



Assessments of plans and projects according to Art. 6(3) and 6(4) of the Habitats Directive

Vedran Nikolić
DG ENVIRONMENT
Nature unit

Framework seminar on
SEA/EIA/Appropriate assessment
Ljubljana, 29th September 2015



7th Environment Action Program

“Living well, within the limits of our planet”

- 2020 timeframe, 2050 vision, 9 priority objectives
- Commitment by EU and its **Member States**

THEMATIC OBJECTIVES:

- **Protect, conserve and enhance the EU's natural capital**
Fully implement the EU Biodiversity Strategy
- Green & competitive growth – low-carbon, resource-efficient economy
- Health & environment, human well-being

LOCAL, REGIONAL, GLOBAL DIMENSION:

- Urban environment
- International

ENABLING FRAMEWORK:

- **Implementation**
- Information, knowledge base
- Investment
- Integration, coherence





EU biodiversity strategy to 2020

"Our life insurance, our natural capital"

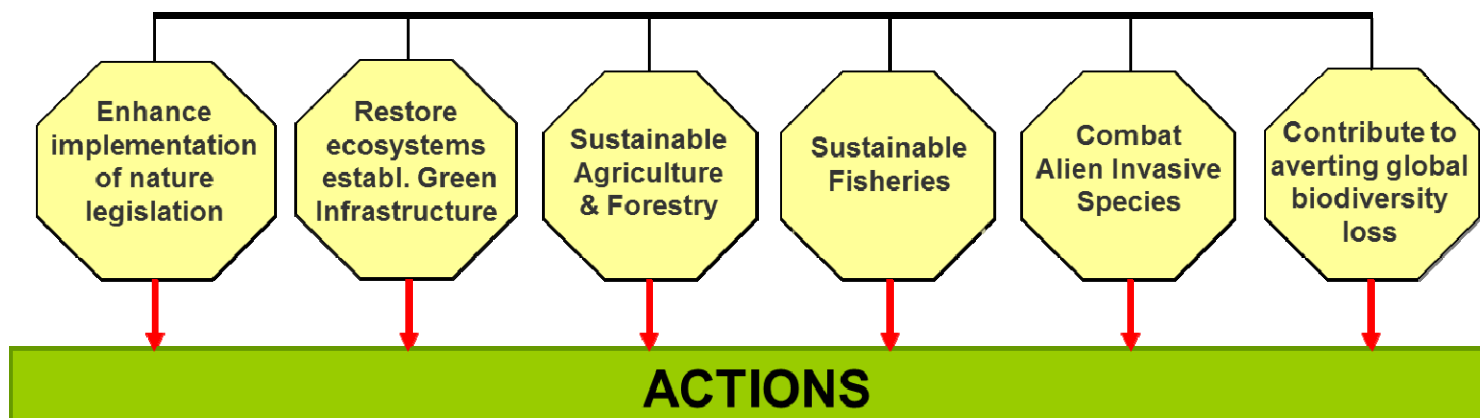
A 2050 VISION

European Union biodiversity and the ecosystem services it provides – its natural capital – are protected, valued and appropriately restored.

A 2020 HEADLINE TARGET

Halt the loss of biodiversity and ecosystem services in the EU and restore them insofar as feasible, and step up the EU's contribution to averting global biodiversity loss.

6 TARGETS



1979: The Birds Directive (consolidated version 2009)

- *Protects all naturally occurring birds species in the wild state in the EU.*
- *Overall objective is to maintain the populations of all wild bird species in the EU at a level which corresponds to their ecological requirements, or to adapt the population of these species to that level.*



SPA



1992: The Habitats Directive

- *Protects 1000+ other threatened plants and animals and c.230 habitat types*
- *Overall objective is to ensure that these species and habitat types are maintained at, or restored to, a 'favourable conservation status'.*

