

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



Constitutional Affairs	
Justice, Freedom and Security	
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**National
implementation of
Council Directive
92/43/EEC of 21/05/92**

STUDY



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

PETITIONS

**National legislation and practices
regarding the implementation of Council
Directive 92/43/EEC
of 21 May 1992 on the conservation of
natural habitats and of wild fauna and
flora, in particular Article 6**

STUDY

Abstract

This study reviews national legislations and practices regarding the implementation of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, in particular Article 6. It is based on eight national reports Belgium, France, Germany, Poland, Spain, Sweden, Romania and UK, each containing on one to four case studies concerning implementation of the key provision for implementing the EU's Natura 2000 system.

This document was requested by the European Parliament's Committee on Petitions.

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This document and eight national reports are available on the Internet at:

<http://www.europarl.europa.eu/studies>

LINGUISTIC VERSIONS

Original: EN

Translation: FR

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Manuscript completed in April 2009.

Brussels, © European Parliament, 2009.

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Executive Summary

This report for the European Parliament reviews national legislation and practices regarding the implementation of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, in particular Article 6. It is based on eight national reports, each containing on one to four case studies concerning implementation of Article 6 – the key provision for implementing the EU's Natura 2000 system of protecting and preserving biological diversity in the Member States. The countries and sites covered are:

- Belgium (Landfill at L'Erablière de Tenneville; Windpower station in Dalhem; Container storage site in Antwerp);
- France (High-speed train line in Vallee du Nied; Highway in Vallee du Ciron; High voltage lines in Gorges du Verdon);
- Germany (Dam on the River Ems; Dam on Borgfelder Wummewiesen);
- Poland (Bypass in the Rospuda Valley; Bypass in the Drweca Valley);
- Romania (Rosia Montana mining project; Waste management in Podisul Hartibaciului);
- Spain (Hotel in El Algarrobico; Enlargement of Barajs Airport; Urbanisation in the Soto of Garray);
- Sweden (Botnia railroad; Eksjoberget wind power station);
- The United Kingdom (Dibden Vay container terminal; Cairngorm funicular railway; Dartford and Gravesham development plan).

The findings and recommendations arising from the national case studies take into account the experiences of Member States, as outlined in the case studies, theoretical considerations and relevant laws and directives, as well as European Court of Justice (ECJ) and national case law. Chapter 2 and the Annex 1 table provide an overview of the case studies.

Designation and Protection

An essential step in building the Habitats Directive's Natura 2000 network is to designate these sites with special importance for biodiversity and requiring special protection. Despite the enactment of the Habitats Directive in 1992, 14 years after its entry into force, the Natura 2000 network has not yet been fully realised. As a result of this delay in establishing protective measures, the erosion of biodiversity in the EU has worsened dramatically.

If a site has not been properly designated, the protective mechanism provided for under the Habitats Directive cannot be implemented. The process of designating Natura 2000 sites and establishing management measures for their protection has been considerably delayed for a number of reasons, including limited financial resources, political unwillingness, litigation, and public protests.

As a result, many sites are still deprived either of a proper protection regime or management plan. The lack of proper protective and management structures are compounding the erosion of biodiversity throughout the EU.

Recommendation: It is urgent for all Member States to complete the process of site designation and to establish binding management measures for each site.

Assessment

Article 6 requires an Appropriate Impact Assessment (AIA) when a project could have significant impact on a Natura 2000 site. Carrying out an AIA procedure as early as possible in the project planning process is of great importance, in order to assess the full range of alternatives. If the AIA is conducted too late, it is quite difficult for the experts to assess the full range of alternatives.

The national studies indicate that several AIAs were flawed given that:

- there was no assessment of the cumulative effects of the plans or the projects; and
- there was no assessment of the alternatives to the plans and the projects.

Given that the AIA must be a genuine scientific analysis, the person who conducts the AIA must be as independent as possible from the vested interests. In particular, this person should seek advice from nature conservation bodies as well as specialised NGOs dealing with nature protection.

To enhance the scientific quality of the AIA, it is of importance for the Member State's authorities to:

- foster public participation;
- assess the independence of the conductors of the AIA (pre-review of the AIA); and
- to require counter-expertise whenever the project or the plan sparks controversies at a scientific level.

In particular, strict and independent control of the quality of AIAs must be organised before consent is given to the plan or project. This guarantees that the assessment, *in fine*, may be considered appropriate and allows the competent authority to have 'ascertained that [the plan or project] will not adversely affect the integrity of the site concerned'.

Recommendation: Member State legislation should provide specific guarantees of the independence of the AIA in order to avoid subjective assessments that might be misleading for the competent authority. In particular, the Member States need to ensure the scientific quality of the Appropriate Impact Assessments (AIA) with respect to the integrity of Natura 2000 sites. In this regard, Member States should ensure that the AIA studies take into account all direct and indirect impacts, including short and long term, as well as cumulative and synergetic impacts. The studies should also analyse possible alternatives, and if appropriate, compensatory measures. Additionally, the AIA should consider any mitigation measures needed to reduce the negative impacts of the project on the integrity of the site, should the project receive authorisation. The Member States should also require that the studies are as far as possible carried out by experts specialised in nature conservation. Finally, there is an urgent need for the Commission to prepare new guidelines for the Member States regarding the actual content of AIAs.

Decision-making process

As the ECJ has affirmed in several judgments, the competent authority is to give consent to the plan or the programme only if there is no doubt as to the absence of significant impacts on the protected habitats. If there are significant impacts or the risks are not suppressed, consent can be given only in accordance with the Article 6 derogation procedure. With respect to the derogation procedure, a proper balancing of interests must be carried out by the public authorities. From the various case studies it appears that the national authorities are not properly balancing the interests. If authorities have a duty to state the reasons as to how they have weighed the conflicting interests, their discretion will be narrowed. Accordingly, authorities should be obliged to disclose the rationales behind their decisions

The national reports also indicate that the precautionary principle has so far been little respected by national public authorities despite the fact that the ECJ has re-emphasised its importance as a fundamental principle to be followed. There is a serious need at national level to endorse a precautionary approach.

Whenever a Natura 2000 site harbours priority habitats or species, the Directive requires the national authority to seek the opinion of the European Commission. However, in several case studies such an opinion was never sought. If State authorities do not bother to seek its opinion, the Commission has no way to ensure that all the procedural requirements laid down in the Directive are complied with.

Recommendation: The decision-making process should be as transparent as possible and include public consultation organised as early as possible, preferably at the time of screening. For instance, Member States should make sure that the opinions of agencies specialised in nature conservation issues are requested. It is also recommended to provide opportunities for the wider public to take part in the public debate. It is equally important to ensure that the reasons for granting (or not granting) an authorisation are stated fully, in order to ensure a better balancing of the interests at stake, in accordance with the balancing of interests principle foreseen in Article 6(4). For instance, if an alternative option is not deemed to be possible, it is recommended that specific explanations be provided as to which factors led the authority to choose the proposed development. Finally, it is vital that national authorities seek the opinion of the Commission whenever a Natura 2000 site harbours priority habitats or species.

Compensatory measures

If a plan or project having a significant impact on a Natura 2000 site is authorised, compensatory measures are compulsory. The case studies reveal that these are too broadly sketched, and are often badly implemented after the project is completed.

Recommendation: Compensatory measures should effectively compensate the losses of species and habitats. In terms of timing, it is important that ‘all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected’ are implemented before the works are carried out. In addition, there is a particular need for the Commission to provide specific guidelines as to the timing, nature, scope, and localization of the compensatory measures.

Control mechanism

Pursuant to the EC Treaty, the European Commission is the watchdog of the correct implementation of the Article 6 mechanism. Citizens deprived of proper scientific expertise, financial resources, and facing a number of judicial hurdles (access to justice for instance) cannot be expected to become the watchdog of such a complex system.

Recommendation: It is essential that the European Commission be more proactive in instigating actions for infringements against the Member States not complying with the Habitats Directive.

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Belgium
France
Germany
Poland
Romania
Spain
Sweden
United Kingdom

List of abbreviations

AIA	Appropriate Impact Assessment according to the Habitats Directive
BNatSchG	<i>Bundesnaturschutzgesetz</i> (Federal Nature Protection Law)
EC	European Communities
EP	European Parliament
ECJ	European Court of Justice
EIA	Environmental Impact Assessment on the assessment of the effects of certain public and private projects on the environment
EIA Directive	Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, Official Journal L 175, 07/07/1985 P. 40-48
Habitats Directive	Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and wild flora and fauna, Official Journal L 206, 22/07/1992 P. 7-50 (“the Directive”)
IBA	Important Birds Area
NGO	Non-governmental organisation
pSCI	Proposed Site of Community Importance
<i>Rationae loci</i>	With regard to location; as reason of the location
<i>Rationae materiae</i>	In relation to ‘material law’ (non-procedural law)
<i>Rationae temporis</i>	By reason of time
SAC	Special Area of Conservation (under the Habitats Directive)
SEA	Strategic Environmental Assessment
SEA Directive	Council Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, Official Journal L 197, 21/07/2001 P. 30-37
SCI	Site of Community Importance
SCO	Site Conservation Objective
SPA	Special Protection Area (under the Birds Directive)

Referencing of case studies

As this report analyses 20 case studies from eight Member States, a special system of referencing is adopted within the main body of this report for ease of reference.

References are indicated in the format of “[XX#.pp]” where XX is the country, # is the case study number, and pp is the page reference. For example, page 20 of the Belgium case study number two is referenced: [BE2.20]. Introductory page references are given without #, for example pages 5-9 of the UK report are referenced: [UK.5-9].

Belgium	BE
France	FR
Germany	DE
Poland	PL
Romania	RO
Spain	ES
Sweden	SE
The United Kingdom	UK

The country case studies can be found at Annex 3.

1. Introduction

Europe's biological diversity, in addition to displaying a number of important ecological characteristics, is testament to the millennial symbiosis between man and his natural environment.

Today, however, biodiversity faces a major crisis at both the world and European levels, the implications of which still have not been fully appreciated. Biodiversity is indeed passing through a period of major crisis. Most natural or semi-natural, continental and coastal ecosystems are now subject to significant modifications as a result of human activity. Scientists expect that these disruptions will cause an unprecedented drop in the wealth of specific and genetic diversity.

As a result, the number of species deemed to be under threat in Europe by the International Union for the Conservation of Nature (IUCN) runs into the hundreds; 42% of mammal species (out of a total of 250), 15% of bird species (out of 520), 30% of amphibian species (out of 75), 45% of reptile species (out of 120), 41% of freshwater fish species (out of 190), 12% of butterfly species (out of 575) and about 21% of plant species (out of 12,500) ⁽¹⁾.

A clear commitment to halting the loss of biodiversity in the EU has been recently made in the Commission's Communication on *Halting the Loss of Biodiversity by 2010 - and Beyond* ⁽²⁾.

In order to reverse these negative trends, in 1979 the EU enacted the Bird Protection Directive ⁽³⁾, and in 1992 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the "Habitats Directive"). Both of these provide for the establishment of the so-called Natura 2000 network of protected sites.

The Natura 2000 network has become the cornerstone of EU nature conservation policy. It is indeed the key instrument that aims to effectively prevent Noah's Ark from sinking. Article 6 of the Habitats Directive requires Member States to protect designated habitats, and provides for specific procedural requirements whenever projects or plans are likely to threaten those protected habitats.

This report for the European Parliament reviews national legislation and practices regarding the implementation of the Habitats Directive, in particular Article 6. It is based on eight national reports covering Belgium, Germany, France, Poland, Romania, Spain, Sweden and the UK. Each national report is based on one to four case studies concerning implementation of Article 6 – the key provision for implementing the EU's system of protecting and preserving biological diversity in the Member States. The eight Member State reports are provided as annexes.

⁽¹⁾ IUCN Species Survival Commission, *2002 IUCN Red List of threatened species*.

⁽²⁾ Communication from the European Commission on halting the loss of biodiversity by 2010 – and beyond, sustaining ecosystem services for human well-being, COM(2006)216 of 22/05/2006, Brussels.

⁽³⁾ Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, Official Journal L 103, 25/04/1979 P. 1-18.

In spite of its key role to sustain biodiversity in the EU, the process of implementation of the Habitats Directive has been fraught with major difficulties. In particular, Article 6 has been dogged by controversies. The huge amount of complaints sent to both the Commission and the European Parliament's Petition Committee signifies the frustration among citizens as well as national nature protection NGOs regarding unsatisfactory processes.

What explanations are there for this situation?

First, at the outset, most Member States had major difficulties in determining the proper legal instruments to implement Article 6 for several reasons. Firstly, this provision is framed in very broad terms, as is the standard for EU directives. Secondly, the provision uses a number of very technical concepts ("conservation status", "site's integrity", "natural habitat types", "conservation objectives", etc.), sometimes without defining them. As a result, Member States have amended their initial implementing legislation a number of times (France [FR.5-9], Germany [DE.7-9], the UK [UK.6-9]), and finally replaced these with new legislation (Germany [DE.7-8], the UK [UK.6-9]).

Article 6 of the Habitats Directive

1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.
2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.
3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.
4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted. Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.

The second explanation is the fact that several Member States (Spain, Germany, Belgium, the UK, Poland) allocate responsibilities between the federal or governmental and regional levels, which has slowed the implementation process. Instead of having one body with exclusive competence, multiple authorities designate and manage Special Protection Areas (SPAs) and Special Areas of Conservation (SACs). For instance, the new German constitutional system is

characterized by such shared competences in the field of nature protection (*Konkurriende Kompetenz*) [DE.7]. In the UK, the implementation of the Directive is a devolved matter for each administration (*i.e.*, the Scottish Executive, the Welsh Assembly Government and the Northern Ireland Executive) [UK.6]. In Belgium, four entities have the competence for implementing Natura 2000: the federal state for marine sites, and the three regions for terrestrial sites. Even in centralised states, authorities at different levels are endowed with different regulatory tasks. For example, in Poland the Ministry of Environment designates the sites whereas the regions (*voivoidships*) manage them [PL.6].

The third explanation is that the technical legal difficulties to implement the Habitats Directive have been compounded by the reluctance of several Member States to implement the Directive in due time. The ECJ has condemned several Member States for failing to:

- implement the relevant provisions (Case C-256/98 *Commission v France* [FR.10]; Case C-71/99 *Commission v Germany*) ⁽⁴⁾ [DE.12];
- communicate to the Commission the list of appropriate SACs in line with the Important Bird Areas (IBAs) (Case C-71/99 *Commission v Germany*) ⁽⁵⁾; and
- designate or to protect a sufficient number of SPAs (Case C-3/96 *Commission v Netherlands*; Case C-168/03 *Commission v Spain* [ES.8]; pending case C-547/07 *Commission v Poland* [PL.4]; pending case *Commission v Romania*) ⁽⁶⁾.

Therefore, despite the enactment of the Habitats Directive in 1992, 14 years after its entry into force, the Natura 2000 network has not yet been fully realised. As a result of this delay in establishing protective measures, the erosion of biodiversity in the EU has worsened dramatically. Member States are clearly failing to fulfil their obligations under EC law.

Fourth, a number of new Member States have not yet sufficiently implemented the Directive, as highlighted in the country report for Romania ⁽⁷⁾ [RO.9-10].

Additionally, many SPAs and SACs have merely been designated for the purpose of reporting to the Commission and are not yet protected with proper regulatory regimes or management plans. These sites are, as a result, extremely vulnerable to development.

This report considers the key issues identified in the eight national reports carried out for this report, against the appropriate theoretical background. These countries were selected with the aim of encompassing:

- a) Western (Belgium, France, the UK), Northern (Sweden), Southern (Spain) and Eastern (Poland, Romania) Member States;
- b) A maximum of biogeographical regions (continental, boreal, Atlantic, Mediterranean, pontic, steppic, pannonian, etc.); and
- c) Different legal systems (common law as well as the Romano-Germanic family).

⁽⁴⁾ Judgment of 6 April 2000 in Case C-256/98: *Commission v France* [2000] ECR I-2487; Judgment of 11 September 2001 in Case C-71/99: *Commission v Germany* [2001] ECR I-05811.

⁽⁵⁾ Judgment of 11 September 2001 in Case C-71/99: *Commission v Germany* [2001] ECR I-05811.

⁽⁶⁾ Judgment of 19 May 1998 in Case C-3/96: *Commission v Netherlands* [1998] I-03031; Judgment of 14 September 2004 Case C-168/03: *Commission v Spain* [2004] ECR I-08227; pending case C-547/07 *Commission v Poland*.

⁽⁷⁾ The EC Commission has initiated an infringement procedure against Romania, because the SPAs designation is inconsistent with the Important Birds Area (IBA) and fewer and smaller areas have been designated.

Each national report sets out from one to four case studies that were selected according to the following criteria:

- a) The cases had to involve the use of the Appropriate Impact Assessment (AIA) (Article 6(3) of the Directive) and, if possible, the derogation procedure (Article 6(4) of the Directive) by the competent authority;
- b) The sites at issue were for the coherency of the Natura 2000 network (major estuary such as the Ems River in Germany [DE1.17], major mountain area in Scotland [UK2.28], major marshlands in Poland [PL2.28]);
- c) The projects or plans at issue were of importance from a socio-economic perspective (high-voltage lines, highways, new cities, dams, windmills, etc.); and
- d) Social and political controversies were sparked by the project or plan.

In addition, one should stress that several sites are designated as both a Special Protected Area (SPA) and a Site of Community Importance (SCI) or Special Area of Conservation (SAC). In other words, they fall within the ambit of both the Birds and the Habitats Directives.

The national experts who carried out the case studies were asked many questions, and the template for the reports setting out these questions can be found at Annex 2. The questions asked included describing the site; setting out the site's management (objectives, conservation measures, plans, relevant laws, funding); followed by questions on the elements of Article 6 of the Habitats Directive: on the preventative regime, describing the impact assessment(s), the substantive decision criterion and any derogatory regimes.

This methodology produces a broad perspective, enabling both conclusions to be made as to the implementation of Article 6 of the Habitats Directive, and recommendations with the aim of improving it.

The table on the next page provides an overview of the SPAs and SACs designated by the case study Member States. The following chapter gives a quick overview of the case studies while Annex 1 provides a summary table. The complete country case studies are included as Annex 3 of this report.

Overview table of SPAs and SACs in Member States

	Belgium	France	Germany	Poland	Romania	Spain	Sweden	The UK
SPAs								
Number of SPAs	234	371	736	141	113	565	531	253
Land area covered	9.7%	7.8%	11.2%	15.59%	11.89%	18.73%	5.7%	-
Territorial sea area covered	30,600 ha	326,035 ha	1,976,975 ha ⁽⁸⁾	0.38% ⁽⁹⁾	-	0.6%	4.9%	-
Number formally designated	27	371	ca. 221	141	108	565	531	253
Average size (ha)	ca. 7,146 ⁽¹⁰⁾	-	ca. 249,000	38,226.8	27,673.26	17,187	5,622.7	6,260.58
Range of sizes (ha)	-	2 to 91,945	- to 648,431	166.3 to 322,500	256.7 to 512,380.6	7 to 214,000	4.7 to 555,103.4	0.11 to 197,504.24
SACs								
Number of SACs	282 ⁽¹¹⁾	1334 ⁽¹²⁾	4,622	364 ⁽¹³⁾	273 ⁽¹⁴⁾	1,434	3,981 ⁽¹³⁾	608
Land area covered	10%	8.5%	9.3%	8.10%	13.21%	23.5%	12.6% ⁽¹³⁾	6.82%
Territorial sea area covered	18,100 ha (1 site)	568,764 ha	2,121,111 ha ⁽¹⁵⁾	0.3% ⁽⁹⁾	-	5%	9.2% ⁽¹³⁾	6%
Number formally designated	41	98	ca. 1387	189	0	84	0	608
Average size (ha)	ca. 7,214.2 ⁽¹⁶⁾	3,771	ca. 207,000	7,939.5	11,962.71	9,858	1,618.9	4,118.72
Range of sizes (ha)	0.03 to 7,555.4 ⁽¹⁷⁾	0.01 to 346,184	3,365 to 645,423	0.03 to 242,553.15	1 to 450,542	0.03 to 210,065	0.01 to 555,103.4	0.08 to 151,341.67
Natura 2000 sites								
Number of sites	- ⁽¹⁸⁾	1,705	5,000	505 ⁽¹⁹⁾	381	1,434	4,071	ca. 861

- indicates no data available.

