Reinhard Slepcevic

Litigating for the Environment

EU Law, National Courts, and Socio-Legal Reality

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Bibliographic information published by the Deutsche Nationalbibliothek
The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available in the Internet at http://dnb.d-nb.de.

Dissertation Universität Wien, 2008

universität
wien

The printing of this book has generously been supported by the Austrian Political Science Association (ÖGPW) and the University of Vienna.

1st Edition 2009

Editorial Office: Dorothee Koch | Anita Wilke

VS Verlag für Sozialwissenschaften is part of the specialist publishing group
Springer Science+Business Media.
www.vs-verlag.de

Cover design: KünkelLopka Medienentwicklung, Heidelberg
Printed on acid-free paper
Printed in Germany

ISBN 978-3-531-16842-5

Preface

This book is the result of doctoral studies that I started in October 2004. At the outset, I only knew that I wanted to work on interest groups and litigation in the context of the European Union. At that time, I would not have believed that I would find myself some time later touring half Western Europe to interview environmental organisations, nor that I would read French, German and Dutch court rulings on the protection of endangered species whose names were completely unknown to me. Yet I never regretted my choice of topic, and hopefully the following chapters will convince the reader that it is indeed a topic that merits our attention. I would not have been able to cope with all the pitfalls of a long research project without the strong and enduring support of my friends and colleagues. Both personally and academically, I have profited enormously from my three years as a doctoral student at the department of political science at the Institute for Advanced Studies (Institut für Höhere Studien) in Vienna, Austria. I am very much indebted to Gerda Falkner, Oliver Treib, Sylvia Kritzinger and Irina Michalowitz for organising such a great programme which allowed me and my colleagues to engage in intensive discussions with outstanding academic scholars such as Alec Stone-Sweet, Paul Pierson, James Caporaso, Frank Schimmelfennig, Klaus Goetz, Andrea Lenschow, Katharina Holzinger and Hellen Wallace. In particular, I would like to thank Oliver Treib for his unlimited support and encouragement. Indeed, it is fair to say that he became my unofficial supervisor. I am also grateful to my colleagues on the doctoral programme – Nicole Alecu de Flers, Juan Casado-Asensio, Florian Feldbauer, Zoe Lefkofridi, Heidrun Maurer, Eric Miklin, Patrick Müller, Erik Tajalli and Florian Trauner – for all the interesting discussions we had and for their help in overcoming the downsides of doctoral research. Two other colleagues and friends must be mentioned as well: Holger Bähr, whose congenial rigour helped me to clarify key concepts in my research, and Andreas Obermaier, who helped me enormously to reconsider my own work for the better. I am also very much indebted to Lydia Wazir-Staubmann and David Barnes for helping me to improve my English. Last but not least, I want to express my gratitude to my supervisor Emmerich Tálos for being both an academic and personal role model. All this said, the usual disclaimer applies: without the support of those mentioned – and many more could be added – I would not have been able to write this book, yet, ultimately, I am the one to have conducted the work and therefore I am happy to claim responsibility for both its quality and errors.

Reinhard Slepcevic

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Abbreviations

AB	*Administratiefrechtelijke Beslissingen* (Dutch administrative law journal)
ABRvS	*Afdeling bestuursrechspraak van de Raad van Staate* (Administrative Law Section of the Dutch supreme administrative court)
Awb	*Algemene wet beschuursrecht* (Dutch General Administrative) Law
BGBL	*Bundesgesetzblatt* (Official Journal of Germany)
Birds Directive	Directive 79/409/EEC on the conservation of wild birds
BMU	*Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit* (German Ministry of the Environment)
BNatSchG	*Bundesnaturschutzgesetz* (German Nature Conservation Law)
BUND	*Bund für Umwelt und Naturschutz Deutschland*
BVerwG	*Bundesverwaltungsgericht* (German Federal Administrative Court)
CAA	*Cour d'administrative d'appel* (French second instance administrative court)
CE	*Conseil d'État* (French supreme administrative court)
DG	Directorate General
EC	European Community
ECJ	European Court of Justice
EIA	environmental impact assessment
EU	European Union
FNE	*France Nature Environnement*
Habitats Directive	Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora
IBA	Important Bird Area
J.O.R.F	*Journal Officiel de la République Francaise* (Official Journal of the French Republic)
M en R	*Milieu en Recht* (Dutch legal journal 'Environment and Law)
MEP	Member of European Parliament
MP	Member of Parliament
Nabu	*Naturschutzbund Deutschland* (German Environmental Organisation)

NuR	*Natur und Recht* (Dutch legal journal 'Nature and Law')
OVG	*Obererwaltungsgericht* (German 2nd instance administrative court)
pSCI	proposed Site of Community Importance
SAC	Special Area of Conservation
SCI	Site of Community Importance
SPA	Special Protection Area
Staatsblad	*Staatsblad van het Koninkrijk der Nederlanden* (Official Journal of the Netherlands)
TA	*Tribunal administratif* (French first instance administrative court)
TEC	Treaty establishing the European Community
WWF	World Life Fund for Nature

1 Introduction

The starting point of this study is an empirical puzzle: from the beginning of the 1990s, French, German and Dutch environmental organisations litigated dozens, even hundreds of times in order to guarantee the implementation of the Birds and Habitats Directives. These so-called Natura 2000 Directives are the very cornerstone of European Union (EU) nature conservation policy and create a considerably stricter environmental protection regime than national laws do. The Member States, however, failed to implement the Directives, even despite strong pressure from the European Commission. In view of this situation, environmental organisations from all three countries relied on the doctrine of the supremacy and direct effect of European law, and turned to their national courts for the enforcement of the European provisions. Their repeated litigation had, however, very different effects on the implementation of the Natura 2000 Directives: in France, environmental organisations litigated hundreds of times to enforce the stricter hunting dates of the Birds Directive. Nevertheless, the competent authorities continued to set the hunting periods in non-conformity with both the Directives and the case law of the European Court of Justice (ECJ). French litigation on the site protection regime of the Natura 2000 Directives similarly had no effect. In Germany, litigation was able to increase the designation of European protection areas and to overcome the initial information deficits of the competent authorities. At the same time, however, it was unable to improve the quality of how the authorities applied the Directives' provisions on site protection in practice. Finally, in contrast, litigation in the Netherlands forced the competent authorities to apply the European nature conservation measures strictly, even before the relevant provisions had been officially transposed.

How can this situation be explained? How can it be explained that public interest group litigation effectively overcame implementation problems in one country, but not in others? The goal of this book is to provide answers to this puzzle. It asks as its main research questions, '*How can we explain the differing effects of public interest group litigation on the implementation of European law?*', and, related to this, '*Under which conditions is public interest group litigation able to effectively remedy compliance problems with EU law?*'

The existing literature has repeatedly highlighted the potential of European law enforcement through national courts. The underlying logic of this system of decentralised law enforcement is straightforward: if problems with implementing

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European law occur, private actors can contest the relevant national law before the courts, which should ultimately lead to the enforcement of EU law even if the Member State opposes its implementation. Thus, in principle, each societal actor enjoying access to the courts holds a powerful tool with which to enforce his rights rooted in European provisions, and each national court potentially becomes a directly involved actor in the process of enforcing European law. However, most analyses have focused only on the legal aspects without inquiring into socio-legal factors. Empirically, litigation based on preliminary references (Article 234 TEC[1]) has attracted most attention, whereas litigation before national courts has been mostly overlooked. From a theoretical perspective, no explicit model exists to explain the varied effects of litigation on the implementation of EU law. Yet this should not imply that the existing analyses do not help us to find answers. On the contrary, it seems that the established strands of research may be fruitfully combined. What is still missing, however, is a theoretical approach that links the findings to a coherent model and clarifies the causal mechanism behind public interest group litigation.

With this book, I contribute to narrowing this research gap. I present a 'stage model' that aims to explain the differing effects of litigation and to determine the conditions under which European law can be effectively remedied through public interest group litigation before national courts.[2] In the current and well-established literature on interest groups, judicial politics, institutional change and compliance theory, I identify four independent variables (the organisational capacity of interest groups; their access to the courts; the interpretation by national courts of European law; and the reaction of the competent authorities to litigation) that can be grouped at three causally connected 'stages'. I argue that only if all the variables display characteristics conducive to law enforcement through the courts can European law be effectively implemented through litigation and thus have its full effect. If one variable is lacking, public interest group litigation will only produce limited effects or will even fail altogether. The theoretical approach will be discussed in more detail in Chapter 3.

I analyse the explanatory power of the stage model presented against the background of an in-depth comparative study of four instances of public interest group litigation in France, Germany and the Netherlands on the Natura 2000 Directives. From a methodological perspective, my study can be briefly described as a backward-looking, small-N, qualitative case study. Its findings rely, first, on 24 expert interviews conducted with environmental organisations and key senior officials responsible for the implementation of the Natura 2000 Directives from all

[1] References to the Treaty establishing the European Community (TEC) follow the consolidated text as of 2002 (Official Journal C 325 of 24 December 2002*)*.

[2] I have recently presented a similar but less refined version of this theoretical model (Slepcevic 2009b).

the countries studied; second, on a detailed analysis of the relevant national case law; and third, on an extensive analysis of the primary and secondary literature on the effects of litigation. This allows me to systematically assess the effects of litigation, the explanatory power of the stage model, and rival explanations of the differing effects of public interest group litigation (for more details, see Chapter 4).

The empirical results of my study confirm the expectations derived from the stage model: in France, the environmental organisations had sufficient organisational capacity and access to the courts to enforce the hunting dates as prescribed by the Birds Directive. Although the courts allowed hunting periods longer than those demanded by the Directive until the mid 1990s, the national courts' interpretation of its European obligations was eventually conducive as well. Nevertheless, the strong public support for open hunting periods made the competent authorities try to circumvent the rulings for two decades. Without the threat of a second referral to the ECJ by the European Commission, this bizarre 'game' of setting hunting dates each year in obvious non-compliance with European law, and their being contested each year before the courts would still be being played. In contrast to hunting issues, however, French environmental organisations did not possess the necessary organisational capacity to enforce the site protection regime of the Directives, which could not be mitigated by their open access to the courts. Even more importantly, the French courts' refusal to give direct effect to the Directives' site protection regime made it impossible to remedy the implementation problems through litigation. In Germany, environmental organisations were heavily restricted in using litigation due to their limited access to the courts and the high procedural costs. Their strong organisational capacity could only partially overcome this obstacle. The interpretation of the courts was on the one hand conducive, as they already accepted the direct effect of the European site protection measures in 1998. On the other hand, however, the courts left the competent authorities considerable leeway in taking their decisions. In addition, the possibility of amending ex post unlawful decisions decreased the pressure created by the threat of judicial review, even though no instances of outright ignoring court rulings had occurred. Due to the characteristics of the four variables, the potential for law enforcement through the courts turned out to be limited in the German case. In the Netherlands, finally, implementation problems were effectively remedied through litigation. The strong organisational capacity of the Dutch environmental organisations combined with their open access to the courts to allow them to challenge administrative decisions that were not in conformity with the Directives. Although the Dutch supreme administrative court was at first rather hesitant to accept the direct effect of the Directives' site protection regime, it ultimately demanded their comprehensive application. The competent authorities had to obey and reacted, first, by applying the European site protection measures, even though no formal transposition had taken place, and second, by putting more time and

energy into the assessment of potentially harmful effects on Natura 2000 sites. These results confirm the expectations derived from the stage model. In particular, they highlight the fact that public interest group litigation will only have its full effect if all variables display characteristics conducive to law enforcement through courts.

The main contribution of my study to current debates in political science and empirical legal studies is twofold: first, it shows that demanding conditions need to be met in order to remedy implementation problems with European law through national courts if areas of 'public' interest are concerned. This casts doubts on the practical potential of the decentralised system of European law enforcement, even though it might still score better than existing law enforcement instruments. Second, the results highlight the independent role that national courts play in the process of European integration. Most analyses only focus on preliminary references sent to the European Court of Justice to support claims on the role of national courts in European integration and democratic governance. The findings here show that more attention needs to be paid to the question of how national courts actually apply European law in practice. Relying only on preliminary references will lead to biased results.

All these issues will be discussed in more detail: the next chapter shows why a study on the judicial enforcement of European law is an important contribution to EU research and how it can contribute to ongoing debates in political science. It concludes with a discussion of the main research questions and shows how they are interrelated. In Chapter 3, I present the theoretical approach used. After clarifying key definitional issues and the existing explanations for the differing effects of public interest group litigation, I develop a 'stage model' on the basis of the existing literature in order to identify the conditions under which law enforcement through courts can effectively operate. I also discuss alternative explanations for the differing effects of litigation. Chapter 4 is dedicated to methodological issues. It discusses my research design, the tools of inquiry used and the policy area under study. Chapter 5 presents a detailed overview of the Natura 2000 Directives. These are the very cornerstone of European nature conservation policy, not least thanks to their strict interpretation by the European Court of Justice. The following three country chapters, on France, Germany and the Netherlands, contain the bulk of the empirical research; they cover the implementation process of the Natura 2000 Directives in these countries in detail, the role of the European Commission in achieving compliance, the reaction of environmental organisations to the implementation problems, the interpretation by the national courts of the key provisions of the Directives, and the reaction of the competent authorities to litigation before their national courts. All three chapters conclude with a discussion

of the empirical evidence against the background of the stage model.[3] I show that the stage model developed is indeed able to explain the differing effects of litigation in the countries under study, while rival explanations fail to do so. Finally, in Chapter 9, I discuss the wider consequences of my findings for the ongoing debates in political science on the role of litigation before national courts in the EU.

[3] In order to avoid misunderstandings, I should emphasise that, from a methodological perspective, I am analysing four cases of public interest group litigation in three countries (two in France, one each in Germany and the Netherlands). Despite this, I have decided to structure the book around country chapters to avoid redundancies in the two case studies regarding France.

2 The Interest in the Judicial Enforcement of EU Law

Why is a study on the judicial enforcement of European law through national courts important? What does the existing literature say on this issue and what has it overlooked? What other, broader strands of contemporary political science research are concerned with public interest group litigation before national courts? And what are the broader implications of such a study for this research? In this chapter, I provide answers to these questions in order to stimulate the reader's interest in the issue of enforcing EU law through national courts. First, I discuss the existing literature on litigation as an enforcement instrument for EU law. I show that although there is a rich 'abstract' literature on the issue analysing the potential of this enforcement instrument, there is a clear gap when it comes to empirical studies. Second, I give a brief overview of more general prominent political science research on the role of litigation before national courts in the EU. Both neo-functionalist approaches to European integration and the literature on democratic governance through the courts make implicit assumptions with regard to the role of (public) interest group litigation before national courts. They do not, however, support these assumptions with empirical evidence. Third, I give a short overview of an empirical puzzle with regard to the varied effects of public interest group litigation aimed at the enforcement of EU environmental law. I then sum up the discussion by posing the key research question of this book: how can we explain the differing effects of public interest group litigation on the implementation of European law? It should be noted that key definitional concepts, such as 'public interest groups', and the literature useful for the theoretical explanation of the differing effects of public interest group litigation will be discussed in the next chapter.

2.1 Public Interest Group Litigation as a Decentralised System of European Law Enforcement

Since the turn of the century, several studies have analysed the extent to which the Member States are complying with European law. They all come to the conclusion that there are huge problems in implementing European law in several EU policy areas (Börzel 2003; Falkner/Treib/Hartlapp/Leiber 2005; Laffan 2005; Jordan 1999a; Haverland 2000; Jordan/Ward/Buller 1998; Collins/Earnshaw 1993; Knill/Lenschow 2000; Glasson/Bellanger 2003; Treib 2006). The founders of the

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then European Economic Community (EEC) anticipated that instances of non-compliance would occur. They therefore introduced a centralised system of law enforcement in the Rome Treaties by giving the task of safeguarding European law to one central actor – the European Commission.[4] It was given the means to pursue instances of non-compliance with European law by initiating infringement proceedings according to what is now Article 226 of the Treaty on the European Community (TEC). If the Commission holds the opinion that a Member State has not correctly transposed European law, or is applying it incorrectly, it may initiate an infringement proceeding. The first and still unofficial phase of such a proceeding is to send a 'formal letter' to the Member State. After having received an answer on the alleged non-compliance, the Commission may decide to enter the second and first official stage of the proceeding by sending a 'reasoned opinion'. Again, if the Commission is not convinced by the Member State's answer, it may finally refer the case to the ECJ, which will then adjudicate the issue. Until the beginning of the 1990s, a conviction by the ECJ had no other result than merely chastising the state. With the Treaty of Maastricht, however, Article 228 was introduced considerably sharpening the centralised system of European law enforcement. Since the entry into force of the Treaty in November 1993, the Commission may now restart an infringement proceeding if a Member State has failed to implement a ruling of the ECJ. This second proceeding goes through the same stages as the first infringement proceeding, yet ultimately the ECJ may decide to impose penalty payments, either lump sums or daily payments, at the Commission's request. These penalty payments can be significant, as in the case of Greece, which was sentenced to pay €20,000 daily until it implemented an ECJ ruling.[5] Nevertheless, although the instrument of infringement proceedings has been strengthened, there are still at least two reasons why this centralised system of law enforcement is largely inefficient: first, the Commission simply lacks the resources to monitor the correct transposition of European law, not to mention its application. To take the example of EU environmental policy, it has no 'inspectors' to regularly monitor the actual situation on the ground (Krämer 2003: 381). As a result, it is completely dependent on external information. In the field of environmental policy, the Commission receives around 500 complaints per year reporting implementation problems of EU law (Krämer 2002: 32), yet in 1997 there was only one 'desk officer' in the Directorate General (DG) Environment – about 0.002% of the total work force – responsible for dealing with these complaints (Jordan 1999b: 80). In view of this situation, it is obvious that the European Commission is not able to fulfil its role as 'guardian of the Treaties'. Second, and related to this, several authors point to the fact that the

[4] Admittedly, according to Article 227, each Member State also has the possibility of bringing another Member State before the ECJ for non-compliance with European law. However, this procedure has been rarely used and has to be considered as "practically a dead letter" (Shaw 2000: 301).

[5] ECJ C-387/97 [2000], Commission *v.* Greece. See Krämer (2003: 390) for additional examples.

Commission takes strategic choices in its decisions to start infringement proceedings, sometimes simply for political reasons (Börzel 2003: 14; Krämer 1996b: 307-308, 2003: 385; Somsen 2000: 312; Weiler 1999: 27). In Jordan's words:

> "Even when formal proceedings are initiated, something like 80% are settled before they go to court. Court cases tend to be long-winded, extremely complicated, stretch the Commission's meagre resources, and endanger the goodwill of the states. Decisions to take cases to the Court are not taken lightly; they must be sanctioned by the Commission's Legal Services and receive the support of the College of Commissioners. Being so political, recourse to the court proceedings is normally considered as a very last resort." (Jordan 1999b: 81)

However, the European Court of Justice established an additional decentralised instrument of law enforcement when it declared the doctrines of supremacy and direct effect. The first doctrine established that European law is supreme over national law. Therefore, in cases of conflict between a European and a national provision, the European one has to be applied.[6] The ECJ developed the doctrine of direct effect with regard to the enforcement of European directives.[7] According to Article 249 (3) TEC, directives were only intended to "be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." Based on a textual interpretation of this Article, the Member States denied that individuals could refer to rights rooted in directives if they had been incorrectly implemented. The ECJ, however, used a teleological interpretation and held that even directives could – under certain conditions – have direct effect. As a result, an individual can rely on a directly effective provision of a directive before the national courts, even if it has not been correctly implemented.[8] The decentralised system of European law enforcement is based on these doctrines. Its underlying logic is straightforward: if a Member State fails to implement directly effective European provisions, private actors may turn to their national courts, which are under the obligation to apply these provisions even if they are in contradiction to national law.[9] Thus, in principle, each private actor enjoying access to the courts has a powerful tool for enforcing his rights rooted in European provisions, and each national court potentially becomes an actor directly involved in the process of enforcing European law.

The potential of this decentralised system of law enforcement through the courts is widely acknowledged. Legal scholars have emphasised its possibility of

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[6] See ECJ C-26/62 [1963] Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration.

[7] It should be noted that provisions of the Treaty may also become directly effective, such as Article 141 on gender equality. However, throughout this book, I will use the term 'direct effect' only with regard to directives.

[8] See e.g. ECJ C-41/74 [1974] Yvonne van Duyn v Home Office and EJC C-8/81 [1982] Ursula Becker v Finanzamt Münster-Innenstadt.

[9] For a discussion of direct effect, see section 3.1.

remedying instances of non-compliance with European law since the beginning of the 1990s, when implementation problems became more and more visible (Micklitz/Reich 1996; Somsen 1996; Krämer 1991). Moreover, legislative moves have been initiated at the European level to strengthen the access of private actors to justice. In the area of the environment, the United Nations Economic Commission for Europe has adopted the 'Aarhus Convention', which explicitly aims to strengthen the legal access to courts of private actors in order to guarantee the protection of the environment.[10] Based on this convention, the European Commission brought forward a proposal for a Directive on access to justice in environmental matters in 2003.[11] The hope placed in this instrument of law enforcement through the courts is summarised in the first paragraph of its preamble:

> "Increased public access to justice in environmental matters contributes to achieving the objectives of Community policy on the protection of the environment *by overcoming current shortcomings in the enforcement of environmental law* and, eventually, to a better environment" (emphasis added).

In sharp contrast to this widely-shared hope in the potential of the courts to remedy compliance problems with European law is an almost complete absence of empirical studies trying to distil the conditions under which this system of decentralised law enforcement can effectively operate. The existing studies focus almost exclusively on legal issues and ignore empirical or theoretical concerns (see again the literature cited above). These works by legal scholars are important in clarifying the legal preconditions for public interest group litigation, yet they tell us very little regarding the 'reality' of judicial law enforcement outside the world of legal textbooks.

2.2 The European Court System, European Integration and Democratic Governance

Since the mid 1990s, the European court system – the European Court of Justice (ECJ) and the courts of the EU Member States – has attracted considerable attention from political science scholars. Two strands of research are of importance. On the one hand, the interaction between the ECJ and the national courts has led to a revival of institutionalist and neo-functionalist approaches to the explanation of

[10] United Nations Economic Commission for Europe (UNECE): Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted on 25th June 1998).

[11] Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters [COM(2003) 624].

European integration.[12] In a nutshell, these approaches claim that the Member States, as rational actors, decided to found the then EEC in order to establish an institutional design that would guarantee their mutual interests in a functional way. However, they could not anticipate the future development of European integration. In addition, it became very difficult for them to change the established institutions once they had been created. Therefore, the Member States were bound by decisions they had taken in the past, regardless of whether or not they still served their interests. At the same time, institutional dynamics led to so-called spill-over effects. As the European institutions and national actors pushed for ever more integration, integration in one area resulted in the extension of the EU's competencies in another area (Pierson 1996; Jupille/Caporaso/Checkel 2003).

According to these approaches, the cooperation of the ECJ and national courts is central to explaining European integration. This cooperation is based on the 'preliminary reference procedure' of Article 234 TEC. It gives each court of the Member States the possibility of interrupting an ongoing procedure if it holds the opinion that an interpretation of European law is necessary for it to give its ruling. The court may then refer the case to the ECJ, which will give an authoritative, but abstract, interpretation of the European provisions concerned, which the national court will then apply in the case concerned. When the then EEC was founded, the preliminary reference procedure was only intended to play a minor role (Dehousse 1998: 30; Moravcsik 1998: 155). However, the number of preliminary rulings skyrocketed in the succeeding decades, from an average of less than 50 in the 1960s to an average of more than 200 in the 1990s (Stone Sweet/Brunell 1998b: 74). More important was the fact that the preliminary reference procedure supplied the ECJ with a steady stream of cases. This gave the Court the possibility of "constitutionalising" (Mancini 2000: 2) the Treaty, i.e. to transform it from a mere international treaty into a quasi-constitution that confers rights upon individuals. In addition, the preliminary reference procedure enabled societal actors to bypass reluctant governments that tried to prevent European rules from becoming effective on the ground. To give just two examples, once the ECJ had declared the direct effect of Article 28 on the free movement of goods and Article 141 on gender equality, societal actors started to litigate against national provisions that were in contradiction with the European rules. This stream of cases gave the ECJ the chance to further refine and close 'regulatory gaps' that it had created by pushing EU law into new issue areas. Judgements of the ECJ thus had a feedback effect and created both more litigation and more European legislation (Stone Sweet 1997, 2004: 64-80; Mattli/Slaughter 1998; Fligstein/Stone Sweet 2002: 1221-1235; Alter/Vargas 2000; Caporaso/Jupille 2001).

[12] However, it needs to be emphasised that not all authors emphasising the importance of the European Courts for European integration automatically adhere to the basic assumptions of 'neo-functionalism'.

On the other hand, the contributors to the special issue of Comparative Political Studies on "Courts, Democracy, and Governance" argue that giving societal actors greater access to courts is in principle a promising way of enhancing democratic governance, as it strengthens accountability, transparency, and individual participation in political processes.[13] In the introduction to the special issue, Cichowski (2006a) identifies three general institutional variables – the nature and scope of rules, the possibilities for courts to perform judicial review, and the access points and resources for societal actors to use litigation – that condition the potential for enhancing democratic governance through the courts. For the context of the EU, Börzel underlines the importance of the third variable in her study on litigation on the judicial enforcement of two EU environmental directives in Germany and Spain. She concludes that "[t]he EU's legal institutions only increase opportunities for participation for those individuals and groups who possess court access and sufficient resources to use it. In other words, it is mostly the 'haves' who benefit – those actors who already command considerable resources that enable them to broadly participate in political and legal processes" (2006: 147).

Obviously, these two approaches address larger issues than the question of litigation before national courts as a decentralised instrument of European law enforcement. Nevertheless, they are closely linked to this issue, as they make the implicit assumption that national courts will – at least by and large – apply European law faithfully. This assumption is central, as the overwhelming majority of cases dealing with the application of European law are not referred to the ECJ. It is up to national courts to apply the principles developed by the ECJ in order to decide whether a national provision is in conflict with a European one and what consequence this may have. The problem is that this key assumption has not been scrutinised empirically. From a methodological perspective, all analyses – with the notable exception of Börzel (2006) – rely on the number of preliminary references as indicator of the enforcement of EU law (Alter 2000; Caporaso/Jupille 2001; Cichowski 1998, 2004; Conant 2006; Stone Sweet 2004; Stone Sweet/Brunell 1998a). Yet, again, as most cases are not referred to the ECJ, we simply do not know how reliable the number of preliminary references is as an indicator of the application of EU law by national courts. Unfortunately, no quantitative data exists that could be used to analyse this issue. What we do know, however, is that qualitative studies have shown the incorrect application or even the complete neglect of European law by national courts (Bapuly/Kohlegger 2003; Golub 1996). Therefore, in-depth qualitative studies on the judicial enforcement of EU law that focus explicitly on national litigation are needed. On the one hand, for research on

[13] In the introduction to the special issue, Cichowski defines "the enhancement of democratic governance" as "greater accountability, transparency, and individual participation in political processes" (2006, 7).

the importance of litigation to European integration, such studies can shed light on the question of under which conditions societal actors can effectively litigate in order to push European integration into a new policy area (but see Alter/Vargas 2000). On the other hand, these studies may elucidate the role of national courts in a conception of democratic governance that focuses above all on the enforcement of rights. For if national courts do not apply European law correctly, this is an additional factor conditioning the practical potential of enhancing democratic governance through the courts. The aim of my study on the judicial enforcement of the Natura 2000 Directives is to contribute to this debate.

2.3 Empirical Puzzle

In spring 2005, I conducted interviews in France, Germany and the Netherlands with environmental organisations on the judicial enforcement of EU law. These interviews revealed that public interest group litigation aimed at the implementation of the Natura 2000 Directives had led to different effects in these countries.[14] From a legal perspective, this situation is surprising: given the fact that the supremacy of European law and the doctrine of direct effect are today fully acknowledged by the supreme courts of the Member States, one should expect that litigation would have the same effects. Yet on the contrary, the effects of litigation differed widely.

In *France*, the restriction on hunting dates demanded by the Birds Directive had been at the centre of hundreds of instances of public interest group litigation since the middle of the 1980s. Over the years, environmental organisations successfully challenged the setting of opening and closing dates for hunting wild birds before French administrative courts. This had, however, only limited effects as the administrative authorities continued to set dates for the hunting season which were out of conformity with the Birds Directive. In addition, in the 1990s the French legislator adopted two amendments to the national hunting laws with the explicit aim of blocking the judicial review of hunting dates. With regard to the creation of the Natura 2000 network of European protection sites for endangered species and the implementation of the site protection regime of the Natura 2000 Directives, litigation yielded no effect at all. Although the implementation of the Natura 2000 Directives posed considerable problems for all Member States, France was the only country where a coherent anti-Natura 2000 group, consisting of agricultural and forestry organisations, emerged. The group tried to prevent the implementation of the Directives by various means, including litigation before the national courts. Although environmental organisations turned to the French

[14] For a detailed discussion of the Natura 2000 Directives and the ECJ's interpretation of them, see Chapter 1.

administrative courts to enforce the Directives, their activities had no effect on either the transposition of the site protection regime or the quality of its application or the creation of the Natura 2000 network.

In *Germany*, the transposition of the Directives' site protection regime was carried out during a major revision of the German nature conservation law, the preparation for which had already begun in the early 1990s. As German environmental organisations did not turn to the courts until 1998, public interest group litigation could logically have no effect on the transposition of the Directive's site protection regime. However, a fear of economic decline led to strong resistance when it came to the creation of the Natura 2000 network. As the nature conservation law only applied to already designated sites, German environmental organisations started to successfully contest authorisations for projects in ecologically sensitive areas that should have been designated before their national courts. This had positive effects on the creation of the German Natura 2000 network, although pressure from the European Commission was still essential to guarantee the network's completion. As far as the quality of the application of the site protection regime was concerned, the annulled administrative decisions helped to increase awareness about the Directives. In the end, however, litigation did not increase the quality of how potentially environmentally harmful projects were evaluated.

As in Germany, the resistance to the Natura 2000 Directives in the *Netherlands* was due to the fear of less economic competitiveness caused by the costs of stricter nature protection measures. Although public interest group litigation also had positive effects on the creation of the Natura 2000 network, its main impact was on the application of the site protection regime. Even though the latter was only transposed in October 2005, it had in practice already been applied by the competent administrative authorities before that date. In addition, even the quality of its application rose considerably over time.

How can we explain this situation? How can it be explained that public interest group litigation had different effects in these countries, or, put differently, that the judicial enforcement of the same European rules proceeded to such a different extent?

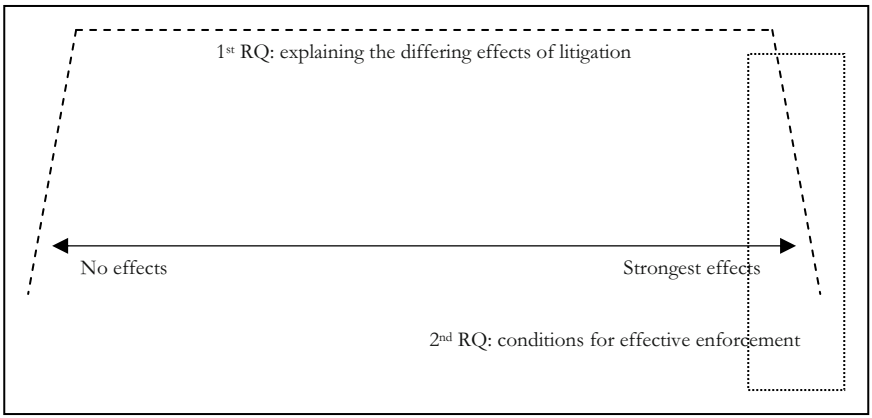
2.4 Research Question(s)

My study ties in with the various strands of research on the judicial enforcement of EU law described above, as well as with the empirical puzzle. Its main research question is "*How can we explain the differing effects of public interest group litigation on the implementation of European law?*" I use the term *implementation* following Raustiala/Slaughter as the "process of putting international commitments into

practice" (2002: 539). It covers two distinct aspects: the legal transposition and the practical application of EU law. *Transposition* means the establishment of the necessary national legal requirements in order to apply the European law in practice. *Application* means the faithful practical application of the European law by the relevant actors. If a European provision is correctly transposed and applied, it has been fully implemented, and full compliance has been achieved (see also Treib 2006: 4-6).

It needs to be emphasised that my main research question also covers a second and more specific question, namely: *Under which conditions is public interest group litigation able to effectively remedy compliance problems with EU law?* That this is the case becomes clear if one imagines all the possible different effects on a continuum ranging from 'no effects' to 'strongest effects' (see Figure 1 for a graphical illustration). If the focus is on the right-hand side with 'strongest effects', it is clear that the conditions under which litigation will create these 'strongest effects' are at *the same time* the conditions under which public interest group litigation will most effectively remedy implementation problems. Thus the question of the differing effects of public interest group litigation automatically includes the issue of public interest group litigation as an enforcement instrument of European law.

Figure 1: The Relationship between the Two Research Questions



Although the first question already covers the second question, the latter one requires a crucial additional clarification: What does *effective* exactly mean? According to the Collins Cobuild English dictionary, "[s]omething that is effective works well and produces the results that were intended." This standard definition can also be used here. The intention of public interest group litigation is to improve the implementation of EU law compared to the status quo ante. Thus, public interest

group litigation will effectively remedy compliance problems if litigation significantly improves the implementation of European rules compared to the period before litigation has taken place. Litigation improves the transposition of EU law if it increases the pressure on the competent authorities to correctly transpose the relevant provisions. Likewise, litigation improves the application of EU law if it increases the pressure on the competent authorities to correctly apply the European provisions, regardless of whether a formal transposition has taken place or not. What exactly constitutes 'correct' implementation is difficult to define in the abstract, as the degree of specification of EU law often differs tremendously. In fact, even very concrete provisions may allow different but still 'correct' interpretations. A useful baseline for comparison seems to be the intention that a European rule tries to pursue. If the implementation runs counter to the goal of the European law, it can be considered as incorrect. Admittedly, there certainly remains a grey area that is difficult to grasp. Nevertheless, it is one thing to admit that a certain range of 'correct' implementations exists and another to completely dismiss the idea that a specific implementation is simply incorrect and wrong. In the end, whether an implementation is correct or not needs to be determined on a case-by-case basis, yet it is clear that more and less correct implementations exist. Finally, it needs to be emphasised that the question of how to trace the causal connection between litigation and implementation is a methodological problem, not a definitional one. This issue will be discussed in Chapter 1.

After having clarified that my main research question on the differing effects of public interest group litigation also covers the issue of the conditions under which European rules can be effectively enforced through litigation, it should be noted that I will deal with both questions throughout this book simultaneously. Nevertheless, given the broader focus of the main question, I will place more emphasis on explaining the differing effects of litigation in my theoretical approach. Both issues however will be equally discussed in the concluding chapter of the book.

3 Theoretical Approach

In this chapter, I discuss the theoretical approach chosen to explain the differing effects of public interest group litigation. After having clarified some definitional issues, I give a brief overview of the existing literature that may help to explain these differences. However, as there is no coherent theoretical model, I tailor different existing research strands to a 'stage model'. Finally, after having discussed the model, I turn to alternative explanations of the differing effects of litigation not covered by my theoretical approach.

3.1 Definitional Issues

Before turning to the theoretical explanation of the differing effects of public interest groups, two essential issues require clarification. First, why have I decided to focus on public interest group litigation and thereby exclude legal actions by individuals? Second, what exactly are 'public interest groups'? Both questions can be answered on the basis of the rich literature on collective action. Since the path-breaking work of Olson, it has become clear that certain interests are plagued by collective action problems. Olson's approach relies on an individualistic, rational conception of human behaviour. Human beings are assumed to calculate the potential costs and benefits of their actions in order to decide whether it would be advantageous to their individual situation to perform a specific action. Following this reasoning, collective action is more likely to take place if the potential individual benefits of collective action are high and the potential individual costs of not becoming active are high as well. On the contrary, if the potential costs and benefits are diffuse, i.e. if they are shared by a large number of people, but individually only to a very limited extent, collective action becomes less likely (Olson 1965). The main implication of Olson's "logic of collective action" is that the safeguard of diffuse interests cannot be assumed to be guaranteed by the people affected themselves. The collective action problems need to be overcome in another way, most commonly by the intervention of the state or interest groups. As Reich correctly notes, here lies a weakness in Olson's approach: although it can convincingly show why the safeguarding of diffuse interests is dependent on 'external' action, it cannot explain why so many interest groups that represent diffuse interests actually exist. They may be significantly weaker than groups

R. Slepcevic, *Litigating for the Environment*, DOI 10.1007/978-3-531-91999-7_3,

representing specific interests – again because of collective action problems – yet their mere existence does not follow the "logic of collective action" (Reich 1987: 21). This problem is, however, less relevant to the focus of this book, as I do not need to explain why people become active in interest groups in the first place to protect an interest by which they are only very indirectly affected. For my focus, the mere fact that diffuse interests depend on the action of interest groups is the crucial point. From this insight it follows that litigation aiming to protect diffuse interests will most probably be started by interest groups claiming to represent such diffuse interests. There may be cases where individuals turn to the courts in order to protect an interest by which they are not directly affected, yet in view of the costs of litigation this is certainly very rare. In addition, Micklitz emphasises that a rights-based legal system – like the European one – has in general a natural bias in favour of property rights, as there is an intense individual interest in having their rights protected, if necessary through litigation. Yet if no property rights are concerned, litigation by individuals that are not directly affected becomes unlikely (Micklitz 2005: 461). As a result, the protection of such diffuse interests through litigation is again dependent on the action of interest groups. For these reasons, I have decided to focus only on the legal actions of interest groups.

The second question requiring clarification is: What exactly constitutes a 'public interest group'? With regard to the term 'interest group', different authors have used very different definitions (for an extensive overview, see Baumgartner/Leech 1998: 25-30). For the focus of my study, I follow Richardson's concept of a 'pressure group' that "may be regarded as any group which articulates demands that the political authorities in the political system or sub-system should make an authoritative allocation" (Richardson 1993: 1). It is a rather all-encompassing definition and does not rely on substantial criteria such as the size or continuity of a group. This has the advantage of covering very different national traditions of collective action, which are in turn reflected by various ways of legally regulating such action.[15] With regard to the term 'public', I again use Olson's "logic of collective action". For the focus of my study, I consider as a 'public interest group' every interest group that claims to represent a diffuse interest plagued by collective action problems. 'Public interest group' is thus the generic term for groups like environmental organisations, consumer associations or gender equality groups. Note that in this respect I use the term 'organisation', 'association' and 'group' in this context interchangeably, without different meanings. As a result of my focus on public interest groups, it has to be emphasized that I do not claim that

[15] For the sake of completeness, it should be noted that collective action does not automatically have to take the form of an interest group. Collective action can also occur in the form of non-organised social movements (see eg. Kriesi 1993; Kriesi/Koopmans/Duyvendak/Giugni 1995; Byrne 1997) or spontaneous actions, such as demonstrations. Nevertheless, interest groups are often the most efficient and stable guarantee of the representation of an interest.

the results of this study will also be valid for interest groups representing other than diffuse interests.

3.2 Existing Explanations for the Differing Effects of Public Interest Group Litigation

When it comes to public interest group litigation itself, no explicit theoretical approach exists aiming to explain the differing effects of such litigation on the implementation of EU law. This does not mean, however, that I have to start from scratch. On the contrary, there is a very rich literature related to this topic on which I can fruitfully build. Careful adaptation is, however, necessary. In the following, I briefly discuss the literature closest to my topic. I show its merits as well as its shortcomings with regard to the explanation of public interest group litigation before national courts.

The literature closest to my topic is work on interest group litigation. In the US-American context, research on this issue is well developed and established (see e.g. Olson 1990; DeGregorio/Rossotti 1995; Epstein/Kobylka/Stewart 1995; de Figueiredo/de Figueiredo 2002; Kritzer/Silbey 2003). However, the main problem with this literature is that it has great difficulty in explaining cross-national differences as it only focuses on one country. With regard to group-specific explanatory factors (resources, access to courts) that could also be relevant to my focus, they have largely been covered in the literature on interest group litigation discussed below. For these reasons, I will not discuss the US-American literature further.

Since the beginning of research on interest groups in the context of the EU, litigation has in principle been considered a possible way for these groups to promote their interests (see van Schendelen 1993: 7). However, the main empirical focus of interest group studies was initially nearly exclusively on the legislative and executive branches of the EU (see Mazey/Richardson 1993; van Schendelen 1993; Pollack 1997; Newell/Grant 2000), with the notable exception of Harlow/Rawlings (1992: 268-288). Even in more recent studies, litigation is often only mentioned for the sake of completeness (see e.g. Hix 2005: chapter 7; Greenwood 2003; Mazey/Richardson 1999; Greenwood/Aspinwall 1998). The situation changed at the end of the 1990s when several studies turned to the question of how interest groups could use the preliminary reference procedure in order to promote their interests. The empirical starting point of this literature was the observation that, first, the ECJ had considerably expanded the scope of the existing principle of gender equality rooted in the Treaty and several directives and, second, the number of preliminary references in the area of gender equality was disproportionally distributed across the Member States. The UK was leading by far, whereas other

countries had very few references (see Mazey 1998). This led to the question of how to explain such differing patterns (Alter/Vargas 2000) and, more broadly, under which conditions interest groups will use the preliminary reference procedure to promote their interests (Alter 2000). The question was also raised of what variables determine the impact of ECJ rulings in the field of gender equality (Tesoka 1999a, b), and also in other policy areas (Conant 2002). In explaining the differing use or impact of litigation, the explanations mentioned focus on various different explanatory factors. Tesoka emphasises two independent variables: the first, based on social movement research (see e.g.Tarrow 1991), is the importance of different national "political opportunity structures" that "assess the receptivity or vulnerability of a given political system to actions of a challenging group [and that explore] the distribution of opportunities and incentives for action" (Tesoka 1999b: 10). Second, she highlights the importance of access to national courts to interest groups. Depending on the characteristics of these variables, she concludes that the ECJ rulings on gender equality had more or less effect in the countries under study. In Conant's study on the differing effect of ECJ rulings in the fields of electricity and telecommunication liberalisation and also of access to public-sector employment and social benefits, Conant underscores the following two independent variables: "(1) the organisational capacity of potential beneficiaries and losers [of ECJ rulings] and (2) the responsiveness of governments to potential beneficiaries and losers" (Conant 2002: 23). Her central argument is that ECJ rulings will only have significant effects if important national or European interest groups mobilise in support of them and are able to push their governments to align with them. Finally, Alter deals with the question of under which conditions interest groups will use the preliminary reference procedure to obtain their policy preferences. She argues that the effective use of this tool for policy influence "involves overcoming four successive thresholds" (Alter 2000: 489). In an article with Vargas, she claims that:

> "[t]here are four separate steps that determine whether the EC legal tool can be successfully invoked to shift the domestic balance of power. First, there must exist a point of European law on which domestic actors can draw, and favourable ECJ interpretations of this law. Second, litigants must embrace EC law to advance their policy objectives, using EC legal arguments in national court cases. Third, national courts must support the efforts of the litigants by referring cases to the European Court and/or applying European Court jurisprudence instead of conflicting national policy. Fourth, the litigants must follow up their legal victory by drawing on legal precedents to create new political and material costs for the government and private actors. A litigation strategy can fail at any of the four steps" (Alter/Vargas 2000: 453-454).

In another article, Alter continues to identify a total of 20 variables from the existing literature that may further determine whether the EU legal system will be used to influence domestic policy (2000: 509-511).

Building on this first wave of EU litigation studies, an article by Bouwen/ McCown examines the conditions under which business interest groups will engage in a lobbying or a litigation strategy in order to promote their interests. They identify three independent variables: first, the material resources of the interest groups, second, their organizational form, and third, the volume and pace of the EU legislative and judicial decision-making process (Bouwen/McCown 2007: 427-431). They then analyse four strategies business interest groups have pursued, based on lobbying, litigation or a combination of both. Although they emphasise the explanatory nature of their article, they find support for their explanatory factors in their empirical case studies.

Lastly, Börzel analyses litigation before national courts as an instrument of democratic governance. The article is part of the special issue edited by Cichowski (2006b) on enhancing democratic governance through litigation discussed in section 2.2. It builds on Börzel's previous empirical work on the implementation of several environmental directives in Spain and Germany (Börzel 2003). In the introduction to the special issue, access to courts and the resources of societal actors wanting to use litigation are identified as two key independent variables for the potential of enhancing democratic governance through courts (Cichowski 2006a: 8). In her case studies, Börzel emphasises the importance of these variables and argues that litigation empowers mostly those actors who already possess considerable resources (Börzel 2006).

This literature brings important insights to the explanation of the differing effects of litigation before national courts. First, Alter's seminal idea of "steps" or "thresholds" that need to be overcome in order to use litigation effectively appears very helpful as it allows us to distinguish analytically between different key actors and explanatory variables. It also allows these variables to be linked to a theoretical model by at the same time emphasising the importance of overcoming all the "steps". Second, the literature emphasises the politics of implementation and rulings. The fact that the ECJ has given a strict ruling does not automatically mean that it will have significant consequences and will lead to policy change. Third, the literature agrees with the US-American literature on interest group litigation that two independent variables are crucial: the resources of interest groups and their access to courts, as they determine the behaviour of interest groups. These variables, therefore, need to also be included in my theoretical framework.

At the same time, however, there are important shortcomings in the literature when it comes to the issue of public interest group litigation before national courts. First, even though Alter/Vargas also empirically focus on litigation at the national level, the emphasis of the theoretical framework is nevertheless more on preliminary references. In addition, Alter's explanation involves in total 20 independent variables (Alter 2000; Alter/Vargas 2000). From a methodological perspective, however, it becomes very difficult, if not impossible, to analyse the independent

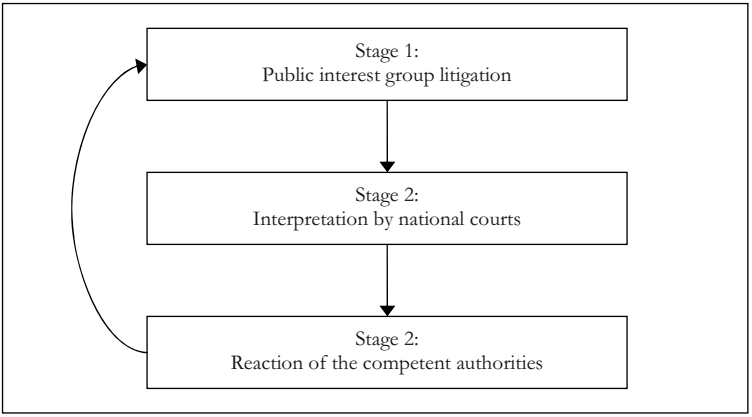
effect of each of these variables, as one would need too many suitable cases for inquiry. The old problem of 'too many variables, too few cases' becomes obvious. Second, Bouwen/McCown deal with the question of under which conditions business interest groups of firms will turn to the courts. As has been discussed in section 2.4, however, my focus is exclusively on public interest groups facing particular problems. The Bouwen/McCown approach thus requires adaptation. Third, although all authors emphasise the importance of resources and access to courts, they do not discuss the possible interaction between these variables, which may lead to mitigating effects. Such effects are nevertheless likely to occur (see below for more details). Fourth, the literature does not give an analytical explanation of why litigation should lead to policy change at all. Although Alter and Conant emphasise the politics of the implementation of rulings, they offer no framework to help an analytical understanding of the micro-mechanisms of litigation and policy change. Broader work on institutional change may be helpful in this respect. Fifth, the broader literature suggests that other independent variables may also be decisive in explaining the differing effect of public interest group litigation (see below). Certainly, however, the literature discussed cannot be blamed for this shortcoming, as it tries to give answers to other research questions and is based on few empirical cases. Nevertheless, this is another reason for creating a coherent theoretical model tailored to the focus of this study.

3.3 The Stage Model

How can the differing effects of public interest group litigation on the implementation of European law be explained? In order to answer this question at a theoretical level, I combine different existing and well-established theories with a 'stage model'. In a nutshell, my argument runs as follows: in order to explain the differing effects of public interest group litigation aimed at the correct implementation of European law, three causally connected stages need to be considered (1st stage: litigation – 2nd: interpretation – 3rd: reaction). At each of these stages, the focus is on the behaviour of one key actor (1st stage: public interest groups; 2nd: the national courts; 3rd: the competent national authorities). The potential for enforcing European law through public interest group litigation at each stage is largely determined by the characteristics of the preceding stages. In addition, litigation can fail at each stage. The stages are passed through repeatedly over time, until either the correct implementation of the European legislation is achieved, or public interest group litigation stops at the first stage (see Figure 2). For each stage, I identify independent variables and derive hypotheses regarding the expected effects of interest group litigation. I derive these indepen-dent variables from state-of-the-art theories for each of the respective stages (1st stage: interest group and

social movement theory; 2nd: judicial politics; 3rd: compliance theory) in order to combine them into a model that is able to explain the dependent variable, i.e. the differing effects of public interest group litigation. Based on this reasoning, it needs to be emphasised that, first, I do not claim to present a new theoretical approach. This analysis builds heavily on existing theoretical approaches. The only merit of the stage model is to combine elements that have been overlooked by previous work. In addition, I use theories on institutional change to make the link between litigation and policy change analytically comprehensible. Second, I do not intend to test alternative theoretical accounts within a stage, such as different theories of compliance. As a consequence, I only rely on the broadly shared assumptions of these theories. This does not mean, however, that I am blind to other explanatory factors that may determine the differing effects of public interest group litigation. I discuss other such factors not included in the stage model separately at the end of this chapter.

Figure 2: A Stage Model for Explaining the Differing Effects of Public Interest Group Litigation



3.3.1 Legal Preconditions for Public Interest Group Litigation

Before turning to a discussion of the various stages of the model, the general legal preconditions for public interest group litigation aimed at the enforcement of EU law need to be discussed. In fact, there are two preconditions for this instrument of law enforcement: first, the competent authorities have to issue a specific decision that public interest groups can contest before the national courts. If the courts rule that the decision has indeed been taken in contradiction to directly effective

European provisions, it should be declared unlawful, as it violates a superior norm. In most cases, this will lead to the annulment of the decision, yet this may vary depending on the national administrative procedural law. The consequence of annulment is that the competent authorities will have to amend their decision according to the requirements of the court in order to eventually pass the stage of judicial review. This means that law enforcement through courts works only indirectly, as it is not possible to turn to the courts from the outset to oblige the competent authorities to perform a certain action.

Second, in order to enforce European law through national courts, the provisions have to fulfil the criterion of direct effect. In the area of secondary European law, only regulations were initially intended to be directly applicable in the legal orders of the Member States. If this had remained the case, the potential of law enforcement through the courts for areas such as environmental protection or gender equality would have remained very limited, as the most important legislative acts in these fields take the form of directives. In the 1970s, however, the ECJ created the possibility for provisions in directives to also become directly effective. The Court summarised the necessary conditions in the following terms:

> "The Court has consistently held that wherever the provisions of a directive appear, as far as their subject matter is concerned, to be *unconditional and sufficiently precise*, those provisions may be relied upon by an *individual against the State* where the State fails to implement the directive in national law *by the end of the period prescribed* or where it *fails to implement the directive correctly*" (emphasis added).[16]

In other words, the provisions of directives may become directly effective if the deadline for transposition has expired, the Member State has not transposed the Directive at all, or only incorrectly, and the provisions are unconditional – meaning that no additional national or European legislation is required to substantiate them – and sufficiently precise – meaning that no discretion is left to national authorities in applying them (see also the discussion in Krämer 1996a: 101-112; Shaw 2000: 435-442; Davies 2004: 100-108; Prechal 2005).

In addition, the ECJ held that directly effective provisions may only confer rights to individuals against the State if the latter has failed to fulfil its duty. In disputes between private parties, however, such provisions may not be invoked, as they would create obligations to individuals even though they have acted in conformity with national legislation. The practical relevance of this restriction depends on the policy area. In environmental matters, for example, it is often administrative authorities that give licences or permissions. If they do not comply with directly effective European provisions, their decisions may be annulled during judicial review. Consumer issues are, on the contrary, often dealt with exclusively

[16] ECJ C-236/92 [1994] Comitato di Coordinamento per la Difesa della Cava v Regione Lombardia.

between private individuals, such as a vendor and a buyer, which precludes any reference to directly effective provisions.

Although it would be very difficult to count the number of directly effective provisions in European law, there are numerous examples of them in important European legislation covering various 'diffuse' interest policy areas. In the field of gender equality, the Equal Pay, Equal Treatment and Social Security Directives each contain provisions that the ECJ has declared directly effective.[17] Directives on consumer protection, such as the one on the protection of consumers in respect of distance contracts, also contain directly effective measures.[18] In the field of European environmental protection, Krämer has identified no less than 16 Directives containing directly effective provisions that may in principle be referred to in national court proceedings (1996b).

So far, the discussion has shed no new light on the issue of enforcing European law through the courts, despite the fact that these purely legal aspects have already been widely discussed by legal scholars. Yet implementation studies show us that the mere existence of legislation does not automatically translate into empirical reality (Pülzl/Treib 2007). As a result, it is necessary to look for the factors that may limit the potential of remedying compliance problems through the courts in order to assess its potential as an enforcement instrument. It is therefore indispensable to turn to more empirically oriented research that goes beyond the restricted realm of the doctrinal 'reality'.

3.3.2 Stage 1: Litigation by Public Interest Groups

The first stage of the Model concerns the general possibility for national public interest groups to contest before national courts administrative decisions which are in breach of European law. The focus of this stage is on public interest groups as they are obviously at the beginning of any interest group litigation. If they decide not to litigate, no public interest group litigation will take place. In addition, the question is not only whether or not litigation will occur, but also how often these groups are able to litigate, as more litigation will increase the costs of non-compliance (see below). It should, however, be emphasised that it is not the purpose of this study to explain the individual decision of a given public interest

[17] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women; Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes; Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

[18] Directive **2002/65/EC** of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services.

group to litigate.[19] On the contrary, my point of departure is that public interest litigation has already occurred, yet with differing effects. As a result, my focus at this stage is more on the overall differences between national public interest group movements than on the individual behaviour of particular interest groups.

The literature on interest group theory and social movements emphasises two aspects that are of particular importance in explaining the differing effects of public interest group litigation. First, it is argued that the institutional context – understood broadly – in which interest groups operate has a decisive impact on their behaviour. Second, and related to this, it is shown that the structure of interest groups, and in particular the resources at their disposal, heavily influences the strategies they pursue in order to reach their policy objectives (Greenwood 2003; Kriesi 1993; Cigler/Loomis 1995; Alter 2000; Bouwen/McCown 2007; Tesoka 1999b).

It is possible to identify two independent variables in this literature for this first stage: the 'organisational capacity' and the 'access to courts' of public interest groups. Their *organisational capacity* refers to the available resources at their disposal. For litigation, two resources are essential. The first is information, both regarding the relevant national and European provisions and also the situation on the ground. Obviously, if public interest groups are simply not aware of the fact that they could potentially turn to their national courts in order to enforce European law, no litigation – or at best very little litigation at a relatively late point in time – will occur. In addition to the relevant legal information, interest groups sometimes need detailed information about the current situation on the ground, which may be difficult to obtain. To give an example, it is far easier to find out whether national legislation on gender equality is in compliance with European obligations than it is to empirically assess whether women are actually treated equally compared to their male colleagues when it comes to promotion. As a result, information problems caused by limited organisational capacity may restrict the use of litigation, depending on the legal issue. In other words, the legal issue area that public interest group litigation is aimed at determines to a large extent whether strong organisational capacity is necessary to effectively use litigation.

The second important resource for litigation is money. It is needed to pay court fees, lawyers, scientific studies to support arguments, etc. The money necessary for litigation itself is in turn determined to a large extent by national procedural law on public interest group litigation.

This leads to the second key variable in this first stage, namely *access to courts*. This does not only refer to the mere legal standing of public interest groups before the national courts. On the contrary, it covers a whole range of issues that can make access to courts more or less open, e.g.:

[19] For research on this issue, see Alter/Vargas (2000) and Bouwen/McCown (2007).

- Do public interest groups enjoy access to courts in all issue areas, or are there restrictions?
- Can new claims be added to an ongoing court proceeding, or is there on the contrary a 'preclusion of arguments'?
- Can any representative of a public interest group file an action, or is the presence of an officially accredited lawyer obligatory?
- What are the procedural costs of litigation?
- Are the costs of litigation refundable?
- Can additional costs appear, e.g. scientific studies commissioned by the court that the loser of the proceedings has to pay?

Based on these two variables, I derive the following two hypotheses:
H.1: The stronger the organisational capacity of public interest groups, the more positive effects public interest group litigation will have on the implementation of European law.
H.2: The more open access to courts is for public interest groups, the more positive effects public interest group litigation will have on the implementation of European law.

Two additional remarks need to be made. First, although both variables are repeatedly highlighted in the literature, it has been overlooked that they are not necessarily independent of each other. There might be situations where low access costs to the courts can mitigate weak organisational capacity. To give an example, if the procedural fees for litigation are very low, even a very weak organisational capacity, which translates into little money available for litigation, might not become a significant obstacle. Alternatively, a comparatively strong organisational capacity of interest groups can also overcome rather restrictive access to the courts, as the former enables the financial barriers of litigation to be overcome. Note, however, that this mitigating effect only applies to the cost of litigation and not to the knowledge available of the practical situation on the ground, nor to the general issue areas open for litigation. In addition, even comparatively rich public interest groups will not be able to totally compensate for high litigation costs. Second, although this study is not concerned with explaining the decision of public interest groups to litigate, this should not suggest that frequency of litigation is not assumed to have a decisive impact on the effects of public interest group litigation. On the contrary, the more often national law is successfully challenged before national courts for not being in compliance with directly effective European provisions, the more pressure will be generated to amend the national law, the more possibilities are given to the national courts to develop their jurisprudence, and the more publicity will be generated on the issue of non-compliance.

3.3.3 Stage 2: Interpretation by the National Courts

The literature on judicial politics makes two strong arguments for assuming that the interpretation of European law by national courts is likely to differ significantly across the Member States. First, it is the very cornerstone of judicial politics research that courts need to be considered as political institutions, whose decisions are not derived from some sort of abstract and constant 'legal truth' but from interaction with other political institutions (Shapiro 1981). In view of the very different historical development of the various court systems of the Member States, the prima facie assumption that European courts should come to the same conclusions when interpreting European law is hard to sustain. Related to this is the fact that European law is often not self-explanatory and requires interpretation in order to be applied in a specific case. Not surprisingly, it has been observed that interpretation can differ significantly, even concerning the same European provisions (see e.g. Hallo 1996; Tesoka 1999a; Glasson/Bellanger 2003; Heinelt/Malek/Smith/Töller 2001; Somsen 1996). Second, it is crucial to remember that acceptance of European law by national courts was – and maybe still is – a cumbersome process (Alter 2001; Slaughter/Stone Sweet/Weiler 1997). For example, the supreme administrative court in France did not accept the supremacy of European law until 1989. In addition, there are still reports of national courts not applying directly effective European provisions (Chalmers 2000; Van Koppen 1992; Bapuly/Kohlegger 2003).

What are the consequences of European law being interpreted differently by national courts? If national courts – for whatever reason – ignore the direct effect of a European provision, public interest group litigation aimed at enforcing European law will logically fail. Yet even if the courts accept their direct effect, there remain considerable possibilities for stricter or less strict interpretation of European provisions. This concerns in particular those provisions that give the competent authorities some leeway when taking a decision. If, for example, the European law requires that the alternatives to a construction project have to be considered before authorisation is given, the question of what exactly such consideration of the alternatives involves must be answered.. Depending on how strictly the national courts interpret the European provisions, the competent administrative authorities will enjoy considerable leeway in taking their decisions. As a result, by interpreting the European law more or less strictly, the national courts delineate the margin of manoeuvre that the competent national authorities enjoy when taking their decisions. This leads to the question of what exactly should be considered a 'strict' interpretation of European law? If, as has been said, European law is often imprecise and open to different, equally correct, legal interpretations, how can the 'true' interpretation be found, against which the interpretation given by a national courts can be compared, in order to determine what a strict interpretation

is? However, I do not claim that it is possible to establish in the abstract what constitutes a 'strict' interpretation and what does not. This needs to be done on a case-by-case basis by comparing two different interpretations given by courts. In order to tackle this issue, I use a teleological interpretation of the European provisions concerned: if the goal of a European directive is, for example, to promote gender equality, an interpretation that better achieves this aim will be stricter than one that offers more possibilities of circumventing it. In addition, it should not be forgotten that the ECJ is continuously giving its interpretation of European law. Once it has done so, the ruling of a national court on a similar issue can be compared to the ECJ's judgement. If the national court's ruling follows the judgement of the ECJ more compared to another national court's ruling, I will consider it to be a stricter interpretation of European law. The foregoing reasoning leads to the following hypothesis:
H.3: The stricter the interpretation of European law by national courts, the more positive effects public interest group litigation will have on the implementation of European law.

3.3.4 Stage 3: Reaction of the Competent Authorities

At the third stage, the focus is on the behaviour of the competent national authorities and their reaction to public interest group litigation. The term 'competent authorities' can refer either to the legislative or administrative authorities. If public interest group litigation leads to changes in the legal transposition of European law, then the legislator is the competent authority. If it leads to changes in the application of European law, then the administrative authorities are concerned. This distinction is clearly fluid, but should not be problematic for the research focus of this study. In general, however, if issues of the practical application of European law are involved, the behaviour of administrative authorities is more important.

The question of how national authorities react in general to the obligation to implement European law is at the heart of compliance research, which also offers important insights into the differing effects of public interest group litigation. Applied to the focus of this study, actor-centred compliance theory combined with theory on institutional change clarifies the mechanism whereby public interest group litigation may lead to the correct implementation of European law. In addition, it helps our understanding of why competent national authorities may still try to evade a strict interpretation of European law given by their national courts.

