Natura 2000
European protected areas - navigating the legal landscape

1. An overview of Natura 2000
About this briefings series

1. This is the first briefing in ClientEarth's series 'European protected areas - navigating the legal landscape'. In this briefing, we provide a short and simple overview of the legal foundations for the Natura 2000 network. We also examine one key article in the Habitats Directive1 - Article 6 - that sets out how the network must be managed.

2. This briefing series provides a broad overview of the legal landscape surrounding Article 6 of the Habitats Directive. It is designed to provide the key legal information needed to engage in discussions relating to developments, or plans for developments, in or around Natura 2000 sites. The Natura 2000 network is made up of Special Protection Areas (SPAs) classified under the Birds Directive2, and Special Areas of Conservation (SACs) designated under the Habitats Directive. The reader will become familiar with the legal framework of Article 6 of the Habitats Directive, which applies across the Natura 2000 network3, and how it has been applied by the courts in practice. There are 8 briefings in the series:

   1. An overview of Natura 2000
   2. The test of 'likely significant effect' and appropriate assessments (Article 6(3))
   3. The importance and meaning of 'site integrity' (Article 6(3))
   4. Article 6(3): the precautionary principle and proportionality
   5. Article 6(4): the precautionary, proportionality and subsidiarity principles
   6. Article 6(3): What constitutes a 'plan or project'?
   7. Article 6: compensation v. mitigation measures
   8. Article 6(4): Absence of alternative solutions and imperative reasons of overriding public interest

3. While the Natura 2000 network is arguably the most effective tool currently available in EU conservation law and policy, most EU citizens have never heard of it. It is important to increase public awareness of the legal foundations for Natura 2000, and the degree of protection it provides. This will help to ensure that Member States continue to designate and protect Natura 2000 sites, as required by EU law. In turn, better implementation by Member States of the legal requirements will promote Natura 2000 as an important network of protected areas, of high value to EU citizens.

4. Please check ClientEarth's website for the latest briefings on the Habitats Directive, and for other documents that may be helpful to those using arguments relating to Article 6. If you have a suggestion for a briefing that is not currently available on www.clientearth.org, please get in touch through wildlife@clientearth.org.

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3 Articles 6(2) to 6(4) of the Habitats Directive are relevant to the conservation of SPAs classified under the Birds Directive, by virtue of Article 7 of the Habitats Directive
The Natura 2000 network

5. The EU Habitats Directive establishes the Natura 2000 network, which is a "coherent European ecological network"4 of protected areas across the EU. It is made up of SACs and SPAs. Natura 2000 sites cover 18% of the EU's land area and include, for example:

- the Samaria National Park in Greece, which protects, amongst other things, forests, wild goats, rivers, sea caves, sea grass, and numerous bird species;5
- the Białowieża Forest in Poland, which protects, amongst other things, forests, bats, European bison, and lynx;6 and
- the East Devon Pebbled Heaths in the United Kingdom, which protects heath habitat and dragonflies.7

6. The aim of Natura 2000 is to ensure the long-term survival of Europe's most valuable and threatened species and habitats, both on land and in the water. As such, Member States must designate SACs and classify SPAs in their terrestrial and marine environments.8

7. The deadline for completion of the Natura 2000 network was 1998.9 Despite this, and despite the fact that both the Birds and Habitats Directives are well established EU laws, there are still a number of gaps in the network. This is the case across most EU Member States, especially in relation to the marine environment. However, a number of marine Natura 2000 sites do exist, for example:

- the Ascrib, Isay, and Dunvegan SAC in the North West region of the Isle of Skye, Scotland, which protects a breeding colony of harbor seals;10 and
- the Fehmarn Belt SAC in the German Baltic Sea, which protects sandbanks, reefs, harbour porpoises, and common seals.11

8. One of the main goals of the Habitats Directive is to maintain or restore, natural habitats and species of wild fauna and flora of "Community interest".12 In particular, the Natura 2000 network is meant to enable important natural habitats, and the habitats of particularly important species, to achieve or maintain "favourable conservation status". Specific habitats requiring protection are listed in Annex I to the Habitats Directive, and include, for example, freshwater habitats, coastal habitats, various types of forests, raised bogs and fens, rocky

