

# WITHOUT VISAS AND BORDERS:

How to Protect  
Birds Pursuant to  
EU Legislation?



ANALYTICAL NOTE

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Дана публікація підготовлена за фінансової підтримки Європейського Союзу та Представництва Фонду імені Гайнріха Бьолля в Україні.

Дана публікація випущена в рамках проекту «Збільшення впливу громадянського суспільства у моніторингу та політичному діалозі щодо реформ в енергетиці та суміжних секторах відповідно до імплементації Угоди про Асоціацію», що здійснюється ГО «Діксі Груп» спільно з Ресурсно-аналітичним центром «Суспільство і довкілля», ВГО «Громадянська мережа «Опора», Асоціацією «Європейсько-Українське енергетичне агентство» та ГО «Енергетична Асоціація України», а також за участі незалежних експертів.

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# EXECUTIVE SUMMARY

Effective implementation of Directive 2009/147/EC on the Conservation of Wild Birds requires a wide public dialog on resolving key issues, searching for ways, and possible consequences in Ukraine.

The need to implement this Directive is one of Ukraine's obligations following from the EU-Ukraine Association Agreement as well as the Energy Community Treaty.

The mechanism of wild birds conservation provided for by the Directive includes measures on protection, management, and control of wild birds as well as the requirements to their use. The most difficult tasks of implementing the Directive on the Conservation of Wild Birds are related to two components thereof: creation of special protection areas (SPA) and the general system of protection of birds.

Full implementation of the Directive in Ukraine will inevitably result in creation of a considerable number of new special protection areas for the conservation of birds. EU member states had to create hundreds of such areas to meet the requirements of the Directive. Creation of new protection areas in Ukraine requires accomplishment of a number of conceptual tasks: organizational and legal form, procedure for creation, management, and others. Every task has a political, financial, and legal component.

The general system of protection of wild birds in Ukraine needs to be improved in order to meet the requirements of the Directive, in particular regarding acceptability of hunting exclusively for certain species of birds.

We furthermore outlined the key challenges and difficulties of social and economic nature that can be expected in Ukraine taking into consideration the experience of the EU state regarding implementation of the Directive on the Conservation of Wild Birds. Therefore, the key difficulties can include financing (both creation and management of new «bird reserves»), potential social and economic conflicts (in particular, with local communities or influence on certain types of economic activities: transport, agriculture) as well as challenges associated with the nature of the European law and individual provisions of the Directive itself.

Implementation of the Directive on the Conservation of Wild Birds within the framework of obligations under the Energy Community is to take place within the framework of the Directive implementation in general, however it can have a number of specific features.

# INTRODUCTION

The objective of this analytical note is to initiate a public dialog on the key issues and prospects of implementation of Directive 2009/147/EC on the Conservation of Wild Birds.

The need to implement this Directive is one of the obligations following from the EU-Ukraine Association Agreement as well as the Energy Community Treaty (which Ukraine joined in 2010). Implementation of the Directive in Ukraine requires political support, legislative amendments, research, and consultations with stakeholders to minimize the consequences of social and economic nature, taking into account the specific features of the energy sector. Furthermore, the Directive implementation is closely related to implementing the Directive on the Conservation of Natural Habitats (Directive 92/43/EEC on the Conservation of

Natural Habitats and of Wild Fauna and Flora).

We hope that this analytical note will help to:

- discuss the key tasks Ukraine is facing with regard to implementation of the Directive on the Conservation of Wild Birds;
- outline the key issues requiring wide discussion and political consensus;
- identify the key challenges and outcomes for economic and social development, ways to overcome them.

This analytical note was developed on the basis of the analytical documents «**Implementation of the Birds Directive in Ukraine**» (Resource & Analysis Center «Society and Environment» 2016).

The document has been developed within the framework of the project “Enhancing impact of civil society in monitoring and policy dialog on energy and related sectors’ reforms in line with the Association Agreement”, which is implemented with the financial support from the European Union.

# (1) SPECIFIC PROVISIONS REQUIRED BY THE DIRECTIVE ON THE CONSERVATION OF WILD BIRDS

IMPLEMENTATION OF THE DIRECTIVE HAS TO BE BASED ON CLEAR JOINT UNDERSTANDING OF ITS KEY REQUIREMENTS BY THE STAKEHOLDERS. IN OTHER WORDS, ONE SHOULD START WITH AN ANSWER TO THE QUESTION «WHAT EXACTLY DOES THE BIRDS DIRECTIVE REQUIRE?»