Although there remains disagreement in the compliance theory literature on whether the degree of 'goodness of fit' between European and national rules will automatically lead to implementation problems, there seems to be a consensus that the preferences of central national actors are a decisive element in explaining correct

implementation (see Börzel 2003; Falkner/Treib/Hartlapp/Leiber 2005; Haverland 2000; Treib 2003; 2006). This actor-centred approach can be linked to the more general literature on institutional change (see Pierson 2000; Streeck/Thelen 2005; Hacker 2004). Here, the term 'institution' is understood broadly, and means a formal or informal system of rules. Examples of institutions range from very formalised ones, such as law, to rather informal ones, such as traditions or normative understandings of 'how things should be done' (for an extensive discussion, see Voss 2001). Drawing on economic theory, institutional theory emphasises the fact that institutions may become 'locked in' as more and more actors adapt their behaviour to them. This creates so-called increasing returns, or self-reinforcing, positive feedback processes. As a result, it becomes more and more costly to change these institutions. Therefore, decisions taken in the past – even inefficient ones – may lead to 'path dependent processes' and thus to the persistence of these institutions (Pierson 2000). In order to change such 'institutionalised' decisions, support for them needs to be reduced. Only if the explicit or implicit support for institutions falls below a certain threshold will institutional change occur, and the result will be the fading away of the institution, its replacement, its rearrangement, or some other form of change (Hacker 2004: 243-249). Coming down to the focus of this study, public interest group litigation can be considered as one mechanism among others for decreasing the level of support for a national institution to be changed by European law over time. On a general level, the more administrative decisions are annulled by the courts due to conflicting European law and, as a consequence, the greater the legal uncertainty, the more costly it will become to maintain the national institutions. This does not necessarily mean that the support for the new European provisions to be implemented has increased over time, but that the costs caused by public interest litigation are ultimately likely to lead to a situation where the competent authorities – maybe grudgingly – agree to 'swallow the bitter pill'.

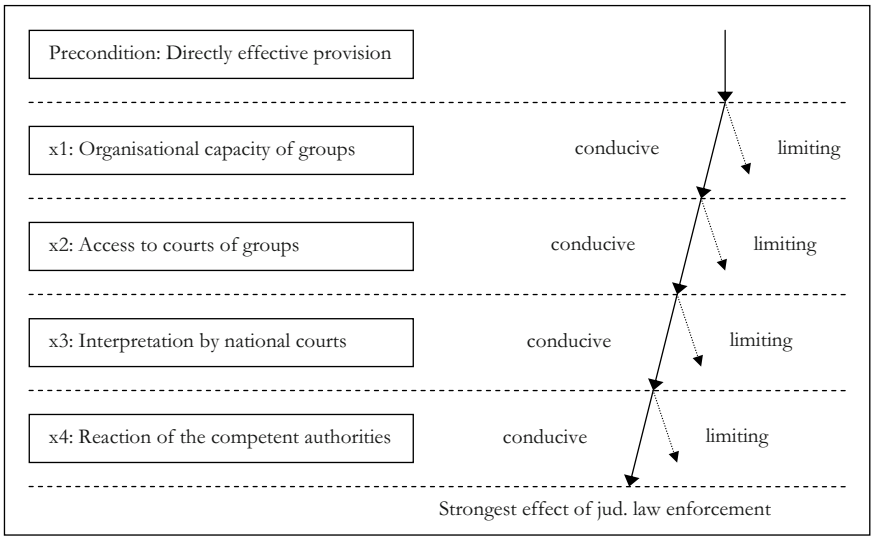
However, strong support for an existing national institution may even result in more or less explicit non-compliance with European rules already applied by national courts. Although the rule of law is a deeply entrenched element of European democracies, such instances of non-compliance with national court judgements should not be ruled out from the start. I am not aware of any research on this issue, yet examples regularly appear in the media.[20] Based on this, the following hypothesis can be formulated:

[20] To give an example, the competent authorities of the Austrian province of Carinthia have for several years ignored a ruling by the Austrian constitutional court that bilingual place-name signs should be erected.

H.4: The larger the support an existing national institution to be changed by European law enjoys, the more limited the effects of public interest group litigation on the implementation of European law will be.

Finally, it needs to be emphasised that the four variables do not determine the potential effect of law enforcement through the courts independently of each other. Although each variable may be the reason why litigation has failed, the overall effect of litigation depends on the characteristics of all the variables. They are in an order of priority, meaning that the possibility of enforcing European law through the courts always depends on the characteristics of the preceding variables. If, for example, the organisational capacity of public interest groups is strong – and thus conducive to law enforcement through the courts – yet the interpretation by the national courts is very restrictive, the potential for remedying compliance problems through the courts cannot ultimately be but limited. Consequentially, law enforcement through the courts will only have its full effects if the characteristics of all four variables are conducive to this instrument (see Figure 3). Furthermore, it will only have very limited effects or even fail altogether if one single variable shows restrictive characteristics, even if the others are conducive. Therefore, as all the hypotheses identified so far only focus on the individual effect of the variables on the potential for law enforcement through the courts, an underlying thesis needs to be added: *Public interest group litigation will only have its full effect if all the independent variables display characteristics conducive to law enforcement through the courts.*

Figure 3: Necessary Conditions for Effective EU Law Enforcement through National Courts



3.4 Other Possible Explanatory Factors

What other possible independent variables may explain why public interest group litigation leads to differing effects? There seem to be three main explanatory factors in the literature, all focusing on the litigation behaviour of interest groups: first, the actions of the European Commission; second, the organisational form of those public interest groups that may turn to the courts; and third, the alternative of access to the national policy-making process. I will take all these factors into account in the empirical analysis and in the discussion of the stage model. However, they only tend to explain cases where litigation did not have any effects. Besides those already included in the stage model, I was unable to find any other possible – or at least plausible – explanatory factors that could explain why litigation was able to effectively enforce EU law.

Although the centralised enforcement system of the EU based on infringement proceedings is widely criticised for its ineffectiveness, it nevertheless has led to compliance in many cases. Pressure from the European Commission is often reported as the key explanatory factor for Member States ultimately becoming willing to implement a European provision correctly (see e.g. Börzel 2003: 62-140; Falkner/Treib/Hartlapp/Leiber 2005). It might therefore be that public interest group litigation has no effect on the implementation of EU law because groups concerned by directly effective provisions intentionally decide not to litigate if the European Commission has already become active. This would be completely rational behaviour for groups trying to use limited resources in the most efficient way. On discovering an instance of non-compliance with European law, they may satisfy themselves by sending a complaint to the Commission and, if the latter opens an infringement proceeding, abstain from going to the national courts. As a result, less litigation would occur and public interest group litigation would, all other things being equal, have less impact on the implementation of the directly effective provisions concerned.

Second, the organisational form of public interest groups may explain why they do not turn to the courts more often. Based on Olson's logic of collective action, Alter/Vargas argue that the larger a group and the more broadly focused its goals, the less likely it is to turn to the courts because the benefit of litigation – the better implementation of EU law – has to be considered as a public good. This leads to the so-called free rider problem, as not only the members of a group but everybody can profit from better implementation. As a result, the incentive to a group member to stay in, or alternatively to a new member to join, the group is reduced, as she would also profit from better implementation if she had not been member. Therefore, the interest group will intentionally decide not to litigate. Only comparatively small, narrowly focused groups will frequently use litigation (Alter/Vargas 2000: 473-474; see also Bouwen/McCown 2007: 429-430). It should

be emphasised that Alter/Vargas find support for this factor in their study on public interest group litigation in a 'diffuse' interest area, namely gender equality, even though Olson had developed his argument for business groups and firms.

Third, litigation needs to be considered as only one instrument with which public interest groups can influence policy – in this case the implementation of EU law – among others. The reason why these groups do not use litigation more often may be that they can rely on other, more efficient ways to achieve their goals. If public interest groups enjoy open access to the policy making process and if they can actively influence implementation by lobbying, they may prefer this route. They may therefore deliberately abstain from using litigation in order to enforce directly effective provisions (Tesoka 1999b: 9-14; Alter/Vargas 2000: 471-472; Alter 2000: 498).

4 Methodological Approach

In this chapter, I give an overview of the methodological approach of my study. After discussing its research design, I describe the various tools of inquiry used in order to find answers to the main research questions. I then summarise the research process and explain the data analysis used. Finally, I show why I have chosen nature conservation in general and the Natura 2000 Directives in particular as the policy area for the focus of my study.

4.1 Research Design

From a methodological perspective, the study can be characterised as a backward looking, small-N, qualitative case study. In the following, I will discuss each of these elements briefly. First, the study is backward looking as it proceeds from the empirical observation that public interest group litigation in France, Germany and the Netherlands had differing effects on the implementation of the Natura 2000 Directives. In methodological terms, the dependent variable, i.e. the differing effects of litigation, takes the form of three different values: (1) no effect of litigation at all; (2) limited effects of litigation on the transposition of European provisions; and (3) positive effects on both the transposition and application of EU rules. Thus, the dependent variable occurs in full variance, from no effects to the strongest effects. The study is backward looking as it seeks to explain this variance in its full complexity. It is thus not the goal to analyse the effect of one single independent variable on litigation, but to give an explanation that takes into account all the necessary explanatory factors (see Scharpf 1997: 24-26).

Second, the study analyses four cases and is thus a small-N study. What exactly constitutes a case can vary greatly and depends on the focus of the case-study itself (see Gerring 2007: chapter 2). For my study, each instance of public interest litigation has to be considered as a single case. As I am looking at public interest group litigation on the Natura 2000 Directives in three countries as well as litigation on hunting dates in France, I am analysing a total of four cases that differ in the dependent variable. At the same time, however, I have identified four independent variables. In order to analyse the individual effect of all these independent variables, it would be necessary to have 2^4, or 16 cases. To resolve this problem of 'too many variables, too few cases', King/Kehoane/Verba's influential book on research

R. Slepcevic, *Litigating for the Environment*, DOI 10.1007/978-3-531-91999-7_4,

methodology would simply advise raising the number of cases (1994: 209-228). However, in this case, this is neither practically feasible nor desirable. On the one hand, in order to analyse the independent variables identified, it is indispensable to carry out detailed inquiries into the case law on litigation over the Natura 2000 Directives and also to obtain in-depth information about the reasons for public interest groups using litigation or not (for more details, see below). In view of the depth of analysis necessary to obtain data with sufficient explanatory power from the case studies, it would be practically impossible to analyse more than a few cases. In addition, it is doubtful whether it would even be possible to find the necessary variation of all four independent variables in the current Member States of the EU. Nevertheless, the importance of small-N studies themselves should not be discarded. Several authors point out that qualitative case-oriented research should not strive to strictly copy the quantitative template for research. In Ragin's words, "case-oriented research is not a primitive form of variable-oriented research that can be improved through stricter adherence to variable-oriented standards. Rather, the case-oriented approach is better understood as a different mode of inquiry with different operating assumptions" (Ragin 2004: 124). If it is accepted that qualitative causal-process observations yield inferential leverage on their own and have an equal methodological status to quantitative data-set observations, the detailed, in-depth analysis of a few cases is often a more promising research strategy (Yin 1986: 21; Brady/Collier/Seawright 2004: 252-264; Gerring 2007: chapter 3). This is definitely the case for this study.

Third, I rely on a qualitative approach of inquiry in order to analyse the explanatory power of the stage model. Is this appropriate or would a quantitative approach be better suited to the focus of the study? I argue that this is not so. On the one hand, in order to carry out a quantitative analysis, it would be necessary to measure the dependent and independent variables either directly or to use appropriate indicators to measure them. However, I am not aware of any existing quantitative indicators that could be used. For obvious reasons of workload, however, it would be impossible to collect all necessary quantitative data from scratch. On the other hand, and more importantly, qualitative and quantitative methods of inquiry pursue different research goals (see Table 1). Qualitative research seeks to achieve the goal of internal validity[21], aims to highlight causal mechanisms that explain a particular outcome and is careful about generalising its findings to other contexts. Quantitative studies, in contrast, rely on explicit theoretical models that they try to test in order to analyse the individual effects of independent explanatory factors. They strive for as much generalisability (external validity) and representativeness as possible (see also Collier/Brady/Seawright 2004).

[21] Internal validity is "[t]he degree to which descriptive or causal inferences from a given set of cases are correct for those cases "(Seawright/Collier 2004: 292).

Table 1: Research Goals of Small-N and Large-N Case Studies

	Affinity	
Research goals	Case Study (small-N)	Cross-Case Study (large-N)
1. Hypothesis	Generating	Testing
2. Validity	Internal	External
3. Causal insight	Mechanism	Effects
4. Scope of proposition	Deep	Broad

Source: adapted from Gerring (2007: 38).

As the focus of my study is on the causal mechanisms that explain the differing effects of public interest group litigation, and given the fact that it cannot rely on an explicit, established theoretical model, a qualitative mode of inquiry appears to be more appropriate.

4.2 Tools of Inquiry, Data Collection and Data Analysis

In order to examine the causal mechanism of the theoretical approach that aims to explain the differing effects of public interest group litigation, I rely on two different qualitative tools of inquiry. First, I use semi-structured expert interviews to assess both the effects of litigation and the possible reasons for its failure or success. According to Gläser/Laudel, "[e]xperts are people who have a particular knowledge about social circumstances, and expert interviews are a method to gain access to this knowledge"[22] (Gläser/Grit 2004: 10). Following the typology of Bogner/Menz, I carry out "systematising expert interviews" (*systematisierende Experteninterviews*), which have the goal of obtaining 'objective', factual insightful information and the professional opinion of the interviewees (Bogner/Menz 2005: 37-38). In contrast to standardised interviews, semi-structured interviews allow the interaction with the interviewees to remain open to alternative explanatory factors so far overlooked. At the same time, they structure the research process and help to examine the abstract theoretical concerns (Lamnek 1995: chapter 3; Gläser/Grit 2004: chapter 3 and 4; Leech 2002: 665). Who should be considered an expert depends on the focus of the study. For this study, experts are those people who have particular knowledge of the litigation behaviour of environmental organisations and/or the process of implementing the Natura 2000 Directives. Three groups of experts thus seem particularly appropriate interview partners: members of environmental organisations involved in the Natura 2000 Directives

[22] "Experten sind Menschen, die ein besonderes Wissen über soziale Sachverhalte besitzen, und Experteninterviews sind eine Methode, dieses Wissen zu erschließen."

and/or litigation; senior officials from the competent national authorities actively involved in the implementation of these Directives; and researchers working on the litigation behaviour of environmental organisations.

The main problem of expert interviews is, of course, that they do not create 'objective' information. On the contrary, and even under the assumption that the interviewees are not lying outright, the information obtained is systematically biased according to the belief system and the socialisation of the interviewees. In order to cope with this problem, it is indispensable to cross-check the information obtained as often as possible. On the one hand, this can be done by interviewing experts who are likely to have 'another view' on the situation. To give an example, it is likely that environmental organisations will overstate implementation problems, whereas members of the competent authorities will instead downplay them. By comparing the opinions of both sides, more multi-faceted information can be gained. On the other hand, as a second tool of inquiry I rely on extensive primary documents and secondary literature analysis. First, I use specialised environmental law journals and similar specialised publications to analyse the process of implementation and possible implementation problems. I also compare the various legislative steps taken by the authorities competent to meet European obligations in order to evaluate the quality of transposition. Besides my expert interviews, I use both secondary literature and primary documents to assess the effects of litigation. These primary documents are, among others, preparatory legislative reports, official administrative information documents and parliamentary debates. They explain why particular legislative or administrative measures were introduced in order to comply with the Natura 2000 Directives. If public interest group litigation had effects on the implementation of the Directives, they should be found there. In addition, I carry out a detailed analysis of the relevant case law in order to assess the interpretation of potentially directly effective provisions by the national courts over time. This is indispensable in order to determine the pressure created by litigation on the competent authorities to comply with the Directives or, alternatively, their remaining discretionary scope. As I am not trained in Dutch, German or French legal studies, I abstain from making my own legal analysis of the case law, but make use of the comments by legal scholars on the rulings that appeared in environmental law journals. I also carry out interviews with legal experts for this purpose. In addition, I make simple descriptive quantitative analyses of the case law where appropriate. Although their importance should not be overstated, these analyses can help to corroborate the qualitative findings. Finally, I search the daily newspaper Europe Daily Bulletins (or *Agence Europe*) for activities at the European level implementing the Directives.

After having discussed the tools of inquiry, I can give more details about the research process. In total, I carried out 24 expert interviews. The shortest was about 37 minutes, the longest 2 hours 38 minutes. The total interview time was about 28

hours, with an average length of 70 minutes per interview. Twenty interviews were carried out on site in Germany, the Netherlands and France between February and May 2006. The remaining four interviews with senior officials from the competent national authorities were conducted by telephone in December 2006 and June 2007 (see Table 2). I decided to first carry out the interviews with environmental organisations and researchers in order to be as well prepared as possible for the interviews with the senior officials of the competent authorities. The latter are sometimes said to be less available for expert interviews due to time constraints. In order to exploit the allocated time for the interviews as fully as possible, the interviews had to be as precise and as firmly based on information about the implementation process as possible. If necessary, I contacted the experts interviewed again, either by telephone or e-mail, in order to clarify specific points. The empirical observations collected cover the period up to the beginning of 2007, but I tried to update them when necessary.

Table 2: Overview of the Interviews Conducted

Experts/organisations interviewed (total: 24)	Date	Type of interview	Short name of interview
France (7 Interviews)			
France Nature Environnement [Réseau Milieux Naturels] (Strasbourg)	22.05.2006	On site	FNE [Réseau Naturel Naturels]
Alsace Nature (Strasbourg)	22.05.2006	On site	Alsace Nature
France Nature Environnement [Legal Expert] (Paris)	23.05.2006	On site	FNE [Legal Expert]
Ligue ROC (Paris)	24.05.2006	On site	Ligue ROC
France Nature Environnement [Réseau Juridique] (Le Mans)	25.05.2006	On site	FNE [Réseau Juridique]
Manche Nature (Saint Amour)	26.05.2006	On site	Manche Nature
Senior official at the French Ministry for Environment	8.06.2007	Telephone	Ministry for the Environment
*Germany (9 Interviews)**			
Naturschutzbund [federal representation, Berlin]	27.02.2006	On site	Nabu 1
Naturschutzbund [Lower-Saxony, Hanover]	02.03.2006	On site	Nabu 2
BUND [municipality level in Lower-Saxony, Hanover]	02.03.2006	On site	Bund 1
BUND [Lower-Saxony, Hanover]	03.03.2006	On site	Bund 2

WWF [federal representation, Berlin]	28.02.2006	On site	WWF 1
WWF [centre for sea protection, Bremen]	03.03.2006	On site	WWF 2
Legal expert on litigation of environmental organisations (Unabhängiges Institut für Umweltfragen, Berlin)	01.03.2006	On site	Litigation Expert
Senior official at the Federal Ministry for the Environment	05.12.2006	Telephone	Federal Ministry
Senior official at the Ministry for the Environment of Lower-Saxony (Ministry	13.12.2006	Telephone	Ministry Lower-Saxony
Netherlands (8 Interviews)			
Faunabescherming (Bergen NH)	07.03.2006	On site	Faunabescher-ming
Natuurmonumenten ('s-Graveland)	07.03.2006	On site	Natuurmonu-menten
Natuur en Milieu (Utrecht)	09.03.2006	On site	Natuur en Milieu
Gelderse Milieufederatie (Arnhem)	09.03.2006	On site	Gelderse Milieufederatie
Waddenvereniging (2 members, Harlingen)	06.03.2006	On site	Waddenvereni-ging
Vogelbescherming (Den Haag)	10.03.2006	On site	Vogelbescher-ming
Legal expert of the University of Utrecht (Utrecht)	09.03.2006	On site	Expert University Utrecht
Senior official at the Dutch Ministry of Agriculture	9.12.2006	Telephone	Ministry of Agriculture

* On 06.02.2008, I had a short e-mail interview with the official responsible for the umbrella organisation of business interest groups in Lower Saxony [*Unternehmerverbände Niedersachsen*]). As it was very specific, I have not included it in the table.

For Germany, I carried out interviews both at the federal level and in Lower-Saxony. This was necessary given the distribution of competencies in nature conservation matters in the German federal system.

After the interviews, I completely transcribed each one and analysed them with a qualitative content analysis (Mayring 2003) using the content analysis software Atlas.Ti 5.0. When I refer to an interview in the text, I do so by giving the short name of the interview and the margin number automatically generated by Atlas.Ti, e.g. 'Int. Nabu 2, 409-424'. This allows me to make the qualitative research process more transparent. Parts of the transcripts of the interviews can be obtained from me upon simple request.

Besides the interview field trips, I spent a week at the university libraries of Leuven and Louvain-la-Neuve in Belgium in September 2006 in order to consult French and Dutch secondary literature, in particular environmental law journals. German law journals and secondary literature were accessible through Austrian libraries.

4.3 The Policy Area: European Nature Conservation Policy and the Natura 2000 Directives

The Natura 2000 Directives – the Birds and Habitats Directives – together form the very cornerstone of EU nature conservation policy. In the words of the European Commission, the "Habitats Directive is the EU's flagship contribution to safeguarding global biodiversity" (2004: 16). Together, these Directives create the so-called Natura 2000 network, a coherent network of nature protection sites for endangered European species. These Natura 2000 sites are protected by a specific protection mechanism that aims to assess the environmental impact of all projects likely to have significant negative effects on the conservation of a site. Projects that have such negative effects must only be authorised if they are justified by overriding public interest. In addition, the Birds and Habitats Directives establish minimum criteria for the hunting of endangered species (for a full discussion of the Directives, see Chapter 1).

There are four reasons why the Natura 2000 Directives are very appropriate cases for a study of public interest group litigation. First, nature conservation policy is in general a classic example of an area of diffuse interest that is plagued by collective action problems. In Olson's rational choice terms, the loss of biodiversity in Europe, for example, does not affect people so directly and intensively that they would invest significant resources and start to litigate for the protection of endangered species. Public interest groups, in this case environmental organisations, are necessary to guarantee judicial protection if the competent authorities fail to do so.

Second, the Natura 2000 Directives created ample opportunities for the judicial enforcement of EU law. In the mid 1990s, when the Directives should have already been fully implemented, France, Germany and the Netherlands still had severe implementation problems. In all three countries, environmental organisations enjoyed at least a minimum level of access to the national courts, and so they had a viable opportunity to use litigation as an enforcement instrument of European law. Furthermore, the Directives contained several provisions that fulfil the criteria for being directly effective. Therefore, the legal requirements for litigation – implementation problems, directly effective provisions and access to the courts – were all met. I doubt whether there are many other environmental directives that

would fulfil all these criteria in all three countries.[23] One of my main concerns from the beginning of my research was to focus on cases that are not explained by very obvious reasons. If the national law granted more environmental protection than European directives, if environmental organisations did not enjoy at least some access to the courts, and if the directives did not contain directly effective provisions, it would simply be evident that litigation could not logically occur and would thus have no effects. It was therefore crucial to find cases that would allow public interest group litigation to actually occur. Therefore, the explanation of the differing effects of litigation can focus on socio-legal factors even in those cases where litigation had no effects on the implementation of EU law.

Third, the European Commission took its role of 'guardian of the Treaties' very seriously and put considerable pressure on all countries to implement the Directives correctly by initiating several infringement proceedings. This fact is important, for if the Commission had not been active in all countries to a roughly equal extent, it could have been that pressure from the Commission rather than litigation was the main factor behind a country's final compliance. As the effect of this alternative explanatory variable remains constant across all cases, the differences in the implementation process can more easily be traced back to litigation. This does not, however, solve the methodological problem that I have to deal with two possible explanations at the same time – litigation and the Commission's actions – for the countries' eventual compliance. No doubt, the research design of my study would have been better if I had been able to analyse the differing effects of public interest group litigation in cases where the Commission was not involved at all. Yet to find such cases appears to me impossible for practical reasons: as several authors point out, the Commission is utterly dependent on information from environmental organisations, which indeed send hundreds of complaints per year (see e.g. Knill 2003: 166). In view of this fact, it is very unlikely that the environmental organisations of different countries should turn to their national courts to enforce EU law without informing the European Commission. If the implementation problems are important, the Commission would very likely become active, but only if the implementation problems are important would environmental organisations start to litigate to enforce directly effective provisions. Nevertheless, this problem is mitigated by the fact that the Commission focuses above all on transposition problems that can be comparatively easily identified. When it comes to application problems, the Commission has repeatedly held that they should be better dealt with in the national courts (European Commission 1999:

[23] To give an example, the Directive on particulate matter (Council Directive 1999/30/EC of 22 April 1999 limiting values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air), which also created huge implementation problems, could not be used as a case given the fact that environmental groups in Germany only enjoy legal standing on issues strictly related to nature conservation matters, but not on broader environmental issues such as air pollution.

47-48, 2000b: 75-76). Therefore, the Commission's action will affect the application of the Natura 2000 Directives significantly less, and thus make it easier to assess the effects of public interest group litigation on their application. Finally, it should not be forgotten that my main research question is not whether public interest group litigation or the enforcement actions of the Commission are more effective instruments to guarantee the safeguarding of EU law. If this were the case, I would have had to focus on cases where only litigation and only actions of the Commission had occurred. However, as I am focusing on explaining differing effects, the actions of the Commission are 'just' an alternative explanatory factor that needs to be taken into account in the empirical analysis.

Fourth, the Directives allow the identification of temporal changes. The Birds Directive entered into force as early as 1981. Although the creation of a coherent network of protection sites only started with the Habitats Directive, the Birds Directive already contained the obligation to designate protection areas for endangered birds. By focusing on the Natura 2000 Directives, I am covering a time span of 25 years. This allows me to identify possible temporal changes that may have occurred with regard to litigation. In this respect, it is appropriate to note that all the countries under study had already been members of the then EEC when the Birds Directive entered into force. In principle, their competent authorities and environmental organisations have all had the same experience with regard to the implementation of directives.

As has already been said, I am analysing four cases of public interest group litigation. Three concern the site protection regime of the Natura 2000 sites and – indirectly – the creation of the Natura 2000 network in all countries. The last only concerns the implementation of the bird hunting regime as established by the Birds Directive and the subsequent interpretations of the ECJ's rulings in France. The reason I do not analyse this case in the other countries is simple: hunting issues neither created particular implementation problems nor were they a priority of environmental organisations. Besides Italy, France is the only European country of the 'old' 15 Member States where hunting wild and migratory birds is still an important issue. Hunting in Germany and the Netherlands, by contrast, has never reached the same level as in France.

5 The Natura 2000 Directives

The goal of this chapter is to give an overview of the Natura 2000 Directives, the ECJ's case law, and the timetable for their transposition. I focus in particular on the hunting dates of wild birds, the site protection regime of the Directives and the obligation to designate Natura 2000 sites. As will be seen, both directives are closely intertwined with regard to these issues, which explains that litigation on the site protection regime of these two Directives in three countries only amount to three real case-studies and not six.

5.1 The Birds Directive and Hunting Dates

In the 1970s, Dutch and German citizens campaigned the European Commission and the European Parliament for stricter legislation regarding the protection of wild birds. Despite strong initial reservations of Italy and France, the "Directive 79/409/EEC on the conservation of wild birds" (Birds Directive) was adopted in April 1979 under the French presidency, after eight years of preparations and negotiations (Fairbrass/Jordan 2001: 509-510; Davies 2004: 120-121; Lenschow 2005: 307).

Besides establishing a specific site protection regime (see below), the Birds Directive contains various provisions regarding the protection of species. Most importantly for the focus of this study is the restriction of hunting dates. Yet the Birds Directive itself does not prescribe particular hunting dates, but only contains general requirements for the setting of the hunting period for wild birds. First, it states in the first three paragraphs of Article 7 that only those species listed in Annex II of the Directive may be hunted in some or all Member States under national legislation. Second, it states in paragraph 4 of the same article that the Member States are obliged to "see (…) that the species to which hunting laws apply are not hunted during the rearing season nor during the various stages of reproduction. In the case of migratory species, [the Member States] shall see (…) that the species to which hunting regulations apply are not hunted during their period of reproduction or during their return to their rearing grounds." In other words, the hunting period for wild birds must be set in such a way that it neither extends to the rearing or reproduction phase for wild birds, nor to the time when migratory birds move to their breeding areas. The Directive does not explain how

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the start and end of these periods are to be identified. This is necessary, however, as various scientific methods exist to do so. The task to tackle this problem was given to the so-called 'Ornis-Committee'. It was created by Article 16 of the Directive in order to prepare the regular 'technical' update of the Directive's Annexes according to the conservational status of endangered wild birds. The Committee is composed of representatives from the Member States and the Commission. With regard to the identification of the opening and closing of hunting dates, the Committee adopted a '10% method': endangered birds should not be hunted if 10% of a bird species had started to migrate or had entered their period of reproduction. However, the opinion of the Committee was not legally binding.

In an infringement proceeding against Italy, the ECJ had for the first time the opportunity to give its interpretation on the hunting dates of the Birds Directive. Italy was brought before the Court because it had been accused of allowing too long hunting periods. In fact, under Italian law, some wild birds could also be hunted during their phases of reproduction and migration. In January 1991, the ECJ found this incompatible with the Directive and established the principle of complete protection, which guided all its following judgments on the issue of hunting dates. The Court held that "the second and third sentences of Article 7 (4) of the Directive are designed to secure a complete system of protection in the periods during which the survival of wild birds is particularly under threat" (paragraph 14). As a result of this requirement for complete protection, it would be incompatible with the Directive to allow the hunt on wild birds on the basis that only a certain percentage of a species had entered the phase of reproduction or migration. In other words, in order to guarantee the complete protection, all birds of a given species had to be protected from the moment they started their phase of reproduction or migration. This meant a considerable sharpening of the Directive, as the allowed hunting period had to be confined strictly to those months in which neither the reproduction nor migration of birds took place.[24]

Three years later, in January 1994, the ECJ reconfirmed the principle of complete protection and refined it with regard to the method used to identify the phase of reproduction and migration. The first instance administrative court of Nantes had sent three questions for a preliminary ruling that were raised during a proceeding on the setting of closing dates for hunting by the Prefects of Maine-et-Loire and of Loire-Atlantique.[25] The court asked, first, whether the closing date for the hunting of migratory birds should be fixed as the date of the commencement of pre-mating migration or the varying date of commencement of migration; second, whether the staggering of the closing dates for hunting seasons by reference to

[24] ECJ C-157/89 [1991] Commission v Italy.

[25] ECJ C-435/92 [1994] Association pour la Protection des Animaux Sauvages and others v Préfet de Maine-et-Loire and Préfet de Loire-Atlantique.

individual species is compatible with the Directive; and third, whether the hunting dates could be set differently in the French départments. In its ruling, the ECJ followed the opinion of the advocate general.[26] The Court repeated literally its principle of complete protection by stating that "Article 7 (4) of the Birds Directive is designed to secure a complete system of protection in the periods during which the survival of wild birds is particularly under threat" (paragraph 9). Therefore, also the methods used to identify the beginning and end of the stages of reproduction and the phase of migration had to guarantee such a complete protection. It explicitly held that methods fixing the closing date for hunting by reference to the period during which the migratory activity reaches its highest level are incompatible with the Directive, as well as methods whose object or effect is to deny the complete protection to a certain percentage of protected wild birds. In other words, once the first birds of a species started its phase of reproduction or migration, their hunt had to be forbidden. By doing so, the ECJ rejected the 10% method adopted by the Ornis-Committee as incompatible with the requirements of the Birds Directive. This led to the second question: as the phase of reproduction or migration differs across different species, was the staggering of hunting dates compatible with the Directives in order to allow the hunt of individual species? The Court answered in principle in the negative, for the disturbance caused by hunting a specific species would also seriously harm other birds that were already under the protection of the Directive. In addition, the risk of confusion would be too serious. However, the ECJ admitted that scientific evidence could prove that no risk of disturbance or confusion existed. If this were undoubtedly the case, the staggering of hunting dates would be compatible with Article 7. Yet, as the general advocate made clear, the burden of proof was on the Member State that allowed staggered hunting dates (see paragraph 25 of its opinion). Finally, the Court held that different hunting dates may exist for different regions, as long as the complete protection of the wild birds is not jeopardised.

With these rulings that were later reconfirmed[27], the ECJ considerably clarified and sharpened the hunting regime of the Birds Directive. It is very likely that the Member States neither wanted nor anticipated such a strict restriction of hunting dates when they agreed on the Birds Directive, given the fact that hunting issues were still an important issue particularly for 'southern' Member States in the 1980s. Also, the design of the Birds Directive is intended to allow ample possibilities for Member States to derogate from the hunting restriction by the use of annexes for different species. These annexes enlist those species that may be hunted, either in all or only some Member States, or whose hunt requires a notification to the

[26] See Opinion of Mr Advocate General Van Gerven, 21.9.1993, Case C-435/92.

[27] See ECJ C-38/99 [2000] Commission v France and ECJ C-182/02 [2003] Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement.

Commission. In addition, all annexes are regularly updated and are thus rather easy to amend if a Member State feels the need to do so. Be it as it may, the interpretation of the Directive given by the ECJ significantly raised its protection level with regard to the possible hunting dates for wild birds.

5.2 The Site Protection Regime of the Birds Directive

The goal of the Birds Directive is to protect, regulate and manage all naturally occurring wild birds in the territory of the Member states, including their eggs, nests and habitats. In order to achieve this goal, the Directive establishes a particular site protection regime. First, as laid out in Article 4 of the Directive the Member States are obliged to designate protection areas for wild birds, called "Special Protection Areas" (SPAs). This obligation covers all those particularly endangered wild birds listed in Annex I. Compared to the Habitats Directives (see below), the designation process is straightforward: "Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of [the Annex I species]" (Article 4 [1]). As will be discussed below, the ECJ interpreted this obligation narrowly, leaving almost no leeway to the Member States as regards the sites to be designated. The second protection mechanism of the Birds Directive concerned the protection of designated SPAs. Article 4 (4) stated that "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 (…)." Surprisingly, the Directive itself did not allow for exceptions of this general rule. However, after the ECJ had given a strict interpretation of this provision, the Member States decided to amend the Birds Directive through the Habitats Directive (see below). Article 6 (4) of the latter directive states that projects for "imperative reasons of overriding public interests, including those of a social or economic nature" are allowed to be carried out even if they will have negative effects on wild birds living in SPAs. Article 7 of the same directive released the Member State from the stricter obligation of Article 4 (4) of the Birds Directive.

The deadline for transposition of the Birds Directive was very clear: until the 7 April 1981, the Member States had to transpose the Directive, both as regards the designation of SPAs as well as the implementation of species and sites protection measures.

5.2.1 The ECJ's Case Law on the Birds Directive

The ECJ had several times the opportunity to clarify the provisions of the Birds Directive. As regards the designation of SPAs, the ECJ ruled that the discretion of

Member States regarding the selection of appropriate sites for designation is very limited. Only scientific and ecological requirements are allowed to be taken into account. Economic or recreational reasons cannot justify that a scientifically appropriate area is not designated as a SPA.[28] In order to determine whether an area has to be designated, the Court followed the approach of the European Commission by accepting the sites listed in the "Inventory of Important Bird Areas in the European Community" as a very strong indicator for the appropriateness of a site for designation.[29] BirdLife International, an international association for the protection of birds, and the Commission had issued jointly this inventory (European Commission 2000b: 88). It contains all ecologically important sites for birds, called Important Bird Areas, and is regularly updated. Following the reasoning of the Court, Verschuuren argues that if a Member State had failed to designate such an important bird area as SPA, national courts can apply the site protection measures of the Birds Directive directly (2003: 314).

Another crucial question that appeared before the ECJ concerned the conditions under which projects that are likely to have a significant negative effect on designated SPAs may be authorised by the competent authorities. Again, the ECJ interpreted the Birds Directive narrowly and excluded economic or recreational reasons. Only those interests superior to the protection of wild birds allow the derogation of an existing SPA, such as the protection of human life.[30] However, this position proved to be unacceptable for several Member States, in particular the UK. At the time the Court ruled on the issue of possible modifications of SPAs, negotiations on the Habitats Directive were taking place. The Member States used this opportunity and decided to amend the Birds Directive indirectly as they adopted the Habitats Directive (Freestone 1996: 237; Davies 2004: 132-133). As has been noted above, imperative reasons of overriding public interests, which may also include economic and social reasons, now allow the authorisation of projects even if they have a negative effect on existing SPAs.

However, it needs to be highlighted that the Habitats Directive only dealt with already designated SPAs. But what happened to 'factual SPAs', i.e. those SPAs that the Member States had failed to designate although they would have been obliged to do so in view of the high ecological importance of these sites? In 2000, the ECJ continued to interpret European nature conservation law strictly: if a Member State had failed to designate a SPA under the Birds Directive, it could not derive an advantage for its failure to fulfil its obligation. Therefore, in such cases, the stricter

[28] ECJ C-355/90 [1993] Commission v Spain (*Santoña*), ECJ C-3/96 [1998] Commission v Netherlands; ECJ C-44/95 [1996] Regina v Secretary of State for the Environment, ex parte: Royal Society for the Protection of Birds (*Lappel Bank*).

[29] ECJ C-3/96 [1998] Commission v Netherlands.

[30] ECJ C-57/89 [1991] Commission v Germany (*Leybucht*); ECJ C-44/95 [1996] Regina v Secretary of State for the Environment, ex parte: Royal Society for the Protection of Birds (*Lappel Bank*).

provisions of the Birds Directive would still apply, regardless of Article 7 of the Habitats Directive amending the Birds Directive.[31] This gave the Member States an incentive to designate all appropriate sites as SPAs in order to enjoy the lower protection regime of the Habitats Directive.

5.2.2 The Protection Regime of the Habitats Directive

The "Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora" (Habitats Directive) extends the idea of the Birds Directive to other species than wild birds. It creates the goal to establish a coherent network of protection sites for endangered species, called 'Natura 2000 Network'. This network is composed of both sites designated under the Birds and Habitats Directive. The deadline of the legal transposition of the Directive's provisions was on 10 June 1994. A special timetable was set up for the designation of sites (see below).

Compared to the Birds Directive, the Habitats Directive is much more detailed. The Habitats Directive differentiates between endangered species and habitats[32] according to their conservation status. The Directive applies to those habitats and species that are enlisted in Annex I (habitats) and Annex II (species). These annexes also contain particularly endangered habitats or species, so-called priority habitats or species that are covered by a stricter protection regime.

As regards the protection of species, the Habitats Directive does not follow the Birds Directive. The latter starts by establishing a general protection regime for all wild birds and then allows certain derogations. In contrast to this approach, the Habitats Directive enlists in Annex IV all animal and plant species to which the Directive applies. For these species, the deliberate killing, destruction or sale is prohibited (Article 12 and 13). The Member States may allow the exploitation of those species contained in Annex V, unless this does not endanger their conservation status (Article 14). However, Article 16 states that the Member States may derogate from the protection regime, provided that there is no satisfactory alternative, under the following conditions:

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;
(b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;
(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic

[31] ECJ C-374/98 [2000] Commission v France (*Basses Corbières*).
[32] Article 1 of the Habitats Directive defines natural habitats as "terrestrial or aquatic areas distinguished by geographic, abiotic and biotic features, whether natural or semi-natural".

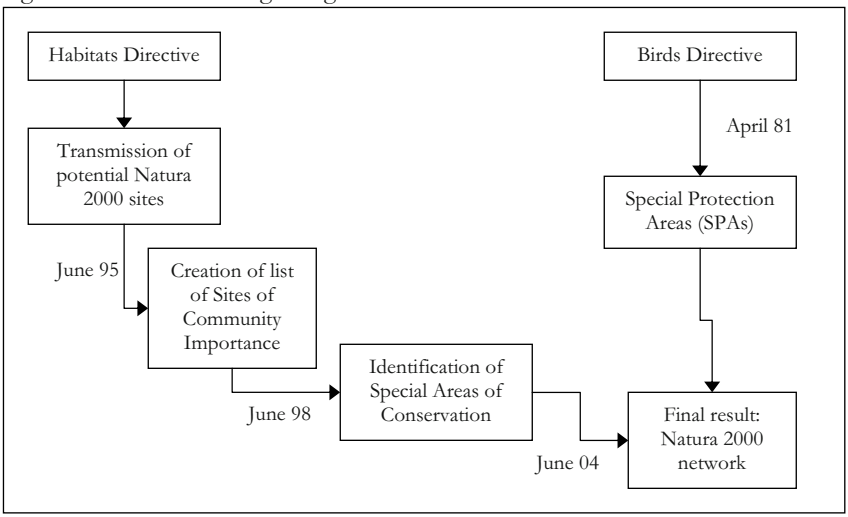
nature and beneficial consequences of primary importance for the environment;

(d) for the purpose of research and education, of repopulating and re-introducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants;

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.

Compared to the Birds Directive, the Habitats Directive allows more and wider exceptions to the species protection regime. The site protection regime of the Habitats Directive obliges the Member States to designate protection areas and to protect these areas according to Article 6. Regarding the designation of sites, the Habitats Directive demands the designation of "Special Areas of Conservation" for the habitats and species enlisted in Annex I and II. According to Article 4, and in contrast to the Birds Directive, the designation process proceeds in three stages (see Figure 4): in the first stage, each Member States creates a list of all national sites appropriate for becoming Natura 2000 sites. The list is set up on the basis of the scientific criteria laid down in Annex III. These 'potential Natura 2000 sites', officially called "proposed Sites of Community Importance", are then transmitted to the European Commission. This stage should have been concluded by 10 June 1995. In the second stage, the Commission creates a draft list of the most suitable sites in order to create the coherent Natura 2000 Network. The sites that are included in this list are called "sites of Community importance" and are identified in accordance with the Member States. According to Annex III Stage 2 (1), all identified sites that host priority habitat types or species will be considered as such sites. This list should have been adopted by 10 June 1998. In the third stage, each Member State officially designates the identified Natura 2000 sites under national law. This must be done within six years at most after the identification of a site as SCI. However, as Article 4 (5) states, the site protection measures of the Habitats Directive already apply identified Natura 2000 sites. If the Commission holds the opinion that a national list fails to mention important sites hosting a priority habitat type or priority species, a bilateral consultation procedure starts. If the dispute remains unresolved, the Council takes a decision by unanimity (Article 5).

Figure 4: Process of Designating Natura 2000 Sites



Finally, Article 6 of the Habitats Directive contains specific site protection measures for Natura 2000 sites. Its paragraph 2 – 4 reads 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.
> 3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.
> 4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.
> Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.

In other words, Article 6 (2) contains a general prohibition of the deterioration of designated protection areas. Once a project or plan is likely to have significant

negative effects on the conservation status of a protected area, an environmental impact assessment has to be carried out. If the results confirm such a negative effect, the general obligation is put on the competent authority to deny the authorisation of the plan or project (paragraph 3). Only if there are no alternatives to the plan or project itself – thus not only no alternative locations –, and only if there are overriding reasons of public interest such as the protection of human health, but also social or economic reasons, may the plan or project be authorised by the competent authority in spite of a negative impact assessment. At the same time, however, compensation measures need to be taken in order to guarantee the coherence of the Nature 2000 Network. Finally, if priority habitat types of species are affected, economic or social reasons can only justify the authorisation of a project or plan with a negative impact assessment report if the European Commission agrees upon it (paragraph 4).

5.2.2.1 The ECJ's Case Law on the Habitats Directive

Compared to the Birds Directive, the ECJ had fewer opportunities to rule on the Habitats Directive. It is therefore not surprising that there still remain important questions that have not ultimately been settled yet, such as what exactly are "significant effects", "alternative solutions", or "reasons of overriding public interest" (see Gellermann 2004: 721; Davies 2004: 120). At the same time, this means that the interpretation of the Directive by national courts becomes more important.

As regards species protection measures, the ECJ held that the Member States must prevent significant disturbance of species and the deterioration of their habitats. The use of mopeds and small motorboats, for example, near the breeding beaches of protected turtles for instance, and the construction of buildings on these breeding beaches is to be considered as a violation of the Directive's provisions.[33]

Regarding the selection of potential Natura 2000 sites that must be reported to the European Commission, the ECJ ruled that the Member States do enjoy a certain margin of discretion in selecting appropriate sites. However, they must use the scientific criteria laid down in Annex III. The ECJ summarised them as follows:

> (…) "the relevant criteria [for the identification of a potential Natura 2000 site] are the degree of representativeness of the natural habitat type on the site, the area of the site covered by the natural habitat type and its degree of conservation, the size and density of the population of the species present on the site, their degree of isolation, the degree of conservation of their habitats and, finally, the comparative value of the sites."[34]

[33] ECJ C-103/00 [2002] Commission v Hellenic Republic (*carretta carretta*).
[34] ECJ C-71/99 [2001] Commission v Germany, para. 25.

In consistence with its rulings on the Birds Directive, the ECJ also held that only scientific criteria could justify that a site is not sent to the Commission as potential Natura 2000 site. Economic or recreational reasons are not to be taken into account.[35]

As regards the site protection measures, the ECJ clarified a number of issues in its ruling on the mechanical cockle fishing in the Wadden See (*Kokkelvisserij* ruling) of September 2004.[36] The Court ruled that the definition of plans or projects of the Habitats Directive is to be interpreted broadly, following the Directive on Environmental Impact Assessment.[37] The fact that an activity has been carried out since a long time and that requires each year a new authorisation by the competent authority does not exclude per se the obligation to carry out an environmental impact assessment. In addition, the ECJ held that if there is any risk that a project or plan, either individually or in combination with other projects or plans, could have a significant negative effect on a protected site, an impact assessment has to be carried out. This is in particular the case if such a plan or project is likely to undermine the site's conservation objectives. The effects of a plan or project are to be identified in the light of the best scientific knowledge available. Where doubts remain as to the absence of negative effects, the competent authority has to refuse the authorisation. This does not preclude, however, the justification of a project following the reasons listed in Article 6 (4). In other words, the Court interpreted Article 6 very strictly. It also held explicitly that Article 6 (3) creates direct effect.

The *Kokkelvisserij* ruling, however, only concerned already designated sites. Does the protection regime of Article 6 also apply to potential Natura 2000 sites, i.e. sites that have not been officially transmitted to the European Commission to become part of the Natura 2000 network despite their ecological value? In January 2005, the ECJ denied this and held that Article 6 (2-4) only applies to priority habitat types or species from the moment they have been identified for becoming Natura 2000 sites by the Commission. This does not mean, however, that such sites are without protection. On the contrary, the Court held that "Member States are, by virtue of the Directive, required to take protective measures appropriate for the purpose of safeguarding that ecological interest" (paragraph 29).[38]

To sum up, key aspects of the Natura 2000 Directives do satisfy the criteria for direct effect. On the one hand, the general obligation of the Birds Directive to

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[35] ECJ C-371/98 [2000] The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping Ltd.

[36] ECJ C-172/02 [2004] Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (*Kokkelfisvisserij*).

[37] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment.

[38] ECJ C-117/03 [2005] Società Italiana Dragaggi SpA and Others v Ministero delle Infrastrutture e dei Trasporti and Regione Autonoma del Friuli Venezia Giulia (*Timavo*).

forbid hunting during the phases of reproduction and migration is both unconditional and sufficiently precise and can thus be evoked before national courts. The same is true for the site protection regime of the Natura 2000 Directives, both Article 4 (4) of the Birds and Article 6 (3-4) of the Habitats Directive. The obligation to designate ecologically important areas as SPAs or to transmit them as potential Natura 2000 sites to the Commission, however, does not appear to satisfy the criteria for direct effect. Yet the designation of a site might be achieved indirectly: by enforcing the site protection regime, the area is as well protected as if it had been officially designated as Natura 2000 sites. In order to achieve legal certainty, the competent authorities might thus decide to designate the area right away.

Also, the ECJ had clarified a number of issues. However, its rulings often came long after the legal requirements of the Directives had already entered into force (see Table 3).

Table 3: Key Requirements of the Natura 2000 Directives and Dates of ECJ Rulings

Birds Directive – Hunting Dates	
Principle of complete protection for wild birds	January 1991
No percentage criteria for identification of hunting period Staggered hunting dates only on basis of scientific evidence	January 1994
Birds Directive – Site Protection Regime	
Deterioration of SPAs not lawful if for economic reasons	February 1991
Designation of SPAs only on basis of ornithological criteria	August 1993
Article 6 Habitats Dir. does not apply to non-designated SPAs	December 2000
Habitats Directive – Site Protection Regime	
Selection of potential Natura 2000 sites only based on scientific criteria	November 2000
Direct effect of Article 6 (3) All potential negative effects have to be assessed	September 2004
Article 6 does not apply for potential Natura 2000 sites	January 2005

The Court gave the key rulings concerning the hunting dates of the Birds Directive only about ten years after its entry into force. The same is true for the Directive's site protection regime. At the same time, however, national courts were confronted with concrete cases and they had to give a decision. Often, however, the ECJ had

not yet ruled on key provisions of the Directive. For example, the important *Kokkelvisserij* judgement was only given in September 2004. So during six years, national courts had no authoritative guidelines on relevant questions such as which projects or plans require an environmental impact assessment according to Article 6 (3), or what criteria such an environmental impact assessment has to fulfil. This underlines the importance to consider the interpretation of European law by national courts in order to explain the effects of public interest group litigation.

6 France

In this chapter, I discuss the judicial enforcement of the hunting dates of the Birds Directive and the site protection regime of the Natura 2000 Directives in France. I start with the issue of hunting dates: first, I give some preliminary remarks on the problem of identifying hunting dates 'objectively' and the general context for the implementation of the Birds Directive in France. Second, I analyse the initial transposition of the Directive and discuss the possibilities of French environmental organisations to influence public policy. As they did not have other options to enforce the Birds Directive, they turned to the French courts. Third, I analyse the case law of the administrative courts, both with regard to the supremacy of European law and the issue of hunting dates. Fourth, I discuss the reaction of the competent authorities to litigation and the late reaction of the European Commission that made France finally comply. Then, I turn to the site protection regime of the Directives: first, I give a brief overview of the implementation process and the compliance problems. Second, I discuss the reaction of French environmental organisations and, third, the interpretation given by the French courts on the Directives' site protection regime. Finally, I discuss the effects of litigation and the role of the European Commission for achieving compliance. I end the chapter with a discussion of the stage model's explanatory power against the background of the empirical findings.

6.1 The Setting of Hunting Dates

6.1.1 Preliminary Remarks: Scientific Evidence and Hunting Dates

Does the Birds Directive permit hunting before the 1st of September and after the 31st of January? This was the main question that French courts and the ECJ were confronted with when it came to the implementation of the Birds Directive's hunting regime. The Directive itself, more precisely its Article 7, does not prescribe clear hunting dates, but it obliges the Member States to protect wild birds during their periods of reproduction, dependence and, in the case of migratory birds, also during their rearing seasons. It is agreed that these periods are particularly crucial for the survival of endangered wild birds. Yet when does each period exactly start

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and end? And which method can be used to determine these dates? In France, there was – and still is – considerable disagreement on this point. On the on hand, environmental organisations argue for a complete protection of wild birds. This would restrict the hunting of wild birds from the 1st of September to the 31st of January at the latest. On the other hand, hunter organisations and the French competent authorities argue that hunting dates could be considerably longer, from mid-July to end of February. What complicates the issue is that both opinions can be justified on the basis of scientific reports. Depending on the methods used and the initial assumptions, the reports came to very different conclusions. As a result, both environmental organisations and hunters used those reports that were more supportive for their claims. Yet, if it cannot be 'objectively' established when the period of reproduction and migration of wild birds starts and ends, how can it be determined whether the Birds Directive had been correctly implemented or not? This question needs to be answered, as it is essential for a study focusing on the 'correct' implementation of European law.

I have to emphasise that I intentionally refrained from consulting biological literature in order to determine the 'correct' hunting periods myself. This is a political science analysis, not a natural science one. I decided to follow a strict 'rule of law approach': both the ECJ and French courts gave authoritative answers to the questions raised above, and they alone set the benchmark against which I 'judged' whether the Birds Directive had been correctly implemented or not. It might well be that – as hunter organisations had argued – the scientific studies used by the courts were not 'correct'. Yet I refrain from trying to give an answer to this. The courts had made clear that hunting had to respect certain periods. From the mid-1990s until 2005, they consistently held that in order to guarantee the complete protection of wild and migratory birds, hunting could not start before the 1st of September and had to stop on the 31st of January. These were the dates that had to be implemented in order to achieve compliance with the Birds Directive. Although the French courts extended this period for certain species of two weeks in 2005, it can be clearly shown that the French competent authorities did not comply with the Birds Directive for decades.

6.1.2 The Context for the Implementation of the Birds Directive

From the 1980s onwards, the general context of the hunting regulation and thus of the correct implementation of the Birds Directive was hostile. On the one hand, this stems from the fact that hunting had a very long tradition and was – and still is – deeply entrenched in rural traditions. Before the French revolution in 1789, hunting had exclusively been done by the nobles, and it was in fact a revolutionary act to give the right to hunt to the 'people'. It is telling in this respect that until the 1980s, the traditional opening of the hunting season was the 14th of July – the fall of

the Bastille – which illustrates how proponents of hunting were trying to relate hunting to the general development of the French republic (Interview Ligue ROC, 24.05.2006, 603-607). Yet, this does not mean that hunting had not been regulated. In fact, since 1790, hunting had been already confined to certain periods (Assemblée nationale 2000: 16-20; Lanord 2004: 207). So, although there had always been some regulation of hunting, it has become a symbol of rural traditions and life style. Although this link between hunting and tradition may be difficult to understand for outsiders, it is omnipresent in the discourse on hunting. In the words of a report of the Assemblé national, hunting of migratory birds "(…) ingrains in strong local traditions (…). It expresses a privileged connection between human beings and their natural environment, an element to which numerous hunters are extremely sensitive to"[39] (Assemblée nationale 2003: 9). To give two additional examples, the Syndicat nationale de la chasse, one of the main French hunting organisations opposed to the restriction of hunting dates, claims on its website that "[o]ur legitimate goal is the preservation of the way of life that is ours."[40] And the main political party representing hunters, called "Hunting, Fishery, Nature and Tradition" (*Chasse, Pêche, Nature et Tradition*), declares in its statutes that it is "(…) dedicated in particular to the protection of rural values and the interests of the rural world, as well as to the valorisation of traditional or cultural *activities on which the regional identities are based, in particular hunting and fishing*" (emphasis added).[41] Because of this strong symbolic charge, hunters had been – and still are – very sceptical towards the external regulation of their activity, in particular had this regulation been 'imposed' by 'urban technocrats' from Paris or, even worse, Brussels (see also Janin 1991: 53; Pinton 2001: 334; Alphandéry/Fortier 2001: 317). In the words of the French MEP, Mireille Almalan, "it is in France, without interference from Brussels, that decisions [to set hunting dates, R.S.] have to be taken."[42]

On the other hand, and related to the symbolic importance of hunting, hunting organisations still play an important role in French politics to this day. Several reasons account for this fact. First, hunters are still an important electorate with a

[39] "(...) [la chasse aux oiseaux migrateurs] s'enracine dans de fortes traditions locales (...). Elle exprime un lien privilégié entre l'homme et son environnement naturel, élément auquel de nombreux chasseurs sont extrêmement sensibles."

[40] "Notre combat est celui légitime de la préservation d'un mode de vie qui est le notre.", http://www.syndicatdelachasse.com/ (Rubrique: Notre But), 2.11.2007.

[41] "(…] il s'attache notamment à la défense des valeurs de la ruralité et des intérêts du monde rural, ainsi qu'à la valorisation des activités traditionnelles ou culturelles sur lesquelles se fondent les identités régionales, en particulier de la chasse et de la pêche.", http://www.cpnt.asso.fr/statuts/statut01.php, 2.11.2007.

[42] Europe Daily Bulletins, No. 6637 – 03/01/1996. Mireille Almalan gave her comments in the discussion of a proposal for an amendment of the Birds Directive by the European Parliament that intended to restrict the start of hunting.

considerable economic weight. In 1976, there were about 2.200.000 officially registered hunters (Interview Ligue ROC, 24.05.2006, 62). Although the number declined considerably, still about 1.360.000 hunters were registered in 2006, which is the highest number in the EU. In the same year, about 2.3 billion euro were spent for hunting and 3.100 fulltime jobs were directly created by national and departmental hunting bodies (Fédération Nationale des Chasseurs 2006; Federation of Associations for Hunting and Conservation of the EU 2003). Second, hunters are strongly organised in several semi-public and private hunting organisations that are able to mobilise their members when their interests are concerned. This was impressively demonstrated on 14.02.1998, when hunting organisations rallied about 150,000 people in Paris, demonstrating against the restriction of hunting dates (Alphandéry/Fortier 2001: 322). Third, hunting organisations also possess considerable resources, which is the result of an indirect public support: if somebody wants to hunt, he or she has to pay a specific hunting fee that goes directly to the local hunting organisation. In 1994, this fee was about 250 francs (about 40 Euro) per person and year (Interview FNE [Legal Expert], 854-866, see also Charlez 1999: 215). Given the importance of hunting and the influence of hunting organisations, it is not surprising that the French hunting regime was comparatively liberally regulated. This is best exemplified by the fact that, until 1999, even the right of property was overruled by hunting, because French law made it impossible for land owners to ban hunting from their property if it was smaller than 20 hectares (Charlez 1999: 205).

Given the above, it is not astonishing that hunting organisations were hostile towards the Birds Directive and pushed the French governments to obtain an amendment (see below). In addition, like environmental organisations, they also used litigation on an extensive basis. On the one hand, each time a lower court had restricted hunting dates, they appealed in order to get the judgement annulled or at least amended in second instance.[43] In addition, when an environmental organisation went to court, a hunting organisation often became a so-called 'affected party", meaning that it could provide the court with evidence on the issue of hunting dates.[44] For hunting organisations, it was crucial to ascertain that the

[43] See e.g. CE, 29 juin 1990, Secrétaire d'État chargé de l'Environnement et Union nationale de défense des chasses traditionelles, n° 101217; CE, 29 janvier 1992, Fédération départementale des chasseurs de l'Ain, n° 122494; CE, 12 février 1993, Fédération départementale des chasseurs de la Correze, n°115468; TA de Nantes, 21 mars 1996, Association pour la protection des animaux sauvages et du patrimoine naturel et Fédération départementale des chasseurs de la Mayenne et de la Sarthe, n° 95354, 95205, 96699); CE, 12 juin 1998, Fédération départementale des chasseurs de la Gironde, n° 129044; CAA de Paris, 24 septembre 1998, Ministre de l'environnement et Fédération interdépartementale des chasseurs de Paris, n°97PA00918, 97PA00932); CE, 25 janvier 2002, Union nationale des fédérations départementales des chasseurs, n° 225769

[44] See e.g. TA d'Amiens, 8 février 1996, Association pour la protection des animaux sauvages et du patrimoine naturel, n° 952132); TA d'Amiens, 17 décembre 1996, Association pour la protection des

courts had the 'right' evidence, as different scientific opinions existed with regard to the opening and closing of hunting dates. On the other hand, in 1990 the French national hunting federation even tried to contest the legality of the Birds Directive itself before the Conseil d'État by arguing that the then European Economic Community had not had competence in environmental matters. The Conseil, however, rejected this and upheld the legality of the Directive.[45]

6.1.3 The Initial Transposition

When the Birds Directive was signed under the presidency and the full approvable of the French government in 1979, no specific transposition measure was taken with regard to the setting of hunting dates. Besides the opposition of hunting organisations, this may be related to the fact that just three years before, in 1976, a new French nature conservation law had entered into force that already contained key aspects of the Directive.[46] The law generally prohibited the hunting of protected birds and stated that the list of huntable birds was to be issued by ministerial decree. According to the European Commission's first implementation report on the Directive the hunting dates where set in such a way that no protected birds were allowed to be hunted during their phases of reproduction or migration (European Commission 1989: 49). It needs to be emphasised that this report was solely based on information submitted by the Member States. However, in view of the contentious development of the setting of hunting dates in the next decades, it is very unlikely that the information supplied was correct.

According to Janin, the first 'real' transposition took place in 1986 (1991: 55). The decree n°86-571 set the general opening and closing date for the hunting season by the 1st of September and the 29th of February, respectively.[47] Yet it also specified longer hunting dates for certain species that extended until the middle of July. In addition, the competent minister could set the opening date for hunting water fowls far earlier in some regions than the general opening date. According to the European Commission's second implementation report, "[t]he opening dates for hunting seasons take account of the development and dependence of the young. The closing dates are based on the different migration periods using data collected at regional level" (European Commission 1993: 71). Again, this report was based on

animaux sauvages et du patrimoine naturel, n° 961678; CE, 3 décembre 1999, Association ornithologique et mammalogique de Saone-et-Loire et autres, n° 199622, 200124; CE, 12 février 2001, France Nature Environnement, n° 229797 229876 230026;

[45] CE, 29 juin 1990, Secrétaire d'Etat chargé de l'Environnement et Union nationale de défense des chasses traditionelles, n° 101217

[46] Loi n°76-629 du 10 juillet 1976 relative à la protection de la nature, J.O.R.F, 13 juillet 1976, 4203.

[47] Décret n°86-571 du 14 mars 1986 fixant les modalités d'ouverture et de cloture de la chasse, J.O.R.F., 18 mars 1986, 4521.

governmental information and, as the course of events will show, was definitely incorrect. In fact, in 1988 the Conseil d'État, the French supreme administrative court, gave its first ruling at the request of an environmental organisation on the compatibility of French hunting dates and the Birds Directive, which led to the partial annulment of the former.

6.1.4 French Environmental Organisations and Litigation

How did environmental organisations react to the too long hunting periods? Before giving an answer to this question, some general remarks on the French environmental movement and the access to the courts for environmental organisations are necessary.

In stark contrast to the 'strength' of the hunter movement are French environmental organisations that only display a weak organisational capacity. According to Stevens, the environmental movement can be characterised as "fragmented and ineffectual" (1996: 296). Although established parties reacted to the new sensitivity to 'green' issues by incorporating environmental concerns quickly into their political programmes (Jansen 2001: 129-130), only a comparatively low percentage of people are members of environmental organisations (Immerfall 1997: 152-154). Also, members of such organisations openly admit that French environmental organisations have a very limited political weight (Interview FNE [Legal Expert], 849-541; Interview Manche Nature, 320-323, 603-610).

