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Training module

**HOW TO HANDLE COURT PROCEEDINGS INVOKING NON-COMPLIANCE
WITH EU NATURE PROTECTION LAW
FOCUS ON SITE PROTECTION**

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Implementation of Article 6 of the Habitats Directive



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Please feel free to interrupt



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Art. 6 of the Habitats Directive has been the subject of extensive jurisprudence by the CJEU. Therefore, many questions have already been clarified, but some points may still require a reference to Luxembourg.

On the Advocate General

- Member of the Court
- Advises the Court by independently preparing Opinions
- Does not participate in deliberations
- Opinion is not a Judgment
- Only the Judgment has the authority of the Court
- Opinions can illuminate the background
- Presentation is my personal view



This slide aims to illuminate the background of the author and original presenter of this presentation. There is no need for others to retain it.

Article 252 TFEU

The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement.

Remarks:

The Council has decided to increase the number of AGs to eleven.

The AG is not assigned to any particular chamber of the court. She does not participate in the deliberations of the judgment.

Relevant Legislation

- The Habitats Directive: Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 7)
- The Birds Directive: Directive 2009/147/EC of 30 November 2009 on the conservation of wild birds (OJ L 20, 7) (former Directive 79/409)



Self-Explanatory

Site Protection

- Applies to designated Habitat and Bird sites (Art. 4 (5), 6, 7 Habitats Directive)
- Art. 6(1) management of Habitat sites
- Art. 6(2) general prevention of deterioration and disturbance of sites
- Art. 6(3) assessment of measures + authorisation if they don't adversely affect the integrity of the site
- Art. 6(4) justification of measures that could affect the integrity of the site
- Before designation different regimes apply to bird and habitat sites.



This is an overview of the provisions of Habitats Directive on site protection.

Overview

- Appropriate Assessment (Art. 6(3) 1st sentence) and Regular Authorisation (Art. 6(3) 2nd sentence)
- Derogation (Art. 6(4))
- Prohibition of deterioration (Art. 6(2))
- Site Management (Art. 6(1))



Structure of the presentation

Art. 6(3) - Appropriate Assessment (AA) + regular permit

“Any plan or project² not directly connected with or necessary to the management^{2a} of the site¹ but likely to have a significant effect thereon,³ either individually or in combination with other plans or projects,⁶ shall be subject to appropriate assessment⁴ 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 4,⁷ the competent national authorities shall agree⁵ to the plan or project only after having ascertained⁵ that it will not adversely affect the integrity of the site^{5a} concerned and, if appropriate, after having obtained the opinion of the general public.^{5b}”



Text of the provision + structure of this part of the presentation

Art. 6(3) 1st sentence - Appropriate Assessment

- Site:
 - SCI - site placed on the Community list (Art. 4(5))
 - SAC - designated special area of conservation (Art.4(4)), application implied
 - SPA - special protection areas according to Art. 4(1) and (2) of the Birds Directive (Art. 7 of the Hab. Dir.)
- Not:
 - pSCI - proposals for the Community list
 - Potential pSCI - sites having characteristics of an SCI
 - De facto SPAs - sites having the characteristics of an SPA but not having been designated



The appropriate assessment applies to

- Sites of Community Importance that the Commission has placed on the Community list as prescribed by Art. 4(5),
- Special Areas of Conservation that MS have designated according to Art. 4(4) (While this is not explicitly spelled out it results from the context: Art. 6(1) and (2) explicitly refer to SACs, therefore “site” in Art. 6(3) should have the same meaning. Moreover, the Directive doesn’t say that SACs are no longer SCIs.) and
- Special Protection Areas under Art. 4 of the Birds Directive as prescribed by Art. 7 of the Habitats Directive.

It does not apply to MS proposals of SCIs or sites that should be proposed. Both come under a special protection regime (see *Dragaggi and Others*, EU:C:2005:16, *Bund Naturschutz in Bayern and Others*, EU:C:2006:579, and *COM/Cyprus (Cypriot Grass Snake)*, EU:C:2012:143). Also de facto SPAs, that is areas meeting the conditions for designation under Art. 4 of the Birds Directive, but have not been designated, are not subject to Art. 6(3) of the Habitats Directive, but still come under the stricter protection of the regime of the Birds Directive (*COM/France (Basses Corbières)*, EU:C:2000:670).

