

## **REQUIREMENTS OF THE BIRDS AND HABITATS DIRECTIVE** **WITHIN AND BEYOND THE 12 SEA MILES ZONE**

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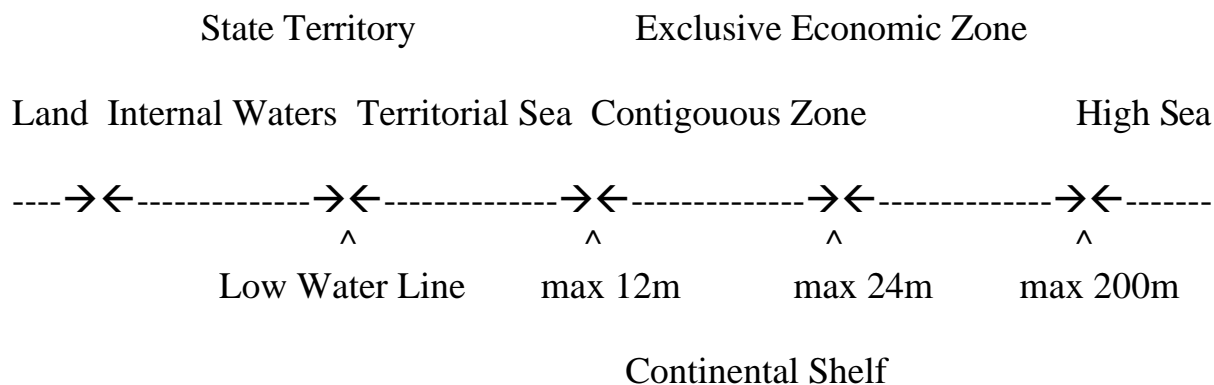
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# I. MARINE AREAS IN INTERNATIONAL LAW

## 1. Marine Areas

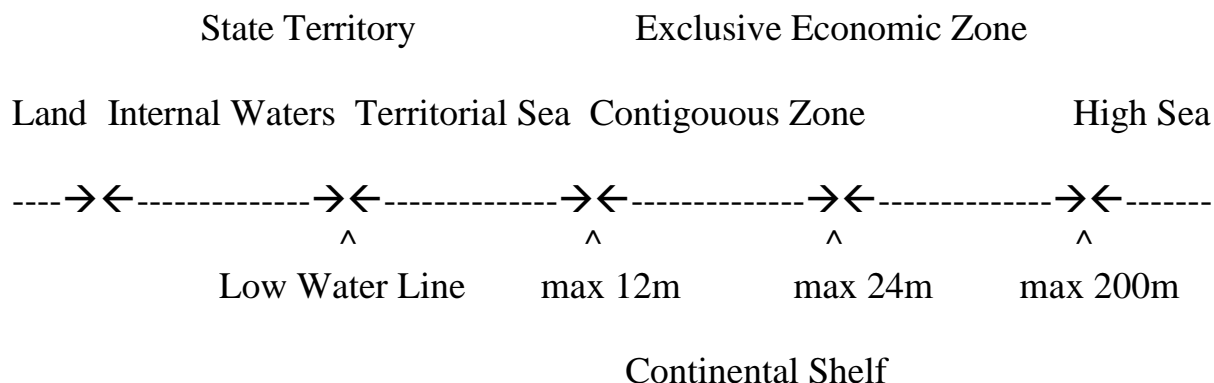


## 2. International Law

- State Territory: Sovereignty
  - Land and Internal Waters: Unlimited Sovereignty
  - Territorial Sea: Limited Sovereignty because of the Right of Innocent Passage
- EEZ and Continental Shelf: Sovereign Rights for the Protection of Areas and Species; Freedom of Navigation, etc.
- High Sea: Freedom of High Sea for all States

## II. MARINE AREAS IN BELGIUM

### 1. Marine Areas



### 2. Marine Areas in Belgian Law

- Designation of the Marine Areas:

- EEZ-Act of 1999
- Continental Shelf Act of 1969 (= EEZ)
- Territorial Sea Act of 1987
- Fisheries Zone Act of 1978 (= EEZ)

- Division of Competences in Belgium:

- Land and Internal Waters: Competence of Flemish Region → Application of Flemish Legislation
- Territorial Sea, EEZ and Continental Shelf: Competence of Federal State (with some Exceptions, e.g. Beaconing and Dredging) → Application of Federal Legislation; Question: Does the Territorial Sea belongs to the State Territory ?

