# Site-based conservation under the Birds and Habitats Directives

## Key provisions and surrounding case law

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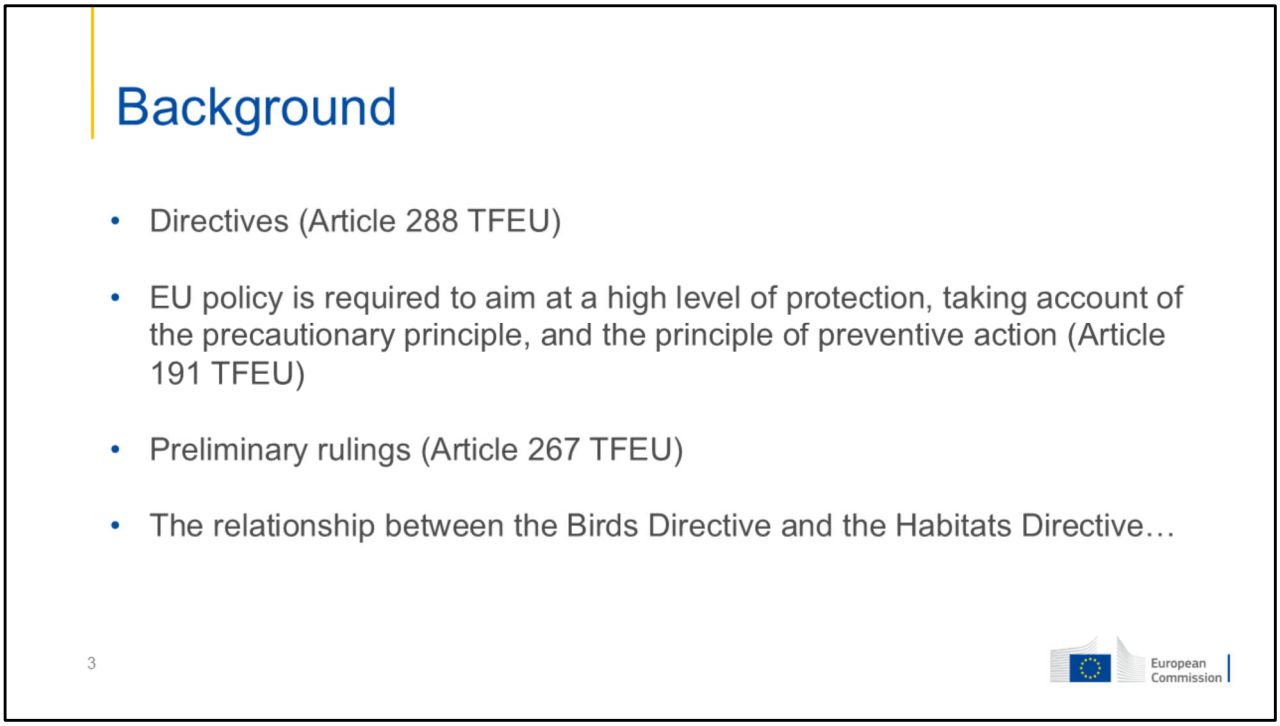
## Content

- Background
- Main objectives and core elements of the Birds and Habitats Directives
- Establishing the Natura 2000 network (Article 4 HD)
  - Identification
  - Designation
- Conservation and management of the network (Article 6 HD)

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This presentation will begin by providing background on the EU framework within which EU nature conservation exists in, before going into a horizontal discussion on the objectives, the core elements and the structure of the birds and habitats directives. Following that, the establishment of the Natura 2000 network (identification & designation of Natura 2000 sites) will be discussed. Finally, conservation and management of the network will be explained.




The birds and the habitats directives are directives → binding as to the standards to be achieved → there is a degree of latitude provided to the member states in how they transpose those 2 pieces of legislation into their respective national systems → in order to reflect the specificities of each member state and their national contexts. However, discretion and latitude does have its limits: need for a ***specific and precise transposition +*** must be transposed with unquestionable binding force → must be legally binding within within those member states.

Looking at the broad EU objectives when it comes to environmental protection:

- TFEU → relevant → important for case law
- requirement to ensure a high level of protection taking account the precautionary principle and the principle of preventive action → briefly mentioned in the context of the Rio Convention but also exist in EU law

Article 267 TFEU:

- Tool for requesting preliminary rulings
- = the Court of Justice of the EU has the competence to rule/give authoritative rulings on issues and questions of EU laws interpretation that have been

referred to them by national courts and tribunals.
- Important source of case law on the directives
- Also important to note that a lot of the case law that will be discussed today → result of questions that have been referred to CJEU by judges at the national level
- Different cultures in the member states regarding preliminary rulings = there are certain members that are more likely to, and more commonly, refer to these questions.

Other way: direct actions by the European Commission
- infringements against the member states
- Also another source of jurisprudence.

Relationship between the birds and habitats directives. They are two directives, and while they have their separate

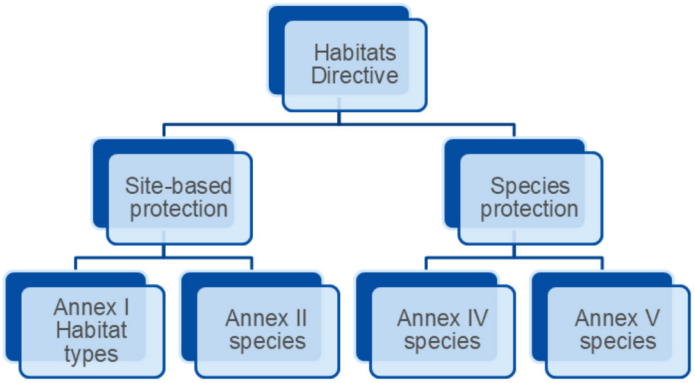



2 separate directives:

- while they have their separate legal standing, they are very closely related in terms of their structure and objectives, and they are also explicitly linked to one another.
- Habitat Directive (more recent of the two –though also a very old directive) → references explicitly the Birds Directive in articles 3 and 7
- two very mutually enforcing pieces of legislation → one can't really exist without the other → C-217/19

# Objectives and scope of the Habitats Directive (Article 2 HD)

- Overall aim to contribute towards ensuring biodiversity through conservation of habitats and species.
- To ensure that these species and habitat types are maintained at, or restored to, a '**favourable conservation status**' (Article 2(2)).




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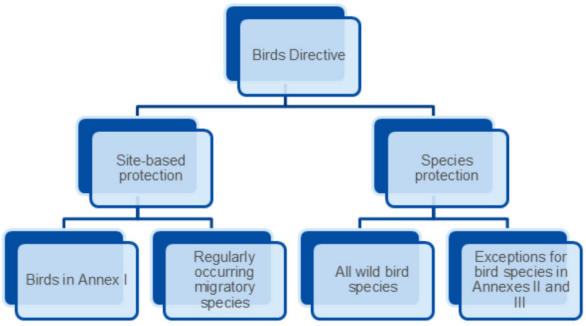
The way in which that is achieved is through two pillars:

- site -based protection and
- species-based protection

Annexes of the directives → guidance as to which species and habitats are Covered by what

## Objectives and scope of the Birds Directive (Article 2 BD)

- Protects all species of naturally occurring birds 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, scientific and cultural requirements**, or to adapt the population of these species to that level (Article 2).




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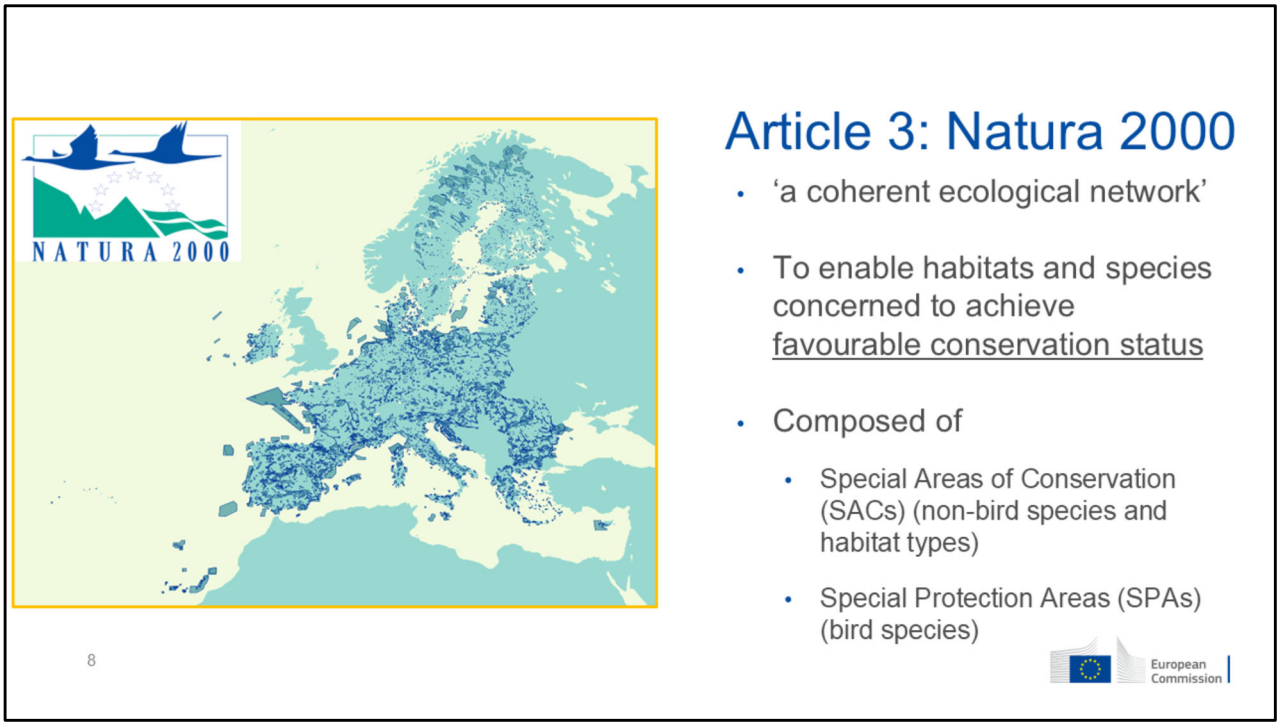
Article 2: European Commission: have taken this to and understood this to mean/ equivocated this to favorable conservation status → CJEU has been driving towards too but haven't had the opportunity to rule on it yet

Structures are very similar.

