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With the eyes of history: the Natura 2000 network, acute land use conflicts, and the future of EU biodiversity policy

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Research carried out under the supervision of Prof. David Taylor (now of the National University of Singapore) and latterly Prof. Anna Davies

Submitted for the degree of Ph.D.,
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May 2014

Declaration

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Summary

This thesis concerns the history of the European Union's Natura 2000 network of protected areas, established under the Birds Directive (1979) and the Habitats Directive (1992), and the light this history sheds on: the resolution of acute conflicts between human land uses and EU protected areas; the process of EU integration in the field of biodiversity; and the future of EU biodiversity policy.

The thesis records a detailed history of the origins and negotiation of Natura 2000 policy, against the backdrop of the general history of EU environmental policy, based on desk study research, archival research, and semi-structured interviews with participants in the negotiations of the Habitats and Birds Directives and the broader history of Natura 2000. The thesis then applies an historical institutionalist analysis (Pierson, 1996) to this history, to address three central research questions: What insights can this detailed history and the attendant historical institutionalist approach contribute to understanding: 1. The resolution of acute conflicts between human land uses and EU protected areas? (Two case studies in the renewable energy sector are considered here: the Severn barrage in the UK; and the Sabor dam in Portugal.); 2. The process of EU integration in the field of biodiversity? 3. The future of EU biodiversity policy?

In respect of 1., the analysis presented here reveals that the Birds and Habitats Directives were forged when EU environmental policy dynamics were much stronger than they are now. Acute conflicts between, for example, large renewable energy projects and Natura 2000 sites are tending to be resolved in favour the development proceeding, even in circumstances where this would appear to breach the Habitats Directive. Where the Directive is not properly enforced, there are negative impacts in terms of the rule of law, but if the Directive were to be strictly enforced in such cases, there would be a risk of triggering a renegotiation of the Habitats Directive, which could result in weaker protection for biodiversity in Europe. The handling of this issue and the resolution of acute conflicts may not be fully within the European Commission's control. That is, subject to access to justice issues, individual citizens and NGOs may seek to bring legal cases at the national level in respect of acute conflicts between human land uses and Natura 2000 sites, and thereafter seek a reference to the European Court of Justice. In this way the rule of law may be vindicated.

In respect of 2., the analysis presented here arguably reveals a "counter-force" to EU integration in the biodiversity field (Alter, 2009, p.16), in the form of a derogation which allows Member States to permit damaging plans or projects in or near Natura 2000 sites where there are imperative reasons of overriding interest for so doing. Member States' decisions in this regard are rarely challenged by the European Commission. This conclusion

presents a "surprising puzzle" (Alter, 2009, p.16) for neofunctionalist accounts of EU integration, which hypothesise that "Supranational governance will routinely produce outcomes that conflict with the revealed preferences of the most powerful states" (Sandholtz and Stone Sweet, 2012, p.19).

In respect of 3., the thesis makes three points: first, in the context of the renewable energy case studies considered in this thesis, there is a risk that climate change - and the related need to promote renewable energy projects - could be used merely (or partly) as convenient excuses to seek a weakening across the board of the protections applicable to Natura 2000 sites. Second, the idea of protecting areas outside the Natura 2000 network, including corridors, was heavily debated during the course of the Habitats Directive negotiations, yet ultimately the provisions agreed were very weak. Given that this was the outcome during a period more conducive to EU environmental policy development, one might justifiably be sceptical of the chances of so-called green infrastructure policy (insofar as this relates to connecting protected areas) succeeding where the Habitats Directive negotiations failed. Third, rather than framing nature conservation policy debates within the context of the current economic crisis, perhaps we should instead envisage conservation policy beyond the current economic crisis, and even beyond the current era of EU environmental policy. If we are serious about halting the loss of biodiversity in Europe, policy development should now focus on how to conserve biodiversity inside *and* outside Natura 2000 areas, in the wider countryside and beyond.

While the historical account presented in this thesis is thus used here to address certain specific issues of interest, it is hoped that this history will be of wider value and application, and can serve to inform future research on many aspects of EU biodiversity policy.

For Suzanne, Saoirse, Róisín, and Cillian,
with love.

The Flaggy Shore in Co. Clare, immortalised in the following Seamus Heaney poem,
is just one of more than 27,000 Natura 2000 sites which owe their conservation
to the work of the individuals recorded in this thesis and
likeminded women and men across Europe.

Postscript

And some time make the time to drive out west
Into County Clare, along the Flaggy Shore,
In September or October, when the wind
And the light are working off each other
So that the ocean on one side is wild
With foam and glitter, and inland among stones
The surface of a slate-grey lake is lit
By the earthed lightning of a flock of swans,
Their feathers roughed and ruffling, white on white,
Their fully grown headstrong-looking heads
Tucked or cresting or busy underwater.
Useless to think you'll park and capture it
More thoroughly. You are neither here nor there,
A hurry through which known and strange things pass
As big soft buffetings come at the car sideways
And catch the heart off guard and blow it open.

Seamus Heaney, from The Spirit Level (1996)

Acknowledgements

Like many PhDs, this thesis has had a long gestation. It was begun shortly after President Obama came to power in the US in 2008, and thus does not predate the foundation of the EEC fifty years before that, contrary to a belief held in some quarters! I am grateful to what is now the Irish Research Council for funding. Many thanks go to the numerous interviewees and correspondents who participated in this research for being so generous with their time, information, expertise and, in certain cases, for commenting on drafts of chapters 3 to 7. Many thanks to DG Environment of the European Commission for allowing me access to their archive – particular thanks to René Deprez and Micheal Ó Briain. I thank my original supervisor Prof. David Taylor and my replacement supervisor Prof. Anna Davies, who took over on David's rejoining the National University of Singapore in 2012. David has very generously remained in touch with this research, providing comments on draft chapters as well as encouragement, and both Anna and David have provided me with various opportunities over the course of this research, such as lecturing and the chance to accompany field trips. The idea of doing a PhD was first planted in my head by David on a boat on Lake Baringo in Kenya during my M.Sc. Biodiversity and Conservation field trip in early 2008. Since then, David has given me the opportunity to accompany two additional M.Sc. field trips to east Africa, resulting in trips to Rwanda in 2011 and 2012. Whilst these trips were not directly relevant to the subject of this research, they nevertheless played an important role in my thinking about the interactions between biodiversity conservation and development (amongst many other things). I thank Gayle McGlynn for her assistance in producing Figures 2 and 3. For a fantastic 4+ years, thanks go to all my friends and colleagues at Trinity College Dublin. Special thanks as always are reserved for my family in Scotland, who have endured more or less radio silence in response to repeated queries of "is it finished yet?" For her support, encouragement, and expert insights throughout, and for patiently enduring my years as a "gentleman academic" (as David Taylor would have it), I thank my wife Suzanne Kingston. This thesis is dedicated with love to Suzanne, and to our daughters Saoirse and Róisín and our son Cillian, all born during the course of this PhD.

Andrew Jackson,

Wicklow town, May 2014

Notes on the text

The terms European Economic Community, European Community, and European Union (and the related acronyms EEC, EC, EU) - used over the years to refer to the supranational bodies now known as the European Union - have been used interchangeably in this thesis. For ease, I have tended to favour using "the EU" even where this is not strictly correct according to the time period being discussed.

An understanding of the institutional structure of the EU is important in the context of this thesis. Since it would be very hard to improve on Jordan's (1998a, pp.15-16) excellent introductory account, I will simply cite his explanation in full here (with some additions by the present author of relevance to this thesis in square brackets) and note that more recent detail can be found in Jordan and Adelle (2013a):

> "The...governance of the EU is shared by several different bodies. The *European Commission* is the EU's executive body, which is responsible for seeing that EU laws are fully implemented. In addition, the Commission enjoys the sole right of proposing new legislation. Operationally, the Commission is divided into...directorates general (DGs), with environmental matters being the responsibility of DG XI [at its creation, the Environment and Consumer Protection Service, then DG XI, now DG Environment]. The main decision-making body is the *Council of Ministers* [comprising government Ministers from the Member States of the EU], which has the authority to adopt or reject the Commission's proposals...[generally in a co-decision procedure involving the *European Parliament* (Burns, 2013)] Although the Council of Ministers is nominally one entity, the complexity of the issues with which it deals has led to the creation of more than 20 sub-councils, including the Environment Council [and there are Working Groups for different subjects within the Environment Council's remit]. These councils have traditionally made decisions by consensus, which is the usual practice in international organizations. In 1987, however, a treaty change known as the Single European Act allowed decisions in most policy areas to be made by qualified majority voting....In practice, however, only a minority of issues are put to a formal vote because countries still prefer to operate on the basis of consensus.
>
> The European Parliament...[is elected on the basis of] European-wide elections every five years. In the past, the Parliament had few powers and its role in policymaking was limited to offering opinions on proposals before the Council of Ministers.

Concern about the elitist nature of EU institutions has gradually led to its receiving greater powers, however...

In addition to the above bodies, there is the *European Court of Justice*,[1] which is the final arbiter of compliance with EU legislation. Unlike with most international agreements, the rulings of this court are immediately binding on member states. Finally, there is the *European Council* (not to be confused with the Council of Ministers), which is the name given to the biannual meetings of heads of state at which matters of strategy are discussed."

In addition, of relevance in the context of the present thesis is the *Council of Europe*, not to be confused with either the European Council or the Council of Ministers (which is also known as the Council of the European Union)! The latter two are EU institutions, while the Council of Europe is an entirely separate organisation, whose members include the EU's 28 Member States plus 19 other European countries.

Where material is directly quoted in this thesis, the relevant page number has been indicated alongside the reference wherever possible. In some cases, however, this has not proven possible because, for example, the material is from a newspaper article where the database used gives access to the text of the article but not to a copy of the article indicating the page, or is from an electronic edition of a book which does not attribute page numbers.

[1] Now formally known as the Court of Justice of the European Union, though still often colloquially referred to as the European Court of Justice or ECJ. This thesis has used the latter formulation for ease.

List of abbreviations

ACE	Actions Communautaires pour l'Environnement (Community Action for the Environment)
ACNAT	Actions Communautaires pour la Conservation de la Nature (Community Action relating to Nature Conservation)
ANCGE	Association Nationale des Chasseurs de Gibier d'Eau (National Association of Waterfowl Hunters, France)
BANC	British Association of Nature Conservationists
BBC	British Broadcasting Corporation
CAP	Common Agricultural Policy
CEC	Council of the European Communities
CEU	Council of the European Union
CFP	Common Fisheries Policy
CIC	Conseil International de la Chasse et de la Conservation du Gibier (International Council for Game and Wildlife Conservation)
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
COG	Chiefs of Government
COREPER	Committee of Permanent Representatives in the European Union
CORINE	Coordination of Information on the Environment
CPRE	Council for the Protection of Rural England (now Campaign for the Protection of Rural England)
DBV	Deutsche Bund für Vogelschutz (German League for Bird Protection)
DCCNDRCC	Department of Climate Change, National Development & Reform Commission of China
DECC	Department of Energy & Climate Change (UK)
Defra	Department for Environment, Food and Rural Affairs (UK)
DG	Directorate General (of the European Commission)
EC	European Community
ECJ	European Court of Justice (now formally known as the Court of Justice of the European Union)
ECOSOC	Economic and Social Council of the UN
ECPS	Environment and Consumer Protection Service of the European Commission

EDF	Électricité de France
EDP	Energias de Portugal
EEA	European Environment Agency
EEB	European Environmental Bureau
EEC	European Economic Community
EIA	Environmental Impact Assessment
ESC	European Economic and Social Committee
ETC-BD	European Topic Centre on Biological Diversity
EU	European Union
FACE	Fédération des Associations de Chasse et Conservation de la Faune Sauvage de l'UE (Federation of Associations for Hunting and Conservation of the European Union; formerly Federation of Hunting Associations of the EEC)
GDP	Gross Domestic Product
IBA	Important Bird Areas
ICBP	International Council for Bird Preservation
ICN	Instituto da Conservaçao da Natureza (Institute of Natura Conservation, Portugal); now Instituto da Conservação da Natureza e das Florestas (Institute for Nature Conservation and Forests)
IMPEL	European Union Network for the Implementation and Enforcement of Environmental Law
IPCC	Intergovernmental Panel on Climate Change
IROPI	Imperative Reasons of Overriding Public Interest – a concept from Article 6(4) of the Habitats Directive
IRSNB	Institut Royal des Sciences Naturelles de Belgique (Royal Belgian Institute of Natural Sciences)
IUCN	International Union for Conservation of Nature
IWRB	International Waterfowl Research Bureau
LIFE	L'Instrument Financier pour l'Environnement (EU Financing Instrument for the Environment)
LIPU	Liga Italiana Protezione Uccelli (Italian League for Bird Protection)
LPN	Liga para a Protecção da Natureza (League for the Protection of Nature, Portugal)
LPO	Ligue de Protection des Oiseaux (Bird Protection League, France)
MEP	Member of the European Parliament
MIT	Massachusetts Institute of Technology

MP	Member of Parliament
NABU	Naturschutzbund Deutschland (Nature and Bird Conservation Union, Germany)
NCC	Nature Conservancy Council (UK government agency)
NGO	Non Governmental Organisation
NVTBVV	Nederlandse Vereniging Tot Bescherming Van Vogels (Dutch Society for the Protection of Birds)
OJ	Official Journal of the European Union
pSCI	Proposed Site of Community Importance under the Habitats Directive
REFIT	EU Regulatory Fitness and Performance Programme
RGI	Renewables Grid Initiative
RSPB	Royal Society for the Protection of Birds
SAC	Special Area of Conservation under the Habitats Directive
SCI	Site of Community Importance under the Habitats Directive
SDC	Sustainable Development Commission (UK)
SEA	Single European Act
SFF	Secrétariat de la Faune et de la Flore (Fauna and Flora Secretariat, a unit of France's National Museum of Natural History)
SPA	Special Protection Area under the Birds Directive
SPEA	Sociedade Portuguesa para o Estudo das Aves (Portuguese Society for the Study of Birds)
SSSI	Site of Special Scientific Interest (site protection designation in Scotland, England, and Wales)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNCBD	UN Convention on Biological Diversity
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	UN Framework Convention on Climate Change
WCMC	World Conservation Monitoring Centre
WEBS	Working Group of European Bird Protection Societies
WHC	World Heritage Convention
WTO	World Trade Organization
WWF	World Wildlife Fund

List of EU legal cases

Case	Stage	In-text reference	Mentioned on page(s)
Case 240/83 *"ADBHU"* [1985] ECR 531	Judgment	ECJ (1985)	69, 319
Case 236/85 *Commission v. Netherlands* [1987] ECR 3989	Judgment	ECJ (1987c)	140
Case 247/85 *Commission v. Belgium* [1987] ECR 3029	Advocate General's Opinion	ECJ (1986a)	140
Case 247/85 *Commission v. Belgium* [1987] ECR 3029	Judgment	ECJ (1987a)	140
Case 252/85 *Commission v. France* [1988] ECR 2243	Judgment	ECJ (1988)	140
Case 262/85 *Commission v. Italy* [1987] ECR 3073	Advocate General's Opinion	ECJ (1986b)	140
Case 262/85 *Commission v. Italy* [1987] ECR 3073	Judgment	ECJ (1987b)	140
Case 412/85 *Commission v. Germany* [1987] ECR 3503	Judgment	ECJ (1987d)	140
Case 247/87 *Star Fruit v. Commission* [1989] ECR 291	Judgment	ECJ (1989a)	336, 339
Case C-339/87 *Commission v. Netherlands* [1990] ECR I-851	Judgment	ECJ (1990b)	234
Case C-288/88 *Commission v. Germany* [1990] ECR I-2721	Judgment	ECJ (1990a)	234
Case 57/89 R *Commission v. Germany ("Leybucht Dykes")* [1989] ECR 2849	Order	ECJ (1989b)	209-210
Case 57/89 *Commission v. Germany ("Leybucht Dykes")* [1991] ECR I-883	Advocate General's Opinion	ECJ (1990c)	118, 233-234, 236, 242, 331

Case	Stage	In-text reference	Mentioned on page(s)
Case 57/89 *Commission v. Germany ("Leybucht Dykes")* [1991] ECR I-883	Judgment	ECJ (1991)	27, 32, 150, 209-210, 242-250, 262, 264, 289-290, 293, 332-333, 338-339, 345-346
Case C-157/89 *Commission v. Italy* [1991] ECR I-57	Advocate General's Opinion	ECJ (1990d)	234
Case C-355-90 *Commission v. Spain ("Santoña marshes")* [1993] ECR I-4221	Advocate General's Opinion	ECJ (1993c)	168, 209, 234
Case C-355/90 *Commission v. Spain ("Santoña marshes")* [1993] ECR I-4221	Judgment	ECJ (1993a)	289
Case C-75/91 *Commission v. Netherlands* [1992] ECR I-549	Judgment	ECJ (1992)	286
C-345/92 *Commission v. Germany* [1993] ECR I-1115	Judgment	ECJ (1993b)	286
C-44/95 *"Lappel Bank"* [1996] ECR I-3805	Judgment	ECJ (1996)	22, 27, 30, 289, 334
C-3/96 *Commission v. Netherlands* [1998] ECR I-3031	Judgment	ECJ (1998)	122, 288-289, 323
C-129/96 *"Inter-Environnement Wallonie"* [1997] ECR I-7411	Judgment	ECJ (1997)	298
C-387/97 *Commission v. Greece* [2000] ECR I-5047	Judgment	ECJ (2000a)	287
C-371/98 *"First Corporate Shipping"* [2000] ECR I-9235	Judgment	ECJ (2000c)	22, 216, 292, 334

Case	Stage	In-text reference	Mentioned on page(s)
C-374/98 *Commission v. France* [2000] ECR I-10799	Judgment	ECJ (2000b)	290, 334
C-127/02 *"Waddenzee"* [2004] ECR I-7405	Judgment	ECJ (2004)	292, 294-295, 334, 346
C-304/02 *Commission v. France* [2005] ECR I-6263	Judgment	ECJ (2005a)	312
C-117/03 *"Dragaggi"* [2005] ECR I-167	Judgment	ECJ (2005b)	298, 300
C-6/04 *Commission v. UK* [2005] ECR I-9017	Judgment	ECJ (2005c)	287, 294, 299, 334
C-239/04 *Commission v. Portugal* [2006] ECR I-10183	Judgment	ECJ (2006b)	296
C-418/04 *Commission v. Ireland* [2007] ECR I-10947	Judgment	ECJ (2007a)	117, 346
C-244/05 *"Bund Naturschutz"* [2006] ECR I-8445	Advocate General's Opinion	ECJ (2006c)	299
C-244/05 *"Bund Naturschutz"* [2006] ECR I-8445	Judgment	ECJ (2006a)	298-300, 304, 334
C-215/06 *Commission v. Ireland* [2008] ECR I-4911	Judgment	ECJ (2008a)	53
C-503/06 R *Commission v. Italy* [2006] ECR I-141	Order	ECJ (2006d)	210
C-503/06 R *Commission v. Italy* [2007] ECR I-19	Order	ECJ (2007c)	312
C-193/07 R *Commission v. Poland* [not published in ECR]	Order	ECJ (2007b)	312

Case	Stage	In-text reference	Mentioned on page(s)
C-193/07 R-2 *Commission v. Poland* [not published in ECR]	Order	ECJ (2008c)	312
C-535/07 *Commission v. Austria* [2010] ECR I-9483	Judgment	ECJ (2010a)	294
C-76/08 R *Commission v. Malta* [2008] ECR I-64	Order	ECJ (2008b)	312
T-186/08 *LPN v. Commission* [2009] ECR II-136	Order	General Court (2009)	305
C-308/08 *Commission v. Spain* [2010] I-4281	Judgment	ECJ (2010b)	300
C-573/08 R *Commission v. Italy* [2009] ECR I-217	Order	ECJ (2009)	312
C-240/09 *"LZ"* [2011] ECR I-1255	Judgment	ECJ (2011a)	340
C-2/10 *"Azienda Agro-Zootecnica"* [2011] ECR I-6561	Judgment	ECJ (2011b)	340
C-43/10 *"Nomarchiaki"* [2012] ECR 0	Judgment	ECJ (2012a)	295, 336, 339-340
C-182/10 *"Solvay"* [2012] ECR 0	Judgment	ECJ (2012c)	32-33, 295, 336, 339-340
C-340/10 *Commission v. Cyprus* [2012] ECR 0	Judgment	ECJ (2012b)	217, 239, 285, 292, 342
C-258/11 *"Sweetman"* [2013] ECR 0	Advocate General's Opinion	ECJ (2012d)	32
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PART I: INTRODUCTION

"[The creation of an EU network of protected nature conservation areas] would constitute an awesome challenge to the sensitivities of member nations. It is one thing for Brussels to dictate the content of sausages, but quite another for it to control the uses to which the motherland is put" (Shoard, 1990)

"[Tomorrow's Europeans] will be grateful that a handful of people in the early 1970s had the foresight to act to try to protect these areas and species and that a movement of European citizens...fought, in some cases successfully, to conserve them...
Tomorrow's Europeans will thank us for that" (Gammell, 1999, p.12).

Chapter 1: Introduction

1.1 Introduction to thesis

This thesis concerns the history of the European Union's Natura 2000 network of protected areas, established under the Birds Directive (1979) and the Habitats Directive (1992), and the light this history sheds on: the resolution of acute conflicts between human land uses and EU protected areas; the process of EU integration in the field of biodiversity; and the future of EU biodiversity policy.

The thesis is in five parts: Part I introduces the subject of the thesis, the theoretical framework, and the research methods used, before providing an overview of EU environmental policy from the establishment of the EEC in 1958 to the present day. Having identified in Part I three broad phases in EU environmental policy, Part II focuses on the first identified phase, from 1958 to 1987, highlighting key developments in EU nature conservation policy during this phase, including the negotiation and adoption of the Birds Directive. Part III considers the second identified phase, from 1987-1992, during which the Habitats Directive was proposed, negotiated and adopted. Part IV focuses on the third identified phase, from 1992 to the present day, during which period the process of implementing Natura 2000 fell largely to be achieved, resulting in certain cases in acute conflicts between human land uses and nature conservation goals. Part V contains a discussion and conclusion.

1.2 Introduction to EU biodiversity policy

At the global level, in 2002 the Parties to the Convention on Biological Diversity pledged to achieve by 2010 a significant reduction in the then current rate of biodiversity loss (UNCBD, 2002). The EU adopted a more ambitious target, seeking to halt biodiversity loss in the EU by 2010 (European Council, 2001), but both the EU's target and the global target were missed (European Commission, 2010c; UNCBD, 2010). The revised global aim, adopted in October 2010, is to take "effective and urgent action to halt the loss of biodiversity in order to ensure that by 2020 ecosystems are resilient and continue to provide essential services, thereby securing the planet's variety of life, and contributing to human well-being, and poverty eradication" (UNCBD, 2010, paragraph 12). The EU has adopted an even more ambitious headline target for 2020: "to halt the loss of biodiversity and the degradation of ecosystem services in the EU by 2020, restore them in so far as feasible, while stepping up the EU contribution to averting global biodiversity loss" (Environment Council of the EU, 2010, p.2; European Commission, 2011d).

The Birds Directive (1979) and the Habitats Directive (1992) are the "cornerstones of the EU's biodiversity policy" (European Commission, 2010a, p.17). The protection provided by the Directives is divided between species protection measures and site protection measures (European Commission, 2007e). In general terms, the species protection measures require the EU's Member States to protect certain species wherever they are found in the wild in the Member States' territories, while the site protection measures require Member States to identify, designate and protect conservation areas for certain habitat types and for the habitats of certain species: namely, Special Protection Areas (SPAs) under the Birds Directive, and Special Areas of Conservation (SACs) under the Habitats Directive. The network of SACs and SPAs – which is intended to comprise an ecologically coherent whole (Article 3(1) of the Habitats Directive (1992)) – is collectively known as Natura 2000, and is the "centrepiece" of EU biodiversity policy (European Commission, 2009a).[2]

Notwithstanding the difficulties that have been encountered in establishing the Natura 2000 network - more below and in chapter 8 - and the fact that the network remains incomplete (European Commission, 2014), the network's importance and impacts should not be underestimated. In 2014, just over 20 years after the Habitats Directive was adopted, the Natura 2000 network now covers more than 27,000 sites in 28 countries, comprising about 18% of the EU's land territory plus large marine areas (European Commission, 2014), with the network having roughly doubled in size in the ten year period to 2010 (European Commission, 2010b). As such, Natura 2000 is now said to be the largest network of protected areas in the world (European Commission, 2010c). Recent research has revealed that the network has begun to deliver conservation benefits (Donald et al., 2007), notwithstanding a poor picture for biodiversity overall in the EU (European Commission, 2009c).

Of course, it is not merely the network's extent that gives Natura 2000 its significance in terms of land use control. Rather, it is the combined effect of this extent, the strict legal protection afforded to Natura 2000 sites by EU law, and the fact that protection for the sites is enforced by the European Commission, a supranational authority. When one combines these elements, conflicts with human land uses are inevitable, and this has indeed proven the case. As Claus Stuffmann, the European Commission's senior negotiator in respect of both the Birds and Habitats Directives, reflects, "areas placed under national protection status can always be victims of arbitration when taking account only national interests. It is quite a different matter, however, when this arbitration must comply with criteria established at Community level...Designating a special area of conservation under the Community

[2] The central objective of the Habitats Directive (1992, Article 2(2)) is to maintain or restore, at a "favourable conservation status," wild fauna and flora of EU interest. On this subject, see Mehtälä and Vuorisalo (2007).

directives is not merely another label, but it also constitutes considerable additional legal protection" (Stuffmann, 1994, p.205). This additional legal protection has arguably been one contributory factor to the delays experienced in establishing the Natura 2000 network: Coffey and Shaw (2001, p.22) refer to the Habitats Directive as "one of the most notorious items of EC law, as far as implementation by the Member States is concerned," with the Habitats and Birds Directives consistently accounting for the first or second highest percentage of the European Commission's infringement caseload in the environmental sector (e.g. see European Commission, 2013e).[3]

1.3 Conflicts in establishing the Natura 2000 network

Whilst the Natura 2000 network is therefore a remarkable achievement and has already delivered conservation benefits, there have nevertheless been numerous difficulties regarding the network's implementation, including delays in establishing the network, resistance at national level, and, in some cases, inadequate protection for sites. Krämer (1993, p.25) provides an overarching insight into these problems in describing "the difference between the European Community (EC) and the United States that has the greatest implication for nature protection within Europe. The Federal Government of the United States," he explains, "owns one-third of all United States territory, including land that provides vital habitat for wildlife. For example, the United States Federal Government owns ninety percent of the habitat of the spotted owl. Consequently, the Federal Government is authorized to protect vast areas of wildlife habitat, including that of the spotted owl, without needing or requiring intervention by the states. In contrast, the Member States and private parties own all the land within the EC...Even when Member States adopt nature protection measures, widespread ownership of private land within the Member States may limit the effectiveness of the measures. Consequently, all nature protection measures within the EC are subject to a greater level of competing interests than are many habitat protection measures within the United States" (Krämer, 1993, p.25).

Engelen et al. (2008, pp.4-5) cite several additional reasons for the problems encountered in establishing the Natura 2000 network, including the "purely scientific legitimation underlying Natura 2000." That is, as a matter of law sites must be chosen solely on the basis of scientific criteria, and no account can be taken of socio-economic considerations in selecting sites and their boundaries (ECJ, 1996, 2000c). Such an approach, Engelen et al. (2008, p.5) argue, seems "to invite a technocratic, top-down mode of policy-making that is increasingly being

[3] That is, legal cases brought by the European Commission against Member States for breaches of EU environmental law; e.g. in the context of this thesis, failing to designate sufficient Natura 2000 sites, and thereafter failing to protect those sites properly.

rejected by local constituencies as too insensitive to local interests, too paternalistic for modern tastes and too elitist for modern democracies." Low political priority at the national level, coupled with a tight implementation schedule, are said to have added to the problems, limiting "the extent to which local interests can collectively decide on the implementation process" (Engelen et al., 2008, p.5; Paavola, 2004). Moreover, a "lack of communication, information, and recognition has further added to the national and local resistance to the implementation of Natura 2000" (Engelen et al., 2008, p.5). One might cite here, for example, a certain wariness about what the designation of a Natura 2000 site will mean in terms of future restrictions on activities (Baldock, 1992), and resistance based on the perception that site designations are being "imposed" (Leibenath, 2008, p.242). Allied to this, in certain countries, is Euroscepticism (Björkell, 2008) - i.e. a specific objection to the perception that site designations are being imposed by "the EU" - and strong landowning traditions, "emphasising the sovereignty of the landowner" (Björkell, 2008, p.110; Laffan and O'Mahony, 2008).

A counter-narrative to this might run that top-down policy implementation based on science should be defended, on the basis that the alternatives presented may well lead to less desirable conservation outcomes. Van den Belt (2008, p.228) offers an interesting perspective in this regard, citing the case of France, where, "on the one hand, we have to recognize that a top-down policy does not work. On the other hand, the attempt to involve local stakeholders like farmers, foresters and hunters in setting the goals for nature policy through public participation tends to result in outcomes that are much less satisfactory from an ecological point of view...One might hold that science...has no monopoly on defining which sites, habitats and species are worth protecting. Dr. Pinton suggests [(Pinton, 2008)] that local stakeholders questioned the credibility of the science used in making the preliminary inventories of the nature heritage in France and that they advanced the claim that their own 'local knowledge' (or practical knowledge) was more adequate. But how credible are such claims made by local stakeholders, given that they are obviously raised for opportunistic reasons in the context of a fierce power struggle? Today it is indeed fashionable in many branches of social science to oppose the notion of 'local knowledge' (or 'indigenous knowledge') as a valuable asset against abstract, formal and presumably impractical scientific knowledge, but perhaps this romanticist flirtation with local knowledge is highly irresponsible and amounts to no more than simply taking sides with rural interests against the overall public interest of nature protection."

It is not necessary for the purposes of this thesis to settle this dispute, it being sufficient here to note that the literature abounds with examples of conflicts during the implementation of

Natura 2000, and that many of these studies cite as reasons some or all of the points mentioned in the first paragraph of this section. For example, Hiedanpää (2002) and Björkell (2008) address the implementation of Natura 2000 in Finland, called by some "the largest environmental conflict in Finland's history," the main reason being "a lack of legitimacy in its implementation process" (Björkell, 2008, p.110). Bogaert and Leroy (2008) review implementation in Flanders, Belgium, which ran into "severe difficulties" (Engelen et al., 2008, p.17). Alphandéry and Fortier (2001), Pinton (2001) and Pinton (2008) review the situation in France, the latter recording that the process of drawing up an inventory of Natura 2000 sites caused "a scientific and political crisis...Opposition reached its peak in March 1996, when the administration presented its final list, including 1,316 sites covering...13% of the country. The opposition movement, ...a powerful alliance of hunters, foresters, farmers and fishermen, fiercely objected to this list. Their action led to a suspension of the inventory procedure for several months in 1997....As a result of the consultations with non-scientific stakeholders, the total area of sites proposed to the EU dropped from the initial figure of 13% of the country in 1996 to 7.6% at the end of 2002" (Pinton, 2008, pp.211-212).[4]

Leibenath (2008, p.237) considers the implementation of Natura 2000 in Germany, "a tale of neglect, delays and lawsuits." The main reason, he explains, "can be found in real or assumed conflicts with landowners and land-users, who were lobbying vigorously against Natura 2000. As the Länder [German states] had to bear the financial and legal consequences of selecting an area for Natura 2000, they followed a conflict-averse strategy in the first place and based their first tranche of [Natura 2000 sites] on political instead of ecological considerations," leading to EU legal proceedings against Germany (Leibenath, 2008, p.239).[5] Raoul Beunen and colleagues have considered the situation in the Netherlands over the course of several publications, the most recent of which perceives a "depressing" story of Natura 2000 implementation in the Netherlands, leading, they report, to a "negative attitude toward nature conservation and [a] crisis in Dutch nature conservation policy" (Beunen, 2006; Beunen, 2010; Beunen and de Vries, 2011; Beunen et al., 2013; Beunen et al., 2009).[6]

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[4] Plus 2.6% within the SPA network under the Birds Directive, bringing the total to 10.2% at the end of 2002 (Pinton, 2008); this has since crept up to bring 12.56% of France's land territory within the Natura 2000 network today - close to the original figure of 13% which was strongly resisted - plus large marine areas (European Commission, 2014).

[5] For more on the situation in Germany, see Stoll-Kleemann (2001) and Winter (2005).

[6] One wonders, reading Beunen et al. (2013), whether the policy context and political atmosphere may have changed in the Netherlands in the years since the Habitats Directive was adopted, potentially contributing to the perceived negative attitude towards nature conservation (and arguably confounding an analysis which lays the blame at the door of the Habitats Directive). In other words, to what extent can changes in the Dutch attitude to nature conservation be blamed on broader political changes in the Netherlands which may have little or nothing to do with the Habitats Directive's implementation?

Ferranti et al. (2010) consider implementation in Italy (and the Netherlands), citing in respect of Italy that "the technical-cultural delay in the regional Natura 2000 implementation process is partly due to the lack of information and training by the government and partly to the fragmentation of responsibilities in the field of nature conservation, lack of communication between the authorities involved and low competence in nature conservation matters" (Ferranti et al., 2010, p.303). Laffan and O'Mahony (2008, p.177) address implementation in Ireland, where the Habitats Directive "triggered a high degree of political opposition from key domestic veto players that stymied the efforts of the Irish authorities to implement the directive on time and in a correct manner." Apostolopoulou and Pantis (2009, p.221) examine Natura 2000 implementation in Greece, revealing, they report, a "national strategy...compromised by absence of conservation policy history, lack of state capacity, uncommunicated biological knowledge and lack of public participation." The UK has similarly experienced various conflicts during the implementation of Natura 2000 (e.g. see Fairbrass and Jordan, 2001; Ledoux et al., 2000; Morris, 2011). Finally, multiple country reviews such as those of: Bouwma et al. (2008) (Netherlands, Flanders (Belgium), England, North-Rhine Westphalia (Germany) and Lower Saxony (Germany)); Laffan (2004) (Ireland, Greece, Finland, Estonia, Hungary and Slovenia); Rauschmayer et al. (2009) (France and Germany); and the WWF (2006) (the then EU-25 plus Bulgaria, Romania, Turkey and Croatia) identify similar messages and reasons for conflicts to those detailed above. One could cite additional reasons, such as, for example, inadequate funding for nature conservation in the EU,[7] particularly when compared to the funding available for activities which have tended over the years to be damaging in biodiversity terms (e.g. the common agricultural policy (Gammell, 1999)).[8]

In summary, Engelen et al. (2008, p.5) argue that "the EU's evident legislative success in the field of nature conservation policies upstream has increasingly been frustrated by highly politicized decision-making downstream, which has resulted in delays, deadlocks, and even out-and-out resistance." Or, as Lenschow (2013, p.59) puts it, more generally, "Obligations formulated on the EU level may not fit into national legal and administrative systems and may overtax local capacities or willingness to adapt (Knill and Lenschow, 1998; Börzel, 2000). We may face a real dilemma in EU environmental governance!"

[7] At present, 0.2% of the EU's budget is dedicated to nature conservation and other environmental aims via the EU's LIFE funding instrument (EEB, 2013b).
[8] The CAP took up 34% of the EU's budget in the years 2007-13 (EU, Undated).

1.4 EU integration in the biodiversity field: Member State or EU control?

As Jordan et al. (1999) argued in 1999, "After forty years of sustained activity, the 'holy grail' of integration theory is still to establish whether states, either individually or collectively, control the process of [EU] integration or whether it has escaped their clutches in several important respects." Although theorising about the EU has since developed to cover other interesting and valuable approaches – such as multi-level governance and the importance of networks, to name but two – the central intergovernmental-supranational debate "continues to inform research" (Bache et al., 2011, p.18). In intergovernmental perspectives, explain Bache et al. (2011, p.17), "European integration is a process whereby the governments of states voluntarily enter into agreements to work together to solve common problems. Some constraints operate on the autonomy of national governments, but they remain in control of the process. The alternative [supranational] perspective suggests that although governments started the process, integration soon took on a life of its own that went beyond the control of the governments." As well as informing research, this debate equally importantly continues to inform political developments on the ground, as evidenced, for example, by the UK government's (2012) "Balance of Competences" review, part of Prime Minister David Cameron's strategy to renegotiate the UK's relationship with the EU before putting the question of the UK's continuing EU membership to an in-out referendum following the next UK general election in 2015 (assuming the Tories hold a majority)(Cameron, 2013).

Interestingly, the few theoretical accounts which exist regarding the EU integration process in the biodiversity field have tended to favour the idea that the EU's Member States lost control of EU biodiversity policy in certain respects, highlighting a potential contributory factor to the conflicts described above. For example, Stone Sweet (2004, p.235) argues that "the activities of supranational organizations, such as the European Court [of Justice], routinely produce "unintended consequences," from the perspective of those who have designed and redesigned the EC." That is to say, the Habitats and Birds Directives have, or so the argument goes, turned out to have rather different implications to those envisaged by the Member States at the time the instruments were negotiated (Fairbrass and Jordan, 2001; Stone Sweet, 2004), and this is in part the result of the European Court of Justice (ECJ), which has interpreted the instruments less flexibly, and more expansively, than the Member States might have intended and hoped.

An example of this sort of argument is made by Stone Sweet (2004), who cites the following snapshot of the history detailed in this thesis: first, in February 1991, in the *Leybucht Dykes*

case (ECJ, 1991), the ECJ ruled that "the power of the Member States to reduce the extent of a special protection area [under the Birds Directive] can be justified only on exceptional grounds...Those grounds must correspond to a general interest which is superior to the general interest represented by the ecological objective of the directive. In that context the interests referred to in Article 2 of the [Birds Directive], namely economic and recreational requirements, do not enter into consideration." In the Member States' view, the ECJ's decision went too far (Krämer, 2009b): many governments were reportedly "alarmed" (Baldock, 1992, p.144) by the decision's "draconian consequences" (Sharp, 1998, p.33). The Member States thus decided to "retaliate" (Cichowski, 2007, p.157), via the then ongoing Habitats Directive negotiations, by amending the Birds Directive to (in effect) overrule the *Leybucht Dykes* decision. They did this by applying a derogation - Article 6(4) of the Habitats Directive - to allow damaging projects to go ahead in or near SPAs under the Birds Directive as well as sites under the Habitats Directive, for reasons of overriding public interest, including for social or economic reasons (Baldock, 1992; Holder, 1997; Krämer, 2009b).

The final step in Stone Sweet's (2004) timeline is the ECJ's 1996 decision in the *Lappel Bank* case (ECJ, 1996), in which the UK government, supported by the French government, argued that in selecting SPAs and their boundaries, Member States should be allowed to take economic considerations into account.[9] The ECJ disagreed, holding that, in selecting SPAs and defining their boundaries, Member States must act solely on the basis of the ornithological criteria set out in Article 4(1) and (2) of the Birds Directive (ECJ, 1996). In other words, while the strict protection of SPAs might have been compromised, in part, by the Member States' introduction of the Article 6(4) derogation, the ECJ's judgment in the *Lappel Bank* case ensured that the SPA *designation* process would, at least in principle, remain the preserve of ecology, to the exclusion of socio-economic factors. "The Court's forthright approach to the part to be played by economic considerations in the designation of land might be better understood," argues Holder (1997, p.1479), in the context of the Member States' earlier decision to overrule the ECJ's judgment in the *Leybucht Dykes* case regarding site protection post-designation.

Having surveyed this history - as well as other examples from EU environmental policy - Stone Sweet (2004, p.232) concludes that, "Through its rulings, [the ECJ] has acted – relatively systematically – to reduce the domain of national autonomy, to expand supranational modes of governance to the detriment of intergovernmental modes, and to

[9] Note that this differs from the situation at issue in the *Leybucht Dykes* case. That case related to the reduction in size of a *designated* SPA for birds to accommodate a construction project. The *Lappel Bank* case, on the other hand, related to the selection of SPAs and their boundaries (i.e. pre-designation).

create conditions for the gradual Europeanization of national administration and judging." This argument effectively forms part of Sandholtz and Stone Sweet's (2012) broader theory of EU integration – an updated version of what is known as neo-functionalism (discussed in the following chapter), which theory, they claim, "offers a causal explanation of the development of EU institutions and the expansion of their authority" and is "the most theoretically viable and empirically productive general theory of European integration" (Sandholtz and Stone Sweet, 2012, p.34).

This opinion is not shared universally, however, with Alter (2009, pp.14 and 16) going so far as to say, "...I think neo-functionalist theory is actually wrong. Neo-functionalist theory remains a package deal. One cannot use neo-functionalist theory without importing...problematic elements...I prefer historical institutionalism [also discussed in the following chapter] as a theoretical approach for a number of reasons. As I said, neo-functionalist theory brings with it theoretical baggage which is often unsupported by evidence. Historical institutionalism...offers a more open framework that deals better with contingency, and it captures important contextual elements and counter-forces that scholars who are looking only for forces supporting integration will miss. By focusing on counter-forces and surprising puzzles, we may well reveal dynamics that ultimately shape long term change, and thus that better account for important systemic transformations we have observed in Europe."

An historical institutionalist analysis has in the past been applied to EU biodiversity policy,[10] by Fairbrass and Jordan (2001),[11] who argue that "a comparison of UK Government aims with long-term political outcomes in the sphere of EU biodiversity policy (c.1970–2000) reveals evidence of firm state control in the short-term, but of significant unintended consequences in the medium to long-term. These findings raise doubts about the explanatory power of intergovernmental accounts of EU environmental policy making" (Fairbrass and Jordan, 2001, p.1). The UK government, they argue, switched between a "strategic manager" and a "passive observer" of EU biodiversity policy over the "full policy cycle": "The two main instances of strategic management were the initial decision to adopt the Birds Directive (on the assumption that it was modelled on a supposedly superior UK model of conservation) and its subsequent amendment via the Habitats Directive [i.e. the application of the Art. 6(4) derogation to SPAs, discussed above]. However, thereafter, the UK government was condemned to watch as the Commission, the ECJ and interest groups exploited EU biodiversity policy to suit their own political purposes" (Fairbrass and Jordan, 2001, p.18).

[10] For an application of this approach to another EU policy, biotechnology, see Burns (2011).
[11] Also see Fairbrass (2000).

This claim alleging an exploitation of EU biodiversity policy for "political purposes" would take a good deal of justifying, and it is not substantiated by Fairbrass and Jordan (2001). For present purposes, it suffices to note that Fairbrass and Jordan's (2001) long-term analysis reaches a similar conclusion to Stone Sweet's (2004) snapshot account: namely, an important feature of EU biodiversity policy has arguably been "unintended consequences" from the Member States' perspective. As noted above, Stone Sweet (2004) effectively uses this conclusion as evidence in support of his neo-functionalist account of EU integration. In contrast, Fairbrass and Jordan (2001, p.1) argue that their study casts doubt on "the explanatory power of intergovernmental accounts of EU environmental policy making," which accounts are often juxtaposed as rivals to neo-functionalist theories of EU integration, such as Sandholtz and Stone Sweet's (2012). For example, Moravcsik's (1998) intergovernmental account, Fairbrass and Jordan (2001, p.5) explain, claims "that the consequences of European integration are both desired and foreseen by member states...and that states (and particularly their national executives), rather than other policy actors, determine the course of EU integration." In a similar vein, Fairbrass and Jordan (2001, p.2) cite and criticise Golub's (1996a) argument that,[12] "with a few exceptions, the UK government successfully defended its national sovereignty by manipulating national and European opportunities to its advantage. [Golub] dismisses functional and environmental pressure group led explanations of the development of the environmental *acquis*[13] on the grounds that they underestimate the power of individual member states to shape political agendas and strike bargains in the EU that reflect the lowest common denominator of state preferences."

Surveying theoretical accounts of EU biodiversity policy integration, there would therefore appear to be something of a consensus around the idea that the Member States in some sense lost control of the policy (if they ever had control of it in the first place), and that the policy has had unintended consequences from the (or at least from certain) Member States' perspective. However, Stone Sweet's (2004) analysis arguably suffers from the weakness that it focuses on a brief snapshot from a lengthy history, and appears to focus specifically on the part of the history which supports the author's argument that the ECJ has acted to reduce the domain of national autonomy, etc. In other words, using Holder's (1997, p.1479) characterisation, the period considered by Stone Sweet (2004) was arguably a dialogue of "legislation and counter-legislation" between the ECJ and the Member States, yet Stone

[12] Which argument was based on a detailed study of UK-EU environmental relations from 1972-1986 (Golub, 1996a).

[13] The environmental *acquis* is the totality of EU law (including legislation, court decisions interpreting that legislation, etc.) in the environmental field.

Sweet (2004) chose to base his analysis on what might appear to have been, but was not, the last word in that dialogue: i.e. the ECJ's decision in the *Lappel Bank* case in 1996, holding that Member States cannot take socio-economic considerations into account in selecting SPAs and their boundaries. Had Stone Sweet (2004) opted, in addition, to trace the post-adoption history of the Member States' part of the dialogue – the introduction of the Article 6(4) derogation and its operation thereafter – he might potentially have uncovered "counter-forces" (Alter, 2009, p.16), at odds with his neo-functionalist account of EU integration.

Historical institutionalism's long-term historical perspective does not suffer from this arguable weakness of Stone Sweet's (2004) account, and would appear a potentially valuable tool for unlocking insights into the process of EU integration in the biodiversity policy field. What seems missing from Fairbrass and Jordan's (2001) historical institutionalist account, however, is a consideration of the potential existence of "counter-forces [to EU integration]" and "surprising puzzles" in biodiversity policy (Alter, 2009, p.16). There is also the fact that Fairbrass and Jordan's (2001, p.18) account can no longer be regarded as covering "the full policy cycle" of EU biodiversity policy, given that thirteen years have passed since their paper was published. Moreover, their account is limited to the UK, whereas there are of course many other EU Member States whose experiences could offer valuable (and potentially alternative) insights into the process of biodiversity policy integration. There would therefore seem to be useful scope for an historical institutionalist analysis of EU biodiversity policy which goes beyond the limits of Fairbrass and Jordan's (2001) account, both temporally and geographically.

1.5 Acute conflicts involving Natura 2000 sites

The starting point for the present research was an interest in just the sort of "surprising puzzles" mentioned by Alter (2009, p.16) in her discussion of historical institutionalism. To recap: the theoretical accounts of EU biodiversity policy just described argue that, from the Member States' perspective, the Habitats and Birds Directives have had unintended consequences, such as the requirement to select sites based solely on ecological criteria. And it is clear, as described above, that such consequences have led to conflicts in some countries during the implementation of Natura 2000. However, as Stone Sweet (2004) records in his analysis, the Member States managed to introduce, in negotiating the Habitats Directive, the Article 6(4) derogation, which provides:

> "If, in spite of a negative assessment of the implications for the [Natura 2000] site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or

economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species,[14] the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."

In other words, whilst the Member States cannot take account of socio-economic considerations at the time of choosing sites for designation, it is thereafter possible for national authorities to allow plans or projects that have been the subject of a negative impact assessment to proceed, but only where three conditions are met: (1) an "absence of alternative solutions" must be demonstrated; (2) "imperative reasons of overriding public interest" for proceeding with the plan or project must be demonstrated (and these reasons are limited in cases involving priority species or habitats, and must in certain cases be confirmed by an opinion from the European Commission);[15] and (3) the Member State in question must take "all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected."

This derogation therefore represents something of a fault line:[16] it is the sole legal means whereby the EU's Member States can allow potentially damaging plans/projects to proceed in or near Natura 2000 sites. Plans or projects which national authorities seek to approve via this provision are referred to as *acute conflicts* in this thesis, because they pit the goal of conserving the EU's most threatened species and habitats against plans/projects which must proceed, according to national governments, for imperative reasons of overriding public interest. Interestingly - and this is the "surprising puzzle" (Alter, 2009, p.16) - we find that of the nineteen published cases which have come before the European Commission for an opinion regarding the existence or absence of imperative reasons of overriding public interest, all but one has been approved by the Commission (European Commission, 2013d).[17]

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[14] Identified with an asterisk on the relevant annexes to the Habitats Directive.

[15] Priority species/habitats are the subset of EU protected species/habitats which are given the highest priority in view of their danger of disappearance. In respect of such species/habitats, public interest arguments are limited, under the Article 6(4) derogation, to reasons of "human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."

[16] Holder (1997, p.1475) describes the *Lappel Bank* case, which concerned site selection rather than site protection post-designation, as taking place "at the seam between economics and environmental protection."

[17] The proposed creation of a new industrial and commercial area "Siegerland" within the former military training area Trupbach near Siegen/Freudenberg (North Rhine-Westfalia), Germany, was the subject of a negative opinion (European Commission, 2003). Thirteen requests for opinions under Article 6(4) have come

As an Advocate General of the ECJ commented recently, "Whilst the requirements laid down under Article 6(4) are intentionally rigorous, it is important to point out that they are not insuperable obstacles to authorisation. The Commission indicated at the hearing that, of the 15 to 20 requests so far made to it for delivery of an opinion under that provision, only one has received a negative response" (ECJ, 2012d).

Moreover, having reviewed the (then) eleven Commission opinions delivered under Article 6(4) (ten positive and one negative), Krämer (2009b, p.84) concluded that, "In my opinion, not one of the positive Commission Opinions would, with the reasoning made, successfully survive scrutiny by the [European] Court of Justice."[18] Interestingly, this was not necessarily the expected outcome at the time Article 6(4) was negotiated: as Redman (1993, p.1007) argued shortly after the Habitats Directive was adopted, "[e]xperience from the [ECJ's *Leybucht Dykes* decision (ECJ, 1991)] suggests it is likely that the European Court of Justice will take a restrictive view of the circumstances in which the provisions of the Habitats Directive can be overruled for reasons of overriding public interest." Instead, experience has shown that such decisions have not tended to come before the ECJ at all, with the European Commission instead tending to issue positive opinions. As Clutten and Tafur (2012) highlighted recently, "Rather unexpectedly...the ECJ does not appear, in the near-two decades since the Directive was adopted, to have had directly to express a view on the question of what is meant by [imperative reasons of overriding public interest] under Article 6(4)." This recently changed with the ECJ's decision in the *Solvay* case - a case brought before the ECJ by way of a reference from a Belgian court, and not by the Commission - in which the ECJ held (having dispensed with the need for an Advocate General's opinion):[19] "It cannot be ruled out [that the conditions of Article 6(4) may be met] where a project, although of a private character, in fact by its very nature and by its economic and social context presents an overriding public interest and it has been shown that there are no alternative solutions...In the light of those criteria, the mere construction of infrastructure designed to accommodate a management centre cannot constitute an imperative reason of overriding public interest

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from Germany, two from Spain, one from Hungary, one from France, one from Sweden, and one from the Netherlands (European Commission, 2013d). This means that 22 of the EU's 28 Member States have never obtained such an opinion; it would be interesting to know whether this is because those Member States have never sought to approve a plan/project which triggers the obligation, or whether (in some cases) the Member State in question has simply failed to engage with the legal obligation.

[18] Winter's analysis in Harte and Winter (1997) provides some support for Krämer's view, at least in respect of certain of the Commission's opinions. Since the date of Krämer's (2009b) article, the Commission has delivered an additional eight opinions, all of which were positive (European Commission, 2013d).

[19] The ECJ may, if it considers that a case raises no new point of law, proceed to judgment without an opinion from an Advocate General.

within the meaning of Article 6(4) of the Habitats Directive" (ECJ, 2012c, paragraphs 77-78).[20]

This presents an interesting conundrum for the EU integration process in the biodiversity field: whilst the Natura 2000 network may have resulted in certain unintended consequences from the Member States' perspective, what are we to make of this situation in respect of acute conflicts under Article 6(4)? Is this an example of the Member States retaining an important degree of control over EU biodiversity policy? Is this a "counter-force" to EU integration in the biodiversity field (Alter, 2009, p.16)? What light, if any, can a detailed analysis of the history of the Natura 2000 network shed on these questions?

1.6 The future of EU biodiversity policy

The final thread which this thesis sets out to explore is the future direction of EU biodiversity policy. In brief, it is clear that certain Member States have in recent years expressed a wish to renegotiate the Habitats and Birds Directives, implicitly or explicitly to weaken the protections which apply in respect of Natura 2000 sites. For example, in 2009, Jan Peter Balkenende, then Prime Minister of the Netherlands, wrote to José Manuel Barroso, President of the European Commission, asking the Commission to "draft proposals to bring [the Habitats and Birds Directives] up to date," on the basis that "Natura 2000 fails to strike a balance between ecological value, economic interests and other uses" (Balkenende, 2009).[21] Interestingly, Balkenende (2009) framed his argument around the need to update these "relatively old directives" to "take account of the increasingly topical need to strike a balance between ecological interests and economic and human interests, and to address the impact of climate change on our living environment." This reference to climate change is interesting, because it potentially serves to muddy the waters: i.e. this could simply be an opportunistic argument aimed at avoiding the Dutch government's stance being characterised as anti-environment.[22] Similar arguments were made in the UK in 2007, when the report of a consultation exercise recorded that the UK's Sustainable Development Commission had

[20] Also see the ECJ's recent decision in Case C-43/10 to the effect that "grounds linked, on the one hand, to irrigation and, on the other, to the supply of drinking water, relied on in support of a project for the diversion of water, may constitute imperative reasons of overriding public interest capable of justifying the implementation of a project which adversely affects the integrity of the sites concerned. Where such a project adversely affects the integrity of a site of Community importance hosting a priority natural habitat type and/or a priority species, its implementation may, in principle, be justified by grounds linked with the supply of drinking water. In some circumstances, it might be justified by reference to beneficial consequences of primary importance which irrigation has for the environment. On the other hand, irrigation cannot, in principle, qualify as a consideration relating to human health and public safety, justifying the implementation of a project such as that at issue in the main proceedings" (ECJ, 2012a, paragraph 8 of operative part).

[21] Barroso (2009) provided a detailed response, which began: "Natura 2000 does not threaten the balance between economic and natural development."

[22] Nevertheless, Dutch MP Diederik Samsom called the letter an "intervention to undermine nature protection" (Dutch News, 2010).

"heard from a number of stakeholders who believe that the [Habitats and Birds] Directives no longer reflect modern conservation priorities in light of the challenges presented by climate change" (SDC, 2007, pp.130-131). Again, there is at least the possibility that climate change - and the related need to promote renewable energy projects and grid expansion[23] - could be used merely (or partly) as convenient excuses to seek a weakening across the board of the protections applicable to Natura 2000 sites (Jackson, 2011).

More recently, the UK has taken a different tack with regard to the Habitats and Birds Directives. In his autumn statement in 2011, the UK's Chancellor, George Osborne, said "we will make sure that gold plating of EU rules on things like Habitats aren't placing ridiculous costs on British businesses...If we burden them with endless social and environmental goals – however worthy in their own right – then not only will we not achieve those goals, but the businesses will fail, jobs will be lost, and our country will be poorer" (Osborne, 2011),[24] which led Sir John Lawton, then Vice-President of the RSPB, to call Osborne a "bloody idiot" on wildlife protection (Jones, 2012b). More recently, David Cameron stated that "we [the UK] need to examine whether the balance is right in so many areas where the European Union has legislated including on the environment...Nothing should be off the table" (Cameron, 2013). It will therefore be interesting to see whether the final report of the UK's "Balance of Competences" review, due to conclude by the end of 2014 (UK government, 2012), will result in any proposals relevant to EU biodiversity policy.[25]

Interestingly, as part of the European Commission's REFIT "Fit for Growth" programme - which has already been heavily criticised by environmental NGOs[26] - the Commission recently announced that Natura 2000 (and hence the Habitats and Birds Directives) is to be subject to a legislative "Fitness Check" to (presumably only if deemed necessary following

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[23] See RGI (2011).

[24] Osborne departed somewhat from the script, which stated, "the Government will...ensure that compliance with the Habitats and Wild Birds Directives does not lead to unnecessary costs and delays to development, while continuing to support the Directives' objectives. The Government is reviewing the Directives as currently implemented in England by Budget 2012 and is committed to tackling blockages for developments where compliance is particularly complex or has large impacts" (HM Treasury, 2011, p.34). On the issue of so-called gold-plating, see Etherington (2006).

[25] The report examining the balance of competences in the field of environment and climate change, led by the UK's Department for Environment, Food and Rural Affairs and the Department of Energy and Climate Change, was published in February 2014. The report "does not predetermine or prejudge proposals that either Coalition party may make in the future for changes to the EU or about the appropriate balance of competences" (Defra and DECC, 2014, p.5). The conclusion in respect of EU biodiversity policy is even-handed and inconclusive: "Some respondents criticised the restrictions which can be placed on development by the requirements of EU legislation such as the Wild Birds and Habitats directives. Others argued that greater action was needed to address the decline in habitats and species within the EU. Respondents also highlighted the importance of tackling Invasive Non-Native Species within the EU" (Defra and DECC, 2014, p.10).

[26] A joint letter dated 22 October 2013 from BirdLife, the EEB and WWF states that "The REFIT Communication presents the environment, at worst, as an obstacle to growth and, at best, as something to be exploited for short-term economic advantage" (BirdLife et al., 2013). For more on REFIT in respect of Natura 2000, see DG Environment (2014b).

the check) "prepare for future legislative initiatives to reduce regulatory burden" (European Commission, 2013b, p.7). Natura 2000 has hence been identified by the Commission as a policy area which needs "assessment to better identify regulatory burden relief so as to meet EU policy goals at least cost and best achieve the benefits of EU regulation" (European Commission, 2013b, p.7).

In these circumstances, there would certainly seem a risk that conflicts between Natura 2000 sites and economic development could create an impetus in certain Member States, and even within parts of the Commission itself, to seek a weakening of EU biodiversity rules.[27] One practical aim of this research, therefore, is to explore whether the history of EU nature conservation policy sheds useful light on Natura 2000 conflicts and their resolution, with a view to better understanding downward pressures on biodiversity policy.

1.7 Summary and research questions

In summary, this thesis records a detailed history of Natura 2000 policy in the EU, against the backdrop of the general history of EU environmental policy. The thesis then applies an historical institutionalist analysis to this history, to address three central research questions:

What insights can this detailed history and the attendant historical institutionalist approach contribute to understanding:

1. The resolution of acute conflicts between human land uses and EU protected areas? (Two case studies in the renewable energy sector are considered here, for the reasons discussed in the following chapter.)
2. The process of EU integration in the field of biodiversity?
3. The future of EU biodiversity policy?

While the historical account presented in this thesis is thus used here to address certain specific issues of interest, it is hoped that this history will be of wider value and application, and can serve to inform future research on many aspects of EU biodiversity policy.

[27] The UK government's 2012 *Report of the Habitats and Wild Birds Directives Implementation Review* did not seek this, but didseek to facilitate "nationally significant infrastructure projects" and to "facilitate the smooth interaction between major infrastructure projects and the Habitats and Wild Birds Directives" (Defra, 2012, p.1).

Chapter 2: Theoretical framework and methods

"[W]hat one makes of the EC depends on whether one examines a photograph or a moving picture. Just as a film often reveals meanings that cannot be discerned from a single photograph, a view of Europe's development over time gives us a richer sense of the nature of the emerging European polity" (Pierson, 1996, p.128)

2.1 Historical institutionalism: an approach to analyse EU biodiversity policy

2.1.1 Introduction to historical institutionalism

As Jordan et al. (1999, p.378) note, "[t]here are still surprisingly few detailed studies of the historical development of individual EU policy sectors." Whilst there are existing overviews of the history of EU nature conservation policy (e.g. see Krämer, 1993; Van Hoorick, 1997), and detailed accounts of the history of the Birds Directive by Meyer (e.g. see Meyer, 2010b, 2011c, forthcoming), there is no existing detailed account of the history of the Habitats Directive, the Natura 2000 network, or the origin and negotiation of the rules applying to protect that network, notwithstanding the network's extensive geographical coverage and its far-reaching impacts on day-to-day land use planning in the EU.[28] The present research aims to fill this gap, mindful of Jordan's (1998b, p.235) emphasis on the need for research to "link broader political and economic currents with the detailed nitty gritty of policy development and implementation...". Chapter 3 of this thesis therefore provides as a backdrop a general overview of EU environmental policy from its inception to the present day, against which the detailed development of EU biodiversity policy - recorded in chapters 4 to 8 - played out.

Having set out this history, chapter 9 then applies and tests a theoretical framework known as historical institutionalism, which was initially explicitly formulated by Thelen and Steinmo (1992) - though has much deeper roots[29] - and whose leading exponent is now Paul Pierson of the University of California, Berkeley.[30] In 1996, Pierson published a now well-known paper

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[28] Cichowski (2007) provides an excellent, nuanced account of certain features of the history, as well as of some important court decisions in respect of the Habitats and Birds Directives. Jones (2012a) touches on the early history of the Habitats Directive, in a chapter taken from a recent UK book, whose title gives an idea of the Habitats Directive's practical significance: "The Habitats Directive: A Developer's Obstacle Course?"

[29] As Steinmo (2008) explains, "Many of the most interesting and important studies of politics – from Karl Polanyi's classic *Great Transformations*, to Theda Skocpol's *States and Social Revolutions* and Philippe Schmitter's *Still a Century of Corporatism?* – would clearly be categorized as historical institutionalist were they written today."

[30] Pierson is not of course the only exponent of historical institutionalism, with other authors having made important contributions to the field, including "Peter Hall, James Mahoney, Theda Skocpol, Sven Steinmo and Kathleen Thelen...(for a sample and overview of such work, see Mahoney and Rueschemeyer 2003)" (Bulmer, 2009, p.311).

entitled *The Path to European Integration: A Historical Institutionalist Analysis* (Pierson, 1996). At the time, the intergovernmental vs. supranational debate described in the previous chapter was in full flow, each side selecting evidence from EU history in support of its favoured position. Pierson (1996, p.123) set out to test the arguments of the intergovernmentalist side of the debate by constructing a framework for a long-term historical analysis, summarising his argument thus: "Observers of the European Community have criticized "intergovernmentalist" accounts for exaggerating the extent of member-state control over European integration. This article grounds these criticisms in a historical institutionalist analysis, stressing the need to study European integration as a process that unfolds over time. Losses of control result not only from the autonomous actions of supranational organizations, but from member-state preoccupation with short-term concerns, the ubiquity of unintended consequences, and the instability of member-state policy preferences. Once gaps in control emerge, change-resistant decision rules and sunk costs associated with societal adaptations make it difficult for member states to reassert their authority."

An historical institutionalist approach, Pierson (1996, p.127) explains, "is *historical* because it recognizes that political development must be understood as a process that unfolds over time. It is *institutionalist* because it stresses that many of the contemporary implications of these temporal processes are embedded in institutions—whether these be formal rules, policy structures, or norms." Pierson's (1996, p.126) aim, essentially, was to provide a more persuasive account of Member State constraint at EU level, by focusing on "why gaps emerge in member-state control over the evolution of European institutions and public policies, why these gaps are difficult to close, and how these openings create room for actors other than member states to influence the process of European integration while constraining the room for maneuver of all political actors."

2.1.2 Factors leading to gaps in Member State control

In framing his argument, Pierson (1996) focused first on four factors which, he argued, were likely to lead to gaps in Member State control over EU policies: First, he highlighted the importance of *the autonomous actions of European institutional actors*, arguing that EU institutions such as the Commission, the ECJ and the European Parliament are "always looking for opportunities to enhance their powers...The Council, to be sure, continues to stand watch over proposed legislation and actively protects member-state interests. Yet the Commission, Parliament and Court possess considerable ability to advance their own interests" (Pierson, 1996, p.133). Second, he emphasised *the restricted time horizons of political decision makers*, arguing, in essence, that given the nature of electoral politics,

policy-makers are frequently most interested in the short-term consequences of their actions, meaning that long-term considerations weigh less heavily in decisions. Third, Pierson highlighted *the large potential for unintended consequences* of policy, meaning that, even if long-term factors were taken into consideration, "unintended consequences are likely to be widespread. Complex social processes involving a large number of actors always generate elaborate feedback loops and significant interaction effects that decision makers cannot hope to fully comprehend" (Pierson, 1996, p.136). Finally, Pierson (1996, p.140) noted the importance of *shifts in Chiefs of Government (COG) policy preferences* over time, owing, for example, to changes in government, etc.: "The result, over time, is that evolving arrangements will diverge from the intentions of original designers, while any newly arriving COG is likely to find institutional and policy arrangements considerably out of synch with its own preferences." Having identified these four sources of gaps in Member State control, Pierson (1996, p.140) emphasises that most of these processes have a temporal quality: "The role of restricted time horizons, unintended consequences, and shifting member-state preferences will only be evident if we examine political processes over time."

2.1.3 Why gaps in Member State control prove hard to close

The final part of Pierson's (1996) analysis involved tackling an obvious counter-point: where gaps in Member State control over EU policy or unintended consequences of such policy become clear, why don't the Member States simply take corrective action? The answer, Pierson (1996) argues, is that gaps, even once identified, can prove hard to close, for three broad reasons: First, *the resistance of EU institutional actors*, which are semi-autonomous and are, Pierson argues, likely to resist Member States' attempts to exercise greater control over their activities. Second, there are *institutional obstacles to reform within the EU*; e.g. Member States will often share different views on important policy issues, and the requirement for unanimity or even qualified majority to make changes "takes time, resources and political capital" (Palmieri, 1997, p.8). And third, there is the issue of *path dependence, and the sunk costs* associated with previous policy decisions; that is, initial policy decisions can become self-reinforcing; "When actors adapt to the new rules of the game by making extensive commitments based on the expectation that these rules will continue, previous decisions may lock in member states to policy options that they would not now choose to initiate" (Pierson, 1996, p.144). If such barriers are sufficiently high, argues Pierson (1996, p.142), "learning will not provide a sufficient basis for correction, and member-state control will be constrained."

2.1.4 Summary

In summary, reports Pierson (1996, p.127), "[t]he crucial claim I derive from historical institutionalism is that actors may be in a strong initial position, seek to maximize their interests, and nevertheless carry out institutional and policy reforms that fundamentally transform their own positions (or those of their successors) in ways that are unanticipated and/or undesired. Attempts to cut into ongoing social processes at a single point in time produce a "snapshot" view that is distorted in crucial respects. Central parts of my analysis emphasize temporal aspects of politics: the lags between decisions and long-term consequences, as well as the constraints that emerge from societal adaptations and shifts in policy preferences that occur during the interim. When European integration is examined over time, the gaps in member-state control appear far more prominent than they do in intergovernmentalist accounts."

2.2 Applying historical institutionalism to test neo-functionalist predictions

Pierson (1996) thus focuses his analysis on critiquing intergovernmentalist accounts of EU integration, such as Moravcsik's (1995, 1998) liberal intergovernmentalism, which, in its strong version, "denied the importance of supranational actors as independent actors in EU decision making and insisted that governments remained in control of the process of European integration" (Bache et al., 2011, p.18). However, Moravcsik would later abandon this strong version of his theory (Sandholtz and Stone Sweet, 2012): after all, as Sandholtz and Stone Sweet (2012, p.12) argue, "By now...the empirical record is decisive: the [ECJ] and the Commission have routinely produced rules and policies that the member governments would not have adopted through intergovernmental bargaining." Moravcsik (1998) thus changed tack, leaving behind the strong version of his theory, per Sandholtz and Stone Sweet (2012, p.31), "for a far weaker version, in order to accommodate "unintended consequences" (unintended, that is, for national governments). His only way out was to argue that the Member States sometimes delegate substantial independent authority to EU bodies (namely, the ECJ) so that the Court could enforce incomplete contracts, thereby enhancing the credibility of national commitments to common policies as well as the effectiveness of those policies," an argument criticised by Sandholtz and Stone Sweet (2012) on the grounds that it is non-falsifiable, amongst other things.[31]

[31] That is, "[w]hen EU organizations carry out the preferences of the powerful member states, they supposedly confirm the theory that governments control EU development. But when EU organizations do not adhere to the preferences of member governments, they also supposedly confirm the theory (by carrying out member state

Since an historical institutionalist analysis has already been applied to intergovernmentalist theories of EU integration in the biodiversity policy field (Fairbrass and Jordan, 2001), and since those theories have been found wanting in certain important respects, this thesis takes a different approach and turns the light of historical institutionalism on the neo-functionalist (supranational) account of Sandholtz and Stone Sweet (2012), a leading rival approach to intergovernmentalism.

Malamud and Schmitter (2007, pp.4-5) summarise the essence of neo-functionalism thus: "It places major emphasis on the role of non-state actors – especially, the "secretariat" of the regional organization involved and those interest associations and social movements that form at the level of the region – in providing the dynamic for further integration. Member states, however, remain important actors in the process. They set the terms of the initial agreement, but they do not exclusively determine the direction and extent of subsequent change. Rather, regional bureaucrats in league with a shifting set of self-organized interests and passions seek to exploit the inevitable "spill-overs" and "unintended consequences" that occur when states agree to assign some degree of supranational responsibility for accomplishing a limited task and then discover that satisfying that function has external effects upon other of their interdependent activities. According to this theory, regional integration is an intrinsically sporadic and conflictual process, but one in which, under conditions of democracy and pluralistic representation, national governments will find themselves increasingly entangled in regional pressures and end up resolving their conflicts by conceding a wider scope and devolving more authority to the regional organizations they have created. Eventually, their citizens will begin shifting more and more of their expectations to the region and satisfying them will increase the likelihood that economic-social integration will "spill-over" into political integration (Haas 1958, 1964)."

In his original paper on historical institutionalism, Pierson (1996, p.126) argued that "neo-functionalism has serious problems of its own. Given the strong institutional position of member states in the EC, neo-functionalists seem to attribute greater autonomy to supranational actors than can plausibly be sustained." Yet Sandholtz and Stone Sweet (2012, p.10) have since refined neo-functionalist theory,[32] which, on their account, posits a basic feedback loop: "(a) increasing [EU] cross-border transactions activates (b) supranational governance (dispute resolution and rule-making), which facilitate (c) a subsequent expansion of cross-border transactions, which translates into greater social demand for new forms of supranational governance (spillover)." Their theory, Sandholtz and Stone Sweet (2012,

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desires for EU-level enforcement of incomplete contracts). Any possible outcome would "fit" the theory, rendering it immune to falsification" (Sandholtz and Stone Sweet, 2012).

[32] See Niemann and Schmitter (2009).

pp.18-19) report, generates a number of testable hypotheses, including – of particular relevance to this thesis – the following: "EU organizations like the Commission and Court of Justice will routinely produce supranational outcomes that the Member States would not have produced on their own"; and "Supranational governance will routinely produce outcomes that conflict with the revealed preferences of the most powerful states."

A focus on testing the limits of this theory is justified not least by Sandholtz and Stone Sweet's (2012, p.34) bold claim in the recently-published *Oxford Handbook of the European Union* that "Neo-functionalism offers a causal explanation of the development of EU institutions and the expansion of their authority. Until a new theory can explain what it does, better, it will remain the most theoretically viable and empirically productive general theory of European integration."

2.3 Limitations and strengths of historical institutionalism

It is important, at this point, to recognise and flag the limitations of an historical institutionalist approach. As Steinmo (2008) explains, "Historical institutionalism is neither a particular theory nor a specific method. It is best understood as an *approach* to studying politics." The approach is of course not without its critics, with some noting that the approach is better at explaining developments *ex post facto* than accounting for change or predicting it (e.g. see Bulmer, 2009; Burns, 2011). Nevertheless, as Bulmer (2009, p.320) argues, "[historical institutionalism] can capture macro-level political development: a scale of research which seems to be slipping from view in the analysis of the EU," and there have been calls for "more detailed empirical policy-based work to test and develop the existing propositions of [historical institutionalist] theory (Kay 2005; Peters et al. 2005; Bulmer 2009)" (Burns, 2011, p.342). In any event, a framework for explaining a detailed and complex EU policy history spanning some four decades is precisely what is required in the context of the present research.

Like Pierson (2004, p.2), the ambition here, "in short, is to flesh out the often-invoked but rarely examined declaration that history matters."

2.4 Methods

2.4.1 Introduction

The principal methods employed in this research were: desk study research, archival research, and semi-structured interviews. In terms of selecting specific research methods, the research was very much problem-driven rather than method-driven (Flyvbjerg, 2004). In other words, the aim was to arrive at research that effectively answers the research questions posed;

methodological rigour was of course essential, but the specific methods employed in any given case were regarded as of "secondary importance" (Flyvbjerg 2004, p.291),[33] and were tailored to the research problems at hand.

2.4.2 Methods broken down by chapter

2.4.2.1 Chapters 1 (Introduction) and 2 (Theoretical framework and methods)

These chapters are based entirely on desk study research, using the library and electronic resources of Trinity College Dublin.

2.4.2.2 Chapters 3 to 7 (History from 1958 to 1992)

Desk study research

Chapters 3 to 7 are based on data obtained using several methods. First, extensive desk study research was carried out using the library and electronic resources of Trinity College Dublin, including material obtained by way of inter-library loans. This desk study research focused on the general history of EU environmental policy (chapter 3), which forms a backdrop to the history of the Birds and Habitats Directives specifically, including case law of the European Court of Justice relating to the Directives (chapters 4 to 7).

Archival research – Council, Commission, European Parliament

Specifically on the history of the Birds and Habitats Directives, research was carried out in the archives of several EU institutions, as follows (archival methods recorded here based on the recommendations of L'Eplattenier (2009)). The *Council of the EU*: in respect of the Habitats Directive, documents held by the Council regarding the negotiation of the Directive were requested from the General Secretariat of the Council by e-mail (access@consilium.europa.eu; Directorate-General F, Communication Transparency - Access to Documents/Legislative transparency, rue de la Loi, 175, B – 1048 Brussels), and the Council subsequently provided a CD-ROM by post containing 55 PDF files of the requested documents; these were all documents produced by the Council (i.e. the Council archive did not provide documents produced by others). In respect of the Birds Directive, the Council's documentary archive is available only in hard copy, such that a personal visit to the reading room of the central archive in Brussels was necessary (Council of the EU, Justus Lipsius

[33] This comment by Flyvbjerg must arguably be seen in the light of the then dominance of certain methods in US political science scholarship, and the willingness of scholars to use certain favoured methods, even where inappropriate. Rigger (2009, p.371) comments: "My own favorite example of this phenomenon was a paper presented at an APSA [American Political Science Association] annual meeting which combined a rich, detailed analysis of election results with a game theoretical framework that could be made to conform to the facts only by applying far-fetched assumptions. Adding game theory to the paper's title made it sound rigorous and up-to-date, but it added nothing to the paper's explanatory power—quite to the contrary."

building, chaussée d'Etterbeek 80, 1040 Brussels). During this visit, which took a single day, the entire collection regarding the pre-adoption history of the Birds Directive (comprising documents in c.15 paper folders) was examined, and hard copies of relevant documents were scanned and saved electronically using equipment made available for free by the Council. On examination, documents were selected on the basis of their relevance to the habitat protection parts of the Directive specifically, since this is the focus of the present research and would represent the main novel contribution in this field, given that the general history of the Birds Directive has been well covered by Meyer (2010b). Again, all of the documents obtained in this way were documents produced by the Council.

The *European Commission*: DG Environment's Nature Unit (B3) - based at Avenue de Beaulieu 5, 1160 Brussels - holds an extensive historical archive of documents relating to the Habitats Directive, to which the present researcher was kindly given unrestricted access. The entire collection of original documents relating to the pre-adoption history of the Directive (i.e. pre-May 1992) was reviewed by the present researcher over the course of seven working days (documents were reviewed rapidly to identify those potentially of interest, erring on the side of over-inclusiveness). Relevant documents – 793 documents across 35 lever arch files/box folders/paper folders – were scanned and saved electronically, using equipment made available for free by DG Environment. This was a very labour and time-intensive process, but was the only way of obtaining the material for future analysis. Documents were selected on the basis of their potential relevance to the general history of the Habitats Directive and to the habitat protection parts of the Directive specifically. The Nature Unit's archive contained a range of documents, essentially comprising the materials which members of the Nature Unit chose to retain during and after the process of the Habitats Directive's negotiation. This included, for example, documents produced by the Commission, Council and European Parliament; documents produced by Member State governments and sent to the Commission; internal Commission correspondence; correspondence between the Commission and other EU institutions, Member State governments, NGOs and civil society; documents produced by NGOs; newspaper and magazine articles, etc.

In addition, the Commission's Central Library (biblio-library@ec.europa.eu; Directorate General for Education and Culture, Directorate – D, Unit – 3) provided scanned electronic copies of the Commission's Directories of personnel for the years 1974-1994 for the Environment and Consumer Protection Service and DG XI (Environment, Consumer Protection and Nuclear Safety); and for the years 1968-1972 (1970 missing) for DG III (Industry), where EU environmental policy originated (see Chapter 3). Having identified individuals of importance to the history (via the process described below in respect of

interviews), these directories allowed the sometimes changing roles of individuals and of relevant units and directorates of the Commission to be accurately identified over time. The *European Parliament* (arch-info@europarl.europa.eu; Archive and Documentation Centre (CARDOC), SCH 00A002, L-2929 Luxembourg) provided by e-mail, on request, electronic copies of specific historical documents of interest, which documents emerged during desk study research and analysis of archival documents obtained from the Council and the Commission.

Archival research – other EU documents

In addition to the archival materials obtained in the above-mentioned way, a search of the online Archive of European Integration (http://aei.pitt.edu/), hosted by the University of Pittsburgh, was carried out, with a view to identifying additional documents of relevance to EU environmental policy in general and the Birds and Habitats Directives in particular. Keyword searches were performed, using some generic keywords (e.g. environment, conservation, nature, habitats, birds) and some specific keywords (e.g. Ripa di Meana, Clinton Davis). Documents of interest were saved electronically in PDF for future analysis. Judgments of the European Court of Justice and Opinions of the Court's Advocates General – relating to the Birds and Habitats Directives – were identified via searches of the ECJ's website (http://curia.europa.eu/) and the EUR-Lex (Access to European Union law) website (http://eur-lex.europa.eu/); relevant documents were saved electronically in PDF. The EUR-Lex website was also used to access relevant documents in the Official Journal of the European Union, where such documents came to light during desk study and archival research (e.g. the EU's Environmental Action Programmes and related Resolutions). The PreLex (Monitoring of the decision-making process between institutions) website (http://ec.europa.eu/prelex/) was used to identify the steps in, and certain official documents relating to, the legislative processes of the Habitats and Birds Directives; relevant documents were then saved electronically.

Archival research – contemporaneous media reports

Using the online database LexisNexis News and Business, keyword searches were carried out in respect of "All English language news", using keywords identified during desk study and archival research.[34] Relevant news articles - dating principally between the date of the Habitats Directive's proposal in 1988 and its adoption in 1992 - were saved in PDF (the LexisNexis database does not go back far enough to cover the period during which the Birds

[34] Such as, for example: Habitats Directive, Birds Directive, Stanley Clinton Davis, Carlo Ripa di Meana, Stanley Johnson, Ludwig Krämer, Laurens Jan Brinkhorst, Leybucht, Claus Stuffmann, Duich moss, Birds Directive, Natura 2000, Caithness and pest, EIA Directive, Hemmo Muntingh, Brice Lalonde, etc.

Directive was negotiated (1976-79)). Additional historical newspaper and magazine articles were obtained by way of Google searches using keywords.

Archival research – creation of an electronic database

All of the above-mentioned archival documents were saved electronically into a single folder in Windows, using a standard naming methodology: that is, each document was allocated its date (or was listed as undated) in the format YYYYMMDD, followed by a brief description of the content (e.g. the first document in the folder, from 1967, has the filename "19671211 - MEP Richarts' question re bird conservation"). When saved in this format, the documents – 1,311 items in total - automatically arranged themselves chronologically, earliest first, making the tasks of analysing and recording the history of EU environmental policy and the Birds and Habitats Directives much more straightforward than might otherwise have been the case. Only a small number of archival documents in this electronic database post-date the Habitats Directive's adoption in May 1992, because a decision was taken, for the reasons discussed in section 2.4.2.3, to research the period from the directive's adoption to present day (the third identified phase in Natura 2000's history) principally by means of desk study research, supplemented by a small amount of interview data, where the post-adoption phase of the history arose during interviews.

Semi-structured interviews and e-mail correspondence

Having identified a short list of potential interviewees (principally those directly involved in the pre-adoption phases of the Habitats and Birds Directives) based on desk study research,[35] contact details for each individual were sought via Google, and individuals were then contacted by e-mail (or by phone in a couple of cases, followed up by e-mail), the e-mail providing a brief introduction to the research, and asking if s/he would be willing to participate in the research. A short list of questions along the following lines was included with each e-mail (tailored, in some cases, depending on whether the individual in question was to be interviewed in respect of the Birds Directive, the Habitats Directive, both, or additional matters):

"1. What was your position/role at the time: (a) the EU's Fourth Environmental Action Programme was produced (OJ C328/1, 19 October 1987); (b) the original proposal for the Habitats Directive was produced by the Commission (COM 88(381), 16 August 1988); (c) the Habitats Directive was negotiated and adopted (political agreement reached in December 1991)?

[35] For example, Fairbrass and Jordan (2003), which names Stanley Clinton Davis, Stanley Johnson and Claus Stuffmann, was the first source used.

2. Could you tell the story, from your perspective, of the origin and negotiation of the Habitats Directive?

3. What can you tell me about the history of Article 6(4) of the Habitats Directive? (which provides...[text of Article 6(4) included, plus brief description of the history available from existing literature]. Do you remember which Member State(s) was/were behind the formulation of the Article 6(4) derogation? Was there resistance from the Commission, other Member States, the European Parliament?

4. Are there any others you think I should try to speak to regarding the history of the Habitats Directive and Natura 2000?"

This mixture of open and closed questions in a semi-structured interview format (Matthews and Ross, 2010) allowed interviewees the scope to identify the issues they felt were most salient to the history, whilst also covering some key points of interest which had been identified in advance. The final question was aimed at snowball sampling, yielding a "study sample through referrals made among people who share or know of others who possess some characteristics that are of research interest," a technique which is "particularly applicable when the focus of study....requires the knowledge of insiders to locate people for study" (Biernacki and Waldorf, 1981, p.141). This was particularly important in the context of a history stretching back more than 20 years in the case of the Habitats Directive and almost 40 years in the case of the Birds Directive. In addition to these referrals, additional potential interviewees were identified by way of names mentioned on archival documents.

Interviewees came from the following groups (at the time the directives were negotiated): EU institutions (Commission and European Parliament); EU Member State governments; NGO representatives; and the Council of Europe. Because of language barriers or for other reasons, some potential interviewees corresponded by e-mail rather than by way of an oral interview. In addition, some of those interviewed orally subsequently provided additional material in correspondence by e-mail. An attempt was made to find at least one interviewee who participated in negotiations in respect of the Directives from each of the Member States, but this did not prove possible, despite best efforts; given the passage of time since the Birds Directive's adoption in 1979, finding interviewees in respect of the negotiation of that instrument was particularly challenging. Twenty-seven interviews were carried out in total, all by Skype (either Skype to Skype or Skype to telephone), using a free software plug-in, MP3 Skype recorder (http://voipcallrecording.com/), to record interviews.[36] Interviews

[36] Recordings were made only with an interviewee's permission; one interviewee refused permission, and two wished to remain anonymous.

ranged in length from 30 minutes (minimum) to 1 hour 40 minutes (maximum), with the average around 1 hour. These twenty-seven interviews broke down as follows.

Table 1: Names and positions at relevant time of interviewees; indication of principal subject(s) of interview.

Name	**Position at relevant time**	**Principal subject of interview**
Alistair Gammell	NGO	Birds and Habitats Directives
Antonio Troya	Spanish government, seconded to Commission for Habitats Directive negotiations	Habitats Directive
Claus Goldberg	Danish government	Habitats Directive
Cosme Morillo	Spanish government	Habitats Directive
Eladio Fernández-Galiano	Council of Europe	Bern Convention and Habitats Directive
Geert Raeymaekers	European Commission	Habitats Directive
Hemmo Muntingh	European Parliament	Habitats Directive
Hilary Neal	UK government	Habitats Directive
Hubert David	NGO	Birds and Habitats Directives
Ian Hepburn	NGO; seconded to Commission during part of Habitats Directive negotiations	Habitats Directive
Jean-Pierre Ribaut	Council of Europe	Bern Convention, Birds Directive and Habitats Directive
John Temple Lang	European Commission	Birds and Habitats Directives
Joost van der Ven	NGO	Birds Directive
Jørgen Henningsen	European Commission	Habitats Directive

Name	Position at relevant time	Principal subject of interview
Kerstin Sundseth	European Commission	Habitats Directive
Liam Cashman	European Commission	Birds and Habitats Directive
Micheal Ó Briain	European Commission	Birds and Habitats Directive
Pierre Devillers	Institut Royal des Sciences Naturelles de Belgique, but working with European Commission	Birds and Habitats Directive
Rania Spyropoulou	Greek government	Habitats Directive
Reinhard Klein	European Commission	Habitats Directive
Roy Bunce	UK government	Habitats Directive
Stanley Johnson	European Commission	Habitats Directive
Sue Everett	NGO	Habitats Directive
Veit Koester	Danish government	Birds and Habitats Directive, Bern Convention
Yves Lecocq	NGO	Birds and Habitats Directives
Anonymous interviewee	European Commission	Birds and Habitats Directives
Anonymous interviewee	European Commission	Habitats Directive

Table 2: Names and positions at relevant time of correspondents; indication of principal subject(s) of interview.

Name	Position at relevant time	Principal subject of correspondence
Alain Megret	French government	Habitats Directive

Name	Position at relevant time	Principal subject of correspondence
Anastasios Nychas	European Commission	Habitats Directive
Brice Lalonde	French government	Habitats Directive
Catherine Yourassovsky	European Commission	Habitats Directive
Henri Jaffeux	French government	Habitats Directive
Marcel Jouve	French government	Habitats Directive
Mireille Jardin	French government	Birds Directive
Robin Sharp	UK government	Habitats Directive
Simon Lyster	NGO	Habitats Directive

One interviewee – Stanley Johnson – provided a copy of a transcript of another relevant interview he had given (Johnson, 2011), and authorised the use of its contents for the present research.

All interviewees, with one exception,[37] were provided with a draft of chapters 3 to 7 (incorporating data obtained from interviews) on which to provide comments; as were four French correspondents listed in Table 2 (who had indicated a particular interest), plus several others who had indicated an interest in the present research during its progress (from DG Environment and the European Topic Centre on Biological Diversity in Paris). Comments received have been incorporated in this thesis.

Analysis of archival, interview and e-mail correspondence data

Desk study research formed the backbone of the material for chapters 3 (An historical overview of EU environmental policy), 4 (The history of habitat protection in the Birds Directive), and 5 (Towards a Habitats Directive), in the sense that there was a reasonable quantity of existing literature on the subjects covered by these chapters. Chapters 6 (The Habitats Directive proposal) and 7 (Negotiating the Habitats Directive) were different in that there was very little pre-existing literature on these topics. To populate and supplement themes identified from desk study material, a *thematic analysis* – "a process of segmentation, categorisation and relinking of aspects of the data prior to final interpretation" (Grbich, 2007,

[37] Pierre Devillers, whose agreement to an interview was obtained too close to the date of first submission of this thesis to allow for comments on draft chapters pre-submission.

p.16) - was applied to the archival documents in the electronic database and to interview and e-mail correspondence data, following (broadly) the six-step approach described by Braun and Clarke (2006): Phase 1: familiarise yourself with your data (this was effectively achieved during the data collection phase); Transcribe interview data (interviews generated a huge volume of data; relevant parts were transcribed); Phase 2: generate initial codes; Phase 3: search for themes; Phase 4: review themes; Phase 5: define and name themes; Phase 6: produce the thesis.

In respect of the historical overview of EU environmental policy provided in chapter 3, Phases 2 through 5 of this approach were effectively conflated, in the sense that desk study research had provided clearly defined themes, into which relevant archival and interview data could be slotted. In respect of the history of the Birds and Habitats Directives specifically, an indicative set of themes was defined based on desk study research and the present researcher's experience of working with the Habitats and Birds Directives as a practising lawyer. These themes were: the negotiation of rules relating to site selection and site designation; the question of the species and habitats requiring protected areas; the negotiation of rules relating to site protection; and the negotiation of rules relating to the protection of areas outside Natura 2000. Other major themes in the history of the directives (e.g. the question of financing in the case of the Habitats Directive) were not known in advance, but became obvious in particular from the minutes of Council meetings, which summarised ongoing negotiations between the Commission and the Member States and highlighted outstanding issues and positions adopted by the various participants. Having set out these basic themes as a framework - which framework developed incrementally on reviewing archival data and the results of desk study research, interviews and e-mail correspondence - data from the electronic database of archival material described above was then woven into the history as the thesis was written, by starting with the first document in the electronic database of archival material and working through each document, picking out information relevant to the above-mentioned themes, until no more documents remained. A similar process was repeated with data transcribed from interviews.

2.4.2.3 Chapter 8 (History of Natura 2000 from 1992 to present) and 9 (Discussion and conclusion)

Desk study research is more dominant in Chapter 8 than in Chapters 3-7, because more recent history - such as that covered by Chapter 8 - is by its nature more sensitive history, in the sense that representatives and former representatives of EU institutions and Member State governments, from which many of the interviewees for the present research were drawn, seemed less likely to feel in a position to discuss issues which might be relatively recent or

indeed still live. Similar issues seemed almost certain to arise with respect to obtaining access to more recent archival documents. For this reason, archival data and interview data contribute only a limited amount to Chapter 8 (excluding the case studies, in respect of which interviews played an important part, as discussed immediately below). Chapter 9 similarly relies (but to a more limited extent) on desk study and interview data in discussing and drawing conclusions from this research.

2.4.3 Case studies in chapter 8

2.4.3.1 Introduction

The aim in selecting case studies for the present research was to find fresh examples of acute conflicts under Article 6(4) of the Habitats Directive, to serve as examples of the potential utility of an historical institutionalist approach to EU biodiversity policy. That is, the aim was to demonstrate what (if any) light an historical analysis could shed on the resolution of Article 6(4) conflicts, since the resolution of these conflicts - which, as noted above, sit on a fault line between economic development and nature conservation - potentially provides insights into EU biodiversity policy integration, and also into the future of EU biodiversity policy. In this sense, the aim was to demonstrate an approach: namely, the application of a detailed knowledge of the history of EU biodiversity policy to inform analyses of Natura 2000 conflicts, EU biodiversity policy integration, and the future of EU biodiversity policy. The cases selected were to be of a class: namely, *representative* or *typical* cases: i.e. "a case that is chosen because it is seen to represent many other similar cases – in a sense it is the everyday, ordinary case, which has similarities to others and is chosen on these grounds" (Matthews and Ross, 2010, p.128). In the case of the present research, a decision was taken to focus on representative or typical cases of acute conflicts between large renewable energy projects and Natura 2000 sites, for the following reasons.

2.4.3.2 Renewable energy vs. Natura 2000 conflicts

The present author has previously argued - on the basis of the case studies presented here - that the legal protections afforded to Natura 2000 sites could potentially necessitate the rejection of many large renewable energy projects in the EU (Jackson, 2011). The two cases in question - the Sabor dam in Portugal and the Severn tidal barrage in the United Kingdom - pit renewable energy projects against the protection of Natura 2000 sites, an area which seems likely to yield persistent conflicts in the coming years (Jackson, 2011), for the following reasons.

First, the trajectory of renewable energy policy is clear: we are likely to see many more - and many large - renewable energy projects proposed over the course of the next decade.

Pursuant to the Copenhagen Accord, Parties to the UN Framework Convention on Climate Change had until 31 January 2010 to submit their greenhouse gas emissions targets (Annex I Parties) or mitigation actions (non-Annex I Parties) for 2020 (UNFCCC, 2009). The EU has committed itself to achieving at least a 20% reduction in greenhouse gas emissions by 2020 compared to 1990 levels (European Union, 2010), and continues to examine options to move beyond this target (CEU, 2010). Other major emitters have proposed less ambitious targets and actions: the US, for example, has pledged to reduce its greenhouse gas emissions by something in the range of 17% by 2020 from 2005 levels, dependent on certain domestic legislation being passed (US government, 2010); China has proposed a 40-45% reduction in carbon intensity (emissions per unit of GDP) between 2005 and 2020 (DCCNDRCC, 2010), slowing the rate of increase rather than cutting back; and India has proposed a 20-25% reduction in carbon intensity over the same period (Indian government, 2010). Such emissions targets and mitigation actions are naturally accompanied by renewable energy goals. The EU, for example, has committed itself to a 20% share of renewable energies in EU energy consumption by 2020 (European Council, 2007), and has adopted legislation that sets mandatory national renewable energy targets for each EU Member State, to ensure the delivery of the overall EU target (Renewable Energy Directive, 2009).

It is evident, therefore, that climate change and renewable energy policy are high up the political agenda; yet this could potentially be at the expense of other environmental policies. For while two issues – climate change and biodiversity loss – have occupied a central position in policy debates about global environmental change since the original Earth summit in Rio in 1992, the two issues have not been given equal weight (Zaccai and Adams, 2012). Indeed, as the head of the European Environment Agency stated in 2009, "In the recent past the scientific and environment community has had to work hard to raise awareness and understanding about the reality of biodiversity loss and the dangers of climate change. Today, as the enormity of the challenge we face sinks in, climate change is seldom out of the headlines...By contrast, biodiversity - which sets the living conditions for humanity - does not yet have the same political impetus as climate change" (McGlade, 2009). And this is despite the fact that climate change and biodiversity policies need to be developed in an integrated manner: "We cannot halt biodiversity loss without addressing climate change," notes an EU policy statement, "but it is equally impossible to tackle climate change without addressing biodiversity loss. It is therefore essential that climate change policy is fully complementary with biodiversity policy" (Message from Athens, 2009).

In practice, such complementarity is not always in evidence. In October 2003, for example, construction activities at a large terrestrial wind farm in Derrybrien, Ireland, appear to have

been the trigger for a landslide which caused an "ecological disaster", when the mass of peat which was dislodged polluted the Owendalulleegh river, causing the death of around 50,000 fish and lasting damage to the fish spawning beds (ECJ, 2008a, paragraph 89).[38] And the Derrybrien wind farm is not, of course, the only conflict (or potential conflict) between large renewable energy projects and EU biodiversity. Others include, for example, the Sabor dam and the proposed Severn barrage (discussed in chapter 8); proposals for a series of wind farms on the island of Skyros in Greece (Dimitropoulos and Kontoleon, 2009); the so-called Spirit of Ireland project, which would combine several hydro-power storage reservoirs with large wind farms in the west of Ireland (Spirit of Ireland, 2013); and the Renewables Grid Initiative, which aims to significantly upgrade and expand the electric grid in Europe (RGI, 2011).

Such conflicts (and potential conflicts) look set to be a defining feature of environmental discourse in the coming years, but to date the potential impact of such conflicts on the future of EU nature conservation policy has received little attention. Given the subject's contemporary importance, and the fact that experience from both the Netherlands and the UK (see section 1.6) has shown climate change being cited as an argument in favour of renegotiating the Habitats and Birds Directives, the present research focuses on two cases in the renewable energy sector, selected in the following manner.

2.4.3.3 Case selection and research methods

Having identified renewable energy vs. Natura 2000 conflicts as a potentially fruitful area for research, desk study research was carried out to identify fresh examples of acute conflicts involving Article 6(4) of the Habitats Directive. This research generated a relatively small number of potential cases, because: (a) a conflict will not arise under Article 6(4) if the relevant national authorities decide that the plan or project in question will not adversely

[38] While the Irish government argued in its defence before the ECJ that "the landslide was caused by the construction methods used and...there was no question of difficulties which could have been anticipated by an environmental impact assessment" (ECJ, 2008a, paragraph 93), the full picture seems rather more complex. Bragg (2007, p.6) notes that "the specific cause of the [landslide] could not be identified even by the geotechnical experts who visited the site immediately afterwards, and so viewed all the evidence in a 'fresh' state...[however,] the most likely triggers were activities that were directly related to wind turbine installation." More generally, the Irish government's assertion that the landslide could not have been anticipated by an impact assessment is open to serious question. Lindsay and Bragg (2005, pp.122 and 126) comment that "It is possible to make predictions about [peat] instability on a theoretical basis but evidence of actual peat movement is provided that indicates that the [Derrybrien] bog slide of 16 October 2003 was part of a recognisable pattern of behaviour rather than a unique event...A major bog slide occurred at an adjoining turbine some weeks prior to the slide of 16 October 2003 but this does not appear to have altered working practices or initiated a period of investigation." As such, it is strongly arguable that the 16 October 2003 Derrybrien landslide was the result of a decision-making failure by the Irish authorities. Indeed, as the ECJ (2008a, paragraph 112) held in its judgment against the Irish government: "by failing to take all measures necessary to ensure that the development consents given for, and the execution of, wind farm developments and associated works [e.g. road construction and peat extraction] at Derrybrien, County Galway, were preceded by an assessment with regard to their environmental effects,...Ireland has failed to fulfil its obligations under [EU law]."

affect the integrity of the relevant Natura 2000 site (and it seems that such decisions are not uncommon); and (b) in order to be suitable as subjects for the present research, the relevant case(s) needed to be sufficiently well-advanced to merit in-depth research.

A short list of conflicts was drawn up, comprising: the Severn barrage in the UK; the Sabor dam in Portugal; wind farms on Skyros; and the Spirit of Ireland project (see the immediately preceding section). The Spirit of Ireland project was ruled out on the basis that it was (and remains) in its very early stages. Some headway was made with researching the Skyros project, but finding local contacts proved particularly challenging, and ultimately a decision was taken to focus solely on the Severn barrage in the UK, which was well-advanced and readily amenable to research; and the Sabor dam, in respect of which a good contact (a Portuguese NGO representative who had worked extensively on the Sabor dispute) was established at a conference held from 26-27 January 2010 in Madrid, Spain, entitled "Post-2010 Biodiversity Vision and Target – The role of Protected Areas and Ecological Networks in Europe". This led to a site visit to Portugal in spring 2010, during which four individuals (NGO representatives and academics) were interviewed (semi-structured) in Lisbon, Porto and on site in the Sabor valley, near Torre de Moncorvo. In addition, a large number of archival documents - obtained from the European Commission by a Portuguese NGO - were provided to the present researcher. The Severn barrage case was studied almost exclusively by way of desk study research, with a small amount of interview data in supplement (one interviewee – interviewed in respect of the history of the Habitats Directive - having mentioned the project). A thematic analysis similar to that described in section 2.4.2.2 was carried out in respect of the data obtained.

2.4.4 Issues encountered during research

The first issue worthy of note was the sheer volume of archival and interview data generated during this research, which was extremely challenging in and of itself. A related issue was how best to record a negotiating history which has multiple complex themes spread out – in the case of the Habitats Directive, for example – across four years, involving twelve EU Member States and several EU institutions. In that regard, a decision was taken in the case of the Habitats Directive to organise the history according to the six-month rotational Presidencies of the Council of the EU, since the Presidency has an "agenda-shaping" role (Wurzel, 2004, p.7), and because archival and interview data indicated that certain Presidencies played a more important role than others in the history. This approach, which allowed the various themes described above to be addressed in relatively neat six-month periods, had the advantage that political developments could be interwoven with the detailed negotiating history of, for example, rules on Natura 2000 site designations. Thus, rather than

tracing and recording the history of site designation rules in the Habitats Directive over four years of negotiations, followed by an examination of the history of the development of the Directive's site protection rules over four years of negotiations (which approach would have made tracing political developments very difficult, risking repetition), themes could instead be progressed in tandem on the basis of the six-month rotational Presidencies. Nevertheless, it took some time – and a couple of false starts – before this solution was reached.

