UPPSALA
UNIVERSITET

Department of Law
Spring Term 2020

Master's Thesis in European Environmental Law
30 ECTS

Paragraph 6(4) of the Habitats Directive and the Precautionary Principle

The European Commission – Friend or foe?

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Abbreviations

BD	Birds Directive
CBD	Convention on Biodiversity
ECJ	European Court of Justice
EEA	European Environmental Agency
EIA	Directive on the assessment of the effects of certain public and private projects on the environment
EU	European Union
HD	Habitats Directive
MS	Menmber States
ORRPI	Overriding Reason of Public Interest
SAC	Special Areas of Conservation (Under the HD)
SPA	Special Protecion Areas (Under the BD)
TFEU	Treaty on the Function of the European Union
UK	United Kingdom

1 Introduction

1.1 Background

Biological diversity, or biodiversity as it is usually called, is decreasing by the minute. We are losing the diversity of living organisms and ecosystems at a never before precedented pace.[1] However, this loss is nothing new, and efforts have been made internationally for many years. Already back in 1992, that is, almost 30 years ago the United Nations (UN) adopted the so-called Convention on Biodiversity (CBD). Through the adoption of the convention all contracting parties vouched to implement the accorded measures in order to protect the biodiversity. [2]

The centerpiece for the European conservation work is based on the Natura 2000 network, a coherent network of protected areas throughout the EU. The Natura 2000 framework is made up by the Birds Directive[3] on one hand, and the Habitats Directive[4] on the other. The Directives oblige the Member States (MS) to designate certain areas of their territories as conservation areas with the hope to ensure the survival of species and habitats of whose existence is endangered. The implementation in the MS has however proven to be rather challenging. To present day half of the MS are failing to designate the obliged areas. The CBD implemented a set of targets called the Aichi targets in 2010. The targets are part of the international conservation plan between 2011-2020. One of the targets, target 11, established the goal of protecting 17 per cent of the terrestrial and inland water. The EU has, as of end 2019, designated 18 per cent of its area in line with the Aichi target. Unfortunately, only half of the MS have designated over 17 per cent if their area. 14 of the 28 concerned states have thus failed to comply with the obligations.

Earlier this year, the European Commission presented their suggestion for a new Biodiversity strategy. The new strategy contained an increase in the amount of areas

[1] IPBES, *The global assessment report on biodiversity and ecosystem services, summary for policymakers.*
[2] United Nations, *Convention on Biological Diversity.*
[3] Directive 2009/147/EC *of the European Parliament and of the Council of 30 November 2009 on the Conservation of Wild Birds.*
[4] Council Directive 92/43/EEC of 21 May 1992 *on the Conservation of Natural Habitats and of Wild Fauna and Flora.*

which should be protected by year 2030 from 17 per cent to 30 per cent.[5] Given the challenge for the MS to designate 17 per cent today, an increase to 30 per cent until 2030 seems much unlikely. The challenge keeping MS from designating the obliged areas is the fear that the designation will restricts their economic and social interests severely,[6] a fear which is not completely irrational. The MS have both positive and negative obligations[7] to protect the sites of conservation from deterioration. The main rule established in paragraph 6(3) HD entails in essence that no project or plan which is not necessary to the conservation of a site should be permitted if they are likely to have a significant negative effect on the site in question. The fear of the MS is therefore not completely irrational, since the rule implies a restriction for the MS to do as they want within their territory.

The legislator has however kept the need to balance conflicting interest in mind. This acknowledgement is established in paragraph 6(4) HD and opens up for the possibility to derogate from the otherwise stringent protection provided by the Directives.[8] The need for certain flexibility in cases of conflicting interests is understandable. Any derogation from the protection under the Directives should however be applied restrictively in order to comply with the ecological interest and the general aims of the directives. The fundamental principle within the EU is that actions concerning the environment should be based on precaution with regards to the possible risks. Just as a flexibility in the legislation is needed, the restricting precautionary principle is needed to avoid any uncertain environmental risks which could compromise the overriding purpose of the directives.

[5] COM(2020) 380.
[6] Krämer, *EU Environmental Law, p.* 205.
[7] The positive obligation obliges the MS to take the needed management measures for conservation. The Negative obligation means the obligation to prevent deterioration of the site.
[8] The BD and HD.

1.2 Goal and research question

The goal of this thesis is to examine whether paragraph 6(4) HD, is applied in accordance with the fundamental precautionary principle. The cornerstone of the European nature protection rests on the network of protected areas established under the Natura 2000 framework. The framework has been adopted to ensure the survival of endangered habitats and species within the European territory. Each permission to deteriorate a protected site entails a threat to the species and habitats, for which the sites have been designated. In order to ensure the protection of the threatened areas and those habitats and species it hosts every authorization needs to be evaluated based on precaution. For this reason, it is necessary to investigate if the authorizations under 6(4) HD are given only in the cases which are in line with the precautionary principle, which is supposed to permeate all actions carried out by the EU institutions on the environmental field.[9]

In order to reach a conclusion, the following research questions are needed:

- When should an authorization be given under paragraph 6(4) of the Habitats Directive?

- How does the Commission apply paragraph 6(4) of the Habitats Directive?

- How does the Commission evaluate the social/economic interest versus the ecological interest?

[9] *Consolidated version of the Treaty on the Functioning of the European Union (TFEU), art.* 191.

1.3 Delimitation

In order to reach the general goal of the thesis some delimitations have to be made. The thesis will be based on EU law and will thus not look into national legislation other than to describe relevant case law. In order to answer the research questions special focus will be given the two Directives constituting the Natura 2000 framework, namely the BD and the HD. These directives will however not be study in their entirety, but rather with a special focus on article 6 and the articles concerning habitats protection and the protection of habitats of species. Furthermore, thesis will focus on the authorized *projects* under paragraph 6 and will thus only mention plans when they are of relevance to the assessment of projects. The analysis will focus on the conflicting interests which should be balanced in the assessment under paragraph 6(4), the conclusions will however be reserved to the economic, social and ecological interests. Even though the precautionary principle is applied both by the European Court of Justice and the Commission, this thesis will only base the conclusion on the application of 6(4) by the Commission.

1.4 Method and material

I will be applying the doctrinal research methodology on this thesis, which means I will try to identify, analyze and synthesize the content of the law by researching existing doctrine.[10] In the context of the research method "doctrine" comprehends all sources such as rules, principles, interpretive guidelines which explains the law or in other ways justifies the law as a smaller part contributing to a larger system of law.[11] The doctrinal research aims to find a legal coherence, in my case, the coherence between the fundamental principle for all application of environmental law within the EU, and the application of the concrete paragraph 6(4) HD. The core of the method is that the argumentation is based on the examination of authorities' sources in order to show the coherence of the legal system.[12] Pursuant to the method this thesis will be based on the two directives constituting the Natura 2000 network, namely The BD

[10] Watkins & Burton, *Research methods in law,* p. 9.
[11] IBID.
[12] Watkins & Burton, *Research methods in law,* p. 10.

and the HD, since the focus of the thesis lays in the common provisions in paragraphs 6(3)-6(4), the key part will pursue from the HD and the sources deriving from this, such as case law, commission opinions, and scholarly publications regarding nature protection, the precautionary principle and the protection and possible derogations under paragraphs 6(3) and 6(4) HD.

1.5 Disposition

In order to be able to answer the question of whether paragraph 6(4) is applied in accordance with the precautionary principle it is important to understand the surrounding environmental ambitions and provisions which permeate the relevant paragraph. With that in mind the thesis will start by presenting the fundamental Natura 2000 network which lays the base for the European nature protection. Since the network stands on to separate but connected directives, a short presentation of the directives will be given. As paragraph 6(4) of the HD concerns the two directives equally these will be given the same importance and space in the introducing chapter.

Due to the fact that paragraph 6(4) entails the only possible derogation from the main principle and is based entirely on paragraph 6(3), a thorough examination of paragraph 6(3) will be needed and presented before advancing to our protagonist – paragraph 6(4). Since the precautionary principle concerns the action taken by the EU institutions exclusively the thesis will go on presenting a number of examined Commission opinions.

Lastly, I will round off the thesis with a concluding chapter where my conclusions of whether paragraph 6(4) is indeed applied in accordance with the precautionary principle will be presented.

2 The Natura 2000 framework in a nutshell

2.1 Introduction

The Natura 2000 framework is the very core of the European nature protection.[13] The protective network consists of two directives under which the Member States are obliged to designate special areas for conservation of the European flora and fauna. In 2001 the Commission phrased the underlying reasons for habitat protection in the following way:

> "Pollution from transport, industry and agriculture continues to threaten natural areas and wildlife … Pressure is coming from the changes in how we utilize land … The building of new roads, houses and other developments is fragmenting the countryside into ever-smaller areas, making it harder for species to survive. All the trends suggest that the loss of open countryside to development will continue in the future … As habitats are degraded or lost, wildlife is frequently under pressure or even the threat of extinction."[14]

The way our society has developed and is continuing to develop is putting pressure on our environment and with it the species on whose habitats we pray by development. There is an apparent need to pull the breaks on certain development if we are to ease the pressure on nature, and stop the loss of species and habitats. Under the CBD the parties adopted a strategic plan of 20 targets between 2011 – 2020 to reach the objectives of the CBD, the so-called Aichi targets. One of the targets, target 11, states that at least 17 per cent of the terrestrial and inland water should be conserved through effectively protected areas.[15] The latest report from The European Environmental Agency (EEA) from 2020 showed that 18 per cent of the European terrestrial area was protected under the Natura 2000 network, meaning reaching the Aichi target of 17 per cent. The problem as I see it is however that only 14 of the 27 MS + the UK have designated over 17 per cent of their land area as sites under the

[13] Langlet & Mahmoudi, *EU Environmental Law and Policy* p. 350.
[14] Krämer, *EU Environmental Law,* p. 201.
[15] Secretariat of the Convention on Biological Diversity, *Strategic Plan for Biodiversity 2011-2020 and the Aichi Targets – Living in Harmony with Nature.*

Natura 2000 network. [16] This would entail that half of the MS have not designated enough sites under the network even though the latest Directive was adopted nearly 30 years ago.

