5. Article 6(4): The precautionary, proportionality, and subsidiarity principles
European protected areas - navigating the legal landscape

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November 2015

About the briefings series

1. This is the fifth briefing in ClientEarth's series 'European protected areas - navigating the legal landscape.' In this briefing, we provide a brief general understanding of the precautionary, proportionality, and subsidiarity principles, and how they have influenced the application 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
The precautionary principle

4. As detailed in the previous briefing in this series, 'Article 6(3): the precautionary principle and proportionality', the precautionary principle represents one of the fundamental objectives underlying EU environmental law, found in Article 191(2) of the Treaty on the Functioning of the European Union (TFEU).

5. To recap, the precautionary principle sets out the EU's approach to risk regulation in environmental decision making. This means that competent authorities are required to undertake appropriate assessments of the plan or project under consideration, and make decisions on the basis of the best scientific evidence available. The precautionary approach means that action can be taken to protect against risks to human health and/or to 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 regulations that are proposed to be put in place, or from the failure to impose regulations.

6. The application of the precautionary principle is demonstrated in the Court of Justice of the European Union's (CJEU) decision in Waddenzee. In that case, it was established that the issuing of annual licences permitting cockle fishing in a SPA was a plan or project under Article 6(3) of the Habitats Directive, and was thus subject to the Article 6 tests to assess whether it should be authorised or not. In that instance, it could not be proved with certainty that the cockle dredging would not adversely affect the integrity of the site. Therefore, following the precautionary principle, the activity was not allowed to continue.

The proportionality principle

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) Treaty on European Union (TEU). The proportionality principle applies to actions taken by EU institutional actors and Member States, in relation to EU law. EU measures, or proposals for measures, that overstep this limitation, without justification, may be legally challenged.

How the proportionality principle works

7. The proportionality principle seeks to prevent EU actions from going beyond what is necessary to achieve their intended outcomes. This means that where the EU (or a Member State) acts in relation to EU law, that action (i) must be suitable to achieve the desired
European protected areas - navigating the legal landscape

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8. The proportionality principle aims at striking a fair balance between competing interests. In order to do this, those interests must, firstly, be identified, and, secondly, be assigned some level of weight or value.

9. Inquiry into whether a measure strikes a fair balance is a three stage process, in which the following are examined:

1. whether the measure is suitable to achieve the objective;
2. whether the measure is necessary to achieve the objective; and
3. whether the measure imposes a burden that is excessive in relation to the objective it seeks to achieve.

10. Judges involved in hearing legal challenges based on failure to comply with the proportionality principle must not substitute their own value judgments for that of the decision-maker. In other words, a decision will not fail the proportionality tests simply because the judge would have arrived at a different decision from the one that was made. In cases involving discretionary political, economic, or social policy choices, judges will apply a less intensive standard of review than usual, to reflect the discretion enjoyed by policymakers in taking those decisions.8

The subsidiarity principle

11. The subsidiarity principle seeks to determine whether action in a particular area should be taken at the EU level or at Member State level. In many areas of policy, it is possible for both the EU and the Member States to produce regulations. These policy areas are known as areas of shared competence. For the most part,9 shared competence is the default position for policy in the EU.

12. The subsidiarity principle is set out in Article 5(3) TEU. It states:

"... the [EU] shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

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8 Case C-491/01 R v Secretary of State for Health [2004] ECR I-11453, para.123
9 Exceptions include areas of exclusive competence for the EU, set out in Articles 3 TFEU, for example, monetary policy, and establishment of the internal market
13. In other words, the EU may only intervene in areas of shared competence if it is able to act more effectively than the Member States would, if they were to take action at their respective national or local levels.\footnote{EUR-Lex, The Principle of Subsidiarity, Available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:ai0017>} The principle seeks to ensure that regulatory powers are exercised as close to the citizen as possible,\footnote{Novak, P., Fact Sheets on the European Union 2014: The Principle of Subsidiarity (European Parliament, 2014). Available at: http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.2.pdf} as increased decision-making at local and national levels allows for increased participation by citizens.

14. The environment is an area of shared competence under Article 4(2) TFEU. Article 193 TFEU allows Member States to introduce protective measures that are more stringent than those at EU level, subject to compatibility with other EU treaties and legislation. This is known as 'gold-plating', and allows for some national autonomy in the area of the environment.

