Annelies A. Freriks
Annelies Freriks

Studied law at Tilburg University (The Netherlands). Thesis in transboundary water law (1994). Working in the field of European and Dutch environmental law since 1990 at Tilburg University, Wageningen University and currently as a professor at the Centre of Environmental Policy and Law of Utrecht University. Partner at the law firm of AKD Prinsen Van Wijmen N.V.
Assessing the value of the environment and its protection

7th February 2007
Prof. Dr. Annelies A. Freriks

Programme

- Necessary conservation measures (Art. 6 (1) Directive 92/43/EEC)
- Compensatory measures (Art. 6 (4) Directive 92/43/EEC)
- Environmental Damage (Directive 2004/35/EC)
Necessary conservation measures
(Art. 6 (1) Directive 92/43/EEC)

Favourable conservation status

• For a **natural habitat**, it occurs when
  - 'its natural range and areas it covers within that range are stable or increasing'
  - 'the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future'
  - 'the conservation status of its typical species is favourable'
Favourable conservation status

- For a species, it occurs when:
  - the population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats
  - the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future
  - there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis

Necessary conservation measures

Art. 6 (1) Habitats Directive

'For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites'
Necessary conservation measures

Context:

• Conservation measures necessary to achieve the general aim of the directive -> Article 2(1): ‘The aim of this directive shall be to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies’.

• Result obligation

• Article 2(2), in particular, specifies the objective of the measures to be taken: ‘Measures taken ... shall be designed to maintain or to restore, at a favourable conservation status, natural habitats and species of wild fauna and flora of Community interest’

• These measures have, according to Article 2(3), to ‘take account of economic, social and cultural requirements and regional and local characteristics’
Necessary conservation measures

- Ecological requirements
  - favourable conservation status
  - identification is a responsibility of the Member States
  - scientific knowledge vs. lack of information
  - case by case vs. lessons learned

- Conservation measures
  - positive measures or no action required
  - choice between statutory, administrative or contractual measures, or even of the management plans, is left to the Member States (principle of subsidiarity), but
  - there is an obligation to respect the general objectives of the directive
### Necessary conservation measures

- **The Netherlands:**
  - management plans (in preparation),
  - no possibility to enforce positive conservation measures, but
  - obligation of the landowner to tolerate measures taken by the government
  - contracts

- **France and England**
  - focus on voluntary management agreements, safety-net provisions

### Compensatory measures

(Art. 6 (4) Directive 92/43/EEC)
Art. 6(4) Habitats Directive

'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 (...)’

- **Mitigation vs. Compensation**
  - mitigation measures in the broader sense, which aim to minimise or even cancel the negative impacts on the site itself
  - compensatory measures sensu stricto: independent of the project, they are intended to compensate for the effects on a habitat affected negatively by the plan or project
Mitigation measures

- Mitigation measures are an integral part of the specifications of a plan or project.
- They may be proposed by the plan or project proponent and/or required by the competent national authorities.
- Examples: the dates and the timetable of implementation, the type of tools and operation to be carried out, the strictly inaccessible areas inside a site
- Mitigation measures limit the extent of compensatory measures
- Mitigation -> no significant effects? -> no obligation to apply art. 6(4) !!

Mitigation: balancing effects I

- Natura 2000-site designated for several species
- A project may have negative effect one of the species (I) but at the same time measures are taken with a positive effect for another species
- An overall neutral or positive effect
Mitigation: balancing effects I

- Under the Habitats Directive it is not allowed to balance the effects of positive and negative measures for several protected species.
- Measures with a positive effect on one species, does not alter the significance of effects caused by a project for other species. No mitigation, compensation is required.

Mitigation: balancing effects II

- Negative effects in one part of the site, but measures with a positive effect on the same species are taken in another part of the site.
- Mitigation or compensation?

I: negative effects
I: measures with a positive effect
Mitigation: balancing effects II

- A project with multiple objectives:
  - for example measures against floods (negative effect) combined with nature development (positive effect)
  - measures are not interconnected, nature development has no relevance as a mitigation measure
  - negative effects of measures against floods have to be compensated

Mitigation: balancing effects II

- Several measures in a project with one overall objective
  - for example trenching a new waterway with negative effects for waterplants and disturbance of bird species (negative effect), combined with filling up the old waterway that will then be out of use (positive effect for plants and birds)
  - interconnected measures
  - mitigation? Not yet decided
Mitigation: regional approach

- Three Natura 2000-sites, classified for the same species (migration)
- Significant negative effects (a), but a growing population in the other areas (b, c)
- An overall positive balance

Example:
- the Delta in one of the Dutch provinces
- several neighbouring Natura 2000-sites
- point of departure in the Directive: judge a site on its own merits
- protected values in the Delta-sites are closely linked
- solution: designate several areas as one Natura 2000-site, or regional goals in the designation of separate areas
Mitigation: regional approach

- Regional goals as a reference for significance and mitigation?
- No certainty, no jurisprudence
- Arguments in favour: Overall protection of the same species, areas are interconnected

Mitigation: habitat banking

- A Natura 2000-site designated for the protection of species I
- Preventive action: improvement of a) for species I, or measures in b) to make sure no significant effects for species I occur in future
Compensatory measures

- Additional measures: Measures required for the ‘normal’ implementation of the ‘Habitats’ or ‘Birds’ directives cannot be considered compensatory for a damaging project
- Examples: improving the biological value of an area, re-creation of a habitat
- The result has normally to be operational at the time when the damage is effective on the site concerned with the project unless it can be proved that this simultaneity is not necessary to ensure the contribution of this site to the Natura 2000 network

Compensatory measures

- Practical issues
  - differing opinions among experts about measures to be taken
  - availability of suitable areas to compensate
  - compensation measures operation before negative effects occur
  - measuring the success of compensation
  - the impact of natural fluctuations
  - capacity of species to adapt to new surroundings
  - (im)possibility to provide for measures that safeguard maintainance of natural values
Compensatory measures

Example I

- Mainport Rotterdam
  - expansion of the Port of Rotterdam
  - land reclamation (2500 hectare) and sand extraction in the North Sea
  - compensation: construction of dune area (100 ha), nature reserve in the North Sea (31,250 ha), and some smaller measures
  - positive advise European Commission

Compensatory measures

Example II

- Expansion of Karlsruhe/Baden-Baden Airport
  - a.o. renovation of runway and taxiways, building of new aprons, construction of buildings
  - compensation: a.o. restoration (following temporary intrusions), planting of new areas, new areas, upgrading of areas, creation of stepping-stones biotopes
  - positive advise European Commission
Environmental Damage

(Directive 2004/35/EC)

Environmental damage

• Damage (caused after 30 April 2007)
  - A measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly
• Includes damage by airborne elements
• Does not include pollution of a diffuse character where there is no causal link between damage and activities of an operator (other exceptions art. 4)
Environmental damage

- Damage to ‘protected species and natural habitats’:
  - any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats and species
- Protected species and natural habitats: scope (art. 2(3))
  - all areas containing habitats and species (not only SPA and SAC). Directive is broadening the scope of Art. 6(2) Habitats Directive

Environmental damage

- Does not include
  - previously identified adverse effects resulting from an act by an operator expressly authorised by relevant authorities (art. 6 (3) en (4) and art. 16 Habitats Directive and art. 9 Birds Directive or provisions of national law)
Environmental damage

• **Outline**
  - unowned (res nullius and res communis) and (privately, with public value) owned natural resources
  - polluter pays: operator (preventive and remedial action, recovery of costs) -> prevention
  - burden of proof on public authorities
  - annex III (strict liability), other (fault-based)

Environmental damage

• **Relevance of the Directive**
  - illegal acts
  - incidents
  - adverse effects not previously identified
Environmental damage

- Points of interest
  - Information about baseline condition required (Annex I),
    - Often not available esp. outside protected sites
    - Natural fluctuations (not in Habitats Directive!)
    - Capacity to recover ‘within a short time’
  - Burden of proof on public authorities
    - Natural fluctuations (not considered to be significant damage)?
    - Difficult in case of migratory species
Article 6 Habitats Directive –
A comparative law study on the implementation of
art. 6 Habitats Directive in some member states

Rechtsvergelijkend onderzoek implementatie
artikel 6 Habitatrichtlijn

Ch. W. Backes
A.A. Freriks
A.G.A. Nijmeijer

March 2006

Met medewerking van/with contributions of:

Prof. mr. G. van Hoorick (Centrum voor Milieurecht/Universiteit Gent)
Mw. J Makowiak, Maître de conférences en droit (CRIDEAU, Centre de
Recherches Interdisciplinaires en Droit de l'Environnement, de l'Aménage-
ment et de l'Urbanisme/Université de Limoges)
A Comparison of the country reports

1. **Introduction**

This comparative part of the study has been structured by the questions which have been asked by the constituent. Paragraph 3 contains an overview of these research questions. After a justification of the research methods these questions will be answered in the paragraphs 5 and 6.

2. **Aim of the study**

The introductory section examined the background of the problem to be studied. With this as a background, the aim of the study can be described as follows:

| Aim: The aim of the study is to acquire insight into the application and interpretation of Article 6 of Directive 92/43/EC by the courts in a number of EC member states in order to be able to judge whether there are significant differences from the Dutch situation in this context. |

3. **Research questions**

To obtain a good picture of the way in which the countries in the study approach Article 6 Hdir. not only is there a comparison of the applicable statutory regulations, but there is also an investigation of the way in which these regulations are interpreted in case law and applied in practice. In doing so, the following questions were answered:

**Questions concerning the transposing of Article 6 Habitats Directive**

- **h)** How have paragraphs 2 to 4 of Article 6 Hdir. been transposed into law or rules in the countries included in the study? Are there already striking differences in transposition on the basis of the legislative text?
- **i)** What kind of regulations is involved? (generally binding provisions, policy rules and official circulars?)
- **j)** Do the regulations into which the Directive's obligations have been transposed relate solely to nature conservation or do they concern integrated environmental legislation?
COMPARISON OF THE COUNTRY REPORTS

k) Has the protection of species and of habitats been transposed in the same legislation?
l) Who is responsible for applying this legislation?
m) Is a distinction made in the applicable legislation between existing use and new activities? If so, in which way?
n) Is the possibility of mitigation embedded in law and if so is mitigation defined?

Questions concerning the interpretation of the Article 6 of the Habitats Directive by the courts

f) Has Article 6 Hdir. been transposed correctly in the law of the member country in the opinion of judges and experts in the country in question?
g) If so, which role does Article 6 Hdir. still have to play in administrative and judicial decisions?
h) If not, do the courts examine directly for compatibility with Article 6 Hdir. or with some parts of this provision?
i) Are future projects and plans tested for compatibility with Article 6(2) Hdir. and what does this test involve?
j) How do the courts interpret the requirements of Article 6(3) and (4) Hdir. and the applicable legal norms of the member states, in particular with regard to subjects which are currently causing problems in the Netherlands? The following issues are addressed:
  o the meaning of 'plan or project'
  o the question whether a suitable assessment is also carried out for strategic plans with a higher level of abstraction (regional plans, key planning decisions etc) or policy frameworks
  o the question whether a distinction is made between a 'preliminary test' (whether an appropriate assessment is required) and the appropriate assessment itself and if this is the case whether it is grounded in law.
  o does the applicable legislation make a distinction between existing use and new activities?
  o the criterion of possibly significant damage in Article 6(3) Hdir.
  o the principle of precaution
  o dealing with possible cumulation
COMPARISON OF THE COUNTRY REPORTS

- the role of management plans in assessing compatibility with Article 6(3) Hdir. and also in assessing compatibility with Article 6(4) Hdir.
- the requirements regarding content and depth of an appropriate assessment
- the meaning of mitigation when testing against Article 6(3) Hdir.
- the possibilities of public participation in the application of Article 6(3) Hdir.
- the alternatives to be considered
- the criterion of imperative reasons of overriding public interest
- other possible reasons for permission in accordance with Article 6(4) (public safety etc.)
- requirements for compensation
- who is responsible for carrying out the assessment and who must provide the necessary data? What will be decided if this data is not complete?

