

COOPERATION WITH NATIONAL JUDGES IN THE FIELD OF EU ENVIRONMENTAL LAW



Trainers Manual Module on Interaction between the Environmental Impact Assessment and the Nature Directives



Table of contents

I. Introduction.....	5
1. Objectives.....	5
2. Structure.....	6
II. Methodology	7
1. Time frame	7
2. Trainer profiles.....	7
3. Teaching methods.....	8
4. Documents	11
III. User pack: the function of the different elements of the training module	12
1. Introduction	12
2. Blended e-learning.....	12
3. Background documentation.....	13
4. Workshop exercise material	14
5. Trainer contributions	14
6. Additional documents	15
IV. Organising an implementing workshop: structure, content and methodology	16
Unit 1: Setting the scene.....	17
Unit 2: Introduction to the Birds Directive, Habitats Directive and Natura 2000	20
Unit 3: Implementation of Article 6 Habitats Directive	23
Unit 4: Habitats Directive in the case law of CJEU	26
Unit 5: Case Study on the Habitats Directive	30
Unit 6: Introduction to the Environmental Impact Assessment (EIA) and the Strategic Environmental Assessment (SEA) Directives	33
Unit 7: The EIA Directive in the case law of CJEU	36
Unit 8: Case study on transboundary EIA.....	40
Unit 9: Interaction between the EIA Directive and the Article 6(3) and (4) of the Habitats Directive.....	43
Units 10 and 11: Role of the EIA and the Nature Directives in judicial review proceedings at national level: substantive and procedural aspects.....	45

Unit 12: Case study on the interaction between the EIA and the Habitats Directive	49
Unit 13: Closing session – evaluation of the workshop	53
Annexes.....	54
1. Template indicative workshop programme	55
2. Background material to be contained in the user’s pack	57
3. Examples of presentations and case studies	66
3.1 Unit 2: Introduction to the Birds Directive, Habitats Directive and Natura 2000 – Presentation provided by <i>Joseph van der Stegen, October 2013</i>	67
3.2 Unit 3: Implementation of Article 6 Habitats Directive – Presentation provided by <i>Joseph van der Stegen, October 2013</i>	83
3.3 Unit 4: Habitats Directive in the case law of CJEU.....	102
a) Presentation provided by <i>An Cliquet, January 2014</i>	102
b) Presentation provided by <i>Matthieu Wemaëre, November 2013</i>	158
3.4 Unit 5: Case Study on the Habitats Directive: Introduction to the facts of the case	
a) Case study facts provided by <i>An Cliquet, January 2014</i>	167
b) Case study solution provided by <i>An Cliquet, January 2014</i>	172
c) Case study facts provided by <i>Matthieu Wemaëre, November 2013</i>	176
d) Case study solution provided by <i>Matthieu Wemaëre, November 2013</i>	186
3.5 Unit 6: Introduction to the Environmental Impact Assessment (EIA) and the Strategic Environmental Assessment (SEA) Directives – Presentation provided by <i>Jerzy Jendroska, October 2013</i>	190
3.6 Unit 7: The EIA Directive in the case law of CJEU – Presentation provided by <i>Jerzy Jendroska, October 2013</i>	236
3.7 Unit 8: Case study on transboundary EIA.....	265
a) Case study facts provided by <i>Yvonne Scannell, November 2013</i>	265
b) Paper on Case study provided by <i>Yvonne Scannell, November 2013</i>	269
3.8 Unit 9: Interaction between the EIA Directive and the Article 6(3) and (4) of the Habitats Directive.....	272
a) Presentation provided by <i>Yvonne Scannell, November 2013</i>	272
b) Paper provided by <i>Yvonne Scannell, November 2013</i>	296
3.9 Unit 10: Role of the EIA and the Nature directives in judicial review proceedings at national level: substantive aspects – Presentation provided by <i>Jan Jans, October 2013</i> with speakers’ notes from <i>Werner Heermann, February 2014</i>	303

3.10 Unit 11: Role of the EIA and the Nature directives in judicial review proceedings at national level: procedural aspects – Presentation provided by <i>Jan Jans, October 2013</i> with speakers' notes from <i>Werner Heermann, February 2014</i>	318
3.11 Unit 12: Case study on the interaction between the EIA and the Habitats Directive	
a) Case study facts provided by <i>Jan Jans, October 2013</i>	334
b) Case study solution provided by <i>Werner Heermann, February 2014</i>	336

I. Introduction

This training module on 'Interaction between the Environmental Impact Assessment and the Nature Directives', developed by ERA on behalf of the European Commission, is addressed to judicial training institutes, networks of judges, trainers and end users of European Union member states wishing to organise training sessions in the area of EU nature protection and planning law.

1. Objectives

The training module addresses judges dealing with environmental issues (mainly administrative judges) with previous general, and in certain cases specific, knowledge regarding the subject. The module will provide judges with relevant information on the latest developments of the EU environmental law *acquis*, relevant jurisprudence of the Court of Justice of the EU and an in-depth analysis of the topic with a special focus on the Habitats and EIA Directives. This training module will also assist national judges to apply, in detail, the relevant EU instruments.

The training module will gather materials in order to conceive a two and a half day workshop, which goal is to develop and raise understanding on the key legal aspects of EU Law on environmental impact assessment and nature protection with a special focus on the interaction between the EIA and the Habitats Directives. The key topics to be covered are:

- Birds and Habitats Directives and Natura 2000
- Implementation of Article 6 Habitats Directive
- Environmental Impact Assessment (EIA) and the Strategic Environmental Assessment (SEA) Directives
- Interaction between the EIA Directive and the Article 6 (3) and (4) of the Habitats Directive
- Role of the EIA and the Nature Directives in judicial review proceedings at national level

After this training on Interaction between the Environmental Impact Assessment and the Nature Directives, participants will have greater knowledge of the EU instruments presented. They will have gained a better understanding of the legal aspects related to EIA and the Nature Directives. Above all, they will be in the position to actively apply the EU rules transposed into their respective national legislations. They will also have

had an excellent opportunity to exchange views regarding implementation practices in their respective member states

2. Structure

The workshop implementing the training module is designed to last 2.5 days.

The training module consists of 13 interrelated but self-standing units. These units can be combined into an implementing workshop depending on the prior knowledge of the participants, the time available and the specific training approach.

- Unit 1: Setting the scene
- Unit 2: Introduction to the Birds Directive, Habitats Directive and Natura 2000
- Unit 3: Implementation of Article 6 Habitats Directive
- Unit 4: Habitats Directive in the case law of CJEU
- Unit 5: Case Study on the Habitats Directive: Introduction to the facts of the case
- Unit 6: Introduction to the Environmental Impact Assessment (EIA) and the Strategic Environmental Assessment (SEA) Directives
- Unit 7: The EIA Directive in the case law of CJEU
- Unit 8: Case study on transboundary EIA
- Unit 9: Interaction between the EIA Directive and the Article 6(3) and (4) of the Habitats Directive
- Unit 10: Role of the EIA and the Nature Directives in judicial review proceedings at national level: substantive aspects
- Unit 11: Role of the EIA and the Nature Directives in judicial review proceedings at national level: procedural aspects
- Unit 12: Case study on the interaction between the EIA and the Habitats Directive
- Unit 13: Closing session – evaluation of the workshop

The varying training methods that can be used in future workshops based on this material will also be presented in the module, together with recommendations on how and in which part of the training they may be best employed. Face-to-face presentations can be combined with practical exercises requiring the active contribution of participants, IT-supported learning, allowing participants to familiarise themselves with available e-justice tools and interactive sessions promoting the exchange of good practice and experience.

II. Methodology

1. Time frame

The workshop is designed to last approximately 2.5 days. The exact structure and length will, of course, be decided by the training providers.

Elements that should be taken into account in each instance when finalising the workshop programme and deciding on the allocation of time between the different sub-sessions include the need to effectively cover all the main features of the subject matter and provide sufficient time for participants to ask questions and interact with the trainers and with each other. The fact that long sessions have proven to be less effective in adult training should be borne in mind. Frequent breaks or changes in teaching style should therefore be introduced in the workshop.

- An indicative time allocation for each unit will be provided in Part IV of this trainer's manual.

2. Trainer profiles

Crucial for the success of the training workshop is the selection of trainers. It has been proven that trainers with a common professional background to that of the participants tend to have a better understanding of their training needs and be more effective when addressing them. For this reason, the composition of the target group is a factor to be considered when selecting the trainers of an implementing workshop.

It is also important to identify the right trainer for each unit. In the units where the emphasis is on practical issues, the involvement of a practitioner, lawyer or judge with personal experience in the issue would be ideal. If the focus of a presentation is the transmission of information or the introduction to concepts or a broader area of law, an academic or a suitable policy officer could also constitute a good option.

- More concrete input on the trainer profiles seemingly best fitting to each unit will be provided in Part IV of this trainers' manual.

In addition to professional qualifications, the quality of an implementing workshop will also depend on the individual trainers' didactic competences and pedagogical skills. Trainers should not only be knowledgeable, but also be able to effectively transmit information, assist end users in developing new skills and motivate them to actively follow the training. They would have to provide the necessary information in a clear and structured manner, highlight the links between participants' daily work and the issues being discussed, retain some flexibility in order to adapt to the specific needs and interests of the end users attending the workshop as they become apparent and be

open and encouraging in discussing and exchanging views with them in the course of the session.

Other skills that potential trainers should ideally possess and which should be considered are the trainers' linguistic skills when workshops are international and their familiarity with IT products, as the use of technology would be required in at least some parts of the training (IT-training sessions, use of PowerPoint or other audio-visual material, the e-learning course, etc.).

For the successful implementation of the workshop and in order to better address participants' training needs, some diversity among the trainers should be sought. Variety between speakers professional backgrounds, gender and, in the context of cross-border training, nationality would enrich the event, offering different perspectives on the issues, employing different teaching methods and ensuring a more comprehensive analysis of the planning and nature protection law in Europe.

Finally, although not always easy to assess, the potential trainers personal motivation could be a factor worth considering. For the implementation of a workshop on the basis of the training module, significant flexibility and commitment, as well as the willingness to interact with end users is expected from the trainers. Engaging experts, who have an interest in the project and are prepared to make the necessary effort for a successful outcome, would bring an added value to the workshop, while further motivating the participants.

Criteria for selecting the workshop trainers:

- Subject and objectives of each sub-session
- Didactic competences and pedagogical skills
- Linguistic and IT skills
- Professional background similar to that of the workshop's participants
- Diversity in the group of trainers
- Motivation

3. Teaching methods

Frontal (face-to-face) presentation

The optimal method for the provision of a large amount of information in a limited period of time is face-to-face presentations, conducted in plenary. This method provides the trainer with the necessary time and flexibility to structure and present the content of the sub-session as s/he sees fit.

Supporting material such as outlines and PowerPoint or other presentation tools should be employed during the lecture. This would not only enable participants to follow the presentation better, but constitute a reference document for the future as well, should end users wish to review the main issues of the sub-session.

One of the objectives of the workshop is to familiarise participants with existing legislation. In this context, reference to the material included in the users pack should be made throughout the lecture and participants should be encouraged to go through the legal texts, identify the provisions and acquire a better understanding of their structure and applicability.

Enriching the lecture with practical examples could also be a means of emphasising the link between theory and practice and better illustrating the application of the various legal instruments. Brief exercises or questions could also be formulated by the trainers, requiring participants to reflect and discuss them before presenting the answer. Trainers would thus not only create an atmosphere of dialogue within the group, but also assess whether the concepts have been properly explained.

Time for discussion or Q&A sessions should in all cases be ensured for end users wishing to ask for clarification or further information. Depending on the content and structure of each lecture, questions may be raised during the presentation or in a subsequent discussion session moderated by the trainer or the workshop leader.

Although the key role in front presentations is played by the trainer, end users should also be encouraged to actively contribute to the different sub-sessions. Participants learn not only from the provision of training per se, but also from hearing questions and problems they have not yet found themselves confronted with. For this reason it is important that all end users attending the workshop are encouraged and feel comfortable enough to share thoughts and ideas and contribute their own experiences. This element is of particular importance in international workshops, where participants have the possibility to expand their knowledge with information on the application of EU environmental law in other member states, learning from each other.

Workshop exercises

In addition to information on the EU legal framework, the training also aims at providing participants with some practical experience in the particularities of the cases on EIA and the Nature Directives.

In order to further highlight issues requiring special attention and allow participants to develop specific skills, it is important to ensure their involvement in this part of the training. For this reason, specially designed workshop exercises will complement each thematic unit. Another advantage of this method is that the preparation of an exercise constitutes an interactive way of learning. After having listened to face-to-face presentations or read background material, participants would appreciate a change of presentation technique.

- Case studies prepared in working groups

During the workshop exercises, participants will be given the opportunity to use their skills and knowledge to solve case studies related to Environmental Impact Assessment and the Nature Protection issues.

The exercise should start with a brief session in plenary, with a presentation by the trainer or the workshop leader on the organisational aspects of the exercise. A brief introduction to the case studies and the main issues end users should deal with could also be included.

Participants should subsequently be divided into smaller working groups and working space provided for each of them. Working in smaller groups has significant advantages for participants: the possibility to focus on case studies will enable them to deepen their recently acquired knowledge by applying it to concrete cases. This approximates a real-life scenario and can constitute valuable experience for the future. The working group format would allow participants to be actively involved in the debate and improve their communication skills.

As one of the key objectives of the exercise is the exchange of opinion between end users, it is important that the workshop leader allocates participants to the working groups to support this interaction: in international implementing workshops and as long as participants working languages allow it, end users from different member states or from jurisdictions with different legal traditions should be brought together in the working groups. If a workshop is organised as national judicial training, judges from different courts could be asked to work together. Further to solving the case, this diversity would allow participants to obtain better insights into how the questions would be dealt with and how the EU directives involved are applied in another country, by a different legal profession, in a different city or court.

➤ As three exercises (two case studies and one role-play exercise) are recommended for the workshops implementing this training module, altering the composition of the working groups in each exercise would be a way to further increase participant interactivity.

