QUESTIONNAIRE FOR THE AVOSETTA MEETING IN KRAKOV, JANUARY 13 AND 14, 2006

(1) Objectives of the meeting:

1. to understand the interaction of national and EC nature protection law, its achievements and failures
2. to identify points of non-implementation and elaborate proposals for reforming national law and practice
3. to identify weaknesses of the EC law and practice and elaborate proposals for reform

(2) General background of the MS relevant for nature protection

(3) Please describe shortly:

(4) the legislative and executive competencies in your country with regard to nature protection

(5) Answer:

(6) Germany is a federal state in which competences are divided between the federal level (called the "Bund") and the 16 "Bundesländer". The Bund has only a framework competence with regard to **legislation** related to nature protection. The Bund has produced a law on nature protection, the "Bundesnaturschutzgesetz", which, although being a framework law, goes much into details, leaving the Länder only a small margin for their own legislation. The Länder, in turn, have introduced their own nature protection laws. These laws repeat most of the provisions of the Bundesnaturschutzgesetz concretising broadly formulated terms and filling in gaps. This is true also in relation to the implementation of the Natura 2000 scheme. Hence, the Länder have adopted provisions on the obligation to notify relevant sites, establish a protection regime, monitor the sites and enforce the protection requirements when projects are submitted for authorisation.

(7) Directives 79/409 and 92/43 were transposed by certain provisions in the Bundesnaturschutzgesetz and the nature protection laws of the BundesLänder. The most recent version of the Bundesnaturschutzgesetz was promulgated on March 25, 2002 (Bundesgesetzblatt I, p. 1193), the most recent version of the

NdsNatSchG (the nature protection law of Lower Saxony taken here as an example) on January 27, 2003 (Nds. GVBl. 2003, p. 39)

(8) Frame-work laws may, in exceptional circumstances, contain directly applicable provisions. This is also true in relation to the Natura 2000 provisions of the Bundesnaturschutzgesetz. Directly applicable are those provisions which address the role the Bund government has to play in the process of determination of SPAs. For instance, the law provides with direct applicability that the Bund government is competent to register the candidate sites identified by the Länder, submit these sites to the Commission and participate in the negotiations according to Art. 4 sec. 2 of the Habitat Directive.

(9) In relation to the EEZ the Bund has an exclusive competence to legislate. Although this is not explicitly mentioned in the Grundgesetz, it is an unwritten competence founded on considerations of what is called „the nature of the matter" („Natur der Sache").

(10) As far as **administrative enforcement** of the nature protection laws is concerned this belongs in principle to the competence of the Länder administration. All of the Länder have established nature protection agencies on the district, regional (if applicable) and ministerial level, but nature protection law has also to be observed by any other Land authority dealing with matters touching upon nature protection.

(11) As mentioned before the Bund has however administrative competences insofar as it registers candidate Natura 2000 sites and represents the German proposals in the Commission procedures. In relation to the EEZ the Bund has the entire administrative competence. This means that the Bund is responsible not only for channelling candidate sites through the Community procedure but also for the primary identification of sites as well as the final establishment and implementation of the protective regime.

(12) The Bund has established a Federal Agency for Nature Protection (Bundesamt fuer Naturschutz) for federal tasks of federal nature protection. In addition, the Federal Agency for Environmental Protection (Umweltbundesamt) has also competences related to nature protection. In relation to the Natura 2000 regime

the Bundesamt fuer Naturschutz is responsible for providing scientific advice on the protectable sites. In addition, it is in charge of identifying sites in the EEZ qualifying for SPAs.

(13) and the characteristics of your natural resources and major threats for nature

(14) ***Answer:***

Characteristics of German natural resources

Germany falls within the Alpine, the Atlantic and the Continental Biogeographical Region recognized by the Directive. More specifically Germany has accepted that 91 of the habitat types listed in Annex 1 occur in Germany and altogether 258 of the species listed in Annexes II (135), IV (132) and V (86).

(15) Major threats:

Development and agriculture are widely considered to be the major threats to nature conservation in Germany.

(16) Natura 2000

1. Identification and notification of special areas of conservation (SACs) and special protection area (SPA's) in MS

(17) Let us give you first a translation of some core provisions of the EU-Directives as they were transformed in German Nature Protection Law (other core provisions are mentioned later in the text):

Basic obligation to create protective regime
„§ 32 Federal Nature Protection Law:

§§ 32 – 38 aim at establishing and protecting the European Ecological Network „Natura 2000“, and in particular the areas of European significance and the European Bird Protection Areas.

The Länder are to fulfil their obligations under Directives 92/43/EEC and 79/409/EEC, and in particular through the adoption of legislation in accordance with §§ 33, 34, 35 sentence 1 No. 2 and § 37 sec. 2 and 3.”

“§ 34b Nature Protection Law of Lower Saxony:

The Land government declares as European Bird Protection Area any area which fulfils the conditions of Art. 4 sec. 1 or 2 of Directive 79/409/EEC. The declaration must be made public.

Areas of Community significance determined according to Art. 4 sec. 4 Directive 92/43/EC, and European Bird Protection Areas must be put under a protection regime in accordance with, besides the already existing National Parks and the Biosphere Reserve „Niedersächsische Elbtalaue“, §§ 24, 26, 27 or 28 (i.e. nature protection area, landscape protection area, nature monuments, or protected parts of the landscape, respectively. G.W./B.W.W.)

In the declaration according to sec. 2 are to be determined in correspondance with the goals of preservation the protection goal, and orders, prohibitions and maintenance and development measures which implement the requirements of Art. 6 Directive 92/43/EC. In the declaration according to sec. 2 it is to be described what prioritary biotopes and what prioritary species exist in the protected area.

A declaration according to sec. 2 is dispensable insofar as equivalent protection is provided for the area through legal provisions, administrative guidelines, the powers of a public or pro bono entity, or through a contractual agreement.

In an area which was announced as identified area of Community significance or European Bird Protection Area according to § 10 sec. 6 BNatSchG any project, measure, change or disturbance significantly impairing the area with regard to its elements of importance for the maintance goals shall be prohibited until the area is being put under a protection regime. In a concertation area which was announced as such according to § 19 sec. 6 BNatSchG any project, measure, change or

disturbance significantly impairing a prioritary biotope or prioritary species occuring in the area shall be prohibited. § 34 c sec. 3 to 5 shall be applied accordingly."

Identification and notification of sites

"§ 33 Federal Nature Protection Law

Protected Areas

(1) The Federal Länder shall select the sites to be proposed to the EU Commission pursuant to Article 4 paragraph 1 of Council Directive 92/43/EEC and Article 4 paragraphs 1 and 2 of Council Directive 79/409/EEC, in accordance with the criteria specified therein. In this process, the Federal Länder shall consult with the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety; the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety on its part shall involve the other Federal ministries concerned in view of their specific subject-related portfolio. The Federal Ministry for the Environment, Nature Conservation and Nuclear Safety shall notify the selected sites to the EU Commission. At the same time the Ministry shall provide the EU Commission with estimates of the Community co-financing needed to enable compliance with Article 6 paragraph 1 of Council Directive 92/43/EEC, including compensatory payments to farmers.

