6. Article 6(3): What constitutes a ‘plan or project’?
6. What constitutes a ‘plan or project’? (Article 6(3))

November 2015

About the briefings series

1. This is the sixth briefing in ClientEarth’s series ‘European protected areas - navigating the legal landscape.’ In this briefing, we outline what constitutes a ‘plan’ or ‘project’ for the purposes of Article 6(3) of the Habitats Directive.

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 Directive, 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 network, 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
About this briefing

4. As discussed in the previous briefings in this series, Article 6(3) of the Habitats Directive requires the assessment of a ‘plan or project’ that is ‘likely to have a significant effect’ on a protected site. It states that:

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

5. The terms ‘plan’ and ‘project’ are not defined in the Habitats Directive. The understanding of those terms must, therefore, be informed by their interpretation by the EU Courts and European Commission guidance. As discussed below, the term ‘plan or project’ should be taken as having a broad meaning, which covers a wide range of activities.

6. The definition of ‘plan or project’ is important, not only for triggering the application of Article 6(3), but also for defining the scope of an appropriate assessment of the implications of a plan or project for the Natura 2000 site concerned.

‘Plans or projects’: a broad definition

7. Article 6 does not set a minimum requirement as to the cost or size of a plan or project. The scale of the plan or project is therefore irrelevant, and Article 6(3) is applicable to even very small scale plans or projects.

8. The European Commission has issued guidance as to the interpretation of the terms ‘plan’ and ‘project’. While guidance from the Commission is not legally binding, it can offer helpful assistance in interpreting requirements under the law. In that regard, the Commission guidance makes two key remarks that suggest a broad interpretation of the terms ‘plan’ and ‘project’. Firstly, it notes that the Habitats Directive does not circumscribe their scope by reference to particular categories. Secondly, the more narrowly those terms are defined, the more restricted the potential to balance conservation interests against damaging activities. The Commission states that the key limiting factor as to what should be considered as a ‘plan or project’ under Article 6(3) is whether or not they are likely to have a significant effect on the site.

9. A purposive approach to interpretation has also been taken by the Court of Justice of the European Union (CJEU) in cases where it has considered the meaning of the terms ‘plan’ and ‘project’ under Article 6(3). As an example of the broad definition, in the Waddenzee case, the Advocate General stated that "[f]or unintentional damage to Natura 2000 sites to
be avoided effectively, all potentially harmful measures must, where possible, be subject to the procedure laid down in Article 6(3) of the [Habitats] Directive. Therefore, the terms 'plan' and 'project' should be interpreted broadly, not restrictively.\(^8\)

'Plan'

10. The CJEU has taken a broad interpretation of the term 'plan'. In Commission v France, for example, the Advocate-General made the following comments, which aligned with the CJEU's subsequent judgment:

"In the context of Article 6(3) the term 'plan' must … be interpreted extensively. The sites likely to be affected by such plans are, by definition, sites of Community importance, which benefit from the protection regime established in accordance with Article 6(1) and (2); the adoption of a narrow interpretation of the term 'plan' would be contrary to both the wording of Article 6(3) ('[any] plan or project'), and the conservation objectives which the designation of [SACs] seeks to pursue.\(^9\)"

11. Furthermore, the Commission's guidance indicates that land-use plans and sectoral plans should be considered to be covered by Article 6(3), to the extent that they are likely to have relevant significant effects on a Natura 2000 site.\(^10\) Land-use plans include regional or geographically extensive spatial plans that may not be applied directly, but which may form the basis for more detailed plans, or serve as a framework for development consents, which then have direct legal effects.\(^11\) Sectoral plans, meanwhile, include transport network plans, waste management plans, and water management plans. All of these may have significant effects on Natura 2000 sites. Indeed, in Commission v. United Kingdom, the CJEU held that the term 'plan or project' included land use plans under town and country planning law.\(^12\)

12. The Commission's guidance makes a distinction between (1) 'plans' which have a clear and direct link between their content and likely significant effects, and (2) 'plans' which are in the nature of policy statements, such as policy documents which show general political will or intention. The latter may only be considered 'plans' for the purposes of Article 6(3) where the link between their content and likely significant effects on a protected site is clear and direct. If it simply a general plan, for example, a plan to achieve sustainable development goals across the territory of a Member State, it is not appropriate to treat it as a 'plan' for the purposes of Article 6(3).\(^13\)

13. Plans which relate to the conservation management of a site, either individually or as components of other plans or projects, should also be excluded from the provisions of Article 6(3).\(^14\)

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8 Ibid, Opinion of Advocate-General Kokott of 29 January 2004, para.30
9 Case C-256/98 Commission v France, Opinion of Advocate-General Fennelly 16 September 1999, para.33
10 n.5, 4.3.1 and 4.3.2
11 n.5, 4.3.2
12 Case C-6/04 Commission v. United Kingdom [2005] ECR I-9017
13 n.5, 4.3.2
14 n.5, 4.3.1
'Project'

14. The term 'project' refers to undertakings which are more site-specific.

15. The CJEU has supported a broad definition of 'project' by drawing an analogy with the Environmental Impact Assessment Directive, for example, in the Waddenzee case. 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. In deciding the case, the CJEU was required to determine whether cockle fishing fell within the concept of 'project' under Article 6(3).

