Dealing with delays

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Abstract: ESPO and EuDA have each assessed within their respective organisations the potential and perceived impact of EU habitats legislation on the port related infrastructure and port operations. Both analyses have been compared and many findings appeared to be similar. In the paper the main issues will be reviewed.

The problems are caused by a combination of factors: the **designation process** of the Natura 2000 sites, the **decision making procedure** under art 6 of the Habitats Directive, the **terminology** in the Directives and the multiple approaches to **transposition** in EU member states.

Port development and dredging projects have suffered from the serious delays in the approval process; if no corrective action is taken, this situation is likely to cause significant economic impact Our analyses have considered existing case law in which ports, estuaries or coastal zones were implied. The different cases have been categorised in function of the outcome. The paper will briefly discuss three typical cases.

On the basis of these findings a list of concerns has been established and good practice recommendations have been formulated for ports concerned by the issue, i.e. ports situated at or near Natura 2000 sites. It is well known that many of the concerns affect also the dredging and marine contracting sector. The paper presents the most robust guidance currently available for the sector.

Keywords: Habitats Directive, Ports expansion.

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INTRODUCTION: EUROPEAN HABITATS LEGISLATION

In the early stages of the European Economic Community environmental policy and legislation was developed in support of the common market. More recently, after forming the European Union, environmental policy became a core competence of the EU. The environmental dimension needs to be considered in all sectoral policies.

The Wild Birds Directive [1] ('BD') is the EU's oldest piece of nature conservation legislation (1979). It creates a comprehensive protection scheme for the EU's wild bird species. The BD defines separate components:

- it calls for the designation of Special Protection Areas (SPAs) for migratory and vulnerable birds;
- it defines a series of bans on activities that directly threaten birds (taking eggs, destroying nests, trading of certain species of wild birds;
- it sets limits on hunting.

The impact and effectiveness of the BD has initially been rather limited. However, in 1992 its provisions have been incorporated into a much wider ranging Habitats Directive ('HD').[2] The HD provides a comprehensive protection scheme for a range of animals, plants and habitat types by means of Special Areas of Conservation (SAC). It provides for the creation of a network of protected sites, known as Natura 2000, which is composed of SPAs and SACs.
Many of the sites designated under the BD and HD are situated along the coast lines, comprise estuaries and follow the migratory routes for birds; it is thus not surprising that many ports, in particular in Western Europe, are situated at or near Natura 2000 sites. The implications of this fact are reviewed in more detail.

Two further preliminary remarks:

- The specific protection requirements depend on the conservation objectives and should normally be dealt with in a management plan. The requirements for species protection, in particular for birds (SPA), do not necessarily exclude industrial activities in the area. The conservation status for an SAC (for biota or habitats) typically imposes territorial restrictions and limitations on the type of activities that can still take place at the site or in the vicinity of the site. Nevertheless, in contrast with the widespread belief, a Natura 2000 site is not immediately a natural park; activities that respect the conservation goals can take place.
- The BD was adopted in 1974, but only entered into force at national level in 1981. The implementation timetable for the Habitats Directive was the following: adoption and notification in 1992; transposition into national legislation 1994; preparation of a list of candidate sites 1995; establishing the agreed list of SACs by 1998 so that the Natura 2000 network could be in place by the end of the millennium. This ambitious timeframe has not been realised: considerable delays were encountered for a variety of reasons. In most member states the Natura 2000 procedure is only now in the final stage of approval. This means that there is a transition period of some 15 years to achieve full compliance.

