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THE PROTECTION OF WETLANDS AGAINST INFRASTRUCTURE PROJECTS IN THE MEDITERRANEAN

INTERNATIONAL AND EUROPEAN LAW

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RED ALERT SYSTEM

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INTRODUCTION

This document was redacted by a group of students from the **master's degrees in Environmental Law** and **Energy Law** of Aix-Marseille University (2024-2025).

It was requested by the **Mediterranean Alliance for Wetlands (MAW)**, in the context of its Red Alert mechanism, which "aims at identifying threats in specific wetlands, such as infrastructure development, and at negotiating with the organisations from which this threat originates, in order to find a solution to delete it"[1]. The MAW ask to be provided with a **presentation of the legal instruments that may be used at the international and European levels, in order to protect a wetland that is threatened by an infrastructure project**. In particular, this need originated from a Red Alert case that was submitted to the MAW, the "Urdaibai case".

To answer this request, it was decided to produce a **general document**, that could be used for other Red Alert situations, **with a focus on the application to the Urdaibai case when relevant**. The document was redacted according to a step-by-step approach, which allows the reader to focus directly on the relevant section, depending on the stage of the concerned infrastructure project. It is intended as a toolkit that can be transmitted to and used by other associations/NGOs dedicated to the protection of habitats and/or species, and in particular wetlands. Therefore, the authors tried to strike a balance between technical aspects and a "ready-to-use" document, accessible to non-lawyers.

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[1] The original definition is redacted in French and was translated by the authors of this document. For the original text, see page 3 of this document: https://medwet.org/wp-content/uploads/2023/02/DocMWC15-05_Mediterranean-Alliance-for-Wetlands_FR.pdf (in French)

PART 1
Situation 1 – A construction project is being considered within/near a wetland

PART 2
Situation 2 – An environmental impact assessment has been executed

PART 1

Situation 1 - A construction project is being considered within/near a wetland

This first step focuses on a situation in which **a construction project is being considered, but there has been no information released yet, nor any action undertaken indicating that the project has been officially launched**.

In such a case, two aspects must be considered:

- First, information can be requested to the public authority that is planning the project (**I**)
- Second, public authorities must be warned about the potential violation of international and/or EU law (**II**)

I - Requesting information about the project to the public authorities

Adopted in 1998, and entered into force in 2001, the Aarhus international Convention is now the cornerstone of environmental democracy. Its aim is to protect "*t*he right of every person of present and future generations to live in an environment adequate to his or her health and well-being" (article 1). In order of guaranteeing this right, the Convention emphases **three main rights** for members of the public:

- Access to information
- Public participation in decision-making
- Access to justice in environmental matters

Ratified by the European Union and its member countries, the Convention has been **transposed into European law** by two directives and one regulation:

- The 2003/4/CE Directive on the access to the information
- The Regulation 1367/2006 on its application by the institutions and bodies of the EU
- The 2003/35/CE Directive on the public participation in decision-making

Before going into the details of the explanation of the rights, it should be noted that in order to ensure the proper and effective application of its provisions, the Convention imposes a series of **positive obligations on the Parties**. Among these obligations, each Party shall:

- "take the necessary legislative, regulatory and other measures" to implement the provisions of the Convention, including proper enforcement measures
- "endeavour to ensure that officials and authorities assists and provide guidance to the public" in its rights
- "ensure that (...) public authorities, in response to a request for environmental information, make such information available to the public" (article 4 of the Convention; article 3. 1 of the Directive)

A- Rights and limits in terms of access to information

In application of the Convention, the Directive 2003/4 establishes a right of public access to environmental information. This right comes with certain limits, but it is the **general rule**, the limits being the exception (Recital 16).

1) Content of the right of access to environmental information

a. Creditor of the right of access to environmental information

The **public** is the creditor of the right of access to environmental information. In accordance with the Convention and the Directive, the *public* must be understood as "one or more natural or legal persons, and in accordance with national legislation or practice, their associations, organizations or groups" (article 2 point 6 of the Directive).

The applicant **does not have to state any specific interest** in having the environmental information, so any person of the public can be an applicant of any environmental information held by or for public authorities. This principle is enshrined in Convention (article 4§1) and the Directive (recital 8) and is systematically reminded by European since the Ville de Lyon case law (22 of December of 2010, Ville de Lyon, C-524/09, EU:C:2010:822, point 36)

b. Debtor of the right of access to environmental information

Public authorities holding the information are the debtors of the right of access to environmental information. According to the Convention and the Directive (article 2 point 2), the expression *public authority* refers to:

- "(a) government or other public administration, including public advisory bodies, at national, regional or local level;
- (b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and
- (c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b)."

Caution, the Convention and the Directive **allow Parties to exclude bodies or institutions acting in a judicial or legislative capacity**. It is therefore necessary to look at each national transposition, to determine whether or not these authorities are included in the debtor authorities. The European judge strictly interprets this freedom of States.

As an example, concerning a case relating to a construction licence in an Irish county, the European Court of Justice recently confirmed the possibility of refusing access to environmental information when it is held by the registry of a judicial court, since Ireland explicitly excluded its judicial jurisdiction of the status of public authority in its national transposition of the Directive (15 of April of 2021, Friends of the Irish Environment Ltd c/ Commissioner for Environmental Information, C-470/19, EU:C:2021:271, §43). Even though the legal case had been closed.

c. Environmental information

The Convention and the Directive give the public a right of access to certain information: the **environmental information**. Both texts detail the types of information corresponding to environmental information, and the concept is largely interpreted since *environmental information* shall mean "any information in written, visual, aural, electronic or any other material form" concerning numerous listed elements related to the environment (article 2 point 1).

Are thus included in the Directive:

- "(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites (...) and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste (...), affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors (...) as well as measures or activities designates to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measurers and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or through those elements, by any of the matters referred to in (b) and (c)."

d. environmental information access procedure

The Convention and the Directive provide for two ways of access to environmental information: **access by request** and **access by dissemination**.

- With the **access by request procedure**, any applicant can ask the authority holding the environmental information to make it available (article 3 of the Directive). The authority must make the information available (unless exceptions) "as soon as possible, or at the latest within one month after the receipt by the public authority" of the applicant request. If "the volume and the complexity of the information" make the request impossible to respond in one month, a one-month time extension can be taken, leading to a two-month timescale after the receipt of the request by the public authority. The applicant must be informed of any extension and the reasons for it.

- Some environmental information made available and disseminated, without prior request, "by means of computer telecommunication and/or electronic technology": it is the **access by dissemination** (article 7 of the Directive). It shall include at least:

  - *"*(a) texts of international treaties, conventions or agreements, and of Community, national, regional or local legislation, on the environment or relating to it;

  - (b) policies, plans and programmes relating to the environment;

  - (c) progress reports on the implementation of the items referred to in (a) and (b) when prepared or held in electronic form by public authorities.

  - (d) the reports on the state of the environment (...)

  - (e) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment.

  - (f) authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or found (...)

  - (g) environmental impact studies and risk assessments concerning the environmental elements (...)or a reference to the place where the information can be requested or found (...)*."*

Concerning the access by request, public authorities "**may make a charge** for supplying any environmental information", but such charge *"*shall not exceed a reasonable amount". In that case, public authorities shall publish and make available to applicants a schedule of such charges (article 5 of the Directive). On the meaning of "reasonable amount", see the case law Esat Sussex County Council (6 of October of 2015, East Sussex County Council, C-71/14, EU:C:2015:656).

Also, if the authority asked for does not have the requested information in its possession but is aware that it is held by another authority, "it shall, as soon as possible, **transfer the request to that other authority** and inform the applicant accordingly **or inform the applicant of the public authority to which it believes it is possible to apply** for the information requested" (article 4.1a) of the Directive)

APPLICATION TO THE URDAIBAI CASE

In Spain, the *Ley 27/2006, de 18 de julio, por la que se regulan los derechos de acceso a la información, de participación pública y de acceso a la justicia en materia de medio ambiente,* is the one which transposes both of the european directives.

*What is the procedure for **requesting** information ?*

Firstly, public Administrations must draw up lists of public authorities on the basis of the environmental information in their possession, which shall be made publicly accessible. There shall be at least **one unified list of public authorities for each Autonomous Community** (article 5.1.c) of the 27/2006 spanish Law)

→ For the Autonomous Community of the Basque Country, here is the Basque government's transparency portal: https://www.euskadi.eus/gobierno-vasco/transparencia/inicio/

→ Here is the Euskadi environmental Portal, where environmental authorities can be fined: https://www.euskadi.eus/gobierno-vasco/medio-ambiente/

→ Here is the Euskadi Red information red, which centralises environmental information: https://www.euskadi.eus/gobierno-vasco/informacion-ambiental/

→ Here is the specific platform to ask for environmental information:

https://www.euskadi.eus/solicitudes-de-informacion-ambiental/web01-a2inginf/es/

Note that if the authorities are not in possession of the environmental information, they must redirect you to the authorities or institutions that do.

*What type of environmental information is **disseminated** in Spain?*

In application of the Convention and the Directive, Spanish law provides for the systematic dissemination of certain environmental information (article 6 and 7 of the 27/2006 Spanish Law). Updated environmental permits that may have a significant effect on the environment, and environmental impact studies and risk assessments relating to the elements of the environment must be published.

2) *Limits to the right of access to environmental information*

a. General rules for the application of limits

Limits to the right of access to environmental information must respect two main principles:

- First, as mentioned above, the public's right to access environmental information can come with **limits**. However, the Convention and the Directive (recital 16) are very explicit, the *"right to information means that* **the disclosure of information should be the general rule** and that public authorities should be **permitted to refuse** a request for environmental information **in specific and clearly defined cases**.*"* In other words, refusal must be the **exception**.

- Also, on how to deal with limits and since access is the general rule, grounds for refusal "should be interpreted in a **restrictive way**, whereby the public **interest served by disclosure should be weighed against the interest served by the refusal**. The reasons for a refusal should be provided to the applicant within the time limit laid down in this Directive." (Recital 16). This rule of weighing interests is systematically reaffirmed by case law since the leading case of Office of Communications (28 of July of 2011, Office of Communications, C-71/10, EU:C:2011:525, point 22).

It Should be noted that the Convention and the Directive **allow** States to set limits. It is therefore advisable to **check which limits have been introduced in each national law**. In this respect, the limits that Sates have the option of introducing are carefully **circumscribed** by the Convention and the Directive.

b. Content of the limits

Now, to the content of the limits to the right of access to information, they are of a material nature. A first category of limits concerns the **content of the information** requested, while a second category concerns **the effects that the disclosure** of the information would have on certain interests (article 4 of the Directive).

Regarding the **limits on the information requested**, the following cases of refusal may be envisaged:

- "(a) the information requested is not held by or for the public authority to which the request is addressed (...);
- (b) the request is manifestly unreasonable;
- (c) the request is formulated in too general a manner (...);
- (d) the request concerns material in the course of completion or unfinished documents or data;
- (e) the request concerns internal communications, taking into account the public interest served by disclosure"

Concerning **protected interests that may justify a refusal** of access to environmental information, they are the following:

- "(a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law;
- (b) international relations, public security or national defence;
- (c) the course of justice, the ability of any person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;

- (d) the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy;
- (e) intellectual property rights;
- (f) the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for by national or Community law;
- (g) the interests or protection of any person who supplied the information requested on a voluntary basis without being under, or capable of being put under, a legal obligation to do so, unless that person has consented to the release of the information concerned;
- (h) the protection of the environment to which such information relates, such as the location of rare species."

An essential precision is to be made: when the request relates to information on emissions into the environment, Member States may not refuse access to this information by virtue of paragraph 2(a), (d), (f), (g) and (h). Regarding the definition of the notion "emissions into the environment", the case Bayer CropScience and Stichting De Bijenstichting (23 November of 2016, C-442/14 EU:C:2016:890) provides, at paragraph 67, that emissions cover discharges and releases into the environment.

It is common for these limits to be interpreted by the courts, to ensure that they are not used for abusive purposes. It is therefore common for case law to specify the content of these limits. Here are a few case law examples that may help you understand some of the limits:

- On what's an *internal communication*, check the 20 January of 2021, Land Baden-Wurttemberg c/ D.R., C-619/19, EU:C:2021:35 (point 53) case law. Therefore, the term internal communication *"covers all information which circulates within a public authority and which, on the date of the request for access, has not left that authority's internal sphere"*.
- On the difference in the meaning and the relationship between the exceptions relating to *internal communication* and the *confidentiality of the proceedings of public authorities*, check the Right to Know case law (23 of November of 2023, Right to Know, C-84/22, EU:C:2023:910).

*What **exceptions** to the right to access to environmental information for the Urdaibai case ?*

The limits on the right to access to environmental information are the same in Spain as those set out in the European directive.

Generally speaking, in the context of the Red Alert mechanism, the limits on the information requested might be the most frequently used by the authorities to deny access to information. It is therefore very important to ensure that requests for environmental information are formulated precisely, and that they are carried out at the right time, to the right authority. On this point, it is better to prefer requests that are made too early but can be repeated later, rather than late requests.

B- Enforcing the right to information in the environmental field: access to justice

When the **public authority fails to comply with its obligation** to disseminate or provide access to the environmental information (request ignored, rejected, incorrectly processed), **applicants must be able to initiate proceedings to assert their rights**, within free or inexpensive procedures.

Two complementary ways must be available for this purpose (article 6 of the Directive):

- a **reconsideration/review procedure** by the authority refusing access to the information. This procedure must guarantee either the possibility of asking the authority refusing access to an environmental information to reconsider its refusal decision, or the possibility of appealing against its decision before an independent and impartial body established by the law.
- a **reviewed procedure before a court of law** or another independent and impartial body established by law, **whose decision can become final**.

It should be noted that, given that the institutions and bodies of the European Union are required to implement the obligations contained in the Aarhus Convention, the **review procedure against decisions of the institutions of the European Union**, provided for in EU Regulation n°1367/2006, can be very useful in cases of project funding by the European Union. Indeed, if a European institution **refuses to re-examine** a decision, the refusal decision can be **appealed** to the Court of Justice of the European Union **for annulment**. For a recent example, see 6 July, 2023, ClientEarth v. European Investment Bank, ECLI:EU:C:2023:546.

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Concerning to the reviews available under Spanish law, the Article 20 of the *Ley 27/2006* transposing the Directive, states that the administrative reviews available are those provided for in the *Ley 30/1992, del 26 de noviembre, de Regimen Juridico de las Administraciones Publicas y del Procedimiento Administrativo Común*. Also, where applicable, must be chosen the contentious-administrative review provided for in the *Ley 29/1998 del 13 de Julio, eguladora de la Jurisdicción Contencioso-Aministrativa*. The reviews in question should therefore be looked up in these national texts.

IN SHORT

The Aarhus Convention is the major tool allowing Civil Society actors to obtain access to environmental information about projects that might cause harm to the environment. This instrument offers two ways to access environmental information: automatic dissemination for some information, or possible request. Access granted to information is the general rule, and refusal is the exception. However, access is not total since restricted exemptions are provided for to protect specific interests. Yet, the Aarhus system enhance proper remedies to challenge abusive refusals: review procedure by the authority itself or judicial procedure in front of a tribunal.

II - Warning the authorities about the potential violation of international and/or European law

If an infrastructure project is being considered by local, regional or national authorities, and may threaten a wetland one of the first actions that may be undertaken is to warn public authorities that their project may violate international and/or EU law. Thus, the idea is to communicate with the authorities, and if necessary to put pressure on them from a political/diplomatic point of view, before considering any other action, like a judicial one.

Indeed, several treaties and EU directives aim at protecting natural habitats and species, and sometimes specifically wetlands. The following sections will focus first on international conventions (section A), then on European directives (section B).

A-International conventions

According to **article 26 of the Vienna Convention on the Law of Treaties** (also called the *pacta sunt servanda* rule): “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”.

This fundamental rule of international law means that international conventions which aim at protecting natural habitats and species can be used for the protection of wetlands threatened by an infrastructure project, by reminding national authorities of their international commitment.

However, **to invoke the treaties listed below, it must first be made sure that the concerned State is party to the convention.** This means that the State agreed to be bound by the treaty, by signing and ratifying it.

1) *The Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat*

a. General presentation

The ***Convention on Wetlands of International Importance Especially as Waterfowl Habitat***, also called the **Ramsar Convention**, was adopted in 1971 in Ramsar (Iran) and entered into force in 1975.

This convention aims at improving the protection of wetlands located on the contracting parties' territories, and by this means, at offering better protection to waterfowl as well.

Important definitions for the purpose of this convention (art. 1):

- Wetlands: "areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres"
- Waterfowl: "birds ecologically dependent on wetlands"

Another important definition is that of "wise use" of wetlands, which is at the core of the convention. This notion was not defined by the convention itself, but by Recommendation 3.3 of the COP3 (1987): "the wise use of wetlands is their sustainable utilization for the benefit of humankind in a way compatible with the maintenance of the natural properties of the ecosystem".

Since then, the notion of wise use of wetlands has been developed by the COP and other institutions of the Ramsar convention[2], for example in a dedicated handbook.

How does it work?

The protection of wetlands provided for by the treaty relies on the creation of a List of Wetlands of International Importance ("the List"), which includes national wetlands submitted by States parties, on the basis of their "international significance in terms of ecology, botany, zoology, limnology or hydrology" (**art. 2**).

b. Relevance for the Red Alert mechanism

The Ramsar Convention is not drafted in a very binding way. However, several elements can be used in order to oppose a construction project that may threaten a wetland.

[2] See this page from the official website of the Ramsar convention: https://www.ramsar.org/about/our-mission/wise-use-wetlands

§1: Commitment of the States Parties under the Ramsar Convention

According to the aforementioned *pacta sunt servanda* rule, States Parties have agreed to implement the Ramsar Convention. Some provisions may therefore be used to remind public authorities of the State commitment to ensure the preservation of wetlands, and to draw their attention to the risks of seeing the construction project through, whether it be planned within the wetland or in its vicinity.

- **Preamble** (in particular the following parts): "The Contracting Parties, [...] considering the fundamental ecological functions of wetlands as regulators of water régimes and as habitats supporting a characteristic flora and fauna, especially waterfowl; [...] being convinced that wetlands constitute a resource of great economic, cultural, scientific and recreational value, the loss of which would be irreparable"
- **Art. 3**: "The Contracting Parties shall formulate and implement their planning so as to promote the conservation of the wetlands included in the List, and as far as possible the wise use of wetlands in their territory"
- **Art. 4**: "Each Contracting Party shall promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands, whether they are included in the list or not, and provide adequately for their wardening"

It is worth noting that a State may contemplate the possibility of reducing the boundaries of a wetland included in the List (or even deleting it), in order to see a construction project through without violating its commitment under the Ramsar Convention. The Ramsar Convention indeed allows States to modify entries in the List, but this may only be done under certain conditions:

- **Art. 2**: "Any Contracting Party shall have the right to add to the List further wetlands situated within its territory [...] or, because of its urgent national interests, to delete or restrict the boundaries of wetlands already included by it in the List [...].
  Each Contracting Party shall consider its international responsibilities for the conservation, management and wise use of migratory stocks of waterfowl, both when designating entries for the List and when exercising its right to change entries in the List relating to wetlands within its territory".
- **Art. 4**: "Where a Contracting Party in its urgent national interest, deletes or restricts the boundaries of a wetland included in the List, it should as far as possible compensate for any loss of wetland resources, and in particular it should create additional nature reserves for waterfowl and for the protection, either in the same area or elsewhere, of an adequate portion of the original habitat."