- Site-based protection covers birds in Annex I and regularly occurring migratory birds → wide scope.
- species protection covers all wild bird species

# Establishing the Natura 2000 Network

Articles 3 & 4 of the Habitats Directive
Article 4 of the Birds Directive

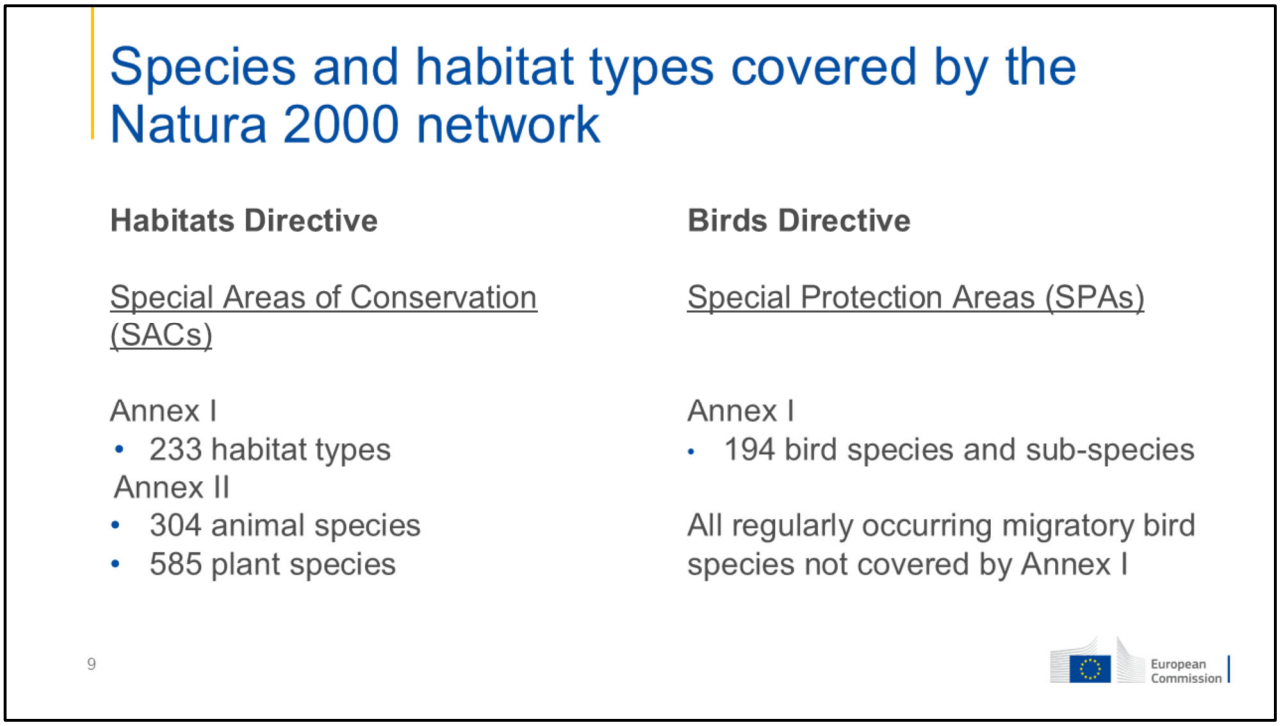



Article 3 sets a good frame for this discussion.
It requires the Member States to establish a coherent ecological network, and its aim is to enable habitats and species concerned to achieve favourable conservation status

1st explicit links between 2 directives:

- it shall be composed of special areas of conservation, which refer to non-bird species and habitat types, which are protected under the habitats directive, and also
- special areas of protection, which are for bird species.

→ **those designated under the Habitats Directive and classified under the Birds Directive come under this broader umbrella → the Natura 2000 network**.




a lot of species and habitat types that are covered by this network (see next slide for examples)

## Some species and habitats covered by the Natura 2000 network



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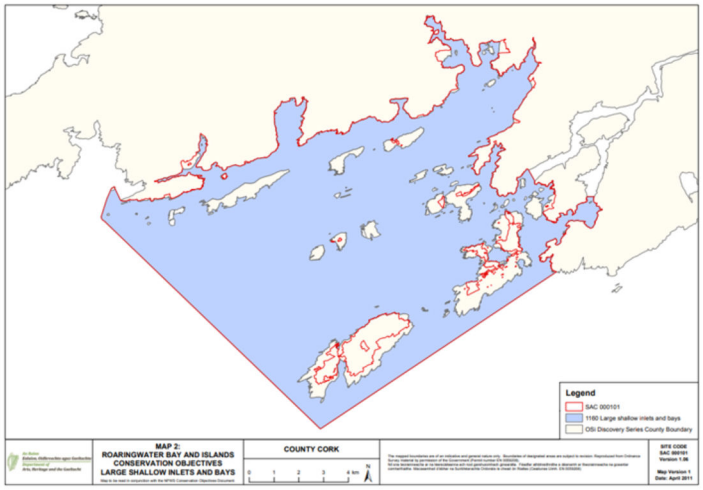
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Photos by Frank Vassen

Examples:

- species:
  - anything from large carnivores like the bear through to the black stork or waterfowl
  - even some on ‘charismatic species’ like the freshwater pearl mussel which is a very important and vulnerable species
- habitat types: wetlands and grasslands and also

## Roaringwater Bay and Islands SAC




Annex I:
- Bays
- Reefs
- Sea cliffs
- Sea caves

Annex II:
- Porpoise
- Otter
- Grey Seal

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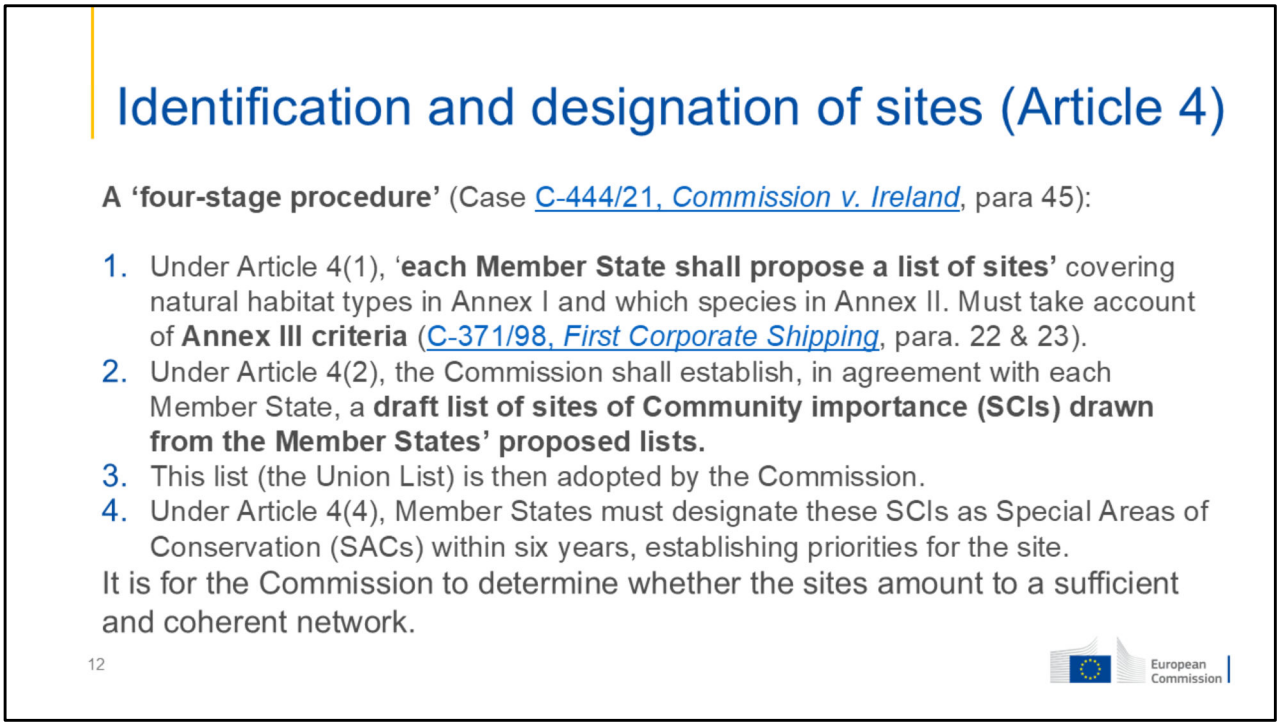
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site = a delineated area, which is designated for certain habitat types in certain species

Eg. Roaringwater Bay and Islands SAC:

- A bay that has been listed for reefs, sea cliffs and sea caves, and also for the species that are present, which include porpoise (a small cetacean, kind of like a dolphin), otters and gray seals.

- Referring to an example a previous speaker (Andrej Sovinc) said regarding building a house, you have to look at whether that house will impact on those species and those habitat types.




Identification and designation of sites → important because in this process, at each stage → different obligations that apply to the site from the point at which it's first proposed as a site by the member state through to when it is finally designated.

The Court has very conveniently identified a '*four-stage procedure*':

1. Stage 1: each member state shall propose a list of sites that covers the natural habitat types and the species in annexes I and II + they must take account of the criteria in annex III → criteria is purely ecological, relates to the abundance of the species in a certain area, the importance of a site for a species or for a particular habitat type. These are the only criteria which can come into account, **you can't take economic criteria into account → t**his is something that the court has been quite strong on. While economic issues do come into play at a later stage, when it comes to the designation of sites and identifying those sites, it is **purely an ecological consideration**.
2. Stage 2: the draft list will be looked at by the Commission, and the commission will accept the sites that it sees as meeting these criteria and it will engage in a dialogue with the the member states asking them why hasn't this site been designated? Etc
3. Stage 3: this list is adopted and referred to as the 'Union List' → these sites

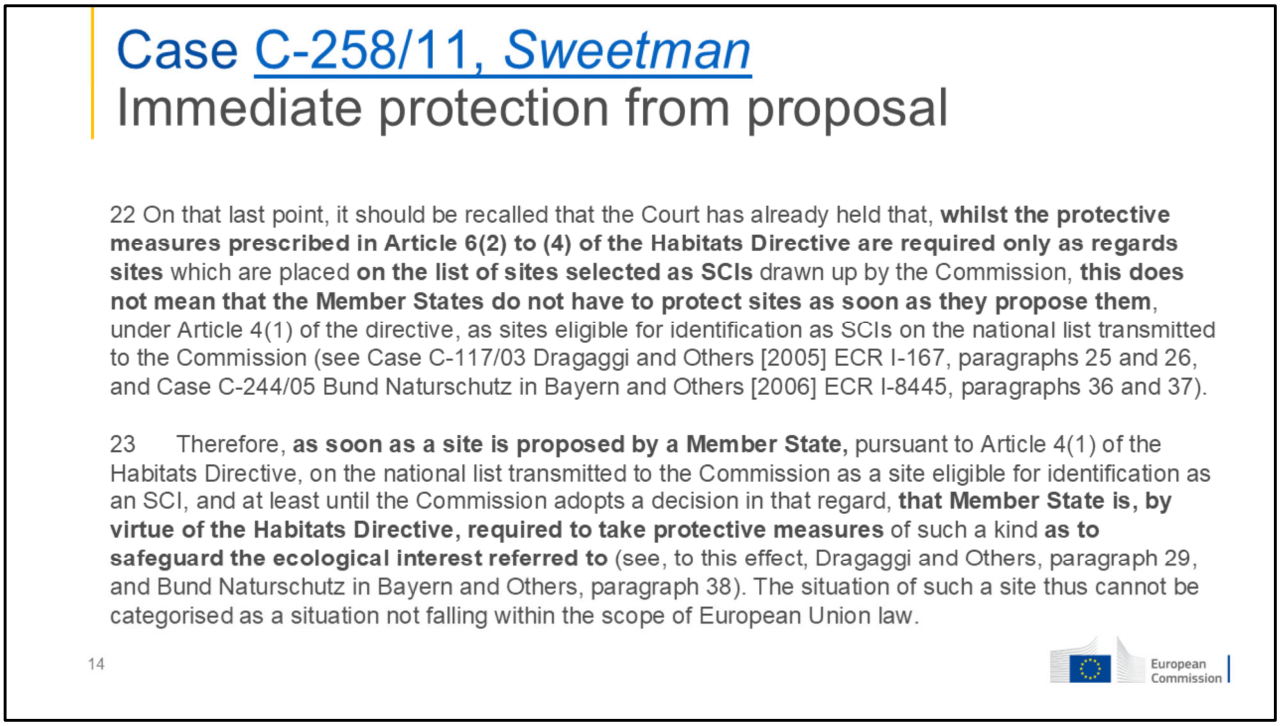
then are referred to as Sites of Community Importance (SCIs).

