IMPLEMENTING NATURA 2000 IN THE CZECH REPUBLIC

THEMATIC REPORT FIVE:

TRANSPOSITION AND IMPLEMENTATION OF ARTICLES 4(4), 6(1), 6(2) AND 6(3) OF THE HABITATS DIRECTIVE

December 2004

Contents

1 Introduction

1.1 Production of five thematic reports

Within the Phare project 'Implementation of Natura 2000 in the Czech Republic', a series of five reports has been produced covering five main themes, as follows:

- mistakes and problems in Natura 2000 management;
- national sources of Natura 2000 financing;
- conservation management approaches;
- capacity building; and
- transposition and implementation of site management provisions.

The aim of the thematic reports is to identify and make available, concrete, up to date and accessible information on how the 15 'old' EU Member States have approached Natura 2000, including both good and bad practice and lessons learned in the process. In order to do so, the five reports focus on practice in a number of selected sites as follows: the Causses du Quercy and Haguenau in France, the Rhön in Germany, Alduide in Navarra Spain and the New Forest in the UK. The site-based analysis is also placed within the broader context of regional/national experiences and approaches.

In order to produce the five thematic reports, a series of country-based reports was produced, each covering the five themes. These reports were produced by ACER (France), IDRiSi (Spain) and IEEP (Germany and UK) with additional support and advice from Ecosystems LTD. Apart from being used as the basis for the five thematic reports, these country studies were used as key reference documents for the participants in three Study Tours organised as part of the project during September and October 2004.

1.2 Focus of this report

This particular report examines different approaches to transposing and implementing Articles 4(4), 6(1), 6(2) and 6(3) of the habitats Directive. The aim is to highlight a number of options to feed into the Czech discussion on transposition and implementation. In addition, the report examines relevant planning or policy documents in the case study Member States where these affect the implementation approach. Specifically, the report focuses on the following:

- experience in adopting the EU lists of Sites of Community Importance;
- approaches to site designation (Article 4(4));
- approaches to site management (Articles 6(1) & (2)); and
- approaches to the assessment of projects with significant impact on Natura 2000 sites (Article 6(3) of the habitats Directive).

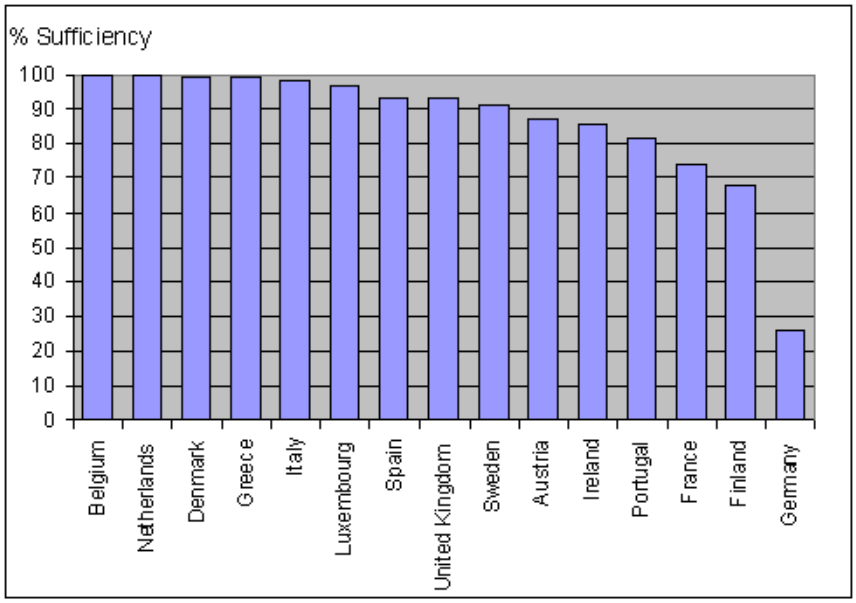
2 Experience in adopting the EU list of Sites of Community Importance

On the basis of the criteria set out in the habitats Directive and relevant scientific information, each Member State was required to propose a list of sites and transmit this to the Commission by mid-1995. The Commission was then to establish, on the basis of the criteria set out in Annex III and in the framework of each of the biogeographical regions, in agreement with each Member State, a draft list of proposed Sites of Community Importance (pSCIs) drawn from the Member States' lists. According to Article 4(3), the list of sites was subsequently to be adopted by the Commission by mid-1998.

2.1 Progress in adopting the EU lists of sites

Despite the requirements of the Directive, in practice the process for submitting site proposals based on scientific assessment alone has been far from smooth, with some Member States asked repeatedly to replenish their lists of proposed sites. Despite these difficulties, some of the reasons for which are given below, there are now more than 18,000 proposed or actual Natura 2000 sites – including bird sites and proposed SACs - covering almost one fifth of the EU's area, demonstrating that Natura 2000 will make a huge contribution to biodiversity conservation. Of the EU-15, nine Member States have now exceeded 90 per cent 'sufficiency' in their lists of pSCIs. Certain new Member States have also responded very rapidly, for example, Slovenia, Slovakia and Latvia.

Figure 1: State of national lists of proposed SCIs – EU-15 (EEA, September 2004)



In December 2004, the Commission had formally adopted four biogeographical lists. The Boreal list was adopted early in 2005. Adoption of the remaining list for the final, Mediterranean region is during 2005.

Adoption of the lists follows discussions in biogeographical seminars attended by relevant Member States, Commission officials, European Topic Centre staff and with non-governmental organisations as observers. The Commission has approached the

biogeographical seminars as an iterative process rather than a one-off assessment. These seminars provide an opportunity to examine and discuss national contributions to biogeographical lists, taking a regional perspective. For each region, several seminars have been organised. In most cases, these have generated additional requests for sites to the Member States which have been discussed and reviewed in later seminars and bilateral meetings. This has resulted in Member States needing to submit complete lists of sites.

In order to ensure that lists can eventually be adopted, even if some gaps remain, the Commission introduced the concept of 'reserves'. This means that lists are adopted by the Commission and published in the Official Journal of the European Communities, but with the reservation that the lists are still open for subsequent elaboration. This has been particularly important where habitat types have been subject to ongoing discussion and also where habitats are relatively poorly known.

Apart from working through the biogeographical seminars, the Commission used various methods to encourage the submission of complete site lists. Provision of LIFE funding was one such tool. Another was the Commission's threat in 1999 and 2000, to withhold Structural Funds unless Member States supplied more complete lists of pSCIs and provided assurances that these sites would not be detrimentally affected by Structural Fund projects. This acted as a major stimulus for progress at regional level where EU funding was targeted, even in countries such as the UK receiving relatively little amounts from the Structural Funds.