APPLICATION TO THE URDAIBAI CASE

Spain ratified the Ramsar Convention in 1982[3], and the Mundaka-Guernika estuary became a Ramsar site in 1993[4].

The Spanish Ministry for Ecological Transition itself underlines the meaning of such a ratification: *"*this treaty is part of our national legal system [...]. When a state accedes to the Ramsar Convention, it undertakes a series of commitments on the conservation and rational use of its wetlands"[5].

The importance of the Mundaka-Guernika estuary is also underlined by the Ramsar Sites Information Service[6], and it must be noted that this information is based on the Ramsar Information Sheet (RIS) provided by Spain itself when it included the area in the List[7].

Spain's commitment to enforce the Ramsar Convention may thus be reminded to national and Basque authorities, in order to prevent the expansion of the Guggenheim Museum at the very border of the Ramsar site, which poses a potential threat to its ecosystem.

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[3] Instrumento de 18 de marzo de 1982 de adhesión de España al Convenio relativo a Humedales de importancia internacional, especialmente como hábitat de aves acuáticas, hecho en Ramsar el 2 de febrero de 1971 (https://www.boe.es/buscar/doc.php?id=BOE-A-1982-21179)

[4] Resolución de 15 de marzo de 1993, de la Subsecretaría, por la que se dispone la publicación del Acuerdo del Consejo de Ministros de 21 de febrero de 1992, por el que se autoriza la inclusión de nueve humedales en la lista del Convenio sobre Humedales de Importancia Internacional, especialmente como hábitat para las aves acuáticas (https://www.boe.es/buscar/doc.php?id=BOE-A-1993-8022)

[5] "*Este tratado internacional forma parte de nuestro ordenamiento jurídico interno* [...]. *Cuando un país se adhiere al Convenio de Ramsar contrae una serie de compromisos de conservación y uso racional de sus humedales"*

The text was translated by the authors of this document, from the official website of the Spanish Ministry for Ecological Transition: https://www.miteco.gob.es/es/biodiversidad/temas/ecosistemas-y-conectividad/conservacion-de-humedales/ch_hum_convenio_ramsar.html (in Spanish)

[6] *"The area is notable for its rich fauna, which includes a diversity of amphibians, reptiles, birds and mammals. Various species of waterbirds use the site for nesting, staging or wintering. Significantly, it is the second most important staging area in Spain for the Dutch breeding population of* Platalea leucorodia*."* (https://rsis.ramsar.org/fr/ris/600)

[7] *"Se trata de una zona muy importante de paso y descanso migratorio. Es, junto con las marismas de Santoña, el humedal más importante del litoral cantábrico y atlántico del norte peninsular como área de reposo y alimentación en las rutas migratorias de la población holandesa de espátulas (Platalea leucorodia)."*

"La ría de Guernica-Mundaca tiene Importancia Nacional desde el punto de vista botánico (Cirujano y col., 1992)" (https://rsis.ramsar.org/RISapp/files/RISrep/ES600_RIS990101.pdf)

§2: Additional elements provided by the Conference of the Parties (COP)

Article 6 of the Ramsar Convention provides for the periodic reunion of States Parties, called "Conferences of the Parties" (COP), which adopt resolutions on the implementation of the convention. Although non-binding, these guidelines and recommendations can constitute additional arguments when trying to deter public authorities from seeing a construction project through.

Article 6

1. The Contracting Parties shall, as the necessity arises, convene Conferences on the Conservation of Wetlands and Waterfowl.

2. These Conferences shall have an advisory character and shall be competent:

a. *to discuss the implementation of this Convention;*
b. *to discuss additions to and changes in the List;*
c. *to consider information regarding changes ii the ecological character of wetlands included in the List provided in accordance with paragraph 2 of Article 3;*
d. *to make general or specific recommendations to the Contracting Parties regarding the conservation, management and wise use of wetlands and their flora and fauna;*
e. *to request relevant international bodies to prepare reports and statistics on matters which are essentially international in character affecting wetlands.*

3. The Contracting Parties shall ensure that those responsible at all levels for wetlands management shall be informed of, and take into consideration, recommendations of such Conferences concerning the conservation, management and wise use of wetlands and their flora and fauna.

Here are some examples of resolutions[8] that may prove useful in the context of the Red Alert mechanism, as additional arguments presented to the public authorities to oppose an infrastructure project:

- **The 4th Strategic Plan 2016 – 2024 (updated in 2022 and extended until COP15):** strategic plans determine goals and targets for the implementation of the convention by States parties. This one focuses particularly on the drivers of the degradation of wetlands, among which "infrastructure development" is cited as one the "primary direct drivers of degradation and loss" (see §10 on page 3).
- **Resolution X.27 "Wetlands and urbanisation" (2008)**: this resolution focuses on the risks of urbanisation for wetlands, such as pollution, poorly managed waste, or ecosystem

[8] Full list can be found here: https://www.ramsar.org/sites/default/files/2023-07/list_resolutions_recommendations_e_1.pdf

fragmentation and exploitation (see §7 and 8), and insists on the duty of the parties "to formulate and implement their land-use planning and management so as to minimize further future impacts on urban wetlands and on those currently in peri-urban or rural situations that are vulnerable to urban encroachment" (see §15).

- Resolution XI.11 **"Principles for the planning and management of urban and peri-urban wetlands" (2012):** it reaffirms the elements contained in Resolution X.27 and provides "policy principles" and "practical principles" that States should apply, including in "spatial planning and management in rural areas" , and "disseminate them to other interested parties" (see §22). The most relevant principles for the Red Alert mechanism are probably policy principles 3 and 4, as well as practical principle 1, 2, 4 and 5.
- Resolution XIV.6 **"Enhancing the Convention's visibility and synergies with other multilateral environmental agreements and other international institutions" (2022):** the resolution insists on the importance of the Ramsar Convention and the preservation of wetlands, including as part of the parties' obligations under other multilateral environmental agreements, especially the Convention on Biological Diversity (CBD).
- Resolution XIV.17 **"The protection, conservation, restoration, sustainable use and management of wetland ecosystems in addressing climate change" (2022):** it underlines the major role of wetlands in addressing climate change, and it can therefore be linked to States' obligations under other treaties such as the UNFCCC and the Paris Agreement.
- Resolution XIV.16 **"Integrating wetland protection, conservation, restoration, sustainable use and management into national sustainable development strategies" (2022):** much like the 4th Strategic Plan, the resolution cites infrastructure, as well as tourism, amongst the *"indirect drivers"* of wetland decline, and insists on the importance of "cross-sectoral interventions at the regional, national and local levels" as "vital means of addressing adverse drivers" (see §4 and 5). Furthermore, it reminds States parties of the need to "ensure that environmental impact assessments are undertaken and measures identified to minimize the impacts of projects on wetland ecosystems" (see §17).

APPLICATION TO THE URDAIBAI CASE

Apart from the aforementioned resolutions of the COP to the Ramsar Convention, a few more elements could be mentioned before the public authorities who are seeking to extend the Guggenheim Museum in the Urdaibai area.

Resolution X.27 (previously mentioned):

§3: " 'peri-urban wetlands' are those wetlands located adjacent to an urban area between the suburbs and rural areas". This notion can probably be applied to the Mundaka-Guernika estuary.

§4: "recognizing that urban green space is increasingly known to contribute to people's physical and mental health and well-being". In the Urdaibai case, this sentence echoes the argument of the civil society that has been benefiting from the opportunity to stroll in the Urdaibai wetland.

Resolution XI.7 "Tourism, recreation and wetlands" (2012): it can be used to insists on the risks induced by increased tourism, due to an extension of the Guggenheim Museum

§6-8: related to some arguments against the project (pressure on the ecosystem due to mass tourism, risk of water scarcity according to the Basque Water Agency).

§3: Using the Ramsar Regional Initiatives' framework

Ramsar Regional Initiatives (RRIs) are cooperation initiatives set up by "a group of Contracting Parties in a region, which may also share a common thematic goal"[9]. According to **resolution XIV.7 "Ramsar Regional Initiatives"** (adopted in 2022 by the COP14), they are "intended as an operational means to provide effective support for improved implementation of the Convention and its strategic plan in specific geographic regions" (§1) and their "importance [...] in promoting the objectives of the Convention" (§2) has been recognised by the COP. It is worth noting that "RRIs are independently governed and are not authorized to speak or act on the Convention's behalf, but they work in close contact with the Secretariat"[10], and resolution XIV.7 also requires that "the governance and financial structures and activities of RRIs are transparent, accountable, compliant with relevant laws and consistent with relevant Resolutions of the COP and Decisions of the Standing Committee" (§12).

Seventeen out of the twenty-one existing RRIs are considered as "Ramsar networks for regional cooperation"[11], and are meant to "provide a platform for collaboration between governments, technical experts, international NGOs, local communities and private companies", as has been encouraged by the COP in the aforementioned resolution (§10). This is illustrated in the mediterranean area by **MedWet, the RRI dedicated to mediterranean wetlands**, which is "based on the collaborative effort of the 27 Mediterranean countries and entities, the Ramsar Secretariat, intergovernmental institutions, international NGOs and national institutions specialising in wetland issues"[12], and promotes "participatory approaches"[13].

Therefore, when an infrastructure project is threatening a Ramsar wetland, this cooperation framework may facilitate the dialogue between local communities (and/or NGOs) and public authorities[14], or even help putting pressure on the latter. For example, one of the

[9] See this page from the official website of the Ramsar convention: https://www.ramsar.org/our-work/activities/ramsar-regional-initiatives

[10] *ibid.*

[11] *ibid.*

[12] See this page from the official website of the MedWet initiative: https://medwet.org/medwet/

[13] See this page from the official website of the MedWet initiative: https://medwet.org/medwet/fundamentals/

[14] See also §11 of the resolution

goals of MedWet is to "[address] the drivers of Mediterranean wetlands loss and degradation", among which infrastructure and tourism were identified by Resolution XIV.16. Thus, the Mediterranean Alliance for Wetlands could use the MedWet framework to invite public authorities to reconsider the project such as in the **Urdaibai case**.

IN SHORT

When trying to deter public authorities from seeing an infrastructure project through, the Mediterranean Alliance for Wetlands should consider using the **Ramsar Convention** as a lever for the protection of the threatened wetland, although it cannot really be used before national jurisdictions or the European Court of Justice, since its provisions are not binding enough, nor do they create rights for members of the civil society. Thus, if the involved State is party to the convention, its commitment to implement the convention and the COP resolutions, under international law, shall be reminded to the national authorities, and the RRI framework provided by MedWet may be used to that end.

2) *The Bern Convention*

a. General presentation

The ***Convention on the Conservation of European Wildlife and Natural Habitats***, also called the **Bern Convention**, was adopted in 1979 in Bern (Switzerland) within the framework of the Council of Europe, and entered into force in 1982. The EU and 49 States, among which five are not members of the Council of Europe, are nowadays parties to the convention.

As defined in the preamble and article 1 of the convention, it aims at improving both the conservation of wild flora and fauna and of natural habitats, the latter being considered as a "vital component" of the former[15].

It should be noted that the EU transposed the Bern Convention in its internal legal order by adopting the **"Birds" directive** (directive 2009/147/EC, formerly directive 79/409/EEC, on the conservation of wild birds) and the **"Habitats" directive** (directive 92/43/CEE on the conservation of natural habitats and of wild fauna and flora). Therefore, for construction projects involving Member States of the EU, please refer to **section B)** on said directives for more specific information.

<u>How does it work</u>?

Apart from the general obligations of the States parties to take measures in order to protect habitats and species, the convention relies on the creation of a protection regime and of

[15] Preamble of the Bern Convention

a strict protection regime for determined lists of threatened and endangered flora and fauna species (Appendix I to III).

b. Relevance for the Red Alert mechanism

Much like the Ramsar Convention, the drafting of the Bern Convention does not provide a very binding framework for States parties[16]. Yet, in this case as well, several elements can be raised before public authorities to oppose a construction project that may threaten a wetland.

§1: Commitment of the States Parties under the Bern Convention

When trying to deter public authorities from seeing through a construction project within or near a wetland, the Bern convention can be used to remind them of the State's duties, both in terms of conservation of the wetland as a natural habitat, and in terms of conservation of the fauna and flora living in, and depending on, the area.

However, useful provisions are mainly based on a global duty, for States parties, to take into account the conservation of habitats and species; the specific protection regime provided to species listed in the appendices is only limited to certain actions unrelated to construction projects and therefore, cannot be invoked in such a case.

- **Preamble:** though non-binding as such, it gathers elements on which the convention is based and that must guide the behaviour of States parties. In particular:
  - → "Recognising that wild flora and fauna constitute a natural heritage of aesthetic, scientific, cultural, recreational, economic and intrinsic value that needs to be preserved and handed on to future generations"
  - → "Recognising the essential role played by wild flora and fauna in maintaining biological balances"
  - → "Aware that the conservation of natural habitats is a vital component of the protection and conservation of wild flora and fauna"
  - → "Recognising that the conservation of wild flora and fauna should be taken into consideration by the governments in their national goals and programmes, and that international co-operation should be established to protect migratory species in particular"
- **Art. 3 (§2):** "Each Contracting Party undertakes, in its planning and development policies and in its measures against pollution, to have regard to the conservation of wild flora and fauna"
- **Art. 4 (§2 and 3):**

[16] Although the Convention is binding as such for States parties, as is reminded by the Standing Committee in this document (2013): "*obligations on the Contracting Parties to protect natural habitats are rigorous requirements clearly set out in the Convention and forming part of binding international law".*

→ “The Contracting Parties in their planning and development policies shall have regard to the conservation requirements of the areas protected under the preceding paragraph [habitats of the wild flora and fauna species, especially those specified in Appendices I and II, and endangered natural habitats], so as to avoid or minimise as far as possible any deterioration of such areas”

→ “The Contracting Parties undertake to give special attention to the protection of areas that are of importance for the migratory species specified in Appendices II and III and which are appropriately situated in relation to migration routes, as wintering, staging, feeding, breeding or moulting areas”

- **Art. 9:** this article lists some motives that may allow States to make exceptions from some provisions, including art. 4. It should be noted that none of these exceptions can be related to a construction project that might threaten the conservation of a wetland, apart maybe from the motive related to “the interests of public health and safety, air safety or other overriding public interests”, if the construction project were related to such interests.

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Spain ratified the Bern convention in 1986[17], and is also a Member State of the European Union, which means it is also bound by the aforementioned “Habitats” directive[18].

As for duties undertaken according to the Bern Convention, Spanish authorities may be reminded that the conservation of wild fauna and flora, and of their natural habitats, is to be taken into account in its “planning and development policies”, which typically refers to an infrastructure project such as the Guggenheim Museum extension in Guernika and Murueta.

However, it should be noted that despite the importance of the Urdaibai area for the Dutch population of *Platalea Leucorodia*, provisions of art. 4.3 of the Bern Convention are not relevant, since it only applies to migratory species specified in Appendices II and III, which is not the case of this bird species.

§2: The Emerald Network Sites

This section is mainly useful for non-EU States. The equivalent of the Emerald Network for EU States is the **Natura 2000 Network**, set up by the “Habitats” directive adopted by the EU to transpose the Bern Convention. Please refer to the dedicated section for more information.

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[17] Instrumento de ratificación del Convenio relativo a la conservación de la vida silvestre y del medio natural en Europa, hecho en Berna el 19 de septiembre de 1979 (https://www.boe.es/buscar/doc.php?id=BOE-A-1986-25961)

[18] See **section B. 2)** for more specific information

The Emerald Network is a specific tool set up by the Standing Committee of the Bern Convention[19] that aims at facilitating and improving the implementation of the convention by States parties. It was created by [Recommendation n°16](#) of the Standing Committee (1989) and is based on the concept of "areas of special conservation interest" (ASCIs).

ASCIs are areas with biogeographical characteristics that prove sufficient to achieve the "ultimate objective of the Network", namely "the long-term survival of species and habitats of the Bern Convention requiring specific protection measures"[20]. These **endangered natural habitat types** and **species requiring specific habitat conservation measures** are listed in the appendices of Resolution n°4 (1996) and Resolution n°6 (1998) of the Standing Committee.

The implementation of the Emerald Network was made possible by the adoption of the "rules for the Network of Areas of Special Conservation Interest (Emerald Network)" through Resolution n°5 (1998). In addition, the adoption process of Emerald sites was specified in a document adopted by the Standing Committee in 2013[21]. The process can be summarised as follows:

- **Assessment and proposition by States parties:** States shall provide the Secretariat with a list of areas situated within their territory, based on their contribution to the conservation of habitats and species listed in Resolutions 4 and 6, and on their fulfilment of one or several conditions listed in §1 of Recommendation n°16:

  "a. it contributes substantially to the survival of threatened species, endemic species, or any species listed in Appendices I and II of the convention;
  b. it supports significant numbers of species in an area of high species diversity or supports important populations of non or more species;
  c. it contains an important and/or representative sample of endangered habitat types;
  d. it contains an outstanding example of a particular habitat type or a mosaic of different habitat types;
  e. it represents an important area for one or more migratory species;
  f. it otherwise contributes substantially to the achievement of the objectives of the convention"

[19] The Standing Committee is the equivalent of what is often called "Conference of the Parties to the convention", like in the case of the Ramsar Convention. It is the plenary and governing body of the Bern Convention. For further details, see **subsection c)** and the following link: https://www.coe.int/en/web/bern-convention/institutions

[20] See this page from the official website of the Bern Convention: https://www.coe.int/en/web/bern-convention/emerald-network#%7B%2212472513%22:[]%7D

[21] "Revised Criteria for assessing the National Lists of proposed Areas of Special Conservation Interest (ASCIs) at biogeographical level and procedure for examining and approving Emerald candidate sites" (https://rm.coe.int/1680746a34)

- **Evaluation and adoption as Emerald sites:** if the thorough "evaluation of the efficiency of the proposed sites"[22] shows that proposed areas ("candidate Emerald sites") are considered to meet these criteria, the Standing Committee shall officially adopt them as Emerald sites.
- **Designation and management by States parties:** States shall officially designate the adopted sites as ASCIs and Emerald Sites, and implement "management, reporting and monitoring measures, under the responsibility of national authorities"

Although the Emerald Network is an optional tool[23], once an area has been adopted as an Emerald site, national authorities must be consistent and comply with their own voluntary commitment. Therefore, if an infrastructure project is being considered within or near a wetland designated as an Emerald site, this may be used as an argument to deter its realisation.

§3: The data provided by States parties as additional arguments

This section is mainly useful for non-EU States. EU States are subject to the **Habitats and Birds directives' obligation to submit national reports**. Please refer to the dedicated section for more information.

Resolution n°8 of the Standing Committee (2012) sets a duty for States to monitor the conservation status of species and natural habitats in Emerald Sites. The information gathered through this monitoring must be submitted to the Secretariat of the convention every 6 years.

National reports were thus submitted for the first time for the 2013-2018 period. Dashboards summarising the data, also including data delivered by EU States pursuant to the Birds and Habitats directive, can be found on the Bern convention website. Such data can be used to underline the risks of an infrastructure project near or within a wetland, especially since it is provided by the States themselves.

Indeed, two dashboards focus on the Conservation status and trends of habitats and species, and on Main pressures and threats for these habitats and species. The dashboards work as follows: at the top of the page, tabs show different types of data (overall assessment, conservation status of habitats, conservation status of species...), while in each tab, the data can be filtered depending on different criteria (country, biogeographical region...).