Art. 6(3) 1st sentence - Appropriate Assessment

- Any plan or project
 - No definition by the Habitats Directive, but the Waddenzee case, EU:C:2004:482, para 24, refers to the definition of projects by the EIA Directive:
 - 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
 - COM v Germany, EU:C:2006:3, highlights the potential of significant impacts of certain activities
 - COM v Italy (Altamura planning), EU:C:2007:578, para 41 excludes preliminary administrative reflection
- Any other impact is still subject to Art. 6(2)!



The specific meaning of “plan or project” is not clear, mainly because there is no definition. The definition of the EIA Directive covers activities that will certainly be projects, but it should not be considered exhaustive. The subsequent case against Germany highlights that potential significant effects of the activity in question are also relevant. And the Italian case draws the distinction in view of the effect of the administrative measure in question: only consent, even preliminary consent, requires the assessment, but mere reflection doesn’t.

Effectively, consent of the authorities is central because without some administrative procedure there will be no framework for the assessment and under Art. 6(3) 2nd sentence the purpose of the assessment is to inform the decision of MS authorities. Therefore, activities that could have significant effects on a site, but do not require consent probably cannot be subjected to an appropriate assessment as such. Conversely, it is possible that the MS has not correctly transposed Art. 6(3) by allowing these activities without making them subject to a consent requirement.

In any event, even the absence of a plan or project do not exclude activities from the rules on site protection because Art. 6(2) imposes similar substantial protection standards as Art. 6(3). While it may be more difficult to enforce Art. 6(2) without an appropriate assessment the operator of the activity will also lose the legal certainty resulting from a permit based on an assessment.

Art. 6(3) 1st sentence - Appropriate Assessment

- Any plan or project not directly connected with or necessary to the management of the site
 - -> Art. 6(1), no(t much?) jurisprudence yet
 - COM/France, EU:C:2010:114, paras 50, 51 and 56: contracts which seek to attain conservation and restoration objectives are not under all circumstances directly connected with or necessary for the management of a site



The meaning of the exemption for management measures has not yet been exhaustively explored by the Court. However, the French case indicates that the direct connection with or the necessity for the management of the site will need to be demonstrated with regard to the circumstances of the case. It's not excluded that identical measures will sometimes fall under Art. 6(3) and sometimes be excluded, depending on the facts of the case.

For example, the cutting and removal of trees from a protected forest will normally not be a management measure. But if the conservation objectives seek to create more open stands as a habitat for certain species or the replacement of certain tree species with others that are more in line with the conservation objectives (eg. replacement of hybrid poplars or eucalyptus with oaks), the cutting can be part of a management strategy.

Art. 6(3) - Appropriate Assessment

- likely to have a significant effect
 - Waddenzee case, EU:C:2004:482, paras 43 and 44, on “likely”:
 - probability or a risk of significant effects
 - in the light of the precautionary principle risk exists if effects cannot be excluded on the basis of objective information
 - meaning (reasonable) doubt as to the absence of significant effects
 - paras 46 ff on “significant”: effects that could undermine the conservation objectives of the site



The triggering condition for an appropriate assessment is that the measure in question is likely to have a significant effect. The CJEU has interpreted the term “likely” in the light of the precautionary principle. Precaution requires that an assessment is conducted if there is reasonable doubt as to the absence of significant effects. If there is such doubt it must be refuted or confirmed by the assessment to ensure that the site is not affected. Mere assumptions are not sufficient to exclude effects, in particular at this stage.

The significance of potential effects depends on the conservation objectives of the sites. Only effects relevant to the objectives can be significant, but if they are relevant they will also be significant.

