

## SUMMARY 'LEVEL PLAYING FIELD'

The principal instruments of European nature policy are the Birds and Habitats Directives <sup>22</sup>, (BHD) which largely form the protection of the European nature network Natura 2000. For many years the business community has been sending out signals that the Wadden Sea countries take different approaches to the granting of permits for projects in a Natura 2000 area, which are said to lead to differences in competition and, accordingly, to an uneven playing field for entrepreneurs.

In response to this the Wadden Sea Council has decided, following consultation with the Minister of Housing, Spatial Planning and the Environment, to carry out an exploratory study into the differences between how the various countries implement the Birds and Habitats Directives (BHD).

Interpretation of the BHD in the three countries  
The Wadden Sea countries and the other European Member States have converted the BHD and the accompanying appropriate assessment into national law. In so doing each of the countries has made its own choices, which has resulted in a number of differences coming about.

The areas earmarked for protection have been designated (whether or not provisionally) in Germany, Denmark and the Netherlands. In cases where an area has not yet been given definitive Natura 2000 status, but has been placed on a provisional list, that is taken into account in the decision on whether to grant the permit and a comparable regime applies.

The BHD has been converted into national legislation in all three countries, and the implementation of a comprehensive assessment and an appropriate assessment has in most cases been guaranteed. In the Netherlands and (in certain cases) in Germany, some interventions or activities call for a separate permit or exemption. It is conceivable that entrepreneurs regard this as being obstructive.

In the three Wadden Sea countries, compensatory measures have to be taken for interventions with adverse effects in Natura 2000 areas. This can represent a substantial cost item for initiators. The BHD prescribes compensatory measures, but does not stipulate the level of the compensation. It is preferable for the compensation to take place in the same area. There are no fundamental differences in the obligation to compensate. In all cases there has to be 1-to-1 compensation. The key principle is that there must be 1-to-1 compensation per species and per type of habitat.

In Germany, the appropriate assessment for a project subject to a mandatory environmental impact assessment (EIA) is automatically included

in the EIA, which is not the case in the Netherlands or Denmark. The fact that they are carried out separately from each other in those countries does not however necessarily mean that they will take extra time. The implementation of an environmental impact report and an appropriate assessment are processes that run parallel to each other and can voluntarily be merged together.

Most of the differences result from differences between the countries' legal cultures. All of the countries have their own legislative system. The German system is slightly more complex than the Dutch because it is a federal system with a constitutional division of powers between the Confederation and the federal states, a division of powers that was recently modified. The BHD respects this division of powers. The BHD can be implemented within a country's existing system.

### Case studies

A number of case studies have been carried out in order to gain an impression of how the various national interpretations of the Birds and Habitats Directives (BHD) are applied in practice. Activities or projects have been chosen that are topical and where there have also been signals indicating an uneven playing field.

The following points were considered for the mussel and shrimp fishing industry, the building of a yacht marina and the construction of a power station:

- the extent to which an appropriate assessment is required;
- the duration of the permit procedure;
- the requirements regarding compensation;
- the costs involved.

The case studies have shown that other than for the fishing industry appropriate assessments will need to be carried out in all cases in the three countries. The costs and the amount of time needed for appropriate assessments are reasonably in line. On this point, there is no question of the level playing field being disturbed.

The Council concludes that there are two notable differences regarding the fishing industry. In Germany, no appropriate assessment is required for shrimp and mussel fishing and in Denmark the costs of an appropriate assessment for fishing activities are borne by the government, which is based on a provision of fishing law. These differences are contributing to an uneven playing field. This is mitigated by the fact that a five-year permit for shrimp fishing is now possible in the Netherlands.

The difference between the Netherlands and Germany in the fishery area could be related to a different reading of the cockle fishing ruling of the European Court of Justice. The Netherlands takes the view that according to that ruling fishery must be subject to an appropriate assessment because

<sup>22</sup> Directive 85/337/EEC.



significant consequences cannot be ruled out beforehand.

Germany interprets the ruling differently and considers the extent to which the activity is a project. The Habitat Directive does not provide a definition for this, which is why the definition of the European EIA Directive is operated for this purpose. (The EIA Directive stipulates the plans and projects for which an environmental assessment is to be carried out.) Germany does not yet regard fishery as being a plan or project in that context and therefore takes the view that an appropriate assessment is not required.

### Entrepreneurs

The signals from the business community that there are significant uneven areas in the playing field are not confirmed by the study (other than for the fishing industry, where a degree of confirmation is found). There remains the question of what those signals are based on. Possible causes include:

- the perception of the business community is fed (in part) by aspects such as differences in objection and appeal options for third-parties and the negotiation positions they have or are gaining;
- possible differences in the administrative structure;
- the differences are the result of aspects such as differences in environmental or other legislation.

This is borne out by talks with representatives of the fishing industry, the seaport sector and the energy sector. Also, it has transpired that the regulations are experienced mainly as being restrictive. The permit procedures call for careful preparation and they are expensive and time-consuming. But this does not apply to the Netherlands alone. Relations with the competent authority and the nature protection organisations are in some cases laborious. The nature protection organisations are encountered mainly in objection and appeal procedures, but these days more and more constructive (preliminary) consultation is taking place in the Netherlands. There is a feeling among the entrepreneurs that the nature protection organisations in Germany play a less strong role (certainly regarding the preliminary consultation).

### Conclusion

The study into the implementation of the Birds and Habitats Directives in the Trilateral Wadden Region has not revealed any differences that the Council believes have an adverse effect on the level playing field. The activities requiring appropriate assessment in the Netherlands are also subject to the same requirement in the other Wadden Sea countries. And there, too, entrepreneurs often need to engage external advice bureaus and bear

costs similar to those of Dutch entrepreneurs. Also, no significant differences in the duration of the procedures were found. The procedures in the Netherlands may be cumbersome and time-consuming, but the same can be said of Germany and Denmark too.

It is only in the fishing industry that some relevant differences between the countries have been identified. An appropriate assessment is required in the Netherlands and Denmark, but not in Germany. Furthermore, the costs of an appropriate assessment for fishing activities are borne by the government in Denmark. In the Netherlands a five-year permit is provided for shrimp fishing instead of an annual permit that used to be issued. A relaxation is visible on that point.

As well as the differences in fishing set out above, it has transpired that the legislation in the Netherlands is structured in such a way that a permit under the Nature Protection Act is required (in some cases this is also required in Germany under the Nationalparkgesetz). Although this procedure runs largely parallel to other permit procedures, it takes an extra amount of effort. The new environmental permit (omgevingsvergunning) in the Netherlands could represent a partial improvement on this point because the Nature Protection Act permit will come in when spatial interventions take place.

For projects subject to a mandatory EIA, the appropriate assessment is not automatically included in the environmental impact assessment reports. There are however calls for them to be carefully coordinated and where possible merged with each other.

**'gelijk speelveld' voor ondernemers:  
feit of fictie?  
rapport 2010/01**

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