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SYNERGIES BETWEEN EIA / SEA DIRECTIVES AND SUBSTANTIVE EU ENVIRONMENTAL LAW

Valerie Fogleman

Consultant, Stevens & Bolton LLP

Professor of Law, Cardiff University School of Law and Politics

TOPICS

- EIA Directive (2011/92/EU as amended by 2014/52/EU) and SEA Directive (2001/42/EC) and their synergies with the following Directives
- Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (Habitats Directive)
- Directive 2000/60/EC establishing a framework for Community action in the field of water policy (Water Framework Directive or WFD)
- Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control) (Industrial Emissions Directive or IED)

EIA DIRECTIVE

- Objective
 - To ensure that an authority that grants consent or approval to a public or private development project, and the public, are aware of the project's likely significant environmental effects and ways in which they can be mitigated

The concept of environmental impact assessments began with the National Environmental Policy Act of 1969 (NEPA) which requires federal agencies in the US to assess the environmental impacts of proposed 'major Federal actions significantly affecting the quality of the human environment'. NEPA was followed by mini-NEPAs in States throughout the US and environmental assessment legislation around the world, including the EU. Virtually every jurisdiction in the world now has similar legislation. As in NEPA and the EIA and SEA Directives, the legislation tends to be procedural rather than substantive.

EIA DIRECTIVE

- Scope
 - Environmental impact assessment (EIA)
 - Automatically required for 'projects' listed in annex I
 - Includes very large industrial installations, infrastructure, extractive and agricultural projects
 - May be required for 'projects' listed in annex II
 - Includes large industrial installations, infrastructure, extractive and agricultural projects (some are smaller versions of annex I projects)
 - Decided on a case-by-case basis or according to thresholds or criteria that include
 - Size
 - Location such as sensitive ecological areas
 - Potential impact such as the area affected and duration
 - Conversely, EIA is not required for any projects that are not listed in annexes I or II

Whilst the EIA applies to a large number and range of projects, its scope has defined limits specified in the Directive itself.

The process to determine whether an EIA is required for annex II projects, that is whether the project is likely to have significant environmental effects, is called 'screening'. See European Commission, Environmental Impact Assessment of Projects; Guidance on Screening (Directive 2011/92/EU as amended by 2014/52/EU) (2017); http://ec.europa.eu/environment/eia/pdf/EIA_guidance_Screening_final.pdf

EIA DIRECTIVE

- Scope (continued)
 - 'Project' is defined as
 - 'the execution of construction works or of other installations or schemes, other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'

The CJEU has concluded that the definition of 'project' in the EIA Directive is relevant to defining the concept of plan or project in article 6(3) of the Habitats Directive (see the section of this presentation on the Habitats Directive). *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (Case C-127/02), para 26.

EIA DIRECTIVE

- Scope (continued)
 - Likely significant effects of the proposed project from
 - Use of natural resources
 - Emissions of pollutants, noise, vibration, light, heat and radiation, creation of nuisances and disposal and recovery of waste
 - Technologies and substances used in the project

Article 5(1) and annex IV of the EIA Directive set out information to be provided by a developer in an environmental impact assessment report in respect of the likely significant effects of a proposed project. The scope of the information that is required increased substantially after the 2014 revision to the Directive.

EIA DIRECTIVE

- Scope (continued)
 - Likely significant effects of the proposed project on
 - Population and human health
 - Biodiversity including fauna and flora, with particular attention to species and habitats protected by the Birds Directive (2009/147/EC) and the Habitats Directive
 - Land, soil, water, air and climate
 - Material assets, cultural heritage, and the landscape
 - Expected significant adverse effects derived from vulnerability of the project to risks of major accidents and/or disasters

Article 3(1) and annex IV of the EIA Directive set out the factors that may be directly or indirectly significantly affected by a project. The environmental impact assessment must identify, describe and assess such effects in the light of each individual case. The factors have increased substantially as a result of the 2014 revision to the Directive.

EIA DIRECTIVE

- Issues examined in EIA include
 - Physical characteristics of the whole project and land use requirements
 - Main characteristics of the project's operational phase including energy demand, energy used, nature and quantity of materials, natural resources including water, land, soil and biodiversity
 - Estimated type of expected residues and emissions and quantities and types of waste produced during construction and operational phases
 - Reasonable alternatives studied by the developer, and an indication of the main reasons for selecting the chosen alternative including a comparison of its environmental effects
 - Measures to avoid, prevent and reduce or, if possible, offset identified significant adverse environmental effects
 - Proposed monitoring arrangements, where appropriate

The 2014 amendments to the EIA Directive (2014/52/EU) increased the criteria to be considered in environmental impact assessment to include, among other things, biodiversity, climate change, human health and risk prevention. See, e.g., European Commission, Guidance on Integrating Climate Change and Biodiversity into Environmental Impact Assessment (2013); <http://ec.europa.eu/environment/eia/pdf/EIA%20Guidance.pdf>

EIA DIRECTIVE

- Public participation
 - Extensive and detailed provisions include
 - Informing the 'public' of the application of EIA, and decisions to grant or refuse development consent
 - Ensuring the effective participation of the 'public concerned' in decision-making procedures by electronic and other public notices including the request for development consent, application of EIA, possible draft and final decisions, location of available information, and time frames for consultation and comments

The provisions on access to justice, including public participation, were not included in Directive 85/337/EEC (the original EIA Directive). The 1997 amendments provided for some public participation (Directive 97/11/EC). The 2003 amendments, which implemented the Aarhus Convention, added the public participation provisions (Directive 2003/35/EEC). See Jan Darpö, 'Article 9.2 of the Aarhus Convention and EU Law; Some Remarks on CJEU's Case-Law on Access to Justice in Environmental Decision-Making' (2014) 11 Journal for European Environmental & Planning Law 367, 369; available at http://jandarpa.se/wp-content/uploads/2017/07/2014-Art-9-2-EU-law_JEEPL.pdf

EIA DIRECTIVE

- Public participation (continued)
 - 'Public' is defined as 'one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups'
 - 'Public concerned' is defined as 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures For the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest'

The 'public concerned' includes individuals and groups such as environmental NGOs. The term reflects article 2.5 of the Aarhus Convention which describes the term as follows: 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest'. See Jan Darpö, 'Article 9.2 of the Aarhus Convention and EU Law; Some Remarks on CJEU's Case-Law on Access to Justice in Environmental Decision-Making' (2014) 11 Journal for European Environmental & Planning Law 367, 368; available at http://jandarpö.se/wp-content/uploads/2017/07/2014-Art-9-2-EU-law_JEEPL.pdf In *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* (Case C-263/08), the CJEU stated that the EIA Directive 'distinguishes between the public concerned by one of the projects falling within its scope in a general manner and, on the other hand, a sub-group of natural or legal persons within the public concerned who, in view of their particular position vis-à-vis the project at issue, are... entitled to challenge the decision which authorises it' (para 42).

EIA DIRECTIVE

- Monitoring
 - EIA report shall include a description of proposed monitoring arrangements 'where appropriate'
 - European Commission and some Member States consider that this means that monitoring is mandatory
 - Some Member States consider that it is discretionary, depending on whether monitoring is 'appropriate'

The 'requirement' to implement monitoring arrangements, which was introduced by the 2014 amendments to the EIA Directive, does not specify the frequency or details of reporting the results of the monitoring to the relevant competent authority.

EIA DIRECTIVE

- Access to justice (courts)
 - Detailed provisions
 - Ensure that 'members of the public concerned':
 - (a) having a *sufficient interest*, or alternatively;
 - (b) maintaining the *impairment of a right* [if a precondition in Member State law];
 - have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of [the EIA Directive]' (emphasis added)
 - Member State law determines what constitutes 'a sufficient interest' and 'impairment of a right' but must be consistent with wide access to justice of the 'public concerned'
 - Procedure must be 'fair, equitable, timely and not prohibitively expensive'

In *R (Edwards) v Environment Agency* (Case C-260/11), the CJEU ruled that the requirement 'that judicial proceedings should not be prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result'. The CJEU further stated that 'Where a national court is called upon to make an order for costs against a member of the public who is an unsuccessful claimant in an environmental dispute or, more generally, where it is required ... to state its views, at an earlier stage of the proceedings, on a possible capping of the costs for which the unsuccessful party may be liable, it must satisfy itself that that requirement has been complied with, taking into account both the interest of the person wishing to defend his rights and the public interest in the protection of the environment' (para 35).