Depending on the time available, the trainer coordinating each exercise will have to decide whether all working groups should deal with all case studies or if specific case studies should be allocated to different groups in order to ensure that end users are able to thoroughly examine all issues.

Once the working groups have been set up, they should organise themselves, develop a working method and identify which member(s) of the group will be responsible for reporting the conclusions of their discussion to the other end users. The trainer leading the exercise should be present, following the interaction in each group to a certain extent, offering advice on time management, being available to provide clarification

and answering questions and being prepared to assist participants if they face major difficulties or their discussion becomes derailed.

When the groups have completed their work, all participants should come together again to discuss their conclusions. This will allow them to compare their solutions to the features of the case studies, get further ideas from their colleagues in the other groups and broaden their understanding of the subject matter.

To achieve the objectives of this closing discussion, it is important to ensure that all groups take the floor and present the results of their work. It would be most effective to discuss one case at a time, invite the rapporteur of one of the groups to present their conclusions and the main elements of their discussion and then ask the end users of the other groups for additional comments, different opinions etc. In conclusion, the trainer should summarise the main points raised in the discussion and give his own feedback, so that participants can confirm whether they successfully dealt with the case or whether there could be further improvement.

- IT-supported learning

IT-supported learning can enhance the efficiency of training and give end users the opportunity to gain practical experience by making use of the possibilities the internet offers on issues related to environmental law generally. In this way, end users will have the opportunity of becoming familiar with the various EU websites in the area (such as the E-Justice Portal, the EJTN website, Eur-Lex, the Curia website etc.), where they can acquire further information and advice on how to apply the EU instruments covered by the workshop. By efficiently using these websites, participants will actively learn how to find the relevant legal texts and cases and receive assistance on the practical problems they may face when applying EU law in this area.

4. Documents

The documents to be made available at the training workshop consist of the contents of the users pack. The users pack will, in particular, include:

- blended e-learning material;
- the workshop reader;
- documentation set;
- workshop programme;
- list of participants;
- list of the trainers;
- CVs of the trainers;
- evaluation form.

III. User pack: the function of the different elements of the training module

1. Introduction

The term 'user pack' means the entire wealth of material that will be made available to the participants of an implementing workshop. This will consist mostly of the blended e-learning material, training material (related legal documents, links to online sources, trainers contributions and case studies) as well as supporting documents, such as the workshop programme, the list of participants, workshop evaluation forms etc.

It is, of course, at the discretion of the workshop organisers and trainers to use the materials provided in the manner they deem most fitting and to also include additional documents where necessary. All key EU legal instruments required for the provision of training on Interaction between the EIA and the Nature Directives are already part of the users pack, but as implementing workshops may be structured with a specific focus, further material could be of use.

The materials for inclusion in the users pack can and should be provided mainly in electronic format, either using a USB stick or by making the content available online and granting all workshop participants access to it. Material that needs to be regularly referred to during the workshop or that would make it easier to follow proceedings should be provided in hardcopy for ease of reference during the event:

- workshop programme;
- list of participants;
- trainers contributions;
- texts of the regulations to be analysed;
- case studies;
- evaluation forms.

➤ When presenting the material that should accompany each unit, distinction should be made between 'necessary material' to be provided in hardcopy and 'additional material' that should be included in the electronic documentation.

2. Blended e-learning

The training module has been structured to include 'blended learning' as a methodological approach, given that it combines the interactivity of face-to-face training during the implementing workshops with the flexibility provided by e-learning material. As the e-learning material has different functions and can be of use to the workshop participants at several stages of their learning process, it is important that they have access to it on different occasions: before the implementation of the workshop, in order to prepare for the meeting, while it takes place, in order to make

best use of the available material with the help of the trainers, and after the workshop, as a point of reference for finding information on European EIA and nature protection issues.

The key function of this e-learning material is to introduce end users to both – the European EIA and Nature Protection law.

It will include:

- The main EU legal instruments and case law that will be analysed during the workshop which participants should go through before they attend the course, as well as the corresponding quiz to test their knowledge. The aim is not to replace the face-to-face sessions on these subjects but to complement them by ensuring that all participants have a common basic level of knowledge before they start and can make the most of the discussion to clarify issues in the face-to-face workshops.
- Access to the bibliography of legal instruments and other relevant source material to which participants can refer to at any time.
- Access to the remainder of the e-learning version of the training module would be provided after the face-to-face workshop for participants to use as a refresher and to re-use with their colleagues alongside the face-to-face training materials.

Once the group of participants has been selected, they should receive information on how to access the e-learning materials and be encouraged to go through its content 10-15 days before the implementation of the workshop. In this way, they will have the possibility to refresh or acquire some basic knowledge and be better prepared for the workshop programme.

3. Background documentation

Legal texts will make up the large majority of the content of the training materials: treaty articles, regulations, directives, case law of the Court of Justice of the European Union etc. will constitute the background to analysis in the workshop. A comprehensive collection of all background documents, which can be referred to after the conclusion of the workshop, should be included in the electronic documentation. Participants are likely to come back to these texts in order to refresh their memory, find a specific provision or judgment, and seek guidance or inspiration if confronted with a case on EIA or Nature Directives at a later stage. This format could also support an easy further dissemination of this material, which workshop participants could forward to their colleagues if requested.

Further to legal texts, links to online databases, tools and sources, such as the E-justice portal, Eur-Lex, Curia and other similar websites should also be included as background material in the electronic documentation.

➤ Proposals on which specific material to include in this part of the users pack are included in Part d) on the analysis of each sub-session of the workshop.

The material should be provided in the language of the workshop. When international workshops are organised, links to the EU databases (such as www.eur-lex.europa.eu or www.curia.europa.eu) could be included, so that end users can access EU legal texts in the language of their choice. Further to their inclusion in the electronic documentation, providing the few documents in hard copy that are absolutely essential during the workshop is recommended. Being able to quickly find a provision, see the structure of a legal instrument, make notes etc. could help end users to better follow the training and further familiarise themselves with the legal instruments being discussed.

4. Workshop exercise material

Three workshop exercises are proposed for the workshops implementing the training module on 'Interaction between the EIA and the Nature Directives'. All of them are structured on the basis of case studies. Preparatory material supporting the workshop exercises, such as the facts of the different cases that are to be discussed or additional legal texts that will be needed for solving the cases, must be provided for the participants in hardcopy during the workshop.

5. Trainer contributions

In addition to the background documents, every time an implementing workshop on 'Interaction between the EIA and the Nature Directives' is organised, the trainers involved should be asked to prepare their own supporting material, in the form of PowerPoint presentations, outlines, notes or full texts of their lectures. Trainers should be free to structure the material supporting their presentations as they prefer. The main objective would be to help end users attending the workshop to better follow the presentation and, for this reason, emphasis should be given, in particular, to the provision of a clear structure. The trainer's contributions could also be used as a reference document for identifying the main points of the subject matter.

Speakers contributions should additionally be included in the user pack. They should also be included in hardcopy in the documentation pack.

➤ Providing some kind of written support of the lectures is always recommended and for this reason always mentioned under 'necessary documents'. Especially an outline of the PowerPoint presentation reflecting the structure of the sub-session allows participants to better understand the structure and follow the lecture.

6. Additional documents

Further to the training material, a number of documents supporting the organisation of the workshop must be made available to participants. These would be of immediate and continuous use during the workshop and should therefore be provided in hardcopy.

The finalised workshop programme must be provided at the beginning of the training, allowing participants to plan accordingly and better understand the training flow. A list of all workshop participants should be provided, facilitating the interaction between end users attending the workshop. Moreover, by including certain contact details (professional position and postal address) participants are given the opportunity to maintain contact even after the conclusion of the workshop. Finally, in order to achieve an immediate evaluation of the workshop, a questionnaire seeking participant feedback on the workshop content, organisational features and overall effectiveness will be distributed.

IV. Organising an implementing workshop: structure, content and methodology

For the training module on 'Interaction between the EIA and the Nature Directives' and its implementing workshops, a structure on the basis of thematic units is proposed. Each thematic unit will focus on a specific topic of EU law in the area of EIA and Nature Directives, as well as on interaction among them. Each implementing workshop will thus consist of several units, ensuring the alternation of theoretical and practical parts. The final structure will, however, have to be decided by taking into consideration end users prior knowledge and training priorities. With the addition of opening and closing units, serving both pedagogical and organisational purposes, an implementing workshop of 2.5 days could be designed as detailed below:

- Unit 1: Setting the scene
- Unit 2: Introduction to the Birds Directive, Habitats Directive and Natura 2000
- Unit 3: Implementation of Article 6 Habitats Directive
- Unit 4: Habitats Directive in the case law of CJEU
- Unit 5: Case Study on the Habitats Directive
- Unit 6: Introduction to the Environmental Impact Assessment (EIA) and the Strategic Environmental Assessment (SEA) Directives
- Unit 7: The EIA Directive in the case law of CJEU
- Unit 8: Case study on transboundary EIA
- Unit 9: Interaction between the EIA Directive and the Article 6(3) and (4) of the Habitats Directive
- Unit 10: Role of the EIA and the Nature Directives in judicial review proceedings at national level: substantive aspects
- Unit 11: Role of the EIA and the Nature Directives in judicial review proceedings at national level: procedural aspects
- Unit 12: Case study on the interaction between the EIA and the Habitats Directive
- Unit 13: Closing session – evaluation of the workshop

Unit 1: Setting the scene

Short description of the contents

The workshop should always start by welcoming the participants and providing a brief introduction and explanation of the contents of the programme.

General objectives

The main objective of this first session is to welcome trainers and participants to the workshop, to set the scene by reminding them of the framework of the training course and to encourage their interaction and active participation in the course.

Specific learning points

Introduction of participants and trainers

The opening session should also be used in order to allow participants to introduce themselves, present their national and professional background and illustrate their expectations from the workshop. In this way, end users will be familiar with addressing the group, which should facilitate their active participation in the following sessions and they will also get to know their colleagues background a little better. Making trainers and participants aware of which nationalities and professional groups are represented in the workshop can be of great relevance in the discussion and an asset in ensuring an effective exchange of information and experience. The possibility to discover from participants the experience which they bring with them to the training course and what they are primarily seeking to achieve by their participation could help the workshop leader to better adapt the programme to meet participants specific needs, by emphasising certain aspects, making adjustments on the time allocated in the different sub-sessions, etc.

- This may be achieved by inviting participants to ask a key question they expect to see addressed during the workshop or to indicate which element made them apply for the course.

Presentation of the workshop's programme

The workshop should include at the beginning a presentation of its programme, scope and objectives. The focus of each unit will be indicated and the expected contribution of the participants in each part of the programme emphasised. It is important that end users realise the goal of each unit and the flow of the workshop programme in order to better equipped to follow the discussions and make sure they do not miss the opportunity to raise questions or clarify any ambiguity.

Presentation of the training material

The opening session is also the opportunity to present the material included in the user pack and explain its function, so that end users may use it throughout the workshop. The content of the electronic documentation should be outlined (all related legal texts, links to online sources, suggested solutions to the case studies, etc.) and explanations provided on the documents that will have been made available to the participants in hardcopy for reference during the workshop (e.g. trainers presentations and outlines, key legal texts, the case studies for the workshop exercises, documents such as the list of participants, the workshop assessment tools etc.).

Presentation of the workshop's organisational aspects

Further to this, all logistical aspects of the workshop will be presented. The locations that will be used during the workshop for the different sessions, the exercises and the lunch and coffee breaks will be indicated, the possibility to use computers, Wi-Fi, a library, a business station etc. laid out and information on the organised lunches and dinners provided. It is important here to ensure that end users are reminded and able to profit from all measures taken to facilitate their participation in the workshop and of the importance of the joint activities in allowing a less formal interaction between trainers and fellow participants.

Methodology

While participants will be in plenary; everyone is invited to introduce themselves. The programme of the workshop will be presented by the leader of the workshop.

After welcoming participants and trainers to the workshop, they will be given the opportunity to introduce themselves and express their expectations regarding the workshop. This will improve the atmosphere of the workshop from the very beginning, which is a key element for its success. Participants are more likely to be active during the event if they know their colleagues' backgrounds.

Furthermore, the outline and main objectives of the workshop will be presented. This introduction will contain information on both the programme and the logistics (e.g. which rooms will be available for the participants during the workshop, library, availability of computers and Wi-Fi, coffee breaks and meals, evening programme).

Duration

The time allocated to the opening session will depend on the number of participants attending the workshop. Taking into account that the workshop should ideally have 20 to 30 participants, the opening session should last approximately 45 minutes, in order to ensure sufficient time for all trainers and participants to present themselves and for the provision of all necessary information on the event.

Documentation

Necessary material (to be made available in hardcopy during the sub-session):

01	The final version of the workshop programme
02	The list of trainers
03	Trainers CV's
04	List of participants

The workshop leader should demonstrate the entire user pack in this unit, including the electronic documentation, in order to inform participants of all the different features of the pack.

Trainer profile

The opening session will be held in plenary and coordinated by the workshop manager, the person responsible for ensuring the coherent management of the workshop. There would be an added value in assigning the role of the 'workshop manager' to the person responsible for the organisation of the workshop. He or she would be most suitable to present the programme's structure and main objectives, having made all related decisions and given priority to specific features of the training over others.

Unit 2: Introduction to the Birds Directive, Habitats Directive and Natura 2000

Short description of the contents

Biodiversity is essential to the existence of human life and the well-being of societies, both directly and indirectly through the ecosystem services it provides. Biodiversity protection and conservation are an essential objective of general interest pursued by the EU, as stated in Article 191 TFEU. Therefore this unit should provide an introduction to the Birds and Habitats Directives of the European Union, which both forms the cornerstone of EU's nature conservation and biodiversity protection policy. It is built around two pillars: the Natura 2000 network of protected sites throughout the EU and a strict regime of species protection. The achievement of these two pillars required Member States to take implementation measures for the last twenty years which are particularly complex and technical. In addition, such measures often interact with a number of other policies and measures covered by EU and/or national legislation, including some measures implementing international or regional agreements.

