IMPLEMENTATION OF THE BIRD- AND THE HABITATS DIRECTIVE IN DENMARK

Professor Peter Pagh

I. General background on Danish Law on Nature Protection

Denmark – with the exception of Greenland and the Faroese Islands – has been a high populated land for centuries the land has been almost totally cultivated. Denmark experienced the first implication of none-sustainable development back in the 14 century where the land and nature was overexploited by too many people. Only because of the plaid, land and nature got time to recover – but that last only for about two centuries. In the 16 century an increasing part of the land suffered from sand drift which was cause to the first Danish environmental legislation making any destruction or collection of plants in sanded areas were subject to heavy penalties. Next problem occur two hundred years later because the exploitation of forest. At the time of the Napoleon war, forest covered less than 2% of the total Danish land territory. After the U.K. attacked and destroyed almost the whole Danish navy, the second environmental legislation on the preservation and restoration was adopted in 1816 and trees were planted. The planted oaks were in 2003 – after 200 hundred years - suitable for it's purpose although the Navy don't need the timber any more. At the same time legislator adopted the first and substantial agricultural reform replacing the feudal system with partly private farmers. In 1931 a new legislation on farming land was adopted establishing a duty on farmers to use their land as either farming or forest land. The obligation - which is still in force – implies that a farmer is subject to criminal sanctions if the farmer refrains from using his land as farming land.

The history has strongly influenced on Danish legislation on nature protection which until the late 1960'ties was governed by two major considerations: (1) to make land suitable for farming (until 1960, agriculture was the main production in Denmark), and (2) considering nature as the area outside the city – because no wild nature exist.

The legislation on nature protection goes back to the first formal Act on preservation of nature from 1919 which establish the legal base for expropriation of land for the benefit of people in the cities and with compensation to the landowner. After world war two, legislation on nature protection gradually expanded to general requirements on protection and restriction of land use without compensation – but any move caused political and legal battles with farmers claiming their private property right.

In sum: before EC went into the business of nature protection, Danish legislation on this matter was based on six schemes: (1) special conservation areas designated after expropriation; (2) protected nature type (swamps, small lakes, moors) which are identified by objective characteristics and where protection doesn't interfere in existing using of land, but require dispensation for new activities; (3) protection zones to forests, streams, coast, lakes and churches where protection doesn't interfere in existing using of land, but require dispensation for new activities; (4) species protection which is tough on mammals and birds but regarding other species don't interfere in legal use of land; (5) the right for the public to recreational use of nature on public and private land; (6) hunting restrictions.

When the Bird Directive was adopted in 1979 the Ministry of Environment thought that this legislation was sufficient and informed the Parliament that the Bird Directive only required minor changes in the hunting legislation.

Legislation: The existing Danish legislation on nature protection is like a puzzle. The two main Parliamentary Acts are the Nature Protection Act and the Act on Hunting and Wildlife Management. Despite the title, the Hunting Act only concerns mammals and birds, while other species fall under the Nature Protection Act to the extend they are protected. This legislation is supplemented by the Planning Act and on the Sea territory replaced by various act.

Competences: Until recently, the Forest and Nature Agency had the responsibility for forest management and nature protection at the Sea while the regional councils had the responsibility for the rest part of nature protection. Designation of SOA and SCA has been the responsibility of the Agency while that protection of SPA and SCA has been (and still is) related to the authority which decide on the application for a project – but 1½ year ago were supplemented by the regional council as the main responsible.

In 2005 a structural reform was adopted according to which the local councils take over almost all responsibilities regarding Nature Protection. Under the new reform which will be in force in 2007 the Ministry is only responsible for adopting management plans on SCA and objectives for water quality under the Water Frame Directive – all other responsibilities are with the reform in hand of 98 local Councils.

Greenland: Greenland is part of the Danish territory but not part of the EC and therefore not subject to EC-legislation. Greenland has it's own nature protection legislation. Danish ratifications on multilateral and bilateral environmental treaties always contain a reservation regarding Greenland and the Faroese Islands – and the short story Greenland is even more fare than Denmark from compliance with EC-standards for nature protection.