SEA DIRECTIVE

- Objective
 - To ensure that an environmental assessment is carried out of certain 'plans and programmes' that are likely to have significant effects on the environment
 - Upstream application versus downstream application of projects subject to the EIA Directive

In contrast to the 'downstream' application of the EIA Directive, the SEA Directive operates at an upstream or strategic level, even though neither the word 'strategy' nor the word 'strategic' appears in the Directive itself.

SEA DIRECTIVE

- Scope
 - Categories of 'plans and programmes' specifically include those that require an appropriate assessment (AA) pursuant to the Habitats Directive
 - Determination of a likely significant effect on the environment is automatic for AAs
 - Environmental assessment, at this strategic level, is triggered by requirements for an AA and/or an EIA
 - No list of plans and programmes as in the EIA Directive

The scope of plans and programmes is somewhat unclear due, in part, to the different positions taken by the then 15 Member States when the EU adopted the Directive. Some Member States wanted the scope of plans and programmes to be narrow and precisely defined whilst others wanted a broad scope.

SEA DIRECTIVE

- Scope (continued)
 - 'Plans and programmes' are defined as
 - 'plans and programmes, including those co-financed by the European Community, as well as any modifications to them:
 - which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and
 - which are required by legislative, regulatory or administrative provisions'
 - Not really a definition; more of a qualification with the focus on the entity that prepares the plan or programme and its mandate for preparing it instead of the content of the plan or programme

Unlike the EIA Directive, the focus of the SEA Directive is on the entity that prepares the plan or programme and 'its mandate for doing so, rather than the content of the [plan or programme]'. William Sheate, Helen Byron, Suzan Dagg and Lourdes Cooper, 'The Relationship between the EIA and SEA Directives; Final Report to the European Commission (Contract No ENV.G.4./ETU/2004/0020r, August 2005), 5, s 3.2.1.

In *Inter-Environnement Bruxelles ASBL v Région de Bruxelles-Capitale* (Case C-567/10), the CJEU concluded that a plan or programme is 'required by legislative, regulatory or administrative provisions' if it is regulated by national legislative or regulatory provisions that determine the competent authorities that adopts it and the procedures for preparing it even if its adoption is not necessarily mandatory (para 31).

SEA DIRECTIVE

- Issues examined in an environmental assessment include
 - Description and main objectives of the plan or programme and its relationship with other relevant plans and programmes
 - Relevant aspects of current state of the environment and its likely evolution if the plan or programme is not implemented
 - Environmental characteristics of areas likely to be significantly affected
 - Any existing problems including, in particular, any relating to Natura 2000 sites
 - Environmental protection objectives and ways in which they have been taken into account
 - Measures to prevent, reduce and as fully as possible offset any significant adverse environmental effects
 - Outline of reasons for selecting the alternatives
 - Monitoring measures

The process of determining the issues to be examined in an environmental assessment is known as 'scoping', which is carried out in conjunction with environmental authorities. The requirements for scoping in the SEA Directive are minimal. There are thus differences between Member States in the measures that are carried out in scoping as well as consultation with environmental authorities including the identity of the authority that determines the outcome of the scoping process itself. The authority that makes the determination is often the planning authority after it has consulted the environmental authority. Alternatively, the environmental authority may make the determination. See Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application and effectiveness of the Directive on Strategic Environmental Assessment (Directive 2001/42/EC) (COM(2009) 469 final, 14 September 2009), para 3.3; <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52009DC0469>

In some Member States, the environmental authority acts as an intermediary between the authority that develops the plans and programmes and the authorities that are consulted as part of the SEA procedure. See Report from the Commission to the Council and the European Parliament under Article 12(3) of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (COM(2017) 234 final, 15 May 2017), s 2.5; <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0234&from=EN>

SEA DIRECTIVE

- Natura 2000
 - Network of sites across the EU designated as special areas of conservation (SACs) under the Habitats Directive and classified as special protection areas (SPAs) under the Birds Directive
 - About 27,000 sites that cover over 18% of the territorial area of the EU and about 6% of its marine areas
 - Considered nearly complete for land but not for marine areas
 - Composition of sites: over 50% forests, over 34% agricultural lands and grassland ecosystems, nearly 10% wetland ecosystems including peatlands; also includes parts of rivers, including approximately 40% of the River Danube
 - Smallest sites are under 1 hectare; largest are over 5,000 km²; 90% are under 1,000 hectares
 - Extent of Natura 2000 network in each Member State varies
 - E.g., Bulgaria 34.46%, Germany 15.46%, Poland 19.56%, Slovenia 37.86%, United Kingdom 8.57%

The primary purpose of the Natura 2000 network is to preserve specified species and natural habitats in the EU, as listed in the Birds Directive and Habitats Directive, with the mix of private / public areas varying between individual Member States. The network includes privately owned areas and areas owned by public authorities. Sixty-five per cent of people in the EU live within 5 km, and 98% live within 20 km, of a Natura 2000 site.

SEA DIRECTIVE

- Public participation
 - Extensive and detailed provisions include
 - Draft plans or programmes and environmental reports must be publicly available
 - Public must be given early and effective opportunities with appropriate time frames to comment on them before the plan or programme is adopted or submitted to the legislative procedure
 - Public must be informed when a plan or programme is adopted
 - Environmental reports must include a statement describing how comments and the results of consultation have been taken into account, reasons for choosing the adopted plan or programme in light of other reasonable alternatives, and monitoring measures
 - Detailed arrangements for providing information and consulting the public are determined by each Member State

SEA DIRECTIVE

- Public participation (continued)
 - 'Public' is defined as 'one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups' (same as EIA Directive)
 - No definition or mention of 'public concerned'
 - But the public 'including the public affected or likely to be affected by, or having an interest in' decision-making under the SEA Directive, including relevant non-governmental organisations such as those promoting environmental protection must be identified prior to consultation

Member States have adopted various measures for public participation including the issuance of public announcements, publication in official journals or the media, holding public meetings, carrying out internet surveys and questionnaires. See Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application and effectiveness of the Directive on Strategic Environmental Assessment (Directive 2001/42/EC) (COM(2009) 469 final, 14 September 2009), para 3.6; <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52009DC0469>

SEA DIRECTIVE

- Access to justice
 - No direct provisions

There is a direct correlation between the absence of a definition or mention of the 'public concerned' in the SEA Directive and the absence of access to justice provisions.

SEA DIRECTIVE

- Monitoring
 - 'the significant environmental effects of the implementation of plans and programmes [must be monitored] in order, inter alia, to identify at an early stage unforeseen adverse effects, and to be able to undertake appropriate remedial action'
 - Frequency of monitoring and the approach for it are not specified

A major reason for monitoring is to 'identify unforeseen adverse effects at an early stage'. Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application and effectiveness of the Directive on Strategic Environmental Assessment (Directive 2001/42/EC) (COM(2009) 469 final, 14 September 2009), para 3.1; <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52009DC0469>

HABITATS DIRECTIVE

- Objectives
 - To maintain or restore species and natural habitats listed in annex I (natural habitat types) and annex II (animal and plant species) at a 'favourable conservation status'
 - To contribute to the Natura 2000 network
 - To ensure that measures to conserve Natura 2000 sites are in place
 - Member States must avoid deterioration of protected species and habitats and the significant disturbance of species; applies to
 - Sites of Community Importance (sites listed by the Commission to be designated as SACs by Member States)
 - SACs
 - SPAs

The main aim of the Habitats Directive is the maintenance and restoration, at favourable conservation status, of natural habitats and species listed in the annexes to the Directive, as those measures contribute to biodiversity in the EU. The Habitats Directive does not specify a deadline for achieving favourable conservation status. Only about 23% of animal and plant species and about 16% of habitat types in the EU are in a favourable conservation status.

