



European Commission

MANAGING NATURA 2000 SITES

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



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of the 'Habitats' Directive 92/43/CEE**



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Biodiversity is increasingly recognised as an inestimable element of our common heritage. The last Eurobarometer shows that European citizens take a great interest in the protection of rare and endangered species and habitats. This is the purpose of the Natura 2000 ecological network established by the 'Habitats' directive, which was adopted in 1992. The network, which also embraces areas established under the 'Birds' directive, will provide a strong protection for Europe's finest wildlife areas.

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The management of the Natura 2000 sites is essential for their conservation. But to be successful it requires, in the first instance, the active involvement of the people who live in and depend upon these areas. The measures for managing Natura 2000 sites are given in Article 6 of the 'Habitats' directive. However, as this is a concise legal text, many of the key concepts are not easy to understand.

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I consider it important that we have a clear and accessible understanding of these key provisions of the directive as this will provide the basis for it to be applied throughout the Community on an equal footing.

This document is therefore intended to facilitate the interpretation of Article 6 by competent authorities in the Member States. I hope it assists them in fully applying it and I would encourage them to further develop guidelines for the different actors concerned.

This important document, which aims at a better understanding of Community legislation by the citizens, should also be seen as part of the openness and transparency policy of the European Commission.

A handwritten signature in black ink, appearing to read 'Margot Wallström'.

Margot Wallström
Commissioner for the Environment

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FOREWORD

WHY AN INTERPRETATION GUIDE FOR ARTICLE 6?

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.

Many questions have been raised about the significance of this article by Member States and operators. At first glance it seems to be broad and not well defined, but a thorough analysis, linking it with the other articles of the directive, makes it easier to understand and apply. Nevertheless, Article 6 should not be seen in isolation. In particular, if its application leads to specific requirements, it should be remembered that Article 8 envisages the co-financing of some of the measures necessary to meet the objectives of the directive.

PURPOSE AND TARGET OF THIS DOCUMENT

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.

The primary targets of the document are Member State authorities and not individuals. It is however expected that it will also facilitate the understanding of the mechanics of the 'Habitats' directive by the various bodies and groups concerned, especially if it is complemented with more detailed guidance which should be drawn up by the Member States themselves.

NATURE AND LIMITATIONS OF THE DOCUMENT

The document has been drafted by the services of the Environment Directorate-General of the European Commission, following relevant informal discussions held with the nature protection authorities of the Member States (see Annex V for a list). As such, the document reflects only the views of Commission services and is not of a binding nature. It should be stressed that in the last resort it rests with the European Court of Justice to interpret a directive.

The interpretations provided by the Commission services 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 serve the general purpose of the directive.

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

The present version is not meant to be a definitive one; indeed, the document may be revised in the future, according to experience that will arise from the implementation of Article 6 in the Member States and from any future case law. Furthermore, the Commission services have arranged for the prepa-



ration of more specific, methodological guidance on the assessment of plans and projects under Article 6(3) and 6(4); such guidance, once ready, is intended to be complementary to 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 scheme. This involves an introduction to the article 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 European Court of Justice, and other relevant directives.

The key points arising from the Commission's analyses are summarised (in bold characters) at the end of each section, in order to facilitate a quick reading of the relevant conclusions. Full references of Court cases quoted throughout the text are provided as an annex at the end of the document.

1. Introduction

Article 6 in context





I. I. PLACED WITHIN THE OVERALL SCHEME OF DIRECTIVES 92/43/EEC AND 79/409/EEC 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/EEC as well as that of Directive 79/409/EEC ⁽¹⁾ and its relationship with a wider legal context.

The first chapter of Directive 92/43/EEC, comprising Articles 1 and 2, is entitled 'Definitions'. This chapter sets out the aim of the directive which is to '*contribute towards ensuring biodiversity 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*' ⁽²⁾. It also provides a general orientation, referring to the need for measures taken pursuant to the directive to be designed to maintain or restore certain habitats and species '*at favourable conservation status*' ⁽³⁾, 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*' ⁽⁴⁾.

The main specific requirements of Directive 92/43/EEC 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 inclusive. The second is entitled 'Protection of species' and comprises Articles 12 to 16 inclusive.

The 'Conservation of natural habitats and habitats of species' chapter addresses the most ambitious and far-reaching challenge of the directive — the establishment and conservation of the network of sites known as Natura 2000. Within this chapter, Article 6 sets out 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 land use.

The article has three main sets of provisions. Article 6(1) makes provision for the establishment of the necessary conservation measures, and is focused on positive and proactive interventions. 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 orientation expressed in the recitals of the directive. This involves the need to promote biodiversity by maintaining or restoring certain habitats and species at 'favourable conservation status' within the context of Natura 2000 sites, while taking into account economic, social, cultural and regional requirements, as a means to achieve sustainable development.

Apart from the place of Article 6 within the overall scheme of Directive 92/43/EEC, it is also relevant to mention its *relationship with the scheme of Directive 79/409/EEC* on the conservation of wild birds.

⁽¹⁾ OJ L 206, 22.7.1992, p. 7 and OJ L 103, 25.4.1979, p. 1 respectively.

⁽²⁾ Article 2(1).

⁽³⁾ Article 2(2).

⁽⁴⁾ Article 2(3).

- In the first place, the scheme of the earlier directive is broadly comparable with that of the latter. In particular, the ‘Conservation of natural habitats and habitats of species’ chapter of Directive 92/43/EEC has its parallel in Articles 3 and 4 of Directive 79/409/EEC.
- In the second place, there has been an important degree of merger or fusion between the schemes of both directives. First, special protection areas (SPAs) classified under the earlier directive are now an integral part of the Natura 2000 network ⁽⁵⁾. Second, the provisions of Article 6(2), (3) and (4) of Directive 92/43/EEC have been made applicable to SPAs ⁽⁶⁾. In this document, most comments on Article 6 are framed by reference to sites proposed under Directive 92/43/EEC. Generally speaking, these comments will apply, *mutatis mutandis*, to sites classified under Directive 79/409/EEC.

Seen in a wider context — that of the Treaty establishing the European Community — Article 6 can be regarded as a key framework for giving effect to the principle of integration, since it encourages Member States to manage the protected areas in a sustainable way and since it sets the limits of activities which can impact negatively on protected areas while allowing some derogations in specific circumstances.

Seen in an **international context**, Article 6 helps achieve the aims of relevant international nature conservation conventions such as the Berne Convention ⁽⁷⁾ and the Biodiversity Convention ⁽⁸⁾, 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 Directive 92/43/EEC entitled ‘Conservation of natural habitats and habitats of species’. It sets out the framework for site conservation and protection, and includes proactive, preventive and procedural requirements. It is relevant to special protection areas under Directive 79/409/EEC as well as to sites based on Directive 92/43/EEC. The framework is a key means of achieving the principle of environmental integration and ultimately sustainable development.

1.2. RELATION WITH PROTECTION OF SPECIES CHAPTER

As mentioned above, the chapter of Directive 92/43/EEC entitled ‘Protection of species’ covers Articles 12 to 16 inclusive and deals with strictly protected animal and plant species listed in Annex IV of the directive.

Articles 12, 13 and 14, which are applicable from the date of implementation of Directive 92/43/EEC, i.e. 10 June 1994, cover certain plant and animal species which also figure in Annex II of the directive, and which therefore benefit from the provisions of Article 6 within the Natura 2000 sites hosting them.

As a consequence, an action may at the same time fall within the scope of both chapters.

⁽⁵⁾ Article 3(1) of Directive 92/43/EEC provides that ‘the Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC’.

⁽⁶⁾ Article 7 of Directive 92/43/EEC.

⁽⁷⁾ 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).

⁽⁸⁾ 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).



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

While this may appear to result in duplication, a few points should be noted.

- In the first place, certain species of plant and animal covered by Articles 12, 13 and 14 do not figure within Annex II. Thus, they do not benefit directly from site conservation and protection within Natura 2000.
- In the second place, for species such as *Ursus arctos* 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 by Article 6 is limited to the Natura 2000 network whereas the protection afforded by the chapter on protection of species is not geographically limited (subject to any restriction mentioned in the annexes to the directive). Thus, Article 6 is concerned with **site** conservation and protection whereas the chapter on protection of species is more narrowly focused on the species (though this will obviously have implications for sites where species occur, in particular the breeding sites and resting places of 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

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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 come within the scope of 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*'. The deadline for transposition was 10 June 1994 (or 1 January 1995 in the case of Austria, Sweden and Finland).

This reflects the type of Community instrument that has been used, namely a directive. A directive is binding as to the result to be achieved, but leaves a Member State some choice as to the form and methods of achieving that result. For most directives, the required result will need national legislation (see Annex I, point 1).

Depending on the Member State concerned, Article 6 needed to be transposed into national law by 10 June 1994 or 1 January 1995.

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 Directive 79/409/EEC and other sites.

1.4.1. Special protection areas

The protection requirements regarding special protection areas (SPAs) are given in Article 4(4), first sentence of Directive 79/409/EEC 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 Directive 92/43/EEC the above obligations are replaced pursuant to Article 7 of Directive 92/43/EEC 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 4(1) and (2) of Directive 79/409/EEC. The date from which these similar provisions should, in principle, apply to SPAs is the date from which Directive 79/409/EEC became applicable in the Member States (see Annex I, point 2).

As regards the provisions of Article 6(2), (3) and (4), it is clear from the terms of Article 7 that these now apply to already classified SPAs.

However, given the wording of Article 7, a question arises as to whether the provisions of Article 4(4), first sentence of Directive 79/409/EEC remain applicable after the 'date of implementation of this directive' (10 June 1994 for the then Member States and 1 January 1995 for Austria, Finland and Sweden) until such time as a site is classified as an SPA.

In the *Santoña Marshes* case (see Annex I, point 3), the European Court of Justice established that the provisions of Article 4(4) first sentence were applicable to an unclassified site which should have been classified as an SPA from the date of implementation of Directive 79/409/EEC (i.e. 7 April 1981 for the then Member States and the date of accession for later Member States).

