APPLICATION IN SPAIN OF THE NATURA 2000 LEGAL PROTECTION REGIME.

General Questions and Case Law

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Application in Spain of the Natura 2000 Legal Protection Regime.

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INTRODUCTION

ACTIVATE OUR NATURA 2000 NETWORK

By Daniel Calleja, Director-General DG Environment, European Commission.

This publication, under the umbrella project *Life+ Natura 2000 Network*. Connecting people with biodiversity, aims to boost knowledge and improve protection of the Natura 2000 Network, thus contributing towards a more effective implementation of the Birds and Habitats Directives.

Despite Europe's growing interest in nature protection, as reflected in the latest Eurobarometer, the Natura 2000 Network is still unknown to many. According to the latest surveys, less than one third of Europeans have heard of the Natura 2000 Network and only 10% know what it is.

Created upon adoption of the Habitats Directive in 1992, the Natura 2000 Network is the world's biggest coordinated network of protected sites. The total of over 27,000 sites accounts for one million kilometres of the European Union. Spain, with more than 1800 sites and 27% of its territory included in the Natura 2000 Network, boasts the third biggest Natura 2000 area among EU member states, vouching for the outstanding richness of Spain's biodiversity.

The Natura 2000 Network is much more than a set of nature reserves. It is also a network of people, all of whom work together day after day to ensure that conservation and the sustainable use of biodiversity go hand in hand with the generation of benefits for the local population and the country in general. It offers new opportunities for sustainable development and also for tourism and recreational activities. These sites also provide us with a wide range of vital services, such as carbon sequestration, flood control or the maintenance of water quality. The Natura 2000 Network thus adds up to an authentic natural store of wealth, whose conservation we are all responsible for and benefit from.

The European Commission's recent Fitness Check of the Birds and Habitats Directives has confirmed that the Directives are suited to their purposes and, as of today, are still the backbone of the European Union's conservation policy and sustainable use of biodiversity.

Indeed, full and efficient implementation of the nature Directives is one of the keystones of the EU Biodiversity Strategy to 2020, our plan for heading off and reversing biodiversity loss and restoring ecosystem services up to 2020.

The Directives have helped greatly to increase our knowledge of the situation and management needs of Europe's species and habitats and also our capacity of action. Many examples show that investment in resources and the necessary effort to protect

them can produce the hoped-for results, improving the state of the protected species and habitats with the consequent knock-on benefits for the whole society.

The conclusions of the Fitness Check also stressed the urgent need of improving implementation of the Directives. The main challenges pinpointed refer to the need of guaranteeing proper and effective management of Natura 2000 sites and raising the necessary finances.

Crucial here, first and foremost, is better stakeholder knowledge and understanding of the Directives and reinforcement of the consistency of their objectives with other sector policies, including energy, agriculture, silviculture and fisheries.

It is also necessary to promote the legal framework and encourage the necessary incentives to guarantee that nature-2000-site owners and managers are duly rewarded for the services these sites provide and therefore remain firm supporters of the scheme.

Another key aspect in working towards full implementation of the Directives is to look out for proper and full enforcement. Without doubt all judges, public prosecutors and lawyers play a vital role in the achievement of this objective. Nonetheless, full implementation of the Directives calls for the involvement of all interested parties: including government authorities, NGOs, natura-2000-site owners and users, scientists and the public at large.

We are all responsible for driving and activating our Natura 2000 Network, which, in short, is the most valuable heritage of all Europeans.

OUR REAL WEALTH

by Asunción Ruiz, Executive Director of SEO/BirdLife

You cannot conserve what you do not know. This slogan has driven SEO/BirdLife´s work since its foundation in 1954. For decades, that necessary knowledge has driven and served as the basis for the actions that our NGO has undertaken to defend, restore and disseminate knowledge on some of the most valuable sites in our territory. One of the first of those was Doñana, an initial battlefront where we fought to stop the destruction of a heritage that belongs to all citizens.

It was there, near the Guadalquivir wetlands, towards mid-XX century that the Spanish Society for Ornithology was shaped and where a new kind of europeism was born, too: that of peoples from all countries -scientifics, academics, naturalists, common citizens- that took action to make sure one of the natural paradises in the continent didn´t dry up. Doñana was a wintering spot for dozens of thousands of European birds and what happended there regarded the whole continent. In this way, before the European Union was born, before the environment reached political agendas and before conservationism exploded as a social movement in every country of Europe, Doñana served to bring about a primitive form of Europe-wide movement behind the flag of nature conservation. SEO/BirdLife was there.

Much has changed in the landscape since then. After 60 years the EU is a 28 member state reality, environmental policy is basic for states and Europe has granted itself a protected area network that is the largest in the world: over 26.000 sites and one million square kilometres form the Natura 2000 Network.

However, despite these improvements, there is still a long way to go before we achieve a favourable conservation condition for our natural environment. We must return to the “to know in order to conserve” slogan. It is not very useful to have a Natura 2000 Network if, as surveys say, hardly 10 per cent of Europeans know of its existence and meaning. For this reason we must insist on the fact that only what is known can be conserved. The Natura 2000 Network will not be totally safe until it lives in the heart of each and everyone of us, until all us, citizens, are aware of the enormous treasure we have in our hands and we fight to avoid losing it.

The publication you have in your hands is part of the effort of SEO/BirldLife to publicize the importance of the Natura 2000 Network and to raise public awareness of its conservation. This is about making the most of our true wealth. With the Life+ Activate your true wealth. Red Natura 2000 project we want to make Spanish and European societies see that we are rich in biodiversity and that caring for and respecting that great natural asset is the best guarantee for seeing any crisis through.

Lastly, as SEO/BirdLife Director, I cannot fail to underline the importance that birds have had in the designation proccesses of the Natura 2000 Network and in the overall protection of natural heritage. The Natura 2000 Network was founded under two great European directives: the Habitats Directive, of 1992, and the Birds Directive, of 1979, as a result of which thousands of Special Protection Areas for Birds (SPAs) have been created.

It is no coincidence that this type of fauna has deserved a specific directive. Birds are a great indicator of the quality of ecosystems and, because of their ubiquity and mobility, they react quickly to alterations in the environment. Sothey are a thermometer for environmental changes and also act as a shield for the rest of biodiversity: when you protect birds you conserve the rest of elements that surround them, too.

In fact it has been shown that the most important areas for birds in the whole world -identified by BirdLife International and known as IBAs (Important Bird and Biodiversity Areas)- contain up to 80 per cent of the rest of world biodiversity. Our intention is to make the Natura 2000 Network succeed protecting all IBAs -including marine ones- that SEO/BirdLife has helped identify, many of which still lack legal protection.

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THE LARGEST COORDINATED NETWORK OF PROTECTED AREAS IN THE WORLD

Over 27.000 natural sites of high ecological value all over Europe are part of the Natura 2000 Network. With a total surface of nearly one million square kilometres, it is the largest network of conservation areas in the world. Nearly 30 per cent of the Spanish territory is included in it, which gives a clear idea of the great wealth of our country in terms of nature and biodiversity. With 1.858 sites (December 2014), Spain is the state that contributes the most to the network: 14 per cent of the total.

The Natura 2000 Network takes into account that the European landscape has been intervened by human beings for thousands of years and that the biodiversity they host is the result of cultural and historic interaction between man and nature. That is why the network does not propose the creation of strict nature reserves where human activities are excluded but fosters a kind of nature conservation goes hand in hand with the obtaining of benefits for the population and the economy at large. Far from being an obstacle to socioeconomic development, the Natura 2000 Network offers new opportunities for the development of traditional productive activities, recreational activities and tourism.

The need to preserve these sites in favourable condition is obvious. The European Commision estimates that the Natura 2000 Network rends European citizens vital services like the carbon sequestration, the maintenance of the quality of water or protection against floods or droughts for a value of 200.000-300.000 million euros.

Legal status

The Natura 2000 Network was born as such in 1992 and it includes sites designated under two key European laws: the Birds Directive, whose first version is from 1979 and the last from 2009, and the Habitats Directive, from 1992. It includes different types of sites:

- Sites of Community Importance (SCIs) are places that host natural habitats or species of particular value at a EU level. These sites are designated according to the Habitats Directive. The SCIs change their name to Special Conservation Areas (SCAs) once they have been official designated by member states and their management plans approved.

- The Special Protection Areas for birds (SPAs) are places that host wild bird species to be conserved in the European Union. SPAs are designated under the Birds Directive.

Both SCIs and SPAs can be land or marine areas, although the marine network is still much less developed than the land network.

The protection of these areas aims at guaranteeing the survival in the long term of the most valuable and endangered species and habitats. In order to achieve this, member states of the European Union must take the due measures to maintain a favourable conservation condition, such as the approval of specific management plans. These management plans are essential to get to know the conservation condition of our natural wealth and to maintain or improve it, as well as to ascertain the necessary funding for it.

In Spain about 24 per cent of Natura 2000 Network sites are being managed with a specific management plan, despite the fact that all sites should have had a plan approved before 2011, according to Law 42/2007 on Natural Heritage and Biodiversity.

In spite of the importance of the Natura 2000 Network, there is a general lack of knowledge of it in European society. The percentage of Europeans that can say that they know its name and what it stands for verges on 10 per cent.

LIFE+ *NATURA 2000: CONNECTING PEOPLE WITH BIODIVERSITY*

The Life+ *Natura 2000: Connecting people with biodiversity* project calls society to action so that it gets to know and becomes involved in the conservation of the Natura 2000 Network. 80 per cent of Spanish citizens live in a place that hosts a Natura 2000 Network site, but in spite of its significance and geographical closeness, the Natura 2000 Network is not very well known by society. Several surveys show that only 10 per cent of Europeans know what it is. The rest have heard of it or know the name but could not explain what it is.

The Life+ *Natura 2000: Connecting people with biodiversity* project aims at increasing that knowledge and bridging the information breach. That is why between 2013 and 2017 very many actions will be undertaken in different realms in order to bring the Natura 2000 Network closer to Spanish society and to get society involved in its conservation.

SEO/BirdLife and EFE news agency develop this project, supported by the European Union. The co-funders are the Ministry of Agriculture, Food and the Environment of Spain, the Biodiversidad Foundation, Red Eléctrica Española and the autonomous communities of Andalucía, Castilla y León, País Vasco, Navarra, Baleares, Castilla-La Mancha, Madrid and Cantabria.

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1.

ABOUT THIS MANUIAL

This is an updated summary of the book "*La Red* Natura 2000 *en España*. *Régimen jurídico y análisis jurisprudencial*" (The Natura 2000 Network in Spain: Legal Regime and Case-Law Analysis) (Gallego Bernad, M.S, 2015) written within the project *Life+ Natura 2000 Network: Connecting people with biodiversity*. This book analysed the internal and Community legal system and outstanding case law, in enforcement of the Natura 2000 legal protection regime, topped up with jurisprudential references and reports of the European Commission or other institutions.

This work looks in general at the legislation of the legal protection regime of the Natura 2000 network, stressing such aspects as its origin and purpose, and the Natura 2000 site designation procedure. These are all fundamental factors for a proper understanding of the legal regime of the active and preventive management and conservation measures to be enforced therein. An explanation is also given of the significance of SEO/BirdLife's Important Bird and Biodiversity Area (IBA) inventory in the SPA designation. Reference is also made to the obligation of sending site information by means of the Natura 2000 Standard Data Form, explaining some important aspects of its content and legal nature, plus the requisites for exceptional total or partial delisting of a Natura 2000 site or modification of its boundaries. As for conservation measures to be applied in SACs and SPAs, a detailed analysis is given of certain questions impinging on management plans. The deterioration-avoidance obligation of art. 6.2 of the Habitats Directive is also looked at, as well as the control regime and appropriate assessment of arts. 6.3 and 6.4 thereof, in terms of the approval of plans or projects likely to adversely affect the integrity of Natura 2000 sites. Reference is duly made here to the eligibility criteria for interim relief by internal courts of the authorisation of plans or projects likely to affect the Natura 2000 network, given the irreversibility of such effects as may arise therefrom, thereby vitiating Community and Spanish law established by the Natura 2000 legal protection regime. Last but not least this analysis stresses the importance of the ecological corridors and connectivity areas between Natura 2000 sites, and the need for their proper protection.

2.

ORIGEN AND PURPOSE OF THE NATURA 2000 NETWORK

Natura 2000 is the world's biggest network of protected sites; its foundational idea was to protect and conserve the European Union's biodiversity. Its creation stemmed from evidence of the significant and constant degradation of natural sites within the European Union, seriously threatening a growing number of species, including birds. It soon became clear that any realistic attempt to protect Europe's biodiversity and stem the loss thereof would necessarily entail action at Community level rather than merely national. In 1992, therefore, the Habitats Directive 92/43[1] set up an EU-wide network of protected nature sites, the Natura 2000 network, with the aim of ensuring the long-term conservation and survival of Europe's most valuable and threatened species and habitats. This network also comprised the bird protection areas that had had to be designated during the previous ten years or more under the Birds Directive 79/409[2], the enforcement of which had to be fortified. This was furthermore conducive to compliance with the United Nations Convention on Biological Diversity (Conference of Río de Janeiro 1992), of which the European Union had been one of the main driving forces, and of others such as the Berne Convention[3], the Bonn Convention[4], and the Ramsar Convention[5], thereby creating a much more detailed framework for the whole endeavour (European Commission, 2000; 9).

Despite the delays and stumbling blocks in the designation of Natura 2000 sites and their conservation, the Birds Directive 79/409 and the Habitats Directive 92/43 "*represent the first serious effort in western Europe to conserve protected zones. As*

[1] COUNCIL DIRECTIVE 92 / 43 / EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and fauna (OJEC 206 of 22/7/1992).

[2] COUNCIL DIRECTIVE of 2 April 1979 on the conservation of wild birds (79/409/EEC). Codified in DIRECTIVE 2009/147/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 30 November 2009
on the conservation of wild birds (OJEC 20 of 26/1/2010).

[3] Convention on the conservation of European wildlife and natural habitats (Berne Convention) of 19 September 1979. The European Union is party thereto by virtue of COUNCIL DECISION of 3 December 1981 concerning the conclusion of the Convention on the conservation of European wildlife and natural habitats (OJEC 38 of 10/2/1982).

[4] Convention on the conservation of migratory species of wild animals (Bonn Convention) of 23 June 1979. The European Union is party thereto by virtue of COUNCIL DECISION of 24 June 1982 on the conclusion of the Convention on the conservation of migratory species of wild animals (82 / 461 / EEC).

[5] Convention on Wetlands of International. Importance especially as Waterfowl Habitat (Ramsar Convention) of 18 January 1971. Spain has been party thereto since 18 March 1982 (Instrument of Accession, BOE 199 of 20/8/1982).

such they go well beyond what member states would have achieved individually at national level in this area" (Krämer, 2009; 215). Nonetheless, although there are studies showing that habitats and species protected in the Annexes of said directives are in a better conservation status than those that are not so protected (Donald *et al*, 2007; 810), in 2009 65% of habitats and 52% of protected species were still in an unfavourable conservation status and up to 25% of Europe's animal species face the risk of extinction (European Commission, 2010; 10). Urban sprawl, industrial development, infrastructure construction and more intensive farming practices are still on the up at the expense of valuable natural areas, which are being irremediably degraded and fragmented (European Commission, 2010; 5-10).

In 2011 the European Union adopted a new strategy to try to head off this loss (European Commission, 2011; 12). Target 1 of the new strategy towards 2020 is still full implementation of the Birds and Habitat Directives, with special stress on ensuring efficient management of Natura 2000 sites and grafting habitat- and species- management and -protection requirements onto other key policies such as those of soil and water, both inside and outside the Natura 2000 network.

The Natura 2000 network has been set up to ensure the long-term survival of Europe's most vulnerable species and habitats, by ensuring that a sufficient number and area of their most important sites are adequately protected and positively managed (European Commission, 2002). This network has to guarantee maintenance and restoration, in a favourable conservation status, of habitats and species of community interest, which are those deemed to be most important and threatened within the European Union. These species and habitats are the 195 bird species listed in Annex I of Birds Directive 2009/147 (formerly Directive 79/409/EEC) and regular migratory birds, plus the 230 habitats of Annex I and 911 species of fauna and flora of Annex II of the Habitats Directive.

Natura 2000 sites are, therefore, of immense value for protection and conservation of fauna, flora and habitats, identified with scientific and technical criteria to ensure conservation of biodiversity, as part of Europe's common heritage. Apart from the intrinsic importance of its mere existence, from the viewpoint of environmental and ecological justice (Baxter, 2005), the value of natural heritage and biodiversity stems from its close relationship with social and economic development, the health and welfare of people and their contribution thereto[6]. According to the European Commission (2010; 7): *"Part of the problem lies in the fact that although humanity's economic and social well-being is dependent on biodiversity and the continuous flow of the many ecosystem services it provides, these are generally considered to be predominantly public goods with no real economic value. The benefits nature brings*

[6] Art. 3.27 and art. 4 of the Natural Heritage and Biodiversity Law 42 of 13 December 2007 (*Ley del Patrimonio Natural y de la Biodiversidad* (BOE 299 of 14/12/2007).

to society are often overlooked and rarely taken into account in day-today decisions when trade-offs are involved".

The network articulation of the scheme means we are not dealing with isolated sites here. Due consideration has to be given to the protection of species that move from one territory to another, such as migratory birds, as well as the ecological connectivity and site-linking corridors. In any case, the coherence of this network of protected sites is based on the global consideration of the whole EU and not only on the conservation status of species and habitats in each particular member state.

3.

