



# **Protection and conservation regime under the Habitats and Birds Directives**

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## Directive 2009/147/EC on the conservation of wild birds (Birds Directive) [Council Directive 79/409/EEC]

### **Article 4**

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

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

The legal provision concerning the actual management of the sites is set in the Art. 4 of the Birds Directive, which requires for the species mentioned in Annex I the establishment of special conservation measures.



2. Member States shall take **similar measures for regularly occurring migratory species not listed in Annex I**, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance.

3. Member States shall send the Commission all relevant information so that it may take appropriate initiatives with a view to the coordination necessary to ensure that the areas provided for in paragraphs 1 and 2 form a **coherent whole which meets the protection requirements of these species** in the geographical sea and land area where this Directive applies.

4. In respect of the protection areas referred to in paragraphs 1 and 2, 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**. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.

Legal provision / self-explanatory



## Directive 92/43/EC on the conservation of natural habitats and of wild fauna and flora (Habitats Directive)

### *Article 4*

4. Once a site of Community importance has been adopted in accordance with the procedure laid down in paragraph 2, the Member State concerned shall designate that site as a **special area of conservation** as soon as possible and **within six years at most**, establishing priorities in the light of the importance of the sites for the maintenance or restoration, at a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which those sites are exposed.

5. 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)**.

Legal provision / self-explanatory



### **Article 6**

1. 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. 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.

Legal provision / self-explanatory

Art. 6(1) is applied only to SACs



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

Legal provision / self-explanatory



4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for **imperative reasons of overriding public interest**, including those of a social or economic nature, the Member State shall take all **compensatory measures** necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted. Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.

Legal provision / self-explanatory



### **Article 7**

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 recognized 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.

Legal Provision; From the moment a site is classified as an SAC according to the Birds Directive it is also subject to the present provisions.



## Objectives of both Directives

*Within all Natura 2000 sites:*

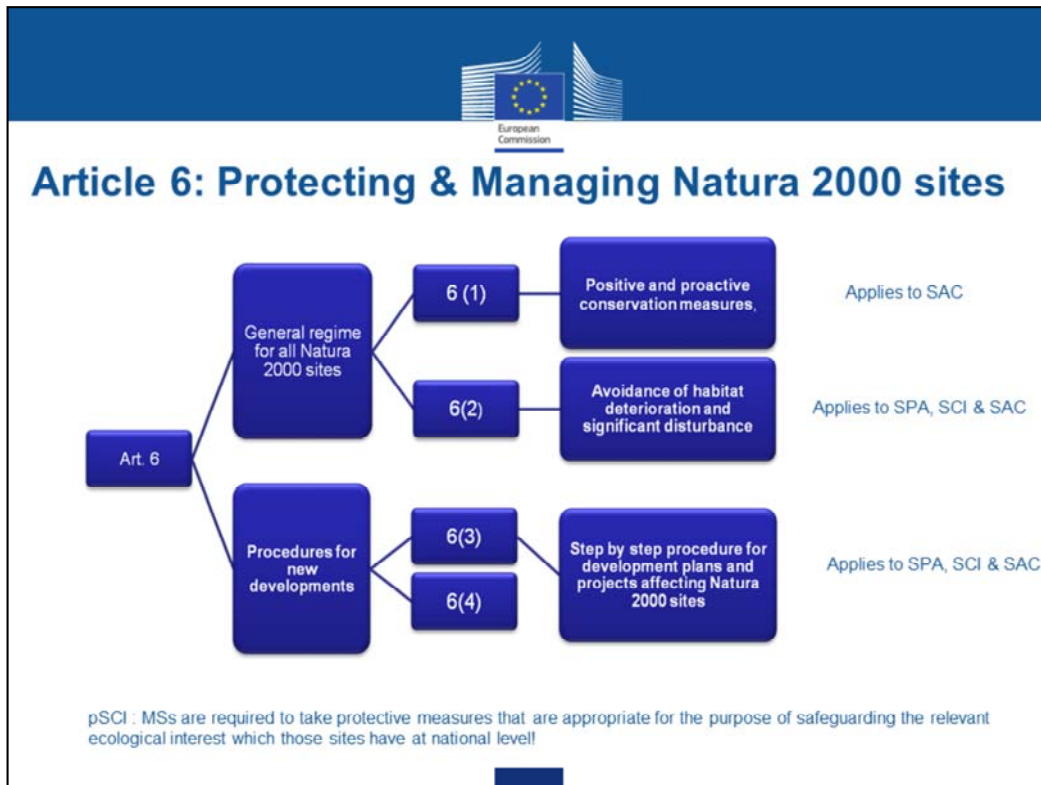
- ❖ *avoid disturbance the species and/or deterioration of habitats for which the site has been designated;*
- ❖ *maintain and restore those habitats and species to a favourable conservation status in their natural range*