The underlying rationale of *Santoña Marshes* is that sites that deserve classification should be treated in the same way regardless of whether or not they are formally classified. The Commission services therefore consider that the provisions of Article 6(2), (3) and (4) are applicable to SPAs, or to sites which should be classified as SPAs, from the date of implementation of Directive 92/43/EEC.

Article 6(1) of Directive 92/43/EEC does not apply to SPAs. However, there are analogous provisions in Article 4(1) and (2) of Directive 79/409/EEC 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 Directive 92/43/EEC to SPAs, it is reasonable to conclude that all sites classified, or qualifying for classification, as SPAs are subject to these provisions from the date of implementation of Directive 92/43/EEC.

1.4.2. Sites based on Directive 92/43/EEC

Article 6(1) applies to special areas of conservation (SACs). According to Article 4(4) of the directive, SACs come into being by way of designation by the Member States. Such designation is only possible after a site has been adopted as a site of Community importance (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. This means that the final deadline for SAC designation — and therefore for compliance with Article 6(1) — is 10 June 2004.

Article 4(5) of Directive 92/43/EEC 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 and before it is designated as an SAC. Member States are also free to choose an earlier date for the implementation of Article 6(2), (3) and (4), and some national legislation already provides for such earlier implementation.

According to Article 4 of Directive 92/43/EEC, Member States ought to have submitted their national lists by 10 June 1995 and the Commission adopted the Community list by 10 June 1998. However, no Community list could be adopted by 10 June 1998 owing to delays in submission of complete national lists.

The text of Directive 92/43/EEC seems to indicate that Member States do not need to pay attention to the provisions of Article 6 before the Community list has been adopted. However, other provisions of Community law as interpreted by the European Court of Justice need to be taken into consideration.

Article 10 (ex Article 5) of the Treaty establishing the European Community provides as follows:

'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.'

The European Court of Justice has, on several occasions, held that, even in the absence of transposing measures or the implementation of specific obligations resulting from a directive, the national authorities, when interpreting national law, should take all possible measures in order to achieve the results aimed at by a directive.

Furthermore, the European Court of Justice ruled in *Santoña Marshes* that a Member State could not escape from its duty to protect a site which, according to relevant scientific criteria, deserved protection, by not classifying it as a special protection area. It is possible that this principle could be used, by analogy, in questions arising from Directive 92/43/EEC.

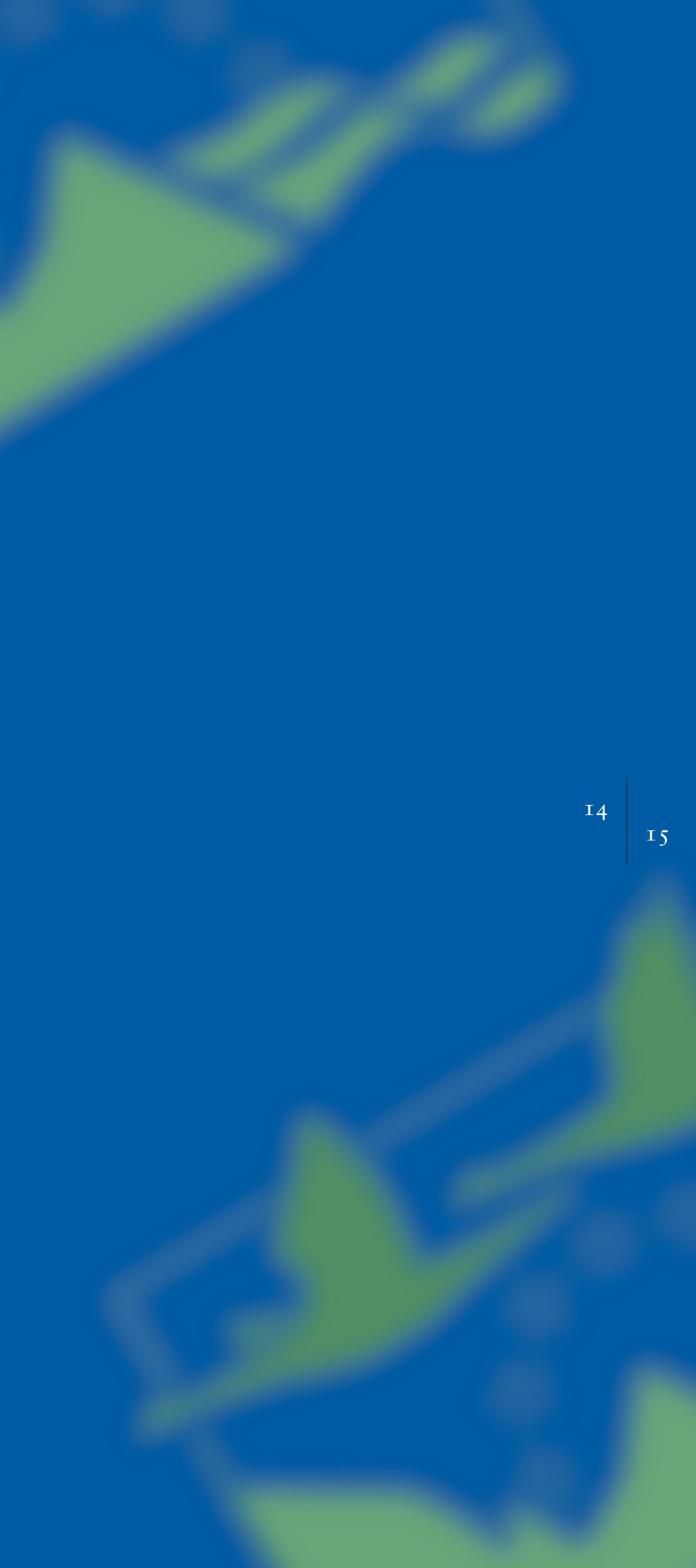
In the light of the foregoing, Member State authorities are advised to ensure that sites on their national list of proposed SCIs are not allowed to deteriorate before the Community list of SCIs is adopted. Where the national list remains incomplete, they are advised to also ensure the non-deterioration of sites that, according to scientific evidence based on the criteria of Annex III of Directive 92/43/EEC, should be on the national list. One practical suggestion is to make correct use of environmental impact assessment (EIA) under Directive 85/337/EEC (impact assessment) in relation to potentially damaging projects. The European Court of Justice has already confirmed the importance which should be attached to sensitive natural sites when deciding whether projects should undergo an EIA under this directive (see Annex I, point 4).

The above considerations can be summarised in the following table:

Site status	pSCI	SCI	SAC
Deadline foreseen by the directive	June 1995	June 1998	June 2004
Applicability of Article 6 provisions	Optional for 6(1), (2), (3) and (4), need for measures to avoid site deterioration	6(2), (3) and (4)	6(1), (2), (3) and (4)

Once the Community list is established, the position will become clear as to what requires site protection under the directive, and the advice on provisional site protection will no longer be applicable.

As regards sites based on Directive 92/43/EEC, it can be argued that Member States, particularly after the date for adoption of the Community list expired on 10 June 1998, have certain obligations to act in a way so as to ensure that the aims of the directive are not jeopardised. Even in the absence of a Community list, Member States' authorities are therefore advised to at least abstain from all activities that may cause a site on the national list to deteriorate. Where a complete national list has not been submitted, the same advice applies to a site which, on the basis of the scientific criteria of the directive, clearly ought to be on the national list.



2. Article 6(1)

Clarification of the concepts of conservation measures; statutory, administrative or contractual measures; and management plans.

2.1. THE 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 the special areas of conservation (SAC).

Article 6(1):

- provides for **positive** measures, involving management plans and statutory, administrative or contractual measures, which aim to achieve the general objective of the directive. 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 comprehension of Article 6; the structured reading and the comprehension of the three other paragraphs of Article 6 require a preliminary reading and comprehension of paragraph 1;
- establishes a general conservation regime which applies to **all** SACs of the Natura 2000 network without exception and to **all** the natural habitat types of Annex I and the species of Annex II present on the sites, except those identified as non-significant in the Natura 2000 standard data form (see Section 4.5.3);
- concerns the **SACs specifically**: Article 6(1) does not apply to the special protection areas (SPAs), unlike Article 6(2), (3) and (4). In this way, the legislator established:
 - a regime laying down special conservation measures for the **SPAs** classified under the ‘Birds’ directive, according to its Article 4(1) and (2);
 - a regime laying down conservation measures for the **SACs** designated under the ‘Habitats’ directive, according to its Article 6(1);
- relates to Article 2(3) which specifies that *‘the measures ... take account of economic, social and cultural requirements and regional and local characteristics’*.

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For all the SACs, Member States are required to draw up conservation measures. These are positive and apply to all the natural habitat types of Annex I and the species of Annex II present on the sites, except those whose presence is non-significant according to the Natura 2000 standard data form.

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

2.3.1. The conservation concept

The conservation concept appears in the sixth recital of the directive which reads: *‘Whereas, in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, it is necessary to designate special areas of conservation in order to create a coherent European ecological network according to a specified timetable’*; and in its eighth recital: *‘whereas it is appropriate, in each area designated, to implement the necessary measures having regard to the conservation objectives pursued’*.

It is then defined in Article 1, point (a) of the directive: *'(a) 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 defined in (e) and (i);'*

Member States have to adopt the conservation measures necessary to achieve the general aim of the directive as set out in its Article 2(1): *'The aim of this directive shall be to contribute towards ensuring biodiversity 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'*. There is therefore a **result obligation**.

Article 2(2), in particular, specifies the objective of the measures to be taken under the terms of this directive: *'Measures taken ... shall be designed to maintain or to restore, at a favourable conservation status, natural habitats and species of wild fauna and flora of Community interest'*. These measures have, according to Article 2(3), to *'take account of economic, social and cultural requirements and regional and local characteristics'*.

Article 3 specifies that it is the Natura 2000 network *'composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II'* which has to ensure the objective pursued by Article 2(2).

