8. Article 6(4): Absence of alternative solutions and imperative reasons of overriding public interest
European protected areas - navigating the legal landscape
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June 2016

About the briefing series

1. This is the eighth briefing in ClientEarth’s series ‘European protected areas - navigating the legal landscape.’ In this briefing, we examine the meaning of ‘absence of alternative solutions’ and ‘imperative reasons of overriding public interest’ for the purposes of Article 6(4) 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.

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
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About this briefing

4. As discussed in previous briefings in this series, Article 6(3) of the Habitats Directive states that any plan or project that is likely to have a significant effect on a Natura 2000 site must undergo an 'appropriate assessment'. Where that assessment concludes that the plan or project would have a negative effect on the site’s integrity, it may only proceed if the conditions under Article 6(4) are fulfilled. Those conditions are that there must be an 'absence of alternative solutions', and there are 'imperative reasons of overriding public interest' (IROPI) in favour of proceeding. The text of Article 6(4) reads as follows:

"If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted. Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."

5. This briefing discusses the tests concerning the 'absence of alternative solutions' and 'IROPI' under Article 6(4). The requirement to take 'compensatory measures' under Article 6(4) may arise after those tests have been carried out, and can be very important in determining whether or not a plan or project may proceed. For more information on compensatory measures, please see the seventh briefing in this series, 'Article 6: compensation v. mitigation measures'.

6. The Habitats Directive does not define 'alternative solutions' or 'IROPI'. Understanding of those terms is assisted, however, by reference to decisions of the Court of Justice of the European Union (CJEU), and various guidance documents.

7. This briefing will, firstly, examine the purpose and scope of the tests under Article 6(4), and, secondly, review the requirements of those tests.

Purpose and scope of Article 6(4) tests

8. Article 6(4) represents a derogation to the safeguards in Article 6(3). The CJEU has underlined that, for that reason, it must be interpreted strictly. The purpose of the tests under Article 6(4) is to enable Member States to take all compensatory measures to ensure the preservation of the overall coherence of Natura 2000. That enables it to be ensured that the conservation of biodiversity is properly balanced against other interests. The burden of

4 Case C-304/05 Commission v Italy 2007 [ECR] I-07495, para.82
5 Case C-441/03 Commission v Netherlands, judgment of 14 April 2005, 2005 [ECR] I-03043, para.27
proving that the requirements of Article 6(4) have been met rests with the person seeking the derogation.6

9. The implied first requirement of Article 6(4), then, is compliance with Article 6(3).7 As Article 6(4) provides a derogation to Article 6(3), it can only apply after a plan or project has been assessed in accordance with that provision. In order to determine the nature of any compensatory measures, which is the purpose of the tests under Article 6(4), the damage a plan or project would cause to the site must be precisely identified. The CJEU has noted that the Article 6(3) assessment provides knowledge on the implications of a plan or project, in light of the conservation objectives of the site in question. That knowledge is necessary before Article 6(4) can be applied as, without it, the conditions for the application of the derogation cannot be assessed.8

10. The European Commission elaborates on this point in its guidance on Article 6(4).9 While guidance from the Commission is not legally binding, it can offer helpful assistance in interpreting requirements under the law. The Commission states that "[b]eing an exception to Article 6(3), [Article 6(4)] can only be applied to circumstances where all the conditions required by the [Habitats] Directive are fully satisfied. In this regard, it falls on whoever wants to make use of [the exception in Article 6(4)] to prove, as a prerequisite, that the aforementioned conditions do indeed exist in each particular case".10

11. Assuming that the procedures under Article 6(3) have been properly carried out, the next step is to examine whether the substantive requirements of Article 6(4) have been met. Article 6(4) requires two steps to be completed: the consideration of alternative solutions, and the existence of IROPI. In completing these steps, the damage to the site that would be caused by the plan or project must be weighed up against both the alternative solutions and the IROPI.11

Absence of alternative solutions

12. The Habitats Directive does not specify how an 'absence of alternative solutions' will be determined, or by whom. Decisions of the CJEU have, however, provided some guidance.

13. Firstly, the CJEU has ruled that it is for the authorising authority to decide whether or not there is an absence of alternative solutions, not the proponent of a plan or project. In Commission v France,12 the Advocate General13 stated that the authority "may, in weighing up all the advantages and disadvantages of other variants of the plan or project applied for, reach a different conclusion that that reached by the [proponent]. In choosing between

6 Case C-239/04 Commission v Portugal, 2006 [ECR] I-10183: Opinion of the Advocate General of 27 April 2006, para.41. 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
7 For more information on the requirements of Article 6(3), please see the other briefings in this series
8 n.5, para.83
10 Ibid, p.4
11 n.5, para.83
12 Case C-241/08 Commission v France 2006 [ECR] I-10183, opinion of the Advocate General of 27 April 2006, para.98
13 See n.7
various alternatives, the [proponent] will normally be influenced by his own interests. In contrast, Article 6(4) ... permits an area of conservation to be affected only if this is required by [IROPI]. Only the authorising authority can decide this."