This initial chapter is intended to give some background information and general understanding regarding the directives - The Birds Directive (BD)[17] and the Habitats Directive (HD)[18] which form the basis of the European nature conservation.

2.2 The Birds Directive (2009/147/EC)

The Birds Directive (BD) was first adopted in 1979 (79/409/EEC); and later renumbered as Directive 2009/147/EC,[19] due to the rapid decline in the number of wild birds in the European territory.[20] The Directive was the first European legislation with respect to nature conservation.[21] The aim of the Directive was to create a comprehensive protection for all wild occurring species of birds within the European territory.[22] Due to the bird's migratory nature they constituted a common heritage and the only way to establish an efficient protection was through a trans-frontier, international legal framework. The Member States (MS) were required to take the needed measures in order to "preserve, maintain or re-establish a sufficient diversity and area of habitats".[23] The protective measures thus stand on two legs, and need to protect both the habitats and the bird species. These two partially separate protections are subject to separate provisions under the Directive. Detailed provisions are outlined in the Directive with regards to the species protection, inter alia, the conditions for hunting, capturing, killing and trading.[24] According to the preamble to the Directive all wild occurring species should be protected from man's activities which have a negative impact on the number of birds.[25] In the case of the species

[16] European Environmental Agency, *Natura 2000 Sites Designated Under the EU Habitats and Birds Directives, p. 7.*
[17] The Birds Directive (2009/147/EC).
[18] The Habitats Directive (92/43/EEC).
[19] Directive 2009/147/EC, preamble p. 1.
[20] Directive 2009/147/EC, preamble p. 3.
[21] Calster & Reins, *EU Environmental Law,* p 183.
[22] Directive 2009/147/EC, art. 3.
[23] IBID.
[24] Directive 2009/147/EC, art. 5.
[25] Directive 2009/147/EC, preamble p. 6.

protection, account should however be taken of economic and recreational requirements.[26]

Some species of birds were assessed to be in need of further going protection than the general provisions in the Directive however. In order to ensure the survival of the most vulnerable and threatened species the MS needed to designate special conservation measures protecting their habitats.[27] The MS were obliged to classify special geographical areas as "Special Protection Areas" (SPA) for the conservation of these most vulnerable species (which are listed in annex I). All MS where subsequently to inform the Commission about the chosen SPAs in order to create a "coherent whole" creating the much-needed protection for the species, many of which in danger of extinction.[28] The SPA:s are the first lynchpins of the Natura 2000 network.

The protection of habitats under the Directive is quite strict and leaves little room for possible derogations. In contrast to the species protection, account should not be taken to economic and recreational requirements while designating SPAs. The considerations when designating SPAs should be based solely on objective environmental criteria which are listed under article 4 BD.[29]

Previous to The Habitats directive, which I will explain in the following, the only possible derogations from the protection under the Directive were listen under article 9, and were reserved for extraordinary circumstances. The need for a stringent protection was subject for discussion in the German case before the European Court of Justice (ECJ) C-57/89 *Commission v Germany,* where The Court reiterated the need to restrict the possible derogations since the MS themselves had selected the SPAs due to the fact that they were the most suitable areas in order to ensure the survival of the endangered bird species. A looser application could risk undermining the protection ensured by the Directive. [30]

The SPAs are not alone however in the creating of the Natura 2000 network, they are merely one of the two components which create the network of protected sites.

[26] Directive 2009/147/EC, art. 2.
[27] Directive 2009/147/EC, art. 4.
[28] IBID.
[29] Barnard & Peers, *European Union Law,* p. 665.
[30] C-57/89, *Commission v Germany*, p.20.

The second component was established through the adoption of the Habitats Directive (92/43/EEC) which will be presented below.

2.3 The Habitats Directive (92/43/EEC)

Although the BD entailed a far going protection for all occurring wild birds within the European territory, the protective measures did not protect the habitats and species outside the bird-category. The status of natural habitats and wild species in general within the territory was following the same down going trend, which eventually lead to the adoption of the complementary HD in 1992.[31] The Directive is constructed similar to the BD, and is based on the species protection on one hand, and the habitats protection on the other.[32] The aim of the Directive is to maintain or restore the favourable conservation status of the natural habitats and species of community interest while balancing economic, social and cultural interests.[33] Grossly simplified, the aim is to protect the species and habitats who are in danger of disappearance within the European territory, while balancing other interests. In contrast to the BD the social and economic interests *should* be taken account of in cases regarding the habitat protection, independently if the site concerns a priority habitat or habitat of priority species.[34] The priority habitats are habitats in danger of disappearance for which the EU has a special responsibility over due to the proportion of their range in the European territory. The priority species are the endangered or vulnerable species for which the Community has a special responsibility due to the same circumstances as the priority habitats.

The two types of protection, species and habitats, are both intertwined and separate. Just as in the BD the MS are obliged to designate "Special Areas of Conservation" (SAC) which are in part correspondent to the SPAs. The SACs however, concern both the priority habitats (listed in annex I) autonomously, and the habitats of the priority species (listed in annex II).[35] The protected areas under the HD and the BD

[31] Directive 92/43/EEC, preamble p.8, and Barnard & Peers, *European Union Law,* p. 664.
[32] Directive 92/43/EEC, art. 2.
[33] IBID.
[34] IBID.
[35] Directive 92/43/EEC, art. 3.

form the network called "Natura 2000".[36] The provisions regarding the habitats protection are found under the articles 3-11, and the species protection under articles 12–16 of the Directive. Albeit this thesis will focus on the habitat's protection under paragraph 6(4) some words should be said regarding the relation between the habitat's protection and the strict protection regime concerning animal and plant species.

The so-called "strict protection regime", as the species protection is called, is autonomous from the Natura 2000 framework and concern the species listed in annex IV(a). The species covered by the strict protection regime are protected independently of where they are, they are protected both inside and outside the protected areas, wherever their natural range may extend. The provisions regarding this regime are, as mentioned above, stated in the articles 12-16 in the Directive. The provision resembles the ones in the BD, and state, inter alia, a protection from all forms of deliberate killing or capturing, deliberate disturbance – with particular regards to their breeding, hibernation, rearing and migrating period, and picking or uprooting.[37] Habitats can only be protected through the SACs while species can enjoy a double protection, they can either be protected solely under annex IV, and enjoy protection at the individual level, or they can be protected individually as well as through the protection of their habitat by the protection of habitats of priority species listed under annex II. The strict protection regime constitutes the strongest protection since the derogations in article 16 HD are more limited than the ones under 6(4) HD. For any other species which is not included in the regime, I would say run to nearest protected habitat if you do not happen to be static, since all individuals within the protected habitats enjoy the protection under article 6, which is yet an important reason for why the Natura 2000 sites need to be protected.

The substance of the protective measures for priority habitats is regulated under article 6 HD, where paragraph 6(3) draws the outlines for the permitted activities in relation to the SACs. In essence, all activities which are not necessary for the management of a protected site should be made subject of an environmental assessment, and only when it is made certain that the activity will not affect the site negatively it can be permitted. The paragraph is essential for the protection since it is

[36] IBID.
[37] Directive 92/43/EEC, article 12-13.

the brace ensuring the integrity of the sites. As mentioned in the background to the thesis the need for a vent for exceptional cases has been acknowledges and pursuant established through paragraph 6(4) which entails the possibility to derogate from the stringent protection under 6(3) under certain cases as long as the coherent network is not compromised. The relation between paragraphs 6(3) and 6(4) act as a brace and harness, sort of like "No harm should be done, but if it has to be done it should keep the network intact".

2.4 Summary

The Natura 2000 network is like a web of protected areas under the BD and HD. The MS need to designate areas which protect both the habitats and species listed under the directives in order to maintain the biodiversity and favourable status for the endangered species or/and habitats. Even though the MS are obliged to designate and protect the said areas, only 14 of the concerned 28 States have designated enough area to the Natura 2000 network as of end 2019. Man's utilization of land and development projects are putting alarming pressure on the wildlife. Both Directives emerged due to the loss of species within the European territory, mainly because of man's use of land which puts a great pressure on the wildlife. Despite the protective framework whose first directive was adopted 40 years ago and the second one almost 30 years ago, the sufficient implementation under Natura 2000 has been challenging. In most cases the challenges are due to conflicts between economic development projects and nature conservation, a seemingly uneven conflict where nature tends to draw the shortest straw.[38] The main rule for protecting the established conservation sites is stated in paragraph 6(3) HD which in essence states that no unnecessary activities which could harm the protected sites should be permitted except for under extraordinary circumstances in accordance with 6(4) HD.

[38] Barnard & Peers, *European Union Law,* p. 664.