The necessary conservation measures have therefore to aim at maintaining or restoring the favourable conservation status of the natural habitat types and the species of Community interest. They are connected with the general objective of the directive which applies to the Natura 2000 network, as defined in Article 3.

The fulfilment of the aim laid down in Article 2(1) largely depends on conservation measures that the Member States have to take in order to maintain or restore the natural habitat types and species at a favourable conservation status. These measures are implemented through the Natura 2000 network defined in Article 3(1), taking into account economic, social and cultural requirements and regional and local characteristics.

2.3.2. The conservation status

The conservation status is defined in Article 1 of the directive:

- For a **natural habitat**, Article 1(e) specifies that it is: *'the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species ...'*
- For a **species**, Article 1(i) specifies that it is: *'the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its population ...'*

The Member State has therefore to take into account all the influences of the environment (air, water, soil, territory) which act on the habitats and species present on the site.

The **favourable conservation status** is also defined by Article 1(e) for natural habitats and Article 1(i) for species.

- For a **natural habitat**, it occurs when:
 - *'its natural range and areas it covers within that range are stable or increasing;*
 - *the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future;*
 - *the conservation status of its typical species is favourable'*.



- For a **species**, it occurs when:
 - *‘the population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats;*
 - *the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future;*
 - *there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis’.*

The favourable conservation status of a natural habitat or species has to be considered across its natural range, according to Articles 1(e) and 1(i), i.e. at biogeographical and, hence, Natura 2000 network level. Since, however, the ecological coherence of the network will depend on the contribution of each individual site to it and, hence, on the conservation status of the habitat types and species it hosts, the assessment of the favourable conservation status at site level will always be necessary.

The conservation status of natural habitat types and species present on a site is assessed according to a number of criteria established by Article 1 of the directive. This assessment is done both at site and network level.

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 of 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 of abiotic and biotic factors necessary to ensure the favourable conservation status of the habitat types and species, including their relations with the environment (air, water, soil, vegetation, etc.).

These requirements rest on scientific knowledge and can only be defined on a case-by-case basis, according to the natural habitat types of Annex I, the species of Annex II, as well as 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 can 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 of 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).

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 can therefore vary according to the sites (aquatic or land).

The identification of the ecological requirements of the natural habitat types of Annex I and the species of 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 for Nature Conservation.

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 necessary to ensure their favourable conservation status. They can only be defined on a case-by-case basis and on the basis of scientific knowledge.

2.4. WHAT FORM CAN THE NECESSARY CONSERVATION MEASURES TAKE?

The conservation measures can take at least two forms: the form of *'appropriate statutory, administrative or contractual measures...'* and *'if need be'*, the form of *'appropriate management plans'*.

2.4.1. Management plans

The necessary conservation measures can involve *'if need be, appropriate management plans specifically designed for the sites or integrated into other development plans'*. Such management plans should address all foreseen activities, unforeseen new activities being dealt with by Article 6(3) and (4).

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'*, therefore be targeted at the sites of the Natura 2000 network, **or** *'integrated into other development plans'*. The latter provision is in conformity with the principle of integration of the environment in the other Community policies. This integration has to contribute to the coherence of the network mentioned in Article 3(1). In any case, it may be necessary to apply Article 6(3) to those aspects of the management plan which are not connected to conservation management (see commentary on Article 6(3) under Section 4.3.3).

While no indication of the specific contents of management plans can be given, Annex II at the end of this document provides a number of important considerations that can be made in view of the preparation of such plans. Furthermore, Annex IIa provides an indicative list of LIFE-Nature projects which have produced management plans or other statutory, administrative or contractual measures (see below) aiming at site conservation.

Member States can establish management plans which superimpose themselves on the other categories of measures. They are not always necessary but, if they are used, they should take into account the characteristics specific to each site and all foreseen activities. They may be stand-alone documents or incorporated into other development plans when those exist.



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. Thus, even if a Member State considers that a management plan is unnecessary, it will nonetheless 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 aim of the directive. In principle, this involves measures having a **positive effect** but, in some exceptional cases, it can also involve measures requiring **no action**. On the other hand, these measures are not necessarily new measures, since existing measures can be considered sufficient if they are appropriate.

Among measures involving positive action, *agri-environmental* or *sylvi-environmental* measures serve as a good example to illustrate how socioeconomic requirements can be taken into account according to Article 2(3).

1. *Agri-environmental measures*: for certain man-made, semi-natural Annex I habitat types (meadows, pastures) and Annex II species hosted in these habitats, agreements with farmers within the new rural development regulation ⁽⁹⁾ will be in most cases a sufficient contractual measure aiming at maintaining a favourable conservation status of habitat types and species.
2. *Sylvi-environmental measures*: appropriate measures might be an initiative by a forest company within the framework of a certain certification scheme provided that this initiative ensures that favourable conservation status is maintained.

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

The choice between statutory, administrative or contractual measures, or even of the management plans, is left to the Member States. This is in conformity 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, in addition to the selected obligatory measures, Member States can 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 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 respect the general objectives of the directive.

Thus, if a Member State chooses the contractual measures, it always has the obligation to establish in a permanent way the necessary conservation measures which correspond to '*the ecological requirements*

⁽⁹⁾ Council Regulation (EC) No 1257/1999 of 17 May 1999, OJ L 160, 26.6.1999, p. 80.

of the habitats of Annex I and the species of Annex II present on the sites' and respect the general aim of the directive defined in Article 2(1).

For SACs, Member States are required to use the appropriate statutory, administrative or contractual measures. These measures shall take into account socioeconomic requirements according to Article 2(3). They have to (a) correspond to the ecological requirements of habitats of Annex I and species of Annex II present on the sites and (b) fulfil the general objective of the directive to maintain or restore 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 *deterioration*;
disturbance; and *significant effect*

3.1. THE 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 disturbances 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.'



3.2. SCOPE

The article takes as a 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 simple management measures necessary to ensure conservation 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 await until deterioration or disturbances occur before taking measures (see under Section 4.4.2 the interpretation of *'likely to'* in Article 6(3)).

This article should be interpreted as requiring Member States to take all the appropriate actions which it may reasonably be expected to take, to ensure that no significant deterioration or disturbance occurs.

The scope of this article is broader than that of Article 6(3) and (4) which apply only to plans and projects requiring an authorisation. It is also applicable to the performance of activities which do not necessarily require prior authorisation, like agriculture or fishing.

Article 6(2):

- applies **permanently** in the special areas of conservation (SACs). It can concern past, present or future activities or events (for instance, in the case of a toxic spill affecting a wetland, this article would mean that all preventive measures should have been taken to avoid the spillage, even if its location is distant from the wetland). If an already existing activity in a SAC causes deterioration of natural habitats or disturbance of species for which the area has been designated, it must be covered by the necessary conservation measures foreseen in Article 6(1). This may require, if appropriate, that the negative impact is brought to an end either by stopping the activity or by taking mitigating measures. This can include economic compensation.
- **is not limited to intentional acts**, but could also cover any chance events that could occur (fire, flood, etc.), as long as they are predictable. 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.

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

- **Spatial limit.** Measures aim only at species and habitats located *'in the SACs'*. On the other hand, measures may need to be implemented **outside** the SAC, i.e. if external events may have an impact on the species and the habitats inside the SAC. Indeed, the article does not specify that measures have to be **taken** in the SAC but to **avoid** in the SAC.
- **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 4.5.3). The aim is not therefore to take general conservation measures, but rather to take measures focused on the species and habitats which justified the selection of the special area of conservation. The disturbances and/or deterioration will thus be determined by the information which has been communicated by the Member States and which has been used to ensure the coherence of the 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. These measures apply only to the species and habitats for which the sites have been designated, and should also be implemented, if necessary, outside the sites.

3.3. 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** however, the effect in relation to the objectives of the directive is not mentioned in the text of the directive. It is simply stated that the deterioration of habitats must be avoided. The purpose of all the measures taken under this directive has to correspond to the objectives of the directive and to respect the principle of proportionality. The deterioration of habitats is therefore also to be assessed against the objectives of the directive. Indeed, it seems difficult to assess deterioration in absolute terms without reference to measurable limits. As presented below, connecting deterioration to the objectives of the directive makes it possible to use Article 1 of the directive to interpret the limits of what one can regard as deterioration.

Disturbance and deterioration should be assessed against the objectives of the directive.

3.4. WHICH CONDITIONS SHOULD TRIGGER MEASURES BY THE MEMBER STATES?

There exists an apparent difference between the limit of acceptability for the deterioration of a habitat or the disturbance of a species.

- In the case of **disturbance**, the latter has to be **significant** (a certain degree of disturbance is tolerated). In addition, it is not necessary to prove that there will be a real significant effect, but the likelihood alone (*'could be'*) is enough to justify corrective measures. This can be considered consistent with the prevention and precautionary principles.
- In the case of **deterioration**, the legislator did not explicitly give this margin. This does not exclude however some room for manoeuvre in determining what can be described as deterioration (see below).

Deterioration is a physical degradation of a habitat. It can be directly assessed through a series of indicators (see below), for example, a reduction in the area or characteristics of the habitat.

On the other hand, disturbances do not directly affect the physical conditions. However, if they are significant, they may trigger changes in physical parameters, which have the same result as deterioration. If disturbances are significant enough to trigger changes in this way, they can be assessed in the same way as deterioration, using indicators of conservation status (see below).



Disturbances are assessed in the same way as deterioration as long as they trigger change in indicators of the conservation status of protected species in such a way as to affect the conservation status of the species concerned.

3.5. WHEN SHOULD MEASURES IN RELATION TO DISTURBANCE AND DETERIORATION BE TAKEN?

First, it should be stressed that measures must be **appropriate**. This means that they should fulfil the main objective of the directive in contributing to the conservation status of the habitats or species concerned while taking account of *'economic, social and cultural requirements and regional and local characteristics'*.

The inter-linkage of the recitals and articles of the directive provides the context for considering the appropriate measures to be taken by the Member States (see Section 2.3).