A second issue worth highlighting is the sensitivity of presenting a history which formed an important part of many individuals' careers, and in which many played an important role. A primary concern throughout was to ensure that the history was recorded faithfully, and reflected as accurately as possible each individual's contribution. A particular issue in this regard was that it was unfortunately not possible as part of the present research to interview Claus Stuffmann, the senior Commission official responsible for the negotiation of the Birds and Habitats Directives (amongst others). For this reason, reflecting Stuffmann's role accurately was particularly important, since he had no right of reply, as it were.[39] Thankfully, it was possible to obtain numerous articles written by Stuffmann on the subject of the Habitats and Birds Directives, and many interviewees and correspondents provided information regarding Stuffmann and his role in the history. A particularity in documenting the history was DG Environment's stipulation that where its archival data named individuals, such individuals should not be identified from the document in describing that document. The result is that in Chapter 8, for example, the history occasionally switches from naming individuals (based on interview data) to continuing the same history on the basis of the names of the institutions for whom the relevant individuals worked, because the latter part of the history is based on archival data from DG Environment. On re-reading, this does not appear to the present author to be either obvious or jarring, but it nevertheless presented certain issues during the writing-up process.

A more general issue is one facing all historical research: "by the time a phenomenon finds an interested sponsor, its remnants may be vastly incomplete. Worse, there are no guarantees that the surviving historical record is – in any way – representative....[M]ore-or-less random factors (observation, remembrance, recording, survival) determine the representativeness of the account that remains" (Moses and Knutsen, 2012, pp.205-6). This is said to be a particular problem when a researcher is "at the mercy of too little data" (Moses and Knutsen, 2012, pp.205-6), which was certainly not a problem here. With respect to the reliability of interview data (which typically related to events which occurred at least 20 years ago), such

[39] Having posted a hard copy of a draft of this thesis to Stuffmann, the present author had a telephone conversation with Stuffmann following the first submission of this thesis in which Stuffmann conveyed that he was impressed with the content and had no substantive comments or changes to suggest.

data were triangulated with the documentary archive, and, where a conflict arose, the documentary archive tended to be preferred on the basis of its contemporaneity.

Finally, in the context of EU research, an important issue is the potential for language barriers, and attendant biases in coverage. The present researcher reads English and French, which creates a natural limit to the scope of the research. Luckily, the vast majority of the documents in the archives used here were in either French or English. In one sense there is a potential over-emphasis on UK politics in the history of the Habitats Directive recorded here, because the LexisNexis News and Business database - which was used to access contemporaneous media stories - provided extensive access to English language news, but relatively scant access to French language sources. Interestingly, however, the present researcher detected a definite UK bias in the archives of DG Environment's Nature Unit itself. That is to say, during the negotiations members of the Nature Unit collected and retained news articles, other relevant documents from Member States (e.g. reports of House of Lords hearings), etc., but these were overwhelmingly from the UK. This may be because several of the figures most closely involved with the pre-adoption history of the Habitats Directive were British: e.g. Stanley Johnson of the European Commission kept in touch with what was happening in the UK; Ian Hepburn, who headed up the EU-wide NGO campaign in support of the Habitats Directive, was also British, and he would send information to the Nature Unit; and more generally, the British NGOs appear to have been most active during the negotiation of the Directive. Moreover, the UK was the main blockage to making progress with the Directive proposal in the early days, justifying to some extent the focus on the UK dynamic. (That said, other major currents during the early history were captured and recorded – e.g. Denmark's negative position and France's positive attitude under Minister Brice Lalonde. It is unfortunate that it was not possible to secure interviewees from every Member State, but this was in any event compensated for to some extent by the Council's archive, which revealed in detail each Member State's views.) Finally, the UK played a key role in broader EU environmental policy dynamics of the time - e.g. the departure of Commissioner Carlo Ripa di Meana and the beginning of a defensive phase of EU environmental policy post-Maastricht – meaning that the UK was necessarily centre-stage in certain important debates of the time.

Chapter 3: An historical overview of EU environmental policy[40]

3.1 First phase: 1958 to 1987[41] - taming the industrial tiger

3.1.1 From the foundation of the EEC in 1958 to the Paris Summit of 1972

At its foundation in 1958, the European Economic Community (EEC) had no environmental policy mandate and no environmental administration (Jordan and Adelle, 2013b; Jordan and Jeppesen, 2000). The EEC - established by the Treaty of Rome (1957) between Belgium, France, Germany, Italy, Luxembourg and the Netherlands - had as its essential aims the restoration of political stability and the promotion of economic recovery on a continent recently devastated by two world wars (Jordan and Adelle, 2013b). As set out in the Treaty, the original tasks of the EEC were: the establishment of a common market and the progressive approximation of the economic policies of the EEC's Member States, the promotion throughout the EEC of a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living, and closer relations between the EEC's Member States (Treaty of Rome, 1957). However, from these original six Member States and tasks, the EEC has grown and developed to form the European Union (EU) we know today, comprising 28 Member States and responsible for a broad array of policy areas, going far beyond the original tasks of the EEC. The creation of an extensive EU environmental policy has been one part of this remarkable transformation: as Weale (1999, p.40) comments, "[c]ompletely unanticipated in 1957, [EU] environmental policy had moved from silence to salience within thirty years."

Wurzel (2008a) identifies the following four key justifications for the EU's initial forays into environmental policy: first, differing national environmental standards could create barriers to trade which could impair the functioning of the common market; second, many environmental problems are transfrontier and cannot successfully be tackled by countries acting in isolation, making EU-level action a more effective regulatory response; third, proponents of ecological modernisation argued that stringent environmental regulations would benefit the EU economy in the long run, giving a first-mover advantage; i.e. strict regulations would drive resource-efficiency and result in the production of less polluting products within the EU, which environmental laggard states would then need to import in the

[40] For existing historical overviews of EU environmental policy and EU nature conservation policy, see, for example, Jordan (1998a), Wurzel (2008c, 2012), Kingston (2012), Krämer (1993), and Van Hoorick (1997).
[41] Note Wurzel's (2008a, 2012) sub-division of this period into an "infant phase" (1958-72) and an "adolescent phase" (1972-87).

face of environmental problems; fourth, from the late 1960s onwards, it became increasingly clear that economic growth resulting in environmental pollution was not compatible with an accelerated raising of the standard of living, as mandated by the Treaty of Rome (1957).

Indeed, by the late 1960s a loose network had emerged advocating and supporting the adoption of a common EU environmental policy, including, for example, the European Parliament (Meyer, 2011c), some Member States, some NGOs, and even some companies, keen on achieving a level playing field (Wurzel, 2008a). More generally, the 1960s and early 1970s - the time, for example, of Rachel Carson's *Silent Spring*, published in 1962 (Carson, 2002), the Ehrlichs' *The Population Bomb* and Garrett Hardin's *The Tragedy of the Commons*, published in 1968 (Ehrlich, 1968; Ehrlich and Ehrlich, 2009; Hardin, 1968), and The Ecologist's *A Blueprint for Survival* (Goldsmith et al., 1972) and MIT's *The Limits to Growth* (Meadows et al., 1972), published in 1972[42] - had seen a rapid growth in environmental interest and awareness. Major environmental incidents, such as the Torrey Canyon oil tanker disaster off Land's End in England in 1967 (McGurren, 1971) and an oil platform blowout off Santa Barbara in California in 1969 (Baldwin, 1970), were seen by worldwide audiences on television for the first time, and this no doubt contributed to a heightened sense of environmental awareness (Meyer, 2011a).[43] Related developments of interest include the founding of the NGOs Friends of the Earth and Greenpeace in 1969 and 1971, respectively (McCormick, 1993), and the first Earth Day event, on 22 April 1970 in the US, which attracted an estimated 20 million Americans and helped to shift the political landscape of the time (Fried, 1998).

The UNESCO *Biosphere Conference*[44] in Paris in September 1968 was, comments Meyer (2011a, p.16), "the first event to place the environment on the international political agenda."[45] Amongst other things, the UNESCO conference conclusions noted a July 1968 resolution by the UN's Economic and Social Council (ECOSOC), which resolution had been

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[42] The final two books are specifically cited by Michel Carpentier, who played a foundational role in the history of EU environmental policy (more below), in a speech he gave in place of then Commissioner Altiero Spinelli in June 1972 (Carpentier, 1972).

[43] Riffault (1983) records: "Asked [in September 1973]...about the relative importance of ten or so problems of national or global concern, Europeans put pollution of the environment first, before rising prices, poverty and unemployment...A few years later, in October 1976 and then again in October 1978, in an international context already characterized by slower growth and economic difficulties, Europeans put nature conservation and pollution control among the three most important problems of the day." In a follow-up European survey, Riffault et al. (1986, p.II) commented that "Nowadays the case for protecting the environment is virtually undisputed, with only one person in ten ranking environmental protection below economic development in importance."

[44] The full title was the "Scientific Basis for Rational Use and Conservation of the Resources of the Biosphere", a conference organised by UNESCO in cooperation with the World Conservation Union (IUCN) and the International Biological Programme (IBP) (Möller and Kammann, 2007).

[45] The conference led to the establishment of UNESCO's Man and the Biosphere programme in 1970 (Möller and Kammann, 2007).

prompted by a request from the Swedish government (Feraru, 1974), on the question of convening an international conference on the problems of the human environment (UNESCO, 1969). In December 1968 the UN General Assembly considered this resolution and decided to convene such a conference in 1972. The end result was the UN Conference on the Human Environment - the UN's first major environmental conference (Wurzel, 2008a) - held in Stockholm in June 1972; but the conference was already envisaged in 1968, and the intervening years became a period of intense environmental activity.[46]

The decision to convene the UN Stockholm conference was quickly followed by the United States' National Environmental Policy Act 1969, passed under the Nixon administration, which defined the environment as a discrete policy area at the national level for the first time, and by the creation in 1970 of the US Environmental Protection Agency (Meyer, 2011a). Such developments were closely followed in Europe, and, emulating the US example, Germany established an environmental programme and the UK and France established environmental ministries (Meyer, 2011c). Such actions naturally gave an impetus to those promoting EU-level action, particularly in light of the potential barriers national regulation might introduce within the common market (Meyer, 2011c); add to this mix institutional competition (i.e. the question of the appropriate forum for environmental regulation) - such as the Council of Europe's *European Conservation Year*,[47] launched with a major conference in Strasbourg in February 1970 (Council of Europe, 1970) - and the momentum towards an EU environmental policy began to build (Meyer, 2011c).

According to Scichilone (2009, p.336), at EU level "[t]he origins of the common environmental policy date back to the late 1960s, primarily to the summit of The Hague held in December 1969." The Hague summit - a meeting of the heads of state or government of the six founding members of the EEC - is most famous as the platform which relaunched European integration following the resignation of French President Charles de Gaulle in April 1969 (Wilson, 1973), de Gaulle having (for example) vetoed enlargement to include the UK in 1963 and again in 1967 (Ellison, 2006), as well as boycotted the EU institutions in the empty chair crisis of 1965-6 (Loth, 2007; Ludlow, 1999). This relaunch primarily focused on goals such as completing the common market, monetary union, and enlargement (Scichilone, 2009, 2010); however, the Hague summit also provided a launch-pad for other initiatives such as a common environmental policy (Scichilone, 2009, 2010).

[46] The conference itself ultimately "fixed the attention of the thousands present and, through them, of much of the world, on the absolute need to take care for our 'Only One Earth'" (Polunin, 1982, p.365).

[47] The Council of Europe is of course a separate institution to the EU (and its constituent institutions), despite certain confusing similarities in names.

Although the environment was not a key theme of the Hague summit, the European Commission submitted a memorandum to the Member States in advance arguing for the need to reconcile economic development with a broader picture of growth (Scichilone, 2009, 2010) (emphasis added): "the Council and Commission should be invited [at the Hague summit] to determine speedily the stages leading to this objective [the building of a genuine Community] and in particular to define the necessary action for the next five years, notably in the matter of common economic and monetary policies, the Community's industrial and technological development and *social and regional action designed more particularly to cope with the changes taking place in these fields*" (European Commission, 1969, paragraph 2). The final communiqué from the summit did not mention the word environment, but it spoke of "world equilibrium"[48] and of seeking an EU of "stability and growth" (Hague Summit, 1969, paragraphs 4 and 8). Moreover, the summit created a climate which was favourable towards further political integration in the EU, work which the European Commission then took the initiative to progress (Scichilone, 2009, 2010).

In July 1970, the Italian federalist Altiero Spinelli - one of the founding fathers of the European Union, and a member of the European Commission from 1970-1976 – was made Commissioner for Industrial Affairs, Science and Technology (DG III)(Bussière, 2007a; Segal, 1973).[49] Although Spinelli held responsibility for industrial affairs throughout his tenure as Commissioner, this was a "casting error" according to Robert Toulemon, the Director General of DG III, because Spinelli had no particular affinity with industrial matters (Toulemon, 2003, p.39) – Spinelli was, after all, a political strategist and former communist, who had been imprisoned for sixteen years[50] aged 20 for opposing the fascist regime in Italy (Pinder, 2007). According to Toulemon, insofar as the industrial portfolio was concerned, Spinelli was only really interested in environmental issues, and he recalls Spinelli's refrain, "Industry is a tiger which needs to be tamed!" (Toulemon, 2003, p.39).[51] Spinelli quickly gave Toulemon responsibility for environmental issues (Bussière, 2007a),[52] and in 1970

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[48] Interestingly, "world equilibrium" appears to have been a popular environmental concept in the 1960s and 1970s. "Stable world equilibrium" was a phrase used in 1965 by Aurelio Peccei, co-founder of The Club of Rome (Peccei, 1965), the think-tank which commissioned the influential MIT study *The Limits to Growth*, published in 1972 (Meadows et al., 1972). The phrase "world equilibrium" was also used in the early 1970s by J.W. Forrester, an MIT academic who was a mentor to authors of the *The Limits to Growth* (Golub and Townsend, 1977, p.204), and in 1972 in *The Limits to Growth* itself (Meadows et al., 1972, p.191). Further, Commissioner Altiero Spinelli commented in an environmentally-focused speech in 1972: "Nowadays we often hear it said that society needs to be organised in such a way that a permanent and stable equilibrium is attained between all the factors operating in it" (Spinelli, 1972c, p.1).

[49] Bussière (2007a) gives the date of appointment as June 1970, but the Commission did not take office until 1 July 1970.

[50] 1927 to 1943.

[51] "L'industrie est un tigre qu'il faut maîtriser" in the French original.

[52] Bussière (2007a, p.468) states: "Commissioner Spinelli handed responsibility for the environment to Robert Toulemon, Director-General of Industrial Affairs in 1969." However, Spinelli was not made Commissioner

Toulemon put Michel Carpentier, a French head of unit in DG III, in charge of a new 'Environmental Problems' unit (European Commission, 1971a), attached directly to the Director General (Bussière, 2007a; European University Institute, 2012).[53]

In 1970 and 1971, the Commission carried out preparatory work on the idea of creating a common environmental policy. As Carpentier commented in 1999, "Without being unduly modest, I can say that we had to start practically from scratch. The little we did have in legal and political terms — ...with the help of a lot of enthusiasm, thinking, hard work and a bit of luck — helped us to establish the basis on which the environment policy gradually took shape" (Carpentier (1999), cited in Bussière (2007a)). In addition to Carpentier's unit within DG III, the Commission set up an environmental working group in February 1971 to help develop policy proposals (Meyer, forthcoming; Scichilone, 2009, 2010). This *ad hoc* group was chaired by Spinelli and comprised four other permanent members - all prominent members of the European Commission - including the Dutch federalist Sicco Mansholt.[54] While Mansholt is perhaps most famous for his role in respect of the common agricultural policy, having served as Agriculture Commissioner from 1958-72 and Commission President from 1972-3, he was also very interested in environmental and development issues (Scichilone, 2010; Van der Harst, 2007). This *ad hoc* group was given responsibility for defining and proposing an EU environmental policy (Scichilone, 2010), supported to a large degree by Carpentier's unit in DG III (Bussière, 2007a), and assisted by several Directorates General of the Commission (Scichilone, 2010). The group's work is said to have been "heavily influenced by the debate between Spinelli and Mansholt and their ideas" (Scichilone, 2010, p.415), and these two individuals would prove particularly important in pushing the environmental cause within the EU (Scichilone, 2009, 2010). Interestingly for the purposes of this thesis, one of Spinelli's advisers during this period – a member of his *cabinet* during his years as Commissioner – was Claus Stuffmann (HAEU, 1970-72; Stuffmann, 1975), a German, who was later the senior Commission official responsible for negotiating the Birds Directive (1979), the Environmental Impact Assessment (EIA) Directive (1985),[55] and the Habitats Directive (1992), before retiring from the Commission in

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until June 1970, according to Bussière (2007a), and the Commission itself did not take office until 1 July 1970 – Bussière's statement could perhaps be read as meaning that Toulemon became Director-General in 1969, but Toulemon was already Director General by 1968 (European Commission, 1968). Carpentier was with DG III before being appointed as head of the Environmental Problems unit. A 1968 Commission directory shows him as head of the 'Industrial Policy in the Nuclear and Advanced Technology Fields' unit of DG III's Directorate A (Industrial Research and Policy)(European Commission, 1968).

[53] A precise date for Carpentier's appointment is unclear, though he was not one of the Commission's representatives at the Council of Europe's major *European Conservation Conference* in February 1970 (Council of Europe, 1970, p.245).

[54] The other permanent members were Albert Coppé (Belgian), Wilhelm Haferkamp (German), and Albert Borschette (Luxembourgian).

[55] See House of Lords (1981).

1994 (Ferranti, 2011). Stuffmann would therefore have been close to the action during this foundational period in EU environmental policy, as well as being directly involved later in the detailed creation of EU nature conservation and impact assessment policies. Stuffmann's personal commitment to European integration is said to have been forged by his experiences growing up in Germany during the Second World War (Devillers, 2013). He is reported to have commented, during his working career, that he had two passions in life: the project of European unity and nature conservation, and "he certainly acted that way" (Devillers, 2013).

In August 1971, the Commission presented for comments a first Communication about a Community policy on the environment (European Commission, 1971b), followed by a second Communication in March 1972 proposing an environmental action programme (European Commission, 1972a). The March 1972 Communication was preceded by five months of "the most wide-ranging and thorough consultations possible" (European Commission, 1972a, p.6). With the support of Spinelli and Toulemon, Michel Carpentier had established a dialogue with the environmental authorities in each of the six Member States as well as the four then candidate countries (Denmark, Ireland, Norway, the UK, though Norway would not ultimately join the EU), and he received input in addition from committees of the European Parliament and from trade unions and industrial organisations (Bussière, 2007a; European Commission, 1972a). Carpentier was reportedly met with a "deeply courteous welcome in every country, albeit with strong differences in the response to the idea of a new Community policy" (Carpentier (1999), cited in Bussière (2007a)).[56]

The March 1972 Communication was immediately followed by a DG III-organised conference on "Industry and Society in the European Community" in Venice in April 1972, which Toulemon (2003) credits as an important factor in the future development of a common EU environmental policy. The idea of the conference, which brought together some 300 delegates from trade unions and employers' federations, the EU institutions, and the civil

[56] The Commission cited with "special interest" a memorandum of 22 January 1972 from the French government (European Commission, 1972a, p.6), and Toulemon (2003) specifically cites the encouragement given by France's first Minister for the Environment, Robert Poujade. Of the January 1972 French memo, Meyer (2011b, p.6), citing 20 January as the date of the letter, states "The document [which "Poujade claimed credit for"] invoked Gaullist principles, insisting on the model of an "Europe des patries" (Europe of nations) rather than supranational integration. Thus, the French government was only willing to accept a very limited role of the EC in environmental policy. Instead of establishing a Community policy, the document advocated merely intergovernmental "European cooperation" ["coopération européenne plus vaste"] in a "flexible and pragmatic manner" ["grâce à des procédures souples et pragmatiques"], and proposed regular meetings of high-ranking national officials and the ministers responsible for the environment. Apart from coordination to ensure a joint approach in international organisations, European action should be limited to two areas: First, in order to prevent that nationally specific environmental rules were used to limit market access or distort competition in the Common Market, common standards and norms both for products and production should be established. Secondly, the French government perceived the EC as a useful instrument to provide funds for and coordinate research and the development of new technologies. Health issues and the construction of instruments to measure pollution were suggested as priorities for research."

services of the six founding Member States and three soon-to-be Member States, was to consider the "interconnection in the Community as a whole between industrial development and a number of economic, social and political issues," with a view to producing "broad guidelines for the formulation of Community policies, and suggestions for practical steps at Community level" (European Commission, 1972b). In his introductory speech to the conference, Commissioner Spinelli posed the question, "How can Europe lead in tackling ecological problems which have reached a critical point?" (Spinelli, 1972b). The answer was the establishment of a common EU environmental policy, and the creation within the Commission of an institution dedicated to this task.

The Commission can thus be said to have been the driving force behind the EU's move into the environmental policy arena (Scichilone, 2009, 2010), albeit supported by the actors mentioned above: the European Parliament (Meyer, 2011c), some Member States, some NGOs, and some companies (Wurzel, 2008a). This activity at EU level, and the parallel wave of public interest and awareness described above, culminated in the United Nations Conference on the Human Environment in Stockholm in June 1972 (Jordan, 1998a), at which the EU's "member states...failed miserably to present a common EU position" (Wurzel, 2008a; 2013, p.88). Some EU countries, such as Germany and the Netherlands, sought "relatively ambitious environmental commitments, whilst others dragged their feet," and the Presidency, then held by Luxembourg, was unable to secure a unified EU position (Wurzel, 2008a, p.67).

It was not only the Member States which were at odds. Agriculture Commissioner Mansholt's thinking on environmental and economic issues had been profoundly affected by theories advanced by the think tank the Club of Rome (exemplified by the Club of Rome-commissioned and MIT-produced *The Limits to Growth*, published in 1972 (Meadows et al., 1972)), as well as by his friend Professor Jan Tinbergen, winner of the Nobel Prize for Economics in 1969 (Bussière, 2007b; Van der Harst, 2007). In this vein, Mansholt wrote a lengthy letter to Commission President Malfatti in February 1972 calling for an immediate U-turn in the EU's economic policy: an abandonment of economic growth maximization, centralised economic planning at EU level, and the development of a "clean and recycling" economy, with GNP to be replaced by gross national happiness as a measure of progress (Bussière, 2007b; Mansholt, 1972a; Van der Harst, 2007; Wurzel, 2012).[57] As Mansholt later

[57] *The Limits to Growth* (Meadows et al., 1972) was published in March 1972 (Golub and Townsend, 1977), whilst Mansholt's letter to the Commission President was dated a month earlier, February 1972 (Mansholt, 1972a). However, one of the authors of *The Limits to Growth* notes that by the summer of 1971 a draft of some of the key findings was circulating amongst member of the Club of Rome (Meadows and Meadows, 2007), and it seems Mansholt had sight of this document: his February 1972 letter refers to a July 1971 report of the System Dynamics Group at MIT, the group which produced *The Limits to Growth*. Club of Rome co-founder

commented (by this time free of his responsibilities as a Commissioner, having retired in 1973): "Ever since 1968 I have been convinced we have to stop growth, not only for ecological reasons but because of the enormous gap between developed and developing countries" (The Ecologist, 1974); and "For us in the industrialized world, a decrease in the material level of our life has become a necessity. Which does not mean zero growth, but negative growth. Growth is only an immediate political objective serving the interests of the dominant minorities" (Mansholt (1974), cited by Latouche (2010, p.520)).

Mansholt's ideas were strongly rejected at the time by the EU's Economic and Financial Affairs Commissioner, Raymond Barre, who accused Mansholt of putting EU jobs and competitiveness at risk (Bussière, 2007b; Van der Harst, 2007; Wurzel, 2012). Nor were Mansholt's ideas shared by his environmental working group colleague Altiero Spinelli, who was "openly against" the Club of Rome's approach (Scichilone, 2009, p.342). First, Spinelli did not believe that environmental protection and economic growth need necessarily be in conflict, and he therefore rejected "that fashionable phrase, a zero rate of growth...This solution is paradoxical and impracticable, because it implies the suppression of any impulse towards discovery, innovation and the spirit of adventure. Our Community cannot be based on anything but the assumption of a growing society, although, of course, this does not mean that we delude ourselves that any form of growth is of itself beneficial" (Spinelli, 1972c). Second, he rejected the technocratic theories of the Club of Rome, which foresaw an expert elite governing the world's problems (Golub and Townsend, 1977; Scichilone, 2009).[58] Such an approach conflicted with Spinelli's vision of a European integration project involving citizens fully and democratically, and he therefore spurned "elitist alternatives, seeing them as a risk to the survival of the [EU] itself" (Scichilone, 2009, p.343).

Many, including loyal members of staff, "were astonished at the neo-Marxist tone of [Mansholt's] speeches and papers" from this time – one staff member reportedly "no longer recognised Mansholt after this brusque ideological shift" (Van der Harst, 2007, p.176). It therefore came as a "real surprise" when Mansholt was appointed interim President of the Commission in March 1972 (Van der Harst, 2007, p.176), a post he held until January 1973 (Blair, 2006), a period coinciding with the UN Conference on the Human Environment in Stockholm in June 1972. The Stockholm Conference gave Mansholt the opportunity to repeat his *Limits to Growth*-inspired ideas on the international stage (Mansholt, 1972b; Scichilone, 2010), albeit expressed somewhat less radically than his candid "negative

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Alexander King therefore appears to have been in error when he commented of Mansholt's letter, "Mansholt had never read anything from the Club of Rome, not even *Limits to Growth*" (Murawiec and di Paoli, 1981, p.22).

[58] A "new world moderator...set up by...the Great Four [i.e. USA, EEC, USSR and Japan]", in the words of Peccei (1969, pp.277-8), a co-founder of the Club of Rome (Golub and Townsend, 1977).

growth" remarks after leaving the Commission (The Ecologist, 1974). His "remarkable speech...was acclaimed by young demonstrators" (Van der Harst, 2007, p.178), but Mansholt nevertheless failed to gain the backing of Luxembourg's Interior Minister, who spoke in Stockholm on behalf of the EU Presidency (Wurzel, 2012).

However, the Stockholm conference effectively "forced" (Wurzel, 2008a, p.67) the EU's Member States and soon-to-be Member States to discuss environmental issues in October 1972 at the Paris summit meeting of the Heads of State and Heads of Government of the Member States of the enlarged EEC, which the UK, Ireland and Denmark attended, since they would join the EEC only three months later, in January 1973 (Wurzel, 2008a). Mansholt and Spinelli had been assisting with the organisation of the Paris summit meeting, the summit seeming an ideal opportunity to launch new EU policies (Scichilone, 2009). As such, the Commission's *ad hoc* environmental group "clearly wanted to arrive at the [Paris] summit with an excellent chance of launching the new [environmental] policy and therefore made...meticulous preparatory work" (Scichilone, 2009, p.345).

In September 1972, a month before the Paris summit, Germany produced a note requesting that any document setting out an EU environmental policy should contain "a general part which determines the basic principles of a European environmental policy" and an action programme with specific concrete actions (Krämer, 2003, p.2); the German note detailed ten basic principles, including many which are familiar today; e.g. the prevention principle, the polluter pays principle and the integration principle (Krämer, 2003). The nine countries represented at the Paris summit ultimately issued a joint Declaration on 21 October 1972, effectively endorsing the Commission's 1970-2 initiatives to formulate an EU environmental policy, by formally inviting the Commission[59] to, amongst other things, draw up a programme of action for a Community environmental policy (Knill and Liefferink, 2013). Just over a week later - from 30-31 October 1972 - the ministers responsible for environmental policy[60] met in Bonn, with Spinelli attending as lead representative for the Commission (Spinelli, 1972a), agreeing eleven general principles of an EU environmental policy, adopting Germany's ten proposed principles and adding some wording about rectifying damage at source (Krämer, 2003). And thus the EU environmental project was launched.

[59] The term used in the Declaration is "the Community Institutions", referring to the Commission, the European Parliament and the Economic and Social Committee (Paris Summit, 1972).
[60] Not all Member States had dedicated departments of the environment at this time (Wurzel, 2008a).

3.1.2 From the First Environmental Action Programme to the Single European Act: 1973 to 1987

Early in 1973 - Denmark, Ireland and the UK having joined the EU on 1 January - the Commission formally created what would later became DG Environment, at its foundation the Environment and Consumer Protection Service (ECPS), an independent service reporting to the Italian Commissioner Scarascia-Mugnozza, who was then a Vice-President of the Commission with responsibility for parliamentary affairs, environmental policy and transport (Johnson, 2013).[61] On its establishment, the ECPS had only a small staff (Flattau, 1979; Schön-Quinlivan, 2013)[62] - headed by Michel Carpentier, who had been in charge of the Environmental Problems unit in DG III from 1970-72 – and had three divisions: Division 1: for the Prevention of Pollution and Nuisances (covering water, air, waste, chemicals and noise), headed by Stanley Johnson, a then 32-year old Englishman who played a "catalytic role" (Cashman, 2012), "initiated a lot of things in EU environment policy" (Henningsen, 2012), and would later play a crucial role in the history of the Habitats Directive;[63] Division 2: Quality of Life and General Affairs, headed by a German, Dieter Hammer; and Division 3: Consumer affairs, headed by another Englishman, John Braun (Johnson, 2011).[64]

Of the ECPS's head, Johnson (2009, p.262) comments, "I liked and admired Michel Carpentier at first sight. A man of explosive energy and dogged determination, he had...a marvellous sense of humour and the instincts of a street fighter. He was exactly the right person to lead the fledgling environment and consumer affairs directorate. Other departments in the Commission would be only too keen to reduce it to impotence. It was Carpentier's job, by fair means or foul, to make sure that didn't happen." Carpentier was, says Johnson (2011), "a very dynamic, almost pugilistic man, exactly the ideal man for that job at that time because he never missed a fight. He was absolutely ready to say: 'I'm a small unit, but we

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[61] It has been suggested that a deliberate decision was taken to create a Service at this time rather than a separate Directorate General to deal with environmental issues, on the basis that such issues should be integrated into the work of all the other then-existing Directorates General (the integration principle was, after all, one of the agreed general principles of the emergent EU environmental policy)(Johnson, 2011; Krämer, 2003). An alternative view is that the Service created was simply too small to justify DG status at that time (Johnson, 2011). The Service ultimately achieved independent DG status in 1981 (Schön-Quinlivan, 2013).

[62] Two sources report five members of staff at the outset (Flattau, 1979; Schön-Quinlivan, 2013). This may have been the position on day one, since the staff from Carpentier's DG III 'Environmental Problems' unit transferred wholesale to the new Service (Johnson, 2013). An interview with Michel Carpentier in 1981 puts the original number of staff at seven, but the staff must have expanded very rapidly, since Stanley Johnson recalls arriving in April 1973 to head a division of "eight, or nine, or perhaps even ten people" with "twenty or thirty" in total in the Service (Johnson, 2011). By 1979 the number is reported to have grown to 65 (Flattau, 1979), and in 1981, according to an interview with Carpentier, to over 100 (Caufield, 1981).

[63] In addition to Johnson, division 1 included, amongst others: Vladimir Mandl (water), Peter Stief-Tauch (air), Jean-Marie Junger (noise), Pierre Bonnet (titanium and dioxide), and Benno Risch (waste)(Johnson, 2011).

[64] The UK having only just joined the EU, Stanley Johnson - who took up his post in April 1973 - and John Braun would have been very much in the vanguard of British nationals appointed to EU positions (Johnson, 2009).

are going to make our voice heard in Brussels.' And he had some big people to take on. He had to take on the industrial affairs directorate, who didn't necessarily want rival proposals being made by the [ECPS], in areas where up till now they had already made proposals or hadn't made proposals. Even on the agricultural front, which we didn't tackle for a very long time, people were not going to say: 'The environment service can make proposals which affect the way we do our farming policy'."

In his new role, Carpentier summarised the Commission's vision of a "reasoned, progressive and enlightened environmental policy" at a symposium in February 1973 (Carpentier, 1973, p.10). Just five months later, on 19 July 1973, at the beginning of a Danish Presidency, the Environment Council (the Council of Ministers meeting in its environment formation) held its first ever meeting and adopted the terms of the First Environmental Action Programme (Johnson, 2011; Vonkeman, 2003; Wurzel, 2008a). This was formalised on 22 November 1973 by way of a joint Declaration of the Council and representatives of the governments of the Member States meeting in the Council.[65] The First Environmental Action Programme (1973) followed the structure of the German proposal, incorporated the eleven principles agreed in Bonn (Krämer, 2003), and ushered in a new era in EU policy-making, "giving environmental policy a sound political and intellectual platform from which to develop" (Jordan, 1998a, p.14).

Nevertheless, a firm legal platform remained absent: that is, notwithstanding the creation of the First Environmental Action Programme, EU environmental policy-making lacked a specific Treaty base; i.e. there remained no dedicated legal basis for the making of EU environmental legislation, with environmental policy remaining, at least on paper, pinned to the common market. Attempts to address this by way of revisions to the Treaty of Rome (1957) had been made in the early 1970s by Germany and the Netherlands, which favoured an ambitious common environmental policy and the deepening of European integration; however, these attempts were vetoed by France, which was opposed to extending the EU's (and particularly the Commission's) powers into a new policy area in such a way (Wurzel, 2012). The result was that, during this first phase in EU environmental policy - from 1958 to 1987 - EU environmental policy had elements driven by the Commission and elements driven by individual Member States. The non-binding Environmental Action Programmes – the First Environmental Action Programme (1973) was followed by the Second and Third Environmental Action Programmes in 1976 and 1983, respectively (Second Environmental Action Programme, 1977; Third Environmental Action Programme, 1983) – were sources of new policy driven by the Commission. In contrast, a source of new policy driven by

[65] This joint formulation being necessary in order to deal with any issues regarding EU competence.

individual Member States was the Information and Standstill Agreement (1973) - self-described as a "gentleman's agreement" - which added environmental measures to an Information and Standstill Agreement of 1969, in view of France's decision to block Treaty changes to provide explicitly for the making of EU environmental legislation (Wurzel, 2012).

The Information and Standstill Agreement (1973) committed the Member States to inform the Commission as soon as possible of, amongst other things, any draft national legislation concerning the protection or improvement of the environment which could directly affect the functioning of the common market, or which was relevant to the EU's programme for the reduction of pollution and nuisances and the protection of the natural environment, or which was of particular interest to the EU and the Member States from the point of view of the protection of public health or of the natural environment, particularly where the legislation could have repercussions for other Member States.[66] The standstill element of the agreement then gave the Commission two months to indicate its intention to propose EU legislation on the subject in place of the draft national legislation, and five months to make its proposal to the Council. By July 1974 – one year into the period of operation of the First Environmental Action Programme – 33 draft national laws had been notified to the Commission under the Information and Standstill Agreement (1973), and the Commission had requested a suspension in nine cases in order to allow the Commission to present EU wide proposals instead (European Commission, 1974b, p.7); by 1980, over 250 draft national laws had been notified in this way (European Commission, 1980b). According to Rehbinder and Stewart (1985, p.17), the Information and Standstill Agreement (1973) had the result that "[s]trongly environmentalist member states were more or less able to set the pace and direction for Community action by unilaterally proposing strong national environmental legislation, which forced the Community to react with measures of its own." Yet the Agreement also served to increase the common market bias of early EU environmental policy measures (Wurzel, 2012).

Whether deriving from an Environmental Action Programme or the Information and Standstill Agreement (1973), any EU environmental legislative proposal had to overcome an additional hurdle: such proposals needed by law to be based on a provision of the Treaty of Rome (1957), since the EU is of course only allowed to exercise powers which have been expressly allocated to it by the Treaty (Jordan and Adelle, 2013b). As Knill and Liefferink (2013, p.16) note in this regard, "the request made by the heads of state and government at the Paris Summit in 1972 to push forward with the development of a European environmental

[66] The Information and Standstill Agreement (1973) was amended in 1974 to clarify the application of the Agreement to measures falling within the scope of the First Environmental Action Programme (1973): see Amendment to the Information and Standstill Agreement (1974).

policy entailed an interesting question, for legal experts in particular. As there was no treaty basis, it was totally uncertain at that point in time what could serve as the legal foundation for the fulfilment of the EU's political objectives."

Ultimately, until 1987 when the Treaty was amended, the two Treaty provisions most commonly relied upon by the Commission in seeking to make EU environmental legislation were (one or both of) Articles 100 and 235 of the Treaty of Rome (1957)(Knill and Liefferink, 2013). Article 100 allowed the Council to adopt EU directives to approximate differing national laws, provided that the differences "directly affect the establishment of the common market". Thus, in appropriate cases, the adoption of EU environmental rules could be justified on the basis of Article 100 on the grounds that different environmental rules in different Member States constituted trade barriers (Johnson and Corcelle, 1989). Where Article 100 was not applicable, Article 235 could potentially be used. Article 235 provided a legislative power where action by the EU should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the EU, but the Treaty had not provided the necessary powers (i.e. the implied powers doctrine)(Wurzel, 2008a). For those seeking greater integration of environmental policies, Article 235 provided scope for a dynamic interpretation of the Treaty, whereby the objectives of the EU, set out in Article 2 of the Treaty,[67] could be read to include environmental protection, even if environmental protection was not explicitly mentioned (Knill and Liefferink, 2013). And this is exactly the approach the EU institutions took, with both the First and Second Environmental Action Programmes containing language to the effect that protection of the natural environment was a fundamental task of the EU (First Environmental Action Programme, 1973; Second Environmental Action Programme, 1977). This approach received legal endorsement in 1985 when the European Court of Justice held, in a landmark ruling, that "environmental protection...is one of the Community's essential objectives" (ECJ, 1985, paragraph 13; Krämer, 2013).

The situation was formalised and clarified in 1987 when the Single European Act (1986) came into effect, revising the Treaty of Rome (1957) by, amongst other things, adding an explicit legislative power in respect of environmental matters (more in chapter 5). But until 1987, as we will see, "the Commission had to go to great lengths to justify measures such as protection for bathing water and wild birds that frankly had little to do with the establishment of a common market" (Jordan and Jeppesen, 2000, p.64). Nevertheless, the European

[67]Article 2 of the Treaty of Rome (1957) provided, in full: "The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it."

Commission, which holds the sole right of legislative initiative in environmental matters (Schön-Quinlivan, 2013), set about implementing the First Environmental Action Programme (and its successors) with gusto during this first phase, leading to a "rapid and profound transformation" of EU environmental policy during the 1980s (Jordan, 1998a, p.17). One reason for the speed of action in this early period was the formulation of the First Environmental Action Programme, which set precise dates by which the Commission was to submit legislative proposals, and internally the Commission regarded these dates as binding (Johnson, 2011). Stanley Johnson's division, which dealt with the 'Prevention of Pollution and Nuisances', was particularly busy: as Johnson (2011) comments, "if you go back to the first action programme, as adopted by the Council, you will see that the bulk of it was actually in the prevention of pollution and nuisances side of things." This is backed up by a 1980 Commission progress report on the implementation of the First and Second Environmental Action Programmes, which comments that "The main endeavours have been in the form of legislative and regulatory action to reduce pollution. It is noteworthy that in less than seven years the Community has adopted 58 legislative texts in this field, fifteen on water pollution, ten on the reduction of air pollution, seven on waste, eight on noise pollution and four on the protection of the environment, land and natural resources" (European Commission, 1980b, p.2). Indeed, already by 1987 about 200 pieces of EU environmental legislation had been adopted in total (Rittberger and Richardson, 2003) - all of which required unanimous support from the Member States (Knill and Liefferink, 2013) - as well as four Environmental Action Programmes (Jordan, 1998a); and this despite the Commission's Directorate General XI (Environment, Consumer Protection and Nuclear Safety) - hereafter DG XI - being staffed by only around 100 officials at the beginning of the 1980s (Caufield, 1981).[68]

According to Cini (1997, 2000), the administrative culture of the ECPS (which became DG XI in 1981 (Schön-Quinlivan, 2013)) was rather different from other parts of the Commission: when the ECPS was set up in 1973, instead of most of its officials being hired internally from other parts of the Commission, as would have been the norm at the time, the ECPS hired numerous specialists with technical knowledge (Schön-Quinlivan, 2013), many coming from the EU's Joint Research Centre at Ispra in Italy (Bourdeau, 2004; Johnson, 2011). One senior DG Environment official interviewed by Cini in 1993 commented that this gave the DG a reputation for being dominated by "ecological freaks" (Cini, 1997, p.78). Cini (1995) continues: "A sense of difference was therefore instilled within DG XI staff from the

[68] Schön-Quinlivan (2013, p.104) puts the number at "about 60 officials in the 1980s", possibly based on Cini (1997, 2000), whom the former cites in the same paragraph. However, Caulfield's (1981) contemporaneous interview with Michel Carpentier is to be preferred, quoting a figure of more than 100 staff members in 1981.

beginning. Environment officials exacerbated their position within the Commission by giving the impression that they were working in some sort of a political vacuum. The drafting of legislation went on behind closed doors without, apparently, much regard for policy being made elsewhere in the Commission. Even NGOs seemed to be excluded. As a result, DG XI officials produced, in a very short space of time, a huge amount of legislation - 12 000 pages of it according to one estimate (Interview, 1993). This legislation was however little influenced by policy objectives outside the boundaries of DG XI. The fact that those who would have to implement the policy had not been involved at the formulation stage, meant that the policy was often considered unworkable and utopian by those at grass roots level (Interview, 1993)."

A few comments are necessary at this point. First, it is worth recalling that Cini's interview was carried out only a year after a very turbulent period in DG XI's history (described in full below), which saw the then Environment Commissioner Carlo Ripa di Meana forced out of his job, at least in part because of his strict pursuit of Member States for alleged breaches of EU environmental law. DG XI was under severe pressure in 1992/3, with issues such as the post-Maastricht Treaty debate regarding subsidiarity,[69] the potential repatriation of powers to Member States, hit-lists of EU environmental legislation being proposed for repeal, etc., in full swing (more in section 3.2). As such, it would seem wise to treat with caution the views, in 1993, of a senior DG XI official seeking, perhaps, to distance her/himself from a supposed DG XI of the past. Second, the suggestion that NGOs were excluded from EU policy making does not reflect the history of the Birds and Habitats Directives (at least), as revealed in chapters 4, 6 and 7. Whilst some NGOs may perhaps have felt excluded from aspects of EU environmental policy-making in the early days, by May 1975 the Commission had published a detailed survey identifying environmental NGOs active in the EU and recommending improved consultation (European Commission, 1975b). Third, the Commission was not in the past (and is not now) in a position to impose EU legislation unilaterally on the EU's Member States – indeed, until 1987, all EU environmental legislation had to be adopted unanimously by the Member States, which play a major role in negotiating such legislation and could exercise a veto should they so choose. Thus, to the extent that EU environmental legislation did not take account of policy being made elsewhere in the Commission, or appeared unworkable to those responsible for implementation, any blame would necessarily need to be shared by the Member States. Fourth, DG XI could not propose new legislation

[69] i.e. The debate over whether action should be taken at EU or Member State level. The formulation of the subsidiarity principle contained in Article 3b of the Maastricht Treaty (1992) was as follows: "In areas which do not fall within its exclusive competence, the Community shall take action...only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member State and can therefore, by reason of scale or effects of the proposed action, be better achieved by the Community."

without first obtaining the agreement of the Commission's other DGs to the draft legislative text; as such, other DGs would have the opportunity to make their views clear in advance. Fifth, "unworkable" legislation is a broad church, and would seem to capture, for example, strict environmental obligations which pose difficulties for economic operators (which might have been the intention), as well as genuinely "unworkable" legislation, of which it would likely be hard to find good examples in the EU environmental *acquis*.

Setting these points to one side, it is interesting to reflect on how and why EU environmental policy managed to progress so far in the years to 1987 in the absence of a specific legal base. Rittberger and Richardson (2003, p.576) cite as the most likely explanations: the high political salience for environmental issues;[70] policy entrepreneurship by the European Commission, assisted on occasion by the European Parliament;[71] and "clever use of what Héritier terms a policy style of 'subterfuge'"; to this list, Knill and Liefferink (2013, p.19) add, simply, that "some of the member states were not totally aware of what they had got into during the European negotiations."

While it can be argued that EU environmental policy was, during this first phase from 1958-1987, primarily a policy flanking the common market (Knill and Liefferink, 2013), by 1981 the Commission was itself describing a focus on the common market as merely the *original* central concern of its environmental policy (European Commission, 1981). Moreover, certain early environmental instruments clearly did not have such a focus; a nature conservation instrument such as the Birds Directive (1979) would be a prime example. For this reason, as we will see in chapter 4, the question of whether the EU had the legal competence to adopt the Birds Directive, and if so on what basis, was one of the fundamental - and first - issues which faced EU policymakers at the time the directive was proposed by the European Commission. Moreover, debates regarding the EU's legal competence in respect of nature conservation matters persisted even after the adoption of the Birds Directive, arguably reflecting the political salience of the issues at stake.

[70] Knill and Liefferink (2013) cite, in addition, the highly politicised issue in the early 1980s of the acidification of Scandinavian lakes and forest dieback in Germany, owing to acid rain caused by air pollution attributable largely to other countries and regions; this reportedly led certain Member States to become very active in seeking EU level regulation.

[71] The European Parliament was described in 1992 by a member of Environment Commissioner Ripa di Meana's *cabinet* as "much greener" than the Commission itself (Judge, 1993, p.199). The official goes on to explain that "the Council still sometimes thinks that there is an incestuous relationship between the [European Parliament] and DG XI, with the Environment Committee [of the Parliament] used to turn the screw" (Judge, 1993, p.199). DG XI officials interviewed for the same article then go on to explain common tactics for indeed jointly turning the screw on the Council (Judge, 1993).

3.2 Second phase: 1987 to 1992 - the golden era of EU environmental policy-making

3.2.1 The golden era and its demise

Introduction

With hindsight, comments Ward (1997, p.178), "the period between the Single European Act (SEA) of 1987 and the Maastricht Treaty in 1992 could be seen as [a] uniquely favourable era for strengthening Community environmental policy." Various factors combined to contribute to this "golden era" (Ward, 1997, p.178): the emergence of, and an increasing awareness of, transnational environmental problems; widespread public support for environmental action; an emergent interest in the potentially damaging impacts of the common market; a growth in support for Green political parties; the entry into force in 1987 of a clear legal base for EU environmental policy (in the Single European Act (1986)); and the momentum provided by numerous influential civil servants (*fonctionnaires*) within DG XI, supported by two progressive EU Environment Commissioners: the Briton Stanley (now Lord) Clinton Davis, who was Commissioner from 1985 until 1988, and the "flamboyant" Italian Carlo Ripa di Meana (Mason, 1992), who was Commissioner from 1989 until 1992 (Hey, 2005; Markham, 1989; Ward, 1997).

Before taking up post as Environment Commissioner, Ripa di Meana had been Commissioner for Culture, and this culture job had suited him well (Henningsen, 2012). As such, he had not, at first, really wanted the environment portfolio (Schoon, 1991). Nevertheless, on appointment as Environment Commissioner, Ripa di Meana "at once made it plain that he intended to use the Commission's legal powers and his own considerable political skills to introduce a radical programme of environmental improvement in the Community" (The Observer, 1991). The combined result of the above-mentioned factors was a rapid expansion in EU environmental policy-making: as Jordan (1998a) highlights, between 1989 and 1991 the Environment Council adopted more environmental policies than it had in the previous 20 years, with DG XI coming to be characterised as a legislative factory (Ward, 1997).[72] But

[72] However, note in this regard the existence of a "heated debate in legal circles about what constitutes the environmental *acquis*" (Jordan et al., 1999, p.381). As Jordan et al. (1999, pp.381-2) explain, "Nigel Haigh's definitive manual (1998) and Stanley Johnson's textbook (Johnson and Corcelle 1995) both arrive at totals of over 500 and 400 measures respectively (see also Table 1). Others, however, such as Krämer (1997) and Macrory and Purdy (1997: 37), settle for a much lower figure. This discrepancy is partly a reflection of the unbounded nature of environmental policy, which crosses many other policy areas. It is for this reason that Nigel Haigh includes legislation adopted under Articles 30 and 31 (nuclear radiation) and 43 (agriculture) in his manual. However, the discrepancy also reflects the politics of subsidiarity post-Maastricht. It is revealing in this respect that Ludwig Krämer (1997: 9), a DG XI official, contrasts his total with those of Haigh and others 'which are sometimes used to illustrate – and criticise – the amount of legislative activity of the [EU]'. Finally, the discrepancy is also a function of which types of legislation are included in the analysis. The higher figures

there were good reasons for this expansion of environmental policy: at a European summit in February 1988, it was agreed that spending under the Structural Funds would double between 1989 and 1993, most of which would be "spent in predominantly rural regions of the less developed parts of the Community; in Southern Europe, Ireland and parts of the United Kingdom. The result [was] likely to be heavy investment in such regions – on new roads, bridges, sewers and energy supplies, factories, tourist developments, and changes to established patterns of agricultural production" (House of Lords, 1989b, paragraph 40). The Funds were indeed said to be creating a "development which is faster perhaps than can readily be controlled in environmental aspects" (House of Lords, 1989b, paragraph 41).

In addition to formulating new environmental policy, Ripa di Meana – nicknamed Carlo the Ripper (White and Wolf, 1991) and the Grim Ripa (Fraser, 1992) by the UK press – was particularly active in his pursuit of the effective implementation and enforcement of EU environmental law, to the annoyance of certain Member States. He is said to have formed a "potent partnership" with Laurens Jan Brinkhorst, the (Dutch) Director General of DG XI from 1987 to 1994 (The Observer, 1991). A third prominent member of this potent team was Ludwig Krämer, a German judge on secondment to the Commission,[73] who joined the ECPS in 1975 and headed the 'Application of Community Law' unit of DG XI (hereafter the Legal Unit) from 1984-1995 (European Commission, 1984b, 1994a, 1995). As head of the Legal Unit, Krämer reported directly to the Director General, until a restructuring of DG XI in 1994/5 (Williams, 1994). Krämer soon gained the nickname 'the Sheriff' because of the uncompromising stance he took towards Member States in breach of EU law (Wurzel, 2002, p.66). As *Environment Watch: Western Europe* commented, "Krämer's unit had its heyday between 1989 and 1992 as the environment commissioner at the time, Carlo Ripa di Meana, aggressively and publicly pursued member states over alleged infringements of environmental legislation..." (cited in Wurzel (2002, p.67)).[74] Other influential members of

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tend to include amendments and updated items of legislation which now account for an increasing proportion of the environmental *acquis* (Table 1)." Jordan et al.'s (1999, pp.382-3) definition of the environmental *acquis* steers what seems a reasonable course, and their data support the view that the years 1987 to 1992 were notably productive in terms of EU environmental policy-making compared with the period before 1987, particularly when one focuses on what they term 'major' EU environmental legislation (i.e. excluding "amendments, Decisions which adopt international conventions and other 'non'-environmental statutes" (Jordan et al., 1999, p.382)). Their data reveal that 74 major pieces of EU environmental legislation were adopted in the 20 years from 1967 to 1986, while 40 major pieces were adopted in the six years from 1987 to 1992 (Jordan et al., 1999, Figure 2 on p.383).

[73] Ultimately for more than 30 years (1972-2004): see UCD (2011).

[74] The quoted passage from Wurzel (2002, p.67) continues, "...sometimes holding news conferences on the issue with Krämer at his side." However, Krämer (pers. comm., 4 October 2013) states that this never in fact happened. It is important to recognise that it was not only DG XI which sought to enforce EU law systematically around this time: as Várnay (2006, p.7) explains, "[Commission President Jacques Delors'] Single Market project was transformed into an action programme by [a Commission] White Paper [of June 1985] which envisaged the legislation of almost three hundred directives until 1992. It was realised that if the Member States did not implement these directives in time and in a correct manner, the great project could easily

DG XI during these years, of particular importance in the context of this thesis, are Stanley Johnson, who joined DG XI from the European Parliament in 1984, having left the ECPS to serve as an MEP from 1979, and took up where he left off as an active policy entrepreneur (Johnson, 2011, 2012); and Claus Stuffmann, former *cabinet* member of Altiero Spinelli, and head of the unit responsible for nature conservation at the ECPS and later DG XI from 1976 to 1994 (European Commission, 1976b, 1995).

Ripa di Meana takes on the UK

By 1991, Commissioner Ripa di Meana – who by this stage was "much loved by Britain's green movement" (Brown, 1991), as well as by environmentalists in other Member States - had crossed swords with the UK government and others on numerous occasions in respect of environmental breaches, "each time with impeccable timing to cause maximum embarrassment" (Brown, 1991). He is said to have had a "flair for publicity" (Brown, 1991), which he deployed "brilliantly, knowing that everywhere in Europe public opinion on environmental issues [was, at least at that time] in advance of the policy-makers" (The Observer, 1991).

However, in October 1991 - right in the heart of negotiations regarding the Habitats Directive, as detailed in chapter 7 below - Ripa di Meana launched what proved to be highly controversial infringement proceedings against the UK government in respect of alleged non-compliance with the Environmental Impact Assessment (EIA) Directive (1985) (European Commission, 1991d), and thereby effectively triggered his own demise as Commissioner. This intervention, which concerned seven construction projects including the M3 motorway extension and its impacts on Twyford Down, Hampshire (Brown, 1992b; Ghazi and Napier, 1991; Linton, 1992), proved particularly controversial, not least because of the political difficulties it created, coming just two months before *the* crucial summit in respect of the Maastricht Treaty in December 1991 (The Observer, 1991), and only a short time before John Major was due to call a general election.

The UK government reacted with "ill-concealed fury" to Ripa di Meana's action (Hardy, 1991). Eurosceptics such as Norman Tebbitt had a field day, decrying "this cardboard Commissioner [who has] come up with the suggestion that we in Britain are neglecting environmental impact" (Moncrieff and Archer, 1991). Then Prime Minister John Major described the Commission's action as "astonishing" and "absolutely how the European

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fail, its advantages would not be realised. The Commission...decided to control the transposition of directives systematically and in case of non-implementation it initiated the [infringement] procedure without any special consideration. It also invited the interested parties to submit complaints which still plays a significant role as a source of information for the Commission about the violation of Community law by the Member States. In order to ensure accessibility for the potential complainants the Commission introduced a complaint form."

Commission ought not to behave" (Usborne, 1991), and wrote directly to Commission President Jacques Delors to complain, giving notice that the UK would now be less likely to support the Maastricht Treaty, due for signature in December 1991 (Usborne, 1991; Wintour, 1991). Ripa di Meana responded in kind, describing the accusation that the UK was being singled out as "offensive and unjust", highlighting the fact that Germany, Spain, Portugal and Italy had received similar warnings, and noting that he would not allow himself to be intimidated (Meade, 1991). "I hear they are calling me Carlo the Ripper," he said. "I'm not the one who wants to rip apart an 8,000-year-old English forest" (White and Wolf, 1991). By the height of the dispute, Ripa di Meana had received over 1,000 letters from the British public, including two death threats, and proudly displayed to a journalist the certificate in his office recording the fact that he had personally adopted one of the chainsaw-threatened oaks from the forest in question (Schoon, 1991).

While all seventeen EU Commissioners had unanimously agreed to the launching of the infringement proceedings against the UK (John, 1991), Ripa di Meana had not, it was reported, sought consent for the "unprecedented" personal letter he sent to the Secretary of State for Transport Malcolm Rifkind (The Observer, 1991), in which Ripa di Meana called for an immediate halt to the construction projects in question on the grounds that they had not been subject to an environmental impact assessment and could cause irreversible damage (Europe Environment, 1991a). Rifkind described himself as "rather irritated" by the intervention of the Commission, which had "some explaining to do", he said (Moncrieff and Archer, 1991). When told that Ripa Di Meana was seen by some as a white knight riding to the European environment's rescue, Rifkind reportedly retorted: "Knights sometimes fall off their horses" (Dynes et al., 1991). And so it would prove.

EU environmental policy enters a defensive period

Commission President Jacques Delors was said to be "furious" regarding Ripa di Meana's intervention, fearing that John Major would interpret the step as calculated pressure as part of the Maastricht negotiations (The Observer, 1991). The decision to launch infringement proceedings had been taken by the Commission, collectively, in March 1991, but the formal infringement letter did not go out to the UK government until October, the intervening months being used for talks between the Commission and the UK aimed at averting legal action (John, 1991). Ken Collins, then Chair of the European Parliament's Environment Committee, reports that he tried to persuade Ripa di Meana to send the letter out months beforehand: "I was knocking on Carlo's door saying, for goodness sake, you really must do something about this, but he waited, and waited, and then the letter came out and, bingo, it

came out precisely at the wrong time" (Wurzel, 1999). The effects were far-reaching, according to Collins:

> "1992 was a particularly difficult year because Carlo Ripa di Meana, for whom I had and have a great affection, timed his intervention on the environmental impact assessment surrounding Twyford Down supremely badly. He sent out his article 169 [infringement] letter just before the Maastricht meeting when the British government, being led by a pro-European Foreign Secretary [Douglas Hurd], had a not very strong Prime Minister [John Major], were in some trouble about the role of Europe, and had Margaret Thatcher throwing in things from the sidelines about Maastricht being a Treaty too far, etcetera, etcetera. And in the middle of all this, the article 169 letter arrives from Carlo, saying, you know, Twyford Down, is a bad thing. We have a complaint. Justify yourself. Immediately that was seized upon by Douglas Hurd as Foreign Secretary, who said we are not going to have the European Commission terrorise us....Carlo had mistimed it completely and inadvertently sparked off the whole debate again about subsidiarity [that is, the principle, recorded in the First Environmental Action Programme and added to the Treaty by the Single European Act (1986), which holds that policy functions should not be exercised by the EU unless the EU is more effective in the operation of the policy than the Member States acting individually (Jordan and Jeppesen, 2000)] in a way that was quite terrible. And environment policy then of course went into a hugely defensive mode. It had not been defensive up until that point, but it became so very, very quickly, in a period of just a few months" (Ken Collins, cited in Wurzel (1999))

Whilst Ripa di Meana's action can thus be seen as a trigger for this renewed debate about subsidiarity, it would be unfair to cite his intervention as the sole, or perhaps even as a major, cause for the retrenchment in EU environmental policy which ensued. As Jordan and Jeppesen (2000, p.65) reflect, the "immediate trigger" for the subsidiarity debate in the early 1990s was the Danish 'no' vote in respect of the Maastricht Treaty. Moreover, they continue, the debate was "merely symptomatic of wider forces of an economic and political nature. It is these forces – notably political disillusionment, concern about competitiveness and recession – that pushed the Brussels agenda in a more minimalist direction, not subsidiarity per se. Subsidiarity is a symptom of these forces not an independent cause of policy change" (Jordan and Jeppesen, 2000, p.73).

Ultimately, the UK government defied the Commission's request to halt work on the development projects in question (Ghazi and Napier, 1991). In response, Ripa di Meana threatened to seek an emergency injunction to prevent work going ahead pending the

outcome of the infringement proceedings (Brown, 1992a; Ghazi and Napier, 1991), but events overtook him before this threat could be effected. In March 1992, Ripa di Meana warned that if the EU did not have a "strong, unambiguous position" on certain key policy issues, he would not attend the Earth Summit in Rio in June 1992, which would "become a carnival of declarations in Copacabana" (Greenwire, 1992a) and little more than "an extended cocktail party" (Palmer, 1992). He repeated this threat in May, commenting that if there is "a rush to a low-level compromise [in respect of what became the UNFCCC climate change agreement], there is no need for an EC Commissioner in Rio" (Jackson, 1992). Ultimately Ripa di Meana followed through on his threat and did not attend the Earth Summit, but he only announced his non-attendance after Commission President Jacques Delors had announced that he himself would not be attending (Wolf, 1992c).

Rio in 1992: a "parade of vanity and hypocrisy"

On 30 May 1992, Ripa di Meana published in *The Guardian* newspaper[75] an extraordinary personal account of his reasons for staying away from Rio (extraordinary in the sense that it is inconceivable to imagine any subsequent EU Environment Commissioner having been as forthright). The Earth Summit, he wrote, "has been betrayed before it has begun. The culprits are the Americans, who have won the battle of the lowest common denominator - profiting from the diplomatic complicity of all those (the Europeans among them, the British first and foremost) who have been content to pour out documents and declarations of "constructive ambiguity"" (Ripa di Meana, 1992). And so the piece continued. Ripa di Meana had decided not to attend this "parade of vanity and hypocrisy," at which the prospective agreements on climate and biodiversity (what became the UNFCCC and the Convention on Biological Diversity, respectively) had been "stabbed to death in preliminary negotiations" (Ripa di Meana, 1992). The conference, Ripa di Meana continued, could be nothing more than "a media parade, a luxury container with no content." "Whose fault is it?" he asked. "The winner of that prize is, undoubtedly, the US which was, is and will remain the great polluter of our planet. But the Europeans have been worse than Esau: for a plate of lentils - a promised softening of the US position at Gatt - they have sold themselves and have "surrendered" to the electoral demands of the Bush administration and even to the intransigence of some countries in the process of developing in the area of forests and biodiversity. Two screens behind which they can hide their own uncertainty, despite efforts from the Brussels Commission. The world's eco-diplomacy has shown its limitations: to have George Bush at Rio, it has renounced the possibility of obtaining results and has prized

[75] The original version having been published in the Italian newspaper La Stampa (Ripa di Meana, 1992).

form over substance. There will be a party; instead of being a party to celebrate the Earth, it is in danger of revealing itself as its funeral wake."

Ripa di Meana nudged out by Delors

While certain EU Member States, such as Germany and Denmark, are reported to have privately applauded the Environment Commissioner's decision to stay away (Palmer, 1992), Ripa di Meana is said to have been embarrassed by Jacques Delors' (U-turn) decision to attend the Earth Summit, in response to pressure "from parties supporting an active EC role in environmental policy" (Wolf, 1992c).[76] Immediately following the Summit, Delors was reported to be actively looking at ways in which the Commission could hand back powers to EU Member States, with environment policy seen as a likely target (Walker, 1992; Wolf, 1992a). It therefore perhaps came as little surprise to observers when, on 29 June 1992 - just two days before the UK government took over the rotational Presidency of the Council of the EU - it was announced that Ripa di Meana would be standing down as Environment Commissioner with immediate effect,[77] "assisted by a little push from within the Commission" (Meade, 1992); specifically, officials in London and Brussels "hinted broadly" that Ripa di Meana had been given a "nudge" by Jacques Delors (Marshall, 1992). "He has been a difficult man to deal with," commented a British official, "because he believes so fervently in green issues that he has lost touch with political reality and political protocol. At a time when the EC may be considering handing some environmental powers back to national governments, it is appropriate that Ripa will buzz off back to Rome," the official added (Fraser, 1992).

With Ripa di Meana's departure, DG Environment lost, and has arguably since lacked at Commissioner level, the "dynamic leadership which allowed it to 'punch above its weight' in internal Commission battles" (Ward, 1997, p.180).[78] That said, Commissioners (and

[76] There is of course every possibility that Ripa di Meana was negotiating a new job for himself while the Rio summit was ongoing. After all, he became Italian Minister for the Environment immediately on leaving his role as Environment Commissioner (Fraser, 1992).

[77] Note that this timeline of events, which is based on contemporaneous sources, differs from one provided recently by Wurzel (2012, p.223), who writes: "The inability of the Environmental Council to adopt an EU-wide carbon dioxide/energy tax led to the resignation of the outspoken Environmental Commissioner, Ripa di Meana, a few months before the 1992 UN Rio summit [held from 3-14 June 1992]. The Commission was therefore only represented in Rio by an acting Environmental Commissioner and Commission President Delors who, however, showed overall little interest in environmental issues." This account would appear to be in error.

[78] Schön-Quinlivan (2013, p.97-8) surveys the post-Ripa di Meana history of EU Environment Commissioners thus: "Ripa di Meana was eventually replaced by Karel van Miert for an interim period of six months until a full-time replacement could be found. Yet Van Miert supported what had been done before him and described environmental policy as 'one of our most successful policies, and one of the best understood' (Cini, 2003: 88). Between 1993 and 1995, a cautious Greek Commissioner, Yannis Paleokrassas, took charge. Despite making it clear that he believed in the importance of environmental issues, he did not have a strong public impact....Between 1995 and 2005, two very outspoken women were appointed as environmental Commissioners, Ritt Bjerregaard and then Margot Wallström. Bjerregaard ended up being marginalised within

Commission officials), whatever their personal attributes, are of course to some degree constrained or freed by the times in which they operate: as Wurzel (2008a, pp.82 and 74) comments, "Individual Commissioners can make a difference to the chances of a particular DG getting dossiers adopted by the College of Commissioners. An energetic commissioner who has good networking, brokering, and presentational skills is likely to increase the role played by a particular DG. However, the actual influence of the environmental commissioner also depends on wider context variables such as the current level of public environmental awareness and economic climate...Ripa di Meana's strategy would have been untenable without the unprecedented upsurge in public environmental awareness in the early 1990s."

The same is true of officials below the level of Commissioner, from Director General down, who arguably have a more influential role than the Commissioners themselves, since the latter simply cannot have a detailed grasp of all the dossiers in their portfolio (Johnson, 2011). As Stanley Johnson comments, "if you were to look at the evolution of Community environmental policy and say how much is owed to the Commissioners and how much is owed to people like Carpentier, and Brinkhorst [Directors General], I would frankly have to say the weighting must go very much to the *fonctionnaires* [civil servants], and not to the Commissioners. No fault of theirs, really, but how could they possibly know the dossiers?" (Johnson, 2011, p.30). Michel Carpentier, for example, clearly viewed strength of personality as an important force in itself, commenting: "It is essential to make decision-makers in other DGs realise that environment should be involved in their policies. The situation now is not good enough. It is largely a matter of the personal power of the DG and the will of the Commission....We have a *rapport de force* with the other DGs. At first they ignored us, but they have seen the progress we have made and now, I think, we have a good position among the others. The Commission is like any other big bureaucracy. Relations between the people involved, more than anything else, will determine how much account is taken of environmental considerations – or of anything else – in establishing policy" (Caufield, 1981, p.417). As Stanley Johnson reflects, "When I think back on the evolution of EU environmental policy, I am constantly struck by how much it owes to the dedication of brilliant men like Carpentier and Brinkhorst and, of course, to some notably able and committed EU Environment Commissioners, like the Italian Carlo Ripa di Meana and the United Kingdom's Stanley (now Lord) Clinton-Davis" (Johnson, 2009).

Subsidiarity and 'hit lists' of EU environmental legislation

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the College when she publicly criticised her colleagues. Wallström was regarded as a much more active Commissioner; she was instrumental in concluding the ratification of the Kyoto Protocol. In 2005, the environmental portfolio went back to a Greek Commissioner, Stavros Dimas, who, like Paleokrassas before him, kept a low profile. It is too early to assess the impact of the Slovenian Commissioner, Janez Potočnik."

Immediately in the wake of Ripa di Meana's departure, Boris Johnson – Stanley's eldest son, now Mayor of London - wrote in the Sunday Telegraph that "the wolves began to circle the sheep-fold" and that "the environment has been chosen as the sacrificial lamb for the altar of 'subsidiarity'. Something, anything, says (EC President) Jacques Delors, must be done to convince the world that the commission has lost its lust to interfere in national life" (Greenwire (1992c)). Johnson continued that the EU was preparing to repeal or amend 60 to 70 environmental directives, and added: "The process should be resisted" (Greenwire (1992c)). However, with Jacques Delors having expressed his willingness to sacrifice environmental goals to progress the wider EU project and the specific goals of establishing the common market and monetary union, "the way seemed clear for a root and branch reform of the environmental *acquis*" (Jordan and Jeppesen, 2000, p.65).

Golub (1996b, p.700) continues the history thus, "Near the beginning of 1992, soon after the Treaty on European Union had been signed at the Maastricht summit, Britain made a concerted effort to block a variety of environmental proposals which 'interfere(d) unnecessarily with British sovereignty' on the grounds that they violated the subsidiarity principle." The Times of London reports that on 6 August 1992, then Foreign Secretary Douglas Hurd asked all UK government departments to search for European Community laws which should be sent to "the knacker's yard" (Gunn, 1992). Golub (1996b) continues, "[such] efforts were reflected in Vice-President of the Commission Leon Brittan's statement that 'environmental policy should be the first target for subsidiarity' and that powers in this area should be 'repatriated' – returned to national parliaments... Two hit-lists were then submitted to the Commission prior to the December 1993 Brussels Summit, one by Germany, the other by France and Britain." The German list was much shorter than the French/British list, and contained only one environmental item (a proposal for a directive on zoos)(Wurzel, 2002). In contrast, the list submitted jointly by Britain and France comprised twenty-four pieces of EU legislation, seven of which were environmental policy measures (Wurzel, 2002); unsurprisingly, perhaps, given the dispute over Twyford Down, the Environmental Impact Assessment (EIA) Directive (1985) was amongst the instruments targeted for repatriation (Golub, 1996b; Hey, 2005). Nevertheless, that instrument - as well as all other existing items of EU environmental legislation (Wurzel, 2002) - ultimately escaped unscathed, and, as Jordan (1998a, p.20) notes, the period from 1992 onwards did not result in "the wholesale repeal of green laws that some environmentalists feared. Rather, events have shown that environmental concerns have a power of their own that will be difficult to dislodge." Thus, as Jordan and Jeppesen (2000) argue, far from undermining the environmental *acquis*, the subsidiarity debate of the early 1990s instead succeeded in demonstrating the robustness of EU environmental policy.

In the context of the present thesis, this episode highlights a very important point: far from being weak and lacking in importance, as environmental issues and DG Environment were once regarded within the EU (Cini, 1997, 2000; Jordan, 1998a), EU environmental policy generally – and impact assessment obligations specifically – had in the early 1990s and have now the power to capture the attention of heads of state and governments, and indeed the potential to change the course of EU integration. Moreover, when one considers the relative weakness of the Environmental Impact Assessment Directive (Kingston, 2010; Ryall, 2009), which nevertheless caused such political problems for the UK government and the Commission in the run up to the Maastricht Treaty, one can begin to imagine the significance of the more onerous Habitats Directive (1992), adopted just as the golden era in EU environmental policy-making was drawing to a close.

3.2.2 Summary of first and second phases

The period from the Stockholm Conference of 1972 to the Earth Summit in Rio in 1992, broadly coinciding with the EU's First Environmental Action Programme in 1973 to the Maastricht Treaty in 1992, can be seen to represent an expansive, transformative phase in EU environmental policy-making, with the golden era from 1987 to 1992 a particularly productive patch. As Jordan (1998a, p.17) comments, "It is doubtful that anyone in the early 1970s could have envisaged the vast role that the EU would eventually play with respect to the environment." Yet already by 1992 it was virtually impossible to understand the environmental policy of any EU Member State without referring to the EU's own policy stance (Haigh, 1992). This was perhaps part of the problem, at least from the perspective of certain Member States, and one trigger for the "weakening and stagnation of the environmental policy dynamics" which began in 1992 (Knill and Liefferink, 2013, p.25). As Jordan and Jeppesen (2000) argue, there was a clear watershed moment in the early 1990s, with the extent to which policy competences had transferred to the EU institutions finally dawning on Member States and the wider public. The Commission then arguably changed gear: after "25 years of spectacular [policy] growth", the Commission increasingly focused in the 1990s and beyond on horizontal issues such as the integration and implementation of existing laws, with EU environmental governance and the allocation of political competences undergoing "unprecedented levels of scrutiny" (Jordan and Jeppesen, 2000, p.73).[79]

[79] Arguably, one result of this increased scrutiny has been a visible weakening of the obligations imposed by EU environmental legislation. Two examples spring immediately to mind: first, the highly restrictive definition of "plans and programmes" in the Strategic Environmental Assessment Directive (2001), rendering that instrument of limited worth; and the extremely limited circumstances in which the species and habitat protection provisions of the Environmental Liability Directive (2004) are triggered.

3.3 Third phase: 1992 to present day - selective activism and implementation of the *acquis*[80]

A sharp decline in new EU environmental legislation

Very soon after political agreement regarding the Habitats Directive had been reached in December 1991 (Sharp, 1998), a general slowdown in new EU environmental policy-making began in earnest, characterised by numerous factors, including a sharp decline in the amount of new EU environmental legislation being proposed (Ward, 1997). This broad trend has arguably continued to the present day,[81] with Groote (2012), current Chair of the European Parliament's Environment Committee, commenting as recently as September 2012 on the dwindling environmental output of the EU, citing amongst other things the economic crisis and a shift away from DG Environment initiatives towards initiatives in the monetary and economic field. Even more recently, in March 2013, the EU's most senior civil servant, Catherine Day, is said to have been actively blocking environmental proposals, believing that the Commission's work should currently be focused on "growth and the euro" (ENDS Europe, 2013b). Significantly, the Seventh Environmental Action Programme (2013), which covers the period to 2020, effectively accepts the lack of political impetus for new EU environmental legislation, and focuses instead on the (admittedly important) challenges of what current EU Environment Commissioner Potočnik (2012) calls the four 'i's: better implementation of existing EU environmental legislation; better information, by improving the scientific evidence base; increased investment for the environment; and full integration of environmental issues into other policies.

Defending and implementing what has already been agreed may prove a big enough challenge on its own for the European Commission, to say nothing of developing ambitious new legislation, because the EU environmental *acquis* has again come under sustained pressure in recent years. Two examples of this are the joint letter sent to the Wall Street Journal in December 2012 by government ministers from Portugal, Spain, France, Italy and Germany, calling for a "constructive review of European horizontal policies that have an impact on industrial competitiveness," including environmental policy (Soria et al., 2012); and UK Prime Minister David Cameron's January 2013 speech - announcing plans to renegotiate the UK's relationship with the EU, to be followed by an in-out referendum - during which he commented, "we need to examine whether the balance is right in so many areas where the European Union has legislated including on the environment...Nothing

[80] Note Wurzel's (2008a) division of this period into a "sedate phase" from 1992-2005 and a "selective activism" phase since 2005.

[81] Though cf. Hey's (2005) argument that there was a renaissance in EU environmental policy-making between 1997 and 2003, as well as Wurzel's characterisation of this period, mentioned in the note immediately above.

should be off the table" (Cameron, 2013). As Tony Juniper, former head of Friends of the Earth, commented, "This was no throwaway line" (Juniper, 2013).

Underlying causes of the decline in new environmental policy-making

Ward (1997) identifies several causal factors behind the decline in new EU environmental policy-making since 1992, to which several others can be added: first, there were the high-profile doubts over the EU integration process around the time of the Maastricht Treaty (1992), including the Danish "no" vote on 2 June 1992 (Palmer and White, 1992),[82] and the 1991 dispute between the UK government and the Commission regarding the Environmental Impact Assessment (EIA) Directive (1985), detailed above, which was one trigger for the renewed debate about subsidiarity which sent EU environment policy into a "hugely defensive mode" in the post-Maastricht period (Ken Collins, cited in Wurzel (1999, p.20)).

Second, the economic difficulties and latterly crises experienced since the early 1990s have arguably transformed the policy debate from one in which environmental policy was high up the agenda to a situation in which the focus within the EU has instead been on competitiveness, stimulating growth, and job creation (Ward, 1997). Indeed, as Commission President José Manuel Barroso - whose interest in environmental issues has been largely restricted to climate change (Wurzel, 2008a) - commented in early 2005: "I have three children: the economy, our social agenda, and the environment. Like any modern father, if one of my children is sick, I'm ready to drop everything and focus on him until he is back to health. But that does not mean I love the others any less" (Rennie, 2005). Of course, the EU's economic problems have prolonged for an extended period, and show no immediate signs of abating. Increased competition in light of international market liberalisation has also played its part in changing the policy dynamics: the EU's Member States have become increasingly unwilling to impose strict environmental standards which might impact negatively on the competitive position of EU industries (Knill and Liefferink, 2013).

A move away from command and control regulation

A concomitant effect of these developments has been a move away - at least in principle - from traditional command and control regulation towards new policy approaches, triggered in part by the Fifth Environmental Action Programme, published in 1993 (Knill and Liefferink, 2013). This new approach favours instruments which are "less legally demanding" (Knill and Liefferink, 2013, p.28): e.g. economic incentives and self regulation. In contrast, legally demanding command and control instruments – of which the Habitats Directive (1992) is a prime example (Wurzel, 2008c) – emphasise direct regulation, strict standards, and

[82] Two days after the Habitats Directive (1992) was adopted.

intervention; that is, such instruments prescribe minimum standards (e.g. in the case of the Habitats Directive: the circumstances in which an impact assessment is required, and the circumstances in which development consent can be granted by national authorities in light of the conclusion of the assessment), and assure compliance through monitoring and sanctions (e.g. in the case of the Habitats Directive: Article 17 reporting requirements, monitoring by NGOs, and sanctions via European Commission-led infringement proceedings and the national and EU courts)(Rittberger and Richardson, 2003).

As Rittberger and Richardson (2003) explain, proponents of deregulatory policies in several Member States began to question both the effectiveness of state intervention and the economic efficiency of command and control regulation. As a result, this traditional regulatory style came to be viewed with increasing scepticism, "reflecting the almost hegemonic power of the 'competitiveness' frame" (Rittberger and Richardson, 2003, p.578). Holzinger et al. (2006) differentiate two strains of the new policy approach: first, from the mid-1980s, the Commission began advocating economic incentive-based instruments, such as environmental taxes, tradable permits and so on. Second, from the beginning of the 1990s, "context-oriented instruments" began to emerge (Holzinger et al., 2006, p.404). As a result, according to Knill and Liefferink (2013, p.28), "the definition of uniform legally binding limits is no longer the main focus of EU environmental policy. Instead, the Commission increasingly is focusing on more flexible and less harmonization-oriented regulatory concepts, which allow the member states greater room to manoeuvre with regard to the implementation of policies. These new instruments are marked in particular by the fact that they are legally less demanding for the member states than previous measures."[83]

A third causal factor was Germany's reunification in 1990. As Ward (1997) explains, Germany has traditionally been regarded as a leader in EU environmental policy, attempting positively to influence the EU environmental agenda with its own relatively high standards. However, the economic costs imposed by political reunification arguably led to environmental issues being deprioritised by the German government (Hey and Brendle, 1994). Indeed, following reunification, discussions in Germany regarding the modernisation of environmental policies "came to a standstill, whereas the economic problems of reunification, especially high unemployment, became a primary concern" (Hey, 2005, p.24).

The fourth causal factor cited by Ward (1997) is internal European Commission politics, reportedly resulting in a decline in the position of DG Environment within the Commission, particularly since the departure of Carlo Ripa di Meana as Environment Commissioner in

[83] Interestingly, despite this rhetoric of a change in policy approach, Rittberger and Richardson (2003) argue that only limited policy instrument innovation has in fact taken place (as at 2003), such that command and control instruments remain the predominant means of addressing environmental issues at EU level.

1992, replaced first by a temporary Commissioner, Karel Van Miert, and next by his permanent replacement, a "cautious" Greek Commissioner (Schön-Quinlivan, 2013, p.97), Ioannis Paleokrassas, formerly Greece's Minister for Finance, who was seen by some as interested only in economic instruments (Wurzel, 1999), reinforcing the point made above regarding a switch from command and control regulation as the favoured policy approach to new-style policy approaches. As Ken Collins, former Chair of the European Parliament's Environment Committee, comments, "Paleokrassas was interested [in economic instruments], because Delors was interested in economic instruments, and Paleokrassas was an economist, a transport economist, when he arrived. He was interested in economic instruments, but he also recognised that this was the kind of thing that would interest Delors. Delors was not, and never has been a kind of ethical environmentalist" (Ken Collins, cited in Wurzel, 1999, p.21).[84]

High profile departures and moves

As one might expect, other high profile departures and moves were not far behind Carlo Ripa di Meana's. Influential Director General of DG XI Laurens Jan Brinkhorst left to become an MEP in 1994 (Europe Environment, 1994), leaving DG XI's Legal Unit, "and especially its head Ludwig Krämer, open to attacks from powerful opponents" (Wurzel, 2002, p.70). The Legal Unit was then "downgraded" within DG XI - with the head of the Legal Unit no longer reporting directly to the Director General - and Krämer was moved sideways, to become head of the Waste Management Unit (Wurzel, 2002, p.70). As Wurzel (2002, p.70) records, a contemporaneous report in *Environment Watch: Western Europe* stated that: "Krämer's effective demotion after 10 years in the job and the downgrading of his unit are widely seen as politically motivated revenge by national governments for his strict interpretation of EU environmental law and his uncompromising pursuit in the European Court of Justice of member states that fail to properly transpose or implement them." A resolution protesting the restructuring of DG XI and the treatment of Ludwig Krämer in particular was adopted in February 1995 by 60 well-known experts in EU environmental law, but this failed to alter the outcome (Europe Environment, 1995).

The longer-term ramifications of this period are difficult to estimate, albeit there are some indications that, post these institutional changes, politics became a more prominent factor in

[84] By way of example of Delors' influence: in 1994, reportedly at Delors' behest, the Commission proposed amendments to the Birds Directive (European Commission, 1994b), Delors having singled the Directive out and wanting to support French hunters (Gammell, 2013). The amendments were reportedly prepared very rapidly and in secret; e.g. the RSPB, which was well informed generally about everything relating to the Birds Directive, was caught unprepared, there having been no prior consultation (Gammell, 2013). Nonetheless, the RSPB mobilised quickly and subsequently helped to defeat the proposed changes in the European Parliament and later in the Council, and the proposal was eventually withdrawn (Gammell, 2013).

DG Environment's enforcement decisions than had previously been the case (Jackson, 2010).[85] Moreover, it seems that history may be repeating itself, with DG Environment's Legal Unit having been significantly restructured in February 2013, involving the departure of its head, Jean-François Brakeland, amongst other things: "Environmental groups fear that the reorganisation of the legal service, though far less drastic than was originally planned, may have been motivated by a push to downgrade environmental enforcement to appease certain member states...An earlier proposal to break up the unit entirely was abandoned following a "backlash" from within and outside the commission, a source at a Brussels NGO said. "What was originally behind it was to get on better terms with some of the more influential member states by weakening enforcement capacity," he added" (ENDS Europe, 2013a).

The effects of EU enlargement

Changes in the composition of the EU as a result of EU enlargements arguably represent a fifth contributory factor to the slowdown in EU environmental policy-making since 1992. Indeed, while one might have expected the gradual shift from the requirement for unanimity to qualified majority voting for the adoption of EU environmental legislation (Wurzel, 2013) to have resulted in strong EU environmental legislation going beyond the lowest common denominator, much in fact depends on the coalition possibilities in the Council of Ministers (Knill and Liefferink, 2013). Thus, whilst the accession to the EU of traditionally environmentally progressive states such as Austria, Finland and Sweden in 1995 arguably made environmentally ambitious Member States more influential within the Council, the accession of thirteen central and eastern European countries since 2004 might be expected to have had the opposite effect, given the focus of those countries principally on economic as opposed to environmental policy development (Knill and Liefferink, 2013).

Political and economic developments

Sixth, political and economic developments have also had a role to play: e.g. since c.2005, the EU has moved to the right politically. Indeed, as Jordan and Adelle (2013c) highlight, at the end of 2011 only three of the then 27 EU Member States were led by centre-left parties – namely, Austria, Denmark and Slovenia. However, the number of centre-left parties in power in the EU has grown since then, and now totals eight of the now 28 Member States (France, Belgium, Denmark, Austria, Slovakia, Romania, Malta and Croatia).[86] This political

[85] Schön-Quinlivan (2013, p.104) hints at this when she says: "Over time, DG ENV matured and settled into the Commission's ways of working. It changed its approach and started focusing on the *politics* of the environment rather than just the technical details."

[86] Croatia, which joined the EU in 2013, is currently led by a coalition headed by a centre-left Prime Minister (Stagno-Navarra, 2013).

balance is significant because "environmental policy has tended to advance further and faster when parties of the centre and centre left are in control" (Jordan and Adelle, 2013c, p.xix). Similarly, the European Commission has itself moved "considerably to the Right" under Commission President Barroso, who took up office in 2004 (Hix, 2006, p.20). Further, Euroscepticism has increased since 2005; new treaties and treaty changes have been threatened in national referenda (Jordan and Adelle, 2013c); and a UK exit from the EU appears more possible by the day (Cameron, 2013; The Economist, 2012). Finally, and perhaps most importantly, the economic situation has worsened considerably in recent years. These factors combined have arguably lent weight to the view that support for the EU, as a political project, is at base sustained by economic growth and prosperity, and not by strong environmental policies (Jordan and Adelle, 2013c). As Jordan and Adelle (2013c, p.xx) comment, "there may be hard political limits to an 'ever closer Union'."

Reflecting on the history of EU environmental policy since the early 1990s, we are presented with something of a conundrum: "we are confronted with the paradoxical situation that the increasing legal and institutional anchoring of EU environmental policy [e.g. via changes introduced by the Maastricht, Amsterdam and Lisbon Treaties (Benson and Adelle, 2013; Knill and Liefferink, 2013)] coincides with the stagnation of its political dynamics" (Knill and Liefferink, 2013, p.26). Interestingly, one can contrast this position starkly with the first phase in EU environmental policy, "in which a respectable environmental policy programme was drawn up despite the weak legal and institutional basis" (Knill and Liefferink, 2013, p.26). This is not to say, of course, that the EU has abandoned tackling important environmental issues in this third phase of EU environmental policy: the "selective activism" (Wurzel, 2008a, p.76) evident in its attempts to adopt a leadership role in international climate change negotiations; the ambitious Water Framework Directive (2000); the so-called REACH Regulation (2006) on chemicals (Registration, Evaluation, Authorisation, and Restriction of Chemicals); and the controversial Environmental Crime Directive (2008), would contradict any such argument. Nor is it the case, of course, that DG Environment's civil servants have worked any less diligently on environmental issues during this third phase than they and their predecessors did during earlier phases. Indeed, their achievements in this third phase are worthy of particular note given the difficult economic and political context. But it is nevertheless the case that the political and institutional dynamics within the EU have changed in recent years, as outlined above, such that there is an increasing focus not merely on better implementation of existing EU environmental laws, but also on defending such laws from attempts to weaken existing rules (via renegotiation, for example) and from attempts to see environmental policy matters repatriated to the national level.

3.4. Summary

What we have identified, then, are three broad phases in EU environmental policy: the first phase, from 1958 to 1987, was characterised by rapid environmental policy development, notwithstanding the absence of a specific legal base for making environmental legislation at EU level; the second phase, from 1987 to 1992, was a golden era, in which the EU environmental *acquis* grew rapidly and came of age; and the third period, from 1992 to the present day, has been marked by something of a weakening and stagnation of the environmental policy dynamics as well as by a very marked economic deterioration in recent years. The focus has therefore gradually shifted during this third phase towards better implementation and integration of existing EU environmental laws.

Interestingly for present purposes, these three phases dovetail neatly with the key phases in the development of EU nature conservation policy: the Birds Directive (1979) was negotiated and adopted during the first phase, "against all odds" (Meyer, 2010b, p.179); the Habitats Directive (1992) was negotiated and adopted during the second phase; that is, when the policy and institutional dynamics were strong, and when command and control regulation remained very much in vogue; and the Habitats and Birds Directives have both fallen to be implemented largely within the third phase, characterised by a weaker (and weakening) environmental policy landscape.

PART II: THE FIRST PHASE (1958-1987):

THE BIRDS DIRECTIVE AND THE ROAD TO THE HABITATS DIRECTIVE

Chapter 4: The history of habitat protection in the Birds Directive

4.1 Introduction

Bird conservation has a long pedigree in Europe.[87] By the mid-19th century, concern about the killing of native birds for their plumage led to early conservation legislation in the UK such as the Sea Birds Preservation Act 1869 and the Wild Birds Protection Act 1880 (RSPB, 2009). However, the trigger for the formation in 1889 of the (then all-female) Society for the Protection of Birds - precursor of the Royal Society for the Protection of Birds (RSPB), which was granted its Royal Charter in 1904 - was "the wearing of ever more exotic plumes" in ladies' hats and so on (RSPB, 2009). The RSPB was not the only conservation pioneer in Europe, of course, with Germany's *Deutsche Bund für Vogelschutz* (DBV; the German League for Bird Protection) founded in 1899 (Chaney, 2008), and France's *Ligue de Protection des Oiseaux* (LPO; League for the Protection of Birds) founded in 1912, for example (Meyer, 2010a). Similarly, bird conservation groups mobilised relatively early at the international level: e.g. the organisation now known as BirdLife International was established as long ago as 1922 (Bowman, 1999).

In terms of legal instruments, by the time the Treaty of Rome (1957) was signed, there were already several international bird conservation conventions in force with European countries as parties, including, for example, the Convention for the Preservation of Wild Animals, Birds and Fish in Africa 1900; the Convention for the Protection of Birds Useful to Agriculture 1902; and the Convention for the Protection of Birds 1950 (Bowman, 1999). Following these early international conservation initiatives, the 1960s saw a widespread public awakening to the issue of bird protection, triggered by a simple letter written to the *Boston Herald* in January 1958 by Olga Owens Huckins (Carson, 2002). The letter was copied to Rachel Carson, already a well-known natural history writer, who was inspired to write the now classic *Silent Spring*, which, when published in 1962, brought to public attention the impacts on birds of the widespread use of chemical pesticides, and helped to launch the modern environmental movement (Carson, 2002; Lytle, 2007). Against this backdrop, the hunting of migratory birds in Italy, Belgium and France (amongst other places) came to be an additional issue of major concern in Europe in the late 1960s, with national organisations such as the *Lega nazionale contro la distruzione degli uccelli* (the Italian

[87] For overviews of the history of bird conservation, see Boardman (2006), Bowman et al. (2010), and Bowman (1999).

League against the Destruction of Birds) joining forces with NGOs elsewhere in Europe to campaign regarding the issue (Meyer, 2010b).

The intergovernmental Council of Europe - an entirely separate organisation from the EU - was active during this period, passing two Resolutions on the subject in October 1967, and an additional Resolution in 1973 (Council of Europe, 1967a, b, 1973). Interestingly, all three Resolutions focused on habitat protection as well as controlling hunting and pesticide use. For example, one of the 1967 Resolutions recommended member governments (which included the six founding Member States of the EEC, as well as Denmark, Ireland and the UK, the three countries which would join in 1973): "To take any measures required for the greater and more effective protection of rare or disappearing species of birds in Europe, such measures to cover not only their legal protection but also their habitats and conditions of life" (Council of Europe, 1967a). However, a central problem with the Council of Europe's work was its lack of enforceability: as Hans Edgar Jahn, a German MEP who worked tirelessly on bird conservation issues (Meyer, 2010b), commented in 1973, "Experience has shown, that, despite all its good intentions, the Council of Europe in practice moves very slowly and must in any case confine itself to the formulation of recommendations" (European Parliament, 1973). Thus, as Meyer (2010b) puts it, those who lobbied the EU institutions regarding the need for EU bird conservation legislation did so because they regarded the Council of Europe as ineffective.

4.2 Agenda-setting: Activism and the First Environmental Action Programme (1973)

While the Commission's first Communication about an EU environmental policy, published for comments in July 1971, contained a generic endorsement of conservation as a key task of the EU (European Commission, 1971b), the Communication contained no proposals for EU level action in the fields of nature conservation generally or bird conservation specifically.[88] This reflected the position expressed by the Commission in March 1968 in response to a question posed in the European Parliament by the German MEP Hans Richart, who asked whether the Commission had any plans to propose harmonisation of bird protection legislation or, if it felt that the EU did not have legal competence, whether the Commission would facilitate an intergovernmental agreement. The Commission responded that it did not regard the EU as competent in the area, nor did it feel in a position to make any suggestions to the Member States regarding the issue (Meyer, forthcoming). And yet, when the EU came to adopt its First Environmental Action Programme (1973) just two years later, bird

[88] The closest the Communication comes is a section on the "Development and improvement of open spaces and the natural environment", which related to agricultural policy (European Commission, 1971b, p.19).

conservation was included as a subject for priority action, notwithstanding the subject's only tenuous link to the common market.

There are several potential explanations for this. First, MEPs and bird conservation NGOs - in some cases working together - were active in the intervening period, calling for action to conserve migratory birds, particularly in light of the "mass extermination" of wild birds in Italy, France and Belgium (Jahn, 1975; Meyer, 2010b). To that end, for example, Luxembourger MEP Jean-Pierre Glesener posed a written parliamentary question to the Commission on 10 September 1971 regarding the "scandalous extermination" of migratory birds in Belgium and Italy, and asked the Commission whether it intended to propose common legislation to protect such birds (Glesener and European Commission, 1971). The Commission responded that, whilst it had not proposed such measures in its first Communication, it did not rule out the possibility of proposing such measures at some future date (Glesener and European Commission, 1971). In April 1972, at the "Industry and Society in the European Community" conference in Venice (the conference mentioned in chapter 3, which Robert Toulemon, then Director General of DG III, credits as an important factor in the future development of a common EU environmental policy), then Commission President Mansholt spoke of the need to tackle the destruction of birds (Seefeld and European Commission, 1972). When questioned the following month by the European Economic and Social Committee[89] – an organisation intended to form a bridge between the EU and civil society – as to why the Commission had not included the issue of migratory birds in its Communication regarding an environmental action programme, Robert Toulemon stated that the EU "would surely be able to act in this area if the [Economic and Social Committee or the European Parliament]" so demanded, in effect inviting such a demand, as Meyer (2010b) argues.

Hans Edgar Jahn – the "MEP most committed to the bird protection issue" (Meyer, 2010b, p.181) - followed this up with a written question to the Commission on 15 February 1973, in which he highlighted the fact that, since the date of MEP Glesener's question in 1971, Belgium had banned bird-catching throughout its territory, but Italy had repealed a similar protective law in January 1970, and since then around 200 million migratory birds had been killed each year in Italy (Jahn and European Commission, 1973). MEP Jahn noted that this had triggered worldwide protests, including calls for boycotts of Italian products and services (Jahn and European Commission, 1973). In its reply, the Commission said that, "For a number of weeks now the Commission has been receiving letters of protest and petitions

[89] The question was posed by "the former Commission official and head of the Luxembourg Chamber of Commerce Carlo Hemmer" (Meyer, 2011c, p.81).

from individuals, animal protection societies and action committees"[90] and noted that "the Commission is at present considering the advisability of incorporating proposals on this subject in the [first] action programme on the environment, now under examination" (Jahn and European Commission, 1973). Jahn reinforced the point in a report on behalf of the Parliament's Committee on Public Health and the Environment, published in June 1973 - just one month before the First Environmental Action Programme (1973) was adopted - in which he called on the Commission to include in the Action Programme "a proposal for the prohibition of bird destruction throughout the Community" rather than merely promoting joint action by the Member States in the Council of Europe and other international organisations (European Parliament, 1973).

A Birds Directive: to make Europe popular in the UK?

Such actions by MEPs, NGOs and individuals were clearly one trigger for the inclusion within the First Environmental Action Programme (1973) of wording raising the possibility of EU legislation on bird conservation (Jahn, 1975, p.10). A second potential contributory factor is provided by Hubert David, founder and first Secretary General of the European Environmental Bureau, a Brussels-based NGO coalition founded in 1974, who recalls that "it has been said many times that the Birds Directive was proposed by the Commission to make Europe popular in the UK" (David, 2012). The UK, which has a longstanding and very popular[91] tradition of bird conservation (RSPB, 2009), also has a longstanding and popular tradition of Euroscepticism (Forster, 2002). The UK had of course joined the EU in January 1973, six months before the First Environmental Action Programme (1973) was adopted (Johnson, 2011; Vonkeman, 2003), but the first decade of the UK's EU membership was turbulent (Dinan, 2007). Almost immediately on entering the EU, a Labour government under Harold Wilson came to power, having promised in its manifesto to renegotiate the terms of the UK's accession and put the result to a referendum (Dinan, 2007). The other EU Member States were "dismayed", but this is indeed what happened, and although continued EU membership was carried by a large majority, the issue would raise its head again less than five years later, in 1979, when Margaret Thatcher came to power and sought (and ultimately

[90] According to Fairbrass and Jordan (2001, p.9), citing Alistair Gammell, then of the RSPB, a "sustained campaign by Dutch and German citizens directed at the Commission and European Parliament proved to be particularly influential."

[91] Toke and Marsh (2003, p.241) record that the "RSPB is, after the National Trust, the largest NGO in the UK. It has over a million members, a figure that is significantly larger than the combined memberships of all UK political parties." When the Birds Directive was proposed in 1976 the RSPB already had some 200,000 adult members and a junior membership of 76,000 (Hillaby, 1976); by 1981, two years after the adoption of the Birds Directive, its membership had grown to 441,000 (Meyer, 2010a); and by 1991, its membership stood at 860,000, having grown from a mere 7,000 members in 1955 (Heseltine, 1991). Note also that in 1976 the UK was the first of the then nine EU Member States to accede to the Ramsar Convention on wetlands of international importance, a convention with particular significance for birds (Ramsar, 2012).

won) a large annual budget rebate for the UK (Dinan, 2007, p.1127). It therefore seems perfectly plausible that one factor militating in favour of the Birds Directive was the issue's perceived popularity in the UK. Nevertheless, the UK's then Secretary of State for the Environment, Peter Shore of the Labour Party, who was an "arch Euro-sceptic" (Fairbrass and Jordan, 2001, p.9), reportedly did not want the Birds Directive to be a popular success for the EU (Stuffmann, 1999). His wishes in that regard would ultimately be thwarted: in 1981, two years after the adoption of the Birds Directive, the *New Scientist* reported that "...many environmentalists would like to see a greater [EU] emphasis on nature conservation and land management. Without doubt, the most popular directive so far has been the one to protect wild birds, which has no discernible connection with the EEC's *raison d'être* – trade" (Caufield, 1981, p.417). Michel Carpentier agreed: "The Birds Directive...has been very popular. The House of Commons said that it was the best one we've ever done" (Caufield, 1981, p.417).

In any event, the First Environmental Action Programme (1973) records the official reasons used at the time to justify an EU level policy on bird conservation:

> "Hundreds of millions of migratory birds and songbirds are captured and killed in Europe every year provoking worldwide protests against the countries which allow the trapping of birds.
>
> This massive destruction provokes a serious threat to the ecological balance in Europe, because it causes plant parasites to proliferate. As a result, the campaign against such parasites requires use on a bigger scale of insecticides which are sometimes harmful to man and to the natural environment.
>
> Policy for the protection of the environment should therefore include measures to prevent the large-scale destruction of birds, particularly songbirds and migratory birds, and more generally to protect the existence of certain animal species threatened with extinction."

To that end, the First Environmental Action Programme (1973) called for the promotion of joint action by the Member States in the Council of Europe and other international organisations,[92] and mandated a "study with a view to possible harmonization of national regulations on the protection of animal species and migratory birds in particular", with a deadline of 31 December 1974.

[92] Just three years later, in Brussels in 1976, at the Second European Ministerial Conference on the Environment, Switzerland presented a study recommending the drafting of an international convention on the protection of the fauna, flora and natural habitats of Europe. This would go on to become the Bern Convention on the conservation of European wildlife and natural habitats, under the auspices of the Council of Europe (Ribaut, 2004).