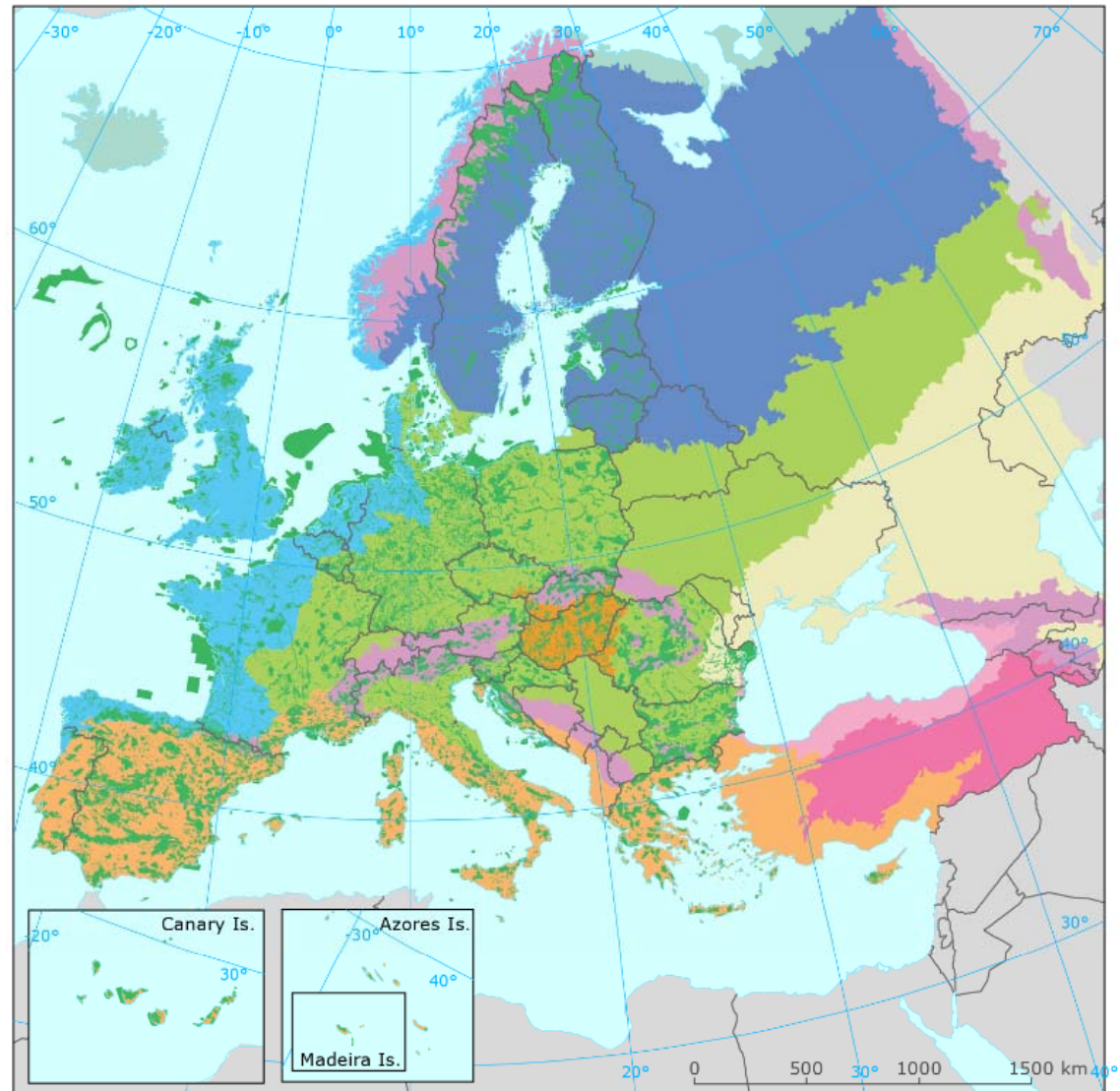


SCI/
SAC

Natura 2000 Network

The cornerstone of EU biodiversity policy

- The **largest coordinated network** of conservation areas
- More than **27.000 sites**
- **Over 18% of EU land territory + more than 5% of marine areas**
- Aims to ensure long-term survival of Europe's most valuable/threatened **species and habitats**
- Works in collaboration with land owners and users; sites are not strict nature reserves
- Human activities are undertaken in a way that allows **nature conservation objectives** to be reached
- **Strong legal basis**, but has high flexibility and subsidiarity provisions