HABITATS DIRECTIVE

- Scope
 - Applies to all listed protected species and natural habitats
 - An AA must be carried out for a 'plan or project' that is likely to have a significant effect on the conservation objectives and the integrity of a Natura 2000 site
 - That is, an AA refers only to a Natura 2000 site but the plan or project need not be located on it
 - Articles 6(3) and 6(4) set out the criteria for an AA

The CJEU has issued over 80 judgments on the Habitats Directive, including approximately 60 cases brought by the European Commission. This accounts for about 20% of environmental cases decided by the CJEU. The General Court has issued about 20 judgments on the Habitats Directive.

HABITATS DIRECTIVE

- Scope (continued)
 - 'Plan or project'
 - Not defined but definition of 'project' in EIA Directive is relevant to defining the concept of 'plan or project' in the Habitats Directive
 - *Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse vereniging tot Bescherming van Gogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (Waddenzee)* (Case C-127/02)

In *Waddenzee*, the Court of Justice concluded that mechanical cockle fishing that had been carried on for many years pursuant to annual licences for limited periods fell within the concept of a 'plan' or 'project' in respect of article 6(3) of the Habitats Directive. New assessments for each licence were carried out of the possibility of carrying out the cockle fishing and the site at which it was carried out (para 29).

HABITATS DIRECTIVE

- Scope (continued)
 - Issues examined in an AA
 - Description of the plan or project
 - Description of the baseline condition when it is relevant to the conservation objectives and integrity of the Natura 2000 site including soil, water, flora, fauna, climate and relationships between them
 - Identification of impacts and assessment of their significance
 - Findings of the AA must be recorded and reported

The Court of Justice stated, in *Waddenzee*, in respect of an AA, that article 6(3) 'does not define any particular method for carrying out such an assessment. None the less, according to the wording of that provision, an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives. Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field'. *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (Case C-127/02), paras 52-54.

HABITATS DIRECTIVE

- Article 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, either individually or in combination with other plans or projects, shall be subject to *appropriate assessment* of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, 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 and, if appropriate, after having obtained the opinion of the general public' (emphasis added)

HABITATS DIRECTIVE

- Article 6(3) thus establishes a two-step process
 - Consider whether the plan or project is likely to have a significant effect on a Natura 2000 site
 - If so, carry out an AA of the site in view of its conservation objectives and integrity
- CJEU has interpreted 'likely to have a significant effect' to mean that an AA must be carried out for a plan or project that is not directly connected with or necessary to the management of an SAC if the possibility of harm cannot be excluded on the basis of objective information.
- 'No reasonable scientific doubt as to the absence of such effects' must remain (*Waddenzee*)

In *Briels v Minister van Infrastructuur en Milieu* (Case C-521/12), the CJEU reiterated that article 6(3) integrates the precautionary principle. The CJEU stated that an AA 'under Article 6(3) ... cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned' (para 27). In addition, the court stated that protective measures included in a project with the aim of compensating for its negative effects on a SAC or SCI cannot be taken into account when carrying out an AA (para 29).

HABITATS DIRECTIVE

- Article 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 that 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' (emphasis added)

- Priority natural habitat types are natural habitat types in danger of disappearance
- Priority species are the most threatened species

Compensatory measures are different from mitigation measures. They must be independent of the plan or project including any associated mitigation measures. Their intent is to offset negative effects of a plan or project in order to maintain the ecological coherence of the Natura 2000 network.

HABITATS DIRECTIVE

- Article 6(4)
 - Imperative reasons of overriding public interest (IROPI)
 - Not defined but article 6(4) mentions human health, public safety and beneficial consequences of primary importance for the environment
 - Guidance document on article 6(4) of the Habitats Directive (2007-2012)
 - Clarifies the concepts of alternative solutions, IROPI, compensatory measures, overall coherence
 - Only public interests can be balanced against conservation aims of the Directive
 - Projects developed by private bodies can only be considered if the above public interests are served
 - Short-term interests cannot be overriding

Examples of overriding public interest include (1) linking a high-speed line (TGV East) in France to other lines (could only be done at certain location), and (2) a reservoir in River Guadalquivir basin to provide water for human consumption and industrial uses and agriculture.

HABITATS DIRECTIVE

- Article 6(4) thus imposes three conditions for carrying out a plan or project despite a negative AA
 - Absence of alternative solutions
 - IROPI
 - Obligation to carry out compensatory measures

Examples of compensatory measures include species re-introduction, species recovery and reinforcement, and land purchase rights acquisition.

HABITATS DIRECTIVE

- Public participation
 - No public participation required for an AA
 - Competent authority may agree to a plan or project after obtaining the opinion of the general public 'if appropriate'
 - Depends on individual Member States
 - NB: if a protected native species is proposed to be re-introduced, public concerned must be consulted
- Access to justice
 - Not directly provided for

In the Slovak Brown Bear case, the CJEU stated that, in respect of a species protected by EU law and, in particular, the Habitats Directive, a national court should 'interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention. [It is therefore] for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental protection organisation, such as the [environmental NGO involved in the case] to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law'. *Lesoochránárske zoskupenie VLK v Obvodný úrad Trenčín* (Case C-240/09) , paras 50-51.

HABITATS DIRECTIVE

- Monitoring
 - Implicit in article 6(2) which directs Member States to take appropriate steps in SACs to avoid deterioration of protected natural habitats and habitats of protected species as well as disturbance of species for which an SAC has been designated in so far as the disturbance could be significant in respect of the objectives of the Habitats Directive

Article 11 of the Habitats Directive provides that 'Member States shall undertake surveillance of the conservation status of the natural habitats and species referred to in Article 2 with particular regard to priority natural habitat types and priority species'. That is, article 11 requires Member States to monitor the habitats listed in annex I and species listed in annexes II, IV and V.

EIA AND HABITATS DIRECTIVE

- Integration of the EIA Directive with the Habitats Directive
 - Directive 2011/92/EU provides that the EIA may be integrated into other procedures for consent to projects (article 2(2))
 - Directive 2014/52/EU repeats the above clause and then states that when there is a simultaneous obligation to carry out EIA and AAs, Member States should ensure that co-ordinated and/or joint procedures that fulfil the requirements of all three Directives should be followed 'where appropriate'
 - That is, there is an obligation to carry out co-ordinated, joint procedures, or a hybrid but some discretion is allowed by the term 'where appropriate'
- Co-ordinated procedure means carrying out the individual assessments for a project under supervision of a single authority
- Joint procedure means a single assessment of the environmental impact of a project

The co-ordinated and joint procedures are described in Commission guidance document on streamlining environmental assessments conducted under Article 2(3) of the Environmental Impact Assessment Directive (Directive 2011/92/EU of the European Parliament and of the Council, as amended by Directive 2014/52/EU) OJ C 273/1 (27 July 2016).

The European Commission reported in 2017 that only 10 Member States had adopted national legislation that provided for co-ordinated or joint procedures. See Report from the Commission to the Council and the European Parliament under Article 12(3) of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (COM(2017) 234 final, 15 May 2017), s 3.1; <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0234&from=EN> Those Member States include Belgium (Flemish Region), Germany and Italy. Some other Member States provide for co-ordinated or joint procedures as common practice. See Milieu, Study concerning the preparation of the report on the application and effectiveness of the SEA Directive (Directive 2001/42/EC) Final Study (2016) 167; http://ec.europa.eu/environment/eia/pdf/study_SEA_directive.pdf

SEA AND HABITATS DIRECTIVE

- Integration of the SEA Directive with the Habitats Directive
 - SEA Directive states that Member States may provide for co-ordinated or joint procedures when the SEA Directive and the Birds and Habitats Directives simultaneously apply to a plan or programme so as, among other things, to avoid duplication of assessment
 - Approximately two-thirds of Member States have joint procedures either set out in legislation or carried out in practice

The CJEU held, in *Sillogos Ellinon Poleodomon kai Khorotakton v Ipourgos Perivallontos, Khorotaxias kai Dimosion Ergon* (Case C-177/11), that the requirement for an assessment under the SEA Directive when a plan or project requires an AA under the Habitats Directive applies on its own merits (para 24).