Two points immediately stand out: first, the aim at the time the First Environmental Action Programme (1973) was produced seems principally to have been to address hunting of migratory birds – that is, species protection rather than habitat protection measures; second, the more general stated aim of protecting the existence of certain animal species (other than birds) threatened with extinction was addressed only in a piecemeal manner at EU level until the Habitats Directive (1992) was adopted, many years later.[93]

4.3 Towards a directive on birds

Between the date of the First Environmental Action Programme (1973) and the Birds Directive proposal in 1976 (European Commission, 1976c), the Commission issued a Recommendation to Member States in December 1974 concerning the protection of birds and their habitats (European Commission, 1974a). This Recommendation highlighted the main conclusions of the ornithological study promised in the First Environmental Action Programme (1973), which was produced in the name of the 'Zoologische Gesellschaft von 1858' of Frankfurt-am-Main (the Frankfurt Zoological Society) under the direction of Professor Dr. Bernhard Grzimek (Poltz and Conrad, 1976). The study highlighted loss of habitats as a major issue for European birds in addition to hunting, and the Commission recommended that the Member States, if they had not already done so, should accede as quickly as possible to the recently concluded Ramsar Convention (1971) on the conservation of wetlands of international importance (which had not yet entered into force owing to too few ratifications), as well as the Paris Convention (1950) for the protection of birds, mentioned earlier in this chapter.

The Grzimek study

The ornithological study to inform Commission policy had been awarded to Grzimek, "one of the towering figures in African conservation" (Adams and McShane, 1996, p.xv), who, as the director of Frankfurt zoo, the host of a popular television programme, and German Chancellor Willy Brandt's special representative for the environment from 1970-73, was "easily the most prominent figure in German environmentalism at the time" (Meyer, 2010a, p.96). However, Grzimek was a veterinarian by training, not an ornithologist, despite being considered "an authority on all issues relating to the environment", which served as the "main motivation" behind his appointment to oversee the study, according to Claus Stuffmann, then

[93] Several EU nature conservation and animal welfare laws were passed in the interim period, including: Regulation (EEC) No. 348/81 of 20 January 1981 on common rules for imports of whales or other cetacean products (Whales Regulation, 1981); the first CITES Regulation, of 3 December 1982, on international trade in endangered species, amended many times since (CITES Regulation, 1982); the Seal Pups Directive, adopted in March 1983, in respect of which Stanley Johnson played an important role (Johnson, 2011; Seal Pups Directive, 1983); and the Leghold Traps Regulation, adopted in November 1991, which, amongst other things, prohibits the use of leghold traps in the EU (Leghold Traps Regulation, 1991).

head of DG XI's Nature Unit (Meyer, 2010a; b, p.182).[94] Grzimek was working at the time with Gerhard Thielcke, head of the German section of the International Council for Bird Preservation (ICBP; now BirdLife International) and director of the ornithological station Radolfzell at Lake Constance in Germany, and the ornithological work for the Commission's study was delegated to two PhD students working in Radolfzell, who produced a report which, in the Commission's view, lacked the prestige and quality of an eminent ornithologist, relied heavily on data from Germany, and focused on hunting in Italy, Belgium and France, which "very undiplomatic approach [and the "'undiplomatic' language used" (Meyer, 2010a, p.97)] made it very difficult for the Commission to use the report" (Meyer, 2010b, p.186). The Commission therefore started looking for "more neutral expertise" (Meyer, 2010b, p.186), having been advised internally that they couldn't do anything on the basis of the report (Temple Lang, 2012a).

A petition[95] – No.8/74 'Save the Migratory Birds' – was submitted to the European Parliament, the European Commission, the Council and the Dutch Foreign Ministry on 26 August 1974 by the Dutch NGO *Stichting Mondiaal Alternatief*, supported by partner organisations from around the world, including national and international animal protection societies (Jahn, 1975; Meyer, 2010a, 2011c), and this gave MEP Hans Edgar Jahn, appointed rapporteur by the European Parliament's Environment Committee, another opportunity to press home the need for EU legislation. In the February 1975 parliamentary debate concerning the petition, Commissioner Guido Brunner conceded that the Commission would propose a directive if the Council's Recommendation did not yield "satisfactory results" (Meyer, 2011c, p.83). Jahn's report, and the Parliament's resolution adopted in light of the report, called for urgent EU measures to be adopted (European Parliament, 1975; Jahn, 1975), and Jahn then entered a period of working closely with environmental NGOs and activists (Meyer, 2011c). That such actions ultimately had an important impact was later confirmed by the Commission, which explained that its Birds Directive proposal, put forward in December 1976, was a response to the "wishes expressed repeatedly by the European Parliament in several of its Resolutions, debates and petitions (see especially the Resolution of 21 February 1975)[96] and to the requests of a broad section of public opinion indicated in more than 50,000 letters received by the Commission alone" (CEC, 1977a, p.2).[97]

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[94] The fact that two senior members of DG XI's Nature Unit – Claus Stuffmann and Richard Geiser – were German may also have played some part in the choice of expert.

[95] i.e. A detailed complaint rather than merely a list of names.

[96] See European Parliament (1975). Claus Stuffmann later stated that preparatory activities regarding the Birds Directive were "speeded up by a strong resolution voted in...1975 by the European Parliament urging the Commission to come forward with concrete proposals as announced in its Action programme for the end of 1974" (Stuffmann, 1999, p.16).

[97] Many of these letters emanated from Germany, according to John Temple Lang (Temple Lang, 2012a).

"Even if [Grzimek's] Frankfurt Zoological Society lacked thorough expertise in ornithology," comments Meyer (2010a, p.96), "it was proficient in networking." Once its study for the Commission was finally out of the way in July 1975, Grzimek's assistant wrote to a newly-formed activist bird protection group in Germany to encourage them to lobby the Commission to propose a directive, and the Zoological Society itself called for a directive once its contractual relationship with the Commission had ended (Meyer, 2010a). In parallel with such lobbying efforts by NGOs and the European Parliament - which continued throughout the negotiating process for the directive, including coordinated NGO letter-writing campaigns as late as 1978 (Meyer, 2010a) - in 1974 the Commission had established a working group within the ECPS to discuss the idea of a legislative proposal on birds, and included within its ranks Commission officials with expertise and interest in bird conservation issues (Meyer, 2010b). As Claus Stuffmann explains, the Commission's formal proposal was "thoroughly prepared in three phases: a number of studies, a group of independent experts and a group of experts designated by the governments. The Commission was precautious to include the hunting and farming communities in these consultations" (Stuffmann, 1999, p.16).

John Temple Lang, Stanley Cramp, and Alistair Gammell

One official involved in the ECPS's working group was an Irishman, John Temple Lang, then a lawyer with the Commission's Legal Service, who was heavily involved in bird conservation issues in Ireland and internationally, including with the ICBP (IELA, Undated; Meyer, 2010b).[98] Temple Lang was very critical of the earlier Grzimek-directed study, and recommended that the Commission should look to Stanley Cramp, a leading British ornithologist (Simmons, 1989; Temple Lang, 2012a), for their desired additional study (Meyer, 2010b; Temple Lang, 2012a).[99] This the Commission did, and Cramp produced a slim, straightforward volume,[100] containing clear priorities for action in a concluding chapter entitled "What should be done?": "Firstly, habitats must be preserved, for without a variety of habitats there can be no variety in any forms of wildlife. The most threatened habitats are clearly wetlands of all kinds"; "The second main line of progress must be to improve protective legislation"; "The third aim must be to reduce environmental pollution"; "A fourth

[98] Such involvement continued after Temple Lang began working for the Commission in 1974 – he was Chairman of the European Continental Section of the International Council for Bird Preservation from 1980-84 and Co-secretary, Standing Committee on Applied Ornithology, International Ornithological Congress 1986-1994 (IELA, Undated). Temple Lang (2012a) reports that he was contacted by the ECPS, which had somehow heard about his involvement in the production of what ultimately became Ireland's Wildlife Act 1976, and that he was closer to being an expert on bird conservation matters than anyone else in the Commission at the time.

[99] In addition to Cramp, Alistair Gammell of the RSPB states that the Dutch Professor M.F. Mörzer Bruijns helped the Commission in their early thinking regarding the Birds Directive (Gammell, 1999).

[100] In contrast to the "lengthy report" produced by the Grzimek team (Jahn, 1975, p.12).

need is for increased research into bird populations and their trends" (Cramp, 1977, pp.49-52).

Another important contact of John Temple Lang's was Alistair Gammell, then working for the RSPB (Meyer, 2010b). As Gammell (2012) highlights, when an EU legislative instrument on birds was first mooted, the EU's significance as an environmental regulator remained unclear: "we [the RSPB] heard about the idea of this Birds Directive being discussed in Brussels, and we took a view that either...the European Union was going to be important, or not, and we weren't quite sure which, but on balance we thought that it probably would be important, and therefore it would probably be important that we engaged in this new legislation, and as a result I went to Brussels to start to lobby....Commission officials were very happy to take what expertise I could offer...so I had, more or less, very easy access right into the Commission building and worked with Commission officials at that time."

The role of hunting organisations

More generally, the consultation process regarding the directive "was informal and very open to groups which could demonstrate an interest or contribute expertise [and] included bird protection organizations, environmentalists, hunting organizations and national governments" (Meyer, 2010b, p.187). Although the hunting lobby clearly played an important role in the history of the Birds and Habitats Directives, Meyer (2010b, p.190) emphasises "[t]he relative weakness and the relatively late intervention of the hunting groups at the European level" in respect of the Birds Directive. The Paris-based International Council for Game and Wildlife Conservation (CIC), which traditionally represented hunting interests at international level, "did not prove to be very influential in the EC in the context of the birds directive," according to Meyer (2010a, p.92), and the EU hunting coalition FACE was not itself established until March 1977, several months after the Birds Directive had been proposed (FACE, 2003).

As Meyer (2010b, p.191) explains, "What the [ECPS] valued highly was scientifically sound, thus credible and apparently even-handed, expertise. While a broad range of groups was consulted to produce a legislative proposal acceptable to the member states, this gave an advantage to the traditional bird protection organizations, who, like the RSPB, had volunteered to cooperate early onwards. Conversely, hunting organizations' high-handed claim to being the real experts in the field appeared less convincing to the Commission officials. Hunters' dilatory stance concerning EC legislation," adds Meyer (2010b, p.191), citing Stuffmann, "excluded them as a potential ally, as soon as the Commission officials had earmarked the issue as a promising area for advancing European integration." Nevertheless, certain hunters worked very hard to ensure hunting interests were fully aired in respect of the

Birds Directive proposal, including a French hunting representative, Raymond Pouget,[101] who was "fighting like hell," according to Joost van der Ven, a Dutch nature conservation NGO representative involved with the ICBP at the time (Van der Ven, 2012). As Mireille Jardin, a member of the French delegation for the negotiation of the Birds Directive, comments, "...in France the hunting lobbying was very powerful and...opposition to the adoption of the directive was very strong. I remember in the south of France [huge] inscriptions on walls everywhere against it!" (Jardin, 2013). It is therefore unsurprising that the hunters scored some notable successes during the negotiations: Denmark's negotiator at the time, Veit Koester, recalls the senior French civil servant involved in the Birds Directive negotiations being "hailed and praised as a hero because France had said no probably to complete protection of one or two species that were eagerly hunted by the French hunters" (Koester, 2012).[102]

Networking by NGOs

On the bird protection side, Gammell of the RSPB became involved early in various networks. In addition to participating in discussions with the Commission, Gammell was appointed expert to assist in the drawing up of the Economic and Social Committee's opinion on the proposed Directive (ESC, 1977; Meyer, 2010b); he also produced a statement regarding the Birds Directive proposal for the EEB, the Brussels-based NGO coalition (Meyer, 2010b). At the initiative of the RSPB and its German equivalent the DBV (now NABU), representatives of various European bird protection groups met in 1976 in Germany to discuss cooperation, and in 1977 the groups decided to create a Working Group of European Bird Protection Societies (WEBS)(BirdLife International, 2012; Meyer, 2010b). WEBS marked the beginning of a new way for the ICBP to work together in Europe, with Gammell as its first secretary-general, working closely with Jean-Patrick Leduc of what is now France Nature Environnement (David, 2012) to collect and distribute information to allow national groups to lobby more effectively (BirdLife International, 2012; Meyer, 2010b).

As Gammell (1999, p.9) would later reflect, "it is clear to me that the Birds Directive had the effect of joining together the Bird Protection Societies in common cause and thus was instrumental in forming what has now become BirdLife. Thus, the Birds Directive is not only our baby, but we too are its baby!" The same was true of the EU hunting coalition FACE, and to a certain extent also the EEB, founded in December 1974 and now the largest

[101] Henri Jaffeux, who worked on nature conservation for many years for the French government explains that Raymond Pouget did not represent all hunters or all types of hunting; he was the president of the National Association of Waterfowl Hunters (ANCGE) (Jaffeux, 2013).
[102] This may refer to the debate regarding the ortolan bunting and the skylark, mentioned below.

federation of environmental organisations in Europe, which was "strengthened by the precedent set by the birds directive in the area of nature protection," and pushed for further EU competence in the field, a large number of conservation bodies having joined the EEB at the end of 1979 (Meyer, 2010a, p.91). Nevertheless, according to the EEB's founder, Hubert David, the conservation organisations were distinguished from other interest groups by the intelligence advantage they gained through working together, which contributed "enormously" to the successful adoption of the Birds Directive (David, 2012)

The roles of Claus Stuffmann and John Temple Lang

In 1976, Claus Stuffmann - formerly a member of Spinelli's *cabinet* - had taken over as the head of Division 3 (General planning and environmental improvement) at the Commission's ECPS (European Commission, 1976a, b). In this capacity he took charge of work relating to the Birds Directive, and "masterminded the whole thing," according to John Temple Lang.[103] With his deep personal commitment to European unity and nature conservation, Stuffmann reportedly "always defended very much more strongly than it's ever done nowadays the competence of the [EU]. He was fighting very hard in CITES, in Bern, in Bonn, everywhere, for the Union to exert as much competence as possible" (Devillers, 2013), and he coupled this with a natural gift for negotiating (Neal, 2012).

In addition to the work of Stuffmann's division, John Temple Lang himself – whom Alistair Gammell describes as "very influential" and "the key guy" (Gammell, 2012) – had a crucial role to play: "although he was working for the Legal Service of the Commission at the time...he was very much both a mentor to me, and to some extent to other Commission officials, because he was both a lawyer and a keen bird watcher, so he uniquely, I think he had probably much more vision as to what [the directive] could be than I did, and probably Commission officials did at the time. Because he combined those two things: a senior Commission lawyer with his knowledge as a bird watcher." Drawing on this knowledge and expertise, Temple Lang - who had received a copy of a draft directive produced by other Commission officials, which covered the killing of song birds, etc. - recommended that the draft ought absolutely to include habitat conservation measures,[104] and personally drafted Articles 3 and 4, the habitat conservation provisions of the Birds Directive proposal (European Commission, 1976c; Meyer, 2010b; Temple Lang, 2012a), which provisions

[103] In this capacity Stuffmann and his colleague Richard Geiser visited Italy in July 1977 to appraise themselves of the bird hunting situation on the ground (Bana, 2003).

[104] Around the same time, under the auspices of the Council of Europe, in March 1976 the Second European Ministerial Conference on the Environment recommended the drafting of "a legal instrument on the conservation of wildlife, with particular reference to migratory species and natural habitats in Europe" (Council of Europe, Undated, paragraph 2). This would ultimately become the Bern Convention, which indeed covered habitats, even if it did not require the designation of protected areas (in contrast to the Birds Directive).

represented a huge leap forward for bird conservation in the EU, and laid the foundations for the Natura 2000 network. Temple Lang (2013b) describes his idea as "extremely simple": namely, "to extend the [criteria for identifying areas of international importance][105] to all migratory species, and then in parallel to produce a comprehensive list of every place in Europe that met those criteria, and argue that there was a legal obligation to protect them all. This idea succeeded, even better than I had hoped."[106]

4.4 Negotiation of the Birds Directive: 1976-1979

4.4.1 Introduction

Thus, while the hunting of migratory birds had been the trigger which led many to campaign for EU legislation on birds (Meyer, 2010b), by the time the Birds Directive proposal emerged in December 1976 - having been adopted by the Commission "without great internal difficulties," according to Stuffmann (1999, p.16) - the policy aim had shifted in an important respect, with habitat protection now firmly rooted in the proposal (European Commission, 1976c), due in no small part to John Temple Lang's work. "It is clear," the Explanatory Memorandum to the Commission's proposal records, "that the situation of some 400 species of birds observed regularly in the territory of the Member States is giving rise to serious problems for several reasons....[S]ome sixty species are currently in danger of extinction, whilst not even one third of the species show normal reproduction rates" (European Commission, 1976c). As with Cramp's (1977) report, the first cited reason for this state of affairs was habitat change and habitat loss: "Wildlife cannot be preserved without adequate space for the survival and reproduction of the species", records the Explanatory Memorandum for the proposal (European Commission, 1976c).

It is a sign of how far nature conservation policy has come in the EU that it comes as something of a surprise to read in the Explanatory Memorandum that in 1976 only seven of the then nine EU Member States had national bird protection laws and hunting control laws, France and Italy having no such provisions (European Commission, 1976c). The aim of the proposed directive was to introduce a general scheme of protection to maintain the numbers of all species of naturally occurring birds in the wild state[107] in the European territory of the Member States at a level compatible with certain requirements – ecological, economic,

[105] Criteria for identifying areas of international importance for waterfowl and wetlands were well established by the time the Birds Directive was adopted in 1979 (Smart, 1976; Temple Lang, 1982, 1983), and updated criteria were agreed at the first meeting of the Conference of the Contracting Parties to the Ramsar Convention in Cagliari in 1980 (De Klemm and Créteaux, 1995).

[106] "The apparent novelty," he adds, "lay in applying the criteria to roosts, bottlenecks, moulting areas, and not just to breeding and wintering areas" (Temple Lang, 2013b).

[107] Thus excluding introduced species and rare visitors, according to the Explanatory Memorandum.

recreational and scientific (European Commission, 1976c). As Temple Lang (1982, p.12) commented shortly after the directive's adoption, "The directive is comprehensive. It applies to all species of birds occurring naturally in the wild state in all the European territories of Member States, but not to Greenland or to the French overseas departments and territories. It applies to the habitats of all these species, as well as to their nests and eggs." Here we will focus on the habitat protection aspects of the proposed directive contained in Article 4.

In the Commission's words,

> "Because of the special situation of certain species, Article 4 provides for additional measures to protect the habitats. These measures relate to rare species or those in danger of extinction, on the one hand, and to migratory birds, on the other. Annex I lists the species regarded as rare or in danger of extinction for the purposes of this Directive. The Annex was drawn up in the light of the need for special protection measures at Community level to cover the European territory of the Member States. Each Member State will designate and manage, as special protection areas, those areas most suitable for the survival and reproduction of those species, taking into account the special requirements of migratory birds. There must be a coherent Community network of such areas, which is why the Commission is to be consulted. Finally, it is stipulated that any pollution, deterioration of the habitat or disturbances of birds which has a significant effect in respect of the objectives of these special protection measures must be prevented. This provision is a logical and necessary supplement ensuring that the special measures to protect the habitat make a fully effective contribution" (European Commission, 1976c)

The proposed text of Article 4 in the Commission's original proposal read:

> "Article 4
>
> 1. The species listed in Annex I shall be the subject of more stringent protection measures aimed at the conservation of habitats in a sufficient number of areas to ensure the survival and reproduction of these species throughout the territory of the Member States. To this end, after consulting the Commission, the Member States shall designate and classify the most appropriate areas as special protected areas.
>
> 2. Each in respect of its own territory the Member States shall, after consulting the Commission, take similar measures concerning migratory species in order to establish protected areas which are adequate in number and in area for the reproduction, moulting and wintering of these species and in order to provide staging points within

their zones of migration. The Member States shall take the requisite measures to preserve recognized wetlands of international importance.

3. The Member States shall take appropriate measures to prevent, in the special protected areas referred to in paragraphs 1 and 2 of this Article, the pollution and deterioration of habitats and the disturbance of birds, should these factors have a significant effect having regard to the objectives of this Article."

4.4.2 Member States' general reactions to the proposed directive

The Directive was proposed by the Commission on 20 December 1976, and fell to be negotiated during, successively, British, Belgian, Danish, German and French Presidencies (Stuffmann, 1999). There is nothing in the Member States' initial reactions to the draft Directive in general and to Article 4 in particular which indicates any recognition that something new and extraordinary had been proposed – that is, a coherent system of protected EU nature conservation areas which would ultimately, following the addition of sites under the Habitats Directive, come to cover almost one-fifth of the EU's land area as well as large marine areas. As Alistair Gammell of the RSPB comments, "at the time of the Birds Directive being passed, I really don't think that it was in the minds of the British or any other government that this was primarily about habitat protection. It was primarily about not killing migratory birds, and controlling hunting... I'm not suggesting they didn't read and understand those articles concerning habitat protection and the need for SPAs, etc, but what I'm saying is that the emphasis of their thinking of what this was about wasn't in that direction at all, and that's what has changed, really, in the last 20 or 30 years, is that these things have become far more to do with habitat protection and less to do with hunting, although hunting is still an issue and still regularly crops up" (Gammell, 2012).

Hunting was a hot topic at the time, however, and the proposal did not sail through the Council, the rhythm of meetings to discuss the draft being "unexpectedly dense," according to Claus Stuffmann.[108] During the Member States' first discussion of the Commission's formal proposal, at a meeting of the Working Party on the Environment on 11 March 1977, most Member States broadly welcomed the proposal, albeit that Germany and the Netherlands – widely agreed to be two of the initial environmental leader states (Wurzel, 2013, p.90) – made particularly positive contributions, and France and Belgium, with

[108] The Council's working group spent nearly twenty days discussing the subject, and the Environment Council itself devoted four sessions to the directive (Stuffmann, 1999, p.16).

powerful pro-hunting lobbies, expressed some reservations, which would later become manifest rather more forcefully.[109]

Denmark's reluctance to allow the EU to regulate nature conservation

Denmark's position is worthy of particular note: whilst characterised as a leader in EU environmental policy, historically Denmark has a reputation as a "forerunner" state, aiming to maximise its freedom to develop its own ambitious domestic environmental policy (Wurzel, 2013, p.89); Denmark also has a reputation for Euroscepticism (Archer, 2000). Cichowski (2007, p.164) highlights the fact that "public debate in Denmark over the last few decades has criticized EU regulations as presenting a threat to the potentially high-level of protection embodied in national legislation." As Pagh (1999, pp.302 and 317) put it in 1999: "for almost two decades the political left-wing and the Greens in Denmark regarded EU and EU environmental law as the target rather than an ally in their attempts to ensure greater environmental protection....[P]ublic debate in Denmark on EU environmental law has been...: to what extent does EU law prevent Denmark from having a high level of protection."[110]

Thus, while Denmark is regarded as one of the "green trio" of initial environmental leader states (together with Germany and the Netherlands)(Wurzel, 2013, p.90), Denmark was often sceptical of EU environmental proposals, and of attempts to expand the EU's competences into new areas, particularly areas, such as nature conservation and land use planning, which had been expressed in Denmark to be off-limits for EU regulation during the Danish debate over whether or not to join the EU (Koester, 2012). In respect of the Birds Directive proposal, for example, of the then Member States, Denmark was the "most reluctant", according to Claus Stuffmann (Stuffmann, 1999, p.16).[111] Veit Koester, Denmark's negotiator at the time, explains:

> "When the Birds Directive was negotiated, our position within the EU, the Danish official position within the EU, was that nature conservation and land use, land planning [were] not matters that should be built within the EEC...that they were, those areas were under national sovereignty. That was the official policy. But when the Birds Directive, this idea came up, we were sort of being split between arguing that nature conservation should be reserved for the members themselves to decide, and

[109] Mireille Jardin, one of France's negotiators, comments, "it was actually, if I remember well, more than reservations as far as France was concerned, but a real opposition to all which dealt with hunting methods" (Jardin, 2013).

[110] Pagh (1999) goes on to criticise this attitude as ill-founded.

[111] While he does not name names, Stuffmann (1999, p.16) was perhaps referring to Denmark (amongst others) when he noted the delaying tactic adopted during negotiations regarding the Birds Directive of "emphasising certain "green" positions as conditions sine qua non knowing very well that they were totally unacceptable to other parties."

then on the other side, we had a situation where hunting and therefore protection of birds was an area which did not belong to the Ministry of Environment at that time, it was under the Ministry of Agriculture, so we had at that time constant battles with the Ministry of Agriculture, which was promoting hunting and then our Ministry, which promoted protection. So we saw probably some advantages in having this directive because this could be a means to sort of squeezing the Ministry of Agriculture...and then we had to give up, to a certain extent, but only to a limited extent, this idea of having land use and nature conservation as domains reserved for the Member States themself, but it was not that difficult to give it up because it was sort of being limited to certain areas which were to some extent already protected by legislation, so we did not feel that we give in very much by having the habitat protection provisions in the [Birds] Directive..." (Koester, 2012).[112]

The UK – widely perceived as "the dirty man of Europe" for much of the 1970s and 1980s (Wurzel, 2013, p.90) – has a reputation, alongside Denmark, as a minimalist, traditionally fighting "to preserve national autonomy in many areas and [preferring] limiting integration to a much lower level of political cooperation", particularly when compared to maximalists such as the Commission, the European Parliament and (often) the six founding Member States, which have tended to favour closer cooperation (Jordan, 1998a, p.16). In addition to not wanting the Birds Directive to be a popular success for the EU, the UK's then Secretary of State for the Environment Peter Shore wrote in May 1978 that he was opposed in principle to the EU's becoming involved in the regulation of issues such as bird protection.[113] Shore evidently did not object strongly enough or hold sufficient sway to prevent the directive's (unanimous) adoption. For its part, Germany argued that given its federal structure the Länder would have difficulties with anything that would reduce their competence; however, it was made clear, according to Stuffmann (1999, p.17), that the Bundesrat "would most

[112] He continues: "Also because at that time, or some years before, we had listed 26 Ramsar Sites, and they were protected, not directly but indirectly, by the planning legislation, nature conservation legislation, and we felt that we could implement the directive, the habitat protection provisions of the directive to a large extent by the Ramsar Sites, and in fact there were at that time, we had 26 Ramsar Sites with an area of almost 6,000 km^2, so considerable areas compared to the size of Denmark, which is only around 45,000 km^2, although many of the areas were in the sea, outside the land territory, but we didn't feel that the restrictions were so important, and we could gain something in connection with the species protection. I think that those were the kind of deliberations we had, and that led us to be rather positive during the negotiations, although we had our constant fights with the Ministry of Agriculture, which was very sceptical to the species protection provisions, especially as water birds were concerned because hunting of water birds was a traditional activity in Denmark, also in that respect we had most of our problems" (Koester, 2012).

[113] As he wrote to the EEB in May 1978, there is the "...difficulty of translating essentially British ways of doing things into Community wide measures without extending the jurisdiction of the Community into areas which are of purely domestic concern and are thus essentially inappropriate for Community action. Frankly I do not want the Community moving too far into an area like this one which I regard as being very much one for Member States" (cited in Fairbrass (2000, p.22)).

probably not veto a directive containing very strict restrictions mainly of unselective hunting methods."

General comments on the draft Birds Directive

In terms of general comments on the draft Directive (all recorded in CEC (1977a, pp.2-7)), the Netherlands expressed itself to be "very much in favour" of the proposal; Italy was "very favourably disposed", and said it would be "making a number of suggestions, aimed for example at improving the protection of habitats"; Ireland was "very constructive" and said that the proposed directive "was based on exactly the same principles as Irish legislation";[114] France was "very much in favour of the aims of the Directive", but noted the "not inconsiderable political interest" and argued that hunting - which was "essentially a recreational or leisure activity" - should be regulated at regional rather than EU level; in contrast, Germany said it was "very pleased with the form of the Directive, which it said was very important"; Denmark indicated its agreement with the aims and principles of the proposal, whilst noting that the Directive provided for very considerable harmonisation of national laws, and querying the criteria used by the Commission in drawing up the Annexes; Belgium approved of the aims and principles of the proposed Directive, but thought that considerable improvements could be made to the form and substance; Belgium - echoing France - expressed concerns about the balance that had been struck between protection and hunting, arguing that "hunting should not simply be presented as an exception that was tolerated, but as a specific form of recreational activity"; finally, the UK expressed approval for the form of the Directive, and noted that the problem was one which could not be satisfactorily solved at the national level; as a general comment, the UK "did not think the Directive posed any major problems."[115] How wrong this would later prove.[116] Nevertheless, the generally positive reception given to the Commission's proposal, and the detailed negotiations which followed, contradict to some degree Meyer's (2011c, p.84) claim of a "recalcitrant Council", or at least reveal this as an oversimplification of a complex institution.

[114] This comes as no surprise, given that John Temple Lang drew up recommendations which formed the basis for Ireland's Wildlife Act 1976 (IELA, Undated; Temple Lang, 1983, p.170), before drafting key parts of the Birds Directive proposal for the Commission (Meyer, 2010b; Temple Lang, 2012a).

[115] How this expressed position could be reconciled with Secretary of State Shore's negative views is unclear.

[116] As the UK government noted in evidence before the House of Lords in 1989, "the EC Directive on the protection of wild birds has not proved a happy precedent. A rigid interpretation of legal issues in Brussels has made many countries hesitant about how to implement the Directive. The UK has a good record in this field but we have had to expend disproportionate effort and time in explaining ourselves to Brussels" (Department of the Environment, 1989).

4.4.3 Legal basis for the proposal

At the Council's second formal discussion of the Birds Directive proposal, at a meeting of the Working Party on the Environment on 23 and 24 June 1977, the issue of the legal basis for the proposed Directive came to the fore (CEC, 1977b). Clearly aware of potential competence problems – the EU not yet having specific legal powers to make environmental policy – the Commission had been keen to emphasise the common market credentials of its proposal, which came in the form, the Commission argued, of regulating the trade in dead game birds and in live birds of certain species. However, the link between this and the proposed directive's wider conservation measures for wild birds was not as evident as the Commission tried to make out in its Explanatory Memorandum for the proposal (emphasis added): "The differing laws of the Member States in this field [i.e. trade in birds] are likely to affect trade between Member States and therefore have a direct effect on the functioning of the Common Market. *This is why* any harmonisation of legislation *must be accompanied* by Community action for the protection, conservation and management of all species of wild bird regularly observed in the territory of the Member States; such action would fall within the scope of Article 235 of the EEC Treaty" (European Commission, 1976c, paragraph II(3)).

Certain (unnamed) Member States expressed doubts about EU competence in the matter (Council Legal Service, 1977),[117] and the Working Party on the Environment therefore asked the Council Legal Service to draw up an opinion on the legal basis for the proposed directive, and the Commission Legal Service committed to doing the same (CEC, 1977b). Pending these opinions, Germany and Denmark entered general reservations about the entire proposal (CEC, 1977b). As Stuffmann (1999, p.17) explains, "The fundamental political problem was in Denmark where Parliament had tied the hands of the government because it did not want to accept any Community competence in the area of nature conservation and therefore strongly questioned the validity of the legal basis." On 25 July 1977, the Council Legal Service (1977) delivered its opinion. The Commission had based the proposed Directive on two powers - Articles 100 and 235 of the Treaty of Rome (1957) – and was considering adding a third power, Article 43, which provided for the making of legislation in respect of the common agricultural policy (Council Legal Service, 1977), the European Parliament having requested the addition of this base in its opinion on the proposed Directive of 14 June 1977 (European Parliament, 1977). As explained in chapter 3, Article 100 of the Treaty allowed the Council, acting unanimously on a proposal from the Commission, to issue directives to approximate differing national laws, provided that the differences "directly affect the establishment of the common market." However, the Council Legal Service was not

[117] Given subsequent discussions, Denmark was certainly one (e.g. see CEC (1977d)).

convinced that "any provision of the draft directive aims to harmonise trade in birds between Member States" (Council Legal Service, 1977, paragraph 7). Article 6, the Legal Service argued, "is a prohibition on trade in birds, with the exception of those mentioned, which may be sold, and seems to have as its object the protection of birds, rather than any harmonisation of trade...No evidence has otherwise been offered by the Commission to show that national laws regarding trade in birds, or any other aspect of national legislation relating to them, affect the establishment or functioning of the Common Market" (Council Legal Service, 1977, paragraphs 7 and 8). So much, then, for Article 100 as a basis for the Birds Directive.

The focus then turned to Article 235 of the Treaty, which allowed the Council, acting unanimously on a proposal from the Commission, and after consulting the European Parliament, to legislate where action by the EU should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, but the Treaty had not provided the necessary powers. The Council Legal Service looked to Article 2 of the Treaty for the objectives of the Community: "to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it." The question then was whether the protection of birds could be said to fall within these objectives; to this question, the Council Legal Service (1977) said, the Council had already given its own answer, pointing in this regard to the First and Second Environmental Action Programmes, which stated that "improvement in the quality of life and the protection of the natural environment are among the fundamental tasks of the Community." On this basis, according to the Council Legal Service, Article 235 provided a legal power for making the Birds Directive. Finally, the Council Legal Service opined that Article 43 of the Treaty would not be an appropriate legal base for the proposed directive because furtherance of the common agricultural policy was "evidently not the object of the proposal" (Council Legal Service, 1977, paragraph 14).[118]

Notwithstanding the fact that the Birds Directive was ultimately adopted solely on the basis of Article 235, it is clear that certain delegations – amongst them Germany and Denmark –

[118] The Commission evidently disagreed with this final point, because in its modified Directive proposal of 3 August 1977, further to the European Parliament's opinion of 14 June 1977 (European Parliament, 1977), the Commission had dropped Article 100 as a base, but was now proposing Articles 235 and Article 43 (European Commission, 1977b). To underline its belief in the common agricultural angle to the proposal, the Commission proposed inserting a new recital in the preamble, to read: "Whereas the disturbance of biological balance could have negative consequences for the common market, in particular for agricultural production" (European Commission, 1977b, p.3). The Working Party on the Environment met again on 8 and 9 September 1977 to discuss, amongst other things, the appropriate legal base for the proposal. The Commission and the Council agreed on Article 235 as a legal base, and agreed to meet to discuss whether the Treaty contained other articles which could be used as bases (CEC, 1977d). Evidently they could not agree on any additional bases, since the directive was adopted on the basis of Article 235 alone (Birds Directive, 1979).

remained uneasy about the EU's move into nature conservation regulation. Germany prepared a draft statement providing that: "The German delegation points out that its agreement to this Directive cannot be interpreted as constituting a precedent for any further action by the European Communities in the field of nature conservancy" (CEC, 1977g, p.30). This position later softened - or at least was explained in more detail - as follows: "The German delegation is doubtful as to the adequacy of Article 235 of the EEC Treaty as the sole legal basis for the Directive on bird conservation. In its opinion Article 100 should also have been cited. [Germany] points to the fact that its agreement on this Directive is not to be interpreted as pre-judging any other Community activities based solely on Article 235 of the EEC Treaty, particularly in the field of nature conservation. Moreover the German delegation wishes to point out that, with respect to other Community activities, specifically in the fields of nature conservation and protection of the countryside, a thorough examination will have to be made of Community powers" (CEC, 1978, p.47).[119]

Similarly, Denmark continued to query the EU's competence to legislate for bird conservation right to the end, and in its own draft statement doubted "whether the provisions of this [Birds] Directive correspond to the objectives defined in Article 2 of the EEC Treaty and whether Article 235 is applicable...[120] While the Danish Government has not wished to refute the arguments put forward in this matter by the other eight Member States and the legal departments [i.e. the Council and Commission Legal Services], it wishes to point out that it does not consider that the adoption of this Directive can create a precedent for the adoption of further Community acts of a similar nature" (CEC, 1977g, p.31; 1978). Reflecting in 1980 on seven years of EU environmental policy, the Commission commented: "Recourse to Article 235, either on its own or in conjunction with another Article of the Treaty, has not caused any particular difficulties, apart from a few cases relating to the protection of wildlife. The Commission hopes that reservations in this sphere will be withdrawn since the international character of the matters involved, their effects on various policies (commercial policy, agricultural policy and fisheries policy) and public sensitivity on these matters are in themselves sufficient to justify the action undertaken by the Community in this respect" (European Commission, 1980b, p.6). The Commission's hopes were not readily fulfilled - it would take another eight years, as well as a Treaty change, before the Habitats Directive would be proposed.

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[119] Hubert David, founder of the EEB, believes that Germany may have had constitutional issues regarding the Birds Directive; that is, the appropriate division of competences between the federal and regional levels of government in Germany (David, 2012), and this is confirmed by Stuffmann (1999).

[120] The question of the validity of Article 235 as a legal base for the Birds Directive was tested before the French Conseil d'Etat in 1990, a hunting association having raised the issue – the Conseil d'Etat held that the Directive had indeed been competently adopted by the Council (Wils, 1994).

4.4.4 Site selection: to consult the Commission or not?

At their first discussion of the proposed Birds Directive, on 11 March 1977, several Member States expressed their opposition to the proposed requirement to consult the Commission before designating special protection areas under Article 4 (all quotes in this paragraph taken from CEC (1977a, pp.12-13)). France requested that "for practical reasons and for reasons of principle an *a posteriori* notification be introduced instead." The German and Danish delegations thought that "any duplication of the activities of other international organisations working in the same field should be avoided"[121] and that "no attempt should be made to introduce new and cumbersome procedures." Germany and Denmark argued that it would be enough to encourage bilateral cooperation and for the Member States to confine themselves to the biannual reporting requirements set out in Article 11 of the Commission's proposal (European Commission, 1976c). The UK expressed some support for this view, suggesting that Article 4 should adopt the expression "if necessary in consultation with other Member States." Striking a discordant note were the Netherlands and Belgium, which argued that "it was particularly in this field of the protection of birds, which knew no frontiers, that prior consultation of the Commission and the other Member States was necessary to ensure the coherent approach desired and to strengthen co-ordination of the measures to be taken." The Commission responded that its sole purpose in proposing the consultation procedure was "to ensure a degree of coherence and rationality that did not exist at present in the framework of existing international organisations, which were consulted on a purely voluntary basis." The Commission also emphasised that "in any case the Member States would remain completely free to take decisions, as the Commission's opinion was only consultative."

At the second formal discussion of the proposal, at a meeting of the Working Party on the Environment on 23 and 24 June 1977, the UK - then holding the Presidency - had softened its earlier approach somewhat, now arguing that the relevant wording should read "in consultation with the Commission" (and not, per the Commission's proposal, "after" consulting the Commission (CEC, 1977b; European Commission, 1976c) or the UK's earlier proposal "if necessary in consultation with other Member States" (CEC, 1977a)). Nevertheless, the Commission, Germany, Denmark and the UK ultimately conceded this

[121] Germany and Denmark most likely had in mind: the IUCN and its Ramsar Convention (1971) on wetlands of international importance; UNEP and its proposed convention on migratory species of wild animals (for which Germany was the principal driver; this instrument became the Bonn Convention on its adoption in 1979 (Caddell, 2005)); and the Council of Europe and its proposed convention on the conservation of European wildlife and natural habitats (which ultimately became the Bern Convention on its adoption in 1979). As Ribaut (2004, p.4) comments, "Without going into details, it has to be said that the drafting process [of the Bern Convention] was made a little more complicated by the fact that the European Commission in Brussels was in the process of drafting its Council Directive on the conservation of wild birds (Birds Directive) at the very same time."

point, with the final version of the Birds Directive (1979, Article 4(3)) merely requiring Member States to "send the Commission all relevant information so that it may take appropriate initiatives with a view to the coordination necessary to ensure that the [special protection areas] form a coherent whole which meets the protection requirements of these species in the geographical sea and land area" where the Directive applies. A Resolution adopted in parallel to the Birds Directive (1979) contained additional detail regarding this process, committing the Member States to notify the Commission within two years of the SPAs which they had classified (CEC, 1979).[122]

4.4.5 Selecting special protection areas

At a Working Group meeting on 28 and 29 July 1977, Italy asked that an indication be provided of the number and total area of zones to be classified as special protection areas (CEC, 1977c). France developed this idea at a Working Group meeting on 22 and 23 September 1977, suggesting that provision should be made in the context of Article 4 for the drawing up of a list in an annex specifying a number of special protected areas on a geographical basis, and suggested the Ramsar Convention's (1971) list of wetlands might be adopted for this purpose (CEC, 1977i). Italy suggested drawing up a list of areas "determined on the basis of the criteria of international conventions," and the Member States would then indicate the minimum number (50 or 60%) from this list of areas which they particularly wished to protect (CEC, 1977i, p.4). Both the French and Italian approaches would of course have limited the conservation impact of Article 4: the French proposal appears to have been aimed at limiting Article 4 to wetlands, when in fact the proposed (and finally adopted) provision extended much further than this; and the Italian approach envisaged designating perhaps as few as 50% of the sites indicated as requiring protection pursuant to international conventions. However, the other Member States and the Commission argued that it did not seem advisable to determine geographically a certain number of special protection areas as part of the Birds Directive proposal, since this would delay the directive's adoption (CEC, 1977i).

In a summary report provided to the Council on 4 December 1977, the Committee of Permanent Representatives (COREPER)[123] outlined the main outstanding issues, recording

[122] Stuffmann (1999) characterises this end point as a positive outcome in respect of habitat conservation (more below), arguably giving some indication of the Commission's negotiating strategy: propose more than it expects to achieve, before being negotiated back to a position that is nevertheless positive from the Commission perspective.

[123] As Wurzel (2013, p.80) explains, "The Council working groups, which recruit their members from among national ministry officials and permanent representation officials, are 'the workhorse of the Council' (ibid.: 153). Their main purpose is to resolve as many contentious issues in dossiers as possible before they are passed up to the COREPER...COREPER meetings are attended by national officials from the Brussels-based permanent representations and national officials from government departments....If agreement has been reached between all

the fact that France and Italy regretted the lack of detail regarding the habitat protection parts of the Directive (e.g. the absence of criteria for selecting sites), and that those countries had requested the adoption of a Resolution inviting: (a) the Member States to announce the areas chosen for the application of Article 4, and (b) the Commission to make proposals concerning, among other things, the coordination of these areas, their status and characteristics (CEC, 1977g). Denmark and France separately proposed text for such a Resolution, which texts give a fascinating insight into the then potential future direction of EU nature conservation policy. The French draft called "upon the Commission to take the necessary co-ordinating steps to ensure that the network which [the Council] establishes can be integrated into a larger network, should the need arise" (CEC, 1977g, p.24). Similarly, the Danish draft provided: "The Council calls upon the Commission to recommend to Member States to, if needed, take protective measures in further areas in order to ensure that areas protected pursuant to Article 4 form a coherent system that can be integrated into future Community action in the field, cf. Point 5 below....[Point 5] The Council renews in this connection its intentions to consider suggestions from the Commission based on paragraphs 89-92, 108-112, 115-118, 130-133, 137 and 154-159 of the [Second Environmental Action Programme (1977)], the paragraphs being of special importance for the protection of the wild fauna of Europe" (CEC, 1977g, p.27).

While one could argue that the French draft may simply have had in mind a larger network of special protection areas for birds under the Birds Directive (e.g. on the accession of new EU Member States such as Greece, Spain and Portugal, which had applied for EEC membership in 1975 (Greece)(Schloh, 1980) and 1977, respectively (Spain and Portugal)(Royo and Christopher Manuel, 2003)), the Danish draft was explicit: special protection areas under the Birds Directive may need to be integrated into "future Community action in the field," relating, for example, to "the protection of the wild fauna of Europe". It is important to note in this regard that the EU's Second Environmental Action Programme (1977) had been adopted on 17 May 1977, between the Council's first and second formal discussions of the Birds Directive proposal, and hence by the time of Denmark's and France's proposed Resolutions regarding site selection under the Birds Directive. The Second Environmental Action Programme (1977) noted the ongoing discussions regarding the proposed Birds Directive, and effectively sowed the first seeds at EU level of the idea of a broader EU nature conservation instrument applying to flora and fauna in addition to birds, as adverted to by

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member states at Council working groups and COREPER levels, then the dossier is passed on to the ministers as an 'A' point. Dossiers on which Council working groups and COREPER have made good progress, but failed to find agreement on a number of contested issues, are passed on to the ministers as 'B' points. Importantly, 'A' points are usually adopted by the ministers in the Council without further negotiations (although they can be reopened as 'B' points by any minister present)."

Denmark's draft Resolution. Amongst other things, the Second Environmental Action Programme (1977) set in motion the development of an ecological mapping system, which would later prove important in the context of the Habitats Directive (1992), and highlighted the Council of Europe's ongoing examination of the possibility of creating an international instrument to protect wildlife and to preserve biotopes (which ultimately became the Bern Convention (1979) on the conservation of European wildlife and natural habitats),[124] adding: "in so far as action is necessary at Community level in order to ensure that the instrument is satisfactorily applied, the Commission will submit appropriate proposals to the Council" (Second Environmental Action Programme, 1977, p.26).

We are therefore presented with something of a conundrum: the wording of Denmark's proposed Resolution in respect of the Birds Directive clearly recognised the possibility of a larger network of EU protected areas in the future, covering wild fauna other than birds, for example; yet at the same time, as we have seen, Denmark remained sceptical of the EU's competence to legislate in the area, and of extending the Commission's powers in this direction. One might perhaps view Denmark's draft Resolution as an example of environmental pragmatism: Denmark perhaps viewed the development of additional EU nature conservation policy as likely - perhaps even inevitable - given the text of the Second Environmental Action Programme (1977), and had the foresight to seek to secure the best environmental outcome (a coherent network), irrespective of whether Denmark fully supported, at that time, the idea of additional EU nature conservation measures. In any event, the final version of the Resolution followed France's proposed wording, yet clearly left the door open to the idea of a network of protected areas covering more than merely birds and their habitats: "The Council calls upon the Commission to take the necessary coordinating steps to see that the network thereby established fulfils the objectives of the [Birds] Directive and can be integrated into a larger network, should the need arise" (CEC, 1979).

4.4.6 Site protection

Insofar as site protection was concerned, at the first discussion of the proposed Birds Directive, on 11 March 1977, France and Ireland struck the most negative tone, arguing for the entire first sentence of Article 4(1) to be deleted (CEC, 1977a, p.12).[125] The UK and Italy sought basic clarifications, including querying what exactly was meant by special protection area, "which might be synonymous with a special nature reserve for a particular species"

[124] On the early history of the Bern Convention, see Ribaut (2004).

[125] The sentence read "The species listed in Annex I shall be the subject of more stringent protection measures aimed at the conservation of habitats in a sufficient number of areas to ensure the survival and reproduction of these species throughout the territory of the Member States" (European Commission, 1976c, Article 4(1))

(CEC, 1977a, p.12).[126] At the second discussion of the proposal, in June 1977, Germany - ever a green leader - suggested (ultimately unsuccessfully - see CEC (1977c)) introducing a new Article 4(4), to read: "The Member States shall take appropriate measures in respect of the species listed in Annex I to reintroduce species or populations threatened with extinction or already extinct into biotopes within their natural habitat" (CEC, 1977b, p.3). Ireland sought to weaken Article 4(3) – then the key site protection provision – at the same meeting by suggesting that the words "shall take appropriate measures to prevent, [within special protection areas,] the pollution and deterioration of habitats and the disturbance of birds," etc., be replaced by "shall take all practical steps to prevent or minimise", etc. This attempt was not ultimately successful, however, with the "appropriate measures" language being retained in the adopted version of the directive (see Birds Directive (1979), Article 4(4)).

On 26 July 1977 - during a Belgian Presidency - the Commission produced a revised draft of certain provisions of the proposed Birds Directive, including Article 4 (European Commission, 1977a). The revised Article 4 provided:

> "Article 4
>
> 1. The rare or endangered species listed in Annex I shall be the subject of special conservation measures in respect of their habitat.
>
> To this end, and keeping in mind the necessity to protect the above species over the territory of the Community as a whole, the Member States shall classify as special protected areas those most suited to the conservation of the said species.
>
> 2. Keeping in mind the need for protection over the territory of the Community as a whole, the Member States shall take similar steps in respect of migratory species and their requirements as regards breeding and wintering areas and staging points along their migration routes. In this connection the Member States shall pay particular attention to the protection of wetlands.
>
> 3. The Member State shall send the Commission any relevant information to enable it to take appropriate initiatives for the required coordination in order to ensure that the areas referred to respectively in paragraphs 1 and 2 above form a coherent whole which meets the protection requirements of these species over the entire Community territory.

[126] It is clear that certain Member States did not think that the new habitat protection provisions were going to make much difference. For example, giving evidence before a House of Commons Select Committee in 1977, a UK official stated that he did not "...see the Directive making a great deal of difference...[M]ember States [have] to take requisite measures to maintain or restore a sufficient diversity of habitats. We are already doing this in Britain...We would not see this Directive as imposing any greater obligation in Britain than we are already doing" (cited in Fairbrass and Jordan, 2001, p.10).

4. In respect of the special protected areas referred to in paragraphs 1 and 2 above, the Member States shall take appropriate steps to prevent pollution or deterioration of the habitat or any disturbances affecting the birds, insofar as these would be significant in relation to the objectives of this Article." (European Commission, 1977a)

At their Working Group meeting on 28 and 29 July 1977, the Member States gave their views on this revised draft. Ireland maintained its negative approach, entering a reservation regarding the entirety of Article 4(4), which specified the level of protection to be provided to special protected areas, on the basis of "its fear that drainage programmes would be substantially restricted and agricultural development thereby impeded" (CEC, 1977c, p.5). More than 40 years later, these same concerns persist in Ireland in respect of raised bog special areas of conservation under the Habitats Directive (Quirke, 2012), highlighting the fact that positions expressed by Member States during negotiations are not necessarily dropped on a directive's being adopted, and may re-emerge during implementation at the national level.

France and Italy offer support for hunting and habitats

More generally, at a meeting of the Working Party on the Environment on 8 and 9 September 1977, the French government, with its strong pro-hunting sensitivities, opened up a novel flank in the negotiations regarding habitat protection, arguing that the French government was not in favour of defining a prohibited list of methods of large-scale capture and killing of birds, such as the one then set out in Annex IV (CEC, 1977d).[127] Rather, France argued, it would be better simply to rely on the strict protection of areas of international importance under Article 4 (CEC, 1977d). In other words: don't ban large-scale methods of capture and killing generally, just have a few strictly-protected areas within which such hunting methods could not be used. Such an approach would of course have greatly limited the conservation impact of the directive, since the French approach would have entailed large-scale methods of capture and killing continuing outside protected areas.

Italy offered its support to this argument at a meeting of the Working Party on the Environment on 13 and 14 October, both countries stating that they attached greater importance to the Directive's provisions regarding habitat protection than to the provisions concerning rules for hunting; the other Member States and the Commission stated that they attached equal weight to the habitat protection and hunting rules (CEC, 1977e). In this regard the French and Italians echoed the sentiments – or vice versa – of the then recently-

[127] Which then included, for example, snares, limes, hooks, nets, semi-automatic or automatic weapons, live birds used as decoys (such as blinded or mutilated birds), etc.

established EU hunting coalition FACE, which stressed in its lobbying efforts the importance of habitat protection: "the destruction of habitats, they argued, accounted for the decline in bird populations" (Meyer, 2010b, p.190). As Stuffmann (1999, p.17) explains, "France and Italy [came] under heavy fire from their hunting lobbies which were notably afraid of the general protection status for all bird species with relatively limited exceptions as well as of the explicit prohibition of a number of "traditional" hunting methods. Thus they insisted very strongly on a reinforcement of the habitat part which of course was completely out of [the] question for the other Member States and would have postponed the adoption of the directive for years. The outcome of this battle was rather positive insofar as the provisions relating to habitat protection were reinforced by the obligation to inform the Commission of the classification of special protected areas in order to enable it to undertake co-ordinative efforts with the perspective to create a coherent network."

On 20 November 1977, the Council's Working Party on the Environment provided a summary of outstanding issues regarding the directive to COREPER (CEC, 1977h). The draft directive attached to this summary reveals that the habitat protection provisions had been strengthened in another way by this time, apparently without much discussion, a line having been added to the end of Article 4(4) reading "Outside the special protected areas, Member States shall also make every effort to prevent pollution or deterioration of habitats" (CEC, 1977h); this was watered down in the final version of the directive to read, "Outside these protection areas, Member States shall also strive to avoid pollution or deterioration" (Birds Directive, 1979).[128] Thus, already in the Birds Directive the Member States were thinking beyond protected areas, an issue which would assume much greater significance in the context of the Habitats Directive, where the protection of corridors and stepping stones would be the subject of much discussion.

By the end of November 1977, the text of Article 4 was more or less agreed, and only minor amendments were made between then and the adoption of the Directive in April 1979. In a report to the Council dated 4 December 1977, COREPER summarised the main outstanding issues, which included the following. Denmark and France had separately proposed text for a Resolution to be adopted at the same time as the Directive - discussed above - concerning, amongst other things, the coordination of special protection areas, their status and characteristics (CEC, 1977g). The French draft and the wording finally adopted arguably reveal a lack of clarity regarding how the system of protected areas would work in practice. The French text called upon the Commission to make proposals regarding the criteria to be adopted for special protection areas, saying (emphasis added), "These proposals will

[128] Note that this obligation has, however, proven enforceable before the ECJ: see the judgment in Case C-418/04 in which Ireland was held to have failed to transpose and apply this obligation in practice (ECJ, 2007a).

determine, among other things, *the proportion of the designated areas which shall be afforded special protection*"; in other words, the French draft envisaged special protection applying only to parts of a designated area, rather than to the whole area. The Resolution ultimately adopted reveals a similar lack of clarity (emphasis added): "The Council takes note of the Commission's intention of submitting appropriate proposals regarding the criteria for the determination, selection, organization and methods of administration of the special protection areas, and invites the Commission to take into consideration in particular in those proposals *the parts of the areas selected which are to be given intensive protection*, a minimum threshold for those parts, which will enable the objectives of Article 4 to be attained, and the measures to be taken to prohibit hunting and to control other specific activities likely to disturb the birds." As it would later turn out, the European Court of Justice would come to interpret the protective provisions of the Birds Directive strictly and uniformly across sites (i.e. the ECJ did not apply different standards of protection to different areas of sites, perhaps confounding certain Member States' expectations). Moreover, as late as 1990 the European Court of Justice highlighted that while, per the Resolution, the Commission had intended to submit appropriate proposals regarding the criteria for the determination, selection, organisation and methods of administration of the special protection areas, it had not yet done so (ECJ, 1990c, paragraphs 6 and 35).

By May 1978, the habitat protection provisions of the Directive had been agreed (CEC, 1978), by December 1978 political agreement had been reached regarding the entire Directive (European Commission, 1979b; Meyer, 2011c, p.84) - during a German Presidency of the Council - and on 2 April 1979 the Directive was formally adopted, accompanied by a separate Council Resolution of the same date, as originally proposed by the Commission as a compromise in response to French and Italian demands (CEC, 1977g, i). John Temple Lang's original drafting of the key habitat protection provision (European Commission, 1976c, Article 4(3)) had barely changed in over two years of negotiations (Birds Directive, 1979, Article 4(4)).

4.4.7 Site selection and protection: the species to be protected

A first formal discussion regarding the Annexes to the proposed directive was held at a meeting of the Working Party of the Environment, composed of ornithologists,[129] on 13 and 14 October 1977 (CEC, 1977f). At that time, Annex I to the Commission's original proposal, which listed species requiring the designation of special protection areas pursuant to Article 4, comprised 62 species in total (CEC, 1977f). Regularly occurring migratory species not listed on Annex I also required the designation of special protection areas, of course (Birds

[129] The Luxembourg delegation was not represented at this meeting of the Working Party of ornithologists.

Directive, 1979, Article 4(2)). The Member States appear to have had remarkably few negative comments regarding the Commission's proposed species list for Annex I - perhaps owing to advance consultations with the Commission - with only Germany, Italy and France raising objections.[130] Interestingly, when one considers the history of the later Habitats Directive, in respect of which the Member States sought to greatly reduce the Commission's proposed lists of species requiring special protection (more below), here the Member States proposed *supplementing* the Commission's Annex I list by the addition of 16 species.[131] Following negotiations, the end result was that the Commission's original proposed list of 62 Annex I species grew to a final list of 74 species in the version adopted in 1979 (Birds Directive, 1979). The list has since grown enormously, following amendments pursuant to EU enlargement, amongst other things. By 1985, for example, the number of species listed on Annex I had almost doubled to cover 144 species (European Commission, 1985; Wils, 1994), and the version of Annex I for the EU 28 comprises 193 species and sub-species (Codified Birds Directive, 2009),[132] covering, amongst other areas, important countries for birds such as Spain and Poland, as well as Arctic areas, which of course were not within the territories of the nine EU Member States in 1979 (Temple Lang, 2012c).[133]

Interestingly, future changes to the Annex I list of species requiring the classification of SPAs was left to a Committee comprising Member States and chaired by the Commission, which operated by way of qualified majority voting (Birds Directive, 1979; Stuffmann, 1999). However, France - and the hunter's organisations (Gammell, 1999) - ensured that the hunting Annexes would be extremely difficult to amend, requiring a unanimous decision in the Council: a "rather strange logic," according to Stuffmann (1999, p.17), and "something I reflect they may have come to regret!" according to Gammell (1999, p.8).[134] The question of

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[130] Germany entered a reservation regarding the Brent goose (Branta bernicla), which was subsequently excluded; France entered a reservation regarding the Red-crested pochard (Netta rufina) and the Ruff (Philomachus pugnax), which were subsequently excluded from the version adopted in 1979 (the Ruff was reinserted during a later revision of the Annex), and the Great snipe (Gallinago media), which was nevertheless retained; and Italy entered a reservation regarding the Ruff (Philomachus pugnax)(see above in this note), and the Great northern diver (Gavia immer), which was nonetheless retained.

[131] France entered a reservation in respect of the proposed addition of the continental population of the Golden plover (Pluvialis apricaria apricaria), which was nonetheless included on the final version of Annex I, and Italy proposed adding the Shag (Phalacrocorax aristotelis), but this was resisted by other delegations for the purpose of the version of the Annex adopted in 1979 (CEC, 1977f). The Mediterranean Shag (Phalacrocorax aristotelis desmarestii) was later included in Annex I as part of a revision process.

[132] Another source gives this as 195 species for the EU-27 (EEA, 2007).

[133] The accession of Croatia has resulted in changes to Annex II: see Council Directive 2013/17/EU of 13 May 2013 adapting certain directives in the field of environment, by reason of the accession of the Republic of Croatia (OJ L 158, 10 June 2013, p.193).

[134] Gammell (1999, pp.10-11) comments, "...in the 20 years of the Birds Directive, BirdLife has never attacked legal shooting and has never tried to reopen the question of what should or should not be on Annex II. An historic compromise was reached...in 1978 and whilst the hunters did not get to shoot everything they desired, nor did bird conservationists get certain species protected that we believe should have been. Compromises are like that. It is a matter of sadness to me that others have continually sought to reopen this issue rather than deal

the species permissible to hunt had proven particularly controversial during the negotiations, and was the subject of the "last battle" between Member States (Stuffmann, 1999, p.17). As Meyer (2010b) explains, "What caused a major delay was the conflict about the trade in birds between the French government, on the one hand, and the Danish and British governments, on the other. In an attempt to build up a bargaining chip, as contemporary observers suspected, the French government sought to impose stronger restrictions on the trade in birds," on the purported basis that the ability to trade encouraged excessive hunting. However, the real reason appears to have been that trade in hunted waterfowl was popular in northern countries, which "were of the opinion that there was no justification at all to prohibit the marketing of legally taken birds" (Stuffmann, 1999, p.17); but by seeking to restrict trade in certain hunted species, the French of course gained valuable leverage to secure their own aims in terms of the species that could legally be hunted. In December 1978,[135] a compromise was finally reached, under which it would remain legal to hunt the skylark in France and Italy (Meyer, 2010b). As Gammell (1999, p.8) puts it, "to have the Annexes finally adopted, the skylark was sacrificed to become a species which might be hunted, where the Ortolan Bunting was protected," France having sought the hunting of both (CEC, 1978). Proving, however, that old habits die hard, and that protection on paper is not the same as protection in practice, it emerged years later that former French President François Mitterand had dined illegally on ortolan - traditionally drowned in brandy - as part of a grand final meal in 1995 (NPR, 2006; Paterniti, 1998).

Nevertheless, as Stuffmann (1999, p.17) reflects, "after only two years the Commission's draft of 1976 was adopted as a Council directive with very minor modifications rather reinforcing the important conservation issues than weakening them."

4.5 Early implementation

Having drafted the key habitat protection parts of the Birds Directive, John Temple Lang of the Commission's Legal Service played an important role in the directive's early implementation. While most Member States proved slow to react to their new obligations, Temple Lang (1983, p.176) had a clear vision of what had been achieved: "A wholly new situation, the importance of which has not yet been realised, has come about as a result of [the Birds Directive]," he wrote, continuing, "For the first time, the directive provides a legal basis for a single, common, scientific Community-wide policy on bird conservation, ignoring

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with the real issue that diminishes the number of birds for both hunter and conservationist alike, how to stop the destruction of Europe's habitats."

[135] Following what Stuffmann (1999, p.17) called "an extremely tense discussion, in particular at the last decisive Council session in December 1978, [which] led to a surprisingly complicated compromise stipulating three groups of species: those free for marketing throughout the Community, those which Member States could admit to trade under certain conditions and those for which a final decision was postponed for two years."

national frontiers which have, or should have, no biological significance. Also for the first time, the basis for a European policy on nature reserves for migratory birds, forming a network throughout much of Europe, has been created" (Temple Lang, 1982, pp.23-24), "on the basis of Important Areas using the same criteria everywhere" (Temple Lang, 2012b).

Alistair Gammell, then with the RSPB, recalls:

> "...I can remember [John Temple Lang] having this conversation with me, when the Birds Directive was...finally passed, it had the provision [Article 4] which...basically says that Member States shall give protection to special areas for Annex I and migratory species, effectively words like that. And I remember John saying, 'OK, where are these special areas?' He said 'This is an opportunity for the non-government organisations to actually tell the Commission and tell the governments what are these special areas. So it was he that spotted – I guess he'd been working on this all the time – but it was he that spotted that niche, and as a result of that, we set out – 'we' being myself at RSPB and colleagues in BirdLife to produce books which we called Important Bird Areas...
>
> [He] pointed out that the Birds Directive required the Member States to protect special areas, and then the question he asked us was, well, where are these special areas, nobody knows where these special areas are, and there is a fantastic opportunity here for us....he was talking with his bird watcher hat on, so to speak, so he was saying it was a fantastic opportunity for us to actually define the nature of the Directive. If we tell people where the areas are, then that will become, effectively, the law. The Commission need help, the Commission don't know where these areas are, so he even suggested that we ask for Commission funding to do these initial studies, which we did, and we got Commission funding to do the first Important Bird Areas studies. So that was a very, very influential discussion, and after that John also was the one to point out, and he certainly led me through this procedure, about how you could make an official complaint to the European Union about Member States not having designated areas or not protecting areas that should be designated but...had some development on, so he actually advised us about how you send a formal letter of complaint to the European Commission, etc. So all of that is now, as we sit here in 2012, absolutely routine, but if I think back to the 1970s and the very early 1980s, this was completely revolutionary."

Thus, the Commission asked the ICBP and the International Waterfowl Research Bureau (IWRB) to draw up lists of all the areas - which became known as Important Bird Areas (IBA) - in the Member States which deserved special habitat protection (Temple Lang, 1982,

1983).[136] The criteria for identifying areas of international importance for waterfowl and wetlands were well established by the time the Birds Directive was adopted in 1979 (Smart, 1976; Temple Lang, 1982, 1983), and updated criteria were agreed at the first meeting of the Conference of the Contracting Parties to the Ramsar Convention in Cagliari in 1980 (De Klemm and Créteaux, 1995). However, in the case of the Birds Directive, these criteria (slightly adapted) were applied - importantly - not only to waterfowl, which are the principal focus of the Ramsar Convention, but to all Annex I Birds Directive species as well as to regularly occurring migratory species not listed in Annex I (Temple Lang, 1982). Further, these criteria were also applied, significantly, to areas not contemplated by the Cagliari agreement, such as bottlenecks[137] and roosts, in addition to areas traditionally regarded as important such as breeding, wintering and staging areas (Temple Lang, 2012c).

The ICBP and IWRB submitted their first list of IBAs to the Commission and the Member States in 1981 (Osieck and Mörzer-Bruyns, 1981; Temple Lang, 1983). Additional and updated lists of IBAs for Europe followed, and the principle of IBAs has since spread globally, with many regional and national lists now established (BirdLife International, Undated). The first European list was quite short, but the most recent list runs to two volumes, over 1600 pages in total (Heath et al., 2000). In 1998, the European Court of Justice cemented the legal significance of the IBA lists when it held that the lists, although not legally binding on the Member States concerned, can, by reason of their acknowledged scientific value, be used by the Court as a basis of reference for assessing the extent to which a Member State has complied with its obligation to designate special protection areas (ECJ, 1998).[138] And while it seems clear from the arguments in that case that the Commission had up to that point been applying a criterion whereby Member States must designate as SPAs at least half in number and area of the territories listed by IBA 89, the Court went further, holding that "Since it thus appears that the Netherlands has classified as SPAs territories whose number and total area are clearly smaller than the number and total area of the territories suitable, according to IBA 89, for classification as SPAs, the requirements of Article 4(1) of the Directive cannot be regarded as satisfied" (ECJ, 1998, paragraph 72).

In addition to site designations, in terms of the early implementation of the Birds Directive more generally, Richard Geiser – the member of the Nature Unit who worked, under Claus

[136] For a detailed discussion of the early years of this process, see Temple Lang (1982, pp.14-18).

[137] "[P]laces where migrating birds congregate, even if they do not land ([e.g.] Straits of Messina, Bosphorus, Kalo in S. Sweden, Orgambideska in the Pyrenees, Gibraltar, hirundine roosts)" per Temple Lang (2012b).

[138] Interestingly, in 1993, of the then twelve EU Member States, ten Member States did not accept the IBA list as an official candidate list; Italy's position was unclear; Belgium did not object to the list; and Denmark's position is worthy of note: it did not accept the list as an official candidate list of sites, but had nonetheless designated 102 of the 118 sites listed, and had undertaken to review the other 16 sites with a view to their possible designation (European Commission, 1993).

Stuffmann, most closely on the Directive's implementation – very quickly formed around him, in an informal way, a small group or "inner core" to advise him on all aspects of the implementation, comprising: François de Beaufort, the founder and director of the Fauna and Flora Secretariat (SFF), a unit of France's National Museum of Natural History; Einhard Bezzel, the head of the Bavarian Conservation Institute and for many years the editor of the Journal für Ornithologie; Alistair Gammell of the RSPB; and Pierre Devillers,[139] an ornithologist from the Institut Royal des Sciences Naturelles de Belgique (IRSNB), who would later play an important role in the genesis of the Habitats Directive (Devillers, 2013).[140]

The Commission's experience with the Birds Directive – a popular success on its adoption and reportedly Michel Carpentier's favourite directive at the end of his eight years in charge of the ECPS (Caufield, 1981) - evidently gave the Commission a taste for expanding its competences in the direction of additional nature conservation policy-making, with Carpentier using the Directive's example "to bolster his argument that the theoretical trade basis of the environmental action programme need not prevent new conservation measures" (Caufield, 1981, p.417). As Carpentier himself commented in 1981, "Though we have to interpret the Treaty cleverly we can use it to justify conservation measures. A re-writing of the Treaty might burden us with more restrictions than we have now with our pragmatic approach. The Birds Directive, for example, was accused of being *ultra vires*, but it has been

[139] Right at the start of the process of implementing the Birds Directive, Richard Geiser of the Nature Unit walked into Pierre Devillers' office (which was only 5 minutes away from DG XI's office) and asked for Devillers' assistance (Devillers, 2013). While the two men did not know one another, it seems that Geiser may perhaps have obtained Devillers' name from John Temple Lang, since Devillers and Temple Lang knew each other very well, having been friends since the 1960s (Devillers, 2013). In the very early days of the Birds Directive's implementation, for example, Geiser was looking in particular for clarifications of key terms used in the Directive. For this purpose, Geiser contracted Devillers/the IRSNB to produce a report, published in 1982 (Ledant et al., 1982), which was, per Devillers, "presented as a monitoring study, how to monitor the populations for the implementation of the directive, but it touched on all the questions of how to organise designation, there was an attempt at the time to define core zones and buffer zones within the special protection areas...that was not accepted by the Member States, but that was an attempt to...because we were already concerned about trying to make the zones as big as possible and therefore have some sort of an area around the core zones...and of course the Member States saw that as an extension, and so it was finally defeated. And it was also in that first report that we defined things like 'small numbers' for the application of the hunting derogations, you know...We were the inventers of the 'small numbers' definition at least, which continued to tick for many, many years."

[140] Slightly later, two others joined the group: Yves Lecocq of the EU hunting coalition FACE, and Stefano Allavena, an ornithologist with the Italian government, who, given his location, found it more difficult than others in the group to attend meetings in Brussels, so Allavena tended to work with Geiser whenever Geiser went to Italy, and brought experience from southern Europe regarding hunting problems (Devillers, 2013). As Pierre Devillers explains, "Although Geiser made sure, because of the rules of the Commission, that in all cases our interventions were covered by the fact that he had contracts with our organisations, we were asked, we were told, very clearly...that we were to act first as scientists and not as representatives of an institution or an organisation. And I must say that the spirit was always that, and particularly coming from people who were working in NGOs like Alistair, the attitude was always absolutely perfect in that – he wasn't representing RSPB; of course he was coming with of course the sensibilities of RSPB, but with his own ideas" (Devillers, 2013).

very popular...We're trying to extend our programme, not just to deal with pollution" (Caufield, 1981, p.417). He continued: "And of course the EIA [environmental impact assessment] directive will have an effect on the landscape. I'm surprised at the resistance in Britain to this. It really is a preventive measure, to ensure that the effects of major development projects are known before they get the go-ahead" (Caufield, 1981, p.417).

4.6 The Environmental Impact Assessment (EIA) Directive (1985)

This mention of the EIA Directive brings us to a final piece of the jigsaw which requires discussion before turning to the Habitats Directive and Natura 2000. Having moved from Commissioner Spinelli's *cabinet* to head the 'General Planning and Environmental Improvement' division at the ECPS, Claus Stuffmann had been thrown immediately into proposing and negotiating the Birds Directive, which proved fraught with difficulties and political sensitivities. Having secured that Directive's adoption "against all odds" (Meyer, 2010b, p.179), Stuffmann went immediately into the process of proposing and negotiating the EIA Directive (Stuffmann, 1981), which would prove at least as difficult and controversial,[141] and whose genesis had overlapped with negotiations regarding the Birds Directive (Roberts and Shaw, 1982; Wood, 1982).

The US having introduced environmental impact assessments via its National Environmental Policy Act 1969, the Commission began to consider the issue by funding several studies of EIA (Wood, 1982), before stating, as early as 1975, in a scoping document for the Second Environmental Action Programme: "The Commission believes that [EIA] procedures should be introduced throughout the Community on the basis of common evaluation criteria defined and adopted under the second programme" (European Commission, 1975a, p.5). By the time the Second Environmental Action Programme (1977, p.36) was adopted two years later, there had been a degree of backpedalling, the programme stating: "In order to determine whether and to what extent the regulations of the Member States need to be harmonized, and whether this is necessary at Community level, the Commission will undertake the necessary studies [of EIA procedures]" and then "draw up appropriate proposals" for the Council.

The Commission issued its first preliminary draft directive in 1978 (Roberts and Shaw, 1982; Wood, 1982) and, following twenty such drafts and detailed consultation, the Commission tabled a formal proposal to the Council in June 1980 (European Commission, 1980c; Wood, 1982). The draft Directive was, comments Wood (1982, p.92), "reported to have been the most discussed draft directive ever issued by the Commission." Thus, while the EIA directive was expected by some to be adopted in 1982/3 (Roberts and Shaw, 1982; Wood,

[141] Cf. the dispute between the UK government and Commissioner Carlo Ripa di Meana regarding the implementation of the EIA Directive, detailed in chapter 3.

1982), it in fact took until June 1985 (Environmental Impact Assessment (EIA) Directive, 1985). The Commission had high hopes for the instrument; as Environment Commissioner Stanley Clinton Davis commented in July 1987, "perhaps the area in which Community policy is going to make the greatest difference in the development world over the next few years will be through implementation of the environment impact assessment directive which comes into force in July 1988..." (Clinton Davis, 1987a).

Thus, between 1976 and 1985, Claus Stuffmann and his division were involved, amongst other things, in proposing and negotiating two of the most important early EU environmental measures - the Birds Directive and the EIA Directive - both of which remain in force today. As we have seen, the Birds Directive put in place, *inter alia*, a strict protection regime for habitats, with which, Temple Lang (1983) commented, it would be difficult to comply without introducing environmental impact assessments. However, the Birds Directive did not specifically require such assessments, and hence did not specify the mechanics for such assessments. In contrast, the EIA Directive was very much a process directive, setting out procedures to be followed before projects likely to have significant effects on the environment could be approved at the national level. With the Commission having taken this step-wise approach from the outcome-oriented Birds Directive to the process-driven EIA Directive, the stage was set for the Habitats Directive. However, the adoption of the Birds Directive in 1979 coincided with the EU's entering a period of "Europessimism" and "Eurosclerosis": as Moravcsik (1991, p.33) argues, "the early 1980s marked the apogee of Europessimism. Disputes over agricultural policy, the accession of Spain and Portugal, and budgetary reform festered. Ideas of splitting the EC into Subgroups proliferated: Europe *à deux vitesses*, a two-tier Community...". It would take almost a decade before the Commission would be in a position to propose the EU's next major leap into nature conservation policy-making by way of the Habitats Directive.

4.7 Summary

With the Birds Directive, a process which began in the late 1960s and early 1970s with protests and questions in the European Parliament regarding the hunting of migratory birds resulted, in the end, in protective legislation that went much further. As Meyer (2011c, p.84) comments, "[t]he Birds Directive was originally motivated by Northern European resentment against the hunting of songbirds in Southern Europe," but ended up introducing, in addition to its hunting control measures, "remarkably strict rules on habitats protection valid in all member states. It provided an important precedent for EC action in the area of nature protection and paved the way for the Habitats directive of 1992 and the Natura 2000 Programme." The EU's second *State of the Environment* report makes clear that the

Commission was well aware of this fact before the Birds Directive had even been adopted: "The importance of this directive lies not so much in its detailed lists of menaced species or of species which can be hunted, much though these will improve the situation in practice. It lies in the establishment of the general principle that birds are to be protected by conserving their habitats in all our Member States and that this policy should be based on sound scientific evidence. This is a firm basis on which to build for the future" (European Commission, 1979c, p.48).

Chapter 5: Towards a Habitats Directive

5.1 Early plans to further regulate habitat conservation

In 1980, the year after the Birds Directive was adopted, the Commission wrote that, "It is becoming increasingly obvious that the extinction of many species cannot be avoided in the long run unless more effort is made to preserve habitats. Future work should therefore focus on this aspect in particular in order to guarantee the protection of biotopes of Community importance on a permanent basis. In order to attain this objective it will be necessary to pass legislation, inform the public and the circles concerned and deploy adequate financial resources at Community and other levels" (European Commission, 1980d, p.8). In the same year the Commission wrote that future priorities might include "Measures to protect...areas of special interest for certain types of habitat, or certain types of flora and fauna" (European Commission, 1980b, p.8), and discussed establishing a "European network of protected areas typical of Europe's mountain terrain, with the Community's financial support" (European Commission, 1980b, p.34). More generally, the Commission stated its intention to "draw up a proposal to the Council on the use of a common classification of protected areas in the Community to establish a basis of comparison for future Community action in this sector" (European Commission, 1980b, p.34).

Most significantly of all, in reviewing progress in implementing the First and Second Environmental Action Programmes, the Commission wrote the following passages in 1980, effectively proposing what would later become the Habitats Directive, albeit that a formal proposal would not be forthcoming for a further eight years:

> "The Commission hopes that certain hesitations which have become apparent as to the scope of the Community's powers [in the field of nature conservation] which have hindered the adoption of important and urgent measures will be overcome in the future.
>
> ...it should be emphasized that it is becoming increasingly clear that it will be possible to avoid the extinction of several species only if greater efforts are made to preserve the habitats of these species; indeed, the scale of the measures to be taken, especially by the Commission, is greater than was originally proposed.
>
> It is therefore on this aspect that future action must be primarily concentrated; it is necessary to identify the requirements both in terms of the total area needing protection and of the administration of the different zones, and to establish a

framework which will guarantee the permanent protection of those biotopes which are considered to be of Community importance.

To achieve this end, the enactment of general rules and the evaluation of the impact of certain developments on the habitat of the endangered species will not suffice. It will also be necessary to have available all the means which can make it possible to cope with the pressures exerted by economic development, including those which arise from Community policies. Such means would be incomplete without the requisite funds.

This fact, as well as the complex patterns of the distribution of powers and responsibilities foreshadows that soundly-based, effective Community action will encounter certain difficulties. However it appears to the Commission that such action is an essential prerequisite to any attempt to combat the gradual extinction of endangered species, and to put an end to the biological impoverishment of the environment.

The Council may perhaps wish to discuss this fundamental policy.

As far as the protection and maintenance of wild species is concerned, the [Birds] Directive of April 1979 will be supplemented by the creation and maintenance of a network of sufficiently large protected zones which will be protected and administered under common rules and principles. If this aim is to be achieved by informing and interesting the public, the Community will doubtless have to introduce legislation and provide funds.

The procedures for assessing the environmental impact of public and private developments must expressly require the examination of their effects on the fauna and flora.

At international level it will be necessary for the Community and the Member States to ratify as soon as possible the [Bern] Convention of the Council of Europe and the International Convention on the Conservation of Migratory Species" (European Commission, 1980b, pp.36-37)

Thus, already by 1980 the Commission had a well-developed picture and plan of how a future Habitats Directive might look, as well as a clear awareness of the financing arrangements that would need to be progressed in tandem. However, these ambitions were evidently constrained in practice by some Member States' continuing reluctance to countenance additional EU nature conservation measures in the immediate wake of the Birds Directive.

The Third Environmental Action Programme (1983, p.13) ultimately contained the following aspirational wording, which gave deference to these Member States' views:

> "The main problem [in respect of fauna and flora] is the conservation of habitats where their gradual, irreversible disappearance in many cases constitutes the chief threat to the survival of species. While it is recognized that local, regional and national responsibilities are decisive in this case, a Community framework is becoming essential if greater cohesion is to be given to such efforts. Such a framework would ensure that a network of properly protected biotopes, sufficient in both extent and number, and interlinked in a rational fashion, was set up and maintained. The network should be designed in such a way as to guarantee — as far as the habitat is concerned — the survival of all species native to the Community. This would be made much easier if it were possible to use Community financial resources, and in particular those destined for the protection of the environment. One cost-effective use of these resources may be to grant support to voluntary organizations, within a framework of appropriate rules, to manage nature reserves."

Notwithstanding these ambitions, the creation of such a network was not secured during the life of the Third Environmental Action Programme (1983).

5.2 Relationship with the Bern Convention[142]

The Commission commented in 1975, with a hint of inter-institutional rivalry, that the intergovernmental Council of Europe - which had twice as many member countries as the EEC at that time - is "less active in the environmental field than the Communities" (European Commission, 1975b, p.14).[143] Yet just as the EU was celebrating the formal adoption of the Birds Directive in April 1979, the Council of Europe appeared to have gone one better, securing agreement on the Bern Convention on the conservation of European wildlife and

[142] For accounts of the Habitats Directive's relationship with the Bern Convention, see Jones (2012a) and Coffey and Richartz (2003).

[143] This claim might be up for some debate, given the Council of Europe's extensive own-initiative activities in the environmental field in the 1960s and 70s, including, for example (list courtesy of Henri Jaffeux: Jaffeux (2013)): in 1962, the creation of the European Committee for the Conservation of Nature, the publication series "Nature and Environment" whose first numbers were devoted to endangered mammals and forests (Ribaut, 2004), and the launch of several studies by the Committee; in 1964, the European Conference on Air Pollution, followed by the creation of a Committee of Experts on Air Pollution (Adinolfi, 1968), plus the creation of a department in charge of environmental issues in the Council of Europe Secretariat, with Jean-Pierre Ribaut in charge (Jaffeux, 2013); in 1965, the creation of the European Diploma of Protected Areas; in 1968, the adoption of the European Water Charter, and the Declaration of Principles on Air Pollution Control; in 1970, the adoption of a Nature Conservation Declaration for Local Authorities in Europe by the European Conference of Local Authorities, the organisation of the European Nature Conservation Year, and the adoption by an ad hoc conference convened by the Council of Europe of a statement on natural development in Europe, defining the principles and main lines of action for the protection of the environment; in 1972, the adoption of the European Soil Charter; in 1973, the European Ministerial Conference on the Environment, held in Vienna; and in 1976, the creation of the European Network of Biogenetic Reserves.

natural habitats, which opened for signature in September 1979 and entered into force in June 1982 (European Commission, 1979a; Lasén-Díaz, 2010). The Bern Convention - which was negotiated in parallel to the Birds Directive, complicating matters somewhat given the overlap in subjects (Ribaut, 2004)[144] - was ambitious in aims and scope, and "visionary" in approach, according to Stanley Johnson (Johnson, 2012). The Convention applied to listed plants, birds, and other animals; to the habitats of those listed species; and to unlisted "endangered natural habitats," and aimed "to conserve wild flora and fauna and their natural habitats, especially those species and habitats whose conservation requires the co-operation of several States, and to promote such co-operation," with particular emphasis given to "endangered and vulnerable species, including endangered and vulnerable migratory species" (European Commission, 1979a). However, at the time of its coming into force the Convention did not specifically require protected areas to be designated; as Ribaut (2004, p.4), who was involved in the negotiations for the Convention, comments, "Among the substantive discussions, those concerning the protection of habitats (Article 4) were undeniably the most important and the most difficult...Once again, common sense and a flexible approach prevailed, resulting in an Article 4 which may appear very general (excessively so perhaps), but which has proved to be effective, thanks to the case-law which has gradually been built up in this area."[145]

Lasén-Díaz (2010, p.186) notes that, "The relationship with the EU, a contracting party to the Bern Convention since 1982, has been a dynamic one, having evolved and changed over the years."[146] Indeed, as highlighted in the previous chapter, the EU's Second Environmental Action Programme (1977) envisaged the prospect of EU legislation to implement the Bern Convention even before the Convention's signature, noting that "in so far as action is necessary at Community level in order to ensure that the instrument is satisfactorily applied, the Commission will submit appropriate proposals to the Council." Further, the text of Denmark's draft Resolution in respect of the Birds Directive noted that special protection areas under the Birds Directive may need to be integrated into "future Community action in the field", relating, for example, to "the protection of the wild fauna of Europe", with a cross-reference to the paragraph of the Second Environmental Action Programme relating to the Bern Convention. Next came the Birds Directive and the Bern Convention itself in 1979

[144] Such complexities would have included, for example, the species to be listed and the prohibited methods of capture and killing.

[145] This reference to "case-law" relates to the Convention's system of complaints and case-files, which can result in Recommendations to Parties from the Standing Committee of the Convention: see Lasén-Díaz (2010).

[146] One thing which has remained static for many years is the set of rules applicable in cases of non-compliance with the Bern Convention, the European Commission having opposed the formal adoption of rules of procedure to deal with case files for non-compliance (Fernández-Galiano, 2013). The (inventive) result is that the Standing Committee has nevertheless been applying these same rules on a provisional basis since 1993; a process of re-examining the applicable rules of procedure began relatively recently (Council of Europe, 2011a).

(Ribaut, 2004). Following the entry into force of the Bern Convention, the EU's regulation of nature conservation issues was certainly more limited than the Council of Europe's, albeit that the EU's more limited regime was backed up by much more sophisticated legal architecture to ensure compliance, and would soon begin slowly expanding with the adoption in 1981 of a Regulation relating to imports of whales and other cetacean products (Whales Regulation, 1981), closely followed by the first CITES Regulation (1982) on trade in endangered species, and in 1983 by the Seal Pups Directive (1983), discussed below.

5.3 Stanley Johnson and the European Parliament: 1979-1984

As well as marking the signature of the Birds Directive and the Bern Convention, 1979 would mark another important milestone in the history of the Habitats Directive. That year, Stanley Johnson, who had been working with the ECPS from 1973, left the European Commission having been elected as an MEP in the first direct European parliamentary elections (Johnson, 2009). Crucially, he took up his position as an MEP on the basis of a *congé de convenance personnelle* (leave on personal grounds) from the Commission (Johnson, 2011). This later gave him the option, on leaving the Parliament in 1984, of reinstatement to a position within the Commission (Staff Regulations, 1968, Article 15).

Once at the Parliament, Johnson was nominated for, and obtained, the post of vice-chair of the Parliament's Environment Committee, a role which allowed him to pursue an active environmental agenda, albeit that the Parliament's powers were relatively limited in those days (Johnson, 2009, 2011). One of Johnson's major achievements during these years as an MEP, with the help of the Dutch MEP Hemmo Muntingh, who was similarly passionate about nature conservation issues (Muntingh, 2013), related to the adoption of EU legislation banning the import of skins of baby seals. As Johnson (2011) explains, "In order to get that through, we had to build first a huge degree of pressure on the Commission, who didn't want to propose it at all." The main Commission official involved was Johnson's then ex-colleague Claus Stuffmann, negotiator of the Birds Directive, who "was not anxious to do this," according to Johnson (2011): there was countervailing pressure from the Canadian government, there were people within the Commission who did not think the EU should be involved in regulating the trade in seal products at all (Johnson, 2011), and Stuffmann would of course at the time have been heavily involved in negotiating the controversial Environmental Impact Assessment (EIA) Directive (1985). Ultimately, however, the

Commission relented, and EU legislation was proposed and adopted (Seal Pups Directive, 1983).[147]

As Johnson (2011) comments, "one of my main activities when I was in the Parliament, as it related to the Commission, was actually trying to force the Commission to do things the Commission didn't want to do....[T]his question of the EU seal ban...was one of the first examples where the European Parliament really forced the Commission to do something it didn't want to do. Now, that's not at all the same thing as saying that the Commission lost the power of initiative. The Commission had then and still has the power of initiative. Of course if the Commission hadn't made a proposal, there wouldn't have been a seal ban. But we did manage to get the Commission to a point where it was under such pressure that it felt it had to make a proposal." This episode sheds light on Johnson's unconventional but effective campaigning style, and reveals some of the tactical lessons he picked up regarding how to secure a desired legislative outcome. In respect of the former, the seals campaign involved rallies in Brussels and Luxembourg, at one of which helium balloons in the shape of baby seals were floated up to the fifteenth floor of a building in Brussels in which the Member States' Ministers were meeting, such that they were surrounded (Johnson, 2011).[148] And in respect of the latter, as Johnson (2011) comments, "if you are an effective parliamentarian, you have to get the Commission on your side, that's obvious; but you also have to get the Member States of the Council on your side. The way sometimes you do that is by working with the *grand public* in the Member States." Thus, having been an active policy entrepreneur with the Commission from 1973-1979, Johnson, plus other activist MEPs such as Hemmo Muntingh, began a phase of similar activism within the European Parliament, which slowly began building momentum towards a broad-based EU instrument on nature conservation.

For example, in May 1980 the Parliament adopted a Resolution on the World Conservation Strategy,[149] calling on the Commission to "submit proposals concerning possible ways of improving the internal structure of the Community with regard to the latter's policy on nature conservation" (European Parliament, 1980b). The following month the Parliament adopted a Resolution regarding the Bern Convention, in which the Parliament urged the Council and the

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[147] As Jans and Vedder (2012, p.520) explain, the "directive was originally to apply from 1 October 1983 to 1 October 1985, but its duration was extended to 1 October 1989 and in 1989 the Council agreed to extend its application indefinitely."

[148] Years later, by this time having left behind his career with the EU institutions, Johnson joined a WTO protest in Seattle dressed as a turtle (The Evening Standard, 1999). As his son Boris commented at the time, "It is magnificent....It is typically brave of him to take on the Robocop police. He is tremendously keen on the environment, which doesn't make him a lefty" (The Evening Standard, 1999).

[149] The World Conservation Strategy was drawn up in 1980 by the IUCN in collaboration with UNEP and the WWF. For additional background, see McCormick (1986).

Commission to give a high priority to a Community policy on nature and the environment, and requested the Commission to accelerate the implementation of projects in the Second Environmental Action Programme relating to natural habitats, and to submit proposals for Directives on the protection of plants and vertebrate animals in the Community (European Parliament, 1980a). By July 1987 - by which time Stanley Johnson was back with the Commission - the Parliament was calling for "land and marine parks and nature reserves to form a Community network of protected areas which is representative of the natural resources of the various geographical regions of the Community" (European Parliament, 1987, p.122). Welcoming this Resolution, Environment Commissioner Stanley Clinton Davis assured the Parliament that "the contents of the report have been very fully noted, both by myself and by my staff, and they will serve as an important guide for the Commission's work in this important field of nature conservation" (Clinton Davis, 1987c, p.288).

5.4 Treaty revision: the Single European Act

In addition to this direct activism in respect of nature conservation, Stanley Johnson's years at the European Parliament coincided with moves towards the first major EU Treaty revision since the Treaty of Rome was signed in 1957. If the late 1970s and early 1980s could be described as periods of "Europessimism" and "Eurosclerosis", by the early 1990s the EU had entered a period of "optimism and institutional momentum" (Moravcsik, 1991, p.19). The source of this change in atmosphere, argues Moravcsik (1991), was the Single European Act, one of the grand bargains which punctuate the EU's history, signed by political leaders in February 1986, but owing its origins to initiatives in the early 1980s.

Altiero Spinelli – former EU Commissioner and a founding father of the EU's environmental policy, as detailed in chapter 3 – played an important role. Having been elected to the European Parliament along with Stanley Johnson in the first direct elections in 1979, Spinelli - ever the committed federalist - wrote to his fellow MEPs in June 1980 to seek support for an initiative to further democratise the EU, and to deepen integration by overcoming institutional barriers (Cardozo and Corbett, 1986; Lodge, 1984; Ward, 2003). Eight MEPs responded to this initial call (Gamble, 1998), and the nine met for the first time on 9 July 1980 in *Au Crocodile*, a restaurant in Strasbourg (Cardozo and Corbett, 1986). One of these nine founding members of the so-called Crocodile Club was Stanley Johnson (Booker and North, 2003). The Crocodile Club grew rapidly in size, and would eventually comprise around 180 members (D'Ancona, 1990), almost half of the MEPs of the then European Parliament. The Club's efforts culminated in a Parliament resolution of September 1983 on the substance of a preliminary draft treaty on European Union (European Parliament, 1983), as well as a draft Treaty produced by the Parliament's itself - containing a short provision

granting the EU explicit competence in environmental matters - which issued in February 1984 (European Parliament, 1984).

While the Parliament's draft would not ultimately be adopted, it led to the creation, during a dynamic French Presidency of the EU under François Mitterand, of a committee of personal representatives of the Member States (known as the Dooge Committee, after its Irish Chair), tasked with investigating possible Treaty changes (Jacobs, 2000).[150] The work of the Dooge Committee coincided with the appointment in January 1985 of a new Commission President, Jacques Delors, who had been freed from his job as France's Minister for Finance by a reshuffle (Moravcsik, 1991). Delors set immediately to work, announcing in his maiden speech plans to complete the common market by 1992 (Moravcsik, 1991). During the course of 1985, the Council endorsed this goal and tasked the Commission with drawing up detailed proposals; that job fell to a Briton, Lord Cockfield, then Internal Market Commissioner, who produced a "celebrated White Paper", published in June 1985, containing almost three hundred specific proposals aimed at liberalising the common market (Moravcsik, 1991, p.40).

Delors then began linking the idea of market liberalisation with the need for qualified majority voting (rather than unanimity) in EU decision-making, arguing that the common market could not be achieved without such voting reform; significantly, he also began proposing extensions in the EU's substantive competences (Moravcsik, 1991). An Intergovernmental Conference was convened, beginning in September 1985, to consider amendments to the Treaty of Rome. A draft of what became the new Treaty - the Single European Act (SEA) - was written during the first month of the conference, the subsequent details were worked out at five meetings between October and December 1985, and the SEA was signed in February 1986 (Moravcsik, 1991).

The SEA sought to relaunch the EU project by setting a deadline of 1992 for the completion of the common market, linking this market liberalisation with procedural reforms designed to ease decision-making within the EU, just as Delors had sought (Moravcsik, 1991). Since 1966, qualified majority had in practice been limited within the EU by the so-called Luxembourg compromise, by which France had asserted the right to veto a proposal by declaring that a vital or very important issue was at stake (Moravcsik, 1991). The SEA overcame the Luxembourg compromise by greatly expanding the use of qualified majority voting, though principally on matters relating to the common market. A price paid for these

[150] Lodge (1994) argues that the SEA was predominantly an initiative of the European Parliament, a view which can be contrasted with that of Moravcsik (1991, p.21), who argues that the SEA reforms primarily "rested on interstate bargains between Britain, France and Germany." As Lodge (1994, p.20) counters, "Without the [Parliament's] initiative for the EUT [draft Treaty], the SEA process would not have been launched or been run in the way that it was."

reforms was the expansion of Structural Funds aimed at poorer parts of the EU (more below); as Moravcsik (1991, p.43) comments, this was "a side payment to Ireland [and] the Southern nations in exchange for their political support."

While the content of the SEA did not meet the European Parliament's aspirations,[151] the new Treaty did grant the EU explicit competence in environmental matters, as the Parliament's draft had sought.[152] In this regard, Moravcsik (1991, p.46) argues that "the Commission might be credited with having quietly slipped some new EC functions, such as environmental and research and development programs, into the revised treaty. But these were functions that the EC had been handling under indirect authorization for a number of years, and there was little opposition from member states to extending a concrete mandate to cover them." This relative lack of opposition might at first glance seem surprising: although the EU had indeed been exercising certain environmental policy-making functions since 1973, the precise ambit of the EU's environmental competences remained a bone of contention in advance of the SEA negotiations in 1985. For example, as Leann Brown (1995, p.14) correctly notes, "although the Danes had reluctantly agreed to the directive protecting wildbirds, they argued that the EC lacked legal competence to legislate in areas such as protecting wildlife habitats and, as a result, it was understood that no further wildlife legislation should be adopted unless it was directly related to trade."[153]

The question therefore arises: how were disputes over the EU's environmental competences settled via the SEA, and how were Member States' earlier objections overcome? Lodge (1994) and Leann Brown (1995) provide convincing accounts. By seeking to expand the ambit of the EU's competences via the SEA, Leann Brown (1995, p.14) argues, Commission President Jacques Delors created tactical opportunities for "coalitions, bargains and trade-offs to be struck across the issues of market reform and institutional reform. Combining market enhancement, institutional reform and environmental provisions would make the single market more attractive to those concerned about the democratic deficit and environmental protection." This did not mean, of course, that extending EU competences in environmental matters went without discussion or dispute – these functions were not "quietly slipped" in, as Moravcsik (1991, p.46) claims. Indeed, as Lodge (1994, p.35) highlights, "The potential for dispute was particularly large on the environmental front. This potential owed as much to the usual disagreement over whether the Council should go over to majority voting in such

[151] MEPs passed a resolution complaining that the SEA "in no way represent[s] the real reform of the Community that our peoples need" (Moravcsik, 1991, p.45).

[152] Lodge (1994, p.14) argues that the Parliament's draft had "a decisive influence on the SEA's content."

[153] As such, it is incorrect to argue that the SEA was merely the constitutionalisation of *de facto* practice: Leann Brown (1995) cites Koppen (1988) as having made this argument.

matters as to the fact that EC intervention in this field remained contested. Once again, however, the overarching demands of the Single Market's realization impelled action."

The Commission proposed four new Treaty articles regarding EU competence in environmental policy matters, containing general aims, principles and specific measures, with unanimity preserved for defining aims and principles, and qualified majority voting to apply for implementing measures (Lodge, 1994). True to form, and fearing a lowest common denominator approach, Denmark was keen to ensure that it would not be forced to lower its own domestic environmental standards by EU environmental law (Lodge, 1994). On the other side of the coin were certain laggard states: Greece, Ireland and the UK, which "considered stringent legislation costly" (Lodge, 1994, p.35). Supported by Greece, Ireland proposed an amendment regarding the need to balance environmental and economic considerations (Lodge, 1994), and both Denmark and Greece objected to majority voting, albeit for different reasons (Lodge, 1994). The provisions finally adopted represented a compromise between competing interests: the EU was given a broad environmental policy mandate, and the general principles of prevention, rectification at source, polluter pays, integration of environmental protection requirements into other EU policies, and subsidiarity were included (Single European Act, 1986, Article 25, inserting Article 130r(1), (2) and (4)). With a nod to the concerns of Ireland and Greece, it was agreed that, in preparing action relating to the environment, the EU was to take account of, amongst other things, costs and benefits, and the economic and social development of the EU as a whole and the balanced development of its regions (Single European Act, 1986, Article 25, inserting Article 130r(3)). New Article 130s provided that, as a general rule, EU environmental measures were to be adopted by unanimity, following consultation with the European Parliament and the Economic and Social Committee, but that the Council could define matters on which decisions were to be taken by a qualified majority (Single European Act, 1986, Article 25). And to reflect Denmark's concerns, new Article 130t provided that EU environmental measures would not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaty (Single European Act, 1986, Article 25). Importantly, the SEA also introduced an additional legal base for environmental measures - new Article 100a, under conditions of qualified majority voting - in respect of the establishing and functioning of the common market (Single European Act, 1986, Article 18). As one might expect, this later led to the appropriate legal base for EU environmental proposals being a common subject of discussion/dispute, since qualified majority voting applied in respect of Article 100a, whereas unanimity generally applied in adopting other EU environmental measures.

Thus, rather than the SEA merely representing a constitutionalisation of existing environmental functions, the SEA went further and gave the EU broad competences in previously contested environmental policy matters, such as nature conservation. As Leann Brown (1995, p.24) argues, "In the end, the substantive content of the [SEA] legislation was the product of Commission-brokered compromise. The most contentious issues were "side-stepped" so that the overall initiative might move forward. All parties to the final decision making were eager that this "fringe" area bring positive incentives rather than confrontation to the SEA negotiations." In other words, in the high politics arena of Treaty negotiations, turf disputes over the ambit of the EU's nature conservation remit – a relatively low politics concern at that time[154] – were subsumed by the political imperative to move forward with EU integration, completing the common market, and reforming the EU's decision-making procedures.

5.5 Legal actions under the Birds Directive

As the Crocodile Club's initiatives in the European Parliament were beginning to bear fruit in the direction of Treaty revisions, the German Karl-Heinz Narjes, then Commissioner for the Environment, noted in an April 1983 speech reviewing ten years of EU environmental policy that enforcement was proving a particular problem, and that he had therefore given instructions that "use should be made of all the legal remedies available in the event of infringements of Community law" (European Commission, 1983b, p.2). By September 1984 this task was principally in the hands of a German lawyer, Ludwig Krämer, who headed the unit within DG XI charged with the application of EU environmental law (hereafter the Legal Unit), which unit was attached directly to the then Director General Athanase Andreopoulos (European Commission, 1984b), who had taken over from Michel Carpentier in 1981 on the ECPS's being upgraded to a Directorate General (Caufield, 1981).[155] Such direct attachment gave the Legal Unit considerable autonomy and power (Williams, 1994).