On the national level, almost all environmental organisations are members of "France Nature Environnement" (FNE), with the notable exception of Greenpeace and WWF. FNE is organised in a very decentralised way, as it is built around several thematic bureaus and 'networks' that are spread all around France. The 'network biodiversity' (Réseau milieux naturels) is for instance situated in Strasbourg, whereas the 'network law' (Réseau juridique) is based in Le Mans. The main task of the networks is to cover legislative developments on the national level and to inform their member organisations. It was an intentional decision to structure FNE in such a decentralised way in order to be as close as possible to the member organisations. The disadvantage of this set up is, however, a rather complicated structure that makes public campaigns more difficult (Interview FNE [Réseau Milieux Naturels], 91-118). Each network usually employs one or two people in their late 20s or 30s, and the fluctuation of employees is rather high (Interview FNE [Réseau Juridique], off records). Besides FNE, there are some other one-issue environmental organisations dedicated to the restriction of hunting activities on the national level, such as the Ligue pour la protection des oiseaux (league for the protection of birds) or the Ligue ROC. The latter organisation has only one fulltime employee and some voluntary supporters in order to deal with the day-to-day work (Interview Ligue ROC, 148-155). On the regional and local level, French environmental

organisations differ very much with regard to the structure and strategies they pursue. Yet most organisations only possess very limited resources. To give an example, the budget of Manche Nature, the main environmental organisation of the département Manche in southern France, was about 53.000 Euro in 2006 (Manche Nature 2007). At the time of the interview, its legal activities were nearly exclusively based on the expertise of a voluntary member of the organisation with legal training (Interview Manche Nature, 26-64).

To sum up, the possibilities of French environmental organisations to push for the correct implementation of the hunting dates as prescribed by the Birds Directive were very limited. Public campaigns or lobbying could have only been done on a very limited scale in view of the few resources. In addition, and more importantly, it would have been very unlikely that such activities would have been able to overcome the strong resistance of the hunting organisations to restrict hunting. Asked whether other viable strategies than litigation were available to achieve the correct implementation of the Directive, a senior member of the Ligue Roc, who had been active already in the 1980s, replied: "No, there were no others. There were no others. It was the only [strategy]." (Interview Ligue ROC, 623-626).[48]

From a legal perspective, France offers interest groups a very open and long established access to the courts. Already since 1901, interest groups could turn to the courts. The precondition is to found an interest group. In order to do so, it is simply necessary to declare the existence of the group at the préfecture, the local administrative authority. Once this has been published in the French official journal, an interest group enjoys access to the courts when its general interests as set out in its statutes are concerned. With regard to environmental issues, French courts have interpreted this provision in an encompassing way, with the result that in principle nearly every environmental organisation may litigate against any public act that concerns an environmental issue (Boré 2000). In 1995, access to the courts was widened even further by granting environmental organisations access to the courts in criminal matters. They can now claim an indirect violation of their rights, for example for the illegal pollution of the environment, which may lead to financial compensation. Already before that date, they could represent claimants in civil court proceedings in order to obtain compensation for having suffered direct prejudice (Dutheil de la Rochère 1999: 223-234). Also in 1995, the territorial restriction of legal claims was abandoned so that environmental organisation can become active in every region of France. The court fees are very low and they can be refunded if the case is won. It is also possible to apply for legal aid, although this plays only a minor role (Prieur/Makowiak 2002: 206, 217-219). Normally, the losing party has to

[48] RS: "Et à l'époque, il n'y avait pas d'autre stratégie possible pour obtenir des dates de chasses plus restreintes que la voie juridique? " Ligue ROC : "Non, il n'y en avait pas d'autre. Il n'y en avait pas d'autre. C'était la seule."

pay the fees of the winning party. This does not apply, however, if a public body has won the case, as the costs of the State are not refundable. There is thus no risk for an environmental organisation to start litigation (Interview FNE [Legal Expert], 896-899). In addition, no officially accredited lawyer is necessary in proceedings before lower administrative courts (*tribunaux administratif*). Only since 2003, the formal presence of such a lawyer is required in proceedings before the Conseil d'État. Yet as it is a written procedure, it is sufficient that a lawyer signs the submission to the court, and therefore the costs for litigation remain low if the organisation can rely on the voluntary help of lawyers (Interview Manche Nature, 537-543). To sum up, legal access to the courts is very open for environmental organisation. In the words of the legal expert of FNE, litigation "(…) is advantageous. Open access, no risk" (Interview FNE [Legal Expert], 899).

Nevertheless, practical reality is often in contrast to the mere legal situation, for open access only exists for those who have a sufficient legal training to use it. If an environmental organisation cannot rely on the voluntary support of lawyers or legally trained members, litigation is often not a viable option. Yet this voluntary support is mostly the result of idiosyncratic circumstances, such as that a person had been already actively involved in an environmental organisation before she started to study law (Interviews FNE [Legal Expert], 727-735; Manche Nature, 26-35). Due to the lack of resources, it is very rare that an environmental organisation is able to employ a legally trained person (Interviews Manche Nature, 40-55; FNE [Legal Expert], 788-799). This might occur, such as in the case of the main environmental organisation in the département Alsace, Alsace Nature, but it is clearly an exception to the rule (Interview FNE [Legal Expert], 799). And the fact that Alsace Nature employs legally trained members is above all the result of a close cooperation with the University of Strasbourg III, which offers a Masters degree in environmental law. This Masters degree requires an internship that can also be done at an environmental organisation, most often at Alsace Nature (Interview Alsace Nature, 23-29). Also, environmental organisations at the national level can only rely on limited legal support. The legal network of FNE, the réseau juridique, only employs two legally trained persons, whose task is to coordinate the network, follow legislative developments, inform the member organisations of FNE, and give legal advice. Thus, little time remains for litigation. If FNE goes to the courts, the real legal work is done by the voluntary members of the legal network, who often write the submission during their weekends (Interviews FNE [Réseau Juridique], 35-86; Alsace Nature, 29-43, 541-543, FNE [Legal Expert], 757-764). If a local environmental organisation wants to turn to the courts, they can only obtain initial legal advice from the legal network of FNE. Other support mechanisms for

litigation do not exist in France (Interview Manche Nature, 85-96).[49] As a result, the environmental organisation has to resort to a 'normal' lawyer's office. There are, however, only very few lawyers who are specialised in French and European environmental law. This often leads to disappointing results in the legal proceedings as the legal advice is not as good as it could have been (Interviews FNE [Legal Expert], 735-750; Manche Nature, 558-572). In addition, the costs rise tremendously when external legal advice needs to be consulted. Alsace Nature reported that they paid 5000 Euro the last time they had to consult a lawyer (Interview Alsace Nature, 547-552, see also de Sadeleer/Roller/Dross 2005: 61). This can become an insurmountable obstacle for smaller environmental organisations. This lack of legal expertise leads Braud to the conclusion that litigation by environmental organisations is far less effective as it could be, even though they remain the main actors in litigation on environmental law. The reason for this inefficiency is a result of the fact that too few members of these organisations are legally trained in order to strategically litigate over a longer period of time. If they turn to the courts, they pursue short-term interests without aiming at the favourable evolution of the administrative case law. In most cases, litigation by environmental organisations only occurs spontaneously without strategic considerations (Braud 1997: 408-409).

6.1.5 The Interpretation of the Birds Directive by French Courts

6.1.5.1 The Conseil d'État and the Supremacy of European Law

In order to enforce the hunting dates of the Birds Directive through courts, French administrative courts had to accept both the doctrine of supremacy and direct effect of EU law. This was, however, a cumbersome process that was only concluded in the mid 1990s.

When the ECJ declared the supremacy of European law and the doctrine of direct effect, the French Conseil d'État was one of the most resistant supreme courts in the then EC that openly rejected its loss of sovereignty. This may be related to the self-understanding of the Conseil d'État that Provine describes in the following words:

> "The brains of the French administrative state is the [Conseil d'État], a venerable institution with an enviable record of stability, prestige, and power that extends back to the earliest days of the French republic. The [Conseil] attracts the most talented, most ambitious graduates of France's Ecole Nationale d'Administration, an exclusive graduate school of public administration that educates virtually all of the government's top administrative officials and many of its politicians. The [Conseil

[49] There exists a French Society for Environmental Law (Société Française pour le Droit de l'Environnement), but it is only an academic society that does not offer legal assistance for environmental organisations (Interview Manche Nature, 85-96).

> d'État] is a sought-after assignment because of its centrality and significance to the national government. It is an inside player, assisting the President, and sometimes the Parliament, in preparing legislation and examining it for constitutional defects. It is secretive and influential in this aspect of its operation." (Provine 1996: 187).

As the judges of the Conseil d'État had the same educational background as the French political elite, it becomes clear that one of their key concerns was to guarantee the sovereignty of France. In the words of an interviewee, the Conseil d'État considers itself as the "guardian of the public order"[50] (Interview Manche Nature, 397). In this role, the Conseil could not but resist the attempt of the ECJ to establish itself as the most supreme court of all supreme courts in the then EC (see also Knapp/Wright 2001: 384-389).

Besides the self-understanding of the Conseil d'État, it has to be emphasised that the French legal doctrine was also traditionally hostile regarding any review of laws by courts. This is strongly related to the deeply entrenched French scepticism towards the role of judges. Based on Rousseau's idea of the "volonté générale", the will of the people is seen as the most supreme authority. The parliament represents this will and translates it into laws. Courts are only perceived as the 'mouth' of the law, and thus the will of the people, with only very little freedom in interpreting the law. In theory, they should not even interpret the law at all, but strictly apply it. Under no circumstances are courts allowed to annul or amend laws, as this would mean that they would challenge the most supreme authority to which they have to subordinate (Rousseau 2000: first and second 'book').[51] From the French revolution until the 5th French republic, this was the very leitmotiv for the role that courts were supposed to play (Knapp/Wright 2001: 380-384; Turpin 1999: 127-134). And, of course, this perception was everything but receptive to the idea that normal judges could decide to set aside national law for contradiction with European provisions.

From a legal perspective, the main question with regard to the supremacy of European law was the following: could a national law that had been taken after the entry into force of an international treaty and that contained provisions in contradiction to this international treaty be contested before national courts? According to the French constitution, international treaties were indeed superior to national law. Therefore, the question did not arise for all those laws that had been taken prior to the entry into force of the treaty, as they were abrogated by an act of the parliament – the signing of the treaty. Yet what happened to laws taken after such entry into force (*lex posteriori*)? Following the established legal doctrine

[50] (…) "gardienne de l'ordre publique."

[51] It should be noted that according to Rousseau, the volonté générale cannot be represented indirectly by an elected parliament, but only by direct participation of all citoyens. French political theorists 'added' this element later (Turpin 1999: 128-129).

mentioned above, the new law would represent a new manifestation of the "volonté générale" and thus could not be bound by any predating legal statutes whatsoever.

The Conseil d'État was confronted with the supremacy of European law for the first time in 1968 when French importers contested the decision of the Minister of Agriculture to apply the French taxes and not the European ones on the import of Algerian semolina. Although the Conseil did not explicitly discuss the issue of supremacy of European law, it emphasised that the decision of the Minister was based on a law that had been legally adopted after the entry into force of the European Economic Community. Following the traditional legal reasoning, it held that the new law would block the application of the European provisions. The decision of the Minister of Agriculture was thus founded.[52] With this ruling, the Conseil implicitly rejected the supremacy of European law and denied French courts to set aside national laws that had been adopted after the entry into force of the European treaties, even if the law was in contradiction to European provisions (Hecker 1998: 43-47; Alter 2001: 140-142).

With regard to the direct effect of directives, the Conseil d'État gave its so-called *Cohn-Bendit* decision in 1978. Daniel Cohn-Bendit, who had been expelled from France for his participation in the events of Mai 1968, challenged the expulsion order for being incompatible with the Directive on the abolition of restrictions on freedom of establishment and freedom to provide services.[53] The lower administrative court had postponed its final decision and had asked the ECJ for a preliminary ruling on the issue. The Conseil d'État, however, simply annulled the decision of the lower instance. It held that:

> "It follows clearly from [ex-]Article 189 of the Treaty of 25 March 1957 that if directives bind the Member States 'as to the result to be achieved' and if, to achieve the goals they define, the national authorities are required to adapt the legislation and regulation of the Member States to the directives that are destined to them, these authorities remain alone competent to decide the form in order to execute the directives and to specify themselves, under the control of the national judiciary, the appropriate means to give them effect in the national law. Therefore, *what so ever their precision may be* (…), directives are *not to be invoked by citizens* of these States to found a recourse *against an individual administrative act*" (emphasis added).[54]

[52] CE, 1 mars 1968, Syndicat général des fabricants de semoules, n° 62814.

[53] Council Directive 64/225/EEC of 25 February 1964 on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of reinsurance and retrocession

[54] (…) qu'il ressort clairement de l'article 189 du traité du 25 mars 1957 que si les directives lient les Etats membres "quant au résultat à atteindre" et si, pour atteindre le résultat qu'elles définissent, les autorités nationales sont tenues d'adapter la législation et la réglementation des Etats membres aux directives qui leur sont destinées, ces autorités restent seules compétentes pour décider de la forme à donner à l'exécution des directives et pour fixer elles-mêmes, sous le contrôle des juridictions nationales, les moyens propres à leur faire produire effet en droit interne. Qu'ainsi, quelles que soient d'ailleurs les précisions qu'elles contiennent à l'intention des Etats membres, les directives ne sauraient être invoquées par les ressortissants de ces Etats à l'appui d'un recours dirigé contre un acte administratif individuel." CE, 22 décembre 1978, Ministre de l'Intérieur c/ Cohn-Bendit, n° 11604.

With this ruling, the Conseil d'État openly challenged the interpretation of the ECJ on the direct effect of directives. It held that directives would only bind the Member States' authorities and could not create rights for individuals, regardless of their precision. This latter point was an explicit rejection of the ECJ's interpretation that directives could create direct effect if they were sufficiently precise.

In the next decades, however, the Conseil d'État incrementally amended its case law on the supremacy of EU law and the doctrine of direct effect.[55] The Conseil proceeded in two steps: The first step was to accept the supremacy of European law by refusing the competent authorities to take new decisions that would be in contradiction to pre-existing European law, including directives. It did so for the first time in December 1984 in a case that already involved the Birds Directive. Several environmental organisations had contested the decision of the Minister for the Environment to allow, under certain conditions, the hunting of protected birds in their period of migration for being incompatible with the Birds Directive. If the Conseil had followed the ECJ, it should have started to inquire whether Article 7 of the Birds Directive that prohibited the hunting of wild birds during their phases of reproduction and migration would be sufficiently precise to create direct effect. If the answer had been in the affirmative, the Conseil d'État would have been obliged to apply the European law directly on the case at hand. Yet the Conseil chose another strategy: faithful to its case law in *Cohn-Bendit*, it repeated word by word that it was up to the national authorities to transpose directives. But then it held that: "(…) these authorities are legally not allowed to take general administrative decisions that would be in contradiction to the goals defined by the directives under consideration".[56] Then the Conseil d'État recapitulated the obligations from Article 7 of the Birds Directive. It concluded that the decision to extend the hunting periods for a particular species to its phase of migration was incompatible with the goals of the Birds Directive. For this reason, it annulled the decision. Thus, although the Conseil had not accepted the direct effect of directives as demanded by the ECJ, its interpretation led to similar effects: if an administrative decision had been taken in contradiction to the goals of a directive, it would have to be annulled by the French administrative courts. In 1989, the Conseil d'État extended its doctrine. It held that the administrative authorities were not only obliged to abstain from taking new decisions in contraction to existing European law, but also to let existing national provisions subsist that were no longer compatible with EU rules. It thereby extended the scope of European law to

[55] For a seminal explanation for this development, see Alter (2001: 124-181). For a detailed legal analysis of this process, see Hecker(1998: 57-96).

[56] "(…) ces autorités ne peuvent légalement édicter des dispositions réglementaires qui seraient contraires aux objectifs définis par les directives dont il s'agit." CE, 7 décembre 1984, Fédération française des sociétés de protection de la nature et autres, n°41971, 41972.

administrative decisions that had been taken before the European law had entered into force.[57]

The Conseil d'État took the second step to accept the supremacy of European law in its ruling *Nicolo* in 1989. The case was brought forward by Mr. Nicolo after the elections to the European Parliament had been held. Mr. Nicolo had contested the compatibility of the national electoral law with ex-Article 227 (1) TEC. The question was not on the substance but whether the Conseil d'État would in principle be ready to check the compatibility of a law with an international treaty if the law had been adopted after the entry into force of the treaty. And it agreed: in the ruling, the Conseil simply held that "the [French] rules, as defined by the law (…), are not incompatible with the clear provision of [ex-]Article 227 (1) (…) of the Treaty of Rome.[58] So, although the Conseil had not explicitly accepted the supremacy of European law, it signalled that from now on it would review any law taken after the entry into force of an international treaty against the background of this treaty. It thereby abandoned its doctrine that the "volonté générale" could not be bound by predating legislative decisions and thus accepted the supremacy of European law.

However, the rulings of the Conseil d'État did not necessarily mean that it would now also fully embrace the doctrine of direct effect. Remember that in the ruling on the compatibility of hunting dates with the Birds Directive mentioned above, the Conseil explicitly focused on *general* administrative decisions, i.e. decisions containing abstract norms that are intended for an undefined audience. The administrative regulation of hunting dates is such a general decision as it is binding to all hunters in a certain region. In the *Cohn-Bendit* ruling, by contrast, the Conseil excluded the direct effect for *individual* administrative decisions, i.e. decisions that are directed towards a clearly identifiable group of legal subjects. Authorisations for particular projects, for example, are such individual administrative decisions. Although legal scholars repeatedly criticised this peculiar interpretation, the Conseil has not abandoned it until today (see Cassia 2006; Rideau 1996; Haïm 1995).

6.1.5.2 French Courts and the Setting of Hunting Dates

As has already been mentioned in the previous chapter, environmental organisation used their open access to the courts very soon after the entry into force of the Birds Directive in order to enforce its hunting regime. The legal background of litigation on hunting dates can be sketched briefly in the following terms: With the exception of the time when the hunting laws 1994 and 1998 were in force (see below), it was

[57] CE, 3 février 1989, Compagnie Alitalie, n°74052.

[58] "les règles [françaises] (…) ne sont pas incompatibles avec les stipulations claires de l'[ex] article 227 (1) (…) du traité de Rome" CE, 20 octobre 1989, Nicolo, n° 108243.

up to the Minister for the Environment to set the general hunting dates each year for the following hunting period. These dates were in principle applicable in the whole of France, but normally different hunting dates were set for particular regions or départements. In addition, generally the Prefects enjoyed a margin of discretion and could extend the hunting dates for individual species. From a legal perspective, the administrative acts that set the hunting dates need to be considered as general administrative decisions. As a result, they were not covered by the Conseil d'État's *Cohn-Bendit* ruling by which the Court had excluded the direct effect of European law for individual administrative decisions. Once the Minister for the Environment or a Prefect had officially issued the hunting dates for the annual hunting period, they were challengeable in the administrative courts. Appeals against the hunting dates were generally based on an alleged '*excès de pouvoir*', i.e. that the competent authorities had exceeded their discretion granted by the law when setting the hunting dates. Nation-wide hunting dates were adjudicated directly by the Conseil d'État, whereas departmental hunting dates fell under the jurisdiction of first instance administrative courts – the *tribunaux administratifs* (TA). Until 1995, appeals against judgements of the tribunaux administratifs were also dealt with by the Conseil d'État. This was changed by a reform of the administrative judicial system in 1995 that extended the jurisdiction of the *courts administratives d'appels* (CAA). These courts had been created in 1987 in order to serve as second instance courts for certain administrative proceedings. From 1995, they also served for this purpose in cases of alleged 'excès de pouvoir'. The Conseil d'État remained competent for questions of general principle and decisions of the Minister for the Environment (Janin 1995: 317; Turpin 2005: 47-50).

The overwhelming amount of cases on hunting dates followed a very similar structure: one or several environmental organisation contested the decision of the Minister for the Environment or Prefect on the opening and closing date for hunting for not being in conformity with the Birds Directive. The organisations argued that the competent authorities had exceeded their discretion ('excès de pouvoir') granted by the Directive by setting the hunting dates for a too long period. The environmental organisations tried to prove that the hunting dates would also cover the start of the phase of migration or reproduction of wild birds, which was prohibited by Article 7 of the Directive as interpreted by the ECJ. The competent authorities and hunting organisations – that often joined the proceeding as concerned party – tried to prove the opposite. In order to do so, both sides referred to various scientific reports that sometimes contradicted each other. If the courts came to the conclusion that the competent authorities had in fact exceeded their discretion, they would annul the hunting dates. As a result, hunting was not legally possible before the competent authorities had set the hunting dates again.

With its ruling of December 1984 on the Birds Directive discussed above, the Conseil d'État had created the legal precondition to challenge hunting dates for

non-conformity with the European law. Although it did not directly apply the ECJ's doctrine of direct effect, it signalled to environmental organisations that it would control whether the hunting dates had been set within the margin of discretion granted by Article 7 of the Birds Directive. Subsequently, the courts were confronted with three main questions: first, what was the earliest date for the opening of the hunting season; second, what was the latest date for the closing of the hunting season; and third, would staggered hunting dates for individual species be in conformity with the Directive? The ECJ's interpretation of these issues left the French courts some room for manoeuvre. Remember that in January 1992, the European Court had already demanded the "strict protection" of wild birds so that all birds were protected once their phase of migration or reproduction had commenced. Two years later, it had interpreted staggered hunting dates in conformity with the Directive, but only if scientific evidence could convincingly show that the demanded strict protection would still be guaranteed. In particular, all risk of confusion with and disturbance of other species had to be excluded.

The French courts quickly found an answer to the first question – the opening of the hunting season. On 7 October 1988, the Conseil d'État gave 15 rulings that all concerned this issue on the request of different environmental organisations (Janin 1991: FN 2). To give one example of these cases, FNE and others had contested the ministerial decision to allow hunting in a specific region already from the 19 of July. The Court held "(…) that it emanates from the dossier that this opening of hunting (…) intervenes in at a time and place where some of the concerned species have not finished their period of reproduction or dependence; that therefore the provisions (…) have been taken without considering the goals of the [Birds] Directive (…) and lead hence to the annulment."[59] Yet in the same decision, the Court upheld the opening of the hunting season after the first of September, as this was – according to scientific evidence – the general date when birds had finished their phase of reproduction. It became quickly settled case law that the hunting period, both on the national and departmental level, could only start after the first of September.[60] This ruling led the Minister for the Environment to commission a new scientific report from the National Museum of Natural History (*Muséum national d'Histoire naturelle)* and the National Hunting Service (*Office national de la chasse*). This report confirmed that hunting could not start before the

[59] "(…) qu'il ressort des pièces du dossier que cette ouverture de la chasse (…) intervient en une période et en des lieux où certaines des espèces concernées n'ont pas achevé leur période de reproduction et de dépendance; qu'ainsi les dispositions réglementaires (...) ont été prises en méconnaissance des objectifs définis par la directive [oiseaux] (...) et encourent dès lors, l'annulation." CE, 7 octobre 1988, Fédération francaise des sociétés de protection de la nature; n° 92193.

[60] See e.g. CE, 11 mai 1998, Fédération départementale des chasseurs de la Gironde et autres, n° 116155; CE, 20 novembre 1998, Ligue pour la protection des oiseaux, n° 182074, 182075.

first of September if the complete protection of wild birds was to be guaranteed (Janin 1991: 52).

The issue of the closing of the hunting period and staggered hunting dates proved to be more cumbersome. As will be shown, both issues are intertwined. The first main question was whether the hunting season had to stop at the 31st of January or whether it could extend until the end of February, its traditional end. In May 1990, the Conseil d'État first held that this would not be in contradiction to the Birds Directive, as it was justified by scientific evidence.[61] It should be noted that at that time the Conseil relied on the information provided by the so-called Ornis Committee. This committee had been set up by the Birds Directive in order to produce more data on the phases of reproduction and migration of wild birds. It was composed of representatives of all Member States and the European Commission. At the time, the committee had proposed to consider the start of the period of reproduction or migration if 10% of a particular species had entered this phase. On the basis of this criterion, the hunting period could extend until the end of February (Assemblée nationale 2003: 18-19). Nevertheless, only one month later the Conseil d'État gave a second ruling on the issue where it introduced a differentiation between waterfowls and migratory birds. This time, it held that the first subspecies of wild birds could not be hunted after the 31st of January. Migratory birds had, however, not commenced their phase of migration at that time, so their hunt was legally allowed.[62] Janin argues that this is the result of an erroneous interpretation of the scientific reports submitted to the Court (1991: 57-62). In addition, as Viguier mentions, the majority of waterfowls are migratory birds as well, which blurs the distinction between these two sub-types of birds (1995: 303). Be it as it may, just one and a half year later the Conseil d'État revised its opinion: it held that also waterfowls could be hunted during the month of February on the basis of staggered hunting dates.[63] Thus, in January 1992, the Conseil saw staggered hunting dates in conformity with the Directive. By doing so, it had followed the opinion of the Minister for the Environment and hunting organisations (Janin 1995: 316). When the Conseil gave its second ruling, the ECJ had already held in an infringement proceeding against Italy in January 1991 that a "complete protection" had to be guaranteed. The Conseil d'État did not, however, discuss whether such complete protection of all wild birds could be guaranteed by staggered hunting dates.

Before the Conseil d'État's ruling of January 1992, some lower courts had already adopted a stricter interpretation of the Directive and annulled the opening of hunting after the 31st of January. Also, staggered hunting dates after this date

[61] CE 25 mai 1990, Secrétaire d'Etat chargé de l'Environnement, n° 94359 et 94936.
[62] CE, 29 juin 1990, Secrétaire d'Etat chargé de l'Environnement et Union nationale de défense des chasses traditionelles, n° 101217.
[63] CE, 29 janvier 1992, Fédération départementale des chasseurs de l'Ain.

were interpreted as being in contradiction to the goals of the Directive.[64] Until the middle of the 1990s, the case law of French courts on the closing of the hunting period remained very heterogeneous: some courts interrupted the proceeding and designated external experts or commissioned additional scientific reports in order to clarify the exact start of the phase of migration. Others based their decision on existing scientific reports. Others again simply relied on the legal dossier submitted by the involved parties (Viguier 1995: 304-306; 1997: 319-322). In this respect, the ruling of the Administratif Court of Toulouse of Mai 1993 is remarkable as it refers for the first time explicitly to the ECJ's case law given in January 1991. On this basis, it annulled the extension of hunting dates until February for not guaranteeing the complete protection of wild birds.[65] Thus, the Administratif Court had put itself in direct opposition to the Conseil d'État's ruling of January 1992.

In December 1992, the administrative court of Nantes took the initiative and referred three questions on the interpretation of the Birds Directive to the ECJ. This was exceptional as French administrative courts were generally rather hesitant to contact the European Court. The Conseil d'État itself was at that time reluctant to seek advice from the ECJ and did not want lower courts to do so either. In a ruling of February 1993 on hunting dates, it held "(…) that the provisions of Article 7 (…) [of the Bids Directive] (…) do not raise any serious problems of interpretation; that hence the requested preliminary reference does not appear necessary."[66] An interviewed legal expert also reported that during a symposium on environmental law in Nantes a former president of the Conseil d'État made it clear that the Conseil would not be pleased to see lower courts referrals. The expert was also convinced that the reluctance of French administrative courts to refer to the ECJ is the result of internal 'rules of conduct' given by the Conseil (Interview FNE [Legal Expert], 581-610, 657-660, see also Lanord 2004: 386-389).

In January 1994, the ECJ gave its answer to the French court. It emphasised again the need for a complete protection of birds. This time, it explicitly held that this principle would exclude methods "which take into account the moment at which a certain percentage of birds have started to migrate and of those which consist in ascertaining the average date of the commencement of pre-mating migration."[67] By doing so, it rejected the 10% method used by the Ornis Committee

[64] See TA de Lyon, 22 novembre 1990, Rassemblement des opposant à la chasse et autres; TA de Lyon, 26 décembre 1989; TA d'Amiens, 4 décembre 1989; TA de Marseille, 11 janvier 1990 (reported in Droit de l'Environnement, n°2, avril 1990, p. 28).

[65] TA Toulouse, 19 mai 1993 Association pour la protection des animaux sauvages et autres (RJ E, 2/1995).

[66] " (...) que les dispositions de l'article 7 (…) [de la directive oiseaux] (...) ne soulèvent pas de difficultés sérieuses d'interprétation ; qu'ainsi le renvoi préjudiciel sollicité n'apparaît pas nécessaire." CE, 12 février 1993, Fédération départementale des chasseurs de la Correze, n°115468.

[67] ECJ C-435/92 [1994] Association pour la Protection des Animaux Sauvages and others v Préfet de Maine-et-Loire and Préfet de Loire-Atlantique, para. 12.

that had been applied by the Conseil d'État so far. With regard to staggered hunting dates, it held that they could be in conformity with Article 7, yet only if scientific evidence could prove that such hunting dates would not endanger the principle of complete protection. The ECJ underlined in particular the risk of confusion with and disturbance of other wild birds that had already begun their phase of migration or reproduction. This ruling led to French government to adopt the hunting Law 1998 (see below).

In June 1997, the Conseil d'État applied the guidelines created by the ECJ. This time, its opinion was based on a scientific report of the Royal Belgian Institute of Natural Sciences published in 1990 (*Institut Royal des Sciences Naturelles*). The report recommended the closing of hunting for the 31st of January in order to avoid the risk of confusion with and disturbance of other wild birds and thus to guarantee the complete protection of wild birds (Lanord 2004: 405). Following this recommendation, the Conseil held that hunting migratory birds had to stop on the 31st of January.[68] In January 1998, the Court required the same closing date of hunting for waterfowls.[69] With these rulings the Conseil d'État had made it clear that it would annul all hunting dates extending until February, regardless whether they were set in a general way or staggered for particular species.

By accepting to control the compatibility of national hunting dates with the Birds Directive, the French courts gave environmental organisations the possibility to use litigation in order to enforce stricter hunting dates. As has been discussed above, environmental organisations were unable to prompt their governments to implement the Birds Directive. They could only react to the continuous non-compliance by turning to the courts, and they did so extensively. Unfortunately, however, it is impossible to determine the exact number of contested administrative decisions setting hunting dates. The main reason for this is the fact that French court rulings are not systematically collected or reported. In general, only the rulings of supreme courts are available through the public French legal information system "Legifrance".[70] Lower court rulings are not covered by this system. Sometimes, they are reported and discussed in specialised legal journals, such as the "Revue de droit de l'environnement". Yet the number of published court rulings is not representative for the total number of court rulings. This stems from the fact that lower court rulings are only reported if they contain new, interesting elements. Once a legal issue has become settled case law, the journals will not publish lower court rulings anymore. This is exactly the case regarding the issue of hunting dates: as there was quite some heterogeneity in the lower court's interpretation of the Birds Directive and the national provisions in the beginning, their rulings were often

[68] CE, 13 juin 1997, Association pour la protection des animaux sauvages, n° 137347.
[69] CE, 14 janvier 1998, Association pour la protection des animaux sauvages, n° 156325.
[70] These rulings can be accessed via http://www.legifrance.gouv.fr - Jurisprudence.

reported. Yet from about 1998 onwards, when also the Conseil d'État followed the ECJ and demanded a strict protection of birds, only some emblematic lower court rulings were still published on this issue. In addition, very similar cases are generally joined if they concern the same legal question. As a result, the total number of cases decreases.

Bearing the above-mentioned limitations in mind, I nevertheless tried to find some rough numbers on the litigation activity of French environmental organisations. First, I searched for rulings with explicit reference to Article 7 of the Birds Directive using the search engine of "Legifrance".[71] In May 2007, I found 138 rulings of the Conseil d'État. Again, this number can only serve as a very crude indicator. Second, I asked the interviewed environmental organisations how often they went to court. Unfortunately, however, they generally do not collect the contested administrative decisions. Only the Ligue Roc did so for a limited time period and gave me access to their internal statistics. From 1986 to 1993, the Ligue contested 159 administrative decisions before French lower administrative courts that either concerned the setting of hunting dates or the hunting of protected species. From 1986 to 1997, they also contested 75 decisions before the Conseil d'État. In addition, the interviewed legal expert of FNE reported that in 1998, FNE started a nation-wide campaign where they contested the hunting dates in 60 départements for being in non-compliance with the Birds Directive (Interview FNE [Legal Expert], 954-963). Third, the "Association for the Protection of Wild Animals" (*Association pour la protection des animaux sauvages*) claimed to have contested more than 400 times administrative decisions for non-conformity with the Directive in 15 years (Le Monde, 3.09.1999, cited in Lagrange (2000: 10). So, even if it is impossible to determine the exact number of administrative decisions contested by environmental organisations, it should have become clear that they litigated hundreds of times in order to restrict hunting dates.

But is this massive litigation not in contradiction of the fact that, as discussed above, litigation is in practice more demanding than what the mere legal access to the courts would suggest? At first sight, this might appear paradox. The issue of hunting has, however, four peculiarities that facilitated litigation considerably. First, the liberal regulation of hunting led to the creation of several environmental organisations that were exclusively oriented towards the restriction of hunting, such as the Ligue ROC, originally founded in 1976 as the "Assemblage of the Opponents to Hunting" (*Rassemblement des Opposants à la Chasse*) or the "Association for the Protection of Wild Animals". As these organisations focused only on one issue, they

[71] I used the expert search function of Legifrance (http://legifrance.gouv.fr/WAspad/-RechercheExperteJade.jsp). Search in "Arrêts publiés au recueil" and "Arrêts non publiés au recueil" was activated. Full text search in all parts of the rulings was used ("Texte integral, résumé et titrage") with "article 7 paragraph 4 directive 2 avril 1979" as the search term. This is the phrase the Conseil d'État has consistently used in order to refer to the Birds Directive's hunting dates regime.

could comparatively quickly develop the legal expertise to repeatedly litigate once they had realised the potential of legal actions. Their long-term members learned how they had to write a submission to the court and could litigate up to the Conseil d'État without the need of a lawyer (Interview Ligue ROC, 398-402). As a result, they were able to effectively exploit the possibilities offered by the open access to the courts and were not restricted by the costs for external legal advise. By doing so, they could mitigate the lack of resources by which they were confronted, like all other environmental organisations. Second, hunting dates were generally set by ministerial decree for the whole country and then refined by the Prefects at the level of the départements. Both decisions are official administrative acts and therefore have to be published in the official journal of the French republic. This has two consequences. On the one hand, environmental organisations interested in the issue of hunting dates can very easily obtain the necessary information by simply consulting the official journal. On the other hand, if they are familiar with the scientific facts on the phases of reproduction and migration of protected birds, they can easily find out whether the Birds Directive has been violated. It is simply necessary to compare the dates, without any need to be familiar with the situation on the ground in a specific region of France. As a result, even very small environmental organisations can effectively control compliance with the Birds Directive, without having to rely on a strong network of voluntary members. Third, once the case law of the issue had been established, litigation against the setting of hunting dates became a good example of 'copy cases', for the legal reasoning remained the same for every year and every region of France. It was therefore very easy to repeat litigation once the basic knowledge had been gathered (Interview Alsace Nature, 567-596). The 11.5.1998 is a nice example of this: on that day the Conseil d'État gave eight almost identical rulings that annulled the hunting dates of eight regions in France. All rulings were based on the request of one single environmental organisation, the French league for the protection of birds (*Ligue pour la protection des oiseaux*) that had systematically attacked the hunting dates.[72] Fourth, once litigation only became a 'copy-paste' issue, it could even bear economic benefits: as has been mentioned, French administrative procedural law allows the claimants to demand financial compensations if their 'moral' interests had been violated. Since 1995, this possibility is also given to environmental organisations. On this basis, both lower and high courts granted compensations to them, ranging from 1.000 to 5.000 Francs.[73]

[72] CE, 11 mai 1998, Ligue pour la protection des oiseaux: n° 188792; 188795; 188797; 188798; 188799; 188800; 188801; 188803; 188810.

[73] See e.g. TA Amiens, 8 février 1996, Association pour la protection des animaux sauvages et du patrimoine naturel, n° 952132: 5.000 Francs; TA Nantes, 21 mars 1996, Association pour la protection des animaux sauvages et du patrimoine naturel, n°95354: 3.500 Francs; TA Amiens, 17 décembre 1996, Association pour la protection des animaux sauvages et du patrimoine naturel: 5.000 Francs; CE, 14

To sum up, these particularities of the setting of hunting dates allowed environmental organisations to repeatedly litigate even though they were confronted by both a lack of resources and members.

6.1.6 Reaction of the Competent Authorities

When French courts annulled more and more hunting dates on the request of environmental organisations, the competent authorities had to react. Yet instead of simply complying with the Birds Directive, they continued to set the hunting dates contrary to the Directive and the ECJ's interpretation. During the 1990, they had two main concerns: on the one hand, they tried to push for an amendment of the Birds Directive in order to justify longer hunting periods as well. On the other hand, they tried to secure their decisions from being constantly annulled in the national courts.

On the European level, the French government took the initiative immediately after the ECJ had given its strict interpretation in 1994 and pushed the European Commission to present a proposal for an amended of the Birds Directive (Assemblée nationale 2003: 86; Lanord 2004: 368). The Commission accepted to do so. The proposed amendment would have introduced in Article 7 of the Birds Directive an additional sentence that referred to a new Annex IV. This Annex IV explained how the closing of the hunting periods would have had to be determined. If adopted, it would have allowed the hunting of birds in February. On 24 March 1994, the Council of the European Union accepted the amendment.[74] The European Parliament, however, strongly refused to agree to it. The EP's rapporteur, Mr. Muntingh, found very clear words:

> "Clearly this approach is too depressing for words. It is the world turned upside down. Because one country [France, R.S.] has applied [the Birds Directive] incorrectly, implementation of the law is not brought in line with the law, but the law is changed to bring it in line with the illegal practices. This is not only an insult to the [European] Court of Justice and all those who have made efforts to put an end to the illegal practice, it is also an *extremely dangerous precedent*, since the law can now be modified if it is not being implemented. (…) Needless to say, this approach will never receive the assent of Parliament, no matter what its composition" (emphasis in original).[75]

janvier 1998, Association pour la protection des animaux sauvages, n° 156325: 1.000 Francs; CE, 3 décembre 1999, Association ornithologique et mammalogique de Saone-et-Loire et autres, n° 199622, 200124: 5.000 Francs; CAA Nancy, Association FNE, n° 99NC00045): 3.000 Francs.

[74] Proposal for a Council Directive amending Directive 79/409/EEC on the conservation of wild birds (Com [94] 39 final).

[75] Recommendation for the second reading by rapporteur Mr. Muntingh (European Parliament, A3-0245/94/Part B, p. 7).

The EP followed the proposition of its rapporteur and rejected the amendment. In addition, in January 1996, the EP's Committee on Environmental Affairs adopted a second report on the amendment of the Birds Directive by the Dutch Socialist MEP Maartje van Putten. Contrary to the goal of the Commission, it proposed to set the closing date for the hunting season explicitly at 31 January at the latest.[76] One month later, this proposal was accepted by the EP by a clear majority of 239 to 162 votes but was not taken up by the Commission.[77] Nevertheless, at least from that moment on, it was clear that the French initiative to amend the Directive had failed.

On the national level, three new laws were passed until the end of the 1990s in order to settle the issue. Yet their goal was less to implement the Birds Directive correctly than to make the judicial review of the hunting dates impossible. It should be noted that the French legislator tried to justify the first two laws by arguing that an amendment of the Directive would soon be achieved. The French rapporteur of the Law 1998 explicitly stated that "I admit, this is a peculiar exercise: in a way, we are going to transpose a *proposal* for a directive that the majority of us wishes to become adopted"[78] (emphasis added, cited in de Malafosse 1999: 3). Furthermore, the Law 1998 was adopted in the hope of an amendment of the Directive (Assemblée nationale 1998: section 1; Sénat 1997: section C). Given the outright opposition of the European Parliament to legitimate the non-compliance of France, such an amendment would have been very unlikely. Yet by referring to the European level the legislator could dispel criticisms by outright ignoring the French courts.

The first law was adopted only five months after the ECJ had answered to the request for a preliminary ruling to the French administrative court of Nantes. Remember that in this ruling, the ECJ had held that staggered hunting dates could only be justified if scientific evidence was able to discard any risk of disturbance of protected birds. Implementing this judgment would have meant to ban hunting in the month of February. This was, however, unacceptable for hunting organisations. They used their political weight and made the competent authorities adopt the new law in July 1994 (Law 1998) (Viguier 1995: 309; Lanord 2004: 241-242).[79] Before that law, the general hunting dates were set each year by ministerial decree and were then further specified by the Prefects. This time, however, the Law 1998 introduced specific staggered hunting dates directly in the "Code rural", the main law that dealt

[76] Europe Daily Bulletins, No. 6637 – 03/01/1996.
[77] Europe Daily Bulletins, No. 6669 – 17/02/1996.
[78] "il s'agit là, j'en conviens d'un exercice particulier (*sic*): nous allons en quelque sorte transposer par anticipation une proposition de directive, dont nous souhaitons pour la plupart favoriser l'adoption."
[79] Loi n° 94-591 du 15 juillet 1994 fixant les dates de clôture de la chasse des oiseaux migrateurs (J.O.R.F., 16 juillet 1994, p. 10246).

with issues of nature conservation.[80] The Law 1998 contained only two paragraphs. The first paragraph of the Law 1998 set the closing date of hunting for most species at the 20th of February. The second paragraph allowed the Prefect to advance the closing date until the 31 of January at the earliest. In its second paragraph, it was stated that in the following two years the government would produce a report containing scientific evidence on the endangered birds. Viguier comments that the Law 1998 "(…) clashes with full force with the logic of the [ECJ]" (1995: 309).[81] In fact, the French legislator outright refused to base the staggered hunting dates on the basis of scientific evidence as it simply postponed presenting such evidence for two years. So, regardless of the situation of the protected birds, they could be hunted until at least 1996.

Yet it was not the fact that hunting dates were again set in non-compliance with the Birds Directive that made the law remarkable. Already before – and also long afterwards – the hunting dates had been set for too long periods. The 'new' aspect was that it tried to make the judicial review of hunting dates itself impossible. According to established French judicial doctrine, administrative courts were only allowed to review decisions taken by the administrative authorities. Yet if an administrative decision was simply copying the provisions of a law, it was deprived of judicial review of administrative courts (Viguier 1997: 311). Thus, even though the Prefect still had to set the hunting dates for his or her département, the decision could not be contested if it was only copying the dates of the Law 1998. The main goal of the law was thus to shield the closing date of hunting from the certain contestation by environmental organisations. Both commentators and official preparatory reports of the two chambers of the French parliament agreed on this point (Lagrange 2000: 22; Sénat 1997: section B.1; Assemblée nationale 1998: section 1).

At first, the strategy of the hunting proponents seemed to work. When the Prefect was simply recopying the hunting dates of the law, most administrative courts rejected the contestation of the Prefect's decision as not admissible for judicial review. This rejection on the basis of a legal reason made it impossible for French courts to adjudicate on the substance, i.e. whether the hunting dates were compatible with the Birds Directive. However, environmental organisations found a legal loophole: they asked the Prefect to modify his or her decision and then attacked the subsequent answer. By doing so, they evoked the provision of the Law 1998 that gave the Prefect the possibility to close hunting already at the 31st of

[80] It should be noted that French legislation relies rather on such "codes" than on individual laws. The main idea is to create a coherent body of legislative provisions aimed at the regulation of a broader and at best distinct issue. Once a "code" has been passed, subsequent laws are used in order to amend it. The result is that each "code" becomes a patchwork of provisions that had entered into force at very different times.

[81] "(…) la loi française heurte de plein fouet de la logique de la Cour [européenne]."

January. Regardless whether the Prefect had explicitly or implicitly answered, or even if the Prefect had not answered at all, the administrative courts interpreted the Prefect's 'decision' as an administrative act admissible for judicial review. On this basis, they could continue to scrutinise whether the hunting dates set by the Prefect were in conformity with the Birds Directive, even if they were directly copied from the Law 1998. They concluded in the overwhelming majority that they were not, and thus annulled the closing of the hunting dates (Viguier 1997: 311-323). As a result, environmental organisations could continue to use litigation in order to enforce the hunting dates of the Birds Directive.

In 1998, the French legislator tried the same strategy to secure again the hunting dates from judicial review. The president of the federation of hunting organisations of Vienne made the motivation for the Law 1998 clear: "[Hunting organisations] had to suffer more than 400 legal proceedings in all of France since three years. The law [1998] was the only solution to stop this procedural inflation"[82] (cited in Lagrange 2000: 10).The preparatory report of the Sénat reflects this reasoning as well: "The goal [of the Law 1998] was to make litigation stop (…). Yet one has to accept that litigation that did not stop (…) The law [of 1994] has not changed anything with regard to the judicial regime (…) of hunting" (Sénat 1997: section B.1.-2.).[83]

In order to do so, the legislator used the Law 1998 in order to amend again the "code rural". As before, it introduced staggered hunting dates for the closing of the season that extended until the 28th of February. In addition, the opening of the season was moved forward as well and could now already start on the third Saturday in July for certain species. Contrary to the Law 1998, however, the Prefect was no longer granted any discretion to set the hunting dates.[84] From a legal perspective, the underlying reasoning was that by eliminating any discretion, the Prefect could only copy the hunting dates from the law. They were thus protected from judicial review. In the words of the preparatory report of the Assemblée national, this discretion had to be abandoned as it was "a true nest of litigation"[85] (1998: section 2). With an overwhelming majority covering all parties except the greens, the law was adopted in June 1998 (Lagrange 2000: Fn 9).

Once the law was passed, environmental organisations applied their same tactic as in the case of the Law 1998: they asked the Prefect to amend the hunting

[82] "[Les fédérations des chasseurs ont] dû subir depuis trois ans plus de quatre cents procédures dans la France entière. La loi [de 1998] était la seule solution pour arrêter cette inflation procédurière."
[83] "L'objet de cette loi [de 1994] était de faire cesser les contentieux (…). Force est de constater que le contentieux n'a pas cessé (…). La loi [de 1994] n'a rien modifié quant au régime juridique (…) de la chasse (...)."
[84] Loi n° 98-549 du 3 juillet 1998 relative aux dates d'ouverture anticipée et de clôture de la chasse aux oiseaux migrateurs (J.O.R.F., 4 juillet 1998, p. 1208-1210).
[85] "un véritable nid de contentieux."

dates and then attacked the tacit, implicit or explicit answer. The result was rather diverse: some lower courts accepted to review the hunting dates of the Law 1998 with the Birds Directive, while others rejected this, arguing that they could not review the law itself (Lanord 2004: 381; Lagrange 2000: 14-15). Depending on the result of the lower courts' ruling, either environmental or hunting organisations appealed to the second instance administrative courts. And in the beginning, it seemed that the legislator's tactic was successful: in May 1999, the court administrative d'appell of Bordeaux held that the Prefect's decision not to amend the hunting dates for the département could not be contested as the Law 1998 granted no discretion. Therefore, the appeal would be inadmissible and it would be thus without influence whether the law would be incompatible with the Birds Directive or not.[86] Half a year later, however, the Conseil d'État held the opposite. In order to so, it used a rather debatable legal reasoning to allow for itself to review the law. According to Lagrange, the Conseil did so to clearly assert the authority of French administrative courts on interpreting the Birds Directive, which the legislator had tried to take away (2000: 18). Be it as it may, the Conseil clearly held that "in view of scientific evidence, the provisions introduced [in the code rural] by the law of 3rd July 1998 are virtually totally incompatible with the goal of preservation of species of [the Birds Directive] as it was interpreted by the ruling of the European Court of Justice of 19 January 1994."[87] With this ruling, the Conseil called on the administrative courts to accept the review of hunting dates, even if they were solely based on the Law 1998, and to annul them if they would allow hunting before the 1st of September and later than the 31st of January. Therefore, environmental organisation could continue to enforce the protection regime of the Birds Directive.

Once again, the legislative initiative to save the hunting dates from being reviewed by administrative courts had failed. In the meantime, French hunting legislation came under attack from another European court, the European Court of Human Rights. In a ruling of 29.4.1999, the Court held that one of the cornerstones of the French hunting regime – the right to hunt in all private properties that were larger than 20 hectares – would violate the right of property.[88] Following this ruling, the Prime Minister asked a member of parliament to present a report on new hunting legislation. When the Conseil d'État gave its ruling on 3 December 1999, it

[86] CAA Bordeaux, 10 mai 1999, Association FNE c/ Ministre de l'Aménagement du territoire et de l'Environnement, n° 99BX00052.

[87] "(...) en l'état des connaissances scientifiques les dispositions introduites au (...) Code rural par la loi du 3 juillet 1998 sont, dans leur quasi-totalité, incompatibles avec les objectifs de préservation de [la directive oiseaux] telle quelle celle-ci a été interprétée par l'arrêt de la Cour de justice des Communautés européennes du 19 janvier 1994." CE, 3 décembre 1999, Association ornithologique et mammalogique de Saône-et-Loire et autres, n° 199622, 200124.

[88] European Court of Human Rights, Chassagnou and others v France, 25088/94, 28331/95 and 28443/95, ECHR 1999-III, 29.4.1999.

became clear that the Law 1998 had to be amended as well, as it would no longer serve as a legal basis for setting hunting dates. The Assemblée national, the lower chamber of the French parliament, adopted the report in March 2000. It explicitly stated that the main goal of any new national legislation on the issue had to be to "incorporate the European law into French law". It continued by stating that "[t]his objective is an exigency. The existing legislation on the practice of hunting will not be able to evolve in our country if France will not bring first its internal legislation in conformity with the Community law (…)"[89] (Assemblée nationale 2000: 25). Yet it needs to be emphasised that the main reason for this law was, again, the pressure created by litigation. Although the Commission had already referred France to the ECJ for noncompliance with the Birds Directive (see below), the justifications for the law 2000 only mentioned the national litigation, but never the threat of a possible conviction by the ECJ (see Assemblée nationale 2000).

From a legal perspective, this objective was achieved when the new law entered into force in July 2000.[90] With regard to the setting of hunting dates, its Article 24 copied almost verbatim the provision of Article 7 paragraph 4 of the Birds Directive.[91] The law stated that:

> "Birds shall not be hunted during the rearing season or during the various stages of reproduction and dependence. In addition to this, migratory birds shall not be hunted during their return to their rearing grounds."[92]

Thus the legal transposition had finally taken place. Yet the law continued directly afterwards to copy again a provision of the Birds Directive, namely Article 9 paragraph 1 (c) that permitted derogations from Article 7.[93] The law stated that:

> "However, derogations may be granted to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain terrestrial or water migratory birds in small numbers (…)."[94]

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[89] "Cet objectif est une exigence. Le droit applicable à l'exercice de la chasse ne pourra pas évoluer dans notre pays si la France ne met pas d'abord son droit interne en conformité avec le droit communautaire (…)."

[90] Loi n° 2000-698 du 26 juillet 2000 relative à la chasse (J.O.R.F., 27 juillet 2000, p. 11542).

[91] Article 7 paragraph 4 of the Birds Directive reads as follows: [The Member States] shall see in particular that the species to which hunting laws apply are not hunted during the rearing season nor during the various stages of reproduction. In the case of migratory species, they shall see in particular that the species to which hunting regulations apply are not hunted during their period of reproduction or during their return to their rearing grounds.

[92] "Les oiseaux ne peuvent être chassés ni pendant la période nidicole ni pendant les différents stades de reproduction et de dépendance. Les oiseaux migrateurs ne peuvent en outre être chassés pendant leur trajet de retour vers leur lieu de nidification."

[93] Article 9 paragraph 1 (c) reads as follows: "Member States may derogate from the provisions of Article 7 (…), where there is no other satisfactory solution, (…) to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.

The problem was that one crucial subordinated clause of Article 9 was omitted: any derogation from Article 7 of the Birds Directive was only possible in cases "where there is no other satisfactory solution". Commentators agree that this was not an unintentional mistake as the derogation was subsequently used to permit longer hunting dates (Saunier 2002; Cans/Romi 2004: 60).

From a merely legal perspective, French legislation was finally in compliance with the Birds Directive, at least as far as Article 7 was concerned. Yet the practical application was everything but implementing the Directive. In fact, on the very same day the new hunting law had entered into force, the Minister for the Environment issued the general hunting dates for the hunting season of 2000. It allowed again the hunt for certain species already before the 1st of September.[95] Environmental organisations contested this and the decree was, not surprisingly, annulled by the Conseil d'État for non-compliance with the Birds Directive.[96] The 'game' was thus continued: the Minister and the Prefects set the hunting dates in contradiction to the Birds Directive, or more precisely to the ECJ's rulings, environmental organisations contested the decisions and they were ultimately annulled by the administrative courts. In fact, until 2004, each general opening or closing date as set by the Minister for the Environment was annulled after judicial review.[97] In addition, the Minister for the Environment used the above mentioned clause of the new hunting law in order to allow derogations from the general hunting dates, i.e. to extend the hunting period. Already in August 2000, some days after the new law had entered into force, a ministerial decision allowed the Prefect to permit hunting for some birds until the 20th of February.[98] Environmental organisations contested this decision several times. FNE, for example, contested

[94] "Toutefois, pour permettre, dans des conditions strictement contrôlées et de manière sélective, la capture, la détention ou toute autre exploitation judicieuse de certains oiseaux migrateurs terrestres et aquatiques en petites quantities (…) des dérogations peuvent être accordées."

[95] Arrêté du 13 juillet 2000 fixant les dates d'ouverture anticipée de la chasse au gibier d'eau en 2000 (J.O.R.F. n° 163 du 14 juillet 2000, p. 10865)

[96] CE, 9 mai 2001, Association ornithologique et mammalogique de Saone-et-Loire, n° 223314.

[97] Arrêté du 18 juillet 2002 relatif aux dates d'ouverture de la chasse aux oiseaux de passage (J.O.R.F. n° 170 du 23 juillet 2002, p. 12586), annulled by CE, 28 mai 2003, Rassemblement des opposants à la chasse, n° 249072 ; Arrêté du 10 janvier 2003 relatif aux dates de fermeture de la chasse aux oiseaux de passage pour la campagne 2002-2003 (J.O.R.F. n° 13 du 16 janvier 2003, p. 925), annulled by CE, 10 mai 2004 Ligue pour la préservation de la faune sauvage et la défense des non-chasseurs, n° 253936 ; Arrêté du 21 juillet 2003 relatif aux dates d'ouverture de la chasse aux oiseaux de passage et au gibier d'eau en 2003 (J.O.R.F. n° 171 du 26 juillet 2003, p. 12683), annulled by CE, 5 novembre 2003, Association pour la protection des animaux sauvages, n° 258777 and CE, 5 novembre 2003, Association convention vie et nature pour une écologie radicale, n° 259339 ; Arrêté du 31 décembre 2003 relatif aux dates de fermeture de la chasse aux oiseaux de passage et au gibier d'eau en 2004, J.O.R.F. n° 23 du 28 janvier 2004, p. 2002), annulled by CE, 5 juillet 2004, Ligue pour la protection des oiseaux, n° 264010.

[98] Décret n° 2000-754 du 1er août 2000 relatif aux dates de la chasse aux oiseaux de passage et au gibier d'eau et modifiant le code rural (J.O.R.F. n° 180 du 5 août 2000, p. 12178).

about 20 decisions of Prefects to use this derogation.[99] The Conseil d'État ruled in January 2001 on the issue, and its ruling was remarkable for two reasons: on the one hand, it allowed for the first time since the middle of the 1990s staggered hunting dates for certain species. Yet although the Conseil relied on the same scientific reports that it had used previously, all of a sudden it interpreted them in a different way than before (Saunier 2002: 627-628). On the other hand, the Conseil decided to ask the ECJ for a preliminary ruling on the question whether and under which conditions the Birds Directive would justify derogations from its hunting regime.[100] This decision was surprising as the Conseil had denied previously that the Birds Directive would require clarification by the ECJ. In addition, the Commissaire du Gouvernement, Mr. Lamy, had discussed the issue extensively in its legal report to the Conseil.[101] Although he had also proposed to refer the question to the ECJ, he came ultimately to the conclusion that the Birds Directive would not permit the derogation of its hunting regime, for the French law ignored in particular the requirement of "no other satisfactory solution" (Lamy 2002). No doubt, it is difficult to say why the Conseil d'État nevertheless referred the issue to the ECJ. The effect of it was, however, clear: until the European Court had not given its decision, the Minister could continue to allow derogations from the general hunting regime. One and a half year later, the ECJ gave its answer: it held that Article 9 of the Birds Directive would – as it said – permit derogations from the hunting regime, yet only if there were no other satisfactory solution. In this regard, the Court held that: "[t]hat condition would not be met, inter alia, if the sole purpose of the derogation authorising hunting were to extend the hunting periods for certain species of birds in territories which they already frequent during the hunting periods fixed in accordance with Article 7 of the Directive."[102] This example used by the Court can only be interpreted as a clear rejection of the French practice to use the derogation clause to extent hunting.

Besides trying to secure their decisions from being contested in the courts by legislative amendments, the competent authorities also adapted their time table in order to limit the impact of the court rulings. In fact, the competent authorities began to issue the hunting dates for the season only shortly before the start or end of the respective season. By doing so, they could hope that the legally trained members of environmental organisations were on holidays and would thus miss the

[99] FNE, Communiqué de presse, 1er février 2001.

[100] CE, 25 janvier 2002, Ligue pour la protection des oiseaux et autres, n°224850, 225596, 225693, 225769.

[101] The "Commissaire du Gouvernement" are members of the judiciary and give independent advice to the Conseil d'État, which are, however, not binding for the court. They perform thus the same task as the Advocate generals at the ECJ.

[102] ECJ C-182/02 [2003] Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, para. 19.

deadline for contesting the dates. This might sound odd, but it did actually happen (Interview Alsace Nature, 377-380).

Related to this reaction was a general problem of litigation: even though if it was clear from the outset that the hunting dates had been set in non-compliance with the Birds Directive, their contestation did not have a suspending effect. As a result, sometimes the French courts gave their final ruling only long after the concerned hunting season had already passed. An extreme example is the ruling of the Conseil d'État of 13 June 1997 when it dealt with the opening of the hunting season of 1990.[103] Nevertheless, this problem could be partly overcome as environmental organisations could ask the courts to grant a preliminary injunction against the administrative decision setting the hunting dates. If granted, such preliminary injunction would suspend the effect of the administrative decision and thus the opening or closing date for hunting. In order to obtain it, certain conditions needed to be fulfilled: before a reform in 2000, the claimant had to show that the realisation of the contested administrative act would immediately lead to irreparable consequences. In 2000, these conditions were relaxed as one had only to prove the urgency of the issue and that there existed serious doubts on the legality of the contested administrative decision.[104] Yet under both conditions, environmental organisation were able to convince the courts that the too early opening or too late closing of the hunting season would have severe and irreparable damages on the protection of wild birds, in particular after the Conseil d'État had followed the strict interpretation of the ECJ. By doing so, they were able to stop hunting dates that were (Interview FNE [Legal Expert], e-mail correspondence, 29.11.2007).

6.1.7 The Late Role of the European Commission

Until the mid 1990s, the European Commission took a rather lenient position on the non-compliance of French hunting law. Even though French environmental organisations had informed the Commission about the problem of hunting dates by sending complaints, in the beginning it did not react (Interview Ligue ROC, 693-705). Also a report of the Assemblé national comes to the conclusion that the Commission "has engaged to interpret Article 7 of the [Birds] Directive with goodwill as long as possible, starting only rarely an infringement proceeding and involving the ECJ only exceptionally"[105] (Assemblée nationale 2003: 21). Besides

[103] CE, 13 juin 1997, Ligue francaise pour la protection des oiseaux, n° 119586.

[104] Loi n° 2000-597 du 30 juin 2000 relative au référé devant les juridictions administratives (J.O.R.F. n° 151 du 1 juillet 2000, p. 9948)

[105] "[La Commission] s'est employée le plus longtemps possible à interpréter l'article 7 de la directive [oiseaux] avec souplesse, n'engageant une procédure en manquement (…) qu'avec parcimonie et saisissant la Cour de Justice des Communautés européennes de façon exceptionnelle."

overlooking implementation problems, the Commission proved to be also ready to initiate an amendment of the Directive at the request of France after the ECJ had given its strict interpretation in 1994, as had been discussed above. In addition, when the EP opposed this initiative by even demanding more explicit and stricter hunting dates, the European Commissioner for environmental affairs made clear that the Commission could not support such a stricter proposal.[106]

The Commission's position started to change in about 1996. In that year, it had received thousands of letters from citizens, in particular from France and the United Kingdom concerning the hunting periods for migratory birds. The same Commissioner for environmental affairs that had one month before rejected the sharpening of the Birds Directive responded by an open letter and declared that the Commission would defend the principles of the Directive.[107] In July 1997, after being contacted by a French environmental organisation, the European Ombudsman denounced the lack of action by the European Commission to enforce the Birds Directive. It gave the Commission three month to produce a report showing that significant improvement regarding the French application of the Directive had been achieved. In particular, it demanded quick intervention with the French government.[108] And indeed, on 13.11.1997, the Commission sent a formal letter – the first but still unofficial stage of an infringement proceeding – to the French government on the opening and closing of hunting dates. It was based on the French hunting Law 1994. Later, just a few days before the new hunting law of 1998 entered into force, the Commission announced to officially start an infringement proceeding by sending a reasoned opinion to France. The Commission was convinced that also the new law would permit too long hunting periods.[109] The ECJ gave its ruling in December 2000 and came, not surprisingly to the conclusion that France had allowed too long hunting periods for a number of migratory bird species.[110] In the meantime, the French hunting law of 2000 had entered into force. Yet although the law had almost verbatim transposed Article 7 of the Birds Directive, the Commission decided that this alone was insufficient for the application of the law was still permitting too long hunting periods. Therefore, it sent a formal letter to the French government in December 2000 in order to enter the first phase of a second infringement proceeding. This proceeding could have ultimately led to severe penalty payments imposed on France by the ECJ. Interestingly, however, this proceeding never entered the second phase of a reasoned opinion (see European Commission 2006a: 432). Nevertheless, the

[106] Europe Daily Bulletins, No. 6669 – 17/02/1996.
[107] Europe Daily Bulletins, No. 6696 – 27/03/1996.
[108] Europe Daily Bulletins, No. 7010 – 05/07/1997.
[109] Europe Daily Bulletins, No. 7249 – 25/06/1998.
[110] ECJ C-38/99 [2000] Commission v France.

