

Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC

CLARIFICATION OF THE CONCEPTS OF: *ALTERNATIVE SOLUTIONS, IMPERATIVE REASONS OF OVERRIDING PUBLIC INTEREST, COMPENSATORY MEASURES, OVERALL COHERENCE, OPINION OF THE COMMISSION.*

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This guidance document should be read in conjunction with the booklet published by the European Commission in 2000 and entitled "Managing Natura 2000 sites. The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC". The current document intends to further develop and replace the section on Article 6(4) of this earlier publication leaflet. The document reflects the views of Commission services only and it is not of a binding nature.

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1.1. The text of Article 6.4 of the Habitats Directive

"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".

1.2. Scope

1.2.1. Substantial Scope

This provision forms part of the procedure of assessment and possible authorisation, by the competent national authorities, of plans and projects likely to affect a Special Area of Conservation (SAC), a Special Protected Area (SPA) or a Site of Community Importance (SCI)¹. Two fundamental considerations arise:

- On the one hand, it addresses 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 site(s) concerned.
- On the other hand, its concrete application has to be done in the respect of the various steps provided for and in the sequential order² established by the Directive.

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 no reasonable scientific doubt remains as to the absence of effects in the site, the competent authorities can give their consent on the plan or project. In case of doubt, or negative conclusions, the precautionary and preventive principles should be applied and procedures under art. 6(4) followed. Furthermore, taking into account the precautionary principle and applying a preventive approach might also lead to the decision not to proceed with the plan or project.

¹ Article 6(2), 6(3) and 6(4) only applies to sites which are placed on the list of sites selected as sites of Community importance (SCI). Thus, these provisions do not apply to sites eligible for identification as sites of Community importance on the national lists transmitted to the Commission (pSCI). The protection regime for the pSCI is defined in case C-117/03 (Judgement of the Court of 13 January 2005, Dragaggi) and in case C-244/05 (Judgement of the Court of 14 September 2006, Bund Naturschutz).

² In its Opinion for the case C-239/04 the Advocate General (paragraphs 44-46) seems to consider that there is no a sequential order between the examination of alternative solutions and imperative reasons of overriding public interest.

To this effect, the Court has already held, in case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging*³ and confirmed in C-6/04 *Commission v United Kingdom of Great Britain and Northern Ireland*⁴, that Article 6(3) of the Habitats Directive makes the requirement for an appropriate assessment of the implications of a plan or project conditional upon there being a probability, or a risk, that it will have a significant effect on the site concerned. In the light, in particular, of the precautionary principle, such a risk is considered to exist if it cannot be excluded, on the basis of objective information, that the plan or project will have a significant effect on the site concerned.

The above mentioned approach is also reflected in the Judgement of the Court of 26 October 2006 in the case C-239/04⁵ regarding the construction of a motorway in Portugal, where it is mentioned that any reasonable scientific doubt as to the absence of adverse effects on the integrity of the site must be removed before the project is authorised.

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

- 1 The alternative put forward for approval, is the least damaging for habitats, for species and for the integrity of the Natura 2000 site, regardless of economic considerations, and that no other feasible alternative, exists that would not affect the integrity of the site.
- 2 There are imperative reasons of overriding public interest, including ‘those of a social or economic nature’.

Being an exception to Article 6(3), this provision can only be applied to circumstances where all the conditions required by the Directive are fully satisfied. In this regard, it falls on whoever wants to make use of this exception to prove, as a prerequisite, that the aforementioned conditions do indeed exist in each particular case.

- 3 Once the lack of suitable alternatives and the acceptance of imperative reasons of overriding public interest are fully ascertained and documented, all compensatory measures that are needed to ensure the protection of the overall coherence of the Natura 2000 network have to be taken. Therefore, compensatory measures should be considered only when the application of other safeguards, such as mitigation measures, is not sufficient. The compensatory measures adopted must **always** be communicated to the Commission.

The provisions of Art. 6(4) apply when the results of the preliminary assessment under Art. 6(3) are negative or uncertain. That is:

- 1. The plan or project will adversely affect the integrity of the site**
 - 2. Doubts remain as to the absence of adverse effects on the integrity of the site linked to the plan or project concerned**
- "The sequential order of its steps has to be followed".**

³ Judgement of the Court of 7 September 2004 in case C-127/02, paragraphs 57 and 61.