General objectives

During this unit the participants from the national judiciary/ies should increase their knowledge on both the Birds and the Habitats Directives of the European Union and be provided with guidance with regard to the conservation measures for Natura 2000 sites.

Specific learning points

- The context of the 7th Environment Action Programme (EAP)
- The objectives and scope of on both, the Birds and the Habitats Directives of the European Union and Natura 2000
- The current progress of the implementation of Natura 2000
- The main issues and problems with enforcing Natura 2000

Methodology

This unit should be conducted as a frontal presentation in plenary. The order in which the different points of the unit are presented should be defined by the trainer. The subsequent discussion should be moderated either by the trainer or the chair of the event.

Duration

The time allocated to this unit will be approximately 45-60 minutes and should include some time for discussion with the participants.

Documentation

Necessary material (to be made available in hardcopy during the sub-session):

01	PowerPoint Presentation "Introduction to the Birds Directive, Habitats Directive and Natura 2000"
02	COUNCIL DIRECTIVE 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitat Directive)
03	DIRECTIVE 2009/147/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 30 November 2009 on the conservation of wild birds (Birds Directive)

Additional material (to be included in the electronic documentation – USB stick):

04	COUNCIL REGULATION (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein
05	COUNCIL REGULATION (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) No 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001
06	COUNCIL DECISION 82/72/EEC of 3 December 1981 concerning the conclusion of the Convention on the conservation of European wildlife and natural habitats (Bern Convention)
07	Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds "The Birds Directive"
08	The implementation of the Birds and Habitats Directives in estuaries and coastal zones
09	Wind energy developments and Natura 2000
10	Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC
11	Natura 2000 and forests 'Challenges and opportunities'
12	Sustainable tourism and Natura 2000: Guidelines, initiatives and good practices in Europe
13	Guidelines for the establishment of the Natura 2000 network in the marine

	environment: Application of the Habitats and Birds Directives
14	Appendix 1 : Marine Habitat types definitions. Update of "Interpretation Manual of European Union Habitats"
15	Appendix 2: Lists of existing marine Habitat types and Species for different Member States
16	Appendix 3: Examples of the technique of the use of matrix as a management tool for decision-making.
17	Appendix 4 I: Good experiences and examples of implementation of Natura 2000 in the marine environment including LIFE fund actions in the marine environment
18	Appendix 4 II: LIFE and the marine environment: Promoting sustainable management of Europe's seas
19	Appendix 5: Bibliography

Trainer profile

The trainer/facilitator in this session should be, where possible, an expert from DG Environment, European Commission, an academic with practical experience of the application of EU nature protection law or an official from a relevant national public authority who is familiar with the implementation of the Habitats and Birds Directives.

Unit 3: Implementation of Article 6 Habitats Directive

Short description of the contents

The EU Habitats Directive 92/43/EEC provides legal protection for habitats and species of European importance through the establishment of a network of designated conservation areas known as the Natura 2000 Network. There are 24 Articles contained within the Habitats Directive, however Article 6 is viewed as being one of the most important as it determines the link between land use and conservation. Article 6 sets out provisions which govern the conservation and management of Natura 2000 sites. Article 6(1) sets out the measurements that are necessary for conservation with a focus on both positive and practical interventions. Article 6(2) places emphasis on prevention, setting out that habitat deterioration and species disturbance should be avoided. Article 6(3) and 6(4) of the Habitats Directive set out the decision-making tests for plans and projects likely to affect Natura 2000 sites.

Under Article 6(3) of the Habitats Directive, an Appropriate Assessment must be undertaken for any plan or programme that is likely to have a significant effect on the conservation objectives of a Natura 2000 site. Article 6(4) allows plans or projects which may have an adverse effect on the integrity of a European site to go ahead on grounds of “imperative reasons of overriding public interest” (IROPI) when there are no alternative solutions and compensatory measures have been secured.

General objectives

During this unit the participants from the national judiciary/ies should increase their knowledge with regard to the implementation of Article 6 of Habitats Directive – one of the most important articles in the as it defines how Natura 2000 sites are managed and protected.

Specific learning points

- The overall objective of Article 6 and its role in protecting and managing Natura 2000 sites
- The measures taken to manage Natura 2000 sites
- The measures taken to protect Natura 2000 sites
- The appropriate stages involved in new plans or projects affecting Natura 2000 sites
- Issues arising with the application of Article 6 and the various roles played within the Appropriate Assessment (AA) of Natura 2000 sites
- Clarification of the concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence.

Methodology

This unit should be conducted as a frontal presentation in plenary. The order in which the different points of the unit are presented should be defined by the trainer. The subsequent discussion should be moderated either by the trainer or the chair of the event.

Time frame

The time allocated to this unit will be approximately 45-60 minutes and should include some time for discussion with the participants.

Documentation

Necessary material (to be made available in hardcopy during the sub-session):

01	PowerPoint Presentation 'Implementation of Article 6 Habitats Directive'
02	COUNCIL DIRECTIVE 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitat Directive)

Additional material (to be included in the electronic documentation – USB stick):

	EU Documents
03	DIRECTIVE 2011/92/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (EIA Directive)
04	DIRECTIVE 2001/42/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (SEA Directive)
05	DIRECTIVE 2009/147/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 30 November 2009 on the conservation of wild birds (Birds Directive)
	Selected CJEU Case Law
06	C-226/08 - Judgment of the Court (Second Chamber) of 14 January 2010. Stadt Papenburg v Bundesrepublik Deutschland. Reference for a preliminary ruling: Verwaltungsgericht Oldenburg - Germany. (Papenburg Case)
07	C-127/ 02 - Judgment of the Court (Grand Chamber) of 7 September 2004. Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (Waddenzee Case)

	Selected Documents
08	MANAGING NATURA 2000 SITES: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC
09	Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC

Trainer profile

The trainer/facilitator in this session should be, where possible, an expert from DG Environment, European Commission, an academic with practical experience of the application of EU nature protection law or an official from a relevant national public authority who is familiar with the implementation of Article 6 Habitats Directive.

Unit 4: Habitats Directive in the case law of CJEU

Short description of contents

Natura 2000 network provides for a coherent European ecological network of special areas of conservation covering Habitats and species which are part of the EU's natural heritage. Threats to such Habitats and species are often of a transboundary nature. Therefore it is absolutely crucial that the Habitats Directive is properly transposed, implemented and enforced the same way in all Member States, in accordance with their duty of loyalty laid down by Article 4 (3) TEU. Most important is that Member States ensure that all rights and obligations arising from the Habitats Directive are effectively protected or met. Looking at the abundant case law of the CJEU (around 85 rulings up to now), this illustrates how much Member States have encountered difficulties in interpreting and implementing the Habitats Directive, from the very moment of its transposition into national law by the Government until its application on the ground, as ultimately enforced by the national judge. With so many rulings, the Court of Justice has been playing a significant role to ensure a proper application of the Habitats Directive, towards a common interpretation of EU law while taking account of local specificities and specific requirements for bio-geographic zones of the Natura 2000 network. Whether based on member States' infringements or on a judicial question for interpretation, this case law of the Court of Justice must be known by the national judge, who is the first judge of the EU, in order to ensure the proper application and interpretation of the Habitats Directive.

General objectives

Participants from the national judiciary/ies should increase their knowledge on the case law of the CJEU on the Habitats Directive, with the purposes of understanding and learning about:

- Both the objectives and content of the Habitats Directive through a horizontal reading of the case law;
- The challenges for Member States when transposing, implementing and enforcing the provisions of the Habitats Directive;
- The interpretation method and conclusions of the Court of Justice with respect to some particular provisions of the Habitats Directive, which may be often brought before the national judge;
- The role of the national judge to contribute to the proper and uniform application of the Habitats Directive.

Specific learning points

Participants will learn the details and effects of the CJEU case law on the Habitats Directive and how the Court has greatly contributed to its proper and uniform application in each Member State towards achieving the Natura network throughout the EU in a coherent and balanced manner. Participants will be informed about the various procedural conditions on which the Court of Justice has developed its case law. They will learn about the key elements of the case law with regard to the following provisions of the Habitats Directive, which are crucial for its proper application on the ground:

- Article 4 (choice and designation of Natura 2000 sites)
- Articles 6 §§1 and 2 (and 7, conservation measures)
- Articles 11 and 14 (surveillance of the conservation status)
- Articles 12, 13, 15 and 16 (strict protection regime of species)
- The articulation of the Habitats Directive and measures implementing the Aarhus Convention at EU and national levels.

Please note that the presentation does not cover the rulings of the Court of Justice concerning the linkages between the Habitats Directive and the EIA Directive, which are addressed in another training module.

Methodology

As the focus of this unit lies in the provision of information and a number of different case law of CJEU regarding the Habitats Directive need to be covered, the best option would be to organise it as face-to-face frontal training.

The scope of this unit is rather large and a great deal of information that is required for effectively comprehending the rest of the programme needs to be provided. For this reason it is essential that this unit is effectively structured. Participants must acquire the knowledge and skills that will allow them to use the case law of CJEU if confronted with a case on Habitats Directive. In order to achieve this, it is essential that the trainer ensures that there is sufficient time for participants to raise questions or discuss any unclear points in relation to the Habitats Directive in the case law of CJEU.

Duration

The duration of this session should be 45-60 minutes (including lecturing time and discussion sessions with the participants).

Documentation

Necessary material (to be made available in hardcopy during the sub-session):

01	PowerPoint Presentation 'Habitats Directive in the case law of CJEU'
02	DIRECTIVE 2009/147/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

	of 30 November 2009 on the conservation of wild birds (Birds Directive)
03	COUNCIL DIRECTIVE 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitat Directive)

Additional material (to be included in the electronic documentation – USB stick):

04	CONSOLIDATED VERSIONS OF THE TREATY ON EUROPEAN UNION AND THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (2012/C 326/01)
05	C-491/08 Judgment of the Court (Fourth Chamber) of 10 June 2010. European Commission v Italian Republic.
06	C-241/08 Judgment of the Court (Second Chamber) of 4 March 2010. European Commission v French Republic
07	C-226/08 Judgment of the Court (Second Chamber) of 14 January 2010. Stadt Papenburg v Bundesrepublik Deutschland. Reference for a preliminary ruling: Verwaltungsgericht Oldenburg - Germany. (Papenburg Case)
08	C-362/06 - Judgment of the Court (Second Chamber) of 23 April 2009. Markku Sahlstedt and Others v Commission of the European Communities.
09	C-508/04 - Judgment of the Court (Fourth Chamber) of 10 May 2007. Commission of the European Communities v Republic of Austria.
10	C-518/04 - Judgment of the Court (Fifth Chamber) of 16 March 2006. Commission of the European Communities v Hellenic Republic.
11	C-98/03 - Judgment of the Court (Second Chamber) of 10 January 2006. Commission of the European Communities v Federal Republic of Germany.
12	C-6/04 - JUDGMENT OF THE COURT (SECOND CHAMBER) OF 20 OCTOBER 2005. COMMISSION OF THE EUROPEAN COMMUNITIES V UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND.
13	C-494/01 - JUDGMENT OF THE COURT (GRAND CHAMBER) OF 26 APRIL 2005. COMMISSION OF THE EUROPEAN COMMUNITIES V IRELAND.
14	C-117/03 - Judgment of the Court (Second Chamber) of 13 January 2005. Società Italiana Dragaggi SpA and Others v Ministero delle Infrastrutture e dei Trasporti and Regione Autonoma Friuli Venezia Giulia.
15	C-127/02 - Judgment of the Court (Grand Chamber) of 7 September 2004. Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw,

	Natuurbeheer en Visserij (Waddenzee Case)
16	C-415/01 - Judgment of the Court (Sixth Chamber) of 27 February 2003. Commission of the European Communities v Kingdom of Belgium.
17	C-103/00 - Judgment of the Court (Sixth Chamber) of 30 January 2002. Commission of the European Communities v Hellenic Republic.
18	C-67/99 - Judgment of the Court (Sixth Chamber) of 11 September 2001. Commission of the European Communities v Ireland.
19	C-71/99 - Judgment of the Court (Sixth Chamber) of 11 September 2001. Commission of the European Communities v Federal Republic of Germany.
17	C-220/99 - Judgment of the Court (Sixth Chamber) of 11 September 2001. Commission of the European Communities v French Republic.
18	C-374/98 - Judgment of the Court (Sixth Chamber) of 7 December 2000. Commission of the European Communities v French Republic.
19	C-329/96 - Judgment of the Court (Fifth Chamber) of 26 June 1997. Commission of the European Communities v Hellenic Republic.
20	C-283/81 - Judgment of the Court of 6 October 1982. Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health.

Trainer profile

The expert presenting the Habitats Directive in the case law of CJEU should be an expert of all aspects with regard to the Habitats Directive and fully familiar with the ECJ case law in this field. Ideally the speaker would be a judge or an attorney who has practical experience in this field.

Unit 5: Case Study on the Habitats Directive

Short description of content

During this unit, a case study on European Habitats Directive raising difficult questions of EU nature protection law should be presented. This case study should be based on real cases, namely Case C-342/05, Commission vs. Finland and Case C-404/09, Commission vs. Spain. Both cases cover the most important issues of the application of Habitats Directive:

- The first case (C-342/05) deals with derogations under Art. 16 Habitats Directive for wolves (protected under Art. 12 Habitats Directive)
- The second case (C-404/09) is a dispute about open-cast mining (Alto Sil site) causing deterioration of habitats and disturbance of species (*capercaillie* and brown bear) (infringement of Art. 6 (2) Habitats Directive) as well as a dispute about infringement of Directive 85/337 and infringement of Art. 6 (3)-(4) Habitats Directive).

General objectives

Participants will be able to deepen their knowledge regarding the Habitats Directive in a practical manner and also to further their grasp of the knowledge gained with regard to the challenges faced by Member States when transposing, implementing and enforcing the Habitats Directive, including issues such as infringement procedure through the medium of a case study. These case studies should also enable judges to facilitate discussion on how they would solve the problems presented.