## 1.1. WHY IS THIS IMPORTANT?

### **For nature and Europe**

Directives on the conservation of birds and habitats are the key tools for conservation and sustainable use of nature in the EU, particularly through creation and functioning of the European network of protection areas (Natura 2000).

Directive 79/409/EEC (currently 2009/147/EC) on the Conservation of Wild Birds was the first systemic legal act in the sphere of environment protection. At the time of its adoption in 1979, the Directive presented an advanced approach to nature conservation: in addition to individual species, a mechanism of wild birds protection provided for conservation of their habitats. In the same year, the Bern Convention on the Conservation of European Wildlife and Natural Habitats in Europe was adopted, and Ukraine is a signatory party thereto.

Birds are an important component of ecosystems, and without them functioning of marine, forest, steppe, and other ecosystems humans depends on is impossible. A discussion on significant losses of populations of a large number of birds in Europe was a political basis for adopting the Directive. The nature of migration of many bird species (in particular, game birds) implied that environmental protection measures taken in one country are neutralized in others.

### **For Ukraine**

The EU-Ukraine Association Agreement defines the Directive implementation schedule: some of the provisions have to be implemented within two years from the date the Agreement comes into force, and some – within four years. In particular, within two years a respective legislation has to be adopted and evaluation of bird populations should be carried out.

In addition, commitments to the Energy Community provide for implementation of Article 4.2 (on migratory birds) provisions by January 1, 2015 (this commitment is set forth in the Association Agreement). The Action Plan on Implementation of the EU-Ukraine Association Agreement for 2014-2017 places the key responsibility for development of draft regulations on the Ministry of Ecology and Natural Resources (implementation timeline — December 2017).

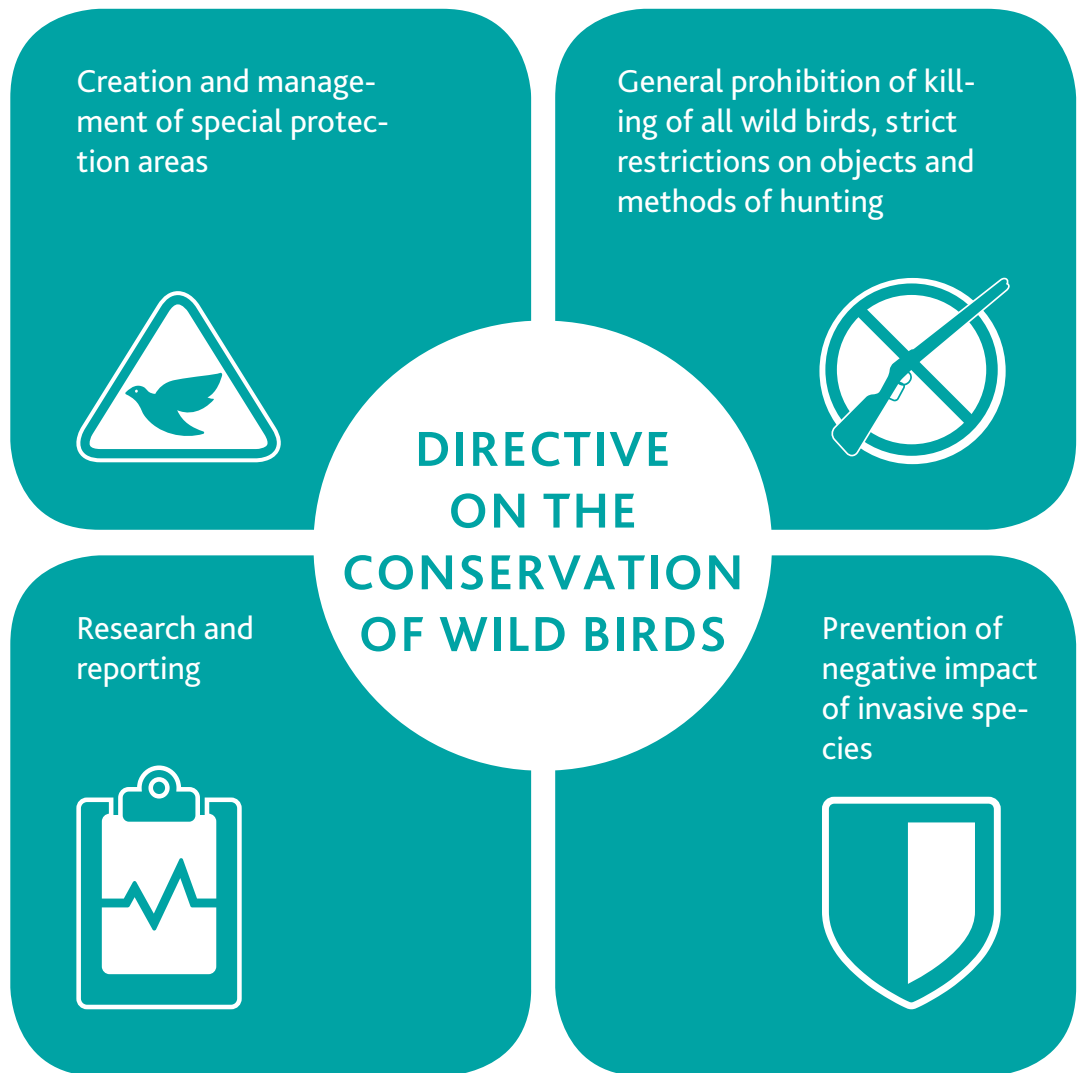
On April 15, 2015, the Action Plan on Implementation of Directive 2009/147/EC of the European Parliament and on the conservation of wild birds was approved by the Cabinet of Ministers of Ukraine, and it is available on the web-page of the CMU. The Ministry of Ecology and Natural Resources is the responsible implementer.

