

Appendix B - Managing Natura 2000 sites (EC, 2018)

The Royal Society for the Protection of Birds

1 April 2019

Planning Act 2008 (as amended)

In the matter of:

**Application by Ørsted Hornsea Project Three (UK) Ltd for an Order Granting Development
Consent for the**

Hornsea Project Three Offshore Wind Farm

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Commission notice

**"Managing Natura 2000 sites
The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC"**

Managing Natura 2000 sites

***The provisions of Article 6
of the Habitats Directive 92/43/EEC***

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Foreword

PURPOSE AND NATURE OF THIS DOCUMENT

Article 6 of the Habitats Directive (92/43/EEC) plays a crucial role in the management of the sites that make up the Natura 2000 network. With the spirit of integration in mind, it indicates the various tasks involved so that the nature conservation interests of the sites can be safeguarded.

This document aims at providing guidelines to the Member States on the interpretation of certain key concepts used in Article 6 of the Habitats Directive.

In the framework of the Action Plan for nature, people and the economy¹, the Commission has committed to '*update the interpretative guidance document on provisions of Article 6 of the Habitats Directive on the conservation and management of Natura 2000*'. This document replaces therefore the original version of this document that was issued in April 2000².

The present update incorporates the large body of rulings that have been issued by the Court of Justice of the EU over the years on Article 6³. It also builds on a series of Commission notes addressing Natura 2000 management, as well as other relevant Commission guidance documents on Article 6 that should be read in conjunction with this one⁴.

The primary targets of the document are Member State authorities. It is however expected to also facilitate the understanding of the mechanics of the Habitats Directive amongst anyone involved in the management of Natura 2000 sites and in the Article 6 permit procedure.

The document has been drafted following consultations with the nature protection authorities of the Member States and stakeholders. It is intended to assist Member State authorities, as well as anyone involved in the management of Natura 2000 sites and in the Article 6 permit procedure, in the application of the Habitat Directive. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law.

¹ http://ec.europa.eu/environment/nature/legislation/fitness_check/action_plan/communication_en.pdf

² 'Managing Natura 2000 sites' - The provisions of Article 6 of the Habitats Directive 92/43/EEC, European Communities, 2000 – ISBN 92-828-9048

³ A compilation of the most relevant cases on Article 6 is available at: http://ec.europa.eu/environment/nature/legislation/caselaw/index_en.htm

⁴ Commission notes on designation of SACs, setting of conservation objectives for Natura 2000 sites, establishing conservation measures for Natura 2000 sites
Commission guidance documents on application of Article 6 in different sectors

The interpretations provided by the Commission cannot go beyond the Directive. This is particularly true for this directive as it enshrines the subsidiarity principle and as such lets a large margin of manoeuvre to the Member States for the practical implementation of specific measures related to the various sites of the Natura 2000 network. In any case, the Member States are free to choose the appropriate way they wish to implement the practical measures provided the latter achieve the results of the Directive.

However interpretative, this document is not intended to give absolute answers to site specific questions. Such matters should be dealt with on a case-by-case basis, while bearing in mind the orientations provided in this document.

STRUCTURE OF THE DOCUMENT

After an introductory note on the overall content and logic of Article 6, there follows a detailed presentation of each paragraph (6(1), 6(2), 6(3), 6(4)) according to the same general structure. This involves an introduction to the paragraph and its scope, and then discussion of the main concepts and issues raised, on the basis of the Commission's knowledge, existing jurisprudence of the Court of Justice of the EU, and other EU legislation, where relevant.

To allow for a speedy reading of the relevant conclusions, the key points arising from the Commission's analyses are summarised (in bold characters) at the end of each section,.

1. Introduction

Article 6 in Context

1.1. PLACE WITHIN THE OVERALL SCHEME OF THE HABITATS DIRECTIVE AND THE BIRDS DIRECTIVE AS WELL AS WITHIN A WIDER CONTEXT

Before addressing Article 6 in detail, it is worth recalling its place within the overall scheme of Directive 92/43/EEC⁵ (hereinafter referred to as the Habitats Directive) as well as that of Directive 2009/147/EC⁶ (hereinafter referred to as the Birds Directive) and its relationship with a wider legal context.

The first chapter of the Habitats Directive, comprising Articles 1 and 2, is entitled ‘Definitions’. It sets out the aim of the Directive which is 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’*⁷. It also provides a general orientation for the implementation of the Directive, referring to the need for all measures taken pursuant to it to be designed to maintain or restore certain habitats and species *‘at favourable conservation status’*⁸, while, at the same time, referring to the need for measures taken pursuant to the Directive to *‘take account of economic, social and cultural requirements and regional and local characteristics’*⁹.

The main specific requirements of the Habitats Directive are grouped under the two subsequent chapters. The first is entitled ‘Conservation of natural habitats and habitats of species’ and comprises Articles 3 to 11. The second is entitled ‘Protection of Species’ and comprises Articles 12 to 16.

The ‘Conservation of natural habitats and habitats of species’ chapter addresses the establishment and conservation of sites designated for habitat types and species of Community interest listed in Annexes I and II to the Directive. These sites, along with sites classified under the Birds Directive, form the Natura 2000 network (Article 3(1)). Within this chapter, Article 6 contains provisions which govern the conservation and management of Natura 2000 sites. Seen in this context, Article 6 is one of the most important of the 24 articles of the Directive, being the one which most determines the relationship between conservation and other socioeconomic activities.

The article has three main sets of provisions. Article 6(1) deals with the establishment of the necessary conservation measures, and focuses on positive and proactive measures to

⁵ OJ L 206, 22.7. 92, p. 7

⁶ OJ L 27, 26.1.2010, p 7, directive repealing Directive 79/409/EEC

⁷ Article 2(1).

⁸ Article 2(2). The term ‘Favourable Conservation Status’ is defined in Article 1(e) and 1(i) and refers to the conservation status of the species or habitat types of Community interest across their natural range within the EU.

⁹ Article 2(3).

maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status. Article 6(2) makes provision for avoidance of habitat deterioration and significant species disturbance. Its emphasis is therefore preventive. Article 6(3) and (4) set out a series of procedural and substantive safeguards governing plans and projects likely to have a significant effect on a Natura 2000 site.

Within this structure, it can be seen that there is a distinction between Article 6(1) and (2) which define a general regime and Article 6(3) and (4) which define a procedure applying to specific circumstances.

Considered globally, the provisions of Article 6 reflect the general approach set out in Article 2 and the recitals of the Directive. This involves the need to promote biodiversity by maintaining or restoring certain habitats and species at ‘favourable conservation status’ across their natural range within the EU, while taking into account economic, social, cultural and regional requirements, as a means of achieving sustainable development.

Apart from the place of Article 6 within the overall scheme of the Habitats Directive, it is also relevant to mention its relationship with the scheme of the Birds Directive:

- Firstly, the scheme of the Birds Directive is broadly comparable with that of the Habitats Directive. In particular, the ‘Conservation of natural habitats and habitats of species’ chapter of the Habitats Directive is analogous to Articles 3 and 4 of the Birds Directive.
- Secondly, there has been an important degree of merger or fusion between the schemes of both Directives. First, Special Protection Areas (SPAs) classified under the Birds Directive are now an integral part of the Natura 2000 network¹⁰. Second, the provisions of Article 6(2), (3) and (4) of the Habitats Directive have been made applicable to SPAs¹¹.

Article 6 is also to be considered within the broader framework of the EU Biodiversity policy¹² and is crucial for the achievements of its targets. The implementation of Article 6 can also benefit from other actions undertaken in that context. In particular, work undertaken to measure ecosystem condition under the Mapping and Assessment of Ecosystems and their Services (MAES)¹³ provides useful and relevant guidance, including sector-specific, on addressing issues such as measuring and assessing the condition of ecosystem types corresponding to the broad habitat types under the Habitats Directive; measuring pressures on ecosystems; quantifying ecological requirements as well as deterioration and ecological integrity of sites.

Seen in a wider context - that of the Treaty on the European Union - Article 6 can be regarded as a key framework to give effect to the principle of integration since it encourages Member States to manage the Natura 2000 sites in a sustainable way and it sets the limits of activities which can impact negatively on protected areas while allowing some derogations

¹⁰ Article 3(1) of the Habitats Directive provides that ‘the Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC’.

¹¹ Article 7 of the Habitats Directive.

¹² Communication from the Commission: Our life insurance, our natural capital: an EU Biodiversity Strategy to 2020 (COM(2011) 244)

¹³ http://ec.europa.eu/environment/nature/knowledge/ecosystem_assessment/index_en.htm

in specific circumstances. Measures under Article 6 may also benefit from synergies with other relevant EU environmental policies such as on water, marine or fisheries.

Measures under Article 6 of the Habitats Directive may require the adoption of measures falling under the Common Fisheries Policy (Regulation (EU) No 1380/2013). In particular, the provisions under article 11 of the CFP on the conservation measures necessary for compliance with obligations under Union environmental legislation could apply; these provisions are clarified in the Commission Staff Working Document ‘on the establishment of conservation measures under the Common Fisheries Policy for Natura 2000 sites and for the Marine Strategy Framework Directive purposes’ (SWD(2018)288 final). The Commission has already adopted several delegated acts pursuant to Article 11 of the CFP (available at https://ec.europa.eu/fisheries/cfp/fishing_rules_en).

Seen in an international context, Article 6 helps achieve the aims of relevant international nature conservation conventions such as the Bern Convention¹⁴ and the Convention on Biological Diversity¹⁵, while at the same time creating a more detailed framework for site conservation and protection than these conventions themselves do.

Article 6 is a key part of the chapter of the Habitats Directive entitled ‘Conservation of natural habitats and habitats of species’. It provides the framework for site conservation and protection, and includes proactive, preventive and procedural requirements. It concerns Special Protection Areas classified under the Birds Directive as well as sites designated under the Habitats Directive. The framework is a key means of supporting the overall objectives of the two directives and achieving the objectives of the EU biodiversity policy and the principle of environmental integration into other EU policies and ultimately sustainable development.

1.2. RELATION WITH PROTECTION OF SPECIES CHAPTER

As mentioned above, the chapter of the Habitats Directive entitled ‘Protection of Species’ covers Articles 12 to 16 and deals with strictly protected animal and plant species listed in Annex IV of the Directive¹⁶, as well those in need of special management measures, as listed in Annex V.

Articles 12, 13 and 14 cover certain plant and animal species which may also feature in Annex II of the Directive, and which therefore also benefit from the provisions of Article 6

¹⁴ Council Decision 82/72/EEC of 3 December 1981 concerning the conclusion of the Convention on the conservation of European wildlife and natural habitats (OJ L 38, 10.2.1982, p.1).

¹⁵ Council Decision 93/626/EEC of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity (OJ L 309, 13.12.1993, p.1).

¹⁶ Further details on the relationship between the species provisions and the site protection provisions of the Habitats Directive can be found in the Commission guidance on the strict protection of species of Community interest. http://ec.europa.eu/environment/nature/conservation/species/guidance/index_en.htm

within the Natura 2000 sites hosting them¹⁷. As a result, an activity may at the same time fall within the scope of both chapters.

*For example, the destruction of a resting place of the brown bear, *Ursus arctos*, may contravene the prohibition in Article 12(1)(d), while also running counter to Article 6 if the resting place is within a Natura 2000 site designated for the species.*

While this may appear to result in duplication, the following points should be noted:

- Firstly, certain species of plants or animals covered by Articles 12, 13 and 14 do not appear in Annex II. Thus, they do not benefit directly from site conservation and protection within Natura 2000.
- Secondly, for vulnerable species, such as large carnivores which benefit from both the chapter on conservation of natural habitats and habitats of species and the chapter on protection of species, the protection afforded to them by Article 6 is limited to sites within the Natura 2000 network, whereas the protection afforded by the chapter on protection of species is not limited to sites. Thus, Article 6 is concerned with the conservation and protection of **sites designated** for the species within the Natura 2000 network, whereas the chapter on protection of species targets the species throughout their natural range within the EU (including specific areas outside Natura 2000 where the species occur, in particular breeding sites and resting places for these animals).

While certain plant and animal species benefit from both the chapter on conservation of natural habitats and habitats of species and the chapter on protection of species, the scope and the nature of the relevant provisions are different.

1.3. PUTTING ARTICLE 6 INTO NATIONAL LAW: THE DUTY OF TRANSPOSITION

It is important to note that the provisions of Article 6 require transposition into national law (i.e. they need to be the subject of provisions of national law giving effect to their requirements). In this respect, they are covered by Article 23 of the Directive which states that ‘*Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within two years of its notification*’. Depending on the Member State the deadline for transposition was 10 June 1994 or the date of EU accession.

This reflects the type of legal instrument that has been used, namely a directive. A directive is binding as to the result to be achieved, but leaves a Member State the choice as to the form and methods of achieving that result.

¹⁷ The species protection provisions of the Habitats Directive apply to certain species of Community interest but not to habitat types of Community interest. The latter only benefit from provisions under the ‘Conservation of natural habitats and habitats of species’ chapter (Articles 3 - 11) which also means that their occurrences outside the Natura 2000 network do not enjoy any protection under the Habitats Directive.

Settled case law clarifies that transposition must be clear and precise, faithful and with unquestionable binding force (see Court of Justice of the EU (hereinafter: Court) Cases C-363/85, C-361/88, C-159/99 paragraph 32, C-415/01 paragraph 21, C-58/02, C-6/04 paragraphs 21, 25, 26, C-508/04 paragraph 80).¹⁸

Depending on the Member State concerned, Article 6 needed to be transposed into national law by 10 June 1994 for the first 12 Member States or the date of EU accession for the others.

1.4. TIME OF APPLICATION OF ARTICLE 6: FROM WHICH DATE DO THE OBLIGATIONS OF ARTICLE 6 APPLY?

In general, a distinction needs to be made between the deadline for transposition of the provisions of Article 6 into national law and the date from which these provisions apply to individual sites.

As regards individual sites, a distinction needs to be drawn between Special Protection Areas classified under Birds Directive and other sites – Sites of Community Importance (SCIs) and Special Areas of Conservation (SACs) - under the Habitats Directive.

1.4.1. Special Protection Areas under the Birds Directive

The protection requirements regarding Special Protection Areas (SPAs) are given in Article 4(4), first sentence of the Birds Directive which provides that, for those areas, ‘... *Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article...*’

After the entry into force of the Habitats Directive the above obligations are replaced pursuant to Article 7 of that Directive which provides as follows:

‘Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.’

Thus, the provisions of Article 6(1) do not apply to Special Protection Areas (SPAs). However, analogous provisions apply to SPAs by virtue of Article 3 and 4(1) and (2) of the Birds Directive. The date from which these similar provisions should in principle apply to SPAs is the date from which the Birds Directive became applicable in the Member States (cases C-355/90 Commission v Spain ‘Santoña Marshes’, C-166/97 Commission v France ‘Seine Estuary’).

¹⁸ https://curia.europa.eu/jcms/jcms/Jo2_7045/en/

As regards the provisions of Article 6(2), (3) and (4), it is clear from the terms of Article 7 that these apply to SPAs already classified at the time of entry into force of the Habitats Directive. However, given the wording of Article 7, a question arises as to whether the provisions of Article 4(4), first sentence of the Birds Directive remain applicable after the ‘date of implementation of this Directive’ (10 June 1994 for the then Member States and the date of accession for later Member States) for sites that should have been classified as SPAs but have not been so classified.

In the *Santoña Marshes* case (C-355/90 paragraph 22) the Court established that Article 4(4) first sentence of the Birds Directive was applicable to an unclassified site which should have been classified as an SPA from the date of implementation of the Birds Directive (i.e. 7 April 1981 for the then Member States and the date of accession for later Member States).

According to the *Basses Corbières* case (C-374/98 paragraphs 43 – 57; see also C-141/14), areas which have not been classified as SPAs but should have been so classified continue to fall under the regime governed by the first sentence of Article 4(4) of the Birds Directive, which is stricter than that of Article 6(2) to (4) of the Habitats Directive because it does not provide for derogation. The duality of the regimes gives Member States an incentive to carry out classifications, in so far as this enables them to use a procedure which allows them, for imperative reasons of overriding public interest, including those of a social or economic nature, and subject to certain conditions, to adopt plans or projects adversely affecting an SPA.

Article 6(1) of the Habitats Directive does not apply to SPAs. However, there are analogous provisions in Articles 3, 4(1) and 4(2) of the Birds Directive and these apply from the date of implementation of that Directive.

As regards the date of application of Article 6(2), (3) and (4) of the Habitats Directive to SPAs, these apply to all sites classified as SPAs following Article 4(1) and 4(2) of the Birds Directive from the date of implementation of the Habitats Directive.

Sites that have not been classified as SPAs but should have been so classified continue to fall under the protection regime of the first sentence of Article 4(4) of the Birds Directive which is stricter than the provisions of Article 6(2) to (4) of the Habitats Directive.

1.4.2. *Sites under the Habitats Directive*

Article 6(1) applies to SACs. According to Article 4(4) of the Directive, SACs come into being when Member States designate them as such. This can happen only after a site has been adopted as an SCI in accordance with Article 4(2) of the Directive. An SCI must be designated as an SAC ‘as soon as possible and within six years at the most’.

The designation of an SCI as an SAC effectively triggers the implementation of Article 6(1) since all the other measures under Article 6 – including the duty to prevent further deterioration (Articles 6(2), (3) and (4)) – already apply to SCIs before they are designated as SACs.

Article 4(5) of the Habitats Directive provides as follows:

‘As soon as a site is placed on the list referred to in the third subparagraph of paragraph 2 it shall be subject to Article 6(2), (3) and (4).’

Thus, in contrast to the provisions of Article 6(1) which apply only when an SCI has been designated as an SAC, the provisions of Article 6(2), (3) and (4) become applicable as soon as a site becomes an SCI (i.e., before it is designated as an SAC). Article 6(1) also applies to SCIs for which the six-year period has expired and which have not yet been designated as SAC in breach of Article 4(4). In other terms, the obligation to establish the necessary conservation measures applies at the latest by the time the six-year period has expired.

The Commission Decisions that approve the SCIs clearly state that: *...it should be stressed that the obligations resulting from Articles 4(4) and 6(1) of Directive 92/43/EEC are applicable as soon as possible and within six years at most from the adoption of the initial or updated lists of sites of Community importance for the biogeographical region, depending on which list a site of Community importance was included as such for the first time.*

This means the six-year period starts running from the date on which the site was first included in the Commission Decision. If later on, subsequent decisions adjust some of the details of the site, this should not be used as an excuse to postpone the SAC designation. These new adjustments will however need to be incorporated into the SAC designation process and taken into account when establishing the necessary conservation measures.

In the *Draggagi* case (C-117/03 paragraph 29) the Court ruled that *‘in the case of sites eligible for identification as sites of Community importance that are mentioned on the national lists transmitted to the Commission and may include in particular sites hosting priority natural habitat types or priority species, the Member States are, by virtue of the Directive, required to take protective measures appropriate for the purpose of safeguarding that ecological interest’.*

In the *Bund Naturschutz* case (C-244/05 paragraph 47) the Court further ruled that *‘the appropriate protection scheme applicable to the sites which appear on a national list transmitted to the Commission under Article 4(1) of the Directive requires Member States not to authorise interventions which incur the risk of seriously compromising the ecological characteristics of those sites’.*

In the light of the foregoing, Member State authorities must ensure that sites on their national list of proposed SCIs are not allowed to deteriorate and are protected for the purpose of safeguarding their ecological interest even before the Union list of SCIs is adopted. Where the national list remains incomplete, Member States are also advised to safeguard the ecological interest of sites that, according to scientific evidence based on the criteria in Annex III to the Habitats Directive, should be on the national list. To that effect one practical suggestion is to use properly the environmental impact assessment (EIA) process under Directive 2011/92/EU¹⁹ for projects with likely significant effects on the environment (in so far as they are covered by that Directive). The Court has already confirmed the importance

¹⁹ OJ L 26, 28.1.2011, p.1, as amended by Directive 2014/52/EU, OJ L 124, 25.4.2014, p. 1.

that should be attached to sensitive natural sites when deciding whether projects should undergo an EIA under that directive (C-392/96 paragraph 66).