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4 Article 3(1) Habitats Directive
5 The official name of the SAC is LEFKA ORI KAI PARAKTIA ZONI and more information about its protected habitats and species can be found here:
   http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=GR4340008. The area also includes an SPA which is called ETHNIKOS DRYMOS SAMARIAS - FARANGI TRYPTIS - PSIedish - KOUSTOGERAKO and more information can be found here:
6 The official name of the site is Puszcza Białowieska and more information about its protected species can be found here:
7 More information can be found here: [http://jncc.defra.gov.uk/protectedsites/sacselection/n2kforms/UK0012602.pdf](http://jncc.defra.gov.uk/protectedsites/sacselection/n2kforms/UK0012602.pdf)
8 The first judicial consideration of this issue was advanced in 2000. The UK courts confirmed that on a purposive construction, the Habitats Directive must extend beyond territorial waters and out to a Member State’s exclusive economic zone, see R (on the application of Greenpeace) v Secretary of State for Trade and Industry (No.2) [2000] 2 CMLR 94 (QBD) at para 117. The Court of Justice of the European Union further confirmed this position in 2005 in C-6/04 Commission v UK [2005] ECR 1-9017
9 Article 4(3), Habitats Directive
10 [http://jncc.defra.gov.uk/ProtectedSites/SACselection/sac.asp?EUcode=UK0030230](http://jncc.defra.gov.uk/ProtectedSites/SACselection/sac.asp?EUcode=UK0030230)
11 [https://www.bfn.de/0314_fehmarnbelt+M52087673ab0.html](https://www.bfn.de/0314_fehmarnbelt+M52087673ab0.html)
12 Article 2(2), Habitats Directive
habitats, and caves. Protected species are listed in Annex II and include, for example, wolves, brown bears, beavers, and butterflies, as well as various plant species. Habitats and species that are especially vulnerable and in need of protection, are marked in those Annexes as "priority" habitats and species.

9. Migratory birds and the species listed in Annex I of the Birds Directive are also protected by the Natura 2000 network, in relation to which SPAs are classified. Protected birds include the common scoter, the red throated diver, and the golden eagle. It is generally accepted that ‘favourable conservation status’ is broadly equivalent to, and implicit in, the requirements of Article 2 of the Birds Directive.

10. In addition, the creation of protected areas has benefits for all habitats and species occurring in those sites, not just those specifically listed in the Annexes to the Birds or Habitats Directives as requiring protection.

**Article 6 of the Habitats Directive**

11. Natura 2000 is not intended to create strict wilderness reserves where all human activities are excluded. Rather, the Habitats Directive establishes rules concerning the legality of activities that may affect protected sites. As such, Article 6 sets out a number of provisions governing the conservation of SACs and SPAs, as well as the procedural requirements for managing human activities that could impact on Natura 2000 sites. Article 6 therefore plays an influential role in establishing the relationship between conservation, and other activities affecting SACs and SPAs.

12. Article 6(1) requires Member States to establish "necessary conservation measures", and "appropriate statutory, administrative or contractual measures" for SACs (but not SPAs). These measures must correspond to the ecological requirements of the relevant protected habitats or species present on the site.

13. Articles 6(2), 6(3), and 6(4) of the Habitats Directive provide further detail over some aspects of how Natura 2000 sites are to be managed. These provisions are applicable to the entire network (i.e. to both SACs and SPAs). In addition, Article 4(4) of the Birds Directive requires Member States to strive to avoid pollution or deterioration of habitats outside of SPAs.

14. Article 6(2) of the Habitats Directive requires Member States to "take appropriate steps to avoid … the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of [the Habitats] Directive." Such "appropriate steps" may involve measures taken inside the protected site, or indeed outside the site, if such measures are necessary to avoid that deterioration or disturbance.

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13 Article 4(1) and 4(2) Birds Directive 2009/147/EC
14 See Articles 3 and 7, Habitats Directive
16 Management measures regarding SPAs are subject to Article 4(1) and 4(2), Birds Directive
17 According to Article 7, Habitats Directive
15. The obligations arising under Article 6(2) of the Habitats Directive (and under Article 4(4) of the Birds Directive, where applicable) are based on the prevention principle. European Commission guidance states that: "The words 'avoid' and 'could be significant' stress the anticipatory nature of the measure to be taken. It is not acceptable to wait until deterioration or disturbances occur before taking measures."

16. The requirement for prevention was confirmed by the judgment of the Court of Justice of the European Union (CJEU) in Commission v Ireland. In that case, the CJEU ruled that the application of the obligations in Article 6(2) could not be "merely a reactive measure". Rather, the protection afforded by Article 6(2) "requires that individuals be prevented in advance from engaging in potentially harmful activities."

17. Article 6(3) follows the preventative obligations set out in Article 6(2) by outlining a two-pronged approach to regulating human activity in protected sites:

- firstly, for any "plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon", an "appropriate assessment" of its "implications for the site in view of its conservation objectives" must be performed; and
- secondly, after Member States have undertaken the appropriate assessment, and in light of its conclusions, the plan or project may only be granted permission to proceed if it can be "ascertained that it will not adversely affect the integrity of the site concerned."

18. Article 6(3) procedures apply to developments both inside and outside Natura 2000 sites, as significant effects may arise from plans or projects located both within and outside the site. For example, a wetland may be damaged by a drainage project located outside its boundaries.

