

## Legal opinion

(N.B. The original document was prepared in German and has already been submitted to members of the Compliance Committee. This translation was prepared to aid discussion amongst all Committee members, but has only been verified on the basis of the accuracy of its contents rather than the English legal terminology. The original German version remains the main reference point for any clarifications the Committee may request.)

on the application made by CIPRA International to the Compliance Committee for a review of the suspected infringement of Art. 11 para. 1 of the Nature Conservation Protocol to the Alpine Convention with reference to amendments made to the Egartenlandschaft Landscape Protection Area around Miesbach and the opinion on the application issued by the German Federal Ministry of the Environment, Nature Conservation, Building and Nuclear Safety on 31 October 2014

## **1. Immediate applicability of Art. 11 para. 1 of the Nature Conservation and the Countryside Protocol**

The application made by CIPRA first of all addresses the question of the immediate applicability of Art. 11 para. 1 of the Nature Conservation Protocol.

This question is not merely academic as stated by the Federal Ministry in its opinion dated 31 December 2014. It makes a fundamental difference whether a provision of a treaty in international law simply requires the legislators of the contracting parties to transpose international law into national law without being binding in the application of the law in the individual case (but rather having a referential function in cases of doubt for the interpretation of unclear legal terms) or can be employed to define the margins of discretion and judgement in federal or state legislation or whether the provision is in itself directly applicable and, like any provision in federal law, must be taken into account in application of the law by the authorities. In that case the provision in international law has equal status with other relevant federal law provisions or even, as a federal law, has precedence over conflicting provisions of state law (Art. 59 para. 2 Basic Law).

In German legal practice, criteria have been developed to answer the question which provisions of treaties in international law are to be treated as immediately applicable federal law. One key criterion is the determinacy of the legal norm involved. When applying a provision of a treaty in international law, it is necessary to examine whether the provision is clear and has an adequate degree of determinacy, i.e. whether it is applicable in its own right and, in terms of formulation, objective and content, has the binding character of a domestic legal provision.

The Landessozialgericht Baden-Württemberg (ruling of 18.7.2013 – L 7 SO 4642/12) summarises this legal practice as follows:

“The immediate applicability of a provision of a treaty in international law can accordingly only be affirmed if it has all the characteristics that a domestic law must have in order to be legitimate and binding. In terms of formulation, objective and content, the provision of the treaty must be capable of having legal effect. In particular, a provision of a treaty only has immediate enforceability (is self-executing) if it has the determinacy required to have legal effect. Conversely, a provision of a treaty will be lacking in immediate applicability where execution requires prior legal specification (cf. Federal Administrative Court, ruling dated 5 October 2006 - 6 B 33.06 -, JURIS Rn. 4).”

With reference to Art. 11 para. 1 of the Nature Conservation Protocol, this permits the following conclusions to be drawn

Art. 11 para. 1 of the Nature Conservation Protocol reads as follows:

*The Contracting Parties undertake to preserve, manage and, where necessary, to extend the existing protected areas, in keeping with their protective function, and also to define, where possible, new protected areas. They shall take all appropriate measures to avoid impairing or destroying these areas.*

This provision has clarity and adequate determinacy. It formulates a specific obligation, which can be applied by the authorities. The wording of the provision is unequivocal (“undertake to preserve”). It is tantamount to saying: “The Contracting Parties shall preserve ... existing protected areas”.

The immediate applicability of Art. 11 para. 1 of the Nature Conservation Protocol is also reflected in its position within the Nature Conservation Protocol in Chapter II.

The Protocols on the Implementation of the Alpine Convention have a uniform structure. Following a preamble, Chapter I on “General Provisions” defines the general objectives and fundamental obligations. Chapter II on “Specific Measures” then formulates the more specific duties involved.

The fact that Art. 11 para. 1 forms part of the “Specific Measures” chapter indicates that the provision is not a general obligation without binding force; it formulates a specific requirement to preserve protected areas.

The general purpose of the regulation is also indicative of immediate applicability. It can be assumed that all nature conservation laws in the Alpine Convention’s member countries contain general requirements and prohibitions designed to prevent impairment of the protective function as well as provisions for government-approved activities and measures in protected areas. Nor is there any shortage of legal requirements to preserve protected areas at the national level.

There was no need for an additional treaty in international law for the preservation of existing protected areas that did not go beyond the provisions of national legislation, in particular in a chapter on specific measures within the relevant protocol. It can therefore be assumed that, in the case of Art. 11 para. 1 of the Nature Conservation Protocol, the parties to the Alpine Convention intended to create a regulation as an additional protective provision over and above the various national regulations, one which has immediate applicability for the administrative bodies concerned.