Specific learning points

- The relevant case law of the CJEU to gain a greater understanding of the objectives and content of the Habitats Directive according to the Court's rulings
- The challenges faced by Member States when transposing, implementing and enforcing the Habitats Directive, including issues such as infringement procedure.
- The CJEU's interpretation of key provisions in the Habitats Directive
- The role of the national judge in ensuring compliance with the Habitats (and Birds) Directive(s)
- The facts, rulings and significance of both cases C-342/05 and C-409/09
- How the key issue of whether the conditions set by Article 16(1) to derogate to Article 12(1) was solved in C-342/05.
- How the issue of whether an obligation existed to stop exploitation of a SAC was solved in the case of C-409/09

Methodology

The trainer will explain the factual background of the case. After the short presentation, participants will be divided into working groups of 6-8 persons. The groups should appoint a moderator and a rapporteur. The groups will discuss the case on the basis of the applicable directives.

After the group discussion, participants will reconvene in a plenary session. Each group will have a rapporteur to explain the results of their discussion. The trainer will comment on their findings during the debriefing of the case study. The trainer will also invite comments from other groups or individuals and seek to stimulate a debate where differences of opinion, approach or interpretation are apparent.

Since the case study is based on two real cases, at the end of the session participants will receive a hand-out providing the solution of the case.

Time frame

The presentation of the case study should take 15 minutes; afterwards participants will divide into groups. The discussion on the case should take 60 minutes, the following discussion in the plenary including the debriefing should take another 30-45 minutes.

Documentation

Necessary material (to be made available in hardcopy during the sub-session):

01	PowerPoint Presentation & Case Study Documents 'Case Study on the Habitats Directive: Introduction to the facts of the case'
02	COUNCIL DIRECTIVE 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitat Directive)
03	DIRECTIVE 2011/92/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (EIA Directive)

Additional material (to be included in the electronic documentation – USB stick):

04	C-409/09 Judgment of the Court (Third Chamber) of 9 June 2011, José Maria Ambrósio Lavrador and Maria Cândida Olival Ferreira Bonifácio v Companhia de Seguros Fidelidade-Mundial SA.
05	C-342/05 Judgment of the Court (Second Chamber) of 14 June 2007, Commission of the European Communities v Republic of Finland.

Trainer profile

The person presenting the case study should be an expert on European nature protection law and – if possible – a judge who has practical experience in this field. The expert should be available during the group discussion and to assist participants if they need him/her. At the debriefing, the expert should be available for an interactive discussion with all the participants.

Unit 6: Introduction to the Environmental Impact Assessment (EIA) and the Strategic Environmental Assessment (SEA) Directives

Short description of content

Environmental assessment is a procedure that ensures that the environmental implications of decisions are taken into account before the decisions are made. Environmental assessment can be undertaken for individual projects, such as a dam, motorway, airport or factory, on the basis of Directive 2011/92/EU (known as 'Environmental Impact Assessment' – EIA Directive) or for public plans or programmes on the basis of Directive 2001/42/EC (known as 'Strategic Environmental Assessment' – SEA Directive). The common principle of both Directives is to ensure that plans, programmes and projects likely to have significant effects on the environment are made subject to an environmental assessment, prior to their approval or authorisation. Consultation with the public is a key feature of environmental assessment procedures.

General objectives

Participants will be given the basic information regarding the European legal framework on the Environmental Impact Assessment as well as the Strategic Environmental Assessment and the legislative background of both the EIA and SEA Directives.

Specific learning points

- The areas of the Environmental Impact Assessment (EIA) including its origins, content and stages involved in the Environmental Impact Assessment procedure.
- The application and meaning of the various Articles in the EIA Directive 85/337
- The scope of the Strategic Environment Assessment (SEA) Directive 2001/42/EC including its application, exemptions and the procedure involved

Methodology

As the focus of this unit lies in the provision of information and a number of different elements of EIA and SEA Directives need to be covered, the best option would be to organise it as face-to-face frontal training.

The scope of this unit is rather large and a great deal of information that is required for effectively comprehending the rest of the programme needs to be provided. For this reason it is essential that this unit is effectively structured. The main features of the both directives should be clearly presented in a logical order. Participants must acquire the knowledge and skills that will allow them to use these legal instruments if confronted with a case with regard to Environmental Impact Assessment or the Strategic Environmental Assessment.

Time frame

The duration of this presentation should be at least 60 minutes. With regard to the large scope of this unit it is essential that the trainer ensures that there is sufficient time for participants to raise questions or discuss any unclear points in relation to the EIA and SEA Directives.

Documentation

Necessary material (to be made available in hardcopy during the sub-session):

01	PowerPoint Presentation 'Habitats Directive in the case law of CJEU'
02	DIRECTIVE 2011/92/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (EIA Directive)
03	DIRECTIVE 2001/42/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (SEA Directive)
04	COUNCIL DIRECTIVE 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitat Directive)
05	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 October 2012 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment

Additional material (to be included in the electronic documentation – USB stick):

	EU documents
06	DIRECTIVE 2009/31/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006
	International documents
07	UNECE Convention on Transboundary EIA (Espoo) 1991
08	CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

	done at Aarhus, Denmark, on 25 June 1998 (Aarhus Convention)
	International Case law
09	INTERNATIONAL COURT OF JUSTICE JUDGMENT OF 20 APRIL 2010, PULP MILLS ON THE RIVER URUGUAY (ARGENTINA v. URUGUAY)
10	INTERNATIONAL COURT OF JUSTICE JUDGMENT OF 25 SEPTEMBER 1997 CASE CONCERNING THE GABCIKOVO-NAGYMAROS PROJECT (HUNGARY/SLOVAKIA)
11	REPORTS OF INTERNATIONAL ARBITRAL AWARDS of 16 April 1938 and 11 March 1941, Trail smelter case (United States, Canada)

Trainer profile

As this constitutes one of the most important sessions of the workshop, it is particularly important to identify a trainer with strong didactic competences and the ability to clearly transmit information and explain complex concepts.

Ideally, the trainer should have some practical experience matching that of the end users attending the workshop, but of utmost importance would be his or her sound knowledge of the issues related to Environmental Impact Assessment. An expert from DG Environment, EU Commission could thus constitute a good option, particularly for workshops organised on a Europe-wide basis. Alternatively, an experienced professor of law represents an appropriate substitute.

Unit 7: The EIA Directive in the case law of CJEU

Short description of content

The original EIA Directive (85/337/EEC) has now been in place for almost 20 years. The directive was the subject of substantial amendments in 1997 (see Directive 97/11/EC), in 2003 (Directive 2003/35/EC) and in 2009 (Directive 2009/31/EC), which aimed to tackle a number of difficulties that had come to light in the day-to-day operation of the directive as originally drafted. The initial Directive of 1985 and its three amendments have been codified by Directive 2011/92/EU.

In July 2009, the Commission published a report on the application and effectiveness of the EIA Directive (COM(2009)378), which documented a range of practical problems with implementation of the directive on the ground at local level. The report has shown that EIA remains one of the most problematic areas of European law in terms of implementation and enforcement at local level.

The EIA Directive is a framework directive and leaves considerable discretion to the Member States as regards the manner of implementation within the national legal system. However, this flexible approach leads to problems with implementation and enforcement. Hence, the Court of Justice plays an important role in implementation and interpretation of the EIA Directive. Knowledge of the case law of CJEU with regard to the EIA procedures is therefore necessary for a better understanding of substance and aims of the EIA Directive.

General objectives

The purpose of this unit is to assemble and discuss the most important rulings of the European Court of Justice related to the provisions of the codified EIA Directive.

Specific learning points

- The transposition of the Environmental Impact Assessment Directive 2011/92/EU
- Approach to applying the Directive and need for assessment with reference to relevant CJEU case law
- The definition of a project and screening with reference to relevant CJEU case law
- The development control, development consent and access to justice with reference to relevant CJEU case law
- Transboundary procedure

Methodology

This unit should be held as a frontal presentation in plenary.

Time frame

The time allocated to this sub-session should be approximately 45-60 minutes and should include some time for discussion.

Documentation

Necessary material (to be made available in hardcopy during the sub-session):

01	PowerPoint Presentation 'The EIA Directive in the case law of CJEU'
02	DIRECTIVE 2011/92/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (EIA Directive)

Additional material (to be included in the electronic documentation – USB stick):

03	C-420/11 Judgment of the Court (Fourth Chamber) of 14 March 2013. Jutta Leth v Republik Österreich and Land Niederösterreich.
04	C-121/11 Judgment of the Court (Third Chamber) of 19 April 2012, Pro-Braine ASBL and Others v Commune de Braine-le-Château.
05	C-416/10 Judgment of the Court (Grand Chamber) of 15 January 2013, Jozef Križan and Others v Slovenská inšpekcia životného prostredia.
06	C-182/10 Judgment of the Court (Fourth Chamber) of 16 February 2012, Marie-Noëlle Solvay and Others v Région wallonne.
07	C-115/09 Judgment of the Court (Fourth Chamber) of 12 May 2011. Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg.
08	C-275/09 Judgment of the Court (First Chamber) of 17 March 2011, Brussels Hoofdstedelijk Gewest and Others v Vlaamse Gewest.
09	C-50/09 Judgment of the Court (First Chamber) of 3 March 2011, European Commission v Ireland.
10	C-240/09 Judgment of the Court (Grand Chamber) of 8 March 2011. Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky.
11	C-263/08 JUDGMENT OF THE COURT (SECOND CHAMBER) OF 15 OCTOBER 2009. DJURGÅRDEN-LILLA VÄRTANS MILJÖSKYDDSFÖRENING V STOCKHOLMS KOMMUN GENOM DESS MARKNÄMND.

12	C-75/08 Judgment of the Court (Second Chamber) of 30 April 2009, The Queen, on the application of Christopher Mellor v Secretary of State for Communities and Local Government.
13	C-142/07 Judgment of the Court (Third Chamber) of 25 July 2008, Ecologistas en Acción-CODA v Ayuntamiento de Madrid
14	C-427/07 Judgment of the Court (Second Chamber) of 16 July 2009. Commission of the European Communities v Ireland.
15	C-156/07 Order of the Court (Sixth Chamber) of 10 July 2008, Salvatore Aiello and Others v Regione Lombardia and Others.
16	C-2/07 Judgment of the Court (Second Chamber) of 28 February 2008, Paul Abraham and Others v Région wallonne and Others
17	C-215/06 Judgment of the Court (Second Chamber) of 3 July 2008, Commission of the European Communities v Ireland.
18	C-332/04 Judgment of the Court (Third Chamber) of 16 March 2006, Commission of the European Communities v Kingdom of Spain.
19	C-508/03 Judgment of the Court (First Chamber) of 4 May 2006, Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland.
20	C-290/03 Judgment of the Court (First Chamber) of 4 May 2006, The Queen, on the application of: Diane Barker v London Borough of Bromley.
21	C-87/02 Judgment of the Court (First Chamber) of 10 June 2004, Commission of the European Communities v Italian Republic.
22	C-201/02 JUDGMENT OF THE COURT (FIFTH CHAMBER) OF 7 JANUARY 2004, THE QUEEN, ON THE APPLICATION OF DELENA WELLS V SECRETARY OF STATE FOR TRANSPORT, LOCAL GOVERNMENT AND THE REGIONS.
23	C-227/01 Judgment of the Court (Second Chamber) of 16 September 2004, Commission of the European Communities v Kingdom of Spain.
24	C-230/00 Judgment of the Court (Third Chamber) of 14 June 2001, Commission of the European Communities v Kingdom of Belgium.
25	C-287/98 Judgment of the Court of 19 September 2000, Grand Duchy of Luxemburg v Berthe Linster, Aloyse Linster and Yvonne Linster

26	C-435/97 Judgment of the Court (Sixth Chamber) of 16 September 1999, World Wildlife Fund (WWF) and Others v Autonome Provinz Bozen and Others.
27	C-392/96 Judgment of the Court (Fifth Chamber) of 21 September 1999, Commission of the European Communities v Ireland.
28	C-72/95 Judgment of the Court of 24 October 1996, Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland.
29	C-301/95 Judgment of the Court (Sixth Chamber) of 22 October 1998, Commission of the European Communities v Federal Republic of Germany.
30	C-133/94 Judgment of the Court (Sixth Chamber) of 2 May 1996, Commission of the European Communities v Kingdom of Belgium.
31	C-360/87 Judgment of the Court of 28 February 1991, Commission of the European Communities v Italian Republic.
32	C-96/81 Judgment of the Court of 25 May 1982, Commission of the European Communities v Kingdom of the Netherlands.

Trainer profile

The expert presenting the EIA Directive in the case law of CJEU should be an all round expert of all aspects of European EIA procedures and fully familiar with the ECJ case law in this field. A possible speaker could be a judge or attorney experienced in European planning law and public participation issues.

Unit 8: Case study on transboundary EIA

Short description of content

In this unit a case study relating to proposed developments in the port of 'Sevilla', which is a harbour area and comes within the jurisdiction of two EU Member States will be presented. The case study is based on a hypothetical case with questions regarding:

- Application of both the EIA and Habitats Directives
- EIA Procedures under the EIA Directive.
- Public participation
- Challenging the legality of the permission for the project in a Member State

General objectives

The case is meant to facilitate discussion amongst the participants on how they would solve the problems presented. Its main purpose is to make the participants aware of the legal problems with regard to transboundary EIA procedure and showing the participants possible ways to react to the questions presented during the case study.

Specific learning points

Participants should be able to identify both the possibilities and the problems for national courts in solving conflicts with regard to transboundary EIA.

Methodology

The cases will be distributed to the participants at the beginning of the workshop. Then the trainer will explain the factual background of the case. After the short presentation, participants will be divided into working groups of 6-8 persons. The groups should appoint a moderator and a rapporteur. The groups will discuss the case on the basis of the applicable directives.

After the group discussion, participants will reconvene in a plenary session. Each group will have a rapporteur to explain the results of their discussion. The trainer will comment on their findings during the debriefing of the case study. The trainer will also invite comments from other groups or individuals and seek to stimulate a debate where differences of opinion, approach or interpretation are apparent.