Art. 6(3) - Appropriate Assessment

- Shall agree ... only after having ascertained
 - Specification of the precautionary principle (Waddenzee case, EU:C:2004:482, para 58)
 - No reasonable scientific doubt may remain as to the absence of adverse effects on the integrity of the site (Waddenzee case, EU:C:2004:482, para 59; COM/Germany (Moorburg), EU:C:2017:301, para 42)
- AA is required before consent is given, subsequent measures are not sufficient (COM/Portugal (Castro Verde), EU:C:2006:665, para 24)



Authorisation of the measure in question is the central element of Art. 6(3). MS consent to a plan or project likely to have significant effects on a protected site is only allowed, if the authorities are certain that the site will not be affected in its integrity. The CJEU has recognised that this provision integrates the precautionary principle into the rules on site protection and sets up a very strict standard. Certainty only is possible in the absence of reasonable scientific doubt.

In view of significant uncertainty about the ecology of protected sites and the necessary prognostic elements in the assessment it can be very difficult to exclude all reasonable scientific doubt.

The CJEU has not yet distinguished between reasonable and unreasonable doubt, but it would be sensible to expect that any reasonable doubt will take the most best scientific knowledge into account and will not be purely hypothetical.

The failure to conduct an AA *before* consent is granted cannot be remedied by a subsequent study. However, such studies can help to justify the continuation of the project.

Example: Impact on Limestone Pavement



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This is the priority habitat type limestone pavement, present in the UK and Ireland.

Art. 6 (3) 2 - adversely affect the integrity of the site

- Lough Corrib site hosts 85 hectares of the priority habitat limestone pavement
- 1.47 hectares would permanently be lost to a road project >> is the integrity of the site affected?
- **Any Opinion?**
- Lasting and irreparable loss of the whole or part of a priority habitat whose conservation was the objective of the designation adversely affects the integrity of the site (Sweetman, EU:C:2013:220, para 46)



This is a possible question to the audience. Loss of protected habitat area is a rather straightforward example of impacts that would undermine the conservation objectives.

Art. 6(3) - Appropriate Assessment

- Appropriate Assessment of its implications for the site in view of the site's conservation objectives / not adversely affect the integrity of the site:
 - cannot have lacunae and must 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 protected site concerned (Briels, EU:C:2014:330, para 27)
 - best scientific knowledge in the field (Waddenzee case, EU:C:2004:482, para 54)
 - up-to-date Data (Acheloos, EU:C:2012:560, para 115)



The appropriate assessment must be understood in view of its function to exclude reasonable doubt that the integrity site will not be adversely affected, thereby allowing consent under Art. 6(3) 2nd sentence.

If doubt cannot be excluded, the AA may be needed as a foundation for the application of Art. 6(4), cf. Acheloos, EU:C:2012:560, para 114.

As a consequence a very high scientific standard needs to be met and in particular the best scientific knowledge needs to be employed aiming at a comprehensive and up-to-date study.

Up-to-date information can be problematic if the administrative procedure takes a long time and/or if the permit is subject to long court proceedings. It cannot be excluded that the situation at the site has substantially changed by the time a decision is definitive. I would submit that for such cases the relevant aspects of an affected site should be monitored during the time between the initial assessment and the final decision.

Art. 6(3) - Appropriate Assessment

- if appropriate, after having obtained the opinion of the general public
 - Read in isolation, the consultation of the public is discretionary
 - It will be necessary where the plan or project requires an SEA or an EIA
 - Lesoochránárske zoskupenie VLK, EU:C:2016:838, paras 45 ff, reads Art. 6(3) of the Habitats Directive in conjunction with Art. 6(1)(b) of the Aarhus Convention >> recognised environmental NGOs have a right to participate in all AA! (and of access to courts!)



Under Art. 6(3) of the Habitats Directive public participation is not obligatory, but should be undertaken if “appropriate”. However, it may be necessary because of other provisions of EU law, such as the SEA or EIA Directives.

In addition, in 2016 the CJEU interpreted Art. 6(3) of the Habitats Directive in conjunction with Art. 6(1)(b) of the Aarhus Convention.

Under the latter provision each Party to the Convention shall, in accordance with its national law, also apply the provisions [on Public Participation] to decisions on proposed activities not listed in Annex I which may have a significant effect on the environment.