As a result, there is unanimous confirmation in the literature of the immediate applicability of Art. 11 para. 1 of the Nature Conservation Protocol (*Federal Ministry of the Environment, Nature Conservation and Nuclear Safety/Bavarian State Ministry of the Environment, Health and Consumer Protection, Die Alpenkonvention: Leitfaden für ihre Anwendung, Berlin/Munich 2008; Schumacher in: CIPRA, Leitfaden zur Umsetzung der Bestimmungen der Alpenkonvention in Deutschland, p. 292; Schroeder, Natur und Recht 2006, p. 138; Battisti, Die Alpenkonvention als Grundlage oder Barriere erneuerbarer Energien am Beispiel des Falles Spullersee-Beileitung Ost, unpublished diploma thesis submitted to Innsbruck University, January 2012, p. 37*).

In its opinion, the Federal Ministry of the Environment says the question of immediate applicability can be considered an open question in the context of the compliance review. For the Ministry, the only relevant question is whether the protected area has been “preserved” or not. Insofar as the Federal Ministry sees the case covered by the constituent elements of Art. 11 para. 1, it is treating the regulation as a legal norm in German law, i.e. with immediate applicability. It is possible that the Federal Ministry did not wish to explicitly contradict the Bavarian Constitutional Court with regard to its ruling of 13 September 2012 (Vf. 16-VII-11). In the matter itself, however, it concurs with the argument put forward by CIPRA International.

The Compliance Committee is therefore advised to rule that Art. 11 para. 1 of the Nature Conservation Protocol should have been applied by the competent authorities at least to the 9th - 20th amending ordinances on the Egartenlandschaft LPA and to the exemption granted for Piesenkam Golf Course.

## **2. Interpretation of Art. 11 para. 1 of the Nature Conservation Protocol**

When applying Art. 11 para. 1 of the Nature Conservation Protocol, one has to consider the function of the regulation and its meaning.

### **a) The function of Art. 11 para. 1 of the Nature Conservation Protocol**

Following confirmation of the immediate applicability of a legal norm, the second step in interpreting a regulation in international law is to consider the function of the norm in the application of law. Norms which prescribe a certain behaviour, e.g. through requirements or prohibitions, are called conditional norms. Regulations designed to achieve a goal (which is often indeterminate) and merely contain provisions for the ways in which the goal is to be achieved or the considerations to be taken into account in the process are called final norms. The distinction between the two types of norm is not always clear, but it is a useful instrument in the application of law, as the question whether a regulation constitutes a specific behavioural rule or only the

formulation of a certain matter of legal importance is decisive with regard to the legal consequences.

Art. 11 para. 1 of the Nature Conservation Protocol would seem to be a conditional norm, i.e. it contains a specific behavioural rule. This interpretation is supported by the formulation used for the regulation: The duty to preserve protected areas is formulated as a requirement and not as a general political or administrative goal. The regulation thus has the function of a planning principle within the terms of the rulings of the Federal Administrative Court. Planning principles are prohibitions or requirements in substantive law, which cannot be undermined or set aside when considering the facts of the case (BVerwGE 71, 163).

To that extent the author is in agreement with the opinion issued by the Federal Ministry. The Federal Ministry expresses the view that the duty to preserve protected areas not only requires the states parties to ensure formal preservation of the protected areas but also to prevent material damage to them (p. 8). All measures that counteract the protective function are therefore forbidden. The Ministry says that in principle this ban is absolute and not subject to any consideration of the facts of a case.

The extent to which this view can be consistently maintained (and actually is maintained by the Ministry) is discussed below. At this point, suffice it to say that there is a consensus on the fact that the function of Art. 11 para. 1 of the Nature Conservation Protocol is that of a conditional norm (prohibition/requirement) in the relationship between the Federal Republic of Germany and CIPRA International.

The Compliance Committee is therefore advised to rule that Art. 11 para. 1 of the Nature Conservation Protocol requires the contracting parties to prevent any impairment of the purpose of the protected area.

#### **b) The concept of the protected area**

Like CIPRA International, the Federal Ministry rightly assumes in its opinion that protected areas within the terms of Art. 11 para. 1 of the Nature Conservation Protocol also include landscape protection areas. Please see the relevant statements on this subject. To that extent there is no difference of opinion between CIPRA International and the Federal Republic of Germany or the Free State of Bavaria.

#### **c) Preservation within the terms of the protective function**

Art. 11 para. 1 of the Nature Conservation Protocol specifies a duty of preservation for existing protected areas.