## 1.2. OBJECTIVE AND KEY PROVISIONS OF THE DIRECTIVE ON THE CONSERVATION OF WILD BIRDS

The general aim of the Directive on the Conservation of Wild Birds is preservation of the population of all wild birds

species that naturally reside on the European territory of member states at the level that meets, mainly, environmental, scientific, and cultural requirements. This being said, one should take into account the economic and recreational needs to adapt population of those species to the required level.

Diagram 1. Mechanism of birds protection in accordance with the Directive (key components)



The mechanism of wild birds conservation provided for by the Directive includes measures on protection, management, and control of wild birds as well as the requirements to their use.

**The key components of this mechanism are:**

- protection of habitats (residences) (Articles 3 and 4)
- protection and use of birds (Articles 5-9)



- prevention of harm from invasive species (Article 11)
- research and reporting (Articles 10 and 12).

The first two components require the most political effort, institutional and economic resources for their implementation, that is why they should be covered in more detail.

### **Protection of birds habitats**

**KEY REQUIREMENT:** creation and management of special protection areas for birds conservation (the species listed in Annex I to the Directive as well as migratory species). Pursuant to Article 3 of the Directive, states should take requisite measures to preserve, maintain and re-establish a sufficient diversity and area of habitats of birds. Primarily, such measures should include creation of special protection areas, maintenance and management in accordance with the environmental needs of habitats inside and outside the protected zones, re-establishment of destroyed and creation of new biotopes.

Identification of such special protection areas should be carried out exclusively on the basis of ornithological criteria, set forth in Article 4, to protect species, included in Annex I. Special protection areas should include all of «the most suitable territories in terms of their number and size» (with such birds habitats). Paragraph 4 of Article 4 also requires taking similar measures for protection of migratory species regularly occurring in their territories, especially in wetlands.

Annex I includes 194 species and subspecies of birds. The list was last updated in 2007 in connection with Bulgaria and Romania joining the European Union.

The regime and management of special protection areas are defined by provisions of Article 6 (2)-6 (3) of the Directive on the Conservation of Natural Habitats used instead of the first sentence of Ar-

ticle 4 (4) of the Directive on the Conservation of Wild Birds.

From the moment of their creation, special protection areas automatically acquire the status of the object of (included into) the NATURA 2000 network.

At the same time, the creation itself is not sufficient: management of such special protection areas is an important component of the birds protection mechanism. In the EU, a special funding program has been launched for that purpose: EU LIFE Nature programme. The main threats for such territories functioning are construction, agriculture, forestry and fisheries.