⁽⁸⁾ Includes Bodensee, in-coastal sea and EEZ, *i.e.*, 35%.

⁽⁹⁾ Territorial sea and EEZ.

⁽¹⁰⁾ Flanders Region: 4,093; Territorial sea: 10,200; Walloon Region: no data.

⁽¹¹⁾ This data is provided by the Natura 2000 Barometer; we cannot use the Walloon data as in the Walloon Region, both SPAs and SACs are designated as 'Natura 2000 sites' and no distinction is made between both types of area.

⁽¹²⁾ SCIs.

⁽¹³⁾ SCIs + pSCIs (Proposed Sites of Community Importance).

⁽¹⁴⁾ pSCIs.

⁽¹⁵⁾ Includes Bodensee, in-coastal sea and EEZ, *i.e.*, 37%.

⁽¹⁶⁾ Flanders Region: 2,622 ha; Territorial sea: 18,100 ha; Walloon Region: 920.6 ha (data for 'Natura 2000 sites' covering both SPAs and SACs).

⁽¹⁷⁾ Flanders Region: no data; Walloon Region: 0.03 to 7,555.4 (data for 'Natura 2000 sites' covering both SPAs and SACs).

⁽¹⁸⁾ No data because both SPAs and SACs overlap.

⁽¹⁹⁾ Also, there are another 101 sites on the Polish shadow list sent by NGOs to the Commission.

2. The case studies

This section describes the cases studied in each of the eight Member States covered by this report, as well as the Article 6 issues involved. The table in Annex 1 provides an overview of the Natura 200 sites concerned, including the natural habitat types and species to be protected, and of the proposed projects. The country studies with more detailed case descriptions can be found in Annex 3.

- **Belgium**

Case study 1 concerns an extension of a landfill into a priority natural habitat without an appropriate impact assessment (AIA) pursuant to Article 6(3) of the Directive. The affected site is the “*érablières sur éboulis ou de ravins*”, which is an area of *Tilio-Acerion* forests of slopes in the Walloon Region. In 1999, the administrative court suspended and cancelled the landfill’s operating permits to protect the priority habitats after an action brought by an NGO. Later, in 2003 the landfill amended its permit applications, this time submitting an AIA, and was granted the permits.

The NGO reintroduced their challenge despite the landfill’s AIA finding that the project’s impact would be minimal, affecting only one small patch of the natural habitat. The decision to grant the permit was upheld on the basis that the habitat to be destroyed was the smallest one, and was not proposed to the Commission for protection status because sufficient other habitats were protected. Furthermore, the NGO did not demonstrate that the AIA used a manifestly unreasonable methodology in reaching its conclusion that, despite some scientific uncertainties, the project was not threatening to the larger patch of the priority habitat.

Case study 2’s focus is the building of five windmills in Dalhem, Walloon Region. Two types of assessments were made: first an environmental impact assessment (EIA) requiring public consultation, and then an AIA. During public consultation related to the EIA, concerns were raised. An appeal led to a further assessment, this time an AIA which found that constructing these windmills would not significantly affect the Natura 2000 site in question, and that it was impossible to assess the affect on bat migration. The Minister decided that four of the five windmills should proceed on the basis of fostering renewable energy sources, balancing the affect on flying fauna such as bats. Ultimately, the courts quashed the decision as the AIA was considered to have actually been an EIA and should have therefore been subject to public inquiry, which it was not.

Case study 3 concerned an effort to create a container storage site (the “*Deurganck*”), on part of an SPA sited on the left bank of the river Schelde, in order to improve the strategic capacity of the harbour of Antwerp. The Government proposed to extend another protected site to compensate for the loss to the SPA that would occur due to this project. Public groups were able to successfully appeal the decision because no AIA had been performed before or during the planning procedure, and because the compensatory measures proposed were not the kind envisaged by Article 6(4) of the Directive. In a second phase, the Government issued building and operation permits. In order to avoid invalidation by the Council of State, the Flemish Parliament adopted a specific Act validating the permits that had been granted. Opponents of the development asked the Constitutional Court to invalidate the legislative

acts. However, the Court did not find a basis for suspending the legislative act,²⁰ and the project was carried out in the end.

- **France**

Case study 1 deals with a high speed train line project that would cross a Natura 2000 site, hosting a priority habitat: continental salt meadows. The supposed overriding impetus for the project was the public interest. The French government asked for the Commission's opinion under Article 6(4) of the Directive. The Commission deemed the assessments as appropriate. The implications of the project on the habitats could jeopardise the overall coherence of Natura 2000, therefore adequate compensatory measures needed to be taken. The Commission regarded the compensatory measures (preservation of the remaining salt meadows near the line; restoration of the site and re-establishment of salt meadows; preservation of the Nied Valley salt meadows not adjacent to the TGV line) sufficient to compensate the effects of the project, provided they are implemented in good time and management plans could ensure their efficiency in the long term.

Case study 2 concerns two of eleven Natura 2000 sites potentially affected by the building of a highway through the Vallée du Ciron. Management plans had been adopted for both, and both accommodated either habitats of community interest and priority species. A "decision ministérielle d'orientation" set out that the project would cross proposed Natura 2000 sites, and therefore the Natura 2000 assessment had to be carried out at the same time as the environmental impact assessment, and submitted to public enquiry. In this case the public saw the utility of the project and it proceeded.

Case study 3 deals with a project to construct high voltage lines through the Grand Canyon du Verdon - Plateau de la Palud. The construction would have impacted upon nine proposed sites of community importance (SCIs), two future special protected areas (SPA) and one existing SPA. An environmental group successfully challenged a Ministerial decree alleging that the project was of great public utility, by demonstrating the drawbacks would exceed the benefits of the project, which led to cancellation of the decree.

Case study 4 relates to the review of a local urban planning scheme (in Chaumes du Vignac et de Clérignac) aimed at turning 40 hectares of a natural area into an area for the creation of industrial plants to exploit mineral natural resources, especially quarries. The judge ruled that due to the specific interest, rarity and originality of this area, which had been proposed as a SCI, the change of zoning would seriously compromise the site.

- **Germany**

Case studies 1 and 2 are combined as they both concern a dam on the River Ems in Lower Saxony: its construction and its operation. The concerned site is an important bird habitat and could potentially qualify as a protected estuary. The cases have sparked high public interest for many years because of the affect on habitats and species from alterations to the flow and depth of the river. Case study 1 regards the dam's construction, which was ultimately

²⁰ The cases are:

- n° 116/2002, 26 June 2002
- n° 174/2002, 27 November 2002
- n° 94/2003, 2 July 2003
- n° 151/2003, 26 November 2003
- n° 56/2006, 19 April 2006.

authorized after an NGO withdrew its case after signals that the judge would rule in favour of the developer – although the blow was to be softened by a 4 million Euro payment to a nature conservation fund.

However, in 2008 the dockyard found it necessary to extend the times for the river to be closed beyond the times authorized, and this gave rise to Case study 2. Because of the dockyard's plans to extend the river closure times, a decision had to be made as to whether further closures would adversely affect the area. An NGO failed in both the lower and higher administrative courts to stop the new authorization because the courts found that no priority habitats would be affected and that habitats and species would not be significantly affected. The lower court considered the public interest and available alternative factors whereas the higher court simply stopped at a finding of no significant affect.

Case study 3 concerns a wet grassland site called Borgfelder Wümmewiesen near the city of Bremen, which hosts protected birds and habitats. The notification of the area as a SPA and the proposal of the area as a SAC were made by the Senator for the Environment on his own initiative. It was not coordinated with other senators or the Bremen parliament. This caused much protest and public debate, not the least because other areas were also submitted together with the Borgfelder Wümmewiesen making up a total 17% of that area of land. Despite the protest the notification and proposal were not withdrawn.

- **Poland**

Case study 1 focuses on building of a new public road (bypassing the city of Augustow) through the Augustow Primeval Forest in the Rospuda Valley – a forest hosting many species and natural habitats. According to the Polish legislation, the road project fell outside the definition of project, and was therefore only submitted to an EIA rather than an AIA. NGOs raised concerns during the EIA public participation procedure, which were acknowledged by the authority but ignored in practice. Consequently, on review by the courts, the approval was annulled and NGOs were invited to participate in the preparation of a new environmental assessment, taking their concerns more seriously into account.

Case study 2 also concerns a bypass road, this time through the Drweca Valley (bypassing the town of Brodnica). The Valley is a site of community importance (SCI) and hosts 12 natural habitat types and various species. The authority issuing the EIA decision - and assessing impact of the project on the site - admitted that the project would have significant effect and moreover that it would adversely affect the site. Moreover, it also failed to consider alternative solutions. The same authority was also responsible for managing Natura 2000 sites so did not seek the advice of any other competent authority. The NGOs and the public took part in the public participation proceedings and raised their reservations, in particular questioning the quality of the EIA report, but ultimately these were rejected by the authority.

- **Romania**

Case study 1 is about the building of a new mining facility in Roșia Montană, Hunedoara County. A proposed site of community importance (*Magurile Baitei*) which hosts various natural habitats and species would be affected by the project. The EIA was annulled after an individual directly affected by the project challenged the decision in the courts. A string of court reviews followed, all negatively affecting the project, resulting in the suspension of the project.

Case study 2 concerns a waste management project in Podișul Hârțibaciului, affecting a site encompassing a great number of bird species. The developer sought to build an incinerator for hazardous waste materials, with obvious negative effects for the species on the site. The environmental agency had refused to grant an environmental permit on the grounds that the complete procedure had not been followed. However, the developer in this case was able to get a court order forcing the environmental agency to issue an environmental permit.

- **Spain**

Case study 1 concerns a project to build a 411-room hotel on El Algarrobico beach in the Cape of Gata, Almería. The site is protected by various nature protection measures because it hosts a wide array of natural habitats and species. The Andalusian authority waived the EIA procedure and agreed to the project without having ascertained that it would not adversely affect the integrity of the site.

Case study 2 deals with a project to enlarge Barajas Airport in Madrid. The enlargement project would affect natural habitats and species located in the river basin of the Jarama River (which runs along the flank of Barajas Airport), as it involves canalizing 3km of the river amongst other changes. The project was set to go ahead subject to compensatory measures being set in place, but the coherence of the Natura 2000 network was not mentioned in the environmental impact statement, and the Commission was not informed about the measures. The deadline for realizing the compensatory measures passed, which led to the Commission forwarding a complaint to the developer who then had the deadline extended to March 2008. As of the date of this report, the developer's full compensatory obligations have not yet been met.

Case study 3 is about constructing an urban complex of hotels and various institutes and facilities on a riparian area ashore the river Duero in the Soto of Garray in Soria. The project specifically affects various natural habitats and species. The Autonomous Community of Castilla y León has passed a law to authorise the project, which prevented judicial review of the project, thus breaching the Aarhus Convention, related EU Directives and the Spanish laws implementing them.

- **Sweden**

Case study 1 concerns the building of the Botnia railroad on two Natura 2000 sites in the river delta of Umeälven (Umeå river) in the northern part of Sweden. The delta and plains of that river are among the most important resting areas for migratory birds in the region, and NGOs and landowners say that the project's building of a 3km stretch of rail through the site will be devastating. The Government permitted the project subject to some conditions, and cases brought by landowners and NGOs were inadmissible because they lacked legal standing. A further case was filed with the highest administrative court on the issue of the landowners' apparent lack of standing, and the final decision just released in December 2008 agreed with the Government's first decision to permit the project. There seems to be no avenue for appeal.

Case study 2 concerns building 10 wind power stations on Eksjöberget Mountain in Älvdalen, Central Sweden. Five would be located on a Natura 2000 site, hosting a priority natural habitat type. According to the EIA produced by the developer, the effects would be insignificant and therefore there was no obligation to apply for a permit according to the

Natura 2000 provisions in the Environmental Code. Moreover, even if the court found a permit was required, the project should be permitted anyway as no damage would occur to the Natura 2000 interests. Most authorities opined that the application should be rejected, that there was an obligation to apply for a Natura 2000 permit and that such a permit could not be issued. They argued that the area must be regarded holistically and that no reduction of the priority natural habitat type could be allowed. Similarly, the County Board protested the lack of assessment of the cumulative effects of the wind power stations, the electric cables and roads that must be built in the area. Only the municipality of Älvdalen was in favour of the project, finding that the societal advantages outweighed the damage on the Natura 2000 site. Ultimately, the court found that the project would cause extensive damage to the site and thus should not proceed.

- **The United Kingdom**

Case study 1 is about a proposal to build a deep water container terminal at Dibden Bay in Hampshire. The application for planning permission included a quay length of some 1,850 metres and provided for dredging and other works, access roads, compulsory acquisition of land, a recharge of the foreshore and provision for a conservation area. The Solent contains seven international nature conservation sites, including the Solent and Southampton Water SPA. Following a number of objections to the proposed project, a public inquiry was held. The report of the Planning Inspector was submitted to the Secretary of State. The Inspector recommended that planning permission be refused. The Secretary of State agreed with these recommendations and refused planning permission.

Case study 2 concerns replacement of an existing chairlift with a funicular railway. The site is in Coire Cas, Cairngorm Mountain, Scotland. The Cairngorm Mountain range was (at the time) the subject of various conservation measures. NGOs filed for judicial review of the decision to permit the project, alleging a failure to carry out a proper assessment in terms of the (then) 1994 Habitats Regulations. These regulations were repealed, which stymied the NGOs' application for review.

Case study 3 deals with a local development plan in Dartford and Gravesham. Notably in this case, the habitats and species at risk were already particularly vulnerable to disturbance because of other activities surrounding the site. As part of the on-going process of agreeing and approving the development plan, a number of 'Habitats Regulations Assessment Screening Reports' were prepared, as there was likely to be some impact on natural habitats and species. However, although new plans and projects are subject to special provisions in the Habitats Regulations, the regulations do not deal with ongoing activities that may be affecting in the site.

3. 'Special conservation measures' for special areas of conservation (SAC) - Article 6(1)

Article 6(1) of the Habitats Directive

For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

3.1 Introductory comments on conservation of SACs

The Habitats Directive provides some limited guidance concerning the form that conservation measures should take. In addition to the binding preventative norms intended to protect the classified habitat (such as the decree of classification), the Habitats Directive requires the adoption of '**necessary conservation measures**' for habitats located within a SAC. 'Conservation' is understood as a 'series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status' (Article 1(a) of the Directive).

The 'conservation status' of a natural or species habitat is taken to be 'favourable' where a number of conditions are satisfied (*i.e.*, stable or increasing natural range, maintenance of specific structure and functions, viable populations (Article 1(e) of the Directive). While each site contributes to the overall effectiveness of the Natura 2000 network, the conservation status at the site level is equally indispensable ⁽²¹⁾. For example, even though the disappearance of about hectares of peat bog from a single SAC at the European Community (macro) level may not threaten the future of this type of habitat on the European continent, such a loss does however jeopardise the effectiveness of the Natura 2000 network by compromising the conservation status of the habitat **on that particular site** (micro).

Special conservation measures' relating to the habitats of a SAC consist of the development, if need be, of two components:

- 'appropriate management plans specifically designed for the sites or integrated into other development plans'; as well as
- the adoption of 'appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites' (Article 6(1) of the Directive).

Management plans are vitally important as they set the Site Conservation Objectives (SCOs) for the site (preferably set out on a map) and, sometimes, indicators to assess whether the

⁽²¹⁾ European Commission, *Managing Natura 2000 Sites: The Provisions of Article 6 of the Habitats Directive 92/43/EEC*, European Commission, Luxembourg, 2000, page 18.

objectives are being met. The SCOs therefore also play an important role in the Appropriate Impact Assessment (AIA) procedure (*infra*).

Substantively ⁽²²⁾, the ‘conservation measures’ required under the first paragraph of Article 6 may either be **positive** (*e.g.*, plans for spreading, grazing incentives, subsidies, delayed pruning, hedgerow maintenance) or **negative** (*e.g.*, prohibitions of soil contour modifications, deforestation, picking or harvesting wild species). For example, subsidies may be effective in guaranteeing the conservation of habitats generated through traditional agro-pastoral activities (*e.g.*, chalk grasslands, moors, irrigated hay fields, hedgerows, etc.) that require extensive agricultural maintenance.

With regard to location ⁽²³⁾, these measures are only applicable inside the specific SAC. From a legal point of view, they are not relevant for SPAs for wild birds. Given that many SACs overlap with SPAs, conservation measures may benefit also wild birds.

In relation to time ⁽²⁴⁾, conservation measures (Article 6(1) of the Directive) only apply following formal classification of the site by the Member State unlike the specific preventative regime (Article 6(2) of the Directive) that enters into force with the adoption of the list of Community sites (Article 4(5) of the Directive).

Finally, measures can include, ‘if need be’, ‘appropriate management plans specifically designed for the sites or integrated into other development plans’. In this case the aspects of the plan that do not relate to site management remain subject to an AIA as provided for in the Habitats Directive.

In any case, even where Member States do not adopt a management plan, they must take the ‘appropriate statutory, administrative or contractual measures’ (Article 6(1) of the Directive). Although no single type of measure is privileged above the others, it is incumbent upon Member States to make a choice between statutory, administrative or contractual measures in accordance with the principle of subsidiarity. In the final analysis the measures must, to repeat, be ‘appropriate’ (*i.e.*, tailored to the ‘ecological requirements’ of the species and habitats concerned), and at the same time contribute to the conservation objective(s) of the site.

Member States’ margins of appreciation therefore turn out to be somewhat limited, as they are bound by the result-based obligations ⁽²⁵⁾ to adopt statutory measures as appropriate where contractual measures prove to be insufficient. In addition, if the state opts for a contractual measure, this does not allow it to refrain from adopting a statutory regime for the area aimed at specific prevention, if required, as will be shown in the section below on paragraph 2 of Article 6. In any case, mere conservation measures are insufficient ⁽²⁶⁾: for instance, in Case C-96/98 *Commission v France* the Court discarded the argument that voluntary ‘set aside’ measures will be sufficient, instead favouring the view that more substantial measures are necessary for long-term protection.

⁽²²⁾ The expression *ratione materiae* is used in the case studies.

⁽²³⁾ The expression *ratione loci* is used in the case studies.

⁽²⁴⁾ The expression *ratione temporis* is used in the case studies.

⁽²⁵⁾ European Commission, *Managing Natura 2000 Sites*, page 18.

⁽²⁶⁾ Judgment of 8 July 1999 in Case C-96/98: *Commission v France*, [1999] ECR I-8531. Note that this case concerns Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, Official Journal L 103, 25/04/1979 P. 0001-0018, but that the significant overlap between this Directive and the Habitats Directive means that application under both directives is likely.

3.2 Comparative analysis of the case studies

3.2.1 Site Conservation Objectives (SCOs)

Site Conservation Objectives (SCOs) are essential to streamline the management of the site and to assess whether or not the project or plan has a ‘significant’ impact upon the site. The national experts therefore were asked to assess whether the competent authorities had formally laid down such objectives.

For instance, in Germany Article 33(3) of the *Bundesnaturschutzgesetz* (NtSchG) (Federal Nature Protection Law) requires that the ‘protection declaration’ shall set out the protection purpose (*Schutzzweck*) in accordance with the SCOs [DE.15]. In the first German case study, these are defined in great detail, but only for a small part of the affected SPA [DE1.18]. In France, the “*document d’objectifs*” (the management plan), sets SCOs and indicators in order to assess their fulfilment [FR.5;1.27]. In the UK, the SCOs are ‘the starting point from which management schemes and monitoring programmes may be developed as they provide the basis for determining what is currently or may cause a significant effect’ (the UK report) [UK1.16]. In the Walloon Region, SCOs (called ‘active management objectives’) are adopted in the Natura 2000 site designation decree and have statutory force.

Spatial delineation of SCOs seems to be provided for only when a specific management plan is enacted (*e.g.*, Spain, Romania, Belgium Walloon Region), although such maps are vitally important for the management and the AIAs.