3 Deterioration free since paragraph 6(3)?

3.1 Introduction

As mentioned in the above 6(3) HD constitutes the protector of the conservations sites both under the BD and the HD. The two initial paragraphs of article 6 HD outline the substantial conservation measures which need to be taken by the MS with regards to the protected areas. The MS have a positive duty to take all needed measures which correspond to the ecological need of the particular site.[39] Depending on the objectives of the site these measures will, of course, look very different. A virgin forest versus an agricultural habitat will of course need different type of management. The positive measures shall be customized to the objectives of the particular site in order maintain or restore the natural habitats for which the area was designated.[40] Additionally to the positive obligation to take the needed measures for conserving the site the MS have a negative obligation to *avoid* the deterioration and disturbance of natural habitats and the disturbance of the species for which the area has been designated.[41] The obligation to avoid deterioration follows from both paragraph 6(2) and 6(3) HD. 6(2) HD lays down the obligations to maintain a day-to-day status quo of the protected site while 6(3) is applicable only in the event of a plan or a project which is not directly connected or necessary management of the site – which in essence are the measures which are established through paragraph 6(1). As mentioned in the above-chapter the biggest challenge to the Natura 2000 network is the conflict of interests, mainly between the ecological interest and the economic and social ones. The protected areas have been designated due to the importance of the ecological interest of the site, why this should be protected from all activities which has a negative effect on it. Paragraph 6(3) HD is the goalkeeper whose mission is to protect the conservation sites from any plan or project which threatens the integrity of the site. The derogations under 6(4) are based on the assessment under paragraph 6(3). To be able to understand the derogations under 6(4) it is essential to dig into the

[39] Directive 92/43/EEC, par. 6(1).
[40] Managing Natura 2000 sites, The provisions of article 6 of the 'Habitats Directive 92/43/EEC, p. 17.
[41] Directive 92/43/EEC, par. 6(2).

meaning of certain requirements under 6(3). In this chapter I will try to decipher paragraph 6(3) in order to understand how the protection is constructed. Special focus will be given to the interpretation of what constitutes a project and what a likely effect on the site comprehends in order to understand which projects are subject to evaluation under 6(4).

3.2 The wording of 6(3) and its relevance for 6(4)

> ”Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.”

As follows, the assessed activities under the paragraph are those who 1) are considered to be a *project* or plan, since this thesis is delimitated to projects, I will not cover what is considered a “plan”. 2) The project may *not be directly connected with or be necessary to the management* of the site, and 3) it needs to be *likely that the project will have a significant effect* on the site. The national authorities are can only authorize a project when it is certain that the project will not have a negative effect on integrity of the site, *unless* it falls under the derogation in paragraph 6(4).

In other words, a project which is not connected to the management and has been assessed to have a likely negative affect on the protected site, may be permitted only under the provisions in 6(4).

3.3 What is considered a project?

There is no definition of the word "project" or how to interpret it the HD. According to the Commission some guidance could be taken by analogy from the guidance of the word "project" in Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (EIA).[42] According to the EIA paragraph 1(2) a "project" means the execution of construction works, other installations, schemes or other interventions in the natural surroundings and landscapes including those of mineral extraction. This view was supported by the ECJ in the Dutch case C-127/02 *Waddenvereniging and Vogelsbeschermingvereniging*. In the case the Dutch court asked whether mechanical cockle fishing fell under the scope of the word "project" under paragraph 6(3) HD. To answer the question the ECJ started out by acknowledging the lack of definition under the HD. The ECJ then goes on to explain the relevance of the definition of the word "project" under the EIA, and states that the definition should be considered when assessing a project under the HD since the Directive and paragraph 6(3) have a similar purpose.[43]

Not all projects need to be subject of an assessment under the Directive however. According to article 2(1) of the EIA Directive only projects likely to have a significant effect on the environment by virtue, inter alia, due to their size, nature or location should be assessed with regards to their effects. The Dutch case C-72/95[44] *Kraaijeveld* shed some light on the importance of the assessment of the nature of the project with regards to the likely effects on the environment. The Netherlands posed the question whether a certain type of dyke-work was to be interpreted as to fit under the expression "canalization and flood-relief work" which had to be subject to an assessment of its impact on the environment.[45] The Court argued that guidance to answer had to be taken from the purpose and general scheme of the directive. According to the ECJ, the wide scope of the wording alone should suffice to interpret all works retaining water or preventing floods to fall under its scope even though the

[42] Managing Natura 2000 sites, The provisions of article 6 of the 'Habitats Directive 92/43/EEC, p. 35.
[43] C-127/02, p. 21-27.
[44] Applying the previous version to the EIA Directive (85/337/EEC).
[45] C-72/95, p. 21.

linguistics might differ.[46] In essence the definition of a project should be assessed in accordance to the effects of it and not the linguistic categorization. The case further reiterates the significance of the nature of the projects as relevant for whether or not it should be subject to an impact assessment.

Further guidance as to the interpretation of what constitutes a project was given in the German case C-226/08, *Stadt Papenburg,* where the question was whether ongoing maintenance work, not directly connected to, or necessary to the management of the site had to be assessed with regards to its implications on the site. The ECJ started out by reiterating the relevance of the EIA with regards to the definition of what constitutes a project under 6(3) HD, in order to confirm that the activity in question was considered to be a project. In this particular case authorization had been given to the maintenance work previous to the transposition of the HD. The beforehand given authorization did not however constitute any hinder in the assessment of each intervention in the channel as a separate project. If the interventions would not have been assessed separately, each work which was not directly linked, or necessary to the management of the site, would have been exempted from any prior assessment of its impact on the site, which would have been in conflict with paragraph 6(3) HD. If the operations can be regarded as constituting one single operation however, either by its regularity or the nature or the nature and/or conditions under which they are carried out, maintenance work can be regarded as one sole project under paragraph 6(3).[47]
The *Stadt* case clarified that even projects having the same purpose, and even considered as one single maintenance work need to be assessed individually and cannot be exempted from the provisions under 6(3).

The *Stadt* case is not the only case which has raised question regarding exemptions. The possibility to make general exemptions for certain types of activities was discussed in the French case C-256/98, *Commission v France,* the ECJ concluded that no general exemptions for activities can be made from the assessment under 6(3) HD. In the case the French government argued that certain activities should be exempted from the impact assessment due their low costs or purpose. The Court stated that the provision did not authorize Member States to nationally legislate in a way which

[46] C-72/95, p. 30-31.
[47] C-226/08, p. 35-51.

allowed certain types of activities to be exempted from the necessary environmental impact assessment, due to the cost or particular type of the project.[48]

3.3.1 Summary

A project is an activity which constitutes an intervention in the natural surroundings and landscape. Projects likely to have significant effects on the environment due to, inter alia, their nature, size or location should be subject to an assessment regarding their effects. How an activity is titled is irrelevant when defining a project, focus should instead be placed on the possible effects. In the case of maintenance work which is not directly connected or necessary to the management of a site, each intervention in the surroundings or landscape should be assessed as a separate project. Finally, no general exemptions from the assessment of projects can be made due to low cost or the type of project.

3.4 "Not directly connected with or necessary to the management"

Solely the projects which are not directly connected with or necessary to the management of the site need to be assessed under paragraph 6(3). The meaning of the term management should be seen in the light of the context and purpose of article 6 as a whole, thus referring to the conservation management which are stated in paragraph 6(1).[49] If an intervention is directly connected to, or necessary to the conservation management it is consequently exempted from the impact assessment under paragraph 6(3).[50]

By presenting the possibility for the Member States to formulate their management plans under paragraph 6(1) certain flexibility was permitted with regards to the form of the plans.[51] The managements plans can be designed for the particular site in question, or it can be part of other development plans. The latter gives the plans

[48] C-256/98, p. 39.
[49] Managing Natura 2000 sites, The provisions of article 6 of the 'Habitats Directive 92/43/EEC, p. 37.
[50] IBID.
[51] Managing Natura 2000 sites, The provisions of article 6 of the 'Habitats Directive 92/43/EEC, p. 38.

margin for having several objectives, not exclusively a conservation one. Since the management measures can be part of a larger plan with differing objectives it is necessary to be able to separate the projects connected or necessary to the management from those who are not, and assess the parts which are not directly connected.[52] The need to separate the projects based on the objectives where discussed in the French case C-241/08, *Commission v France.* The French government had exempted so-called "Natura 2000 contracts" from the assessment under paragraph 6(3) with the motivation that the contracts were intended to achieve fixed conservation and restoration objectives for the site, and were consequently to be seen as directly connected or necessary for the management of the site. The ECJ stated that even if the contracts were intended to achieve the conservation or restauration objectives of the site, the works and developments provided for in the contracts could not automatically be determined as directly connected or necessary for the management. It was further argued that there is room for contradicting conservation objectives within the same site, a measure could in fact prove favourable for one type of habitat and at the same time mean a deterioration for another. Hence, the sole fact that a Natura 2000 contract complied with the conservation measures of a site was not satisfactory to exempt the activities from the assessment required under paragraph 6(3).[53]

A similar need for management plans to undergo the appropriate assessment was highlighted in the Polish case C-441/17 *Commission v Poland (Forêt de Białowieża).* The polish authorities had adopted an appendix to the forest management plan for the Natura 2000 Białowieża Forest District without asserting that the activities in the appendix would not have an adverse effect on the site. The appendix in question concerned an increase in the volume of harvestable timber as an alleged part of the forest management. The court found that the increased harvesting did not in the slightest align with the conservation objectives of the site. As a result, the harvesting of timber was considered to be intended to exploit the recourses of the site, and was thus to be considered as a plan or project not directly connected with or necessary to the management of the site. The Court asserted that the determining factor to the

[52] IBID.
[53] C-241/08, p. 55.

assessment if the intervention was to be considered as connected or necessary to the management was the nature of the interventions and not the extent of it.[54]

3.4.1 Summary

The term management in paragraph 6(3) references to the positive obligations for MS to take the appropriate measures in order to reach the conservation objectives for the particular site. Since the management measures can be fitted under plans with differing objectives it has to be possible to separate the measures which are connected or necessary to the management from the projects who are not. Only the projects which are not connected to the management are thus subject for the assessment under paragraph 6(3).

