The permitting procedure under the EU Nature Directives - Natura 2000 and Appropriate Assessments

Fotios Papoulias
European Commission, DG Environment, Nature Protection Unit
EU Biodiversity Strategy to 2020
Target 1 - Nature conservation

To halt the deterioration in the status of all species and habitats covered by EU nature legislation and achieve a significant and measurable improvement in their status by 2020

- Complete the establishment of the Natura 2000 network and ensure good management
- Increase stakeholder awareness and involvement and improve enforcement
- Improve and streamline monitoring and reporting
- Ensure adequate financing of Natura 2000 sites
Natura 2000 – based on both EU nature directives

HABITATS DIRECTIVE
- National List of proposed sites (pSCI)
- Sites of Community Importance (SCI)
- Special Areas of Conservation (SAC)

BIRDS DIRECTIVE
- Special Protection Areas (SPA)
Natura 2000 Network
pillar of EU biodiversity policy

- The EU wide ecological network of protected areas
- Aims to ensure long-term survival of Europe’s most valuable/threatened species and habitats
- The largest co-ordinated network of conservation areas in the world
- Supports sustainable development
- In parallel with species protection requirements

> 27,700 sites 1,234,000 km²
= 18.2% of land
> 9% of sea
Management framework of Natura 2000

Within all Natura 2000 sites:

- Positive measures are taken, where necessary to maintain and restore those habitats and species to a favourable conservation status in their natural range.

- Avoid damaging activities that could significantly disturb the species and/or habitats for which the site has been designated;

The ultimate objective is to ensure that the species and habitats reach «favourable conservation status».
Article 6: Protecting & Managing Natura 2000 sites

Art. 6

- General regime for all Natura 2000 sites
  - 6 (1) Positive and proactive conservation measures
    - Applies to SACs
  - 6 (2) Avoidance of habitat deterioration and significant disturbance
    - Applies to SPAs, SCIs & SACs
  - Procedures for new developments
    - 6 (3) Step by step procedure for development plans and projects affecting Natura 2000 sites
      - Applies to SPAs, SCIs & SACs
    - 6 (4)
Assessment & Permitting process under Art. 6(3)&(4)

- No ‘a priori’ prohibition of new 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 if the integrity of the site is guaranteed

  Art. 6(4)
  - In case of negative conclusion and absence of alternatives, PP can still 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 significant negative impact on Natura 2000 site?
  • No ⇒ OK
  • Yes ⇒ Appropriate Assessment (AA) re. site conservation obj.
    • No impact on site integrity ⇒ OK
    • Negative/unknown impact ⇒ no authorisation - Alternatives?
      • There are alternatives ⇒ new AA
      • No alternative ⇒ Imp. Reasons of Overriding Public Interest?
        • No IROPI ⇒ no authorisation
        • IROPI ⇒ Priority habitats/species affected?
          • No ⇒ OK with compensation measures, notification to EC
          • Yes ⇒ Commission opinion required if reasons other than health/safety/env
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 integrity of the site.
  - Authorisation if certainty, without any reasonable scientific doubt, that the plan or project will not affect the integrity of the site.
- Alternatives & compensation measures, if required, need to be properly analysed and implemented.
- Coordination with the EIA/SEA process is possible/advisable.
Plans and projects

- No definition of "plan" or "project" in Hab Dir
- Court supports a broad meaning
- Plans – wide interpretation (including land use or spatial plans, sectoral plans)
- Plans such as policy statements or other policy documents normally outside the scope
- Plans and projects related to conservation management excluded
- AA at plan level does not exempt projects from AA
Determining likelihood of significant effect

- **Likelihood** vs. Certainty
- **Precautionary principle** – if in doubt, go for AA
- **Spatial scope** (plans/projects either inside or outside Natura 2000 sites)

**Significant effect:**
- No arbitrary (quantitative) definition → case by case approach;
- Related to
  - specific features/ecological conditions of 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
Site's conservation objectives

- Information on each site in a Standard Data Form (SDF)
- As a minimum: no deterioration
- Article 6(1) → more specific objectives
- Management plans
- Guidance note of Commission services