The CJEU considers that the reference to national law relates only to the manner of carrying out public participation. Conversely, a plan or project requiring an AA by definition may have a significant effect on the environment, namely on the protected site in question. Therefore, an environmental NGO, recognised for the purposes of the Convention, has a right to participate in the decision on the plan or project. It should be noted that the recognition of environmental NGOs also is a requirement of EU law, in particular of the EIA Directive.

As a corollary, these NGOs also can challenge decisions on plans or projects subject to an AA in court. More on this in the second presentation.

Art. 6(3) - Appropriate Assessment

[Remediation/Mitigation Measures I], e. g. an underpass system for amphibians

- Not foreseen in the legislation
- Remediation reduces or excludes impacts
 - Mitigation can prevent that the ecological characteristics of a pSCI will be seriously compromised (COM/Spain (Spanish Lynx), EU:C:2010:281)
 - Mitigation can prevent that the integrity of an SCI is adversely affected (Briels, EU:C:2014:330, para 28)
 - Can mitigation exclude the need for an AA? (C-323/17, pending)



Remediation measures are not mentioned in Art. 6, but very important in practice. These measures initially were aiming to reduce or even exclude impacts on the site. For example an underpass system for amphibians can reduce the mortality resulting from a new road project.

In the Spanish Lynx case the Court has recognised that such remediation can ensure compliance with the protection of pSCI. In Briels it was accepted that it could also help to ascertain that an SCI will not be affected in its integrity, allowing consent under Art. 6(3) 2nd sentence.

Currently the question is pending whether in view of foreseen remediation measures it is possible to forego an appropriate assessment.

Art. 6(3) - Appropriate Assessment

[Remediation/Mitigation measures II], e. g. an underpass systems for amphibians

- Disputed: exclusion of impacts by way of compensation
 - Briels, EU:C:2014:330, paras 29 - Compensation cannot exclude that the integrity of a site is adversely affected + 32 - uncertainty of success + 33 ff - circumvention of Art. 6(4)
 - Orleans, EU:C:2016:583: Briels remixed
 - COM/Germany (Moorburg), EU:C:2017:301, para 37 f



A number of recent cases raised the question whether compensation of impacts could also be considered remediation, allowing consent under Art. 6(3) 2nd sentence instead of requiring application of Art. 6(4). Building on the example of an underpass system, such a system could be proposed for an existing road to compensate the impacts of another project that would increase the mortality and disturbance of amphibians, eg. a well-used mountain bike trail or even a quad track passing through the habitat of the amphibians.

The specific cases were about the recreation of a destroyed habitat at another location (Briels), the development of estuary habitats replacing similar habitats that subsequently would be destroyed (Orleans) and a fish pass that aims to compensate increased mortality of fish because of drawing water to cool a power plant (Moorburg). In all cases the CJEU refused consideration of the measure in the context of Art. 6(3), but for the last one it exclusively relied on uncertainty of success. Conversely, the earlier cases additionally relied on the considerations that compensation would not prevent impacts on the integrity of the site and that compensation properly is one of three cumulative conditions for a derogation under Art. 6(4).

Art. 6(3) - Appropriate Assessment

- Either individually or in combination with other plans or projects (cumulative effects)
 - COM/Spain (Spanish Brown Bear), EU:C:2011:768, para 103: absence of analysis of possible cumulative effects with existing projects not permissible
 - COM/Germany (Moorburg), EU:C:2017:301
 - paras 58 - 63: projects predating site protection need to be taken into account when assessing a new plan or project
 - paras 64 - 67: hypothetical future projects do not need to be included



The assessment and relevance of cumulative effects can be very difficult and complex, but as yet has only been superficially addressed by the CJEU.

It is clear that a failure to appreciate cumulative effects with existing projects is not permissible. Moreover, the assessment must cover the effects of pre-existing projects, while purely hypothetical future projects don't need to be considered. In the German case the old project dated from 1958 but still affected the conservation objectives of the relevant sites while the hypothetical project was debated but was very unlikely to be initiated in the foreseeable future.