Objective of both Directives

Within all Natura 2000 sites:

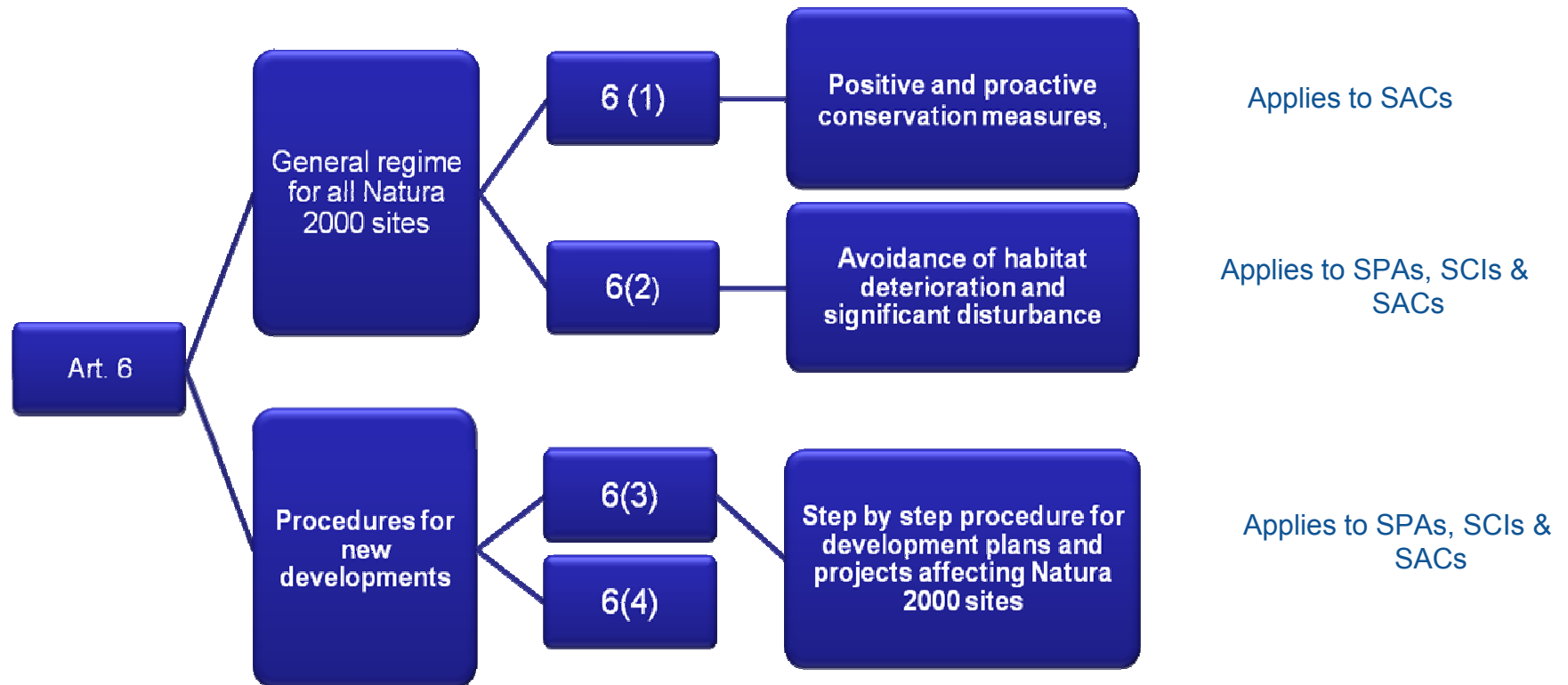
- ❖ *Avoid damaging activities that could significantly disturb the species and/or habitats for which the site has been designated;*
- ❖ *Positive measures are taken, where necessary to maintain and restore those habitats and species to a favourable conservation status in their natural range*