Several observations flow from the national reports:

Concerning the substantive requirements, the ‘conservation measures’ required under Article 6(1) are:

- a) Positive (*e.g.*, plans for spreading, grazing incentives, subsidies, delayed pruning, hedgerow maintenance) (*e.g.*, French DOCOBs [FR1.26;4.52]);
- b) Negative (*e.g.*, prohibitions of soil contour modifications, deforestation, picking or harvesting wild species) (*e.g.*, Spain [ES1.12]); or
- c) Mixed (*e.g.*, Poland [PL1.20], the UK [UK1.35;2.28-30]).

Most conservation measures aim to conserve only the species and natural habitat types for which the site was designated (with the exception, of course, of the sites which are already subject to a non-specific protection regime). In Spain, however, the protection seems to cover all natural habitat types and not only the natural habitats of Community interest.

With regard to location, many conservation measures are only applicable within the SPAs or SACs and apply to these only (Spain [ES1.12], Germany [DE3.32]). In some cases, however, the preventative measures are spatially wider than the SPA itself (the UK [UK1.18], Belgium Walloon Region).

In relation to time, with the exception of the sites that were already subject to a preventative regime (see the Cairngorm case study from Scotland that was partly protected as a National Park [UK2.30-33]), the conservation measures apply only pursuant to a formal classification of the site by the Member State.

3.2.2 Management plan

Perhaps because of the belated designation process, most of the SACs which have not been or are in the process of being designated are still lacking a proper management plan.

Though most national legislation flowing from Article 6(1) of the Directive provides for management plans (see the French law that provides for a '*document d'objectifs*' laying down the SCOs; German, Swedish, English and Polish law), the majority of national reports highlight the fact that, until now, most of the sites were not subject to any specific or integrated management plans. There are some exceptions, however (France, where many '*document d'objectifs*' were enacted [FR.12]; Germany [DE.15] and the UK [UK1.19;3.46] where management plans were adapted or are in preparation for each site; the Walloon Region where the first designation decrees, which lay down SCOs and specific protection measures are to be adopted before the end of the year). In most cases, where management plans are in place, their existence could be explained by the prior existence of a protective regime, such as a nature sanctuary or national park (see in particular the Cairngorms funicular railway in the Cairngorms National Park in Scotland [UK2.30-33]).

For these sites, the management plans are usually designed specifically for the site at issue and not integrated into other development plans. In addition, where these plans exist, the national experts have deemed them 'appropriate'. Romania, however, has decided that both specific and integrated plans could be adopted [RO.12]. Interestingly, Romania has also enacted specific rules to guarantee the coherence of other plans and programmes (especially land-use plans) with the management plan of Natura 2000 sites [RO.6,9]. The management plan includes zoning of the site, specifying the zones to be strictly protected, the buffer areas and the 'areas of sustainable development of human activities'. This technique is especially useful in large sites, like in Spain, as these sites necessarily include zones where human activity is present.

3.2.3 Statutory, administrative or contractual measures

The SACs can be protected through an array of measures, including:

- a) statutory measures (see the German case studies);
- b) administrative measures;
- c) contractual measures; or
- d) a mix of several measures.

For example, France has favoured a contractual option (point (c) above) rather than a mandatory approach (Article L 414-3 French Environmental Code 2001) [FR.6,12]. Given that the Natura 2000 network in France encompasses a great number of natural parks as well as national parks, most of the management measures stem from 'charters' concluded by the park authorities and the communes [FR.6,12-14]. The UK regulation provides for a management agreement between the nature conservation body and the occupier of the land (Statutory Instrument 1994 No 2716, The Conservation (Natural Habitats &c) Regulations, §16 SI 1999/2716) [UK1.18-19]. Concerning point (d) above, two UK examples of mixed measures are: the Solent & Southampton Water SPA that was threatened by the construction of a container terminal, and the SAC Cairngorm range that is protected by a mix of measures [UK1.16;2.28]. The Romanian and Polish regimes are also characterised by a mix of statutory, administrative and contractual measures [PL1.20] [RO.12-14].

It is fairly difficult to assess the extent to which the ‘appropriate statutory, administrative or contractual measures’ have been implemented by the authorities with the aim of achieving the SCOs. In Germany, only the *Nedorper Vorland* (116 hectares), which is a small part of the Ems River SPA (4,000 hectares), was subject to a strict nature protection regime and a management plan [DE1.27]. According to the German report, the fact that the whole range of mudflat habitats was not under strict protection was explained by economic needs (shipment of vessels). By the same token, the French *Ciron* and *Midouze* SACs, which were affected by a highway, were only partially protected by nature conservation orders (biotope decrees) [FR2.25]. The main parts of the SACs were subject to contracts and charters reflecting the reluctance of the administration to designate the site [FR2.25-27].

The majority of the national reports demonstrate that there are no sets of scientific indicators that could be used with the aim of assessing whether the SCOs are being realised (see, for instance, the Spanish case studies where very general indicators were used but not linked to the SCOs [ES1.17]). However, the British report points out that Natural England (a conservation body) is required to regularly monitor the site to establish whether SCOs are being met [UK1.16]. The Flemish and Walloon Regions in Belgium are reported to have designed detailed sets of indicators for this purpose, but these indicators are not yet in use [BE1.20 ; 49]. In France, some DOCOBs have established sets of indicators to assess the implementation of SCOs [FR2.27].

None of the national reports were able to comment on whether the particular measures at the case study sites were tailored to the ‘ecological requirements’ of the species and habitats concerned and therefore contributing to the SCOs. At this point we are not aware of the existence of such studies, and it may take many years before genuine scientific assessment of the relationship between specific measures and the SCOs is possible.

3.2.4 EC Funding

The European Commission has no general fund exclusively for the implementation of management regimes for classified natural habitats. The Life Nature fund⁽²⁷⁾ is deemed insufficient by most actors in terms of its value in the wider conservation effort. The case studies of this report highlight that European Community funds are seldom used, and the financial burden is consequently put on national funds.

That said, some EC funds (mainly Life Nature) have been used with the aim of implementing the conservation measures:

- Solent & Southampton Water SPA in the UK case study where it is stated that funding was the Solway LIFE project [UK1.18]; and
- Cape of Gata in the Spanish case study where it is stated that “leaving aside EAFRD (that provides funds for the so-called traditional rural activities) and EDRF (that has been used to finance some minor projects, i.e. an information website named www.elsurmarino.net), LIFE is the main source for funding to support conservation projects in the site at issue. LIFE provided 3,012,000 Euros (out of a lump sum of 4,300,000) to improve the management of the SCI/SPA from 2001 to 2005” [ES1.13].

⁽²⁷⁾ The Life Nature fund’s website can be accessed at: <http://ec.europa.eu/environment/life/>

4. Preventative regime for both SPAs and SACs (Article 6(2))

Article 6(2) of the Habitats Directive

Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

4.1 Introductory comments

4.1.1 Avoiding deterioration of habitats and significant disturbance of species: a result-based obligation

In accordance with the principle of prevention (Article 174(2) of the EC Treaty), the adoption of a preventative regime including prohibitions, *e.g.*, on building or the modification of the contours of soil or vegetation, binds Member States. Article 6(2) of the Directive obliges them to take ‘appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, insofar as such disturbance could be significant in relation to the objectives of this Directive’ (Article 6(2) of the Directive). References to ‘avoid’ and ‘could be significant’ reinforce the anticipative nature of this regime. Indeed, it is more sensible to pre-empt potential rather than repair actual damage.

The ECJ has on several occasions offered clarifications relating to the implementation of Article 6 of the Habitats Directive⁽²⁸⁾, in particular in *Commission v France* (Case C-256/98). In this case Advocate General Fennelly noted that, even if States were not obliged to adopt a general provision establishing a specific protection regime in the SACs⁽²⁹⁾, they would in any case have to adopt measures in order to satisfy the conservation objectives set out in the Directive. Therefore, the provision is nothing less than a result-based obligation binding on the Member States.

According to the European Court of Justice (ECJ), Article 6(2) of the Directive cannot be applied concomitantly with Article 6(3)⁽³⁰⁾.

⁽²⁸⁾ The following cases deal with the transposition of Article 6 of the Habitats Directive: Judgment of 15 February 2000 in Case C-374/98: *Commission v France* (‘Basses Corbières’) [2000] ECR I-10799; Judgment of 5 December 2002 in Case C-324/01: *Commission v Belgium* [2004] ECR I-11197; Judgment of 13 February 2003 in Case C-75/01: *Commission v Luxembourg* [2003] ECR I-1585; Judgment of 20 March 2003 in Case C-143/02: *Commission v Italy* [2003] ECR I-2877.

⁽²⁹⁾ Opinion of Advocate General Fennelly in the Judgment of 6 April 2000 in Case C-256/98: *Commission v France* [2000] ECR I-2487 at paragraph 14.

⁽³⁰⁾ Judgment of 7 September 2004 in Case C-127/02: *Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (‘Waddenzee’) [2004] ECR I-07405 at paragraph 38.

4.1.2 Scope of the preventative measures: species and habitats covered by the general prevention regime

The results-based obligation contained in Article 6(2) of the Directive may have to cover particular activities carried out outside the site means that the prevention measures provided for under Article 6(2), even if not required to, ensure the protection of habitats and the species present within the site concerned ⁽³¹⁾. This may require national authorities to fix boundaries broader than the actual site within which particular activities must be regulated, *i.e.*, the spreading of manure or the maintenance of landscape features supporting nature walkways. It follows that activities carried out outside the area, but which potentially threaten it, should be regulated or even prohibited. The ECJ has endorsed this doctrinal position in Case C-98/03 *Commission v Germany*.

4.2 Comparative analysis of the case studies

4.2.1 Scope of preventative measures.

To protect SPAs and SACs, Member States often set in place general legislative or regulatory provisions prohibiting deterioration of the natural habitat types or significant disturbance to the species (see, for instance, Article 45 of the Spanish Natural Heritage Act 2004; Article 33 of the Polish Nature Protection Act 2004; Article 28 of the Romanian Regulation 57/2007; Article 28, paragraph 1, of the Walloon Region's Nature Conservation Act of 12 July 1973). Difficulties arise when the designation of the site is not complemented by the enactment of specific management plans or specific administrative-regulatory measures (see the Polish case studies) [PL1.20;2.29-30].

However, a few countries (such as France [FR.6,12]) have no specific Natura 2000 protection regime providing for preventative measures, other than appropriate assessment: the measures are either contractual or regulatory ones pursuant to other national nature protection legislation. Without these supplementary measures, the general preventative regime is insufficient for long-term preservation of the sites.

In that respect, the protection of the UK Solent & Southampton Water SPA is a good case in point as the general regime is supplemented by specific protection regimes provided by the same legislation [UK1.18]. The Belgium Walloon regime also seems to be interesting as it provides for general protection measures applicable in all Natura 2000 sites, as well as for specific protection measures, adapted to each site and enacted by the site designation decree.

4.2.2 Spatial range of preventative measures

The issue of whether the preventative regimes apply exclusively within the site and/or to activities carried out outside the site (*e.g.*, the spreading of manure in agricultural fields outside of the site) given that they are subject to the result-based obligation contained in Article 6(2) of the Habitats Directive has seldom been used, because most activities took place within (and not outside) the sites. The UK study suggests that the preventative regime is spatially wider than a particular SPA, as in the case of the Solent & Southampton Water SPA [UK1.18]. The Walloon regime provides the explicit possibility for the Government to apply

⁽³¹⁾ An analogy can be drawn with long-distance pollution caused by nitrates; Judgment of 25 April 2002 in Case C-396/00: *Commission v Italy* [2002] ECR I-3949.

interdictions and preventative measures outside the sites (see also Swedish law) [SE1.16;2.28]. By contrast, in Spain and Germany the protection regime only applies to activities carried out inside the site, which seems reductive [ES1.12] [DE3.32].

4.2.3 Nature of the activities covered by the general prevention regime

The general binding regulatory framework is intended to cover the whole set of human activities capable of causing, on a particular site, habitat deterioration or significant disturbance to species, such as:

- a) ‘deterioration of natural habitats and the habitats of species’, irrespective of their nature; and
- b) ‘disturbances of species’, where such disturbances are significant.

However, in some countries, several categories of ‘sensitive’ activities are excluded at the outset from any interdiction (*e.g.*, operation of the Ems River dam in Germany [DE1.17]; hunting and fishing in Natura 2000 sites in France [FR6]) without clear scientific justification.

Activities already authorised before the selection of the site as a SPA or SAC raise another problem. In many countries, existing activities are, in principle, subject to an interdiction to prevent the deterioration of habitats or significant disturbance to species (the UK [UK1.18-19;2.32;3.46], Poland [PL1.21;2.31], Belgium Walloon Region, Romania [RO1.25]). In others, only future activities can be subject to preventative measures (Spain).

4.2.4 Effectiveness of the general prevention regime

If the general preventative regime is not supplemented by more precise regimes, it is not deemed to be ‘appropriate’ in terms of fulfilling the conservation status of the habitats or species concerned, in particular when specific threats arise.

4.2.5 Direct effect

The German and Belgian courts have ruled that paragraph 2 has direct effect. The other national reports have not identified any case law on this point.

5. Appropriate Impact Assessment (Article 6(3) first phrase)

Article 6(3) first phrase of the Habitats Directive

Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.

5.1 Introductory comments

In order to preserve designated habitats from development or other activities likely to alter their ecological integrity, Article 6(3) of the Directive provides for a *sui generis* 'prospective impact study' of the environmental effects applicable to 'any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects'. For clarity, we shall use the acronym AIA ("appropriate impact assessment") in order to distinguish that assessment from the broader EIA ("environmental impact assessment", under Directive 85/337/EEC) and SEA ("strategic environmental assessment", under Directive 2001/42/EC).

In other words, the AIA procedure applies to either plans or projects that:

- a) are not necessary the management of the site; and
- b) create a risk of a significant effect on the site.

In addition, the assessment must be 'appropriate' as regards the site conservation objectives (SCOs) (see above). Given that the objective must be defined in accordance with scientific criteria, the assessment must be based upon sound science⁽³²⁾. It flows that the experts conducting the AIA must show a high level of competence with respect to nature conservation issues. As a consequence, questions arise as to the independence of the experts as well as to the quality of the assessment.

5.2 Which plans and which projects?

Whilst plans and projects which are directly related to or necessary for the management of a site are not subjected to an impact study, *e.g.*, the woodcutting foreseen in the management plan for a Natura 2000 forestry site, all other plans or projects capable of having a significant effect on the area must be assessed in accordance with procedures set in place by the Member States.

However, the Directive has defined neither the concept of plan nor project.

⁽³²⁾ Waddenzee, at paragraph 54.

The concepts of ‘project’ and ‘plan’ must be interpreted broadly due, on the one hand, to the wording of Article 6(3) of the Directive covering ‘any plan or project’, and, on the other hand, the conservation objectives on the strength of which SACs are set up ⁽³³⁾.

For instance, national courts as well as the ECJ have been holding that the following activities qualify as ‘plans or projects’ for the purposes of this provision:

- Amendments of territorial management plans allowing for the operation of a rubbish dump ⁽³⁴⁾; and
- Annual permits to fish molluscs in a SPA ⁽³⁵⁾.

5.2.1 Are the plans and the projects subject to consent?

The first phrase of Article 6(3) of the Directive merely requires that ‘any plan or project’ shall be subject to appropriate assessment and does not require a formal development consent procedure. A consent procedure should be required to ensure that, firstly, reasons are given as to why environmental damage is being permitted, and secondly, so these reasons can be used to guide appropriate compensatory measures ⁽³⁶⁾.

Given that the second sentence of that paragraph requires that ‘the competent national authorities shall agree to the plan or project’, a formal consent procedure is, however, implicitly required. What is more, given that developers are required to limit their impacts on the site’s integrity as much as possible, formal consent is needed in order to properly set out the mitigation measures.

5.2.2 What is a significant impact?

Only plans and projects that are ‘likely’ to have a ‘significant’ effect on the area are subject to this assessment procedure. Two components must be distinguished.

a) **The effect is ‘likely’ to occur.** The first question to answer is whether the plan or project is ‘likely’ to have an effect. Whether ‘likely’ means ‘possible’, ‘probable’ or ‘potential’ remains to be seen. That said, the use of the word ‘likely’ means that one cannot require absolute proof that an effect exists. Given that such projects are rare, it is difficult to assess the impacts. Consequently, the information gathered in the course of the assessment must be characterised by its predictive quality. Put simply, the assessment is an exercise in prediction. Given that the assessment might become more complex while dealing with synergetic and long-term risks, the experts should extrapolate (from the information gathered) the level of risk with a view to triggering an anticipatory approach, *e.g.*, the authorisation cannot be granted unless mitigation measures are endorsed.

⁽³³⁾ Opinions of: Advocate General Fennelly in *Commission v France* (‘Basses Corbières’), at paragraph 33; and, Advocate General Kokott in *Waddenzee*, at paragraph 30.

⁽³⁴⁾ Belgian Council of State, *Wellens*, n. 96.198, 7 June 2001.

⁽³⁵⁾ *Waddenzee*, at paragraphs 21-29.

⁽³⁶⁾ Mitigation measures are those that are part of the plan or programme: for example, in building a highway, tunnels could be made so as not to obstruct the movement of small mammals; or highways could be insulated to reduce noise impacting upon bird breeding areas. On the other hand, compensatory measures are outside the immediate scope of the plan or programme: for example, developers may buy land elsewhere to ‘compensate’ for the damage caused by putting a highway through an area used by various breeds of birds for feeding.

As regards the transposition of Article 6(3) and (4) of the Directive, the ECJ has held that Article 6(3) makes the requirement (for an appropriate assessment of the implications of a plan or project) conditional on there being a probability or a risk that that plan or project will have a significant effect on the site concerned ⁽³⁷⁾.

The question arises as to how to determine the likelihood of a significant impact. According to the ECJ, '[i]n the light, in particular, of the precautionary principle, such a risk exists 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' ⁽³⁸⁾.

b) **The effect is 'significant'**. Secondly, there must be a probability or a risk of a significant effect. *A contrario*, plans or projects that are deemed not to have such impacts may proceed without further procedural requirements.

There is no legal definition of the term 'significant'. This is a legal standard rather than a rule. A standard does not lay down any precise legal test, but merely requires the exercise of judgement on specific grounds, according to the specificities of the individual case. However, the ECJ has expanded upon that standard in the *Waddenzee* case: a plan or project is deemed not to entail significant effect where 'it is considered not likely to adversely affect the integrity of the site concerned and consequently, not likely to give rise to deterioration or significant disturbances within the meaning of Article 6(2)' ⁽³⁹⁾.

The 'significant' nature of the impact of the plan or project must be interpreted objectively in light of the SCOs, the particular characteristics and the environmental conditions of the protected site. Accordingly, the ECJ has held that any activity compromising the SCOs which apply to the area is assumed to have a significant effect ⁽⁴⁰⁾. For example, the loss of 100 square metres of chalk grasslands can have significant implications for the conservation of a small site hosting rare orchids, whereas a comparable loss in a larger site (such as a steppe) does not necessarily have the same implications for the conservation of the area ⁽⁴¹⁾.

The issue of significance is of the utmost importance and can give rise to heated debates. Moreover, one should take into account that 'significance' can vary tremendously according to the size of the area. For instance in the Swedish windmill case discussed below, the developer took the view that constructing a windmill was insignificant on the ground that the machines were affecting only 2.5% of the SAC. However, the Swedish environmental courts took the opposite view (*Eksjöberget* case, Sweden [SE2.25-26]). Given that opinions may vary regarding whether or not there is a significant effect, it may be necessary at this preliminary stage to invite the public or stakeholders to express their opinions. In other words, the assessment of the significance could be made the subject of a statement of reasons, consultation of specialised authorities and enhanced public participation.

The fact that the Habitats Directive requires assessment of the projects likely to have significant effects is not merely a question of drawing the line between small and large-sized

⁽³⁷⁾ Judgment of 20 October 2005 in Case C-6/04: *Commission v United Kingdom* [2005] ECR I-09017 at paragraph 54; Judgment of 13 December 2007 in Case C-418/04: *Commission v Ireland* [2007] ECR I-10947 at paragraph 226.

⁽³⁸⁾ *Ibid.*

⁽³⁹⁾ *Waddenzee*, at paragraph 36.

⁽⁴⁰⁾ *Ibid.*, at paragraph 48. See also the opinion of Advocate General Kokott also in *Waddenzee*, at paragraph 85.

⁽⁴¹⁾ European Commission, *Managing Natura 2000 Sites*, page 35.

projects. As the ECJ already stated with respect to the EIA procedure ‘even a small-scale project can have significant effects on the environment if it is in a location where the environmental factors [...], such as fauna and flora, soil, water, climate or cultural heritage, are sensitive to the slightest alteration’ ⁽⁴²⁾.

5.2.3 Screening: the assessment of the significance of the plan or project

As indicated above, in order to be assessed the plan or project must be likely to have a ‘significant’ effect.

Given that thousands of project categories could have an impact on sites, questions arise concerning which criteria are needed. Most Member States have screening procedures aiming at determining which projects have to comply with the full procedural requirements.

Screening can be seen as the preliminary stage of the assessment. It can be defined as the process through which the experts are assessing whether the plans or projects at issue are likely to have a significant impact. In doing so, the experts decide whether an assessment should be conducted. Indeed, the ability at this stage to determine whether the plan or the project is likely to have a significant impact triggers the whole AIA process.

One could draw a distinction between the screening exercise as a prior assessment and that of the full assessment (AIA) (see the table below).

PRIOR ASSESSMENT	Screening <i>in abstracto</i>	Determining whether there is likely to be a significant effect triggering the full assessment
FULL ASSESSMENT	Screening <i>in concreto</i>	Determining the extent to which the impact is significant

The screening can be operated in two main ways ⁽⁴³⁾:

1. In the form of thresholds or criteria (quantitative approach).
 - a) *Advantages*: enhances legal certainty, reduces the authority’s discretion.
 - b) *Drawbacks*: given that the thresholds might be too high, or inaccurate, many projects or plans that may have a significant impact could escape the assessment procedure; in addition, such thresholds preclude the implementation of the precautionary principle.

⁽⁴²⁾ *Waddenzee*, at paragraph 66.

⁽⁴³⁾ See also Article 4(2) of the EIA Directive.

2. In the form of a case-by-case approach (qualitative approach).
 - a) *Advantages*: given that the impacts of a plan or project are highly contingent/variable, their significance is likely to increase with respect to many factors, for instance, proximity, the size of the project, or additional or cumulative effects of pre-existing projects. As far as concerns these cumulative effects, the ECJ confirmed in the *Waddenzee* case that the first sentence of Article 6(3) of the Directive requires taking into account the significant effect not only ‘individually’ but also ‘in combination with other plans or projects’. As a result, the cumulative impact with other projects must be considered. This can be done only through a case-by-case approach. For instance, an additional highway in an area honeycombed with roads will slightly modify the ecology of the site whereas the construction of a minor road in a pristine road-less area is likely to have a significant impact.
 - b) *Drawbacks*: a case-by-case approach might be seen as a somewhat cumbersome procedure because the likely significance of the plan or project must be established before the full AIA is conducted. In other words, it requires the authority to ensure that some assessment is conducted at this preliminary stage.

According to ECJ case law, Member States cannot rely exclusively on abstract criteria to decide whether the project or plan needs to be assessed or not.

In that respect, two ECJ judgments are clear:

- In Case C-256/98 *Commission v France* the ECJ held that the French regime providing that an AIA could be waived because of the low cost of the project or its purpose was inconsistent with the Directive⁽⁴⁴⁾.
- In Case C-98/03 *Commission v Germany* the ECJ held that the restriction of AIA to projects subject to notification or authorisation procedures was inconsistent with Article 6 requirements⁽⁴⁵⁾. As a result, Germany had to amend the BNatSchG: every activity affecting a protected area must now be regarded as a project.

The fact that French law excludes several activities (hunting and fishing) on the ground that they cannot have significant impacts on the protected sites whatever the nature of the activity (over-fishing) is clearly inconsistent with the Directive⁽⁴⁶⁾ [FR.6,10,13].

To conclude, a qualitative (not quantitative) approach is better suited for Natura 2000 sites.

Our view is that uncertainty should prompt the authority to err on the side of caution in requiring a full assessment. Indeed, uncertainty should naturally involve the search of further information as to the real existence or extent of a risk. It must be stressed that such broad screening does not jeopardise the project; it just requires the full assessment of the effects of the project to be conducted from a preventative perspective.

It must also be kept in mind that in screening the likely significance of the impacts, the authority cannot take into account mitigation as well as the proposed compensatory measures. The potential impacts of the plan or project must be assessed in their own right, irrespective of further measures that could mitigate or compensate for their potential adverse effects.

⁽⁴⁴⁾ *Commission v France*, paragraph 35.

⁽⁴⁵⁾ Judgment of 10 January 2006 in Case C-98/03: *Commission v Germany* [2006] ECR I-00053 at paragraphs 42-45.

⁽⁴⁶⁾ The Commission has issued a reasoned opinion on that matter.

By way of illustration, a developer cannot claim that his or her project would not have a significant adverse effect considering the proposed mitigation measures or habitat restoration proposals on a locally distinct site. This reasoning is predicated on the assumption that the design of the nature, location and size of mitigation and compensatory measures can only be dealt with at the AIA level.

5.2.4 The splitting of plans and projects

With the aim of avoiding the assessment procedure, developers might be willing to split the project or the plan into several smaller units (highway or motorway being split in a series of 2-kilometre long projects to avoid a 2.5-kilometre EIA threshold), none of which individually requires a permit as being deemed not to entail significant effects. However, the cumulative impacts of a flurry of small projects can be significant. Viewed individually these projects may fall below the significance threshold; however, seen in combination with other projects, they may have significant impacts⁽⁴⁷⁾.

As a matter of EC law, one must not consider the project in isolation if it can be regarded as an integral part of a more substantial development. The ECJ has taken the view that: '[n]ot taking into account of the cumulative effect of projects means in practice that all projects of a certain type may escape the obligation to carry out an assessment when, taken together, they are likely to have significant effect on the environment'⁽⁴⁸⁾. This points to the conclusion that any administrative practice allowing a splitting of projects or plans that could be regarded as an integral part of a specific development is inconsistent with the objectives of the Habitats Directive.

There is only one example of such splitting in the national reports - the distinction made between the construction and the operation of the Ems River dam in Germany [DE1.17].

5.2.5 Content of the assessment

Since the impact study regime covers plans and projects 'likely' to affect a site, the conductor of the impact study must be able to identify, in accordance with the precautionary principle, even those damages which are still uncertain⁽⁴⁹⁾. Likewise, Article 6(3) of the Directive expressly requires that the cumulative effects of more negligible impacts be taken into account.

Plans and projects covered by Article 6(3) of the Directive must, finally, be authorised by an express act, subject to various conditions, which will determine the rights and obligations of the parties involved⁽⁵⁰⁾. This means that a notification mechanism is not sufficient to satisfy the requirements of the Habitats Directive. The authorities must expressly mark their agreement on the project or plan. It stems from that reasoning that implicit authorisation

⁽⁴⁷⁾ As regards an illustration of a splitting practice, see: Judgment of 25 July 2008 in Case C-142/07: *Ecologistas en Accion-Coda v Ayuntamiento de Madrid* (2008) at paragraph 20.

⁽⁴⁸⁾ Judgment of 21 September 1999 in Case C-392/96: *Commission v Ireland* [1999] ECR I-5901.

⁽⁴⁹⁾ *Waddenzee*, at paragraph 44.

⁽⁵⁰⁾ Opinion of Advocate General Kokott in *Waddenzee*, at paragraph 98.

regimes that would render any impact study irrelevant are incompatible with the requirements of Article 6(3) ⁽⁵¹⁾.

5.2.6 Geographical range and objectives of the impact assessment regime

The geographical range of the impact study is not limited only to activities carried out in protected areas, but must also cover any plan or project located outside the site which is likely to have a significant effect on the conservation status of the classified area. Thus, even more distant polluting activities (for example, polluting activities located upstream from a classified wetland) must be subject to an AIA provided there is a probability or a risk of significant impact.

5.2.7 Background against which the AIA must be carried out

The authority is called upon to assess the significant impact of the plan or project in terms of:

- “its implications for the site in view of the site’s SCOs” ⁽⁵²⁾; and
- the site’s integrity, as defined in the SCOs.

Consequently, the assessment has first to identify the SCOs, and second to assess the manner in which the project or plan could jeopardise the realisation of these objectives. By way of illustration, the main SCO of Glen Lake SPA in Ireland is to protect the Whooper Swan (*Cygnus cygnus*), a species listed under Annex I of the Birds Directive. The ECJ held that drainage works carried out within the SPA adversely affected the integrity of the site within the meaning of the second sentence of Article 6(3) of the Directive. The Court reached the conclusion that ‘since conservation of the whooper swans’ wintering area is the principal conservation objective of the SPA, its integrity was adversely affected within the meaning of the second sentence of Article 6(3) of the Habitats Directive’ ⁽⁵³⁾.

Integrity is an EC legal concept, the meaning of which must be understood in the light of a number of criteria, including:

- coherence of the ecological structures;
- resilience of the habitats to change;
- ability of the habitats to evolve in a sense favourable to conservation;
- inherent potential for meeting SCOs; and/or
- self-renewal without external management support ⁽⁵⁴⁾.

5.2.8 Content of the appropriate assessment

The Natura 2000 AIA assessment must be ‘appropriate’ having regard to the SCOs of the particular site (Article 6(3) of the Directive) ⁽⁵⁵⁾. Concerning the concept of ‘appropriate

⁽⁵¹⁾ Here an analogy can be drawn with Court’s jurisprudence on so-called tacit permits (Judgment of 28 February 1991 in Case C-360/87: *Commission v Italy* [1991] ECR I-00791 at paragraphs 30 & 31; Judgment of 28 February 1991 in Case C-131/88: *Commission v Germany* [1991] ECR I-825 at paragraph 38).

⁽⁵²⁾ See in particular *Waddenzee*, at paragraph 54.

⁽⁵³⁾ Judgment of 13 December 2007 in Case C-418/04: *Commission v Ireland* [2007] ECR I-10947 at paragraph 259.

⁽⁵⁴⁾ European Commission, *Managing Natura 2000 Sites : The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC*, (2000) Office for Official Publications of the European Communities, Luxembourg.

⁽⁵⁵⁾ On the concept of appropriate evaluation, see the Opinion of Advocate General Kokott in *Waddenzee*, at paragraphs 95-98.

assessment', the ECJ has already pointed out that 'the provision does not define any particular method for carrying out such an assessment' ⁽⁵⁶⁾.

Nonetheless, in analysing the rationale of Article 6 as well as the Directive's objectives it is possible to highlight a number of components of an 'appropriate' assessment. Of importance is that the scope and content of an AIA depends upon:

- The intensity of the impacts according to the nature, location (current use of the land, relative abundance of the natural resources) and size of the proposed plan or project;
- The vulnerability of the habitats or species under protection (regenerative capacity, absorption capacity); and
- The level of existing threats.

In assessing the intensity of the impacts, the AIA must in particular take into account the following elements:

- The specific, and not abstract, effects of the plan or project on every habitat and species for which the site was classified;
- The indirect effects of the project - impacts which are not the direct result of the project, but the result of complex pathways;
- The interrelated effects - the interactions between the impacts stemming from other projects within or outside the area;
- The cumulative effects of the project with other proposed or existing projects - these impacts result from incremental changes caused by other past, present, and future actions interacting with the project at issue. The 'in combination' requirement (Article 6(3), first sentence of the Directive) means that the content of the assessment should not be restricted to the effect arising from the project in consideration, but also the effects stemming from existing plans or projects not under consideration in the approval procedure. Likewise, the ECJ has stressed in the *Waddenzee* case the need to take into account 'the cumulative effects which result from the combination of that project with other plans or projects' ⁽⁵⁷⁾.
- The short and long-term impacts of the plan or the project.
- The reversible and irreversible impacts of the plan or the project.

Since it is important to consider the possibility of alternative solutions to the plan or project (required under paragraph 4), the assessor could also determine – though this is not compulsory under paragraph 3 – whether such solutions do in fact exist, including the alternative of cancelling the project entirely (zero option) ⁽⁵⁸⁾.

Last but not least, the assessor could also propose an appropriate compensation package – though this is not compulsory under paragraph 3 – depending on the circumstances of the case ⁽⁵⁹⁾. These measures must envisage the prevention, reduction and where possible the offset of any significant impact on the site's integrity. These measures may allow the objections to the project to be overcome.

⁽⁵⁶⁾ *Waddenzee*, at paragraph 52.

⁽⁵⁷⁾ *Ibid.*, at paragraph 53.

⁽⁵⁸⁾ The authorities are called upon to examine 'solutions falling outside' the site: Judgment of 26 October 2006 in Case C-239/04: *Commission v Portugal* [2006] ECR I-10183 at paragraph 38.

⁽⁵⁹⁾ European Commission, *Managing Natura 2000 Sites*, page 38.

TYPE OF IMPACTS TO BE ASSESSED	PROVISIONS
specific, and not abstract, effects	Article 6(3), first sentence.
indirect effects	By analogy to the case law on Directive 85/337.
interrelated & cumulative effects	Article 6(3), first sentence; C-127/02, <i>Waddenzee</i> , paragraph 53.
short and long-term impacts	<i>Ratio legis</i> of Article 6.
reversible and irreversible impacts	<i>Ratio legis</i> of Article 6.
alternative solutions and mitigation measures	Not required under paragraph 3 but implicitly from paragraph 4.

In addition, the ECJ has stressed that the assessment must be carried out ‘in the light of the best scientific knowledge in the field’⁽⁶⁰⁾.

As a matter of fact, a failure to take into account the whole set of impacts from a genuine scientific perspective will lead to a narrow assessment failing to provide the competent authority with the relevant information. Therefore, such an assessment should be deemed inconsistent with the concept of ‘appropriateness’ required by the Habitats Directive.

5.2.9 Holistic (EIA) or specific (AIA) assessment?

The obligation to carry out an AIA does not preclude the obligations to conduct:

- a) A traditional EIA under Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment whenever the project is falling within the ambit of that directive; or
- b) A SEA under Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment whenever the programme falls within the scope of that directive.

These procedural obligations are indeed autonomous and cumulative⁽⁶¹⁾.

However, the difference in substance between the different assessments ought to be remembered. Given that the bulk of the information in the AIA relates to ecosystemic data, the Habitats AIA is more targeted as well as far less multidisciplinary than the traditional EIA or the SEA⁽⁶²⁾. Conversely, the AIA should provide a much clearer picture and a more in-depth analysis of the impacts on habitats. It is not necessary to take into consideration all the environmental impacts of the project (effects on archaeological resources, cultural heritage or

⁽⁶⁰⁾ *Waddenzee*, at paragraph 54.

⁽⁶¹⁾ Pursuant to Article 3(2)(b) of Directive 2001/42/EC, each plan or programme subject to an AIA must be also subject to an SEA.

⁽⁶²⁾ In Case C-256/98, *Commission v France*, the Court held that the object of the French impact study regime was not sufficiently ‘appropriate’ having regard to the conservation objectives of the sites (at paragraph 40).

human health) since the project needs only to ‘be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives’.

Nonetheless, nothing stands in the way of establishing more targeted Habitats Directive assessments because these are seen as specific sub-assessments within the broader (general) assessment regime. Given the size and the nature of the projects dealt with in the different national reports (harbours, motorways, etc.), most of the AIAs discussed below are part of much broader EIAs conducted pursuant to national regulations implementing the EIA Directive.

5.3 Comparative analysis of the case studies

Most of the case studies deal with AIAs. However, one Spanish case study deals with the construction of a major hotel within a Natura 2000 site (Cape of Gata, Andalusia) where, for unknown reasons, no AIA was required [ES1.15]. The project was deemed to be illegal.

5.3.1 Scope of the plans or projects requiring an appropriate assessment

By and large, there are no legal definitions of the concepts ‘project’ or ‘plan’ since these concepts are not defined in the Directive. The question arises as to whether these concepts are defined narrowly or broadly.

In the UK as well as in Germany (⁶³), the concepts of ‘plan’ and ‘project’ are interpreted broadly by the legislature [UK1.19]. In stark contrast, these concepts are narrowly interpreted in France [FR1.18;2.32;3.45], Poland [PL1.22;2.32] and the Belgium Walloon Region: only projects subject to an existing authorisation are deemed to be projects according to the nature protection regime (⁶⁴). However, the Walloon regime provides the possibility for the Government to make any activities subject to a “nature permit” handed down by the nature conservation agency when these activities are not subject to a ‘traditional’ licence.

All the plans and projects that were assessed because of their significant impact were authorised by an express act, subject to various conditions, which determined the rights and obligations of the parties involved.

5.3.2 Screening for the appropriate assessment: whether necessary with the management of the site

In most of the cases it was somewhat obvious that the plan or project was not directly related to or necessary for the management of the site. This was particularly the case for major infrastructure (dams in Germany, highways in France [FR2.27] and Poland [PL1.19], airport development in Spain [ES2.17], etc.). In only one case study (*Ciudad del Medio ambiente*, Madrid, Spain [ES3.23]) was this issue discussed. This could be explained by the criteria imposed on national experts for the choice of case studies (only major projects: see above). More problems could occur with regard to farming and forestry activities within the sites, as these could be considered as management activities.

⁶³) At the outset, the German lawmaker narrowly defined the concept of ‘project’. Germany had to modify its legislation after being condemned by the ECJ (Case C-98/03).

⁶⁴) Moreover, in the Walloon Region, only statutory plans are subject to an AIA (Article 1bis of the Act of 13 July 1973).

5.3.3 Screening for the appropriate assessment: significant effect

‘Significance’ operates as a threshold for determining whether an appropriate assessment of the implications of the project should be conducted. The question arises as to how the plan or project is deemed to be ‘significant’; in other words, how the project falls below a threshold of ‘significance’.

It flows from the national reports that the ‘significance’ is usually determined by:

- a) A case-by-case approach (Poland [PL1.21;2.31], Romania (projects) [RO1.32], the UK [UK3.46]⁽⁶⁵⁾, Germany [DE1.24], Belgium Walloon Region, etc.); in some cases, a formal decision must be made in regard to specific criteria (localization, etc.) and can be subject to public participation and judicial control (see the UK Dartford and Gravesham Local Development Framework (LDF) case study, where a “screening report” was realised [UK3.42,47]). Generally, institutions with nature conservation mandates are consulted, as in the case with the regional conservation agency in the UK [UK3.46,51-52], or with the conservation NGO in Sweden (*Botnia* case study) [SE1.19].
- b) In laying down thresholds or criteria - France [FR1.19;2.33;3.46]; Romania only for plans and programs [RO1.31-33]). This option is criticised more as it is very difficult, from an ecological point of view, to guarantee that certain plans and projects outside the thresholds or criteria will never have a significant impact.

In assessing the significance of the effect most assessors took into account the following elements:

- The intensity of the impacts according to the nature, the location and the size of the project;
- The vulnerability of the habitats/species under protection; and/or
- The level of existing threats.

When the French [FR1.19;2.33;3.46], German [DE3.34] and UK [UK2.35;3.49] authorities assessed the significant impact of a plan or project on the site they properly considered the SCOs. Other authorities (Spain [ES1.15;2.18;3.25], Poland [PL1.23;2.33], French authorities as regards the power-lines crossing the *Gorges du Verdon* [FR3.45-46]) did not bother to take these elements into account.

In most of the case studies, cumulative effects were ignored at this stage. But there are some exceptions, as in the UK, where a “screening” report was realised in the Dartford and Gravesham Local Development Framework (LDF) case [UK3.42,47].

In some countries, only plans and projects occurring inside the sites are subject to AIA (Spain [ES1.14;2.18;3.25], Romania [RO1.26-33]), which is overly restrictive with regards to the Directive’s objectives.

5.3.4 Quality of the assessors

In some case studies, the assessors were considered as general experts or experts specialised in habitat conservation (France [FR1.21;2.34;3.47], Poland [PL1.23-24;2.33], Sweden [SE1.19;2.30], Germany [DE1.24;3.35]). It appears to be a much better option to hire specialised experts as far as

⁽⁶⁵⁾ By way of illustration, Regulation 33 in the UK provides information on how to review a plan or programme to assess if an AIA is required.

this expertise is recognised and for the experts to be considered as independent (see *infra*). In stark contrast, for some countries the assessor was the promoter of the project (Sweden, Spain in the third case study [ES3.25]). This option virtually always led to bad AIAs (see for instance the Dibden Bay case study where the AIA for the building of a container terminal was realised by the Associated British Ports and where the strict control of the AIA quality in this case allowed the project to be stopped, see *infra* [UK1.20]).

In the majority of the case studies, the assessors were appointed and paid by the operator or the author of the plan. The question arose as to whether these assessors were independent from the vested interest(s).

In the UK Dibden case study, a planning inspector and an independent authority were appointed by the Secretary of State to hold a public inquiry, and to forward to the Secretary their recommendations [UK1.20]. The independence of the office allowed the English planning inspector to take critical views as regards the content of the AIA submitted by the developer. The inspector considered that ‘no reliance could be placed on the Dibden Bay project’s AIA’.

In contrast, the German report stresses that the assessors were not as neutral given the emphasis being placed upon the construction of the dam [DE1.23-24]. The Polish report also mentions that the experts were not considered independent from the vested interests [PL1.23].

This situation is very problematic as the conclusions of the assessment will directly influence the decision of the competent authority. It is clearly imperative that specific guarantees of the independence of the AIA should be provided in the legislation in order to avoid subjective assessments that are likely to be very misleading for the competent authority.

5.3.5 Content, form and methodology of the appropriate assessment

- *Content*

National regimes differ on how the precise content of the AIA is defined. This stage of an AIA is called ‘scoping’. This ‘scoping’ stage is a crucial one as it can give indications to the assessors on what has to be analysed to make the AIA ‘appropriate’. It should be subject to a specific decision of the competent authority on a case-by-case basis, preferably after having consulted nature conservation experts or agencies, and the public (including NGOs).

In most case studies, however, the content of an AIA seems to be set out in very general terms by the general EIA or SEA law without taking into account the specificity of Natura 2000 (especially the applicable SCOs), *e.g.*, Romania [RO1.33], Spain [ES2.19;3.25]. In other case studies, the authority has set the content of the AIA on a case-by-case basis, but without seeking advice from nature protection NGOs and specialised agencies with regard to the content of the assessment (Spain [ES1.14]).

- *Form*

The form of the AIA can be specific (France [FR1.21;2.35]) or, more often, integrated into a general EIA or SEA (Spain, Romania, Poland, Belgium Walloon Region, etc.). In the latter case, problems can occur when the studied impacts are non-specific to natural habitat types or species but encompass the whole ‘fauna and flora’ without taking the SCOs into consideration (*e.g.*, the *Ciudad del Medio Ambiente* case study, Spain [ES3.25-26]). On the other hand, this

option has a great advantage, as it provides for all procedural guarantees imposed by the EIA and SEA Directives, *e.g.*, public inquiry, declaration of terms, etc.

- *Methodology*

Many problems of Article 6 implementation seem to be caused by bad methodology in the assessment. Most of the national reports consider the assessment as superficial or inappropriate (Spain, Poland, Romania, the UK, Belgium Walloon Region, Sweden (wind power stations)). This often means a lack of quality in the assessment.

Some judicial decisions illustrate this apparently frequent situation. With respect to development cases (the *Gorges du Verdon*, an urban development project), French administrative lower courts (*tribunaux administratifs*) quashed the consents on the ground that the AIAs were inappropriate [FR3.46]. By the same token a Romanian Court of Appeal quashed a local decision allowing a mining facility within a protected site (Rosia Montana Project) [RO1.20]. The Belgian Supreme Administrative Court (*Conseil d'Etat*) also quashed a consent given for the extension of a landfill in a priority natural habitat for the same reason.

Nonetheless, it appears that, even with respect to AIAs deemed to be appropriate, not all effects are taken into consideration. For instance, in Germany the AIA on the impacts of a dam built on the Ems River was deemed to be appropriate though a number of salient issues (cumulative damages, compensatory measures) were not dealt with [DE1.23-25]. In particular, the national assessors were unable to assess the following impacts in-depth:

- a) the impacts on certain vulnerable habitats/species; and
- b) the cumulative effects.

Although there is no obligation as such at the AIA level to assess the alternatives and the compensatory measures, it appears that the decision-making process is improved whenever these elements are taken into consideration by the assessors. Furthermore, the conductors of the impact study often seem unable or reluctant to identify, according to the precautionary principle (Article 175 of the EC Treaty), even those damages which are still uncertain.

Finally, in the majority of the case studies, the authority did not submit the licence application and the final AIA report to nature protection NGOs or specialised agencies, despite the fact that such opinions could be helpful for the authority to ‘ascertain’ whether the project or plan will adversely affect the integrity of the site.

The imperative lesson to be learned here is that strict and independent control of the quality of AIAs must be organised before the consent to the plan project is delivered. This guarantees that the assessment, *in fine*, may be considered appropriate and allows the competent authority to have ‘ascertained that [the plan or project] will not adversely affect the integrity of the site concerned’.

Many techniques exist and some case studies deserve to be mentioned in this regard. In the first Romanian case, a “Technical Analysis Committee” (including representatives of central authorities and institutions) assessed the EIA report submitted by the developer of a project [RO1.32]. However, this control was insufficient as the Romanian Court quashed the consent for the gold mining facility.

In the UK Dibden Container Terminal case study, an independent inspector – the ‘Planning Inspector’ – was appointed by the Secretary of State to hold a public inquiry and to report back to him with recommendations and conclusions [UK1.20]. He concluded that ‘no reliance could be placed’ on the AIA that was carried out. This is probably the most elaborate example of quality control for an AIA report. Finally, in the *L’Erablière* case (landfill extension, Belgium Walloon Region), the EIA was subject to the advice of an environmental consultative organ (the *Conseil wallon de l’environnement et du développement durable*) which identified important gaps in the Natura 2000 part of the EIA and pointed to the presence of priority habitats within the site of the future landfill.

6. Substantive Decision Criterion (Article 6(3) second phrase)

Article 6(3) second phrase of the Habitats Directive

In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

6.1 Introductory comments

6.1.1 Impact of Article 6(3) on decisions taken by national authorities

Article 6(3) provides that ‘in the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned’.

As a matter of procedure, the wording of this provision implies that where a risk of significant impact on the site of plans or projects is assessed, it is also necessary for the developer or operator to obtain the authorisation or express and written (and reasoned) approval of the relevant authority⁽⁶⁶⁾. In other words, the developer must receive formal permission giving him or her the right to develop in accordance with the conditions laid down by the public authorities⁽⁶⁷⁾. Accordingly, the correct implementation of Article 6(3) of the Directive therefore requires Member States to set up a legal framework covering such plans and projects (whether specific or not: the amendment of legislation applying to listed installations would be sufficient).

The majority of the Member States have so far not established specific Natura 2000 licences. However, the Swedish Environmental Code provides for a specific Natura 2000 authorisation, which must be granted in addition to traditional urban or environmental licences [SE1.17]. A similar system has been set out in the UK [UK3.51]. Under French law, the competent authority may require a specific license for activities that are, as a matter of law, not subject to a permit (Article L 414-4, IV French Environmental Code) [FR.7]. Whether this regime will be implemented remains to be seen. In the Belgium Walloon Region, the Government may request that any activity, that is not yet subject to a ‘traditional’ licence be subject to a specific permit, *e.g.*, like farm or forestry practices or recreational activities.

⁽⁶⁶⁾ Judgment of 10 January 2006 in Case C-98/03: *Commission v Germany* [2006] ECR I-00053 at paragraph 98.

⁽⁶⁷⁾ The EIA Directive defines the consent as ‘the decision of the competent authority or authorities which entitles the developer to proceed with development’.

Accordingly, land consolidation, drainage or contour modification operations impinging upon the conservation of SPAs and SACs must all be submitted for assessment and authorisation, even if they would not otherwise be submitted to such procedures under national law.

Most of the case studies deal with genuine administrative authorisations given the size of the projects. However, there are only a few exceptions - impacts of activities not subject *per se* to authorisations, such as hunting and canoeing in the SPA *Borgfelder Wümmewiesen*, Germany [DE3.34].

Attention should be drawn to the fact that consent procedures can be somewhat awkward. See, in particular, the case studies dealing with the construction of a dam in Germany [DE1.25-26] or the development of the Dibden Bay container terminal in the UK [UK1.21-23] - activities requiring a number of applications. A phased project might be carried out provided it is subject to several consents, *e.g.*, planning permission, industrial operations consent, water extraction or water discharge consent, etc. The following questions arise: which of these decisions properly constitutes development consent and, as a result, triggers the procedural requirements in paragraph 3? Should the screening assessment or the full assessment apply at every stage and for any decisions? Or, should the assessment requirements apply exclusively at a particular stage⁽⁶⁸⁾? The Habitats Directive does not offer any answers to these questions. Reasoning by analogy, it is worth noting that the ECJ held in *Wells* that where a consent procedure comprises several stages, the EIA (requested under the EIA Directive) must be carried out as soon as possible.

Another problem can occur when the legislature confers a legislative force to individual permits in order to prevent administrative or judicial review of the project. This is the case in Spain (*Ciudad del Medio Ambiente* [ES3.26]). A similar system is provided by the Flemish and Walloon legislation in order to allow major projects to be implemented without any control from the Belgian *Conseil d'Etat* (supreme administrative court). This option puts the separation of powers at stake and could breach the 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("Aarhus Convention")⁽⁶⁹⁾, that requires them to organise public participation for a wide array of projects and plans and related EC Directives on access to justice.

6.1.2 No adverse effects

In order for the project to be authorised, Article 6(3) of the Directive requires that the competent authority additionally ensures that 'it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public'. In other words, a plan or a project may be agreed to insofar as the authorities are 'convinced' that the site's integrity will not be adversely affected⁽⁷⁰⁾. It therefore follows that a negative assessment obliges authorities to refuse consent for the project that is likely to deteriorate the site's integrity. The authority must be convinced that the negative effects will not occur.

⁽⁶⁸⁾ Judgment of 7 January 2004 in Case C-201/02: *Wells* [2004] ECR I-00723 at paragraph 54.

⁽⁶⁹⁾ The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the "Aarhus Convention"), signed on 25 June 1998 in the Danish city of Aarhus. It entered into force on 30 October 2001.

⁽⁷⁰⁾ In *Waddenzee*, the ECJ stressed that the national authorities are to be 'convinced', and that they can grant consent only if they have made certain that it will affect the integrity of the site (at paragraph 59).

As a result, the assessment provides a positive means by which permission may either be refused or made conditional. Put simply, the assessment's conclusions shape the substantive outcomes of the decision. The site's integrity comes first, development second. This reasoning is predicated on the assumption that most of the land in the Member States is subject to development whereas only a small percentage falls within the ambit of the Natura 2000 network. As a result, development occurring in the protected areas must be subject to a web of procedural conditions with a view to reducing the adverse effects as much as possible. This legal reasoning stands in stark contrast to the EIA Directive, which does not prevent the authority from granting permission despite the fact that the conclusions of the assessment are negative ⁽⁷¹⁾ (see *Waddenzee* case and *supra*).

6.1.3 Precautionary decision-making

The authorisation can only be given where the AIA demonstrates the absence of risks in relation to the integrity of the site. If there is any lingering uncertainty over the subsequent manifestation of risks, the term 'ascertain' would require, according to ECJ case law and in line with the precautionary principle, that the competent authority refrain from issuing the authorisation ⁽⁷²⁾.

Where there is any reasonable doubt over the absence of any effects, authorities must refrain from issuing authorisations. In accordance with the logic of the precautionary principle, authorities can order additional investigations in order to remove the uncertainty (if needed).

6.1.4 Participatory decision-making

Contrary to the EIA Directive, which entitles individuals to express their opinion as to the likely significance of a project, Article 6(3) of the Directive does not automatically ensure public participation. This is left to each Member States' discretion. It should be noted here that this grey area does not align with recent developments in international law: all Member States are parties to the Aarhus Convention, which requires them to organise public participation for a wide array of projects and plans.

Even when public participation is not provided for, it can be wise to provide opportunities for the wider public to take part in the public debate. As a matter of law, there are numerous ways in which public participation could be organised (conference, consultation, public debate, public inquiry, etc.).

In addition, public participation should be organised as early as possible, if possible at screening level. This issue was not addressed in the national reports.

Finally, in most of the national legal orders, the fact that someone participates in the decision-making process reinforces his or her right to standing and therefore in any subsequent challenge to the authorisation issued. Furthermore, participation enhances the correct implementation of EU law, given that the public might raise questions as to the correct implementation of the Habitats Directive. Moreover, when a plan or a programme is subject

⁽⁷¹⁾ See Advocate General Elmer's opinion in: Judgment of 11 August 1995 in Case C-431/92: *Commission v Germany* [1995] ECR I-2209 at paragraph 35.

⁽⁷²⁾ *Waddenzee*, at paragraph 67.

to an AIA, it must also be subject to a SEA, which expressly entails a participatory process (see Article 3, paragraph 2 of the SEA Directive) ⁽⁷³⁾.

6.1.5 Statement of reasons

There is no express obligation for the authorities to state the reasons for granting or refusing a permission similar to the one laid down under Article 9 of the EIA Directive ⁽⁷⁴⁾. However, when the project falls within the ambit of the EIA Directive, the authority is called upon to state the reasons. That said, there are many projects not encompassed within the EIA Directive's scope.

It goes without saying that the duty to state the reasons as to the weighing of conflicting interests narrows the discretion on the part of the authorities. Accordingly, the authority should disclose the rationale behind their decision. For instance, if an alternative option is not deemed to be possible, it is recommended that specific explanations be provided as to which factors led the authority to choose the proposed development.

6.2 Comparative Analysis of the Case Studies

6.2.1 Substantive decision criterion guiding the authority

As a matter of law, if the authority decides to authorise the plan or the project in spite of the negative conclusions of the assessors, it must be aware that it can do so only under the condition that it is convinced that the project or plan will not adversely affect the **'integrity'** of the site concerned.

The national experts were asked to assess whether the competent national authority agrees to a plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned.

In some cases, it was commonly believed between the parties that the project was likely to have a significant impact on the site (Cairngorm funicular in Scotland [UK2.37-38]; Dibden Bay

⁽⁷³⁾ Article 3(2) of SEA Directive:

“Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,

(a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or

(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.”

⁽⁷⁴⁾ Article 9 of EIA Directive:

“1. When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public thereof in accordance with the appropriate procedures and shall make available to the public the following information: — the content of the decision and any conditions attached thereto, — having examined the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process, — a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects.

2. The competent authority or authorities shall inform any Member State which has been consulted pursuant to Article 7, forwarding to it the information referred to in paragraph 1 of this Article. The consulted Member States shall ensure that that information is made available in an appropriate manner to the public concerned in their own territory.”

container development [UK1.22]; development of highways and power lines in France [FR2.37;3.49]; Botnian railroad in Sweden [SE1.12-13]; etc.). In the *Eksjöberget* windmill project in Sweden, an interesting discussion took place on the issue of the relative surface of the habitat destroyed by the project in relationship to the surface of the site. The Environmental Court of Stockholm dismissed the wind power company's attempts to make the effects seem insignificant using the percentage of the area as a description of what could be affected in their arguments. However, this case seems, according to the national expert, to be quite rare, and most Courts do not 'fall for' the applicant's descriptions that only 2% or 3% of the area or of a certain habitat will be affected and that this is insignificant. This is very worrying as all sites are considered as essential parts of a coherent network, a decision maker should not be allowed to decide that even a small percentage of the site can be destroyed without considering this destruction as 'significant' [SE2.31-32].

In other cases the assessors reached the conclusion that the project did not have a significant impact (construction of a dam on the Ems River in Germany [DE1.26], etc.). They had not assessed, however, all relevant impacts, especially cumulative effects (see *supra*). In some cases, the authority came to this conclusion taking into account the proposal of compensatory measures as well as mitigation measures (France, project of highway in *Vallée du Ciron* and *affluents de la Midouze* [FR2.37]). Confusion between mitigation measures and compensatory measures can be very harmful for the coherency of the Natura 2000 network as no alternatives are sought for the project and no advice is sought from the European Commission.

In other cases, the administrative authorisations were quashed by administrative courts because their significant impacts were inconsistent with the protection regime (power-line project over the *Gorges du Verdon* in France [FR3.52-53]; *L'Erablière* case in Walloon Region).

The concept of 'integrity of the site concerned' was seldom defined in regulations. The exception among the countries studied is the UK. British authorities have defined the concept of 'integrity' as the 'coherence of its ecological structure and function across its whole area, that enables it to sustain the habitat, complex of habitats and/or the levels of populations of the species for which it was classified' (Circular 6/95) [UK2.34].

Some agencies (such as the French competent authority) interpreted the concept of integrity in light of the SCOs, as the ECJ requires [FR1.23;2.37;3.49]. Others did not make the link between the SCOs and the concept of the integrity of the site (Botnian railroad and *Eksjöberget* windmill projects in Sweden [SE1.20;2.31]).

Moreover, several authorisations were granted even where the assessment demonstrated severe risks for the integrity of the site (Poland [PL1.25;2.34], France, Cairngorm funicular railway in Scotland [UK2.37-39]).

The question arises at this point whether the authorities were aware that, pursuant to ECJ case law, they were obliged to refrain from issuing the authorisation if there was any reasonable doubt over the absence of any effects.

6.2.2 Participatory decision-making

All the projects discussed in the national reports were controversial in their own rights. Given that most AIAs discussed in the national reports are encompassed within broader EIAs, the public are able to make comments and raise objections. Indeed public inquiries were organised by the competent authorities. By way of illustration, as regarding the development of Dibden Bay, the authorities decided to apply a major planning inquiry [UK1.22]. For other projects (Ems River in Germany [DE1.17]; Cairngorm Funicular Railway in Scotland [UK2.38]) a large number of objectors raised their concerns. In some cases (Germany [DE1.26]), though nothing required the organisation of a public inquiry, the authority decided to organise such an inquiry.

In several cases, the competent nature conservation agencies were consulted (Germany, construction of the dam on the Ems River, etc.) (see *supra*).

6.2.3 Precautionary decision-making

In the countries reviewed for this study, the national legislation implementing the Directive did not explicitly include the precautionary principle (Romania, Poland, France, Germany, Spain). Moreover, in the decisions allowing controversial projects the principle was hardly referred to, though uncertainties still lingered in many cases. No additional investigations were ordered by the authority in order to remove the uncertainty. Lastly, the precautionary principle did not prompt a reversal of the burden of proof from the project opponent to the authority authorising the project or plan. Only in the *L'Erablière* case (Belgium Walloon Region), the supreme administrative court held that even if there was no strong evidence that the site had to be integrated into the Natura 2000 network, this was not a reason for not protecting it until the Commission had enacted the list of SCIs.

6.2.4 Statement of reasons

In France, the *déclaration d'utilité publique* -- the last act of the expropriation procedure taken after a public enquiry -- declares the public utility of a project and therefore the requirement of an expropriation. However, at the time of the cases (*Vallée du Ciron* and *Grand Canyon du Verdon*) the authority did not have to state the reasons motivating the decision.⁷⁵ As a result, the administrative judge could not review the administrative declaration taking into account the motivations. The French law was subsequently modified in order to require the reasons to be stated and the *déclaration d'utilité publique* must now come with a document setting out the grounds and considerations justifying the public utility character of the project.⁷⁶

⁷⁵ Art. L.11-1 and following, of the Expropriation Code for public utility.

⁷⁶ New Art.L.126-1 of the Environmental Code, and new Art. L.11-1-1 of the Expropriation Code for public utility.

7. Derogatory regime (Article 6(4))

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.

7.1 Introductory comments

7.1.1 Derogation mechanism following negative findings in the assessment

It may transpire that the AIA clearly shows that the project threatens the integrity of the site.

As discussed above, in principle **no authorisation can be issued**. An exception is however provided for by Article 6(4) of the Directive which is testament, according to Advocate General Kokott, to the principle of proportionality⁽⁷⁷⁾.

However, Article 6(4) assures optimum environmental protection through both procedural and substantive guarantees. Projects can only be implemented where:

- there are no alternative measures;
- their completion is justified by specific interests; or
- (even where) a challenged project is accepted.

In such cases Member States must implement compensatory measures in order to off-set the losses of habitats and guarantee the global consistency of the Natura 2000 network.

