ASSESSMENT AND AUTHORISATION OF PLANS AND PROJECTS HAVING A SIGNIFICANT IMPACT ON NATURA 2000 SITES

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1. INTRODUCTION

The continuing loss of biodiversity is an issue of global concern. 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. In effect, more than on any other continent, human activities have been shaping biodiversity over centuries. Ecosystems were relatively stable until the agricultural and industrial revolutions of the past two centuries.[1] Today, however, biodiversity faces a major crisis at both global 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 costal ecosystems are now subject to significant modifications as a result of human activity (land use changes, intensification of agriculture, land abandonment, urban sprawl, climate change, etc.). Scientists expect that these disruptions will cause an unprecedented drop in the wealth of specific and genetic diversity. [2]

In order to reverse these negative trends, in 1979 the EU enacted the Birds Protection Directive,[3] and in 1992 a sister directive, Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the 'Habitats Directive'). In addition, under the Convention on Biological Diversity, the EU agreed in 2001 to a global target of 'significantly reducing the current rate of biodiversity loss by 2010'. After this failed attempt to stop

1 *EEA*, Progress towards halting the loss of biodiversity by 2010, 2006, p. 8.
2 *F. Ramade*, Le grand massacre, 1999.
3 Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, OJ 1979 L103/1, replaced by EP and Council Directive 2009/147/EC of 30 November 2009 on the conservation of wild birds, OJ 2010 L20/7.

biodiversity loss,[4] the European Commission adopted a new strategy to halt biodiversity loss in the EU by 2020.

The Birds Directive makes it a requirement for Member States to 'preserve, maintain and re-establish sufficient diversity and area of habitats for all wild birds' and in particular to designate a range of Special Protection Areas (SPAs). The aim of the Habitats Directive is to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild flora and fauna throughout the Member States.[5] Accordingly, measures taken pursuant to the Directive must be designed to 'maintain at or restore to', a favourable conservation status, natural habitats and species of wild flora and fauna 'of Community interest'.[6] It is thus 'an essential objective of the Directive that natural habitats be maintained at and, where appropriate, restored to a favourable conservation status'.[7] Given the continuing deterioration of natural habitats, Member States are called on to designate and to protect the most appropriate natural sites as Special Areas of Conservation (SACs). The following table highlights the two regimes.

Legal Acts	Natura 2000 protected areas	Scope of ambit
EP and Council Directive 2009/147/EC	SPAs	Annex I rare and vulnerable bird species as well as migratory species
Council Directive 92/43/EEC	SACs	Sites of Community Importance contributing significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type (200 types) or of a species (over 1.000 animal and plant species)

Against this background, both SPAs and SACs are the backbone of the so-called Natura 2000 network of protected sites.[8] Being the biggest ecological network in the world, the Natura 2000 network has become the cornerstone of EU nature conservation policy. In 2015, the network has over 26000 sites and cover over 1 million square km. 18% of the land surface and 4% of the EU waters (territorial

4 The Commission as well as the EEA have repeatedly been acknowledging that the EU was unable not achieve its global target of significantly reducing biodiversity loss by 2010. For example, *European Commission*, A mid-term assessment of implementing the EC Biodiversity Action Plan, COM(2008) 864 final; ibid., Communication on options for an EU vision and target for biodiversity beyond 2010, COM(2010) 4 final; *EEA*, *supra* note 1; ibid., The European Environment 2010, pp. 49–50.

5 Article 2(1).

6 Article 2(2).

7 AG Sharpston opinion in Case C-258/11 *Peter Sweetman* [2012] EU:C:2013:220, para. 40.

8 Nothing prevents Member States to designate the same site as both a Special Protected Area (SPA) and a Special Area of Conservation (SAC). As a result, such areas fall within the ambit of both the Birds and the Habitats Directives.

seas and ZEEs) have been designated. These sites are located on a diverse range of land use types ranging from agriculture, forests, mountains, to wilderness areas. Accordingly, this network has been hailed as the key instrument that aims to effectively prevent Noah's Ark from sinking.

Among the different provisions of the Habitats Directive, Article 6 – that applies to both SPAs and SACs[9] – has been given rise to a steady flow of cases. It requires Member States to protect designated habitats, and provides for specific procedural requirements whenever projects or plans are likely to threaten those protected habitats.[10] Accordingly, this provision has not only halted ill-conceived development projects but has also encouraged developers to find ways to reduce damaging effects of their projects. The four paragraphs of that provision require a few words of explanation.

As regards the conservation of natural habitats, the two first paragraphs of this provision provide for necessary conservation measures to be established in relation to SACs (Article 6(1)) and for steps to be taken to avoid the deterioration of those habitats (Article 6(2)).

In particular, the first paragraph ensures that positive steps are taken with a view to maintaining and/or restoring habitats.[11]

The second paragraph 'imposes an overarching obligation to avoid deterioration or disturbance'.[12] The general binding regulatory framework intends to cover the whole set of human activities capable of causing:

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

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9 Account must be made that pursuant to Article 7 of the Habitats Directive, Article 6(2) to (4) of that directive replaces the first sentence of Article 4(4) of the Birds Directive as from the date of implementation of the Habitats Directive or the date of classification by a Member State under the Birds Directive, where the latter date is later (see, in particular, Case C-418/04 *Commission* v *Ireland* [2007] ECR I-10947, para. 173).

10 *N. de Sadeleer*, Habitats Conservation in EC Law: From Nature Sanctuaries to Ecological Networks, Yearbook of European Environmental Law, 2005 (5), pp. 215–252.

11 Article 6(1) requires the adoption of 'necessary conservation measures' for habitats located within a SAC. Special conservation measures relating to the habitats of a SAC consist of the adoption of 'appropriate management plans specifically designed for the sites or integrated into other development plans'. Management plans are vitally important as they set the Site Conservation Objectives (SCOs). The SCOs therefore play an important role in the Appropriate Impact Assessment (AIA) procedure (infra).

12 Article 6(2) of the Directive obliges the Member States 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'. The CJEU has on several occasions offered clarifications relating to the implementation of Article 6 of the Habitats Directive. The following cases deal with the transposition of Article 6 of the Habitats Directive: Case C-374/98 *Commission v France* ('*Basses Corbières*') [2000] ECR I-10799; Case C-324/01 *Commission v Belgium* [2004] ECR I-11197; Case C-75/01 *Commission v Luxembourg* [2003] ECR I-1585; and Case C-143/02 *Commission v Italy* [2003] ECR I-2877.

The Court of Justice of the European Union (CJEU), has described paragraph 2nd as 'a provision which makes it possible to satisfy the fundamental objective of preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, and establishes a general obligation of protection consisting in avoiding deterioration and disturbance which could have significant effects in the light of the directive's objectives'.[13] Accordingly this preventive obligation has to be read as an obligation of result.[14] In order to establish a failure to fulfil the preventive obligations within the meaning of Article 6(2), the Commission does not have to prove a cause and effect relationship between the project or the operation at issue and significant disturbance to the protected species found on the site. In effect, it is sufficient for the Commission 'to establish the existence of a probability or risk that that operation might cause significant disturbances for that species'.[15]

However, the preventive obligation encapsulated in Article 6(2) is not an absolute one. The 3rd and 4th paragraphs set out a series of procedures to be followed in the case of plans or projects that are not directly connected with or necessary to the management of the site. Accordingly, these two paragraphs are not concerned with the day-to-day operation of the site.[16]

Under Article 6(4) a plan or project may, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, if the Member State takes all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is achieved. Such derogations are applicable only *after* the implications of the project or the plan have been assessed pursuant to the conditions laid down under Article 6(3). Accordingly, an Appropriate Impact Assessment (AIA) must be conducted thoroughly in order to ascertain that the plan or the project is not likely to impair the site's integrity.

The obligation to carry out a genuine AIA is of utmost importance for the sake of habitats conservation. Firstly, as a matter of principle, negative conclusions preclude the adoption of the plan or the granting of the license. Secondly, in case the proposal is likely to be authorised in accordance with overriding interests, experts must assess whether alternatives exist which have a lesser adverse effect on the area. Thirdly, experts can determine the compensatory measures that are likely to be required in case the development is taking place in accordance with Article 6(4).[17] It flows from that that the experts conducting the AIA must

13 Case C-226/08 *Stadt Papenburg* [2010] ECR I-131, para. 49.

14 Case C-308/08 *Commission v Spain* [2010] ECR I-4281, paras. 53 and 54; Case C-517/11 *Commission v Greece* [2013], para. 43. See *N. de Sadeleer & C.-H. Born,* Droit international et communautaire de la biodiversité, 2004, p. 516.

15 Case C-241/08 *Commission* v *France* [2010] ECR I-1697, para. 32; Case C-2/10 *Azienda Agro-Zootecnica Franchini and Eolica di Altamura* [2011] ECR I-0000, para. 41; Case C-404/09 *Commission* v *Spain* [2011] ECR I-11853, para. 142.

16 Opinion AG Sharpston in Case C-258/11 *Peter Sweetman* [2012] EU:C:2013:220, para. 45.

17 Opinion AG Kokott in Case C-304/05 *Commission v Italy* [2007] ECR I-7495, para. 54.

show a high level of competence with respect to nature conservation issues. As a consequence, questions arise as to their independence as well as to the quality of the assessment.