The ultimate objective is to ensure that the species and habitats reach "favourable conservation status"

Translated in legal terms in **Article 6 of the Habitats Directive (HD)**
BUT applies also to sites designated under the Birds Directive

Article 6: Protecting & managing Natura 2000 sites





Assessment process under Art. 6(3) & (4)

- No ‘*a priori*’ prohibition of new activities or developments - judged on ‘*case by case*’ basis
- Art. 6(3)
 - Any plan or project likely to have a significant effect on the site (whether located within the site or not), either individually or in combination with other plans or projects, must be subject to an **Appropriate Assessment** of its implications for the site in view of the site’s conservation objectives.
 - The competent authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site.
- Art. 6(4)
 - In case of negative conclusion and absence of alternatives, P&P can still be authorised if: imperative reasons of overriding public interest evoked, compensation measures established, opinion of the Commission (if needed).



Step-by-step assessment of plans and projects affecting Natura 2000 sites

- Possible negative impact on Natura 2000 site? (screening)
 - No ⇒ OK
 - Yes ⇒ Appropriate Assessment (AA)
 - No impact ⇒ OK
 - Negative impact ⇒ Alternatives?
 - There are alternatives ⇒ **no authorization** ⇒ new AA
 - No alternative ⇒ Imp. Reasons of Overriding Public Interest?
 - No IROPI ⇒ **no authorization**
 - IROPI ⇒ Priority habitats/species affected?
 - No ⇒ OK with compensation measures, notification to EC
 - Yes ⇒ Commission opinion required



Appropriate Assessment (AA) – key elements

- ❖ Triggered by the likelihood of significant effects ("screening")
- ❖ Assessment focusing on **conservation objectives** of the site on the basis of habitats/species for which it has been designated.
 - Consider **cumulative effects**
 - **Mitigation measures** form integral part of the process
- ❖ **Objective and verifiable information** required to enable the competent authorities to decide on the basis of the impact on the integrity of the site.
 - Authorisation only if certainty exists, **without any reasonable scientific doubt**, that the plan or project will not affect the integrity of the site.
- ❖ Coordination with the **EIA/SEA process** is possible/advisable.

Plans and projects

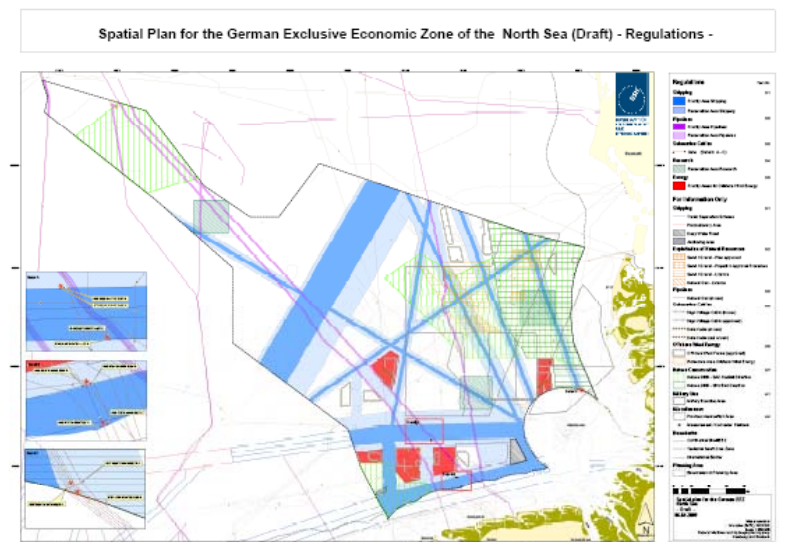
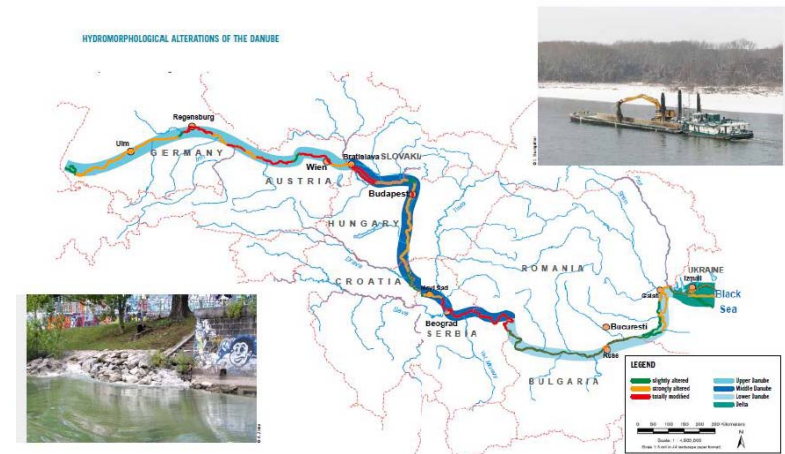
- No definition of "plan" or "project" in HD
- Court supports a **broad meaning**

