Position paper of the Birds and Habitats Directives Task Force on the approach to alternative solutions and imperative reasons of overriding public interest under Article 6(4) of the EU Habitats Directive

*Adopted by BHDTF on 12 April 2010*

**Summary**

1. The Nature Directives represent an ‘enlightened approach to dealing with environmental constraints, and one that is at the heart of sustainable development’. A key part of this is making sure the best areas for wildlife in Europe, Natura 2000 sites, are properly protected in the wider public interest, so that they continue to make their full contribution to securing the favourable conservation status of the habitats and species they conserve. For good reason, the Nature Directives only allows these sites to be damaged in exceptional circumstances and require strict tests to be passed first.

2. The strict tests are set out in Article 6(4) of the Habitats Directive and are intended to make sure any damage permitted to Natura 2000 sites is both unavoidable and necessary in the genuine and overriding public interest. They are about deciding, in the interests of wider society, where the balance lies between the public interest of conserving Europe’s biodiversity and the public interest(s) provided by a particular plan or project.

3. It is BirdLife International’s position that these tests on alternative solutions and imperative reasons of overriding public interest (IROPI) under Article 6(4) are central to ensuring the Habitats Directive contributes to sustainable development by making damage to Europe’s most important wildlife sites a last resort. Applied in a systematic, robust and transparent manner, they can ensure decisions on whether to damage some of Europe’s most important wildlife areas are taken in the genuine interests of society as a whole.

4. This paper sets out a BHDTF position on how Member States and other competent authorities should approach decisions under Article 6(4) in respect of the tests on alternative solutions and IROPI. It draws on a combination of views and experience of various BirdLife International partners. It seeks to provide a structured approach to help ensure greater consistency, transparency and fairness in the application of these key tests. We think this will mean any damage permitted to Natura 2000 sites is fully justified only as a last resort, having

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2 Special Protection Areas (SPAs) classified under the Birds Directive and Special Areas of Conservation (SACs) classified under the Habitats Directive
exhausted all other options to protect the site *in situ*. It is designed to be consistent with existing European Commission guidance.\(^3\) Given the breadth of potential issues that any decision on a plan or project might raise, it can only provide a generic framework to help guide the necessary analysis of a case on alternative solutions and IROPI.

5. Where a plan or project is to be consented on the basis of no alternative solutions and IROPI, Article 6(4) then requires compensatory measures to be secured to protect the overall coherence of the Natura 2000 network. A separate position paper on compensatory measures outside Natura 2000 sites under Article 6(4)\(^4\) has already been adopted and should be read in conjunction with this paper where necessary.

**Introduction**

6. 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 sites 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*”.\(^5\)

7. This is in line with the key purpose of the Habitats Directive, which is to achieve the favourable conservation status of species and habitats of European importance (supported by the Commission’s own guidance\(^6\)). Natura 2000 sites are a key mechanism by which to achieve this. Therefore, all Natura 2000 sites should be maintained at or, where necessary, restored to favourable conservation status.

8. Unfortunately, plans or projects that will damage (or risk damage to) a Natura 2000 site are not uncommon. This means that to get consent, 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 IROPI; and
   - Provide compensatory measures to ensure the overall coherence of the Natura 2000 network is protected.

9. These tests were introduced late into the draft Habitats Directive by the Council of Ministers following a key ECJ 1991 judgment under the Birds Directive. The Council considered the restrictions imposed by the ECJ in Case C-57/89 (*Commission vs Germany*, also known as Leybucht Dykes) were too restrictive as they ruled out any chance of economic or recreational considerations overriding the protection of SPAs. Article 6(4) was therefore introduced to allow for damage to a Natura 2000 site for economic or social reasons. The stricter tests of the

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\(^5\) C-127/02, Waddenzee case, paragraph 58

\(^6\) EC guidance document on sustainable hunting under the Birds Directive explains that 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.
Leybucht Dykes judgment were retained for priority habitats and species on Annexes I and II of the Habitats Directive, given that these are species and habitats for which the EU has a particular responsibility as a significant proportion of their range falls within the EU (Article 2).

10. It is evident from the experience of BirdLife International partners in the EU and from information published by the EC (see Kramer (2009)), that there is considerable variation in how Member States and the EC itself apply these important tests. In addition, various commercial sectors have criticised the application of these tests as either too strict, inconsistent or ill-defined, arguing that they be applied in a less restrictive manner or amended to make the tests less stringent. This has not been helped by the fact that the EC’s own guidance has developed little beyond that contained in the 2000 guidance, Managing Natura 2000.