As mentioned in the previous paragraph 3.4, disturbance and deterioration should be assessed against the conservation concept, bearing in mind that according to Article 3(1) the network is composed of **sites** and shall enable the natural habitats types and the species' habitats concerned to be maintained at **favourable conservation status** in their natural range.

The favourable conservation status, as defined in Article 1 of the directive, can serve as a term of reference to fix the limit of acceptable disturbance and deterioration with respect to the objectives of the directive and to determine if the appropriate measures are properly implemented (see below).

The conservation status of a habitat or species in a site will be assessed according to the contribution of this site to the ecological coherence of the network, either:

- against its initial status at the time of transmission of site-related information provided in the Natura 2000 standard data forms (see Section 4.5.3) if this conservation status is favourable; or
- against an aim of improving the conservation status announced at the time of the setting-up of the network. Indeed, if a Member State is obliged to propose the classification of habitats in an unfavourable conservation status, it is only logical to assume that it will set a restoration target for these habitats so as to ensure their sustainability. When Community funds are granted for the improvement of the conservation status of a habitat or species in a site, it is this improved status that will be taken into consideration.

On a particular site the conservation status should reflect the dynamic nature of the habitats and species concerned. In that regard, the importance of **surveillance** of the conservation status of habitats and species, as required by Article 11 of the directive, should be stressed.

Deterioration or disturbance is assessed against the conservation status of species and habitats concerned. At a site level, the maintenance of the favourable conservation status has to be evaluated against the initial conditions provided in the Natura 2000 standard data forms when the site was proposed for selection or designation, according to the contribution of the site to the ecological coherence of the network. This notion should be interpreted in a dynamic way according to the evolution of the conservation status of the habitat or of the species.

3.6. INDICATORS OF DISTURBANCE AND DETERIORATION

The conditions which govern the concepts of disturbance and deterioration are well defined, but they should be assessed by the Member State, on the one hand, against the general conservation status of the species or the habitats concerned (at biogeographical level) and, on the other hand, against the local conditions (at site level). 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 value. This is measured against (a) the conservation status of the natural habitat or species concerned, and (b) the contribution of the site to the coherence of the Natura 2000 network.

3.6.1. Deterioration of habitats

Deterioration is a physical degradation affecting a habitat. The definition of the conservation status (Article 1(e) — see Section 2.3), means that 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 status of the habitat less favourable than it was before, the deterioration can be considered to have occurred.

To assess this deterioration against the objectives of the directive, one can refer to the definition of the **favourable conservation status of a natural habitat** set out in Article 1(e), on the basis of the following factors:

- *'The **natural range and areas** it covers within that range are **stable or increasing**'.*

Any event which contributes to the reduction of the areas covered by a natural habitat for which this site has been designated can be regarded as deterioration. For example, the importance of reduction of the area of the habitat has to be assessed in relation to the total surface occupied in the site according to the conservation status of the habitat concerned;

- *'The **specific structure and functions of the area necessary for its long-term maintenance exist and are likely to continue to exist in the foreseeable future**'.*

Any impairment of the factors necessary for the long-term maintenance of the habitats can be regarded as deterioration.

The functions necessary for the long-term maintenance depend of course on the habitat concerned (it would be useful to have common indicators enabling to assess these elements for each habitat type). Member States have to 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'*.

- *'The **conservation status of its typical species** is favourable as defined in (i)' (see Section 2.3 for the definition of item (i) of Article 1).*

Habitat deterioration occurs in a site when the area covered by the habitat in this site is reduced or the specific structure and functions necessary for the long-term maintenance or the good conservation status of the typical species which are associated with this habitat are reduced in comparison to their initial status. This assessment is made according to the contribution of the site to the coherence of the network.



3.6.2. Disturbance of species

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

In order to be significant a disturbance must affect the conservation status. The conservation status of a species is defined in Article 1(i) (see Section 2.3).

In order 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 which contributes 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 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 which contributes to the reduction of the size of the habitat of the species within the site can be regarded as a significant disturbance.

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Disturbance of a species occurs on a site when the population dynamics data for this site show that the species could no longer constitute a viable element of it in comparison to the initial situation. This assessment is done according to the contribution of the site to the coherence of the network.

4. Article 6(3)

Clarification of the concepts of plan or project; significant effect; appropriate assessment; site's conservation objectives; competent authorities; opinion of the public; integrity of the site

4.1. THE 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.'



4.2. 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 Article 4 of Directive 79/409/EEC) 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 ecologically positive or ecologically compatible activities 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 development regime, setting out the circumstances within which plans and projects with negative effects may or may not be allowed. The provisions thus ensure that negative economic and other non-ecological requirements can be balanced against conservation objectives.

Article 6(3) and (4) define a **step-wise procedure** for considering plans and projects ⁽¹⁰⁾.

- (a) The first part of this procedure consists of an assessment stage and 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 decision of the competent national authorities.
- (c) The 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.

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.

As regards **geographical scope**, the provisions of Article 6(3) are not restricted to plans and projects which exclusively occur in or cover a protected site; they also target developments situated outside the site but likely to have a significant effect on it.

Article 6(3) and (4) set out the circumstances within which plans and projects with negative effects may or may not be allowed. 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, Article 4(1) and (2) of Directive 79/409/EEC — and 6(2) of Directive 92/43/EEC.

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

In as much as Directive 92/43/EEC 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 Community law must be interpreted on the basis of its wording and of its purpose and the context in which it occurs.

⁽¹⁰⁾ A simplified flow chart of this procedure is presented in Annex III at the end of this document.

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 (see Annex I, point 5).
- 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 is the means to balance a conservation interest against a damaging non-conservation interest. This may produce disproportionate or inconsistent results.

4.3.1. Project

Support for a broad definition of ‘project’ is reinforced, by analogy, if we refer to **Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment** (as amended by Directive 97/11/EC) ⁽¹¹⁾. That directive operates in a similar context, setting rules for the assessment of environmentally significant projects. Article 1(2) of Directive 85/337/EEC 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.’

As can be seen, this is a very broad definition (see Annex I, point 6), which is not limited to physical construction. For example, a significant intensification of agriculture which threatens to damage or destroy the semi-natural character of a site may be covered.

4.3.2. Plan

The word ‘plan’ has a potentially very broad meaning ⁽¹²⁾. This point has already been noted in an Advocate-General opinion (see Annex I, point 7).

Of obvious relevance are **land-use plans**. Some 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 have direct legal effects. Both types of land-use plans should be considered covered by Article 6(3) to the extent that they are likely to have relevant significant effects on a Natura 2000 site.

Sectoral plans can also be considered as within 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, waste management plans and water management plans.

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 a 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. However, where the link between the content of such an initiative and likely significant effects on a Natura 2000 site is very clear and direct, Article 6(3) should be applied.

⁽¹¹⁾ OJ L 175, 5.7.1985, p. 40 and OJ L 73, 14.3.1997, p. 5 respectively.

⁽¹²⁾ The Commission has proposed a directive on the environmental assessment of plans and programmes (COM(96) 511 final, amended proposal COM(1999) 73) which may be of assistance in considering the term ‘plan’. In that context, the terms ‘plans’ and ‘programmes’ can be used alternatively.



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) in relation to details not covered by the plan assessment.

4.3.3. 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. the term 'management' is to be seen in the sense in which it is used in Article 6(1).

In making provision for conservation management plans, Article 6(1) of Directive 92/43/EEC 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.

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 assessment.

For example, commercial timber harvesting may form part of a conservation management plan for a woodland designated as a 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 assessment.

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

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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.

The term 'project' should be given a broad interpretation to include both construction works and other interventions in the natural environment. The term 'plan' also has a broad meaning, including land-use plans and sectoral plans or programmes but leaving out general policy statements. Plans and projects related to 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).

4.4. HOW TO DETERMINE WHETHER A PLAN OR PROJECT IS 'LIKELY TO HAVE A SIGNIFICANT EFFECT THEREON, EITHER INDIVIDUALLY OR IN COMBINATION WITH OTHER PLANS OR PROJECTS'

This phrase encapsulates a cause-and-effect relationship. 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 that, firstly, this key issue is considered, and that, secondly, the consideration is capable of standing up to scientific and expert scrutiny.

Proposals that are considered as not likely to have significant effects can be processed without reference to the succeeding steps of Article 6(3) and (4). However, Member States are advised that the reasons for reaching such a conclusion should be justified, and that it is good and prudent practice to record them.

4.4.1. 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 necessary 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. Some of this information will be present in the data that accompanies the site selection process under Article 4 of Directive 92/43/EEC (see Section 4.5.3). Member States may also have available detailed site conservation management plans which describe variations in sensitivity within a site.

Against this background, it is clear that what may be significant in relation to one site may not be in relation to another (see Annex I, point 8).

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.

The notion of what is 'significant' needs to be interpreted objectively. At the same time, 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.

4.4.2. Likely to have ...

The safeguards set out in Article 6(3) and (4) 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.

It is again useful to refer to Directive 85/337/EEC, 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 earlier directive⁽¹³⁾. Directive 85/337/EEC and amending Directive 97/11/EEC are also of assistance in setting out a range of factors which may contribute to a likelihood of a significant effect.

⁽¹³⁾ See Article 2(1) of Directive 85/337/EEC.



Any proposal which is deemed to require an assessment under Directive 85/337/EEC 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).

Directive 85/337/EEC in its Article 2(1) refers in particular to the factors of nature, size and location of the project. Amending directive 97/11/EEC in its Annex III presents a more detailed set of factors comprising, *inter alia*: the size of a project; the production of waste; pollution and nuisances; the risk of accidents; existing land use; the relative abundance, quality and regenerative capacity of natural resources in the area; the absorption capacity of the natural environment, with particular attention to natural areas and sites classified or protected under Directives 79/409/EEC and 92/43/EEC; the extent of the potential impact; the magnitude and complexity of the impact; the probability of the impact; the duration, frequency and reversibility of the impact.