(2) The Federal Länder shall designate the sites entered in the list of sites of Community importance in accordance with Article 4 paragraph 4 of Council Directive 92/43/EEC, and European Bird Sanctuaries, in line with the respective conservation objectives (Erhaltungsziele), as protected parts of nature and landscapes as laid down in Article 22 paragraph 1 of this Act.

(3) The 'protection declaration' (Schutzerklärung) shall set out the protection purpose (Schutzzweck) in accordance with the conservation objectives (Erhaltungsziele) for the site concerned, as well as the necessary site boundary definitions. The declaration shall also set out whether any priority biotopes or priority species are to be protected. It shall be ensured through appropriate orders and prohibitions as well as management and development measures that the requirements of Article 6 of Council Directive 92/43/EEC are met. More stringent or more extensive protection provisions shall remain unaffected.

(4) The requirement of placing under protection as set forth in paragraphs 2 and 3 may be waived if equivalent protection is guaranteed by other legal provisions, administrative provisions, powers of disposal held by a public or non-profit body or agency, or by contractual arrangements.

(5) Once a site has been published pursuant to Article 10 paragraph 6, any plans and projects, measures, changes, disturbances or disruptions that may result in significant adverse effects on parts or components of the site that are of a critical interest for the conservation objectives concerned, shall be inadmissible

1. in a site of Community importance, in the interim period until formal legal protection of the site,
2. in a European Bird Sanctuary, subject to any special conservation regulations laid down in accordance with Article 22 paragraph 2 of this Act.

In concertation sites, any activities or acts referred to in the first sentence of this paragraph shall be inadmissible, where such activity or act could result in significant adverse impacts on any priority biotope or priority species in the site concerned.

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

(19) *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?*

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

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

(22) 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)?

(23) 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)

(24) Answer:

(25) As mentioned earlier the selection of sites is a competence of the Länder including marine protected areas in the coastal zone. Only for the EEZ the Bund is competent to select sites for marine protected areas.

(26) The Länder have applied procedures of selection differing in details but following a general pattern which can be shown using the example of the Land Brandenburg:

1. Reports were compiled by the Land Ministry of Environmental Protection on those areas which qualify for SPAs. The reports were based on knowledge and views collected from the local nature protection agencies, scientific institutions, and the central Land agency for nature protection.

2. Further scientific expertise from national or European sources was taken into consideration. Documents which have become influential include - in relation to bird protection - the International Bird Areas Lists (IBA-Lists) 2000 and 2002 and - in relation both to bird and habitat protection - a report on protectable sites compiled by the Federal Agency for Nature Protection [Ssymank, A. et alii, Das europäische Schutzgebietssystem Natura 2000. BfN Handbuch zur Umsetzung der FFH-Richtlinie und Vogelschutzrichtlinie, Bonn-Bad Godesberg 1998 (ISBN 3-89624-113-3)]. The nature protection associations provided additional case-related evidence.

3. The reports were discussed in public hearings on the district level.

4. Negotiations with the other ministries (notably economy and transport) which informally reported back to the Bund Ministries of Economy and Transport.

5. Revision of the areas listed.

6. Decision of the Land government on the bird and habitat protection areas to be designated.

7. Submission of the lists to the Federal Ministry of Environment. Involvement of other Federal Ministries including Economy and Transport.

8. Negotiations between Bund and the Land about controversial cases.

9. Submission by the Bund to the European Commission of the agreed lists.

(27) As for the criteria, the Länder had to stand to the criteria of Art. 4(1) Dir 92/43 and Dir 79/409 respectively.

(28) For a long time Germany had not identified sufficient candidate SACs and had not notified them to the Commission. Thus Germany had to refinish/rework the candidate lists and deliver more candidates in addition. This procedure has even now January 2006 not yet been finished. The ECJ will decide in mid february whether to impose a fine on Germany, with an alleged rate of 700.000€ per day.

(29) Some of the Länder had special consultation procedures in order to give the possibility of an open discussion concerning the selection of the sites. In Bavaria, for example, the inhabitants were included in a so called "dialogue-procedure" that lasted for three months, before the areas were notified to the Commission. North Rhine-Westphalia notified the areas after the reconcilement with the owners of the land, other entitled persons, the authorities and other concerned persons or institutions.

(30) One main obstacle in the process of identification was the resistance/opposition of the land owners. They did not want their property to lose economic worth.

(31) However, all lawsuits brought up against decisions of the Länder and the Bund to place certain sites on the lists send to the EU-Commission were dismissed by the German administrative courts. The lawsuits were declared inadmissible because of the preliminary character of the national selection of the sites. In a parallel decision, the President of the Court of First Instance of the EU refused to take preliminary measures against a decision of the Commission to place certain sites in North Rhine-Westphalia on the list of sites selected as sites of Community importance (Article 4 (2, 3) of Directive 92/43). The president

declared the main case as probably inadmissible according to Art. 230 (4) EC and the application as not urgent (Case T-117/05 R 1, 5.7.2005).

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

(33) 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?

(34) Answer:

(35) In Germany, the process of identification and notification of the areas has just been finished. A few areas that the Commission asked to notify have not yet been notified. Meanwhile however, the Commission has established, in agreement with Germany, draft lists of sites of Community importance for the three biogeographical regions of relevance in Germany.

(36) The Commission has – as far as we can see – retained only few – if any - German candidate areas. That comes at no surprises, because in the beginning in Germany there was a lack of candidate areas, and the Commission ordered the notification of more areas.

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

(38) 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?

(39) Answer:

(40) It is the duty of the Länder to take the final decisions according to Article 4 (4) of Directive 92/43. The Länder are very much aware of the protection obligations arising already from the notification of sites. A good part of the notified sites had been put under protection under traditional national nature protection law even before the EC-directive 92/43 had to be transformed. For the considerable rest of the notified sites, final decisions still have to be taken in the future.

(41) 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?

(42) Answer:

(43) According to § 33 (2) of the German Federal Nature Protection Act: "The Länder declare those areas which have been included in the list of areas of Community significance according to Art. 4 sec.4 Directive 92/43/EEC and the European Bird Protection Areas as protected elements of nature and landscape according to § 22 sec. 2." A site which shall be protected as a Natura 2000 site will be therefore designated using one of the traditional categories of protected sites, such as nature protection area, national park, biosphere reserve, or landscape protection area. The level of protection varies with the type of protected area nature protection sites setting up the strictest and landscape sites the most lenient regimes. Some Länder, e.g. North Rhine-Westphalia, normally choose the strictest category, others, take the one which satisfies the minimum protection required. In any case specific protection requirements following from Natura 2000 rules will be superimposed to what the law already provides for the respective protection category.

(44) The designation as a protected area is made by externally binding regulation, in cases of national parks sometimes also by a parliamentary law of the Land. The regulations will also contain those parts of the maintenance and development plan which shall be made binding upon concerned private actors.