NATURA 2000 NETWORK: DISTRIBUTION AND FIGURES

EU countries designate Natura 2000 sites on the basis of scientific information. Special Protection Areas (SPAs) are designated on the basis of the Birds Directive 2009/147, while Sites of Community Importance (SCI) are proposed on the basis of the Habitats Directive 92/43; after Commission approval they must then be designated as Special Areas of Conservation (SACs) by states.

Although SCIs and SACs are identified and designated by member states, intervention by the European Commission is crucial, since they are approved in a broader context of European marine and biogeographical regions[7]. These are vast areas of land and sea that, within the European Union, share ecological characteristics in terms of vegetation, climate and geology, given the great variety that exists within EU territory[8]. They are used both to build up the network and to weigh up progress in the conservation status. Working at biogeographical level makes it easier to conserve habitats and species with similar natural conditions in twenty eight countries, regardless of their political and administrative borders.

There are nine types of terrestrial biogeographical region for the purposes of SCI and SAC designation: Alpine, Atlantic, Boreal, Continental, Steppic, Macaronesian, Black Sea, Mediterranean and Pannonian. For each biogeographical region the European Commission has approved a Decision with a list of the SCIs included therein; this list is periodically updated.

In turn European marine waters are divided into five marine regions for the purposes of marine SCI and SAC designation: Atlantic, Baltic, Macaronesian, Black Sea and Mediterranean.

[7] Art. 1.c) iii) of the Habitats Directive 92/43.

[8] MAGRAMA, "Espacios protegidos Red Natura 2000, Regiones biogeográficas y regiones marinas", http://www.magrama.gob.es/es/biodiversidad/temas/espacios-protegidos/red-natura-2000/rn_pres_const_reg_biogeo_and_marinas.aspx (checked 3 September 2014).

In the case of the SPAs, the Birds Directive 2009/147 mentions no specific biogeographic division, so each state has to divide up its territory according to such ornithological criteria as may help to identify the most appropriate territories (see ECJ judgment 28 June 2007, C-235/2004, paragraph 34).

According to the figures of the Natura 2000 Barometer[9], as at January 2016 the Natura 2000 network comprised 27,312 terrestrial and marine sites (23,726 SCIs and 5572 SPAs) occupying 787,606 km^2 on land and 360,350 km^2 at sea. This accounts for 18.12% of the European Union's land area and about 6.3% of marine waters under the jurisdiction of member states (AEMA, 2015; 5).

Spain's biogeographic regions are: Atlantic (*comunidades autónomas* [Spanish regional authorities] of Asturias and Cantabria, most of Galicia and the Basque Country, and part of Castilla y León and Navarra); Alpine (Pyrenees: northern part of the *comunidades autónomas* of Navarra, Aragon and Cataluña); Macaronesian (Canary Isles); Mediterranean (the biggest, taking in Extremadura, Madrid, La Rioja, Castilla-La Mancha, Valencia Region, Balearic Islands, Murcia Region and Andalusia, most of Castilla y León , Navarra, Aragón and Cataluña, a small part of Galicia and the Basque Country and Ceuta and Melilla).

In Spain the network comprises 1467 SCIs and 644 SPAs, accounting for a total land area of c. 137,757 km^2, about 27% of Spanish territory and a marine area of 84,386 km^2, about 8% of Spain's territorial waters.

4.

LEGISLATIVE FRAMEWORK AND OBLIGATIONS OF THE NATURA 2000 NETWORK

Art. 3 of the Habitats Directive 92/43 created the Natura 2000 network, comprising the SACs designated by member states pursuant to said Directive and the SPAs designated under the Birds Directive 2009/147 (which codified Directive 79/409/EEC). In brief, the obligations laid down by the Habitats Directive in relation to the Natura 2000 network are the following:

a) Obligation of designating a network of protected sites (SCI/SAC, SPA) (arts. 3, 4, 5)

[9] European Commission, Natura 2000 Barometer. Information sent by member states up to January 2016 http://ec.europa.eu/environment/nature/natura2000/barometer/index_en.htm (checked 9 January 2017).

b) Adoption in said sites of conservation measures, and, involving, if need be, appropriate management plans (art. 6.1), which may be the object of Community co-financing in a prioritized action framework (art. 8).

c) Obligation of avoiding therein any deterioration of habitats or significant disturbance of species (art. 6.2)

d) Appropriate assessment of plans and projects likely to affect these sites, which may be authorised only after having ascertained that they will not adversely affect the integrity of the site concerned, or exceptionally, when in the absence of alternative solutions, they must nevertheless be carried out for imperative reasons of overriding public interest and taking all necessary compensatory measures (arts. 6.3 and 6.4).

e) When deemed necessary member states will be entitled to establish ecological corridors and areas of connectivity to improve the ecological coherence of the network (art. 10).

f) Other obligations of monitoring, investigation and informing the European Commission.

Although the Birds Directive 79/409 has been enforceable in Spain since it joined the European Economic Community (EEC) on 1 January 1986, it was not until 7 December 1995 when the first reference to SPAs was made in Royal Decree (*Real Decreto*) 1997/1995[10], which implemented in Spain the Habitats Directive 92/43 and defined SCIs and SACs and the procedures for designating them. But really it was not until the Forest Law 43 of 21 November 2003 (*Ley de Montes*), when, by means of its final provision 1, amending *Ley* 4/1989[11], that this Nature Site Conservation Law included an exclusive chapter for the European environmental network Natura 2000, representing definitive implementation of the Birds Directive and a definition of SPAs.

As from 1995 the Natura 2000 network was phased into regional legislation, since most of the powers involved had been devolved on these regional governments (*comunidades autónomas)*, both for designating and also managing the protected sites and, in short, development of the basic legislation in this matter.

The last major updating of basic Natura 2000 legislation came with the Natural Heritage and Biodiversity Law 42/2007 (*Ley del Patrimonio Natural y de la Biodiversidad,* BOE 299 of 14/12/2007), which overturned *Ley* 4/1989 and fine-

[10] *Real Decreto* 1997/1995 of 7 December establishing biodiversity-guaranteeing measures by means of the conservation of natural habitats and of wild flora and fauna (BOE 310 of 28/12/1995).

[11] Wild flora and fauna and nature site conservation Law 4 of 27 March 1989 (*Ley de Conservación de los Espacios Naturales y de la Flora y Fauna Silvestre*, BOE 74 of 28/3/1989).

tuned the definition of some procedures such as designation of a plan or project of overriding public interest, the delisting of a site or modification of its borders and responsibilities in the designation and management of the marine 2000 network. The last reform of *Ley* 42/2007, which has also renumbered the articles of the Natura 2000 network (currently arts. 42 to 49), was carried out by *Ley* 33 of 21 September 2015 (BOE 227 of 22/9/2015)[12].

Finally, mention must be made of Spain's Natura 2000 Conservation Guidelines (*Directrices de Conservación*), approved by agreement of 13 July 2011 of the Sector-Based Environment Conference (*Conferencia Sectorial de Medio Ambiente*)[13], and also Order (*Orden*) AAA/2230 of 25 November 2013, which laid down the procedures for communicating official Natura 2000 protected-site information between regional, state and Community authorities (BOE 288 of 2/12/2013).

5. SEO/BIRDLIFE's IMPORTANT BIRD AREAS (IBA) INVENTORY AND ITS RELATION TO THE NATURA 2000 NETWORK

5.1. Objective of the IBA inventories and their role in the SPA designation

The objective of the Important Bird Area (IBA) inventory is to pinpoint the minimum network of sites to ensure survival and management of wild bird species in Europe and around the world. These sites are identified on standard international numerical criteria agreed by experts and scientists; these criteria are then applied to the most exact ornithological information to hand, whereby the inventory has been revised in line with the growing knowledge of the distribution and abundance of these species.

The inventory "Important Bird Areas in Europe" (Grimmett and Jones, 1989) was taken up by the Commission as an official list of priority zones for bird conservation in the European Union. In Spain SEO/BirdLife was given the responsibility for drawing up this inventory, which has then been published since 1986 in several updated editions and revisions, some of them at the behest of the European Commission. In 2011, drawing from the best ornithological information to hand (Infante et

[12] Up to now *Ley* 42/2007 has been amended by *Ley* 25 of 22 December 2009, RDL 8 of 1 July 2011, RDL 17 of 4 May 2012, *Ley* 11 of 19 December 2012, *Ley* 21 of 9 December 2013, RD 1015/2013 of 20 December 2013 and *Ley* 33 of 21 September 2015.

[13] Resolution of 21 September 2011 of the Secretary of State for Climate Change (*Secretaría de Estado de Cambio Climático*), publishing the agreements of the *Conferencia Sectorial de Medio Ambiente* on natural heritage and biodiversity BOE 244 of 10/10 2011).

al, 2011) SEO/BirdLife published the last inventory of Important Areas for Bird and Biodiversity Conservation in Spain, including 469 IBAs.

Over 12,000 IBAs have been identified in about 200 countries by more than 120 national partners of BirdLife International. It should be pointed out here that most of these IBAs designated in the member states have been legally protected in the European Union. This contrasts sharply with the situation of IBAs in other non-EU states such as Russia or Turkey (Barov and Derhé, 2011; 19).

The European Commission has always taken BirdLife's IBA inventory as a benchmark for analysing the degree of compliance by member states[14]. Especially important was the 1998 inventory (IBA 98), used for evidentiary purposes in Commission proceedings in the Court of Justice against five member states (Netherlands, France, Ireland, Italy and Spain). Amongst them the ECJ judgment of 28 June 2007, C-235/2004, for Spain's failure to fulfil SPA-designation obligations, indicates that the IBA inventory constitutes the most up-to-date and exact reference for the identification of the sites most suitable in number and size for the conservation of birds. As such it represents a shift in the burden of proof, whereby abidance by the IBA inventory represents legal compliance, whereas any opponents thereof have to account for its scientific inconsistency (without there having been to date any scientific studies that have demonstrated inconsistency of the IBA inventory in any of the Spanish *comunidades autónomas*). It added that art. 4 of Directive 79/409 lays down a regime which is specifically targeted and reinforced both for the Annex I species and for the regular migratory species, an approach justified by the fact that they are, respectively, the most endangered species and the species constituting a common heritage of the European Community. Moreover, for that purpose, *the updating of scientific data* is necessary to determine the situation of said species in order to classify the most suitable areas as SPAs[15]. In that regard, it should be recalled that SEO/BirdLife's IBA 98 provides the most exact and up-to-date scientific data.

National courts have phased ECJ case law into their own body of law and hence consider the IBA inventory, for its scientific value, to be the most up-to-date and precise SPA-designation benchmark, the burden of proof thereby being shifted to those who wish to stray therefrom.

In a SPA-designation case in the Canary Islands Spain's *Tribunal Supremo* (Supreme Court) ruled in its Judgment of 5 July 2012, rec. 1783/2010, that, in the absence of scientific proof to the contrary, SEO/BirdLife's IBA inventories, on the strength of their acknowledged scientific value, could be used as a benchmark for defining the

[14] ECJ judgment 26 November 2002, C-202/01; ECJ judgment 20 March 2003, C-143/02; ECJ judgment 25 October 2007, C-334/04.

[15] ECJ judgment 28 June 2007, C-235/04, section 23, 24 and 25, and ECJ judgment 13 July 2006, C-191/05, section 9.

"*most appropriate territories*" for SPA classification. Similarly, the Supreme Court Judgment of 13 March 2014, rec. 3933/2011, and Supreme Court Judgment of 24 March 2014, rec. 3988/2011.

In cases where the appellants were private individuals or companies opposing the government's SPA designation, the ruling has gone against the appellants if the SPA-designated site had been previously designated as an IBA (Judgments of the High Court of Justice of the *Comunidad Valenciana*, of 24 June 2012, rec. 255/2009 and 20 July 2012, rec. 233/2009) and in their favour when the site was not an IBA and the government authority did not demonstrate, even so, its ornithological worth (Judgment of the High Court of Justice of the *Comunidad Valenciana* of 23 July 2012, rec. 293/2009). Similar rulings of lack of proof of any arguments contradicting the IBA inventory have been handed down by other courts when rejecting appeals seeking annulment of the SPA designation (Judgment of the High Court of Justice of the Balearic Islands of 12 November 2008, rec. 399/2006; Judgment of the High Court of Justice of the Canary Islands, Las Palmas, of 1 June 2009, rec. 17/2007, of 1 June 2009, rec. 14/2007, and of 23 July 2010, rec. 219/2007; Judgments of the High Court of Justice of Galicia of 4 April 2012, rec. 4048/2010, of 4 April 2012, rec. 4050/2010, and of 4 April 2012, rec. 4005/2010). These rulings indicate that the government authority had the backing of SEO/BirdLife's IBA inventory, "*whose overriding scientific value for determining territories classified as SPA has been recognised by the European Commission and the European Court of Justice*", and that coincidence between IBA and SPA "*has to be an important objective for the Environment Department, in view of the fact that the IBA inventory constitutes the scientific reference used by the European Commission and the European Court of Justice to gauge member-state compliance with Directive 79/409* ". (Judgments of the High Court of Justice of Aragón of 31 January 2005, rec. 112/2002 and 31 January 2005, rec. 110/2002). This was echoed by the Judgments of the High Court of Justice of Castilla-La Mancha of 2 October 2012, rec. 1242/2007 and 18 April 2011, rec. 262/2008.

Courts, for their part, have also found in favour of the government authority when it designated a SPA that was not previously an IBA if it had properly accounted for its ornithological value (High Court of Justice judgments of the *Comunidad Valenciana* of 23 July 2012, rec. 261/2009, rec. 235/2009, rec. 257/2009 and rec. 234/2009; Judgments of the High Court of Justice of Cataluña of 13 October 2009, rec. 769/2006 and of 20 October 2009, rec. 778/2006).

One of the most noteworthy cases of an IBA not having been SPA-designated by the government authority is the one for insufficient designation of the SPA *Desfiladeros del Río Jalón* (Judgment of the High Court of Justice Aragón of 5 April 2005, rec. 992/2001) in which the Court argues that "*the defendant government authority has presented no scientific proof whatsoever that might counter the criteria maintained*

in the ornithological inventory [SEO/BirdLife's IBA]", and also that "*the existence of environment-transforming circumstances such as the execution of infrastructure work of general interest does not justify exclusion by the appellant party of the protection provided for in the Directive*", obliging the government authority to designate the whole legally disputed IBA as a SPA.

5.2. Application to IBAs of the Birds Directive art. 4.4 non-deterioration obligation

If despite not being SPA designated an IBA is still considered to be an essential bird conservation area or of high value for same, government authorities are then bound to take appropriate measures to avoid contamination or deterioration of its habitats as well as any disturbance to the birds of said IBA, or in any case to do all within their power to avoid it, in application of art. 4.4 of the Birds Directive[16].

In the case of the saltmarsh known as *Marismas de Santoña,* authorisation had been given for construction of a road and industrial buildings in a designated non-SPA IBA. The Court of Justice ruled that government authorities are bound under art. 4.4 of the Birds Directive to take appropriate steps, even before SPA designation, to avoid

pollution or deterioration of habitats or any disturbances affecting the birds. This represents a de facto preventive protection regime that can be extended outside SPAs (ECJ judgment 2 August 1993, C-355/90).

The Court of Justice considers that the obligations laid down in article 4.4 of the Birds Directive have to be met even when the area concerned has not been classified as a SPA when it should have been and the IBA inventory contains scientific data that show how far a state has designated as SPA the most appropriate territories in number and size (ECJ judgment 20 September 2007 C-388/05; ECJ judgment of 18 March 1999, C-166/97, paragraph 38; ECJ judgment 7 December 2000, C-374/98, paragraph 25 and ECJ judgment 24 November 2016, C-461/14). In the case of the Segarra-Garrigues Canal, although Spain submitted that the project was important for the economic and social development of the area affected (a non-SPA-designated IBA), the Court of Justice found that non-enforcement of article 4.4 cannot be justified on the grounds of economic or social needs (ECJ judgment 18 December 2007,

[16] Art. 4.4 of the Birds Directive 2009/147) runs as follows: "*Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats*".

C-186/06, paragraphs 36 and 37 and ECJ judgment 28 February 1991, C-57/89, paragraphs 21 and 22).

As regards enforcement of this matter and Community case law by Spanish courts, they have been ruling that the IBA inventory identifies important bird territories, with disparate pronouncements on enforcement therein of the non-deterioration obligation of article 4.4 of the Birds Directive 2009/147.

The High Court of Justice of Castilla y León ruled on a group of cases in which the government authority authorized several wind farms in an area designated as IBA but not SPA, applying a preventive criterion by likening the ornithological value of the IBA to that of a SPA, by virtue of the interpretative efficacy principle (under which national courts have the duty – deriving from articles 249 and 10 of the EC Treaty – of enforcing national law in such a way as to achieve as far as possible the result referred to in the Directive). Under the aegis, therefore, of article 4 of the Birds Directive and article 174.2 of the EC Treaty (precautionary principle and the principle of preventive action) this zone had to be considered as a SPA for the purposes of submitting these projects to an ordinary rather than simplified assessment procedure (Judgments of the High Court of Justice of Castilla-León, Valladolid of 10 June 2009 rec. 767/2008 and 27 April 2012, rec. 2892/2008).

According to the Supreme Court Judgment of 5 July 2006, rec. 10319/2003, although the IBA concerned had not yet been SPA designated when the mining project involved was approved therein, the Supreme Court considered that its *a posteriori* designation shortly afterwards meant that the spot, from that moment on, complied with the SPA-delegation eligibility requisites laid down by the Directive, whereby its protection conditions were bound to abide by the strict stipulations imposed over these zones by the Directive. But this was not taken into account in the Environmental Impact Statement, whose corrective measures, in the view of the court on the basis of an expert report, lacked efficacy for preserving the values of the protected area.

