



17/02/2017

Ensure proportionate species and habitat protection that offers legal certainty for economic actors

European industry is convinced of the importance of protecting biodiversity and of the need to mobilize the economic sector to contribute to its preservation. Therefore, BusinessEurope supports the objectives and standards of the European Natura 2000 directives (Habitat Directive and Birds Directive) that aim to preserve our protected areas while ensuring that the sites are managed in a sustainable manner both ecologically and economically. However, European regulations must provide visibility and proportionality to ensure a harmonious development of economic activities inside protected areas.

In practice planning and authorisation procedures show that, due to incorrect implementation, the current legal requirements associated with species and habitat protection can lead to lengthy procedures and a very substantial effort by companies which outweighs the benefits. Due to legal uncertainties at national, regional and local level about what actually has to be done to meet requirements, this can lead to delays in, or even the cancellation of, investment decisions. As a result, some companies have taken the decision to avoid Natura 2000 areas altogether, opting instead for less suitable and more expensive alternatives. This often has several negative impacts in terms of quality of products, resource efficiency and transport distances (most notably higher CO2 emissions).

Deadlines and bureaucracy associated to the authorisation procedures must become more homogenous and take less time; it is therefore important to apply the tacit administrative consent rule in all EU Member States.

In BusinessEurope's view, the technical and legal requirements surrounding nature protection must be implemented in a reasonable, workable and easily applicable manner for all. Excessive requirements do not serve the clearly understood need to protect nature, do not meet the objectives of the Natura 2000 directives effectively nor allow for the development of economic activities that provide growth and jobs. Unreasonably high requirements make implementation difficult and should be rejected from a legal interpretation angle.

It is our conviction that the ambitious 2020 biodiversity objectives, which the Natura 2000 directives are intended to underpin, can be achieved only if they can be supported effectively on a broad basis across the EU. This presupposes wide-ranging cooperation between all stakeholders and ensuring that the requirements are structured to be as practical and reasonable as possible.



To this end, please find below our thoughts on how this could potentially be achieved:

More flexible application of the provisions relating to species distribution, degree of exposure and conservation status

It is necessary to establish clear and exhaustive interpretation concerning protected species in order to avoid confusion. As currently framed, the provisions of the Natura 2000 directives protect species irrespective of their specific *degree of exposure* and their distribution. This applies in particular for numerous bird species, which are protected as European bird species but are not vulnerable in reality. Here, it is important to bear in mind that the status of certain species can vary from one region to another across Europe. For example, whilst the great crested newt is rare in some parts of Europe, it is more abundant in the United Kingdom. Based on experience with permitting procedures, many companies report a focus on protecting „individuals“ rather than „populations“ which, in the case of the great-crested newt, has led to the very costly protection of each and every individual in areas where there is an abundant population. More emphasis should be put on the European perspective when considering detrimental impacts of a project. Local authorities tend to only take into account the local population which may be endangered locally, but which doesn't reflect the European-wide situation. Inasmuch, such provisions as laid down in European and therefore national species protection law are not structured to take account of application for large-scale industrial and infrastructure projects, since they have to be fulfilled for every individual species. In our view, a more flexible and balanced approach should be recommended in the upcoming guidance in order to avoid disproportionate requirements. Otherwise, as can already be seen in practice, the need for a derogation from species protection law becomes the general rule, contrary to the intended system.

Such derogation procedures can severely delay and degrade already complex planning and authorisation procedures. They furthermore lead to legal uncertainties and obstacles, which are difficult to overcome. We therefore call for more flexibility to be applied in the implementation of these provisions on species protection. It may prove useful to develop evidence-based regional/national 'Species Action Plans' which would practically define 'favourable conservation status' and inform planning and management practice, thus ensuring an informed and proportionate approach to the conservation of the species and populations. Such plans should take a meta-population approach and aim at conserving the species population, genetic viability, ecological functionality and range. They should not aim at protecting every individual, except where this is necessary to maintain or secure favourable conservation status.

Finally, it is important to point out that forest certifications, such as FSC and PEFC, can be a good tool to operationalise the Directive's provisions on protected species, to help resolve uncertainty and speed up authorisation procedures.

- More flexible application of these provisions should be specified in a Guidance Document.