The above considerations can be summarised in the following table:

Site status	Proposed SCI	SCI	SAC	SPA	Sites that should have been classified as SPA
Article 6(1)	Optional	Optional (obligatory if the six-year period has expired)	Obligatory	Not applicable but analogous provisions in Articles 3, 4(1) and 4(2) of the Birds Directive apply.	Not applicable.
Article 6(2), (3) and (4)	Optional, but Member States must take protective measures that are appropriate for the purpose of safeguarding the ecological interest of the sites ²⁰ .	Obligatory	Obligatory	Obligatory	Not applicable but these sites continue to fall under the protection regime of the first sentence of Article 4(4) of the Birds Directive.

Articles 6(2), (3) and (4) apply to SCIs and SACs under the Habitats Directive. Article 6(1) applies to SACs under the Habitats Directive.

They do not apply to sites which are on a national list transmitted to the Commission under Article 4(1) of the Directive. Member States must nevertheless take protective measures that are appropriate to safeguard the ecological interest of those sites. This includes not authorising interventions which incur the risk of seriously compromising the ecological characteristics of those sites.

Where a complete national list has not been submitted, Member States are advised to take a similar approach for sites which, on the basis of the scientific criteria in the Directive, clearly ought to be on the national list.

²⁰ A similar requirement would apply to sites that, according to scientific evidence based on the criteria of Annex III of the Habitats Directive, should be on the national list of proposed SCIs.

2. Article 6(1)

Clarification of the concepts of *necessary conservation measures; conservation objectives; ecological requirements; management plans; and statutory, administrative or contractual measures.*

2.1. TEXT

‘For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.’

2.2. SCOPE

Article 6(1) lays down a general conservation regime which has to be established by the Member States for all Special Areas of Conservation (SAC).

Article 6(1):

- provides for **positive** conservation measures, involving, if need be, management plans, and statutory, administrative or contractual measures, which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the site. In that regard, Article 6(1) is distinguished from the three other paragraphs of Article 6 which provide for preventive measures to avoid deterioration, disturbance and significant effects in the Natura 2000 sites;
- has a value of **reference** for the logic and the overall understanding of Article 6 and its three other paragraphs;
- establishes a general conservation regime which applies to **all** SACs in the Natura 2000 network without exception and to **all** the natural habitat types in Annex I and the species in Annex II present on the sites, except for those identified as non-significant in the Natura 2000 Standard Data Form (SDF)²¹;
- concerns the **SACs specifically**: Article 6(1) does not apply to the Special Protection Areas (SPAs), unlike Article 6, paragraphs 2, 3 and 4. In this way, the legislator established:

²¹ Commission Decision 2011/484/EU concerning a site information format for Natura 2000 sites <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:198:0039:0070:EN:PDF>

- a regime laying down ‘special conservation measures’ for the **SPAs** classified under the Birds Directive, according to its Articles 3 and 4, paragraphs 1 and 2;
- a regime laying down ‘necessary conservation measures’ for the **SACs** designated under the Habitats Directive, according to its Article 6(1);
- also applies to SCI for which the six years period has expired and which have not yet been designated as SAC in breach of Article 4(4). In other terms, the obligation to establish the necessary conservation measures applies at the latest by the time the six years period has expired;
- relates to Article 1(a), which defines conservation measures as a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status;
- relates to Article 2(2), which establishes that measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest;
- relates to Article 2(3), which specifies that the measures must take account of economic, social and cultural requirements and regional and local characteristics.

For all the SACs, Member States are required to draw up conservation measures and adopt appropriate statutory, administrative or contractual measures. These measures must be established within six years from the adoption of Union lists of Sites of Community Importance (SCIs) at the latest.

These measures are positive and site-specific; they apply to all the natural habitat types in Annex I and the species in Annex II present on the sites, except those whose presence is non-significant according to the Natura 2000 Standard Data Form. They aim to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest; and they take into account economic, social and cultural requirements and regional and local characteristics.

2.3. WHAT SHOULD BE THE CONTENT OF THE ‘NECESSARY CONSERVATION MEASURES’?

2.3.1. *Setting site-level conservation objectives*²²

There are several references to the term 'conservation objectives' in the preamble of the Directive as well as an explicit mention of it in Article 6(3). The need for such a concept is also underlined by Articles 4(4) and 6(1) of the Directive. It is useful therefore to examine what is meant by ‘conservation objectives’ and how it relates to establishing the necessary conservation measures for SACs under Article 6(1).

²² For further details see Commission note on Setting Conservation Objectives (2013) - http://ec.europa.eu/environment/nature/natura2000/management/docs/commission_note/commission_note2_EN.pdf

Article 1 states that for the purpose of the Directive ‘*Conservation means a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status...*’.

As stated in Article 2 the overall aim of the Habitats Directive is to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora. The measures taken under the Directive seek to are with a view to ensuring that the species and habitat types covered achieve ‘favourable conservation status’, i.e. that their long-term survival is secured across their entire natural range within the EU.

Whereas each site shall contribute to the attainment of **favourable conservation status (FCS)** this overall objective **can only be defined and achieved at the level of the natural range of a species or a habitat type** (see Article 1(e) and (i) of the Directive). A broad conservation objective aiming at achieving FCS can therefore only be considered at an appropriate level, such as for example the national, biogeographical or European level.

However, the **general objective of achieving FCS** for all habitat types and species listed in Annexes I and II to the Habitats Directive **needs to be translated into site-level conservation objectives**. It is important to distinguish between conservation objectives of individual sites and the overall objective of achieving FCS.

Site-level conservation objectives are a set of specified objectives to be met in a site in order to make sure that the site contributes in the best possible way to achieving FCS at the appropriate level (taking into account the natural range of the respective species or habitat types).

Site-level conservation objectives should be established not only for special areas of conservation (SACs) under the Habitats Directive but also for Special Protection Areas (SPAs) under the Birds Directive with a view to achieving the requirements as set out in Articles 2, 3, 4(1), 4(2) and 4(4) of that Directive.

In principle, site-level conservation objectives should be set for all species and habitat types of Community interest under the Habitats Directive and for bird species in Annex I of the Birds Directive or regularly occurring migratory bird species, which are significantly present on the site. However, it is not necessary to establish specific conservation objectives or conservation measures for species or habitat types whose presence on the site is non-significant according to the Natura 2000 SDF²³.

Site-level conservation objectives should be based on the ecological requirements of these natural habitat types and species present on the site (see below at section 2.3.3) and should define their desired conservation condition on the site. They should reflect the importance of the site for the maintenance or restoration of the habitat types and species present on the site and for the coherence of Natura 2000. Moreover, they should reflect the threats of

²³ i.e. all species indicated as having an insignificant population size and density in relation to the populations present within the national territory (population size category D), habitat types indicated as having an insignificant representativity (category D).

degradation or destruction to which the habitats and species on the site are exposed, including those brought about by climate change.

Site-level conservation objectives should define the desired conservation condition of the species and habitat types on the site for maximising its contribution to achieving FCS at the appropriate level. They are sometimes defined as a set of targets to be achieved over a certain period of time. These targets should be established in function of the conservation assessment of each species and habitat type on the site as recorded in the SDF.

Conservation objectives may reflect priorities within a site. In case C-241/08, the Court concluded that ‘...*determining the conservation and restoration objectives in the context of Natura 2000 may require, as the Advocate General pointed out in point 71 of her Opinion, the reconciliation of various conflicting objectives.*’

It is important to distinguish clearly between objectives and measures. For example, conservation objectives can be expected to be reasonably stable over time – indeed, in most cases they need to be long-term aims. Meanwhile, the conservation measures required to achieve those objectives are likely to change, including in response to changing patterns of threats to sites and, of course, the hopefully positive effects of conservation measures already taken.

Once the conservation objectives have been defined for a Natura 2000 site, there is some flexibility in defining and establishing the conservation measures. Several options can be considered, (using a choice of administrative, contractual or statutory measures), which take into account other socio-economic activities in the sites.

Examples of site-level conservation objectives

1. *Site x has been designated in view of its importance for the habitat type: semi-natural grasslands (6210). According to the SDF, the habitat type has a poor conservation condition (marked as class C in the SDF). The conservation objective for this site may therefore have been set to improve the conservation of the habitat type to class A - excellent - within 10 years, considering that the habitat type has a very unfavourable conservation status within the region. The necessary conservation measures established under Article 6(1) have been designed to achieve that objective.*
2. *Site y has been designated because it harbours a large area of active raised bog (7110). According to the SDF, the habitat type is in excellent condition (marked as class A in the SDF). The conservation objective for that site has therefore been set simply to maintain this condition, even though the habitat types has an unfavourable conservation status within the region. No conservation measures have been established under Article 6(1) since the site does not require any active management measures to maintain this condition.*

In principle conservation objectives should be set for each site and for all species and habitat types significantly present on each site. They should be based on the ecological requirements of the species and habitats present and should define the desired conservation condition of these species and habitat types on the site. They should be

established in function of the conservation assessment of each species and habitat type as recorded in the Standard Data Form.

The conservation objectives should also reflect the importance of the site for the coherence of Natura 2000 so that each site contributes in the best possible way to achieving FCS at the appropriate geographical level within the natural range of the respective species or habitat types.

2.3.2. *Establishing the necessary conservation measures*²⁴

Conservation measures are the actual mechanisms and actions to be put in place for a Natura 2000 site with the aim of achieving the site's conservation objectives and addressing the pressures and threats that the species and habitats within the site face.

According to Article 6(1) '*Member States shall establish the necessary conservation measures*' which correspond to the ecological requirements of the habitats and species of Community interest present. This should be understood as meaning that all necessary conservation measures **must be taken**.

This is confirmed by the Court which has ruled that '*the Directive requires the adoption of necessary conservation measures, a fact which excludes any discretion in this regard on the part of the Member States and restricts any latitude of the national authorities when laying down the rules or taking decisions to the means to be applied and the technical choices to be made in connection with those measures. By means of the words used in Article 6(1) of the Directive, the Community legislature sought to impose on the Member States **the obligation to take the necessary conservation measures** that correspond to the ecological requirements of the natural habitat types and species covered by Annex I and Annex II to the Directive respectively*' (case C-508/04 paragraphs 76, 87).

Furthermore the Court has ruled that '*Article 6(1) of the Habitats Directive and Article 4(1) and (2) of the Birds Directive require, if those provisions are not to be rendered redundant, that the conservation measures necessary for maintaining a favourable conservation status of the protected habitats and species within the site concerned not only be adopted, but also, and above all, be **actually implemented***' (case C-441/17 paragraph 213).

The obligation is to establish the necessary conservation measures, irrespective of whether those measures are applied within individual sites, or even in some cases outside the boundaries of sites or across multiple sites. In some cases it may be that a significant component of a Member State's compliance with Article 6(1) is through measures of a broader scope which nevertheless contribute to site-specific conservation objectives and are adapted to the ecological requirements of protected habitats and species in the SAC. This

²⁴ See Commission note on Establishing Conservation Measures (2013) - http://ec.europa.eu/environment/nature/natura2000/management/docs/commission_note/comNote%20conservation%20measures_EN.pdf.

may be particularly relevant to marine sites where, for example, wider regulation of fisheries activities²⁵ may be a significant element of Article 6(1) compliance.

Key elements to consider in establishing the necessary conservation measures²⁶

Sound knowledge base on the existing conditions in the site, on the species and habitats status and the main pressures and threats that can affect them, the existing land uses and stakeholders interests, etc. This information should include the precise location of key natural features (habitat types and species); the main land uses and activities that can influence the conservation status of relevant habitats and species; the identification of all relevant stakeholders that need to be involved or consulted in the management planning process; potential conflicts and possible ways and means to solve them.

Participation, consultation and communication in planning and preparing the conservation management of a Natura 2000 site allows to take into account the views of the people that live and work or use the site and to ensure engagement of the different stakeholders in the management of the site, so that the likelihood of success is enhanced. Participation can be carried out throughout the process of management planning, starting with early consultation and involvement of stakeholders to inform about the conservation objectives of the site and its importance and to clarify the steps for proper management. This can be done for example through steering groups or committees involving local authorities and representatives of land owners, users and main operators in the Natura 2000 site. It requires efficient organization of the process, collaboration of different policy levels, sufficient staff and budget and effective communication tools; targeted training and effective conflict resolution methods, as well as facilitation of the whole process by a specifically appointed ‘site champion’, can also be of great added value.

Defining the necessary conservation measures with sufficient level of detail (who does what, when and how) facilitates their implementation and can prevent possible conflicts. The measures must be realistic, quantified, manageable and clearly formulated, drawing on an appropriate level of technical expertise which identifies essential measures and those for which there are various alternative options for implementation, adapted to local interests. The precise location and a description of the means and tools required for their implementation should be provided, e.g. through a work plan flexible enough to allow its review and adaptation as required. It is important also to set a timeline to review the implementation of conservation measures taken, their suitability and the progress towards achieving conservation objectives.

The necessary resources for implementation of the conservation measures need to be considered in any management instrument for Natura 2000 sites, including information about estimated costs for implementation and monitoring, administration, compensation payments, etc, as well as about required human resources and skills, and **possible financial instruments**. Accordingly, full regard is needed to the multiple benefits that flow from

²⁵ In accordance with rules under the Common Fishery Policy, including measures taken under Article 11 of Regulation (EU) No 1380/2013.

²⁶ Extract from Commission Note on Establishing Conservation Measures for Natura 2000 sites, available at http://ec.europa.eu/environment/nature/natura2000/management/docs/commission_note/comNote%20conservation%20measures_EN.pdf.

investing in Natura 2000 through their ecosystem services. The various socio-economic activities and their interactions with the natural environment should also be analysed to determine possible costs and benefits arising out of the site management and the actual need for financial support.

Effective implementation and communication needs to be ensured through a mechanism demonstrating that the necessary measures are not just established but also actually implemented, and by making them publicly available (e.g. on websites or official registers) as a source of information for all those concerned.

Article 6(1) of the Habitats Directive imposes an obligation to establish and implement the necessary conservation measures that correspond to the ecological requirements of the natural habitat types and species covered by Annex I and Annex II, a fact that excludes any discretion in this regard on the part of the Member States.

2.3.3. *The ecological requirements*

Article 6(1) specifies that the necessary conservation measures have to correspond ‘*to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites*’. It is therefore in relation to the ecological requirements of the natural habitat types and the species that Member States have to determine the conservation measures.

Although the Directive does not contain any definition of the ‘*ecological requirements*’, the purpose and context of Article 6(1) indicate that these involve all the ecological needs, including both abiotic and biotic factors, which are deemed necessary to ensure the conservation of the habitat types and species, including their relations with the physical environment (air, water, soil, vegetation, etc.)²⁷.

These requirements are based on scientific knowledge and can only be defined on a case-by-case basis, according to the natural habitat types in Annex I, the species in Annex II, and the sites which host them. Such knowledge is essential to make it possible to draw up the conservation measures, on a case-by-case basis.

The ecological requirements may vary from one species to another but also, for the same species, from one site to another.

Thus, for the bats included in Annex II to the Directive, the ecological requirements differ between the period of hibernation (when they rest in underground environments, in hollow shafts or in dwellings) and the active period, from spring onwards (during which they leave their winter quarters and resume their activities of insect hunting).

²⁷ Work under Mapping and Assessment of Ecosystems and their Services can support the identification of the ecological requirements of the natural habitat types in Annex I - see especially 5th technical report (http://ec.europa.eu/environment/nature/knowledge/ecosystem_assessment/index_en.htm).

For the Annex II amphibian Triturus cristatus, the ecological requirements vary during its life cycle. The species hibernates in the ground (cavities, fissures), then lays its eggs in spring and at the beginning of the summer in ponds. It then leaves the aquatic environment and lives on land during the summer and autumn. For the same species, the ecological requirements may therefore vary according to the sites concerned (aquatic or land). This species also inhabits an extensive range throughout Europe, which means that its ecological requirements may differ from one part of its range to another as well.

The identification of the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites is the responsibility of the Member States. The latter may wish to exchange their knowledge in this field, with the support of the European Commission and the European Environment Agency - European Topic Centre on Biological Diversity.

The conservation measures have to correspond to the ecological requirements of the natural habitat types in Annex I and of the species in Annex II present on the site. The ecological requirements of those natural habitat types and species involve all the ecological needs which are deemed necessary to ensure the conservation of the habitat types and species. They can only be defined on a case-by-case basis and using scientific knowledge.

2.4. WHAT FORM CAN THE NECESSARY CONSERVATION MEASURES TAKE?

The conservation measures can take the form of *‘appropriate statutory, administrative or contractual measures...’* and *‘if need be’*, the form of *‘appropriate management plans’*.

The choice is left to the Member States, in line with the principle of subsidiarity. The Directive sets out the results to be achieved and leaves it up to the Member States to decide how to do so in practice. Often, the different options referred to in Article 6(1) are used in combination for the management of Natura 2000 sites.

In all cases, the responsibilities for implementing conservation measures need to be clearly defined, along with the relevant financial resources.

2.4.1. *Management plans*

The necessary conservation measures may involve *‘if need be, appropriate management plans specifically designed for the sites or integrated into other development plans’*. Such management plans should address all existing activities, including regular ongoing activities such as day-to-day agricultural activities, whereas new plans and projects are dealt with under Article 6(3) and 6(4).

In general, management plans at site level are used to formulate the site’s conservation objectives, on the basis of an analysis of the conservation status of species and habitats on the site and the pressures and threats they face, together with the measures necessary to attain these objectives. Management plans are often used as a tool to guide managers and other interested parties in dealing with the conservation of Natura 2000 sites, and to involve the different socioeconomic stakeholders and authorities, including local communities,

landowners, farmers, fishermen and other interest groups, in implementing the necessary conservation measures that have been identified.

Management plans are a useful tool for ensuring that the implementation of Article 6(1) provisions is done in a clear and transparent way, enabling all stakeholders to be informed about what Natura 2000 sets out to achieve and to engage actively in this discussion. Management plans may also help identifying the funding needs for the measures and achieving better integration into other plans.

The words ‘if need be’ indicate that management plans may not always be necessary. If management plans are chosen by a Member State, it will often make sense to establish them before concluding the other measures mentioned in Article 6(1), particularly the contractual measures. Contractual measures will often involve a relationship between the competent authorities and individual landowners and will be limited to individual land-holdings which are normally smaller than the site. In such circumstances, a management plan focused on the site will provide a wider framework, and its contents will provide a useful starting point for the specific details of contractual measures.

The management plans must be ‘*appropriate*’ and ‘*specifically designed for the sites*’, i.e. targeted at the sites of the Natura 2000 network. Existing management plans for other protected area categories (e.g. national or natural parks, etc.) are not always sufficient to address the management of Natura 2000 sites and should therefore be adapted or supported by further measures to meet the specific conservation objectives of the species and habitat types of Community interest present on the site. Furthermore, the boundaries of other types of protected areas and those of the Natura 2000 sites may not coincide.

Management plans can be stand-alone documents or can also be ‘integrated into other development plans’, in line with the principle of integration of the environment into other EU policies. In the case of an integrated plan, it is important to ensure that clear conservation objectives and measures are set for the relevant habitats and species present on the site.