Time frame

The presentation of the case study should take 15 minutes; afterwards participants will divide into groups. The discussion on the case should take 60 minutes, the following discussion in the plenary including the debriefing should take another 30-45 minutes.

Documentation

Necessary material (to be made available in hardcopy during the sub-session):

01	PowerPoint Presentation and Case Study Documents of 'Case study on transboundary EIA'
02	DIRECTIVE 2011/92/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (EIA Directive)
03	COUNCIL DIRECTIVE 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitat Directive)

Additional material (to be included in the electronic documentation – USB stick):

	International documents
05	UNECE Convention on Transboundary EIA (Espoo) 1991
06	CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS done at Aarhus, Denmark, on 25 June 1998 (Aarhus Convention)
	Selected CJEU Case Law
07	C-258/11 Judgment of the Court (Third Chamber) of 11 April 2013. Peter Sweetman and Others v An Bord Pleanála. Reference for a preliminary ruling: Supreme Court - Ireland.
08	C-50/09 Judgment of the Court (First Chamber) of 3 March 2011, European Commission v Ireland.
09	C-241/08 Judgment of the Court (Second Chamber) of 4 March 2010, European Commission v French Republic.
10	C-75/08 Judgment of the Court (Second Chamber) of 30 April 2009, The Queen, on the application of Christopher Mellor v Secretary of State for Communities and Local Government.
11	C-418/04 Judgment of the Court (Second Chamber) of 13 December 2007, Commission of the European Communities v Ireland.
12	C-508/03 Judgment of the Court (First Chamber) of 4 May 2006, Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland.

13	C-127/02 Judgment of the Court (Grand Chamber) of 7 September 2004. Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (Waddenzee Case)
14	C-236/01 Judgment of the Court of 9 September 2003, Monsanto Agricoltura Italia SpA and Others v Presidenza del Consiglio dei Ministri and Others.
15	C-487/01 Judgment of the Court (Fifth Chamber) of 29 April 2004, Gemeente Leusden (C-487/01) and Holin Groep BV cs (C-7/02) v Staatssecretaris van Financiën.

Trainer profile

The expert presenting the case study should be an expert of all aspects of the EIA Directive, in particular with regard to the transboundary issues of the EIA procedures. The expert should have relevant experience in moderating discussions and should be available during the group discussion to assist participants if they need him/her. At the debriefing, the expert should be available for an interactive discussion with all the participants and capable of moderating such a discussion.

Unit 9: Interaction between the EIA Directive and the Article 6(3) and (4) of the Habitats Directive

Short description of content

In the early phases of implementation of the requirements of the EIA and Habitats Directives, many practitioners assumed that an EIA of a project would also satisfy the requirements for an Appropriate Assessment (AA) of the same project. Frequently, AAs were submitted in the chapter of an Environmental Impact Statement describing the likely significant effect of the project on fauna and flora and the cultural heritage, especially the last mentioned. This assumption has proved to be wrong as is illustrated by the decisions of the ECJ and evolving practice on the implementation of both Directives. The Commission advises that AAs must now be clearly identifiable in an EIS or reported separately. Many EIA projects will also be AA projects because the requirement for EIA of sub-threshold projects is triggered by likely effects on environmentally sensitive locations. The presentation should address the issues which occur when implementation of these Directives is involved.

General objectives

The objective of this presentation is to illustrate the important interactions between EIA and Articles 6.2 and 6.3 of the Habitats Directive.

Specific learning points

- How the Environmental Impact Assessment (EIA) and the Articles 6(3) and 6(4) of the Habitats Directive interact with one another
- Issues involved in this interaction such as screening tests, consultation obligations and compensatory measures
- The transboundary issues between the interaction of the EIA and Habitats Directive

Methodology

This unit should be held as a frontal presentation in plenary.

Time frame

The time allocated to this sub-session could be approximately 45-60 minutes and should include some time for discussion.

Documentation

Necessary material (to be made available in hardcopy during the sub-session):

01	PowerPoint Presentation 'Interaction between the EIA Directive and the Article
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	6(3) and (4) of the Habitats Directive'
02	COUNCIL DIRECTIVE 92/43/EEC of May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitats Directive)
03	DIRECTIVE 2011/92/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (EIA Directive)

Trainer profile

As this constitutes one of the most important sessions of the workshop, it is particularly important to identify a trainer with strong didactic competences and the ability to clearly transmit information and explain complex concepts.

Ideally, the trainer should have some practical experience matching that of the end users attending the workshop, but of utmost importance would be his or her sound knowledge of the relationship between the EIA and Nature Directives and the wider legal context in this area. An expert from DG Environment, EU Commission could thus constitute a good option, particularly for workshops organised on a Europe-wide basis. Alternatively, an experienced professor of law represents an appropriate substitute.

Units 10 and 11: Role of the EIA and the Nature Directives in judicial review proceedings at national level: substantive and procedural aspects

Short description of content

This session takes as a starting point for national courts dealing with judicial review in cases where the EIA-, Wild Birds and Habitats Directives are relied upon by the parties. Which instruments are available to national courts to settle conflicts between national law and the abovementioned EU directives? More in particular the doctrines of direct effect, consistent interpretation and state liability will be treated on the basis of the case law of the CJEU on EIA and nature conservation, as well as on the basis of comparative national case law. In particular, attention will be given to problems and dilemmas at national level to deal with conflicts between national and EU EIA and nature conservation law.

General objectives

Participants from the national courts:

- should increase their knowledge on the relevance of the EIA-, Wild Birds and Habitats Directives for national courts;
- should be able to identify both the possibilities and the problems for national courts of solving conflicts between national and EU EIA and nature conservation law.

Specific learning points

Participants from the national courts should be able to exchanges common experiences in dealing with conflicts between national and EU EIA and nature conservation law.

- The procedural aspects of the EIA and the Nature Directives in judicial review proceedings at national level
- How the EIA and Nature Directives have adopted Article 9(3)-(4) of the Aarhus Convention
- The significance of the Trianel case (C-115/09) and the aftermath effect that then occurred

Methodology

Both units should be held as a frontal presentation in plenary. It is advisable to schedule Unit 11 on procedural aspects after the Case study on the interaction between the EIA and the Habitats Directive (Unit 12). Should the case study, however, not be included into the training programme, then Unit 10 and 11 can be held as one presentation.

Time frame

The time allocated to the presentation on the 'Role of the EIA and the Nature Directives in judicial review proceedings at national level' should be at least 60 minutes. As mentioned in the 'methodology' part above, the units can be combined into one presentation and take 60 to 90 minutes. The units can, however, be presented separately. Ideally a case study on the interaction between the EIA and the Habitats Directive (Unit 12) should be scheduled between the presentations on substantial and procedural aspects. In this case, each of the units could be approximately 45 minutes and should include some time for discussion.

Necessary material (to be made available in hardcopy during the sub-session):

01	PowerPoint Presentation 'Role of the EIA and the Nature Directives in judicial review proceedings at national level: substantive and procedural aspects'
02	COUNCIL DIRECTIVE 92/43/EEC of May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitats Directive)
03	DIRECTIVE 2011/92/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (EIA Directive)
04	DIRECTIVE 2003/35/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice

Additional material (to be included in the electronic documentation – USB stick):

	EU Documents
05	Rules of Procedure of the Court of Justice (consolidated version of 25 September 2012)
06	Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling procedure (OJ C 338 of 6 November 2012, p. 1)
	International documents
07	CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (2000/C 364/01)
08	European Convention on Human Rights as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13
09	CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN

	DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS done at Aarhus, Denmark, on 25 June 1998 (Aarhus Convention)
	Selected CJEU Case Law
10	C-244/12 Judgment of the Court (Fifth Chamber) of 21 March 2013. Salzburger Flughafen GmbH v Umweltsenat.
11	C-127/02 Judgment of the Court (Grand Chamber) of 7 September 2004. Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (Waddenzee Case)
12	C-201/02 Judgment of the Court (Fifth Chamber) of 7 January 2004, The Queen, on the application of Delena Wells v Secretary of State for Transport, Local Government and the Regions.
13	Joined Cases C 397/01 to C 403/01 Judgement of the Court (Grand Chamber) 5 October 2004, Pfeiffer and Others.
14	C-106/89 Judgment of the Court (Sixth Chamber) of 13 November 1990, Marleasing SA v La Comercial Internacional de Alimentacion SA.
15	C-260/11 Judgment of the Court (Fourth Chamber) of 11 April 2013, The Queen, on the application of David Edwards and Lilian Pallikaropoulos v Environment Agency and Others.
16	C-530/11 Judgment of the Court (Second Chamber) of 13 February 2014, European Commission v United Kingdom of Great Britain and Northern Ireland.
17	C-416/10 Judgment of the Court (Grand Chamber) of 15 January 2013, Jozef Križan and Others v Slovenská inšpekcia životného prostredia.
18	C-115/09 Judgment of the Court (Fourth Chamber) of 12 May 2011, Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg.
19	C-263/08 Judgment of the Court (Second Chamber) of 15 October 2009, Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd.
20	C-45/76 Judgment of the Court of 16 December 1976, Comet BV v Produktschap voor Siergewassen.
21	C-33/76 Judgment of the Court of 16 December 1976, Rewe-Zentralfinanz eG

	and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland.
22	C-240/09 Judgment of the Court (Grand Chamber) of 8 March 2011, Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky.

Trainer profile

Apart from training abilities and knowledge on the EIA and Nature Directives, the expert should have the necessary experience with issues of judicial review proceedings at national level. An ideal speaker could be therefore a judge experienced in planning and nature protection law.

Unit 12: Case study on the interaction between the EIA and the Habitats Directive

Short description of the content

The case presented is a hypothetical case in which all kinds of doctrinal and practical problems are 'hidden' regarding the effects the EIA and Habitats Directives in cases handled by national courts. The case is meant to facilitate discussion amongst the participants on how they would solve the problems presented. Important to note is that the case is not meant to provide 100% right or wrong answers to the legal questions, problems and dilemma's presented. Its main purpose is to make the participants aware of the legal problems and showing the participants possible and impossible routes to react to these questions.

General objectives

Participants will be able to deepen their knowledge regarding the relevance of the EIA- and Habitats Directives for national courts in a practical manner.

Specific learning points

Participants should be able to identify both the possibilities and the problems for national courts in solving conflicts between national the EIA and Habitats Directives.

Methodology

The trainer will present the case by raising some difficult points on the relevance of the EIA and the Habitats Directive in national court proceedings. After the short presentation, participants will be divided into groups of 6-8 persons. The groups will discuss the case on the basis of the directives. After the group discussion, participants will return to the plenary. Each group will have a rapporteur to explain the results of their discussion and the trainer will comment on their findings.

Duration

The presentation of the case study should take 15 minutes; afterwards participants will divide into groups. The discussion on the case will take 60 minutes, the following discussion in the plenary including the debriefing will take another 45-60 minutes.

Documentation

Necessary material (to be made available in hardcopy during the sub-session):

01	PowerPoint Presentation & Case Study Documents of 'Case study on the
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	interaction between the EIA and the Habitats Directive'
02	COUNCIL DIRECTIVE 92/43/EEC of May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitats Directive)
03	DIRECTIVE 2011/92/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (EIA Directive)

- **Additional material (to be included in the electronic documentation – USB stick):**

01	C-244/12 Judgment of the Court (Fifth Chamber) of 21 March 2013. Salzburger Flughafen GmbH v Umweltsenat.
02	C-420/11 Judgment of the Court (Fourth Chamber) of 14 March 2013. Jutta Leth v Republik Österreich and Land Niederösterreich.
03	C-240/09 Judgment of the Court (Grand Chamber) of 8 March 2011. Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky.
04	C-115/09 Judgment of the Court (Fourth Chamber) of 12 May 2011. Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg.
05	C-263/08 Judgment of the Court (Second Chamber) of 15 October 2009. Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd.
06	C-226/08 Judgment of the Court (Second Chamber) of 14 January 2010, Stadt Papenburg v Bundesrepublik Deutschland.
07	C-205/08 Judgment of the Court (Second Chamber) of 10 December 2009. Umweltanwalt von Kärnten v Kärntner Landesregierung.
08	C-75/08 Judgment of the Court (Second Chamber) of 30 April 2009, The Queen, on the application of Christopher Mellor v Secretary of State for Communities and Local Government.
09	C-427/07 Judgment of the Court (Second Chamber) of 16 July 2009. Commission of the European Communities v Ireland.
10	C-117/03 Judgment of the Court (Second Chamber) of 13 January 2005, Società Italiana Dragaggi SpA and Others v Ministero delle Infrastrutture e dei Trasporti and Regione Autonoma Friuli Venezia Giulia.

11	C-201/02 Judgment of the Court (Fifth Chamber) of 7 January 2004, The Queen, on the application of Delena Wells v Secretary of State for Transport, Local Government and the Regions.
12	C-127/02 Judgment of the Court (Grand Chamber) of 7 September 2004, Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij.
13	C-129/96 Judgment of the Court of 18 December 1997. Inter-Environnement Wallonie ASBL v Région wallonne.
14	C-168/95 Judgment of the Court (Fourth Chamber) of 26 September 1996. Criminal proceedings against Luciano Arcaro.
15	C-72/95 Judgment of the Court of 24 October 1996, Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland.
16	C-46/93 Judgment of the Court of 5 March 1996. Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others. Joined cases C-46/93 and C-48/93.
17	C-431/92 Judgment of the Court of 11 August 1995, Commission of the European Communities v Federal Republic of Germany.
18	C-396/92 Judgment of the Court of 9 August 1994. Bund Naturschutz in Bayern e.V. and Richard Stahnsdorf and others v Freistaat Bayern, Stadt Vilsbiburg and Landkreis Landshut.
19	C-6/90 Judgment of the Court of 19 November 1991. Andrea Francovich and Danila Bonifaci and others v Italian Republic. Joined cases C-6/90 and C-9/90.
20	C-106/89 Judgment of the Court (Sixth Chamber) of 13 November 1990. Marleasing SA v La Comercial Internacional de Alimentacion SA.
21	C-57/89 Judgment of the Court of 28 February 1991. Commission of the European Communities v Federal Republic of Germany.
22	C-103/88 Judgment of the Court of 22 June 1989, Fratelli Costanzo SpA v Comune di Milano.
23	C-45/76 Judgment of the Court of 16 December 1976. Comet BV v Produktschap voor Siergewassen.
24	C-33/76 Judgment of the Court of 16 December 1976. Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland.