2.2 Causes of delay in adopting sites under Article 4(3)

Article 4(3) of the habitats Directive requires the Commission to establish draft lists of pSCIs within six years of its coming into force, ie by mid-1998. Difficulties in proposing national lists of pSCIs were caused by a number of factors, which in many cases caused subsequent delays in the discussion and adoption of lists corresponding to the biogeographical regions. Some of these factors are described below:

- *The need for more or different scientific information*. This was not just an issue at the beginning of the process but in many cases emerged as more sites were requested from the Commission through the biogeographical seminars. Data were difficult to obtain for some habitats and species that had not been well studied.

- *The need to adapt national classification systems to the EU systems and to complement the existing data sources with additional inventories.* For example, for the New Forest in the UK, not all national vegetation classifications were easily matched to the CORINE biotopes that provided the basis for the Annex I habitats Directive classifications. It took approximately one year to produce a full GIS[1]-compatible map of the New Forest pSCI, which responded fully with the habitats Directive priorities.

[1] GIS means Geographic Information System and refers to mapping software that can be used to display layers of information about a site, eg vegetation cover, soil type, species present etc.

- *The time-critical nature of some of the revisions to site proposals.* In some cases, regions were faced with having to suggest new sites within just a few weeks in order to avoid the withholding of EU funding (see 2.1 above).

- *The criteria for assessing representativity*. The European Topic Centre for Nature Conservation (now the European Topic Centre on Biological Diversity – ETC/BD) prepared guidance - *Criteria for assessing national lists of pSCI at biogeographical level* - to aid assessment of proposed national site lists at biogeographical seminars. A working draft of these guidelines was endorsed by the EC Habitats Committee in 1997. The approach adopted by the Topic Centre is generally known as the '20/60 guidelines': habitats and species for which 60% or more of the total resource is contained within the proposed sites are generally considered to be a low priority for further scrutiny; features for which representation is less than 20% are a high priority, and those for which representation is between 20% and 60% are treated on a case-by-case basis. The Commission has made it clear that this is for guidance only, and that these threshold values are intended to inform debate at the biogeographical seminars, and not for application as rigid rules. These guidelines were not considered to be sufficiently clear in the case of Navarra.

- *Communication between national and local administrations.* In the UK and Spain, there are central coordinating bodies to compile the national lists based on regional proposals. This established good lines of communication and a sense of shared ownership for the process. Good networks made it easier to propose and complete the national lists and to deal with insufficiencies subsequently identified at the biogeographical level. However, national debate about the site selection process and communication with stakeholder groups has contributed to delays in some regions and Member States.

- *The level of attention given to Natura 2000 as a new designation, rather than simply a new label.* The UK's initial approach was to notify the ten or so 'best' sites for any given habitat or species, selected from a pre-existing list of Special Sites of Scientific Interest (SSSIs). This approach was rejected by the Commission and experts at the first biogeographical seminars in 1999, where the UK's submission was judged to provide insufficient representation of a relatively large number of features (37 habitats and 28 species). Additional sites and information had to be put forward to ensure sufficient coverage (geographically and proportionally) and improve site inventories.

- *Unwillingness to propose sites on a purely scientific basis*. Progress in Germany, for example, was hindered by a general reluctance on the part of the *Landesregierung* (government of Hessen) to select sites purely on the basis of scientific criteria. In 1998, the first tranche of sites just contained existing nature reserves larger than 75 hectares in size. Subsequent notifications went beyond this, but still failed to gain the Commission's approval on grounds of being incomplete. In particular, there was concern that certain areas had been excluded from notification for economic reasons (eg to allow for motorway or airport development).

3 Approach to designation of Special Areas of Conservation under Article 4(4)

Article 4(4) reads:

Once a site of Community importance has been adopted in accordance with the procedure laid down in paragraph 2, the Member State concerned shall designate that site as a Special Area of Conservation as soon as possible and within six years at most, establishing priorities in the light of the importance of the sites for the maintenance or restoration, at a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which those sites are exposed.

Member States are not required to apply Articles 6(2), (3) and (4) until sites are formally on the list of SCIs, ie once the Commission has adopted the list. However, Member States do have to protect the ecological interests of any sites that are proposed to the Commission as pSCIs, and this may in fact be a far stricter requirement than the provisions of Article 6.

In **Germany**, Hessen aims to have all Natura 2000 sites fully designated as SACs by 2006. Hessen's nature law provides that all Natura 2000 sites are given one of seven national designations (nature reserve, landscape protection area, natural monument, protected biotope, national park, nature park, or biosphere reserve), unless their protection can be secured by application of other legislation, administrative rules, or contractual agreements. This 'unless secured otherwise…' clause was first introduced in 2002, following a change in transposing legislation. As a consequence, Hessen has radically changed its approach to protecting Natura 2000 sites, moving away from statutory protection and towards greater use of contractual management.

This change of direction has been criticised, even within the German statutory agencies themselves. One of the main concerns is that protection by contractual agreement cannot protect sites from the activities of third parties. Abandoning statutory site protection in effect means that the value of the site is not recognised under Hessen's law, but merely in a contract between parties. It is not clear whether Hessen's interpretation and transposition in this respect is entirely in line with the Habitats Directive and, if not, what the consequences may be for maintaining a favourable conservation status. Most if not all other Bundesländer have taken a more conventional approach, designating all European sites as national nature reserves.

In the **UK**, the Conservation (Natural Habitats &c.) Regulations 1994 state that '[o]nce a site of Community importance […] has been adopted in accordance with the procedure laid down in paragraph 2 of Article 4 of the habitats Directive, the Secretary of State shall designate that site as a special area of conservation as soon as possible and within six years at most.' This is a near literal transposition of the habitats Directive.

Even though SACs do not *have* to be designated for a period of six years, the UK Government and the devolved administrations already treat candidate SACs as if they were fully designated. In England, candidate SACs are afforded legal protection by virtue of an amendment to the Conservation (Natural Habitats &c.) Regulations 1994, such that candidate sites are legally protected from the date that they are notified to

the European Commission. Almost all Natura 2000 sites are also protected through existing designation as SSSIs, which should simplify the task of SAC designation.

Protection of pSCIs - recent ruling of the European Court of Justice

On 13 January 2005, the European Court of Justice (ECJ) gave a ruling with important implications for the protection of proposed Sites of Community Importance (SCIs). The Court's judgment related to an Italian case concerning a public contract for dredging work in a port (1).

Initially, a contract had been awarded to the claimants (Draggagi) in May 2001, to carry out dredging work and dumping of sediment on reclaimed land in the port of Monfalcone. The site identified for the dumping of dredged material was located in a proposed SCI. Four months after the award, the contracting authority annulled the tender process. It was stated that the dumping site was to be regarded as an SCI, and consequently, depositing the sediment would require an appropriate assessment. On the assumption that the impacts would be negatively assessed, the authority cancelled the contract.