⁴ Judgement of the Court of 20 October 2005 in case C-6/04, paragraph 54.

⁵ Judgement of the Court of 26 October 2006, Commission/Portugal (case C-239/04, paragraph 24).

1.2.2. *Temporal scope*

The judgement delivered by the Court of Justice in relation to the case C-209/04 states the principles with regard to the temporal applicability of Article 6(3) and consequently Article 6(4) of the Habitats Directive. In order to determine whether projects must be subject to an environmental assessment in accordance with Article 6(3), the Court uses a formal criterion: the date of the application for the authorisation for a project. Thus, if the application for authorisation was formally lodged before the expiry of the time-limit for transposition of the Directive or before the accession to the EU, the project is not subject to the requirements laid down in Article 6(3) and (4). However, if the application for authorisation was formally lodged after the expiry of the time-limit for transposition of the Directive or after the accession to the EU, the project is subject to the requirements laid down in Article 6(3) and (4).

1.3. **Initial considerations**

Ensure quality of appropriate assessment under article 6 (3)

Appropriate assessments of the implications of the plan or project for the site concerned must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives. This implies that all aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field.

Assessment procedures of plans or projects likely to affect Natura 2000 sites should guarantee full consideration of all elements contributing to the site integrity and to the overall coherence of the network, both in the definition of the baseline conditions and in the stages leading to identification of potential impacts, mitigation measures and residual impacts. These determine what has to be compensated, both in quality and quantity.

Regardless of whether the provisions of Article 6(3) are delivered following existing environmental impact assessment procedures or other specific methods, it must be ensured that:

- Article 6(3) assessment results allow full traceability of the decisions eventually made, including the selection of alternatives and any imperative reasons of overriding public interest.
- The assessment should include all elements contributing to the site's integrity and to the overall coherence of the network as defined in the site's conservation objectives and Standard Data Form, and be based on best available scientific knowledge in the field. The information required should be updated and could include the following issues:
 - Structure and function, and the respective role of the site's ecological assets
 - Area, representativity and conservation status of the priority and non-priority habitats in the site

- Population size, degree of isolation, ecotype, genetic pool, age class structure, and conservation status of species under Annex II of the Habitats Directive or Annex I of the Birds Directive present in the site
 - Role of the site within the biographical region and in the coherence of the Natura 2000 network
 - Any other ecological assets and functions identified in the site
- It should include a comprehensive identification of all the potential impacts of the plan or project likely to be significant on the site, taking into account cumulative impacts and other impacts likely to arise as a result of the combined action of the plan or project under assessment and other plans or projects.
 - The assessment under Article 6(3) applies the best available techniques and methods, to estimate the extent of the effects of the plan or project on the biological integrity of the site(s) likely to be damaged.
 - The assessment provides for the incorporation of the most effective mitigation measures into the plan or project concerned, in order to avoid, reduce or even cancel the negative impacts on the site.
 - The characterisation of the biological integrity and the impact assessment should be based on the best possible indicators specific to the Natura 2000 assets which must also be useful to monitor the plan or project implementation.

To meet the requirements of Article 6(3) assessment, it seems most appropriate that the Natura 2000 authorities set up the specific formal requirements regarding the type of information and criteria to follow when carrying out the appropriate assessment. Dissemination and training to the relevant parties (E.g. authorities at a different level of government, consultants and plan or project developers) it is highly recommended.

1.3.1. Examining alternative solutions

In line with the need to prevent undesired impairment to the Natura 2000 network, the thorough revision and/or withdrawal of a proposed plan or project should be considered when significant negative effects on the integrity of a site have been identified. This should be observed especially in the case of effects on priority habitats and/or species protected under the Habitats Directive or globally endangered bird species listed in Annex I of the Birds Directive. The competent authorities have to analyse and demonstrate first the need of the plan or project concerned. Thus, the zero option should be considered at this stage.

Subsequently, the competent authorities should examine the possibility of resorting to alternative solutions which better respect the integrity of the site in question⁶. All feasible alternatives, in particular, their relative performance with regard to the conservation objectives of the Natura 2000 site, the site's integrity and its contribution to the overall coherence of the Natura 2000 Network have to be analyzed. 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 or routes, different scales or designs of development, or alternative processes.