**Questions concerning the consequences of Article 6 of the Habitats Directive in practice**

d) Does Article 6 Hdir. stand in the way, whether temporarily or not, of the planning and realisation of infrastructural works and other projects?

e) If so, what type of activities is involved?

f) What are usually the prime arguments, where applicable, that determine whether a plan or project can be carried out?

4. **METHODS AND SOURCES**

This comparative law section of the study is based on the country reports from England, Flanders, Austria, Germany, France and the Netherlands. The relevant legislation, case law and literature were studied in all the countries concerned. In the case of the latter, as far this was available for the researchers. Moreover telephone conversations and discussions were held and emails exchanged with experts in all the countries. We were not able to rely in the end on the support of civil servants in all the countries involved. Where this was not possible, the information was discussed with specialist researchers and the country reports were verified by them. An exception applied to Sweden. As far as Sweden is concerned we had to use methods of research different from those used for the other countries. After all, we are not able to
read and understand first hand sources like Swedish legislation, jurisprudence and legal literature. Swedish legislation is partly available in English, namely the Environmental Code (Miljobalken). Other than that no primary Swedish sources could be studied. For this reason the research was especially done in the form of interviews with three civil servants of several Swedish agencies which are competent and expert on this point. Moreover secondary Dutch and English literature were consulted. On the basis of these sources a concept country report was written that has been verified by the Swedish contributors.

It is particularly noticeable that the availability of case law varied widely in the countries in the study. In Germany and Austria proportionally many more judgments on Article 6 Hdir have been given by courts of law. In these countries, and to a lesser extent in England and France, case law is available, in which a review of the national stipulations for transposing has taken place. In Flanders there are very few judicial decisions of this nature. This leads to the first conclusion:

| Conclusion: |
| Judicial decisions play a very diverse role in the application and interpretation of Article 6 Hdir. |

We had already half expected this result but it was still surprising. This question rises why there is this conspicuously large difference. Although this was not part of the remit, we have tried to find an answer to this question – by confronting the experts in the countries in question with this finding, for example.

In so far this provides any kind of explanation, the reasons for the absence of case law in the various countries are diverse.

In the case of England, the administrative culture seems to provide an explanation. There is less haste in presenting differences of opinion on the application of legal frameworks to the courts, and solutions are first sought in consultations. There seems to be a different reason in Flanders: the individuals concerned seem to have limited access to the courts. Environmental or nature conservation associations are often excluded as well. In addition, it

\[6\] It must be emphasised here that the following statements are not based on scientific study, but only on a few discussions with people involved outside the Netherlands. Further, scientifically based research into the role of court decisions in the field of environmental law would have to show whether there is a foundation for the assumptions reproduced here.
COMPARISON OF THE COUNTRY REPORTS

seems that neither government organisations responsible for nature conservation nor the nature conservation associations set great store in the effectiveness of an appeal to the courts in realising their aims. Additionally, the average length of time before a judgment can be obtained from a court like the Council of State is much longer than in the Netherlands, for example. Moreover, in the countries where the body of available case law is relatively large, access to the courts can still be limited due to the application of the 'Schutznormtheorie'. It should be noted, however, that in recent years the possibilities of legal protection have been extended in both Germany and in Austria.

By far the greatest body of literature on Article 6 Hdir. can be found in Germany but several books have been written on Natura 2000 in Austria, too. It is noticeable that much attention is given to this theme in both countries but any questions are only discussed several years after consideration of these has taken place in literature in the Netherlands. It seems to be the case that interest in the scientific journals is less in those countries where there is also less case law available. We are not sure whether there is a causal connection here or not. Nonetheless, this does not detract from the fact that in both England and Flanders scientific discussion of the effects of Article 6 Hdir. has been limited.

In all the countries in the study, the administrative authorities responsible for the application of Article 6 Hdir. have variously issued guides, circular letters or other kind of information on the Birds and Habitats Directive and in particular on the interpretation and application of Article 6 Hdir. Whereas in Flanders this is just the one document - 'service instructions' - all the German federal states have at least one, and often more, guides and there are 'recommendations' at central federal level. In France there are several official 'Circulaires' which give further explanation of Article 6 Hdir. and the French provisions for transposing. The Swedish Environmental Protection Agency has published a handbook that is an important tool for the application of the protection provisions in practice. In Austria there are great differences between the federal states on this aspect. England has the greatest number and the most expensive explanatory documents concerning various kinds of questions and applications. A possible reason for this is that England has transposed Article 6 Hdir. by means of an 'integrated system'. Thus there is no separate system of permits for nature. The 'Habitats test' has to be included in various permits and permissions from the competent authorities. This is probably what makes the need for extra information and guides particularly great. In comparison with this, it is noticeable that a comprehensive guide was only issued for the administrative authority with final respon-
COMPARISON OF THE COUNTRY REPORTS

sibility for implementation of Article 6 Hdir. in the Netherlands – the Minister of Agriculture, Nature and Food Quality (LNV) – at the time that a transition was made from what was actually an integrated system – i.e. based on the direct effect of Article 6 Hdir. to a system with a separate permit. It is only since the revised Nature Conservation Act 1998 [Natuurbeschermingswet 1998] came into force that the Ministry of Agriculture, Nature and Food Quality (LNV) has made detailed guides available for the application of the provisions to transpose Article 6 Hdir. Before that time, several other explanatory guides to Article 6 Hdir. were available, alongside scientific literature, for example at the Ministry of Transport, Public Works and Water Management. This has led to the second conclusion:

Conclusion:
In the countries studied, the authorities responsible for transposing and implementing Article 6 Hdir. published guides or explanatory memorandums on the interpretation of Article 6 Hdir. earlier than the Netherlands.

5. QUESTIONS CONCERNING THE TRANSPOSING OF ARTICLE 6 HABITATS DIRECTIVE

5.1 How have paragraphs 2 to 4 of Article 6 Habitats Directive been transposed into the legislation or the regulations of the countries in the study? Are there already striking differences in transposition on the basis of the wording of the acts?

The first remark is that the way in which Article 6 Hdir. has been transposed is linked to the constitutional structure of the countries studied. Austria, Germany and Belgium have a federal structure. The study focused specifically on the Flemish Region where Belgium was concerned. Although Great Britain is not a federal state in the strict sense, it does have federal characteristics since several regions - Wales, Northern Ireland and Scotland) have their own parliament and administration and can pass their own legislation. This does not apply to England, which was one of the subjects of the study. The Netherlands, Sweden and France are unitary states. Naturally this has an effect on the structure of legislation and the division of competences. This is outlined in this chapter on the countries in the study. Later in the study, specific aspects are examined in more detail.
Countries with a federal constitutional structure

In Austria, nature conservation falls under the authority of the individual federal states. Article 6 Hdir. was not implemented at the same time in all federal states and it was not possible to examine all federal states within the framework of this study. The federal states have passed implementation legislation, which is regularly revised, since implementation has repeatedly proved to be insufficient. It is important that all the Austrian federal states which were studied have introduced a new area category in the implementation of directive obligations - Europaschutzgebiet or Natura 2000-gebiet [European Protection Area or Natura 2000 Area]. In the two federal states which were studied in greater detail, there was no harmonisation between the areas designated in accordance with the directives and other designated nature conservation areas. Unlike the Netherlands (see Article 15a Nature Conservation Act 1998 [Natuurbeschermingswet 1998]) the protection regimes are cumulative in their application. In the implementation legislation of the federal states, close alignment is sought with the wording of Article 6 Hdir. In the legislation of Niederösterreich [Lower Austria] it is noticeable that, should the wording of the act be followed, no legal consequences occur if it can be determined that there is still doubt as to significant effects after an appropriate assessment. The legislation determines that the assessment framework resulting from Article 6(4) Hdir. must be applied if significant effects occur. That this also applies if there is doubt as to whether these effects will occur does not follow from the wording of the act. In our view, this legislation is not in conformity with the Directive with regard to this aspect, since Article 6(3) Hdir. provides that permission may only be given if significant effects can be ruled out. The competent authorities do, however, provide an interpretation that is in keeping with the text of the Directive.

Another remarkable element in the legislation of Niederösterreich is that in the case of not yet designated Birds Directive Areas or registered Habitats Directive Areas, or Habitats Directive Areas which are listed on the Community list but are not yet designated, the protection regime must be applied if the Umwelt-anwalt [Environmental attorney] so requests.

In Germany the division of competences is arranged differently within the federal structure. A framework competence [Rahmenkompetenz] in the field of nature conservation for the federal government can be derived from the German constitution. The competence exists, if framework legislation is required to bring about equal living conditions in German territories or this legislation is necessary with regard to uniformity of law or economic uniformity. The individual federal states must also be given some latitude. In German legislation, a distinction may be made between federal legislation with no immediate impact in the individual federal states and which requires
further specification, and provisions which do have an immediate impact. The statutory provisions for the implementation of Article 6 Hdir. belong largely to the first category but there are also some provisions which do have an immediate effect. The latter concern federal decisions on plans for railway lines or national motorways, for example, but such decisions occur only rarely. During the revision of federal legislation, the Federal Nature Conservation Act [Bundesnaturschutzgesetz] in 2002, the aim was to give the federal government a greater role as the setter of frameworks. The federal states were given a time limit for the transposing of federal legislation. This time limit expired on 8 May 2003 but only a minority of the federal states have fulfilled this obligation. As has already been said, the federal states have implementation legislation but this does not comply with the federal requirements in all cases. The discussion in German literature focuses on federal legislation. We have not encountered judgments in which specific aspects of the federal states play a role. This can be explained by the fact that the legislation in the federal states is of very recent date. We have therefore concentrated on central federal legislation, partly because the legislation at federal state level concerns sixteen federal states. In addition, the system in Germany can be characterised as an integrated one. The assessment of nature conservation aspects is formed in sectoral decisions in the federal states and, as a consequence, decision-making takes place at several levels. Where appropriate, this report will examine the legislation in the individual federal states.

In Belgium, Article 6 Hdir. is transposed into the legislation of the various regions. In Flanders the transposition has taken shape in the Nature Conservation Decree [Natuurbehoudsdecreet]. It is noticeable that the Decree states in general terms that the measures to implement the Birds and Habitats Directive must take the requirements of economic, social and cultural aspects into account and also specific local and regional characteristics. Although the Habitats Directive mentions these aspects, it is questionable whether such a provision in relation to the specific requirements arising from Article 6 Hdir. is compatible with the Directive. The provisions on area conservation focus on the Flemish Ecological Network (VEN). The nature conservation regime of the Directive applies within the VEN, although not all areas are designated as special conservation zones on the basis of one of the two directives. The nature development plans are important for the implementation of the obligations arising from Article 6 Hdir. and these must include a regional vision on special conservation zones. These plans contain a description of the stimulating and binding measures required in order to achieve a regional perspective, and state the instruments which could be used for this. The Decree does however indicate that the plan is not by defi-
COMPARISON OF THE COUNTRY REPORTS

nition binding on the government. As yet the implications of this in actual practice are unclear since, to date, no nature development plans have been drawn up. although several plans are in preparation. The Decree also contains a section with specific reference to special conservation zones: this section primarily sets out stipulations with regard to the designation of areas. In addition mitigating measures for conservation are formulated. The conservation regime is special in that priority is given to spatial planning over the interests of nature conservation. Measures taken in accordance with the Nature Conservation Decree - with the exception of measures cited in the nature development plan – may not entail restrictions on activities and/or acts which comply with spatial planning execution plans (these can be compared with zoning plans [bestemmingsplannen] in the Netherlands). The Decree also contains an almost literal translation of Article 6(3) and (4) Hdir.