4. Stage 4: full protection level. These SCIs are designated in the law of the member states as special areas of conservation → **a step that is completed by the member state.** From the point at which a site is adopted in the list, the member states have up to 6 years to adopt the site as a Special Area of Conservation (SAC), at which point they need to look at setting conservation objectives based on the priorities of the site.

# Case C-71/99, *Commission v. Germany*
# Criteria for identification

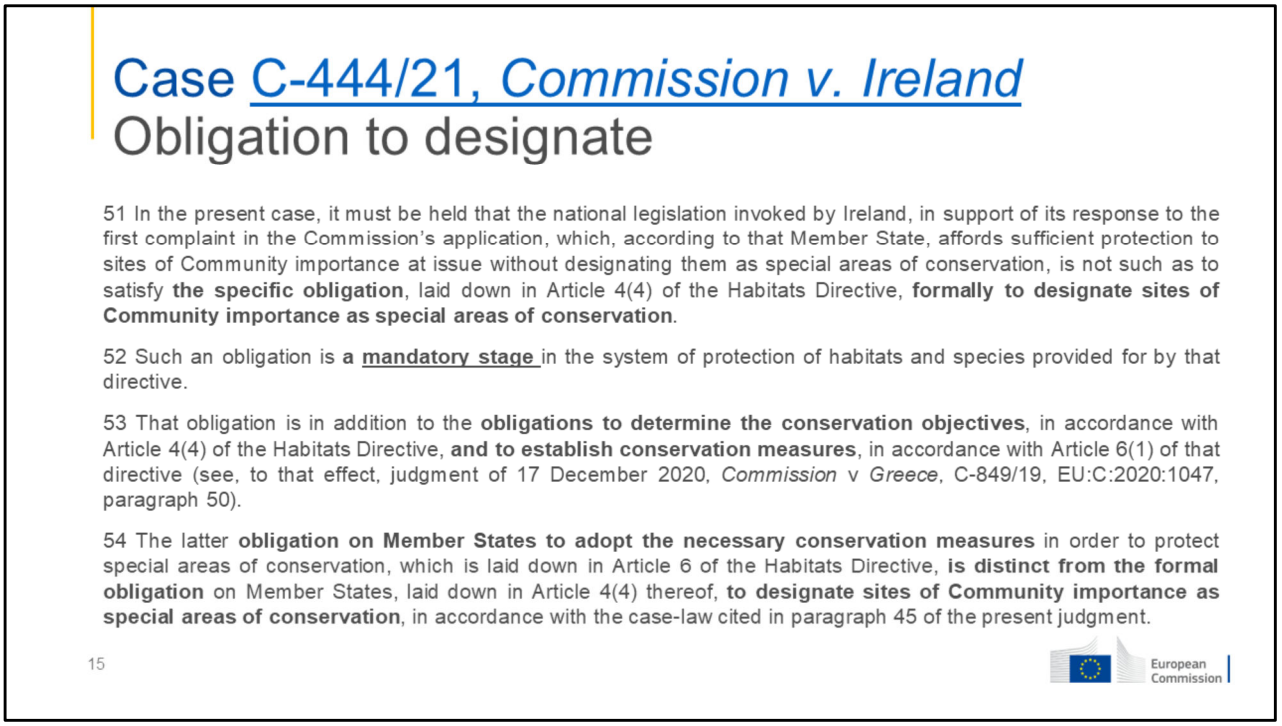
26 Next, although it follows from the rules governing the procedure for identifying sites eligible for designation as SACs, set out in Article 4(1) of the directive, **that Member States have a margin of discretion when making their site proposals**, the fact none the less remains, as the Commission has noted, that **they must do so in compliance with the criteria laid down** by the directive.

27 It should be noted in this regard that, in order to produce a draft list of sites of Community importance, capable of leading to the creation of a coherent European ecological network of SACs, the Commission must have available an exhaustive list of the sites which, at national level, have an ecological interest which is relevant from the point of view of the directive's objective of conserving natural habitats and wild fauna and flora. To that end, that list is drawn up on the basis of the criteria laid down in Annex III (Stage 1) to the directive (Case C-371/98 First Corporate Shipping [2000] ECR I-9235, paragraph 22).




As soon as a site is identified and communicated to the Commission, it gets a certain level of protection.

- Not explicit in the Directive, but it's been read in by the CJEU based on the idea that if you propose a site and then you continue degrading it, that's not going to be in line with the objectives of the Directive
- → immediately there's a quite low level of protection, which is essentially a non deterioration requirement




Important issue with the many member states: the sites were accepted as SCIs, put on the Union List and then the member states didn't do the final step (designating them as sites of special areas of conservation). Why is this stage so important?

- It is the stage in which the sites are invested with full protection but also
- The stage where the identification of the conservation objectives takes place.

There is an **obligation** to set our conservation objectives.

## Case C-444/21, *Commission v. Ireland*
## Obligation to set conservation objectives

64 With regard to the wording of Article 4(4) of the Habitats Directive, it should be pointed out that, **although it does not explicitly mention the obligation to set conservation objectives, that provision nevertheless requires the competent authorities of the Member State** concerned, when designating the special area of conservation, **to establish priorities** in the light of the importance of the sites for the maintenance or restoration, at a favourable conservation status, of a habitat type. **Establishing those priorities implies that those conservation objectives have already been set**.

65 Thus, and taking into account also the context and purpose of Article 4(4) of the Habitats Directive, the Court has considered that, although it is apparent from that provision that the designation of special areas of conservation and the **determination of conservation priorities must be carried out as soon as possible and in any event within six years** at most from the moment when a site of Community importance has been selected in the context of the procedure laid down in paragraph 2 of that article, **that period applies also to the establishment of the conservation objectives**, given that they are necessary for the setting of those priorities and must, therefore, precede it.

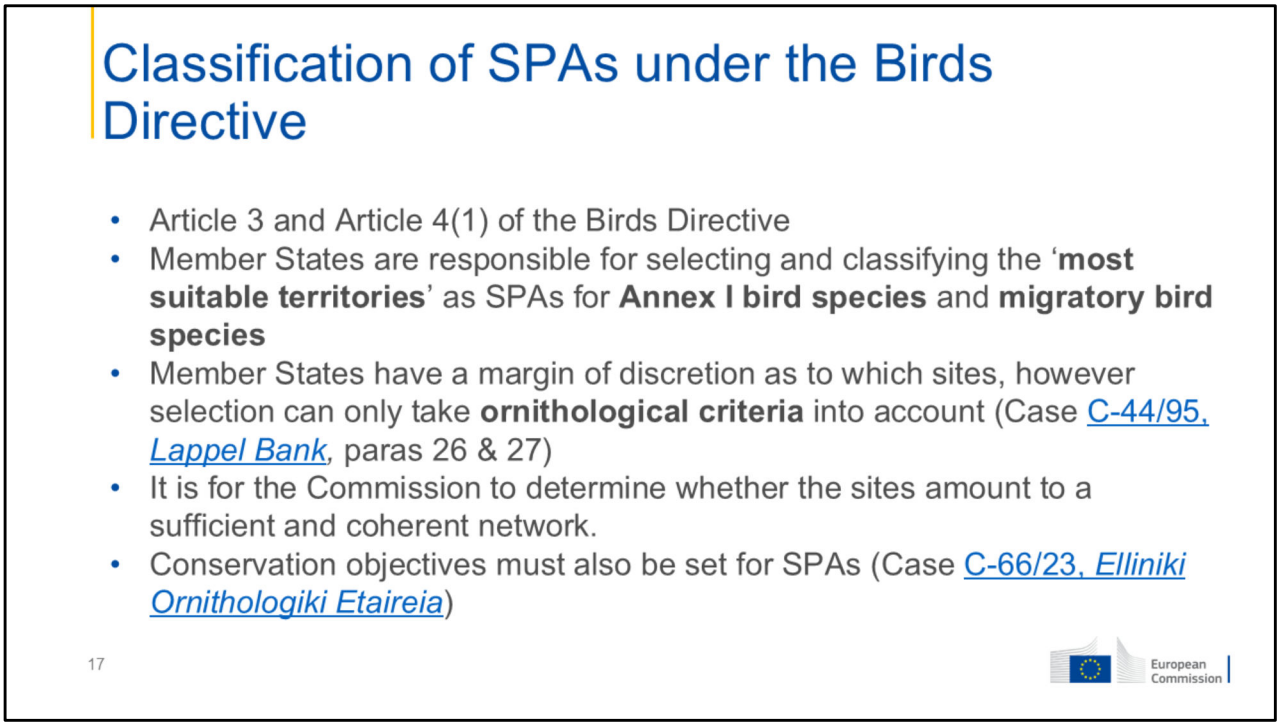
66 It should be added that **only specific and precise objectives may be regarded as 'conservation objectives'** within the meaning of the Habitats Directive.

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this obligation isn't explicit *per se* in the directives → but when the CJEU faced this question, it looked at different articles and at the fact that in Article 4, it says that there shall be priority set for the site and these priorities presume the existence of objectives

→ this requirement imposes on the member states that they must set objectives which are specific as to the site and as to the features that are in that site.




The situation for the birds directive is far more straightforward.

There is not a 'four-stage' procedure here. There's only one step and that is that the member states must classify the sites that they identify based on the criteria in the directive.

As soon as the site is identified as an SPA and communicated to the Commission. It is vested with the protection status of the of the directive as a special protection area.

These areas must be the most suitable territories for these Annex I bird species and for migratory bird species.

Like with the Habitat's Directive, you can only take account of these ornithological criteria. It can't relate to the economic considerations.

It is then for the Commission, in both cases to look at this network of sites, and decide if they're sufficient → covered? very long procedure of ensuring that this network is sufficient in terms of its coverage → still an ongoing process, particularly with the marine sites.

obligation to set conservation objectives for SPAs → CJEU trying to ensure that there's a consistent interpretation of the Directives → drawn this requirement for conservation objectives from different parts of the Directive and by reference to the Habitat Directive also.