The habitats Directive was transposed into Italian law by Presidential Decree No 357 of 8 September 1997. According to the referring court, this legislation is a faithful transposition of the Directive, with the protection regime tied to the European Commission's site list. At the time there was no explicit protection of proposed SCIs under Italian law but the legislation was being interpreted in a way that was considered to be sympathetic with the habitats Directive, with the Italian authorities applying Article 6(2), (3) and (4) to pSCIs.

Draggagi challenged the cancellation of the contract in the Italian courts. After a series of appeals, the question of whether Member States were **obliged** to carry out impact assessments under Article 6(3) as soon as a proposed site was included on the national list, was referred to the ECJ for a preliminary ruling. The Court found that the protective measures of Articles 6(2), (3) and (4) could not be relied upon until the site in question had been adopted by the Commission as a Site of Community Importance. However, the Court also stated that Member States are required to protect the ecological interest of sites proposed under Article 4(1), particularly those hosting priority species or habitat types. Failure to provide sufficient national protection for proposed sites could undermine achievement of the habitats Directive's conservation objective. Fulfilling this obligation may require domestic legislation that is more stringent than the Directive itself.

3.1 Lessons for the Czech Republic

The approach taken to the designation and protection of sites under Article 4(4) and the recent ruling of the European Court of Justice could usefully inform practice in the Czech Republic in this area, as follows:

- Firstly, even if the national transposing legislation is near identical to the provisions of the habitats Directive, this does not mean that national policy will be the same. The UK example shows that policy is more stringent since it treats pSCIs as fully designated SACs.

- Secondly, the Italian case demonstrates the importance of introducing national provisions to protect pSCIs. It is perfectly possible for national protection to exceed that of the Directive, as it does in the UK, but this needs to be spelled out in national legislation. National authorities cannot rely on the provisions of the Directive if they want to apply Articles 6(2), (3) and (4) to pSCIs.

- Thirdly, and importantly, the level of protection that is required for pSCIs is significant. It will be in the interest of the Czech authorities to ensure the protection of all sites submitted to the Commission. For this reason, there are strong arguments for treating sites as fully designated as soon as possible, as is the case in the UK.

- Finally, additional protection may be needed, beyond Article 6, to meet the objectives of the Directive.

4 National approaches to transposing and implementing Articles 6(1)

Article 6(1) reads:

For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

Different patterns are emerging in relation to site management planning and the use of administrative, contractual or other types of conservation measures under Article 6(1), most notably:

- Some Member States and/or regions have a system for establishing a suite of management plans set up and underway (eg France and Navarra). The French approach is the most comprehensive: *documents d'objectif* (management plans, DOCOBs) are being put in place for all sites, and are prerequisites for pSCIs. In Spain too, all sites are eventually to have management plans although the process is at a less advanced stage than in France. Plans are not a precondition to sites being forwarded to the Commission as pSCIs and some Spanish plans may eventually simply consist of pre-existing site plans that have been adapted to reflect additional/different Natura 2000 requirements.

- The comprehensive approach contrasts to the UK where only the more complex terrestrial sites are being covered by management plans, as opposed to management statements that are being prepared for all sites. In Germany, there is national flexibility in terms of management planning and policy varies widely between the Länder.

- As for the types of measures that are being used to ensure management, the conclusion of contracts between authorities/agencies and landowners or users is now becoming common practice in France, Germany, Navarra (Spain) and the UK. Compensatory payments, on the other hand, appear to be becoming less common, and seem increasingly to be limited to cases where existing permissions are being revoked in order to meet Natura 2000 requirements.

4.1 France

In France, the Order of 11 April 2001[2] completed the transposition into French law of the habitats Directives, and provided a full legal framework for the management of Natura 2000 sites. The statute, which has been incorporated into the Environment Code, pursues four aims:

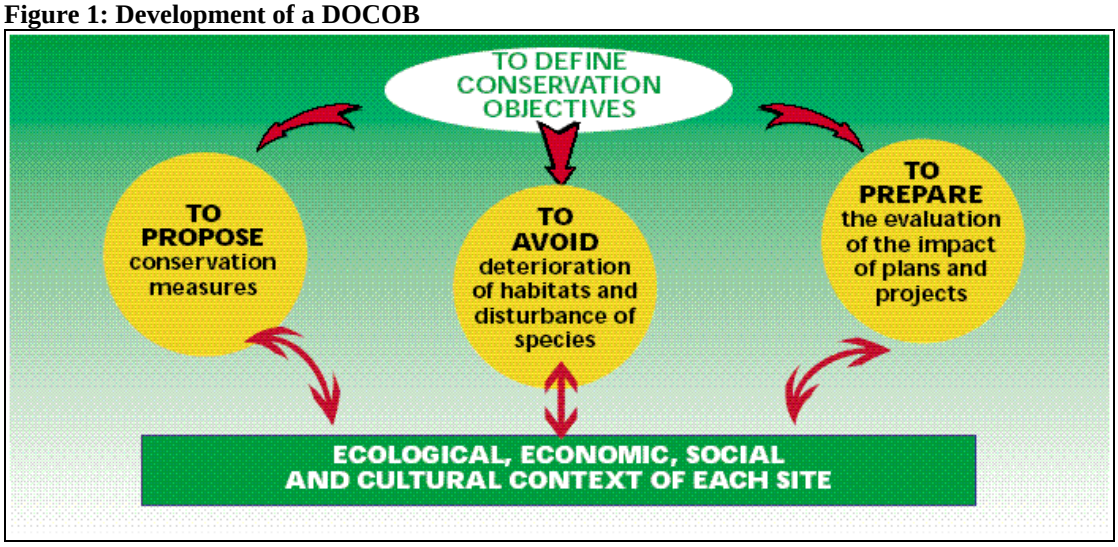
[2]Ordonnance no 2001-321 du 11 avril 2001 relative à la transposition de directives communautaires et à la mise en oeuvre de certaines dispositions du droit communautaire dans le domaine de l'environnement, available online at:
http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=ATEX0100019R

- to give a legal basis to Natura 2000 sites, so that contractual or statutory protection can be applied in any case;
- to preferentially use the option of contractual protection;
- to organise the necessary cooperation for the elaboration of the management objectives of each site; and
- to introduce an assessment of programmes or projects, which could notably affect site management.

Further Decrees were signed on 8 November and 20 December 2001[3], amending the Rural Code. The amendments specify the legal framework for consultations, set out contract-based measures for site management and lay down provisions governing impact assessments of programmes and projects.

The implementation of Article 6(1) is secured through the development of site-based DOCOBs. DOCOBs provide a framework for coherent public and private conservation measures for the site, and the habitats and species warranting its proposed designation. For each site, management objectives are identified. DOCOBs also propose management measures to be taken and provide the basis for responding to requirements concerning deterioration (Article 6(2)) and appropriate assessment (Article 6(3)) of the habitats Directive (see diagram).