11. These concerns arise most often with plans or projects of a social or economic nature as there is likely to be some overlap between any public interest they meet and the private interests of the proponent. Too often, there is a failure to make clear the difference between the public and the private interests, compounded by a failure to justify such an approach. The absence of clear guidance from national or regional authorities on public interest objectives for a particular sector can lead to inconsistency and poorly justified decisions, and criticisms from all sides that the Habitats Directive is not being implemented properly.

The purpose of the Article 6(4) tests

12. The conservation of Europe’s biodiversity is an essential objective of general, public interest at an EU level. The EU Council of Environment Ministers has recently reaffirmed “the intrinsic value of biodiversity and its importance in supporting the provision of vital ecosystem goods and services on which human society, as well as the economy and a healthy environment, depend”. The Birds and Habitats Directives are central to the EU’s efforts to achieve the conservation of Europe’s biodiversity, in particular the species and habitats protected by the Directives that represent the common natural heritage of the EU.

13. Avoiding damage to the species and habitats of Natura 2000 sites is one of the main ways the Nature Directives protect this public interest: damage should only be justified in exceptional circumstances. This is where the tests in Article 6(4) come in – they are intended to make sure damage permitted to Natura 2000 sites is both unavoidable and necessary in the genuine and overriding public interest. Therefore, the alternative solutions and IROPI tests must be about deciding, in the interests of wider society, where the balance lies between public interest of conserving Europe’s biodiversity and the public interest(s) provided by the plan or project.

The evidence base

14. BirdLife International is concerned that the evidence base justifying consent for damaging plans or projects under Article 6(4) is often weak, poorly presented and fails to relate to the public, as opposed to private, interest. The approach taken in this position paper is aimed at

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improving the quality of the evidence presented to competent authorities that have the challenging job of deciding where the balance of public interest lies when faced with a proposal that threatens to damage a Natura 2000 site. Our hope is that this will improve the quality and transparency of the decisions that result.

**The role of the competent national authority**

15. The competent national authority is central to ensuring the tests are applied rigorously, robustly and transparently. In particular, it has three key roles:
   - Identifying the alternative solutions that can meet the public interest(s) which the plan or project serves. This will require a clear view of what the relevant public interest objectives are;
   - Deciding whether those alternative solutions are less damaging to Natura 2000 site interests than the plan or project concerned
   - If there are no less damaging alternative solutions to meet the public interest, deciding whether the plan or project can be justified for imperative reasons of overriding public interest.

16. In this context, the competent national authorities have an important role to play in setting out clearly the public interest objectives for those key land-use sectors likely to give rise to plans or projects that might damage Natura 2000 sites: these will vary between member states. This will provide a clear framework within which relevant central and local government bodies, conservation agencies, industry, NGOs and the public can participate and inform decisions affecting Natura 2000 sites.

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**Case studies: differentiating between the public and private interests**

**Renewables:** A public interest objective for renewable energy projects might be to provide xx% of a member state’s electricity supply from a range of renewable energy sources by 2020. This will be very different from a private developer’s objective to supply xxMW of renewable electricity from wind energy in a specific location.

**Ports:** A public interest objective for the port sector might be to provide 20mTEU deep-sea lift-on, lift-off container capacity by 2030 in coastal locations with good inland rail connections. A private interest objective might be to provide 3mTEU Lo-Lo container capacity at one specific coastal location owned by a particular port company.

17. It is for the proponents of the plan or project to set out how their proposal will meet the public interest objectives, as well as their own private interests. They should provide sufficient information to the competent national authority to show how their plan or project can pass the alternative solutions and IROPI tests. It is probably unrealistic to expect a proponent to be in a position to take a strategic national view of the pros and cons of their proposal in terms of meeting the wider public interest: this is properly the role of the competent national authority. This requires the competent authority to look beyond the proponent’s case and take a wider view on the alternative solutions available to meet the public interest.