# Constitution of the Natura 2000 Network




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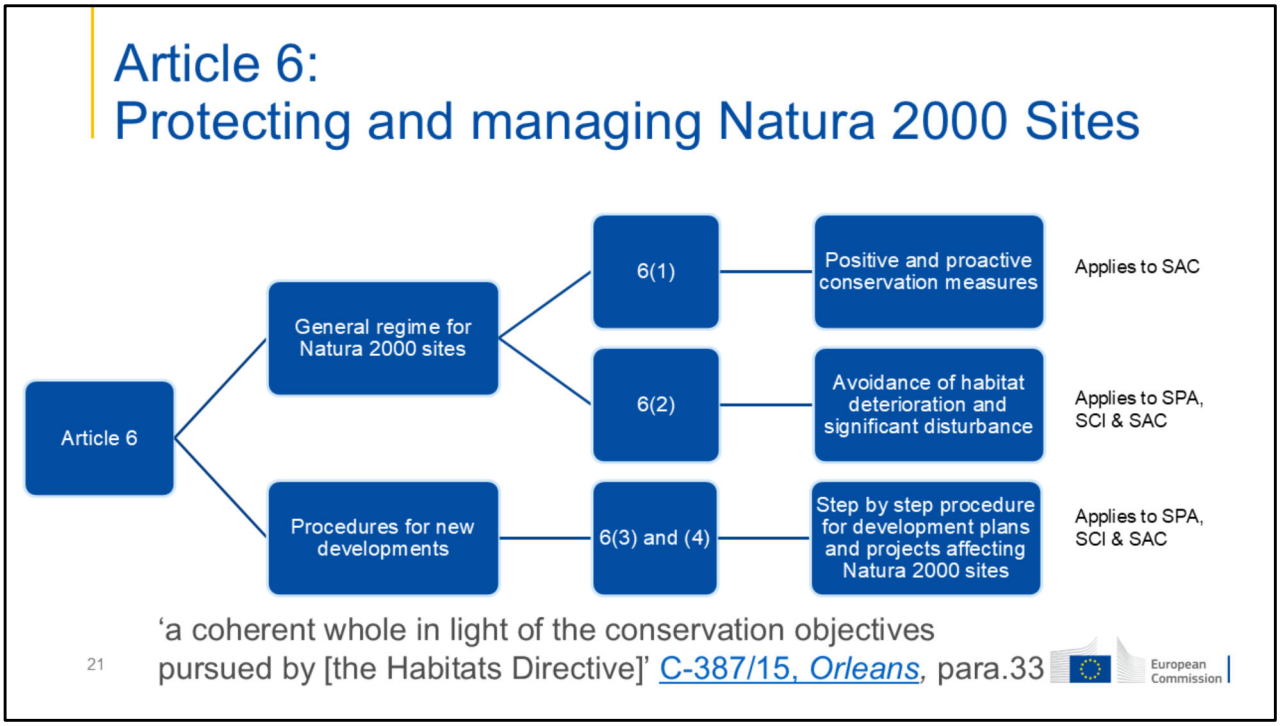
Steps in order to achieve special areas of conservation and special protection areas → SAC + SPA = Natura 2000 network




Now we have our Natura 2000 Network, it's been identified, and then what do we do with it? What are the member state required to do to protect these sites?




- Includes practical examples of how these provisions are implemented, namelyArticle 6, which covers both the Birds Directive and the Habitat Directive
- As a Commission guidance, it reflects the view of the Commission as an institution, no just DG ENV, but the final say → CJEU




Article 6 is one of the most crucial elements of the Habitat Directive, and in turn the birds directive.

Its elements apply differently depending on what stage of designation you're at with the Habitat Directive and as the Birds Directive.

1st part of Article 6: the general regime for Natura 2000 sites which covers the constant residual situation in Natura 2000 sites:

- there's a constant requirement to ensure that there are proactive and positive conservation measures which are addressing the threats and these should respond directly to the conservation objectives on the site.
    - Applies only to SAC, because it relates directly to the need for conservation objectives, which are only determined at this final stage.
- there is also a passive requirement to ensure that there is no deterioration in the site.
    - that comes into force essentially as soon as it's adopted as a site of Community Importance by the Commission in the Union List.

2nd part of Article 6: relates to the procedure if you want to build a house in a Natura 2000 site or to identified situations where you have a plan to or project and you have to assess the implications for the site. So in a sense it's kind of upholding and supporting the implementation of 6(2), it's making sure that there's no deterioration, but it also provides for a very limited strict derogation procedure through 6(4)

## Article 7 of the Habitats Directive

- Article 7 of the Habitats Directive makes SPAs subject to the site-based conservation requirements of the set out in Article 6(2), (3), and (4).
- Replaced the obligation held in the second sentence of Article 4(4) of the Birds Directive and making SPAs subject to the derogation procedure of Article 6(4) of the Habitats Directive.



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6(2), (3), (4) non-deterioration, need to assess, derogation procedure.

# Article 6(1): conservation measures

- It applies only to fully designated **SACs**
- It requires the adoption of the necessary positive and proactive conservation measures – no discretion in this regard for Member States
- Goal: to maintain / restore FCS

- Article 6(1) is not applicable to SPAs, however there is still an obligation to establish site-specific conservation measures for the protected bird species in the SPA (C-66/23, *Elliniki Ornithologiki Etaireia*, para. 59)

## C-444/21, *Commission v. Ireland*
## Conservation measures

158 It is true that, as is apparent from paragraphs 64 to 70 of the present judgment and from the judgment of 17 December 2020, Commission v Greece (C-849/19, EU:C:2020:1047, paragraphs 42 to 61), the failure of a Member State to adopt specific and precise conservation objectives must be regarded as constituting a failure to fulfil its obligations under Article 4(4) of the Habitats Directive.

159 That being so, as the Advocate General observed, in essence, in points 85 to 88 of her Opinion, Article 6(1) of that **directive does not require the conservation measures to be adopted imperatively after the adoption of the conservation objectives**.

160 The fact remains that, even if those objectives are defined after the adoption of the conservation measures**, it is necessary for those measures to meet those objectives**.

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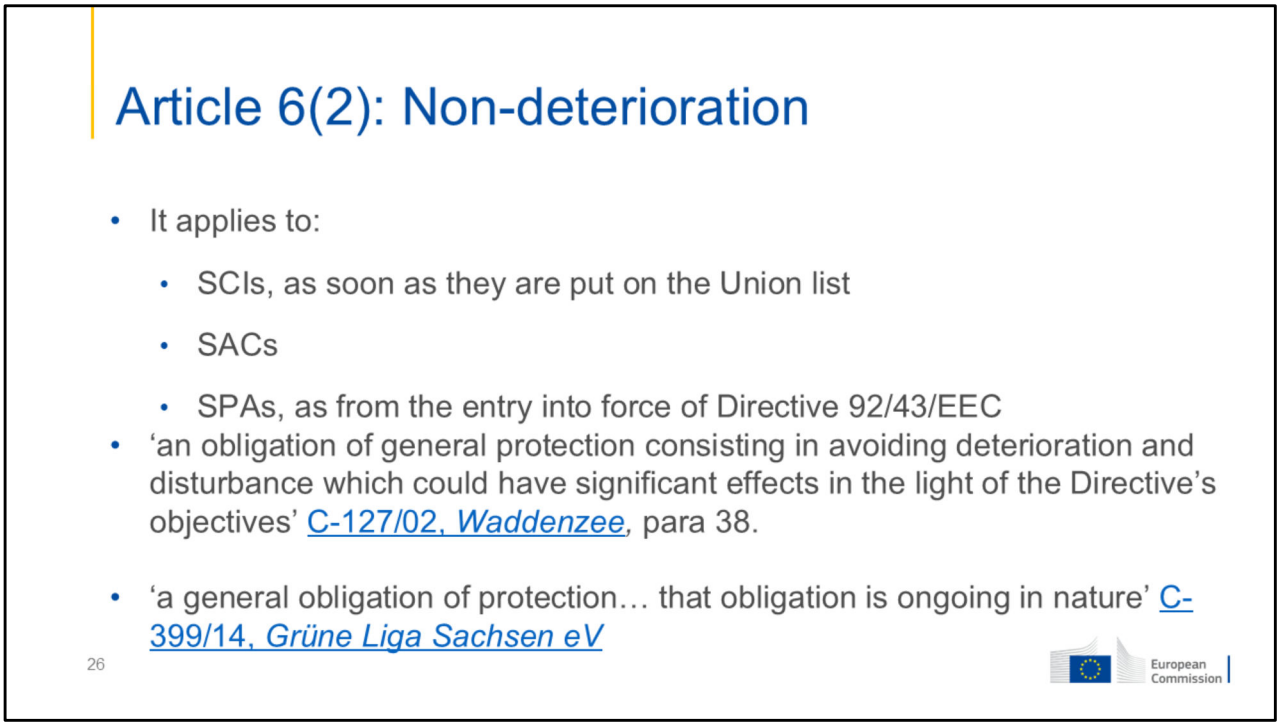
Important case taken against Ireland for its failure to establish conservation measures

Commission had said that if you want your conservation measures to achieve the conservation objectives, which has been set for the site → there needs to be a sequential logical development there where you have your conservation objectives and then in order to achieve those you identify conservation measures.

CJEU: this is not necessarily the case; you can have conservation measures set prior to the setting of conservation objectives. However, the key element there, though, is that these measures do need to achieve the objectives that are set for the site.




And in that vein it needs to be readily determinable that these objectives will be achieved, so there needs to be an ability to verify that the conservation measures will achieve the objectives which have been set, while that doesn't necessarily mean that they need to be quantitative, which is something that the Commission had asked and had argued for.

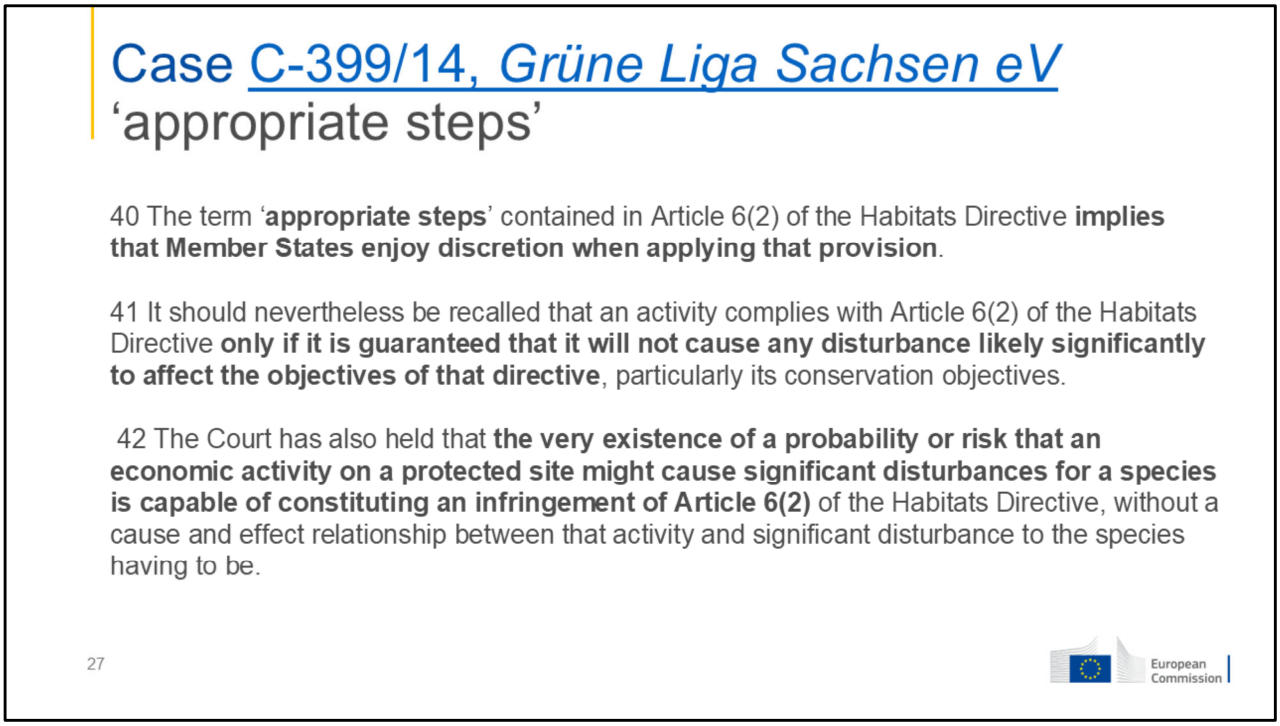



In order to achieve non-deterioration, it might sound like it's just a matter of leaving the site hands off, but there are certain habitat types which do require certain active management.

