



**Position paper of the Birds and Habitats Directives Task Force on
the treatment of compensatory measures proposed
outside affected Natura 2000 sites
under Article 6(4) of the EU Habitats Directive**

adopted by the BirdLife Birds and Habitats Directives Task Force on 31st of July 2007

Introduction

1. This paper sets out the position of the BirdLife International Birds and Habitats Directives Task Force on the principles underlying the provision of compensation measures arising under Article 6(4) of the EU Habitats Directive. It draws on a combination of views and experience of various BirdLife International partners.
2. The European Court of Justice (ECJ) has reminded Member States that the underlying purpose of Article 6 of the Habitats Directive is to prevent adverse effects on the integrity of Natura 2000 sites¹ and that consent for a plan or project should only be granted when *“there is no reasonable scientific doubt as to the absence of adverse effects”*.²
3. This is in line with the key purpose of the Habitats Directive, which is to achieve the favourable conservation status of protected species and habitats in the EU (supported by the Commission’s own guidance³). By virtue of Article 7 of the Habitats Directive, Articles 6(3) and 6(4) also apply to the SPA network designated under article 4 of the Birds Directive.⁴ Natura 2000 sites are a key mechanism by which to achieve the favourable conservation status of species and habitats of European importance. Therefore, all Natura 2000 sites should be maintained at or, where necessary, restored to favourable conservation status.
4. Unfortunately, proposals that will damage (or risk damage to) a Natura 2000 site are not uncommon. This means that to get consent, scheme proponents will need to pass the strict tests under Article 6(4):
 - Prove there are no less ecologically damaging alternative solutions;
 - Demonstrate that the damage is justified for imperative reasons of overriding public interest (IROPI); and
 - Provide compensatory measures to ensure the overall coherence of the Natura 2000 network is protected.

¹ Special Protection Areas (SPAs) classified under the Birds Directive and Special Areas of Conservation (SACs) classified under the Habitats Directive

² C-127/02, Waddenzee case, paragraph 58

³ Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds

⁴ While the Birds Directive does not explicitly refer to favourable conservation status, it is reasonable to argue that the more implicit “ecological requirements” in Article 2 of the Birds Directive has been replaced by the more explicit “favourable conservation status” phrase of the Habitats Directive.

5. The proponents of such schemes often put forward measures to offset the predicted adverse effects, which can include offers of habitat creation or other measures. In line with the Habitats Directive and EC guidance, it is BirdLife International's view that the provision of habitat compensation should be seen as a **last resort**, when all other options to protect the Natura 2000 site *in situ* have been exhausted and the damage is considered justified under Article 6(4).

Distinguishing between mitigation and compensation measures

6. It is important to distinguish between those measures designed to **mitigate** the effects of the proposed plan or project and those to **compensate** for the residual adverse effects of the plan or project. Mitigation measures are considered during the appropriate assessment of the plan or project and are designed to reduce or remove predicted adverse effects. Compensatory measures must only be considered once it has been concluded that there are no less damaging alternative solutions and IROPI that justify the damage to the Natura 2000 site.

Mitigation can be defined as:

“measures that avoid or reduce overall potential adverse effects on the integrity of a Natura 2000 and should be taken into account during the appropriate assessment of the impacts of a development.”⁵

It is important to note that proposed measures to manage the Natura 2000 site that are really required to achieve the favourable conservation status of the site cannot be considered as mitigation as they are already necessary to meet obligations under Articles 6(1) and 6(2) of the Habitats Directive.

Compensation can be defined as:

“measures that provide alternative habitats (or other measures) that offset residual adverse effects remaining after all attempts to mitigate impacts on the integrity of a Natura 2000 site have been exhausted. These are not to be taken in to account as part of the appropriate assessment as they do not form part of the plan or project.”

7. The European Commission has issued guidance on Article 6(4), with particular emphasis on compensatory measures.⁶ The guidance on compensation measures is broadly in line with the position of BirdLife International set out in this paper and its accompanying annex. However, the Commission's guidance proposes that compensatory measures can comprise restoration or enhancement within the Natura 2000 site to comply with the conservation objectives of the site. This could be interpreted as inconsistent with advice elsewhere in the same guidance that compensation measures should not be understood to mean measures required for the overall management of the site (see paragraph 6 above).