[22] *ibid.*

[23] *ibid.*

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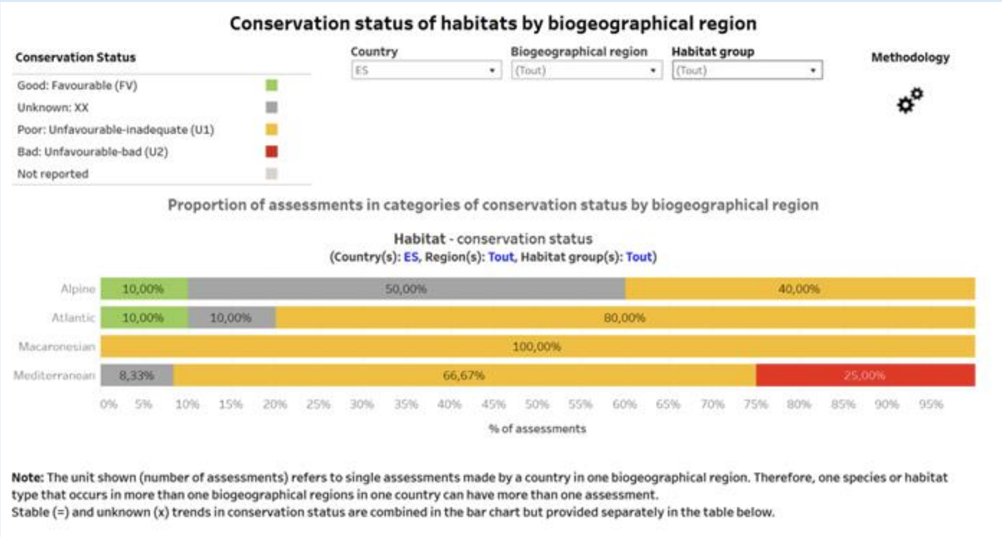
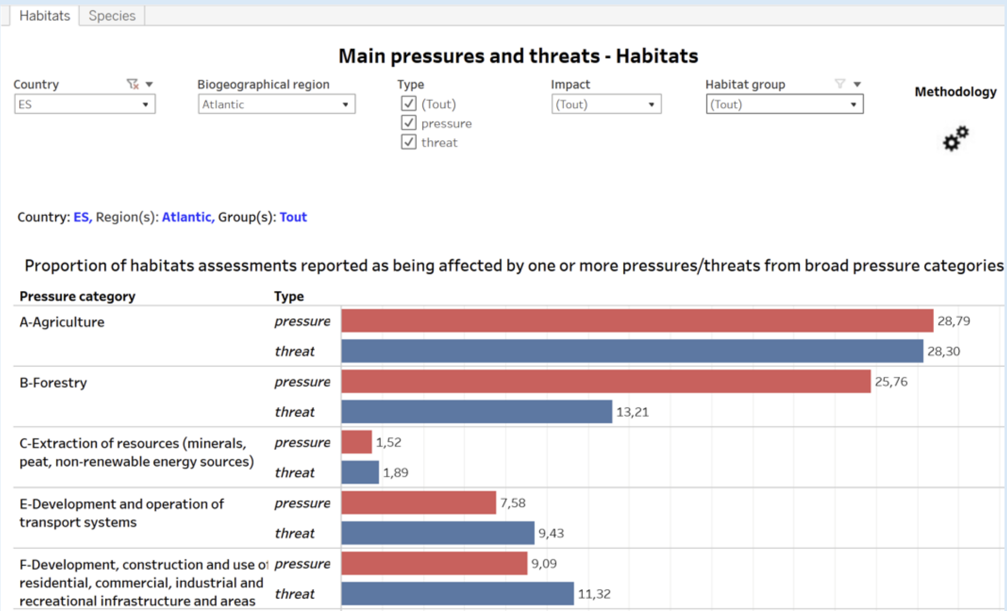
Although Spain is subject to a reporting obligation under the Birds and Habitats directives more than under Resolution n°8 of the Bern convention, the data it provided is delivered in the corresponding dashboards.

For the 2013-2018 period, data provided by Spain shows that 80% of the assessed habitat types in the Atlantic biogeographical region (which is the case of the Urdaibai area) is in a "poor conservation status", and even 100% of the assessed "coastal habitats" of the Atlantic region are.



As for main pressures and threats, "development, construction and use of [...] infrastructure and areas" is identified as the third main threat and third main pressure on habitats in the Atlantic biogeographical region by Spain, and even one of the two main threats and pressures of the assessed "coastal habitats" in the Atlantic region.



c. An important tool: the complaint mechanism before the Standing Committee

§1: General presentation and examples

In 1984, the Standing Committee of the Bern Convention decided to create a "case-file system", a mechanism that allows members of the civil society to file complaints in order to draw the attention of the Bureau[24] (or even of the Standing Committee) on possible breaches of the convention by States parties. According to the Bern Convention website, this "unique monitoring tool [...] has proven to be a very successful problem-solving instrument"[25].

As the governing body of the Bern Convention and according to its article 14, the Standing Committee is "responsible for following the application of this Convention". In particular, it may "make recommendations to the Contracting Parties concerning measures to be taken for the purposes of this Convention". These recommendations can be addressed to a State party in the context of the case-file system, if the Standing Committee deems that the convention has been breached. Although non-binding, it constitutes an interesting political and diplomatic means of pressure.

The complaint mechanism can typically prove useful when facing the case of an infrastructure project that threatens a wetland and the species depending on it, especially if it has been recognised as an Emerald Network site or a Natura 2000 site.

A case-file dashboard is available on the Bern convention website and allows anyone to browse through the different cases, classified depending on their status (open, stand by, dismissed...). A register of Bern Convention complaints was also adopted in September 2024. Here are some examples of recommendations of the Standing Committee adopted in the context of complaints filed against infrastructure projects that threatened habitats and biodiversity:

- **Recommendation No. 97 (2002) on the conservation of the Bald ibis (Geronticus eremita) and the tourism development project in Tifnit (Souss Massa, Morocco):** the recommendation insists on the high threat that an infrastructure project related to tourism would pose to a national park (which "represents a migratory stopping-off point of international importance for thousands of waterfowl"), and especially to an endangered species. According to the Standing Committee, in such a case, "any tourism development, however legitimate, will only harm the local natural heritage".
- **Recommendation No. 130 (2007) of the Standing Committee on the windfarms planned near Balchik and Kaliakra, and other wind farm developments on the Via**

[24] *"The Bureau of the Standing Committee takes administrative and organisational decisions in between meetings of the Standing Committee. It includes the Chair of the Standing Committee, the Vice-chair, the previous Chair, and two additional Bureau members, and is assisted by the Secretariat"* (https://www.coe.int/en/web/bern-convention/institutions)

[25] See this page from the official website of the Bern Convention: https://www.coe.int/en/web/bern-convention/case-files#{%22162072147%22:[0

Pontica route (Bulgaria): the case was related to the development of "windfarms [...] situated within or nearby sites designated as important bird areas and special areas of conservation" and led the Standing Committee to recommend that the Bulgarian government "fully reconsider the development of approved windfarms projects" and "investigate the possibility of relocating the windfarm projects already under construction". The recommendation also underlines the necessity of carrying out an Environmental Impact Assessment (EIA) and the importance of their being "precise and scientifically sound".

- **Recommendation No. 219 (2023) of the Standing Committee on the possible impacts of infrastructure and urbanisation developments particularly Vlora International Airport, on the Vjosa-Narta Protected Area (Albania):** this recommendation was precisely issued following a complaint filed by the MAW. Again, the Standing Committee recommends to the national authorities to "suspend the construction of Vlora International Airport until a new and sufficient Environmental Impact Assessment (EIA) procedure is conducted". Other elements are listed, and it can be noted that the Standing Committee suggests a lot more than in early recommendations.
- **Recommendation No. 221 (2023) of the Standing Committee on the negative impacts to Lake Ohrid and Galichica National Park candidate Emerald Network sites due to infrastructure and urbanisation developments (North Macedonia):** this recommendation is especially interesting regarding the attention paid to the area's variety of protection statuses, as an additional argument for its protection. In the preamble of the recommendation, the Standing Committee "not[es] that the Lake Ohrid and Galichica sites, which as such constitute a UNESCO World Heritage Site, include other international and national protected areas, including a UNESCO Transboundary Man and Biosphere Reserve, a Ramsar Wetland of International Importance, a Monument of Nature corresponding to the IUCN Protected Area category III, a National Park corresponding to the IUCN Protected Area category II, and potential future Natura 2000 sites". The various statutes are indeed part of the elements that are considered in the complaint form (see following subsection for more information).

Other cases that are still pending may be interesting to follow for the MAW. The following links redirect to the files presentation and lists of documents submitted either by the complainant or by the targeted national authorities. It should be noted that this complaint mechanism often takes several years for a case to be closed (assuming that it works and that it is not dismissed).

- **Case 2020/1:** Recognising Horbachykha as a protected area to save it from residential developments
- **Case 2021/4:** Threats to wild flora and fauna and their natural habitats in Irpin river valley Emerald Network site from constructions
- **Case 2020/6:** Presumed threat to Tagus Estuary Special Protected Area from a new airport
- **Case 1986/8 - Protection of Caretta Caretta in Laganas bay, Zakynthos:** this case is related to the impacts of tourism on the Loggerhead sea turtle. Two recommendations were adopted by the Standing Committee in 1987 (No. 7 and No. 9) before the case was closed, then re-opened in 2020.

§2: Procedure

All the information (and relevant links) related to the procedure of the case-file system can be found on the dedicated page of the Bern Convention website. According to the general presentation it provides, "the complaints so received are processed by the Secretariat, the Bureau and, when particularly relevant, also by the Standing Committee, according to their merits and on the basis of the information submitted".

Therefore, **it must be kept in mind, when using this tool, that the case will not necessarily be reviewed by the Standing Committee itself, *i.e.* the plenary body of the Bern Convention.** Most of the time, the complaint will lead to a diplomatic process of negotiations and alternate communications by the complainant and the targeted national authorities, conducted by the Bureau. It must also be noted that "when the Standing Committee or its Bureau considers that further information is needed, they can arrange for on-the-spot visits by independent experts, who report to the Standing Committee". This is why it takes several years for a case to be entirely considered and eventually, if applicable, closed. Yet, **this tool is an important one when trying to deter public authorities from authorising an infrastructure project that threatens a wetland, because it gives an opportunity to bring the case to an international level and to discuss with the involved authorities.**

Regarding the procedure, two documents prepared by the Secretariat and adopted by the Standing Committee are relevant: the first is a **Summary of general procedures for the processing of complaints** and the second is the **Appendix 1** to the Rules of procedure of the Standing Committee, that details the **rules applicable to on-the-spot appraisals**. The procedure is summarised hereunder:

- **Filing of the complaint:** the complainant shall use the dedicated form[26] to submit the complaint, which shall specify clearly the reason for the potential breach of treaty obligations, and detail some other information that will determine if the complaint is deemed admissible by the Secretariat. Based on these criteria, the following requirements should be fulfilled for the complaint to have good chances to be admitted:
  - → The elements provided are sufficiently serious, meaning that the complaint should rely as much as possible on verified information and scientific data, and that it should demonstrate a serious risk for natural habitats and/or species
  - → Efforts to address the matter with local, national, and/or alternative international procedures should be made prior to the complaint, and demonstrated in case a complaint is submitted
  - → If the issue is already treated within the framework of another Multilateral Environmental Agreement (MEA), the added value of the Bern Convention also treating this case should be demonstrated

[26] The form can be found in the Annex 1 to the Summary of general procedures for the processing of complaints or on the webpage of the case-file system

- **Screening process:** the Secretariat of the Convention receives and reviews the complaints to determine whether they are admissible. The complainant may be asked to provide additional information.
- **Response of the concerned State party:** a response report is requested from the targeted national authorities within a delay of minimum 3 months.
- **Examination and preliminary decision by the Bureau:** based on the complaint form and the response report of the State, the Bureau shall determine what status is given to the complaint and what to do about it (it can also express concern or recommend certain actions)
  → <u>Dismiss the complaint</u>: when it is deemed insufficiently serious or outside the mandate of the case-file system
  → <u>Leave the status to "new complaint"</u>: when further information is required from the complainant, or the State, or both
  → <u>Complaint "on stand-by"</u>: if it is serious enough to be monitored by the Bureau but not urgent enough to be reviewed by the Standing Committee
  → "<u>Possible file</u>": if the Bureau deems it sufficiently serious and urgent to require the attention of the Standing Committee (which can then decide to elevate it to the status of "<u>open file</u>", the highest category)
- **Transmission of information:** update reports must be sent by the complainant and/or the State on any relevant updates regarding the issue, or on specific requests by the Bureau or the Standing Committee. Usually, these reports must be submitted up to one month before the next meeting at which the complaint will be discussed. If no information is provided for a while by one of the parties (usually, after two consecutive meetings), actions may be undertaken by the Bureau or the Standing Committee, depending on the status of the case
  → <u>New complaints and complaints on stand-by</u>: dismissing the case (if the lack of information originates from the complainant) or raising it to a "possible file" (if it originates from the State)
  → <u>Open and possible files</u>: addressing a letter from the Chair of the Standing Committee to the relevant party, urging them to react (and warning them that the case may be dismissed, when the lack of information originates from the complainant).
- **On-the-spot appraisals (OSA):** the Standing Committee may recommend an OSA, if deemed necessary for the assessment of the case, and with the agreement of the concerned State. The appointment of the expert, as well as the terms of reference for the OSA, shall be agreed by both the State and the complainant. Several conditions must be fulfilled by the expert and regarding the funding of the OSA, in order to guarantee their independence, and the OSA shall be carried out in the presence of a member of the Secretariat, as well as representatives of the State and the complainant. The expert shall then submit a written report to the Standing Committee.
- **Outcome of a case:** the Standing Committee may adopt a Recommendation that contains proposals of action (usually to the State, but also possibly to the complainant and other stakeholders of the case). The recipient shall then keep the Bureau and/or Standing Committee updated on its fulfilment. The Standing Committee may afterwards decide to

close the case, but it may also classify it as “follow-up Recommendation”, meaning that the State/stakeholder shall continue to report on a less regular basis.

IN SHORT

The **Bern Convention** can provide interesting levers to the MAW when it is trying to deter public authorities from seeing an infrastructure project through. As most MEAs, its provisions are not very binding as such, and it cannot really be invoked before national or EU jurisdictions. However, its regional scope allowed for a drafting that is maybe a bit stricter than universal treaties, and its implementation framework may offer more possibilities.

Thus, if the involved State is party to the convention, its commitment to implement the convention and the Standing Committee resolutions, under international law, shall be reminded to the national authorities, especially if the threatened wetland is an Emerald Site (or a candidate Emerald Site). The data provided by the State itself may also be used as an argument, if it shows that the conservation status of habitats and species on its territory is not good. Eventually, provided that the case is serious enough, the complaint mechanism is an interesting tool that can prove very useful.

3) The Bonn Convention

The Convention on the Conservation of Migratory Species of Wild Animals (also known as the Bonn Convention) focuses on ensuring the effective conservation of migratory species and the preservation of their habitats and migration routes (Article 2).

To achieve those objectives, the Convention established obligations that the State Parties must follow.

First, States must grant immediate protection to migratory species listed in Annex I of the Convention and must promote, cooperate in and support research on migratory species (Article 2).

They must prevent any negative impact on the sites of migratory species by preserving and restoring, if possible, habitats important for protecting the endangered species and preventing, eliminating, compensating or minimizing the negative effects of activities that constitute an obstacle to migration or make it impossible. States must prevent, reduce or control threats to the species by controlling the situation (Article 3).

States must conclude agreements on the conservation and management of migratory species listed in Appendix II of the Convention (Article 2) and international agreements necessary for the conservation and management of migratory species (Article 4).

This type of agreement is intended to ensure the recovery or maintenance of the migratory species concerned to a favourable conservation status, covers the entire range of the migratory species concerned and should cover more than one migratory species (Article 5).

This agreement must provide several types of information, such as: the type of migratory species, the description of the range and the migration route, the national authority responsible for the implementation of the agreement, mechanisms for the proper implementation of the agreement and the procedures for settling disputes. The agreement may also include periodic reviews of the state of conservation of the species and threats to it, coordinated conservation and management plans, research, exchange of information on the species, conservation and restoration of critical habitats, removal of activities and barriers to migration, measures to communicate the content and objectives of the agreement to the public and emergency procedures to strengthen conservation measures (Article 5).

States should inform the Migratory Species Secretariat when they consider themselves as a Range State and should inform the Conference of the Parties through the Secretariat of measures taken to implement the Convention (Article 6).

States can appoint a qualified expert as a member of the Scientific Council (Article 7) and submit a proposal for amendment to the Convention (Article 10) and the Appendices (Article 11). They can also denounce the Convention by written notification to the Depositary (effective 12 months after receipt of the notification) (Article 19).

States parties to this Convention do not have the right to take samples of animals belonging to migratory species in danger but there are derogations that can be set up for scientific purposes or to improve the survival of the species (Article 3).

The problem with this Convention is that there is no real legal sanction imposed by the Convention and the lack of binding aspects makes the impact of this Convention weak. However, regular sessions take place every 3 years (or a special session at any time) where the Conference of the Parties may review the application of the Convention with recommendations from other Parties, review progress made on the conservation of migratory species and review any reports submitted by the Parties to the Convention, the scientific council, the Secretariat "or any permanent body established under an agreement" (Article 7).

Beginning with Article 7, the main topic of the following Articles is the explanation of the functioning of the Convention.

7 binding agreements[27] to the Convention have been made since:

- Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA)

Spain is a State party.

- Agreement on the Conservation of Bats in Europe

Spain is a State party.

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[27] https://www.cms.int/fr/cms-instruments/agreements

- Agreement on the Protection of Albatrosses and Petrels (ACAP)

Spain is a State party.

- Agreement on the Conservation of Cetaceans in the Black Sea, the Mediterranean and the adjacent Atlantic Seas

Spain is a State party.

- Agreement on the Conservation of Gorillas and their Habitats

- Agreement on the Conservation of Seals in the Wadden Sea

- Agreement on the Conservation of Small Cetaceans in the Baltic, North-East Atlantic, Ireland and North Sea

The Convention is mostly used to give definitions, used as a reference in cases and is not used as an argument. (CJEU, 11 June 2020, Asociaţia "Alianța pentru combaterea abuzurilor" v TM and Others, Aff. C-88/19, point 41 ; CJEC, 12 July 2007, Commission of the European Communities v Republic of Austria, Aff. C-507/04).

Spain is a member party since 1985.

In the COP14 National report[28], Spain reported that this species (listed in the document from Red Alert) was in its territory (Appendix I): Neophron percnopterus

In the COP14 National report, Spain transmitted that these species (listed in the document from Red Alert) were in its territory (Appendix II): Miniopterus schreibersii, Rhinolophus euryale, Neoprhon percnopterus, Pandion haliaetus.

IN SHORT

Spain is obligated to respect the Convention's obligation due to the presence of protected species within its territory. Although there is limited jurisprudence directly enforcing the Convention, it serves as a reference for defining conservation standards and legal responsibilities. This lack of direct enforcement does not reduce its binding nature but highlights the need for Spain to proactively adopt measures ensuring compliance.