***The ultimate objective is to ensure that the species and habitats reach «favourable conservation status»***

Brief overview of the objectives of both Directives contributing to the overarching target of reaching a “favourable conservation status”.

Twofold objective: i. avoidance disturbance the species and/or deterioration of habitats for which the site has been designed [preventive approach]  
ii. Maintain and restore those habitats and species to a favourable conservation status in their natural range [positive/proactive conservation action]



6(1) and 6(2) constitute the general regime, which applies to all Natura 2000 sites.

6(3) and 6(4) concern the specific procedural provisions for new plans and projects, which may have significant effects on Natura 2000 sites [assessment and authorization procedure].

Based on this provision the question that naturally follow is “what about conservation measures for SPAs”? The answer can be found in the general provision of Art. 4 of Birds Directive and in case law, where the Court held that for the SPAs the Member States have to put in place coherent, complete and specific protective regime to fulfill their objectives.

Moreover, regarding the proposed SCIs, the Court has rules that Member States should take the appropriate protective measures , which will safeguard the sites that are not yet adopted at EU level.



## Article 6(1)

- It applies to **SAC**
- It requires the adoption of the necessary conservation measures – no discretion in this regard for Member States **[1]**
- Goal: to maintain / restore FCS

Commission notes on establishing conservation objectives and measures (all languages)

[http://ec.europa.eu/environment/nature/natura2000/management/guidance\\_en.htm](http://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm)

Conservation measures corresponding to the ecological requirements of the sites.

The main focus of the Art. 6 can be briefly described as an active conservation work, since it encompasses both maintaining and restoring the “favourable conservation status”.

In this field, the Commission has developed together with Member States guiding principles regarding classification for strengthening the efficient implementation of Art. 6 provisions.



## ECJ case law

### [1] C-508/04 (Commission v Austria)

76 Thus, 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 rules or taking decisions to the means to be applied and the technical choices to be made in connection with those measures.

The only case law on 6(1) stressing that the Directive excludes any discretion of the Member States and restricts any latitude of the national authorities when adopting the necessary conservation measures.



## Article 6(2)

- It applies
  - To **SCIs**, as soon as they are put on the list
  - To **SACs**
  - To **SPAs**, as from the entry into force of Directive 92/43/CEE (before this date Article 4(4) of Directive 79/409/CEE applies)
- Obligation of general protection "on-going in nature" **[1]**
- Margin of discretion for competent authorities in application **[2]**
- It is also applicable to activities not requiring authorization
- It is also applicable to natural developments **[3]**
- It is also applicable to the implementation of projects authorized before Article 6(3) was applicable **[4]**
  - It might require a subsequent review – if so, it should be in line with Article 6(3) **[5]**

-Scope of Art. 6(2).

-Summary of the main aspects of this legal provision based on the relevant CJEU case law.



## Article 6(2) (cont.)

- No need to prove a cause and effect relationship between an operation and significant disturbance **[6]**
- It is not enough for a MSs to initiate proceedings/imposing penalties: MSs must avoid deterioration/disturbance! **[7]**
- It also applies to existing activities/processes – not only NEW ones **[8]**
- It might imply the implementation of active measures **[9]**

(cont.)