15. Additionally, the Subsidiarity Protocol\footnote{Protocol (No 2) to the TEU and the TFEU on the application of the principles of subsidiarity and proportionality [2010] OJ C83/206} enhances the role of national parliaments in ensuring compliance with the subsidiarity principle. It is legally binding, but applies only to draft legislative acts. It provides recourse to the CJEU for infringements of subsidiarity. Article 5 of the Subsidiarity Protocol states that draft legislative acts must be justified with regard to the principles of subsidiarity and proportionality. As such, any draft legislative act "should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality."\footnote{Ibid, Article 5}


**Precautionary and proportionality principles: interaction within Article 6**

Article 6 of the Habitats Directive sets out a number of provisions governing the conservation of SACs and SPAs, including the procedural requirements for managing human activities that could affect Natura 2000 sites. Article 6 therefore plays an influential role in establishing the relationship between conservation and activities affecting SACs and SPAs.

Article 6 includes provisions relating to conservation measures for Natura 2000 sites, to steps needed to avoid the deterioration of natural habitats and significant disturbance to species, and to appropriate assessments for plans and projects likely to have a significant effect on Natura 2000 sites. It also sets out the need for compensation measures where harmful plans or projects are carried out for reasons of overriding public interest.

The information below specifically focusses on Article 6(4). Briefing 4 in this series, 'Article 6 of the Habitats Directive: Precautionary and Proportionality Principles' discusses the interaction between the precautionary and proportionality principles as they relate to Article 6.
Article 6(4) of the Habitats Directive

17. Article 6 seeks to balance the advantages of a plan or project against its damaging effects on the conservation of natural habitats. In the Waddenzee case, the Advocate General stated that Article 6, as a whole, incorporates the proportionality and precautionary principles. This is done through Article 6(4), in particular.

18. A measure is proportionate only where it is (1) suitable, (2) necessary, and (3) not disproportionate to the objective pursued. The Advocate General noted in Waddenzee, however, that it would be contrary to the proportionality principle to "require certainty as to the absence of adverse effects on the integrity of the site concerned before an authority may agree to a plan or project."

19. The overarching duty pursued by Article 6 is the maintenance or restoration of protected habitats and species to 'favourable conservation status'. An exception can be made to this duty in the specific and limited circumstances set out in Article 6(4), where imperative reasons of overriding public interest (IROPI) are deemed to supersede that duty, and the balance is tipped in favour of proceeding with the development. In such cases, Article 6(4) makes clear that Member States still have an obligation to ensure the protection of the 'overall coherence' of Natura 2000.

20. A plan or project that will adversely affect the integrity of a protected site can only be authorised under Article 6(4) if three criteria are met: there must be an absence of alternative solutions; compensatory measures must be taken; and there must IROPI in favour of the development. This briefing will consider how the principles of proportionality and subsidiarity interact with Article 6(4) of the Habitats Directive.

Alternative solutions

21. The Habitats Directive provides that a plan or project that will adversely affect a protected site may only be authorised in the absence of alternative solutions. In accordance with the principle of subsidiarity, it is the competent national authorities that should compare potential alternative solutions. National authorities must determine which plan best respects the integrity of the site in question.
22. The European Commission has issued guidance to assist in that comparison exercise. While guidance from the Commission is not legally binding, it can offer helpful assistance in interpreting requirements under the law. The Commission indicates that the reference parameters for the exercise will "deal with aspects concerning the conservation and the maintenance of the integrity of the site and of its ecological functions. In this phase … other assessment criteria, such as economic criteria, cannot be seen as overruling ecological criteria." 19

Compensatory measures

23. Article 6(4) further requires that, where a project or plan that will negatively affect a Natura 2000 site has been approved, 'compensatory measures' must be proposed to "ensure that the overall coherence of Natura 2000 is protected". The European Commission must be informed of any compensatory measures. Such measures must be feasible and effective, since they are critical to the administration of Article 6(4), in accordance with good practice and with the precautionary principle. 20

24. Compensatory measures are intended to offset the negative effects on a habitat or species caused by a proposed plan or project. They should be used as a last resort (see the Briels case 21), since the idea of 'compensation' detracts from the other actions foreseen by Article 6, such as the appropriate assessment, and consideration of alternative solutions. In summary, compensatory measures are only relevant to decision-making in relation to projects that are to be approved on the basis of IROPI, where no alternatives are available. 22

25. It is important to differentiate measures mitigating the impact on the integrity of a site ('mitigation measures'), from 'compensatory measures'. Mitigation measures may be considered in an appropriate assessment carried out under Article 6(3). Compensatory measures, meanwhile, are only referred to in Article 6(4), and cannot be considered at the appropriate assessment stage.

Examining IROPI

26. Article 6(4) requires a balancing act to be performed between the conservation objectives of a Natura 2000 site, and the IROPI pursued by the plan or project. The Commission has provided some guidance on what should be considered as IROPI when balancing these interests.