Commission had considerably increased the pressure on France to implement the Birds Directive.

6.1.8 Ultimately Achieving Compliance

Although hunting dates continued to be set in non-compliance with the Birds Directive, the situation appeased somewhat in about 2004. One year before, the French government had created the "*Observatoire national de la faune sauvage et de ses habitants*", an advisory council on hunting issues. Both hunting organisations and environmental organisations could nominate representatives in order to negotiate on hunting issues.[111] After initial problems, the Obersvatoire could agree on a common position in 2004 with regard to the hunting dates for most birds that were later taken up by the Minister for the Environment. Even though some problems remained, FNE decided to abstain from further legal action in order to show its good will and not to endanger the achieved (France Nature Environnement 2003: 37, 2004: 22). Yet other environmental organisations were not that satisfied and continued to contest the hunting dates.[112] In January 2005, the Minister for the Environment issued hunting dates for the closing of the season.[113] They restricted hunting of most species at the 31 January, yet made exceptions for some particular species. Nevertheless, these dates found again the approval of at least some environmental organisations as significant progress had been achieved compared to the situation of the former years.[114] In addition, contrary to the former years, these hunting dates were intended to stay permanently.

However, in July 2005, a severe backlash to this new consensual approach occurred. In that month, the Minister for the Environment issued the new opening dates that led to critical comments of environmental organisations.[115] The closing date permitted the hunt of some species in certain regions in France already from the last Saturday of August. Environmental organisations criticized in particular the report that the Minister had used to justify her decision.[116] It had been produced by the National Hunting Office (Office national de la Chasse), a semi-public body

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[111] Décret n° 2002-1000 du 17 juillet 2002 relatif à l'Observatoire national de la faune sauvage et de ses habitats et aux modalités de fixation des dates d'ouverture et de fermeture de la chasse aux oiseaux migrateurs (J.O.R.F. n° 166 du 18 juillet 2002 p. 12272)

[112] See e.g. CE, 8 février 2006, Association convention vie et nature pour une écologie radicale, n° 289757.

[113] Arrêté du 17 janvier 2005 relatif aux dates de fermeture de la chasse aux oiseaux de passage et au gibier d'eau ((J.O.R.F. n° 15 du 19 janvier 2005, p. 927).

[114] See Ligue pour la protection des oiseaux, L'historique du dossier chasse en France, 2005-2005; http://champagne-ardenne.lpo.fr/chasse/point_sur_la_chasse_2004_2005.htm (25.5.2007).

[115] Arrêté du 21 juillet 2005 relatif aux dates d'ouverture de la chasse aux oiseaux de passage et au gibier d'eau (J.O.R.F. n° 172 du 26 juillet 2005, p. 12123).

[116] See e.g. Ligue pour la Protection des Oiseaux, Communiqué de presse, 3 aoûut 2005

under the control of both the Ministry for the Environment and the Ministry of Agriculture. Environmental organisations argued that the report used insufficient data and was one-sided. They contested the hunting dates before the courts. In the beginning it seemed that the Conseil d'État would follow their opinion as the hunting dates were suspended.[117] Yet ultimately, the Conseil upheld the hunting dates and interpreted the report of the National Hunting Office as convincing evidence to justify the longer hunt for some species.[118]

The Ministry for the Environment continued to justify the hunting dates on the basis of the report of the National Hunting Office and the Conseil d'État followed.[119] And also the European Commission accepted the report as showing that French hunting law was in compliance with the Birds Directive. Therefore, in April 2006, it officially decided to discontinue legal action that dated back to the first conviction of France in 1999.[120]

From the perspective of environmental organisations, the decision of the Conseil d'État and the European Commission was certainly disappointing. Yet one has to put these new hunting dates into perspective: before 2005, the opening of hunting dates had been repeatedly set for some species already for mid-July. So although the Conseil d'État accepted the last Saturday of August as starting date and thereby abandoned its opinion that the 1st of September had to be the opening date, the opening dates of 2005 were still a considerable improvement compared to former times. In addition, as mentioned above, the closing dates did find the approval of most environmental organisations.

But how did it come that the French government was suddenly ready to restrict the hunting dates when it had tried to ignore the French courts in the years before? It is clear that neither the opinion of the government nor hunter organisations had changed. In fact, the Ministry for the Environment justified the

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117 CE, 3 août 2005, Ligue pour la protection des oiseaux, n° 283104.

118 CE, 6 avril 2006, Ligue pour la protection des oiseaux, n° 283103. The Conseil d'État confirmed its rulings in CE, 2 février 2007, Association convention vie et nature pour une écologie radicale, n° 289758.

119 Arrêté du 4 août 2005 modifiant l'arrêté du 21 juillet 2005 relatif aux dates d'ouverture de la chasse aux oiseaux de passage et au gibier d'eau (J.O.R.F. n° 181 du 5 août 2005, p. 12845); confirmed by CE, 6 avril 2006, Ligue pour la protection des oiseaux, n° 283103; Arrêté du 31 janvier 2006 modifiant l'arrêté du 17 janvier 2005 relatif aux dates de fermeture de la chasse aux oiseaux de passage et au gibier d'eau (J.O.R.F. n° 27 du 1 février 2006, p. 1684); confirmed by CE, 2 février 2007, Association convention vie et nature pour une écologie radicale, n° 289758; Arrêté du 24 mars 2006 du ministre de l'écologie et du développement durable relatif à l'ouverture de la chasse aux oiseaux de passage et au gibier d'eau (J.O.R.F. n° 76 du 30 mars 2006, p 4787); confirmed by CE, 13 juillet 2006, Association France Nature Environnement et autres, n° 293764; Arrêté du 17 novembre 2006 du ministre de l'écologie et du développement durable modifiant l'arrêté du 17 janvier 2005 relatif aux dates de fermeture de la chasse aux oiseaux de passage et au gibier d'eau (J.O.R.F. n° 275 du 28 novembre 2006, p. 17859); confirmed by CE, 6 juillet 2007, France Nature Environnement, n° 300021.

120 European Commission: France: progress by French authorities allows Commission to close files on hunting and drinking water, Press Release IP/06/460 of 05.02.2006.

restriction of the hunting dates[121] as it would "protect in particular hunters from being incessantly contested before the national courts and from the resulting uncertainty with regard to the effective dates when they are allowed to hunt"[122]. That the Birds Directive had to be implemented was not brought forward as argument. The main reason why the government finally complied was the threat of a second referral to the ECJ. As has been shown above, also the Commission was not as lenient anymore as before the mid 1990s and it had become likely that it would refer France to the European court. And if such a referral had taken place, it would have been almost certain that the ECJ would have convicted France again and would not have hesitated to impose severe penalty payments given the long history of French non-compliance. In view of this situation, the French government obeyed. Asked in the Sénat why it had done so, the responsible Minister explained that:

> "[t]he European Commission has (…) decided to reopen this dossier (…). Given this situation, the Minister of the Environment (…) considered it necessary and urgent to stabilise the hunting dates and to thereby avoid exposing hunters to new litigation that would have very seriously threatened the achievement of the current situation (…). In the absence of other reliable scientific studies than [that of the National Hunting Office], it would be extremely dangerous to believe that hunting dates could evolve. Hunters do not have any interest at all to see litigation on hunting dates reappear."[123]

Thus, the threat of a second referral was ultimately necessary to make France comply with the hunting regime of the Birds Directive.

6.1.9 Conclusion

The story of the implementation of the Birds Directive's hunting dates in France shows the decisive impact that the reaction of the competent authorities can have on the possibilities to enforce European law through courts. Although French environmental organisations could only rely on a weak organisational capacity, they

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[121] Ministère de l'Écologie, du Développement et de l'Aménagement durables, press release of 19.01.2005 (http://www.ecologie.gouv.fr/article.php3?id_article=3480, 25.05.2007).

[122] "[La décision de restreindre la chasse] protége en particulier les chasseurs contre des remises en cause incessantes devant la juridiction nationale et contre l'incertitude qui en résulte quant aux dates effectives où ils peuvent pratiquer."

[123] "La Commission européenne a (...) décidé de rouvrir ce dossier (…). Dans ces conditions, la ministre de l'écologie (…) a estimé nécessaire et urgent de stabiliser les dates de chasse et d'éviter ainsi d'exposer les chasseurs à de nouveaux contentieux qui auraient menacé très sérieusement les acquis de la situation actuelle. (…) En l'absence d'autres études scientifiques sérieuses que [celle ci de l'Observatoire national de la Chasse] (…), il serait extrêmement périlleux de prétendre faire évoluer les dates de chasse. Les chasseurs n'ont strictement aucun intérêt à voir renaître des contentieux sur les dates de chasse." Réponse du Ministère de la culture et da la communication (J.O. Sénat, 15.11.2006, p. 8051). The Minister of Culture was answering to the questions as the Minister of the Environment was at the 12th United Nations Climate Change Conference in Nairobi at the time.

were able to effectively exploit the opportunities offered by the open access to the courts. This would not have been possible if the issue of hunting had not facilitated litigation. First, specialised environmental organisations existed that could, second, easily collect the necessary information on the hunting dates and, third, follow each year nearly the same procedure before the courts to enforce the Birds Directive. Also the latter's interpretation of the Birds Directive proved to be in the end conducive to judicial law enforcement. Even the Conseil d'État ultimately followed the strict interpretation given by the ECJ although it had openly resisted to accept the supremacy of European law in the beginning. The sufficient organisational capacity of environmental organisations, the open access to the courts and the strict interpretation given by the French courts created the basis for the annual contestation of the hunting dates. Yet despite the regular annulments, the competent authorities resisted to restrict the hunting dates and thus to comply with the Birds Directive. The issue was too strongly charged with symbolic meaning and too fiercely defended by hunting organisations that the French consecutive governments were ready to obey the European law. As a result, the competent authorities tried to negate or at least to contain the effects of both European and national court rulings. In the end, the threat of a second referral to the ECJ was indispensable to guarantee the correct implementation of the Birds Directive.

6.2 The Implementation of the Natura 2000 Network

As in all Member States, the designation of Natura 2000 sites – Special Protection Areas for the Birds- and Sites of Community Importance for the Habitats Directive – was a very cumbersome process in France. Contrary to other countries, however, was the fact that key societal opponents of the Directives joined their forces in order to limit the scope of the European rules. Due to the dismissive interpretation of the Directives by the French courts, environmental organisations were unable to influence their implementation. Both with regard to the designation of Natura 2000 sites as well as the transposition of the Directives' site protection regime, the pressure from the European Commission proved to be decisive. Nevertheless, implementation problems still remain.

6.2.1 The Protracted Process of Designating Natura 2000 Sites

From an ecological perspective, France plays a key role in guaranteeing the protection of endangered European species. The comparatively low density of population and industry allowed the persistence of a very rich biological diversity.[124]

[124] According to the Fischer Weltalmanach 2007, the population density of France is 111 inhabitants per km², compared to 231 in Germany and 481 in the Netherlands.

2/3 of the most endangered wild birds listed in Annex I of the Birds Directive and about 70% of all natural habitats of the Habitats Directive occur in France (Belorgey/Gervasoni/Lambert 2005: 3).In addition, France is on the main migration route of most migratory birds. As a result, the Natura 2000 Directives concerned France more than other European countries.

Before turning to the discussion of the protracted designation of Natura 2000 sites, it is important to note that already in the beginning of the 1980s the French government decided to identify and categorise all ecologically important areas in France in two inventories. This decision was taken independently of the Natura 2000 Directives. In fact, it was never intended to give legal effect to the sites identified by the inventories by designating as what was later called Natura 2000 sites. The government assigned to task to produce these inventories to the National Museum of Natural History (*Muséum national d'Histoire naturelle)*, a semi-public but independent body. With regard to important bird areas, the Museum cooperated closely with the French League for the Protection of birds (*Ligue française pour la protection des oiseaux*). In 1994, it presented the inventory of important areas for the conservation of birds (*Zones Importantes pour la Conservation des Oiseaux, ZICO).* This inventory identified 285 sites covering about 44.000 km², thus about 8,1% of the terrestrial territory of France.[125] Yet it was never intended to designate all sites of the ZICO inventory as SPAs. In fact, at the end of 1995 only 99 SPAs covering 7.079 km² (1,29% of France) had been officially designated (European Commission 2000a: 7). With regard to all other ecologically important areas, work was started in 1982 on the Inventory of Natural Areas of Ecologic, Faunistic and Floristic Interest (*Zones d'intérêt écologique, faunistique et floristique, ZNIEFF*) Again, the Museum of Natural History was responsible for the elaboration of the inventory. Contrary to the inventory of important bird areas, however, the main information was provided by regional scientific committees composed of hunting, agriculture, forestry and environmental organisations. In 1992, the first results were presented that are regularly updated until today. The sites were categorised as ZNIEFF I type or ZNIEFF II type, whereas the former was from an ecological perspective more important than the other. In 1994, 12.440 sites covering 45.000 km² (8,14% of France) were categorised as ZNIEFF I type and 1.909 sites covering 117.500 km² (21% of France) as ZNIEFF II type. Yet similar to the inventory of important areas for birds, the inventory was never intended to create legal effects (Le Corre/Noury 1996: 388-398).

When the Birds Directive entered into force in 1981, the issue of hunting regulation attracted all attention. The obligation to designate protection areas was, by contrast, largely forgotten by all key actors involved. Environmental organisation focused predominantly on the restriction of hunting dates and did not become

[125] See http://inpn.mnhn.fr/inpn/fr/biodiv/zico/index.htm (16.12.2007)

active with regard to the site protection regime of the Birds Directive. The administrative authorities did designate some areas as Special Protection Areas (SPAs) in order to be able to prove that they had 'fulfilled' their obligations. Yet, these areas had been already protected under national law anyway (Interview FNE [Réseau Milieux Naturels], 206-216). And the European Commission was content by reporting that some sites had been designated. As a result, in 1986, only 20 sites covering 1.519 km² (0,27% of France) were designated as SPAs (European Commission 1993: 41). To show the complete insufficiency of this number, it should be noted that this number rose to 369 sites covering 45.804 km² (8,42% of France) in June 2007 (for an overview of the process of designating Natura 2000 sites, see Table 6 on page 125).

When the Habitats Directive entered into force the situation changed tremendously.[126] As the Member States had agreed to create a European wide system of protection areas and to bind themselves to an explicit timetable, the almost forgotten designation of sites under the Birds Directive reappeared on the agenda. And in the beginning, the French authorities took an ambitious approach to identify all potential sites under the Habitats Directive. The competent Ministry assigned the task of identifying possible Natura 2000 sites to the National Museum of Natural History, an independent, semi-public body. It coordinated the work of regional committees that used the existing national ZNIEFF inventory of ecologically important areas to identify possible sites for the European network. Initially, the identification of possible sites was intended to proceed without the consultation of the involved communities and stake-holders. In Mai 1995, however, the Minister for the Environment issued a decree that intended to establish an extensive consultation procedure. First, so-called "Natura 2000 conferences" were to be organised on the level of the départements that should bring together all involved stake-holders. Although the Museum of National History and the regional committees remained competent in preparing the list of possible Natura 2000 sites, the "Natura 2000 conferences" and the mayors of the concerned communities were given the possibility to give their opinion on the proposed sites.[127] However, a report of the Sénat came to the conclusion that this consultation procedure had never been followed in reality (Sénat 1996: section C.1). Nevertheless, in March 1996 the Ministry for the Environment presented the initial list of possible areas. It contained 1.316 sites covering 70.000 km², thus 13% of the French territory. This would be an enormous increase to the then existing 99 designated SPAs covering 7.069 km².

[126] For a more detailed overview of the process of site designation, see Sénat (1996), Maljean-Dubois/Dubois (1999), Alphandéry/Fortier (2001,), Le Corre (2002), Février (2004b), Makowiak (2004) and Interview FNE [Réseau Milieux Naturels], 378-435, 1087-1109.

[127] Décret no 95-631 du 5 mai 1995 relatif à la conservation des habitats naturels et des habitats d'espèces sauvages d'intérêt communautaire (J.O n° 108 du 7 mai 1995, p. 7612).

The initial list of possible areas led, however, to a strong uproar of the French opponents to the Natura 2000 Directives. One month after the presentation of the list, several organisations representing hunting, agriculture and forestry interests formed the so-called "Group of nine" (*groupe de neuf*).[128] They issued a declaration in which they heavily criticised the proposed list as inaccurate and unfounded. At the same time, they put considerable pressure on the government to abstain from officially transmitting the list to the European Commission as the French proposal for the Natura 2000 network. In July 1996, the government publicly announced to freeze the process of site designation in order to engage in more extensive consultations. Commentators agree that this decision was the result of the "group of nine's" intensive lobbying and the approaching next legislative elections in France (Interview FNE [Réseau Milieux Naturels], 268-290, Février 2004b: 34; Maljean-Dubois/Dubois 1999: 539; Prieur 2004: 289).

The European Commission deplored the freeze of the site designation as the timetable of the Habitats Directive would not justify any delay.[129] Already in March 1996, it had sent a formal letter to France for the insufficient designation of sites under the Habitats Directive and it made clear that it would not accept persistent non-compliance. As a result, in February 1997, the Minister for the Environment recommenced the process of site designation. This time, however, the explicit goal was to transmit sites covering only "about 2,5%" of France to the Commission.[130] Compared to the 13% of the initially identified sites, this number is remarkably small. In order to transmit sites as soon as possible, the Minster asked the Prefects to classify the initial sites according to their degree of contestation. Those sites that were likely to be accepted by all actors involved should be reported by 14.03.1997. [131] In May 1997, legislative elections were held that led to a change in government. The new Minister for the Environment from the Greens issued a new circular on 11.8.1997.[132] In it, the Minister referred to semi-official consultations that had taken place and estimated that about 1146 sites could be transmitted as sites under the Habitats Directive. Again, it asked the Prefects to report all those sites on which all actors could agree within two month for a discussion of the unpublished circular. By doing so, the sites were to be identified in a way contrary to the decree of May

[128] The following organisations were members of the group of nine: Assemblée permanente des chambres d'agricultures, Fédération nationale des syndicats d'exploitants agricoles, Jeunes agriculteurs, Centre national professionnel de la propriété forestière, Fédération nationale des chasseurs , Fédération nationale des communes forestières de France, Fédération nationale de la propriété agricole, Fédération nationale des syndicats de propriétaires forestiers sylviculteurs , Union nationale pour la pêche en France.
[129] See Europe Daily Bulletins, No. 6783 – 02/08/1996 and No. 6823 – 02/101996.
[130] See Circulaires du 12 février 1997 relatives à la relance de Natura 2000 (application de la directive 92/43/CEE du 21 mai 1992 concernant la conservation des habitats naturels ainsi que de la faune et de la flore sauvages) (J.O n° 38 du 14 février 1997, p. 2546).
[131] Idem.
[132] The circular had not been officially published. See Makowiak (2004: 112) for its details.

1995 that had established, as mentioned above, an extensive consultation procedure. Nevertheless, until the end of 1997 the Minster could transmit 543 sites to the European Commission on the basis of the simplified procedure.

As has been mentioned in the previous chapters, the access to the courts for interest groups is particularly open in France. Therefore, not only environmental organisations could use the courts in order to try to enforce the Natura 2000 Directive, but also the opponents of the Directives could resort to judicial review to block the entry into force of the European rules. And that was exactly what the "Group of Nine" did: their members founded an interest group called "National Coordination Natura 2000" (*Association Coordination nationale Natura 2000*) and contested the unpublished circular before the Conseil d'État. In September 1999, the Court held that the procedure as set up by the decree of May 1995 had not been followed and thus annulled the circular of August 1997.[133] This annulment had far reaching consequences as it led automatically to the annulment of all decisions that had been based on it. Therefore, also the submission of the first sites to the European Commission had been annulled.

Briefly before the ruling of the Conseil d'État, the Minister for the Environment had transmitted a second list of sites to the Commission. The list of July 1999 submitted new sites that had followed the consultation procedure of the decree. Yet it also contained again those initial 534 sites that had been unlawfully identified by ignoring the consultation procedure. Not surprisingly, the "Group of Nine" contested this decision again before the Conseil d'État. Faithful to its first ruling, the Conseil annulled the transmission of those 534 sites that had not followed the consultation procedure. As the other sites had been correctly identified by consulting all stakeholders, they were upheld by the Conseil.[134] Nevertheless, until December 2000, only 1.029 sites covering 31.440 km², thus approximately 5,84% of France, had been transmitted under the Habitats Directive (European Commission 2003b: 17) This number was not so much worse compared to other European countries. Yet the situation was dramatically worse with regard to sites under the Birds Directive: until 2003, only 117 sites covering about 8.000 km², thus only about 1,44% of French territory had been designated as SPAs. This difference can be explained by the fact that the opposition against the designation of SPAs had been particularly fierce as hunting organisations feared that hunting would be prohibited in these areas. Yet, in any case, these figures show that France had huge insufficiencies in creating its contribution to the Natura 2000 network. Potentially, there was thus huge 'potential' for environmental organisations to enforce the site protection regime of the Directive for those sites that had been unlawfully excluded from becoming Natura 2000 sites.

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[133] CE, 27 septembre 1999, Association Coordination nationale Natura 2000", n° 194648.
[134] CE, 22 juin 2001, Association Coordination nationale Natura 2000, n° 219995.

6.2.2 The Initial Transposition of the Directives' Site Protection Regime

A similar picture of persistent non-compliance regarding the designation of Natura 2000 sites can be drawn with regard to the implementation of the Directives' site protection regime. When the Birds Directive entered into force, no special legislative measures were taken in order to transpose its site protection regime. This is not surprising for in the 1980s even the European Commission did not consider Article 4 of the Birds Directive as prescribing an independent site protection regime. In the first implementation report of the Birds Directive covering the period from 1981 to 1983, the issue of site protection for SPAs was not even mentioned at all (European Commission 1989: 48). Also in the second report for the period from 1981 to 1991, the issue of site protection was only discussed insofar as to see whether designated sites were protected at least by some sort of national protection measures (European Commission 1993: 26-28). This did not change until the Habitats Directive entered into force (see European Commission 2000a).

When Article 6 of the Habitats Directive replaced the site protection regime of the Birds Directive, the French government argued that the existing national nature conservation legislation would already transpose the European rules completely. In particular, it referred to its general nature protection law of 1976[135] and the law of 1995 on the strengthening of environmental protection[136]. These laws already contained general protection measures for protected sites as well as the obligation to carry out environmental impact assessments. However, this obligation was limited to certain projects and excluded others completely. In addition, an impact assessment was only a procedural requirement that had little consequences if negative effects would occur. Therefore, Makowiak states that the alleged transposition was rather "symbolic than real" (2003: 9).

When the Habitats Directive entered into force, the French government did not communicate any transposition measure to the European Commission for the foregoing reason. As a result, the Commission sent a letter of formal notice on 9.8.1994. Not convinced that the existing French legislation would transpose Article 6 correctly, the case was finally lodged on 15.07.1998. In April 2000, the ECJ gave its ruling. Already in 1999, the Court had convicted France for the insufficient protection of two particular SPAs. And also this time, the ECJ held that the existing protection measures would be insufficient and that France had thus failed to transpose Article 6 correctly.[137]

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[135] Loi no 76-629 du 10 juillet 1976 relative à la protection de la nature (J.O du 13 juillet 1976, p. 4203).
[136] Loi no 95-101 du 2 février 1995 relative au renforcement de la protection de l'environnement (J.O n° 29 du 3 février 1995, p. 1840).
[137] ECJ C-256/98 [2000] Commission v France.

At that time, France failed to transpose several directives. In order to avoid further legal proceedings, the French parliament adopted in January 2001 a 'framework law'.[138] It allowed the government to transpose 47 directives, various treaty provisions as well as several regulations by so-called "ordonnances". These acts are taken by the government, but have the same legal quality as laws. The adoption of these "ordonnances" does not require the participation of the Parliament and can thus speed up the legislative transposition process considerably. Mostly, they do not contain any specific substantial requirements for the government to fulfil. Yet for three directives, the Parliament included such requirements in the 'framework law'. The most explicit ones were taken for the transposition of the site protection regime of the Natura 2000 Directives. Besides allowing the government to create a particular site protection regime for Natura 2000 sites and to simplify the consultation procedure for identifying such sites, Article 3 (6) of the law specified that "fishing and hunting practiced according to the conditions and in the regions authorised by [French law] do not constitute disturbing activities or activities having such effects."[139] In other words, the obligation of Article 6 of the Habitats Directive to consider any disturbing activity likely to have negative effects on a Natura 2000 sites was sidelined with regard to hunting or fishing. According to Le Corre, this "clearly reveals the wish of the Parliament to give some guaranties to the rural world, hostile to the construction of the Natura 2000 network (…)"[140] (2002: 4).

On the basis of the 'framework law' the government issued an *ordonnace* in April 2001 that can be considered as the first real transposition of the Directives' site protection regime.[141] Besides simplifying the authorisation procedure, it stated, first, that for each Natura 2000 site specific measures had to be taken in order to guarantee or restore its favourable conservation status. Yet it immediately emphasised by copying verbatim the requirement of the Parliament that hunting or fishing could not at all create negative effects on the conservation status of a site. This general exclusion was clearly not in conformity with Article 6. Second, the *ordonnance* established a contractual based system of maintaining or restoring the favourable conservation of Natura 2000 sites. Owners and/or economic users of

[138] Loi no 2001-1 du 3 janvier 2001 portant habilitation du Gouvernement à transposer, par ordonnances, des directives communautaires et à mettre en oeuvre certaines dispositions du droit communautaire (J.O n° 3 du 4 janvier 2001, p. 93).

[139] "les activités piscicoles, la chasse et les autres activités cynégétiques pratiquées dans les conditions et sur les territoires autorisés par les lois et règlements en vigueur ne constituent pas des activités perturbantes ou ayant de tels effets."

[140] "(…) révèle clairement la volonté du Parlement de donner quelques garanties aux acteurs du monde rural, hostiles à la constitution du réseau Natura 2000 (…)."

[141] Ordonnance no 2001-321 du 11 avril 2001 relative à la transposition de directives communautaires et à la mise en oeuvre de certaines dispositions du droit communautaire dans le domaine de l'environnement (J.O n° 89 du 14 avril 2001, p. 5820).

territories hosting Natura 2000 sites were to sign so-called "Natura 2000 contracts" with the administrative authorities. Before doing so, the administrative authorities had to create so-called "target documents" (*documents d'objectifs*) for each site. These target documents had to be set up in close cooperation with the affected stakeholders and communities. The cooperation with Environmental organisation was, however, not compulsory. The documents had to contain the planned conservation measures, details on their realisation and accompanying financial compensations. These measures were to be subsequently carried out on the basis of the "Natura 2000 contracts". Third, with regard to the site protection regime, the *ordonnace* stated that:

> "I. Programmes or projects (…) subject to an authorisation procedure and whose realisation is likely to notably affect a Natura 2000 site are subject to an impact assessment regarding the conservation objectives of the site. Projects (…) provided by Natura 2000 contracts are exempted from the impact assessment (…).
> II. The competent authority may not authorise (…) a programme or project (…) if the impact assessment concludes that its realisation would harm the conservation status of the sites.
> III. However, if there is no other solution but the realisation of the programme or plan (…), the competent authority may give its authorisation for imperative reasons of public interest. In this case, it assures that compensatory measures are taken in order to maintain the global coherence of the Natura 2000 network (…)."[142]

As can be seen, large parts of Article 6 have been transposed almost verbatim. Yet besides the already mentioned non-compliance for excluding hunting and fishing a priori from any environmental impact assessment, there were two additional insufficiencies.[143] First, only those projects that were already covered by an existing French authorisation procedure could become subject to an environmental impact assessment. Yet also other projects might have significant negative effects on a site and would thus require an impact assessment. For example, authorisations for life stock farms were only required under French law if the number of animals on the farm exceeded a certain threshold. Already below this threshold, the emission of

[142] I. Les programmes ou projets de travaux, d'ouvrage ou d'aménagement soumis à un régime d'autorisation ou d'approbation administrative, et dont la réalisation est de nature à affecter de façon notable un site Natura 2000, font l'objet d'une évaluation de leurs incidences au regard des objectifs de conservation du site. Les travaux, ouvrages ou aménagements prévus par les contrats Natura 2000 sont dispensés de la procédure d'évaluation mentionnée à l'alinéa précédent.
II. - L'autorité compétente ne peut autoriser ou approuver un programme ou projet mentionné au premier alinéa du I s'il résulte de l'évaluation que sa réalisation porte atteinte à l'état de conservation du site.
III. - Toutefois, lorsqu'il n'existe pas d'autre solution que la réalisation d'un programme ou projet qui est de nature à porter atteinte à l'état de conservation du site, l'autorité compétente peut donner son accord pour des raisons impératives d'intérêt public. Dans ce cas, elle s'assure que des mesures compensatoires sont prises pour maintenir la cohérence globale du réseau Natura 2000.

[143] For a complete discussion of the legal insufficiency, see Prieur (2004), Makowiak (2003: 9-14), Le Corre (2002: 8-13) and Février (2004a).

ammonic could have significant negative effects on a Natura 2000 sites. Yet this case was not covered by the French transposition of Article 6 (Interview FNE [Réseau Milieux Naturels], 486-520). Second, all projects provided by Natura 2000 contracts were exempted for any assessment of their possible negative effects. As a result, all existing activities in a Natura 2000 site could simply be exempted from the Directives' site protection regime. At least since September 2004, when the ECJ gave it ruling on the mechanical cockle fishing in the Wadden Sea, it was clear that this derogation was incompatible with Article 6.[144] To sum up, even though parts of the Directives' site protection regime had been finally transposed in April 2001, key aspects were still missing.

6.2.3 Reaction of French Environmental Organisations

As has been discussed, France failed to implement several key provisions of the Natura 2000 Directives. On the one hand, a completely insufficient number of sites had been either designated or reported as Natura 2000 sites. On the other hand, the site protection regime of the Directives had been incorrectly transposed. As a result, a large number of sensitive areas did not enjoy the protection regime of the Directive for several years. Environmental organisations were well aware of this situation. Their possibilities to enforce the Directives through lobbying were, however, very limited. Due to the strong and combined opposition of the most influential hunting, agriculture and forestry organisations, it was clear that the French parliament and the government could not be 'convinced' by environmental organisations to implement the Directives correctly (Interview Manche Nature, 596-659). This was even true for the period from July 1997 to Mai 2002, when the Greens were in government and responsible for the Ministry for the Environment. Arguably, during this time the influence of environmental organisations on policy should have been the strongest possible and thus the possibility to push for the correct implementation of the Directive through lobbying the highest. Yet also during that period, neither the correct transposition of the site protection regime nor the complete designation of Natura 2000 areas had been achieved.

As lobbying on the national level was not a viable option, French environmental organisations turned both the European Commission and to national courts. Contacts with the Commission were very important, as the Commission was dependent on information from external sources in order to detect instances of non-compliance. However, environmental organisations were well aware of the fact that the Commission was chronically overcharged with complaints and completely understaffed. In view of the totally uncertain outcome of complaints sent to the

[144] See ECJ C-127/02 [2004] Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij

Commission, these organisations did not expect much. In addition, complaints had to be carefully prepared in order to have a chance of being actively considered. Environmental organisations, however, were constantly confronted by limited resources and thus could not devote much energy in such an activity with uncertain results (Interviews Manche Nature, 829-860; Alsace Nature, 790-799; FNE [Réseau Juridique], 585-610).

When confronted with a specific project likely to have negative effects on a potential Natura 2000 sites, litigation before national courts was in fact the only viable option for French environmental organisations. But besides the very restrictive interpretation of the Natura 2000 Directives by the French administrative courts (see below), these organisations were constantly confronted by their weak organisational capacity that considerably limited their possibilities to enforce the Directives through litigation from the outset. First, in order to use litigation, environmental organisations had to possess detailed information of the conservational status of a site. As in other countries, active voluntary members of organisations were the source for such information. Yet most environmental organisations simply lacked these members and thus the necessary information. Second, contrary to the issue of hunting dates, litigation on Natura 2000 Directives proved to be very complex from a legal perspective. Thus, even if an environmental organisation had access to lawyers or legally trained members, it was not at all certain whether they would be able to cope with Natura 2000 issues. Third, litigation against administrative authorise decisions requires sufficient resources in order to follow the long and complex authorisation procedures. Again, environmental organisations often simply lacked the voluntary members able to do so (Interviews Alsace Nature, 323-368, 559-561; Manche Nature, 282-323). Thus from the outset, the possibilities of environmental organisations to enforce the Directives were strongly limited.

6.2.4 The French Courts and the Natura 2000 Directives

During the 1980s, no cases making explicit reference to the Birds Directive were reported by French environmental law journals (see also Makowiak 2003). Also the interviewed experts agree that no cases occurred at that time. This situation is not surprising, as the site protection regime of the Birds Directive was almost completely dead letter until the beginning of the 1990s. Yet at least after the ECJ had given its ruling in the Leybucht case in 1991, one could have expected the first judicial reviews of administrative decisions. Nevertheless the Birds Directive remained 'forgotten' until the middle of the 1990s when the Habitats Directive entered into force. From that time on, administrative courts had to give their interpretation of the Directives' site protection regime. The cases that appeared

before the courts and that tried to enforce – directly or indirectly – the site protection regime of the Natura 2000 Directive can be divided into three groups: in the first group of cases the claimants made an explicit reference to either Article 4 of the Birds- or Article 6 of the Habitats Directive. Relying on the ECJ's doctrine of direct effect, it was claimed that an administrative decision would violate directly effective provisions of the Directives and thus would have to be annulled. The second and by far larger group of cases made 'only' indirect reference to the Directives. The main argument was that as a particular area would require designation as Natura 2000 site, its high ecological value had been proven. It was then argued that by ignoring this fact, the competent authorities had exceeded their discretion as they had not sufficiently taken the high ecological value of the area into account when taking their decision. Finally, the goal of the third and smallest group of cases was to oblige the competent authorities directly to designate a specific area as Natura 2000 site.

6.2.4.1 Direct Reference to the Directives' Site Protection Regime

In November 1995, the Conseil d'État gave its first ruling on the potential direct effect of Article 4 of the Birds Directive in a case dealing with the construction of a high speed train (*T.G.V. – Train à grande vitesse*) in southern France. The huge project was highly contested as the train would pass through several communities and privately owned property. Besides the disturbance caused by the train, it would only stop after having passed large distances and thus would not be of advantage for areas in between the T.G.V. train stations. Therefore, concerned citizens founded the "Legal Union of southern Rhine" (*Union juridique Rhône-Méditerranée*) in order to be able to contest the realisation of the project before the administrative courts. In 1994, the competent ministry had issued a decree declaring the public interest (*d'utilité publique*) of the project, which was the precondition to start the procedure for compulsory purchase of land whose owners had refused to sell. The Legal Union contested this decision before the Conseil d'État by arguing that, inter alia, important bird areas would be negatively affected by the realisation of the T.G.V. The Conseil, however, refused to deal with the question on substantial terms. It simply held that "the contested provisions of the declaration of public interest do not constitute a general administrative decision (*un acte réglementaire*); that, therefore, the claimant cannot usefully maintain that the decree would misconceive the provisions of the [Birds Directive]"[145] By doing so, the Conseil d'État remained faithful to its *Cohn-Bendit* doctrine according to which only general administrative decisions (*actes réglementaires*) could create direct effect. Individual administrative

[145] "les dispositions attaquées de la déclaration d'utilité publique ne constituent pas un acte réglementaire; que, par suite, la requérante ne peut utilement soutenir que le décret attaqué méconnaît les dispositions de la directive n° 79-409 du 2 avril 1979 du Conseil des Communautés européennes". CE, 17 novembre 1995, Union juridique Rhône-Méditerranée, n° 159855.

decisions – such as the declaration of public interest for a specific project – could thus not be contested for non-compliance with the Birds Directive. As this legal principle was not fulfilled in the case on the construction of the T.G.V., the Conseil refused to further examine whether the alleged violation of birds areas would actually occur or not.

Two years later, the second instance administrative court of Bordeaux confirmed the ruling of the Conseil d'État with regard to Article 6 of the Habitats Directive. An environmental organisation had contested the decision of the Prefect of the département *Pyrénées-Orientales* to allow the exploitation of a marble quarry. The quarry was situated directly in an area that had been both identified by the inventory for important bird areas (*ZICO*) and the inventory for ecologically important sites (*ZNIEFF*) for its ecological value. Yet it had neither been designated as SPA nor transmitted as potential Natura 2000 site under the Habitats Directive. Again, the Court refused to examine the issue on substantial terms. Faithful to the Conseil d'État's *Cohn-Bendit* doctrine, it simply held that the decision of the Prefect was not a general administrative decision and that, therefore, no direct reference to Article 6 was possible. [146]

It needs to be emphasised that the consequence of these rulings were fatal for the possibilities to enforce the site protection regime of the Natura 2000 Directives through courts. Due to the courts utmost restrictive interpretation of the ECJ's doctrine of direct effect, environmental organisation could not enforce the site protection regime of the Directives if an individual administrative decision had been concerned. In practical terms, this meant that judicial review of authorisations for specific projects, such as the extension of an intensive life-stock farm or the construction of a quarry, was legally impossible, regardless whether the concerned project would have severe negative consequences for potential Natura 2000 sites.

In 1999, the first case appeared that concerned both an already designated SPA and a general administrative decision. In 1993, the Prefect of Charente-Maritime had authorised by *arrêté*, i.e. by a general administrative decision, the extension of the harbour of Ars-en-Ré. An environmental organisation had unsuccessfully contested this decision before the administrative court of Poitiers and had then decided to appeal the ruling to the Conseil d'État. In the meantime, parts of the area covering the extension had been designated as SPA, but this decision had not been officially published in the French official journal. At that time the Prefects were only obliged to inform the concerned communities of the designation of an area, but no legal text stipulated the official publication of a SPA.[147] Yet regardless of this fact, administrative decision can only be contested once they have been officially published. For this reason, the Conseil d'État held that the fact that the area had

[146] CAA Bordeaux, 19 juin 1997, Comité de défense de Vingrau et autres.
[147] See the anonymous comment on the ruling in Revue Juridique de l'Environnement (2/2002, p. 262).

been designated as SPA could not be legally raised. Nevertheless, if the Conseil had fully embraced the ECJ's doctrine of direct effect, it should have examined whether Article 6 of the Habitats Directive could be directly applied. The background of the case would have been ideal for dealing with this issue: on the one hand, it was clear that at least parts of the concerned area would fall under the Directives site protection regime, as they had been already designated as SPA. There was thus no doubt about the status of the area. In fact, the only reason why it was deprived of the Directives' site protection regime was that the French government had unlawfully failed to transpose Article 6 correctly. On the other hand, the *arrêté* had the legal status of a general administrative decision and was thus not covered by the Conseil's traditional *Cohn-Bendit* doctrine. Despite this background, the Court refused once again to follow the ECJ. Instead of examining whether Article 6 could be directly applied and then deciding whether the administrative authorities had exceeded their discretion by authorising the extension of the harbour, the Conseil simply held "that it emanates from the dossier that the planned extension (…) is not of the nature to endanger the interests that the [Birds Directive] aim to protect; that, therefore, the alleged incompatibility of the contested *arrêté* with the [Birds Directive] has to be, in any event, dismissed."[148]

So far, the Conseil d'État had refused to even examine whether the Directives' site protection regime could create direct effect. In July 2001, however, it seemed that it would relax its opinion. An environmental organisation had contested an *arrêté* of the Minister for Economic Affairs that allowed the plantation of grapes on a site that was on the list of proposed Natura 2000 site. Just one month before, the Conseil d'État had annulled this list on the request of the Anti-Natura 2000 group as the sites had been identified without following the consultation procedure established by national law. The site had been transmitted because it hosted a particular type of natural grass (*pelouse calcaire*). Obviously, planting grapes on such grass would completely eradicate this habitat. Confronted with this situation, the environmental organisation asked for a preliminary injunction. And the responsible judge of the Conseil d'État, the so-called *juge des référés*, granted it: the judge held that although the list of proposed sites had been annulled, this annulment was only done for procedural and not for substantial reasons. Therefore, given to the fact that the planting of grapes would have irreversible effects on the site, the injunction was granted.[149]

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[148] „qu'il ressort enfin des pièces du dossier que l'extension envisagée (…) n'est pas de nature à compromettre les intérêts qu'entend protéger la directive communautaire (…) du 2 avril 1979 relative à la protection des oiseaux sauvages ; que, par suite, le moyen tiré de l'incompatibilité de l'arrêté attaqué avec ladite directive doit, en tout état de cause, être écarté." CE, 6 janvier 1999, Société pour l'étude et la protection de la nature en Aunis et Saintonge (Sepronas), n° 161403.

[149] CE, 9 juillet 2001 (en référé), Association Fédérative Régionale pour la protection de la Nature Haut-Rhin, n° 234555.

The preliminary injunction was, however, only part of the story. One and a half year later the 'full' plenary of the Conseil d'État gave its final ruling on the issue. It was as negative as before, but remarkable for two reasons. First, the Court recapitulated for the first time explicitly the text of Article 6. More importantly, it also referred to its transposition through the *ordonnance* of April 2001. However, the Court did not discuss whether this transposition had been correct. As has been shown above, there were very good reasons to believe the opposite. By ignoring this point, the Conseil signalled that it was actually satisfied with the way Article 6 had been transposed. Second, the Court held that the French government was not allowed to take any action that would "definitely stay in the way of realising the goals of the [Habitats Directive]"[150] It thereby granted a minimum protection to possible Natura 2000 sites. Yet in the end, the Conseil came to the conclusion that the actual delimitation of the site would not endanger this goal.[151] The reason for this decision was that in the meantime the competent authorities had send three experts to re-examine the site. They came to the conclusion that the natural grass did only occur in some parts of the sites. For this reason, the authorities decided to split the site. Given this situation, the Conseil did not see the possible designation of the site as Natura 2000 site endangered (Interview Alsace Nature, 128-155).

Until the end 2005, no other case appeared before the Conseil d'État trying to make explicit reference to the site protection regime of the Natura 2000 Directives.[152] It should be also noted that the analysed environmental law journals did not report any case where a lower administrative court had applied Article 6 directly. Contrary to the situation of hunting dates, there was consensus between the lower courts and the Conseil d'État. Thus, to sum up, this first group of cases did not yield positive results with regard to the enforcement of the Directives' site protection regime. Either the Conseil d'État refused right away to examine the Directives as an individual administrative decision was concerned, or it ignored the question whether the environmental impact assessment established by Article 6 should have been applied by simply stating that the goals of the Directives were not endangered.

6.2.4.2 Indirect Reference to the Directives' Site Protection Regime

From 1994 on, a second group of cases dealing with the protection of Natura 2000 sites appeared before the French courts. This time, no direct reference was made to the individual site protection regime of the Directives. The fact that an area had or should have been designated as Natura 2000 site was only raised in order to prove

[150] "(…) de ne prendre aucune mesure susceptible de faire définitivement obstacle à la poursuit des objectifs fixes par la directive du 21 mai 1992".

[151] CE, 30 décembre 2002, Association Fédérative Régionale pour la protection de la Nature Haut-Rhin, n° 232752.

[152] Own search on legifrance.

the outstanding ecological value of the concerned site. Yet the goal was not to enforce the site protection regime of the Directives itself, but to activate purely national protection provisions. In order to do so, the claimants had to demonstrate that the competent authorities had exceeded their scope of discretion because they had failed to take the ecological value of the site into account. If the court followed this opinion, it annulled the administrative decision for the incorrect balancing of interests. It is important to highlight that this possibility to protect sensitive areas had been already used with regard to the national French inventories ZICO (for important bird areas) and ZNIEFF (for all other ecologically important sites). Although these inventories had never been intended to create legal effect, the courts used the fact that a site was part of them to review contested administrative decisions. Again, the question was whether the competent authorities had exceeded their scope of discretion if they had ignored the ecological value of a site (for an overview of this type of cases, see Le Corre/Noury 1996). To give an example for such an indirect reference to the Natura 2000 Directives, in 1996 the Prefect of the département Manche authorised the extension of a golf course that would require drying up parts of a nearby ecologically important wetland. An environmental organisation contested this decision on this very basis. The court followed the organisation's arguments and held:

> "It emanates from the dossier that the contested project is situated in an area whose ecosystem is of particular importance and that corresponds largely to a ZNIEFF of type I (…) and also to an area proposed for the Natura 2000 network; in an area that is, in addition, identified by France in the name of the [Ramsar Convention on important wetlands]; that even if the ZNIEFF was void of any legal effect (…), the above mentioned elements attest the particular ecological importance of the area (…) that, at least parts of it, have to be considered as a remarkable area (*espace remarquable*) in the sense of the provisions of (…) the Law on urban planning (*Code d'urbanisme*); that, therefore, (…) the Prefect of Manche has taken an illegal decision."[153]

As can be seen, the administrative court did not base its decision to annul the authorisation exclusively on the possible designation as Natura 2000 sites. It used it 'only' as an additional element to corroborate the ecological importance of the zone. After this importance had been proven, it relied on a national provision to annul the decision. Yet the court did not ask whether Article 6 of the Habitat Directive could justify by itself the annulment of the authorisation.

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[153] "Il ressort des pièces du dossier (...) que le projet litigieux se situe dans une zone dont l'écosystème présente un intérêt particulier et correspond en grande partie à une ZNIEFF de type I (…) et à une zone par ailleurs proposée pour le réseau Natura 2000, zone, en outre, identifiée par la France au titre de la Convention de Ramsar ; qu'alors même la ZNIEFF serait dépourvue de tout effet juridique (…), les éléments susrappelés (sic!) attestent de l'intérêt écologique particulier de la zone (…) qui, pour une partie au moins, doit être regardé comme un espace remarquable au sens des dispositions de (…) Code de l'urbanisme ; qu'ainsi (…) le préfet de la Manche a entaché sa décisions d'illégalité." TA Caen, 12 mai 1998, Manche Nature, n° 97-14.

Several other rulings of lower administrative courts and the Conseil d'État followed a similar pattern. Mostly, the cases concerned areas that had been identified as possible Natura 2000 sites under the Habitats Directive.[154] With regard to the protection of non-designated SPAs, the same legal reasoning had been used as well. In 1997, for instance, an environmental organisation contested the authorisation for the construction of a tyre testing centre in the so-called "*Massif des Maures*". The court annulled the authorisation as the area was both on the ZICO and ZNIEFF inventory.[155] One and a half year later, parts of the area were also designated as SPAs.[156] Yet in the ruling itself, the site protection regime of the Nature had not been discussed.

6.2.4.3 Forcing the Designation of Specific Sites

The third group of cases aimed at the designation of additional sites. Until spring 2006, however, only three of such cases have appeared before the French courts. In 2005, two environmental organisations had asked both the Prefects of their départements and the Minister for the Environment to either propose some specific areas to the European Commission as Natura 2000 sites or, alternatively, to start the national consultation procedure in order to probably obtain the same result. Both the Prefects and the Minister had denied this request. Once the environmental organisations had received the answer, they contested these administrative decisions before the French courts. With regard to the decision of the Minister for the Environment, both the concerned administrative court of Caen and Strasbourg gave similar rulings in November 2005. In the first case, four sites were concerned that had originally been intended for transmission as Natura 2000 sites. However, the Ministry for the Environment decided later to ignore these sites due to the strong resistance against the Natura 2000 site designation. In its decision, the court explicitly recapitulated the ECJ's interpretation of the Natura 2000 Directives that only scientific evidence could justify the exclusion of a site from the Natura 2000

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[154] See e.g. TA Grenoble, 7 novembre 1996, FRAPNA Isère c/ Préfet de la région Rhône-Alpes, n° 953656, 962540; TA Caen, 12 mai 1998, Manche Nature, n° 97-14; TA Caen, 9 juin 1998, Manche Nature, n° 97-1201; TA Caen, 9 juin 1998, Manche Nature, n° 97-1339; TA Poitiers, 8 octobre 1998, Fédération départementale d'exploitants agricoles de la Charente-Maritime et autres c/ Préfet de la Charente-Maritime; CAA Lyon, 16 Juillet 1999, Association Puy-de-Dôme Nature Environnement ; CAA Nantes, 30 juin 2000, Syndicat mixte de la région angevine (SMRA), n° 98NT01333; CAA Lyon, 18 juillet 2000, Commune de Mont-de-Lans, Société Deux-Alpes Loisirs et Ministre de l'Equipement, n° 96LY02821, 97LY00014 et 97LY00090; TA Lille, 5 février 2003, Association France Nature Environnement, n° 02-1605; CAA Douai, 4 mars 2004, Société et Entreprises Morillon-Corvol c/ Commune de Sempigny, Association Sempigny-Pont-l'Evêque Environnement et Regroupement des Organismes de Sauvegarde de l'Oiuse, n° 02DA00666.

[155] TA Nice, 24 avril 1997, Association de défense de la plaine et du massif des Maures et autres, n° 93-882.

[156] See SPA FR9310110 (Plaine des Maures), http://natura2000.environnement.gouv.fr/sites/FR9310110.html (17.12.2007).

network. It then held that for two of the four sites, such exclusion was indeed justified. For the two other sites, however, insufficient information regarding the ecological importance of the site existed. For this reason, the court annulled the decision of the Minister to ignore these two sites and obliged it to gather new scientific information within a delay of three months. In other words, the court did not oblige the Minister to designate the area, but only to re-examine the issue.[157] The second case concerned an area that had only been partly been transmitted under the Habitats Directive. Official documents show that only for economic reasons, a quarry situated directly in the area had been intentionally excluded (Interview Alsace Nature, 262-276). The administrative court of Strasbourg came to similar conclusions as its counterpart of Caen: it also held that according to the ECJ's interpretation of the Habitats Directive, only scientific reasons could justify the non-designation of a Natura 2000 site. Economic considerations, as they had been brought forward in the case at hand, were not justified. As a result, the Court annulled the decision of the Ministry and obliged it to take a new decision, this time based on scientific evidence.[158]

In late December 2005, the second instance court of Nantes gave a somewhat more promising decision on the obligation to designate sites, yet again with unclear practical implications. The ruling concerned the same four sites on which the administrative court of Caen had already ruled. Yet this time the question was whether the refusal of the Prefect to start the designation procedure for the sites concerned was lawful or not. The court held that scientific evidence for three of the four sites proved the high ecological value of the sites. As a result, the consultation procedure had to be started. Nevertheless, the court emphasised that this would not automatically lead to the designation of the sites as the competent authorities would still enjoy a margin of discretion.[159] Until mid-2006, it was still unclear whether the sites would be proposed as Natura 2000 sites or not.

Although environmental organisations had won these cases, they were very sceptical regarding their practical consequences. The courts themselves only obliged the competent authorities to retake a decision or to start the consultation procedure, yet the whether the areas would become Natura 2000 sites or not was still unclear. In view of the experienced resistance of the French authorities to designate Natura 2000 sites, the interviewed members of environmental organisations fear that the authorities would put forward reasons to exclude the sites from the Natura 2000 network. In fact, with regard to the second case, the administrative authorities have already issued a new decision that confirmed the exclusion of the quarry. An environmental organisation has contested this decision again before the

[157] TA Caen, 17 novembre 2005, Association Manche Natura, n° 0300880.
[158] TA Strasbourg, 21 novembre 2005, Association Alsace Nature, n° 0402365.
[159] CAA Nantes, 30 décembre 2005, Association Manche Nature, n° 04NT00958.

administrative courts, yet the case is still pending (Interview Alsace Nature, 279-284). In addition, environmental organisations criticized that the courts followed too easily the arguments of the competent authorities and were only concerned that the right procedure had been chosen. The ruling of the administrative court of Caen is telling in this respect: it is true, the court obliged the Minister to take a new decision based on new scientific evidence within three months. The rulings was given in November and the deadline was thus in February. Yet the court did not explain how the new biological information was supposed to be collected during winter, when almost all species are inactive (Interview Manche Nature, 356-364, see also Manche Nature 2006: 2).

In any case, the three cases appeared only in end 2005. This raises the question why environmental organisation did not turn earlier to the courts in order to try to oblige the designation of specific areas? In fact, since 1995, they knew which sites would be considered for transmission and whose designation should thus potentially be 'imposed' by legal action. My interviews with the key actors of the two environmental organisations behind these cases show that it was rather 'by chance' that they started these cases. Yet above all, they were some of the very few legal experts on Natura 2000 issues. Indeed, they had been also actively involved in the first group of cases, i.e. those that aimed at the direct enforcement of the Directives' site protection regime. Other environmental organisations did not have the legal expertise on the issue and it is thus due to the weak organisational capacity of French environmental organisation that they did not try to obtain the designation of additional Natura 2000 sites earlier (Interviews Manche Nature, 282-323, Alsace Nature, 329-333).

6.2.4.4 Effects of the Courts' Restrictive Interpretation

The consequence of the courts' restrictive interpretation of the Natura 2000 Directives were clear: the site protection regime of the Directives could not be enforced through litigation. Due to the general denial of direct effect for individual administrative decisions, the authorisation for most types of projects that could harm potential Natura 2000 sites could not be contested before French courts. And even if a site had been either designated as SPA or transmitted as Natura 2000 site to the European Commission, no reference to the Directives' site protection regime was possible. Designated SPAs were only protected by national conservation measures and, from 2001 on, by the incorrect transposition of the site protection regime. Yet most sites that would satisfy the criteria for becoming Natura 2000 sites and that were ultimately included in the Natura 2000 network were deprived from the protection mechanisms granted by the Directives. As a result, the site protection regime of the Directives' remained dead letter in France. In view of this situation, it was of little help that national protection measures could be activated by the fact that a site would also require designation as Natura 2000 site and had thus to be

considered of high ecological importance for this did not concern the site protection regime of the Directives at all. Also the last group of cases that dealt with the designation of specific sites did not create new opportunities for environmental organisations, as they appeared comparatively late and left the competent authorities still the option to exclude the site from the Natura 2000 network.

6.2.5 Effects of Litigation

In order to assess the effects of litigation, I used my expert interviews, official documents justifying the implementation measures and a very simple descriptive analysis of the case law. The conclusion remains the same: due to the weak organisational capacity and, more importantly, the restrictive interpretation given by the French courts, litigation on the Natura 2000 site protection regime had neither effects on its transposition nor application.

First, the interviewed experts agree that litigation of environmental organisations did neither significantly influence the process of transposing the Directives' protection regime nor speed up the creation of the Natura 2000 network. According to them, the main reason was the restrictive interpretation of the national courts. As the latter were only making indirect reference to the Natura 2000 Directives without really dealing with the relevance of the site protection regime itself, the did not create pressure on the competent authorities to implement the Directives (Interviews FNE [Legal Expert 219-316, Alsace Nature, 686-696, Ministry for the Environment, 192-223). In addition, a member of the legal network of France Nature Environnement who had been also actively involved in the most prominent cases emphasised that French environmental organisations were not able to engage in a more strategic judicial approach due to their insufficient resources. As Natura 2000 issues were complex, very few legally trained members of environmental organisation were sufficiently competent to start litigation. Yet it would have needed more attempts to fully 'test' the possibility to enforce the Natura 2000 Directives (Interview Manche Nature 298-323).

Second, the competent authorities did not make any reference to litigation started by environmental organisations in order to justify why they had to finally comply with the Natura 2000 Directives (see below for more details). Both a report of the Sénat (2003: 41) and an inter-ministerial report on the implementation of the Natura 2000 Directives (French Ministry for the Environment 2006: 5-6) emphasised that France could face further convictions by the ECJ that may lead to penalty payments if it did not contribute more to the creation of the Natura 2000 Network. Also the Minister for the Environment used this argument in a circular of November 2004[160] and in a press release of May 2006[161] to explain why new sites

[160] See Circulaire du 23 novembre 2004, DNP/SDEN n°2004-2.

had to be transmitted the European Commission or designated as SPAs. Yet the fact that environmental organisations had turned to the courts had not been mentioned at all. This supports the opinion of the interviewed experts and the analysis of the case law that there was no causal link between national litigation and the implementation of the Natura 2000 Directives.

Third, Table 4 contains a simple descriptive analysis of all cases adjudicated by the Conseil d'État until the end of 2005. It shows that only two cases reached the court that had been started both by environmental organisations and that made direct reference to the Directives' site protection regime. The same organisations brought four additional cases where they made an indirect reference to the Directives in order to support their claims. This low number alone indicates that litigation of environmental organisations did not have any significant effects on the implementation of the Natura 2000 Directives. More importantly, however, is the fact that most cases on Natura 2000 issues did not have the goal to enforce the Directives, but to achieve the opposite. These cases had been started either by organisations opposing the Directives or communities that tried to avoid the designation of Natura 2000 sites. In fact, as also an interviewed expert mentions, litigation on Natura 2000 in France was more dominated by anti-Natura 2000 cases than pro-Natura 2000 cases (Interview Alsace Nature, 726-732). Litigation of environmental organisations, on the contrary, did not have significant effects on the implementation of the Natura 2000 Directives.

Table 4: Cases Dealing with Natura 2000 Issues Adjudicated by the Conseil d'État

Type of litigation	Number
Environmental organisation making direct reference to Directives	2
Environmental organisation making indirect reference to Directives	4
Private litigant making indirect reference to Directives	2
Anti-Natura 2000 groups/Communities try to prevent Natura 2000 Directive	10
Total	18

Source: own counting based on search on the French public legal information system "Legifrance" that contains all published rulings of the Conseil d'État. Search terms: "Natura 2000" and "directive communautaire 92 43 CEE". Date of Search: 17.12.07.

6.2.6 The Role of the European Commission for Achieving Compliance

Without the pressure of the European Commission to transpose the site protection regime of the Directives and to complete the French Natura 2000 network, France

[161] See the press releases of the Ministry for the Environment of 03.05.2006 (http://ecologie.gouv.fr/article.php3?id_article=5730, 04.05.2006).

would not have implemented large parts of the Natura 2000 Directives. Nevertheless, the Commission was on certain points rather lenient and some transposition problems still remain.

The most important instrument used by the Commission to put pressure on France was the threat of infringement proceedings. As can be seen in Table 4, France had been convicted in total six times for the incorrect implementation of the Natura 2000 Directives. Four cases concerned the failure to designate or to guarantee the protection of specific ecologically important areas for wild birds. For two of them – the cases on the SPA *Poitevin* and *Basses Corbières* – the Commission even started the unofficial phase of a 2nd infringement proceedings.[162] Three cases concerned 'horizontal' issues that touched on the transposition of the Directives as such. One was on the transposition of Article 6, one on the insufficient transmission of sites under the Habitats Directives and one on the insufficient designation of SPAs.

Table 5: Infringement Proceedings against France on the Directives' Site Protection Regime

Case	Horizontal/ specific	Formal letter	Reasoned opinion	Referred to ECJ	Ruling of ECJ
ECJ C-166/97 [1999] Commission v France (SPA Estuaire de la Seine)	specific	23.12.1992	03.07.1995	30.04.1997	18.03.1999
ECJ C-96/98 [1999] Commission v France (SPA Poitevin)	specific	23.12.1992	28.11.1995	03.04.1998	25.11.1999
ECJ C-256/98 [2000] Commission v France (transposition of Article 6)	horizontal	09.08.1994	21.09.1995	15.07.1998	06.04.2000
ECJ C-374/98 [2000] Commission v France (SPA Basses Corbières)	specific	02.06.1996	19.12.1997	16.10.1998	07.12.2000
ECJ C-220/99 [2001] Commission v France (insufficient Habitat sites)	horizontal	27.03.1996	6.11.1997	09.06.1999	11.09.2001
ECJ C-202/01 [2002] Commission v France (insufficient SPAs + SPA Plaine de Maures	horizontal + specific	23.04.1998	4.04.2000	16.05.2001	26.11.2002

Source: own compilation based on ECJ rulings.

Table 5 also shows the dates of the unofficial start of the infringement proceeding (formal letter), the official initiation (reasoned opinion), the referral to the ECJ and

[162] See Europe Daily Bulletins, No. 8257 – 18/07/2002 and No. 8371 – 04/01/2003).

finally the date of the ECJ's ruling. These dates show that with regard to the transposition of Article 6 and the transmission of sites under the Habitats Directive, the Commission was rather tough. Soon after the Habitats Directive had entered into force, it sent a formal letter to France in order to monitor the transposition of the new site protection regime. It did the same after the deadline of the Habitats Directive to transmit possible Natura 2000 sites had expired. Nevertheless, it took still almost four respectively three years until the Commission finally referred the issues to the ECJ. For other sites, the cases did not enter the formal phase of an infringement proceeding.[163] Although this shows the inefficiency of infringement proceedings to achieve timely implementation, it does not indicate that the Commission had been particularly lenient on France with regard to these issues. It should be also mentioned that concerning the transmission of Natura 2000 sites, the record of France had not been much worse compared to other countries (see Table 6 for an overview of the transmission process).

Table 6: Overview of the creation of the French Natura 2000 Network

Date	SPAs (Birds Directive) (number; km²; % of France)	Source
Dec. 1986	20 (1.519; 0,27%)	(European Commission 1993: 41)
Apr. 91	61 (5.197; 0,95%)	(European Commission 1993: 42)
End 1995	99 (7.069; 1,29%)	(European Commission 2000a: 7)
End 1998	109 (7.877; 1,44%)	(European Commission 2002a: 8-9)
Jan. 2002	117 (9.154; 1,68%)	(Sénat 2003: 22)
Oct. 2003	155 (11.749; 2,15%)	Natura 2000 Barometer of the Commission (cited in Deutscher Naturschutzring 2003: 16)
Mar. 2005	174 (14.361; 2,64%)	Natura 2000 Barometer of the Commission (cited in French Ministry for the Environment 2006: 46)
Apr. 2006	369 (45.500; 8,36%)	Natura 2000 Barometer of 01.12.2006
Jun. 2007	369 (45. 804; 8,42%)	Natura 2000 Barometer of 30.06.2007
Date	**Transmission of Habitat Sites (number; km², % of France)**	**Source**
Dec. 2000	1.029 (31.440; 5,84%)	(European Commission 2003b: 17)
Jan. 2002	1.109 (38.082; 7,00%)	(Sénat 2003: 18)
Mar. 2003	1.174 (40.632; 7,46%)	(European Commission 2003b: 18)
Mar. 2005	1.219 (42.201; 7,75%)	Natura 2000 Barometer of the Commission (cited in French Ministry for the Environment 2006: 47)

[163] See Europe Daily Bulletins, No. 8174 – 19/93/2002 and Europe Daily Bulletins, No. 8353 – 04/12/2002).