To explain: by 1984 DG XI had been divided into two Directorates: Directorate A was in charge of *Protection and Improvement of the Environment*; and Directorate B was charged with *Protection and Promotion of Consumer Interests* (European Commission, 1984b). Each Directorate was headed by a Director, and comprised several units; heads of unit would report to the Director of Directorate A or B, as appropriate, and the Directors of the two Directorates would in turn report to the Director General. However, the Legal Unit fell outside this Directorate structure and instead reported directly - and hence had direct access -

[154] In a Communication regarding the SEA issued by the Commission in 1987, environmental policy was described as a "flanking" policy (European Commission, 1987, pp.54-55).

[155] Krämer took on the role of head of the Legal Unit sometime between May and September 1984 (European Commission, 1984a, b).

to the Director General. In contrast, the heads of units within the Directorates would gain access to the Director General only with the approval of the Director of the relevant Directorate (Williams, 1994). In deciding whether to grant such access, such Directors would "be weighing up [the proposed action] in the light of political requirements and the various policy and technical issues" he or she happened to be responsible for at the relevant time (Williams, 1994, p.355). As head of the directly-attached Legal Unit, Ludwig Krämer had no such barrier to overcome.

Soon after taking office as head of the Legal Unit, Krämer gave an early demonstration of the power of the Birds Directive. In July 1984 the UK government granted outline planning permission to Scottish Malt Distillers to drain a peatland named Duich Moss on the island of Islay in Scotland's Inner Hebrides, famous for its malt whisky (Batten, 1987). The distillers intended to drain the peatland, build an access road, and begin peat extraction for use in whisky production (Batten, 1987; Haigh, 1991). Permission was granted in spite of objections from the Nature Conservancy Council (the NCC, the government's nature conservation body), the RSPB and others, which objections were based on the site's importance for the Greenland white-fronted goose (*Anser albifrons flavirostris*)(JNCC, 2001; Parry, 1985; Stead, 1985b), a then declining Annex I species. In winter, 4-5% of the world population of this endangered species was found at Duich Moss (Haigh, 1991), yet the UK had not designated the site as a special protection area (SPA) under the Birds Directive.

The RSPB lodged a complaint with the Commission, and in September 1984 the Commission wrote to the UK government requesting that Duich Moss be designated as an SPA and given appropriate protection (Batten, 1987). However, the Commission's concerns were reportedly not passed on to the Scottish Secretary owing to an administrative error, and in December 1984 the government confirmed detailed planning consent (Batten, 1987; Parry, 1985). Between March and May 1985 the Commission wrote to the UK government a further three times, and on 1 July 1985 the UK responded, arguing that peat extraction was compatible with the maintenance of the site's conservation importance (Batten, 1987). On 31 July the Commission replied, asking for a postponement of works for two months to allow the UK's claims to be investigated; however, the UK rejected this request (Batten, 1987). Construction work began in August 1985, but was halted almost immediately when demonstrators from Friends of the Earth staged a sit down protest in front of the bulldozers (The Guardian, 1985). At a subsequent public meeting on the island, the naturalist David Bellamy and then director of Friends of the Earth, Jonathan Porritt, were amongst the speakers shouted down by islanders, who drew parallels with the clearances of the 19th century and urged the

environmentalists to "go back to the backyards of England where you belong" (Stead, 1985c).[156]

In October 1985, in an unprecedented move, Ludwig Krämer paid a personal visit to Duich Moss (Batten, 1987). As Haigh (1991) records, "As a matter of courtesy, the Foreign Office was informed of [Krämer's] intended visit and was thereby thrown into a state of mild panic. Nothing like this had ever happened before in the EC. Did the official have the right to come? Was his visit desirable? Could he be stopped if he insisted on coming? One can imagine the questions being asked. There is no doubt that the official could visit Islay as a holiday maker to watch birds. But he was coming as a representative of the EC institution that is the guardian of the treaty, to investigate a complaint by a private body against a member state for failure to fulfil an obligation under the treaty. The treaty gives no guidance whatever on the right to visit. In this case, the British government put a motor car at the disposal of the official and had him accompanied to Islay."[157] Krämer produced a report recommending that infringement proceedings be commenced against the UK (Haigh, 1991), and the Commission took the first steps in that regard (Ezard, 1986). The UK ultimately backed down, following "discreet talks" between Commissioner Stanley Clinton Davis and Scottish Secretary Malcolm Rifkind (Norton-Taylor, 1986), and the end result was that the distillery agreed to use an alternative source of peat on the island (Stead, 1987),[158] such that Duich Moss was duly protected by the Birds Directive (Haigh, 1991).

The realisation that the Birds Directive had teeth was a wake-up call for the EU's Member States, particularly since the majority, until about the mid-1980s, "were of the opinion that nature protection came in their exclusive competence," according to Krämer (2011, p.181), notwithstanding the adoption of the Birds Directive. The experience certainly was not a welcome one from the UK government's perspective, as Alistair Gammell explains: "Duich Moss was an awful experience for the British government. They didn't enjoy it very much. They are not used to being questioned and found wanting" (Brooke, 1989, p.55). And despite the positive conservation outcome in the case of Duich Moss, "the embarrassment caused to ministers by the demonstrated teeth of the [Birds Directive]" arguably had an "unwelcome

[156] The environmentalists were later informed they would be safe if they returned to the island, which gives some indication of the atmosphere at the time (Stead, 1985a).

[157] A report by the House of Lords would later note, "The experience of Duich Moss (Islay) in Scotland in 1985, when a Commission official visited the site to investigate a possible case of non-compliance, was regarded by the Scottish Office as having created unwelcome and unnecessary political controversy" (House of Lords, 1989b, paragraph 28). And yet, as Viscount Blakenham reflected, "If that unwelcome visit had not been made the wintering ground of the white-fronted goose is unlikely to have remained protected" (House of Lords, 1989a, p.1266).

[158] The NCC had identified an alternative site nearby, already used by the distillers, which the distillers could use to source their peat, but the distillers had rejected this site on the basis that the supplier at the site could not meet the distillers' requirements, though this was contested by the NCC (Ardill, 1985).

spin-off" in the form of potential negative impacts on negotiations regarding the Habitats Directive, as explained in more detail in chapter 7 (Brooke, 1989, p.55).

It was not merely the UK which had begun to realise the full impacts of the Birds Directive. In December 1986 an Advocate General of the European Court of Justice handed down two Opinions in respect of alleged breaches of the Birds Directive, by Belgium and Italy (ECJ, 1986a, b),[159] ultimately leading to the first judgments under the Birds Directive in July 1987, which went against the countries concerned and were "very firm" and gave "a real boost to our efforts to ensure that member countries protect Europe's natural heritage," in the words of Commissioner Stanley Clinton Davis (Clinton Davis, 1987c, p.287; 1987d; ECJ, 1987a, b). Judgments against Germany, the Netherlands and France in respect of the Birds Directive were not far behind, handed down in September 1987, October 1987, and April 1988, respectively (ECJ, 1987c, d, 1988). The Commissioner threw his weight behind these enforcement efforts, citing Sophocles favourably during a speech in London in April 1987: "'nobody [has] a more sacred obligation to obey the law than those who made the law'... The governments of our Community countries would do well to remember that. Certainly, the Commission does not intend to forget it" (Clinton Davis, 1987e). With a supportive Commissioner, Krämer's Legal Unit had evidently been busy: the same speech by Clinton Davis refers to 100 pending environmental infringement cases in respect of only twelve EU Member States (Clinton Davis, 1987e), and by February 1988 the Unit had launched 29 infringement proceedings against Member States seeking to force them to comply with their obligations to designate SPAs under the Birds Directive (DG XI, 1988a-q).

5.6 Financing

Convinced of the need to support EU environmental policy with financial backing by way of a "European Fund for the Environment", the European Parliament took the initiative of entering new budget headings in the EU's 1982 budget, with a view to enabling intervention in support of environmental policy (European Commission, 1983a, p.3). The Commission used the opportunity presented by these new budget headings to propose a Regulation on action by the EU relating to the environment. As the Commission wrote in its proposal, "it is becoming increasingly clear that Community support for the conservation of certain sensitive areas of Community importance is needed... It is above all a question of encouraging the competent authorities or non-governmental organizations to take appropriate steps to ensure the protection of such areas concerning which the Community has special responsibilities

[159] The Commission having launched the proceedings against Belgium in February 1984 (ECJ, 1986a). The timing of the first steps against Italy is unclear, but it is likely to have been similar to the timing of the case against Belgium.

arising from the community Directive on the conservation of wild birds, and the Berne and Bonn Conventions and the Protocol to the Barcelona convention [for the Protection Of The Mediterranean Sea Against Pollution]" (European Commission, 1983a, p.4).

The Commission's draft instrument therefore provided that EU co-funding could be provided for, amongst other things, "measures to protect the natural environment in sensitive areas of Community interest" (European Commission, 1983a, Article 2(1)(b)). However, this was amended and restricted during the course of negotiations relating to the Regulation, such that the wording in the version finally adopted in 1984 applied only to co-funding of measures in respect of the Birds Directive: "projects providing an incentive and aimed at contributing towards the maintenance or re-establishment of seriously threatened biotopes which are the habitat of endangered species and are of particular importance to the Community, under [the Birds Directive]" (CEC, 1984, Article 1(1)(c)). Certain Member States were likely motivated to make this amendment due to their unease at the idea of extending the EU's competences into additional areas of nature conservation policy; and perhaps also by the Commission's statement in its proposal to the effect that "Generally, such damage [to sensitive areas] can be prevented only by imposing restrictions on local economic activities," such that EU financial intervention would therefore be necessary (European Commission, 1983a, p.4). One would imagine that the Member States would not have been keen to extend any such restrictions beyond what was strictly required as a matter of EU law.

The Commission's draft Fourth Environmental Action Programme of October 1986 effectively reopened this debate by stating that "...the 'nature conservation' section of the Community's ACE Regulation (EEC) No 1872/84 should be expanded and extended to help the achievement of the above objectives [the protection of flora and fauna]; it would be neither logical nor desirable to restrict its scope to species covered by the 'Birds Directive'; the Commission will make appropriate proposals" (European Commission, 1986a, p.31). The Commission acted quickly, issuing its draft Regulation to the Council only two months later, in December 1986. In respect of nature conservation, the draft provided that EU co-funding could be made available for:

> "(e) projects providing an incentive and aimed at contributing towards the protection, maintenance or re-establishment of areas of particular Community-wide importance for the conservation of nature and especially of seriously threatened biotopes which are the habitat of endangered species and are of importance to the Community;
>
> (f) projects providing an incentive and aimed at implementing programmes on the conservation or restoration of populations of species in danger of extinction in the Community" (European Commission, 1986b, Article 1(1)(e) and (f))

In the draft instrument's Explanatory Memorandum, the Commission justified this proposed change on the basis that "In a number of urgent cases, this restriction [allowing funding only in respect of the Birds Directive, insofar as nature conservation was concerned] has made it impossible for the Community to grant support to protect the natural habitat of other severely endangered species in the Community, such as the monk seal, the brown bear, the sea turtle or certain bats, even though no-one denies that an effective, rapid Community campaign is essential to the survival of these species in the Community" (European Commission, 1986b, p.5). However, the Member States again rejected the Commission's proposal, with the instrument finally adopted in July 1987 again restricting EU co-funding in the nature conservation field principally to measures in respect of the Birds Directive,[160] and this in spite of the new EU environmental competences provided by the SEA, which had come into force on 1 July 1987 (Sands, 1990). Nonetheless, the final version of the Fourth Environmental Action Programme retained the above-quoted aspirational wording from the 1986 draft,[161] and so the issue remained very much on the Commission's agenda.

Indeed, DG XI's Nature Unit was creative in seeking to take action in respect of organisms other than birds, and did not lose sight of the species mentioned above, as Pierre Devillers of the IRSNB explains: "one thing that is important in the genesis of the Habitats Directive is that Richard [Geiser of the Nature Unit] was very conscious of the need to do something for other organisms, especially for mammals, and he launched a series of actions using as best he could some of the dispositions of the Treaty that permitted the Commission to look at more than the birds, and so he initiated some action plans for certain mammals and that he did mostly, if not entirely, with our institute. The first he did was the monk seal [(Anselin et al., 1988)], and also the sea turtles (Kunkel et al., 1989)...because he was very aware of the plight of the monk seal particularly in Greece, and so we were very, very involved with that, and of course that also meant contact with the Bern Convention. And we tried to go as far as we could; ...I wouldn't say it was stretching the Treaty but it was certainly using it to its fullest possibilities" (Devillers, 2013).

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[160] "(e) projects providing an incentive and aimed at contributing towards the maintenance or re-establishment of seriously threatened biotopes which are the habitat of endangered species and are of particular importance to the Community under Directive 79/409/EEC; (f) projects providing an incentive and aimed at contributing towards the protection or re-establishment of land threatened or damaged by fire, erosion and desertification" (CEC, 1987, Article 1(1)(e) and (f)).

[161] That is, "the 'nature conservation' section of the Community's ACE Regulation (EEC) No 1872/84 should be expanded and extended to help the achievement of the above objectives; it would be neither logical nor desirable to restrict its scope to species covered by the 'Birds Directive'; the Commission will make appropriate proposals" (Fourth Environmental Action Programme, 1987).

5.7 Stanley Johnson: back to the Commission in 1984

Soon after the European parliamentary elections of June 1984, Stanley Johnson moved back to the European Commission, returning from his five year *congé de convenance personnelle* as an MEP (Johnson, 2011). He rejoined the Commission at the same senior grade he had held on his departure for the Parliament, and took on a dual role on his initial return: head of the 'Waste Management and Prevention of Noise Pollution' unit, and adviser on intersectoral environmental issues to Anthony John Fairclough, then Director of Directorate A (Protection and Improvement of the Environment), but soon to be promoted to acting Director General of DG XI on the departure of Athanase Andreopoulos (Johnson, 2012). "It was quite a strange couple of years [from June-July 1984 to January 1987] in a way," reports Johnson (2011), "because I came back being vice-chairman of the Parliament's environment committee. I didn't have the kind of overarching role which I'd had before."[162] Strange for Johnson those two plus years may have been – that is, from his return to the Commission in June/July 1984 to the appointment of a new Director General, Laurens Jan Brinkhorst, in January 1987 (Japan Economic Newswire, 1987), at which point Johnson would drop his role as head of the Waste unit and act solely as main adviser to Brinkhorst (Johnson, 2011) - but they turned out to be important years in terms of EU nature conservation policy.

A British Commissioner for the Environment, Stanley Clinton Davis, took up office in January 1985 (Brown, 1984), and Stanley Johnson was given responsibility for drafting the Fourth Environmental Action Programme, to cover the period from 1987-1992; that is, the golden era of EU environmental policy described in chapter 3. As Johnson (2011) explains, "It was my job to write the whole thing, and indeed I did. Of course I got input from everybody else in the DG." Not only did Johnson and Clinton Davis share a common country of origin, they also shared interests; as Johnson (2011) comments, "Clinton Davis I regarded as wonderful because he was particularly keen on the things I was interested in," which of course included nature conservation.[163]

Others in DG XI were not the only ones seeking to provide input to the draft Fourth Environmental Action Programme. For example, of the many conservation conferences taking place across Europe in this period, at a British Association of Nature Conservationists' (BANC) conference in Cambridge in 1985, the need for an EU level instrument on species and habitat conservation was widely discussed (Everett, 1987; Hepburn, 1994). The issues

[162] Johnson worked as head of the 'Prevention of Pollution and Nuisances' division of the ECPS from 1973-76, but from 1976-79 he worked as adviser to Michel Carpentier, head of the ECPS (Johnson, 2011).

[163] Ian Hepburn, the RSPB/WWF coordinator of the EU-wide Habitats Directive campaign, explains that having a British Commissioner with a British adviser, in the form of Stanley Johnson, gave British NGOs an opportunity to go over and "start talking the same language, literally and metaphorically...and understand each other rather well" (Hepburn, 2012).

were recorded in detail in a 1987 journal article, in which Sue Everett, a former chair of BANC, called specifically for a Habitats Directive (Everett, 1987). Hepburn (1994, p.2) recalls that "This was based upon discussions held at and subsequent to the BANC conference on international wildlife treaties at Cambridge in 1985 and, in particular, encouragement from the RSPB and others with experience of the Birds Directive. This fortuitous event, combined with judicious lobbying by BANC, ensured that these views were not lost on the European Commission...". As Alistair Gammell explains, "Myself and one or two others...lobbied to put [a proposal for a directive on habitats and species protection] in [the Fourth Environmental Action Programme], although there were Commission officials in DG XI...who were...very easy to lobby...They wanted to do it and we wanted it in..." (Gammell, 2012).

This aspect of DG XI's work was given powerful political impetus around this time by agreement of the SEA Treaty changes in February 1986. Knowing that the Commission could rely on the new environmental competence provisions agreed in the SEA, Stanley Johnson worked on his draft of the Fourth Environmental Action Programme throughout 1986 (Johnson, 2011), and the Commission submitted its final draft to the Council on 15 October 1986, during a British Presidency of the Council of the EU, containing the following wording drafted by Stanley Johnson (European Commission, 1986a, p.31; Johnson, 2012):

> "5.1.2 More than six years have now elapsed since the Council adopted its Directive and resolution on the conservation of wild birds (79/409/EEC). It is of course essential to ensure that this Directive and resolution are fully implemented in the Member States...But this alone is not enough; the time is now ripe for the Community and Member States to make a major new thrust in the field of nature conservation.
>
> 5.1.4 What essentially is needed is a Community instrument aimed at protecting not just birds but all species of fauna and flora; and not just the habitats of birds, but the habitat of wildlife — animals and plants — more generally. Such a comprehensive framework should ensure that, throughout the Community, positive measures are taken to protect all forms of wildlife and their habitat; such measures should be aimed at the three main objectives of the World Conservation Strategy:
>
> — the maintenance of essential ecological processes and life support systems,
>
> — the preservation of genetic diversity,
>
> — the sustainable utilization of species and ecosystems.
>
> 5.1.5. The Commission will make appropriate proposals on these lines. The Commission is also working on the preparation of a comprehensive list of sites

throughout the Community that are protected under the various categories of protected areas. Such a list is a necessary basis for the consistent implementation of the kind of framework instrument discussed above.

5.1.6. ...It seems clear from recent reports that the implementation of the Berne Convention in the Member States of the Community, as elsewhere, is poor. A comprehensive framework of nature protection measures, at Community level, would undoubtedly help to improve the situation of endangered species of plants and animals within the Community, whilst at the same time helping to achieve the three-fold objective of the World Conservation Strategy."[164]

An EU instrument with these aims would naturally be a significantly more complex undertaking than the Birds Directive, given the former's much broader ambit. However, by 1987 the Commission already had some data to work with.

5.8 The CORINE biotopes project[165]

In addition to the lists of species annexed to the Bern Convention, the Commission had launched, in 1985, the CORINE (Coordination of Information on the Environment) programme, in many ways a precursor to work of the European Environment Agency (Devillers, 2013). One project within CORINE was CORINE biotopes, which was "designed to assemble reliable and consistent information about the location and status of ecosystems, habitats and species in need of protection and to make this information accessible to policy-makers" (Moss and Wyatt, 1994, p.329); or in other words, per Pierre Devillers of the IRSNB, "it was essentially doing, if you like, Natura 2000, it was doing exactly that" (Devillers, 2013). The CORINE biotopes project - which was "essential in the early process" of the Habitats Directive, according to Devillers (2013) - was under the direction of Gunter Schneider of DG XI, with Michel Cornaert the main official responsible under Schneider (Devillers, 2013). Schneider had worked as Stuffmann's deputy head of division – with special responsibility for "economic aspects and land use" – from 1980 to 1988, at which time Schneider moved to head up his own division, *Economic aspects, employment and statistics* (European Commission, 1980a, 1988b). The relations between Schneider's CORINE team and Stuffmann's nature team were reportedly not particularly good, but there were good contacts between the CORINE team and the Council of Europe (Devillers, 2013). Interestingly, at this time - that is, from the launch of CORINE in 1985 - there were three separate habitat classification projects running in parallel in Europe, as well as a fourth

[164] The World Conservation Strategy was drawn up in 1980 by the IUCN in collaboration with UNEP and the WWF. For additional background, see McCormick (1986).
[165] In general, see Moss and Wyatt (1994).

project which had already resulted in a report: the first, already published, was the Council of Europe's *Classification of European Ecosystems* designed by Géhu (1984); second, as part of the implementation of the Birds Directive, Stuffmann's team had developed a "very short typology of habitats...the kind of typology that bird watchers do" (Devillers, 2013); third, there was the CORINE biotopes project, which involved identifying important nature conservation sites and describing them; and fourth, there was ongoing work between the Council of Europe and the Commission - overseen by Professor Noirfalise of the Agricultural Science Faculty, Gembloux, Belgium - to produce a map of the natural vegetation of the member countries of the European Community and the Council of Europe, work which would ultimately be published in 1987 (Council of Europe and European Commission, 1987).[166]

As Devillers and Devillers-Terschuren (1996) record, "Throughout the development of the [CORINE] classification great efforts were made to establish or retain compatibility, in the sense of possibilities of one to one conversion, between the CORINE classification and two other Europe-wide projects. These were, on the one hand, the Council of Europe *Classification of European Ecosystems* designed by J. M. Géhu (1984), and, on the other hand, the *Carte de la végétation naturelle des Etats membres des Communautés européennes et du Conseil de l'Europe* that was being prepared by Professor Noirfalise simultaneously with the CORINE project." However, it was the task of seeking to ensure compatibility between the Birds Directive's simple typology and the developing CORINE initiative that would see Devillers become involved in CORINE biotopes in the first place, as he explains: "Richard [Geiser] asked me to try to bridge the two, to try to convince Cornaert to take onboard what was already done for the Birds Directive, because he [Geiser] was very worried about the incoherence that it would be for the Commission to have two systems of describing, and he was very aware of that, and so was Michel Cornaert, after all CORINE was Coordination, Information, so the idea was to do to the two together" (Devillers, 2013).[167]

Having started out in this way, Devillers soon became involved with broader discussions regarding coherence with the Council's of Europe's two ongoing projects, leading to some "difficult discussions" in Strasbourg, finally resulting in a compromise, allowing Devillers to

[166] This 1987 map was effectively the second edition, the first - covering the Council of Europe Member States - having been published in 1979, with Noirfalise amongst the authors (Ozenda et al., 1979). The 1987 map formed the basis for the creation of the first indicative map of biogeographical regions for the purposes of the Habitats Directive, which was later extended eastwards: for more detail, see ETC-BD (2006).

[167] Devillers (2013) adds, "when I joined the [CORINE] Biotope team, at that point, primarily to see to it that it would not conflict with the description of the special protection areas of the Birds Directive, that what they did would work, and that for birds, for instance, their list of important birds would be those in Appendix I and that the descriptions of habitats would be the same as those of the Birds Directive....it was just to make sure that it did not undermine the Birds Directive, originally" (Devillers, 2013).

begin work on a typology of EU habitats as part of CORINE biotopes, work which would continue throughout much of the Habitats Directive negotiations, before being published in 1991 (Devillers, 2013).[168] This work, explains Devillers (2013), "differed only from something like Natura 2000 in the sense that it was not legally binding, it was just to be a scientific inventory." The CORINE team established lists of animals and plants to be taken into consideration, as well as a typology of habitats. This typology was, explains Devillers (2013), originally strictly "a tool to describe the habitats identified, but very...early in the process, I proposed - and it was quickly accepted... that it also be used as a selection criterion. The idea was that we could not indefinitely make longer and longer lists of species, that it was not that all species had to be protected and all populations; all representative populations, we had to have a geographical basis, so all representative populations should be protected, nothing should fall through the net, but we could not do that by listing all the species of Europe, including all the unglamorous creepy-crawlers and little plants. And so I proposed to use habitat types as surrogates, and therefore to make sure that the list of habitats was detailed enough, went into fine enough details to make sure that every distinctive community was identified, and that therefore every distinctive community would have to be represented in the network in sufficient quantity in every geographical area, so that we would be sure that all the species would be covered, or as sure as possible that all the species would be covered. So that was the philosophy, and that's why the typology of habitats became extremely detailed, exactly to ensure that [element of surrogacy]".

At this time, the work was not being done with a Habitats Directive in mind; rather, the CORINE team simply saw CORINE biotope as "the best thing we could do. We felt that it was a way to get it through the back door, if you like. We did not think that it was possible to get a binding instrument, but we felt that notoriety is essential, and that if we made a scientific inventory of what needs to be conserved, it would bring a strong leverage on what the Member States would have to do. So essentially we were doing something like the Habitats Directive but without thinking of an instrument. ...CORINE ran into trouble later on, there was very strong pressure from the Member States to find other things to reduce its importance and its significance...but it's clear that it came from the fact that many Member States were afraid of CORINE. And we were told, in fact, by representatives of Member

[168] As Devillers (2013) explains, the typology he developed "incorporated as two digit units the units from the Birds Directive as upper limit, and then accommodated all of Géhu's proposals under those as the hierarchy, and also further developments, etc. And I worked very closely with Professor Noirfalise, who was a friend, and so he was developing at the same time his cartography and we kept in close contact, so that the typology we proposed within the [CORINE] biotope team was a synthesis of that of Géhu, of what Noirfalise was preparing, and of the very little that had to be respected that came from the Birds Directive. That typology took time to finish because it was complicated by accessions – the accession of Spain and Portugal certainly broadened the diversity of habitat types considerably, and so it was finally published in 1991 [(Devillers et al., 1991)]. So that was when it was published. [I]t was being finalised all through the preparation of the Habitat Directive."

States, that we were going much too far because, OK, we were admitting that it was not a binding instrument but in reality we were making it such that it would be difficult not to regard it as that. So it was our wish, and it's fundamental to what happened with the Habitat Directive" (Devillers, 2013).

PART III: THE GOLDEN ERA (1987-1992) AND THE HABITATS DIRECTIVE

Chapter 6: The Habitats Directive proposal

6.1 Introduction

In January 1987, DG XI got a new Director General, the Dutchman Laurens Jan Brinkhorst (Japan Economic Newswire, 1987).[169] As Brinkhorst's main adviser, "I was really able to push things through," comments Stanley Johnson (Johnson, 2011, 2012). Yet even after the new environmental powers in the SEA came into force in July 1987, DG XI was aware that nature conservation negotiations would remain a challenge - and not only with the twelve Member States,[170] but also internally within the Commission. As DG XI had commented in February 1987, "like other EEC policies, environmental policy has to work with the need to find compromise between 12 Member States, whose priorities and depth of commitment often vary widely. This tends to lead to a lowest common denominator approach, with legislation moving at the pace of the 'slowest' member government; a similar compromise has to be found within the Commission itself, where different departments also have different priorities. Officials responsible for Community agriculture or industry policies may see efforts to protect the countryside and wildlife habitats or to impose stricter pollution requirements as a threat to the success of their own policies" (DG XI, 1987, p.63).

Nonetheless, DG XI and others were convinced of the need for an EU nature conservation instrument going beyond birds, and by August 1987 the policy was beginning to take shape, with Commissioner Clinton Davis commenting, "We would like...to use a Community instrument, probably a directive, to provide for the EEC-wide notification and protection of sites of special interest, whether in terms of species, habitat or landscape" (Clinton Davis, 1987b).[171] Separately, also in August 1987 DG XI's Legal Unit launched the first stage in legal proceedings against Germany in respect of the Birds Directive, for allegedly failing to protect bird habitats from coastal protection works in Leybucht bay, a case which would play an important recurring role during the negotiations regarding the Habitats Directive (Freestone, 1996). Two months later, in October 1987, the Council adopted the Fourth Environmental Action Programme (1987), retaining untouched[172] Stanley Johnson's language

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[169] Who came to the job from Japan where had had been head of the European Communities' delegation (Japan Economic Newswire, 1987).

[170] Greece, Portugal and Spain having joined the EU since the Birds Directive was adopted in 1979.

[171] These were evidently expansive times in EU environmental policy, on the brink of the golden era described in chapter 3, with Clinton Davis giving a very early indication of the Commission's desire to extend the EIA Directive to cover programmes as well as plans; as he noted, "I do not underestimate the difficulties involved"; it would indeed prove difficult, taking a further 14 years before such a step would be taken, in the form of the Strategic Environmental Assessment Directive (2001).

[172] Note that, as was customary at the time in respect of environmental action programmes (Ludwig Krämer, pers. comm., 4 October 2013), the *entirety* of the Commission's proposed text for the Fourth Environmental

regarding the need for a new EU nature conservation instrument,[173] thus clearing the path for the Commission to bring forward proposals for a Habitats Directive. As Alistair Gammell comments, "I think governments, my explanation is that governments put...in [the wording about a new EU instrument on nature conservation] with the full expectation that they wouldn't do anything about it. So they did, governments allowed it to remain in, but I'm pretty certain that they never intended to do anything about it" (Gammell, 2012). This is not impossible; after all, in the Resolution accompanying the Fourth Environmental Action Programme, the Council and Member States merely "[noted] the action programme set out in the Annex to this resolution and [approved] in general the guidelines" (Fourth Environmental Action Programme, 1987, p.4). Moreover, in terms of the priority areas on which the EU should concentrate, the Resolution accompanying the Action Programme referred to: "(g) measures to protect and enhance Europe's natural heritage, in particular: ....the protection, as laid down in the Treaty, of areas of importance in the Community, *inter alia*, in the framework of [the Birds Directive], or of areas which are particularly sensitive environmentally, and encouragement of the revival of areas which are environmentally impaired" (Fourth Environmental Action Programme, 1987, p.3). This was hardly a direct endorsement of the Commission's proposal, setting to one side the ambiguity of the paragraph.[174] Indeed, as the UK government would later argue, "[a possible Habitats Directive] had not been one of the 22 priorities identified explicitly in the Resolution of 19 October 1987" (House of Lords, 1989b, paragraph 38).

Nevertheless, having successfully negotiated the Fourth Environmental Action Programme (1987) through the Council on behalf of the Commission, Stanley Johnson – as main adviser to DG XI's Director General – found himself in a position to progress the idea of a Habitats Directive, albeit that this caused certain internal difficulties within DG XI. By 1987 Johnson held an overarching senior role as adviser, but he no longer had responsibility for any policy sector (Johnson, 2012). The head of the unit which would naturally be responsible for the Habitats Directive – 'Agriculture, nature conservation and relations with other policies' (European Commission, 1988b); hereafter the Nature Unit – was Claus Stuffmann, who had earlier negotiated the Birds Directive and the EIA Directive on behalf of the Commission, the latter having been adopted only two years before, in 1985. Both Directives had proven controversial, and Stuffmann would of course also have been involved at this time with the early implementation of the Birds Directive, including multiple legal proceedings and the

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Action Programme (European Commission, 1986a) was included, untouched, in annex to the Council's final Resolution in respect of the action programme (Fourth Environmental Action Programme, 1987).

[173] Language quoted in section 5.7 above.

[174] It is not clear if the "inter alia" is attached to "areas of importance in the Community" or instead to "in the framework of [the Birds Directive]".

dispute with the UK government over Duich Moss (detailed in chapter 5). For some or all of these reasons, Stuffmann was reportedly reluctant to proceed with the idea of a new nature conservation directive, as set out in the Fourth Environmental Action Programme (Johnson, 2012; Sundseth, 2012). This was not, of course, because he was not keen on nature conservation; on the contrary, in fact, as Pierre Devillers of the IRSNB highlights: "both Claus Stuffmann and Richard Geiser were extremely dedicated conservationists and extremely pro-active." The Commission was "a force for conservation in Europe" at that time, adds Devillers (2013), "and it's very largely those two men that did it. I think that will never be too much recognised." Notwithstanding these convictions, it seems that Stuffmann did not think he would be able to get a Habitats Directive proposal through the Commission, not to mention the Council (Johnson, 2012). As Kerstin Sundseth, a stagiaire (intern) in DG XI at the time, recalls, "There was a little bit of humming and hawing [regarding] whether the Commission dared to launch something as major as this when the Birds Directive was...not under attack, but was in the news, but the argument was, look, many Member States have already signed up to the Bern Convention, we should be coherent and continue" (Sundseth, 2012).[175]

In the circumstances, Stanley Johnson decided to take matters into his own hands, and began the process of producing a draft Habitats Directive, causing a "good deal of friction" within DG XI, given that Johnson did not hold the policy brief for nature conservation matters (Johnson, 2012). This dynamic between Stanley Johnson and Claus Stuffmann was an important feature of the early history of the Habitats Directive (Henningsen, 2012), and it would take all the skills and experience of both to see the Directive successfully adopted. As Sundseth reflects, "I really do think that if Stanley hadn't been there we would never have seen the Habitats Directive. He just went ahead, he was determined that...they had committed to it [in the Fourth Environmental Action Programme] and that they should follow it through" (Sundseth, 2012). Johnson having set the ball in motion in this way, Claus Stuffmann would then play a pivotal role in the successful negotiation of the Habitats Directive, just as he had with the Birds Directive: as John Temple Lang comments, "Without [Claus Stuffmann] I doubt if either [the Birds Directive or the Habitats Directive] would have been adopted. He patiently and professionally steered the ships through many shoals....It was an achievement of the best kind that Commission officials can do" (Temple Lang, 2013a).

[175] Moreover, as Denmark's Veit Koester, then Chair of the Standing Committee of the Bern Convention, argues, "[T]here is no doubt that one of the reasons why the Commission proposed the [Habitats] Directive was that there were constant problems with the Member States' implementation of the [Bern] Convention, especially as far as the habitat protection provisions of the Convention....There's no doubt that the Commission was frustrated by the constant complaints [to the Standing Committee] against EU Member States about their poor implementation of the Bern Convention and that was one of the reasons for proposing the Habitat Directive" (Koester, 2012).

6.2 First draft of the Habitats Directive and Annexes: January 1988 to formal proposal in August 1988

6.2.1 The first draft: Devillers and Temple Lang

The official starting signal for producing a draft Habitats Directive was given in mid-January 1988 (DG XI, 1988a-t), and the very first draft was produced for Johnson very rapidly by Pierre Devillers, a scientist from the Institut Royal des Sciences Naturelles de Belgique (IRSNB),[176] together with John Temple Lang, who at the time was still with the Commission's Legal Service, having about a decade before played a key role in drafting the Birds Directive (Temple Lang, 2012a).[177] As Devillers (2013) explains, Stanley Johnson "met John Temple Lang for lunch somewhere and [Stanley] asked [John] if he thought it could be done, and John called me,[178] and because of the existence of the CORINE biotope habitat list, I told him indeed yes I was sure it could be done. And so [John] told Stanley and I remember very well that on the Friday [15 January 1988][179] Stanley said he wanted the draft by the Monday and John spent the weekend with me, here in my home, and we drafted it during that weekend."[180] The first draft was modelled on the Birds Directive, with Temple Lang doing the drafting given his legal skills, though it was obvious to Devillers and Temple Lang that the Habitats Directive was going to be a much more complicated job than the Birds Directive had been, because of the wide variety of habitats and species concerned, and the multifarious problems those species and habitats faced (Temple Lang, 2012a). A major difference between the Birds Directive and this new draft instrument was that, whilst the Birds Directive covered, *inter alia*, habitat conservation (via protected areas) and, in addition,

[176] Devillers was the main architect of an EU classification system for habitats, part of the CORINE biotopes project (Devillers et al., 1991; European Commission, 1991a), and of its "successor" the Palaearctic habitat classification (Devillers and Devillers-Terschuren, 1996), "developed for the Council of Europe," and re-structuring and re-defining the earlier classification (Moss, 2008, p.2). This Palaearctic classification formed the basis for the Habitats Directive Interpretation Manual for the EU-15 in 1996, produced to aid the interpretation of Annex I habitat types (European Commission, 2007g; Moss, 2008).

[177] The draft in the Commission's archive is marked "1er Texte directive (IRSNB)". It is a partial draft, undated, but from the archive folder "Directive Habitats – Preparations à 1988". Several provisions were left to be completed by way of "technical adaptations" to similar Birds Directive provisions, and the draft contains no Annexes of species/habitats (IRSNB, Undated).

[178] As Devillers (2013) explains, "...I think the reason I was contacted by him [John Temple Lang] was that we knew each other very well, I was his main contact on nature in Brussels, and he was in the habit of getting in touch with me every time he wanted to discuss a point that had to do with nature conservation...[A]t that time we were birding together at least once a month or twice a month...we published a paper on raptors together around that time, and...we were quite often together in the field."

[179] Whilst this very first draft is undated in the archive, other documentary evidence suggests that this must have been Friday 15 January 1988. As discussed below, this first draft was amended by Devillers, Johnson and Temple Lang on the Monday (18 January), and the draft was passed to Stuffmann immediately thereafter – the first draft marked up by Stuffmann (removing the funding provision, for example, as discussed below) is dated 19 January 1988 (DG XI, 1988a-v).

[180] Typed up by Devillers' wife "on an old Zenith computer in Spellbinder" (Devillers, 2013).

species protection (inside and outside protected areas), the first draft of the Habitats Directive related only to habitat protection and did not contain a parallel species protection regime (IRSNB, Undated). As Devillers (2013) explains, he and Temple Lang did "not put into [this first draft] anything about taking [i.e. species protection], and that came from the allergy I had developed to the taking problems under the Bird Directive, and I didn't want to restart with snails or with frog legs what we had been doing with thrushes and pâté and the rest....".[181]

A few additional points are worthy of note (all from IRSNB (Undated)): first, in terms of site designations, the draft envisaged the designation of (at least) the one hundred most important areas in the EU and the five most important areas in each region[182] for each of the species and habitats to be listed in Annexes (Article 4(2)).[183] Second, the draft gave the Commission no greater role than it had under the Birds Directive in respect of site designations; that is, the Commission was merely to be provided with information by the Member States to allow the Commission to perform a coordinating function (Article 4(3)). Third, in terms of site protection, the draft contained a provision based on Article 4(4) of the Birds Directive, but going a little bit further: "In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the flora and fauna, in so far as these would have significant undesirable effects on the species or types of habitats for which the area has been classified. They will consider in particular the creation of nature reserves, the upkeep and management of other areas in accordance with the ecological needs of the species and types of habitat concerned, the re-establishment of destroyed biotopes, the creation of biotopes. Outside the species protection areas, Member States shall also strive to avoid pollution or deterioration of habitats" (Article 4(4)). Further, the draft envisaged the Annexes covering bird species in addition to other species of fauna and flora, with a cross-reference to the Birds Directive providing that obligations satisfied under Article 4 of the Birds Directive would fulfil site protection obligations under the Habitats Directive (Article 4(5)). Fourth, the draft proposed settling the long-running dispute over nature conservation financing[184] by providing that species recovery plans for Annex I species and projects concerning the conservation, management, maintenance, or reestablishment of habitats or species of flora or fauna in

[181] When asked whether hunting regulation formed part of the work of the advisory group of Devillers, Gammell et al. which assisted Richard Geiser with the early implementation of the Birds Directive (see notes 139, 140 and associated text), Devillers (2013) replied, "...unfortunately, very much. Hunting and other forms of taking took a great deal of our time, not to say most of it...I've always felt that the interest of the Birds Directive was Article 4 [habitat protection], but there was no way not to cover the hunting...".

[182] The regions being the administrative units designated in the Political Map of the European Community, edited by the Office for Official Publications of the European Communities.

[183] Though this first draft of the Directive did not include the Annexes themselves (IRSNB, Undated).

[184] Under, at that time, ACE Regulation (No 2242/87).

protected areas designated pursuant to Article 4 would be eligible for EU co-funding of up to 75% as a general rule, and up to 100% in the case of species or habitats threatened with extinction in the EU – higher levels of co-funding than was the general rule under the then applicable Regulation.[185]

6.2.2 Revising the first draft with Stanley Johnson

Devillers and John Temple Lang presented this draft to Stanley Johnson in the latter's office on Monday 18 January 1988, as Devillers (2013) explains: "on the Monday John and I went to Stanley's office and...we worked on the floor with various pieces of paper and scissors and started to put things together and to jot the missing pieces and we probably [finished] it that evening, it's certainly not much longer than that. I think by the next day anyway it was in Stuffmann's division." Indeed, the revised draft which was passed to Stuffmann - dated Monday 18 January 1988 - drew heavily on material from the Bern Convention to supplement the draft produced over the weekend (DG XI, 1988a-x). Johnson then immediately sought comments from Stuffmann's Nature Unit (DG XI, 1988a-v). The draft as revised on the Monday had developed quite a bit from the original version of the weekend. One major change concerned the addition of species protection measures: the revised draft contained a substantial section on this subject, modelled largely on the Bern Convention, containing, for example, rules about deliberate capturing and killing of certain species, etc (DG XI, 1988a-v, Articles 5-9). Making changes on the Monday, Johnson had insisted on inserting these species protection measures, saying: "we've got to, it's a question of coherence with the Council of Europe, we have to cover what Bern covers" (Devillers, 2013). The EU hunting coalition FACE was therefore correct on the substance (but not quite on the timing) in stating that "our information of about a year ago – end '87, early '88 – [was] that the Commission was preparing a Directive on habitat protection, and that, to the surprise of many observers – including bodies such as the E.E.B. - the extension to the conservation/management of flora and fauna species, probably took place only in February or March '88" (FACE, 1989b, p.1).[186]

In terms of site designations, the revised draft proposed obliging Member States to classify territories sufficient in number and size to ensure the survival of species and habitats to be listed in Annexes; this was backed up by site selection criteria in an Annex, including a '100

[185] See Articles 5 and 6 of ACE Regulation (No 2242/87).

[186] That said, the decision to exclude species protection measures from the original draft of the weekend of 16/17 January appears to have been a unilateral decision by Pierre Devillers, based on his Birds Directive experience, and this decision was reversed by Johnson on the Monday (Devillers, 2013), such that the Commission was preparing a directive on habitats (alone) for a matter of only a couple of days.

most important areas in the EU' formula as one criterion (DG XI, 1988a-v, Annex V). The revised draft no longer envisaged listing birds in an Annex, such that the directive would in general terms cover only other fauna and flora and their habitats. In terms of site protection, Article 4(4) remained in the revised draft, but the draft now included an interesting new idea: "Article 16: In carrying out their obligations under this directive, Member States shall apply the provisions of Articles...of [the EIA Directive] in respect of programmes and projects susceptible of having a significant effect on the territories classified as special protection areas under this directive or under [the Birds Directive]." The EIA Directive had yet to come into force at this time – it would do so on 3 July 1988 (Environmental Impact Assessment (EIA) Directive, 1985) – but here the draft proposed requiring projects *and* programmes to undergo impact assessment, in supplement to the bare protective provision set out in Article 4(4). Finally, it is in this 18 January 1988 draft that Annexes of specific species and habitats were mentioned for the first time, and here the influence of the Bern Convention and the CORINE biotopes project is evident; in terms of the species and habitats requiring the designation of protected areas, the draft states: "ANNEX I Plants – identical to latest Berne list...ANNEX II Animals – Berne....ANNEX IV Types of habitat to be protected – to be completed (see for example Section 4.4 of Technical Handbook Volume I of CORINE Biotopes Project)" (DG XI, 1988a-v).[187]

This Devillers/Temple Lang/Johnson draft of 18 January 1988 was passed immediately to Stuffmann's Nature Unit, which gave its initial reflections on 19 January, amongst which was a proposal to delete the financing provisions altogether from the draft instrument (DG XI, 1988a-v, p.6). As Devillers (2013) highlights, the Nature Unit commented (in person) "that [the draft directive] was certainly a very good text, a very good idea, but that it was very visible that it had not been seen by lawyers, there were things that were totally impossible surely for the Legal Service of the Commission, which I thought was very amusing at the

[187] A handwritten comment notes that the IRSNB was updating/reviewing the CORINE list for the purposes of the draft directive, with a deadline of 14 February 1988 (DG XI, 1988a-r). Devillers notes, "It's obvious that the Appendix was to be the CORINE list of habitats and for the species Appendices there were two possibilities: either take the Bern Convention ones as they were or take the CORINE ones as well, and I was in favour of the CORINE ones because it was wider, quite a bit wider. Like we had drafted for CORINE...the dragonfly list, and an orchid list, and some other people within the Biotope [team] had also some other groups that were much, much wider than the Council of Europe...[Those] were the species that had to be used as selection criteria, it was 'if a species, any species on any of those lists has a significant population, it has to be, the site has to be identified', which would have meant has to be designated, and the same thing for the habitats. And for the habitats, the idea, that was, I think a source of, I shouldn't say conflict, but a source of friction later is that because...the habitats were seen as a surrogate, we wanted all the habitats listed under CORINE as criteria, because that was the only way we would have complete coverage. And so they all had to be represented with the exception of the ones that were totally artificial, that were there only for the purpose of description of those, that was clear. But all the natural, semi-natural habitats included in the CORINE list, in our mind should have been in the Appendix of the Directive" (Devillers, 2013).

time...John [Temple Lang] was a very high officer in the Legal Service, but at the time it could not be known that it was him who had drafted it."[188]

6.2.3 The Nature Unit begins work on the draft

This 18 January 1988 draft formed the base material on which Johnson and the Nature Unit began to work, with Johnson assisted in the early stages principally by his *stagiaire* (intern) Kerstin Sundseth, and from April 1988 by Henriette Bastrup-Birk, a Danish Commission official who later played a key role in negotiating the instrument as part of Stuffmann's Nature Unit (Johnson, 2012). Johnson reports that he retained control over the draft instrument by typing it out on his personal Amstrad computer (Johnson, 2012). There was, he explains, a general reluctance on the part of others to get involved in heavy retyping; in other words, there was "what you might call a presumption that you would think twice before changing a text in a typeface you couldn't alter without retyping the whole thing" (Johnson, 2012). Thus, others within the Commission could suggest changes, but Johnson retained control of the working draft (Johnson, 2012).

Following a meeting with the Nature Unit on 21 January 1988, Johnson produced a revised draft of the directive (DG XI, 1988a-r). Article 1, which recorded the aims of the directive, had been amended to provide "The aim of this directive is to conserve natural habitats and wild flora and fauna (other than birds)," though the question of whether or not birds should be covered by the directive remained open, as evidenced by a handwritten comment on the list of Annexes and by the fact that this draft retained the idea of applying the EIA Directive to protected areas under this new directive *and* under the Birds Directive (DG XI, 1988a-r). The issue of financing was now proposed to be dealt with by way of a simultaneous amendment to the ACE Regulation (1984) (DG XI, 1988a-r), and an interesting development had taken place in respect of the directive's site protection obligations. Two new paragraphs were proposed for Article 4, reading:

> "4.9 Outside the special protection areas, Member States shall also strive to avoid pollution or deterioration of natural habitats.
>
> Member States shall take the necessary measures to conserve characteristic or representative habitats in all of the regions where they naturally occur.
>
> Version 1

[188] Indeed, neither Devillers' nor Temple Lang's involvement was revealed at the time: "Stanley passed [the draft] to Stuffmann's unit, and because of the sensitivities between the two units, I [Devillers] did not tell anybody of my involvement. I was immediately consulted by Stuffmann and Geiser, but I didn't indicate that it was a direct offshoot of CORINE because that would have undermined it...nor John Temple Lang, for even more obvious reasons...So both I was consulted the next day and the Legal Service was consulted" (Devillers, 2013).

[They will furthermore take all necessary measures to ensure the protection of landscape features, especially those mentioned in Annex VIII, of major importance for the conservation of the species mentioned in Annex I whose conservation cannot be assured solely through the designation of special protection areas.]

Version 2

[Author's note: a variation on Version 1, so not reproduced here.]

4.10 [Member States may allow derogations from the provisions of paragraph [4.9], if the impact on landscape features can be counterbalanced or if the measures of derogation are required by overriding public interest, provided, however, that compensatory measures are taken.]" (DG XI, 1988a-r)

In other words, in this draft, special protection areas themselves were not to be the subject of any form of derogation; however, a derogation could be applied in respect of important areas *outside* special protection areas, which the directive would also require to be protected. It is also interesting to note that, as early as January 1988, the Commission had in mind the concepts of "overriding public interest" and "compensatory measures" in their draft derogation, which concepts would re-emerge later in Article 6(4) of the final version of the directive to be applied in respect of protected sites under the Habitats and Birds Directives (Habitats Directive, 1992).

Although the draft directive was already highly detailed by the end of January 1988,[189] several major questions remained outstanding. For example: whether the Directive should remain limited to the European territory of the EU (as was the case with the Birds Directive). After all, as a DG XI official noted, "One should not forget the great number of endangered species in the overseas territories!" (DG XI, 1988a-k). Also, the possibility of Member States derogating from the provisions of Article 4 (the main site protection provision) remained open (DG XI, 1988a-k). Several decisions had, however, been taken: the representatives of four federations of NGOs were to be invited to discuss the draft directive: the WWF, IUCN, EEB, and FACE (DG XI, 1988a-y).[190] Moreover, a decision had been taken that the UK government's nature conservation advisory body, the Nature Conservancy Council, was to work on producing Annexes listing species requiring the designation of special protection

[189] Even going so far as to propose an Annex containing a proforma sign and notice to be used on the ground to indicate a site's status as an EU protected area (DG XI, 1988a-r). The relevant annex to the directive would later be deleted, on the initiative of the French Presidency of the Council in 1989 (DG XI, 1989a-c). However, it would later be reinserted, in April 1990, when the Commission was required by the European Parliament to insert annexes formally as part of its proposal (CEC, 1990c), only to be deleted again.

[190] The Fédération européene des parcs naturels was originally to have been the fifth coalition of NGOs invited (DG XI, 1988a-k), but its name was scored out in a later draft, evidently following an internal discussion (DG XI, 1988a-y).

areas, and Belgium's IRSNB was to work on a list of habitats as well as site selection criteria (DG XI, 1988a-k).

6.2.4 Rapid progress and the question of consultation

The team led by Stanley Johnson worked rapidly. The Fourth Environmental Action Programme (1987) had only been adopted in October 1987, yet by February 1988 Commissioner Clinton Davis was already promising an audience that "I will soon present a first Directive of general scope with the aim of protecting habitats, fauna and flora" (Clinton Davis, 1988b). That said, much remained to be done. By this time the Nature Unit was fully engaged in the process, and on 8 February the Unit sent out an ambitious draft work programme for the directive, comprising the following actions for 1988: 15 February: Dispatch of draft directive to other Directorates General (DG) of the Commission for a first consultation and to the Environment Commissioner's cabinet; 16 February: Working group meeting on the species Annexes of the draft directive (with representatives of the WWF, IUCN, the UK government's Nature Conservancy Council, the French National Museum of Natural History's SFF,[191] and the IRSNB); 8 March: Consultation meeting with representatives of DGs VI (agriculture), XII (science, research and development), XIV (fisheries) and XVI (regional policy); 15 March: Dispatch of the draft directive to Member States' Permanent Representations with a view to discussing; 18 April-22 April: Consultation meeting with national experts; 25 April-29 April: Consultation with representatives of NGOs: WWF (International and UK), EEB, IUCN, FACE; June: Dispatch of draft directive for formal consultation of other DGs; 30 June: Transmission of proposed directive to Commission (DG XI, 1988a-s).

Despite the proposal here of consultations with Member State representatives, it seems that no formal[192] consultations were held with governments before the instrument was proposed to the Council in August 1988 (DG XI, 1988a-e, o; Wildlife Link, 1988c).[193] The reason for

[191] The Fauna and Flora Secretariat, a unit of France's National Museum of Natural History (Le Muséum national d'histoire naturelle)(Jaffeux, 2013).

[192] The UK government stated that "EC officials appear to have had contacts with a number of organisations within the UK during the preparation of the Directive (including a short informal session with DOE officials in January 1988). There were however, no formal meetings with the UK government and although the Commission are not obliged to consult we believe that they recognise with hindsight that it would have been more productive to have done so" (Department of the Environment, 1989, paragraph 3). Commenting on what seems to have been this informal session with UK officials, Roy Bunce, then head of the Department's Wildlife and Countryside Division, states: "my first contact was with Stanley Johnson, with this early draft, so called, which I think had been very largely written for him by the RSPB... We were very concerned about the implications of the first draft as drafted, and Stanley...turned up with a draft at the end of the day that was virtually the same as what he'd started with. And we felt that our views and concerns had not been taken into account in any way" (Bunce, 2012).

[193] In another draft of this file note, the relevant wording had been amended to read that NGOs were consulted *more* than the Member States (DG XI, 1988b-b).

this is unclear, but it seems that the proposal to consult Member State representatives may have come from the Nature Unit, while Stanley Johnson was in practice running the day-to-day process. This interpretation is given some support by the following comment from Claus Stuffmann in 1989, who said the draft directive was "pulled out of the Commission's drawers in the space of three months, without consulting national administrations" (cited in Bader and May (1992), in turn cited in Kautz (2002, p.54)). The UK government would later argue that the proposal for a directive was not one of the priorities identified explicitly in the Resolution of 19 October 1987 which accompanied the Fourth Environmental Action Programme (1987), and that more extensive prior consultation would therefore have been appropriate (House of Lords, 1989b). The Commission's response was that "there had been extensive discussion in Council working groups at earlier stages – for example during the preparatory stages of the Fourth Environmental Action programme – so [more extensive discussion with Member States before the launch of the proposal] had not been necessary," and that "during the working group discussion of the Fourth Environmental Action Programme, no Member State had recorded a "reserve" against this particular item, unlike others" (House of Lords, 1989b, paragraphs 38 and 66).

6.2.5 Comments from DG XI's Finance Unit

In letters dated 10 and 11 February 1988, Gunter Schneider's 'Economic aspects, employment and statistics' unit of DG XI (European Commission, 1988b)(hereafter the Finance Unit) - which held responsibility for the CORINE biotopes project (Devillers, 2013) - expressed concerns regarding the draft directive. In particular, the Finance Unit did not believe that adequate financial provisions were available to meet the aims of the draft directive, and argued that the draft did not set realistic objectives in certain respects (DG XI, 1988a-m). The Unit noted that the financial capacity of Member States was inversely proportional to biodiversity richness (i.e. the most biodiverse regions of the EU tended to be the poorest), and that financing of a different order of magnitude to that available in the ACE Regulation's (1984) budget would be required (DG XI, 1988a-m).[194] Further, the Unit argued that a step-wise approach to deadlines for site designations would be required, since very short timescales could not be met by all countries (the draft directive had proposed 3 years for the designation of sites): some, such as Denmark, could perhaps meet a short timetable,[195] the Finance Unit noted, but for others even 10 years would be insufficient (DG XI, 1988a-m). Finally, the Finance Unit suggested naming the new network of protected

[194] Morillo and Gómez-Campo (2000) note, for example, that "ca. 40% of the EU priority species and >60% of the priority natural habitats [under the Habitats Directive] are found" within Spain's borders.

[195] Denmark had proven itself the "honourable exception" in respect of site designations under the Birds Directive, having made a lot of progress with its network of SPAs for birds within four years of the Directive's adoption (Gammell, 1999; Stuffmann, 1999).

areas "OIKOS",[196] and proposed merging the Birds Directive with the new directive, with the former to be repealed on the entry into force of the new directive (DG XI, 1988a-n).

At this point, DG XI's work was given added impetus by the European Council's decision, at its meeting of 11-13 February 1988, to double spending under the Structural Funds between 1989 and 1993 (House of Lords, 1989b), completing part of the deal done to secure agreement on Treaty changes via the SEA. Most of these Funds would be spent in rural regions of Southern Europe, Ireland and parts of the UK, including "heavy investment...on new roads, bridges, sewers and energy supplies, factories, tourist developments, and changes to established patterns of agricultural production" (House of Lords, 1989b, paragraph 40). Claus Stuffmann expressed particular concern at the speed of development envisaged, noting that, whatever their benefits, the Structural Funds were creating "a development which is faster perhaps than can readily be controlled in environmental aspects" (House of Lords, 1989b, paragraph 41). Giving evidence before the House of Lords in the UK, the Commission argued that "such potential problems with the Structural Funds were themselves an important argument for a new Habitats Directive granting the Community internal competence for protection of all Community flora and fauna, rather than simply for birds, as hitherto" (House of Lords, 1989b, paragraph 44).

Returning to the draft, the Finance Unit's comments were taken on board in the next version of the directive, dated 15 February 1988, which called for the "basic structure" of the OIKOS network to be established by the designation of sites within two years from the entry into force of the directive, as well as by the immediate designation of remaining undesignated sites under the Birds Directive (DG XI, 1988a-p, Article 4.5). Within three years of the new directive's entry into force, the Commission, assisted by a Standing Committee on Nature Conservation, would then prepare a Joint Programme for the strengthening and development of the network, and this Programme would be reviewed every three years (DG XI, 1988a-p, Article 4.7). Amongst other things, the Programme would specify deadlines by which further areas needed to be designated (DG XI, 1988a-p, Article 4.7). Thus, slowly but certainly, the Commission began to propose greater powers for itself in respect of site designations than had been the case in respect of the Birds Directive. In addition, the revised draft retained the possibility of Member States derogating from the protection provided to important "distinct natural features" outside the special protection areas: "Member States may allow derogations...if the impact on distinct natural features can be counterbalanced or if the derogations are required by overriding public interest, provided, however, that they do not

[196] Oikos is an ancient Greek term meaning 'house, an inhabited place, a habitat' (Hughes, 1975).

have adverse effects on the sustainability of the biological systems connecting the special protection areas" (DG XI, 1988a-p, Article 4.11).[197]

6.2.6 Early meeting of experts to discuss annexes of species and habitats

On 16 February 1988 the Commission held a meeting of experts in Brussels to discuss the species to be listed in annexes to the draft directive, with one representative invited from each of: the UK government's Nature Conservancy Council, the IUCN's Conservation Monitoring Centre in Cambridge, UK, the Museum d'Histoire Naturelle in Paris, the IRSNB in Belgium, and the Nature Conservation Bureau, a UK-based ecological consultancy (DG XI, 1988a-h). For the purpose of the meeting, the IRSNB had produced a "comprehensive list" of species requiring the designation of special protection areas, on the basis of information from the CORINE project (DG XI, 1988b-a). It was decided, however, that additional work on plant species should be carried out under contract by the IUCN's Conservation Monitoring Centre's Kew office in the UK (DG XI, 1988b-a). The list of habitats requiring the designation of protected areas was reported to be close to finalisation by this date, albeit that a draft of the directive dated only two days before had stated "to be completed" in respect of this Annex, adding "see for example Section 4.4 of Technical Handbook Volume I of CORINE Biotopes Project" (DG XI, 1988a-l, p)(revealing, perhaps, that the intention was simply to use the then current draft list produced by the CORINE biotopes team). In any event, various tasks were allocated at this meeting of experts, and relatively short deadlines were set for the return of draft Annexes and comments (DG XI, 1988a-l). By the end of February 1988, a single-page list of habitats requiring the designation of special protection areas, produced by the IRSNB, had been added to the draft directive (DG XI, 1988b-d). As Devillers (2013) explains, "...The lists that we produced...were always directly based on those of the CORINE habitats, and...it was possible to produce short lists of habitats, but they were in fact more encompassing...[than longer lists might have been]," because listed habitat types on a short list would protect all sub-habitat types, and these sub-habitats were extensive and were being listed as part of the CORINE biotopes project. The risk of producing a very detailed list of habitats for the draft Directive, as Devillers (2013) explains, would be that "in making the sentence more precise, in a legal text like that, you of course restrict its application."

[197] The paragraph cross-referred to in the 15 February 1988 version of the derogation provision is a typographical error (DG XI, 1988a-q); subsequent drafts reveal the above interpretation of the intended effect to be correct.

6.2.7 The Legal Unit provides comments: hands off the Birds Directive

On 18 February 1988 the Legal Unit of DG XI gave its views on the draft directive, expressing particular concern regarding the idea of amalgamating the Birds Directive with the new Habitats Directive (DG XI, 1988a-q). Many of the Legal Unit's 29 infringement proceedings in respect of site designations under the Birds Directive "have already had a positive result", the Unit argued, and the introduction of new deadlines and a "dynamic" (step-wise) system of site designations would "obviously call in question the legal basis of the existing 29 infringement proceedings against Member States and the work that has been done till now by Member States and the Commission. Furthermore by introducing new deadlines the pressure that the Commission has been exercising to force Member States to classify and protect habitats, will be radically reduced" (DG XI, 1988a-q, pp.1-2). Moreover, the Legal Unit foresaw a "reduction of the level of protection provided for by [the Birds Directive] since the draft provides for derogations and has not such a clear wording as [the Birds Directive]" (DG XI, 1988a-q, p.2).[198] In addition, the Legal Unit highlighted the imprecision of the obligation to establish the "basic structure" of the network of protected areas within two years (DG XI, 1988a-q, p.3). The Legal Unit's conclusions were clear: bird species should be removed from the draft directive and a new paragraph should be inserted into the habitat protection provision stating that "The obligations of this article are without prejudice to the provisions of [the Birds Directive]" (DG XI, 1988a-q, p.2).

6.2.8 Progressing the draft; and contact with the Council of Europe

The proposal to provide protection for "distinct natural features" outside the network of special protection areas, subject to the possibility of derogating from this protection, came in for criticism from the UK ecological consultancy the Nature Conservation Bureau (which was consulted about the species Annexes), albeit from a different angle: "To be honest, I think that the aims of the directive to place strict obligations on Member States to conserve the 'distinct features' is a laudable one but unobtainable....the EC would be inundated with applications for hedgerow removal, or no-one would take any notice of the directive in this respect. Who is going to apply for a derogation relating to a field margin?" (NCB, 1988,

[198] In this regard, Pierre Devillers of the IRSNB, who played an important role in the early implementation of the Birds Directive, offers an interesting perspective: "our actions through it all [have] always been to do everything we could to prevent the [birds] directive from being revised, because we were convinced – and it is still my conviction – we were convinced that the Birds Directive was a splendid text, in general, and it reflected the spirit of what nature conservation was in the '70s, and if it was ever, if anything was rewritten now, it would amount to a terrible weakening of the directive, because the conservation atmosphere is not what it was... So we were very afraid of ever seeing the directive reopened... We saw that as the open door to everything. So that's why we tried to play with the 'small numbers' [for the purposes of the hunting derogation in Article 9(1)(c), which allows a Member State "to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers"] so that the directive would be implementable."

p.2). Someone at DG XI evidently agreed, an annotation beside this comment reads, "There is more than sense in what she is saying!" (NCB, 1988, p.2). This sentiment was ultimately shared by a majority of Member States, as the history below reveals.

By 26 February 1988, the OIKOS network had been renamed the NATURA network in the draft directive (DG XI, 1988b-d, Article 4.3), and by May 1988 this had been further amended to NATURA 2000 (DG XI, 1988b-c), a name which "seems to be invented by a cheap PR-advertising firm," according to the EU hunting coalition FACE (1989b, p.2).[199] At about this time, Stanley Johnson paid a visit to the Council of Europe in Strasbourg, which held responsibility for the Bern Convention, the "mother" of the Habitats Directive (Jaffeux, 2013). As Johnson (2012) explains, "The Bern Convention was undoubtedly an extremely important part of my thinking at this stage, because it was perfectly clear that the Bern Convention did, at the level of the Council of Europe, address the two things that I was most interested in, which was habitat and species, and it was a fine document...[Y]ou could say to yourself, well, what is the value-added to having an EU directive, well the value added from my point of view was that it meant that all the mechanisms for implementation and enforcement which the EU could bring to bear would then be available. So even if we produced an instrument which actually mimicked the Bern Convention, there would still be a value added in terms of its implementation." However, in Strasbourg, the then Director of Environment and Local Authorities at the Council of Europe "was rather worried about the EU adopting its own instrument" on nature conservation (Johnson, 2012). There had always been a sensitivity in terms of whether the EU would in some way usurp functions of the Council of Europe, particularly as the EU's membership grew in size (Johnson, 2012). This sensitivity was evidently acute in respect of the Bern Convention, because at one point in the new EU directive's passage the above-mentioned Director at the Council of Europe went so far as to ask Johnson not to proceed with the draft directive (Johnson, 2012). The relationship between the Bern Convention and the new directive would remain complex and difficult for some time, as further detailed below.[200]

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[199] It is this 26 February draft which incorporated for the first time a list of habitats - as Annex IV - to be protected by the designation of special protection areas (DG XI, 1988b-d).

[200] Several interviewees highlighted the fact that despite the Bern Convention being the "mother" of the Habitats Directive, the Directive's preamble unfortunately omits to mention the Convention. Reviewing the history: in a June 1988 draft of the Directive (two months before the Directive was formally proposed to the Council), there were several paragraphs in the preamble regarding EU Decisions/Regulations relating to: the Bern Convention, the Bonn Convention, the CORINE programme, plus financing and agricultural instruments (DG XI, 1988a-f). However, these paragraphs were all removed very soon after comments were received from the agricultural adviser in Jacques Delors' cabinet, in July 1988 (Delors' cabinet, 1988). The adviser suggested various changes to streamline the explanatory memorandum, and it seems likely that a knock-on impact was the removal of these paragraphs from the preamble. In any event, the end result was that the version of the draft Directive proposed by the Commission to the Council mentioned the Bern Convention in the explanatory memorandum but not in the preamble itself (European Commission, 1988f). In other words, the decision to remove the Bern Convention

6.2.9 Revised draft annexes

In March and April 1988, revised drafts of the species annexes began to come in to the Commission. The Conservation Monitoring Centre of the IUCN, based in Cambridge and Kew, UK - which in 1989 became a joint venture of the IUCN, UNEP and the WWF, and was renamed the World Conservation Monitoring Centre (WCMC, 1989a) - had been sub-contracted to carry out much of the work by the UK government's Nature Conservancy Council, and hence produced lists of threatened species of mammals, amphibians, reptiles, fish, invertebrates and plants for the purposes of then Annex II, to which the full species protection measures applied, as well as for Annex III, which related to exploitable animals and plants (DG XI, 1988a-c; IUCN, 1988a, b). It is clear that there was some confusion regarding the preparation of the Annexes, as well as inter-institutional disputes regarding their content. For example, the Conservation Monitoring Centre of the IUCN was unhappy when its list of plant species believed to be suffering from commercial exploitation was incorporated at one point in the draft directive as a list of exploitable plants. As the Centre pointed out in a blunt letter to the Commission, "Many of the species...could certainly NOT withstand ANY form of exploitation whatsoever" (IUCN, 1988c). Further, having prepared the list of plant species requiring the designation of special protection areas, the Conservation Monitoring Centre was unhappy with the IRSNB's proposed inclusion of over one hundred additional orchid species:[201] "Many of the orchid species proposed...are NOT priorities for protection within the Community. Essentially there are many other non-orchid species within the Community which are certainly more deserving of conservation than these!" (IUCN, 1988c, p.3).[202]

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from the preamble was taken by the Commission alone, before the draft Directive reached the Council. Separately, the relationship between the Resolutions of the Bern Convention listing species and habitats to be protected under the Convention's network of protected areas, and Annexes I and II of the Habitats Directive, listing species and habitats to be protected by the Natura 2000 network, is worthy of note. As Doug Evans of the European Topic Centre on Biological Diversity explains, the relevant lists from Bern Convention Resolutions were originally based on Annexes I and II of the Habitats Directive (Evans, 2013). However, with EU enlargement, the lists diverged because many of the species and habitats added to Annexes I and II of the Directive were not on the relevant Bern Convention lists (Evans, 2013). In 2011, Annex I to Resolution 6 (1998) of the Bern Convention was updated so that the list of threatened species on that Annex was once again aligned with Annex II to the Habitats Directive (Council of Europe, 2011b); further, in September 2012, Doug Evans presented a paper to the Bern Convention's Group of Experts on Protected Areas and Ecological Networks on how to bring the Habitats Directive's Annex I list of habitats and Resolution 4 of the Bern Convention together (Council of Europe, 2012, p.9), and action in that regard may well be taken (Evans, 2013).

[201] This is presumably the orchid list prepared by the CORINE biotopes team: in respect of the annexes of species, Devillers (2013) reports, "there were two possibilities: either take the Bern Convention ones as they were or take the CORINE ones as well, and I was in favour of the CORINE ones because it was wider, quite a bit wider. Like we had drafted for CORINE...the dragonfly list, and an orchid list, and some other people within the Biotope [team] had also some other groups that were much, much wider than the Council of Europe."

[202] The Conservation Monitoring Centre evidently got its way on this point, a subsequent letter noting that the Centre would incorporate into its proposals for Annexes I(c) and II(b) "those orchid species which have since come to my attention and which meet the species criteria for these two Annexes..." (IUCN, 1988d).

6.2.10 The genie leaves the bottle: draft circulated to NGOs

In parallel with these lists coming into the Commission, Stanley Johnson had been busy circulating drafts of the directive and its annexes to NGOs for comments. As Alistair Gammell explains: "when the draft was complete, Stanley, with our [RSPB] support, sent it out to about 200 NGOs around Europe...on the grounds that the Commission had been criticised a lot for putting...what the governments described as half-baked ideas; ill-researched and half-baked ideas to the Council. And so we said....– it can really be described as no more than an excuse – ...that we didn't want to put a half-baked idea....to the Commission and to the European Council, we wanted to make sure it was fully informed, and therefore we sent it round to about 200 NGOs to ask for their opinion as to whether or not this was a good idea and whether it could be improved or not" (Gammell, 2012). Comments came back from a range of organisations between April and June 1988, including, for example, the hunting coalition FACE (FACE, 1988a, b), the Italian bird protection NGO, LIPU (LIPU, 1988), a Dutch bird protection NGO (NVTBVV, 1988), the Max Planck Institute for Behavioural Physiology (MPI, 1988), the European Environmental Bureau (EEB, 1988), and Wildlife Link, an umbrella organisation of UK conservation NGOs of which Stanley Johnson was Vice-Chair (Wildlife Link, 1988a, d).[203] More importantly, the genie of a broad-based EU nature conservation instrument was out of the bottle.

Whilst this type of inclusive consultation might perhaps be regarded as good practice today, at the time it was unconventional to say the least. As Gammell (2012) explains, "I had Nicholas Ridley, who was the British Minister...shout at me that I'd broken every rule in the book, and I had to point out that I was actually an employee of an NGO and as far as I was aware I hadn't broken any rules whatsoever. ...[T]he governments and some people in the Commission were absolutely apoplectic. I have no idea what they said to Stanley...". Kerstin Sundseth, Johnson's *stagiaire* at the time, does not recall this particular episode, but she remembers more generally "a lot of furious phonecalls" (Sundseth, 2012)! However, as a senior DG XI colleague reflects, "Stanley is and was not a person who finds it terribly important to respect the rules" (Henningsen, 2012).

[203] By June 1989, Wildlife Link comprised twenty organisations: British Association of Nature Conservationists, British Herpetological Society, British Trust for Conservation Volunteers, Conservation Association of Botanical Societies, Council for the Protection of Rural England, Environmental Investigation Agency, Fauna and Flora Preservation Society, Friends of the Earth, Golf Course Wildlife Trust, Greenpeace, International Council for Bird Preservation (British Section), Joint Committee for the Conservation of British Insects, Marine Conservation Society, Royal Society for Nature Conservation, Royal Society for the Prevention of Cruelty to Animals, Royal Society for the Protection of Birds, Vincent Wildlife Trust, Wildfowl and Wetlands Trust, Woodland Trust, World Wide Fund for Nature UK (Wildlife Link, 1989b)

6.2.11 Jacques Delors' *cabinet* intervenes

By 27 June 1988, DG XI had a final version of the Habitats Directive and Annexes ready, and the complete draft was circulated that day to the rest of the Commission with a view to its being considered formally on 6 July 1988 (DG XI, 1988a-f). By this time the Commission's Legal Service had already given a favourable opinion, and the other Directorates General of the Commission had indicated their agreement, with the exception of DG VI (agriculture), which was still being consulted (DG XI, 1988a-f). The draft evidently remained in a state of flux: several revised versions were circulated to the rest of the Commission in the first half of July, and the date of the Commission's consideration was repeatedly pushed back.

On 13 July 1988, the formidable *cabinet* (Ross, 1994) of Commission President Jacques Delors intervened, and from this point on Stanley Johnson conducted the final internal Commission negotiations alone (DG XI, 1988a-t). As Johnson (2012) explains, the draft was "blocked by the gentleman in the [Delors] *cabinet*, who was a Frenchman, who was in charge of looking after the proposals coming up to do with the agricultural sector, and his name was...[Michel-Jean] Jacquot,[204] and I remember him telephoning me at one stage, saying that the cabinet, the President, was not minded to allow this proposal to be adopted by the Commission, because it was really just much, much too detailed.[205] Now, if you remember, if you go back to the implementation of the Birds Directive, there had been, ...right at the beginning, when the Birds Directive was first adopted, which was 1979, ...a colossal row with the French over the listing of....what the French call the ortolan, which you know French hunters absolutely love to hunt. So it was a very, very sensitive area, and I think Jacquot took one [look] at all these species and all these habitats and thought 'Oh my God, the French farmers are going to rise up in arms'."

The President's *cabinet* highlighted that the Council had not said "yes" to the Fourth Environmental Action Programme (1987); rather, the Council had noted the proposals (Delors' cabinet, 1988). Further, the President's *cabinet* stressed that under the SEA it was necessary to show that the objectives of an EU environmental proposal could be better attained at EU level than at the level of the Member States; in the *cabinet's* view, this demonstration of subsidiarity was lacking from the Explanatory Memorandum for the

[204] Given as "André Jacquot" during interview (Johnson, 2012), but corrected following further research by the present author. See ELO (2004) for a short biography of Michel-Jean Jacquot; ironically, this biography appears a page before an article entitled "The Natura 2000 network in Estonia: the fears of private landowners".
[205] Briefing the Environment Commissioner in October 1989, the Director General of DG XI wrote: "..when DG XI's original proposal – in a complete form – was being deliberated within the Commission....[y]our predecessor felt constrained to bow to pressure from a number of his colleagues to withdraw the detailed annexes and to make a number of consequential amendments" (DG XI, 1989b-j).

proposal (Delors' cabinet, 1988).[206] Nevertheless, the *cabinet* was clearly not altogether against the idea of a habitats directive, as evidenced by the *cabinet's* detailed, constructive comments on the Explanatory Memorandum for the instrument, including proposing wording to tackle the subsidiarity point mentioned above (Delors' cabinet, 1988). As an institution acute to political sensitivities, Delors' *cabinet* was also keen for references to be inserted into the Explanatory Memorandum highlighting "provisions in [the] draft directive permitting derogations etc. to allow for flexibility" (Delors' cabinet, 1988, p.6).

6.2.12 Annexes dropped from the proposal; and departure of Clinton Davis

Stanley Johnson and DG XI took these comments on board, and rapidly produced a revised version of the Explanatory Memorandum, which was amended to note, amongst other things, that the draft directive requires "an appropriate balance to be struck between conservation and economic interests and [provides] for the possibility of derogations from the general obligations in certain specific cases" (DG XI, 1988a-w, p.4). More significantly, Johnson took a tactical decision to drop the annexes of species and habitats from the proposal altogether, the idea being that they could be re-inserted later in the process. As Johnson (2012) explains, "So this was a unilateral decision I took, to say, 'OK, at least get this show on the road, let's get it to the European Parliament anyway, even without Annexes, so that at least we've got a start...'. I thought, 'OK, better to get the process actually officially launched rather than have it die a death in the Commission, by trying to get permission to agree Annexes'... And then I said to myself, 'OK, we will get the Annexes, we'll introduce them or we'll somehow get them introduced at the stage of the Parliamentary discussion'. OK, that was the thought I had, let the thing move." As it later turned out, the European Parliament would refuse to consider the draft directive without seeing its detailed Annexes, but Johnson's plan was simply to get a proposal onto the Commission's table and thereafter the Council's, and it was a plan that worked.

On 18 July 1988, DG XI commenced legal proceedings against Spain in respect of the Birds Directive, alleging that Spain had failed to protect the Santoña marshes in Cantabria in various ways, including by allowing a new road to be built across the marshland and allowing industrial estates to be established on land that formed part of the marshes (ECJ, 1993c). Just two days later, on 20 July 1988, a final draft of the directive and annexes (minus the species and habitats annexes) was transmitted by DG XI to the rest of the Commission, and the draft was agreed at a Commission meeting of 26 July 1988 (European Commission, 1988c),

[206] "Cette démonstration de subsidiarité manque fortement" in the original.

subject to a handful of minor amendments.[207] As planned, most of the annexes were left out of the proposal, the idea being that these would be left to the Committee envisaged by Article 23 of the draft directive to define, by way of a cooperative procedure between the Commission and the Member States (DG XI, 1989b-c). Just four days before the directive proposal was agreed by the Commission, Commissioner Stanley Clinton Davis – an appointee of the UK's Labour party – learnt from Conservative Prime Minister Margaret Thatcher that his name was not going to be put forward for the new EU Commission, which would take office at the beginning of 1989 (European Commission, 1988e).[208] Having secured the Commission's agreement to the Habitats Directive proposal, Clinton Davis would thus remain in place until the end of the year, long enough to see negotiations with the Member States begin.

6.2.13 Launching the Directive proposal

At this point, the question of how best, politically, to launch the directive arose. The Director General of DG XI, assisted by the Nature Unit,[209] had a clear plan (emphasis as per the original): "In view of the fact that the Habitat draft directive constitutes a major proposal in a politically very sensitive area, the timing and the conditions of the launching of the examination process in the Council must be thought through very carefully. It is indeed of crucial importance that the right frame of mind be created before the proper examination of the proposal by the Environmental Group begins. I therefore insist that the proposal be presented by myself or [the Director of Directorate B] at a meeting of high officials (Directors or Director Generals for Nature Conservation) before the detailed discussions take place in the Council. The purpose of that meeting will be to present the objectives and the philosophy of the draft directive in the light of – among other things – experience gained from the application of the Birds Directive" (DG XI, 1988a-t, p.2). This meeting - described by UK government officials as a "réunion de séduction" (DG XI, 1988a-b) - was arranged for 29 September 1988 (DG XI, 1988a-t).

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[207] The amendments agreed at the meeting of 26 July 1988 are recorded in DG XI (1988a-u). A few additional modifications were made, at the proposal of the Director General of DG XI, assisted by the Nature Unit, before the Commission formally proposed the directive to the Council (see DG XI (1988a-t)).

[208] Potential reasons cited for this decision include: avoiding the embarrassment of sacking only a Conservative commissioner, Lord Cockfield, who had reportedly annoyed Margaret Thatcher with his commitment to certain EU policies (Palmer and Wintour, 1988); to avoid Stanley Clinton Davis becoming Vice President of the Commission (Palmer and Wintour, 1988); and as an alleged pay-off to Leon Brittan (who would be nominated by Thatcher to the Commission) for his support in the Westland affair, which related to the future of the UK helicopter industry (Webster and Ford, 1988).

[209] The letter, signed by the Director General, is marked XI.B.3. (the Nature Unit) and bears the initials of a member of the Nature Unit (DG XI, 1988a-t).

Chapter 7: Negotiating the Habitats Directive – from proposal in August 1988 to adoption in May 1992

7.1 Greek Presidency (July – December 1988)

7.1.1 The Directive in principle

Introduction

The text of the draft directive was formally proposed to the Council on 16 August 1988,[210] during a Greek Presidency of the Council. Having secured the successful launch of the proposal, Stanley Johnson played a less prominent role from this point onwards, albeit that he remained informed of developments and intervened in February 1990 when the proposal came under threat once more from Jacques Delors' *cabinet* (more below), before leaving DG XI altogether in May 1990 (Johnson, 2012). On the Commission side, the key figures in the negotiations from this point onwards (some directly and some in an advisory capacity) were: Claus Stuffmann, head of the Nature Unit, who was "the prime mover" and "very much in the lead on all the official negotiations of the Habitats Directive" (Bunce, 2012);[211] Henriette Bastrup-Birk, Stuffmann's number two in respect of the negotiations (Neal, 2012), variously referred to by interviewees as the "mother" of the Habitats Directive (Troya, 2012), and "the person who really ended up doing the job," dealing with a lot of the detailed issues relating to the directive (Henningsen, 2012); Geert Raeymaekers, who worked with DG XI providing scientific input to the annexes (Raeymaekers, 2012); Catherine Yourassovsky, a Belgian member of the Nature Unit who coordinated the annexes; Reinhard Klein, a German member of the Nature Unit who dealt with nature conservation financing (Klein, 2012); Richard Geiser, another German member of the Nature Unit, who worked on the species protection aspects of the Birds Directive (Klein, 2012); Pierre Devillers of the IRSNB, who worked closely with the CORINE biotopes team in DG XI; Ian Hepburn, the English RSPB/WWF campaigner, who was seconded to the Nature Unit for a period during the negotiations

[210] The published version of the Commission proposal is dated 31 August 1988 (European Commission, 1988a), but the proposal appears to have been submitted to the Council on 16 August (European Commission, 1988f).

[211] Participants in the negotiations describe Claus Stuffmann variously as: "very clever" and "very important during the negotiations" (Goldberg, 2012); a "wonderful person" and "very helpful" to certain countries which had only just joined the EU at the time of the negotiations (Morillo, 2012); a "very genial" man and "quite wily," who could "charm you with his chat" and "win points very subtly by being charming" (Neal, 2012); someone with "a strong political sense" (Cashman, 2012); "very personable and intelligent... [he] could reach a compromise and [was] a man you could do business with, I found, all the way through" (Bunce, 2012). One interviewee reflected that Stuffmann should be "awarded a prize for European diplomacy" (Jouve, 2013); another said Stuffmann was "the right man" for the Habitats Directive, and that he "deserves a MEDAL" from Europe (Megret, 2013a).

(Hepburn, 2012); and Antonio Troya, a Spanish government expert seconded to DG XI to act as a liaison during negotiations regarding the Directive (Troya, 2012).

An over-ambitious plan to agree the Directive by November 1988

As the UK government would later note, it seems that Greece at one point hoped (very optimistically) to secure agreement regarding the Directive at the Environment Council meeting in November 1988, and to this end called a series of working group meetings, the first two of which were held on 8 September and 23 September (Department of the Environment, 1989; DG XI, 1988a-b), somewhat unpicking the Commission's proposed strategy of easing the proposal's path via a meeting of *hauts fonctionnaires* (senior civil servants) scheduled for 29 September. The reaction from Member States at the first meeting of officials on 8 September 1988 was reportedly generally positive (CEC, 1988e; DG XI, 1988a-b). It is important to recognise that, for some Environment Ministers at least, the prospect of EU legislation on nature conservation was potentially empowering, faced at home with reluctant ministries in other fields. As Brice Lalonde, French Minister for Environment at the time, comments, "For most environment ministers confronted [with] reluctant colleagues, the European detour was the way to move ahead....Also they felt pressure from the conservation groups to implement the Bern convention" (Lalonde, 2012). Roy Bunce, head of the Wildlife and Countryside Division of the UK's Department for Environment at the time, offers a similar reflection, stating that some countries: "were quite keen to have....a draconian directive, because they saw it giving them much more power within their own governments, where they felt they were rather weak within their own national systems" (Bunce, 2012).

Amongst the issues covered at the meeting on 8 September, certain delegations expressed the view that the proposal was too complex and needed to be simplified; Germany and France foresaw conflict between the species protection provisions and hunting interests; Spain and Germany expressed serious reservations regarding the absence from the proposal of annexes of species and habitats; to this, DG Environment replied that it would be happy to table draft annexes, and this it did, tabling its existing draft annexes as working documents at the meeting on 23 September (CEC, 1988a; DG XI, 1988a-i), thus completing a step in Stanley Johnson's strategy;[212] the question of the relationship between the proposal and the Bern Convention was raised, and almost all delegations suggested that the proposal would involve long and intensive negotiations (CEC, 1988e; DG XI, 1988a-b). They were not wrong: the negotiations would ultimately take more than three years, spanning seven Council

[212] These were the draft Annexes which the Commission as a whole had failed to approve, following the intervention of Commission President Delors' *cabinet* (see section 6.2.11).

Presidencies in total (Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands), albeit that the lion's share of the work would be done during the French, Luxembourg and Dutch Presidencies, as set out below.

NGO preparations

If the Birds Directive was a motor for NGO coordination in Europe (David, 2012; European Commission, 1979c; Meyer, 2010a), by the time the Habitats Directive was proposed, NGOs were relatively well prepared. Wildlife Link – a coalition of UK conservation NGOs – met on 21 September 1988 to discuss the proposed directive, with Stanley Johnson in attendance as an invited expert,[213] together with experts from the NCC and the Conservation Monitoring Centre of the IUCN, amongst others (Wildlife Link, 1988d). The NCC representative at the meeting - whose colleagues had of course worked with the Commission in early 1988 to begin the process of putting together draft annexes for the directive – stated that the NCC was concerned that the directive "would result in a huge increase in administrative work with little net benefit [in the UK], i.e. effectively re-notifying SSSIs [Sites of Special Scientific Interest, a domestic site protection regime] in order to demonstrate compliance with the Directive" (Wildlife Link, 1988d, p.2).[214] It was noted at the meeting that certain Member States did not regard the proposed directive as an EU competence (e.g. citing the fact that national measures would be more appropriate for non-migratory species), and that some countries were concerned that the proposed directive might render the Bern Convention "powerless" (Wildlife Link, 1988d, p.3). Moreover, it was thought that "Denmark, Netherlands, Spain and the UK would be amongst those raising objections to the Directive" (Wildlife Link, 1988d, p.3). As such, it was agreed that it was a crucial time to coordinate NGOs in all Member States. The RSPB reported that it had appointed Angus Westgarth-Smith to a newly-created campaigning post in support of the Habitats Directive proposal (ultimately a joint RSPB/WWF position (Wildlife Link, 1988b)), though Westgarth-Smith would be replaced in July 1989 by Ian Hepburn, who played an important role in the directive's history being at one point seconded part-time from this NGO position to assist the Nature Unit of DG XI with the preparation of the Habitats Directive, "much to the disappointment of the UK staff," according to Hepburn (2012), "when [they] saw me sitting at the top table during

[213] Johnson's affiliation is given as "Vice Chair of Wildlife Link/EC".

[214] This view appears to be linked to the statement in the Explanatory Memorandum for the proposed directive to the effect that only between 1 and 2% of the total surface area of the Member States would need strict measures of protection. This issue had been discussed earlier in the Wildlife Link meeting, and an NGO representative had noted that "For the UK this could be seen as a backward step as existing domestic legislation [in the UK] already exceeds that percentage" (Wildlife Link, 1988d, p.2). It is important to highlight that the Explanatory Memorandum did not envisage 1-2% representing the totality of the site protection network; rather, 1-2% would be in the form of strict nature reserves, while other sites would "need management plans reconciling appropriate measures of protection and expensive agricultural and forestry exploitation based on adapted techniques" (European Commission, 1988f).

meetings in Brussels."[215] Other coalitions of NGOs were also beginning to mobilise, and it was noted that Alistair Gammell of the RSPB had organised a meeting of major coalitions of NGOs in Europe for 18 October 1988 to establish a common stance regarding the directive (Wildlife Link, 1988d). An important milestone was to be a meeting of Environment Ministers on 24 November 1988 at which the Ministers would decide whether to support the directive in principle (Wildlife Link, 1988d), and the NGOs were therefore going to need to act fast.

Wildlife Link resolved to seek a meeting as soon as possible with Roy Bunce of the UK's Department for Environment, preferably before a meeting with then Secretary of State for the Environment Nicholas Ridley. But Bunce had been given clear instructions: "basically the brief was to keep this [directive proposal] in the long grass for as long as possible" (Bunce, 2012). Ridley himself was openly hostile to the proposal, telling Gammell that there would be a habitats directive "over my dead body," prompting Gammell (2012) to reply that he would be sorry to see Ridley go! Gammell feared Ridley's attitude was in part attributable to the UK government's experience in the Duich Moss case under the Birds Directive; as Gammell stated in early 1989, "The society and conservation are now paying an awful price in the habitats directive which has been launched in Brussels. Nicholas Ridley has said 'over his dead body', so there is the risk that the new directive will have its teeth removed" (Brooke, 1989, p.55).

Preliminary meeting between officials

By the 23 September 1988 meeting between the Commission and Member State officials, positions had begun to take shape. Nine years of implementing the Birds Directive had opened the Member States' eyes to the potential impacts of EU nature conservation legislation, and it quickly became clear that negotiations would be painstaking, if progress could be made at all. While a number of delegations indicated their support in principle for the proposal, several reiterated that the proposal was too complex, and that the powers granted to the Commission were too extensive (CEC, 1988a). Some delegations sought clarifications regarding the proposed directive's relationship with the Birds Directive; the Commission explained that "the two Directives would continue to operate independently although a merger of the two instruments could not be excluded at a later stage" (CEC, 1988a, p.2). Worryingly from the Commission's perspective, many comments were negative, and several struck at the heart of the proposal. For example, Denmark argued that a policy of conservation based on special protection areas was outdated (CEC, 1988a); the UK remained

[215] Hepburn describes this as being two days per week, to provide some replacement cover for a member of the Nature Unit who was on maternity leave from March to September 1990 (Hepburn, 2012).

concerned about economic impacts (DG XI, 1988a-i); the three EU powerhouses – France, Germany and the UK – were anxious to minimise the role of the Commission in general (DG XI, 1988a-i); Denmark, Greece, France (arguing again from a pro-hunting angle (DG XI, 1988a-i)), and the UK queried the need for provisions aimed at protecting species, in addition to provisions protecting habitats, arguing that this could lead to a duplication of obligations under the Bern Convention. More generally, DG XI's unofficial notes of the meeting record that the UK and Denmark sought to "hide behind" the Bern Convention,[216] arguing that this instrument would suffice in the nature conservation field (DG XI, 1988a-i); the Commission responded that species and habitats conservation were inseparable elements of a nature conservation strategy, and that an EU instrument would provide a better guarantee of protection than a less binding international agreement (CEC, 1988a).

In respect of the proposal to amend the EIA Directive to apply impact assessment obligations to special protection areas under the new directive, certain Member States argued that it would not be appropriate to amend the EIA Directive in this way, since that Directive had only just entered into force (CEC, 1988a). The Commission responded that "experience gained in implementing the wild birds Directive had demonstrated the need for prior environmental impact assessment since ex-post corrective measure[s] were often unsuccessful" (CEC, 1988a, p.8). Spain was concerned that the Canary Islands were to be covered by the Directive, although France - interestingly - argued for the inclusion of its overseas departments and territories (DG XI, 1988a-i), a view rejected unconvincingly by the Commission, "in view of the very different characteristics of the fauna and flora in those regions compared with those to be found in the European territories of the Member States" (CEC, 1988a, p.9). Few positive comments emerged from this meeting, although the Greek delegation made the interesting suggestion of distinguishing priority species and habitats from species/habitats requiring less urgent measures, an idea that would later re-emerge and be successfully adopted (DG XI, 1988a-i). The Commission evidently had a lot of ground to cover if it was to persuade Member States of the merits of the instrument, yet the political atmosphere remained difficult, though there were positive developments on the horizon in that regard.

Political developments in the European Parliament and the UK

For example, at the end of September 1988, the European Parliament published three reports penned by Hemmo Muntingh - the MEP most active in the nature conversation field - on the Birds Directive and the Bern, Bonn and Washington conventions, which together threw significant weight behind the Habitats Directive proposal (European Parliament, 1988a, b, c).

[216] In the French original, "se retranchent derrière la Convention de Berne..." (DG XI, 1988a-i).

As Muntingh explains, "In the resolutions set out in those reports, Parliament made it clear that it was dissatisfied with the current state of implementation of the conventions [and the Birds Directive], and it made a large number of recommendations. For example, it called on the Commission and the Member States...to draw up as quickly as [possible] a Community directive implementing the Bern and Bonn Conventions covering all species of marine and terrestrial flora and fauna present in the wild and their habitats" (European Parliament, 1989b, p.25).

It was not merely in the European Parliament that political developments were beginning to favour the Habitats Directive proposal. Whilst Nicholas Ridley remained a negative influence within the UK government in respect of the proposal throughout 1988 and much of 1989, times in the UK were slowly beginning to change, kickstarted by a landmark speech by Margaret Thatcher to the Royal Society in London on 27 September 1988, in which the Prime Minister reflected that "the health of the economy and the health of our environment are totally dependent upon each other...Stable prosperity can be achieved throughout the world provided the environment is nurtured and safeguarded" (Thatcher, 1988). The Prime Minister's speech received a cautious welcome at the time from environmentalists (Ardill and Linton, 1988),[217] with the Royal Society for Nature Conservation maintaining NGO pressure on the government by setting out a five-point plan to achieve the government's vision, including "A lead from Mrs Thatcher on the proposed European habitat directive" (PR Newswire Europe, 1988). Significantly, times were also changing in France: in May 1988, Brice Lalonde – ex-head of Friends of the Earth France – was appointed Minister for the Environment (Forsyth, 1988; Lalonde, 2012; Phillips, 1988).

La réunion de séduction

Nevertheless, in late 1988 the Commission was facing into a difficult political wind as regards its proposal. The Director General of DG XI's proposed launch of the proposal at a meeting of senior civil servants took place as scheduled on 29 September 1988, and his speaking notes reveal both the Commission's determination that its proposal should receive a fair hearing notwithstanding early feedback, as well as the Commission's awareness of key points that may arise, reflected in an "arguments to keep in reserve" section of the Director General's notes. Amongst these hypothetical questions which might be posed by Member States were: "What guarantee do we have that the Commission will not continue with the pernickety attitude it has had the tendency to adopt in handling complaints under the Birds

[217] "Blimey," reacted Jonathon Porritt, then executive director of Friends of the Earth, "the speech is impressive, a milestone for the environment" (Randal, 1989).

Directive?";[218] and "Why maintain two distinct instruments [i.e. the Birds Directive and the Habitats Directive]?" (DG XI, 1988a-g).

The Member States restated many of their previously-raised points, and threw a few new ones into the mix (DG XI, 1988a-e): e.g. the risk of delaying or rendering more difficult the application of the Bern Convention, which was then, countries claimed, entering an important phase (Belgium, Denmark, Luxembourg, the UK);[219] the financial, legislative and administrative implications (Belgium, UK, Germany, Luxembourg, Netherlands), with certain delegations expressing fears of creating a "mega-bureaucracy"; fears of the Commission being granted too prominent a role (Belgium, Germany); reticence to extend the application of the EIA Directive to cover special protection areas under the new directive, so soon after the entry into force of the EIA Directive (Belgium, Spain); resentment that NGOs had been consulted about the proposal in advance but not the Member States (Belgium, Germany); the possibility of merging the proposed directive with the Birds Directive (Belgium, Luxembourg); the necessity to mobilise EU financial resources to support national nature conservation bodies (Denmark, Ireland, Italy); the necessity to balance nature conservation aims and other policy goals (UK, Ireland), etc. In his response, DG XI's Director General noted that in establishing the new alliance which he wished to see between the Commission and Member States, it would be important to focus on common interests and to leave behind "sterile debates" regarding respective competences and legal points of detail (DG XI, 1988a-e). In conclusion, the Director General noted that the Commission was ready to take a flexible approach and to listen carefully to the Member States' concerns (DG XI, 1988a-e).

In this vein, the Commission continued its discussions with the Member States, and, pending the Environment Council meeting on 24 November 1988 (i.e. at ministerial level), which could make or break the proposal, several tentative decisions were taken by officials at a meeting on 6 October 1988, including (DG XI, 1988a-j): that the missing annexes, once examined and amended, would be reintroduced to the proposal for adoption by the Council; that it would be desirable to introduce a hierarchy in terms of the species and habitats listed in annexes (cf. Greece's earlier proposal of priority species and habitats); and that after the meeting of the Environment Council in November, technical groups would be established to

[218] "Quelle garantie avons-nous que la Commission ne perpetue pas l'attitude trop pointilleusse qu'elle à adopter lors de son examen de plaintes dans le cadre de la directive 'oiseaux'," in the French original.

[219] Jørgen Henningsen has an interesting recollection of the meeting: Laurens Jan Brinkhorst chaired the morning session, and Henningsen himself chaired the afternoon session. Denmark was represented by two officials at the meeting: Leo Bjørnskov and Veit Koester. Bjørnskov spoke during the morning session, representing the "political level" as head of delegation, and was "very positive about the idea that the EU would now move in this area," but during the afternoon session, by which time Bjørnskov had left, Veit Koester gave "exactly the opposite message" (Henningsen, 2012).

consider the criteria for classifying special protection areas and the lists of species and habitats to be annexed to the directive. An appeal was made by the Member States for greater flexibility – presumably compared to their experience with the Birds Directive – in terms of the application of site selection criteria and the envisaged mechanisms for protection. Further, France (joined by Greece) continued to stress the view that protecting habitats would automatically benefit species, the unstated corollary being that it would therefore be unnecessary to introduce rules regulating species protection outside protected areas, which rules would of course impact on hunting.

Johnson and Stuffmann begin tour of capitals

At this point in time, Stanley Johnson and Claus Stuffmann embarked jointly on bilateral negotiations with three Member States - the Netherlands, Spain and the UK - in advance of the crucial Environment Council meeting on 24 November 1988. They visited the Netherlands on 24 October (DG XI, 1988a-o), Spain on 7/8 November (DG XI, 1988a-a), and London on 17 November (DG XI, 1988a-d). The Commission's note of discussions with the Netherlands complicates any characterisation of the Habitats Directive as a "Dutch directive", a perception which appears to have developed in certain quarters over time (Wurzel, 2008b, p.267).[220] Indeed, the Netherlands harboured numerous fundamental concerns regarding the Commission's proposal, and the Dutch authorities expressed their regret that the Commission had not consulted national authorities in advance of proposing the Directive to the Council (DG XI, 1988a-o). In other words, whilst the Netherlands – like other Member States – certainly played an important role in negotiating the text of the Directive, the central elements of the Directive (Natura 2000 network, parallel species protection regime, etc.) were already in place in the Commission's original proposal, whose history is described in detail above. Moreover, an important 'network' element of the proposal – that is, the protection afforded to features such as corridors outside protected areas – was watered down during negotiations, such that the version finally adopted imposes weaker obligations in this respect than were contained in the Commission's original proposal.

Thus, Liefferink and Zouwen's (2004) argument that the Netherlands "uploaded" the concept of the Dutch National Ecological Network for the purposes of the Habitats Directive, and Leistra et al.'s (2008, p.27) argument that this Network "proved to be the exemplar for Natura 2000," appear hard to sustain, given that: the Dutch government complained that it had not been consulted regarding the Commission's draft directive before the directive was proposed to the Council; the Dutch Ecological Network formed part of a plan adopted by the Dutch

[220] For example, Keulartz (2009, p.446) states that, "The Habitats Directive was adopted in 1992, while the EU was under Dutch Presidency, and has been very much perceived as a "Dutch Directive" by many officials in the Netherlands and abroad."

Parliament in 1990 (Keulartz, 2009), two years after the Habitats Directive was formally proposed, and ten years after a plan for an EU network of protected areas was mooted by the Commission (European Commission, 1980b);[221] and the protection for important features outside protected areas was weakened during negotiations, albeit that the Netherlands consistently sought to shore up this aspect of the Directive (more below). Arguably, a better characterisation of what happened is that the Netherlands tried, but failed, to upload its concept of a European Ecological Network to the EU level. As Henri Jaffeux comments, "If there is a country that [was] not satisfied out of the [Habitats Directive] negotiation[s], it is indeed the Netherlands" (Jaffeux, 2013), because the Directive as finally adopted was less ambitious than the Netherlands had sought, in particular in respect of defining and protecting corridors between sites.[222]

The bilateral meeting with Spain raised a number of interesting issues (DG XI, 1988a-a), including: the issue of financing, which was central to Spanish concerns, since Spain needed, it said, to develop economically, yet the designation of "vast untouched zones" could create a barrier to such development (DG XI, 1988a-a, p.2). As Jørgen Henningsen, a Director in DG XI, explains, Spain was not against the idea of nature protection, "but Spain felt...that very large areas that would be covered by this legislation were in Spain, [and] that Spain had actually proportionally and in absolute terms much bigger areas than any other country" (Henningsen, 2012). Further, Spain expressed itself to be categorically opposed to amending the EIA Directive to apply that Directive to special protection areas under the Habitats Directive (DG XI, 1988a-a). Finally, Spain noted that the list of habitats to be the subject of special protection areas – a short list in DG XI's original proposal - was on the one hand too detailed, and on the other contained too many gaps (DG XI, 1988a-a), an unenviable problem for the Commission to address!