→ There are some cases in which it might be appropriate to intervene to prevent natural processes. Eg: the loss of grasslands, which require mowing, we need to have that constant, regular, seasonal activity in order to maintain that very important habitat type

In Article 6 it says that *appropriate steps* must be taken. But what is an appropriate step in order to ensure non-deterioration?

- There is discretion for the Member States → they can determine what's appropriate but that discretion is limited by the need to ensure that there is no deterioration (preventative requirement)
- It's not enough that you have taken measures, it's got to stop this from happening in the first place which is important because there are some habitat types which are very difficult to restore after they've been deteriorated and can take years




→ An activity can comply with Article 6 (2) only if it is guaranteed that it will not cause any disturbance likely to affect the objectives of that directive = the conservation objectives to achieve/maintain favorable conservation status

The very existence of a probability of a risk that an economic activity might cause significant disturbance will be enough to constitute an infringement → it doesn't even need to have happened, there just needs to be a likelihood.

## Case C-6/04, *Commission v. United Kingdom*
## Prevention of deterioration

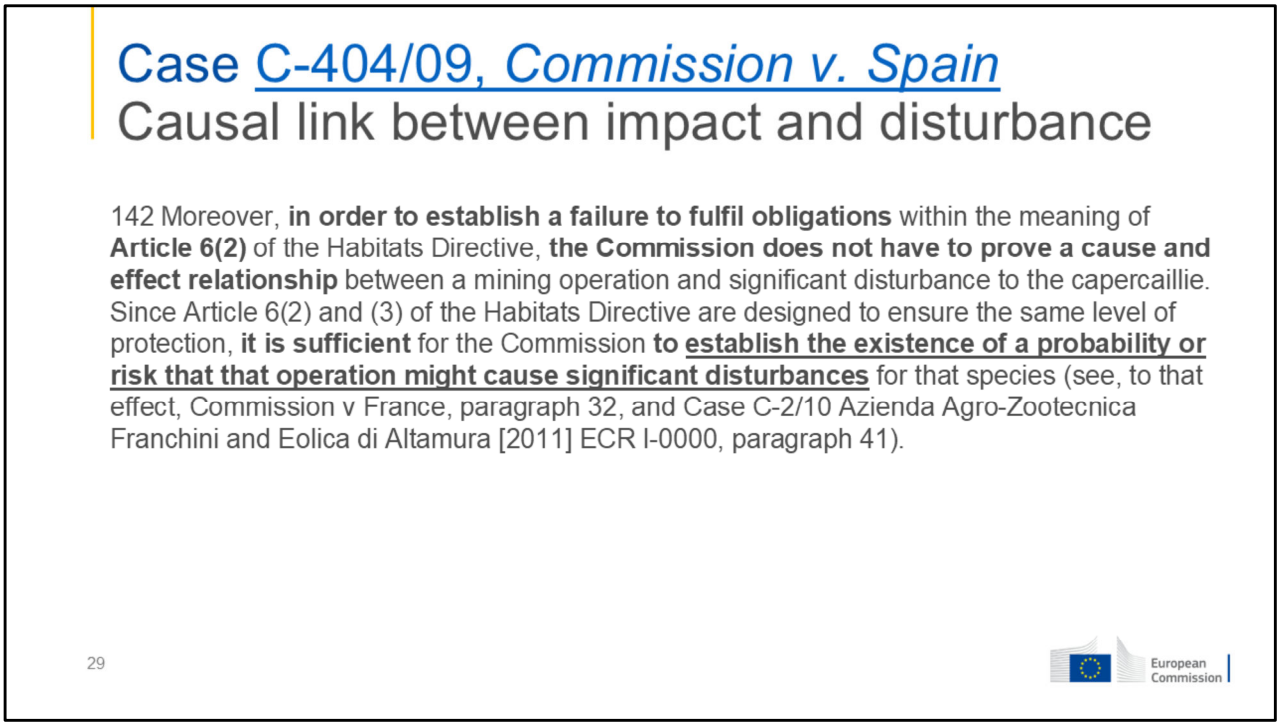
34 As the Advocate General has observed in point 19 of her Opinion, it is clear that, in implementing Article 6(2) of the Habitats Directive, it may be necessary to adopt **both measures intended to avoid external man-caused impairment and disturbance and measures to prevent natural developments that may cause the conservation status of species and habitats in SACs to deteriorate.**



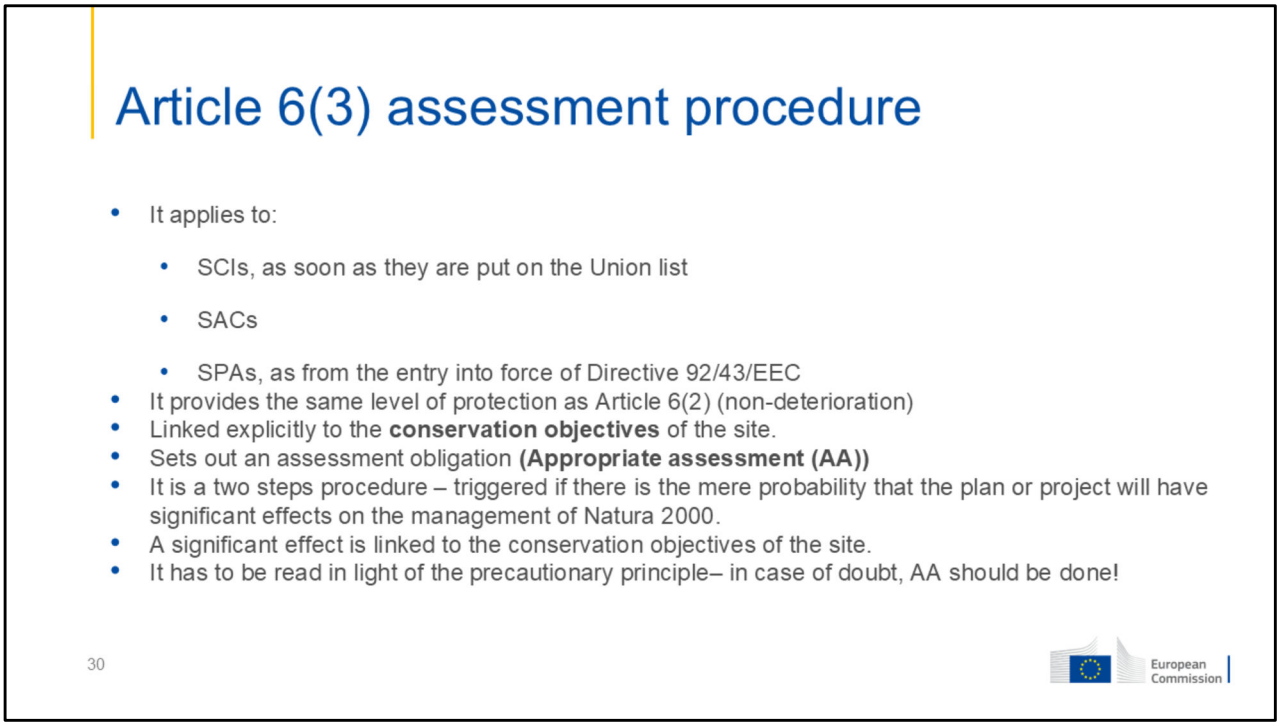
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It isn't just about man -caused deterioration. It may also be necessary to intervene for natural developments

In this case, the alteration of a grassland into a forest due to the accession of that forest into a grassland area.




There should be a causal link between the deterioration and an activity that's been caused disturbance, but there's not a very strong requirement there because often, in view of the **precautionary principle**, the CJEU has taken a very expansive look at this and has said that it is necessary only to establish the existence of a probability of a risk that the operation might cause significant disturbances.

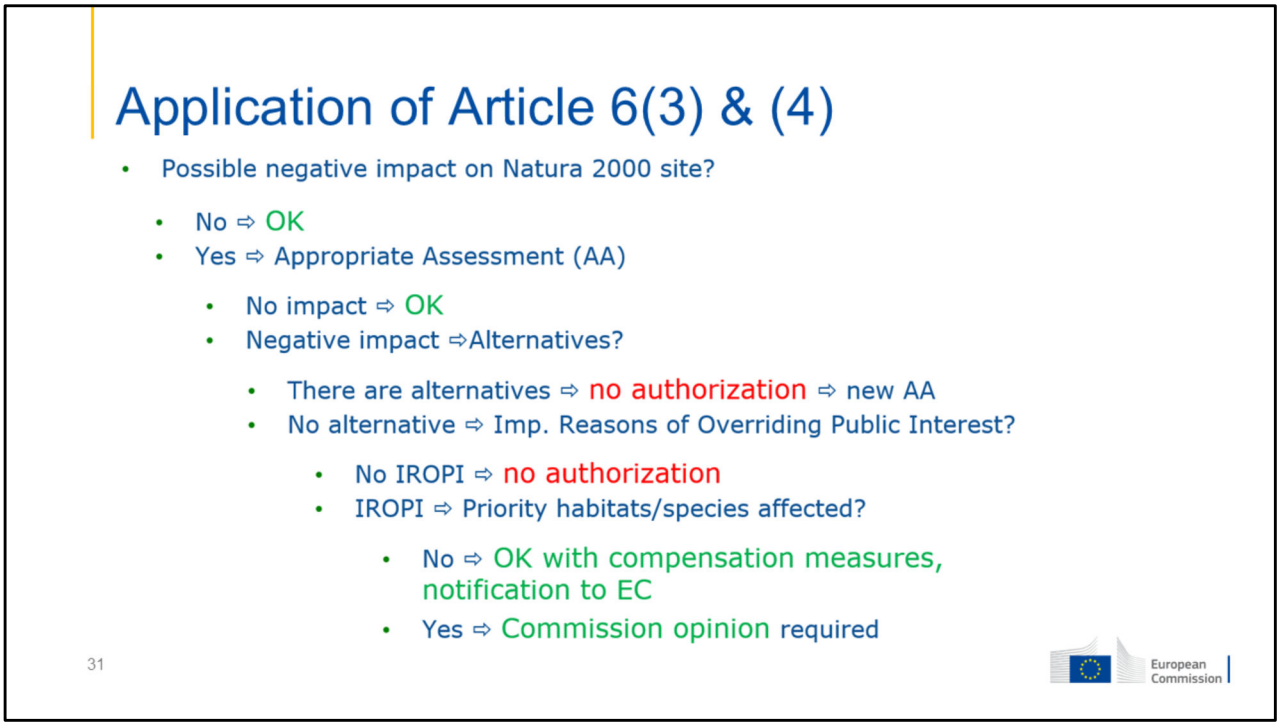



The Habitat Directive is one of the most litigated pieces of EU law in the Union and it's been subject to many court cases and most of that is as a result of Article 6(3) because I think of the sensitivity of the implications that it has.

