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EU Fitness Check for the Habitats Directive and the Birds Directive

Legal and scientific report

Commissioned by the

„Aktionsbündnis Forum Natur“

Authors:

Dr. Claus Albrecht (Kölner Büro für Faunistik)
Dr. Thomas Esser (Kölner Büro für Faunistik)
Dr. Frank Fellenberg (Redeker Sellner Dahs)
Prof. Dr. Alexander Schink (Redeker Sellner Dahs)

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1. Assignment and summary of the essential findings

The Habitats Directive[1] (German: *FFH-Richtlinie* (FFH-RL)) and the Birds Directive[2] (German: *Vogelschutzrichtlinie* (VRL)) are an important contribution to the protection of biodiversity in the EU Member States. The objective of the protective system established by the Directives is to ensure a uniform and high degree of protection. „Aktionsbündnis Forum Natur" asked us to examine where and which problems might arise in the practical implementation of the Directives and their requirements, and identify possibilities for improvement.

According to our assignment, the present examination is limited to areas that are particularly important in practice, namely habitat protection law (see lit. (a) herein-below) and the laws on the special protection of species (see lit. (b) herein-below). In summary, we can put forward the following recommendations for improvement:

a) Network of protected areas Natura 2000

- *Updated protection*: The protected sites designations and their boundaries should be periodically examined as part of monitoring. This is the only way to ensure that site protection is adequately up-to-date. This is the only means of staying abreast of changes in the location of species' habitats. The same applies to changes in protection needs that may result from improvements or deteriorations of the conservation status. However, plans for specific projects already launched have to be taken into account when adjusting the classification of protected sites.

  Proposed solution: Supplement the Habitats Directive and the Birds Directive by a mechanism for adjusting the level of protection to changed circumstances in a bilateral coordination procedure between the Member State concerned and the Commission.

- *Differentiated protection*: Furthermore, we recommend creating the conditions for applying an adjusted level of protection to the habitat types listed in Annex I and species in Annex II of the Habitats Directive as soon as they reach the desired, favourable conservation status in their respective biogeographical region of the Member State (e.g. by omitting or easing the restoration or development requirements set out in the conservation objective or by allowing a more flexible use or management of land). This would help to actually reward successful types of management that are adjusted to the objectives of site protection with a less strict protection status, contrary to current, inconsistent prac-

[1] Directive 92/43/EEC of the Council of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206 of 22 July 1992, p. 7.
[2] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (codified version), OJ L 20/7 of 26 January 2009.

tice. Doing so would help achieve the objectives of maintaining and promoting a favourable conservation status of the habitats and protected species.

- *Contractual nature conservation*: Contractual solutions should be given significantly more consideration. They should have priority over regulatory measures. It is usually sufficient to issue a regulatory basic protection regime in order to ensure the required protection of third parties. In relation to land owners and managers, contractual nature conservation should have priority. This would raise the level of acceptance and facilitate a combination of conservation and supporting instruments.

  Proposed amendments: Such priority could be established without amending the Directives. In German law, Sect. 32, para. 4 BNatSchG could be amended to the effect that „contractual arrangements shall be employed primarily, provided they guarantee effective protection in combination with site-specific regulatory rules (basic protection).“

- *Incentive systems and compensation*: Existing support programmes of the EU and the Member States for land owners and managers should be given preference when planning and adopting regulatory official measures. As a result, the affected parties could participate more effectively and actively in nature conservation and would be affected less strongly in their ownership positions. Already existing, ideally simultaneous, nature conservation mechanisms, should be linkedin a sensible manner. In addition, – for instance by supplementing Art. 2 of the Habitats Directive – it would be advisable to clarify the fact that severe encroachments on rights of ownership and use will entail appropriate compensation.

- *Temporary nature conservation*: Applicable law often provides an incentive for land owners, managers, and project developers to prevent from the outset the settlement of protected species and the establishment of habitat types and species deemed worthy of protection in order to escape future restrictions of nature conservation law. To prevent this undesirable effect, legislative measures should be taken at EU level in order to ensure that positive developments are not simultaneously sanctioned by restrictions on land management or use. Again, rewarding positive effects with more flexible protection targets could constitute an effective approach. This goal could be reached by a “Temporary Nature Conservation“-regulation. It would enable managers who act in conformity with nature conservation objectives to (re-) engage in previously defined activities after a certain period of time as stipulated by contract, and in particular to resume original types of use.

Proposed amendments: Supplement the Habitats Directive by an Article 6, para. 5: „The resumption of a form of land use for purposes of agriculture, forestry, fishing […] that was interrupted on the grounds of a contractual arrangement with the responsible public authority, or the participation in a public scheme of management restrictions, is not subject to the requirements of para. 3, provided the resumption occurs within […] years from the end of the restriction or interruption."

- *Significance and de minimis thresholds*: (Additional) specialist conventions should be drafted, defining effect-based significance thresholds for habitat types and special protected species, for the purpose of assessing the prospective significance or impairment of protection and conservation goals. This would also entail considerable procedural simplification and allow for a consistent application of Art. 6, para. 3 of the Habitats Directive. In suitable sectors, the development of uniform European standards is also recommended.

  Recommended solution: drafting special conventions for the most important habitats and special protected species.

- *Project definition*: Any „plan or project" that either individually or in combination with other plans and projects is likely to have a significant effect on the management of a site must be assessed under Art. 6, para. 3 of the Habitats Directive for its conformity with the conservation goals determined for the site in question. The central term „project" that is used in the provision is not defined in the Directive. In practice, this leads to considerable legal incertainty and to an inconsistent application of the directive by the EU Member States. A definition will have to take into account that it would be incompatible with the requirement of proportionality to subject any kind of activity, irrespective of whether it has an adverse impact on the habitat, to a preliminary or full assessment in terms of Art. 6, para. 3 of the Habitats Directive.

  Recommended solution: Add a definition to Art. 1 of the Habitats Directive.

- *Interaction with other plans and projects*: The limits, in terms of time and scope, within which cumulative additional implications caused by other plans and projects shall be taken into account as part of the assessment of the environmental impact, as required under Art. 6, para. 3 of the Habitats Directive, have to be clarified urgently. Implemented plans and projects are already factored into the initial level of pollution and thus define the conservation status of a habitat. If they were taken into account again in the cumulation examination under Art. 6, para. 3 of the Habitats Directive, as partly called for, they would be counted twice, which is not justified.

  Recommended solution: Expressly highlight the limited scope of the cumulation examination under Art. 6, para. 3 of the Habitats Directive in EU-Guidelines.

- *Avoidance measures*: In environmental impact assessments it should be possible to a much larger extent to include compensatory measures (new creation of protected habitat types, deconstruction and decommissioning of other interventions, etc.). This applies at least in the case of types of habitats and species that are in a favourable state of conservation and if it has been demonstrated that the measures took effect before any loss/damage occurred. This would make it easier to implement integrated projects that pursue both economic and nature protection goals (e.g. excavations with an ecological purpose).

  Recommended amendments: Supplement Art. 6, para. 3, sentence 1 of the Habitats Directive as follows behind a semicolon: „; when assessing the significance, both the effect of avoidance measures shall be taken into account as well as the effects of early measures taken to ensure the global coherence of Natura 2000 if they demonstrably already occurred before the damage/loss occurred."

- *Examination of alternatives:* In practice, the very limited possibility of including protected interests that have nothing to do with nature conservation into the examination of alternatives, frequently leads to acceptance problems. The current system only permits the abandonment of an alternative solution that has a weaker impact on the site if that alternative is „unreasonable". Consequently, interests such as public safety, especially the protection of public health (e.g. from noise, contamination or dust), and the value of property, frequently rank lower than nature conservation interests.

  Recommended solution: Provide clarifying explanations in Commission Guidelines on Art. 6, para. 4 of the Habitats Directive regarding the possibility of taking a broader range of interests more widely into account in the examination of alternative solutions.