Noteworthy judgments that do not apply a preventive protection regime and non-deterioration obligation to IBAs, on the grounds that the appellant had not proven the adverse effects of a housing estate on birds (even though it had not been environmentally assessed), or on the grounds that an IBA cannot be likened to a SPA for these purposes, or in the absence of proper assessment of the technical rigour of an IBA designation, are the Judgments of the High Court of Justice of the *Comunidad Valenciana* of 28 November 2008, rec. 711/2006 and 22 March 2011, rec. 268/2008; and the Judgment of the High Court of Justice of Extremadura of 30 June 2011, rec. 1757/2008).

5.3. The IBA inventory as an indicator of significant environmental value

Quite apart from the important role of IBAs in SPA designation and the application thereof to the preventive regime and non-deterioration obligation of art. 4.4 of the Birds Directive 2009/147, a significant number of courts consider IBAs in their own right to be sites with identified environmental values that need to be protected from other uses and, if need be, assessed. Witness the Judgment of the High Court of Justice of the Canary Islands, Las Palmas, of 3 September 2010, rec. 13/2008, which ruled that, on the grounds of the recognised scientific value of the IBA inventory, it is not arbitrary to incorporate IBA 343 *Jandía* as a Restricted Use Zone (*Zona de Uso Restringido*) in the Nature Park's Land Use and Management Master Plan (*Plan Rector de Uso y Gestión*: PRUG), with the subsequent limitation on land uses. In the Judgment of the High Court of Justice of the *Comunidad Valenciana* of 22 March 2011, rec. 268/2008, the court ruled that although states are not obliged to declare terrain or fit in with the delimitation thereof, government authorities are bound to show the ornithological validity of any deviation from the IBA inventory. In a case dealt with in the Judgment of the High Court of Justice of the Canary Islands, Las Palmas, of 3 April 2008, rec. 1389/2001, limitations were placed on land owned by the appellant in Fuerteventura, which limitations the latter considered to be unjustified. The court nonetheless analysed the values of the site and deemed it to have been demonstrated that it had a significant value for the Houbara Bustard, especially acknowledged due to designation as IBA and SPA. The Judgment of the High Court of Justice of Cataluña of 20 September 2011, rec. 3/2008 ruled that the decision of whether or not to assess the environmental impact on an IBA is not a discretional remit of the government authority. On the contrary the court considered that, in light of the great environmental value reflected by said classification, the assessment is a *sine qua non* for the government authority to be able to authorise a project likely to affect an IBA.

6. SITE DESIGNATION OF THE NATURA 2000 NETWORK

In Spain the responsibility for proposing, designating and managing terrestrial Natura 2000 sites (including fluvial sites) has been devolved on the *comunidades autónomas*. In the case of marine SPAs, SCIs and SACs the proposal, designation and management is the remit of the Central Government, unless there is proven ecological continuity of the marine ecosystem with a protected terrestrial Natura 2000 site[17].

[17] Arts. 6 and 37 of *Ley* 42/2007, and art. 28 of the Marine Environment Protection Law 41 of 28 December 2010 (*Ley de protección del medio marino*) (BOE 317 of 30/12/2010).

The designation procedure is laid down in arts. 43 to 45 of the Natural Heritage and Biodiversity Law 42/2007 (*Ley del Patrimonio Natural y de la Biodiversidad*) (following renumbering thereof by *Ley* 33/2015).

6.1. SPA designation (Special Protection Areas)

Member states are bound to SPA-designate such territories as may be most appropriate in number and size for conservation of the Annex I bird species of the Birds Directive 2009/147 and for regularly occurring migratory species not listed in Annex I (arts. 4.1 and 4.2). For this purpose member states will grant particular importance to the protection of wetlands, especially those of international importance. The SPA network has to make up a coherent whole which meets the protection requirements of these species in the geographical sea and land area where this Directive applies (art. 4.3).

SPAs are designated directly by member states without intervention of the European Commission, although the latter does need to be informed of its designation and characteristics.

SPAs have been progressively designated in Spain since 1986 by the various *comunidades autónomas* and Cities with a Statute of Autonomy, (and for marine SPAs the central government) in the framework of various administrative and legislative instruments. Article 45 of *Ley* 42/2007 lays down a previous public-information procedure for *comunidades autónomas* entitled to designate SPAs and, as part of a public-information procedure, the designations have to be published in the respective regional Official Journals, including information on their geographical boundaries and the habitats and species warranting the designation. These designations then have to be reported to the ministry with the environment portfolio, which in turn then passes it on to the European Commission. The Court of Justice has already ruled on this matter, indicating that the SPA-demarcating maps and identification of the species that have warranted classification of that SPA must be invested with unquestionable binding force, otherwise the boundaries of SPAs could be challenged at any time with the concomitant risk of their protection objective not being fully attained. In the interests of legal certainty, therefore, they should be published in several official journals to guarantee *juris et de jure* presumption of their knowledge by third parties (ECJ judgment 27 February of 2003, C-415/01, paragraph 22; and ECJ judgment 14 October 2010, C-535/07 paragraph64).

Pursuant to art. 46.1 of *Ley* 42/2007 it is compulsory to set up management instruments and plans for any SPA. Although this law does not actually specify that said instruments and plans have to be approved together with its designation (this requisite is laid down for SCIs and SACs in art. 43.3) Community case law has ruled that: *"States have to adopt the measures necessary to ensure that the classification*

of a site as a SPA *automatically and simultaneously entails the application of a system of protection and conservation complying with Community law*" (ECJ judgment 27 February 2003, C-415/01, paragraphsn 15 and 26). And in any case, SPAs designated before the coming into force of *Ley* 42/2007, with no management plans or instruments, would be covered by transitional provision two, whereby they have to be approved and published within a 3-year deadline (by 15 December 2010).

Improper SPA designation has prompted the European Commission to open infraction proceedings against the states concerned. In many cases these in turn lead to appeals lodged before the Court of Justice of the European Union. The main conclusions drawn by this slew of judgments are the following:

1. The protection regime specifically targeted and reinforced both for the Annex I species and for migratory species is justified by the fact that they are respectively the most endangered species and the species constituting a common heritage of the Community (ECJ judgment 13 July 2006, C-191/05, paragraph 9). Article 4(1) and (2) of the Birds Directive requires the Member States to classify as SPAs the territories meeting the ornithological criteria specified by those provisions (ECJ judgment 13 December 2007, C-418/04, paragraph 36 and 37; ECJ judgment 20 March 2003, C-378/01, paragraph 14).

2. The SPA-classification obligation cannot be substituted by other conservation measures or schemes such as nature reserves or parks, SCI or SAC, otherwise this might jeopardise the objective of setting up a coherent network of SPAs (ECJ judgment 19 May 1998, C-3/96, paragraph 58, ECJ judgment 2 August 1993, C-355/90, paragraph 28) and the legal regimes are different (ECJ judgment 28 June 2007, C-235/04, paragraph 79, ECJ judgment 14 October 2010, C-535/07, paragraph 24).

3. *Exceptions of a social and economic nature may not be applied* in the SPA designation (ECJ judgment 2 August 1993, C-355/90, paragraphs 18-19, ECJ judgment 13 December 2007, C-418/04, paragraphs 130 to 145). A SPA has to be classified exclusively on its ecological value; once designated, however, certain plans and projects could be authorised under paragraphs 3 and 4 of art. 6 of the Habitats Directive, due to imperative reasons of overriding public interest (ECJ judgment 11 July 1996, C-44/95). There is hence a *SPA-designation obligation even if the species to be protected thereunder live within urban areas* (ECJ judgment 28 June 2007, C-235/04, paragraphs 72 and 73). A state may not justify a non-SPA designation on the grounds of a comparative situation with other Member states, for example that its SPA area is larger than the Community mean, or *internal difficulties* such as the distribution of territory between various administrative regions or a fiercely conflictive local situation, since it is only the ornithological criteria of art. 4 of the Birds Directive that enable the most appropriate zones to be classified (ECJ judgment 28 June 2007, C-235/04, paragraph 42, 45, 55, 66; ECJ judgment 7 December 2000, C-374/98, paragraph 13).

4. *The margin of discretion with regard to the choice of special protection areas is limited to the application of certain ornithological criteria* to choose the most appropriate territories (ECJ judgment 2 August 1993, C-355/90, paragraph 26). Thus where it appears that the number and total area of a Member State's classified SPA sites *are manifestly less than* the number and total area of the sites considered to be the most suitable for conservation of the species in question it will be possible to find that said Member State has breached its obligation (ECJ judgment 19 May 1998, C-3/96 paragraphs 60-64).

5. *BirdLife's Important Bird Area (IBA) inventories are based on scientific and ornithological criteria that enable the most suitable sites to be identified*. According to the Commission, the inventory is based on balanced ornithological criteria and an updated and detailed scientific analysis that facilitate identification of the most suitable territories in terms of number and surface area for conservation of Annex I species of Directive 2009/147 and migratory species. Though not legally binding, said inventory is taken to be true and certain in the absence of scientific evidence to the contrary (ECJ judgment 28 June 2007, C-235/04, paragraphs 20 to 27; ECJ judgment 13 December 2007, C-418/04, paragraphs 46 to 57; ECJ judgment 19 May 1998, C-3/96 paragraphs 60-64). Even if not SPA-designated, if any IBA is considered to be essential or of great value for birds, then, pursuant to art. 4.4 of the Birds Directive, appropriate measures have to be taken to avoid pollution, habitat deterioration or disturbance to birds, or the member state must strive to do so (ECJ judgment 20 September 2007, C-388/05; ECJ judgment 18 December 2007, C-186/06; ECJ judgment 24 November 2016, C-461/14).

6. The SPA-designation obligation has to be appraised in relation to the territory of the member state, even if there is other territory more suitable in other states, since, where these species are fairly frequent, SPAs ensure conservation of a large sections of the overall population, whereas, in the states where they are rare, SPAs contribute to the *geographical range of the species*, thus complying with the *objective of setting up a coherent network (*ECJ judgment 13 December 2007, C-418/04, paragraphs 58 to 61; ECJ judgment 19 May 1998, C-3/96 paragraphs 56 and 58).

7. *The SPA-classification obligation does not necessarily cease to apply if the area is no longer most suitable*. A state is not entitled to exploit its breach of the site-classification and protection obligation, since, in areas that have not been classified as SPAs but should have been, suitable deterioration-prevention measures should nonetheless have been taken (art. 4.4 Directive Aves); furthermore it is also possible that a species may recolonise the area involved (ECJ judgment 13 December 2007, C-418/04 paragraphs81 to 88, 121-122; ECJ judgment 19 May 1998, C-3/96 paragraph 62; ECJ judgment 28 June 2007, C-235/04, paragraph 22; ECJ judgment 7 December 2000, C-374/98, paragraphs 47 and 57; ECJ judgment 13 July 2006, C-191/05, paragraphs 13 and 14).

As for the responses of Spanish courts to appeals against SPA designations, in general they have ruled that public information suffices without needing to give a hearing to interested parties or that omission thereof would not represent an invalidating defect (Supreme Court Judgment of 20 May 2008, rec. 2719/2004, 26 February 2010, rec. 276/2006; Judgment of the High Court of Justice of Cataluña of 16 February 2010, rec. 706/2006; Judgment of the High Court of Justice of the Balearic Islands of 12 November 2008, rec. 399/2006; Judgment of the High Court of Justice of the *Comunidad Valenciana* of 24 June 2012, rec. 255/2009). Responding to an attempt to reduce the size of the site or exclude appellants' estates therefrom, claims that the demarcation thereof is arbitrary or insufficiently accounted for have been thrown out on the grounds that identification thereof is a technical decision and that the burden of proof pertaining to ostensible arbitrariness or apparent errors in the decision of the government authority falls on the party wishing to annul the classification (Judgments of the High Court of Justice of Cataluña of 6 May 2009, rec. 776/2006 and 21 September 2010, rec. 239/2007; Judgment of the High Court of Justice of the *Comunidad Valenciana* of 24 June 2012, rec. 255/2009; Judgment of the High Court of Justice of Castilla-La Mancha of 2 October 2012, rec. 1242/2007). It has also been ruled that the fact that a zone has been identified as an Important Bird Area (IBA) by SEO/BirdLife is sufficient grounds for SPA designation, since said inventory has a recognised scientific value for defining the "most suitable territories" for SPA designation in number and size in the absence of any scientific proof to the contrary (Supreme Court Judgments of 5 July 2012, rec. 1783/2010, 13 March 2014, rec. 3933/2011, 24 March 2014, rec. 3988/2011; Judgment of the High Court of Justice of Aragón of 31 January 2005, rec. 110/2002; Judgment of the High Court of Justice of the Balearic Islands of 12 November 2008, rec. 399/2006; Judgment of the High Court of Justice of the Canary Islands, Las Palmas, of 1 June 2009, rec. 17/2007; Judgment of the High Court of Justice of the *Comunidad Valenciana* of 24 June 2012, rec. 255/2009; Judgment of the High Court of Justice of Castilla-La Mancha of 2 October 2012, rec. 1242/2007). That said, the fact that an area has not been identified by SEO/BirdLife as an IBA would not override any designation recommended by any other reports in possession of the government authority, showing the presence of values worthy of protection (Supreme Court Judgment of 28 February 2013, rec. 6639/2009; Judgment of the High Court of Justice of Cataluña of 20 October 2009, rec. 778/2006; Judgment of the High Court of Justice of the *Comunidad Valenciana* of 20 July 2012, rec. 233/2009). On the other hand it is not merely the presence of Annex I species or regular migratory species that triggers a SPA classification but rather a set of circumstances that indicate the territories involved are the most appropriate in number and size, thereby constituting a coherent network for protection thereof (Supreme Court Judgment of 13 October 2003, rec. 8065/2000).

Other motives for challenging the SPA designation have also been dismissed by the courts. These include: absence of joint approval of the management plan and

measures; classification of the land as eligible for urban development, directly or indirectly; violation of entrepreneurial freedom; elimination of hunting activities; the fact that it is not based on the public forest network; lack of coherence with SPAs of other regions; impingement on local autonomy or violation of the equality principle (Judgments of the High Court of Justice of Cataluña of 6 May 2009, rec. 776/2006, 13 May 2009, rec. 777/2006 and 26 May 2009, rec. 784/2006; Judgments of the High Court of Justice of the *Comunidad Valenciana* of 24 June 2012, rec. 255/2009 and 20 July 2012, rec. 233/2009; Judgment of the High Court of Justice of the Canary Islands, Las Palmas, 23 July 2010, rec. 219/2007; Judgment of the High Court of Justice of the Balearic Islands of 12 November 2008, rec. 399/2006; Supreme Court Judgment of 13 March 2014, rec. 3933/2011).

In general the courts rule that designation of Natura 2000 sites does not imply a compensation obligation (Supreme Court Judgment of 26 February 2010, rec. 276/2006; Judgments of the High Court of Justice of Aragón of 31 January 2005, rec. 110/2002 and 31 January of 2005, rec. 112/2002; Judgments of the High Court of Justice of Cataluña of 6 May 2009, rec. 776/2006, 13 May 2009, rec. 777/2006 and 20 October 2009, rec. 778/2006; Judgment of the High Court of Justice of the *Comunidad Valenciana* of 17 July 2013, rec. 14/2010), without accepting grounds of economic losses based on mere expectations (Judgment of the High Court of Justice of Cataluña of 18 June 2012, rec. 278/2010).

6.2. Proposal and approval of SCIs (Sites of Community Importance) and SAC designation (Special Areas of Conservation)

SCIs and SACs represent the same sites at different stages of their declaration. Unlike SPAs they are designated in a regulated, stage-by-stage procedure involving intervention not only of the states but also the European Commission. The procedure is regulated in arts. 3, 4 and 5 of the Habitats Directive, and arts. 43, 44 and 45 of *Ley* 42/2007.

Each member state will contribute towards construction of the Natura 2000 network in terms of the representation in its territory of the types of natural habitat of community interest in Annex I of the Habitats Directive 92/43, and habitats of the animal and vegetable species listed in Annex II, which is complementary to the former in terms of setting up a coherent network. To do so they have to follow the selection criteria and stages of Annex III of the Directive and the protocol of its art. 4. This protocol includes an SCI proposal from the member states, formal approval of the European Commission, and SAC designation of the states, defining the objectives and conservation measures to be carried out in each site. If there are any SCI-definition discrepancies between the European Commission and any member state, a bilateral concertation procedure will be triggered to try to solve the dispute (art. 5).

The Supreme Court Judgment of 11 May 2009, rec. 2965/2007, *Caso Calebus*, represents a benchmark, due to its thoroughgoingness and degree of detail, on the SCI and SAC approval procedure in Spain and legal transcendence of each stage.

Stage 1. Proposal of the SCI list by member states

In Spain the responsible Government authorities – regional authorities (*comunidades autónomas)* in general and the central government for marine territories with no ecological continuity with a terrestrial site – draw up an SCI proposal, which they submit to public information and send up to the ministry holding the environment portfolio, which in turn sends it on to the European Commission. This proposal is published in the official journal.