As mentioned above, this duty of preservation does not only relate to the formal framework of a protected area as exists in the form of a subordinate ordinance in the Federal Republic of Germany; Art. 11 para. 1 of the Nature Conservation Protocol is designed above all to guarantee the key elements and functions of the protected area.

The Federal Ministry rightly points out that an infringement of Art. 11 para. 1 of the Nature Conservation Protocol can only be considered to have occurred in the case of a substantial impairment of the protective function (p. 9). That is self-evident, as the prohibition of impairment formulated in the law and the relevant protection orders always relates to the protective function.

The central challenge in assessing a project for compliance with Art. 11 para. 1 of the Nature Conservation Protocol is to determine whether the protective function is impaired or not.

#### **aa) Primacy of Art. 11 para. 1 of the Nature Conservation Protocol as *lex specialis***

On this question, the Federal Ministry's opinion is equivocal: Whereas – as stated above – the Federal Ministry states on page 8 that any impairment of the protective function is inadmissible, it argues on page 13 that Art. 11 para. 1 is only violated if the protective function can no longer be maintained. The Ministry also says that the Egartenlandschaft LPA was “encumbered” from the beginning with the possibility of an exemption in the individual case pursuant to the provisions of current nature conservation legislation and that one cannot speak of an infringement of Art. 11 para. 1 of the Nature Conservation Protocol where this right to an exemption is exercised.

This view must be refuted:

It is not possible to define a threshold beyond which the protective function of a protected area can no longer be maintained. It would defeat the purpose of Art. 11 para. 1 of the Nature Conservation Protocol if it were only effective when a protected area had been so compromised that the continued existence of the protected area is no longer meaningful. In fact, Art. 11 para. 1 of the Nature Conservation Protocol goes beyond the prohibition of impairment or destruction: In the second sentence, the contracting parties agree to “take all appropriate measures to avoid impairing or destroying these areas”. The only reasonable interpretation therefore is that all impairment of a protected area is inadmissible. It is precisely one of the objectives of Art. 11 para. 1 of the Nature Conservation Protocol to protect the surroundings of built-up areas from urban sprawl where the land involved forms part of an existing protected area.

The possibility of an exemption in the individual case as provided for in German national nature conservation law does not entitle a contracting party to circumvent the provisions of Art. 11 para. 1 of the Nature Conservation Protocol.

According to settled case law of the administrative courts in Bavaria, it is clear that the use of a significant area of land for construction purposes or preparations for such use in the form of a site development plan cannot be authorised by granting an exemption from the prohibitions provided for in the Bavarian Protected Area Ordinance (BayVGH 14.1.2003 – 1 N 01.2072). Where more than minor local measures are to be taken in a protected area with the result that the protective function can no longer be permanently maintained in the area concerned, the required land must be released from the protected area. That was the procedure adopted in the case of the Egartenlandschaft LPA: The areas rededicated as building land and commercial zones were released from the landscape protection area by making changes to its borders.

The release of land from a protected area is an *actus contrarius* to the original demarcation of the protected area. There are no specific provisions for such a measure in German or Bavarian nature conservation law.

The admissibility of a reduction in size of a protected area on the basis of an amendment to the Protected Area Ordinance must be assessed in the light of Art. 11 para. 1 of the Nature Conservation Protocol.

The same applies for exemptions from requirements and prohibitions in the individual case.

Art. 11 para. 1 of the Nature Conservation Protocol, as an immediately applicable federal law, enjoys equal status with Art. 67 of the Bavarian Nature Conservation Law. In the case of a conflict of law between an immediately applicable norm in international law and any other federal law, the following procedure applies: According to the rulings of the Federal Constitutional Court, a conflict between German federal law and immediately applicable norms in international law must be resolved through due interpretation and application of national law in keeping with the principles of international law. This is because it is to be assumed that it is not the intention of the legislator to neglect the Federal Republic of Germany's obligations in international law nor to permit any violation of such obligations (BVerfGE 74, 352, 370). For application of the Protocols to the Alpine Convention, the doctrine of “*lex specialis derogat legi generali*” takes on a special significance (see also: Geiger, Grundgesetz und Völkerrecht, § 32 III.4). The Protocols contain specific regulations for those areas of German territory that are subject to the Alpine Convention. Within the

geographical area covered by the Alpine Convention Protocols, therefore, primacy must be given to the immediately applicable regulations that deviate from or exceed the federal German norms (Schroeder, Natur und Recht 2006, 133 – 137).

The Compliance Committee is advised to rule as follows:

As *lex specialis* for the territory covered by the Alpine Convention, Art. 11 para. 1 of the Nature Conservation Protocol has primacy over Art. 67 of the Bavarian Nature Conservation Law in those cases where approval of a project pursuant to Art. 67 of the Bavarian Nature Conservation Law is not provided for in Art. 11 para. 1 of the Nature Conservation Protocol.

