The background of the entire page is a photograph of a forest. Tall, thin tree trunks are visible, with sunlight filtering through the canopy, creating a dappled light effect. A semi-transparent white rectangular box is positioned in the upper half of the image, containing the title and subtitle text.

APPROPRIATE ASSESSMENT AND NATURA 2000 AREAS

SHORT GUIDE TO RULES AND CASE LAW

Justice&Environment
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1. What is appropriate assessment?

Appropriate assessment is a mechanism to ensure protection of Natura 2000 from harmful human activities, especially construction plans and projects. In essence, it does so by requiring evaluation of potential impacts of planned activities before they are permitted by authorities. If the planned activity may have significant adverse effects on the site, measures to prevent those effects will be sought. Without appropriate assessment, the project or plan cannot be authorised.

Appropriate assessment is regulated by Article 6 of the EU 'Habitats' Directive (Council Directive 92/43/EEC, hereinafter also: HD). But there is more than meets the eye: the Court of Justice of EU (CJEU) has further specified the rules in numerous cases. In this short guide both, the appropriate assessment rules and case law will be outlined.

2. Appropriate assessment rules in a nutshell

EU Habitats Directive requires that impacts of any plan or project, which may have significant effects on a Natura 2000 site (special protection site - "SPA" or site of Community importance - "SCI") have to be assessed before their authorisation. Plans and projects are terms that should be interpreted broadly; they can be either construction plans or other intervention that may be damaging to the site's integrity (for details, see section 3).

Appropriate assessment consists of 4 "steps":

1. Screening – determines whether a plan or project may have significant effects on the site concerned. Significant impacts would be presumed and step 2 undertaken, unless it is proven that the project does not undermine conservation objectives of the site.

2. Assessment of impacts - potential adverse effects on the site and the degree of jeopardy to the site are identified. Assessment must be based on best scientific knowledge available and take into account cumulative effects. This is also the stage where mitigation measures are identified and assessed. If a plan or project might harm the integrity of the site despite all identified mitigation measures, the authorities cannot allow it to be carried out as a rule (more on steps 1 and 2 in Section 4).

3. Assessment of alternatives – in case the plan or project is harmful to the integrity of the site, non-harmful alternative solutions (e.g. other locations to a seaport) must be sought as a next step.

4. Exceptional permitting – If no better alternatives are found, the plan or project may only be permitted exceptionally, in case there are imperative reasons of over-riding public interests. Projects that are not in over-riding public interests cannot be permitted. If the plan or project is exceptionally allowed, compensatory measures must be taken to "offset" the damage done by the project (more on steps 3 and 4 in Section 5).



C-127/02 (Waddenzee)

A fishing company was licenced to perform mechanical cockle fishing in the special protection area of the Waddenzee area in the North Sea. The licences were issued to the company each year. One of such repeated decisions was challenged by an environmental NGO claiming that such fishing activity is a project which needs an appropriate assessment under Habitats Directive.

CJEU ruled, referring to the definition of “project” in the environmental impact assessment (EIA) Directive that mechanical cockle fishing is a project. Moreover, CJEU ruled that the fact that the activity has been carried on periodically for several years does not exclude it from appropriate assessment.



3. What projects and plans must be assessed?

Appropriate assessment must be considered (see “screening” below) for plans and projects not directly connected with or necessary to the management of the site. First crucial question then is, what is meant by a “project” or “plan”?

Projects include execution of construction works, mining and other interventions in the natural surroundings and landscape. Projects are therefore not limited to actual construction; a significant intensification of agriculture or logging which threatens to damage or destroy the valuable character of a site should be considered a project and need appropriate assessment. A project may also be an on-going activity.

Typical examples of **plans** are land-use plans or sectoral strategic/activity plans (e.g. transport network plans, waste management plans or water management plans). However, ‘plans’ which are policy statements in their nature (only show the general political will or intention of an authority) are not considered to be plans under Habitats Directive.

As an exception, appropriate assessment is not compulsory for plans connected with or necessary to the management of the site. This exception should be interpreted narrowly, i.e. in cases where only a part of a plan or project is connected with site management assessment is still required for the other part. This would be the case, for example, with dual-purpose forest harvesting.

Also, a plan or project needed for management of one site may still need to be assessed in relation to potential negative effects on another site. For example, project on rewetting of a mire habitat may require appropriate assessment regarding its impacts on a nearby protected forest habitat.

It is not only projects located inside a protected site that are screened, **projects outside a site** that are likely to have significant effects on the protected site have to undergo appropriate assessment just as well (C-98/03, Commission v. Germany).

4. Article 6(3) – Screening and appropriate assessment

Habitats Directive does not define any particular method for carrying out appropriate assessment. Generally speaking, assessment should be recorded and arguments laid out should be reasoned so as to avoid arbitrary decision-making and allow review; precautionary principle and best scientific knowledge should be applied.

Appropriate assessment consists of altogether 4 steps that need to be completed in the order below.

