

NGO position on updating the guidance documents on Art 6(3) and 6(4) of the Habitats' Directive

Organisations supporting this paper:



1. Introduction

Art 6(3) and (4) of the Habitats Directive, which contain the legal provisions on the so-called “appropriate assessment” are key to protecting the Natura 2000 network from development plans and projects that may irreversibly harm the sites and the network as a whole. The provisions themselves are rather short, but there is considerable amount of case-law interpreting them, forming the basis of methodology to be used when carrying out these assessments.

As part of its Communication ‘[An Action Plan for nature, people and the economy](#)’ the European Commission has undertaken to update, develop and actively promote, in all EU languages, guidance on site permitting procedures. In the following document, the undersigned environmental NGOs would like to highlight key issues to be considered and taken into account in this exercise.

With respect to the European Commission’s Communication, it is important to note that there are currently a number of guidance documents on site permitting procedures:

- [“Managing Natura 2000 sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC”](#) from 2000 (hereinafter: 2000 guidance);
- [„Assessment of plans and projects significantly affecting Natura 2000 sites”](#) from 2001 (hereinafter: 2001 guidance); and
- [„Guidance document on Article 6\(4\) of the Habitats Directive 92/43/EEC“](#) from 2007/2012 (hereinafter: art 6(4) guidance).

Although the 2001 guidance is the one most immediately concerned with the so-called appropriate assessment, it cannot be viewed or revised in isolation. As it is clearly brought out in the introduction of the 2001 guidance (p.6), it must be read within the context of the advice set out in the 2000 guidance document and nothing in the 2001 guidance should be seen as overriding or replacing the interpretations provided in the earlier document. Art 6(4) guidance in turn further details the guidance found in the 2001 guidance. Therefore, the comments below address all three guidance documents listed above, highlighting issues that arise from using them in the prescribed way, i.e. in a combined and interrelated manner.

The organisations supporting this paper also highlight that the drafting of revised guidance should include a public consultation process with the involvement of relevant stakeholders, including competent authorities, experts, developers and NGOs, while ensuring compliance with interpretations by the CJEU.

2. General notes

Taking stock of new studies, analyses, position papers etc.

The issue of appropriate assessments has been subject to numerous studies, analyses, position papers and other materials highlighting the key questions arising in the practical application of this legal instrument. Therefore it would be logical that the updating exercise takes these different documents into due account. In particular, the following studies, analyses and positions should be taken into account:

- [2017 NGO action plan](#)
- [2016 J&E implementation analysis](#)

- [2015 J&E case studies](#) (and [summary](#))
- [2013 Ecosystems study](#)
- [ClientEarth Article 6 briefing series](#)
- Materials gathered within the REFIT evaluation of the EU Nature Directives
- Relevant academic literature on implementation of Article 6 of the Habitats Directive

Adequate reflection of the CJEU case-law

In addition, numerous judgments of the CJEU have been issued since the methodological guidance on Art 6(3) and (4) was published. Therefore, the review and update of guidance should pay attention to this and reflect relevant case-law as appropriate. It is especially important to add guidance on those aspects not covered by previous documents (see chapter 2).

Most importantly, the guidance should make clear that the **principles established by the CJEU in the *Waddenzee* case (C- 127/02),¹** which have been confirmed in all later relevant judgments, **should be applied unconditionally and to their full extent by competent authorities.** In particular, the current guidance does not give sufficient prominence to and at times misrepresents the role of the precautionary principle, which is embedded in Article 6 of the Habitats Directive and should therefore be at the heart of measures taken pursuant to the Directive, as confirmed by *Waddenzee* and other judgments.² The following considerations should be clearly and systematically presented in the guidance:

- First of all, there must be a broad understanding of the term “plans and projects”. With reference to this judgement, the guidance should set out a definition for these terms, listing also examples such as the given fishing activities.
- As regards the screening stage, decisions about whether a plan or project is likely to have significant effects on a site must be made in line with the precautionary principle.³ The phrase “plan or project likely to have a significant effect on the site”⁴ does not mean a plan or project that will *definitely* have significant effects on the site concerned, but rather that there is a “*mere probability* that such an effect attaches to that plan or project”⁵ (our emphasis). Therefore, where there is a probability or a risk that the plan or project will have a significant effect on the site concerned that “cannot be excluded, on the basis of objective information”, an appropriate assessment must be carried out.⁶
- The meaning of ‘significant effect’ should be judged in the context of the plan or project’s likely impact on the site’s conservation objectives. A plan that is not at all likely to undermine the site’s conservation objectives cannot be considered likely to

¹ Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse vereniging tot Bescherming van Gogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (Waddenzee).