19. Article 6(4) sets out a derogation to the safeguards in Article 6(3). It allows a plan or project to be carried out, in spite of a negative assessment of the implications for the integrity of the site. This may occur where there is no alternative solution, and where there are imperative reasons of overriding public interest for the plan or project to proceed. Where there is a priority species or habitats involved, the cited public interest must relate to human health or public safety. In such cases, necessary compensatory measures must be undertaken "to ensure that the overall coherence of Natura 2000 is protected."

20. It is important to note that Article 6(2) is broader in scope than Articles 6(3) and 6(4). Articles 6(3) and 6(4) apply only to plans or projects that are considered likely to have a significant effect on a Natura 2000 site, and so require prior authorisation from the appropriate authority. Article 6(2), however, relates to site maintenance more generally. It provides that Member States must 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." This means that Member States must assess management measures relating to all activities, including those that do not require prior authorisation under Article 6(3). This may include agricultural practices, or recreational activities. In addition, the requirements in Article 6(2) are not limited to activities carried out intentionally, but also include chance events, such as fire or flooding, provided that they are predictable.24

The Waddenzee case and Article 6

21. One of the most significant cases on Article 6 of the Habitats Directive is Waddenzee25, which concerned cockle fishing in an SPA in the Netherlands. In that case, the CJEU considered in detail the correct legal interpretation and application of Article 6.

22. This case and others will be returned to in more detail in the other briefings in this series, which discuss specific aspects of Article 6. For the purposes of this briefing, however, two key points arising from Waddenzee are of note.

23. Firstly, the Advocate-General26 in Waddenzee pointed out that, while Article 6(2) is not as prescriptive as Article 6(3), any measures taken pursuant to Article 6(2) must be "no less effective than the procedure under Article 6(3)."27 This view has since been confirmed by the CJEU judgment in the Sweetman case28, which involved the construction of a road through a SAC in Ireland.

24. Secondly, according to Waddenzee, Article 6(3) must be interpreted as meaning that Member States can only permit an activity affecting the Natura 2000 network "if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects."29 When read together with the first key point, this must also be the case where Article 6(2) applies, as authorisation under Article 6(2) must be, "in substantive terms", the same as authorisation under Article 6(3).30

25. In effect, these key points show that the precautionary principle31 must always be applied in the context of authorising plans or projects under Article 6(3). This also follows from the obligation to take preventative measures pursuant to Article 6(2), discussed at paragraph 15 above. This is because Article 6(3) – which sets out the requisite standard of protection applicable under Article 6(2) – prohibits a Member State from approving a plan or project unless it is certain that it will not affect the integrity of the site. This requirement represents a

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24 n.18, para.3.2
25 Case C-127/02 Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij [2005] ECR I-7405 (Waddenzee)
26 The Advocate General is a senior lawyer who advises the CJEU on potential solutions to cases. The Advocate General's opinion is not binding on the CJEU, and merely advises it of a potential way to decide the case before it. The Advocate General's opinion is, therefore, a helpful aid, but the CJEU is not obliged to follow it. It is quoted here as persuasive guidance on how the legal issue in question may be interpreted by the CJEU.
27 n.25, Opinion of the Advocate General, para.120.
28 Case C-258/11 Peter Sweetman, Ireland, Attorney General, Minister for the Environment, Heritage and the Local Government v An Bord Pleanála [2014] I P.T.S.R. 1092 (Sweetman)
29 n.25, para.59 and 61, and n.28, para.40
30 n.25, Opinion of the Advocate General, para.120
31 The precautionary principle provides that protective action may be taken, in the absence of conclusive scientific evidence as to the existence or extent of risks to the environment, where that risk cannot be excluded. For information on the precautionary principle, please see briefings 4 and 5 of this series.
precautionary approach, as opposed to a requirement to prove that the plan or project will cause harm to the site in order to justify refusal of consent.

26. The strong presumption in favour of precaution in Article 6, therefore, places the burden of proof on proponents of plans or projects affecting Natura 2000 sites to show that there will be no adverse effect to the site's integrity, as regards its conservation objectives, should they be allowed to proceed.

Conclusion

27. Natura 2000 does not require Member States to prohibit all human activity in protected areas; rather, it attempts to strike a balance between social needs and environmental conservation. In this way, Natura 2000 is one of the most effective EU conservation tools available for protecting Europe's most important biodiversity.

28. For biodiversity to be preserved, it is essential that the precautionary principle is applied. The application of that principle causes much difficulty for decision-makers in practice, despite being a legal requirement for the management of Natura 2000. This is particularly so in the marine environment, where relatively little is known about the ecosystems that Natura 2000 is trying to protect. It is, however, precisely for that lack of knowledge that the precautionary principle, and the proper implementation of Natura 2000, is so important.
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ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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