This primacy in application applies as a matter of principle to the amendments to the Egartenlandschaft LPA Ordinance.

At the same time, the Federal Ministry is correct in stating that Art. 11 para. 1 of the Nature Conservation Protocol does not apply to the period prior to the ratification and hence the coming into force of the Nature Conservation Protocol. That is the case with regard to the first eight amendments to the ordinance. The advance effect of norms in international law as (correctly) presented in the opinion issued by the Federal Ministry can hardly have required anticipatory application of Art. 11 para. 1 of the Nature Conservation Protocol in its function as a prohibitory norm.

As of the 9th amendment to the ordinance and in the case of planning permission for the Piesenkam Golf Course, however, Art. 11 para. 1 of the Nature Conservation Protocol should have been applied with regard to the decision to release the land from the LPA or to make an exemption for the buildings and other facilities required for the golf course.

**bb) Yardstick and criteria for an assessment of impairment of the protective function, especially in the case of landscape protection**

When can one speak of a violation of the preservation requirement contained in Art. 11 para. 1 of the Nature Conservation Protocol?

Great importance must be attached to the formulation of the protective function.

Where the protective function relates to maintenance of the ecological balance of the area or the preservation and restoration of certain ecosystems, biotopes or species, impairment can be predicted relatively reliably with the help of scientific methods.

For an assessment of matters relating to species protection law or an impact assessment pursuant to Art. 34 para. 2 of the Bavarian Nature Conservation Law (Natura 2000 areas), scientific standards have been established, and – although their application has often led to differences of opinion in the individual case – in general they permit fairly reliable verdicts to be reached concerning the compatibility of a project with the protective function.

The situation is different where the protective function is “preservation of the appearance or character of the landscape”. The Egartenlandschaft Landscape Protection Area provides a good example:

Historically, landscape protection was often the point of departure for the introduction of governmental nature conservation measures. That is why so many landscape protection area regulations in the Bavarian Alps, like the Egartenlandschaft LPA or the Inn Valley LPA, go back to the 1950s. The old ordinances in particular often provide only a rudimentary description of the protective function. Assessment of an impairment of the protective function, however, first of all presupposes a yardstick and practicable criteria.

In its opinion, the Federal Ministry refers to Art. 10 para. 1 s. 3 of the Nature Conservation Protocol. As objects worthy of nature and landscape protection in the Alps, natural and near-

natural elements of the landscape and traditional rural landscapes are included in the protocol. Landscape protection is targeted primarily at nature as an aesthetic resource and as a space for recreation and enjoyment for human beings. Hansjörg Küster explains why it is so difficult to define the concept of landscape as follows:

*“Nature is never the same thing as landscape. Nature exists and passes away whether we are aware of it or not. Landscape always involves reflection. When we see landscape, we interpret it. At the same time, there can be no landscape in which only elements of culture occur.”* (Küster, *Schöne Aussichten, Kleine Geschichte der Landschaft*, p. 15).

Any assessment of whether the protective function of the preservation of the landscape is impaired or not is automatically influenced by subjective elements and ideas shaped by the *zeitgeist*. That is why it is so important to reach an agreement for each protected area on the question of what constitutes its specific character and the natural and near-natural elements involved.

This definition of the protective function, especially with regard to landscape protection, is an important activity required of the states parties by Art. 11 para. 1 of the Nature Conservation Protocol. After all, protected areas can only be preserved and impairment and destruction prevented where there is a yardstick by which potential impairments can be measured. As mentioned above, there is no shortage of scientific methods for quantifying impairment of the ecological balance of an area, but there is a lack of criteria for evaluating impacts on the landscape.

The dominant aspect of the Egartenlandschaft LPA is its hedgerows as a near-natural element of a traditional cultural landscape. It is not enough, however, simply to preserve the hedges, bushes, trees and avenues; the special character and charm of the area derives from the interaction between the fields and meadows and these natural elements.

For an assessment of an impairment of the protective function, it would also be useful to identify those zones within the protected area in which the specific character of the landscape is particularly pronounced and those that are important as development and buffer zones.

In the opinion issued by the Federal Ministry, an impairment of the protective function is negated on the grounds that the size of the Egartenlandschaft LPA was only reduced by 0.51%, rising to 1.68% if the area covered by the actual golf course is included. Relative to the total size of the protected area, the opinion concludes that it has not been compromised to a degree that jeopardises its protective function.