It applies to SCIs, so those sites that have been adopted by the Commission and it provides the same level of protection as Article 6 (2) → it's about ensuring non-deterioration, and is linked to ensuring that any project or plan doesn't impact on the conservation objectives for the site which have been identified in the designation procedure.

2 steps process:

1. triggering of the appropriate assessment which arises as a result of the mere probability that a plan or project will have a significant effect
2. whether that project can go ahead after the appropriate assessment has occurred, where it doesn't have a significant impact on the habitats types and species present on the site.




First I come to the local authority with a plan or a project, for example, I want to build a house in a Natura 2000 area.

They must look at, is there going to be a possible negative impact on the site?

And then you might say, if it's a site that's predominantly marine, then the house is probably going to be okay.

If it's going to be built in a very sensitive grassland, then there might be a risk for the European hamster which need to be assessed to see what impact that will have.

Then the appropriate assessment occurs → to see if that probability in fact actually is linked to an actual impact. If there's no impact then the project can move ahead.

But if there's a negative, then you have to look at the alternatives.

## Case C-127/02, *Waddenzee*
## 'a preliminary examination'

38 The answer to the second question must therefore be that **Article 6(3)** of the Habitats Directive establishes **a procedure intended to ensure, by means of a preliminary examination**, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it **will not adversely affect the integrity of that site**, while **Article 6(2) of the Habitats Directive establishes an obligation of general protection** consisting in avoiding deterioration and disturbances which could have significant effects in the light of the Directive's objectives, and cannot be applicable concomitantly with Article 6(3).

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In this case the court has articulated the appropriate assessment procedure as a preliminary examination in order to ensure that there will not be any any adverse effects on the integrity of the site and they then differentiated this from Article 6(2) which is about establishing a general protection obligation.

## Case C-258/11, *Sweetman*
## Two stage procedure

29 That **provision thus prescribes two stages**. The first, envisaged in the provision's first sentence, requires the Member States **to carry out an appropriate assessment** of the implications for a protected site of a plan or project when there is a likelihood that the plan or project will have a significant effect on that site (see, to this effect, Waddenvereniging and Vogelbeschermingsvereniging, paragraphs 41 and 43).

30 **Where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site**. The assessment of that risk must be made in the light of, in particular, the characteristics and specific environmental conditions of the site concerned by such a plan or project (see, to this effect, Waddenvereniging and Vogelbeschermingsvereniging, paragraph 49).

31 **The second stage**, which is envisaged in the second sentence of Article 6(3) of the Habitats Directive and occurs following the aforesaid appropriate assessment, **allows such a plan or project to be authorised on condition that it will not adversely affect the integrity of the site** concerned, subject to the provisions of Article 6(4).

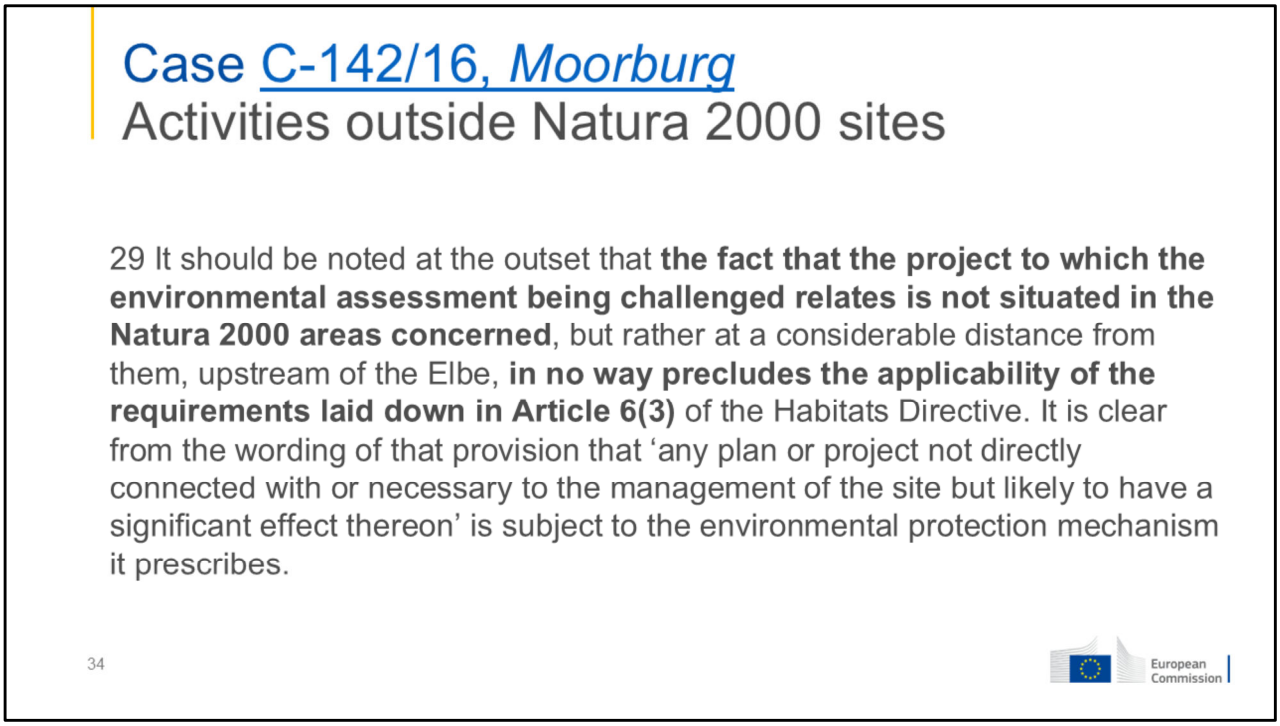
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This can be seen as a two-stage procedure wherein you carry out the appropriate assessment.

Important to note that there is a presumption that a project will not have implications when it is directly connected to the management of a site.

At the second stage, you have to look at whether it'll adversely affect the site.




It's not just about activities that are happening in the the sites.

Article 6(3) is concerned with the impact on the site. it's not about where the activity is occurring, it's not about the size of the scale of it, but **only the impact of on the site**.

Interesting about Habitats Directive as compared to a lot of EU legislation which entails assessments, is that whereas legislation like the EIA directive refer only to the scale of a project, the Habitats Directive looks exclusively at the impact that it'll have.

In this German case, it was held that it is not about whether it is situated in the Natura 2000 site, it is about whether there is an impact on that site.

- Concerned a river Natura 2000 site
- it was found that there was an impact from a factory that was built 600 kilometers away from the site and the runoff from that factory which is flowing down river into the site was found to have a significant impact.
- it doesn't matter if the if the project or plan is in Natura 2000, it's only about the impact that that project or plan has in the sites nearby.

## Case C-461/17, *Holohan*
## Habitat types and species outside the site

38 It must also be added that, since **the assessment must clearly demonstrate why the protected habitat types and species are not affected**, it may be sufficient to establish, as observed by the Advocate General in point 30 of her Opinion, that only certain protected habitat types and species are present in the part of the protected area that is affected by the project and that the other protected habitat types and species present on the site are not liable to be affected.

39 **As regards other habitat types or species, which are present on the site, but for which that site has not been listed, and with respect to habitat types and species located outside that site**, it must be recalled that the Habitats Directive, as follows from the wording of Article 6(3) of that directive, subjects '[a]ny plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon' to the environmental protection mechanism of that provision. In that regard, as stated by the Advocate General in points 43 and 48 of her Opinion, **the conservation objective pursued by the Habitats Directive, recalled in paragraph 35 of the present judgment, entails that typical habitats or species must be included in the appropriate assessment, if they are necessary to the conservation of the habitat types and species** listed for the protected area.

40 In the light of the foregoing, the answer to the first three questions is that Article 6(3) of the Habitats Directive must be interpreted as meaning that **an 'appropriate assessment' must, on the one hand, catalogue the entirety of habitat types and species for which a site is protected**, and, on the other, **identify and examine both the implications of the proposed project for the species present on that site**, and for which that site has not been listed, and the implications for habitat types and species to be found outside the boundaries of that site, provided that those implications are liable to affect the conservation objectives of the site.

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European Commission

It may also be appropriate to look at the habitat types and species outside the site, where they are important and significant to the conservation status of those habitat types and species which are inside the site.

→ seeing the nature of the network as a complicated and interlinked system.

→ this isn't just about the law, it's also about governing and managing ecological processes.

## Case C-127/02, *Waddenzee*
## Trigger for AA, precautionary principle

41. Therefore, the triggering of the environmental protection mechanism provided for in Article 6(3) of the Habitats Directive does not presume – as is, moreover, clear from the guidelines for interpreting that article drawn up by the Commission, entitled 'Managing Natura 2000 Sites: The provisions of Article 6 of the "Habitats" Directive (92/43/EEC)' – that the plan or project considered definitely has significant effects on the site concerned but **follows from the mere probability that such an effect attaches to that plan or project.**

44. In the light, in particular, of **the precautionary principle**, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, **such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned**. Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that **in case of doubt as to the absence of significant effects such an assessment must be carried out**, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Article 2(1) thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora.

36

European Commission

Looking at the precautionary principle, which is something that the CJEU always has in its mind when it's looking at the Habitat's directive and EU legislation as a whole, what triggers an appropriate assessment is the mere probability of a project having an effect that would significantly impact the habitats or species in the site

→ If it can't be excluded, that it won't have an impact, then you still have to move ahead with this appropriate assessment.

## Case C-127/02, *Waddenzee*
## Using best scientific knowledge

54 Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those **objectives must be identified in the light of the best scientific knowledge in the field**. Those objectives may, as is clear from Articles 3 and 4 of the Habitats Directive, in particular Article 4(4), be established on the basis, inter alia, of the importance of the sites for the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I to that directive or a species in Annex II thereto and for the coherence of Natura 2000, and of the threats of degradation or destruction to which they are exposed.