Figure 1: Development of a DOCOB



DOCOBs are mandatory for all Natura 2000 sites. They are not statutory or regulatory documents, but basic working documents to guide those involved in managing and monitoring sites (eg landowners, farmers, local elected representatives, forest managers, anglers/fishermen, hunters, municipalities) in making decisions prior to the contract development stage. DOCOBs are developed as follows:

- a facilitator is used to draft the management plan in consultation with all local interest groups;

[3] Décret no 2001-1031 du 8 novembre 2001 relatif à la procédure de désignation des sites Natura 2000 et modifiant le code rural, see: http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=ATEN0190039D
Décret no 2001-1216 du 20 décembre 2001 relatif à la gestion des sites Natura 2000 et modifiant le code rural, see: http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=ATEN0190063D

- the parties meet periodically within a steering committee and/or working groups. Only once this group has reached its final decision, is the document passed on to the State for validation;
- technical studies are drawn up to allow one to specify the ecological (map of habitats and species in the directive) and socio-economic characteristics of the Natura 2000 site; and
- local interest groups work together to define the management objectives and their practical application through the development of specific contracts with private landowners, which the State signs and provides financial payments for, as necessary.

The Ministry of Environment issued a *Circulaire* on 26 February 1999 requesting *département* to begin work on preparing the DOCOBs. The Prefects launched consultation for 300 DOCOBs in 1999. Additional guidance on site management was provided in a circular of 3 May 2002. By 2004, 800 DOCOBs were established, 200 of which have been validated.

Contractual measures are core to French conservation management, and firmly located within the DOCOB. On the basis of the DOCOB, administrative contracts are concluded between landowners or site managers, and *département* Prefects. The contracts, to run for a minimum of five years, are to draw on the terms of reference for the management measures laid out in the DOCOB, stipulating site management commitments and the corresponding funding arrangements (financial support for the work undertaken and services rendered to the community resulting from compliance with the environmental commitments). The Natura 2000 contracts are formally established in Article L 414-3 of the Environment Code. For farmers, the Natura 2000 contracts take the form of agri-environment measures within or outside of farmland management contracts. Additional information on funding within the context of these contracts is provided in Report Two.

4.2 Germany

In Germany, the approach taken to management planning varies from *Land* to *Land*. In Hessen there is no specific requirement for management plans for Natura 2000 sites. Bavaria, in contrast, intends to produce specific Natura 2000 management plans for all its sites.

Hessen's Natura 2000 transposing legislation states that 'landscape planning is to illustrate and justify the requirements and measures of nature and landscape conservation for the respective planning areas. It serves the implementation of goals and principles of nature and landscape conservation, not least in planning and administrative procedures […]' *(translated from German)*. To this end, a landscape programme is to be developed and adopted by Hessen's government, taking account of and spelling out planning and nature conservation priorities. Local requirements and measures are to be presented in individual landscape plans, providing amongst others:

- a descriptive representation of the rationale for protection;
- aims and principles for implementation;
- an assessment of the present state of the interest features;

- maps;
- a description of the measures necessary for the prevention, reduction or mitigation of disturbances and destruction; and
- a description of the management measures, including any measures under agri-environment schemes.

Landscape plans are to be developed for areas where significant changes in landscape and land use are planned or likely. They are adopted by the relevant planning and nature conservation agencies. The relevant Ministry department can comment or reject the plan where it conflicts with nature conservation objectives. The landscape programme provides the basis for the areas' development and appraisal.

Site-specific management plans are developed by the nature conservation agencies for certain sites, but legally, these are only required for nature monuments and nature reserves. They are not required for European sites, unless they are also designated as one or both of the previous designations.

The Federal conservation law (*Bundesnaturschutzgesetz* BuNa) sets the framework for the laws of the Länder, and a recent revision of the BuNa has, for the purposes of Natura 2000 transposition, emphasized contractual arrangements at site level rather than strict legal protection. This is a break away from the classic legal protection offered by reserves.

In Hessen where changes in management practice are needed, contractual and/or voluntary agreements are favoured over legal measures. Management and/or protection prescriptions will be agreed with landowners and users on a site-by-site basis, and signed off in bilateral or, where necessary, multilateral contracts. This applies to specific land management measures on individual plots of land (eg grazing or mowing), as well as to assigning management responsibility for larger units of land. One example is in the case of private forests, where foresters are responsible for preparing site inventories, management schemes and monitoring activities. Another is the tri-lateral agreement reached with the Ministries of Defence and Finance in relation to the management of a large military training ground in the Rhön pSCI. The contractual partners, in this case the German State, have agreed to pass on any data needed for ecological reporting purposes to Hessen's Ministry of the Environment. Detailed experience with implementation of such models is still lacking.

This contractual approach has some potential problems. It is difficult to protect sites from the influence of third parties not bound by the specific contractual agreement. Members of the public may be less aware of sites not formally designated under any of the known national schemes, although there is a duty to promote Natura 2000 for its own sake. A further problem is that the long term quality of the habitats depends too much on the financial situation of the land users, and in particular on nature funding programmes.

4.3 Spain

Planning and management of all protected areas, including Natura 2000 sites, is the responsibility of the 17 regional governments. National Parks are an exception where responsibility is shared between State and regional authorities.

A national legal framework (*Ley* 4/1989) exists for the management of designated protected areas, but there is no national system (methodology or guidelines) specifically for the preparation of management plans and measures in pSCIs [4]. Under *Ley* 4/1989, all areas that are protected under national and regional legislation are required to have management plans and their corresponding measures. Where these plans exist they will be modified as necessary when sites are designated under Natura 2000.

For many protected areas in Spain, the development of management plans for protected areas under existing legislation is still underway. Where these protected areas coincide with pSCIs, some regions are streamlining the development of management plans with the implementation of Natura 2000, so that the protected area plans currently being developed will also comply with the requirements of the habitats Directive for the SCIs concerned (for example, in Extremadura).

A few regions have started to develop plans specifically for proposed SCIs. For example, Galicia has several management plans well advanced, including for sites partially and totally outside existing protected areas. The Basque Country also is developing broad guidelines for site management, including the definition of conservation objectives for each habitat and species. Some regions report that studies of sites are underway, with a view to the development of management plans (e.g. Murcia). In most other regions, other than where sites coincide with existing protected areas, management plans are not yet being developed for pSCIs, because the site lists are still not approved for the majority of the Spanish territory.

The Spanish government is planning to update its protected areas legislation in 2004 and the new legislation was to require:

- a management strategy for the regional Natura 2000 network;
- a management strategy for each district; and
- a management plan for each Natura 2000 site.

Further details on the new legislation were not available at the time of preparing the Spanish input section of this report.

Navarra is following the policy of producing management plans for every Natura 2000 site. It has drafted a methodological guidance document to standardise this process[5]. Navarra is in the process of developing a detailed database and GIS system of management plans for all pSCIs. Eight of the pSCIs currently have draft management plans (Tramos Bajos del Aragón y Arga, Peñacil, Valdorba, Ultzama, Urbasa, Aralar y Montes de Alduide).