Activities carried out periodically Waddensea (C-127-02), Papienburg (C-226/08)

Generally certain activities (C-256/98; C-6/04; C-241/08; C-418/04; -538/09)

The size of the project not relevant (C-98/03; C418/04)

- Plans – **wide interpretation** (including land use or spatial plans, sectoral plans)
- Plans such as policy statements or other policy documents normally outside the scope, as well as plans and projects related to the conservation management
- AA at plan level does not exempt projects from AA



Determining likelihood of significant effect

- Likelihood vs. certainty

Precautionary principle – in case of doubt as to the absence of significant effects, go for the AA

(Waddensea C-127/02, par. 39-44)

- Spatial scope (plans/projects **either inside or outside** Natura 2000 sites – also transboundary effects!)
- Significant effect:
 - No arbitrary (quantitative) definition → case by case approach;
 - Related to
 - specific features / ecological conditions of the site,
 - nature of impacts (magnitude, type, extent, duration, intensity, timing, probability, **cumulative effects**).



Cumulative impacts

- Modest impacts multiplied = significant impact
- Threshold of significance
- Plans and projects to be considered:
 - completed
 - approved but uncompleted
 - or actually proposed

"the failure to take account of the cumulative effect of projects in practice leads to a situation where all projects of a certain type may escape the obligation to carry out an assessment, whereas, taken together, they are likely to have significant effects on the environment" (C-418/04, C 392/96 paragraphs 76, 82).





Assessing the implications for the site

- **Evaluation on a case-by-case basis** (C-127/02, par. 48)
- Look at **all aspects of the plan or project** that could cause a significant effect on the Natura 2000 site
- Consider **all elements essential to the functions and the structure of the site** and to the habitat types and species present.
- Use **best scientific knowledge** (C-404/09)
- The appraisal of effects must be based on objective and, if possible, quantifiable criteria. Impacts should be predicted as precisely as possible, and the basis of these predictions should be made clear and recorded in the Appropriate Assessment report.

Site's conservation objectives

- Where conservation objectives have been set for a site, the effects must be assessed against these objectives (C-127/02, par. 46-48)
- As a minimum: *no deterioration*
- Information on each site in a **Standard Data Form (SDF)**
- Article 6(1) → more ambitious objectives
- Management plans
- Guidance note of Commission services

3.2.C. MAMMALS listed in Annex II of the Council Directive 92/43/EEC									
Code	Name	POPULATION				Population Stage	SITE ASSESSMENT		
		Resident	Migratory		Conservation		Isolation	Global	
			Breed	Winter					
1337	Castor fiber	I	P			B	A	C	A
1355	Lutra lutra	I	P			B	A	C	B
1318	Myotis	I	P			C	B	C	C
	dasychema								
1324	Myotis myotis	I	P			C	B	C	C