57 So, **where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation.**

59 Therefore, pursuant to Article 6(3) of the Habitats Directive, the **competent national authorities**, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned, in the light of the site's conservation objectives, **are to authorise such activity 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 .**

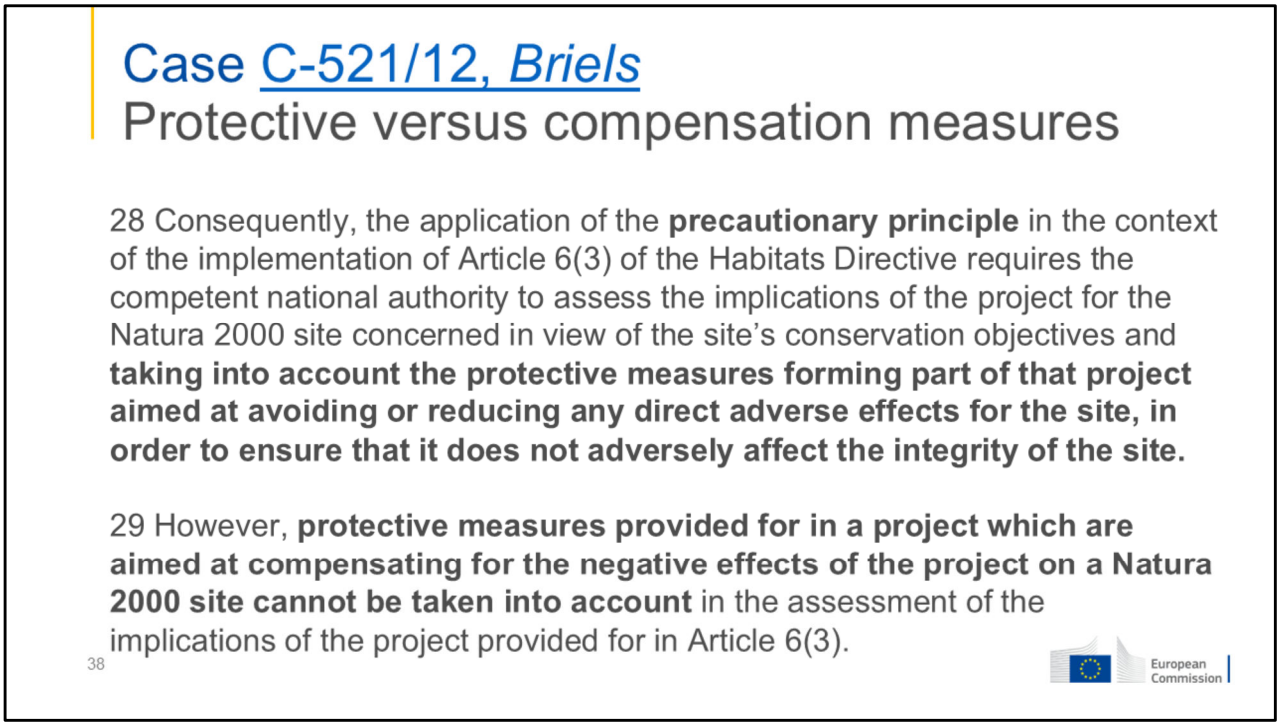
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European Commission

You also need to make sure that you're using the best scientific knowledge → complicated, because the standards of data are very significantly depending on species and depending on the habitat types and the member states.

In line with this need for the precautionary principle, it is important that activities are only authorized if it is certain that they will not have an adverse effect on the integrity of the site.

→ Where scientific doubt remains, it will be necessary to conduct an appropriate assessment.




If I design a project in the Natura 2000 site to build a house, for example, and I know that it's going to affect certain species, I might put into my plan certain measures that I will take to limit the impacts of that construction on the Natura 2000 site.

There are various ways in which you can do this, but these are things which are integral to the project and can't be separated from it. These are permitted and they can be taken into account because they lower the impact and they may bring the project below the threshold of whether it will have an impact on the integrity of the site.

! However, there is a differentiation to be made there between protective measures such as those that I've described and compensation measures. Compensation measures are those where there is damage to a site and then I take measures elsewhere to damage to a site and then I take measures elsewhere to counter that, so I restore for example grassland in another area because I've destroyed the grassland in this part where my project is)

→ These will not be covered by Article 6(3 and you can't take those into account when you're conducting an assessment.

Any compensatory measures will be taken into account in the 6(4) procedure.

## Case C-127/02, *Waddenzee*
## Regular periodic activities

28 The fact that the **activity has been carried on periodically for several years** on the site concerned and that a **licence has to be obtained for it every year**, each new issuance of which requires an assessment both of the possibility of carrying on that activity and of the site where it may be carried on, **does not in itself constitute an obstacle to considering it, at the time of each application, as a distinct plan or project within the meaning of the Habitats Directive.**

39

European Commission

Important to note that simply because an activity has been happening regularly, you need to look at that every single year and do an appropriate assessment every single year, as long as there is this risk that there will be a significant impact → to reflect the fact that the status and the context in which you're acting in nature is always changing, even if the activity isn't the sensitivity of the habitat in the species might be changing for a variety of reasons.

## Case C-142/16, *Moorburg*
## Cumulative effects of multiple projects

62 Projects which […] are likely to cause, **as a result of their combination with the project to which the impact assessment relates**, deterioration or disturbance **likely to affect the migratory fish** present in the river and consequently result in the deterioration of the site concerned in the light of the objectives pursued by the Habitats Directive, **are not to be excluded from the impact assessment required under Article 6(3)** of the Habitats Directive.



European Commission

This is in the wording of Article 6(3).

CJEU: When you are designing a project and when I'm then looking to see if an appropriate assessment needs to be made, I need to look at the broader context within which this project is taking place → I need to look at other projects which have occurred in the Natura 2000 site, or that are planned. → it's looking at the cumulative effects of multiple projects because otherwise you create this loophole where I could have lots of tiny projects, which all fall under the threshold, but as a whole would have a significant impact when taken together.

→ It's important that the multiple effects are taken into account , and it's not just about an individual project or plan, it's about the context in which they exist.

## Case C-243/15, *LZ*

### 'if appropriate, after having obtained the opinion of the general public'

45 In addition, Article 6(3) of Directive 92/43 provides that the competent national authorities, before agreeing to a plan or project as referred to in that provision, must, if appropriate, obtain the opinion of the general public. **That provision must be read in conjunction with Article 6(1)(b) of the Aarhus Convention**, an instrument which forms an integral part of the EU legal order.

46 Article 6(1)(b) of the Aarhus Convention states that the provisions of Article 6 of the convention concerning public participation in decisions on specific activities are to apply to decisions on proposed activities not listed in Annex I to the convention which may have a significant effect on the environment. **Article 6 of the convention**, as is clear from Article 6(3), (4) and (7), **confers on the public, in particular, the right to participate 'effectively during the environmental decision-making'** by submitting, 'in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity'. **There must be 'early public participation, when all options are open and effective public participation can take place'.**

70 In this context, the referring court has, moreover, observed that, since only the applicant for the permit is automatically a party to the procedure, it is possible that, without the participation in the administrative procedure of an environmental organisation such as LZ as a party to the procedure, arguments supporting protection of the environment will be neither put forward nor taken into account, so that the fundamental objective of the procedure envisaged in Article 6(3) of Directive 92/43, namely that of ensuring a high level of environmental protection, will not be achieved.

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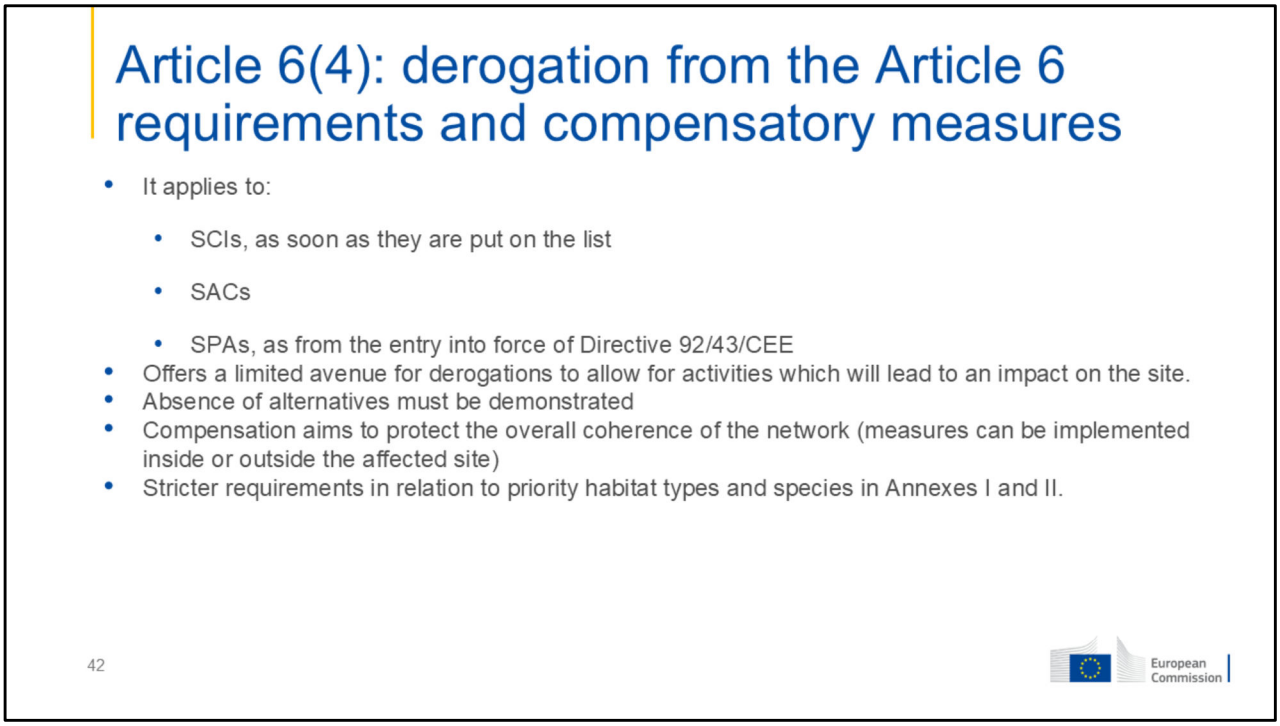
The last line of article 6(3) says: "If appropriate, after having obtained the opinion of the general public".

"If appropriate" → there's a certain discretion which is afforded to the member states

The CJEU have taken a very strong approach in this, and they've looked at the Arhus Convention, which affords the right to public participation for environmental decision-making.

Looking at that and looking at the European Charter of Fundamental Rights, the CJEU has said that there must be an 'early public participation when all options are open and effective public participation can take place'.

- that's not something that's immediately clear from the Directive




limited derogation procedure → allows for projects to move forward, even though there might be a significant impact on the site.