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19 n.15, 5.3.1
21 Case C-521/12 Briels and Ors v Minister van Infrastructuur en Milieu [2014] P.T.S.R. 1120 (Briels), Opinion of Advocate General Sharpston, para 9. 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. In that case, the Advocate General referred to the European Commission guidance document, 'Managing Natura 2000 Sites' (see n.15), which states "compensatory measures constitute the 'last resort'" (para 5.4.1).
22 For a more detailed analysis of applicability of mitigation and compensatory measures in Article 6, please see briefing 7 in this series: Article 6: compensation v. mitigation measures.
27. Firstly, the public interest must be 'overriding'. As such, not every kind of public interest of a social or economic nature will be deemed sufficient to outweigh the conservation interests pursued by the Habitats Directive.23

28. Secondly, the Commission indicates that it would be reasonable to assume that only long-term public interests will be considered to be 'overriding'. Short-term economic or other interests, which would only result in short-term benefits, would not appear to outweigh the long-term conservation benefits envisaged in the Habitats Directive.24

29. Article 6(4) sets out two alternative procedures that must be followed if a plan or project having significant negative effects on the integrity of a Natura 2000 site is to be authorised. The choice of which to use depends on whether or not there is a priority habitat or species involved.25 In particular, the categories of IROPI that may justify a harmful development are more limited where a site hosts priority habitats or species.

1. Non-priority habitats and species

30. For non-priority habitats and species, IROPI (including those of a social or economic nature) may justify the execution of a plan or project. In such cases, Article 6(4) requires the competent authority to inform the Commission of the compensatory measures adopted. The communication of compensatory measures to the Commission is facilitated by a standard form for supplying information.26 Information on the compensatory measures should be submitted to the Commission either before the measures are implemented, or after the plan or project is authorised but before work has begun.27 The information on the measures provided by the authorities should enable the Commission to understand the manner in which the conservation objectives of the affected site are being pursued in that particular case. It is not the Commission's role, however, to either suggest compensatory measures, or to validate them scientifically.28

31. This procedure requires the authority to clearly define the IROPI relied upon, and how authorisation of the plan or project would enable the objectives relating to those IROPI to be met. It also gives the Commission an opportunity to examine the rationale applied by the authority. In reviewing the information provided to it, the Commission must bear in mind the large amount of choice enjoyed by Member States (known as the 'margin of appreciation') in the practical implementation of specific measures related to Natura 2000 sites, in line with the subsidiarity principle.

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23 n.15, 5.3.2
24 n.15, 5.3.2
25 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.
27 n.21, p.21
28 Ibid, p.23
5. Article 6(4): The precautionary, proportionality, and subsidiarity principles

November 2015

2. Priority habitats or species: Specific IROPI or Commission opinion

32. The second sub-paragraph of Article 6(4) provides for increased protection where the plan or project will affect a site hosting priority habitats or species. In that case, the margin of appreciation afforded to Member States under the subsidiarity principle is more limited. That means that that the freedom of national authorities to authorise developments on the basis of IROPI is more limited where there are priority species or habitats on the site. The only IROPI which may be raised, in such cases, are those relating to human health or public safety, or to beneficial consequences of primary importance for the environment. Other IROPI may only be raised in cases where the Commission has expressed an opinion on the initiative prior to the plan or project being approved.

33. Damage to sites hosting priority habitats and species will therefore only be accepted as superseding the overarching Article 6 duty to maintain or restore 'favourable conservation status', either when specific IROPI are in play, or after an additional independent opinion from the Commission.

34. In accordance with the principle of subsidiarity, the competent national authorities must check whether such IROPI exist. The procedural safeguards in Article 6(4) enable the Commission to become aware of, and thus examine, any "situation of this kind… within the framework of its activity of control on the correct application of [EU] law." The Commission’s opinion is not legally binding and the national authorities may decline to follow it. This means that plans or projects with significant negative effects on priority habitats and species may be implemented even if the Commission’s opinion is to not proceed with the development. In such cases, the decision of the national authorities may be reasonably expected to explain why the Commission’s opinion has not been followed.
Conclusion

37. The balancing exercise between conservation objectives and IROPI is a key aspect of Article 6(4). The precautionary, proportionality, and subsidiarity principles all play an important role that balancing exercise, in ensuring that competing interests are weighed appropriately.

38. Both the proportionality and precautionary principles must be applied in the context of Article 6(4). This means that the form of proportionality applied is influenced by the precautionary principle. The balancing of interests must therefore err on the side of precaution.

39. 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.'
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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.

ClientEarth is funded by the generous support of philanthropic foundations and engaged individuals.

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