² See for example references to ‘relative’ precautionary measures (p.25) and the statement on p. 26 that “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” in the 2000 guidance.

³ This is made clear in the 2001 guidance – see for example, pp.11, 16, 17. However, it is not made clear in the other guidance documents on application of the Art 6 of the Habitats Directive (especially the 2000 guidance).

⁴ Article 6(3), Habitats Directive.

⁵ Waddenzee, para. 41.

⁶ Waddenzee, paras. 41-44.

have a significant effect on it, while a plan or project that might undermine the site's conservation objectives, is likely to have significant effects on it.⁷

- As regards the appropriate assessment stage, all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect the site's conservation objectives, must be identified and evaluated in the light of the best scientific knowledge in the field.⁸
- The precautionary principle applies equally at appropriate assessment stage.⁹ A plan or project may be approved only where adverse effects on site integrity can be ruled out. More specifically, the plan or project can be approved only in cases where "no reasonable scientific doubt remains as to the absence of such [adverse] effects".¹⁰

The guidance document should furthermore put specific focus on environmental safeguards laid down in recent judgements such as:

- The Kaliakra Case: C-141/14,
- The Waldschlösschenbrücke Dresden Case: C-399/14,
- The Moorburg Coal Power Plant Case: C-142/16.

Putting the right emphasis on conservation objectives

There is an over-emphasis in the current guidance documents on the role of social, economic and cultural considerations, including an incorrect statement that these need to be "balanced" with conservation objectives when taking measures under the Directive.¹¹ While Article 2(3) of the Habitats Directive does indeed refer to the need to take into account economic, social and cultural requirements when taking measures pursuant to the Directive, the Directive's clear aim is to contribute towards ensuring biodiversity, by maintaining or restoring the species and habitats protected by it, to favourable conservation status (Articles 2(1) and 2(2)). Therefore, where there is a conflict between conservation objectives and social, economic and cultural requirements, conservation objectives should prevail. The new guidance has to make this clear.

Highlighting the relationship between Art 6(2) and (3) of the Habitats Directive

The CJEU confirmed in the *Sweetman* case (C-258/11)¹² that Articles 6(2) and 6(3) are designed to ensure the same level of protection.¹³ The updated guidance should clarify the relationship between Articles 6(2) and 6(3) and remove any passages that are inconsistent with that clarification.¹⁴ In other words, compliance with Article 6(2) also requires compliance with Article 6(3) – and vice versa. For

⁷ Waddenzee, paras. 47-48.

⁸ Waddenzee, para. 54.

⁹ This is made clear in the 2001 guidance – see for example, pp.11, 24, 28. However, it is not made clear in the other guidance documents on application of the Art 6 of the Habitats Directive (especially the 2000 guidance).

¹⁰ Waddenzee, paras. 55-59.

¹¹ See for example pp. 8, 19, 27, 31, 43 of the 2000 guidance.

¹² Case C-258/11 *Peter Sweetman, Ireland, Attorney General, Minister for the Environment, Heritage and the Local Government v An Bord Pleanála*[2014] P.T.S.R. 1092 (*Sweetman*).

¹³ *Sweetman*, paras. 32-33.