EIA AND HABITATS DIRECTIVE

- Comparison of EIA and Habitats Directives
 - Directive 2014/52/EU requires inclusion of 'biodiversity, with particular attention to species and habitats protected under [the Birds and Habitats Directives]'
 - That is, if there is a sufficient probability of significant effects on a Natura 2000 site to require an AA, there is implicitly a sufficient probability of significant effects to require EIA
 - EIA and AA must both be prepared prior to a competent authority making a permitting decision

The threshold for an AA is very low. The CJEU ruled, in *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (Case C-127/02), that an appropriate assessment must be carried out for any plan or project that is not directly connected with, or necessary to, the management of a special area of conservation if the possibility of harm cannot be excluded on the basis of objective information (para 44). In such a case, there must remain 'no reasonable scientific doubt as to the absence of such effects' (para 67).

EIA AND HABITATS DIRECTIVE

- Comparison of EIA and Habitats Directives (continued)
 - EIA must be prepared for all projects listed in annex I and may be required for projects listed in annex II
 - No list of projects in Habitats Directive
 - No limitation on projects that may require an AA but scope is limited to the conservation objectives and integrity of Natura 2000 sites
 - EIA covers more environmental effects; AAs are more targeted and limited
 - EIA is procedural only; the decision-maker can authorise a project regardless of whether it includes negative environmental impacts as long as likely environmental effects and comments are 'taken into account'
 - Articles 6(3) and 6(4) impose substantive requirements; a competent authority cannot authorise a project that fails to comply with them

In *Commission v Ireland* (Case C-418/04), the CJEU stated that the EIA and SEA Directives 'contain provisions relating to the deliberation procedure, without binding the Member States as to the decision, and relate to only certain projects and plans' Accordingly, assessments carried out pursuant to Directive 85/337 or Directive 2001/42 cannot replace the procedure provided for in Article 6(3) and (4) of the Habitats Directive' (para 231). Whilst a plan or programme that is subject to the Habitats Directive cannot proceed unless it complies with that Directive, an environmental report that is prepared for a plan or programme that is subject to the SEA Directive is only 'taken into account' during its preparation and its formal adoption. See Milieu, Study concerning the preparation of the report on the application and effectiveness of the SEA Directive (Directive 2001/42/EC) Final Study (2016) 165; http://ec.europa.eu/environment/eia/pdf/study_SEA_directive.pdf

EIA AND HABITATS DIRECTIVE

- Comparison of EIA and Habitats Directives (continued)
 - Lower threshold for AAs than for EIA
 - Therefore, an AA may be required for a plan or project that does not require EIA
- Extensive public participation provisions in EIA Directive
- Very limited provision in Habitats Directive

Opportunities for synergies in screening between the EIA Directive and the Habitats Directive are stated to include the following.

‘The likelihood of significant impacts on a Natura 2000 site in accordance with Article 6(3) of the Habitats Directive may be central to Screening under the EIA Directive. In many instances, where an AA is required for a proposed Project under the Habitats Directive, then the determination of the likely significant impacts in the Screening procedure, of an Annex II Project under the EIA Directive, is preempted by the obligation to carry out an AA under the Habitats Directive, since:

- the impact on a Natura 2000 site is a part of the concept of ‘environment’ covered under the EIA Directive, and
- the obligation to carry out an AA presupposes that a significant impact cannot be excluded at the stage of EIA Screening’.

European Commission, Environmental Impact Assessment of Projects; Guidance on Screening (Directive 2011/92/EU as amended by 2014/52/EU) (2017) 67;
http://ec.europa.eu/environment/eia/pdf/EIA_guidance_Screening_final.pdf

SEA AND HABITATS DIRECTIVE

- Comparison of SEA and Habitats Directives
 - SEA takes into account the wide range of environmental issues specified in annex I of the SEA Directive
 - AA is focused on the conservation objectives and integrity of Natura 2000 sites
 - SEA is procedural only with likely environmental effects and comments 'taken into account'; Habitats Directive is substantive
 - SEA is based on criteria in the plan or programme
 - AA is based on the location, that is, the relevant Natura 2000 site(s)
 - Extensive public participation requirements in SEA Directive
 - Very limited provision in Habitats Directive

One commentator has suggested that the reason for the absence of a requirement for public consultation in the Habitats Directive may be its adoption when requirements for public participation in EU and national law was only just beginning. See Milieu, Study concerning the preparation of the report on the application and effectiveness of the SEA Directive (Directive 2001/42/EC) Final Study (2016) 165 (citing Day (2015));

http://ec.europa.eu/environment/eia/pdf/study_SEA_directive.pdf

Guidance by the European Commission on implementation of the SEA Directive states that, because the Habitats Directive is binding, it may be preferable to describe the effects of a plan or programme on the environment (as required under the SEA Directive) in a separate chapter of an environmental report than their effects on protected sites and protected species under the Habitats Directive. European Commission, Commission's Guidance on the implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (2006), para 9.23;

http://ec.europa.eu/environment/archives/eia/pdf/030923_sea_guidance.pdf

EIA / SEA AND HABITATS DIRECTIVE

- Synergies between EIA / SEA Directives and the Habitats Directive
 - Co-ordinated and/or joint procedures, or a combination of both, for preparing an EIA / SEA and an AA allows for the development of synergies between them and the avoidance of duplication and conflicts
 - Risk of duplication in the assessments is low due to the complementary nature of EIA / SEA and AAs
 - Screening under EIA for an annex II project is pre-empted by the Habitats Directive if an AA must be prepared for the project
 - Requirement to prepare an AA means that a significant environmental effect cannot be excluded

The SEA and AA procedures are mainly complementary due to their distinct differences in scope. As stated in a study on the SEA for the European Commission, however, the 'differences in scope ... may in some cases lead to a risk of inconsistency [because, for example, during an AA], an alternative is preferred (even if it costs significantly more) if it will substantially minimise impacts on biodiversity This is not the case with SEA, which is only required to assess 'reasonable' alternatives to prevent or minimise environmental impacts'. Milieu, Study concerning the preparation of the report on the application and effectiveness of the SEA Directive (Directive 2001/42/EC) Final Study (2016) 166; http://ec.europa.eu/environment/eia/pdf/study_SEA_directive.pdf

EIA / SEA AND HABITATS DIRECTIVE

- Synergies (continued)
 - AA's focus on conservation objectives and integrity of Natura 2000 sites results in more detailed assessment of biodiversity in the EIA or SEA
 - Similarly, an EIA or SEA assessment's focus on much broader environmental issues results in a more holistic review and assessment
 - Information required for an EIA / SEA assessment can be used for an AA and vice versa
 - Public participation requirements in EIA / SEA can apply to an AA if a co-ordinated or joint procedure, or a hybrid of them is adopted

WFD

- Objectives

- Establish a framework to protect inland surface waters, transitional waters, coastal waters and groundwater
 - No deterioration of the status of surface or ground waters
 - Protect and enhance the status of aquatic ecosystems and wetlands and other terrestrial ecosystems that directly depend on surface and ground waters
 - Promote sustainable water use based on long-term protection of available water resources
 - Progressively reduce pollution by priority substances in surface waters and phase out emissions of priority hazardous substances
 - Priority substances: substances that pose a significant risk to or via the aquatic environment
 - Priority hazardous substances: sub-set of priority substances
 - Prevent and limit entry of pollutants into groundwater and reverse any significant, upward trend of pollutants
 - Contribute to mitigating the effects of floods and droughts

The WFD, which was adopted by the EU on 23 October 2000, is programmatic and regulatory. That is, it incorporates or links with regimes for drinking water, bathing water, waste water, nitrates and fish and shellfish water bodies. The framework established by the WFD is sophisticated and includes measures for the protection of inland surface waters, transitional waters, coastal waters and groundwater in the EU based on river basins rather than political boundaries.