<table>
<thead>
<tr>
<th>Code</th>
<th>Name</th>
<th>POPULATION</th>
<th>SITE ASSESSMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Resident</td>
<td>Migratory</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Breed</td>
<td>Winter</td>
</tr>
<tr>
<td>1337</td>
<td>Castor fiber</td>
<td>I P</td>
<td>B</td>
</tr>
<tr>
<td>1355</td>
<td>Lutra lutra</td>
<td>I P</td>
<td>B</td>
</tr>
<tr>
<td>1318</td>
<td>Myotis daubentiana</td>
<td>I P</td>
<td>C</td>
</tr>
<tr>
<td>1324</td>
<td>Myotis myotis</td>
<td>I P</td>
<td>C</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Code</th>
<th>Name</th>
<th>POPULATION</th>
<th>SITE ASSESSMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Resident</td>
<td>Migratory</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Breed</td>
<td>Winter</td>
</tr>
<tr>
<td>1188</td>
<td>Bombina bombina</td>
<td>I P</td>
<td>B</td>
</tr>
<tr>
<td>1186</td>
<td>Triturus cristatus</td>
<td>111-50</td>
<td>C</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Code</th>
<th>Name</th>
<th>POPULATION</th>
<th>SITE ASSESSMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Resident</td>
<td>Migratory</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Breed</td>
<td>Winter</td>
</tr>
<tr>
<td>1130</td>
<td>Aspius aspius</td>
<td>I C</td>
<td>C</td>
</tr>
<tr>
<td>1149</td>
<td>Cobites taenia</td>
<td>I R</td>
<td>C</td>
</tr>
<tr>
<td>1144</td>
<td>Gobio</td>
<td>I C</td>
<td>A</td>
</tr>
<tr>
<td>1099</td>
<td>Lampetra fluviatilis</td>
<td>I V</td>
<td>C</td>
</tr>
</tbody>
</table>
Assessing the implications for the site

- Evaluation on a **case-by-case basis**
- Look at **all aspects of the plan or project** that could cause a significant effect on the Natura 2000 site
- Consider **all elements of the site** essential to its functions and structure and to the habitat types and species present.
- Use **best scientific knowledge**
- 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.
Appropriate assessment - methodology

1. Define the study area:
   - Natura 2000 site
   - Project actions areas

2. Identify the conservation objectives of the site

3. Identify the habitats and species to be considered in the assessment:
   - Analyse species sensitivity to project actions & habitats present in the project areas

4. Consultation: Competent authorities & stakeholders

5. Existing information, inventories, surveys

6. Information about other plans and projects

7. Assess the effects on natural habitats & species, ecological structure & functions

8. Design preventive and mitigation measures

9. Determine the effects on the integrity of the site

10. Design monitoring
Decision making

- The appropriate assessment should contain complete, precise and definitive conclusions capable of removing all reasonable scientific doubt as to the effects.

- Developer normally pays for AA........but authorities need to ensure 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).

- Need to ensure sufficient ecological expertise
  
  Example: Approach of the Czech Republic – A System of specially authorised persons for Natura 2000 & a special exam to be passed to be assessor.
Integrity of the site

Sum of structure, function, ecological processes

Linked to conservation objectives, resilience

Site specific

Court (case 258/11): A PP will affect the integrity of a site 'if it is liable to prevent the lasting preservation of the constitutive characteristics of the site'
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/authorisation of a plan or project

Not to be confused with compensation measures under Art. 6(4) (Court case 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'
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.

• 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 - see Table)

- **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
  - 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)

<table>
<thead>
<tr>
<th></th>
<th>Appropriate Assessment</th>
<th>EIA (amended Dir.)</th>
<th>SEA</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Which type of development covered?</strong></td>
<td>Any plan or project <strong>likely</strong> to have an adverse effect on a Natura 2000 site</td>
<td>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)</td>
<td>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</td>
</tr>
<tr>
<td><strong>What impacts need to be assessed relevant to nature?</strong></td>
<td>Assessment in view of the site’s conservation objectives (for species/habitats for which site designated)</td>
<td>significant effects on ..., <strong>biodiversity</strong>, with particular attention to species and habitats protected under the Habitats and Birds Directives.</td>
<td>Likely significant effects on the environment, including on issues such as biodiversity, fauna, flora &amp; interrelationship</td>
</tr>
</tbody>
</table>
## Comparison of Appropriate Assessment, EIA and SEA (2)