⁶ In its Opinion for the case C-239/04, the Advocate General (paragraph 44) considers that "among the alternatives short-listed *"the choice does not inevitably have to be determined by which alternative least adversely affects the site concerned. Instead, the choice requires a balance to be struck between the adverse effect on the integrity of the SPA and the relevant reasons of overriding public interest."*

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

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

1.3.2. *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 above-mentioned conservation aims of the Directive - the competent authorities have to examine the existence of imperative reasons of overriding public interest, including those of a social or economic nature, which require the 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, irrespective of whether they are promoted either by public or private bodies, can be balanced against the conservation aims of the Directive. Thus, projects developed by private bodies can only be considered where such public interests are served and demonstrated.

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 the imperative requirements which can justify national measures restricting freedom of movement, the Court recognised public health and environmental protection, as well as the pursuit of legitimate goals of economic and social policy.

In addition, Community law also recognises 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 Europe⁷, 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*

⁷ COM (96) 443, of the 11.09.1996.

*obligations of public service*⁸. 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 above-mentioned imperative reasons weighs in favour of the latter. This should be determined according to 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 e.g. its 4th recital stating "*Community's natural heritage*") (see Annex I point 10).
- b) in this context, it seems also reasonable to assume that the public interest can only be overriding if it is a **long-term interest**; short term economic interests or other interests which would only yield short-term benefits for the 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 social and economic nature" refer to situations where plans or projects envisaged prove to be indispensable:

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

In order to provide readers with a more precise indication of what might legitimately be considered as potential imperative reasons of overriding public interest, some **examples** have been extracted from the Opinions delivered by the Commission in the framework of Article 6(4) and are related to the reasoning given by Member States.

Intersection of the Peene Valley (Germany) by the planned A 20 motorway (Germany)

A 20 motorway is part of the trans-European road network. An east-west link has to be created in Mecklenburg-Western Pomerania in order to link it with central regions of the Community.

Mecklenburg-Western Pomerania suffers from an exceptionally high unemployment. For several years its unemployment rate has been almost the double of that in the old Länder. The gross national product created in Mecklenburg-Western Pomerania, as compared to the percentage of the population, is significantly lower than the average gross national product.

⁸The public service obligations, in their turn, are characterised for the respect of some essential principles of operation, such as continuity, the 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.

Project Mainport Rotterdam” Development Plan (The Netherlands)

Portuary and industrial activity in the Rotterdam area is one of the main pillars of Dutch economy. The harbour of Rotterdam is an essential multimodal crossroads in the TEN-T Network and is therefore of Community importance. Expected growth in global container handling and chemical industrial activity will lead to increased demand for space which will have to be met if the competitive position of the Rotterdam harbour in the Hamburg – Le Havre range has to be maintained.

The development of the Rotterdam port, also brings into focus the question of promoting modal-shift particularly in relation to freight transport. It is clear that shifting freight from road to water will have considerable benefits in terms of reduced green-house gas emissions, reduced atmospheric pollution and reduced congestion. These benefits should be recognised in assessing questions of public interest.

Extension of the site of Daimler Chrysler Aerospace Airbus GmbH in Hamburg-Finkenwerder (Germany)

Outstanding importance for the region of Hamburg and northern Germany and the European aerospace industry. Project will contribute to the technological advance and foster the European co-operation in the aviation business. Positive effect on the economic and social situation of the bordering regions and positive impact on the competitiveness of the European aeronautic industry. Important number of highly qualified new jobs, needed to counterbalance the considerable loss of jobs in the industrial sector of the region.

High speed line (TGV East) (France)

Lack of options for linking the existing lines. The European TGV East project was viewed favourably in the Council of Ministers of the European Community on 1990 and was chosen as a priority project by the European Council in 1994, having benefited from Union decisions regarding the priority of infrastructure projects to be implemented.

Operational master plan (“Rahmenbetriebsplan”) of the Prosper Haniel Colliery (Germany)

Due to its geological and infrastructure qualities the Prosper Haniel coal mine and the continuation of its mining activities contribute to achieving the general objectives of the German long term energy policy at the federal and regional level, and in particular the interest of supply security and to maintain the leading position of European mining and coal energy technologies. The closure of the Prosper Haniel mine would have unacceptable direct and indirect economic and social consequences at the regional level with a direct loss of jobs in coal mining and in up-stream industries and downstream services.

La Breña II Reservoir Project (Spain)

Provide enough water for human consumption, industrial uses and agriculture, which cannot be available in the current situation of the River Guadalquivir basin.