3.2.D. AMPHIBIANS AND REPTILES listed in Annex II of the Council Directive 92/43/EEC									
Code	Name	POPULATION				Population Stage	SITE ASSESSMENT		
		Resident	Migratory		Conservation		Isolation	Global	
			Breed	Winter					
1188	Bombina bombina	I	P			B	C	C	C
1166	Triturus cristatus	I	11-50			C	B	C	B

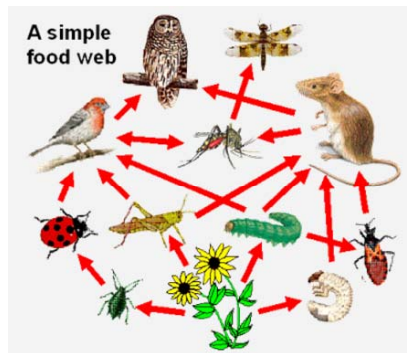
3.2.E. FISHES listed in Annex II of the Council Directive 92/43/EEC									
Code	Name	POPULATION				Population Stage	SITE ASSESSMENT		
		Resident	Migratory		Conservation		Isolation	Global	
			Breed	Winter					
1130	Aspius aspius	I	C			C	A	C	B
1149	Cobitis taenia	I	R			C	A	C	B
1124	Gobio albipinnatus	I	C			A	A	C	A
1099	Lampetra fluvialis	I	V			C	B	C	B

Integrity of the site

Sum of structure,
function,
ecological
processes

Linked to
conservation
objectives,
resilience

Site specific



A plan or project will affect the integrity of a site *'if it is liable to prevent the lasting preservation of the constitutive characteristics of the site'* (C-258/11, par. 48)

Mitigation measures

- Aim to prevent negative effects or reduce them to a non-significant level
- Directly linked to the negative effects
- **Must be described in sufficient detail**
- Based on best available knowledge
- Integral part of the specifications of a plan or project
- **Not to be confused with compensation measures under Art. 6(4)**

(C-521/12): a project...which has negative implications for a type of natural habitat ...and which provides for the creation of an area of equal or greater size of the same natural habitat type within the same site, has an effect on the integrity of that site. Such measures can be categorised as 'compensatory measures'





Decision making

- The appropriate assessment should contain **complete, precise and definitive conclusions capable of removing all reasonable scientific doubt** as to the effects of the works on the site. (C-304/05, par. 69)
- Developer normally pays for AA.....but authorities need to assure quality and consistency of assessments.
- Competent authorities...are to authorise that plan or project only if they have **made certain that it will not adversely affect the integrity of that site**. That is the case where **no reasonable scientific doubt remains as to the absence of such effects**. (Case C-127/02 Waddenzee)
- **The onus is on demonstrating the absence of adverse effects, rather than their presence.**



Art. 6 (4)

- Allows for exceptions to the general rule of Article 6(3)
- Its application is not automatic, it is up to the project or plan proponent to decide whether they wish to apply for a derogation to Article 6(3). (C-241/08)
- **Article 6(4) must be applied** in the sequential order established by the Directive – that is **after all the provisions of Article 6(3) have been undertaken in a satisfactory manner.** (C-304/05)
- **The decision must meet the requirements, in particular:**
 - *No alternative exists that would not affect the integrity of the site* (C-239/04)
 - *There are imperative reasons of overriding public interest* (C-182/10, C-43/10)
 - *All compensatory measures necessary to ensure the overall coherence of N2000 are taken*
- Information to the Commission or **the opinion of the Commission** in case the site hosts priority habitats/species



Compensation measures

- Independent of the project (including any associated mitigation measures)
- Intended to offset the negative effects of the plan or project so that the overall ecological coherence of the Natura 2000 network is maintained.
- Last resort. They can only be considered in the context of Art. 6(4).
- Can involve habitat restoration or enhancement, habitat recreation, or new site designation.
- Important to consider: feasibility and effectiveness of compensation, extent, location and timing
- Additional to normal obligations under the Habitats and Birds Directives



Relationship between EIA, SEA and AA

- Many **similarities** but also important **differences** (scope, content, implications)
- **Streamlining**: Procedures, where appropriate, can be coordinated and/or run jointly (Art. 2(3), Amended EIA Directive) – AA can be part of EIA/SEA
- But:
 - SEA and EIA **cannot substitute** for the AA (C-418/04)
 - In all cases **the AA must be clearly identifiable**, either within the EIA/SEA report or in a separate report, so that its conclusions can be distinguished from those of the overall impact assessment.