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. For example, a wetland may be damaged by a drainage project located some distance outside the wetland's boundaries. For this reason, it is important that Member States, both in their legislation and in their practice, allow for the Article 6(3) safeguards being applied to development pressures which are external to a Natura 2000 site but which are likely to have significant effects within it.

The procedure of Article 6(3) and (4) is triggered not by a certainty but by a likelihood of significant effects, arising not only from plans or projects located within but also outside a protected site.

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4.4.3. ... either individually or in combination with other plans or projects

A series of individually modest impacts may in combination produce a significant impact. Article 6(3) tries to address this by taking into account the combination of effects from other plans or projects. It remains to be determined what other plans and projects are covered. In this regard, Article 6(3) does not explicitly define which other plans and projects are within the scope of the combination provision.

It is important to note that the underlying intention of this 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 not yet 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. Although already completed plans and projects are excluded from the assessment requirements of Article 6(3), it is important that some account is still taken of such plans and projects in the assessment, if they have continuing effects on the site and point to a pattern of progressive loss of site integrity.

Such already completed plans and projects may also raise issues under Article 6(1) and (2) of Directive 92/43/EEC if their continued effects give rise to a need for remedial or countervailing conservation measures or measures to avoid habitat deterioration or species disturbance.

- Plans and projects which have been approved in the past and which have not been implemented or completed should be included in the combination provision.
- On grounds of legal certainty, it would seem appropriate to restrict the combination provision to other plans or projects which have been **actually proposed**. 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 as yet unproposed 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.

When determining likely significant effects, the combination of other plans or projects should also be considered to take account of cumulative impacts. It would seem appropriate to restrict the combination provision to other plans or projects which have been actually proposed.

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

The ‘appropriate assessment’ raises questions concerning form and content.

4.5.1. Form of the assessment

As pointed out above, the trigger for an assessment under Directive 85/337/EEC is almost identical to the trigger for an assessment under Directive 92/43/EEC, being essentially related to the likelihood of significant effects.

- The European Court of Justice has emphasised that, in relation to the transposition of Directive 85/337/EEC (and by implication its application), it is necessary to take into account sensitivity of location (see Annex I, point 9). For a project likely to have a significant effect on a site protected by Article 3, it will therefore often be appropriate to undertake an assessment that fulfils the requirements of Directive 85/337/EEC.

Where an assessment for the purposes of Article 6(3) takes the form of an assessment under Directive 85/337/EEC, this will provide obvious assurances in terms of records and transparency.

- Where an assessment for the purposes of Article 6(3) does not take the form of an assessment under Directive 85/337/EEC, questions arise as to what may then be considered ‘appropriate’ in terms of form.

In the first place, an assessment should be **recorded**. A corollary of the argument that the assessment should be recorded is the argument that it should be **reasoned**. Article 6(3) and (4) requires decision-makers to take decisions in the light of particular information relating to the environment. 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 other steps — in particular, an approval or refusal of a plan or project. The assessment should therefore be considered as only comprising what is in the record of the assessment pre-dating these further steps. Of course, where a plan or project undergoes redesign 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 succeeding step in the sequence of steps set out in Article 6(3) and (4) has been taken.

In some cases, an assessment under Directive 85/337/EEC (as amended by Directive 97/11/EC) could accommodate an assessment under Article 6(3). The latter should anyhow be recorded and provide a basis for other steps; in particular it should be sufficiently reasoned to allow the right decision to be taken.

4.5.2. Content of the assessment

As regards content, an Article 6(3) assessment is narrower in scope than an assessment under Directive 85/337/EEC, being confined to implications for the site in view of the site's conservation objectives.

However, the ecological impacts of the plan or project may not be properly assessed in many cases without an assessment of the other environmental components (i.e. soil, water, landscape, etc) set out in Article 3 of Directive 85/337/EEC.

Furthermore, even allowing for an exclusively conservation focus, the assessment in its methodology can usefully draw on the methodology envisaged by Directive 85/337/EEC. In particular, Directive 85/337/EEC envisages that an assessment may contain information on several points, including a description of the project, a description of the aspects of the environment likely to be affected by the project and a description of the project's likely significant effects ⁽¹⁴⁾.

It is worth noting that, although, for purposes of Article 6(3), an assessment does not, strictly speaking, need to look beyond the plan or project proposed to address alternative solutions and mitigation measures, there may be a range of benefits from doing so.

In particular, an examination of possible **alternative solutions and mitigation measures** may make it possible to ascertain that, in the light of such solutions or mitigation measures, the plan or project will not adversely affect the integrity of the site.

As regards **mitigation measures**, these are measures aimed at minimising or even cancelling the negative impact of a plan or project, during or after its completion.

Mitigation measures are an integral part of the specifications of a plan or project. They may be proposed by the plan or project proponent and/or required by the competent national authorities. For example, they may cover:

- the dates and the timetable of implementation (e.g., not to operate during the breeding season of a particular species);

⁽¹⁴⁾ That directive makes reference to 'direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent, positive and negative effects' — see footnote 1 of Annex III.4 of the directive, which is identical to footnote 1 of Annex IV.4 of Directive 97/11/EC.

- 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);
- the strictly inaccessible areas inside a site (e.g., hibernation burrows of an animal species).

Mitigation measures are distinguishable from compensatory measures *sensu stricto* (see Section 5.4). Of course, well-implemented mitigation measures limit the extent of the necessary compensatory measures by reducing the damaging effects which require compensation.

Even where a broad assessment does not lead to the conclusion that the plan or project will not adversely affect the integrity of a site, the provisions of Article 6(4) suggest the practical value of such a broad exercise.

As regards **alternative solutions**, once it is proposed to consider approving a damaging plan or project, these become relevant (for more details, see under Section 5.3.1). Moreover, a reference to such solutions may also be needed to satisfy the independent requirements of Directive 85/337/EEC.

All these aspects above may be considered as ideally forming part of an iterative process seeking to improve the siting and design of a plan or project at the earliest stages.

Finally, the ‘in combination’ reference in Article 6(3) (see Section 4.4.3) has two implications in terms of the content of an assessment.

- Firstly, it means that the content of an assessment should address the potential for ‘in combination’ effects to arise from a specific plan or project under consideration in an approval procedure and other plans or projects not under consideration in the same approval procedure.
- Secondly, it means that the contents of the assessments of different plans or projects under consideration at the same time should include references to and take account of each other in so far as the different plans and projects give rise to ‘in combination’ effects.

An Article 6(3) assessment should focus on the implications for the site in view of the site’s conservation objectives. It could in its methodology usefully draw on the methodology envisaged by Directive 85/337/EEC. In particular, an examination of possible mitigation measures and alternative solutions may make it possible to ascertain that, in the light of such solutions or mitigation measures, the plan or project will not adversely affect the site. ‘In combination’ effects need also to be addressed in an assessment.

4.5.3. How are ‘the site’s conservation objectives’ established?

Article 4(1) requires Member States to propose a list ‘indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host’. According to its second paragraph, the information on each site shall include a map of the site, its name, location, extent and the data resulting from the application of the criteria specified in Annex III (Stage 1) provided in a format established by the Commission ⁽¹⁵⁾.

The format requires that all Annex I habitat types present on a site and all Annex II species occurring at the site should be mentioned in the appropriate place in the data form. This information forms the basis for a Member State establishing ‘the site’s conservation objectives’, for example through a man-

⁽¹⁵⁾ Standard data form, established by Commission Decision 97/266/EC of 18 December 1996 (OJ L 107, 24.4.1997, p. 1).



agement plan. The reason for a site's inclusion in the network is evidently the protection of those habitats and species. Sometimes, there may be competition between different habitat types and species, and it may, of course, be appropriate to prioritise when establishing the site's conservation objectives (for example, by giving precedence to a priority habitat type as against a competing non-priority habitat type).

Where the presence of the Annex I habitat type or Annex II species is deemed to be 'non-significant' for purposes of the format, these should not be considered as included in 'the site's conservation objectives'. The Member States are also invited to present information on other important species of flora and fauna than those listed in Annex II (point 3.3). This information has no relevance either for the determination of a site's conservation objectives.

The information provided according to the standard data form established by the Commission forms the basis for a Member State's establishment of the site's conservation objectives.

4.6. DECISION-MAKING

4.6.1. The 'competent national authorities'

It is clear that the word 'national' in this expression has been used in contrast with the word 'Community' or 'international'. Thus, the term refers not only to authorities within the central administration but also to regional, provincial or municipal authorities, which have to give an authorisation or consent to a plan or project.

A court can 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).

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

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

Directive 92/43/EEC does not indicate when it is appropriate to obtain the opinion of the general public. However, consultation of the public is an essential feature of Directive 85/337/EEC. Clearly therefore, where the assessment required by Article 6(3) takes the form of an assessment under Directive 85/337/EEC, public consultation is necessary.

In this context, it is worth mentioning the possible longer-term implications of the Aarhus Convention⁽¹⁶⁾ which emphasises the importance of public consultation in relation to environmental decision-making.

Public consultation should be considered in the light of the provisions of Directive 85/337/EEC and the Aarhus Convention.

⁽¹⁶⁾ 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 European Community is one of the signatories.

4.6.3. 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 the site’ relates to the site’s conservation objectives (see Section 4.5.3 above). For example, it is possible that a plan or project will adversely affect the integrity of a site only in a visual sense or only habitat types or species other than those listed in Annex I or Annex II. In such cases, the effects do not amount to an adverse effect for purposes of Article 6(3), provided that the coherence of the network is not affected.

On the other hand, the expression ‘integrity of the site’ shows that 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 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’ has been usefully defined as *‘the coherence of the site’s ecological structure and function, across its whole area, or the habitats, complex of habitats and/or populations of species for which the site is or will be classified’* ⁽¹⁷⁾.

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 manifesting themselves in the short, medium and long-term.

The integrity of the site involves its ecological functions. The decision as to whether it is adversely affected should focus on and be limited to the site’s conservation objectives.