(45) Just as a reminder: the regime to be applied to projects and plans potentially impairing Natura 2000 sites (Art. 6 para 3 and 4 Dir 92/43) is not part of the regulation designating the protective regime but follows directly from the relevant Nature Protection Acts.

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

(47) Answer:

(48) State of Complaints; ECJ judgements

(49) In planning procedures concerning valuable sites environmental associations and environmentalists very often argue that the Natura 2000 requirements of the Bird and Habitat Directives had not been respected. In many cases they also file complaints at the Commission asking for instigating a treaty violation procedure. We have no overall information how often this has been done, and how many complaints are pending. In the case of Brandenburg, for instance, there were, in September 2002, about 10 cases pending in which the Commission had taken the first step according to Art. 226 EC, i.e. asking the Bund for comment on the complaint.

(50) The ECJ has issued 2 judgements on German violations of the Natura 2000 scheme. In the first decision (judgement of 11 Dec. 1997, Case C 83/97) the Court determined that Germany had failed to adopt the necessary laws and administrative provisions for transposing the relevant EC Directives into national law. In the second decision (judgement of 11 Sept. 2001, Case C-71/99) the Court proclaimed that Germany had failed to submit to the Commission the lists required by Art. 4 Dir. 79/409 and Art. 4 Dir. 92/43.

(51) As for the legislation Germany has meanwhile fulfilled its duties. As for the notification of candidate areas Germany did not immediately follow suit to the judgement. The Commission therefore informed Germany that they were considering to ask the ECJ for imposing a fine on Germany. In addition the Commission announced that regions with sites qualifying as SPAs should not receive financial aid from the structural funds as long as the submission of candidate areas was not complete.

(52) This caused the authorities to speed up the procedure. In spring 2002 Germany has finally submitted a list which was deemed complete. However, at meetings under Art. 4 sec. 2 Dir. 92/43 it was determined that more sites will have to be nominated. This let to a final round of notifications in late 2004 and in spring 2005.

(53) As mentioned above, the President of the Court of First Instance refused to take preliminary measures protecting the interests of a number of landowners in

North Rhine-Westphalia. Their land could therefore be listed by the Commission as sites of Community importance according to Article 4 (2, 3) of Directive 92/43.

(54) As to procedures under Art. 234 it seems that there is no one single case where a German court has asked the ECJ for a preliminary ruling concerning the Natura 2000 regime. In general German courts have been very reticent to use this procedure, although they have developed quite innovative doctrinal concepts especially related to the direct effect of the Habitat Directive.

(55) Decisions of national courts

(56) Identification of areas

(57) The directives have in many cases been referred to and applied by German courts. In relation to the obligation to compile and submit a list of candidate SACs the German Federal Administrative Court (Bundesverwaltungsgericht – BVerwG) resounding jurisprudence of the ECJ has repeatedly held that the listing of sites for submission to the Commission must be based on scientific considerations. Social and economic considerations are to be neglected at this stage. The BVerwG has however added that the science-based judgement involves a certain margin of assessment with regard to the criteria proposed by Annex III Dir. 92/43, such as, for instance, the representativity of a local habitat for the distribution of the habitat in the wider country (BVerwG, judgement of 26 Oct. 2000, Case 4 A 18/99, Rep. 112, 140 et seq.). The case concerned the construction of a highway (the A 70) in the Land Thueringen. The plaintiff, a farmer part of whose land was to be expropriated for the project claimed that the project would destroy a valuable habitat. Interpreting the relevant law the Court says on p. 156:

(58) „The scope of a site is determined by the scientific criteria proposed by Annex III Habitat Directive. Political or economical considerations and any other considerations of expediency have no place. If it is determined by legislation that in a certain region there is need for a transport infrastructure project this cannot be of relevance for the geographical delineation of a site. The Directive concedes the MS a margin of discretion only insofar as the catalogue of criteria

contained in Annex III allows for different scientific assessments in the individual case. However, if from the scientific perspective there is no doubt that a site fulfils the criteria, the site imposes itself to be listed, and indeed must be listed."

(59) Looking at the factual situation the Court however found no evidence that habitats protected by Directive 92/43 were affected. The plaintiff had argued that the responsible administrative authority had not taken a close enough look at the facts. For instance, according to the plaintiff of the 100 red list birds affected by the project the authority had only mentioned 49. The Court reacted saying that although the facts must thoroughly be considered the authority did not have to go into every detail and produce a full account of every species to be found in the area:

(60) „The extension of research depends on the circumstances of the geographical area. From the scientific perspective a study going into any detail may prove superfluous. If certain species of fauna or flora are an indicator for the quality of the biotope and the living conditions of more species, or if certain structures of vegetation allow to extrapolate to the incidence of certain flora and fauna, it may be sufficient to only investigate the representative data." (p. 159)

(61) In other cases the BVerwG has avoided to be conclusive on the facts but assumed that there was sufficient proof for a potential SAC. It nevertheless rejected the complaint also in these cases because it held either that the project at stake did not involve a significant deterioration or that there was a compelling public interest justifying the impairment.

(62) Cases concerning the legal protection of landowners

(63) As mentioned above, the German courts have developed a restrictive line of jurisprudence concerning applications of landowners, who tried to stop the notification of their land as sites of Community interest. None of the applications have been held admissible (see VG Oldenburg, 20.1.2000, 1 B 4195/99, NVwZ RR 2002, 25; VG Lüneburg, 6.4.2000, 7 B 7/00, NVwZ 2001, 590; VG Düsseldorf, 21.12.2000, 4 K 6745/99, NVwZ 2001, 591; VG Frankfurt

a.M. 2.3.2001, NVwZ 2001, 1188; VGH Kassel, 20.3.2001, NVwZ 2001, 1178; OVG Lüneburg, NuR 2000, 298 und NuR 2000, 711; VG Gießen, NuR 2000, 712).

(64) 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?

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

(66) Answer:

(67) Once the complete list of protectable sites has been accepted by the Commission the question will arise whether even further areas should be put under a special protection regime (see Art. 4 section 1 Sentence 4 Dir. 92/43). The question of direct effect will then arise anew. No court or administrative case law has been produced so far but the question has been discussed in academic journals [*G. Winter*, Die Dogmatik der Direktwirkung von EG-Richtlinien und ihre Bedeutung für das EG-Naturschutzrecht, in: Zeitschrift für Umweltrecht 2002, 313.]

(68) 2. Management of Natura 2000 sites

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

(70) does national law require management plans for the sites - are they specifically designate for the site or integrated to others plans (which?)

(71) which conservations measures - statutory, administrative or contractual measures – where chosen in your country? Which is the main form?

(72) what appropriate steps are taken to avoid deterioration/disturbances (art.6(2) Dir 92/43)

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

(74) Answer:

(75) Transposition of Art. 6.1 Directive 92/43

(76) Art. 6.1 was transposed into both the Federal Framework Law on Nature Protection (BNatSchG) and the Länder Laws on Nature Protection. The Länder although having a discretionary margin to find there own solutions have not much departed from the approach proposed by the Bund.

