



Environment and Climate
Regional Accession Network **ECRAN**

Sub-Regional Workshop on Pilot Appropriate Assessment of the Tikvesh Pilot Site II

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Art. 6(4): when, what, how

Art. 6(4)

Topics:

- a) feasible alternatives
- b) public interest
- c) imperative reasons
- d) overriding nature
- e) relative value of target features
- f) compensatory measures: N2K coherence; nature of CM; feasibility; proof of function; induced challenges
- g) EC opinion

Art. 6(4)

Derogation from the principle “Natura 2000 is untouchable”

Purpose: to allow run *public* projects which are:

- really needed for the country
- the value of which is higher than that of Natura 2000 site

all this under strict conditions:

derogation from the N2K protection regime →
all requirements of the Article must be met
(confirmed by several CJEU rulings)

Art. 6(4) first part

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.

Art. 6(4) first part

6(4): Feasible alternatives

Investor has to provide the proof of non-existence of alternatives

In theory, alternatives always exist

In practice not

Alternative must be *feasible* – technically and economically

Art. 6(4) first part

6(4): Public interest

If no alternative exists:

Only projects in *public interest* qualify for 6(4)

Public interest \neq public investor

Public interest = projects serving the public
(infrastructure, schools, hospitals, ...)

Case-by-case decision needed

Art. 6(4) first part

6(4): Imperative reasons

Often overlooked

meaning of “imperative”: many projects are public, overriding, but *not* imperative

6(4): Compensatory measures

Why to treat them before overriding interest?

Because many habitat types and species are not compensable at all

Target feature not compensable at all = project cannot be authorized

If TF not compensable – the proceedings have to be stopped

6(4): Compensatory measures

What is “compensation” *sensu* 6(4)?

EC guidance 2007(2012): “like for like” – three options:

- a) establishment of habitats and habitats of species of equal size/area “on green meadow”
- b) establishment (restoration) of new habitats inside N2K site
- c) designation of new N2K site

6(4): Compensatory measures

prerequisite: newly established site(s) must be officially designated as N2K sites then

6(4): Compensatory measures

aim of CM: maintenance of “overall coherence of Natura 2000”

coherence = entirety of all N2K sites; if a site is to be sacrificed → must be *fully* compensated or even overcompensated

6(4): Compensatory measures

Challenges of compensatory measures

- technical: suitable location(s) difficult to find
- ownership: investor has to ensure his right to manage the land
- procedural: CM often need landuse change; often in different county/region
- functionality: CM should in principle be operational before the project has been authorized

6(4): Compensatory measures

CM – used by some EU MS only; information is scarce to missing

Recommendation: try to

- avoid impact
- mitigate impact

in order to avoid 6(4) procedure

6(4)

Overriding nature of public interest

Case-by-case: particular N2K site *versus*
particular public project: what is “heavier”?

Relative value of target features:

- more common are “less valuable”
- endemic or rare are “more valuable”

6(4): Regime of "priority" sites

Art. 6(4) second part:

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.

6(4): Regime of "priority" sites

3 kinds of reasons do not need EC opinion

All other reasons do

EC opinions published at

http://ec.europa.eu/environment/nature/natura2000/management/opinion_en.htm

EC opinion: lengthy procedure, suitable only for large capital projects

6(4): Regime of "priority" sites

Practical recommendation:

- try to put 6(4) procedure in the legislation in a functional way

but

- try to avoid it in practice as it will hardly work (?)