Comparison of Appropriate Assessment, EIA and SEA (1)

	Appropriate Assessment	EIA (amended Dir.)	SEA
Which type of development covered?	Any plan or project likely to have an adverse effect on a Natura 2000 site	Projects listed in Annex I. Annex II projects determined on a case by case basis through thresholds or criteria (biodiversity taken into account for screening)	Any Plan or Programme (a) for certain sectors which set the framework for future development consent, or (b) that requires AA under Art. 6 HD
What impacts need to be assessed relevant to nature?	Assessment in view of the site's conservation objectives (for species/habitats for which site designated)	significant effects on biodiversity , with particular attention to species and habitats protected under the Habitats and Birds Directives.	Likely significant effects on the environment , including on issues such as biodiversity, fauna, flora & interrelationship



Comparison of Appropriate Assessment, EIA and SEA (2)

	Appropriate Assessment	EIA	SEA
Who carries out the Assessment?	Responsibility of the competent authority but developer may need to provide necessary studies & information	The developer provides necessary information to be taken into account by the competent authority	Competent planning authority
Are the public/ Other authorities consulted?	Not obligatory but encouraged (the public 'if appropriate')	Compulsory consultation to be done before adoption of the proposal	Compulsory consultation to be done before adopting the PP
How binding are the outcomes?	Binding . Agreement to the plan/project only if it will not affect the integrity of the site	Result of consultations and information must be taken into consideration in the development consent procedure	Environmental report & opinions expressed shall be taken into account during the preparation of the plan/program

Typical problems with applying Article 6.3/6.4

- **Trying to avoid Art 6.3. AA** - inappropriate screening, non-respect of the precautionary principle
- **Wrong interpretation of 'P&P necessary for the management of the site'**, e.g. no AA of forest management plans
- **No or inappropriate assessments:**
 - e.g. no AA of projects outside Natura 2000, but which affect Natura 2000 nearby or downstream
 - effects on species or habitats not well assessed, poor expert input
 - effects assessed on species and habitats status quo, not on the conservation objectives
 - **Lack of consideration of cumulative impacts (salami slicing)**
- **Mixing-up mitigation and compensation measures**





Typical problems with applying Article 6.3/6.4 (cont'd)

- **Trying to avoid Art 6.4.**
- **Negative results of assessments not respected**
- **No/insufficient alternatives considered**
 - Economic arguments only are not enough
 - Best alternatives are not assessed on purpose so as to stick to old plans
 - Zero alternative not considered
- **No real IROPI**
- **No or inadequate compensation measures**
 - Trying to avoid designating more sites
 - Usually best sites have been designated, or restoration takes time, so more than 1:1 in size expected
 - Using normal management measures such as restoration of existing sites as compensation

No designation/proposal of a qualifying site: requirements apply nevertheless
(C-340/10 linked to C-244/05)

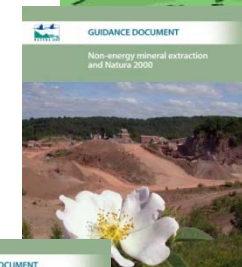
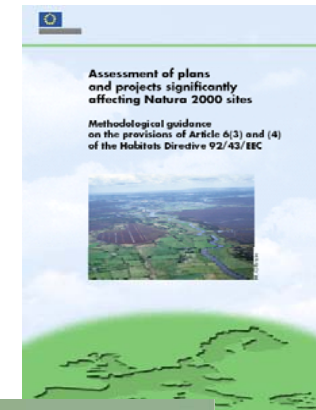
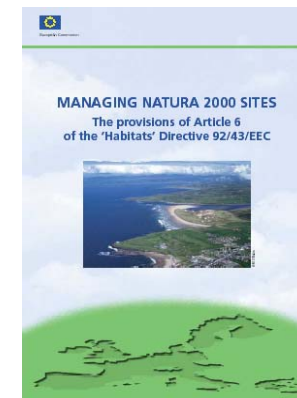