Management plans for the Natura 2000 sites are a useful tool for ensuring that the implementation of Article 6 (1) provisions is done in a clear and transparent way, and with the involvement of stakeholders. These plans are not always necessary but, if they are used, they should be specifically designed for the sites or incorporated into other development plans when those exist. They should address all known activities, whereas new plans and projects are dealt with under Article 6(3) and 6(4).

2.4.2. *Statutory, administrative or contractual measures*

The phrase ‘*if need be*’ refers only to the management plans and not to the statutory, administrative or contractual measures which are needed in all cases (case C-508/04 paragraph 71). Thus, even if a Member State considers a management plan unnecessary, it will still have to take such measures.

The division into these three categories of measures has to be considered in a broad sense. A variety of measures may be considered as appropriate to achieve the conservation objectives established for each site. Often this involves active management but, in some cases, it may also involve more passive preventative measures (e.g. non-intervention management). On

the other hand, they may not necessarily be new measures, since existing measures may be considered sufficient if they are appropriate.

- *Statutory measures* usually follow a pattern laid down in law and can set specific requirements in relation to activities that can be allowed, restricted or forbidden in the site.
- *Administrative measures* can set relevant provisions in relation to the implementation of conservation measures or the authorisation of other activities in the site.
- *Contractual measures* involve establishing contracts or agreements usually among managing authorities and land-owners or users on the site.

Agri-environmental or forestry-environmental measures serve as a good example of a contractual measure that takes socioeconomic requirements into account when establishing agreements which benefit Natura 2000 sites. They should be designed in line with the conservation measures established for the site and in view of reaching its conservation objectives.

- *Agri-environmental agreements* with farmers within the Rural Development Programmes can be used as a contractual measure aiming to maintain or improve the conservation condition of certain habitat types (e.g. meadows, pastures) and species across a range of sites.
- *Forestry-environmental measures* can also be used to establish contracts and agreements with forest owners on the management of the forest to favour the conservation of habitats and species.

In this perspective, all suitable EU funds (e.g. rural development and regional funds as well as the LIFE programme²⁸) should be considered as a means for implementing these measures²⁹.

The choice between statutory, administrative or contractual measures is left to the Member States. This is in line with the principle of subsidiarity. However, Member States must choose at least one of the three categories, i.e. statutory, administrative, contractual.

There is no hierarchy between these three categories. Thus Member States have the choice to use, on a Natura 2000 site, just one category of measures (e.g. only contractual measures) or combined measures (e.g. combination of statutory and contractual measures according to the conservation issues of the natural habitat types in Annex I and the species in Annex II present on the site). Moreover, on top of the selected compulsory measures, Member States may establish and implement management plans.

The three categories of measures are qualified as ‘appropriate’. This qualifier is not defined in the Directive. However, in the case of Article 6(1), the statutory, administrative or contractual measures are embraced within the concept of conservation measures. The

²⁸ Regulation (EU) No. 1293/2013

²⁹ Financing Natura 2000 – http://ec.europa.eu/environment/nature/natura2000/financing/index_en.htm

qualifier ‘appropriate’ has no other objective than to recall that whatever the type of measure chosen by the Member States, there is an obligation to ensure that they correspond to the ecological requirements of the target features of particular Natura 2000 sites and respect the general aim of the Directive defined in Article 2(1) and (2).

For SACs, Member States are required to establish and implement the appropriate statutory, administrative or contractual measures. They must a) correspond to the ecological requirements of habitats in Annex I and species in Annex II present on the sites and b) fulfil the Directive’s overall aim of maintaining or restoring at a favourable conservation status the natural habitats and the species of fauna and flora of Community interest.

3. Article 6(2)

Clarification of the concepts of *taking appropriate avoidance steps; deterioration; and disturbance*

2.5. TEXT

‘Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.’

2.6. SCOPE

The article takes as its starting point the **prevention principle**: *‘Member States shall take appropriate steps **to avoid**, in the special areas of conservation, the deterioration... as well as disturbances...’*

These measures go beyond the management measures needed for conservation purposes, since these are already covered by Article 6(1). The words *‘avoid’* and *‘could be significant’* stress the anticipatory nature of the measures to be taken. It is not acceptable to wait until deterioration or disturbances occur before taking measures (case C-418/04 – see also under section 4.4.1 the interpretation of *‘likely to’* in Article 6(3)).

This article should be interpreted as requiring Member States to take all the appropriate actions to ensure that no deterioration or significant disturbance occurs. It requires both human-caused and any predictable natural deterioration of natural habitats and the habitats of species to be avoided.

The scope of this article is broader than that of Articles 6(3) and 6(4) which apply only to plans and projects. It also applies to the performance of all ongoing activities, like agriculture, fishing or water management, that may not fall within the scope of Article 6(3)³⁰, along with plans and projects which have already been authorised in the past and subsequently prove likely to give rise to deterioration or disturbances³¹. It can also apply to the implementation of plans or projects which were authorized before Article 6(3) became applicable (C-399/14 para. 33).

Article 6(2):

³⁰ See also section 4.4.1 of this document on term ‘project’.

³¹ Case C-127/02, paragraph 37. See also section 4.3 of this document on relationship between Article 6(2) and 6(3).

- Applies **permanently** in SACs, SCIs and SPAs. It may concern past, present or future activities or events. If an already existing activity in a SAC or SPA is likely to cause deterioration of natural habitats or disturbance of species for which the area has been designated, it must be covered by the appropriate measures foreseen in Article 6(2) of the Habitats Directive or Article 4(4) of the Birds Directive respectively, when applicable. This may require, if appropriate, bringing the negative impact to an end by stopping the activity and/or by taking mitigation or restoration measures. This may be done by means of an ex-post assessment.

This is supported by the *Owenduff* case (C-117/00 paragraphs 28-30)³² in which the Court ruled that Article 6(2) was infringed because measures had not been adopted to prevent deterioration, in an SPA, of the habitats of the species for which the SPA was designated.

The Court has also ruled that, by providing generally that certain activities practised under the conditions and in the areas authorised by the laws and regulations in force do not constitute activities causing disturbance or having such an effect, a Member State fails to fulfil its obligations under Article 6(2) of the Habitats Directive (case C-241/08 paragraph 76).

- **Is not limited to intentional acts**, but could also cover any chance events that might occur (fire, flood, etc.), as long as they are predictable - for example, if they tend to occur every few years³³. In case of catastrophes this concerns only the obligation to take (relative) precautionary measures to decrease the risk of such catastrophes as long as they could jeopardise the aim of the Directive.
- **Is not limited to human activities**. In the case C-6/04 paragraph 34, the Court considered that ‘*in implementing Article 6(2) of the Habitats Directive, it may be necessary to adopt both measures intended to avoid external man-caused impairment and disturbance and measures to prevent natural developments that may cause the conservation status of species and habitats in SACs to deteriorate*’. For instance, in the case of natural succession or of climate change effects, measures would need to be taken to halt or counter this process if it is deemed to be negatively impacting on the species and habitat types for which the site has been designated. Accordingly, naturally dynamic situations, as well as modifications linked to climate change (e.g. sea level rise, disappearing or newly arriving species) should be assessed case-by-case³⁴.

The legislator envisaged certain *limits* to the responsibility of the Member States:

- *Spatial limit* – the measures target only species and habitats located ‘*in the SACs*’. On the other hand, measures may need to be implemented *outside* the SAC if external events may have an impact on the species and the habitats inside the SAC. For instance, in the case of a toxic spill affecting a wetland, the application of Article 6(2) would require that

³² see also C-75/01, C-418/04, C-508/04, 301/12

³³ In particular, climate projections point to the increased frequency and intensity of extreme weather events which need to be factored in.

³⁴ See guidance on Climate change and Natura 2000 at <http://ec.europa.eu/environment/nature/climatechange/pdf/Guidance%20document.pdf>.

all preventive measures should have been taken to avoid the spillage, even if its location is distant from the wetland. Indeed, the article does not specify that measures have to be **taken in** the SAC but that they should **avoid deterioration in** the SAC. The same logic applies to SPAs.

- *Limit of habitats and species concerned* - the appropriate measures concern only habitats and species *'for which the areas have been designated'*. In particular, the habitats and species concerned by the measures to be taken are those identified in the Natura 2000 Standard Data Forms (see sections 2.2 and 4.6.3). The aim is not therefore to take general protection measures, but rather to take measures focused on the species and habitats which justified the selection of the site (i.e. those recorded as significantly present in the SDF and identified in the designation act). The disturbances and/or deterioration will thus be determined with reference to the information communicated by the Member States and used to ensure the coherence of the Natura 2000 network for the species and habitats concerned.

Member States are required to take preventive measures to avoid deterioration and disturbances connected with a predictable event, activity or process. These measures apply to all species and habitats for which the sites have been designated, and should also be implemented, if necessary, outside the sites.

2.7. WHAT DOES 'TAKE APPROPRIATE STEPS TO AVOID...' MEAN?

Article 6(2) requires Member States to *'take appropriate steps to avoid...'*. Several Court cases have clarified the type of legal protection regime that needs to be put in place for the purposes of Article 6(2) of the Habitats Directive. They stress in particular the need for the legal regime to **be specific, coherent and complete**, capable of ensuring the sustainable management and the effective protection of the sites concerned (C-293/07 paragraphs 26 - 29)³⁵.

The Court has also identified infringements in cases where the regime in place was *'too general and did not concern specifically the SPA or the species that live in it'* (C-166/04 paragraph 15), where provisions can come into play *'only after the activities in question have already commenced and thus only after any deterioration has already occurred'* (C-418/04 paragraph 208), or where SPAs were submitted to *'heterogeneous legal regimes which did not confer on the SPAs a sufficient protection'* (C-293/07 paragraph 26).

In certain cases, merely bringing criminal proceedings against or imposing fines on the party responsible for deterioration/disturbance might not be enough for a Member State to ensure compliance with Article 6(2) (C-504/14, paragraphs 55 and 56).

According to the Court, *'the term "appropriate steps" contained in Article 6(2) of the Habitats Directive implies that Member States enjoy discretion when applying that provision. It should nevertheless be recalled that an activity complies with Article 6(2) of the*

³⁵ See also Cases C-491/08, C-90/10

Habitats Directive only if it is guaranteed that it will not cause any disturbance likely significantly to affect the objectives of that directive, particularly its conservation objectives' (judgment in Commission v Spain, C-404/09 paragraph 126 and the case-law cited in it). The Court further states that *'should a subsequent review, on the basis of Article 6(2) of the Habitats Directive, prove to be an 'appropriate step' within the meaning of that provision, that review must define what risks of deterioration or disturbance likely to be significant within the meaning of that provision are entailed by the implementation of the plan or project, and that review must be carried out in accordance with the requirements of Article 6(3) of that directive'* (C-399/14, paragraphs 40, 41, 54).

The legal regime under Article 6(2) has to be specific, coherent and complete, capable of ensuring the effective protection of the sites concerned. Member States enjoy discretion when taking appropriate steps to implement Article 6(2), provided it is guaranteed that no deterioration and disturbance will occur. If a review of a plan or project is necessary to comply with the provisions of Article 6(2), it must be carried out in accordance with the requirements of Article 6(3).

2.8. DOES IMPLEMENTATION DIFFER FOR DETERIORATION AND DISTURBANCE?

In terms of **disturbance of species**, Article 6(2) specifies that appropriate steps have to be taken to avoid it *'in so far as such disturbance could be significant in relation to the objectives of this Directive'*.

The disturbance in question has to be relevant to (have an impact on) the conservation status of the species in relation to the objectives of the Directive. It is therefore in relation to these **objectives** that the Member State has to determine whether or not disturbance is significant.

In terms of **deterioration of habitats** (which relates both to natural habitats and habitats of species) however, the effect in relation to the objectives of the Directive is not explicitly mentioned in the text of Article 6(2). It is simply stated that the deterioration of habitats must be avoided.

It may seem difficult to assess deterioration in absolute terms without reference to measurable limits. However, connecting deterioration to the site-level conservation objectives, which contribute to achieving the Directive's objectives, may make it possible to interpret the limits of what constitutes deterioration (see section 3.5.1).

Article 6(2) and (3) of the Habitats Directive must be construed as a coherent whole and are designed to ensure the same level of protection of habitat types and habitats of species (C-258/11, paragraph 32; C-521/12, paragraph 19; C-387&388). Therefore, the assessment of the deterioration, if necessary, should follow similar criteria and methods as those used in applying Article 6(3) (see also C-399/14 paragraph 54).

The conservation condition of a habitat type or habitat of a species present in a site may be assessed against its conservation condition as provided in the Natura 2000 Standard Data Form, subject to this being up to date.

On a particular site the conservation condition should reflect the dynamic nature of the habitats and species concerned.

Disturbance of a species must be avoided in so far as it could be significant in relation to the Directive's objectives. On the other hand, deterioration of a natural habitat or a habitat of a species is not qualified by the need to be significant in relation to the Directive's objectives, it must simply be avoided altogether.

Deterioration and disturbance should be assessed against the conservation objectives of the site and the conservation condition of the species and habitat types present in the site using the same criteria as for the Article 6(3) procedure. This notion should be interpreted in a dynamic way, according to the evolution of the conservation condition of the habitat or of the species in that site.

2.9. INDICATORS OF DETERIORATION AND DISTURBANCE

Member States must take appropriate protective measures in order to maintain *the ecological characteristics* of Natura 2000 sites from the time they are proposed as sites of Community interest.

The Court has confirmed this in the *Bund* case (C-244/05 paragraph 45): ‘...it must be remembered that, in accordance with the first part of Annex III to the Directive, the ecological characteristics of a site identified by the competent national authorities must reflect the assessment criteria which are listed there, namely, the degree of representativity of the habitat type, its area, structure and functions, the size and density of the population of the species present on the site, the features of the habitat which are important for the species concerned, the degree of isolation of the population present on the site and the value of the site for the conservation of the habitat type and species concerned’.

It follows that the ecological characteristics of the site must not be allowed to deteriorate below their level at the time of designation. In case a better condition has been achieved, this improved condition should be the reference. As a general rule, on a particular site, disturbance or deterioration is assessed on a case-by-case basis, using indicators (see below) with respect to the significance of their change in value³⁶.

2.9.1. Deterioration of habitat types and habitats of species

Deterioration is any form of degradation affecting a habitat. The Member State has to take into consideration all the influences on the environment hosting the habitats (space, water, air, soils). If these influences result in making the conservation parameters for the habitat worse than they were before, the deterioration can be considered to have occurred.

³⁶ Work under Mapping and Assessment of Ecosystems and their Services provides indicators on pressures on ecosystems that can also be used to assess deterioration and disturbance - see especially 5th technical report (http://ec.europa.eu/environment/nature/knowledge/ecosystem_assessment/index_en.htm).

It is important to recall that the requirement to avoid deterioration applies not just to the **habitat types** listed in Annex I to the Habitats Directive for which the site has been designated, but also to the **habitats of the species** listed in Annex II to the Habitats Directive and Annex I to the Birds Directive, and of the migratory species covered by Article 4(2) of the Birds Directive, for which the site has been designated.

To assess this deterioration, one can refer to the conservation objectives of the site and the ecological characteristics of the site that lead to it being selected as an SCI (in accordance with the selection criteria in Annex III to the Directive) or as an SPA.

These ecological characteristics for **habitat types** are recorded in the SDF using the following parameters³⁷:

- *The degree of **representativity** of the habitat type – this gives a measure of “how typical” a habitat type is.*
This should be linked to the interpretation manual of Annex I habitat types³⁸ since this manual provides a definition of each habitat type, together with an indication of characteristic species and other relevant elements. Any event, activity or process that causes the habitat type to lose its representativity should be assessed as deterioration.
- ***The surface** of the habitat in the site and its relative surface as compared to the total area covered by the habitat type within the national territory.*
Any event, activity or process which contributes to the reduction in the size, within the site, of the habitat type or the habitat of the species for which this site has been designated, should be regarded as deterioration.
- *The **degree of conservation** of the structure and functions of the natural habitat type concerned and its restoration possibilities.*

Similar considerations may apply in the case of habitats of species, e.g. wetlands for birds. Any impairment of any of these factors which are necessary for the long-term maintenance of the habitats and habitats of species may be regarded as deterioration, e.g. deterioration may be caused not just by the habitat's physical reduction in size but also by the loss of quality as a breeding, feeding, resting or staging site for the species.

The functions necessary for the long-term maintenance depend of course on the habitat concerned. Member States must know these requirements (by means of studies, data collection, etc.) since Article 6(1) provides that they have to take measures ‘*which correspond to the ecological requirements of the habitats in Annex I and species in Annex II*’.

Habitat deterioration occurs on a site when the area covered by the habitat type or habitat of the species in this site is reduced, or the specific structure and functions

³⁷ Commission implementing Decision of 11 July 2011 concerning a site information format for Natura 2000 sites (notified under document C(2011) 4892) (2011/484/EU) OJ L198 30.7.2011, p 39)

³⁸ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:198:0039:0070:EN:PDF>
http://ec.europa.eu/environment/nature/legislation/habitatsdirective/docs/Int_Manual_EU28.pdf

necessary for the long-term maintenance of that habitat or the status of the species which are associated with this habitat are reduced in comparison to their initial or restored condition. This assessment is done according to the site's conservation objectives and its contribution to the coherence of the network.

2.9.2. *Disturbance of species*

Contrary to deterioration, disturbance does not directly affect the physical conditions of a site; it concerns the species and it may be limited in time (noise, source of light etc.). The intensity, duration and frequency of repetition of disturbance are therefore important parameters.

To assess whether a disturbance is significant in relation to the objectives of the Directive, reference can be made to the definition of the *favourable conservation status of a species* given in Article 1(i), on the basis of the following factors:

- ***'Population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable element of its natural habitats'***
Any event, activity or process contributing to the long-term decline of the population of the species on the site can be regarded as a significant disturbance.
- ***'The natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future'***
Any event, activity or process contributing to the reduction or to the risk of reduction of the range of the species within the site can be regarded as a significant disturbance.
- ***'There is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis'***
Any event, activity or process contributing to the reduction of the size of the available habitat of the species can be regarded as a significant disturbance.

In that regard effects such as noise, vibrations and isolation of sub-populations of a species are capable of causing significant disturbances for that species. Therefore, failure by a Member State to take appropriate measures to prevent them constitutes a failure to fulfil obligations under Article 6(2) of the Habitats Directive (case C-404/09).

Factors such as intensity, frequency and duration of the disturbance may be taken into account to determine its significance, which may vary from one species to another and according to different times and different conditions (e.g. food resources, or through the presence of sufficient undisturbed areas nearby).

Disturbance of a species occurs on a site from events, activities or processes contributing, within the site, to a long-term decline in the population of the species, to a reduction or risk of reduction in its range, and to a reduction in its available habitat. This assessment is done according to the site's conservation objectives and its contribution to the coherence of the network.

3. Article 6(3)

Clarification of the concepts of *plan or project*, *likelihood of significant effects*, *appropriate assessment*, *site's conservation objectives*; *cumulative effects*, *competent authorities*, *opinion of the public*, *integrity of the site*

3.1. TEXT

'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.'

3.2. SCOPE

As regards **purpose and context**, the role of the third and fourth paragraphs of Article 6 needs to be considered in relation to that of the first (or, in the case of SPAs, with that of the first and second paragraphs of Articles 3 and 4 of the Birds Directive) and second paragraphs of Article 6. In particular, it is important to remember that, even if it is determined that an initiative or activity does not fall within the scope of Article 6(3), it will still be necessary to make it compatible with the other aforementioned provisions.