⁽¹⁷⁾ PPG 9, UK Department of the Environment, October 1994.



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. THE 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 the assessment and possible authorisation, by the competent national authorities, of plans and projects likely to affect the special area of conservation (SAC). Two fundamental considerations arise.

- On the one hand, it addresses specific situations (exceptions) with regard to the general rule of Article 6(3) according to which authorisation can only be granted to plans or projects not affecting the integrity of the sites concerned.
- On the other hand, its concrete application has to be done in respect of the various steps provided for and in the sequential order established.

The preliminary assessment of the impacts of a plan or project on the site, provided for in Article 6(3), enables the competent national authorities to arrive at conclusions regarding the consequences of the initiative envisaged in relation to the integrity of the site concerned. If these conclusions are positive, in the sense that there is a high degree of certainty that the initiative in question will not affect this site, the competent authorities can give their consent on the plan or project. In case of doubt, the precautionary principle should be applied and procedures under Article 6(4) followed, as in the case of negative conclusions.

Being a derogation from Article 6(3) this provision has to be **interpreted in a restrictive way**, so that its application is limited to circumstances where all the conditions required are satisfied. In this regard, it falls on whoever wants to make use of this exception to prove, as a prerequisite, that the aforementioned conditions indeed exist in each particular case.

The provisions of Article 6(4) apply when the results of the preliminary assessment under Article 6(3) are negative or uncertain. The sequential order of its steps has to be followed.

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5.3. INITIAL CONSIDERATIONS

5.3.1. Examining alternative solutions

The **first step** of the competent authorities is to examine the possibility of resorting to alternative solutions which better respect the integrity of the site in question. Such solutions should normally already have been identified within the framework of the initial assessment carried out under Article 6(3). They could involve alternative locations (routes in case of linear developments), different scales or designs of development, or alternative processes. The 'zero-option' should be considered too.

In conformity with the principle of subsidiarity, it rests with the competent national authorities to make the necessary comparisons between these alternative solutions. 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.

It rests with the competent national authorities to assess alternative solutions. This assessment should be made against the site's conservation objectives.

5.3.2. 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 concerned, with regard to the abovementioned conservation aims of the directive — the **second step** of the competent authorities is to examine the existence of imperative reasons of overriding public interest, including those of a social or economic nature, which require the realisation 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 imperative reasons of overriding public interests. As regards the *'other imperative reasons of overriding public interest'* of social or economic nature, it is clear from the wording that only public interests, promoted either by public or private bodies, can be balanced against the conservation aims of the directive. Thus, projects that lie **entirely** in the interest of companies or individuals would not be considered to be covered.

So far the European Court of Justice has not given clear indications for the interpretation of this specific concept. It may therefore be helpful to refer to other fields of Community law, where similar concepts appear.

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

In addition, Community law also knows the concept of *'service of general economic interest'*, evoked in Article 86(2) (ex 90(2)) of the Treaty, within the framework of the exception to the rules of competition envisaged for companies responsible for the management of such services. In a communication on services of general interest in Europe ⁽¹⁸⁾, the Commission, taking account of case law on the matter, gave the following definition of services of general economic interest: *'they describe activities of commercial service fulfilling missions of general interest, and subject consequently by the Member States to specific obligations of public service'* ⁽¹⁹⁾. *It is the case in particular of services in transport, energy, communication networks'*.

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 affected by those initiatives and the abovementioned imperative reasons weighs in favour of the latter. This should be determined along the following considerations.

- (a) 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 example, its fourth recital stating *'Community's natural heritage'*) (see Annex I, point 10).
- (b) In this context, it also seems 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 which would only

⁽¹⁸⁾ COM(96) 443, of the 11.9.1996.

⁽¹⁹⁾ The public service obligations, in their turn, are characterised for the respect of some essential principles of operation, such as continuity, equal access, universality and transparency, but can vary from one Member State to the other, according to different situations, such as geographical or technical constraints, political and administrative organisation, history and traditions.



yield short-term benefits for society would not appear to be sufficient to outweigh the long-term conservation interests protected by the directive.

It is reasonable to consider that the ‘imperative reasons of overriding public interest, including those of a 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 citizens’ lives (health, safety, environment);
- within the framework of fundamental policies for the State and society;
- within the framework of carrying out activities of an economic or social nature, fulfilling specific obligations of public service.

5.4. ADOPTING COMPENSATORY MEASURES

5.4.1. 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.

- Mitigation measures in the broader sense, which aim to minimise or even cancel the negative impacts on the site itself (see Section 4.5).
- Compensatory measures *sensu stricto*: independent of the project, they are intended to compensate for the effects on a habitat affected negatively by the plan or project. For example, general tree-planting to soften a landscape impact does not compensate for the destruction of a wooded habitat with quite specific characteristics.

Measures required for the ‘normal’ implementation of the ‘Habitats’ or ‘Birds’ directives cannot be considered compensatory for a damaging project. For example, the implementation of a management plan or the proposal/designation of a new area, already inventoried as of Community importance, constitute ‘normal’ measures for a Member State. Compensatory measures should be additional to proper implementation.

The compensatory measures should be considered only after having precisely ascertained a negative impact on the integrity of a Natura 2000 site. Proposing compensatory measures from the beginning could not exempt from the need to respect beforehand the steps described in Article 6, in particular the study of alternatives and the comparative assessment of the interest of the project/plan in relation to the natural value of the site.

The compensatory measures constitute measures specific to a project or plan, additional to the normal practices of implementation of the ‘Nature’ directives. They aim to offset the negative impact of a project and to provide compensation corresponding precisely to the negative effects on the species or habitat concerned. The compensatory measures constitute the ‘last resort’. They are used only when the other safeguards provided for by the directive are ineffectual and the decision has been taken to consider, nevertheless, a project/plan having a negative effect on the Natura 2000 site.

5.4.2. Content of compensatory measures

The compensatory measures *sensu stricto* have to ensure the maintenance of the contribution of a site to the conservation at a favourable status of one or several natural habitats ‘*within the biogeographical region concerned*’. It results from the fact that:

- a site should not be irreversibly affected by a project before the compensation is indeed in place. For example, a wetland should normally not be drained before a new wetland, with equivalent biological characteristics, is available for inclusion in the Natura 2000 network;
- compensation must be additional in relation to the Natura 2000 network to which the Member State should have contributed in conformity with the directives.

In terms of the ‘**Birds’ directive**, compensation cannot be the designation of an inventoried area which should have already been classified by the Member State. One could on the other hand accept, as a compensation, work to improve the biological value of an area (to be designated) or of a SPA (designated) 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. *A fortiori*, the re-creation of a habitat favourable to the bird species concerned is acceptable provided the created site is available at the time when the affected site loses its natural value.

In terms of the ‘*Habitats’ directive*, the compensation could, similarly, consist of the re-creation of a comparable habitat, the biological improvement of a substandard habitat or even the addition to Natura 2000 of an existing site the proposal of which under the directive had not been deemed essential at the time of the drawing up of the biogeographical list.

In the latter case, one could argue that overall, the project will result in a loss for this habitat type at Member State level. However, at Community level, a new site will benefit from the protection provided for in Article 6, thus contributing to the objectives of the directive.

The compensatory measures can consist of:

- recreating a habitat on a new or enlarged site, to be incorporated into Natura 2000;
- improving a habitat on part of the site or on another Natura 2000 site, proportional to the loss due to the project;
- in exceptional cases, proposing a new site under the ‘*Habitats’ directive*.

The result has normally to be operational at the time when the damage is effective on the site concerned with the project unless it can be proved that this simultaneity is not necessary to ensure the contribution of this site to the Natura 2000 network.

5.4.3. ‘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 the Member State has to take measures to compensate for the loss.

It also appears in Article 3(1) which states that Natura 2000 is ‘*a coherent European ecological network of special areas of conservation*’ and in Article 3(3) which 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 character of the coherence. It is obvious that the expression 'overall coherence' in Article 6(4) is used in the same meaning.

Article 6(4) requires to 'protect' the overall coherence of Natura 2000. Thus, the directive presumes that the 'original' network has been coherent. If the derogation regime is used, the situation must be corrected so that the coherence is fully restored.

- Under the '**Habitats' directive** the selection of a site for the Natura 2000 network rests on:
 - the taking into account of habitat and species in proportions (surfaces, populations) described in the standard data form;
 - the inclusion of the site in a biogeographical region within which it is selected;
 - the selection criteria established by the 'Habitats' Committee and used by the European Topic Centre — Nature Conservation to advise the Commission to retain a site on the Community list.
- The '**Birds' directive** does not provide for biogeographical regions, or selection at Community level. By analogy, one could consider that **the overall coherence of the network** is ensured if:
 - compensation is ensured along the same migration path;
 - the compensation site(s) are accessible with certainty by the birds usually occurring on the site affected by the project.

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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; (b) concern the same biogeographical region in the same Member State; and (c) provide functions comparable to those which had justified the selection criteria of the original site.

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

5.4.4. Who bears the cost of the compensation measures?

It appears logical that, in line with the 'polluter pays' principle, the promoter of a 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 this connection, the European funds could, for example, co-finance the compensatory measures for a transport infrastructure retained under the TEN (trans-European network).

A subsidy granted by a public authority for measures taken in order to compensate for damage to a Natura 2000 site can be considered as a **State aid** (within the meaning of Article 87 (ex 92) of the Treaty), should it be granted to an undertaking established in a Natura 2000 site, designated before or after the establishment of the undertaking. However, in the case of an undertaking acting as a contractor for a public authority to build an infrastructure, the subsidy would not be considered as a State aid as long as it is granted in exchange of works carried out.

The Member State is bound to compensatory measures as from the entry into force of Article 6. Their financing can fall within its competence.

5.4.5. Communication to the Commission of the compensatory measures

The competent national authorities have to communicate to the Commission the compensatory measures adopted. The provision in question specifies neither the form, nor the purpose of this communication. However, in order to facilitate that process the Commission services have prepared a standard format ⁽²⁰⁾ for supplying information to the Commission according to the provisions of Article 6(4)1 or 6(4)2. In any case, it is not the Commission's role either to suggest compensatory measures, or to validate them scientifically.