### **Protection and Use of Birds**

**KEY REQUIREMENT:** general prohibition of deliberate killing or capture of all wild birds and introduction of severe limitations for hunting objects and methods. The Directive establishes a general system of protection of all wild birds species: in particular, prohibiting deliberate killing and capture of birds; deliberate destruction and damage of nests or eggs; deliberate disturbance of birds; keeping birds of species the hunting and capture of which is prohibited (Article 5). At the same time, the Directive prohibits trade in wild birds (alive or dead), except for the species listed in Annex III (under certain conditions).

Under some conditions, hunting (killing and capturing) birds is allowed for species listed in Annex II (Article 7), yet some methods are prohibited (in particular, the large-scale or non-selective killing or capture, use of semi-automatic or automatic weapons with a magazine containing more than two rounds of ammunition, etc. (Article 8).

The Directive provides for a procedure of derogation from the regime of protection and use of birds (Article 9). This procedure is used quite often in the EU – in particular, with the aim to protect agricultural plants, control diseases, ensure aviation security, etc.

## (2) KEY TASKS FOR UKRAINE WITHIN THE FRAMEWORK OF IMPLEMENTATION OF THE DIRECTIVE

THE MOST DIFFICULT TASKS OF THE DIRECTIVE ON THE CONSERVATION OF WILD BIRDS IMPLEMENTATION EXIST WITH REGARD TO TWO COMPONENTS THEREOF: CREATION OF SPECIAL PROTECTION AREAS (SPAS) AND THE GENERAL SYSTEM OF PROTECTION OF BIRDS.

### EU EXPERIENCE

More than 30 years of application of the Directive led to significant results in the sphere of birds protection not only within but also outside the EU. During this period, the EU member states gained considerable experience of implementing the Directive provisions: only in Great Britain, for the purposes of implementation of the Directive, 270 special protection areas for birds conservation were created (the so-called Special Protection Areas, SPAs), with a total area of almost 2.8 million hectares. In total, almost 5,500 of such protection areas were created in 28 EU states, which cover 12.51% of the area of the EU member states. For comparison, the area of all objects of the nature reserve fund of Ukraine is about 3.3 million hectares (nearly 6% of the territory). This Directive is one of the most often used environmental protection Directives in the practice of the EU Court.

Meeting the Directive requirements is a necessary condition for acquiring financing from the EU states, which was an important incentive for strict implementation of the Directive provisions, especially in the new member states.

### 2.1. SPECIAL PROTECTION AREAS FOR CONSERVATION OF BIRDS («BIRD RESERVES»)

**In view of the requirements and practices of application of the Directive in the EU countries, the need to introduce a new special form of conservation of wild birds habitats in accordance with the Directive requirements is obvious – special protection areas.**

Unfortunately, the Plan of implementation of the Directive practically ignores the need to create SPAs reducing this part only to organizational measures: «completion of compilation of a list» of potential territories of the Emerald network on the basis of available materials, first of all, in the territories of the nature reserve fund and in the environmental network objects, as well as beginning of their evaluation pursuant to the procedures approved by the Bern Convention and «setting special marks» in the field.

Though the Emerald network, which is being created on the basis of the Bern Convention, is close in terms of its contents, it cannot substitute for the Natura 2000 network in any way, and a legal basis is completely different – it is the Bern Convention itself, not the Directive. The objects (areas) of the Emerald network have no legal status or regime in Ukraine – there is no such definition in the national legislation at all. The procedure for their creation is regulated exclusively by decisions and recommendations of the Standing Committee of the Bern Convention.

Such measures are obviously insufficient for implementation of provisions of the Directive.

**Full implementation of the Directive in Ukraine will inevitably result in creation of a huge number of new special protection areas for the conservation of birds.** EU member states had to create hundreds of new SPAs to meet the requirements of the Directive. Such SPAs are created as separate special types (forms) provided for by law for

nature protection areas, and they do not substitute for a traditional system of environmental protection (reserves, national parks, etc.). SPAs function «in parallel» in space and time: in particular, their borders can coincide completely or partially with traditional nature protection areas.