18. In the interests of transparency and accountability, the competent authority should publish in full its decisions and justification to grant or refuse consent for a plan or project under Article 6(4).
The role of the European Commission

19. The EC’s opinion must be sought in cases where the affected Natura 2000 site hosts priority habitats and species and the claimed public interest does not relate to human health, public safety or beneficial consequences of primary importance to the environment. This will normally be the case where economic and/or social interests are claimed to override the protection of the Natura 2000 site. Such opinions, while not binding, will be very influential on the final decision by the competent authority. At present, the EC does not publish all such opinions and it apparent that not all opinions meet the requirements of Article 6(4) (see Kramer 2009). It is the view of the BHDTF that, in the interests of transparency and accountability, the EC should publish all opinions provided to member states under Article 6(4).

The Tests

20. The remainder of this position paper summaries BirdLife International’s recommended approach to applying the alternative solutions and IROPI tests. A more comprehensive checklist is provided in the Annex to this paper.

Alternative solutions

21. The aim of the alternative solutions is to determine whether there are other ways the public need to be met by the plan or project can be delivered without damaging Natura 2000. The debate at a project level often centres on whether there are alternative solutions available to the proponent. This probably stems from a traditional environmental impact assessment approach to alternatives, which is linked to the “main alternatives” studied by the developer: these are usually restricted to those available to the proponent only. However, it is clear both from the wording of Article 6(4) and EC guidance that the alternative solutions test is to be applied by the competent authority, not the proponent of the plan or project. Therefore, it should not be limited by the proponents view or definition of the need to be met. The competent authority should cast its net widely to ensure all alternative solutions to the plan or project have been considered. Depending on the need to be met, this may involve alternative solutions in other regions or countries. In doing this, the EC states that the primary assessment criteria for compensation are the conservation and maintenance of Natura 2000 site integrity: economic criteria cannot be seen as overruling ecological criteria.

22. Four basic steps are necessary to ensure the alternative solutions test is applied rigorously and fairly:

A. **Identify the needs (or benefits) for the plan or project (private and public) and decide which are genuine public needs**. This should be objective and not restricted to the benefits claimed by the proponent;

B. **Identify all potential and feasible alternative solutions to meet the public needs**. For example, they do not have to be identical in nature to the plan or project, can be in different locations, use different methods and can incur extra costs, delays etc.

C. **Assess the impacts of these alternative solutions on Natura 2000**

D. **Decide whether there are less damaging alternative solutions to the plan or project**
23. These steps are set out in more detail in the checklist contained in the Annex to this position paper. We recommend the competent authority follow this basic checklist to make sure a systematic and transparent approach is taken to determine whether there are less damaging alternative solutions to the proposed plan or project.

24. A plan or project cannot satisfy the alternative solutions test and should be refused if it will not meet any public interest needs. If there are public interest needs, the plan or project should be refused if there are less damaging alternative solutions to meet them.

25. However, if the plan or project will meet public interest needs and it is decided that there are no less damaging alternative solutions, then the competent authority must consider whether those needs are imperative and override the protection of the Natura 2000 site.

### Case studies: alternative solutions – renewable energy

Two recent windfarm cases in the Netherlands and the UK illustrate the importance of setting the right temporal and geographical parameters for the consideration of alternative solutions.

**Emmapolder windfarm, Netherlands:** the Dutch court overruled a Government decision to consent a windfarm near the Waddenzee on the basis that the Government had failed to consider all the potential alternative solutions available. The Government had limited its consideration of alternative solutions to those available up to the year 2011. This is because it wanted to ensure it met its 2011 wind energy goals. The Court considered this led to the Government failing to consider all the potential less damaging alternative solutions that could be available over a longer time period.

**Lewis windfarm, Scotland, UK:** a proposal for a 181 turbine windfarm within the Lewis Peatlands SPA on the Isle of Lewis was rejected by the Scottish Government. The main reason for refusal was it would have adverse impacts on the SPA and that there were sufficient less damaging alternative renewables proposals elsewhere in Scotland that would allow the Scottish Government’s to meet its 2020 renewable energy target comfortably. By considering the potential for less damaging alternative solutions in Scotland as a whole, the Scottish Government had overridden the developer’s arguments that the search for alternative solutions should be restricted to the Western Isles.

### Imperative reasons of overriding public interest

26. If it is clear that the public interest objectives of the plan or project cannot be delivered by solutions that are less damaging to Natura 2000, then the competent authority has to examine the existence of IROPI that require the plan or project to go ahead. The IROPI test comprises sequential “balancing decisions”, the overall aim should be to undertake a systematic analysis to demonstrate where the balance of public interest lies and why. There are three essential steps:

- **E. Obtain essential information necessary to the balancing exercises:** information is needed on (i) the predicted adverse effects on the Natura 2000 site and (ii) the nature of the public need being met by the plan or project and the contribution made to that need;

- **F. Is the public need for the plan or project “overriding”?** If not, then it should be rejected. If it is, then:
G. **Is the public need for the plan or project “imperative”?** If not, then it should be rejected. If it is, then the competent authority needs to determine whether compensatory measures can be secured to protect the overall coherence of the Natura 2000 network.