## ECJ case law

### [1] C-399/14 (Grüne Liga Sachsen eV and Others)

37. That provision {article 6(2)} establishes a **general obligation of protection** consisting of taking appropriate protective measures so as to avoid deterioration as well as disturbance which could have significant effects in the light of the directive's objectives (see, to that effect, judgments in *Waddenvereniging and Vogelbeschermingsvereniging*, C-127/02, EU:C:2004:482, paragraph 38; *Commission v Italy*, C-304/05, EU:C:2007:532, paragraph 92, and *Sweetman and Others*, C-258/11, EU:C:2013:220, paragraph 33). As the Advocate General pointed out in point 43 of her Opinion, that **obligation is ongoing in nature**.

This Court Ruling affirms that the Art. 6 (2) establishes a general obligation of protection, which has an ongoing nature.



## ECJ case law

### [2] C-399/14 (Grüne Liga Sachsen eV and Others)

40. The term 'appropriate steps' contained in Article 6(2) of the Habitats Directive implies that Member States **enjoy discretion when applying that provision.**

Interpretation of the crucial term "appropriate steps" by highlighting that Member States "enjoy discretion when applying this provision".



## ECJ case law

### **[3]** C-6/04 (Commission v. United Kingdom)

Article 6(2) of the Habitats Directive obliges the Member States to avoid the deterioration of natural habitats and the habitats of species. It is clear 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.

In this case against UK the Court stated that the Member States are obliged to adopt measures in order to avoid external man-caused impairment and disturbance and measures to prevent natural developments (i.e. floods or fires, which destroy some natural habitats)



## ECJ case law

### [4] C-399/14 (Grune Liga Sachsen eV and Others)

33. The Court has nevertheless held that, **even if a project was authorised before the system of protection laid down by the Habitats Directive became applicable to the site in question and**, accordingly, such a project was not subject to the requirements relating to the procedure for prior assessment according to Article 6(3) of that directive, its **implementation nevertheless falls within the scope of Article 6(2) of that directive.**

In this case, the Court stressed that even if a project was authorized before the system of protection laid down by the Habitats Directive became applicable, it nevertheless falls within the scope of Art. 6 (2) of that Directive.



## ECJ case law

### [5] C-399/14 (Grüne Liga Sachsen eV and Others)

54. Therefore, should a subsequent review, on the basis of Article 6(2) of the Habitats Directive, prove, in the present case, 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.**

In that case the Court shed light on the ex post environmental assessment of a damaging project highlighting the need of taking mitigation measures to stop/control the damaging results to the aspects that caused the deterioration of the site.



## ECJ case law

### [6] C-404/09 (Commission v Spain)

142. Moreover, in order to establish a failure to fulfil obligations within the meaning of Article 6(2) of the Habitats Directive, the Commission does not have to prove a **cause and effect relationship** between a mining operation and significant disturbance to the capercaillie. Since Article 6(2) and (3) of the Habitats Directive are designed to ensure the **same level of protection, it is sufficient for the Commission to establish the existence of a probability or risk that that operation might cause significant disturbances for that species** (see, to that effect, Commission v France, paragraph 32, and Case C-2/10 Azienda Agro-Zootecnica Franchini and Eolica di Altamura [2011] ECR I-0000, paragraph 41).

In this case, the Court held that the Commission has to establish the existence of a probability or risk that that operation might cause significant disturbances for that species.

The Commission in that case did not have to demonstrate damage but only that there has been a *high risk* of damage from a specific activity in order to evoke art. 6 (2).



## ECJ case law

### [7] C-504/14 (Commission v Greece)

55. By **confining itself** (i) to **bringing criminal proceedings** against the executives of the company that built the roads in question and imposing **administrative penalties** on that company and (ii) to claiming, before the **national courts, that the roads concerned are illegal and must be removed**, the Hellenic Republic has failed to fulfil the specific obligation imposed on it by Article 6(2) of Directive 92/43 (see, by analogy, judgment of 9 November 1999, Commission v Italy, C-365/97, EU:C:1999:544, paragraph 109).