⁵ This should not be confused with so-called “mitigation banking” from the United States of America, which is the regulated but speculative creation of new habitats to offset the loss of wetland habitats. Such habitat creation is, in reality, a form of non-targeted habitat compensation, as it does nothing to avoid or reduce the loss of the original wetland habitats.

⁶ [European Commission \(2007\) Guidance document on Article 6\(4\) of the ‘Habitats Directive’ 92/43/EEC. Clarification of the concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence, opinion of the Commission.](#)

8. The Commission's advice in respect of compensation measures *within* the site raises complex issues in terms of both legal interpretation and practical application, which require further consideration, and discussion with the Commission. **Therefore, this position paper addresses compensatory measures only insofar as they relate to measures taken outside Natura 2000 sites.**

Compensation measures

9. Compensation measures must be considered once it has been concluded there are no less damaging alternative solutions and that IROPI exist. It would be unlawful to allow the plan or project to proceed if no compensation measures have been secured that will ensure the overall coherence of Natura 2000 is protected.
10. The stated legal purpose of compensation is to maintain the coherence of the Natura 2000 network: this amounts to a **no-net loss** obligation in respect of the Natura 2000 network. Compensation measures should be targeted at the ecological requirements of those qualifying interests adversely affected by the plan or project. This approach should ensure that the resulting compensation ensures the coherence and quality of the Natura 2000 network is maintained. This means that financial compensation for the loss of habitat is never an option. Compensation measures should not themselves have an adverse effect on other existing interests of nature conservation importance, in particular Natura 2000 sites.
11. Member States are responsible for ensuring compensatory measures are secured. However, in line with the polluter-pays principle this should normally be achieved by obtaining legal guarantees that commit the applicant to carry out compensatory measures to an agreed standard and within an agreed timescale so that compensation is fully functional before the damage is caused.
12. In line with the requirements of Article 6(4), compensatory measures should only be considered when it cannot be concluded there will be no adverse effect on a Natura 2000 site and the decision-maker has addressed the subsequent tests on alternative solutions and imperative reasons of overriding public interest. However, good practice suggests that, where an adverse effect looks likely, a developer can and should suggest compensatory measures early on, often for consideration alongside the plan or project itself. This enables developers and nature conservation bodies time to assess how effective the proposed compensation will be and to make any adjustments to its design to ensure success if the decision-maker decides to grant consent.
13. In determining an approach to the provision of habitat compensation, it will be necessary to have a detailed understanding of the following issues:
- The Natura 2000 site's conservation objectives;
 - The current conservation status of the site including other factors that may be causing it to deteriorate;
 - The favourable conservation status of a site⁷;
 - Whether appropriate steps are necessary to avoid deterioration or disturbance or to restore a site currently in unfavourable conservation status;
 - An understanding of the ecological integrity of the site i.e. site structure and functions; and
 - The effects of the plan or project on the integrity of the site i.e. how will site integrity be harmed?

⁷ See Position paper of the Birds and Habitats Directives Task Force on the Favourable Conservation Status of Special Protection Areas (SPAs), adopted 6 February 2006.

14. Once this information is known, it should provide the framework for the provision of robust habitat compensation measures.
15. In conclusion, it is BirdLife International's position that habitat compensation measures under Article 6(4) of the Habitats Directive should be seen as a last resort when all other options to protect the Natura 2000 site *in situ* have been exhausted and the damage is considered justified under Article 6(4).
16. Where damage to a Natura 2000 site is justified under Article 6(4) of the Habitats Directive, any compensation measures should be:
 - **Targeted** at completely compensating for the damage caused by the plan or project;
 - **Effective** in both ecological and legal terms;
 - **Sufficient** in extent to meet the ecological needs of the affected species and habitats;
 - **Well-located** through compensation measures realised as close as practicable to the location where the damage will be caused; and
 - **Well-timed** so that the compensation measures are fully functional before the damage is caused.
17. This position is elaborated in the guiding principles attached as an Annex to this paper.