Using the Convention as a reference can strengthen political advocacy, especially during protest or public campaigns, by underscoring Spain's international commitments. Advocates could demand the adoption of targeted measures, such as enhanced habitat protections or stricter regulations on activities impacting protected species, to honour these obligations and demonstrate respect for the Convention's binding authority.

[28] https://www.cms.int/fr/node/24116

4) AEWA

a. The conservation plan of AEWA

§1: General presentation

The Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA) aims at **encouraging international cooperative action to conserve migratory species**. It highlights that migratory waterbirds constitute an important part of the global biological diversity and should be conserved for the benefit of present and future generations, in accordance with Agenda 21 and the Convention on Biological Diversity.

The need to take immediate action **to stop the decline of migratory waterbirds species and their habitats in the geographic area of the African-Eurasian waterbird migration systems** is essential as **these species are particularly vulnerable**. Moreover, for an effective implementation of this Agreement, States shall assist each other for research, training and monitoring of migratory waterbirds species and their habitats, for the management of those habitats and the establishment or improvement of scientific and administrative institutions.

§2: The geographic and ecological scope of the Agreement

► The geographic scope of this Agreement is the area of the migration systems of African-Eurasian Waterbirds, defined as follows (Article I – Annex 1 and 1a):

► This Agreement defines "waterbirds" as species of birds that are "ecologically dependent on wetlands for at least part of their annual cycle, have a range which lies entirely or partly within the Agreement Area and are listed in Annex 2" (Art. I).

§3: The conservation measures to implement

/!\ The Agreement states that Parties have the right to maintain or adopt stricter measures for the conservation of migratory waterbirds and their habitats (Art. XI).

For these birds, located in this geographic area, Parties shall take co-ordinated **measures to maintain migratory species in a favourable conservation status or to restore them to such a status, while taking into account the precautionary principle** (Art. II). To cope with this, Parties shall apply, within the limits of their national territory, the following measures (Art. III):

a. accord the same strict protection for endangered migratory waterbirds species in the Agreement Area as is provided for under Article III (4-5) of the Convention on Biological Diversity
b. ensure that any use of migratory waterbirds is based on an assessment of the best available knowledge of their ecology and is sustainable for the species and the ecosystems
c. **identify sites and habitats for migratory waterbirds occurring within their territory and encourage the protection, management, rehabilitation and restoration of these sites**
d. coordinate their efforts to ensure that a network of suitable habitats is maintained or re-established
e. **investigate problems that are posed or are likely to be posed by human activities and endeavour to implement remedial measures, including habitat rehabilitation and restoration, and compensatory measures for loss of habitat**
f. develop and maintain programmes to raise awareness and understanding of migratory waterbirds conservation issues, and exchange information and results from research, monitoring, conservation and education programmes
g. etc.

Furthermore, Parties shall implement the specific actions determined in **the Action Plan of AEWA** (Art. IV – Annex 3). The Action Plan is applicable to the populations of migratory waterbirds listed in Table 1, and specifies actions for priority species and issues, regarding:

- **species conservation**
- **habitat conservation**
- **management of human activities**
- implementation
- research, monitoring, education and information.

The **Action Plan** (Annex 3) set up **legal measures** to put in place:

- to **prohibit deliberate disturbance if such disturbance would be significant for the conservation of the population concerned**
- prohibit the introduction into the environment of non-native species of animals and plants which may be detrimental to the populations listed in Table 1
- to **undertake and publish national inventories of the habitats within their territory which are important to the populations** listed in Table 1
- as a matter of priority, to **identify all sites of international or national importance for populations** listed in Table 1, and Parties shall **continue establishing protected areas to conserve habitats important for these populations, and to develop and implement management plans for these areas**
- **to give special protection to those wetlands which meet internationally accepted criteria of international importance**: as regards those wetlands, Parties shall make wise and sustainable use of all wetlands in their territory, especially by avoiding degradation and loss of habitats through the implementation of appropriate regulations or standards and control measures.

The **Action Plan** also provides for rehabilitation and restoration measures for areas that suffer degradation as a result of the impacts of climate change, hydrological change, agriculture, **unsustainable use**, eutrophication and pollution (Annex 3 – 3.3).

► *Regarding the management of human activities*, Parties shall evaluate the costs, benefits and other consequences that can result from eco-tourism at selected wetlands with concentrations of populations listed in Table 1 and communicate the results of these evaluations to the Agreement secretariat.

In particular, Parties shall **assess the impact of proposed projects which are likely to lead to conflicts between populations listed in Table 1 and human interests and shall make the results of the assessment publicly available**. Parties shall, as far as possible, promote high environmental standards in the planning and construction of structures to minimize their impact on populations listed in Table 1, and they should minimize the impact of structures already in existence where it becomes evident that they constitute a negative impact for the populations concerned.

♠ ***In case where human disturbance threatens the conservation status of waterbird populations listed in Table 1***: **Parties should take measures to limit the level of threat, with special attention to the problem of human disturbance at breeding colonies of colonially-nesting waterbirds**, especially when they are situated in the areas which are popular for outdoor recreation. Appropriate measures might include the establishment of disturbance-free zones in protected areas where public access is not permitted.

For more on this matter please see Annex 3 – 4.

/!\ States must monitor the populations listed in Table 1, and the results of this monitoring shall be published or sent to appropriate international organizations, to enable reviews of population status and trends. More, States shall develop programmes, information materials and mechanisms to improve the level of awareness of the general public with regard to the objectives, provisions and contents of this **Action Plan**, with particular attention to people living in and around important wetlands, to users of these wetlands (hunters, **tourists**, etc.) and **to local authorities and other decision makers**.

+ For more precise information on hunting and trade exemptions, on pollution prohibition and on the regulation of the taking and modes of taking of birds and eggs, please see Annex 3.

§4: Obligations of AEWA bodies

The Agreement secretariat shall ensure, where possible, coherence with guidelines approved under other international instruments. These conservation guidelines shall aim at introducing the principle of sustainable use. They shall cover, *inter alia*:

(a) single species action plans

(b) emergency measures

(c) preparation of site inventories and habitat management methods

(f) tourism

(h) a waterbird monitoring protocol.

Each Party shall prepare for each ordinary session a report on its implementation of the Agreement with particular reference to the conservation measures it has undertaken (Art. V).

Among the bodies, the **Technical Committee** provides for scientific and technical advice and information (Art. VII).

The Agreement Secretariat execute the decisions addressed to it by the Meeting of the Parties and promote and coordinate activities under the Agreement, including the **Action Plan**. Regarding relations with International Bodies, the Agreement secretariat shall consult the CBD Secretariat and the bodies responsible for the secretariat functions under Agreements relevant to migratory waterbirds (e.g.: the Convention on Wetlands of International Importance).

b. Relevance for the Red Alert Mechanism

Disclaimer: as for all over international conventions, the provisions provided for by AEWA are not legally enforceable. That means that even if the States parties are legally bound by it and shall respect it as much as possible, they can be held liable if they do not respect any of these provisions. The only possible action is to remind the authorities that they shall comply with these provisions.

Migratory waterbirds are particularly vulnerable because they migrate over long distances, and they are dependent on networks of wetlands. However, these wetlands are decreasing and degrading through non-sustainable human activities.

► **Application to the Urdaibai case**:

This Agreement defines "waterbirds" as species of birds that are *"ecologically dependent on wetlands for at least part of their annual cycle, have a range which lies entirely or partly within the Agreement Area and are listed in Annex 2*". According to the aforementioned map, the whole Urdaibai zone is in the scope of the Agreement. In Annex 2 and among the birds listed in the documents about Urdaibai sent by the organisation, only **the Eurasian Spoonbill (*Platalea leucorodia*) is listed in this Annex**. However, other species that are not mentioned in the documents may be on this Annex; a more precise search is needed to acknowledge all species concerned.

The **Action Plan** of Annex 3 is applicable to species listed in Table 1. **The Eurasian Spoonbill** is for now the only bird listed in the Urdaibai document that is on this Table. But again, a more precise search may be conducted to check on all species concerned.

For these birds, States shall make reports on their implementation of AEWA, with particular reference to the conservation measures it has undertaken. They shall **identify sites and habitats for migratory waterbirds occurring within their territory** and encourage the protection, management, rehabilitation and restoration of these sites. States also have to investigate problems that are posed or are likely to be posed by human activities and endeavour to implement remedial measures, including habitat rehabilitation and restoration, and compensatory measures for loss of habitat.

Local organisations can check on the AEWA websites for national reports. Regarding Spain, the latest report is from 13th July 2022 and can be found here: https://www.unep-aewa.org/sites/default/files/document/aewa_national_report_2018_2020_spain.pdf .You can use these reports to check if the State has implemented the provisions set up by the **Action Plan** in an effective and comprehensive way. Otherwise, you can remind it of its international obligations under AEWA.

As those reports shall undertake national inventories of the habitats within their territory which are important to the populations listed in Table 1, these reports are also important to check on the conservation status of the species present on the Urdaibai site.

As an example, in these reports, States shall identify all sites of international or national importance for populations listed in Table 1 and shall continue establishing protected areas to conserve habitats important for these populations, and to develop and implement management plans for these areas.

Here, as the Urdaibai wetlands are located in Ramsar sites (https://www.ramsar.org/es/country-profile/espana), they have to be particularly protected: the State shall **make wise and sustainable use of all wetlands in its territory, especially by**

avoiding degradation and loss of habitats through the implementation of appropriate regulations or standards and control measure.

So, the project is not in compliance with this provision: it can be emphasized to the authorities as AEWA states that **Parties shall assess the impact of proposed projects which are likely to lead to conflicts between populations listed in Table 1 and human interests and shall make the results of the assessment publicly available**. Moreover, Parties shall, as far as possible, **promote high environmental standards in the planning and construction of structures to minimize their impact on populations listed in Table 1**, and they should minimize the impact of structures already in existence where it becomes evident that they constitute a negative impact for the populations concerned.

In conclusion, by looking at the national report, you can see if these provisions are followed, and otherwise it can be a political argument to oppose the museum extension project.

Indeed, ***in case where human disturbance threatens the conservation status of waterbird populations listed in Table 1***, **Parties should take measures to limit the level of threat, with special attention to the problem of human disturbance at breeding colonies of colonially-nesting waterbirds**, especially when they are situated in the areas which are popular for outdoor recreation. Appropriate measures might include the establishment of **disturbance-free zones** in protected areas where public access is not permitted. Moreover, local authorities and other decision makers have a right to be informed and to inform about population status and trends, and with regard to the objectives, provisions and contents of the **Action Plan**.► **Here,** the local organisations can suggest that the green path include such limitations, with areas where the public cannot go. And information boards may be addressed to local population and tourists.

The Agreement secretariat made a single species action plans for the Eurasian spoonbill, that can be found here: https://www.unep-aewa.org/en/publication/international-single-species-action-plan-conservation-eurasian-spoonbill-complete-ts.

5) OSPAR

The OSPAR (for two former Oslo and Paris conventions) international Convention was adopted in 1992 and entered into force in 1998. It aims to **protect the marine environment of the North-East Atlantic**, by **reducing** and **eliminating pollution resulting from human activities**.

The Convention's scope covers the internal waters and territorial sea of the parties, the area beyond and adjacent to the territorial sea under the jurisdiction of the coastal State, and the high seas of the North-East Atlantic, including the bed of all those waters and its sub-oil soil. Sixteen Parties ratified the Convention, including Spain and the European Union.

The European Union has transposed the OSPAR Convention into its legal order through various instruments, such as :

- the Directive 2000/60/EC of the European Parliament and of the Council, of October 2000, establishing a framework for Community action in the field of water policy.
- the Directive 2008/56/CE of the European parliament and of the Council of June 2008, establishing a framework for community action in the field of marine environmental policy (the Marine Strategy Framework Directive).

European Union's States have generally transposed the OSPAR Convention into their national law through the transposition of these to directives.

Positives obligations *of the Parties :*

In application of the Convention, the Parties must **take separately and jointly :**

- **all possible measures to prevent and eliminate pollution**,
- as well as the **necessary measures to protect the maritime area against the harmful effects of human activities**.

The aim is threefold: to safeguard human health, preserve ecosystems and restore damaged maritime areas. It should be noted that pollution should be understood as the "introduction by man, directly or indirectly, of substances or energy into the maritime area which results, or is likely to result, in hazards to human health, harm to living resources and marine ecosystems, damage to amenities or interference with other legitimate uses of the sea." (article 1. (d) of the Convention). This bread definition takes into account **dumping or incineration** pollution, **offshore sources** pollution, and **land-based sources** pollution.

To this end, two main principles must be applied by the parties, such as :

- the **precautionary principle** (article 2. 2. a) of the Convention)
- the **polluter pays principle** (article 2. 2. b) of the Convention)

APPLICATION TO THE URDAIBAI CASE

Neither the OSPAR Convention nor its transpositions contain explicit provisions prohibiting construction on the coast. However, its objectives and principles (protection of ecosystems and prevention of human impacts) could be used to regulate or limit such projects.

B- European law

Contrary to international agreements and treaties, European directives have to be directly implemented into national legislations of EU Member States. The Court of Justice can condemn a State if it has not transposed a Directive, or if it transposed it badly.

So here, the legal measures and obligations set out in the following directives are legally binding obligations for Member States: they have to implement them.

1) *The Directive 2009/147/EC of the European Parliament and of the Council (30 November 2009) on the conservation of wild birds (" the Birds Directive")*

a. The protection regime of the Birds Directive

The Birds Directive aims at preserving all wild birds in the EU by setting out **rules for their protection, conservation, management and control**. **It covers birds but also their eggs, nests and habitats**. It codifies legislation originally adopted in 1979 (Directive 79/409/EEC), and was amended in 2019 by Regulation 2019/1010 which aligns and streamlines reporting obligations in the field of environmental law.

> *Scope of application*: The directive applies to all species of naturally occurring birds in the wild state in the European territory of the Member States (Article 1).

> Main objectives of the Directive and principles applicable to all birds (Annex I and II):

- Migratory species constitute **a common heritage** that urge to be protected, and an effective bird protection is a trans-frontier environment problem entailing **common responsibilities** for all Member States
- Conservation measures must be applied **to all factors that can affect bird population, *for example the impact of human activities or habitat destruction and pollution***, and the level of protection of these measures must be adapted to the situation of the different species, as part of a conservation policy
- Preserving, maintaining and re-establishing a diverse and sufficient surface area of habitats is essential for the conservation of all bird species, but some of them require specific conservation measures concerning their habitat to ensure their survival and reproduction cycle in their area of distribution
- Conservation is aimed at the **long-term protection** and management of natural resources as an integral part of the heritage of the peoples of Europe.

> Obligations applicable to all birds listed in the Directive:

◘ **Member States must take the requisite measures to maintain the population of birds referred to in** *the scope of application* **at a level compatible with ecological, scientific and cultural requirements** while taking into account economic and recreational requirements (Art. 2).

◘ The Directive highlights that the preservation, maintenance and re-establishment of biotopes and habitats **shall include the following measures:**

1. **creation of protected areas**
2. **upkeep and management in accordance with the ecological needs of habitats inside and outside the protected zones**
3. **re-establishment of destroyed biotopes**
4. creation of biotopes.

◘ Member States shall take the appropriate measures to establish **a general system of protection for all species of birds referred to in** *the scope of application*, prohibiting in particular (Art. 5):

1. deliberate destruction or damage to their nests and eggs
2. taking their eggs and keeping them
3. **deliberate disturbance of birds particularly during the period of breeding and rearing**
4. keeping birds which are targeted by the prohibition of hunting and capture.

This directive is of minimal harmonisation, i.e. Member States may introduce stricter protective measures than those provided for under this Directive (Art. 14).

► In order to achieve these objectives, **the Birds Directive set out 2 protection regimes, associated with two main types of measures:**

♦ **Birds listed in Annex I** – **absolute protection**: no hunting or trading activities are allowed, and they are subject to special conservation measures concerning their habitat, to ensure their survival and reproduction in their area of distribution.

♦ **Birds listed in Annex II** – **lighten protection**: on account of their population levels, geographical distribution and reproductive rates throughout the EU, these species may be hunted under national legislation only if it does not jeopardize conservation efforts undertaken in their area of distribution.

→ Every 3 years, Member States must send to the Commission a report on the implementation of national measures taken under this Directive (Art. 12).

→ Member States are under **an obligation to adopt the measures necessary for the conservation of species** (*CJEU, 13 December 2007, aff. C-418/04, European Commission v*

Ireland; CJEU, 28 June 2007, Commission v Spain, C-235/04, §23). Moreover, **Member States have a special obligation to ensure that their legislation designed to transpose the directive is clear and precise** (*CJEU, 2 March 2023, aff. C-432/21, Commission v Poland; CJEU, 15 March 2012, Commission v Poland, C-46/11, EU:C:2012:146, §26 and 27 ; CJEU, 30 May 1991, Commission v Germany, C-361/88, Rec. p. I-2567, §15 ; CJEU, 13 December 2007, aff. C-418/04, Commission v Ireland, §158 ; CJEU, 13 July 2006, Commission v Portuguese Republic , C-191/05, Rec. p. I-6853, §9*).

§1: Annex I protection regime

Member States shall implement **special conservation measures** concerning the habitat of the species referred to in Annex I, so as to ensure their survival and reproduction in their area of distribution.

i. *Step 1: Classifying special protection areas*

The most suitable territories in number and size shall be classified as **special protection areas (SPA)**. Article 4(1) and (2) requires Member States to classify as SPAs all sites which, according to ornithological criteria, appear to be the most appropriate for the conservation of the species in question. **The obligation imposed on Member States to classify sites as SPAs cannot be challenged by the adoption of other special conservation measures** (*CJEU, 23 March 2006, aff. C-209/04, Commission v Austria*).

Eg: a protection regime under which a special protection area only benefits from the status of public domain and maritime hunting reserve, in the absence of concrete measures in areas other than hunting, is not enough to ensure adequate protection (*CJEU, 18 March 1999, C-166/97, Commission v France ; CJEU, 11 December 2008, aff. C-293/07, Commission v Greece, §22 ; CJEU, 13 December 2007, Commission v Ireland, C-418/04, Rec. p. I-10947, §153*).

In the evaluation to set up these conservation measures, States shall particularly consider (Art. 4):

- species in danger of extinction
- species vulnerable to specific changes in their habitat
- species considered rare because of small populations or restricted local distribution
- other species requiring specific attention because of the specific nature of their habitat
- trends and variations in population levels.

Important to know:

♦**Member States shall pay attention to the protection of wetlands, especially wetlands of international importance**.

♦**Member States shall take measures to avoid pollution or deterioration of habitats, or any disturbances affecting the birds in these protected areas <u>but also outside them</u>**.

/!\ This Directive also give incentives for States to take **similar measures for regularly occurring migratory species not listed in Annex I but which are coming to their territories for breeding, moulting or for wintering areas and staging posts along their migration routes**, Member States are therefore obliged to adopt the measures necessary to conserve these species (*CJEU, 17 April 2018, aff. C-441/17, Commission v Poland; CJEU, 13 December 2007, Commission v Ireland, C-418/04, EU:C:2007:780, §46; CJEU, 11 July 1996, Royal Society for the Protection of Birds, C-44/95, Rec. p. I-3805, §23*).

Furthermore, even though the Member States' obligation under Article 4(1) relates only to the classification of the most suitable territories for the conservation of birds, **as soon as the territory of a Member State is home to species mentioned in Annex I, the Member State is obliged to define SPAs for these species** (*CJEU, 13 December 2007, aff. C-418/04, Commission v Ireland; CJEU, 19 May 1998, Commission v Netherlands, C-3/96, Rec. p. I-3031, §56*).