Apr. 2006	1.305 (48.942; 8.99%)	Natura 2000 Barometer of 01.12.2006
Jun. 2007	1.335 (52.156; 9,79%)	Natura 2000 Barometer of 30.06.2007

The Commission was well aware of the strong resistance in France against the designation of SPAs. Yet although it deplored the decision of the French government to 'freeze' process of creating the Natura 2000 network,[164] the Commission took a very indulgent position towards France with regard to the designation of SPAs. It is true that it had sent already in 1992 two formal letters on the conservational status of two important areas for birds. Yet these cases had been referred to the ECJ only four respectively five years later. More importantly, however, is the Commission's negligence with regard to the total number of SPAs for wild birds. The comparison of the designation process of SPAs and the time when the Commission started the infringement process on the general insufficient designation of SPAs is telling in this respect. The Commission started the unofficial phase of an infringement proceeding on the issue only in 1998. At that time, however, only 1.44% of the French territory had been designated as SPAs (see Table 6). Although the figure did not significantly increase in the next years, it took the Commission until May 2001 to finally lodge the case at the ECJ. Also the interviewed expert of the French Ministry for the Environment admitted that the Commission had been for a long time very lenient regarding the incomplete designation of SPAs: in the case of Belgium the Commission had decided to block the payment of money from the structural funds for the French province as too few SPAs had been designated.[165] Yet in the case of France that had had even more severe gaps in its network of SPAs, the Commission abstained from realising this threat (Interview Ministry for the Environment, 327-340).

Nevertheless, the interviewed experts agree that the pressure from the European Commission was crucial in bringing France to respect the obligation stemming from the Natura 2000 Directives (Interviews FNE [Réseau Milieux Naturels], 375-379, 1468-1472; Ministry for the Environment, 97-105). With regard to the designation of sites, the Commission increased the pressure on France considerably in late 2004 by threatening to refer France a second time to the ECJ if the French Natura 2000 network had not been completed by April 2006. As France had already been convicted for the insufficient transmission and designation of Natura 2000 sites, this could have resulted in severe penalty payments. And it was

[164] See Europe Daily Bulletins, No. 6783 – 02/08/1996.

[165] It should be noted that the EP's Committee on the Environment adopted a resolution in which it called on the Commission to link the disbursement of money from the structural funds with the Member State's complete contribution to the Natura 2000 network. The plenary of the EP, however, did not go as far as the resolution and only invited the Commission to do so (Europe Daily Bulletins, No. 7679 – 18/03/2000).

also obvious that the European Court would not hesitate to convict France a second time as the French Natura 2000 network was still far from complete. This credible threat of penalty payments explains the sudden increase of designated SPAs of more than 30.000 km² in less than a year, from 2,64% in March 2005 to 8,36% in April 2006 (Interviews FNE [Réseau Milieux Naturels], 1558-1565; Ministry for the Environment, 225-264). In the words of the interviewed expert of the Ministry for the Environment, "it was, indeed, really when the pressure from the Commission became extremely strong and it was clear anyway that [France] was moving towards a certain conviction [by the ECJ] with penalty payments that [the French authorities] were able to effectively and firmly mobilise" (Interview Ministry for the Environment, 345-349).[166] In addition, also official documents indicate that the threat of penalty payments was the main reason why the French authorities were suddenly ready to fulfil their obligations, in particular to designated more SPAs (see Sénat 2003: 41; French Ministry for the Environment 2006: 5-6). The circular of the Minister for the Environment of November 2004 is explicit on this point. The Minister calls on the Prefect to present the delimitations of missing SPAs as soon as possible. Before stating that "our network [of SPAs] is obviously insufficient"[167], the Minster emphasised that:

> "France is very seriously exposed to be convicted again if it does not present its complete contribution to the construction of the [Natura 2000] network within one and a half year at the latest. The Commission has recently put France on formal notice to execute two rulings of the European Court of Justice at the risk of continuing the legal proceeding. This could lead to a new conviction, this time with heavy financial penalty payments."[168]

The threat of a second referral proved to be convincing. In April 2006, France was able to present an almost complete list of sites for the Natura 2000 network. There were, however, still minor problems with regard to the delimitation of two SPAs and a couple of protection areas for Natura 2000 species. Yet as France had made an enormous progress, the Commission abstained from referring the case to the ECJ. It extended the deadline until March 2007 when the next evaluation of the transmitted sites was scheduled. Shortly before that date, the French authorities were able to present the last sites for the Natura 2000 network. The Commission

166 "(…) et, en fait, c'est vraiment lorsque la pression de la Commission a été extrêmement forte et que, de toute façon, on allait vers une condamnation certaine avec astreinte, qu'on a pu, effectivement et fortement se mobiliser."

167 "(…) notre réseau est manifestement insuffisant".

168 "La France est très sérieusement exposée à être une nouvelle fois condamnée si elle ne fournit pas une complète contribution à la constitution du réseau d'ici un an et demi au plus tard. La Commission a récemment mis en demeure la France d'exécuter deux arrêts de la Cour de justice des Communautés européennes, sous peine de poursuivre la procédure contentieuse. Celle-ci pourrai aboutir à de nouvelles condamnations, cette fois assorties de lourdes astreintes financières" Circulaire du 23 novembre 2004, DNP/SDEN n°2004-2.

judged the French contribution as sufficient and coherent (Interview Ministry for the Environment, 364-301).

To sum up, the Commission's role was decisive for the creation of the French Natura 2000 network and the transposition of the Directives' species protection regime that is, however, still insufficient. Nevertheless, the 'general' problems of the EU's centralised enforcement mechanism were also clearly visible in the case of France. First, even if the Commission became quickly active, it was not able to guarantee the transposition of Article 6 before 2001 and the completion of the French Natura 2000 network before 2006. Thus, a large number of ecologically important sites that did become Natura 2000 sites in the end were not protected for years. Second, the indulgence of the Commission towards France regarding the designation of SPAs seems to be another example of the fact that the Commission does take 'political' considerations into account when deciding to enforce EU law or not. It is otherwise hard to explain why the Commission did not become active although France had obviously designated by far too few sites. Third, environmental organisation sent systematically complaints to the Commission as sites had not been either designated as SPAs or transmitted under the Habitats Directive, but where endangered by construction projects. The response of the Commission was, however, that it would prefer the issue to be settled before the national courts. Yet as the French courts ignored the site protection regime of the Directives, this was impossible (Interview Alsace Nature, 798-799). Therefore, the requirements of the Directives' had to remain dead letter for most sites.

6.2.7 Remaining Implementation Problems

Although the creation of the French Natura 2000 network has been achieved, at the time of my interviews two implementation problems remained. On the one hand, it has been discussed above that the French legislation had to be considered as an insufficient transposition of Article 6 of the Habitats Directive concerning several key aspects. The Commission was aware of this fact and started an infringement proceeding. In May 2007, it was still pending. According to the interviewed expert of the Ministry for the Environment, the French authorities feared a referral to the ECJ and therefore started to prepare an amendment of the legal provisions that were transposing Article. At the time of the interview, however, it was still unclear which aspects of the transposition would be changed or if the law would be amended at all (Interview Ministry for the Environment, 150-176). Thus, France still failed to transpose Article 6 correctly. On the other hand, the faithful application of Article 6 still seems to make problems. As the site protection regime would only apply to those sites that had been correctly designated, important areas fell out of its scope. Admittedly, following the increased pressure of the European Commission, the Ministers for the Environment, for Agriculture and for Transport

issued a conjoint circular on the application of Article 6 environmental impact assessments in October 2004. It obliged the Prefects to conduct such an assessment for all programmes or projects carried out by public authorities even for sites that had been identified as Natura 2000 sites but had not been designated yet. Emblematically, the circular ended by stating that "[w]e inform you that you could encounter potential difficulties in the implementation of this circular".[169] Yet in any case, the importance of this circular should not be overstated. First, the transposition of Article 6 was still incorrect, as not all plans or projects that could have significant negative effects on Natura 2000 sites would require an impact assessment. Second, in October 2004, many sites had not even been transmitted to the European Commission and would therefore not be covered by the circular. Third, the circular did only apply to projects initiated by public authorities but not by private parties. Therefore, many projects would still not require an Article 6 assessment. Finally, the experience of environmental organisations so far had been rather negative, as the competent authorities considered an Article 6 assessment still as a 'normal' French environmental impact assessment with only procedural requirements. Interview FNE [Réseau Milieux Naturels], 673-734). However, it has to be said that at the time of my interviews, given the late implementation of the Natura 2000 Directives and the negative interpretation of the French court, there had been only few cases of Article 6 assessments (Interview FNE [Legal Expert], 702-719). Therefore, although scepticism on the quality of the application of the Directives' site protection regime is justified, no definite answer can be given on this issue.

6.3 Linking the Empirical Results to the Stage Model

The empirical discussion has shown that public interest group litigation in France on the Natura 2000 Directives had only had limited effects on the implementation of the Birds Directive's hunting dates and no effects at all on the implementation of the Directives' site protection regime and the creation of the Natura 2000 network. In the case of hunting dates, the massive litigation of French environmental organisations repeatedly caused legal amendments that ameliorated, at least from a merely legal perspective, the transposition of the hunting dates of the Birds

[169] "Vous nous tiendrez informés des difficultés éventuelles que vous pourriez rencontrer dans la mise en œuvre de la présente circulaire" Circulaire du 5 octobre 2004 (DNP/SDEN n° 2004-1) relative à l'évaluation des incidences des programmes et projets de travaux, d'ouvrages ou d'aménagements susceptibles d'affecter de façon notable les sites Natura 2000, p. 3.

Directive as interpreted by the ECJ. However, both the transposition and particularly the practical application of the European requirements remained completely incorrect. Ultimately, it was the pressure from the European Commission and not public interest group litigation that led to the correct implementation of the hunting dates.

These results support the expectations derived from the stage model. Due to particular circumstances, French environmental organisations did have the sufficient organisational capacity to contest the incorrect hunting dates before French administrative courts. Also the open access to the courts was conducive to law enforcement through courts. Thus, on the first stage of the model that focuses on the behaviour of public interest groups, no problem occurred. Regarding the second stage – the interpretation of the Directive's provisions by French courts –, the administrative courts followed in the end by and large the ECJ's interpretation of the Birds Directive's hunting dates. It became settled case law that hunting was only allowed during certain restricted periods. If the competent authorities were not respecting these dates, the courts would not hesitate to annul unlawful hunting dates. Thus, also the interpretation given by French administrative courts was conducive to law enforcement through courts. Nevertheless, the effects of litigation were largely neutralised due to the behaviour of the third stage's key actor, the competent authorities. As large parts of the rural population was hostile regarding the external regulation of their traditions, the issue of hunting dates became a symbol for the 'defence' of rural values. The fact that public opinion and powerful, well organised interest groups were strongly supporting this national institution, i.e. open hunting dates, led the competent authorities to not comply with both the Birds Directive and even their national administrative courts. Their reaction of the constant annulment of their decisions by the French court was to set the hunting periods again in an unlawful way and thus to ignore the legal obligation. To sum up, three variables identified for effective law enforcement through courts were conducive to this instrument. However, due to the limiting characteristics of the last variable, litigation on hunting dates in France only had very limited effects on its implementation. This highlights the fact that all variables of the model are of equal importance. The characteristics of each variable determine the potential for law enforcement through courts of the subsequent variables. Yet as the case of litigation on hunting dates in France shows, litigation can even fail on the last stage.

With regard to the implementation of the site protection regime and the creation of the Natura 2000 network, the empirical discussion has shown that public interest group litigation did not have any effects. Again, this supports the expectations derived from the stage model. With regard to the first stage, the open access to the courts allowed environmental organisations to start litigation, yet their weak organisational capacity set clear limits. Only some organisations had both the legal expertise for litigation on Natura 2000 issues and the sufficient resources to

obtain the necessary biological information demanded by the courts. Thus, the possibilities for environmental organisations to enforce the Directives through litigation were limited from the outset – regardless of the open access to the courts. However, although the weak environmental organisations would have become a problem for further legal actions, more fatal for the failure for law enforcement through courts was the utmost restrictive interpretation given by the French courts. Due to the resistance of the Conseil d'État to accept the ECJ's doctrine of direct effect, most administrative decisions that were likely to negatively affect Natura 2000 sites could not be contested. And even if general administrative decision were at stake, the courts ignored the site protection regime of the Directives. For this reason, no pressure could be created by the contestation of construction projects to implement the Directives, both with regard to their site protection regime and the creation of the Natura 2000 network. The fact that the courts accepted an indirect reference to the Directives and to review the decision of the local authorities to start the designation process for specific sites could not alter this situation. Given the fact that it was for legal reasons simply impossible to enforce the site protection regime of the Directives through litigation, the question how the competent authorities reacted to litigation became irrelevant. In theoretical terms, the characteristics of the variable 'interpretation by national courts' were so negative for law enforcement through courts that the subsequent variable – reaction of the competent authorities – was insignificant.

In contrast to the stage model, the identified alternative explanatory factors do not yield any explanatory power. First, litigation on the site protection regime was not ineffective because the European Commission had become active and environmental organisations did therefore refrain from turning to the courts. On the contrary, as they were well aware of the limits of the EU's centralised enforcement instrument, they tried themselves to enforce the Directives with regard to particular projects. Litigation had no effect because of the weak organisational capacity and in particular for the utmost restrictive interpretation given by the French courts on the site protection regime, but not because the Commission's actions made environmental organisations passive. In the case of the setting of hunting dates, this alternative explanation does also not hold, as the Commission did only become active long after environmental organisations had already turned to the courts. And they continued to do so even then. Second, also the organisational form of public interest groups is not able to explain why litigation created only limited effects. With regard to the Birds Directive, both narrowly focused small environmental organisations – such as the Ligue ROC and the Association for the Protection of Wild Animals – as well as narrowly focused large organisations – such as the French League for the Protection of Birds – and even more widely focused large organisations – like *France Nature Environnement* – used litigation to enforce the Birds Directive's hunting dates. The same is true with regard to the site protection

regime of the Natura 2000 Directives. The organisational form of interest groups might well be a decisive variable to explain the behaviour of business or economically oriented interest groups, yet it has no explanatory power in explaining why litigation did not create effects. Third, the empirical discussion has shown that French environmental organisations did not enjoy any access to policy making through which they could have achieved the goal of implementing the Directives. By contrast, only the opponents to the Directives – hunting, agricultural and forestry organisations – did enjoy such access and they were indeed able to block the implementation. Precisely because of this missing access to policy making, environmental organisations turned to the courts, yet with ultimately only limited or even no effect.

7 Germany

This chapter is dedicated to the judicial enforcement of the Natura 2000 Directives in Germany. After having discussed the initial implementation of the Directives, I turn to the activities of both German environmental organisations and the European Commission to enforce the European requirements. Subsequently, I discuss in detail the interpretation of the Directives by the German administrative courts and the effects of litigation on the implementation of the Directives.

7.1 The Implementation of the Natura 2000 Directives

The implementation of the Directives had to follow the German federal system of shared competencies between the *Bund* and the *Länder*. According to the German constitution, nature conservation issues are regulated by both entities: the *Bund* can pass more or less detailed framework laws (*Rahmengesetze*) that are subsequently further substantiated by the *Länder*. However, if the *Bund* abstains from taking such laws, the *Länder* are free to take their own legislative measures. This happened, for example, regarding the issue of legal standing of environmental organisations in administrative matters. The access to courts was very differently regulated in the *Länder* until the revised federal nature conservation law (*Bundesnaturschutzgesetz*) of 2000 set minimum criteria. With regard to the designation of Natura 2000 sites, it was solely up to the *Länder* to identify, report and designate these sites as they were alone competent for the creation of all types of protection areas. Although the Federal Ministry for the Environment was ultimately responsible for transmitting sites under the Habitats Directive to the Commission, it was completely dependent on the cooperation of the *Länder*. Concerning the implementation of the site protection regime, the *Bund* had already made use of its possibility to regulate this matter through framework laws since the 1970s. Although the Länder could have transposed Article 6 of the Habitats Directive themselves, it was practically up to the federal government to amend the then existing nature conservation law to implement the Directives' site protection regime.

In view of this situation, I had to analyse both the Federal and *Länder* level. For reasons of work load, I had to pick one *Land* on which I would particularly focus. As this Land should allow at least in principle environmental organisations to contest administrative decisions, I decided to focus on Lower-Saxony (*Niedersachsen*).

R. Slepcevic, *Litigating for the Environment*, DOI 10.1007/978-3-531-91999-7_7,

It opened the access to the courts for environmental organisations in 1993 and gives them compared to other *Länder* – yet not compared to other countries – a rather open access (see Schmidt/Zschiesche/Rosenbaum 2004: 23-27).[170] Nevertheless, I tried to focus on the situation of whole Germany as much as possible.

7.1.1 Designation of Sites

The process of designating Natura 2000 sites was one of the most problematic aspects of the implementation of the Directives. As has been mentioned, the *Länder* were responsible for identifying and designating these sites. However, as Table 7 shows, Germany was not able to fulfil its requirements on time. Only in 2005 – 25 years after the entry into force of the Birds Directive – , most protection areas for birds had been designated as SPAs. With regard to the Habitats Directive, the Commission accepted the German list of sites as sufficient only in February 2006 – eight years after the deadline had expired. Today, almost 15% of German territory is designated as Natura 2000 sites, compared to only about 2% that had been designated as national protection areas before the 1990s (Interview Federal Ministry, 657-659).

Table 7: Creation of the Natura 2000 Network in Germany

Date	SPAs (surface area in km²; % of Germany)	Source
Dec. 1986	117 (2.909 km², 0,8%)	(European Commission 1993: 41)
Apr. 1991	117 (2.909 km², 0,8%)	(European Commission 1993: 42)
Until 1993	117 (2.909 km², 0,8%)	(European Commission 1993: 21)
End 1998	551 (~14.000 km², 3,9%)***	(European Commission 2002a: 8-9)
Apr. 2001	152 (15.015 km², 4,2%)	(Nabu 2001)
Oct. 2003	446 (28.977 km², 7,8%)	Natura 2000 Barometer of the Commission*
Jun. 2005	497 (32.080 km², 8,9%)	(European Topic Centre on Biological Diversity 2005: 10)

[170] The first *Länder* that gave environmental organisations legal standing in (some) administrative matters were Bremen (1979), Hessen (1980), Hamburg (1981) and Berlin (1983). Most but not all other *Länder* followed in the beginning of the 1990s (Schmidt/Zschiesche/Rosenbaum 2004: 2). From a methodological perspective, it would have been best to chose a *Land* that had already gave access to the courts for environmental organisations when the Birds Directive entered into force. However, these Länder are not appropriate cases for practical reasons: on the one hand, Bremen, Hamburg and Berlin are small city-states where the designation of protection areas is obviously of less importance than in territorial states. Hessen, on the other hand, abandoned the legal standing for environmental organisations in 2002 (Schmidt/Zschiesche/Rosenbaum 2004: 23).

Jun. 2006	568 (48.102 km², 13,4%)	(European Commission 2006c)
Date	Transmission of Habitat Sites (number; km², % of Germany)	Source
Jun. 1995 (initial deadline)	No sites reported	(Schreiber 2004: 1; Deutscher Naturschutzring 2003: 11)
Dec. 1999	1.114 (5.712 km², 1,6 %)	(Nabu 2001)
Dec. 2000	2.196 (20.434 km², 5,7%)	(European Commission 2003b: 17)
Apr. 2001	3.289 (22.017 km², 6,1%)	(Nabu 2001)
Oct. 2003	3.536 (32.151 km², 9,0%)	Natura 2000 Barometer of the Commission*
Jun. 2005	4.617 (35.208 km², 9,8%)	(European Commission 2005)
Jun. 2006	4.617 (53.293 km², 14,9%)	(European Commission 2006b)
Jun. 2007	4.617 (53.294 km², 14,9%)	(European Commission 2007)

Note that SPAs can also be designated as sites under the Habitats Directive. The covered surface is thus not cumulative. In addition, it also occurred that some sites were withdrawn or their reported area had been changed afterwards. This explains why the number and size of Natura 2000 sites is not always increasing.
* Cited in Deutscher Naturschutzring (2003: 16).
** Cited in French Ministry for the Environment (2006: 46).
*** I was not able to verify whether the reported number – 551 SPAs – was really correct. It might well be that smaller areas were joined to larger SPAs, yet this appears to me rather unlikely.

With regard to SPAs, the nature conservation laws of the *Bund* and *Länder* did not contain particular criteria for the designation of such sites. In fact, until 1998 SPAs did not even exist as separate type of protection area (Niederstadt 1998: Fn 8). Until that year, SPAs were designated as nature protection areas according to the then existing nature conservation law. In the beginning, the decision to designate such sites was also not guided by strictly scientific criteria, but according to Winter mainly political (1992: 21). In Lower Saxony, some already existing protection areas had been designated in the years 1984 to 1986. They were known as tourist regions and important areas for wild birds, but had little economic relevance. After that, no new areas had been designated before the Habitats Directive revived the whole process of site designations in order to create the Natura 2000 Network (Interview Nabu 2, 270-276, Ministry Lower-Saxony, 701-706). Above all, however, the initial designation of SPAs did not lead to the application of specific protection measures. Existing protection areas merely became an extra 'label' without further consequences (Interview WWF 2, 189-201). The real increase of SPAs occurred in the end of the 1990s. In 2001, the Commission sent a formal letter to Germany for the insufficient designation of SPAs that was accompanied by a reasoned opinion in

April 2006.[171] At the time of my last interviews, the infringement proceeding was still open, as some Länder still had not designated all appropriate areas (Interviews Federal Ministry, 443-447, Ministry Lower-Saxony, 73-76). In Lower-Saxony, the last sites were to be designated in summer 2007.[172] Nevertheless, in June 2007, there were still press reports that the Commission would start an infringement proceeding on the issue shortly.[173]

According to the timetable of the Habitats Directive, all eligible sites should have been sent to the Commission until June 1995. At that time, however, Germany had not reported a single site (see again Table 7). From 1996 on, Germany reluctantly fulfilled its European obligations. In February 1999, the European Commission started an infringement proceeding against the insufficient designation of sites under the Habitats Directive. This led to the conviction of Germany by the ECJ in September 2001.[174] Germany reported new sites and, in a letter sent to the Commission on 10.01.2002, held the opinion that it had completely fulfilled its obligations. However, the assessment seminars on the Natura 2000 network held on 11-13.11.2002 in Potsdam and 05-07.06.2003 in Den Haag found that there still existed important deficits in the reported German sites. On the basis of these assessment seminars, the European Commission pursued a second infringement proceeding on this issue in April 2003. In December 2005, it sent the reasoned opinion to the German government. A conviction by the Court could have led to the payment of a lump sum over ten million Euro and daily penalty payments up to 900.000 Euro a day (press release BMU No 027/06, 17.02.2006, Schreiber 2004: 1-4; Deutscher Naturschutzring 2003: 10-13). In February 2006, Germany reported the last sites under the Habitats Directive. In October 2006, the European Commission accepted this last report of sites as being sufficient and stopped the second infringement proceeding (press release BMU No 265/06, 16.10.2006). Although Environmental organisations still saw some insufficiencies in the transmitted sites, they could live with the proposals and emphasised that the next step of the Habitats Directive, the drawing up of management plans for Natura 2000 sites[175], had to be accomplished as soon as possible (Interview Nabu 1, 430-437).

[171] Infringement proceeding No. 2001/5117.

[172] See http://www.umwelt.niedersachsen.de/master/C555113_N11314_D0_I598_L20 (07.02.2008).

[173] See press release 26.06.2007, Ministry for Agriculture and Environment of Schleswig-Holstein (http://www.schleswig-holstein.de/MLUR/DE/Service/Presse/PI/2007/0607/MLUR__070625__Vertragsverletzung__Vogelschutz.html, [07.02.2008]).

[174] ECJ C-71/99 [2001] Commission v Germany.

[175] According to Article 6 (1) of the Habitats Directive, the Member States have to establish the necessary conservation measures including, if needed, management plans for Natura 2000 sites in order to guarantee their conservation status.

7.1.2 Site Protection Measures

7.1.2.1 Transposition

Initially, Germany argued that site protection regime of the Birds Directive had been already transposed by the federal nature conservation law (*Bundesnaturschutzgesetz*) of 1987 (*BNatSchG 1987)* by simply considering SPAs as nature protection areas (*Naturschutzgebiete*). It was argued that more specific protection measures were neither planned nor needed (European Commission 1993: 21). At the time, however, the site protection regime of the Birds Directive did not attract much attention anyway – a situation that started to change only after the ECJ had given its ruling on the *Leybucht* case in 1991. In that case, the Commission had brought Germany before the ECJ as a designated SPA should have been reduced in size in order to create new dykes. The proceeding was thus on the conservation of a specific site and not on the German transposition of the Birds Directive's site protection regime as such. Even though Germany was ultimately not convicted, the ECJ made it clear that the reduction of designated SPAs can only be justified by imperative reasons of public health and security, but not by economic ones.[176] The opinions of Germany and other Member States during the court procedure made it quite clear that the Birds Directive was still considered as generally irrelevant for projects in protected sites.[177] Yet also German legal scholars focused mostly on the obligation to designate SPAs and not whether the Birds Directive would contain an independent site protection regime. One reason for this was the fact that, as has been mentioned, the designation of national protection areas was not bound by scientific criteria. The Birds Directive in connection with the ECJ's interpretation, however, introduced for the first time such specific criteria that could oblige the competent authorities to designate particular sites (see Soell 1993: 307-308; Iven 1996: 373-376).

When the Article 6 of the Habitats Directive entered into force in June 1994, legal scholars agreed that the existing German law fell short of the new obligations to assess potentially harmful plan or projects and that an amendment of the federal nature conservation law was indispensable (see Gellermann 1996; Freytag/Iven 1995; Iven 1996). Vis-à-vis the European Commission, the government remained silent and did not report any transposition measures. Admittedly, there was indeed nothing to report, but normally governments tend to report at least some legislative measures as transposition given the fact that otherwise the Commission would start infringement proceedings immediately. And this is exactly what happened: already

[176] ECJ C-57/98 [1991] Commission v Germany (*Leybucht*). As has been mentioned, this ruling lead ultimately to the replacement of the stricter site protection regime of the Birds Directive through the Habitats Directive.

[177] See the opinion of Advocate General Van Gerven, 5 December 1990, C-57/89 Commission v Germany (*Leybucht*), para. 22.

in August 1994, the Commission sent a formal letter to Germany as it had not received any transposition measures. The German government argued that the transposition was already underway and would be completed soon. Not satisfied, the Commission sent a reasoned opinion in November 1995 to Germany to which the government did not even reply. The case was then referred to the ECJ in February 1997. During the court hearing, the German government did not deny that it had not yet taken the necessary legislative steps to transpose the Directive[178] and was, not surprisingly, convicted.[179]

However, the German government was correct in arguing that the legislative process to transpose Article 6 had been already started. Indeed, the Directives' site protection regime should be transposed during the amendment of the nature conservation law. In July 1995, the German socialist party (SPD) already proposed such an amendment, although without direct reference to the Habitats Directive.[180] In December 1995, the German Greens presented their proposal that also explicitly emphasised the obligation to transpose the Natura 2000 Directives as soon as possible.[181] After the German government had presented its own proposal in August 1996[182], several amendments and difficult negotiation between the two chambers of parliament – the *Bundestag* and *Bundesrat* – followed (for a more detailed overview of the legislative process, see Niederstadt (1998: 517). In the introduction of the legislative proposals, the obligation to transpose the Habitats Directive is regularly mentioned, yet without explicitly referring to the ongoing infringement proceeding. Finally, on 30.04.1998, the amended version of the nature conservation law, called *Bundesnaturschutzgesetz 1998* (*BNatSchG 1998*) was adopted.[183] The *BNatSchG 1998* was also the first explicit transposition of the Birds Directive's site protection regime.

Article 19 a-f of the *BNatSchG 1998* contained the main provisions on the Natura 2000 Directives. It introduced SPAs and sites under the Habitats Directive as new types of protection areas in the German legal system and clarified key concepts. The Directives' site protection regime was transposed in Article 19 c: following Article 6 (3-4), it stated that in principle, all plans or projects that could have negative effects on a site's conservation status required an environmental impact assessment. If the plan or project would have such negative effects, it could

[178] See the opinion of the Advocate General (C-83/97, para. 4) and the ruling itself (para. 7).
[179] ECJ C-83/97 [1997] Commission v Germany.
[180] Gesetzesentwurf der Fraktion der SPD: Entwurf eines Zweiten Gesetzes zur Änderung des Bundesnaturschutzgesetzes (Drucksache 13/1930, 03.07.1995).
[181] Gesetzesentwurf der Fraktion Bündnis 90/Die Grünen: Entwurf eines Zweiten Gesetzes zur Änderung des Bundesnaturschutzgesetzes (Drucksache 13/3207, 05.12.1995).
[182] Gesetzesentwurf der Bundesregierung: Entwurf eines Gesetzes zur Neuregelung des Naturschutzes und der Landschaftspflege, zur Umsetzung gemeinschaftsrechtlicher Vorschriften und zur Anpassung anderer Rechtsvorschriften, (Drucksache 636/96, 06.09.1996).
[183] Zweites Gesetz zur Änderung des Bundesnaturschutzgesetzes (30.04 1998), BGBl 1998 I, p. 823.

only be authorised if it met specific criteria (for a detailed legal analysis of the transposition of the site protection measures, see Niederstadt (1998), Apfelbacher/Adenauer/Iven (1999) and Kloth/Louis (2005).

The transposition was, however, incorrect for three reasons.[184] First, according to Article 19 a – 8a, environmental impact assessments were limited to only those projects inside a Natura 2000 site. Projects outside such a site where thus a priori excluded, regardless whether they would create significant negative effects or not. Second, and similar, Article 19 a – 8c excluded from the outset all projects that did not require an authorisation under national legislation against air pollution (*Bundes-Immissionsschutzgesetz*) and the use of water (*Wasserhaushaltsgesetz*). Third, Article 19 c – 3.2 stated that during the authorisation procedure only those alternatives to the concerned project had to be considered that would allow realising the project *on an alternative location* without or with less negative effects. Only if such alternative location did not exist and overriding reasons of public interest justify the project, it could be authorised. However, Article 6 does not restrict the search for alternatives to alternatives location, but speaks of "alternative solutions". Admittedly, in contrast to the first two points, the ECJ has not given an authoritative interpretation on this issue. It might therefore be questioned whether such a restricted search for alternatives really constitutes a violation of the Directives. Yet at any case, it limits the scope of such an assessment and thereby the possible protection level of Article 6.

The *BNatSchG 1998* was immediately applicable in the Länder, meaning that the competent authorities of the Länder had to apply them from April 1998 on. Nevertheless, the Länder had to amend their nature conservation laws until May 2003. From that date on, the transposition is done nearly exclusively through the nature conservation laws of the Länder (e.g. Article 34 of the Nature Conservation Law of Lower Saxony [*Niedersächsisches Naturschutzgesetz*], amended on 27.01.2003). Already in August 1998, the nature conservation law was amended, yet without consequences for the transposition of Article 6.[185] In 2002 a new nature conservation law was passed and the relevant provisions became unchanged Articles 32-38 of the *Bundesnaturschutzgesetz 2002*.[186]

The Commission was aware of the transposition deficits and sent a formal letter in April 2000 to Germany. Besides some incorrectly transposed species protection measures, it criticised the a priori exemptions from impact assessments for all projects outside Natura 2000 sites as well as those projects that did not require an authorisation under the law against air pollution and the law on the use of water. Although the reasoned opinion was sent in June 2001 when the legislative

[184] See also Wirths (2003) and Niederstadt (1998).
[185] See Drittes Gesetz zur Änderung des Bundesnaturschutzgesetzes (25.03.2002), BGBL. 1998 I, p. 2481.
[186] Gesetz über Naturschutz und Landschaftspflege (25.03.2002), BGBl. 2002 I, 1193.

process for the new nature conservation law was still underway, Germany did not amend the provisions. In February 2003, the Commission referred the issue to the ECJ that convicted Germany in January 2006. The Court concluded that Germany had indeed failed to transpose Article 6 with regard to the above mentioned reasons correctly. In April 2007, the German government presented its proposal to amend the nature conservation law in order to comply with the ruling. It stated that the "legislative proposal is restricted to a 1:1 transposition of the ruling".[187] It then proposed, among others, to abandon the a priori exemption of environmental impact assessments for certain projects. In December 2007, the proposal entered into force and remedied the compliance problem.[188]

7.1.2.2 Application

As has already been mentioned, the site protection regime of the Birds Directive did not play any role before the ruling of the ECJ in the *Leybucht* case and particularly before the Habitats Directive had entered into force. Until April 1998, when the *BNatschG 1998* was transposing Article 6, the competent authorities would have been under the obligation to apply the Directives' species regime themselves. However, to my knowledge there was only one case where this actually happened: during the planning process of the motorway A 20 in Northern Germany in 1995, the competent authorities asked the Commission to allow the deterioration of two designated SPAs in the Peene Valley. As they hosted priority species, the consent of the Commission was necessary to allow the construction of the motorway. The Commission held that there were no alternatives to the project and it was justified for overriding social reasons, namely the reduction of unemployment in the region. It therefore gave its consent to the project.[189] In spite of this case, the interviewed experts of environmental organisations agree that the site protection regime of the Directives was not really applied until about 2000. There were two main problems: first there existed enormous informational deficits as regards the application of Article 6 and the relevant provisions of the *BNatSchG 1998*. It seemed that the competent authorities did not really differentiate between a 'normal' environmental impact assessment based on German law, and the particular procedure that the Habitats Directive demands for projects likely to have significant negative effects. The key difference is that a 'normal' environmental impact is a procedural tool that focuses on the general analysis of the effects of projects (for more details, see Niederstadt 1998: 522-523). In contrast to an assessment according to Article 6, however, it does not contain substantial criteria according to which projects may or

[187] „Der Gesetzentwurf beschränkt sich dabei auf eine 1:1-Umsetzung des Urteils." Gesetzesentwurf der Bundesregierung: Entwurf eines Ersten Gesetzes zur Änderung des Bundesnaturschutzgesetzes (Drucksache 16/5100, 25.04.2007), p. 2.
[188] See Erstes Gesetz zur Änderung des Bundesnaturschutzgesetzes (12.12.2007), BGBl. I, p. 2873.
[189] See Commission Opinion of 18.12.1995, OJ No. L6, p. 14 (09.01.1996).

may not be authorised. Yet according to German environmental organisations, there were numerous examples where the national administrative authorities considered a 'normal' EIA as an equal substitute for Article 6 assessment. Second, the main implementation problem in Germany was not so much the incorrect transposition of Article 6, but the failure to designate appropriate sites as SPAs for wild birds or to report them as potential sites under the Habitats Directive. The problem was that according to the *BNatschG 1998*, the transposed species protection regime did only apply for already designated Natura 2000 sites. Yet it did not cover all those sites that had not been designated even though the deadline of the Directives had already expired. As a result, the competent authorities did not apply the site protection regime of the Directives for projects that could have negative effects on these non-designated sites (Interviews Nabu 2, 320-332; BUND 1, 188-194, 544-552, Nabu 1, 122-135). This was a significant problem, as in April 2001, only about 1/3 of those areas that would finally become SPAs and less then a half of those sites eligible under the Habitats Directive had been either designated or reported to the Commission. Therefore, huge areas remained unprotected even though the main provisions of Article 6 had been already transposed in 1998.

7.2 Reasons for the Implementation Problems

Why was the implementation of the Natura 2000 Directives so difficult in Germany? In the beginning, the failure to implement the Directives on time was attributed to the stalemate between the *Bund* and the *Länder*: as the former was not transposing the site protection regime, the latter declared in 1996 that they would not designate Natura 2000 sites until the legal transposition had been achieved (Interviews Federal Ministry, 103-124, Ministry Lower Saxony, 94-406). However, at least since the *BNatSchG 1998* was agreed on, it became clear that three other reasons accounted for the implementation problems:

Informational deficits: As has been already been noted in the previous section, the obligations of the Natura 2000 Directives were misinterpreted by the German competent authorities due to informational deficits about the Directives. This seemed to be also related to the reforms of the German administration (*Verwaltungsreform*) at the turn of the century, which resulted in considerable staff reductions of the competent authorities (Interview Nabu 1, 127-135). Be it as it may, the following example illustrates the informational deficits quite well: in the town of Hildesheim in Lower Saxony, a local bypass was planned that would have had negative effects on an ecologically sensitive area, which fulfilled the criteria for designation both as SPA and site under the Habitats Directive. After environmental organisations had informed the competent road construction department about this, the latter sent a letter to the Ministry for the Environment asking it to not designate

the area. The Ministry replied that this would not be a problem as they would designate the area only in such a way that the local bypass could be carried out without delay. So in 1998, it seemed that the Ministry still believed that it could designate areas without applying the strictly scientific criteria of the Natura 2000 Directives. The almost funny thing is that the road construction department sent a copy of this letter several times to the environmental organisations that had decided to contest the authorisation of the project before the national courts. Yet the department argued that the organisations had no chance in winning the case, because the Ministry for the environment had told them that the Natura 2000 Directives would not become concerned at all. Yet neither the environmental organisations nor the courts[190] could be convinced by this argument (Interview BUND 1, 716-732).

Resistance from the economy: Both farmers and business companies tried to put pressure on the competent authorities to limit the designation of SPAs or the transmission of potential Natura 2000 sites to the Commission as they feared economic losses. Although there was not, as in the case of France, an outright 'anti-Natura 2000 network', agriculture and economic associations tried to influence the administrative authorities to designate as few and as small sites as possible. To give an example, the head of the *Wirtschaftsrat* – a national wide organised business organisation – of Schleswig-Holstein called explicitly in a press release on the government to "report only as many protection areas for birds to the Commission as absolutely necessary".[191] There was an intense fear that landowners would lose the control over their property once it was regulated by European law and that a 'cheese cover' would be put on protected sites that would make any economic activity impossible. Therefore, in its position paper on the implementation of the Habitats Directive, the Federation of German Industry (*Bundesverband der Deutschen Industrie*) complained that the Directives would excessively restrict industrial activities in or near protection areas.[192] Even though the mere proposal of a site under the Habitats Directive did not automatically mean that the Commission would decide to included it in the Natura 2000 network, it appeared to be more strategically to landowners and investors to prevent the reporting of their sites as potential Natura 2000 sites from the outset by putting pressure on the competent

[190] See OVG Lüneburg, Urt. v. 18.11.1998 - 7 K 912/98, BVerwG, Urt. v. 27. 1. 2000 – 4 C 2. 99.

[191] „[Der Landesvorsitzende] fordert die Landesregierung dringend auf: - nur so viele Vogelschutzgebiete wie zwingend notwendig an die Europäische Union zu melden" Wirtschaftsrat Deutschland: FFH-Gebiete – Unverantwortliche Folgekosten für den Landeshaushalt (18.06.2004, http://www.wirtschaftsrat.de/data/landesverbaende/SH/2004-06-18.pdf (08.02.2008).

[192] Bundesverband der Deutschen Industrie e.V. – Positionspapier zur Umsetzung der FFH-Richtlinie in Deutschland (August 2000), http://www.bdi--nline.de/BDIONLINE_INEAASP/iFILE.dll/X84E0DB30986B11D4B93D0050DA2662B7/2F252102116711D5A9C0009027D62C80/PDF/84E0DB30986B11D4B93D0050DA2662B7.PDF (08.02.2008).

authorities (Interviews Nabu 2, 610-624, 678-697, Nabu 1, 239-250, 331-351, WWF 2, 363-374). In addition, concerned land owners and communities turned several times to the German courts in order to prevent the designation or reporting of their land. In a nutshell, they argued that such a designation would result in an intense economic loss for them and would therefore violate their constitutionally guaranteed property rights. However, the German courts, in contrast to their French counterparts, refused to annul the administrative decisions.[193]

Negative public discourse: Finally, and related to the resistance from the land owner, the implementation of the Natura 2000 Directives came at a time when Germany suffered from high unemployment and low economic growth. Nature conservation measures became more and more under attack because they were seen as an obstacle to economic investments. In addition, each time after a new list of proposed sites had been sent to the Commission, the standard message was: "But that's it now – no more new sites!" (see e.g. Wirtschaftsrat Deutschland 2004: 7). However, it was clear from the outset that the first lists where completely insufficient and that new proposals would become necessary in the near future. Also the site protection regime of the Directives was badly communicated, which increased in turn the uncertainty about what could be still be done in Natura 2000 sites (Interview Ministry Lower-Saxony, 344-360). As a result of the adverse climate and the way the European obligations were communicated by the competent authorities, the general public acceptance of the Natura 2000 Directives was low (Interviews Nabu 2, 678-697, Nabu 1, 107-126, 304-316, BUND 2, 1676-1707, WWF 2, 337-348).

7.3 The Activities of German Environmental Organisations to Achieve Compliance

After the Birds Directive had entered into force in the beginning of the 1980s, German environmental organisations did not pay particular attention to its site protection regime. The Directive was not perceived as granting a stricter protection level. At the time, the focus was more on national nature protection areas and the implementation of the Ramsar Convention on wetlands. Environmental

[193] See for example OVG Münster, Beschl. v. 11. 5. 1999 – 20 B 1464/98 AK, NuR 2000 (3), 165; VG Oldenburg, Beschl. v. 20.1.2000 - 1 B 4195/99, NuR 2000 (5), 295; OVG Lüneburg, Beschl. v. 24.3.2000 - 3 M 439/00, NuR 2000 (5), 298; VG Lüneburg, Beschl. v. 6.4.2000 - 7 B7/00, NuR 2000 (7), 396; VG Freiburg, Beschl. v. 26.4.2000 – 4 K 981/00, NuR 2000 (11), 653; OVG Schleswig, Beschl. v 27.8.1999 – 2 M 45/99, NuR 2000 (11), 658; OVG Lüneburg, Beschl. v. 12.7.2000 - 3 N 1605/00, NuR 2000 (12), 711; VG Gießen, Beschl. v. 2.5.2000 - 1 G 804/00, NuR 2000 (12), 712; VG Oldenburg, Besch. v. 29.6.2000 - 1 B 2016/00, NuR 2000 (12), 713; VG Frankfurt/Main, Beschl. v. 2.3.2001 - 3 G 501/01 (1), NuR 2001 (7), 415.

organisations did simply not have the impression that 'Brussels' could help them to obtain their policy objectives in nature conservation issues (Interviews WWF 1, 329-343, 393-414, BUND 2, 824-833, Nabu 1, 146-200, Nabu 2, 248-263). This changed in the beginning of the 1990s when the Habitats Directives was adopted. Supported by the ECJ's environmental friendly interpretation, the Natura 2000 Directives became quickly the most important example of European nature conservation policy. Even for commonly known environmental friendly countries such as Germany, they meant a significant increase regarding the level of environmental protection. This is even more the case since the middle 1990s, when national environmental protection measures became more and more under attack to the extent that the economic growth declined and the unemployment rate grew. German environmental organisations had the impression that the level of environmental protection would not be raised anymore on the national level, but, on the contrary, was rather softened. In view of this situation, the correct implementation of the Natura 2000 Directives became more and more important for these organisations. For the Directives represent to them some sort of closely meshed safety net that is very difficult to amend on the European level[194] and that could not, at least in the foreseeable future, be obtained from the national legislator (Interview Nabu 2, 282-301, BUND 2, 616-649, Nabu 1, 1132-1140).

In order to achieve the implementation of the Natura 2000 Directives, German environmental organisations could rely on their strong organisational capacity. Comparative studies show that the German environmental movement is well established and organised (Sebaldt 1997: 129-132; Reutter 2001: 90; Immerfall 1997: 152-154; Rootes 1997: 326; Dalton 1994: 90). The main organisations in the area of nature conservation – the *BUND für Umwelt und Naturschutz Deutschland* (BUND), the *Naturschutzbund Deutschland* (Nabu) and, to a lesser extent due to its partly international focus, the WWF Germany – display high member ship rates and possess significant resources. This allows them to employ full time members to pursuit their policy objectives (see Table 8).

[194] Remember that any significant amendment of the Natura 2000 Directives would require qualified majority in the Council and the approval of the European Parliament.

Table 8: Key Figures of Three German Environmental Organisations (for 2006)

	Date of foundation	Number of members	Number of employees	Income p.A. (in Euro)
BUND (Federal level)	1975	394.470	-	12.840.000
BUND (Lower-Saxony)	1961	22.000	15	-
Nabu	1899	418.000	-	19.675.000
WWF Germany	1963	324.000	-	27.300.000

Sources: BUND (2007: 24-25); Bund Lower-Saxony (http://www.bund-niedersachsen.de/content/wir/1580.php, 11.02.2008), Nabu (2007: 24-25), WWF Germany (2007: 21-21).[195]

The BUND and Nabu are organised on all level of the German political system, relying on a dense network of local and regional groups (*Orts-* and *Kreisgruppen*). These groups are generally run by voluntary members. In each *Land* and on the federal level, the BUND and Nabu have bureaus whose full-time staff supports the work of the voluntary members (Interviews BUND 1, 36-53, WWF 1, 16-27, 39-47). In addition, the German environmental movement is used to work closely together. In order to use the available resources as efficiently as possible, one of the main organisations takes generally the lead on a specific issue that is of particular relevance to it. If it is of interest to them, other organisations join and provide, depending on the issue, informational or financial support. This system of close cooperation is regarded as very well functioning (Nabu 1, 699-705, WWF 1, 91-143).

Also the implementation of the Natura 2000 Directive led to a close cooperation between the main German environmental organisations active in the area of nature conservation. As has been discussed above, the main implementation problem was not so much the transposition of the site protection regime, but the designation of protection areas. Therefore, it was first of all necessary to identify all areas that would fulfil the criteria for becoming Natura 2000 sites. The BUND, Nabu and WWF created with the help of small regional and local nature conservation organisations 'shadow lists' of Natura 2000 sites.[196] The goal was to create a single inventory of all ecologically important areas that satisfy the scientific criteria of the Natura 2000 Directives for site designation. Thanks to the strong organisational capacity of the BUND and Nabu at the local level and with support from small, but specialized environmental organisations such as the German Bryological Society or the German Speleological Federation, more than 10 000 sites

[195] Contrary to the BUND and Nabu, the WWF Germany does not only work in Germany, but spends about 2/3 of its resources worldwide (Interview WWF 1, 148-157).

[196] The environmental organisations preferred to call them 'sunshine lists' in order to emphasize the positive aspects of the issue (Interview Nabu, 1, 276-279).

with about 70 000 entries of important species and habitats could be identified. This required a lot of work from the voluntary members of these environmental organisations, but it appeared to them the best way to put pressure on the competent authorities. Besides the creation of shadow lists, the BUND, Nabu and WWF coordinated their activities regarding the implementation of the Natura 2000 Directives closely by issuing e.g. joint press releases and supporting each other in litigation (Interviews Nabu, 1, 699-725, BUND 1, 76-92, WWF 2, 034-051, see also BUND 2003: 23).

Once the information about the potential Natura 2000 sites had been collected, the environmental organisations tried to lobby the national legislator in order to implement the Directives. This is one of the three basic possibilities for public interest groups to achieve the correct implementation of European law, besides contacting the European Commission and starting litigation. However, bearing in mind the reasons for the implementation problems discussed in section 7.2, there was not much environmental organisations could obtain from mere lobbying: the resistance they faced was simply far too strong. Although they informed the competent authorities about the implementation problems based on the scientific information collected in the shadow lists, this did not change much. Even in those Länder where the Greens were in government, which could be at least an indicator of more environmental friendly governments, the designation of sites was as cumbersome as in Länder with conservative governments (Interview Nabu 1, 291-316).[197] In the words of the interviewed senior official of the Ministry for the Environment of Lower Saxony, Lower Saxony and also the other Länder would have "never, never ever" designated so many areas as nature protection areas.[198]

As a result, German environmental organisations tried to make the Commission put pressure on Germany. One of the most important elements was to supply the Commission with information about the German implementation deficits. Here, the shadow lists played a decisive role. Given the limited resources of the Commission, it was utterly depended on information about the ecologically important sites in Germany, because it alone would have been never be able to collect these data. With the shadow lists in hands, it was relatively easy to evaluate whether the German site proposals were sufficient or not. However, also the other implementation deficits were reported during the regularly contacts. Taking the Commission's limited resources into consideration, the larger environmental

[197] In Lower Saxony, it can be argued that the participation of the Greens in the government was even counterproductive. The landowners trusted the Greens far less than the conservative parties and were thus more sceptical about their proposals to implement the Natura 2000 Directives (Interview Nabu, 2, 02.03.2006, 678-690).

[198] "(...) nie freiwillig unter Schutz gestellt. Nie, nie im ganzen Leben" (Interview Ministry Lower-Saxony, 695-696).

organisations such as BUND and Nabu adopted the approach to collect first all the complaints from their members, and then sent only the most urgent and convincing to the Commission. By doing so, they hoped to convince the Commission that their complaints were well founded and at least worth a further investigation (Interviews BUND 1, 598-610, Nabu 1, 367-378, 755-778).

At the same time, however, environmental organisations were well aware of the limits of the Commission's enforcement power (see section 7.4). Therefore, environmental organisations did not rely exclusively on the pressure from the European level. From the outset on, they also used the third possibility to guarantee the correct implementation of European environmental law: they turned to national courts in order to challenge administrative acts in breach with the Natura 2000 Directives.

7.3.1 Environmental Organisations and Their Access to Courts

Traditionally, the German legal system has relied on the 'protective law theory' according to which the plaintiff has only access to the courts if he or she is able to prove that his or her legally protected individual interests have been violated. The idea to protect the 'public interest' through judicial review is rather alien to this legal understanding (Rehbinder 2002: 237-238). In addition, Rehbinder argues that "there has been a wide-spread aversion against 'self-appointed guardians of the public interest' – arguably an unconscious relict of absolutism, but officially based on the lack of democratic legitimation of environmental associations" (2002: 248).

Compared to other countries, Germany opened the access to courts for environmental organisations rather late. On the federal level, these organisations were only given legal standing before administrative courts with the *BNatSchG 2002*. However, the *Länder* were free to give access already before that date. Before unification, environmental organisations had legal standing in five *Länder* (Bremen, Hessen, Hamburg, Berlin and Saarland). During the 1990s, all other Länder with the exception of Mecklenburg-West Pomerania, Bavaria and Baden-Württemberg followed. Since the *BNatSchG 2002* had entered into force, a minimum access is guaranteed in all *Länder*, yet the latter may still grant broader access. In any case, an environmental organisation is only allowed to contest administrative decisions if it has been officially recognised (*anerkannter Naturschutzverband*). This is no problem for established organisations such as the Nabu or BUND, but can become a problem for ad-hoc founded groups (de Sadeleer/Roller/Dross 2002: 1-3; Schmidt/ Zschiesche/Rosenbaum 2004: 2, 15-19).

The scope of review for public interest group litigation in environmental matters is rather limited. The access to civil courts is practically impossible, as an environmental organisation would have to prove its individual harm and not only the harm of the public interests it claims to protect (Rehbinder 2002: 255). With regard to administrative matters, in most *Länder* and on the federal level claims can

only be filed in matters strictly related to nature conservation issues. These are basically derogations for existing nature protection areas and administrative authorisation proceedings affecting protected sensitive areas. Most issues going beyond nature conservation, such as air pollution, are not covered, yet the exact issue areas open for litigation vary across the *Länder*. Compared to other countries, however, even the most 'open' *Länder* rules remain restrictive. Besides the scope of review, two additional restrictions apply to using litigation. First, only those environmental organisations that have been already actively involved in the authorisation procedure for a decision enjoy access in those areas mentioned above. If they have failed to do so, they cannot contest the resulting administrative decision. Second, only those arguments already raised in the administrative authorisation procedure may later be brought forward in the phase of judicial review (so-called 'substantial preclusion'). If an argument has not been raised, it cannot be introduced afterwards (Schmidt/Zschiesche/Rosenbaum 2004: 12-15,23-29; de Sadeleer/Roller/Dross 2002: 3-6; IMPEL Network 2002: 71; Busch et al. 2004: 1365-1368).

Since the beginning of the 1990s, the German legislator took several steps to speed up the administrative authorisation proceedings either by amending existing or adopting new laws. This had also consequences for the conditions under which an administrative decision gets annulled by the courts. In fact, procedural errors do not automatically lead to the annulment of administrative decisions as the German administrative procedural code gives the competent authorities the possibility to 'repair' – literally translated to 'heal' (*heilen*) – the decisions (see Article 45 of the Administrative procedural code). The contestation will only lead to the annulment of the decision if substantial errors have been made. In addition, some specific laws, such as the law on the construction of motorways (*Fernstraßengesetz*) extended the possibilities for the competent authorities to repair contested decisions further. According to them, even substantial deficits do only lead to the annulment of the decision if it is impossible to repair them by additional planning and administrative proceedings. In 1996, this possibility to 'heal' illegal decisions was extended until the end of the hearing before the administrative courts. Therefore, the administrative authorities have ample opportunities to protect their decisions from getting annulled even if the official authorisation procedure has ended. It should be also noted that the contestation of administrative decisions creates in principle suspending effects, although several exceptions have been introduced to speed up authorisation procedures (Busch et al. 2004: 906-913, 1543-1544; Koch/Rubel/Heselhaus 2003: 166).

From a legal perspective, the fees for litigation depend heavily on the issue as the fees in administrative proceedings are calculated according to the amount in

dispute. For example, if the amount is 25.000 € – which is not uncommon in environmental matters –, the approximate fees are as follows:[199]

1st instance: ~ 4.200 € (without expert hearing), ~ 5.600 € (with expert hearing);

2nd instance: ~ 5.600 € (without expert hearing), ~ 7.700 € (with expert hearing);

3rd instance: ~ 5.600 € (always without expert hearing).

The losing party has to bear all the costs of litigation, including the court fees, the cost of hearing evidence as well the fees of the winning party's lawyer. The fees for the lawyer are again calculated according to the amount in dispute. Using the same example as above, the fees of the lawyer are:

1st instance: ~ 700 to ~ 2.500 €;

2nd instance: ~ 900 to ~ 3.000 €;

3rd instance: ~ 900 to ~ 2.000 €.

However, in practice the actual costs of litigation are higher: first, given the fact that the mere court fees are too low to hire a lawyer, fee agreements are signed that amount to higher sums than the court fees. Although the actual costs for a lawyer are difficult to generalise, the Nabu advises environmental organisations to expect five figure sums.[200] As a result, even if an environmental organisation wins the case, it is likely that it will have to bear significant costs as the costs for its lawyer are only partly refunded. Second, external expert reports that the court may request are also not refundable. As the loosing party has to pay these expertises that can easily amount up to 7.000 – 10.000 € each, the risk of litigation rises significantly. Both environmental organisation as well as other experts agree that the costs of litigation are thus one of the main obstacles for litigation (Interviews Nabu 1, 667-683, Litigation expert, 598-648, Nabu 2, 153-158, BUND 1, 374-397, Ministry Lower-Saxony 408-410, see also Schmidt/Zschiesche/Rosenbaum 2004: 43-44).

Another problem for litigation is the necessary legal knowledge, although this depends on the circumstances. If large projects such as the deepening of a river or the construction of motorways are concerned, environmental organisations will focus rather soon on their available options and seek legal advice (Interview BUND 2, 981-984). In any case, however, even the main organisations like BUND and Nabu do not employ full time lawyers, but rely on them on a case by case basis (Interviews Litigation expert, 212-216, BUND 2, 323-330). Therefore, informal contacts with supportive lawyers are important. For local groups of the BUND and Nabu – not to speak of other local environmental organisations – that are not familiar with litigation, the preclusion of arguments can make effective litigation

[199] The example is taken from: Nabu – Die Verbandsklage, (http://www.nabu.de/m06/m06_02/01281.html (17.02.2006), see also Rehbinder (2002: 234).

[200] Nabu – Die Verbandsklage (http://www.nabu.de/m06/m06_02/01281.html (17.02.2006).

impossible. As they are often not familiar with all legal arguments, they forget to raise them – or raise them in a way that cannot be used from a legal perspective – during the administrative authorisation procedure. Yet due to the preclusion, new arguments cannot be raised afterwards during the judicial phase. The bureaus of the BUND and Nabu at the Länder and federal level try to tackle this problem by issuing guidelines for litigation[201]. Nevertheless, it remains a problem (Interview Litigation expert 107-148).

In view of the rather closed access to the courts and the high costs, litigation plays only a rather minor role in the day-to-day work of environmental organisations. Besides the already mentioned fact that environmental organisations do not employ lawyers, it is telling in this respect that WWF Germany has never tried to become officially recognised in order to gain access to the courts. The possibility to litigate was simply not perceived as being that attractive (WWF 1, 201-221). Also the available numbers on litigation of environmental organisations support this: between 1979 and 1991, only about 62 cases were started by environmental organisations (Ormond 1991; cited in de Sadeleer/Roller/Dross 2002: Fn 6). From 1996 to 2001, 114 cases where started that led ultimately to 183 judicial decisions (Schmidt/Zschiesche/Rosenbaum 2004: 31). Also in Lower-Saxony that has one of the most open standing rules for environmental organisations compared to the other *Länder*, litigation does only play a minor role. Although 13 regional environmental organisations are officially recognised in Lower-Saxony and could thus use litigation, there are only two to maximal three cases per year (Interview Nabu 2, 44-49). According to an internal study of the Ministry for the Environment in Lower-Saxony covering the period from 1994 to 2002, environmental organisations of this *Land* went only 14 times to the courts, even though the participated in about 10.000 administrative authorisation proceedings (Interview Ministry Lower-Saxony 368-410).

To sum up, environmental organisations did enjoy in principle access to the courts in nature conservation issues – and thus to the Natura 2000 Directives –, yet the access was heavily restricted by the scope of judicial review, the procedural limits and most of all the costs of litigation. That environmental organisations turned to the courts despite this fact in order to enforce the site protection regime of the Directives shows that no other option was available to them in order to protect endangered sensitive areas.

[201] E.g.: http://www.bund-sachsen.de/doc/publikationen/naturschutz/verbandsklage.doc (12.02.2008).

7.4 The Role of the European Commission

The European Commission put considerably pressure on Germany to implement the Natura 2000 Directives correctly. Yet as in other countries, it only became really active after the Habitats Directive had entered into force (Ministry Lower-Saxony, 701-706). Since the middle of the 1990s, the Commission relied on two instruments to make Germany comply: first, it made use of infringement proceedings and threatened several times to refer Germany to the ECJ. Ultimately, four cases reached the ECJ. As Table 9 shows, three of these cases concerned horizontal issues. The time gaps between the formal letter and the referral to the ECJ are between two and three years, which does not indicate that Germany had been differently treated than other countries.

Table 9: Infringement Proceedings against Germany on the Directives' Site Protection Regime

Case	Horizontal/ specific	Formal letter	Reasoned opinion	Referred to ECJ	Ruling of ECJ
ECJ C-57/89 [1991] Commission v Germany (Reduction of specific SPA)	Specific	07.08.1987	04.07.1988	28.02.1989	28.02.1991
ECJ C-83/97 [1997] Commission v Germany (Transposition Article 6)	Horizontal	09.08.1994	28.11.1995	24.02.1997	11.12.1997
ECJ C-71/99 [2001] Commission v Germany (Designation Habitats sites)	Horizontal	04.03.1996	19.12.1997	01.03.1999	11.09.2001
ECJ C-98/03 [2006] Commission v Germany (Transposition Article 6 (3) and other provisions)	Horizontal	10.04.2000	25.07.2001	28.02.2003	10.01.2006

Source: own compilation based on ECJ rulings.

Besides these cases that ultimately led to a ruling of the ECJ, the Commission started several other infringement proceedings. The interviewed senior member of the Federal Ministry for the Environment reported that the Ministry had received dozens of formal letters on either the alleged incorrect application of Article 6 or the non-designation of particular areas. Yet ultimately, only five entered the stage of the reasoned opinion and where subsequently either abandoned or are still pending (Federal Ministry, 450-474, see also Europe Daily Bulletins, No. 7129 – 29/12/1997; No. 8371 – 04/01/2003). The situation was similar in Lower-Saxony (Interview Ministry Lower-Saxony, 618-623). With regard to the designation of sites under the Habitats Directive, the Commission also threatened to refer the case a second time to the ECJ in order to obtain daily penalty payments after Germany had been convicted in September 2001. The formal letter was sent in April 2003. Yet the case was closed in October 2006 after Germany had sent a complete list of sites under the Habitats Directive. It is interesting to note, however, that the

insufficient designation of SPAs has never been referred to the ECJ, although the Commission started two times an infringement proceeding: in October 1998, it had already sent a reasoned opinion to Germany for the insufficient designation of SPAs.[202] In July 1999, it even announced to refer the case to the ECJ.[203] However, it ultimately did not do so. In late December 2001, the Commission again sent a letter of formal notice to Germany whose allegations were expanded in April 2003. Only in April 2006, the Commission entered the official stage of the infringement proceeding by sending a reasoned opinion to Germany.[204] This is rather surprising as the compliance problems of Germany with regard to SPAs had been as huge as concerning sites under the Habitats Directive.