### **III. BIRDS AND HABITATS DIRECTIVE**

#### **1. Special Protection Areas (SPA's) of the Birds Directive**

- for vulnerable birds (Annex I) and migratory birds
- decision of Member States (1981)
- "most suitable" areas → only scientific criteria (Court of Justice)
- positive obligations: management (art. 4.1.-4.2. Birds Directive and 6.2. Habitats Directive)
- negative obligations: derogation procedure for negative plans and projects (art. 6.3-6.4 Habitats Directive)

#### **2. Special Conservation Areas (SAC's) of the Habitats Directive**

- for habitats (Annex I) and species (Annex II)
- designation procedure: Member States (1995) - Commission - Member States (2004)
- only scientific criteria (Court of Justice)
- SPA's + SAC's = Natura 2000
- positive obligations: management (art. 6.1.-6.2. Habitats Directive)
- negative obligations: derogation procedure for negative plans and projects (art. 6.3-6.4 Habitats Directive)

#### **3. Species Protection in the Habitats Directive**

- for species (Annex IV)
- directly applicable to breeding sites or resting places (animal species) (art. 12 Habitats Directive)
- directly applicable to plants → no destruction, uprooting, etc. (plant species) (art. 13 Habitats Directive)
- negative obligation: derogation procedure (art. 16 Habitats Directive)

#### 4. Derogation Procedure of the Habitats Directive, art. 6.3-6.4.

plan or project with possible adverse effect → appropriate assessment

or no significant adverse effect → yes

or significant adverse effect → no, except

1° no alternatives

2° overriding public interests (priority habitats or species (\*): social and economic interest only after opinion of the Commission)

3° compensatory measures

interpretation problems: costs of alternatives ? legal effect of impossible compensation ?

Habitats Directive, art. 6.3-6.4.

*"3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.*

*4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.*

*Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."*

## **IV. BIRDS AND HABITATS DIRECTIVE IN BELGIUM**

### **1. Designation of SPA's**

- Designated SPA's
  - Flemish Region: Regulation of 1988 - 23 SPA's (7 %) published; no marine SPA's
  - Federal State: no published SPA - designation of 3 marine SPA's in preparation ?
- Procedure for new SPA's
  - Flemish Region: Nature Decree of 1997, as amended in 2002
  - Federal State: Protection of Marine Environment Act of 1999

### **2. Designation of SAC's**

- Designated SAC's:
  - Flemish Region: Regulation of 2002 - 38 SAC's (10 %) (40 % overlay with SPA's) published; some marine SAC's
  - Federal State: no published SAC - 1 marine SAC proposed to the Commission ?
- Procedure for new SAC's:
  - Flemish Region: Nature Decree of 1997, as amended in 2002 (also for Annex IV species)
  - Federal State: Protection of Marine Environment Act of 1999

### **3. Derogation Procedures**

- Flemish Region: Nature Decree of 1997, as amended in 2002
- Federal State: Protection of Marine Environment Act of 1999

## V. APPLICATION OF BIRDS AND HABITATS DIRECTIVE IN MARINE AREAS

### 1. Application in the Territorial Sea ?

Yes (no discussion possible)

Text of de Directives:

#### Art. 1.1. Birds Directive

*"This Directive relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies. It covers the protection, management and control of these species and lays down rules for their exploitation."*

#### Art. 2.1. Habitats Directive

*"The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies."*

Territory includes the territorial sea

### 2. Application beyond the 12 miles-zone, in EEZ and Continental Shelf ?

Yes (but discussion is possible; final decision will eventually be made by the Court of Justice)

Arguments:

#### 1. Argumentation based on the text and history of the Directives

General opinion that E.C.-legislation can be applicable beyond the territorial sea, to the extent that Member States exercise there sovereign rights (Court of Justice 1970s). This is the case in the EEZ and continental shelf. → look at the Directives themselves

Birds Directive is from 1979, in a period when very few Member States had designated an EEZ → no much attention for legal divisions in marine areas

Clear reference in the Birds Directive to protection in the sea

Art. 4.1-4.2. Birds Directive

*"1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.*

*(...)*

*Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this Directive applies.*

*2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. (...)"*

→ Birds Directive is applicable in EEZ and continental shelf

Habitats Directive is from 1992 → attention for legal divisions of marine areas

Clear reference in the Proposal for the Habitats Directive (1998) to protection beyond the territorial sea