¹⁴ The 2000 guidance (see p 8) states that the Article 6(1)/(2) regime is wholly separate from the Article 6(3)/6(4) regime. While there are differences between the provisions, they are interlinked and designed to work as part of one whole regime, as per the *Sweetman* judgment. See also p. 26.

example, if, in breach of Article 6(3), an activity is allowed to continue that may or will have adverse effects on site integrity, then there is also a breach of Article 6(2), because deterioration and/or disturbance of the site's habitats or species is likely to occur in these circumstances. Further, the *Waddenzee* judgment makes it clear that the Article 6(3) and (4) regime applies not only to 'new' activities, but also to on-going activities, where these could have adverse effects on site integrity.¹⁵ Also, it should be noted that in order to establish failure to fulfil obligations under Article 6(2) it is sufficient that there is a probability or risk that that operation might cause such disturbances.

Clarifying the relationship between appropriate assessments and EIA/SEA

The guidance should not overly emphasise the similarities or analogies between appropriate assessments on the one hand and EIA/SEA on the other hand. The guidance should make it clear that, as regards both the scope and standards to be applied, as well as how binding the results are, the different types of assessment differ substantially from each other. It should be clear that the EIA/SEA assessment processes are not interchangeable and do not discharge the same obligations under EU law. In addition, and as confirmed by the CJEU, assessments carried out pursuant to those directives cannot replace the procedure provided for in Article 6(3) and (4) of the Habitats Directive.¹⁶ Because of a lower threshold, appropriate assessments may also often be required in cases where there is no requirement to carry out the EIA or SEA under the respective EU Directives.

This does not mean that appropriate assessments may not be carried out in parallel, or together, with EIA or SEA and the different assessments should complement each other, if they are required. However, it should be borne in mind that even in the case of coordinated or joint procedures it will often make sense to carry out the appropriate assessment early in the process, to avoid a costly and lengthy EIA/SEA procedure in cases where the appropriate assessment would lead to a negative decision on the planned activity. This should also be reflected in the guidance document.

Best practices

From a practitioner's perspective, having easy access to best practices from other Member States and authorities can be very valuable. Although we find that the best practices as regards appropriate assessments deserve to be spread and made widely available, this should not be done as part of the guidance itself but rather as a separate, stand-alone document. This way the best practices collection can be more easily updated to reflect its development.

3. Proposed additions to the scope of guidance

The scope of the guidance documents available does not cover all the issues on which the CJEU has offered its interpretation. In order to avoid a situation where experts, public authorities or developers rely on incomplete guidance and ignore important interpretations of the Habitats Directive, the updated guidance should also cover the following issues.

¹⁵ The 2000 guidance suggests that the Article 6(3)/(4) regime applies only to 'new' activities (see p.20). See also p. 35, which incorrectly suggests that agricultural and fishing activities would not be subject to the Article 6(3)/(4) regime, and p.32.

¹⁶ Case C-418/04 *Commission v. Ireland*, para. 231. See further, G. Simons, „Habitats Directive and Appropriate Assessment“, (2010) 17/1 Irish Planning and Environmental Law Journal 4.

Public participation

Clear reference to the requirements regarding consultations with the public, including environmental NGOs, needs to be made in the updated guidance. This reference should be modelled on the interpretation given to Art 6(3) in conjunction with the Aarhus Convention by the CJEU in *Lesoochránárske zoskupenie II* case (C-243/15).¹⁷ The CJEU emphasised that environmental NGOs have a right to participate in the procedure relating to the authorisation of a plan or project under Art 6(3).¹⁸ The fact that this is an unconditional right of the environmental NGOs and not a mere recommendation should be stressed.¹⁹

Site integrity

The updated guidance document should clarify that ‘site integrity’ refers not only to the habitats and species protected by the Directive, but also to factors beyond the designated features themselves. Specifically, as noted in Art 1 (e) and (i) of the Habitats Directive, and confirmed by the CJEU in *Sweetman*,²⁰ in order to avoid adverse effects on site integrity, in addition to protected features, the ‘typical species’ associated with those features must *also* be maintained at, or restored to, favourable conservation status. In addition, the guidance should clarify that, following *Sweetman*, even a small loss of part of a site can constitute an adverse effect on site integrity.

As regards site integrity, the guidance should also strongly highlight the fact that plans or projects taking place outside Natura 2000 sites that may have negative impacts on the conservation objectives of those sites should also undergo appropriate assessment. This is needed to ensure the protection of the sites’ integrity from all pressures, no matter where the source of impacts may be located.

Distinction between mitigation and compensatory measures

Clear reference should be made to the fact that measures which are or will be implemented after damage has already occurred as well as monitoring for potential impacts, are not mitigation measures and thus cannot be taken into account as part of the screening or appropriate assessment procedures under Article 6(3). Such measures are compensatory measures and may only be considered as part of an Article 6(4) process, in case the other preconditions for derogation exist (cases [C-521/12](#)²¹, [C-387/15](#) and [C-388/15](#)²²).²³

Assessing impacts after the authorisation

The CJEU has previously emphasised, that although the appropriate assessment under Article 6(3) should be carried out before an authorisation is issued regarding a plan or a project, in some cases it

¹⁷ Case C-243/15 *Lesoochránárske zoskupenie VLK v. Obvodný úrad Trenčín*.

¹⁸ *Lesoochránárske zoskupenie II*, para. 49.

¹⁹ Whereas the 2001 guidance refers to the need to consult the public in some places, the more general 2000 guidance fails to adequately cover the issue of public consultation.

²⁰ *Sweetman*, see in particular paras. 37-29.

²¹ Case C-521/12 *T.C. Briels and Others, v. Minister van Infrastructuur en Milieu*.

²² Joined Cases C-387/15 and C-388/15 *Hilde Orleans and Others v. Vlaams Gewest*.

²³ Whereas a reference to this issue is made in the 2001 guidance the more general 2000 guidance is not clear on the issue and at times misleading (see e.g. p 37).

may also have to be carried out or repeated post-authorisation, in relation to on-going activities. Such an assessment will be needed wherever there is a risk of deterioration or disturbance that could be significant in view of the objectives of the Directive, in order to comply with Article 6(2)²⁴. It is important to note that such assessment may lead to the review or annulment of permits.

Conservation objectives

According to Art 6(3) of the Habitats Directive, the appropriate assessment needs to be carried out 'in view of the site's conservation objectives'. In this regard, as well as updating guidance on site permitting procedures, the Commission should also update the Commission Note on establishing conservation objectives for Natura 2000 sites²⁵ and establish a clear link with this new guidance by including a definition of the term 'conservation objectives' based on it. This would be needed to bring about much-needed clarity as regards the object of the impact assessment.

It should also be highlighted that the conservation objectives themselves are not static, but should be updated based on the knowledge available and changes in the environment. The key requirement is that the conservation objectives must be set with the view of maintaining or achieving favourable conservation status of species and habitats.

Cumulative impacts

Although it is clear that the appropriate assessment should also take into account cumulative impacts, not just the impacts of the proposed plan or project, the new guidance document should provide more details on how to fulfil this requirement in practice (modelled, among others, also on recent case law such as C-142/16 (*Moorburg Coal Power Plant*) and C-399/14 (*Waldschlösschenbrücke Dresden*)). The document should be based on best practices and include at least theoretical examples of common errors made in this regard.

Especially important in this respect is to clarify on the one hand, how and to what extent other planned activities (which have not yet been permitted or executed) should be taken into account. On the other hand it should also clarify how effects of existing activities should be taken into account (in particular, how to distinguish between activities where the impact have been fully realised and are on-going and projects where the impacts are still developing).

The updated guidance should also clarify that the use of so-called "salami-slicing" tactics (dividing a larger project in smaller, less significant parts) to avoid assessments, is not permitted.

Avoiding conflicts of interests

Similar to the EIA procedures, attention needs to be paid to potential conflicts of interests.²⁶ The guidance should clearly state that any such conflict of interests, e.g. in case the authority in charge of

²⁴ Case C-399/14 *Grüne Liga Sachsen eV and Others v Freistaat Sachsen*, paras. 43-46.