3.5 "Likely to have a significant effect"

The paragraph 6(3) procedure is triggered by the likelihood of significant effects and not by the certitude of the effects originating from projects.[55]

The ECJ gave a much leading example in the already mentioned Dutch case *Waddenzee*, where the ECJ explained the procedure as follows. Firstly, the assessment under paragraph 6(3) is triggered by the likelihood of the significant effects arising from a project on the site. In essence the assessment of the implications are thus subordinated the probability of a risk of the effects stemming from an activity.[56] Secondly, the ECJ explained the meaning of the guidelines from The Commission which stated that the evaluation should not be based on the definite significant effects, but from the probability of such effects as a result of an activity.[57] In case of any doubt as to the absence of significant effects, an appropriate assessment of the implications must in effect be carried out.[58]

[54] C-441/17, p.125.
[55] Managing Natura 2000 sites, The provisions of article 6 of the 'Habitats Directive 92/43/EEC, p. 40.
[56] C-127/02, p. 43.
[57] C-127/02, p. 41.
[58] C-127/02, p. 44.

The need for a stringent application of the aforesaid precautionary principle has been expressed by the ECJ to ensure the fulfillment of the protection objectives for the sites protected by the directive.[59]

It is at this point necessary to clarify that the effects of any mitigation measures, meaning measures to avoid or reduce negative effect, should not be taken into consideration in the assessment of the risks of a plan or project at the screening stage. Taking mitigation measures into consideration at the screening stage would risk compromising the practical effects of the Habitats Directive as a whole, and the assessment procedure in particular since a consideration of these measures at this point could circumvent the entire assessment stage.[60] Accordingly, any mitigation measures should be considered first in the appropriate assessment stage.[61]

When assessing the likelihood of a significant effect it should be noted that it is the effects on the protected sites which should be assessed, independently if the activities are carried out inside of a site or outside.[62] This principle is equally relevant to projects whose effect can be significant in a second country, so-called potential transboundary effects, as well as projects which are carried out in more than one MS.[63]

So, what does the word "significant" entail? The word has to be interpreted in an objective and individualized way in relation to the specific environmental conditions and features of the concerned site.[64] The effects of a plan or project need to take special account to the conservation objectives and ecological characteristics of the site in question.[65]

Furthermore, these effects have to be considered for the projects individually as well as combined with other projects. This part of paragraph 6(3) is in essence a safety net in which cumulative effects of even small projects whose individual effects are negligible, can be seen in a bigger context and not lead to an erosion of the directive. The projects which should be assessed in combination are only those who are

[59] C-441/17, p.118.
[60] C-323/17, p.37.
[61] C-323/17, p.36.
[62] Managing Natura 2000 sites, The provisions of article 6 of the 'Habitats Directive 92/43/EEC, p. 40.
[63] IBID.
[64] IBID.
[65] IBID.

completed, approved but uncompleted or proposed. Any theoretical or potential plans shall thus not be considered.[66]

In light of the conclusion of the assessment resulting from 6(3), the competent national authorities have to decide whether or not to approve the plan or project. An approval can only be given once it has been assured that the activity in question will not adversely affect the integrity of the site, that is, when no reasonable scientific doubt remains as to the adverse effect resulting from the activity.[67] If any doubts linger, the competent national authorities are obliged to refuse the project.[68]

3.5.1 Summary

The assessment of whether a project is likely to have a significant effect on the site should be based on the likelihood or risk for a negative effect on the site. The assessment is based on the precautionary principle and the assessment should be carried out in any case where a risk cannot be ruled out. The assessment is rather far going as the possible effects of the projects need to be assessed in conjunction with other projects or plans and irrelevant of whether the project is carried out in- or outside of the protected site.

To summarize the general rule in paragraph 6(3) the following can be established:
All interruptions in the surroundings or landscape which are not necessary to reach the conservation objectives of the protected site should be assessed with regards to the effects whenever there exists a possibility of a significant effect on the site. Only projects whose negative effect on the site can be ruled out should be authorized.
The only possibility to derogate from the general rule and authorize projects where the negative effects cannot be ruled out are under the circumstances in paragraph 6(4).

[66] Managing Natura 2000 sites, The provisions of article 6 of the 'Habitats Directive 92/43/EEC, p. 42.
[67] Managing Natura 2000 sites, The provisions of article 6 of the 'Habitats Directive 92/43/EEC, p. 51.
[68] C-127/02, p. 57.

4 Article 6(4) "The Blow Hole"

4.1 Introduction

The general provision to prevent deterioration of habitats and loss of species under 6(2) HD form the basis for both 6(3) and 6(4). This negative obligation is one of the main reasons to why the implementation of protected sites has been so delayed in many MS.[69] Although the provision was intended to be balanced by paragraph 6(4), which makes it possible to derogate from the protection and general rule stated in 6(3), many MS were concerned that the sites designated under Natura 2000 would restrict their economic or leisure interest severely.[70] The far going national fear became much obvious in 1996 when France, despite several positive opinions by the commission, froze the work on designating areas due to considerable pressure from the national hunters, fishermen and other groups at one point.[71] It is clear that the national economic and social interests matter to the level of willingness to implement the directives. The question is, do these interests influence the application of 6(4)? In order to answer the question, it is fundamental to understand the meaning of the paragraph which I will present in the following.

> "4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.
>
> Where the site concerned hosts a priority natural habitat type and /or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary

[69] Krämer, *EU Environmental Law, p.* 205.
[70] IBID.
[71] IBID.

> importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."

The assessment under paragraph 6(4) is dependent on a number of requirements which need to be fragmented in order to investigate whether the paragraph is applied in the light of the precautionary principle. 1) The paragraph is only applicable in case of a *negative assessment* of the implications on a site due to a project, 2) There can be *no alternative solutions,* 3) The project must be carried out despite the negative implications due to an *imperative reason of overriding public interest* 4) The MS need to take *compensatory measures* to protect the cohesion of the Natura 2000 network. 5) If the site hosts a priority habitat or species the economic and social interest can *only* be accepted further to a Commission opinion.

4.2 The negative assessment of the implications

The procedure under paragraph 6(4) is an extension of the authorization process for projects under 6(3) which is triggered under certain circumstances.[72]As stated in the above, the procedure under 6(4) needs to follow a series of steps in order to enable a permission in spite of the negative implication for a protected site, which are closely linked to its foregoing paragraph 6(3). In other words, the negative assessment following from 6(3) is a requisite in order for 6(4) to be applicable. The abcense of a negative assessment would entail an authorization under the previous paragraph. Thus, the negative assessment is the very core of the paragraph.

The close link between the two paragraphs has been expressed by the ECJ in several occasions. The ECJ describes it as follows in the Italian case C-304/05 *Commission v Italy*. Paragraph 6(4) can only apply after the assessment of the implications of a plan or project in accordance with paragraph 6(3). The knowledge of the implications of an activity in the light of the conservation objectives are necessary in order for the application of 6(4). The needed knowledge can only be obtained by the appropriate assessment in 6(3). In the absence of an assessment following from 6(3) there is no

[72] Managing Natura 2000 sites, The provisions of article 6 of the 'Habitats Directive 92/43/EEC, p. 53.

possibility to consider any derogation. In effect, the application and assessment under 6(3) is a necessary perquisite for the assessment under 6(4).

The correlation between the two paragraphs with regards to the impact assessment can further be gathered by the fact that a derogation under paragraph 6(4) can only be given if there are compensatory measures (which will be discussed below) for the damages in order to ensure the coherence of the Natura 2000 network. In order to determine the necessary compensatory measures, the precise damages have to be identified. The individual steps of evaluation under 6(4) thus need to be conducted on the basis of the result of the assessment under 6(3).[73]

A negative assessment resulting from paragraph 6(3) does not however automatically entail an application of 6(4) or an automatic examination of possible derogations. A derogation needs to be decided by the authorities and is thus optional.[74] This optionality of the paragraph was confirmed in the above French case C-241/08 where The Court expressed that the competent authorities following the appropriate assessment under paragraph 6(3), had the choice to either refuse the authorization of an activity or grant an authorization under paragraph 6(4) given that the rest of the provisions under the paragraph were satisfied.[75] The authorities optionality is not unlimited however. According to the statement of the ECJ in case C-399/14 *Grüne Liga Sachsen eV and Others v Freistaat Sachsen*, the possibility to derogate from the negative assessment in paragraph 6(3) should be applied strictly.[76] The ECJ did not however specify the meaning of the strictness in the case. The ECJ did give some guidance to the meaning of the required strictness in the Portuguese case C-239/04 *Commission v Portugal*. The Portuguese case regarded the authorization by Portuguese authorities to build a motorway through a SPA, notwithstanding the negative consequences of the project and alternative solutions. The Court established that in order to apply paragraph 6(4) and conform to its strictness, the Member State needs to demonstrate, inter alia, the absence of alternative solutions.[77] In essence the

[73] C-304/05, p. 83.
[74] Managing Natura 2000 sites, The provisions of article 6 of the 'Habitats Directive 92/43/EEC, p. 54.
[75] C-241/08, p. 72.
[76] C-399/14, p. 73.
[77] C-239/04, p. 36.

ECJ concluded that all provisions under 6(4) needed to be satisfied in order to approve a derogation.