Stage 1: Screening

The first step is to identify, if the project may have any adverse effects on the site, thus making a “full” appropriate assessment necessary (so-called screening). Mere likelihood of negative impacts is sufficient. Therefore, to avoid full appropriate assessment it must be proven to a point of certainty that the activity will not have any significant effects, not the other way around.

The decision on what a ‘significant effect’ is must be based on specific features and environmental conditions of the protected site, with particular regard to the site’s conservation objectives. Significance of the effect does not depend on the “size” of the project or plan (see text box on the right)

According to CJEU, following factors must be taken into account when “screening” whether full appropriate assessment is necessary:

- Likelihood of significant effects on the site concerned;
- Characteristics and specific environmental conditions of the site;
- All aspects that on their own or together with other plans or projects (cumulative effects) may affect conservation objectives of the site;
- Best scientific knowledge in the field.

The CJEU has ruled that if a project may undermine the conservation objectives^[i] of a specific site, it must be considered to likely have a significant effect on the site concerned and therefore a full appropriate assessment must be carried out^[ii].

In line with the precautionary principle, in case of scientific uncertainties or doubt about the impacts and whether they are adverse, full appropriate assessment must be carried out. Plan or project should at this stage be assessed as proposed by the promoter, meaning no mitigation measures may be taken into account in the screening stage.

Member States may impose even more stringent rules on the permitting process within Natura 2000 sites, for example prohibit construction of certain projects altogether.

Case C-98/03 (Commission vs Germany)

The German government, when transposing the HD, decided to demand appropriate assessment only in those cases where water use required a water use permit. The German government claimed that use of water in such small quantities that a permit was not necessary could not have significant impacts on neighbouring sites.

The CJEU decided that it cannot be excluded from the outset that use of small quantities of water would never have significant impacts on Natura 2000 sites. Rather a case-by-case assessment should be made. The court therefore found that the HD had not properly been transposed by the German government.

Case C-2/10 (Regione Puglia)

In Italy, wind turbines not intended for self-consumption were prohibited to be constructed within Natura 2000 sites by a regional law in Puglia province. This was challenged by a company wishing to develop wind farms on a site.

CJEU held that rules prohibiting certain activities without any requirement for a prior assessment can be legal, if it is not disproportionate or discriminating developers. The court found that such a move is also not a threat to general EU pro-renewables attitude.

Case C-258/11 (Sweetman)

Authorisation of the Galway City Outer Bypass was challenged in Irish courts, because part of the project was planned to cross the Lough Corrib SCI. The project would have resulted in permanent loss of 1.47 ha of limestone pavement, a priority habitat type. Total area of that habitat type at the site was 270 ha. Local authorities concluded that while the project would have localised severe impact on the site, such an impact would not adversely affect the integrity of the whole site.

CJEU ruled that a plan or a project will adversely affect the integrity of the site if it can lead to lasting and irreparable loss of even a part of a priority natural habitat type for the conservation of which the site was designated.

Stage 2: Appropriate assessment

If, according to the screening, an appropriate assessment is needed, all impacts on the integrity of the site must be identified. Integrity of the site can be defined as the coherence of the site's ecological structure and functions.

When assessing impacts on the integrity of a site, a broad range of factors must be taken into account. Assessment must look at the project "in combination with other plans or projects", i.e. assess cumulative impacts.

Special attention must be paid to any impacts to species and habitats that the HD lists as "priority" species and habitats (see text box to the left).

Impact on site's conservation objectives are identified based on the **best scientific knowledge** in the field. This means that high standards should be applied both to the experts carrying out the assessment as well as the methods they apply. These must take into account the specific characteristics of the site and cannot be "generic".

If there are any adverse impacts, an **assessment of mitigation options** is carried out. Mitigation measures are measures that are aimed at minimising or even cancelling the negative impacts of a plan or project during or after its completion. If adverse effects to the integrity of site cannot be prevented by mitigation measures, the development consent can only be given exceptionally (see next section).

Mitigation measures may cover setting timetables for project implementation (e.g. ban to operate during the breeding season of a particular species), specify the type of tools and operations to be carried out (e.g. to use a specific dredge at a distance agreed upon from the shore in order not to affect a fragile habitat) or determine inaccessible areas inside a site (e.g. hibernation burrows of an animal species).



Compensation measures (e.g. recreating a habitat destroyed somewhere else) are not considered mitigation measures (see text box on the right).

Appropriate assessment is based on **precautionary principle**. In practice, this means that if it cannot be excluded that the plan or project will have a significant effect on the site (scientific doubt remains), then significant adverse effects on the site are presumed^[iii]. As a rule, such a plan or project must therefore be refused authorisation. As the next step, safer alternatives must be sought (stage 3). If such alternatives do not exist, the plan or project is only allowed to be authorised on exceptional grounds (stage 4).