- *Communication*: Finally, communication with land owners and managers should be considerably improved. The current practice leads to manifest and – avoidable – problems with acceptance. This applies especially to the preparation and implementation of management plans, which are meant to improve the conservation status. Where possible, such plans should be set up in a transparent manner and in consultation with managers. This requires no amendment of EU law.

b) Special species protection

- *Inconsistent criteria in the selection of the protected objects*: The objective of the Birds Directive is the protection of all species of wild birds. It therefore applies to all species whether or not they are endangered, and hence irrespective of whether or not their populations must be attested an unfavourable conservation status. There is no conceivable objective reason for such a raised standard of protection for birds compared to the species protected under the Habitats Directive.

Recommended solution: Limit the scope of protection to certain species of birds to be listed in an Annex to the Birds Directive (adopt the regulatory model of the Habitats Directive).

- *Management of land:* Applying the provisions of the Habitats Directive relating to the protection of species without limitation, and to specimens, would render the management of agricultural and forestry land more or less impossible or at least extremely difficult. National law takes this into account, at least partly, in the special provisions of Sect. 44, para. 4 BNatSchG. However, an explicit legislative provision at European level, too, would be preferable.

- *Prohibitions relating to specimens*: The protection of specimens and their different stages of life against killing or harm, as required by the Directives at least according to the interpretation of the German courts, does not make sense from a biological point of view in the cases of many species. The fact that the loss of parts of some species' populations is part of their survival strategy and that many habitats can only be preserved by recurring intervention, is ignored. In many cases, this is inseparably linked with a threat to single specimens and their stages of life. The protection of specimens is threatening to call into question the protection of habitats as such, so that the conservation status of species that depend on dynamic habitats that require regularly tending or management will deteriorate over time despite all efforts of protection. Therefore, it is advisable to facilitate a differentiated system of protection already at EU level.

  Recommended amendments: Supplement the prohibitions in Art. 12, para. 1, lit. a) and Art. 13, para. 1, lit. a) of the Habitats Directive and Art. 5, lit. a) – c) of the Birds Directive by the requirement that the endangerment of the population concerned must be likely. Alternatively, the requirements already stipulated could be supplemented by adding: „The Member States must take into account the individual species' varying need for protection."

  In addition, the substantive requirements of these provisions will have to be specified in the Guidelines of the Commission. As the prevailing opinion in current law correctly holds, an undifferentiated reference to specimens is not compulsory under the EU-Directives. Consequently, corresponding clarification can be achieved without amending the Directives.

- *Prohibition of disturbance:* The term „disturbance" of protected species in Art. 12, para. 1, lit. b) of the Habitats Directive and Art. 5, lit. d) of the Birds Directive is not sufficiently specific. In particular, it does not make sense in the case of animals with a large distribution range and „local populations" which are almost impossible to delimit.

  Recommended solution: More detailed specifications in the Commission's Guidelines.

- *Capture and relocation*: The conditions imposed on the deliberate capture of specimens in order to resettle them in surrogate habitats are elaborate and inappropriate. Accordingly, a measure that is intended to protect specimens and restore habitats is subjected to the disproportionate complexity of the derogation examination required under species protection law. This counteracts the underlying objectives of protection.

  Recommended amendments: Supplement Art. 12, para. 1 of the Habitats Directive and Art. 5 of the Birds Directive and allow for a derogation for the capture of species that are eligible for protection for the purpose of resettlement in suitable surrogate habitats and exempt such measures from the prohibitions if the capture is performed in conformity with established standards and if the suitability and effectiveness of the measure has been evidenced. Alternatively, a clarification could be included in the Commission's Guidelines.

- *Derogations*: It should be possible to also consider private interests as justification, at least in the area of the protection of species. This would require an amendment of Art. 16 of the Habitats Directive and of Art. 9 of the Birds Directive. Furthermore – and regardless of the above – the grounds for derogations should be harmonised in both Directives. Unlike the Habitats Directive, the Birds Directive does not contain a catch-all provision that would make a derogation possible for „imperative reasons of overriding public interest". The reasons for derogations under the Birds Directive are therefore limited to the ones that are expressly mentioned. There is no objective reason for this stricter standard of protection compared to the Habitats Directive.

  Recommended amendments: Supplement Art. 9, para. 1, lit. a) of the Birds Directive with the derogation „other imperative reasons of overriding public interest" and supplement Art. 16, para. 1 of the Habitats Directive and Art. 9, para. 1 of the Birds Directive with the derogation „clearly prevailing other reasons, in particular if the application of the prohibitions would lead to an unreasonable burden and the derogation is consistent with the objectives of the Directive."

2. Background

In December 2012, the EU-Commission initiated the „Regulatory and Performance Programme“ (REFIT) to create a clear, stable and predictable legal framework promoting development and employment. As part of the REFIT programmes, the Commission instructed the Directorate-General for the Environment in February 2014 to conduct a „Fitness Check“ for EU legislation in the area of environmental law. As part of these „Fitness Checks“, the different stakeholders are consulted. The Commission structured the process by defining specific questions. *Inter alia*, it poses the following questions:

- Are the main problems and concerns arising in connection with the protection of species and habitats still adequately addressed by the applicable laws?
- How important are the Habitats and the Birds Directive for achieving sustained progress?
- How relevant is EU nature conservation legislation for EU citizens and how willing are the latter to support/implement the Directives?
- What are EU citizens' expectations regarding the role of EU nature conservation?

The present legal opinion is based on a comprehensive study. Its aim is to accompany the ensuing debate in the context of the REFIT process on the basis of the above questions.

3. Analysis of the status quo and recommendations for improvement

3.1 Network of protected sites Natura 2000: Habitat and bird protection areas

3.1.1 Site classification system

The Habitats Directive provides for a systematic assessment of the relevant protected objects when selecting sites of Community importance. Accordingly, relevant criteria for the selection of protected sites are, resp. were:

- Existence of habitat types listed in Annex I of the Habitats Directive and their assessment based on the individual criteria: size, conservation status, and representativety, and
- The occurrence of species listed in Annex II of the Habitats Directive and their evaluation based on the individual criteria: population, conservation status of the habitat elements and isolation.

The criteria for the selection of habitat types and habitats for the different species of „Common interest“ are listed in Annex III of the Habitats Directive. „Site assessment criteria for a given natural habitat type in Annex“ are the degree of representativity of the natural habitat, the area of the site covered by the natural habitat type in relation to the total area covered by that natural habitat type within the national territory in the respective Member State, and the degree of conservation of the natural habitat type concerned. The assessment criteria determined by the Habitats Directive are a significant step forward because of their transparency and comparability of protected objects, compared to the classification for protection, for example, of nature or landscape conservation sites under German law. A point of criticism is, nevertheless, that the selection of bird protection sites was based on other criteria: According to Art. 4, para. 1 of the Birds Directive, the „most suitable territories in number and size“ shall be classified as protected sites for especially endangered or rare species. However, the Birds Directive does not define the criteria to be applied in order to assess said suitability „in number and size“. Thus, the network of protected sites Natura 2000 is somewhat inconsistent.

Need for action?

Having largely completed the classification of areas, it appears questionable whether a full alignment of the two Directives' different selection systems is able to compensate the disadvantages that a change of system almost always involves. Such an alignment can at least be considered for the future. This applies especially in view of the fact that according to the regulatory regime of the Birds Directive, the stricter protection of Art. 4, para. 4, sentence 1 of the Birds Directive applies until a site is placed under protection,[3)] whilst at the same time, site classification in the field of bird protection cannot be considered completed at any particular date because of the dynamic reference to the „most suitable territories“. And, moreover, the objection can still be raised that the territorial delimitation has become incorrect (in the meantime). This regulatory system leads to considerable legal incertainty.

3.1.2 Consideration of altered states of knowledge

The identification and delimination of protected sites is more or less completed in Germany. Occasional subsequent submissions of Natura 2000 sites are, however, still conceivable (for example the southern Odenwald in Baden-Württemberg as a bird protection site especially for black stork populations).

[3)] ECJ, case C-117/00 – Commission/Ireland, [2000] ECR II- I-5335, para. 25; case C-374/98 – Commission/France, [2000] ECR I-10799, para. 43 et seq.