Adding the Brussels bureaucrat to the official pest list

[221] Albeit that the Dutch Ecological Network was suggested in the 1980s (Liro, 1995).

[222] These failed ambitions, and the fact that the Fifth Environmental Action Programme contained only a relatively weak endorsement on corridors ("An interrelated network of habitats, based on the concept for Natura 2000, should be created through the restoration and maintenance of habitats themselves and of corridors between them. The creation and maintenance of this network will be very much dependent on how carefully transport, agricultural and tourist policies are shaped and pursued in the future" (Fifth Environmental Action Programme, 1993)), led the Netherlands, shortly after the Habitats Directive was adopted in 1992, to continue pushing its European Ecological Network (EECONET) concept via a major conference in Maastricht in November 1993 (Jaffeux, 2013). As Jaffeux (2013) explains, the aim of the Maastricht conference "was to overcome the Habitats Directive and the EU by proposing an ecological network for the whole of Europe based on a regional implementation of the Rio Convention on Biological Diversity as a pan-European strategy of biodiversity...". This ultimately led, in 1995 in Sofia, to the endorsement by 54 countries of the Pan-European Biological and Landscape Diversity Strategy, under the auspices of the Council of Europe and others (Jaffeux, 2013; Jones-Walters, 2007).

In preparation for the meeting of the Environment Council on 24 November 1988, and in light of discussions up to that point, following a Working Group meeting on 4 November (Department of the Environment, 1989) the General Secretariat of the Council agreed a list of fundamental issues to be considered by Environment Ministers, which essentially boiled down to whether or not it was a good idea to proceed with the proposed directive at all (CEC, 1988c).[223] Early indications from the UK were not good. On 18 November 1988, Lord Caithness, the UK's junior Environment Minister, gave a speech containing the following remarks, no doubt timed to coincide with the impending meeting of Ministers: "We must keep control of the future of our own countryside and of our wildlife in our own hands," he said, and suggested "the addition of the Brussels bureaucrat to the official pest list" (Caithness, 1988).[224] The day before Lord Caithness made these remarks, Stanley Johnson and Claus Stuffmann had met with UK officials in London to discuss the Habitats Directive proposal (DG XI, 1988a-d). Noting the UK's "extremely negative attitude," evidenced by several press articles, Johnson and Stuffmann aimed to set in motion a "more constructive dialogue" (DG XI, 1988a-d).

The UK reported that it remained to be convinced of the need for any EU instrument in the field and, on being reminded of the clear commitment to such an instrument in the Fourth Environmental Action Programme (1987), a senior UK official stated that "the UK had had a change of heart since then" (DG XI, 1988a-d). Like other Member States, the UK expressed reservations about amending the EIA Directive so soon after its adoption (DG XI, 1988a-d). Moreover, the UK rejected the notion that the Commission might be granted the power, as the Commission's draft proposed, to identify sites for designation which fell within the EU's "top ten" for a particular species or habitat in circumstances where the country in question had not itself designated the site within two years of the directive's entry into force (DG XI, 1988a-d). Recognising the strength of resistance to this proposal, the Commission's file note records "we should think how to reformulate this – because it surely won't fly in its present version" (DG XI, 1988a-d, p.2). Finally, the UK seemed to be particularly concerned that "sites once designated under the directive would be "set in concrete" and that it would be impossible to touch them in any way subsequently" (DG XI, 1988a-d, p.2). Reacting to this point, Johnson and Stuffmann explained that "It was true that, once designated, the text did not envisage further derogations but we were ready to consider a formula which permitted a

[223] The final version of this list was forwarded to the Council by COREPER on 14 November 1988 (CEC, 1988d).

[224] One must remember that these were difficult times for UK Eurosceptics: just four months earlier, Commission President Jacques Delors had made his famous remark that, "Ten years hence, 80% of our economic legislation, and perhaps even our fiscal and social legislation as well, will be of Community origin" (Delors, 1988).

certain flexibility as long as it was clear that the protected status of a site was to be maintained" (DG XI, 1988a-d, p.2), an early presaging of the Article 6(4) derogation which would ultimately be introduced. As for the UK's fear that things shouldn't be "set in concrete", a Commission aside in its note of the meeting records, "Without action of the kind proposed, sensitive sites are only too likely to be "set in concrete" – several feet thick!" (DG XI, 1988a-d, p.2).

The UK was similarly robust in a "frank off-the-record chat" with the Wildlife Link coalition of NGOs around the same time (Wildlife Link, 1988b). The government reported that while some Member States would favour a directive in principle, all were opposed to the present draft, "on the ground of its intrusiveness, bureaucracy and inflexibility" (Wildlife Link, 1988b).[225] "This is code for enforceable!" added the RSPB minute taker, noting that "The UK Government's probable unwillingness to negotiate on this draft comes about in part in pique, since they had little to do with the drafting process and the text is not to their liking (because it means something)" (Wildlife Link, 1988b). The government may also have been piqued to be faced with the RSPB, which, the government felt, had had a very strong hand in drafting the directive: the draft seemed to have "been very largely written for [the Commission] by the RSPB," comments Roy Bunce, then head of the UK government's Wildlife and Countryside Division (Bunce, 2012).[226] The UK government was also reportedly "fed up with being hounded by [the Commission's Legal Unit] on matters of opinion" (Wildlife Link, 1988b). According to the RSPB minute taker, "The UK's position has been to say very little so far at meetings on this Directive in Europe. We knew this from our contacts, but [the senior UK official present] said it as well. I judge this is for two reasons. First they dread their fingerprints being found on the murder weapon, whereas if someone else will do the dirty act that would be preferred by them. Secondly, I sense they genuinely may finally not have resolved their final position. We told [the government] clearly that silence when the draft was under attack, would be construed by us as agreement with the attack and draw the appropriate response from us...we do now begin to see the size of the problem....We are

[225] A later report by a UK House of Lords Committee was similarly critical of the Commission's draft, stating that "The draft proposed by the Commission is unsatisfactory. It is unwieldy and overambitious in its immediate aims. It duplicates much of the ground covered by the Berne Convention, without making clear the precise relationship between the two. It is rigid and mechanistic in its numerical approach to the designation of species and habitats in each Community country and/or region. However, the Committee note that the Commission is not wedded to the detail of the draft text, and that its overall aim is to "galvanise activity" in the nature conservation sphere, rather than to extend its own authority gratuitously. The Committee endorse this approach" (House of Lords, 1989b, paragraph 85).

[226] Alistair Gammell, then of the RSPB, confirms that he played a role in the drafting process, though he reports that the directive was "primarily" drafted by Stanley Johnson (Gammell, 2012). Gammell (2013) comments, "in the early days of the Habitats Directive drafting, Stanley also worked very closely with myself and Simon Lyster, then at WWF on drafting text. I recall a number of sessions in DGXI in front of Stanley's Amstrad." For his part, Lyster (2012) recalls one such session in front of a computer in Brussels, but states "[Alistair Gammell] and Stanley [Johnson] were both heavily involved. I really wasn't."

warning...that if we are rebuffed, [the government] can expect quite a rough ride and an issue that will not go away" (Wildlife Link, 1988b).[227]

Make or break Environment Council meeting of 24 November 1988

Ignoring the NGOs' demands, at the ministerial-level meeting on 24 November 1988, the UK - represented by Lord Caithness, since Secretary of State Nicholas Ridley refused to attend EU Council meetings (Department of the Environment, 1989; Travis, 1989) - did its best to derail the directive. Spain and the UK reportedly "felt that a number of preliminary issues needed to be settled before launching a Community scheme of this scale; in particular, there should be appropriate implementation nationally of the Bern Convention and the Directive on wild birds....[The] UK thought that Community action might rather be focused on assisting Member States to improve their implementation of the various instruments" (CEC, 1988b, p.2). An internal Commission file note would later record that only Spain and the UK had expressed themselves in negative terms at this meeting, both "contesting the necessity for EU action in the area" (DG XI, 1989a-d).[228]

The UK government later fleshed out its version of events in evidence before the House of Lords: "In the end, there was general support for the UK's view that the Community could most usefully get involved in this field by assisting member states, as appropriate, to implement fully the existing international conventions. This effectively proved to be a way out of something of an impasse for the Council, and Commission officials made a point of thanking the UK at the end of the discuss for their positive contribution" (Department of the Environment, 1989, paragraph 13). Whatever the truth of the matter between these "contrasting accounts" (House of Lords, 1989b, paragraph 66), the record reveals that the Commission's formal response at the Environment Council meeting in November 1988 was to say that the provisions of the Bern Convention were "too vague and lacked binding force, hence the need for more thorough harmonization at Community level" (CEC, 1988b, p.3), not to mention the fact that two EU Member States - France and Belgium - were not yet parties to

[227] The UK's silence during early negotiations was attributable to Secretary of State Nicholas Ridley's attitude, coupled with the fact that the UK had at the time "the most high profile and politically campaigning NGOs," leading the UK to be characterised as the main obstacle to progressing the Directive, Roy Bunce explains (Bunce, 2013b). He continues, "Knowing this other member states tended to keep their heads down and wait for us to speak against the Commission's proposals, knowing that our remarks would be leaked, and simply say "We agree the UK's position" leaving us to take the flak. To counter this I was advised by [the UK's Permanent Representation in Brussels] to keep quiet for as long as possible and force the others to voice their own objections. Hence our relatively low profile during the early part of the negotiations. Fostering a situation where no one was prepared to take a strong lead fitted well with our strategy of keeping the draft directive in the long grass" (Bunce, 2013b).

[228] Contrast this with the UK government's description of the directive receiving "a generally hostile reception when it was discussed in Brussels" (Department of the Environment, 1989, paragraph 7), which chimes with the senior French negotiator's recollection: "the newly proposed text was not very welcomed by most of the delegations of the member states" (Megret, 2013b).

that Convention (Nature Conservancy Council, 1989). On the issue of impact assessment, some delegations were in favour of compulsory assessments, but Ireland reiterated the view that amending the EIA Directive, as proposed by the Commission, would not be desirable (CEC, 1988b). Many Member States were in favour of reinforcing EU financial support for nature conservation, though some felt this should come from existing funds, such as the ACE Regulation (1984) or the Structural Funds (CEC, 1988b). Ireland stressed the importance of EU financial support, "particularly in view of the number of habitats for protection that were situated in Member States which lacked administrative and financial resources" (CEC, 1988b, p.6).

In respect of the establishment of annexes of species and habitats, the Council was presented with three options: the first was the establishment of comprehensive annexes to be drawn up by the Council; the second was the progressive establishment of a comprehensive list according to the procedures set down in the draft directive; the third was the establishment in a first stage of a short list of habitats and species agreed by the Council, based on the needs of species or ecosystems which were especially endangered or which were a key factor in terms of general conservation potential; this list would be reviewed regularly and extended by procedures to be agreed (CEC, 1988d). Unsurprisingly, the majority of delegations were in favour of the third option (CEC, 1988b). The Council concluded its discussions by asking COREPER to continue examining the proposal in light of the statements made by Member States (CEC, 1988b). At this point in time the directive's future remained very much in the balance; as a contemporaneous article in Natural World magazine argued, "The main danger to this Directive is that it will be ambushed by an alliance of self-interested Member States, who are keener on saving money and pleasing the powerful industrial and agricultural lobbies than in promoting conservation of Europe's natural heritage" (Rose, 1988, p.8).

Strengthening habitat protection in the Bern Convention

Another risk to the Directive's progress came from a different – perhaps less expected – angle. Just a few days after the Environment Council meeting of 24 November 1988, the Standing Committee of the Bern Convention met in Strasbourg. The Chair of the Committee – Veit Koester of Denmark – had a longstanding relationship with the Bern Convention, having headed the Danish delegations during the instrument's negotiation from 1976-1979 (Koester, 2004).[229] Koester was also prominently involved in early discussions regarding the Habitats Directive, in respect of which Denmark had repeatedly stressed its support for existing instruments such as the Bern Convention, and the need to avoid duplication and

[229] Moreover, Denmark had other longstanding connections with the Convention, since Gunnar Seidenfaden, a Danish expert on orchids, was Chair of the Convention's Interim Committee, established before the Convention came formally into force (Ribaut, 2004).

overlap. As Koester (2012) explains, "when Denmark joined the EU [in 1973]...it was the official Danish policy, and that was also something that was referred to very openly: 'Do not worry about the EU, for instance nature conservation, land use planning and what belongs to that will remain as national concerns only and there will be no interference from the side of the EU'....When the Habitat Directive negotiations started, the Danish position was still the same, namely that nature conservation and land use planning and so forth, they belonged to the national domain and the EU should not interfere. And we could see that the Habitat Directive would have rather strong implications for freedom in respect of nature conservation and land use planning, so the Danish position was at the beginning very negative, and also we have the position that our nature protection and planning legislation was so good that it should rather be copied by all other EU countries than be influenced by the Habitat Directive, so we were very negative at the beginning, because we felt that our legislation was good and we didn't need the EU to interfere...".

One of the issues on the agenda of the Bern Convention's Standing Committee in December 1988 was the implementation of Article 4 of the Convention, which concerned habitat protection; the UK delegate reported to the Committee that his country attached considerable importance to the Bern Convention, particularly Article 4 (Council of Europe, 1988). What followed was a concerted, albeit ultimately failed, attempt by certain countries to undermine the need for an EU Habitats Directive by seeking to refine the habitat protection provisions of the Bern Convention (Coffey and Richartz, 2003; Fernández-Galiano, 2012).[230]

Acting on a proposal from the Chair, the Standing Committee instructed the Secretariat to prepare a revised draft of a Resolution which had been presented to the meeting,[231] which was intended to provide a basis for the common interpretation of several expressions provided in the Convention, such as natural habitats, necessary measures, etc (Council of Europe, 1988). The hope was that Parties to the Convention would, at an extraordinary meeting of the Standing Committee arranged for June 1989, "agree a Resolution on the legal interpretation of the Convention's habitat provisions together with a series of Recommendations on their implementation" (Nature Conservancy Council, 1989, paragraph 19) The UK government was very much in the thick of this approach: "...there are already a

[230] It is worth noting that this approach did not have the support of the Secretariat of the Bern Convention, which favoured the cause of nature conservation over politics and inter-institutional competition (Fernández-Galiano, 2013).

[231] A brief history of this Resolution is recorded by the Nature Conservancy Council (1989, paragraph 19): a 1985 Wildlife Link report critical of the UK's implementation of the Bern Convention led to the commissioning by the Standing Committee of a general report from the IUCN on the implementation of the Bern Convention in Party States. This report focused on difficulties regarding the habitat provisions of the convention, and this ultimately led to further studies on the legal interpretation of the habitat provisions, and proposals concerning measures for the implementation of these provisions.

number of existing conventions which could in our view secure the same nature conservation objectives [as the proposed Habitats Directive] if properly implemented by all member states. As Lord Caithness made clear at the Council [on 24 November 1988], we believe that the first step should be to invest more effort in making these conventions function more effectively rather than seeking to establish a further overlay. The Standing Committee of the Bern Convention, for example, is currently working up proposals to clarify the interpretation of some of the key articles in the Convention, and to suggest ways of securing their effective implementation. A special session of the Committee is to take place in early June to resolve these matters. The UK government is closely involved in this process" (Department of the Environment, 1989, paragraph 18).

This process would ultimately lead to the adoption of a Resolution and three Recommendations by the Standing Committee of the Bern Convention at its 8th meeting, in June 1989 (Standing Committee, 1989a, b, c, d).[232] Whatever effect these agreements may have had in terms of strengthening the habitat protection provisions of the Bern Convention,[233] they did not have the desired effect of halting the march towards a Habitats Directive. Nevertheless, amongst the Recommendations agreed in June 1989 was one which advised countries to take steps to designate areas of special conservation interest, which ultimately led to the Bern Convention's Emerald Network (Lasén-Díaz, 2010; Standing Committee, 1989c), a site designation and protection regime which operates in parallel to Natura 2000, covering those Council of Europe countries which are not Member States of the EU. Ironically, therefore, given that the two systems are now complementary, what became the Emerald Network was initially born of an attempt to arrest the development of the Habitats Directive.[234]

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[232] The Secretariat of the Bern Convention was in no hurry to progress the task of developing the list of "endangered natural habitats requiring specific conservation measures" and the list of "species requiring specific habitat conservation measures" (Standing Committee, 1989a), on the basis that the cause of nature conservation was more important than politics and inter-institutional competition, and in any event because it would be better to await the outcome of developments regarding the Habitats Directive (Fernández-Galiano, 2013). In the end, the identification of those endangered natural habitats and species happened in 1996 and 1998, when Resolution 1 (1989) was used to extend a Natura 2000-type protected area system (the Emerald Network) to the whole of Europe (Fernández-Galiano, 2013; Standing Committee, 1989d).

[233] It appeared to the Secretariat to the Convention that some countries used the occasion to seek to dilute their responsibilities in terms of habitat protection under the Bern Convention (Fernández-Galiano, 2013). In other words, at the meeting in June 1989, certain countries were not only trying to stop an EU legislative instrument on habitats, they were also seeking to "decaffeinate" the Bern Convention by adopting a restrictive interpretation of Article 4, which would thus only apply in practical terms to sites "identified by the Standing Committee" (i.e. the governments) as worthy of such protection: i.e. sites later included in the Emerald Network (Standing Committee, 1989d). Article 4 of the Convention is of course much broader than this.

[234] In November 1989, just a few months after these Resolutions and Recommendations were adopted by the Standing Committee of the Bern Convention, the Berlin wall fell, and the whole mission of the Council of Europe and the Bern Convention changed (Fernández-Galiano, 2013). The Secretariat to the Bern Convention could then defend without objections that its priority was to work with the new democracies of Central and

It did not take long for the outcome of the Environment Council's meeting of 24 November 1988 to be portrayed in the UK as a rejection of the Habitats Directive. By 14 December, the House of Lords' European Communities' Committee was busily convening an enquiry into the future of habitat protection in the EU, "Following the rejection by the Environment Council, on 24 November 1988" of the Commission's proposal (House of Lords, 1988). The UK government maintained that reports of its having blocked or opposed the directive were misinformed: "The UK has at no stage formally opposed the principle of a Directive, and has at no stage been isolated in Community discussions. We have in fact been right in the mainstream of Community thinking" (Department of the Environment, 1989, paragraph 14). The Wildlife Link coalition of NGOs was similarly quick to organise, holding a meeting with a senior UK government official as well as an internal meeting on 15 December 1988 (Wildlife Link, 1988c). The message the NGOs subsequently put out to the media was not one of defeat: as Huw Davies (1988) reported before the year was out, "Next year the European environment ministers in Brussels will start debating the draft [Habitats Directive]" which would be a "major test of the government's commitment to nature conservation," according to Alistair Gammell of the RSPB. "Ironically," continued the article, "the proposed directive is a very British initiative. It was largely drafted by a senior EEC official and former British MEP, Stanley Johnson, and endorsed by the outgoing Environment Commissioner and former MP, Stanley Clinton Davis" (Huw Davies, 1988). The outgoing Commissioner, in the final weeks of his term, expressed his pride at having secured the Commission's agreement to propose the directive, but also his fears for its future: "I am very proud of the fact that my colleagues agreed to [the] habitats directive but I can not hide from you that there is a good deal of opposition to it in Council. It is not very worthy opposition, it is opposition which is designed to erode the purpose of the habitats directive, based upon anxieties alleged in relation to the birds directive. I think it is a reflection of the difficulties which emerged from that directive..." (Clinton Davis, 1988a).

7.2 Spanish Presidency: January – June 1989

7.2.1 Green shoots?

The new year brought a new Commissioner for the Environment, the Italian Carlo Ripa di Meana (European Commission, 1988d), as well as a new Presidency of the Council, held by Spain for the first half of 1989. Ripa di Meana would prove a flamboyant and dynamic Environment Commissioner, as described in chapter 3, but, as noted above, he had previously worked as the EU Commissioner for Culture, and nature conservation was not his

Eastern Europe, and not (at that time) on habitat conservation in Bern Convention states (Fernández-Galiano, 2013).

environmental priority, which was very much the urban environment, an area which he felt "should be a much more important part of the Commission's environmental agenda" (Henningsen, 2012).[235] However, support for the Habitats Directive proposal emerged from an unlikely corner: despite having reportedly expressed itself in negative terms at the meeting of Environment Ministers on 24 November 1988, Spain performed a *volte-face* on taking over the Presidency, revealing that the Habitats Directive would be one of its environmental priorities during its six month Presidency (DG XI, 1989a-d). In briefing the new Environment Commissioner for a meeting with Spain, DG XI's Nature Unit noted that the Spanish Presidency could usefully focus on advancing the technical work needed to establish the annexes to the Habitats Directive; as the Nature Unit explained, at its meeting of 24 November 1988 the Council had favoured producing short annexes which would be capable of being operational in a short space of time. The establishment of such annexes could be worked upon, the Nature Unit suggested, by an *ad hoc* group of experts who could work in parallel to the Council's Working Group on the Environment, which would focus on the directive's text (DG XI, 1989a-d).

7.2.2 Preparation of the annexes of species and habitats

DG XI wrote immediately to the World Conservation Monitoring Centre (WCMC) in Cambridge - by this time a joint venture of the IUCN, UNEP and the WWF (WCMC, 1989a) - to highlight the mandate to "shorten considerably the annexes", which would now focus "on endangered species and more specially species for which the conservation of habitat is a matter of particular urgency," and to request the WCMC to "draw up as soon as possible the shortened, updated list of these species" for the twelve EU Member States (DG XI, 1989a-q). The WCMC replied that it had "serious reservations on conservation grounds of the appropriateness of shortening the annexes...Those species which are Endangered require immediate action, those which are Vulnerable require attention to prevent them becoming Endangered and those which are Rare require monitoring to ensure that action is taken should a threat materialise...The provision of shortened lists for the annexes will be done therefore on the understanding that....the Directive will continue to include the provision for periodic review of the annexes. Without this assurance WCMC would have to seriously reconsider our position" (WCMC, 1989j). In parallel with this work, the IRSNB in Brussels had been tasked with producing a short list of natural and semi-natural habitats requiring the

[235] In February 1989, DG XI put out a press release setting out the new Commissioner's vision for EU environmental policy: "Particular attention will be given to urban environmental problems," the document stated, citing "the rapid deterioration of living conditions together with the dangers of a steady deterioration in the natural and architectural heritage of our cities..." (European Commission, 1989b).

designation of special protection areas (DG XI, 1989a-h); however, the IRSNB's original 1988 list was already short - albeit based on the CORINE system of habitat types, thus encompassing extensive (in this case unnamed) sub-habitat types (Devillers, 2013) - and the process which would unfold over the subsequent years of negotiation, with Member State experts at the helm, would result - interestingly - in the list of annexed species being considerably shortened, but the list of habitats considerably lengthened. However, this lengthening of the habitat annex is deceptive because, as cited above, the risk of producing a very detailed list of habitats would be that "in making the [annex] more precise...you of course restrict its application" (Devillers, 2013).

The WCMC was given a 15 February 1989 deadline to produce its shortened list of endangered species for the purposes of the directive's annexes, and it met this deadline. In its covering letter regarding endangered plants, the WCMC's Kew office strongly reiterated its concerns regarding using the category Endangered as the criterion for selection:

> "Although 'Endangered' species are those whose populations are so small and under such threat that they are considered close to extinction, these species do not necessarily reflect the main threats to the European flora."[236]

A handwritten note by a member of the Nature Unit records that the WCMC's shortened list of plant species, in respect of which special protection areas would be required, covered 289 species and sub-species, of which 109 were endemic to the Canary Islands (DG XI, Undated-

[236] The WCMC continued, "For example, some 'E' species have probably always been very scarce because of their high degree of adaptation to a particular habitat type or because they may be a relict of a previous and therefore slightly different climatic period. Many of these 'E' plant species are therefore unrepresentative of present threats within the Community countries...We believe that the conservation of these 'E' species alone...would therefore contribute very little in arresting the main threats facing the survival of the European flora. It is this argument that is at the root of our present concern....As a solution to this problem, we propose that species in the other conservation categories, particularly 'Vulnerable' and 'Indeterminate' also be considered for selective inclusion. These species are already listed in the plant annex as included in the first published draft of the Directive. This approach would not only help to include those species which are representative of the major threats to European plants but it would lend support to the protection of threatened EC habitat types too. ...[W]e cannot over-emphasise our strong reservations about the adoption of the 'Endangered' species list alone for the preparation of the plant annexes. Instead we recommend that additional or alternative species be selectively included from the full list of Community threatened plant species, prepared earlier, by WCMC, for the Directive" (WCMC, 1989f). This letter from the WCMC also explains one quirk of the directive: that is, the fact that an entire section of Annex I relating to plants requiring protected areas is devoted to the Macaronesian region (that is, the Canary Islands, Maderia, the Azores and Salvage Islands (DG XI, 1989a-w)): "...please note that I have listed the Endangered species endemic to the Canary Islands as a separate list. This was done because the Canary Islands have approximately half the number of Endangered species as the remainder of the region put together" (WCMC, 1989f). Moreover, because of the very high numbers of species (>200) that would qualify for Annex I if the proposed criteria were applied to the threatened plants of Macaronesia, the WCMC, following discussions with the Commission, proposed that Macaronesia be treated separately, with all threatened species from that region being screened according to a list of sub-criteria (DG XI, 1989a-w). On 11 October 1989, the WCMC presented a draft list of threatened plants of Macaronesia for Annex Ib, based on an original list presented to the Commission by a botanist from Tenerife on behalf of Macaronesian botanists (WCMC, 1989h). Using agreed criteria, this list was further refined by a botanist from Gran Canaria (WCMC, 1989h).

a). This compared, the note highlights, to the c.1,125 plant species which were listed in the original draft annex of plants requiring special protection areas (DG XI, Undated-a); i.e. the draft which Stanley Johnson dropped from the directive proposal following objections from Delors' *cabinet*.[237]

Also on 15 February 1989, the WCMC's Cambridge office sent through its lists of animal species for the directive's annexes – with cetaceans and bats not considered, and with the list of amphibians and reptiles to follow on 16 February (WCMC, 1989b)[238] - and similarly expressed serious concerns about the Commission's proposed approach:

> "Your request to us was that we provide to the Commission lists of 'Endangered' species in the Community for which 50% or more of the populations present in the whole Palaearctic region are to be found within the boundaries of the member States of the European Community and for which the conservation of habitat is a matter of particular urgency....As you are aware and as we have stated in our FAX to you of 26 January this Centre does have serious reservations of the appropriateness of shortening the proposed annexes and we feel we must reemphasise this point..."[239]

A handwritten note by a member of the Nature Unit estimated that the WCMC's proposed minimalist approach for animal species would result in the listing, for the purposes of designating special protection areas, of 13 mammal species, 10 species of amphibians/reptiles, 3 fish species, and 48 species of invertebrates: a total of 74 species plus cetaceans and bats, which the Nature Unit estimated at ±100 species in total (DG XI, Undated-b). The note recorded that this compared to 388 species listed on the original draft annex of animals requiring special protection areas (DG XI, Undated-b).

Responding to the WCMC's concerns regarding shortening the lists of species to be protected, the Commission reiterated that the Council, at its meeting on 24 November 1988,

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[237] By 21 March 1989, the WCMC had received notice, and expressed its pleasure, that "it might now be possible to extend the list of plant species currently included in the draft species annexes" (WCMC, 1989d).

[238] Two additional invertebrate species were added to the 'indeterminate' section of the WCMC's list in a fax dated 17 February 1989 (WCMC, 1989e).

[239] The WCMC continued, "We did not find that your request for 50% of the population occurring in the EEC a workable premise and we have therefore had to adopt the idea of 'a significant proportion of the range lies within the EEC'. We have therefore supplied to you...the full list of threatened animals in the EEC...We have divided each taxonomic list (mammals, amphibians, reptiles, fish and invertebrates) into the status categories of Endangered, Vulnerable, Rare, and Indeterminate. Each of these species' lists has in turn been divided into the following: i) Endemic to the Community; ii) Significant proportion of the range within the EEC; iii) Large proportion of the range outside the EEC. ...[O]ur suggestion to you is that you include the following species in the shortened annexes: (i) For endemic species we suggest you include both the 'Endangered' and 'Vulnerable' species. (ii) For species with a significant proportion of their range within the Community we suggest you include all 'Endangered' species. (iii) For widespread species we suggest you include the Endangered species. However there is a possibility that the 'widespread not threatened globally' species could be dropped from the Community list and the responsibility for their protection placed at the national level" (WCMC, 1989g).

"gave mandate to continue the examination of the proposal including annexes to be considerably shortened, concentrating in a first phase on endangered species. It goes without saying," the Commission promised, "that these annexes are to be reviewed and extended periodically after the adoption of the Directive" (DG XI, 1989a-o, p).

The Commission continued its earlier practice of circulating draft material to NGOs, receiving back comments on the draft directive and its species annexes from March 1989 onwards from groups as diverse as the University of York, the Institute of Terrestrial Ecology in Dorset, the EU hunting coalition FACE, and Herpetofauna Consultants International (FACE, 1989a; HCI, 1989; ITE, 1989; University of York, 1989). In March 1989 the Commission formally proposed the establishment of a technical Working Party in order to study the annexes (CEC, 1989h), but the Commission continued with its informal approach in the meantime, hosting a working group of non-governmental experts on 25 April 1989 to consider the criteria and methodology to be used for the identification of areas to be protected in the EU, inviting participants from the WCMC in Cambridge and Kew, the IRSNB in Belgium, and the UK's Institute of Terrestrial Ecology (DG XI, 1989a-e). On 10 May 1989 the Commission wrote to the Member States, noting that the Commission had been tasked with establishing a working document for Annexes I to V (protected species and habitats, and site selection criteria), and that the Commission would like to have the assistance of national experts for the purpose (DG XI, 1989a-n). A first meeting of these experts – comprising eighteen government experts and ten private experts (DG XI, 1989a-k, l) - was convened in Brussels on 23 May 1989 (DG XI, 1989a-n).[240]

7.2.3 Political developments

Giving evidence before the House of Lords in late January 1989, the UK government persisted with its negative attitude towards the Directive, stating that "the whole thrust of the Directive appears to run counter to the Government's policies on deregulation and reducing

[240] Various working documents were distributed for the purpose of this first meeting, including: the latest version of the annexes to the Bern Convention; a working document version of Annex I, which listed plants and animals requiring the designation of special protection areas (DG XI, 1989a-u); a DG XI document noting the likely number of animal species requiring the designation of special protection areas: 92 species (14 mammals, 15 reptiles/amphibians, 6 fish, and 57 invertebrates)(DG XI, 1989a-r); a DG XI document noting the likely number of plant species requiring the designation of special protection areas: ±300 species, of which one third were endemic to the Canary Islands, although there were an additional 785 species considered vulnerable in the EU (DG XI, 1989a-r); a working document version of Annex IV, which listed habitat types requiring the designation of special protection areas; this list remained very short at this time (just over one page), but it was accompanied for consideration at the meeting by a much more extensive list of habitats, extracted from the CORINE biotopes project (DG XI, 1989a-v). In respect of animal species, the inclusion of cetacea and bats remained outstanding, and it was decided that these would be considered at a later stage (DG XI, 1989a-k, r). The document circulated to experts stated that it was practically impossible to protect the habitat of cetacea on an EU basis, and that ±23 bat species might be listed (DG XI, 1989a-r). In respect of invertebrates, a handwritten Commission comment notes that their conservation might be assured by the protection of habitats, and that only a few groups would be retained on the annexes (DG XI, 1989a-r).

burdens on industry...we are reluctant to add on a new system for nature conservation, with massive bureaucracy, in the UK when our own system is already established, based on the existing conventions, and widely praised" (Department of the Environment, 1989, paragraphs 7h and 7k). Evidently the UK had not yet heard the news that Spain would be taking the Habitats Directive proposal forward during its Presidency: "[At the end of the meeting on 24 November] The Council remitted to COREPER responsibility for further work in the light of the discussion," reported the UK government, continuing, "We have heard nothing since from Brussels, but we are working on the basis that it will be for future Presidencies (successively, Spain, France and Ireland) to determine whether and if so how to take things forward...[T]he Government is ready to examine all possibilities and is prepared to consider any proposal for Community action which might offer some added value over and above existing measures provided that it is practicable and recognises competing priorities" (Department of the Environment, 1989, paragraph 15).

Elsewhere, however, others appear to have been better informed, and were proceeding very much on the basis that the directive would be going ahead. For example, the EU hunting coalition FACE provided its preliminary comments on the proposal on 26 January 1989. One important intervention FACE made at this stage was to emphasise that greater use should be made in the directive of the term conservation, as opposed to protection, since Article 1 of the proposal made clear that conservation was the aim, whereas the term protection implied non-use to many, according to FACE (1989b). FACE therefore suggested that the term Special Conservation Areas should be used in the Habitats Directive in place of Special Protection Areas (FACE, 1989b, p.4), this latter phrase being the term used in the Birds Directive. FACE's proposal would ultimately be adopted, albeit that the language would be switched around to read Special Areas of Conservation (SAC).[241]

7.2.4 Substantive negotiations begin: February 1989

Substantive negotiations regarding the text of the directive effectively began in earnest at a meeting of the Working Party on the Environment on 3 February 1989. The UK maintained the approach it had adopted during Working Party meetings in 1988 – confining itself to "asking probing questions on the Commission's proposal," since "there was in fact no need to declare a formal position" (Department of the Environment, 1989, paragraph 9) – and this probably explains why the UK is not listed amongst the countries which expressed a general

[241] Other NGOs were also actively engaging with the detail of the proposal at this time; e.g. the Wildlife Link NGOs in the UK requested the Campaign to Protect Rural England to suggest an approach to Article 8 of the Directive (on the protection of important landscape features), which it did at the beginning of February 1989 (CPRE, 1989).

reservation regarding the proposal at this meeting.[242] This is not to say that the Habitats Directive proposal was by this time free from general attacks; it was not, as evidenced at the meeting on 3 February by Denmark, Ireland and the UK arguing again that it would be better to focus on the proper application of existing instruments such as the Bern Convention and the Birds Directive (CEC, 1989i), and by France, apparently keen to accommodate its hunters, which proposed proceeding in two stages, starting with the protection of habitats, with species to form the subject of a separate Directive (the latter of which might of course never materialise)(CEC, 1989h). However, from around February 1989 countries began to focus less on issues on principle and began instead to engage with the substantive provisions of the proposal, as set out below. That said, progress was slow during the Spanish Presidency (House of Lords, 1989b, paragraph 66), and would only really take off when the French took over the Presidency in July 1989, which coincided with the departure of Nicholas Ridley, the UK's obstructive Secretary of State for the Environment, as explained below.

7.2.5 Designation of Natura 2000 sites

The Commission's proposal, as forwarded to the Member States on 16 August 1988, envisaged a step-wise designation process of special protection areas: as the Commission explained, "The Commission proposal provides for the gradual establishment of a network of protected areas made up in the initial phase of a core of 10 areas [per listed species/habitat] which would be subject to very strict protective measures. In a second phase, this network would be supplemented by a larger number of areas where there would be less stringent measures, giving due weight to both socio-economic and environmental considerations" (CEC, 1989d).

At the first stage, the Member States would have two years to classify as special protection areas those areas which corresponded to criteria set out in Annex V(a) (European Commission, 1988f, Article 5(2)). Annex V(a) stated that at least those areas should be classified which met one or both of the following conditions: (a) they are among the ten most important areas in the Community for the conservation of each of the species specified in Annex I or the habitats specified in Annex IV; (b) they are among the two most important areas in a region for the conservation of the species specified in accordance with Annex I or the habitats in Annex IV insofar as that region contained areas of regional significance for those species or that habitat type. The definition of "region" was therefore important, as it would impact on the number of sites to be designated – the UK raised objections to the proposed definition of regions on the basis, for example, that it would have meant dividing

[242] The countries which expressed a general reservation at this meeting on 3 February were Belgium, Spain, Ireland, the Netherlands, and Portugal (CEC, 1989i).

England into 28 regions while Denmark would have counted as one (Department of the Environment, 1989, paragraph 7j). If, after the expiry of the initial two year period, the ten most important areas in the Community for each listed species/habitat had not been classified by Member States, the draft directive proposed giving the Commission the power to identify these areas, with the assistance of a Committee comprising representatives of the Member States and chaired by a Commission representative; these areas would then be classified by the Member States within one year following the decision of the Commission (European Commission, 1988f, Article 5(2)).

As a second stage, the Member States would have eight years to classify as (so-called) special protection areas territories sufficient in number and size to ensure: (a) the maintenance of the species specified in Annex I at a satisfactory level in all regions where they occur; and (b) the protection of the habitats specified in Annex IV with their associated fauna and flora in all regions where they occur (European Commission, 1988f, Article 5(3)). In classifying these areas, Member States were to apply the criteria set out in Annex V(b), which included – subject to some complex exceptions – at least those areas meeting one or both of the following conditions: (a) that the area was among the one hundred most important areas in the Community for the conservation of each of the species specified in Annex I or the habitats specified in Annex IV; and (b) that the area was among the five most important areas in a region for the conservation of the species specified in accordance with Annex I or the habitat types in Annex IV insofar as that region contained areas of regional significance for those species or that habitat type (European Commission, 1988f, Article 5(3) and Annex V). In respect of these areas to be classified as part of the second stage, the Commission's proposal envisaged a derogation being available from the site selection criteria set out in Annex V(b), with the result that a site would not have to be classified for protection, "if on the basis of scientific evidence and environmental impact assessment the [national] authority competent for nature protection is satisfied that...the coherence of [the Natura 2000 network] and its conservation potential for the habitats and species concerned is fully maintained" (European Commission, 1988f, Article 5(5)). The reasons for the derogation would need to be made public and be communicated to the Commission.

Areas designated under this first and second stage, together with sites classified under the Birds Directive and the Ramsar Convention,[243] would together form the NATURA 2000 network (European Commission, 1988f, Article 6(1)). Within two years of the Directive's coming into force, the Commission would adopt a Joint Programme for the development and strengthening of the NATURA 2000 network, with assistance from the Committee of

[243] Unless notice was given to the contrary in respect of sites under the Ramsar Convention (European Commission, 1988f, Article 6(1)).

Member State representatives mentioned above (European Commission, 1988f, Article 6(2)). The Joint Programme would specify the measures to be taken by the Community and the Member States to back up implementation of the Directive, and would be reviewed at the end of the eight year period for classifying special protection areas at the second stage (European Commission, 1988f, Article 6(2)). In addition to these site designation proposals, the Commission's draft went further by seeking to offer protection for important areas *outside* the NATURA 2000 network, as described in section 7.2.8 below; in other words, NATURA 2000 was to be a genuinely connected network, not merely protected islands in a sea of unprotected land.

At the Working Group meeting on 3 February 1989, the Member States made their views on these proposals known (CEC, 1989i). France favoured a single flexible system of designations and was against any derogations which might be interpreted differently by the Commission and the Member States; France also expressed doubt about the idea of establishing a Joint Programme, and in respect of the Commission's role thereof. Denmark continued to object to an approach based on the establishment of protected areas, and argued that protection should instead be extended to all species of major ecological value. Greece argued that the emphasis in designating areas should be on protecting ecosystems, rather than on protecting species. Ireland was keen that where protected areas had already been designated at the national level, those sites should only be designated at EU level if such a move would add something over and above the existing system. Several delegations were unhappy about the "disproportionate role assigned to the Commission"; in particular, the French and German delegations thought that the list of areas to be classified ought to be determined by the Member States and that the Commission should not be able to "fill in the gaps" during the first stage. Several delegations, in particular Greece, France, Portugal and the UK, argued that the figure of ten areas per annexed species/habitat to be classified during the first two years was arbitrary; [244] or, as the UK's Secretary of State for the Environment Nicholas Ridley put it, "The proposed designation procedure bears all the hallmarks of the 'Gentleman in Brussels knows best'...the draft Directive [is] a Daft Directive" (Ridley, 1989). By the end of April 1989, Spain, Portugal and the UK were arguing that they would prefer to select areas according to objective criteria, without specifying a particular number in advance (CEC, 1989d), and Belgium and France proposed that each Member State should draw up a nominal list of areas to be protected on its territory which would then be submitted to the Commission (CEC, 1989d).

[244] The Commission would later note that "the figures indicated in [our] original proposal....were taken from the criteria guiding the selection of biotopes of Community importance in the Corine/biotope data base..." (DG XI, 1989a-j).

7.2.6 A turning point: the RSPB's discussion paper of March 1989

On 15 March 1989, at the request of the UK government's Department of Environment, which "seemed to cautiously like the solution," and following discussions with the French government, which was due to take over the Presidency of the Council in July 1989, the RSPB produced what turned out to be a very important discussion paper on possible site selection and protection criteria for the draft directive (RSPB, 1989). The paper highlighted problems experienced with the Birds Directive and other conservation instruments:

> "in the 1980s it has become clear that these early attempts at habitat conservation contained one major flaw. That was that they did not contain any clear criteria upon which to base action. Thus conservationists habitually asked for more action, whilst Governments generally took less. Lawyers profited! ...[T]his inexactitude over habitat protection requirements has led at times to bitter disputes between Convention secretariats, Governments and NGOs...At the same time it was clear that yet more needed to be done since more and more of Europe's wildlife and wildlife habitats were declining and becoming steadily more threatened. It was in this climate that the Commission came to draft the habitats directive..." (RSPB, 1989)

As the RSPB went on to explain, the Commission's proposals sought to give particular attention to two matters: first, the proposals sought at the outset to set criteria establishing exactly what needed to be done by Member States as regards site protection, to avoid conflicts based on vague wording; second, the proposals recognised that some species could not easily be conserved within sites because of their dispersed populations, and that even for species which could be protected within defined sites, it was necessary, in order to maintain the viability of sites, to ensure they did not become entirely isolated (RSPB, 1989). According to the RSPB: "The Commission chose the 100 [most important sites in the EU] and 5 most important sites [on a regional basis] as their answer to the need to define precisely the action to be taken by Member States on site protection. They proposed landscape features as a mechanism to protect dispersed species and to allow a link between protected sites" (RSPB, 1989).

Given the resistance of certain Member States to these proposals, the RSPB proposed a solution to break the impasse. They did this by posing five questions which, they said, arose in the RSPB's experience in seeking to protect habitats: which habitats/sites should be protected? How many should be protected? What size should they be? What degree of protection should be given? Under what circumstances may exceptions be envisaged? (RSPB, 1989). The draft Habitats Directive only addressed the first two questions, the RSPB said, albeit that the draft "did attempt to allow exceptions (which the Birds Directive for

example did not)" (RSPB, 1989). As a central organising principle to answer all five questions, the RSPB insisted on the importance of defining the objective of the envisaged conservation measures: "It is important to define the objective, since it is only in relationship to a defined objective that the efficacy of any action may be judged. If [an] objective is agreed, then the measures needed (either for habitat conservation or other measures) are those that will achieve the objective" (RSPB, 1989). As a suggested precedent for such an objective, the RSPB's paper attached in annex an amended version of the concept of favourable conservation status, as defined in Article I(1)(c) and (d) of the Bonn Convention on the Conservation of Migratory Species of Wild Animals (RSPB, 1989). Favourable conservation status should be established as an objective in the Habitats Directive, the RSPB argued, and all actions judged against how they would meet this objective (RSPB, 1989).

Thus, while the UK press continued to report the government's "uncompromisingly hostile" attitude to the proposed Habitats Directive, which was reportedly being opposed "as another unwanted extension of EEC law into British life" (McCarthy, 1989), the Department of the Environment's request to the RSPB to prepare this important discussion paper suggests that attitudes were slowly beginning to change. This was likely attributable to a changing political climate, with green issues coming very much to the fore: e.g. just a few days after the RSPB's paper was written, the *New York Times* could be found reporting that "Across Western Europe, mainstream politicians are scrambling to embrace the cause of the endangered environment as small ecological parties register startling electoral triumphs," causing Margaret Thatcher and French President François Mitterand to perform "sharp U-turns...to put environmental concerns at the top of their policy agendas" (Markham, 1989). Similarly, support for the environment was on the rise in Germany, with the Greens growing in support to comprise, by April 1989, the country's third political force, thus holding the balance between the two big parties (de Bresson, 1989).

Conservation NGOs continued to apply pressure in the run up to the Environment Council meeting of 5 June 1989, with the WWF's national organisations in Belgium, Denmark, Germany, Italy, the Netherlands, Spain, the UK and France writing a joint letter to heads of state on 12 May 1989, expressing their unanimous support for the adoption of a strong Habitats Directive, which "was of the highest priority for nature conservation in the European Community" (WWF, 1989). Such efforts coincided with significant political changes in the UK, with Labour sweeping to victory in the European elections in mid-June 1989, capturing ten seats from the Tories; the Greens also made a "spectacular advance" in the UK, picking up nearly two million votes (Oakley, 1989), or 15% of the poll, the highest Green vote, proportionately, in Europe (FT, 1989). Amongst the recommendations made to Thatcher to

halt the slide were the following: "Signal a more constructive and accommodating approach to Europe" and "Find re-employment for...Environment Secretary, Nicholas Ridley. No one is more reviled throughout the Tory heartland of the South" (Jenkins, 1989). Others clearly began to smell blood, with the Greens calling for Ridley to go, and unnamed Cabinet colleagues briefing that Thatcher might try to "enhance the status of green issues in Government by appointing a more sympathetic minister" (Brown, 1989). The broader ramifications were well summarised at the time by Jonathon Porritt, then director of Friends of the Earth, who wrote "The combination of Mrs Thatcher's own conversion to the green cause, plus the Euro election vote, more or less guarantees a higher profile for environmental issues than ever before" (Porritt, 1989). The UK's Wildlife Link NGOs immediately capitalised on these developments by writing to Lord Caithness highlighting that it would be "unacceptable to the NGOs if the Government approached negotiations on the [Habitats] Directive on the basis that it would resist any EC measures which would require the UK to strengthen its habitat protection legislation" (Wildlife Link, 1989b).

7.2.7 Protection of Natura 2000 sites

Under Article 7 of the Commission's proposal of August 1988, a protective provision which mirrored Article 4(4) of the Birds Directive would apply to sites classified under the Habitats Directive: "[In respect of special protection areas,] Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting fauna and flora, insofar as these would have significant effects, having regard to the objectives of this Directive, on the species or types of habitats for which the area has been classified" (European Commission, 1988f, Article 7(1)). Further, Member States were to consider "the setting up of integrated management plans in accordance with the ecological needs of the species and types of habitat concerned" (European Commission, 1988f, Article 7(2)).

In addition to these protective provisions, the Commission proposed amending the EIA Directive to provide that "all projects which are located in or are likely to affect the conservation potential of a special protection area forming part of the [NATURA 2000 network] shall be made subject to an assessment in accordance with Articles 5 to 10 [of the EIA Directive].[245] All development plans or programmes likely to affect special protection

[245] This would have meant that even projects listed in Annex II to the EIA Directive - which projects are not subject to mandatory assessment under the EIA Directive - would have been subject to mandatory assessment where the project was located in or likely to affect the conservation potential of a special protection area. The Commission revisited an idea along similar lines in 1994, in proposing amendments to the EIA Directive, suggesting that Annex II EIA Directive projects should be subject to mandatory assessment under the EIA Directive where "they are liable to have a significant effect on the special protection areas designated by Member States pursuant to Community law" (European Commission, 1994c, Article 1(2)). However, the Member States rejected this idea, recording their conclusion as follows: "Whereas the existence of a location criterion referring to special protection areas designated by Member States pursuant to Council Directive

areas shall be made subject to an equivalent assessment" (European Commission, 1988f, Article 11).[246] The EIA Directive was to be further amended to read that "Member States shall ensure that the authorities responsible for the protection and management of special protection areas, and other relevant bodies likely to be concerned by the project, development plan or programme, are closely associated in the assessment procedures and that their final opinion is made public" (European Commission, 1988f, Article 11).

Discussing this issue at the Working Party on the Environment's meeting on 3 February 1989, some delegations – in particular Belgium, Germany, Spain and Ireland – were not opposed to compulsory impact studies, but did not consider the proposed amendment of the EIA Directive to be desirable (CEC, 1989i). Ireland argued that since Article 7 of the draft contained an obligation for Member States to take appropriate steps to avoid deterioration of habitats, etc, the provisions on EIA were superfluous and should be deleted (CEC, 1989i). In March 1989 the Commission attempted to find a compromise by proposing that the EIA procedure would not apply if the national competent authorities felt on the basis of a preliminary examination that the project concerned would have no harmful effect on the environment (CEC, 1989h). However, by the end of April 1989, the number of delegations which did not regard an amendment to the EIA Directive to be desirable had grown to include: Belgium, Germany, Spain, Ireland, the Netherlands and Portugal (CEC, 1989d). When the French took over the Presidency of the Council in July 1989, one of the many major changes they made to the draft directive was to remove the idea of amending the EIA Directive altogether (DG XI, 1989a-b).

The RSPB's March 1989 paper - which had proposed the objective of favourable conservation status as the organising principle for the Habitats Directive - drew the following conclusions in respect of site protection: "That the protection appropriate to a habitat will be a case by case decision and must be related to the conservation of the interest of the site and hence the Objective...Thus in a theoretical sense we can envisage a range from small strict nature reserves; through larger reserves where certain activities continue; through the ESI [Environmental Sensitivity Index] concept where the objective is to maintain certain features of interest; to the landscape as a whole where the retention of certain features is desirable "landscape features". All have a role to play. Small strict reserves may be appropriate to protect certain specialist plants, but not otters; ESIs may protect even larger populations of

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79/409/EEC of 2 April 1979 on the conservation of wild birds (6) and 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (7) does not imply necessarily that projects in those areas are to be automatically subject to an assessment under this Directive" (CEU, 1997, recital 10).

[246] Thus requiring the assessment of projects, plans and programmes, which would have represented a significant extension of the position under the EIA Directive, which related only to projects (Environmental Impact Assessment (EIA) Directive, 1985).

birds but still not otters and finally landscape features to protect those features essential for wideranging species such as Golden eagle or otter as well as to provide stepping stones to prevent isolation of "island" reserves. These have nothing in common save they all share the same objective, to restore and maintain a satisfactory conservation status for the species concerned" (RSPB, 1989). In respect of the possibility of exceptions from habitat conservation measures, the RSPB had an equally clear position: "If the objective is explicit, ie to restore and maintain a satisfactory conservation status for the species concerned, then exceptions may be allowed which do not compromise this objective....[and thus] That derogations can be foreseen in principle, but only when other satisfactory alternatives are impossible and when it is in the "Overriding national interest", only when alternative substitution is not possible or where the exception does not compromise the Objective" (RSPB, 1989).[247] Here we effectively find all the elements of the Article 6(4) derogation which would later be inserted into the text of the Habitats Directive.

As highlighted above, "The Commission proposal [provided] for the gradual establishment of a network of protected areas made up in the initial phase of a core of 10 areas which would be subject to very strict protective measures. In a second phase, this network would be supplemented by a larger number of areas where there would be less stringent measures, giving due weight to both socio-economic and environmental considerations" (CEC, 1989d, p.3). Germany, Spain and Italy were in favour of this type of division, but others – Belgium, France, Ireland and the UK – expressed doubts (CEC, 1989d). France proposed a single network of protected areas, which it thought would be easier to manage and more consistent (CEC, 1989d). Similarly, Ireland and the UK proposed adopting the same approach for all areas (most likely fearing the 'very strictly protected' wording of the Commission's proposal, and aiming for a single, less stringent system), based on socio-economic considerations and environmental protection objectives (CEC, 1989d). Thus, the UK had evidently rejected the RSPB's (1989) suggestion of different standards of protection applying to different types of protected areas.

7.2.8 Protection of areas outside Natura 2000 sites

As noted above, the Commission's original directive proposal of August 1988 went beyond mere site protection by seeking to secure protection for important areas *outside* the Natura

[247] As Gammell (2012) explains, "I never shied away from clauses like that, because it would seem to me to be, let's say, extremism to assume that nature conservation, or indeed anything else in the world, should absolutely 100% trump everything else...[Make] those people who wanted to exercise those clauses demonstrate the real importance and lack of alternatives, but if they could demonstrate the importance and lack of alternatives, then as I say it would seem an unreasonable expectation that society as a whole would still be denied those extremely important things that couldn't go anywhere else."

2000 network: outside special protection areas, "Member States shall also strive to avoid pollution or deterioration of natural and semi-natural habitats....Member States shall furthermore take measures to ensure the protection of distinct features of the landscape, including in particular those specified in accordance with Annex VII, which are of outstanding local important to wildlife" (European Commission, 1988f, Article 8(1) and (2)). Here, too, there was to be some flexibility, with the proposal providing for a derogation from the obligation to take measures to protect distinct landscape features, limited to the minimum area necessary, "if [the derogations'] impact can be counterbalanced, so that they have no adverse effects on the sustainability of the biological systems connecting the special protection areas or on species whose conservation cannot be ensured solely through the designation of special protection areas" (European Commission, 1988f, Article 8(3)). At the Working Party on the Environment's meeting on 3 February 1989 (CEC, 1989i), Germany and Denmark expressed doubts about the need for a provision seeking to protect areas outside the Natura 2000 network. Further, several delegations, in particular Belgium, Spain, France, Greece, Italy and Portugal, thought that the aim of protecting distinct landscape features was desirable, but expressed doubts about the advisability of including such a provision in the directive.

Article 9 of the proposal obliged Member States to assist the Commission in promoting: (a) common or co-ordinated management of transfrontier areas of major importance for the conservation of species in Annexes I and II and for the protection of habitats in Annex IV; (b) the maintenance of wilderness areas throughout the Community; and (c) the transfer of know-how with regard to the management of special protection areas (European Commission, 1988f). At the Working Party on the Environment's meeting on 3 February 1989 (CEC, 1989i), Germany, France, Greece and Ireland expressed doubts about including within the directive the idea of maintaining wilderness areas, and the idea of common or co-ordinated management of transfrontier areas.

7.2.9 Financing

At the same meeting on 3 February 1989, some delegations, in particular Spain, Italy and Ireland, said that EU resources would need to be mobilised and that the Directive should therefore set out all the budgetary and administrative implications for the Member States (CEC, 1989i). The question of adequate financing would loom large throughout the negotiations, and would later become an issue of central importance.

7.3 French Presidency: July-December 1989

If the Spanish Presidency of the Council from January-June 1989 had achieved "little significant progress" on the Habitats Directive proposal (Wildlife Link, 1989a, paragraph 3), the same could not be said of the French Presidency under Environment Minister Brice Lalonde, which held office for six months from July 1989. The incoming Presidency, led by its senior negotiator, Alain Megret, was keen to revise the draft directive, and sought to embed a totally different approach to the adversarial one Member States had experienced in respect of the Birds Directive's implementation (Megret, 2013a, b; Wildlife Link, 1989a). Megret, then deputy director of the Nature Protection directorate at the Department of the Environment, became responsible in 1985 for the Birds Directive's difficult implementation in France (Megret, 2013b). Prior to this he had worked for ten years for the French government on free movement within the EU of medical specialists, dentists and pharmacists, following mutual recognition of their qualifications: "a subject as difficult, at the time, [as] the protection of birds in Europe," according to Megret (2013b). However, the Commission's representatives were, says Megret (2013b), exceptional throughout long negotiations regarding these free movement rules, leading to agreements on three directives, and helping to bring along with them professionals, academics and students (Megret, 2013b). This was exactly the sort of collaborative, consensual approach Megret felt was essential to imprint on the Habitats Directive negotiations under the French Presidency, "respectful of the respective competences of the Member States and the Commission for the implementation of the new provisions" (Megret, 2013b). Moreover, the French Presidency felt it was essential to develop a directive which European citizens could take ownership of, having been fully informed and engaged during its development, particularly given the fact that many citizens would be involved during the implementation phase. The French thus maintained a "very open dialogue" with civil society throughout, with drafts of important documents being "sent to NGOs and associations, representatives of the agricultural [industry] and hunters, fishermen," both in France and at EU level (Megret, 2013b).[248]

7.3.1 Political developments

No doubt with a view to the impending Presidency, the French had produced a radically revised version of the draft Directive as early as March 1989, during the Spanish Presidency

[248] This contradicts to some extent Keulartz's (2009, p.446) claim that the Habitats Directive "was adopted in a very top-down fashion with relatively little consultation involving stakeholders and policy actors on the ground who had to implement the Natura 2000 measures....[T]hese low levels of consultation and representation triggered high levels of resistance." For discussions of resistance in France during the implementation phase, see Alphandéry and Fortier (2001), Pinton (2001) and Pinton (2008). Interesting questions must therefore include: is it defensible to say that poor consultation triggered resistance? Have reports by land-owners and land-users of poor consultation been rigorously verified, mindful of van den Belt's (2008, p.228) wariness of arguments "raised for opportunistic reasons in the context of a fierce power struggle"? Was resistance from certain quarters perhaps inevitable, irrespective of the quality of prior consultation?

(DG XI, 1989a-b). The French informed the Commission that they would be engaging in bilateral discussions with other Member States regarding the Directive during July 1989, and that France hoped the Commission would put on the table, for the purposes of the next meeting of the Environment Council, an amended directive proposal which would follow closely the ideas of the French Presidency (DG XI, 1989a-b). With the French Presidency thus working away on its revised draft proposal, the UK's Nicholas Ridley found himself under ever-increasing pressure. Contradicting Ridley's claim that Britain led Europe in environmental protection, Clinton Davis said in July 1989 that Ridley had instead "for years obstructed or frustrated progress" (Travis, 1989). "The fact is," Clinton Davis continued, "Mr Ridley is not so much a Secretary of State for the Environment as an ecological hooligan. The best news that the Prime Minister could offer to the cause of the environment would be to shunt him into the political sidings right now" (Travis, 1989).

Against this backdrop, the UK House of Lords' Select Committee report on habitat and species protection - published on 18 July 1989 - could not have come at a worse time for the embattled Ridley. Having weighed all the evidence provided to it, the Select Committee recorded that they found it "disappointing that the British Government should have adopted an unenthusiastic approach to the prospect of a Community Directive in the nature conservation sphere. In particular, they regret the somewhat parochial attitudes which appear to have characterised the Government's evaluation of the initiative from the outset...Either [the Member States] can elect to equip themselves, through their own domestic administrations, with a genuinely European perspective...[or] they will have to accept that, increasingly, on matters like nature protection, public pressures and popular support will encourage the Community to move in to fill the gap" (House of Lords, 1989b, paragraph 76).

Thus, when the long-expected UK cabinet reshuffle finally took place on 24 July 1989, it was little surprise to find Nicholas Ridley – the "environmental Genghis Khan" (Goodwin, 1989) – moved sideways by Thatcher into the Department of Trade and Industry, to be replaced as Environment Secretary by the up-and-coming pro-European Chris Patten (White, 1989), thus equipping the Department of the Environment with the European perspective called for by the House of Lords only days before.[249] Briefing the Director General of DG XI the following day, the Nature Unit reflected that perhaps this reshuffle would mark a change in attitude on the part of the UK government (DG XI, 1989a-a). And indeed it did: as Roy

[249] In June 1990 Ridley would be forced to resign from the cabinet altogether, having given an interview to the Spectator comprising an "impassioned denunciation" of Germany, in which he called the European Commission "seventeen unelected reject politicians", and accused Germany of trying to take over Europe (Dowling, 1990; Lawson, 1990). "I'm not against giving up sovereignty in principle, but not to this lot," he said, adding, "You might just as well give it to Adolf Hitler, frankly" (Lawson, 1990). He then came very close to saying he would rather see Hitler in charge than Helmut Kohl: "I'm not sure I wouldn't rather have...er...the shelters and the chance to fight back" (Lawson, 1990).

Bunce, then head of Wildlife Policy at the UK's Department for Environment, explains: "my brief changed...from being...keep this in the long grass for as long as possible, basically, to be seen as, if possible, one of the positive advocates of the directive, supporters of the directive, but – and this was a big but – turning it into a shape that the government could actually live with at the end of the day... So the idea was to show that we had very good environmental credentials, we were not afraid of the directive, we would support it, but it had to be in terms that were practicable" (Bunce, 2012).[250]

There were even greater political upheavals elsewhere in Europe in 1989, of course, with 9 November marking the fall of the Berlin wall, the "most momentous event in the history of Europe, since the battles of Stalingrad and Kursk in the winter and summer of 1943" (Halliday, 1991). In tandem with momentous political change came more mundane challenges: the reunification of East and West Germany gave renewed political impetus to the idea of developing a high speed rail link between Berlin and Hanover, envisaged since September 1988 (PBDE, 1998). The agreement to build the link was signed in June 1990, but the project would later run into serious difficulties owing the projected impacts of the railway's route on a special protection area for the Great bustard (*Otis tarda*), earning the species "an ambiguous fame in some media outlets in the 1990s as 'the most expensive bird in the world'" (Flyvbjerg et al., 2003; LUGV, 2012; PBDE, 1998; Troya, 2012). This dispute in respect of the Birds Directive was another issue to the fore of certain Member States' minds during negotiations regarding the Habitats Directive (Troya, 2012).

7.3.2 Preparation of the annexes of species and habitats

In July 1989, the WCMC's Threatened Plants Unit in Kew had been contracted by the Commission to produce a revised list of plant species requiring special protection areas,[251] based on five criteria which differed only minimally from those the WCMC was using for the purposes of its revision of Appendix I of the Bern Convention, which was undergoing revision in parallel (WCMC, 1989i).[252] A second meeting of experts in respect of the Habitats Directive's annexes was convened in Brussels on 1 and 2 August 1989, again combining private experts with national government experts,[253] and featuring further discussion of the animal and plant species requiring special protection areas - including a special presentation on invertebrates by an expert from the Irish government's Wildlife

[250] As Bunce further notes, "under that part of the Thatcher government and under the Major government which followed it, the cabinet was, well the Tory party in fact was hopelessly split...[E]very time you got a new Minister, and you got a new Minister quite frequently, it was like a change of government. You know the whole policy would simply change" (Bunce, 2012).

[251] By a deadline of 1 September 1989 (WCMC, 1989i).

[252] For details of the five criteria, see WCMC (1989c).

[253] Eleven private experts (five from the UK, three from Belgium, and one each from Spain, France and Ireland) and sixteen government experts (European Commission, 1989a).

Service (DG XI, 1989a-s, x) - as well as a discussion of the habitats requiring special protection areas, to be listed on Annex IV.[254]

In respect of the plant species requiring special protection areas, the Commission noted that a list of between 400 and 500 species of plants would be prepared before 15 September 1989 and that it "might be possible to reduce this number a little by excluding those plants for which adequate protection was provided by Annex IV [habitats requiring special protection areas]" (DG XI, 1989a-f, p.5); as such, it was agreed that "plants belonging to a specific habitat type mentioned in Annex IV would be omitted from Annex Ib [plants requiring special protection areas]" (DG XI, 1989a-f, p.5). However, some Member States were seeking to reduce this list of plants by more than a little; for example, shortly after the meeting of experts in August 1989, the Irish national expert wrote to the Commission, commenting that "the number of [plant species requiring special protection areas] is too long and it needs shortening to half that number. A suggested method is to use the list of habitats of Annexe 4 as the filter which would catch many of the species" (Coillte, 1989).[255]

In addition to the special treatment given to Macaronesian plants (see note 236), another feature of the plant annex requiring the designation of special protection areas, as finally adopted, is its relatively poor coverage of lower plants (e.g. mosses, lichens, algae) and fungi (which are not covered at all). As the UK government's Nature Conservancy Council noted in June 1989, "The consideration of lower plants is important and we commend the list of bryophytes prepared by [a professor] and the earlier lichen list as starting-points for selection. We believe that Britain's significance as the European stronghold for Atlantic bryophytes and lichens should be recognised via the Annex I listings" (NCC, 1989). This was later reflected in a July 1989 working document produced by the WCMC in Kew following discussions with the Commission, which document proposed criteria for including plant species on Annex I (species requiring special protection areas), noting that only a small selection of threatened lower plants would be included, on the basis that "Lower plants...have tended to be badly neglected by conservationists, probably due to limited knowledge about their conservation status...A small selection of them...is proposed for inclusion in the Annex to

[254] Amongst the issues covered, the UK's Nature Conservancy Council agreed to shorten the list of bats by "concentrating on the best known species" (DG XI, 1989a-f, p.1), and an approach to cetacea was agreed whereby two species (the Bottlenose dolphin (Tursiops truncatus) and the Harbour porpoise (Phocoena phocoena)) would be listed on Annex I, since specific habitats could be identified for these species (DG XI, 1989a-f). Evidently under pressure in respect of invertebrates, where the suggestion seemed to be that these could be protected by virtue of protecting habitats, the Irish national expert agreed to "reorganise" his proposed list so as not to include those species already satisfactorily covered by the habitat protection annex (DG XI, 1989a-f, p.2). "This would have the effect," the Commission's note records, "only of excluding the butterflies, whereas dragonflies...would have to be included in Annex Ia" (DG XI, 1989a-f, p.2).

[255] Adding, "In my opinion there should be emphasis on species of pharmaceutical, medicinal, economic and food value in...Annexe Ib [plants requiring special protection areas]" (Coillte, 1989).

represent their conservation needs at an international level. The species chosen would be those which will most benefit from SPAs [special protection areas]" (DG XI, 1989a-w). On 11 October 1989, the WCMC in Kew wrote to the Commission to inform them that the WCMC was not yet in a position to send a list of lower plants requiring special protection areas, but that the WCMC had spoken to a number of specialists on the matter and intended to do so by the end of the month (WCMC, 1989h). "The list will intentionally be quite short," added the WCMC (1989h).[256]

Annex IV, which would list habitats requiring the designation of special protection areas, was the subject of an in-depth discussion at the meeting of experts on 1-2 August 1989, which began with a presentation by Professor Noirfalise of the Agricultural Science Faculty, Gembloux, Belgium, who had just spent several years overseeing the production of a map of the natural vegetation of the member countries of the European Community and the Council of Europe (Council of Europe and European Commission, 1987; DG XI, 1989a-g), and who also played an important role in the CORINE biotopes project, together with Pierre Devillers of the IRSNB (European Commission, 1991a).[257] There were three schools of thought as regards drawing up a list of habitat types requiring protection: the first envisaged "a pragmatic, or inductive, approach whereby on-the-spot observations would be made to list the types of habitat in a critical state" (DG XI, 1989a-f, p.3); the second, suggested by Professor Noirfalise, was "a deductive approach whereby a list of types of habitat would be drawn up on the basis of predetermined concepts and definitions. This had the merit of being based on existing knowledge, namely the types of habitat defined in the CORINE Biotopes Project....[although CORINE] did still not include marine and intertidal systems" (DG XI,

[256] Geert Raeymaekers, who worked with DG XI, principally on the annexes of plant species and habitats, was himself a specialist in bryophytes (Raeymaekers, 2012). As he explains (Raeymaekers, 2012), during the preparation of the Habitats Directive, the European Committee for Conservation of Bryophytes was working on a list of threatened bryophytes at European level. Around the same time, the Bern Convention's list of annexed plants was being revised, and experts from the Council of Europe met with experts working on the Habitats Directive such that the two lists could be aligned; one of these meetings took place in Cambridge under Professor Vernon Heywood. Raeymaekers proposed at this time including bryophytes within the Bern Convention and, by coincidence, a meeting of the European Committee for Conservation of Bryophytes was taking place at the same time in Uppsala. The Committee faxed to Cambridge their datasheets of threatened bryophytes; this list was accepted by the experts at the meeting in Cambridge, then later by the Standing Committee of the Bern Convention, and most species were subsequently included on the relevant annex for the purposes of the Habitats Directive (Hallingbäck, 2003; Raeymaekers, 2012). As Richard and Evans (2006, p.168) explain, the listing of 29 species of bryophytes has subsequently proven problematic, owing to the scarcity of bryologists: "As a consequence, data on distribution and ecology are poor; this has led to problems in site selection and will pose problems for site management and monitoring. It is also possible that some of these species are not really as rare and threatened as we currently think they are. Rather, the number of people capable of recognising them in the field is very small. Due to the Directive there has been a focus of attention on these species resulting in new localities being found or old records being confirmed." Raeymaekers explains that an attempt was made at one point to include fungi in the Habitats Directive, but that the effort was too late and there was insufficient information, such that fungi were ultimately left out altogether (Raeymaekers, 2012).

[257] Noirfalise was reportedly asked to assist in the process of producing the annex of habitat types by Catherine Yourassovsky of DG XI's Nature Unit (Devillers, 2013).

1989a-f, p.3); the third approach, advocated by the German delegation, was "a dynamic functional approach, rather than the structural approach which it felt could result in an attempt to "freeze" natural biological evolution" (DG XI, 1989a-f, p.4). The Germans "felt that it was wrong to try to keep the situation as it was, and that due account should be taken of the processes of regeneration, transition and competition (many of which were inevitable)" (DG XI, 1989a-f, p.4).

The meeting decided that "the second approach would be adopted for drawing up the list of specific types of habitat to be protected, on the understanding that in doing this as much account as possible would be taken of the dynamic implications" (DG XI, 1989a-f, p.4). Professor Noirfalise had proposed a list of habitats for the purposes of the meeting (DG XI, 1989a-y), which cross-referred to and used the nomenclature of the CORINE biotopes project, and was significantly longer than the IRSNB draft which had been annexed to DG XI's original proposal to the rest of the Commission. Following Professor Noirfalise's presentation and the ensuing discussion, the IRSNB distributed at the same meeting its own shorter list of habitats (DG XI, 1989a-f). Thus, Member States were presented with two lists of habitats: the short IRSNB list and the longer Noirfalise list. The Commission asked delegations to send their comments on the IRSNB list by 31 August 1989 (DG XI, 1989a-f), though ultimately it would be the Noirfalise list that would form the basis of future work.

Indeed, Professor Noirfalise amended his list following discussions at this meeting in early August, resulting in a working document list of habitats of some twelve pages, much longer than the single page IRSNB list which had accompanied DG XI's original proposal (DG XI, 1989a-m). The Irish government's national expert later commented, "I recommend the adoption of the general scheme of [the IRSNB's list]....Prof Norfalaise's [sic] scheme was welcome but is too detailed. It will be necessary to introduce some finer categories within the [IRSNB] scheme to accommodate additional habitats" (Coillte, 1989). The French Presidency similarly expressed support for the IRSNB list, noting, however, that the work of Professor Noirfalise would be a very useful reference document allowing for the identification of priority habitats (DG XI, 1989a-c). Nevertheless, when it came to distributing working versions of the annexes at the meeting of the Working Party on the Environment on 28 and 29 September 1989, it was the Noirfalise list which the Commission used (CEC, 1989g; DG XI, 1989a-t). Moreover, when the French Presidency presented to the Member States a working document version of Annex IV habitats on 8 November 1989, it was again the Noirfalise document which was favoured (CEC, 1989c).

However, trying to compare the two lists would effectively have been comparing apples and pears. Explaining the difference between the IRSNB's short list of habitats and Noirfalise's

longer list, which was based on CORINE data, like the IRSNB's, Pierre Devillers comments: "...The lists that we produced...were always directly based on those of the CORINE habitats, and...it was possible to produce short lists of habitats, but they were in fact more encompassing...[T]he idea, [was] that the CORINE list would be used to identify the sub-habitat types....and the way the directive was formulated meant that, not only would the division have to be protected, ...but each of the sub-divisions would too, and so that permitted later development.... There was a constant effort by [certain members of the Nature Unit], and at one point with I think the unwitting help of Noirfalise...to constantly make things more precise, and in making the sentence more precise, in a legal text like that, you of course restrict its application..." (Devillers, 2013).[258]

According to Pierre Devillers, the process of producing the annex of habitat types resulted, at this stage, in the introduction of a number of serious gaps in coverage: the CORINE biotope team's most recent draft list of habitats, which was being provided regularly to the Nature Unit, was taken by the relevant member of the Nature Unit and, instead of working directly with the biotope team, the draft list was then provided to a colleague in the Nature Unit, who asked Noirfalise for his help, "and gave him things to fix, completely out of context, which was bizarrely circular, because a lot of the work of the biotope team was based on Noirfalise's cartography, but then [the Nature Unit official] gave...him drafts without informing us that [this had happened], nor him that we didn't know, and I wasn't seeing him every day, I was seeing him fairly regularly, but I realised at one point that that was happening, and in fact he tried to backpedal at that point, but it was too late, he had reacted and given...information without having the proper background" (Devillers, 2013).[259]

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[258] Devillers (2013) gives the following example: "at some points Noirfalise has added a phytosociological name in Latin behind the English expression, in some but not in all. By doing that, it's sometimes, the phytosociological name is much narrower than the English name that precedes, so you can either understand it in the broad sense and say that the Latin means "for example", or you understand that it's only that that is, and that has happened time and again....The attempt at fixing it, which was an extremely good attempt, was by a member of the [CORINE] biotope team, it's the Interpretation Manual of European Union habitats, I think it was published in '96, and that was written by Carlos Romão, Portuguese, who had been a member of the biotope team, and he made enormous efforts to, he made efforts at making it coherent, which was not evident at all, and...he did a fantastic job at that point, but for the rest it got to be – time and again you have those long sentences that in fact restrict the application, ...I know it happens with the oligotrophic amphibious vegetation...where they've made a very...long sentence which leaves out some substrates without any particular reason.... Trying to say what it is, and as a result making it very restricted. You'll find those things easily."

[259] Devillers (2013) adds, "[T]here are some serious gaps in the Habitat Directive that it bothered people a lot around here, that comes strictly from that process. For instance....you know, we had made the basic distinction between bogs and fens, right, infraaquatic peat bogs and ombrogenous peat bogs and then transition things like bogs inbetween. There is a very vast class of habitats which you have if you were in the British Isles, which is the acidic, infraaquatic marshes. It's the *Carex nigra* marshes, and that's one of the major categories in CORINE. For the infraaquatic peat bogs we had the acidic ones and the calcareous ones, the alkaline ones, and the acidic ones disappeared for a simple reason, [which] is that Noirfalise has always – and I know that, it's an idiosyncrasy, I mean he was extremely competent, especially on soils – but he had that habit of calling the marshes that we have in the Ardennes which are slow peat bogs of calling them raised bogs, and in fact they are

The UK government, at least, was not particularly impressed by the annexes circulated by France on 8 November (which included lists of species and habitats, plus site selection criteria): "We are endeavouring to press [for brief annexes] in Brussels but at present the French text envisages greatly extended annexes....Plainly the greater the scope of the annexes, the less the degree of protection which could be considered for everything in those annexes. At present the Commission drafts are very lengthy...One alternative and perfectly logical approach might be for the extended annexes to stand as they are, provided that they were based on sound scientific data, but for member states to make their own assessment of what measures were needed to protect species and habitats of European significance within their own national boundaries" (House of Lords, 1989a).

Private experts having thus played a key role in establishing the working draft annexes of species and habitats requiring the designation of special protection areas, for the next two years the annexes were the subject of detailed discussions and horse trading between Member State experts and the Commission, with input from private experts, the European Parliament and NGOs, amongst others. As Pierre Devillers of the IRSNB explains, Henriette Bastrup-Birk of DG XI had been handed a "very difficult task, which is that the Member States who had been caught by surprise on the Birds Directive were not going to be caught a second time, and they certainly had an action that was mostly reductive. They were trying to take as few responsibilities as possible, and you got classical things like the wolf being protected in Spain only in the area where it does not exist...So those things happened during that period. I still attended a number of meetings, but I felt my influence was very limited... Plus there was a certain suspicion towards the CORINE biotope team, which did not make things simpler....I could feel that progressively my position was seen as too demanding, as too extensive, so that more and more other people were brought in very much in a spirit of reducing the Appendices. At least that was my feeling" (Devillers, 2013).

Further negotiations regarding the annexes are beyond the scope of this thesis, and are a subject for another day (for some discussion, see Evans (2010)). Needless to say, the annexes, as important and detailed as they are, ended up leaving some notable gaps, including poor coverage of the marine environment, underground habitats, lower plants and fungi, for

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not, the current of water passes through the sheet, if you like – the sheet of water passes through – and they are infraaquatic and they're classified by all the central European sources as infraaquatic and he, when he felt that...those marshes that are a very important habitat group in our hills, were covered by...raised peat bogs, and so he eliminated the other one, and by the time we realised it was too late. The same happened to the Quercian woods, to the acidophilus Atlantic woods, they're not in the Directive, and that has plagued us in this part of the world....It's those acidic, Atlantic deciduous woods – that's a whole category that's been eliminated as a habitat for the [directive], because he couldn't think of any that was important for nature conservation, which is – I don't know how it happened – but he was asked, as I say, he probably didn't know what the content was when he did that, so it was extremely unfair to him to do it that way...".

example (Devillers, 2013; Raeymaekers, 2012).[260] Moreover, as several interviewees made clear, the selection of priority species and habitats became politicised during the negotiations when it became clear that EU financing would be available, and that a higher degree of co-funding would be available in respect of priority sites (the EU element would be up to 75% in such cases rather than up to 50%)(Goldberg, 2012; Neal, 2012; Raeymaekers, 2012). As Hilary Neal, one of the UK government's negotiators explains it, "The annexes had been just sort of chuntering along nicely, you know scientists getting around the table talking about what the important habitat types were and what the important species were to have sites designated for, and which ones should be priority according to their rarity...Suddenly the annexes came full force to the front, because we were then having an argument about which ones to make priority not so much on the basis of the science but on the basis of...get as many asterisks against these habitat types as possible so that you can get access to LIFE money"

[260] Discussing the reason for the poor coverage of the marine environment, Pierre Devillers comments, "Well, the reason is fairly simple....it relies, the directive, on CORINE...and it was an ongoing discussion within the CORINE biotope team what to do about marine regions and marine habitats, and it's only later that we really got to, into doing something about them. That is the reality....[i]f you look at the 1991 [CORINE biotope report (Devillers et al., 1991)] you'll see that they [marine areas] are not very well developed. However, again, if you take the approach of units and sub-units we had, you can say that everything was in it. There was the room to develop, that's always been the philosophy of CORINE and later of the Council of Europe habitat typologies is to always leave the room for development, and in fact a great development of marine habitats only came within the framework of the Council of Europe much later...You have to put yourself at the time, everybody was very much aware of the necessity to create marine reserves and marine protected areas, etc, but nobody knew very well how to go about it. It was being very much in discussion and I think everyone felt it was a bit premature to establish criteria. There were marine biologists involved with the [CORINE] biotope team, and they were reluctant to help very much. The same was true of cave habitats, it's only...underground habitats only got developed, really, under the Council of Europe when we got the Balkan countries, Croatia in particular, and before then Romania, who had a real interest in those...and it was incorporated in the Palaearctic habitat list [Devillers and Devillers-Terschuren (1996)], which [has] got very long chapters on underground habitats...[A] lot of the problems with the habitat list had to do with different schools of describing terrestrial vegetation. There was the phytosociological Braun-Blanquet school which is supreme in some countries, there was a different system in Britain, and there was a completely different system in Scandinavia, and then there was the Russian system, and most of our work had to do with that, we spent days and weeks with people like, I think it was later on, but the Romanians are Braun-Blanquet completely, the Bulgarians are Russian system...[T]o try to sit down with them and convince one of them they'd better use the other system, that never works, so we always worked at making their system work and stick together, without changing, and so if you at the – and many people have accused us of giving a scientifically heterogeneous list, but it's a pragmatic approach, if you [look]....at Bulgaria you'll see that they are designated in a Russian system, and in Romania in the Braun-Blanquet system. In the same way we had Ulla Pinborg who later worked with the [EEA] and she was fantastically instrumental in...making the Scandinavian system work with the rest of Europe, but we never tried to make anybody change, and we always agreed that they should use their system and we should just have a database system that can evolve, and with the marine biologists it was more difficult, I think, for one thing – it's very much out of my field – and it was more difficult to make them agree...[I]t eventually worked under the Council of Europe, but in good time, because there was a very strong feeling that the way to – it's a little bit more difficult because it's three dimensional, it's quite hard" (Devillers, 2013). It is also worth noting that the precise territorial extent of the Directive in the marine area remained unclear as late as September 1991 (CEC, 1991a-r) - just three months before political agreement was reached regarding the directive - such that the marine environment, at least beyond territorial waters (which, at the time of adoption, was believed to be the territorial extent of the directive) may not have been a priority for Member States in discussing the annexes of species and habitats.

(Neal, 2012).[261] Thus, the fact that "ca. 40% of the EU priority species and >60% of the priority natural habitats [under the Habitats Directive] are found" within Spain's borders (Morillo and Gómez-Campo, 2000) does not necessarily reflect purely the scientific priority of protecting those habitats and species, for example.

7.3.3 Legal developments

Although Nicholas Ridley's departure from the UK's Department of the Environment, combined with a green French Presidency under Brice Lalonde (The Times, 1989), certainly gave the Habitats Directive proposal renewed life in July 1989, DG XI's Nature Unit under Claus Stuffmann faced the tricky political task of persuading the Member States to embrace the idea of a Habitats Directive whilst those same Member States continued to see high profile infringement proceedings brought against some of their number under the Birds Directive. Two important examples arose in mid-1989. First, on 27 June 1989, in the dying days of the Spanish Presidency, the Commission issued a Reasoned Opinion against Spain in respect of the latter's failure to protect the Santoña marshes from various developments, giving Spain one month to comply (ECJ, 1993c). The following month, a particularly important application was lodged with the European Court of Justice by Ludwig Krämer's Legal Unit, relating to German plans to build a coastal protection dyke in Leybucht bay in East Friesland, a project which had been opposed by conservation organisations for several years on the grounds that the project would impact negatively on important bird habitats which had been classified as a special protection area under the Birds Directive in September 1988 (Clough, 1989; ECJ, 1989b).[262] In February 1989 the Commission had applied to bring the German government before the European Court of Justice in respect of the overall dispute, but then, in an unprecedented move in the environmental context, the Commission sought an emergency injunction on 14 July 1989 to prevent any further construction work going ahead pending the outcome of the case (ECJ, 1989b).

The application was heard in Luxembourg on 9 August and the Court's order issued just a week later, refusing the Commission's request on the ground that the required element of urgency had not been established (ECJ, 1989b). This on the basis that the Commission, "did not apply for interim measures until a large part of the work had already been completed. In effect, the Commission is requesting the Court to stop work which has already been partially completed...In those circumstances, the application for interim measures can only be allowed if it is precisely the next stage in the construction work, that is to say the stage due to be

[261] While this was never made explicit, the Irish and Spanish were said to be particularly keen to maximise the number of priority sites on their territories (Neal, 2012). In the Irish context, one might cite the fact, for example, that machair is a priority habitat only for Ireland and not also for the UK.
[262] For a more detailed account of the facts of the Leybucht Dykes case, see Freestone (1996).

carried out in 1990, which will cause serious harm to the protection of birds in the Leybucht. There is nothing in the file relating to the case or in the arguments presented before the Court to show that that is in fact true" (ECJ, 1989b, paragraphs 17 and 18). While the judgment in the broader *Leybucht Dykes* case would later emerge to play a decisive role in the history of the Habitats Directive, one wonders what might have happened had the European Court of Justice granted the Commission its requested injunction in August 1989; that is, one wonders how the Member States might have reacted with regard to the fledgling Habitats Directive negotiations had the Court ordered Germany to stop works in Leybucht bay as a result of the Birds Directive. As an indication of the political sensitivities at stake, following the negative outcome of the Commission's request for an injunction in the *Leybucht Dykes* case, it would take almost 20 years before the Commission would make another such application to the Court in an environmental case (see ECJ (2006d)).

7.3.4 French progress and Danish change of position

On 13 September 1989 the Commission met with the French government to discuss the latter's progress with the directive proposal. The French representatives reported that they had succeeded in consulting almost all Member States, with the exception of Greece, Luxembourg, and Denmark, although the latter would that week be asked for written comments on France's proposals.[263] As Marcel Jouve, then head of the International and European Affairs division of the Nature Protection Directorate at France's Department of the Environment, comments, "[I] think that the European tour of capitals that I made at the beginning of our presidency was probably very important in the negotiation process, as it was a strong signal of our determination to make progress, and of our openness to discuss our and [others'] ideas and find compromise formulas" (Jouve, 2013). The French Presidency built on these consultations with Member States to produce an overhauled draft of the Directive (Jouve, 2013), having assembled a broad consensus around key points: namely, a site designation process which would be more consistent with the principle of subsidiarity; the integration into the Natura 2000 network of SPAs under the Birds Directive; the principle of management plans for protected areas, supportive of ongoing human activities compatible with areas' conservation objectives; and the establishment of a Management Committee under the Directive (Megret, 2013b).

By this time, Denmark's position had undergone something of a transformation, as Veit Koester, Denmark's senior negotiator, explains: "at a certain time during the negotiations...the head of department, Ministry of Environment, he said to me, 'We have to give in, we have to change our position and we have to go to be positive to the negotiations,

[263] Marcel Jouve recalls visiting all Member States bar Denmark and Greece (Jouve, 2013).

we cannot stick to our idea that the EEC shall not interfere with our legislation in that field.' And then we turned around, not to say that we were promoting or very eager with the Habitat Directive, but we were not opposed to the Habitat Directive as we had been when the negotiations started. And I think it was a mere political standpoint the head of department took. I don't know whether he had been in contact with some high officials within the EU or whether they had indicated to him that they felt that the Danish approach was unnecessarily negative, I don't know, or simply that he felt that the time had now come to change our position...I don't know whether he had actually discussed it with the Minister, maybe it came from the Minister" (Koester, 2012).[264] Claus Goldberg, who worked under Veit Koester and acted as Denmark's main negotiator once substantive negotiations over the text began, reflects: "I do think that the Danish position was that we were more hesitant in the beginning, and when we found out, no, we can't escape, we can't use existing Danish legislation, we need to go in through this directive, we were pretty positive" (Goldberg, 2012).

The majority of delegations had expressed support for France's revised proposals regarding site designations,[265] with only Spain and the UK expressing serious reservations (DG XI, 1989a-c). France trialled these proposals at a meeting of the Working Party on the Environment on 28 and 29 September 1989; the notes of that meeting record the outcome as follows:

> "In order to take account of the concern expressed by several delegations about the Commission's role in nominating the areas to be classified, [France] proposed setting up a system of closer consultation between the Commission and the Member States when areas were classified. Once a single list of areas to be classified had been established, in co-operation between the Member States and the Commission, it would be submitted to [an] Adaptation Committee which would deliver its opinion within a specified time-limit. In the event of the Committee's opinion differing from that of the Commission, it would be for the Council to take a final decision" (CEC, 1989g, p.13).

Several (unnamed) delegations were favourably inclined to France's proposal, although Italy and the UK had misgivings about the final stage of the procedure, i.e. in the event that there was disagreement between the Commission and the Member States over the areas to be

[264] As Koester reflects, it was a "little bit surprising" that no-one in Denmark reacted to this change of position, given the debate that took place over retaining competence at the national level for nature conservation and land use planning prior to Denmark's accession to the EU in 1973 (Koester, 2012). It is possible, of course, that the adoption of the Birds Directive had in any event prepared the ground somewhat for this development.

[265] Backed by the "Bezzel method" of site selection criteria: "An algorithm for the computation of a vulnerability index has been proposed for birds by E. Bezzel (1980, ENVNNT/22/80). Its usefulness for this group has been demonstrated, and the feasibility of its extension to other groups verified for various constellations of invertebrates and plants" (European Commission, Undated).

classified (CEC, 1989g). Perhaps fearing the effects of greater national control over site designations, the traditional green leaders weighed in: the Netherlands highlighted that it was important to retain the central notion of a European ecological network, and Denmark and Germany thought that "precise ecological criteria should be more to the fore and proposed fixing a minimum threshold for protection areas" (CEC, 1989g, p.13).

7.3.5 The European Parliament's first report

On 29 September 1989, the European Parliament issued what turned out to be the first of two reports on the Commission's Habitats Directive proposal, following a draft of this first report, which had issued in May 1989 (European Parliament, 1989a).[266] These reports – which included proposed amendments to the text of the directive – were drawn up by the Dutch MEP Hemmo Muntingh, and were developed in consultation with nature conservation organisations, coordinated by the EEB and the RSPB;[267] account was also taken of criticisms and recommendations made by hunting organisations such as FACE (European Parliament, 1989b). The RSPB had evidently had an important role to play in the report, since Muntingh included in his suggested amendments the RSPB's March 1989 proposal of "satisfactory ("favourable" in the RSPB's draft) conservation status" as the central organising objective for the directive (European Parliament, 1989b; RSPB, 1989). More generally, Muntingh's proposed amendments sought, *inter alia*, to shorten the time limit for establishing the Natura 2000 network – which he proposed renaming "NATURA SEMPER"[268] – and also sought to delete the proposed numbers of sites to be established at each stage (i.e. 10 most important areas in the EU, two most important areas in a region during the first stage; 100 most important areas in the EU, five most important areas in a region during the second stage). Removing these numerical limits would of course mean there would be no ceiling on the maximum number of sites requiring designation; as Muntingh noted, "there is no need to provide arbitrary figures with regard to the areas in question; ecological necessity and potential should be the guiding principles" (European Parliament, 1989b, p.31). Thus, both Muntingh and several Member States regarded the requirement to designate a specific

[266] The delay in publishing the final report was due in large part to the slowdown in work in the European Parliament caused by the European elections of July 1989 (DG XI, 1989b-c).

[267] Ian Hepburn, who was coordinating an EU-wide Habitats Directive campaign on behalf of the RSPB and the WWF, explains that he developed close links in this capacity with Hemmo Muntingh (Hepburn, 2012).

[268] "Semper" being Latin for "always". Muntingh explained his thinking thus: "[Natura 2000 is] a somewhat unfortunate name, because it creates the impression that nature can be frozen in time. This is not the case nor, of course, may it be so. Nature reserves are intended as a permanent resource for the continued existence of living and dynamic nature, and the name of the programme should reflect this" (European Parliament, 1989b, p.28). The Environment Commissioner responded: "The reason why the Commission chose the term "Natura 2000" was that it thereby wished to underline that the objective is to set up, by year 2000, the foundation of a network which, obviously, by its sheer nature, is bound to remain dynamic. I also have some doubts as to whether a Latin term would strike the public opinion as much as the threshold of the 3rd millennium" (DG XI, 1989a-j).

number of sites as arbitrary, though one suspects that certain Member States hoped the removal of these figures would result in fewer sites being designated, whilst Muntingh most likely expected the opposite; both could not be right!

By early October 1989, the French Presidency had indicated to the Commission its intention to table its extensively revised version of the draft directive, which had been drawn up in close consultation with the Commission's services, for approval in principle at the Environment Council meeting on 28 November 1989 (DG XI, 1989b-d). The Commission did not have any "major problems" with the French proposals; as the Commission noted, "the only point likely to remain controversial right up to ministerial level is the procedure to be adopted both for amending the main text of the directive and the annexes...Everything should be done...to avoid the requirement of Council unanimity to change even a limited number of annexes" (DG XI, 1989b-d). The Commission was happy to adopt suggestions from the Muntingh report which the Commission felt would improve the proposal, though the Commission was mindful that negotiations in the Council had proven "fairly difficult, with a number of Member States still maintaining a general reservation on the whole proposal (notably Greece, Portugal, and Spain)" (DG XI, 1989b-d). As such, the Commission faced a tactical question regarding how best to secure the inclusion of amendments tabled by Muntingh: "One crucial consideration in that context," noted the Commission, "is to avoid any step which would seriously hamper the prospects of a swift approval of a proposal in which the 3 key elements to which the Commission attaches the greatest priority, i.e. a system of double protection of threatened species and habitat types, the setting up of a coherent network of duly protected special protection areas and flexible procedures for amending the annexes, are retained" (DG XI, 1989b-d).[269]

7.3.6 Launch of the French Presidency's revised draft: October 1989

7.3.6.1 Designation of Natura 2000 sites

On 13 October 1989 the French Presidency formally presented its compromise text of the draft directive to the other Member States (CEC, 1989b). There had been a complete overhaul in respect of the process for site selection and designation, and the number of annexes had been reduced from eleven to six (DG XI, 1989b-c). Under a new Article 7 (emphasis as per the original), "On the basis of the most reliable scientific information the

[269] Rather than seeking to amend formally the Commission's original proposal, which would be a lengthy procedure, the Commission therefore decided to follow "two alternative and complementary paths": first, seeking to convince the French Presidency to insert the relevant Muntingh amendments into their text of compromise prior to its transmission to the Working Group on the Environment; second, to the extent that this was not possible, the Commission could suggest the amendments during the discussions regarding the French proposal (DG XI, 1989b-d).

Commission, together with the Member States, shall draw up a list of habitats [covering listed habitat types and habitats of listed species] to be classified under [the Directive] on the basis of the criteria laid down in Annex V[, within two (or three) years of its notification]" (CEC, 1989b, Articles 5, 7 and 25).[270] This list would then be submitted to a Committee comprising representatives of the Member States and chaired by a representative of the Commission (CEC, 1989b, Article 7(1)). The Committee would deliver its opinion on the list on a qualified majority basis (i.e. weighted voting), though the Commission as Chair would not have a vote (CEC, 1989b, Article 7 and 22). In the event that the envisaged measures were not in accordance with the opinion of the Committee, the Commission would be empowered to submit a proposal to the Council, which would act by qualified majority; and if the Council did not take action within three months of referral, the proposed measures would be adopted by the Commission (CEC, 1989b, Article 22). Pending adoption via this Committee procedure, the listed sites would be protected by the new impact assessment obligation described in section 7.3.6.6 below (CEC, 1989b). Once its list was adopted, a Member State would have 1 to 5 years within which to classify as special protection areas the habitats included on its list (CEC, 1989b). The list itself would be revised every five years, and the Member States would send the Commission all relevant information on each special protection area (CEC, 1989b).

7.3.6.2 The missing annexes and UK support for the directive

Discussing Hemmo Muntingh's report and draft opinion on the Habitats Directive proposal during the plenary from 9-13 October 1989, the European Parliament decided that it was not in a position to adopt an opinion because the proposal still lacked detailed annexes, and the Parliament's Environment Committee then asked the Commission, on 18 October, formally to complete the proposal by including the missing annexes (DG XI, 1989b-c, j). As a contemporaneous media report records, "during the last 18 months representatives of [DG XI] have allowed national experts in the Member States' Committee of Permanent Representatives (COREPER) to work on the annexes, a fact which caused Parliament fury. The Parliament accused the Commission of producing 2 proposals, one for the EEC's Council of Ministers and one for Euro-MPs and withheld its Opinion, demanding that the Commission formally propose the annexes it had discussed at COREPER meetings" (European Report, 1990). The Economic and Social Committee quickly followed suit and reached a similar decision to the Parliament's (DG XI, 1989b-c). The Director General of DG XI concluded that "the best, and fairest option open to us at this juncture is simply to respond to the [European Parliament's] demand for completion of the proposal by formal

[270] Revised Annex V criteria were not included with the proposal, having themselves been discussed at a meeting of experts on 11 October 1989 (DG XI, 1989b-i).

insertion of the technical annexes" (DG XI, 1989b-j). Whilst this would require consequential amendments of the proposal, these were minor distractions compared with the major political development reported in the Director General's letter: "the Council's deliberations have been aided by the decision of the United Kingdom's government to support the proposal for a directive" (DG XI, 1989b-j).

7.3.6.3 Designation of Natura 2000 sites, cont.

Meanwhile, the French Presidency's compromise text for the Directive fell to be considered for the first time at a Working Group on the Environment meeting on 19 October 1989 (CEC, 1989e). All delegations entered scrutiny reservations, since the proposal was still being examined by their authorities, though several gave positive preliminary reactions (CEC, 1989e). Belgium, Spain, Ireland and Portugal maintained general reservations on the Directive proposal as a whole (CEC, 1989e). Little of note emerged during these preliminary negotiations, though the Commission and Germany tried (and ultimately failed) to have sites classified under the Ramsar Convention automatically included within the Natura 2000 network (CEC, 1989e). Several delegations were in favour of a co-operative procedure for drawing up the lists of sites to be designated, but Belgium, Denmark and Germany felt that it should be initially for the Member States to propose the areas, with any issues then being solved according to the procedure described in the Presidency's proposal (CEC, 1989e). Spain struck out on its own, arguing that the Member States should be solely responsible for designating areas for classification on the basis of criteria set out in the Directive (CEC, 1989e).

On 8 November 1989 the French Presidency presented as working documents versions of Annexes I (species requiring the designation of protected areas), II (species requiring special protection measures wherever they are found), IV (habitat types requiring the designation of protected areas) and V (comprising revised site selection criteria)(CEC, 1989c). Gone was the Commission's specified total number of protected areas;[271] in its place were mathematical formulae for calculating the surface area to be protected in respect of each habitat type/species (CEC, 1989c). Most delegations reserved judgment, but the UK expressed doubts about the proposed mathematical approach, considering that the approach did not take account of all relevant factors, and suggested that the responsibility for designating protected areas should simply be the competence of each Member State (CEC, 1989c).

The Working Party on the Environment met on 9 November 1989 for a detailed discussion regarding the French compromise draft (CEC, 1989j). Several delegations – Belgium, Spain,

[271] i.e. First phase: 10 most important sites in the EU, 2 most important sites regionally; second phase: 100 most important site in the EU, 5 most important sites regionally.

Greece, Ireland, the Netherlands, Portugal and the UK – foresaw difficulties with the collaborative procedure proposed for establishing the list of protected areas, especially with regard to the role given to the Commission in the event of disagreement in the course of the procedure (CEC, 1989j). The Commission responded that the collaborative procedure provided for a certain weighing up of factors, given Article 2 (general principles), Annex V (site selection criteria) and the Committee procedure (CEC, 1989j). When, following these discussions, the French Presidency presented a revised draft of the directive on 13 November 1989, the drafter had clearly picked up on the Commission's reference to Article 2: instead of merely referring to the criteria in Annex V in selecting sites, the draft now proposed allowing Member States to take account, in addition, of the matters set out in Article 2(1), which included economic, social, cultural and recreational requirements, as well as regional peculiarities (CEC, 1989a).[272] This reference to Article 2 was ultimately dropped from the provision of the directive setting out the site selection process, and the question of whether such socio-economic factors could be taken into account in site and boundary selection fell much later to be adjudicated by the European Court of Justice, which held that they could not (ECJ, 2000c).

By now, the whole approach and language of the Directive had begun to shift subtly, its title having been amended from Council Directive on "the protection of natural habitats..." to "the conservation of natural habitats", etc. (DG XI, 1989b-h), reflecting the point raised at the beginning of the year by the hunting coalition FACE (1989b). Moreover, the revised draft of 13 November had moved away somewhat from the collaborative approach to the creation of an EU list of sites – following "sharp criticism" from a number of delegations, notably Spain (DG XI, 1989b-h) - with Member States now to take the first step alone, before submitting their lists of sites to the Commission (CEC, 1989a, Article 5(1)). As the head of the Nature Unit commented, "The latest version hereby very much picks up the model developed under the Birds Directive, whilst the former version was an attempt to innovate and introduce a more cooperative mechanism straight from the outset" (DG XI, 1989b-h). Given the experience with the Birds Directive, the expected benefits of such a cooperative mechanism would likely have included fewer visits to the European Court of Justice in Luxembourg.