**It is obvious that in Ukraine, SPAs have to be created as an independent form of wild birds habitats protection on the basis and for the purposes of the Directive. Creation of new pro-**

Diagram 2. Key issues concerning SPAs creation in Ukraine



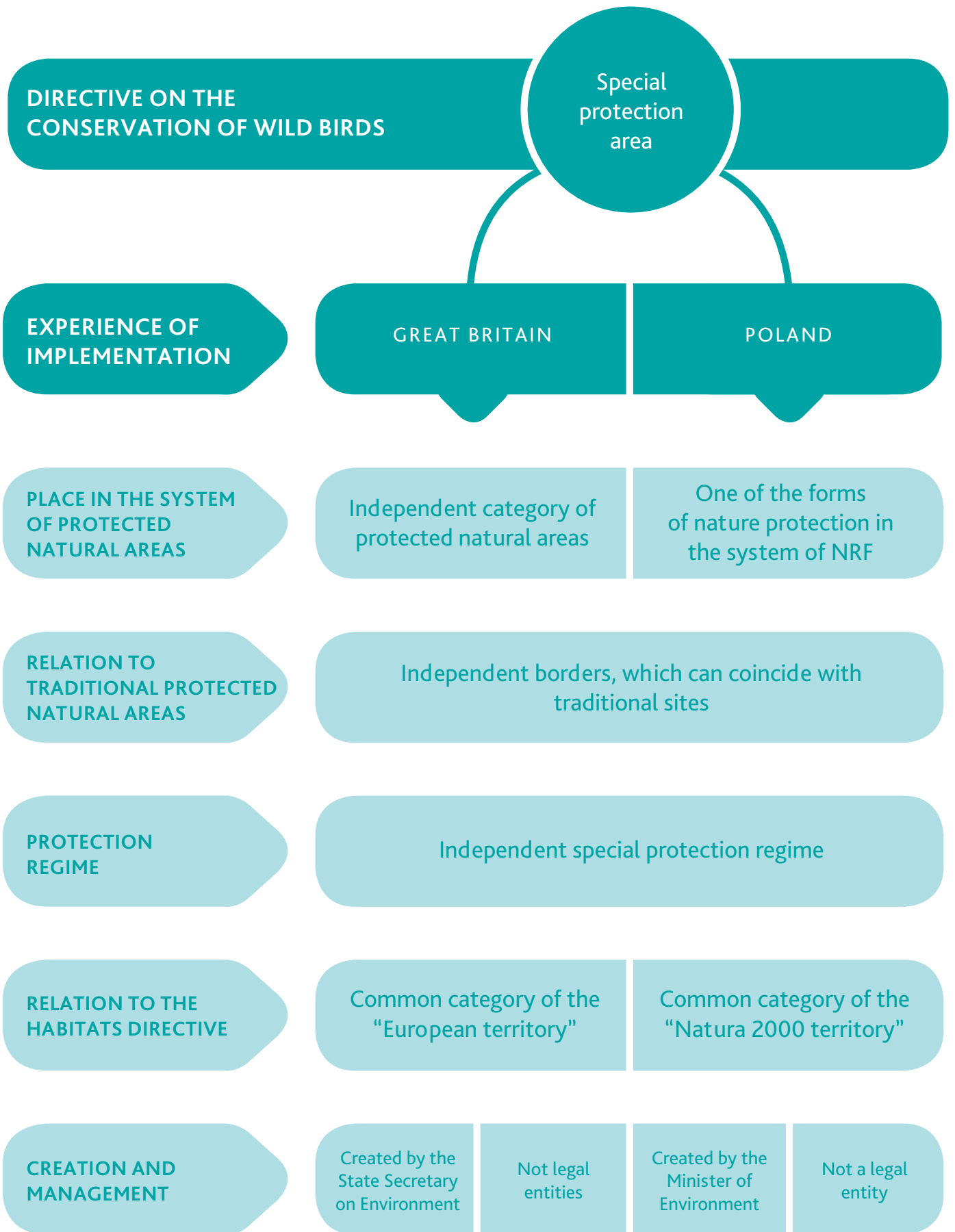


Diagram 3. Experience of European countries and key issues concerning SPAs creation in Ukraine

**tection areas in Ukraine requires accomplishment of several conceptual tasks: organizational and legal form, reasons for identification and creation procedure, protection regime.**

The key features of SPAs as an independent new form of environment protection should be:

- independence of available traditional objects of the nature reserve fund – both in terms of borders and protection regime;
- special individual protection regime integrated into systems of state planning and granting of permits for carrying out economic activities.