In Great Britain, Article 6 Hdir. was transposed into national legislation in the Habitats Regulations in 1994. Since then, Wales, Northern Ireland and Scotland have been given their own regional governments, and the Habitats Regulations have been adapted for these countries. The present study is directed at England, which has no regional government. The Habitats Regulations have also been amended twice in England, and a third amendment is in preparation. The Habitats Regulations implement the designation procedure in accordance with the Habitats Directive as well as the requirements of Article 6 Hdir. They include no procedure for the designation of Birds Directive Areas. The implementation of Article 6 Hdir. is very comprehensive, in line with the choice for an integrated system. Not only are the general requirements of Article 6 included, but there are also specific provisions for decisions where an assessment may be required. The European Court of Justice has indicated that the implementation legislation falls short with regard to a number of decisions. These decisions concern water extraction and spatial planning. Neither the Habitats Regulations nor any other legislation impose the obligation, where necessary, to assess decisions on water extraction in accordance with the requirements of Article 6 Hdir. The Habitats Regulations state that no assessment is required in relation to spatial plans. The European Court of Justice thought this was incorrect since such plans form the assessment framework for implementing decisions. The Habitats Regulations also contain provisions for control. This takes the form of voluntary management agreements in principle, but should it prove impossible to draw up a management agreement, the Habitats Regulations provide an array of compulsory measures. The Habitats Regulations cover registered Habitats Directive areas, areas on the Community list and designated Habitats Directive areas. Its scope also covers designated Birds Directive areas. In accordance with government policy, Ramsar Areas and potential Birds
COMPARISON OF THE COUNTRY REPORTS

Directive areas are assessed in the same way. The structure of the Habitats Regulations is fundamentally different from Dutch legislation. In the first place, the definitions refer to the Directive in the general sense. The legislation also contains a General Clause as catch-all provision. This states that the competent authorities are obliged to exercise their powers in accordance with the Habitats Directive. It has since become apparent from the recent ruling by the European Court of Justice that this clause is of limited value, since there must be precise transposition of the provisions of the directive into national legislation. An appeal by the government of the United Kingdom to close the gaps in transposition by appealing to the catch-all provision foundered at the European Court of Justice. The most remarkable difference between Dutch and English regulations lies in the fact that the permits issued in England and other forms of permission have to be reassessed in certain cases (see 5.6 below.).

Unitary states

In France, the Birds Directive and the Habitats Directive have been transposed in the *Code de l’environnement* (statutory provisions) and the *Code rural* (regulatory provisions). A considerable number of implementing measures published in official circulars. Article 6(1) and (2) have been transposed in general terms. In addition there are more specific stipulations that the measures must be tailored to the specific threats to the natural habitats and species in question. Measures can be taken within the framework of Natura 2000 contracts or in the form of statutory or regulatory provisions, in particular provisions concerning the national parks, nature reserves, biotopes and classified landscapes. The framework for active management and preventive measures is created by a "document d’objectifs" (DOCOB) drawn up by the Prefect, in consultation with municipalities and representatives of owners and operators. These provisions are elaborated in greater detail in the *Code rural*. A piloting committee – the *Comité de pilotage Natura 2000* – participates in working out the further details of the DOCOB. For application of the DOCOB, the owners and authorised users may enter into contracts with the government - the Natura 2000 contracts. The *Code de l’environnement* contains several provisions which probably do not represent a correct transposing of the Directive. This can be seen in the stipulation that measures must take into account the requirements of economic, social and cultural aspects as well as regional and local circumstances (see also Flanders). It is also stated that measures may not lead to the prohibition of human activities which are not significant, and that fishing, hunting and other game management activities which are in line with prevailing legislation on fishing and hunting are to be regarded as not significant. In other words, this
legal fiction means that fishing, hunting and game management are not subject to the preventive measures of paragraph 2 of Article 6 Hdr. and this immediately implies that the application of paragraphs 3 and 4 of Article 6 Hdr. "is not necessary" for fishing, hunting and game management. This method of working is not in conflict with the Habitats Directive only if the legislation on hunting and fishing itself contains provisions which ensure full application of Article 6(3) and (4) Hdr. We have not been able to establish whether this is the case, but the position of priority allocated to fishing, hunting and game management is strongly criticised in legal literature at any rate.

The transposition of Article 6(3) Hdr. in France also seems to show other shortcomings. In this way, plans fall outside the scope of the regulation; the regulation (as in Germany) only applies for acts which already are subject to some kind of permission or approval, and it is determined that no assessment is required for works, activities or structural activities provided for under a so-called Natura 2000 contract. The latter would be a correct transposing in accordance with Article 6(3) Hdr. if the legislation determined that Natura 2000 contracts may only include works, activities or structural activities which are necessary for nature conservation in the area, but this is not the case.

The Code rural contains further provisions on the works, activities or structural activities which are subject to appropriate assessment with a distinction being made between acts within a special conservation zone and those outside such a zone. The assessment must take place for discharges into surface water etc., activities subject to permission in national parks, nature reserves or classified landscapes, and activities subject to an EIA. Apparently the classified structures which may lead to objections are not included in this. In addition the Prefect must compile a list for each area with categories of activities not requiring an EIA being subject to a permit or approval for which a suitable assessment must be carried out. This way of working does not seem to ensure that all activities which have possible significant consequences for an area to be protected are subject to an appropriate assessment. For activities outside a special area of conservation, the area of application is restricted even further. This solely concerns discharges in surface water and the like, and activities requiring an EIA "if they can have a considerable impact on one or more special areas of conservation, taking into account the distance, topography, hydrography, the functioning of ecosystems, of nature and the importance of the programme or project, the characteristics of the site or sites and the objectives of preserving them.” The kind of list referred to is not compiled for activities outside the special area of protection. Article 6(4) has been transposed literally. It provides specifically that the compensating measures are for the account of the party that will benefit from the works or management or structural activities. In France
the applicability of the requirement for an appropriate assessment is further limited by the fact that agreements with land-users seem to play a major role. For acts provided for in this kind of 'management agreement' no appropriate assessment is required. There is a preference to regulate existing and future use via such agreements and not by the application of Article 6(3) Hdir. The act often refers to the 'autorité administrative' with regard to the division of competences. The regulatory provisions subsequently determine who the competent authority is. Usually this is the Prefect, who represents central authority at regional level. The central administration responsible for the application of this legislation is the environmental administration, the Department of Nature and Landscapes. The environmental administration has field departments at regional level and at département level (Direction Régionale/Départementale de l'Environnement). As far as the application of other laws requiring permission or approval for certain programmes or projects is concerned, the regulation impinges on no existing competences. The French system – like the English and German system – can be characterised as an integrated one.

In Sweden art. 6 Hdir. has been transposed by provisions of the Environmental Code (Miljöbalken), more concrete in chapter 7 of the Environmental Code. These provisions are completed and interpreted by some ordinances, which is binding law of a lower level. The Environmental Code is in comparison with the other examined countries a quite comprehensive (integral) law. The Environmental Code contains the testing criteria for activities that might have significant effects on any Natura 2000-site. An operator requires a permit for activities that may have a significant effect on a Natura 2000-site. This has to be applied when taking decisions based on the Environmental Code itself, e.g. concerning permits for industrial installations. For other parts, other laws refer to the Environmental Code and declare the decision criteria layed down in the Environmental Code applicable within the decisions based on those laws. That is true e.g. for the acts concerning forestry, fishing and agriculture and for the physical planning law. The physical planning law is not integrated into the Environmental Code.

Finally, in the Netherlands, the Hdir. has been transposed into the Nature Conservation Act 1998 [Natuurbeschermingswet 1998]. The Act provides a foundation for designating areas, as well as a conservation regime, on the basis of Article 6 Hdir. It is important to note that the conservation regime only applies if areas have already been designated. Since the designation of habitats directive areas has not yet taken place, the Habitats Directive and its immediate application is still a topical matter for the time being. The prov-
COMPARISON OF THE COUNTRY REPORTS

ences play a central role in the implementation of the Nature Conservation Act 1998, but in some cases competences can be exercised by the Minister of Agriculture, Nature and Food Quality (LNV). Management plans are drawn up for special areas of conservation; the activities described in these plans are not subject to permits. Other activities which could have a harmful effect on special areas of conservation are subject to an obligation to acquire a permit. The Nature Conservation Act 1998 has a system of permits with two different reference frameworks. In the first place, a so-called 'deterioration and disturbance assessment' has to be carried out for projects and other activities which will certainly have no significant effects but which may possibly cause a disturbance or lead to a reduction in quality. This can cover existing or new activities. In addition, a suitable assessment is required in conformity with Article 6(3) Hdir. for projects or other acts which may have significant effects on special areas of conservation. The necessity of a suitable assessment is confined to 'new' activities. This restriction does not follow from Article 6 Hdir. The European Court of Justice indicated in its Cockle Fishing Judgment that an appropriate assessment can also be designated for activities requiring renewed assessment. The General Guideline indicates that this provision must be interpreted in accordance with that judgment. This seems however to be inconsistent with the definitions in the Nature Conservation Act 1998 [which state that activities that require a permit – whether annually renewable or not – and that existed at the time an area was designated and have taken place uninterruptedly since, have to be qualified as 'existing use'.

**Conclusion:**

*Article 6 Hdir. has now been transposed in all the countries studied. The way this was effected varied for each country. This is linked in part to the constitutional structure: federal or unitary state. In comparison with the Netherlands, the transposition in the other countries in the study varied substantially in relation to the structure of competences and the way in which the obligations had been elaborated. All the countries studied have their own system by which substance is given to the obligations under the directive. None of the countries studied has yet been able to make all legislation for transposition conform in full with the directive.*
5.2 What kind of regulations is involved? (Generally binding provisions, policy rules and circulars?)

In all the countries studied - except for France where some of the requirements have been included in regulatory provisions - Article 6 Hdir. has been transposed in formal legislation. There are considerable differences in the kind of legislation, and the administrative level at which the legislation has come into effect. France and the Netherlands are the only countries in the study where there has been legislation by the central authorities. In Belgium, the legislation has been passed at regional level - in this case the Province of Flanders - and so the regulations originate in a federal state. There have been no directions on law making from central, federal level. The same can be said of the nine Austrian federal states. In Great Britain, the regulation applies to England and Wales; Scotland and Northern Ireland have their own legislation. In Germany there are sixteen laws from the federal states but there is also a Bundesnaturschutzgesetz which - as has already been explained - has a far-reaching directional effect on the legislation of the individual federal states. As already indicated in section 5.1, the differences can be explained by the different constitutional structure and cultures of the countries studied. The Netherlands and France are not the only non-federal countries which were examined. The legislation in federal countries can vary widely on details, and it is therefore difficult to obtain a total overview of the implementation legislation in countries with many member states like Austria and Germany. This is particularly true when there is no "guiding" legislation at central federal level, but it applies even when there is such legislation. The point is in fact the details, and also to some extent the details not regulated by law, but also the way in which the legislation is worked out in greater detail in official circulars, guidances etc. It is therefore more difficult - for example for the European Commission - to determine whether the legislation and its application in these countries actually comply with the requirements of European law. To some extent scientific attention is focused almost exclusively on the federal level in federal countries with many individual federal states and often the differences at the level of individual federal states are not taken into consideration.

Conclusion:
In all the countries studied, apart from France, Article 6 Hdir. has been fully transposed into formal legislation.
5.3 Do the regulations in which the Directive’s obligations are transposed relate only to nature conservation or do they concern integrated environmental legislation?

In Austria, Germany, England, Flanders and the Netherlands, Article 6 Hdir. has been transposed in nature conservation legislation. In one or two instances, this can be explained by the division of competences between the various authorities. In Austria, nature conservation falls within the competence of the individual federal states, whilst water management and environmental protection are the responsibility of the central federal government. Germany has been working on an “integrated” Umweltgesetzbuch, which would include nature conservation legislation, for more than ten years. This project has now been abandoned. The situation in France and Sweden is unlike that of the countries just referred to. In France, the transposition has taken shape in the Code de l’environnement (statutory provisions) and the Code rural (regulatory provisions). As the name suggests, the Code de l’environnement contains not only the law on nature conservation but also – or perhaps even primarily – a large part of environmental law. Here too it is not a question of fully integrated environmental legislation. The same applies for Sweden. The Environmental Code includes a lot of sectoral subjects for which no own laws exist. This also applies for the subject of nature protection. However, the spatial planning is not integrated.

Conclusion:
In none of the countries studied is there a fully integrated environmental legislation. In France and Sweden provisions for the transposing of Article 6 have been incorporated in a law which regulates environmental protection and nature conservation.