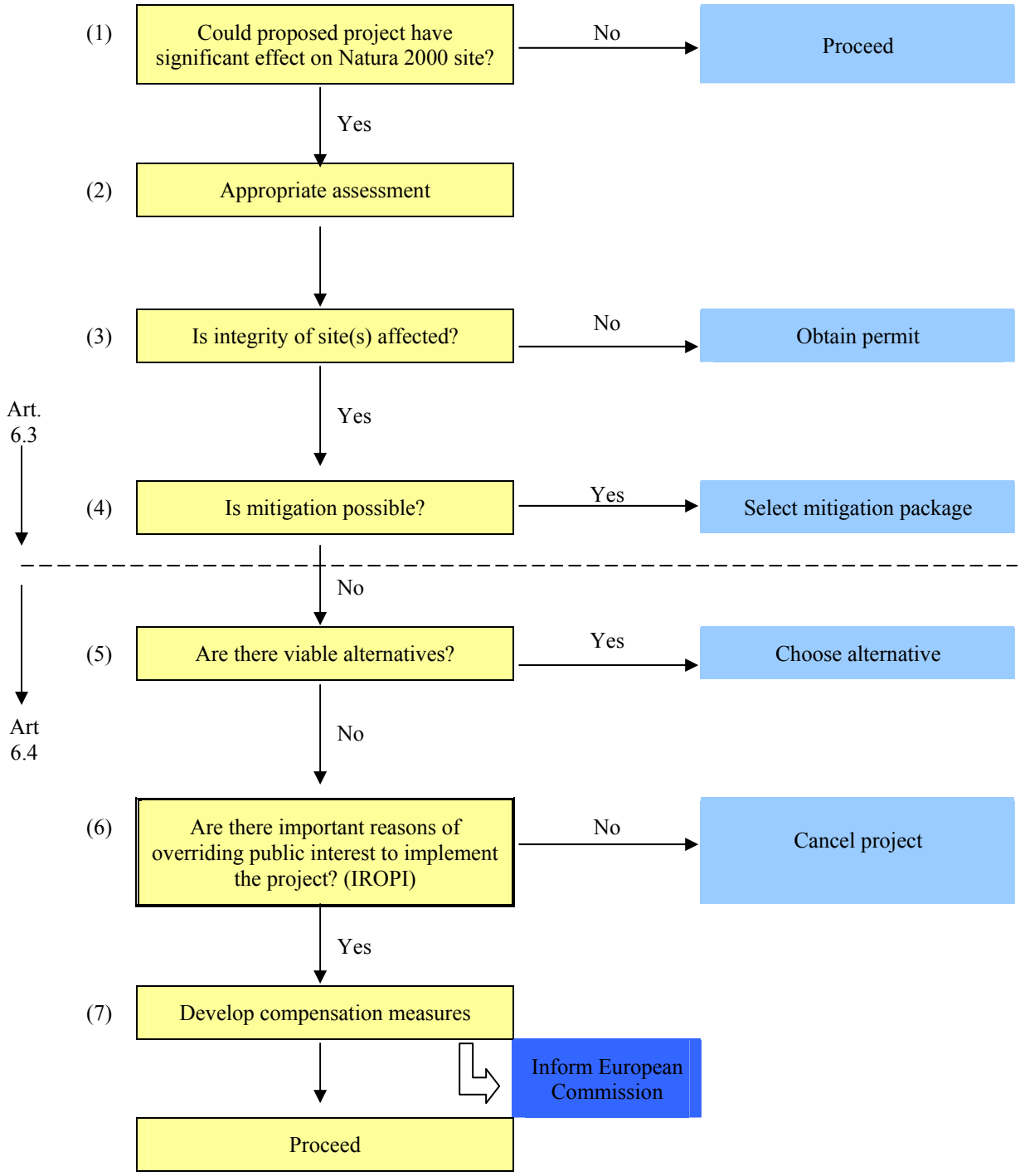
DECISION-MAKING PROCEDURE

In order to grasp the potential impact the two Directives on port expansion and dredging projects, it is essential to understand the procedure for project consent in more detail.
After Natura 2000 sites have been designated and their official status confirmed, any new plan or project that may have a (negative) impact on the conservation status should be assessed in accordance with the procedure in Article 6 of the HD:

"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's conservation objectives. In the light of the conclusions (...) the competent national authorities shall agree to the plan or project only after having ascertained that it* ***will not adversely affect the integrity*** *of the site concerned…*
Art. 6.4 If in spite of the 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* ***compensatory measures*** *necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted. (…..)"*

The logic flow of the procedure is given in a simplified form in fig 1.

Fig. 1: Simplified logic of Art. 6.3 and 6.4 of the Habitats Directive



DECISION MAKING PROCESS: THE CASE OF PORTS

The decision making process is also applied to port projects. Many port projects will have to deal with the provisions in Articles. 6.3 or even 6.4. The numbering in this section refers to the decision steps in fig 1. The procedure is highlighted by referring to a number of cases, each of which caused delays, directly or indirectly.

(1) As pointed out, many ports are located near SACs or SPAs or parts of the site have been designated as SPA. As soon as a port expansion project or capital dredging is envisaged it is necessary to verify whether the procedure under art 6.3 and 6.4 will apply. If the protected site is adjacent to the project it is likely that the appropriate assessment will have to be carried out. However, there have been examples where it was deemed necessary to consider possible negative effects at greater distance. The example that raised concern among the practitioners is the case of Maasvlakte 2 (Port of Rotterdam), where the Dutch Administrative Court (Raad van State) ruled in an appeal case [3] that the environmental impact study had not sufficiently investigated the possible effect of disturbances in the transport of larvae and silt for the Wadden sea at a distance of over 120km. The absence of certainty on what should be regarded as a **significant effect** may cause delays.
More specifically:
To what extent and at what distances should potential impact be considered?
- When does a potential impact become significant?
- How should cumulative effects be treated?

(2) Indeed, the European Court of Justice (ECJ) has ruled in 2004[4] that an **appropriate assessment** needs to be undertaken for any plan or project at the site that is not directly connected with the management of the site "if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site…" In ordinary language this would mean that any project planned on a Natura 2000 site requires an appropriate assessment.

The decision whether a project possibly affecting a Natura 2000 site, but not on the site, needs an assessment depends on the answer to the question whether or not it is likely that the project undermines the conservation objectives. Again, in normal terms it means that it is always prudent for projects near Natura 2000 sites to carry out an appropriate assessment.
An appropriate assessment, according to the ECJ, identifies all the aspects of the plan or project which can negatively affect the conservation objectives- and this in the light of the best available scientific knowledge. The requirement to assess the project effects in such detail and with such a narrow focus leads to other issues. The uncertainty may cause further delays. More specifically:
- To what level of detail should possible effects be determined?
- How is the appropriate assessment linked to the broader requirement for an Environmental Impact Assessment as per Directive 1985/337?
- How should the effects determined under the BHD be balanced against other environmental effects (e.g. the effects of poor air quality or congestion that would arise if the port cannot expand)?

(3) When can it be concluded that the impact is not negative?
Answer, according to the ECJ (see ref.4): when it has been made certain that the plan or project will not negatively affect the integrity of the site and its conservation objectives. This is the case where no reasonable scientific doubt remains as to the absence of negative effects. This leads us to conclude that the burden of proof as to the absence of adverse effects is entirely on the project promoter: he will have to make his case 'beyond any reasonable scientific doubt'. This interpretation by the ECJ is based on a double negative, or, in other words, in judicial space the project developer is always "suspect" unless he can prove the contrary. Again, the absence of clarity could cause delays. More specifically:
- How to deal with scientific uncertainty in complex dynamic environments such as estuaries?
- How should the precautionary principle be handled in this context?
- To what extent should the issue of appropriate assessment and the resulting interpretation of scientific doubt be subject to legal scrutiny by Administrative Courts?

(4) The consideration of mitigation measures is not formally mentioned in the Directives, but follows by analogy to similar pieces of environmental legislation. In order to outline mitigation measures, one must at least be able to define the negative impacts. If there is insufficient scientific evidence to do so, one may have to skip this step in the decision-making logic. Although it may sometimes be difficult to draw a distinction between mitigation and compensation, one could for example think of

strengthening the ecological infrastructure of an SPA site by creating corridors between nesting and feeding areas. Another possibility could be to introduce zoning of activities, with separation barriers to protect species. Practical examples involve the construction of barriers or dykes to mitigate visual or noise impacts. Extreme examples are those where tunnels or bridges are constructed to avoid cutting through a site. Indeed, as more expertise is built up, the provision of suitable mitigation packages appears to be good practice and may help to avoid compensation.

(5) In case of remaining negative impacts, despite mitigation, the first step would be to look for alternative solutions. For port projects this would almost certainly imply a different location , either in another existing port, in a new port at a different site or at another location in the same port. This is the category of geographic alternatives. The question comes up how far one should go in looking for alternatives? There is already an interesting case history (Southampton/Dibden Bay[5] and the Western Scheldt Container Terminal[6]). At this stage of the procedure the balance between environmental goals and economic or social considerations must already be taken into consideration. More specifically:
- What is the geographical area in which alternative sites should be considered?
- Should one make a distinction between the balance of environmental and economic impact in step 5 and the imperative reasons of public interest (IROPI) under step 6?
- Can Administrative Courts correctly assess the balance between environment and economy?

(6) Imperative reasons of overriding public interest (IROPI). The final step in determining whether a project may proceed, in spite of negative effects on a Natura 2000 site consists of considering the benefits for society (economic and social). One should think of employment opportunities in weaker regions, economic development or essential traffic handling capacity. These must be somehow offset against the importance of the site. If the overriding public interest is established, compensation measures must be developed (step 7). The IROPI test would certainly play a role in specific cases where the value of the estuary as an SPA or SAC must be balanced against the needs to deepen access channels to a port (Antwerp, Hamburg). The absence of clarity on what is a valid IROPI case could cause delays.

(7) Compensation: The role of compensation measures is to counter the loss of valuable habitat (possibly) introduced by the project. It follows from the considerations of the Commission - as well as from common sense- that the constraints should be:
- the compensation should when possible be '**like-for-like'**; for an SAC a similar habitat, for an SPA equivalent conditions to support the species,
- the compensation should **support the conservation objectives** of the project site (or its vicinity) as much as possible,
- the compensation measures should preferably already be '**functional' when the project is built**.

Issues on all three criteria have arisen. Especially the time constraint of the compensation is in practice hard to meet: it takes time to develop a new SAC or SPA, e.g. as a habitats zone or in the form of an artificial island for birds nesting. In most cases the compensation comes 'on line' in parallel or after the project development. (Mühlenberger Loch site near Hamburg).

In case compensation is required considerable cost is involved. Port developers generally accept the obligation for compensation, but regret the procedural delays, the cost of obtaining the necessary permits and the uncertainty about the detailed requirements for compensation schemes.

THREE CASE HISTORIES

The outline of the decision-making procedure with the examples amply illustrates that the procedure does not excel in clarity in the way it was written into the European Directives. The uncertainty in applying these Directives is amplified by the next steps in the process: the interpretation by the Commission services, the transposition into national law and the interpretation by national courts as well as the interpretation by the ECJ. It is therefore not surprising that the application of the HD to ports projects has led to delays and disappointments. In this section 3 case histories are summarized to underline the point. The selection is based on three cases that demonstrate different stages in the decision-making process and illustrate the uncertainties and the resulting delays.

Appropriate assessment: mainport rotterdam

The planning for a further expansion of the Port of Rotterdam started in 1998 as a cooperation between the city, the port and the central government. This was necessary as multiple objectives were defined: rearranging and restoring older sites within the existing port, improving the general environment conditions in and around Rotterdam and creating space for the port by winning land from sea.

The Project Mainport Rotterdam (PMR) focuses on both expansion and on improving the living climate in the entire area and it is subject to the statutory planning procedure which results in a decision by the national government.

The planning was supported by a (preliminary) environmental impact assessment, in which the requirements of the HD were fully taken into account. In addition there has been open communication with environmental groups and other stakeholders right from the beginning. The European Commission has been consulted informally to ensure full understanding on the aspects of mitigation and compensation. This resulted in a favourable opinion by the EC (2003) and a formal planning decision ('PKB') by the Dutch government. However, the validity of this PKB was challenged by a body representing the interests of fisheries on the grounds that it had not been sufficiently established that the effects on larvae transport to the Waddensea were **not significant**; consequently there might be an impact on fish stocks. In terms of the HD the fisheries industry thus claimed that the impact assessment was not "appropriate".

The highest Dutch Administrative Court in its judgement [3] agreed on formal grounds with the plaintiff that it had not been demonstrated that the effects in the Waddensea would be insignificant and annulled part of the PKB.

This decision was taken on the basis of a strict judicial reading of the HD. The impact assessment had indeed not modelled in detail the effect of an extension of the Maasvlakte on the transport of larvae, rather because the effect was considered to be negligible. The Dutch Court thus ruled that the assessment had not been appropriate.

Result: a further delay of two years in the realisation of the project!

The main uncertainty in this case concerns the extent (in distance and time) of the required 'appropriate' assessment.

Mitigation measures: Vuosaari Port

The Vuosaari port development aims to replace the two cargo ports in the metropolitan area of Helsinki. Planning of this port started back in 1992, well before any nearby sites had been designated as SAC or SPA. The project is socio-economically very profitable and logistically well based. Construction has started in 2003, but the construction of mitigation measures started well before that.

In fact a SAC situated near the future port site was proposed only in 1998 and is now part of the Natura 2000 network.

The port authorities have cooperated closely with the environmental authorities to review the impact of this designation. The solution has been to build tunnels under the Natura 2000 site for road and train connections to the port and to construct a 200m rail bridge across a nearby bay that is part of the network. The train goes into a tunnel immediately after the bridge and surfaces at the north border of the Natura 2000 area. These mitigation measures avoid any direct impact on the Natura sites and thus avoid the need for compensation. The costs associated with this mitigation is very high!

Nevertheless, the project has been challenged in 20 administrative procedures (!) before Finnish courts, before the European Commission and even via a petition to the European Parliament. All arguments relating to Natura 2000 have been rejected by the Finnish Supreme Administrative Court [7] [8] .

The impact in this case is thus the extreme high cost of the mitigation package and also the lengthy challenges in court that cause expense as well as delays resulting from these complaint procedures. In this case the nearby presence of a Natura 2000 site has been abused by the plaintiffs as an excuse for claiming financial compensation. The concern is that the HD legislation does not prevent this abuse and can thus cause project delays that are simply the result of opportunistic behaviour.

Result: The period from initial planning to effective port operation lasted almost 16 years.

Main uncertainty: in spite of fully complying with the BHD, the port developer still had to face numerous court cases that slowed down the process.

Compensation measures: Le Havre 2000

Behind the planning of Port 2000 at Le Havre in the mouth of the Seine estuary lies a long-running dispute between the European Commission and France on the obligation to designate large parts of the Seine estuary as SPA. The EC considered that France had reserved far too much area for future industrial development and not enough for conservation purposes. Against this background planning for Port 2000 started in 1994 without the full realisation of the impact of EU habitat legislation.

The port impact on the estuary is without doubt significant. Once France had been condemned by the ECJ for insufficient habitat protection of the Seine estuary in 1999[9], the authorities adopted a holistic view and developed a more integrated approach to the whole area. This included a large package of compensation measures under art 6.4 to offset the negative impact of the new port on the conservation objectives. The estuary had been under severe environmental strain in any case and the compensation measures target restoration of the estuary functions. The package was reviewed by and agreed with the European Commission. It consists of the following elements:

- Mudflats: currently only some 300 ha of mudflats remain in the estuary mouth. The dissymmetry of the tidal currents and the swell action tend to fill the estuary with (marine) sediment; this causes also sedimentation of the mudflats. Experiments were carried out to determine the most favourable location for creating new mudflats. Dykes had been created in the estuary outlet to control sedimentation; these **dykes were opened at a few locations and settling of the sediment from upstream was stimulated via the** construction of small channels and catchment dams.
- Resting area for **birds:** the construction of the port caused the destruction of 30 ha SPA. This has been compensated by reconfiguring 40 ha of nearby 'hunting pools' into resting area. In addition 3 artificial islands will be built in the estuary mouth for resting and nesting of birds.
- The infrastructure connecting the port with the hinterland could have destroyed a valuable site with various rare and protected species of fauna and flora. The site was spared by rerouting the connections and special conservation measures have been taken for this site (70 ha).

In addition, a number of projects were financed to support the environmental management of the estuary; this concerns notably a fishing observatory. Furthermore, a comprehensive monitoring programme has been put into operation and biannual reviews are prepared. The results are used for keeping the European Commission informed.

Result: after many years of disputes between the EC and France about the classification, competence of the member state and compensation needs, a costly compromise has been established.