II. Natura 2000

1. Identification and notification of SPA and SCA in Denmark

a) Article 4(1) Dir 92/43 and 4(1) Dir 79/409

- *How were the areas identified which went into the national list of candidate areas for SACS (Article 4(1) of Directive 92/43)? Which criteria were used, if any?*

- *Has your country identified sufficient candidate SACs and notified them to the Commission? Have core zones and puffer zones been suggested?*

- *Which criteria were used to designate to designate SPA's (art. 4(1) Dir. 79/409)?*

- *Was there any public consultation or discussion with regard to the selection of sites of Article 4(1) of Directive 92/43 and to designate SPA's (Dir. 79/409)?*

- *What were the main obstacles in process of identification these areas (e.g. local protests, lack of explicit criteria, lack of national data base on such areas)*

b) Article 4 para. 2 and Art. 5 Dir 92/43

- *Is the Commissions decision with regard to the lists of areas (Article 4(2) of Directive 92/43) final? How many areas of those that had been proposed have been retained (number and surface)? What then happens to the candidate areas which had been proposed by a Member State, but not retained?*

The first temporarily designation of SPA in 1983 was decided by the Agency without prior public debate. The list was only intend to effect regional planning which are not legally binding. The designation seems not to be based on comprehensive research but was based on the designated areas under the Ramsar Convention supplemented by incidental knowledge in the Agency. Until the late 1980'ties not even the Appeal Board on Nature Conservation or the Environmental Appeal Board seem to be aware of the designated areas. It was first in 1994 a formal legislation (but insufficient) on the designated SPA was issued. One could only guess how the Ministry escaped any infringement procedure from the Commission during that very long period of time – but you didn't need to be a specialist to detect that the designation was insufficient and protection almost ignored by all involved authorities. Even after 1994 it is easy to demonstrate that the Forest and Nature Agency didn't follow the criteria for designation laid down in article 4(1) and 4(2) of the Bird Directive. When the Environmental Protection Agency in 1998 find need for a new Sewage Facility for waste water at the Wadensee the border of the designated area was just moved by a formal decision – and that was two year after the ECJ concluded in Case C-44/95 on Lapel Banks.

The Danish designation of SCA followed another pattern that the SPA. Based on the existing data in the Agency, the Agency proposed designation of different areas and held a public hearing. There is no indication that the proposals were based on the exhaustive criteria listed in Annex III to the Habitat Directive. In some cases I know that the designated areas were effected by expected developing projects and in other cases the public debate and particular pressure from farmers lead to reducing the designated area. Neither from a biological science perspective nor from a legal perspective, the Forest and Nature Agency followed the Directive in the designation of areas.

c) Article 4 para. 2 and Art. 5 Dir 92/43

- *Is the Commissions decision with regard to the lists of areas (Article 4(2) of Directive 92/43) final? How many areas of those that had been proposed have been retained (number and surface)? What then happens to the candidate areas which had been proposed by a Member State, but not retained?*

The Commission has made a final decision under article 4(2) in designation of SCA in Denmark – but certain areas are still subject to discussion.

d) Art. 4(4) Dir 92/43

- *Has your country already taken decisions with regard to Article 4(4) of Directive 92/43 (final decision to consider an area as special area of conservation of Community interest)? What is the state of decision-taking?*

No final decision has been taking and according to the Ministry such final decision can not be expected before 2009 because the Ministry still hasn't identified the special objective for each designated area.

e) Are Natura 2000 sites protected through a genuine category of area protection, or are the existing categories of protected areas used for Natura 2000 areas?

This is a mix. Mainly Natura 2000 sites contain protected types of nature protected under the old national regime and are hereby protected. But the protection is supplemented by special provisions in the Act on Nature Protection and by a Ministerial Order issued by the Minister. Neither of these provision do however meet the protection required by the directive.

f) Are there decisions by national courts which deal with the identification and notification of areas under Article 4(1) of Directive 92/43?