In this context it must be said, however, that the mere size of the project is not an adequate criterion for assessing the degree of impairment of a protected area. Projects occupying only a small piece of land can have powerful visual, aesthetic and functional impacts on the landscape.

In addition – as the Federal Ministry rightly says – a plurality of small measures can also have a cumulative impact that constitutes a significant impairment of the protective function. The threshold at which such cumulative impacts lead to an impairment of the protective function is not specified by the Federal Ministry.

That is because, in its retrospective review, the Federal Ministry simply states that the changes made to the Egartenlandschaft LPA – even in their cumulative effect – are compatible with Art. 11 para. 1 of the Nature Conservation Protocol. The retrospective approach is unacceptable, however, as it only permits infringements of Art. 11 para. 1 of the Nature Conservation Protocol to be identified *post factum*, i.e. when the impairment has already occurred and can no longer be redressed.

A clear-cut threshold cannot be defined for an assessment of impacts on the character of the landscape of all protected areas, but the following general criteria could be applied to determine the threshold in the individual case:

- The larger the area in which the landscape is affected,
- The greater the involvement of the zones in which the specific visual character of the protected area is especially pronounced,
- The more land to be used for permanent structures,
- The less the project can be seen as part of the process of organic growth of an existing built-up area, and
- The more the protected area in the vicinity of the project has been affected by negative changes or reductions in size in the past,

the greater the probability of an impairment of the protective function.

The above criteria are not free of subjective elements, but they offer reasonably objective points of reference for assessing the possible impairment of the protective function of a protected area where the focus is on the protection of the appearance and character of the landscape.

It is also necessary to refute the argument put forward by the Federal Ministry (p. 11) that, as far as can be seen, the areas affected by the changes do not contain any elements of nature or the landscape that are worthy of protection. The 14th amendment to the LPA Ordinance (Waakirchen-Krottenthal Industrial Park) led to building on a site of the protected plant species *Apium repens* (creeping marshwort). Some plants were transferred to an alternative site, but the results of that measure must be considered uncertain in the long term.

The Compliance Committee is advised to call upon the Federal Republic of Germany to improve the existing landscape protection area regulations in the German area of the Alps with regard to the description of the protective function and to employ the above criteria to introduce zoning plans for large landscape protection areas, defining the core areas, lines of sight, etc.

It would probably not have been possible/admissible to approve some of the reductions in the size of the landscape protection area performed if the projects concerned had been assessed applying specific yardsticks in the light of the above criteria.

#### **d) Admissibility of projects in cases of non-compliance with Art. 11 para. 1 of the Nature Conservation Protocol**

It should finally be considered whether projects or measures can be compatible with Art. 11 para. 1 of the Nature Conservation Protocol even where they impair the protective function of the protected area.

Were Art. 11 para. 1 of the Nature Conservation Protocol to be interpreted as a strict prohibitory norm, excluding all exemptions, the protection regime would exceed the provisions of the relevant national and European legal norms. Not even an overriding public interest in the absence of reasonable alternatives (cf. Art. 34 para. 3 of the Bavarian Nature Conservation Law) would then be an admissible argument with reference to all types of protected areas covered by the Alpine Convention.

In both international and European law, the principle of proportionality is to be applied in the application of legal norms (ECR 1979, 3727, see also: Art. 5 para. 1 s. 2 TEU). Art. 11 para. 1 of the Nature Conservation Protocol must therefore be applied in such a way that private individuals and the local authorities within the landscape protection area concerned are not deprived of all scope for development by the requirement to preserve protected areas. That would be unreasonable and would not do justice to the goals of the Alpine Convention, which explicitly refers in Art. 2 para. 1 to the prudent and sustained use of resources.

On the other hand, in the light of the outstanding resources of the natural space and the great sensitivity of the Alpine ecosystem, Art. 11 para. 1 of the Nature Conservation Protocol places greater restrictions on the local authorities within the territorial scope of the Alpine Convention than



on others. The economic and urban planning limitations imposed in this context have to be accepted in principle by the municipalities involved. Pursuant to Art. 28 para. 2 of the Basic Law, the legislator is entitled to restrict the local authorities' planning authority, which is protected by the Basic Law, as long as the core areas of their rights of self-government are not affected (BVerfGE 79, 127 / 143). The same applies to private property, which the legislator may define and limit pursuant to Art. 14 para. 1 s. 2 of the Basic Law.

With due regard to the principle of proportionality, therefore, the requirement formulated in Art. 11 para. 1 of the Nature Conservation Protocol for the preservation, management and, where necessary, the extension of existing protected areas must be interpreted in such a way that reductions in size and other impairments of a protected area are only admissible in atypical exceptional cases and only to the extent that they are absolutely necessary.

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