However, the Commission had not given up all hope of retaining some degree of control over the site designation procedure without the necessity of going to court. In the revised draft

[272] As a matter of historical interest, Ireland and Portugal requested that the term "classify" sites be replaced with "designate", explaining the difference in terminology between the Birds Directive, which uses "classify" and the Habitats Directive, which uses "designate" (CEC, 1989j). The UK evidently agreed, reminding the Commission on 15 February 1991, "You did, I think, agree to replace 'classify' by 'designate' in the English text, to reflect the difference between these two words in normal English usage" (Department of the Environment, 1991b).

directive of 13 November, a new Article 6 proposed that where the Commission believed that areas other than those proposed by a Member State ought to be included on the EU list, the Commission could make an appropriate proposal to the Council, which would act by a qualified majority in responding to the Commission's proposal (CEC, 1989a). The provision was introduced by the French Presidency in response to the Commission's wish that the site selection procedure should not give Member States a right of veto over the sites to be designated (DG XI, 1989b-a). As the head of the Nature Unit commented, "Maintenance of this provision is a *sine qua non* condition for the Commission's acceptance [of the new site designation system]. This item should, if necessary, be brought up to Ministerial level. During the discussions in Coreper, the Commission should, however, play down a bit this provision describing it as a means likely only to be topical in marginal cases with a view to ensure the coherence of the Community network of special protection areas" (DG XI, 1989b-h, p.5).[273]

Having achieved a great deal in respect of the Habitats Directive proposal during its Presidency, the French government made it known that it intended to ask the EU's Environment Ministers to give their opinion on Articles 1 to 9 of the compromise text at the Environment Council meeting on 28 November 1989 (DG XI, 1989b-h).[274] According to the head of the Nature Unit, "Article 5 and 6 specifying the mechanism for designating SPA's are likely to become the main items for discussion...As for Annex V [site selection criteria], the initial version of which was heavily criticized by a majority of delegations, a new draft will be discussed within a technical sub-group under the Council, hopefully before the end of the year" (DG XI, 1989b-h, p.1).

7.3.6.4 Explaining the UK's change of heart

Addressing the House of Lords on behalf of the UK government on 14 November 1989, Lord Reay sought to paper over any suggestion of a Damascene conversion by the Conservatives with regard to the Habitats Directive proposal: "When the Commission first published its text, it is certainly true to say that we approached it with caution rather than enthusiasm...However, claims that we were the villain of the piece, pulling against the wishes of the majority of member states, are exaggerated. I believe that our initial lack of enthusiasm was soundly based...[T]he Community's previous involvement in nature

[273] As it turns out, this process – ultimately restricted to sites for priority species/habitats, as set out in Article 5 of the adopted version of the Directive – has never been used by the Commission (Cashman, 2013; Ó Briain, 2013), though Cyprus recently argued, unsuccessfully, before the European Court of Justice that the process ought to have been used by the Commission in a dispute regarding site protection for the Cypriot grass snake (*Natrix natrix*) (ECJ, 2012b).

[274] With the exception of Article 3, then the definitional provision, which had been submitted to COREPER for discussion.

conservation (the 1979 Birds Directive) has sometimes created tensions between the Commission and member state governments....[and in] the Government's view...the Commission's draft on this occasion was presented prematurely – without any prior consultation, without eight of the 11 annexes, and containing a number of features which had not been properly thought through...As a result of this unsatisfactory situation, there has been a virtual stalemate in Brussels, with the Commission adhering to the original draft, while all – and it really is all – member states have consistently expressed deep dissatisfaction with both the content of the text and the continuing absence of the annexes. Indeed, dissatisfaction with the situation has spread to the European Parliament which has refused to take a view on the environment committee's somewhat premature report on the grounds that the proposal is incomplete....I believe for three reasons that there is light at the end of the tunnel. In the first place, the Commission has been showing greater flexibility – more over the past couple of months than in the whole of the previous year....Secondly, the current French Presidency has tabled an alternative text as a basis for further discussions...Our initial reaction, like that of most other member states, is to regard the French text as an improvement on the Commission's draft...The purely mechanical approach to site designation, for example, seems to have been dropped....[but] Commission involvement in site selection and what we regard as unacceptable powers for the proposed committee might lead...to site designation from Brussels against the wishes of the member state concerned. So there is some way to go on this front yet" (House of Lords, 1989a).

7.3.6.5 Designation of Natura 2000 sites, cont.

Reporting to the Council on 21 November 1989, COREPER noted that Spain and Portugal had maintained their general reservations regarding the directive proposal, given the absence of the Annexes from the proposal, and that the Council would therefore not be in a position to take a decision regarding the directive at its meeting on 28 November (CEC, 1989l). Nevertheless, progress had been made pending the receipt of detailed Annexes, and only two main problems emerged during COREPER discussions on 15 November: first, the procedure for designating sites, in respect of which numerous Member States (Spain, Ireland, Portugal, the UK, Greece) had issues, feeling that Member States were the best judges of the need to protect habitats and that protected areas should not be imposed upon countries (CEC, 1989l). Denmark, Spain and Italy stressed the need to see the detailed site selection criteria before reaching a final position (CEC, 1989l), though Denmark was said to be favourably disposed towards the proposed process (DG XI, 1989b-c). The second major outstanding issue was the question of financing - on which more below - with Greece, Spain, Ireland, Italy, the

Netherlands and Portugal saying that the mobilisation of EU financial resources would need to be guaranteed (CEC, 1989l).

Preparing for the Environment Council meeting on 28 November 1989, an internal DG XI briefing note recorded that there was a chance the German Minister would propose an alternative site selection process to that in the draft: namely, each region would contribute to Natura 2000 by designating, within 5 years of the directive's entry into force, a minimum of 10% of its territory within the network of special protection areas (DG XI, 1989b-a). In the event, this idea does not appear to have been raised at the November meeting, the discussion instead following expected lines. France's Environment Minister Brice Lalonde, as President of the Environment Council, recalled at the meeting on 28 November that the proposed compromise position on site selection took account of, amongst other things, problems encountered in applying the Birds Directive (CEC, 1989f). Denmark and the Commission indicated that they supported France's compromise proposals; Belgium and the Netherlands welcomed the compromise but wanted additional details on Article 6, the provision which empowered the Commission to step in and make proposals where it considered that additional areas ought to be proposed for designation (CEC, 1989f). However, Spain, Greece, Ireland, Portugal and the UK considered that only the Member States should have the authority to designate areas and that Article 6 would therefore be inappropriate (CEC, 1989f).

On 13 December 1989 the Director General of DG XI circulated draft annexes to the rest of the Commission and asked for their agreement by 20 December 1989 in order to allow the Commission to adopt them formally before 15 January 1990, for (re)insertion into the proposal (DG XI, 1989b-f). In the meantime, various people were contributing ideas to the Commission regarding the best way to deal with site selection criteria for the directive. One was Geert Raeymaekers, an environmental consultant working with DG XI, who proposed in December 1989 the idea of setting up a series of biogeographical working groups: that is, Atlantic, Continental, Mediterranean, and Alpine biogeographical working groups in which national scientific delegates would be represented, under the chairmanship of the Commission (DG XI, 1989b-g; Raeymaekers, 2012). These working groups, which were intended to strengthen the international and transboundary aspect of the protected area network, would then be given the task of establishing site selection criteria (DG XI, 1989b-g). The Council met the following day – 15 December – to discuss the Annex V site selection criteria, and the discussion revealed almost as many different ideas as delegates (CEC, 1989m; DG XI, 1989b-b).

7.3.6.6 Protection of Natura 2000 sites

On 13 September 1989, France discussed with the Commission progress during the French Presidency regarding the directive proposal (DG XI, 1989a-c). The French representatives reported that certain Member States, such as Germany, felt that protected areas, once designated, should not be regarded as untouchable (DG XI, 1989a-c). Moreover, a majority of Member States were not in favour of operating a system of two categories of protected areas with differing standards of protection applying to the categories, as had been proposed by the Commission (DG XI, 1989a-c). Thus, the Member States were moving slowly towards a single category system, with the potential for derogations being available in respect of all protected areas. Further, while a majority of Member States maintained their rejection of the Commission's proposal to amend the EIA Directive to apply that directive to sites designated under the Habitats Directive, France's idea of including a new, standalone provision on impact assessment within the text of the draft Habitats Directive had been met with a favourable response (DG XI, 1989a-c).

France launched its impact assessment proposals at the meeting of the Working Party on the Environment on 28 and 29 September 1989; the note of the meeting records: "To take account of the concern voiced by a number of delegations....[France] proposed that, instead of [provisions applying the EIA Directive to special protection areas under the Habitats Directive]...special rules for protection areas should he included in [the Habitats Directive itself] providing for an assessment of the effects which development projects not directly connected to the management of these areas would have on the conservation potential of the areas concerned, on the understanding that the Member States would be making this assessment and would inform the Commission thereof. The rules should also be applicable to areas awaiting designation" (CEC, 1989g, p.21). Several delegations were "favourably inclined" to this proposal, although Belgium expressed doubts, and Denmark stated that any form of intervention likely to have an impact on protection areas should be ruled out (CEC, 1989g). In that regard, in the European Parliament's first report on the draft directive, published on 29 September 1989, rapporteur Hemmo Muntingh expressed his surprise at the Commission's suggestion in the explanatory memorandum for the draft directive that "only between 1 and 2% of the total surface area of the Member States will need strict measures of protection. The major part of the surface area of the biotopes will need management plans reconciling appropriate measures of protection and expensive agricultural and forestry exploitation based on adapted techniques" (European Commission, 1988f). As Muntingh commented, "This restriction is quite superfluous, particularly when it is borne in mind that a lot of marine areas are also eligible for protection. It would also be quite unreasonable with

regard to those Member States which have already designated quite large numbers of special protection areas" (European Parliament, 1989b, p.30).

On 13 October 1989, the French Presidency formally submitted to the other Member States its compromise proposal regarding the text of the Habitats Directive. As expected, the French had removed all references to the EIA Directive, and in its place inserted the following tailored provision as a new Article 8:[275]

> "1. In respect of the special protection areas referred to in Article 7 Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting fauna and flora, insofar as these would have significant effects, having regard to the objectives of this Directive, on the species or types of habitat for which the area has been classified.
>
> 2. Member States shall in particular decide on the most appropriate protection status to be given to the areas referred to in paragraph 1 and consider setting up integrated management plans in accordance with the ecological needs of the species and types of habitat concerned. A common typology for the classification of protected areas at European level shall be adopted in accordance with the procedure laid down in Article 22.
>
> 3. All development projects affecting or likely to affect a special protection area and which are not directly connected with or necessary to the management of the area shall be subject to detailed assessment of their impact in relation to the area conservation objectives. Where development is carried out, the Member State shall send the Commission the results of the study and inform it of any compensatory measures adopted, showing that the integrity of the area has not been significantly affected.
>
> 4. Where necessary to ensure a satisfactory conservation status of a species Member States shall envisage the re-establishment of destroyed or degraded biotopes or the development of new ones" (CEC, 1989b)

Discussing the proposed text at a meeting of the Working Party on the Environment on 9 November 1989, Spain argued that account should be taken of Article 2 – i.e. economic, social, cultural requirements, etc. - in applying the above Article (CEC, 1989j). In respect of Article 8(3), the UK and Ireland argued that the introductory wording should be amended to read "All development projects affecting or likely to significantly affect...."; Germany

[275] Soon renumbered as Article 7 (CEC, 1989a) and later still becoming Article 6, in the Directive as finally adopted.

opposed this on the basis that a series of non-significant effects could result in serious consequences (CEC, 1989j). When the French Presidency presented its revised draft on 13 November, the result was a compromise: "significantly" had been added, but to address Germany's point regarding cumulative effects the draft now required assessment of projects likely to have significant effects, *either alone or in combination with other projects* (CEC, 1989a). Finally, the UK challenged the term "detailed assessment" in paragraph 3, and said that it preferred "appropriate assessment", thus giving rise to the now well-known term in the context of the Habitats Directive (CEC, 1989a, j).

Commenting on the new provisions, the head of DG XI's Nature Unit commented, "The Commission should express strong support for [Article 8(3)] and be ready to carry it up to Ministerial level if so required. NB: It replaces the very contested section on Environmental Impact Assessment in the Commission's initial proposal" (DG XI, 1989b-h). The UK government was also positively disposed towards the new provision, noting that "the new proposal on environmental impact assessment is much less ambitious" than the earlier proposal to amend the EIA Directive (House of Lords, 1989a), a judgment which was likely based on the fact that the proposal to amend the EIA Directive had covered projects, plans and programmes, whereas the new standalone impact assessment provision for the Habitats Directive covered only projects in its first incarnation.[276] Nevertheless, the provision would ultimately be extended during negotiations to cover projects *and* plans, and would also be amended to set out the circumstances in which a plan or project could be approved at national level following an impact assessment. In summary, the UK government's view of a "less ambitious" provision has been disproven by the history of the directive's implementation over the past 20+ years. But back when the proposal was first mooted in 1989, the UK was in any event open to considering extending the protection provided at national level: "I can say that we are willing to explore what scope there might be for extending in some cases the degree of protection currently available under British law. However, much will depend on the content of the annexes. Plainly the greater the scope of the annexes, the less the degree of

[276] It is interesting to note that the Member States do not appear to have been wary of the fact that "all development projects" would potentially be subject to impact assessment under the new draft provision, particularly when one considers that the Member States rejected the Commission's original formulation of an impact assessment obligation, which envisaged, *inter alia*, projects listed in Annex II to the EIA Directive - which projects are not subject to mandatory assessment under the EIA Directive - being subject to mandatory assessment where the project was located in or likely to affect the conservation potential of a special protection area. In other words, the Member States were accepting of the French Presidency's compromise provision, yet that provision was as broad in its coverage of projects as was the Commission's original draft. The key differences between the Commission's original formulation and the French Presidency's draft impact assessment provision were therefore that the French draft covered only "development projects" and not also plans/programmes, and that the French provision was standalone and would therefore not result in applying *the EIA Directive's provisions* to all development projects.

protection which could be considered for everything in those annexes. At present the Commission drafts are very lengthy" (House of Lords, 1989a).[277]

7.3.6.7 The UK as a forerunner: November 1989

By November 1989, the UK's position regarding the directive had changed fundamentally, from obstructionist at the proposal's origin to forerunner: "I can say that the Government feel that there is now a real basis on which to move forward and that we are looking to play a leading role in this process...We do not think that the fate of each nation's threatened species, and of the habitats necessary for their survival, is and should be the concern only of the nation within whose frontiers they are to be found...we acknowledge also the right of others to know what we are doing in our own backyard. We accept that we can learn [from] the experience of others. We hope therefore that it will soon be possible to reach an agreement on this important directive..." (House of Lords, 1989a). However, it was by this time clear that this would not be possible during the French Presidency, despite the enormous progress made: a report from COREPER to the Council on 21 November 1989 noted that "The absence of technical annexes has seriously inhibited progress on this proposal. Delegations have indicated on several occasions that they cannot take final decisions on the enacting terms without knowing the content of the annexes. In these circumstances, [Spain and Portugal] have upheld a general reservation" (CEC, 1989k).

7.3.6.8 Protection of areas outside Natura 2000

As recorded above, many delegations had expressed doubts about including any provision in the directive relating to the protection of landscape features outside the Natura 2000 network. Thus, it could have come as little surprise to the Commission when the French Presidency suggested an approach that would significantly weaken the obligation on Member States in respect of areas outside Natura 2000 sites, and proposed the deletion of Annex VII, which listed the distinct landscape features requiring protection (DG XI, 1989a-c). The Commission adopted the French approach as its own at the meeting of the Working Party of the Environment on 28 and 29 September 1989, the meeting notes recording that: "In order to take account of the concern voiced by several delegations....[the Commission] suggested a more flexible wording, specifying that Member States should encourage the implementation of the measures needed to ensure protection of the features of the rural area, insofar as these had a direct effect on the protection of habitats" (CEC, 1989g, p.23).

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[277] As the Earl of Cranbrook noted presciently in contributing to the same debate, "looking beyond the near future and into the period when the directive is in operation, there will be and must be action at the Community level which may be against the wishes of some at least in a member state. That is an inevitable deduction and is one that we have to face up to as the debate grows" (House of Lords, 1989a).

On the same day that the Working Party was thus considering weakening the protection applicable to important areas outside the Natura 2000 network, the Dutch MEP Hemmo Muntingh presented the European Parliament's first report on the directive, extolling the virtues of the directive's approach to such areas: "...one of the major positive features of the Habitats Directive is its attempt to prevent and eliminate the fragmentation of nature....It is...imperative to maintain or develop habitats of a sufficient size and to maintain and encourage migration routes and natural links between main propagation areas and smaller habitats. In short, the aim must be to establish a continuous ecological infrastructure" (European Parliament, 1989b, p.27). Despite having effectively conceded weaker wording on the subject, the Commission maintained its belief in the importance of this aspect of its proposal, noting in October 1989: "The Commission is fully convinced that the Natura 2000 Network will only form a viable ecological infrastructure if the special protection areas are duly connected by linking corridors constituted by those natural features in the wider countryside that are of paramount importance for the maintenance or recovery of the species covered by the directive in their natural areas of distribution. These features will typically comprise hedges, ponds, streams, groves etc. It will not be acceptable for the Commission to limit the Community's effort to save its natural heritage to measures geared to a number – however impressive – of isolated islets" (DG XI, 1989a-i, p.3).

However, when the French Presidency presented its compromise proposal on 13 October 1989, this aspect of the directive had been significantly watered down, reading:

> "Article 10
>
> Member States shall also strive to avoid pollution or deterioration of natural and semi-natural habitats outside the classified special protection areas referred to in Article 7.
>
> Member States shall furthermore strive to ensure the protection of natural features which are of outstanding local importance to wildlife and which allow species to live normally in their areas of distribution such as hedges, woods, thickets, ponds, etc" (CEC, 1989b)

Nevertheless, certain Member States pushed to strengthen this aspect of the directive, the Netherlands suggesting in November 1989, for example, that "in the interests of the [Natura 2000] network's coherence, certain features connecting the various areas, such as rivers, hedges, etc., should also be included" within the network (CEC, 1989j, p.13). When this suggestion was not taken up, the Netherlands and Germany suggested that the above text of Article 10 should be supplemented as follows: "In applying the provisions of this Article, Member States shall give particular attention to the areas surrounding protected areas and to

the natural features that serve as links between protected areas" (CEC, 1989j, p.19). Again, this suggestion was not taken up (CEC, 1989a). Despite its by now generally favourable disposition towards the directive proposal, in November 1989 the UK had the following to say regarding connectivity: "As regards the question of providing a degree of protection outside the network of protected sites, many member states have expressed their opposition to the inclusion of any measure of this kind in the directive, on the basis it would seem that it is enough to get the site designation procedures in place. It seems unlikely therefore that anything beyond an obligation expressed in fairly general terms will feature in the final text of the directive. I recognise that this is less than the [House of Lords' select] committee may have sought, but perhaps the important thing is that the subject is appearing in the draft directive at all" (House of Lords, 1989a). On the contrary: experience with legal instruments would suggest that a woolly provision which does not impose an enforceable obligation is little better than no provision at all, and the Member States would almost certainly have known this.

7.3.6.9 Financing

Financing for the new directive grew in stature to become a key concern during the French Presidency. On 13 September 1989, the French Presidency reported to the Commission that financial support represented a prerequisite for certain delegations in respect of the directive's entry into force (DG XI, 1989a-c). This was reinforced at a meeting of the Working Party on the Environment on 28 and 29 September 1989, where several delegations expressed concern at the financial implications of the directive; in particular, Spain, Greece, Ireland, Italy and Portugal (CEC, 1989g). And when, in October 1989, it became known that the UK government would be supporting the directive, the biggest remaining stumbling block, in the view of the Director General of DG XI, was the "absence of a financial-support mechanism to assist the less developed Member States to preserve the wealth of important habitats which they have – largely because of their under-development!" (DG XI, 1989b-j).

The Commission had a well-established position for the purposes of the Environment Council meeting on 28 November 1989: "A directive addressed at Member States is not the place to include a section on financial resources. The Commissioner is, however, ready to make a formal statement at the Council meeting committing himself to present to the Commission in the near future a proposal for the extension of ACE/biotopes Regulation to cover other species than birds and foreseeing a substantial increase of financial means under the Regulation and also, in association with the Commissioner of Agriculture, to introduce a proposal aimed at increasing support under the Agricultural fund for the conservation of the special protection areas included in the Natura 2000 network" (DG XI, 1989b-h). The stakes

were already high by this stage: as the UK government noted in November 1989, "some member states are saying that they will not agree to the text of this directive unless the financial provisions are clearly established in advance" (House of Lords, 1989a). But the Director General of DG XI had a plan: in a briefing note sent to the Environment Commissioner on 20 November 1989, he noted that the availability of EU financial support has been "a major stumbling-block for [Spain, Portugal, Ireland, Italy and Greece] from the beginning. You should be able, at the Council [of 28 November 1989] to allay their fears....My services are working on a proposal which would involve the replacement of the biotopes element of the ACE Fund by a non-finite financial regulation which would reflect the decisions eventually taken by the Council on the Habitats Directive" (DG XI, 1989b-e).

7.3.7 The French Presidency: a "remarkable effort"

Overall, the Nature Unit clearly felt that the French Presidency had done an excellent job in respect of the Habitats Directive proposal, an internal DG XI note recording that the Commission, "warmly congratulates the Presidency with its remarkable effort of synthesis aimed at reconciling very different views and resulting in a simplified and clear text. The Commission can broadly support the compromise text and has only diverging views on 2 issues contained in that text [issues not relating to site designation or site protection]" (DG XI, 1989b-h, p.2).

7.4 Irish Presidency: January – June 1990

7.4.1 Designation of Natura 2000 sites

Ireland took over the Presidency of the Council in January 1990, and made very little progress regarding the Habitats Directive during its six months in charge. In respect of site designations, the Member States picked up where they had left off, meeting on 16 January 1990 to discuss the Annex V site selection criteria. For the purposes of the meeting, the Commission had produced a working draft version of Annex V which had moved slightly away from the previous mechanistic approach (DG XI, 1990b). The Annex was now in two parts: a qualitative "general objectives" part as section A; and the quantitative, mechanistic approach now shifted to a section B (DG XI, 1990b). In part A, the Commission had introduced to the criteria the general objective of maintaining or re-establishing "a favourable state of conservation" for each listed species and habitat, picking up on the RSPB's suggestion, which had been included in Hemmo Muntingh's report for the European Parliament (DG XI, 1990b). Moreover, the Commission had also included the idea of dividing the EU into biogeographical regions for the purposes of site selection: Macaronesia

having been added to Geert Raeymaeker's earlier suggested list of Mediterranean, Atlantic, Continental and Alpine regions (DG XI, 1990b).[278]

The suggestion of including favourable conservation status as an objective did not prove controversial, unlike the suggestion that each region, as defined in the Directive, would be obliged to "allocate a minimum of X% of its area to the network of special protection areas with a view to conserving the common natural heritage made up of a coherent ecological infrastructure throughout the whole Community. Beyond this minimum threshold, the contribution of each region [would] vary according to the size of the habitats [as defined in the Directive] it contains at the time the Directive is adopted" (DG XI, 1990b, paragraph 3). This idea was the subject of a long discussion at the meeting on 16 January, with the Irish representative resisting the idea particularly strongly, pointing to the "sacro-saint" nature of property rights in Ireland, and suggesting that if a percentage needed to be included, this should be on a voluntary basis, and that the percentage should be capable of being revised subsequently, an idea supported by the UK and Germany (DG XI, 1990c). Germany pointed out that its earlier idea of protecting 10-15% of territory did not necessarily envisage this percentage comprising only special protection areas, but could also be understood as including buffer zones and ecological corridors (DG XI, 1990c). Spain suggested a compromise proposal, which received broad support, whereby each region would go about the business of designating sites for each listed species and habitats, and where the region ultimately fell short of the minimum percentage stated, Member States could then add additional areas of their choice to reach the minimum (DG XI, 1990c). Finally, Ireland, the UK and Germany were very critical of the quantitative method contained in section B of the Annex V site selection criteria, favouring an approach which would rely on the judgment of experts at the regional and national levels (DG XI, 1990c).[279]

7.4.2 Delors' cabinet intervenes again

With the Commission now required by the European Parliament to table annexes formally as part of its proposal, in December 1989 the Director General of DG XI had circulated the relevant draft annexes to the rest of the Commission for their agreement, commenting that

[278] Germany would later suggest adding the Baltic region (CEC, 1991a-o), and the Commission was prepared to accept this (DG XI, 1991e), but this did not ultimately come to pass. With later EU expansions, other biogeographical regions (Black Sea, Boreal, Pannonian, and Steppic) have since been added (European Commission, 2013f). Further, there is now an unofficial "marine Baltic region" first introduced for the 2001-2006 report under Article 17 of the Habitats Directive, and used since for evaluation of marine sites (Evans, 2013).

[279] Roy Bunce, then of the UK government, explains that "from the outset the UK's position was that the selection of both species and habitats for inclusion in the Directive should be based on sound scientific criteria. This informed all our objections to arbitrary numbers and percentages" (Bunce, 2013a). This was the UK's consistent line throughout, Bunce (2013a) reports.

"the draft annexes I, II, III and IV...have been drastically shortened as compared with the initial ones...As your Directorate General has already agreed to the far broader lists of species and habitat types presented in the initial annexes I, II, III and IV...we assume that you will have no problem in agreeing to the attached set of annexes" (DG XI, 1989b-f). Two points are worthy of note: first, it is not clear that the rest of the Commission had in fact agreed to the original annexes, given that they were dropped before the formal proposal was made to the Council;[280] second, Annex IV (habitats requiring special protection areas) had not been drastically shortened, and had instead grown considerably in length.[281]

In any event, the cabinet of Commission President Jacques Delors intervened (again) in February 1990, its earlier intervention having led to the annexes being excluded from the proposal in the first place. Briefing notes were dispatched to Environment Commissioner Ripa di Meana for the purposes of a meeting with Delors, explaining why the principle of subsidiarity was not a sound basis to block the proposal (DG XI, 1990g, n). A contemporaneous media report records that "With hands tied [by the European Parliament's demands to see the annexes], Environment Commissioner, Carlo Ripa di Meana, suggested that the Commission re-enact the annexes drafted in 1988 and put them forward by written procedure. But, Mr Ripa di Meana was not the only one with a keen memory, as Delors reproduced the same arguments he had used in 1988 for not proposing the annexes, that it would be bureaucratic and that there should be subsidiarity, and blocked the move. Commission sources report that Delors has never been very keen on conservation legislation anyway mainly because of pressure from France's powerful hunting lobby" (European Report, 1990).

Stanley Johnson, who had not been heavily involved with the directive proposal once it got off the ground, nevertheless re-engaged when the proposal came under threat once more, writing that it was "impossible to imagine [that the directive] could be blocked not by the Council or the Parliament...but BY THE COMMISSION ITSELF! And notably by the President and his cabinet!" (DG XI, 1990n). However, as reported at the time, "since the Commission now has little option but to put forward proposals on the annexes, Delors is not

[280] As noted above, as at 27 June 1988 all DGs with the exception of DG VI (agriculture) had indicated their agreement to DG XI's proposal, which at that time included the detailed annexes of species and habitats (DG XI, 1988a-f). However, it is not clear that agreement was subsequently reached with DG VI around that time, and it is clear from the above history that Commission President Delors was not prepared to sign off on the directive including the annexes in question at that time.

[281] Though as noted above, Devillers (2013) explains that a shorter list of habitats might in fact capture more than a longer list: "it was possible to produce short lists of habitats, but they were in fact more encompassing...[than longer lists might have been]," because listed habitat types on a short list would protect all sub-habitat types, and these sub-habitats were extensive and were being listed as part of the CORINE biotopes project. The risk of producing a very detailed list of habitats for the draft Directive, Devillers (2013) continues, would be that "in making the sentence more precise, in a legal text like that, you of course restrict its application."

expected to block the measures" (European Report, 1990), and the Commission's modified proposal, including the annexes, was ultimately agreed and communicated to the Council on 14 March 1990 (CEC, 1990d).[282]

7.4.3 Site selection criteria

Despite this hiccup within the Commission, things continued to look positive in the UK, with the Observer reporting on 4 February 1990 that "Britain, which originally opposed the [Habitats Directive] proposals, is now understood to be strongly in favour...[under Environment Secretary Chris Patten]" (Ghazi, 1990).[283] Notwithstanding this renewed political impetus, progress during the Irish Presidency was very slow, with the work that was done focusing mainly on the Annex V site selection criteria.

The Working Group on the Environment met on 23 February 1990 to discuss the best way forward regarding Annex V (DG XI, 1990m). At the meeting, the UK expressed its support for the idea of site selection based on biogeographical regions, and those present agreed that the EU list of protected areas should be established by the Commission *in agreement with* each Member State (DG XI, 1990m). The meeting mandated the Commission, with the aid of the Irish Presidency, to draw up a revised version of Annex V (DG XI, 1990m). This the Commission did, and its working document version of Annex V of 8 May 1990 revealed a continuing gradual shift away from a quantitative assessment of the sites requiring protection towards a more qualitative method, albeit that the proposal still envisaged there being a minimum percentage area of habitat to be designated as special protection area in respect of different classes of species/habitat (e.g. class I (exceptional sites), class III (sites of high interest))(DG XI, 1990e). This type of approach had already been criticised by the UK government on the basis that it might be more logical "to aim to apply a reducing degree of protection to sites in each class rather than a declining percentage of area to be protected...[I]f the proposal is to designate as SPAs 80% of Class 1 sites and 20% of Class 4 sites the end result will be that the 20% in Class 4 will have full protection while the 20% not selected for Class 1 will have none. This might seem odd given the comparative value of the sites in conservation terms" (Department of the Environment, 1990).

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[282] CEC (1990a) erroneously recorded that Annex V (site selection criteria) had not yet been forwarded to the Council. In fact, that annex was one of the few contained within the Commission's original proposal (DG XI, 1990j), and so did not need to be forwarded again. Unfortunately from the Commission's perspective, this reporting error resulted in the Irish Presidency, Italy and Germany calling for the Commission to make a formal proposal to the Council modifying the original version of Annex V; the Commission preferred a less formal approach, and sought a willing delegation to table a working document instead (DG XI, 1990k).

[283] Alistair Gammell recalls being told by Ian Presst, then Director of the RSPB, that Patten had rung Presst to say that the UK's policy towards the Habitats Directive had changed, and to invite the RSPB to work with the government in a new and constructive way, "which [the RSPB] certainly did" (Gammell, 2013).

Progress during the Irish Presidency was in fact so poor that the proposal was included on the agenda for the Environment Council meeting of 7 June 1990 "solely to try to motivate the [incoming] Italian Presidency to restart active work on the dossier" (DG XI, 1990j). Ireland sought to explain the lack of progress during its Presidency on the basis that the Commission had transmitted the annexes too late, and DG XI acknowledged that there was some truth in this, given that Delors' intervention had delayed matters somewhat (DG XI, 1990j). The UK was not impressed, however, with junior Environment Minister David Trippier commenting that the situation "is bordering on a farce. We are all the more appalled that so little progress has been made in recent months" (Brown, 1990). The Member States' desire to pin down precise site selection criteria, and to provide a degree of flexibility in the protection afforded to sites, was no doubt given added impetus by Environment Commissioner Carlo Ripa di Meana's continuing focus on enforcement, and his envisaged role for the new European Environment Agency, which the Member States had only recently agreed to set up: "Community legislation must be strictly applied throughout all the Member States. At the very start of my mandate," he said, "I made it clear that this would be my major priority. I have stuck to that...I consider that my determination to have Community Law applied has led to a change in the attitude of Member States to environmental legislation in all its stages. At present the task of following the application of Community law in the Member States is undertaken by the Commission alone...The Council agreed that in two years it would examine again the question of how the [European Environment] Agency might assist the Commission in its task of following the application of Community law and, in particular, the task of inspection" (Ripa di Meana, 1990).[284]

7.4.4 The European Parliament's second report

Having worked rapidly since the Commission formally added the annexes to its proposal, Hemmo Muntingh produced his second draft report on the Habitats Directive proposal on 27 June 1990 (European Parliament, 1990a). The draft built on his first draft, but now included comments and proposed changes to the detailed annexes (European Parliament, 1990a); the final report was issued on 18 October 1990 (European Parliament, 1990b), by which time the Commission had had a good opportunity to digest its contents. The Parliament debated the

[284] Surprisingly, perhaps, this idea is said to have had the support of UK Conservative MEPs (Europe Environment, 1991b). The establishment of the European Environment Agency was held up for some time by the French government, which was accused by Environment Commissioner Ripa di Meana of "blackmail" and "hostage-taking" for blocking the Agency's establishment until Strasbourg was confirmed as a permanent home of the European Parliament (IPS, 1991).

report and delivered its positive Opinion with proposed amendments on 19 November 1990 (European Parliament, 1990c).[285]

7.4.5 Protection of Natura 2000 sites

When the Member States met to discuss the Annex V site selection criteria at the beginning of the Irish Presidency, on 16 January 1990, the Commission's revised working version of the criteria included some interesting points on site protection, including a definition of special protection area which envisaged differing standards of protection, as the RSPB's March 1989 paper had earlier proposed: "By 'special protection area' is meant an area where the necessary measures are applied for the maintenance or re-establishment of a favourable state of conservation for the species and types of habitat for which the area was designated. These measures may, if necessary, imply the creation of full nature reserves in cases where the species or types of habitat in question cannot resist disturbance by man; in practice, however, the measures will most often be limited to defining a certain number of rules on the human activities which can take place there and guaranteeing the maintenance or re-establishment of the factors on which depends the conservation of the species and types of habitat for which the area has been designated" (DG XI, 1990b). There were no objections to this definition, and the Member States asked that it be transferred to Article 3 of the main text of the Directive (DG XI, 1990c). However, such a definition was not ultimately retained in the Directive as adopted, and the Directive instead codified a single protection regime for special areas of conservation, albeit one that could dictate different outcomes for different types of sites.

7.4.6 Protection of areas outside Natura 2000

The Commission was still holding out hope for protecting areas outside Natura 2000 via the Directive: responding in January 1990 to an NGO's points regarding the Directive, a senior DG XI official wrote: "The Commission is attaching great importance to this aspect and will stand very firm against any attempt to limit the scope of the Directive to the mere network of special protection areas" (DG XI, 1990l, p.2). Thus, when the Commission was required by the Parliament to insert the remaining annexes formally into its proposal, the Commission took the opportunity to insert as Annex VII a list of "types of distinct features of outstanding local importance to wildlife" which the Member States would need to strive to protect, including, for example, valley corridors, coastal staging posts, bodies of water, fallow land, and wooded farmland (including hedgerows)(CEC, 1990c).[286] Belgium, Spain, France and

[285] The Economic and Social Committee delivered its Opinion on 18 October 1990 (ESC, 1990).
[286] This list differs from the list of features included as Annex VII to DG XI's original proposal to the rest of the Commission in summer 1988: compare with DG XI (1988a-f).

Luxembourg were in favour of deleting this annex "in view of the difficulty involved in applying it"; in contrast, Germany and the Netherlands were in favour of retaining it, but with more detail (CEC, 1990c). NGOs similarly picked up on a perceived lack of detail, with the Council for the Protection of Rural England writing to the Commission that "We are concerned that the vague categories in the latest draft of Annexe VII...are so imprecise as to make their protection impossible...We fear that this may be a prelude to the removal or emasculation of Article 8 of the Directive [on protecting areas outside Natura 2000]" (CPRE, 1990).

The Netherlands remained particularly committed to the idea of protecting areas outside Natura 2000, noting in a letter to the Commission of 16 October 1990 that "An ecological frame of reference may consist of a European ecological network, composed of core areas of European importance and, in my opinion, of ecological corridors, enabling species to migrate from one core area to another...If desired, the Netherlands is willing to make available its know-how in realizing ecological networks...It is not impossible that in some cases we have to conclude that entirely new nature areas are to be developed in order to realise ecological coherence. In my opinion it is therefore necessary that the Habitats Directive pays attention to nature development in addition to conservation and restoration" (Dutch government, 1990). Here we see an *attempt* by the Netherlands to "upload" the concept of its own National Ecological Network to EU level (cf. Liefferink and Zouwen, 2004), but this attempt was not ultimately successful given the limited protection finally afforded to areas outside Natura 2000, as we will see below.

7.4.7 Financing

On 2 May 1990 the Commission announced a proposal for a Council Regulation on action by the Community relating to nature conservation (ACNAT), a new instrument for the protection of habitats of EU importance and for the conservation of endangered species, with increased funding (European Commission, 1990a), to replace the biotopes part of the earlier ACE Regulation (1984) (European Commission, 1990b).[287] The target was clear: "Although such action may concern the whole of the Community, the Commission is particularly interested in helping less favoured regions to promote the development of nature conservation measures" (European Commission, 1990a). Several Member States were very critical of the failure to include details of the amounts of financing which would be available during each year of operation of the Regulation, and some queried the link between the ACNAT proposal and the Habitats Directive proposal (DG XI, 1990i). The Commission indicated that it would

[287] For the proposal, see European Commission (1990d).

not be possible for the ACNAT Regulation[288] to be adopted by the Council before the Habitats Directive was adopted (DG XI, 1990i), but nevertheless, looking to the Italian Presidency, the Environment Council mandated COREPER to press ahead with work on the Habitats Directive proposal, and to start examining the new ACNAT proposal with a view to reaching agreement on both as soon as possible (CEC, 1990b).

7.5 Italian Presidency: July – December 1990

7.5.1 Designation of Natura 2000 sites

During the early months of the Italian Presidency, work on the Habitats Directive focused on the Annex V site selection criteria. Commenting on the latest draft on 17 September 1990, the Commission suggested that protected areas under the Directive should be named Special Areas of Conservation rather than Special Protection Areas, since the former connoted the idea of management rather than outright banning of activities (DG XI, 1990h), finally reflecting a point raised almost two years before by the hunting coalition FACE (1989b). Around the same time, the Commission and the Italian Presidency introduced the idea of identifying "Areas of Urgent Intervention" for species and habitats in danger of disappearance, the latter to be indicated with an asterisk on Annexes I (species) and IV (habitats), an idea that would ultimately lead to the concept of priority species and habitats (DG XI, 1990o). Spain and France, in particular, were keen on this idea, on the one hand to introduce an order of priority in respect of their conservation work, and on the other to cast light on the differences between Member States in terms of their respective contributions to the Natura 2000 network (presumably Spain and France expected to be contributing more priority sites to the network than certain northern European countries, for example)(DG XI, 1990a). Professor Noirfalise, who had earlier drawn up the working draft list of habitats which formed the basis for Annex IV,[289] then produced a working list of priority habitats in November 1990 (DG XI, 1990f).

7.5.2 Experience with the Birds Directive

In October 1990, the Commission stressed (internally) that the Habitats Directive proposal risked reaching a stalemate, in part owing to certain Member States' ongoing issues regarding implementation of the Birds Directive, which risked seeping across and impacting on discussions regarding the Habitats Directive (DG XI, 1990a). As at 15 March 1990, the Commission had commenced 37 cases against Member States for failure to comply with their site designation and site protection obligations under Article 4 of the Birds Directive (ECJ,

[288] ACNAT Regulation (1991).
[289] Which ultimately became Annex I (habitats requiring SACs) in the Directive as finally adopted.

1990c), and decisions kept coming: e.g. the European Court of Justice held the Netherlands in breach of the Birds Directive in March 1990 (ECJ, 1990b), Germany in breach in July 1990 (ECJ, 1990a), and various other cases were in the pipeline, including against Italy in respect of bird hunting (ECJ, 1990d), and against Spain in respect of its failure to protect the Doñana wetlands (European Commission, 1990c), leading Spain to characterise the Birds Directive as a "complaints machine" (COREPER, 1991c).

Antonio Troya, who was seconded to DG XI as a Spanish national expert from 1990-94, working mainly on facilitating negotiations between the Commission and Spain concerning the Habitats Directive proposal, explains that when he joined the Commission in 1990, the directive proposal was facing a "strong blockage," led by Spain but supported by other Mediterranean countries and France to a certain extent, owing to those countries' experience with the implementation of the Birds Directive (Troya, 2012). These countries hoped to address, via the Habitats Directive, the "dysfunctionality" they perceived in the implementation of the Birds Directive, which was impacting on projects funded under the Structural and Regional Funds, for example (Troya, 2012).[290] Spain's attitude would likely have hardened in that regard in November 1990 when the Commission lodged an application to bring the Spanish government before the European Court of Justice in respect of Spain's failure to apply the Birds Directive to protect the Santoña marshes from various damaging developments (ECJ, 1993c).

In parallel to these developments, DG XI's Legal Unit and Commissioner Carlo Ripa di Meana were beginning to gear up for their major battle with the UK government regarding an alleged failure to assess various projects under the EIA Directive - as described in chapter 3 - a complaint having been lodged with the Commission in November 1990 (McCarthy, 1990). However, before that conflict could fully develop, there would be even greater turmoil within the UK government, with the resignation of Prime Minister Margaret Thatcher on 22 November 1990, having failed to decisively fend off a leadership challenge from Michael Heseltine in the first round of voting by Conservative MPs (Associated Press, 1990). In the event, Heseltine lost out to John Major in the subsequent leadership election, and Major then appointed Heseltine as Environment Secretary in place of Chris Patten (Oakley, 1990).[291]

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[290] Such an impact was not accidental or incidental, of course. As noted above, the Structural Funds were, according to Claus Stuffmann, creating "a development which is faster perhaps than can readily be controlled in environmental aspects" (House of Lords, 1989b, paragraph 41). The Commission argued that "such potential problems with the Structural Funds were themselves an important argument for a new Habitats Directive granting the Community internal competence for protection of all Community flora and fauna, rather than simply for birds, as hitherto" (House of Lords, 1989b, paragraph 44).

[291] Heseltine had held this role under Thatcher in a previous government, from 1979-1983. Speaking in March 1991, Heseltine reaffirmed the UK's support for the Habitats Directive, thus continuing the positive attitude displayed towards the proposal by his predecessor: "the UK is fully committed and indeed enthusiastic about

7.5.3 Another six months lost

The Italian Presidency having, per the Commission, made "very little progress" regarding the Habitats Directive proposal, the Commission met with Luxembourg's Minister for the Environment on 28 November 1990 and with a senior official on 13 December, to discuss the situation regarding the draft Habitats Directive, in view of Luxembourg's taking over the Presidency in January 1991 (DG XI, 1990d). The Commission stressed that the European Parliament had expressed strong support for the proposal in a vote on 19 November 1990[292] and that NGOs in various Member States were increasing their pressure on their respective governments to work more actively towards a political agreement in the first half of 1991 (DG XI, 1990d). The financing aspect of the proposal was now central to the Commission's concerns: "It becomes increasingly clear that the discussions in the next half year on the "Habitats" draft directive and on the Acnat Regulation as well as on other relevant sources of funding have to take place at the same time at the various levels of work within the Council...[otherwise] the prospects of it getting approved quickly by the Council are very poor indeed" (DG XI, 1990d). Nevertheless, the Commission maintained "reasonable hope" for an agreement during the Luxembourg Presidency, in part owing to the motivation displayed by several Member States, notably Germany, the Netherlands, Denmark and France (DG XI, 1990d).

Germany's appetite for the Habitats Directive might perhaps have been dampened a little by legal developments in December 1990, when Advocate General Van Gerven gave his Opinion in the *Leybucht Dykes* proceedings, which had earlier been the subject of an unsuccessful application for an injunction by the Commission (detailed in section 7.3.3 above). Germany's arguments in the case were supported by the UK,[293] and neither can have been comforted by the Advocate General's conclusion (albeit that this was only advisory and remained subject to the ECJ's judgment): "I am in agreement with the Commission that the reduction in extent of a designated special protection area or a diminution in the quality of living conditions in such an area is only permitted where the work carried out can be justified by compelling reasons arising from a general interest which is more important than the environmental interest protected by the directive. I am also in agreement with the Commission that the protection of human life is (of course) such a higher interest, [and] that

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[the directive's] concepts... We will be taking an active and constructive role in the Environment Council over the next few months to bring the Directive to fruition" (Heseltine, 1991).

[292] 103 votes for, 17 against the proposal as amended by Parliament, and 3 abstentions (RSPB/WWF, 1991a).

[293] In 1987 the UK government had advised planning authorities that planning permission could be granted in an SPA where, *inter alia*, there were economic or recreational requirements which outweighed the conservation interest (Freestone, 1996).

(in the absence of special or exception circumstances which are difficult to foresee) economic or recreational interests do not constitute such an interest..." (ECJ, 1990c, paragraph 39).

Sites under the Birds Directive therefore looked set to receive strict protection, but the prospect of there being sites under a Habitats Directive was no closer to being realised, the Irish and Italian Presidencies having "made virtually no progress with the draft Directive [in 1989]", as Ian Hepburn, the joint RSPB/WWF campaigner would write in his campaign newsletter in January 1991 (RSPB/WWF, 1991a). "Ireland points to the lack of a formal Commission proposal for the complete set of annexes and lack of a funding proposal (which were eventually produced in March and May, respectively)," he added (RSPB/WWF, 1991a). "Italy had no excuse for failing to make progress, but seemed unwilling to give the Habitats Directive proposal any priority in working group discussions with the Commission and equally unwilling to take any initiative to negotiate the crucial points of difficulty – Annex V and the articles relating to establishment of Special Protection Areas and Commission powers of intervention. As a result, the Italian Environment Council in late December did not even include a progress report on the Habitats Directive: there was no progress to report!" (RSPB/WWF, 1991a).

7.6 Luxembourg Presidency: January – June 1991

7.6.1 Introduction

After a lost year, in effect, things looked immediately more positive for the Habitats Directive proposal under the Luxembourg Presidency: by 15 January 1991, only two weeks in, the Commission's archive reveals a draft directive modified with numerous major handwritten changes in light of discussions with the Presidency (DG XI, 1991s).[294] The Commission continued working closely with the Presidency on producing a revised draft throughout January and February 1991, the Commission pausing to publish its formal modified proposal on 8 February, which took onboard certain of the European Parliament's suggested amendments, including the idea of introducing "satisfactory" conservation status as an objective of the directive, thus formally incorporating into the text the RSPB's original idea of March 1989 (European Commission, 1991c; RSPB, 1989). Indeed, the Commission and Presidency were working so rapidly on the draft that on the same day the modified proposal was published, incorporating the term "satisfactory" conservation status, the Commission's working draft had already moved on to use the term "favourable" conservation status in its place (DG XI, 1991t). Not only was the Commission working hard in conjunction with the

[294] The handwritten changes here included extending the Article 6 impact assessment process to plans as well as projects.

Presidency, it was also floating trial balloons of its draft with other Member States, meeting the UK on 13 February for example, and receiving back detailed comments (Department of the Environment, 1991b).[295]

7.6.2 Designation of Natura 2000 sites

On 28 February 1991, the Luxembourg Presidency presented its compromise proposal, which built on and was "largely inspired by the French Presidency's compromise text of November 1989" (CEC, 1991a-c). In terms of site designations, the revised draft stated that the Natura 2000 network would comprise sites designated under the Habitats Directive and SPAs under the Birds Directive (but not Ramsar sites, as some had previously sought)(CEC, 1991a-c, Article 3(1)). Each Member State was to contribute to the network by designating a sufficient number of sites of appropriate quality and size as special areas of conservation, taking account of the objective of maintaining or restoring favourable conservation status (CEC, 1991a-c, Article 3(3)). In terms of site selection, the draft required the Member States, on the basis of the criteria in Annex III (formerly Annex V),[296] to draw up a list of sites hosting Annex I habitats or Annex II species[297] and to transmit this list to the Commission within three years of the directive's notification (CEC, 1991a-c, Article 4). The revised Annex III site selection criteria were now much more qualitative than before, relying, for example, on "overall expert judgment", amongst other things (CEC, 1991a-c). Having received the Member States' lists, the Commission would then establish a list of sites of Community importance drawn from the national lists, within six years of notification of the directive, in the framework of the five biogeographic regions and of the whole of the EU territory (CEC, 1991a-c, Article 4). This list would be submitted to a Committee foreseen by the draft directive, and in the event of a disagreement concerning one or more sites, a mechanism for resolving the dispute would be triggered, potentially leading to a qualified majority vote by the Council (CEC, 1991a-c, Articles 4 and 19). The draft also provided a mechanism for the Commission to refer a proposal directly to the Council where, in disagreement with a Member State, the Commission considered that a priority site not occurring on a national list should be added to the list of sites of Community importance; the Council would then decide the issue by a qualified majority (CEC, 1991a-c, Article 5).

[295] By this time, the UK very much wanted to be at the forefront of the negotiations and the adoption of the Habitats Directive, according to Hilary Neal, one of the government's key negotiators (Neal, 2012). The UK felt that it could lead from the front and had a "very good story to tell," given the existence of its own domestic site protection regime, SSSIs, as well as its national nature reserves (Neal, 2012).

[296] The reference to taking account, during site selection, of Article 2's "economic, social and cultural requirements and regional characteristics" had by now been dropped.

[297] Formerly Annexes IV and I, respectively, which had been renumbered.

Once a site had been retained as a site of Community importance, the Member State would have a maximum of six years to designate the site as a special area of conservation, and during this period the sites on the list would be subject to the protective provisions set out in Article 6(2) and (3) of the directive (CEC, 1991a-c, Article 4) – more below. The draft continued, "A Member State having designated sites retained on this list which total up to at least 15% of its European territory" may consider itself as having fulfilled its site designation obligations (CEC, 1991a-c, Article 4(4)). This proposed ceiling would be deleted from the draft before the directive came to be adopted.

The Commission was now targeting the Environment Council meeting of 14 June 1991 as the date for adopting both the Habitats Directive and the ACNAT Regulation,[298] which the Commission referred to as an "indispensable complement" to the former (DG XI, 1991q). At a COREPER meeting on 6 March 1991, the Director General of DG XI spoke on the issue of financing, but also noted that experience with the Birds Directive would allow the "errors of the past" to be avoided, meaning that the system of protection envisaged by the Habitats Directive should be put in place by the Commission and the Member States acting in full cooperation, reducing to a minimum the need for litigation (COREPER, 1991b; DG XI, 1991q). The Director General also stressed the need for a flexible process regarding future revisions of the technical annexes of species and habitats; this should not be by way of unanimity in the Council, he said, but rather by way of qualified majority, in order to ensure a credible and efficiently operating directive (COREPER, 1991b; DG XI, 1991q). In this regard, DG XI was also drawing on experience from the Birds Directive, with amendments having been agreed to that Directive the same day as the COREPER meeting, after a "cumbersome" process ending with a vote from the Council on the basis of unanimity (European Commission, 1991f).

Luxembourg Presidency's compromise text

Sandwiched either side of the COREPER meeting were meetings of the Working Party on the Environment on 5 and 7 March 1991, which met to discuss the Luxembourg Presidency's compromise text for the first time (CEC, 1991a-a). The delegations in general expressed satisfaction with the proposals, but a number of basic problems nevertheless emerged from the discussions (CEC, 1991a-a). For example, Article 5 – which covered the circumstance of a dispute between the Commission and a Member State regarding the non-designation of a priority site – was the subject of lengthy consideration, with Spain and Portugal maintaining that responsibility for designating sites should be the exclusive competence of the Member

[298] ACNAT Regulation (1991).

States, resulting in revised draft text which provided that if the Council did not take a decision within 3 months of a proposal by the Commission, the Commission's proposal would cease to be applicable (CEC, 1991a-a; COREPER, 1991c). Most delegations responded favourably to this - Spain a notable exception - subject to more detailed evaluation (CEC, 1991a-a; COREPER, 1991c). Interestingly, therefore, it was certain of those countries which insisted most strongly on the need for EU financing which wished to maintain exclusive competence over the designation of sites (COREPER, 1991c), a difficult negotiating position to maintain. However, the situation regarding financing came to be of such importance – with Spain refusing to accept the entry into force of the Directive in the absence of a major EU funding commitment (more below) – that by April 1991 the Commission, in an internal briefing note, conceded that if Spain refused to budge on this issue of site designations, as a last resort the Commission could sacrifice this site designation article to "save" the Directive as a whole (DG XI, 1991c). As it turns out, this would not have been a major concession. Since the Habitats Directive was adopted, this Article 5 designation procedure has never been used by the Commission (Cashman, 2013; Ó Briain, 2013).[299]

The Working Party on the Environment met to discuss the detail of the Luxembourg Presidency's proposed text on 21 March 1991 (CEC, 1991a-u). Amongst the issues discussed was the territorial extent of the Directive, the draft having been amended to provide explicitly that "maritime areas under the sovereignty or jurisdiction" of the Member States would be covered by the Directive (CEC, 1991a-u). Denmark, Spain, France, Ireland and the UK expressed reservations, arguing that this was "likely to create problems of legal interpretation and implementation" (CEC, 1991a-u, p.11).[300] Most delegations expressed reservations regarding the proposal that a country which had designated 15% of its territory would be regarded as having fulfilled its contribution to the Natura 2000, albeit for different reasons. Germany and the Netherlands felt that the percentage indicated could be interpreted as a maximum, to the detriment of the environment; the other delegations were concerned on the (vague) grounds of the "incoherences and imbalances in implementation that a single percentage would cause" (CEC, 1991a-u, p.15). Answering the first concern, the Commission suggested specifying that the provision would apply where 15% of a country's territory had been designated as *priority* sites (CEC, 1991a-u). Interestingly, the Annex III site selection criteria (formerly Annex V), which had previously been hotly contested, were

[299] Cyprus recently argued, unsuccessfully, before the European Court of Justice that the process ought to have been used by the Commission in a dispute regarding site protection for the Cypriot grass snake (Natrix natrix) (ECJ, 2012b).

[300] DG XI subsequently sought advice from the Commission Legal Service regarding the definition of maritime areas (European Commission, 1991b).

by now less of a concern, the Member States seemingly broadly happy with the proposed approach (CEC, 1991a-u). Geert Raeymaekers, who had earlier proposed adopting the concept of biogeographical regions for the purposes of the Directive, played an important role in settling the Annex III criteria, having redrafted the Annex to "give more weight to the understanding of the definition of the habitat types in the country, and also to the [qualitative] elements of the site within the [relevant] biogeographical region" (Raeymaekers, 2012). Indeed, the agreed version of Annex III provides for a much greater degree of qualitative assessment than had been the case in early drafts (Habitats Directive, 1992).

On 3 May 1991 the Luxembourg Presidency presented a revised draft of the directive, amended to reflect discussions to date (CEC, 1991a-d), and this draft was the subject of a detailed debate on 16 and 23 May (CEC, 1991a-s). The issue of the territorial extent of the Directive remained live, with the relevant provision having now been amended to read that the Directive covered (emphasis added) "the European territory of the Member States to which the Treaty applies *including Member States' territorial waters*" (CEC, 1991a-d); Spain, France, Ireland, Greece and the UK entered scrutiny reservations (CEC, 1991a-s). In respect of deadlines for site designations, Greece gave an early indication of troubles ahead, challenging the proposed deadline of three years from notification of the directive for the transmission of national lists of sites to the Commission; the Commission suggested adding a new provision whereby this period could be extended in agreement with the Commission if, on the basis of a provisional list, more detailed study proved to be necessary (CEC, 1991a-s). This idea found its way temporarily into the directive by way of a Presidency proposal of 12 June 1991; however, Denmark, the Netherlands and the UK expressed the view that any such derogation should be limited in time (CEC, 1991a-b), and the idea of any such derogation was ultimately dropped altogether (CEC, 1991a-m). The Presidency's revised draft of 3 May 1991 also suggested a mechanism whereby a country whose sites hosting priority natural habitat types and priority species represented, in terms of surface area, more than half of all the sites of Community importance on their territory could, in agreement with the Commission, request that other criteria than those listed in Annex III be applied for selecting *the remaining* sites of Community importance on their territory (CEC, 1991a-d). Greece and Spain expressed scrutiny reservations, with Greece immediately indicating that "half" should be replaced by "a third" (CEC, 1991a-s, p.17).

At the Environment Council meeting of 13-14 June 1991, progress was made on several issues, but other points of fundamental importance remained outstanding, including financing (CEC, 1991a-m). One issue that was more or less settled, however, was the site designation process under Article 4 (CEC, 1991a-m): on the basis of the criteria set out in Annex III,

Member States would propose a list of sites to the Commission within three years of notification of the Directive. On the basis of criteria in Annex III, the Commission would then establish, in agreement with each Member State, a draft list of sites of Community importance. Member States whose sites hosting priority natural habitat types and priority species represented more than 5% of their national territory could, in agreement with the Commission, request that other criteria than those listed in Annex III be applied for selecting *all* the sites of Community importance on their territory. The Commission would then adopt this list of sites of Community importance within six years of the notification of the directive, and in accordance with a procedure set down in the directive. As soon as a site was adopted in this way, the protective obligations set out in Article 6(2) to (4) would apply – more below. The Member State in question would have six years from a site's adoption as a site of Community importance to designate the site as a special area of conservation.

The issue of the Commission's power to propose sites not included on a national list continued to be controversial at the Environment Council meeting of 13-14 June 1991 (CEC, 1991a-m). The latest draft suggested that where a national list failed to mention a site hosting a priority natural habitat type or priority species which, on the basis of relevant and reliable scientific information, the Commission considered to be essential for the maintenance of that priority natural habitat type or to the survival of that priority species, a bilateral consultation procedure would be initiated between the Commission and the Member State for the purpose of comparing the scientific data used by each (CEC, 1991a-s). If after six months the dispute remained unresolved, the Commission would forward a proposal to the Council relating to the designation of the site as a special area of conservation (CEC, 1991a-s). Within three months of the referral, the Council would then take a decision by qualified majority (CEC, 1991a-s). During the consultation period and pending a Council decision, the site concerned would be subject to Article 6(2) – more below (CEC, 1991a-s). It was noted by several delegations that there was a close link between this entire provision and the question of financing (CEC, 1991a-m); i.e. a country seeking substantial EU financing could hardly expect to retain exclusive competence for selecting sites. Nevertheless, Spain, Ireland and Portugal expressed reservations regarding this site designation process (CEC, 1991a-m); Germany and Greece were in favour of the process described, but with a Council decision adopted unanimously rather than by qualified majority (CEC, 1991a-m); Belgium, Denmark,

France, Italy and the Netherlands[301] were in favour of keeping the Article as worded, while the UK had an "open mind" (CEC, 1991a-m, p.5).[302]

7.6.3 Protection of Natura 2000 sites

On 15 January 1991, in light of discussions with the Luxembourg Presidency the previous day, the Commission made two crucial changes to the directive's impact assessment provision (DG XI, 1991s): first, the provision was amended to apply an appropriate assessment to *plans* as well as to projects likely to significantly affect a special area of conservation, either alone or in combination with other plans or projects; second, the same provision was amended to provide that, in light of such an appropriate assessment, as a general rule a Member State could not authorise the plan or project in question unless they were satisfied that the plan or project would not significantly affect the integrity of the site in question. Where such a conclusion could not be reached, a Member State could allow the plan or project to proceed via a derogation provision, but only where this was required for reasons of overriding public interest, and where all necessary measures were taken to ensure that the conservation potential of the Natura 2000 network would not be adversely affected. In other words, the provision now dictated the circumstances in which a plan or project could - or could not - proceed.

At this point, the dispute being played out over the Birds Directive in the *Leybucht Dykes* case - between the Commission on one side and the UK and Germany on the other - spilled over to the text of the draft Habitats Directive, when the UK was given the opportunity to comment on a working draft of the directive shortly prior to the formal presentation of the Luxembourg Presidency's compromise proposal. By 12 February 1991, the working draft's derogation provision had been further amended to provide: "If the plan or project must nevertheless be carried out for reasons of overriding public interest related to public health and security [i.e. categories recognised as legitimate reasons for damaging a special protection area under the Birds Directive by the Advocate General's Opinion in the *Leybucht Dykes* case (ECJ, 1990c)], the Member State shall take all necessary steps to ensure that the

[301] Germany is listed with these countries also, but this seems incorrect, since it is also listed as being in favour of a unanimous vote by the Council (CEC, 1991a-m).

[302] The UK appears to have been hedging its bets, perhaps for tactical reasons, since it had earlier expressed support for this sort of mechanism: speaking in March 1991, the Environment Secretary Michael Heseltine said that "there must be an effective emergency mechanism whereby the Community as a whole, acting on the best scientific advice can work with a Member State to save sites of critical importance when they are threatened by avoidable destruction or damage which cannot be justified on non-conservation grounds. This is particularly vital to protect those habitats, which might otherwise be lost during the period before the Directive becomes fully effective. In the UK such sites would already be protected under our planning system and by our system of National Nature Reserves and SSSIs. But that is not the case in several other Member States" (Heseltine, 1991). Nevertheless, this whole debate was arguably, in retrospect, much ado about nothing, since the Article 5 process has never been used in practice (Cashman, 2012; Ó Briain, 2012).

conservation potential of Natura 2000 will not be affected. The Member State shall transmit to the Commission the results of the assessment and, as appropriate, the adopted compensatory measures" (DG XI, 1991v, Article 7(2)). Commenting on this provision on 15 February, the UK government stated, "after 'security' insert 'and economic factors'" (Department of the Environment, 1991b). This effectively sought to weave the UK's and Germany's argument in the *Leybucht Dykes* case into the text of the Habitats Directive, in advance of the ECJ's ruling on the issue in respect of the Birds Directive.

On 28 February 1991, the Luxembourg Presidency formally presented its compromise proposal, containing the following as Article 6:

> "Article 6
>
> 1. For the sites designated as special areas of conservation, Member States shall examine and establish the necessary conservation measures, including management plans specifically designed for the sites or integrated into other land use planning, and, as appropriate, statutory or administrative measures which correspond to the ecological requirements of the natural habitats of annex I and the species of annex II present on the sites. They shall provide information concerning the conservation measures carried out.
>
> 2. The Member States shall take appropriate steps to avoid, in the special areas of conservation, the pollution or deterioration of the natural habitats and the habitats of species as well as disturbances of the species for which the areas have been designated, in so far as these would have a significant effect having regard to the objectives of the present directive.
>
> 3. Any development plan or projects likely to affect significantly such a site, either individually or in combination with other projects and whether or not directly connected with or necessary to the management of the site, shall be subject to appropriate assessment of its impacts in view of the site's conservation objectives. Having regard to the conclusions of the impact assessment and subject to the provisions of paragraph 4 below, the national authorities responsible in the field of environment shall only allow the plan or project, after having the assurance that it will not affect, in a significant way, the integrity of the site concerned and after having sought the opinion of the public on the matter.
>
> 4. If, in spite of a negative impact assessment and in the absence of other feasible solutions, a plan or project must nevertheless be carried out for reasons of overriding national interest, the Member State shall take all necessary steps to ensure that the

coherence of Natura 2000 will not be affected and shall inform the Commission of the adopted compensatory measures" (CEC, 1991a-c)

Thus, the derogation provision in paragraph 4 had been further amended to require "other feasible solutions" to be excluded, on top of the language about compensatory measures and reasons of overriding interest. The bare reference in paragraph 4 to "reasons of overriding national interest"[303] indicates that the Commission/Presidency had backed off from the idea of limiting such reasons to public health and security, favouring broader language which could potentially encompass the "economic factors" the UK had sought to have added to the draft in its comments before the outcome of the *Leybucht Dykes* case (Department of the Environment, 1991b).

ECJ's judgment in Leybucht Dykes

The Member States did not in any event have long to wait for the ECJ's decision in *Leybucht Dykes*: the judgment was handed down on 28 February 1991, the same day as the Luxembourg Presidency's compromise proposal was presented. Germany and the UK's (and most likely most other Member States') fears were realised, and the decision "created a huge wave amongst the Member States" (Neal, 2012). The ECJ agreed with the Advocate General's Opinion, holding that: "the power of the Member States to reduce the extent of a special protection area can be justified only on exceptional grounds...Those grounds must correspond to a general interest which is superior to the general interest represented by the ecological objective of the directive. In that context the interests referred to in Article 2 of the [birds] directive, namely economic and recreational requirements, do not enter into consideration...With regard to the reason put forward in this case, it must be stated that 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 as long as those measures are confined to a strict minimum and involve only the smallest possible reduction of the special protection area" (ECJ, 1991, paragraphs 21-23). Thus, Germany won the case on the facts, but Germany and the UK had lost the battle - at least for now - on the issue of taking socio-economic factors into account in deciding whether and how sites should be protected.

In the Member States' view, the ECJ's decision went too far (Krämer, 2009b): many governments were reportedly "alarmed" (Baldock, 1992, p.144) by the decision's "draconian consequences" (Sharp, 1998, p.33). The Commission evidently noted the implications for its Habitats Directive proposal: annotated in hand on the Nature Unit's archive copy of the

[303] The possibility of a derogation based on "overriding national interest" had been raised almost two years before by the RSPB (1989).

judgment are the words "Interpretation art. 6(4) (imperative reasons of overriding interest)" (DG XI, 1991a).

Discussing Article 6 at a meeting of the Working Party on the Environment on 21 March 1991, the Netherlands and Portugal proposed deleting the word "development" from "development plan or project" in Article 6(3), and this was successfully removed, potentially broadening the application of the impact assessment obligation (CEC, 1991a-u).[304] Pulling in the opposite direction, Ireland tried to narrow the impact assessment obligation by arguing that the words "or in combination with other plans or projects" should be deleted, such that cumulative effects would not need to be assessed; this was successfully opposed by the Commission and the Netherlands (CEC, 1991a-u). In respect of the proposed derogation provision, Article 6(4), Belgium, Ireland and the UK wanted the interpretation of "overriding reasons of national interest" to be clarified, but, surprisingly, no mention of the ECJ's recent decision in the *Leybucht Dykes* case is recorded in the minutes of this meeting (CEC, 1991a-u).[305]

A new version of Article 6 was presented in the Luxembourg Presidency's revised draft of 3 May 1991, and this was discussed at a meeting of the Working Party on the Environment on 16 and 23 May (CEC, 1991a-s). Spain and France successfully argued that the words "insofar as these would have a significant effect with regard to the objectives of this Directive" should be added to the end of Article 6(2) (indicated below), and revised versions of Articles 6(3) and (4) also raised debate:

> "[Article 6(2)] The Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated[, insofar as these would have a significant effect with regard to the objectives of this Directive].

[304] Similarly, the Netherlands successfully suggested deleting the words "responsible in the field of the environment" from the Article 6(3) phrase "the national authorities responsible in the field of the environment", thus imposing the Article 6(3) obligation on all relevant national authorities (CEC, 1991a-u).

[305] As Roy Bunce of the UK government explains, following the Leybucht Dykes judgment, "we contacted as many other Member representatives on the Committee, as many of them individually as we could.... the Dutch were not onboard with the rest of us at first, they still were very, they were still worried that if we put in a sort of a derogation like this, that the southern European countries would exploit it and negate the whole purpose of the directive. They were very concerned that this was going to undermine what they thought was a very important step forward in nature conservation in Europe, and I had conversations with them on the telephone and we went to a meeting with them about this – one to, you know, sort of, bilateral meeting with them about this, and I pointed out – I can recall this – I pointed out that, you know, our worries about the, say the Humber and Felixstowe, applied just as strongly to Rotterdam, and they hadn't seen it in that light, quite, until then, or that was my impression, and their view somewhat changed after that" (Bunce, 2012).

[Article 6(3)] Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect on such a site, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the national authorities responsible for the environment shall agree to the plan or project only after having ascertained that it will not affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

[Article 6(4)] If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, the Member State shall take all necessary steps to ensure that the coherence of Natura 2000[306] will not be affected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health and public safety" (CEC, 1991a-d)

The proposed changes to Article 6(4), which included the replacement of "reasons of overriding national interest" with "imperative reasons of overriding public interest", as well as an entirely new second paragraph, were unsurprisingly a subject of discussion at the Working Party meeting on 16 and 23 May. The derogation provision now clearly distinguished between two categories of sites: regular sites, in respect of which any imperative reason of overriding public interest could be used to justify damage to a site; and priority sites, in respect of which a more restrictive rule would apply. The result was odd: special protection areas under the Birds Directive would be subject to protection under the rule established in the *Leybucht Dykes* case (i.e. damage could be justified only on exceptional grounds corresponding to a general interest which is superior to the general interest represented by the ecological objective of the Birds Directive, and these grounds could not include economic and recreational requirements; on the facts of the *Leybucht Dykes* case, the accepted exceptional grounds were human health and public safety); priority sites under the Habitats Directive would be subject to an *even stricter* rule, since the second paragraph of Article 6(4) now went further than the Leybucht Dykes judgment, proposing

[306] At the Working Party meeting on 16 and 23 May 1991, the Commission proposed inserting "conservation potential of Natura 2000" in the first paragraph of Article 6(4) in place of the "coherence of Natura 2000," to take account of "the concern of some delegations" (CEC, 1991a-s, p.23), but the coherence language was ultimately retained.

that *only* reasons of human health and public safety could be used to justify damage to a site for a priority species or habitat; and a weaker rule than that which applied either to Birds Directive sites or priority Habitats Directive sites would apply to regular sites under the Habitats Directive.

The UK pays a visit to the Commission re Article 6(4)

France, the Netherlands and the UK felt that the proposed derogation in respect of priority sites was too restrictive, and Greece argued that considerations relating to the exploitation of strategic resources should also be taken into account (CEC, 1991a-s). On 4 June 1991, Roy Bunce of the UK government met informally with DG XI's Claus Stuffmann to discuss the implications of the ECJ's judgment in the *Leybucht Dykes* case. As Bunce recalls,

> "I remember the *Leybucht* case causing consternation. I can remember that almost immediately I sought a private meeting with Claus Stuffmann... I went to Brussels, he came out of a meeting, we found a quiet [spot] in some corridor, we didn't even go into a Committee room, and we sat and I told him in terms that in the light of *Leybucht* the British government would be unable to basically continue our support for the directive. We had to have something which enabled us to take, to put precedence for human needs over those of wildlife, and the *Leybucht* seemed to destroy that. And I think it's fair to say now that the particular concern of the British government were estuaries – very important for wildlife but also extremely important for our trade: Southampton water...the Felixstowe, the Humber – all very important bird habitats, but absolutely vital economic interests.[307] And we just couldn't, we couldn't have lived with the way the Commission[308] interpreted the Birds Directive" (Bunce, 2012)

The UK followed up with a letter on 10 June 1991, stating: "When we met informally on 4 June I explained to you the UK's need to have a single legal regime of protection applying to both SPAs classified under the Birds Directive and Special Areas of Conservation (Natura 2000 sites) envisaged under the Habitats Directive, and also the need for this regime to give Member States the right to take economic considerations into account when deciding the future of these sites...You kindly indicated that the Commission were not unsympathetic to the UK's concerns but that you were concerned to ensure that the protection offered to these sites protected them from all but overriding issues of national importance. You indicated that this could include economic considerations with regard to Natura 2000 sites but that for

[307] Scotland was said to be particularly sensitive about the inclusion of rivers, inter-tidal areas and marine areas on the Annex requiring the designation of SACs (Neal, 2012).

[308] Presumably the UK could not have lived with the ECJ's interpretation in addition to the Commission's, though this was given as "the Commission" during the interview.

'priority' sites hosting species or habitat types in danger of extinction the protection should be waived only for matters of public health or safety or other overriding environmental benefit. You invited the UK to propose amendments to the text of the Directive that would achieve these aims" (Department of the Environment, 1991a).

This the UK did, as follows, keeping "as precisely as I know how to my understanding of what would be acceptable to you [i.e. DG XI]" (Department of the Environment, 1991a)(proposed insertions underlined, proposed deletions in square brackets):[309]

> "Article 6(4) If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for [imperative] reasons of overriding public or economic interest, the member state shall take compensatory measures [all necessary steps] to ensure that the overall coherence of Natura 2000 will not be affected. It shall inform the Commission of the compensatory measures adopted.
>
> When the site concerned hosts a priority natural habitat type or a priority species, the only considerations which may be raised are those relating the human health or public safety or overriding environmental benefit." (Department of the Environment, 1991a)

In addition to this proposed drafting, the UK made a play for "social" factors to be taken into consideration in addition to economic interests in the first paragraph of Article 6(4): "In discussions with my colleagues here, particularly those with responsibilities for remoter areas containing small communities facing difficult conditions, I have been pressed to include the word "social" in line 4 of paragraph 4 of Article 6. My understanding is that this is unacceptable to you but if, on reflection you can see merit in including the means to take account of matters that might be vital to the survival of small human communities as social units but which could not be described as overriding economic significance at the national scale, that would certainly help the UK" (Department of the Environment, 1991a).

On 12 June 1991, the Presidency proposed revised text intended to address the UK's concerns, as well as to tackle certain other major issues, namely financing and the protection of areas outside the Natura 2000 network (CEC, 1991a-b). In addition to an amendment to apply Article 6(2) to (4) of the Habitats Directive to SPAs under the Birds Directive, "clarifying" the obligation under Article 4(4) of the Birds Directive (the provision which had

[309] According to Fairbrass and Jordan (2002, p.14), citing Freestone (1996, p.248), "the UK Government supported amendments to the draft habitats directive, which strongly resembled instructions issued by the UK Government in a 1987 circular...".

been interpreted strictly by the ECJ in the *Leybucht Dykes* case), the Presidency proposed the following in respect of the Article 6(4) derogation (proposed insertions underlined):

> "[Article 6(4)] If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest <u>of a social or economic nature</u>, the member state shall take <u>such compensatory measures as are necessary</u> to ensure that the <u>overall coherence of Natura 2000 is protected</u>. It shall inform the Commission of the compensatory measures adopted.
>
> When the site concerned hosts a priority natural habitat type or a priority species, the only considerations which may be raised are those relating the human health or public safety <u>or overriding environmental benefit</u>." (CEC, 1991a-b, pp.3 and 6)

At first glance this might appear to have addressed the UK's concerns, but the framing of the point regarding socio-economic concerns in fact narrowed the conditions in which the derogation would be applicable, by qualifying the imperative reasons of overriding public interest that could lawfully be taken into account; in other words, *only* interests of a social or economic nature could be used to justify damage to a regular Natura 2000 site in this revised draft. When the provision arose for discussion at the Ministerial level Environment Council meeting of 13-14 June 1991, this issue was addressed, and the following text was agreed:

> "[Article 6(4)] If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.
>
> When the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating the human health or public safety or to beneficial consequences of primary importance for the environment" (CEC, 1991a-m)

As Roy Bunce, the UK's senior negotiator, notes, "We did have some problems in that obviously the Commission is always against taking into account national interest, that's why it's all written in terms of public interest rather than national interest, and they were worried

about inserting 'economic', 'of an economic nature', into it, but that had to be insisted upon and was finally – at the very end – finally agreed" (Bunce, 2012). The amendment "...overriding public interest, *including* those of a social or economic nature..." ensured that the interests that could be taken into account in applying a derogation would not be limited to socio-economic matters.

Interestingly, the proposal that special protection areas under the Birds Directive should be subject to Article 6(2) to (4) of the new directive rather than Article 4(4) of the Birds Directive - effectively overruling the ECJ's decision in the *Leybucht Dykes* case - did not sail through, with Spain maintaining a reservation regarding the point (CEC, 1991a-m). Antonio Troya, a Spanish national expert seconded to DG XI, explains that Spain's objections in respect of Article 6 were directly linked to its goal of achieving the inclusion of a provision on EU co-financing within the text of the Habitats Directive (Troya, 2012): in other words, this issue regarding a single regime for SPAs and SACs was something the UK wanted very badly, while Spain was holding out strongly for a deal on financing, as detailed below, such that objecting to Article 6 gave Spain a bargaining chip. As one of the UK's negotiators puts it, "That was very much the dynamic of the final stages of negotiations, where they [Spain] weren't going to capitulate on what they knew we really, really wanted, until we were prepared to sign up to something which was...tricky for us" (Neal, 2012).

7.6.4 Protection of areas outside Natura 2000

In the Luxembourg Presidency's compromise proposal of 28 February 1991, the draft retained a fairly generic obligation – Article 8(1) – regarding the protection of important areas outside Natura 2000: "Generally Member States shall strive to avoid pollution or deterioration of natural habitats and habitats of species located outside the special areas of conservation, in so far as they would have a significant effect having regard to the objectives of the present directive" (CEC, 1991a-c). However, the draft did not stop there, with a new provision having been added, providing: "Article 8(2) To that effect, Member States shall in particular take into account, in the framework of their land-use planning and development policies, the features of the landscape of outstanding importance for the conservation of wild fauna and flora, such as those mentioned in annex IV, which allow species to move normally within their natural range and which ensure the coherence of Natura 2000. They shall endeavour to promote the conservation of such features through, among other measures, management contracts" (CEC, 1991a-c, Article 8(2)). Moreover, the draft also contained another new provision on the subject, as Article 3(2): "Member States shall enhance the ecological coherence of Natura 2000 by maintaining and, where appropriate, developing ecological corridors between natural habitats" (CEC, 1991a-c), a provision likely inspired by

the Dutch government's suggestion of October 1990 (Dutch government, 1990), as discussed in section 7.4.6 above. Thus, protection for areas outside the Natura 2000 network had made something of a late comeback in the Luxembourg Presidency's draft of February 1991 (DG XI, 1991f).

In March 1991, the UK's Environment Secretary Michael Heseltine voiced support for some form of protection of the broader countryside via the directive, saying that "the [Habitats] Directive must safeguard the general character of the landscape. This will help provide links to prevent the special sites becoming isolated and therefore vulnerable. Nature conservation cannot succeed as a series of individual oases in land which leaves no other footholds for our native wildlife. In essence this requires a continuation of the good stewardship which farmers in many parts of Europe have exercised for generations" (Heseltine, 1991). However, when it came later that month to discussing the detail of the protective measures proposed for the wider countryside, the UK, Belgium, Spain, France and Ireland expressed reservations. The Article 3(2) obligation to maintain and, where appropriate, develop ecological corridors was a particular problem: Spain argued that it was "impossible to impose legal obligations outwith the designated areas and that only a political compromise might be possible"; the UK argued that Article 8(2) covered the issue; and, true to form, Denmark, Germany and the Netherlands "considered this [Article 3(2)] concept essential for the coherence of the network" and argued that a definition of "ecological corridor should also be included" (CEC, 1991a-u, p.13).

This division in views was also evident when the delegations discussed the compromise text from the Luxembourg Presidency regarding Annex IV (formerly Annex VII), which set out a list of the landscape features outside the Natura 2000 network requiring protection under Article 8. This list had grown considerably as a result of proposed amendments in Hemmo Muntingh's report for the European Parliament, some of which the Commission had taken onboard in producing its modified proposal (CEC, 1991a-e; European Parliament, 1990b). Most delegations expressed reservations regarding Annex IV, some arguing that its application would be difficult and that, in imposing obligations solely in respect of the features listed, the Annex would lead to differences of application in view of the inevitable gaps in its coverage (CEC, 1991a-e). Belgium, Spain, France and the UK thought that Article 8 could prove sufficient on its own, while Denmark, Germany and the Netherlands emphasised the importance of retaining the Annex to ensure network consistency (CEC, 1991a-e). Interestingly, by April 1991 the Member States had begun to form the view that, whatever the content of Annex IV, the underlying obligation, Article 8, had been rendered rather weak: Spain and Portugal reportedly "felt the scope of the Article was so general that it

was impossible to implement it and proposed replacing it with a policy statement. Other delegations thought the Article could be retained with some clarification and pointed out in particular that it did not impose a formal obligation" (CEC, 1991a-t, p.3). Certain countries nevertheless remained favourably disposed towards the list of landscape features of outstanding importance in Annex IV, with Denmark, France, Ireland, Portugal and Germany even going so far as to suggest additions at a meeting of the Working Group on the Environment on 3 May 1991 (CEC, 1991a-q).

The battle over the protection of the broader countryside continued when, also on 3 May, the Luxembourg Presidency presented a revised draft of the directive, containing the following (newly inserted) definition of "ecological corridors", linked to the obligation, now in Article 3(3), to maintain and, where appropriate, develop ecological corridors linking the special areas of conservation: "'ecological corridors' means terrestrial or aquatic formations of the countryside or coherent features which, in combination, are essential for the migration, geographical distribution and genetic exchange of species of wild fauna and flora" (CEC, 1991a-d). Belgium, Spain, France, Greece, Ireland and the UK favoured deleting the new definition, and those countries, with Portugal replacing Greece,[310] favoured deleting the underlying obligation in Article 3(3); several of these countries considered the concept was too vague and too broad in scope, while Spain considered that provisions protecting areas outside Natura 2000 would raise legal problems, and again suggested a "simple political statement of intent" (CEC, 1991a-s, p.9). In contrast, Denmark, Germany, Italy, the Netherlands and Portugal favoured retaining the definition and making the Annex IV list of features of interest more precise to facilitate implementation (CEC, 1991a-s); moreover, those countries, minus Portugal, expressly favoured retaining the underlying obligation in Article 3(3) (CEC, 1991a-s).

Ecological corridors

The revised draft also contained an amended version of the other major provision in respect of ecological corridors, Article 8: "Member States shall ensure that in their land-use planning and development policies and, in particular, in their relevant programmes to harmonize agricultural practices with the requirements of maintaining the countryside, encouragement is given to conservation of features of the landscape as listed in Annex IV which serve as

[310] Portugal's position appears quite convoluted here. It is important to realise that the term "ecological corridors" had in this revised draft been inserted into Article 8 (more below): thus, Portugal favoured deleting Article 3(3) but at the same time argued for a definition of "ecological corridors" (now used in Article 8 in addition to Article 3(3)) to be retained and wanted to make the Annex IV list of features of interest more precise to facilitate implementation (CEC, 1991a-s). In other words, Portugal appeared to support a clearer version of Article 8 but did not support Article 3(3). However, when it came to discussing Article 8 itself, Portugal argued that the provision should be deleted, perhaps to be replaced by a statement of intent (CEC, 1991a-s)! Perhaps the minutes of this meeting did not accurately record Portugal's position.

ecological corridors" (CEC, 1991a-d). The UK, supported by Belgium, Ireland and Luxembourg, expressed reservations regarding this provision, and suggested returning to an earlier draft (CEC, 1991a-s). Greece thought that the provision should be optional, while Spain and Portugal proposed deleting the Article altogether, perhaps to be replaced by a statement of intent (CEC, 1991a-s). Denmark, Germany, Italy, the Netherlands and the Commission were in favour of retaining the provision (CEC, 1991a-s).

The Netherlands continued working hard to retain the idea of ecological corridors in the draft, producing a working document on the concept for all delegations on 6 June 1991, which concluded "ecological corridors and stepping stones are essential for the ecological coherence of...Natura 2000" (The Netherlands, 1991). However, when the Luxembourg Presidency presented revised text on the subject on 12 June 1991, the Netherlands' hopes were dashed: the proposal involved deleting the definition of "ecological corridors", deleting Article 3(3), and deleting Annex IV, which listed important features outside Natura 2000. In place of all of this, the sole provision on the subject would be the following weak obligation:

> "Member States shall endeavour, where they consider it necessary, in their land-use planning and development policies and, in particular, with a view to improving the ecological coherence of the Natura 2000 network, to encourage the management of features of the landscape which are of major importance for wild fauna and flora.
>
> Such features are those which, by virtue of their linear and continuous structure (such as rivers with their banks or the traditional systems for marking field boundaries) or their function as stepping stones (such as ponds or small woods), are essential for the migration, dispersal and genetic exchange of wild species" (CEC, 1991a-b, p.4).

A majority of delegations are reported to have reacted positively to this proposal (CEC, 1991a-b).

7.6.5 Financing

On 31 January 1991, the Commission had presented a new, grand proposal: for a Council Regulation establishing a Financial Instrument for the Environment (LIFE) (European Commission, 1991e).[311] The aim was to introduce an "Environment Fund commensurate with the problems to be solved and the role which the Community must play in this area", which fund would ultimately subsume other funding initiatives such as ACNAT (European Commission, 1991e, p.5). However, LIFE's precise scope and levels of financing were unclear, and this proved problematic from the perspective of the Habitats Directive proposal.

[311] "LIFE" is an acronym taken from the French: L'Instrument financier pour l'environnement.

As the Commission noted in preparation for an Environment Council meeting on 18 March 1991, the prior or simultaneous adoption of the ACNAT Regulation[312] was a *sine qua non* condition for the adoption of the Habitats Directive, and without adequate financial support, the Directive would risk being a dead letter or merely giving rise to litigation (DG XI, 1991g). This was reiterated by several delegations at meetings of the Working Party on the Environment on 5 and 7 March 1991 (CEC, 1991a-a): Spain, Greece, Italy and Portugal maintained that the question of financing was fundamental, "especially in the case of countries whose geographical and socio-economic characteristics were such that they would have to bear very heavy financial burdens in order to implement [the directive]" (CEC, 1991a-a, p.2). The aforementioned delegations argued that the existing and planned financial instruments would not be entirely suitable or sufficient for an "extensive ongoing measure" such as the Habitats Directive (CEC, 1991a-a, p.2).

At the Environment Council meeting of 18 March 1991, the Commission conceded that the ACNAT programme would not be enough alone to resolve all nature conservation-related issues, but highlighted that there were various other possibilities for EU financial involvement in support of the Habitats Directive (CEC, 1991a-n). However, by April 1991 the issue of financing had become of foremost political concern for the future of the Habitats Directive proposal, in particular given the position of Spain, which had made it clear that its agreement to the Directive's entry into force would be dependent on the creation of a financial instrument with guaranteed levels of funding (DG XI, 1991c).[313] In other words, Spain was seeking a major funding instrument along the lines of the Structural Funds, with guaranteed funding levels effective for a lengthy period; Spain required, it said, very high levels of funding per annum in support of the directive's implementation, almost like a farming quota, based on the total area of protected areas designated by a country, but this latter was an impossibility from the Commission's perspective (DG XI, 1991c). In that regard, ACNAT, which was by now said to be likely to be ready for adoption in June 1991, would be totally insufficient, in Spain's view (DG XI, 1991c). The Commission's services could not resolve the issue, and recommended that everything should be done at a political level to find a solution (DG XI, 1991c).

In preparation for the Environment Council meeting of 13/14 June 1991, the Council's Secretariat General produced on 29 May a summary of progress, noting that certain delegations had been querying the potential role of the new LIFE instrument in support of the Habitats Directive, in addition to ACNAT (CEC, 1991a-h). Reporting to the Council on 7

[312] ACNAT Regulation (1991).

[313] The Mediterranean countries and Ireland all felt that appropriate financing needed to be put in place, but only Spain had made this a condition sine qua non.

June, COREPER reinforced this point, recording that Spain, Greece, Ireland, Italy and Portugal "questioned the ability of existing or projected financial instruments, in particular ACNAT and LIFE, to make an effective contribution to financing the Directive" (CEC, 1991a-w, p.3). The Commission's representative responded that, in addition to ACNAT, other EU instruments in the framework of the environment and the agricultural and regional policies could contribute to the financing of the directive, and that the involvement of these instruments should be expressly provided for within the text of the Habitats Directive – the Commission representative undertook to submit a proposal along these lines (CEC, 1991a-w). The Commission worked on this idea at the beginning of June 1991, sending Spain for review a draft Article for potential inclusion within the Directive, covering Spain's two "major concerns": first, the possibility for a Member State to make clear what costs deriving from the directive it considered itself unable to cover without EU funds; second the possibility to postpone a number of measures (more below), in agreement with the Commission, in case the available EU funds proved insufficient (DG XI and Spain, 1991).

To address Spain's concerns, on 12 June 1991 the Presidency formally proposed revised text for the directive (CEC, 1991a-b). The new text obliged the Member States to inform the Commission of their programmes relating to nature conservation and activities which followed specifically from the implementation of the Habitats Directive, including the estimated costs involved (CEC, 1991a-b). On the basis of this information, the Commission would establish a framework of EU activities, identifying the measures essential for the survival of species or the maintenance of priority natural habitat types in the EU, and "the necessary joint financing which can be provided within the framework of the relevant budget funds and procedures" (CEC, 1991a-b).

In establishing this framework of activities, the Commission was to be obliged to take into account "the specific situations of the various Member States, especially where, because of the high percentage of areas to be designated in relation to its territory, the existence of a large number of priority areas within those areas, and the socio-economic situation of the regions concerned, the financial burdens resulting from the implementation of Article 6(1), (2) and (3) are disproportionate for one Member State in comparison with those borne by the other Member States" (CEC, 1991a-b). Further, the draft provision provided that implementation of Article 6(1) to (3) - which imposed protective obligations in respect of Natura 2000 sites - could be suspended if it proved impossible to provide adequate joint financing (CEC, 1991a-b). In such a case, the Member State would be obliged not to take any action liable to degrade the area in question (CEC, 1991a-b). Following further comments from Spain, the Presidency tabled a revised version of this provision for the

purposes of the Environment Council meeting on 13-14 June 1991 (CEC, 1991a-f); however, when the proposal was discussed at that meeting, the new provision did not receive the wholehearted support Spain may have wished for, with some delegations noting that the provision might have considerable financial implications which ought to be studied closely (CEC, 1991a-m).

7.6.6 The Luxembourg Presidency: "absolutely brilliant"

According to Roy Bunce of the UK government, the Luxembourg Presidency was, in summary, "absolutely brilliant. I mean, everybody knew that they had been...[T]hey had no axe to grind anywhere, and they really did seek a compromise and they worked extremely hard and were extremely good, and if it wasn't for them I don't think the directive could've been finally passed" (Bunce, 2012).

7.7 Dutch Presidency: July – December 1991

7.7.1 Designation of Natura 2000 sites

Work on the directive continued apace under the new Dutch Presidency, with a meeting of the Working Party on the Environment held just over a week in, on 10 July 1991 (CEC, 1991a-p). The question of the Commission's ability to propose, and the process for proposing, priority sites for designation where they were absent from a national list remained strongly contested. As a compromise, the Dutch Presidency proposed in Article 5 that any such proposal would be subject to a unanimous decision of the Council, rather than a qualified majority, which had been the previous position (CEC, 1991a-p). Germany, Greece and Portugal said that they could agree to this; Spain and Ireland upheld a reservation of principle regarding the Article; Belgium, Denmark, France and Italy considered a qualified majority vote to be the most appropriate solution and pointed to the close link with the Article 7 financing provision, effectively saying that Spain could not ask for substantial EU money to fund implementation of the directive whilst at the same time rejecting any possibility of the Commission stepping in to propose designation of a priority site which Spain had left off its national list (CEC, 1991a-p); the UK similarly preferred a qualified majority vote, but primarily wanted clarification regarding what would happen if no decision at all was taken by the Council (CEC, 1991a-p). DG XI's Legal Service made it clear that in such circumstances, the Commission could bring a case regarding the situation before the European Court of Justice (DG XI, 1991k).

Considering the same issue at a subsequent meeting on 4 September 1991, the Presidency proposed a decision by the Council acting unanimously, which Germany, Greece, Portugal

and now Ireland said they could agree to;[314] Spain maintained its general reservation regarding the principle of the Article; Belgium, Denmark, France and Italy continued to consider a qualified majority vote to be the most appropriate solution, and again highlighted the close link with the Article 7 financing provision; the Netherlands wanted the provision clearly defined and circumscribed, while the UK preferred a qualified majority vote and considered that the main aim of the Article was to avoid recourse to the European Court of Justice (CEC, 1991a-r).[315] At a COREPER meeting on 25 September 1991, Denmark and Germany indicated that they would be prepared to see Article 5 deleted altogether in the event of failure to agree the wording and as part of an overall agreement on other provisions (presumably including Article 7 on financing), "bearing in mind also that [Article 5] would be applied only in exceptional circumstances" (CEC, 1991a-o, x).

The Commission had not yet given up on Article 5, however, and at the Environment Council meeting on 1 October 1991 expressed itself to have a net preference for a qualified majority vote in the Council, but, in a spirit of compromise, could accept the need for a unanimous decision (DG XI, 1991h). However, the Dutch Presidency's compromise proposal of a unanimous decision did not obtain a consensus, and the Dutch then proposed as an alternative solution that the Article be deleted altogether (CEC, 1991a-l). Denmark, Germany,[316] Spain, Greece, Ireland, Luxembourg and Portugal were agreeable to this solution, or could accept it as part of an overall compromise; however, Belgium, France, Italy and the UK still considered that a qualified majority was the most appropriate solution (CEC, 1991a-l). Indeed, the Belgian, French and UK Ministers remained strongly attached to the provision, arguing that the Article 5 procedure would help to ensure a smooth implementation of the Natura 2000 network, allowing issues to be determined at the level of the Council rather than being brought before the European Court of Justice, the latter having been the experience with the Birds Directive (CEC, 1991a-i).

Territorial extent of the Directive

The issue of the precise territorial extent of the Directive remained live as late as September 1991, with the Directive no longer referring explicitly to any maritime areas, instead referring

[314] Albeit that Greece would later press for the Article to apply "only in exceptional cases where the habitat or species was in a single Member State and in danger of disappearance and on condition that the measures to be implemented in the areas designated under this Article were fully funded by the Community" (CEC, 1991a-o, p.19).

[315] This is a very interesting observation by the UK, particularly in light of the fact that this designation procedure has never in fact been used by the Commission (Cashman, 2013; Ó Briain, 2013), while there have been many cases before the European Court of Justice in respect of countries' failure to propose sufficient sites for designation.

[316] Germany's position is explained by the fact that it would be the Länder which would have the power to designate protected areas under the directive (CEC, 1991a-i).

simply to the "European territory of the Member States to which the Treaty applies" (CEC, 1991a-r). Following a statement from the Council's Legal Service to the effect that this phrase included territorial waters (CEC, 1991a-r), on 16 August 1991 the UK proposed a change to the site designation process – which was accepted[317] – adding the words, "For aquatic species which range over wide areas such sites will only be proposed where there is a clearly identifiable area representing the physical or biological factors essential to their life and reproduction" (UK government, 1991). All the while, in the background, Environment Commissioner Carlo Ripa di Meana was in full flow, reiterating his call for a new EU inspectorate as part of the then proposed European Environment Agency, "to ensure the Community's green laws are not flouted" (EC Energy Monthly, 1991).[318] The dispute regarding the M3 motorway in the UK, and the UK government's alleged failure properly to assess the impacts of that and several other proposals, was beginning to heat up at this time, with sources in Brussels reporting at the end of August 1991 that a letter of formal notice would soon be sent to the UK government (McCarthy, 1991a).

Spain continued to negotiate hard in respect of other aspects of the site designation process: regarding the situation where more than 5% of a country's territory comprised sites hosting priority habitats or species, the draft directive proposed allowing the country in question to request that criteria other than those set out in Annex III be applied for selecting sites of Community importance on their territory (CEC, 1991a-r). The UK proposed that this should be amended to instead read that the criteria listed in Annex III may be applied more flexibly in selecting such sites; Spain rejected this proposal initially, but ultimately accepted the UK position (CEC, 1991a-r; DG XI, 1991m). Amidst these detailed discussions, there was a possibility that political agreement regarding the Directive might be reached by Ministers at the Environment Council meeting on 1 October 1991, and the European Parliament and NGOs kept up the pressure from outside: the Parliament, in collaboration with the WWF, hosted a conference "Europe 2000 – Let's Protect Nature" from 25-26 September 1991, where Dutch MEP Hemmo Muntingh reflected that "the Community must truly assume its responsibilities and react to the questions of nature protection if it is to be taken seriously by the rest of the world", noting that the EU's contribution of 0.2% of its budget for the environment was "ridiculous" (Europe Environment, 1991c).

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[317] With only a very minor change in language, switching "be only" for "only be".

[318] This ultimately led, under the British Presidency in the second half of 1992, to the creation of the IMPEL network – a "permanent network of EC environmental enforcement agencies" – to exchange information and experience (UK government, 1992), thus falling well short of Environment Commissioner Carlo Ripa di Meana's original plans for an EU-wide environmental inspectorate.

Introducing the Habitats Directive proposal to the Environment Council on 1 October 1991, Commissioner Carlo Ripa di Meana noted that the public could not understand why the Council, after three years of work, was not yet in a position to take a decision regarding the Directive, and flagged that the adoption of the Directive could be considered as an important contribution looking towards the Earth Summit in Rio, due to be held in 1992 (CEC, 1991a-i; DG XI, 1991h). The Commission was determinedly pushing for political agreement at this meeting, and highlighted that the Commission had already shown its positions regarding the Directive to be flexible on a good number of points, but stressed, however, that there were nevertheless several points on which the Commission insisted, including: first, regarding the Article 6(4) site protection derogation (more below); and second, regarding the process for adapting the Annexes, which the Commission felt should be done by a Committee and not by the Council, although the Commission was willing to compromise in this regard by allowing slightly more political questions – that is, the Annex III site selection criteria and the question of which species/habitats were afforded priority status – to be the subject of a qualified majority vote by the Council (DG XI, 1991h). The Dutch Presidency proposed that all the Annexes be subject to amendment by qualified majority Council decision, and the great majority of delegations said they could accept this solution (CEC, 1991a-l). France, however, argued that what was by now Annex IV - species requiring strict protection wherever they are found - should be amended by a unanimous Council decision (CEC, 1991a-l), a result of pressure from the French hunting lobby (DG XI, 1991b), mirroring the position the French had insisted upon in respect of the Birds Directive (Gammell, 1999).

Despite noting the substantial progress that had been made, and despite finally reaching agreement on the directive's annexes (CEC, 1991a-j, l),[319] the Council could not reach agreement on the text of the directive itself at its meeting of 1 October 1991, and charged COREPER with continuing to examine the directive with a view to an agreement at the next Environment Council meeting, in December (CEC, 1991a-v).[320] Right in the heart of these final negotiations, Member States continued, of course, to be held to account for alleged failures to apply EU environmental law. Embarrassingly for the UK's Environment Secretary Michael Heseltine, who had taken a relatively positive line towards the Habitats Directive, the Commission's decision to bring legal proceedings against the UK government in respect of the M3 motorway - the dispute which ultimately led to the demise of Commissioner Ripa di Meana, as detailed in chapter 3 - was announced the day before Heseltine sought to "expose European backsliders" in respect of EU environmental law

[319] The UK and France would subsequently seek additional changes in advance of the key Environment Council meeting in December 1991 (DG XI, 1991o).

[320] Which would be a joint Council of Environment/Energy ministers on 10 December 1991 (European Report, 1991b).

(McCarthy, 1991b). Although Heseltine declined to give examples, the press reported "many flagrant failures to implement EC environmental measures, such as the Italian government's unwillingness to enforce the Birds Directive by preventing the annual slaughter of thousands of birds of prey by Italian hunters" (McCarthy, 1991b). The UK evidently felt it was above such behaviour, Heseltine claiming, "Many of the people who sign up to these directives don't do anything about them. We can have a position where directives are acclaimed with enthusiasm, and then shelved with dispatch, except in this country" (McCarthy, 1991b).

In preparation for the Environment Council meeting of 12 and 13 December 1991, where it was hoped the Habitats Directive would finally be agreed, the Dutch Presidency presented compromise proposals on the few remaining issues, which included: financing (Article 7 and preamble); the possibility for the Commission to propose the designation of a priority site not designated by a Member State (Article 5) - the Presidency proposed deleting this provision; the procedure for amending the Annexes, which the Presidency proposed would be entirely by way of qualified majority vote by the Council, albeit that France was still insisting that Annex IV, which listed species requiring strict protection, should be the subject of a unanimous vote, and Greece was now seeking unanimity for changes to Annex II (species requiring SACs) and priority habitats under Annex I (DG XI, 1991b); and finally, the type of Committee to be established under the Directive (CEC, 1991a-g).