Article 4 requires Member States to take the necessary measures to avoid the deterioration of habitats and disturbance affecting birds. But its important to note that **the protection obligations exist even before a decline in bird numbers has been observed or the risk of extinction of a protected species became a reality** (*CJEU, 22 June 2022, aff. C-661/20, Commission v Slovak Republic; CJEU, 14 January 2016, Commission v Bulgaria, C-141/14, EU:C:2016:8, §76 ; CJEU, 24 November 2016, Commission v Kingdom of Spain, C-461/14, EU:C:2016:895, §83*).

In the same way, in Member States where these species are common, SPAs primarily guarantee the conservation of large parts of the overall population. **However, SPAs are also necessary where these species are relatively rare. In these cases, SPAs serve to ensure the geographical distribution of the species** (*CJEU, 13 December 2007, aff. C-418/04, Commission v Ireland; CJEU, 19 May 1998, Commission v Netherlands, C-3/96, Rec. p. I-3031, §58 ; CJEU, 8 June 2006, WWF Italia e.a., C-60/05, Rec. p. I-5083, §27*).

Moreover, this obligation to classify an area as a SPA does not necessarily become obsolete even if the site is no longer the most appropriate: areas which have not been classified as SPAs when they should have been, continue to fall within the scope of Article 4(4) (*CJEU, 13 December 2007, aff. C-418/04, Commission v Ireland; CJEU, 2 August 1993, Commission v Kingdom of Spain, §22 ; CJEU, 7 December 2000, Commission v France, C-374/98, Rec. p. I-10799, §47 and 57*).

The protection of SPAs must not be limited to measures designed to counteract external damage and disturbance caused by man, **but must also, depending on the situation, include positive measures designed to conserve and improve the condition of the site**. The Directive, **by binding the Member States to the result to be achieved, leaves to the national authorities the power to determine the form and methods of implementation of the Birds Directive**. However, the Court of Justice points out that, even if Article 4(4) **does not require certain results to be achieved, Member States must take seriously the**

objective of protecting habitats outside SPAs, in particular by taking appropriate measures to avoid pollution or disturbance of habitats (*CJEU, 13 December 2007, aff. C-418/04, Commission v Ireland, §153 and 154; CJEU, 20 November 2003, Commission v France, C-296/01, Rec. p. I-13909, §55; CJEU, 18 March 1999, Commission v France, §48*).

♠ *According to the Court caselaw*, Member States must comply with the obligations arising from Article 4(4) **even where the areas concerned have not been classified as SPAs, if it appears that they should have been** (*CJEU, 24 November 2016, aff. C-461/14, Commission v Kingdom of Spain; CJEU, 18 December 2007, Commission v Kingdom of Spain, C-186/06, EU:C:2007:813, §27 ; CJEU, 14 January 2016, Commission v Bulgaria, C-141/14, EU:C:2016:8, §67*). And the legal protection status of SPAs must ensure that the deterioration of natural habitats and the habitats of species, as well as significant disturbance of the species for which the areas have been classified, are avoided (*CJEU, 11 December 2008, Commission v Hellenic Republic; CJEU, 27 February 2003, Commission v Belgium, C-415/01, Rec. p. I-2081, §16*).

♠ **The economic requirements set out in Article 2 of the Directive cannot be taken into account when selecting and delimiting a SPA:** according to established case law, **a Member State may not, when selecting and delimiting a SPA, take into account economic requirements, either on the grounds of a general interest that served the ecological objective pursued by the Birds Directive, or on the grounds of imperative reasons of overriding public interest such as those referred to in Article 6.** And the obligation to classify is not limited by the state of scientific knowledge at a given date (*CJEU, 19 May 1998, Commission v Netherlands, C-3/96, Rec. p. I-3031, §55, 59, 61 and 62 ;CJEU, 23 March 2006, aff. C-209/04, Commission v Austria; CJEU, 18 December 2007, aff. C-186/06, Commission v Kingdom of Spain; CJEU, 11 July 1996, Royal Society for the Protection of Birds, C-44/95, Rec. p. I-3805, §31 and 42 ; CJEU, 14 January 2016, Commission v Bulgaria, C-141/14, EU:C:2016:8, §26 to 36 ; CJEU, Commission v Ireland, C-418/04, EU:C:2007:780, §36*).

The Court uses as a reference various inventories and indicators. Eg: the IBA 2000 Inventory of Important Bird Areas in the European Community (*CJEU, 07 December 2000, aff. C-374/98, Commission v France*), or other non-governmental associations' classifications, as ZICO from BirdLife International (*CJEU, 14 January 2016, aff. C-141/14, Commission v Bulgaria*), although there are not legally binding (*CJEU, 13 December 2007, aff. C-418/04, Commission v Ireland*).

Example of a decision

CJEU, 18 December 2007, aff. C-186/06, Commission v Kingdom of Spain

The Commission received a complaint from various associations: an irrigation project for the irrigable area of the Segarra-Garrigues canal would affect the only two important areas for the conservation of steppe birds in Catalonia, also known as Important Bird Areas. Here the Commission's submission did not relate to the inadequate classification of SPAs, but to the authorization of the Segarra-Garrigues canal irrigation project and the damaging consequences of this project for certain bird species listed in Annex I of the Birds Directive.

The Court stated that Member States must comply with their obligations under the first sentence of Article 4(4) of the Birds Directive, **even where the areas concerned have not been classified as SPAs when they should have been** (*CJEU, 18 March 1999, Commission v France, C-166/97, Rec. p. I-1719, §38 ; CJEU, 20 September 2007, Commission v Italy, C-388/05, §18*).

Accordingly, the project does not comply with the obligation incumbent on States under Article 4 of the Birds Directive, **even though Spain argued that the project is of considerable importance for the economic and social development of the area concerned**. Indeed, the Member States' possibility to significantly affect areas that should have been classified as SPAs and which fall under the regime of the first sentence of Article 4(4) of the Birds Directive **cannot, in any event, be justified by economic and social requirements** (*CJEU, 28 February 1991, Commission v Germany, C-57/89, Rec. p. I-883, §21 and 22*).

ii. Step 2: Setting up a general system of protection

Member States shall establish a **general system of protection (GSP)** for all species referred to in the scope of application, so it applies to the birds listed in Annex I (Art. 5).

/!\ Member States are allowed to derogate from this provision ***IF 2 conditions are met*** (Art. 9):

- there is no other satisfactory solution
- one of the following motives is met:
    - the interests of public health and safety
    - the interests of air safety
    - to prevent serious damage to crops, livestock, forests, fisheries and water
    - for the protection of flora and fauna
    - for the purposes of research and teaching, of re-population, of re-introduction and for the breeding necessary for these purposes

- to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.

The derogation fulfilled by the Member State must specify:

- the species subject to the derogation
- the means or methods authorised and the controls which will be carried out
- the conditions of risk and the circumstances of time and place under which the derogation is granted.

For the implementation of this derogation, Member States are required to establish that the conditions set up by Art. 9 are met (*CJEU, 10 September 2009, aff. C-76/08, Commission v Malta Republic; CJEU, 8 June 2006, WWF Italia e.a., C-60/05, Rec. p. I-5083, §34*).

These special rules have to follow a strict interpretation, i.e. Parties must follow them strictly: the judge must apply the entire text and only the text; interpreting means explaining and giving meaning to a text. To do this, the court must draw all the consequences that the legislator intended to attach to the directive, nothing more, nothing less. The obvious consequence is that the court must not extend the scope of the directive or narrow the meaning of the text, so that there is no uncertainty about the scope of the rules.

§2: Annex II protection regime

Member States shall establish a **general system of protection (GSP)** for all species referred to in the scope of application, so it also applies to the birds listed in Annex II (Art. 5).

The application of the prohibitions referred to in Article 5 **is by no means restricted to species which are listed in Annex I, or which are threatened at some level or whose population shows a long-term downward trend** (*CJEU, 04 March 2021, aff. C-473/19, Föreningen Skydda Skogen*).

Birds listed in Annex II may be hunted under national legislation **owing to their population level, geographical distribution and reproductive rate throughout the Community**. But Member States shall ensure that the hunting of these species does not jeopardise conservation efforts in their distribution area:

- the species listed in Annex II Part A may be hunted in the geographical sea and land area where this Directive applies
- the species listed in Annex II Part B may be hunted only in the Member States in respect of which they are indicated (Art. 7).

/!\ Member States are allowed to derogate from this provision (Cf. Art. 9).

In all cases Member States shall ensure that **the practice of hunting complies with the principles of wise use and ecologically balanced control** and that it is compatible with the population of these species, in particular migratory species. For more information regarding the hunting, capture or killing of birds, please see Art 8.

+ For more information on the sale, transport for sale, keeping for sale and the offering for sale of live or dead birds and of any readily recognisable parts or derivatives of such birds, please see Art 6.

To know – the link between the Birds Directive and the Habitats Directive

The Birds Directive works alongside with the Habitats Directive: the Natura 2000 network is also based on SPAs and ornithological criteria lay down by the Birds Directive.

When a project is likely to have a negative impact on a Natura 2000 site or on species protected by the Birds and Habitats Directive, an environmental assessment must be carried out to assess the impacts the plan or project is going to have on these sites or species.

Article 7 of the Habitats Directive states that the obligations arising from Article 6 (2, 3 and 4) of the Habitats Directive replace the obligations arising from Article 4 (4) of the Birds Directive, for areas classified under Article 4 (1) or similarly recognized under Article 4 (2) from the date of application of the Habitats Directive or the date of classification or recognition by a Member State under the Birds Directive (for an example of application to facts, please see *CJEU, 25 November 1999, aff. C-96/98, Commission v France*).

=> Therefore, the obligations set up for the protected zones of Article 7 of the Habitats Directive are also current for SPAs. As an example, the following case law also applies to the areas referred to in Article 4(1) and (2) of the Birds Directive:

- (Article 6(3) Habitats Directive) the condition to make an appropriate assessment (AA) of the impact of a plan or project is the likelihood or risk that it will significantly affect the site concerned (*CJEU, 7 September 2004, Waddenvereniging et Vogelbeschermingsvereniging, C-127/02, Rec. p. I-7405, §43; CJEU, 21 June 2012, aff. C-177/11, Syllogos Ellinon Poleodomon kai Chorotakton v Ypourgos Perivallontos, Chorotaxias & Dimosion Ergon*). This condition is met if it cannot be excluded that the concerned plan or project will significantly affect the site, based on objective elements (*CJEU, 13 December 2007, Commission v Ireland, C-418/04, Rec. p. I-10947, §227*). So an assessment carried out to assess whether a plan or project is likely to significantly affect a site is necessarily limited to the question of whether it can be excluded, based on objective elements, that the said plan or project significantly affects the site concerned.

The environmental impact assessment must include **an analysis of the cumulative environmental effects that the project may produce if considered in conjunction with**

other projects, insofar as such an analysis is necessary to ensure that the assessment covers all the significant environmental effects of the project (*CJEU, 24 November 2011, aff. C-404/09, Commission v Kingdom of Spain; CJEU, 24 October 1996, Kraaijeveld e.a., C-72/95, Rec. p. I-5403, §30*).

Example: in *CJEU, 24 November 2011, Commission v Kingdom of Spain*, an analysis of the impact of this project on the species was necessary, since the Spanish authorities could not have been unaware of the presence of these species on the site, since in 1998 Spain classified the site as an SPA in 2000 due to the presence of these species. But above all, **even if the farm is located outside the SPAs, it is immediately adjacent to the site, so it may have an impact on it**.

> To set up an infringement to Article 6 (2) of the Habitats Directive, the Commission does not have to establish a causal relationship between the exploitation of an installation and a significant disturbance to species, the Commission just has to establish the existence of a *probability* or a *chance* that the exploitation prompt such disturbance.

b. Relevance for the Red Alert Mechanism

When an organisation is told that there is somewhere in a EU Member State a project that can cause damage to the environment, the organisation may go look into the transposition of the Birds Directive, to see how it has been transposed and what are the national regulatory mechanisms put in place to fulfill the objectives of the Directive.

If an Infringement mechanism has already been lodged by the Commission for an erroneous transposition or an incorrect application of the national measures, it can be helpful to tell the national authorities that they need to act in accordance with what the Commission and the Court of Justice said.

If there is no such procedure, the transposition, national legislation and the Birds Directive's objectives and principles can be opposed to local, regional or national authorities to remind them of their obligations and how they are supposed to act. Depending on the birds reported to be on site, the different protection regimes will be applicable. But in all cases, **Member States have to take the requisite measures to maintain the population of birds at a level compatible with ecological, scientific and cultural requirements** while taking into account economic and recreational requirements. Member States must take the appropriate measures to preserve, maintain or re-establish **a sufficient diversity and area of habitats for birds**. **The national measures shall include the creation of protected areas, re-establishment of destroyed biotopes,** creation of biotopes, etc. Furthermore, Member States must establish **a general system of protection for all species of birds referred to** in the scope of application.

Accordingly, all the national measures adopted to meet these goals can be reviewed to see if the project respects or not what has been implemented at the national or local level. Otherwise, it can be an argument to oppose the authorities, as they are forced to comply with the objectives of the Directive, even if they are free about the forms and measures chosen to comply effectively.

c. The protection regime implemented for birds in the Urdaibai area

§1: The transposition of the Birds Directive in Spanish law

Each EU Member State is bound by an obligation to achieve results in transposing directives. However, Member States remain free to choose the means of ensuring transposition. A deadline must be respected (generally no more than two years), and the texts produced must be binding.

The Kingdom of Spain is a EU Member State, so it has the obligation to transpose all EU Directives. The transposition laws are:

- Ley 42/2007, de 13 de diciembre, del Patrimonio Natural y de la Biodiversidad
- Ley 33/2015, de 21 de septiembre, por la que se modifica la Ley 42/2007, de 13 de diciembre, del Patrimonio Natural y de la Biodiversidad.

If a Member State does not respect this obligation (no transposition or incorrect transposition), the European Commission can launch an **Infringement procedure**, and this procedure can be supported by a complaint, filled by individuals or NGOs (please see Part II).

Moreover, Member States have a special obligation to ensure that their legislation designed to transpose the directive is clear and precise (*CJEU, 2 March 2023, aff. C-432/21, Commission v Poland; CJEU, 15 March 2012, Commission v Poland, C-46/11, EU:C:2012:146, §26 and 27 ; CJEU, 30 May 1991, Commission v Germany, C-361/88, Rec. p. I-2567, §15*).

As far as the Kingdom of Spain is concerned, no Infringement mechanism has been lodged by the Commission against the Spanish transposition of the Birds Directive. It seems that the Spanish laws fulfil the transposition criteria.

However, other Infringement procedures can be launched against specific point of the protection regime set up by the transposition laws, for example against the effective protection of birds, the appropriate national regulation or the classification of SPAs.

For the Urdaibai reserve, several national regulations apply, linked with the transposition of the Birds Directive:

- Ley 5/1989, de 6 de julio, de Protección y Ordenación de la Reserva de la Biosfera de Urdaibai : it is the first law related to the establishment of a special legal regime for the

Urdaibai Biosphere Reserve, which goal is to protect the integrity and promote the recovery of the flora, fauna, landscape, water and atmosphere and of all its ecosystems due to their natural, scientific, educational, cultural, recreational and socioeconomic interest.

- DECRETO 242/1993, de 3 de agosto, por el que se aprueba el Plan Rector de Uso y Gestión de la Reserva de la Biosfera de Urdaibai : it is a "Use and Management Plan" that materializes the establishment of the special legal regime necessary for the protection and enhancement of the territorial scope of the aforementioned Reserve.
- DECRETO 27/2003, de 11 de febrero, de modificación del Plan Rector de Uso y Gestión de la Reserva de la Biosfera de Urdaibai : it updates the management plan for the Urdaibai Biosphere reserve.
- DECRETO 160/2004, de 27 de julio, por el que se aprueba definitivamente el Plan Territorial Sectorial de Zonas Húmedas de la Comunidad Autónoma del País Vasco : it pursues a responsible management of natural resources and protection of the environment, as an inventory and classification of the wetlands recognised among others by the Ramsar Convention, and the regulation of uses and activities in accordance with their carrying capacity in the wetlands subject to specific management. It also stablishes a series of recommendations and general criteria for the protection of all the wetlands inventoried.

§2: The protection regime implemented for birds in the Urdaibai area

As it is located on a migratory route, the Urdaibai marshes are used by various species of waterbirds for nesting, staging or wintering. Over 250 species have been recorded, and 215 of them are protected by the Birds Directive.

Among them, the one listed in the document sent by the organisation mentioned 5 species that are registered under Annex I of the Birds Directive:

- the Eurasian Spoonbill (*Platalea leucorodia*), with 1454 spoonbills recorded on site in 2011 and for which the site represents a crucial staging area
- the Egyptian Vulture (*Neophron percnopterus*), frequents the site regularly and is an endangered specie
- the Osprey (*Pandion haliaetus*), with a significant population on site and for which the site is an important nesting area
- the European storm petrel (*Hydrobates pelagicus*), up to 600 pairs have been recorded
- the Shags (*Phalacrocorax aristotelis*), up to 70 pairs have been recorded.

As all these birds come under Annex I, we will look at the regime applicable to these birds.

+ For a more precise report on the birds populations levels and inventories, please see the *RESUMEN DE LOS RESULTADOS DEL INFORME DEL ARTÍCULO 12 DE LA DIRECTIVA 2009/147/CE, DE AVES (SEXENIO 2013- 2018)* , i.e. a report made by the government on the review of the Spanish data: it highlights the final results of the information reported to Europe for the sexennial reports (period 2013-2018), validated and accepted by the European Commission.

i. *The first obligation: classifying SPA to implement protection*

Annex I protection regime will be used here, both for birds listed in Annex I and for specific migratory species: according to the Court of Justice, this Directive also give incentives for States to take similar measures for regularly occurring migratory species not listed in Annex I but which are coming to their territories for breeding, moulting or for wintering areas and staging posts along their migration routes.

Member States shall implement special conservation measures concerning the habitat of the species referred to in Annex I to ensure their survival and reproduction in their area of distribution.

First, Spain has the obligation to classify the most suitable territories in special protection areas (SPAs). On the maps, **it seems that the project is likely to be located almost entirely in the SPA** *Ría de Urdaibai*.

In this case the obligation of classifying SPA has been fulfilled, as even though the Member States' obligation under Article 4(1) relates only to the classification of the most suitable territories for the conservation of birds, as soon as the territory of a Member State is home to species mentioned in Annex I, the Member State is obliged to define SPAs for these species (*CJEU, 13 December 2007, aff. C-418/04, Commission v Ireland; CJEU, 19 May 1998, Commission v Netherlands, C-3/96, Rec. p. I-3031, §56*).

The question is whether there are enough SPAs or not: <u>this can be challenged by the Commission before the Court of Justice</u>, as Member States must comply with the obligations arising from Article 4(4) **even where the areas concerned have not been classified as SPAs, if it appears that they should have been** (*CJEU, 24 November 2016, aff. C-461/14, Commission v Kingdom of Spain; CJEU, 18 December 2007, Commission v Kingdom of Spain, C-186/06, EU:C:2007:813, §27 ; CJEU, 14 January 2016, Commission v Bulgaria, C-141/14, EU:C:2016:8, §67*).