The second instrument the Commission used to put pressure on Germany was the threat of holding back money from the structural funds. Already in March 1999, the WWF had urged the Commission to link the payment of this money to the completion of the Natura 2000 network.[205] In January 2000, the Commission agreed to do so, yet refrained from setting a clear deadline.[206] Nevertheless, the threat was taken seriously as important sums were concerned. In Lower-Saxony, about 15 million Euros were at stake (Interview Ministry Lower-Saxony, 117-120). Ultimately, however, no money was held back (Nabu 1, 1030-1042). In May 2000, the Commission even approved 20 billion Euros from the structural funds for objective 1 areas in Germany after the authorities had reported additional sites. Yet at the time, the German contribution to the Natura 2000 network was still far from complete.[207]

Nevertheless, the interviewed experts agree that the threat of financial costs – either through a second referral to the ECJ or through missing money from the structural funds – was crucial to make Germany comply (Interviews Nabu 2, 409-424, Federal Ministry, 404-433, Ministry Lower-Saxony, 104-138, WWF 1 343-366). The most direct influence was on the designation of sites under the Habitats Directive. The Commission's pressure on the designation of SPAs was, however, less important given the fact that the infringement proceeding had never been reached the ECJ. It is hard to tell why the Commission was not as hard on SPAs as on sites under the Habitats Directive. According to environmental organisations, the Commission did not acted independently as it was under strong pressure from parts of the federal as well as *Länder* governments to accept the non-designation of

[202] Europe Daily Bulletins, No. 7319 – 10/10/1998.
[203] Europe Daily Bulletins, No. 7511 – 20/07/1999.
[204] See infringement proceeding No. 2001/5117, reasoned opinion sent to the permanent representation of Germany to the EU on 10.04.2006.
[205] Europe Daily Bulletins, No. 7419 – 06/03/1999.
[206] Europe Daily Bulletins, No. 7642 – 27/01/2000.
[207] Europe Daily Bulletin, No. 7724 – 25/05/2000

sites whose deterioration was necessary in order to carry out large projects (Interviews Bund 2, 194-219, WWF 2, 128-141, 483-490).

Yet if the Commission had been very active in order to make Germany complete its contribution to the Natura 2000 Directives, why did environmental organisation still turned to the courts? First, as has been mentioned, environmental organisations were well aware of the fact that the Commission was under pressure to accept specific gaps in the Natura 2000 network. In the case of the deepening of the river Ems, for example, the Commission is blamed to have been far too lenient with Germany (WWF 2, 110-141). Second, and more importantly, one has to put oneself into the position of an environmental organisation that is confronted with a project that could deteriorate an ecologically sensitive area. In view of this situation, its main goal is to protect the area. Even if the Commission would become immediately active, it would not help the concerned area as an infringement proceeding would take years. And even if the ECJ would ultimately convict Germany, it would not restore the destroyed area (Interview Nabu, 1, 378-407). In addition, the Commission even officially declared itself that it would focus predominantly on issues of transposition and on large, exemplary violations of European environmental law in its infringement proceedings (European Commission 2000b: 76; 2002b: 41; 2003a: 9,13). When it comes to the question whether an environmental impact assessment had been carried out correctly, the Commission had officially announced that it would prefer that the issue would be dealt with by national courts (European Commission 2003a: 9). This approach stems from the Commission's limited monitoring resources: it simply does not have the ability to pursuit every alleged violation of European law. This 'strategy' might be understandable, yet is completely unacceptable for an environmental organisation trying to protect a particular area. Thus, litigation was often the only viable option that would allow environmental organisations to protect sensitive sites.

7.5 Interpretation by German Courts

The main implementation problem in Germany was, as has been discussed above, that the *Länder* governments hesitated until the last moment to identify all possible Natura 2000 sites. Yet from the middle 1990s on, the ECJ had made it clear that only scientific criteria could justify the exclusion of an area from being eligible as part of the Natura 2000 network. In view of this situation, the main question that arose before the German courts was what level of protection had to be granted to sites that should have been designated as SPAs or proposed as sites under the

Habitats Directive, but that had not been due to the resistance of the *Länder* governments?[208]

7.5.1 Initial Rulings on the Directives' Site Protection Regime

To my knowledge, the first ruling dealing with non-designated Natura 2000 sites was given by the first instance administrative court (*Verwaltungsgericht*) of Potsdam in November 1994. A recognised environmental organisation had contested the authorisation of the construction of a cement factory and argued that it would create severe negative effects on several protected birds as well as other species. During the authorisation procedure, the competent authorities either ignored the objections or failed to consider them sufficiently. For example, the competent authorities considered the statement of the deputy mayor that a protected bird species did simply not occur in the affected area as an adequate ornithological expertise. By referring to the then recent case law of the ECJ, the administrative court held that even though the site protection regime of the Birds Directive had been in principle transposed, Germany was still under the obligation to designate the most appropriate areas as SPAs. Yet this had not happened with regard to the site under consideration, even though particularly endangered birds occurred in the area. Therefore, the court held that the competent authorities had unlawfully failed to consider the site protection regime of the Birds Directive as interpreted by the ECJ even though the area had not been officially designated.[209] Given the fact that at that time the Habitats Directive had not been adopted, it is rather unlikely that the project could have been carried out as the construction of a cement factory cannot be considered as an overriding interest of public health or safety. Yet in any case, the administrative court already came to the same conclusion as the Bunderverwaltungsgericht (BVerwG) – the supreme administrative court in Germany – would come to in 1998 by creating 'factual SPAs'.

At the time, however, the issue was far from settled. In fact, one and a half year later the administrative court of Munich denied the possibility of 'factual SPAs'. Several farmers had contested the authorisation of the construction of a highway that would cross their land. Among others, they argued that several endangered wild bird species would be affected. Regardless the fact that no SPAs had been designated for them, the competent authorities would have been obliged to consider the site protection regime of the Birds Directive. The court of Munich, however, held that no direct reference to the Directive was possible as the area had not been officially designated as SPA. Only if this had been done, the competent authorities

[208] For additional analysis of the case law of the Bundesverwaltungsgericht on the Natura 2000 Directives, see Hösch (2004a) and Backes/Freriks/Nijmeijer (2006: 115-147).
[209] VG Potsdam, Beschl. v. 17.11.1994 - 1 L 956/94.

would have been under the obligation to apply the site protection regime of the Directive. Although the complainants had made reference to the ECJ's case law, the court denied that it could be applied to the case at hand. It argued that the then existing rulings of the ECJ on the issue only concerned the Birds Directive without considering the Habitats Directive that had been adopted in the meantime. Thus, the ECJ's case law was inapplicable. The court also denied to refer the issue to the ECJ for a preliminary ruling.[210]

Shortly before the administrative court of Munich had given its ruling, the Bundesverwaltungsgericht had already the opportunity to clarify the issue, but the Court based its decision purely on procedural reasons. In the case, both land owners as well as a recognised environmental organisation had contested the authorisation for the construction of a motorway in Saxony. The environmental organisation had argued that the motorway would also affect areas eligible under the Natura 2000 Directives. The Bundesverwaltungsgericht, however, denied that the organisation could raise this argument: according to the nature conservation law of Saxony, environmental organisation had only legal standing if particular types of protection areas were concerned. As so-called '*Landschaftsschutzgebiete*' were not covered, the Bundesverwaltungsgericht refused that the environmental organisation could contest the authorisation for the motorway on substantial terms as 'only' such a '*Landschaftsschutzgebiet*' was affected in the case at hand. For this procedural reason, the Court denied to consider Article 6 of the Habitats Directive and, as the organisation had requested, ask the ECJ for a preliminary ruling.[211] It should be noted that today, the very '*Landschaftsschutzgebiet*' has been officially reported as site under the Habitats Directive.[212]

7.5.2 Giving Direct Effect to Article 6

The Bundesverwaltungsgericht gave its key ruling on the status of sites that had not been designated or transmitted under the Natura 2000 Directives in May 1998. Already in January, the Court had granted a preliminary injunction against the construction of parts of the motorway A 20 as the competent authorities had failed to take the site protection regime of the Directives into consideration.[213] In May, however, the Court amended its decision when it ruled in the main proceeding. In the case, the BUND of Schleswig-Holstein had contested the authorisation of parts of the motorway A 20, called 'Baltic Sea Motorway' (*Ostseeautobahn*), near Lübeck for

[210] VGH München, Urt. v. 14.6.1996 - 8 A 94.40125/40129. The ruling was later annulled by the Bundesverwaltungsgericht (see BVerwG, Urt. v. 19. 5. 1998 – 4 C 11. 96).
[211] BVerwG, Urt. v. 24.5.1996 - 4 A 16.95.
[212] See the transmitted area 'Laubwälder der Königshainer Berge' (site no. 4754-304) (http://www.bfn.de/fileadmin/MDB/documents/030303_sn.pdf, 13.02.2008).
[213] BVerwG, Beschl. v. 21.1.1998 - 4 VR 3.97 (4 A 9.97).

it would create significant negative effect on areas eligible both as SPAs as well as sites under the Habitats Directive. During the authorisation procedure, two possible routes of the motorway had been discussed. The southern route had been finally approved, although the northern route would have had less negative effects on the environment. Right from the outset, however, the Court made clear that it would not play the role of an alternative planner:

> "(…) it is not the task of the Court to plan [the motorway] on its own and by doing so be guided by considerations of 'better' planning. (…) The Court does not mistake that at the time of the authorisation procedure there have been different opinions in the political discussions in the *Land* on the construction of the federal motorway A 20 including its specific route. Yet this is without prejudice to the formal responsibility of the competent authority to take a planning decision and to accept consciously the negative consequences of a specific route of the motorway."[214]

The Court was thus well aware of the political consequences of its ruling and tried not to become too involved in politics. It then considered whether the decision of the competent authorities to choose the northern instead of the southern route was justified, and agreed. It explicitly held that the northern route had to be considered as a completely different traffic project compared to the southern route and not as its alternative in the sense of an 'alternative' according to Article 6 (4) of the Habitats Directive. Remember that the Directive only allows a project having negative effects to be carried out "in the absence of alternative solutions". The Court continued by arguing:

> "The courts can only examine whether the competent authorities have not exceeded both the authorisation to plan and the included legal limits as set out by the law. They cannot, however, base their control on the assumption that a specific traffic policy was mistaken and conclude that therefore it had not been considered in the legal sense."[215]

The Court emphasised thus its judicial self-restraint. Regardless whether one agrees or not to this understanding of the role of courts, it meant that the Court would interpret the search for alternatives as laid down in Article 6 (4) rather narrowly. As the German legislator had done in the transposition of the Article, only alternative

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[214] „(…) ist es nicht die Aufgabe des Gerichts, durch eigene Ermittlungen ersatzweise zu planen und sich herbei gar von Erwägungen einer ‚besseren' Planung leiten zu lassen. (...) Das Gericht verkennt nicht, dass innerhalb der Landespolitik durchaus unterschiedliche Auffassungen über den Bau der Bundesautobahn A 20 einschließlich ihrer konkreten Trassenführung im Zeitpunkt des Planfeststellungsbeschlusses bestanden haben. Das berührt indes nicht die formale Zuständigkeit der Planfeststellungsbehörde, eine planerische Entscheidung zu treffen und damit bewusst bestimmte Nachteil der gewählten Trassenführung in Kauf zu nehmen."

[215] "Die Gerichte können nur prüfen, ob die gesetzlich Ermächtigung zur Planung und die mit ihr der Planung gesetzten rechtlichen Schranken beachtet wurden. Sie können dagegen nicht (...) ihrer Kontrolle die Annahme zugrunde legen, eine bestimmte Verkehrspolitik sei verfehlt und daraus folge auch im Rechtssinne ihre Unbeachtlichkeit."

locations would have to be ultimately required to be considered, but not alternatives to the project itself.

After having emphasised these points, the Court dealt with the question whether the site protection regime of the Natura 2000 Directives would have to be applied even for sites that had neither been designated nor transmitted. This question arose because the planned motorway would cross directly through an ecologically sensitive area. Although the Court sympathised with the idea that the area would be eligible as site under the Habitats Directive, it argued that this question would not require a definite answer in order to rule on the case. The Bundesverwaltungsgericht simply discussed all legal possibilities and asked whether there were 'insurmountable legal obstacles' to the realisation of the project. This reasoning is based on the German law on motorways, (*Fernstraßengesetz*). It stipulated that even if the procedural rules or substantial mistakes had been made during the authorisation procedure – such as ignoring the Natura 2000 Directives and the procedure of Article 6 –, this violation would only lead to the annulment of the decision if the deficits could not be remedied through additional ex-post planning or authorisation procedures. During the authorisation procedure, the competent authorities had repeatedly declared that neither the protection regime of the Birds- nor the Habitats Directive would apply and had thus ignored their protection regime. The main question for the Court was, however, only whether there were 'insurmountable obstacles' to the application of the Directives. And it concluded that there were not: first, if it were assumed that the site had to be considered as 'factual SPA' (*faktisches Vogelschutzgebiet*), the effects of the motorway could be in principle mitigated in such a way that it would not create significant negative effects on the site. Although the competent authorities had initially considered to carry out such mitigating measures yet ultimately refrained from doing so, the Court was satisfied with the mere possibility to mitigate the effects. Second, if the site had to be considered as potential site under the Habitats Directive (*potentielles FFH-Gebiet*), the motorway could be justified for overriding reasons of public interests, in particular social and economic interests. And third, if the site had to be considered as potential site under the Habitats Directive where priority species would occur – and thus neither social nor economic interests could justify a project having significant negative effects –, mitigating measures could again bring the motorway under the threshold for creating significant negative effects.[216]

The authorisation was thus still lawful even if it had ignored the Natura 2000 Directives. Yet although the environmental organisation had lost this case, it had achieved an important victory: the Bundesverwaltungsgericht had declared that the site protection regime of the Directives would apply to all ecologically sensitive areas eligible for either designation as SPAs or transmission to the European

[216] BVerwG, Urt. v. 19.5.1998 - 4 A 9.97.

Commission as sites under the Habitats Directive. It thus gave direct effect to Article 6 for all potential Natura 2000 sites. However, it needs to be emphasised that although the Court discussed whether the stricter site protection regime of the Birds Directive would still be applicable for factual SPAs, it left the question open until November 2001 (see below).

7.5.3 Clarifying the Status of Potential Natura 2000 Sites

The ruling of the Court on the Baltic Motorway of May 1998 led to the question what criteria an area had to fulfil to become either factual SPA or potential site under the Habitats Directive? With regard to potential sites under the Habitats Directive, the Bundesverwaltungsgericht gave an answer in August 2000 in a case involving the authorisation of an airport in Rhineland-Palatinate. A recognised environmental organisation had contested the authorisation, yet it was upheld by the first and second instance administrative court. The organisation still tried to obtain a ruling by the Bundesverwaltungsgericht, but the Court refused to review the case again. Nevertheless, the Court repeated in its decision that "there is no doubt (…) that there may be areas whose reporting to the [European] Commission is obvious and that they have to be thus treated as potential sites under the Habitats Directive".[217] However, the Bundesverwaltungsgericht emphasised that the national authorities still enjoyed discretion with regard to the question whether a specific area had to be reported or not. There was thus no automatic relationship between the occurrence of endangered and the reporting of a site.[218] In May 2002, however, the Court established such relationship at least for priority species of the Directives, i.e. particularly endangered species. It followed thereby Annex III of the Habitats Directive that regulated the process of identifying Natura 2000 sites. According to it, the occurrence of priority species did automatically require the designation of the concerned area[219]

With regard to the identification of factual SPAs, the Bundesverwaltungsgericht followed similar lines as in the case of potential sites under the Habitats Directive. In 2001, a recognised environmental organisation asked the Court for preliminary injunction against the authorisation of a highway as it would cross a sensitive site for birds that had been identified by the inventory of important bird areas. Following the ECJ, the Bundesverwaltungsgericht held that this inventory had to be considered as a strong indicator for the eligibility of an area as SPA. However, it made also clear that, as in the case of potential sites under the Habitats

[217] (…) [dass] nicht zweifelhaft ist (…), dass es Gebiete geben kann, deren Meldung an die Kommission sich aufdrängt und die demzufolge als potentielle FFH-Gebiete zu behandeln sind."
[218] BVerwG, Beschl. v. 24. 8. 2000 – 6 B 23/00.
[219] BVerwG, Urt. v. 17. 5. 2002 – 4 A 28/01.

Directive, there was no automatic relationship between the inventory and the designation of an area. Nevertheless, in the case at hand a factual SPA was indeed affected. In the ruling, the Bundesverwaltungsgericht also applied the then new reasoning of the ECJ that if an area had not been designated as SPA, the site protection regime of the Birds Directive would still apply. [220] Remember that in its key ruling of 1998, the Court had not given a definite answer to this issue. Following the reasoning of the ECJ, the Bundesverwaltungsgericht held that only if an area had been officially designated, Article 6 of the Habitats Directive could be used. For these reasons, the Bundesverwaltungsgericht granted the requested injunction in the case at hand.[221]

Yet what happened to areas that could become Natura 2000 sites, but whose designation was not so obvious compared to other sites? For such areas, the Bundesverwaltungsgericht referred to Article 10 TEC that contains the principle of Community loyalty: if it was not clear whether a site would become Natura 2000 site or not, the competent authorities had to abstain from any action that would make the future designation of the area impossible. Thus, although Article 6 did not apply for these sites, a minimal protection was nevertheless granted.[222]

Obviously, the question whether an area would qualify as Natura 2000 site or not was of key importance for environmental organisations. However, once the Bundesverwaltungsgericht had 'created' factual SPAs and potential sites under the Habitats Directive, it made clear that it would not review the decisions of first and second instance administrative courts to deny such status for particular areas. The Court justified this refusal on the basis of the German administrative procedural law, according to which it is only responsible for decisions of general principle. Whether the facts had been correctly interpreted or not – and thus whether a particular area was given the status of factual SPA or potential site under the Habitats Directive – remained exclusively up to the lower administrative courts to decide.[223]

7.5.4 Applying the Site Protection Regime: Significant Negative Effects, Alternatives, and Overriding Reasons of Public Interest

In the ruling of the Bundesverwaltungsgericht on the Baltic Motorway, the Court had emphasised that only those projects had to be assessed on the background of Article 6 that would affect sensitive areas to a significant extent. Yet when did a project create such a significant effect? Already in 1999, the lower court of

[220] ECJ C-374/98 [2000] Commission v France.
[221] BVerwG, Beschl. v. 21. 11. 2001 – 4 VR 13.00.
[222] BVerwG, Urt. v. 17. 5. 2002 – 4 A 28/01.
[223] BVerwG, Urt. v. 12.6.2003 - 4 B 37.03.

Oldenburg had ruled that a project would not automatically create significant negative effect on Natura 2000 sites if it would reduce their size.[224] Until end 2005, the Bundesverwaltungsgericht has not established abstract criteria to determine whether significant effects would occur or not. Nevertheless, two aspects of its case law are particularly worth mentioning: first, in February 2000, the Court held explicitly that mitigating measures could bring the negative effects of a project under the threshold of 'significant negative effects' already during the authorisation procedure. The case concerned the construction of the motorway A 17 that had been contested by a recognised environmental organisation. In the ruling, the Court held that the reduction of potential site under the Habitats Directive of 3% of its total size could indeed be considered as 'significant'. However, the competent authorities had planned several measures to mitigate the negative effects. A strict reading of Article 6 would suggest that if a project would create negative effects, it had to be assessed according to its paragraph 3 and 4. Only if there where no alternatives and overriding reasons of public interest, the project could be authorised if compensating measures to guarantee the coherence of the Natura 2000 network were taken. The Court, however, rejected this interpretation. It held that:

> "[c]ompensation measures according to Article 6 (4) of the Habitats Directive are superfluous if the negative effect of a project do not reach the threshold for significant negative effect according to Article 6 (3). The goal of coherence that according to the design of the [Habitats] Directive is to be protected foremost is satisfied if the project planner is able to guarantee by taking mitigating measures that the degree of negative effect, which the Habitats Directive uses as characteristic for significance, is not reached."[225]

Environmental organisation criticised that the competent authorities used this interpretation to use mitigation measures in order to exclude an assessment according to Article 6 (see below).

The second aspect worth mentioning relates to factual SPAs. In April 2004, the Court increased the pressure on the competent authorities to designate all these sites as the reduction of their areas could not be justified. It referred explicitly to the case law of the ECJ according to which the Member States had to guarantee the complete conservation of SPAs.[226] Once a factual SPA has been officially designated, the reduction of its size could be in principle justified on the basis of the site's goals of conservation: whether the reduction of the SPA would have

[224] VG Oldenburg, Beschl. v. 26.10.1999 - 1 B 3319/99.

[225] "Kompensationsmaßnahmen nach Art. 6 Abs. 4 FFH-RL erübrigen sich, wenn die mit einem Vorhaben verbundenen nachteiligen Wirkungen nicht die Schwelle der erheblichen Beeinträchtigung i. S. des Art. 6 Abs. 3 FFH-RL erreichen. Ist der Planungsträger in der Lage, durch Schutzvorkehrungen sicherzustellen, dass der Grad der Beeinträchtigung, den die FFH-Richtlinie durch das Merkmal der Erheblichkeit kennzeichnet, nicht erreicht wird, so ist dem Integritätsinteresse, das nach der Konzeption der Richtlinie vorrangig zu wahren ist, Genüge getan." BVerwG, Urt. v. 27. 2. 2003 – 4 A 59.01.

[226] ECJ C-355/90 [1993] Commission v Spain.

significant negative effects or not had to be assessed against the background of these goals. Yet as they are obviously missing for factual SPAs that had not been designated, the reduction of the SPA could not be justified in view of its size.[227]

In the ruling of the Bundesverwaltungsgericht of May 1998 on the Baltic Motorway, the Court had made it clear that it would not play the role of an alternative project planner. Nevertheless, it was soon confronted with the question whether the competent authorities had sufficiently examined possible alternatives or not. The Court adopted, however, a rather restrictive position. In January 2000, the Bundesverwaltungsgericht was for the first time directly confronted with the issue of alternatives. The case concerned the construction of a bypass near the town of Hildesheim in Lower-Saxony. The BUND and another environmental organisation had contested the authorisation for the bypass as it would have negative effects on a nearby site hosting a priority habitat. In 1998, the second instance administrative court of Lüneburg had held in its ruling on the issue that the site would not be sufficiently negatively affected. Yet even if this were the case, the court stated that no realistic alternatives to the project existed and that it would be justified on the basis of overriding reasons of public health as it would lower the risk of accidents.[228] The BUND appealed to the ruling. The Bundesverwaltungsgericht agreed with the environmental organisation that a potential site under the Habitat Directive was indeed negatively affected and the competent authorities had to apply Article 6 (4). In view of this situation, the Court emphasised that the term 'alternative solution' used in the Directive would require interpretation and held that:

> "If the objective of the plan can be realised *on another location* that is more favourable to the protection regime of the Habitats Directive or with less negative effects, the project initiator must use this possibility. He does not enjoy any discretion in this respect. (…) Only important reasons external to nature protection may justify (…) to exclude an alternative solution. The project initiator can only exclude a technically possible alternative if it would create excessive costs for him or negatively affect other public interests" (emphasise added).[229]

The reason why the Court had to interpret Article 6 (4) and not the transposition of this Article in the German nature conservation law of 1998 was the fact that the latter would only apply to sites that had been already designated. Nevertheless, the

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[227] BVerwG, Urt. v. 1.4.2004 - 4 C 2.03 (OVG Koblenz).

[228] OVG Lüneburg, Urt. v. 18.11.1998 - 7 K 912/98.

[229] "Lässt sich das Planungsziel an einem nach dem Schutzkonzept der FFH-Richtlinie günstigeren Standort oder mit geringerer Eingriffsintensität verwirklichen, so muss der Projektträger von dieser Möglichkeit Gebrauch machen. Ein irgendwie geartetes Ermessen wird ihm nicht eingeräumt. (...) Nur gewichtige ‚naturschutzexterne' Gründe können es danach rechtfertigen, (...) die Möglichkeit einer Alternativlösung auszuschließen. Der Vorhabenträger darf von einer ihm technisch an sich möglichen Alternative erst Abstand nehmen, wenn diese ihm unverhältnismäßige Opfer abverlangt oder andere Gemeinbelange erheblich beeinträchtigt werden." BVerwG, Urt. v. 27. 1. 2000 – 4 C 2. 99.

Court seemed to be sympathetic to the narrow interpretation the legislator had chosen. In fact, as in the transposition, the Court interpreted Article 6 (4) as demanding only the search for alternative locations, yet not alternatives to the project at such. At the same time, however, the Court made it clear that if there were an alternative location to realise the objectives of the project, it had to be chosen unless important reasons would prohibit this. Yet the Court immediately emphasised that the costs of an alternative location may be a good reason to justify the exclusion of such an alternative. In the case at the hand, the Bundesverwaltungsgericht held that the construction of tunnels in the double figure or specific road pipes for 1.6 million Deutsch Mark to protect the habitat had not to be considered as a viable alternative.[230]

The ruling led to another question: to what extent must an alternative to a project realise the goals that the initial project pursued? Obviously, in most cases an alternative will not be able to do so to 100 percent. In May 2002, the Bundesverwaltungsgericht gave an answer in a case that dealt again with the construction of a motorway, this time the A 44 in Hesse. A recognised environmental organisation had contested the authorisation as the selected route of the motorway would cut through an allegedly potential site under the Habitats Directive hosting priority species. During the authorisation procedure, the environmental organisation had argued that there existed an alternative route to the motorway that would be less ecologically harmful to the site. The competent authorities had examined this alternative, yet had ultimately decided to ignore it. They argued that the alternative route would not allow realising one of the main goals of the motorway – to lower the traffic in some communities – as good as the chosen route and thus could not be considered as an alternative to the project. The Bundesverwaltungsgericht, however, rejected this reasoning. It emphasised that:

> "[t]he fact that the alternative route is only able to achieve the objective of the local reduction of traffic in a suboptimal way compared to the preferred route does not justify to denounce it as another project. If the main goals [of the project] can be reached as such, concessions to the extent to which they can be achieved have to be tolerated as the typical consequence of the obligation to use alternatives."[231]

However, in January 2004 the Bundesverwaltungsgericht relaxed the obligation to select alternatives. The case was about the authorisation of a motorway in Bavaria that had been contested by an environmental organisation. It argued among others

[230] BVerwG, Urt. v. 27. 1. 2000 – 4 C 2. 99.

[231] „Dass sich mit [der alternativen Route] der Zweck der örtlichen Verkehrsentlastung im Vergleich mit der [bevorzugten Route] nur suboptimal verwirklichen lässt, rechtfertigt es nicht, ihr den Stempel eines anderen Projekts aufzudrücken. Bleibt das Ziel (-Bündel) als solches erreichbar, so sind Abstriche am Grad der Zielvollkommenheit als typische Folge des Gebots, Alternative zu nutzen, hinnehmbar" (BVerwG, Urt. v. 17. 5. 2002 – 4 A 28/01).

that the competent authorities had not sufficiently examined alternative locations of the project. Before the ruling, the Court had always distinguished between the obligation stemming from Article 6 and the German rules on infrastructure projects to choose alternatives. The latter requires the competent authorities to search for alternatives that are more environmentally friendly already before an assessment according to Article 6 has taken place. Yet ultimately they are allowed balancing nature protection against other general interests in order to justify the deterioration of sensitive areas, even if there existed alternatives. There is thus no strict obligation to choose alternatives as Article 6 requires. The goal is rather to reduce the damage on the affected area (Hösch 2004b: 573-574). In the ruling, the Court suddenly mixed the two obligations. It held that:

> "[a]n alternative in the sense of Article 6 (4) of the Habitats Directive exists if the goals pursued by the construction of the motorway, that are on their part dependent on the balancing and weighting of other objectives, can be realised in a more nature friendly way. If an alternative version leads to another project, it does not have to be considered as an alternative."[232]

The problem is that these "other objectives" have been already identified on the basis of German law before the assessment according to Article 6 has taken place. Yet the German law allows taking other interests than those granted by the Directives into account to justify the deterioration of an area. As the selection of objectives directly determines what criteria an alternative has to fulfil to be considered as a 'real' alternative and not as another project, it becomes clear that mixing both issues leads to a reduction of the protection level granted by the Directives. With its interpretation, the Bundesverwaltungsgericht allows indirectly to take other reasons than those granted by the Directives account to justify the deterioration in the Natura 2000 area. In addition, the search for alternatives becomes practically irrelevant, as most alternatives will not be able to realise all chosen objectives sufficiently and will become therefore 'other projects' that can be excluded (Backes/Freriks/Nijmeijer 2006: 142-143; Hösch 2004b).[233]

Finally, how did the Court interpret the 'overriding reasons of public interest' that could justify the deterioration of a Natura 2000 site? In the case on the construction of the bypass in the town of Hildesheim, the Bundesverwaltungsgericht held that the reduction of deadly accidents could indeed justify the project and the deterioration of the Natura 2000 site. However, it emphasised in its ruling that the competent authorities had to prove such reduction on the basis of scientific

[232] „Eine Alternative im Sinn des Art. 6 Abs. 4 S. 1 UAbs. 1 FFH-RL ist vorhanden, wenn sich die mit dem Straßenbauvorhaben verfolgten Ziele, die ihrerseits von einem Bewerten und Gewichten anderer Zielsetzungen abhängig sind, naturverträglicher erreichen lassen. Läuft eine Variante auf ein anderes Projekt hinaus, kann von einer Alternative nicht mehr gesprochen werden" (BVerwG, Urt. v. 15.1.2004 - A 11.02).

[233] BVerwG, Urt. v. 15.1.2004 - A 11.02.

evidence. The mere claim would be insufficient.[234] In the case on the construction of the A 73, the Bundesverwaltungsgericht signalled that it would interpret the overriding reasons of public interest rather widely. It held that the construction of the motorway would be justified as "the project pursues first and foremost the growing together of the old and new 'Länder' and the creation of similar living conditions."[235] It might well be that the construction of motorways is one appropriate mean to achieve these goals, yet it clearly leaves the competent authorities ample possibilities to justify the overriding importance of a project.

7.5.5 Holding the Directives back through Courts

It needs to be emphasises not only environmental organisations turned to the courts to obtain their policy objectives with regard to the Natura 2000 Directives. Also affected land owners tried to prevent the designation of their land. However, the German administrative courts denied to grant preliminary injunctions[236]. The first case appeared in 2000 before the first administrative court of Oldenburg. A mining company asked the court to grant a preliminary injunction against the decision of the Ministry for the Environment of Lower-Saxony to send several sites to the Federal Ministry for the Environment in order to report them as sites under the Habitats Directive. It did so as it planned to mine in some of these areas. The court, however, denied doing so: the mere reporting of a site had to be considered as a preparatory administrative act that could not be contested. Only once the final decision had been made, its review would be possible.[237] The decision of the first instance court was then confirmed by the second instance court of Lüneburg. The latter also denied that the issue could be referred to the Bundesverwaltungsgericht as no question of general principle was concerned.[238] Several other lower administrative courts gave similar rulings.[239] In July 2000, the second instance court of Lüneburg also held that ultimately it would be up to the ECJ to decide via the preliminary reference procedure whether a particular area had been incorrectly designated as Natura 2000 area or not. However, to my knowledge not a single court referred this issue to the ECJ until today.[240] Yet not only administrative courts

[234] BVerwG, Urt. v. 27. 1. 2000 – 4 C 2. 99.
[235] „(…) weil das Vorhaben auch und zuvörderst dem Zusammenwachsen der alten und neuen Bundesländer und der Herstellung gleicher Lebensverhältnisse zu dienen bestimmt ist." BVerwG, Urt. v. 15.1.2004 - A 11.02.
[236] For an extensive legal discussion, see Ever (2000).
[237] OVG Schleswig, Beschl. v 27.8.1999 – 2 M 45/99.
[238] OVG Lüneburg, Beschl. v. 24.3.2000 - 3 M 439/00.
[239] See for example VG Lüneburg, Beschl. v. 6.4.2000 - 7 B7/00, VG Gießen, Beschl. v. 2.5.2000 - 1 G 804/00, VG Oldenburg, Besch. v. 29.6.2000 - 1 B 2016/00, VG Frankfurt/Main, Beschl. v. 2.3.2001 - 3 G 501/01
[240] OVG Lüneburg, Beschl. v. 12.7.2000 - 3 N 1605/00.

were concerned by the issue: in 2005, a municipality whose area had been nearly exclusively designated as Natura 2000 site argued that this would violate its constitutional right to local government (*kommunale Selbstverwaltung*) and turned therefore to the constitutional court of Rhineland-Palatine. However, although the court held that the provisions of the Natura 2000 Directives had to be interpreted in a municipality-friendly way, it emphasised that the European obligation take precedence over the national provisions and thereby rejected the claim.[241]

7.5.6 Assessing the Court's Rulings

Compared to France and the Netherlands, the Bundesverwaltungsgericht clarified the main issues of the Directives' site protection regime – direct effect of Article 6, factual SPAs and potential sites under the Habitats Directive – already in 1998. It thereby applied the case law of the ECJ and even went further than the European Court did. In fact, in 2004 the ECJ denied that Article 6 could created direct effect for potential sites under the Habitats Directive, whereas the Bundesverwaltungsgericht had already declared the direct effect of this Article six years before.[242] Yet although the Bundesverwaltungsgericht had quickly embraced the site protection regime of the Directives, it interpreted the specific obligations in later rulings in a rather restrictive way. By doing so, it gave the competent authorities more leeway in applying the Directives' site protection regime: they had to apply Article 6, yet could use mitigating measures to bring the project under the threshold for creating significant negative effects; they had to examine possible alternatives to the project, yet only alternatives locations and not alternatives to the goals as such; they had to justify the deterioration of a project for overriding reasons of public interest, yet they could refer to rather vague goals to do so. It is worth mentioning in this respect that Rehbinder sees a general trend of the Bundesverwaltungsgericht to defer to the opinion of the competent authorities when it comes to the assessment of complex scientific and technical issues (2002: 243-244). The Court's case law on the site protection regime of the Natura 2000 Directives confirms this assessment.

In addition, the Court already mentioned in its rulings how the competent authorities could overcome the phase of judicial review: in November 2002, it held first that the competent authorities had ignored a negatively affected factual SPA. Then it continued by explaining that, after the site had been officially designated, the project could be justified for an overriding reason of public interest.[243] Similar,

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[241] VerfGH Rheinland-Pfalz, Urt. v. 11.7.2005 - VGH N 25/04.
[242] See ECJ C-117/03 [2005] Società Italiana Dragaggi SpA and Others v Ministero delle Infrastrutture e dei Transporti and Regione Autonoma del Friuli Venezia Giulia
[243] BVerwG, Urt. v. 14.11.2002 - 4 A 15.02.

in April 2004, the Bundesverwaltungsgericht held that the competent authorities could 'simply' designate the factual SPA correctly, which would then allow them to justify the deterioration of the area on the basis of the reduced protection regime of Article 6.[244] By doing so, it showed the competent authorities how to create decisions that could not be contested before the courts.

Finally, as in other countries, the Bundesverwaltungsgericht did not clarify all aspects of the Natura 2000 Directives in one key ruling. As the case law of the ECJ was still vague on several points, environmental organisations asked both lower administrative courts as well as the Bundesverwaltungsgericht to refer the issue for a preliminary ruling.[245] They did so for two reasons: first, the ECJ was known for its strict interpretation of European law in general and the Natura 2000 Directives in particular, which could help environmental organisations to pursue their policy objectives. Second, as they were focusing predominantly on large infrastructure projects that were heavily contested, they had the impression that the German judges would be too involved in local politics to give an 'objective' ruling. The ECJ in Luxembourg had more distance to the sometimes heavily tensed situation on the ground (Interview WWF 2, 449-481). However, only in 2005 the second instance court of Munich referred questions to the ECJ.[246] The German courts had denied to follow all other requests by arguing that they would not require the help of the ECJ to interpret the provisions.

7.6 Reaction of Environmental Organisations: Restricted Litigation

Since the Bundesverwaltungsgericht had established the direct effect of Article 6, environmental organisations had – at least from a mere legal perspective – the viable possibility to use litigation in order to enforce the Directives site protection regime for non-designated Natura 2000 sites. Unfortunately, however, it is not possible to determine how often environmental organisations contested administrative decisions for being in breach with the Directives. Rulings of German administrative courts are neither systematically collected nor made available to the public: rulings of the Bundesverwaltungsgericht are only accessible online since January 2002, yet only those rulings that are deemed to be particularly interesting are made available. Older rulings can only be bought if the exact reference of the case is

[244] BVerwG, Urt. v. 1.4.2004 - 4 C 2.03.
[245] See e.g. BVerwG, Urt. v. 24.5.1996 - 4 A 16.95, VGH München, Urt. v. 14.6.1996 - 8 A 94.40125/40129, BVerwG, Urt. v. 19.5.1998 - 4 A 9.97, BVerwG, Beschl. v. 24. 8. 2000 – 6 B 23/00, OVG Lüneburg, Urt. v. 18.11.1998 - 7 K 912/98.
[246] ECJ C-244/05 [2006] Bund Naturschutz in Bayern v others.

know, which makes it impossible to search rulings on the basis of keywords.[247] Also rulings of the lower administrative courts are not systematically reported. For Lower-Saxony, there exists a data base of rulings that judges of first and second instance administrative courts deem to be worth reporting. Yet the criteria for selection remain unclear.[248] More important is the fact that the search engine of the data base does simply not work.[249] An alternative would be to use only those rulings published in German law journals. Yet as in other countries, using the number of published rulings as an indicator for the number of all cases dealing with the site protection regime of the Natura 2000 Directives is problematic: only those rulings get published that add 'something new' to the debate. Yet once an issue had been settled – such as the direct effect of Article 6 – no rulings will be published anymore if they are simply a 'copy' of older rulings. Published rulings are therefore an appropriate instrument to trace the development of the case law as well as to see initial differences between the courts. Yet they tell us little about the total number of rulings. For these reasons, it is impossible to determine how often environmental organisation went to the courts in order to enforce the Directives' site protection regime.

Nevertheless, that they did so can be shown easily: of all published rulings of the main German environmental law journal – *Natur und Recht* – that had the goal to enforce the Directives' site protection regime, 62% were started by environmental organisations (see Table 10). In total, 40 rulings have been published that dealt with the site protection regime of the Natura 2000 Directives. Eight of these cases tried to prohibit the designation of particular areas as Natura 2000 sites and tried thus to prevent the Directives from becoming effective. In twelve cases land owners used the Directives as one legal claim among others in order to protect their interests. Yet arguably, their main concern was not nature protection but to protect their own economic interests.

[247] See the information of the Bundesverwaltungsgericht on http://www.bverwg.de/enid/5b9d2838b4c176bf4d8737f5213c63a0,0/Bundesverwaltungsgericht/Entscheidungen_96.html (23.03.2008).

[248] http://www.dbovg.niedersachsen.de/Index.asp (23.03.2008).

[249] To give an example, when using "FFH-RL 6", which is the suggested key word for Article 6 of the Habitats Directive, only one case is found despite the fact that several rulings of courts of Lower Saxony have been published in *Natur und Recht*.

Table 10: Published Rulings Dealing with Natura 2000 Issues

Type of litigation	Number
Environmental organisation trying to enforce the Directives' site protection regime	20
Land owners trying to enforce the Directives' site protection regime	12
Land owner trying to prevent the designation of Natura 2000 sites	8
Total	40

Source: own counting based on all published rulings in Natur and Recht until the first issue of 2006.

Although we do not know how often environmental organisations went to the court, they were clearly restricted in using litigation even though they had the necessary bio-geographical knowledge on potential Natura 2000 sites. First, as has been already discussed, by matter of law they did only enjoy access to courts on issues strictly related to nature conservation issues. Thus, they could not, for example, litigate against authorisations for emissions of industrial plants or intensive life stock farms that could negatively affect Natura 2000 sites. Also one of the discussed transposition problems of Article 6 – the exclusion of assessments of projects requiring authorisation under the legislation against air pollution the use of water – could not be remedied through litigation as German environmental organisations do simply not enjoy access in these matters. In addition, before 2002 when minimum criteria for access to the courts for environmental organisations were established by federal law, some Länder like Bavaria had still completely excluded public interest group litigation in all environmental matters.[250] Second, the comparatively high costs for litigation made it impossible to use litigation on an extensive basis. As a consequence, environmental organisations focused mostly on large, symbolic projects, such as the deepening of the river Ems or the construction of highways. These were often highly contested projects with a long history of conflict. The deepening of the river Ems is a good example for this: the main goal of the project was to allow larger cruiser ships of the shipyard company "Meyer Werft" to access the North See as the company is one of the main employer in this region of Lower-Saxony. Yet each deepening had significant negative effects on this ecologically important area. For this reason, already before the Habitats Directive had entered into force environmental organisations had contested the deepening before the courts. In 1994, they withdraw the case as an agreement had been signed that guaranteed that the Ems would not be deepened anymore. Yet shortly afterwards, the competent authorities presented new proposals to deepen the river

[250] This did not exclude Bavarian environmental organisations completely from going to the courts: they bought sensitive areas that gave them legal standing if it would become negatively affected by administrative decisions. This allowed them to counter-balance the restricted access, yet was not able to overcome the blocked legal standing fully.

and to build a river barrier to allow the "Meyer Werft" to construct again even larger cruisers. In view of this situation, environmental organisations saw the Natura 2000 Directives as a welcomed instrument to finally protect the river and litigation as the only instrument to achieve their policy goals (Interview WWF 2, 059-101).[251] Third, environmental organisations were rather careful in using litigation due to the fact that such legal activity had a rather negative image in the public opinion and risked therefore incurring a negative backlash on the broader goals of these organisations. When I asked them about how they had used litigation as a tool to enforce the Directives, the interviewees were emphasising that they went to the courts both on a selective basis and in a responsible manner. Above all, they tried to avoid that they could be attributed an 'image of hindrance' (*Verhindererimage*) or that people could get the impression of a 'flood of complaints' (*Klagsschwemme*) due to their legal activities (Interviews Nabu 2, 20-57, BUND 1, 670-683, BUND 2, 990-1028, Litigation expert, 408-510). Interestingly, neither the interviewed Dutch nor French environmental organisations – that both use litigation on a much more frequent basis – emphasised in a similar way how careful and responsible they were in using litigation. The reaction of German environmental organisations has to be seen in the specific German context: as unemployment was rising and nature protection measures became under attack, critics of environmental organisations accused them to block economic activity. Of course, they could use cases before the courts started by these organisations to support their allegations. In addition, it should not be forgotten that public interest group litigation does not have such a long tradition in Germany than in the Netherlands or France. As a result, the public opinion seems to be still rather sceptical when environmental organisations enforce environmental law through courts. In view of these reasons, environmental organisation had to fear that excessive litigation could endanger their broader policy goals.

7.7 Effects of Litigation

Public interest group litigation on the Natura 2000 Directives had two main effects in Germany. First, it raised the awareness of the competent authorities on issues of Natura 2000. On the one hand, after the first authorisations had been contested

[251] In late 2006, the parties were able to settle the case: the environmental organisations withdraw their claim as the competent authorities agreed to invest nine million euro to improve the ecological situation of the rive (Interview Ministry Lower-Saxony, 251-280, see also the Press release of the Ministry for the Environment of Lower-Saxony [No. 118/2006, 05.12.2006]). However, one year later the saga continues: the river is to be deepened again and environmental organisations already announce to take it to the courts (Press release BUND Lower Saxony, 20.12.2007, http://www.bund-niedersachsen.de/content/presse_publikationen/2378.php [11.02.2008]).

before the administrative courts, it became clear that an Article 6 assessment was not simply a more detailed 'normal' environmental impact assessment according to German law, but required particular justifications. Litigation thus helped to overcome the informational deficits on the Directives' site protection regime. On the other hand, litigation had what a senior member of the Nabu called a "hygenic effect" ("*hygienische Wirkung*") (Interview Nabu 1, 570): the mere fact that environmental organisations were able to contest administrative decisions for being in breach with the Directives' site protection regime signalled to the latter that there was somebody who would take their decisions to the courts if the Natura 2000 Directives had not been sufficiently taken into consideration (see also Interview BUND 1, 542-568).

The second main effect of litigation was to increase the pressure on the competent authorities to designate all potential Natura 2000 areas as it created legal uncertainty. Since 1998, when the Bundesverwaltungsgericht had 'created' the legal constructs of factual SPAs and potential sites under the Habitats Directive, project planners where confronted with the situation that their already authorised projects risked to be significantly delayed due to litigation as the competent authorities had failed to take the Natura 2000 Directives into account. Yet it was not their 'fault' given the fact that the Natura 2000 sites had not been officially designated. Given the fact that Article 6 does not intend at all to ban economic activity in ecologically sensitive areas, investors preferred the complete designation of sites in order to obtain legal certainty. This should not imply that they became suddenly supporters of stricter environmental protection measures. Yet legal uncertainty caused by litigation of public interest groups was simply worse than to include the costs for assessing and mitigating potential negative effects in the project's calculation. The effect of litigation on the designation of areas was even more direct if non-designated 'factual SPAs were concerned as the Bundesverwaltungsgericht did not allow the deterioration of these sites for economic reasons. Yet once the site had been officially designated as Natura 2000 site, the project could be carried out due to the weaker protection regime of Article 6 of the Habitats Directive. It is therefore no surprise that some sites for protected birds were only designated in order to reach the wider justification criteria of Habitats Directive. Some politicians in Lower-Saxony outright declared in public statements that their main motivation to designate a SPA was only to allow the – from a legal perspective – 'correct' deterioration of the site[252] (Interviews Nabu 2, 343-368, 382-404, 610-627, BUND 2, 1107-1123, 1343-1374, Federal Ministry, 350-366, 586-594, Ministry Lower Saxony, 547-559 and E-Mail Interview of 06.02.2008 with the responsible official of

[252] See e.g. the statements of the president of the regional council (*Regierungspräsidum*) to designate a factual SPA in order to construct the motorway A 26 (Tageblatt Online "48 Wachtelkönige stehen dem A 26-Bau im Wege", 14.06.2007, also TAZ, "Naturschutz für die Ausnahme", 29.09.2004).

the umbrella organisation of business interest groups of Lower Saxony [*Unternehmerverbände Niedersachsen*]).

Compared to the Netherlands, however, the interviewed environmental organisations agree that litigation did not lead to an improved application of the Directives' site protection regime. They criticised the competent authorities for taking the European obligations only 'pro forma' into consideration. In particular, they denounce that the competent authorities tried to bring a project arbitrarily under the threshold of 'significant negative effect' in order to avoid an assessment according to Article 6. They also blame them for not sincerely examining possible alternatives to a project (Interview Nabu 1, 575-595, BUND 2, 342-387, 1558-1577). Also the interviewed expert of the Federal Ministry of the Environment confirmed that the effects of litigation were limited to the designation of sites and did not affect the quality of application (Interview Federal Ministry, 366-374).

There are three related reasons that explain the limited effect of litigation: first, as has been discussed above, from the outset German environmental organisations were restricted to use litigation on an extensive basis. Second, the administrative courts did still leave a considerable margin of manoeuvre to the competent authorities when it came to the assessment of whether significant negative effects would occur or alternatives to the project would exist. With regard to the first issue, the courts allowed the competent authorities to avoid an assessment according to Article 6 by planning mitigating measure. As they were not too strict on scrutinising them, the competent authorities had the possibility to avoid an Article 6 assessment altogether. In addition, from the very beginning the court had made it clear that it would not play the role of an alternative planner. No doubt, this judicial self-restraint can be justified. Yet, it is one thing to become a second planner and another to interpret Article 6 strictly and require the competent authorities to search for alternative solutions for a project – as the Dutch courts did. Third, the last reforms of German administrative procedural law are clearly motivated to speed up administrative authorisations procedures. Since the 1990s, it thus allows to rather easily repair ex post unlawful administrative decisions. They are only annulled by the courts if a set of rather demanding conditions are met. Yet if, for example, 'only' the necessary justification for a decision is missing, the decision does not get automatically annulled, even tough it is unlawful and thus temporarily suspended.[253] Therefore, the competent authorities are given the possibility to provide such justification afterwards, without having to start the whole authorisation procedure all over again. Consequentially, the administrative authorities are under less pressure to create 'watertight' decisions, as they can still remedy flaws detected by the courts afterwards. Taken all three reasons together explains why the pressure on the competent authorities to apply the site protection regime of the Directives strictly

[253] See e.g. BVerwG, Urt. v. 1.4.2004 - 4 C 2.03, BVerwG, Urt. v. 23.2.2005 - A 4 1.04.

was limited. The result was that the quality of how they were applying the Directives' site protection regime was not ameliorated by litigation.

7.8 Linking the Empirical Results to the Stage Model

As has been shown, the main effect of public interest litigation on the site protection regime of the Natura 2000 Directives was on the designation of potential Natura 2000 sites, in particular SPAs. This led in turn to the application of Article 6 for projects affecting these sites, even though that they were still waiting for designation. The fact that the main legal provisions of Article 6 were already transposed in 1998 was certainly important, yet it was only part of the story in view of the completely insufficient designation of Natura 2000 sites. Litigation did not, however, improve the quality how the competent authorities were applying Article 6 in practice.

Since the entry into force of the Habitats Directive, the Commission pushed seriously for the completion of the Natura 2000 network. By threatening to indirectly impose financial payments if Germany would not comply, the resistance against the designation of the *Länder* could be overcome. Without the Commission's pressure, it is likely that the complete designation of Natura 2000 sites, in particular sites under the Habitats Directive, would have taken far longer. Yet the Commission's actions were unable to protect specific sensitive areas threatened by planned projects. It was also unable to affect the quality of how the competent authorities were applying the site protection regime of the Directives in practice, as the Commission refrained from getting too much involved into complex authorisations procedures. In view of this situation, environmental organisations turned to the courts. Thanks to the support of their voluntary members and strong degree of professionalisation, they were able to quickly create shadow lists that contained all sites eligible for designation. They were also able to contest several projects, yet the high costs for litigation as well as the restrictive legal rules made litigation on an extensive basis impossible. Although the first rulings of lower administrative courts on the Directives' site protection regime were contradictory, the Bundesverwaltungsgericht gave direct effect to Article 6 already in 1998. By creating the legal construct of factual SPAs – to which the stricter protection regimes of the Birds Directive would still apply – and potential sites under the Habitats Directive, it gave environmental organisations the possibility to enforce the Directives even though large areas had not been designated. At the same time, however, the Court still left considerable leeway to the competent authorities regarding key aspects of Article 6, such as the search for alternatives. In addition, the Court was bound to German procedural law that aimed to speed up

administrative authorisation procedures. Combined with the limited possibilities of environmental organisations to contest administrative decisions, the pressure on the competent authorities to create 'watertight' decisions that would survive the phase of judicial review was thus limited. They could exploit the leeway granted by the courts and did not have to change their practice of assessing projects that would have negative effects on Natura 2000 sites.

The empirical evidence largely supports the expectations derived from the stage model: even though the site protection of the Natura 2000 Directives could be enforced through the courts, the characteristics of some independent variables reduced the effects of litigation. Although the strong organisational capacity of environmental organisations was conducive to law enforcement through courts as it enabled them to both collect the necessary knowledge and partly overcome the high costs of litigation, their possibilities to use litigation was limited from the outset due to the restrictive access to courts. The interpretation given by the administrative courts was in the beginning also conducive to public interest group litigation, yet proved to be ultimately restrictive on key aspects of Article 6. The key actor of the third stage – the competent authorities – did comply with the court rulings, but still enjoyed a large discretion in justifying their decisions. The legal uncertainty created by litigation made them designate all potential Natura 2000 areas, in particular all SPAs, yet they did not have to change their administrative practices with regard to the application of key provisions of Article 6. The empirical evidence thus shows the importance of all stages for determining the effectiveness of public interest group litigation to enforce EU law. However, one element is seemingly not covered by the stage model: the peculiarity of German administrative law to repair ex post unlawful decisions. This provision – which of course the courts had to apply – reduced the pressure on the competent authorities to create 'watertight' decisions. To my knowledge, such legislation is rather uncommon and may be related to the specific circumstances of Germany after unification. Yet in any case, it shows the importance of detailed in-depth case studies to analyse the potential of law enforcement through courts.

In contrast to the stage model, the identified possible alternative explanations for the reduced effects of public interest group litigation in Germany do not yield any explanatory power. First, the fact that the European Commission was very active did not keep environmental organisations from trying to enforce the site protection regime of the Directives themselves. They did turn to the courts even though this involved significant costs. In contrast to the Commission, they would not only focus on the large issues – such as the completion of the Natura 2000 network as such –, but would try to protect each potential Natura 2000 site. That they were restricted in doing so is another story, yet they were certainly not leaning back once they realised that the Commission had become active. In the case of Germany, it would be better to see both instruments for achieving compliance – the

EU's centralised system of law enforcement based on Commission's actions and the decentralised system based on national litigation – as complementary. Without the pressure created by the Commission, it would have taken longer to complete the Natura 2000 network. And without the pressure generated through litigation before national courts, large areas would have remained excluded from the site protection regime of the Natura 2000 Directives for years. In addition, no legal uncertainty would have been created on the national level which also helped to overcome the resistance against the designation of Natura 2000 sites.

Also the second and third alternative explanations do not yield explanatory power: the organisational form and thus the distribution of costs and benefits did not keep such large environmental organisations as the BUND and Nabu from using litigation. Even the BUND, that not only focuses on nature conservation but has a more encompassing approach to environmental protection – and thus broader policy goals –, went to the courts to enforce the Directives. As the goal of these organisations is the protection of nature as such, they did simply not care whether others than their members would also benefit from the enforcement of the Natura 2000 Directives. Finally, the limited effect of litigation can also not be explained through alternative access routes through which the environmental objectives had been able to achieve their policy goals. Even after 1999, when the Greens were in government and arguably the influence of environmental organisations on policy making was the biggest, the resistance against the implementation of stricter environmental protection was far too strong. In fact, besides contacting the Commission, litigation was the only viable option available to environmental organisations to enforce the Natura 2000 Directives.

8 The Netherlands

In this chapter, I discuss public interest group litigation aiming at the correct implementation of the Natura 2000 Directives in the Netherlands. My main focus is on the Directives' site protection regime, yet the Dutch case also requires to discuss some aspects of the species protection regime. The reason for this is the fact that both issues are causally interlinked and it would not be possible to explain the effects of litigation on the site protection regime without taking the species protection regime into account. The chapter is structured as followed: first, I give an overview of the implementation process that ended in late 2005. Second, I explain the reasons why implementation problems had occurred and discuss, third, the role of the European Commission for achieving compliance. Fourth, I turn to the initial actions of Dutch environmental organisations to make the government comply. As they were not able to achieve their goal through lobbying or contacts with the European Commission, they started to litigate. Fifth, I turn to a discussion of the somewhat peculiar interpretation of the Dutch courts on the Directives' site protection regime. I also briefly discuss rulings on the species protection regime and those that aimed at the designation of additional sites. As the Raad van State (ABRvS), the supreme court of the Netherlands, ultimately accepted the direct effect of Article 6 of the Habitats Directive, environmental organisations could use litigation. In the sixth section, I show how these organisations exploited this opportunity and, seventh, what effects litigation had on the implementation of the Directives. I conclude the chapter by discussion the explanatory power of the stage model against the background of the empirical findings.

8.1 The Implementation of the Natura 2000 Directives

8.1.1 The Site Protection Regime

When the Birds Directive entered into force in 1981, the Netherlands already had a special nature conservation law. Regarding site protection, the *Natuurbeschermingswet 1967* (nature conservation law) provided basically for two types of protected area: the *Staatsnatuurmonumenten* (public nature monuments) and *beschermde natuurmonu-*

R. Slepcevic, *Litigating for the Environment*, DOI 10.1007/978-3-531-91999-7_8,

menten (protected nature monuments).[254] Article 12 of the *Natuurbeschermingswet 1967* prohibited activities that would harm the natural beauty or integrity of such sites. Exemptions were, however, rather easily possible. This was clearly not in conformity with Article 4 of the Birds Directive, in particular after the *Leybucht* ruling in 1991.[255] However, given the fact that both the competent authorities and Dutch environmental organisations nearly completely ignored the site protection regime of the Birds directive anyway (see below), this case of non-compliance was of little practical relevance.

In 1994, when the Habitats Directive entered into force, the Dutch government referred to the same Article in the *Natuurbeschermingswet 1967* as the correct transposition of Article 6 of the Directive. Indeed, it was sufficient with regard to the general requirement of Article 6 (2) to protect Natura 2000 areas. However, the Dutch nature conservation law fell short of Article 6 (3) and (4), which stipulates substantial and procedural criteria for the authorisation of potentially harmful activities. The *Natuurbeschermingswet 1967* did not provide for such a system of evaluation and therefore left the competent authorities much more leeway in their decisions to allow the deterioration of protected areas (Interviews Natuurmonumenten, 61-77, Waddenvereniging, 285-290, see also Backes 1995: 219).

In the end of the 1980s, the creation of a completely new Dutch nature conservation law was decided. The first draft was presented in 1988, but it took the subsequent governments until July 1998 to publish the first official version, called *Natuurbeschermingswet 1998*.[256] However, the law was not intended to transpose Article 6 of the Directives as the Dutch government did still see saw no reasons for changes.[257] It held the opinion that the existing legislation – the *Natuurbeschermingswet 1967* – would already transpose the site protection regime of the Habitats Directive in a sufficient way and saw therefore no need for further amendments (Interviews Vogelbescherming, 850-853, Natuurmonumenten, 301-315, Ministry of Agriculture, 67-73, 260-264, see also the letter of the Dutch permanent representation to the EU of 20.06.1994 as referred to in Backes 1995: 216, FN 214). According to Freriks, the preparatory documents for the *Natuurbeschermingswet 1998* also reflect this point of view (2001: 7). In any case, only some parts of the *Natuurbeschermingswet 1998* entered into force in 1998, but not those containing the new site protection

[254] Staatsblad 1967, 572.
[255] ECJ C-57/89 [1991] Commission v Germany (*Leybucht*).
[256] Staatsblad 1998, 403.
[257] It should be mentioned that the Ministry of Agriculture, Nature and Food Quality (Ministerie van Landbouw, Natuur en Voedselkwaliteit) had from the beginning the task to implement the Directives. Issues of the environment are dealt with by the Ministry of Housing, Spatial Planning and the Environment (Ministerie van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer).

regime.[258] Yet even if the law had entered into force completely, it still would have been an insufficient transposition of Article 6, as the new provisions failed to establish a system for evaluating plans or projects that could endanger protected sites based not only on procedural, but also substantial criteria (see Backes/van Buuren/Freriks 2004: 117-127; Freriks 2001).

The situation started to change in October 2000 when the European Commission sent a letter of formal notice to the Netherlands for not having transposed the site protection regime. In late December 2001, the government presented a legislative proposal to the 2nd chamber of Parliament in the form of an amendment of the *Natuurbeschermingswet 1998*.[259] Intensive discussions and several revised versions followed. The final amendment was published in January 2005, shortly before the ECJ convicted the Netherlands for not having transposed Article 6.[260] The amendment introduced the Natura 2000 sites as separate type of protected sites in the Dutch legal system and basically copied the protection regime of Article 6. At long last, on 1 October 2005, the complete *Natuurbeschermingswet 1998* entered into force, even though the date in its name suggests something different. The Commission accepted the amendment as a sufficient transposition of the Directives site protection regime (Backes/van den Broek 2005: 771).

The consequence of the protracted legal transposition was that Dutch law did not protect Natura 2000 sites to an equal extent than the Directives required for about eleven years. As a result, the competent authorities were confronted with two very different legal sources on which they had to justify their decisions. Even if they were in principle under the legal obligation to set aside the conflicting Dutch law and to apply the provisions directly, they did not do so at all. Until 1997 the site protection regime of the Directives was basically dead letter with no practical relevance (Interviews Expert University Utrecht, 579-592, Natuurmonumenten, 333-350; Vogelbescherming, 129-133). This is also the conclusion of an interdepartmental research project on the Natura 2000 Directives commissioned by the Dutch government (IBO 2003: 14). However, from 1998 on, more and more decisions of the administrative authorities were contested before national courts. The competent authorities were therefore directly confronted with the Directives and had to take them into account if their decisions should pass the judicial review (see below).

[258] These parts where nevertheless very important for the designation of Natura 2000 sites because Article 27 of the Natuurbeschermingswet 1998 gives the Minister of Agriculture the competence to transmit potential Natura 2000 sites to the Commission.
[259] Kamerstukken II 2001-2002, 28 171, nrs. 1-3.
[260] Staatsblad 2005, 195.

8.1.2 The Designation of Sites

No single Member State was able to fulfil the timetable for the creation of the Natura 2000 network. The Netherlands are no exception, although they were comparatively quick in meeting their requirements.

When the Birds Directive entered into force, only some Dutch sites had been designated as SPAs (see Table 11). These sites were already protected under Dutch law and there was consensus that they should be also designated as SPAs. The real increase of SPAs and later proposed sites under the Habitats Directive, occurred in the 1990s, and it was very significant: in the beginning of the 1990s, about 2.240 km² (about 5%) of the Dutch territory had been designated under Dutch law as protected sites (European Commission 1993: 41). Today, 10.109 km² (about 24%) are designated as SPAs, and 7.510 km² (about 18%) have been transmitted to the Commission as potential Natura 2000 sites .[261]

Table 11: Designation of Natura 2000 Sites in the Netherlands

Year	Number of sites (surface area in km²)	Source
Birds Directive		
December 1986	5 sites (76,9 km²)	(European Commission 1993: 41)
April 1991	9 sites (528,65 km²)	(European Commission 1993: 42)
1994	13 sites (3.290 km²)	(BirdLife International 2004: 15)
End 1998	30 (3.509 km²)	(European Commission 2002a: 9)
April 2000*	77 sites (10.109 km²)	(European Commission 2006c)
Habitats Directive		
December 2000	76 sites (7.708 km²)	(European Commission 2003b: 17)
March 2003	76 sites (7.330 km²)	(European Commission 2003b: 18)

[261] These numbers are not cumulative given the fact that many sites host both wild birds and important species of the Habitats Directive. The overlap between SPAs and sites under the Habitats Direcitve is about 95% for the maritime and 75% for the land area (Woldendorp 2005: 277).

May 2003	141 sites (7.510 km²)	(European Commission 2006b; Woldendorp 2005: 277)

Note that SPAs can also be designated as sites under the Habitats Directive. The covered surface is thus not cumulative, but often overlaps.
* Interestingly, official Dutch documents refer to 80 areas designated as SPA (see for example Dutch Ministry of Agriculture 2005a). I was not able to find the reason for this.

The Dutch governments used different selection criteria for SPAs and sites under the Habitats Directive. Regarding SPAs, remember that the Birds Directive itself is very vague on the criteria for SPAs. Article 4 (1) only states that the "Member States shall classify the most suitable territories". As mentioned above, the first Dutch SPAs have been widely accepted as important bird habitats, yet no systematic criteria for SPAs were developed. This happened only after the Netherlands were convicted by the ECJ for not having designated enough SPAs in 1998. As a result, the Dutch Ministry of LNV formulated three criteria according on which it based its selection. In a nutshell, these criteria are the following:

1) From the areas where bird species listed in Annex I of the Directive occur, the five most important areas have to be designated, unless fewer than two breeding pairs or five individual specimens occur in an area.
2) An area also qualifies for designation if at least 1% of the population of water birds regularly broods, moults, feeds, and/or rests there.
3) Qualifying areas smaller than 100 hectares need not be designated.