56. As the Commission submits, the Hellenic Republic should have acted to **ensure that those thoroughfares did not remain operational and that use of them did not significantly disturb the Caretta caretta sea turtle or impair the dune habitats located in the Kyparissia area.**

In this ruling, the Court stated that criminal proceeding or administrative penalties are not sufficient for ensuring compliance with the requirements of Art. 6(2).



## ECJ case law

### [8] C-504/14 (Commission v Greece)

100. As regards the Hellenic Republic's argument that street lighting was in place before such facilities were subject to an appropriate assessment pursuant to Directive 92/43, it is sufficient to note that, under that directive, the prohibition on deterioration laid down therein is **not limited** to an obligation, on the part of the Member State concerned, **to prohibit or bring to an end only 'new' harmful activities**.

In that case, the Court clarified that the fulfillment of the requirements of the Art. 6 (2) includes positive conservation measures as well.



## ECJ case law

### [9] C-404/09 (Commission v Spain)

135. In that respect, it should be recalled that the protection of SPAs is not to be limited to measures intended to avoid external anthropogenic impairment and disturbance but must also, according to the situation that presents itself, **include positive measures to preserve or improve the state of the site.**

Same content with the previous ruling.



## Application of Article 6(3) and 6(4)

- Possible negative impact on Natura 2000 site?
  - No ⇒ OK
  - Yes ⇒ Appropriate Assessment (AA)
    - No impact ⇒ OK
    - Negative impact ⇒ Alternatives?
      - There are alternatives ⇒ no authorization ⇒ new AA
      - No alternative ⇒ Imp. Reasons of Overriding Public Interest?
        - No IROPI ⇒ no authorization
        - IROPI ⇒ Priority habitats/species affected?
          - No ⇒ OK with compensation measures, notification to EC
          - Yes ⇒ Commission opinion required

This slide reflects the whole process regarding the assessment and authorization of plans and projects, which may have significant effects on NATURA 2000 sites.

The whole process has many similarities to the standard EIA process in the sense that this assessment begins with a kind of screening asking whether the envisaged plan or project is likely to have a negative impact on the site.

If on the basis of scientific data/evidence, the answer is negative, the project is excluded from the further steps.

If the answer is affirmative (that it's likely to have negative impacts), the obligation is to carry out the Appropriate Assessment (AA) (ecological assessment).

This AA has to be carried out by the country under the responsibility of the competent authority focusing mainly on the conservation objectives of the sites.

Following this ecological assessment, if the conclusion is that it will not disturb the integrity of the site, then the activity can go ahead.

At this stage, ~~it must be also assessed~~ the possible mitigation measures, which can either remove or reduce the impact on the site (clear, effective, binding mitigation measures) are to be considered.

In case of a negative conclusion in the previous stage, the plan/project can still go ahead by examining if there are better alternatives. If there are, the authorization is not given and it must take place a new AA for these alternatives, which may lead to better final conclusion.

In case there are no better alternatives, still the project can go ahead under specific circumstances. Those are, first of all, invoking Imperative Reasons of Overriding Public Interest (IROPI).

The Directive itself gives already some reasons to justify this «test» including public health and safety, security, major environmental benefits.

If these IROPI cannot be evoked, this is the end of the process for this specific plan-project.

If there is some good justification for such IROPI, the project can continue subject to compensation for the unavoidable loss of the habitats due to this particular project.

In particular, the Member State concerned has to inform the Commission about these reasons and the compensation measures as well as the whole process which took place.

In case priority habitats/species are affected, the only reasons that can be evoked are those listed in the text of the Directive; or other IROPI proposed by Member States subject to an opinion by the Commission.