At a COREPER meeting to discuss these issues on 29 November 1991, delegations made their views known: in respect of the site designation question, Belgium felt that Article 5 had to be retained if a "balanced solution" was to be found to the outstanding issues (the financing issue was leaning in Spain's favour at this time – more below), and France and the UK shared this view (COREPER, 1991e). The Commission therefore maintained its proposal to retain Article 5 (COREPER, 1991e). Little progress was made on this issue between the COREPER meeting and the Environment Council meeting of 12-13 December 1991: Ireland, Portugal and Italy insisted that Article 5 should be deleted; Belgium made the provision's retention a condition for its agreement to the directive, while France and the UK were also keen to see the Article retained (DG XI, 1991b). In an internal briefing note for the Environment Council meeting, DG XI noted that if certain countries persisted in seeking the deletion of the provision, it should be recalled that Spain had indicated, informally, that it could accept the retention of the provision – even with the provision providing for a qualified majority vote by the Council – provided a satisfactory solution was found to the issue of financing (DG XI, 1991n).

7.7.2 Political agreement reached: December 1991

In the event, political agreement was reached unanimously in respect of the Habitats Directive – with Denmark and Italy abstaining (more below) – and in respect of the new LIFE funding instrument at the Environment Council meeting on 12 December 1991, following twelve hours of negotiations (COREPER, 1991d; European Report, 1991a). The final position in respect of site designation was that there would be a standard designation procedure via Article 4, whereby Member States would draw up national lists of sites hosting habitats listed in Annex I and species listed in Annex II; these would be proposed to the Commission within three years of the notification of the Directive; the Commission would then adopt a list of sites of Community importance on the basis of biogeographical regions; each Member State would then have six years to designate the sites in question as SACs (Habitats Directive, 1992). The special procedure set out in Article 5 was retained, allowing the Commission to propose for designation a priority site which had not been proposed by a Member State, subject ultimately to a unanimous decision by the Council in the event of a dispute (Habitats Directive, 1992).

On the subject of modifications to the annexes, the general position was that such modifications would be subject to a qualified majority vote by the Council, with the exception of Annex IV, which listed the species requiring strict protection wherever they are found, which was made subject to a unanimous vote by the Council at France's insistence, causing Denmark and Italy to abstain from the final vote (COREPER, 1991d).[321] France's Environment Minister Lalonde sought to justify this position – which was essentially a concession to France's hunting lobby – on the grounds that if the designation of a priority site on a proposal from the Commission was to be made subject to unanimity, so should be proposals to add new species to Annex IV (COREPER, 1991d). Thus, despite the Commission stressing throughout the negotiations the need for a flexible process for amending the annexes, the mechanisms finally agreed have made making changes difficult in practice (Evans, 2013).[322]

7.7.3 Protection of Natura 2000 sites

At the first meeting regarding the Directive under the Dutch Presidency, on 10 July 1991, Spain continued to query the idea that Article 6(2) to (4) of the Habitats Directive would be applied to "clarify" obligations in respect of SPAs under the Birds Directive, and requested

[321] Denmark, Italy and Commissioner Ripa di Meana expressed their surprise that Ministers for the environment would render decisions about protecting species more difficult at a time when the EU was seeking to simplify decision-making procedures (COREPER, 1991d).

[322] And although there are frequent calls for changes to be made to the annexes (e.g. see Cardoso (2012) and Hochkirch et al. (2013)), there would appear to be a reluctance on the part of the Commission to open the annexes for debate, perhaps fearing a renegotiation/weakening of the Directive in the current political climate.

the opinion of the Council Legal Service on the obligations stemming from the introduction of this provision in relation to the obligations which already existed under the Birds Directive (CEC, 1991a-p). The Council Legal Service ultimately proposed text to cover the situation, which stated that obligations under Article 6(2) to (4) of the Habitats Directive would replace (rather than clarify) obligations in respect of SPAs under the first sentence of Article 4(4) of the Birds Directive (which had been interpreted strictly in the *Leybucht Dykes* case), and a large majority of delegations agreed to the proposed text (CEC, 1991a-o).

At a meeting of the Working Party on the Environment on 4 September 1991, Ireland made an audacious late attempt to restrict the effect of the impact assessment provision – Article 6(3) – by proposing that only projects should require appropriate assessment and not also plans (CEC, 1991a-r).[323] The Commission was against this, and successfully resisted Ireland's proposal (CEC, 1991a-r). At the same meeting, a separate attempt was made to weaken the protective regime by way of a proposed deletion - made by the Presidency following discussions at the meeting - of the second paragraph of the Article 6(4) derogation, which then read:

> "Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety or to beneficial consequences of primary importance for the environment" (CEC, 1991a-r).

Belgium, Denmark, Greece, Italy and the Commission entered scrutiny reservations regarding the proposed deletion (CEC, 1991a-r). Portugal wanted to retain the paragraph but suggested adding wording relating to overriding public interest (CEC, 1991a-r), an idea which was ultimately adopted. At a COREPER meeting on 25 September 1991, a majority of delegations said that they could agree to the proposed deletion of the second paragraph of Article 6(4), although Italy thought the paragraph should be retained, Denmark and the Commission entered scrutiny reservations, and the Commission made it clear that it could not accept that the same possibility of a derogation would apply in respect of priority sites as other sites, and that the Commission would therefore be insisting that the second paragraph be retained (DG XI, 1991r); Portugal maintained its earlier position – seeking the insertion of language relating to overriding public interest – an idea which Greece said it could support or else agree to the deletion of the paragraph (CEC, 1991a-o).

The second paragraph of the Article 6(4) derogation

[323] Interestingly, in a note regarding the Environment Council meeting of 1 October 1991, DG XI records that Italy had accepted the possibility of mentioning "programmes" in Article 6(3) (DG XI, 1991m), but this does not seem to have come to anything.

Preparing for the Environment Council meeting on 1 October 1991, the Commission, internally, made its position clear regarding the proposed deletion of the second paragraph of Article 6(4): if a majority rallied around this, and if Italy, Germany and Denmark caved in, the Commission would express its strong objections to deletion and would propose that: first, the application of a derogation in respect of priority species/habitats would be made the subject of an Opinion from the Commission, to be given within three months; and second, that in respect of sites which benefited from EU co-financing under Article 7, only derogations based on human health, security or beneficial consequences of primary importance for the environment would be acceptable (DG XI, 1991e). The first idea found its way into the directive, minus the deadline, with the second paragraph of Article 6(4) amended to read, after the Environment Council on 1 October 1991:

> "Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, reasons of overriding public interest" (CEC, 1991a-k).

In other words, the Commission had accepted the principle that Member States could apply a derogation to allow damage to sites protecting priority habitats/species for reasons of overriding public interest *other than* those relating to human health, public safety, or to beneficial consequences of primary importance for the environment, provided that those other reasons be made subject to an Opinion from the Commission in advance (DG XI, 1991m). That said, from the Commission's perspective, it remained to be clarified that such other "reasons of overriding public interest" should be qualified as "imperative" reasons, as per the first paragraph of Article 6(4); after all, as the Commission noted internally, it would be difficult to justify the availability of a more permissive derogation in respect of priority habitats/species than was the case for non-priority habitats/species (DG XI, 1991m). The opportunity to achieve this came when the UK government requested that the derogation provision in respect of the species protection regime – what became Article 16(1)(c) – be amended to include reference to imperative reasons of overriding public interest, to mirror the Article 6(4) provision in respect of sites;[324] one of the *quids quo pro* for this, from the Commission's perspective, was the insertion of the word "imperative" into the second paragraph of Article 6(4) (DG XI, 1991u), and the Commission set out to achieve this, should

[324] The UK feared that unless the derogation provisions in respect of the habitats and species parts of the directive were aligned, a protected species could prevent an activity on a special area of conservation even where that activity had been sanctioned under Article 6(4) (CEC, 1991b-b).

the opportunity arise, at the Environment Council meeting on 12 December 1991 (DG XI, 1991o).[325]

At a COREPER meeting to discuss these issues on 29 November 1991, Greece attempted - but failed - to have "national defence" added to the list of reasons justifying an impact on a priority site without the need for a Commission Opinion (COREPER, 1991e). The final text of Article 6(3) and (4) as agreed at the Environment Council meeting on 12 December 1991, read:

> "3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.
>
> 4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.
>
> Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, [to other imperative][326] reasons of overriding public interest" (CEC, 1991b-a)

And in order to ensure that the ECJ's decision in the *Leybucht Dykes* case was effectively overruled, an Article 6a – later renumbered Article 7 – was inserted to read:

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[325] DG XI's internal briefing note for the meeting records that the omission of the word "imperative" was no doubt a typographical error, but was of serious consequence (DG XI, 1991o).

[326] These words in square brackets were not included in the formal version of the document circulated following agreement by the Environment Council on 12 December 1991 (CEC, 1991b-a), but they somehow found their way into the final version of the Directive adopted in May 1992. How this happened is unclear to the present author, though the inclusion of these words must presumably have been based on an agreement reached at or prior to the meeting in 1992 when the directive was formally adopted (Habitats Directive, 1992).

"Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly recognized under Article 4(2) of the latter Directive,[327] as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later" (CEC, 1991b-a).

7.7.4 Protection of areas outside Natura 2000

The Dutch, who had long championed the idea of ecological corridors, had one more go, during its Presidency, at shoring up wording in the Directive in support of such areas. They proposed, "[Article 3(3)] Where they consider it necessary, Member States shall endeavour to improve the ecological coherence of Natura 2000 by maintaining and, where appropriate, developing features of the landscape which are of major importance for wild fauna and flora, as referred to in Article 8(1)" (CEC, 1991a-p). This might have been better than nothing, but it was much weaker than the former Article 3(2), which had provided, "Member States shall enhance the ecological coherence of Natura 2000 by maintaining and, where appropriate, developing ecological corridors between natural habitats" (CEC, 1991a-c).

Article 8 now – in July 1991 – read:

"Member States shall endeavour, where they consider it necessary, in their land-use planning and development policies and, in particular, with a view to improving the ecological coherence of the Natura 2000 network, to encourage the management of features of the landscape which are of major importance for wild fauna and flora.

Such features are those which, by virtue of their linear and continuous structure (such as rivers with their banks or the traditional systems for marking field boundaries) or their function as stepping stones (such as ponds or small woods), are essential for the migration, dispersal and genetic exchange of wild species" (CEC, 1991a-p).

Under the Dutch Presidency's proposals, the Annex IV list of landscape features would be dropped, the definition of "ecological corridor" would be deleted, and Article 3(3) would be amended to read as above (CEC, 1991a-p); the difference between this and the position reached at the end of the Luxembourg Presidency was the inclusion of Article 3(3), since the Luxembourg Presidency had proposed, in the end, retaining only Article 8 (CEC, 1991a-b). The majority of delegations were generally in favour of the Dutch proposal. Denmark and Portugal considered that the examples in brackets should be deleted from Article 8, while

[327] The phrase "of the latter Directive" was later changed to "thereof" (Habitats Directive, 1992), though again it is unclear when this change was agreed.

France felt that they should be amended (CEC, 1991a-p). Spain maintained its reservation regarding the Article, which it considered should be replaced by a declaration of intent (CEC, 1991a-p). However, at a COREPER meeting on 25 September 1991, Spain indicated that it was prepared to agree to the proposed wording for Article 8, but asked for Article 3(3) to be deleted (CEC, 1991a-o). Internally, the Commission admitted that it was prepared to accept this (DG XI, 1991e), but Article 3(3) was finally retained following Spain's agreement to its retention alongside Article 8 (DG XI, 1991m; Habitats Directive, 1992), with the same text as cited above (CEC, 1991b-a).[328] Interestingly, less than a week before this weak position was codified by agreement of the Habitats Directive on 12 December 1991, the Standing Committee of the Bern Convention adopted a Recommendation setting out a much more detailed, ambitious policy on the conservation of natural areas outside protected areas proper, emphasising once more the complex interplay between the Council of Europe's and the EU's policies on nature conservation (Council of Europe, 1991).

As Claus Stuffmann commented at a conference the year after the Habitats Directive's adoption, "not all the Member States were ready to accept Community rules stricter than Article 3(3)...The Commission's original proposal was clearer and more prescriptive.[329] It is nevertheless to be hoped that the firm belief shared by all today that nature conservation can not only be achieved by establishing protection areas but that it is vital to promote it in the whole territory of the Community, will in time lead to changes in Community legislation that could prove necessary" (Stuffmann, 1994, pp.206-7). Twenty years on, there have been no such changes, despite moves in more recent times to promote so-called green infrastructure.[330]

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[328] The only change being that "Article 8(1)" at the end of Article 3(3) had been amended to "Article 8".

[329] To recap, the Commission's original proposal read: outside special protection areas, "Member States shall also strive to avoid pollution or deterioration of natural and semi-natural habitats....Member States shall furthermore take measures to ensure the protection of distinct features of the landscape, including in particular those specified in accordance with Annex VII, which are of outstanding local important to wildlife" (European Commission, 1988f, Article 8(1) and (2)). There was to be some flexibility here, with the proposal providing for a derogation from the obligation to take measures to protect distinct landscape features, limited to the minimum area necessary, "if [the derogations'] impact can be counterbalanced, so that they have no adverse effects on the sustainability of the biological systems connecting the special protection areas or on species whose conservation cannot be ensured solely through the designation of special protection areas" (European Commission, 1988f, Article 8(3)). See section 7.2.8 for further details.

[330] Action 6 of the EU's biodiversity strategy to 2020 states "The Commission will develop a Green Infrastructure Strategy by 2012 to promote the deployment of green infrastructure in the EU in urban and rural areas, including through incentives to encourage up-front investments in green infrastructure projects and the maintenance of ecosystem services, for example through better targeted use of EU funding streams and Public Private Partnerships" (European Commission, 2011d). However, it was reported recently that the Commission's Secretary General, Catherine Day, wants the Environment Commissioner to delay proposals on green infrastructure (ENDS Europe, 2013b).

7.7.5 Financing: on the brink of being withdrawn, the Directive is agreed

At a meeting on 10 July 1991, Germany – supported by Belgium, Denmark, France and the UK – argued that the text for Article 7, the proposed provision on EU co-financing to be included within the Habitats Directive, "should make a clearer distinction between the "normal" situation and cases where Community co-financing was necessary, for which precise obligations and criteria would need to be defined" (CEC, 1991a-p, p.23). The Presidency undertook to produce a revised version of the text based on these discussions (CEC, 1991a-p). Some delegations, in addition, drew attention to the link with the Article 5 site designation process (CEC, 1991a-p) – again, the implication being that Spain could hardly hold out for major EU co-financing in circumstances where it was unwilling to accept that the Commission would have power to propose priority sites for designation which Spain had left off its national list.

The Dutch Presidency circulated a revised version of the financing provision on 1 August 1991, this time accompanied by various paragraphs to add to the directive's preamble, which hint at the nature of some of the arguments which must have been going on behind the scenes regarding the appropriateness (or otherwise) of including financing provisions in support of a directive's obligations within the text of the directive itself:

> "1. Whereas it is recognised that, notably because of the uneven distribution of species and habitats throughout the Community, the application of the present Directive may entail disproportionate additional expenditure between different Member States;
>
> 2. Whereas, whilst it is acknowledged that in accordance [with] the provisions of the Treaty, in particular the subsidiarity principle, the primary responsibility for such expenditure must continue to be exercised at national level, it is nevertheless recognised that the present Directive is a special case in the framework of the Community's environmental policy in that it cannot be based upon the "polluter pays" principle;
>
> 3. Whereas it is agreed that, as an exceptional case, the present Directive should provide, under clearly defined conditions, for a co-financing mechanism which would operate as far as Community funding is concerned within the limits of the resources made available under the Community's legislative decisions and budgetary procedures" (CEC, 1991a-y).

Agreement on the proposed financing provision remained elusive, and a meeting of the Working Party on the Environment on 4 September 1991 ended inconclusively, with the

Presidency promising to submit a further proposal based on the outcome of discussions to date (CEC, 1991a-r). The NGO community was active on this issue, sensing the adoption of the directive drawing near. The coordinator of the European Habitats Campaign wrote to NGO contacts in other Member States on 13 September 1991, stating that "Most Member States, with, perhaps, the exception of Ireland, appear to be more-or-less content with the compromise through Article 7 which was initiated by Luxemburg and progressed by the Dutch Presidency...While it is not possible to include in the text of the directive any precise figures which relate to the application of financial resources (the place for these is in a financial Regulation), it seems possible that the needs of the Spanish administration might be met through a statement in the Council minutes...relating to [Article 7] which provides guidelines for the level of co-financing from Community sources....My guess is that Spain might be persuaded to put this forward as a suggestion if they (a) feel happy with it themselves and (b) feel that it will gain support from the Presidency and, in particular, Germany and UK. If these four are content, there is a reasonable chance that the rest will follow" (RSPB/WWF, 1991b).

However, by the end of September 1991, the parties remained apart, with some doubting the advisability of including a financial provision in the directive itself, stressing "the exceptional nature of an approach of this type in the general context of Community environmental policy, especially in relation to the "polluter pays" principle" (CEC, 1991a-x, p.3). Some were concerned about the precedent that might be set by linking the entry into force of a directive with the provision of EU funds (COREPER, 1991a). Germany emerged as the key player in this regard, with the Dutch Presidency meeting with Spain in Madrid on 24 September 1991 to discuss new recitals desired by Germany on this issue for the Directive's preamble (DG XI, 1991d). The Commission felt that Spain had made two important concessions: first, that the co-financing mechanism would apply only to sites protecting priority species and habitats; second, that the possibility of co-financing would only kick-in when a site was formally designated as a special area of conservation (DG XI, 1991d).

Spain seeking broad financing of EU environmental measures

Having failed to reach agreement regarding the Directive proposal at the Environment Council meeting on 1 October 1991, the Council charged COREPER with continuing to work on the Habitats Directive and LIFE funding proposals, with a view to reaching agreement on both as soon as possible (CEC, 1991a-v). This was now a key objective, given that financing had escalated to become *the* core political problem for the Habitats Directive:[331]

[331] In terms of the persuasive effect of EU financing, the Nature Unit's then expert on the subject, Reinhard Klein, explains:"Knowing a little bit what would be available under LIFE Nature, then it was 'but who is

"The technical problems raised during the [meeting] soon gave way to substantive ones, with Spain asking for an automatic system of co-funding to be set up to implement the measures contained in the Directive so that each Community obligation would be backed up with sufficient resources. The other 11 Member States were at pains to point out that a Directive had to be applied at national level by being incorporated into national legislation. As a result, the cost of introducing these sorts of measures should be borne at national level, too....Thumbs down for automatic co-funding. Spain's main concern during the Council was to establish just to what extent the Community would be prepared to provide aid. The 11 other Community members were reluctant to enter into this debate as this question was thought to be a smokescreen for Spain's idea that all Community activities should be financed at EEC-level, or so some sources would have us believe. Spain wants the measures to be recognised as Community ones [within the meaning of Article 130r(4) of the EEC Treaty] so that all special protection areas established by the proposed Directive would be regarded as of relevance to the Community, thus implying that the Community should provide some funding. The other Member States felt, however, that Community funding should be reserved for exceptional cases and to give in to Spain on this point could have created a dangerous precedent for environmental policy and have repercussions for all other Community policies....Creating a precedent was the biggest fear lurking in the minds of the Ministers, who finally expressed their willingness to finance certain activities, but refused to recognise the activities in the natural habitat Directive as Community measures. The German Environment Minister, Klaus Töpfer, summed up the Member State's attitude when he said: "We are prepared to finance the habitat Directive through the LIFE programme" but not to fund the Directive directly" (European Report, 1991b).

A fundamental difference in approach had opened up between two groups: the countries of the south (joined by Ireland) sought an EU co-financing mechanism that was quasi-automatic and unconditional, while certain northern European countries (Belgium, Germany, France,

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supposed to get how much from it?', and there we made a simple simulation internally, for us, saying, OK, it should be, let's say, an orientation which corresponds, on the one hand, as one factor, the surface area concerned by future Natura 2000 in the country, and the, let's say, the financing capacity in the country itself....So we took a little bit the surface area and divided it or put it into relation to the GDP, so that those with a low GDP with the same surface area would be set aside more than those like Germany or the northern countries with a rather high GDP....So there were some...simulations, there was never fixed something in writing, there was never really negotiated, but we made those Member States who were particularly reluctant, we made them aware of these considerations, and afterwards, indeed, when the Habitats Directive and LIFE, with LIFE Nature, were in force, we also implemented this, let's say, more or less according to these terms....There were estimates [of the surface area of each country expected to be within the Natura 2000 network] that had come from our scientific consultants...from Pierre Devillers and NGOs and people from this time" (Klein, 2012).

the UK) could accept the principle of a certain financial solidarity, but wanted any co-financing provision within the text of the Directive to be subject to strict conditions, and expressed as an exceptional case (CEC, 1991a-i). The ministers of Spain and Germany met in the margins of the informal Environment Council meeting of 12/13 October 1991 to see if they could break the impasse, but the Spanish attitude was reportedly "extremely hard": if the Community wanted to impose concrete obligations on Member States, Spain said, it needed to be willing to contribute the necessary financial means to allow countries to meet those obligations (DG XI, 1991j). Such a consideration would apply not only in the case of the Habitats Directive but also in other situations, and Spain thus rejected the idea of including a paragraph in the preamble citing the "exceptional" nature of a co-financing mechanism within the terms of the Habitats Directive (DG XI, 1991j). The Dutch Presidency hoped to finesse this by writing to Spain and Germany proposing that "exceptional" might be replaced with a reference to the "particular" character of nature conservation measures (DG XI, 1991j), but this would not break the impasse.

The Twyford Down EIA dispute erupts

With DG XI's Nature Unit seeking to manage this very sensitive issue, just a few days later, towards the end of October 1991, the major dispute (detailed in chapter 3) erupted between the Commission and the UK government over the UK's alleged failure to apply the EIA Directive to several construction projects, casting a shadow over the UK's support for the draft Maastricht Treaty, which was then entering a critical phase (Usborne, 1991). As DG XI noted in respect of the Habitats Directive proposal, the Maastricht discussions seemed likely to be very important for the Directive itself: that is, the solution to the Article 7 financing issue – now the main blockage – was felt likely to depend to a great degree on the ministerial discussions in Maastricht on 9-10 December 1991, where the issue of EU co-financing of measures relating to the environment, culture, education and tourism would be examined (DG XI, 1991m). In this high politics forum, the Habitats Directive proposal did not seem likely to fall under scrutiny, except that the UK was at the very same time fiercely disputing similar (and less stringent) impact assessment obligations in the EIA Directive. As the UK's then Foreign Secretary Douglas Hurd commented, when asked to give an example of the European "straitjacket" that Britain wanted to avoid, "When out of some desk in Brussels comes something telling Britain which field a road should go through" (MacIntyre, 1991).

At a COREPER meeting on 29 November 1991, Spain and Portugal indicated that they were content that new text on co-financing proposed by the Dutch Presidency for Article 7 and the related preambular provisions was a good basis for continuing discussions with a view to an agreement, and Ireland stressed the importance of the principle embodied in the text

(COREPER, 1991e). However, it seems that the Dutch Presidency had leaned too far towards the Spanish position: the UK felt that the proposal fell short of striking the appropriate balance between the obligations of Member States under the Directive and their entitlement to EU co-financing; Denmark felt that the text was at the limit of acceptability; more forcibly, Belgium, Germany and France "considered that the Presidency's text...establishing a direct conditional link between implementation and financing, was seriously unbalanced, especially in view of the subsidiarity principle" (COREPER, 1991e, p.5). Germany challenged the preambular provisions, which did not, in its view, "stress clearly enough the exceptional character of possible Community financing" (COREPER, 1991e, p.5). In reality, of course, this dispute over financing for the Habitats Directive was part of a much bigger picture playing out in respect of the proposed Maastricht Treaty, which was to go before heads of state in December 1991. As the Guardian reported at the time, "The weakening of the environment chapter [of the draft Maastricht Treaty] is the result of the strong pressure for an accord on political union at Maastricht. The Dutch, who had solid environmental credentials, have been forced to cede ground to reluctant countries, such as Spain and Britain...The Spanish have argued against tougher EC environmental laws on the grounds that they will place a severe burden on less prosperous parts of the EC which are seeking to develop their economies...Environmentalists had hoped that Spain could be convinced to go along with a stronger EC environmental policy if it was promised an EC environment fund. Northern European countries, however, seem to have been unwilling to cough up enough money to satisfy the Spanish" (Wolf, 1991).

After more than three years of negotiations, it was very much make or break time for the Habitats Directive proposal, the Commission having by this stage nearly reached the end of the generally authorised number of Presidencies for securing agreement on a proposal (seven in this case)(Yourassovsky, 2012). Rumours of a potential withdrawal of the proposal were circulating, the WWF writing to DG XI on 9 December 1991 that they were "very concerned to hear...that the Commission is considering withdrawing the Habitats Directive if it is not adopted under the Dutch Presidency," and encouraged the Commission to leave the proposal on the table throughout 1992 (WWF, 1991). However, unbeknownst to the WWF and others, Portugal had made it very clear to the Commission that it would not be taking the Habitats Directive dossier forward during its Presidency in the first half of 1992, in the event of a stalemate at the Environment Council in December 1991 (DG XI, 1991b). The main sticking point on the financing issue was said by DG XI to be Germany's persistence regarding the need to make explicit the exceptional nature of a link being made between the implementation of a directive and the availability of EU funds (DG XI, 1991b), but this framing of the issue may well have been coloured by the Dutch Presidency's tactical decision

to try to isolate Germany on the point, the Presidency's proposed drafting of Article 7 having been welcomed by the southern countries plus Ireland at the COREPER meeting on 29 November (DG XI, 1991n). However, this tactic had not really worked, since France and the UK had shown a certain solidarity with Germany (DG XI, 1991n), leading the UK to propose changes to Article 7 for consideration at the Environment Council meeting on 12 December (CEC, 1991b-c). These changes were, however, considered "too brutal" by the Commission, as well as having been tabled too late in the day, which risked alienating Spain et al (DG XI, 1991l).

Adopt or withdraw

Introducing the directive proposal at the Environment Council meeting on 12 December 1991, Environment Commissioner Carlo Ripa di Meana noted that it would be a sad first - which, from the outside, would risk appearing "grotesque" – if a piece of EU legislation were to fall owing to a dispute over the text of the preamble (where Germany was seeking insertion of the "exceptional" language)(DG XI, 1991p). Ripa di Meana then played to the German part of his audience a little, referring to the Article 7 financing mechanism as "exceptional" and "sui generis", before pausing to hear the interventions of the Member States (DG XI, 1991p).[332] The Commissioner was then presented with two scenarios by his speech-writer: in the first, he was to call upon Spain to compromise by acceding to Germany's demand to record in the directive's preamble the exceptional nature of Article 7, Spain having already obtained most of what it had asked in respect of that Article (DG XI, 1991p). There then followed the second scenario, under a section headed "In extremis", for use should Spain refuse to give any concessions, in which case the Commissioner would propose withdrawing the directive proposal altogether, call the outcome "deplorable" in light of the efforts of the Dutch, Luxembourg and French Presidencies, and highlight the disastrous outcome for habitats and species in the EU (DG XI, 1991p).[333] This latter scenario was evidently considered a serious possibility, for in the Commission's archives is a draft press release - unused in the event - for use should Spain have refused to budge, announcing the Commission's "profound regret" at having to withdraw the proposal, name-checking Spain as the guilty party, and promising a mobilisation of all the Commission's resources to enforce strictly the Birds Directive as well as to monitor more closely and have a decisive say

[332] Given the content of what followed in his speech, the importance of stopping at this point was underlined by the stage instruction "!!!! stop !!!! s'arrêter ici !!!!!!!!!!!!!!!!!!".

[333] It is perhaps indicative of the character of Commissioner Ripa di Meana that the Nature Unit felt it necessary to add a "NB" to their briefing note: "It might be worth reminding the Commissioner that the threat of withdrawing the directive is a weapon to be used with great prudence and, if at all, as a very last resort" (DG XI, 1991l, p.2).

regarding the execution of policies, plans and programmes with significant environmental impacts (DG XI, 1991i).[334]

Ultimately, of course, this nuclear option did not come to pass, and political agreement was reached regarding the Habitats Directive and the LIFE funding instrument at the meeting on 12 December 1991 (COREPER, 1991d; European Report, 1991a). Spain secured the inclusion of the Article 7 provision on financing,[335] and the Germans secured a provision for the preamble stating (emphasis added) "in this *exceptional* case, a contribution by means of Community co-financing should be provided for within the limits of the resources made available under the Community's decision" (Habitats Directive, 1992). Spain, which had "wanted the Community to finance all measures provided for in environmental Regulations or Directives" (European Report, 1991a) had therefore compromised,[336] but sought 2 billion Ecus for LIFE, while the Dutch Presidency proposed a compromise of 500 million Ecus, which many delegations still felt was too high.[337] Agreement was reached on a figure of 400 million Ecus for the first stage of the programme (European Report, 1991a). As a parting shot, Germany's Minister Töpfer agreed to sign up to the Habitats Directive only with a declaration recorded in the Council's minutes to the effect that Germany presumed that, from 1994, the financing of measures foreseen by Article 7 of the Habitats Directive would be financed by the Cohesion Fund in eligible countries (CEC, 1991b-a; COREPER, 1991d). The Cohesion Fund was a new fund - "the fruit of a political trade-off on the eve of the Maastricht Treaty" – intended to direct EU funding to four specific, less-developed Member States: Spain, Portugal, Greece and Ireland (Borrás, 1998, p.211). For their part - and unsurprisingly - Spain, Portugal, Greece and Ireland made an equal but opposite declaration, to the effect that measures under the Habitats Directive should not be financed by the Cohesion Fund (CEC, 1991b-a; COREPER, 1991d). The majority of the other Member

[334] Fernández (2008, p.90) argues that Spain maintained a "pro-EU discourse" during negotiations, with "a socialist national government which, not having to rule in coalition and enjoying a relatively free hand in Community affairs, was willing to be seen as a main defender of the European cause. In this sense," she argues, "the Spanish government never disputed the right of Europe to legislate on natural areas nor did it ask for the 'nationalization' of certain powers, which had been gradually acquired by the Commission in relation to this policy (as was the case at the time of the Thatcher government in the UK). The Spanish government only asked for the recognition of Southern ecological specificities while highlighting the fact that conservation in the region was going to be comparatively more expensive and needed, therefore, some EU help."

[335] Article 7 (later renumbered Article 8), which on reflection, according to Cosme Morillo, the senior Spanish civil servant involved during the Habitats Directive negotiations, in fact "says nothing" (Morillo, 2012). That said, Article 8(4) (which provides for the adoption in respect of Natura 2000 sites of prioritized action frameworks of measures involving co-financing) has recently come into its own. The Member States were asked by the Commission to submit their prioritised action frameworks by the end of 2012 (DG Environment, 2014a).

[336] For an account which argues that Spain's input into the text of the directive was of "utmost importance" and altered the "Central-Northern bias" of the directive to be "more sympathetic toward the ecological situation of Southern Europe," see Aguilar Fernández (2003, p.693).

[337] Interestingly, this amount of 500 million Ecus appears to match the amount flagged as necessary by a Spanish conservationist group at the time (Aguilar Fernández, 2003).

States, plus Commissioner Ripa di Meana, supported the latter countries, noting that the Cohesion Fund was intended only for use in respect of four Member States, and not to fund environmental measures in all twelve, such as might be foreseen by the Habitats Directive (COREPER, 1991d).[338] To secure the agreement, however, Ripa di Meana declared that the Commission would take into consideration, in its report on the operation of the LIFE programme, all relevant elements pertaining to environmental policy, including the manner in which the Cohesion Funds had been put in place (COREPER, 1991d). And in this spirit of compromise and goodwill, the Habitats Directive was agreed![339]

7.8 The golden era of EU environmental policy draws to a close

In March 1992, before the Habitats Directive had even been formally adopted, Brice Lalonde – France's green Minister for the Environment – announced that he would not serve in a new French cabinet (Lalonde, 2012; Nundy, 1992). A few days later, the Tories were returned to government in the UK's general election of 9 April 1992, and Michael Heseltine was replaced as Secretary of State for the Environment by Michael Howard (Oakley, 1992), a prominent Eurosceptic who had played an important role in the Maastricht negotiations (Heppell, 2002; Roth, 2004). Just over one month later, on 21 May 1992, the Habitats Directive was finally formally adopted (Habitats Directive, 1992). Less than two weeks later, the EU would be plunged into "chaos" by the Danish 'no' vote in respect of the Maastricht Treaty (Palmer and White, 1992), just as the UK took over the Presidency of the Council, with subsidiarity as its focus (European Report, 1992): "the [UK] Government...sees a diminished role for the EC in social and environment issues as lying at the heart of its interpretation of the new doctrine of subsidiarity," commented The Guardian (1992) at the time. Just two days before the UK took over the Presidency on 1 July 1992, Environment Commissioner Carlo Ripa di Meana resigned, having been nudged out by Jacques Delors (Marshall, 1992), leaving an empty seat at the Presidency kick-off meeting in London (European Report, 1992). A month into the UK's Presidency, it was announced that the Commission had dropped five cases against the UK, including its challenge relating to the M3 motorway and Twyford Down;[340] Karel Van Miert, the acting Environment Commissioner, said the Commission had acted "reasonably and pragmatically" in closing the cases (Wolf, 1992b). By now EU environment policy had entered the "hugely defensive

[338] The Greek, Spanish, Irish and Portuguese delegations later included a formal declaration to this effect in the Council's minutes for the meeting on 12 December 1991 (CEC, 1992a).

[339] Minor amendments continued to be made to the text up until its adoption in May 1992. For example, a revised working version of the preamble was produced on 16 January 1992 (CEC, 1992c), and this was presented to the Member States on 27 January (CEC, 1992b).

[340] As UK MP Stephen Milligan put it in July 1992, "Jobs in Southampton are more important than butterflies on Twyford down" (cited by Jones (2012a, endnote 19)).

mode," spoken of by Ken Collins, former Chair of the European Parliament's Environment Committee (Wurzel, 1999). As noted in chapter 3, environment policy had not been defensive, according to Collins, until Ripa di Meana pursued the UK for alleged breaches of the EIA directive immediately prior to the Maastricht negotiations, but "it became so very, very quickly, in a period of just a few months" (Wurzel, 1999, p.20). By February 1993, Van Miert had been replaced by a "cautious" Environment Commissioner, Ioannis Paleokrassas, formerly Greece's Finance Minister (Greenwire, 1992b). In May 1994, Director General of DG XI Laurens Jan Brinkhorst announced he was leaving post to stand for election as an MEP (European Report, 1994b), and by the end of that year, the restructuring of DG XI had been announced which would lead to Ludwig Krämer, head of the Legal Unit, being moved sideways out of that post, as well as the retirement of head of the Nature Unit, Claus Stuffmann (European Report, 1994a). Thus it was that the golden era of EU environmental policy came to a rather abrupt end, and the process of implementing the Natura 2000 network then began in a challenging political landscape.

PART IV: THE THIRD PHASE (1992 – PRESENT):

IMPLEMENTING NATURA 2000

Chapter 8: Implementing Natura 2000; and acute conflicts under Article 6(4)

8.1 Introduction

Although this chapter focuses on difficulties in implementing the Natura 2000 network and subsequent conflicts in terms of site conservation (on which see also chapter 1), it is important to highlight at the outset some of the many positive aspects of what has proven an extraordinary achievement of EU environmental policy.

First, the Habitats and Birds Directives have together led to the establishment of a coherent, EU-wide network of protected areas – the largest network of its kind in the world (European Commission, 2010c) – which currently covers more than 27,000 sites, comprising about 18% of the EU's land territory plus large marine areas (European Commission, 2014). Thus, although 1992 may have marked, in a broad sense, the drawing to a close of a golden era of EU environmental policy, in a narrower sense this was not true of the Habitats Directive, because the Directive acted as a catalyst for major new ecological survey work and mapping across Europe (Evans, 2006) and ultimately led to the enormous network just described. As Cosme Morillo, Spain's senior negotiator during the passage of the Habitats Directive, comments, "for Spain [1992] was the [beginning] of the golden era, when hundred[s] of [scientists] became involved in identifying the sites that should be listed. Thanks to...Life funding the project National Inventory of Biodiversity (still alive!) was launche[d] to provide to the Spanish Lists the strongest scientific support. And thanks to that, more than 25% of the national surface was included in the Lists.[341] And [it] was then, when the official lists were [published], that the golden era ended" (Morillo, 2013).

Second, the Habitats Directive and the LIFE instrument, adopted in parallel, have together resulted in a long-term flow of funding into Natura 2000 and environmental projects more generally: since 1992 there have been three complete phases of the LIFE programme, resulting in the co-financing of "some 3104 projects across the EU, contributing approximately €2.2 billion to the protection of the environment" (European Commission, 2013a). That said, this is a relatively small financial contribution spread across more than 20 years, compared to the estimated total annual cost of managing the Natura 2000 network of €5.8 billion (European Commission, 2011b), particularly when one considers that "the benefits that flow from Natura 2000 are of the order of €200 to 300 billion/year" (European Commission, 2013c, p.3). Thus, the LIFE instrument makes a relatively small contribution to

[341] 27.27% of Spain's land territory, according to the most recent figures (European Commission, 2014).

the management of a network of protected areas which, if conserved, has the potential to deliver very large financial benefits. Looking beyond the Natura 2000 network, since much of Europe's landmass is, after all, outside Natura 2000, "[a]t EU level, most of the available financial support for nature protection comes from rural development programmes under the Common Agricultural Policy and Cohesion policy programmes" (European Commission, 2009c, p.16). However, the recent CAP reform seriously disappointed environmentalists (e.g. see EEB (2013a)), and historically the CAP has been harmful, rather than beneficial, in nature conservation terms.

Indeed, as Alistair Gammell commented in 1999, "I am certainly not afraid to call [the CAP] the single greatest force of destruction of Europe's culture and heritage that exists today...Its reform must be a priority...We need to demonstrate the destructiveness of the CAP and find solutions [that] will support the rural population, provide healthy food stuffs and conserve Europe's biodiversity. This is not impossible, it just requires the will of Governments to do it....To us it is clear that one of the obvious reasons for conflict over the designation and conservation of Specially Protected Areas is that Member States and the Community provide money for certain activities, such as farming, infrastructure, etc. But, provide wholly inadequate resources for conservation. Under these circumstances, conflicts are inevitable, as land managers can obtain financial support for actions which lead to damage to important areas, but little or no support for conservation actions. BirdLife has been in the forefront of pressing for more LIFE money so that conflicts can [be] avoided" (Gammell, 1999, pp.10-11). This push for additional funding for EU nature conservation measures continues to the present day, with the EEB (2013b, p.5) recently calling for 1% of the EU's budget to be devoted to the LIFE instrument (up from the current 0.2%, and compared to the 34% currently devoted to the CAP),[342] and for a "substantial greening of all the spending lines under the Common Agricultural Policy (CAP), Common Fisheries Policy (CFP), the Structural and Cohesion Funds, transport and energy funding, research and innovation funding, with sufficient funding to be allocated to funding the Natura 2000 network to secure an annual total of 3.5 billion EUR."

Third, because the Habitats Directive requires Member States to monitor the conservation status of listed species and habitats and report to the Commission every six years (Habitats Directive, 1992, Article 17), we now know much more about some 1,182 species and 216 habitat types than we did before:[343] not only their distribution and populations, but also their

[342] "[F]arm spending has dropped sharply in recent years as a share of the EU budget, from a peak of nearly 70% in the 1970s to just 34% in 2007-13" (EU, Undated).

[343] These figures were taken from the most recent assessment report, covering the period 2001-2006, in the EU-25 (European Commission, 2009c), thus excluding Bulgaria and Romania which joined the EU only in 2007,

current status. As the Commission notes, "the scale of this reporting exercise is unparalleled in Europe and has provided a first overview and point of reference for assessing future trends" (European Commission, 2009c, p.2). The composite report for the then EU-25 - covering the period 2001-2006 - reveals a picture of EU biodiversity under "serious pressure" and facing "grave risks" (European Commission, 2009b).[344] At biogeographical level, only 17% of the habitat assessments were favourable, with nearly 65% unfavourable (European Commission, 2009c). Some habitat types were worse than others, of course:

> "The overall status of grassland, wetland and coastal habitat types is particularly poor. Grasslands are mainly associated with traditional patterns of agriculture, which are disappearing throughout the EU, and the conservation status of all habitat types associated with agriculture is significantly worse than other types of habitat: only 7% of such assessments are favourable, compared to 21% for 'non-agricultural' habitats This is due to shifts towards more intensive agriculture, abandonment of the land and poor land management. Wetlands are being converted to other uses, and are also suffering the effects of climate change, as are habitats associated with mountain glaciers. Coastal habitats are under increasing pressure from tourism" (European Commission, 2009b)

In respect of species, only 17% of assessments were favourable, 52% were unfavourable and in 31% of cases the status was reported as unknown (European Commission, 2009c). Information gaps were particularly marked in southern Europe and in respect of the marine environment in general: 57% of the marine species assessments and about 40% of the marine habitat assessments were classed as 'unknown'; and Cyprus, Greece, Spain and Portugal indicated 'unknown' for more than 50% of the species reported in their territories (European Commission, 2009b). The picture was not "uniformly gloomy", however, with some charismatic species "such as the wolf, Eurasian lynx, beaver and otter beginning to re-colonize parts of their traditional range" (European Commission, 2009b).

The Commission reflected that it would be "unrealistic to expect to see at this stage [in 2009], a clear, positive relationship between the Natura 2000 network and the conservation status of habitat types (Annex I) and species (Annex II) covered by the Directive," noting, however, that this is not to say that there are no positive examples (European Commission, 2009c, p.15). "By the time the second and third [assessment] reports are due in 2013 and 2019 respectively," the Commission adds, "the positive contribution of Natura 2000 to the

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and Croatia which joined the EU in 2013. EEA (2007) contains information on the numbers of species and habitats listed in each annex to the Birds and Habitats Directive for the EU-27.

[344] Bulgaria and Romania only joined the EU in 2007 and Croatia in 2013, so after the period covered by this report.

conservation status of the habitat types and species covered by the Habitats Directive should be clearly discernible" (European Commission, 2009c, p.15). In this regard, the Commission points by way of precedent to a major study published in *Science* in 2007 which revealed strong evidence that the Birds Directive – which is of course 13 years older than the Habitats Directive - has had a significant positive impact on listed species: e.g. "Between 1990 and 2000, species listed on Annex I of the Birds Directive [i.e. requiring SPAs] fared significantly better on average than non–Annex I species within the EU15, a pattern not apparent in the same groups of species outside the EU15" (Donald et al., 2007, p.812).

8.2 A contested implementation

8.2.1 Introduction

Concluding its 2009 composite report on the status of EU protected species and habitats, the Commission commented,

> "The land part of the Natura 2000 network is in the final stages of completion and the priority now must be to ensure the development and implementation of appropriate conservation measures for all Natura 2000 sites, including sufficient financial support. For the marine environment, considerable work still has to be done to complete the network" (European Commission, 2009c, p.17)

This comment reveals two important facts about the establishment of the Natura 2000 network: first, it has been a long process, beginning in principle in 1981 when the Birds Directive came into force; second, something evidently happened to cause the difference in the state of completion of the marine and land parts of the network.

8.2.2 Site designations: a long process

Just days before the Habitats Directive would be formally adopted in May 1992, the RSPB published a report reviewing the UK government's performance in designating and protecting sites under the Birds Directive, which highlighted the very small percentage of UK land within the network and the fact that, despite the passage of 11 years since the directive entered into force, only 27 out of 150 important areas for birds in Scotland had been designated as SPAs or Ramsar sites (Buie, 1992). "The UK's record," commented the RSPB, "is a source of increasing embarrassment" (Buie, 1992). According to Robin Sharp, at the time a senior Department of the Environment official, "[Nicholas] Ridley [Secretary of State for the Environment from 1986 to 1989] undoubtedly didn't want to see [the Birds Directive] moving too quickly, so I think people had a kind of instruction to make haste slowly..." (Fairbrass and Jordan, 2001, p.10).

However, the UK was not alone in making slow progress: data compiled by the European Commission in March 1993 reveals that, twelve years after the Birds Directive's entry into force, work on establishing the network of SPAs had really only just begun (see Table 3),[345] with work up to that point having focused principally on hunting controversies and other species protection issues (Ó Briain, 2012).[346] Interestingly, as Stuffmann (1999, p.16) reflects, Denmark – the country which was most reluctant during negotiations regarding the Birds Directive – was the "only one to correctly implement it more or less in due time," and by 1994, "only Denmark and Belgium [had] fully complied with their obligations [under the Birds Directive], and Spain [had] made a considerable effort as 40 per cent of the areas notified in the Community to date [had] been designated by this country" (Stuffmann, 1994, p.205). However, even Denmark would later face the potential prospect of Commission-led infringement proceedings (ultimately averted), because Denmark's designation of sites remained provisional until 1994 (Cichowski, 2007), pending some potential minor changes in boundaries (Koester, 2012).[347]

[345] Albeit that there had, of course, by this time been many European Commission-led legal actions seeking to have SPAs classified (see section 5.5).

[346] Slepcevic (2009, p.385) comments that "the Birds Directive was – with the exception of hunting issues – essentially a dead letter as regards the obligation to designate sites and guarantee their conservation. This only changed in the beginning of the 1990s when the Habitats Directive came into force and the process of creating the Natura 2000 network started."

[347] As Cichowski (2007, p.165) notes, "Prior to [1994], Danish authorities were given considerable latitude in allowing development in previously designated areas and even did so despite Community officials' awareness of the violations...Finally in 1994, following considerable public outcry and complaints arising from a bridge project involving two major bird areas, national implementation improved (Pagh 1999: 309)." Veit Koester, Denmark's senior negotiator at the time of the passage of the Birds and Habitats Directives, reflects, "at that time [i.e. the time of negotiating the Birds Directive], or some years before, we had listed 26 Ramsar Sites, and they were protected, not directly but indirectly, by the planning legislation, nature conservation legislation, and we felt that we could implement the [birds] directive, the habitat protection provisions of the directive to a large extent by the Ramsar Sites, and in fact there were at that time, we had 26 Ramsar Sites with an area of almost 6,000 km^2, so considerable areas compared to the size of Denmark, which is only around 45,000 km^2, although many of the areas were in the sea, outside the land territory" (Koester, 2012).

Table 3: Special Protection Areas under Article 4 of the Birds Directive: number and area of sites classified by each Member State by 31 March 1993 (based on DG XI (1993))

Member State	Member State Area (km^2)	Number of SPAs	Total area of SPAs	Area of SPA as % of Member State Area
Belgium	30,519	36	4,313.06	14.1
Denmark	43,093	111	9,600.92	22.3
Germany	356,949	485	8,501.88	2.4
Greece	131,957	26	1,916.37	1.5
Spain	504,765	139	23,889.10	4.7
France	549,086	91	6,609.40	1.2
Ireland	70,283	20	55.48	0.001
Italy	301,281	74	3,103.78	1.0
Luxembourg	2,586	5	7.09	0.3
Netherlands	41,478	10	3,028.65	7.3
Portugal	92,071	34	3,188.72	3.5
UK	244,139	68	1,877.95	0.8

Indeed, the early implementation of the network of SPAs under the Birds Directive has been described by Stuffmann (1999, p.17) as a "sad story," resulting in "disillusion," according to Gammell (1999, p.9): "[s]ome of us fondly thought that once the Directive was adopted, everything would be perfect. We were to be proven wrong. Member States did not set up their SPA systems within two years. Member States did not always enact adequate legislation. What legislation was enacted, was not always enforced...". One result of this was the Commission's many infringement proceedings against Member States, as mentioned in chapter 1. A second result was that, on the adoption of the Habitats Directive in 1992, the Nature Unit faced the daunting task of implementing the site designation aspects of both the Birds Directive (to a large extent) and the Habitats Directive (in its entirety). And this was a task the Unit had to complete largely without two of the key architects of the Habitats Directive: Henriette Bastrup-Birk left the Unit in 1993, followed in 1994 by the retirement of Claus Stuffmann (European Commission, 1994a, 1995). Stuffmann was replaced by a

Frenchman, Bruno Julien (European Report, 1994a), who is said to have played a central role in translating the Habitats Directive into a living reality (Fernández-Galiano, 2012).[348] Another new recruit to the Nature Unit was an Irishman, Micheal Ó Briain, who joined the Unit in 1993 and has remained there ever since, thus participating in more or less the entire process of the establishment of Natura 2000 (Ó Briain, 2012).

As discussed in chapter 7, in light of their experiences with the Birds Directive, the Member States set out, in negotiating the Habitats Directive, to codify a different, more flexible, and therefore potentially less adversarial, approach to site designations and site protection. Roy Bunce, the UK's senior negotiator at the time, comments, "The progress on the Birds Directive had been very slow, right across Europe. People were worried about the implications of it...I think that a number of Member States, probably including the UK, were a bit naive when they negotiated the Birds Directive, and they didn't expect the SPA network to have such an impact on them as it did. By the time I came on to this particular scene [in 1987], there were quite serious worries about what the SPA network actually implied, and...the Commission had taken several, I think, Member States to the European Court because of their slow designation programme, and we were just beginning to sort of wake up to the fact that the Birds Directive was not just about species, that this business about the provision of SPAs had very serious implications which I think the original negotiators had rather glossed over" (Bunce, 2012).

However, even in light of this dawning realisation, Member States did not necessarily appreciate fully the implications of the Habitats Directive: Hilary Neal, a fellow UK negotiator, reflects, "As it turned out, I think we were a little bit too relaxed about the implications of the [habitats] directive, you know, kind of assuming that it would be OK and that we wouldn't have to do very much because the SSSIs [UK national site protection system] did it already, and I think we thought at the time it was going to be the marine designations that would be the most difficult because we didn't have a system of protection below the low water mark which was effective. We knew that that would be the difficult one, but we, I think, realised once the directive had been adopted and we were starting to think about designation that actually the implications of implementation were going to be much more far reaching than we had ever expected" (Neal, 2012). The UK was not alone in this respect, as Claus Goldberg of Denmark reflects: "When the discussions, negotiations started, I don't think we realised the later impact of the [Habitats] Directive on Danish legislation on Danish nature protection...From the decision on the Birds Directive, I mean it had lived to some extent a rather silent and quiet life. When we designated the bird protection areas we

[348] Without Julien's strength and resolve, commented one interviewee, the Habitats Directive would have died out (Fernández-Galiano, 2012).

didn't have a public hearing process, we didn't inform in detail owners about the designated sites, I mean we had a history of rather detailed nature protection legislation, physical planning, and we thought it more or less fit into the already existing picture and procedures and wouldn't mean...a lot. And in the beginning of the Habitats Directive, I do think we had the same feeling. We had the Bern Convention, there's a lot of similarities, so we thought this might be something like the Bern Convention, while knowing that there would be the European Court and the whole EU system. But still we felt that it might not have a very detailed, a strong impact on nature protection in Denmark, which for sure it has had later on, we have realised later on the huge impact of both directives in relation to Danish nature protection" (Goldberg, 2012).[349]

The legal implications of the Directives, both in terms of site designation and site protection obligations, unfolded over an extended period, as set out in section 8.3 below. It is clear from this history, first, that there was a general reluctance on the part of many Member States to designate and protect sufficient sites (cf. the discussion in chapter 1); and second, in light of this fact, the Commission ended up bringing a raft of legal proceedings leading to decisions of the ECJ clarifying (typically in quite stringent ways) obligations under the Birds and Habitats Directives, as described in section 8.3, which created a feedback loop of sorts, resulting in further reluctance to designate sites. As Krämer (2011, p.191) comments, "there was considerable concern at local level in many Member States that, on a site which would come under [the Habitats Directive], economic or leisure activities would severely be restricted. Under pressure from hunters, fishermen, farmers and other groups, France even went so far, in the summer of 1996, as to freeze its work on a national list for several months, arguing that it was neither clear who would finance the managing of the habitats, nor exactly what activities would be forbidden within a habitat...". Such factors together played an important role in the delayed establishment of the Natura 2000 network (Krämer, 2011)(see Figure 1), the network roughly doubling in size in the decade 2000-2010 (European Commission, 2010b).[350] Interestingly, therefore, despite attempts to introduce a less adversarial process for site designations under the Habitats Directive, the Commission did not end up using the Article 5 process designed to that end (in respect of priority sites)(Cashman,

[349] On reflection, according to Veit Koester, the impacts of Danish nature conservation have been positive, not negative: "I think that the Habitat Directive and also the Bird Conservation Directive, both of them, they have been very, very important. I mean, they are instruments that can block developments which would be detrimental at least to nature conservation....seen from everyday life, they have meant a lot in Denmark, I think. And the situation would have been rather bad without them, especially in the previous years when we had the big development and a good economy and projects everywhere and wise ideas of building this or that and so forth, so I think that they have been very, and they are still very, important" (Koester, 2012).

[350] Krämer (2011, p.188) records details of the development of the network of SPAs over time.

2013; Ó Briain, 2013),[351] and many Member States have instead been subject to legal proceedings aimed, amongst other things, at securing the submission of sufficient sites for designation (Lasén-Díaz, 2001),[352] replicating to some extent the experience under the Birds Directive.[353]

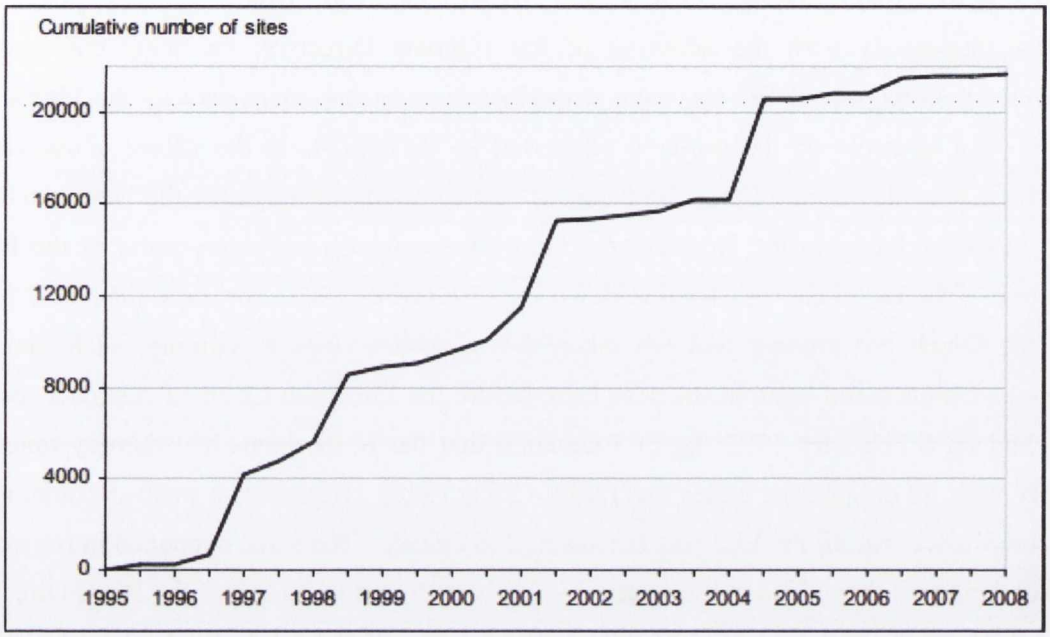

Figure 1: Development of the Natura 2000 network in terms of numbers of sites (from European Commission (2009c, p.15, Figure 8)

Writing of the Birds Directive in 1994, Claus Stuffmann said: "It seems to us that what makes Member States hesitate to designate an area under Community legislation, even if it is already protected under national law, is that areas placed under national protection status can always be victims of arbitration when taking account only national interests. It is quite a different matter, however, when this arbitration must comply with criteria established at Community level....Designating a special area of conservation under the Community directives is not merely another label, but it also constitutes considerable additional legal

[351] i.e. The process allowing the Commission to propose a priority site missing from a national list, subject ultimately to a unanimous decision of the Council.

[352] Lasén-Díaz (2001) cites the fact that as early as November 1997, 36 infringement proceedings were ongoing against all Member States for inadequate implementation of the Habitats Directive.

[353] Why the Article 5 process has never been used is unclear. There are several possible explanations. One would be that the Nature Unit lost the two central negotiators of the Habitats Directive - Claus Stuffmann and Henriette Bastrup-Birk - very soon after the Directive was adopted, such that there was, as it were, a loss of institutional memory regarding the intended purpose of Article 5. A second potential explanation would be that Article 5 presupposes the existence of a scientific disagreement between the Commission and the Member State in question (this was the Commission's argument in ECJ (2012b)), rather than simply a dispute, in principle, over whether a particular site should be designated or not.

protection" (Stuffmann, 1994, p.205). Exactly the same comment could be made of sites under the Habitats Directive; and just as *that* directive was adopted, the Commission was given an important new tool for its enforcement armoury, strengthening the Commission's hand in seeking to have the Natura 2000 network completed and conserved.

8.2.3 Legal enforcement: from 1993, the prospect of fines

Contemporaneously with the adoption of the Habitats Directive, the legal enforcement mechanisms in respect of EU law were strengthened in an important way by the Maastricht Treaty. An example of the problem addressed at Maastricht, in the nature conservation context, is provided by the European Court of Justice's judgment against the Netherlands in Case 236/85, relating to the Netherlands' failure to transpose and apply parts of the Birds Directive. The judgment was handed down on 13 October 1987, but more than four years later the Dutch government had not taken the necessary steps to comply, such that the European Commission brought the case back before the European Court of Justice a second time, and on 6 February 1992 the ECJ declared that the Netherlands had thereby failed to comply with its obligations under the Treaty (ECJ, 1992). However, a mere declaration of non-compliance was all the ECJ was empowered to deliver. The same happened in respect of another supposed green leader, Germany: having been found in breach of the Birds Directive on 17 September 1987 in Case C-412/85, Germany was taken back to the ECJ for failing to comply with that judgment, and was declared to be in breach of the Treaty in that regard on 23 March 1993 (ECJ, 1993b). Again, the result was a mere declaration which could be complied with, or ignored, at will. Thus, whilst "a whole generation of Community law scholars was assured that the authority of the Court's judgments was such that no Member State would dare defy a judgment made against it in an infringement proceeding...[,] as the Commission began to routinely bring actions against Member States allegedly infringing the Treaty, the number of judgments not immediately complied with similarly began to rise. The Court's authority seemed to be coming under threat" (Wägenbaur, 1995, p.940).[354]

In light of such considerations, the Maastricht Treaty, which entered into force in 1993, "finally closed a legal vacuum in EU law, by giving the Court the power to impose financial penalties to enforce compliance with its judgments" (Jack, 2011, p.73). This power was reportedly proposed by the UK, and supported by the other Member States, because they were "disturbed by the non-execution of the Court's judgments" (Várnay, 2006, p.8). While

[354] Wägenbaur (1995) cites the fact that, at 31 December 1993, there were eighty-two outstanding cases where Member States had not complied with a judgment given against them in Article 169 infringement proceedings (i.e. a judgment establishing a substantive breach of EU law), and nine cases in which a second judgment, given under Article 171 (i.e. a judgment establishing a failure to comply with an earlier judgment of the Court), had also been disregarded.

the Commission would take some time to grow into this new power,[355] and while the Commission may not yet have made full use of its potential (Jack, 2011, 2013), the power is nevertheless a mechanism with real potential to concentrate minds in government and thereby to ensure compliance (Wennerås, 2006).

8.2.4 Territorial extent: the marine area

As detailed in chapter 7, the marine area proved something of a tricky issue during negotiations regarding the Habitats Directive, resulting in wording to effect that the Directive applies to "the European territory of the Member States to which the Treaty applies" (replicating the wording used in the Birds Directive)(Habitats Directive, 1992, Article 2(1)). When the precise marine extent of the Habitats Directive fell to be considered in 1999 in a case brought before the UK courts by Greenpeace, the result was quite unexpected from the UK's perspective. As Lasén-Díaz (2001, p.294) records, "[i]n the absence of a stated limit, the UK Government maintained that the Directive should be taken as referring only to territorial waters up to 12 nautical miles. However, the judge accepted Greenpeace's argument that most EU Directives with marine implications such as those relating to fisheries and oil exploration specify a 200-mile limit. The fact that the United Kingdom has applied the 1985 EIA Directive with a limit of up to 200 miles may have helped Greenpeace's case." This interpretation of the territorial extent of the Directive was later confirmed by the ECJ in Case C-6/04, against the UK, in which the Court held that the Habitats Directive (and by extension also the Birds Directive) indeed applies to Member States' exclusive economic zones where they exercise sovereign rights in that area, meaning that the Directives cover a much larger marine area than the Member States had believed - out to c.200 nautical miles (ECJ, 2005c).

As Hilary Neal, then with the UK government, explains, "we made assumptions about the [habitats] directive which we'd signed up to, which have subsequently proved to be wrong, like the limits of territorial waters, we assumed we were signing up to a 12 [nautical] mile limit from baselines and fought the case against Greenpeace on that basis, and it turns out that the court...eventually declares that it was 200 [nautical] miles....For me it was absolutely clear cut that it wasn't 200 miles...we were talking about designating sites for cetaceans...and I questioned the Commission, I said, how can you designate for cetaceans, that go all over the place, what's the point, how can you do that, how can you draw the boundaries, and the response I got was that, well, these cetaceans that we have listed here are the ones that are most residential...The harbour porpoise and the bottlenose dolphin, which are the ones that

[355] The first fine in an environmental case was imposed only in 2000 (ECJ, 2000a), and as at the time of writing of Jack (2013), there had been fines imposed in only 11 cases, across all sectors of EU law.

hang around the coast, and for me, that was, well, Cardigan bay, some of the inlets and those sorts of areas which we could happily designate, you know we've obviously got a job to do to make the marine regulations satisfactory in order to control activities within 12 miles, but we never in our wildest dreams thought that we were going to have to go out to 200 miles...I don't believe it was in anyone's mind that that was what we would have to do...no Member State would have been thinking that..." (Neal, 2012).

Thus, therefore, the ECJ played an important role in expanding the territorial extent of the Habitats and Birds Directives in what could be described as an unintended direction, at least from the Member States' perspective. And the ECJ's influence did not stop there: in fact, from the early nineties, "the European Court of Justice played a crucial role in the process of further Europeanisation of nature policy making, by ruling on appeals over (the lack of) compliance of member states" with the Habitats and Birds Directives (Bogaert and Leroy, 2008, p.191).

8.3 Pushing the boundaries: some ECJ rulings regarding Natura 2000

8.3.1 Site designation under the Birds Directive

To recap, under the Birds Directive in principle the EU's Member States designate[356] SPAs without the European Commission's involvement.[357] Pursuant to Article 4(1) of the Directive, the Member States must, amongst other things, designate the "most suitable territories in number and size" as SPAs for the conservation of the species listed in Annex I to the Directive. Article 4(2) imposes a similar site designation obligation in respect of regularly occurring migratory species not listed in Annex I, "bearing in mind their need for protection in the geographical sea and land area where the Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes", paying particular attention to wetlands. As noted in chapter 4, in 1998 the ECJ held that Important Bird Areas lists, although not legally binding on the Member States concerned, can, by reason of their acknowledged scientific value, be used by the Court as a basis of reference for assessing the extent to which a Member State has complied with its obligation to designate special protection areas (ECJ, 1998).

[356] As highlighted in note 272, the Birds Directive uses the term "classify" (see Article 4(1)); however, "designate" is used throughout this chapter for simplicity, since the Habitats Directive uses "designate", and there is no legally significant difference between the two terms.

[357] See Article 4(1) and (2) of the Birds Directive. The Commission can (and frequently has) become involved in the process by bringing infringement proceedings where a Member State has not designated sufficient SPAs, for example. But in principle, at least, the SPA designation process under the Birds Directive should operate without the Commission's involvement.

While the EU's network of SPAs was to have been established by 1981 (Article 18 of the original version of the Birds Directive (1979)), new sites are still being added to the network, including in countries which were Member States at the time the Birds Directive was adopted (European Commission, 2014). Reasons for this long delay in completing the network are easy to find from the Member States' perspective (cf. also the discussion in chapter 1). First, until the ECJ's 1991 decision in the *Leybucht Dykes* case, the Member States were unsure as to the standard of legal protection to be afforded to SPAs, and were arguably wary of site designation as a result (Baldock, 1992). Second is the simple fact that once an SPA is designated it must legally be protected, imposing management costs and potential restrictions on land uses within the SPA network. Third - and connected to this second reason - is the fact that the selection of SPAs (and their boundaries) is itself a controversial issue, made particularly controversial by two decisions of the ECJ post-dating the adoption of the Habitats Directive in 1992.

First was the ECJ's 1996 decision in the *Lappel Bank* case (ECJ, 1996), discussed in chapter 1, in which the UK government, supported by the French government, argued that in selecting SPAs and their boundaries, Member States should be allowed to take economic considerations into account.[358] The ECJ disagreed, building on its 1993 decision in the Santoña marshes case (ECJ, 1993a) by holding that, in selecting SPAs and defining their boundaries, Member States must act solely on the basis of the ornithological criteria set out in Article 4(1) and (2) of the Birds Directive (ECJ, 1996). Next came a 1998 decision of the ECJ which established that the Member States' margin of discretion in selecting SPAs "does not concern the appropriateness of classifying as [SPAs] the territories which appear the most suitable according to ornithological criteria, but only the application of those criteria for identifying the most suitable territories for conservation of the species in question" (ECJ, 1998, paragraph 61). The combined effect of these judgments was arguably to reinvigorate just the sort of ecology-trumps-economy principles that the Member States had earlier sought to legislate against, in effect, by introducing the Article 6(4) derogation for damaging projects when negotiating the terms of the Habitats Directive. In other words, while the strict protection of SPAs might have been compromised, in part, by the Member States' introduction of the Article 6(4) derogation, these ECJ judgments in 1996 and 1998 ensured that the SPA *designation process* would, at least in principle, remain the preserve of ecology, to the exclusion of socio-economic factors.

[358] Note that this differs from the situation at issue in the *Leybucht Dykes* case. That case related to the reduction in size of a *designated* SPA for birds to accommodate a construction project. The *Lappel Bank* case, on the other hand, related to the selection of SPAs and their boundaries (i.e. pre-designation).

8.3.2 Site protection under the Birds Directive

8.3.2.1 Sites that have not been designated as SPAs but which should have been so designated

Against this backdrop, it is interesting to note that the ECJ has given the Member States a powerful incentive to designate their SPAs, by breathing new life into its (seemingly overruled) decision in the *Leybucht Dykes* case (ECJ, 1991): in the *Basses Corbières* case (ECJ, 2000b) - a decision against France in 2000 - the ECJ held that "areas which have not been classified as SPAs but should have been so classified continue to fall under the [old, stricter] regime governed by the first sentence of Article 4(4)" of the Birds Directive (ECJ, 2000b, paragraph 47). This was, of course, the protective provision at issue in the *Leybucht Dykes* case. The first sentence of Article 4(4) provides, simply, that "[Within SPAs,] Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the [relevant] birds, in so far as these would be significant having regard to the objectives of [Article 4 of the Birds Directive]". The Article 4(4) protection regime does not provide for a derogation for damaging projects, and is buttressed by the ECJ's decision in *Leybucht Dykes*: i.e. economic considerations cannot be regarded as exceptional grounds justifying the reduction in size of an area protected by Article 4(4) of the Birds Directive (ECJ, 1991). Thus, sites that have not been designated as SPAs but which should have been so designated receive stricter legal protection than designated SPAs, since the derogation for damaging projects - Article 6(4) of the Habitats Directive - is available only in respect of designated SPAs (ECJ, 2000b). As the ECJ reasoned, a Member State should not derive an advantage from its failure to comply with EU law (ECJ, 2000b).

8.3.2.2 Designated SPAs

The legal protection afforded to designated SPAs is discussed in section 8.3.4.1 below, since protective provisions of the Habitats Directive apply to SPAs under the Birds Directive as well as to SACs under the Habitats Directive, for the reasons discussed in chapter 7.

8.3.3 Site designation under the Habitats Directive

Given the difficulties experienced in establishing the SPA network, it is unsurprising that the Commission and the Council negotiated a rather different designation process for sites under the Habitats Directive – a process involving a much greater degree of Commission involvement. Indeed, as noted in chapter 7, in the original version of the Habitats Directive the Commission proposed giving itself wide-ranging powers, including a power to identify, in limited circumstances, sites for designation without requiring the relevant Member State's agreement (European Commission, 1988f, Article 5(2)). Predictably this proposal did not

meet with the approval of the Member States, and the position in the Directive as finally adopted was naturally something of a compromise.

To recap: first, under Article 4(1) of the Habitats Directive, each Member State must propose a list of sites - proposed Sites of Community Importance (pSCIs) - in its territory which host habitats listed on Annex I of the Directive or species listed on Annex II. This list of pSCIs must then be transmitted to the European Commission.[359] The Commission examines these national lists at a biogeographical level,[360] and then, in agreement with the relevant Member States, adopts a list of Sites of Community Importance (SCIs) for each biogeographical region, by way of a formal legal Decision.[361] (In practice, several such lists have been adopted over the years for most biogeographical regions, since the Member States have needed periodic nudging by the Commission to submit sufficient sites.) Once a site has been adopted as an SCI, the relevant Member State has six years to designate the site as an SAC,[362] in principle to allow the Member State time to put in place conservation measures, such as a management plan. Under the terms of the Habitats Directive, this entire process was due to have been completed by June 2004 (Hamer, 2007), but as with sites under the Birds Directive, the process remains incomplete (European Commission, 2014).

In addition to its rather different site selection process, the Habitats Directive differs from the Birds Directive in another important way: as highlighted in chapter 7, of the subset of EU biodiversity protected by the Habitats Directive, the Directive singles out certain habitats and species as priority habitats/species,[363] to which certain special protective rules apply. In the context of site selection, it suffices to note that, in the case of sites hosting priority species or habitats, Article 5 of the Habitats Directive allows the Commission to initiate a bilateral consultation process with the relevant Member State where the Commission believes that a site is "essential for the maintenance of that priority natural habitat type or for the survival of that priority species", and should have been submitted for adoption as an SCI. If the dispute remains unresolved after 6 months of consultation, the Commission can submit a proposal to the Council (i.e. the Member States, acting together) relating to the selection of the site as an SCI. The Council, acting unanimously, must take a decision within 3 months of the

[359] Under Article 4(1) of the Habitats Directive.
[360] To recap, the EU now has nine biogeographical regions: the Alpine region, the Atlantic region, the Black Sea region, the Boreal region, the Continental region, the Macaronesian region, the Mediterranean region, the Pannonian region, and the Steppic region. Further, there is now an unofficial "marine Baltic region" first introduced for the 2001-2006 report under Article 17 of the Habitats Directive, and used since for evaluation of marine sites (Evans, 2013). Examining sites at the biogeographical level "makes it easier to check species and habitat conservation trends under similar natural conditions, irrespective of national boundaries" (European Commission, 2010a, p.19).
[361] Article 4(2) of the Habitats Directive.
[362] Article 4(4) of the Habitats Directive.
[363] Identified by an asterisk on Annexes I and II to the Directive.

Commission's proposal. As noted in chapter 7, the Member States and the Commission had high hopes that this provision would allow disputes to be resolved at the level of the Council rather than ending up before the ECJ; in the event, however – as highlighted above – the Article 5 process has never been used by the Commission (Cashman, 2013; Ó Briain, 2013),[364] and many 'failure to designate' cases have ended up before the ECJ in Luxembourg.

Mirroring the situation in respect of SPAs under the Birds Directive, the ECJ has adopted a strict ecological approach to the Member States' selection of sites under the Habitats Directive. In 2000, the ECJ held that "on a proper construction of Article 4(1) of the Habitats Directive, a Member State may not take account of economic, social and cultural requirements or regional and local characteristics, as mentioned in Article 2(3) of [the Habitats Directive],[365] when selecting and defining the boundaries of the sites to be proposed to the Commission as eligible for identification as [SCIs]" (ECJ, 2000c, paragraph 25).

8.3.4 Site protection under the Habitats Directive

Article 6 of the Habitats Directive is the key protective provision for SCIs and SACs under the Habitats Directive, and for SPAs under the Birds Directive. The position in respect of pSCIs under the Habitats Directive - that is, sites that have been proposed to the European Commission but which have yet to be adopted as SCIs - is more complex, and is addressed in section 8.3.4.2.

8.3.4.1 Legal protection afforded to SCIs, SACs, and SPAs

General

Article 6 comprises four paragraphs, which the European Commission (2010a, p.21) summarises as follows: "Whereas Article 6(1) and (2) of the Habitats Directive concern the day-to-day management and conservation of Natura 2000 sites, Articles 6(3) and 6(4) lay down the procedure to be followed when planning new developments that might affect a Natura 2000 site."[366]

Article 6(1) of the Habitats Directive requires the EU's Member States to "establish the necessary conservation measures [for SACs] involving, if need be, appropriate management

[364] Though Cyprus recently argued, unsuccessfully, before the European Court of Justice that the process ought to have been used by the Commission in a dispute regarding site protection for the Cypriot grass snake (*Natrix natrix*)(ECJ, 2012b).

[365] Article 2(3) of the Habitats Directive provides "Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics."

[366] This reference to "new" developments is arguably misleading, since Article 6(3) has been held by the ECJ to cover, for example, an activity that has been carried out for many years but for which a licence is granted annually for a limited period (ECJ, 2004).

plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites." Note that Article 6(1) applies only to SACs and not to pSCIs, SCIs or SPAs. Pursuant to Article 4(5) of the Habitats Directive, Article 6(2), (3) and (4) alone apply to SCIs, since, as noted above, the Member States are given six years from a site's adoption as an SCI to put in place the necessary conservation measures under Article 6(1), and to designate the site as an SAC.

In respect of SPAs under the Birds Directive, pursuant to the Member States' decision to seek to (in effect) overrule the ECJ's decision in the *Leybucht Dykes* case (discussed in chapters 1 and 7), Article 7 of the Habitats Directive substituted obligations arising under Article 6(2), (3) and (4) of the Habitats Directive for obligations arising under the first sentence of Article 4(4) of the Birds Directive (the old, stricter protective regime in respect of SPAs). Presumably Article 6(1) of the Habitats Directive was not applied to SPAs because Article 4(1) and (2) of the Birds Directive already require Member States to take conservation measures of the type described in Article 6(1). In the case of SPAs, however, such conservation measures must be adopted "immediately upon [designation]", according to the European Commission (2010a, p.20).[367] In respect of SACs, the objective of such conservation measures is to ensure that the species and habitat types are maintained or restored to a "favourable conservation status"[368] across their natural range; according to the European Commission (2010a) an analogous requirement applies in respect of SPAs under the Birds Directive.

Article 6(2) of the Habitats Directive might best be regarded as a broad, continuing "general obligation of protection" (ECJ, 2013, paragraph 33), capturing, amongst other things, activities that do not fall neatly within the impact assessment regime governed by Article 6(3), for example (such as ongoing activities that are not subject to licensing or other consent). Article 6(2) (which was based on Article 4(4) of the Birds Directive, as chapter 6 records) provides: "Member States shall take appropriate steps to avoid, in [SPAs, SCIs, and SACs], the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive." Interestingly, the ECJ has held that the obligation under Article 6(2), "is not to be limited to measures intended to avoid external

[367] After all, pursuant to Article 4(1) of the Birds Directive, the species mentioned in Annex I to the Birds Directive must be the subject of "special conservation measures" concerning their habitat in order to ensure their survival and reproduction in their area of distribution, and Article 4(2) of the Directive requires the Member States to take similar measures for regularly occurring migratory species not listed in Annex I.
[368] Defined in Article 1 of the Habitats Directive.

anthropogenic impairment and disturbance but must also, according to the situation that presents itself, include positive measures to preserve or improve the state of the site" (ECJ, 2010a, paragraph 59). Such positive measures might include, for example, "measures to prevent natural developments that may cause the conservation status of species and habitats…to deteriorate" (ECJ, 2005c, paragraph 34). In terms of the substantive level of legal protection provided by Article 6(2), the position is clear: "Article 6(2) and Article 6(3) are designed to ensure the same level of protection of natural habitats and habitats of species (see, to this effect, Case C-404/09 Commission v Spain...)" (ECJ, 2013, paragraph 32).

The leading case on the general standard of protection provided by Article 6(3) of the Habitats Directive is the ECJ's 2004 decision in Case C-127/02 *Waddenzee* (ECJ, 2004). The case concerned the interpretation of Article 6(3), which determines the situations in which an appropriate assessment is needed in respect of the impacts of any plan or project on an SCI, SAC, or SPA, and the conditions under which permission for such a plan or project can be granted following an appropriate assessment. The ECJ's decision in the *Waddenzee* case thus impacts directly on the circumstances in which Member States have to rely on the Article 6(4) derogation for damaging projects: if a plan or project fails the test in Article 6(3), the only legal route available is the derogation in Article 6(4), which is limited in nature.

On the issue of the need for an appropriate assessment, Article 6(3) seems clear:

> "Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives" (Habitats Directive, Article 6(3)).

However, the ECJ gave a precautionary spin to this wording in the *Waddenzee* case: the wording, the Court held:

> "must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects" (ECJ, 2004, paragraph 44, emphasis added).

In other words, an appropriate assessment is needed where significant effects on a protected site cannot be ruled out, rather than only where significant effects have been demonstrated to be likely, as the wording of Article 6(3) would appear to dictate.

Further, Article 6(3) provides:

> "In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of [the Article 6(4) derogation], the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned" (Habitats Directive, Article 6(3)).

That is the case, the ECJ held, only "where no reasonable scientific doubt remains as to the absence of such effects" (ECJ, 2004, paragraph 59).[369] This clearly sets a high threshold, which many plans and projects cannot pass. If they are to proceed, the only available route is the derogation in Article 6(4) of the Habitats Directive.

Article 6(4) allows plans or projects that have been the subject of a negative assessment to proceed, but only where three tightly-defined conditions are met: (1) an "absence of alternative solutions" must be demonstrated; (2) "imperative reasons of overriding public interest" for proceeding with the plan or project must be demonstrated (and these are limited in cases involving priority species or habitats);[370] and (3) the Member State in question must take "all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected" (Habitats Directive, Article 6(4)).

For present purposes it suffices to note that Article 6(4) is on paper interpreted restrictively by the Commission,[371] and has been interpreted restrictively by the ECJ, albeit that not many cases have come before the ECJ regarding the provision (Clutten and Tafur, 2012).[372] In a case regarding the routing of a motorway in Portugal, the ECJ made it clear that the burden of establishing an absence of alternatives for the purpose of Article 6(4) falls on the Member State in question. While the Portuguese authorities had examined certain alternative

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[369] More recently, the ECJ has restated the full legal obligation as follows: "Authorisation for a plan or project, as referred to in Article 6(3) of the Habitats Directive, may therefore be given only on condition that the competent authorities – once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field – are certain that the plan or project will not have lasting adverse effects on the integrity of that site. That is so where no reasonable scientific doubt remains as to the absence of such effects (see, to this effect, Case C-404/09 Commission v Spain, paragraph 99, and Solvay and Others, paragraph 67)" (ECJ, 2013, paragraph 40).

[370] Article 6(4) provides: "Where the site concerned hosts a priority natural habitat type and/or a priority species, the only [imperative reasons of overriding public interest] which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."

[371] For example, see the Commission's guidance documents on Article 6(4) (European Commission, 2007d), and on wind energy developments and Natura 2000 (European Commission, 2010a).

[372] For two recent examples on the issue of imperative reasons of overriding public interest, see ECJ (2012a) and ECJ (2012c).

motorway routes in the case, it was "not apparent from the file that those authorities examined solutions falling outside [the] SPA and to the west of [certain settlements], although, on the basis of information supplied by the Commission, it cannot be ruled out immediately that such solutions were capable of amounting to alternative solutions within the meaning of Article 6(4) of the Habitats Directive, even if they were, as asserted by the Portuguese Republic, liable to present certain difficulties" (ECJ, 2006b, paragraph 38). In other words, it is not for an objector to demonstrate that an alternative solution exists for the purposes of Article 6(4); rather, the burden is on the relevant national authority to demonstrate an absence of alternatives.

Similarly, in the Commission's view Article 6(4) is "only applicable under…strict conditions and will only be passed in exceptional circumstances" (European Commission, 2010a, p.86). Specifically, "it falls on whoever wants to make use of [the Article 6(4)] exception to prove, as a prerequisite, that the [conditions required by the Directive] do indeed exist in each particular case" (European Commission, 2007d, p.4). In the case of "imperative reasons of overriding public interest", the Commission argues that "the public interest can only be overriding if it is a long-term interest; short term economic interests or other interests which would only yield short-term benefits for..society would not appear to be sufficient to outweigh the long-term conservation interests protected by the Directive" (European Commission, 2010a, p.89). Further, in considering compensatory measures under Article 6(4), the Commission's guidance provides, in effect, for like-for-like compensation (e.g. like-for-like replacement habitat)(DECC, 2010h), at ratios "generally well above 1:1" (European Commission, 2007d, p.18).

In this regard, as Hilary Neal, one of the UK's negotiators of the Habitats Directive reflects, "another thing, I think, that we were slightly naive to was this whole question of compensatory habitat under Article 6(4), where I think the assumption of everybody was, because we thought the number of sites we would be designating would be relatively limited, you know, close to the SSSI network or boundaries would be tightly drawn, we kind of assumed that if you went through the process and damaged an SAC for socio-economic reasons, that it would be enough to simply designate an alternative site somewhere else, and that is what we thought was meant by the integrity of the network....but [the Commission] took...a sort of a maximalist view of, you basically designate almost everything you've got that comes within that habitat type, and that means that if you damage it that means you've got to recreate it somewhere else, not just designate something else somewhere else...and so that whole question of compensatory habitat was a case of, well, you've actually got to spend money – or the developer has got to spend money if it insists on proceeding along those lines

– which adds obviously to the cost of the development, it can be massively difficult to achieve because you technically can't recreate some habitats, and this was hovering in the margins of the discussion in the recent consideration of the Severn barrage..." (Neal, 2012).

Priority habitats: integrity of the site

A recent landmark judgment of the ECJ has clarified the protection to be afforded under Article 6 to Natura 2000 sites for priority habitats. The case concerned a road scheme in Ireland which would have resulted in the permanent loss of approximately 1.47 hectares of protected limestone pavement – a priority habitat – within a distinct sub-area of 85 hectares, forming part of a total area of 270 hectares of such limestone pavement in the Lough Corrib Natura 2000 site. Granting planning permission for the project, Ireland's planning appeals board (An Bord Pleanála) had decided that the project would have a locally significant negative impact on the site, but that such an impact would not "adversely affect the integrity of the site" for the purposes of Article 6(3) of the Habitats Directive, such that it would not be necessary to apply the Article 6(4) derogation. The issue of the correct interpretation of the point was referred to the ECJ by Ireland's Supreme Court, following a case brought by environmentalist Peter Sweetman. Unusually, the Irish government - at the time under a Green Party Minister for the Environment - supported Sweetman's interpretation that Article 6(4) was necessarily engaged; less unusually, so too did the Commission. Opposing this view were Galway City and County Councils, Ireland's planning appeals board, Greece and the UK. The ECJ (2013, paragraph 46) sided with Sweetman and Ireland, holding that the integrity of a Natura 2000 site like Lough Corrib will be adversely affected where "the competent national authority concludes that [the] plan or project [in question] will lead to the lasting and irreparable loss of the whole or part of a priority natural habitat type whose conservation was the objective that justified the designation of the site concerned" as a Natura 2000 site.

The decision, handed down in April 2013, has far-reaching implications for priority habitats across the EU, of which there were 72 in total in 2007 (EEA, 2007). From this point on, therefore, any partial, irreplaceable loss of a priority habitat whose conservation was the objective that justified the designation of the site concerned must automatically be held to affect the integrity of the Natura 2000 site in question. The result is that projects which will permanently damage priority habitats within the Natura 2000 network will in principle be able to proceed only in very limited circumstances, via the derogation in Article 6(4).

8.3.4.2 Legal protection afforded to pSCIs

As noted above, the protection afforded to pSCIs - that is, sites that have been proposed to the European Commission but which have yet to be adopted as SCIs - is complex.

The first relevant decision came in the *Dragaggi* case in 2005, with the ECJ holding that, on a proper construction of Article 4(5) of the Habitats Directive, the protective measures prescribed in Article 6(2), (3) and (4) of the Directive are required only as regards sites which have been adopted as SCIs by the Commission (ECJ, 2005b). However, the ECJ continued, "This does not mean that the Member States are not to protect sites as soon as they propose them...[to the Commission on their national list] as [pSCIs]" (ECJ, 2005b, paragraph 26). In respect of such pSCIs, the ECJ held, Member States are required to take protective measures that are "appropriate, from the point of view of the Directive's conservation objective, for the purpose of safeguarding the relevant ecological interest which those sites have at national level" (ECJ, 2005b, paragraph 30). In 2006, in the *Bund Naturschutz* case, the ECJ attempted to clarify the content of such appropriate protective measures, holding that "Member States must...take all the measures necessary to avoid interventions which incur the risk of seriously compromising the ecological characteristics of [pSCIs]" (ECJ, 2006a, paragraph 51).[373] There is a strong argument that this excludes the use of the Article 6(4) derogation for damaging projects in respect of pSCIs, at least in certain cases. Such an argument is supported by four facts (and by Hamer (2007)): First, the ECJ reasoned to its conclusion in the *Bund Naturschutz* case by explaining that,

> "at the time of the decision which the Commission is called upon to take [i.e. the decision regarding which sites to adopt as SCIs], the sites identified [as pSCIs] by the Member States must reflect the situation on the basis of which the scientific evaluations of [pSCIs] have been carried out...If that were not the case, the [EU] decision-making process which is not only based on the integrity of the sites as notified by the Member States, but is also characterised by the ecological comparisons between the different sites proposed by the Member States, would run the risk of being distorted and the Commission would no longer be in a position to fulfil its duties in the area concerned" (ECJ, 2006a, paragraphs 41-42).

[373] Interestingly, the ECJ's "seriously compromising" language seems to have been borrowed from an earlier ECJ decision, albeit that this is not mentioned in the *Bund Naturschutz* judgment. The case in question is *Inter-Environnement Wallonie*, in which the ECJ held that EU law requires the Member States to refrain, during the period laid down for an EU directive's implementation into national law, from adopting measures "liable seriously to compromise the result prescribed" (ECJ, 1997, paragraph 45). By analogy, the *Bund Naturschutz* judgment would appear to require Member States not to authorise interventions, via Article 6(4), that seriously comprise the ecological characteristics of a pSCI (i.e. during the period when the site is under consideration for adoption as an SCI by the Commission).

Such reasoning would appear to exclude the use of the Article 6(4) derogation in respect of pSCIs, since a pSCI that had been damaged by a project via Article 6(4) would almost certainly no longer reflect the situation on the basis of which the scientific evaluation of the site had been carried out. Second, the European Commission's guidance document on Article 6(4) explicitly states that Article 6(2) to (4) "do not apply to sites eligible for identification as sites of Community importance on the national lists transmitted to the Commission (pSCI)",[374] and refers to the two ECJ decisions just discussed (European Commission, 2007d, p.3, footnote 1). Third, the Advocate General in the *Bund Naturschutz* case argued in his Opinion to the ECJ that the Article 6(4) derogation should be available in respect of pSCIs (ECJ, 2006c, paragraph 34), but the ECJ chose not to follow the Advocate General's argument on this point, instead proposing its own test, as described above. Fourth, the European Commission reacted to the ECJ's decision in the *Bund Naturschutz* case by greatly accelerating its SCI adoption process, thereby reducing the time that sites would spend as pSCIs, presumably as a result of its own – and perhaps also the Member States' – view (or fear) that the Article 6(4) derogation would not be available in respect of pSCIs, many of which are in the marine area beyond 12 nautical miles, given the ECJ's relatively recent clarification that the Habitats Directive applies to that area (ECJ, 2005c); this marine area is of course also an area for numerous development activities, such as oil and gas exploration.[375] Thus, like sites that have not been designated as SPAs but which should have been so designated under the Birds Directive, which benefit from stricter protection than SPAs (see section 8.3.2.1), pSCIs under the Habitats Directive arguably benefit from a stricter level of legal protection than fully designated SACs. While this might seem counterintuitive, there would be justifiable policy reasons for this position: in the case of the Birds Directive, the Member States are thereby incentivised to complete their SPA designation processes; and in the case of the Habitats Directive, the Commission is thereby in a position to make its scientific evaluations at the SCI adoption stage on the basis of uncompromised sites.

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[374] Note that the Commission's guidance does not state that Article 6(2) to (4) do not *need* to be applied to pSCIs; it states that those provisions "do not apply".

[375] The ECJ's judgment was on 14 September 2006 (ECJ, 2006a). As at that date, there had been only one round of SCI adoptions for each biogeographical region covered by the Habitats Directive at that time, notwithstanding the fact that the Directive was adopted in 1992 (SCI adoptions took place in the Alpine region: on 22 December 2003; Atlantic region: on 7 December 2004; Boreal region: on 13 January 2005; Continental region: on 7 December 2004; Macaronesian region: on 28 December 2001; Mediterranean region: on 19 July 2006)(European Commission, 2013f). However, since the date of ECJ's judgment in the *Bund Naturschutz* case, for the regions just mentioned there have been seven additional rounds of SCI adoptions in all regions except in respect of the (smaller) Macaronesian region, where there have been four additional rounds. The pattern now appears to be annual adoptions of SCIs, taking place in winter each year. See European Commission (2013f).

It should be noted, for completeness, that one could argue that the *Bund Naturschutz* decision (ECJ, 2006a) offers pSCIs weaker protection than SCIs, SACs, and SPAs, and that certain Member States have nevertheless decided to go beyond their EU law obligations by applying protection equivalent to Article 6(2) to (4) to pSCIs (e.g. Ireland and the UK). Proponents of this view could point to the ECJ's decision in the *Dragaggi* case, which held that the protective measures prescribed in Article 6(2), (3) and (4) of the Directive are required only once a site has been adopted as an SCI (ECJ, 2005b), which arguably implies that Member States can choose to apply those provisions to pSCIs. Proponents of this view could also perhaps point to the ECJ's decision in the Iberian lynx case (ECJ, 2010b), which concerned a pSCI. In the *Bund Naturschutz* case, the ECJ held (at paragraph 46; emphasis added): "[In respect of pSCIs,] Member States cannot...authorise interventions which may pose the risk of seriously compromising the ecological characteristics of a site, as defined by [the assessment criteria listed in the first part of Annex III to the Habitats Directive]. *This is particularly the case when an intervention poses the risk either of significantly reducing the area of a site, or of leading to the disappearance of priority species present on the site, or, finally, of having as an outcome the destruction of the site or the destruction of its representative characteristics.*" In the Iberian lynx case, the ECJ focused on the italicised sentence just quoted, holding that "the evidence before the Court is not sufficient for it to find that the project for upgrading the country road, accompanied by the corrective measures, constitutes in itself intervention of a kind which places the Iberian lynx on the site concerned in danger of extinction and which, accordingly, risks seriously compromising the ecological characteristics of that site" (paragraph 52). It is important to note, however, that the *Bund Naturschutz* judgment states "This is particularly the case"; it does not state "This is the case" or "This is only the case", such that "seriously compromising the ecological characteristics of a site" is evidently not limited to the matters mentioned in the italicised sentence just quoted.[376] Further, a project that proceeded via the Article 6(4) derogation could, of course, fall within the terms of the italicised sentence, because, for example, the project would risk significantly reducing the area of a site. Thus, at least some Article 6(4) projects must surely fall foul of the ECJ's interpretation in the *Bund Naturschutz* case.

[376] This is further supported by the fact that the ECJ's more recent judgment in Case C-43/10 provides (emphasis added): "The Member States are required, under that directive, to take protective measures that are appropriate, having regard to the directive's conservation objective, for the purpose of safeguarding the relevant ecological interest which those sites have at national level (see Dragaggi and Others, paragraph 30) and cannot therefore consent to interventions which may create the risk of seriously compromising the ecological characteristics of those sites, *for example* interventions which create the risk of significantly reducing the surface area of a site, of leading to the disappearance of priority species present on that site, or, finally, of having as an outcome the destruction of the site or the eradication of its representative characteristics (see Case C-244/05 Bund Naturschutz in Bayern and Others [2006] ECR I-8445, paragraph 46, and Case C-340/10 Commission v Cyprus [2012] ECR I-0000, paragraph 44)" (ECJ, 2012a, paragraph 104).

8.3.5 Summary

The strict site designation and site protection obligations discussed above have set the nature conservation bar high in the EU, but have arguably contributed to the prolonged delay in completing the Natura 2000 network, and to the concomitant raft of Commission-led legal proceedings aimed at forcing the EU's Member States to designate sufficient Natura 2000 sites, and subsequently to protect them.[377] Indeed, it is perhaps no surprise that EU nature conservation law is consistently one of the most heavily litigated fields in the EU environmental sector, comprising some 23% of all environmental cases handled by the European Commission in 2012 (European Commission, 2013e).

8.4 The Sabor dam and the Severn barrage: acute conflicts

8.4.1 Introduction

Having thus surveyed some of the ECJ's important judgments in respect of Natura 2000 sites, we now turn to consider how acute conflicts under Article 6(4) play out on the ground, focusing on two cases in the renewable energy sector: a hydroelectric dam in Portugal's Sabor valley (the Sabor dam), and proposals for a tidal barrage in the UK's Severn estuary (the Severn barrage). Both projects were promoted, at least in part, on the basis of their potential for reducing greenhouse gas emissions. The Severn barrage, for example, would make a sizeable contribution to the UK's renewable energy targets, and hence to the UK's current efforts to address climate change (SDC, 2007).

However, the UK government concluded in 2010 that it "does not see a strategic case to bring forward a Severn tidal power scheme in the immediate term [since]…[t]he costs and risks for the taxpayer and energy consumer would be excessive compared to other low-carbon energy options" (DECC, 2010a, p.8), and the project would be unlikely to be operational in time to contribute to the UK's 2020 energy and emissions reduction targets (Defra and DECC, 2010a, b). In the immediate aftermath of the government's decision, much was made of the projected cost of the project (up to £34.3 billion (DECC, 2010g)), which arguably led the government to favour other technologies, in other places, at least in the short to medium term (e.g. see Harvey (2010)). While a focus on the likely financial cost of the project is understandable given the prevailing economic climate, and while financial cost was certainly an important factor in the UK government's decision (DECC, 2010g), any such focus risks underplaying two important points. First, the UK government acknowledged at the time that there may be a review of the case for Severn tidal power at some later date (DECC, 2010g), and, sooner than expected, the barrage idea is reportedly being re-examined by the

[377] For recent examples of such proceedings, see European Court of Justice, 2007a and 2010.

government (BBC, 2012, 2013). Second, and more importantly, "regulatory barriers," according to the government, "create uncertainties that would add to the cost and risk of construction" of a barrage (DECC, 2010g, p.8).

As this section aims to show, such regulatory barriers are a very important factor in any discussion of large renewable energy projects in the EU. In particular, the strictness of the EU's biodiversity protection regime could in any event have necessitated the rejection of the Severn project, and could yet necessitate the rejection of other large renewable energy projects across the EU.[378] In other words, it may not be possible as a matter of EU law for national authorities to grant permission for the construction of such projects. The potential for such difficulties will be shown to be highly visible to policymakers, and could potentially trigger negative impacts in terms of the rule of law, and negative feedbacks on nature conservation policies in the EU and, by way of precedent, globally.

8.4.2 Test cases?

The Severn barrage has been cited in the past as a test case: "[T]he Severn barrage is a test case for a new political proposition: that it is all right to cause massive environmental damage in order to tackle other potentially catastrophic environmental problems – such as the warming and sea level rise that will come with climate change" (Clover, 2009). However, this is not, in fact, a new political proposition in the EU, since it has already been tested by Portugal's Sabor dam, which is currently under construction, and expected to begin producing electricity in 2014 (EDP, 2011). When complete, the main dam - which will be >100m high (EDF, 2007), and located near the mouth of the Sabor river in north-eastern Portugal - will create a reservoir around 50 km long, almost entirely within two Natura 2000 sites (EDP, 2002; Natura 2000 viewer, 2013).

Writing before construction of the Sabor dam was approved, Freitas and Horta (2003, p.10) described the projected biodiversity impacts as follows:

> "A dam on the Sabor River would destroy one of Europe's few remaining regions of extraordinary biodiversity, and one that is home to unique cultural traditions. Much of the Sabor valley in northeastern Portugal [Figure 2] is part of the Natura 2000 network, and several habitats along the river are classified as priority conservation areas [the subset of EU protected habitats that are given the highest priority in view of

[378] Note that the ECJ has recently ruled that Member States are entitled to introduce even stricter rules than those set out in the Habitats and Birds Directives to protect Natura 2000 sites from developments such as wind farms; see ECJ (2011b, paragraph 58), which provides: "the Birds and Habitats Directives, in particular Article 6(3) of the Habitats Directive, do not preclude a more stringent national protective measure which imposes an absolute prohibition on the construction of wind turbines not intended for self-consumption within areas forming part of the Natura 2000 network, without any requirement for an assessment of the environmental impact of the individual project or plan on the site concerned forming part of that network."

their danger of disappearance]. The region contains some of the few remnants of ancient Mediterranean native forest ecosystems, interspersed with low intensity agriculture of olive and almond trees. The Sabor valley is rich in endemic plant species and a critical habitat for endangered bird species such as the Bonelli's eagle, the golden eagle and the black stork, which nest on the steep cliff formations along the valley. The valley itself is a migratory corridor for wolves [a priority species in Portugal under the Habitats Directive] and other wildlife and the Sabor is the spawning ground for fish species, such as the barbel, which annually swim up-river to reproduce."

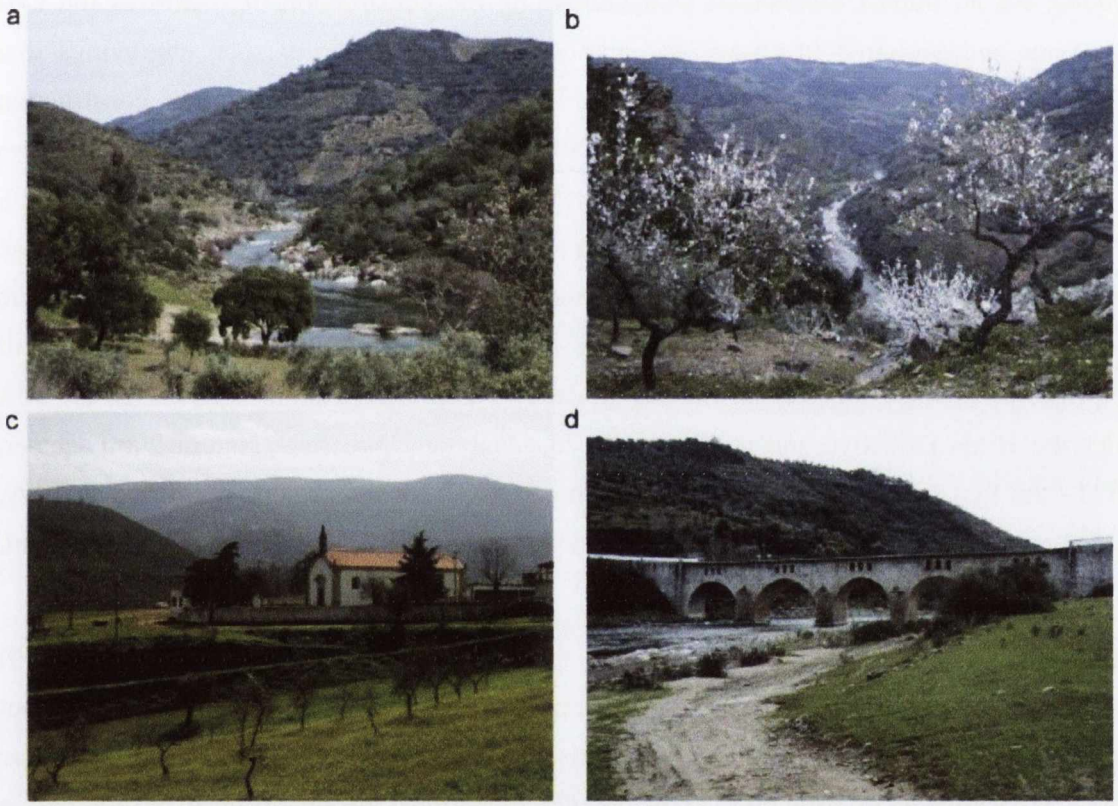

Figure 2: (a) the Sabor valley, near the Ponte de Remondes, looking north-east; (b) another view of the Sabor valley, with flowering almonds in the foreground; (c) the church of Santo Antão da Barca, which will be submerged when the Sabor dam is completed; and (d) the historic Ponte de Remondes, which will also be submerged. All photos: present author, March 2010.