→ this is the reason why the birds directive is made subject to Article 6:

the birds directive was adopted in 1979 and then it was only in 1992 that the Habitat Directive came into play

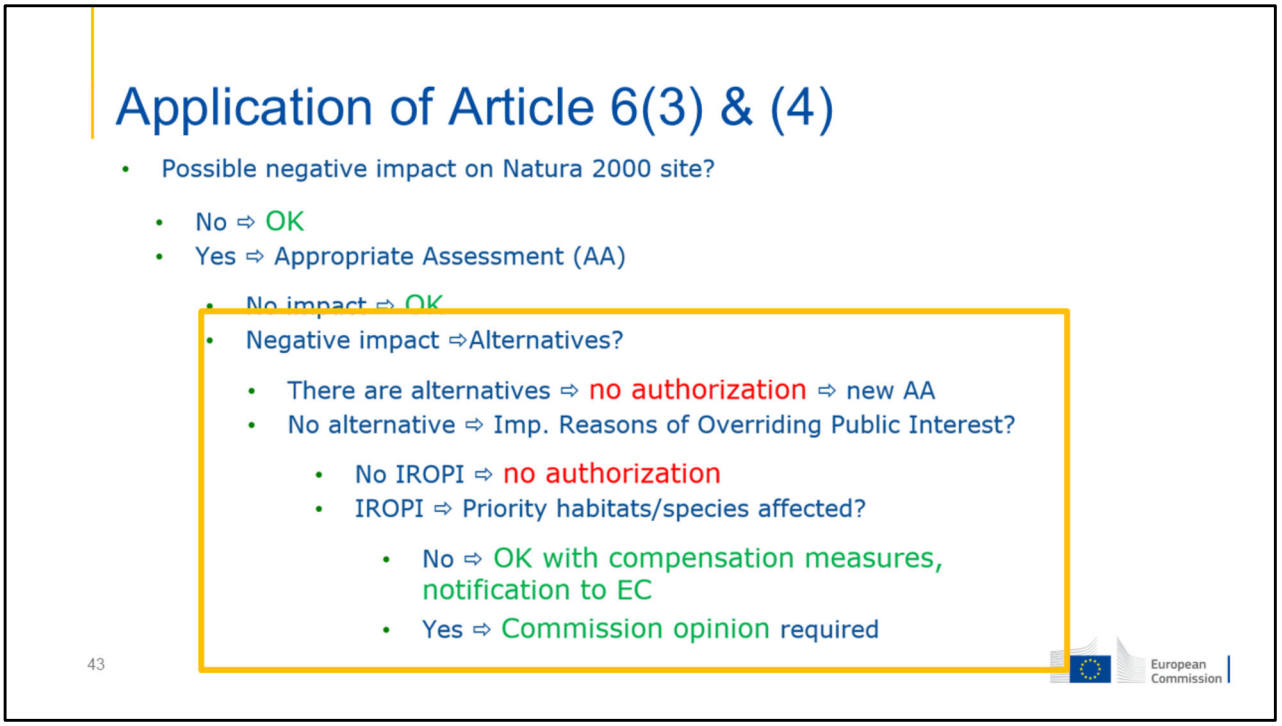
→ there was site protection obligations for SPA during that time but it was quite controversial because there was no derogation procedure → there was an obligation of no deterioration and nothing could happen in those sites

→ it was essentially about strict protection and the member states are very unhappy about this.

→ they made this derogation procedure and made the bird's director subject to it

→ it offers you know a very limited avenue

→ it has quite a few stipulations in order to achieve this and well




From this Article 6(3) procedure, we've identified that there will be a negative impact.

Then you need to look first, are there alternatives available? If there are, then you can't move forward and you need to do a new appropriate assessment for these alternatives, which are hopefully less impactful or not impactful at all.

If there is no alternative identified, then you must ask if it is an imperative reason of overriding public interest.

These are somewhat at the discretion of the member states but there are certain limits to that.

If it is found to be an imperative reason, you then have to look at the site and then see if there are there any priority species or habitats affected? (these priority species and habitats are indicated in the Annexes with an asterisk, they relate to very sensitive species and habitats)

And in those cases, you can only move forward with a Commission Opinion → it will ask for certain measures to be made perhaps and examine if it will be appropriate to move forward.

If not, there's still an obligation to take compensatory measures. If there'll be an impact on this non-priority habitat type of species I'll need to try and do some

additional efforts somewhere else in order to to balance out the impact. → last resort!!

Remember that it is better to conserve and keep what you have than it is to compensate elsewhere in terms of the ecological benefits

## Case C-304/05, *Commission v. Italy*
## Article 6(3) a prerequisite

83 Furthermore, **Article 6(4) of Directive 92/43 can apply only after the implications of a plan or project have been studied in accordance with Article 6(3)** of that directive. **Knowledge of those implications** in the light of the conservation objectives relating to the site in question is **a necessary prerequisite for application of Article 6(4)** since, in the absence thereof, no condition for application of that derogating provision can be assessed. The assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration. In addition, in order to determine the nature of any compensatory measures, the damage to the site must be precisely identified.

44

European Commission

As an authority,you cannot just go straight to the Article 6(4) procedure. You need first to go through this 6(3) procedure, because a lot of what is done at the later stage and through the fourth paragraph is based on and builds on the appropriate assessment. → this appropriate assessment that's been done already allows us to understand

- what those impacts are,
- how they can be addressed and mitigated
- what appropriate alternatives there are.

## Case C-239/04, *Castro Verde*
## Absence of alternative solutions required

35 That provision, which permits a plan or project which has given rise to a negative assessment under the first sentence of Article 6(3) of the Habitats Directive to be implemented on certain conditions, **must, as a derogation from the criterion for authorisation laid down in the second sentence of Article 6(3), be interpreted strictly.**

36 Thus, **the implementation of a plan or project under Article 6(4)** of the Habitats Directive **is, inter alia, subject to the condition that the absence of alternative solutions be demonstrated.**

45

European Commission

There needs to be an **absence of alternative solutions** → this requires the authorities to show that they've looked at alternatives and considered alternatives and they must then give reasons as to why those are not viable alternatives and why it is that they must move forward with this particular approach that they have decided and so it needs to be very **transparent procedure**.

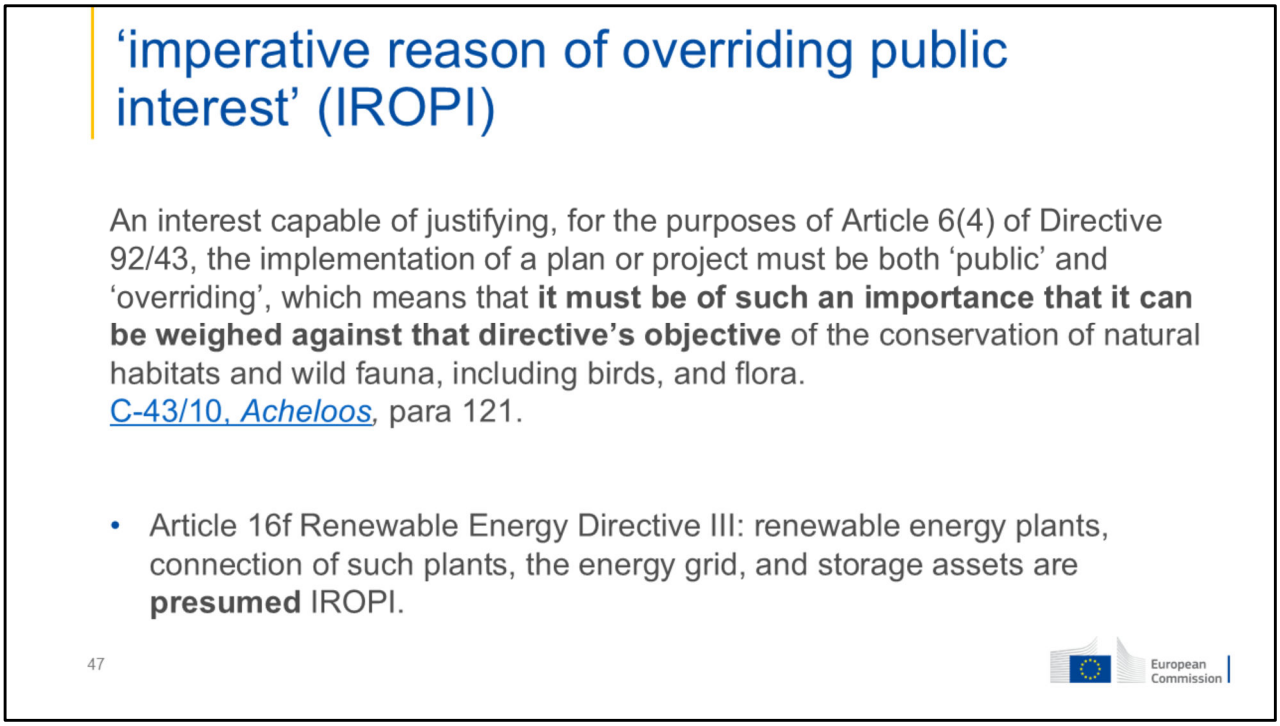
## Case C-411/19, *WWF Italia*
## Relevant considerations for alternatives

41 Account being taken of the strict interpretation of Article 6(4) of the Habitats Directive, as noted in paragraph 34 above, **it cannot be accepted that the economic cost alone of the measures capable of being considered in the review of alternatives may be a determining factor** in the choice of alternative solutions under that provision (judgment of 14 January 2016, Grüne Liga Sachsen and Others, C-399/14, EU:C:2016:10, paragraph 77).



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Relevant considerations = they have not excluded that you can take economic cost to account when looking at the alternatives, but it cannot be the determining and decisive factor. It has to be, by reference to a few different considerations, the ecological benefits or the impacts, the cost, the social or cultural elements.




in view of the strict language, the CJEU has said that it must be of such importance that it can be weighed against the Directive's objectives → conservation of natural habitat types

It has to be a public interest → not commercial interest or a private interest

They've also looked at energy and renewable energy and energy security → held that that is also in based in a case-by-case assessment it can be considered an imperative reason of overriding public

Revision of the Renewable Energy Directive, in the wake of the energy crisis following the invasion of Ukraine → increased importance seen on achieving energy security, but also about achieving climate neutrality → renewable energy plants, connections of such plants, energy grid and the storage assets are presumed imperative reasons of overriding public interest. → issue: it can have an impact on those habitats and species.

BUT it's a *presumption* = can be rebutted by intervening parties, not just a *carte blanche*, but it does make it far easier for developers to move forward with those kinds of projects and harder to come back on them.

## Case C-521/12, *Briels*
## Compensatory measures must aim for coherence

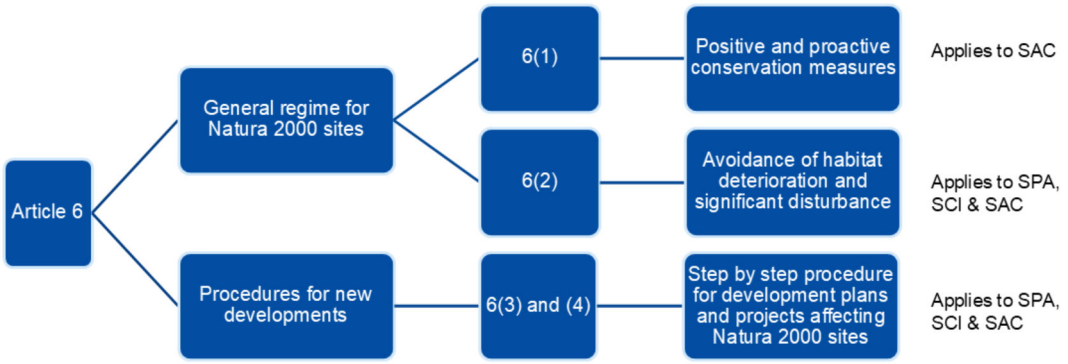
38 It should be observed in that regard that, in the application of Article 6(4), the fact that the measures envisaged have been implemented on the Natura 2000 site concerned has no bearing on any 'compensatory' measures for the purposes of that provision. For the reasons set out by the Advocate General in point 46 of her Opinion, **Article 6(4) of the Habitats Directive covers any measure liable to protect the overall coherence of Natura 2000, whether it is implemented within the affected site or in another part of the Natura 2000 network.**

48

European Commission

You to make sure that they ensure the coherence of the network, of the Natura 2000 network → Article 3, which states that it will ensure coherent network of protected areas = Natura 2000 network.

# Article 6:
# Protecting and managing Natura 2000 Sites






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Thank you!
Questions?
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