WFD

- Objectives (continued)
 - Achieve 'good status' of waters covered by the WFD by 2015
 - Surface waters: good ecological status and good chemical status
 - Artificial or heavily modified waters: good ecological potential and good chemical status
 - Groundwater: good chemical status and good quantitative status
 - Comply with standards and objectives for protected areas, including Natura 2000 sites that are water dependent, by 2015
 - Status of waters is assessed by reference to surface water, artificial or heavily modified surface water, and groundwater bodies
 - 2015 deadline may be extended by Member States to 2021 or 2027, subject to specified conditions, to allow for the phased achievement of the objectives provided no further deterioration in the status of affected water bodies

The concept of good ecological status was introduced by the WFD. Member States must assess the structure and functioning of the aquatic water systems associated with a water body by a scientific mechanism based on biological quality and other quality elements in accordance with annex V of the WFD. In respect of rivers, annex V lists various biological quality elements for rivers as 'Composition, abundance and age structure of fish fauna'. A report published by the European Environment Agency in 2018 stated that approximately 40% of surface water bodies had achieved good ecological status and good chemical status. The report further stated that good chemical and quantitative status has been achieved for 74% and 89%, respectively, of the area of groundwater bodies. European Environment Agency, European waters; Assessment of status and pressures 2018 (EEA Report No 7/2018), 60.

WFD

- Water bodies
 - Two types
 - Body of surface water
 - Defined as 'a discrete and significant element of surface water such as a lake, a reservoir, a stream, river or canal, part of a stream, river or canal, a transitional water or a stretch of coastal water'
 - 'Heavily modified water body' is defined as 'a body of surface water which as a result of physical alterations by human activity is substantially changed in character ...'
 - Body of groundwater
 - Defined as 'a distinct volume of groundwater within an aquifer or aquifers'
- NB: a water dependent Natura 2000 site may be included in more than one water body due to potential for Natura 2000 sites to be larger than water bodies and vice versa

Article 6(1) of the WFD directs Member States to establish 'a register or registers of all areas lying within each river basin district which have been designated as requiring special protection under specific Community legislation for the protection of their surface water and groundwater or for the conservation of habitats and species directly depending on water'. The register(s) must 'include all bodies of water identified under Article 7(1) and all protected areas covered by Annex IV'. Article 7(1) refers to 'all bodies of water used for the abstraction of water intended for human consumption providing more than 10 m³ a day as an average or serving more than 50 persons, and those bodies of water intended for such future use'. Annex IV lists types of protected areas including 'areas designated for the protection of habitats or species where the maintenance or improvement of the status of water is an important factor in their protection, including relevant Natura 2000 sites designated under [the Habitats Directive and the Birds Directive]'.

Natura 2000 sites that have Annex I habitat types or Annex II species under the Habitats Directive that are dependent on ground and/or surface water or Natura 2000 sites that have bird species of Annex I or migratory bird species of the Birds Directive and, again, are dependent on ground and/or surface water are known as 'water-dependent Natura 2000 sites' if the presence of such species or habitats was the reason for their designation under the Birds or Habitats Directives. The objectives of the Birds and Habitats Directives and the WFD apply to such sites. Links between the Water Framework Directive (WFD 2000/60/EC) and Nature Directives (Birds Directive 2009/147/EC and Habitats Directive 92/43/EEC) Frequently Asked Questions (December 2011), 9-10.

WFD

- River basin management approach
 - River Basin Management Plans (RBMPs) prepared by Member States for each river basin district (RBD) in their territory or, for international RBDs, in co-ordination with other Member States; updated every 6 years
 - RBMPs include
 - General description of the characteristics of the RBD
 - Summary of significant pressures and impacts of human activity on the status of surface water and groundwater
 - Identification and mapping of protected areas (including water dependent Natura 2000 sites)
 - Statement of environmental objectives
 - Monitoring programmes and their results
 - Economic analysis of water use
 - Summary of the Programme of Measures (PoMs) to achieve the objectives of the WFD

WFD

- PoMs
 - Established for each RBD or the part of an international RBD in a Member State's territory
 - Include
 - Measures under Habitats and Birds Directives and the IED
 - Measures under other water Directives including Urban Waste Water Treatment Directive (91/271/EEC) and Nitrates Directive (91/676/EEC)

Article 11 of the WFD sets out the PoMs for surface waters and groundwater.

WFD

- Environmental assessments; article 4(7) derogations
 - New modifications to the physical characteristics of a surface water body
 - Alterations to the level of bodies of groundwater
 - New sustainable human development activities
- Environmental assessments; RBMPs

WFD

- Environmental assessments; article 4(7) derogations (continued)
 - 'Member States will not be in breach of this Directive when:
 - failure to achieve good groundwater status, good ecological status or, where relevant, good ecological potential or to prevent deterioration of the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or

The WFD does not define the concept of 'deterioration of a body of water'. In *Bund für Umwelt und Naturschutz Deutschland eV v Bundesrepublik Deutschland* (Case C-461/13), the CJEU was called to rule whether the concept of a 'deterioration of the status' of a body of surface water in article 4(1)(a)(i) of the WFD should be interpreted as covering: (1) only detrimental changes that resulted in a lowering of the overall status of that body of water (status classes theory); or (2) any detrimental change to the body of water at issue (status quo theory). The Court upheld the status quo theory by ruling that 'deterioration' of a water body occurred as soon as the status classification of at least one of the quality elements within the meaning of annex V to the WFD falls by a single class, even if that fall did not result in a fall in the classification of the body of surface water as a whole. The Court further ruled that if the relevant quality element was already in the lowest class (that is, if deterioration was not possible as indicated above), any deterioration of that element would constitute a deterioration of the status.

WFD

- Environmental assessments; article 4(7) derogations (continued)
 - failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities and all the following conditions are met:
 - a) all practicable steps are taken to mitigate the adverse impact on the status of the body of water;
 - b) the reasons for those modifications or alterations are specifically set out and explained in the [RBMP] and the objectives are reviewed every six years
 - c) the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and
 - d) the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option'

WFD

- Environmental assessments; article 4(7) derogations (continued)
 - Article 4(7) thus imposes four conditions for new modifications to the physical characteristics of a surface water body, new sustainable development activities, or new alterations to the level of bodies of groundwater
 - Take all practicable steps to mitigate the adverse impact on the status of the body of water
 - Specifically set out and explain the reasons for the project in the RBMP
 - Reasons must be of overriding public interest and/or the benefits to the environment and society of achieving the objectives under the WFD must be outweighed by the benefits of the project to human health, the maintenance of human safety or sustainable development
 - Beneficial objectives served by the project cannot, for reasons of technical feasibility or disproportionate cost, be achieved by other means, which are a significantly better environmental option

Examples of new development activities are hydro-electric power plants and large scale water abstraction facilities.

WFD

- Environmental assessments; article 4(7) derogations (continued)
 - Derogation applies to all situations of deterioration of a water body whether due to a proposed facility or not
 - *Gert Folk v Unabhängiger Verwaltungssenat für die Steiermark* (Case C-529/15, 2017)

The CJEU ruled, in *Bund für Umwelt und Naturschutz Deutschland eV v Bundesrepublik Deutschland* (Case C-461/13), that a Member State cannot consider an individual project separately from the RBMP. The Court further ruled that ‘the grounds for derogation apply in particular where failure to comply with the objectives follows new modifications to the physical properties of the body of surface water, resulting in adverse effects. That may occur following new authorisations for projects’ (para 47).