27. The Annex to this position paper sets out a more detailed checklist of the steps necessary to inform these steps. The basic approach summarised below in Steps E to G applies to cases affecting both priority and non-priority species and habitats. Its aim is to help the competent authority determine whether the plan or project is so indispensable to the public interest that damage to a Natura 2000 site is justified.

<table>
<thead>
<tr>
<th>Priority habitats and species</th>
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<tbody>
<tr>
<td>Article 6(4) applies stricter IROPI tests to priority compared to non-priority habitats and species: this reflects the special responsibility the EU has for the conservation of the priority habitats and species listed on Annexes I and II respectively. Essentially, socio-economic reasons cannot be allowed to override the protection of these habitats and species without the opinion of the EC being sought: this is meant to act as a form of non-binding oversight to ensure a consistent EU-wide approach in cases where EU biodiversity priorities are being affected.</td>
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In respect of EC opinions, BirdLife International’s position is that to increase transparency in decision making:
- the EC should publish all such opinions in full
- the competent national authority should publish an explanation of how it has taken the opinion into account in reaching its decisions and, where relevant, its reasons for deviating from that opinion.

E. **Obtain essential information necessary to the balancing exercises**
Information on the impacts on the Natura 2000 site and the public interest should be brought together at the outset:
- **Natura 2000 site** (taken from Article 6(3) assessment):
  - Interests adversely affected and their conservation status including e.g. rarity, irreplaceability;
  - Are those interests priority or non-priority habitats or species?
  - Nature, scale, duration and significance of adverse effects on each interest affected.
- **Public interest**
  - Nature of the public need (taken from alternative solutions work);
  - Level of public need (and evidence to justify)
    - International, national, regional, local
    - Population of EU citizens benefited (directly/indirectly);
  - Duration of public need: long, medium or short term;
  - Contribution of plan or project to need: all or part?

If there is no evidence of any public benefit, then the plan or project cannot be overriding and so should be rejected.
F. Balancing the public interests: is the public need for the plan or project “overriding”?  

It is clear from EC guidance that a plan or project will need to make a significant contribution to the public interest to override the need to avoid damage to and conserve the European importance of Natura 2000 sites. To illustrate this, BirdLife International has identified three basic public interest scenarios with decreasing levels of likelihood that they will justify overriding the protection of Natura 2000 sites:

<table>
<thead>
<tr>
<th>Benefit to public interest</th>
<th>Likelihood plan or project will override protection of Natura 2000 site(s)</th>
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</thead>
<tbody>
<tr>
<td>Nationally important and long-term</td>
<td>High</td>
</tr>
<tr>
<td>Nationally important or long-term</td>
<td>Medium</td>
</tr>
<tr>
<td>Neither national important or long-term</td>
<td>Low</td>
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</tbody>
</table>

Whatever scenario is encountered, each plan or project must be assessed against:

- **The scale of need**: the greater the scale, the more likely the plan or project will be overriding;
- **The contribution to need**: the greater the contribution, the more likely the plan or project will be overriding;
- **The significance of the impact on Natura 2000 interests**: the greater the impact, the less likely the plan or project will be overriding.

A plan or project is less likely to be overriding:

- The further away it is from being in the national and long-term public interest e.g. regional, medium-term;
- The higher the impact it has on Natura 2000 interests e.g. loss of Natura 2000 site, affects multiple Natura 2000 sites;
- The lower its contribution to the public need identified for the plan or project.

### Priority habitats and species

By excluding socio-economic reasons from the automatically available IROPI grounds, the construction of Article 6(4) makes it clear that the protection afforded priority habitats and species is stricter than for non-priority habitats and species. Therefore, where socio-economic matters are the justification for IROPI, there should be a presumption that, in order for those matters to override the conservation of a Natura 2000 site, the weight of the need must be greater than in a case where only non-priority habitats or species are affected.

If the competent authority determines that the public interest need for the damaging plan or project overrides the protection of the Natura 2000 site, it must then move to the second balancing decision: is the need met by the plan or project “imperative”?