No cases on designation of SPA or SCA have been brought before courts or before administrative tribunals in Denmark. The main explanation for this is that the Ministry in presenting proposals for designated SCA claimed that the designation will not in any respect effect the landowners right to use his land. So it is no surprise that farmers consider to have been cheated.

The Danish Ornithological Association managed to convince the Commission that certain areas should have been designated as SPA and later this was accepted by the Danish government and the area designated.

g) If the notification of the first round is completed, is there an obligation to improve the list of Natura 2000 sites, eg under Art. 10 Dir 92/43?

Is it possible to reduce or abolish already designated sites (for others reasons then indicated in point II. 3.c).

In my opinion areas designated as SCA and decided by the Commission can neither be reduced not abolished. In contrast, regarding SPA it is possible to reduce or abolish the area because the obligation to designate area under the bird directive is dynamic and not definitive. However, that will require that the birds have left the area for more than one year and established on another site which then must have been designated before the old SPA is abolished.

2. Management of Natura 2000 sites

a) Article 6 paras. 1 and 2 Dir 92/43

- *does national law require management plans for the sites - are they specifically designate for the site or integrated to others plans (which?)*
- *which conservations measures - statutory, administrative or contractual measures – where chosen in your country? Which is the main form?*
- *what appropriate steps are taken to avoid deterioration/disturbances (art.6(2) Dir 92/43*

b) Who does administer/supervise Natura 2000 sites – is it organized within existing nature public bodies? Do environmental associations supervise?

c) Special question on GMOs and nature protection (posed in the context of research for the German Nature Protection Agency): Is there specific regulation or a discussion in your country on whether in nature protection areas the sowing of genetically modified seeds can and even must be prohibited? Can the authorisation for releasing genetically modified seed be denied for the mere fact that the site of release is situated in a nature protection area? Would an authorisation of the bringing on the market of genetically modified seed exclude any measure restricting the sowing of the seed in nature protection areas (see Art. 22 Dir 2001/18)?

The formal Danish implementation of article 6(1) was first done in a Ministerial Regulation from 2003 because the Ministry assumed that Denmark didn't need to implement this provision before the third phase of designation of SCA (article 4(4). The first effect of this misinterpretation was that the legal and factual effects of the designation was not considered when SCA were designated as described above. The second implication was and is still that the preferable status of the designated sites are unknown, which of course make it almost impossible to ensure the required protection under article 6(3) and 6(4). In 2003 it was designated that the Regional Councils were

responsibility for adopting management plans for SCA – but because of the structural reform this responsibility was in 2005 moved to the Forest and Nature Agency – which has announced that plans can be expected in 2009.

Regarding article 6(2) the Ministry until 2003 claimed that the designation of SCA didn't have any effect on existing land use despite of the ECJ ruling in the Irish Case C 117/00. After the Commission issued an opening letter regarding missing protection at one the designated bird areas the Ministry finally gave up its position and in June 2004 the Nature Protection Act was amended with a new chapter 2a on protection of SCA and SPA. According to the new legislation the regional councils (and in the future the local councils) are in special circumstances obliged to act, and if the authority interfere in existing land use, the landowner has the right to be compensated. I don't know whether this step has convinced the Commission but even the last legislation is fare from sufficient because the authorities are only obliged to act in case of special circumstances. Moreover, the Act does not prohibit the landowner to damage the designated site and the protected species. This obligation on the landowner requires a formal decision from the authority, which then must compensate the landowner. But because the regional council today – and in the future the local council must pay – almost no such cases have been reported. Until now only in one case regarding a minkery which was closed and was compensated. The case shows how strange the Danish system is. The case didn't start because the authority discovered any harm, but because the operator of the minkery applied for a new permit to enlarge his harm but at the same time reducing emission because by using BAT. The answer from the authority was two: (1) permit granted; (2) the farm must be closed, but he will be fully compensated. No surprise that the farmer is a bit confused about the Danish Law.

But regarding the other questions the Danish implementation is so fare behind that it isn't possible to give answers.