It is submitted that many complications related to cumulative effects can be avoided by appropriate assessments of strategic plans and, if they arise, be addressed by applying Art. 6(2). For some speculative ideas on this topic see Sobotta, Kumulative Gebietsbeeinträchtigungen in der Verträglichkeitsprüfung und unter dem Einfluss des Verschlechterungsverbots der Habitatrichtlinie, Europäisches Umwelt- und Planungsrecht 2015, 341 (Heft 4).

Art. 6(4) - Derogation

Subject to the provisions of paragraph 4 >> Art. 6(4):
“If, in spite of a negative assessment of the implications for the site⁶⁽³⁾ and in the absence of alternative solutions,² a plan or project must nevertheless be carried out for imperative reasons of overriding public interest,¹ including those of a social or economic nature, the Member State shall take all compensatory measures³ necessary to ensure that the overall coherence of Natura 2000 is protected. ...”



Text of the 1st Subparagraph of Art. 6(4) + structure of the subsection.

Art. 6(4) - Derogation

- Exemption, to be interpreted strictly (COM/Portugal (Castro Verde), EU:C:2006:665, para 35)
- Compliance with conditions must be demonstrated by MS/authorities (burden of proof, COM/Portugal (Castro Verde), EU:C:2006:665, paras 36 and 39)
- Must be based on an AA, because all conditions can only be appreciated in light of its outcome (COM/Italy (Santa Caterina), EU:C:2007:532, para 83)
- However, all conditions require complex and prognostic appraisals and therefore probably imply discretion of the MS



This provision is an exemption, allowing to authorise measures that could not be allowed under Art. 6(3). In EU law any exemption from general rules must be interpreted strictly to avoid the erosion of the general rule.

At least under EU procedural law the party that relies on an exemption must prove that the conditions are present. MS procedural law may be structured differently, but it would probably not comply with EU law to inverse this relationship by requiring that the absence of the conditions for a derogation must be proven.

It can apply only after the implications of a plan or project have been studied in accordance with Art. 6(3). Knowledge of those implications in the light of the conservation objectives relating to the site in question is a necessary prerequisite for the application of Art. 6(4), since, in the absence of those elements, no condition for the 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.

Excursion: Discretion in EU Environmental Law I

- If EU bodies do complex appraisals they, in principle, enjoy broad discretion; judicial review is limited to manifest errors and procedural issues
- Judicial Self-restraint is justified by
 - Technical Expertise & Experience as well as
 - Democratic Legitimacy (in particular for the balancing)



This theory is based on well established jurisprudence that started, for example in the area of competition law (cf. recently Judgment of 15 February 2005, *Commission v Tetra Laval*, C-12/03 P, EU:C:2005:87, para 39; judgment of 8 December 2011, *Chalkor v Commission*, C-386/10 P, EU:C:2011:815, para 54) and has now been applied to many more areas where complex appraisals or political balancing is required, including environmental law (Judgment of 15 October 2009, *Enviro Tech (Europe)*, C-425/08, EU:C:2009:635, para 46; and judgment of 21 July 2011, *Etimine*, C-15/10, EU:C:2011:504, para 59).

The CJEU has not yet suggested a general transfer to MS authorities in similar situations, but there are cases where the idea has been expressed (eg.

Excursion: Discretion in EU Environmental Law II

- There are indications that as a minimum standard EU law would allow that MS authorities enjoy similar discretion when they do complex appraisals
- Stricter review could be required if very important objectives are involved, eg. very dangerous environmental impacts (clean air?) or very rare species
- Obviously, procedural autonomy allows MS to impose stricter judicial scrutiny



The CJEU has not yet suggested a general transfer to MS authorities in similar situations, but there are cases where the idea has been expressed (eg. *Commission v Austria*, EU:C:2016:322, para 70, on balancing with regard to the Water Framework Directive, *Commission v France*, C-333/08, EU:C:2010:44, para 91 – 93, on precautionary measures of MS restricting trade).