G. Balancing the public interests: is the public need for the plan or project “imperative”?  

This balancing exercise is essentially to decide whether meeting the overriding need demands actions in the form of the specific plan or project. This suggests the need for something to be
done in a timely manner in order to ensure the public need identified can be met. Therefore the test includes a temporal judgement to be made in terms of when the need must be met.

For this test to be met, the following three questions must be answered “yes” in relation to one or more overriding needs identified in step F above. If the overriding need for the plan or project cannot be shown to be “imperative” then the competent authority must refuse it.

- **Is the existence of the overriding need “certain”?** There will not be certainty if there are reasonable questions over the accuracy, reliability or sufficiency of the evidence;
- **Is the ability of the plan or project to contribute to/satisfy that overriding need “certain”?** It will not be certain if:
  - There are reasonable questions over whether the plan or project will contribute to/satisfy the need;
  - The plan or project’s benefits are either earlier or later than when the need arises;
  - The plan or project will result in significant over-supply or provision above that required;
  - Other uncertainties suggest the plan or project may not proceed e.g. regulatory, legal, financial, land ownership
- **Is the overriding need for this plan or project “vital”?** If the consequences of the plan or project not going ahead do not cause significant public interest hardship, then it could not be considered “vital”.

<table>
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<tr>
<th>Case study: IROPI – UK ports industry</th>
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<tbody>
<tr>
<td>Between 2000 and 2008, there was a series of four competing proposals for major container ports, vying with each to provide additional capacity in south and east England. The decisions on two of these illustrate some of the issues relevant to the IROPI test.</td>
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<tr>
<td><strong>Dibden Bay Container Terminal:</strong> this was the first of the four proposals to be decided by the UK Government, in 2004. Although it was refused on the basis that there were less damaging alternative solutions being proposed elsewhere, the Government agreed with the Inspector to the public inquiry that in refusing consent for the scheme, any shortfall in national container handling capacity would be short-lived and therefore there were no IROPI that justified the scheme going ahead.</td>
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<tr>
<td><strong>Bathside Bay Container Terminal:</strong> this was the last of the four proposals to be considered at a public inquiry. After the Dibden Bay proposal, it would cause the most direct damage to Natura 2000 sites by destroying 69ha of the Stour and Orwell Estuaries SPA. The UK Government ruled that the long-term need to 2030 for new container port capacity in south and east England meant that such damage was justified for IROPI. In contrast, the Government agreed with the Inspector to the public inquiry that the considerable benefits of the scheme to the sub-regional economy did not comprise an imperative reason of overriding public interest. This illustrates the relative weight that should be given to national and regional economic needs in the IROPI test.</td>
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**Conclusion**

28. Competent authorities play a vital role in ensuring the Natura 2000 network is properly protected and that it damage is only allowed in exceptional circumstances. This demands a robust, systematic and transparent approach to the key tests on alternative solutions and
imperative reasons of overriding public interest. The alternative solutions and IROPI tests must be about deciding, in the interests of wider society, where the balance lies between public interest of conserving Europe’s biodiversity and the public interest(s) provided by the plan or project. This position paper aims to provide a framework to support this work and instil greater confidence for all involved in the decision-making process that decides the fate of Natura 2000 sites.

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ANNEX

Checklist for the approach to alternative solutions and imperative reasons of overriding public interest under Article 6(4) of the EU Habitats Directive

The following sets out a basic checklist on how to approach the alternative solutions and IROPI tests under Article 6(4). Its aim is to make sure decisions are based on a systematic and transparent analysis of the issues such that the genuine public interest is served and sustainable development achieved. Plans or projects that cannot avoid damage to Natura 2000 sites should be the exception. Therefore, it is appropriate that any decision to allow damage to Natura 2000 sites are fully and explicitly justified. In all cases, a clear record should be made of the analysis and conclusions.

It is important to remember that even if a plan or project passes the alternative solutions and IROPI tests, Article 6(4) then requires the competent authority to secure the compensatory measures necessary to protect the overall coherence of the Natura 2000 network.

Alternative solutions
We recommend the competent authority should follow the checklist set out below to make sure a systematic and transparent approach is taken to determine whether there are less damaging alternative solutions to the proposed plan or project.