4.2.1 Summary

The derogations under paragraph 6(4) are entirely dependent on the result of the assessment under paragraph 6(3) since 6(4) is an exception to the previous paragraph. No derogation can be made unless the assessment under 6(3) has resulted in a negative one. The possibility to make a derogation under 6(4) is under the authority's discretion to decide. The decision should however be made with strictness and can only be made when all the provisions under the paragraph are proven satisfactory.

4.3 The Examination of Alternative Solutions

Continuous to a negative assessment under paragraph 6(3) it is up to the competent authorities to decide whether the possibility to derogate from the general rule under 6(4) should be explored. As stated by the ECJ in the presented Portuguese case *Commission v Portugal* all the provisions under paragraph 6(4) need to be satisfactory. The first provision to examine is thus the absence of alternative solutions to the assessed project.

The investigation of alternative solutions is triggered as soon as a significant negative implication has been identified for a project. The reason for the obligation to search for alternatives derives from the MS negative obligation to prevent the deterioration of the Natura 2000 network.[78] The authorities need to investigate whether there are any alternative solutions, which can be resorted to, that better respect the protection of the site. While searching for feasible solutions their relative performance should be assessed in relation to the conservation measures for the specific sites and the contribution the particular site entails for the overall Natura 2000 network.[79] The investigation of the best suited alternative should take aspects concerning the conservation and maintenance of the integrity of the site, as well as its ecological

[78] Commission 2007/2012 p. 1.3.1.
[79] IBID.

function into consideration, why the economic aspects cannot prevail over the ecological ones.[80] According to the Commission's guidelines the examination could involve possible relocation of the project, conducting an alternative process and changing its scale.[81] The proportionality regarding costs should be taken into consideration in the examination, but the economic factor cannot be the sole consideration in deciding the best alternative solution.[82] In the above mentioned German case C-399/14 The Court established that it is not satisfactory for a party to argue that an alternative solution has not been examined due to the fact that they would cost too much.[83]

4.3.1 Summary

The examination of alternative solutions should be made by the national authorities as soon as significant negative effects due to the proposed project have been identified. The examination aims to find a feasible less damaging alternative. While assessing the existence of alternatives both the ecological and economic considerations can be made. The result from the project should be balanced with the ecological importance of the site, both autonomously and in relation to the Natura 2000 network as a whole.

4.4 The Imperative Reasons of Overriding Public Interest

Once the competent authorities have determined the absence of alternative solutions, they need to examine whether or not any imperative reasons of overriding public interest exist. There is no exhaustive list of the imperative reasons to considered in the assessment, and neither is it specified what constitutes such reasons. The paragraph does however specifically mention economic and social interests in the first sub paragraph. The second subparagraph which provides the provisions for when a

[80] Managing Natura 2000 sites, The provisions of article 6 of the 'Habitats Directive 92/43/EEC, p. 55.
[81] IBID.
[82] IBID.
[83] C-399/14, p. 77.

derogation can be made within a habitat hosting priority habitats or species gives additional guidance. The only interests which should be interpreted as weighing more than the ecological interest by more or less default, are those regarding human health, public interest or beneficial consequences of primary importance for the environment. The specific examples posed in the paragraph point to a broad scope stretching from social interests to human health and public safety.

The provisions key point is unarguably the *overriding public interest* in the project. The public interest should however not be confused as meaning that the project needs to be carried out by a public body. This clarification was made by the ECJ in the Belgian case C-182/10 *Solvay and Others,* where the ECJ rendered that a project could not be ruled out on the basis of its private character if it by its very nature and by its economic and social context presented an overriding public interest and it was demonstrated that no other alternative solutions existed. In essence, the nature of a project is not the determinate factor, but rather whether there is both an *overriding* and *public* interest which requires the implementation of the particular project.[84]

The ECJ did not however specify what the terms *imperative* or *overriding* entailed. To find some guidance to the meaning of the terms the commission has referred to other areas of community law.[85] A definition which gives some guidance is the definition of "service of general economic interest" which was described as "activities of commercial service fulfilling missions of general interest, and subject consequently by the Member States to specific obligations of public service. It is the case in particular of services in transport, energy, communication networks"[86] The communication further describes public and general interests as those which involve guaranteed access to essential services and those who are meant to serve a society as a whole, and those living in it.[87]

Concerning the term *overriding* the understanding should be that only long-term interests can be considered.[88] Short term interests of economic or social nature should not be enough the triumph over the ecological interest which the Natura 2000

[84] C-182/10, p. 75-79.
[85] Commission 2007/2012 p. 1.3.2.
[86] IBID.
[87] COM(96) 443, p. A(1).
[88] Commission 2007/2012 p. 1.3.2.

network aims to protect.[89]

4.4.1 Summary

The provision is a somewhat hard nut to crack due to the vague definitions. What can be said however, is that interests which benefit society as a whole, and those living in it in the long-term could be considered as imperative reasons of overriding public interest. The fact that paragraph 6(4) mentions economic and social interests in the first subparagraph but only human health, public security and environmental benefits as reasons for possible derogations in a priority habitat, demonstrates that the reasons may have different values. The possibility to invoke "softer" interests, such as economic or social ones, in the case of the priority habitats shows the need for a flexibility even in the areas which enjoy the strongest protection. However, the decision to authorize projects with "softer" interests has to go through the Commission instead of the national authorities, assumable in order to vouch for the best result for the Natura 2000 network and the community as a whole.

4.5 The Compensatory Measures

As seems to be the trend in the HD there is no clear definition of the term "compensatory measures".[90] The Commission has however made a distinction between compensatory measures and mitigating measures with the following distinction.[91] A mitigating measure is a measure which aims to diminish or if possible, to eliminate any negative impacts that can result from a project in order to maintain the integrity *of the site*.[92] The mitigating measures are considered in the assessment under paragraph 6(4) and need to be attributed to the specifications of a project in case of an authorization.[93] Compensatory measures on the other hand are separate from the project, including the related mitigating measures, and are meant to balance out the negative implications of a project to maintain the overall consistency of the

[89] IBID.
[90] Managing Natura 2000 sites, The provisions of article 6 of the 'Habitats Directive 92/43/EEC, p. 57.
[91] IBID.
[92] IBID.
[93] Managing Natura 2000 sites, The provisions of article 6 of the 'Habitats Directive 92/43/EEC, p. 57.

Natura 2000 network.[94] The compensatory measures are considered exclusively in the context of paragraph 6(4).[95] The compensatory measures should be supplementary to the actions that are considered to be normal practices under EU law.[96] An example of such actions can be seen in paragraph 6(1) HD and the stated conservation measures, which is considered a normal measure.[97] The compensatory measures should thus go beyond the measures that are expected to be taken for the protection and management of a Natura 2000 site.

The obligation of compensating measures under paragraph 6(4) have never been explicitly ruled on by the ECJ, the closest thing to a ruling on the matter was made in case 258/11 Sweetman v An Bord Pleanála which in essence regarded the challenge and failure to properly assess the effects of a road scheme in an area of limestone pavement under article 6(3). The habitat was a priority habitat where the road scheme undisputedly would lead to a permanent non-renewable loss of part of the habitat. Advocate general Sharpson formulated the meaning of the obligation of compensatory measures in the following way:

> "The legislation recognizes, in other words, that there may be exceptional circumstances in which damage to or destruction of a protected natural habitat may be necessary, but, in allowing such damage or destruction to proceed, it insists that there be full compensation for the environmental consequences. (26) The status quo, or as close to the status quo as it is possible to achieve in all the circumstances, is thus maintained."

An interesting distinction in the compensating obligation under paragraph 6(4) is that it focuses on the impact on the Natura 2000 network as a whole, and not on the specific site which is assessed in paragraph 6(3). The compensatory measures under paragraph 6(4) are thus directed to protect and compensate the overall coherence of

[94] IBID.
[95] IBID.
[96] IBID.
[97] IBID.

the network.[98] Compensation focusing on the network instead of the particular site entails the need for a broad perspective where attention needs to be payed to the site's significance to the network as a whole. MS should pay particular attention to negative effects in rare natural habitat types or in habitats where it would take an extended period of time to return to the same ecological functionality after a damage. The compensatory measures shall replace the properties and functions which justified the selection of the specific site and the role it plays in relation to the biogeographic distribution.[99]

While covering the obliged compensatory measures the aspect regarding the expected result should be subject to additional scrutiny. According to a guidance from the Commission, the "most effective" option needs to be chosen to reinstate the ecological conditions of the network. On the other hand, they also stated that it is rather unlikely that any compensatory measures could reinstate the same level of ecological structure or function as before the damages due to a project. The guidance can undoubtably be said to give rather mixed messages on the matter of any expected results. What can be said however, is that the Commission expresses a need for a legislative flexibility enabling exceptions for projects with a negative effect. Due to difficulties in reinstating the same function or structure to the damaged site it is unreasonable to establish an obligation based on a specific result, instead the compensating measures should part from the "best effort" obligation. In order to comply with the overall aim of the Directive to restore or maintain a favourable conservation status of the protected habitats the general rule for the measures is that they need to be in place before the project affects the site in an irreversible way.[100] In some cases however, the measures would require an extended period of time in order to compensate for the damage as in the case of a forest habitat for example. Recreating a forest habitat would take several years in order to ensure the ecological functionality. In these types of cases the "best efforts" should be made to assure the compensation beforehand, and since the extent of the damages are hard to estimate in its totality, an overcompensation is requested. For example, if a project damages 1

[98] Born and others, *The Habitats Directive in its EU Environmental Law Context,* p. 103.
[99] Commission 2007/2012 p. 1.4.2 -1.4.3.
[100] Commission 2007/2012 p. 1.4.3.