It may be noted that activities which contribute to or are compatible with the site conservation objectives may already be accommodated within Article 6(1) and (2) - for example, traditional farming practices which sustain particular habitat types and species. The provisions of Article 6(3) and (4) constitute a form of permitting regime, setting out the circumstances within which plans and projects with likely significant negative effects on Natura 2000 sites may or may not be allowed. They thus ensure that economic and other non-ecological requirements can be fully considered in light of the site's conservation objectives.

Article 6(3) defines a *step-wise procedure* for considering plans and projects³⁹.

³⁹ A simplified flow chart of this procedure is presented in Annex II at the end of this document.

- a) The first part of this procedure consists of a pre-assessment stage ('screening') to determine whether, firstly, the plan or project is directly connected with or necessary to the management of the site, and secondly, whether it is likely to have a significant effect on the site; it is governed by Article 6(3), first sentence.
- b) The second part of the procedure, governed by Article 6(3), second sentence, relates to the appropriate assessment and the decision of the competent national authorities.

A third part of the procedure (governed by Article 6(4)) comes into play if, despite a negative assessment, it is proposed not to reject a plan or project but to give it further consideration. In this case Article 6(4) allows for derogations from Article 6(3) under certain conditions.

The applicability of the procedure, and the extent to which it applies, depend on several factors, and in the sequence of steps, each step is influenced by the previous step. The order in which the steps are followed is therefore essential for the correct application of Article 6(3).

As regards *geographical scope*, the provisions of Article 6(3) are not restricted to plans and projects that exclusively occur in or cover a protected site; they also target plans and projects situated outside the site but likely to have a significant effect on it regardless of their distance from the site in question (cases C-98/03 paragraph 51 and C-418/04 paragraphs 232, 233).

Furthermore, the Court has stated that Article 6(3) of the Habitats Directive does not preclude a more stringent national protective measure which might for instance impose an absolute prohibition of a certain type of activity, without any requirement for an assessment of the environmental impact of the individual project or plan on the Natura 2000 site concerned (C-2/10 paragraphs 39-75).

Article 6(3) defines a step-wise procedure for considering plans and projects that may have a significant effect on a Natura 2000 site. Activities not falling within the scope of Article 6(3) will still have to be compatible with the provisions of Article 6(1) - or, in the case of SPAs, Articles 3, 4(1) and (2) of the Birds Directive - and 6(2) of the Habitats Directive.

3.3. THE RELATIONSHIP BETWEEN ARTICLE 6(2) AND ARTICLE 6(3)

Articles 6(2) and 6(3) are both intended to prevent any negative effects on a site. In the case of Article 6(2) the intention is to avoid '*deterioration ...or significant disturbance*'. In the case of Article 6(3) the aim is to avoid the authorisation of any plans or projects that could '*adversely affect the integrity of the site*'. The objectives are therefore broadly similar. However, it should be recalled that the provisions of Article 6(2) apply to the site *at all times* whereas those under Article 6(3) only come into play *if a plan or project is being proposed* that may have significant effects on the site. Because both paragraphs serve the same overall objective, it is logical to conclude that any plan or project approved in compliance with Article 6(3) will also be in conformity with the provisions of Article 6(2), unless it subsequently proves likely to deteriorate the habitat and/or disturb the species for which the site has been designated.

This was confirmed by the Court (case C-127/02 paragraphs 35-37): *‘the fact that a plan or project has been authorised according to the procedure laid down in Article 6(3) renders superfluous, as regards the action to be taken on the protected site under the plan or project, a concomitant application of the rule of general protection laid down in Article 6(2). Authorisation of a plan or project granted in accordance with Article 6(3) necessarily assumes that it is considered not likely adversely to affect the integrity of the site concerned and, consequently, not likely to give rise to deterioration or significant disturbances within the meaning of Article 6(2).*

Nevertheless, it cannot be precluded that such a plan or project subsequently proves likely to give rise to such deterioration or disturbance, even where the competent authorities cannot be held responsible for any error. Under those conditions, application of Article 6(2) of the Habitats Directive makes it possible to satisfy the essential objective of the preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, as stated in the first recital in the preamble to that directive.’

On the other hand, where authorisation for a plan or project has been granted without complying with Article 6(3), a breach of Article 6(2) may be found where deterioration of a habitat or disturbance of the species for which the area in question was designated has been established (C-304/05, C-388/05, C-404/09, C-141/14).

The same applies to all projects and activities which were authorised prior to the inclusion of sites into the SCI list, or their classification as SPAs, and which do not fall under the obligation of the assessment of their implication for habitat types and species under Article 6(3) but the effects of which might adversely affect the integrity of those sites. Article 6(2) and (3) of the Habitats Directive must be construed as a coherent whole, and are designed to ensure the same level of protection of natural habitats and habitats of species (C-258/11, C-521/12, C-399/14, C-387&388/15).

Therefore, where Article 6(2) leads to an obligation to carry out a subsequent review of the implications for the site concerned of a plan or project, that review must be carried out in accordance with the requirements of Article 6(3) (Case C-399/14, paragraph 54).

Article 6(3) does not apply in respect of any action whose implementation was subject to authorisation but which was carried out without authorisation and thus unlawfully. However, such actions may have consequences breaching Article 6(2), and the Member State is obliged to act in line with the latter provision (case C-504/14).

3.4. WHAT IS MEANT BY ‘PLAN OR PROJECT NOT DIRECTLY CONNECTED WITH OR NECESSARY TO THE MANAGEMENT OF THE SITE’?

In as much as the Habitats Directive does not define ‘plan’ or ‘project’, due consideration must be given to general principles of interpretation, in particular the principle that an individual provision of EU law must be interpreted on the basis of its wording and of its purpose and the context in which it occurs.

There are two arguments for giving a broad interpretation to ‘plan’ or ‘project’:

- Firstly, the Directive does not circumscribe the scope of either ‘plan’ or a ‘project’ by reference to particular categories of either. Instead, the key limiting factor is whether or not they are likely to have a significant effect on a site.
- Secondly, a corollary of the continued applicability of Article 6(2) to activities excluded from the scope of Article 6(3) and (4) is that, the more narrowly ‘plan’ and ‘project’ are defined, the more potentially restricted are the means to consider a conservation interest against a damaging non-conservation interest, and hence to ensure the correct application of Article 6(2), i.e. avoiding deterioration and disturbance.

3.4.1. *Project*

Support for a broad definition of ‘project’ is reinforced, by analogy, if we refer to Directive 2011/92/EU *on the assessment of the effects of certain public and private projects on the environment*⁴⁰ - hereinafter referred to as the EIA Directive. That directive operates in a similar context, setting rules for the assessment of projects with likely significant effects on the environment. Article 1(2) of the EIA Directive provides that ‘project’ means:

‘ - the execution of construction works or of other installations or schemes, - other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources.’

This is a very broad definition (C-72/95 *Kraaijeveld* paragraphs 30 and 31) which is not limited to physical construction but also covers other interventions in the natural environment including regular activities aimed at utilising natural resources⁴¹. For example, a significant intensification of agriculture which threatens to damage or destroy the semi-natural character of a site may be covered⁴².

The Court has issued a number of rulings regarding the type of interventions which require the application of Article 6(3).

The *Waddenzee* case (C-127/02 paragraphs 25 – 29) clarified that **activities which have been carried out periodically** for several years on the site concerned but for which a licence is granted annually for a limited period, with each licence entailing a new assessment both of the possibility of carrying on that activity and of the site where it may be carried on, should be considered, at the time of each application, as a distinct plan or project within the meaning of the Habitats Directive.

In the *Papenburg* case (C-226/08 paragraphs 50 - 51) the Court further ruled that: ‘... ongoing maintenance works in respect of the navigable channels of estuaries, which are not

⁴⁰ OJ L 26, 28.1.2012, p.1, as amended by Directive 2014/52/EU.

⁴¹ The relevance of this definition to the Habitats Directive is also stated by the Court (case C-127/02, paragraph 26).

⁴² To fall under the scope of the EIA Directive, such interventions/activities have to involve alterations to the physical aspects of a given site (C-121/11, *Pro-Braine* paragraph 31, C-275/09 *Brussels Airport* paragraph 30).

connected with or necessary to the management of the site ... must, to the extent that they constitute a project and are likely to have a significant effect on the site concerned, undergo an assessment of their implications for that site pursuant to those provisions [Article 6(3)] ’.

However, ‘...if, having regard in particular to the regularity or nature of the maintenance works at issue ... or the conditions under which they are carried out, they can be regarded as constituting a single operation, in particular where they are designed to maintain the navigable channel at a certain depth by means of regular dredging necessary for that purpose, those maintenance works can be considered to be one and the same project for the purposes of Article 6(3) of the Habitats Directive.’

The Court has also ruled that **the option of exempting generally certain activities does not comply with the provisions of Article 6(3)** (C-256/98, C-6/04, C-241/08, C-418/04, C-538/09). In addition, the Court ruled that projects may not be excluded from the assessment obligation on account only of the fact that they are not subject to authorisation (C-98/03, paragraphs 43 –52).

The Court has also ruled that **the size of the project is not relevant** as it does not in itself preclude the possibility that it is likely to have a significant effect on a protected site (Case C-98/03, Case C-418/04 paragraph 244).

3.4.2. *Plan*

The term “plan” has also, for the purpose of Article 6(3), a potentially very broad meaning. If we refer, by analogy, to the Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment⁴³ (hereinafter referred to as the SEA Directive), Article 2(a) of that Directive defines plans and programmes as:

‘Plans and programmes, including those co-financed by the European Community, as well as any modifications to them:

- *which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and*
- *which are required by legislative, regulatory or administrative provisions;’*

In this respect, the Court has ruled that ‘Given the objective of Directive 2001/42, which consists in providing for a high level of protection of the environment, **the provisions which delimit the directive’s scope**, in particular those setting out the definitions of the measures envisaged by the directive, **must be interpreted broadly** (C-567/10 paragraphs 24-43).

Of obvious relevance under the Habitats Directive are **land-use or spatial plans**. Some plans have direct legal effects for the use of land, others only indirect effects. For instance, regional or geographically extensive spatial plans are often not applied directly but form the basis for more detailed plans or serve as a framework for development consents, which then

⁴³ OJ L 197, 21.7.2001, p. 30–37.

have direct legal effects. Both types of land-use plan should be considered as covered by Article 6(3) to the extent that they are likely to have significant effects on a Natura 2000 site.

The Court upheld this view (C-6/04 paragraph 52) stating that although land-use plans do not always authorise developments and planning permission must be obtained for development projects in the normal manner, **they have great influence on development decisions**. Therefore land-use plans must be subject to appropriate assessment of their implications for the site concerned (see also C-418/04).

Sectoral plans should also be considered as covered by the scope of Article 6(3), again in so far as they are likely to have a significant effect on a Natura 2000 site. Examples might include transport network plans, energy plans, waste management plans, water management plans or forest management plans (see C-441/17, 122-124).

However, a distinction needs to be made with ‘plans’ which are in the nature of policy statements, i.e. policy documents which show the general political will or intention of a ministry or lower authority. An example might be a general plan for sustainable development across a Member State's territory or region. It does not seem appropriate to treat these as ‘plans’ for the purpose of Article 6(3), particularly if any initiatives deriving from such policy statements must pass through the intermediary of a land-use or sectoral plan (C 179/06, paragraph 41)⁴⁴. However, where the link between the content of such an initiative and likely significant effects on a Natura 2000 site is clear and direct, Article 6(3) should be applied.

Where one or more specific projects are included in a plan in a general way but not in terms of project details, the assessment made at plan level does not exempt the specific projects from the assessment requirements of Article 6(3) at a later stage, when much more details about them are known⁴⁵.

3.4.3. *Not directly connected with or necessary to the management ...*

From the context and purpose of Article 6, it is apparent that the term ‘management’ is to be treated as referring to the ‘conservation’ management of a site, i.e. it is to be seen in the sense in which it is used in Article 6(1). Thus, if an activity is directly connected with and necessary for fulfilling the conservation objectives, it is exempted from the requirement for an assessment.

By introducing the possibility of establishing management plans, Article 6(1) envisages flexibility for Member States as regards the form such plans can take. The plans can either be specifically designed for the sites or ‘integrated into other development plans’. Thus it is possible to have a ‘pure’ conservation management plan or a ‘mixed’ plan with conservation as well as other objectives.

⁴⁴ This is without prejudice to the application of the SEA Directive (2001/42/EC).

⁴⁵ For details on the integration of different stages of assessment see also the guidance document on streamlining environmental assessment procedures for Projects of Common Interest, Chapter 3.2: http://ec.europa.eu/environment/eia/pdf/PCI_guidance.pdf.

The words ‘*not directly connected with or necessary to...*’ ensure that a non-conservation component of a plan or project which includes conservation management amongst its objectives may still require an appropriate assessment.

For example, commercial timber harvesting may form part of a conservation management plan for a woodland designated as Special Area of Conservation. In as much as the commercial dimension is not necessary to the site's conservation management, it may need to be considered for an appropriate assessment.

The Court has supported this view (C-241/08 paragraph 55), pointing out that ‘*the mere fact that the Natura 2000 contracts comply with the conservation objectives of sites cannot be regarded as sufficient, in the light of Article 6(3) of the Habitats Directive, to allow the works and developments provided for in those contracts to be systematically exempt from the assessment of their implications for the sites.*’

There may also be circumstances where a plan or project directly connected with or necessary to the management of one site may affect another site.

For example, in order to improve the flooding regime of one site, it may be proposed to build a barrier in another site, with a possible significant adverse effect on the latter. In such a case, the plan or project should be the subject of an assessment as regards the affected site.

In addition, case C-441/17 (paragraph 123) identifies an example of a plan (concerned solely with increasing the volume of harvestable timber by the carrying out of active forest management operations within a Natura 2000 site) not directly related to conservation as it does not lay down any conservation objectives or measures, and hence would fall for consideration under Article 6(3).

The term ‘project’ should be given a broad interpretation to include both construction works and other interventions in the natural environment. The term ‘plan’ has also a broad meaning, including land-use plans and sectoral plans or programmes.

Plans and projects directly related to the conservation management of the site, either individually or as components of other plans and projects, should generally be excluded from the provisions of Article 6(3), but their non-conservation components may still require an assessment.

3.5. HOW TO DETERMINE WHETHER A PLAN OR PROJECT IS ‘LIKELY TO HAVE A SIGNIFICANT EFFECT’ ON A SITE, ‘EITHER INDIVIDUALLY OR IN COMBINATION WITH OTHER PLANS OR PROJECTS’?

This phrase encapsulates both a cause-and-effect relationship and the cumulative aspect. On the one hand, it is necessary to explore what sorts of effects are covered (‘*significant effect*’), and then to explore what sorts of causes are likely to create such effects (‘*likely to have ... either individually or in combination*’).

Determining whether a plan or project is likely to have a significant effect will have practical and legal consequences. Therefore, when a plan or project is proposed, it is important firstly that this key issue is considered, and secondly that the consideration is capable of standing up to scientific and expert scrutiny.

Plans and projects that are considered as not likely to have significant effects can be processed without reference to the subsequent steps of Article 6(3). However, Member States will need to justify and record the reasons for reaching such a screening conclusion.

3.5.1. *Likely to have...*

The safeguards set out in Article 6(3) are triggered not by a **certainty** but by a **likelihood** of significant effects. Thus, in line with the precautionary principle, it is unacceptable to fail to undertake an assessment on the basis that significant effects are not certain.

This was confirmed by the Court's Waddenzee ruling (C-127/02 paragraphs 39 - 44): '*...The environmental protection mechanism provided for in Article 6(3) ... does not presume that the plan or project considered definitely has significant effects on the site concerned but follows from the mere probability that such an effect attaches to that plan or project. ... In case of doubt as to the absence of significant effects such an assessment must be carried out. ... The first sentence of Article 6(3) must therefore be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects*'.

It is again useful to refer to the EIA Directive 2011/92/EU as amended, since the formula 'likely to have a significant effect' is almost identical to the basic formula used to create the assessment duty of Member States under the EIA Directive⁴⁶. The EIA Directive is also of assistance in setting out a range of factors which may contribute to a likelihood of a significant effect⁴⁷. Any proposal deemed to require an assessment under the EIA Directive on the grounds, *inter alia*, that it is likely to significantly affect a Natura 2000 site can be judged to also come under the assessment requirement of Article 6(3)⁴⁸.

In determining the likelihood of significant impacts, and hence the need for an appropriate assessment, mitigation measures (i.e. measures to avoid or reduce negative effects) cannot be taken into account. This is confirmed by the Court in its ruling in case C-323/17: '*Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the*

⁴⁶ See Article 2(1) of Directive 2011/92/EU as amended by Directive 2014/52/EU.

⁴⁷ See Annex III of Directive 2011/92/EU as amended by Directive 2014/52/EU.

⁴⁸ On the other hand, an appropriate assessment under Article 6(3) might be required for projects not falling under the scope of the EIA Directive.

screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site'.⁴⁹

A likelihood of significant effects may arise not only from plans or projects located **within** a protected site but also from plans or projects located **outside** a protected site (C-142/16, paragraph 29). For example, a wetland may be damaged by a drainage project located some distance outside the wetland's boundaries, or a site may be impacted by an emission of pollutants from an external source. For this reason, it is important that Member States, both in their legislation and in their practice, allow for the Article 6(3) safeguards to be applied to any development pressures - including those which are external to Natura 2000 sites but which are likely to have significant effects on any of them.

This includes the consideration of any **potential transboundary effects**. If a plan or project in one country is likely to have a significant effect on a Natura 2000 site in a second country, either individually or in combination with other plans or projects, then an appropriate assessment must be undertaken which addresses *inter alia* the potential effects on the integrity of respective Natura 2000 sites in that second country as well.

Cross-border plans and projects (i.e. plans or projects located in more than one Member State, involving for example pipelines, cables, bridges, or tunnels) should be treated accordingly, ensuring that all potential effects on Natura 2000 sites are considered. To this end, and to avoid duplications, the respective competent authorities should coordinate their assessments.

This is in line with the Espoo Convention and its SEA Protocol⁵⁰ which are implemented within the EU through the EIA and SEA Directives⁵¹. As those Directives cover plans or projects that are likely to require an assessment pursuant to Article 6 of the Habitats Directive as well, it follows that transboundary effects are also to be covered in appropriate assessments undertaken under the Habitats Directive, in accordance with relevant provisions under those Directives.

The procedure under Article 6(3) is triggered not by the certainty but by the likelihood of significant effects, arising from plans or projects regardless of their location inside or outside a protected site. Such likelihood exists if significant effects on the site cannot be excluded. Mitigation measures cannot be taken into account at this stage. Transboundary effects are also to be considered.

⁴⁹ However under the EIA Directive it is possible to take into account features of the project and/or measures envisaged to avoid or prevent significant adverse effects when deciding on the need to conduct a full EIA (Article 4(5)(b) of the EIA Directive, as amended).

⁵⁰ <http://www.unece.org/env/eia/welcome.html>

⁵¹ Art. 7 of Directive 2011/92/EU (as amended by Directive 2014/52/EU) and Art. 7 of Directive 2001/42/EC.

3.5.2. *Significant effect*

The notion of what is a ‘significant’ effect cannot be treated in an arbitrary way. In the first place, the Directive uses the term in an objective context (i.e. it does not qualify it with discretionary formulae). In the second place, a consistency of approach to what is ‘significant’ is needed to ensure that Natura 2000 functions as a coherent network.

While there is a need for objectivity in interpreting the scope of the term ‘significant’, clearly such objectivity cannot be divorced from the specific features and environmental conditions of the protected site concerned by the plan or project. In this regard, the conservation objectives of a site as well as prior or baseline information about it can be very important in more precisely identifying conservation sensitivities (C-127/02, paragraphs 46-48).