Concluding comments

- ❖ The "Appropriate Assessment" is a key tool of Habitats Directive in ensuring **sustainable development, nature protection** and prevention of conflicts.
- ❖ AA process can be combined with **EIA/SEA process**, but with different focus/implications.
- ❖ Value of **strategic approach** and integrated planning (e.g. spatial planning).
- ❖ Fudging makes things worse. Respecting the legislation is often at the end cheaper than trying to avoid it.
- ❖ **Competent authorities** have key responsibility to ensure the standards for effective delivery of AA (conservation objectives, status of habitats/species, etc.).
- ❖ Practitioners need to have necessary **expertise** for delivery of assessments.
- ❖ **Guidelines** and standards very important in helping ensure quality and consistency of assessments.

Commission guidance documents

- ❖ 'Managing Natura 2000 sites – the provisions of Art. 6' – currently updated...
- ❖ ***NEW – Article 6 – Rulings of the ECJ (July 2015)**
- ❖ Assessment of plans and projects: methodological guide Art 6 (3) & (4)
- ❖ Sector specific guidance:
 - ❖ Wind energy
 - ❖ Non-energy extractive industries
 - ❖ Ports and estuaries
 - ❖ Aquaculture
 - ❖ Inland Waterways
 - ❖ Agriculture
 - ❖ Forests
 - ❖ Forthcoming: Energy infrastructure and hydro-power





Thank you for your attention

More information on our internet site:
http://ec.europa.eu/environment/nature/index_en.htm



Environment





Case studies

Integrity of the site

In Ireland a competent national authority decided to grant development consent for the Galway City Outer Bypass road scheme. Part of the proposed road was planned to cross the Lough Corrib SCI which hosts a total of 14 habitats referred to in Annex I to the Habitats Directive, of which six are priority habitat types. The road scheme involves the permanent loss within the SCI of approximately 1.47 hectares of limestone pavement, a priority habitat type. A total of 270 hectares of limestone pavement lies within the entire SCI.



- ***“The competent national authorities cannot therefore authorise interventions where there is a risk of lasting harm to the ecological characteristics of sites which host priority natural habitat types.***
- ***“In the main proceedings, the Lough Corrib SCI was designated as a site hosting a priority habitat type because, in particular, of the presence in that site of limestone pavement, a natural resource which, once destroyed, cannot be replaced.”***
- ***“Consequently, if, after an appropriate assessment of a plan or project’s implications for a site, carried out on the basis of the first sentence of Article 6(3) of the Habitats Directive, the competent national authority concludes that that plan or project will lead to the lasting and irreparable loss of the whole or part of a priority natural habitat type whose conservation was the objective that justified the designation of the site concerned as an SCI, the view should be taken that such a plan or project will adversely affect the integrity of that site.”***



Distinguishing between mitigation and compensation measures

(2012)

The Netherlands decided to approve a project to widen the A2 motorway despite the fact that was found to have potential negative implications for the Natura 2000 and in particular for the habitat type Molinia meadows within that site. They considered this was acceptable since the project provided also for improvements to the hydrological situation in other parts of the site, which will allow for the development of a larger area of Molinia meadows of higher quality, thereby ensuring that the conservation objectives of the site for this habitat type are maintained through the creation of new Molinia meadows.



- *It is clear that **these measures are not aimed either at avoiding or reducing** the significant adverse effects for that habitat type caused by the A2 motorway project; rather, they tend to compensate after the fact for those effects.*
- *“...**protective measures** provided for in a project which are aimed at **compensating** for the negative effects of the project on a Natura 2000 site **cannot be taken into account** in the assessment of the implications of the project provided for in **Article 6(3)**.”*