7.1.2 First condition: Absence of alternative solutions

The Habitats Directive makes the issuance of authorisations dependent on the absence of alternative solutions⁽⁷⁸⁾. First, only in the absence of alternative solutions can the authority allow for derogations under paragraph 4. Member States must be able to demonstrate, where

⁽⁷⁷⁾ Opinion of Advocate General Kokott in *Waddenzee*, at paragraph 106.

⁽⁷⁸⁾ In sharp contrast, the EIA Directive is not as crystal clear. Annex III of Directive 85/337/EEC provides, 'where appropriate' that the developer study 'an outline of the main alternatives'.

appropriate, that the impact study has found no viable alternative ⁽⁷⁹⁾. Applicants should therefore demonstrate that they have fully considered alternative solutions.

Given that the obligation to seek the least damaging alternative ⁽⁸⁰⁾ encapsulates a preventative approach ⁽⁸¹⁾, the specific importance of that obligation is not difficult to fathom.

Considering the useful effect (*effet utile*) of the Directive, it is appropriate to give a **broad interpretation** to the obligation to seek out the least damaging alternative for the conservation of the site ⁽⁸²⁾. The obligation to seek the least damaging alternative should be at the heart of every AIA, with the particular aim of reducing the potential impact on the Natura 2000 site. Strictly speaking, it should be considered as a key feature of the assessment.

If the Member State can achieve the same objective in a way that causes less damage to the conservation of the protected habitat, the initial project must be abandoned in favour of the alternative project. This means that it should not be possible to invoke the higher costs of alternative projects as a reason for excluding less damaging projects, except where the costs are disproportionately high ⁽⁸³⁾.

Nonetheless, the assessors have to overcome a number of hurdles, including:

- the difficulty in obtaining the relevant information, for example, as needed for assessors to have something to compare and contrast; and
- the difficulty in comparing the ecological value of the development site and the proposed mitigation site, given that developers' property rights are usually limited to the site proposed for development.

In addition, the obligation to seek the least damaging alternative prompts a number of questions:

- a) What range of alternatives should be covered? The solutions could involve an array of measures ranging from alternative locations, alternative processes, different scales or design, or the zero-option or do-nothing alternative.
- b) What is the appropriate level of comparison? This raises the question of the level at which the comparison of alternatives should take place. For instance, it may make more sense not to compare the different routes that a motorway could follow but to compare different means of transportation.
- c) How should alternatives be compared? According to the Commission's documents: 'economic criteria cannot be seen as overruling ecological criteria' ⁽⁸⁴⁾.
- d) Technical feasibility: Which are the reasonable sites for the proposed development? Must all alternatives be viable? Are the alternatives likely to be suitable? Are the alternative sites available?

⁽⁷⁹⁾ Case C-21/08, *Commission v France*.

⁽⁸⁰⁾ Judgment of 26 October 2006 in Case C-239/04: *Commission v Portugal* [2006] I-10183 at paragraphs 38-39.

⁽⁸¹⁾ Holder, J., *Environmental Assessment*, Oxford, OUP, 2004, page 148.

⁽⁸²⁾ On the obligation to privilege the alternative which is least prejudicial to ecological interests, see Judgment of 12 December 1996 in Case C-10/96: *Ligue royale belge pour la protection des oiseaux* [1996] ECR I-06775 at paragraph 18. Cf. the Commission's favourable opinion of 24 April 2003 on the construction of a railway line in Northern Sweden where the available alternatives did not entail higher costs.

⁽⁸³⁾ The European Commission considers that economic criteria do not take precedence over ecological criteria when selecting 'alternative solutions'. Cf. European Commission, *Managing Natura 2000 Sites*, page 43.

⁽⁸⁴⁾ European Commission, *Managing Natura 2000 Sites*, page 43.

- e) Territorial dimension: Should the assessor focus exclusively on a particular site or should he set out a broader approach? For instance, when assessing the opportunity of a harbour development (e.g., Dibden development in Hampshire in UK report [UK1.14]), should the experts assess the port capacity with respect to other projects around the UK, around the EU or around the globe (e.g., development in Tangier)?

7.1.3 Second condition: Weighing interests

In addition to the obligation to adopt the least damaging alternative possible, the advantages of the project must be carefully balanced against its damaging effects for the conservation of the natural habitats. The proportionality principle plays a key role in this balancing of interests: a project justified by a fundamental interest with only a relatively minor negative impact will be more readily accepted than a particularly damaging project in which public interest is marginal. A fundamental distinction must, however, be established between habitats where protection is deemed to be important and those where it is not.

For **non-priority habitats and species**, ‘imperative reasons of overriding public interest, including those of a social or economic nature’ will justify the execution of the project.

However, it would not be viable to give too broad interpretation to ‘reasons of a social or economic nature’ which would run the risk of depriving the protection regime of any substance. Although in *Lappel Bank* ⁽⁸⁵⁾ the Court took care not to make any express statements on the range of ‘imperative reasons of overriding public interest, including those of a social or economic nature’, paragraph 41 of the judgment (‘economic requirements, as an imperative reason of overriding public interest’) nonetheless indicates that a restricted interpretation of ‘economic requirements’ must prevail.

In any case, it is evident from the wording of Article 6(4) of the Directive that economic requirements cannot be directly equated with ‘imperative reasons of overriding public interest’ ⁽⁸⁶⁾. This means that the enlargement of a harbour or the construction of a road network cannot be authorised for the simple reason that it satisfies particular economic requirements (for example, job creation or local economic development) but rather because it is intended to satisfy an overriding public interest - for example, the opening up of a particularly isolated region, or the necessity of substantially raising the standard of living of the local population.

On the other hand, greater weight has been given to ecological interests when the site hosts so-called **priority habitats or species** ⁽⁸⁷⁾. Accordingly, the Member State’s margin of appreciation is more limited since ‘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’ (Article 6(4) of the Directive). The authority can only grant the permission on the ground of this narrow set of interest.

⁽⁸⁵⁾ Judgment of 11 July 1996 in Case C-44/95: *Regina v Secretary of State for the Environment, ex parte: Royal Society for the Protection of Birds* [1996] ECR I-03805.

⁽⁸⁶⁾ Any pre-eminence of economic over ecological interests in the context of modifications to special conservation areas must be tempered by Article 2 of the EC Treaty, which puts economic and environmental objectives on an equal footing.

⁽⁸⁷⁾ Neither the Birds nor Habitats Directives, however, indicate whether wild birds are to be considered as priority species.

Framed in restrictive language, these grounds are to be interpreted strictly insofar as they depart from the principle that authorisations not be granted to plans or projects when assessments demonstrate that they would have negative ramifications for the conservation of the site (Article 6(3) of the Directive).

It is therefore necessary to understand the phrase ‘other imperative reasons of overriding public interest’ as referring to a general interest superior to the ecological objective of the Directive. The fact that social or economic reasons are not expressly included in this second exception indicates that they are not covered by it. Therefore, Member States may not authorise the passing of a motorway through a nature reserve classified as a special conservation area hosting priority species where the impact study shows that the project will damage the integrity of the site.

As far as projects justified by ‘other imperative reasons of overriding public interest’ are concerned, a favourable opinion from the Commission is required in all cases⁽⁸⁸⁾. This requirement is drawn up in similar terms to Article 37 of the Euratom Treaty. According to the Commission’s position on the Euratom Treaty, the approval required for development affecting priority sites does not have binding force⁽⁸⁹⁾. However, a failure to request the Commission’s opinion or the implementation of a project in spite of a Commission refusal would constitute a default on the obligations contained in the Habitats Directive, which should be punished both by the competent national or Community authorities as well as by the national courts.

7.1.4 Mitigation measures

The conservation of the area having been established in principle, any derogations that can be made must be interpreted strictly. As Article 6(2) of the Directive requires Member States to take appropriate measures to avoid the deterioration of natural habitats and the causing of significant disturbances to species in the areas; they must therefore mitigate as far as possible any negative impacts of any project authorised pursuant to an impact study⁽⁹⁰⁾. In our view, these considerations should be dealt with in the AIA with the aim of reducing the negative impacts on the integrity of the site.

The adoption of mitigation measures also limits the importance of compensatory measures⁽⁹¹⁾.

⁽⁸⁸⁾ The Commission’s practice seems to be *a priori* favourable to requests from Member States. See the commentary by Nollkaemper, A., ‘Habitat Protection in European Community Law: Evolving Conceptions of a Balance of Interests’ (1997) 9 *J.E.L.* page 271. The European Commission has, in particular, recognised the greater public interest in the extension of the port of Rotterdam (opinion of 24 April 2003), the construction of a railway opening up a region of Sweden (opinion of 24 April 2003), and the extension of a coal mine (opinion of 24 April 2003). It did not, however, endorse a project to establish an industrial zone in Germany (opinion of 24 April 2003).

⁽⁸⁹⁾ Case C-187/87 *Saarland v Minister for Industry* (1988) ECR I-5013.

⁽⁹⁰⁾ It should be noted that Directive 85/337/EEC only provides for the adoption of mitigation measures where strictly procedural pre-requisites are satisfied (see Annex IV, section 5).

⁽⁹¹⁾ See the mitigation measures for the passage of the A20 motorway through the ‘*Peene*’ protection area (anti-noise barriers, headlight-blocking screens). Cf. Commission Opinion 96/15/EC of 18 December 1995, paragraph 4.3.

7.1.5 Compensatory measures

If a project is justified because there are no available alternatives and it satisfies the interests outlined above, it can be implemented subject to the obligation to take ‘all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. [The Member State] ‘shall inform the Commission of the compensatory measures adopted’.

7.2 Comparative analysis of the case studies

It flows from the national reports that some of the assessors’ conclusions were positive whereas others were negative. Whenever the impacts were deemed to be insignificant, the assessors were not required to seek alternatives (Ems dam construction in Germany [DE1.26-27]; Spanish *Ciudad del Ambiente* [ES3.27-28]; Swedish windmill case study [SE2.31-33]).

7.2.1 Absence of alternative solutions

In several case studies, the authority abided by the obligation to seek out the least damaging alternative for the conservation of the site.

- As regards a power line passing over the Valley of Nied in French Lorraine [FR1.25-26], the authority sought the least damaging alternative. By the same token, the French authorities compared different routes before authorising the construction of a highway crossing not less than 11 SACs.
- In the UK Dibden Bay case, the planning inspector found that there were no realistic alternatives to the proposed project [UK1.24-25].
- With respect to the Barajas International Airport Development, Spain, the assessors considered different flyways but exclusively according to engineering criteria [ES2.20-21].
- As regards to the German dam on the Ems River, the assessors analysed the viability of relocating the dockyard but rejected that option on monetary grounds [DE1.26-27].

In other cases, the authority did not control whether the impact study sought a viable alternative (Polish AIAs because the route had been decided prior to the accession of Poland to the EU [PL1.27]). In the UK Dibden Bay Container terminal case [UK1.24-25], the Secretary of State dismissed the arguments put forward by the developer on account of his rejection of an alternative due to its location outside the territory of Southampton.

Given that there is no harmonised methodology used in these Member States in this area, it is impossible to know how the costs of alternative projects were being assessed.

By and large, the assessors as well as the authorities did not consider the zero-risk option (with the exception of Barajas International Airport where it was discussed whether it was possible not to build a new airport. Nonetheless, nature conservation was not a salient issue [ES2.20-21]). However, regarding the Dibden Bay project, the developer gave some indication of the zero-risk option, however the Secretary of State agreed with the Inspector’s assessment there was a strong emerging need for additional container terminal capacity in the South East quadrant of the UK [UK1.23].

7.2.2 Balancing interests

Most of the sites were hosting priority habitats and species. As a result, the strict weighing of interests applied.

It is fair to say that the advantages of the plan or project were by and large taken for granted. As a result, the authorities never carefully balanced these advantages against its damaging effects for the conservation of natural habitats.

- The regional economic importance of a dockyard prevailed over the conservation of an estuary (dam on the Ems River, Germany [DE1.26-27]).
- The construction of a high speed line prevailed over the conservation of salt marshes (French Lorraine, *Vallée du Nied* [FR1.24-26]).
- Construction of highways prevailed over a SAC's conservation (France [FR1.24-26], Poland, bypass of Brodnica town [PL2.35-36]).
- The extension of an international airport was considered vital for the economic development of a country (Barajas, Spain [ES2.20-21]).
- The advantages in terms of transport of a construction of a high speed train over an estuary classified as an SPA prevailed over the conservation of wild birds (Botnia case, Sweden [SE1.21-23]).

However, the administrative courts were more in favour to adjudicate in the interests of nature conservation concerns in other cases:

- The drawbacks of a power line over the *Gorges du Verdon* (France) could not be off-set by the benefits stemming from that project [FR3.51-53].
- The drawbacks of windmills within a SAC in Sweden could not be off-set by the benefits stemming from that project (*Eksjöberget*, Sweden) [SE2.32-34].
- The opposing interests – highway versus wetland conservation – were not correctly balanced (Ropsuda Valley, Poland) [PL1.25-28].

This can be partly explained by the fact that the courts can be more independent from the vested economic interests than the consent authorities.

In only two cases (Dibden Bay container terminal, UK [UK1.24-25]; *Eksjöberget*, windmill project, Sweden [SE2.32-34]), the competent authority rebutted the character of 'imperative' and of 'overriding public interest' with respect to the reasons put forward by the promoter with the aim of justifying the project. Very interesting arguments were exchanged in the Dibden Bay case by the Planning Inspector and the Secretary of State on this issue: for example, the discussion on the future needs of the UK for berths to handle deep-sea container ships and the considerations of the 'national interest' to be met by the project. This case demonstrates that not all the projects of spatial development can be deemed as justified by 'imperative reasons of overriding public interest' [UK1.24].

What is more, the case studies demonstrate that the Member States studied do not give any substantial appreciation to the distinction between:

- a) the 'reasons of a social or economic nature' (non-priority habitats and species); or
- b) the 'considerations [...] relating to human health or public safety, to beneficial consequences of primary importance for the environment' (priority habitats and species).

Lastly, the proportionality principle played no role in this balancing of interests (Poland, Sweden, Spain), although this should be an important step to consider whether there are

alternative solutions and whether a project can be justified by imperative reasons of overriding interest.

7.2.3 Procedural requirements

Nearly all sites were harbouring either priority species or priority habitats. Nonetheless, though the three Spanish sites and the two Polish SACs were hosting priority habitats and species, the competent authorities did not seek the opinion of the Commission. Similarly, the authorities of Andalucía did not require an AIA before allowing the construction of a major hotel in a SAC, and therefore also did not seek the Commission's opinion.

These are clear infringements of Article 6(4) of the Directive. With regard to the Romanian cases, SACs will only be established in 2013 [RO.7,13,24].

Conversely, some national authorities are keener to seek the Commission's opinion. For instance, Germany sought its opinion despite the AIA not actually reaching the conclusion that a dam on the Ems River would negatively impact upon the SPA concerned [DE1.27].

The Commission's opinions were always positive.

7.2.4 Compensatory measures

In terms of timing, it is important that 'all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected' are implemented before the works are carried out. For instance, the Swedish Environmental Court held that no building could be allowed unless the compensatory measures were undertaken (Sweden, *Eksjöberget* case). In the Botnian railroad case (Sweden [SE1.11-12]) a detailed plan of compensatory measures was drafted. In sharp contrast, the compensatory measures for the Barajas international airport in Madrid were partly implemented after the airport development had been completed [ES2.20-21].

The ecological relevance of compensatory measures is not always guaranteed. In the Ropsuda Valley case (Poland), the proposed compensatory measures (afforestation) would have led to the deterioration of another Natura 2000 site [PL1.27]. (See also the Barajas Airport case in Spain, where, among compensatory measures, the building of a Wildlife Recovery Centre was proposed. [ES2.20-21])

It appears that the Commission – when its opinion was sought - was not always properly informed of the compensatory measures (Spain [ES2.21]).

8. CONCLUSIONS & RECOMMENDATIONS

The findings and recommendations below arise from the national case studies. They take into account the experiences of Member States, as outlined in the case studies, theoretical considerations and relevant laws and directives, as well as European Court of Justice (ECJ) and national case law. Chapter 2 and the Annex 1 table provide an overview of the case studies.

Designation and Protection

An essential step in building the Habitats Directive's Natura 2000 network is to designate these sites with special importance for biodiversity and requiring special protection. Despite the enactment of the Habitats Directive in 1992, 14 years after its entry into force, the Natura 2000 network has not yet been fully realised. As a result of this delay in establishing protective measures, the erosion of biodiversity in the EU has worsened dramatically.

If a site has not been properly designated, the protective mechanism provided for under the Habitats Directive cannot be implemented. The process of designating Natura 2000 sites and establishing management measures for their protection has been considerably delayed for a number of reasons, including limited financial resources, political unwillingness, litigation, and public protests.

As a result, many sites are still deprived either of a proper protection regime or management plan. The lack of proper protective and management structures are compounding the erosion of biodiversity throughout the EU.

Recommendation: It is urgent for all Member States to complete the process of site designation and to establish binding management measures for each site.

Assessment

Article 6 requires an Appropriate Impact Assessment (AIA) when a project could have significant impact on a Natura 2000 site. Carrying out an AIA procedure as early as possible in the project planning process is of great importance, in order to assess the full range of alternatives. If the AIA is conducted too late, it is quite difficult for the experts to assess the full range of alternatives.

The national studies indicate that several AIAs were flawed given that:

- there was no assessment of the cumulative effects of the plans or the projects; and
- there was no assessment of the alternatives to the plans and the projects.

Given that the AIA must be a genuine scientific analysis, the person who conducts the AIA must be as independent as possible from the vested interests. In particular, this person should seek advice from nature conservation bodies as well as specialised NGOs dealing with nature protection.

To enhance the scientific quality of the AIA, it is of importance for the Member State's authorities to:

- foster public participation;
- assess the independence of the conductors of the AIA (pre-review of the AIA); and
- to require counter-expertise whenever the project or the plan sparks controversies at a scientific level.

In particular, strict and independent control of the quality of AIAs must be organised before the consent to the plan project is delivered. This guarantees that the assessment, *in fine*, may be considered appropriate and allows the competent authority to have ‘ascertained that [the plan or project] will not adversely affect the integrity of the site concerned’.

Recommendation: Member State legislation should provide specific guarantees of the independence of the AIA in order to avoid subjective assessments that might be misleading for the competent authority. In particular, the Member States need to ensure the scientific quality of the Appropriate Impact Assessments (AIA) with respect to the integrity of Natura 2000 sites. In this regard, Member States should ensure that the AIA studies take into account all direct and indirect impacts, including short and long term, as well as cumulative and synergetic impacts. The studies should also analyse possible alternatives, and if appropriate, compensatory measures. Additionally, the AIA should consider any mitigation measures needed to reduce the negative impacts of the project on the integrity of the site, should the project receive authorisation. The Member States should also require that the studies are as far as possible carried out by experts specialised in nature conservation. Finally, there is an urgent need for the Commission to prepare new guidelines for the Member States regarding the actual content of AIAs.

Decision-making process

As the ECJ has affirmed in several judgments, the competent authority is to give consent to the plan or the programme only if there is no doubt as to the absence of significant impacts on the protected habitats. If there are significant impacts or the risks are not suppressed, consent can be given only in accordance with the Article 6 derogation procedure. With respect to the derogation procedure, a proper balancing of interests must be carried out by the public authorities. From the various case studies it appears that the national authorities are not properly balancing the interests. If authorities have a duty to state the reasons as to how they have weighed conflicting interests, their discretion will be narrowed. Accordingly, authorities should be obliged to disclose the rationales behind their decisions.

The national reports also indicate that the precautionary principle has so far been little respected by national public authorities despite the fact that the ECJ has re-emphasised its importance as a fundamental principle to be followed. There is a serious need at national level to endorse a precautionary approach.

Whenever a Natura 2000 site harbours priority habitats or species, the Directive requires the national authority to seek the opinion of the European Commission. However, in several case studies such an opinion was never sought. If State authorities do not bother to seek its opinion, the Commission has no way to ensure that all the procedural requirements laid down in the Directive are complied with.