In addition, creation and management of SPAs should not necessarily be accompanied by creation of a new legal entity. The selected organizational and legal form has to ensure possibility of coordinated implementation of both the Birds Directive and the Habitats Directive (in the part of management of nature protection areas).

The criteria and procedure of SPAs creation should be derived from the Directive requirements on application of exclusively ornithological criteria for identification of potential SPAs. It is conceptually important to select a principle of their creation (voluntary and/or compulsory) tak-

ing into consideration the powers of local communities (in particular, in the context of decentralization).

Practical implementation will require considerable scientific and financial resources, which cannot be found without external assistance. The process of potential SPAs identification can be coordinated—in particular, for consolidation of resources—with the process of the Emerald network formation.

## **2.2. PROTECTION AND USE OF BIRDS**

Some components of the general system of birds protection have already been implemented in Ukraine (in particular, concerning general prohibition of wild birds killing, hunting methods, destruction of nests, etc.), however the regime of wild birds protection will need improvement.

**Regulation of hunting wild birds is the key task.** This mechanism requires improvement: in particular, concerning acceptability of hunting some bird species (in accordance with Annex II A-B to the Directive). It can cause resistance among organizations of hunters, which can, in its turn, worsen political conditions for regulation (many politicians are also known to be hunters).

It is important to mention that hunting for some species is permitted in some countries (Annex II-B), but Ukraine is not specified in the annex (as it is not the EU member). It causes uncertainty concerning the Directive implementation in this part.

# (3) EXPECTED CHALLENGES FOR UKRAINE IN THE PROCESS OF IMPLEMENTING THE DIRECTIVE ON THE CONSERVATION OF WILD BIRDS

IN THIS PART WE TRIED TO IDENTIFY THE KEY CHALLENGES AND DIFFICULTIES OF SOCIAL AND ECONOMIC NATURE THAT CAN BE EXPECTED IN UKRAINE TAKING INTO CONSIDERATION THE EXPERIENCE OF THE EU STATES REGARDING IMPLEMENTATION OF THE DIRECTIVE ON THE CONSERVATION OF WILD BIRDS

## 3.1. SOCIAL AND ECONOMIC CHALLENGES

Implementation of the Directive requires considerable funds. Financing is necessary both for identification of territories that should receive a nature protection status and for creation and management of special protection areas. It can include both one-time measures (purchase of land, restoration of damaged habitats, or infrastructural projects) and measures taken on a regular basis (for example, regular mowing, monitoring). Natura 2000 network management requires nearly EUR 5.8 billion every year (for all EU member states in total), or about EUR 63/hectare/year for the network objects on average. At the same time, social and economic benefits the EU receives thanks to functioning of the Natura 2000 network are estimated at EUR 200-300 billion/year (absorption of carbon dioxide, disaster prevention, water purification, tourism, and health care, etc.).

In Poland, abrupt creation of special protection areas for birds conservation in large territories was a shock for many local communities. The key difficulties in the process of Natura 2000 implementation in Poland included social resistance and negative perception, especially in the farming, forestry, water sectors, and river

transport. Limitations related to holding or planning economic activities that were suddenly introduced in the process of SPAs creation are the main source of dissatisfaction and conflicts.

It is especially important to take into account the process of decentralization in Ukraine and the necessity to expand the powers and authority of communities. On the other hand, due to European importance of SPAs, some level of control and coordination on the national level is necessary. Therefore, the procedure of SPAs creation has to provide some balance between the powers of local communities and the need for centralized control of the process of SPAs creation (and partially management).

Hunting limitation remains one of the most difficult aspects – both politically and from the viewpoint of the Directive implementation in the EU. In some countries – in France, Spain, and Italy – there are still conflicts related to this issue and a large number of lawsuits (about 15 decisions of the EU Court concerning Articles 7 and 8 of the Directive). For these reasons, even the «Guide to Hunting» was adopted in the EU in 2004.

### 3.2. SPECIFIC FEATURES OF THE ENERGY SECTOR

Commitments within the Energy Community framework add a special context to the process of implementation of the Directive in Ukraine. The key commitment that follows from Clause 2 of Article 4 of the Birds Directive is creation of special protection areas (SPAs) to conserve migrating birds.