ha of forest, an overcompensation could be reforestation of an area of 3 ha. If these measures would prove to be insufficient, the competent authorities should consider whether additional measures need to be taken.[101]

The "best effort" approach is a tricky way to go, and worst case, it is a slippery slope. Since the approach is intended for the cases where there is no possibility to hold a project until the compensating measures are in place it all relies on the estimated damage and estimated effects of the compensatory measures. Generally, pro-development interests dominate during the decision of which compensatory measures should be chosen.[102] Considering an economic interest in an exaggerated way is of course a risk to the ecological interest. In the case of the decision-making process regarding the measures however, it poses a concrete threat since the assessment tends to underestimate the projects negative impact on the site while the positive effects of the compensatory measures tend to be exaggerated.[103]

Lastly it is important to make an important clarification about the compensatory measures. The measures are not in any way means to *authorize* an implementation of a project with a negative impact on the site. The purpose of the measures is rather a sort of "last resort" when a project must be carried out *despite* of its negative effects on the site.[104]

4.5.1 Summary

When a project entails a significant negative effect on a protected site but it cannot be ruled out due to its overriding public interest the plan can still be permitted if compensatory measures are taken to ensure the overall coherence of the Natura 2000 network. The compensatory measures are not meant to *authorize* any project with negative effects on a site, the purpose of the measures is to function as a "last resort" when a project with negative effects needs to be carried out *despite* of the negative effects. The measures should be separate from the conservations measures which are part of the MS' positive obligations under 6(1), instead the compensatory measures

[101] IBID.
[102] Born and others, *The Habitats Directive in its EU Environmental Law Context,* p. 107.
[103] IBID.
[104] IBID.

should be assessed on the need to maintain the status quo of the network as a whole regarding the significance of the site to the to the network. The compensatory measures aim to restore the properties and ecological functionality of the affected site. Due to the difficulties in reinstating the same functionality as the damaged site and the difficulties to predict the long-term effects, it is not possible to set any result obligations, instead a "best effort" obligation any result obligations are not possible, instead a "best effort" obligation is installed. The difficulties in assessing the risk of the damages and effects of the compensatory measures entail a precautionary approach as to the compensation for sites where the compensation will take many years. In those cases, an overcompensation is needed to ensure the cohesion of the network.

5 Examination of the Commission opinions

5.1 Introduction

Paragraph 6(4) second subparagraph:

> "Where the site concerned hosts a priority natural habitat type and / or a priority species , the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest ."

As seen in the second subparagraph of paragraph 6(4), sites hosting a priority habitat or species entails a higher threshold in order to permit an activity which is likely to affect either the habitats and/or the species. Accordingly, the projects can only be approved when there is an underlying interest of human health, public safety, primary beneficial consequences for the environment, or, further to an opinion from the commission to other imperative interests. This provision actually has a history stemming from the judgment in case C-57/89 *Commission v Germany* regarding the close tied BD, and the need for possible derogations from the protection of the SPAs.

Despite the lack of any type of "vent" in article 4 of the Birds Directive, Germany argued that they should be given permission to build a dyke which would disturb birds within the designated SPA in order to protect the human population from future floods. The Commission on the other hand argued that dyke-building should only be acceptable in case of threat to human life.[105] The Court concluded that derogations from the protection under art 4(1) of The Birds Directive could only be justified under extraordinary cases where the invoked interest needed to be of general superiority than the ecological interest behind the Directive. These interests did not include economical or recreational interests at the time.[106] The German case made an impact at legislative level, and when the MS later gathered in the Council to discuss the future HD they pondered the implications of the ruling.[107] They unanimously agreed on the need for a vent which allowed certain derogations from the future protection which needed to include both economic and social reasons.[108] These reasons could apply to all habitat types, but in the case of a prioritized one, such derogations needed to be foregone by an opinion by the Commission.[109]

I have to this point mentioned the so-called opinions numerous times but have yet failed to explain what an opinion actually is. It is high time to give the opinion a proper presentation, or at least a presentation at all. Opinions are a type of instrument under community law which can be expressed by several EU-bodies, among them the Commission.[110] In the case of an opinion under paragraph 6(4) the opinions are prepared by the Environment Directorate-General of the Commission and later approved by the entire College of Commissioners.[111] The opinions are not legally binding for the MS and are thus not usually the instrument of choice as they do not have the same legal weigh as other instruments.[112] However, even if the content of the opinion is not binding for the MS, the procedure to seek an opinion when needed

[105] C-57/89, p. 8.
[106] C-57/89, p. 21-22.
[107] Krämer, *The European Commission's Opinions under Article 6(4) of the Habitats Directive,* p. 60.
[108] Krämer, *The European Commission's Opinions under Article 6(4) of the Habitats Directive*, p. 61.
[109] IBID.
[110] IBID.
[111] Born and others, *The Habitats Directive in its EU Environmental Law Context,* p. 109.
[112] Krämer, *The European Commission's Opinions under Article 6(4) of the Habitats Directive*, p. 61.

is.[113] Failure to seek an opinion could thus entail an infraction to community law.[114] As the opinions are not legally binding, they cannot be challenged in Court.[115]

In the very first case where the commission gave an opinion under the second subparagraph 6(4) they expressed the need for MS to await the opinion before agreeing to the project in question.[116] This was not expressed in any of the following opinions which left a room for interpretation regarding the commissions initial statement. Should it be understood as a failure to await an opinion could lead to a nullity of a premature authorization?[117] The Court expressed that in cases where MS merely needed to inform the commission of a specific measure a failure to await an opinion did not entail a nullity. The contrary applied in cases where the MS's notification lead to some kind of community procedure – such as an opinion.[118] Meaning, the failure to await an opinion under 6(4)HD could lead to a nullity of an authorization.

It is by now established that it is a procedural obligation for the MS to forward the issue of a planned project to the Commission under the circumstances in 6(4)HD . Before we dive into the opinions it should be reminded that all opinions under 6(4) HD regard sites hosting priority habitats and/or priority species, and are thus the sites who should enjoy the farthest going protection.

In the following I will present 6 opinions spanning from 1995 to 2019. I will focus on how the commission has evaluated the projects with regards to the invoked interest and the presented compensatory measures. I will focus on said parts in order to conclude how the Commission evaluate the economic/social interest versus the ecological one.

[113] Born and others, *The Habitats Directive in its EU Environmental Law Context,* p. 109.
[114] IBID.
[115] Krämer, *The European Commission's Opinions under Article 6(4) of the Habitats Directive,* p. 61.
[116] Krämer, *The European Commission's Opinions under Article 6(4) of the Habitats Directive,* p. 67.
[117] IBID.
[118] IBID.

5.2 The Intersection of the Trebel and Recknitz Valley by a Motorway (Germany)[119]

This early case from 1995 concerned the Trebel and Recknitz valley, a site hosting several priority habitats and species. Germany wanted to construct a Motorway linking the German city Lübeck with the Polish city Stralsund und Szeczin which would need to cross the protected area, and significantly affect it.[120] Germany argued that the imperative reason for going forward with the project was that the area where the motorway would be built suffered from a high level of unemployment and that the gross national product was below the German average. Besides, the region was supported by the EC Structural Funds (Funds which are managed by the Commission and the MS, inter alia, made with the purpose to invest in job creation)[121] and the fact that the motorway was part of the trans-European transport network.[122] The invoked reasons where thus both social and economic ones. In the case of the Trebel and Recknitz Valley Germany had not indicated any concrete compensation measures, instead they described measures which they considered to be possible for the affected areas.[123] Despite this fact, the Commission gave a positive opinion with the perquisite that all needed compensation measures needed to be taken.[124] The Trebel case is one of the first opinions made under the second subparagraph, in fact there is not even an English version on the Commissions internet page of it, only a German one.[125] Considering the fact that the EU only years before, expressed the pressing concern and need to protect larger parts of the European territory the lightness in the assessment is very interesting.

[119] (EC) 96/15 of 18 December 1995.
[120] Krämer, *The European Commission's Opinions under Article 6(4) of the Habitats Directive,* p. 67.
[121] Https://ec.europa.eu/info/funding-tenders/funding-opportunities/funding-programmes/overview-funding-programmes/european-structural-and-investment-funds_en.
[122] Krämer, *The European Commission's Opinions under Article 6(4) of the Habitats Directive*, p. 67.
[123] IBID.
[124] IBID.
[125] Https://ec.europa.eu/environment/nature/natura2000/management/opinion_en.htm.

5.3 The Extention of a Private Airport in Mülenberger Loch (Geramany)[126]

A couple of years after the Trebel case Germany asked for the opinion in yet another case, namely the Mühlenberger Loch case. Germany wanted to enlarge an already existing industrial plant located close to a runway to be able to complete the production of a jumbo passenger airline. The area where the enlargement would take place was however a SPA, that is, a site protected under the BD.[127] Since paragraphs 6(3) and 6(4) apply equally to areas established under the BD, any infringement in these areas need to undergo the same procedure as the ones under the HD. The extension of the existing plant would claim 171 hectares of the protected area which hosted several habitats as well as species of priority.[128] The project would exploit around 20% of the area and undoubtedly have an adverse effect on the site.[129] The German authorities justified the project by referring to the number of highly qualified jobs that would spring from the project both directly and indirectly which would be able to balance out the loss of jobs which had occurred in the industrial sector in the region.[130] The project would furthermore entail economic and social gains in the bordering regions, as well as a positive impact on the European Aeronautic industry. As far as the compensatory measures were concerned Germany presented three compensation sites which would be larger than the affected SPA.