A. Identify the need(s) for the plan or project

1. Identify all the need(s) for the plan or project
   It is important to be clear on what is a private or a public benefit. Therefore, the competent authority should identify:
   • Private benefits to proponent
   • Public benefits e.g. contributing to national renewable energy supply target
   This should not be restricted to benefits claimed by the proponent.

2. Identify those needs that are in the public interest (set out the public interests fully and precisely)
   • Does the benefit maintain/improve one or more of:
     – Citizen’s fundamental values or rights e.g. human health, public safety, environmental protection
     – Provision of essential products or services e.g. transport, energy, water
     – Economy
     – Social welfare/cohesion
   • Does the benefit relate to or affect a population or community of citizens? If so, quantify.
   • Is there up to date evidence that the need has not been met and that the plan/project can satisfy it (wholly or in part)?

3. Identify the most significant public need(s) the plan or project will satisfy
   • What evidence is there that the need exists e.g. national policy
   • Nature of the need: human health or safety will be more significant than economic improvement
   • Number of citizens who will benefit (directly/indirectly)
   • Duration of need – long-term more significant than short term
4. Identify **total extent of the most significant public need(s)**
   - Will the plan or project satisfy the whole or only part of this need?

**B. Identify all potential alternative solutions to meet the public benefits**

5. Identify all the possible alternative solutions that could meet or contribute to the public need(s) identified in (4)

   Consider different ways of meeting that need:
   - Locations
   - Timings
   - Methods or technologies
   - Forms, scales, designs, layouts, routes
   - Commercial approaches

6. **Identify which potential alternative solutions are feasible**

   Feasible alternatives:
   - Must be physically and operationally possible
   - Do not have to duplicate every aspect of the proponent’s plan or project
   - Can incur extra costs, delays, technical difficulties or impacts (e.g. financial) significantly greater than the plan or project
   - Do not have to prove they will obtain relevant consents/approvals/permits
   - Must not be limited to alternative solutions that can only be provided by the proponent of the plan or project

   An option **may** not be feasible in the following situations (**these should be seen as exceptional**):
   - Unacceptable negative public health or safety implications for which there are no available measures (whatever the cost)
   - Where demonstrated that the solution is so excessively expensive it is not feasible it will ever come into effect (**in all other situations economic considerations must be disregarded**)

**C. Assess the impacts of the alternative solutions on Natura 2000**

7. **Assess the impacts of the alternative solutions on Natura 2000 sites**

   - Summarise the potential impacts of the proposed plan or project on the Natura 2000 site(s) (using Article 6(3) assessment)
   - Summarise potential impacts on integrity of relevant Natura 2000 site(s) of each potential alternatives (to the extent possible on the information available)
   - Record whether any of the potential alternative solutions are likely to have lesser impacts on Natura 2000 site(s) than the proposed plan or project
D. Decide whether there are less damaging alternative solutions to the plan or project

The plan or project will not satisfy Article 6(4) and should be refused if:

• It will not meet any public interest benefits; or
• There are less damaging alternative solutions

However, if the plan or project will meet public interest benefits and there are no less damaging alternative solutions then the competent authority must consider whether it can pass the IROPI test.
Imperative reasons of overriding public interest
The basic approach set out applies to both priority and non-priority habitats and species. An additional step (the opinion of the Commission) is necessary in cases affecting priority habitats and species where the public interest relates only to social or economic matters.

E. Obtain essential information necessary to the balancing exercises
The following information is necessary to enable the competent authority to carry out the IROPI balancing exercises.

1. Natura 2000 site information
   • Context:
     o Purposes of the Birds and Habitats Directives (as set out in recitals)
     o Purpose of a coherent Natura 2000 site network in contributing to achievement of favourable conservation status, and role of individual sites in that network
   • Impacts:
     o Qualifying interests adversely affected and their conservation status, including e.g. rarity, irreplaceability
     o Nature, scale, duration, significance and risk of impact
     o Which interests, if any, are priority

2. Information on the nature of the public interest(s)
   • Characterise the nature of the public need - describe the public interest objectives to be met (taken from Steps A and B under alternative solutions) e.g. xx% of energy to be from renewable sources by 2020.
   • Scale of need:
     o Is it international or national?
       ▪ EU law
       ▪ EU policy e.g. TEN-T
       ▪ National law or policy
     o Is it regional or local?
       ▪ Regional/local law
       ▪ Regional/local policy
     o Does it relate to a significant number of citizens of Member State or EU.
       ▪ If so, how many?
       ▪ Directly/indirectly?
   • Type of need
     o Human health
     o Public safety
     o Primary importance to the environment
     o Economic
     o Social
   • Duration of need: short, medium or long term
   • Contribution of plan or project to need: will it satisfy all or part of the need?
F. Is the public need for the plan or project “overriding”?
This is about balancing the benefits from meeting the public need met by the plan or project against the public benefit of conserving the site in situ. If, at any stage, a plan or project is judged not to be of overriding importance, there is no need to continue with the analysis.