14. The proponent of the plan or project is, however, responsible for demonstrating that the requirements of Article 6(4) have been met. In Commission v Portugal, the Advocate General stated that it is for the person "relying on [the derogation under Article 6(4)] to show that the requirements of the derogating provisions have been complied with. [Therefore] the Commission is not required to demonstrate an alternative route, but only to raise reasonable doubts as to whether [the person relying on the derogation] has complied with the requirements of Article 6(4)".14

15. That case involved a motorway development between Lisbon and the Algarve, part of which ran through the Castro Verde SPA. That SPA hosted at least 17 species of bird listed in Annex I of the Birds Directive. The Portuguese authorities approved the development, despite an assessment showing that it would have an adverse effect on the birds on the site. The Commission, therefore, brought an action against Portugal for failing to fulfil its obligations under Article 6(4). In deciding on that action, the CJEU and the Advocate General were required to consider the 'absence of alternative solutions' test.

16. The Advocate General noted that the test is intended to prevent damage to protected sites. It does this by determining whether the project's objectives could be achieved in a less damaging, or non-damaging, way. This, essentially, involves the application of a proportionality test: where there are several appropriate measures, the least onerous option must be chosen. All potential solutions must be examined so that the least onerous option can be identified. The more it appears that a potential alternative may achieve the project aims without giving rise (beyond reasonable doubt) to adverse effects on a Natura 2000 site, the harder it is to exclude it.

17. The Advocate General specified that this does not mean, however, that the option which would have the least adverse effect on the site must be chosen. Rather, a balance must be struck between the adverse effect and the relevant IROPI. The decisive factor is whether the IROPI requires the implementation of specifically that option chosen by the proposed plan or project, or whether a less damaging alternative would do. To make that determination, the various alternatives must be examined on the basis of comparable scientific criteria, both with regard to their effects on the site, and the relevant IROPI.15

18. Applying this logic, the CJEU noted that, while the Portuguese authorities had reviewed and rejected a number of alternative solutions, there were others that they had not examined. Those others could not be immediately ruled out as incapable of constituting alternative solutions, even where they might present certain difficulties. The CJEU, therefore, found Portugal to be in breach of its obligations under Article 6(4).16

14 n.7, Opinion of the Advocate General, para.41
15 n.7, Opinion of the Advocate General, para.42-46
16 n.7, Judgment of the CJEU, para.37-39
19. Adding to its interpretation of the 'alternative solutions' test, the CJEU, in *Grüne Liga*, stated that if an option entails risks of potentially significant deterioration or disturbance, within the meaning of Article 6(2), it cannot be regarded as an alternative solution under Article 6(4). 17

20. The Commission guidance on Article 6(4) underlines the importance of examining all alternatives, including the option of doing nothing. It states that the first step for competent authorities is to analyse and demonstrate that there is a need for the plan or project in the first place. Second, the competent authorities must examine solutions other than the one proposed, which may better respect the integrity of the site. All feasible alternatives must be analysed (and should normally have been identified in the Article 6(3) assessment). Such alternatives might include, for example, alternative locations or routes, different scales or designs of development, or alternative processes. In particular, the relative performance of the alternatives with regard to the site's conservation objectives, its integrity, and its contribution to the overall coherence of Natura 2000 should be assessed. 18

21. The UK Department for Environment, Food and Rural Affairs (Defra) has also issued guidance on the application of Article 6(4). 19 While not legally binding, and applicable only in the UK, it provides further analysis of the 'alternative solutions' test. It states that the competent authority must ensure that there are no feasible alternative solutions. To do so, it must determine the range and type of possible alternatives to be considered, including the 'do nothing' option. It must then use its judgment to decide what is reasonable in a given case. Alternatives must be considered objectively and broadly. Defra also states that, in some cases, the authority may need to consider options that have not been identified by the proponent of a plan or project, or that are delivered by someone other than the proponent, using different routes, scale, size, methods, or timing. 20

22. The Defra guidance also states that, while they are separate tests, it may be helpful to initially consider alternative solutions and IROPI together. This is because the consideration of alternative solutions includes the identification of the overall objective of the plan or project, and the assessment of whether alternatives would deliver that goal. It is a waste of effort to assess alternative solutions if they will not deliver the same objective, or if it is very clear that the nature of its objective means that a plan or project will not meet the IROPI test. 21

**Imperative reasons of overriding public interest**

23. Once it has been established that there is an 'absence of alternatives' to the proposed plan or project, it must be determined whether there are any IROPI in favour of proceeding with it.