Given the importance of the AIA procedure for achieving the biodiversity conservation objectives, the question arises as to whether the traditional EIA is taking into account this particular procedure. It must be noted that Article 2(3) of Directive 2011/92/EU as amended by Directive 2014/52/EU of 16 April 2014 requires:

> 'In the case of projects for which the obligation to carry out assessments of the effects on the environment arises simultaneously from this Directive and from Council Directive 92/43/EEC …. Member States shall, where appropriate, ensure that coordinated and/or joint procedures fulfilling the requirements of that Union legislation are provided for.'

In shedding the light on the procedural requirements laid down under Article 6(3) and (4) of the Habitats Directive, a key provision for implementing the EU's system of protecting and preserving biological diversity in the Member States, this article attempts to emphasise the extent to which this atypical procedure reinforces the obligations stemming from the EIA and the SEA Directives.[18] It should at this point be noted that in sharp contrast to these two directives, that are entirely dedicated to impact assessments, only two sentences in Article 6(3) of the Habitats Directive relate to the appropriate assessment.

The discussion will be structured in the following manner. Given that Article 6(3) distinguishes two procedural stages, sections 2 and 3 examine subsequently the assessment procedure and the authorisation scheme. Section 4 is dedicated to the possibility for the Member States to authorise a plan or a project adversely affecting the integrity of a protected site. Last but not least, there will be a discussion in section 5 of the relationship between the different impact studies provided for under EU environmental law.

[18] Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment; Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment. Regarding the scope of these two directives, see *N. de Sadeleer*, L'évaluation des incidences environnementales des programmes, plans et projets : à la recherche d'une protection juridictionnelle effective, RDUE, 2014 (2), pp. 1–56.

2. APPROPRIATE IMPACT ASSESSMENT (ARTICLE 6(3) FIRST PHRASE)

2.1. INTRODUCTORY COMMENTS

In order to preserve classified habitats from development or other activities likely to alter their ecological integrity, Article 6(3) 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'.[19] In other words, the AIA procedure applies to either plans or projects that:

a) have no relationship with the management of the site; and
b) create a risk of a significant effect on the site.

According to the CJEU, Article 6(2) cannot be applied concomitantly with Article 6(3).[20]

For clarity, we shall use the acronym AIA ('appropriate impact assessment') in order to distinguish that assessment from the broader EIA ('environmental impact assessment' in Directive 2014/52/EU) and SEA ('strategic environmental assessment' in Directive 2001/42/EC[21]).

2.2. WHICH PLANS AND WHICH PROJECTS ARE SUBJECT TO AN AIA?

2.2.1. Broad Interpretation of the Concepts

The Habitats Directive has defined neither the concept of plan nor the concept of project. According to the CJEU, the definition of project laid down under the EIA Directive is relevant to defining the concept of project as provided by the Habitats Directive given that both directives are aiming to prevent activities which are likely to damage the environment from being authorised without prior assessment of their impact on the environment.[22] Pursuant to Article 1 of the EIA Directive, the concept of project is defined as 'the execution of construction

19 Article 7 of the Birds Directive, which applies to SPAs designated under the Birds Directive, makes clear that the provisions of Article 6(3) apply.

20 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-7405, para. 38.

21 European Parliament and Council Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment OJ 2001 L197/30.

22 Case C-127/02 *Waddenzee*, paras. 27.

works or of other installations or schemes and 'other interventions in the natural surroundings including those involving the extraction of mineral resources'. Account must be made of the fact that the concepts of 'project' under the EIA Directive has been interpreted broadly by the CJEU.[23] What is more, in sharp contrast to the EIA Directive, the Habitats Directive does not introduce any threshold as to the nature, the location, the size, the level of impact of the projects and plans falling within its scope of ambit. As a matter of law, where the EU lawmaker wishes to limit the obligation to carry out an EIA, it makes express provision to that end in laying down specific thresholds.[24]

As far as plans are concerned, they are broadly defined under Article 3(2) of the SEA Directive. They can cover policies relating to 'agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use'.

The concepts of 'project' and 'plan' must be interpreted broadly due, on the one hand, to the wording of Article 6(3) covering 'any plan or project', and, on the other hand, the conservation objectives on the strength of which SACs are set up.[25] It follows that 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.[26] For instance, national courts as well as the CJEU 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;[27]
- annual permits to fish cockle in a SPA;[28]

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23 Regarding the scope of the EIA Directive, the CJEU has stated on numerous occasions that its scope is very wide. See Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, para. 31; Case C-435/97 *WWF and Others* [1999] ECR I-5613, para. 40; Case C-2/07 *Abraham and Others* [2008] ECR I-0000, para. 32; and Case C-142/07 *Ecologistas en Accion-Coda v Ayuntamentio de Madrid* [2008] ECR I-9097, para. 28. However, projects must alter the physical aspects of a site. See Case C-275/09 *Brussels Hoofdstedelijk Gewest* [2011] ECR I-1753, para. 24. That prompts the question whether emissions into water or air are likely to qualify as a project under the EIA Directive. See *H. Schoukens*, Ongoing Activities and Natura 2000. Biodiversity Protection vs Legitimate Expectations?, JEELP 2014 (11:1), p. 21.

24 Case C-133/94 *Commission v Belgium* [1996] ECR I-2323, paras. 26–27. Regarding the importance of thresholds to determine the scope of the EIA Directive, see Case C-531/13 *Marktgemeinde Straßwalchen* [2015] C:2015:79.

25 Opinion AG Fennelly in Case C-374/98 '*Basses Corbières*', para. 33; and opinion AG Kokott in Case C-127/02 *Waddenzee,* para. 30.

26 The issue of ongoing activities within SPAs and SCAs is giving rise to debate. See *B. Gors & L. Vanskick*, Le contrôle par le juge européen des activités en cours sur ou à proximité des sites Natura 2000, Amén.-Envt, 2014 (4), pp. 42–54; H. Schoukens, *supra* note 23.

27 Belgian Council of State, *Wellens*, n. 96.198, 7 June 2001.

28 Case C-127/02 *Waddenzee*, paras. 21–29.

- dredging works in a navigable channel;[29]
- open-cast coal mine;[30]
- alteration to an urban development plan comprising a series of industrial construction projects.[31]

Several Member States took the view that projects or plans not subject to national authorisation schemes are falling outside the ambit of Article 6(3). In effect, the first phrase of that provision merely requires that 'any plan or project' shall be subject to appropriate assessment without requiring a formal development consent procedure. However, 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 implicitly required. In effect, 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. 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.[32]

2.2.2. Projects and Plans that are Likely to Have a Significant Impact

Only plans and projects that are 'likely' to have a 'significant' effect on the area are subject to the AIA. This calls for a few words of explanation.

– *Interpretation of the terms 'likely to occur'.*

Firstly, the effect is 'likely' to occur. The first question to answer is thus whether the plan or project is 'likely' to have an effect.

As regards the transposition of Article 6(3), the CJEU has held that that paragraph makes the requirement for an AIA 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'.[33]

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29 Case C-226/08 *Stadt Padenburg* [2010] ECR I-131.

30 Case C-404/09 *Commission* v *Spain* [2011] ECR I-11853.

31 Case C-179/06 *Commission* v *Italy* [2007] ECR I-8131.

32 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 can be carried out outside the immediate scope of the plan or programme. For example, developers may purchase land elsewhere to 'compensate' for the damage caused by putting a highway through an area used by various species of birds for feeding or nesting. See *H. Schoukens & A. Cliquet*, Mitigation and Compensation under EU Nature Conservation Law in the Flemish Region: Beyond the Deadlock for Development Projects?, Utrecht Law Review, 2014 (10:2); D. *McGillivray*, Compensatory Measurse under Article 6(4) of the Habitats Directive, in C.-H. Born et al. (ed.), The Habitats Directive in its EU Environmental Law Context, 2015, pp. 101–118.

33 Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017, para. 54; and Case C-418/04 *Commission v Ireland* [2007] ECR I-10947, para. 226.

However, the terms 'likely to have [an] effect' used in the English-language version of the text appear to be stricter than the ones used in the French version ('*susceptible d'affecter*'), the German version ('*beeinträchtigen könnte*'), the Dutch version ('*gevolgen kan heben*'), and the Spanish version ('*pueda afectar*'). According to AG Sharpston, each of those versions suggests that the test is set at a lower level than under the English-language version.[34] As a result, the English terms 'likely to' have to be interpreted in line with the other EU official languages. Accordingly, they mean 'possible' or 'potential' and must not be understood as requiring absolute proof that a risk will occur.

The question arises as to how to determine the likelihood or the probability of a significant effect. According to the CJEU, '[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'.[35]

– *Interpretation of the term 'significant'.*

The second requirement that the effect in question be 'significant' exists in order to lay down a *de minimis* threshold.[36] In other words, 'significance' operates as a threshold for determining whether an appropriate assessment of the implications of the project should be conducted. In contrast, plans or projects that are deemed not to have such effects could proceed without further procedural requirements.