(77) see § 33 Federal Nature Protection Act (BNatSchG)

....

The Länder declare those areas which have been included in the list of areas of Community significance according to Art. 4 sec.4 Directive 92/43/EEC and the European Bird Protection Areas as protected elements of nature and landscape according to § 22 sec. 2 (which contains the types of protected areas)

The protection declaration shall set out the protection purpose (Schutzzweck) in accordance with the conservation objectives (Erhaltungsziele) for the site concerned, as well as the necessary site boundary definitions. The declaration shall also set out whether any priority biotopes or priority species are to be protected. It shall be ensured through appropriate orders and prohibitions as well as management and development measures that the requirements of Art. 6 of Council Directive 92/43/EEC are met. More stringent or more extensive protection provisions shall remain unaffected.

The establishment of a protected area is dispensable insofar as equivalent protection is provided for the area through legal provisions, administrative guidelines, the powers of a public or pro bono entity, or through a contractual agreement.

...

(78) § 10 para. 1 No. 10 BNatSchG defines „protection purpose“ as „the protection purpose which follows from legal provisions on protected areas“. In § 10 para. 1

No. 9 BNatSchG „conservation objectives“ are defined as „conservation or restoration of a favorable conservation status“

> of the habitats and species listed in Annexes I and II Dir 92/43 existing in a site of Community importance and
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> of the species listed in Annex I and Art. 4 para 2 Dir 79/409 existing in European Bird Protection Site.

(79) The federal framework was transposed into Länder provisions, as, for example in § 34 b Nature Protection Act (NSchG) of Lower Saxony (almost identical: Art. 13b NSchG Bavaria, § 48a Landscape Act (LG) North Rhine-Westphalia and others):

(80) In the declaration as a SPA are to be determined in correspondence with the conservation objectives: the protection purpose as well as orders, prohibitions and maintenance and development measures which implement the requirements of Art. 6 Directive 92/43/EC. In the declaration it shall be set out what prioritary biotopes and what prioritary species exist in the protected area.

(81) Other than Art. 6 para 1 Dir 92/43 the cited German provisions do not mention „management plans“ as a special instrument of administering Natura 2000 sites. Instead, they speak of „appropriate orders and prohibitions as well as maintenance and development measures“. However, according to traditional practice, this implies that the responsible agency have discretion and are used to prepare the necessary measures by elaborating a so-called maintenance and development plan (Pflege- und Entwicklungsplan).

(82) Modalities of Management

(83) Consideration of biogeographical orientations

(84) Whilst expert reports of European importance such as the IBA-list was widely used in the process of identification and designation of Natura 2000 sites the elaboration of management plans is based rather on national advice. Some of this dates back to pre-Natura 2000 times or was elaborated independently from Natura 2000 considerations, for the protection of valuable sites (habitats as well

as areas hosting certain species) has since long been a well-known administrative task, including sites which later became protectable sites under Dir 79/409 and Dir 92/43.

(85) There is a great number of administrative soft law instruments, mostly administrative guidelines, but also public-private covenants, exposing general rules on the management of various valuable sites. These instruments range from establishing substantial conservation objectives to setting out a methodology of how management plans shall be elaborated, be it technically, be it in terms of the involvement of stake-holders. They are normally focussed on the specific types of sites provided by traditional nature protection law. The more recent ones also refer to Natura 2000 sites, addressing special demands required by this regime. Some such instruments are exclusively committed to selected Natura 2000 sites.

(86) An example of a more substantial instrument is the so-called Warburg Covenant which was concluded by the competent authorities and forestry associations of North Rhine-Westphalia on the conservation of valuable forest habitats. This non-binding covenant sets out, for instance, that deciduous forest may not be transformed into coniferous forest, that a certain percentage of old trees shall be preserved in deciduous forests, that slash cutting is prohibited, etc. Another example of substantial content is the Federal Administrative Guidelines for the protection of wet greenlands.

(87) An example of a more methodological instrument is an administrative instruction promulgated by the Ministry for the Environment of North Rhine-Westphalia in 2002 on objectives and methodologies of managing forested areas [Ministerium für Umwelt und Naturschutz, Landwirtschaft und Verbraucherschutz, Runderlass Umsetzung der FFH-RL und VogelschutzRL im Wald, Dec. 6, 2002]. A similar but more technical „Working Instruction“ (Arbeitsanweisung) was elaborated by the Bavarian Land Agency for Forestry in 2003 [Bayerische Landesanstalt für Wald und Forstwirtschaft, Arbeitsanweisung zur Fertigung von Managementplänen für Waldflächen in Natura 2000-Gebieten, July 2003].

(88) In legal terms such administrative guidelines oblige administrative agencies to follow them but do not establish rights and duties for citizens.

(89) Specific management plans

1. Denomination: The traditional instrument used to concretely set out the objectives and measures to be taken for a specific site is called maintenance and development plan (Pflege- und Entwicklungsplan). In many of the sites declared as Bird Protection Areas or submitted as Natura 2000 sites such plans had already existed under the previous national nature protection law. They are gradually being revised to be adapted to additional requirements the relevant Directives impose. It may be that the terminology will be changed in this process and the European „management plan“ adopted.
2. Competent authority: The competent authority is in principle the lower nature protection agencies, i.e. agencies located at the level of the district (Landkreis). The task is regarded as one of (decentralised) state administration, not of communal self-adminstration. This implies that the administrative agency, not the elected body of the district is competent to decide. In some Länder higher authorities (forest or other directorates at the intermediate level, the Ministry or specialised Nature Protection Agencies at the ministerial level) may be competent, in particular where the site is part of a larger protected area like, e.g. a national park. For instance, in Lower Saxony a special agency was established for the National Park Lower Saxon Wadden Sea which is also a Natura 2000 site.

3. Area of application: There are all kinds of cases, maintenance plans for a part or the entire SPA or for SPAs grouped together.

4. Information of the public: There is no legal rule on the publication of maintenance and development plans. Being often very voluminous (they contain an analysis of the state of nature in the area with many maps, lists, etc.) they normally do not exist but in a few copies which are accessible under environmental information laws but not actively

published. Those parts which are included in more formal acts (like landscape plans, zoning plans, regulations, individual decisions, or contracts) are published according to the legal provisions concerning these individual acts.

5. Procedure: There is no legislation on the procedure of elaborating a maintenance plan, be this made before or after the qualification of a site as Natura 2000 site (this is different, however, with regard to the procedure of selection and designation of the site as such). The practice nowadays tends to a broad involvement of other administrative agencies and private stakeholders.

6. Participation of the public: As noted above stakeholders are involved, even at a relatively early phase. The public at large is not invited as such. It is however represented by environmental, agricultural and other associations.

