Natura 2000
European protected areas - navigating the legal landscape

4. Article 6(3): the precautionary principle and proportionality
About the briefings series

1. This is the fourth briefing in ClientEarth's series 'European protected areas - navigating the legal landscape.' In this briefing, we provide a general understanding of the precautionary and proportionality principles, and how they have influenced the application of Article 6(3) of the Habitats Directive.¹

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. 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 Precautionary Principle

The precautionary principle is fundamental to EU environmental law. It is referred to in Article 191(2) of the Treaty on the Functioning of the European Union (TFEU), which sets out the EU's approach to risk regulation in environmental decision making.

The precautionary principle means, in essence, that action can be taken to protect against risks to human health and/or the environment, even in the absence of conclusive scientific evidence as to the existence, or extent, of those risks. Protective action should be taken in such cases, as risks to health and the environment cannot be ruled out. Those risks can arise from proposed regulations, or from the failure to impose regulations.

How it works: integrating science and politics

4. The TFEU does not define the precautionary principle. A communication from the European Commission, however, explains that it is to be considered within a structured approach to risk analysis, which compromises three elements: risk assessment (identification), risk management (response), and risk communication (monitoring and review). The precautionary principle is particularly relevant to risk management.

5. Application of the precautionary principle is relevant to two distinct stages of risk management analysis:
   - the political decision of whether or not to act, where a potential risk has been identified; and
   - where the decision is made to act, the kind of protective measures that should be taken.

6. The first stage - deciding whether or not to act - takes place when decision-makers become aware of a risk to health or the environment that may have potentially significant consequences. Once they become aware of the risk, decision-makers should obtain a scientific assessment. The assessment should be based on the information available at the time, and be as complete as possible. It should identify any instances of scientific uncertainty - including the degree of that uncertainty - and any gaps in knowledge that prevent a sufficiently clear determination of the risk. The purpose of the assessment is to allow decision-makers to make an objective evaluation of the risk, so that they can choose the most appropriate course of action.

7. Decision-makers should consider the scientific assessment when weighing up the potential impact of preventive measures, or the consequences of inaction. The Court of Justice of the European Union (CJEU) has specified that protective measures invoking the precautionary principle may be taken "without having to wait until the reality and seriousness of those risks become fully apparent." In that regard, the Commission Communication notes that, in

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5 Ibid, p.12
situations where scientific advice is supported by only a minority fraction of the scientific community, "due account should be taken of their views, provided the credibility and reputation of this fraction are recognised."7

8. The Commission emphasises that the decision on whether or not to take action is of an "eminently political nature".8 It concerns a value judgment on the level of risk that is "acceptable" to the society affected by the risk, which, in turn, influences the decision that is ultimately made.

9. Concerning the second stage - where a decision is made to act - a variety of responses is possible. The selected response can range from funding research to gain a fuller understanding of the risk, to adopting legislative measures. Measures applying the precautionary principle should be:

- proportionate to the chosen level of protection;
- non-discriminatory;
- consistent with similar pre-existing measures;
- based on an examination of the potential costs and benefits (including an economic cost-benefit analysis, if appropriate);
- subject to review, where new scientific information comes to light; and
- capable of authorising the production, or gathering, of the scientific evidence required for a comprehensive risk assessment.9

10. It should also be noted that Article 11 TFEU requires that environmental protection be integrated into the definition, and implementation, of EU policies and activities. This is to promote sustainable development. Environmental objectives and principles, including the precautionary principle, must, therefore, be considered by EU institutional actors in devising and implementing laws and activities. The Treaty on European Union (TEU) also promotes sustainable development as one of the fundamental aims of the EU; the pursuit of sustainable development involves balancing economic growth alongside other goals, such as environmental protection.10