The first criterion – the five most important areas – was already used in the IBAs list of 1989. As the ECJ had accepted this list as the scientific reference document, the Ministry of Agriculture took it over as well. The second criterion – 1% of the population water birds – has its origins in the so-called Ramsar Convention on Wetlands. The Birds Directive refers to this Convention implicitly by stating in Article 6 (2) the "Member States shall pay particular attention to the protection of wetlands". For the Ramsar Convention, the 1% criterion was already accepted, and again the Ministry of Agriculture followed this example. Although the last criterion – minimum size of 100 hectares – is strictly speaking not an ornithological one, the Ministry justifies it by referring to the obligation to designate only the "most suitable territories". It argues that if the site would be smaller than 100 hectares, it would be impossible to guarantee its conservation (Dutch Ministry of Agriculture 2000: chapter 2).

Regarding the selection of sites under the Habitats Directive, Annex III of the Directives already contains several selection criteria. In the beginning, however, the Netherlands used rather restrictive criteria. Besides using insufficient data on existing habitats and species, it took only areas larger than 250 hectares into consideration. However, after the European Commission had criticised the first Dutch list of potential Natura 2000 sites, the Ministry of Agriculture changed the

criteria, which led to a rather complex system. In a nutshell, the five most important areas for non-priority habitats and species, and the ten most important areas for priority habitats and species have to be reported as sites under the Habitats Directive (Dutch Ministry of Agriculture 2003c). Additional criteria were set up in order to neatly delineate the sites (Dutch Ministry of Agriculture 2004a).

8.1.3 The Species Protection Regime

Compared to the issue of site protection, the implementation of the Directives' species protection regime created far less problems. Nevertheless, a rather 'indirect' transposition was in place until the entry into force of the law on flora and fauna (*Flora- en faunawet*) in April 2002. Based on these indirect transposition statutes, the Raad van State (ABRvS) – the supreme administrative court of the Netherlands – gave some very important rulings that had significant consequences on the 'implementation dynamics' of the Natura 2000 Directives as such. For this reasons it is indispensable to briefly discuss the main issues of the Dutch transposition of the species protection regime.

Species protection in the Netherlands has always been a very complex matter. When the species regime of the Birds- and later the Habitats Directive entered into force, dozens of provisions in various national statutes were in principle already transposing the protection measures of the Directives: the nature conservation law (*Natuurbeschermingswet 1967*), the birds law (*Vogelwet 1963*), the fishery law (*Visserijwet 1963*), the law on endangered foreign species (*Wet bedreigde uitheemse dier- en plantensoorten*), and numerous ministerial ordinances that further specified the mentioned laws. These ministerial ordinances were among others used to transpose the various annexes of the Natura 2000 Directives containing the list of protected species (Backes/van Buuren/Frerikes 2004: 25). The transposition was, however, rather 'indirect', as it depended to a large extent on ministerial decrees and individual decisions of the Ministry of Agriculture. This is illustrated by the protection system for endangered species as it was set up in the *Natuurbeschermingswet 1967*: its Articles 22 to 25 created a system of general protection coupled with authorisations given on an individual basis. In a nutshell, the Ministry of Agriculture was given the competence to declare endangered species as protected. Such status prohibited their deliberately killing or disturbance. In addition, the Minister of Agriculture could further specify the concrete protection of selected species through ministerial decrees. If a project would lead to the killing of protected species, an authorisation from the Ministry of Agriculture was needed. This authorisation had to identify the conditions under which the project was allowed. Based on this requirement, the species protection regime of the Habitats Directive could be transposed by simply copying it in the authorisation, as happened in the famous

'*Hamster* cases' (see below). Also the Annexes of the Directives containing the species requiring strict protected could be easily transposed.

Already since the 1980s, it had been discussed to integrate the dispersed Dutch species protection measures in one law in order to simplify the system of species protection. The first legislative proposal was presented in 1993. After intensive discussion and dozens of amendments, the law on flora and fauna (*Flora en faunawet*) was adopted in 1998.[262] It entered into force in April 2002 and now fully transposes – with very minor exceptions – the species protection regime of the Natura 2000 Directives (Backes/van Buuren/Freriks 2004: 151-204; Bastmeijer/Verschuuren 2003: 27-28).

8.2 Reasons for the Implementation Problems

As has been discussed, both the designation of sites and in particular the transposition of the Directives' site protection regime proved to be neither on time nor for a long time sufficient. What were the reasons for these implementation problems? Although the designation of sites demanded considerable knowledge, it was the resistance of affected landowners, farmers and investors and the general negative public climate that led to the protracted and faulty implementation.

When the first SPAs were designated in the 1980s, there was little disagreement about the concerned sites. Their importance as habitats for wild birds was widely acknowledged. Moreover, they were already protected under Dutch law. In addition, as has been already mentioned, the administrative authorities did not apply the Directive's site protection regime anyway. So the designation as a SPA had no real consequences; it was just like an extra 'label'. This changed quickly as the European Commission and Dutch environmental organisations pushed for the designation of all sites that met the scientific requirements of the Birds Directive.

The first step was to identify all these sites. The "Inventory of Important Bird Areas in the European Community" served as the scientific reference document for bird areas. The International Council for Bird Preservation, which became in 1991 BirdLife International, developed this inventory in 1989. It contains all ecologically important sites for birds, called Important Bird Areas (IBAs). Vogelbescherming, the Dutch BirdLife partner organisation, was actively involved in drawing up the inventory for the Netherlands. An update was presented in 1994. The Commission accepted the inventory as the best available scientific evidence on bird areas and argued that the Member States were under the obligation to designate the sites listed in the inventory. The non-designation was only acceptable if it was founded on

[262] Staatsblad 1998, 402.

sound scientific evidence. The ECJ followed this reasoning.[263] Also for the Birds Directive, Dutch environmental organisations drew up a similar shadow list containing all potential Natura 2000 sites (Interview Vogelbescherming, 795-809). The Dutch government had a difficult position to argue that the Dutch inventory of IBAs was inaccurate, because it had both cooperated with Vogelbescherming in the development of the inventory and had also partly commissioned it (Interview Ministry of Agriculture, 196-209). So although there were discussions about whether some specific areas should become Natura 2000 sites, the main lines of the Natura 2000 sites should have been clear from the beginning on.

The main problem was therefore not the lack of scientific evidence, but the widespread fear that the designation of sites – in combination with the application of the sites' protection regime – would become an insurmountable obstacle for further economic growth. The main catchphrase of the end of the 1990s was that the Netherlands were "under lock" because of the Directives ("*Nederland op slot*"). Given the Dutch situation, this fear is to a certain extant understandable. The Netherlands are a comparatively small country with a high density of population and intensive livestock farming and agriculture. At the same time, they are both on the main migration route for migratory birds as well as an important breeding and resting area of endangered wild birds and other species. Due to this fact, about a quarter of the Dutch territory has now been designated as Natura 2000 sites. In addition, in the 1990s the fear of economic decline and rising unemployment became more and more important in the Netherlands, as in other European countries. The public climate was therefore hostile towards the implementation of the Natura 2000 Directives as they were perceived as an obstacle to economic growth (Interviews Faunabescherming, 530-544, Waddenvereniging, 121-14). Also Dutch conservative and liberal parties made very critical statements against the Directives for this reason (Interviews Waddenvereniging 717-724, Ministry of Agriculture, 193-196).

For farmers, another reason for opposition against the Directives was its binding nature. Traditionally, the Netherlands rather relied on voluntary agreements with farmers to guarantee the conservation of sensitive areas. This made direct negotiations between farmers, nature conservation organisations and the competent authorities possible. The Natura 2000 Directives, however, ran counter to this way of nature conservation by establishing substantial criteria for the evaluation of potentially harmful projects (Interview Natuurmonumenten, 149-185, see also Kenbeek/van Wingerden 2004).

The opposition against the Directives was additionally backed up from informational deficits and misunderstandings about the new obligations. This was amplified by the cross-cutting nature of the Directives' site protection regime.

[263] See ECJ C-3/96 [1998] Commission v Netherlands.

Potentially, it concerns both all levels of government (municipality, provincial and state level) and all issues where authorisations related to nature conservation matters are required. Above all, however, the Dutch government did not take a clear role regarding the transposition of the Directives. As has been already discussed above, it held for a long time the opinion that no changes would be necessary to the existing Dutch legislation on nature conservation (Interview Natuur en Milieu, 123-130). This point of view is illustrated in an official document by the Ministry of Agriculture that tries to explain the Natura 2000 Directives to a larger public: the main message is that the Directives would only require minor changes of the current system of nature conservation, but in particular would not lead to stricter protection measures (see Dutch Ministry of Agriculture 2000: chapter 6). Such misunderstandings about the requirements of the Directives are also reflected by an amendment lodged by members of one of the main opposition party at the time – the centre-right Christian Democratic Appeal – during the parliamentary debate on the amendment of the *Natuurbeschermingswet 1998* in December 2003. The parliamentarians wanted to limit the assessment of negative effects of a planned project to only those projects situated directly inside an SPA.[264] If this had been accepted, any potential deterioration of a SPA stemming from a project outside its area could have been ignored. However, at that time, the Raad van State had already made it clear that such a limitation would be incompatible with Article 6 of the Habitats Directive. Nevertheless, the Ministry of Agriculture asked the Court to give its opinion on the issue. Not surprisingly, the Raad concluded in its advice that such amendment would be in conflict with Article 6.[265]

The initial opinion of the Ministry of Agriculture was in stark contrast to the fact that more and more administrative decisions were annulled during judicial review. These annulments led to a situation of legal uncertainty that representatives of the Dutch economy often publicly complained about (see e.g. Dutch Ministry of Agriculture 2003b: 4; 2003a: 3; 2004b: 4). For them, the situation appeared to be rather paradox: even if they followed the opinion of the Dutch Ministry, it was not sure whether a given authorisation would pass the judicial review. This strengthened the accusation that the Natura 2000 Directives would put the country 'under lock'.

Nevertheless, no coherent Anti-Natura 2000 network emerged as in France. Yet this does not mean that there was no resistance. On the contrary, land owners, farmers and firms sent about 5500 complaints against the designation of SPAs to the Ministry of Agriculture, which was responsible for the designation (Interview Natuurmonumenten, 130-138). About 1500 of these complaints entered the stage of judicial review, but only 20 out of 95 decisions had to be changed because of small

[264] See the amendments of the MPs Jager and Van den Brink, Kamerstukken II 2003-2004, 28 171, nr. 35.

[265] ABRvS, advice no. W11.04.0066/V of 27.2.2004, Kamerstukken II 2003/04, 28171, nr. 61.

errors (Interview Ministry of Agriculture, 213-231).[266] Not surprisingly, the situation is similar for potential sites under the Habitats Directive: the first 'complete' Dutch list sent to the European Commission resulted in about 1000 complaints from different stakeholders (Dutch Ministry of Agriculture 2003a: 3).

8.3 The Role of the European Commission for the Implementation

During the 1980s, the European Commission was rather passive in pushing the Netherlands to implement the Birds Directive, at least compared to its activities in the next decade. It started two infringement proceedings because of hunting issues that resulted in the conviction of the Netherlands.[267] Yet compared to the issues of site designation and site protection, these were rather small issues.

With regard to the Directives' site protection regime, the Commission started to take its role as 'guardian of the Treaties' seriously in the beginning of the 1990s, in particular after the Habitats Directive had been adopted. It is useful to distinguish two kinds of infringement proceedings: the first group covers 'horizontal' cases that aim at the correct legal transposition of the European requirements. The second concerns more or less idiosyncratic problems related to the application of the Directives in practice.

As Table 12 shows, there had been two 'horizontal' infringement proceedings for the designation of SPAs and the site protection regime that led to convictions. In 1996, the Commission brought the Netherlands as one of the first countries before the ECJ for not having designated enough SPAs. This resulted in a conviction, but the ruling itself had far more consequences because it made clear that the Member States were under the obligation to designate all scientifically appropriate sites.[268] After the ruling, the Commission continued to push for the designation of SPA through an infringement proceeding. But it did not come to a 2nd referral to the ECJ because the Netherlands had already designated all relevant sites in April 2000 (Interview Ministry of Agriculture, 161-164). Also for sites under the Habitats Directive, the Commission started infringement proceedings because the Netherlands had only sent an incomplete list of potential Natura 2000 sites in April 1998 (Europe Daily Bulletins, No. 7200 – 14.04.1998). This proceeding was

[266] There were two groups of complaints. By far the biggest part aimed at the designation as such or the reduction of a specific site. Here, the complainants were land owners, farmers and firms. The second group of complaints aimed at the enlargement of sites. These were filed by environmental organisations. There are about eight cases where the complaint of an environmental organisation was successful (Interview Ministry of Agriculture, 231-235)

[267] ECJ C-236/87 [1987] Commission v Netherlands and ECJ C-339/87 [1990] Commission v Netherlands.

[268] ECJ C-3/96 [1998] Commission v Netherlands.

stopped as the Dutch government was able to report all relevant sites in 2003. Regarding the Dutch transposition of the Directives' site protection regime, the Commission sent a letter of formal notice to the government on 24 October 2000. This came remarkably late as Article 6 of the Habitats Directive had already entered into force six years before that date. Be it as it may, in the beginning of 2003 the Commission referred the Netherlands to the ECJ, which lead to a conviction in April 2005.[269]

Table 12: Infringement Proceedings against the Netherlands on the Directives' Site Protection Regime

Case	Horizontal/ specific	Formal letter	Reasoned opinion	Referred to ECJ	Ruling of ECJ
ECJ C-3/96 [1998] Commission v Netherland (designation SPAs)	horizontal	25.09.1989	14.06.1993	05.01.1996	19.05.1998
ECJ C-441/03 [2005] Commission v Netherlands (Article 6)	horizontal	24.10.2000	26.07.2001	16.10.2003	14.04.2005

Source: own compilation based on ECJ rulings.

As regards the application of the Directives in practice, the Commission started some infringement proceedings, but no case reached the ECJ. To give an example, in the case of the deepening of the estuary of the river Scheldt (the *Westerschelde*), the Commission started infringement proceedings after it had received complaints from Dutch environmental organisations. In July 2003, the Commission sent the final written warning (Europe Daily Bulletins, No. 8512 – 26.07.2003), but dropped the case in January 2006. Dutch environmental organisations also litigated before national courts against the project. Finally, a settlement was reached and the authorities had to compensate the deepening by giving 600 hectares of land back to the sea. According to environmental organisations, the threat of the infringement proceeding was in this case very helpful (Interviews Vogelbescherming, 925-936; Natuurmonumenten, 639-646). The Commission had also become active in the 'famous' case on the protection of hamsters, yet decided to drop the issue later (van der Zouwen/van Tatenhove 2002: 34, 37-39).

The Commission's role for the implementation of the Natura 2000 Directives in the Netherlands differs widely depending on the issue one is looking at. Its main impact was on the designation of sites. The conviction of the Netherlands in 1998 was very important because it left no doubt that the Member States had only very little discretion in designating sites. It rejected the position of the Dutch government that also economic and recreational reasons could be taken into account (Interview Ministry of Agriculture, 111-116).[270] After the ruling, the

[269] ECJ C-441/03 [2005] Commission v Netherlands.

[270] See also the arguments presented by the Dutch government in the case (ECJ C-3/96 [1998] Commission v Netherlands, 47-49).

Netherlands made a great effort to designate all relevant sites, even though the resistance against it was considerable. The second conviction in 2005 was also important, because it clearly demonstrated that the national legislation – contrary to what the Dutch government had always argued – was not transposing the Directives' site protection regime. However, this was already common knowledge in the Dutch courts and therefore did not change much in practice (see below). The comparison between the dates of the ECJ's ruling and the publishing of the amendment to the Natuurbeschermingswet 1998 that transposed Article 6 is quite telling in this respect: the Netherlands were convicted in April 2005, but this had been already anticipated given the fact that the amendment was already published in January.[271] This is at least a strong indicator that the pressure from the Commission was not the only relevant factor for the transposition of the site protection regime.

Regarding the practical application of the Directives' requirements, the Commission's role was far less important. It should not be forgotten that the time gap between the entry into force of the Directives and the correct transposition was 24 years for the Birds and 11 years for the Habitats Directive. During that time, there have been numerous cases where the Dutch authorities took decision in breach with the Directives' site protection regime. This does not intend to suggest that the Commission should have had taken every case where the requirements of the Directives were not applied to the ECJ. But it is still remarkable that the Commission did not bring the Netherlands a single time before the ECJ because of non-application of the Directives, in particular if this is compared to the number of national court proceedings that dealt with the (non-) application of the Directives in the Netherlands (see below).

8.4 Initial Actions Taken by Dutch Environmental Organisations: Blocked Access

How did Dutch environmental organisations react to the incorrect implementation of the Natura 2000 Directives? When the Birds Directive had entered into force in the beginning of the 1980s, its site protection regime did not attract much public attention. Also the Dutch environmental organisations were not really aware of it. Only Vogelbescherming was active, but focused at the time mainly on the species protection regime of the Birds Directive (Interview Natuurmonumenten, 301-304; Waddenvereniging, 700-704; Vogelbescherming, 129-133). The reason why there was little awareness during the 1980s seems to be the same in the Netherlands as in Germany: metaphorically spoken, 'Europe' was too far away. Public debates focused on the creation of the single market, but not on existing European

[271] Staatsblad 2005, 195.

environmental legislation. Also the Commission did not become active with regard to the Directive's site protection regime. Finally, the protection measures of the Birds Directive were still rather vague and it was the ECJ that strengthened it – something that was of course impossible to anticipate. It is therefore comprehensible that at the time environmental organisations were focusing generally more on national legislation than on European Directives.

This situation started to change in the beginning of the 1990s. Once Dutch environmental organisations realised the potential of the site protection regime of the Natura 2000 Directives, they became very active on it. Before turning to their actions, a few remarks need to be made on the environmental movement in the Netherlands. First, Dutch environmental organisations have a strong organisational capacity both in terms of members and available resources compared to other European countries (see Kleinfeld 2001: 306; Dalton 1994; Immerfall 1997: 152-155). As Table 13 shows, their number of members and resources allows them to employ full-time personal in order to professionally pursue their policy interests. Second, some of them are not only trying to influence policy making, but also own large areas in order to protect endangered species more actively. Natuurmonumenten adopted this strategy and today owns about 9,000 km^2 of sensitive sites. As a result, they have a lot of expertise in nature conservation issues, but also have to face new issues such as cooperation with nearby stake holders (Interview Natuurmonumenten, 102-120). Third, the main Dutch environmental organisations are in well established relations with one another. They often cooperate in order to achieve an effective division of labour (Interview Natuur en Milieu, 325-327; Natuurmonumenten, 415-437). Fourth, even if an organisation decides not to act on a certain issue, there are numerous smaller and rather one-issue oriented organisations that are likely to fill the gap. This is particularly true for litigation given the fact that it is comparatively easy to contest administrative decisions in the Netherlands (Interview Faunabescherming, 398-400; Natuurmonumenten, 264-289; Vogelbescherming, 596-600). To conclude, once it has become clear to the Dutch environmental movement that the Natura 2000 Directives would mean a significant improvement of the nature protection level, they had the necessary resources and expertise to react quickly in order to try to enforce the new European requirements.

Table 13: Key Figures of Three Dutch Environmental Organisations (for 2006)

	Date of foundation	Number of members	Number of employees	Income p.A. (in Euro)
Vogelbescherming	1899	125.000	50	8.200.000
Natuurmonumenten	1905	900.000	585	109.400.000[272]
Waddenvereniging	1965	37.000	19	1.800.000

Source: Annual reports of Vogelbescherming (2006), Natuurmonumenten (2006) and Waddenvereniging (2006).

In order to effectively work for the correct implementation of the Natura 2000 Directives, Dutch environmental organisations needed to obtain the relevant information about those sites that would qualify as SPA or potential Natura 2000 sties. As described shortly above, given the expertise of the Dutch environmental movement on site protection, they could comparatively easily collect this information. The small size of the Netherlands was of course also an advantage in this respect.

The next step was to use this information. Dutch environmental organisations have pursued basically three strategies to enforce the Natura 2000 Directives, mostly all of them in parallel. First, they tried to lobby the parliament and the respective government to implement the Directives correctly (Interview Natuur en Milieu, 42-48; Vogelbescherming, 170-178). In retrospect, it is fair to say that this strategy was not effective. Given the strong resistance against the new European requirements, lobbying alone was unable to implement the Directives.

Second, environmental organisations turned to the European Commission by sending complaints about the faulty implementation of the Directives. It should be noted that the Commission was also interested in these contacts, because it was from the beginning on dependent on information from Dutch environmental organisations about the implementation of the Directives.[273] The first conviction of the Netherlands for not having designated enough SPAs in 1998 was based on the Inventory of IBAs, which, as has been mentioned, Dutch environmental organisations had created for the sites in the Netherlands. The situation was similar in the second case: in cooperation with the University of Utrecht, Natuur en Milieu and Vogelbescherming carried out a study that provided the Commission with the necessary information to start the infringement proceeding that led to the conviction of the Netherlands for not having transposed Article 6 (Interview

[272] This high income is explained through the fact that Natuurmonumenten owns numerous important areas that host endangered species. The organisation is responsible for the conservation of sites and receives substantial financial support from the various levels of the Dutch state for doing so.

[273] The two infringement proceedings in the 1980s are an exception to this. Dutch environmental organisations had little to do with them and it was mainly the Commission who pushed them (Interview Vogelbescherming, 118-129).

Vogelbescherming, 940-960). Given the very limited monitoring capacity of the Commission, its dependency on external information is hardly surprising.

Dutch environmental organisations view the possibility to send complaints to the Commission as an useful instrument, but they have no illusions about its limits: it takes a lot of time, in particular if detailed information needs to be provided, the result is very uncertain, and once the Commission has reached a decision, there is no way to contest it (Interviews Waddenvereniging, 830-844; Vogelbescherming, 10.03.2006, 936-940; Faunabescherming, 417-432). In particular the last two aspects can lead to the persistence of implementation problems if the Commission decides – for whatever reason – not to start infringement proceedings. To give an example, Vogelbescherming sent in the beginning of the 1990s complaints to the Commission about the authorisation of mechanical fishing of cockles in the Wadden Sea which had already been designated as SPA. Yet the Commission refrained to start infringement proceedings because it was afraid that it would not been able to proof the case (Vogelbescherming, 913-925). However, about ten years later, the Raad van State referred a similar case on mechanical cockle fishing that was started by the Waddenvereniging to the ECJ for a preliminary ruling. The European Court held that the Dutch administrative authorities did not apply Article 6 correctly because the possible negative effect of this way of fishing was not assessed.[274] In view of the fact that mechanical cockle fishing has severe negative effects on the SPA Wadden Sea, the Raad van State annulled all given authorisations from 1999 to 2005. As a result, the mechanical cockle fishing in the Wadden Sea is now forbidden. It is of course difficult to compare the two cases one-to-one, not at least because the negative effects of mechanical cockle fishing are today better proven (see for example Piersma et al. 2001). Nevertheless, the complete dependence on the Commission's decision to pursue a case can be problematic.

A further shortcoming of sending complaints to the Commission was that it could not stop the realisation of projects that were in breach with the Directives' site protection regime. Although the start of infringement proceedings can ultimately improve the implementation substantially, it gives no immediate protection against the violation of European requirements. In addition, the Commission itself had declared that it would focus more on the correct transposition than on pursuing individual complaints such as "the deterioration of areas designated or awaiting designation as special protection areas under [the Birds Directive]" (European Commission 2000b: 75). From the perspective of an environmental organisation trying to protect an endangered site, this position cannot be but dissatisfying. Therefore, Dutch environmental organisation used extensively their third possibility to enforce the Directives' requirements: the

[274] ECJ C-127/02 [2004] Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij.

contestation of administrative decisions in breach with the Directives before national courts.

8.5 The Courts' Interpretation of the Natura 2000 Directives

8.5.1 The Site Protection Regime

The courts interpretation of the site protection regime of the Natura 2000 Directives evolved gradually. As time passed by, more and more provisions of Article 6 were given – explicitly or implicitly – direct effect. In the beginning, however, they were not taken into consideration at all. Following Bastmeijer and Verschuuren, one can distinguish three phases of the Raad van State's interpretation (2003: 11-12; see also Backes/Freriks/Nijmeijer 2006: 221-254). The first phase is characterised by almost complete neglect. It began when the Birds Directive entered into force and lasted until about 1996/97. The second phase from about 1998 to 2000 is characterised by the first judgements on the issue, but they were still rather ambiguous. In the third phase, starting in 2000, the Raad van State dealt intensively with the Directives. But this does not mean that the Court had applied the Directives' site protection regime to an equal extent. On the contrary, it took several years until the Court required the administrative authorities to take all key provisions serious if their decisions should to pass the judicial review.

8.5.1.1 The First Phase: Complete Neglect

I analysed all issues of the main Dutch environmental law journal 'Environment and Law' (*Milieu en Recht*), starting from 1980 in order to see whether there were legal proceedings dealing with the site protection regime of the Natura 2000 Directives. From a merely legal point of view, this could have been the case since the entry into force of the Directives, thus 1981 for the Birds, and 1994 for the Habitats Directive. However, not a single ruling appeared before 1997. As has been discussed above, this has been also confirmed through my interviews: until the middle of the 1990s, the implementation of the Natura 2000 Directives did not attract much importance. The public knowledge of the Directives was very limited and environmental organisations did not realise them as a helpful instrument to pursue their goals. Consequentially, they did not perceive the possibility to try to enforce the Directives' provisions through the national courts as a viable option and therefore no cases appeared on the courts' dockets.

8.5.1.2 The Second Phase: Approaching the Directives Ambiguously

The first judgements that seriously dealt with the Directives' site protection regime were given by lower courts. Already in April 1997, the chair of the Rechtbank

Leeuwarden was confronted with the possible negative effects of drilling test boreholes on the Wadden See. Different environmental organisations contested the authorisation given by the Ministry of the Economy and asked for its suspension until the court would give its final judgement.[275] The chair[276] granted this suspension: although he or she did not deal directly with the question whether Article 6 of the Habitats Directive was correctly transposed, the chair held that the European provisions had to be taken into consideration. As the competent authorities had failed to do so when taking the decision, the chair saw a conflict with Article 3:2 of the General Administrative Law (*Algemene wet bestuursrecht*, Awb) and therefore suspended the given authorisation.[277]

In July 1998, the Rechtbank Leeuwaarden gave its final judgement on the above mentioned authorisation for test drillings. The environmental organisations argued among others that several ecologically important areas could be negatively affected by the drillings. Although some of these areas had neither been designated as SPAs nor identified as potential Natura 2000 sites, the environmental organisations argued that the areas would qualify for such a designation and thus require an environmental impact assessment according to Article 6. Yet such an assessment had not been carried out. The court started by recapitulating the ECJ's case law on areas that would qualify as SPAs, but have not been designated. It concluded that if an area had not been designated although it should have been on the basis of scientific ornithological criteria, the area had to be considered nevertheless as a factual SPA. As scientific reference document, it used the IBAs list of 1994, although the ECJ referred only to the IBAs list of 1989 when it gave its ruling on the criteria according to which SPAs had to be identified[278]. Then the court outrightly rejected the opinion of the Ministry of the Economy that Article 6 Habitats Directive was already transposed and would therefore not be relevant for the case. On the contrary, it examined whether Article 6 paragraphs 2, 3 and 4 could create direct effect. The court held that the provisions were unconditional and sufficiently precise and concluded that they had to be applied directly for plans or projects that could affect already designated or even factual SPAs. Yet it rejected the opinion of the environmental organisations that Article 6 would also apply for

[275] According to Dutch law, an authorisation has to be suspended if there are serious doubts about its legality.

[276] Throughout the paper, I discuss both the rulings given by courts as well as the decisions taken by the courts' chairs. The reason for doing so is that both judicial decisions are signals sent from the national judiciary to the administrative authorities regarding the status of the Natura 2000 Directives. Certainly, the annulment due to a court's ruling is a 'stronger' signal than the mere preliminary suspension by the court's chair. Nevertheless, also the suspension signals to the administrative authorities that they should better take the Directives' provisions into account if they want to issue legally valid decision.

[277] Prs. Rb Leeuwarden 28 April 1997; 97/366/ t/m 369 and 97/493 t/m 496, M en R 1997/10, p.214-222, no. 99 (m. nt. Backes).

[278] ECJ C-3/96 [1998] Commission v Netherlands.

potential sites under the Habitats Directive, regardless whether they had been officially transmitted to the Commission or not. The court argued that the obligation to designate these sites was not unconditional, given the fact that the Commission could chose between all transmitted potential Natura 2000 sites to create a coherent network of protection sites. Therefore, Article 6 was unable to create direct effect for sites under the Habitats Directive that had not been officially included in the Natura 2000 network. Nevertheless, the court annulled the authorisation for the test drillings due to the conflict with the Birds Directive.[279]

At the time the Rechtbank Leeuwarden gave its judgement, the Raad van State had an opposing opinion on nearly all issues dealing with the Directives. Ultimately, however, it came to the same conclusions. To my knowledge, the first case where the Raad had to deal with the site protection regime of the Birds Directive was in January 1997. The case was about a sensitive ecologically area that had been designated as *Staatsnatuurmonument* and was therefore protected by national nature conservation law. The Court simply held that the existing legal protection granted by the Dutch law was already a sufficient implementation of Article 4 of the Birds Directive and refrained from discussing the issue any further.[280] If this had continued to be the Court's opinion, the legal route to enforce the Directives would have been completely blocked. However, it can be argued that the Raad van State's knowledge on the Natura 2000 Directives was not the best at that time. This is nicely illustrated by a judgement of November 1997. It concerned the authorisation of a zoning plan in an already designated SPA that was contested by Vogelbescherming and other claimants. The Court started by repeating its opinion that the site protection regime of Article 4 Birds Directive was sufficiently implemented through the then existing Dutch legislation. Then it held that there was no conflict with this Article anyway because the planned wind park would not have negative effects on the SPA. That the competent authorities had authorised the plan before an appropriate assessment had been carried out did not seem to bother the Court. This alone already reflects the Raad's little knowledge on the Directives' site protection regime. What is even more telling is that the Court discussed the wrong legal basis: remember that Article 6 of the Habitats Directive replaced Article 4 of the Birds Directive in 1994. So the former Article should have been the legal basis for this case, but the Court simply ignored this fact.[281]

As has been mentioned above, in the beginning the Raad van State interpreted the designation of a site as Staatsnatuurmonument as a sufficient implementation of the Directives' site protection regime. But what happened to already designated or factual SPAs that have not been designated as well as *Staatsnatuurmonumenten* under

[279] Rb. Leeuwarden 17 July 1998; 97/40-45 WET, M en R 1998, p. 250-267, no. 89 (m.nt. Backes).
[280] ABRvS 31 January1997, cited in Vz. ABRvS 14 September 1998; F02.98.0014, M en R 1999/7-9, p.163-166, no. 64 (m. nt. Bakker) on page 165-166.
[281] ABRvS 6 November 1997; E01.95.015, M en R 1999/10, p. 267-270, no. 90 (m. nt. Backes).

Dutch law? An answer to this question would require automatically the examination of the issue of the direct effect of Article 6. In the late 1990s, however, the Raad van State had a rather ambiguous opinion. This is illustrated by the rulings in the first *IJburg* cases.[282] The plan was to create a new residential quarter near Amsterdam – called *IJburg* – by taking land from the see. The affected maritime area, the *IJmeer*, is an important resting area for birds. It is on the IBAs list of 1994, but had not been designated at the time as SPA. So a Dutch environmental organisation contested the authorisation to create the residential area because it had failed to take Article 6 into account. However, the Raad van State declared both the request for suspension and later the contestation itself as unfounded. In particular, it evaded the question whether Article 6 would create direct effect by using an 'even if' argumentation: even if the IJmeer had had to be designated as SPA and there were significant negative effects, the requirements of the Directives would have been satisfied as the construction of about 15.000 apartments were an overriding reason of public interest. By using this argumentation, it avoided to give a direct answer to the questions whether Article 6 would apply to factual SPAs. The Court seemed to imply it, but was not explicit.[283] In addition, it implied a rather shallow understanding of Article 6 (3) and (4) – the obligation to carry out an environmental impact assessment that could lead to the stop of a project if it failed to meet the substantial criteria for authorisation. This will be discussed in more detail below.

8.5.1.3 The Third Phase: Gradually Giving Direct Effect to Article 6

In about 2000, the Raad van State started to seriously examine the European requirements. It used a step-wise approach, dealing subsequently with (and giving power to) the direct effect of Article 6 (2) and the possibility of factual SPA, and later the direct effect of Article 6 (3) and (4).

8.5.1.3.1 The Status of Article 6 (2) and Factual SPAs

The first provision that the Court gave direct effect to was Article 6 (2), i.e. the general obligation to avoid any deterioration of designated sites.[284] This happened at the same time as the Raad van State accepted the possibility of factual SPAs. The key ruling was given in March 2000 in a case about the zoning plan of the island Texel. This plan gave the permission to the Dutch military to use an area that had

[282] Vz. ABRvS 2 December 1998; K01.98.0208, M en R 1999/6, p. 9, no. 59K and ABRvS 11 January 2000; E01.97.0234, M en R 2000/10, p. 254-257, no. 104.

[283] An other example for this can be found in Vz. ABRvS 13 July 1999; E03.94.1402, M en R 1999/12, p. 292-294, no. 114 (m. nt. Verschuuren).

[284] Article 6 (2) Habitats Directive reads as follows: "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."

been partly designated both as SPA and as *Staatsnatuurmonument*, and partly not designated even though it was on the IBAs list 1989. Several environmental organisations contested this plan by arguing that the military activities would have negative effects on the ecologically sensitive sites, which would violate Article 6 of the Habitats Directive. First, the Raad van State dealt with the issue of factual SPAs. It recapitulated the judgement of the ECJ where the European Court had convicted the Netherlands for not having designated enough areas on the basis of the IBAs list 1989.[285] The Raad emphasised that the IBAs list had to be considered as the best available scientific evidence on important bird areas. As a result, it accepted the possibility of factual SPAs: each area that qualified on ornithological scientific evidence as SPA had to be designated as such. Then it turned to the issue whether Article 6 (2) would apply for these factual SPAs, i.e. whether it created direct effect. It answered in the affirmative. It held that the provision of Article 6 (2) was sufficiently unconditional and precise in order to create rights for third parties. As a result, the administrative authorities had to take them into account when taking a decision. Second, the Court turned to the areas that had been designated as a *Staatsnatuurmonumenten*. It stated that "the Natuurbeschermingswet does not contain any provisions that are specifically meant as an implementation of the obligation to make sure that the quality of the natural habitats and the habitats for species does not deteriorate and that no disturbing effects occur (…).[286] Nevertheless, the Raad van State argued that according to the ECJ's case law it has to be examined first whether a consistent interpretation of the national provisions is possible. Only if this is not the case, the relevant directly effective European provision has to be applied. Based on this reasoning, the Court ruled that the provisions of the *Natuurbeschermingswet* on *Staatsnatuurmonumenten* would allow such a consistent interpretation of the Dutch law with the Directives possible. Yet in any case, the result was the same: Article 6 (2) had to be taken into consideration.[287]

It is interesting to note that according to Backes/Freriks/Nijmeijer, the Raad van State was the only court in the EU that give direct effect to Article 6 (2) (2006: 92). In fact, direct effect of this paragraph seems to be of minor importance with regard to the protection regime of the Directives. Remember that Article 6 (2) only contains the general obligation to avoid the deterioration of a Natura 2000 sites, but not the provisions about the environmental impact assessments and the criteria for authorising ecologically harmful projects. In the Dutch case, the direct effect of Article 6 (2) meant 'only' that the competent authorities had to examine the

[285] See ECJ C-3/96 [1998] Commission v Netherlands.
[286] "De Afdeling overweegt dat the Natuurbescherimgswet geen regles bevat die uitdrukkelijk bedoeld zijn als implemenatie van de verplichting om ervoor te zorgen dat de kwaliteit van de natuurlijke habitats en de habitats van soorten niet verslechtert en er geen storende factoren optreden (...)."Paragraph 2.6.2.9.2 of ABRvS 31 March 2000; E01.97.0178, M en R 2000/10, p. 257-259, no. 105 (m. nt. Jans).
[287] ABRvS 31 March 2000; E01.97.0178, M en R 2000/10, p. 257-259, no. 105 (m. nt. Jans).

potential negative effects of a plan or project on a (factual) SPA before taking a decision. Yet the ruling of the Raad van State did not clarify the consequences if a project was deteriorating such an area had not been.

Nevertheless, the result of the Courts rulings was significant, as it interpreted Article 6 (2) on the background of Article 3:2 General Administrative Law (*Algmene wet bestuursrecht*, Awb). This article reads as follows: "In the preparation for taking a decision, the administrative body collects the necessary information concerning the relevant facts and the interests which are to be balanced."[288] The Dutch courts' interpretation of this article is strict: if an administrative authority takes a decision without taking the relevant facts into account, this would be a violation of Article 3:2 Awb and thus lead to the annulment of the decision. As a result, if the administrative authority could not show that it actually had taken Article 6 (2) into account and had examined the effects of a plan or project, the administrative decision would become annulled during judicial review. This became quickly settled case law, resulting in the annulment of numerous decision in the following years.[289] From a perspective of legal certainty, however, the automatic annulment of decisions that had not dealt with Article 6 (2) was counter productive. According to Dutch procedural law, if a decision gets annulled for one single reason, all other legal issues that had been raised do not have to be discussed. Therefore, cases in which the Raad annulled administrative decisions for conflict with Article 6 (2) of the Habitats Directive and Article 3:2 Awb could not help to clarify the status of Article 6 (3) and (4).

For the sake of completeness, it should be noted that the Raad van State had traditionally held that if a provision had created direct effect, the competent authorities had to apply it themselves (*ex officio*), regardless whether concerned parties had referred to it or not. In October 2002, however, the Court made a surprising u-turn and suddenly held the opposite: only if a concerned party had

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[288] "Bij de voorbereiding van een besluit vergaart het bestuursorgaan de nodige kennis omtrent de relevante feiten en de af te wegen belangen." Article 3:2, Algemene wet bestuursrecht.

[289] For designated Staatsnatuurmonumenten, see e.g. ABRvS 31 March 2000; E01.97.0178, M en R 2000/10, p. 257-259, no. 105 (m. nt. Jans); ABRvS 27 March 2002; 200103923/1, M en R 2002/12, p. 365-366, no. 133; ABRvS 23 October 2002; 2001/04498/1, M en R 2003/2, p 58-59, no. 22. For cases of direct effect of Article 6 (2), see e.g. Rb. Leuwaarden 20 October 2000; 2000/1037, 1050, 1071 t/m 1073 and 1075, M en R, 2001/3, p. 70-73, no. 28 (m. nt. Bastmeijer); Rb. Breda, 6 november 2000; 00/428-436 WET and 00/733 WET, M en R 2001/3, p. 65-70, no. 27 (m. nt. Verschuuren); Vz. ABRvS 22 February 2001, 200004502/2, M en R 2001/5, p.142, no. 81K; Prs. Rb. Utrecht, 6 September 2001; SBR 01/1323 VV, M en R 2002/4, p. 131-134, no. 55 (m. nt. Verschuuren); ABRvS 20 February 2002; 200100018/1, M en R 2002/10, p. 314-316, no. 117 (m. nt. Verschuuren); ABRvS 18 September 2002; 200104495/1, M en R 2003/3, p. 80-82, no. 28 (m. nt. Verschuuren); Rb. Arnhem 26 May 2003; AWB 01/333 and AWB 01/334, M en R 2003/11, p. 329-332, no. 118 (m. nt. Van Rijswick); ABRvS 27 August 2003; 200103396/1 and 200105173/1, M en R 2004/4, p. 249-251, no. 36 (m. nt. Verschuuren); ABRvS 29 October 2003; 200206338/1, M en R 2004/1, p. 36, no. 1K; ABRvS 19 November 2003; 200206719/1, M en R 2004/3, p. 181-183, no. 23 (m. nt. Verschuuren).

explicitly argued during an administrative authorisation procedure that Article 6 (2) could be relevant, the competent authority had to take it into account.[290] Legal scholars heavily criticised this sudden change in the Court's case law (see e.g. Bastmeijer/Verschuuren 2003: 19). However, the less than a half year later, the Raad van State reversed its u-turn again and held again that the competent authorities had to take Article 6 (2) *ex officio* in to account.[291] Why the Court did so is hard to explain, yet it is clear that such sudden changes did not help to create a situation of legal certainty.

As has been mentioned, the Raad van State accepted the possibility of factual SPAs in the *Texel* ruling. In the beginning, it did this only for areas that were on the IBAs list of 1989. The Court's reasoning was that the ECJ had in its rulings only referred to this list and not to the IBAs list of 1994.[292] Already in the *IJburg* ruling, the Court had rejected the possibility of factual SPAs based on the latter list for this reason.[293] This changed in summer 2001 when, among other complainants, an environmental organisation contested the authorisation of excavating works in a sensitive area that was on the IBAs list of 1994 but had not been designated as SPA. The Raad van State repeated first that the ECJ had not used the updated IBAs list when the Netherlands were convicted. But then it held that "no facts or circumstances are known that would nullify the conclusiveness of the IBAs list of 1994 in this case".[294] It thereby accepted also the updated IBAs list as the principle scientific reference document for SPAs.[295]

This leads to another question: remember that in December 2000, the ECJ held that if a Member State failed to designate an area as SPA although it would have had to do so, Article 4 (4) Birds Directive would still apply. For such factual SPAs, the amendment of the Article 4 (4) Birds Directive through Article 6 Habitats Directive – and thus the possibility to authorise ecologically harmful projects also for social and economic reasons – had no meaning. How did the Raad van State react to this case law? Initially, it admitted only implicitly that Article 4 (4) Birds Directive applied to factual SPAs. Again, it decided the cases that dealt with this issue by using its 'even if argumentation'. In April 2001, in a case on the authorisation for constructing a recreational facility that included some apartment buildings and a small harbour situated in a factual SPA, the Court held that "[e]ven

[290] ABRvS 23 oktober 2002, AB 2002, 417 en 418.
[291] ABRvS 12 March 2003; 200204044/1, M en R 2003/12, p. 372-374, no. 133 (m. nt. Verschuuren).
[292] For another example of a factual SPA based on the IBAs list 1989, see ABRvS 12 April 2001; E03.99.0312, M en R 2002/3, p. 90-92, no. 37 (m. nt. Verschuuren).
[293] ABRvS 11 January 2000; E01.97.0234, M en R 2000/10, p. 254-257, no. 104.
[294] „Niet is gebleken van feiten of omstandigheiden die de bewijskracht van de IBA-lijst uit 1994 in dit geval teniet doen." Paragraph 2.8 ABRvS 20 June 2001; E03.98.0236, E03.98.0352 and E03.98.0353; M en R 2002/4, p. 13-139, no. 56 (m. nt. Verschuuren).
[295] ABRvS 20 June 2001; E03.98.0236, E03.98.0352 and E03.98.0353; M en R 2002/4, p. 13-139, no. 56 (m. nt. Verschuuren).

if the area had been already designated, or should have been designated as SPA, and even if one assumed that the respective provisions of the Birds Directive [Article 4 (4), R.S.] would have direct effect and even if there were a disturbance, it cannot be concluded that these provisions had not been satisfied, in view of among others the character and size of the facility."[296] There are two other cases where the Court used this reasoning.[297] Nevertheless, given the fact that the Netherlands had designated nearly all factual SPAs in late 2000, this issue quickly became irrelevant.

So far, only the issue of factual SPAs has been discussed. Yet what was the status of sites that had already been reported to the European Commission under the Habitats Directive, but were not (yet) placed on the Community list? Remember that according to the timetable of the Habitats Directive this list should have been already adopted in June 1998. Despite this deadline, the Commission could only present the list for the atlantic biogeographical region, which concerned in particular the Netherlands, in December 2004.[298] The Raad van State adopted a rather strict interpretation of the Directive. Already in January 1999, an environmental organisation contested an authorisation for intensive pig farming. It was argued that the discharge of ammonic could have had serious negative effects on a nearby situated site that had been transmitted as potential Natura 2000 site to the Commission. Therefore, Article 6 of the Habitats Directive had to be taken into account. The Court, however, rejected this argumentation. It held that the European Commission and the Member States enjoyed some discretion in selecting from the proposed sites those that were the most appropriate to create a coherent network of Natura 2000 sites. As a result of this discretion, there was no unconditional and precise obligation put on the Member States, in contrast to the unambiguous duty to designate all scientifically appropriate SPAs. Therefore, the administrative authorities did not have to take Article 6 into consideration when taking a decision. [299] This line of reasoning became quickly settled case law.[300]

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[296] "Zelfs indien het gebied op dat moment zou zijn aangewezen, of had moeten worden aangewezen als speciale beschermingszone [thus SPA, R.S.] en zelfs indien ervan wordt uitgegaan dat de toepasselijke bepalingen van de Vogelrichtlijn rechtstreekse werking hebben en zelfs al zou er sprake zijn van verstoring , kan, gezien onder meer de aard en omvang van de inrichting, niet worden geconcludeerd dat aan deze bepalingen in dit geval niet is voldaan." Paragraph 2.9.2. of ABRvS 12 April 2001; E03.99.0312, M en R 2002/3, p. 90-92, no. 37 (m. nt. Verschuuren).

[297] ABRvS 20 June 2001; E03.98.0236, E03.98.0352 and E03.98.0353; M en R 2002/4, p. 13-139, no. 56 (m. nt. Verschuuren) and ABRvS 3 October 2001; 200003661/1, M en R 2002/1, p. 2, no. 7K

[298] Commission Decision 2004/813/EC of 7 December 2004 adopting, pursuant to Council Directive 92/43/EEC, the list of sites of Community importance for the Atlantic biogeographical region [Official Journal L 387, 29.12.2004].

[299] ABRvS 29 January 1999; E03.96.1543, M en R 1999/6, p 135-138, no. 53 (m. nt. Backes).

[300] See e.g. ABRvS 26 October 1999, E01.97.0672, M en R 2000/7-8, p. 182-185, no. 73 (m. nt. Verschuuren p.188-189); ABRvS 10 February 2000; E01.98.0406, M en R 2000/12, p.310-313, no. 122 (m. nt. Bastmeijer and Verschuuren); ABRS 19 June 2002; 200001253/1, M en R 2002/9, p. 249-250, no. 208K.

In March 2001, however, this reasoning was sharpened in a case that was very similar to the discussed one. Again, an environmental organisation contested the authorisation of intensive livestock farming by arguing that the discharge of ammoniac would have negative effects on a site transmitted as potential Natura 2000 site situated about 600 meters away. As the Community list was not yet presented, the administrative authority issuing the license had, according to the Court's case law, not dealt with this question. This time, however, the Raad van State changed its reasoning: it held that the principle of Community solidarity based on Article 10 TEC obliged the authorities of the Member States to abstain from taking any action that could make the realisation of European requirements impossible. As a result of this principle, no authorisations for plans or projects could be given if this would harm a transmitted site in such a way that it could not potentially become a Natura 2000 site later. Against the background of Article 3:2 Awb, this meant in turn that the administrative authorities had to examine the possible effects of a plan or project that could negatively affect such a site before taking a decision. If they did not do so, this would mean that they had not considered all relevant facts, which would lead to the annulment of the taken decisions during judicial review. This is exactly what happened in this case on intensive livestock farming.[301] This line of reasoning anticipated the ECJ's *Dragaggi* ruling of 13 January 2005, where the European Court held that although Article 6 (2) would not apply directly for transmitted Habitats sites, those sites had to be nevertheless protected by appropriate protection measures in order to guarantee that they could ultimately become Natura 2000 sites.[302] After the *Dragaggi* ruling was published, the Raad van State referred in its rulings on transmitted Natura 2000 sites directly to it, but it did not change much in practice.[303]

8.5.1.3.2 The Status of Article 6 (3) and (4) of the Habitats Directive

As has been discussed above, it was clear since 2000 that Article 6 (2) created direct effect. But would Article 6 (3) – the obligation to carry out impact assessments if a plan or project could have negative effects on a Natura 2000 sites – and Article 6 (4) – the limitation to justify environmentally harmful projects to certain overriding reasons of public interest if no other alternatives exist – be also become directly effective? In the *Texel* case, the Court did not need to deal with this question, because there had been no assessment of the effects on the (factual) SPAs at all. But what happened if the effects had been evaluated? As already mentioned above, the

[301] ABRvS 11 July 2001; 200004042/1, M en R 2002/3, p. 95-97, no. 39.

[302] ECJ C-117/03 [2005] Società Italiana Dragaggi SpA and Others v Ministero delle Infrastrutture e dei Trasporti and Regione Autonoma del Friuli Venezia Giulia.

[303] See e.g. ABRS 23 February 2005; 200404709/1, M en R 2005/10, p. 657-664, no. 99 (m. nt. Verschuuren); ABRvS 2 March 2005; 200402711/1; M en R 2005/8, p. 537-538, no. 85 (m. nt. Van den Broek).

Rechtbank Leeuwaarden had interpreted Article 6 (3) and (4) as being directly effective and upheld this opinion in later rulings.[304] The Raad van State was, however, again more reluctant to do so. Until January 2005, the Court only suggested implicitly that Article 6 (3) and (4) could create direct effect. It stuck to its 'even if argumentation' already discussed in the *IJburg* case on the construction of apartments near Amsterdam. For example, in a case on the authorisation of a zoning plan for a greenhouse next to a SPA, the Raad argued first that "[b]ased on the foregoing (…), the Court does not see any reason for the expectation that the plan could create disturbing factors with a significant effect in the sense of Article 6 (2) of the Habitats Directive. (…) [F]urthermore, the Court holds the opinion that there is likewise no conflict with Article 6 (3) of the Habitats Directive. Even if the direct effect of this article is assumed, the absence of disturbing factors with a negative effect means that there is in this case no conflict with this paragraph. Thereby follows that [Article 6 (4)] does not need to be considered."[305] There are several other cases where the Court used a similar argumentation and thereby avoided to give a clear answer whether Article 6 (3) and (4) would create direct effect.[306]

Nevertheless, as more and more cases appeared on the Court's docket asking for clarification of the issue, in March 2002 the Raad van State decided during a proceeding on mechanical cockle fishing in the Wadden See to ask the ECJ for a preliminary ruling on the issue. It asked inter alia whether Article 6 (3) would be directly effective. In September 2004, the ECJ gave an affirmative answer to this question.[307] However, in a surprising judgement in July 2002, the Raad van State had already applied Article 6 (3) directly, even though it did not declare the direct effective explicitly. The background of this case was that an environmental organisation had contested the authorisation for a runway for model airplanes situated in a SPA. Before taking the decision, the competent authority had not

[304]See Vz. Rb Leeuwarden 5 July 2002; 02/341 WRO, M en R 2002/11,p. 326-329, no. 121 (m. nt. Verschuuren) and Rb. Leeuwarden, 23 September 2002; 99/902 WET, M en R 2003/4, p. 104-110, no. 38.

[305] "Gelet op hetgeen hierboven (…) is overwogen, ziet die Afdeling geen grond voor de verwachting dat door het plan storende factoren met een significant effect zouden kunnen ontstaan als bedoeld in artikel 6, tweede lid (...). (...) is de Afdeling voorts van oordeel dat er evenmin strijk is met artikel 6, derde lid, van de Habitatrichtlijn. Ook als word aangenommen dat dit artikellid rechtstreeks werkt, betekent de afwezigheid van storende factoren met een significant effect dat in dit geval geen strijd bestaat met dit artikkellid. Hierut volgt dat het vierde lid niet aan de orde kan komen." Paragraph 2.18 ABRvS 20 March 2002; 200002547/1, M enR 2002/9 p. 266-269, no. 98 (m. nt. Verschuuren).

[306] See e.g. ABRvS 10 February 2000; E01.98.0406, M en R 2000/12, p.310-313, no. 122 (m. nt. Bastmeijer and Verschuuren); ABRvS 30 June 2000; E03.96.1555, M en R 2001/5, p171-175, no. 67 (m. nt. Verschuuren); ABRS 17 June 2002; 200103804/1, M en R 2002/9, p. 250, no. 214K.

[307] ECJ C-127/02 [2004] Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (Kokkelfisvisserij).

examined the effects of this authorisation on the site. The Court stated outright that Article 6 had to be to be considered and annulled the authorisation. However, it did this not because of conflict with Article 6 (2) of the Habitats directive and Article 3:2 Awb, as it used to do, but held that "[a]s the [competent authority] has disregarded this examination [according to Article 6 (3) Habitats Directive, R.S.] the contested decision is in so far in conflict with Article 6 paragraph 3 of the Habitats Directive.[308] In other words, the Court annulled the decision because the administrative authority had not taken Article 6 (3) of the Habitats Directive into account , which is in the end the same as giving this article explicitly direct effect. The reason why this judgement is rather surprising is that, as Van Gestel notes in his annotation to the case, the Raad van State had already sent preliminary questions about the status of Article 6 (3) to the ECJ, as mentioned above. Although the Court normally awaits the judgement of the ECJ, it did not in this case. Therefore, Van Gestel believes that the Raad simply made a mistake.[309]

To my knowledge, no other ruling of the Court dealing with the same issue has been published before the ECJ declared Article 6 (3) directly effective in September 2004. After that moment, the Raad van State accepted the direct effect without objection.[310]

Finally, did the Court also hold that Article 6 (4) would create direct effect? Similar to the direct effect of Article 6 (3), it circumvented to give a clear answer for a long time: as it mostly held that there were no significant negative effects at all, the Raad argued that it did not have to deal with the issue of direct effect of Article 6 (4). Even in its ruling on the Westerschelde Container Terminal in July 2003, it avoided to give a clear answer: during the authorisation proceeding, the competent administrative authorities had declared outright that the construction of the container terminal could only be allowed if Article 6 (4) of the Habitats Directive was fully satisfied. The Court seemed to have embraced this argument and held that, as the competent authority had applied Article 6 (4) on its own free will, the question whether Article 6 (4) would create direct effect was irrelevant.[311] In January 2001, the Raad van State was confronted with a similar situation. Again, the competent authority had declared that the realisation of the project – the extension of the main port of Rotterdam – could only be authorised if Article 6 (4) was satisfied. This time, however, the Court had no problems to declare explicitly the direct effect of the Article: it referred to the ECJ's ruling on mechanical cockle

[308] "Nu verweerders dit onderzoek achterwege hebben gelaten, is het bestreden besluit in zoverr in strijd met artikel 6, derde lid, van de Habitatrichtlijn." Paragraph 2.4.3 of ABRvS 24 July 2002; 200103706/1, M en R 2002/11, p. 329-333, no. 122 (m. nt. Van Gestel).

[309] ABRvS 24 July 2002; 200103706/1, M en R 2002/11, p. 329-333, no. 122 (m. nt. Van Gestel).

[310] See e.g. ABRvS 26 January 2005; 200307350/1, M en R 2005/6, p. 375-385, Nr. 60 (m. nt. Verschuuren).

[311] ABRvS 16 July 2003; 200205582/1, M en R 2003/11, p. 341-349, no. 124.

fishing in the Wadden Sea and argued that the European Court had answered the question in affirmative in paragraphs 59 and 61 of the ruling. Interestingly, however, the ECJ does not deal in these paragraphs with Article 6 (4) at all, but only with the direct effect of Article 6 (3).[312] Be it as it may, in January 2005the Raad van State had officially accepted the direct effect of Article 6 (4).

8.5.2 The Issue of Site Designation

As in other countries, the decision to designate an area as SPA or to report it to the European Commission as potential Natura 2000 site was frequently disputed. It is therefore not surprising that also the Raad van State was confronted with the question whether the responsible Ministry of Agriculture had correctly identified sensitive sites. But the Dutch procedural law made it also possible to indirectly request the designation of additional areas.

The Dutch cases on site designation can be distinguished according to the underlying goals the respective claimants tried to pursue. The claimants in the first group of cases, such as hunting or agricultural organisations, had an interest in preventing the designation of an area. Thus the goal was not to enforce the European obligations, but on the contrary to prevent their application or at least to minimize their scope. As has been mentioned, the Dutch Ministry responsible for identifying possible Natura 2000 sites – the Ministry of Agriculture – received more than 5500 complaints that challenged the initial selection of sites. In December 2001, such a complaint appeared for the first time before the Raad van State. This ruling was, however, based merely on procedural and not on substantial grounds.[313] Be it as it may, Verschuuren reports that the Court initially refused to look at the contested decision on a substantial basis anyway. The Raad justified its opinion on the Dutch system of designating SPAs: based on the three criteria used by the Ministry of Agriculture, the Raad held the opinion that the designation of a specific area was linked to the possible designation of other suitable areas. Therefore, the review of the designation of an individual site was only possible after the other potential sites had been identified for the respective Annex I species according to the three selection criteria.[314] This reasoning of the Raad van State explains why it was only in March 2003 that the Court gave its first rulings on substantial grounds

[312] See ABRvS 26 January 2005; 200307350/1, M en R 2005/6, p. 375-385, Nr. 60 (m. nt. Verschuuren), p. 378.

[313] In this case, the Ministry of Agriculture had rejected the contestation of the designation of the SPA Gelderse Port as being unfounded. The ABRvS annulled this decision and argued that the Ministry had to deal with the contestation on substantial grounds (See ABRvS 4 December 2001; 200102724/2, M en R 2002/3, p. 74, no. 53K).

[314] See Verschuuren's annotation to the case in ABRvS 29 January 2003; 200204302/1, M en R 2003/6, p. 191-194, no. 71 (m. nt. Verschuuren) on page 193.

on the issue of site designation.[315] The cases were very similar: different organisations, such as the main Dutch hunting organisation and regional agriculture organisations had challenged the decision of the Ministry of Agriculture to designate several areas as SPAs. The Raad examined the three criteria used by the Ministry to identify possible sites in the light of the ECJ's case law on site designation. It reaffirmed that contrary to the opinion of the claimants, only ornithological considerations had to be taken into consideration in order to select SPAs. As the Ministry's criteria were solely based on such considerations, the Court confirmed their lawfulness. The Raad van State also held that the Ministry's decisions were based on reliable data, and therefore upheld the designations of the areas. According to my interviews, only very few challenges of decisions to designate sites were ultimately successful (Interviews Ministry of Agriculture, 213-235).

The second group of claimants is essentially constituted by Dutch environmental organisations, who tried to obtain the designation of additional areas through the courts. This could not be achieved directly through judicial review, but only indirectly: in a nutshell, Dutch administrative law makes it possible ask the competent authority to perform a certain action, such as the designation of an area as SPA. If the administrative authority refuses such a request, it has taken a decision, which can in principle be contested before the courts. If the courts consider the request as well founded and annul the authority's refusal, the competent authority has generally no other possibility than to designate the respective area as SPA.

This strategy was successful in the case of the lesser white-fronted goose. In March 2003, a Dutch environmental organisation asked the Ministry of Agriculture to designate an area called *De Abtskolk-De Putten* in the Province of *Noord-Holland* for this species. The Ministry considered the request as being unfounded, because the concerned area was smaller than 100 hectares. Therefore, according to the criteria used by the Ministry, the area needed not to be considered as possible SPA. In its ruling on the issue of March 2004, the Raad van Statte reaffirmed its opinion that the used criteria to select SPAs were in principle well founded. In the case of the lesser white-fronted goose, however, there were from the outset only three areas in the Netherlands where this species occurred. Yet the first selection criterion required the designation of the five most important areas. Therefore, the Raad van State held that the first selection criterion overruled the 100 hectares criterion. As the first criterion was not satisfied, the Court annulled the administrative decision.[316] It is interesting to note that this ruling was given at a time when the European Commission had already accepted the Dutch designation of SPAs as being

[315] See ABRS 19 March 2003, 200201927/1, M en R 2003/6, p. 186-191, no. 70; ABRvS 19 March 2003; 200201925/1; ABRvS 19 March 2003; 200201929/1 and ABRvS 19 March 2003; 200201933/1.
[316] ABRvS 17 March 2004; 200305428/1, M en R 2004/9, p. 574-577, no. 88 (m. nt. Verschuuren).

sufficient and would not have requested additional sites. This may be the reason why the Ministry of Agriculture simply ignored the Court's ruling and refused to designate the SPA a second time. The answer of the Raad van State was, however, very clear, and also the wording of the ruling suggests that the Court was rather angry that the Ministry had outright ignored its first ruling. Be it as it may, the Court annulled the Ministry's refusal a second time. In addition, it imposed a preliminary injunction on the Ministry to consider the area as if it had already been designated as SPA.[317] The result of the cases on the lesser white-fronted goose was that the Ministry of Agriculture had to check again whether all potential areas had been designated as SPAs.