24. The first paragraph of Article 6(4) states that IROPI include reasons of a "social or economic nature". The second paragraph, meanwhile, notes that, where a site hosts a priority habitat

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18 n.10, p.6-7
20 Ibid, para.6-7
21 n.20, p.19
or species, only issues relating to "human or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other [IROPI]" may be considered. Human or public safety and beneficial consequences of primary importance for the environment are therefore included within the scope of IROPI.

25. In Solvay, the CJEU considered the meaning of IROPI. It stated that, for an interest to be capable of justifying a plan or project under Article 6(4), it must be both 'public' and 'overriding'. That means that "it must be of such an importance that it can be weighed up against the objective [in the Habitats Directive] of the conservation of natural habitats and wild fauna and flora". Works relating to the location or expansion of a business will only satisfy those conditions in exceptional circumstances. It cannot be ruled out, however, that a project of private character may present an overriding public interest, in light of its nature, and its economic and social context. In Solvay, the CJEU held that the mere construction of infrastructure designed to accommodate a management centre for a private company cannot constitute an IROPI. This judgment suggests that a project of private character may present IROPI where, by its nature, it provides public benefits. For example, a development may bring greater employment to a deprived area. Such projects are likely to pass the IROPI test only in exceptional circumstances.

26. In Commission v Portugal, the Advocate General indicated that IROPI can override site protection only where greater importance attaches to those reasons. In other words, the damage caused by a development must not be disproportionate to the benefits it aims to achieve.

27. The Commission guidance on Article 6(4) builds upon this understanding. It states that the competent national authorities must perform a balancing exercise between the conservation objectives of the site affected and the IROPI. The balance must weigh in favour of the IROPI for a plan or project to be approved. In determining that balance, the following must be considered:

- the public interest must be overriding: not every kind of public interest of a social or economic nature will be sufficient, in particular when seen against the weight of the interests protected by the Habitats Directive. Public interests may, however, be promoted either by private or public bodies; the important factor is that public interests be served and demonstrated;
- the interest must be long-term: it is reasonable to assume that short-term economic or other interests, which would only yield short-term benefits for society, would not be sufficient to outweigh the long-term conservation objectives protected by the Habitats Directive.

28. Defra's guidance on Article 6(4) echoes that analysis. It states that, when identifying IROPI, a competent authority must consider whether all three elements of the test are met:

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22 Case C-182/10 Solvay and Others v Région wallonne, www.cueria.europa.eu: Judgment of 16 February 2012, para.75-78
23 n.7, Opinion of the Advocate General, para.45
24 n.10, p.7-8
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- Imperative: the plan or project must be necessary, whether urgent or otherwise, for one or more of the reasons permitted under Article 6(4);
- Overriding: the interest served by the plan or project must outweigh the harm to the integrity of the site;
- Public interest: a public good, rather than a solely private interest, must be delivered. Public interest can occur at national, regional, or local level, provided the other elements of the test are met. In practice, plans or projects which enact, or are consistent with, national strategic plans or policies, may be more likely than others to show IROPI.25

29. With these interpretations in mind, it is useful to review some of the case-law applying the IROPI test under Article 6(4).

30. The case of Commission v Bulgaria concerned the approval of the installation of several windfarms within a proposed SPA on the Black Sea coast. The Bulgarian authorities made the argument that those projects had been approved prior to Bulgaria's accession to the EU and, consequently, before the inclusion of the sites in question in the Natura 2000 network. For that reason, they argued, the Habitats Directive did not apply.

31. The Advocate General considered that the primary factors to be taken into account when identifying the public interest, in that context, included not only the interest in the use of wind energy and preserving jobs, but legal certainty and the protection of legitimate expectations. Legal certainty and legitimate expectations arise where a person has relied on information communicated to them by an authority, and they would suffer harm if the authority went back on that information. She concluded that, provided that all reasonable steps are taken to reduce adverse effects, legal certainty and legitimate expectation should, in most cases, prevail over the interest in the protection of the natural assets in question. As Bulgaria had not yet identified the extent of those adverse effects, meaning that the requirements of Article 6(3) had not been met, the conditions required for using the derogation of Article 6(4) had not been satisfied.26

32. The judgment of the CJEU added that the implementation of the project in question in that case, and the activity generated by the installations, fell within Article 6(2) of the Habitats Directive, which requires states to avoid deterioration and disturbances of habitats and species in Natura 2000. That is so even though the projects were authorised before Bulgaria joined the EU. This observation by the CJEU, therefore, provides some protection to the sites in question, even though Article 6(4) did not apply in that case.27

33. It should be noted that this case is somewhat peculiar in that the development was approved before Bulgaria joined the EU, meaning that EU law did not apply to it at that time. As such, it is arguable that legal certainty and legitimate expectation are not IROPI where a state is already an EU member when the development is proposed.