This communication should enable the Commission to appreciate the manner in which the conservation objectives of the site in question are pursued in the particular case. While the national authorities are only specifically obliged to communicate the compensatory measures adopted, the communication of certain elements relating to the studied alternative solutions and to the imperative reasons for overriding public interest which required the realisation of the plan or project can also prove necessary, insofar as these elements affected the choice of the compensatory measures.

The communication of compensatory measures must enable the Commission to appreciate the manner in which the conservation objectives of the site in question are pursued in the particular case. However, it is not the Commission's role to suggest compensatory measures.

5.5. 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. The realisation of plans or projects likely to adversely affect these sites 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 initiative envisaged.

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;

⁽²⁰⁾ This format is presented in Annex IV of this document.



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

5.5.1. The sites concerned

Article 6(4), second subparagraph, applies when the realisation of the plan or project is likely to 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 that a site should be subject to this second subparagraph.

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.

5.5.2. 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 defined expressly.

Community law refers to public health and public safety reasons as ones which can justify the adoption of restrictive national measures to the free movement of goods, workers and services as well as to the right of establishment. In addition, the protection of persons' health is one of the fundamental objectives of Community policy in the field of the environment. In the same view, the primary beneficial consequences for the environment constitute a category which must be included in the aforementioned fundamental objectives of environmental policy.

Within the framework of the principle of subsidiarity, it rests with the competent national authorities to check whether such a situation occurs. Of course, any situation of this kind is likely to be examined by the Commission within the framework of its activity of control on the correct application of Community law.

As regards the concept of 'public safety', it is useful to refer to the judgement of the Court of Justice of 28 February 1991 in Case C-57/89, *Commission v Germany ('Leybucht Dykes')*. That decision preceded the adoption of Directive 92/43/EEC and hence Article 6. However, the decision retains relevance, 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 a reduction in the area of an SPA. As a matter of general principle, the Court stated that the grounds justifying such a reduction must correspond to a general interest which is superior to the general interest represented by the ecological objective of the directive. In the 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 those measures are confined to a strict minimum.

The national authorities can authorise the realisation of the plan or project only if the proof of the existence of the aforesaid 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.

5.5.3. Adoption of the Commission's opinion — its consequences

In the case of imperative reason of overriding public interest other than human health, safety and environmental benefits, the prior opinion of the Commission is necessary. Article 6(4), second subparagraph, does not specify a procedure or the specific contents of such an opinion ⁽²¹⁾. One 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 compensation measures. That assessment involves both a scientific and economic appraisal as well as an examination of the necessity and proportionality of the realisation of the plan or project with regard to the invoked imperative reason.

From its nature, the opinion is not an act having binding legal effects. The national authorities can move away from it and decide to implement the plan or project, even if the opinion is adverse. In the latter case however, one can reasonably expect that the decision will address the Commission's arguments and explain why its opinion has not been followed. In any case the Commission can assess whether the implementation of the plan or project is in conformity with the requirements of Community law and, if necessary, initiate appropriate legal action.

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. The opinion is not binding but in a case of non-conformity with Community law, legal action may be taken.

⁽²¹⁾ The relevant standard format (Annex IV) also covers the request for a Commission opinion according to the provisions of Article 6(4)2.



Annexes





ANNEX I

COURT CASE REFERENCES

- (1) The need for a strict transposition of Article 6 has already been signalled in a case brought before the European Court of Justice (Opinion of Advocate General Fennelly in Case C-256/98, *Commission v France*, delivered on 16 September 1999).
- (2) See the decision of the European Court of Justice in Case C-355/90, *Commission v Spain* [1993] ECR I-4221 ('*Santoña Marshes*') and its decision of 18 March 1999 in Case C-166/97, *Commission v France (Seine Estuary)*.
- (3) As above.
- (4) Case C-392/96, *Commission v Ireland*, judgment of ECJ of 21 September 1999.
- (5) This point is also underlined by Advocate General Fennelly of the European Court of Justice in the case above under (1).
- (6) The relevant case law of the European Court of Justice further emphasises that the concept of 'project' is to be broadly interpreted — see in particular judgment of 24 October 1996 in Case C-72/95, *Kraaijeveld*.
- (7) As above under (1).
- (8) To see what in practice may be considered 'significant', it is helpful to refer to the case law of the European Court of Justice, in particular Case C-355/90, *Commission v Spain* [1993] ECR I-4221 ('*Santoña Marshes*'). Although that case was not decided by reference to Article 6(3) and (4) of Directive 92/43/EEC (being decided by reference to the preceding protection regime for SPAs under Directive 79/409/EEC), it serves to indicate some of the types of activity which may be considered as having significant effects on a protected site.
- (9) The Court has stated that '*Even a small-scale project can have significant effects on the environment if it is in a location where the environmental factors set out in Article 3 of (Directive 85/337/EEC) such as fauna and flora ... are sensitive to the slightest alteration.*' (Case C-392/96, *Commission v Ireland*, judgment of ECJ of 21 September 1999).
- (10) See also the emphasis the ECJ placed on the common responsibilities of the Member States in the context of the 'Birds' directive in Cases C-252/85 and C-262/85 (Respectively: *Commission v France* [1988] ECR 2243 and *Commission v Italy* [1987] ECR 3073).

ANNEX II

CONSIDERATIONS ON MANAGEMENT PLANS

While the appropriate management plans are not always necessary, at both the Galway seminar ⁽²²⁾ and the Bath Conference ⁽²³⁾, participants stressed that the management plans could constitute an effective means to fulfil the obligations provided for by the 'Habitats' directive.

The following extract from the conclusions of the Galway seminar sets out a number of considerations which may be helpful in view of the preparation of management plans:

1. Methodology

- Is a management plan for the site really needed? Explain why
- Who will initiate the plan? Who will be responsible for the plan?
- What is important about the site (both natural value and socioeconomic context)?
- What are its main threats?
- What do we want to achieve?
- How do we want to achieve it, according to what precise time schedule?
- How much will it cost? Will it optimise the benefits for nature conservation?

2. Objectives

The objectives of the management plan for the site have to correspond to the ecological requirements of the natural habitats and species significantly present on it in order to ensure their favourable conservation status. They must be as clear as possible, realistic, quantified and manageable. Use clear language with concrete formulation, to be understandable by everybody.

- What is the favourable conservation status for each habitat type and species present on the site?
- How does it contribute to the integrity of the site and the coherence of the network?
- Is it assessed in a dynamic way according to the evolution of the conservation status of the habitats or species concerned?

3. Consultation and implementation

It is an essential part of the process to establish a management plan needing a multidisciplinary and professional approach.

- Have you identified all the local actors?
- Have you involved them according to a bottom-up approach?
- When do you involve them?

An illustration of the consultation method is the *document d'objectifs* in France where all interest groups are invited to participate under the responsibility of the competent authorities (*préfet de région*).

⁽²²⁾ Organised by the Irish authorities from 9 to 11 October 1996 in Galway, Ireland on SAC Site Management.

⁽²³⁾ Organised by the Commission and the UK presidency from 28 to 30 June 1998 in Bath, UK, on Natura 2000 and People.



4. Monitoring and evaluation

These issues are one of the most important parts of the plan, especially for determining whether you have been successful with your plan. As with the objectives of the management plan, monitoring has to be clearly and accurately defined, including an analysis of financial matters.

ANNEX II A

EXAMPLES OF LIFE-NATURE PROJECTS ⁽²⁴⁾ THAT HAVE INVOLVED MANAGEMENT PLANS OR STATUTORY, ADMINISTRATIVE OR CONTRACTUAL MEASURES

For each project, its relevant aspects are indicated below:

BELGIQUE-BELGIË

- *Protection through acquisition and management of the last calcareous mires in Belgium (B4-3200/95/435)*

The provincial authority has secured the bulk of this very valuable site by leasing it from the owners.

- *Integral Coastal Conservation Initiative (B4-3200/96/483)*

Preparation of management plans for both the coastal (dune) and the marine habitats (offshore).

DEUTSCHLAND

- *Protecting great bustard habitats in Brandenburg (B4-3200/92/14529)*

Contractual arrangements with farmers were concluded, involving land purchase and leasing, or management agreements.

- *Preservation and re-establishment of the Trebeltal fen and Restoration and conservation of riverine fens in Mecklenburg-Vorpommern (B4-3200/94/731 and B4-3200/95/260)*

Elaboration and implementation of a management plan to restore riverine and fen habitats, through close cooperation with conservation and water authorities.

- *Transnational programme for the conservation of bats in western-central Europe (B4-3200/95/842)*

Contractual arrangements with landowners and public authorities, and establishment of a management plan.

- *Conservation and development of nature of the Federseelandschaft (B4-3200/96/489)*

Rural land consolidation procedure, supported through agri-environment measures.

⁽²⁴⁾ Further information can be found on Internet at: <http://europa.eu.int/comm/life/nature/databas.htm>



ΕΛΛΑΔΑ - GREECE

- *Management and protection of the threatened biotopes of western Crete with ecotopes and priority species (B4-3200/95/850)*

Preparation of management plans with direct involvement of local authorities.

- *The Mediterranean monk seal in Greece: Conservation in action (B4-3200/96/500)*

Drawing up management plans in permanent consultation with the various stakeholders.

ESPAÑA

- *First, second and third phases of the action programme for the conservation of the brown bear and its habitat in the Cantabrian mountains (B4-3200/92/15185 & 94/736 & 95/523)*

Agreements with hunters for the management of hunting areas in a way that is compatible with bear conservation

- *First and second phases of the creation of a network of flora micro-reserves and purchase of land of significant botanical interest in the Valencia region (B4-3200/93/766 & 95/521)*

Agreements with the land-owners and implementation of management plans for the microreserves (160 sites)

- *First and second phases of the conservation programme for three threatened vertebrate species in the Pyrenees (sub-project Spain) (B4-3200/93/772, 95/277, 95/524)*

Agreements with hunters for the maintenance of reserve areas for the *Gypaetus barbatus*, and compensation payments to avoid timber cutting in forest within the brown bear distribution area.