3. Appropriate assessment' and authorisation of plans and projects

a) Article 6 para 3 and 4 Dir 92/43

- ***How was Article 6(3) and (4) Dir 92/43 transposed in your country***

Article 6(3) and (4) have never been formally implemented into Danish Law. The Ministerial regulation on designation and protection of SPA and SCA include a provision under which application for certain listed permits to projects must be rejected if the project have significant negative effect on the site. As all the other mess this is caused by misinterpretation of the Ministry, but the implication is that under the Danish legislation projects are subject to the protection under the habitat directive article 6(2) – not 6(3). Moreover, the scope of project which are subject to this protection is fare from the the scope of article 6(3) and seem to be based on no knowledge on legislation adopted under other ministries (as for example farmer og fishing legislation) and a rather restricted knowledge on the legislation of the Ministry itself.

One improvement should however be mentioned. The amendment of the Nature Protection act includes a provision which require prior notification if new land within a designated area will be subject to new activities as grassing, new forest, intensive use of manure – so these projects are subject to an assessment under article 6(3). But this only covers activities within the designated site – not activities outside the site even if such activities have substantially harming effect on the protected area. If the activity is prohibited the farmer has the right to fully compensation.

The lacking implementation has after the Wadenzee-case C-127/02 lead the Environmental Appeal Body and the Nature Appeal Body do use the direct effect of the habitat directive article 6(3) in stead of using the (hopeless) Danish implementation. This has however generated another problem for the Nature Appeal Body, because this body does mainly deal with these matters in disputes on EIA. In the attempt to comply with EC law the Nature Appeal Body has therefore went too fare because it has enacted the reversed burden of prove in article 6(3) on the EIA obligation which have no support in the EIA Directive.

- ***Does national law/case law make Article 6 para 3 and 4 applicable also to a) Proposed Sites of Community Importance (pSCIs) b) non proposed but eligible sites (npSCIs)? If yes is this regarded as required by EC law or as a stricter national measure?***

If one ignores the substantial mistakes in the Danish implementation, the formal position from the Ministry was that the Proposed SCI has been subject to protection under article 6(2)-(4) since 1998. The protection of proposed SCI and SPA has been the same since then – but because the substantially mistakes this has no even been able to establish a protection which correspond with the Dragon ruling. In 2004 the Commission adopted a list covering SCA in Denmark which mean that the later ruling inspired by the Wadenzee case all have been dealing with SCA.

- ***What is the factual information on plans and projects affecting Natura 2000 candidates or determined sites***

As the Danish legislation is unclear on whether assessment is needed for projects and plans which could effect Natura 2000 sites, the legislation does not contain any guidance regarding factual information.

b) Relation of the appropriate assessment under Article 6 to the EIA under EIA Directive and SEA under SEA Directive

PROJECTS

- ***Does the assessment for the purposes of Article 6(3) take the form of an assessment under EIA Directive /or SEA Directive (if not – please shortly indicate the form, content and procedure of 'appropriate assessment ', including questions of public participation***

No common form or pattern has been established on how to make the assessment neither in guidance nor in practice. If the matter is integrated in an EIA assessment, the assessment follow this system but even here there is no common model. The assessments which have been seen until now differ substantially in quality and in the issues covered. For example the Ministry made an assessment regarding the introduction of the beaver nearby SPA and SCA – after the Ministry has lost the case in the high court. In this assessment the Ministry described the effect on known species concluding that the introducing of beaver only is expected to have a minor negative impact on the protected species in the effected sites – but adding this isn't certain. Following the ECJ ruling in C 127/02 the introducing of beaver should only be possible under article 6(4) – but the Nature Appeal Board concluded opposite and granted permission.