For further examples and information concerning the Opinions delivered by the Commission:
http://ec.europa.eu/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/index_en.htm

1.4. Adopting compensatory measures

1.4.1. What is meant by "compensatory measures" and when should they be considered?

In the context of article 6 of the Habitats Directive, mitigation measures must be clearly distinguished from compensatory measures.

The term "*compensatory measures*" is not defined in the 'Habitats' Directive. Experience would suggest the following distinction:

- mitigation measures in the broader sense, are those measures which aim to minimise, or even cancel, the negative impacts on a site that are likely to arise as a result of the implementation of a plan or project. These measures are an integral part of the specifications of a plan or project (see section 4.5 of the leaflet "Managing Natura 2000 sites. The provisions of Article 6 of the Habitats Directive"), and
- compensatory measures *sensu stricto*: are independent of the project (including any associated mitigation measures). They are intended to offset the negative effects of the plan or project so that the overall ecological coherence of the Natura 2000 Network is maintained.

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

Compensatory measures should be additional to the actions that are normal practice under the Habitats and Birds Directives or obligations laid down in EC law. 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. Thus, compensatory measures should go beyond the normal/standard measures required for the protection and management of Natura 2000 sites.

Another example of compensation can be given in the case of a harbour extension leading to the destruction of a roosting site for birds and the diminution of low depth inter-tidal mudflats and reedbeds. The recreation of a high tide roosting site and of shallow beaches associated to mudflats as well as habitat restoration of reedbeds and wet meadows through hydraulic works, environmental measures for the agricultural use of reedbeds and meadows, and management of hunting pressure, would compensate for the negative impact caused by the project.

Consequently, compensatory measures are not a means to allow the implementation of plans or projects while escaping the obligations of Article 6. They should be considered only after having ascertained a negative impact on the integrity of a Natura 2000 site. Specifically, the logic and rationale of the assessment process requires that if a negative impact is foreseen then an evaluation of alternatives should be carried out as well as an appreciation of the interest of the plan/project in relation to the natural value of the site. Once it is decided that the project/plan should proceed, then it is appropriate to move to a consideration of compensation measures. This approach has also been confirmed in the opinion given by the advocate general in the case C 239-/04 (paragraph 35).

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.

1.4.2. *“Overall coherence” of the Natura 2000 network*

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

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

Art. 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 Art. 3 and Art. 10 to explain the character of the coherence. It is obvious that the expression “*overall coherence*” in Art. 6(4) is used in the same meaning.

Having said this, it is clear that the importance of a site to the coherence of the network is a function of the conservation objectives of the site, the number and status of the habitats and species found within the site, as well as the role the site plays in ensuring an adequate geographical distribution in relation to the range of species and habitats of species concerned.

Art. 6(4) requires to “protect” the overall coherence of Natura 2000. Thus, the Directive presumes that the “original” network has been coherent. If the exception regime is used, the situation must be corrected so that the coherence is fully restored.

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

At this stage it would be useful to recall that under the Habitats Directive the selection of a site for the Natura 2000 Network rests on:

- the taking into account of the habitat(s) and species in proportions (surface areas, populations) described in the standard data form;
- the inclusion of the site in a biogeographical region within which it is located;
- the selection criteria established by the ‘Habitats’ Committee and used by the European Topic Centre on Biological Diversity to advise the Commission to retain a site on the Community list.

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

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

- compensation fulfils the same purposes that motivated the site's designation in accordance with Article 4(1) and 4(2) of the Birds Directive;
- compensation fulfils the same function 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.

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

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

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

1.4.3. Objective and general contents 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 natural habitats types and habitats of species “*within the biogeographical region concerned*”. In short, ensure the maintenance of the overall coherence of the Natura 2000 Network. It results from this:

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

Member States should pay particular attention when the negative effects of a plan or project are produced in rare natural habitats types or in natural habitats that need a long period of time to provide the same ecological functionality. Under these circumstances, the zero option should be seriously considered.

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

In terms of the *'Birds' Directive*, this could include, as a compensation, work to improve the biological value of an area, which is either designated or will be 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 or the biological improvement of a substandard habitat within an existing designated site, or even the addition to the Natura 2000 Network of a new site of comparable quality to the original site. In the 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.

