35 Years of the EU Birds Directive in the Light of the Court Practice of the European Court of Justice and the German Federal Administrative Court

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In 1979 the European Economic Community for the first time adopted provisions of its own on nature conservation and species protection in the form of the Birds Directive 79/409. Since then 35 years have passed. Not only have the Member States worked to implement the directive during this period, but there have also been a large number of court judgments on its application and interpretation. This paper seeks to set out the progress made with interpreting the crucial provisions of the directive and, in particular, to provide an overview of the court practice of the European Court of Justice (ECJ) and the German Federal Administrative Court (BVerwG). It also draws attention to unresolved issues and implementation deficits.

1 Introduction

Despite its new “plumage”, the consolidated Birds Directive 2009/147 is one of the original pillars of European nature conservation law: as long ago as 1979 the European Economic Community, as it was then, first introduced pan-European conservation provisions for European bird species and migratory birds in the shape of Directive 79/409. Since then it has undergone various changes in the course of EU expansion, especially in the Annexes. There has not, however, been any need for fundamental revision. The court practice

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of the ECJ has made an important contribution here. The directive serves the purposes of the Ramsar Convention on Wetlands of International Importance³ (1971), the Bonn Convention on the Conservation of Migratory Species of Wild Animals⁴ (1979) and the Bern Convention on the Conservation of European Wildlife and Natural Habitats⁵ (1979), which was supplemented in 1995 by the Agreement on the Conservation of African-Eurasian Migratory Waterbirds.⁶ In view of the transboundary mobility of birds, bird conservation was predestined for a Community arrangement, which was based on the then new environmental competence of the European Economic Community.

The directive is intended to maintain all naturally occurring species of birds in the wild state in Europe, including migratory species, at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level (Article 2). To this end Member States must preserve, maintain or re-establish a sufficient diversity and area of habitats (Article 3(1)). To protect European bird species the Member States must designate general and special bird protection areas (habitat protection) and introduce prohibitions and provisions on country-wide protection (species protection).

All in all, the Birds Directive has considerably reinforced habitat and species protection in the Member States, although for a long time its legal and practical implementation – the deadline according to Art. 18 Birds Directive 79/409 was June 1981 – was very sluggish in Germany and other Member States. In particular, great implementation problems arose in connection with the designation of special bird protection areas, the relationship to hunting and the admissibility of infrastructure projects. However, complaints that birds enjoy better protection than people⁷ are largely due to the inadequate legal protection of the public from noise and emissions.

2 General Requirements for National Transposition

As a directive, the Birds Directive has to be transposed into national law; administrative guidelines conforming to the directive are not sufficient in