After the proposal has been sent to the ministry, these sites will enjoy "*a preventive protection regime to prevent any impairment of the conservation status of its habitats and species until the moment of its formal designation"* (art. 43.2 *Ley* 42/2007). This preventive regime had already been established in Community case law, indicating that the states are bound to take suitable protection measures to safeguard the ecological interest of the proposed SCIs until such time as a decision of the Commission triggers its inclusion in the corresponding list (ECJ judgment 13 January 2005, C-117/03) and that the appropriate protection regime for these sites requires states not to authorise interventions that might significantly alter their ecological characters (ECJ judgment 14 September 2006, C-244/05). This protection regime also extends to sites meeting the criteria of art. 4.1 of the Directive and which should have featured in the national SCI list sent to the Commission, albeit in fact unproposed (ECJ judgment 15 March 2012, C-340/10, paragraphs 43 to 55). In Spain's internal law this preventive regime has been recognised, among others, by a Judgment of the High Court of Justice of Madrid of 14 February and 1 July 2008, rec. 706/2005 and 553/2005, Supreme Court Judgments of 11 May 2009, rec. 2965/2007 and 22 October 2010, rec. 5593/2006; Judgment of the National High Court (*Audiencia Nacional*) of 10 June 2009, rec. 122/2004; Judgment of the High Court of Justice of Cantabria of 12 July 1999, rec. 1862/1997; Judgment of the High Court of Justice of Andalusia, Sevilla, of 27 January 2006, rec. 828/1999; Judgment of the High Court of Justice of Cataluña of 7 January 2009, rec. 277/2007.

The Habitats Directive sets forth detailed SCI-selection criteria in its arts. 3 and 4 and Annex III, which are to be taken as the bottom line, fleshed out with pertinent scientific information, whereby the states' margin of appreciation is limited to application thereof (ECJ judgment 14 September 2006, C-244/05, paragraph 33). No consideration can be given to economic, social and cultural requirements or regional and local characteristics when selecting and defining the boundaries of SCIs, since the Commission needs to work from an exhaustive inventory of the sites of ecological

interest at national level. This is so because the favourable conservation status of a habitat or species should be appreciated in relation to the whole European territory of member states, otherwise the Commission could not be sure of having available an exhaustive list of sites eligible as SACs, thus jeopardising the objective of bringing them together into a coherent European ecological network (ECJ judgment 7 November 2000, C-371/98). This case law has been taken up by Spanish courts; witness the Supreme Court Judgment of 18 October 2012, rec. 5894/2009, dealing with the enlargement of the SCI *Prat del Llobregat*.

Stage 2. European Commission approval of SCI lists

In this second phase the Commission approves the list of SCI-designated sites for the various biogeographical regions of the European Union, following the procedure laid down in art. 21 of the Directive. The Commission is aided in this task by a committee in which member states participate (Habitats Committee).

Spain's proposed SCIs were initially approved by the European Commission in four Community lists, one for each one of the biogeographic regions present within Spain's territory: Atlantic (Decision 2004/813/EC) Alpine (Decision 2004/69/EC) Macaronesian (Decision 2002/11/EC) and Mediterranean (Decision 2006/613/EC). All these initial lists have in turn been updated on several occasions.

After this approval of the SCI list in which a site was included *for the first time*[18], states are then bound to designate it as SAC as soon as possible, within a maximum deadline of six years, laying down the necessary conservation measures (art. 4.4, and art. 6.1 of Directive 92/43).

Furthermore, from the moment in which an SCI features for the first time in the Commission-approved list[19], it will be bound by the provisions of art. 6.2, 6.3 and 6.4 of Directive 92/43 (non-deterioration obligation and appropriate assessment and strict authorisation criterion and exceptions for plans and projects likely to have a significant effect).

After the first approval of these lists by the European Commission, successive updatings are phased thereinto to include new sites or reflect changes in the information. The SCI and SAC approval procedure cannot be considered to be concluded in any member state; the same goes for SPA designations. Knowledge of the existence and distribution of species and habitats constantly evolves and available information

[18] All the decisions taken with the successive Commission-approved SCIs lists are shown on its website. One way of finding out which was the Decision in which an SCI was approved and the date thereof is to look for the SCI code in these decisions, beginning with the initial list.
See: http://ec.europa.eu/environment/nature/natura2000/sites_hab/biogeog_regions/index_en.htm

[19] Art. 4.5 of the Habitats Directive 92/43.

could be widened and improved in the future; furthermore some member states have not yet proposed a sufficient number of sites.

Stage 3. SAC designation by member states

Working within the overall six-year deadline laid down in art. 4.4 of the Habitats Directive 92/43 for SAC designation after first inclusion of any SCI in Commission lists, priority has to be given to those sites that are under most threat or are of the greatest importance in conservation terms.

As follows from the definition of a SAC in art. 1.l of the Habitats Directive, its designation must be done by means of a statutory, administrative or contractual act with binding force.

Accordingly, art. 43.3 of *Ley* 42/2007 stipulates that SACs will be declared by the *comunidades autónomas* (or by the central Government in the case of marine sites without any ecological continuity with a terrestrial site), together with approval of the corresponding management plan or instrument. Art. 45 of *Ley* 42/1007 lays down the following steps: 1) previous public information; 2) definitive approval; 3) publication in Official Journals, including information on its geographical borders and the habitats and species warranting the designation; 4) Communication to the minister holding the environment portfolio for the latter in turn to send it up to the European Commission.

Designation of a SCI as SAC entails application of art. 6.1 of Directive 92/43, which calls for establishment of necessary conservation measures (management plans and statutory, administrative or contractual measures); this does not apply to SCIs. The protection regime and conservation of a SAC shall meet all the provisions of art. 6 of the Habitats Directive (art. 46 *Ley* 42/2007) and apart from the non-deterioration obligation (art. 6.2) and appropriate assessment and strict authorisation criteria and exceptions for plans and projects likely to have a significant effect (arts. 6.3 and 6.4), approval must also be given to the necessary conservation measures (art. 6.1).

In other words it is the SAC designation that triggers the member states' obligation to specify the conservation regime of these sites, establishing permitted and prohibited uses and activities, thereby delimiting the legal regime for each one, a crucial aspect in terms of ownership (Legal ground 8 of the Supreme Court Judgment of 11 May 2009, rec. 2965/2007, *Caso Calebus*).

In the designation of the Canary Island SACs, ECJ judgment of 22 September 2011, C-90/10 found against the Kingdom of Spain for its failure to apply appropriate protection measures or such a conservation regime as would ensure legal protection of said sites (art. 4.5, 6.1 and 6.2 Directive 92/43), finding a significant number of habitats and species in said SACs to be in a poor or inadequate conservation status.

In appeals lodged in Spanish courts the pleas are usually targeted not so much against the SAC designation (especially when no appeal was previously lodged against SCI approval) but rather against the associated management plan, which includes the necessary conservation measures and might impinge thereafter on the ownership regime. Thus, in the Judgment of the High Court of Justice of Madrid of 19 June 2013, rec. 248/2012, land owners lodged an appeal against the SAC designation decree of the SCI *Cuencas de los ríos Jarama y Henares* and approval of its management plan, the complainant clarifying that its appeal was lodged against approval of the management plan and not SAC designation per se. In other cases in which some owners have sought exclusion of their land from the SAC or annulment of the designation due to a breach of the 6-year SAC-designation deadline laid down in art. 42.3[20] of *Ley* 42/2007, this was thrown out by the courts. Particularly revealing here is the ruling of the Judgment of the High Court of Justice Extremadura of 30 June 2016, rec. 365/2015: "*The nullity argument has to be rejected forthwith. If it was allowed, this would lead to a situation in which it would be impossible to approve any of these plans, with the very damaging effect of not being able to undertake the conservation measures that are their main purpose. This would without doubt eventually lead to the European Commission bringing an action for failure to fulfil obligations before the Court of Justice of the EU, which would immediately give its approval thereto. We are therefore not dealing here with a case of automatic nullity*". A similar conclusion was drawn by the Judgment of the High Court of Justice of Asturias of 21 July 2016, rec. 167/2015 in its legal ground 2.

7.

REMITTANCE OF INFORMATION: THE STANDARD DATA FORM

Directive 92/43 establishes the states' obligation of sending the proposed SCI list to the Commission, *together with information on each site* (art. 4.1, paragraph 2). This information shall include a map of the site, its name, location, extent, plus a wide-ranging description of the site and its ecology on the basis of the data resulting from application of the criteria specified in Annex III (Stage 1) *provided in a format established by the Commission*.

Commission Decision 97/266/EC of 18 December 1996 approved the first Natura 2000 Standard Data Form, which was later repealed by Commission Implementing Decision 484/2011 of 11 July 2011, concerning a site information format for Natura 2000 sites (OJEU 198 of 30/7/2011), which expressly states that *"The format serves as documentation of the Natura 2000 network"*.

[20] Now art. 43.3 of *Ley* 42/2007

Together with the form, this Decision contains detailed explanatory notes of the alphabetic and numerical keys and their significance in terms of ecological information on natural habitats and species of flora and fauna of community interest in any SCI or SPA, plus other important data and characteristics such as the SCI-proposal or SPA-designation date, with important legal consequences in terms of the regime applicable therein as from those dates. These Explanatory Notes have been officially published, together with the form, in a mandatory legal provision of the European Union. As such they should in principle suffice for any legal operator obliged to enforce Community law to be able to understand and interpret the content and basic data of the factfile or official form of an SCI, SPA or SAC without needing to call on expert evidence, even when such evidence may or must be proposed and furnished for an expert to opine in the specific facts under debate.

The official form of a Natura 2000 SCI, SAC or SPA is a public administrative document kept in public registers and files, accessible online from the official websites of the ministry holding the environment portfolio and the *comunidades autónomas* that have proposed same. They hence contain "*facts*" on the identification and locality of the site, SCI-proposal date or SAC- or SPA-designation date, types of habitats and species present therein and assessment of the site on the basis thereof, general characteristics, quality, importance, vulnerability, threats and pressures impinging on the site, other existing protection schemes, etc. Their input to any judicial process, if they do not feature in the administrative file, should be in principle be by way of documentary evidence.

In certain pronouncements internal courts have considered that the standard forms of 2000 sites constitute important technical reports to justify the boundaries of a Natura 2000 site (Judgments of the High Court of Justice of Aragón of 31 January 2005, rec. 110/2002 and 31 January 2005, rec. 112/2002; Judgment of the High Court of Justice of the Balearic Islands of 12 November 2008, rec. 399/2006).

The courts have accepted that, in the interests of affording more protection, the data of the Natura 2000 form can be fleshed out with expert reports giving additional, more complete or up-to-date information on habitats or species that have not previously been considered. Witness the Judgment of the High Court of Justice of Cantabria of 28 November 2013, rec. 538/2011. Nonetheless, in cases where the aim of the expert reports added to judicial procedures is to prove that a given SCI, SAC, SPA or zone thereof did not actually contain a habitat or species of community interest or of priority status, which habitat or species was however mentioned in the site form as a factor in favour of the authorisation of a given plan or project, this argument has not been accepted, the court ruling: "*Unless the Decision approving the list considering the Sierra del Escudo SCI to be priority is challenged, this is fully effective until such time as it is delisted by the Commission. The appellant cannot therefore claim that a simple expert report added to a procedure can override the protection given*

by the Directive and Spain's internal body of law to a zone designated as such by the European Commission" (Judgment of the High Court of Justice of Cantabria of 4 February 2010, rec. 921/2008 and 28 November 2013, rec. 538/2011).

The objectives of the form include that of offering a coherent and useful format not only for exchanging information between government authorities but also for sharing this environmental information with the public at large. Given its sheer legal importance and also the fact that legal and administrative operators are bound to consult and interpret it, it would now be a good idea for the alphanumerical information of each form and site to be also spread further afield in Spain in a single, clearer document, comprehensible and readable in its own right without continual referrals to other documents. The contents in English should also be translated into Spanish, since English is not an official language in Spain.

Decision 2011/484 stipulates that the content of the Natura 2000 Standard Data Form should be updated regularly on the basis of the best available information for each site of the network in order to allow the Commission to fulfil its coordinating role and in accordance with art. 9 of Directive 92/43/EEC to periodically review the contribution of Natura 2000 towards the achievement of the objectives set out in arts. 2 and 3 of that Directive.

The updates or modifications of the SCI, SAC or SPA data form have to be sent to the Commission in the form of a file that identifies clearly the changes introduced and substantiates the scientific justification for each one of those changes (European Commission, 2005). Moreover, any modifications of boundaries, area and coordinates of a SCI, designation of new SCIs or abolition of existing SCIs have to be approved in a new Commission Decision. In any case, even if not expressly stated in *Ley* 42/2007, we understand that, just like the initial SCI proposal, any update or modification has to be submitted by *comunidades autónomas* for public information (art. 43.2 *Ley* 42/2007) including a clear identification of each one of the changes proposed and the scientific justification for same.

In Spain's internal body of law, Order (*Orden*) AAA/2230/2013 of 25 November, deals with the communication procedure between regional, state and Community authorities of the official information on protected Natura 2000 sites. It lays down the content of the official information on these sites, which has to be presented always in digital form; the procedure for communicating official information thereof, including the information sent to the European Commission, which must be nationwide; no partial regional information may be sent in but rather a single database and two official maps, one of SCI/SACs and the other of SPAs, covering the whole state territory.

It is important here that, jointly with the last version of each site form, the previous official versions with information on Natura 2000 sites are also accessible to the public, together with associated maps, for such legal effects as may have obtained

at the time. The competent government authority's obligation to keep information in their different versions is laid down in art. 6 of *Orden* AAA/2230/2013, whereby their accessibility and distribution among the public has to be a logical consequence thereof, stemming from the obligations of the Aarhus Convention and *Ley* 27/2006 of 18 July, dealing with access to information, public participation in decision-making and access to justice (BOE 171 of 19/7/2006).

8.

DELISTING AND MODIFICATION OF NATURA 2000 SITES

The possibility of totally delisting or declassifying a Natura 2000 site is expressly set forth for SACs in art. 9 of the Habitats Directive 92/43, only if warranted and justified on the grounds of "*the natural developments noted*" as a result of the surveillance of the conservation status of the natural habitats thereof (art. 11). The possibility of partial declassification is not mentioned in said article but is obviously possible on the general legal principle of *qui potest plus, potest minus* (he who can do more can do less)

In Spain's internal law, art. 49 of *Ley* 42/2007 stipulates that total or partial delisting of a Natura 2000 site[21], i.e., a proposed SCI or designated SAC or SPA, can be proposed only when justified by changes provoked therein by the *"scientifically demonstrated natural development, as shown by surveillance results*" defined in art. 47.

This same criterion has also been laid down in art. 52 of *Ley* 42/2007, allowing for the exceptional possibility of changing the boundaries of protected Natura 2000 sites (proposed SCI, SAC and SPA) "*reducing their total area or excluding land therefrom*", when justified on the grounds of "*changes caused therein by scientifically demonstrated natural development*", and reflected in surveillance results.

In both cases the procedure for total or partial delisting or changing the boundaries or reducing the area and excluding land therefrom incorporates in basic state legislation

[21] According to art. 42 of *Ley* 42/007, these are the sites making up the Natura 2000 network, and this in principle, if all requirements are met, would enable the delisting of a proposed SCI, although art. 9 of Directive 92/43 refers only to SACs. The same line of argument is followed by ECJ judgment 3 April 2014, C-301/12, paragraph 25, which indicates that although it is true that there is no provision of the directive which expressly provides for the declassification of a site on the list of SCIs, it is appropriate, however, to note that art. 9 of the Habitats Directive allows the Commission to consider declassifying a SAC where this is warranted by natural developments noted as a result of the surveillance undertaken by the Member States in accordance with art. 11 thereof. Such declassification implies of necessity the declassification of an SIC since, under art. 4(4) of the directive, all sites on the list of SCIs must be designated as SACs by the Member States.

a public-information procedure before sending the proposal up to the European Commission (Witness Supreme Court Judgment of 11 May 2009, rec. 2965/2007).

Said declassification or modification, therefore, is allowed for only in the event of natural development of the site (as opposed to human-caused changes), which development cannot reasonably be headed off or avoided by application of the measures mentioned in arts. 6.1, 6.2 and 6.3 of the Directive (European Commission, 2005). The declassification, therefore, cannot stem from the result of improper site management, the failure to apply suitable conservation measures, the failure to avoid deterioration or authorisation of plans or projects likely to adversely affect site integrity either individually or in combination with other factors, aggravating the habitat degradation or loss of habitat or species. A breach of these Directive obligations by any member state cannot be invoked by the latter as an argument for total or partial site declassification or to smooth the way for authorisation of plans or projects in anthropised parts of the site or parts that have lost their natural values due to human activity. In such cases the Directive would call for cessation of the activities contributing towards this impairment and, where possible, restoration (see, ECJ judgment 28 February 1991, C-57/98, paragraphs 21 and 22 and ECJ judgment 2 August 1993, C-355/90, paragraph 35).

As an exceptional circumstance, its requisites need to be interpreted and applied in a restrictive and limited way with thoroughgoing justification and grounds. There are three main requirements: 1) Scientific substantiation of the impairment due to natural development (ECJ judgment 13 July 2006, C-191/05, ECJ judgment 11 July 1996, C-44/95, paragraph 26); 2) proof that all appropriate measures have been taken to avoid impairment (ECJ judgment 13 December 2007, C-418/04, paragraphs 85 to 87), and 3) the irreversibility or irreparability of the situation (ECJ judgment 13 December 2007, C-418/04, paragraph 88).