<u>It can be an argument to develop in the complaint procedure before the European Commission</u> (please see Part II). Indeed, during the evaluation to classify territories as SPAs, Member States shall particularly take into account (Art. 4) species in danger of extinction, or species vulnerable to specific changes in their habitat for example, which is the case especially for migratory species.

The Court also emphasizes that Member States have a certain degree of freedom when choosing the most appropriate territories for classification, but it does not concern the appropriateness of classifying as SPAs territories which appear to be the most appropriate according to ornithological criteria: this degree of freedom is only on the application of these criteria to identify the most appropriate territories for the conservation of the species listed in Annex I (*CJEU, 23 March 2006, aff. C-209/04, Commission v Austria*). So classification cannot be the result of an isolated examination of the ornithological value of each of the areas in question, but **must be based on a consideration of the natural limits of the ecosystem concerned**, and the ornithological criteria, on which the classification must be based exclusively, must be scientifically founded (*CJEU, 13 December 2007, Commission v Ireland, C-418/04, EU:C:2007:780, §142*). And **the economic requirements set out in Article 2 cannot be taken into account when selecting and delimiting a SPA**.

Moreover, the Directive states that Member States shall pay attention to the protection of wetlands, especially wetlands of international importance. In and near the planned project site, there are internationally-identified Ramsar sites, which need to be protected specifically.

In those SPAs, and in the territories that should have been classified as such, Member States shall take measures to avoid pollution or deterioration of habitats, or any disturbances affecting the birds in these protected areas **but also outside them**. Under Article 6(2) of the Habitats Directive and Article 4(4) of the Birds Directive, **the legal protection status of SPAs must ensure that the deterioration of natural habitats and the habitats of species, as well as significant disturbance of the species for which the areas have been classified, are avoided**. This obligation of protecting habitats also applies outside SPAs, in particular by taking appropriate measures to avoid pollution or disturbance of habitats (*CJEU, 13 December 2007, aff. C-418/04, Commission v Ireland, §153 and 154; CJEU, 20 November 2003, Commission v France, C-296/01, Rec. p. I-13909, §55; CJEU, 18 March 1999, Commission v France, §48*).

That means that inside SPAs and in areas near them, the Member State has to ensure the effective implementation of its legislative framework (*CJEU, 22 June 2022, aff. C-661/20, Commission v Slovak Republic; CJEU, 17 April 2018, Commission v Poland (Bialowieza Forest), C-441/17, EU:C:2018:255, §213; CJEU, 2 July 2007, Commission v Austria, C-507/04, EU:C:2007:427, §103 and 339 ; CJEU, 26 January 2012, Commission v Poland, C-192/11, EU:C:2012:44, §25 ; CJEU, 27 April 1988, Commission v France, 252/85, EU:C:1988:202, §9*). So in Urdaibai, even if the project is located in and near SPAs or outside but close to a SPA, the protection obligations of the Birds Directive are effective.

Thus, the government cannot allow a project that can negatively affect birds and their reproduction cycle. And the protection obligations exist even before a decline in bird numbers has been observed or the risk of extinction of a protected species became a reality (*CJEU, 22 June 2022, aff. C-661/20, Commission v Slovak Republic; CJEU, 24 November 2016, Commission v Kingdom of Spain, C-461/14, EU:C:2016:895, §83*). So, the Spanish government cannot justify the project with the number of birds, as the protection must go on even if the population has not started to decrease.

Moreover, in the Urdaibai case, conservation measures have certainly been adopted, but they need to be implemented effectively, i.e. by not degrading the environment or carrying out constructions that would run counter to the rules for protecting and restoring the areas concerned.

In conclusion, this project is likely to cause significant disturbance in SPAs and areas where protected birds are passing through or live. If this project is authorised, it can be a violation of the various obligations set up by the Birds Directive. The development works carried out do not comply with the protection requirements for the species reported to live on site.

ii. *The second obligation: the general system of protection*

Member States shall establish a **general system of protection (GSP)** for all species referred to in the scope of application, so it applies to the birds listed in Annex I. However, Member States are allowed to derogate from this provision if 2 conditions are met:

- there is no other satisfactory solution
- one of the motives set up in Article 9 is met.

In the Urdaibai case, none of these motives can be used to justify a derogation to a general system of protection.

So here, as a significant number of birds living or passing through the project's site are listed in Annex I or are migratory species, the Spanish government must establish a GSP. And it has been done through all the legislation set out in the part on transposition.

In conclusion, it seems that the Spanish government has fulfilled its obligation regarding the establishment of a general system of protection.

Nevertheless, as the government has started to dismantle some protective measures, such as reducing the shoreline protection from 100m to 20m, the local organisation needs to keep a close watch on this point.

If a Member State wants to derogate from the GSP, the derogation must specify:

- the species subject to the derogation
- the means or methods authorised and the controls which will be carried out
- the conditions of risk and the circumstances of time and place under which the derogation is granted.

These special rules must follow a strict interpretation. For their implementation, Member States are required to establish that the conditions set up by Art. 9 are met (*CJEU, 10 September 2009, aff. C-76/08, Commission v Malta Republic; CJEU, 8 June 2006, WWF Italia e.a., C-60/05, Rec. p. I-5083, §34*).

Example of infringement procedures against Spain on the grounds of the Birds and Habitats Directives:

♦ In *CJEU, 24 November 2011, Commission v Kingdom of Spain*, an analysis of the impact of the project on the species was necessary, since the Spanish authorities could not have been unaware of the presence of these species on the site, since in 1998 Spain classified the site as an SPA in 2000 due to the presence of these species. But above all, **even if the farm is located outside the SPAs, it is immediately adjacent to the site, so it may have an impact on it**.

Example of infringement procedures with facts similar to our case:

♦ *CJEU, 20 September 2007, aff. C-388/05, Commission v Italy* : la Lega Italiana Protezione Uccelli (LIPU), the Italian representative of BirdLife International, lodged a complaint with the Commission alleging that a designated geographical area classified as an SPA was the subject of numerous industrial and building works, already completed or in progress, damaging the natural habitat and conservation of numerous species of wild birds living in or transiting through the area. The Court ruled in favor of the protection against all construction projects, done or in progress, that were causing harm to natural habitats and to the conservation of numerous wild bird species living or routing through these areas (similar judgement: *CJCE, 29-01-2004, aff. C-209/02, Commission c/ Autriche*).

2) *The Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora*

This Directive was codified on 21 May 1992 and has been amended several times. The consolidated version is from the first of July 2013. The Member States had 2 years to enforce this directive into their national legal systems. (Article 23).

a. The Habitats Directive

§1: The protection regime established by the Habitats Directive

This directive **aims to protect biodiversity in the European Union in specific areas where some species are in danger of extinction, captivity or mistreatment.** To guarantee an effective protection, the Member States need to ensure the maintenance or restoration of those natural habitats and species of wild fauna and flora to keep a favourable environment for those species. The goal is to maintain or restore a favourable conservation status for those natural habits and species of wild fauna and flora of Community interest (Article 2). This Council Directive set up concrete mechanisms that Member States need to apply in their countries to reach that goal: the creation of Natura 2000 network at European level and a strict and absolute protection regime for species.

i. *The subject of the protection*

The Council Directive provides a list of habitats and species concerned that are to be given protection. First, the protection concerns the natural habitats and of wild fauna and flora that are in the EU territory (Article 2). Then the Directive contains several appendices listing the different types of natural habitats and the animal and plant species depending on their category and need.

Annex I: Natural habitat types of community interest whose conservation requires the designation of special areas of conservation.

Annex II: Animal and plant species of community interest whose conservation requires the designation of special areas of conservation.

Annex IV: Animal and plant species of community interest in need of strict protection.

Annex V: Animal and plant species of community interest whose taking in the wild and exploitation may be subject to management measures.

Species that are not in the Annexes could also benefit from the protection of the Directive. Article 6 of the Habitats Directive needs to be read with the Birds Directive. Therefore, “Member States [need] to establish, for each special protection area, individual conservation objectives and measures for all bird species listed in Annex I to Directive 2009/147 and regularly occurring migratory species not listed in that annex and their habitat [...].” (CJEU, 12 September 2024, Elliniki Ornithologiki Etaireia and Others v Ypourgos Esoterikon and Others, Aff. C-66/23).

IN SHORT

The subjects of protection under the directive are certain natural habitats at risk of extinction, animal and plant species that are at risk of extinction or likely to be threatened, and species that require strong protection to prevent possible capture. Bird species not listed in the annexes may still fall under the Habitats and Birds directive due to their regular passage through certain areas.

For more information about the Birds Directive, refer to : Part 1 Situation 1 – A construction project is being considered within/near a wetland > II - Warning the authorities about the potential violation of international and/or European law > B- European Law > The Directive 2009/147/EC of the European Parliament and of the Council (30 November 2009) on the conservation of wild birds.

ii. The Natura 2000 network (article 3 and 4)

The development of Natura 2000 network is the main goal of this Council Directive. The purpose is t**o harmonize legislation among Member States at European level regarding environmental protection and biodiversity conservation.** It ensures that specific species benefit a high level of protection with the creation of special areas of conservation and special protection areas. Member States are the main actors in the creation of sites in their own territory and must follow several criteria from the Directive to select the relevant sites, natural habitats and species that are concerned by the Natura 2000 regulation and must use scientific data and research to create the list of sites. The Commission finalizes the list with the cooperation of the Member States. The Member State has 6 years to designate this site as a special area of conservation. The Member State must set rules to ensure the maintenance and the favourable conservation status of the site. (CJEU, 29 June 2023, European Commission v Ireland, Aff. C-444/21, point 45)

iii. General obligations from the Directive regarding the Natura 2000 sites

The Directive sets up obligations to Member States so that the biodiversity in the EU is well protected. It "must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty" (CJEU, 20 June 2024, European Commission v Republic of Bulgaria, Aff. C-85/22, point 52). The conservation measures need to be effective in the territory and be "complete, clear and precise […]" (CJEU, 29 June 2023, European Commission v Ireland, Aff. C-444/21, point 138).

Member States must do **their utmost to protect the habitats and species in the Natura 2000 sites**, meaning that the main goal is to keep a favourable environment for the habitats and species and that Member States have the obligation to prevent anything from deteriorating those areas (CJEU, 4 March 2010, European Commission v France, Aff. C-241/08, point 18).

They must monitor and check regularly that the status of the sites stays the same and establish regulatory and administrative measures to protect the new sites (Article 6). Those measures must be efficient (CJEU, 22 January 2022, European Commission v Slovak Republic, Aff. C661/20, point 128).

States should support features like rivers, hedgerows, or ponds in their land-use plans to help animals and plants move and thrive, keeping the Natura 2000 network connected (article 10).

States must monitor the health of protected habitats and species. They will then know where they must pay the most attention and be very careful regarding these areas (Article 11).

To ensure that Member States respect the guidelines of the Directive, they need to make a report to the Commission every 6 years where the Member States describe how they respect the Directive and share new measures being implemented. They also need to include the evaluation of impact, the conservation status of the natural habitat and species from Annex I and Annex II and the outcome from the surveillance of those sites. It will be verified by the Commission (Article 17).

Member States are encouraged to work with other Member States to do research and carry out scientific work to be able to fulfill the objectives of Article 2 and Article 11 (Article 18).

Member States can reintroduce species in Annex IV when it benefits its conservation. An investigation must be made to ensure that it will allow a favourable conservation status in that case, and the public can be part of this process. This reintroduction should not cause any harm to the natural habitats, animal species or plant species. The outcome of the investigation is also public. Member States also need promote education and inform citizens of the necessity to protect the species of fauna and flora (Article 22).

IN SHORT

The Directive obliges Member States to put in place clear, effective and precise measures to ensure proper protection of biodiversity. They must do their best to prevent any deterioration or negative impacts. Member States must monitor the situation regularly and take appropriate measures to do so. A report must be submitted every 6 years to the Commission to prove the proper observance of the Directive, the latest measures adopted and the Status of sites. Member States make decisions on Natura 2000 sites based on scientific data and sometimes with the help of the public.

iv. A project and its consequences on the biodiversity regarding the directive (Article 6)

As said before, Member States have the obligation to keep the situation in Natura 2000 **favourable** for habitats and species. Therefore, they must be very careful with every project that could have an impact on the Natura 2000 sites so that no negative consequences are seen.

A project is defined by the "execution of construction works or of other installations or schemes and in the second indent, to other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources" and "refers to work or interventions involving alterations to the physical aspect of the site" (CJEU, 29 July 2019, Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministers, aff. C-411/17 ; CJUE, 19 April 2012, Pro-Braine ASBL and Others v Commune de Braine-le-Château, aff C-121/11 ; CJEU, 17 July 2014, European Commission v Greece, aff C-600/12; CJEC, 7 September 2004, Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, aff. C-127.02).

An appropriate assessment must be made to highlight the impact of those plans on the habitats and species. If it is found that the project might have negative consequences on the territory that would lead to the degradation of the protected area, the project must not continue especially if that means that the integrity of the habitats and the species are in danger. The site must stay intact whatever happens. After the appropriate assessment is made, the competent national authority must decide whether to allow the project to continue. If there are no adverse effects, the project can take place.

The opinion of the public can also be considered.

If the report shows a deficiency in the protection of the habitats and species, the national authority can find alternative solutions to take compensatory measures to restore the situation before the impact of the project.

Article 6 of this Directive created a debate regarding the point at which a project can still proceed if it has an impact on a site or the environment.

The CJEU is very clear about how we should interpret Article 6:

The slightest negative impact a project can have on a natural habitat should not be authorized. An activity is authorized and conforms to the Directive if it generates no perturbation on the site or natural habitats and does not change the conservation status of animal and plant species. (CJEU, 22 January 2022, Commission v Slovak Republic, aff. C-661/20, point 98; CJEU, 24 January 2011, Commission v Kingdom of Spain, aff. C-404/09, point 126; CJEU, 24 November 2016, Commission v Kingdom of Spain, aff. C-461/14, point 94, CJEU, 14 January 2016, European Commission v Republic of Bulgaria Aff. C-141/14; CJEC, 20 September 2007, Commission of the European Communities v Italian Republic, Aff. C-388/05.)

Therefore, even if there are no material evidence of negative consequences yet, just a **possible risk wouldn't let a project continue.** The Commission only needs to expose the probability or the risk that an impact is possible (CJEU, 22 January 2022, Commission v Slovak Republic, aff-C661/20, point 101).

The projects **don't necessarily need to be in the Natura 2000 sites**. That's why plans or projects, even if they are not directly related to the sites, need to be discussed if **they might have a significant effect on the site**. The projects could be away from the sites, but if they might have an impact, they need to be analysed. The plans or projects can be studied individually or in combination with other plans.

This concept was strengthened again with a different case, where the Court said "that a plan or project not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorized only to the extent that it will not adversely affect the integrity of that site" (CJEU, 17 April 2018, European Commission v Poland, aff. C-441/17, point 108; CJEU, Edel Grace and Peter Sweetman v An Bord Pleanala, aff. C-164/17, point 38; CJEU, 4 March 2010, European Commission v France, Aff. C-241/08, point 44).

The integrity of the Natura 2000 site is also defined by the Court : "the site needs to be preserved at a favourable conservation status; this entails the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of sites of Community importance, in accordance with that directive" (CJEU, 7 November 2018, Brian Holohan and Others v An Bord Pleanála, aff. C-461/17, point 35).

The precautionary principle is the main principle in this process. The point of this principle is to take measures when scientific data is uncertain and the issue is very important (think thank European Parliament[29]). Even if we are not sure that the project has an actual negative effect on the protected area, no risk is to be taken. (CJEC, 7 September 2004, Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Aff. C-127/02, point 44).

There are some imperative reasons where, even if the project has negative consequences on the Natura 2000 sites, **the project can still be carried out** when there are beneficial consequences for the environment, human health or public safety (cf **Article 6-4**).

"A project incompatible with the conservation objectives of the site concerned must be implemented **for imperative reasons of overriding public interest**". (CJEU, 14 January 2016, Grüne Liga Sachsen eV and Others vs Freistaat Sachsen, Aff C-399/14, point 56).

This idea was reaffirmed in several cases, where the court analysed if the project was valid for imperative reasons and found again the need for an evaluation of the interest of the project and the negative impact on the protected site.

The Court analyses projects very strictly. In a decision (CJEU, 16 February 2012, Marie-Noëlle Solvay and Others vs Région Wallonne, Aff. C-182/10, point 79), the Court said that the "**article 6(4)** of the Habitats Directive must be interpreted as meaning that the creation of infrastructure intended to accommodate a management centre cannot be regarded as an imperative reason of overriding public interest, such reasons including those of a social or economic nature, within the meaning of that provision, capable of justifying the implementation of a plan or project that will adversely affect the integrity of the site concerned".

Moreover, "the assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration" (CJEC 20 September 2007, Commission vs Italie, Aff. C-304/05, point 83).

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[29] https://www.europarl.europa.eu/thinktank/en/document/EPRS_IDA(2015)573876

A strict interpretation of the derogation from Article 6 to authorize the project to be carried out for compelling reasons must be made. “Thereof must be interpreted strictly and can be applied only after the implications of a plan or project have been analysed in accordance with Article 6(3)” (CJEU, 17 April 2018, European Commission vs Republic of Poland, Aff C-441/17, point 189).

When a project is being carried out for compelling reasons, a **balance must be struck between the damage to the site and the necessity of the project** given the risks and impacts that this project would have on the protected site. “The assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration. In addition, in order to determine the nature of any compensatory measures, the damage to the site must be precisely identified”. (CJEU, 14 January 2016, Grüne Liga Sachsen eV and Others vs Freistaat Sachsen, Aff C-399/14, point 57)

- If we can’t avoid the damage caused by the project because this project is being done for compelling reasons, we must **reduce** the negative impact.

- If we can’t reduce it, or we have reduced it as much as possible, then the damage that the project will cause to the protected site must be **compensated** -> “If, in spite of a negative assessment carried out in accordance with the first sentence of Article 6(3) of the directive, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, and there are no alternative solutions, the Member State is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected”. (CJEU, 14 January 2016, Grüne Liga Sachsen eV and Others vs Freistaat Sachsen, Aff C-399/14, point 72)

Where a project is carried out for compelling reasons, the state must find **an alternative solution to be sure that they do not have any other choice but to pursue the project**. “Therefore, the examination of alternative solutions requires weighing the environmental consequences of maintaining or restricting the use of the works at issue, including closure or even demolition, on the one hand, against the important public interest that led to their construction, on the other ” (CJEU, 14 January 2016, Grüne Liga Sachsen eV and Others vs Freistaat Sachsen, Aff C-399/14, point 74).

We can see the same reasoning from the European Commission in a case in 2018 : “a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, and there are no alternative solutions, the Member State is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected” (CJEU, 17 April 2018, European Commission vs Republic of Poland, Aff C-441/17, point 190 ; CJUE, 21 July 2016, Hilde Orleans and Others vs Vlaams Gewest, Aff C-387/15 and C-388/15, point 62)

The term “compensatory measures” is defined as “any measure liable to protect the overall coherence of Natura 2000, whether it is implemented within the affected site or in another part of the Natura 2000 network.” (CJUE, 15 May 2014, T.C. Briels and Others, v Minister van Infrastructuur en Milieu, Aff C-521/12, point 38).