7. Content: There is no legal provision about the content of maintenance plans. In general the plans include

    a) a description of the state of nature at the site, concentrating on types of biotopes and species

    b) an analysis of the kinds of land-use, such as agriculture, tourism, transport, settlements, focussing on the pressure on the natural conditions

    c) an assessment of nature protections measures taken thus far

    d) an outline of the basic orientations of nature protection as related to the site, including an analysis of the general character and potential of the site

    e) a determination of concrete nature conservation objectives

    f) a determination of concrete measures

8. For instance, in the Maintenance and Development Plan concerning the Borgfelder Wuemmewiesen, a Natura 2000 wet greenland in the vicinity of Bremen, the following measures were determined:

    a) renaturation of running waters: removal of summer dikes, removal of certain drainage devices, removal of limnological barriers between the river and the ditches, protection of the river eco system against extreme tides

    b) water management

    c) maintenance of ditches

    d) management of greenland (grass cutting, etc.)

    e) measures to guide visitors

    f) planting, development of coppice

    g) acquisition of property

    h) lease contracts

    i) compensation payments

    j) transposition into planning rules

    k) monitoring

9. Legal value: Maintenance and development plans only have inner administrative binding effect. They do not constitute rights and duties for private actors. They do also not provide sanctions, neither administrative nor criminal, in cases of violation.

    However, those measures which shall be made binding will be included in the regulation designating a site as protected area. This is particularly the case with prohibitions and orders which may follow from the analysis and assessment of the site contained in the plan. For instance, the

prohibition to transform a deciduous forest into a coniferous forest will appear in the regulation.

(90) As for the active measures which have to be undertaken (e.g. the removal of the summer dike) they are to be implemented by the authority itself. But a contract may be concluded with a private actor (e.g. the concerned farmer) that he takes this on himself for some kind of remuneration.

(91) One can assume that maintenance and development plans exist for every nature protection area, (i. e. 2,8 % of the German territory), but not for all of the other types of protection (landscape protection areas, national parks, etc.) which cover a much higher percentage of the territory.

(92) Integration with other management plans

(93) German nature protection legislation does provide a special planning instrument used for all kinds of „green" areas, i.e. the so-called landscape-planning. Landscape plans shall be elaborated at 3 levels: for the entire Land, for sub-regions, and for local areas. Very much like the maintenance and development plans they contain an indepth description of the situation and a determination of measures to be taken. Whilst the former only concern protected areas, landscape plans concern any green area, even in populated settlements. They are sectoral plans stressing the demands of nature preservation. With that they inform the integrated land-use plans which also exist at the three levels mentioned above. The demands of nature preservation as laid down in a landscape plan may be relativised („weighed away") in an integrated plan.

(94) § 14 para 1 No 4 d) BNatSchG says that landscape plans shall also set out requirements for the establishment and protection of Natura 2000 sites. Such plans can expressly be elaborated for a Natura 2000 site, or they may cover a broader geographical area embracing a Natura 2000 site.

(95) In relation to valuable sites including Natura 2000 sites landscape plans often overlap with maintenance and development plans. Sometimes they come earlier preparing recommendations for the designation of a site as a protected area (including as a Natura 2000 site). In that case the maintenance and development

plan if elaborated at all will draw on the analysis and recommendations of the landscape plan. In other cases the designation of a site and the elaboration of a maintenance and development plan will come first and the landscape plan if made at all will draw on this plan.

(96) A similar practice is in use concerning other sectoral plans like water management plans, drinking water protection plans, waste disposal plans, etc.

(97) Neither landscape plans nor management and development plans have external binding effect [In some Länder they can however be endowed with binding effect. In that case they serve as integrated plans for green areas].

(98) Regulatory measures

(99) see the explanations given above at number (43).

(100) Administrative measures

(101) The competent administrative agency is according to the Länder Nature Protection Acts empowered to enter the premises of concerned private actors in order to check if the rules laid down in the regulation designating the site as a protected area were respected (e.g. § 62 NatSchG of Lower Saxony).

(102) In case of non-respect the administrative agency is empowered to

1. once more specify by administrative act what he has to do or in case of damage order restoration (e.g. § 63 NatSchG of Lower Saxony)

2. apply measures of enforcement of administrative acts (e.g. substitute action, and even physical force) according to the general laws

3. impose a fine if the activity or omission of the private actor has caused a significant impairment of the Natura 2000 site (e.g. § 64 NatSchG of Lower Saxony)

(103) Contractual measures

(104) The Nature Protection Acts provide for four types of agreements:

1. Agreements replacing a regulation designating a protected area. Such agreement may also be concluded as a substitute for the designation of a Natura 2000 site (see § 33 para 4 BNatSchG). We wonder whether this is compatible with Art. 4 para 4 Dir 92/43.

2. Agreements implementing a regulation designating a protected area.

3. Agreements delegating certain supervisory functions to private associations, as e.g. an environmental protection association.

4. In addition, sometimes agreements of a general nature are concluded concerning appropriate management of certain categories of habitat, such as the Warburg Agreement mentioned earlier.

(105) The latter kind of agreement has become very popular, especially with regard to active maintenance and development measures which as mentioned above cannot be imposed on private actors. The Länder have developed model contracts for this purpose.

(106) Nature protection agreements are considered as administrative contracts.

(107) Parties to the contract can be administrative agencies, private associations, and individual persons.

(108) The contract normally does not provide penalties. Instead the administrative agency reserves the right to fall back to its legal powers and take unilateral measures.

(109) Competent courts in case of litigation are the administrative courts.

(110) Financial measures

(111) It is to be distinguished between

1. compensation for the quasi-expropriation of land due to use restrictions excluding a profitable exploitation of the land (very rare in practice)

2. compensation in cases of „hardship“ (Erschwernis) due to losses from restrictions

3. subsidies inciting private actors to do more than is legally required

(112) Some Länder have set up subsidy programmes for renaturation of sites. We have no exact figures about this.

(113) 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)?

(114) Answer:

(115) Article 2 Amendment of the Federal Nature Conservation Act (Protection of ecologically sensitive areas) has regulated the use and handling of GMOs in Natura 2000 areas. The new § 34a BNatSchG regulates the use and handling of GMOs in Natura 2000 areas. If a significant effect of GMOs on a SAC or SPA is possible, § 34 (1) and (2) BNatSchG applies. According to the reasons given by the lawmaker, "the Amendment contains special provisions for the protection of ecologically especially sensitive areas which form part of the "Natura 2000" network. The use and handling of GMOs in such areas will in future only be allowed after notification to the local nature conservation authority prior to the beginning of use. The nature conservation authority can prohibit such use if a material negative effect on the area is deemed likely."

(116) 3. Appropriate assessment' and authorisation of plans and projects

(117) Article 6 para 3 and 4 Dir 92/43

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

(119) Answer:

(120) Article 6(3) and (4) Dir 92/43 was transposed in Germany by §§ 34 - 36 BNatSchG:

„Article 34

Impact Assessment, Inadmissible Projects, Exemptions

(1) Before approving or carrying out a project, its compatibility with the conservation objectives (Erhaltungsziele) of a site of Community importance or a European bird sanctuary shall be assessed. In the case of protected areas pursuant to Article 22 paragraph 1, the compatibility criteria shall derive from the protection purpose (Schutzzweck) and the provisions laid down in this context.