5.4 Has the protection of species and of habitats been transposed in the same legislation?

In Germany (both at central and federal state level), the federal states studied in Austria, and in England, Flanders, France and Sweden, the provisions on the protection of species and habitats have been transposed in the same legislation. The Netherlands occupies an exceptional position in this respect. There is no other country which has a special law for species protection. However, in lower-level regulations (orders-in-council etc), explanatory memorandums and circulars, a distinction is often made between species and habitats protection. It was not the object of this study to determine whether regulating habitats and species protection in a single act also reinforces the cohesion between the two policy strands within nature conservation.
Conclusion:
In all the countries studied except for the Netherlands, species and habitats protection has been transposed in the same law.

5.5 Who is responsible for applying this legislation?

The responsibilities for applying legislation for the transposing of Article 6 Hdir. varies in the countries examined. All imaginable variations can be found. A number of factors are important here.

First of all a distinction can be made according to the position of the responsible authority within the constitutional structure. In some of the countries in the study, the central level (central government, federal government or government of the federal state or the region) is, at least in some cases, responsible for the granting of permits requiring an assessment for compatibility with Article 6(3) and (4) Hdir. In the Netherlands, the check against the requirements of Article 6(3) and (4) is carried out by the central government in a number of cases, which are summed up in an order-in-council. In Flanders, the Flemish government is not competent to decide on certain kinds of activity, but it does decide in all cases concerning a certain part of the habitats assessment, that is when there is an imperative requirement of overriding public interest. In Sweden permitting is usually done by the county councils, which may, and sometimes must, ask SEPA for advice. Moreover the federal government in Belgium is competent in matters concerning projects and plans at sea. In Austria we found two federal states where the Landesregierung (federal authority) is competent. For the rest, it is usually decentralised government authorities that take decisions for which the criteria of Article 6(3) and (4) have to be applied. In some countries - Germany and Austria - the level of competence in decision-making varies even from federal state to federal state.

Secondly there is a further - no less important - distinction arising from the difference between the so-called integrated system and the system with separate nature conservation permits. As already stated, we encountered an integrated system in three countries where there was no separate requirement for a permit for nature conservation, but decisions on the application of Article 6(3) and (4) Hdir. were taken within the framework of other permit systems directed more at the approval of plans and projects. In these countries - France, Germany and England - the authority having competence depends on the division of competences in relation to these systems of approval. Sometimes this is determined by the level of the authority (municipality,
province, Regierungsbezirk [administrative region] or federal state government) of the authority taking the decision on the permit. Therefore, for example, in a decision of the minister of transport of the federal state on the construction of a motorway, the advisory authority would be the minister of the federal state responsible for nature conservation, but in a decision of a municipality on a planning permission for a hotel the advisory authority would be the nature conservation department of the provincial authority. Something special occurs in Sweden. The on the basis of the law competent institutions decide, just like in England, Germany or Austria. If however an area would be considerably damaged by such a decision, an additional authorisation of the government is necessary concerning the questions of nature protection.

Very often the competent authority in these countries, which is not primarily expert in the field of nature conservation, is assisted by an expert government agency which gives advice – for example, English Nature in England or the Environmental Protection Agency in Sweden. Which government agency this is varies.

**Conclusion**

There is a great deal of variation among the authorities as to who is competent to carry out the habitats assessments between and even within the countries in the study. All levels of competent authorities from municipality to minister were found. In a number of countries in the study, an authority with primary responsibilities for nature conservation decides; in other countries the decision is taken by authorities not specifically expert in the field of nature conservation. In that case the decision-making is often supported by advice from an expert body.

5.6 Is a distinction made between existing use and new activities in the applicable legislation? If so, which?

A distinction between existing activities and new activities is already encapsulated in the structure of Article 6 Hdir. Whilst Article 6(2) Hdir. concerns existing activities which are carried out in accordance with permissions which have been granted and which are still valid, Article 6(3) and (4) Hdir. is about plans and projects, which are in principle future activities. Article 6(3) Hdir. however concerns activities which have been taking place for a longer time and which require periodic permission. This distinction has been adopted in the legislation of the countries in the study. The systems of permits for future activities also apply for activities which are carried out for a longer period of time but for which periodic permits must be granted. But in the Netherlands it is not clear whether this is also the case under the Nature
COMPARISON OF THE COUNTRY REPORTS

Conservation Act 1998. From Article 1(3)(n) it could be deduced that in such cases no assessment is necessary in accordance with Article 19f of the Nature Conservation Act 1998.

In some of the countries in the study, specific provisions on existing use have been included in legislation. For instance, in Lower Austria, Rechtsverordnungen (local bye-laws) need to be passed which must include the boundaries and the conservation objectives, and also the ordering and prohibitory provisions have to be included. Prohibitory provisions must in this case relate to activities which could lead to disturbance or actual deterioration of an area. Another remarkable observation is that in various places in Austrian literature the point of view is taken that intensification or change in existing use must be assessed in accordance with Article 6(3) Hdir. The view that Article 6(2) Hdir. provides an assessment framework for these situations can also be found in the literature. In France no distinction is made between existing use and new activities, but the DOCOB must include a descriptive situation of the human activities carried out in the special area of conservation, in particular the existing agricultural and forestry activities in this area. There is also a transitional provision setting out that the most important conservation obligations of a number of provisions in the Code de l'environnement only apply for programmes or projects of works, management or structural activities for which decision procedures commenced after publication of a Decree of 20 December 2001. There is also a specific regulation for forestry. Forests in a special area of conservation which are operated according to a management plan established by decision, or which has been approved or recognised, and for which the owner has concluded a Natura 2000 contract, are regarded as sustainably managed forests. Fishing, hunting and game management have been kept out of the scope of the conservation regime. This is contrary to Article 6 Hdir. unless the legislation on hunting and fishing contains a framework that complies fully with Article 6 Hdir. We have not been able to establish whether this is the case. But it became clear that not including hunting and fishing in the legislation on nature conservation has been strongly criticised in legal journals in France itself.

Whereas in France it is concerned mainly with a restriction on the scope of the conservation regime for existing activities, in England the reverse is true. In England the regulations include an obligation to reassess existing permits etc. It is in fact not about existing use, but it is about a reassessment of certain permitted activities, plans etc. The obligation for reassessment applies to plans which have not yet been carried out or fully carried out, for certain permits etc which have not yet been put into effect. There is also an extensive regime in England with management agreements for existing situa-
COMPARISON OF THE COUNTRY REPORTS

tions and compulsory measures which can be imposed if there is no management agreement.

Sometimes a more far-reaching (material) distinction is made between existing use and future activities in the explanatory guidelines, circulars etc. The notes on the Länderarbeitsgemeinschaft Naturschutz, Landschaftspflege und Erholung (LANA) emphasise that existing use has “Bestandsschutz” [protection of continuance] and this has also been declared partly applicable to uses for which an umbrella permit has been granted, even though there will still have to be decisions on further conditions every year within this umbrella permit. It is questionable whether the latter is in accordance with the preconditions under EC law. Notably, existing use receives very little attention in literature and case law in Germany.

**Conclusion:**
In all the countries in the study, the permit system entailing a test for compatibility with the criteria in Article 6(3) and (4) is only required for future activities (plans and projects). This also includes existing activities for which permits have to be renewed at periodic intervals in all the countries. To this extent no distinction is made in the legislation between existing and new activities. The determinant factor is whether a permit is required for an activity or not. In the case of the Netherlands it is not yet completely clear whether the wording of the revised Nature Conservation Act 1998 is such that an assessment must take place against the criteria of Article 6(3) and (4) Hdir, for existing activities which require a permit being granted periodically. In a number of countries existing use is provided for explicitly in the legislation. In such cases this often relates to a protection of existing use. In England, on the other hand, the law includes an obligation to subject certain decisions to a re-assessment. In explanatory official circulars – in countries other than England - a far-reaching protection of existing use is assumed in a number of cases.

5.7 Is there a statutory basis for mitigation measures and if so has mitigation been defined?

Apart from in England, mitigation has not been incorporated in legislation as a separate requirement. No clear indications were found in Flanders as to the role of mitigating measures in assessments based on Article 6(3) and (4) Hdir. In Austria mitigation was part of the review of alternatives. In Germany mitigating measures play a role during review by the Bundesverwaltungsgericht [Federal administrative court] as to possible significant effects. The effect of these mitigating measures needs to be supported by expert
reports in these cases. LANA also refers to the importance of mitigating
measures. In its recommendations, LANA points out the various kinds of
mitigating measures which may play a part, such as the construction period,
the defining and marking of areas which may not be entered and limiting
the size of a project etc. These are most explicitly not measures to compensate
for effects which are being incurred but measures to prevent adverse effects.
The recommendations of different federal states can sometimes vary on this
matter. Compensatory measures are included in appropriate assessment here
and this is not in line with the system of Article 6(3) and (4) Hdiv. and, inci-
dentially, with the system of German federal legislation (Bundesnaturschutzgesetz)
[Federal Nature Conservation Act]. The demarcation line be-
tween mitigating and compensatory measures should not be ignored. Several
German federal states have issued guides which include considerations on
this subject to which we are unable to subscribe. The Bundesverwaltungs-
gericht's interpretation [Federal administrative court] is, however, in line
with the Directive.

In England, the meaning of mitigating measures is regulated in the Habitats
Regulations as far as the re-assessment of existing permits and other per-
missions is concerned. There is also the obligation here to examine whether
amending a decision can prevent negative effects on the integrity of an area.
No explicit arrangements have been made for plans and projects, new and
existing, but one of the Habitats Regulations Guidance Notes (HRGN) indi-
cates that these measures are to be included when the negative effects are
determined. In the Netherlands, the Nature Conservation Act 1998 contains
no statutory foundation for a mitigation obligation, and the term is not to be
found in the entire act. The General Guide discusses mitigation in some de-
tail however and the meaning of the term is explained further. It is interest-
ing that this (extralegal) definition gives rise to the impression that the gov-
ernment certainly views the search for and taking of mitigating measures as
an obligation within the framework of the Habitats assessment. But it is not
clear during which stage of decision-making mitigation should be dealt with.
It can be deduced from the Guide that it is certainly not during the assess-
ment as to whether sufficient compensatory measures have been taken.
Conclusion:
Although the legislation in the countries in the study – apart from in England as far as the re-assessment of existing permissions is concerned – does not include an obligation to take mitigating measures, it appears that this obligation does play a substantial role in practice in the countries included in the study. This is not surprising since the structure of Article 6(3) and (4) Hdir. and the corresponding provisions in national law necessitate the consideration of mitigating measures. Although Germany is the only country that states this in so many words, it can be assumed that all countries require that proper substantiation is provided for the positive effects of mitigating measures.

6. QUESTIONS CONCERNING THE INTERPRETATION OF ARTICLE 6 OF THE HABITATS DIRECTIVE BY THE COURTS

6.1 Has Article 6 Hdir. been transposed correctly in the law of the member country in the opinion of judges and experts in the country in question?

With regard to the opinion of the courts, it is not possible to give a positive or a negative answer. There is a considerable body of judicial decisions in all the countries in the study in which it was considered, or from which it may deduced without doubt, that the courts did not regard that national law complied with the requirements of the Directive when the decision was taken. Some are fairly recent judgments made in the years from 2002 to 2005. Almost all the countries examined were confronted with actions for formal notice of default by the European Commission because the Directive’s provisions had not been correctly transposed in national legislation. Some of these court cases took place some time ago but others are of more recent date while others are still pending. Germany has had two rulings – in 1997 and in 2001 - against it for failing to transpose the Directive completely. The first ruling related to the designation of areas, the second to the transposing of conservation measures. In other proceedings against Germany (C-98/03), the Advocate General delivered his conclusion just before this report was completed.7 The AG found that the Commission was right on all points and proposed that a ruling be made against Germany because German legislation does not comply with Article 6 Hdir. The question here concerned the acts

---

7 Conclusion of 24 November 2005, C-98/03. On the 10th of January 2006 the court took a decision against Germany again.
and activities to which the requirement of an appropriate assessment applies. Recently, the European Court of Justice ruled against Great Britain for incomplete transposing of the Habitats Directive, and the same happened to the Netherlands some time before. Recently, the AG gave his conclusion on an action for formal notice of default against Austria. This conclusion states that Austria has failed to fulfil its obligations in accordance with the provisions of Article 4(1) and (2) of the Birds Directive by not designating the Soren and Gleggen-Köblern areas as special areas of conservation. In addition, the obligations pursuant to the provisions of Article 6(4) Hdr. were not complied with because the competent authorities again allowed the project to construct the S18 motorway near Lake Constance to go ahead without investigating whether there are alternative solutions and without securing the necessary compensatory measures to guarantee the coherence of the Natura 2000 network. These proceedings were therefore concerned with the implementation of legislation and not so much with whether the Directive has been correctly transposed in legislation. There are two formal notices of default still pending against Austria; one relates exclusively to one federal state – Kärnten – in respect of Article 6(3) and (4) and the other to several federal states in respect of Article 6(1) and (2).

The decisions of both the ECJ and the national courts refer to laws that were applicable at a time that is now long past. The time difference is shortest for the Netherlands – the decisions were given about a year after the contested decision had been taken - and longest for Flanders - often the decisions were given after many years, sometimes as long as ten years. The legislation in most of the countries studied is subject to constant change, largely as a result of the gradually developing insight, but partly as a result of decisions by the European Court of Justice, that national legislation does not as yet comply with all the requirements of European law. Particularly in countries with many federal states which are entitled to pass legislation - Germany especially - there are continuous legislative amendments. It could very well be the case that courts would now judge that the law does comply with the requirements arising from the Habitats Directive.

In the eyes of the experts, conclusions may be drawn somewhat more easily. Generally the experts in most countries examined thought that the transposing legislation was broadly sufficient, although there are still several questions at micro level in many countries which have not yet been answered. In France, some of the national regulations are still strongly criticised in the literature and thought to conflict with the European requirements on a wide range of aspects. In 1999 Sweden received a formal notice of default from
the European Commission. This led to a revision of the Swedish legislation in 2001. Nowadays there is no longer discussion amongst courts or legal authors in Sweden whether art. 6 Hdir. is correctly transposed into Swedish law. It is generally applied that this is the case. It is worth reiterating here that in countries where the federal states have legislative powers and they are many in number – i.e. Austria and Germany - it seems as if even the experts lack a complete overview of the legislation and therefore cannot give a comprehensive judgment as to whether the applicable legislation complies with all aspects of the requirements of the Habitats Directive.

Conclusion:
In all the countries studied, with Sweden as an exception, judgments could be found from the courts, including recent ones, which show that they were of the opinion that Article 6 Hdir. was not correctly transposed in the national legislation at the time the decision under discussion had been taken. Because of the passage of time between the decision-making and the court’s decision, this says little about the law which is currently applicable. A number of countries, including the Netherlands, Great Britain, Germany and France, have been ruled against by the European Court of Justice for failure to transpose Article 6 Hdir. correctly. Other formal notices of default are still pending against other member states. Sweden has revised it's legislation after a formal notice of default in 1999. Experts in most of the countries studied are of the opinion that, in general terms, Article 6 Hdir. has been transposed correctly. This does not preclude the fact that there are certainly reservations as to the details.

6.2 If so, what role does Article 6 Hdir. still play in administrative and judicial decisions?

We have encountered very few judgments by the courts where there is discussion of administrative decisions taken by applying national law that fully complied with Article 6 Hdir. - apart from in Sweden, France and England where the review has been made against the background of the national provisions for transposition. Where this was the case, Article 6 Hdir. still played an important role as the framework of interpretation for national law. In Sweden article 6 Hdir. is not applied directly. Discussions on decisions about Natura 2000-sites are related to national law and the national guidance. In addition to this, those cases should also be cited where national law, despite correct transposition, cannot be applied to areas which should certainly be regarded as conservation areas under Article 6 Hdir. Examples include areas of conservation for birds for which designation has wrongfully not yet been granted or habitats conservation areas which have been included on the
COMPARISON OF THE COUNTRY REPORTS

Community list but have not yet been designated nationally. This often happens – for example in the Netherlands in relation to all Habitats Directive areas. In relation to these areas, Article 6 Hdir. is applied directly, irrespective of whether this provision has been correctly transposed into national law. In Germany the court has acted in a similar fashion concerning habitats conservation areas for which it appears that registration had wrongfully not been effected. It can be assumed however that the Bundesverwaltungsgerichtshof [Federal administrative court] will adapt its case law in this respect following the ruling of the European Court of Justice dated 13 January 2005 (Draggagi).

The flanking policy instruments for decisions to be taken in accordance with national law refer repeatedly to Article 6 Hdir. and also, for example, to the Commission’s guidance document to Article 6 Hdir. This is true for all countries.

**Conclusion:**

Even after correct and complete transposing of Article 6 Hdir. into national law, this provision and the additional information given by the Commission still play a crucial role in the application of national law by the competent authorities and in the review of administrative decisions by the courts in all the countries, except Sweden, in the study. In Sweden is referred to national legislation and explanations in which article 6 Hdir. and the explanations of the Commission have been processed. Irrespective of whether transposing has been correct or not, Article 6 Hdir. is applied directly in most countries for areas where Article 6 Hdir. is applicable, but the relevant national law is not applicable, for example, areas listed on the Community list but not yet nationally designated.

6.3 If not, do the courts check directly against the Article 6 Habitats Directive or against some parts of this provision?

This question has already been partly answered, perhaps implicitly, at 6.2 above. The following additional remarks can be made here. In Austria, there are various judgments in which Article 6 Hdir. is applied directly or national legislation is interpreted in conformity with the Directive. However, these judgments related to proceedings which were already pending in the courts before transposition into national legislation had taken place. In Austria, the moment that Austria joined the European Union has also had an influence on case law. In Germany, a number of judgments have been tested directly for compatibility with Article 6(3) and (4). This has something to do with the
COMPARISON OF THE COUNTRY REPORTS

fact that provisions in the Bundesnaturschutzgesetz [Federal Nature Conservation Act] have no direct effect in the individual federal states, and in the past the individual federal states had no implementation legislation available to them. This has now become the case. German case law refers frequently to the 2000 Guidance Document of the European Commission.

In France two rulings were given in a single action. In administrative interlocutory proceedings, reference was made – but not in so many words - to Article 6 Hdir., but since it concerned a judgment on an activity with harmful effects on a registered Habitats Directive Area, there can be no misunderstanding about the fact that the court was testing the facts against Article 6. During the appeals proceedings there was an explicit test against Article 6 Hdir. Since in the intervening period the French Council of State had reversed the decision of the minister to register the list with the European Commission, the Council of State ruled that the government needs not take conservation measures before the areas on the national list had again been designated. The Council of State moreover added that since the Habitats Directive allows harmful projects under certain conditions, the administration could not be reproached for manifest errors of judgment. Lower courts in France regularly test, or have tested, against Article 6 Hdir. but the court of appeal (Council of State) rejects their rulings.

England occupies a special position. We have encountered no judgments there in which a direct check against Article 6 Hdir. had been made. An explanation for this could lie in the fact that England had adopted the necessary implementation legislation as early as 1994. There is however one action in which direct testing against the Directive did take place. During these proceedings, there was discussion of the fact that the scope of the English Habitats Regulations did not extend to the Exclusive Economic Zone (EEZ). Legislation to close this gap is in preparation. Dutch legislation also has this same gap. We have been given to understand that here, too, legislation is in preparation to close the gap.

There is a marked difference between the way in which the Dutch courts - the Administrative Law Division of the Dutch Council of State to be precise - checked against Article 6 Hdir. before its questions were answered by the European Court of Justice in September 2004 (Cockle fishing ruling) and the way in which courts in all the other countries do this. The Administrative Law Division had indeed tested directly against Article 6(2) and had its doubts as to the possibility of testing against Article 6(3) and (4). There have been critical comments made on this in Dutch literature. In all the other countries, the possible direct effect of Article 6(3) and (4) Hdir. has been
COMPARISON OF THE COUNTRY REPORTS

assumed more or less as a matter of course but, as already said, no rulings can be found in which tests were made against Article 6(2) Hdir.

There have been differences concerning Habitats Directive areas after these have been notified to the Commission, but before the Community list had been drawn up. German courts test or tested directly against Article 6(3) Hdir., the Dutch courts in fact tested indirectly, through the link between Article 10 EC Treaty and Article 6 Hdir., and the French and Austrian courts rejected an appeal to Article 6 Hdir. in any form at all.

Conclusion:
Where Article 6 Hdir. is or has not yet been correctly transposed or where this provision has been correctly transposed but the relevant national law cannot be applied to areas which come under the protection of Article 6 Hdir., the courts in most countries check directly against Article 6(3) and (4) Hdir., apart from in England where this problem has not come up for discussion, and in France where some of the courts do the check and others do not. No ruling was found in any of the countries where a test was made against Article 6(2) Hdir. apart from in the Netherlands.

6.4 Are future projects and plans tested for compatibility with Article 6(2) Hdir. and what does this test mean?

In Germany, Flanders, Austria, Sweden, France and England, we found no examples of tests for future plans and projects against Article 6(2) Hdir. In England, this is a consequence of the way in which the Habitats Regulations have been introduced into the system. In Germany and Austria, the line set out by the European Court of Justice in the Cockle fishing ruling is followed and paragraphs 3 and 4 are regarded as lex specialis with regard to Article 6(2) Hdir. In Germany, several (legal) authors are critical about the role assigned to Article 6(2) Hdir. by Advocate General Kokott after permission has been granted for a plan or project with the application of Article 6(3) and (4) Hdir. The tenor of the Advocate General's view is that, after permission has been granted for a plan or project in accordance with Article 6(3) and (4) Hdir. and it has been put into practice, action can be taken at a later date on the grounds of Article 6(2) Hdir., should it appear that significant disturbance or deterioration occurs. The reservations against the conception of the Advocate General are prompted by the view that the Advocate General attaches too little importance to legal certainty.
COMPARISON OF THE COUNTRY REPORTS

The administrative courts in the Netherlands have checked against Article 6(2) Hdir. in the past, but the Cockle fishing ruling has changed this and it is of course important that Article 6(2) Hdir. has found implementation in the Natuurbeschermingswet 1998 [Nature Conservation Act 1998].

Conclusion:
In none of the countries in the study are future plans tested for compatibility with Article 6(2) Hdir. Until recently, this was the case in the Netherlands because this was required by the courts. In all the countries studied, Article 6(3) and (4) Hdir. are regarded as lex specialis with regard to Article 6(2) Hdir.

6.5 How do the courts interpret the requirements of Article 6(3) and (4) Hdir. and the applicable legal norms of the member states, in particular with regard to subjects which are currently the cause of problems in the Netherlands?

a. the meaning of ‘plan or project’
The concepts of ‘plan’ and ‘project’ are interpreted differently in the countries examined. German legislation not only includes a general definition of the concepts of plan and project, but a distinction is also made between a number of categories of plans which have been brought explicitly within the scope of the definition of the concept. LANA recommends a broad interpretation. However, the implementation legislation interprets some aspects of both concepts in a restricted way. The scope of both concepts is restricted to activities requiring a permit or a notification. Like the European Commission, we do not regard this restriction as compatible with the Hdir. It may also be noted that a lex specialis has been included in the German Bundesimmissionsschutzgesetz [Federal Control of Pollution Act], where the appropriate assessment is confined to the sphere of influence of the establishment.

Austria primarily follows the EIA Directive in its interpretation of the two concepts but this interpretation is not regarded as exhaustive. England and the Netherlands have not opted for a definition of the concepts. It does follow explicitly from English regulations, however, that the interpretation of the concepts in the Hdir. should be followed unless the context of the regulation indicates otherwise. The Natuurbehoudsdecreet [Nature Conservation Decree] in Flanders contains no definition of a project but it does describe which plans are included in the scope of the regulation.
COMPARISON OF THE COUNTRY REPORTS

Remarkable here is that a more specific definition is given in case law. A plan or project is always the subject of discussion if a test is made against the rulings on Article 6(3) and (4) Hdir. or the implementation legislation based on this, but this approach is by its nature ad hoc and gives no clarity as to the limits of both concepts. In the Netherlands the Guide provides additional explanatory information.