Given that there is no legal definition of the term 'significant', the question arises as to how the plan or project is determined to fall below a threshold of 'significance'. The issue of significance is of the utmost importance and can give rise to heated debates.

'Significance' is a legal standard rather than a rule. Given that a standard does not lay down any precise legal test, it merely requires the exercise of judgment on specific grounds, according to the specificities of the individual case. From an ecosystemic perspective, the impact would become significant where the ecosystem has lost his ability to reorganise itself in order to provide the same ecological functions. The CJEU 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)'.[37]

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 projects. As the CJEU already stated with respect to the EIA procedure 'even a small-scale project can have significant effects on the

34 Opinion AG Sharpston in Case C-258/11 *Peter Sweetman* [2012] nyr, para. 46.
35 Case C-127/02 *Waddenzee*.
36 Opinion AG Sharpston in Case C-258/11 *Peter Sweetman* [2012] EU:C:2013:220, para. 48.
37 Case C-127/02 *Waddenzee*, para. 36.

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'.[38]

One should thus take into account that 'significance' can vary tremendously according to the size and the vulnerability of the area. In effect, small habitats containing unusual and particularly delicate species may react much more sharply than other less 'sensitive' protected sites to a given type of external effect.[39] 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.[40] The *Sweetman* judgment offers a typical illustration of the soundness of that interpretation. In effect, the CJEU ruled that a road scheme involving the permanent loss within a site of a small percentage of a site harbouring a priority habitat (limestone pavement) had an impact on the integrity of the site.[41]

Last, 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 as well as nature conservation experts 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 determination of the 'significance' of the effects.*

The 'significant' nature of the impact of the plan or project must be interpreted objectively in light of the Site Conservation Objectives (SCOs), the particular characteristics and the environmental conditions of the protected site. SCOs are 'the specification of the overall target for the species and/or habitat types for which a site is designated in order for it to contribute to maintaining or reaching favourable conservation status'.[42] Management plans adopted under Article 6(1) are vitally important as they set these objectives. The SCOs are thus 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.[43]

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38 Case C-392/ 96 *Commission v Ireland* [1999] ECR I-5901, para. 66.

39 Opinion AG Tizzano in Case C-98/03 *Commission v Germany* [2006] ECR I-53, para.38.

40 *European Commission*, Managing Natura 2000 Sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC, 2000, p. 35.

41 Case C-258/11 *Peter Sweetman*.

42 *European Commission*, Note on Setting Conservation Objectives for Natura 2000 Sites, Final Version 23/11/2012.

43 There are several references to the term 'conservation objectives' in the preamble of the Directive as well as an explicit mention of it in Article 6(3). As far as national laws are concerned, 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. In France, the '*document d'objectifs*' (the management plan), sets SCOs and indicators in order to assess their fulfilment. In the UK, the

Accordingly, the CJEU has held that any activity compromising the SCOs, which apply to the area, is assumed to have a significant effect.[44]

– *Projects and plans not having significant effect on the integrity of the site are subject to Article 6(2) preventive obligations.*

Last, given the extra costs incurred by AIAs, developers are often intent upon avoiding this procedure in claiming that their projects are not falling within the scope of ambit of Article 6(3). That prompts the question whether avoiding the AIA procedure amounts to a Pyrrhic victory. In effect, though projects and plans not having significant effect on the integrity of the site are not subject to the AIA requirements laid down by Article 6(3), their implementation nevertheless falls within the scope of Article 6(2).[45] Indeed, given that paragraphs (2) and (3) of Article 6 'are designed to ensure the same level of protection of natural habitats and habitats of species', these two paragraphs have been construed 'as a coherent whole in the light of the conservation objectives pursued by the directive'.[46]

2.2.3. Screening: Prior Assessment of the Plan or Project's Significance

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, the question arises according as to which criteria are needed to assess them. Most of the Member States do have screening devices aiming at determining which projects have to comply with the AIA 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 a full assessment should be conducted. In other words, the ability at that 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 seen as a prior assessment and with that of the full assessment (AIA) (see the table below).

Prior assessment	Screening *in abstracto*	Determine whether there is likely to be a significant effect triggering the full assessment
Full assessment	Screening *in concreto*	Determine the extent to which the impact is significant

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'. In the Walloon Region of Belgium, SCOs (called 'active management objectives') are adopted in the Natura 2000 site designation decree and have statutory force.

44 Case C-127/02 *Waddenzee*, para. 48. See also opinion AG Kokott also in *Waddenzee,* para. 85.

45 Case C-226/08 *Stadt Papenburg* [2010] ECR I-131, paras. 48 and 49; Case C-404/09 *Commission* v *Spain* [2011] ECR I-11853, para. 125.

46 Case C-127/02 *Waddenzee*, para. 32.

It must be stressed that such broad screening does not jeopardise the project; it just requires the authorities to assess whether a full assessment of the effects of the project has 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 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 compensate for their potential adverse effects. As AG Kokott rightly pointed out: 'compensatory measures can be considered only when adverse effects have to be accepted in the absence of any alternative, for overriding reasons of public interest. The preservation of existing natural resources is preferable to compensatory measures simply because the success of such measures can rarely be predicted with certainty'.[47] By way of illustration, a developer cannot claim that his or her project would not have a significant adverse effect considering the 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.

2.2.4. Advantages and Drawbacks of Screening Methods

There are two main ways in which the screening could be operated. Regarding the implementation of the Habitats Directive, the 'significance' criterion is usually determined either by a case-by-case approach or in laying down thresholds or criteria. [48]

1. The quantitative approach: setting thresholds or criteria.

    a) *Advantages*: enhances legal certainty in reducing the authority's discretion.
    b) *Drawbacks*: This first option is more controversial as it is very difficult, from an ecological point of view, to guarantee that the plans and projects will never have a significant impact. For instance, given that the thresholds might be too high, or inaccurate, many projects or plans that may have a significant impact could escape the full assessment procedure.[49]

[47] AG Kokott's opinion in Case C-239/04 *Commission v Portugal* [2006] ECR I-10183, para. 35.
[48] See also Article 4(2) EIA Directive.
[49] In establishing criteria and/or thresholds at a level such that, in practice, all projects of a certain type would be exempted in advance from the requirement of an impact assessment the Member States would exceed the limits of their discretion. See Case C-392/96 *Commission v Ireland* [1999] ECR I-5901, paras. 75 and 76.

2. The qualitative approach: case-by-case analysis.

    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 these cumulative effects are concerned, the CJEU confirmed in the *Waddenzee* case that Article 6(3) first sentence requires the significant effect to be taken into account not only 'individually' but also 'in combination with other plans or projects'. As a result, the cumulative impact with other projects must be considered. That 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. To conclude with, a qualitative (not quantitative) approach is better suited for Natura 2000 sites.
    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 at this preliminary stage some assessment is conducted.

According to CJEU case law, the discretion left by the Habitats Directive does not preclude judicial review of the question as to whether Member States have exceeded their margin of appreciation.[50] Indeed, it is settled case law that national authorities cannot rely exclusively on abstract criteria to decide whether the project or plan needs to be assessed or not. In that respect, several CJEU judgments are crystal clear:

- In Case C-256/98 *Commission v France* the CJEU 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.[51]
- In Case C-98/03 *Commission v Germany* the CJEU held that the restriction of AIA to projects subject to notification or authorisation procedures were inconsistent with Article 6 requirements.[52] As a result, Germany had to amend the *Bundesnaturschutzgesetz*: every activity affecting a Natura 2000 site must now be regarded as a project.
- In Case C-241/08 *Commission v France* the CJEU took the view that a Member State cannot grant a general exemption for fishing and hunting activities on

[50] See, by analogy, Case C-72/95 *Kraaijeveld* [1996] ECR I-4503, para. 59.
[51] Case C-256/98 *Commission v France*, para. 35.
[52] Case C-98/03 *Commission v Germany* [2006] ECR I-53, paras. 42–45.

> the account that one cannot consider that these activities will never cause significant disturbance.[53]

To sum up, one is driven to the conclusion that the dispensation to conduct an AIA must be granted on a case-by-case basis and not in accordance with a general list of exemptions.

2.2.5. 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 kilometres long projects to avoid a 2.5 kilometres EIA threshold), neither of which individually requires a permit as they are 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 (tyranny of small decisions phenomenon), they may have significant impacts.

As a matter of EU law, one must not consider the project in isolation if it can be regarded as an integral part of more substantial development. Accordingly, the CJEU took 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'.[54] 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.[55]

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53 Case C-241/08 *Commission v France* [2010] ECR I-1697.

54 Case C-392/96 *Commission v Ireland* [1999] ECR I-5901.

55 It must be noted that the CJEU ruled that various splitting practices were inconsistent with the EIA Directive: Case C-431/92 *Commission v Germany* [1995] ECR I-2189; and Case C-142/07 *Ecologistas en Accion-Coda v Ayuntamentio de Madrid* [2008] ECR I-6097, para. 20.

2.3. CONTENT OF THE AIA

2.3.1. Background Against which the Appropriate Assessment 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 sites SCOs';[56] and
- the site's integrity, as defined in the SCOs.