Art. 1 Proposal for the Habitats Directive

*"The aim of the Directive is to conserve natural and semi-natural habitats and wild fauna and flora in the European territory of the Member States to which the Treaty applies, including maritime areas under the sovereignty or jurisdiction of the Member States."*

Replaced by art. 2.1. Habitats Directive

*"The aim of this Directive shall be to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies."*

Reason: no contestation of the applicability beyond the 12-miles zone, but similar wording with the Birds Directive

→ Habitats Directive is applicable in EEZ and continental shelf



## 2. Argumentation based upon the aims of the Directives

The Directives clearly aim at protecting habitats and species beyond the 12-miles zone

- Species of Annex I of the Birds Directive includes sea birds

- Habitats of Annex I and Species of Annex IV of the Habitats Directive  
Annex I includes open sea and tidal areas

*"1110 Sandbanks which are slightly covered by sea water all the time*

*1120 \*Posidonia beds (Posidonion oceanicae)*

*1130 Estuaries*

*1140 Mudflats and sandflats not covered by seawater at low tide*

*1150 \*Coastal lagoons*

*1160 Large shallow inlets and bays*

*1170 Reefs*

*1180 Submarine structures made by leaking gases"*

Annex IV includes open sea species, e.g. *harbour porpoise, all cetacea, bottlenose dolphin, monk, common seal, grey seal, etc.*

- The Directives are aimed for the implementation of the Bern Convention (1979) and the Convention on Biological Diversity (1992), to which the E.C. is a Party and which apply to the EEZ and continental shelf

Bern Convention: implicitly, marine species in the Annexes

Art. 4 Biodiversity Convention:

*"Subject to the rights of other States, and except as otherwise expressly provided in this Convention, the provisions of this Convention apply, in relation to each Contracting Party:*

*(a) In the case of components of biological diversity, in areas within the limits of its national jurisdiction; and*

*(b) In the case of processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction."*

## 3. Official E.C-documents, English jurisprudence, Member State practice and legal doctrine

- Answer of the Commission to a European Parliament written question, E-3529/96:

*"As far as Member States have competence, it applies to the exclusive economic zones. However, the marine species and habitats concerned generally have their main range inside territorial waters."*

- Communication from the Commission to the Council and the European Parliament - Fisheries Management and Nature Conservation in the Marine Environment COM(1999) 363 final, 14.07.1999, p. 10

*"The provisions of the "Habitats" Directive automatically apply to the marine habitats and marine species located in territorial waters (maximum 12 miles). However, if a Member State exerts its sovereign rights in an exclusive economic zone of 200 nautical miles (for example, the granting of an operating licence for a drilling platform), it thereby considers itself competent to enforce national laws in that area, and consequently the Commission considers in this case that the "Habitats" Directive also applies, in that Community legislation is an integral part of national legislation."*

- Ruling of the UK High Court (Greenpeace II) 05.11.1999

Granting of licenses for oil exploitation in UK continental shelf, beyond the 12-miles zone, without applying the Habitats Directive

UK government: *no application of the Habitats Directive because UK legislation implementing the Habitats Directive is explicitly not applicable beyond 12-miles zone*

Greenpeace: *violation of Habitats Directive: species of Annex IV and coral Lophelia pertusa occurring there → Habitats Directive applicable in EEZ and continental shelf + direct effect of species protection provisions*

Court:

*"In my judgment the wider scope contented for by Greenpeace is correct. It seems to me that a Directive which includes in its aims the protection of inter alia, lophelia pertusa and cetaceans will only achieve those aims, on a purposive construction, if it extends beyond territorial waters. Although much of the concern of the Directive and some of its language can properly be described as "land-based", it also deals specifically with some habitats and species which are sea-based and, to a large extent, flourish beyond territorial waters."*

- UK, Portugal and Danmark designated SPA's and/or SAC's beyond the 12-miles zone

- Legal doctrine is in favour of application of the Directives

T. Ijlstra and A. Nollkaemper (1990)

D. Czybulka and P. Kersandt (2000)

A. Cliquet (2000)

C. Backes, O. Elferink and P. van der Ree (2002)

G. Van Hoorick (2003)

## **VI. APPLICATION OF LEGISLATION IMPLEMENTING THE BIRDS AND HABITATS DIRECTIVE IN MARINE AREAS IN BELGIUM**

### **1. Application of the Nature Decree and its regulations**

- Flemish Region
- applicable only in land and internal waters (stops at the low water line)

### **2. Application of the Protection of Marine Environment Act and its regulations**

- Federal State
- applicable only in territorial sea, EEZ and continental shelf