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ANNEX

Position paper of the Birds and Habitats Directives Task Force on the treatment of compensatory measures proposed outside affected Natura 2000 sites under Article 6(4) of the EU Habitats Directive

Guiding principles for the provision of compensation measures under Article 6(4) of the Habitats Directive

Procedures

Compensation measures:

- Should not be included in the screening process for the “likely significant effect” test under Article 6(3);
- Should only be considered after the appropriate assessment has concluded that an adverse effect on site integrity cannot be ruled out. However, good practice suggests that a developer can and should suggest compensatory measures early on, often for consideration alongside the plan or project itself. This allows developers and nature conservation bodies time to assess how effective the proposed compensation will be and to make any adjustments to its design to ensure success if the decision-maker decides to grant consent;
- Should only be assessed by the decision-maker after it has been concluded that there are no alternative solutions and that imperative reasons of overriding public interest justify damage to the Natura 2000 site.

Targeted compensation

- Compensation measures should provide alternative habitats (or other measures) that fulfil the same ecological contribution and functions of the habitats and species affected by the residual adverse effects on the integrity of a Natura 2000 site and thereby maintain the overall coherence of the Natura 2000 network;
- In those limited situations where it is not possible to fulfil the same ecological contribution and functions of the habitats and species, it will be necessary to consider other options that secure the most appropriate contribution to secure the coherence of the Natura 2000 network. These measures should provide as close a match as possible to those habitats, species and ecological functions damaged. Consideration will need to be given to the coherence of the Natura 2000 network at local, national and EU levels;
- The nature and magnitude of the impacts of the plan or project must be agreed before the compensation measures can be defined;
- In respect of damage to SPAs, clear objectives must be established for the compensation measures that:
 - Identify the total numbers of birds affected;
 - Identify the principle species affected and the broad proportion of the total population(s) that these occur in;
 - Identify the principle function(s) of the habitats that will be adversely affected that the species depend on e.g. feeding, roosting, breeding etc;
 - Identify the likely populations of species and the habitat functions at favourable conservation status where the site is currently considered to be in unfavourable conservation status;
 - Identify the measures needed to offset the damage to the habitat functions and species affected so that they are restored to a state that reflects the favourable conservation status of the area affected.

- Compensation should be:
 - Like-for-like habitat, preferably adjacent to the damaged Natura 2000 site in order to sustain the site's functions;
 - Genuinely additional measures to those site management measures required under Articles 6(1) and 6(2).
- The compensatory habitat should be included in the Natura 2000 network within a specified timescale – either as a stand-alone site or, more probably, an extension to an existing site. Simply reaching the threshold for designation purposes does not remove the need to ensure the compensation measures meet their agreed objectives;
- A rigorous assessment of the risk of an adverse effect should form part of the appropriate assessment under Article 6(3). Any uncertainty over the precise nature and magnitude of the adverse effects should be thoroughly tested. Where appropriate, a precautionary approach should be adopted and the assessment of adverse effect based on a realistic worse case scenario. This will affect the provision of compensation where the extent or timing of adverse effects is uncertain.

Effective compensation

- There should be clearly defined timescales for delivering the compensation measures and measuring their success;
- The additional habitat must be as self-sustaining as possible i.e. after the process of initial establishment; it should require minimal management intervention to maintain the necessary ecological functions. The level of intervention will vary from habitat to habitat;
- The underlying condition of the ecological system must be capable of supporting the compensation measures and not act to undermine its success e.g. a quickly eroding estuarine system;
- The compensation measures should be provided in perpetuity in line with obligations to ensure the overall coherence of the Natura 2000 network is maintained;
- Adequate funding should be provided to ensure the measures can be maintained in perpetuity;
- Compensation measures should not themselves have an adverse effect on other existing interests of nature conservation importance, in particular Natura 2000 sites. Where adverse effects on Natura 2000 sites are predicted, the compensation proposal should be subject to Articles 6(3) and 6(4) in the same way as any other project. Preference should be given to compensation proposals that will achieve the agreed objectives and which will have no adverse effect on a Natura 2000 site;
- Comprehensive monitoring packages should be agreed and implemented to measure success and identify any remedial measures necessary to ensure the agreed objectives are met;
- Compensation measures should be subject to clear legal and financial commitments to deliver the compensation to an agreed ecological standard within an agreed timescale;
- Where it is not possible to devise compensatory measures to offset the adverse effects on site integrity, then the project should not proceed.