The Navarra regional authority places a lot of emphasis on stakeholder dialogue and participation and therefore favours contractual agreements for positive management

[4]Other Spanish laws with application to protection of species and habitats are:
Ley Foral 9/1996, 17 June (natural Spaces, restrictions)
Ley Foral 2/1993, 5 March (protection and management of fauna and habitats)
Ley Foral 9/1992 (natural Spaces)
[5] Available at http://www.cfnavarra.es/MedioAmbiente/downloads/guiaLIC.pdf.

measures. The proposal is to introduce voluntary environmental contracts with a five-year duration which commit producers to applying sustainable models of exploitation in return for payments, co-financed with rural development funds. The greater the environmental commitment, the greater the payment will be.

4.4 UK

In the UK, the establishment of management plans at Natura sites is not a legal requirement, although there is a presumption that sites with more complex management and/or ownership issues will require a management scheme, or will have other arrangements in place which define the management needed. A wide range of organisations may be involved in the preparation and implementation of management plans in the UK. These are principally the statutory nature conservation agencies, other Government departments and agencies, (eg the Ministry of Defence and the Forestry Commission), and non-governmental organisations (NGOs), where they own land. NGOs with significant site holdings include the Royal Society for the Protection of Birds, National Trust, and Wildlife Trusts.

Site management in terrestrial sites is taken forward in three steps. Firstly, a management statement is prepared. Management statements are less detailed than full management plans, but can include some general management prescriptions. The process of developing management statements for sites in England is substantially complete.

A relevant nature conservation body (eg English Nature) produces the management statement. It outlines views on the conservation and enhancement of the sites, and should be accompanied by a full list of features of interest, and a list of operations that are thought to be likely to damage the site. This information is kept in a public database at: http://www.natureonthemap.org.uk/map.aspx?map=int_sites.

These documents are designed to set out management objectives for each site in layman's terms for discussion with owners and occupiers. They provide a practical and effective means of influencing the actions of all relevant stakeholders with a direct interest in the designated land.

Secondly, legal agreements with land owners and occupiers are developed to secure appropriate management, often in return for financial payments. Thirdly, agri-environment schemes and similar incentives are used to encourage farming that is more geared towards the conservation interests of the site (See Report Two).

Management agreements generally form the basis for the management, conservation, restoration or protection of terrestrial sites in England and Wales, or parts thereof. Initially, English Nature used three simple categories of management agreement:

- compensatory - made in the light of restrictions on the land;
- positive - for achieving wildlife gain; and
- wildlife enhancement agreements – standard agreements which support conservation management.

The appropriate nature conservation body can enter into a management agreement with any owner, lessee and occupier of land forming part of a European site, or land adjacent to such a site. The agreement may impose restrictions on land use. Where landowners refuse to conclude a management agreement, or where a breach of an existing agreement has occurred, English Nature may make a compulsory purchase order for the relevant land to ensure protection.

Until the early 1990s, compensation was payable to any landowner or occupier who made a claim for loss of profits as a consequence of being prohibited from carrying out a damaging activity. This system was subsequently found to be inappropriate and was revised in 2001 prohibiting the paying of public money unless a positive shift in site management is undertaken. In general, this means that money can only be paid for measures that go beyond general good land management practice. In addition, anyone entering into a management agreement on part of a parcel of land is now required to observe a certain minimum standard of land management over their entire holding.

Both annual and capital payments made by English Nature are normally based on standard payments for income foregone. English Nature produces a menu of standard payments for each of the principal designated habitats. For specific management actions such as fencing, scrub clearance or provision of a water, payment may instead reflect the actual costs (or a proportion thereof) of carrying out the works, excluding any tax recoverable by the land manager. English Nature will make a contribution to the professional fees reasonably and appropriately incurred in completing a management agreement.

Establishment of a discussion forum in which issues relevant to the management and protection of the site can be aired may be an obligation under the management agreement. Experience to date is that these fora are welcomed and perform a useful function. Progress can be slow, however, until group cohesion is achieved.

In accordance with EU rules, agreements will normally be for a minimum term of five years and a maximum of 10 years, except in special cases where it is shown that the conservation benefits cannot be delivered in a shorter timeframe. English Nature reviews and updates management agreements with individual owners and/or occupiers on an ongoing and needs basis. About 2,000 are processed each year.

4.5 Lessons for the Czech Republic

The Member States have made varying progress in transposing and implementing Articles Article 6(1). There is a contrast between countries such as France where management plans are compulsory for all Natura 2000 sites and indeed, where plans provide the focus for identifying, building a constituency around and submitting site proposals, and Germany management plans are not required by law.

As it is still early in the implementation process, it is not yet possible to say which of these approaches is more advantageous. Indeed, the actual approach taken should in any case reflect national issues and contexts.

The French approach requires more local consultation and may therefore be expected to lead to better buy-in for management practices later on – at least that was the

rationale behind the comprehensive approach now taken. It appears to be best suited to cases where there is or is likely to be a great deal of local resistance to sites. Apart from specific stakeholder problems, the general presumption appears to be that management plans are desirable, at least for the management of the more complex sites where land-use and ownership issues arise.

The actual content of management plans will vary from country to country. Whilst some documents are designed more as platforms for communicating with stakeholders, others will focus more on scientific objective setting and identifying ways of meeting these objectives. Either way, the modalities and funding tools for site management appear in many cases to be missing, while monitoring appears to be considered separate to management planning.

5 Transposing and implementing Articles 6(2) into national law

Article 6(2) reads:

Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

As noted above, a recent European Court of Justice ruling states that Member States are required to protect the ecological interest of all sites proposed under Article 4(1), particularly those hosting priority species or habitat types. Failure to provide sufficient national protection for proposed sites could undermine achievement of the habitats Directive's conservation objective.

At the EU level, three groups of Member States and regions have been identified in relation to protecting sites from deterioration and damage, as follows:

- those that have introduced full legal protection for all sites as soon as these are notified to the Commission (eg the UK, Ireland and Galicia);
- those that have taken some administrative steps to protect all proposed sites (eg France and most Spanish regions); and
- those that are only protecting proposed sites where they are already protected areas, postponing the designation of other new sites until after the Community lists are formally adopted (e.g. Abruzzo).

The situation in the four countries covered by this report is as follows.

5.1 France

DOCOBs provide the tool for identifying deterioration or disturbance issues, in line with Article 6(2) of the habitats Directive. In October 1997, a working group on disturbance (*perturbation*) was set up by the National Monitoring and Consultation Committee (*Comité national de suivi et de concertation*). It examined the concept of disturbance of Annex II species and established a list of activities likely to disturb species for which sites will be designated under the habitats Directive.