## Article 6(3)

- It applies
  - To **SCIs**, as soon as they are put on the list
  - To **SACs**
  - To **SPAs**, as from the entry into force of Directive 92/43/CEE (before this date Article 4(4) of Directive 79/409/CEE applies)
- It provides the same level of protection as Article 6(2) **[1]**
- It is a preliminary examination **[2]**
- It is a two steps procedure - triggering if there is the mere probability that the plan or project will have significant effects on the site – in case of doubt, AA should be done! **[3]**
- It has to be read in light of the precautionary principle **[3]**

Scope of the art. 6 (3).

Summary of the important aspects regarding art. 6 (3) based on the relevant CJEU case law.



## Article 6(3)

- It implies that competent authorities might only authorise a plan or project after having ascertained that it will not adversely affect the integrity of that site – no reasonable doubt remaining (at the time of adoption of the decision)! **[4]**
- Based on best available scientific knowledge, no lacunae, complete **[4]**
- Only protective measures aiming at avoiding or reducing the impact on the site can be considered **[5]**
- Compensation measures cannot be taken into account, e.g. future creation/restoration of habitats **[5]**
- It also applies to activities repeated for several years (licenced yearly) **[6]**
- Application of Article 6(3) renders superfluous the application of Article 6(2) **[7]**

(cont.)



## Article 6(3)

- Significant effect on the site is linked to the conservation objectives **[8]**
- Not important if plans/projects are inside or outside – even long distances! **[9]**
- No general exemptions from categories of projects
- No exemption for plans or projects adopted through legislative procedure **[10]**
- All aspects of the projects should be taken into account **[11]**
- Cumulative impacts – including from projects authorized before transposition of the Directive **[12]**
- Ex-post monitoring not sufficient to ensure compliance with Article 6(3) **[13]**

(cont.)



## ECJ case law

### [1] C-404/09 (Commission v Spain)

142. Moreover, in order to establish a failure to fulfil obligations within the meaning of Article 6(2) of the Habitats Directive, the Commission does not have to prove a cause and effect relationship between a mining operation and significant disturbance to the capercaillie. Since **Article 6(2) and (3) of the Habitats Directive are designed to ensure the same level of protection**, it is sufficient for the Commission to establish the existence of a probability or risk that that operation might cause significant disturbances for that species.

Art. 6(2) and 6(3) ensure the same level of protection.



## ECJ case law

### [2] C-127/02 (Waddenzee)

38. The answer to the second question must therefore be that Article 6(3) of the Habitats Directive establishes a procedure intended to ensure, by means of a **preliminary examination**, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site, while Article 6(2) of the Habitats Directive establishes an obligation of general protection consisting in avoiding deterioration and disturbances which could have significant effects in the light of the Directive's objectives, and cannot be applicable concomitantly with Article 6(3).

Landmark Ruling in relation to the application of the art. 6(3) with many clarifications as regards the screening phase, the actual assessment as well as its conclusions.

In this context, screening/preliminary examination is essential part of the whole process.



## ECJ case law

### [3] C-127/02 (Waddenzee)

41. Therefore, the triggering of the environmental protection mechanism provided for in Article 6(3) of the Habitats Directive does not presume – as is, moreover, clear from the guidelines for interpreting that article drawn up by the Commission, entitled ‘Managing Natura 2000 Sites: The provisions of Article 6 of the “Habitats” Directive (92/43/EEC)’ – 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.**

44. In the light, in particular, of **the precautionary principle**, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned (see, by analogy, inter alia Case C-180/96 *United Kingdom v Commission* [1998] ECR I-2265, paragraphs 50, 105 and 107). Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that **in case of doubt as to the absence of significant effects such an assessment must be carried out**, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Article 2(1) thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora

The activation of the mechanism provided for in the art. 6 (3) of the Habitats Directive requires the mere probability that the plan or the project definitely has significant effects on the protected site.

The ruling explicitly refers to the precautionary principle and states that in case of doubt as to the absence of significant effects such an assessment must be carried out.