In *Gert Folk v Unabhängiger Verwaltungssenat für die Steiermark* (Case C-529/15), a case under the Environmental Liability Directive (ELD; 2014/35/CE), the CJEU ruled that the WFD, especially article 2(1)(b), ‘must be interpreted as precluding a provision of national law which excludes, generally and automatically, that damage which has a significant adverse effect on the ecological, chemical or quantitative status or ecological potential of the water in question be categorised as “environmental damage” due to the mere fact that it is covered by an authorisation granted under that law’ (para 34).

The *Gert Folk* case was brought by Mr Folk, who owned fishing rights for both banks of a 12 kilometre stretch of the River Mürz in Austria downstream from a hydro-electric power plant. He alleged that fluctuations in water discharged by the power plant had caused ‘water damage’ under the ELD because they significantly adversely affected the ecological status of the river by disrupting the natural reproduction of fish. The definition of ‘water damage’ in the ELD specifically excludes significant adverse effects on the ecological or chemical status of surface water if article 4(7) of the WFD applies.

WFD AND HABITATS DIRECTIVE

- Environmental assessments; article 4(7) derogations (continued)
 - If article 6(3) of the Habitats Directive applies to a water dependent Natura 2000 site and the AA concludes that the project is likely to cause a deterioration in the ecological status of one or more water bodies in the site (very low threshold), the competent authority must assess whether article 4(7) of the WFD applies
 - If article 4(7) applies, conditions under it as well as conditions under article 6(4) apply

The process of identifying and assessing impacts under article 4(7) of the WFD may be carried out jointly with the procedure under the EIA Directive with the caveat that article 4(7) sets out requirements that go beyond those considered in the EIA process in that it includes activities that may not be listed in either of the annexes to the EIA Directive. See European Commission, Environmental Impact Assessment of Projects; Guidance on Screening (Directive 2011/92/EU as amended by 2014/52/EU) (2017) 68; http://ec.europa.eu/environment/eia/pdf/EIA_guidance_Screening_final.pdf and European Commission, Environmental Impact Assessment of Projects; Guidance on Scoping (Directive 2011/92/EU as amended by 2014/52/EU) (2017), 68; http://ec.europa.eu/environment/eia/pdf/EIA_guidance_Scoping_final.pdf

WFD

- Environmental assessments; other derogation provisions
 - Article 4(4)
 - Extension of time for achieving environmental objectives; must ensure no further deterioration in the status of affected bodies of water
 - Article 4(5)
 - Less stringent environmental objectives for specific bodies of water that are so affected by human activity that their achievement would be infeasible or disproportionately expensive; subject to specified conditions
 - Article 4(6)
 - Temporary deterioration in status of water bodies due to exceptional unforeseeable natural circumstances or *force majeure* such as extreme floods and prolonged droughts

The WFD does not specify assessment procedures that must be carried out.

WFD

- Environmental assessments; RBMPs
 - RBMP must include
 - Analysis of characteristics
 - Review of impacts of human activity on the status of surface and ground waters
 - Economic analysis of water use
- WFD directed Member States to publish RBMPs by 22 December 2009 and to update them every six years
 - Many Member States have published second RBMPs, using information and experience from the first RBMPs

Article 13 of the WFD directs Member States to ensure that a RBMP is produced for each river basin district that lies entirely within their territory. If the river basin district is international and is located entirely in the EU, Member States should co-ordinate with other Member States to produce a single international RBMP. If an international river basin district extends beyond the boundaries of the EU, Member States should endeavour to produce a single RBMP but, if this is not possible, should at least cover the portion of the international river basin district that lies within their territory.

WFD

- Environmental assessments; RBMPs (continued)
 - RBMPs and PoMs are subject to screening under the SEA Directive
 - PoMs require assessments to identify water bodies in which individual, cumulative or synergistic impacts cause them to risk failing to meet the environmental objectives of the WFD by 2015

WFD

- Public participation
 - Member States to 'encourage the active involvement of all interested parties in the implementation' of the WFD
 - Production of RBMPs and their review and updating, is subject to public comment periods of at least six months each, including
 - Timetable and work programme for their production, a statement of consultation measures to be taken – to be made public at least three years before the beginning of the period for the RBMP
 - Interim overview of significant water management issues identified in the river basin – at least two years before the beginning of the period for the RBMP
 - Publication of draft copies of the RBMP – at least one year before the beginning of the period for the RBMP
 - Access to background documents and information used to develop the draft RBMP on request
 - No definitions of 'public' or 'public concerned'; references to 'public' and 'interested parties'

Article 14 of the WFD sets out provisions on public information and consultation.

WFD

- Access to justice
 - No specific access to justice provisions

WFD

- Monitoring
 - Programmes to monitor water status must be established
 - Surface waters
 - Volume and level or rate of flow to extent relevant for ecological and chemical status and ecological potential
 - Ecological and chemical status and ecological potential
 - Groundwater
 - Chemical and quantitative status
 - Protected areas
 - Supplemented by specifications in relevant EU legislation including Birds and Habitats Directives

Article 8 of the WFD directs Member States to establish programmes to monitor the status of surface water within each RBD for '(i) the volume and level or rate of flow to the extent relevant for ecological and chemical status and ecological potential, and (ii) the ecological and chemical status and ecological potential'. For groundwater, the programme must cover monitoring of the chemical and quantitative status. For protected areas, the monitoring must include the above as appropriate plus 'specifications contained in Community legislation under which the individual protected areas have been established'.

EIA AND WFD

- Integration of the EIA Directive with the WFD
 - Member States may, but are not obliged to, provide for co-ordinated or joint procedures in carrying out EIA and assessments under the WFD
 - EIA and WFD may apply to the same type of project
 - EIA, annex I examples
 - Works to transfer over 100 million cubic metres/year of water resources between river basins so as to prevent possible water shortages; and works to transfer water resources between river basins where the multi-annual average flow of the basin of abstraction is over 2,000 million cubic metres/year and the amount of transferred water is over 5% of that flow.
 - Groundwater abstraction or artificial groundwater recharge schemes where the annual volume of water abstracted or recharged is equivalent to or exceeds 10 million cubic metres
 - Dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres

EIA AND WFD

- Integration of the EIA Directive with the WFD (continued)
 - Application to same type of project
 - EIA, annex II examples
 - Dams and other installations designed to hold water or store it on a long-term basis (projects not included in Annex I)
 - Groundwater abstraction and artificial groundwater recharge schemes not included in Annex I
 - Coastal work to combat erosion and maritime works capable of altering the coast through the construction, for example, of dykes, moles, jetties and other sea defence works, excluding the maintenance and reconstruction of such works

SEA AND WFD

- Integration of the SEA Directive and the WFD
 - Member States 'may' provide for co-ordinated or joint procedures when the SEA Directive and the WFD simultaneously apply to a plan or programme so as, among other things, to avoid duplication of assessment
 - SEA may need to be prepared for RBMPs depending on the likelihood of significant environmental effects

Other Directives to which the SEA is linked are the Nitrates Directive (91/676/EEC), the Waste Framework Directive ((EU) 2018/851), the Noise Directive (2002/49/EC), and the Flood Risk Directive (2997/60/EC). See Report from the Commission to the Council and the European Parliament under Article 12(3) of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (COM(2017) 234 final, 15 May 2017), s 3; <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0234&from=EN> Still further Directives are the Marine Strategy Framework Directive (2008/56/EC), the Ambient Air Quality Directive (2008/50/EC), Heavy Metals in the Ambient Air Quality Directive (2004/107/EC), and the Seveso Directive (2012/18/EU). See European Commission, Environmental Impact Assessment of Projects; Guidance on Screening (Directive 2011/92/EU as amended by 2014/52/EU) (2017), 69-72; http://ec.europa.eu/environment/eia/pdf/EIA_guidance_Screening_final.pdf