Trainer profile

The person presenting the case study should be an expert on EU law with an advanced knowledge of the EU doctrines of direct effect, consistent interpretation and state liability. If possible, the expert should also have practical experience in this field as a national judge dealing with judicial review. The expert should be available during the group discussion and to assist participants if they need him/her. At the debriefing, the expert should be available for an interactive discussion with all the participants.

Unit 13: Closing session – evaluation of the workshop

Short description of content

In the final session of the workshop, conclusions will be drawn and participants will be invited to evaluate the event.

General objectives

Participants will provide feedback on the whole event, the preliminary information, the workshop documentation, the e-learning module and the usefulness of the workshop for their daily work.

Specific learning points

- Summing up the event
- Obtaining feedback
- Use the feedback and the evaluations to improve the training module (for organisers)

Methodology

Participants will be in plenary. Before the final discussion and evaluation of the event is actually opened, each participant should have already filled in the evaluation form. If possible, all participants, i.e. including the speakers and the leader of the workshop, should participate in this final evaluation session. The workshop manager should encourage the participants to speak openly about their impressions of the workshop.

Time frame

The closing session should take approx. 20-30 minutes.

Documentation

Necessary material (to be made available in hardcopy during the sub-session):

01	Evaluation form
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Trainer profile

The closing session will be chaired by the workshop manager.

Annexes

Annex 1 – Template indicative workshop programme

Objective

The goal of this two and a half day workshop is to develop and raise understanding on the key legal aspects of EU Law on environmental impact assessment and nature protection with a special focus on the interaction between the EIA and the Habitats directives.

Key topics

- Birds and Habitats Directives and Natura 2000
- Implementation of Article 6 Habitats Directive
- Environmental Impact Assessment (EIA) and the Strategic Environmental Assessment (SEA) Directives
- Interaction between the EIA Directive and the Article 6 (3) and (4) of the Habitats Directive
- Role of the EIA and the Nature directives in judicial review proceedings at national level

Who should attend?

Judges from all EU Member States who are interested in environmental law.

For further information:



INTERACTION BETWEEN THE ENVIRONMENTAL IMPACT ASSESSMENT AND THE NATURE DIRECTIVES

Venue, Date

Organiser:

Language:



Day 1		Day 2		Day 3	
08:45	Arrival and registration of participants	09:00	Introduction to the Environmental Impact Assessment (EIA) and the Strategic Environmental Assessment (SEA) Directives	09:00	Case study on the interaction between the EIA and the Habitats Directive: Introduction to the facts of the case
09:00	Setting the scene				
09:30	Introduction to the Birds Directive, Habitats Directive and Natura 2000	10:00	The EIA Directive in the case law of CJEU	09:15	Case study on the interaction between the EIA and the Habitats Directive: Working groups
10:30	Coffee Break	11:00	Case study on transboundary EIA: Introduction to the facts of the case	10:30	Coffee Break
11:00	Implementation of Article 6 Habitats Directive	11:15	Coffee Break	11:00	Case study on the interaction between the EIA and the Habitats Directive: Discussion of the results
12:00	Habitats Directive in the case law of CJEU	11:30	Case study on transboundary EIA: Working groups	11:30	Role of the EIA and the Nature directives in judicial review proceedings at national level: procedural aspects
13:00	Lunch break	13:00	Lunch break		
14:15	Case Study on the Habitats Directive: Introduction to the facts of the case	14:00	Case study on transboundary EIA: Discussion of the results	12:30	Evaluation of the Workshop
14:30	Case Study on the Habitats Directive: Working groups	14:30	Interaction between the EIA Directive and the Article 6(3) and (4) of the Habitats Directive	13:00	End of the workshop
16:00	Coffee Break	15:30	Coffee Break		
16:30	Case Study on the Habitats Directive: Discussion of the results	16:00	Role of the EIA and the Nature directives in judicial review proceedings at national level: substantive aspects		
17:30	End of the first workshop day	17:00	End of the second workshop day		

Annex 2: Background materials to be contained in the users' pack

1. General information

1.	Final version of the workshop programme
2.	List of trainers
3.	List of participants
4.	Immediate evaluation form

2. E-learning course

1.	E-learning course on the Interaction between the EIA and Nature Directives
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3. Trainers' contributions

Notes, outlines, PowerPoint presentations and written texts provided by the trainers

4. Background Documentation – legal texts

A. European Nature Protection Law

	EU Documents:
01	DIRECTIVE 2009/147/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 30 November 2009 on the conservation of wild birds (Birds Directive)
02	COUNCIL REGULATION (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) No 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001
03	COUNCIL REGULATION (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein
04	COUNCIL DIRECTIVE 92/43/EEC of May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitats Directive)
05	COUNCIL DECISION 82/72/EEC of 3 December 1981 concerning the conclusion of the Convention on the conservation of European wildlife and natural habitats (Bern Convention)
06	Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds "The Birds Directive"
07	MANAGING NATURA 2000 SITES: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC
08	Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC
09	The implementation of the Birds and Habitats Directives in estuaries and coastal zones
10	Wind energy developments and Natura 2000
11	Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC
12	Natura 2000 and forests 'Challenges and opportunities'
13	Sustainable tourism and Natura 2000: Guidelines, initiatives and good practices in Europe
14	Guidelines for the establishment of the Natura 2000 network in the marine environment: Application of the Habitats and Birds Directives

15	Appendix 1 : Marine Habitat types definitions. Update of "Interpretation Manual of European Union Habitats"
16	Appendix 2: Lists of existing marine Habitat types and Species for different Member States
17	Appendix 3: Examples of the technique of the use of matrix as a management tool for decision-making.
18	Appendix 4 I: Good experiences and examples of implementation of Natura 2000 in the marine environment including LIFE fund actions in the marine environment
19	Appendix 4 II: LIFE and the marine environment: Promoting sustainable management of Europe's seas
20	Appendix 5: Bibliography
	Selected CJEU Case Law
21	C-258/11 Judgment of the Court (Third Chamber) of 11 April 2013. Peter Sweetman and Others v An Bord Pleanála. Reference for a preliminary ruling: Supreme Court - Ireland.
22	C-340/10 Judgment of the Court (Fourth Chamber) of 15 March 2012, European Commission v Republic of Cyprus.
23	C-182/10 Judgment of the Court (Fourth Chamber) of 16 February 2012, Marie-Noëlle Solvay and Others v Région wallonne.
24	C-409/09 Judgment of the Court (Third Chamber) of 9 June 2011, José Maria Ambrósio Lavrador and Maria Cândida Olival Ferreira Bonifácio v Companhia de Seguros Fidelidade-Mundial SA.
25	C-491/08 Judgment of the Court (Fourth Chamber) of 10 June 2010. European Commission v Italian Republic.
26	C-241/08 Judgment of the Court (Second Chamber) of 4 March 2010, European Commission v French Republic.
27	C-226/08 Judgment of the Court (Second Chamber) of 14 January 2010, Stadt Papenburg v Bundesrepublik Deutschland.
28	C-362/06 Judgment of the Court (Second Chamber) of 23 April 2009. Markku Sahlstedt and Others v Commission of the European Communities.
29	C-418/04 Judgment of the Court (Second Chamber) of 13 December 2007, Commission of the European Communities v Ireland.
30	C-342/05 Judgment of the Court (Second Chamber) of 14 June 2007, Commission of the European Communities v Republic of Finland.

31	C-508/04 Judgment of the Court (Fourth Chamber) of 10 May 2007, Commission of the European Communities v Republic of Austria.
32	C-518/04 Judgment of the Court (Fifth Chamber) of 16 March 2006, Commission of the European Communities v Hellenic Republic.
33	C-98/03 Judgment of the Court (Second Chamber) of 10 January 2006, Commission of the European Communities v Federal Republic of Germany.
34	C-6/04 Judgment of the Court (Second Chamber) of 20 October 2005, Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland.
35	C-494/01 JUDGMENT OF THE COURT (GRAND CHAMBER) OF 26 APRIL 2005. COMMISSION OF THE EUROPEAN COMMUNITIES V IRELAND.
36	C-441/03 Judgment of the Court (Second Chamber) of 14 April 2005, Commission of the European Communities v Kingdom of the Netherlands.
37	C-117/03 Judgment of the Court (Second Chamber) of 13 January 2005, Società Italiana Dragaggi SpA and Others v Ministero delle Infrastrutture e dei Trasporti and Regione Autonoma Friuli Venezia Giulia.
38	C-127/02 Judgment of the Court (Grand Chamber) of 7 September 2004, Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij.
39	C-407/03 Judgment of 15 July 2004, Commission v Finland.
40	C-143/02 Judgment of the Court (Third Chamber) of 20 March 2003, Commission of the European Communities v Italian Republic.
41	C-415/01 Judgment of the Court (Sixth Chamber) of 27 February 2003. Commission of the European Communities v Kingdom of Belgium.
42	C-75/01 Judgment of the Court (Sixth Chamber) of 13 February 2003, Commission of the European Communities v Grand Duchy of Luxemburg.
43	C-103/00 Judgment of the Court (Sixth Chamber) of 30 January 2002, Commission of the European Communities v Hellenic Republic.
44	C-67/99 Judgment of the Court (Sixth Chamber) of 11 September 2001. Commission of the European Communities v Ireland.
45	C-71/99 Judgment of the Court (Sixth Chamber) of 11 September 2001. Commission of the European Communities v Federal Republic of Germany.

46	C-220/99 Judgment of the Court (Sixth Chamber) of 11 September 2001. Commission of the European Communities v French Republic.
47	C-374/98 Judgment of the Court (Sixth Chamber) of 7 December 2000, Commission of the European Communities v French Republic.
48	C-371/98 Judgment of the Court of 7 November 2000, The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping Ltd, interveners: World Wide Fund for Nature UK (WWF) and Avon Wildlife Trust.
49	C-256/98 Judgment of the Court (Fifth Chamber) of 6 April 2000, Commission of the European Communities v French Republic.
50	C-3/96 Judgment of the Court of 19 May 1998, Commission of the European Communities v Kingdom of the Netherlands.
51	C-329/96 Judgment of the Court (Fifth Chamber) of 26 June 1997. Commission of the European Communities v Hellenic Republic.
52	C-44/95 Judgment of the Court of 11 July 1996, Regina v Secretary of State for the Environment, ex parte: Royal Society for the Protection of Birds.
53	C-57/89 Judgment of the Court of 28 February 1991. Commission of the European Communities v Federal Republic of Germany.
54	C-396/92 Judgment of the Court of 9 August 1994. Bund Naturschutz in Bayern e.V. and Richard Stahnsdorf and others v Freistaat Bayern, Stadt Vilsbiburg and Landkreis Landshut.

B. Environmental Impact Assessment

	EU Documents
55	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 October 2012 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment
56	DIRECTIVE 2011/92/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment
57	DIRECTIVE 2003/35/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice
58	DIRECTIVE 2001/42/EC OF THE EUROPEAN PARLIAMENT AND OF THE

	COUNCIL of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (SEA Directive)
	International Documents
59	UNECE Convention on Transboundary EIA (Espoo) 1991
60	CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS done at Aarhus, Denmark, on 25 June 1998 (Aarhus Convention)
61	European Convention on Human Rights as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13
62	CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (2000/C 364/01)
	Selected CJEU Case Law
63	C-121/11 Judgment of the Court (Third Chamber) of 19 April 2012, Pro-Braine ASBL and Others v Commune de Braine-le-Château.
64	C-416/10 Judgment of the Court (Grand Chamber) of 15 January 2013, Jozef Križan and Others v Slovenská inšpekcia životného prostredia.
65	C-115/09 Judgment of the Court (Fourth Chamber) of 12 May 2011. Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg.
66	C-275/09 Judgment of the Court (First Chamber) of 17 March 2011, Brussels Hoofdstedelijk Gewest and Others v Vlaamse Gewest.
67	C-50/09 Judgment of the Court (First Chamber) of 3 March 2011, European Commission v Ireland.
68	C-75/08 Judgment of the Court (Second Chamber) of 30 April 2009, The Queen, on the application of Christopher Mellor v Secretary of State for Communities and Local Government.
69	C-142/07 Judgment of the Court (Third Chamber) of 25 July 2008, Ecologistas en Acción-CODA v Ayuntamiento de Madrid.
70	C-156/07 Order of the Court (Sixth Chamber) of 10 July 2008, Salvatore Aiello and Others v Regione Lombardia and Others.
71	C-215/06 Judgment of the Court (Second Chamber) of 3 July 2008, Commission of the European Communities v Ireland.
72	C-2/07 Judgment of the Court (Second Chamber) of 28 February 2008, Paul Abraham and Others v Région wallonne and Others
73	C-508/03 Judgment of the Court (First Chamber) of 4 May 2006, Commission of the European Communities v United Kingdom of Great