Compensatory measures appropriate or necessary to adverse effects on Natura 2000 site can consist of:

- Restoration or enhancement in existing sites: restoring the habitat to ensure the maintenance of its conservation value and compliance with the conservation objectives of the site or improving the remaining habitat in proportion to the loss due to the plan or project on a Natura 2000 site;
- Habitat Recreation: recreating a habitat on a new or enlarged site, to be incorporated into Natura 2000;
- As described above and in association with other works, proposing a new site under the Habitats and Birds Directive.

The range of compensatory measures found in current practice within the EU in the frame of the Habitats Directive also includes:

- Species reintroduction.
- Species recovery and reinforcement, including reinforcement of prey species.
- Land purchase.
- Rights acquisition.
- Reserve creation (including strong restrictions in land use).
- Incentives for certain economic activities that sustain key ecological functions.
- Reduction of (other) threats, usually upon species, either through action on a single source or through co-ordinated action on all threat factors (E.g. resulting from space-crowded effects).

In principle, the result of implementing compensation has normally to be operational at the time when the damage is effective on the site concerned. Under certain circumstances where this can not be fully fulfilled, overcompensation would be required for the interim losses.

The option of habitat banking as compensatory measure under Article 6(4) is of very limited value due to the tight criteria mentioned in relation to the need for compensation to ensure the protection of the coherence of the network (*Section 1.4.2*).

Nevertheless, there could be a potential use of the concept of habitat banking in a constraint regime linked to Article 6(1). For instance, where a development is foreseen it might be appropriate to consider and implement within the management plan designed for the site or integrated into other development plans, the necessary compensatory measures that would be required in the context of such development and consequently before any decision is made by the competent authorities.

1.4.4. What to include in the programme of compensation measures?

The compensatory measures under Article 6(4) must address all issues, whether technical and/or legal or financial, necessary to accomplish the objective of offsetting the negatives effects of a plan or project and preserving the overall coherence of the Natura 2000 network. The following provides an overview of the issues to include in the programme of compensatory measures.

- Tight coordination and cooperation between Natura 2000 authorities, assessment authorities and the proponent of the compensatory programme (i.e. plan or project proponent and external consultants involved).
- Clear objectives and target values according to the conservation objectives of the site.
- Analysis of the technical feasibility of the measures in relation to their conservation objectives.
- Analysis of the legal and/or financial feasibility of the measures according to the timing required.
- Explanation of the time-frame in which the achievement of the conservation objectives is expected.
- Timetable for implementation and their co-ordination with the schedule for the plan or project implementation.
- Public information and/or consultation stages.
- Specific monitoring and reporting schedules based on progress indicators according to the conservation objectives.
- The appropriate budget programme approved during the suitable period to guarantee the success of the measures.

1.5. Criteria for designing compensatory measures

1.5.1. Targeted compensation

Compensatory measures under the Habitats Directive must be established according to reference conditions that are defined after the characterisation of the biological integrity of the site likely to be lost or deteriorated, and according to the likely significant negative effects that would remain after mitigation. Biological integrity can be defined as all those factors that contribute to the maintenance of the ecosystem including structural and functional assets. In the framework of the Habitats Directive, the biological integrity of a site is linked to the conservation objectives for which the site was designated as part of the Natura 2000 network.

Targeted compensation requires that an appropriate Article 6(3) assessment has been correctly undertaken in line with the provisions mentioned in the previous chapter.

Once the biological integrity likely to be damaged and the actual extent of the damage have been identified, the measures in the compensation programme must address specifically those effects, so that the elements of integrity contributing to the overall coherence of the Natura 2000 network are preserved in the long term. Thus, these measures should be the most appropriate to the type of impact predicted and should be focused on objectives and targets clearly addressing the Natura 2000 elements affected. This requires that measures clearly refer to the structural and functional aspects of the site integrity, and the related types of habitat and species populations that are affected.

This entails that the compensatory programme must necessarily consist of ecological measures, for example in the form of habitat restoration or enhancement, population reinforcement and/or any other actions that may be suitable for the purpose. Therefore, payments to members or towards special funds, regardless of whether these are ultimately directed to nature conservation projects are not suitable under the Habitats Directive. In addition, any secondary or indirect measure that might be proposed to enhance the performance of the core measures or the outcome of the compensation scheme, must have a clear relationship to the objectives and targets of the compensatory scheme.