With regard to discretion of EU bodies the CJEU has limited discretion and strengthened judicial review with regard to fundamental rights, depending on a number of factors, including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference (*Digital Rights Ireland and Others*, EU:C:2014:238, para 47). Similar considerations could apply to the implementation of secondary legislation by MS where important objectives are at issue, eg. human health in the area of clean air or the protection of very rare species or habitats in the area of nature conservation.

In any event, procedural autonomy allows MS to give more powers and responsibilities to courts, strengthening judicial review.

Art. 6(4) - Derogation

Imperative reasons of overriding public interest I

- Imperative and overriding: 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 (Solvay and Others, EU:C:2012:82, para 75)
- Reasons of public interest: a project, although of a private character, can in fact by its very nature and by its economic and social context present an overriding public interest (Solvay and Others, EU:C:2012:82, para 77)



The derogation requires to conduct an extremely difficult balancing exercise. How can we determine whether the interest to implement the measure is more important than the interest to protect the elements of the sites that will or can be harmed?

At least the CJEU has clarified that, in principle, private measures can be supported by public interests that are more important than the protection of nature. However, this will need to be appreciated in each individual case. For example, the CJEU has already decided that

- works intended for the location or expansion of an undertaking satisfy those conditions only in exceptional circumstances (Solvay and Others, EU:C:2012:82, para 76);
- the mere construction of infrastructure designed to accommodate a management centre cannot constitute an imperative reason of overriding public interest (Solvay and Others, EU:C:2012:82, para 78);
- Irrigation and the supply of drinking water can be such interests (Acheloos, EU:C:2012:560, para 122)

Art. 6 (4) - Balancing

- What could be relevant factors in the balancing whether an additional bridge in a city threatening to increase mortality of a rare bat species can be allowed?



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- Traffic objectives: Safety (Health and Life), Economic (better access), Environment (less noise and air pollution in living quarters) v. mortality + limited loss of habitat



Another possible question to the audience. It is based on the Grüne Liga case and shall demonstrate balancing the interests involved in the derogation. It would involve the objectives relating to traffic improvement and the protection of the affected elements of the site, in this case in particular certain bat species as well as, possibly, very limited habitat loss resulting from the bridge and the road.

In practice a strictly enforced speed limit of 30 km/h during the time that the bats are active (in Dresden: nights between April and November) promises to be sufficient.

Art. 6(4) - Derogation

Imperative reasons of overriding public interest II

- Art. 6(4) 2nd subpara: “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.”
- Acheloos, EU:C:2012:560, paras 123 ff
 - Drinking water is human health and public safety
 - Irrigation perhaps environment
- Impact on priority elements necessary?



Art. 6(4) 2nd subpara limits the available imperative reasons of overriding public interest if priority elements are present. Either these reasons are related to human health, public safety or the environment, or an opinion of the Commission must be taken in. The Acheloos case provides an example for possible derogation without Commission consultation.

The effects of and limits to a Commission opinion have not yet been subject of jurisprudence. Therefore it is unclear whether it's binding on the MS and, if so, whether it must cover all or only some conditions of Art. 6(4).

Moreover, it is not entirely clear whether Art. 6(4) 2nd subpara only applies if the priority elements are affected or – strictly following the wording – if they are present at the site. Though older Commission guidance advocates the former approach the Court quotes the wording. In COM/Spain (Spanish Brown Bear), EU:C:2011:768, paras 194 f, this question didn't need to be decided because a priority species was affected. Conversely, in Acheloos, EU:C:2012:560, paras 123 ff, this wasn't clear and the CJEU discussed whether certain interests came under the grounds of Art. 6(4) 2nd subpara.

Art. 6(4) - Derogation

In the absence of alternative solutions

- All solutions capable of amounting to alternative solutions need to be examined (COM/Portugal (Castro Verde), EU:C:2006:665, para 38)
- Existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project (COM/Italy (Santa Caterina), EU:C:2007:532, para 83)
- Impacts and advantages of alternatives will need to be studied to a similar extend as the original measure



The absence of alternatives is closely related to the balancing of impacts with the interests justifying the measure. Any comparison between alternatives requires equally reliable information on their impacts and on their capacity to achieve the objectives of the plan or project.