Some of this information is presented in the Standard Data Form that accompanies the site selection process under the Habitats and Birds Directives (see section 3.5.1). Member States may also have available detailed site conservation management plans which describe variations in the sensitivity of habitats and species within a site with regard to different threats.

Significance will vary depending on factors such as magnitude of impact, type, extent, duration, intensity, timing, probability, cumulative effects and the vulnerability of the habitats and species concerned.

Against this background, it is clear that what may be significant in relation to one site may not be in relation to another.

For example, a loss of a hundred square metres of habitat may be significant in relation to a small rare orchid site, while a similar loss in a large steppic site may be insignificant if it does not have implications for the site conservation objectives.

The notion of what is ‘significant’ needs to be interpreted objectively. The significance of effects should be determined in relation to the specific features and environmental conditions of the protected site concerned by the plan or project, taking particular account of the site’s conservation objectives and ecological characteristics.

3.5.3. *... either individually or in combination with other plans or projects*

A series of individually modest impacts may, in combination, produce a significant impact. As the Court has pointed out ‘*the failure to take account of the cumulative effect of projects in practice leads to a situation where all projects of a certain type may escape the obligation to carry out an assessment, whereas, taken together, they are likely to have significant effects on the environment*’ (C-418/04, C-392/96 paragraphs 76, 82).

Article 6(3) tries to address this by taking into account the combination of effects from other plans or projects. In this regard, Article 6(3) does not explicitly define which other plans and projects are within the scope of the in-combination provision.

It is important to note that the underlying intention of this in-combination provision is to take account of cumulative impacts, and these will often only occur over time. In that context, one can consider plans or projects which are **completed, approved but uncompleted, or proposed**:

- In addition to the effects of those plans or projects which are the main subject of the assessment, it may be appropriate to consider the effects of already completed plans and projects in this 'second level' of assessment, including those preceding the date of transposition of the Directive or the date of designation of the site (see, for example, C-142/16, paragraphs 61 and 63). Although already completed plans and projects are themselves excluded from the assessment requirements of Article 6(3), it is still important to take them into consideration when assessing the impacts of the current plan or project in order to determine whether there are any potential cumulative effects arising from the current project in combination with other already completed plans and projects. The effects of such completed plans and projects would normally form part of the site's baseline conditions which are considered at this stage⁵².
- Plans and projects which have been approved in the past but have not yet been implemented or completed should be included in the in-combination provision.
- As regards other proposed plans or projects, on grounds of legal certainty it would seem appropriate to restrict the in-combination provision to those which have been *actually proposed*, i.e. for which an application for approval or consent has been introduced. At the same time, it must be evident that, in considering a proposed plan or project, Member States do not create a presumption in favour of other not yet proposed plans or projects in the future.

For example, if a residential development is considered not to give rise to a significant effect and is therefore approved, the approval should not create a presumption in favour of further residential developments in the future.

In addition, it is important to note that the assessment of cumulative effects is not restricted to the assessment of similar types of plans or projects covering the same sector of activity (e.g. a series of housing projects). All types of plans or projects that could, in combination with the plan or project under consideration, have a significant effect, should be taken into account during the assessment.

Similarly, the assessment should consider the cumulative effects not just between projects or between plans but also **between projects and plans** (and vice versa). For example, a new project to build a major motorway through an area may on its own not adversely affect the site, but when considered in combination with an already approved housing development plan for the same area, these impacts may become significant enough to adversely affect the site. On the other hand, a plan may have no significant impact on Natura 2000 sites on its

⁵² Already completed plans and projects may also raise issues under Article 6(1) and Article 6(2) of the Habitats Directive if their continued effects give rise to a need for the Member States to take remedial or countervailing conservation measures or measures to avoid habitat deterioration or species disturbance.

own but may be assessed differently if considered in combination with an already proposed or authorised major development project not included in that plan.

Potential cumulative impacts should be assessed using sound baseline data and not rely only on qualitative criteria. They should also be assessed as an integral part of the overall assessment and not be treated merely as an ‘afterthought’ at the end of the assessment process.

When determining likely significant effects, the combination with other plans and/or projects should also be considered to take account of cumulative impacts during the assessment of the plan or project in question. The in-combination provision concerns other plans or projects which have been already completed, approved but uncompleted or actually proposed.

3.6. WHAT IS MEANT BY ‘APPROPRIATE ASSESSMENT OF ITS IMPLICATIONS FOR THE SITE IN VIEW OF THE SITE'S CONSERVATION OBJECTIVES’?

3.6.1. *What is meant by an ‘appropriate’ assessment?*

The purpose of the appropriate assessment is to assess the implications of the plan or project in respect of the *site's conservation objectives*, either individually or in combination with other plans or projects. The conclusions should enable the competent authorities to ascertain *whether the plan or project will adversely affect the integrity of the site concerned*. The focus of the appropriate assessment is therefore specifically on the species and/or the habitats for which the Natura 2000 site is designated.

In its *Waddenzee* ruling (C-127/02 paragraphs 52-54, 59) the Court emphasized the importance of using the best scientific knowledge when carrying out the appropriate assessment in order to enable the competent authorities to conclude with certainty that there will be no adverse effects on the site's integrity:

*‘As regards the concept of ‘appropriate assessment’ within the meaning of Article 6(3) of the Habitats Directive, it must be pointed out that the provision does not define any particular method for carrying out such an assessment. None the less, according to the wording of that provision, an appropriate assessment of the implications for the site concerned of the plan or project **must precede its approval** and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives.’*

*‘Such an assessment therefore implies that **all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those (conservation) objectives must be identified in the light of the best scientific knowledge in the field.***’

‘The competent national authorities, taking account of the appropriate assessment of the implications of the plan or project for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that

*it will not adversely affect the integrity of that site. That is the case **where no reasonable scientific doubt remains as to the absence of such effects.***’

Assessments that confine themselves to general descriptions and a superficial review of existing data on ‘nature’ within the area cannot therefore be considered as ‘appropriate’ for the purposes of Article 6(3). According to the Court **the appropriate assessment should contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt** as to the effects of the works proposed on the site concerned (C-304/05 paragraph 69)⁵³. It cannot be held that an assessment is appropriate where information and reliable updated data concerning the habitats and species in the site are lacking (C-43/10 paragraph 115).

It is at the time of adoption of the decision authorising implementation of the project that there must be no reasonable scientific doubt remaining as to the absence of adverse effects on the integrity of the site in question (C-239/04, paragraph 24).

Furthermore, as regards multi-phase monitoring, such monitoring cannot be considered as sufficient to ensure performance of the obligation laid down in Article 6(3) of the Habitats Directive (C-142/16, paragraph 43).

It follows from the above that the appropriate assessment should **be reasoned and recorded**. If the record of the assessment does not disclose the reasoned basis for the subsequent decision (i.e. if the record is a simple unreasoned positive or negative view of a plan or project), the assessment does not fulfil its purpose and cannot be considered ‘appropriate’.

Finally, **timing** is also important. The assessment is a step preceding and providing a basis for the other steps - in particular, an approval or refusal of a plan or project. The assessment must therefore be undertaken **before** the competent authority decides whether or not to undertake or authorise the plan or project (C-127/02 paragraph 42). Of course, where a plan or project undergoes re-design before a decision is taken on it, it is quite in order to revise the assessment as part of an iterative process. However, it should not be open to authorities to add retrospectively to an assessment once the subsequent step in the sequence of steps set out in Article 6(3) and 6(4) has been taken.

Relationship with the EIA and SEA Directives

The Appropriate Assessment is often undertaken as part of or alongside the EIA or SEA process, and its results are included in the relevant EIA or SEA report. This approach can help to streamline the administrative steps involved in obtaining development authorisations under EU environmental legislation⁵⁴. The revised EIA Directive⁵⁵ (Art. 2(3)) stipulates that, in the case of projects for which the obligation to carry out assessments of the effects on the environment arises simultaneously from the EIA and the Habitats Directives, Member States

⁵³ See also cases C-239/04 and C-404/09.

⁵⁴ Such streamlining can also cover assessments required under Art. 4(7) of the Water Framework Directive – see also http://ec.europa.eu/environment/eia/pdf/PCI_guidance.pdf.

⁵⁵ Directive 2011/92/EU as amended by Directive 2014/52/EU.

shall, where appropriate, ensure the use of coordinated and/or joint procedures. Relevant guidance on this has been issued⁵⁶.

Nevertheless it is essential that the information relevant to the Appropriate Assessment and its conclusions remain clearly distinguishable and identifiable in the environmental impact assessment report, so that they can be differentiated from those of the general EIA or SEA. This is necessary as there are a number of important distinctions between the EIA/SEA and the Appropriate Assessment procedures, which means that **an SEA or an EIA cannot replace, or be a substitute for, an Appropriate Assessment as neither procedure overrides the other.**

This was further confirmed by the Court (C-418/04): *‘Those two (EIA and SEA) Directives contain provisions relating to the deliberation procedure, without binding the Member States as to the decision, and relate to only certain projects and plans. By contrast, under the second sentence of Article 6(3) of the Habitats Directive, a plan or project can be authorised only after the national authorities have ascertained that it will not adversely affect the integrity of the site. Accordingly, assessments carried out pursuant to the EIA Directive or SEA Directive cannot replace the procedure provided for in Article 6(3) and (4) of the Habitats Directive’.*

Key similarities and differences between the Appropriate Assessment and the EIA and SEA are set out in Annex I.

3.6.2. *Content of the appropriate assessment*

The appropriate assessment of plans or projects likely to affect Natura 2000 sites should guarantee full consideration of all elements contributing to the site integrity (see section 3.7.4), both in defining the baseline conditions and in the stages leading to identification of potential impacts, mitigation measures and residual impacts.

In this respect it must be ensured that the appropriate assessment addresses all elements contributing to the site’s integrity as specified in the site’s conservation objectives and Standard Data Form, and is based on the **best available scientific knowledge in the field.**

The **information required should be up-to-date** (C-43/10, paragraph 115) and may include the following issues, as appropriate:

- structure and function, and the respective role of the site’s ecological assets;
- the area, representativity and degree of conservation of the habitat types on the site;
- population size, degree of isolation, ecotype, genetic pool, age class structure, and degree of conservation of species under Annex II to the Habitats Directive present on the site or of the bird species for which a given SPA was classified;
- any other ecological assets and functions identified on the site; and

⁵⁶ Commission guidance on streamlining environmental assessments conducted under Article 2(3) of the revised EIA Directive (Commission notice 2016/C 273/01, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2016:273:TOC>)

- any threats affecting or representing a potential risk to habitats and species present on the site.

The appropriate assessment should also include a **comprehensive identification of all the potential effects** of the plan or project likely to be significant on the site, taking into account cumulative and other effects likely to arise as a result of the combined action of the plan or project under assessment with other plans or projects.

It **should apply the best available techniques and methods to assess the extent of the effects** of the plan or project on the integrity of the site(s). The description of the site's integrity and the impact assessment should be based on the best possible indicators specific to the Natura 2000 features, which can also be useful in monitoring the impact of the plan or project implementation.

The appropriate assessment report should be sufficiently detailed to demonstrate how the final conclusion was reached, and on what scientific grounds. For instance, in its ruling in case C-404/09 the Court identified a number of gaps in the appropriate assessment under question (namely, that it did not give sufficient consideration to the possible disturbances to various species on the sites in question, such as noise and vibrations or to the risk of isolating sub-populations by blocking communication corridors linking those sub-populations to other populations)⁵⁷.

3.6.3. ... *in view of the site's conservation objectives*

The appropriate assessment focuses on **assessing the implications for the site** of the plan or project, individually or in combination with other plans or projects, **in view of the site's conservation objectives**. Article 6(3) must therefore be read in close conjunction with Article 6(1) and 6(2) since the conservation objectives to be used in the appropriate assessment are linked also to these two earlier paragraphs.

As explained in section 2.3.1, 'conservation objectives' should be set at the level of each individual site and should concern, within that site, all the species and habitat types for which the site has been designated under the Habitats Directive or classified under the Birds Directive.

These **conservation objectives** should be based on the ecological requirements of the species and habitats present and should define the desired conservation condition of these species and habitat types on the site. This should be established in function of the conservation condition of each species and habitat type as recorded in the Standard Data Form. The conservation objectives should also reflect the importance of the site for the coherence of Natura 2000 so that each site contributes in the best possible way to achieving Favourable Conservation Status at the appropriate geographical level within the natural range of the respective species or habitat types.

⁵⁷ See also C-441/17 paragraphs 134-144.

Where such conservation objectives have been set for a site, the effects must be assessed against these objectives.

This was confirmed by the Court in its *Waddenzee* Ruling (C-127/02 paragraphs 46-48) : ‘As is clear from the first sentence of Article 6(3) of the Habitats Directive in conjunction with the 10th recital in its preamble, the significant nature of the effect on a site of a plan or project not directly connected with or necessary to the management of the site is linked to the site's conservation objectives. So, where such a plan or project has an effect on that site but is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned.’

‘Conversely, **where such a plan or project is likely to undermine the conservation objectives of the site concerned, it must necessarily be considered likely to have a significant effect on the site.** As the Commission in essence maintains, in assessing the potential effects of a plan or project, their significance must be established in the light, inter alia, of the characteristics and specific environmental conditions of the site concerned by that plan or project.’

Where conservation objectives have not yet been set for a site, and until this is done, then the appropriate assessment must assume as a minimum that the objective is to ensure that the habitat types or habitats of species present do not deteriorate below the current level or the species are not significantly disturbed, in accordance with the requirements of Article 6(2) and without prejudice to the effectiveness of the conservation measures necessary for the fulfilment of the requirements of Article 6(1).

This position has been confirmed by the Court (C-127/02 paragraph 36) ‘Authorisation of a plan or project granted in accordance with Article 6(3) of the Habitats Directive necessarily assumes that it is considered not likely to adversely affect the integrity of the site concerned and, consequently, not likely to give rise to deterioration or significant disturbances within the meaning of Article 6(2).’

3.6.4. *The concept of the ‘Integrity of the site’*

It is clear from the context and from the purpose of the Directive that the ‘integrity of a site’ relates to the site’s conservation objectives (see point 4.6.3 above). For example, it is possible that a plan or project will adversely affect the site only in a visual sense or only affect habitat types or species other than those listed in Annex I or Annex II for which the site has been designated. In such cases, the effects do not amount to an adverse effect for purposes of Article 6(3).

In other words if none of the habitat types or species for which the site has been designated is significantly affected then the site’s integrity cannot be considered to be adversely affected. However, if just one of them is significantly affected, taking into account the site's conservation objectives, then the site integrity is necessarily adversely affected.

This is supported by the Court in its ruling in case C-258/11, paragraph 48: ‘Article 6(3) of the Habitats Directive must be interpreted as meaning that **a plan or project not directly connected with or necessary to the management of a site will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive**

characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of SCIs, in accordance with the directive. The precautionary principle should be applied for the purposes of that appraisal.’ The logic of such an interpretation would also be relevant to non-priority habitat types and to habitats of species.

The expression ‘integrity of the site’ shows that the focus is here on the specific site. Thus, it is not allowed to destroy a site or part of it on the basis that the conservation status of the habitat types and species it hosts will anyway remain favourable within the European territory of the Member State.

As regards the connotation or meaning of ‘integrity’, this clearly relates to **ecological integrity**. This can be considered as a quality or condition of being whole or complete. In a dynamic ecological context, it can also be considered as having the sense of resilience and ability to evolve in ways that are favourable to conservation.

The ‘integrity of the site’ can be usefully defined as the coherent sum of the site’s ecological structure, function and ecological processes, across its whole area, which enables it to sustain the habitats, complex of habitats and/or populations of species for which the site is designated.

A site can be described as having a high degree of integrity where the inherent potential for meeting site conservation objectives is realised, the capacity for self-repair and self-renewal under dynamic conditions is maintained, and a minimum of external management support is required.

When looking at the ‘integrity of the site’, it is therefore important to take into account a range of factors, including the possibility of effects materialising in the short, medium and long-term.

The integrity of the site involves its constitutive characteristics and ecological functions. The decision as to whether it is adversely affected should focus on and be limited to the habitats and species for which the site has been designated and the site’s conservation objectives.

3.6.5. *Assessing the implications for the site*

The appropriate assessment itself involves looking at all the aspects of the plan or project that could cause a significant effect on the Natura 2000 site. In this context, each element of the plan or project should be examined in turn and their potential effects should be considered in relation to each of the species or habitat types for which the site has been designated⁵⁸. Thereafter, the effects of the different features within the plan or project should

⁵⁸ Work under Mapping and Assessment of Ecosystems and their Services can support the appraisal of effects, e.g. to identify ecological assets and functions in the site, define threats to habitats and species, measure ecological structure and functions of broad habitat types relevant to site integrity - see especially 5th

be looked at together, and in relation to each other, so that the interactions between them can also be identified.

For instance, it may be that the risk of collision mortality with wind turbines alone is not likely to be significant but if it is taken in combination with the installation of overhead power lines, which could also cause collision mortality, then the effects for particular bird population could become significant.

It is evident that the effects of each project will be unique and must be evaluated on a case-by-case basis. According to the Waddenzee ruling (C-127/02 paragraph 48), ‘in assessing the potential effects of a plan or project, their significance must be established in the light, inter alia, of the characteristics and specific environmental conditions of the site concerned by that plan or project.’ Relevant general regulations and specifications established by the Member States may also be used for that purpose.

Whilst the focus should be on the species and habitats of Community interest (including birds identified according to Article 4(1) and 4(2) of the Birds Directive) that have justified the site designation, it should not be forgotten that these target features also interact with other species and habitats, as well as the physical environment in complex ways.

It is therefore important to consider all the elements that are essential to the functions and the structure of the site and to the habitat types and species present. Furthermore, other species can also be relevant in determining the potential effects on protected habitats if they constitute typical species of the habitat in question⁵⁹ or play a role in the food chain on which the site’s target features depend.

The **appraisal of effects must be based on objective** and, if possible, **quantifiable criteria**. Impacts should be predicted as precisely as possible, and the basis of these predictions should be made clear and recorded in the appropriate assessment report (this means also including some explanation of the degree of certainty in the prediction). As with all impact assessments, the appropriate assessment should be undertaken within a structured framework to ensure that the predictions can be made as objectively and accurately as possible.

Bearing in mind that the Court has stressed the importance of using the best scientific knowledge when carrying out the appropriate assessment, further ecological and survey field work may be necessary to supplement existing data. Detailed surveys and fieldwork should be sufficiently long in duration and focus on those target features that are sensitive to the project actions. Sensitivity should be analysed taking into account the possible interactions between the project activities (nature, extent, methods, etc.) and the habitats and species concerned (location, ecological requirements, vital areas, behaviour, etc.).

technical report on ecological condition
http://ec.europa.eu/environment/nature/knowledge/ecosystem_assessment/index_en.htm

⁵⁹ For explanation of particular terms, see the *Interpretation Manual of European Union Habitats - EUR28* at http://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm#interpretation

3.6.6. *Considering suitable mitigation measures to avoid or reduce the impacts*

If adverse impacts on the site's integrity have been identified during the appropriate assessment or cannot be ruled out, the plan or project in question cannot be approved. However, depending on the degree of impact identified, it may be possible to introduce certain mitigation measures that will avoid these impacts or reduce them to a level where they will no longer adversely affect the integrity of the site.

Mitigation measures must be directly linked to the likely impacts that have been identified in the appropriate assessment and can only be defined once these impacts have been fully assessed and described in the appropriate assessment. Thus, as pointed out in section 4.5.1, mitigation measures can only be considered at this stage and not at the screening stage.