EIA / SEA AND WFD

- Comparison of EIA / SEA Directives and the WFD
 - Specific procedures under the WFD; general procedures under the EIA and SEA Directives
 - But assessment is the main focus of EIA and SEA Directives not the WFD
 - Substantive assessments under the WFD, that is, environmental concerns identified in an assessment cannot be overridden by socio-economic considerations
 - Carried out for the purpose of achieving explicit and precise environmental objectives and standards
 - Procedural assessments under the EIA and SEA Directives
 - Environmental concerns are brought to the attention of decision-makers and are to be taken into account but need not be achieved

A determination whether an RBMP and a PoM are within the scope of the SEA Directive must be made on a case by case basis. The key question is 'whether they set the framework for the future development consent of projects'. European Commission, Commission's Guidance on the implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (2006), para 9.7;
http://ec.europa.eu/environment/archives/eia/pdf/030923_sea_guidance.pdf

EIA / SEA AND WFD

- WFD requires the achievement of specific goals by specific time frames
- No deadlines in EIA / SEA Directives
- EIA and SEA Directives are broad in respect of effects on the environment
- WFD is focused on water including land uses that affect its status
- EIA and SEA Directives are limited to specified projects, plans and programmes
- WFD has no such limitation

The European Commission stated that one area in which the SEA Directive ‘can add particular value to the implementation of the [WFD] is in the application of derogations [under] the WFD’. The Commission stated that ‘Whenever the terms “the wider environment”, “significantly better environmental option” or “sustainable human development” are used as criteria for applying a derogation, an environmental assessment in accordance with the SEA Directive may be useful in justifying the derogation on the basis of those criteria’. European Commission, Commission's Guidance on the implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (2006), para 9.16; http://ec.europa.eu/environment/archives/eia/pdf/030923_sea_guidance.pdf

EIA / SEA AND WFD

- Synergies between EIA / SEA Directives and WFD
 - Assessment under article 4(7) includes data under EIA Directive and vice versa thus allowing for better analysis
 - Carrying out an SEA for an RPMB allows for a strategic assessment of options for water management before a PoM is prepared
 - If an annex I or II project under the EIA Directive impacts the status of a water body, the RBMP must include additional assessment to develop and review alternatives and meet other conditions under article 4(7)
 - Information gathered and analysed in the EIA / SEA can be used in preparing the RPMB and/or the PoM
 - SEA may identify non-water related effects of the RPMB
- EIA / SEA Directives and the WFD have extensive and detailed public participation requirements
- Preparation of EIA / SEA together with assessment under the WFD avoids duplication and enhances public participation

Synergies between the WFD and the EIA include using the detailed environmental data collected for water as part of the planning process of the RBMP, and the assessment of effects on water bodies under article 4(7) of the WFD, in the EIA process. In addition, if the EIA process indicates that a project listed in either of the annexes to the EIA Directive affects the status of a water body, as specified in the relevant RBMP, further assessment will be needed 'to develop and review alternatives and possibly justify reasons of overriding public interest in line with the requirements of the [WFD]'. European Commission, Environmental Impact Assessment of Projects; Guidance on Screening (Directive 2011/92/EU as amended by 2014/52/EU) (2017) 69;

http://ec.europa.eu/environment/eia/pdf/EIA_guidance_Screening_final.pdf

In contrast to the scope of the public participation provisions of the SEA Directive on the environment, the public participation provisions of the WFD focus on measures to produce, review and update RBMPs. European Commission, Commission's Guidance on the implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (2006), para 9.16;

http://ec.europa.eu/environment/archives/eia/pdf/030923_sea_guidance.pdf

IED

- Objectives
 - Prevent, reduce and as far as possible eliminate pollution from industrial emissions, especially through better application of Best Available Techniques (BAT)
 - Ensure prudent management of natural resources
 - Taking the economic situation and specific local characteristics into account

BAT Reference Documents (BREFs) have been prepared under the IED and the Directive that it superseded, the Integrated Pollution Prevention and Control Directive (IPPC Directive), for various industrial activities listed in annex I to the IED including food, drink and milk industries, iron and steel production, and the manufacture of glass. They have also been prepared for various related topics concerning annex I including emissions from storage, and energy efficiency. BREFs are available from <http://eippcb.jrc.ec.europa.eu/reference/> Work on BREFs is co-ordinated by the European IPPC Bureau at the EU Joint Research Centre in Seville, Spain.

IED

- Scope
 - Recast the following seven Directives
 - Directive 2008/1/EC concerning integrated pollution prevention and control (IPPC Directive)
 - Directive 2001/80/EC on the limitation of certain pollutants into the air from large combustion plants
 - Aim: to reduce emissions of sulphur dioxide, nitrogen oxides and dust from combustion plants with a capacity exceeding 50 megawatts
 - Directive 2000/76/EC on the incineration of waste
 - Aim: to prevent and limit risks arising from the incineration and co-incineration of waste
 - Council Directive 1999/13/EC on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations
 - Aim: to prevent and reduce impacts of emissions of volatile organic compounds from specified industrial activities
 - Three Titanium Dioxide Directives
 - Main purposes: protection of the aquatic environment; waste prevention and recycling; re-use of waste as raw materials

The IED, which extended the scope of the IPPC Directive including not only the categories of installations subject to it but also more stringent emission limit values on sulphur dioxide, nitrogen oxides and dust, entered into force on 6 January 2011. Member States were required to transpose it by 7 January 2013 and to phase it in as follows:

- 7 January 2013: new installations
- 7 January 2014: installations formerly subject to IPPC except existing large combustion plants
- 7 January 2015: installations subject to IED but which were not subject to IPPC
- 7 January 2016: large combustion plants in existence before 6 January 2013; with a derogation to enable installations such as oil refineries and coal-fired power stations to delay complying with the IED until 30 June 2020 if the European Commission approves.

IED

- Scope (continued)
 - Requires approximately 50,000 installations across the EU that carry out industrial activities listed in annex I to have a permit to operate
 - Installations include
 - energy industry
 - production and processing of metals
 - mineral industry
 - chemical industry
 - waste management and treatment activities
 - livestock farming
 - wood preservation activities
 - independently operated wastewater treatment works

The European Commission has published Frequently Asked Questions (FAQs) about the IED; available at <http://ec.europa.eu/environment/industry/stationary/ied/faq.htm>

IED

- Implementation is based on five pillars
 1. Integrated approach: permits must take into account the entire environmental operations of the facility including
 - Emissions to air, water and land
 - Energy efficiency
 - Generation of noise and vibrations
 - Consumption of raw materials
 - Prevention of accidents
 - Minimising waste generation and/or use of waste recovery
 - Contamination during the pendency of a permit and restoration of a permitted site to a 'satisfactory condition' on closure

IED

- Implementation (continued)
 2. Use of BAT to specify emission limit values (ELVs) for relevant pollutants
 3. Flexibility
 - Permitting authority can take the following into account in determining the conditions of a permit
 - Technical characteristics of the installation
 - Its geographical location
 - Local environmental conditions
 4. Mandatory inspections, with required site visit at least every 1 to 3 years using risk-based criteria
 5. Public participation

IED

- Assessments; application for a permit must examine and describe
 - Future measures to operate the installation in accordance with the following principles
 - Take all appropriate preventive measures against pollution
 - Apply BAT
 - Not cause any significant pollution
 - Prevent the generation and handling of waste in accordance with the Waste Framework Directive ((EU) 2018/851 amending Directive 2008/98/EC on waste)
 - Use energy efficiently
 - Take the necessary measures to prevent accidents and limit their consequences
 - Avoid the risk of pollution and return the site to a satisfactory state on closure

Article 12 of the IED sets out the categories of measures for which descriptions must be provided in an application for a permit. Article 12 sets out the general principles that govern the basic obligations of an operator of a permitted activity. Article 14 sets out measures that must be included in the conditions for a permit.