As an example, in designing compensation, clear objectives must be established:

- Identify the total numbers of species affected
- Identify the principle species affected and the broad proportion of the total population(s) that these occur in;
- Identify the principle function(s) of the habitats that will be adversely affected that the species depend on e.g. feeding, roosting, etc;
- Identify the likely populations of species and the habitat functions at favourable conservation status;
- Identify the measures needed to offset the damage to the habitat functions and species affected so that they are restored to a state that reflects the favourable conservation status of the area affected.

Any uncertainty over the precise nature and/or magnitude of the adverse effects should be thoroughly tested. Where appropriate, a precautionary approach should be adopted and the assessment of adverse effect based on a worse-case scenario.

1.5.2. Effective compensation

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

Compensatory measures must be feasible and operational in reinstating the ecological conditions needed to ensure the overall coherence of the Natura 2000 network (i.e. the ecological structure and functions impaired and the habitats and species involved). The estimated timescale and any maintenance action required to enhance performance should be known and/or foreseen right from the start in view of the implementation of the measures. This must be based on the best scientific knowledge available, complemented with specific investigations for the precise location where the compensatory measures will be implemented. Measures for which there is no reasonable guarantee of success should not be considered

under Article 6(4), and the likely success of the compensation scheme should influence the final approval of the plan or project in compliance with the preventive principle.

In addition, the most effective option, which allow for the greatest chances of success must be chosen when it comes deciding between different possibilities for compensation.

The programme of compensatory measures needs to include detailed monitoring during implementation to ensure effectiveness in the long term. Being in the framework of the Natura 2000 network, such monitoring should be co-ordinated with, and eventually integrated into, that foreseen under Article 11 of the Habitats Directive.

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

1.5.3. Technical feasibility

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

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

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

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

1.5.4. Extent of compensation

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

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

There is wide acknowledgement that ratios should be generally well above 1:1. Thus, compensation ratios of 1:1 or below should only be considered when it is demonstrated that with such an extent, the measures will be 100% effective in reinstating structure and functionality within a short period of time (e.g. without compromising the preservation of the habitats or the populations of key species likely to be affected by the plan or project).

1.5.5. Location of compensatory measures

Compensatory measures should be located to accomplish the highest effectiveness in maintaining the overall coherence of the Natura 2000 network. This entails a set of pre-conditions that any compensatory measure should meet:

- The area selected for compensation must be within the same biogeographic region (for sites designated under the Habitats Directive) or within the same range, migration route or wintering area for bird species (i.e. sites designated under the Birds Directive) in the Member State concerned. Further on, the area should provide functions comparable to those which had justified the selection criteria of the original site, particularly regarding the adequate geographical distribution.
- The area selected for compensation must have -or must be able to develop- the specific features attached to the ecological structure and functions, and required by the habitats and species populations. This relates to qualitative aspects like the uniqueness of the assets impaired and demands the consideration of local ecological conditions.
- Compensatory measures must not jeopardize the preservation of the integrity of any other Natura 2000 site contributing to the overall coherence of the network. When carried out in existing Natura 2000 site(s), the measures must be consistent with the conservation objectives of the site(s) and must not be understood as a means to undertake the overall management required for the site(s).

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

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

New designations as part of compensation measures shall be submitted to the Commission before those are implemented and before the realisation of the project but after its authorisation. The new designations should be made available to the Commission through the established channels and procedures as in the process of adoption of the SCI lists and SPA designations (*business as usual*).

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

1.5.6. Timing of compensation

Timing the compensatory measures demands a case-by-case approach, where the schedule adopted must ensure the continuity of the ecological processes essential for maintaining the biological structure and functions that contribute to the overall coherence of the Natura 2000 network. This requires a tight coordination between the implementation of the plan or project and the implementation of the measures, and relies on issues such as the time required for habitats to develop and/or for species populations to recover or establish in a given area. In addition, other factors and processes must also be considered:

- A site must not be irreversibly affected before compensation is in place.
- The result of compensation should be effective at the time the damage occurs on the site concerned. Under certain circumstances where this can not be fully achieved, overcompensation would be required for the interim losses.
- Time lags might only be admissible when it is ascertained that they would not compromise the objective of ‘no net losses’ to the overall coherence of the Natura 2000 network.
- Time lags must not be permitted, for example, if they lead to population losses for any species protected in the site under Annex II of Directive 92/43/EEC or Annex I of Directive 79/409/EEC, requiring particularly attention when it entails priority species.
- It may be possible to scale down in time compensatory measures according to whether the significant negative effects would presumably arise in the short, medium or long term.