The precautionary principle underpins Article 6(3) of the Habitats Directive

11. Article 6(3) contains two limbs:

- firstly, an 'appropriate assessment' must be carried out where a proposed plan or project, which is not directly involved with or necessary to the management of the site concerned, is likely to have a significant effect on the site. A significant effect can be caused either individually by the plan or project in question, or in combination with other plans or projects. The appropriate assessment may take into consideration alternative solutions

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7 n.5, p.16
8 n.5, p.21
9 n.5, p.3 [6]; pp.17-21
10 Treaty on European Union (TEU) Article 3(3): "The Union...shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy...and a high level of protection and improvement of the quality of the environment..."
and mitigation measures aimed at avoiding or reducing any direct adverse effects the project may have on the site; and

- secondly, after the appropriate assessment has been carried out, and in light of its conclusions, the plan or project may only be approved if it can be ascertained that it will not adversely affect the integrity of the site concerned.

12. This is not limited to plans and projects which occur within a protected site, but also applies to developments located outside the site, which are likely to have a significant effect on it.

13. The European Commission has issued guidance on the meaning of 'site integrity'. While guidance from the Commission is not legally binding, it can offer helpful assistance in interpreting requirements under the law. The Commission indicates that 'site integrity' is connected to the site's conservation objectives, and the overall coherence of the site's ecological structure and function. It states that a site can be described as having a high degree of integrity where the inherent potential for meeting site conservation objectives is realised, the capacity for self-repair and self-renewal under dynamic conditions is maintained, and a minimum of external management is required.11

14. Furthermore, the CJEU has stated that the concept of 'site integrity' is related to the favourable conservation status of "a natural habitat type whose preservation was the objective justifying the designation of that site."12 For further discussion on 'site integrity' please see briefing 3 in this series, 'Article 6(3): The importance and meaning of 'site integrity'."

15. The CJEU has also offered guidance on the precautionary principle. In the Waddenzee13 case, for example, it had occasion to consider its meaning and application. That case concerned the question of whether intensified cockle fishing in the Wadden Sea, a SPA in the transboundary maritime coastal area on Dutch, German, and Danish territory, was the cause of the decline in numbers of shellfish-eating birds in that area.

16. The CJEU strictly applied the precautionary principle to the requirement to carry out an appropriate assessment under Article 6(3). An appropriate assessment must be carried out when a plan or project is 'likely' to have a 'significant effect' on a protected site. The CJEU held that such an assessment is required if significant effects "cannot be excluded on the basis of objective information",14 such as scientific studies.15

17. Ultimately, in order for the plan or project to be authorised, the assessment must show that it is certain that it will not adversely affect the integrity of the site.16 In assessing the

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13 Case C-127/02 Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels vs Staatssecretaris van Landbouw, Natuurbeheer en Visserij [2005] ECR I-7405 (Waddenzee)
14 n.14, Judgment of the CJEU, para 44
15 n.14, Judgment of the CJEU, para 39, 45
16 n.14, Judgment of the CJEU, para 59
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4. Article 6(3): the precautionary principle and proportionality

1. Article 6(3) of the Habitats Directive requires that appropriate assessment of the possible effects of a plan or project must be made in relation to the site, because the loss or destruction of a site could result in overall loss of important habitat or species, and weakening the integrity of the site.

2. The significance of the potential effects of a plan or project, the characteristics and specific environmental conditions of the site will be among the factors considered.

3. The CJEU also considered the precautionary principle in the case of Sweetman. It concerned a candidate SAC of limestone pavement in the Republic of Ireland. An Bord Pleannála (the Planning Board) granted consent for a proposed road scheme that would affect 270 ha of this priority habitat type. It stated that habitat lost would only be a small proportion of the habitat in question, and therefore would not affect the integrity of the site as a whole.