Art. 6(4) - Derogation

All compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected

- Depends on AA because in order to determine the nature of any compensatory measures, the damage to the site must be precisely identified (COM/Italy (Santa Caterina), EU:C:2007:532, para 83)
- Protection of coherence ≠ replacement of loss
 - What are the functions of the affected element in the network?
 - Timing? When is compensation necessary?
 - Discretion?



With regard to compensation the Court stresses that an AA is indispensable to determine what needs to be compensated. However, compensation doesn't merely mean replacement of the loss. The coherence of Natura 2000 refers to the functions of the affected elements in the network. Some habitats or occurrences of species will primarily be representative in nature and can be compensated by nearby replacement. Others will have connective functions that may require more imaginative action. Again we are in an area of rather complex technical and scientific appraisal, including prognostic elements. Therefore, it is quite likely that MS enjoy some discretion.

Art. 6(2) - Deterioration and Disturbance

- *„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.”*
- According to Art. 4(5) and 7 this provision also applies to SCI and SPA



Text of the provision and remark on the scope.

Art. 6(2) - Deterioration and Disturbance

- Art. 6 (2) and (3) ensure the same level of protection (COM/Spain (Spanish Brown Bear), EU:C:2011:768, para 142)
- Applies to man-caused impacts, but also to natural developments (COM/UK, EU:C:2005:626, para 34)
- Can require the rehabilitation of a deteriorated site (COM/Ireland, EU:C:2007:780, paras 84 ff)
- Derogation under Art. 6 (4) applies by way of analogy (COM/Spain (Spanish Brown Bear), EU:C:2011:768, paras 156 and 192)



The foundation of the jurisprudence on Art. 6(2) is that it aims to ensure the same level of protection as the AA under Art. 6(3). Therefore the cases on the latter provision can provide guidance.

Very early, the Court found that the obligation to prevent deterioration and disturbance is not limited to man-caused impacts, but also applies to natural developments. A consequence of this obligation is that MS may have to rehabilitate a deteriorated site if they did not comply with the obligation to prevent natural deterioration.

Finally, the Court has recognised that Art. 6(4) must apply by way of analogy because in many instances it would be incoherent to allow derogation in case of plans or projects, but refuse it with regard to the general obligation under Art. 6(2).

Art. 6(2) - Deterioration and Disturbance

- Art. 6(2) may apply to authorised activities (COM/UK, EU:C:2005:626, para 58), namely
 - Activities predating the protection of Art. 6 (Stadt Papenburg, EU:C:2010:10, para 48 f, COM/Spain (Spanish Brown Bear), EU:C:2011:768, paras 124 ff, COM/Bulgaria (Kaliakra), EU:C:2016:8, paras 51 ff),
 - activities infringing Art. 6(3) (COM/Italy (Santa Caterina), EU:C:2007:532, paras 91 ff , COM/Greece (Kyparissia), C-504/14, EU:C:2016:847)
 - but not to impacts authorised under Art. 6(4)



This is perhaps the most controversial jurisprudence on site protection because it challenges acquired rights. It is based on the consideration that Art. 6(2) creates obligations irrespective of the source of the impact. In particular, there is no exception for existing projects. If such activities cause deterioration or relevant disturbance after Art. 6 becomes applicable protective measures are necessary.

Similar requirements must apply to authorisations subject to Art. 6(3) where this provision has not been complied with, even if the authorisation became definitive in the interim.

Conversely, deterioration or disturbance authorised under Art. 6(4) is no longer subject to Art. 6(2).

Art. 6(2) - Deterioration and Disturbance

- No formal assessment required, but the existence of a probability or risk that that an operation might cause deterioration or significant disturbances establishes the infringement (COM/Spain (Spanish Brown Bear), EU:C:2011:768, para 142) >> probability or risk can be refuted by scientific assessment (see also Grüne Liga, EU:C:2016:10, paras 35 ff > discretion)



Art. 6(2) doesn't set up procedural requirements to address possible impacts on the site. However, similar to Art. 6(3) a probability or risk of relevant impacts requires action, namely refutation of the probability or risk or measures to prevent the impact. As regards the modalities MS have discretion.