The fact that the Sabor dam was approved by the Portuguese authorities in spite of such projected impacts, and in full knowledge of the European Commission (as discussed in section 8.4.3), might appear to contradict the argument that the EU's strict biodiversity

protection regime could necessitate the rejection of many large renewable energy projects. However, there is no such contradiction. Rather, it is strongly arguable that it was not possible as a matter of EU law for Portugal's authorities to grant permission for the Sabor dam, but, as discussed below, the European Commission arguably did not enforce the EU law position as one might have expected.

8.4.3 The Sabor dam

8.4.3.1 Introduction

The proximate trigger for dam-building in Portugal's Sabor valley was the cessation of dam-building in a nearby valley. In November 1994, the Portuguese media revealed that, whilst carrying out an impact assessment study regarding the construction of a dam in the Côa valley, the archaeologist in charge had noticed a large number of rock engravings that appeared to be of Palaeolithic age (Gonçalves, 1996). In light of this revelation, construction of the Côa dam ceased in 1995 (Gonçalves, 1996), and in 1998 the Prehistoric Rock Art Sites in the Côa Valley was inscribed on the World Heritage List by UNESCO (WHC, 1999). Having thus shelved its plans for a dam in that part of the Côa valley, in 1996 the Portuguese government announced plans for a dam in the nearby Sabor valley (SPEA and BirdLife International, 2006). The proposed Sabor dam quickly ran into legal difficulties. In view of the projected adverse impacts on the Sabor valley's two Natura 2000 sites - then an SPA under the Birds Directive and a pSCI under the Habitats Directive (Natura 2000 viewer, 2013) - the first environmental impact assessment (EIA) for the project, published in 1999, recommended that the proposal should be withdrawn (SPEA and BirdLife International, 2006).

The Portuguese government was not deterred, however, and sought to apply the Article 6(4) derogation for damaging projects, notwithstanding the fact that the derogation is arguably not available in respect of impacts on a pSCI, as discussed in section 8.3.4.2.[379] And even where Article 6(4) applies in principle, to recap: (1) there must be an absence of alternative solutions; (2) there must be imperative reasons of overriding public interest for carrying out the project (which are limited in the case of priority habitats and species, which are present in the Sabor valley); and (3) all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected must be taken.

[379] The ECJ judgment clarifying this point (ECJ, 2006a) was only handed down in September 2006, while the Sabor dam was approved at the national level in June 2004. Thus, this argument almost certainly did not arise pre-approval of the dam, and to the present author's knowledge the argument has not been raised since. Nevertheless, it is strongly arguable that approval of the dam by Portuguese authorities in June 2004, using the Article 6(4) derogation, was in breach of EU law, as clarified by the ECJ in September 2006, since the Sabor dam seems certain to be an intervention "which incur[s] the risk of seriously compromising the ecological characteristics of [the then Rio Sabor e Maçãs pSCI]" (ECJ, 2006a, paragraph 51).

In view of this framework, the Portuguese government decided that alternatives would need to be considered before a final decision could be taken regarding the Sabor dam (SPEA and BirdLife International, 2006). The alternative site selected for consideration? The upper Côa valley - upstream of the World Heritage Site, some distance from the protected engravings (EDP, 2002).

In June 2002, a general election returned a new government in Portugal, with Prime Minister José Manuel Barroso at its helm. Shortly thereafter, in September 2002, an EIA was published comparing the Côa and the Sabor valleys as potential locations for a dam (EDP, 2002). The Côa project - which would comprise a series of smaller dams - would be more expensive, the EIA concluded, and would produce less electricity than a dam in the Sabor valley, but would have fewer impacts on Natura 2000 (EDP, 2002; SPEA and BirdLife International, 2006). In light of this EIA, Portugal's statutory nature conservation agency (then the ICN) published a report in 2003 stating that the Sabor option would be unlawful pursuant to the Habitats Directive, given the project's projected impacts on Natura 2000, the existence of the Côa valley as an alternative, and the impossibility of compensating adequately for the damage that would be caused (European Commission, 2007f; SPEA and BirdLife International, 2006). In spite of this report, on 15 June 2004 the Portuguese government formally approved the construction of the Sabor dam (European Commission, 2004). Less than one month later, José Manuel Barroso left his job as Prime Minister of Portugal to take up a new position: President of the European Commission, a post he holds to this day.

8.4.3.2 Legal issues

By the time the Sabor dam was approved at the national level, the European Commission was well aware of the proposal and its potential impacts on Natura 2000. Indeed, following the publication of the ICN's 2003 report, the Liga para a Protecção da Natureza, a Portuguese NGO, and the Plataforma Sabor Livre, an umbrella organisation of NGOs, filed complaints with the Commission regarding the legality of the proposed Sabor dam (General Court, 2009; LPN, undated).

Given the strict protection afforded to Natura 2000 sites by EU law, the odds seemed stacked against the dam. In October 2005, the Commission launched infringement proceedings against Portugal (European Commission, 2006a), and throughout 2006 it seemed that the Commission remained resolutely in favour of pursuing these proceedings, which raised issues regarding all three conditions of the Article 6(4) derogation. In respect of alternatives, for example, there seemed to be a clear breach of Article 6(4), given the existence of the Côa alternative; and additional potential alternatives kept emerging, a result of the Portuguese

government's incessant drive to expand the country's hydroelectric capacity. In 2007, for example, Portugal announced its National Dam Programme, which foresees ten additional new dams being built, six of which are to be in the Douro valley region, like the Sabor dam (PNBEPH, 2011).[380] In advance of this announcement, an internal European Commission briefing note, obtained under access to information legislation, recorded that:

> "Of all these [then five dam] proposals, Sabor is the most damaging for nature but the Portuguese are not prepared, it would seem, to see any of the others as alternatives as they want them all!" (European Commission, 2006a)

This drive for hydroelectric power stems, at least in part, from Portugal's ambitious renewable energy targets and obligations: by 2020, Portugal aims to produce some 60% of its electricity from renewable sources (Portuguese government, 2010), and it is legally obliged to ensure at least a 31% share of energy from renewable sources in the country's gross final consumption of energy in 2020 (from 20.5% in 2005)(Renewable Energy Directive, 2009). However, as Melo (2009) highlights, Portugal's entire large dam programme (comprising, at that time, twelve new dams including the Sabor) is worth no more than a year of business as usual increase in consumption in Portugal; and as Paterson et al. (2008, p.1353) note, "the studies used to support the Sabor project did not evaluate the effects of future climate change", and hence made no mention of an assessment of the long-term viability of hydropower in the region.

8.4.3.3 The Commission's change of heart

In early 2007, shortly before Portugal's assumption of the Presidency of the Council, the Commission had a change of heart regarding its infringement proceedings. In February 2007, Commission President Barroso - who, to recap, was Prime Minister of Portugal when the Sabor dam was approved at the national level - received an internal briefing note regarding the ongoing Sabor dispute (European Commission, 2007c). The preliminary legal assessment has been redacted from the copy available to the present author, though there seems little doubt what the assessment must have said, given what had gone before.

In April 2007, President Barroso received a further briefing (European Commission, 2007b), which summarised the position at that time:

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[380] The European Commission (2011a, p.4) records that "the Portuguese authorities state that the other dams in the national dam programme, particularly those in the Douro valley, presented a level of performance, in terms of water-holding capacity, turbine efficiency and speed of response, that was clearly below [the] Sabor in fulfilling the proposed aims, particularly that of augmenting the level of wind energy. The national programme's dams should be seen as a necessary complement and not an alternative to the…Sabor dam, in view of the highly ambitious energy targets that the Portuguese Government had set itself." Writing in an industry publication, Lopes Santos et al. (2010), representatives of the EDP (the utility company behind the Sabor dam), develop this argument in more depth.

> "The Commission issued a Letter of Formal Notice on 18.10.05 in which it considered that the project breached the Habitats Directive...namely because [the Côa dam] should be considered as an alternative solution (less impacts on the Natura 2000 sites) and the public interest justifications invoked by the Portuguese authorities were not accurate and not proportional to the damages caused by the project in the Natura 2000 network.[381]
>
> In January 2007 the Portuguese authorities provided some complementary studies they had announced in July 2006 aimed at justifying the project and at replying [to] some questions asked by the Commission services in November 2006. The Portuguese authorities basically argued that (1) the impacts on the Natura 2000 sites were overestimated by the previous impact studies, (2) [the Côa project] would be 70% more expensive and less efficient (both technically and economically) and (3) would be operational 5-7 years later than [the Sabor project]."

Notwithstanding this summary, and the fact that the points reportedly raised by the Portuguese government could not be regarded as adequately addressing the conditions of Article 6(4), a mere three months after President Barroso received this briefing, the Director General of DG Environment indicated to the Portuguese government that the Commission was on the verge of closing its infringement proceedings:

> "If the above elements [a list of additional compensatory measures plus a timetable for their implementation] are made available to us during August [2007]..., we would have the legal basis to recommend to the College [of Commissioners] the closure of the [Sabor] case at the earliest opportunity..." (European Commission, 2007h)

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[381] According to the European Commission (2007b),"The Portuguese government decided on 15.6.04 to execute the project in the [Sabor] location, on the basis of reasons of public interest linked to (1) the reduction of greenhouse gases (the dam would operate as back-up of a network of wind-farms, allowing for a 1% reduction of CO_2 emissions in Portugal), (2) the prevention of floods in the Douro valley, and (3) the protection of an archaeological rock engravings site." (Interestingly, the Portuguese government thus sought to justify its choice of the Sabor valley on the basis, in part, that this would help to preserve rock engravings in the Côa valley. Such reasoning arguably unravels, however, when one considers that the Portuguese government chose the Côa valley as *the* alternative site for consideration in full knowledge of the existence of rock engravings in the valley.) An internal European Commission (2006a) briefing note records that, "To date the Commission has not accepted the arguments of the Portuguese government on these issues." This is fleshed out in a later internal Commission briefing note as follows: "The Commission contested the reasons of public interest linked to the flooding protection and the greenhouse gases reduction invoked in the authorisation of the project....A map showing the flooded areas..., with and without dam, for more or less frequently occurring floods (once every 10 years and once every 50 years) show the difference to be quite small and not very relevant for the more frequent floods, while it would be slightly more important for the less frequent ones. ...Concerning the reduction of production of CO_2....the initial reduction due to the Sabor dam, of 270,000 tons/year, would...be of the order of 6 to 8% of the Portuguese commitment for reductions in the sector of energy generation and supply, and less than 1% of the total production of CO_2 in Portugal" (European Commission, 2007a).

In other words, between April 2007, when President Barroso received his further briefing note, and July 2007, when the Commission wrote to the Portuguese authorities in the above terms, the Commission appears, for some reason, to have changed its mind regarding two of the three conditions of Article 6(4) of the Habitats Directive, with only the issue of compensatory measures remaining outstanding. This remaining issue was evidently resolved to the Commission's satisfaction, since the infringement proceedings were formally dropped on 28 February 2008 (European Commission, 2008), a decision that is effectively immune from legal challenge (Hedemann-Robinson, 2007). The compensatory measures to be implemented:

> "include restoring the Vilariça stream (important to fish), improving and restoring the habitats of several tributaries of the river Sabor, ensuring the continuity of ecosystems in tributaries of the river Sabor, improving the river corridor of "Alto et Médio Sabor" and the river Maçãs, improving and protecting priority habitats in the area surrounding the dam basin, creating new shelters for bats, an otter and mole ["mole" presumably refers here to the Pyrenean desman (*Galemys pyrenaicus*)(European Commission, 2007c)] conservation programme, wolf and river birdlife improvement and protection programmes (particularly improving the food chain) and an improvement and protection programme for reptiles and invertebrates in the Sabor valley." (European Commission, 2011a, p.5)

Setting other arguments to one side, in legal terms it is unclear how such compensatory measures could be regarded as sufficient within the terms of the European Commission's (2007d) guidance, particularly given the scale of the habitat to be lost, the species affected, and the fact that the Portuguese government is not proposing to designate another river valley as an SAC and SPA in the Sabor's place.

In a series of interviews conducted by the present author in 2010, a consistent explanation was provided by Portuguese environmentalists and NGO representatives for the Commission's change of heart regarding its infringement proceedings: Commission President Barroso, having presided over the national authorisation of the Sabor dam while Prime Minister of Portugal, personally intervened to influence then EU Environment Commissioner Stavros Dimas's handling of the case (Interviews, 2010). One NGO representative stated that he had been given this version of events by officials from the European Commission and the Portuguese government (Interviews, 2010). Another stated that he had been told by a senior DG Environment official that this was indeed what had happened (Interviews, 2010).

8.4.4 The Severn barrage

8.4.4.1 Introduction

The Severn estuary's attraction as a potential source of renewable energy relates to its tidal range, which, with a mean of 8.2 metres at Avonmouth, is the highest in the world after the Bay of Fundy in Canada, creating around 200 km^2 of intertidal habitat (SDC, 2007).[382] While the estuary's high tidal range makes it very attractive in renewable energy terms, at the same time the estuary's tidal system has created an assemblage of habitats and species that is "extreme and unusual" (DECC, 2010h, p.3), and important in EU terms, leading the UK government to designate two Natura 2000 sites in the estuary (Figure 3), and additional Natura 2000 sites in the Usk and Wye rivers, two of the estuary's tributaries (DECC, 2010g).

8.4.4.2 The legal issues

The largest barrage option under consideration (Cardiff-Weston) - 16.1 km long - would have been capable of generating up to 4.4% of the UK's electricity needs (0.6% of its energy needs)(SDC, 2007), and would thus have contributed sizeably to the UK's 2020 renewable energy targets.[383] However, such a barrage would inevitably have triggered Article 6(4) of the Habitats Directive. Indeed, the UK government's 2010 feasibility study revealed that, in respect of the Cardiff-Weston barrage, the government could not rule out an adverse effect on the integrity of 24 Natura 2000 sites (19 SACs and five SPAs), including seven SACs supporting a total of three priority habitats (DECC, 2010e, g). Out of these 24 Natura 2000 sites, a definite conclusion of adverse effects on site integrity was reached in respect of four sites (DECC, 2010g).

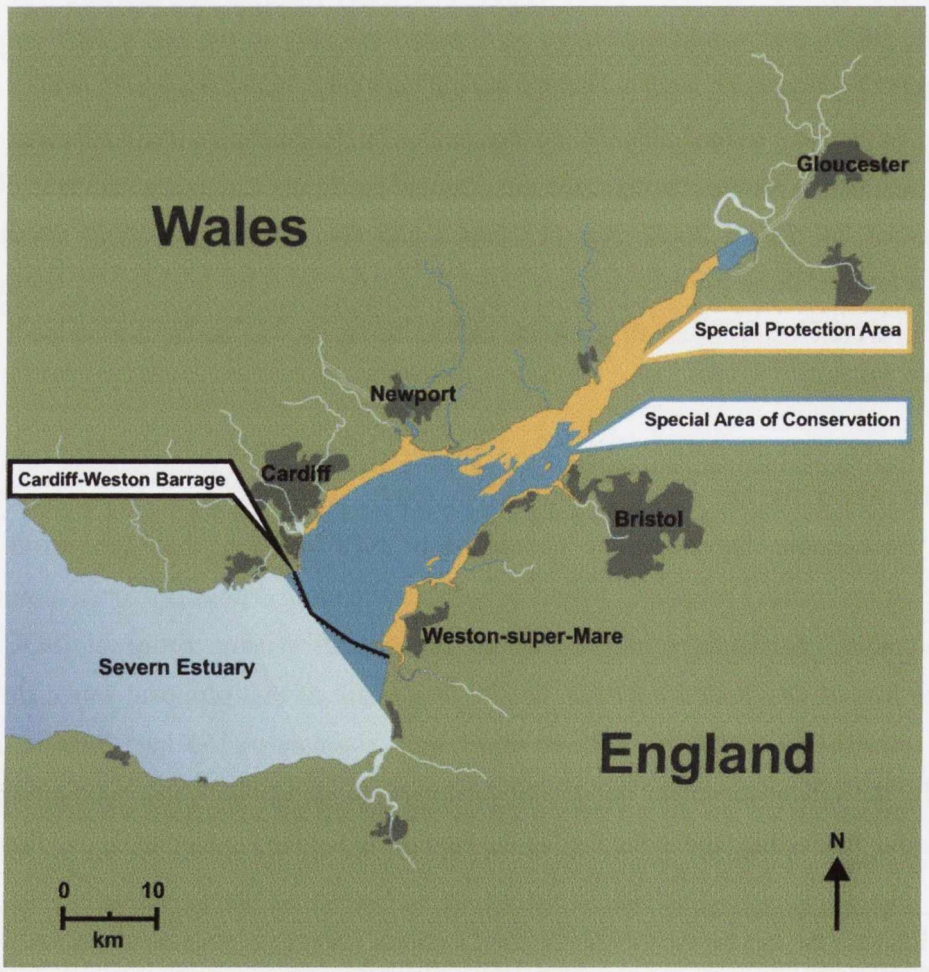
In respect of the tests in Article 6(4), the provision of adequate compensatory measures appears to have been the key sticking point (SDC, 2007). A research report commissioned by the UK's Sustainable Development Commission (SDC) noted that the provision of appropriate compensatory measures would be very challenging, "possibly to the point of not being deliverable," particularly in the case of the Cardiff-Weston proposal (SDC, 2007, p.132). The loss of designated intertidal habitat as a result of that proposal was estimated at 140.5 km^2 (mean)(DECC, 2010i), with an upper limit estimate of 163 km^2 (DECC, 2010g). Interestingly, the UK government had the Severn barrage idea (which has been around for a while) in mind at the time the Article 6(4) derogation was being negotiated, as Hilary Neal

[382] Intertidal habitat is the area between the low-tide and high-tide marks (e.g. the areas of mud and sand flats which are exposed at low tide in the Severn estuary (DECC, 2010g)).

[383] The UK is legally obliged to ensure at least a 15% share of energy from renewable sources in the UK's gross final consumption of energy in 2020 (from 1.3% in 2005)(Renewable Energy Directive, 2009), and the "lead scenario" in the UK's National Renewable Energy Action Plan envisages 30% of electricity coming from renewable sources in 2020 (DECC, 2010c, p.11).

highlights: "Although the Severn barrage was in our minds when we were thinking about, well OK, what if we needed to do something major like that for environmental reasons which could arguably override the nature conservation interest, I suppose we just didn't think through far enough whether you could actually satisfy [Article] 6(4) in its entirety." Compensation under the Article 6(4) derogation "can be massively difficult to achieve," she adds, "because you technically can't recreate some habitats, and this was hovering in the margins of the discussion in the recent consideration of the Severn barrage...[T]he thought of having to somehow recreate the Severn estuary somewhere else would, *could* not be possible....But certainly a Severn barrage was one of the projects we had in mind when we were saying [at the time of negotiating the Directive] that we might need to override the designation" (Neal, 2012).

Figure 3: Natura 2000 sites in the Severn estuary, and the proposed location of the Cardiff-Weston barrage (edited version of Figure 25 of SDC (2007, p.92)).



Setting the ecological challenges to one side, the extent of compensatory habitat required - and the cost - would be enormous, because the European Commission generally requires countries to replace lost areas with equivalent habitat, at ratios "generally well above 1:1" (European Commission, 2007d, p.18; 2011c, p.30), and in the case of the Severn there is no suitable estuary in the UK that could be designated in its place (DECC, 2010h; SDC, 2007). Using a compensatory ratio of 2:1 as a "base case" (DECC, 2010g, p.44), the government's feasibility study records that an upper limit of 326 km^2 of intertidal habitat would need to be created to compensate for damage caused by the Cardiff-Weston barrage (DECC, 2010g). In terms of scale, this is 60 times greater than the largest existing UK compensation project (DECC, 2010g). Using the government's estimated cost of creating compensatory intertidal habitat (£4.5 million/km^2, uncorrected for optimism bias)(DECC, 2010d), this upper limit scenario would cost £1,467 million for intertidal habitat alone.

In any event, the consensus view appears to have been that it may not have been possible for the UK government legally to grant permission to construct the Cardiff-Weston barrage (SDC, 2007).

8.4.4.3 Potential solutions

Perhaps unsurprisingly, a (pre-emptive) backlash did not take long to materialise. The SDC recorded that it "heard from a number of stakeholders who believe that the [Habitats and Birds] Directives no longer reflect modern conservation priorities in light of the challenges presented by climate change. A number of commentators have suggested possible ways forward on a Severn barrage that lie outside the current legal framework" (SDC, 2007, pp.130-131). These boiled down to: (1) reforming the Directives to give greater importance to the development of renewable energy projects in Natura 2000 sites (SDC, 2007), or (2) breaking EU law, albeit on a one-off basis, possibly by failing to provide the requisite compensation (SDC, 2007).

The SDC expressed concerns regarding both routes. The first was described as a "risky strategy, as the eventual scope of possible amendments would...be outside any one country's control. As a result, the final outcome could be quite different, and possibly much weaker, than the instigator intended" (SDC, 2007, p.131). The second route, according to the SDC, "would represent a very serious step...The UK has up to now prided itself on its leadership role on both climate change and biodiversity...[T]he [Habitats and Birds] Directives are already threatened or overlooked by a number of Member States, and have been a significant hurdle for some new Member States entering the EU. There is the potential to jeopardise or open up important protections by seeking to derogate from [i.e. breach] the Directives in the context of a major renewable energy project" (SDC, 2007, p.131).

And breaking EU law can of course have serious legal consequences, if the European Commission chooses to act. Thus, if the UK opted to break EU law in the context of a Severn barrage, the government might ultimately face a large fine from the ECJ under Article 260 of the TFEU (2010). While such fines have to date been rare (Jack, 2013), and while the process is painfully slow, their potential nevertheless arguably creates a powerful incentive for Member States to avoid continuing breaches of EU law (at least post a fine). For example, consider the fine imposed on France in 2005: a lump sum payment of €20 million plus a penalty payment of €57.7 million for every six months of continuing non-compliance (ECJ, 2005a).

In addition, the European Commission and the ECJ have been willing to, respectively, seek and grant injunctions in the context of the Habitats and Birds Directives,[384] ordering the cessation of certain activities pending the outcome of infringement proceedings (ECJ, 2007b, c, 2008b, c, 2009). Thus, if construction work on a Severn barrage were about to commence in breach of EU law, the European Commission would have the power to request the ECJ to issue an injunction preventing construction going ahead. Indeed, even if the European Commission decided not to commence infringement proceedings, an individual or NGO could seek to have the EU law position enforced in the UK courts (though it is worth noting that recourse to national courts in Portugal has not been successful to date in preventing the construction of the Sabor dam (Garcia, 2010)).[385]

8.4.4.4 A progressive interpretation of the Habitats Directive?

While the SDC cautioned against reforming or breaching the Directives, it concluded its report with the following recommendation (emphasis added): "The Government should seek a progressive interpretation of the Directives that takes into account climate change impacts on the long-term integrity of the Natura 2000 network of protected sites" (SDC, 2007, p.12). This idea was fleshed-out somewhat, as follows: "Rather than a process which attempts to create equivalent habitat on a narrowly-defined basis, a progressive strategy would look at the long-term coherence of the Natura 2000 network [...], and the types and locations of habitat required to support it within the relevant biogeographic region. This would explicitly aim to adapt to climate change by using the funding available...to create new coastal and wetland

[384] Under Articles 278 and 279 of the Treaty on the Functioning of the European Union (2010) (ex Articles 242 and 243 of the Treaty establishing the European Community (2006)).

[385] An individual or NGO with a sufficient legal interest could bring an action before the High Court of England and Wales under Part 54 of the Civil Procedure Rules 1998 (S.I. 1998 No. 3132), as amended, to judicially review any decision to grant permission for the project in breach of EU law. Such an action would refer to the relevant transposing legislation for the Habitats Directive in England and Wales: the Conservation of Habitats and Species Regulations 2010 (S.I. 2010 No. 490), which consolidated the earlier relevant transposing legislation

habitats on a national scale, aiding both biodiversity and coastal protection objectives" (SDC, 2007, p.145).

This suggestion was considered in detail as part of the UK government's barrage feasibility study, which reported in 2010. The result was an array of reports, detailing, amongst other things: (1) a toolkit of 14 compensatory measures, in respect of the impacts of a barrage, which are either within, or arguably within, the terms of the Commission's guidance on Article 6(4) (DECC, 2010a, h), and (2) potential compensatory measures that are "outside Commission guidance but [arguably] within the requirements of the Habitats Directive" (DECC, 2010g, p.44) and of "equal value to the coherence of the Natura 2000 network" (DECC, 2010h, p.2).

Amongst the many potential compensatory measures within (1), of particular interest in the present context is managed realignment (i.e. landward movement of existing flood defences) to create intertidal habitats, both adjoining and at a distance from the Severn estuary. Such managed realignment would arguably answer the SDC's (2007) call to combine compensatory measures with climate change adaptation on a national scale, since new intertidal habitat would be created around the UK coastline, and coastal squeeze - a feature of the sea-level rise accompanying climate change in Europe (IPCC, 2001) - would be eased.

The government's feasibility study concluded that "it may be possible to create very large areas of inter-tidal habitat through managed re-alignment, although this would be challenging and would not be fully 'like for like' compensation" (DECC, 2010h, p.3), given the unusual ecology of the Severn estuary (DECC, 2010h). Challenges would include: the scale of habitat creation envisaged; the potential displacement of homes and people; the loss of terrestrial and freshwater habitats; and the difficulty of finding sufficient areas over which mudflat could be created and maintained in the longer term (mudflat is likely to progress to saltmarsh over time)(DECC, 2010f, h). This latter concern is echoed in recent literature (Mazik et al., 2010), with Burgin (2010, pp.52-52) arguing that:

> "There is a major flaw in the concept of offsetting one wetland with another for conservation when it results in wetland loss in one area and the construction, rehabilitation or maintenance of wetlands in a different habitat type, with no connection to the lost wetlands....The outcome for wetland mitigation may not be an 'unmitigated disaster' but it is, at best, modestly successful."

While the full extent of proposed compensatory measures in the context of a Severn barrage is beyond the scope of this thesis, it is worth noting that the government's feasibility study makes it clear that for certain interest features - some migratory fish species, for example -

the impacts of a barrage may be particularly severe (e.g. local or national extinction), and hard or impossible fully to compensate within the terms of the European Commission's guidance (DECC, 2010g). The feasibility study thus considers offering "'substitute' measures where it is not possible to directly replace a habitat or species" (DECC, 2010g, p.44), an approach referred to as "equal value" compensation (DECC, 2010b). This aspect of the feasibility study appears to have been particularly controversial, with an absence of consensus on many fundamental issues (DECC, 2010b).

More generally, the feasibility study records "a tension between what might succeed in ecological terms and what might be deliverable in practice or acceptable from a political and legal perspective" (DECC, 2010b, p.3). An example of this is the government's admission that the ability to compensate for the impacts of a barrage is constrained by a lack of suitable sites in the UK (DECC, 2010b). In that regard, the government mooted the possibility of widening the geographic area within which compensation could be delivered to include providing compensation in other EU Member States, "in order to maintain or enhance the conservation status of a habitat or species within the [Atlantic] Biogeographic Region or the Natura 2000 network as a whole" (DECC, 2010b, p.4). While such an approach might potentially be of interest ecologically, and could be acceptable legally, one can imagine the political difficulties of, for example, persuading the French government that it should designate an additional Natura 2000 site to compensate for damage caused in the UK by a large UK renewable energy project.

While a host of ecological, legal, and political issues remain in respect of large-scale compensatory measures under Article 6(4), the UK government nevertheless regards its feasibility study as having "started an important and timely debate, [which] represents a real opportunity for the broadening of thinking about biodiversity conservation in the face of the twin challenges of climate change and the scale of energy infrastructure development that will be need to be put in place across the EU" (DECC, 2010b, p.4).

8.5 Summary

A 2009 letter from Commission President Barroso to the then Prime Minister of the Netherlands gives some indication of the Commission's view of how conflicts such as those presented in this chapter tend to resolve themselves: "There is no instance of the EU Nature Directives having prevented significant economic development in the Netherlands or in other Member State [sic]. There are numerous examples of large projects (e.g. extension of the Airbus factory in Hamburg, extension of the Rotterdam harbour) taking place within or close

to Natura sites...The Directives as they stand do provide the necessary flexibility to ensure compatibility between nature protection and economic developments" (Barroso, 2009).

This view would certainly resonate with the two cases presented here. Article 6(4) of the Habitats Directive did not prevent the Sabor dam being approved, even if it arguably ought to have done. Similarly with the Severn barrage: experience would suggest that "the necessary flexibility" will be found to approve the barrage via Article 6(4) if the project re-emerges as a serious proposal.

It is important to highlight that the Sabor dam case would not be the first time a Member State has used the Commission President's political influence to affect the outcome of EU infringement proceedings (Krämer, 2009a).[386] The possibility of a direct intervention by President Barroso in respect of the Sabor dam - as described above - is therefore not without precedent. In that regard, the Sabor dam raises two important issues. First, the case is arguably another example of political factors impinging on EU legal enforcement decisions, damaging the integrity of the rule of law, one of the foundational principles of the EU (TEU, 2012, Article 2). While one might argue that this is merely the realpolitik of enforcement in a supranational context, clear examples of such political impingement are in fact relatively rare at EU level (e.g. see Hedemann-Robinson, 2007; Krämer, 2009a; Williams, 1994, 2002), and in any event such an argument does not excuse such conduct. Second, one wonders whether the Commission's handling of the Sabor dam has set a precedent: can the Member States hereafter expect the Commission to relax its application and enforcement of EU biodiversity law to facilitate large renewable energy projects? This remains an open question, with arguments pointing in both directions.

On the one hand, in 2010 the Commission was reportedly in the process of preparing infringement proceedings in respect of Portugal's National Dam Programme, whose ten new dams will entail further adverse impacts on the Natura 2000 network (Avosetta, 2010). A

[386] Krämer (2009b, pp.82-3) writes, "it is clear that all 11 [Article 6(4) opinion] cases [examined] also have a political aspect. In cases of Article 6(4) of the Habitats Directive, the Member States' Governments strongly intervene with the Commission in order to have a positive Opinion issued. In the Mühlenberger Loch case (Section 3.3 above), this issue had come into the open through subsequent judicial cases concerning access to documents. However, in the cases of the motorway A-20 (Sections 3.1 and 3.2 above), the Rotterdam Port (Section 3.5 above), the Botniabanen (Section 3.7 above) and the Granadilla Port (Section 3.11 above) it is also general knowledge that political interventions were made at the highest national political level, in order to obtain the green light from the Commission on the project in question. This is also explained by the fact that most of the infrastructure projects were, at national level, severely contested by environmental organisations, nature protection groups, citizen associations, or scientists, who did not see the necessity of impairing or destroying a priority natural habitat. The support by the European Commission or, conversely, the fact that the Commission did not support these opposing groups was seen by the relevant Member States as a welcome factor in the political dispute on the different projects....The political discussions at national level would make it all the more necessary to have the European discussion on the pros and cons take place in an open, transparent way. Therefore, they add to the argument, made above, that the Commission should systematically publish its Opinions under Article 6(4) of the Habitats Directive."

report, commissioned by the European Commission, records: "It is evident that the [National Dam Programme] will cause significant impacts on species protected under the Natura directives. It will also have a considerable direct impact on a Natura 2000 site (Alvão-Marão), which has not been properly assessed, and some indirect impacts on other four [sic] Natura 2000 sites (Rio Vouga, Carregal do Sal, Ria de Aveiro and Estuário do Tejo), which have not been considered at all in the [strategic environmental assessment]" (Arcadis-Atecma, 2009, p.23). However, the Commission in 2010 notified Portuguese NGOs of its intention to close these infringement proceedings, notwithstanding the fact that Portugal's adoption of the Programme arguably breaches the Habitats Directive (Garcia, 2010). On the other hand, the UK government's detailed consideration of the legality of a Severn barrage suggests that the government expected the project to receive very close scrutiny from the Commission. There is certainly no evidence that the UK expected the Severn barrage to receive lenient treatment. Nevertheless, the Commission's and the Member States' engagement with legal obligations imposed by Article 6 of the Habitats Directive arguably presents serious difficulties at present, as discussed further in the following chapter.

PART V: DISCUSSION AND CONCLUSION

Chapter 9: Discussion and conclusion

9.1 An historical institutionalist analysis of the Birds and Habitats Directives

To recap from chapter 2, Pierson's (1996, p.123) historical institutionalist analysis posits, in essence, that "Losses of [Member State] control result not only from the autonomous actions of supranational organizations, but from member-state preoccupation with short-term concerns, the ubiquity of unintended consequences, and the instability of member-state policy preferences. Once gaps in control emerge, change-resistant decision rules and sunk costs associated with societal adaptations make it difficult for member states to reassert their authority."

As discussed in chapter 1, an historical institutionalist analysis has in the past been applied to EU biodiversity policy by Fairbrass and Jordan (2001), who argue that "a comparison of UK Government aims with long-term political outcomes in the sphere of EU biodiversity policy (c.1970–2000) reveals evidence of firm state control in the short-term, but of significant unintended consequences in the medium to long-term. These findings raise doubts about the explanatory power of intergovernmental accounts of EU environmental policy making" (Fairbrass and Jordan, 2001, p.1). As argued in chapter 1, what seems missing from Fairbrass and Jordan's (2001) account, however, is a consideration of the potential existence of "counter-forces [to EU integration]" and "surprising puzzles" in biodiversity policy (Alter, 2009, p.16), which might shed interesting light on (amongst other things) the neofunctionalist claims of Sandholtz and Stone Sweet (2012), whose theory - emphasising supranational aspects of EU integration - is often set up as a central rival to intergovernmentalist accounts. Sandholtz and Stone Sweet's (2012, pp.18-19) theory generates a number of testable hypotheses including, of particular relevance here: "EU organizations like the Commission and Court of Justice will routinely produce supranational outcomes that the Member States would not have produced on their own"; and "Supranational governance will routinely produce outcomes that conflict with the revealed preferences of the most powerful states".

In this chapter, an historical institutionalist analysis is applied to the history outlined in chapters 4 to 8 to test these hypotheses and to answer the research questions set out in chapter 1.

9.1.1 The first phase (1958-1987): the Birds Directive and the road to the Habitats Directive

9.1.1.1 Chapter 4: The history of habitat protection in the Birds Directive

Autonomous actions of EU institutions

It is worth recalling, at the outset, Meyer's (2010b, p.179) comment that the Birds Directive (1979) was negotiated and adopted during this first phase of EU environmental policy, "against all odds". Thus, while there might seem a certain inevitability, in retrospect, about the Directive's creation, the idea that EU institutions might hold responsibility for nature conservation regulation was of course far from a given at the time the Birds Directive was negotiated.

The first point to note is that, at its most basic level, the mere existence of the Birds Directive represents in one sense a gap in Member State control, given the southern Member States' sensitivities about hunting regulation, and given Denmark's repeatedly expressed reluctance to allow the EU to regulate nature conservation at all; Denmark "did not want to accept any Community competence in the area of nature conservation and therefore strongly questioned the validity of the legal basis [during the Birds Directive negotiations]" (Stuffmann, 1999, p.17). In addressing this puzzle, one might point first to the *autonomous actions* of the European Commission and the European Court of Justice in driving forward the process of EU integration by adopting a dynamic interpretation of Article 235 of the Treaty of Rome (1957), whereby the Article 2 objectives of the EU were read to include environmental protection, even although environmental protection was not explicitly mentioned. In the context of the Birds Directive negotiations, this reasoning allowed the Council Legal Service (1977) to determine that Article 235 gave the EU legal competence to make legislation on bird conservation, noting that the Council had endorsed the First and Second Environmental Action Programmes, which stated that "improvement in the quality of life and the protection of the natural environment are among the fundamental tasks of the Community." This approach to Article 235 was cemented legally when the European Court of Justice held, in a landmark ruling in 1985, that "environmental protection...is one of the Community's essential objectives" (ECJ, 1985, paragraph 13; Krämer, 2013).

Even at the very end of the negotiation process, Germany and Denmark remained uneasy regarding the EU's foray into nature conservation regulation. It will be recalled that Germany prepared a statement to the effect that: "The German delegation points out that its agreement to this Directive cannot be interpreted as constituting a precedent for any further action by the European Communities in the field of nature conservancy" (CEC, 1977g, p.30).

For its part, Denmark challenged the legal basis for the Directive to the end, but - and this highlights Pierson's (1996) point about potential *institutional obstacles* to closing gaps in control - Denmark was willing to go along with the other Member States, even although the requirement for unanimity would have allowed Denmark to veto the Birds Directive: "While the Danish Government has not wished to refute the arguments put forward in this matter by the other eight Member States and the legal departments [i.e. the Council and Commission Legal Services], it wishes to point out that it does not consider that the adoption of this Directive can create a precedent for the adoption of further Community acts of a similar nature" (CEC, 1977g, p.31; 1978). Denmark perhaps wished to avoid characterisation as a barrier to EU integration; a similar analysis might be applied in respect of the UK: in addition to not wanting the Birds Directive to be a popular success for the EU (Stuffmann, 1999), the UK's then Secretary of State for the Environment Peter Shore wrote in May 1978 that he was opposed in principle to the EU's becoming involved in the regulation of issues such as bird protection.[387] Yet Shore evidently decided to set these convictions to one side, given that the UK did not veto the Birds Directive's adoption. As Fairbrass and Jordan (2001, p.9) comment, "in the dying days of the 1974–79 Labour government, [Shore's] reservations could not have been that important because in April 1979 he approved the proposal, nicely illustrating Pierson's point about politicians (even the most ardently Eurosceptic) having short time horizons."

The *European Commission* was not put off by Denmark and Germany's reticence, and continued to exercise its autonomy, with head of the ECPS Michel Carpentier commenting in 1981, just two years after the Birds Directive was adopted: "Though we have to interpret the Treaty cleverly we can use it to justify conservation measures. A re-writing of the Treaty might burden us with more restrictions than we have now with our pragmatic approach. The Birds Directive, for example, was accused of being *ultra vires*, but it has been very popular...We're trying to extend our programme, not just to deal with pollution" (Caufield, 1981, p.417). Moreover, Carpentier's colleague within the ECPS, Claus Stuffmann, had a strong personal commitment to European unity and nature conservation, and reportedly "always defended very much more strongly than it's ever done nowadays the competence of the [EU]. He was fighting very hard in CITES, in Bern, in Bonn, everywhere, for the Union to exert as much competence as possible" (Devillers, 2013).

[387] As he wrote to the EEB in May 1978, there is the "...difficulty of translating essentially British ways of doing things into Community wide measures without extending the jurisdiction of the Community into areas which are of purely domestic concern and are thus essentially inappropriate for Community action. Frankly I do not want the Community moving too far into an area like this one which I regard as being very much one for Member States" (cited in Fairbrass (2000, p.22)).

The *European Parliament's* concerted activism to apply pressure on the Commission and the Member States to (respectively) propose and adopt legislation on bird conservation is also worthy of note here in considering the *autonomous actions* of EU institutions. That the European Parliament's actions ultimately had an important catalysing effect was confirmed by the Commission, which explained that its 1976 Birds Directive proposal was a response to the "wishes expressed repeatedly by the European Parliament in several of its Resolutions, debates and petitions....and to the requests of a broad section of public opinion indicated in more than 50,000 letters received by the Commission alone" (CEC, 1977a, p.2).

Unintended consequences

It is worth recalling, at this stage, Meyer's (2011c, p.84) comment that, "[t]he Birds Directive was originally motivated by Northern European resentment against the hunting of songbirds in Southern Europe," but ended up introducing, in addition to its hunting control measures, "remarkably strict rules on habitats protection valid in all member states. It provided an important precedent for EC action in the area of nature protection and paved the way for the Habitats directive of 1992 and the Natura 2000 Programme." As Alistair Gammell, then of the RSPB, reflects, "I really don't think that it was in the minds of the British or any other government that this was primarily about habitat protection. It was primarily about not killing migratory birds, and controlling hunting..." (Gammell, 2012).

Whilst the habitat protection provisions were debated by the Member States, their content hardly changed over the course of the negotiations; indeed, as Stuffmann (1999, p.17) reflects, "after only two years the Commission's draft of 1976 was adopted as a Council directive with very minor modifications rather reinforcing the important conservation issues than weakening them." It seems clear, in retrospect, that the Member States had little idea that the habitat protection aspects of the Birds Directive would result in a large network of (in many cases new) protected areas across Europe. One might point in this regard to the UK and Italy's naive-sounding query during negotiations regarding what exactly was meant by a special protection area, "which might be synonymous with a special nature reserve for a particular species" (CEC, 1977a, p.12), and to the UK's comment that the government "did not think the Directive posed any major problems" (CEC, 1977a, pp.2-7). Member States even went so far during negotiations as to supplement by 12 species the Commission's Annex I list of birds requiring the designation of SPAs.

Denmark's position is interesting: its negotiator was effectively divided between resisting EU competence over nature conservation on the one hand, yet on the other hand seeking a stronger hand in respect of internal disputes over hunting at the national level between the Ministries of Environment and Agriculture, as Veit Koester reflects: "...we saw probably

some advantages in having this [birds] directive because this could be a means to sort of squeezing the Ministry of Agriculture...and then we had to give up, to a certain extent, but only to a limited extent, this idea of having land use and nature conservation as domains reserved for the Member States themself, but it was not that difficult to give it up because it was sort of being limited to certain areas which were to some extent already protected by legislation, so we did not feel that we give in very much by having the habitat protection provisions in the [Birds] Directive..." (Koester, 2012). The unintended consequence here is that, in agreeing to the Birds Directive, Denmark would in fact give up control over nature conservation regulation to more than just "a limited extent".

Another unintended consequence of the Birds Directive, from the perspective of at least certain Member States, is revealed by the assumption implicit in a draft Resolution prepared by France during the negotiations, and of the wording finally adopted in respect of that Resolution, revealing a lack of clarity regarding how the system of protected areas would operate in practice. The French text called upon the Commission to make proposals regarding the criteria to be adopted for special protection areas, saying (emphasis added), "These proposals will determine, among other things, *the proportion of the designated areas which shall be afforded special protection*"; in other words, the French draft envisaged special protection applying only to parts of a designated area, rather than to the whole area (CEC, 1977g). As it would later turn out, the European Court of Justice interpreted the protective provisions of the Birds Directive in a different manner: that is, strictly and uniformly across sites (i.e. the ECJ did not apply different standards of protection to different areas of sites, perhaps confounding certain Member States' expectations).

Path dependence

The final point to be highlighted in respect of the immediate aftermath of the Birds Directive negotiations is the advisory role played by John Temple Lang of the Commission's Legal Service, who assisted with the early implementation of the habitat protection parts of the Directive by advising Alistair Gammell of the RSPB to "ask for Commission funding to do these initial studies [regarding important bird areas], which we did," Gammell (2012) explains, "and we got Commission funding to do the first Important Bird Areas studies. So that was a very, very influential discussion, and after that John also was the one to point out, and he certainly led me through this procedure, about how you could make an official complaint to the European Union about Member States not having designated areas or not protecting areas that should be designated but...had some development on, so he actually advised us about how you send a formal letter of complaint to the European Commission, etc."

Thus, Temple Lang helped to kick start a process which would effectively become path dependent when, in 1998, the European Court of Justice cemented the legal significance of the IBA lists by holding that, although not legally binding on the Member States concerned, the IBA lists could, by reason of their acknowledged scientific value, be used by the Court as a basis of reference for assessing the extent to which a Member State has complied with its obligation to designate special protection areas (ECJ, 1998). Thereafter, an area's presence on an IBA list would indicate that it ought to be an SPA under the Birds Directive; and the production of new and expanded IBA lists could then of course help to drive forward the expansion of the SPA network across the EU.

In summary, the pattern that arguably emerges from the Birds Directive negotiations, on an historical institutionalist analysis, is of EU-level regulation of bird conservation being driven forward by a series of autonomous actions on the part of EU institutions, in spite of some Member State scepticism and resistance. To a certain extent the creation of a large network of SPAs then became path dependent, in particular owing to the use of IBA lists to establish, legally, a site's status as a prospective SPA. Finally, the adoption of the Birds Directive has had both intended and certain unintended effects from the Member State perspective – more below.

9.1.1.2 Chapter 5: Towards a Habitats Directive

Autonomous actions of EU institutions

Notwithstanding the concerns of (at least) Denmark and Germany in the immediate aftermath of the Birds Directive, *the Commission* immediately made its intentions clear regarding its desire to expand its nature conservation mandate: e.g. "The Commission hopes that certain hesitations which have become apparent as to the scope of the Community's powers [in the field of nature conservation] which have hindered the adoption of important and urgent measures will be overcome in the future" (European Commission, 1980b, pp.36-37). Moreover, it will be recalled that as early as 1980 the Commission had a clear vision in the direction of a future Habitats Directive, accompanied by EU financing: "As far as the protection and maintenance of wild species is concerned, the [Birds] Directive of April 1979 will be supplemented by the creation and maintenance of a network of sufficiently large protected zones which will be protected and administered under common rules and principles. If this aim is to be achieved by informing and interesting the public, the Community will doubtless have to introduce legislation and provide funds" (European Commission, 1980b, p.37). Yet there must have been a degree of push-back from the Member States, because the Third Environmental Action Programme (1983, p.13) ultimately struck a somewhat uneasy balance between the Commission's aspirations and giving due

deference to Member States' views: "While it is recognized that local, regional and national responsibilities are decisive in this case, a Community framework is becoming essential if greater cohesion is to be given to such efforts."

As it had in the case of the Birds Directive, *the European Parliament* - by now directly elected – also played an important role during this period in lobbying for a Habitats Directive, led by activist MEPs such as Stanley Johnson and Hemmo Muntingh. For example, by July 1987 (by which time Johnson was back with the Commission) - six months before the process of drafting the Habitats Directive would begin - the Parliament was calling for "land and marine parks and nature reserves to form a Community network of protected areas which is representative of the natural resources of the various geographical regions of the Community" (European Parliament, 1987, p.122). In respect of this Resolution, Environment Commissioner Stanley Clinton Davis assured the Parliament that "the contents of the report have been very fully noted, both by myself and by my staff, and they will serve as an important guide for the Commission's work in this important field of nature conservation" (Clinton Davis, 1987c, p.288), an interesting example of the interplay between EU institutions, both of which wished to see greater EU competences in the field of nature conservation.

Also in the *European Parliament*, Altiero Spinelli, Stanley Johnson and the rest of the Crocodile Club played an important role during this period by way of catalysing changes to the Treaty, ultimately resulting in an expanded EU environmental policy mandate via the Single European Act (1986). And rather than the SEA merely representing a constitutionalisation of existing environmental functions, the SEA went further, as argued in chapter 5, and gave the EU broad competences in previously contested environmental policy matters, such as nature conservation. In other words, disputes over the precise ambit of the EU's nature conservation remit were subsumed by the political imperative to move forward with EU integration, complete the common market, and reform the EU's decision-making procedures. It would be hard to sustain an argument that this expansion of EU environmental competences was an *unintended consequence* on the part of the (or of some) Member States; rather, the better analysis (at least in respect of certain Member States) would arguably be that the expansion of such competences was a price paid for desired progress in other areas, such as the common market.

On foot of the signature of the SEA, attention focused on *the Commission*, to see what use it might make of its new environmental functions in the direction of nature conservation, particularly given the opportunity presented by the drafting of the Fourth Environmental Action Programme (1987). As Alistair Gammell explains, "Myself and one or two

others...lobbied to put [a proposal for a directive on habitats and species protection] in [the Programme], although there were Commission officials in DG XI...who were...very easy to lobby...They wanted to do it and we wanted it in..." (Gammell, 2012). And it was not only via the Fourth Environmental Action Programme that the EU nature conservation agenda was pushed at this time: e.g. the CORINE biotopes team within DG XI saw their work as: "the best thing we could do. We felt that it was a way to get [something akin to a Habitats Directive] through the back door, if you like. We did not think that it was possible to get a binding instrument, but we felt that notoriety is essential, and that if we made a scientific inventory of what needs to be conserved, it would bring a strong leverage on what the Member States would have to do" (Devillers, 2013).

In respect of EU financing for nature conservation, there is clear evidence that a *learning process* had begun during this phase in the history, with the Member States and the Commission engaging in something of a ping pong match throughout the 1980s on the subject of the ambit of EU financing measures for nature conservation, as detailed in chapter 5. Despite having its proposals to extend EU financing for nature conservation beyond birds rejected twice by the Member States - in 1984 and in 1987 - the issue remained very much on the Commission's agenda, and an extension of financing to other fauna and flora would later be secured. In the meantime, and notwithstanding these knock-backs, DG XI's Nature Unit creatively took action in respect of organisms other than birds, launching studies on the monk seal and sea turtles, for example: "we tried to go as far as we could; ...I wouldn't say it was stretching the Treaty but it was certainly using it to its fullest possibilities" (Devillers, 2013).

Unintended consequences

Unintended consequences of the Birds Directive's adoption began to play a pronounced role during this phase of the history. These are perhaps best exemplified by the many legal actions brought in respect of the Birds Directive in the mid to late 1980s. Whilst there is a strong argument that legal actions brought to enforce EU law obligations (which were negotiated and agreed by the Member States) cannot justifiably be characterised as *unintended consequences* from the Member States' perspective, there was nevertheless a clear sentiment on the part of some Member States that insufficient "flexibility" was being shown by the Commission in adopting a "pernickety attitude"[388] to its enforcement functions (DG XI, 1988a-g). As Fairbrass and Jordan (2001, pp.15 and 8) argue, the UK, for example, "failed to protect its voluntary approach to nature conservation" which "implied that farmers could be encouraged (sometimes with financial inducements) to protect biodiversity, but never compelled by government fiat." In a parallel way at EU level, the Member States were

[388] "l'attitude trop pointilleusse" in the French original.

only now beginning to realise that they could not adopt a similar voluntary approach to EU obligations. These Commission-led legal actions under the Birds Directive therefore served as something of a wake-up call for the EU's Member States, particularly since the majority, until about the mid-1980s, "were of the opinion that nature protection came in their exclusive competence," according to Krämer (2011, p.181), notwithstanding the adoption of the Birds Directive.

In addition to the Duich Moss case on Islay, a raft of other legal proceedings under the Birds Directive were brought during this phase of the history: by February 1988, DG XI's Legal Unit had launched 29 infringement proceedings against Member States seeking to force them to comply with their obligations to designate SPAs under the Birds Directive (DG XI, 1988a-q). This arguably kick-started a learning process on the part of the Member States, who would subsequently seek to use the opportunity presented by the Habitats Directive negotiations to address perceived gaps in control over EU biodiversity policy.

9.1.3 The second phase (1987 to 1992): the golden era of EU environmental policy-making

9.1.3.1 Chapter 6: The Habitats Directive proposal

Autonomous actions of EU institutions; and path dependence

This phase of Natura 2000's history reveals the importance not only of institutions but of *individuals within institutions*. Thus, one take on this history might be that *the European Commission* autonomously drove forward the idea of a Habitats Directive. However, this would not do justice to the complexity of what happened; uncovering this complexity is one important contribution of an historical analysis in this case. It is clear that, having taken on the role as Director General Laurens Jan Brinkhorst's main adviser in 1987, Stanley Johnson was in a position to "push things through" (Johnson, 2011, 2012). And yet, even after the new environmental powers in the SEA came into force in July 1987, extending the EU's reach in terms of nature conservation negotiations would remain a challenge - not only with the Member States, but also within the Commission.

In drafting the Fourth Environmental Action Programme (1987), Stanley Johnson included language about the need for a Habitats Directive. However, as Alistair Gammell reflects, "governments allowed it to remain in, but I'm pretty certain that they never intended to do anything about it" (Gammell, 2012). This is not impossible; after all, in the Resolution accompanying the Fourth Environmental Action Programme, the Council and Member States merely "[noted] the action programme set out in the Annex to this resolution and [approved] in general the guidelines" (Fourth Environmental Action Programme, 1987, p.4). Indeed, the

UK government would later argue that "[a possible Habitats Directive] had not been one of the 22 priorities identified explicitly in the Resolution of 19 October 1987" (House of Lords, 1989b, paragraph 38).

But having allowed this wording to remain in the Fourth Environmental Action Programme, there was then an element of *path dependence* in what followed (i.e. Johnson could argue he was simply fulfilling a mandate from the Action Programme, as well as implementing the Bern Convention), plus a considerable degree of *autonomous institutional action*. DG XI having been given a mandate (it argued), via the Fourth Environmental Action Programme, Stanley Johnson rapidly produced a draft Habitats Directive, relying for production of the first draft on John Temple Lang, who had been instrumental in drafting the habitat protection parts of the Birds Directive, and Pierre Devillers, who had been deeply involved in the early implementation of the Birds Directive, and who was at this time immersed in the CORINE biotopes project. The Birds Directive having mandated the creation of a network of protected areas, there was a certain degree of *path dependence* at this stage, with the draft Habitats Directive introducing the idea of a greatly expanded, coherent Natura 2000 network, notwithstanding Denmark's claim during the early stages of the Directive's negotiation that a policy of conservation based on special protection areas was outdated (CEC, 1988a). Despite not holding responsibility for nature conservation policy within DG XI, Johnson pressed ahead with his plan, notwithstanding some "humming and hawing [regarding] whether the Commission dared to launch something as major as this when the Birds Directive was...not under attack, but was in the news" (Sundseth, 2012). Johnson did not formally consult Member State governments in advance of the Commission proposing the Directive; in contrast, with help of Alistair Gammell of the RSPB, Johnson circulated the draft instrument to a large number of NGOs (Gammell, 2012), effectively letting the genie out of the bottle, never to be put back.

Having taken the draft this far, the entire proposal was then almost stymied by the intervention of the agricultural adviser in Jacques Delors' *cabinet*, who was concerned at the length of the annexes of species and habitats, and the potential reactions of Member States given their experience with the Birds Directive (Johnson, 2012). Johnson then took a tactical decision to drop the annexes from DG XI's proposal altogether, with a view to their reinsertion later in the process: "we'll introduce them or we'll somehow get them introduced at the stage of the Parliamentary discussion" (Johnson, 2012). However, the intervention of Delors' *cabinet* was not without an effect, and Johnson redrafted the Explanatory Memorandum for the proposal to note that the draft directive required "an appropriate balance to be struck between conservation and economic interests and [provides] for the

possibility of derogations from the general obligations in certain specific cases" (DG XI, 1988a-w, p.4).

This episode is arguably an example of an implicit (albeit partial and by proxy) reassertion of control by the Member States. In other words, the Member States' reaction to the implementation of the Birds Directive triggered a response within the Commission, leading the proposal for the Habitats Directive to be framed in terms more conducive to the Member States' wishes. And even if the immediate effect was simply an amendment to the Explanatory Memorandum (not an operative part of the legislation), DG XI's card had effectively been marked by Delors' *cabinet*, arguably establishing certain parameters which could serve to frame DG XI's positions in respect of the Directive during negotiations.

Another important example of *path dependence* – as well as a critical juncture in the history – is provided by the intervention of DG XI's Legal Unit during the directive's drafting, effectively to defend retaining the Birds Directive and the Habitats Directive as separate instruments. As Pierson (2004, pp.134-5) explains, "historical institutionalists have frequently argued that institutional change typically involves a dynamic of "punctuated equilibrium" (Krasner 1989; Collier and Collier 1991). There are brief moments in which opportunities for major institutional reforms appear, followed by long stretches of institutional stability. Junctures are "critical" because they place institutional arrangements on paths or trajectories, which are then very difficult to alter." Amongst other things, the Legal Unit foresaw a "reduction of the level of protection provided for by [the Birds Directive] since the draft [Habitats Directive] provides for derogations and has not such a clear wording as [the Birds Directive]" (DG XI, 1988a-q, p.2). This is a theme to which we will return below, in section 9.2.3.

In summary, the *European Commission* (and individuals within the Commission) can be seen to have exercised considerable autonomy and policy entrepreneurship during the production of the Habitats Directive proposal. And having secured the instrument's inclusion in the Fourth Environmental Action Programme, the Directive proposal arguably became path dependent in four important respects: first, Johnson could argue that he was simply fulfilling a political mandate (as well as implementing the Bern Convention) in producing a draft instrument; second, on the draft's being circulated to NGOs around Europe, the Directive proposal built up a head of steam that became hard to stop, particularly during a phase of EU environmental policy when environmental awareness and interest were high; third, by introducing the idea of the Natura 2000 network, the protected area concept introduced by the Birds Directive would be secured as a central feature of EU biodiversity policy; and fourth, DG XI's Legal Unit having intervened in favour of retaining the Birds Directive and the

Habitats Directive as separate instruments, the two Directives then set off on separate, albeit interlocking, paths, leading later to important differences in the protection afforded to sites under the two Directives, as a result of judgments of the ECJ.

It was, in sum, a remarkable achievement for DG XI to have succeeded in launching the Habitats Directive proposal, given the preceding history in respect of EU nature conservation policy, and given the resistance within the Commission itself (at the most senior level), not to mention the Council.

9.1.3.2 Chapter 7: Negotiating the Habitats Directive

There is a lot that could be said in respect of this chapter, but we will limit ourselves here to charting the Directive's general trajectory, as well as to a specific focus on the development of the Article 6(4) derogation. The first thing to note is that this section of the history represents, in a generic sense, a critical juncture, in that the Habitats Directive negotiations gave the Member States a rare opportunity to close gaps in control that they perceived to have emerged during the Birds Directive's implementation. Pierson (1996, p.123) is quite right to argue that "Once gaps in control emerge, change-resistant decision rules and sunk costs associated with societal adaptations make it difficult for member states to reassert their authority." Nevertheless, from the Member States' perspective, the Habitats Directive proposal amounted, in effect, to a fortuitous opportunity to retake control of certain aspects of EU biodiversity policy. In terms of historical institutionalist analysis, arguably we see coming to the fore during the Habitats Directive negotiations attempts by Member States to close gaps in their control of EU biodiversity policy, and, in certain cases, related defensive moves by the Commission (or *resistance by an EU institutional actor*, in Pierson's (1996) terms). Another way to put it would be to say that it took all of the negotiating and diplomacy skills of an expert like Claus Stuffmann to steer the Habitats Directive safely to shore, and this during a "uniquely favourable era for strengthening Community environmental policy" (Ward, 1997, p.178). It is often said, but it bears repeating: the Habitats Directive would be very unlikely to be successfully negotiated today.

Changes in government preferences played a crucial part in the history at this time. That is, immediately following the Commission's proposal of the Habitats Directive, it was unclear whether the Directive would gain sufficient political support to proceed at all. The situation in the UK was particularly problematic, where Secretary of State Nicholas Ridley was openly hostile to the proposal, saying there would be a habitats directive "over my dead body" (Gammell, 2012). Alistair Gammell of the RSPB feared Ridley's attitude was in part attributable to the UK government's experience in the Duich Moss case under the Birds Directive; as Gammell stated in early 1989, "The society and conservation are now paying an

awful price in the habitats directive which has been launched in Brussels. Nicholas Ridley has said 'over his dead body', so there is the risk that the new directive will have its teeth removed" (Brooke, 1989, p.55). Thus, a *learning process* had clearly taken place in light of the implementation of the Birds Directive. As Commissioner Stanley Clinton Davis commented, there was "a good deal of opposition to [the Habitats Directive] in Council. It is not very worthy opposition, it is opposition which is designed to erode the purpose of the habitats directive, based upon anxieties alleged in relation to the birds directive. I think it is a reflection of the difficulties which emerged from that directive..." (Clinton Davis, 1988a). The question remained whether, and in what way, the Member States might seek to retake control.

The first strategy was to seek to undermine the Habitats Directive proposal altogether. This took several forms. First, at a ministerial-level meeting in November 1988, the UK did its best to derail the directive, joined principally by Spain, with both "contesting the necessity for EU action in the area" (DG XI, 1989a-d). Next, a concerted, albeit ultimately failed, attempt was made by certain countries, amongst them Denmark and the UK, to undermine the need for a Habitats Directive by seeking to refine the habitat protection provisions of the Bern Convention (Coffey and Richartz, 2003; Fernández-Galiano, 2012). At this point in time - the end of 1988 - the Directive's future remained very much in the balance. What tipped the scales in favour of the Habitats Directive was a fortuitously-timed French Presidency under Green Minister Brice Lalonde, from July 1989, and very soon thereafter an important political change in the UK. The incoming French Presidency was keen to revise the draft directive, and sought to embed a different approach to the one Member States had experienced in respect of the Birds Directive's implementation (Megret, 2013a, b; Wildlife Link, 1989a). And just one month into the French Presidency, a UK cabinet reshuffle saw Nicholas Ridley - the main barrier to the Directive's negotiation - moved sideways, to be replaced as Environment Secretary by Chris Patten, a pro-European (White, 1989). The UK then became a positive advocate of the Directive (Bunce, 2012), and Denmark's opposition also dissipated (Koester, 2012).

France's Marcel Jouve made a tour of European capitals at the beginning of the French Presidency, and then produced an overhauled draft of the Directive (Jouve, 2013), having assembled a broad consensus around key points, including (amongst others): a site designation process which would be more consistent with the principle of subsidiarity; the integration into the Natura 2000 network of SPAs under the Birds Directive; the principle of management plans for protected areas, supportive of ongoing human activities compatible with areas' conservation objectives. Crucially, there were very good working relations

between the French Presidency and DG XI's Claus Stuffmann (Jouve, 2013; Megret, 2013b), smoothing the path for the Presidency's compromise draft. In October 1989 the French Presidency formally presented its compromise text to the other Member States (CEC, 1989b). There had been a complete overhaul in respect of the process for site selection and designation (DG XI, 1989b-c), and the approach and language of the Directive had shifted subtly, its title now referring to conservation rather than protection (DG XI, 1989b-h). Moreover, the compromise text had scrapped plans to apply the EIA Directive to Natura 2000 sites, the French Presidency having instead produced a standalone impact assessment provision for the Directive (CEC, 1989b).

In respect of site designations, a new provision introduced by the French Presidency (what ultimately became Article 5 of the Habitats Directive) proposed enabling the Commission to propose sites to the Council for designation, where the Commission believed a site ought to have been proposed (CEC, 1989a). This would later be restricted to priority sites and amended to require a bilateral consultation process with the relevant Member State where the Commission believed that a site is "essential for the maintenance of [a] priority natural habitat type or for the survival of [a] priority species", and should have been submitted for adoption as a Natura 2000 site. If the dispute remained unresolved after 6 months of consultation, the Commission could then submit a proposal to the Council relating to the selection of the site as a Natura 2000 site. As noted in chapter 7, this provision and the French Presidency's original version of it were aimed squarely at avoiding the sorts of legal disputes experienced under the Birds Directive; i.e. the Member States and the Commission had high hopes that this provision would allow site designation disputes (at least in respect of priority sites) to be resolved at the level of the Council rather than ending up before the ECJ. In other words, this is not quite an example of the Member States retaking complete control, since the Commission would also be involved, but rather of their trying to sort matters out politically, without engaging the ECJ.

An interesting example of (internal) *resistance by the Commission* came in early 1990 when Commission President Jacques Delors intervened in the process for a second time, again with a view to blocking the Directive proposal. Stanley Johnson of DG XI again helped to rebuff this move. Later that year, in October 1990, the Commission stressed that the Habitats Directive proposal risked reaching a stalemate, in part owing to certain Member States' ongoing issues regarding implementation of the Birds Directive (DG XI, 1990a). As at 15 March 1990, the Commission had commenced 37 cases against Member States for failure to comply with their site designation and site protection obligations under Article 4 of the Birds Directive (ECJ, 1990c), and decisions kept coming. As a result, the Habitats Directive

proposal was facing a "strong blockage," led by Spain but supported by other Mediterranean countries and France to a certain extent, owing to those countries' experience with the implementation of the Birds Directive (Troya, 2012). These countries hoped to address, via the Habitats Directive, the "dysfunctionality" they perceived in the implementation of the Birds Directive, which was impacting on projects funded under the Structural and Regional Funds, for example (Troya, 2012)

At this point in time, in February 1991, the ECJ handed down its decision in the *Leybucht Dykes* case under the Birds Directive, ruling that socio-economic considerations could not be relied upon to justify reducing the size of an SPA for birds (e.g. to accommodate a construction project)(ECJ, 1991). The decision "created a huge wave amongst the Member States" (Neal, 2012): the Member States thus decided to "retaliate" (Cichowski, 2007, p.157), via the then ongoing Habitats Directive negotiations, by amending the Birds Directive to (in effect) overrule the *Leybucht Dykes* decision. They did this by applying a derogation - Article 6(4) of the Habitats Directive - to allow damaging projects to go ahead in or near SPAs under the Birds Directive as well as sites under the Habitats Directive, for reasons of overriding public interest, including for social or economic reasons (Baldock, 1992; Holder, 1997; Krämer, 2009b).

Where this derogation was to be applied in respect of a site hosting a priority species or habitat, a special rule was to apply: "Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety or to beneficial consequences of primary importance for the environment" (CEC, 1991a-r). When a group of Member States agitated for this special rule to be deleted from the draft Directive, the Commission *resisted this attempt to assert Member State control* (in historical institutionalist terms) by proposing a compromise: rather than deleting the provision altogether, the application of the derogation in respect of priority species/habitats would be made the subject in certain cases[389] of an opinion from the Commission (DG XI, 1991e). As with the Article 5 site designation process, which sought to provide for disputes to be resolved in the Council rather than before the ECJ, here we see a similar idea: a positive opinion from the Commission on the issue could avoid the need to appear before the ECJ. Again, Member States do not retake complete control, but the ECJ is nevertheless potentially cut out of the process.

[389] In the Directive as adopted, a Commission opinion is needed where the imperative reasons invoked are other than "human health or public safety" or "beneficial consequences of primary importance for the environment" (Habitats Directive, 1992, Article 6(4)).

A final point to note here is that, in the UK at least, the *restricted time horizons of politicians* arguably played a role during the Habitats Directive negotiations, as Hilary Neal records: "We [the UK] prided ourselves on having all the bases covered and knowing exactly what we were talking about, and being able to see through to implementation, but even...we were subject to the political pressures of Ministers wanting the directive adopted...they wanted to be able to go back to the environmental NGOs back home and say, we've negotiated this directive, isn't it terrific, and so we were having to, by virtue of that pressure, we were having to compromise where colleagues perhaps in DTI, in the Treasury might not have wanted us to compromise, and certainly the Scottish Office might not have wanted [to compromise]..." (Neal, 2012).

In summary, the negotiation of the Habitats Directive can be seen as something of a balancing act from DG XI's perspective, its Directive proposal facing attacks from powerful opponents both within and outside the Commission. As such, for the most part the Commission engaged, during negotiations, in forcefully resisting attempts to undermine the Directive, whilst adopting a pragmatic approach in respect of Member State wishes to close certain gaps in their control over EU biodiversity policy, such as the one opened by the *Leybucht Dykes* case. As the UK's Roy Bunce wrote to Claus Stuffmann following a meeting to discuss that case (emphasis added), "You kindly indicated that the Commission were *not unsympathetic* to the UK's concerns but that you were concerned to ensure that the protection offered to these sites protected them from all but overriding issues..." (Department of the Environment, 1991a). In historical institutionalist terms, whilst Pierson (1996) makes a convincing case regarding the opening up of gaps in control and subsequent difficulties in closing them, the Habitats Directive nevertheless presented Member States with a rare opportunity to reassert control. As Cichowski (2007, p.158) states, as part of an excellent review of the Article 6(4) derogation, "This legislative act shifts the control over national conservation measures back into the hands of member states."

9.1.4 The third phase (1992-present): implementing Natura 2000

9.1.4.1 Chapter 8: Implementing Natura 2000

If the adoption of the Article 6(4) derogation arguably shifted control back to the Member States, decisions of the ECJ post the adoption of the Habitats Directive have clearly rebalanced matters somewhat in the direction of supranational control (and in the direction of *unintended consequences* from the Member States' perspective), and this has created something of a feedback effect in terms of conflicts at the national level during the establishment of the Natura 2000 network, as recorded above. Moreover, strict legal

interpretations of the Habitats and Birds Directives have arguably forced more and more plans and projects down the Article 6(4) derogation route (in cases where, that is, countries engage seriously with their legal obligations).

It is unnecessary to rehearse the legal arguments in detail here, since they are set out in full in chapter 8, but it is worth flagging a few key decisions, which include: the ECJ's ruling that the Habitats Directive applies beyond territorial waters in the marine area (ECJ, 2005c); the ECJ's rulings to the effect that socio-economic considerations cannot be taken into account when selecting Natura 2000 sites and their boundaries (ECJ, 1996, 2000c); the ECJ's precautionary take on the circumstances in which an Article 6(3) appropriate assessment must be carried out, and the limited circumstances in which a plan or project can be approved in light of the outcome of that assessment (ECJ, 2004) – this ruling in principle forces many plans/projects down the Article 6(4) derogation route; the ECJ's decision that sites which should have been designated as SPAs but have not been so designated remain subject to protection under Article 4(4) of the Birds Directive, meaning that the Article 6(4) derogation is not available in respect of such sites (ECJ, 2000b); a separate decision of the ECJ which arguably has a similar effect in respect of pSCIs under the Habitats Directive (ECJ, 2006a); and finally, the ECJ's recent decision in the *Sweetman* case, to the effect that if "the competent national authority concludes that [a] plan or project will lead to the lasting and irreparable loss of the whole or part of a priority natural habitat type whose conservation was the objective that justified the designation of the site concerned as [a Natura 2000 site], the view should be taken that such a plan or project will adversely affect the integrity of that site", which will in principle have the effect of forcing additional plans/projects down the Article 6(4) derogation route (ECJ, 2013, paragraph 46).

Given the painstaking efforts of certain Member States to retake control of aspects of EU biodiversity policy during the Habitats Directive negotiations, these ECJ decisions must certainly be regarded as having had unintended consequences from the Member States' perspective. What makes these consequences particularly politically controversial is the fact that the ECJ decisions giving rise to them have been handed down during the third broad phase in EU environmental policy identified in this thesis – i.e. from 1992 to present – which has been characterised by relatively weak environmental policy dynamics.

Ironically, therefore, since 1992, ECJ decisions have served to strengthen, on paper, the legal protections afforded to Natura 2000 sites, yet these decisions have played out against a relatively difficult political backdrop at Member State level. The European Commission has therefore faced the tricky task during this third phase of defending the Natura 2000 network and the Habitats and Birds Directives more generally from downward pressures seeking, in

some cases, a renegotiation of the instruments. It is important to highlight that these instruments are very much of their time: they were negotiated during the first and second identified phases of EU environmental policy, when the environmental policy dynamics were much more favourable than they are now, and they impose meaningful command-and-control obligations, which are arguably less common in EU instruments negotiated today.

9.2 Research questions

Returning to the research questions set out in chapter 1, this thesis turns now to examine what insights this detailed history and the attendant historical institutionalist approach can contribute to understanding the following points.

9.2.1. The resolution of acute conflicts between human land uses and EU protected areas

Acute conflicts

Given the history and the policy dynamics described above, acute conflicts such as the Sabor dam and the Severn barrage clearly present serious difficulties for policymakers, and they are likely to be simply the first of many hard cases in the renewable energy sector in the EU given the growth targets described above.

The Commission is left in an unenviable position: if EU law is strictly enforced, the Commission arguably runs the risk of triggering a renegotiation of the Habitats and Birds Directives, potentially leading to substantially weaker biodiversity protection provisions. This would seem a particularly acute risk at the present time, given the ongoing REFIT (regulatory fitness) check of the Natura 2000 system at EU level (European Commission, 2013b). However, if the Commission engages in political *ad hockery* (e.g. by accepting less by way of compensatory measures under Article 6(4) than one might expect on the basis of its existing guidance, or by accepting that there are no alternatives to a project when there would appear to be alternatives), the rule of law will be compromised, and with it important environmental protections.

It would certainly be advisable to treat with extreme caution any suggestion that the Habitats and Birds Directives ought to be renegotiated on the basis of the need to address climate change, which - given the detailed history recorded here of the EU's hard-won biodiversity policy instruments - could turn out to be no more than an excuse to seek a weakening of the Directives across the board (e.g. in respect of oil and gas exploration as well as renewable energy projects).

Schools of thought on Article 6(4)

There would appear, at present, to be two leading schools of thought regarding Article 6(4), the first of which is exemplified by Krämer (2009b, pp.84-85), who writes:

> "the Commission would not lose, but rather win credibility, if it were to take a position that was more along the line of the 'rule of law' - in other words if it were to strictly apply Article 6(4) of the Habitats Directive. How can local, regional and national authorities, private investors and economic operators be persuaded to apply Article 6 and follow the Commission's guidelines, if the Commission itself does not set an example and apply this provision? The rule of law is for everybody; and letters, visits or telephone calls from prime ministers or members of national governments are nothing more than protectionist lobbyism."[390]

The second school of thought - which would arguably appear to be the Commission's current approach - regards the Article 6(4) derogation as a "safety valve", which provides legal "flexibility" and (at times) serves to protect the Habitats and Birds Directives from renegotiation/weakening. The Commission could point to the fact that the institutional balance established within the EU is such that the Commission has discretion as to whether or not to pursue infringement proceedings (ECJ, 1989a), and that the Commission is therefore entitled to take operational decisions about which potential infringements to prioritise within the bounds of its limited resources. The Commission might further argue that Natura 2000 comprises more than 27,000 sites, yet only 15-20 opinions have ever been given under Article 6(4) (all bar one being positive).[391] In the context of such an enormous network of protected areas, it is in the greater biodiversity good – the argument might run – that a small number of Natura 2000 sites are sacrificed in exchange for compensatory measures (i.e. no net loss), in order to protect the continuing existence of the Habitats and Birds Directives.

In response one might highlight that the aim of EU biodiversity policy is "to halt the loss of biodiversity and the degradation of ecosystem services in the EU by 2020, restore them in so

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[390] This view is effectively shared by Clutten and Tafur (2012), who write: "In spite of the rhetoric of conserving the EU's natural heritage at the centre of the Habitats Directive, the ease with which conservation interests can be overridden casts serious doubt on its effectiveness as a conservation tool. Neither the ECJ— now the Court of Justice of the European Union— nor the European Commission, with responsibility for ensuring compliance with European law, are taking measures to counteract the broadening of the exception under Article 6(4). Member States appear similarly at ease with a wide interpretation of IROPI [imperative reasons of overriding public interest]. In answer to the question posed in the title of this paper, it seems that the purpose of the Habitats Directive really is imperilled by the interpretation being accorded in practice to the phrase 'imperative reasons of overriding public interest'". To be fair to the ECJ, it can only "counteract the broadening of the exception under Article 6(4)" where relevant cases are brought before it, as recently happened in the Solvay (ECJ, 2012c) and Nomarchiaki (ECJ, 2012a) cases (both preliminary references from a national court, so not brought by the Commission), the ECJ holding that imperative reasons of overriding public interest were absent in the Solvay case. Whether the Commission would have reached the same conclusion is open to debate.

[391] The proposed creation of a new industrial and commercial area "Siegerland" within the former military training area Trupbach near Siegen/Freudenberg (North Rhine-Westfalia), Germany, was the subject of a negative opinion (European Commission, 2003).

far as feasible, while stepping up the EU contribution to averting global biodiversity loss" (Environment Council of the EU, 2010, p.2; European Commission, 2011d). It is hard to see how this can be achieved in practice when, in Commission President Barroso's words, "There is no instance of the EU Nature Directives having prevented significant economic development in [any Member State]" (Barroso, 2009). Surely, one might argue, a proper application of Article 6(4) – requiring the establishment of no alternatives, imperative reasons of overriding public interest, and compensatory measures – would and should have stopped at least some significant economic development in the EU. If Barroso's statement is factually correct, the Commission would appear to be placing great faith indeed in the ability of compensatory measures to halt the loss of biodiversity in the EU by 2020.

Consider, further, that there is no clear picture of what is happening to non-priority Natura 2000 sites across the EU via Article 6(4), since there is no need for an opinion from the Commisison to be sought in such cases, and it would appear that not all countries notify the Commission of the compensatory measures they have adopted, as they are obliged to do. Similarly, there is limited visibility of what is happening to priority Natura 2000 sites via Article 6(4) where the imperative reason relied upon is human health or public safety or beneficial consequences of primary importance for the environment, since here, again, no opinion from the Commission need be sought. So the Commission would arguably seem to be taking the protection of the network of 27,000+ Natura 2000 sites on faith to a certain extent, whilst failing to enforce the law in certain acute conflict situations (perhaps in purported furtherance of the interests of the Natura 2000 nework as a whole). However, compromising the rule of law - one of the foundational principles of the EU (TEU, 2012, Article 2) - by failing properly to enforce the Habitats Directive in respect of the protection of certain Natura 2000 sites could of course lead to an overall weakening of respect for the rule of law, potentially impacting the Natura 2000 network (amongst other things) more generally (e.g. "If they can get away with that in that site, why can't we do something similar here?").

A third view of Article 6(4) (which has not to the present author's knowledge been argued to date), which avoids some of the potential excesses of the second, might hold that there is scope for further legal development of Article 6(4) by reference to the principle of proportionality (as set down in Article 5 of the Treaty on European Union (TEU, 2012)). That is, the "safety valve" view of Article 6(4) arguably gives too much away in terms of the protection of Natura 2000 sites, allowing Member States merely to posit the existence of "imperative reasons of overriding public interest" for proceeding with a damaging plan or project, and the Commission will then be likely to give deference to the Member State's view (the Commission having satisfied itself, exercising its very broad margin of discretion, as

regards alternatives and compensatory measures). A better approach might be to seek to further refine the application of the Article 6(4) derogation to provide for a weighing up of the claimed "imperative reasons of overriding public interest" (IROPI) and the precise impacts foreseen (i.e. scale and type). Whilst this would serve to further calibrate the approach in respect of the question of IROPI, it would not of course address the issue of projects proceeding under Article 6(4) where the compensatory measures to be adopted appear legally insufficient (cf. the cases of the Sabor dam and the Severn barrage) or where there would appear to be alternatives (cf. the Sabor dam). This third view would therefore go some way to addressing concerns with the second, but would still leave certain problematic issues untouched.

So which of these three views is to be preferred? The historical institutionalist analysis presented here arguably provides valuable insights to inform this debate. The analysis reveals that the Birds and Habitats Directives were forged when EU environmental policy dynamics were much more positive than they are now, and that even at the time of their negotiation it was a major achievement to obtain agreement regarding the Directives, with the Habitats Directive very nearly falling several times, including at the final hurdle, as detailed above. If a strict application of the Article 6(4) derogation were to trigger a renegotiation of the Habitats Directive – as a strict interpretation of Article 4(4) of the Birds Directive did in the *Leybucht Dykes* case in 1991 (ECJ, 1991) – such a renegotiation would play out not during a golden era for EU environmental policy, as was the case in *Leybucht*, but instead during the present phase of EU environmental policy, during which the environmental policy dynamics have significantly weakened. In such circumstances, what hope would there be for a positive outcome for nature conservation of such a renegotiation? Very little, it would seem.

In response to this, one might argue that the rule of law is too important a principle to compromise, and that the Commission should not seek to second-guess the outcome of a strict application of the law, particularly since, over time, adopting a "flexible" approach to Article 6(4) of the Habitats Directive could result in serious adverse impacts on Europe's most threatened species and habitats. The Commission might counter here by saying that it always seeks to secure the best possible outcome for Natura 2000 via Article 6(4) by way of compensatory measures (i.e. 'no net loss'), but the ability of compensatory measures to halt the loss of biodiversity may, of course, prove rather uncertain, even where those measures are properly implemented on the ground, which is by no means guaranteed.

These are very difficult issues which go to the heart of EU nature policy, and it is important to recognise that their resolution may not be entirely within the European Commission's

control. That is, while the Commission controls the centralised EU infringements process by bringing (or not bringing) Member States before the ECJ for alleged breaches of EU law, it is clear (and oft-repeated) that the primary responsibility for implementing EU law lies with authorities in the Member States (e.g. see European Commission (2006b)). Thus, Member State enforcement of the Habitats and Birds Directives at national level could - even if this would be unlikely - result in a strict application of the Directives. More likely than this would be the enforcement of the Directives at the national level by legal actions brought by individuals and NGOs. Since cases can come before the ECJ in Luxembourg by way of references on points of legal interpretation from national courts (under Article 267 of the TFEU (2010)), it would be possible for actions at the national level - initiated by national authorities *or* individuals/NGOs - to result in important developments in EU nature conservation law which would apply across the entire EU via judgments of the ECJ.[392] As Cichowski (2001, p.26) argues, in the context of the Member States' decision to enact the Article 6(4) derogation in response to the *Leybucht Dykes* judgment: "in the area of nature conservation, Member State governments have diminished or at least delayed the impact of expansive [ECJ] rulings. While such intervention has minimized the immediate policy consequences of these rulings and perhaps slowed the process of integration, the general trajectory is not easily reversed once the rules are created. The cycle begins again. Through the action of individuals, national courts, and the ECJ, these EU rules can be changed."

This strikes at the heart of the matter. As the above history has revealed, the Commission's enforcement of the Birds Directive in the *Leybucht Dykes* case (ECJ, 1991) led directly to a change in the law via the Habitats Directive, by way of the introduction of the Article 6(4) derogation. This is a very clear example of the rule of law in operation, resulting ultimately in an amendment to the law – i.e. the very essence of the democratic process in action. What is arguably happening now is that the Commission is exercising its discretion not to enforce the law (or, at least, it is interpreting the law as "flexibly" as possible in certain cases, in a way that would at times appear to stretch the law beyond breaking point). In so doing, Commission officials might argue that they are seeking to avoid a weakening of the Habitats and Birds Directives via renegotiation, that they have the best interests of nature conservation in mind, and that they are therefore promoting the general interest of the EU, as the Commission is required to do by the Treaty on European Union (TEU, 2012, Article 17), relying on its broad margin of legal discretion (ECJ, 1989a). However, the same Treaty establishes the rule of law as a foundational principle of the EU (TEU, 2012, Article 2), and

[392] As recently happened in respect of Article 6(4) in the Solvay (ECJ, 2012c) and Nomarchiaki (ECJ, 2012a) cases, the ECJ holding that imperative reasons of overriding public interest were absent in the Solvay case.

requires the Commission to "ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them" (TEU, 2012, Article 17).

Ultimately this debate concerns democracy and the rule of law. One can certainly fully understand - and many would support - the motives of nature conservation-minded officials in the European Commission who may fear a renegotiation and weakening of the Habitats and Birds Directives, particularly against the backdrop of the ongoing REFIT (regulatory fitness) check in respect of Natura 2000 (European Commission, 2013b). However, officials move jobs, retire, etc., and one cannot therefore be certain that officials within the Commission will always be so minded, nor indeed that the preferences of any official or group of officials will always secure the most favourable policy outcome. At base, the rule of law - in opposition to the rule of (wo)men - operates to protect democratically agreed policy from the whims of individuals, whether those whims be well intentioned or otherwise. Thus, in terms of democracy and the rule of law, the most principled position here would be to say that the law should be enforced, without fear or favour – that is, that the first approach to Article 6(4) should be preferred. If this were to trigger a reopening of the Habitats and Birds Directives, the Commission, civil society and (any) green Member States should stand ready to defend the necessity of the instruments and their effectiveness to date, and to mobilise public opinion against any weakening of biodiversity protections in the EU.

Some, however, might view such a stance as naïve, idealistic and likely to lead only to a bad outcome for nature in Europe. Further, for various reasons (e.g. political considerations, resource constraints, etc.), the Commission and Member States are highly unlikely to pursue a strict enforcement and full compliance policy in practice. In such circumstances, the task will fall - if it falls to anyone - principally to individuals and NGOs. While there are certainly limitations in, and preconditions to, the effective vindication of EU legal obligations via public interest litigation before national courts[393] - on which see Slepcevic (2009) in the context of the Habitats and Birds Directives - there are encouraging signs that such litigation has proven important in recent years in driving forward nature policy in Europe. One could cite in this regard the fact that several recent important Habitats Directive judgments came before the ECJ via references from national courts (e.g. ECJ, 2011a; ECJ, 2011b, 2012a, c, 2013). For those who would like to see the Habitats and Birds Directives strictly enforced and fully complied with in practice - and the present author counts himself amongst these - a central task, in parallel to applying pressure on Member States and the Commission to take effective action, will be the bringing of strategic legal cases at the national level by citizens and NGOs, thereafter seeking references to the ECJ. Slepcevic (2009) argues convincingly

[393] For example, accessing justice may be prohibitively expensive in certain jurisdictions (e.g. see Ryall (2013)).

that four variables determine the potential success of such a litigation strategy: the organisational capacity of potential litigants; their ability to access the courts (e.g. questions of legal standing and prohibitive expense may arise); the interpretation by national courts (e.g. a national court may decline to make a reference to the ECJ); and the reaction of the competent authorities on the receiving end of any such litigation. Since these variables vary considerably across the EU's Member States, the potential for enforcing EU environmental law via national courts varies accordingly (Slepcevic, 2009). Such enforcement may therefore prove to be something of a long game, since it may require first working on one or more of these variables before legal actions under the Habitats and Birds Directives can be successfully pursued by a wide range of public interest litigants.[394] Nevertheless, it is clear that such a strategy could reap benefits in the long run, since litigation at the national level can clearly have a positive impact in the context of Natura 2000 (Slepcevic, 2009).

The question, then, for individuals and NGOs will ultimately be the same one the European Commission faces: when and in what cases should legal action be pursued? Some might shy away, for example, from pursuing potentially controversial litigation in respect of acute conflicts at the national level at a time when the Habitats and Birds Directives might appear to be under threat via the REFIT (regulatory fitness) process. Others might not be put off by such considerations. The crucial point here is that litigation pursued at the national level by citizens and NGOs would serve to democratise enforcement. It is for this reason that providing more effective access to justice at the national level is such a key issue at present within the EU. In this regard, the Commission's recent withdrawal of its 2003 proposal for an EU directive on access to justice in environmental matters is unfortunate, if not unexpected given the consistent blocking of the proposal by the EU's Member States (An Taisce, 2013). The Commission has committed simply to "consider alternative ways of meeting its obligations under the Aarhus Convention and is conducting an impact assessment while awaiting an ECJ judgement" (European Commission, 2013b, p.8). In a recent open letter, the EEB and others called upon the Commission to bring forward a new access to justice directive proposal (EEB et al., 2013). Developments are awaited in this regard.

9.2.2. The process of EU integration in the field of biodiversity

This discussion leads neatly on to the question of EU biodiversity policy integration. To re-pose the questions put in chapter 1: Is Article 6(4) an example of the Member States retaining

[394] A good example would be Ireland, where access to justice is limited in practice in environmental cases because of the problem of prohibitive expense (see Ryall, 2013). It might first be necessary in Ireland to tackle the problem of prohibitive expense via a complaint to the Aarhus Convention's Compliance Committee, before individuals and NGOs will generally feel at liberty to pursue actions for judicial review in respect of breaches of the Habitats and Birds Directives.

an important degree of control over EU biodiversity policy? Is this a "counter-force" to EU integration in the biodiversity field (Alter, 2009, p.16)? What light, if any, can a detailed analysis of the history of the Natura 2000 network shed on these questions?

In the present author's view, Article 6(4) is a very clear example of the Member States retaining a significant degree of control over EU biodiversity policy. Moreover, the history recorded in this thesis reveals that the provision was designed with this in mind, specifically as a reaction to the loss of control Member States perceived in respect of the Birds Directive's implementation (there being no derogation provision under the Birds Directive, for example). Moreover, as detailed above, the requirement to seek an opinion from the Commission regarding the application of the Article 6(4) derogation in respect of priority Natura 2000 sites (in certain cases) was designed at the time of negotiation with a view to ensuring that such cases might be dealt with on a bilateral basis between the Commission and the Member State, without needing to involve the ECJ. (A similar solution was adopted in respect of site designations, with Article 5 allowing the Commission to enter bilateral discussions with a Member State regarding a priority site which has not been designated; ultimately such disputes can be brought before the Council, again in pursuit of a political, rather than a legal, solution. Interestingly, however, the Commission has never used this power (Cashman, 2013; Ó Briain, 2013).)[395]

In this regard, the present historical institutionalist analysis has arguably revealed a "counter-force" to EU integration in the biodiversity field (Alter, 2009, p.16). As noted above, Sandholtz and Stone Sweet's (2012, pp.18-19) neofunctionalist theory generates a number of testable hypotheses, including, of particular relevance here: "EU organizations like the Commission and Court of Justice will routinely produce supranational outcomes that the Member States would not have produced on their own" (the present research certainly supports this hypothesis); and "Supranational governance will routinely produce outcomes that conflict with the revealed preferences of the most powerful states". The present research supports this second hypothesis as a general principle, with the important caveat that the Member States' negotiation of the Article 6(4) derogation under the Habitats Directive allows Member States to permit damaging projects within or near Natura 2000 sites by positing the existence of imperative reasons of overriding public interest;[396] and these decisions have not tended to be challenged by the European Commission. Thus, the "revealed preferences of the

[395] Though Cyprus recently argued, unsuccessfully, before the European Court of Justice that the process ought to have been used by the Commission in a dispute regarding site protection for the Cypriot grass snake (Natrix natrix) (ECJ, 2012b).

[396] Alongside "no alternatives" and the adoption of compensatory measures.

most powerful states" would appear to have a good chance of holding sway in respect of the protection (or otherwise) of Natura 2000 sites.

The present research therefore supports Alter's (2009, p.16) argument that "Historical institutionalism...offers a more open framework [than neo-functionalism and] deals better with contingency, and...captures important contextual elements and counter-forces that scholars who are looking only for forces supporting integration will miss. By focusing on counter-forces and surprising puzzles, we may well reveal dynamics that ultimately shape long term change, and thus that better account for important systemic transformations we have observed in Europe."

9.3. Conclusion: the future of EU biodiversity policy

Renegotiation pressures and acute conflicts

As argued in chapter 1, certain Member States have in recent years expressed a wish to renegotiate the Habitats and Birds Directives, implicitly or explicitly to weaken the protections which apply in respect of Natura 2000 sites. It remains to be seen whether the UK's "Balance of Competences" review (UK government, 2012), which is due to culminate in a final report in 2014, will result in any proposals relevant to EU biodiversity policy;[397] but as David Cameron stated in early 2013, "we [the UK] need to examine whether the balance is right in so many areas where the European Union has legislated including on the environment...Nothing should be off the table" (Cameron, 2013).

Even more recently, as discussed above, as part of its REFIT "Fit for Growth" programme, the European Commission announced in 2013 that the legislation underpinning Natura 2000 is to be the subject of a legislative "Fitness Check" to (presumably only if deemed necessary following the check) "prepare for future legislative initiatives to reduce regulatory burden" (European Commission, 2013b, p.7). The Habitats and Birds Directives will therefore be under particularly intense scrutiny in the coming months. In the meantime, acute conflicts under Article 6(4) are likely to remain at the frontline of debates regarding the future direction of EU biodiversity policy. That is, if projects favoured by Member State governments are prevented from proceeding by the Habitats or Birds Directives, there seems likely to be renewed and increased pressure to reopen these Directives for renegotiation.

In the context of the renewable energy case studies considered in this thesis, and given the history presented here, which has revealed a contested implementation of Natura 2000 in many Member States, there is a risk that climate change - and the related need to promote renewable energy projects and grid expansion - could be used merely (or partly) as

[397] See note 25.

convenient excuses to seek a weakening across the board of the protections applicable to Natura 2000 sites (Jackson, 2011). The risk posed by grid expansion is implicit in the following statement from the Renewables Grid Initiative's "European Grid Declaration on Electricity Network Development and Nature Conservation in Europe", signed in 2011 by 24 inaugural signatories comprising environmental NGOs, power companies and others (emphasis added): "3.1 The Parties agree on the desirability and need for: 3.1.3 A high level of protection of areas designated for their conservation value, in particular achievement and maintenance of a favourable conservation status of species and habitats for which Natura 2000 sites have been designated, and maintaining the integrity and coherence of the Natura 2000 network, through *retention* and implementation *of the provisions in the Birds and Habitats Directives*" (RGI, 2011, pp.3-4).

Green infrastructure

A popular policy development in recent years – albeit an old idea – is so-called green infrastructure. As a study for the Commission stated in 2007, the "Natura 2000 network is the core of the Green Infrastructure" (EC study, 2007, p.6), and in 2010 "Although core nature areas are now largely protected under the Natura 2000 Network, species still need to be able to move between these areas if they are to survive in the long term. A green infrastructure will help reconnect existing nature areas and improve the overall ecological quality of the broader countryside." Sound familiar? More recently, the idea has taken on a more pronounced economic slant (e.g. see DG Environment, 2012).

Just two comments in this regard. First, as the historical analysis presented here reveals, the idea of protecting areas outside the Natura 2000 network, including corridors, was heavily debated during the course of the Habitats Directive negotiations, yet ultimately the provisions agreed were very weak. Given that this was the outcome during a period more conducive to EU environmental policy development, one might justifiably be sceptical of the chances of green infrastructure succeeding where the Habitats Directive negotiations failed. That said, proponents of green infrastructure may find valuable lessons from the past in the history recorded here. Second, there is arguably a danger in relying too heavily on an economic frame of reference – ecosystem services, etc. – in seeking to justify new biodiversity policy development. It is clear that such ideas have strategic value, particularly during an economic crisis, but as Redford and Adams (2009, p.785) argue, "The concept of ecosystem services increasingly structures the way conservationists think, the ways they explain the importance of nature to often skeptical policy makers, and the ways they propose to promote its conservation. Is this a good thing? Not entirely....[I]n a world of relentless pursuit of

economic logic, there is a real risk that economic arguments about services valued by humans will overwrite and outweigh noneconomic justifications for conservation."

Competing visions of conservation

Related to this, a recent paper by Jones-Walters and Čivić (2013, pp.123-4) argues that:

> "The 20th anniversary of the Habitats Directive is significant for other reasons; protected areas in Europe have a reached a critical point in the development of their policy and management. In spite of their deep roots in human history and their long-time justification on the basis of intrinsic value protected areas must face the economic challenges of the modern era...
>
> ...The economic arguments are modern ones and, whilst they no doubt have validity in the 21st Century economies of Europe, the intrinsic value of protected areas is what led to their designation and it still remains a fundamental raison d'être for their continued protection and management; (and such an ethos remains at the core of the Emerald and Natura 2000 networks). Growing pressures on protected areas include their potential exploitation for economic and commercial benefit and the continued threats from competition over land use and climate change. There is a therefore a need for strong policy at all levels; to guide decision-making in relation to their continued designation, protection and management, including the ecosystem services that they deliver and taking into account the needs of the local communities who live and work in and around them."

It is interesting to place these remarks in the context of a broader historical debate regarding the Habitats and Birds Directives, and to note that the "economic challenges of the modern era" may well be transient, as may the era itself. Thus, it would perhaps be advisable to pause for reflection before deciding what, if any, changes are required to European protected area policy in "the modern era".

There are some who regard the Birds Directive as the high-water mark of EU biodiversity policy (Linehan, 2005), with the Habitats Directive arguably representing something of a roll-back or weakening. After all, immediately following the *Leybucht Dykes* judgment, it was not possible to allow a damaging plan or project to proceed in or near an SPA under the Birds Directive for socio-economic reasons (ECJ, 1991). However, when the Habitats Directive was adopted, the Article 6(4) derogation was applied to sites under the Habitats *and* Birds Directives. John Temple Lang – who played an important role in respect of both instruments – provides a reflective account in this regard: "At [the stage of negotiating the Habitats Directive] the scientists working for the various governments had a much better, clearer idea

of what was involved and what was likely to be involved, and there was a lot more shoving and pulling to try to get reasonable compromises, so the Habitats Directive is more complicated, as it needed to be, and is more of a compromise than the Birds Directive. The Birds Directive is really, in retrospect, an astonishingly clear piece of legislation and that's why it has been applied so consistently and in such a very wildlife conservation-minded way by the European Court of Justice. It's relatively easy for a court to apply in clear and pretty absolute terms" (Temple Lang, 2012a).

As discussed above, it is clear that Article 6(3) and (4) of the Habitats Directive reflect the intermediate effect of the EIA Directive, adopted in 1985. In other words, the idea of environmental impact assessment came to the fore in the EU between the dates of the Birds and Habitats Directives, and the idea was then incorporated in the latter directive. Setting to one side the question of how the impact assessment obligation has been applied in practice, there is something to be said for the argument that the Habitats Directive introduced a "procedurally careful" and "calibrated" impact assessment (and derogation) system of "careful due process" (Cashman, 2012), in response of the Member States' rejection of the strict protection for SPAs laid down by the ECJ in *Leybucht Dykes*. And it would perhaps be a little too negative to regard the Habitats Directive as less ambitious but more administratively complex than the Birds Directive; whilst it is true that the Habitats Directive has introduced an impact assessment process, this is arguably a strength of the Directive, particularly when one considers that the appropriate assessment regime of Article 6(3) falls back on stringent underlying protective obligations, Article 6(2) and (3) (cf. ECJ, 2004), the former of which was modelled on Article 4(4) of the Birds Directive. Having thus undergone this transition from strict site protection under the Birds Directive (a creature of the 1970s) to the impact assessment and derogation system under the Habitats Directive (a creature of the "golden era" of EU environmental policy), must the Natura 2000 network and the species and habitats it protects really now "face the economic challenges of the modern era" (Jones-Walters and Čivić, 2013, p.124)? What would this mean in practice? Perhaps we should instead envisage conservation policy beyond the current economic crisis, and even beyond the current era of EU environmental policy. If we are serious about halting the loss of biodiversity in Europe, policy development should now focus on how to conserve biodiversity inside *and* outside Natura 2000 areas, in the wider countryside and beyond.[398] What would tomorrow's Europeans say?

[398] A good start would be to implement the second sentence of Article 4(4) of the Birds Directive, which provides: "Outside [SPAs], Member States shall also strive to avoid pollution or deterioration of habitats" (Birds Directive, 1979). This obligation has proven to be legally enforceable (see ECJ, 2007a) but has not yet been enforced throughout the EU.

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DG XI (1990e) DG XI working document dated 8 May 1990. Annex V - Criteria for the classification of special protection areas.

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