Natura 2000
European protected areas - navigating the legal landscape

7. Article 6: compensation v. mitigation measures
About the briefings series

1. This briefing is seventh in the ClientEarth briefing series on ‘European protected areas - navigating the legal landscape’. In this briefing, we provide a short and simple overview of the distinction between mitigation and compensation measures for the purposes of Article 6 of the Habitats Directive.¹ The applicability of mitigation and compensation measures to Articles 6(3) and 6(4) will also be examined.

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
Definition of 'compensatory measures' and 'mitigation measures'

4. The meaning of compensation and mitigation, in the context of Article 6, is not entirely clear. While the concept of 'compensatory measures' is used in Article 6(4) in relation to 'projects of overriding public interest', the meaning of the term is not defined in the Habitats Directive. The concept of 'mitigation' is not referred to at all in the Habitats Directive itself, and case-law has described the concept as being somewhat imprecise.4

5. An indication of the distinction between the two concepts can be gathered from guidance issued by the European Commission. While guidance from the Commission is not legally binding, it can offer helpful assistance in interpreting requirements under the law. The Commission distinguishes between:

- 'mitigation measures', which are "those measures which aim to minimise, or even cancel, the negative impacts on a site that are likely to arise as a result of the implementation of a plan or project"; and
- 'compensatory measures', which "are independent of the project (including any associated mitigation measures) [and] are intended to offset the negative effects of the plan or project so that the overall ecological coherence of the Natura 2000 Network is maintained."5

6. Mitigation measures may be proposed by the proponent of the plan or project, and/or may be required by the competent authority.6 In its guidance, the Commission indicates that mitigation measures may cover, for example:

- the dates and timetable of the implementation of the plan or project, for example, to avoid operations during the breeding season of protected species;
- the type of tools and operation to be carried out, for example, to avoid affecting a fragile habitat by using a specific dredge at an agreed distance from the shore; and
- rules determining which areas of the site are strictly inaccessible, for example, the hibernation burrows of a specific species.7

7. As for compensation measures, the Commission indicates that they could consist of "the re-creation of a comparable habitat, the biological improvement of a substandard habitat or even the addition to Natura 2000 of an existing site the proposal of which under the [Habitats Directive] had not been deemed essential at the time of the drawing up of the biogeographical list."8

8. Mitigation measures, therefore, seek to prevent or avoid negative impacts on a protected site from a proposed plan or project. In other words, they aim to prevent harmful effects from ever arising, or from arising to a significant degree. Compensation measures, on the other hand, do not prevent harmful effects, but offset those effects via a separate project.

4 Smyth v Secretary of State for Communities and Local Government [2015] EWCA Civ 174, para.66
7 Ibid, 4.5.2
8 Ibid, 5.4.2
Applicability to Article 6(3) - compensatory measures

9. The Court of Justice of the European Union (CJEU) has established that compensation measures can only be taken into account for the derogation tests for projects of imperative overriding public interest under Article 6(4) of the Habitats Directive. This is not necessarily the case for 'mitigation measures'. In order to understand the difference between the two types of measures, it is useful to begin by considering the Briels case.9

10. Briels 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. In order to reduce the negative impact, hydrological improvements were proposed, which would allow a new, larger molinia meadow area to be created, with the intention of off-setting the loss caused by the motorway development. The CJEU examined whether the provision of new habitat in this way could be considered a 'mitigation measure' which would prevent the development from adversely affecting the integrity of the site. If so, the project could be approved under Article 6(3). If not, the measure could only be examined as a 'compensatory measure' under Article 6(4).