Art. 6(2) - Deterioration and Disturbance

- Art. 6(2) Hab. Dir. in combination with Art. 4(1) + (2) Birds Dir. requires for SPA (cf. COM/AT, paras: EU:C:2010:602, 56 ff.)
 - a **legal protection regime** ensuring survival and reproduction of the protected bird species
 - positive and specific to the site
 - unquestionable binding force
- Under Art. 4(4) Hab. Dir. similar requirements should apply to SCI and SAC, but only six years after designation



Art. 6(2) not only applies to specific threats to a site, but also requires the adoption of a specific legal protection regime of preventive nature. It should aim at typical risk.

Art. 6 (4) - Balancing

- Remember the bridge: What if it had already been built before the threat to bats became apparent? What to do now? In particular: Can the costs of construction be taken into account?



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- The new information triggers Art. 6(2) - appropriate measures must be undertaken, in particular the question of derogation may arise.
- Subsequent justification of a project that was realised without proper assessment may not *exclusively* be based on „sunk costs“ (Grüne Liga, EU:C:2016:10, para 77).



Another possible question to the audience, again based on the Grüne Liga case. It shall illustrate the application of Art. 6(2) and demonstrate the difficulties of balancing the interests involved in the derogation.

If the threat to the conservation objectives only becomes apparent after the consent to the project has become definite Art. 6(2) must be applied. This means that the risk or probability of harm must be averted. The speed limit might be a solution.

However, if a derogation becomes necessary the following considerations may be relevant:

Before construction the balancing would involve the objectives relating to traffic improvement and the protection of the affected elements of the site, in this case in particular certain bat species as well as, possibly, very limited habitat loss resulting from the bridge and the road. If the traffic objectives would have been insufficient to justify construction of the bridge the question arises whether after construction in addition the investment (sunk costs) can be taken into account.

On the one hand, this could be a dangerous incentive to abstain from an AA because after construction the case to maintain the project would be stronger than the case to undertake it in the first place.

On the other hand, the Court allows to take sunk costs into consideration. Implicit justification could be found in the fact that apparently the authorisation was granted and exercised in good faith. Therefore, legitimate expectations needed to be protected.

Art. 6(1) - Site Management

- *For special areas of conservation, Member States shall establish the necessary conservation 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.*
- *+ Art. 4(4): The Member State concerned shall designate that site ... 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.*



Under Art. 6(1) MS must lay down the necessary conservation measures for sites. Art. 4(4) helps to identify the relevant objectives, in particular the contribution of the site to a favourable conservation status and the threats to the site.

Art. 6(1) - Site Management

- Apart from the COM/France, EU:C:2010:114, paras 50, 51 and 56, addressing the possibility that measures to realise conservation objectives could, nevertheless, in certain circumstances not be excluded from Art. 6(3) there hasn't been any relevant EU jurisprudence yet
- C-441/17, COM/Poland, pending, raises questions on the application of Art. 6(1)
- C. Sobotta: MS enjoy a certain margin of discretion!



There is not really much jurisprudence yet on Art. 6(1) of the Habitats Directive though the pending case could help to improve our understanding.

I would expect that MS enjoy more discretion with regard to Art. 6(1) than under Art. 6(2) and (3) because the standard of reasonable doubt cannot be applied to active conservation measures. It is unlikely that any active conservation measure will be subject to reasonable doubt. Therefore, under this strict standard no conservation measure could be applied. However, there are many habitat types that depend on active conservation measures. (cf: Christoph Sobotta, The European Union legal boundaries for semi-natural habitats management in Natura 2000 sites, *Journal of Nature Conservation* (online 18.7.2017, doi: 10.1016/j.jnc.2017.07.003))

Thank you for your attention!



Case law: <http://curia.europa.eu/juris/recherche.jsf?language=en>
Guidance: http://ec.europa.eu/environment/nature/index_en.htm