French legislation requires that 'suitable preventive measures are also to be taken on Natura 2000 sites to avoid deterioration of these natural habitats and disturbances that may significantly affect these species. These measures are to take into account economic, social and cultural requirements as well as regional and local particularities, and are to be adapted to the specific threats on the natural habitats and species concerned…'

The measures are to be adopted under Natura 2000 contracts, or under existing systems of protection of natural areas, particularly national parks, nature reserves, biotope protection orders and listed sites (*sites classés*). These statutory, regulatory and contract-based systems lay down general protection requirements for natural areas, ie these requirements are only implemented on Natura 2000 sites, if they are in one or more of the specific categories of protected area concerned.

5.2 Germany

Hessen's nature law states that '[t]he special functions of Sites of Community Interest (SCI) and of SPAs within the Natura 2000 network, are to be safeguarded and, where detrimental impacts are unavoidable, restored as much as possible' *(translated from German).*[6] It further prescribes that 'measures, changes or disturbances, which may lead to significant impacts on a Natura 2000 site or parts thereof, are prohibited, not precluding any other special conservation rules, . […]' *(translated)*.

5.3 Spain

According to Royal Decree 1997/1995, which transposes the habitats Directive into Spanish law, Article 6(2) will come into force only once the final site lists have been approved. The Spanish report on implementation of the habitats Directive (2002) notes that several regions offer no specific protection for proposed sites, although many will have a *de facto* protection as they are already protected under national designations. It would appear that Spain is therefore in breach of the Directive, at least according to the recent ECJ ruling (see section 3).

Other regions have taken steps to apply the protection required by Article 6(2) to proposed SCIs. For example, in Extremadura, all activities which might affect sites harbouring habitats or species from the habitats or birds Directives are subject to a special environmental impact assessment (EIA). This applies to all sites, whether or not they are pSCIs. In Galicia, all pSCIs have had a provisional protected area designation since 1999, thus requiring an assessment procedure for any activity causing a loss of natural values. In Cataluña, all pSCIs must also be included in the regional network of protected areas. This ensures a control of damaging activities, although not referring specifically to Natura 2000 habitats and species.

5.4 UK

In order to secure compliance with the requirements of the habitats Directive, English Nature can identify, notify and amend, at any time, a list of potentially damaging operations. Under the regulation 19 of the Conservation (Natural Habitats &c) Regulations 1994, the owner or occupier subsequently may not carry out, or cause or permit to be carried out, any such operation, unless:

- written consent has been granted by English Nature; or
- the operation is carried out in accordance with the terms of a management agreement, and written notification has been given to English Nature; or
- four months have passed without response since notifying English Nature in writing of an activity.

The Secretary of State can induce or give greater weight to restrictions on the carrying out of notified activities by making a 'special nature conservation order' in respect of

[6] 'Die besonderen Funktionen der Gebiete von gemeinschaftlicher Bedeutung und der Europäischen Vogelschutzgebiete innerhalb des Netzes „Natura 2000" sind zu erhalten und bei unvermeidbaren Beeinträchtigungen soweit wie möglich wiederherzustellen' (Hessisches Naturschutzgesetz, 2002).

any land within a European site. Where a person is convicted of contravening such an order, the Courts may judge that the offender has to restore the land to its former condition. If restoration is not carried out within the specified time, English Nature may carry out the works and recover all costs involved. English Nature can also make bylaws (under the 1949 National Parks and Access to the Countryside Act 1949) to prohibit or restrict certain activities.

Where an existing consent for an operation is withdrawn or modified or where a stop notice is served, English Nature may be required to pay compensation, where the owner or occupier of the land can show that he or she has suffered loss.

Action by the UK to avoid deterioration of habitats and disturbance to species on cSACs (corresponding to Art 6(2)) takes two forms. The first is to change management practices, generally by means of case-specific management agreements or through a management scheme (see above). Voluntary schemes or codes of conduct also provide a tool. In addition, English Nature and other competent authorities (eg the Environment Agency and planning authorities) are required to review all existing notifications/consents/permissions in relation to activities taking place in or around a site. The review is likely to continue until the end of March 2010.

5.5 Lessons for the Czech Republic

Article 6(2) has varied in its degree of implementation with some states such as the UK providing legal protection for all pSCIs as soon as they are notified to the Commission, and others such as Spain intending to provide legal protection to newly proposed sites only when final lists are approved by the Commission. A precautionary approach would involve following the UK example, and providing the higher level of protection which has in practice involved a widescale review of all existing permissions to assess their impacts. The Commission has already indicated that it considers Member States obliged to protect proposed sites from damage, especially those containing high priority habitats and species. This has recently been confirmed by the European Court of Justice which has stated that the ecological features of sites – even pSCIs and particularly priority pSCI – need to be protected. The key lesson for the Czech Republic is the high level of protection that must be offered to all sites as soon as they are notified to the Commission. Although an emphasis is placed on sites hosting priority habitats and/species, the Court's wording suggests that other sites should also be protected.

6 National approaches to assessment of projects with significant impact on Natura 2000 sites (Art. 6(3) & 6(4))

Article 6(3) reads:

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, is to 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.

Article 6(4) reads:

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.

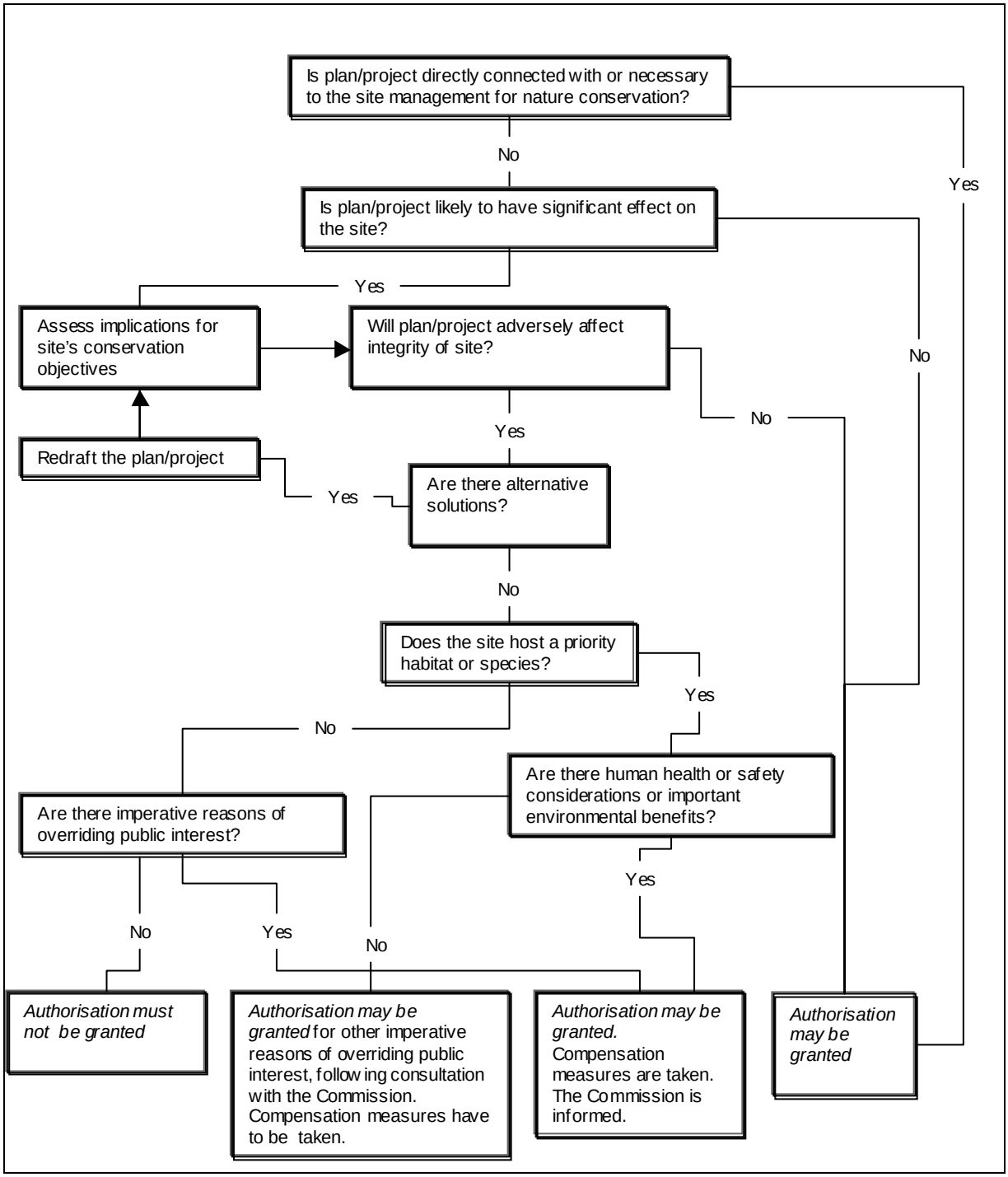
Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission,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

