

Natura 2000

Mitigations and compensations

1. EIA procedure.
2. Mitigation measures *versus* compensations.
 - Mitigation at the design stage.
 - Compensation once Article 6(3) has been complied with but (i) EIA is negative and (ii) no alternatives are available.
 - Degree of compensation
 - Timely implementation
 - Exceptions

Mitigation measures

- A. **Mitigation** measures are not mentioned in the Habitats Directive.
- B. They address the project as it is planned (e.g. by reducing its dimensions, its output or its likely geographical setting).
- C. The duty to avoid adverse effects undoubtedly justifies requiring the developer to detail them.
- D. It is legitimate to consider mitigation measures as part of participatory rights.

Compensation measures

- A. Unlike mitigation measures compensation measures are expressly contemplated in Article 6(4) ('shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected').
- B. Compensation measures counterbalance the effects of a project once it is executed (e.g. by recreating an area destroyed or by liberating wild species to counterweigh for those that may be lost owing to the carrying out of the project).
- C. They cannot be applied within the assessment procedure (Case C-521/12, *Briels v. Minister van Infrastructuur en Milieu*, at para. 32).
- D. Likewise, if the assessment is not 'adequate'.

Environmental liability Directive. Annex II. 1.1.1

- Purpose of **complementary remediation**

- The purpose of complementary remediation is to provide a similar level of natural resources and/or services, including, as appropriate, at an alternative site, as would have been provided if the damaged site had been returned to its baseline condition.
- Where possible and appropriate the alternative site should be geographically linked to the damaged site, taking into account the interests of the affected population.

Environmental liability Directive. Annex II. 1.1.3

- Purpose of **compensatory remediation**
- Compensatory remediation shall be undertaken to compensate for the **interim loss** of natural resources and services **pending recovery**. This compensation consists of additional improvements to protected natural habitats and species or water at either the damaged site or at an alternative site. It does not consist of financial compensation to members of the public.

Degree of compensation

- EU Commission (Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC)
 - A. There is wide acknowledgement that ratios should be generally **well above 1:1**.
 - B. Thus, compensation ratios of 1:1 or below should only be considered when it is demonstrated that with such an extent, the measures will be 100% effective in reinstating structure and functionality within a short period of time (e.g. without compromising the preservation of the habitats or the populations of key species likely to be affected by the plan or project).

Timely application of compensation measures

- The Commission acknowledges that
 - A. 'there may be situations where it will not be possible to fill this condition (e.g., the recreation of a forest habitat would take many years to ensure the same functions as an original one negatively affected by a project).
 - B. 'Best efforts should be made to assure compensation is in place **beforehand** and in the case this is not **fully achievable**, the competent authorities should consider extra compensation for the interim losses that would occur in the meantime'

Timely application of compensation measures

- Case C-521/12, *Briels v. Minister van Infrastructuur en Milieu*
- The ECJ held that any positive effects of a future creation of a new habitat which was aimed at compensating for the loss of area and quality of that same habitat type on a protected site, even where the new area could be bigger and of higher quality, were
 - ‘highly difficult to forecast with any degree of certainty’ and, in any event, could be visible only ‘several years into the future’.

Timely application of compensation measures

- The opinions from the European Commission under Article 6(4) (second paragraph, *in fine*) have concluded on certain occasions that the proposed compensation measures were adequate if they were executed ‘in a timely manner’ (e.g., La Breña II dam in Spain).
- No statement from the Commission has ever been published informing about the definite implementation of such measures

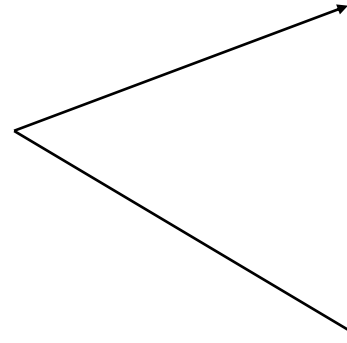
Exceptions

1) Non Priority hábitats and species

2) Priority hábitats
and species

**A) Without
previous
consultation**

**B) Previous
consultation**



1) Non priority hábitats and species

Imperative reasons of overriding public interest, **including** those of a social or economic nature,

2) Priority habitats and species

A) No consultation

Human health
Public safety
Beneficial consequences of primary importance for the environment

B) Previous consultation

'other' imperative reasons of overriding public interest

Exceptions

- The Commission accepts imperative reasons
 - A. If it is a Project of European interest (Rotterdam harbour, Airbus A380; high speed train between Paris and Strasbourg).
 - B. If there is a high unemployment rate (A-20 motorway in Germany; a mine in Germany).
 - C. Water supply for citizens plus agriculture and industry (dam in Spain).
 - D. In some cases, a different DG had already approved the Project.
 - E. The Commission accepts the exemptions under the second group ('other' imperative reasons).

Plans	0			
Projects	15	Year	Number	Member State
		1995	2	Germany
		2000	1	Germany
		2003	4	Germany (2); Netherlands(1); Sweden (1)
		2004	2	France (1); Spain (1)
		2005	1	Germany
		2006	1	Germany
		2009	1	Germany
		2010	2	Germany
		2011	3	Germany (2); Hungary (1)
		2012	1	Germany
		2013	1	Germany
		2015	1	Germany