(2) If the assessment shows that the project may give rise to significant adverse effects on a site referred to in paragraph 1 above, affecting the components of the site that are of a critical interest for relevant conservation objectives (Erhaltungsziele) or the protection purpose (Schutzzweck) concerned, the project shall be deemed inadmissible.

(3) Any project may only be approved or carried out in derogation of paragraph 2 above

1. if this project is necessary for imperative reasons of overriding public interest, including those of a social or economic nature, and

2. if there are no other reasonable* alternatives for achieving the project's purpose at a different location without any or with less serious adverse effects.

(4) If the site affected by the project contains priority biotopes or hosts priority species, the only imperative reasons of overriding public interest eligible are reasons relating to human health, public safety – including national defence and protection of the civilian population –, or the project's beneficial consequences of primary importance for the environment. Other reasons within the meaning of (* Translator's note: German text: 'zumutbar') paragraph 3 no 1 are only eligible for consideration if the competent authority has obtained a relevant prior opinion from the EU Commission, via the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety.

(5) If a project under paragraph 3 above, also in conjunction with paragraph 4 above, is to be approved or carried out, the necessary measures to safeguard coherence of the "Natura 2000" European ecological network shall be provided for. The competent authority shall inform the EU Commission, via the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, of the measures taken.

Article 35

Plans

(1) Article 34 shall be applicable mutatis mutandis in connection with

1. the determination of routes (Linienbestimmungen) pursuant to Article 16 of the Federal Highways Act (Bundesfernstraßengesetz), Article 13 of the Federal Waterways Act (Bundeswasserstraßengesetz), or Article 2 paragraph 1 of the Act on Acceleration of Traffic Infrastructure Planning (Verkehrswegeplanungsbeschleunigungsgesetz), as well as

2. other plans; in the case of spatial/ regional planning schemes (Raumordnungspläne) as referred to in Article 3 no 7 of the Federal Regional Planning Act (Raumordnungsgesetz): with the exception of Article 34 paragraph 1, first sentence.

(2) Article 34 paragraph 1, second sentence and paragraphs 2 to 5 shall be applicable mutatis mutandis to 'building master plans' (Bauleitpläne) and municipal bye-laws (Satzungen) under Article 34 paragraph 4, first sentence no 3 of the Federal Building Code (Baugesetzbuch).

Article 36

Impacts from Emissions

If a facility subject to approval under the Federal Immission Control Act is expected to emanate emissions that, also in combination with other facilities or measures, will in the area affected by the facility have significant adverse impacts on a Site of Community Importance or on a European Bird Sanctuary, affecting components of this site that are of a critical interest for the respective conservation objectives (Erhaltungsziele) or the

protection purpose (Schutzzweck), and if these adverse impacts cannot be compensated for in accordance with Article 19 paragraph 2, this shall be deemed to preclude the approval of the facility unless the prerequisites specified in Article 34 paragraph 3 in conjunction with paragraph 4 have been met. Article 34 paragraphs 1 and 5 shall apply mutatis mutandis. Relevant decisions shall be made in consultation with the authorities responsible for nature conservation and landscape management."

(121) 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?

(122) Answer:

(123) Direct effect of the protective regime

(124) The German Federal Administrative Court has extended the temporary protection regime to cases where a site qualifying as a protectable habitat according to the criteria of Annex III Dir. 92/43 was not notified by the authorities. In such so-called „potential FFH areas", the Court ruled no significant impairment is allowed which may prevent the later designation of the area as a Natura 2000 habitat. In developing this doctrine the Court referred to the judgement of the ECJ in the case of Inter-Environnement Wallonie (dated 18 Dec. 1997, Case C-129/96) where the ECJ said that a directive has a kind of advance-significance suppressing activities which may hinder the full realisation of its provisions after its full transposition into national law (see BVerwG, judgement of 19. May 1998, Case 4 A 9/97, Rep. 107, p. 1 et seq., at p. 22). The protection requirements in such cases are somewhat less strict than in the normal case, but *in praxi* the German courts nevertheless more or less apply the criteria established for judging projects in the normal case, i.e. the requirement that significant impairment is only allowed if the project is necessary in the public interest and no alternative solution is possible. However, no active management duties are assumed.

(125) Active temporary management

(126) The BNatSchG only requires active temporary management with regard to those sites which – in the case of habitats under Dir. 92/43 – have been introduced in the Natura 2000 list but not yet submitted to a detailed protection regulation, and which – in the case of bird habitats under Dir. 79/409 – qualify as EC bird protection areas without having been either notified or put under detailed protection regulation.

(127) This legal situation has been left untouched by case law of the judicature.

(128) Protective temporary management

(129) Like in the case of active management the BNatSchG only requires protective temporary management with regard to those sites which – in the case of habitats under Dir. 92/43 – have been introduced in the Natura 2000 list but not yet submitted to a detailed protection regulation, and which – in the case of bird habitats under Dir. 79/409 – qualify as EC bird protection areas without having been either notified or put under detailed protection regulation.

(130) This legal situation has been qualified by case law of the BVerwG. See sub.

(131) Court decisions on temporary protection duties

(132) Directive 79/409

(133) The BVerwG has accepted direct effect of the protection requirements of Art. 4 sec. 4 Dir. 79/409 in cases where a site qualifying for special protection was neither protected according to national regulations nor notified to the Commission as protected (so-called factual bird protection areas) (see BVerwG judgement of 19 May 1998, Case 4 A 9.97, Rep. 107, p. 1 et seq., at p. 18 et seq.

(134) Following the ECJ judgement in the Les Corbières case (judgement of 7 Dec. 2000, Case C-374/98) the Court found that the rather strict criteria developed by the ECJ in the Leybucht case (judgement of 11 July 1996, Case C-44/95) are to be applied, i.e. not the somewhat weaker criteria of Art. 6 sec. 4 Dir. 92/43. This means that no public interest of an economical or social nature can justify a project involving significant impairment of a bird protection area.

(135) Applying this principle the courts have, however, in most cases either denied that a project had a significant impact on the area, or accepted a public interest in the project as being prioritary. The judgement of the Verwaltungsgericht Oldenburg in the Ems river dam case may serve as an example. The dam was designed to protect against high tides from the sea as well as to make the Ems water body rise in order to allow ships constructed in Papenburg 40 km upstream to float into the deep sea. The dam was to be constructed right into a bird protection area, but the court said that neither the loss of ground for the building nor the cutting of the site into 2 pieces was a significant impairment. It asked for proof that the birds living on the site would be affected but found no evidence in this regard. (judgement of 16 May 2001, Case 1 A 3558/98; see also OVG Lüneburg, 1.12.2004, 7 LB 44/02 - Emssperrwerk).