The Commission has issued some guidance on the interpretation of Articles 6(3) and 6(4) (see figure 2)[7]. The Commission's guidance on appropriate assessment[8] states that, where projects or plans are subject to the environmental assessment or strategic environmental assessment Directives (85/337/EEC, 97/11/EC, 2001/42/EC), the Article 6 appropriate assessments may form part of the other assessments. However, the assessments required by Article 6 should be clearly distinguishable and identified within an environmental statement or reported separately. Where a project is likely to have significant effects on a Natura 2000 site it is also likely that both an Article 6 assessment and an EIA in accordance with the relevant Directives will be necessary.

Figure 2: Flow chart of the Article 6(3) and (4) procedure

[7] *Figure 2 from Managing Natura 2000 sites - The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC*, European Commission. European Communities, 2000. Available at http://www.europa.eu.int/comm/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf/art6_en.pdf

[8] Available at: http://europa.eu.int/comm/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf/natura_2000_assess_en.pdf



6.1 France

In France, for Articles 6(3) and 6(4), the transposition into the French law is a simple paraphrase. The relevant legislation is set out in Article L 122-1 of the Environment Code. These measures were amended to transpose Article 6(3), by Articles L 414-4 and 5 of the Environment Code and Articles R 214-34 to R 214-39 of the Rural Code. This regulatory item was adopted following a European Court of Justice ruling against

France issued on 6 April 2000. Further guidance on the implementation of Articles 6(3) and (4) was issued in October 2004.[9]

There have been several court cases concerning Articles 6(3) and (4) in France. The case of TA de Grenoble (23 October 1996) resulted in the annulment of a law of the Préfet de la Région Rhône-Alpes which permitted new tourism development. The action was based on the argument that the project proposal did not take sufficient account of the area being a Natura 2000 site. Another case, C.E. (9 July 2001 n°234555), an order of the Agricultural Ministry was partially suspended as it had authorised a vine plantation without having due regard to the impacts on a pSCI.

6.2 Germany

In Hessen, in Germany, plans and projects are to be assessed prior to their authorisation. If landscape or management plans relevant to the area exist, these need to be consulted as to the conservation status and priorities of the site. Plans and projects, which are thought to lead to significant effects, and which are unconnected to the management of the site, are prohibited. Exceptions are made in accordance with Article 6(4) of the Directive.

There is as yet little experience with the implementation of appropriate assessments in relation to European sites in Hessen. However, experience from other parts of Germany suggest that damage to Natura 2000 sites has occurred despite legislation aimed at preventing the negative impact of plans and projects. The building of federal motorways (eg the A11 in Brandenburg, and A20 in Mecklenburg) and other developments (eg a development affecting hamster populations in the Aachen-Heerlen area), for instance, have led to national and occasional European court action. In some cases this related to failure to follow procedures sufficiently. An ongoing case, concerning the A11, suggests that lipservice is being paid to appropriate assessment, with other economic interests and authorities taking precedence (see box).

The A11 motorway example

The A11 motorway goes through the Rhön Biosphere Reserve for about 30 km, crossing a Special Protection Area (SPA). Three Annex I birds have nesting sites close to the motorway: *Ciconia nigra*, *Grus grus* and *Aquila pomarina.* Habitats Directive Annex I semi-natural beech woods (types 9110, 9130) extend right up to the motorway edge.

Because of higher than expected traffic and in order to modernise it, the motorway is being widenend by adding emergency stopping lanes on either side (there are none at present). The relevant nature conservation authorities are resisting this, as any broadening would in their view negatively affect the natural areas on both sides of the motorway. The road authority examined Article 6 issues, but conservation groups felt that this was not done in a satisfactory manner. A Natura 2000 impact examination was commissioned in 2002 but the consultancy that undertook the assessment had its contract terminated and was replaced by another consultancy. A second assessment was apparently rather general and did not examine impacts on species and habitat.

In summer 2002, acting on reports about the problems with the Article 6 assessment, the Commission opened an infringement procedure against Germany (Procedure 2002/2304) concerning the broadening of the A11 and its impact on the Natura 2000 sites. It sent Germany a series of questions about the A11

[9] See: http://natura2000.environnement.gouv.fr/actualites/documents/circulaire_du_05102004_evaluation_des_incidences___Natura_2000.pdf

and its impact on Natura 2000 values. An additional *'Verträglichkeitsuntersuchung'* (impact study) was carried out in December 2002, again concluding that there was no significant impact on the SPA or pSCI except for the parking lots. Final permission for the road widening was given at the end of 2002, and the work on the motorway continued despite the Commission's proceedings. Much of the eastern side was cleared of trees by autumn 2003 and felling over the rest began in December 2003. The Commission's services are still working on this case.