- ***is the appropriate assessment confined only to EIA Directive Annex I and II projects or also to other projects (if yes - how they are being defined and what triggers the procedure)***
- ***is the appropriate assessment confined only to 'development consent" under EIA Directive or also to other permits (for example: IPPC permit)***

In the last 2 or 3 years it has been understand by the Ministry that it isn't possible to restrict the assessment to EIA-projects – but as indicated above a substantially number of projects are not covered by the Danish system because the failing implementation and because the responsible authority is not aware of this obligation. But despite of mistakes the scope is not restricted to development consent under the EIA Directive or permits under the IPPC-directive

- ***is the scope of EIA procedure and EIA documentation (EIS) limited in case of 'appropriate assessment' as compared with those under EIA Directive?***

Such concept is not known in Denmark.

- ***has there been any discussions concerning the possible effects on the national legal scheme of the Waddenzee case; Draggagi case***

The Waddenzee case has have a rather substantially effect on practice as described above. The implication of the Draggagi case is now considered regarding cases in "the pibe" but started before the decision of the Commission.

PLANS

- ***is the 'plan'' under the Habitat Directive (and legal implications under Article 6.4) interpreted to cover all plans and programs covered by SEA Directive? How in practice it is determined that they are "likely to have significant effects on the site'? what triggers the procedure?***
- ***is there any special decision making procedure to decide in case a plan will "adversely affect the integrity of the site". Who decides whether to agree to the plan and what compensatory measure be taken (the authority competent to prepare/adopt the plan or any other authority)?, in what legal form?***

There are formally rules on physical planning should follow the assessment procedure but I have never seen a case in which this the proposal for a plan included an assessment of the impact on a protected site. Moreover, also other plans as waste management plans, plan for sewage, for drinking water supply and water management plans are subject to article 6(3) as well as the SEA-Directive. My impression is that the planning authority are either not aware of this obligation or ignore it.

c) ***Interpretation of certain terms according to administrative adjudication, court decisions, and academic debate (<u>you can illustrating the following problems on significant case/cases or just answer the questions</u>)***

- ***design of impact studies***

No contribution from Denmark

- ***meaning of „significant effect" and „adversely affect", e.g.: is the cutting of a special area of conservation (SAC) per se an adverse effect? Any mandatory or indicative thresholds (for example - projects within certain radius from a site deemed to be likely to have significant effect on it)***

I think there is no per se answer : what might be good for one specie might be bad for another specie – so it all depend on the objective with the site. Moreover, there are substantially differences between the different language version of the directive, and even the term "significant effect" is in some versions translated different in different provisions – so the wording of the threshold is a mess. But regarding threshold there is an ongoing case at the Danish court which could enlighten this matter – a pretty funny one which I will tell in Krakow.

- ***what is and what not regarded as „imperative reason of overriding public interest"? On what level of concretion are the objectives of the plan or project formulated (mark that the more concrete the less alternatives come into play)? Are they sometimes expressed in monetary terms?***

There is no Danish practice on these matters – Denmark have not even one time used article 6(4) …. ! – so this is also a response to the questions below.

- *what is the scope of alternatives to be considered? must any alternative considered be realisable by the original applicant? Are alternatives involving more costs than the prime variant excluded from further consideration?*

- *Are compensatory measures (Art. 6 para 4 subpara 1) be counted as reducing the adverse effect?*

- *Do „prioritary" species under under Art. 4 para 4 subpara 2 Dir 92/43 also include endangered birds, such as those listed in Annex 2 of Dir 79/409 recognised?*

- *what counts and what not as an „opinion from the Commission"? Is an informal statement sufficient? Are there instances of lobbying the Commission to render obtain a favorable opinion? What is the legal role of a positive or negative opinion?*

- *who has standing to challenge decisions under Art. 6 para 4 Dir 92/43? is it a difference between plans and programs in this respect? Does Article 10a of the EIA Directive apply?*

- *Is Art. 4 para 4 Dir 79/409 either as such or in combination with Art. 7 /Art. 4 para 4 Dir 92/43 directly applied if the site was not notified?*

- *Is Art. 4 para 4 Dir 92/43 directly applied aa) if the site was notified and listed by the Commission (Draggagi case) bb) if the site was notified but not yet listed cc) if the site was not notified but qualifies as potential Natura 2000 site*