IED

- Assessments (continued)
 - Installation and its activities
 - Raw and auxiliary materials, other substances and energy use in or generated by the installation
 - Sources of emissions from the installation
 - Baseline report of the condition of the site of the installation (to determine suitable condition between permit being granted and closure)
 - Nature and quantities of foreseeable emissions into each environmental medium and their significant environmental effects
 - Proposed technology and other techniques to prevent or reduce emissions
 - Measures for the prevention, preparation for re-use, recycling and recovery of generated waste
 - Measures planned to monitor emissions

IED

- Public participation
 - Extensive provisions for the public to have access to, and comment on, the following
 - Granting a permit for a new installation
 - Granting a permit for any substantial change in an installation
 - Granting or updating a permit for an installation subject to a derogation
 - Updating a permit or permit conditions for an installation
 - Provisions include making the contents of a decision to grant or update a permit available to the public as well as a copy of the permit, any subsequent updates, and the reasons for the decision
 - Derogations include less strict ELVs if an assessment shows that the achievement of emission levels associated with BAT would lead to disproportionately higher costs compared to environmental benefits due to the geographical location or local conditions of the installation, or its technical characteristics – subject to specified conditions including not exceeding ELVs in the annexes to the IED and no significant pollution

Article 24 directs Member States to ensure that the ‘public concerned’ are provided with ‘early and effective opportunities to participate in’ procedures specified in that article. Article 25, entitled ‘Access to justice’, sets out the conditions for Member States to ensure, in accordance with relevant national legal systems, ‘members of the public concerned have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to Article 24 when one of the following conditions is met’.

IED

- Public participation (continued)
 - 'Public' is defined as 'one or more natural or legal persons and, in accordance with national law or practice, their associations, organisations or groups'
 - Same definition as EIA Directive
 - 'Public concerned' is defined as 'the public affected or likely to be affected by, or having an interest in, the taking of a decision on the granting or the updating of a permit or of permit conditions; for the purposes of this definition, nongovernmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest'
 - Same definition as EIA Directive except for 'the taking of a decision on the granting or the updating of a permit or of permit conditions' instead of 'environmental decision-making procedures'

IED

- Access to justice
 - Detailed provisions
 - Ensure that 'members of the public concerned have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions ... when one of the following conditions is met:
 - (a) they have a sufficient interest;
 - (b) they maintain the impairment of a right [if a precondition under Member State law]
 - Member State law determines what constitutes 'a sufficient interest' and 'impairment of a right' but it must be consistent with wide access to justice of the public concerned
 - Procedure must be 'fair, equitable, timely and not prohibitively expensive'
- Basically the same as EIA Directive

IED

- Monitoring
 - Detailed monitoring required based on BAT during the pendency of a permit
 - Frequency of monitoring to be determined in the permit by the competent authority
 - Must include periodic monitoring at least once every five years for groundwater and 10 years for soil unless monitoring is based on a systematic appraisal of the risk of contamination

Article 16 of the IED sets out monitoring requirements, in particular those for emissions.

EIA AND IED

- Integration of the EIA Directive and the IED
 - Competent authority must, in granting a permit for a new installation, or updating a permit for a substantial change in an installation, examine and use any relevant information obtained in an EIA and conclusions from the EIA
 - Member States may, but are not obliged to, provide for co-ordinated or joint procedures, or a combination of both, in carrying out EIA and assessments under the IED

EIA AND IED

- Comparison of EIA Directive and the IED
 - IED covers many more activities than the EIA, especially new and existing industrial processes and some agriculture projects, but not infrastructure projects
 - Some projects in the annexes to the EIA Directive are listed under the IED
 - Examples
 - EIA, annex I: 'Crude-oil refineries (excluding undertakings manufacturing only lubricants from crude oil) and installations for the gasification and liquefaction of 500 tonnes or more of coal or bituminous shale per day'
 - IED, annex I: 'Refining of mineral oil and gas'
 - When projects overlap, Member States have discretion to use the thresholds in annex I of the IED in the context of EIA but must 'adopt all measures necessary to ensure that ... projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects on the environment'

EIA AND IED

- Comparison of EIA Directive and the IED (continued)
 - Thresholds of projects covered by the EIA Directive and the IED may differ
 - EIA, annex I: 'Installations for the intensive rearing of poultry or pigs with more than:
 - a) 85 000 places for broilers, 60 000 places for hens;
 - b) 3 000 places for production pigs (over 30 kg); or
 - c) 900 places for sows'
 - IED, annex I: 'Intensive rearing of poultry or pigs:
 - a) with more than 40 000 places for poultry;
 - b) with more than 2 000 places for production pigs (over 30 kg), or
 - c) with more than 750 places for sows'

The BREF entitled 'Best Available Techniques (BAT); Reference Document for the Intensive Rearing of Poultry or Pigs' (2017) sets out among other things detailed information on the intensive rearing of poultry or pigs and related industrial processes, data and information on the environmental performance of relevant farms, current emissions, consumption and nature of raw materials, water consumption, and use of energy and the generation of waste, as well as techniques to prevent or, where this is not practicable, to reduce emissions from pig or poultry farms that were considered in determining the BAT. The BREF is available at <http://eippcb.jrc.ec.europa.eu/reference/irpp.html>

EIA AND IED

- Comparison of EIA Directive and IED (continued)
 - Some similar requirements in both Directives
 - For example, Member States must take the necessary measures to ensure that an application for a permit includes a description of 'the nature and quantities of foreseeable emissions from the installation into each medium as well as identification of significant effects of the emissions on the environment'
 - Member States may use a co-ordinated, a joint, or a hybrid, procedure for projects including a common public participation procedure
 - Monitoring requirements in the IED are more specific than in the EIA Directive

The monitoring that is required under the IED may be used for the EIA process with the caveat that the monitoring will not cover all aspects required under the EIA Directive. In addition, the approach to monitoring adopted under the IED may be expanded to cover aspects specified in monitoring proposals under the EIA Directive. European Commission, Environmental Impact Assessment of Projects; Guidance on Screening (Directive 2011/92/EU as amended by 2014/52/EU) (2017), 71; http://ec.europa.eu/environment/eia/pdf/EIA_guidance_Screening_final.pdf and European Commission, Environmental Impact Assessment of Projects; Guidance on Scoping (Directive 2011/92/EU as amended by 2014/52/EU) (2017), 68; http://ec.europa.eu/environment/eia/pdf/EIA_guidance_Scoping_final.pdf

SEA AND IED

- Comparison of SEA Directive and IED
 - Some projects subject to the SEA Directive are subject to the IED
 - Example
 - Large combustion plants may be subject to the SEA Directive (as well as the EIA Directive) because they are industry and energy projects
 - Monitoring requirements in the IED are more specific than in the SEA Directive
 - IED sets out rules on integrated prevention and control of pollution from industrial activities including rules to prevent or, when not practicable, reduce emissions into air, water and land and to prevent the generation of waste
 - EIA's objective is to ensure that the likely significant effects of a proposed project are taken into account

EIA / SEA AND IED

- Synergies between EIA / SEA Directives and IED
 - Permits under the IED must include conditions concerning the entire environmental operations of the installation
 - Similarly, EIA / SEA Directives apply to a broad range of likely environmental effects
- Use of co-ordinated or joint procedure results in a more holistic approach
- Although monitoring that must be carried out under the IED does not cover all environmental aspects of a permit, such monitoring can be applied to the EIA / SEA Directives
- In addition, the methodology for monitoring under the IED can be broadened in scope to cover other aspects of proposed monitoring in the EIA or SEA report

Member States tend to use monitoring arrangements required by the IED and other Directives, such as the Habitats Directive and the WFD, for monitoring under the SEA Directive. Report from the Commission to the Council and the European Parliament under Article 12(3) of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (COM(2017) 234 final, 15 May 2017), s 2.6; <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0234&from=EN>

CONCLUSIONS

- Different objectives for EIA Directive, SEA Directive, Habitats Directive, WFD and IED but overlaps between some projects subject to them
 - Co-ordinated or joint procedures provide a more holistic approach
 - BUT assessments for each Directive must be clearly distinguishable to fulfil different objectives
 - Public participation increased in some cases when using the co-ordinated, joint, or hybrid, procedures