Along these lines a Judgment of the High Court of Justice of Andalusia (Granada) of 11 June 2012, rec. 1309/2008 in the *Hotel El Algarrobico* case has ruled that *"though it might well be understood that the placement of a huge pile of bricks as the skeleton of a large building, impinging on the maritime-terrestrial easement area and occupying a vast area, represents in itself an act of environmental degradation, this situation is not due to the natural development of the area, but rather has been the result of aggressive human action, which has to be put right by other means but not by reducing the area's protection level. And precisely to correct this activity it is necessary only to apply proper urban development rules"*.

Mention must also be made of the circumstance, not provided for in the Habitats or Birds Directives or in the *Ley de Patrimonio Natural y de la Biodiversidad*, of a possible *error in the classification or delimitation* of a Natura 2000 site, which error then has to be amended or corrected. For example, an SCI designated to protect a

certain bat cave, when the bat does not in fact exist in the terrain where the SCI is proposed but several kilometres away. This exceptional circumstance, which in Spain's body of law would derive from the government's possibility of rectifying at any moment any material, factual or mathematical mistakes in its acts[22], has also expressly been catered for in Community case law (ECJ judgment 25 November 1999, C-96/98), and the European Commission has indicated the applicable requisites and caveats to allow for this exceptional possibility. It has to be shown that at the moment of the classification there was a *genuine scientific error* incorporating into the SCI or SPA terrestrial or marine territory that:

1) Was not of any value for the Annex I and II habitats and Annex I species of the Habitats Directive or migratory species of the Birds Directive warranting the site's classification. A wide timeframe and spatial perspective needs to be kept here, for changes in a species' breeding site might occur within a wider area or certain habitat-type dynamics that argue against such an error having been committed.

2) It has not meanwhile acquired as much importance as a site that regularly hosts other species or habitats, even if not mentioned in the data form.

3) It is not necessary for the integrity of the site (for example, it is not a transition zone or a buffer area or a nearby area that could be restored).

The European Commission (2005) has indicated that if the aforementioned requisites do not obtain and no sound scientific proof of the error is furnished, there is then a serious risk that the rectifying modification may be exploited to circumvent the site-protection procedure of arts. 6 of the Habitats Directive. It goes on to say that BirdLife's IBA inventories can be taken as a scientific reference for checking whether or not this error in fact exists.

In any case, and in application of the *contrarius actus* principle (Supreme Court Judgment of 11 May 2009, rec. 2965/2007) the proposed rectification amendment also has to be submitted to public information and communicated to the European Commission, for approval, if deemed fitting, of the corresponding Decision in the case of SCIs or SACs, and to have an official record thereof and check its circumstances in the case of SPAs (arts. 49 and 52 *Ley* 42/2007 and art. 4.3 of the Birds Directive 2009/147). Thus, the Judgment of the High Court of Justice of Murcia of 26 November 2010, rec. 620/2006, indicated in an alleged case of a material delimitation error "*Modification of the boundaries of protected* Natura 2000 *sites calls for a specific procedure with intervention of the European Commission*".

[22] Art. 109.2 of the Common Administrative Procedure Law 39 of October 2015 (*Ley del Procedimiento Administrativo Común de las Administraciones Públicas*) (BOE 236 of 2/10/2015).

9. CONSERVATION MEASURES OF NATURA 2000 SITES

Article 6.1 of the Habitats Directive 92/43 runs as follows: "For special areas of conservation, Member States shall establish the necessary conservation measures involving , if need be, appropriate management 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"[23].

This general conservation scheme necessarily has to be set up by member states in *all* SACs and applied to *all* types of Annex I and II habitats and species present in these Natura 2000 sites. In other words, to all habitats and species listed in the Natura 2000 Standard Data Form of each site, barring those that have no significant presence.

Article 6.1 of the Habitats Directive is applicable solely to SACs, unlike 6.2, 6.3 and 6.4, which also apply to SCIs and SPAs. Nonetheless, arts. 4.1 and 4.2 of the Birds Directive 2009/147 establish for SPA-management purposes a protection regime similar to that of art. 6.1 of the Habitats Directive (ECJ judgment 27 February 2003, C-415/01, paragraph 15 and ECJ judgment 18 March 1999, C-166/97). This SPA conservation and protection regime, as with the SACs, must have an unquestionable binding force, and it has to be published in official journals or gazettes, whichever management plan or instrument may have chosen to enshrine it (ECJ judgment 10 May 2007, C-508/04, paragraphs 75 to 80, ECJ judgment 25 November 1999, C-96/98 paragraphs 26 and 27, ECJ judgment 17 May 2001, C-159/99 and ECJ judgment 20 June 2002, C-313/99).

In Spain art. 46.1 of *Ley* 42/2007 stipulates that: "*With regard to SACs and SPAs, the central government and the* comunidades autónomas*, within their respective remits and powers, will establish the necessary conservation measures to meet the ecological demands of the natural types of habitat and the species present in such areas, which will imply: a) Suitable management plans or instruments (…). b) Appropriate statutory, administrative or contractual measures"*.

That is to say, Spain has opted to implement the rule so that both types of measures have to be established in all SACs and SPAs of the Natura 2000 network. For this purpose the *comunidades autónomas* have the remit for terrestrial sites and the central government for marine sites (unless ecological continuity with a terrestrial site is demonstrated).

[23] See ECJ judgment 10 May 2007, C-508/04, section 71 to 80.

Article 42.3 of the *Ley de Patrimonio Natural* indicates that the ministry holding the environment portfolio, with the participation of the *comunidades autónomas*, will draw up Natura 2000 conservation guidelines to serve as a guide for the planning and management of said sites, and they will be approved by agreement of the Environment Sector Conference (*Conferencia Sectorial de Medio Ambiente*). The *Tribunal Supremo* has pointed out that these guidelines, approved by means of an agreement of 13 July 2011, "*represent a guide for site planning and management but they are not legislative by nature"* (Supreme Court Judgment of 5 September 2013, rec. 3552/2010).

9.1. Management plans or instruments

As for SAC and SPA management instruments or plans, Spain has lagged well behind in their approval, with a big backlog too in the proposal and designation of these sites. The upshot is that, in recent years, scores of management plans have been presented all at once for public information. The sheer number, size and rushed deadlines have thus balked any real public participation in this process.

These Natura 2000 management plans are administrative provisions of a statutory character (Judgment of the High Court of Justice of Castilla-La Mancha of 12 November 2012, rec. 51/2009). They have to be submitted for public information and then, following formal approval and publication, have to be notified by the Natura 2000 organisation to the ministry, which then in turn communicates them to the European Commission (art. 3.22 of *Ley* 42/2007 and Natura 2000 conservation guidelines in Spain of 2011). In general, courts consider that the public-information arrangements suffice for their approval without needing to grant a hearing to the interested parties (Judgment of the High Court of Justice of Extremadura of 24 November 2011, rec. 1455/2009; Judgment of the High Court of Justice of Madrid of 19 June 2013, rec. 248/2012; Judgment of the High Court of Justice of Asturias of 21 July 2016, rec. 167/2015).

Art. 46.1.a) of *Ley* 42/2007 states that management plans and instruments have to include, at least, the site's conservation objectives and the appropriate measures for keeping sites in a favourable conservation status.

The Habitats Directive 92/43 in its art. 6.1 and *Ley* 42/2007 in its article 46.1 stipulate that Natura 2000 management plans could be specifically designed for the sites or integrated into management plans of other protected nature sites, which overlap therewith. Amendment of article 28.2 of *Ley* 42/2007[24] by Royal Decree Law (*Real Decreto-ley*) 17/2012 (BOE 108 of 5/5/2012) laid down the obligation

[24] Currently, art. 29.2 after renumbering under *Ley* 33/2015.

of unifying any overlapping protection schemes in a single integrated document for the site concerned. Given the location of said article in Chapter II of Title II of *Ley* 42/2007, referring to protected nature sites (Parks, nature reserves, etc) the moot point here is whether this integrated planning obligation is applicable only to said sites and is merely optional in the case of protected Natura 2000 sites. The latter, after all, are dealt with in a different chapter (Chapter III) and art. 46.1.a still offers the alternative of specifically designed Natura 2000 management plans or integration in other plans. In any case, it is essential for this integrated planning to include at least site conservation objectives and the appropriate measures for keeping states in a good conservation status, in keeping with Natura 2000 legislation, whereby Natura 2000 sites that do not coincide with another protected nature site cannot remain without their own management instrument (ECJ judgment 22 September 2011, C-90/10, paragraphs 40 and 41).

Paragraph 3 of art. 6 of the Habitats Directive excludes from the environmental assessment obligation those plans that bear a direct relation with management of a Natura 2000 site network or are necessary for same, such as management plans or instruments. Nonetheless, this exclusion refers only to the measures of the plan that meet conservation objectives, i.e., those that, according to the *Tribunal Supremo* have the "genuine purpose" of site protection (Supreme Court Judgment of 30 September 2014, rec. 4573/2012), since measures and activities not meant to meet objectives or, even if they are, which might come into conflict with other measures or alter or degrade other site habitats or species, will indeed be subjected to the appropriate assessment of art. 6.3 of the Directive (ECJ judgment 4 March 2010, C-241/08, paragraphs 47 to 56). Certain uses in the management plans cannot be categorised as compatible without a prior assessment, duly documented with scientific grounds that systematically guarantee that said activities will not cause alterations that might significantly affect site conservation objectives.

The conservation objective of a site is defined as *"population levels of the various species and the area and quality of habitats a site needs to obtain a favourable conservation status*"[25] (art. 3.25 of *Ley* 42/2007); these objectives should be numerical (population, density, surface area…). The European Commission (2013) stipulates that they have to be established in light of the degree of conservation of each one of the species and habitat types with a significant presence at the moment of SCI- or SPA-designation, as recorded in the Standard Data Form. The conservation objectives of the site will thus be either maintaining (if it is already in a good state)

[25] Art. 2 of the Habitats Directive stipulates that measures taken pursuant to this Directive shall be designed to maintain or restore , at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest. The conservation status for habitats and species, and when this is favourable, at European level, is defined in art. 1, e) and i) of the Habitats Directive 92/43 and sections 14, 15 and 16 of art. 3 of *Ley* 42/2007.

or improving the status of the species and types of habitat present in this particular site, thus helping to achieve a favourable conservation status thereof at national or biogeographical level.

The conservation objectives have to be established for all species and habitat types of community interest included in Annex I and II of the Habitats Directive and Annex I of the Birds Directive, which have a significant presence in the site, plus the regularly occurring migratory species, and have to be based on its ecological needs. The starting point is therefore the information contained in the Natura 2000 Standard Data Form. At the same time plans can determine the most important habitats or species to be acted on or the most important or urgent measures to be taken. The European Commission appraised the coherence of the Natura 2000 network, especially all the examples of all the species indicated in the Directives or migratory species indicated in the forms of each site, whereby the only guarantee of maintaining network coherence is to ensure conservation of all species with a significant presence in each site, regardless of whether or not they are the most important in that site. It is therefore not possible to adopt the criterion of reducing the conservation objectives in management plans to a few key features of the site. The Judgment of the *Tribunal Supremo* of 16 October 2014, rec. 4077/2012 on the management plan of the SAC *Cuencas and Encinares de los ríos Alberche and Cofio* indicated that "*The justification requirement was particularly to the fore in this case since, in the course of the process, the complainant alleged that the challenged management plan had left unprotected species that featured as worthy of protection in the forms drawn up in the past by the Government itself (…) and that it corresponded to the complainant Government authority to substantiate that the approved instrument duly defined the conservation objectives specific to the ecological requirements of the habitats and species of community interest and, likewise, that the zoning criteria were duly accounted for and the establishment of conservation and management measures; such a substantiation was not forthcoming during the process*".

As for the conservation measures, these are the mechanisms and actions put into practice in a Natura 2000 site with the purpose of achieving the site's conservation objectives. According to the European Commission (2012a) areas that are not part of the Natura 2000 network can also be included (horizontal measures or measures for national ecological networks, connectivity, etc). According to art. 6.1 of the Habitats Directive these measures have to correspond to the ecological requirements of the natural habitat types present on the sites. There must be mechanisms that ensure effective enforcement thereof and states are bound to inform the Commission every six years about the conservation measures adopted and also assessment of their effect on the conservation status of species and habitats (arts. 11 and 17 Habitats Directive 92/43). Within a reasonable period of time a check must also be made of the management plans and measures to bring them into line with any changes and the circumstances of each site.

If space zoning is established this may not be invoked as grounds for *de facto* unprotecting of zones thereof; rather should it be a tool for establishing the most suitable measures in each zone. This zoning may not, therefore, be carried out according to the limits or zoning of other planning arrangements, such as urban planning, nor according to administrative boundaries or ownership of the land involved, but rather the existing habitats and species and necessary measures for same.

As for pronouncements of internal courts on the zoning established in Natura 2000 site management plans, some of the most significant are the Judgments of the High Court of Justice of Extremadura of 24 November 2011, rec. 1451/2009 of 20 December 2011, rec. 1456/2009 and of 20 December 2011, rec. 1457/2009, plus the Judgment of the High Court of Justice of Madrid of 19 June 2013, rec. 248/2012, and the Judgment of the High Court of Justice of Castilla y León (Burgos) of 6 July 2013, rec. 188/2010.

Finally, as regards economic resources and compensation arrangements for application of the plans, Spain's Natura 2000 Conservation Guidelines of 13 July 2011 indicate that the management instrument will contain an economic appraisal of all the active conservation activities and measures proposed during its term, as well as its priority rating, but will not entail immediate acquisition of an obligation by the management body; rather will the commitment deriving from said appraisal materialise periodically to suit the budget at each time and the priorities laid down in the management instrument (Guideline 8.1.1). Within this necessary budget, identification must be made of site administration costs, the protection, control and education costs and it must include an assessment of the likely income to meet site maintenance costs in favourable conditions. Inclusion of a site in the Natura 2000 network entails entitlement to financing funds linked to the existence of a plan plus direct and indirect financing schemes involving Community funds (FEADER, LEADER, LIFE+ programme, etc).

Problems nonetheless may crop up in the case of Natura 2000 sites that overlap totally or partially with other protection schemes and arrangements (Parks, Nature Reserves, Protected Marine Areas, etc) when Natura 2000 management plans are approved integrated or unified with other plans, such as the Natural Resources Master Plans (*Planes de Ordenación de los Recursos Naturales*: PORN), Use and Management Master Plans (*Planes Rectores de Uso y Gestión*: PRUG) or others that might differ in their terms and minimum obligatory content[26]. This raises problems in the case of a SAC designation approved together with its management plan (art. 43.3

[26] There is no coincidence between, on the one hand, the requisites laid down by art. 19 and Chapter II of Title II of *Ley* 42/2007 for approval of a PORN of a Nature Reserve or Park, calling for example for an economic report, and, on the other, the minimum requisites for approval of a 2000 network management plan laid down in art. 46.1.a of said *Ley* and any conservation guidelines of the Natura 2000 network in Spain of 13 July 2011.

Ley 42/2007), when the management instrument integrated with other sites is annulled due to a breach of material or formal requisites applicable to a PORN but not to a Natura 2000 management plan or instrument. Moreover, this nullity also entails, as has occurred in the Judgment of the High Court of Justice of Asturias of 9 May 2016, rec. 327/2015 and 21 July 2016, rec. 167/2015, nullity of these SAC designations approved in the annulled Decree due to lack of the economic Report required for PORNs under art. 19 of *Ley* 42/2007. On the other hand, other judgements, such as that of the High Court of Justice of Extremadura of 30 June 2016, rec. 365/2015 indicate that approval of Natura 2000 management plans does not imperatively entail application of the precepts laid down in Chapter II of Title II of *Ley* 42/2007 dealing with national protected sites designated as such by the competent territorial authority and not by Chapter III dealing with the Natura 2000 network whose designation as such is the remit of the European Union. Neither would it be applicable to apply the PORN precepts laid down in Chapter III of Title One of *Ley* 42/2007 and neither, ipso facto, the case law pertaining thereto.

In any case management plans should not be affected by any compensation need due to limitations in activities within the purview thereof, since in any case it is necessary to comply with the Habitats Directive 92/43 and Birds Directive 2009/147, and Spain's body of law includes mechanisms for pinpointing and solving conflicts of interest between private individuals and binding rules (Iñigo et al., 2010; 14). Under certain circumstances compensation can be claimed on the grounds of a singular privation that has to be compensated; nonetheless, compensation is not in order in all cases, for example if no proof is given of effective damage and claims are based on mere expectations (See Judgments of the High Court of Justice of Extremadura of 24 November 2011, rec. 1451/2009 and rec. 1455/2009, 20 December 2011, rec. 1456/2009 and 20 December 2011, rec. 1457/2009; Judgment of the High Court of Justice of Castilla-La Mancha of 12 November 2012, recs. 51/2009, 76/2009, 51/2009, 48/2009, 66/2009; Judgments of the High Court of Justice of Castilla y León (Burgos) of 6 July 2013, rec. 188/2010 and 3 February 2013, rec. 39/2010).

9.2 Statutory, administrative and contractual measures

These measures may be established within the management instruments or plans or applied separately to only a category or combination thereof. In any case they must be concordant with the rest of the measures proposed in the management plan and meet the ecological requirements of the Annex I and II habitats and species of the Habitats Directive or Annex I or regular migratory species of the Birds Directive present in the site and meet the general objective of restoring or maintaining a favourable conservation status of said habitats and species (European Commission, 2000; 21).