34. A somewhat similar set of facts arose in Grüne Liga. In that case, a road bridge was approved for construction in the Elbe Valley, on a site that was subsequently declared to be

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25 n.20, para.16-18
27 For more information on Article 6(2), please see the first briefing in this series, ‘An overview of Natura 2000’
a SAC. The construction of the bridge had actually been completed by the time the case came before the CJEU. The question arose as to whether the bridge should be demolished, if it were concluded that its construction was in breach of the legal requirements. The CJEU and the Advocate General agreed that any plan to demolish the bridge would need to be assessed as a plan or project under Article 6(3). They also agreed that economic cost (such as the cost of demolishing the bridge or compensating the developer) is not as important as the objective of conserving natural habitats and species when performing the balancing exercise between conservation and IROPI. To decide otherwise, the Advocate General noted, would be to “favour maintaining environmentally deleterious projects on the mere basis that it was too expensive to remedy a failure to observe correctly the requirements of the [Habitats Directive]".28

Priority habitats and species

35. Where the site in question hosts priority habitats or species,29 the categories of IROPI that may apply are more limited. Specifically, only plans or projects relating to "human or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other [IROPI]" may be considered.

36. The more limited nature of IROPI in relation to priority sites was illustrated in Commission v Spain. That case involved the approval of mining operations in a Natura 2000 site which was host to the brown bear, a priority species. The noise and vibrations caused by the mines, as well as the closure of a transit corridor of great importance to the bear population, caused significant disturbances to the site. The Spanish authorities argued that there were IROPI in favour of maintaining the mining operations, namely security of supply, the maintenance of employment, and the definitive character of the authorisations. The CJEU held that the reasons could not support a derogation in that case, as they did not fall within the specific categories listed in Article 6(4), and the site was host to a priority species.30

37. IROPI in priority sites were, again, considered in Aitoloakarnanias. In that case, the CJEU confirmed that, where a site hosts a priority species or habitat, the reasons for the derogation must relate to human health or public safety, or to beneficial consequences of primary importance for the environment. Where they do not fall into those categories, they may be classified as IROPI only if the Commission has provided an opinion. Where the Commission has not given an opinion, reasons that do not fall within those categories cannot justify a derogation.31

38. That case involved a project for the partial diversion of the river Acheloos in Greece, which would have a significant effect on a number of Natura 2000 sites hosting priority species and habitats. The reasons put forward to justify the derogation were irrigation, and ensuring drinking water supply. The CJEU held that the supply of drinking water, in principle, falls

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28 n.18, Judgment of the CJEU, para.76-77; Opinion of the Advocate General, para.69-70
29 Priority habitats and species are those considered to be especially vulnerable and in need of protection, and are marked with an asterisk in Annexes I and II to the Habitats Directive.
within considerations relating to human health, and that irrigation could, in some circumstances, have beneficial consequences of primary importance for the environment.\(^{32}\)

39. The Advocate General, meanwhile, found that irrigation of agricultural land could be considered to be an overriding public interest, depending on whether the benefits of the development outweighed its adverse effects. In performing the weighing exercise, Member State authorities enjoy an 'appropriate margin of discretion'. This means that they are free to use their judgment to decide on the best course of action, so long as it remains within the limits of the law. The Advocate General also noted that public interests that are not specifically mentioned in Article 6(4) are less important than those that are. While these observations were made in relation to the Water Framework Directive (which was also at issue in the case),\(^{33}\) the Advocate General indicated that similar considerations would apply to the Habitats Directive.\(^{34}\) In its judgment, the CJEU seemed to agree with the Advocate General's interpretation of the Water Framework Directive on these points.\(^{35}\)

**Conclusion**

40. Article 6(4) offers a derogation to the safeguards for Natura 2000 sites provided by Article 6(3). It must be interpreted strictly, and it is the responsibility of the competent national authorities to determine whether or not the conditions for the derogation have been met.

41. The first requirement under Article 6(4) is that there must be an 'absence of alternative solutions'. In order to determine whether or not that is the case, all potential solutions must be examined, including the 'do nothing' alternative.

42. The second requirement is that there must be imperative reasons of overriding public interest (IROPI) for proceeding with the plan or project. Such IROPI may be of an economic or social nature, though the categories of reason that may justify a derogation are substantially limited where the site in question hosts a priority species or habitat. In order to determine whether IROPI justify the execution of a plan or project, the benefits to be gained by the development must be weighed against the damage that would be caused to the site.

43. For more information on Natura 2000 and Article 6, please refer to the other briefings in this series. Compensatory measures, which are of particular relevance to a project that might be allowed to proceed under Article 6(4), are discussed in the seventh briefing in this series, Article 6: compensation v. mitigation measures.

\(^{32}\) Ibid, para.125-126


\(^{34}\) n.32, Opinion of the Advocate General, para.88-90, 222

\(^{35}\) n.32, Judgment of the CJEU, para.67-68
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