## ECJ case law

### **[4] C-127/02 (Waddenzee)**

54 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 objectives must be identified in the light of the **best scientific knowledge in the field**. Those objectives may, as is clear from Articles 3 and 4 of the Habitats Directive, in particular Article 4(4), be established on the basis, inter alia, of the importance of the sites for the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I to that directive or a species in Annex II thereto and for the coherence of Natura 2000, and of the threats of degradation or destruction to which they are exposed.

Concerning the actual assessment, this has to be done based on the best scientific knowledge.



## ECJ case law

### [4] (cont)

57 So, **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**.

58 In this respect, it is clear that the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the **precautionary principle** (see Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 63) 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.

59 Therefore, pursuant to Article 6(3) of the Habitats Directive, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned, in the light of the site's conservation objectives, are to authorise such 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** .

.....and when doubt remains, then the competent authority has to refuse authorization.

The authority should authorize the specific activity only if they have made certain that it will not adversely affect the integrity of that site [no reasonable scientific doubt should remain about these effects].



## ECJ case law

### [5] C-521/12 (Briels)

28 Consequently, the application of the **precautionary principle** in the context of the implementation of Article 6(3) of the Habitats Directive requires the competent national authority to assess the implications of the project for the Natura 2000 site concerned in view of the site's conservation objectives and taking into account the **protective measures forming part of that project aimed at avoiding or reducing any direct adverse effects for the site, in order to ensure that it does not adversely affect the integrity of the site.**

29 However, **protective measures provided for in a project which are aimed at compensating for the negative effects of the project on a Natura 2000 site cannot be taken into account** in the assessment of the implications of the project provided for in Article 6(3).

Important ruling. Which again refers to the precautionary principle and elucidated the following points:

-firstly, the competent authority should assess the protective (mitigation) measures forming part of that project aimed at avoiding or reducing any direct adverse effects for the site, in order to ensure that it does not adversely affect the integrity of the site.

-moreover, this ruling made distinction between mitigation and compensation measures by stating that protective measures provided for in a project which are aimed at compensating for the negative effects of the project on a Natura 2000 site cannot be taken into account in the framework of the assessment of the art. 6(3). Otherwise, it could be a total destruction of the core-logic of the Directive.



## ECJ case law

### **[6]C-127/02 (Waddenzee)**

28 The fact that the activity has been carried on **periodically for several years** on the site concerned and that a licence has to be obtained for it every year, each new issuance of which requires an assessment both of the possibility of carrying on that activity and of the site where it may be carried on, **does not in itself constitute an obstacle to considering it, at the time of each application, as a distinct plan or project within the meaning of the Habitats Directive.**

The periodic implementation of activities for several years does not constitute itself an obstacle to considering the project in the time of its yearly application.



## ECJ case law

### [7] C-127/02 (Waddenzee)

35 The fact that a plan or project has been authorised according to the procedure laid down in Article 6(3) of the Habitats Directive **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).

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 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).

37 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 national 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.

The application of Art. 6(3) renders the application of art. 6(2) superfluous.



## ECJ case law

### [8] C-127/02 (Waddenzee)

46 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.**

47 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.

48 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.

This ruling made clear that the directive is not about a general ecological assessment but about a focused assessment on those features that have justified the designation of the site/the inclusion of the site in the network.



## ECJ case law

### **[9]** C-142/16 (Commission v Germany) (Moorburg)

29 It should be noted at the outset that **the fact that the project to which the environmental assessment being challenged relates is not situated in the Natura 2000 areas concerned, but rather at a considerable distance from them, upstream of the Elbe, in no way precludes the applicability of the requirements laid down in Article 6(3) of the Habitats Directive.** It is clear from the wording of that provision that 'any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon' is subject to the environmental protection mechanism it prescribes.

In this case the Court ruled that projects located outside the Natura 2000 sites, which have effects within the protected sites, are concerned by the Appropriate Assessment obligation.



## ECJ case law

### [10] C-182/10 (Solvey and Others)

69. Those 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.

This ruling deals with activities (plans and projects) authorized through a separate legislative act (i.e. parliamentary decision) stressing that these activities as well are not excepted from the Art. 6 (3) assessment.