In relation to the conservation measures of art. 6.1 of the Habitats Directive the Court of Justice has ruled that such a definition cannot be given to *"mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity,"* (ECJ judgment 10 May 2007, C-508/04, paragraphs 75 to 80); neither can sector-based rules such as those of water be regarded as such since their prime objective is not the conservation of said sites, since they cannot be capable of supplementing effectively their protection regime (ECJ judgment 25 November 1999, C-96/98 paragraphs 26 and 27). The measures must be linked to each one of the sites and must be carried out with unquestionable binding force, with the specificity, precision and clarity required to meet the demand for legal security (ECJ judgment 17 May 2001, C-159/99 and ECJ judgment 20 June 2002, C-313/99). The corollary of the above is that contractual measures, implying implementation of contracts or agreements between the managing government authority and the owners of property or users of the site, may in some cases be supplementary to other conservation measures of the site that obligatorily have to be approved with binding character to meet the site's conservation objectives.

Finally, it should be borne in mind here that although the contractual measures are meant to favour the site's conservation objectives, they might nonetheless come into conflict with other measures or cause alterations or deterioration of another type of habitat or species of the site. The Court of Justice has ruled along these lines in the case of the Natura 2000 contracts regulated by France, signed with owners for application of objectives and measures defined for planning these sites, the court ruling that "*It follows that the mere fact that the Natura 2000 contracts comply with the conservation objectives of sites cannot be regarded as sufficient, in the light of Article 6(3) of the Habitats Directive, to allow the works and developments provided for in those contracts to be systematically exempt from the assessment of their implications for the sites*" (ECJ judgment 4 March 2010, C-241/08, paragraphs 47 to 56). Neither is it valid to adopt statutory or administrative measures that classify certain uses or activities within the site as compatible, excluding them in general from assessment of the environmental impact, without appropriate assessment of the impact of this activity on site integrity (Judgment of the High Court of Justice of Castilla y León, Valladolid, of 26 December 2013, rec. 1198/2011).

10.

THE OBLIGATION OF AVOIDING HABITAT DETERIORATION OR SPECIES DISTURBANCE

Within the legal protection and conservation regime of Natura 2000 sites, member states are bound to take appropriate or suitable measures to avoid habitat deterioration and disturbance to species both in already-designated SACs and SPAs and SCIs approved by the European Commission (art. 4.5 Habitats Directive 92/43).

In relation to SACs, art. 6.2 of the Habitats Directive runs as follows: "2. *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, in so far as such disturbance could be significant in relation to the objectives of this Directive*".

The obligation of avoiding within SPAs deterioration of habitats or any disturbances affecting the birds, as worded in the first sentence of art. 4.4 of the Birds Directive, has been replaced by the wording of art. 6.2 of the Habitats Directive, pursuant to art. 7 of the latter. In any case, however, outside SPAs, the second sentence of art. 4.4 of the Birds Directive is still applicable in terms of the member states' striving to avoid pollution or deterioration of habitats.

This non-deterioration obligation has been implemented into Spain's body of law in art.46.2 of *Ley 42/2007 del Patrimonio Natural y de la Biodiversidad*.

According to the European Commission (2000; 24), art. 6.2 of the Habitats Directive and the protection regime it establishes refers to activities of all types, even if already authorised, and is not limited to intentional acts, but could also cover any chance events that could occur (fire, flood, etc.), as long as they are predictable. In the case of catastrophes, moreover, precautionary measures would be called for to minimise the risk of their occurrence. It is also applicable to illegal or clandestine activities carried out without prior authorisation, when the government authority has failed to take the necessary measures to stop the activity and its ensuing disturbance (ECJ judgment 24 November 2011, C-404/09, paragraphs 150 to 152). Neither can it be asserted, a priori, that activities like hunting and fishing cause no disturbance (ECJ judgment 4 March 2010, C-241/08, paragraphs 26 and 30 to 39).

As for its timeframe, art. 6.2's non-deterioration obligation has to be adhered to even in the case of projects authorised before a given member state joins the European Union or before SPA-designation of the zone affected by the activities and to which the appropriate assessment of art. 6.3 has not been applied (Sundseth and Roth,

2013; 47). A ruling along these lines was made in ECJ judgment 24 November 2011, C-404/09, paragraphs 121 to 125. According to ECJ judgment 14 January 2016, C-399/14, art. 6.2 of the Directive means that a plan or project approved before the site's SCI-listing has to be subsequently subjected to a backdated art. 6.3 assessment of its effect on the site before going ahead with said plan or project or even if it is already underway (due to the failure of provisional measures), if said assessment is the only appropriate way of heading off appreciable disturbance or deterioration caused by said plan or project.

The Court of Justice has ruled that art. 6, paragraphs 2 to 4 of the Habitats Directive is not applicable to zones that have not been SPA-designated, even if they should have been. Applicable thereto, however, is the non-deterioration prohibition laid down in art. 4.4 of the Birds Directive (ECJ judgment 24 November 2016, C-461/14, paragraph 62; Judgments of the High Court of Justice of Madrid of 16 June 2004, rec. 1131/2001, 1 April of 2004, rec. 817/2001 and 29 October 2003, rec. 1374/2000) without possibly invoking, even by analogy, exceptions or justifications of an economic or social type like those of art. 6.4 of the Habitats Directive, since a member state cannot be allowed to benefit from a breach of its Community obligations, in this case the formal SPA designation (ECJ judgment 7 December 2000, C-374/98, paragraphs 45 to 57, ECJ judgment 11 July 1996, C-44/95, paragraphs 23 and 25).

Article 6.2 of the Habitats Directive uses two concepts: "deterioration" and "disturbance". The former pertains to habitats and "disturbance" to species insofar as it might have a "significant effect" vis-à-vis the Directive's "objectives". In application of the two principles of prevention and precaution, therefore, it is not necessary to show that there is an actual significant effect. It suffices for there to be a probability ("could be") of such an effect to justify the adoption of measures (European Commission, 2000; 25). ECJ judgment 24 November 2011, C-404/09, paragraphs 126 to 148, on the Alto Sil mines, indicates: *"Moreover, in order to establish a failure to fulfil obligations within the meaning of Article 6(2) of the Habitats Directive, the Commission does not have to prove a cause and effect relationship between a mining operation and significant disturbance to the capercaillie. (…) it is sufficient for the Commission to establish the existence of a probability or risk that that operation might cause significant disturbances for that species"* (see also ECJ judgment 24 November 2016, C-461/14, paragraph 67 and ECJ judgment 14 January 2016, C-141/14, paragraph 58).

In a similar tenor the Commission considered in ECJ judgment 4 March 2010, C-241/08, paragraph 14, that when French legislation applied the 'significant effect' criterion indifferently both to habitat deterioration and species disturbance, it is imprecise and less strict than art. 6(2) of the Habitats Directive, since the latter refers to habitat deterioration per se, but in terms of species disturbance it adds that it could have a significant effect. In other words species disturbance, often limited in time,

could be tolerated up to a certain extent, unlike habitat deterioration, which could be defined as physical degradation thereof, which is strictly forbidden.

The appropriate measures to be adopted to avoid habitat deterioration and significant disturbance to species go beyond the management measures of art. 6.1 of the Habitats Directive, without there having to be an approved management instrument or plan for adoption of art. 6.2 measures, since they can be adopted without inclusion therein (ECJ judgment 22 September 2011, C-90/10, paragraphs 53 and 54). And this despite the fact that art. 46.2 of *Ley* 42/2007 indicates that these appropriate measures will especially be taken in management plans or instruments.

Even after application of art. 6.3 of the Habitats Directive, application may also be made of art. 6.2 when the assessment carried out is not suitable (for failure to comply with legal requisites and case law in application of art. 6.3 and, where applicable, 6.4) or even when the assessment was suitable and, despite the measures taken, the plan or project should then cause said deterioration or disturbance (ECJ judgment 24 November 2011, C-404/09, paragraphs 121 to 125, ECJ judgment 7 September 2004 C-127/02, paragraphs 35 to 38).

It has also been mooted that a breach of the non-deterioration obligation of art. 6.2 of the Habitats Directive might be justified on the grounds of the importance of certain activities for the local, regional or national economy or for reasons of public interest. According to the Court of Justice such a ground might be invoked by a member state under the procedure laid down by art. 6.2 of the Habitats Directive. In the case of projects authorised before the site was designated as SCI/SAC o SPA and before application, therefore of the protection regime of art. 6 of the Habitats Directive, the exceptional procedure of art. 6.4 of the Habitats Directive could be applied by analogy, invoking a reason of public interest, and if the requisites of said provision are met, an activity could be authorised that, in consequence, would not be prohibited by paragraph 2 of said article. Nonetheless, to be able to ascertain whether the requisites of art. 6.4 are met, the site repercussions of the plan or project must previously have been analysed pursuant to art. 6.3 (ECJ judgment 24 November 2011, C-404/09, paragraphs 153 to 159 and 192 to 195 and ECJ judgment 3 April 2014, C-301/12, paragraph 34).

11. APPROVAL OF PLANS OR PROJECTS THAT MIGHT AFFECT THE NATURA 2000 NETWORK

11.1. The appropriate assessment and the authorisation criterion based on the precautionary principle of art. 6.3 of the Habitats Directive

Article 6.3 of the Habitats Directive 92/43 runs as follows:

"*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*".

The general rule of art. 6.3 of the Habitats Directive 92/43, therefore, is that authorisation can be given only to plans or projects that cause no damage to the integrity of sites of the Natura 2000 network. This general rule includes the obligation of conducting an appropriate assessment of the effects of a plan or programme on these sites; it also includes the precautionary principle, with a strict authorisation criterion whereby authorities can authorise them only if there is scientific certainty that they will have no adverse effect (ECJ judgment 7 September 2004, C-127/02 paragraph 34 and ECJ judgment 20 September 2007, C-304/05, paragraph 56). If there are any doubts or if the conclusions of the assessment are negative, the plan or project cannot be authorised, or only exceptionally according to paragraph 4 of art. 6 of the Habitats Directive, and proving that all requisites thereof are met.

Article 6.3 has been implemented in Spain by art. *46.4 of Ley 42/2007 de Patrimonio Natural y de la Biodiversidad*.

The obligation of applying the assessment and authorisation procedure of paragraphs 3 and 4 of art. 6 of the Directive takes in both SCIs as from Commission adoption and designated SACs and SPAs. This principle is laid down by arts. 4.5 and 7 of the Habitats Directive 92/43.

As for the competent body for carrying out this appropriate assessment, internal legislation links it to the competent body for approving or authorising plans, programmes or projects: the central or regional government authority. This competence is not therefore tied in which the established body for designation or management of Natura 2000 sites. In answer to appeals lodged by some *comunidades autónomas* the Constitutional Court (*Tribunal Constitucional*) has reiterated the validity of this attribution (Judgment of the Constitutional Court of 5 July 2012, No. 149/2012, rec. 2004/2004), guaranteeing at any event *consultation, by means of the mandatory report, of the* comunidades autónomas *hosting the project in question* (Judgment of the Constitutional Court of 25 April 2013, No. 104/2013, rec. 2095/2004, et al).

In Spain the appropriate assessment has been grafted onto environmental impact assessment procedures, currently defined in Spain's Environmental Assessment Law 21 of 9 December 2013 (*Ley de evaluación ambiental*) (BOE 296 of 11/12/2013). *comunidades autónomas*, for their part, have developed this basic legislation. Although due consideration has to be given to the appropriate assessment of plans or projects likely to affect the Natura 2000 network, there are certain specific features in terms of scope, content and authorisation criterion, all of which need to be taken into account.

A watershed moment came in 30 April 2006 with the coming into force of the Law on the Assessment of Certain Environmental Plans and Programmes 9 of 28 April 2006 (*Ley sobre evaluación de los efectos de determinados planes y programas en el medio ambiente)* (BOE 102 of 29/4/2006), which implemented in Spain Directive 2001/42/EC. Until that time there had been no basic state procedure for assessment of plans and programmes. This means that all plans likely to have a significant effect on Natura 2000 sites approved between 22 July 1994 and 30 April 2006 (practically twelve years) have to be assessed according to art. 6 of the Habitats Directive. In most cases this has not ensued[27]. In some cases, based on the material content of plans facilitating land-use changes or which are sufficiently well-defined to establish the localisation or site of construction work, infrastructure or facilities, the *Tribunal*

[27] Given that urban development plans in Spain have a statutory nature, this begs the question of whether, in appeals subsequently lodged directly against the development plans or projects pertaining thereto, an indirect appeal can be brought (arts. 26 and 27 of the Judicial Review Law 29/1998 (*Ley de la Jurisdicción Contencioso-administrativa*) against the urban development plan approved before 2006, which gives coverage thereto, and which, despite being obligatory, was not subjected to an appropriate assessment and the strict authorisation criterion of art. 6.3 of the Habitats Directive. Some courts rule out this possibility on the grounds that it is a formal defect not eligible for allegation in an indirect appeal, but the *Tribunal Supremo* has indicated in Supreme Court Judgment of 10 July 2012, rec. 2483/2009 that lack of justification and environmental assessment in activities that remove protection of land, including that of the Natura 2000 network, are substantial defects that can be invoked in the indirect challenging of any plan.

Supremo accepted exceptional cases of likening plans to projects for the purposes of subjecting them to the environmental impact assessment procedure of projects (Supreme Court Judgment of 19 July 2004, rec. 3080/2001; Supreme Court Judgment of 3 March 2004, rec. 1123/2001; Supreme Court Judgment of 18 November 2011, rec. 5960/2007, *et al*).

As established by art. 6.3 of the Habitats Directive and subsequent case law of the Court of Justice of the European Union, it is necessary to carry out the "appropriate assessment" both of projects and plans in the following cases:

1) Given the mere possibility that a plan or project might significantly affect a Natura 2000 site or doubt about the absence of such an effect[28].

2) No category of plans or projects can a priori be excluded from the appropriate assessment[29].

3) To appreciate this possibility, due consideration must be given to cumulative and synergistic impacts with other plans or projects, since the combination of several minor impacts might add up to a significant impact.

4) An appropriate assessment also has to be conducted for plans or projects outside the Natura 2000 network that might nonetheless have a significant effect thereon[30].

5) An assessment has to be made of measures included in the instruments or management plans of the Natura 2000 site that bear no direct relation to the management thereof or, even having such a relation, might counter or affect the conservation objectives of another habitat or species of the site, having a significant effect thereon.

6) The appropriate assessment must necessarily be carried out, even in the case of plans or projects excluded from assessment in the general legislation on the

[28] See ECJ judgment 13 December 2007, C-418/04, section 243 and 254, ECJ judgment 26 May 2011, C538/09, ECJ judgment 7 September 2004, C-127/02 section 43 and 44; ECJ judgment 20 October 2005, C-6/04, section 54, ECJ judgment 13 December 2007, C-418/04, section 226, ECJ judgment 4 October 2007, C-179/06, section 35). The Judgment of the High Court of Justice of Castilla y León (Valladolid) of 26 December 2013, rec. 1198/2011 made an interesting analysis of this case law.

[29] ECJ judgment 10 January 2006, C-98/03, section 41, ECJ judgment 4 March 2010, C-241/08, section 26 and 30 to 39, Judgment of the High Court of Justice of Castilla y León (Valladolid) of 26 December 2013, rec. 1198/2011.

[30] ECJ judgment 24 November 2011, C-404/09, section 63 and 87. Supreme Court Judgment of 24 May 2011, rec. 121/2009, Supreme Court Judgment of 21 June 2012, rec. 1834/2009, Judgment of the High Court of Justice of Cantabria of 22 January 2009, rec. 518/2006, Judgment of the High Court of Justice of Canary Islands, Las Palmas, of 3 September 2010, rec. 265/2008.

environmental impact assessment of plans or projects, but which are likely to have a significant effect on the Natura 2000 network[31].

The Court of Justice has also set forth the basic aspects of this "appropriate" assessment:

1. The assessment must refer fundamentally to the "*conservation objectives"* of said site and afford an in-depth analysis with scientific grounds[32].

2. The "appropriate assessment" of art. 6.3 should not appraise the effects on *cultural heritage or the socioeconomic environment*, which will be assessed in the assessment procedures of plans, programmes and projects[33].

3. To ensure that it is "appropriate" it should take in the synergistic and cumulative effects of all plans or projects likely to affect this site, even if located outside[34].

4. The damage caused by the plan or project (individually or synergistically) to the affected site has to be identified with *precision*, in light of the best scientific knowledge[35].

[31] ECJ judgment 26 May 2011, C-538/09, ECJ judgment 6 April 2000, C-256/98, section 39, ECJ judgment 21 September 1999, C-392/96, section 66). In the Supreme Court Judgment of 11 February 2014, recs. 384/2012 and 387/2012 the court drew attention to the fact that the *activities related to the defence are not excluded from the purview of the Habitats Directive 92/43,* whereby any activity "likely to have a significant effect " on the SAC will have to be subjected to an appropriate assessment of effects by the Spanish MoD (*Ministerio de Defensa*). Likewise Judgment of the National High Court (*Audiencia Nacional*) of 29 October 2010, rec. 651/2008.

[32] ECJ judgment 14 April 2005, C-441/03 section 22, ECJ judgment 7 September 2004, C-127/02, section 54, ECJ judgment 24 November 2011, C-404/09, section 101 to 106; Judgment of the National High Court (*Audiencia Nacional*) of 17 January 2011, rec. 273/2004, Supreme Court Judgment of 18 December 2013, rec. 1594/2011.

[33] ECJ judgment 24 June 2011, C-404/09, section 109.