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

1.5.7. Long term implementation

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

- Making effective a temporary protection, even if the SCI/SPA status is only granted later.

- Devising binding enforcement tools at the national level aimed to ensure the full implementation and effectiveness of compensation (e.g. linked to liability under EIA directive, if applicable, or to the Environmental Liability Directive when in force; subsidising plan or project approval to the robustness of the relevant provisions for implementation of compensatory measures).
- Devising the necessary legal means in case land or rights purchase is deemed essential for the effective implementation of the measures according to good practice (e.g. typified procedures for compulsory purchase on grounds of nature conservation).
- Establishing monitoring programmes for the whole life of the project, including objectives, responsible bodies and resources needs, indicators, and requirements on reporting to the Commission. This could be best performed by independent bodies specifically set up for the purpose and in close coordination and cooperation with the Natura 2000 authorities.

1.6. 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). In particular, financial assistance from the European Regional Development Fund (ERDF) is possible for compensatory measures associated to projects that are being financed with this fund and provided it is given according to the objectives, rules and procedures applicable to this fund.

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 Art. 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.

1.7. Information to the Commission of the compensatory measures

The competent national authorities have to inform the Commission of the compensatory measures adopted. The provision in question specifies neither the form, nor the purpose of this communication. However, in order to facilitate the process the Commission services have prepared a standard format⁹ for supplying information to the Commission according to the

⁹ This format is presented in Annex IV of this document.

provisions of Art. 6(4). In any case, it is not the Commission's role either to suggest compensatory measures, or to validate them scientifically.

The information should enable the Commission to 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 information about 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.

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

In order to allow the Commission to request additional information on the measures taken or to take actions in case it considers that the legal requirements of the directive were not correctly applied, compensatory measures should be submitted to the Commission **before** they are implemented and indeed before the realisation of the plan or project concerned but after its authorisation. It is therefore advised that compensatory measures should be submitted to the Commission as soon as they have been adopted in the planning process in order to allow the Commission, within its competence of guardian of the treaty, to assess whether the provisions of the Directive are being correctly applied.

As responsible bodies for the preservation of the overall coherence of, and for updating the information on, the Natura 2000 network, the authorities responsible for Natura 2000 in each Member State must play an important role in this process, and the information would be submitted through the national authority via the Permanent Representations of each Member State as with the process for the adoption of site lists.

1.8. What happens with sites hosting priority habitats and/or species?

The second subparagraph of Art. 6(4) provides for a special treatment whenever the plan or project concerns a site hosting priority habitats and/or species and is likely to affect these 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;
- the interpretation of the concepts of human health, public safety and the primary beneficial consequences for the environment;
- the procedure for the adoption of Commission's opinion and the consequences which arise from this opinion.

1.8.1. 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.

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

Art. 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.

1.8.2. 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 reasons which can justify the adoption of restrictive national measures to the free movement of goods, workers, services as well as to the right of establishment. In addition, the protection of persons' health is one of the fundamental objectives of the 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 the 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 afore mentioned reasons of overriding public interest is given and within the limits within which the plan or project in question proves necessary for the fulfilment of the public interest in question.

1.8.3. The adoption of Commission's opinion - its consequences

As confirmed by the Judgement of the Court of 14 September 2006 in case C-244/05, the Commission would only deliver an opinion under Article 6(4) when dealing with sites which are placed on the list of sites selected as sites of Community importance (SCI).

In the case of imperative reasons of overriding public interest other than human health, safety and environmental benefits, the prior opinion of the Commission is necessary. Article 6(4), second subparagraph, does not specify a procedure or the specific contents of such an opinion¹⁰. 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 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 the appropriate legal action. While the Directive does not include any specific deadline regarding the adoption of the Commission's opinion, Commission services will make all necessary efforts to carry out the assessments and to draw the appropriate conclusions as speedily as possible.

¹⁰ The relevant standard format (Annex IV) covers also the request for a Commission opinion according to the provisions of Art. 6(4)2.

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 case of non-conformity with Community law, legal action may be taken.

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

Member State:

Date:

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

Documentation sent for/

information/

opinion/

(art. 6(4).1)

(art. 6(4).2)

Competent national authority:

Address:

Contact person:

Tel., fax, e-mail:

1. PLAN OR PROJECT

Name and code of Natura 2000 site affected:

This site is:

- a 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:

N.B.: 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: