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MARITIME INFRASTRUCTURE AND MARINE COASTAL ZONES

► ISSUES WITH THE HABITATS DIRECTIVE ◄

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ANALYTICAL PAPER

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1. Introduction

The European Birds Directive (79/409/EC)[1] dates from 1979. It calls for action to protect certain bird species, but its impact has been rather limited until the Habitats Directive (92/43/EEC)[2] was enacted. This Directive absorbs the Birds Directive to a large extent as far as the decision making procedures are concerned.

Since about 1994 there have been quite a few cases of "conflict" between the provisions of these directives and the plans to develop and extend ports, in particular when situated in estuaries or at river mouths. The fact that these conflicts resulted in project delays and cost escalation at best -and in project cancellation at worst- has caused a lot of resentment amongst stakeholders in the domain of maritime transport and construction. The causes of conflict have mostly been attributed to the provisions of the Habitats Directive, which are not very transparent. The fact that several court cases, both before European and national courts, were necessary in order to clarify the impact of these directives, has cast a shadow over the perceived quality of legislation.

The purpose of the current analysis is to review the situation in terms of what the Habitat Directive requires, to review a number of important case histories and to draw conclusions on the root causes of the problems. In this context it is of interest to quote Commissioner Dimas (Environment) in a recent statement before the Environment Committee of the European Parliament (June 20, 2006):

"We also need to see where we can improve the legislative framework and the Commission has asked Member States to provide status reports on the national implementation of the Birds and Habitats Directives. These reports are due in 2007 and will provide the basis for a full, scientific assessment of how the network is operating. Based on these assessments a full review of the Birds and Habitats Directives can be launched in 2010 in order to take account of the progress made in meeting the 2010 target. For those areas where additional clarity is needed we will continue the on-going work of producing technical guidance documents."

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[1] Council Directive 79/409/EEC on the conservation of wild birds (OJ L, n°103, April 1979) and amendments.

[2] Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (OJ L, n° 206, July 1992) and amendments.

The fact that the ports sector is particularly at loggerheads with this environmental legislation can be appreciated if one realizes that many ports in Western Europe are situated at the mouth of rivers and estuaries. These constitute ecologically rich areas for biodiversity and birds life. One will find designated Natura 2000 sites in or adjacent to a large number of ports. When plans for expansion and development of such ports are being considered, this immediately triggers the decision making procedure under the Habitats Directive

2. Summary of the procedures under the Birds and Habitats Directives

The Birds Directive calls for the protection of certain (rare) birds and for the designation of "Special Protection Areas" (SPA) which are critical to support bird life, in particular the migration patterns (often along stretches of coast line).
In a similar fashion the Habitats Directive requires:

- Art 6.1 To establish special areas of conservation (SAC) and manage these correctly in view of the protection goals. The collected SPAs and SACs are to form a network called Natura 2000.

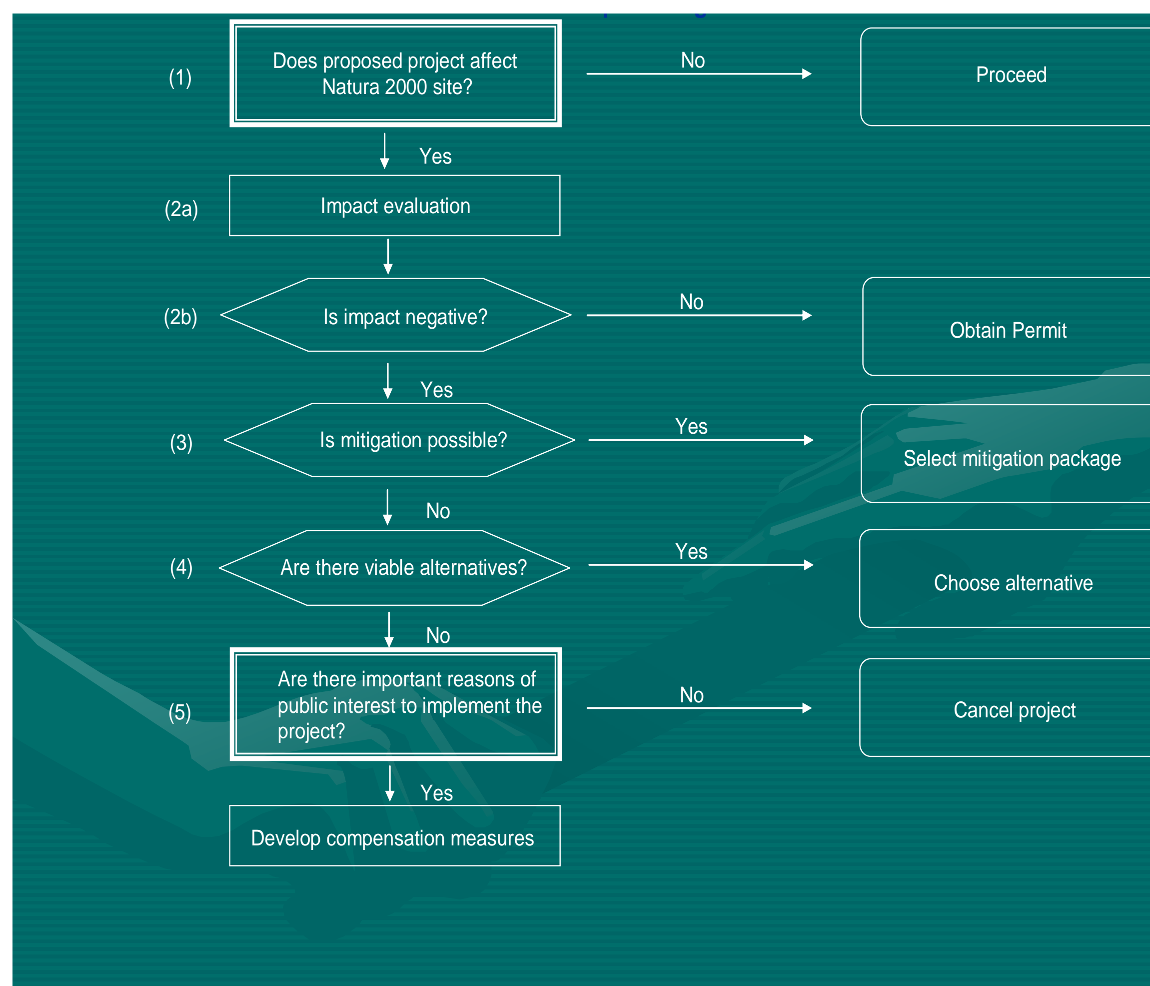
- Art 6.2 Avoid disturbance and deterioration.

- Art 6.3 "Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, (….) shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives….."
- Art 6.4 "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.
  Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest".

These articles define a complex decision making procedure that raises several questions of a legal and judicial nature. These issues will be reviewed in more detail, but for now we dwell on the structure of this procedure.

Figure 1 presents a simplified diagram of the decision making procedure, which is an attempt to make the decision making more accessible. In fact the Directive does not foresee the possibility of mitigation explicitly, although this may be implied under the alternatives. Mitigation could also be seen as one of the management measures referred to in art 6.1.

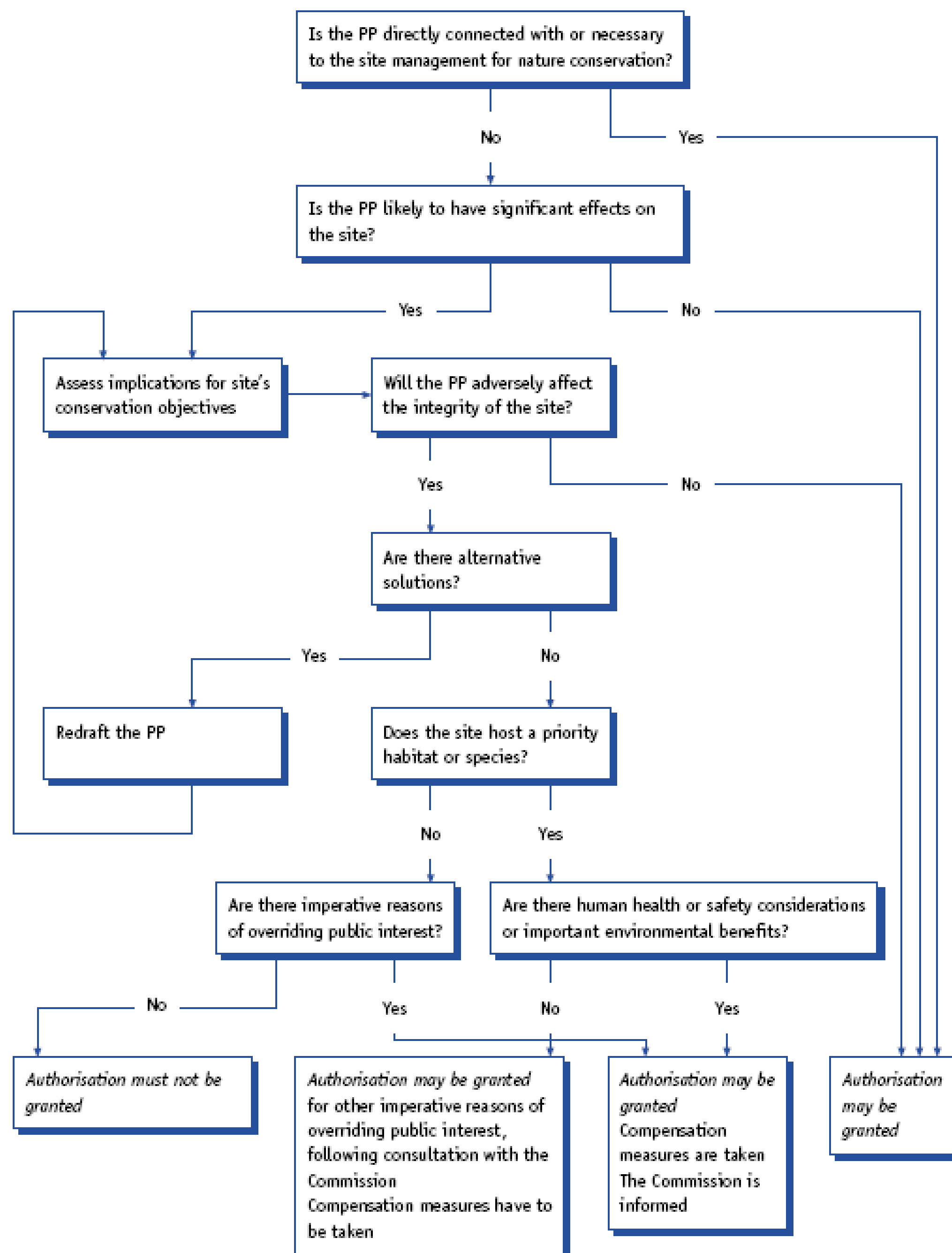
Fig. 1. : Simplified figure of the decision making procedure for a project affecting a Natura 2000 site



The complete and detailed logic of the decision making structure was developed by the Commission in the Guidance Document [3] on art 6.3 and 6.4 and is presented in fig 2.

[3] European Commission – Managing Natura 2000 sites. The provisions of Art. 6 of the Habitats Directive 92/43/EEC – published in 2000.

Fig. 2. :



The following preliminary remarks are in order:

- The concept of “imperative reasons of overriding public interest” has not been defined in such a way that it is usable as a legal instrument without further case law; consequently several courts have considered the implications of this terminology and developed some jurisprudence. The concept nevertheless gives a lot of leeway for diverging interpretations.
- The Commission plays a somewhat questionable role in that it was involved in drafting the law, but it has also a role in the compliance review under art 6.4. which in this case implies interpreting the law also.

Before commenting any further, the following section reviews the relevant cases where ports and estuaries were affected by the Habitats Directive to the extent that there was conflict.

3. Case Histories

3.1. Seine Estuary and Port Le Havre

The Seine estuary is one of the most important wetlands on the French coast from an ornithological point of view. The French government designated in 1990 some 2800 ha as Special Protection Area under the terms of the Birds Directive. The Commission argued that this was insufficient under the obligations of the Directive. France extended the SPA to some 17000ha in 1997. The original dispute between the Commission and France came nevertheless before the European Court of Justice[4], which in essence agreed that France should have designated a larger area and that it had failed to meet its protection obligations under art 4 of the Birds Directive.
The judgement was published in 1999, almost a decade after the incriminated facts!
In the meantime the Habitats Directive had entered into force as well, but the Court ruled that its protection requirements were to be kept separate.
Back in 1985 the French authorities had concluded an agreement that reserved 1300 ha for use by the ports or by industry. An industrial plant was built in the area. The Commission claimed that the area should have been protected under the Birds Dir. because of the quality of the wetland area. In a similar fashion the Commission claimed that protection obligations apply to land that should have been classified, but was not.
On this point the ECJ also agreed with the Commission.

[4] ECJ – 18 March 1999 – C-166/97, Commission vs France.

In a further development, the Port of Le Havre developed expansion plans for its port which were initiated in 1995 (Le Havre 2000). The port expansion obviously would have significant impact on the surrounding estuary and wetlands, whether classified or not. By this time the French authorities requested to make extensive provisions to the initial project plans in order to compensate for the loss of valuable area, before granting project approval. In the course of the evaluation the plans were expanded to restore parts of the estuary that had previously been transformed. The project thus was in principle involved in a procedure under art 6.4 which deals with compensation. Extensive modifications to the initial project were developed, including restoring wetlands and old river arms, but also building bird nesting islands in the mouth of the estuary, away from the port. The proposed improvements and compensation schemes were thus presented to the Commission for review. This resulted in overall agreement; it also added some 7% to the project budget and was the cause of important delays.

3.2. Deepening of the Westerscheldt

The Westerscheldt and the adjacent mudflats were designated as SPAs under the Birds Directive. In 1995 The Netherlands and Belgium reached agreement on the further deepening of the navigational access to Antwerp. The impact assessment had indicated a relatively minor loss of valuable habitat area, for which compensation was proposed.
The European Commission intervened and finally sent a reasoned opinion which stated that the impact assessment was insufficient and that the provisions of art 6.3 (appropriate assessment) and 6.4 (IROPI) had not been respected. The Commission even questioned the need for Antwerp to maintain a deeper navigational access.
Ultimately the Commission did not go before the ECJ, because the works had been carried out anyway. The Commission focused on the issue of compensation and the coherence of the Natura 2000 network. It concluded that the compensation measures had not been finalised before the project start, but after receiving commitments from the Member States on the implementation the case was dropped. Nevertheless, the weight of the impact of the Habitats Directive became apparent during the investigation and has certainly consequences for future compensation packages in estuaries. The fact that the Commission ventured to question the necessity of deepening the Westerscheldt, while considering that there are alternatives available in other ports in the region, is remarkable. If pursued, this would lead to the conclusion that the integrity of the estuary is more important than the economy of an entire region, even considering that compensation measures are possible. This would stretch the IROPI criterion to its limit and beyond.

3.3. Deurganck Dock

The Port of Antwerp developed plans for a tidal dock starting 1995. Green light was given in 1998 on the principle of constructing it. Large parts of the Antwerp port area on the left bank and its surroundings had been given already the status of SPA for the protection of birds. Some of these areas would be affected or even disappear as a consequence of the project. The Belgian authorities thus decided to change the status of these areas or reduce some of them in size. At the same time compensation was proposed by designating other areas for the SPA status.
The Commission intervened[5] and claimed that Belgium had not respected its obligations under the Birds and Habitats Directives. It used the following arguments:

- member state cannot really come back on earlier classification, unless there are ‘scientific’ arguments
- SPA status is not equivalent to creating a nature park where nothing should be touched any more; in other words, economic and industrial activity might go hand in hand with bird protection measures within an SPA.
- Prior designation for specific other uses (such as for port activity in this case), is not a valid reason (!)
- Alternatives had not been investigated sufficiently
- The economic importance and the IROPI test were put into question
- The adequacy of compensation was put into question.
- Finally the adequacy of the Environmental Impact Assessment was put into question.

The case did not make it to the ECJ. Belgian authorities ordered a new EIA and revised the compensation package to become more comprehensive. The conclusion of the new assessment is that the project plus the compensation do not lead to a deterioration of the habitat and birds conservation objectives. As far as the European Commission was concerned, the file was closed after this EIA had been reviewed.
There have been several court proceedings before Belgian administrative courts, but these concern in part the status of the village of Doel and the technicalities of the permitting procedure. They do not shed new light on the implications of the Birds and Habitats Directives.

The final solution is thus that the port area remains classified as an SPA for birds protection. An ecological network has been created within the port that provides special sites for protection of the species concerned. The habitat protection, which

[5] Letter from Commissioner Walström to Minister Louis Michel – 18 January 2001 and further correspondence.

results in classification as an SAC, is not possible within the port and has been realised by designating other valuable habitat of a similar type in the surroundings of the port (i.e. compensation).

3.4. Rotterdam Maasvlakte 2

The Port of Rotterdam has been planning expansion of its port on the basis of reclaiming land from sea. The port is situated next to three areas classified as SPA or SAC and which are part of a national network of ecological structures. If the project is demonstrated to have (negative) effects on these sites, measures must be taken. In addition, the marine area in front of the current coast line has developed into a valuable marine habitat. On the basis of a detailed EIA study, impacts were assessed and a package of mitigation (management) measures was developed. In addition it was assessed that environmental impact on the adjacent sites could not be excluded; consequently compensation measures were also outlined. The package was reviewed by the Commission under art 6.4.; this has not posed major problems and the Commission formulated a positive advice on the proposals[6].
The impact assessment was not entirely conclusive on the question whether or not there could indeed be negative impact. In fact the opinion was that mitigation (management) measures would be adequate without compensation.
However, the permit to proceed with the project, which had been issued by the Dutch authorities, was challenged before the Dutch Administrative Court[7].
This Court held that the EIA contained insufficient conclusive evidence that the project would not have a negative impact on the food balance in the Wadden Sea (at more than 100 km distance). The Court insisted that such a conclusion should be drawn on the basis of scientific evidence, which was lacking. Consequently the Court reversed the decision to approve the project.

The lessons learned from this case so far are:

- The procedure under arts 6.3 and 6.4 can work satisfactorily. It is recommended to have an informal exchange with the Commission prior to submitting the final package.
- Better propose too much compensation than insufficient.
- The interpretation by the Dutch Court was unexpected. The Court had to base its conclusions on the text of the Directive, since the transposition into the national planning procedures had not been completed yet. The Court drew a very strict line and took the position that the impact over large distances should equally weigh in the final conclusions. In this case there was no evidence of negative impact, there was only lack of ‘scientific’ certainty. This “no-unless” basis for drawing far-reaching conclusions is

[6] Commission Opinion C(2003) 1308, 24 April 2003.

[7] Raad van State, Case C (2003) 7350/1, 26 January 2005.

rather shocking, in particular since the effect of the decision was not balanced against economic or social impact. For the case under review the result of this judgement has been a (further) project delay with at least one year.

- Although not relevant for the decision reached, the parties involved in developing the project are currently collecting further evidence that the food balance in the Waddensea will not be significantly disturbed by the project. With that information the planning permit will be ‘repaired’.

3.5. Western Scheldt Container Terminal

The Port of Flushing developed plans to extend the port with a Container Terminal with a capacity of 1.5m TEU per year. The area destined for the WCT included a piece of nature reserve that is part of an SPA under the Birds Directive and had also been proposed as SAC under the Habitats Directive.
The project developers had proposed compensation in the form of a newly created estuarine area outside the dykes and a wet saline nature reserve inside the dykes, totalling an area that was larger than the area to be occupied by the WCT.

The project never made it to the European Commission for a review of the compensation measures, but was brought before the Dutch Administrative Court[8]. The case reviewed the question whether the derogation criteria in the Habitats Directive were met. The Court concluded that the applicability of art 6.4 was not disputed. It even found that the proposed compensation measures were adequate.
The Court held though that the IROPI criterion was not met:

- the project did not consider sufficiently the available alternatives;
- the effects of additional employment and the economic benefits had not been weighed adequately against the nature protection objectives.

Consequently it held that the IROPI test had not been met and that the project could not be justified. It also found that the impact assessment was incomplete as the nuisance of additional traffic streams had not been evaluated.

The conclusion is drawn that, similar to the Maasvlakte project, the Dutch Administrative Court reviewed the case on the basis of a very strict reading of the Habitats Directive, art 6. This was done because the transposition into national law had not been finalised. The Court reading of art 6.4 may well be even stricter than the view of the Commission or the ECJ.

As a consequence the proposed project has been cancelled, but an initiative to develop alternatives in the form of a smaller project that would leave the nearby protected zones intact, is currently under consideration. The incurred delay is at

[8] Raad van State, Case (2002) 5582/1.

least 3 years. The most important lesson however is that the ruling of the Court was not predictable since it was based on a very strict interpretation of the Directive. This outcome left the project developers (provincial authorities) in shock.

3.6. Hamburg – Mühlenberger Loch

The Elbe River forms an estuary with a length of about 120 km until it reaches the Port of Hamburg.
The Mühlenberger Loch is situated just downstream of the port area. It features a fresh water mudflat which is protected under national law, it is a Ramsar Convention area and it has been designated as SPA under the Birds Directive.

The Port of Hamburg needed a site for the production of the new Airbus 380. After evaluating the possible alternatives, the Mühlenberger Loch site was the most appropriate, also considering that transport planes needed to take off from the airstrip which was an integral part of the project. The construction of the Airbus facility necessitated the reclassification of a part of the site: in view of the nature protection objectives of this very valuable site, compensation would be an absolute requirement[9].
An area of 170 ha out of 675 ha had to be reclaimed as land. This would cause loss of freshwater mudflats, breeding and resting area for birds and some shallow waters. After in-depth review of the available information and using advanced modelling techniques, a series of compensation measures was proposed:

- Restoring a tidal arm of a former tributary of the Elbe (220ha)
- Develop an area currently not very valuable for birds into a new wetland area (100ha)
- Creating new freshwater mudflats by removing the top layer from a part of the nearby island Hahnöversand (100ha).

In order to comply with the provisions of the Directives, the project required the assessment of economic and social considerations to establish the overriding public importance. The Commission has to be involved under art 6.4, but there is no requirement for "approval"; the Commission has to be kept informed via annual reports on the evolution of the compensation measures.
The Commission took note of the project, its urgency , the overriding public interest and the proposed compensation scheme. The Commission prepared a Communication on the scheme in 2000 in which it did not object to the project[10].
A major reason for the Commission not to raise objections was the fact that

[9] See for ex. Paralia Nature Update Report 2006 – Case study 2.1 – Inst. for Infrastructure, Environment and Innovation.
[10] Opinion of the European Commission, final April 2000.

Germany had not yet finalised its list of candidate sites for Natura 2000; a second circumstance may be found in the urgency of the decision to be taken and the pressure put on the Commission by the Member State.
The concept of developing compensation areas with similar functions, biotopes and biodiversity is rather challenging. The Commission did not raise fundamental questions, but several NGOs are sceptical on the feasibility. The annual reports to the Commission nevertheless confirm that the numbers of protected birds remain high at these sites, even during the period of 'construction'.

The Commission expressed its satisfaction with the success of the scheme, but NGOs went to court with objections to one part of the compensation scheme. The case is still pending before the ECJ. Final conclusions cannot be drawn although the Airbus facility has been operational since several years.
Comment: it would appear that in this case the Commission holds a more pragmatic view of the IROPI test than the Dutch Court held in the Flushing Terminal case. There is nevertheless a slight suspicion of inconsistency: the Commission apparently has not objected to reclassification of a very valuable site (as was also done in the Antwerp case). Another issue raised is that some parties hold that a compensation scheme must be in place and shown to be effective prior to starting the works. Such would be a very tough criterion to meet and the Mühlenberger Loch case illustrates that parallel development is possible.

3.7. Southampton – Dibden Bay

Associated British Ports proposed in 2000 an extension of the port of Southampton with a deep water container quay. The terminal would for the most part have occupied land that had been reclaimed with dredged material. The environmental impact of the project on the surrounding areas would have been significant. There are nearby sites classified as SPA (Solent) and SAC (New Forest). ABP intended to realise large-scale offsetting measures.

The outcome of the public enquiry[11], during which thousands of objections were filed, was a refusal to grant the permit by the British Authority on recommendations from the Inquiry Inspector[12].
The arguments considered that:

- Although there is a need for additional container capacity, this need could also be fulfilled by other expansion programmes foreseen on the British east coast.
- The project confuses mitigation and compensation; in other words, the project needs large scale compensation, but many of these measures were

[11] Dibden Bay Inquiry – Report to the Secretary of State for Transport – September 2003.

[12] UK Dept for Transport – Dibden Bay Decision- letter.

presented as mitigation. The Inspector considers that the ‘appropriate assessment’ is flawed.
- Although there were economic considerations, the Inspector did not believe that the IROPI test could be met.

The report did not enter into other considerations, such as the impact of a container terminal on traffic flows on land or the optimal location for a terminal from the transport viewpoint. The international significance of the conservation sites weighed heavily on the conclusions of the review.

On balance, it must be pointed out that the public enquiry escalated into an adversarial event where compromises were no longer feasible. Furthermore, the project preparation and EIA probably failed to take some important environmental considerations into account and was controversial from the outset. Competition with the ports at the east coast may have played a role. Nevertheless, although the case did not end up before the ECJ, European law weighed heavily on the conclusions of the Inspector. Dibden Bay was the first port-related project that was cancelled for environmental reasons.

3.8. Harwich Haven Authority

Several ports along the south and east coast of the UK had/have expansion and upgrade plans. Par 3.9 will deal with this, but in order to prepare for these projects several estuaries needed deepened access channels. In 1998 the Harwich Haven Authority applied for a deepening of the approach channel by 2m to 14.5m over a length of 27km. This represents a very significant capital dredge project.
The western end of the dredged area is situated adjacent to the Stour/Orwell SPA. The deepening could potentially have consequences for coastal processes which might affect another SPA in the vicinity.
The conclusion of the preliminary studies was that the impact of the project was significant for the SPAs. This than results in the need for an appropriate assessment which quantified the effects:
- loss of tidal range results in loss of intertidal areas;
- increased erosion rate;
- increase in sediment losses in the SPAs.

As there were no real alternatives to the project a compensation package was developed:
- creation of 4ha of intertidal area to replace losses due to reduced tidal range;
- a sediment replacement programme, consisting of subtidal placement of dredged material that could feed the eroding shores;

- retreating the coastal defences at Trimley so as to create a larger area of intertidal (up to 16ha).

The creation and maintenance of new intertidal area required a new approach to deposition of dredged material, the effectiveness of which had to be demonstrated.

The compensation measures were documented in an agreement and the project could not start before all of this had been negotiated with the stakeholders and the authority.
The approach is in line with art 6.3 and 6.4 of the Habitats Directive, it is not clear whether the scheme was submitted to the Commission for information. As in many of the project proposals that were initiated since about 1994, the extent of the provisions of the Habitat Directive were not crystal clear and it took considerable time and effort to gauge its real impact.

The negotiations with authorities and stakeholders caused important delays; moreover the cost of the compensation package is estimated at some 7% of the project cost!

3.9. Ports of Felixstowe, Harwich, Hull, Immingham and London.

The following projects were submitted by various port authorities and operators for approval by the UK authorities:

- the Felixstowe Dock and Railway company for extending the quayline of the port;
- Harwich Port International for constructing a new quay wall and for reclaiming land for a container terminal;
- ABP to construct a new facility on the Humber (Quay 2005);
- ABP to build a Ro-Ro terminal at Immingham near the existing bulk terminal by dredging into the foreshore;
- London Gateway Port to construct and operate a new port centre at the site of the former Shell Haven oil refinery on the Thames River.

After the painful evaluation procedure for the Dibden Bay proposal, all of these projects were reviewed against possible application of art 6.4 and the need for compensation. The Secretary of State in each case justified the decision to approve (or his mindset to approve) by referring to the growing traffic from shipping transport , to the importance of ports to the regional and national economy, to the absence of viable alternatives and the lack of sufficient capacity. For the larger

part of these projects regional employment opportunities form also a factor to consider[13].

The impact of these specific projects on nearby SPAs or SACs is limited to indirect effects. But the development of the ports facilities and terminal capacity necessitates improvement in access to the ports and in most cases further deepening of the navigation channel. These enabling measures have a more direct effect on nearby protected zones. The assessment is done by considering the entirety of the impact from the different project stages.

In all cases the conclusion has been that “The Secretary of State considers for the above-mentioned reasons that there are important reasons of overriding public interest, including those of a social and economic nature, as to why consent should be given to the proposed project.”

In line with this approval the Commission has been informed of the package of compensation measures that is imposed.

It must be pointed out that, even when these decisions and their justification are welcomed, the conclusion that the IROPI test is positive would not have been reached if reasoning similar to Dibden Bay or the Westerscheldt Container Terminal would have been applied. In other words, there appears to be quite some leeway in the interpretation of the IROPI.

3.10. Miscellaneous cases

In order to complete the review, other relevant cases are listed, but without going into further detail.

- Germany-Leybucht. Birds protection SPA in conflict with the need to improve coastal protection. EC objected and brought the case before the ECJ. ECJ ruled that reduction of SPA area can only be agreed in exceptional cases, but that improved coastal defences were such an exception[14].
- UK-Lappel Bank. Medway estuary was declared SPA, but Lappel Bank in the estuary was excluded because it might restrain shipping to the Port of Sheerness. The ECJ was eventually asked for a ruling. It declared that economic and social considerations could not be taken into account when designating a SPA; it can only play a role when IROPI conditions occur[15].
- Port of Vuosaari. This new Finnish port replaces the port in the city centre.. Natura 2000 site is located adjacent to new port. Many mitigation

[13] The Harbour Revision Orders for the respective projects have all been released during 2004-2005 and can be traced via the Government website www.dft.gov.uk

[14] ECJ – C-57/89, Commission vs Germany, Feb. 1991

[15] ECJ – C-44/95, Lappel Bank, July 1996

measures were implemented to prevent disturbing bird life, but environmental NGOs still objected. Finnish courts supported the project. The Eur. Commission gave as its opinion that the port would not significantly affect the SPA site and a procedure under art.6.4 was not necessary.

Cases not yet before the courts, but expected to present difficulties:

- Jade-Weser Port. This new port in the north of Germany is situated near SPA sites at the Wadden Sea. Navigation and port operations are expected to have some impact on the SPA. NGOs are protesting against the development. It remains to be seen whether IROPI considerations will be brought into play.
- Elbe estuary. The access to Hamburg port via the Elbe will once again have to be deepened in order to accommodate large container vessels. The deepening affects the SPA sites in the estuary and it will have to be demonstrated that either the impact is negligible or compensation must be outlined.

3.11 Cockle Fisheries

One other court case needs particular attention, even though it does not involve ports. This concerns the preliminary ruling by the ECJ [16] on a question raised by the Dutch Administrative Court on how to interpret specific aspects of art 6.2 and 6.3. The questions were about –what constitutes a plan or project under art 6.2, -when is appropriate assessment called for under art 6.3?

The ECJ developed lengthy considerations, but eventually concluded that:

When an activity at or near a Habitat site (SPA in particular) is subject to receiving a periodic permit and when it is not directly necessary for the management of the site, but likely to have a significant effect there on, it must each time be demonstrated that the integrity of the site is not negatively affected and that deterioration or disturbances should be avoided.
In order to do so, an appropriate assessment must be carried out which should demonstrate, on the basis of scientific criteria, that the conservation objectives are not eroded.
Authorisation may thus only be granted if, on the basis of the appropriate assessment, it has been demonstrated that the activity will not adversely affect the integrity of the site. This is the case where no reasonable scientific doubt remains as to the absence of negative effects..

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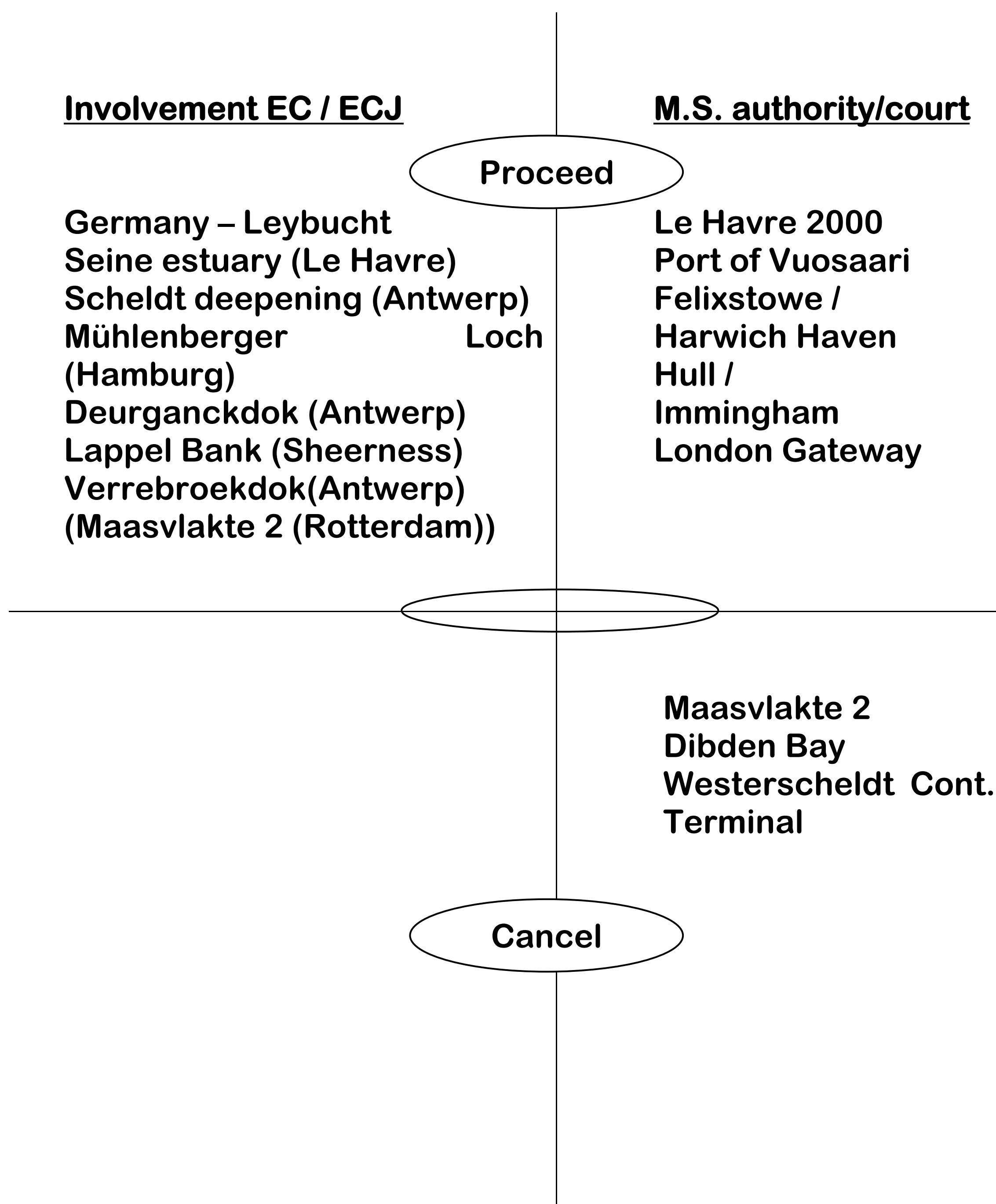
[16] ECJ C-127/02, Cockle Fisheries, September 2004.

The ruling gives the maximalist interpretation to the key terms of “plan or project”, “appropriate assessment” and “certainty on the basis of scientific knowledge”. The key is that considerable scientific evidence must be provided. If this is lacking, or if the scientific facts are simply not available, the plan or project should not receive the green light. This is clearly a “no, unless” reasoning; the Directive leaves the door open for a “yes, unless” provision which takes into account other considerations of an economic or social nature. Such arguments come into play under art 6.4; by closing this path off in the interpretation of art 6.3 the Court is implicitly giving priority to environmental objectives.
The Dutch Court, which requested this clarification, obviously applies this very strict reading. If this interpretation is not challenged, it could have far-reaching consequences for maintenance and periodic activities that are associated with the navigation in and on estuaries or other such designated areas and which are vital activities for navigation and transport. Under this ruling, an authority might impose annual permits for maintenance dredging with the need to submit each time an appropriate assessment in most member states the authorities will not choose this direction, but the ECJ preliminary ruling keeps the door open.

3.12 Provisional Conclusions

- The Birds and Habitats Directives have significant impact on the development of ports and waterways.
- The interpretation of the criterion that ‘important reasons of overriding public interest’ must be present in order to allow for compensation, is applied in a strict manner by the courts and the Commission.
- Different interpretations by European and national courts create uncertainty; this is largely caused by legal provisions in the Directives that leave room for such differences.
- The designation of SPAs and SACs is done without considering current or future economic use of the sites; this is bound to cause friction and conflict.
- Most problem cases involve SPAs designated under the Birds Protection Directive, although the evaluation procedure of the Habitats Directive is applied (art 6). The reasons are twofold: coastal sites are typically of interest for bird life and thus become SPA sites, but also the designation of SAC sites to protect fauna, flora and/or biodiversity has been completed much later. The Natura 2000 network is only now in the process of completion (2006). Impact of ports on SAC sites may create a different category of issues in the future.
- The cases and jurisprudence reviewed above can be assigned to different categories of involvement and outcome as illustrated in figure 3.

Fig. 3. : Segregation of various ports projects



This segregation leads to the following further observations:

- The bulk of art 6 procedures under the Habitats Directive has been dealt with by MS rather than by the Eur. Commission or by the ECJ.
- The interpretation of the IROPI test is not homogeneous as the weight given to economic and social aspects seems to vary from case to case.

- Although the Commission raises issues with the Member States, it has not been the cause of an outright rejection of a port-related project. Proposals reviewed by the Commission are modified or adapted where necessary. There remains an element of subjectivity as demonstrated by the history of the Maasvlakte 2 case.
- The Commission thus plays a dual role: it is not only charged with monitoring implementation of the Directives at national level and clarifying the legislation where needed, it also has a role as referee in those cases where priority species would be under threat (Art 6.4)

4. Analysis by third Parties

4.1. Paralia Nature

The Paralia initiative is a cooperation between the Institute for Infrastructure, Environment and Innovation and several ports which faced difficulties with the implementation of the directives for nature protection. The aim is to develop good practices and to clarify the procedural aspects of the process, in particular the Art 6.3 and 6.4. Paralia Nature has organised a number of workshops and published several reports on the findings and recommendations[17] (see www.imiparalianature.org).
Paralia looked in particular at mitigation schemes and possibilities to use mitigation rather than compensation. The observation is that compensation schemes, even when approved, take a long time to implement, firstly because there is pressure to provide the compensation prior to the project itself and, secondly because the implementation is often slowed down by local interests. The message is that the status and the potential of mitigation schemes should be enhanced.
Paralia identified cross-border issues as potentially problematic: designation of sites is a national matter and the selection criteria may be different at both sides of a border between member states.
The general observation is that, although the procedures under the Birds and Habitats Directives are complex, it is quite possible to implement them in a workable manner, but typically with delays. It is always essential to get stakeholders involved in an early stage of the decision making process. (Note that Paralia does not pay attention to the cost implications).

4.2. New!Delta

This is an EU sponsored cooperation between a number of ports and public bodies involved in (coastal) planning. Members include a.o. the ports of Le Havre,

[17] Paralia Nature – Update report 2006 – ISBN 9081054619.

Antwerp and Rotterdam. The idea is similar as for Paralia, namely to develop a pragmatic approach for dealing with the implementation aspect and to develop ‘Good practice’ guidance and instruments. The emphasis is on actually implementing (smaller) projects along the coast while following the EU regulations. There are no findings yet that add new insights[18].

[18] www.newdelta.org

4.3. SER

The Dutch high-level Social-Economic Council (SER) has prepared an advice on the constraints and barriers formed by European environmental law, including the Habitats Directive[19].

The Council reviewed EU environmental policy in the light of the need for sustainable development and it made a point of balancing the costs of implementing environmental legislation against the societal wellbeing. In other words, the SER recognizes that mitigation and compensation measures have a price ticket, but that this is balanced by improved health of the environment and better living conditions.

This obviously brings to the fore the question: who should pay for these costs when others benefit??

The Council states that the objective of conservation measures is to ensure that the integrity of the Natura 2000 network can be maintained. This seems a questionable statement, since the various compensation schemes around the ports insist very much on replacing habitat areas with the same kind of natural biotope, more so than on the interconnection between the various protected sites.

The SER identifies as key issues lack of experience with the implementation procedure of the Habitats Directive and costs incurred by the project developer.

The problems with several projects on Dutch territory were amplified by the fact that the Directive had not been transposed yet into national law in a satisfactory manner as judged by the ECJ (C-441/03). Consequently the Hab.Dir. art 6 was applied as is, without transposition into the national body of law. This would explain partly why there have been relatively many court cases on the Directive in the Netherlands and more specifically why the ruling of the Dutch Administrative Court was based on a very strict interpretation of the art 6 of the EU Directive. Only in 2005 a Dutch law became in force that incorporates the directive into the Dutch law.

The SER criticizes in passing the lack of clarity in the Directive definitions and procedures and emphasizes that this may be the cause for sometimes inadequate project impact assessment and the resulting issues during the rest of the implementation process.

Nevertheless, SER’s general conclusion is that problems with the implementation of the Habitats Directive are in a first instance due to poor transposition in The Netherlands, which was aggravated by a lack of guidance for the lower public authorities dealing with the necessary permits (others maintain that the Dutch Nature Protection law is too strict a transposition of the Habitats Directive and will lead to more problems).

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[19] ADVISE SER – Consequences of EU Environmental legislation for the Dutch economy – June 2006.

The Council does not provide recommendations on the allocation of costs caused by delay and compensation.
It should be noted that the comments on transposition are not satisfactory: if the goal of the transposition is to implement the Habitats Directive into Dutch law, there is still no convincing argument why the interpretation of the Dutch Administrative Court should be stricter in dealing with the Habitats Directive than when applying the equivalent Dutch law. We submit that this will not be the case.

4.4 LEI Report ISBN 90-8615-014-1 (2005)**: Best Practices Birds and Habitats Directives.**

This study by a Dutch Agriculture Institute presents an analysis of the cases already discussed and makes recommendations on the best approach when facing project constraints from nature protection law.

4.5 Van Hooydonk

The study[20], which was conducted on request of Directorate General Transport, provides a **wealth of documentation and observations**. The report cannot be summarized in a few paragraphs, but the author draws some fundamental conclusions on EU environmental law in general and on the Birds and Habitats Directives in particular:

- Integration principle in EU law.
  Art 6 of the Treaty states: "Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Art 3, in particular with a view to promoting sustainable development." The activities listed under art 3 include the common transport policy. A similar provision to integrate these other policies into environmental law has not been foreseen in the Treaty; the position of environmental considerations could therefore become one-sided. However, the integration principle under art 6 does certainly not give room for prioritising environmental requirements over other policy objectives.

- It is therefore surprising to find that neither the Birds Directive nor the Habitats Directive leave room for the consideration of economic or social factors when designating SPA or SAC sites: the selection is to be made on purely environmental grounds. In the structure of the Directives the consideration of social, economic or safety aspects is only entering the

[20] Report ID M22.00.24.052.001 - Study by E Van Hooydonk (commissioned by Dir. Gen. of Transport of the European Commission) on the relationship between transport law and environmental law - August 2006.

equation in the last stages of the decision making process, once the imperative reasons of public interest (IROPI) are invoked under art 6.3 and 6.4 of the Habitats Directive.

– Consequently, the procedure for designation of sites with a conservation status does not recognize any pre-existing user rights, zoning for (future) economic uses, or existing activities of national importance such as major ports, even when these planning decisions had been taken prior to the introduction of the Habitats Directive.

– The Directives lack precision in terminology: both the test to investigate alternative solutions for a project and the IROPI criterion have not been clarified in the judicial sense and need therefore to be interpreted via court proceedings. The guidance developed by the Commission is in itself insufficient. Moreover, guidance documents form ‘soft law’ that does not have the same level of authority in court; it is in any case confusing to pile layer and layer of interpretation and clarification on top of a legal text that lacks precision.

– The search for alternatives and the IROPI test can overlap or even be in conflict: if the search for alternatives is geographically widened, the imperative reasons of public interest are likely to weaken and vice versa.

– The interpretation given to art 6 of the Habitats Directive appears to vary widely between the European Commission, the European Court of Justice and various national administrations as becomes evident from the case law. This is the predictable result of poor drafting of the provisions in the Habitats Directive in particular. Needless to say that the wide margin of interpretation causes legal uncertainty, unpredictability in the decision making process and leads to costly delays in the approval of projects.

– The overall finding is that the EU environmental policies and the transport policies for maritime and inland shipping, as well as the development of necessary infrastructure for ports and waterways, show a total lack of integration to the detriment of the ports and shipping sector and its infrastructure needs.

4.6 Others

Two other observations should be highlighted:

– The representatives of the Port of Antwerp and Natuurpunt (Belgian NGO) have stated repeatedly that the species protection in and around ports –

designated as SPAs - can be realised via the creation of a robust network of corridors, resting places and nesting provisions in and around the port area. This solution is not explicitly referred to in the Directives, but has been agreed by the competent authorities and the European Commission. The argument is that the Directives should be read with a creative and constructive mind, while keeping the protection goals of the Directives in view. This has allowed the Antwerp Port to build the Deurganckdok and strengthen the conservation objectives at the same time.

– The Head of Cabinet of Commissioner Barrot (Transport) , M Benoît Le Bret, recently stated in a public meeting on Maritime Policy in the European Parliament (Nov 10, 2006) that as far as he is concerned the Birds-and Habitats Directives are manageable , **provided that a bureaucratic attitude towards the interpretation** of the text is avoided. His view is that the simplified logic as illustrated in fig.1in this report is the correct manner to deal with the decision logic under art.6 of the Habitats Directive and is in line with the intent. In other words: the sequence is -mitigation, -alternatives, -IROPI plus compensation. The recent mindset of the British Minister to approve a series of ports projects (3.9) that contribute to economic development and employment would appear to be in line with this reading.

Referring back to fig. 3 above, one must come to the conclusion that national courts seem to follow the strictest interpretation and hesitate to follow a pragmatic reading of the Directives. Certainly in the back of their minds looms the possibility to be overruled by the ECJ.

5. Summing-up the Problems

The above review clearly demonstrates the existence of common concerns and root causes. The list sums it up and forms the basis for further recommendations.

- Ports, maritime and coastal infrastructure are very often situated in or close to SPA or SAC sites designated under the EU Birds and Habitats Directives and appear to be especially affected by these Directives.
- The environmental Directives are integrated into policies for maritime transport and infrastructure, but conversely, there is no obligation to consider other existing EU policies when designating sites.
- The application of the provisions under the Birds and Habitats Directives to port-and maritime infrastructure projects has caused significant delays in

project execution as well as important cost escalation. When compensation measures were found necessary under the terms of the Directives, their cost typically ranges between 5 and 10 % of the overall project costs.

- The only indication that the Commission is aware of a potential problem concerning the cost of compensation was found in the Guidance document for the application of Art 6 of the Habitats Directive: “It appears logical that, in line with the polluter pays principle, the promoter of a project bears the cost of the compensatory measures. (….)”. In this connection the European funds could for ex. co-finance the compensatory measures for a transport infrastructure retained under the trans-European network (TEN).
- The Directives have no provision on how to deal with pre-existing user rights, nor is there any mechanism to compensate for property rights that have been infringed upon directly or indirectly as a result of the site designation process. . It may be submitted that the selection procedures for designated sites have not always respected the stakeholder rights laid down in the Aarhus Convention on access to information in environmental matters. The Convention was adopted after the Habitats Directive in 1998, but the rights of stakeholders preceded the Convention in any case.
- The Habitats Directive art 6 contains the decision making procedure for project approval; the procedure contains several grey areas of definition that leave considerable room for diverging interpretations .The uncertainty concerns the meaning of the criterion on “imperative reasons of public interest”, the geographic extent of the need to investigate alternative solutions as well as the distance to be considered for the possible effects of a project, and also the role of appropriate assessment on the basis of ‘scientific evidence’ as well as what the extent of ‘appropriate assessment’ should be in specific cases..
- However, once the need for compensation measures has been established, common understanding is that these measures should result in habitat areas very similar to the ones under threat and that they should be located in the close vicinity of the original site.
- Any rulings by the ECJ or national courts today have failed to give special weight to the classification of a port or waterway as being of strategic importance and listed under the Trans-European Network of (waterborne) transport infrastructure. This underlines the lack of clarity and definition of the IROPI test, since the TEN network represents a specific aspect of European transport policy that should be integrated with the environmental considerations.
- Neither soft law initiatives by the European Commission in the form of guidance on the application of certain articles of the Habitats Directive, nor the case law that has grown over the years, have clarified the fundamental uncertainty and the potentially conflicting demands of the decision making procedure. As may be concluded from par 4.6 above, even within the Commission there is no common view.

- One cannot help but concluding that there is a gap between EU transport policy and environmental policy. This seems to be caused by a lack of integration of transport policies in the environmental legislation.

6. Recommendations

– The Habitats Directive should preferably be revised or amended in order to eliminate the lack of clarity in the decision-making procedure. This would help to avoid further unnecessary project delay and cost escalation. The 2007 national evaluation reports may form the basis for such a revision.

– Barring the update of the Directive, certain clarification and guidance must be provided in order to minimize the 'grey zone'. This is preferably done via Commission channels. Examples are: how to deal with dynamic habitats such as estuaries? What constitutes "appropriate assessment"? To what limits should impacts be assessed? Which economic and social considerations can be invoked under art 6.4.?

– More consideration should be given on how to deal with pre-existing user rights and financial compensation for cost impacts: who-by whom-why is a party entitled to cost compensation? The question has not played a major role thus far, possibly because many of the ports that initiated the projects are public or semi-public entities. Few private undertakings have been exposed to delays and cost escalation, but they will certainly charge the costs to their customers.

– The views of the ECJ on "appropriate assessment" as expressed in the Cockle Fisheries ruling (section 3.11), which put much emphasis on the conclusion that "no reasonable scientific doubt remains as to the absence of negative effects", should be examined in greater depth as to their impact on new project studies for ports and port access.

– The relationship between the Birds- and Habitats Directives, the Water Framework Directive and the Marine Strategy needs to be clarified in clear terms. Equally important is the need to clarify the position of EU environmental law vis-à-vis the International Conventions, such as the London Convention or the OSPAR Convention. This is absolutely necessary for cases where the Conventions recognize rights that the EU Directives may undermine.