It is essential that the authorities demonstrate that **there are no alternative solutions for a project which could have a negative impact on a protected site**. If the authorities have not tried to demonstrate the absence of alternative solutions, then they will have failed to meet their obligations under the Habitats Directive. This was demonstrated during the construction of a highway project that crossed a special protection area. “By implementing a project for a motorway whose route crosses the Castro Verde special protection area, notwithstanding the negative environmental impact assessment and without having demonstrated the absence of alternative solutions for the route concerned, the Portuguese Republic has failed to fulfil its obligations under Article 6(4) of Council Directive 92/43/EEC” (CJEC, 26 October 2006, Commission of the European Communities vs Portuguese Republic, Aff C-239/04, point 41).

IN SHORT

The Directive requires an appropriate assessment of the project to determine its impact on the Natura 2000 site. A project can be defined as facilities or constructions that may alter the surrounding nature. The goal is to prevent any risk of deterioration, negative consequences on Natura 2000 sites and their surroundings. There must be no doubt about the impact of the project, otherwise the project cannot be authorized. The precautionary principle is very important and means that even if scientific data are not certain of the outcome and impact of the project, no risk should be taken.

To know – the link between the EIA directive and Habitat directive

The Habitats Directive prohibits any degradation or negative impact on a protected area that is concerned by the Natura 2000 regulation to preserve biodiversity. Article 6 of this Directive states that a prior assessment is necessary to authorise a project that could affect a Natura 2000 site. It will determine if the project does not put the site in danger.

The Environmental Impact Assessment Directive requires an environmental assessment to ensure environmental and health protection. It establishes an obligation to assess impacts throughout the life of the project.

The two directives are complementary in the sense that the EIA Directive allows for a more global assessment of the impacts on a protected site. Its annexes define the cases where an assessment is systematic or recommended and the Habitats Directive must also assess the risks of impact or deterioration on Natura 2000 areas.

This was admitted in jurisprudence by the CJEU that the environmental impact assessment must be made before any authorization can be granted. (CJEU, 29 July 2019, Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministers, aff. C-411/17)

> For more information concerning the EIA Directive, refer to: Part 2 Situation 2: An environmental impact assessment has been executed > I - On the violation of procedural obligations > A - Environmental impact assessment

§2: The absolute and strict protection regime

The second mechanism set up by the Directive is a high and absolute protection regime for animal and plant species listed in Annex IV to ensure their well-being during their whole life (Articles 12 and 13).

In Article 12, it is written that the protection regime should forbid regarding animal species:

(a) all forms of deliberate capture or killing of specimens of these species in the wild;

(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;

(c) deliberate destruction or taking of eggs from the wild;

(d) deterioration or destruction of breeding sites or resting places.

Those species are not to be considered an object in any financial transactions including selling, transport or any part of business.

In Article 13, it is written that the protection regime should forbid regarding plant species:

(a) the deliberate picking, collecting, cutting, uprooting or destruction of such plants in their natural range in the wild;

(b) the keeping, transport and sale or exchange and offering for sale or exchange of specimens of such species taken in the wild, except for those taken legally before this Directive is implemented.

Member States monitor the exploitation of the species so that their environment and status remain the same and are still favourable. They must add measures to the surveillance that they are doing on those species (Article 14). Article 15 deals with the capture or killing of species of the wild flora and fauna listed in Annex V and if we are in a case where Article 16 is applied, species from Annex IV (Article 15).

Article 16 elaborates derogations from the provisions of Articles 12, 13, 14, 15 if there are no other alternatives and the consequences won't alter the conservation status for various reasons. For example: to protect the biodiversity, prevent any damages, for public health and safety, public interest or for scientific purposes (Article 16).

IN SHORT

The Directive ensures absolute protection for species listed in Annex IX from being killed, captured or having their habitats destroyed. Member States must monitor the sites and species. Only specific derogations can overcome this protection regime**.**

§3: The transposition in the Spanish legislation

The transposition of the Habitat Directive was made through Ley Nº 42/2007 - Ley del Patrimonio Natural y de la Biodiversidad.

b. Relevance for the Red Alert Mechanism

§1: The protection of the natural habitats and animal and plant species

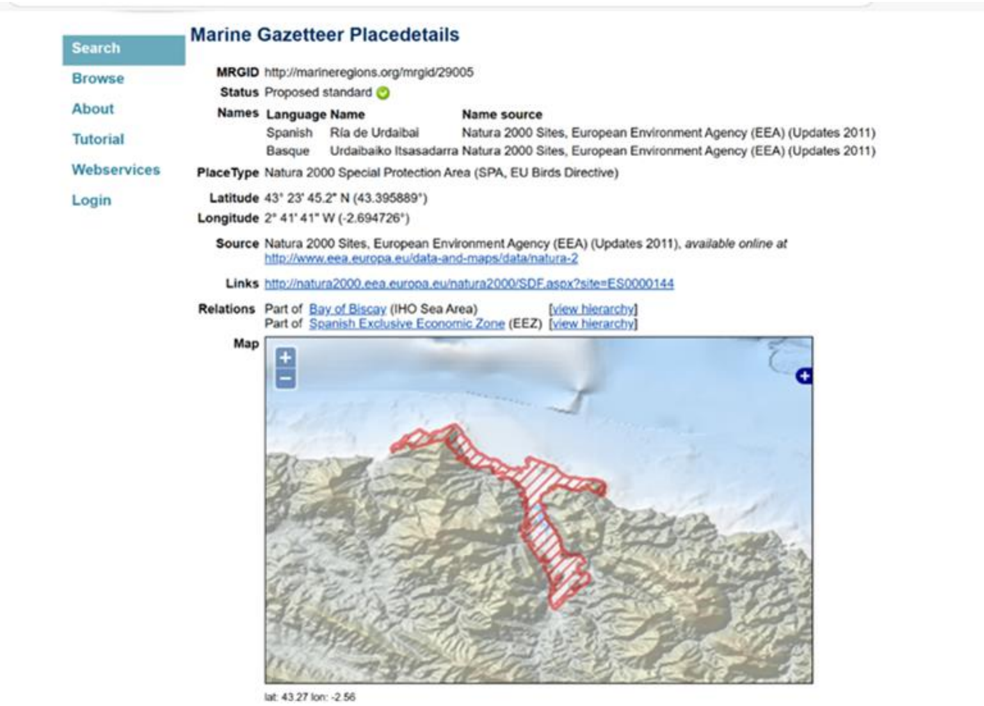
In 1984, UNESCO defined the Urdaibai as a **Biosphere Reserve**, giving the site its first level of protection. The goal is "to understanding and managing changes and interactions between social and ecological systems, including conflict prevention and management of biodiversity" (definition given by UNESCO[30]).

Then, to ensure the protection of the zone, the Basque Parliament approved Ley 5/1989 de Protección y Ordenación de la Reserva de la Biosfera de Urdaibai. This legislation creates specific Management Plans (PRUG), which aim to promote environmental education and manage the conservation of the ecosystems, biodiversity and landscape. The legislation also includes the Program for the Harmonization and Development of Socio-Economic Activities (PADAS), logistic support for education and an investigation plan. The regional Council of Biscay, the Basque government and the Spanish government have authority over Urdaibai.

Finally, the Urdaibai zone is considered **a Natura 2000 site**[31].

[30] https://www.unesco.org/en/mab/wnbr/about

[31] https://www.marineregions.org/gazetteer.php?p=details&id=29005



Therefore, the habitats and the species integrated in this area must receive high protection and their environment must stay favourable.

The Urdaibai area is known for its biodiversity. It includes 729 species of fauna, 821 species of flora, 86 habitats (including 26 habitats of Community interest) and 52 sites of geological interest.

The document we received from the association gives us a list of species represented in the Urdaibai zone. Checking the list, we can notice that some are indicated in several appendices of the Directive. That means that it requires the creation of a Natura 2000 site to ensure their protection, or they require the absolute protection regime.

Below are the following species that belong to the list of species where their conservation needs the designation of special area of conservation:

- Austropotamobius pallipes: endangered
- Miniopterus schreibersii: vulnerable
- Mustela lutreola: critically endangered
- Cerambyx cerdo: vulnerable
- Coenagrion mercuriale: vulnerable
- Lucanus cervus: near threatened
- Rhinolophus Euryale: near threatened
- Emys orbicularis: near threatened
- Lacerta schreiberi: near threatened

Therefore, Spain has the obligation to protect those species from any deterioration and any plan that might change the favourable situation of their environment. The Member State must prevent it even if there is no clear evidence to prove that there will be negative consequences, thus Spain needs to establish plans to ensure the safest option for those species.

On top of that, some species on the document from Red Alert whose conservation needs to be protected are also in another appendix that outlines species that need to benefit from the strict protection regime:

- Mustela lutreola
- Austropotamobius pallipes
- Cerambyx cerdo
- Mauremys leprosa
- Emys orbicularis
- Lacerta schreiberi.

Spain, by transposing the Directive through the law 42/2007, establishes the guarantee of the conservation of wild native species in Article 54. In Article 56, a list of wild species under Special Protection Regime is created. The binding impact is strengthened by the enforcement of Royal Decree 139/2011 from February 2011 that develop that list.

NEWS IN 2024[32]

The European Commission awards prizes to organisations for their management of Natura 2000 sites. Among the winners of this year's awards, the Hazi Foundation (Department of Economic Development, Sustainability and Environment of the Basque Government) established a Franco-Spanish initiative to address inappropriate grazing practices to restore habitats and ensure their proper conservation.

Another Spanish project was also awarded in 2024. Its goal was to increase the effectiveness of measures taken to fight against environmental crime in Portugal and Spain. Thanks to that, a better legal system for protecting the environment and biodiversity is now in place.

It shows the real interest in Spain and in Europe for the importance of ensuring the protection of biodiversity.

IN SHORT

The Urdaibai area is a Natura 2000 area with vulnerable, endangered or near-threatened species listed in the Habitats Directive. Therefore, Spain must do everything possible to ensure their protection through either the strict protection regime or clear, precise and appropriate measures.

[32] https://environment.ec.europa.eu/news/natura-2000-award-and-winners-are-2024-05-30_en

§2: The expansion of the Guggenheim Museum Bilbao

With the appropriate assessment, the national authority will know if there are any consequences on the habitats and species listed above and will determine any compensatory measures necessary. Even if there is a slight doubt, the authority will have to reconsider the project to protect the biodiversity in the Urdaibai zone. The environmental assessment is included in the appropriate assessment and will determine the change of situation of the environment during the project. (If you want more information, refer to: Part 2 Situation 2: An environmental impact assessment has been executed > I - On the violation of procedural obligations > A - Environmental impact assessment).

There is no mandatory method of evaluation, the only requirement is that the evaluation must be done before any authorization be granted (CJEU, 7 September 2004, Landelijke Vereniging tot Behoud van de Waddenzee et Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Aff. C-127/02, point 52, 53).

With the scientific data, the national authority must make the correct decision to protect the natural habitats and the animal and plant species and cannot authorize a project without the environmental assessment. (CJEU, 29 July 2019, Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministers, aff. C-411/17)

The expansion of a museum doesn't count as a compelling reason as the project is not done due to public health or public interest. If there was a compelling reason, the authority needs to evaluate the reason and compare it to the impact on the integrity of the site. (CJEU, 5 December 2011, European Commission v Kingdom of Spain, Aff. C-560/08, point 138)

Spain has the obligation to stop this project or try alternative solutions. If there are no alternatives, Spain must apply every measure to ensure the protection of the site. If the project is allowed to continue, then Spain will be in violation of the Directive. (CJEC, 24 october, Landelijke Vereniging tot Behoud van de WaddenzeeetNederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Aff. C-72/95, point 65)

IN SHORT

The expansion of the museum is not a public interest or for the protection of public health. Therefore, the expansion of the museum must not disturb or have a negative impact on the Natura 2000 site. If the appropriate assessment indicates any risk, the project should not continue at all. A complaint can be made to the Commission about this project to point out the danger of the expansion. This procedure is the best way to stop this project.

§3: The infringement proceeding

If a Member State does not ensure the proper respect of the directive, a procedure called "an infringement proceeding" can be brought against the Member State before the Court of Justice of the European Union.

According to Articles 258 and 259 of the TFEU, this procedure can be initiated by the Commission or another Member State when a state fails to meet its obligations under EU law. If the Commission initiates the procedure itself, it does not need to demonstrate an interest in acting. A dialogue is opened between the concerned state and the Commission to resolve the issue without entering the litigation phase or legal process. If nothing is done, the Commission can send a formal notice urging the State to comply with the law. If the situation remains unresolved, the Commission can issue a reasoned opinion where the Commission explains what happened and the reasons for this procedure. If no progress is made, there is a litigation phase where the court is involved. The act is only declaratory and can't force the Member State to change the problematic national law. The Member State still needs to take measures to make the directive effective in the national legislation so that the violation of the EU law no longer exists.

IN SHORT

If the breach does not stop soon, an infringement procedure can start to make sure that the authority effectively protects the biodiversity of the Urdaibai area. The Commission or another Member State can start this procedure. That is why we should focus on the Complaint procedure before the Commission that can be done on the internet via a form that any individual or groups/associations can fill out.

> For more information, refer to: Part 2 > Situation 2: An environmental impact assessment has been executed > II-On the violation of substantial obligations.

APPLICATION TO THE URDAIBAI CASE:

For reasons of major public interest such as national security, general interest or public health, a project may be authorized even if it could have a negative impact on a site. However, it must be demonstrated that alternative solutions have been explored for the project to be carried out. If there is evidence of a search for alternative solutions but none exist, then the authorities must carry out compensatory measures to always pursue the purpose of the habitat directive. The extension of the museum does not represent a project of general interest and therefore cannot be covered by the derogation.

The expansion of the Museum is most likely to cause a negative impact to the Urdaibai zone and harms natural habits, animal and plant species.

The project must be stopped, or it would cause a violation of the Habitats Directive and therefore the EU law. The Habitats Directive is a very useful tool thanks to its binding force.

3) *The Directive 2000/60/EC of the European Parliament and of the Council of October 2000, establishing a framework for Community action in the field of water policy*

The Directive 2000/60/EC of the European Parliament and of the Council, establishing a framework for Community action in the field of water policy, was adopted in October 2000. The aim of this directive is to **establish a framework for the protection of all waters** (inland waters, surface waters, transitional waters, coastal waters and groundwater), that :

- **prevents further deterioration** and **preserves** and **improves** the state of ecosystems
- **promotes sustainable water use** based on a long-term protection of available water resources
- **ensure the progressive reduction of pollution** of groundwater and prevents its further pollution

The general aim is to achieve a **good ecological status** for Europe's waters. The methods introduced to achieve this goal include :

- water management on the scale of **river basin districts** (article 6)
- a **6 year planning** comprising several phases (inventory, monitoring programmes, management plans, programmes of measures)

In a ruling dated 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland eV v Bundesrepublik Deutschland*, the Court of Justice of the European Union established that any project likely to compromise the good ecological status of water is incompatible with the Directive, unless very strict derogations (point 51).

As the Urdaibai site is already in a fragile water situation, the construction of new infrastructures would certainly cause pollution that would degrade water quality of the aquifer connected to the site. In such a case, the obligations imposed by the Directive would mean that the project would have to be abandoned.

PART 2

Situation 2 - An environmental impact assessment has been executed

The Environmental Impact Assessment (EIA) is a critical step to ensure that construction projects comply with environmental standards set by **Directive 2011/92/EU**, as amended by **Directive 2014/52/EU**. This directive outlines the criteria for conducting an EIA, specifying the types of projects it applies to and the procedural and substantive requirements that must be followed to provide a comprehensive analysis of potential environmental impacts. When an EIA is omitted or lacks necessary detail, there are legal avenues to challenge the project's approval.

Additionally, the Aarhus Convention and other European Union legislation—such as the directives on natural habitats, birds, and water protection—guarantee public participation and set specific obligations for protecting biodiversity and water resources. If these standards are not upheld, it is possible to file a complaint with the European Commission or seek recommendations from the Standing Committee of the Bern Convention.

I - On the violation of procedural obligations

A- Environmental impact assessment

1) Conditions and typology of projects requiring an EIA under Directive 2014/52/EU

The EU directive on the assessment of the effects of certain public and private projects on the environment aims to guarantee a **high level of protection for the environment and human health** and to ensure that environmental considerations are taken into account in the assessment and development of projects.

In order to ensure a high level of protection of the environment and human health, screening procedures and environmental impact assessments should take account of the impact of the whole project in question, including, where relevant, its subsurface and underground, during the construction, operational and, where relevant, demolition phases.

The assessment of impact should be conducted on the basis of the **appropriate information supplied by the developer,** which may be supplemented by the authorities and by the public likely to be concerned by the project in question.

a. Process of the environmental impact assessment

The European Court of Justice, in a decision Kraaijeveld in 1996[33], said about the Directive that **its scope is wide and its objective very broad**.

The 2008 and 2009 decisions: Ecologistas en Acción[34] and Umweltanwalt von Kärnten[35] complement the Kraaijeveld judgment by laying down the requirement that the assessment must be "global".

The EU directive, in article 1, defined a project as "*the execution of construction works or of other installations or schemes, or other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources*".

Article 1 expose also the **process of the "environmental impact assessment"** that consist of:

- the preparation of an environmental impact assessment report by the developer;
- the carrying out of consultations;
- the examination by the competent authority of the information presented in the environmental impact assessment report and any supplementary information provided, where necessary, by the developer;
- the reasoned conclusion by the competent authority on the significant effects of the project on the environment;
- the integration of the competent authority's reasoned conclusion into any of the decisions referred to in Article 8a.

→ **Concerning the preparation of an environmental impact assessment report by the developer**

Where an environmental impact assessment is required, the developer shall prepare and submit an environmental impact assessment report. The information to be provided by the developer shall include at least:

- (a) a description of the project comprising information on the site, design, size and other relevant features of the project;

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33 Affaire C-72/95 https://curia.europa.eu/juris/showPdf.jsftext=&docid=100313&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=897191

34 https://curia.europa.eu/juris/document/document.jsf?text=&docid=68146&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3011743

35 https://curia.europa.eu/juris/document/document.jsf?text=&docid=76786&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3019305

- (b) a description of the likely significant effects of the project on the environment;
- (c) a description of the features of the project and/or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment;
- (d) a description of the reasonable alternatives studied by the developer, which are relevant to the project and its specific characteristics, and an indication of the main reasons for the option chosen, considering the effects of the project on the environment;
- (e) a non-technical summary of the information referred to in points (a) to (d); and
- (f) any additional information specified in Annex IV relevant to the specific characteristics of a particular project or type of project and to the environmental features likely to be affected.

-> cf **Article 5 - 1**

Where requested by the developer, the competent authority shall issue an opinion on the scope and level of detail of the information to be included by the developer in the environmental impact assessment report (**Article 5-2**).

→ **Concerning the carrying out of consultations**

Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities or local and regional competences are given an opportunity to express their opinion on the information supplied by the developer and on the request for development consent.

-> for more information about the participation, **cf articles 6 and 7.**

→ **Concerning the examination by the competent authority of the information presented in the environmental impact assessment report**

In order to ensure the completeness and quality of the environmental impact assessment report. The developer shall ensure that the environmental impact assessment report is prepared by competent experts.

Indeed, the competent authority shall ensure that it has, or has access as necessary to, sufficient expertise to examine the environmental impact assessment report.

-> For more information regarding the examination by authorities of the information presented in the EIA, cf article 5-3.