- Member States should be required to complete their reporting under Article 4, paragraph 2 of the Habitats Directive with published evidence of which priority natural habitat types and priority species are present in each site of community importance.
- National efforts such as the Dutch ‘pathway for the environment’ initiative to develop an integrated online environmental data platform for all national government departments and regional authorities by 2024 should be encouraged and facilitated.

Harmonisation of the derogation grounds for bird species in article 9 of the Birds Directive with the standard applicable for species laid down under article 16 of the Habitats Directive

Considerable legal uncertainty also arises from the fact that the derogation grounds in relation to bird species are formulated differently and more strictly than they are for species, which are protected in accordance with the habitats directive. These derogation ground should be harmonised and brought in line with those under the Habitats Directive.

- Derogation grounds should be harmonised in a Guidance Document.

Guidance on Temporary Nature

There are often large fallow areas, which are temporarily not in use at industrial and infrastructure locations. Habitat conditions suitable for many species, which have become rare in today’s landscape, could develop on these areas. However, many landowners/developers are concerned that they may have to deploy extensive compensatory measures to fulfil the requirements of species protection law when these areas are subsequently brought into use for a project. This leads to a situation whereby landowners prevent the development of such habitats to avoid problems in the future. As a result, areas which could be of value to nature on a temporary basis are prevented. Not “tak[ing] account of economic, social and cultural requirements” as required by Article 2 of the Habitats Directive leads to missed opportunities such as these to further the conservation objectives of the Directive (i.e., blocked or threatened projects do not deliver conservation benefits). The Netherlands already adopted national legislation embracing the concept of Temporary Nature providing the developer with legal certainty to continue using the plot of land when needed while allowing nature to benefit temporarily undisturbed.

- The Commission should include the notion of temporary nature under the relevant guidance documents, based on existing experience in Member States.



Structure the relationship between article 6.2 and article 6.3 of the Habitats Directive proportionately and protect the stock of existing industrial installations

In the area of habitat protection, the unclear relationship between requirements regarding deterioration in accordance with article 6.2 and the project-related requirements of article 6.3 of the habitats directive poses difficulties. Due to the recent ECJ rulings, it is possible to impose on project managers a further tightening of the requirements by obliging them to carry out ex-post compatibility tests on existing installations. In this regard, too little account is taken of the fact that article 6.2 of the habitats directive imposes an obligation on the Member States themselves. As such, it is not up to individual project managers to carry out extensive baseline or ex-post compatibility tests in order to meet this obligation. This tendency is leading to an across-the-board threat to the stock of existing industrial installations and/or their modern replacements. These installations need to be protected in BusinessEurope's opinion, to enable EU industry to continue to modernise and remain competitive.

- The Commission should clarify that existing projects should not be jeopardized by Natura 2000 directives.
- The Commission should lay down rules regarding the consultation process to be followed by competent authorities when selecting expansions to the existing Natura2000 network including better consultation of and communication with landowners and appropriate compensation measures when rights of ownership are encroached upon.

Appropriately target what limited EU funding is available

With the proposed Action Plan, the European Commission intends to strengthen investment in Natura 2000 and leverage private sector funds to do so. Among the private investments that can most readily generate public revenues for the conservation of nature are those that require the close and continuous support of local communities and for which a business case for local biodiversity conservation and enhancement can be made (e.g., some infrastructure projects).

- The Commission should introduce a policy of including compatible investments in its identification of measures for co-financed sites under Article 8, paragraph 2 of the Habitats Directive, e.g., through Public-Private-Partnerships with private investors, such that EU funding of Member States' Natura2000 sites can be conditional upon implementation of the Commission's vision for compatible land-uses following Article 6 and its various pieces of sector guidance (e.g., non-energy extractives, ports, aquaculture, wind-power etc.).
- Where Member States have issued bans on project development in or near Natura 2000 areas, the Commission should investigate whether the Member States concerned have fully consulted the regional and local public before enacting such bans, or whether they have failed to comply with the provisions of



Article 2 paragraph 3 and/or Article 6, paragraphs 3 and 4, including through application of relevant Commission guidance.

Update Guidance Document on Art. 6 Habitat Directive

The Nature Directives have led to much tighter conditions for the permitting of projects and overload of permitting authorities.

- Member States could be encouraged to form inter-Ministerial working groups for the drafting of guidance and appropriate assessment of EIA Annex I projects, such that the affairs of all such sectors are treated impartially and fairly as required by the EU Treaties.