Extent of compensation

- The extent of compensation should be based on an assessment of the necessary ecological requirements to restore species populations and the habitat structure and functions identified in the compensation objectives;
- Where the original area of SPA that will be damaged is in unfavourable conservation status additional measures will be needed to ensure the habitat functions and species affected are restored to a state that reflects favourable conservation status;

- Ratios should be above 1:1 to safeguard against the risks associated with the creation of new habitat. Risks include the confidence in creating new habitats of equivalent quality, proximity to the damaged site and time lags between damage and delivery of fully functional habitat;
- Ratios of 1:1 or less should only be considered when there is 100% confidence in meeting the ecological objectives in a short time period. These circumstances will be rare.

Location of compensation

- Additional habitats should be created as geographically close as possible to the location of the damage;
- The practical starting point for identifying potential locations for compensatory habitats should be directly adjacent to the damaged Natura 2000 site. This will provide the best chance of securing the coherence of the Natura 2000 network;
- Compensation measures should be designed to provide the same ecological contribution and functions of the habitats and species affected in order to maintain the coherence of the Natura 2000 network. The area of search hierarchy should be:
 - Adjacent or in close proximity to the Natura 2000 site adversely affected;
 - Outside the Natura 2000 site but within a common topographical or landscape unit;
 - Outside the Natura 2000 site and in a different topographical or landscape unit.

Timing of compensation

- Should be fully ecologically functional before any damage occurs, to ensure the overall coherence of Natura 2000 is protected. There should be no time-lag between compensation measures becoming fully functional and the damage to the Natura 2000 site occurring;
- This means that proponents of potentially damaging plans or projects should integrate the need to provide fully functioning habitat into their project planning to ensure the new habitat is fully functional and available to the affected qualifying interests before damage occurs;
- In designing compensation measures, the effects of any time-lag in delivering fully ecologically functional habitat should be assessed to ascertain whether it will add to the predicted residual adverse effects of the original plan or project. Where necessary, the effect of any delay should be factored into the design and additional compensation measures provided as part of that package.

Compensatory measures cannot comprise:

- Management measures to restore a Natura 2000 site to favourable conservation status (as this is already a requirement of the Directive);
- Financial compensation in lieu of habitat compensation (as per Marie Claude-Blin, DG ENV *pers.comm.*⁸, and see also the Commission's guidance on Article 6(4)⁹);
- Other activities that fail to restore the ecological functions damaged or lost e.g. visitor centres, scientific studies/monitoring, land acquisition, artificial nest sites unrelated to the damage.

Strategic habitat compensation provision

- Strategic habitat compensation provision offers the potential to address the problem of the time-lag between damage occurring and compensatory habitat becoming fully functional that is common to many project-level compensation schemes. However, thinking on this issue is not well developed at present.

⁸ International exchange of experience on compensatory measures under Article 6(4) of the Habitats Directive, Berlin, 1-2 July 2004.

⁹ See Footnote 6.

- The preparation of strategic sectoral plans which set out a programme of project level works or which provisionally sanction individual schemes must be subject to Articles 6(3) and 6(4) of the Habitats Directive if they are likely to have a significant effect on a Natura 2000 site.¹⁰ Where an appropriate assessment concludes that the implementation of the plan will or is likely to have an adverse effect on a Natura 2000 site, the plan will need to pass the strict tests of Article 6(4). This offers the opportunity to identify, agree and implement strategic habitat compensation in advance of individual projects coming forward;
- Strategic habitat compensation provision is different conceptually to “land banking” as any compensation measures must be carefully targeted at the predicted adverse effects of the programme of works in the plan. Habitat created through land banking is more speculative and cannot be guaranteed to correspond to the damage requiring compensation;
- BirdLife International will consider the practicalities of strategic habitat compensation provision over the next 12 months to address the practical issues that need to be overcome to implement such an approach in line with the requirements of the Habitats Directive.

¹⁰ See Case C-6/04 *European Commission vs. United Kingdom*