→ **Concerning the reasoned conclusion by the competent authority on the significant effects of the project on the environment**

The competent authority must take into account the results of the examination and, where appropriate, its own supplementary examination.

→ **Concerning the integration of the competent authority's reasoned conclusion into any of the decisions referred to in Article 8a**

The article 8a states that the decision to grant development consent shall incorporate at least the reasoned conclusion, any environmental conditions attached to the decision, a description of any features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment as well as, where appropriate, monitoring measures.

The decision to refuse development consent shall state the main reasons for the refusal.

b. Typology of projects that required an environmental impact assessment

The Directive provides for a different regime depending on the type of project. It establishes two lists divided into annexes.

Projects mentioned at the annex 1 have significant effects on the environment and those projects should, as a rule, be subject to a systematic assessment (article 4). This annex includes the construction of:

- Crude-oil refineries,
- Thermal power stations and other combustion installations,
- Nuclear power stations,
- Installations for the reprocessing of irradiated nuclear fuel;
- Integrated works for the initial smelting of cast iron and steel;
- Installations for the production of non-ferrous crude metals
- Installations for the extraction of asbestos
- Integrated chemical installations,
- Construction of lines for long-distance railway traffic and of airports
- Construction of motorways
- Waste disposal installations for the incineration, chemical treatment
- Wastewater treatment plants
- Extraction of petroleum and natural gas

For projects listed at Annex II, projects that may not have significant effects on the environment in every case, Member States shall determine whether the project shall be made subject to an assessment. This annex include:

- Agriculture, silviculture, and aquaculture projects
- Extractive industry projects
- Energy industry projects
- Production and processing of metals projects
- Mineral industry projects
- Chemical industry projects (not included in annex I)

- Food industry projects
- Textile, leather, wood and paper industries
- Rubber industry projects
- Infrastructure projects
- Tourism and leisure projects

In a ECJ judgment rendered in 2008, Ecologistas en Acción[36] , the Court held that the modification or extension of a road encompasses projects for the transformation and improvement of urban roads. In this respect, it should be noted that Spain argued that projects in urban areas do not generally fall within the scope of the Directive, an argument which was disapproved by the Court. As a result of this Spanish position, Spain was found to have failed to fulfill its obligations in the Commission v/ Spain judgment.

So, **the extension of the Guggenheim Museum shall be part of annex II** as "urban development projects". And as a "change or extension of projects" listed in this Annex that have been already authorized, and which may have significant adverse effects on the environment.

The developer on the projects listed in annex II must provide information regarding annex II bis of the EIA directive. He must provide **a description of the project**, including in particular:

- a description of the physical characteristics of the whole project and, where relevant, of demolition works ;
- a description of the location of the project, regarding the environmental sensitivity of geographical areas likely to be affected.

He has also to provide a **description of the aspects of the environment** likely to be significantly affected by the project and a **description of any likely significant effects**, to the extent of the information available on such effects, of the project on the environment resulting from:

- the expected residues and emissions and the production of waste, where relevant ;
- the use of natural resources, in particular soil, land, water and biodiversity.

For the projects listed at the annex II, member States may set thresholds or criteria for the purpose of determining which of such projects should be subject to assessment based on the significance of their environmental effects.

[36] https://curia.europa.eu/juris/document/document.jsf?text=&docid=68146&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3011743

c. Case by case examination or thresholds by Member states (for projects annex II)

Where a case-by-case examination is carried out or thresholds or criteria, **the relevant selection criteria set out in Annex III shall be considered**.

Criteria to determine whether the projects listed in annex II should be subject to an EIA:

- Characteristics of projects
- Location of projects
- Type and characteristic of the potential impact

The European Court of justice, in 1996, in its Kraaijeveld decision, held that the Member States' margin of discretion is not unlimited, but is circumscribed by the obligation laid down in Article 2(1) of the Directive to subject to assessment all projects likely to have significant effects on the environment. The Court also held that the criteria or thresholds serve only to facilitate the assessment of the specific characteristics of a project but cannot exclude in advance from the assessment obligation certain entire classes of projects listed in Annex II.

The ECJ confirmed this idea in its decisions "World Wildlife Fund" on the 16 of September of 1999[37] and on "Paul Abraham" on 28 of February of 2008[38].

In the Kraaijeveld decision, the ECJ also found that, if a Member State set criteria or thresholds at such a level that in practice all projects of a certain category would be exempt from the requirement of an impact assessment, this would mean that, that Member State had exceeded its margin of appreciation.

The criteria used to justify the need to carry out an impact assessment before authorizing the extension of the Guggenheim Museum:

Concerning the characteristics, the Guggenheim project must be considered regarding the size and design of the project (a), the production of waste (d), the pollution and nuisance (e) it is likely to generate. But also, regarding the risk of major accidents and/or disasters which are relevant to the project concerned, including those caused by climate change, in accordance with scientific knowledge (f), and the risks to human health (g).

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[37] https://curia.europa.eu/juris/document/document.jsf?text=&docid=44707&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=909410

[38] https://curia.europa.eu/juris/document/document.jsf?text=&docid=69435&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=904001

Concerning the location, almost all the criteria set out in Annex III can be applied, but especially the absorption capacity of the natural environment, paying particular attention to the following areas (c):

(i) wetlands, riparian areas, river mouths;

(v) areas classified or protected under national legislation; Natura 2000 areas designated by Member States pursuant to Directive 92/43/EEC and Directive 2009/147/EC;

(viii) landscapes and sites of historical, cultural or archaeological significance.

Concerning the type and characteristic of the potential impact, the likely significant effects of projects on the environment must be considered in relation to criteria set out in points 1 and 2, considering:

(a) the magnitude and spatial extent of the impact (for example geographical area and size of the population likely to be affected);

(b) the nature of the impact;

(c) the transboundary nature of the impact;

(d) the intensity and complexity of the impact;

(e) the probability of the impact;

(f) the expected onset, duration, frequency and reversibility of the impact;

(g) the cumulation of the impact with the impact of other existing and/or approved projects;

(h) the possibility of effectively reducing the impact.

About the transposition of the directive in Spanish law

The EU has been transposed into Spanish law by the **law 9/2018 that was adopted on the 5 of December** of 2018. The law states that it is possible to exclude the submission of a project to an EIA, in the scope of an analysis on a case-by-case basis, only for projects or parties of projects whose sole purpose is defence or "civil emergency". But the Urdaibai case does not seem to enter this category.

Indeed, the law states that it is also possible to exclude, with the reasoned agreement of the Council of Ministers or the body determined by each autonomous community, the assumptions according to which the application of the environmental impact assessment has harmful effects for the purpose of the project.

Although the program or project is excluded from an EIA under **Article 8-5** of Law 21/2013, it will need to be subject to an adequate spatial impact assessment if it is likely to affect Natura

2000 protected areas. The promoter will therefore have to prepare a study on the conditions of the project that could cause damage to the integrity of the Natura 2000 area. It is possible to consider that the extension of the museum poses a potential risk of adverse impacts on the Natura 2000 area, although the sites of extensions are located at the edge of protected areas. In this case, the promoter will have to comply with this requirement.

To know – the link between EIA directive and Habitat directive

The EIA directive and the habitats directive have a similar objective. Impact assessments aim to prevent negative impacts on the environment, species and habitats protected under the Habitats and Birds Directives. These directives should help to avoid any deterioration in the quality of the environment and any net loss of biodiversity.

According to article 6 of the habitat directive, they must be very careful with every project that could have an impact on the Natura 2000 sites so that no negative consequences are seen. An appropriate assessment of their impact must be made to highlight the impact of those plans on the habitats and species.

In the annex 3 of the EIA directive, this is mentioned that the environmental sensitivity of the geographical areas likely to be affected by the project must be considered, taking into account the special protection areas designated by the Member States in accordance with Directive 2009/147/EC on the conservation of wild birds and Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

> For more information concerning the link, refer to: Part 1: a construction project is being considered near the wetland > II) B) > §1) The protection regime established by the habitat directive > iv) a project and its consequences on the biodiversity regarding the habitat directive.

2) *Ability to challenge the omission of EIA*

If the competent authorities fail to carry out an impact assessment and approve the extension project without carrying it out, the decision may be challenged.

->To challenge the omission of an EIA, a good option is to resort to national courts, in the case of the extension of the Guggenheim Museum, to Spanish courts.

-> At the European level, actions are possible to challenge the omission of EIA. This is complicated to obtain a result because it is necessary to demonstrate an interest in bringing proceedings. But, in the past, the ECJ has been able to condemn states that have failed regarding their obligations to realize an EIA.

In fact, in a decision rendered in March of 2006 "Commission v Spain"[39], by failing to submit the project for a leisure Center in Paterna to the environmental impact assessment procedure, Spain was condemned by ECJ (en manquement).

In the request for a preliminary ruling in 2023 "Eco Advocacy CLG"[40], the ECJ states that the grounds for not carrying out an environmental impact assessment must exclude, on the basis of objective elements and by reference to the relevant criteria in Annex III to that Directive, the likelihood or risk that the project concerned will have significant environmental impacts.

Where, during the screening phase, the competent authority of a Member State is satisfied that no assessment of the effects is necessary, **it must at least provide an explicit and detailed justification to remove any scientific doubt as to the negative impact of the proposed work on the protected area itself**. This applies to doubts expressed during the authorisation procedure only if these doubts are scientifically reasonable.

In a judgment rendered on the 7 of november of 2013 "Gemeinde Altrip"[41], the ECJ held that the right to appeal may concern not only the legality of a decision which is challenged on the grounds that the environmental assessment has been omitted, but also the regularity of the procedure.

The **action of infringement** can only be initiated by the European commission or a member State of the European Union. But, in European law, there exists a **complaint mechanism** that permits private individuals to inform the Commission of a misapplication of EU law. For example, an omission of EIA. Can be done on paper or on the internet. The advantage of this approach is that there is no formalism but also, there is no need to prove an interest in bringing proceedings.

-> for more information about the action of infringement, cf **article 258** of the treaty on the functioning of the European Union.

[39] https://curia.europa.eu/juris/document/document.jsf?text=&docid=57691&pageIndex=0&doclang=ES&mode=lst&dir=&occ=first&part=1&cid=927763

[40] https://curia.europa.eu/juris/document/document.jsf?text=&docid=274644&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=932960

[41] https://curia.europa.eu/juris/document/document.jsf?text=&docid=144212&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=939685

B- Public Participation and Remedies for Non-Compliance

1) Projects subject to Public Participation under the Aarhus Convention

The Aarhus Convention, adopted in 1998, is an international legal instrument aimed at strengthening environmental democracy. It is based on three fundamental pillars: access to information, public participation in decision-making processes, and access to justice in environmental matters. These principles specifically apply to projects likely to have significant environmental impacts, such as construction or infrastructure developments that could affect wetlands—ecosystems recognized as critical under many international regulations.

According to Article 6 of the Convention, any project or activity with a potential significant environmental impact must be subject to a public participation procedure. This includes:

1. **Major infrastructure projects**, such as the construction of highways, airports, or ports.
2. **Projects impacting protected ecosystems**, like wetlands known for their biodiversity and their role in climate regulation.
3. **Significant industrial or energy-related activities** that may pose risks to air, water, or soil quality

In the case of the proposed project in Bilbao, which threatens a wetland area, it is essential that the responsible authorities comply with these obligations. The public, including environmental organizations like yours, must be transparently informed about the project's impact—e.g., through an Environmental Impact Assessment (EIA)—and consulted before any decisions are made.

2) Remedies for Non-Compliance with Public Participation

The Aarhus Convention not only guarantees the right to public participation but also provides effective remedies in cases of non-compliance. If obligations are neglected or violated, several mechanisms can be activated to protect the rights of citizens and civil society:

1. **Reporting to national authorities**: If participation procedures have not been properly implemented, a complaint can be filed with the national environmental oversight body. In Spain, this includes the Basque regional authorities or the Spanish Ministry for Ecological Transition.
2. **Filing lawsuits in national courts**: In cases of blatant violations, legal action can be taken in Spanish courts, citing the decision-making process's failure to comply with the Aarhus Convention. Courts may order the suspension of the project until public participation is ensured.
3. **Referring the case to the Aarhus Convention Compliance Committee**: If national remedies fail or are not accessible, the case can be reported to the Aarhus Convention Compliance Committee. This international mechanism assesses whether Spain has adhered to its international commitments.

4. **Seeking support from European institutions**: As a member of the European Union, Spain is also obligated to comply with EU environmental directives, including Directive 2001/42/EC on environmental impact assessments. If the Bilbao project breaches these directives, a complaint can be filed with the European Commission.

The wetland is a critical ecosystem for local biodiversity and a natural regulator against flooding. Any intervention in this area must strictly adhere to the principles of the Aarhus Convention. As an organization, you can play a key role in monitoring the transparency of the decision-making process and ensuring effective public participation.

If you identify a lack of information or exclusion of the public in this project, it is advisable to document irregularities and mobilize the legal tools mentioned above. These mechanisms can not only halt the project but also require corrective measures to protect this essential habitat.

II - On the violation of substantial obligations

/!\ Some substantial obligations have already been set up in Part I. So, for more information and information about international standards, please refer to Part I.

The mechanism laid out here is the European procedure. This complaint procedure is designed for NGOs or civil society to inform the Commission about EU law infringement in their State. You can find the form to complete on the Commission website: https://european-union.europa.eu/contact-eu/make-complaint_en .

This procedure may urge the Commission to start an Infringement procedure with Spain, to make it comply with its European obligations under the Habitats Directive and the Birds Directive.

1) The complaint procedure before the European Commission

a. Conditions to meet for the complaint to be valid

- Does your complaint concern a national authority in an EU country?

YES: the regional administration of Basque Country (Spain) and the national government of Spain.

- Does the subject of your complaint fall under EU law?

YES: Birds Directive, Habitats Directive, and Environmental Impact Assessment Directive.

- Is your complaint about a company breaking the EU competition rules or receiving illegal financial support from a government?

NO

- Are you already engaged in an action in the country concerned to solve the problem?

YES: The political actions and demonstrations engaged to ask the government to withdraw the project, and the administrative appeal against the Ministerial Decree authorising the reduction of the easement for the protection of the public maritime and terrestrial public domain in Murueta.

/!\ For your complaint to have a better chance to achieve, you should wait until you receive a political or legal response from the local or national government. Indeed, if administrative or judicial procedures are ongoing with your national authorities, it is unlikely that the Commission will follow up your complaint. In such situations, it may be too early to establish that a breach of EU law has taken place.

- Is your complaint about a specific one-off situation where EU laws were not followed correctly?

1st option: YES if we consider the projects in Urdaibai

/!\ If your complaint is about a one-time event where EU law was incorrectly applied, it is unlikely that the Commission will investigate the matter further. The Commission aims to swiftly follow up on systemic issues involving the application of EU law in EU countries. However, one-off instances of this are better dealt with at national level, as long as there are available remedies, including judicial ones. In these cases, it is up to the national courts to apply and enforce your rights under EU law.

2nd option: NO if we consider the modification of the *Ley de Costa* which reduces the shoreline protection from 100m to 20m.

- What are your expectations regarding your complaint?

The procedure offers 4 options:

- **To solve my specific problems**
- To annul a national rule that is incompatible with EU law (the Commission cannot annul a national rule which is incompatible with EU law, nor force a national administration to respond to a request by an individual, nor order the country to pay damages to an individual adversely affected by a breach of EU law. To achieve these results or to seek compensation, you must take your case to a national court within the time limit set out in national law)
- To provide me with compensation for damages

- To make sure that EU legislation is correctly turned into law and applied properly in my EU country (here, as no transposition problem has been raised, we assume that this option is not viable).

/!\ If the correspondence becomes repetitive (for example, successive letters on the same topic that does not introduce new information) or that is abusive, pointless and/or improper, we reserve the right to discontinue the correspondence.

+ If you want more info about the procedure, please see *How the Commission handles complaints.*

b. The complaint

§1: Personal information

To fill by the organisation.

§2: Which EU country is your complaint about?

Spain – Regional, local administration.

§3: What is your complaint about?

- What did the Member State and its administration do wrong?
- Describe the problem by outlining the facts and the reasons for your complaint by applying the following scheme:

c. Facts / problem

> **What happened? Give the facts in chronological order**.

The organisation can disclose any information it has since they heard about the project.

> **What did the national authorities do wrong? What did you ask them for? What did you want to achieve? What didn't happen the way you had expected? Why do you believe the action by the national authorities was in breach of EU law?**

Disclaimer: we made this complaint assuming that the future plans of the project show that the expansion will go through the areas protected by the Birds Directive and the Habitats Directive.

The national authorities give their agreement to start a project of expansion of the Guggenheim Museum near the city of Bilbao, in the Urdaibai Biosphere reserve, which is protected by the Birds Directive and the Habitats Directive. It goes against all objectives and principles of these two Directives, particularly concerning the protection of endangered birds and species and their habitat.

<u>According to the document made by Mediterranean Alliance for Wetlands for the Urdaibai case</u>:

"Regarding biodiversity, Urdaibai is a key spot on the bird migration flyway. It is a wetland recognised as being of international importance. The construction of this museum goes against the spirit of protected areas.

Regarding mass tourism, in 2023, 200,000 walkers strolled through the Urdaibai Biosphere Reserve. The museum project aims to attract an additional 140,000 visitors over just 4 months of the year. However, scientific studies demonstrate the negative impact of disturbance on bird species. Receiving 140,000 additional visitors will require the construction of various reception facilities such as parking lots, hotels, restaurants, etc., and thus the artificialization of land.

Regarding water Scarcity, according to a report by the Basque Water Agency (URA), the Gernika site is connected to an aquifer that is currently in a fragile state, and the addition of 140,000 summer visitors would exacerbate an already strained supply.

Regarding water pollution, the Basque Water Agency (URA) has pointed out that the chosen sites are connected to an aquifer that is already in a "worrying" situation due to pollution, which must not be aggravated.

Regarding participation, land use planning within a biosphere reserve must include a high level of public participation to ensure sustainable development.

Regarding flood risk, the Basque Water Agency (URA) informed the Basque Parliament about the "important risk situation" of flooding of the chosen site in Gernika."

The project needs to be stopped, and if the construction has started compensation and protective measures should be put in place.

/!\ The organisation can add any other information it has since then.

If the Environmental Impact Assessment is done: please see **Part 2, I "On the violation of procedural obligations"**.

If the Environmental Impact Assessment hasn't been done: as the national government has already engage incentives to make the project possible (eg: to reduce the coast protection), and as those areas are protected by EU law and international conventions (eg: Ramsar convention, AEWA, Bern Convention, the Convention on the Conservation of Migratory Species), the project is likely to have serious impacts on both fauna and flora protected by these legislations.

<u>§1: Contacts with national authorities</u>

> **Mention any national procedures related to your problem that are still ongoing (legislative, administrative and/or judicial) and tell us whether the national authorities, including the courts, have already made a decision on your complaint.** The organisation lodged an administrative appeal against the Ministerial Decree authorising the reduction of the easement for the protection of the public maritime and terrestrial public domain in Murueta, but no decision has been issued for now.

§2: Other

> **Did the country you are complaining about receive EU funding related to the subject of your complaint?** NO

> **Have you already contacted any other EU institutions dealing with complaints of this type?** NO

> List any evidence or documents supporting your complaint. You can upload the 2 most important pieces of evidence.

- the agreement State / Province to finance the project (40 millions €)
- the Ministerial Decree authorising the reduction of the easement for the protection of the public maritime and terrestrial public domain in Murueta.