Open questions:

Uncertainties still exist as regards subsequent submissions that are detrimental to reliable planning and management. The selection and delimination of Natura 2000 sites has repeatedly shown in the past that data on the occurrence and distribution of the protected species relevant for classification were not, or insufficiently, evidenced. In many cases, participation procedures with the parties concerned lead to corrections and alterations of the determination of the sites. Moreover, it can assumed that the current state of knowledge regarding the protected sites will continue to change as a result of the reporting obligation. In this context, it would be a great benefit for all parties involved if altered conditions of individual protected sites were publicly communicated. In particular, the following questions arise:

- How exactly are altered states of knowledge of protected habitats and bird protection sites handled? Are such changes communicated to the site owners and managers even if there is no official participation procedure?
- Can altered states of knowledge regarding the protected sites also lead to alterations of the defined conservation goals and possibly even of the site delimitations or designations? Which criteria are applied in this respect? The European Commission and the federal Länder have issued numerous communications on the question of how to deal with the protection provided by the European nature protection directives. Nevertheless, changes that possibly even correspond with the natural dynamics of habitats and species are hardly ever taken into account. In this area, there is a lack of factual and legal assessment standards.

A periodical review of site classification is indispensable. The Member States' reporting obligations towards the Commission can be used to report

- whether, due to the improvement of the conservation and protection status, there is still a need for protection or whether the site can be released from the classification,
- whether a permanent relocation of the species' habitat, on behalf of whom protection is granted, has taken place and therefore the classification ought to be adjusted,
- whether changed habitats require an expansion or reduction of the protected site.

The results of such periodical reviews should then trigger a procedure for reviewing the protected sites and, where necessary, an adjustment of the classification in accordance with the provisions relating to site reports under the Habitats Directive, which require completion of the report within a reasonable period of time (one year). Such a procedure can ensure that the classification of the area is up-to-date and that it corresponds with the actual need for

protection. At the same time, any existing legitimate expectations of protection have to be taken into account. There must be a reliable system for ensuring that changes in the site classification do not have a detrimental impact on admission procedures already initiated or even more so on projects already implemented.

3.1.3 Consideration of the conservation status

A fundamental problem of Natura 2000 is the generally rigid system of protection which imposes numerous limitations. Each limitation is predetermined by the definition of the conservation objectives and the related measures. Said measures are partly composed of management or exploitation plans and thus, ultimately, of permissions and prohibitions. For interventions, even if they do not occur on the actual area but may have an adverse impact on the protected site, the instrument of the environmental impact assessment under Art. 6 of the Habitats Directive was chosen.

At the same time, the reports delivered on the conservation status of species and habitat types according to Art. 17 of the Habitats Directive reveal that the situation has not improved fundamentally as regards the protected sites of Natura 2000, at least in Germany. On the contrary, the relative percentages and the absolute figures of habitat types and species whose conservation status deteriorated between 2007 and 2013 have risen. Even when taking into consideration the fact that the years 2007 and 2013 cannot be directly compared because the state of knowledge and the assessment criteria might have changed in individual cases, it is clear, nevertheless, that at least no significant improvement of the habitat types and the species was achieved.

Year of assessment	HABITATS					SPECIES				
	FV	NA	XX	U1	U2	FV	NA	XX	U1	U2
2007	65		10	69	49	130		115	117	118
2013	**54**		**4**	**75**	**59**	**93**		**56**	**115**	**106**

Table 1: Comparison of the classification of types of habitats *(Habitats)* and species *(Species)* in the years 2007 and 2013 in Germany in absolute figures (taken from the „National Summary for Article 17 – Germany“). FV = *favorable*; NA = *not reported*; XX = *unknown*; U1 = *unfavourable inadequate*; U2 = *unfavourable bad*.

The report on Germany (2013) contains indicators of possible reasons for the endangerment of species and habitats relevant under the Habitats Directive. In addition to natural reasons, the use of land (agriculture and forestry and fishing) is mentioned as a possible cause. It is evident that due to a rising degree of acceptance there is an opportunity here for designing and implementing more effective protection measures.

Approach:

The current definition of conservation objectives and related measures, combined with the classification as a protected site of the Natura 2000 network, does not, or only insufficiently, take the conservation status of habitat types and species, resp. their habitats, into account. This applies likewise to the protected bird sites to which similar procedures apply as to sites under the Habitats Directive.

A higher degree of acceptance could be achieved by making the requirements of site protection more flexible without curtailing the desired high standard of protection. Such increased flexibility regarding the habitats listed in Annex I, and the species listed in Annex II of the Habitats Directive, and for wild birds species that are subject to the Birds Directive, are conceivable in view of the actual situation. This is the case, at least, where said habitats and species have a favourable conservation status, meaning that the objectives of the Directives for such species have already been achieved. A more flexible form of site protection could take the following shape:

- Species and habitats with a favourable conservation status that are relevant under the Habitats Directive, and not endangered bird species listed in Annex I of the Birds Directive, resp. species that are under protection according to Annex II of the Birds Directive, require no development or restoration measures on protected sites. Here, the aim of maintaining a favourable conservation status has already been achieved and does not need to be supported by additional measures.
- Therefore, a more flexible form of management is imaginable in the case of the species and habitats mentioned. After all, the objective is the permanent preservation of a favourable conservation status. For example, the loss of surface space in a habitat (e.g. 9130 Waldmeister-Buchenwald) situated in one location of a protected site would not entail any sustained detrimental impact on the favourable conservation status if, at the same time, compensation was provided in a different location, for instance by creating a new habitat of the same type. The prohibition of deterioration under Art. 6, para. 2 of the Habitats Directive can therefore be relaxed in cases in which there is no reason to fear that an impact with no lasting detrimental effect on the single occurrence of a certain type of habitat on a small surface area with a favourable conservation status would not permanently entail a deterioration of that conservation status if, at the same time, it was compensated elsewhere. This would give land managers a higher degree of flexibility. At the same time, - without resulting in cutbacks on the Directives' protection objectives – avoidable competitive disadvantages in a globalised marketplace would be prevented.

- The same course of procedure is possible in the case of habitats of the type listed in Annex II of the Habitats Directive or habitats that are eligible for classification under the Birds Directive, provided they have already reached a favourable conservation status. Here, too, provided any necessary measures for ensuring the sufficient availability of habitats are taken, site protection can be handled more flexibly, thus giving managers more choice without putting the Directives' objectives at risk.
- Likewise, a more flexible form of handling individual protected sites of the Natura 2000 network, in which types of habitats or habitats of species already have a favourable conservation status, is possible, too. For instance, as a reward for achieving targets on individual protected sites, management could be made more simple and more flexible. This would offer an incentive to managers to support developments that are beneficial to nature protection and that, on achieving an improvement, would allow them to become more flexible again on individual sites.
- Species and habitats that show a positive trend and where there is no reason to assume that once a favourable conservation status has been achieved, it will deteriorate again in foreseeable time, should be released from Annexes I and II of the Habitat and the Birds Directive: in that case, they would cease to be target species/habitats for the definition of conservation targets and would not justify the classification of additional protected sites. This criterium would of course only be applied to species and habitats where there is no reason to fear any present or future danger to the current favourable conservation status.
- From a practical point of view, to which especially land users and managers are able to contribute, more flexible compensation measures in spatial terms also appear recommendable in order to achieve compatibility with the Habitats Directive. An effective promotion of bio-diversity could be achieved more efficiently and more economically if larger and coherent, but not adjacent, compensation sites were used.
- Likewise, it is questionable whether identical compensation measures ought always to be required, as is currently the case *de lege lata*. It does not always make sense to support a species that is affected by a project, by taking compensatory measures. Instead, biodiversity, as well as the preservation of a species as a whole, may often benefit more from equivalent individual measures than from constantly identical compensation measures. This would make it possible, for instance, to intensively protect other especially endangered species *in lieu* of the less endangered species in question. For this purpose, the responsible authorities would have to be given the possibility to make flexible decisions that take into account individual needs.