The identification of mitigation measures, like the impact assessment itself, must be based on a sound understanding of the species and habitats concerned. For example, they may cover:

- the dates and the timetable of implementation (e.g.: do not operate during the breeding season of a particular species);
- the type of tools and operation to be carried out (e.g.: to use a specific dredge at a distance agreed upon from the shore in order not to affect a fragile habitat, or to reduce emissions which may cause harmful deposition of pollutants); and
- the strictly inaccessible areas inside a site (e.g. hibernation burrows of an animal species).

Mitigation measures, which aim to avoid or reduce impacts or prevent them from happening in the first place, must not be confused with compensatory measures, which are intended to compensate for any damage that may be caused by the project. Compensatory measures can only be considered under Article 6(4) if the plan or project has been accepted as necessary for imperative reasons of overriding public interest and where no alternatives exist (see Section 5).

This distinction was confirmed by the Court which found that 'Article 6(3) of the Habitats Directive must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site of Community importance, which has negative implications for a type of natural habitat present thereon and which provides for the creation of an area of equal or greater size of the same natural habitat type within the same site, has an effect on the integrity of that site. Such measures can be categorised as 'compensatory measures' within the meaning of Article 6(4) only if the conditions laid down therein are satisfied. (...) It is clear that these measures are not aimed either at avoiding or reducing the significant adverse effects for that habitat type caused by the project; rather, they tend to compensate after the fact for those effects. They do not guarantee that the project will not adversely affect the integrity of the site within the meaning of Article 6(3) of the Habitats Directive.' (C-521/12 paragraphs 29-35, 38-39; see also C-387&388/15 paragraph 48).

In connection with these findings, the Court stated that '*...measures, contained in a plan or project not directly connected with or necessary to the management of a site of Community importance, providing, prior to the occurrence of adverse effects on a natural habitat type present thereon, for the future creation of an area of that type, but the completion of which will take place subsequently to the assessment of the significance of any adverse effects on*

the integrity of that site, may not be taken into consideration in that assessment.’ (C-387&388/15 paragraph 64).

Of course, well designed and implemented mitigation measures will limit the extent of the necessary compensatory measures (if applicable, in the context of Article 6(4)), by reducing the residual impacts that require compensation.

For the competent authority to be able to decide if the mitigation measures are sufficient to remove any potential adverse effects of the plan or project on the site (and do not inadvertently cause other adverse effects on the species and habitat types in question), each **mitigation measure must be described in detail**, with an explanation based on scientific evidence of how it will eliminate or reduce the adverse impacts which have been identified. Information should also be provided of how, when and by whom they will be implemented, and what arrangements will be put in place to monitor their effectiveness and take corrective measures if necessary. The need for definitive data at the time of authorization is also raised in case C-142/16, paragraphs 37-45.

If the competent authority considers the mitigation measures are sufficient to avoid the adverse effects on site integrity identified in the appropriate assessment, they will become an integral part of the specification of the final plan or project or may be listed as a condition for project approval. If, however, there is still a residual adverse effect on the integrity of the site, even after the introduction of mitigation measures, then the plan or project cannot be approved (unless the conditions set out in Article 6(4) are fulfilled).

Mitigation measures may be proposed by the plan or project proponent and/or required by the competent national authorities in order to avoid the potential impacts identified in the appropriate assessment or reduce them to a level where they will no longer adversely affect the site’s integrity.

The identification of mitigation measures, like the impact assessment itself, must be based on a sound understanding of the species and habitats concerned and must be described in detail. Well designed and implemented mitigation measures will limit the extent of any necessary compensatory measures, if applicable in the context of Article 6(4), by reducing the residual impacts which require compensation.

3.7. DECISION MAKING

3.7.1. *The ‘competent national authorities’*

It is clear that the word ‘national’ in this expression has been used in contrast with the word ‘EU’ or ‘international’. Thus, the term refers not only to authorities within the central administration but also to regional, provincial or municipal authorities that have to give an authorisation or consent to a plan or project. A court may constitute a competent authority if it has the discretion to make a decision on the substance of a proposed plan or project for purposes of Article 6(3) (C-127/04, paragraph 69).

Under certain circumstances, authorisation of a plan or project may be granted by a legislative authority (national or regional parliament) and take the form of a legislative text. In this context, in case C-182/10 paragraphs 69-70, the Court has ruled that: ‘*Those [Article*

6(3)] obligations are incumbent on the Member States by virtue of the Habitats Directive **regardless of the nature of the national authority with competence to authorise the plan or project concerned**. Article 6(3) of the Habitats Directive, which refers to the ‘competent national authorities’, does not lay down any special rule for plans or projects approved by a legislative authority. That status consequently has no effect on the extent or scope of the obligations imposed on the Member States by Article 6(3) of the Habitats Directive... Article 6(3) of the Habitats Directive must be interpreted as not allowing a national authority, even if it is a legislative authority, to authorise a plan or project without having ascertained that it will not adversely affect the integrity of the site concerned’

In other words, permission cannot be granted to a plan or project by means of law if an appropriate assessment has not been undertaken beforehand, in accordance with Article 6(3) of the Habitats Directive, or if the appropriate assessment has not concluded with certainty that there will be no adverse effect on the integrity of the site⁶⁰.

Competent national authorities are those entitled to give authorisation or consent to a plan or project.

3.7.2. *When is it appropriate to obtain the opinion of the general public?*

The Habitats Directive does not contain an explicit obligation to obtain the opinion of the general public when authorising plans or projects requiring an appropriate assessment. According to the wording of Article 6(3) this has only to be done if it is ‘*considered appropriate*’. However, consultation of the public is an essential feature of the EIA and SEA directives. Clearly therefore, where the assessment required by Article 6(3) is coordinated with the assessment under these directives, public consultation is necessary in line with their requirements.

Nonetheless, even if a plan or project does not fall under the scope of the SEA or EIA directives and is assessed solely on the basis of Article 6(3) of the Habitats Directive, the Court has clarified in a recent judgment on the basis of the requirements of the Aarhus Convention⁶¹, that the public concerned, including recognised environmental NGOs, has the right to participate in the authorisation procedure (C-243/15 paragraph 49). This right involves in particular, ‘*the right to participate “effectively during the environmental decision-making” by submitting, “in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity”*’ (C-243/15, paragraph 46).

⁶⁰ See also C-142/16, para 33: ‘*As the Court has previously held, competent national authorities may authorise an activity subject to an assessment only if they have made certain that it will not adversely affect the integrity of the protected site. This is so when there is no reasonable doubt from a scientific point of view as to the absence of such adverse effects*’.

⁶¹ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. This Convention was concluded in Aarhus, Denmark in June 1998. The EU is one of the signatories since 2005 under Decision 2005/370/EC <http://ec.europa.eu/environment/aarhus/legislation.htm>.

In this context, it is also worth mentioning that the Court, on the basis of the public participation rights, provides in particular for recognised environmental NGOs a right to challenge *'decisions adopted by the competent national authorities within the framework of Article 6(3) of Directive 92/43, whether they concern a request to participate in the authorisation procedure, the assessment of the need for an environmental assessment of the implications of a plan or project for a protected site, or the appropriateness of the conclusions drawn from such an assessment as regards the risks of that plan or project for the integrity of the site'* (C-243/15, paragraph 56).

3.7.3. ***Making a decision on the basis of the appropriate assessment***

It is for the competent national authorities, in the light of the conclusions of the appropriate assessment into the implications of a plan or project for the Natura 2000 site concerned, to approve the plan or project. This can be done **only after they have made certain that the plan or project will not adversely affect the integrity of the site**. That is the case where no reasonable scientific doubt remains as to the absence of such effects.

Where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation (C-127/02 paragraph 57).

Furthermore, *'The authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible effectively to prevent adverse effects on the integrity of protected sites as the result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not as effectively ensure the fulfilment of the objective of site protection intended under that provision'* (C-127/02, paragraph 58).

The onus is therefore on demonstrating the absence of adverse effects rather than their presence, reflecting the precautionary principle (C-157/96 paragraph 63). It follows that the appropriate assessment must be sufficiently detailed and reasoned to demonstrate the absence of adverse effects, in light of the best scientific knowledge in the field (C-127/02 paragraph 61).

5. ARTICLE 6(4)

Clarification of the Concepts of: *Alternative solutions, Imperative reasons of overriding public interest, Compensatory measures, Overall Coherence, Opinion of the Commission.*

5.1 TEXT

‘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’.

5.2 SCOPE

This provision forms part of the procedure of assessment and possible authorisation, by the competent national authorities, of plans and projects likely to affect a Special Area of Conservation (SAC), a Special Protection Area (SPA) or a Site of Community Importance (SCI). Two fundamental considerations arise:

- on the one hand, it deals with exceptions to the general rule in Article 6(3), according to which authorisation can only be granted to plans or projects not affecting the integrity of the site(s) concerned;
- on the other hand, its application in practice has to abide by the various steps provided for and in the sequential order established by the Directive. This has been repeatedly confirmed by the Court (C-209/02, C-239/04, C-304/05, C-560/08, C-404/09).

In its ruling in case C-304/05, paragraph 83, the Court clearly stated that: ***‘Article 6(4) of Directive 92/43 can apply only after the implications of a plan or project have been studied in accordance with Article 6(3) of that directive. Knowledge of those implications in the light of the conservation objectives relating to the site in question is a necessary prerequisite for application of Article 6(4) since, in the absence thereof, no condition for application of that derogating provision can be assessed. 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' (see also C-399/14, C-387&388/15, C-142/16).

The application of Article 6(4) is not automatic. It is up to the authorities to decide whether the conditions for a derogation from Article 6(3) can be applied in the event that the appropriate assessment has concluded that the plan or project will adversely affect the integrity of the site concerned, or in case of doubt over the absence of such adverse effects.

The optional nature of Article 6(4) was confirmed by the Court in case C-241/08, paragraph 72: *'Thus, following the assessment of the implications undertaken pursuant to Article 6(3) of the Habitats Directive and in the event of a negative assessment, **the competent authorities have the choice of either refusing authorisation for the plan or project or of granting authorisation under Article 6(4) of that directive, provided that the conditions laid down in that provision are satisfied**'*.

The decision to go ahead with a plan or project must meet the conditions and requirements of Article 6(4). In particular, it must be documented that:

1. the alternative put forward for approval is the least damaging for habitats, for species and for the integrity of the Natura 2000 site(s), regardless of economic considerations, and that no other feasible alternative exists that would not adversely affect the integrity of the site(s);
2. there are imperative reasons of overriding public interest, including 'those of a social or economic nature';
3. all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected are taken.

Being an exception to Article 6(3), this provision must be interpreted strictly (C-239/04 paragraphs 25 – 39) and can only be applied to circumstances where all the conditions required by the Directive are fully satisfied. In this regard, it falls on whoever wants to make use of this exception to prove, as a prerequisite, that the aforementioned conditions are indeed met in each particular case.

Once the lack of suitable alternatives and the acceptance of imperative reasons of overriding public interest are fully ascertained and documented, all compensatory measures that are needed to ensure the protection of the overall coherence of the Natura 2000 network have to be taken. The compensatory measures adopted must always be communicated to the Commission.

Article 6(4) allows for exceptions to the general rule of Article 6(3) but its application is not automatic. It is up to the authority to decide whether a derogation from Article 6(3) can be applied. Article 6(4) must be applied in the sequential order established by the Directive – that is after all the provisions of Article 6(3) have been undertaken in a satisfactory manner.

5.3 INITIAL CONSIDERATIONS

3.7.4. *Examining alternative solutions*

The first obligation of the Article 6(4) derogation procedure is to examine whether there are alternative solutions to the plan or project. In this respect the Court has made it clear that this examination falls formally within the scope of Article 6(4) and not Article 6(3) (C-441/03 paragraph 15, C-241/08 paragraph 69, C-142/16 paragraph 72).

In line with the need to prevent undesired impairment to the Natura 2000 network, the thorough revision and/or withdrawal of a proposed plan or project should be considered when negative effects on the integrity of a site have been identified. Thus, the competent authorities have to analyse and demonstrate the need of the plan or project concerned, considering the zero option too at this stage.

Subsequently, the competent authorities should examine the possibility of resorting to alternative solutions which better respect the integrity of the site in question. All feasible alternatives that meet the plan or project aims, in particular, their relative performance with regard to the site's conservation objectives, integrity and contribution to the overall coherence of the Natura 2000 network have to be analysed, taking also into account their proportionality in terms of cost. They might involve alternative locations or routes, different scales or designs of development, or alternative processes.

As concerns the economic cost of the steps that may be considered in the review of alternatives, it cannot be the sole determining factor in the choice of alternative solutions (C-399/14, paragraph 77). In other words, a project proponent cannot claim that alternatives have not been examined because they would cost too much.

In line with the principle of subsidiarity, it is for the competent national authorities to assess the relative impact of these alternative solutions on the site concerned. It should be stressed that the reference parameters for such comparisons deal with aspects concerning the conservation and the maintenance of the integrity of the site and of its ecological functions. In this phase, therefore, other assessment criteria, such as economic criteria, cannot be seen as overruling ecological criteria.

The **absence of alternatives must be demonstrated**, before proceeding with the examination of whether the plan or project is necessary for imperative reasons of public interest (Court ruling in Castro Verde case C-239/04 paragraphs 36-39).

It is for the competent national authorities to ensure that all feasible alternative solutions that meet the plan/project aims have been explored to the same level of detail. This assessment should be made against the species and habitats for which the site has been designated and the site's conservation objectives.

3.7.5. *Examining imperative reasons of overriding public interest*

In the absence of alternative solutions - or in the presence of solutions having even more negative environmental effects on the site(s) concerned, with regard to the above-mentioned conservation aims of the Directive - the competent authorities have to examine the existence

of imperative reasons of overriding public interest, including those of a social or economic nature, which require the carrying out of the plan or project in question.

The concept of ‘imperative reason of overriding public interest’ is not defined in the Directive. However, Article 6(4) second subparagraph mentions human health, public safety and beneficial consequences of primary importance for the environment as examples of such reasons. As regards the ‘*other imperative reasons of overriding public interest*’ of a social or economic nature, it is clear from the wording that only public interests, irrespective of whether they are promoted either by public or private bodies, can be balanced against the conservation aims of the Directive. Thus, projects developed by private bodies can only be considered where such public interests are served and demonstrated.

This was confirmed by the Court in its ruling in case C-182/10, paragraphs 75-78: ‘*An interest capable of justifying, within the meaning of Article 6(4) of the Habitats Directive, the implementation of a plan or project **must be both ‘public’ and ‘overriding’, which means that it must be of such an importance that it can be weighed up against that directive’s objective of the conservation of natural habitats and wild fauna and flora.** Works intended for the location or expansion of an undertaking satisfy those conditions only in exceptional circumstances. It **cannot be ruled out that that is the case where a project, although of a private character, in fact by its very nature and by its economic and social context presents an overriding public interest** and it has been shown that there are no alternative solutions. In the light of those criteria, the mere construction of infrastructure designed to accommodate a management centre cannot constitute an imperative reason of overriding public interest within the meaning of Article 6(4) of the Habitats Directive.*’

It may also be helpful to refer to other fields of EU law, where similar concepts appear.

The ‘imperative requirement’ concept was worked out by the Court as an exception to the principle of free movement of goods. Among the imperative requirements which can justify national measures restricting freedom of movement, the Court recognised public health and environmental protection, as well as the pursuit of legitimate goals of economic and social policy.

In addition, EU law also recognises the concept of ‘service of general economic interest’, evoked in Article 106(2) of the Treaty on the Functioning of the European Union, within the framework of the exception to the rules of competition envisaged for companies responsible for managing such services. In a Communication on services of general interest in Europe⁶², the Commission, taking account of case law on the matter, gave the following definition of services of general economic interest: ‘*economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market without public intervention*’.

Having regard to the *structure of the provision*, in the specific cases the competent national authorities have to make their approval of the plans and projects in question subject to the condition that the balance of interests between the conservation objectives of the site

⁶² A Quality Framework for Services of General Interest in Europe, COM(2011) 900 final 20.12.2011.

affected by those initiatives and the above-mentioned imperative reasons weighs in favour of the latter. This should be determined according to the following considerations:

- a) There must be an **imperative reason** for implementing the plan or project;
- b) the public interest must be **overriding**: it is therefore clear that not every kind of public interest of a social or economic nature is sufficient, in particular when seen against the particular weight of the interests protected by the Directive (see for instance recital 4, which refers to '*Community's natural heritage*');;
- c) in this context, it seems also reasonable to assume that the public interest can only be overriding if it is a **long-term interest**; short term economic interests or other interests yielding only short-term benefits for the society would not appear to be sufficient to outweigh the long-term conservation interests protected by the Directive.

As an example of what are considered imperative reasons of overriding public interest, the Court ruled, in a case concerning a large region (region of Thessaly in Greece), that: '*Irrigation and the supply of drinking water meet, in principle, those conditions and are therefore capable of justifying the implementation of a project for the diversion of water in the absence of alternative solutions*' (C-43/10, paragraph 122)⁶³.

It is reasonable to consider that the 'imperative reasons of overriding public interest, including those of social and economic nature' refer to situations where plans or projects envisaged prove to be indispensable:

- **within the framework of actions or policies aiming to protect fundamental values for the citizens' life (health, safety, the environment);**
- **within the framework of fundamental policies for the State and the society;**
- **within the framework of carrying out activities of an economic or social nature, fulfilling specific obligations of public service.**

It is for the competent authorities to weigh up the imperative reasons of overriding public interest of the plan or project against the objective of conserving natural habitats and wild fauna and flora. They can only approve the plan or project if the imperative reasons for the plan or project outweigh its impact on the conservation objectives.

To provide readers with a more precise indication of what might legitimately be considered as potential imperative reasons of overriding public interest, examples can be extracted from the Opinions delivered by the Commission in the framework of Article 6(4), second subparagraph, and the related reasoning given by the Member States: http://ec.europa.eu/environment/nature/natura2000/management/opinion_en.htm

⁶³ In this context, this does not mean that drinking water supply and irrigation projects can always be justified for imperative reasons of overriding public interest.

5.3 ADOPTING COMPENSATORY MEASURES

3.7.6. *What is meant by ‘compensatory measures’ and when should they be considered?*

The term ‘compensatory measures’ is not defined in the Habitats Directive. Experience would suggest the following distinction between compensatory and mitigation measures:

- mitigation measures in the broader sense, are those measures that aim to minimise, or even eliminate, the negative impacts likely to arise from the implementation of a plan or project so that the site’s integrity is not adversely affected. These measures are considered in the context of Article 6(3) and are an integral part of the specifications of a plan or project or conditional to its authorisation (see section 4.6.5);
- compensatory measures are independent of the project (including any associated mitigation measures). They are intended to offset the residual negative effects of the plan or project so that the overall ecological coherence of the Natura 2000 network is maintained. They can only be considered in the context of Article 6(4).

Of course, well-designed and implemented mitigation measures may limit the extent of the necessary compensatory measures by reducing the residual negative impacts that require compensation.

*For instance, an extension of a colliery’s underground coal mining activities into areas which so far have not been exploited will cause large scale ground subsidence, accompanied by flooding and increase of ground water levels with considerable impacts on all ecosystems in the area. To compensate for the negative effects of the project, land will be selected following ecological criteria for the creation of non-priority habitat types (beech and oak forests) through re-forestation or transformation/improvement of existing forests. It is also considered to create and improve alluvial forests and restore or optimise riverbeds to compensate for the loss of a priority habitat type (alluvial forests with *Alnion glutinoso-incanae*) and a non-priority habitat type (water courses of plain to montane levels with floating vegetation). The measure will also help counteract the negative impact of the project on the *Lampetra planeri* species.*

Compensatory measures should be additional to the actions that are normal practice under the Habitats and Birds Directives or obligations laid down in EU law. For example, the implementation of conservation measures under Article 6(1), or the proposal/designation of a new area already inventoried as being of Community importance, constitute ‘normal’ measures for a Member State. Thus, compensatory measures should go beyond the normal/standard measures required for the designation, protection and management of Natura 2000 sites.