Main uncertainty: the procedural aspects of complying with the BHD in the introduction phase.

Overview

An overview of the different port cases that have struggled with the HD is presented in table 1. The overall conclusion is that many port projects have experienced **delays of** up to **2 years** as a result of the HD assessment and approval. In addition, for those ports that had to develop compensation measures, the costs of compensation typically range between **5 and 10% of the total project costs.**

Table 1: Selected Port Development Project

	Involvement of						Period	
Projects	Nat. Court	European Com.	ECJ	IROPI?	Compensation?	Delay	Procedure	project
Deepening Scheldt Nav. Channel estuary		■			■	--	1998-2005	1997-1998
Antwerp Deurganck Dock (port dvp)	(■)	■		■	25M€	4 years	1999-2005	2002-2005
Western Scheldt Cont. Terminal	■		(■)	(■)	■	reject	2003-2004	
Dibben Bay Port extension	Inquiry			(■)	(■)	Reject	2002-2004	
2° Maasvlakte	■	■		■	■	Partly reject ; > 2 years	1998-2006	2007-2013
Le Havre Estuary		■	■				1994-1999	
Le Havre Port 2000		■	■		50M€	3 years		1994-2006
Vuosaari (Helsinky)	■	(■)			Costly mitigation	■	1996-2006	1992-2008?
Harwich Haven (Humber est.)	Inquiry	(■)		■	■			1998-2000
Felixstowe South	Inquiry			■	Mitigation	■	2004-2006	2006-2008
Bathside Bay (Harwich)	Inquiry	(■)		■	■		2004-2007	2009 →
HULL	Inquiry	(■)		■	■ 5.5 M€		2007	
Immingham Terminal	Inquiry	(■)		■	■		2004-2006	
London Gateway	Inquiry	(■)		■	■		2000-2007	2007 →

GUIDANCE

As illustrated in the previous sections many procedural uncertainties exist in the implementation of the Birds- and Habitats Directives. In view of the significance of the impact, several initiatives have been taken to develop specific guidance on the implementation aspects of the HD[10] and on the good practices for ports[11] [12]. The **European Seaports Organisation** has published the bulk of guidance and good practices in a special report [7], **which should be consulted by any practitioner not familiar with the subject.**

The following listing presents the essence of the good practices for ports. The sequence follows the decision-making process as shown in fig 1.

Project:

When developing a plan or project to expand the port, the **objectives** should be clearly defined and the need for expansion justified.

Article 6.3:

- In preparing the project an early **screening exercise** for environmental impact is recommended prior to the appropriate assessment. (This could be the Strategic Environmental Assessment currently required by law).
- Involve **stakeholders**, including environmental NGOs, in an early stage and create a platform for regular consultation.
- Make sure that the **scientific data** needed for further impact assessment are available.
- Prepare a **comprehensive** appropriate assessment ('rather more than less').
- Put priority on **preventing** significant environmental impacts on Natura 2000 sites whenever possible.
- Before considering alternatives fully explore the possibility to implement **mitigating measures.**

Article 6.4:

- Develop an **understanding** with the environmental agencies and the competent authorities on the details of the art 6.4 procedure.
- By all means, keep stakeholders involved.
- Ensure that an assessment of **alternatives is wide-ranging** (even when not realistic); don't forget the 'zero' option.
- In case the IROPI procedure comes into play, ensure that the **economic and social considerations** are clearly stated in the light of public interest. (growth, transport needs, trans-European networks, regional development, employment, cost-benefit considerations); select an 'appropriate' time frame in view of the planning horizon in ports.
- In case of compensation: establish **early informal** contact with the European Commission.
- In case of compensation: plan a **generous compensation** package which keeps the Natura 2000 network intact, which proposes "like-for-like" and which has some "reserve margin" built in.
- Explore the possibility of compensation by enhancing the **ecological value of existing** SPA sites (e.g. strengthen corridors).
- Start the effective realisation of **compensation as early** as possible (the compensation will in any case not be fully functional when the project comes on line).