[34] ECJ judgment 24 June 2011, C-404/09, section 103 and 121 to 125; Judgments of the High Court of Justice of Castilla y León (Burgos) of 10 May 2010, rec. 211/2008, 21 May 2010, rec. 362/2008, 11 January 2013, rec. 10/2012, 17 September 2010, rec. 117/201, 22 February 2013, rec. 3/2012, 22 October 2014, rec. 110/2014; Supreme Court Judgment of 11 December 2013, rec. 4907/2010, 14 October 2013, rec. 4027/2010, 8 July 2011, rec. 4222/2010, 11 October 2011, rec. 6608/2010, 24 May 2011, rec. 3613/2010; Judgments of the High Court of Justice of Castilla y León (Valladolid) of 27 April 2012, rec. 2892/2008, 7 June 2013, rec. 787/2008, 30 September 2013, rec. 1630/2009, 30 January 2014, rec. 211/2010, 21 February 2014, rec. 673/2009; Judgment of the High Court of Justice of Cantabria of 26 January 2007, rec. 245/2004.

[35] ECJ judgment 20 September 2007, C-304/05, paragraph 83, ECJ judgment 16 February 2012, C-182/10, paragraph 74, ECJ judgment 11 September 2012, C-43/10 paragraphs 114 and 131, ECJ judgment 7 September 2004, C-127/02 paragraph 54.

5. An assessment cannot be deemed to be appropriate if it *lacks information or trustworthy and up-to-date data* on the fauna or habitats of the Natura 2000 sites likely to be affected[36].

6. The appropriate assessment "*cannot have lacunae*" and "*must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned*". This is particularly important with regard to the *sufficiency of the mitigating and corrective measures*[37].

By means of this appropriate assessment the government authority has to ascertain whether the plan or project is likely to adversely affect the integrity of the site, taking its conservation objectives into account. The Court of Justice has ruled in ECJ judgment 7 September 2004, C-127/02, paragraphs 57 to 59, among others, that the competent authorities should act as follows in light of the conclusions of said assessment:

1. "*they are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects*" adding,

2. "*So, where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation*".

3. Adding that "*the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle (. . .) and makes it possible effectively to prevent adverse effects on the integrity of protected sites as the result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not as effectively ensure the fulfilment of the site-protection objective intended under that provision*".

In other words the appropriate assessment has to invest competent authorities with the certainty that a given plan or project will not adversely affect the *integrity of the site,* given that, where doubt remains as to the absence of such effects, the competent authority will have to refuse authorisation (see ECJ judgment, 20 September 2007, C-304/05, paragraph 58).

[36] ECJ judgment 11 September 2012, C-43/10, paragraph 115, Supreme Court Judgment of 22 September 2009, rec. 770/2007.

[37] ECJ judgment 11 April 2013, C-258/11 paragraph 44, ECJ judgment 24 November 2011, C-404/09, paragraphs 100 and 105, ECJ judgment 20 September 2007, C-304/05, paragraphs 60 to 63, Judgment of the National High Court (*Audiencia Nacional*) of 11 December 2006, rec. 394/2003 and 25 April 2007, rec. 39/2005, Supreme Court Judgment of 22 September 2009, rec. 770/2007, Supreme Court Judgment of 28 May 2012, rec. 1991/2009.

The Court of Justice of the European Union even considers that if a "favourable" appropriate assessment of the effects is contested by an alternative scientific report with grounds, showing the risks to the site or bringing out contradictions or errors in the assessment, the authority can hardly claim to have "ensured" the absence of significant effects of the plan or project on the site (ECJ judgment 29 January 2004, C-209/02, paragraphs 26 to 28).

There are therefore several key aspects to be considered here: a) The concept of site integrity and the conservation objectives, b) the requirement of the absence of reasonable doubt from the scientific point of view, and c) inclusion in said article of the precautionary principle.

In relation to these aspects, however, the rulings of Spain's own courts are disparate. They do tend to be swinging towards a clearer requirement of certainty about the absence of adverse effects to site integrity, and, in default thereof, tend to annul the authorisations conceded in other judgments given the possibility of a significant effect on Natura 2000 sites. Despite this, there is a notable absence of even the briefest analysis and express pronouncement on compliance with art. 6.3 requisites of the Habitats Directive, to be able to show in accordance with project authorisation: existence of the appropriate assessment, and certainty of no significant effect on site integrity, analysing, albeit minimally, the ability of the corrective measures to amend or eliminate the significant impact. In many cases we find court pronouncements that take for granted the fact that the existence of corrective measures in the Environmental Impact Statement or compatibility report rules out any damage to site integrity without analysing the sufficiency of measures and whether they could lead to a pronouncement of the certainty of no effect, given the existing impacts and the circumstances and vulnerability of the site. All this regardless of whether or not the appellant vouches for the insufficiency of said measures, since the appropriate assessment of art. 6.3 of the Habitats Directive requires that it be the applicant or authorising national authority that shows, first of all and without any doubt, that the project is not going to have an adverse effect on site integrity.

As for the existence of an appropriate assessment and the requirement of certainty about the absence of adverse effects, some Spanish courts' judgments have tended to call for it in an increasingly clear way and to annul conceded authorisations in the event of any breach thereof, either because such certainty could not be concluded from the assessment made or because the appropriate assessment as performed is not considered capable of supporting such a conclusion. Thus, the Supreme Court Judgment of 14 February 2011, rec. 1511/2008, indicates: *"As derives from the case law of the Court of Justice of European Community, set forth in the judgment of 26 October 2006 (C-239/04) it is at the moment of taking the project-authorisation decision when there must be no reasonable doubt, from the environmental point of view, about the absence of adverse effects to the environmental integrity of the affected site"*.

Likewise the Supreme Court Judgment of 15 July 2011, rec. 3796/2007, Supreme Court Judgment of 14 October 2013, rec. 4027/2010, Judgment of the National High Court (*Audiencia Nacional*) of 10 June 2009, rec. 122/2004, Judgment of the High Court of Justice of Castilla y León (Valladolid) of 21 February 2014, rec. 673/2009, Supreme Court Judgment of 14 January 2013, rec. 214/2010, Judgment of the High Court of Justice of the Basque Country of 18 February 2011, rec. 1247/2008).

It is in any case a mistake, as some government authorities and courts do, to gauge the effect on site integrity mainly in terms of the *percentage area of the site affected* rather than the ecological functions and interrelationships of habitats and species affected in said site since the effect, not only direct but also indirect, may be more than this spatial percentage (see ECJ judgment 11 April 2013, C-258/11*)*. For this reason the Court of Justice insists on the need of taking into account the vulnerability of the project site: 《*Even a small-scale project can have significant effects on the environment if it is in a location where the environmental factors set out in Article 3 of the Directive, such as fauna and flora, soil, water, climate or cultural heritage, are sensitive to the slightest alteration.*» (ECJ judgment 21 September 1999, C-392/96; Supreme Court Judgment of 26 January 2010, rec. 7442/2005; Supreme Court Judgment of 30 May 2006, rec. 2681/2003; Judgment of the High Court of Justice Navarra of 8 October 2015, rec. 147/2011 and 148/2011; Judgment of the High Court of Justice Cantabria 3 February 2003, rec. 840/2001).

11.2. Exceptional authorisation of plans or projects likely to have an adverse impact on Natura 2000 sites (art. 6.4 Habitats Directive)

The first paragraph of art. 6.4 of the Habitats Directive runs as follows:

> "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".

The second paragraph then goes on:

> "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 reasons of overriding public interest".

As an exception to the provisions laid down in art. 6.3, the art. 6.4 overriding mechanism and compensation arrangement is interpreted very strictly in terms of compliance conditions. The onus, in any case, is on whoever wishes to apply this exception (developer and authorising government authority) to previously show the non-existence of any viable alternatives and imperative reasons of overriding public interest. And at all times the order of the various stages laid down in art. 6 of the Habitats Directive must be adhered to. For this reason, it is a fraud for any items within the realm of this art. 6.4 to impinge on the conclusions of the appropriate assessment of art. 6.3 of the Directive, and for the authorisation taken under this sentence of art. 6.3 to consider socioeconomic aspects, the lack of alternatives or precipitous adoption of compensatory measures to justify an ostensibly non-significant impact of the plan or project and authorise same, circumventing application of the requirements and controls of art. 6.4 of the Directive[38].

This exceptional authorisation regime of paragraph 6.4 of the Habitats Directive has been implemented in Spain via paragraphs 5 to 9 of art. 46 *Ley* 42/2007, developing some procedural aspects thereof, such as the way of declaring the imperative reasons of overriding public interest and the moment of adopting these compensatory measures, tagging on additional protection requisites for the case of affecting species listed as in danger of extinction.

In the basic or ordinary procedure to be followed in Spain the following requisites have to be met in the order shown:

1. *Appropriate assessment of the plan or project pursuant to art. 6.3 of the Directive 39, the conclusions thereof being negative or uncertain, i.e., the plan or project significantly affecting the integrity of the site or there being doubts about the non-existence of said harmful effects.*

2. *Substantiation of the absence of alternatives40: according to the European Commission (2012b; 4) it has to be shown on the strength of furnished documents that the alternative put forward for approval, is the least damaging for habitats, for species and for the integrity of the Natura 2000 site, regardless of economic considerations, and that no other feasible alternative exists that would not affect the integrity of the site.*

[38] See ECJ judgment 15 May 2014, C-521/12, paragraphs 29 to 33.

[39] ECJ judgment 20 September 2007, C-304/05, paragraph 83; ECJ judgment 24 November 2011, C-404/09, paragraph 109; ECJ judgment 16 February 2012, C-182/10, paragraph 74; ECJ judgment 11 September 2012, C-43/10 paragraph 114 and ECJ judgment 3 April 2014, C-301/12, paragraph 34

[40] ECJ judgment 26 October 2006, C-239/04, paragraphs 36 to 40 annulled a road project in a SPA on the grounds that the authorities had not substantiated the lack of alternative solutions to the route. Some Spanish courts, however, tend to call for a reversal of the burden of proof, not in keeping with Community case law, whereby it is the appellant that has to show the lack of alternatives and even in this case justify the alternative chosen by the government authority on the grounds of technical discretion whereas this possibility is very limited in the provisions of art. 6.4 of the Habitats Directive.

3. *Evidence for the existence of imperative reasons of overriding public interest41, including "reasons of a social or economic ilk"42. It has to be formally declared in each case via a Law or public resolution with grounds of the Council of Ministers (Consejo de Ministros) or the regional government authority, according to whether or not this authorising power has been devolved on the latter.*

4. *Once the lack of alternatives has been shown and documented and the imperative reasons of overriding public interest have been accepted, all necessary compensatory measures have to be approved43, according to the plan or project assessment procedure carried out to ensure overall coherence of the Natura 2000 network.*

5. *Notification of compensatory measures to the European Commission, before being applied and always before going ahead with the plan or project in question.*

Of primordial importance in this procedure is the adoption of compensatory measures. These are measures whose object is to offset the adverse effects of a plan or project on the species or habitats affected and on the overall ecological coherence of the Natura 2000 network. They aim to offset the damage or *residual impact* of a plan or project, which are those that cannot be reduced and will persist even if preventive, corrective or mitigating measures are applied (see Annex VI of *Ley* 21/2013).

The *necessary measures* for "normal" application of the Birds and Habitats Directives (monitoring of species, conservation measures, etc) or other provisions, which have to be carried out in any case, cannot be considered to compensate for a harmful project. They must be additional measures. Rulings in this tenor have been given, among others, in Supreme Court Judgment of 29 November 2006, rec. 933/2003. According to the European Commission (2012b; 11) "*compensatory measures are not a means to allow the implementation of plans or projects while escaping the obligations of Article 6"*. ECJ judgment 21 July 2016, C-387/15 and C-388/15 clearly distinguishes between conservation measure (art. 6.1 Habitats Directive), preventive measures (art. 6.2) and compensatory measures (art. 6.4).

[41] See ECJ judgment 16 February 2012, C-182/10, paragraph 75.

[42] This is not equivalent to a simple *declaration of general interest* of a plan or project (European Commission, 2012c). The European Commission, in the construction of a new port in Tenerife, has accepted as a reason of overriding public interest the dependence of maritime transport and the saturation thereof. The Judgment of the High Court of Justice of Cantabria of 4 February 2010, rec. 921/2008 considered that an opencast mine did not constitute a case of public interests overriding environmental interests. The Supreme Court Judgment of 29 November 2006, rec. 933/2003 considered that the labour, economic and social problem caused to a local authority and the company due to shutdown of the mining activity did not constitute a reason of general interest overriding the social or economic order that might justify the effect on a SPA

[43] ECJ judgment 20 September 2007, C-304/05, paragraph 81; ECJ judgment 16 February 2012, C-182/10, paragraph 72, ECJ judgment 11 September 2012, C-43/10 ap.114, and ECJ judgment 21 July 2016, C-387/15 and C-388/15.

The European Commission (2012b) has indicated that *"Measures for which there is no reasonable guarantee of success should not be considered under Article 6(4), and the likely success of the compensation scheme should influence the final approval of the plan or project in compliance with the preventive principle"*. Compensatory measures that are not technically, legally or economically viable, or whose viability is not guaranteed, cannot be considered as such and would flout the guarantee principle for exceptional authorisation laid down in art. 6.4 of the Habitats Directive. In actual practice plans or projects have been carried out on the basis of an exceptional authorisation of art. 6.4 of the Habitats Directive, calling for compensatory measures that were not then carried out for diverse legal or financial reasons, especially those relating to land purchases[44] or those laying down specific management terms (Carrasco et al, 2013; 74). As for technical viability the Court of Justice has ruled in ECJ judgment 21 July 2016, C-387/15 and C-388/15, section 43 "*that, as a rule, any positive effects of a future creation of a new habitat, which is aimed at compensating for the loss of area and quality of that same habitat type on a protected site, are highly difficult to forecast with any degree of certainty and, in any event, will be visible only several years into the future*" (see also ECJ judgment 15 May 2014, C 521/12, section 32).

The abovementioned procedure is what we might dub as "ordinary" (Agudo, 2012; 93), within the exceptionality per se of applying art. 6.4., but there are some idiosyncrasies when the site hosts priority habitats or species[45], in which case (art. 46.6 *Ley* 42/2007)[46]:

a) Substantiation of the existence of imperative reasons of overriding public interest can be based only on considerations related to human health[47] and public

[44] Furthermore, on the possibility of reconstructing destroyed habitat in other land that does not meet the same values, the Judgment of the High Court of Justice of Castilla y León (Burgos) of 29 September 2006, rec. 535/2003 (given in the case *Ciudad del Golf de Navas del Marqués*) considered it to be "*more logical and convenient to transfer said project to the site where it is planned to reforest these 210 hectares instead of destroying the natural, environmental, scenic, forest and fauna values found on that land*". This finding was echoed in the Judgment of the High Court of Justice of Madrid of 16 June 2004, rec. 1131/2001, of 1 April 2004, rec. 817/2001 and 29 October 2003, rec.1374/2000.

[45] Marked with an asterisk [*] in Annexes I and II of the Habitats Directive and of *Ley* 42/2007.

[46] Some cases in which Spanish courts have considered the protection regime of art. 6.4 of the Habitats Directive to be fulfillin the presence of priority habitats or species are Supreme Court Judgment of 24 May 2012, rec. 4853/2009 of 29 November 2006, rec. 933/2003; Judgment of the High Court of Justice of Cantabria of 28 November 2013, rec. 538/2011 of 31 October 2012, rec. 582/2010 of 4 February 2010, rec. 921/2008; Judgment of the High Court of Justice of Galicia of 23 September 2009, rec. 116/2006.

[47] ECJ judgment 11 September 2012, C-43/10 paragraph 126 considered that, in default of any alternatives, the supply of drinking water is included in principle among the considerations linked to human health, the authorities having to demonstrate that the plan or project is necessary and essential to meet this public interest. In the opinion of the *Tribunal Supremo*, road safety reasons justifying turning a road into a dual carriageway is not based on reasons of human health and public security (Supreme Court Judgment of 24 May 2012, rec. 4853/2009).

security or related to positive consequences of primordial importance for the environment, excluding therefrom "reasons of social or economic nature".

b) If the justification is based on the existence of other imperative reasons of overriding public interest, including those of social or economic ilk, there then has to be previous consultation of the European Commission before approval of the plan or project.

Given that the Birds Directive 2009/147 does not classify any species as priority (on the grounds that, in principle, these would be all those listed in Annex I) there would be no need for previous consultation of the Commission as provided for in the second paragraph of art. 6.4 of the Habitats Directive (art. 46.6 *Ley* 42/2007) in the case of affecting bird populations of a SPA, although the Commission would have to be notified of any compensatory measures taken. Nonetheless, consideration by the Ornis Committee and the European Commission of certain Annex I bird species of Directive 2009/147 as priority, when investing Community funds[48] and establishing conservation measures, is indicative of the importance and priority that the European Union grants to the conservation of said bird species in application of Directive 2009/147, and has to be taken onboard in the authorisation of plans or projects likely to affect them, especially in relation to conservation measures and threats to same established in approved action plans.

Furthermore, in Spain there is another speciality established in art. 46.7 of *Ley* 42/2007 to cover the case when a plan or project is likely to have an adverse effect on the species of Annexes II or IV of said *Ley*, *listed as in danger of extinction*[49]. In this case due proof must be given of the lack of alternatives and the existence of imperative reasons of overriding public interest cited in art. 46.6 of *Ley* 42/2007 for the case of priority habitats or species, adopting compensatory measures[50].

[48] The list of Annex I bird species of the Birds Directive 2009/147/EC considered to be "Priority for funding under LIFE" as agreed by the Ornis Committee (updated at April 2014) is available at: http://ec.europa.eu/environment/nature/conservation/wildbirds/action_plans/index_en.htm

[49] At state level the species in danger of extinction are recorded in Royal Decree (*Real Decreto*) 139/2011 of 4 February or the List of Wild Species under a Special Protection Regime and the Spanish Catalogue of Threatened Species (*Catálogo Español de Especies Amenazadas*) (BOE 46 of 23/2/2011).