Firstly, the assessment has to identify the SCOs, and second to assess the manner in which the project or plan could jeopardise the realisation of these objectives. Secondly, under Article 6(3), second phrase, the effects on the integrity of the site have to be assessed. Given that the requirement of 'integrity' is set out in the second sentence of Article 6(3) of the Habitats Directive, we shall provide a more detailed analysis of this second requirement in the next section.

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 CJEU 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). 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'.[57]

2.3.2. Soundness of the Appropriate Assessment

The Natura 2000 assessment must be 'appropriate' having regard to the SCOs of the particular site (Article 6(3)).[58] The CJEU has already pointed out that 'the provision does not define any particular method for carrying out such an assessment'.[59] That does not mean that the experts are endowed with unfettered discretion. According to AG Kokott, this term should also be understood in the sense of 'proper' or 'expedient'. Accordingly, 'an assessment is not merely a formal procedural act, but rather it has to achieve its aims. The aim of the assessment is to

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56 It is settled case law that 'where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site.' See Case C-127/02 *Waddenzee*, para. 49; and Case C-258/11 *Peter Sweetman* [2012], para. 30.

57 Case C-418/04 *Commission v Ireland* [2007] ECR I-1094, para. 259.

58 On the concept of appropriate evaluation, see the Opinion of Advocate General Kokott in *Waddenzee*, paras. 95–98.

59 Case C-127/02 *Waddenzee*, para. 52; case C-304/05 *Commission* v *Italy* [2007] ECR I-7495, para. 57; and case C-43/10 *Nomarchiaki Aftodioikisi Aitoloakarnanias* [2012], para. 111.

establish whether a plan or project is compatible with the specified conservation objectives for the particular site'.[60] It follows that the AIA must be carried out in such a manner that 'the competent national authorities can be certain that a plan or project will not have adverse effects on the integrity of the site concerned, given that, where doubt remains as to the absence of such effects, the competent authority will have to refuse development consent'.[61]

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;
- extent of the impacts of the project on the ecosystems and the scale of the works involved;[62]
- vulnerability of the habitats or species under protection (resilience, regenerative capacity, absorption capacity); and
- level of existing threats.

In particular, the CJEU has been stressing the need to conduct AIAs as sound as possible: 'the assessment … cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned'.[63] Accordingly, the assessment is not deemed to be appropriate where reliable and updated data are lacking.[64] This statement requires a few words of explanation.

2.3.3. Best Scientific Knowledge in the Field

The CJEU has stressed that the assessment must be carried out 'in the light of the best scientific knowledge in the field'.[65] Thus, the experts conducting

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60 Opinion AG Kokott in Case C-441/03 *Commission v Netherlands* [2005] ECR I-3043, paras. 11–12.

61 Case C-304/05 *Commission* v *Italy* [2007] ECR I-7495, para. 58.

62 Case C-43/10 *Nomarchiaki Aftodioikisi Aitoloakarnanias et al.* [2012] C:2012:560, para. 132.

63 Case C-404/09 *Commission v Spain* [2011] ECR I-11853, para. 100; and Case C-258/11 *Peter Sweetman* [2012], para. 38.

64 Case C-127/02 *Waddenzee* [2004] ECR I-7405, para. 54; Case C-404/09 *Commission v Spain* [2011] OJ C25/3, para. 100; and Case C-43/10 *Nomarchiaki Aftodioikisi Aitoloakarnanias et al.* [2012] C:2012:560, para. 128.

65 Case C-127/02 *Waddenzee*, para. 54. By the same token, Member States are required to adopt conservation measures in favour of endangered bird species using the most up-to-date scientific data. See Case C-355/90 *Commission v Spain* [1993] ECR I-4221, para. 24; and Case C-418/04 *Commission v Ireland* [2007] ECR I-10947, para. 47. With respect to the designation of protected sites, it must be noted that public authorities do not always have a monopoly

the assessment must show a high level of competence with respect to nature conservation issues. As a matter of fact, failure to take into account the whole set of impacts from a genuine scientific perspective will lead to a narrow assessment which fails to provide the competent authority with the relevant information.[66] Therefore, such an assessment should be deemed inconsistent with the concept of 'appropriateness' required by the Habitats Directive.

However, neither the lawmaker nor the CJEU require that scientific advice must be based on the principles of excellence, independence, and transparency.[67] Given that in a number of Member States assessors are appointed and paid by the operator or the developer itself, the question arises as to whether the assessors are independent of the vested interests. This prompts the question whether the methods applied by the experts are reliable.[68]

In this connection, the recent *Seaport* judgment is a good case in point regarding the absence of independence of assessors under the Strategic Environmental Assessment (SEA) Directive. When asked whether an authority responsible for drawing up a development plan may be designated as the sole scientific authority to be consulted under the SEA Directive, the Court of Justice held that the directive did not prevent the authority from wearing two hats.[69] It follows that whilst the obligation to consult must be functionally separated, it need not be institutionally separated. By adopting such a minimalist approach to the obligation to consult provided for under the directive, the Court departed from the opinion of Advocate General Bot. It is clear that the Court's reading of the SEA Directive does not satisfy the objective of transparency in the national decision-making process pursued by the EU legislature. Indeed, it is the contribution of external expertise to that of the authority that creates and fuels debate, results in constructive criticism, and even offers alternative solutions to the planned project. Requesting the authority adopting the plan or the programme to be an independent expert in the procedure to which it is a party may appear to be somewhat schizophrenic.

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

over scientific knowledge. For instance, a review of the classification by national authorities of natural habitats for wild birds may be made by reference to scientific inventories drawn up by NGOs. See Case C-3/96 *Commission v Netherlands* [1998] ECR I-3031; and Case C-418/04 *Commission v Ireland* [2007] ECR I-10947, paras. 51 and 55.

66 See the different cases discussed in Directorate-General for Internal Policies, Citizens' Rights and Constitutional Affairs of the European Parliament, National Implementation of Council Directive 92/43/EC of 21/05/92, 2009, 74 p.

67 Regarding food safety, the EU courts have been setting out such a requirement. See Case T-13/99 *Pfizer* [2002] ECR II-3305, para. 158.

68 *E. Truihlé-Marengo*, How to cope with the unknown: a few things about scientific uncertainty, precaution and adaptive management, in C.-H. Born et al. (ed.), The Habitats Directive in its EU Environmental Law Context, 2015, p. 341.

69 Case C-474/10 *Seaport* [2011] OJ C362/10.

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 in this perspective. Independent technical analysis committees or environmental consultative organs can assess the quality of AIAs submitted by the developer of a project. By the same token, independent inspectors can be appointed by the authorities to hold a public inquiry and to report back to them with recommendations. Furthermore, the certification of the experts by an environmental agency is likely to improve the quality of the AIA.

2.3.4. Material Range of Effects

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

- 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;[70]
- the *interrelated effects*, the interactions between the impacts stemming from other projects within or outside the area;
- the *short and long-term effects* of the plan or the project;[71]
- the *reversible and irreversible effects* of the plan or the project;[72]
- the *cumulative effects* of the project with other proposed or existing projects must also be taken into consideration. Even the cumulative effects of more negligible impacts have to be taken into account. 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) 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 CJEU has stressed in the *Waddenzee*

[70] In view of the overall assessment of the effects of projects required by the EIA Directive, it 'would be simplistic and contrary to that approach to take account, when assessing the environmental impact of a project or of its modification, only of the direct effects of the works envisaged themselves, and not of the environmental impact liable to result from the use and exploitation of the end product of those works' (Case C-2/07 *Abraham and Others* [2008] ECR I-1197, paras. 42 and 43; Case C-142/07 *Ecologistas en Accion-Coda v Ayuntamentio de Madrid* [2008] ECR I-6097, para. 39).

[71] For instance, the impacts of climate change on habitats are just emerging and their impacts have not yet been fully recognised.

[72] Regarding the irreparable destruction of a priority habitat, see Case C-258/11 *Peter Sweetman* [2012], para. 43.

case the need to take into account 'the cumulative effects which result from the combination of that project with other plans or projects';[73]

- 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);[74]
- 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.[75] 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.

The following table sets out the different effects that should be dealt with.

SORT 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 the EIA Directive
Interrelated & cumulative effects	Article 6(3), first sentence; C-127/02, *Waddenzee*, para. 53
Short and long-term impacts	*Ratio legis* of Article 6
Reversible and irreversible impacts	*Ratio legis* of Article 6
Alternative solutions and mitigation measures	Not required under para. 3 but implicitly from para. 4

2.3.5. Uncertain Effects

Although the conductors of AIAs seem unable or reluctant to identify, according to the precautionary principle (Article 192(2) TFEU), even those impacts which are still uncertain,[76] this author's view is that uncertainty should prompt the authority to err on the side of caution in requiring at the screening stage a full

[73] Case C-127/02 *Waddenzee*, para. 53. Regarding the cumulative effect of open-cast mining operations on the conservation of the capercaillie (*Tetrao urogallus*), see Case C-404/09 *Commission v Spain* [2011] ECR I-1185.