In terms of actual loss of habitat and disturbance, the project may not seem particularly important, but it may nevertheless reflect more widespread problems in Brandenburg. In particular non-environmental authorities pay insufficient regard to Article 6 and conservation aspects when promoting projects. Conservation authorities are treated as an irritant and 'an enemy of progress'. The behaviour of the motorway authority in the A11 case is symptomatic. It employed a consultancy which produced a poor quality Article 6 assessment in conservation terms, imposed impossibly short deadlines on environmental authorities to comment on huge technical reports and refused to examine possible alternative solutions. No serious attempt appears to have been made by the motorway authority to seek win-win solutions, although these may have existed.

There are similar cases elsewhere in Germany, eg construction of a wind farm across a flyway connecting Great Bustard populations in western Brandenburg (this is also the subject of complaints to the European Commission and the European Parliament).

6.3 Spain

In Spain, Royal Decree Law 9/2000 regarding environmental impact assessments transposes the habitats Directive provisions. Under this law it is obligatory to carry out impact assessments for a wide range of activities that may impact on Natura 2000 sites. All projects promoted by the State and co-financed by Community Funds must obtain a 'non-impact certificate' for Natura 2000 sites. The regions carry out a similar process within the scope of their competencies.

At Navarra, the evaluation and authorization of new activities in pSCIs is governed by existing legislation:

- Law Foral 2/1993, 5 March (Protection and management of fauna and habitats); and
- Decree Foral 229/1993, 19 July (Regulation of Environmental Impact Studies of plans and projects or projects carried out in the natural environment).

6.4 UK

The UK Conservation (Natural Habitats &c) Regulations 1994 (the Habitats Regulations) contain provisions that paraphrase Articles 6(3) and (4).[10] If a proposed activity may have a significant effect on a site, the appropriate nature conservation body (eg English Nature) must make an 'appropriate assessment' of the implications for the site in view of the site's conservation objectives. Permission may then be given only if the site will not be damaged. If consent is refused, the proposer of the activity may refer the matter to the Secretary of State who may require consent to be given if he is satisfied that there are no alternative solutions, and the plan or project must be carried out for imperative reasons of overriding public interest in accordance with the principles of Article 6(4) of the habitats Directive[11].

[10] UK Conservation (Natural Habitats &c.) Regulations 1994, regulations 20-27
[11] Refer to regulation 24, UK Conservation (Natural Habitats &c.) Regulations 1994.

In the UK, an appropriate assessment is considered a step in the planning process. Its conclusions must be based only on the scientific considerations, and should not be influenced by wider planning or other considerations. The scope and content of an appropriate assessment will depend on the location, size and significance of the proposed project. English Nature can advise on a case-by-case basis, and in accordance with the nature conservation value of the site, whether particular aspects such as hydrology, disturbance or land-take should be addressed. In the simplest cases, a general statement from English Nature of the impact of the development may suffice.

The appropriate assessment must be undertaken by the competent authority, which includes any Minister, Government Department, public or statutory undertaker, public body of any description or person holding a public office. English Nature must be consulted, during the course of the assessment, but the final judgement must be made by the competent authority itself.

The information on which the competent authority bases its assessment must be provided by the developer or proposer of the plan or project. This may be any environmental information, and information about the proposal, relevant to the assessment, including:

- information already available; or
- new information from surveys that may need to be carried out; or
- data analysis, predictions, comparisons or assessments of a technical nature.

To facilitate better implementation of Article 6(3), the UK Government has produced guidance on nature conservation in a land use and planning context. This is contained in Planning Policy Guidance Note 9: Nature Conservation[12], which includes guidance on the carrying out of an appropriate assessment. Guidance Notes do not have the force of law, but local planning authorities in England must take their contents into account in preparing development plans, and in judging individual planning applications and appeals.

Further detailed guidance is available to competent authorities by means of the Habitats Regulations Guidance Notes (HRGN) published by English Nature[13], including the following topics:

- appropriate assessments;
- determination of 'likely significant effect';
- the consideration of 'alone and in combination';
- determination of 'not directly connected to the management of the site';
- permitted activities; and
- compensation for habitat damage.

The appropriate assessment of potential impacts of plans or projects requires a decision on the likely significance of the impact. The competent authority must carry

[12] Available at: http://www.odpm.gov.uk/stellent/groups/odpm_planning/documents/page/odpm_plan_606919.hcsp
[13] Available at: http://www.solentforum.hants.org.uk/natconsv/AA_guidance_notes.html

out the 'significance test', with assistance from English Nature where necessary. Consideration of 'likely significant effect' will have practical and legal consequences and must be based on sound judgement and bear scientific or expert scrutiny. Significance should be judged in relation to the features for which the European site has been designated and their conservation objectives. The significance of an impact may depend on whether the impact is direct or indirect, temporary or permanent, beneficial or harmful to the site, or a combination of these. An appropriate assessment only becomes necessary, when the impact is deemed significant.

Appropriate assessment is not the same as an EIA undertaken in compliance with the EIA Directive (85/337/EEC). However, in many cases, plans or projects that will be subject to an appropriate assessment will also need an Environmental Statement to be prepared under the EIA Directive. This will help identify all significant environmental impacts of the proposed plan or project. In deciding whether a particular project is an EIA development, the planning authority will consider the location and potential effects of the proposed development, and a development likely to have a significant effect on a European Site will usually require am EIA.

Recent ruling of the European Court of Justice – Dutch Waddensee case (Case C-127/02)

A 2004 court ruling provides some detail on appropriate assessment, at least on the legal minimum required. According to the ruling, Article 6(3) establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it, is authorised only to the extent that it will not adversely affect the integrity of that site. Article 6(2), in contrast, establishes an obligation of general protection consisting in avoiding deterioration and disturbances which could have significant effects in the light of the Directive's objectives.

Article 6(3) must be interpreted as meaning that any plan or project is to be subject to an appropriate assessment if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site. Where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project.

An appropriate assessment implies that, prior to its approval, all the aspects of the plan or project must be identified in the light of the best scientific knowledge in the field. The competent national authorities are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.

Where a national court is called on to ascertain the lawfulness of an authorisation for a plan or project within the meaning of Article 6(3) of Directive 92/43, it can determine whether the limits on the discretion of the competent national authorities

set by that provision have been complied with, even if the Article has not been transposed into national law within the legal deadline.

6.5 Lessons for the Czech Republic

All of the Member States studied in this project have gone to some lengths to incorporate Articles 6(3) and 6(4) of the habitats Directive into local legislation, and the Commission has provided fairly detailed guidance on appropriate implementation. There has not been a long history of implementation to date, so it is not possible to compare the various approaches with any rigour. However, it seems that legislative change is likely to be needed to put in place the assessment systems described above.

In addition a mindset change at government level may be needed to ensure the results achieved are in line with the spirit of the habitats Directive. Germany provides an example of a situation where although assessments are being carried out, they may not be adequate to meet the objectives of the Directive (and are thus generating complaints to the Commission).

Although Article 6 (3) and (4) set out a process to follow, it is important to bear in mind that the overall objectives of the Directive should not be undermined, even if the proposed development goes ahead.