## ECJ case law

### **[11] C-258/11 (Sweetman)**

40. Authorisation for a plan or project, as referred to in Article 6(3) of the Habitats Directive, may therefore be given only on condition that the competent authorities – **once all aspects of the plan or project** have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field – are certain that the plan or project will not have lasting adverse effects on the integrity of that site. That is so where no reasonable scientific doubt remains as to the absence of such effects (see, to this effect, Case C-404/09 Commission v Spain, paragraph 99, and Solvay and Others, paragraph 67).

Irish case in which the Court clarified that all aspects of the plan or project have to be considered in the assessment.



## ECJ case law

### **[12] C-142/16 (Commission v Germany) (Moorburg)**

61 Under Article 6(3) of the Habitats Directive, national authorities are required, when assessing **cumulative effects**, to take into account **all projects** which, in combination with the project for which an authorisation is sought, are likely to have a significant effect on a protected site in the light of the objectives pursued by that directive, **even where those projects precede the date of transposition of that directive.**

This German case referred to the need for properly assessing the cumulative effects including projects, which precede the date of transposition of the present Directive.



## ECJ case law

### [13] C-142/16 (Commission v Germany) (Moorburg)

42 In that regard, it should be noted that **it is at the date 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.

43 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.**

This case clarified that monitoring during different phases of the project cannot be considered sufficient to ensure fulfillment of Art. 6 (3) obligation. Monitoring *per se* is useful but not fulfillment of art. 6(3) requirement.



## Article 6(4)

- It applies
  - To **SCIs**, as soon as they are put on the list
  - To **SACs**
  - To **SPAs**, as from the entry into force of Directive 92/43/CEE (before this date Article 4(4) of Directive 79/409/CEE applies)
- It is an exception to the rule – must be interpreted strictly **[1]**
- Absence of alternatives must be demonstrated **[1]**
- It can only be applied after AA **[2]**
  - Assessment of IROPI against damage caused
  - Nature of compensation measures
- Compensation aims to protect the overall coherence of the network (measures can be implemented inside or outside the affected site) **[3]**

Art. 6 (4) establishes a kind of derogation regime to the general obligation set in the Art. 6(3).

Art. 6(4) as an exception to the general rule must be interpreted strictly and cannot be immediately (disregarding the process of the art. 6(3), even if it is clear that the project could justify an IROPI) activated

Summary of the main aspects regarding Art. 6(4) based on the relevant CJEU case law.



## ECJ case law

### [1] C-239/04 (Commission v Portugal - Castroverde)

35 That provision, which permits a plan or project which has given rise to a negative assessment under the first sentence of Article 6(3) of the Habitats Directive to be implemented on certain conditions, must, as a derogation from the criterion for authorisation laid down in the second sentence of Article 6(3), **be interpreted strictly**.

36 Thus, the implementation of a plan or project under Article 6(4) of the Habitats Directive is, *inter alia*, subject to the condition that the absence of **alternative solutions be demonstrated**.

Older case against Portugal regarding the strict interpretation of the Art. 6 (4) and also the need for demonstrating the absence of alternative solutions before jumping into the Art. 6(4) regime.



## ECJ case law

### [2] C-304/05 (Commission v Italy)

83 Furthermore, 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.

This case highlighted that the assessment of any IROPI requires a weighing up against the damage caused to the site by the plan or project under consideration.

In addition to that, in order to determine the nature of any compensatory measures, the damage to the site must be precisely identified.



## ECJ case law

### [3] C-521/12 (Briels)

38 It should be observed in that regard that, in the application of Article 6(4), the fact that the measures envisaged have been implemented on the Natura 2000 site concerned has no bearing on any 'compensatory' measures for the purposes of that provision. For the reasons set out by the Advocate General in point 46 of her Opinion, Article 6(4) of the Habitats Directive covers **any measure liable to protect the overall coherence of Natura 2000, whether it is implemented within the affected site or in another part of the Natura 2000 network.**

This ruling highlighted that art. 6(4) of the Habitats Directive covers any measure liable to protect the overall coherence of Natura 2000, whether it is implemented within the affected site or in another part of the Natura 2000 network.