[74] The authorities are called upon to examine 'solutions falling outside' the site: Case C-239/04 *Commission v Portugal* [2006] CER I-10183, para. 38. What is more, under Article 5(1) of the SEA Directive that applies to plans affecting Natura 2000 sites, experts are called on to take into consideration 'reasonable alternatives'.

[75] *European Commission*, Managing Natura 2000 Sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC, 2000, p. 38.

[76] See National Implementation of Council Directive 92/43/EC, *supra* note 66.

assessment. Indeed, since the AIA must cover 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.[77] Therefore, uncertainty should naturally involve the search of further information as to the real existence or extent of a risk.

2.3.6. Geographical Range of Effects

The geographical range of the AIA is not only limited 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 protected wetland) must be subject to an AIA provided there is a probability or a risk of significant impact. Accordingly, the material nuisances caused outside the protected sites have to be taken into account.[78] It goes without saying that the radius of the zone where the projects and plans are likely to affect the integrity of the protected sites is likely to vary according to the nature of each plan and each project.[79]

2.3.7. Concluding Remarks

To conclude with, 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).

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

3.1. INTRODUCTORY COMMENTS

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

77 Case C-127/02 *Waddenzee*, para. 44.

78 Case C-418/04 *Commission v Ireland* [2007] ECR I-1094, para. 232; and Case C-98/03 *Commission v Germany* [2006] ECR I-53, para. 51.

79 *F. Haumont*, AIA: the key to effective integration of nature conservation issues into land-use planning, in C.-H. Born et al. (ed.), The Habitats Directive in its EU Environmental Law Context, 2015, p. 94.

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'. The aim of this third section is thus to explore some of the key issues arising in the implementation of this requirement.

3.2. IMPACT OF ARTICLE 6(3) OF THE HABITATS DIRECTIVE ON NATIONAL PROCEDURAL LAW

3.2.1. Express Authorisation

Under Article 2 of the EIA Directive, the concept of 'project' is linked with the requirement of development consent. In sharp contrast, the Habitats Directive does not require that all plans and projects covered by Article 6(3) have to be authorised by an express act, subject to various conditions, which will determine the rights and obligations of the parties involved.[80] That would be the case of projects subject to a notification scheme. It must be noted that in the majority of the Member States, so far no specific Natura 2000 licensing regimes have been adopted yet. To make matters worse, activities, such as grazing, hunting, fishing, camping, and canoeing, are not always subject *per se* to authorisations.[81]

Although they are not falling within the scope of an authorisation regime, these projects are nonetheless subject to an AIA. Indeed, the Member Sate is called on to ensure that installations not subject to authorisation comply with the duty laid down in Article 6(3) of the Directive.[82]

We are nonetheless taking the view that the lawmaker should require the competent authorities to expressly mark their agreement on the project or plan. Indeed, where a risk of significant impact on the site of plans or projects must be assessed, it must also be necessary for the developer or operator to obtain the authorisation or express and written (and reasoned) approval of the relevant authority. In other words, the developer must obtain a permission giving him or her the right to develop in accordance with the conditions laid down by the public

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80 Ibid.

81 However, the Swedish Environmental Code provides for a specific Natura 2000 authorisation, which must be granted in addition to traditional urban or environmental licences. A similar system has been set out in the UK. Under French law, the competent authority may request 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). In the Belgium Walloon Region, the Government may request that any activity, which is not yet subject to a 'traditional' licence, be subject to a specific permit (like farm or forestry practices or recreational activities). 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.

82 Case C-98/03 *Commission v Germany* [2006] ECR I-53, para. 43.

authorities.[83] If it were not the case, it would be much more difficult for the public authorities to require mitigation measures. It follows that implicit authorisation regimes that would render any impact study irrelevant are incompatible with the requirements of Article 6(3).[84]

3.2.2. Stage at which Formal Consent Must Be Granted to the Developer

Attention should also be drawn to the fact that consent procedures can be somewhat burdensome. 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 constitute development consent and, as a result, trigger 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?[85] The Habitats Directive does not offer any answer to these questions. Reasoning by analogy, it is worth noting that the CJEU held, in *Wells*,[86] that where a consent procedure comprises several stages, the EIA requested under the EIA Directive must be carried out as soon as possible.

3.2.3. Circumventing Formal Administrative Consent by Legislative Acts

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. Such a system is provided in Belgium by Flemish and Walloon laws in order to allow major projects to be implemented without any control from the Belgian *Conseil d'Etat* (supreme administrative court).[87] This option not only puts the separation of powers at stake but is also in breach of the Aarhus Convention and related EIA Directives.[88] Furthermore, the Article 6 obligations are incumbent on the Member States regardless of the nature of the national authority with

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83 The EIA Directive defines the consent as 'the decision of the competent authority or authorities which entitles the developer to proceed with development'.

84 Here an analogy can be drawn with Court's jurisprudence on so-called tacit permits: Case C-360/87 *Commission v Italy* [1991] ECR I-791, paras. 30 and 31; and Case C-131/88 *Commission v Germany* [1991] ECR I-825, para. 38.

85 Case C-201/02 *Wells* [2004] ECR I-723, para. 54.

86 Ibid.

87 *M. Delnoy & R. Snal*, La délivrance ou ratification par le législateur de permis d'urbanisme ou d'environnement au regard du droit européen et de la Convention d'Aarhus, JDE 2014, pp. 50–53; *L. Lavrysen*, Justice constitutionnellle et Nautra 2000, in C.H. Born & F. Haumont, *Natura 2000 and the Judge*, 2014, pp. 136–143.

88 Case C-128/09 *Boxus* [2011] ECR I-9711, para. 39; and Case C-182/10 *Solvay and Others* [2012] C:2012:82, para. 52.

competence to authorise the plan or project concerned. Consequently, the legislative authority has to comply with the AIA requirements.[89]

3.3. PLAN AND PROJECT THAT CAN BE AUTHORISED IN AS MUCH AS IT WILL NOT AFFECT SITE'S INTEGRITY

3.3.1. No Adverse Effects on Site's Integrity

In order for the project to be authorised, Article 6(3) 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 appraising the scope of the expression 'adversely affect the integrity of the site' in its overall context, the CJEU has made clear that 'the provisions of Article 6 of the Habitats Directive must be construed as a coherent whole in the light of the conservation objectives pursued by the directive.'[90] 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.[91] It therefore follows that a negative assessment obliges authorities to refuse consent for the project that is likely to deteriorate the site's integrity. Put it differently, the authority must be convinced that the negative effects will not occur.

However, it is not at all clear what is meant by the obligation to assess the significance of the effects in the light of the integrity of the site. Whereas, a number of language version (English, French, Italian) use an abstract term (integrity), some other language versions are more concrete. Thus, the German text refers to the site '*als solches*' (as such). The Dutch version speaks of the '*natuurlijke kennmerken*' (natural characteristics) of the site.[92]

Until the *Sweetman* case was decided by the CJEU, there was little guidance from the courts on what an adverse effect on site integrity was. In that case, the Court was asked to rule on whether the loss of 1.5ha of limestone pavement could be qualified as an adverse effect on the integrity of the Irish Natura 2000 site, regardless of the fact that it only amounted to 0,5% of the actual surface of limestone in the whole site. According to the Irish planning authority, the road bypass at issue was not so severe as to adversely affect the integrity of the Natura 2000 site.

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89 Case C-182/10 *Solvay and Others* [2012], para. 69.

90 Case C-258/11 *Peter Sweetman*, para. 32.

91 In Case C-127/02 *Waddenzee*, the CJEU 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 (para. 59).

92 Opinion AG Sharpston in Case C-258/11 *Peter Sweetman* [2012] nyr, para. 53.

Notwithstanding those linguistic differences discussed above, AG Sharpston took the view that it is 'the essential unity of the site that is relevant'. As a result, in her view, the notion of 'integrity must be understood as referring to the continued wholeness and soundness of the constitutive characteristics of the site concerned.'[93]

The CJEU endorsed in *Sweetman* the AG's reasoning: 'in order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6(3) of the Habitats Directive the site needs to be preserved at a favourable conservation status; this entails, …, the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance with the directive.'[94] It must be noted that the Court paid heed to the irreversible damage caused to the protected habitat: once destroyed by the road, it could not be replaced.[95]

The Court's interpretation of site integrity has been welcomed since it provides an additional safeguard for the EU's most vulnerable habitats in particular with respect to the accumulation of adverse impacts on biodiversity. Such an interpretation should help decision-makers to eschew the risk of the so-called 'death by a thousand cuts'-phenomenon.[96]

Along the same lines, the CJEU held recently in *Briels* that a motorway project which will impair the protected natural habitat type molinia meadows, due to drying out and acidification of the earth caused by increases in nitrogen deposits, adversely affect the integrity of the site within the meaning of Article 6(3) of the Habitats Directive.[97] The creation of new habitat with a view to off-setting the losses had to be categorised as a 'compensatory measure 'within the meaning of Article 6(4). Accordingly, they could not be taken into consideration in the assessment of the impact on the integrity of the site.

Further guidance has been provided by the European Commission. The meaning of the concept 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;

93 Ibid., para. 54.
94 Case C-258/11 *Peter Sweetman* [2012] nyr, para. 39.
95 Para. 45.
96 *D. McGillivray*, The ruling of the court of Justice in Sweetman: How to avoid a death by a thousand cuts?, ELNI Rev., 2014 (1), p. 1.
97 Case C-521/12 *Briels* [2014] C:2014:330, paras. 23 and 24.