- *Conservation of the little bustard, great bustard and lesser kestrel in the SPAs of Extremadura (B4-3200/96/507)*

Agreement with farmers for the improvement of the steppe habitat.

FRANCE

- *Protection programme for bogs in France (B4-3200/95/518)*

Preparation of a manual for the management of bog habitats.

- *Experimental drawing up of management plans for future French Natura 2000 sites (B4-3200/95/519)*

Testing of management plans on 35 sites and drafting of a methodological guide for preparing management plans for Natura 2000 sites.

IRELAND

- *Development of management plans and emergency actions aimed at candidate SACs (B4-3200/95/837)*

Developing management plans for potential SACs

ÖSTERREICH

- *Bear protection programme for Austria (B4-3200/95/847)*

Elaboration of a management plan in cooperation with all authorities and interest groups concerned and a strong public participation input.

- *Wetland management in the Upper Waldviertel. (B4-3200/96/539)*

Developing management plans for numerous small wetland sites (bogs, ponds, small river-areas), and partly implementing them in close contact with the affected landowners and users.

PORTUGAL

- *Second phase of the project for conservation of the stepparian bird fauna of Castro Verde (B4-3200/95/510)*

- *New technology applied to nature conservation in Guadiana valley (B4-3200/95/511)*

Both projects involved the preparation and implementation of management plans for areas that after the end of the projects were integrated into SPAs.

SUOMI-FINLAND

- *Protection of biodiversity, and particularly of flying squirrel habitats, in the Nuuksio area (B4-3200/95/508)*

Preparation of a management plan for recreation and conservation in privately owned areas.

- *Saimaa ringed seal management plan for Lake Pihlajavesi (B4-3200/95/505)*

Land use plans focusing on seal conservation.

SVERIGE

- *Protection and restoration of Stora Alvaret on Öland Island, south-east Sweden (B4-3200/96/547)*

- *Preservation of the hermit beetle, *Osmoderma eremita* (B4-3200/97/288)*

Use of agri-environmental schemes for the long-term management of the sites.



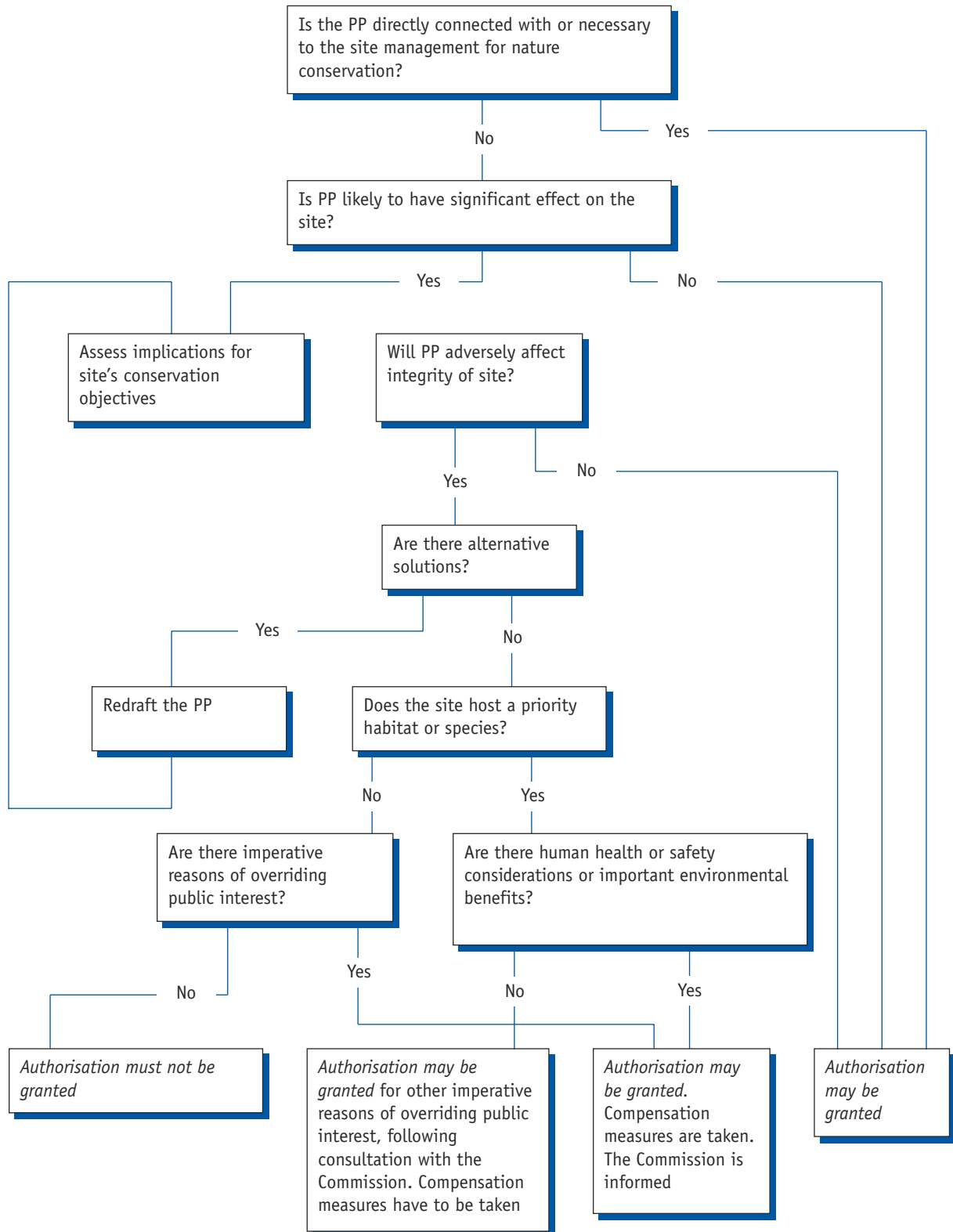
UNITED KINGDOM

- *Conservation management of priority upland habitats through grazing: guidance on management of upland Natura 2000 sites (B4-3200/95/854)*

Development of a practical manual for grazing management planning.

ANNEX III

CONSIDERATION OF PLANS AND PROJECTS AFFECTING NATURA 2000 SITES





ANNEX IV

FORM FOR SUBMISSION OF INFORMATION TO THE EUROPEAN COMMISSION ACCORDING TO ARTICLE 6(4)

Member State:

Date:

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

60

61

Documentation sent for:

information
(Article 6(4)1)

opinion
(Article 6(4)2)

Competent national authority:

Address:

Contact person:

Tel., fax, e-mail:

I. PLAN OR PROJECT

Name and code of Natura 2000 site affected:

This site is:

- an SPA under the 'Birds' directive a proposed SCI under the 'Habitats' directive
 hosting a priority habitat/species

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



2. NEGATIVE EFFECTS

Summary of the assessment of the negative effects on the site:

NB: This summary should focus on the adverse effect expected on the habitats and species for which the site has been proposed for the Natura 2000 network, include the appropriate maps and describe the already decided mitigation measures.

3. ALTERNATIVE SOLUTIONS

Summary of alternative solutions studied by the Member State:

Reasons why the competent national authorities have concluded that there is absence of alternative solutions:



4. IMPERATIVE REASONS

Reason to nevertheless carry out this plan or project:

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

Short description of the reason:

5. COMPENSATION MEASURES

Foreseen compensatory measures and timetable:



ANNEX V

MEMBER STATE NATURE PROTECTION AUTHORITIES ⁽²⁵⁾

Belgique-België

- Ms Els MARTENS
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- Mr Olaf G. CHRISTIANI
Ministry of the Environment and Energy,
The National Forest and Nature Agency
Haraldsgade 53, DK-2100 COPENHAGEN
- Ms Tine NIELSEN SKAFTE
The National Forest and Nature Agency
Haraldsgade 53, DK-2100 COPENHAGEN

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- Dr Ursula VON GLISCYNSKI
Ministry for the Environment, Nature
Conservation and Nuclear Safety, Referat NI 2
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- Mr Detlef SZYMANSKI
Hessisches Ministerium des Innern und für
Landwirtschaft, Forsten und Naturschutz
Hölderlinstr. 1-3,
D-65187 WIESBADEN

Ελλάδα-Greece

- Mrs Stavroula SPYROPOULOU
Ministry of Environment, Physical Planning
and Public Works, Environmental Planning
Division, Nature Management Section
36 Trikalon str, GR-11526 ATHENS
- Mr Panagiotis DROUGAS
General Secretariat for Forests and the Natural
Environment, Department of Aesthetic
Forests, National Parks and Game
Management
Ippokratous str. 3-5, GR-10164 ATHENS

España

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- Mr Miguel AYMERICH DESPOINTES
Dirección General de Conservación de la
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France

- Mr Jean-Marc MICHEL
Ministère de l'Environnement, Direction de la
Nature et des Paysages
20, avenue de Ségur, F-75302 PARIS 07 SP

⁽²⁵⁾ List of delegates to the 'Habitats' Committee, established under Directive 92/43/EEC. An updated list can be found on the Internet at: <http://europa.eu.int/comm/life/nature/databas.htm>

- Mr Henri JAFFEUX
Ministère de l'Environnement, Direction de la
Nature et des Paysages
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- Mrs Marie-Paule KREMER
Ministère de l'Environnement
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73 Bezuidenhoutseweg, PO Box 20401,
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Sverige

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- Mr Jan TERSTAD
Swedish Environmental Protection Agency
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Department of the Environment Transport
and the Regions
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BRISTOL, BS2 9DJ, United Kingdom

- Mr Trevor SALMON
Department of the Environment, Transport
and the Regions, European Wildlife Division
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BRISTOL, BS2 9DJ, United Kingdom

European Commission

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