4. The CJEU rejected An Bord Pleannála's arguments. Firstly, it confirmed that the Habitats Directive applied to candidate Natura 2000 sites. Secondly, it stated that the precautionary approach to appropriate assessments would apply "all the more" where a priority habitat type is at stake. The CJEU then endorsed the Advocate General's view that, in order for 'site integrity' not to be adversely affected, the protected habitat (whose preservation was the objective justifying the designation of the site) must be preserved at a 'favourable conservation status'. Preserving a protected habitat at 'favourable conservation status' requires "the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type." The CJEU therefore found that national authorities must refuse to authorise developments where "there is a risk of lasting harm to the ecological characteristics of sites which host priority natural habitat types."

5. The applicability of the precautionary principle was further explored in the Briels case. That case concerned the proposed widening of a motorway in the Netherlands, which would result in the loss of a particular section of a nearby SAC, which contained molinia meadows. To reduce the negative impact of the development, hydrological improvements were proposed. This would allow for the creation of a new, larger molinia meadow area, effectively off-setting the loss of protected area caused by the development.

6. The CJEU, in Briels, clarified that the precautionary principle is integrated into Article 6(3), and that various factors must be considered in relation to the 'integrity of the site'. Those factors include the possibility of effects manifesting themselves in the short, medium, and long-term. In this case, the benefits it was claimed would result from the proposed new habitat could not be predicted with sufficient certainty and therefore could not be taken into account.

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17 n.14, Judgment of the CJEU, para.47-49
18 n.13
19 Priority habitats are those that are considered especially vulnerable and in need of protection, and are marked with an asterisk in Annex I to the Habitats Directive. For more information on priority habitats and species, please see the first briefing in this series, ‘An overview of Natura 2000’.
20 n.13, Judgment of the CJEU, para.42
21 n.13, Judgment of the CJEU, para.39. For the Advocate General's opinion please see Sweetman, Opinion of Advocate General Sharpston 22 November 2012, para. 54-56. 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.
22 n.13, para.43
23 Case C-521/12 Briels and Ors v Minister van Infrastructuur en Milieu [2014] P.T.S.R. 1120
24 For a further discussion of this case, and the applicability of compensation and mitigation measures in Article 6, please see briefing 7 in this series Article 6, compensation v. mitigation measures.
25 n.12, 4.6.3
account in the appropriate assessment. Authorities must refuse to authorise a plan or project where there is uncertainty regarding its potentially negative effects.26

Proportionality

The proportionality principle requires that EU action, both in content and in form, shall not go beyond what is suitable and necessary to achieve its objectives. This is set out in Article 5(4) TEU. The precautionary principle applies to actions by EU institutional actors and Member States, in relation to EU law. EU measures, or proposals for measures, that overstep this limitation, and cannot be justified, may be legally challenged.

22. The principle of proportionality is of particular relevance to the derogation to Article 6(3) of the Habitats Directive set out in Article 6(4). This derogation relates to 'imperative reasons of overriding public interest'. For further analysis of the role of the principle of proportionality in that context, please see briefing 5 in this series, 'Article 6(4): the precautionary, proportionality and subsidiarity principles'.

Conclusion

23. As the three cases above illustrate, the precautionary principle underpins Article 6(3). The precautionary principle is of practical relevance at several stages of the application of Article 6(3):

- when deciding whether or not an appropriate assessment is required, i.e. where 'significant effects' cannot be ruled out on the basis of objective information (Waddenzee);
- in defining the content and scope of an appropriate assessment, i.e. the assessment of effects on site integrity should not take account of any compensation measures associated with the project where their compensatory effect is uncertain (Briels); and
- in deciding whether or not the plan or project should be authorised, i.e. if the appropriate assessment shows that constitutive characteristics, which are connected to the presence of a priority habitat (and that priority habitat had been the basis of the designation of the site as protected) would be adversely affected, authorisation must not be granted (Sweetman).

24. An analysis of Article 6(4), and the application to it of the precautionary and proportionality principles, is provided in the next briefing in this series, Article 6(4): the precautionary, proportionality, and subsidiarity principles.

26 n.24, para.26
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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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