In France, Article 6(3) only applies for plans for which administrative approval is required, but zoning plans, which require no appropriate assessment, are an exception to this. In addition, the concept of 'plan' has not been adopted in French legislation but the concept 'programmes and projects' in its place. Not only the concept of 'plan' but also the concept of 'project' is in some respects more limited in law than the Directive allows. In this way hunting and fishing are not included – as far as they are in accordance with French hunting and fishing legislation.

**Conclusion:**

It could not be concluded from the case law or administrative guides on the interpretation of Article 6 Hdir. of all the member states how the concepts of plan and project were to be applied. Generally, following the Commission, it was stressed that these concepts are open to wide interpretation. In Germany and in Flanders, a statutory definition exists as far as the definition of plans is concerned. The definition chosen in Germany is in some respects problematic in terms of EC law, and this is certainly also true for France.

b. **Is an appropriate assessment also carried out for strategic plans of a higher level of abstraction (regional plans, key planning decisions etc) or policy frameworks?**

Not all member countries carry out the appropriate assessment for strategic plans. In England development plans are exempt from tests since they are not designated as plan or programme as defined in the strategic EIA Directive. In Austria, according to the literature, an assessment only takes place if a strategic plan has an important influence on permit procedures which will be undertaken once the plan has been adopted. For instance, this is the case if the options in the strategic plan exclude examination of alternatives at a later stage. The plan is then not purely indicative. In such a case an assessment of the effects on the area must still take place during later decision-making. In some respects this is similar to the Dutch interpretation. In this

---

8 Apart from Raumordnungsprogramme, for example, for which it has been explicitly stipulated that there must be testing against conservation objectives.
connection, it is important to point to the recent ruling by the European Court of Justice in the case of the Commission v. Great Britain. According to the English regulations, spatial plans or a development plan need not be subject to a test. The British government substantiated this starting position by pointing out that the effects only come with the implementation decisions and their practical implementation. The ECJ judged, however, that these plans form a framework for tests on permits. The fact that the plan itself had no significant effects was regarded by the Court as of no importance.

In Germany there is, however, a provision of a general obligation to subject strategic plans to appropriate assessment. The review obligation applies not only for plans which are binding within the framework of permit decisions, but the German legislation is not without sticking points. It is the non-strategic plans where the problems occur here. Then again the review obligation does not apply for permits based on Bauleitpläne [urban land-use planning] and this, in the view of the European Commission, is in conflict with Hdir. The same applies to the provision that no appropriate assessment needs to be made for activities requiring a permit during the determination procedure for Bebauungspläne [legally binding land use plans]. The reasoning behind this is that the underlying plans have already had to undergo an assessment but this view certainly finds no favour with the European Commission. That a Bebauungsplan [legally-binding land use plan] (which broadly speaking corresponds with a bestemmingsplan [local spatial plan] in the Netherlands) has to be checked against Article 6 does not necessarily mean that now all existing older Bebauungspläne, on the basis of which the granting of permits is equally possible, have to be checked against Article 6 Hdir.

With regard to the situation in Belgium, we have not been able to determine whether an appropriate assessment also extends to strategic plans. Broadly speaking, all the member countries involved must be aware of the considerations of the European Court of Justice in its above ruling.

At present there is no obligation, or there is no obligation as yet, in France for an appropriate assessment for strategic plans — for example, for strategic plans for spatial planning. This will change when the law to transpose the obligations of Directive 2001/42/EC (Strategic environmental assessment directive) comes into effect on 21 July 2006.

In Sweden strategic plans are not explicitly tested against art. 6 II Hdir. There are no psychical plans concerning the whole Swedish territory. However, psychical planning is an important instrument on regional level. The ‘habitattest’ of art. 6 III Hdir. can be relevant for plans on a regional level. If
such a plan may have significant effects on a Natura 2000-site, it therefore must be motivated what these effects are and if the criteria of art. 6 Hdir. are met. However, there is no explicit legal provision, which could be relied on before court that requires a direct testing of plans against the criteria of art. 6 Hdir.

It follows from Dutch case law that purely indicative plans need not be subject to the habitats test. The underlying thought is that these kinds of plans have no significant harmful effects on a special area of conservation in themselves since the plans are not intended to have any legal effect. The Natuurbeschermingswet 1998 [Nature Conservation Act 1998] includes an obligation to review decisions for the adoption of plans if they lead to a disturbance or reduction in quality. The General Guide outlines indicate which plans are concerned here.

**Conclusion:**

When it comes the obligation to review strategic plans in accordance with Article 6 Hdir., the picture varies in the countries examined. After the ruling of the European Court of Justice of 20 October 2005, it can no longer be contested that strategic plans must be subject to examination against Article 6(3), although they may not be formally binding, but still have a certain directional effect, on further decision-making. Legislation in England, France and Austria does not comply with this but the German legislation does seem to comply. In Germany there is however a different shortcoming: permits, including building permits, which are granted in accordance with Bebauungspläne [legally binding land-use plans], need not be subject to a habitats assessment or need not be subject again to a habitats assessment. This also seems to be out of line with the requirements of the directive. It may be assumed that case law and legislation in England and Austria will be adopted according to the ruling of the European Court of Justice referred to, and that courts in other countries will bear this ruling in mind in their interpretation of their national law.

**c. The question whether a distinction is made between a "preliminary test" (whether an appropriate assessment is required) and the appropriate assessment itself and, if this is the case, whether it is enshrined in law.**

In none of the countries examined is the distinction between a preliminary test and an appropriate assessment enshrined in law but the distinction plays a large part in actual practice in all the countries. Austria uses Weissbücher [White Books], for example, where measures are recorded which are expected to have no significant effects on protected areas. In Germany, too, use
COMPARISON OF THE COUNTRY REPORTS

is made of interpretation documents with lists, which include a summary of kinds of projects (with an indication of a certain size) which are not likely to have significant effects. Distinctions are to some extent made between kinds of areas, and between kinds of habitat. Unlike Austria, there are both positive and negative lists - generally significant effects, or no significant effects. In a few Austrian Länder, Gebietsbetreuer have been appointed to act as advisers in answering the question whether an appropriate assessment is needed for a specific activity or specific use. Information is also obtained in other ways to determine whether an appropriate assessment is required.

In Germany, the distinction is derived in practice from the formulation of 'plan and project'. It is only if significant effects could possibly occur that an assessment is required in conformity with Article 6(3) Hdir., as implemented in Germany. During the determination whether there is a plan and project, a preliminary test is in fact being implicitly carried out.

Although this has not been made explicit in the other countries in the study, the same applies there by analogy, of course. One of the English guidances contains the remark that the effects on an area must be determined to ensure that plans and projects which may have significant effects are subject to an appropriate assessment.

As has already been said, the Natuurbeschermingswet 1998 [Nature Conservation Act 1998] makes no distinction between a preliminary test and an appropriate assessment, but the Guide has introduced a distinction between the various phases and kinds of tests. There must first be examination during an orientation phase whether significant effects are to be expected. On the basis of this orientation phase, it can be ascertained whether a permit is necessary and, if so, whether an appropriate assessment is required for this. The appropriate assessment is only required if the orientation phase shows that possibly significant harmful effects are to be expected. If this is not the case, but a permit is required, then the deterioration and disturbance review needs to be carried out. It is important for actual practice to know precisely when the deterioration test is sufficient and when, on the other hand, an appropriate assessment is necessary. The Guide gives no definitive answer but clarifies the various stages in the orientation phase extensively and mentions a number of illustrative situations as examples. This is similar in some ways to the German and Austrian lists but seems to give little concrete guidance in actual situations.
Conclusion:
In none of the countries examined is the distinction between a preliminary test and the appropriate assessment firmly enshrined in law, but the distinction plays an important part in actual practice in all the countries. In some states (or parts of them,) various kinds of indicative lists and other instruments of a supportive administrative nature are used within the framework of a preliminary test and these can determine whether a "main test" is likely to be necessary for a plan or project in or near a certain kind of habitat.

d. distinction between existing and future activities
This question has already been partly answered in section 5.6 above. The following additional remarks may be made here.
In both Flanders and England, the regulations differentiate between existing and future activities/situations. It is remarkable that in England an obligation has been included in the regulations so that, in certain cases, existing permits or plans have to be re-assessed (see section 5.6 on this).
German legislation also makes a clear distinction between existing and future activities. The definition of the concept of project follows closely the explanation given by the European Court of Justice to its ruling in the Cockle fishing case where activities which have been taking place for a longer period of time and for which the permits must be renewed are included in the definition. There is still discussion in the Netherlands over the question whether national legislation in this respect complies with the requirements of Hdir. since the law gives a definition of existing use which includes the re-assessment of activities which have been carried out for a longer period of time. The Guide of the Ministry of Agriculture, Nature and Food Quality (LNV) provides a practical solution.

The Austrian legislation makes no distinction between existing and future activities, but differentiation follows from the structure of the Directive, which has been incorporated in legislation. (See section 5.6 on this.) It may be remarked here that, on the basis of case law for existing activities, the principle of legitimate expectations plays an important role here. It is questionable, however, whether this is compatible with the requirements of European law. In the other countries in the study, we have encountered no similar considerations.
Conclusion:
Besides the remarks made at 2.6, special reference may be made to the case law of the Austrian courts in which the principle of legitimate expectations plays a very far-reaching role.

E. the precautionary principle
The effect of the precautionary principle is given no further detailed specification in the legislation of the countries examined; neither is this principle known in Belgian case law. This is unlike the situation in Germany and the Netherlands where both case law and literature examine the effect of the precautionary principle in the application of Article 6(3) Hdir. In the Guide to the Nature Conservation Act 1998 [Natuurbeschermingswet 1998], the importance of this principle is pointed out and its effect is explained. Also in Sweden when testing an application against art. 6 II Hdir. the precautionary principle is explicitly applied, according to our speakers.

In Austria the role of the precautionary principle seems to differ depending on which federal state is involved. It seems to play a role in Tyrol and Steiermark, for instance. In our opinion, the principle has been insufficiently incorporated in the legislation of at least one federal state (Niederösterreich), but the expert in Austria sees this differently. The precautionary principle was also subject of discussion in the ruling on the Semmering tunnel, which concerned the law in Niederösterreich in particular, but the Verwaltungsgerichtshof [Austrian supreme administrative court] concluded here that Article 6 Hdir. was not applicable. This is regrettable since, in our view, the legislation does not provide for the obligation that it must be certain that significant effects will not occur before permission may be given. If, in these proceedings, Article 6 Hdir. would have been applicable, then the ruling could have contained a principle judgment on the interpretation of the precautionary principle.

In England, one of the Guidance documents points explicitly to the effect of the precautionary principle, but gives no further explanation on this point.

The precautionary principle plays no explicit role in the application of Article 6(3) Hdir. in France, but if the State has to judge applications and is unsure of the ecological facts, it may call on an organisation — the Conseil Scientifique Régional du Patrimoine Naturel [the Regional Scientific Council for the Natural Environment] — which can provide the names of experts who can clear up as many of the uncertainties as possible.
Conclusion:
The structure of most of the legislative provisions is such that the precautionary principle is expressed; the exception is Niederösterreich. The literature of some of the countries examined also subscribes to the applicability of this principle. In some countries, judgments by the courts or interpretary documents can be found in which the precautionary principle is discussed explicitly.

f. dealing with possible cumulation
Assessment of the cumulative effects obligatory under Article 6(3) Hdir. is expressed in the countries studied to various degrees. In the Netherlands and Belgium, this element can be discovered in the case law. In Germany, there is a single judgment from the Verwaltungsgericht Oldenburg from which it may be deduced that the effects of planned activities must be viewed in combination with those of existing activities.