	Britain and Northern Ireland.
74	C-290/03 Judgment of the Court (First Chamber) of 4 May 2006, The Queen, on the application of: Diane Barker v London Borough of Bromley.
75	C-332/04 Judgment of the Court (Third Chamber) of 16 March 2006, Commission of the European Communities v Kingdom of Spain.
76	C-227/01 Judgment of the Court (Second Chamber) of 16 September 2004, Commission of the European Communities v Kingdom of Spain.
77	C-87/02 Judgment of the Court (First Chamber) of 10 June 2004, Commission of the European Communities v Italian Republic.
78	C-201/02 Judgment of the Court (Fifth Chamber) of 7 January 2004, The Queen, on the application of Delena Wells v Secretary of State for Transport, Local Government and the Regions.
79	C-230/00 Judgment of the Court (Third Chamber) of 14 June 2001, Commission of the European Communities v Kingdom of Belgium.
80	C-287/98 Judgment of the Court of 19 September 2000, Grand Duchy of Luxemburg v Berthe Linster, Aloyse Linster and Yvonne Linster
81	C-392/96 Judgment of the Court (Fifth Chamber) of 21 September 1999, Commission of the European Communities v Ireland.
82	C-435/97 Judgment of the Court (Sixth Chamber) of 16 September 1999, World Wildlife Fund (WWF) and Others v Autonome Provinz Bozen and Others.
83	C-301/95 Judgment of the Court (Sixth Chamber) of 22 October 1998, Commission of the European Communities v Federal Republic of Germany.
84	C-72/95 Judgment of the Court of 24 October 1996, Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland.
85	C-133/94 Judgment of the Court (Sixth Chamber) of 2 May 1996, Commission of the European Communities v Kingdom of Belgium.
86	C-431/92 Judgment of the Court of 11 August 1995, Commission of the European Communities v Federal Republic of Germany.
87	C-360/87 Judgment of the Court of 28 February 1991, Commission of the European Communities v Italian Republic.
88	C-96/81 Judgment of the Court of 25 May 1982, Commission of the European Communities v Kingdom of the Netherlands.
89	C-103/88 Judgment of the Court of 22 June 1989, Fratelli Costanzo SpA v

	Comune di Milano.
90	C-427/07 Judgment of the Court (Second Chamber) of 16 July 2009. Commission of the European Communities v Ireland.
91	C-205/08 Judgment of the Court (Second Chamber) of 10 December 2009. Umweltanwalt von Kärnten v Kärntner Landesregierung.
92	C-263/08 Judgment of the Court (Second Chamber) of 15 October 2009. Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd.
93	C-115/09 Judgment of the Court (Fourth Chamber) of 12 May 2011. Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg.
94	C-420/11 Judgment of the Court (Fourth Chamber) of 14 March 2013. Jutta Leth v Republik Österreich and Land Niederösterreich.
95	C-244/12 Judgment of the Court (Fifth Chamber) of 21 March 2013. Salzburger Flughafen GmbH v Umweltsenat.
	International Case law
96	INTERNATIONAL COURT OF JUSTICE JUDGMENT OF 20 APRIL 2010, PULP MILLS ON THE RIVER URUGUAY (ARGENTINA v. URUGUAY)
97	INTERNATIONAL COURT OF JUSTICE JUDGMENT OF 25 SEPTEMBER 1997 CASE CONCERNING THE GABCIKOVO-NAGYMAROS PROJECT (HUNGARY v SLOVAKIA)
98	REPORTS OF INTERNATIONAL ARBITRAL AWARDS of 16 April 1938 and 11 March 1941, Trail smelter case (United States, Canada)

C. Role of the EIA and the Nature directives in judicial review proceedings at national level: substantive and procedural aspects

	EU Documents
99	Selected articles from the consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union, including Statute of the Court of Justice of the European Union (OJ C 83 of 30 March 2010, p.1)
100	Rules of Procedure of the Court of Justice (consolidated version of 25 September 2012)
101	Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling procedure (OJ C 338 of 6 November 2010)

	2012, p. 1)
	Selected CJEU Case Law
102	C-260/11 Judgment of the Court (Fourth Chamber) of 11 April 2013, The Queen, on the application of David Edwards and Lilian Pallikaropoulos v Environment Agency and Others.
103	C-530/11 Judgment of the Court (Second Chamber) of 13 February 2014, European Commission v United Kingdom of Great Britain and Northern Ireland.
104	C-416/10 Judgment of the Court (Grand Chamber) of 15 January 2013, Jozef Križan and Others v Slovenská inšpekcia životného prostredia.
105	Case 283/81 Cilfit and Others [1982] ECR 3415
106	Joined Cases C-397/01 to C-403/01 Pfeiffer and Others [2004] ECR I-8835
107	C-240/09 Judgment of the Court (Grand Chamber) of 8 March 2011. Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky.
108	C-45/76 Judgment of the Court of 16 December 1976. Comet BV v Produktschap voor Siergewassen.
109	C-33/76 Judgment of the Court of 16 December 1976. Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland.
110	C-106/89 Judgment of the Court (Sixth Chamber) of 13 November 1990. Marleasing SA v La Comercial Internacional de Alimentacion SA.
111	C-6/90 Judgment of the Court of 19 November 1991. Andrea Francovich and Danila Bonifaci and others v Italian Republic. Joined cases C-6/90 and C-9/90.
112	C-46/93 Judgment of the Court of 5 March 1996. Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others. Joined cases C-46/93 and C-48/93.
113	C-168/95 Judgment of the Court (Fourth Chamber) of 26 September 1996. Criminal proceedings against Luciano Arcaro.
114	C-129/96 Judgment of the Court of 18 December 1997. Inter-Environnement Wallonie ASBL v Région wallonne.
115	C-240/09 Judgment of the Court (Grand Chamber) of 8 March 2011. Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky.

Annex 3: Examples of presentations and case studies

3.1 Unit 2: Introduction to the Birds Directive, Habitats Directive and Natura 2000 – Presentation provided by Joseph van der Stegen, October 2013

3.2 Unit 3: Implementation of Article 6 Habitats Directive – Presentation provided by Joseph van der Stegen, October 2013

3.3 Unit 4: Habitats Directive in the case law of CJEU

a) Presentation provided by An Cliquet, January 2014

b) Presentation provided by Matthieu Wemaëre, November 2013

3.4 Unit 5: Case Study on the Habitats Directive: Introduction to the facts of the case

a) Case study facts provided by An Cliquet, January 2014

b) Case study solution provided by An Cliquet, January 2014

c) Case study facts provided by Matthieu Wemaëre, November 2013

d) Case study solution provided by Matthieu Wemaëre, November 2013

3.5 Unit 6: Introduction to the Environmental Impact Assessment (EIA) and the Strategic Environmental Assessment (SEA) Directives – Presentation provided by Jerzy Jendroska, October 2013

3.6 Unit 7: The EIA Directive in the case law of CJEU – Presentation provided by Jerzy Jendroska, October 2013

3.7 Unit 8: Case study on transboundary EIA

a) Case study facts provided by Yvonne Scannell, November 2013

b) Paper on Case study provided by Yvonne Scannell, November 2013

3.8 Unit 9: Interaction between the EIA Directive and the Article 6(3) and (4) of the Habitats Directive

a) Presentation provided by Yvonne Scannell, November 2013

b) Paper provided by Yvonne Scannell, November 2013

3.9 Unit 10: Role of the EIA and the Nature directives in judicial review proceedings at national level: substantive aspects – Presentation provided by Jan Jans, October 2013 with speakers' notes from Werner Heermann, February 2014

3.10 Unit 11: Role of the EIA and the Nature directives in judicial review proceedings at national level: procedural aspects – Presentation provided by Jan Jans, October 2013 with speakers' notes from Werner Heermann, February 2014

3.11 Unit 12: Case study on the interaction between the EIA and the Habitats Directive

a) Case study facts provided by Jan Jans, October 2013

b) Case study solution provided by Werner Heermann, February 2014



"Introduction to the Birds & Habitats Directives"

European Commission, DG Environment, Nature Unit

ERA Academy of European Law,
Barcelona, 23-25 October 2013
Trier, 13-15 November 2013



Outline of the presentation

1. The EU environmental policy context – 7th EAP
2. Natura 2000 (Birds and Habitats Directives)
3. Where are we in the implementation of Natura 2000?
4. Where are the main enforcement issues?
5. Conclusion





EU biodiversity strategy to 2020 « Our life insurance, our natural capital »

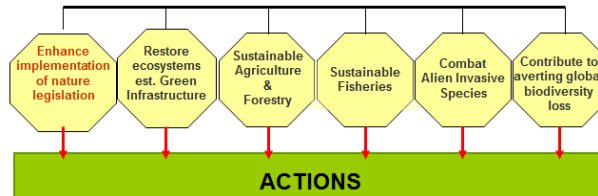
A 2050 VISION

European Union biodiversity and the ecosystem services it provides – its natural capital – are protected, valued and appropriately restored...

A 2020 HEADLINE TARGET

Halt the loss of biodiversity and ecosystem services in the EU and **restore** them insofar as feasible, and step up the EU's contribution to averting global biodiversity loss

6 TARGETS



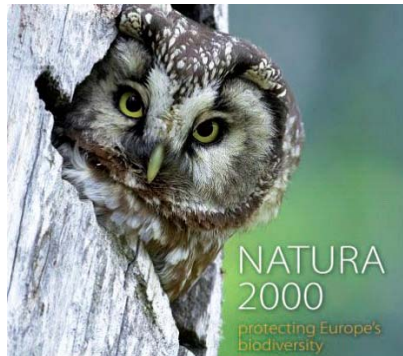
New EU Biodiversity Strategy 2011 Target 1 - Nature conservation

To halt the deterioration in the status of all species and habitats covered by EU nature legislation and achieve a significant and measurable improvement in their status by 2020

- ➔ Complete the establishment of the **Natura 2000** network and ensure good **management**
- ➔ Increase stakeholder **awareness** and **involvement** and **improve enforcement**
- ➔ Improve and streamline **monitoring** and reporting
- ➔ Ensure adequate **financing** of Natura 2000 sites

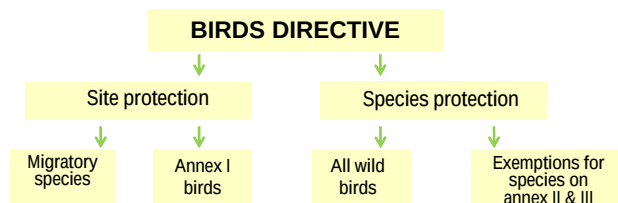


2. Natura 2000 (Birds and Habitats Directives)



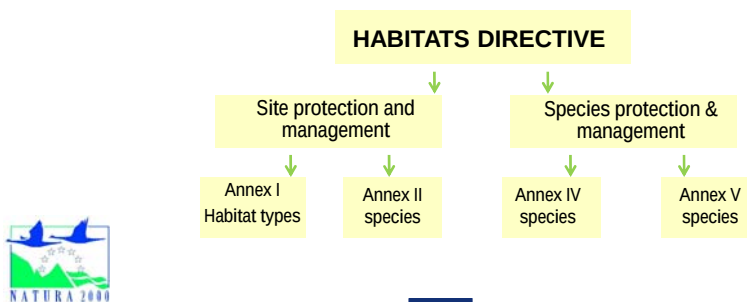
Objectives and Scope of the Birds Directive

- ❖ **Protects all** species of naturally occurring **birds** in the wild state in the EU.
- ❖ **Overall objective is** to maintain the populations of all wild bird species in the EU at a level which corresponds to their ecological, scientific and cultural requirements, or to adapt the population of these species to that level.