The Commission assessed that the damages to the site were justified by the reasons of overriding public interest despite Germany not having proposed enough sites in total under the Natura 2000 network as required under the Directive.[131] The economic and social reasons triumphed yet again even though the site in question hosted both habitats and species of priority. Although the Directive is focused on nature conservation it is in my opinion interesting to note that the long-term consequences of the project seems to irrelevant to the assessment. In this case a

[126] C(2000) 1079 of 14 April 2000, the published document on the Commission's internet page is not a final version. A Final version does not seem to be published.
[127] C(2000) 1079 of 14 April 2000, p. 1.
[128] IBID.
[129] C(2000) 1079 of 14 April 2000, p. 2.
[130] IBID.
[131] C(2000) 1079 of 14 April 2000, p. 2.

project which indirectly leads to an increase of greenhouse gas emissions through the construction of a jumbo passenger airline.

5.4 The Extension of the Coal Mine at Haniel (Germany)[132]

Third time is a charm they say, in the best of worlds this third German case could be the first published one with a negative opinion but unfortunately it is not. The Haniel case regarded the expansion of an existing coal mine in which would entail the destruction of numerous habitats within the established areas of protection.[133] An area which was characterized by hosting habitats of priority. As reasons of overriding public interest the German authorities upheld that a closure of the coal mine would lead to direct loss of over 4000 jobs, and indirect another 6000 jobs at regional level. Furthermore, the authorities reiterated their belief that the expansion of the mine was crucial in order to achieve the long-term energy policy, aiming to secure the national energy supply.[134] As compensatory measures the competent authorities had planned recreational habitats by re-afforestation or transformation/improvement of already existing forests and restoration of riverbeds.[135]

The commission did not quite share the authorities thought on the imperative reasons of economic and social importance. The Commission explained that since the coal mining industry was projected to decline, the question regarding the loss of jobs was a matter of 'when' not 'if'. If the mine would close, the economic resources freed from the closing and the money not needed to be invested in compensatory measures could go to retrain the workers for example, which would have an additional positive environmental effect.[136] Concerning the importance of the specific mine to secure the long-term energy supply, the Commission upheld that the national contribution from the mine was way below the level to be of major importance. As a matter of fact, the mine only contributed with 1% to Germany's need. In addition to the two already skeptical stands with regards to the German arguments the

[132] C(2003) 1304 of 24 April 2003.
[133] C(2003) 1304 of 24 April 2003, p. 3-4.
[134] C(2003) 1304 of 24 April 2003, p. 5.
[135] IBID.
[136] C(2003) 1304 of 24 April 2003, p. 6.

Commission expressed its concern in extending and even by maintaining the current levels of mining in the light of the EU's objective in reducing greenhouse gases. Despite these arguments, the Commission accepted that the short-term negative effects on the region should be considered as imperative reasons of overriding public interest in the particular case. The commission added that the opinion did not constitute a precedent and that it was not in any way a reflection in the stands on the dependency on coal.

5.5 The Construction of the Railway "Botniabanan" (Sweden)[137]

For the sake of comparison let us have look at a case during the same time lapse as the Haniel case which does not involve Germany, but a small Member State with a lesser potential to influence by size in the EU.

The Bothnia case, which according to a remark in the case "may not be published"[138], regards the construction of a railway in the northern parts of Sweden which would cross several habitats, among them priority ones, and thus negatively affect the coherence of the Natura 2000 network.[139] As imperative reasons the Swedish authorities invoked socioeconomic reasons. The construction would lead to an enhancement of the regional competitiveness abating regional imbalances within the country while ensuring a good quality of transport.[140] The construction would furthermore contribute to better conditions for co-operation between cities in the northern regions of Sweden, as well as it offers an environmentally friendly alternative for transportation which needed to be efficient and functional.[141] The commission did not comment the invoked reasons in detail but accepted the national reasoning.[142] Relating to the compensatory measures, Sweden only presented a preliminary suggestion for compensatory measures, but did not present any intended measures in

[137] K(2003) 1309 of 24 April 2003.
[138] The case is only published in Swedish.
[139] K(2003) 1309 of 24 April 2003, p.2.
[140] K(2003) 1309 of 24April 2003, p.4.
[141] IBID.
[142] IBID.

the submitted documentation.[143] The authorities merely referred to ongoing discussions between the authorities and the Commission regarding the needed measures.[144] Despite not being able to present any concrete compensatory measures the Commission accepted the Swedish arguments and gave a positive opinion subject to the condition that the appropriate measures needed to be implemented and supervised.[145]

So far, I have covered a couple of cases during the early years of the Habitats Directive, let's take a look at the last two published opinions to see if the evaluations follow the same pattern.

5.6 The Railway Construction via Rosenstein Portal (Germany)[146]

The German authorities were planning on constructing a long-distance and suburban railway connection from Bad Cannstatt to Stuttgart Central Railway Station which was supposed to run with two double-track tunnels under the Rosensteinpark.[147] The concerned site hosted several protected habitats and priority species. Since the project concerned the sub-site the German focused on the habitat and species which would be affected in the sub-site, namely a beetle categorized as a priority species whose habitat consisted of the hollows of the old deciduous trees. Since the project would entail the removal of these first-order trees, where majority of the beetles spent their entire lives, it would be equivalent to destroying their natural habitats. [148] Similar to the Bothnia case above, the German authorities stressed the importance of the railway in order to improve regional and long-distance transport which would lead to stronger cross-regional links to other developed areas.[149] They also reiterated the advantages the railway would mean for the transportation by train in other ways.[150] As

[143] IBID.
[144] IBID.
[145] IBID.
[146] C(2018) 466 of 30 January 2018.
[147] C(2018) 466 of 30 January 2018, p. 2.
[148] C(2018) 466 of 30 January 2018, p. 3.
[149] C(2018) 466 of 30 January 2018, p. 4.
[150] IBID.

compensatory measures the German authorities had planned to enlarge the Natura 2000 network by incorporating, an additional site 45 times larger than the affected area under the network, and implementing maintenance measures to make the site suitable for the protected beetle.[151] Through the suggested compensatory measures the conservation status would remain "favourable" according to the German authorities.[152]

The commission did not differ in the assessment of the imperative reasons presented by Germany and by such accepted the reasons as being imperative ones of public interest.[153] The concrete compensation measures presented by the authorities were considered to be enough to compensate for the damage on the existing Natura 2000 site affected,[154] especially considering the fact that the national authorities had already put in place sufficient implementation and monitoring schemes.[155]

5.7 The deepening of the Danube Waterway (Germany/Bavaria)[156]

Yet another German case. The frequency of the German application to deteriorate sites of community interest is interesting to note but a topic for another thesis.

The Danube Waterway case is the most recent opinion published on the commissions internet page and regarded a case where Germany wanted to deepen a part of the Danube ship fairway significantly.[157] The site concerned was largely a natural river landscape which was protected both under the HD and the BD. The site hosted several priority habitats where of course, at least one priority habitat was considered to be adversely affected by the project.[158] As imperative reasons of overriding public interest, the German authorities argues that the deepening of the waterway would close the gap between several geographical points and that the Danube federal waterway formed part of the core network of the European TEN-T

[151] IBID.
[152] C(2018) 466 of 30 January 2018, p. 5.
[153] IBID.
[154] IBID.
[155] IBID.
[156] C(2019) 8090 of 19 November 2019.
[157] C(2019) 8090 of 19 November 2019, p. 2.
[158] C(2019) 8090 of 19 November 2019, p. 5.

network which is of high economic interest for Europe. The project would further entail a better connectivity for the inland ports and the navigation conditions would better significantly leading to a decrease in accidents. Since the transport within the shipway was expected to increase the coming years, a deepening was of great importance.[159] The compensation for the negative impact on the coherence of the Natura 2000 network was expected to take between 5-60 years depending on the expected level of compensation to the conservation status. As the compensation required a very long time to be established the compensation was planned to be compensated at 3:1 ratio and 2:1 dependent on the kind of habitats.[160]

The commission accepted the presented imperative reasons of overriding public interest and did not go into much detail on the assessment. Moving on from the invoked reasons, the Commission stated the problems stemming from the absence of the conservation measures which are required under 6(1) and used as basis in the impact assessment under paragraph 6(3). The lack of conservation measures aggravates the assessment of suitable compensation measures under paragraph 6(4). The focus of the opinion was finally dedicated to the obliged compensatory measures. Despite the absence of conservation measures the Commission assessed that the extent and ration of the proposed compensation measures for the most part would be sufficient to adequately compensate for the damages.[161] For some habitats and species the Commission did however consider that additional measures were needed.

A positive development could be seen in comparison to the earlier opinions in the sense that the Commission engaged in a detailed presentation of the concerned habitats and species which needed further going compensatory measures.[162] It is also the only one of the presented cases where the Commission expresses the need for overcompensation in cases where the compensation is expected first many years later.[163] The case concluded in a positive opinion this time as well, but the list of conditions was more respectable than in the earlier cases and stated concrete conditions in order for the opinion to apply.[164]

[159] C(2019) 8090 of 19 November 2019, p. 6.
[160] C(2019) 8090 of 19 November 2019, p. 7.
[161] C(2019) 8090 of 19 November 2019, p. 8.
[162] C(2019) 8090 of 19 November 2019, p. 9-10.
[163] C(2019) 8090 of 19 November 2019, p. 9.
[164] C(2019) 8090 of 19 November 2019, p. 11.