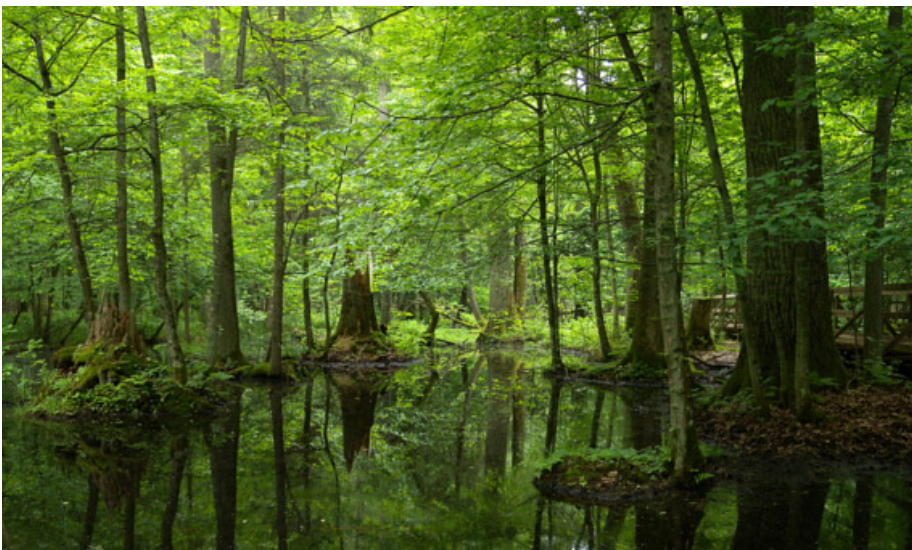
5. Art. 6(4) – alternatives and exceptions

Stage 3: Assessment of alternative solutions

In case a plan or project may have significant adverse effects to the integrity of a site, alternative and safer solutions for achieving the same objectives would have to be sought. In this stage, other considerations (e.g. economic consideration that the alternative solution is much more expensive) cannot overrule ecological considerations (need to preserve integrity of the site). If an alternative solution that would not harm the integrity of the site is found, it must be used.

Stage 4: Imperative reasons of over-riding public interest (IROPI)

Where no suitable alternative solution exists or is applicable and where adverse impacts of the plan or project on the site concerned cannot be prevented, authorities can approve the project or plan only in exceptional cases. Exceptions may only be applied after appropriate assessment (all of the preceding stages) has been carried out properly^[iv] and IROPIs exist. Exceptions should always be interpreted restrictively and in line with the precautionary principle.



C-521/12 (Briels et al)

In the Netherlands, a project for extending a motorway that would have resulted in destruction of a part of a protected habitat was planned. The appropriate assessment concluded that the project would have significant adverse effect on the existing habitats. However if the hydrological conditions were improved in neighbouring areas, the protected habitat type – molinia meadows – could keep extending. The project was therefore approved along with measures that would help the protected habitat type to spread.

CJEU ruled that measures proposed in the project were aimed at compensating for the adverse effects instead of avoiding or reducing them and do not guarantee that the project would not adversely affect the integrity of the site. Therefore they are compensation measures that may be only considered under Art. 6(4), if exceptional grounds for approving the project exist (see stage 4). Measures which are in fact compensatory rather than mitigating impacts must not enable promoters or national authorities to approve projects more easily than foreseen in HD.



What is an IROPI is not defined by the Habitats Directive. The Directive only mentions some examples, such as human health, public safety and beneficial consequences of primary importance for the environment. In addition, the European Commission finds that fundamental policies for the national government and society may be considered as IROPI[v].

When assessing IROPIs, competent authorities must decide whether they are more important than the need for site conservation. Exception may be justified based on two criteria: (1) the public interest must be overriding and (2) long-term.

Different approach must be applied if the site concerned hosts a priority natural habitat and/or priority species. In these cases, national authorities may only authorise the harmful project or plan for overriding public-interest reasons relating to human health or public safety, or beneficial consequences of primary importance for the environment. Other IROPIs may only be used as basis for an exception after asking and receiving an opinion from the European Commission.

If a plan or project would be exceptionally authorised, compensatory measures designed to make up for the adverse effects of the plan or project must be considered. Compensatory measures may have various forms, e.g. re-creation of a comparable habitat on the site or elsewhere and incorporating it into Natura 2000, improvement of existing habitat or proposal to add a new (and equivalent) site to Natura 2000 network. Compensatory measures must take into account the specific habitat or species concerned and must be able to “offset” the damage done by the plan or project, i.e. they must address same species/habitats, in comparable proportions and provide similar functions. Adopted compensation measures have to be communicated to the Commission.

i - Site's conservation objectives are established based on Art. 4(1) of the Habitats Directive are a series of measures and objectives based on information about the particular site and habitat types and species. They are established separately for each site.

ii - See C-127/02, para 47

iii - See cases C-258/11 (p 40), and C-404/09 (p 99, 100)

iv - See cases C-239/04 p 35; case C-404/09, p 156-157.

v - See Managing Natura 2000 Sites. The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC. European Communities, 2000 (p 44-45).

Available online:

http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf