

COMMISSION NOTE ON THE DESIGNATION OF SPECIAL AREAS OF CONSERVATION (SACs)

Final draft version of 29 March 2012

The purpose of this note is to provide guidance to assist Member States in fulfilling the key duty of designation of Special Areas of Conservation under the Habitats Directive. It reflects the views of the Commission Services, having regard to the relevant case law.

1. The purpose of SAC designation

The overall objective of the Habitats Directive is defined in Article 2. It specifies in particular that: *Measures taken pursuant to this Directive shall be designed to maintain and restore, at a favourable conservation status, natural habitats and species of wild fauna and flora of Community interest*

In order to ensure the restoration or maintenance of natural habitats and species of Community interest, it is necessary to (6th preamble and Article 3) establish, inter alia: *A coherent European ecological network of special areas of conservation, (called Natura 2000); This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.*

The term 'Special Areas of Conservation' is defined in article 1.1: *"special area of conservation means a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated"*.

It is clear from the definition of the SAC, and the overall references to SACs in the Habitats Directive, that the role of an SAC is to help maintain and restore, at a FCS, the species and habitat types of Community interest.

Article 6.1 defines conservation measures that are required to be taken for SACs: *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 site.* Member States Article 17 reports must contain in particular information on the conservation measures referred to in Article 6.1 as well as an evaluation of the impact of these measures on the conservation status of the natural habitat types of Annex I and the species in annex II .

The designation of an SCI as an SAC effectively triggers the implementation of Article 6.1 since all the other measures under Article 6 – including the duty to prevent further deterioration (Articles 6.2, 6.3, 6.4) - already apply to SCIs and are therefore *de facto* applicable to SACs as well.

The need for such positive conservation measures, within SACs, is demonstrated by the findings of the last Article 17 Commission report (for the period 2000-2006). This found that 65% of the assessments of habitat types listed in Annex I and 54% of the assessments of species listed in annexes II, IV and V have an unfavourable conservation status.

Whereas Articles 3.3 and 10 of the Habitats Directive recognise that improving the ecological coherence of Natura 2000 requires measures outside of the sites, for the habitat types listed in annex I, the implementation of article 6 is the primary measure available under the Directive to maintain and/or restore the habitat types listed in annex I to FCS. Whereas there may also be other species protection provisions available to them under the Directive Article 6 is also a key provision for the protection of Annex II species.

It can therefore be concluded that the designation of SACs is central to achieving the objectives of the Habitats Directive and to maintaining or restoring, at FCS, the species and habitats of Community interest since it requires Member States to apply the necessary conservation measures in accordance with Article 6.1.

2. What SAC designation entails

Article 4.4 of the Habitats Directive states that *'Member States shall designate sites of Community importance as a special area of conservation as soon as possible and within six years at most, establishing priorities in the light of the importance of the sites for the maintenance or restoration, at a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which those sites are exposed'*.

This clearly implies that the most important sites and/or those facing threats should be given priority within the six year timeframe for SAC designation. It also implies establishing priorities for the most important species/habitats in order to take action once the sites are designated. Such priorities can also be established at higher levels (EU, biogeographical level, national, regional).

When establishing site level priorities full regard must be given to:

- the ecological requirements for species & habitats listed in the Natura 2000 Standard Data Form (i.e. present on the site, except for those whose presence is non-significant according to the SDF)
- the local, regional, national conservation status of the habitats and species
- threats and degradation processes that species and habitats are exposed to
- the overall coherence of the Natura 2000 network

In light of the definition of 'Special Areas of Conservation' given in article 1.1 and Article 4.4 it is clear that:

- the designation of a SAC must be done through a statutory, administrative and/or contractual act with binding force;
- the necessary conservation measures must be identified within the six years (Article 6.1) so that they can normally be established and applicable at the time of SAC designation.

Each of these obligations is explored further below (see points 4 and 5).

3. Timeframe for SAC designation

According to article 4.4, within six years from the adoption of European lists of Sites of Community Importance (SCI), Member States must designate SCIs as Special Areas of Conservation (SAC) establishing priorities in the light of the importance of the sites for the maintenance or restoration, at a favorable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which those sites are exposed. Annex 1 gives the current deadline for designation¹.

According to Article 6.1. Member States shall establish the necessary conservation measures for special areas of conservation, 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.

The Commission Decision that approves the SCIs clearly states that: *...it should be stressed that the obligations resulting from Articles 4(4) and 6(1) of Directive 92/43/EEC are applicable as soon as possible and within six years at most from the adoption of the initial or updated lists of sites of Community importance for the biogeographical region, depending on which list a site of Community importance was included as such for the first time*

This means the date at which the site was first included in the Commission Decision is the date at which the six years start being counted. If later on, subsequent decisions adjust some of the details of the site this should not be used as an excuse to postpone the SAC designation. These new adjustments will however need to be incorporated into the SAC designation process and taken into account when establishing the necessary conservation measures.

Once a site has been adopted a site of Community Importance Article 4.4 also provides for establishing priorities regarding designation as a SAC. Thus, sites that are considered to be of most importance for the species/habitat types listed in annex I and II and for the coherence of Natura 2000, and which are most under threat should be clearly prioritised in designation and in setting conservation objectives and conservation measures that clearly reflect such importance. Conservation measures should ideally be established following public consultation and appropriate involvement of all interested parties.

4. Procedure for SAC designation

Although the Directive requires Member States to designate SCIs as SACs within six years from the adoption of the European list of SCIs, it does not set out any particular procedure for the designation of SACs. This issue is a matter for the domestic law of the Member States, which enjoy a broad discretion in determining the manner in which they designate the SCI to SAC.

Member States can introduce new designation procedures or adapt existing ones and/or underpin the designation by other legal acts. They have a choice in the type of legal act they use - whether it is statutory, contractual or administrative - and can decide at which administrative level (e.g. national or regional) it is most appropriate to designate SACs. It is

¹ Each of the Commission Decisions for the different biogeographical regions is available on the web site of the Commission at http://ec.europa.eu/environment/nature/natura2000/sites_hab/biogeog_regions/index_en.htm

also up to Member States to determine whether the designation act is done for one site at a time or whether it covers multiple sites.

However, whatever procedure is used, there needs to be a clear legal basis underpinning SAC designation and Member States should ensure the unquestionable binding force of that designation. The designation Act itself must also provide sufficient clarity to satisfy the requirements of the Directive with legal certainty.

This is consistent with existing case-law (Commission/Belgium, C-415/01)²;

- *the provisions of directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty. The principle of legal certainty requires appropriate publicity for the national measures adopted pursuant to Community rules in such a way as to enable the persons concerned by such measures to ascertain the scope of their rights and obligations in the particular area governed by Community law.*
- *With regard to maps demarcating SPAs, they must be invested with unquestionable binding force. If not the boundaries of SPAs could be challenged at any time. Also there would be a risk that the objective of protection under Article 4 of the Directive on birds would not be fully attained.*

5. Legal provisions applying to SACs as a result of designation

In order to provide the necessary legal clarity, the SAC designation act must, in addition to providing the name and location of the site, be clear and legally transparent about:

- Species and habitat types for which SAC designated: for instance, by listing - either in the act itself or in a separate legally binding document - all the species of Annex II and habitat types of Annex I significantly present in each site, (i.e. all species indicated in the Standard Data Form (SDF) as having a significant population size and density³ in relation to the populations present within the national territory (population size category A, B or C) and all habitat types indicated in the SDF as having an excellent (A), good (B) or significant (C) representativity⁴),
- SAC boundaries: by including a map or maps - either in the act itself or in a separate statutory, administrative and/or contractual act (such as a public register) with binding force - showing the precise boundary of the site(s). The map should be in accordance with the relevant national/regional cartographic systems and at a suitable scale to allow all interested and affected parties to be able to determine the spatial location of the site in relation to land holdings. The boundaries must not differ from those of the Site of Community Importance (SCI) established for this area unless the borders of an SCI have already been amended following the established procedure (Doc. Hab.05-06-08) and subject to an updated Commission Decision.
- The purpose of the designation: in its broadest terms this should make clear that the purpose of the SAC is to contribute to enabling the natural habitat types and the species

² See for instance judgment of 27.2.2003, Commission/Belgium, C-415/01, ECR 2003 p.2081, paragraph 21 Although dealing with sites under the Birds Directive this is also relevant to sites under the Habitats Directive .

³ Criterion B(a) of Annex III of the Habitats Directive: Size and density of the population of the species present on the site in relation to the populations present within national territory.

⁴ Criterion A(a) of Annex III of the Habitats Directive, representativity, should be linked to the interpretation manual of Annex I habitat types since this manual provides a definition, a list of characteristic species and other relevant elements. The degree of representativity gives a measure of 'how typical' a habitat type is.

present on the site to be maintained or, where appropriate, restored at a favourable conservation status. Ideally, the specific conservation objectives of the SAC should be spelt out, either in the legal act or in an accompanying legally binding document so that it is clear what the motivation for designating the SAC is and that this involves the introduction of conservation measures where necessary (i.e. not just to protect it from deterioration as set out in Article 6.2-4).

- Legal provisions applying to SACs: The SAC designation or the law transposing the Habitats Directive should make clear that the provisions of Article 6.2, 6.3, 6.4 apply de facto to SACs as well as SCIs – for instance by making a cross reference in the designation act to the relevant articles in the law transposing the Habitats Directive or to a legal act that has been established earlier to give protection to the SCIs.

The SAC designation should also make clear the obligation to apply the necessary conservation measures on the SAC which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the site (in accordance with Article 6.1 of the Habitats Directive). It should also provide, or be accompanied by, a transparent mechanism for establishing and implementing these conservation measures (e.g. management plans, sectoral plans etc...).

As is set out in Article 6.1 of the Habitats Directive Member States have a choice of approaches that may be used in relation to applying the necessary conservation measures. This includes the use of appropriate management plans specifically designed for the sites or integrated into other development plans and appropriate statutory, administrative or contractual measures. The Commission has strongly encouraged the use of management plans as a transparent tool to assist the pro-active management of Natura 2000 sites. Whatever the measure chosen the aim must be for these to be sufficient to achieve the objectives of Article 6.1 of the Directive.

The definition of the SAC makes clear that the conservation measures must normally be established at and applied from the time of designation, i.e. by the end of the six years deadline. This does not necessarily mean that they cannot be adapted after the six years in light of improved knowledge and feedback on experience with implementation. The management of sites, and in particular the identification of what is 'necessary' to meet the 'ecological requirements' of sites under Article 6.1 will continue to evolve over time, long after the sites are designated. The effects of climate change, for example, and other influences on sites may in future require review of the measures needing to be taken under Article 6.1.

Determining conservation measures is also often an iterative process and very much dependent on stakeholder involvement and acceptance and it is recognised that this takes time. However, the six year time frame from SCI adoption to SAC designation implies that the work on identifying and establishing the necessary conservation measures for the site should begin as soon as the site has been adopted as an SCI and not at the end of the six year period.

It is clear that establishment and application of the necessary conservation measures must be based on a full understanding of the conservation objectives. Whereas, ultimately, this must be understood at site level Member States may decide to develop generic conservation objectives and measures for the species and habitat types at broader geographical scales (e.g. nationally, regionally) which can then be cross-referenced to the site level.

6. The type of legal protection regime to be established for SACs

Article 6 is a key provision of the Habitats Directive, as it sets out the framework for site conservation and protection, and includes proactive, preventive and procedural requirements. Article 6(2), (3) and (4) applies to SCIs (according to Article 4(5) of the Habitats Directive). Article 6(1) applies only to SACs, which are also subject to the requirements of Article 6(2), (3) and (4).

As regards the protection requirements of SAC, the relevant case-law⁵ should be taken into account when defining the legal protection regime of SAC;

- Article 6 of the Habitats Directive should be understood as requiring the Member States to provide SACs with a legal protection regime that is capable of enabling the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range (article 3).
- The absence of any specific provision(s) linking the designation of a site as a SAC to the application of an adequate legal protection and necessary conservation measures for the species or habitats present on this SAC undermines the objective set out in Articles 3, 4(4) and 6 of the Habitats Directive.

Thus, it is clear from existing case law that the SAC designation must be linked to an adequate legal protection and conservation regime which is applied in accordance with article 6 of the Habitats Directive.

What the protection and conservation regime should contain

The protection and conservation regime should cover all the provisions of Article 6. The protection regime must in particular:

- Contain the necessary conservation measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II *present on the SAC*, except those whose presence are considered non-significant according to the Natura 2000 Standard Data Form. The conservation measures should be detailed and substantive enough with the aim of ensuring that their implementation delivers the conservation objectives of the site and contributes to the overall objective of the Directive to maintain and restore the species and habitat types concerned to a FCS across their natural range.

How these conservation measures are established and how they are implemented is up to each Member State to decide. Member States may require management plans to be established which identify the necessary conservation measures and provide a mechanism for ensuring their implementation. They may adopt horizontal measures which ensure the implementation of the necessary conservation measures which have identified for the habitat types and the species present on the SAC. These measures maybe appropriate statutory, administrative or contractual.

But whatever mechanism is used, Member States must ensure that the necessary conservation measures are sufficiently specific, precise and clear to provide legal

⁵ See the following judgments of the Court: Commission/Spain, 2 August 1993, C-355/90, ECR 1993 p.4221, paragraphs 28-32; Commission/France, 18 March 1999, C-166/97, ECR 1999 p. 1719, paragraphs 21 and 25; Commission/France, 25 November 1999, C-96/98, ECR 1999 p.8531, paragraphs 22-27; Commission/ Belgium, 27 February 2003, C-415/01, ECR 2003 p.2081, paragraphs 15-17 and 21-22; Commission / Spain, 22 September 2011, C-90/10, ECR 2011 p.---, paragraph 37.

certainty for those involved. They must also ensure that conservation measures developed under Article 6.1 are effectively implemented.

- Take appropriate steps to avoid the deterioration of natural habitats and the habitats of species as well as significant disturbance of the species for which those areas have been designated. Again it is up to the Member State to decide how Article 6.2 is implemented in practice. For example Member States may decide to establish a list of potentially damaging operations which require prior consent for each site or suite of sites, or they may identify these in national/regional legislation.
- Ensure that a legal consent procedure is in place for any plans or projects not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, to ensure that the integrity of the SAC is not adversely affected (unless article 6.4 is invoked)

7. Applicability to SPAs

In accordance with Article 3.1 of the Habitats Directive Special Protection Areas designated under the Birds Directive form part of the Natura 2000 network. Article 6(2), (3) and (4) applies to SCI (according to Article 4(5) of the Habitats Directive) and to Special Protection Areas (according to Article 7 of Directive 92/43/EEC⁶). The provisions of Article 6(1) do not apply to SPAs. However, analogous provisions apply to SPA by virtue of Article 4(1) and (2) of the Birds Directive. I.e. Member States have to ensure that the species mentioned in Annex I and regularly occurring migratory Bird species are subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution. The ECJ case-law on these provisions is already quite extensive. For example in case C-293/07 the Court clarified the need for a coherent, specific and integrated legal regime capable of ensuring viable management and effective protection of SPAs. This means that SPAs need to be subject to a similar clear protection regime as SACs (boundaries, reasons for the designation, conservation objectives and measures).

⁶ *“Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.”*