Another example of compensation relates to a harbour extension leading to the destruction of a roosting site for birds and the decrease of low depth inter-tidal mudflats and reedbeds. The recreation of a high tide roosting site and of shallow mudflats, coupled with the habitat restoration of reedbeds and wet meadows through hydraulic works and with environmental measures for the agricultural use of reedbeds and meadows, would compensate for the negative impact caused by the project.

Consequently, compensatory measures are not a means to allow the implementation of plans or projects while escaping the appropriate assessment obligations under Article 6. It is clear from the sequence of Article 6(4) that **they constitute the ‘last resort’**. They are to be considered only when a negative impact on the integrity of a Natura 2000 site is ascertained or it cannot be excluded, despite all other measures taken to avoid or reduce adverse effects on it, and once it is decided that the project/plan should proceed for imperative reasons of overriding public interest and in absence of alternative solutions.

The compensatory measures constitute measures specific to a project or plan, additional to the normal duties stemming from the Birds and Habitats Directives. These measures aim to offset precisely the negative impact of a plan or project on the species or habitats concerned. They constitute the ‘last resort’ and are used only when the other safeguards provided for by the directive are exhausted and the decision has been taken to consider, nevertheless, a project/plan having a negative impact on the integrity of a Natura 2000 site or when such an impact cannot be excluded.

3.7.7. ‘Overall coherence’ of the Natura 2000 network

The expression ‘overall coherence’ appears in Article 6(4) in the context where a plan or project is allowed to be carried out for imperative reasons of overriding public interest and measures are to be taken to compensate for the damage.

It also appears in Article 3(1) which states that Natura 2000 is a ‘coherent European ecological network of special areas of conservation’ that shall enable ‘the natural habitats types and the species’ habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range’. Hence, two different criteria are considered, on the one hand the targeted species and habitats in terms of quantity and quality, and on the other hand the role of the site in ensuring the adequate geographical distribution in relation to the range.

Article 3(3) stipulates that ‘where they consider it necessary, Member States shall endeavour to improve the ecological coherence of Natura 2000 by maintaining, and where appropriate developing, features of the landscape which are of major importance for wild fauna and flora, as referred to in Article 10.’

Article 10, which deals more generally with land-use planning and development policy, stipulates that

‘Member States shall endeavour, where they consider it necessary, in their land-use planning and development policies and, in particular, with a view to improving the ecological coherence of the Natura 2000 network, to encourage the features of the landscape which are of major importance for wild fauna and flora.

Such features are those which, by virtue of their linear and continuous structure (such as rivers with their banks...) or their function as stepping stones (such as ponds or small woods), are essential for the migration, dispersal and genetic exchange of wild species.’

The word ‘ecological’ is used both in Article 3 and Article 10 to explain the nature of the coherence. It is obvious that the expression ‘*overall coherence*’ in Article 6(4) is used in the same meaning.

Having said this, it is clear that the importance of a site to the coherence of the network depends on the site’s conservation objectives, on the number and status of the habitats and species for which it has been designated, and on its role in securing an adequate geographical distribution in relation to the range of the habitats and species concerned.

For instance, if the plan or project will damage an area of a rare habitat type which has a very restricted range, which is very hard to recreate and for which the site in question is only one of 10 sites designated for that habitat type, the compensatory measures will clearly need to be very substantial if they are to be capable of protecting the overall coherence of Natura 2000. If on the other hand, the plan or project will damage a habitat for a species (e.g. Triturus cristatus) which has a wide range across the EU, which is relatively straightforward to recreate, and for which the site in question has only a minor role to play in its conservation, the compensatory measures will be more feasible and much less onerous.

Article 6(4) requires that the overall coherence of Natura 2000 is protected. Thus, the Directive presumes that the ‘original’ network has been coherent. If the exception regime is used, the situation must be corrected so that the coherence is fully restored.

With regard to a plan or project, the compensatory measures defined to protect the overall coherence of Natura 2000 network will have to address the criteria mentioned above. This would mean that compensation should refer to the site’s conservation objectives and to the habitats and species negatively affected in comparable proportions in terms of number and status. At the same time the role played by the site concerned in relation to the biogeographical distribution has to be replaced adequately.

At this stage it would be useful to recall that under the Habitats Directive the selection of a site for the Natura 2000 network takes into account:

- the habitat(s) and species in proportions (surface areas, populations) described in the Standard Data Form;
- the location of the site within the respective biogeographical region; and
- the selection criteria established by the Habitats Committee and used by the European Topic Centre on Biological Diversity to advise the Commission to place a site on the Union list⁶⁴.

Competent authorities should be looking at these criteria when designing the compensatory measures for a project, and should ensure that the measures provide properties and functions comparable to those which had justified the selection of the original site.

The Birds Directive does not provide for biogeographical regions, or selection at EU level. However by analogy, it could be considered that *the overall coherence of the network* is ensured if:

⁶⁴ https://biodiversity.eionet.europa.eu/activities/Natura_2000/chapter6

- compensation fulfils the same purposes that motivated the site's classification under Article 4(1) and 4(2) of the Birds Directive;
- compensation fulfils the same function along the same migration path; and
- the compensation areas are accessible with certainty by the birds usually occurring on the site affected by the project.

For instance, if an SPA, whose specific function is to provide resting areas for migratory bird species in their way towards the north, is negatively affected by a project, the compensatory measures proposed should focus on the specific function played by the site. Therefore, compensating with measures that could recreate the necessary conditions for resting of the same species in an area outside the migratory path or within the migratory path but at some distance, would not be sufficient to ensure the overall coherence of the network. In this case, compensation should provide for suitable resting areas for the targeted species located correctly in the migratory path so that they will be realistically accessible to the birds which would have used the original site affected by the project.

In order to ensure the overall coherence of Natura 2000, the compensatory measures proposed for a project should therefore: a) address, in comparable proportions, the habitats and species negatively affected; and b) provide functions comparable to those which had justified the selection criteria for the original site, particularly regarding the adequate geographical distribution. Thus, it would not be enough for the compensatory measures to concern the same biogeographical region in the same Member State.

The distance between the original site and the place of the compensatory measures is not necessarily an obstacle as long as it does not affect the functionality of the site, its role in the geographical distribution and the reasons for its initial selection.

3.7.8. *Objective and general content of compensatory measures*

The compensatory measures have to ensure that a site continues contributing to the conservation at a favourable status of natural habitats types and habitats of species 'within the biogeographical region concerned', in short, ensure the maintenance of the overall coherence of the Natura 2000 network. It follows from this, that:

- as a general principle, a site should not be irreversibly affected by a project before the compensation is in place. However, there may be situations where it will not be possible to meet this condition. For example, the recreation of a forest habitat would take many years to ensure the same functions as the original habitat negatively affected by a project. Therefore, best efforts should be made to *ensure* that compensation is in place beforehand and, in the case this is not fully achievable, the competent authorities should consider extra compensation for the interim losses that would occur in the meantime;
- the compensation must be additional to the contribution to the Natura 2000 network that the Member State should have made under the Directives.

Member States should pay particular attention when the negative effects of a plan or project are produced in rare natural habitats types or in natural habitats that need a long period of time to provide the same ecological functionality.

While designations of new Natura 2000 sites can be part of a compensation package under Article 6(4), the designations alone are insufficient without the accompanying management measures.

In terms of the Birds Directive, compensation might for example include work to improve the biological value of an area, which is or will be classified, so that the carrying capacity or the food potential are increased by a quantity corresponding to the loss on the site affected by the project. Accordingly, the re-creation of a habitat favourable to the bird species concerned is acceptable provided that the created site is available at the time when the affected site loses its natural value.

In terms of the Habitats Directive, the compensation might, similarly, consist of the re-creation of a comparable habitat or the biological improvement of a substandard habitat of the same type within an existing designated site, or even the addition to the Natura 2000 network of a new site of comparable quality to the original site. In the last of these cases one might argue that overall the project would result in a net loss for this habitat at Member State level. However, at EU level, a new site would benefit from the protection provided for in Article 6, thus contributing to the objectives of the Directive.

Compensatory measures appropriate or necessary to offset the adverse effects on a Natura 2000 site (i.e. in addition to what is already required under the Directives) may consist of:

- habitat improvement in existing sites: improving the remaining habitat on the site concerned or restoring the habitat on another Natura 2000 site, in proportion to the loss due to the plan or project;
- habitat re-creation: creating a habitat on a new or enlarged site, to be incorporated into Natura 2000; or
- as described above, and in association with other works, proposing a new site of sufficient quality under the Habitats or Birds Directive and establishing/implementing conservation measures for this new site.

The range of compensatory and accompanying measures found in current practice in the EU under the Habitats Directive also includes:

- species reintroduction;
- species recovery and reinforcement, including reinforcement of prey species;
- land purchase;
- rights acquisition;
- reserve creation (including strong restrictions in land use);
- incentives for certain economic activities that sustain key ecological functions;
- reduction in (other) threats, usually to species, either through action on a single source or through co-ordinated action on all threat factors (e.g. factors stemming from space-crowded effects).

In principle, the result of compensation measures has to be achieved at the time when the damage occurs on the site concerned. Under certain circumstances where this cannot be fully achieved, overcompensation would be required for the interim losses.

3.7.9. *Key elements to consider in the compensation measures*

The compensatory measures under Article 6(4) must address all issues, be they technical, legal or financial, needed to offset the negative effects of a plan or project and to maintain the overall coherence of the Natura 2000 network.

The following list provides an overview of elements to consider:

- Tight coordination and cooperation between Natura 2000 authorities, assessment authorities and the proponent of the plan or project.
- Clear objectives and target values according to the site's conservation objectives.
- Description of the compensatory measures, accompanied by a scientifically robust explanation of how they will effectively compensate for the negative effects of the plan or project on the species and habitats affected in light of the site's conservation objectives, and how they will ensure that the overall coherence of Natura 2000 is protected.
- Demonstration of the technical feasibility of the measures in relation to their objectives.
- Demonstration of the legal and/or financial feasibility of the measures according to the timing required.
- Analysis of suitable locations and acquisition of the rights (purchase, lease...) to the land to be used for the compensatory measures.
- Explanation of the time-frame in which the compensation measures are expected to achieve their objectives.
- Timetable for implementation and co-ordination with the schedule for the plan or project implementation.
- Public information and/or consultation stages.
- Specific monitoring and reporting schedules based on progress indicators according to the objectives of compensation measures.
- The financing programme approved during the necessary period to guarantee the success of the measures.

5.4 CRITERIA FOR DESIGNING COMPENSATORY MEASURES

3.7.10. *Targeted compensation*

Compensatory measures under the Habitats Directive must be established according to reference conditions that are defined after the description of the integrity of the site likely to be lost or deteriorated, and according to the likely significant negative effects that would remain after mitigation.

Once the integrity of the site likely to be damaged and the actual extent of the damage have been identified, the compensatory measures must address these issues specifically, so that the elements of integrity contributing to the overall coherence of the Natura 2000 network are compensated for in the long term. Thus, these measures should be the most appropriate to the type of impact predicted and should be focused on objectives and targets clearly addressing the Natura 2000 elements affected. They must clearly refer to the structural and functional aspects of the site integrity, and the related types of habitats and species populations that are affected.

This entails that the compensatory measures must necessarily consist of ecological measures. Therefore, payments to individuals or towards special funds, regardless of whether or not these are ultimately allocated to nature conservation projects are not suitable under the Habitats Directive. In addition, any secondary or indirect measure that might be proposed to enhance the performance of the core compensatory measures must have a clear relationship to the objectives and targets of the compensatory measures themselves.

As an example, in designing compensatory measures for species, there is a need to identify:

- the species adversely affected, their total numbers and the proportion of the total population(s) that these occur in;
- the principal function(s) of the habitats that will be adversely affected that the species depend on e.g. feeding, roosting, etc.;
- the measures needed to compensate for the damage to the habitat functions and species affected so that they are restored to a state that reflects the favourable condition of the area affected.

3.7.11. *Effective compensation*

The feasibility and effectiveness of compensatory measures are critical to the implementation of Article 6(4) of the Habitats Directive, in keeping with the precautionary principle and good practice. In ensuring effectiveness, technical feasibility must go hand in hand with the appropriate extent, timing and location of the compensatory measures.

Compensatory measures must be feasible and operational in reinstating the ecological conditions needed to ensure the overall coherence of the Natura 2000 network. The estimated timescale and any maintenance action required to enhance performance should be known and/or foreseen right from the start before the measures are rolled out. This must be based on the best scientific knowledge available, together with specific investigations for the precise location where the compensatory measures will be implemented. Measures for which there is no reasonable guarantee of success should not be considered under Article 6(4), and the likely success of the compensation scheme should influence the final approval of the plan or project in line with the prevention principle. In addition, when it comes to deciding between different possibilities for compensation, the most effective options, with the greatest chances of success, must be chosen.

The programme of compensatory measures needs to include detailed monitoring during implementation to ensure effectiveness in the long term. Being in the framework of the

Natura 2000 network, such monitoring should be co-ordinated with, and possibly integrated into monitoring under Article 11 of the Habitats Directive.

Measures showing in practice a low level of effectiveness in contributing to the objectives should be modified accordingly.

3.7.12. *Technical feasibility*

According to current knowledge, it is highly unlikely that the ecological structure and function or the related habitats and species populations can be reinstated to the status they had before the damage by a plan or project. To overcome the intrinsic difficulties standing in the way of full success for the ecological conditions, the design of compensatory measures must:

- (1) follow scientific criteria and evaluation in accordance with best scientific knowledge, and
- (2) take into account the specific requirements of the ecological features to be reinstated (e.g. soil, humidity, exposure, existing threats and other conditions critical to the success of reinstatement).

The aspects critical to technical feasibility will determine the suitability of the location of compensatory measures (spatial feasibility), the appropriate timing and their required extent.

In addition, the choice of particular measures and their design must follow the existing guidance for each particular practice, i.e. habitat creation, habitat restoration, population reinforcement, species reintroduction, or any other measure considered in the compensatory programme.

3.7.13. *Extent of compensation*

The extent required for the compensatory measures to be effective is directly related to the quantitative and qualitative aspects inherent to the elements of integrity (i.e. including structure and functionality and their role in the overall coherence of the Natura 2000 network) likely to be impaired and to the estimated effectiveness of the measures.

Consequently, compensation ratios are best set on a case-by-case basis and must be initially determined in the light of the information from the Article 6(3) appropriate assessment and ensure ecological functionality. The ratios may then be redefined according to the results observed when monitoring the effectiveness, and the final decision on the proportion of compensation must be justified.

There is wide acknowledgement that ratios should be generally well above 1:1. Thus, compensation ratios of 1:1 or below should only be considered when it is shown that with such an extent the measures will be fully effective in reinstating structure and functionality within a short period of time (e.g. without compromising the preservation of the habitats or the populations of key species likely to be affected by the plan or project nor their conservation objectives).

3.7.14. *Location of compensatory measures*

Compensatory measures should be located in areas where they will be most highest effective in maintaining the overall coherence of the Natura 2000 network. This entails a set of pre-conditions that any compensatory measure should meet:

- The area selected for compensation must be within the same biogeographical region (for sites designated under the Habitats Directive) or within the same range, migration route or wintering area for bird species (i.e. sites designated under the Birds Directive) in the Member State concerned. Furthermore, the area should provide functions comparable to those which had justified selecting the original site, particularly regarding adequate geographical distribution.
- The area selected for compensation must have - or must be able to develop - the specific features attached to the ecological structure and functions, and required by the habitats and species populations. This relates to qualitative aspects like the uniqueness of the assets impaired and requires that local ecological conditions be taken into account.
- Compensatory measures must not jeopardize the preservation of the integrity of any other Natura 2000 site contributing to the overall coherence of the network. When carried out on existing Natura 2000 site(s), the measures must be consistent with the conservation objectives of the site(s) and go above the conservation measures established under Article 6(1). Management plans will be a useful reference to steer sensible compensation measures.

In addition, there is general agreement that the local conditions necessary to reinstate the ecological assets at stake are found as close as possible to the area affected by the plan or project. Therefore, locating compensation within or near the Natura 2000 site concerned where suitable conditions for the measures to be successful seems the most preferred option. However, this is not always possible and a range of priorities should therefore be applied when searching locations that meet the requirements of the Habitats Directive:

- 1) Compensation within the Natura 2000 site, provided the necessary elements to ensure ecological coherence and network functionality exist within the site.
- 2) Compensation outside the Natura 2000 site concerned, but within a common topographical or landscape unit, provided the same contribution to the ecological structure and/or network function is feasible. The new location can be in another designated Natura 2000 site or a non-designated location. In the latter case, the location must be designated as a Natura 2000 site and be subject to all the requirements of the Nature Directives.
- 3) Compensation outside the Natura 2000 site, in a different topographical or landscape unit. The new location can be another designated Natura 2000 site. If compensation takes place on a non-designated location, this location must then be designated as a Natura 2000 site and be subject to all the requirements of the Nature Directives.

New designations forming part of compensation measures must be submitted to the Commission before the measures are implemented and before the carrying out of the project but after its authorisation. The new designations should be made available to the

Commission through the established channels and procedures as happens with SCI lists and SPA classifications, and qualify for designation according to relevant criteria under the Habitats and Birds directives respectively.

Best cooperation and coordination shall be ensured by Member States when dealing with the location of compensatory measures in the frame of transboundary projects.

3.7.15. *Timing of compensation*

Timing the compensatory measures calls for a case-by-case approach. The schedule adopted must provide continuity in the ecological processes essential for maintaining the structure and functions that contribute to the overall coherence of the Natura 2000 network. This requires a tight coordination between the implementation of the plan or project and the implementation of the compensatory measures, and relies on issues such as the time required for habitats to develop and/or for species populations to recover or establish in a given area.

In addition, other factors and processes must also be considered:

- A site must not be irreversibly affected before compensation is in place.
- The result of compensation should be operational at the time the damage occurs on the site concerned. Under certain circumstances where this cannot be fully achieved, overcompensation would be required for the interim losses.
- Time lags might only be admissible when it is ascertained that they would not compromise the objective of ‘no net losses’ to the overall coherence of the Natura 2000 network.
- Time lags must not be permitted, for example, if they lead to population losses for any species protected on the site under Annex II to the Habitats Directive or Annex I to the Birds Directive; priority species listed in Annex II to the Habitats Directive merit special attention.
- It may be possible to scale down in time compensatory measures, depending whether the significant negative effects are expected to arise in the short, medium or long term.

Specific measures to outweigh interim losses that would occur until the conservation objectives are met may be advisable. All technical, legal or financial provisions needed to implement the compensatory measures must be completed before the plan or project implementation starts, so as to prevent any unforeseen delays that may hinder the effectiveness of the measures.

3.7.16. *Long term implementation*

Compensatory measures require that a sound legal and financial basis for long-term implementation and for the protection, monitoring and maintenance of the sites be secured before impacts on habitats and/or species occur. This could involve:

- Providing for temporary protection, even if the SCI/SPA status is only granted later.

- Applying binding enforcement tools at the national level to ensure the full implementation and effectiveness of compensation (e.g. linked to the EIA Directive, if applicable, or to the Environmental Liability Directive; or linking the plan or project approval to the robustness of the relevant provisions for implementing compensatory measures).
- Applying the necessary legal means in case land or rights purchase is deemed essential for the effective implementation of the measures in line with good practice (e.g. standard procedures for compulsory purchase on grounds of nature conservation).
- Establishing monitoring programmes to ensure that the compensatory measures reach their objective and are maintained over the longer term, and if not, that corrective measures are taken to address this, including objectives, responsible bodies and resource needs, indicators, and requirements for reporting to the Commission. This could be best performed by independent bodies specifically set up for the purpose and in close coordination and cooperation with the Natura 2000 authorities.