So far, only the designation of SPAs has been discussed. Was it also possible to challenge (or to ask) the decision to report a site as potential site under the Habitats Directive? Although the status of such a site meant, as has been discussed above, a less strict protection, the question was still important. The Raad van State had a very clear opinion on this issue: as it was finally up to the European Commission to select from the lists of the Member States the most important identified sites that would become part of the Natura 2000 network, the Court held in January 2003 that the transmission of a site to the European Commission as potential Natura 2000 sites had to be considered only as a preparatory act and not as final decision. Following this reading, from a legal procedural perspective, no contestable administrative decision had been given, and thus no judicial review was possible.[318]

8.5.3 The Issue of Species Protection

As has been discussed above, the *Natuurbeschermingswet* of 1967 required an authorisation for projects that would kill protected species, like species protected by the Birds- or Habitats Directive. Such an authorisation was given for the construction of a cross-border business park "*GOB Aachen-Heerlen*" between Germany and the Netherlands. The authorisation was necessary because an environmental impact assessment had concluded that the construction of the park would kill several families of the European or common hamster (*cricetus cricetus*). This hamster is strictly protected by the Habitats Directive as Annex IV species. Its killing or disturbance could therefore only be justified if the requirements of Article 16 of the Directive were satisfied, i.e. if no other alternatives existed and overriding reasons of public interest required the realisation of the project. When the Dutch municipality of Heerlen asked the Ministry for the authorisation of the project in 1999, the latter literally copied Article 16 into the authorisation and came to the conclusion that the high unemployment in the region would justify the construction

[317] ABRvS 29 December 2004; 200408181/1, M en R 2005/6, p. 373-375, no. 59 (m.nt. Verschuuren).
[318] ABRvS 29 January 2003; 200204302/1, M en R 2003/6, p. 191-194, no. 71 (m. nt. Verschuuren).

of the business park. Several environmental organisations contested this authorisation before the Raad van State.[319] In its ruling of April 2000, the Court first held that Article 16 of the Habitats Directive had been correctly implemented, as it had been literally copied in the authorisation. So it did not have to deal with the question whether this Article would create direct effect. Then it turned to the question whether alternatives to the projects existed. It emphasized that the main question is not whether there existed an alternative location to the project, but whether the alleged reason justifying the killing of the hamsters – the reduction of unemployment – could not be achieved in an alternative way. However, this had not been assessed by the competent authorities. For this reason, the Court annulled the authorisation for being in conflict with Article 3:2 Awb.[320] Already three month later, the Ministry authorised the project a second time. It based its decision on rather old data on unemployment in Herleen and argued that the construction of the business park would create about 10.000 new jobs. This would constitute an overriding reason of public interest and thus justify the killing of the hamsters. Again, environmental organisations contested this decision. In January 2001, the Raad van State annulled the authorisation a second time. In its very detailed ruling, the Court admitted that the reduction of unemployment could be in principle a overriding reason of public interest, yet it rejected the way the Ministry had tried to proof this as insufficient: besides the use of old data, it criticised that the competent authority had not examined whether the use of existing vacant buildings would not be an alternative to the construction of new ones in the business park. This led again to the annulment of the authorisation.[321]

Strictly spoken, the *Hamster* cases fall outside the scope of this study as they concern the interpretation of a national statute, i.e. the given authorisation that contained word by word the obligations stemming from Article 16 of the Habitats Directive. Nevertheless, their discussion is indispensable for this study for three reasons. First, and most importantly, they triggered an enormous debate about nature protection in the Netherlands in general and the role of the Natura 2000 Directives in particular. The context of the cases – some small animals prevent the construction of a big project – was ideal for the press and let to national wide media coverage (van der Zouwen/van Tatenhove 2002: 29). According to Bastmeijer and Verschuuren, this intense and partly lurid media coverage led, in combination with

[319] There were several other proceedings about the construction of the business park already before the first authorisation was given, and also afterwards. A good overview of the rather complicated story can be found in Bastmeijer/Verschuuren (2003: 57-60).

[320] ABRvS 27 April 2000; 199901039/1, M en R 2000/7-8, p. 185-189, no. 74 (m. nt. Verschuuren).

[321] AbRvS 15 January 2001; 200004163/1, M en R 2001, p.73-78 , no. 29 (m.nt. Verschuuren). In the end, however, the project was carried out: already in the second proceeding, doubts had occurred whether there were still hamsters in the region or not. Some weeks later, the Ministry officially declared that no new authorisation was needed as the existence of hamsters in the area could not be proven anymore.

the entry into force of the new law on flora and fauna, to the general impression that the Natura 2000 Directives had been just recently agreed on and that the species protection measures would completely block the economic development in the Netherlands (Bastmeijer/Verschuuren 2003: 28). This impression was further intensified as the rulings in the *Hamster* case led to several other proceedings were environmental organisations or individually concerned citizens contested authorisations for not taking into account the presence of protected species.[322] According to my interviews, this was not only done for the sake of environmental protection, but also for pure self-interest. For example, citizens tried to prevent the construction of a refugee's home by suddenly arguing that protected birds were present. Their primary goal was, however, not to protect the birds, but to prevent the arrival of refugees. Such cases – although very limited in number – encouraged the opponents of the Natura 2000 Directives in their critique of the European provisions and, more generally, of the broad access to courts (Interviews Natuur en Milieu, 150-154, Expert University Utrecht, 212-228, 598-620).

Second, the *Hamster* cases are remarkable as the way the Raad van State deals with key provisions of the Directives is in sharp contrast to its initial rulings on their site protection regime. In particular, they contain a very detailed and thorough discussion on the issue of alternatives to projects. Although Article 16 and Article 6 (4) are very similar in this respect – they prohibit the destruction of species respectively sites if alternatives to a plan or project exist – the Court proved to be reluctant to discuss Article 6 (4) in a similar way. This happened – with similar results – only two and a half year later in the ruling on the Westerschelde Container Terminal.[323] Yet this should not imply that the Raad van State's rulings on species protection issues were always characterized by a thorough analysis. On the contrary, two other contested authorisations for the construction of a highway and a railway bridge were upheld by the Court after a rather cursory analysis.[324]

Finally, the *Hamster* cases had concrete practical effects on the application of the site protection regime. In contrast to the ambiguity of the Raad van State, the Ministry of Agriculture referred directly to the 2nd *Hamster* case in order to explain how the competent authorities on the level of provinces and communities should apply Article 6 (4) (Dutch Ministry of Agriculture 2004c: 28). This shows that the obligation stemming from the *Hamster* rulings were not only limited to the issue of species protection, but extended well to the application of the Directives' site protection regime.

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322 See for example See ABRvS 24 December 2002; 199901366/1, M en R 2002/3, p. 66-67,no. 49K; ABRvS 23 April 2003; 200200160/1, M en R 2003/12, p. 364-369, no. 130 (m. nt. Verschuuren), and Bastmeijer/Verschuuren (2003: 29).

323 ABRvS 16 July 2003; 200205582/1, M en R 2003/11, p. 341-349, no. 124.

324 ABRvS 13 November 2002; 200200050/1, M en R 2003/2, p. 41-50, no. 16 (m. nt. Verschuuren) and ABRvS 29 December 2004; 200403380/1; M en R 2005/9, p. 595-599, no. 90.

8.5.4 The Reasoning of the Raad van State – The Way the Court Tests

To sum up the preceding discussion, the Raad van State gave direct effect to the various provisions of the Directives' site protection regime. It also dealt with their species protection regime, even though this happened in a rather indirect way. Yet how did the Court come to its conclusions? Did it substantially examine the administrative decisions in most cases or was it already satisfied if the formal requirements, such as the examination of possible negative effects on a site, were met? This is an important issue because, as has been discussed in the theoretical chapter, the more detailed the Court scrutinised administrative decisions, the higher the pressure on the competent authorities to correctly apply the European requirements. To clarify this issue, I first report the general assessment of my interviewed experts and the results of two legal analysis of the Court's case law. In order to get more fine-grained results, I also performed a simple quantitative analysis of all rulings on the Directives' site protection regime that have been published in the main Dutch environmental law journal.

According to the interviewed experts, the Raad van State is rather reluctant to perform a substantial analysis of the contested decision. In general, it only verifies whether all legal procedural requirements have been correctly fulfilled, but normally does not substantially analysis the presented facts (Interviews Vogelbescherming, 328-356; Waddenvereniging 578-589, 729-744; Ministry of Agriculture, 367-381, 435-456). This general assessment is also supported by two independent legal analyses that together cover the Court's case law from 1998 until mid 2004 (see Bastmeijer/Verschuuren 2003: 12-14; and Kistenkas/Kuindersma 2004: 23). This limited way of testing administrative decisions should not, however, suggest that the litigation on the Natura 2000 Directives had no effect (see below).

In order to obtain more detailed results, I turned to the published rulings in the main Dutch environmental law journal *Milieu en Recht*. Although such an analysis does not reveal the absolute numbers of rulings dealing with the Natura 2000 Directives, it should be possible to identify the way how the Court tests. From the beginning of the 1980s until October 2005, in total 59 rulings were published in the journal *Milieu en Recht* that dealt directly with the site protection regime[325] of the Natura 2000 Directives.[326] 49 of these rulings concerned already designated or

[325] I decided to exclude the rulings on species protection as they were strictly spoken not about direct effective provisions of the Natura 2000 Directives. However, as has been already discussed, these rulings also had positive effects on the application of the site protection regime itself.

[326] For the sake of completeness, it should be mentioned that the given time period refers to the date when the ruling was given and not to the journal's date of publication. Therefore, all rulings given before October 2005 are covered by the sample.

factual SPAs, and 10 potential sites under the Habitats Directive.[327] This distribution is not surprising given the fact that the Raad van State accepted the direct effect of Article 6 only for SPAs and not for sites under the Habitats Directive. As a result, fewer questions required clarification regarding the protection status of the latter sites compared to SPAs, which led in turn to fewer published rulings. In addition, the incentive for environmental organisations to start litigation because of alleged deterioration of SPAs was higher than for potential sites under the Habitats Directive as the chance to win the case was higher.

Table 14 reports the results of the rulings dealing with the Directives' site protection regime. First, we can observe is the increase of published rulings in about 2001. This increase coincides with the starting public debate in 2000 when the Raad van State annulled the first administrative decisions, both in the area of species and site protection. These rulings and their public discussion had in turn a self reinforcing effect: the public debate increased the knowledge about the Natura 2000 Directives and led to more contested decisions. The result was even more public debate on the European obligations, which led again to more publicity of the Directives, and again to more contested decisions.

Table 14: Published Rulings on the Directives' Site Protection Regime (Results)

	Results					
Date	n.a.*	Annulment (Alternatives +Reasons)	Annulment (Effects)**	Confirmation (Alternatives +Reasons)	Confirmation (Effects)	Total
1st half 97	0	0	0	0	2	2
1st half 98	1	0	0	0	0	1
2nd half 98	0	0	1	1	0	2
1st half 99	0	0	0	0	2	2
2nd half 99	0	0	1	0	0	1
1st half 00	0	0	1	1	1	3
2nd half 00	0	0	0	0	2	2
1st half 01	0	0	1	0	3	4
2nd half 01	0	0	1	0	5	6

[327] Some few cases about the authorisation of big construction works have affected both sites under the Birds- as well as Habitats Directive. I decided to categorise them according the question whether the issue of the SPA or potential site under the Habitats Directive was legally more important in order to avoid double counts.

1st half 02	1	0	3	0	2	6
2nd half 02	0	0	3	0	2	6
1st half 03	0	0	0	0	3	3
2nd half 03	0	1	4	0	2	7
1st half 04	1	0	0	0	2	3
2nd half 04	0	0	2	0	1	3
1st half 05	1	0	3	0	1	5
2nd half 05	1	0	1	0	1	3
Total	5	1	21	2	30	59

Source: own counting based on all issues of Milieu en Recht from 1980 to 2005. In brackets are the reasons why an administrative decision was annulled or confirmed.
* Although the rulings in this column were about the Directives' site protection regime, they were decided due to merely legal procedural issues. As a result, it is not possible to categorise them.
** There are two rulings in this column that do not really fit the heading 'annulment': in both cases economic actors contested the competent authority's decision to not authorise the project because of conflict with Article 6. The Raad van State upheld the taken decisions by referring directly to the Directives' obligation. As, for the sake of this study, the signal was the same – Article 6 had to be taken into account – I decided nevertheless to include these two cases in this category.

Second, the total number of annulled and confirmed decisions is not very different and does not allow further interpretations. However, one can observe an increase of annulled decision from 2002 on. In fact, more than ¾ of all annulled decisions occurred after 2001. On the one hand, this is certainly related to the general increase of cases discussed above. Yet on the other hand, we do not see an equal pattern regarding confirmed decisions. Here, exactly half of the confirmed decisions occurred before and after December 2001. This should not be overstated, but as the discussion on the direct effect of Article 6 has shown there seemed to have been informational problems about the European obligations also on behalf of the Raad van State. This is reflected by the fact that the first rulings of the Raad van State were characterised by a very shallow understanding of the Directives. As time passed by, these informational deficits seem to have disappeared.

Third, it is remarkable that most cases (51 out of 54) were decided because of the issue of effects on Natura 2000 sites. Admittedly, the reason for this could simply be that most cases dealt only with this question and were not about possible alternatives or overriding reasons of public interest at all. This is, however, difficult to establish by only considering the published rulings due to the legal structure of Article 6 and the way the Court gives its rulings: on the one hand, if the Raad van State annuls a decision because of an insufficient examination of the effects on a

site, then it does not further dwell on the question of possible alternatives. The ruling in the Westerschelde Container Terminal is the only exception to this rule[328]. So even if the claimant had argued that also the alternatives to a project had not been correctly examined, this would not be considered anymore. On the other hand, if the Court confirms the competent authority's opinion that there are no significant negative effects, the obligation to examine alternatives to the project according to Article 6 (4) is not triggered, and therefore the Court does not consider this issue any further. As a consequence, the number of rulings that were decided because of the examination of effects on a site will be higher, regardless whether the cases where also about the alternatives or overriding reasons of public interest.

This last point leads to next question: does the Raad van State only make a formal examination of the competent authority's assessment or does it more substantially inquire whether the European obligations have been met? In order to clarify this issue, I categorised the published rulings according to the quality of the Court's testing ('formal' or 'substantial'). Admittedly, this is a subjective assessment. In order to counterbalance this inherent problem, I only categorised those rulings where a clear assessment was possible. Rulings where doubts remained are in the category 'unclear'. In addition, I cross-checked my interpretation with the opinion of legal experts that had written commentaries to the rulings in the analysed environmental law journals in order to obtain more 'objective' results.

Table 15 gives an overview of how the Raad van State tested. Although it is impossible to make a clear assessment for a large number of rulings, two aspects are remarkable: first, in those cases where a clear assessment can be made, the proportion of rulings marked by a merely formal examination is more than three times higher than the proportion of those rulings characterized by a substantial analysis. Second – and far more telling – the first case of substantial testing in the area of the Directives' site protection regime only appeared in July 2003. This was the ruling on the Westerschelde Container Terminal that led to the annulment of the authorisation. Yet this case was not about the examination of significant negative effects, but on the alternatives and reasons of public interests. The first case where the Court was not satisfied by the simple fact that at least some kind of examination of the negative effects on a site had been carried out was only in January 2004. Therefore, the signal the Court sent to the administrative authorities in the area of site protection was quite clear: if they were not be able to show that at least some kind of examination of the potential negative effects was carried out, their decisions would very likely get annulled in the phase of judicial review. Yet until January 2004, the Court signalled as well that it would not look too detailed at the examination of the effects itself. This fact is also supported by a cross-tabulation of the results of the rulings and its quality (see Table 16): There is only one case

[328] ABRvS 16 July 2003; 200205582/1, M en R 2003/11, p. 341-349, no. 124.

where the Raad van State annulled an administrative decision after it had formally examined the assessment of potential negative effects. Contrary to that, there are 15 cases where the Court confirmed the opinion of the competent authorities that there were no such effects after a formal examination of the authority's assessment.

Table 15 Published Rulings on the Directives' Site Protection Regime (Quality of Testing)

	Quality of Testing			
Date	Unclear	Formal	Substantial	Total
1st half 97	0	2	0	2
1st half 98	1	0	0	1
2nd half 98	0	2	0	2
1st half 99	2	0	0	2
2nd half 99	1	0	0	1
1st half 00	1	2	0	3
2nd half 00	0	2	0	2
1st half 01	2	2	0	4
2nd half 01	4	2	0	6
1st half 02	6	0	0	6
2nd half 02	5	1	0	6
1st half 03	2	1	0	3
2nd half 03	4	2	1	7
1st half 04	2	0	1	3
2nd half 04	2	1	0	3
1st half 05	3	0	2	5
2nd half 05	1	1	1	3
Total	36	18	5	59

Source: own counting based on all issues of Milieu en Recht from 1980 to 2005.

Table 16: Cross-Tabulation of the Results and the Quality of Testing of Published Rulings

	Quality of Testing			
Result	Unclear	Formal	Substantial	Total
Na	5	0	0	5
Annulment (Alternatives+Reasons)	0	0	1	1
Annulment (Effects)	18	1	2	21
Confirmation (Alternatives+Reasons)	0	2	0	2
Confirmation (Effects)	13	15	2	30
Total	36	18	5	59

Source: own counting based on all issues of Milieu en Recht from 1980 to 2005.

This result needs, however, to be put into perspective. First, in contrast to the situation in the area of site protection, the first rulings of the Raad van State on species protection, in particular the second ruling in the *Hamster* cases in January 2001 – were characterised by a substantial and thorough way of testing. Although following rulings of the Court in the same area were marked by an only formal inquiry, this initial difference is hard to explain. Second, the mere fact that the Raad

had overwhelmingly used a formal way of inquiry does not mean that the litigation had no effects on the implementation of the Directives. It suggests, however, that legal issues only requiring the formal comparison of the legal obligations and the administrative decision are easier to enforce than those legal issues that demand a substantial analysis. Most of all, however, it blurred the initial signal sent to the administrative authorities in the area of site protection, i.e. that the Court would abstain from a substantial inquiry of the contested decisions.

8.6 Public Interest Group Litigation to Enforce the Directives

Over time, the case law of the Raad van State had created opportunities to enforce the Natura 2000 Directives through courts. This was the necessary condition for further actions of environmental organisations. But were they able to use the created opportunities? In this chapter, I first briefly discuss the legal possibilities for environmental organisations to contest administrative decisions before Dutch courts. Second, I report the empirical findings of my interviews regarding the use of litigation to enforce the Directives.

8.6.1 The Opportunities to Use Litigation

The necessary legal condition for using the created opportunities was an easy access to courts. Briefly stated, the Dutch legal system for public interest group litigation is characterised by four important characteristics. First, Dutch environmental organisations enjoy since the 1970s broad access to the courts. They are therefore very familiar with this instrument and do often have lawyers or legal experts as employees. Second, the procedural requirements for an interest group to litigate are easy to meet. As long as environmental organisations are able to show their 'interest' with respect to an administrative decision, they may contest it before the courts. This is generally no obstacle, because the reference to the goals of the organisation as laid down in their statutes is sufficient to prove their 'interest' in the issue. Third, the costs for administrative proceedings are compared to other European countries very low. For environmental organisations, the court fees are about 200 to 300 Euros. In addition, there is often only one instance. So contested decisions are often directly adjudicated by a special chamber of the Raad van State. This also helps to keep the court fees low. Fourth, all representatives of an environmental organisation have the possibility to contest administrative decisions. This right is not restricted to any occupational status such as being a publicly accredited lawyer. So everybody with some legal experience can represent the organisation before the courts (Interviews Expert University Utrecht, 23-46, 118-136, Waddenvereniging, 317-322, 473-491, 608-628, Interview Faunabescherming,

219-225, 279-286, see also de Sadeleer/Roller/Dross 2002: 76-104; Backes 2002; IMPEL Network 2002: 98-105).

8.6.2 The Reaction of Environmental Organisations to the Created Opportunities

In the middle of the 1990s, environmental organisations started for the first time to refer to the site protection requirements of the Natura 2000 Directives during court proceedings. It is difficult to establish the exact date, but Natuurmonumenten was already involved in such a case in 1994: the city of Amsterdam planned to build apartments at the lake of Eimeer. The site would have qualified as a SPA, but had not been designated. Natuurmonumenten contested the authorisation of the project, arguing that the administrative authorities had not taken the Birds Directive into consideration. Yet they had no success. At the time, the Dutch administrative courts were reluctant to apply the Directive's site protection regime directly. They only applied the national legislation and had therefore no objection to the authorisation of the project (Interview Natuurmonumenten, 336-350)

Once the Raad van State annulled the first administrative decisions for not taking the Natura 2000 Directives into consideration, Dutch environmental organisations used their knowledge of the Natura 2000 sites and the open access to courts intensively to get the Directives directly applied. It would be very interesting to report the absolute number of legal proceedings that involved environmental organisations and that led to annulment of administrative decisions. Unfortunately, however, such data does simply not exist as the rulings of the Dutch courts are not systematically reported. Admittedly, the Raad van State had started to publish its rulings on its web page since April 2002.[329] For this study, however, this is of little help: first, the relevant time period under examination started at least in the middle of the 1990s and ended with the entrance into force of the amended Natuurbeschermingswet in October 2005. As a result, the analysis of the cases published since April 2002 would only lead to truncated results. Second, the site protection issues of the Natura 2000 Directives cut short various legal matters and therefore do not only concern environmental law. Therefore, even though the majority of published cases were directly decided by the Raad van State, also lower courts had to give rulings based on the Directives. Yet these judicial decisions were not included on the Court's web page.

A possibility to tackle this problem is to turn to published rulings in environmental law journals. C.J. Bastmeijer and J.M. Verschuuren from the University of Tilburg did this is in their study commissioned by the Ministry of

[329] See http://www.raadvanstate.nl/uitspraken/.

Finance. They relied on the main Dutch legal law journals.[330] From 1998 to 2002, they find a total of 96 court rulings that dealt with site protection issues. 57 cases where either decided by applying the Natura 2000 Directives directly or by interpreting the national law in a way that was in conformity with the Directives. Environmental organisations started 48 of the total 96 rulings. In 31 of the cases where these organisations contested administrative decisions, the site protection regime of the Directives played an explicit role. Eleven of these rulings led ultimately to the annulment or suspension of the concerned decisions (Bastmeijer/Verschuuren 2003: 13-15).

This number does not seem to be particularly high. There are, however, two important reasons why the use of rulings published in legal journal to determine the absolute number of rulings on the Natura 2000 Directives will lead to significantly distorted results. First, the general policy of law journals is to select cases for publication that seem to be particularly relevant for the case law on specific issues, such as environmental protection, and thus for the journal's readership. To example, if a ruling clarifies previously contended aspects, or on the contrary if the Raad van State suddenly deviates from an established line of reasoning, it is very likely that such ruling will be published. However, if a Dutch court simply confirms the existing case law, the ruling will not be published as it does not add anything 'new' to the legal discussion. As a result, the mere analysis of published rulings can be misleading both with regard to the absolute number of cases that the courts were confronted with and with regard to the 'practical' relevance of a ruling. Consider e.g. the issue of direct effect of Article 6 (2) of the Habitats Directives. In principle, the Raad van State had clarified the issue with its ruling in the *Texel* case by stating that Article 6 (2) had to be taken into account. As a consequence, the effects on a protected site had to be examined. Given the fact that the ruling had clarified an important legal issue – the status of Article 6 (2) – it was published. Yet after a while, rulings that dealt exactly with the same question would not be published anymore if they were, from a legal perspective, a 'copy' of the *Texel* case. So we do not know how many cases there are exactly 'behind' the ruling of a particular case, or, in other words, how important a ruling was practically spoken. What we do know, however, is that such 'copy cases' occurred regularly. For example, van der Meijden reports four rulings that dealt with the potentially negative effects of ammoniac on SPAs (2006: 16). The Raad van State annulled all the given authorisations for intensive livestock farming because the administrative authority had not sufficiently examined that negative effects on the nearby SPAs could be excluded. This line of reasoning comes directly from the ECJ's ruling in the cockle fishing case that the Raad van State had accepted outright in a series of rulings.

[330] Personal communication with C.J. Bastmeijer. As they use additional law journals, it is not surprising that they find more cases than I do based solely on the main Dutch environmental journal.

However, the four rulings on ammoniac were not published in the main Dutch environmental law journal, for they added 'nothing new' to the Raad's case law.[331]

There is a second reason why the total number of rulings does not tell us the whole story. Once it became clear that administrative decisions would not pass the judicial review if the competent authorities had not taken the Natura 2000 Directives into account, environmental organisations could already refer to this in the administrative authorisation procedure. In the Netherlands, almost all decisions that concern nature conservation issues have to follow such an authorisation procedure during which all the concerned parties, including environmental organisations, can raise their concerns. The judicial review of taken decision is only possible afterwards. Arguably, the competent authorities would prefer their decision not to be annulled by the administrative courts. Therefore, the mere threat of judicial review was often sufficient to get the Directives' site protection regime applied already during the process of the administrative authorisation. Yet these 'cases' do not appear on the courts docket (Interview Expert University Utrecht, 448-465, Natuurmonumenten, 475-489).

Based on the foregoing, the numbers reported in the study by Bastmeijer and Verschuuren need to be considered as only a rough indicator for the numbers of contested decisions by environmental organisations. I also tried to obtain the absolute numbers of cases through my interviews. Unfortunately, however, environmental organisations do not keep a systematic record about the proceedings they have started. According to my interviews, Vogelbescherming went about three to four times a year to the courts; Faunabescherming about 50 times[332] (Interviews Vogelbescherming, 76-78; Faunabescherming, 226). Although the interviewed member of Natuurmonumenten could not give an estimation of the number of cases, it said that there were "an enormous flow of court rulings" and "heaps of cases were all won" (Interview Natuurmonumenten, 355 and 477). Also the interviewed members of the Waddenvereniging that held that "every case we had in the last few years was directly related to the Birds and Habitats Directive" (Interview Waddenvereniging, 637-639).

To conclude, it is impossible to establish even by approximation the number of administrative decisions that were contested by environmental organisations. Nevertheless, as will be discussed in the next chapter, the number of contested decisions was high enough to create concrete effects on the implementation of the Natura 2000 sites.

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[331] The rulings were ABRvS 26 January 2005; 200403339/1, ABRvS 9 February 2005; 200305131/1, ABRvS 6 April 2005; 200500343/2 and ABRvS 4 May 2005; 200408657/1.

[332] The number Faunabescherming need to be put into perspective: it covers both cases on hunting and site protection issues.

8.7 Effects of Litigation

Finally, what have been the effects of the litigation started by environmental organisations on the implementation of the Natura 2000 Directives? First and foremost, the Directives' site protection regime was already applied before the legal transposition took place. The administrative authorities took the threat of judicial review serious and followed the procedure laid down in Article 6 for the authorisation of projects in or near Natura 2000 sites. In fact, the catchphrase of the Directives' opponents that the Netherlands would become "under lock" ("*Nederland op slot*") has its origin not in the infringement proceedings taken by the Commission, but in the annulled administrative authorisations for economic projects. (Interviews Natuurmonumenten 277-285, 475-505; Gelderse Milieufederatie, 477-49?; Faunabescherming, 633-64?). This assessment of the interviewed experts is also supported by the comparison of the process of key events of the Directive's implementation (see Table 17). As can be seen, rulings of the Raad van State on the status of Article 6 preceded the decision of the competent authorities to apply Article 6 (2) and Article 6 (3-4). And before Article 6 had been transposed into national law, the Court had declared all provisions of Article directly effective.

Table 17: Process of Key Events in the Netherlands

	Date*
Lower court declares direct effect of Article 6	July 1998
Raad van State: direct effect of Article 6 (2); IBAs list 1989 indicates SPA	March 2000
Raad van State: Hamster case (detailed inquiry of alternatives to a project's goals is required)	January 2001
Raad van State: IBAs list 1994 indicates SPA	June 2001
Raad van State: minimum protection for potential Natura 2000 sites	July 2001
First case where comp. authorities had applied Article 6 (2) themselves	January 2002
Raad van State: implicit direct effect of Article 6 (3-4)	July 2002
First case where comp. authorities had applied Article 6 (3-4) themselves	July 2003
Raad van State: explicit direct effect of Article 6 (3-4)	January 2005
Transposition of Article 6	October 2005

*All dates are the dates of the rulings. Therefore, the application of Article 6 by the competent authorities had already occurred before.

In addition, also a key official document shows that the site protection regime of the Natura 2000 Directives had been already applied before its transposition had been taken place: in its Manual on the Natura 2000 Directives of April 2004, the Ministry of Agriculture left no doubt that the competent authorities on the

provincial and municipality level had to take Article 6 seriously. It explains in detail the various obligations stemming from this Article, starting from the assessment of any potential negative effects of a project on a site to the serious analysis of alternatives to the project's goal and the justifying reasons of public interest (Dutch Ministry of Agriculture 2004c). Interestingly, the Manual dealt with Article 6 (4) already as if it were directly effective, even though the Raad van State had not given an explicit answer at that time. Be it as it may, at least in two very large projects, the construction of the Westerschelde Container Terminal and the extension of the main port Rotterdam, the competent authorities declared outright that they had to apply Article 6 (4) as it had been a purely national provision. For the Ministry of Agriculture, it was therefore clear that Article 6 had to be applied. This is also nicely illustrated by the Ministry's Natura 2000 newsletter of summer 2005: it announced the entry of the force of the Directives' site protection regime and the preparation of management plans for the sites in the Natuurbeschermingswet 1998 with the heading: "From legal reality to practical reality"[333] (Dutch Ministry of Agriculture 2005b: 2). In fact, the European requirements were already legal reality in the Dutch courts before the transposition law entered into force. This law did not change much as far as the practical application of the site protection regime was concerned, but was very important for the drawing up of management plans for the sites, to which the second part or the quote refer.

Second, and linked to the first effect, the quality of the administrative review rose considerably over time. Given the threat of judicial review, the competent authorities took the obligations of Article 6 seriously and made therefore extensive evaluations of the possible negative effects on Natura 2000 sites. This point was particularly emphasised by the interviewed expert of the University Utrecht, who is also member of the Dutch commission for environmental impact assessments[334] (Interview Expert University Utrecht, 289-303, 421-425). Yet is this not in contradiction to the fact that the Raad van State refrained from analysing most contested decisions in a substantial way? Not necessarily: if there is a clear will to carry out a certain project, there is strong pressure on the competent authorities that their authorisation, if it is given, will pass judicial review. If the courts annul the authorisation for conflict with the Directives, the whole project will be delayed and the costs will therefore rise. In order to prevent such scenario from happening, the competent authorities will take all obligations stemming from Article 6 seriously. This should not imply that every decision will be perfect, but that the site protection regime of the Natura 2000 Directive will at least be applied correctly.

[333] "Van juridische realiteit naar praktische werkelijkheid".

[334] The Dutch EIA commission is an independent but state funded organisation that is involved in all environmental impact assessments in the Netherlands (see http://www.commissiemer.nl/, 22.01.2006).

Third, the court rulings led to a significant increase of the publicity of the Directives. This helped to overcome the initial informational deficits of the requirements on behalf of those administrative authorities that do normally not deal with issues of nature conservation. The 'problem' was, first, that the Netherlands have a decentralised system of issuing permits and authorisations and that, second, Article 6 has an cross-sectional approach: it does not only concern some clearly identifiable projects, but covers the extension of small livestock farms as well as gas exploitations in the Wadden Sea or plans for the construction of industrial parks. Thus the Directive has concerned potentially all national, regional and local administrative authorities that were giving permits or authorisations. In addition, as has been discussed, the Ministry of Agriculture failed to make the obligations stemming from Article 6 clear. As a result, it is not surprising that in the beginning the competent authorities continued to give permits in breach with the Directives, even though it was clear that they would not pass the judicial review, because they were simply missing the necessary legal information. The quantity of annulled decisions triggered a sort of learning process that reached also the competent authorities on the municipality level. Today, they are fully aware that they have to pay particular attention to the Natura 2000 sites (Interviews Vogelbescherming 962-971; Expert University Utrecht, 446-465). This is likely to have also positive effects on the next stages of the implementation of the Directives, i.e. the drawing up of management plans, but this remains to be seen (Interview Natuurmonumenten 765-799).

Fourth, the contestation of administrative decisions led to legal uncertainty and as a result increased costs for investors. For them, clear calculations about the costs of projects are crucial. Yet if an already given authorisation was annulled because it was in conflict with the Directives, this meant either a significant delay for the concerned project or even its end. Both situations resulted in higher costs for the involved investors. Although this did not make them great supporters of nature conservation measures, they preferred to have clear rules than legal uncertainty. So their resistance against the Directives decreased, albeit rather grudgingly (Interviews Expert University Utrecht, 289-297, 435-437, Vogelbescherming, 440-451, Gelderse Milieufederatie, 569-575, see also Dutch Ministry of Agriculture 2003b: 4; 2003a: 3; 2004b: 4).

Fifth, had the repeated public interest group litigation also effects on the transposition of the Directives' site protection regime? Given the fact that also the European Commission was putting considerable pressure on the Netherlands, it is impossible to neatly delineate whether the threat of a referral to the ECJ or rather litigation before national courts was more important for the final transposition of Article 6. Yet this is not the goal of this study anyway, as both the pressure form the European level as well as national litigation is perceived as in principle complementary instruments to enforce European law. Be it as it may, in the case of

the site protection regime of Natura 2000 Directives, both factors were crucial in order to achieve the complete transposition. This is clearly shown by the legislative proposal of December 2001 to amend the *Natuurbeschermingswet* 1998 in order to transpose Article 6. In its fourth chapter, the necessity of the amendment is discussed. After a short analysis of the Raad van State's case law on the direct effect of Article 6 and the protection status of potential Natura 2000 sties, it is concluded that there is considerable "uncertainty and ambiguity" ("*onzekerheid en onduidelijkheid*") in the current administrative praxis regarding the effects of the Natura 2000 Directives on administrative decisions. In other words, it is argued that a correct transposition of Article 6 is necessary in order to reach legal certainty. Subsequently, it is reported that the European Commission had sent a letter of reasoned opinion to the Netherlands for not having transposed the site protection regime. Again, it is suggested that there is an imperative necessity for complete transposition. Any other possible reasons for the amendment of the Natuurbeschermingswet, e.g. the goal to protect sensitive areas, are not mentioned at all.[335] This reasoning of the government clearly indicates that both the threat of a referral to the ECJ and the litigation before national courts had a decisive effect on the transposition of the Directives' site protection regime. Nevertheless, as has been shown, only public interest group litigation led to the application of Article 6 before the transposition had taken place and not the pressure from the Commission.

Sixth, did litigation also support the designation of Natura 2000 sites? There is little evidence for this: with regard to sites under the Birds Directive, all SPAs had already been designated in April 2000, thus at a time when the Raad van State still had an ambiguous interpretation of Article 6, litigation could not have major effects. In addition, the Netherlands had already been convicted in May 1998 for the insufficient designation of SPAs by the ECJ. As the Commission upheld its pressure and threatened to refer the issue a second time to the ECJ, pressure from the Commission seems to have been more important. Admittedly, public interest group litigation led to the designation of an area for the lesser-white fronted goose that had been 'overlooked' by all actors. Yet as the ruling only concerned one species and as it was only given in March 2004, it could not influence the designation process significantly. However, it should not be forgotten that the issue of site designation was less relevance for the Netherlands: even if a site had been correctly designated, the site protection regime would not become applied as its transposition had not taken place. This had to be guaranteed by litigation of environmental organisations, irrespective of the official status of an ecologically sensitive area. With regard to sites under the Habitats Directive, the Raad van State did not give direct effect to those sites, but only obliged the competent authorities to avoid such

[335] See the „Memorie van toelichting" for the "Wijziging van de Natuurbeschermingswet 1998 in verband met Europeesrechtelijke verplichtingen", Kamerstukken II 2001-2002, 28 171, nr. 3.

deteriorations that would exclude the site from becoming part of the Natura 2000 network. Compared to SPAs, there was significantly less pressure to report such a site under the Habitats Directive. In this respect, the pressure from the Commission was more important. However, given the fact that the overlap between SPAs and sites under the Habitats Directive is about 95% for the maritime and 75% for the land area (Woldendorp 2005: 277), also the latter sites were indirectly protected.

8.8 Linking the Empirical Results to the Stage Model

As the empirical discussion has shown, public interest group litigation in the Netherlands was able to effectively enforce the site protection regime of the Natura 2000 Directives: the competent authorities applied Article 6 already before its legal transposition had taken place and litigation also increased the quality of application significantly. Dutch environmental organisations could rely on their strong organisational capacity to work for the enforcement of the Directives. As lobbying alone proved to be ineffective, they turned to their national courts. For decades, they enjoyed an open access to the courts and were familiar with litigation as a tool to promote their policy objectives. Their strong organisational capacity allowed them to employ lawyers that were able to use litigation strategically and follow even complex authorisation procedures. The downside of litigation was, however, that the public had the impression that the Netherlands would have become 'under lock' due to the Directives. For environmental organisations, this negative image was not welcomed, but it was the cost for implementing a stricter nature protection regime in the Netherlands. In the beginning, however, the Raad van State proved to be rather reluctant to apply the Directives' site protection regime. Nevertheless, in the end the Court gave direct effect to all provisions of Article 6 and also carried out thorough analysis of the decisions of the administrative authorities. This gave environmental organisations the opportunity to enforce the Directives through the courts. As more and more of their decisions got annulled during judicial review, the competent authorities started to apply Article 6 even though no formal transposition had taken place. Without litigation, they would not have done so.

These results support the expectations derived from the stage model: only as all identified independent variables displayed conducive characteristics for law enforcement through courts, litigation proved to be effective. The key actors of the first stage – public interest groups – could rely both on their strong organisational capacity and the open access to the national courts in order to repeatedly litigate. The interpretation of the national courts was in the end also conducive to law enforcement through courts. However, as the empirical discussion has shown, it took the Raad van State several years to ultimately come to the same conclusions that the Rechtbank Leeuwarden had already come to in 1998. In addition, the Raad

was the only supreme court in the EU that gave direct effect to Article 6 (2) – the general obligation to avoid the deterioration of Natura 2000 sites. After having read dozens of academic articles on the Directives' site protection regime, I can fairly say that all authors had focused on the system of environmental impact assessments created by Article 6 (3-4), but never on its 2nd paragraph. Why the Raad van State gave such a peculiar interpretation of the Directives and why it only developed the direct effect of Article 6 gradually is hard to tell. Yet in any case this fact underpins that the interpretation of national courts of the same legal provisions can significantly differ. Be it as it may, as the Court's interpretation proved to be ultimately strict, it left little leeway for the competent authorities. They had to apply Article 6; if they did not, environmental organisations would certainly contest their decisions and the courts would not hesitate to annul them. This increased the pressure on both the legislative and administrative authorities to implement the new institution Natura 2000 – understood as a system of rules – in order to achieve legal certainty. In addition, and contrary to France where the strong public support of wider hunting dates led the French competent authorities to try to negate the effects of national court rulings, the Dutch authorities obeyed to the Raad van State. Their reaction to the first of the lesser-white fronted goose cases where they had ignored the ruling of the Court was the only exception to this, yet it is not representative. Thus, as all four independent variables displayed conducive characteristics for law enforcement through court, public interest group litigation in the Netherlands was able to effectively remedy implementation problems.

9 Conclusion

I started my analysis with two related questions: how can we explain the differing effects of public interest group litigation on the implementation of European law? And: under which conditions is public interest group litigation able to effectively remedy compliance problems with EU law? In this chapter, I provide answers to these questions on the basis of the four case studies. In addition, I discuss the consequences of the empirical findings for the broader literature on European integration and democratic governance through courts.

9.1 Evaluating the Stage Model on the Basis of the Empirical Results

9.1.1 The Explanatory Power of the Stage Model

My starting point was the observation that public interest group litigation in France, Germany and the Netherlands had differing effects with regard to the implementation of the Natura 2000 Directives. In the empirical chapters, I have further discussed these effects: in France, litigation on the hunting dates of the Birds Directive only helped to transpose the relevant provisions, yet the transposition was nothing but formal. The competent authorities continued to set the hunting dates in a way that was clearly not in conformity with the ECJ's interpretation of the Directive. Ultimately, litigation had little influence on the actual implementation of the hunting dates. Regarding the site protection regime of the Natura 2000 Directives, public interest group litigation did not even have positive effects on its transposition, not to speak of its application. In contrast to this observation, litigation in Germany did help to enforce the Natura 2000 Directives. Although the site protection regime of the Directives had already been transposed, the *Länder* refused to contribute to the Natura 2000 network by designating possible protection areas. Litigation helped to overcome the resistance and led – in combination with pressure from the Commission – to the designation of a sufficient number of Natura 2000 sites. It also remedied initial information deficits, but did not ameliorate the application of the site protection regime in practice. Finally, public interest group litigation in the Netherlands made the competent authorities apply the site protection measures of the Directives even before their

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transposition had taken place. In the Dutch case, litigation also improved the way the competent authorities assessed ecologically harmful projects in practice.

In order to explain this empirical puzzle, I have combined existing and well-established theoretical accounts with a coherent model – the stage model. Based on existing literature, it identifies three stages in order to explain the differing effects of litigation. At each of the stages, the focus is on the behaviour of one key actor for litigation: the first stage concentrates on the behaviour of public interest groups and their possibility of using litigation to pursue their policy objectives. At this stage, two independent variables are identified: the organisational capacity of public interest groups and their access to the courts. The second stage highlights the importance of the interpretation given by national courts of the respective European provisions. By interpreting European law strictly or less strictly, the courts circumscribe the leeway left to the competent authorities and thus increase or decrease – in combination with public interest group litigation – the pressure to implement the provisions correctly. The key actors in the third stage are the competent authorities, as it is ultimately up to them to amend the national law in order to comply with the European obligations. Even though the rule of law is a deeply entrenched element in European democracies, the competent authorities still enjoy discretion in taking their decisions. If strongly supported national institutions are to be changed by European law, they may even choose to deny national court rulings outright and continue to ignore their European obligations.

The advantage of the stage model is threefold: first, it clarifies why litigation will help to overcome implementation problems as it increases the costs of upholding national institutions. Second, it identifies the key actors of litigation and thus allows the process of litigation to be separated into three analytically different stages. This helps to split complex empirical patterns into smaller and – from a research perspective – more manageable parts, which in turn allows the identification of the effect of each of the four independent variables on the judicial enforcement of EU law. Third, the model links the explanatory variables in a causal way and thereby shows how closely they are interrelated. It is argued that only if all independent variables display conducive characteristics for law enforcement through the courts will litigation effectively remedy compliance problems with EU law.

The empirical analyses of public interest group litigation in France, Germany and the Netherlands have given support to the explanatory power of the stage model: even though French environmental organisations lacked a strong organisational capacity they were nevertheless able to repeatedly contest hunting dates. Thanks to their open access to the courts, they could systematically contest administrative decisions in breach of the hunting regime of the Birds Directive. Although the Conseil d'État remained sceptical with regard to directly effective European provisions, it used the cases on the Birds Directive to fine-tune its case

law and ultimately annulled the hunting dates set for being in contradiction with the Directive. The competent authorities, however, did not accept this: due to the strong support for a longer hunting season, they ignored both the rulings of the ECJ and the Conseil d'État. Instead of complying with the courts, they tried to block their decisions from being reviewed. After this strategy had failed, they literally copied the respective provisions of the Birds Directive into French law. Nevertheless, this formal transposition did not lead to compliance as the hunting dates were still set for too long periods. Ultimately, only pressure from the European Commission was able to make the competent authorities comply. The case of litigation on hunting dates in France shows that even though all except one variable was conducive for law enforcement through the courts, the effects of litigation were ultimately determined by the very last variable – the reaction of the competent authorities. Due to its characteristics, litigation could only have limited and 'pro forma' effects.

The French case of litigation on the site protection regime of the Natura 2000 Directives also supports the expectations derived from the stage model. As litigation on environmental impact assessments requires a strong organisational capacity, the effects of public interest group litigation could not be but limited from the outset. The open access to the courts that environmental organisations enjoyed was not able to overcome this problem, as detailed knowledge about negatively affected sites and members able to follow long and complex authorisation procedures were indispensable for repeated litigation on this issue. Above all, however, the French courts' denial of direct effect made it impossible to enforce the site protection regime of the Directives through the courts. Although the Conseil d'État seemed to have recognised the ECJ's doctrine of direct effect, it proved to remain sceptical and applied a peculiar interpretation in order to block the influence of EU law. The competent authorities were thus free to designate only those areas that they deemed to be appropriate. Furthermore, the quality of the application of Article 6 could not be controlled through litigation. That some lower courts did finally agree to review the non-designation of specific sites did not alter this situation. Due to the denial of direct effect, litigation on the Directives' site protection regime in France could not have any effects. The second French case study highlights even more directly than the other cases the importance of the interpretation given by national courts for the judicial enforcement of EU law. Although the doctrine of direct effect appears to be officially accepted by all supreme courts of the Member States, important '*poches de résistance'* seem to remain.

In Germany, environmental organisations could rely on their strong organisational capacity, yet their possibility to use litigation was limited. Their actual access to the courts was restricted due to the high costs of litigation, the narrow issue areas open for judicial review, and the negative image of going to the courts. Also the interpretation given by the German courts limited the effect of litigation:

although they accepted the direct effect of the Directives' site protection regime quickly, they still left the competent authorities considerable leeway in deciding on key aspects such as whether a project would have significant effects or whether there were alternatives to the project. The German administrative procedural law reduced the pressure on the competent authorities to create 'watertight' decisions even more. For these reasons, litigation was not able to ameliorate the quality of the application of the site protection regime of the Directives. It did, however, help to overcome the resistance against the creation of the German Natura 2000 network as litigation created legal uncertainty and could prohibit the use of wider justifications for the deterioration of non-designated SPAs. The German case highlights in particular the importance of two variables: restricted access to the courts and the interpretation given by national courts. First, although German environmental organisations did enjoy legal standing in nature conservation matters, even their strong organisational capacity was only able to overcome the practical obstacles to going to the courts to a limited extent. In addition, it should not be forgotten that litigation on harmful projects that fell outside the narrow scope of nature conservation issues was not possible at all. Second, the interpretation by the national courts shows that there are many 'correct' interpretations of EU law. Compared to their Dutch counterparts, the German courts interpreted the obligations stemming from the site protection regime of the Directives in a much more limited way, which in turn reduced the pressure on the competent authorities.

Finally, the Dutch case study has shown that European law can be effectively enforced if all variables display characteristics conducive to law enforcement through the courts. The strong organisational capacity of Dutch environmental organisations in combination with their open access to the courts allowed them to repeatedly contest all the different kinds of projects that could negatively affect potential Natura 2000 sites. Although it took the Raad van State comparatively long to fully embrace the site protection regime of the Directives, it ultimately gave a strict interpretation of key aspects of the Directives. Occasionally, it also analysed the administrative decisions made in great detail and did not hesitate to annul them. In combination with the credible threat that environmental organisations would contest incorrect authorisation, the competent authorities had to apply Article 6 even though it had not even been transposed into Dutch law. In addition, they had to carry out detailed analyses in order to pass the certain phase of judicial review, which increased the quality of the way that they applied Article 6. That the Directives' site protection regime could be effectively enforced through litigation is the result of the characteristics of all the variables identified for litigation being conducive.

To sum up, the four case studies show that all the explanatory factors of the stage model are decisive in order to explain the differing effects of litigation. In addition, and maybe even more importantly, the empirical results highlight the fact

that the independent variables identified are closely related to each other. On the one hand, the characteristics of one variable can help to mitigate – at least partially – problems rooted in another variable, for example open access to the courts may overcome weak organisational capacity. On the other hand, law enforcement through the courts can only have its full effects if all variables display conducive characteristics. If only one variable is too restrictive for litigation, this instrument of decentralised European law enforcement will fail.

9.1.2 The Explanatory Power of Alternative Explanations

In contrast to the stage model, the alternative explanations of why litigation may not have effects on the implementation of EU law did not prove to be convincing in any of the four case studies. The first explanation assumed that environmental organisations would not turn to the courts once they had realised that the European Commission had become active. Therefore, no, or at least very little, litigation would occur, which would in turn explain why legal actions would not yield positive effects on implementation. The empirical results reject this explanation: in all the countries under study, environmental organisations themselves started to try to enforce the Directives' site protection regime through litigation despite the fact that the European Commission used – sometimes more, sometimes less convincingly – various means to push for its correct implementation. Arguably, the proposed explanation overlooks both the perspective of environmental organisations and the problems of the EU's centralised enforcement system: the goal of environmental organisations is to protect *each and every* ecologically important site. If they see a chance to achieve this objective at acceptable cost, they will take it. No doubt, the environmental organisations did appreciate that the European Commission was an ally in enforcing the Directives, but due to its limited resources, the Commission was only able to focus either on large transposition problems – such as the non-transposition of Article 6 or the insufficient *general* designation of Natura 2000 sites – or a few exemplary cases – such as the deterioration of one specific site. In view of this situation, it was totally unacceptable for environmental organisations to lean back and to hope that the 'general' pressure from the Commission would ultimately lead to the correct application of the Natura 2000 Directives. The empirical discussion of those cases where environmental organisations turned less often to the courts – litigation on the site protection regime in France and, but to a far lesser extent, in Germany – clearly shows that this restricted litigation behaviour was not connected to the Commission's enforcement actions, but to other factors identified by the stage model whose characteristics restricted the use of litigation.

The second alternative explanation draws on the organisational form of environmental organisations in order to clarify why only little litigation has occurred. It argues that only narrowly focused interest groups will turn to the courts

on a frequent basis in order to obtain their specific policy objectives and to attract new members. The empirical results, however, clearly refute this explanation: in all the countries both large environmental organisations with broad policy goals (the BUND and Nabu in Germany, FNE in France, Natuur en Milieu in the Netherlands) and small, narrowly focused organisations (the Ligue Roc in France, Faunabescherming in the Netherlands) used litigation to obtain their policy objectives. More generally, it can be doubted whether Olson's logic of collective action applies at all to environmental organisations: as the protection of the environment is by definition a common good, there is good reason to believe that the members of these organisations do not even expect direct, measurable benefits from their membership – as firms would do when becoming members of business organisations. If the environmental organisation that they are part of appears to do a good job, the members are likely to continue to pay their membership fees. Whether the organisations use litigation or some other instrument to protect the environment is arguably of rather minor interest to their members.

Finally, neither does the last alternative explanation – that environmental organisations will not turn to the courts if they have access to the national policy-making process in order to pursue their policy objectives – find empirical support. Both the implementation of the Birds Directive's hunting dates in France and the site protection regime of the Natura 2000 Directives in all three countries met with such strong resistance that environmental organisations could not use any available alternative access to the policy-making process to achieve implementation. Even in those countries where the Greens were in government – in France from June 1997 to August 2002, in Germany from October 1998 to October 2005 on the federal level and throughout the period of implementation in some *Länder* – the implementation process was as cumbersome as in those countries and at those times where the Greens were in opposition. In principle, it seems to be reasonable to assume that environmental organisations rationally choose the most efficient strategy to pursue their policy objectives. In the case of the Natura 2000 Directives, it was clear that they could only enforce the Directives through litigation.

9.1.3 Forgotten Explanatory Factors of the Stage Model?

Two additional important remarks are necessary regarding those aspects that appear to not be covered by the stage model and thus seem to limit its explanatory power. First, it might be argued that legal uncertainty was not so much the result of litigation by environmental organisations as the effect of both the ECJ's and, to a lesser extent, the national court's peculiar and diverse interpretations of the Directives. It is certainly true that the ECJ gave a generally 'integration friendly' reading of both the hunting provisions of the Birds Directive and the site protection regime of the Natura 2000 Directives. It is also true that the Member States had not

foreseen such a development when adopting the Directives. The legal uncertainty was thus partly the result of the unforeseen (and unforeseeable) interpretation of the courts. Yet this is only part of the story: it should not be forgotten that some obligations stemming from the Directives became clear comparatively quickly. To give two examples, from the middle of the 1990s, it was clear that wild birds were not allowed to be hunted after the first species had started their period of migration; and that all outstanding ecological areas had to be designated as Natura 2000 sites. However, even after these issues had been clarified, implementation deficits remained. Regarding these settled issues, the legal uncertainty was only created by the litigation of environmental organisations, as the national law came into conflict with the European provisions and not because the European provisions were continuously interpreted in a contradictory manner by the national courts. The main question in interpretation was 'only' how to interpret Article 6. Here, the diverse readings given by the courts did certainly not help to create legal certainty. Yet again, legal uncertainty did not come by itself, but had to be 'activated' by litigation. And in all the countries, it was mostly environmental organisations that turned to the courts and thus created legal uncertainty by opposing the national law with the supreme European provisions.

The second seemingly overlooked explanatory factor that has become apparent during the empirical discussion relates to peculiarities of national administrative procedural law: in Germany, special provisions of the procedural law gave the competent authorities the possibility to repair ex post unlawful administrative decisions, which in turn reduced the effect of litigation as the authorities were under less pressure to create 'watertight' decisions. In the Netherlands, similar cases led simply to the annulment of the decision. In addition, Dutch administrative procedural law allowed (or required) the Raad van State to annul a decision if not all the relevant facts had been considered. The result was that the Dutch Court declined to discuss the status of Article 6 (3) and (4) once it had become clear that the competent authorities had failed to examine the potential effects of a plan or project on an actual or potential Natura 2000 site. This is the reason why it took the Raad van State longer to clarify the obligations stemming from the Directives' site protection regime. The German BVerwG, by contrast, already discussed the most important aspects of Article 6 in its first ruling, even though it 'fine-tuned' its interpretation later on. As these peculiarities of national law proved to be decisive for the effects of litigation, should they not become directly included in the chosen theoretical account? I think that this would go too far and would unnecessarily complicate the issue. Interpretation by courts does not come from nowhere, but is by definition deeply embedded in the national legal context. The national administrative procedural law with all its peculiarities is part of this context, as well as specific national legal and judicial traditions. For this reason, I argue that idiosyncratic explanatory factors rooted in national administrative

procedural law are already included in the variable 'interpretation by national courts'. Admittedly, however, this aspect should be more directly discussed in a revised version of the stage model. In any case, it shows the importance of detailed, in-depth analysis to explain the differing effects of litigation.

9.2 Litigation as a Decentralised Instrument of European Law Enforcement

The second main question of this book is: under which conditions public interest group litigation is able to effectively remedy compliance problems with EU law? I argue that the empirical results cast doubt on the effectiveness of remedying violations of European law through the national courts when areas of public interests are concerned. As the case study on the Netherlands has shown, this instrument of law enforcement can indeed work effectively, but it needs to be remembered that – besides indispensable legal preconditions – law enforcement through the courts requires that a particular set of socio-legal conditions is met in order to operate effectively. First, public interest groups with a strong organisational capacity are necessary in order to monitor and enforce the correct application of European law. This is, however, often not the case in 'southern' and 'new' Member States of the EU (see e.g. Rootes 2004; Marx Ferree/McClurg Mueller 2004). Second, these groups need to enjoy access to the courts, and the more open the access, the more effectively they can use litigation. Yet this access to the courts for interest groups varies considerably both across Member States and issue areas. Third, national courts have to accept the direct effect of EU law and interpret the provisions strictly, but to what extent they are actually doing so is still an open question. Above all, they enjoy a large leeway in interpreting the European provisions, and this interpretation can hardly be appealed against. This can lead to serious time gaps in the application of EU law or even its complete neglect. Fourth, if strongly supported national legislation is to be amended or replaced by EU law, even outright instances of non-compliance may occur that can only be very partially remedied through litigation. As these socio-legal variables vary considerably amongst the Member States, the potential for law enforcement through the courts varies accordingly. Consequentially, if the goal is to guarantee the rule of law in the European Union, litigation before domestic courts can only complement other instruments of law enforcement. Although it has the potential for effectively remedying compliance problems in areas of public interest, one should not make the mistake of considering it panacea for the enforcement of EU law.

At the same time, however, the issue can be seen less pessimistically if it is put in the larger context of the existing mechanisms for guaranteeing compliance in the EU. In fact, even though law enforcement through the courts requires particularly

demanding conditions, it might still be the most effective instrument of EU law enforcement currently available. As the empirical discussion has shown, the EU's centralised enforcement system based on the actions of the European Commission suffers both from significant delays and limited scope. First, although the Commission had become – with the exception of hunting dates in France – quickly active after the Habitats Directive had entered into force, infringement proceedings were time consuming: as Table 18 shows, the average length of such proceedings in France, Germany and the Netherlands on the Natura 2000 provisions under study was five and a half years before the ECJ gave its ruling. On average, it took the Commission 3.8 years to refer the issue to the ECJ. Compared to the general average time of 3.1 years that it took before a case was referred to the Court in the period from 2000-2001, the Commission does not score significantly worse. The same is true for the total average length of infringement proceedings (see again Table 18). As a second ruling of the ECJ is necessary to obtain penalty payments – which are arguably the most serious 'tool' the Commission has to obtain compliance – the average length has to be multiplied by two. This expands the total average time for the infringement proceedings to about 10 years, which cannot but be dissatisfying if the rule of law is to be taken seriously.

Table 18: Length of Infringement Proceedings

Average length of infringement proceedings on Natura 2000 issues:	Before referral to the ECJ (in years)	Before the ruling of the ECJ (in years)
France	3.7	5.5
Germany	3.2	4.5
Netherlands	4.6	6.5
Average of Natura 2000 cases in FR, DE, NL	3.8	5.5
Average length of infringement proceedings		
Average 1992-1994	-	4.7
Average 1995-1997	-	3.9
Average 1998-1999	-	5.6
Average 2000-2001	3.1	4.9

Source: own counting and Krämer (2003: 388)

Second, the main focus of the Commission in the countries under study was clearly the correct transposition of the Directives' site protection regime – either the designation of Natura 2000 sites or the transposition of Article 6. This is also true for the other Member States as the distribution of infringement proceedings brought to the ECJ on the site protection regime of the Natura 2000 Directives

reveals: before 2006, there were in total 19 'horizontal' cases that led to the conviction of a Member State for not having transposed the Directives correctly, but only three cases[336] concerned the practical application of the sites' protection regime. Given the limited monitoring resources of the Commission, it is not surprising that it focuses on the legal transposition rather than the practical application of European environmental law – as it admits itself (see European Commission 2000b: 75). Issues on practical application generally revolve around points of fact whose assessment demand far more time and resources than the mere comparison of legislation. Nevertheless, this also shows a great weakness in the current system of enforcement of European law.

In view of the limits of the EU's centralised enforcement system, it might be interesting to ask hypothetically what the consequences would have been if only the European Commission and not environmental organisations had become active in enforcing the Natura 2000 Directives. In France, despite the fact that litigation did not achieve compliance, the hunting seasons would have been set for even longer periods than they were with litigation. In Germany, the site protection regime of the Directives would not have been applied for any potential Natura 2000 site. In addition, information deficits would have persisted longer. The designation process of SPAs would also have taken longer as the Commission had not even started an infringement proceeding on the insufficient designation of these sites. In the Netherlands, the designation of Natura 2000 sites would not have had further consequences as the transposition of Article 6 was still missing. Thus, these areas would have remained either unprotected or subject to a less strict national protection regime. In addition, the quality of the competent authorities' application of the Directives' site protection regime would have remained worse compared to the periods after litigation took place. Therefore, despite the fact that litigation before national courts is a demanding enforcement instrument, it might still be more effective than the existing centralised one, even if not all of its socio-legal conditions are met. However, more research in other policy areas and countries is necessary to clarify this issue.

9.3 European Integration, Democratic Governance and Litigation

As has been discussed in section 2.2, the use of litigation to enforce EU law is of central concern both to neo-functionalist theories of European integration as well as to approaches emphasising the possibility of improving democratic governance through the courts. However, the empirical results reported in this study cast doubt

[336] ECJ C-103/00 [2002] Commission v Hellenic Republic; ECJ C-117/00 [2002] Commission v Ireland; ECJ C-209/02 [2004] Commission v Austria.

on the assumptions used by these two approaches (see also Slepcevic 2009c). With regard to the first theory, there is no doubt that the European Court of Justice pushed the scope and depth of the Natura 2000 Directives considerably further and thus increased the level of European integration in the area of nature conservation. However, environmental organisations played only a minor role in this court-driven process. In all the countries under study, these organisations tried to obtain preliminary rulings, yet the national courts simply declined to follow this request in the overwhelming majority of cases. In Germany, environmental organisations were most active in their application to national courts because they perceived the implementation of the Natura 2000 Directives to be too contentious for the local courts, yet both the Bundesverwaltungsgericht and the lower courts repeatedly argued that the issue would not require a referral to the ECJ. As this decision cannot be appealed, environmental organisations were completely dependent on the good will of the courts. In addition, neo-functionalist theories attach too much meaning to the fact that an environmental organisation is behind a case that made its way to the ECJ. For these organisations, the main goal is to protect the environment; they care little whether it is the supreme national court or the ECJ that grants a stricter protection level. Therefore, even if a case started by an environmental organisation is referred to the ECJ, this does not necessarily mean that the referral had been the intentional goal. To give an example, the lawyer interviewed from the Dutch Waddenvereniging, who had been actively involved in the case on mechanical fishing in the Wadden Sea, reported that it was not their goal to obtain a preliminary ruling. It was the Raad van State itself that decided to refer the case to the ECJ. In view of the fact that the Dutch supreme court had both annulled many decisions in conflict with the Natura 2000 Directives and interpreted the Directives comparatively strictly, Dutch environmental organisations did not really see the need to go to the ECJ as they could obtain their goal – a strict interpretation of the Directives – more quickly through the national courts. For these reasons, the empirical results of this study suggest that neo-functionalist theories either overestimate the importance of societal actors to European integration in environmental policy or misinterpret their litigation behaviour as purposefully oriented towards the European level.

With regard to approaches emphasising the possibility of enhancing democratic governance through the courts, the findings suggest that additional variables need to be included (see also Slepcevic 2009a). As has been discussed in 2.2, three institutional variables – the nature and scope of rules, the possibility of courts to perform judicial review, and the access points and resources of societal actors to use litigation – have been identified that condition the potential for enhancing democratic governance through the courts. Although Börzel (2006) focuses in her case study on the EU, she seems to have overlooked a crucial additional variable: the interpretation given by national courts. Throughout the

empirical analysis, it has been shown that French, Dutch and German courts interpreted the very same European provisions differently, ranging from full embracement to complete neglect. Also the time when the national courts gave direct effect to the relevant provisions of the Natura 2000 Directives differed significantly. Yet litigation will only be able to improve democratic governance by strengthening accountability, transparency, and individual participation in political processes if the national courts accept the direct effect of European provisions. If they decline to do this for whatever reason, this instrument will be doomed to fail. Therefore, the variable 'interpretation given by national courts' should be added to the other three explanatory factors identified. However, adding new variables reduces the practical potential for improving democratic governance through the courts, as the probability that it will indeed effectively work decreases. In the European context, it is thus questionable whether democratic governance can be strengthened through litigation before national courts in practice.

Finally, and related to the last point, both theoretical approaches assume that European courts will apply European law faithfully, at least by and large. The empirical results suggest that this assumption should not be accepted as easily as it has been by previous studies. It is true that all the courts under study have 'officially' accepted the supremacy of EU law, yet the diversity of the interpretations given by the courts is remarkable. Certainly, the results of a small-N case study cannot be representative of other policy areas or countries. Nevertheless, they suggest the need to reconsider the central assumptions of current research on the European legal system and to spend more time on 'basic' research on the application of EU law by national courts.

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