And beyond:

- Develop (pro-actively) an environmental **management plan** for the port, port access and affected Natura 2000 sites.
- Ensure that the needs of **port maintenance operations**, including maintenance dredging, are recognized.
- Obtain **agreement** on the management plan with the competent authorities.
- Don't forget the **monitoring** programme!

This guidance on good practices is not necessarily the low cost option, but it provides the maximum assurance that costly delays due to procedural matters can be avoided. As was illustrated with the case histories, even with the best of all intentions surprises may still pop up any time.

CONCLUSION AND PERSPECTIVE

The paper points out the complexity of the decision-making procedure under the Habitats Directive and the lack of clear definition of key terminology.
The introduction of the Birds-and Habitats Directives has effectively caused considerable uncertainties in the planning procedures for large infrastructure projects at or near designated Natura 2000 sites. The uncertainty has caused delays of up to two years for several port development projects.

Several ports projects encountered the obligation to develop nature compensation under the terms of art.6 of the Habitats Directive. Cost of compensation typically ranges between 5 and 10% of the total investment.
It has taken some 15 years for the port community and for the competent authority to 'learn to live' with the implications of the HD. Some of the issues are rooted in the lack of clarity of the HD, but other problems were caused by the poor transposition into national law of the respective member states or by poor implementation by the authorities.

The guidance on good practices in dealing with the BD and HD, as summarised in this paper, provides reasonable assurance that delays in the project implementation can be kept to a minimum, but it is no guarantee. Even the best advice and every good intention from the project developer and the competent authorities cannot prevent the risk of project delays caused by legal proceedings initiated by third parties.

Moreover, other EU legislation still in preparation (e.g. proposal for a Marine Strategy Directive) or being implemented (e.g. the Water Framework Directive) may make assessment and approval procedures for marine infrastructure even more burdensome and time consuming. There is also a risk that various Directives contain conflicting requirements; the comparison between EU Transport related Directives and Environmental legislation illustrates the concern. While the Transport policy puts emphasis on the promotion of waterborne transport, the environmental policy tends to set narrow objectives and does not promote comprehensive transport solutions[8].

Therefore, and while keeping in mind the expected growth in container transport, with the resulting port congestion, decision making processes need to improve. The plea of the sector to speed up planning and approval procedures is not aimed at ignoring environmental concerns. The port and dredging community does not put into question the objectives of the Birds and Habitats Directives. Many projects have demonstrated that ports are willing to go even beyond legal requirements to meet environmental concerns. The only demand is to provide in turn for more legal certainty.

The European Parliament recently joined the sector demands by stressing the need for constructive approaches that seek to balance transport needs and environmental objectives*.
So, where does this leave us?
- Guidance documents, both from the European institutions and from the industry, are useful but not sufficient.
- Procedural fine-tuning is required at the level of the member states to avoid the excesses of a zealous interpretation of articles 6.3 and 6.4.
- A framework for cooperation between project developers and environmental groups should be enforced. The solution may lie in more strategic planning involving the different stakeholders and better spatial planning (zoning) in which the future needs for industry are respected.
- For concrete project proposals enforceable legal agreements between different stakeholders could reduce the possibility of procedural challenges and thus delays.
- The question needs consideration whether or not further action at EU level is desirable? Is there a case for revision of the procedures under the Habitats Directive?

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* European Parliament resolution on the Maritime Green Paper, 12 July 2007, paragraph 15, stresses that promoting maritime transport as a sustainable mode of transport requires the development and expansion of port areas ; notes that ports are often adjacent to Natura 2000 sites protected under the Birds and Habitats Directives, and stresses the need for constructive approaches and initiatives between port operators and nature conservation bodies in order to achieve acceptable solutions for port authorities, regulators and wider society which respect the spirit and the objectives of those Directives, whilst enabling ports to maintain their central role as global gateways.

In any case, EuDA and ESPO believe in the value of the guidance documents prepared by the port and dredging sector [7] [13]. Recognition of the industry effort to deal with environmental concerns is still needed at EU level. Wider acknowledgement by the Commission of the value of self regulation by the sector could effectively contribute to win-win situations for ports and nature. In our experience
Environmental solutions proposed by port developers are broadly acceptable at national level and should not be frustrated by legalistic interpretations.

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