50 We understand that the content of this paragraph 7 is applicable to plans or projects likely to affect the aforementioned species in danger of extinction, regardless of whether they are located in the Natura 2000 network, since paragraphs 8 and 9 of art. 46 of *Ley* 42/2007 do not stipulate that this paragraph 7 is exclusively applicable to Natura 2000 sites (approved SCI, SAC, SPA) but this is expressly stated for following paragraphs (4, 5 and 6).

12.

INTERIM RELIEF OF PLANS OR PROJECTS LIKELY TO AFFECT THE NATURA 2000 NETWORK

In Spanish law any administrative authorisation or approval of a plan or project likely to adversely affect the integrity of a Natura 2000 site network is immediately enforceable (art. 98 of Common Government Procedure Law 39/2015 of 1 October). In other words its validity is assumed and execution and construction can go ahead unless it is otherwise disposed therein.

Should it be considered that an administrative act violates the strict authorisation requisite and the exceptional authorisation criterion laid down in sections 3 and 4 of art. 6 of the Habitats Directive and art. 46 sections 4 to 9 of *Ley* 42/2007, a judicial review can be lodged against it asking for an interim injunction, which will normally be suspension of the enforceability of the administrative act to forestall any of the appealed-against damage to the Natura 2000 site while the process is underway and until such time as a ruling is passed down on the validity of the authorisation. This is so because its legitimate purpose would otherwise be undermined, provoking de facto and de jure situations that would be difficult or impossible to repair afterwards, thereby balking the proper purpose of the Habitats and Birds Directives.

There are frequent cases of a final judgment annulling authorisation of a plan or project affecting the Natura 2000 network for violation of Community law and internal implementation laws deriving therefrom, but the road, infrastructure or housing development concerned have already been built years earlier in default of any precautionary stoppage of the construction work at the start of the whole procedure, or because of the interim injunction being granted but on condition of furnishing by the appellant of sureties or bonds that not-for-profit environmental NGOs cannot afford, and it is normally such NGOs that try to defend a collective good like the environment in the courts[51]. In these cases most of the judicial decisions finally handed down have in the end no effectiveness whatsoever, due to the lack of voluntary enforcement by the competent government authority, the difficulty and enormous costs of demolition and restoring the affected zone to its original state and due to the legalisation attempts and new authorisations granted afterwards to validate the activity carried out. In this way a breach of Community law and the effects on the Natura 2000 network are consolidated, thereby also undermining the principle of effective legal protection laid down in art. 24 of the Spanish Constitution.

51 Witness the upgrading of the M-501 into a dual-carriageway or the *Marina Isla Valdecañas* housing development (Judgment of the High Court of Justice of Madrid of 14 February 2008, rec. 706/2005, and 1 July 2008, rec. 553/2005, Judgment of the High Court of Justice of Extremadura of 9 March 2011, rec. 753/2007).

Hence the crucial importance of interim relief by internal courts of the authorisation of plans or projects likely to adversely affect the Natura 2000 network, given the irreversibility of effects in most cases and the forfeiture of the purpose sought in the process normally concomitant with the denial of such measures, with the ensuing damage to Natura 2000 sites, precisely the damage that the procedure aims to prevent.

The regime of art. 6.3 and 6.4 of the Habitats Directive for authorisation and subsequent execution of plans and projects thus needs to be brought into relation with the fundamental elements taken into account by internal courts to grant interim injunctions *52*: weighing up of the interests at stake, *periculum in mora* (danger in delay), assumption of legal grounds for an interim injunction and request for bond and sureties. If not correctly applied all these factors could lead to a lack of effective legal protection of sites and render ineffective Community law and Spanish law established by the Natura 2000 legal protection regime.

Interim injunctions are regulated in arts. 129 to 136 of the Spanish Judicial Review Law 29 of 13 July 1998 (*Ley reguladora de la Jurisdicción Contencioso-Administrativa*), on the basis of which such interim injunctions as may ensure effectiveness of the judgment may be sought at any stage of the process. This includes *medidas cautelarísimas*, i.e. especially urgent interim injunctions that might be granted on grounds of particular urgency, *inaudita parte*, at the start of the procedure. In general the following criteria are laid down by the judicial review law:

1. *Prior substantiated assessment of all interests in conflict*, it will be possible to grant the interim injunction only when execution of the act or application of the provision *could undermine the appeal's legitimate purpose* (art. 130.1)

2. It will be possible to turn down the interim injunction when it may lead to a grave *disturbance of general or third-party interests*, which the judge or court will ascertain in a substantiated way (art. 130.2)

It is crucial here to take into account the *Tribunal Supremo*'s precautionary-measure case law over time, and which currently, under the influence of art. 24.1 of the Constitution, considers interim relief of the enforceability of the administrative act to be, not exceptional, but rather part and parcel of "ordinary judicial protection", and the right to effective legal protection. The decision on the validity of the interim injunction involves joint weighing up of several criteria by the court, which, according to *Tribunal Supremo* case law, could be summed up as follows:

a) The periculum in mora (danger in delay) principle is the first criterion to be considered. It does not depend entirely on the irreparability of the damage;

52 See Supreme Court Judgment of 8 July 2011, rec. 4222/2010 and the decision (*Auto*) of the *Tribunal Supremo* of 5 June of 2012, rec. 327/2012, which sums up *Tribunal Supremo* case law on the matter.

it is always justified whenever a potentially process-invalidating situation occurs. It should be borne in mind that the purpose sought through interim injunctions is the legitimate purpose sought before the courts. There is a need for substantiation or proof, even incomplete or evidence-based, that execution of the challenged act could cause damage of difficult or impossible repair afterwards, or thwart the legitimate purpose of the appeal. An appeal in general terms will not be enough.

b) The criterion of weighing up concurrent interests is supplementary to that of the forfeiture of the appeal's legitimate purpose. Due consideration has to be given to the circumstances obtaining in each case and the interests at stake, both public and private parties, doing so in a detailed and substantiated way.

c) The principle of fumus bonis iuris (legal verisimilitude or plausible right) enables courts to discern the legal soundness of the protection sought without prejudging what the final judgment might be. The impossibility of prejudging the substance of the matter implies that the adoption of the measures involves a limited trial in which the court may not rule on matters that have to be left until the main trial on the substantial matter.

As well as the abovementioned general criteria, case law makes special reference in the adoption of interim injunctions in environmental matters to the "precautionary principle" or "prudence". In case of doubt the competent bodies have to incline towards rejection of any activity likely to damage or impair the natural balance, even in those cases in which there is no complete scientific certainty about the adverse effects of a given activity on the environment (Supreme Court Judgment of 22 June 2005, rec. 7370/2002, Supreme Court Judgment of 19 April 2006, rec. 503/2001; ECJ judgment 5 May 1998, C-180/96 and ECJ judgment 7 September 2004, C- 127/02).

This criterion is even more to the fore in cases of a likely effect on Natura 2000 sites, in which art. 6.3 of the Habitats Directive already includes the precautionary principle *per se* without the need of invoking it expressly, laying down a strict authorisation criterion that reverses the burden of proof, it being the responsibility of the developer or government authority to prove the harmlessness to site integrity during the authorisation procedure beyond any reasonable scientific doubt. Compliance with these strict pre-authorisation requirements have to be confirmed also by courts in any interim injunctions, with special stress not only on the existence of *periculum in mora* in view of the doubt about the absence of any effect but also the weighing up of the interests at stake and the link thereof with art. 6.4's material and formal requirements for exceptional authorisation of a plan or project likely to cause

damage or in case of doubt about same. This includes justification of imperative reasons of overriding public interest, and the intervention if need be of the European Commission.

At the precautionary-measure decision-taking moment, therefore, consisting of suspension of the enforceability of a plan or project likely to affect a Natura 2000 site, specific consideration has to be given, albeit provisionally, to compliance with all requisites of art. 6.3 and 6.4 of the Habitats Directive (and art. 46 sections 4 to 9 of *Ley* 42/2007). These debar *authorisation and ipso facto execution of a plan or project likely to have an adverse effect on these sites, without compliance with said requisites and without following the order of stages established therein*.

Thus, the *Tribunal Supremo* has granted or confirmed the interim relief of plans or projects due to the effect on Natura 2000 sites and on the grounds that the Environmental Impact Statement carried out lacked the "appropriate assessment" of art. 6.3 of the Habitats Directive, due to the failure, for example, to assess the combined effect with other projects. It has found that whenever there is a possibility of important damage, if any substantial anomaly is noted, at first sight, this must be taken into account when what is at stake is the protection of environmental values ostensibly protected by the Birds and Habitats Directives, in cases where these might be affected by certain projects in protected nature sites (Supreme Court Judgment of 8 July 2011, rec. 4222/2010 of 11 October 2011, rec. 6608/2010, of 24 May 2011, rec. 3613/2010).

In this case the national courts act as guarantors of compliance with and application of Community law, which might be violated not only by giving an authorisation contrary thereto but also by turning down an interim relief or granting it under conditions that thwart its efficacy and therefore permit the execution and completion of a plan or project with an adverse effect on a Natura 2000 site, thereby breaching the strict requisites of art. 6.3 and 6.4 of the Habitats Directive 92/43.

As for the requirement of a surety or financial guarantee in granting said interim relief, the *Tribunal Supremo* has ruled that it is not obligatory in all cases, as follows from art. 133.1 of the Spanish Judicial Review Law 29/1998 (*Ley de la Jurisdicción Contencioso-Administrativa*), especially when dealing with an action taken in defence of a collective interest like the environment, which the law especially protects, and the legal verisimilitude of a sought interim relief of a legislation-flouting project affecting the Natura 2000 network (Supreme Court Judgment of 11 October 2011, rec. 6608/2010). In some cases, moreover, the courts have declared that any possible damage to the environmental assets of sites affected by the plan or project appealed against is not quantifiable for the purposes of deciding on a caution sum. Such was the ruling of the High Court of Justice of the Canary Islands of 3 March 2009 rec. 66/09, confirmed by Supreme Court Judgment of 9 July 2012, rec. 1213/2010 and

also Supreme Court Judgment of 3 February 2009, rec. 5125/2007 and the Judgment of the High Court of Justice of Castilla y León (Burgos) rec. 382/2008.

In other cases, however, the courts have granted the interim relief of the challenged act on the grounds that Natura 2000 sites could be gravely and even irreversibly affected, but on condition of the prior furnishing of large financial guarantees by the environmental NGO appellants, which they could not in fact afford. In these cases the construction work was carried out and finished. By the time a final judgment annulling the plans or projects was handed down several years later, among other reasons due to infringement of art. 6.2, 6.3 and 6.4 of the Habitats Directive, the appeals had lost their original purpose since the harm to Natura 2000 sites had by now been done. Such was the case, for instance, in the upgrading to a dual carriageway of the M-501 road or the *Marina Isla Valdecañas* housing estate (Judgment of the High Court of Justice of Madrid of 14 February 2008, rec. 706/2005, and 1 July 2008, rec. 553/2005, Judgment of the High Court of Justice of Extremadura of 9 March 2011, rec. 753/2007).

It should also be borne in mind here that the Court of Justice has declared that the cross undertakings imposed for provisional measures or interim injunctions in an environmental procedure cannot be excessively onerous for the appellant (ECJ judgment 13 February 2014, C-530/11 section 64, 65, 66 and 70 and ECJ judgment 15 January 2013, C-416/10, section 107).

13.

ECOLOGICAL CORRIDORS BETWEEN NATURA 2000 SITES

Ecological or biological corridors or networks are those areas that ensure connectivity between protected sites, in this case of the Natura 2000 network. Their primordial function is to ensure individuals of protected species are able to move from one protected site to another, thus guaranteeing the overall coherence of the network.

Article 3.1 of the Habitats Directive and art. 4.3 of the Birds Directive establish a "primary" coherence deriving from the obligation of guaranteeing the favourable conservation status of interrelated habitats and species, by means of the Natura 2000 network. But arts. 3.3 and 10 of the Habitats Directive speak of a "reinforced" ecological coherence referring to protection of the features of the landscape and territory that, although located outside the Natura 2000 network, are important in terms of connecting up habitats and species, i.e. guaranteeing "connectivity" between Natura 2000 sites. It is specifically stated that member states shall strive to "improve" the ecological coherence of the Natura 2000 network by maintaining and if need be de-

veloping the features of the landscape which are of major importance for wild fauna and flora, i.e., 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.

In Spain's internal body of law, *Ley* 42/2007 defines ecological corridor as that "*territory of variable surface area and makeup that, due to its juxtaposition and conservation status, functionally connects up otherwise disconnected nature sites of singular importance for wild flora, thus allowing, among other ecological processes, genetic exchange between populations of wild species or the migration of individuals of these species*" (art. 3.8). Its art. 21 binds government authorities to include in their environmental planning such mechanisms as might ensure ecological connectivity of the territory, establishing or re-establishing corridors, in particular among protected Natura 2000 sites, including nature sites of outstanding importance for biodiversity. For this purpose particular importance is granted to rivers, droveways, mountain ranges and other linear and continuous features that act as stepping stones from one site to another, regardless of whether or not they are protected sites in their own right. Furthermore, its art. 47 stipulates that, with the purpose of improving ecological coherence and connectivity of the Natura 2000 network, the *comunidades autónomas*' environmental and land-use policies will encourage the conservation of ecological corridors and the management of those features of the landscape and territorial areas that are essential or primordially important for the migration, dispersal and genetic exchange of wild species of flora and fauna.

The trend in recent years, however, has been to propose or authorise certain projects outside the Natura 2000 network but on the borders thereof, surrounding same and often intercepting the corridors and territories of connection between them. The effect was patent, in view of the damage done to the hunting-, feeding- or dispersal-areas of the species of animals or birds that warranted site designation. By and large, however, the appropriate assessment of art. 6.3 of the Habitats Directive was not carried out and neither was the exceptional authorisation regime of art. 6.4 followed despite the destruction, urban development or infrastructure sprawl of territories crucially important for ecological connectivity, genetic exchange and movements of species from one Natura 2000 site to another. Neither was the priority role of rivers as ecological corridors taken into account properly in hydrological planning.

In other cases, however, in both project authorisation and plan approvals, the competent government authorities and domestic courts have taken into account the importance of ecological corridors and areas of connectivity between sites. The *Tribunal Supremo*, for example, has indicated that the provision of art. 21 of *Ley* 42/2007 is especially applicable to Natura 2000, establishing as it does ecological corridors as nature sites of outstanding importance for wild flora and fauna (Supreme Court

Judgment of 14 February 2011, rec. 1511/2008 of 24 May 2012, rec. 4853/2009 of 20 March 2013, rec. 333/2010, and of 24 September 2009, rec. 5239/2006). In the Judgment of the High Court of Justice of Cataluña of 20 March 2009, rec. 319/2005 the court attached clinching importance to the fact that the landed property involved contained optimum habitat and formed part of an ecological corridor of a site proposed for inclusion in the Natura 2000 network, the corridor being essential for maintenance of these ecological connections of the site. Also the Judgment of the High Court of Justice of Cantabria of 16 March 2010, rec. 428/2007 annulled a ring-road project, among other reasons because it destroyed a fluvial thicket (priority habitat in the Habitats Directive but not found in the Natura 2000 network in the specific case), said Directive indicating and the implementing legislation stipulating that such features of the landscape should be conserved, especially rivers with their corresponding banks due to their primordial importance for wild flora and fauna as an ecological corridor.

Some of the outstanding judicial pronouncements on ecological corridors by the Luxembourg Court are ECJ judgment 24 November 2011, C-404/2009 in which the Court of Justice considered that the opencast mining activities of the Alto Sil (Spain) could bring about a "barrier effect" contributing towards fragmentation of the habitat of the capercaillie and isolation of certain subpopulations of this species and the brown bear.

GLOSSARY OF ABBREVIATIONS AND NOTES

Art. .....Article

Arts .....Articles

BOE .....*Boletín Oficial del Estado* (Official State Journal)

EC .....European Community

ECJ .....Judgment of the Court of Justice of the European Union

EEC .....European Economic Community

EU .....European Union

IBA .....Important Bird Area

MAGRAMA .....Spanish Ministry of Agriculture, Food and the Environment

OJEC .....Official Journal of the Economic Community

OJEU .....Official Journal of the European Union

PORN ..... *Plan de Ordenación de los Recursos Naturales* (Natural Resources Maser Plan)

PRUG .....*Plan Rector de Uso y Gestión* (Use and Management Master Plan)

Rec. .....*Recurso* (Appeal)

SAC .....Special Area of Conservation

SCI .....Site of Community Importance

SPA .....Special Protection Area

In the original Spanish version of this work the court judgements and rulings are cited as the abbreviation of the court involved (written in full in the translation), the date and appeal number. In the case of judgments and rulings of the *Tribunal Supremo*, *Audiencia Nacional* and, *Tribunales Superiores de Justicia*, most belong to the Spanish judicial review procedure, whereby no reference is made thereto in each case. Only in the case of judgments from other orders, such as the criminal, is this fact expressly cited.

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SEO/BirdLife is the representative organization of BirdLife International in Spain, an umbrella organization comprising associations dedicated to bird conservation worldwide. It is the largest global organization of conservation of birds and nature, which has representatives in 121 countries and mobilizes approximately 13 million members and supporters worldwide. All the countries in the European Union have a partner of BirdLife International.

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www.activarednatura2000.org

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