Only in Austria is the scope of examination of cumulative effects incorporated in the legislation. Both assessments which have been carried out and decisions still being considered must be reviewed for their cumulative effects. In Niederösterreich, in an explanation on the assessment of cumulative effects, it is stated that there must be consideration of reviews which have been set up in earlier or simultaneous decision-making procedures.

In England, there is a single Guidance Document completely devoted to the assessment of cumulative effects. Three categories are distinguished: activities which have received a permit but have not been fully completed, ongoing activities which require periodic assessment, and activities for which a decision-making procedure is still taking place.

Conclusion:
In all the countries examined, the cumulative effects are taken into consideration in the legislation (Austria, France), practice (explanatory documents from the administration) or case law. In England there is a single Guidance Document completely devoted to the evaluation of cumulative effects.

g. The importance of management plans during reviews
In all the countries in the study – apart from France and England which have a system that provides for voluntary management agreements and where safety-net provisions are in place if there is failure to reach voluntary agreements – the implementation legislation includes instruments which may be regarded as management plans. In none of the countries studied have management plans been drawn up so far. This is the reason that these plans appear to play no part at the moment in decision-making on plans and projects.
as referred to in Article 6(3) and (4) Hdir. or in review of these plans and projects by the courts. In Austria judicial decisions seem to indicate that management plans will play an important role in the review once they will be drawn up. In Germany, too, management plans need to be taken into consideration but it should be noted that many other documents need to be taken into consideration there as well as the management plans. It seems therefore that the management plans are not regarded as particularly important in these considerations. No management plans have been decided on in the Netherlands so far. Activities which have been included in a management plan are not obliged to have a permit. It should be noted, however, that plans and projects that fall within the scope of the permit regime of Article 19f et seq. Natuurbeschermingswet 1998 cannot be included in a management plan. This mechanism is not an explicit consequence of the legislation in the Netherlands and in other countries, but it is implicitly the case in all the countries. After all, examination on the basis of Article 6(3) and (4) Hdir. concerns by definition those plans and projects which cannot be classified as management.

In Sweden the tool of the conservation plan is used, which has to be drawn up for each Natura 2000-area. In such a conservation plan is described what the specific ecological requirements and the reasons for conservation of the site at stake are, what is to be understood by a favourable conservation status and what kind conservation measures are necessary. When writing the conservation plan the needs and wishes of nature protection policy prevale. The conservation plan therefore is an important tool for the decisions on permits. During the process of drafting the conservation plans, there are quite some discussions with the landowners and -users. After all, only when drafting such a plan it becomes clear what art. 6 Hdir. really means in the concrete case. The conservation plan must not be confused with the management plan. In a management plan certain developments or wishes of other policy-sector may be mentioned and described. A management plan can only be drafted after a conservation plan is available. After all, the information about the necessities of the protection and the wishes of nature protection policy must be known to discuss about a management plan. The conservation plan prevails upon the management plan.

In France voluntary agreements are particularly important. In principle, attempts are made to arrange the management of the Natura 2000 sites by means of contracts so that regulatory restrictions are avoided as much as possible. However, there are discussions in the literature whether the French provision by which activities falling under this kind of management plan do not require a permit is not too sweeping. This is because the Directive provides for an exception to the requirement for a permit only for those activi-
ties which "are directly connected or are necessary" for the management of the area.

**Conclusion:**

It is now too early to draw conclusions on the role which management plans are going to play in the review of activities, since the countries in the study have as yet no experience with management plans. In France contracts with owners and users play a particularly important role. In principle, attempts are made to arrange the management of a site by means of such contracts and without the restrictions of statutorily binding obligations. All the activities included in such a contract are no longer required to be subject to a habitats test. This is treated with some criticism in the French literature. The Swedish approach is interesting, whereby a management plan can only be drafted after a conservation plan is available and where the wishes of other sectors can be taken into account as well.

**h. Scope of appropriate assessment**

In none of the countries involved does the implementation legislation provide insight into the required extent of the appropriate assessment. Moreover in Flanders, no further indications have been found on the required extent of the investigation. In Austria, the Verwaltungsgerichtshof [Austrian supreme administrative court] sets high standards for the so-called **Naturverträglichkeitsprüfung**. This can be seen in various rulings including the Semmering tunnel and the Wörschach golf course. In both cases, the Verwaltungsgerichtshof judged that reference to the studies was not enough, despite the fact that these presented hundreds of pages of arguments concerning the ecological consequences within the framework of other decisions. This is particularly remarkable in relation to the latter case, since the European Court of Justice considered this matter and found no problems in this respect. Case law of the Bundesverwaltungsgericht [Federal administrative court] in Germany, too, indicates that stringent requirements are made of the extent of the appropriate assessment. The recommendations of the LANA support this. According to the case law, the required extent depends on the specific protected values of an area. In particular, where species are concerned which give an indication of the habitat requirements of other species or in cases where the condition of a certain kind of vegetation provides important information on the presence of species, then it is sufficient to investigate these 'key species or key vegetations'. It could be described as a biotope focused approach to the investigation requirements. There is no requirement for an investigation which is not expected to provide additional information. In the Netherlands, the species policy forms the framework for
COMPARISON OF THE COUNTRY REPORTS

focusing the investigation of the effects on species which indicate the presence of other species.

In England, the extent of the appropriate assessment depends on the location, the size and the significance of the proposed plan or project, according to an official circular from the Office of the Deputy Prime Minister (ODPM) and the Department for Environment, Food and Rural Affairs (DEFRA) and English Nature advises on a case-by-case basis. The way in which English Nature views the appropriate assessment results from the Habitats Regulations Guidance Notes (HRGN) which it has drawn up. The supplement to these HRGN refers to information on the protected status of the area, the conservation objectives, currently available information, information on direct and indirect effects, temporary and permanent effects and the importance of these effects in relation to the nature, scale, geographic extent, location, duration and impact of the effects. There must also be information on the way in which these effects can be prevented by conditions and restrictions in agreements, for example.

In the Nature Conservation Act 1998 [Natuurbeschermingswet 1998] a link is made with the conservation objectives of the area where the appropriate assessment is concerned. In the General Guide, specific points of special attention are listed which must be considered during the appropriate assessment.

Conclusion:
The requirements made of the appropriate assessment vary in the countries in the study. It can be concluded from Austrian and German case law, in particular, that far-reaching requirements are made. Where a comparison can be made between the various countries, it mainly concerns the fact that the specific situation in an area, the species and habitats to be protected there, and the conservation objectives as well as the seriousness of damage which may possibly be expected are important in determining the scope of the investigation.

i. Mitigating measures
See section 5.7

j. Public participation and legal protection
In both Austria and Germany, there are very limited possibilities for public participation and legal protection available to citizens to contest an infringement of the implementation of national legislation putting Article 6(3) and (4) Hdir. into effect. Legislation (apart from that of one of the Austrian
COMPARISON OF THE COUNTRY REPORTS

Länder) says nothing specific here but, on the basis of the general provisions for access to legal actions for citizens, only owners and other stakeholders are entitled to these possibilities since their subjective rights may be harmed by decisions on plans and projects. The Austrian Verwaltungsgerichtshof considers that public participation and legal protection of citizens are not required since the European nature conservation directives concern the protection of a general interest and not the protection of the interests of the individual citizen. Thus, the principle of relativity plays an important part in this judgment. The case is the same in Germany.

It is interesting to see that the fact that in eight of the nine Austrian Länder there is no provision in legislation at all for involvement of citizens is not regarded by the European Commission as an infringement of European law. Citizen involvement is not formulated as mandatory in Article 6(3) Hdir. Public participation is mandatory if there is also an EIA procedure but this derives from the EIA Directive and not from the Habitats Directive. It is questionable whether this restricted conception is compatible with the ruling. In Germany, the possibilities for public participation and legal protection for nature conservation organisations in certain kinds of decisions have been extended considerably in recent years by the Bundesnaturschutzgesetz [Federal Nature Conservation Act]. The Länder can offer more far-reaching possibilities for public participation and legal protection and, to some extent, have availed themselves of this opportunity with regard to nature conservation organisations.

Moreover, in the countries where access to the courts is relatively restricted, there is a great deal of case law on questions of admissibility. Restrictions of access to the courts have therefore led to a great deal of discussion on legal protection in this respect.

In England, it is decided in each specific case whether opportunities for public participation will be offered. Although we have not been able to include this in this study, DEFRA has indicated that often legal protection is available against sectoral decisions. Whether this possibility is available in a specific case largely depends on the question of whether the stakeholder has a locus standi.

In Sweden the question in which way the general public is consulted when deciding on projects which fall under art. 6 III and IV Hdir., depends

9 Unlike the Netherlands, it is not possible in Austria to appeal to the directive obligations for the first time in appeals proceedings if this has not taken place in the administrative phase. Since the significance of the directive obligations only became apparent in Austria in recent years, similar to the Netherlands, this restriction has had important consequences for outstanding cases.
COMPARISON OF THE COUNTRY REPORTS

on the basis of which statutes the decision about the project in question is taken (e.g. physical planning law, statutes on infrastructure or the environmental code itself). Usually, public participation is limited to the ‘affected public’ and environmental NGO’s. NGO’s have to have a certain size to be allowed to participate. The right to complain before courts is usually limited to ‘the public affected’ and NGO’s too. The Swedish Environmental Protection Agency can go to court as well.

In Flanders, nature and environment organisations have access to the Belgian Council of State to contest decisions. In the proceedings concerning the Deurganckdok, this participation was set aside by the Nooddecreet Deurganckdok [Deurganckdok emergency decree] in which decision-making authority was allocated to the Flemish government with the agreement of the Flemish parliament. This agreement could only be contested in the Arbitragehof [Court of arbitration], which only tests for compatibility with the Constitution and does not test on the content of the decisions. This completely undermined the possibilities for legal protection for the decisions in connection with this project.

In the Nature Conservation Act 1998 [Natuurbeschermingswet 1998] in the Netherlands, the choice was for preparation for permits under Section 3.4 of the General Administrative Law Act on the basis of which stakeholders can submit their views during the development phase. This may include nature and environmental organisations in the light of Article 1.3 GALA. This differs noticeably – and in our view not justifiably – from the choice which has been made for the preparation of permits on the basis of the Environmental Management Act [Wet milieubeheer] and many other environmental laws, for which everyone may submit their point of view. Access to the appeals procedure is also available to interested parties on the basis of Article 39 New Civil Code 1998 [Nieuw burgerlijk wetboek]. In the Netherlands there is no relativity review. Once an interested party has access to the proceedings, he or she can present all arguments against a decision no matter whether he or she has a specific interest with these arguments. In Germany and Austria, the relativity requirement is applied, but in Germany the right of ownership is recognised as a reason to challenge all possible wrongful acts in connection with decisions which can infringe on ownership.
Conclusion:
If the public participation and possibilities for legal protection in the countries examined are compared with those of the Netherlands, then it seems that the opportunities for participation in legal actions in the Netherlands are much wider for interested citizens as well as for nature and environmental protection organisations. It is questionable whether some of the restrictions in force in other member countries can still fully hold after the Cockle fishing ruling.

k. Investigation of alternatives
In Germany, England and the Netherlands in particular, the investigation of alternatives plays an important role and many of the discussions centre on the question of what is or what is not an alternative for a project or a plan. At the moment little is known on this in Austria, France and Flanders. In relation to Austria, it should be remarked here that limitation of the alternatives to be investigated can be deduced from the federal structure in judicial practice. The administration of an individual federal state (nature conservation) may not put up a decision of the central federal authority (for example the ministry of transport) for further discussion. In our opinion this is not compatible with the Habitats Directive. Support for this criticism could be found recently in the conclusion of the Advocate General in the action against Austria (see above). In Sweden there is not much discussion which alternatives have to be taken into account on the grounds of art. 6 IV Hdir. and which are not required. This question is one of the important questions at stake in the still pending Botnia-railway-case. In that case, it is discussed, whether an alternative has to be taken into account although the train will need more time on the alternative route. In Germany and the Netherlands, the objective of the plan or project plays an important part in the investigation of alternatives, and it seems that there is often a fairly easy acceptance of the proposition that no alternatives are available. Sometimes the courts carry out a critical examination as in the WCT case, and this can lead to the shattering of the formulated objectives and an investigation of the actual underlying objective. The General Guide examines the investigation of alternatives extensively. There is examination of the nature of the alternatives as well as of the points to consider in the investigation of alternatives. In Germany, the Bundesverwaltungsgericht [Federal administrative court] interprets the scope of the investigation of alternatives in such a way that alternatives leading to a poorer achievement of the objective must be included in the considerations in certain circumstances. An example is the adjustment of a planned route instead of building a new route. Strangely enough, the Bundesverwaltungs-
gericht [Federal administrative court] seems to examine alternatives, in particular, which can bring about all the objectives of a plan or project, without paying attention to the grounds for justification of the implementation of the plan or project, such as imperative reasons of overriding public interest. An alternative may therefore be rejected if it fails to comply with an objective which cannot be qualified as an imperative requirement of overriding public interest. It is questionable whether this is compatible with Article 6(4) Hdir. We do not think so. In the Dutch literature, it has long been advocated that the investigation of alternatives should be related to the grounds for justification in the Directive. In the German interpretation of the investigation of alternatives, the costs of alternatives are not relevant in principle, unless they are disproportionally high. The Dutch literature also assumes this starting point. The German mechanism assumes that, in the question whether an alternative may be excluded because of the higher costs or because the objective of the project will not be able to be achieved to the full extent, there may also be consideration of the adverse effect on the area.