– inherent potential for meeting SCOs; and/or
– self-renewal without external management support.[98]

As a result, the AIA does provide a positive means by which the granting of 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 granting permission despite the fact that the conclusions of the assessment are negative.[99]

3.3.2. Precautionary Decision-Making

The precautionary principle has been proclaimed in EU primary law with the principles of prevention, rectification at source and the polluter pays in Article 191(2) TFEU, a provision obliging institutions to base their environmental policies on a set of principles. It is however not defined in Treaty law, even though there are various definitions in international environmental law.[100] In short, precaution is testament of a genuine paradigm shift. While prevention is based on the concept of certain risk, the new paradigm is distinguished by the intrusion of uncertainty. Precaution does not posit a perfect understanding of any given risk: the absence of full evidence does not preclude the authorities to act in face of uncertainty. In this respect, precaution aims to bridge the gap between scientists working on the frontiers of scientific knowledge and decision-makers willing to act to prevent environmental degradation.

The precautionary principle came to centre stage in the field of environment policy in response to the limitations of science in assessing complex and uncertain ecological risks. With respect to assessing the impacts of projects on ecosystems, uncertainty may arises as a result of the inherent complexity of ecosystems, the distance in time and space between sources and damages, the cumulative and synergistic effects of other impacts (acidification, eutrophication, climate change, invasive species, etc.), the unpredictable reactions of some ecosystems (potential resilience), and the incomplete knowledge of the effectiveness of mitigation

98 *European Commission*, Managing Natura 2000 Sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC, 2000.

99 See AG Elmer's opinion in Case C-431/92 *Commission v Germany* [1995] ECR I-2209, para. 35.

100 See also our previous works on this topic: Environmental Principles: from Political Slogans to Legal Rules, 2002; Implementing Precaution. Approaches from Nordic Countries, the EU and USA, 2007.

measures.[101] The lack of knowledge is compound by methodological difficulties in assessing these risks such as the:

- lack of opportunity for experimental testing;
- lack of scope for comparative analysis;
- lack of long-term data sets.[102]

Accordingly, there is a strong deficit in predictive capability with respect to the functioning and the resilience of ecosystems.

The CJEU has been fleshing out the environmental principle with respect to the AIA procedure. In effect, it is settled case law that 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 CJEU case law and in line with the precautionary principle, that the competent authority refrain from issuing the authorisation.[103] It follows that an assessment made under Article 6(3) of the Habitats Directive 'cannot be regarded as appropriate if it contains gaps and lacks complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the SPA concerned'.[104] In other words, where there is any reasonable doubt or where there is incomplete knowledge over the absence of any effects, authorities must refrain from issuing authorisations.[105] Put it simply, where the information is insufficient, the project can't go along. *In dubio pro natura*, as the saying goes. That being said, in accordance with the logic of the precautionary principle, authorities can order additional investigations in order to remove the uncertainty (if needed).

Lastly, the precautionary principle does not prompt a reversal of the burden of proof from the project opponent to the authority authorising the project or plan.

101 J. *& R. Kasperson* (ed.), Global Environmental Risk, 2001.

102 *G. Tucker & J. Treweek*, The Precautionary Principle and Impact Assessment, in R. Cooney & B. Dickson (eds.), Biodiversity & the Precautionary Principle, 2005, p. 75.

103 Case C-127/02 *Waddenzee*, para. 67; Case C6/04 *Commission v UK* [2005] ECR I9017; Case C239/04 *Commission v Portugal* [2006] ECR I10183, para. 24; Case C404/09 *Commission v Spain* [2011], para. 99.

104 Case C-304/05 *Commission* v *Italy* [2007] ECR I-7495, para. 69; Case C-404/09 *Commission* v *Spain* [2011] ECR I-11853, para. 100.

105 Regarding the risks entailed by hazardous substances, see, by analogy: Case T229/04 *Sweden v Commission* [2007] ECR II2437; and Cases C14 and 295/06 *Parliament and Denmark v Commission* [2008] ECR I1649.

3.3.3. Participatory Decision-Making

Contrary to the EIA Directive that entitles individuals to express their opinion as to the likely significance of a project, Article 6(3) does not automatically ensure public participation. This is left to each Member States' discretion. It should be noted here that this is a grey area and does not align with recent developments in international law: Member States are parties to the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters adopted on 25 June 1998, that 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.). Moreover, public participation should be organised as early as possible, if possible at screening level.

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 challenging the authorisation that will be 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 to an AIA, it must also be subject to an SEA, which expressly entails a participatory process.[106]

3.3.4. Statement of Reasons

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 must provide specific explanations as to which factors led it to choose the proposed development. However, there is no express obligation to state the reasons similar to the one laid down under Article 9 of the EIA Directive. Nonetheless, when the project falls within the ambit of the EIA Directive the authority is also being called upon to state the reasons.

[106] See Article 3(2) SEA Directive.

4. DEROGATORY REGIME (ARTICLE 6(4))

4.1. INTRODUCTORY COMMENTS

4.1.1. Derogation Mechanism Following Negative Findings in Assessment

Environmental protection has more often given way to socio-economic considerations. For instance, in cases involving the overlap of administrative regulations, the solutions adopted by the national courts generally lean in favour of economic development rather than the conservation of natural resources.[107] Nature has thus paid a weighty tribute to the absence of any incorporation of environmental requirements into other policies. In adopting the Habitats Directive, the EU lawmaker struck a balance between the competing interests.

Where it transpires that the AIA shows that the project threatens the integrity of the site, in principle no authorisation can be issued. An exception is however provided for by Article 6(4) which is testament, according to Advocate General Kokott, to the principle of proportionality.[108]

Optimum environmental protection is assured by both procedural and substantive guarantees contained in Article 6(4) of the Directive. Projects can only be implemented where:

- there are no alternative measures;
- their completion is justified by specific interests;
- moreover, where a challenged project is accepted, the 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.

These conditions warrant special attention.

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[107] For the convenience of representation, the impact of transport infrastructures on protected habitats have been chosen. For example the construction of a highway across a Natura 2000 site in order to alleviate traffic was deemed to be an imperative reason of overriding public interest that justifies, by virtue of Art. 6(4) of the Habitats Directive, encroachments on priority habitats and species (BVerwG A 20,05 of 17 January 2007, BVerwG 128 1). By the same token, the enlargement of a protected area within an existing industrial plant in order to complete the production of a jumbo jet was deemed to fulfil an imperative reason of overriding public interest on account that 'the German authorities have demonstrated that the project is of outstanding importance for the region of Hamburg and for northern Germany as well as the European aerospace industry (Commission, C(2000) 1079 of 14 April 2000).' (In spite the fact that a number of specimens of the most endangered mammal in Europe, the Iberian lynx (*Lynx iberica*), were killed due to an increase in traffic, the conversion of a by-road into a regional motorway across a national park did not infringe the Habitats Directive's obligations on the protection of that rare species (Case C-308/08 *Commission v Spain* [2010] ECR I-4281)).

[108] Opinion AG Kokott in *Waddenzee*, para. 106.

4.1.2. First Condition: Absence of Alternative Solutions

The Habitats Directive makes the issuance of authorisations dependent on the absence of alternative solutions.[109] First, only in the absence of alternative solutions could the authority allow for derogations under paragraph 4. Member States must therefore be able to demonstrate, where appropriate, that the AIA has found there to be no viable alternative.[110] Developers should therefore demonstrate that they have fully considered alternative solutions.

Given that the obligation to seek the least damaging alternative [111] encapsulates a preventative approach,[112] the specific importance of that obligation is not difficult to fathom. However, given the traditional emphasis upon developers' rights, one can expect a fair amount of resistance from the authorities to seek the least damaging alternative.

Considering the useful effect (*effet utile*) of the Directive, it is appropriate to give, keeping in mind the *effet utile* of the EU legislation, a broad interpretation to the obligation to seek out the least damaging alternative for the conservation of the site.[113] 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. As soon as it becomes possible for the Member State to 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.[114]

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

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109 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'.

110 Case C-21/08, *Commission v France*.

111 Case C-239/04: *Commission v Portugal* [2006] ECR I-10183, paras. 38–39.

112 J. Holder, Environmental Assessment, 2004, p. 148.

113 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-6775, para. 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.

114 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: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC, 2000, p. 43.

– 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.

Besides, 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 makes 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'.[115]
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?
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, should the experts assess the port capacity with respect to other projects around the country, around the EU or around the globe (*e.g.,* development in Tangier or in Singapore)?

4.1.3. 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 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.

[115] Ibid., p. 43.