3. Working out where the balance lies: magnitude
Is the need the plan or project will meet:
• Of at least national importance?
• Long-term?

If the plan or project meets a need that is both long-term and nationally important, it is more likely to be overriding.

Anything that is below national importance and/or less than long-term, is unlikely to be overriding and a robust case will be needed to make the case for it to be of overriding importance.

4. Working out where the balance lies: impact of meeting need
In order to work out where the balance lies, it is important to understand the impact on both Natura 2000 and the defined public need for the plan or project.

Will the plan or project:
• Result in complete destruction or loss of a Natura 2000 site?
• Affect multiple Natura 2000 sites?
• Only satisfy part, rather than all, the need?

Schemes of national and long-term need
If a scheme of national, long-term need answers no to all, then the presumption is that the need for plan or project is overriding. If it answers yes to any, then more detailed analysis is needed (see Step 5).

Schemes of less than national and/or long-term need
Any plan or project of less than national and/or long-term need is unlikely to be overriding if it has a high impact on Natura 2000 and does not contribute significantly to the need for the plan or project.
5. Analysis

This is necessary in all cases, and especially so in cases where:

- The magnitude of need met by the plan or project is not long-term and/or national/international
- The impact on Natura 2000 is high
- The plan or project will only meet part of the need.

The following issues need to be analysed:

- **Scale of need**: international through to local, long-term through to short-term. The greater the scale, the more likely the plan or project will be overriding;

- **Contribution to need**: what proportion of the defined need will be met by allowing the plan or project to go ahead? The greater the contribution, the more likely the plan or project will be overriding;

- **Significance of impact on Natura 2000 site(s)**: what is the impact on the conservation status at site level of the affected habitat or species? Account should be taken of any additional negative effects on the favourable conservation status of the feature. The greater the impact, the less likely the plan or project will be overriding.

6. Seeking the opinion of the European Commission

(Where a priority habitat or species is affected and the public need is only economic or social)

In cases where a priority species or habitat is affected, and the public need met by the project is only social or economic in nature, then the analysis from Steps 3-5 above must be submitted to the EC for its opinion.

The Habitats Directive defines priority habitats and species as those for which ‘the Community has particular responsibility in view of the proportion of their natural range which falls within the [European Union] territory’.

On this basis, the presumption should be that in order for socio-economic matters to override the value of a site with priority habitats and/or species, the weight of the need must be greater than where the site does not contain priority natural habitats.

Therefore, it is highly unlikely that plans or project that are less than national and/or long-term need will be able to justified as of overriding importance.
### G. Is the public need for the plan or project “vital”?
This balancing exercise is essentially to decide whether meeting the overriding need demands actions in the form of the specific plan or project. For this to be the case, the following three questions must be answered “yes” in relation to the one or more overriding needs identified in step F above. If the overriding need for the plan or project cannot be shown to be “imperative” then the competent authority must refuse it.

<table>
<thead>
<tr>
<th>Question</th>
<th>Reason</th>
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<tbody>
<tr>
<td>7. <strong>Is the existence of the overriding need “certain”?</strong></td>
<td>There will not be certainty if there are reasonable questions over the accuracy, reliability or sufficiency of the evidence.</td>
</tr>
</tbody>
</table>
| 8. **Is the ability of the plan or project to contribute to/satisfy that overriding need “certain”?** | It will not be certain if:  
  - There are reasonable questions over whether the plan or project will contribute to/satisfy the need;  
  - The plan or project’s benefits are either earlier or later than when the need arises;  
  - The plan or project will result in significant over-supply or provision above that required;  
  - Other uncertainties suggest the plan or project may not proceed e.g. regulatory, legal, financial, land ownership. |
| 9. **Is the overriding need for this plan or project “vital”?** | If the consequences of the plan or project not going ahead do not cause significant public interest hardship, then it could not be considered “vital”. In other words, is it absolutely necessary to carry out this plan or project? |