Recommendation: The decision-making process should be as transparent as possible and include public consultation organised as early as possible, preferably at screening level. For instance, Member States should make sure that the opinions of agencies specialised in nature

conservation issues are requested. It is also recommended to provide opportunities for the wider public to take part in the public debate. It is also important to ensure that the reasons for granting (or not granting) an authorisation are stated fully, in order to ensure a better balancing of the interests at stake, in accordance with the balancing of interests principle foreseen in Article 6(4). For instance, if an alternative option is not deemed to be possible, it is recommended that specific explanations be provided as to which factors led the authority to choose the proposed development. Finally, it is vital that national authorities seek the opinion of the Commission whenever a Natura 2000 site harbours priority habitats or species.

Compensatory measures

If a plan or project having a significant impact on a Natura 2000 site is authorised, compensatory measures are compulsory. The case studies reveal that these are too broadly sketched, and are often badly implemented after the project is completed.

Recommendation: Compensatory measures should effectively compensate the losses of species and habitats. In terms of timing, it is important that ‘all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected’ are implemented before the works are carried out. In addition, there is a particular need for the Commission to provide specific guidelines as to the timing, nature, scope, and localization of the compensatory measures.

Control mechanism

Pursuant to the EC Treaty, the European Commission is the watchdog of the correct implementation of the Article 6 mechanism. Citizens deprived of proper scientific expertise, financial resources, and facing a number of judicial hurdles (access to justice for instance) cannot be expected to become the watchdog of such a complex system.

Recommendation: It is essential that the European Commission be more proactive in instigating actions for infringements against the Member States not complying with the Habitats Directive.

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Annex 1 – Table of specific cases of Article 6 implementation

Case study	General description of the Natura 2000 site involved in the Article 6 issue dispute	Size	Natural habitat types and species	Project	Other threats to the site
Belgium					
Case study 1 – Landfill extension in the site ‘Al Pisserotte’ (Tenneville)	<p>The Natura 2000 site concerned is a vast complex of forests in the Ardennes, mainly composed of deciduous forests (beech, oaks), with some exotic plantations (spruce). It has been proposed as an SCI. Its designation as a SAC is still pending. The site is also proposed as a SPA.</p> <p>The site of “<i>Al Pisserotte</i>” (municipality of Tenneville, Wallonia), where the landfill would extend, is located near two patches of Tilio-Acerion forests of slope*: one large (4ha) and one small (1ha). The large one is located inside the perimeter of the SCI. The small was not proposed to be included in the pSCI.</p>	7,338.1ha.	<p><i>Habitats:</i> mostly Luzulo Fagetum Beech Forests (45 %) and oak forests; also priority forests habitat types including Tilio-Acerion Forests of slope* and bog woods*; open habitats such as Nardus grasslands*; wet and dry heathlands.</p> <p><i>Species:</i></p> <ul style="list-style-type: none"> ▪ Birds: forest birds (Dryocopus martius, Pernix apivorus, etc.) ▪ Fish: Cottius gobio. 	<p>The site is occupied by an existing landfill (“<i>centre d’enfouissement technique</i>” or CET) used for eliminating municipal and inert waste. The site was included in 1997 in the “<i>Plan des Centres d’enfouissement technique</i>” of Wallonia (“<i>Plan des CET</i>”).</p> <p>The project consists in the extension of the landfill in order to eliminate 3.8 million cubic metres of municipal, non dangerous industrial and inert waste.</p>	Risk of fire caused by the public; Molinia grasslands extension; spruce plantations in organic soils; pressure of the game ungulates on the vegetation; drainage or development of vegetation in open space.
Case study 2 – Wind power station in Dalhem (Walloon Region)	<p>The project is located in the countryside (<i>Pays de Herve</i>) in the Walloon Region, near the Flemish Region border, a short distance from the “<i>Voerstreek</i>” Natura 2000 site (located in Flemish Region). The project is also located nearby a winter roost for bats in a former military installation (“<i>Fort St Aubin</i>”), which has not been proposed as a SCI.</p> <p>The <i>Voerstreek</i> site is proposed as a SCI. Designation as SAC is still pending.</p>	No information.	<p><i>Species:</i> the Voerstreek Natura 2000 was proposed for three bat species, including Rhinolophus hipposideros.</p>	The project objective is to build four windmills (125m high, and two megawatts each) and an electric power station.	No information.
Case study 3 – Deurganckdok case (Flemish Region)	<p>This case study concerns the project lead by the Antwerp harbour operator (<i>Gemeentelijk Havenbedrijf Antwerpen, GHA</i>) to create in the village of Doel a new containers storage site on the left bank of river Schelde (the “<i>Deurganck</i>”), in order to improve the strategic capacity of the harbour of Antwerp. Sensitive issue for the Flemish Region: i.e. the extension of harbours of international importance in Zeebruges and in Antwerp.</p>	No information.	<p><i>Habitats:</i> shelter and food for thousands of birds in winter and during migrations.</p> <p><i>Species:</i> migratory waterbirds.</p>	The project is make more storage space that will reduce the size of the SPA, and to compensate for this they will extend a nearby SPA. Extension of the harbour is another parallel project.	No information.

Case study	General description and the Article 6 issue in dispute	Size	Natural habitat types and species	Project	Other threats to the site
France					
Case study 1 – High Speed Train Line (TGV) in Vallée du Nied	The site of <i>Vallée du Nied</i> is a coastal wetland including halophile habitats and wet grasslands. The site is owned and managed by a Regional Conservatory of Natural Areas (“ <i>CREN Lorraine</i> ”). It is protected by an ‘ <i>arrêté de biotope</i> ’ (biotope order). The site was designated as a SAC in 2008. It is covered by a DOCOB (management plan).	737ha.	<i>Habitats</i> : continental salted meadows*; other non-priority habitats (not identified).	Project of High Speed Train Line (“ <i>TGV East</i> ”) crossing the SAC.	No information.
Case study 2 – Highway in Vallée du Ciron	In this case, eleven Natura 2000 sites are affected by the project. Only two were analysed: - the <i>Vallée du Ciron</i> (Site A), which is proposed as a SCI, and is protected by its various statuses (three registered sites, four classified sites, 22 zones of pre-emption) - the hydrographic network of <i>Midouze</i> (Site B), which is partially protected by a biotope order (Vallon du Cros) and proposed as a SCI Both sites are covered by a DOCOB (Natura 2000 management plan).	<i>Site A</i> : 3,637ha. <i>Site B</i> : 4,914ha.	<u>Site A</u> <i>Habitats</i> : Eight habitat types, including two priority habitats (Temperate Atlantic wet heaths*; alluvial forests with <i>Alnus glutinosa</i> and <i>Fraxinus excelsior</i> *). <i>Species</i> : <i>Mustela lutreola</i> . <u>Site B</u> <i>Habitats</i> : Seven habitat types, including two priority habitats (Temperate atlantic wet heaths*; alluvial forests with <i>Alnus glutinosa</i> and <i>Fraxinus excelsior</i> *). <i>Species</i> : <i>Mustela lutreola</i> , <i>Lutra lutra</i> .	Project of highway.	No information.
Case study 3 – Project of high voltage lines in Grand Canyon du Verdon	In this case, the project will impact upon nine proposed SCIs, two future SPAs and one designated SPA. The case study focuses on one pSCI: the <i>Grand Canyon du Verdon</i> and the <i>Plateau de la Palud</i> . This site is a classified site (“ <i>site classé</i> ”) and registered site (“ <i>site inscrit</i> ”). It also benefits from the provisions regarding outstanding areas pursuant to coastal law and to mountain protection law. It is located within the boundaries of a regional natural park. The site is an SCI, and a DOCOB (management plan) is under way.	9,819ha.	<i>Habitats</i> : calcareous habitats, among which semi-natural dry grasslands and scrubland facies on calcareous substrate (important for orchids)*; Tilio-acerion forests of slope*; petrifying springs with tufa*; and <i>taxus baccata</i> woods. <i>Species</i> : calcareous habitats species, among which <i>Osmoderma eremita</i> *; <i>Callimorpha quadripunctaria</i> *; <i>Rosalia alpina</i> *.	Project of building high voltage lines crossing the site. Severe impacts were expected on the site.	No information.

Case study	General description and the Article 6 issue in dispute	Size	Natural habitat types and species	Project	Other threats to the site
Case study 4 – Local urban planning scheme for quarries in Chaumes du Vignac et de Clérignac	In this case, the local urban planning scheme covers the <i>Chaumes du Vignac et de Clérignac</i> SCI. The site is partly owned and managed by the Regional Conservatory of Natural Areas (<i>CREN Poitou-Charentes</i>). It is protected by two biotope orders. The site is covered by a DOCOB (management plan).	103ha.	<i>Habitats</i> : calcareous habitats, among which semi-natural dry grasslands and scrubland facies on calcareous substrate (important for orchids)*; rupicolous calcareous or basophilic grasslands of the Alysso-Sedion albi*; Pseudo-steppe of the Thero-brachypodietea*.	Project of local urban planning scheme (plan) aimed at the conversion of 40ha of natural areas into an area authorising the creation of industrial plants to exploit mineral resources (quarries).	Threatened by quarry projects.
Germany					
Case study 1 – Construction and operation of River Ems flood barrage	<p>The River Ems flows into the Dollart which is adjacent to the North Sea (estuary). On this stretch of the river, 40km upstream, a ship-building factory builds large cruisers. A flood barrage was built close to the river mound to close the river and impound the down-flowing so that the cruisers could more easily pass through.</p> <p>The barrage is located in an area of 4,000ha and was designated as an SPA in 1983. The site also qualifies as a SAC under the Habitats Directive. Although the river was proposed as an SCI from the barrage to the North Sea and upstream Papenburg, the concerned stretch of the River Ems (between Papenburg and the barrage) has not been proposed as an SCI.</p>	No information.	<p><i>Habitats</i>: River estuary (in bad status of conservation).</p> <p><i>Species</i>: Waterfowl.</p>	<p>The project consisted of building and the operating the 'Emssperrwerk' flood barrage in the SPA. Both were authorised but a condition was imposed restricting impounding of the river to certain seasons. In 2008, the dockyard found it necessary to extend the times of closure of the river beyond the allowed time periods.</p> <p>The construction of the barrage reduced the surface of habitat. Impounding of the river was expected to have impacts, as it will flood nests on the river banks and desalinize/deoxygenize the water ecosystem, causing fluid mud covering the river bed and perturbing the food chain for birds.</p>	No information.

Case study	General description and the Article 6 issue in dispute	Size	Natural habitat types and species	Project	Other threats to the site
Case study 2 – Borgfelder Wümmewiesen (Bremen)	This wet grassland area, frequently overflowed by the River Wümme, is located in a dense urban region northeast of Bremen city. It has been proposed as a SPA and a SAC.	580ha.	<i>Habitats:</i> Lowland hay meadow. <i>Species:</i> <ul style="list-style-type: none"> ▪ Wetland birds (Snipe, B-T Godwit, Redshank, Ruff, ducks etc.); ▪ Otter; ▪ Various plants (Great Burnet, Water Violet, etc.); ▪ Dragonflies, fishes, etc. 	No specific project studied.	Settlement and industry pressure. Canoeing; hunting of ducks. Development of agricultural lands.
Poland					
Case study 1 – Angustow bypass (Rospuda Valley)	The site of the Angustow Primeval Forest (in the Rospuda Valley) has been designated as a SPA and proposed as an SCI. Within the SPA and the SCI, national forms of nature protection also apply: one national park, 13 small nature reserves, and four areas of protected landscape.	<i>SPA:</i> 134,377.7ha. <i>SCI:</i> 105,766.15ha.	<i>Habitats:</i> 21 natural habitat types, including bog woodland* and alluvial forests with <i>Alnus glutinosa</i> and <i>Fraxinus excelsior</i> *. <i>Species:</i> <ul style="list-style-type: none"> ▪ Mammals: <i>Castor fiber</i>, <i>Lynx lynx</i>, <i>Canis lupus</i>, etc. ▪ Birds: 40 species of Annex I (including <i>Botaurus stellaris</i>, <i>Ciconia nigra</i>, <i>Aquila pomarina</i>, etc.) ▪ Plants: Eight species, including <i>Cypripedium calceolus</i>*, <i>Liparis loeselii</i>, etc. 	The project objective is to build a bypass road around the city of Angustow.	Water eutrophication; fragmentation of the site due to road building; development of settlement and tourism; decreasing groundwater level.

Case study	General description and the Article 6 issue in dispute	Size	Natural habitat types and species	Project	Other threats to the site
Case study 2 – Bypass of Brodnica town (Valley of Drweca)	The site has been proposed and classified as an SCI. It is also protected by its nature protection status as a nature reserve and a landscape park.	6,930.7ha.	<i>Habitats:</i> 12 natural habitat types, including lowland hay meadows; alluvial forests with <i>Alnus glutinosa</i> and <i>Fraxinus excelsior*</i> ; natural dystrophic lakes and ponds, etc. <i>Species:</i> <ul style="list-style-type: none"> ▪ Mammals: <i>Castor fiber</i>, <i>Lutra lutra</i>; ▪ Amphibians: <i>Triturus cristatus</i>, <i>Bombina bombina</i>; ▪ Fish: <i>Lampetra fluviatilis</i>, <i>Salmo salar</i>, <i>Aspius aspius</i>, <i>Cottus gobio</i>, etc.; ▪ Plants: 8 species, including <i>Cypripedium calceolus*</i>, <i>Liparis loeselii</i>, etc. 	The project objective is to build a bypass road for the town of Brodnica.	Water pollution; uncontrolled tourism and poaching.
Romania					
Case study 1 – Rosia Montana Mining Project (Hunedoara County)	The project would impact several Natura 2000 sites. The case study focused on the mountainous Magurile Baitei site, proposed as SCI. The site is established as protected natural area of national interest.	257ha.	<i>Habitats:</i> mountain hay meadows; calcareous rocky slopes with chasmophytic vegetation; tilio-acerion forests of slope*; dacian oak and hornbeam forests <i>Species:</i> <ul style="list-style-type: none"> ▪ Animal: <i>Rhinolophus hipposideros</i>, <i>Lycaena dispar</i>, <i>Euphydryas aurinia</i>; ▪ Plants: <i>Iris aphylla</i>. 	The project objective is to build a new state-of-the-art mining facility (Rosia Montana Mining Project).	Inside the site: hunting, mountain climbing, electric lines, erosion. Outside the site: quarries, roads, pollution, etc.
Case study 2 – Waste Management Project in Podisul Hartibaciului	This extensive site has been designated as a SPA in 2007. No management plan was adopted until now.	246,357.1ha.	<i>Species:</i> 29 bird species of Annex I, including <i>Crex crex</i> , <i>Ciconia nigra</i> , <i>Tringa glareola</i> , <i>Falco vespertinus</i> , etc.	Project of building an incinerator to dispose of hazardous waste.	Deforestation, non-controlled tourism, sylvic facilities, hunting, poaching, invasive species, industrialisation, electric lines.

Case study	General description and the Article 6 issue in dispute	Size	Natural habitat types and species	Project	Other threats to the site
<i>Spain</i>					
Case study 1 - Hotel in El Algarrobico beach, Cape of Gata (Almeria)	<p>Coastal area of Cape of Gata-Nijar (Almería). Natural Park; Biosphere Reserve; Ramsar site; Special Protection Area of Mediterranean Interest (SPAMI).</p> <p>This area was designated as a SPA and proposed as an SCI. Designation as an SCA still pending.</p> <p>The construction of the hotel has almost been achieved, but after social and judicial controversy, the Autonomous Government of Andalucia purchased the facility, but it seems reluctant to demolish and restore the area.</p>	49,547.10ha	<p><i>Habitats:</i> Posidonia meadows*; Lotus tree woody scrubland*; Mediterranean saline steppes*; Iberian gypsum vegetation*; marine caves*; etc.</p> <p><i>Species:</i></p> <ul style="list-style-type: none"> ▪ Many steppic and limicolous birds (including Flamingo; Audouin Seagull; Royal Heron; Black-winged Stilt; Snowy Plover; Dupont's Lark; etc.); ▪ Mammals: Algerian Hedgehog; ▪ Reptiles: Snub-nosed Viper. 	Building of a 411-room, 17 storey hotel and tourist complex on "El Algarrobico" beach.	Mining activities, intensive hydroponic culture under plastic greenhouses, urban development.
Case study 2 – Enlargement of the Barajas Airport (Madrid)	<p>River basin of the Jarama River flowing from northeast to southeast of the city of Madrid, along the flank of Barajas airport.</p> <p>This area was designated as a SPA and is covered by two SCIs. One of these SCIs was designated as a Natural Park (but not the SCI which the project concerns). Designation as an SCA is still pending.</p>	36,123ha.	<p><i>Habitats:</i> 13 different natural habitats types among which 2 priority habitats, covering 2 types of ecosystem: mainly steppe and river.</p> <p><i>Species:</i> 36 bird species (mostly steppic species, like Bustards, Sandgrouses, etc); 17 other animal species (including Otter).</p>	Enlargement of the Barajas Airport. The project implies that it will redirect and canalize 3km of the River Jarama, as well as tunnelling several smaller rivers, etc.	<p>The site was already affected by the building of a runway.</p> <p>Also threatened by the completion of the metropolitan periphery network, mining activities, urban development etc.</p>

Case study	General description and the Article 6 issue in dispute	Size	Natural habitat types and species	Project	Other threats to the site
Case study 3 - Construction of the project “Ciudad del Medio Ambiente” in the Soto of Garray (Soria)	Riparian area ashore of the River Duero, near the town of Garray (6km), northeast of Soria (Castilla Leon). The bed and banks (25m width on each shore) of stretches of the River Duero are included in the SCI (designation still pending). The main part of the site is also designated as a SPA. The part of the site affected by the project is a stretch of the river.	<i>SCI</i> : 5,049.31ha.	<i>Habitats</i> : riparian Mediterranean forest (willow and white polar galleries); masses of elm, ash trees and birches. <i>Species</i> : ▪ Bird species (White and Black Stork, Egyptian Vulture, Booted Eagle, etc.); ▪ Mammals: Iberian Desman; bats; otter, etc.); ▪ Fish: Iberian Nase; ▪ Invertebrates: Marsh Fritillary, Agrion de Mercure, etc.	Construction of an urban macro-complex of 560ha (780 houses, several hotels, environmental research campus, business and sport facilities, etc.) called “Ciudad del Medio Ambiente”.	No information.
Sweden					
Case study 1 – Botnia railroad	This study concerns the River Delta of <i>Ulmeälven</i> (Ulmea River) in the northern part of Sweden. The delta and plains of that river are among the most important resting areas for migratory birds in the region (mainly geese). The site is designated as a SPA. It is also an SCI. The whole area has been a nature reserve since July 2008.	<i>SPA</i> : 3,376.6ha. <i>SCI</i> : 1,897.7ha.	<i>Habitats</i> : the case study provides codes for habitat types protected. <i>Species</i> : ▪ 42 Bird species (5 unofficially prioritised); ▪ Other animal species.	The railroad is planned to pass through a 3.5 km section of the site.	Building, digging, extracting, dredging, forestry, discontinuation of farming activities, energy crops, drainage, pollution in air and water, disturbance by motors, boats, humans, dogs and hunting, changes in water level lack of conservation management.
Case study 2 – Eksjöberget wind power station	Mountain in Älvalden in Central Sweden, largely consisting of the priority habitat ‘Western Taiga’ forests. The site is a SCI. There is no protection status today, but the area is part of a deal between the State (SEPA) and a state-owned forest company (<i>Sveaskog</i>) where forest important for biodiversity will be protected. When the deal is ready, the area will become a nature reserve.	336ha.	<i>Habitats</i> : Mainly Western Taiga forests*.	Building of 10 power stations (capacity 2-3 megawatts each, height 125m), of which five would be built in the Natura 2000 site, covering 4ha, i.e. 2.5% of the of the priority habitat in the site.	Forestry, building of roads, other fragmentation, lack of managed fires, and plantation of spruces.