3.1.4 Precedence of contractual nature protection

The implementation of a Natura 2000-classification requires measures that reliably ensure the observance of the EU's targets without fail. However, this can also be achieved by public contracts, provided they are legally enforceable and also grant protection especially from third parties. Sect 32, para. 4 BNatSchG expressly acknowledges that the classification as protected site under Sect. 32, paras. 2 and 3 BNatSchG can be omitted if an equivalent level of protection is ensured by a contractual agreement. So far, this provision has only been used with restraint and mainly on land belonging to the State, such as military training areas. This is due to the fact that the ECJ demands a formal classification[4] that fully and conclusively covers the sites in question.[5] Moreover, the sites have to be effectively legally delineated in relation to third parties and must immediately entail the application of protection and conservation provisions under national law in conformity with EU law;[6] also, specific obligations and prohibitions relating to the site have to be stipulated.[7] In the case of larger sites with more than one owner, the effectiveness and practicability of contractual provisions is doubted.[8]

However, contractual provisions can very well provide effective protection. This is especially the case if a Natura 2000 site affects one or a few owners, only. For in this case, provisions regarding the permitted exploitation of the site and the limits of owners' rights have to be adopted in order to ensure that the protection and conservation objectives are reached. The requisite protection against third parties can be achieved in the form of a basic regulation defining the territorial borders and provisions which again stipulate third parties' obligations in respect of required actions and omissions. Otherwise, however, contractual arrangements should be given preference because they are more efficient in aligning the prohibitions, obligations and management measures required to reach the protection and conservation objective with the owner's interests. This requires the land owner's willingness to implement the required measures whilst simultaneously ensuring the achievement of the protection and conservation objectives. In addition, contractual provisions can be used as sovereign instruments of protection to more easily accommodate changes in the protection and conservation objectives. For example, it would be possible to take into account changes in the need for protection, which may be caused by a displacement of the habitat of a priority species, by

[4] ECJ, case C-374/98 – Basses Corbières, [2000] ECR, I-10799 et seqq.
[5] ECJ, case C-240/00 – Commission/Finnland, [2003] ECR I-2081 et seqq.
[6] ECJ, case C-415/01 – Commission/Belgium, [2003] ECR I-2081 et seqq.
[7] Heugel, in: Lütkes/Ewer, BNatSchG, 2010, Sect. 32 marginal no. 12; Niederstadt, NuR 2008, 126, 131.
[8] Heugel, in: Lütkes/Ewer, BNatSchG, 2010, Sect. 32 marginal no. 10; OVG NRW, Decision of 02 February 2005 – 11 D 68/02 AK, juris, para. 11.

amending the contract. The legitimate interests of land owners can be given better consideration on sites classified as Natura 2000 sites.

In addition, contractual nature conservation is especially suited to link site protection with compensatory measures and thus raise the level of acceptance of the requisite protection and conservation measures. Not every measure of sovereign protection involves an obligation to pay compensation. According to established case law, this is only the case if a type of use previously exercised is subsequently prohibited or if the regulation would be disproportionate if no compensation were provided.[9] This limited obligation to provide monetary compensation is often detrimental to the acceptance of site protection measures in Natura 2000 areas. Contractual provisions, by contrast, make flexible solutions possible that can take into account both nature protection requirements on the one hand and the legitimate interests of the owners on the other. Thus, contractual protection is able to involve land owners in the pursuit of the protection, conservation and development objectives of Natura 2000 sites and thus achieve better results than sovereign protection.

For these reasons, contractual nature conservation should be given priority over sovereign conservation, which addresses land owners. Ideally, it would be supplemented by a basic form of protection that regulates site delineation and protection against third parties in order to ensure the achievement of the protection and conservation objectives. This could be best implemented by amending the Directives. Another conceivable alternative, however, are Commission Guidelines establishing the principle of a priority of contractual regulations.

3.1.5 „Temporary nature protection“

Defining conservation objectives in habitat protection law often has an undesired effect that is frequently overlooked: managers who have been using their land in an especially environmentally friendly manner are „punished“ by a higher protection status and more severe restrictions. If, by contrast, the type of land use has not incidentally created any natural habitat types, or habitats of species, that are eligible for protection, either the site is not designated as protected site or the parts of the site that are eligible for protection are considerably smaller, as are the parts of land to which the conservation objectives and measures relate. This is a fundamental problem of the Habitats and the Birds Directive: the provisions designed for these cases generally do not provide for a reward for nature protection efforts undertaken but, on the contrary, create a kind of resistance that has an adverse impact on the willingness to support nature protection efforts.

[9] Fellenberg, in: Lütkes/Ewer, BNatSchG, 2010, Sect. 68 marginal no. 5 with further references.

Experience has shown that the fear of restrictions on the use of land, or the anticipated inadmissibility of an intervention often prompts the party concerned to attempt to prevent the occurrence of anticipated obstacles before an assessment or a corresponding study is carried out. In these cases, too, rigid protection has an undesired effect. This is a particularly good example of how land managers' general acceptance, and their willingness to support positive developments in protected areas, is manifestly counteracted.

If industrial brownfields and other unused spaces are temporarily not exploited economically, the population with and breeding of protected animals and plants, and the creation of types of natural habitats as listed in the Annexes to the Habitats and the Birds Directive, should be permitted. In times in which the owner does not use the site, it would serve nature protection purposes and, at the same time, make sense economically, if said land owner, or the leaseholder, etc., did not fight such a population.

This problem must be addressed at Union-level through corresponding judicial decisions of the European Court of Justice or by corresponding amendments of the Directives. For, under current law, it is contentious whether and within which limits the Member States have any discretionary leeway to find practical and balanced solutions.

At the level of national nature protection law, for example, Sect. 4, para. 2 no. 1 LG NRW, or Sect. 30, para. 5 and 6 BNatSchG relating to biotope protection, the possibility of „temporary nature protection" already exists. These provisions, however, do not apply to projects on Natura 2000 sites but merely to impact rules of national nature conservation law, which are not shaped by EU law (Sect. 4, para. 2, no. 1 LG NRW), or to equally purely national statutory biotope protection provisions (Sect. 30, paras. 5 and 6 BNatSchG). It would be recommendable to find a regulatory solution at EU level that determines the general framework for the conditions under which improvements are not prevented by the approval of projects in the sense of a „temporary nature" principle. This requires two regulatory approaches:

- On the one hand, a provision is required that, in the case of land management that, voluntarily, is coordinated with the nature conservation authorities and complies with nature conservation laws, or in the case of voluntary non-utilisation, provides that the sites may not, or only under very strict conditions (e.g. the occurrence of species in need of strict protection as listed in Annex IV of the FFH Directive) be included in the Natura 2000 classification. This applies particularly to bird protection sites.
- On the other hand, the existing classifications require a provision that stipulates that the significance of a project is determined on the basis of the state of nature as at the time when the use of land in conformity with nature conservation law, or non-

utilisation, was commenced; such a provision should be supplemented by the regulatory requirement of a documentation of the original condition.

Land management in line with nature should be accompanied by contractual regulations. These can determine which types of use are permitted, or not, for the term of the contract and that utilisation, or non-utilisation, of the land in conformity with nature conservation law will not prevent the resumption of previous utilisation after the end of the contractual term.

In order to ensure the application of these instruments at Union level, and to open up the needed leeway for the parties involved, it would be recommendable to adjust the Directives accordingly.

3.1.6 Support mechanisms and compensation

In addition to the above thoughts regarding the treatment of individual cases in the area of the protection of natural habitat types and habitats of species that have a favourable conservation status, the question arises how managers can be rewarded for positive developments in the protected areas in order to give them a corresponding incentive for managing the land in line with nature conservation objectives. Instead of imposing regulatory obligations and prohibitions that have to be enforced under public law, other – contractual - models are conceivable here, too. Their advantage is a significantly higher degree of acceptance on the part of the site managers, at least if the latters' efforts are rewarded accordingly.

Examples of successful contractual and funding instruments have been developed at European level, too (cf. e.g. the European Forum on Nature Conservation and Pastoralism, ENCP). Support programmes also exist in some German federal Lands. Acceptance of these support mechanisms depends, however, on various factors:

- Sufficient remuneration for managers' management related work;
- Ensure that land management does not lead to a higher level of protection that would be irreversible after the end of the contract term or after funding is completed.