5.8 Summary and Conclusion

The presentation of the above opinions where intended to give some sort of understanding of what interests have been assessed as imperative ones of overriding public interest and how these reasons were assessed in the light of the compensatory measures. My hope was to examine the reasons which reached the bar as "Extraordinary" situations which were enough to put aside the ecological interest which are the very core of the Natura 2000 network, and which interests did not reach the bar. I expected the "bar" to be set fairly high given the background to both the Natura 2000 Network in general but the two Directives and paragraph 6(4) in particular. In all of the examined cases stretching from 1995 to 2019 the reasons invoked by the Member States were accepted by the Commission as reasons to carry out the intended projects. None of the cases went into any depth in examining the invoked reasons except for the German Haniel case where the Commission questioned the accuracy of the reasons as being of imperative public interest. Despite its skepticism and deviant position the Commission accepted the short-term reasoning. In my opinion it was obvious in the reasoning of the Commission that neither the requisites overriding or public could have been considered as valid. In the Mühlenberger case serious doubt could be raised as to the need to carry out the extension of the plant on that particular spot destroying the priority habitat. Was it a determining factor to construct the airline on that particular spot? This question will remain to be answered since no information in this regard was submitted. To conclude, it can be said that the threshold of proving an imperative reason of overriding public interest is not high enough to include merely "extraordinary" cases. The ease of proving an overriding interest in the strictest conservation provision is worrying to say the least and gives little hope to the protected areas which do not host priority habitats and thus are exempted from the "though" assessment by the Commission.

As to the question of how the invoked interests are assessed in the light of the compensatory measures or vice versa the gathered experience of the opinions is that extremely insufficient suggestions were accepted. The competent authorities did not present any concrete measures in several cases and yet the opinion concluded in a

positive one. Indeed, if the compensatory measures are the life insurance for the maintenance of a coherent conservation network within the union, it is deficient in its most fundamental purpose. The only opinion which seemed to make its slightest effort in actually safeguarding the protected sites was the most recent case concerning the Danube waterway where the Commission examined the affected habitats and species in a bit more detail (although still far from detailed enough to establish much concrete) and established conditions for the positive opinion. The difference could hopefully be an upgoing trend, meaning a closer scrutiny, or solely the exception confirming the rule. How positive the changing trend is, would however depend on the monitoring and possibility for the public to do any follow ups on the set conditions and a possibility to process against any project not fulfilling the conditions.

The examined cases support the view of an existing proponent bias. The process of seeking opinions can be criticized for being inherently proponent bias since the responsibility for formulating the application lays on the Member States exclusively, who by obvious reasons will seek to justify the project in question by social and economic reasons in order to obtain a positive opinion.[165] As noted in the previous, the Commission does not cover on any factual disputes, such as the assessment of whether the invoked interest truly proves to be an imperative reason of overriding public interest. Neither is there any chance for third parties as NGOs to express their views in the concerned cases.[166] No "opponent" to the project under consideration has yet been reported to have been asked for any further information in the published cases. A suspicion with regards to the level of verity in the submitted information to the Commission has further been expressed, namely that the estimated effects of the compensatory measures have been rather exaggerated in the quest for a positive opinion.[167]

There are ways to try to close the gap between the provisions under paragraph 6(4), its objectives and the result of the Commission procedure. By publishing both the applications submitted by the MS as well as *all* the opinions by the Commission, the public would be able to scrutinize the application of EU law. An enhanced

[165] Born and others, *The Habitats Directive in its EU Environmental Law Context,* p. 114.
[166] IBID.
[167] Krämer, *The European Commission's Opinions under Article 6(4) of the Habitats Directive*, p. 83.

transparency could lead to both an increase in credibility for the EU institutions and a potential stricter procedure by the Commission due to the possible scrutiny of their application .[168] In environmental cases transparancy is of even greater importance since nature itself lacks the ability to protect itself but relies on the civil society and politicians to raise the voice in its place.[169]

6 The Precautionary principle

According to article 191 (ex article 174 of the EC Treaty) of TFEU the EU environmental policy should be based on the precautionary principle. The principle spans across a wide range of issues including nature conservation and obliges the EU institutions to act based on precaution when carrying out any action on the environmental field, such as a Commission opinion.[170] The treaty does not however offer any definition of the principle. The Commission interpreted the principle in their communication from 2000 where it established the principles wide scope whose applicability was triggered whenever:

> "objective scientific evaluation, indicates that there are reasonable grounds for concern that the potentially dangerous effects on the *environment*, *human, animal or plant health* may be inconsistent with the high level of protection chosen for the Community."[171]

The precautionary principle has caused much controversy on the arena of environmental law during the years.[172] The principle is the gateway from prevention-steered decision-making into the land where precaution is king. A decision-making based on precaution forces authorities to prepare for tangible environmental risks despite the absence of definite proof that the risk will be realized.[173] There is a great need for precaution in areas where new scientific techniques are used in a larger scale.

[168] Krämer, *The European Commission's Opinions under Article 6(4) of the Habitats Directive,* p. 84.
[169] Krämer, *The European Commission's Opinions under Article 6(4) of the Habitats Directive,* p. 85.
[170] Sadeleer, *Implementing the Precautionary Principle,* p. 12-13.
[171] COM(2000), *Communication From the Commision on the Precautionary Principle,* p.2.
[172] Sadeleer, *Implementing the Precautionary Principle,* p.3.
[173] IBID.

New techniques imply a lack of experience which challenges the ability to predict the scale of possible consequences.[174] The need to include precaution in the environmental area arouse from these scientific difficulties in assessing the potential ecological risks. These risks are called post-industrial risk and have certain characteristics in common, firstly the impacts are generally much wider than pre-industrial risk as well as they are more diffuse.[175] Secondly, they are usually much uncertain in terms of predicting the true implications of the risks in the long-term.[176] These characteristics call for a high level of precaution. Precaution entails the possibility to act while the uncertainties are being examined, and hopefully cleared.[177]

In the *Waddenvereniging and Vogelbeschermingsvereniging* case C-127/02, The ECJ stated that the precautionary principle has been incorporated in the scheme of paragraph 6(3), meaning that the very assessment following the paragraph ensures the application of the principle and there is thus no need to interpret the paragraph itself in the light of the precautionary principle.[178] The principle is a procedural one which is constructed to be used by the authorities during the decision making, but does not aim to reach any specific result in the assessment.[179] In the Commission communication from 2000 the commission stated the following:

"The dimension of the precautionary principle goes beyond the problems associated with a short or medium-term approach to risks. It also concerns the longer run and the well-being of future generations."[180]

The principle could be read implicit in paragraph 6(4) just as in 6(3). The problem appears when the EU institutions which should be bound by the principle seems to look through its fingers in the substantial cases. In comparison with the arguments by the Commission in the Coal mine case there is an uncanny discrepancy in its risk-management.

[174] Sadeleer, *Implementing the Precautionary Principle,* p.4.
[175] IBID.
[176] IBID.
[177] IBID.
[178] 22 November 2012, AG Sharpston, p.79.
[179] 22 November 2012, AG Sharpston, p.78.
[180] COM(2000), *Communication From the Commision on the Precautionary Principle.*

7 Conclusion

The need to include precaution in the environmental area arouse from the scientific difficulties in assessing potential ecological risks. A decision-making based on precaution forces authorities to prepare for tangible environmental risks despite the absence of definite proof that the risk will be realized. The provisions under the second subparagraph of 6(4) HD set the conditions under which a deterioration can be made to a site hosting priority species or habitats. The only way to get an authorization due to an economic or social interest is to submit an application for an opinion by the Commission. Since the precautionary principle only applies to the EU institutions the conclusion on whether paragraph 6(4) is applied in accordance with the precautionary principle should be based on the result of the examined Commission opinions in this thesis. The synthesized conclusion with regards to the aims behind the Natura 2000 network and the precautionary principle leads to the interpretation that the "bar" should be set high in order to be given a positive opinion to carry out a project with either a social or economic interest. The published opinions made it clear that this is however not the case. The acceptance of applications where every environmental aspect point in a direction towards a dismissal renders a very unreliable impression as to the ambition and willingness to protect the European environment. Contrary to a high-level protection, the assessment seems to entail a high-level greenwashing. The compensatory measures are not given the importance equivalent to the purpose they serve. The compensatory measures are meant to maintain the ecological status quo when a project has to be carried out despite its negative effects on the protected site. The Mühlenberger Loch case made it very clear that major focus was given the invoked *interest,* while the compensatory measures could not even be assessed during the time of the decision-making. The projects subject to a Commission opinion should be assessed based on the worst-case ecological risks in order to comply with the precautionary principle, this is not the case in practice. Instead, the cases seem to be assessed on the authorities biased "best case" scenarios which are formulated to obtain a positive opinion. Interests of economic development generally triumph over conservation ones, and only in rare

cases has the existence of a habitat or threatened species stopped a development project.[181] In fact, the Commission has never issued a negative opinion due to unsatisfactory proposed compensation measures.[182]

It is interesting to note that all environmental provisions are based on science. The environmental law must respond to the environmental issues concluded by scientists.[183] In fact, no other public policy area is as permeated by science as the environmental one. Despite the scientific lynchpin and the ambitious protection intended within the EU, the Commission has failed to live as they learn. The Commission has, through its opinions, demonstrated how they allocate a higher value in the social and economic interests than the ecological needs based on the scientific risk. By prioritizing the i*nterest* over the *compensation*, the commission does not apply paragraph 6(4) in accordance with the precautionary principle.

[181] Krämer, *EU Environmental Law,* p. 205.
[182] Barnard & Peers, *European Union Law*, p. 667.
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