<table>
<thead>
<tr>
<th>Who carries out the Assessment?</th>
<th>Appropriate Assessment</th>
<th>EIA</th>
<th>SEA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Responsibility of the competent authority but developer may need to provide necessary studies &amp; information</td>
<td>The developer provides necessary information to be taken into account by the competent authority</td>
<td>Competent planning authority</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Are the public/ Other authorities consulted?</th>
<th>Appropriate Assessment</th>
<th>EIA</th>
<th>SEA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not obligatory but encouraged (the public ‘if appropriate’)</td>
<td>Compulsory consultation to be done before adoption of the proposal</td>
<td>Compulsory consultation to be done before adopting the PP</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>How binding are the outcomes?</th>
<th>Appropriate Assessment</th>
<th>EIA</th>
<th>SEA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Binding. Agreement to the plan/project only if it will not affect the integrity of the site</td>
<td>Result of consultations and information must be taken into consideration in the development consent procedure</td>
<td>Environmental report &amp; opinions expressed shall be taken into account during the preparation of the plan/program</td>
<td></td>
</tr>
</tbody>
</table>
Complementarity of SEA and EIA Dir. with Art. 6 Hab. Dir

- SEA/EIA have broader scope and application than N2000;
- Extended assessment obligations:
  - Scoping (SEA Dir., optional under EIA amended Dir.)
  - Assessment of reasonable alternatives (SEA Dir., EIA amended Dir.)
  - Participation of the public and the environmental authorities (information and consultation)
  - Transboundary impact assessment and consultations.
  - Information after the decision
  - Monitoring (SEA Dir., EIA amended Dir.)
Commission guidance on streamlining

For energy infrastructure Projects of Common Interest (PCIs)

Recommendations:

- early planning, roadmapping and scoping of the assessments; integration of env assessments and requirements;
- procedural co-ordination and time limits;
- data collection, sharing and quality control;
- cross-border cooperation;
- early and effective public participation;

COM guidance on coordinated/integrated procedures under Amended EIA Directive (Commission notice 2016/C 273/01)
Typical problems with applying Article 6(3)

- **Trying to avoid Art 6(3) AA** - inappropriate screening, non-respect of the Precautionary Principle
- **Wrong interpretation of 'PP necessary for the management of the site',** e.g. no AA of forest management plans
- **No or not appropriate 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(4)

- Trying to avoid going to 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
  - Presenting normal management measures (e.g. restoration of existing sites) as compensation
Concluding comments

- The «Appropriate Assessment» is a key tool of Habitats Directive in ensuring **sustainable development** and **nature protection**. 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.
Species Protection Regime

- HD Art. 12 (animals) & 13 (plants), BD Art. 5 (birds) provide system of strict species protection
- Derogations allowed under specific conditions
- Annex V HD and Annex II BD lists species that can be hunted
- EC Guidance documents on strict protection (HD Art. 12), sustainable hunting, and on large carnivores
- EC supports Species Action Plans/Management Plans
EU Action Plan for Nature, People and the Economy

- Based on Fitness Check of nature directives
- Better implementation through action in the following areas:
  - More/better guidance and policy coherence
  - More political ownership and better compliance
  - Strengthening investment in Natura 2000 and EU funding
  - Communication and stakeholder/public engagement
- Timeframe 2017-2019
- Commission, MS, regional and local authorities, stakeholders, all of us should fully engage in delivering the actions!
Commission guidance documents

- 'Managing Natura 2000 sites – the provisions of Art. 6’ – updated version forthcoming
- Assessment of plans and projects : methodological guide Art 6 (3) & (4) – under updating
- Species protection Art. 12 – under updating
- Sector specific guidance:
  - Energy infrastructure
  - Hydro-power
  - Wind energy
  - Non-energy extractive industries
  - Ports & estuaries
  - Aquaculture
  - Inland Waterways
  - Agriculture
  - Forests

Thank you for your attention!