3.8. WHO BEARS THE COST OF THE COMPENSATION MEASURES?

It appears logical that, in line with the 'polluter pays' principle, the promoter of a plan or project bears the cost of the compensatory measures. It may include it in the total budget submitted to the public authorities in the event of co-financing. In that regard, EU funds could, for example, co-finance the compensatory measures for transport infrastructure that is part of the TEN (Trans-European Networks) and financed from these funds, provided such financial assistance complies with the objectives, rules and procedures applicable to the EU fund in question.

3.9. INFORMING THE COMMISSION OF THE COMPENSATORY MEASURES

The competent national authorities have to inform the Commission of the compensatory measures adopted. Article 6(4) does not specify the form nor the purpose of this information. However, in order to facilitate the process the Commission has prepared a standard form⁶⁵ for supplying it with information under Article 6(4). In any case, it is not the Commission's role either to suggest compensatory measures or to validate them scientifically.

The information should enable the Commission to assess the manner in which the adverse effects are compensated for, so that the elements of integrity contributing to the overall coherence of the Natura 2000 network are maintained in the long term. While the national authorities are only specifically obliged to communicate the compensatory measures adopted, it may also prove necessary to provide certain elements relating to the studied alternative solutions and to the imperative reasons for overriding public interest which have led to the approval of the plan or project, insofar as these elements have affected the choice of the compensatory measures.

⁶⁵ Available at: http://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm

The obligation to inform the Commission of the compensatory measures adopted – which is set out in the second sentence of the first subparagraph of Article 6(4) - has to be fully transposed into national law. If that provision, laying down adequate detailed rules concerning information on the compensatory measures adopted, is absent from national law, *‘it is not possible to ensure that the second sentence of the first subparagraph of Article 6(4) has full effect and attains its objective’* (C-324/01 paragraph 21).

- *When in the planning process must the Commission be informed about compensatory measures and who is responsible for this information?*

In order to allow the Commission to request additional information on the measures taken or to take actions in case it considers that the legal requirements of the Directive have not been applied correctly, compensatory measures should be submitted to the Commission before they are implemented – and, indeed, before the implementation of the plan or project concerned but after its authorisation. Compensatory measures should therefore be submitted to the Commission as soon as they have been adopted to allow the Commission, within its competence as Guardian of the Treaties, to assess whether the provisions of the Directive are being applied correctly.

As those responsible for the maintenance of the overall coherence of, and updating the information on, the Natura 2000 network, the authorities in charge of Natura 2000 in each Member State must play an important role in this process. The information should be submitted by the national authority via the Permanent Representation of each Member State, as happens with the process for adopting site lists.

The information about compensatory measures must enable the Commission to assess the manner in which the adverse effects are offset, so that the elements of integrity contributing to the overall coherence of the Natura 2000 network are maintained in the long term. However, it is not the Commission’s role to suggest compensatory measures.

3.10. WHAT HAPPENS WITH SITES HOSTING PRIORITY HABITATS AND/OR SPECIES?

The second subparagraph of Article 6(4) provides for a special treatment whenever the plan or project concerns a site hosting priority habitats and/or species and will affect these priority habitats and/or species. In such cases carrying out the plan or project could be justified only if the evoked imperative reasons of overriding public interest concern human health and public safety or overriding beneficial consequences for the environment, or if, before granting approval to the plan or project, the Commission expresses an opinion on the envisaged initiative.

In other words, damage to the sites would only be accepted as overruling the fulfilment of the objectives of the directive when the specific imperative reasons mentioned above occur or, alternatively, after the additional procedural safeguard of an independent appraisal by the Commission.

This provision raises a number of questions relating to:

- the identification of sites concerned;

- the interpretation of the concepts of human health, public safety and the primary beneficial consequences for the environment; and
- the procedure for adopting the Commission's opinion and the consequences arising from this opinion.

3.10.1. *The sites concerned*

Article 6(4), second subparagraph, applies when carrying out the plan or project will affect a site hosting priority habitats and/or species. In this regard, it would be reasonable to consider that a plan or project:

- a) not affecting, in any manner, a priority habitat/species; or
- b) affecting a habitat/species which has not been taken into account in the selection of a site ('non-significant presence' in the Standard Data Form)

should not de facto justify making a site subject to this second subparagraph.

Since the Birds Directive does not rank any species as priority, compensatory measures aiming to offset effects on SPAs' bird populations would never require the Commission's opinion.

Article 6(4), second subparagraph may be understood as applying to all sites hosting priority habitats and/or species, when these habitats and species are affected.

3.10.2. *The concepts of 'human health', 'public safety' and 'primary beneficial consequences for the environment'*

Human health, public safety and primary beneficial consequences for the environment constitute the most important imperative reasons of overriding public interest. However, like the concept of 'imperative reasons of overriding public interest' these three categories are not expressly defined.

As mentioned in section 5.3.2, EU law refers to public health and public safety as reasons justifying the adoption of restrictive national measures on the free movement of goods, workers and services, as well as on the right of establishment. In addition, the protection of people's health is one of the fundamental aims of EU environment policy. In the same vein, the primary beneficial consequences for the environment constitute a category which must be included in these fundamental aims of environment policy.

In line with the subsidiarity principle, it is for the competent national authorities to check whether such a situation exists. Of course, any such situation is likely to be examined by the Commission under its work to monitor the correct application of EU law.

As regards the concept of 'public safety', it is useful to refer to the judgement of the Court in case C-57/89 (*Leybucht Dykes*). That judgement preceded the adoption of Directive 92/43/EEC and hence Article 6. However, it is still relevant, not least because the Court's approach influenced the drafting of Article 6. At issue were construction works to reinforce

dykes on the North Sea at Leybucht. These works involved reducing the area of an SPA. As a matter of general principle, the Court stated that the grounds for such a reduction must correspond to a general interest superior to the general interest represented by the ecological objective of the relevant directive. In this specific case the Court confirmed that the danger of flooding and the protection of the coast constituted sufficiently serious reasons to justify the dyke works and the strengthening of coastal structures as long as the measures were kept to a strict minimum.

In a subsequent case (C-43/10 paragraph 128) the Court held that: *‘Where such a project adversely affects the integrity of a SCI hosting a priority natural habitat type and/or a priority species, its implementation may, in principle, be justified by grounds linked with the supply of drinking water. In some circumstances, it might be justified by reference to beneficial consequences of primary importance which irrigation has for the environment. On the other hand, irrigation cannot, in principle, qualify as a consideration relating to human health or public safety, justifying the implementation of a project such as that at issue in the main proceedings.’*

In case C-504/14 paragraph 77 the Court stated that *‘...the construction of a platform designed to facilitate the movement of disabled persons may, in principle, be regarded as having been carried out for imperative reasons of overriding public interest relating to human health...’*.

The national authorities may authorize a plan or project only if the proof of the existence of the afore mentioned reasons of overriding public interest is given and within the limits within which the plan or project in question proves necessary for the fulfilment of the public interest in question.

3.10.3. *The adoption of Commission’s opinion and its consequences*

In the case of imperative reasons of overriding public interest other than human health, safety and environmental benefits, the prior opinion of the Commission is a necessary procedural step. Article 6(4), second subparagraph, does not specify a procedure or the specific contents of such an opinion⁶⁶. We must therefore refer once again to the economy and to the aims pursued by the provision in question.

The opinion has to cover the assessment of the ecological values which are likely to be affected by the plan or project, the relevance of the invoked imperative reasons and the balance of these two opposed interests, as well as an evaluation of the compensatory measures. That assessment involves both a scientific and economic appraisal as well as an examination of the necessity and proportionality of the plan or project with regard to the invoked imperative reason.

⁶⁶ The relevant standard form (at: http://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm) covers also the request for a Commission opinion under Article 6(4), second subparagraph.

The Commission can assess whether the implementation of the plan or project meets the requirements of EU law and, if necessary, initiate the appropriate legal action.

While the Directive does not include a specific deadline for adopting its opinion, the Commission will make all necessary efforts to carry out the assessments and issue its opinion as speedily as possible.

The Commission, in delivering its opinion, should check the balance between the ecological values affected and the invoked imperative reasons, and evaluate the compensation measures.

ANNEX I

Comparison of procedures under Appropriate Assessment (AA), EIA and SEA

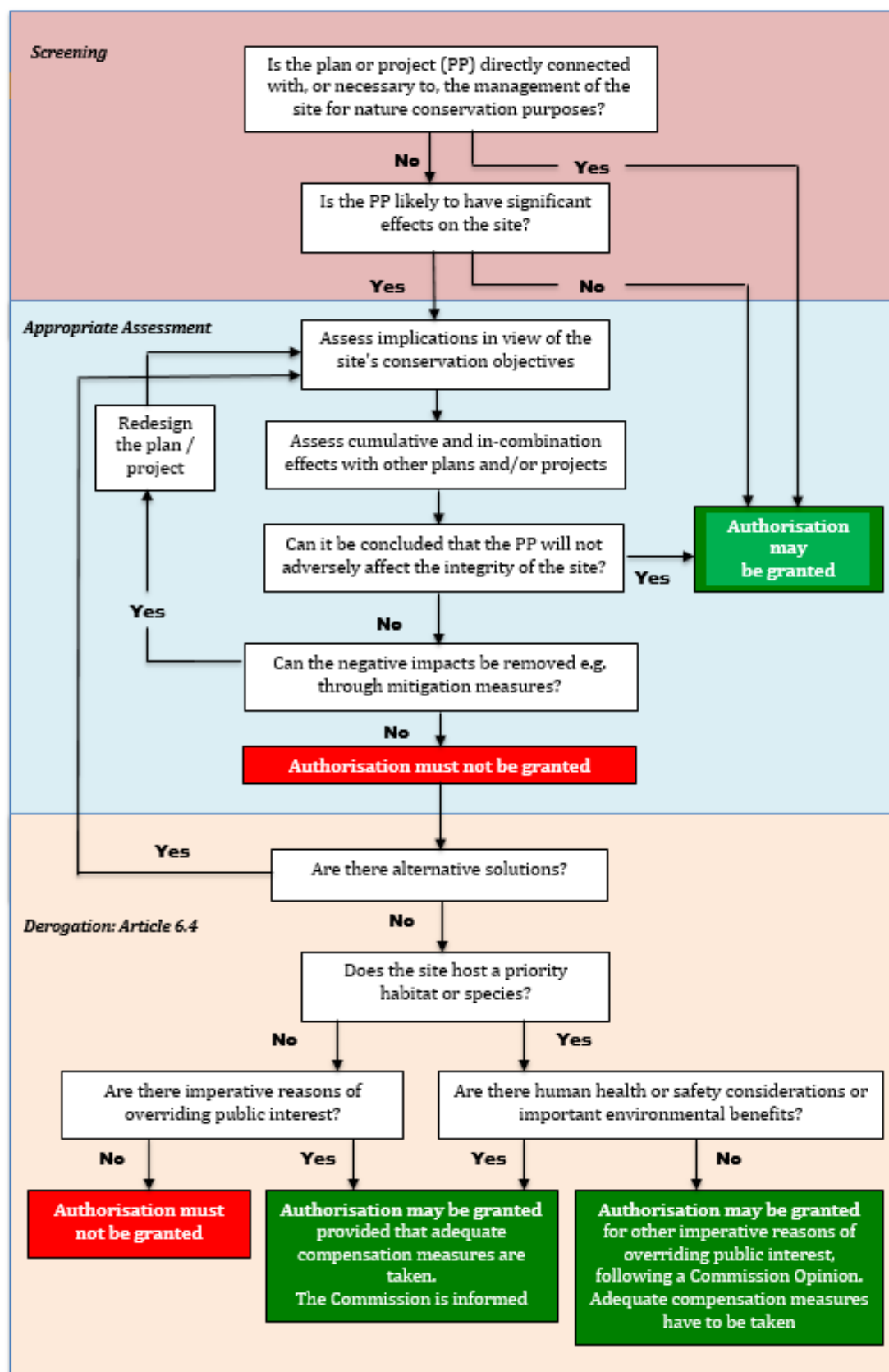
	AA	EIA	SEA
<i>Which types of developments are targeted?</i>	Any plan or project which - either individually or in combination with other plans/projects - is likely to have a significant effect on a Natura 2000 site (excluding plans or projects directly connected to the conservation management of the site).	All projects listed in Annex I. For projects listed in Annex II the need for an EIA shall be determined on a case-by-case basis or through thresholds or criteria set by Member States (taking into account criteria in Annex III).	All plans and programmes , or amendments thereof, which: (a) are subject to preparation and/or adoption by an authority and national, regional and local level; (b) are required by legislative, regulatory or administrative provisions; (c) are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use <u>and</u> set the framework for future development consent of projects listed in Annexes I and II to the EIA Directive; or which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.
<i>What impacts need to be assessed relevant to nature?</i>	The assessment should be made in view of the site's conservation objectives (which relate to the species/ habitat types for which the site was designated). The impacts should be assessed to determine whether or not they will adversely affect the integrity of the site concerned.	Direct and indirect, secondary, cumulative, transboundary, short, medium and long-term, permanent and temporary, positive and negative significant effects on population and human health; biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC; land, soil, water, air and climate and landscape; material assets, cultural heritage and the landscape; and the interaction between these factors.	Likely significant effects on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors.

<i>Who is responsible for the Assessment?</i>	It is the responsibility of the competent authority to ensure that the AA is carried out. In that context the developer may be required to carry out all necessary studies and to provide all necessary information to the competent authority in order to enable it to take a fully informed decision. In so doing the competent authority may also collect relevant information from other sources as appropriate.	The developer supplies the necessary information to be duly taken into account, together with the results of consultations, by the competent authority issuing the development consent.	The SEA Directive leaves Member States with a wide margin of discretion in assigning the responsible authorities for SEA. These could either be the authorities in charge of making a plan/programme, the environmental authorities, who are consulted <i>ex lege</i> on the scope and level of detail of the information that must be included in the environmental report, as well as the draft plan/programme and the accompanying environmental report; or the authorities specifically entrusted with running the SEA procedure.
<i>Are the public/ other authorities consulted?</i>	Compulsory - consultation of the general public before the authorisation of the plan of project Member States shall ensure that the public concerned, in particular environmental NGOs, can participate early and effectively, already at screening, in an authorisation procedure following an appropriate assessment. This involves in particular the possibility to submit any comments, information, analyses or opinions that are considered relevant to the proposed activity.	Compulsory – consultation before adoption of the development proposal. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project (including environmental, local and regional authorities) are given an opportunity to express their opinion on the request for development consent. The same principles apply for consulting the public concerned. In case of likely significant effects on the environment in another Member State, the relevant authorities and the public in that Member State must be consulted.	Compulsory – consultation before adoption of the plan or programme. Member States shall consult the authorities, which by reason of their specific environmental responsibilities are likely to be concerned by the environmental effects of implementing a plan/programme. The public, including the public affected or likely to be affected or having an interest in, the decision-making, including NGOs, should be consulted. The authorities and the public shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure. In case of likely significant effects on the environment in another Member State, the relevant authorities and the public in that Member State must be consulted.

<i>How binding are the outcomes of the Assessment?</i>	Binding. The competent authorities may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site.	The results of the consultations and the information gathered as part of the EIA shall be duly taken into account in the development consent procedure. The decision to grant development consent shall incorporate at least the reasoned conclusion (i.e. the EIA decision) and any environmental conditions attached to the decision.	The environmental report and the opinions expressed shall be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure.
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ANNEX II

Consideration of plans and projects affecting Natura 2000 sites



ANNEX III**Form for submission of information to the European Commission
according to Art. 6(4)**

Member State:

Date:

**Information to the European Commission
according to Article 6 of the Habitats Directive
(92/43/EEC)**

Documentation sent for:

☐ information
(Art. 6(4).1)☐ opinion
(Art. 6(4).2)

Competent national authority:

Address:

Contact person:

Tel., fax, e-mail:

Does the notification contain sensitive information? If yes, please specify and justify

1. PLAN OR PROJECT

Name of the plan/project:

Promoted by:

Summary of the plan or project having an effect on the site:

Description and location of the elements and actions of the project having potential impacts and identification of the areas affected (include maps):

2. ASSESSMENT OF NEGATIVE EFFECTS⁶⁷

Name and code of Natura 2000 site(s) affected:

This site is:

- | | |
|---|--|
| ☐ an SPA under the Birds directive | ☐ an SCI/SAC under the Habitats directive |
| | ☐ hosting a priority habitat/species |
| | ☐ priority habitats/species are affected |

Site's conservation objectives and key features contributing to the site integrity:

Habitats and species that will be adversely affected (e.g. indicate their representativity, if applicable their conservation status according to Article 17 on national and biogeographic level and degree of isolation, their roles and functions in the site concerned).

Importance of the site for the habitats and species that will be affected (e.g. explain the role of the site within the national and biogeographical region and in the coherence of the Natura 2000 network).

Description of adverse effects expected (loss, deterioration, disturbance, direct and indirect effects, etc.); extent of the effects (habitat surface and species numbers or areas of occurrence affected by the project); importance and magnitude (e.g. considering the affected area or population in relation to the total area and population in the site, and possibly in the country) and location (include maps).

Potential cumulative impacts and other impacts likely to arise as a result of the combined action of the plan or project under assessment and other plans or projects.

Mitigation measures included in the project (indicate how these will be implemented and how they will avoid or reduce negative impacts on the site).

⁶⁷ NB.: focus on the adverse effects expected on the habitats and species for which the site has been proposed for the Natura 2000 network. Include all the information that may be relevant in each case, depending on the impacts identified for the species and habitats affected.

3. ALTERNATIVE SOLUTIONS

Identification and description of possible alternative solutions, including the zero option (indicate how they were identified, procedure, methods)

Evaluation of alternatives considered and justification of the alternative chosen (reasons why the competent national authorities have concluded that there is absence of alternative solutions)

4. IMPERATIVE REASONS OF OVERRIDING PUBLIC INTEREST

Reasons to carry out this plan or project in spite of its negative effects

- ☐ Imperative reasons of overriding public interest, including those of a social or economic nature (in the absence of priority habitats/species)
- ☐ human health
- ☐ public safety
- ☐ beneficial consequences of primary importance for the environment
- ☐ other imperative reasons of overriding public interest

Description and justification of the reasons and why they are overriding⁶⁸:

⁶⁸ A different level of detail may be required depending on whether the notification is submitted for information or for opinion.

5. COMPENSATORY MEASURES⁶⁹

Objectives, target features (habitats and species) and ecological processes/functions to be compensated (reasons, why this measures are suitable to compensate the negative effects)

Extent of the compensatory measures (surface areas, population numbers)

Identification and location of compensation areas (including maps)

Former status and conditions in the compensation areas (existing habitats and their status, type of land, existing land uses, etc.)

Expected results and explanation of how the proposed measures will compensate the adverse effects on the integrity of the site and will allow preserving the coherence of the Natura 2000 network

Time schedule for the implementation of the compensatory measures (including long-term implementation), indicating when the expected results will be achieved.

Methods and techniques proposed for the implementation of the compensatory measures, evaluation of their feasibility and possible effectiveness

Costs and financing of the proposed compensatory measures

Responsibilities for implementation of compensatory measures

Monitoring of the compensatory measures, where envisaged (e.g. if there are uncertainties concerning the effectiveness of the measures), assessment of results and follow-up

⁶⁹ A different level of detail may be required depending on whether the notification is submitted for information or for opinion.