²⁵

http://ec.europa.eu/environment/nature/natura2000/management/docs/commission_note/commission_note_2_EN.pdf

²⁶ In the current version of the EIA Directive (Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the

appropriate assessments and/or decision making is the same authority that is promoting the plan or project being assessed, must be avoided. Detailed recommendations in this regard would be very welcome.

Qualifications and independence of the experts

The guidance should also tackle and offer solutions as regards (perceived and/or real) problems with qualifications, independence and objectivity of external experts that either carry out the appropriate assessment or studies which are taken as the basis for appropriate assessments. It should be clear that appropriate assessment may only be carried out by experts who have an up-to-date knowledge regarding the habitats and species that may be impacted. In many cases, external experts are either hired or at least financed by the project promoters, therefore creating a need to provide a clear framework enabling experts' independence and objectivity. In this respect too, detailed recommendations would be a preferred approach.²⁷

4. Issues where the guidance should be more specific

Appropriate assessment of plans

The updated guidance needs to clearly explain how the appropriate assessment should be carried out for strategic/spatial plans, which provide a framework for other future decisions that may have adverse effects on Natura 2000 sites (e.g. regional spatial plans, national strategic plans). According to art 6(3) of the Habitats Directive, the appropriate assessment obligation also includes 'plans'. Following the logic of the provisions, as well as CJEU case-law, assessment of effects of such plans should from the outset exclude all activities/alternatives that are certain to harm the integrity of Natura 2000 sites. The assessment should additionally provide a clear overview of which other activities may be harmful to which habitats and species and include an indicative list of projects for which further assessment is needed in the future. It should also be made clear that any following decisions are dependent on the results of further appropriate assessments.

Alternative solutions

The concept of 'alternative solutions' within the context of art 6(4) of the Habitats Directive should be further clarified and explained. It would be especially important to highlight if 'alternative solutions' refers only to alternative modalities for an activity as such (e.g. different routes, number of lanes etc. for roads) or rather a broader set of alternative solutions that achieve the same objective. E.g. whether a rail connection improvement could be considered as an alternative to a new road, wind energy development an alternative to a hydro power plant etc. – and if so, who, how and when should determine the scope of possible alternatives. Based on the wording and interpretations of the Article 6(4), the second approach should be proposed in the guidance, i.e. looking at a broader set of alternatives when deciding whether to grant an approval to a potentially harmful project or not. The perceived objective of the project can restrict the scope of alternatives only, if this objective appears

environment, as amended by the Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014), this requirement is explicitly provided in Article 9a.

²⁷ For specific solutions, see [2017 NGO action plan](#), chapter 4.

to be an overriding public interest²⁸. It should also be clearly stated that the ‘alternatives’ in this context should not be limited to only alternatives proposed by the developer.

Overriding public interest

The guidance needs to make clear that the exceptional circumstances and interests that can override significant effect on the Natura 2000 sites need to be narrowly defined. It must also clarify that in this context only purely public interests are legitimate. Private projects can only exceptionally be determined to be of an overriding public interest. For example, merely the fact that a private project may create jobs, does not constitute overriding public interest.

Compensatory measures

The guidance should make it clear that there need to be strong legal and procedural guarantees that in case of designating new sites as part of compensation measures, these sites are indeed appropriate as compensatory measures and that these measures are really implemented. According to the current guidance²⁹, these ‘compensatory’ sites will be submitted to the European Commission only after authorisation of the project. It should be made clear that validity of any such authorisation must be made conditional on the actual implementation of the designation of sites. Compensatory habitat must be functional before the project is started to ensure the integrity of the Natura 2000 network.

The guidance should also highlight the importance of obligatory monitoring of the actual success of compensatory measures as the current art 6(4) guidance is not strong and specific enough on this issue. The consequences that should follow in case the compensatory measures partly or completely fail to fulfil expectations should also be clearly spelled out.

²⁸ For example, the objective of increasing the share of renewable energy may restrict the alternatives considered, as this could be considered an overriding public interest. However, restricting alternatives to only one type of renewable energy (e.g. wind) and its production on a small territory, should as a rule be considered arbitrary and non-permissible restriction.

²⁹ See art 6(4) guidance, p.19.