Moreover, relevant funding programmes and the prohibitions of the Habitats Directive and the Birds Directive currently stand side by side without any interrelation. From the public authorities' perspective, the intervention instruments at first seem easier to plan and more cost-efficient so that it is the land managers who frequently invoke funding instruments as a reaction to prohibitions. Nevertheless, the fact that incentive systems often contribute much more efficiently to the achievement of nature conservation objectives and hardly ever entail any or less severe encroachments on ownership rights, is largely ignored.

To ensure that the principle of proportionality is observed, it is illustrated in the following, for instance by supplementing Art. 2 of the Habitats Directive, that severe encroachments require adequate compensation.

3.1.7 Impact assessment under the Habitats Directive

3.1.7.1 Significance thresholds

Art. 6, para. 3 of the Habitats Directive provides that any plan or project that, either individually or in combination with other plans or projects, is likely to have a significant effect on the site's conservation objectives, shall be subject to an assessment of its implications. The impact assessment shall be based on the conservation objectives defined for the protected site in question. Said conservation objectives relate to the significant occurrence of habitats listed in Annex I and of the species listed in Annex II of the Directive, as specified in the so-called standard data sheet, resp. in the case of bird protection areas to the occurrence of species listed in Annex I of the Birds Directive or of (endangered) migratory birds that are not listed in Annex I of the Directive.

In order to clarify the question under which conditions the occurrence of significant effects on protected sites must be assumed, conventions specialised on individual sectors have been established. They take into consideration relevant aspects of nature conservation, such as the size of protected natural habitat types, various biological criteria, the distribution of species, etc. Such conventions add a considerable degree of legal certainty to the practical aspects of implementation, which is very welcome. However, the fact that the respective conservation status, too, may be relevant to the question of when an impact must be considered significant from a biological point of view, is not given sufficient consideration. For example, different significance thresholds can be applied to the natural habitat types of Annex I of the Habitats Directive and to the habitats of species in Annex II and of bird species under the Birds Directive, that have a favourable conservation status in the respective bio-geographical region, than in the case of those with an unfavourable conservation status. Therefore, conventions should be devised for all relevant species and natural habitat types that, taking into consideration their rarity and protection needs as well as the particularities of the type of natural habitat and the conservation status of a species, make it possible to assess the significance of interventions in respect of the protected objects and the conservation objectives.

3.1.7.2 Project definition under Art. 6, para. 3 Habitats Directive

The fact that the Habitats Directive does not define the central term „project“ in its Art. 6, para. 3 – as the EIA Directive does (cf. its Art. 1, para. 2, lit. a) –, leads to a high degree of uncertainty in practice.[10] Despite the fact that the European Court of Justice has provided a couple of specifications,[11] regulation at the level of the Directive is required. In practice, the interpretation of the term currently varies from Member State to Member State and even amongst the federal German Lands there are considerable differences. The desirable definition would, of course, have to take into consideration the fact that not every human activity will sufficiently qualify as an encroachment to justify the complexities of an impact assessment review under the Habitats Directive.

3.1.7.3 Summation assessment under Art. 6, para. 3 of the Habitats Directive

Art. 6, para. 3 of the Habitats Directive provides that when assessing the implications of a plan or a project, its interaction with „other plans or projects“ must be taken into account. How far the requirement of including other plans and projects reaches, is disputed. In practice, this leads to significant legal uncertainty. The issue arises, for instance, where spaces are lost due to projects implemented in a protected area, or where conservation objectives/natural habitat types are affected by pollution. To include all plans and projects since the classification of the site as protected site, as is partly called for, seems unreasonable. Projects already implemented certainly do not qualify as “plans or projects”. They rather play a role in respect of prior contamination and as such shape the conservation status. A clarification of the limited scope of application of the cumulative assessment under Art. 6, para. 3 of the Habitats Directive is urgently needed in this context, at least in the form of „Guidelines“.

3.1.7.4 Prevention versus coherence

Difficulties also arise in the implementation of so-called integrated projects that promote the sustained implementation of protection and conservation objectives. Integrated projects are projects that may have an adverse effect on protection and conservation objectives but which ultimately is more than compensated by accompanying measures taken during project implementation and through recultivation, thus creating a considerable added-value for the conservation status of the Natura 2000 site as one of the essential objectives of the project. Such projects include, for example, excavations where recultivation is already carried out during the excavation process by creating stagnant water zones and pools with bank vegeta-

[10] Cf., e.g. OVG Lüneburg, NordÖR 2015, 270 (pot fishery).
[11] Cf. fundamentally ECJ, Case C-127/02 – mechanical cockle fishing, recital. 21 et seqq.

tion, which, as „second-hand“ biotopes, exclusively serve nature conservation objectives after the excavations are completed and considerably improve the conservation status.

The implementation of such integrative projects, however, is difficult because, according to ECJ case law, preventive measures and coherence measures have to be strictly distinguished and solely prevention measures are taken into consideration when assessing the significance of an intervention.[12] When applying this case law, doubts arise as to whether integrated projects can still be permitted in their current form. For, in many cases, the original status can only be restored by coherence measures so that private projects, which are primarly concerned in this context, cannot be permitted due to the fact that derogations are limited to projects which primarily serve public interests, despite the fact that the former would considerably improve the conservation status of the Natura 2000 site in question. Moreover, it is often difficult to exactly distinguish preventive measures from coherence measures, as one measure often pursues both goals. Therefore, a distinction between preventive and coherence measures does not make much sense in the case of integrated projects, in fact it often prevents sustainable improvements of the conservation status of the Natura 2000 site because of the inadmissibility of the project and consequently also prevents considerable added-value for nature conservation. Therefore, it is necessary to examine the impact of a project on nature conservation as a whole and already consider compensatory measures when assessing the significance of implications for the protection and conservation objectives. At least this should be the case if the project’s objectives are in line with nature conservation law from the start and it also aims at an improvement of the conservation status of a Natura 2000 site. The significance of an adverse impact on a protected site should be assessed in terms of its effects; it can then be prevented by local mitigation measures. It would be recommendable to clarify this expressly.

[12] ECJ, Case C-521/12 – Briels. Also Schütte/Wittrock/Flamme, NuR 2015, 145 et seqq.; Füßer/Lau, NuR 2014, 453 et seqq.

This approach can be extended beyond so-called integrative projects. Especially in the case of natural habitat types, resp. habitats of species with a favourable conservation status, there should be a possibility to compensate any occurring adverse impact with early compensatory measures, thereby preventing the actual occurrence of a significant impact on the protected objects. This has already been acknowledged in principle in a couple of individual cases. The Federal Administrative Court in its judgment regarding the federal motorway A44[13], for example, considered early compensatory measures to create natural habitats for the species of crested newt listed in Annex II as compensation for the loss of precisely such natural habitats a „mitigation measure" although the protection regime of the Natura 2000 network does not expressly mention this. However, under current law, it is unlikely that this can also be applied to the natural habitat types of Annex I.[14]

3.1.7.5 Examination of alternative solutions

If a reasonable alternative solution that is conform with the project objectives is objectively available without adversely affecting the site in question, such alternative shall be chosen on principle.[15] Criteria that have nothing to do with nature conservation are only taken into consideration marginally when assessing the reasonableness. This is especially so in the case of the protection of human health from noise pollution, for instance in road planning or air contamination or the value of property (catch phrase: „*nature protection before the protection of man*"). The requirement of reasonableness, on the basis of which the results of the examination of possible alternatives can be adjusted in favour of other protected objects, will not change much about this situation, because reasons that have nothing to do with nature conservation are only able to justify the exclusion of an alternative solution to the disadvantage of the integrity interests of Natura 2000 sites, if they are severe; accordingly, a project developer is only permitted to decide against an alternative that is technically available to him if this would demand disproportionate sacrifices of him or if other public interests are severely impaired[16]. This far-reaching precedence of nature conservation is often difficult to explain in conflicts and is able to severely impair the degree of acceptance of European habitat and species protection measures. Moreover, this often also means that the legitimate needs of neighbours for protection from noise or air pollution are not adequately taken into considera-

[13] BVerwG, judgment of 17 May 2002 – 4 A 28/01, BVerwGE 116, 254; confirmed in BVerwG, judgment of 23 April 2014 – 9 A 25/12 (BAB 49), NuR 2014, 706.
[14] Cf. regarding the losses of natural habitat types, ECJ, Case C-521/12 – Briels; also see Reference for a preliminary ruling on Raad van State (Belgium), submitted on 17 July 2015 — Hilde Orleans u. a./Vlaams Gewest, cases C-387/15 and C-388/15.
[15] Accordingly on the decision derogating from the Habitats Directive: BVerwG, decision of 03 June 2010, NuR 2010, 573. In favour of a derogation under species protection law: ECJ, case C-239/04 – Castro Verde, [2006] ECR I-10183, para. 36.
[16] BVerwG, judgment of 27 January 2000, BVerwGE 110, 302, para. 30.

tion. Therefore, in the examination of alternatives it should be possible to weigh up the overall circumstances and the requirements of nature conservation and decide in favour of the most preferable solution. The requirements of nature conservation should be given the more weight the more severe the impairment of the protection and conservation objectives is, for example in the case of an important loss of a site or the impairment of a priority species or habitats, and the rarer the species affected by a violation of prohibitions protecting the species is.

3.1.8 Communication with land owners and managers

Finally, it is advisable to improve communication and the coordination between land owners and managers on the one hand and the nature conservation authorities on the other. Management measures, especially, ought to be carried out only in consultation with, and where possible by, the land owners and managers. This requires intense communication regarding the protection status, area development and the need for, resp. reasonableness of, measures intended to improve the status quo between land owners and/or managers and the nature conservation authorities. Only this will ensure an implementation of site management measures in line with the interests of the land owners and the users of the land without whom it is difficult to bring the measures to a successful conclusion. Only then would management gain the concerned parties' required consent. Involving the latter intensely, i.e. in practice, in the development of management measures and their implementation, and communicating and discussing the requisite nature conservation measures, is indispensable.

3.2 Protection of species

Likewise, practical experience with the ubiquitously applicable European species protection laws in Germany shows that reforms are necessary - which is partly due to the way the requirements of Habitats and Birds Directive are implemented and applied in Germany, but which is also directly due to the provisions of the Directives, themselves.

3.2.1 Inconsistent selection criteria

To begin with, it is striking that the Habitats and the Birds Directive do not only differ in respect of their provisions on species protection but also in respect of the standards to be applied in the selection of the species to be protected.

The protection of species under the Habitats Directive focusses on certain endangered and/or rare species that are listed in Annex IV of the Directive. The Birds Directive, by contrast, aims at the protection of all wild bird species, regardless of whether these species are endangered or not, resp. regardless of whether their populations are endangered and whether their populations have to be attested an unfavourable conservation status or not. For

the future, it would be recommendable to align the selection criteria to the effect that the Birds Directive does not indiscriminately put all species („common species“) under protection but instead selects certain species on the basis of their specific needs for protection (endangerment), as does the Habitats Directive.

In addition, it should be noted that the species listed in Annex IV of the Habitats Directive have varying conservation statuses. For instance, in the case of some species, a favourable conservation status can simply be assumed, which partly follows from the protection efforts taken and partly from a better state of knowledge of populations and their distribution. As in habitat conservation, these aspects should be taken into consideration by only applying regulations for the protection of species if due to a project actual implications at the level of the population have to be feared. This also corresponds with common practice in Germany, concerning the treatment of widely spread species that are not endangered. They are only taken into consideration for species protection in the context of the planning of measures to prevent implications under species protection law, but not in the measures planned as compensation for ensuing habitat losses, because it is assumed that these species will continue to encounter a favourable availability of habitats.

3.2.2 Land management

The species protection provisions of the Habitats and the Birds Directive fail to take into account conceivable conflicts with the ECJ’s case law relating to the question of „intentionality“ that may arise in connection with land management. This fact was partly taken into account in the definition of the prohibitions in German species protection law (Sect. 44, para. 4 BNatSchG) by the assumption that agricultural and forest management that is in line with the requirements of good practice and property forestry does not violate the prohibition of capture, possession, and marketing of animals under species protection law. As regards the species listed in Annex IV of Directive 92/43/EEC and European bird species this only applies if the conservation status of the local populations does not deteriorate as a result of the management of the land.

This national legislation take the fact into consideration that the unlimited and species-related application of species protection provisions under the Habitat and the Birds Directive make the management of agricultural land and forests almost impossible or at least considerably more difficult. The mowing of grassland and the management cycles of farmland, for example, inevitably involve the occasional destruction of nests, eggs, and possibly even pose a danger for not yet fully fledged young birds of wild bird species: land management cannot always be postponed until rearing is completed and young birds are fully fledged. For example, it is almost impossible to prevent an endangerment of breeds or young animals as well

as the breeding sites themselves (nests) of species such as the skylark *(Alauda arvensis)*, partridges *(Perdix perdix)* or corn buntings *(Emberiza calandra)* as typical species that need open fields, especially since the youngest birds aren't fully fledged until August.[17] This applies even more to land management in organic farming where the use of pesticides is substituted by mechanical processing methods (z. B. harrowweeding), which pose an even larger threat to birds breeding on the field than conventional crop protection. In forestry, too, the prohibitions of species protection law that relate to individual species are far from reality. For example, it is practically impossible to register and assess all hollow trees for the purposes of species protection that qualify as breeding sites and resting places for numerous forest-bound species (e.g. aboreal bats, cave breeders, small mammals, such as the dormouse), before carrying out forestry measures. It is impracticable to register all hollow trees in advance and assess their significance in the spatial context bevor carrying out management measures in a forest. It is advisable to also consider this adequately at the European level.

3.2.3 „Temporary nature conservation"

As in the Natura 2000 network, the problem arises in species protection, too, that efforts to populate and promote species that are eligible for species protection regularly lead to a permanent imposition of management conditions or other impediments on land management. The manager of a gravel pit who is familiar with species protection will make sure that no small waterbodies with populations of typical amphibian species will develop because then he would have to expect more restrictions on the use of the land. Likewise, for a farmer, the promotion and permanent settlement of endangered grassland birds would potentially entail permanent restrictions in the management of his land. This is highly detrimental to the appeal of protective efforts. If species protection regulations and bans even meant that land management would have to be ceased entirely due to increasing restrictions this would lead to a further decline in agricultural land and thus a decline in biodiversity. Certain types of open and half-open land would be particularly affected. As in the protection site network Natura 2000, a reward system needs to be established for species protection, too, alongside stricter prohibitions, in order to support the degree of acceptance of conservation efforts („temporary nature conservation").

3.2.4 Prohibition of killing: Difficulties of protecting individual specimens

The Habitat and the Birds Directive provide for the protection of specimens and their development phases. In Germany, at least, the courts interpret the species protection prohibition

[17] Bauer et al., Das Kompendium der Vögel Mitteleuropas, 2005.

of killing and harming under Art. 12, para. 1, lit. a) of the Habitats Directive and Art. 5, lit. a) of the Birds Directive to the effect that protection must be assessed at individual level.[18] According to the courts, the assessment of a situation of conflicting interests regarding species protection objectives must be based on the question whether the form of projection in question might lead to a significant increase of the „general risk inherent to life“ for the potentially affected specimens that are eligible for species protection.

In many cases, the strategy of protecting species eligible for species protection at specimen level does not make sense for biological reasons because it ignores the reproductive biology and development strategies of numerous species. Especially amongst amphibians and most invertebrates there are many species that, as so-called r-strategists[19], have included the loss of specimens in their biological strategies. These species are characterised by a high reproduction rate (r), which is often linked to a rapid growth of the individual animal, a usually short life span of adults, and little to no caring for offspring. R-strategists are usually composed of smaller species. Typical r-strategists are pioneers such as the endangered amphibian species natterjack toad and green toad. These species lay a large amount of eggs and their tadpoles have very short growth periods so that they can even populate small waterbodies that only bear water for short periods of time, even until the point of metamophosis. The high reproduction rate is designed for exponential mass reproduction in suitable years, and practically never reaches its capacity limit. Accordingly, in the case of these species, the loss of growth stadiums of a large amount of the total population and, of young animals, is part of the development strategy. Many r-strategists populate instable habitats in which living conditions can alter rapidly.

Then there are k-strategists, which are the opposite of r-strategists. The latter comprise species that already populate habitats at capacity limit (k). Typical characteristics of these species are a long lifespan, intense-care brooding, resp. rearing of offspring, a low reproduction rate, frequently a higher degree of intelligence, and correspondingly more complex behaviour (e.g. territory defence). Typical k-strategists are mammals (including man) and birds. Then there are numerous species whose reproduction strategy is located somewhere between these two extremes.

From a biological point of view it makes no sense, at least for species where the loss of part of the population is part of the survival strategy, to promote the protection of specimens. For

[18] BVerwG, judgment of 09 July 2008 – 9 A 14.07, BVerwGE 131, 274 (301), Para. 91; BVerwG, judgment of 14.07.2011 – 9 A 12.10, NuR 2011, 866 (875); BVerwG, judgment of 12 March 2008 – 9 A 3.06, BVerwGE 130, 299, para. 219.
[19] Cf. fundamentally MacArthur & Wilson, 1967/2001, The Theory of Island Biogeography.

these species, the protection or support of suitable habitats is much more important. In these cases, protection should relate to populations.

In practice, the protection of individual specimens leads to absurd avoidance strategies, and not only in respect of the species with high reproduction rates mentioned above. Examples of measures to prevent the killing of animals and the development of growth stadiums in practice are:

- Backfilling small waterbodies, especially driving ruts and small pools on factory sites in order to prevent populations of amphibians such as natterjacks and green toads developing. This measure is becoming increasingly common to prevent the killing of tadpoles or young amphibians through business-related traffic.
- Deterrent measures involving foils or warning tapes on open industrial sites to prevent the settlement of ground breeders in areas that may be used during the breeding period. This shall prevent the killing of unfledged young birds and the destruction of eggs and nests.
- Covering steep walls or rock faces with tarpaulins or nets to prevent the settlement of species such as eagle owls or sand martins.
- Removing rockfills, preventing stumpshoots in deforested woodland, premature clearing of spaces to prevent the settlement of rare, highly specialised breeding birds on open and half-open grasslands, such as wheatears, nightjars, or woodlarks.
- Removal of breeding niches, or embankment clearing, in order to prevent the development of eagle owl breeding sites.

Although the described measures serve the purpose of preventing killings prohibited under species protection law, at the same time they – lawfully – prevent the creation of habitats of the species concerned, or at least make these sites unattractive. Frequently, this takes place successively where still existing residual habitats are concerned so that the process of reducing suitable habitats usually takes place subtly and gradually. Especially in the case of species whose distribution takes place almost entirely in „secondary habitats“, such as gravel pits, stone quarries, or brownlands, the consistent implementation of preventive measures against the endangerment of individual specimens would lastly have the effect that due to the reduction of available habitats the population would shrink, thus also leading to a significantly higher degree of endangerment than the singular killing of specimens and their different growth stadiums. In Germany, meanwhile, the species whose main distribution sites are located at least partly on such sites include the species listed in Annex IV, for instance natterjacks and green toads, yellow-bellied toads and midwife toads, and occasionally the sand lizard and the wall lizard or the bird species sand martins, eagle owls or peregrines. For all

these species one would have to examine in each individual case whether, as a result of the protection of species, the total population might develop worse in one particular area in the long run. In these cases, the application of species protection law to specimens is counter-productive. It would make more sense to take the (local) population in the area concerned as a benchmark for assessment.

It is strongly advisable to open up species protection rules to the protection of specimens and their development stadiums in cases in which the protection of specimens would have an adverse effect on the population concerned rather than advantageous ones. This applies especially to habitats that can only be conserved by recurring land management measures. In these cases, the fact that precisely the protection of individual specimens can lead to obstacles for the owner or manager is a particularly weighty reason. Any voluntary commitment to the protection of species is thus thwarted.

Proposal:

An effective way of achieving the protection of specimens and their development stadiums under species protection law could be achieved as follows:

1. The killing or harming of specimens of species that are eligible for species protection should be prevented at far as possible by taking corresponding preventive measures – such as adopting construction hours regulations.
2. Should it, however, be impossible to prevent the killing or harming of specimens and their development stadiums, the prohibited act should not be considered committed unless, as a result of the loss of a specimen, a decline in the likelihood of the survival of the population of the species on the site concerned has to be expected. These considerations should also include the conservation status of the species concerned.

Other practical difficulties result from the fact that the prohibitions under Art. 12, para. 1, lit. a) of the Habitats Directive and Art. 5, lit. a) of the Birds Directive also mention the capture of specimens for the purpose of resettlement to suitable surrogate habitats, even if this takes place in line with established scientific standards. Such measures, however, are intended to serve the protection of specimens and the restoration of habitats so that it does not appear appropriate to subject them to the additional burden of a derogation assessment.

3.2.5 Prohibition of disturbance: Unclear scope

The Habitats Directive and the Birds Directive contain different definitions of the prohibition of disturbance. In its Art. 12, para.1, lit. b), the Habitats Directive ultimately limits disturbances to reproduction times, rearing periods, hibernation periods and migration periods, however it does not define what actually constitutes a disturbance. The Birds Directive, on the other

hand, specifies that the disturbance has to be „significant“, but without defining what „significant“ actually means, „having regard to the objectives of the Directive“ (Art. 5, lit. d) of the Birds Directive). The German implementation clause, Sect. 44, para. 1, no. 2 BNatSchG, again contains the mention that disturbances must be considered „significant“ if there is reason to fear that they may have an impact on the conservation status of the affected „local population“ of a species.

As the question of the „significance“ of a disturbance depends on the possibility of a deterioration of the conservation status of local populations, the assessment of the conservation status of a local population before a disturbance becomes effective is very important. In the case of widely distributed species that do not occur in concentrations, the conservation status is not so easily affected, whilst species that do occur in concentrations and that have an unfavourable conservation status can already be affected in the event of slight implications at the local level.

How „local populations“ can be determined, remains unclear, too. It is obvious that such a specification can easily be achieved in the case of species that have a clearly delineable distribution range, for instance amphibians in their spawning waters and the land habitats they also need. How the term „local population“ is to be applied to widely spread birds, who – especially as migratory birds - might even have to travel long distances between their summer and their winter habitats, however, remains unclear. For example, the skylark - that has been classified as endangered in Germany – still populates expansive areas of open farming land. In the case of such species, it is almost impossible to determine any local populations. Even if certain widely populated areas, such as the Börde landscapes in North Rhine-Westphalia or Saxony Anhalt, could be delineated as the habitats of a local population, these populations would still be so large that singular implications from disturbances would hardly have a significant impact on the conservation status.

The term „local population“ would lose its meaning entirely if the interrelations of specimens within one area were not defined by existing suitable habitats but genetically in relation to populations. In this case it would be highly likely that close interrelations between populations could also be determined across long distances beyond the actual action range of the species in question. Consequently, a local population could not even be delimited by the existing habitats available locally.

The reference in Art. 44, para. 1, no. 2 BNatSchG to the “conservation status of the local population of the species“ brings up another problem: in most cases, no data on the actual conservation status is available. It is practically impossible to biologically determine such a

"local" conservation status because no corresponding data is ever collected. Setting up a species protection inventory that takes into account both the actual radius of the impact of a project and the conservation status of local populations, is likely to require frequent unreasonable, additional examination efforts.

Proposal:

Useful legislative definitions of the term "disturbance" under species protection law should concentrate on criteria that in current practice are already referred to today to evaluate disturbances: According to Art. 12, para. 1, lit. b) of the Habitats Directive and Art. 5, lit. d) of the Birds Directive, a disturbance exists in the case that

1. the suitability of essential parts of natural habitats (feedings areas, resting areas, connecting corridors, etc.) are so strongly impaired that even the abandonment of reproduction sites and resting areas must be anticipated *and*
2. in addition there is reason for concern that, due to such abandonment of reproduction sites and resting areas, the available habitat of a species will be changed in a lasting manner, causing the likelihood of implications for that species' distribution and population size.

This definition of a disturbance creates a link between the disturbance and the possible loss of reproduction sites and resting areas. The question of „significance" no longer depends on determinable criteria, such as the conservation status of the local population, but on the question whether sufficient habitats are available in the area examined that can offer alternatives to the affected species, for instance to resettle. Such alternatives could also be created, as Sect. 44, para. 5 BNatSchG already requires in the case of a loss of reproduction sites and resting areas, in the form of early compensatory measures. Therefore, planning and implementing measures is able to prevent disturbances, too.[20]

3.2.6 Habitat protection

Art. 12, para. 1, lit. d) of the Habitats Directive extends the protection of habitats to reproduction sites and resting areas, whilst Art. 5, lit. b) of the Birds Directive merely applies to the protection of nests. In German law, this has lead to the provisions of Sect. 44, para. 1, no. 3 BNatSchG, according to which the reproduction sites and resting areas of all species under special protection (including birds) are protected.

[20] This possibility is expressly confirmed by the German courts: BVerwG, judgment of 12 March 2008 – 9 A 3.06, BVerwGE 130, 299, para. 107; also Lau, GK-BNatSchG, 2012, Sect. 44 BNatSchG, marginal no. 12.

The privilege provided for under Sect. 44, para. 5 BNatSchG modifies the prohibitions set out under Sect. 44, para. 1, no. 3 BNatSchG in the case of interventions that are permitted under German law to the effect that destructions are not prohibited if the „the fulfilment of the ecological functions of the reproduction sites or resting areas that are affected by the intervention or project is continued in a spatially coherent form. In this context, early compensatory measures (CEF-measures)[21] can be included in the assessment. There is no equivalent provision in the Habitat or the Birds Directive but it makes the application of the species protection prohibitions more practical thanks to the possibility of planning measures as functional compensation for occurring impairments. In actual fact, these, too, are preventive and mitigative measures, because the objective of CEF measures is precisely to reduce the detrimental impact of projects in such a manner that no prohibited situation arises. Their typical feature is the fact that as measures that "actively create a biotope" they are not based on a project and its implications but aim at maintaining the ecological functionality of the affected habitats.[22] The concept is intended to enhance the prohibitions of species protection law by adding a planning tool, thus ensuring a higher degree of practicability.

The fact that German case law is based on the assumption of conditions that rarely exist in nature, makes the situation even more difficult. For example, German case law requires that in the case of early compensatory measures there must be a direct connection with the specimen concerned. The measure intended to maintain the habitat's function must therefore be planned in view of the prospective population of the affected species, i.e. the affected specimens, and shall have a close spatial and functional connection with them.[23] According to this point of view, the measures should lead to a direct „relocation" of the concerned species from the site of intervention to a site where the compensatory measure is carried out. This may work in cases where only few mobile species are salvaged and directly resettled to the compensatory site. In individual cases, it is imaginable that a mobile species would actually directly accept the compensatory site after the loss or impairment of the reproduction site or resting place it originally selected. However, especially in the case of highly mobile species, the natural dynamics of populating habitats do not work that way. It is more likely that other animals than the affected ones will populate the compensatory site whilst the affected population is looking for a different habitat. It is also possible that one part of the concerned popu-

[21] Continued Ecological Functionality-measures (CEF-measures), Guidance document on the strict protection of animal species of community interest provided by the 'Habitats' Directive 92/43/EEC, final version February 2007, Section II, para. 72 et seqq. (S. 47 et seqq.).
[22] Fellenberg, in Kerkmann, Naturschutzrecht in der Praxis, 2nd. Ed. 2010, Sect. 7, marginal no. 128 et seqq.
[23] BVerwG, judgment of 18 March 2009 – 9 A 39/07, BVerwGE 133, 239, para. 67.

lation remains in the affected habitat whilst the compensatory habitat is already populated by other parts of the population. The dynamics of natural processes are much more comprehensive than the courts evidently assume. Already when one considers the simple fact that amongst the species of birds, bats, and occasionally sea mammals, that are eligible for species protection, there are species that travel long distances on their migration routes, it appears rather unlikely that the populations or specimens concerned will actually „resettle“ to the substitute habitats. Therefore, the vital criterion must be that a habitat is created that can be populated, and is then indeed populated by the affected species (and not necessarily the specimen concerned). Whether such a measure supports a different part of the population than the one affected by the project is irrelevant from a biological point of view. After all, the ultimate objective is to maintain a favourable conservation status at the level of the natural distribution areas of the species that are eligible for species protection. These correlations should also be examined and made clear in European law.

The same applies for the follow-up checks that are conducted in monitoring and risk management. It is foreseeable that the guidelines set up by the case law of German courts will lead to ecologically absurd risk management requirements. They are based on the assumption of functional correlations between the affected parts of populations and compensatory measures that cannot be maintained - at least where highly mobile species are concerned. The forecasting reliability of the efficiency of measures would become questionable if the direct link between affected animals and substitute habitats would have to be proven on principle.

3.2.7 Derogations: Inconsistency of the derogation reasons

The varyingly strict requirements for derogations of both Directives have an adverse effect on acceptance and practicability in the area of species protection. Art. 16, para. 1, lit. c) of the Habitats Directive provides for derogations from species protection provisions if they are necessary „for other imperative reasons of overriding public interest, including those of .... economic nature“. Thus, it is legitimate to take economic interests, albeit within narrow limits, into consideration. Due to this wording, the protection of species in individual cases still enjoys a very high level of protection without ruling out economically justified interests on principle.

The Birds Directive lacks such a general derogation. Art. 9 of the Birds Directive contains a conclusive[24] list of different specific derogations. However, it does not mention (imperative public) economic interests.

Therefore, there is a disparity in the protection standards and the assessment criteria between the protection of endangered bird species under the Birds Directive on the one hand and the animal and plant species protected under the Habitats Directive on the other hand. There is no perceivable reason for this higher level of protection for bird species than for other species. It is likely that the difference is due to historical reasons, namely the different times in which the Directives were prepared and revised. From the point of view of affected land users and managers, this often creates the impression that the protection standards and derogations are purely arbitrary. Therefore, it would be recommendable to model Art. 1, para. 9, lit. a) of the Birds Directive after the Habitats Directive and supplement it with the derogation „other imperative reasons of overriding public interest".

3.2.8 Derogation for the benefit of private projects

Neither of the Directives expressly permits derogations from species protection law to the benefit of private projects. German law provides for the possibility of an exemption under strict conditions (Sect. 67, para. 2 BNatSchG) from prohibitions and obligations, even if they are based on European law, in order to prevent a disproportionate impairment of private interests in individual cases.[25] However, the provision is not secured by secondary law and can be perceived as a mere expression of the principle of proportionality, which is also fundamental to European law (Art. 5, para. 4 EUV).

Nevertheless, it is not out of the question that a derogation from species protection law could also be permitted in the case of private interests if a population can be successfully maintained at a different site than the actual place of impact. After all, this condition would ensure that the conservation status of the species concerned would not deteriorate. This again is the essential objective of both European nature conservation directives.

3.2.9 No collection of relevant data for species protection

The legal requirements of species protection and the obligation to assess potential conflicts connected with interferences, or other projects, in scientific essays on species protection and in official species protection examinations have produced a vast number of targeted studies on the occurrence of species eligible for species protection in the last few years. Most of

[24] ECJ, case C-192/11 – Commission/Polen, NuR 2013, 718 (720).
[25] In detail Heugel, in Lütkes/Ewer, BNatSchG, 2010, § 67 marginal no. 6.

these studies have become more systematic following corresponding Communications and Guidelines for each federal Land. Unfortunately, their findings only serve as bases for the corresponding approval procedures and are not generally bundled and analysed by a central body to fill information gaps on the occurrence and distribution of species eligible for species protection. Thus, findings that evaluators or nature conservationists have already been gathering for years do not reach, or only with great delay, the competent authorities responsible for reporting. The two European nature protection directives therefore both fail to meet one of their central objectives, namely to improve the state of knowledge of the distribution and endangerment of species that are under special protection. The digitalisation of data should in fact have open up the possibility for the competent authorities of the federal Lands to pass on expert surveys after having completed their approval procedures to a central body where they can be analysed in a timely manner. We recommend imposing a corresponding statutory obligation. This could initially take place at national level without amending the requirements of EU law.

Cologne/Berlin, 18 January 2016