Development and activities of the energy sector can significantly influence migrating birds and their habitats. It refers to both sectoral planning (for example, an energy strategy) or individual energy systems (for example, a gas transportation system) and individual projects – from infrastructure lines to wind turbines.

Electric overhead lines are an important factor influencing birds. Taking individual measures to protect birds (for example, ornithological protection of high-voltage electric grids) is important and useful; however, from the viewpoint of Article 4 of the Directive, the key issue is preservation of birds habitats. Besides, in Ukraine, as a rule, it is an issue of storks, but electric lines also threaten migrating birds of prey that often choose them for hunting (as places for observing prey).

Power stations that regularly emit warm water into reservoirs and natural objects are a source of negative influence on migrating waterfowl. In particular, such birds often do not fly for wintering, which harms their natural biological processes and has a negative impact on their immune system.

Influence of wind turbines has been an object of special attention in the EU for a long time (in particular, on migrating birds and waterfowl). The main issue is selection of the location for such turbines. The key impact factors: disturbance of birds, damage to their habitats and collision of birds with blades.

Implementation of the Directive on the Conservation of Wild Birds within the framework of obligations to the Energy Community is to take place within the framework of the Directive implementation in general; however, it can have the following specific features:

- violation of the implementation timelines for Article 4 (2) for commitments within the framework of the Energy Community should be considered to be a ground for giving high priority to implementation of the Directive in general;
- no measures can substitute for commitments to create special protection areas (SPAs) to conserve migrating birds habitats. For meeting the commitments within the framework of the Energy Community, a practical process of identification and creation of SPAs can begin with detection of migrating birds habitats (in particular, in wetlands of international importance).

### 3.3. CHALLENGES ASSOCIATED WITH APPLICATION OF THE EU LAW IN UKRAINE

**Implementation of the Birds Directive has some challenges associated both with the European law nature and its individual provisions. Certain provisions of the Directive cannot be applied without solving some organizational and legal issues.**

The first challenge refers to the sphere of application of the Directive itself defined in Article 1: «all species of naturally occurring birds in the wild state in the European territory of the Member States» (emphasis added). Ukraine is not a mem-

ber of the European Union, that is why a literal application of this provision will mean asymmetric, if not discriminative, mode of application of the Directive in general.

A serious challenge is associated with the powers of the European Commission to perform some actions provided for by the Directive. It refers to reporting, making decisions (consultations) in some cases (concerning permissions to hunt certain species, application of exceptions, etc.). It should be noted here that implementation of such provisions of the Directive in practice is impossible in the case of Ukraine. Provision of such powers has to be recognized not only by the European Commission but also by Ukraine and the EU member states.

The following challenge is associated with freedom of actions concerning a permission to hunt certain species provided

for in Annex II-B. The Annex contains a table stating in which country specific species can be a hunting object. Of course, Ukraine is not there. So, a literal application of the Directive in Ukraine means that these hunting types cannot be permitted due to general prohibition of hunting wild birds. It is obvious that it is neither the objective of the Directive nor the objective of its implementation in Ukraine.

Lack of control from the EU institutions has to be taken into account in the implementation process. Control of fulfillment (implementation) of directives from the European Commission and the EU Court (national courts in the member states) is an integral part of the EU legal system. Without such a control, neither environmental nor other areas of the EU law can be efficient.

## CONCLUSIONS

The most difficult tasks of the Directive on the Conservation of Wild Birds implementation are related to two components thereof: creation of special protection areas (SPAs) and the general system of protection of birds.

Full implementation of the Directive in Ukraine will inevitably result in creation of a huge number of new special protection areas for protection of birds.

Creation of new protection areas in Ukraine requires accomplishment of several conceptual tasks: organizational and legal form, reasons for identification and creation procedure, protection, and management regime.

Practical implementation of requirements of the Directive will require considerable scientific and financial resources, which cannot be found without external assistance. The process of potential SPAs identification should be coordinated — in particular, for consolidation of resources — with the process of the Emerald network formation.

The general system of protection of wild birds in Ukraine needs to be improved in order to meet the requirements of the Directive, in particular regarding acceptability of hunting exclusively for certain species of birds).

Commitments within the Energy Community framework add a special context to the process of implementation of the Directive in Ukraine.

In the process of implementation, risks of social and economic conflicts should be seriously minimized, and the decentralization process should be taken into consideration.