Based on that, "compensatory measures" can be either through improving habitats within an existing or another site or, as a last resort, by designating another site.



## Typical problems encountered with applying Article 6(3)/6(4)

- ❖ Trying to avoid Art 6.3. AA - inappropriate screening, non-respect of the Precautionary Principle
- ❖ Wrong interpretation of 'necessary for the management of the site', e.g. no AA of forest management plans
- ❖ No or inappropriate assessments:
  - ❖ e.g. no AA on projects outside Natura 2000 but which affect Natura 2000 nearby or downstream
  - ❖ effects on species or habitats not well assessed, poor expert input
  - ❖ lack of consideration of cumulative impacts (salami slicing)
- ❖ Mixing-up mitigation and compensation measures

Self-explanatory



## Typical problems encountered with applying Article 6(3)/6(4 )(cont.)

- ❖ Trying to avoid going to Art 6.4.
- ❖ Negative results of assessments not respected
- ❖ No/insufficient alternatives considered
  - ❖ Economic arguments only are not enough
  - ❖ Best alternatives are not assessed on purpose so as to stick to old plans
  - ❖ Zero alternative not assessed
- ❖ No real IROPI
- ❖ No or inadequate compensation measures
  - ❖ Restoration takes time, so more than 1:1 in size expected
  - ❖ Using normal management measures such as restoration of existing sites as compensation

Self-explanatory



## Commission guidance documents

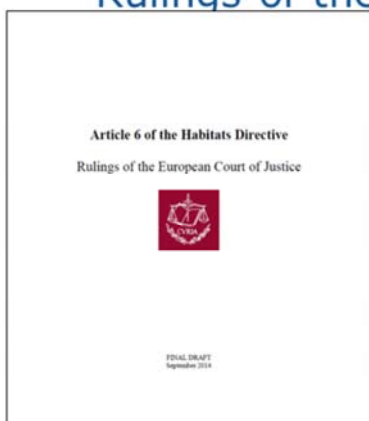
- ❖ Managing Natura 2000 sites – the provisions of Art. 6
- ❖ Assessment of plans and projects : methodological guide Art 6 (3) & (4)
- ❖ Sector specific guidance:
  - ❖ Wind energy
  - ❖ Non-energy extractive industries
  - ❖ Ports & estuaries
  - ❖ Agriculture
  - ❖ Inland Waterways
  - ❖ Aquaculture
  - ❖ Forthcoming: Hydro-power



For all these aspects the Commission published a lot of guidance documents in cooperation with Member States and stakeholders in order to facilitate the tasks of the national competent authorities despite their non binding character.



## Publication on "Article 6 of the Habitats Directive Rulings of the European Court of Justice"



[http://ec.europa.eu/environment/nature/legislation/caselaw/index\\_en.htm](http://ec.europa.eu/environment/nature/legislation/caselaw/index_en.htm)

(until 2015)



# Conclusions



- ❖ Economic Development **compatible** with Natura 2000
- ❖ Birds and Habitats Directives provide clear framework within which appropriate decisions can be taken
- ❖ The «Appropriate Assessment» is a key tool of Habitats Directive in ensuring **sustainable development** and **nature protection**.
- ❖ **Precautionary principle** applies
- ❖ **Competent authorities** have key responsibility to ensure the standards for effective delivery of AA (conservation objectives, status of habitats/species, etc.)
- ❖ Practitioners need to have necessary **expertise** for delivery of assessments
- ❖ Guidelines and standards very important in helping ensure quality and consistency of assessments

Self-explanatory



**THANK YOU FOR YOUR ATTENTION**



[http://ec.europa.eu/environment/nature/index\\_en.htm](http://ec.europa.eu/environment/nature/index_en.htm)