(136) Directive 92/43

(137) The BVerwG has developed a kind of direct effect of the protection regime required by Art. 4 sec. 3 and 4 Dir. 92/43. The basic idea is that the authorities have to see that the area qualifying for habitat protection is not impaired in a measure which excludes the final decision about its inclusion into the NATURA 2000 network. Although the Court constructs this regime of „potential FFH areas“ to be somewhat less strict for designated or even not designated areas than for already finalised Natura 2000 SICs it more or less refers to the criteria established by Art. 4 sec. 3 and 4 Dir. 92/43 in such cases.

(138) For instance the BVerwG held that the abatement of noise and accident caused by a city throughway was sufficient public interest to build a new road by-passing the city involving the impairment of a prioritary habitat qualifying for a SIC (BVerwG, judgement of 27 Jan. 2000, Case 4 C 2.99, Rep. 110, 302, 312 et seq.). The Court however developed some requirements for the proof of the danger to public health and refused to accept mere postulations in this respect.

(139) In regard to what kind of *alternatives* must be checked the BVerwG only requires the checking of geographic alternatives. For instance, the relocation of the planned route of a road construction would have to be considered but not the choice of another mode of transport. An alternative solution is also not to be considered if it causes unproportionally high expenses. For instance, the

argument sometimes promoted by objectors against road construction plans that a valuable site should be tunnelled was rejected on the ground that this caused costs unproportional in relation to the loss of habitat. The courts did however not venture into calculating the value of this loss (see BVerwG judgement of 27 Jan. 2000, Case 4 C 2.99, p. 302 et seq., at p. 311).

(140) what is the factual information on plans and projects affecting Natura 2000 candidates or determined sites

(141) Answer:

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

(143) PROJECTS

(144) 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)

(145) Answer:

(146) No, the appropriate assessment for the purposes of Article 6 (3) is regarded as independent (but largely similar) to the assessment under the EIA Directive. Where the project requires an authorisation according to other norms of environmental law, the FFH-assessment is carried out in the framework of this authorisation procedure. It is therefore possible, that a FFH-assessment and an EIA-assessment are carried out at the same time. No public participation is required for the FHH-assessment alone.

(147) 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)

(148) Answer:

(149) The appropriate assessment is confined to projects in the meaning of § 10(1) no. 11 lit. a) and b) BNatschG:

"projects means

a) projects and measures within a Site of Community Importance or within a European Bird Sanctuary, that require a decision taken by an authority, notification to an authority or are carried out by an authority;

b) interventions in nature and landscape within the meaning of Article 18 that require a decision taken by an authority, notification to an authority or are carried out by an authority (…)"

(150) The wording of § 10 (1) BNatSchG differs from the wording of Annex I and II EIA Directive. It does not list single typs of projects like the EIA Directive but is formulated in a more general way. This means that also projects that are not listed in Annex I and II EIA Directive can be considered. The definition of a "project" as one that requires authorisation under national law can be regarded as problematic because it limits the potential scope of the FFH-assessments in a way that is not necessarily in conformity with EU-law.

(151) is the appropriate assessment confined only to 'development consent" under EIA Directive or also to other permits (for example: IPPC permit)

(152) Answer:

(153) According to §§ 36, 34 and 10 (1) Nr. 11c BNatSchG an assessment has to be carried out also in those cases, where the potential harm for the protected site may be the result of activities for which a permit under the regime for the control of air (the Immissionsschutzgesetz) or water (the Wasserhaushaltsgesetz) pollution has to be issued.

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

(155) ***Answer:***

(156) Under § 34 BNatSchG, the assessment concerning the facts and the area is limited to the conservation objectives.

(157) *has there been any discussions concerning the possible effects on the national legal scheme of the Waddenzee[1] case; Draggagi case*

(158) ***Answer:***

(159) Yes. The Dragaggi case has provoked a renewed discussion in Germany about the protection of the so called "potential SACs". The interpretation of the significant passages of the decision diverts exceedingly in the German literature, as well as the reaction of German courts. The Bavarian Verwaltungsgerichtshof asked the EC to explain its remarks concerning the protection of notified but not yet listed areas, whereas the Oberverwaltungsgericht Schleswig inclines to understand these remarks as a comprehending prohibition of deterioration. The Verwaltungsgerichtshof Kassel decided that at least when the standard of protection of Article 6 (3) and (4) Habitat Directive is adhered, the premises of the EC are kept. In the meantime the Bundesverwaltungsgericht has followed this opinion.

(160) *PLANS*

(161) *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?*

(162) ***Answer:***

(163) Plans according to § 35 BNatSchG are interpreted as plans and decisions from procedures, that have to be complied with or taken into account in official decisions, if they are likely, either individually or in combination with other

[1] Gemeint sein dürfte das Muschelfischerurteil, EuGH, Rs. C- 127/02, 7.9.2004,

plans or projects, to have a significant effect on a Site of Community Importance or on a European Bird Sanctuary, with the exception of plans which are designed directly for the administration of Sites of Community Importance or European Bird Sanctuaries, § 10 (1) no. 12 BNatSchG,

(164) Plans according to the SEA-Directive shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:

> which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and
>
> which are required by legislative, regulatory or administrative provisions, Article 2 lit. a) SEA Directive.

(165) The scope of the SEA Directive is according to Article 3 the following:

"Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,

1. which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or

2. which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC."

(166) The scope of § 35 BNatSchG, the transposition of Article 6(3) and (4) Habitat Directive, is the following:

The appropriate assessment according to § 34 BNatSchG has only to take place, if a plan either individually or in combination with other plans or projects is likely to have a significant effect on the management of a site (SAC or SPA). Plans are the determination routes (Linienbestimmungen) according to § 35 no.

1 and 2 BNatSchG as well as other plans and decisions in preliminary procedures that are to be considered in magisterial decisions. This means that § 35 BNatSchG only includes plans and measures that need an administrative decision for their realisation. If the procedure of the planning takes place in several steps (mehrstufiges Planungsverfahren), the implementation of the appropriate assessment becomes necessary, as soon as a significant effect on a SAC or SPA is possible.

(167) Determination routes according to § 35 no. 1 BNatSchG are such as §§ 16 FStrG (Federal Highways Act), 13 WaStrG (Federal Waterways Act) and 2 Abs. 1 VerkwPBG (Act on Acceleration of Traffic Infrastructure Planning).

(168) Other plans according to § 35 no.2 BNatSchG are for example regional planning schemes (Raumordnungspläne), § 3 Nr. 7 ROG (Federal Regional Planning Act) and regional planning procedures, § 15 ROG.

(169) 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?

(170) Answer:

(171) It differs from Land to Land who decides whether to agree to the plan, what compensatory measure is to be taken and which legal form is to be chosen. Also the decision making procedure differs from Land to Land.

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

1. *design of impact studies*

2. *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)

(173) Adverse effects are all direct and indirect negative implications on the components of the sites that are caused by any effective factor. The state of the site after the realisation of the plan or project is forecasted and then compared with the state of the site according to the conservation objectives as it would be without the realisation of the project or plan. Every adverse effect that concerns the habitat and species which are the reason for the protection must be classified as a significant effect. The effect is not significant only in the case that the state of the protected habitats does not change or does ameliorate or if the size of the population of the protected species does not diminish.