In England, the case law offers no points of departure on the extent of the investigation of alternatives, but an official circular from ODPM/DEFRA indicates that it can include both an alternative location and an alternative manner of execution. This assumption is also made in literature and case law in the Netherlands.

**Conclusion:**

*For some of the countries studied (Flanders, France, Sweden and parts of Austria), there is no clear picture of the content and scope of the investigation of alternatives on the basis of the case law and explanatory notes on legislation.*

*In Germany the investigation of alternatives is taken very seriously indeed but, like the Netherlands, the picture also varies in Germany. In several countries (Germany, Austria) we think (partly supported by the Advocate General at the European Court of Justice) we have discovered certain restrictions on the investigation of alternatives which are not compatible with the Directive.*

1. Imperative reasons of overriding public interest

In Austria, there is no information available on the interpretation of the concept of imperative reasons of overriding public interest in the practice of implementation and in court decisions, since this has not actually been a matter for discussion. German case law provides several remarkable insights. First reference is made to the stringent regime of Article 4(4) of the Birds Directive during examination of interventions in bird conservation areas which have been classified but not designated. The interpretation of the cri-
COMPARISON OF THE COUNTRY REPORTS

terion of 'imperative reasons of overriding public interest' has twice been the subject of discussion in Germany in a decision on the construction of roads. In the first case, the reduction in the number of road casualties was regarded as sufficient imperative reason. The second case is more remarkable and refers to the function of the road to be constructed as a link between old federal states in Germany and new ones (former East Germany), and its importance for achieving comparable living conditions in these federal states. In view of the fact that this latter argument could be put forward for many plans and projects, it has been criticised in the literature, but it is not yet clear what the effects of this will be in practice. Finally it is pointed out that, in the case where there are priority habitats or species, not only must the Commission be consulted in accordance with the Directive but the Bundesverwaltungsgericht [Federal administrative court] tests more stringently for the presence of imperative reasons of overriding public interest. The general interest of public health is not judged to be sufficiently imperative in this case. It must be shown that the plan or the project is to preserve road users most specifically from dangers and that these must be more than just the general dangers involved in taking part in traffic. The decisions and the recommendations of the Länder also refer to this stringent judgment. The requirements demanded of the arguments as grounds for the imperative reasons of overriding public interest are related to the seriousness of the adverse effect on the protected values of an area.

In England, the website of DEFRA gives an explanation of the imperative reasons of overriding public interest that must be taken into consideration. There is reference to the need to address a serious risk to human health and public safety, the interests of national security and defence, a clear and demonstrable direct environmental benefit on a national or international scale, a vital contribution to strategic economic development or regeneration or where failure to proceed would have unacceptable social and/or economic consequences. More specifically, individual plans and projects which involve national interests will generally comply with these criteria. This often applies for important regional projects. Local projects are not excluded in advance, but it is less likely that the interest involved in these projects is of greater significance than the interests of protection of the areas to be conserved. During these considerations, the importance of an area within the network of Natura 2000 plays a role in the balancing of interests.

In Flanders, the criterion has only been discussed once in the proceedings concerning the Deurganckdok. In the Nooddecreet [Emergency decree], the realisation of the project was designated in advance as one of imperative reason of overriding public interest. The compatibility of this decree with the Hdir. avoided review by the courts, including review of the substance of the
matter. It is clear that the courts should be able to review the application of the criterion on its substance; otherwise legislation could be easily used to circumvent correct application of the criterion.

In France, there is criticism that the French legislation does not speak of an imperative reason of overriding public interest but of a majeur requirement of overriding public interest. This is viewed as an impairment of the provisions of the Directive. It seems that in practice the administration and some of the courts are very easily satisfied in the stating of requirements or imperative requirements of overriding public interest. In this way damage to an important wetland was accepted in order to build vineyards, and the highest court in France gave its consent.

In the Netherlands, the question as to the presence of imperative reasons of overriding public interest has been a repeated feature of discussions in court actions. Examples are – in the appropriate specific situation - housing construction, harbour extensions and the construction of roads. Although at first (Uburg I) an imperative requirement of overriding public interest was probably accepted relatively easily, it seems that the courts later became stricter (in particular WCT). The General Guide now contains an explanatory memorandum on this.

**Conclusion:**

In so far further information is available on the application in practice of the reasons of justification from Article 6(4) Hdr. (Germany, England, France and the Netherlands), a diverse picture develops. Examples of stringent (WTC) and less stringent review (Uburg I) can be found in the Netherlands. The same can be said of Germany. In France it seems that there is at least partly an impairment of the concept which is not in line with the directive.

**m. Compensation**

Where the assessment of compensatory measures is concerned, there are few court judgments in the countries involved, and literature on this subject is also scarce. But it is stressed in all the countries that compensation must be functional. The natural functions in the protected area which have been lost or damaged by the interference need to be repaired so that the coherence with Natura 2000 is not affected. Financial compensation is not regarded as sufficient in any of the countries.

It is interesting to note here that there is discussion in German literature on the moment that compensatory measures should be effected. Between the two extreme standpoints in which stringent requirements are set (compensation finalised before the interference takes place) or in which the approach to the compensation obligation is particularly pliant, it may be interesting to
COMPARISON OF THE COUNTRY REPORTS

point to a view which lies more in the middle and which amounts to not all compensatory measures being realised and in operation, but that it must be ensured that the natural system retains its mutual integrity. This seems to be a practical interpretation of what the European legislators had in mind. In both Dutch and English case law, there have been discussions as to the extent compensatory measures must be defined by law. In the English Humber case, the compensatory measures were set out in an agreement which could stand the test of criticism. A special feature of these proceedings was that there was an agreement before the obligation for compensation developed. The court judged that the execution of the compensation obligations was not undone or hampered. Moreover, it was considered that parties with various interests were involved in the agreement, including nature conservation organisations, and that the execution of this agreement could be demanded by those who represent the interests of nature, if the stakeholder in the decision should fail to realise the compensatory measures agreed on.

In the Netherlands, reference can be made to the ruling in the WCT case in which compensatory measures were set out in the regional plan without this being referred to as a concrete policy decision. The Administrative Law Division did not therefore regard this as necessary, although the ruling in Tweede Maasvlakte had found incorporation in spatial planning to be important. In Flanders, the Deurganckdok case provided confirmation, in particular, that compensation may not take place by designating areas which should have already been designated as special area of conservation in themselves. In the Netherlands, the General Guide has since included a number of basic principles for effecting compensatory measures. The Nature Conservation Act 1998 [Natuurbeschermingswet 1998] specifies emphatically that the initiator must propose the compensatory measures to be taken.

**Conclusion:**

Since this requirement forms the last element in the test to be carried out on the basis of Article 6(3) and (4) Hdir., it is not surprising that not a great deal is known of its actual application. There is agreement that financial compensation is not sufficient, but that the affected functions of the conservation area within Natura 2000 have in fact to be restored. There is also agreement that this functional fulfilment of the compensation requirement has consequences for the time that the compensation should be in place. At the micro level, there are various ways of looking at what this latter point signifies.
COMPARISON OF THE COUNTRY REPORTS

n. **Who is responsible that this test can be carried out? Who must supply the necessary data? What are the consequences if insufficient data are available?**

In the member states there is very little case law on this. In Austria, the Semmering tunnel procedure, which has already been mentioned several times, is relevant. This seems to lead to the conclusion that the competent authority (Natur schutzbehörde) must show that significant effects will occur. In Germany, the responsibility for being able to carry out the test on well-founded grounds lies with the initiator and the competent authority. Opponents of projects cannot confine themselves to the standpoint that the assessment is not sufficient but they must also substantiate their point of view with evidence. In England, one of the HRGNs states that the competent authority must carry out the appropriate assessment. In the light of this, an initiator may be asked to provide all the necessary data.

6.6 **Does Article 6 Hdir. obstruct, whether temporarily or not, the planning and realisation of infrastructural works and other projects?**

The picture varies in the member countries. With regard to a number of countries, it may be concluded that – just like in the Netherlands – large projects have been delayed or have eventually not gone through. In connection with the situation in Austria, it should be mentioned that the habitats test takes place within the framework of environmental impact statements for large projects. It can be inferred from judicial decisions in Austria that considerable delays in infrastructural and other works occur regularly. These are projects like the construction of roads and railways as well as smaller projects like building golf courses. Often citizens avail themselves of the possibilities of legal protection in connection with the realisation of infrastructural projects, but extensive use is also made of the possibilities for public participation and legal protection for other projects. There are frequently lengthy procedures – sometimes longer than ten years. The judicial decisions lead to the conclusion that nature conservation arguments have increased in importance. There are also instances where proposals to carry out activities in Birds and Habitats Directive areas were eventually called off. Yet it seems as though the Verwaltungsgerichtshof [Austrian supreme administrative court] tries to circumvent the impediments arising from the obligations in the directives; judicial decisions show that assessed projects often take place in the end.

In Germany too, several projects have been considerably delayed in connection with imperfections in the test against the obligations arising from Article 6 Hdir. but there are also many judgments in which appeals have been turned down.
COMPARISON OF THE COUNTRY REPORTS

In France a number of projects have been halted or delayed because of conflict with Article 6 Hdir., but some projects have been allowed in the past, despite the fact that they did not comply with the requirements of the Directive – at least in the eyes of the respondent. It seems that the influence of areas which have been notified for designation too late has been most explicit here. The French Council of State was, after all, of the opinion that without national designation it was not possible to test (directly) against Article 6 Hdir.

6.7 If so, what type of activities are involved?

See also 6.6

6.8 What are usually the major arguments, where applicable, that determine whether a plan or project can be carried out?

Austrian court decisions have dealt with various elements of Article 6 Hdir. In Germany, it is noticeable that there are still areas which, wrongfully, have not been designated as Birds Directive area. In these cases, the stringent test of Article 4(4) Hdir. has had to be applied and the result of this was that a number of projects could not be carried out. These projects include the construction of roads through areas not designated under the Birds Directive.

7. SOME CONCLUDING REMARKS

It is not our intention to recapitulate all that has been written, and yet we would like to point out one or two aspects which have caught our attention. Although Article 6 has by now been transposed reasonably well in most countries, this has taken a considerable period of time in almost all the countries and has led to the necessary friction, including litigation in the European Court of Justice. It is noticeable that these omissions have led to many problems in practice in the Netherlands, on account of the fact that the courts have compelled direct application of Article 6 Hdir. In France, on the other hand, it seems that projects that should have been tested against Article 6 Hdir. have long profited from a tardy transposition because of the fact that the highest court rejected a test against the requirements of the Habitats Directive. In a number of member states, the shortcomings in the transposition of Article 6 Hdir. still exist at micro level.