11. The CJEU found that the provision of a new habitat could not be taken into account for the purposes of Article 6(3), and so could not count as a 'mitigation measure'. The provision of new habitat, it noted, did "not guarantee that the project will not adversely affect the integrity of the [existing] site within the meaning of Article 6(3) of the Habitats Directive", and was instead simply providing compensation "after the fact for those effects."10

12. The CJEU emphasised the uncertainties linked to relying on compensatory measures. These uncertainties arise because compensatory measures would take time to bear fruit. The CJEU said that, "as a rule, any positive effects of a future creation of a new habitat which is aimed at compensating for the loss of area and quality of that same habitat type on a protected site, even where the new area will be bigger and of higher quality, are highly difficult to forecast with any degree of certainty and, in any event, will be visible only several years into the future … Consequently, they cannot be taken into account at the procedural stage provided for in [Article 6(3)] of the Habitats Directive."11 That conclusion drew on the Advocate General's reasoning,12 which underlined that an appropriate assessment under Article 6(3) must remove all uncertainties.13 That is, an appropriate assessment must remove all reasonable scientific doubt as to the effect of the proposed project on a protected site.14

13. The Advocate General further reasoned that, as Article 6(4) specifies that compensatory measures are required "where (i) there has been a negative assessment under Article 6(3), (ii) there are no alternative solutions and (iii) the plan or project must go ahead for imperative reasons of overriding

9 Case C-521/12 Briels and Ors v Minister van Infrastructuur en Milieu [2014] P.T.S.R. 1120 (Briels)
10 n.10, Judgment of the CJEU, para. 31
11 n.10, Judgment of the CJEU, para. 32
12 n.10, Opinion of Advocate General Sharpston of 27 February 2014. 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.
13 See also Case C-258/11 Peter Sweetman, Ireland, Attorney General, Minister for the Environment, Heritage and the Local Government v An Bord Pleanála [2014] P.T.S.R. 1092 (Sweetman)
14 n.10, Opinion of the Advocate General, para.11
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public interest”, it would be illogical to say that they could be brought into account at the earlier, Article 6(3) stage.

14. The reasoning in Briels was applied in the UK case of Smyth. In that case, the High Court stated that compensation measures are not applicable for the purposes of assessing the adverse effects of a project under Article 6(3). This is because compensatory measures are not designed to "prevent harm from occurring, but […] would (once harm to a protected site has occurred) provide some form of offsetting compensation so that the harm to the site is compensated by new environmental enhancing measures elsewhere." Compensation measures therefore do not prevent harm from occurring, and so do not "meet the preventive and precautionary objectives of Art 6(3)."

Applicability to Article 6(3) - mitigation measures

15. Mitigation measures, while not explicitly mentioned in the Habitats Directive, have been described as relevant to the second prong of Article 6(3), that is, the examination of potential adverse effects to the site. For example, in Waddenzee, the Advocate General stated that measures to "minimise and avoid harm" may be of relevance to the 'appropriate assessment' under Article 6(3).

16. This approach has been adopted in the UK. In Smyth, the court stated that "a preventive safeguarding measure … which eliminates or reduces the harmful effects which a plan or project would have upon the protected site in question so that those harmful effects either never arise or never arise to a significant degree, … is directly relevant to the question which arises at the Article 6(3) stage and may properly be taken into account at that stage.'

17. It should be noted that there is UK authority to the effect that mitigation measures may also be assessed as part of the first prong of Article 6(3), that is, the examination of likely significant effects to the site.

Conclusion

18. Mitigation measures are measures taken to prevent a project or plan from damaging a Natura 2000 site. They can be relevant to both prongs of Article 6(3). Compensatory measures are measures which are designed to offset the loss to a protected site caused by a plan or project, rather than to prevent or avoid that loss in the first place. Compensatory measures should not be considered in the context of an appropriate assessment under Article 6(3).

19. Compensatory measures must, however, be considered in the context of a decision to authorise a plan or project under Article 6(4). According to Article 6(4), compensatory measures should be taken...
where plans or projects, which are damaging to the integrity of a Natura 2000 site, must nevertheless be carried out for imperative reasons of overriding public interest. Most plans or projects are not required to be carried out for such reasons. As such, compensatory measures will not be considered in arriving at the decision on whether or not to authorise most plans.

20. This position is a reflection of the precautionary principle, which pervades decision-making under Article 6(3). For more on the precautionary principle, see the fourth briefing in this series, 'Article 6(3): the precautionary principle and proportionality'.

21. For more information on where Article 6(4) becomes relevant, please see the eighth briefing in this series, 'Article 6(4): Absence of alternative solutions and imperative reasons of overriding public interest'.
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ClientEarth is a non-profit environmental law organisation based in London,
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