(174) 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?

(175) Answer:

(176) Imperative reasons of overriding public interest can be such as health, public security or significant positive affects of the project on the environment, but also economic or social reasons. An example for the latter can be found in the decision of the Hamburg authorities and of the Commission to allow the construction of a prolonged runway for the airfield of Airbus Industries in Hamburg. For further case law on the definition of the "overriding public interest" see above numbers (135) and (138).

(177) 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?

(178) Answer:

(179) In principle both a different location and a different construction of the project can be considered as alternatives. However, the German Federal Administrative Court has developed certain limits to the consideration of alternatives that were already mentioned above in number (139).

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

(181) Answer:

(182) There are different views on this point among practioners and legal scholars.

(183) Do „prioritary" species 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?

(184) Answer:

(185) According to § 10 (2) no. 8 BNatSchG priority species means the species of flora and fauna marked with an asterisk (*) in Annex II of Council Directive 92/43/EEC only. This means that German law does not accept the view that also birds can qualify as priority species. In our view Art. 4 para 4 subpara 2 Dir 92/43 could be understood otherwise.

(186) 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?

(187) It seems to be the majority opinion in German literature, that the opinion from the Commission comprehends an assessment of the ecological coefficients that are possibly affected by the project, the significance of the submitted imperative reasons, the compensation of the opposed interests and an assessment of the provided protection measures. The competent authority has therefore to deal with the opinion from the Commission. But for factual reasons it has the opportunity to defy the opinion of the Commission. In that case it has to reveal its reasons for not following the reasoning of the Commission.

(188) 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?

(189) According to Article 61 BNatSchG associations have the right to challenge certain decisions.

"Article 61

Legal Remedies available to Associations

(1) Without having been subject to any violation of its rights, an association recognized in accordance with Article 59 or on the basis of respective provisions of Länder legislation within the framework of Article 60, may lodge a legal remedy in conformity with the Rules of Administrative Courts (Verwaltungsgerichtsordnung) against

1. exemptions from prohibitions and orders relating to the protection of 'nature conservation areas' (Naturschutzgebiete), 'national parks' (Nationalparke) and other protected areas referred to in Article 33 paragraph 2 as well as against

2. decisions of 'plan establishment procedures' (Planfeststellungsbeschlüsse) relating to projects involving intervention in nature and landscape as well as 'plan approvals' (Plangenehmigungen) where the involvement of the general public has been provided for in relevant provisions. The first sentence above shall not apply where the decision on an administrative act referred to therein has been taken on the basis of an Administrative Court decision within the framework of corresponding legal proceedings.

The first sentence above shall not apply where the decision on an administrative act referred to therein has been taken on the basis of an Administrative Court decision within the framework of corresponding legal proceedings.

(2) Legal remedies pursuant to paragraph 1 above are only admissible if the association concerned

1. asserts that the adoption of an administrative act referred to in paragraph 1 first sentence is conflicting with provisions of this Act, legal provisions laid down on the basis of or within the framework of this Act or which continue to be applicable on the basis of or within the framework of this Act, or with any other legal provisions to be complied with/to be taken into consideration when adopting the administrative act concerned and which are at least also intended to serve the interests of nature conservation and landscape management,
2. is affected within the scope of activities set forth in its Articles of Association, to the extent this is covered by the recognition granted, and
3. was entitled to involvement in accordance with Article 58 paragraph 1 nos 2 and 3 or in accordance with respective provisions of Länder legislation within the framework of Article 60 paragraph 2 nos 5 to 6 and has expressed its views on the matter in this context, or, contrary to Article 58 paragraph 1 or to rules and regulations of the respective Federal Land laid down in conformity with Article 60 paragraph 2, was given no opportunity to express its views.

(3) If the association was given the opportunity to express its views within the framework of the respective administrative procedure, the procedure based on a legal remedy lodged by the association shall preclude objections raised which it had failed to put forward in the respective administrative procedure despite the fact that it would have been able to do so on the grounds of the documentation transmitted to it or inspected by it.

(4) If the association was not notified of the administrative act concerned the objection to be raised and the action to be filed must be transmitted within one year from the date the association had knowledge or ought reasonably to have had knowledge of the respective administrative act.

(5) The Federal Länder may also admit legal remedies lodged by associations in other cases where Article 60 paragraph 2 provides for the involvement of relevant associations concerned. The Federal Länder may provide further detail on applicable procedure."

(190) "exemptions from prohibitions and orders relating to the protection of 'nature conservation areas' (Naturschutzgebiete), 'national parks' (Nationalparke) and

other protected areas referred to in Article 33 paragraph 2" include the right to challenge decisions under Article 6 (4) Directive 92/43 because the FFH-sites have to be declared as sites of the mentioned categories.

(191) Besides, in Germany everybody who is affected in his own rights by a decision has the right to challenge it. That is of special relevance for those who are affected in their property rights.

(192) 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?

(193) Is Art. 4 para 4 Dir 92/43 directly applied aa) if the site was notified and listed by the Commission (Dragaggi 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

(194) In case of "potential SPAs", that means if the site was not notified, Article 4(4) Directive 79/409 is directly applied. For more details and for the treatment of "potential SACs", see the remarks on the jurisdiction of the Federal Administrative Court above number (123).

— **Species Protection (only for discussion)**

(195) For reasons of time we will discuss this topic as in terms of EC requirements rather than as in terms of national law. It is recommended that you make yourself familiar with Articles 12 to 16 Dir. 92/43 as they are viewed from the EC and national perspectives. No written report is requested.

— **Financing nature protection (please write a short opinion, if possible)**

(196) Should there be a financial instrument (fund) at EC level for financing conservation measures? Don't we run the risk that then Member States will do something on the condition that there is money coming from Bruxelles?

(197) What about Article 175(5) EC Treaty and Article 8 of Directive 92/43: should these provisions be made operational?

(198) Is it appropriate to delete LIFE (Regulation 1655/2000) and let the Structural Funds intervene instead?

Answer: not ye given

The actual state and the future development of EU nature protection law (topic for final discussion; the written answer is optional)

(199) It is suggested that we come up with an avosetta resolution on certain basic points including e.g.

(200) The results of 26 years of Directive 79/409 and 13 years of Directive 92/43. What has been the evolution of animals and plants in this time? Is it true that despite these measures, nature slowly withdraws from the environment in Member States?

(201) Major deficiencies in the 2 directives: e.g.: does EC law allow for too many possibilities for the balancing of interests and thus the preponderance of exploitation interests?

(202) The main 'troubles' with regard to transposition and applying of the directives?

(203) Is the system of Directives 79/409 and 92/43 enough to protect nature in Europe? Should there be further European legislation (e.g. on landscapes)?

(204) What can be done to improve the situation of nature within the EU and globally?