16. The CJEU began by examining the definition of 'project' under Article 1(2) of the EIA Directive. It found that the definition was relevant to defining the concept of 'project' under the Habitats Directive, since both directives operate in a similar context, namely by seeking to "prevent activities which are likely to damage the environment from being authorised without prior assessment of their impact on the environment."  

17. Article 1(2) of the EIA Directive defines a 'project' as:

- "the execution of construction works or of other installations or schemes,
- other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources".

18. When assessed in light of that definition, the CJEU considered that the mechanical fishing of cockles fell within the concept of 'project' for the purposes of Article 6(3).  

19. The CJEU then held that the fact that the activity had been carried out at the protected site periodically for several years, and that a licence had to be obtained for it every year, did not prevent it from being considered, at the time of each application for a new licence, as a distinct plan or project within the meaning of the Habitats Directive. Activities carried out periodically can therefore be included within the broad definition of 'plan or project'.

20. The CJEU has taken a similar approach in subsequent cases, using the EIA Directive definition of 'project' to guide its interpretation of the Habitats Directive. In Stadt Papenburg, for example, it held that dredging works in respect of a navigable channel could fall within the concept of 'project' under Article 1(2) of the EIA Directive, and that definition was relevant to the interpretation of 'plan' or 'project' under the Habitats Directive.

16 n.7, para.26
17 n.7, para.29
18 n.7, para.28
19 Case C-226/08 Stadt Papenburg v Bundesrepublik Deutschland [2010] Env.L.R. 19
What constitutes a ‘plan or project’? (Article 6(3))

November 2015

As the Habitats Directive does not draw a distinction between new projects and modifications to existing ones, it may be necessary to undertake assessments of changes to existing projects. This may include proposals to change the intensity of existing projects. For example, in the UK it was decided that a proposal to introduce larger, more powerful ferries to an existing ferry route would constitute a ‘plan or project’. This is indicative of the UK’s interpretation of the terms.

21. The Commission's guidance also makes reference to Article 1(2) of the EIA Directive in defining a ‘project’. This is again due to the fact that they operate in a similar context, by setting rules for the assessment of environmentally significant projects. The guidance notes that the definition of ‘project’ is a broad one, which is not limited to physical construction. As such, the term ‘project’ does not refer exclusively to building projects but could include, for example, a significant intensification of agriculture.

22. The Commission also notes that where one or more specific projects are included in a ‘plan’ in a general way, an assessment of the ‘plan’ does not exempt the specific projects from undergoing individual assessment under Article 6(3). In such cases, assessment of the project must examine the details not covered by the assessment of the plan.

Conclusion

23. The terms ‘plan’ and ‘project’ have been given a broad interpretation. As made clear in Waddenzee, Article 6(3) must be interpreted in light of the broad objective of the Habitats Directive: achieving a high level of protection for the environment.

24. The CJEU has developed the interpretation of ‘project’ with reference to the definition of ‘project’ in the EIA Directive. The Commission has built upon this expansive approach. ‘Projects’ include both construction and other works, such as variations in use (or intensity of use) of the natural environment. As size is not a defining feature of a ‘project’, developments may be very large or very small in scale. ‘Plans’ include land-use plans, and sectoral plans or programmes. They do not, however, include general policy statements.

25. Ultimately, the terms ‘plan’ and ‘project’ are central to the scope and success of the Natura 2000 regime. They have been interpreted broadly to ensure that the Habitats Directive is effective in providing protection to biodiversity.

26. For more details of Article 6 of the Habitats Directive, and how it operates in practice, please see the other briefings in ClientEarth’s series ‘European protected areas - navigating the legal landscape.’

20 R (on the application of Akester and another (on behalf of the Lymington River Association)) v Department for Environment, Food and Rural Affairs and another [2010] EWHC 232
21 n.5, 4.3.1
22 n.5, 4.3.1
23 n.5, 4.3.2
24 n.5, 4.3.3
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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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