4.1.3.1. Non-Priority Habitats and Species

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 an 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* 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) that economic requirements cannot be directly equated with 'imperative reasons of overriding public interest'.[116] 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 (e.g., job creation or local economic development) but rather because it is intended to satisfy an overriding public interest (e.g., the opening up of a particularly isolated region, the necessity of substantially raising the standard of living of the local population). This interpretation has been endorsed in *Solvay*. The CJEU ruled that: 'an interest capable of justifying, within the meaning of Article 6(4) of the Habitats Directive, the implementation of a plan or project must be both 'public' and 'overriding', which means that it must be of such an importance that it can be weighed up against that directive's objective of the conservation of natural habitats and wild fauna and flora.'[117] As a result, the mere construction of infrastructure designed to accommodate a management centre cannot constitute an imperative reason of overriding public interest within the meaning of Article 6(4).[118]

4.1.3.2. Priority Habitats and Species

On the other hand, greater weight has been given to ecological interests when the site hosts so-called *priority habitats or species*.[119] 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

116 In the context of modifications to SCAs, any pre-eminence of economic over ecological interests must be tempered in virtue of Article 3 TEU as well as of Article 11 TFEU. These provisions put economic and environmental objectives on an equal footing. See *N. de Sadeleer*, EU Environmental Law and Internal Market, 2014.

117 Case C-182/10 *Solvay and Others* [2012] nyr, para. 75.

118 Ibid., para. 78.

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

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)). The authority can only grant the permission on the ground of this narrow set of interest.

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.

The CJEU has already taken the view that health protection objectives may prevail over those relating to nature protection. For instance, a project jeopardising a wild bird sanctuary protected under the Wild Birds Directive can be authorised insofar as it wards off the risk of floods.[120]

Although it adversely affects the integrity of a Natura 2000 site, the conversion of a natural fluvial ecosystem into a largely man-made structure in Northern Greece can be justified on the ground that it 'may, in some circumstances, have beneficial consequences of primary importance for the environment'.[121] Indeed, irrigation and the supply of drinking water can be of such an importance that such projects can be weighed against the Habitat Directive's objective of conservation of natural habitats and wild fauna.[122] Given the severity of the impact of irrigation projects on the natural environment, the position of the Court on this question is controversial.[123]

The position of the CJEU on this issue is slippery. Framed in restrictive language, these grounds of derogation 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)). 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.

120 Case C-57/89 *Commission v Germany* [1991] ECR I-883, paras 20–3.

121 Case C-43/10 *Nomarchiaki Aftodioikisi Aitoloakarnanias et al.* [2012], para. 125.

122 Ibid., paras 121–122.

123 Indeed, 'irrigation and drainage projects invariably result in many far-reaching ecological changes', some of which 'cover the entire range of environmental components, such as soil, water, air, energy, and the socio-economic system'. See the *Food and Agriculture Organization (FAO) and Overseas Development Administration (ODA)*, FAO Irrigation and Drainage Paper 53, 1995, p. 1.

4.1.3.3. Derogations Interpreted in the Light of the Objective of Sustainable Development

The concept of sustainable development is recognised as one of the main objective pursued by the EU.[124] That being said, it is characterised by a strong degree of indeterminacy. Though few authorities and undertakings will contend with the proposition that development should be sustainable, they might disagree on how to flesh out this proposition in individual cases. Accordingly, the main attraction of this concept is that 'both sides in any legal argument will be able to rely on it'.[125]

The interpretation given by Advocate General Léger to sustainable development in his Opinion in *First Corporate Shipping*, a case on development taking place in protected birds habitats, is testament to a conciliatory approach. Indeed, the Advocate General stressed that 'the concept 'sustainable development' does not mean that the interests of the environment must necessarily and systematically prevail over the interests defended in the context of the other policies pursued by the Community . . . On the contrary, it emphasises the necessary balance between various interests which sometimes clash, but which must be reconciled'.[126] Against this backdrop, some scholars have been taking the view that nature conservation law has not always be capable to facilitate sustainable development on the ground that Article 6 requires 'merely a dogmatic approach focusing on ecological criteria'.[127]

Recently, the impact of sustainability on the procedural requirements set out under Article 6 has been gathering momentum. In *Nomarchiaki Aftodioikisi Aitoloakarnanias*, the Greek Council of State sought to ascertain whether the Habitats Directive, interpreted in the light of the objective of sustainable development, could allow the conversion of a natural fluvial ecosystem into a largely man-made fluvial and lacustrine ecosystem, irrespective of the negative impacts on the integrity of sites that are part of the Natura 2000 network. The CJEU took the view that the Habitats Directive, and in particular its Article 6(3)(4) interpreted in the light of the objective of sustainable development, permits such project.[128] Nonetheless, the Court stressed that such a project can be authorised inasmuch as the conditions for granting the derogation were satisfied – conditions which have so far been interpreted rather narrowly.[129]

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124 The concept is currently enshrined in Articles 3(3)–(5) and 21(2)(d)–(f) TEU, Article 11 TFEU, as well as Article 37 EUCFR. See also the 6th recital of the preamble to the TEU. See *N. de Sadeleer*, Sustainable Development in EU Law. Still a Long Way to Go, in Jindal Global Law Review. Special Issue on Environmental Law and Governance, 2015 (6:1), pp. 1–7.

125 *P. Birnie, A. Boyle & C. Redgwell*, International Law and the Environment, 3rd edn, 2009, p. 124.116.

126 Opinion AG Léger in Case C-371/98, *First Corporate Shipping* [2000] ECR I-9235, para. 54.

127 *F.H. Kistenkas*, Rethinking European Nature Conservation Legislation: Towards Sustainable Development, JEELP 2013 (10:1), p. 75.

128 Case C-43/10 *Nomarchiaki Aftodioikisi Aitoloakarnanias et al.* [2012], paras 134–9.

129 Case C-538/09 *Commission v Belgium* [2011] OJ C211/5, para. 53.

Our view is that sustainable development cannot water down basic environmental requirements. As noted previously, the assessment and decision-making procedures are framing the balance between the competing interests. Moreover, pursuant to Article 3(3) TEU and Article 191(2) TFEU, the manners in which these procedures apply include the requirement to attain a 'high level of protection and improvement of the quality of the environment'.

4.1.3.4. Procedural Requirements

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. 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.[130] 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.

Be that as it may, several authors contend that many of the Commission's opinions do not fulfil the applicable derogation requirements set about by Article 6(4).[131]

4.1.4. 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) requires Member States to take appropriate measures to avoid the deterioration of natural habitats and significant disturbances to species in these areas, they must therefore mitigate as far as possible any negative impacts of any project authorised pursuant to an impact study.[132] The view of this report is that these considerations should be dealt with in the AIA with the aim of reducing the negative impacts on the integrity of the site.

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130 Case C-187/87 *Saarland v Minister for Industry* [1988] ECR I-5013.

131 The Commission's practice seems to be *a priori* favourable to requests from Member States. See the commentary by *A. Nollkaemper*, Habitat Protection in European Community Law: Evolving Conceptions of a Balance of Interests, Journal of Environmental Law, 1997 (9), p. 271; *L. Krämer*, The European Commission's Opinions under Article 6(4) of the Habitats Directive, J Environmental Law, 2009 (21); *D. McGillivray*, Compensating Biodiversity Loss: the EU Commission's Approach to Compensation under Art. 6 of the Habitats Directive, Journal of Environmental Law, 2012 (3), pp. 417–450; *L. Krämer*, Implementation and Enforcement of the Habitats Directive, in C.-H. Born et al. (ed.), The Habitats Directive in its EU Environmental Law Context, 2015, pp. 236.

132 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).

The adoption of mitigation measures also limits the importance of compensatory measures.[133]

4.1.5. 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'. Regarding the scope of this obligation, AG Sharpston noted:

'The legislation recognises, in other words, that there may be exceptional circumstances in which damage to or destruction of a protected natural habitat may be necessary, but, in allowing such damage or destruction to proceed, it insists that there be full compensation for the environmental consequences. The status quo, or as close to the status quo as it is possible to achieve in all the circumstances, is thus maintained.'[134]

In *Briels*, the Court was asked whether Article 6(3) of the Habitats Directive must be interpreted as meaning that a motorway project in the Netherlands which provides for the creation of an area of equal or greater size of the same natural habitat type within the same site, has an effect on the integrity of that site and, if so, whether such measures may be categorised as 'compensatory measures' within the meaning of Article 6(4) thereof. The Court took the view that the creation of an area of the same natural habitat type were aiming at compensating for the negative effects of the project on the Natura 2000 site. Accordingly, these compensatory measures could be taken into account in the assessment of the implications of the project provided for in Article 6(3).[135] The judgment deserves a warm welcome. Indeed, it does not make sense to eschew the assessment on the account that compensatory measures belittle the impact of the project on the Natura 2000 site. These measures have to be carved out in a second stage, when the risks have been clearly ascertained by the experts thanks to an AIA.

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133 See the mitigation measures for the passage of the A20 motorway through the '*Peene*' protection area (anti-noise barriers, headlight-blocking screens). For example, Commission Opinion 96/15/EC of 18 December 1995, para. 4.3.

134 Opinion AG Sharpston in Case C-258/11 *Peter Sweetman*, para. 64.

135 Case C-521/12 *Briels* [2014], para. 29.

5. AIA, EIA, AND SEA: HOW TO SQUARE THE CIRCLE?

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

a) A traditional EIA under the EIA Directive; or
b) A SEA under SEA Directive 2001/42/EC.