Case study	General description and the Article 6 issue in dispute	Size	Natural habitat types and species	Project	Other threats to the site
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<i>United Kingdom</i>					
Case study 1 – Dibden Bay Container Terminal	<p>The Solent area (Hampshire) – a big estuary in a busy and developed area contains seven international nature conservation sites, including marine protected areas.</p> <p>It includes :</p> <ul style="list-style-type: none"> ▪ the Solent and Southampton Water (SSW) , designated as an SPA and as Ramsar site; ▪ one maritime cSAC (South Wight cSAC); ▪ one River Itchen cSAC. <p>The site concerned by the project is the SSW SPA.</p>	SPA: 5,505.86ha.	Species: Water birds (Limicolous, Terns, Pigmy Gull, Brant Geese, etc.).	Proposal to build a deep water container terminal by Associated British Ports at Dibden Bay (Hampshire), including a quay of 1,850m in length; dredging; access road; recharge of the foreshore.	<ul style="list-style-type: none"> ▪ Previous flood and coastal defence works, land claim and dredging operations; ▪ Sea rise and issues related to coastal squeeze; ▪ Potential for accidental pollution from shipping, heavy industries, etc.; ▪ High levels of pressure both on shore and at sea by recreational and commercial interests.
Case study 2 – Cairngorm Funicular railway	<p>The site concerned is the extensive Cairngorm Mountain range (Scotland), hosting various habitats and species of community importance (see ad hoc column).</p> <p>The site was the subject of various protection measures, including National Park status, SSSI perimeters and three National Nature Reserves. It was also proposed as a SPA and a SAC. It has now been designated as a SAC and certain areas as SPAs.</p> <p>Non-governmental conservation bodies own large areas of land within the site and manage them for nature conservation. Forest Enterprise own small parts of the site, and the rest is mostly managed primarily for game and forestry.</p>	SAC: 57,685.02ha.	<p>Habitats: mainly Heath/scrub (42%), alpine and subalpine grasslands (16%), Coniferous woodlands (13%), inland rocks, screes, sands, etc. (8%) and wetlands, including blanket bogs*, Nardus grasslands*, petrifying springs with tufa*, bog woodlands*, etc.</p> <p>Species: Green shield-Moss.</p>	The project consisted in an application for planning permission for a development on the skiing area which involved the replacement of the existing chairlift in Coire Cas with a funicular railway.	Outside protected areas, the mountain is managed for game and forestry. Pressure from Red Deers reduced to allow recovery of Caledonian Forest and associated habitats.

Case study	General description and the Article 6 issue in dispute	Size	Natural habitat types and species	Project	Other threats to the site
<p>Case study 3 –</p> <p>Dartford and Gravesham Local Development Framework (LDF)</p>	<p>The site concerned is the Medway Estuary and Marsh, which feeds into and lies on the south side of the Outer Thames Estuary (Kent, southeast England). It forms a single tidal system with the Swale and joins the Thames Estuary between the Isle of Grain and Sheerness. It has a complex arrangement of tidal channels, which drains around large islands of salt marsh and peninsulas of grazing. The mud-flats are rich in invertebrates and also support beds of <i>Enteromorpha</i> and some Eelgrass <i>Zostera sp.</i> Small shell beaches and grazing marshes occur.</p> <p>The complex and diverse mixes of coastal habitats support important numbers of water birds throughout the year, and especially during migration.</p> <p>The site is designated as SPA1993 and is protected by SSSI status over 100% of its surface.</p>	<p>4,684.36ha.</p>	<p><i>Species:</i> Water birds (various grebes and ducks, Avocet, Terns, Ringed Plover and other waders, etc.).</p>	<p>Local urban development plan, including a specific “Centre Area Action Plan” (AAP). The Screening Reports have identified one SPA that fell within the spatial scope of the LDF plan and three to four Natura 2000 sites that are located within the potential influence of both the LDF and AAP plans.</p>	<ul style="list-style-type: none"> ▪ Evidence of rapid erosion of the intertidal habitat within the site due to natural processes and the effect of sea defences and clay extraction; ▪ Disturbance from waterborne recreation.

Annex 2 – Questions put to national experts

PART ONE: OVERVIEW

1 GENERAL INFORMATION

1.1 Designated SPAs and SACs

Give a brief overview SPAs and SACs designated by your MS.

1.2 Biogeographical regions

Briefly describe the biogeographical regions in your MS.

1.3 Institutional context

Briefly describe the institutional context in your MS, *i.e.*, what are the main authorities and organisations that are involved in this area.

1.4 The implementation of Article 6

Briefly describe the implementation of Article 6 in your MS.

Please provide the English translation of the national provision(s) that transposes Article 6. For federal entities, it is not necessary to set all the provisions from each federal entity. However, please outline the major differences in approach between federal entities (in lieu of providing the provision(s) transposing Article 6).

1.5 Failure to implement Article 6

Is there any action for infringement pursuant to Article 226 EC?
Is there any condemnation by the ECJ?

2 SPECIAL PROTECTION AREAS (SPA)

2.1 SPA designation procedure

Briefly describe the procedure for designation of SPAs.

2.2 SPA data overview table

1	How many SPAs are there?	
2	What percentage of land area is covered by SPAs?	
3	What percentage of territorial sea is covered by SPA?	
4	How many SPAs have been formally designated?	
5	What is the average size of SPAs? (ha)	
6	What size is the smallest SPA? And the largest? (ha)	

3 SPECIAL AREAS OF CONSERVATION (SAC)

3.1 SAC designation procedure

Briefly describe the procedure for designation of SACs.

3.2 SAC data overview table

1	How many SACs are there?	
2	What percentage of land area is covered by SACs?	
3	What percentage of territorial sea is covered by SACs?	
4	How many SACs have been formally designated?	
5	What is the average size of SACs? (ha)	
6	What size is the smallest SAC? And the largest? (ha)	

4 NATURA 2000 SITES

4.1 Transposition of Natura 2000 management regimes

Briefly describe how Natura 2000 management regimes have been transposed into national laws. (e.g., Articles 4(1), 4(2) Birds Directive; Article 6(1) Habitats Directive)

4.2 Transposition of Natura 2000 general protection regime

Briefly describe how the Natura 2000 general protection regime has been transposed into national laws. (e.g., Article 6(2) Habitats Directive)

4.3 Transposition of Natura 2000 protection regime

Briefly describe how the Natura 2000 protection regime has been transposed into national laws. (e.g., Articles 6(3), 6(4) Habitats Directive)

4.4 Natura 2000 data overview table

1	How many Natura 2000 sites are there?	
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PART TWO: CASE STUDY

Please refer to the site selection criteria in Annex I

5. BASIC DESCRIPTION OF THE SPA or SAC

- Formal designation as a SPA or as a SAC (or just SCI inclusion?)
- Size
- Species and habitats under protection (identify priority ones)
- Protection status
- Level of/Main threats

Please note: this information is provided in the 'site standard data form' (97/266/EC) that was communicated by each national authority to the European Commission.

If the site has not been formally designated either as a SPA or a SAC:

- Indicate whether the site was selected for inclusion into the SCI's list; OR
- If not included (or if a bird site) describe the manner in which the authorities ensure, pursuant to Article 10 EC, that the site will not be jeopardised.

6. MANAGEMENT OF NATURA 2000 SITES

Specifically:

- 'special conservation measures' (SPA, Art 4(1) Birds) or
 - 'necessary conservation measures' (SAC, Art 6(1) Habitats)
- relating to the habitats of a SPA/SAC.

6.1 Site's conservation objectives (SCO)

Given that a site's conservation objectives (SCOs) are essential to assess whether or not the project/plan has a 'significant' impact upon the site's integrity, please address this issue carefully.

- SCOs formally identified?
- Or is info from 'site standard data form' available on web?
- Describe how SCOs are assessed.

6.2 Conservation Measures

- (i) Ratione materiae: Are the 'conservation measures' required under Article 6(1)
 - (1) positive (e.g., plans for spreading, grazing incentives, subsidies, delayed pruning, hedgerow maintenance); or
 - (2) negative (e.g., prohibitions of soil contour modifications, deforestation, picking or harvesting wild species)?
- (ii) Ratione loci: Are these conservation measures only applicable inside the SPA/SAC? Do the conservation measures only apply only to SPAs/SACs?
- (iii) Ratione temporis: Did the conservation measures apply only pursuant to a formal classification of the site by the Member State?

6.3 Management Plan

Is the management plan:

- (i) specifically designed for the site at issue?
- (ii) integrated into other development plans?
- (iii) deemed to be 'appropriate'?

6.4 Statutory, administrative or contractual measures

- (i) Please explain whether the conservation measures are set out through:
 - (1) statutory measures;
 - (2) administrative measures;
 - (3) contractual measures; or
 - (4) a mix of several measures.
- (ii) Please explain the manner in which the 'appropriate statutory, administrative or contractual measures' (Article 6(1)) have been enacted by the authorities with the aim of achieving the SCOs? In so doing, one should take into account the qualitative as well as the quantitative approach that should have been endorsed by the national authority.
- (iii) How are the SCOs being assessed? Is there a set of indicators that could be used with the aim of assessing the SCOs?
- (iv) Please assess briefly whether these measures are tailored to the 'ecological requirements' of the species and habitats concerned and contributing to the SCOs.

6.5 Funding

Are there some EC funds (Life, rural development (Reg EC1698/2005), FEDER, etc) used with the aim of implementing the conservation measures?

7. PREVENTIVE REGIME FOR BOTH SPA AND SCA (ARTICLE 6(2))

7.1 Type of prevention regime provided by legislation

- (i) Is the site protected by:
 - (1) a specific and/or general preventive regime applicable to Natura 2000 sites only;
 - (2) existing nature protection regimes (existing protected areas status, existing species protection rules, etc);
 - (3) a combination of these protection measures?

7.2 Scope of the preventive measures

Does the obligation in paragraph 2 cover the deterioration of any natural or species habitat inside the SCA rather than just the habitats for which the site has been classified? Or is the obligation restricted to the habitats prompting the classification?

7.3 Spatial range of preventive measures

Does the regime apply exclusively within the site or does the regime also apply to activities outside the site (for example the spreading of manure in agricultural fields is not encompassed within the site)? Please keep in mind the results-based obligation contained in Article 6(2) of the Habitats directive.

7.4 Nature of the activities covered by the general prevention regime

- (i) Please describe the binding regulatory framework intended to prevent deterioration and specific-significant disturbances resulting from human activities performed outside the site.
- (ii) Does the preventive regime cover all types of activities that could have impacts? (e.g., building, circulation, pollution (physical, chemical), agricultural and forestry activities etc).
- (iii) Does the general prevention regime cover existing activities (including legally permitted infrastructures and installations) or only future activities?

7.5 Effectiveness of the general prevention regime

- (i) In case studies where the impact is disturbance of a species, how does the authority assess the significance of the impact? Are there any indicators to assess it?
- (ii) Is the regime 'appropriate' to effectively prevent deterioration of natural habitat types and significant disturbances of species on the site, and so to fulfil the favourable conservation status of the habitat/species concerned?

7.6 Direct Effect

Have the national courts of your MS ruled that paragraph 2 has direct effect?

8, APPROPRIATE IMPACT ASSESSMENT (AIA) (ARTICLE 6(3) FIRST PHRASE)

1. The impact assessment procedure applies to either plans or projects that:
 - a) have no relationship with the management of the site;
 - b) but do have a significant effect on the site.
2. In addition, the assessment must be 'appropriate' as regards to the SCOs. Consequently, questions arise as to the independence of the experts as well as to the quality of the assessment. Please keep this in mind and systematically examine the scope of these different conditions.

8.1 Scope of the plans/projects requiring an appropriate assessment

- (i) Is there any legal definition of the concepts: 'project' and 'plan'?
- (ii) Are the concepts of 'plan' and 'project' interpreted broadly by the administration and the courts?
- (iii) Are all the plans/projects likely to be assessed because of their significant impact authorised by an express act, which determines the rights and obligations of the parties involved?
- (iv) Is it likely that plans/projects located outside the site (which are likely to have a significant effect on the conservation status of the classified site) are assessed?

8.2 Screening for the appropriate assessment: no relationship with the management of the site

How has the authority reached the conclusion that the plan/project was not directly related to or necessary for the management of the site? Was the concept of 'management' interpreted in reference to activities necessary to realise SCOs?

8.3 Screening for the appropriate assessment: significant effect

'Significance' operates as a threshold for determining whether an appropriate assessment of the implications of the project should be conducted.

- (i) How is the plan/project deemed to be 'likely to have significant effects'? Or, in other words, how is the project falling below a threshold of 'risk of significance'?
- (ii) Is it achieved by:
 - (1) a case-by-case approach with a formal decision for each case;
 - (2) laying down thresholds or criteria without a formal decision for each case; or
 - (3) combining both approaches?
- (iii) In assessing the significance, does the authority take into account the following elements:
 - The intensity of the impacts according to the nature, the location and the size of the project;
 - The vulnerability of the habitats/species under protection;
 - The level of existing threats;
 - The cumulative effects of other plans or projects?
- (iv) When the authority assessed the significant impact of the plan/project on the site:
 - (1) Did it properly and explicitly consider the SCOs in its decision? (see in particular the Waddensee case, paras. 46 and 54)
 - (2) Did it seek the advice of a nature conservation expert or competent agency before making its decision?
 - (3) Did it seek public or NGO advice before making its decision?

8.4 Quality of the assessors

- (i) Were the assessors appointed and paid by:
 - (1) an independent authority; or
 - (2) the operator or the author of the plan?
- (ii) Were the assessors:
 - (1) general experts;
 - (2) experts specialised in habitat conservation; or
 - (3) otherwise?
- (iii) Were the assessors seeking advice from nature protection NGOs and specialised agencies?
- (iv) Were the assessors deemed to be independent from the vested interests?

8.5 Form and content of the appropriate assessment

- (i) Do you consider the assessment superficial or appropriate? In particular, was the assessment procedure deemed to be 'appropriate' having regard to the conservation objectives of the particular site?
- (ii) Did the assessors assess:
 - (1) all the environmental impacts of the project (including the effects on cultural heritage or human health) or exclusively the impacts on the Natura 2000 site?
 - (2) the specific, and not abstract, effects of the plan or project on every habitat and species for which the site was designated?
 - (3) the cumulative, the indirect, the interrelated and the long-term effects?

- (4) (if relevant) the ‘imperative reasons of overriding public interest’ that justified the plan or project?
 - (5) the impacts of already completed plans/projects already deemed to be significant pursuant to paragraph 3?
 - (6) the nature, location and size of compensatory measures?
 - (7) the possibility of alternative solutions to the plan or project?
- (iii) Did the conductor of the impact assessment try to identify, according to the precautionary principle (Article 175 EC), those damages which are still uncertain?

9. SUBSTANTIVE DECISION CRITERION (ARTICLE 6(3) SECOND PHRASE)

9.1 The scope of the authorisation

- (i) Please succinctly describe the authorisation or plan adoption procedure.
- (ii) Was the authorisation of the project or the decision to adopt the plan express and motivated?

9.2 Substantive decision criterion guiding the authority

- (i) As a matter of law, in cases where the authority is deciding to authorise a plan/project (despite the negative conclusions of the assessors), must the authority be aware that it can do so only on the condition that it is convinced that the project/plan will not adversely affect the ‘integrity’ of the site concerned?
- (ii) Did the competent national authority agree to the plan/project only after having ascertained that it will not adversely affect the integrity of the site concerned?
 - How did they reach that conclusion?
 - How is the concept ‘integrity of the site concerned’ being defined (by the lawmaker, agency, administration, etc) or interpreted? Was it interpreted by reference to formally identified SCOs? Was it interpreted as a synonym of ‘significant effect’?
- (iii) Was the authorisation passed where the assessment demonstrated the absence of risks for the integrity of the site?

9.3 Precautionary decision-making

- (i) Was the authority aware that pursuant to ECJ case law that in case of any (scientific) reasonable doubt over the absence of any effects, they were obliged to refrain from issuing the authorisation?
- (ii) Were there any additional investigations in order to remove the uncertainty being ordered by the authority?
- (iii) Does the use of the precautionary principle entail a reversal of the burden of proof from the project opponent to the authority authorising the project/plan?

9.4 Participatory decision-making

Were the concerned public able to raise objections? Was the competent nature conservation agency consulted? Was there any public enquiry or other forms of participation?

9.5 Direct effect

Have the national courts ruled that Article 6(3) has direct effect?

10. DEROGATORY REGIME (ARTICLE 6(4))

10.1 Were the conclusions of the assessors negative or positive?

10.2 Absence of alternative solutions

- (i) Did the authority abide by the obligation to seek out the least damaging alternative for the conservation of the site?
- (ii) Was the authority able to demonstrate that the impact study has found there to be no viable alternative?
- (iii) How were the costs of alternative projects being assessed?
- (iv) Did the authority consider a zero-risk option?

10.3 Balance of interests

- (i) Does the site host 'priority habitats and species' or 'non-priority habitats and species'? Which are the priority habitats and species?
- (ii) Were the advantages of the plan/project and alternative solutions carefully balanced against its damaging effects for the conservation of natural habitats?
- (iii) How did the authority interpret:
 - (1) the 'imperative reasons of overriding public interest of a social or economic nature' (non-priority habitats and species); or
 - (2) the 'considerations ... relating to human health or public safety, to beneficial consequences of primary importance for the environment' (priority habitats and species)?
- (iv) Did the proportionality principle play a key role in this balancing of interests?

10.4 Procedural requirements

In case studies where the site was hosting priority habitats and species did the authority seek an opinion from the Commission? Please describe the Commission's opinion.

10.5 Compensatory measures

- (i) Were 'all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected' enacted by the authority? Please describe these measures.
- (ii) Was the Commission properly informed of these measures?
- (iii) Were these measures already in force before the project was carried out?

11. LITIGATION

- (a) Please describe the manner in which your MS's national courts have been adjudicating the cases brought before them on the consistency of the assessment and the derogatory procedures.
- (b) Please explain whether the courts were inclined to take into account the doctrine of direct effect and consistent interpretation.

12. BIBLIOGRAPHY & TABLE OF CASES

- (a) Please list:
 - (1) the main books and articles (law and political sciences) published in your country with respect to the implementation of Article 6;
 - (2) the relevant judgments from your Member State's national courts.

ANNEX I: SITE SELECTION CRITERIA FOR CASE STUDIES

1. Select 2 case studies for your MS, taking into account all of the following criteria:
 - a) At least one case study should involve the use of the assessment (Article 6(3)) and the derogatory (Article 6(4)) procedures by the competent authority;
 - b) Ecological importance of the site for the consistency of the NATURA 2000 network;
 - c) Importance of the socio-economic impacts of the plan/project;
 - d) Political controversies sparked off either by the plan/project or by the protection afforded to the site by the Birds or Habitats Directive;
 - e) The relevance from an EC legal perspective of the judgments handed down by national courts, regarding the validity of the activities impairing the conservation objectives. The fact that the case is subject to an infringement procedure pursuant to Article 226 EC does not matter.
2. You should try to select case studies with the view to systematically answering, as much as possible, the questions below.
3. We ask that you select case studies related to different plans and activities (e.g., one on highway and recreational infrastructure (e.g., a ski resort); and then secondly, one on railway and urban sprawling; irrigation and industries etc). In other words, we want varied case studies that give a better overall picture.
 - For Member States with federal systems, we ask that, if possible, you select case studies related to different political entities (e.g., Navarra and Andalucia; Bremen and Lower Saxony).
4. Because the four paragraphs of Article 6 are somewhat intertwined, we are aware that some questions will be more difficult to answer than others. In addition, it is possible that authorities have not complied with a number of procedural steps, such as the proper assessment or the balancing of the interests at issue. Please keep in mind that what we seek is a proper understanding of the ways in which Article 6 is actually applied in the light of particular case studies.
5. Wherever possible, please do not hesitate to give additional but brief information related to other case studies (i.e., other than the 2 you have been limited to). This is particularly applicable where it is otherwise impossible to answer one of the questions.

Annex 3 – Case studies

Belgium	Landfill at L'Erablière de Tenneville; Windpower station in Dalhem; Container storage site in Antwerp
France	High-speed train line in Vallee du Nied; Highway in Vallee du Ciron; High voltage lines in Gorges du Verdon
Germany	Dam on the River Ems; Dam on Borgfelder Wummewiesen
Poland	Bypass in the Rospuda Valley; Bypass in the Drweca Valley
Romania	Rosia Montana mining project; Waste management in Podisul Hartibaciului
Spain	Hotel in El Algarrobico; Enlargement of Barajs Airport; Urbanisation in the Soto of Garray
Sweden	Botnia railroad; Eksjoberget wind power station
United Kingdom	Dibden Vay container terminal; Cairngorm funicular railway; Dartford and Gravesham development plan

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