These procedural obligations are indeed autonomous and cumulative.[136]

Of importance is to note that when a plan or programme is subject to an AIA in accordance with Article 6(3), it must also be subject to an SEA. Article 3(2) of SEA Directive runs as follows:

'Subject to para. 3, an environmental assessment shall be carried out for all plans and programmes,

…

(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.'

The SEA Directive has an added value on the account that it enhances a more upstream approach. For instance, inasmuch as land planning regulations allow the realisation of public or private projects, environmental concerns must be taken into account at the earliest stage, when conceiving the land-planning regulation, not at the time of construction. It is certainly more effective first to assess the overall impact of all the roads encapsulated in a highways project than to single out every road without any broader assessment.

The CJEU ruled recently that the examination carried out to determine whether the plan is not subject to an SEA 'is necessarily limited to the question as to whether it can be excluded, on the basis of objective information, that that plan or project will have a significant effect on the site concerned.'[137] Accordingly, where a plan subject to an AIA, it is consequently subject to an SEA.

That being said, it ought to be remembered that there is a difference in substance between the different assessments. 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.[138] Conversely, the AIA provides a much clearer picture, and a more in-depth analysis of the impacts on habitats. It is therefore not necessary to take into consideration all the environmental impacts of the project (effects on archaeological resources, cultural heritage or human health, etc.) as it needs only

136 *N. de Sadeleer*, L'évaluation des incidences environnementales des programmes, plans et projets : à la recherche d'une protection juridictionnelle effective, RDUE 2014 (2), pp. 1–56.

137 Case C-177/11 *Sillogos Ellinon Poleodomon kai Khorotakton* [2012] nyr, para. 24.

138 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 (para. 40).

to 'be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives'.

Moreover, the negative conclusions of an AIA do bind the competent authorities whereas the conclusions of either an EIA or a SEA dot not entail specific requirements. Accordingly, neither an EIA nor a SEA can replace a genuine AIA.

The EIA Directive 2011/92/EU as amended by Directive 2014/52/EU of 16 April 2014 is taken into account to a greater extent than in the past the need to conserve the biodiversity.

The preamble of the new directive states:

> 'The measures taken to avoid, prevent, reduce and, if possible, offset significant adverse effects on the environment, in particular on species and habitats protected under (the Habitats Directive 92/43/EEC) and (the Birds Directive 2009/147/EC), should contribute to avoiding any deterioration in the quality of the environment and any net loss of biodiversity, in accordance with the Union's commitments in the context of the Convention and the objectives and actions of the Union Biodiversity Strategy up to 2020 laid down in the Commission Communication of 3 May 2011 entitled 'Our life insurance, our natural capital: an EU biodiversity strategy to 2020'.

Furthermore, Article 2(3) of Directive 2011/92/EU as amended by Directive 2014/52/EU of 16 April 2014 requires coordination between the EIA and the AIA procedures. That provision reads as follows:

> 'In the case of projects for which the obligation to carry out assessments of the effects on the environment arises simultaneously from this Directive and from (the Habitats Directive 92/43/EEC and the Birds Directive 2009/147/EC) … Member States shall, where appropriate, ensure that coordinated and/or joint procedures fulfilling the requirements of that Union legislation are provided for.'

Para 37 of the preamble of Directive 2011/92 offers some clarification :

> 'In order to improve the effectiveness of the assessments, reduce administrative complexity and increase economic efficiency, where the obligation to carry out assessments related to environmental issues arises simultaneously from this Directive and (the Habitats Directive 92/43/EEC and the Birds Directive 2009/147/EC), Member States should ensure that coordinated and/or joint procedures fulfilling the requirements of these Directives are provided, where appropriate and taking into account their specific organisational characteristics.'

Pursuant to Article 2(a) of Directive 2011/92/EU as amended by Directive 2014/52/EU, the Commission is called on to provide guidance regarding the setting up of any coordinated or joint procedures for projects that are simultaneously subject

to assessments under the EIA Directive and the Habitats Directive 92/43/EEC and the Birds Directive 2009/147/EC.

In addition, the wide scope of the EIA has to include, in virtue of Article 3 of the IEA Directive the assessment of 'biodiversity, with particular attention to species and habitats protected under' the Habitats Directive.[139]

Last but not least, where Member States have to subject projects listed under Annex II to an EIA, they have to take into consideration the criteria set out in Annex III. Among these criteria, the Member States have to take into consideration 'the environmental sensitivity of geographical areas likely to be affected by projects must be considered, with particular regard to: … areas classified or protected under national legislation; Natura 2000 areas designated by Member States pursuant to Directive 92/43/EEC and Directive 2009/147/EC'.[140]

That being said, one should bear in mind that the SEA and EIA Directives expressly entail a participatory process whereas the Habitats Directive does not require compulsory public inquiries.

Nonetheless, nothing stands in the way of establishing more targeted Habitats Directive assessments as it is seen as a specific sub-assessment 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.

Last but not least, as a matter of practice, it must be noted that there are a huge number of projects not encompassed within the EIA and the SEA Directives' scope of ambit. As a result, the EIAs and SEAs cannot serve as an ersatz for the vast majority of plans and projects threatening the conservation of Natura 2000 sites.

6. CONCLUSIONS

Halting biodiversity loss has become a key objective of the EU. It requires a strict application of AIA requirements. Indeed, the AIA is a critical biodiversity management tool as it ensures that the effects of developments within, or next to, Natura 2000 sites are fully assessed before consent is given. In addition, negative conclusions preclude the adoption of the plan or the granting of the license. As a result, the site's integrity comes first, development second.

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139 Pursuant to Article 3(1)(b) of the EIA Directive, 'the environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project on the following factors: biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC'.

140 Annex II, 2, c, v).

In spite its key role in conserving biodiversity in the EU, Article 6 is still dogged by controversies.[141] The extension of ports[142] and of mining activities,[143] the development of renewable energy projects,[144] the irrigation of intensive agriculture,[145] or the construction of major infrastructure works such as railways,[146] motorways[147] and tourist facilities[148] increasingly collide with the protective regime enshrined in the Habitats Directive. Moreover, a few lawyers argue that this 'rigid' piece of legislation excludes social and economic interests to the detriment of sustainable development.[149] That being said, it must be noted that the vast majority of projects still go ahead, even when they seem hardly reconcilable with the conservation objectives pursued by the directive.

What is more, there are serious grounds for concern that Member States are not sufficiently implementing the Directive.[150] So far the vast majority of the cases adjudicated by the CJEU concern situations where there has been no appropriate assessment.[151] 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. Most of the SACs which have not been or are in the process of being designated are still lacking a proper management plan. In addition, there are no sets of scientific indicators that could be used with the aim of assessing whether the SCOs are being realised. These sites are, as a result, extremely vulnerable to development.

The question is whether this cornerstone of nature legislation will become the victim of the Better Regulation creed. On Tuesday 16th of December 2014, the new Juncker Commission announced to the European Parliament its Work Programme 2015. The Commission's power to initiate is exclusively focussed on creating job opportunities. In relation to environmental policy any new vision

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141 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.

142 Case C-44/95 *Royal Society for Protection of Birds* ('*Lappel Bank*') [1996] ECR I-3805; Journal of Environmental Law, vol. 9/2, 139, note J.D.C. Harte.

143 Case C-404/09 *Commission* v *Spain* [2011] ECR I-11853.

144 Case C-2/10 *Azienda Agro-Zootecnica Franchini and Eolica di Altamura* [2011] ECR I--0000.

145 Case C-202/00 *Commission v France* ('*Plaine des Maures*'); case C-43/10 *Nomarchiaki Aftodioikisi Aitoloakarnanias* [2012].

146 Case C-182/10 *Solvay and Others* [2012].

147 Case C-239/04 *Commission v Portugal* [2006] CER I-10183; case C-142/07 *Ecologistas en Accion-Coda v Ayuntamentio de Madrid* [2008] ECR I-9097; Case C-258/11 *Peter Sweetman* [2012].

148 Case C-304/05 *Commission* v *Italy* [2007] ECR I-7495.

149 *S. Borgström & F. Kistenkas*, The Compatibility of the Habitats Directive with the Novel EU Green Infrastructure Policy, EEELR 2014 (23:2), p. 40.

150 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.

151 Case C-179/06 *Commission* v *Italy* [2007] ECR I-8131; Case C-241/08 *Commission* v *France* [2010] ECR I-1697; Case C-226/08 *Stadt Papenburg* [2010] ECR I-131; and Case C-182/10 *Solvay and Others* [2012] ECR I-0000.

is missing. Here, the Commission only looks at existing legislation and pending proposals asking if they are 'fit for purpose' or are still topical. In particular, the Commission is intent upon proposing the lawmaker the merger of the Habitats and the Birds directives with the aim of assuaging the fears of developers and some Member States. Accordingly, the sensible but sustained compromise between environmental and economic interests achieved in EU nature protection law may be blurred if the Natura 2000 directives are tested in terms of economic efficiency within a new regulatory framework. Given the significant and continuing loss of biodiversity across Europe, it is of utmost importance that the lawmaker keeps in mind the cardinal importance of the Natura 2000 network.