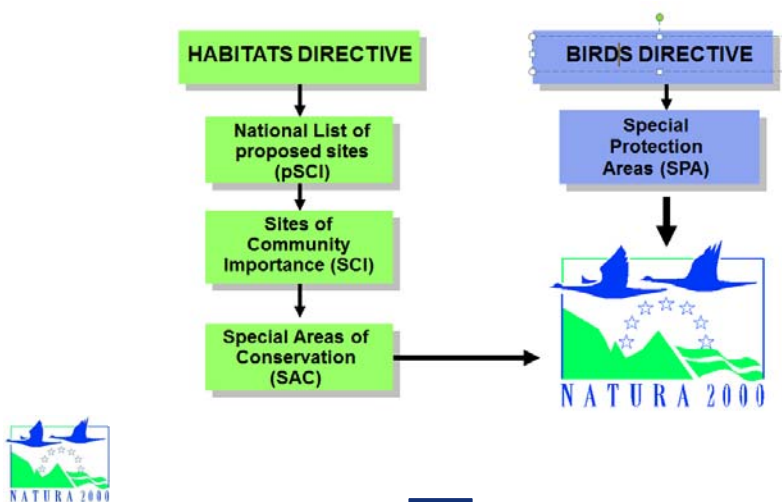


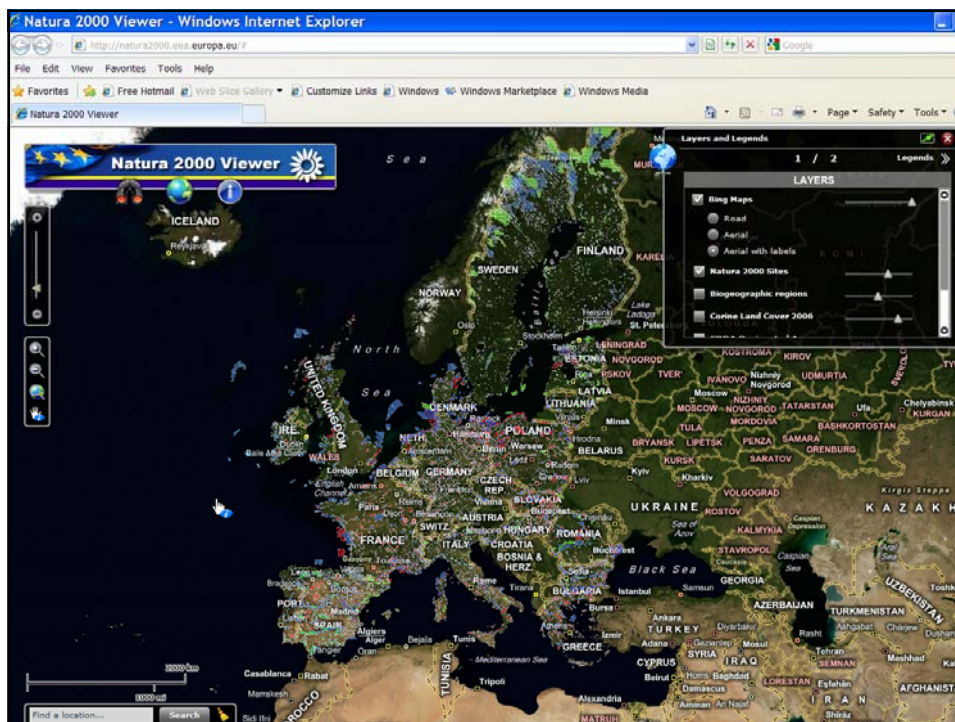
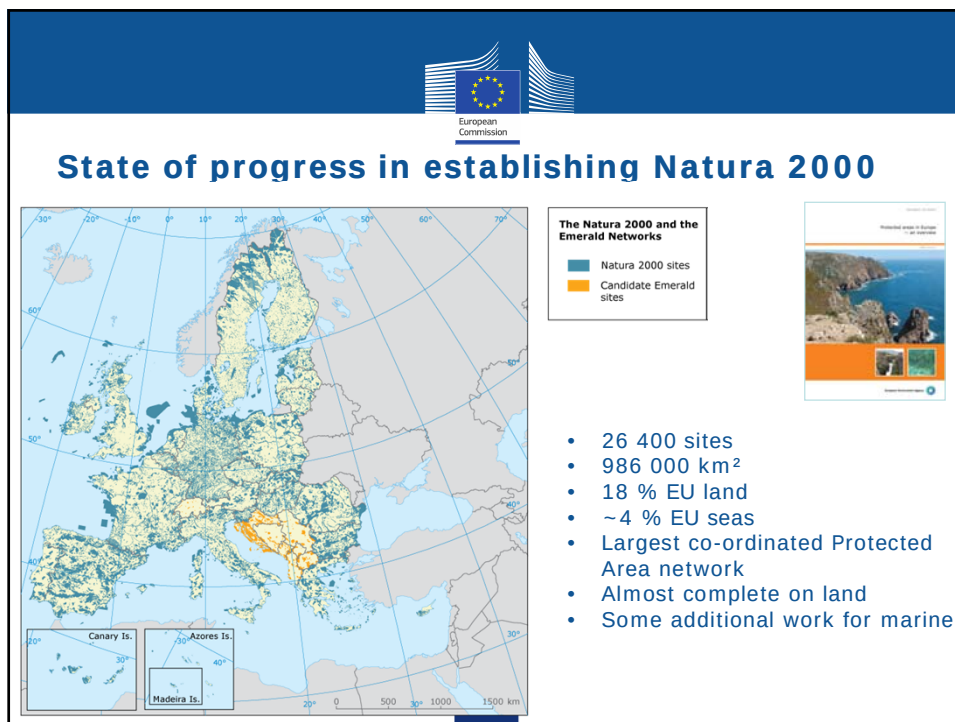
Objective and scope of the Habitats Directive

- ❖ To contribute towards ensuring biodiversity through conservation of natural habitats and species in EU
- ❖ To ensure that these species and habitat types are maintained at, or restored to, a '**favourable conservation status**'.
- ❖ Focus on 1000+ threatened plants & animals & c.230 habitats



Natura 2000 – based on two EU Directives



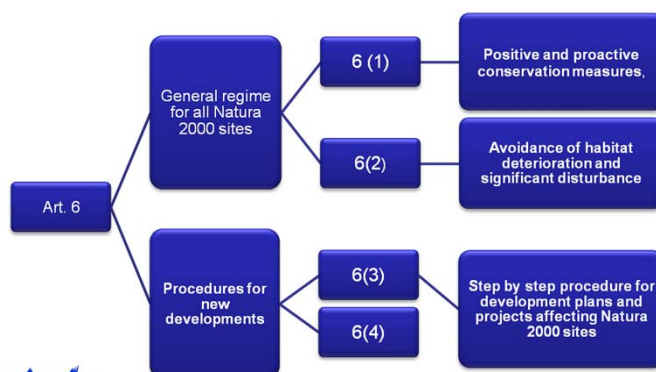


Key protection principles of Natura 2000

- ❖ Conserves species & habitats **across entire natural range in EU**, irrespective of political boundaries;
- ❖ Selects sites using the same scientific criteria;
- ❖ Offers strong legal protection but has high **flexibility** and **subsidiarity** provisions;
- ❖ Works in collaboration with land **owners & users**; not strict nature reserves;
- ❖ Supports **sustainable development** : new activities or development affecting N2000 are not automatically excluded, not all strictly protected areas



Management Regime for Natura 2000



Species Protection Regime

- Article 12 (animals) & 13 (plants) HD and 5 BD (Birds) provide system of strict species protection
- Derogations allowed under specific conditions
- Annex V HD and Annex II BD lists species that can be hunted
- EC Guidance documents on strict protection (Art. 12), sustainable hunting, and on large carnivores
- EC supports Species Action Plans/Management Plans



3. Where are we in the implementation of Natura 2000?



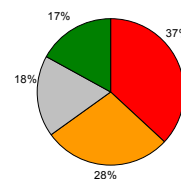
Main steps:

1. Transposition by Member States: OK
2. Designation of sites: almost OK except on sea
3. Taking care of the sites: on-going
 1. **Management of the sites:** conservation objectives and implementation of management measures: on-going, a lot to do – different tools available – stakeholder engagement
 2. **Protection of the sites:** on-going, a lot to do
 3. **Avoiding significant impact** due to new projects: on-going
 4. **Exceptions:** Compensation measures: on-going, a lot to do



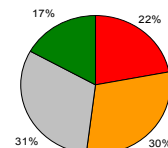
Monitoring & Reporting

- ❖ First Member State assessments done for 2001-2006
- ❖ 2009 EU composite report or 'Health Check' showed
 - ❖ Only 17% deemed to be in favourable conservation status
 - ❖ Grasslands, wetlands & coastal habitats most under pressure

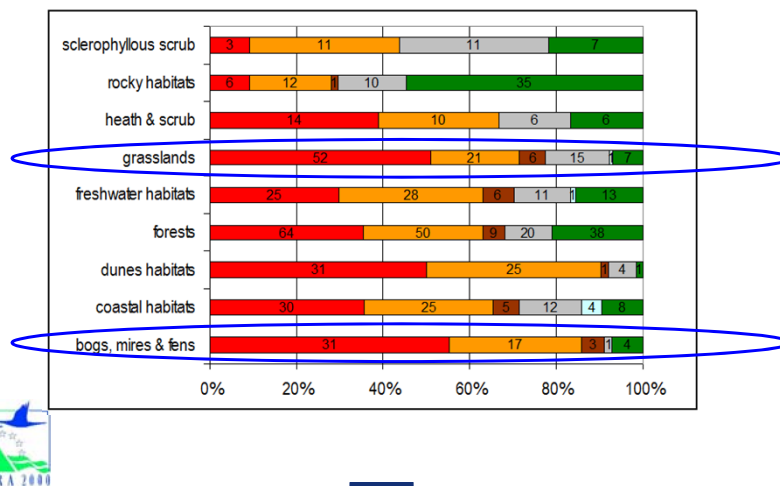


The job is far from done!

- ❖ New reporting cycle underway – MS to submit national reports in 2013



Habitats and Species related to Agriculture and water have worse status than others

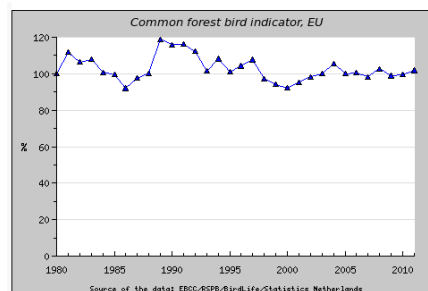
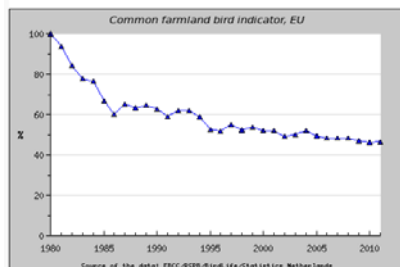


EU common birds Index in Europe

Farmland: decrease



Forest: stability



Main sources of pressure:

- Pollution
- Fragmentation
- Overexploitation
- Climate change
- Habitat loss
- Invasive species
- Etc.



May 2012: Celebrating 20 years of Habitats Directive and LIFE instrument



Thanks to the HD, BD & LIFE

- Nature protected Areas in EU more than tripled
- Large-scale destruction of high value areas halted
- Endangered species are brought back from the brink of extinction
- Increased knowledge & better, more targeted action
- Funding for nature in EU significantly increased
- Greater co-operation between countries (EU12-EU 27)
- Better mechanisms for local stakeholder engagement
- Time-honored land management practices supported
- New opportunities for recreation and tourism

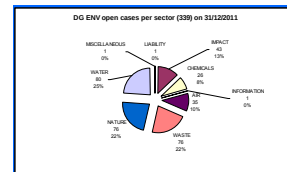


4. Where are the main enforcement issues?



Commission enforcement policy

- Commission obligation to ensure application of EU law
- But: primarily MS obligation
- Enforcement is within context that includes **compliance promotion**, e.g. guidance documents, LIFE funding, EU Pilot
- Enforcement related to **citizen complaints**/ European Parliament petitions
- Trend towards **strategic use of enforcement powers** confirmed by 2012 Communication
- On-going initiative on environmental surveillance, inspections and investigations



Where do problems occur?

- **Article 6** of the Habitats Directive (see next presentation)
- Lack of consideration for **protection measures** for species outside Natura 2000 (Art. 5. of Birds D. and 12 of Hab. D.)
- Non-compliance with the **hunting** provision (Art. 7 BD)
- Misuse of **derogations** (Art. 9 BD, Art. 16 HD)
- Illegal taking, capture, killing of protected species – special focus on "Illegal Killing, trapping and trade of birds"



5. Conclusion

- Natura 2000 = network for **nature** & network for and of **people**
- A lot was achieved, a lot remains **to be done** (management, financing)
- Investing in Natura 2000 **pays off**
- **Integration and cooperation** with other sectors and funds is needed
- Natura 2000 is not against socio-economic development, but a good tool to avoid unnecessary damage to our valuable natural heritage
- Cooperation between different administrations and stakeholders is important
- No success without proper **enforcement!**



I thank you for your attention

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<http://www.cc.cec/dgintranet/env/b3/index.htm>

Where do problems occur?

- Art. 6. and 6.4 of the Habitats Directive:
 - Trying to avoid Art 6.3. appropriate assessment (AA), alternatives not properly examined, effects assessed on species and habitats status quo, not on the conservation objectives, "salami slicing", no AA on projects outside Natura 2000 when necessary, mixing-up mitigation and compensation measures
 - Trying to avoid concluding on significant impact and compensation measures
 - Inadequate compensation measures or no follow-up
 - Permitting conditions not respected



Where do problems occur?

- Lack of consideration for protection measures for species outside Natura 2000 (Art. 5. of the Birds Directive and 12 of the Habitats Directive)
- Non-compliance with the hunting provision (Art. 7 BD)
- Misuse of derogations (Art. 9 BD, Art. 16 HD)
- Illegal taking, capture, killing of protected species – special focus on "Illegal Killing, trapping and trade of birds"



Where do problems occur?

- Degradation of sites (Art. 6.2 HD)





"Implementation of Article 6 of the Habitats Directive"

European Commission, DG Environment, Nature Unit

ERA Academy of European Law,
Barcelona, 23-25 October 2013
Trier, 13-15 November 2013



Outline of the presentation

1. Overview of Article 6
2. Management of the sites - Article 6.1
3. Protection of the sites - Article 6.2
4. New projects/plans - Article 6.3
5. Conclusion



1. Overview of Article 6



Objective of both Directives

Within all Natura 2000 sites:

- ❖ *Avoid damaging activities that could significantly disturb the species and/or habitats for which the site has been designated;*
- ❖ *Positive measures are taken, where necessary to maintain and restore those habitats and species to a favourable conservation status in their natural range*



The ultimate objective is to ensure that the species and habitats types reach «favourable conservation status»



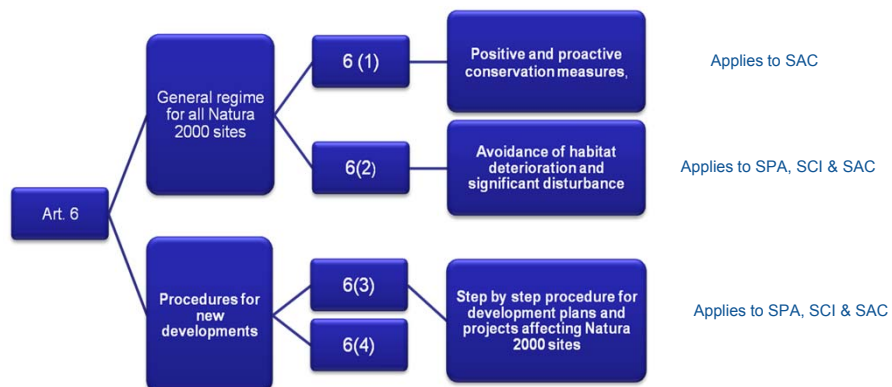
Translated in legal terms in Article 6 of the Habitats Directive (HD)
BUT applies also to sites designated under the Birds Directive

Different types of sites

- ❖ Sites identified in the context of the Birds Directive: Special Protection Areas (SPAs)
- ❖ Sites identified in the context of the Habitats Directive:
 1. Basis for the designation: often existing national inventories of "interesting" sites = "Candidate pSCI"
 - ↓
 2. Submission to the EC: **Proposed Sites of Community Interest (pSCI)**
 - ↓
 3. Adoption by the EC of a list of sites per biogeographical region: **Sites of Community Interest (SCI)**
 - ↓
 4. Designation by the Member States, at the latest 6 years after the designation as SCI: **Special Area of Conservation (SAC)**



Article 6: Protecting & Managing Natura 2000 sites



2. Management of the sites: Article 6.1



Site management – proactive measures

- ❖ Identify the conservation status of species and habitats present in the site
- ❖ Identify potential threats
- ❖ Define Conservation Objectives
- ❖ Define appropriate maintenance and/or conservation measures (statutory, contractual, or administrative) involving, if need be, appropriate management plans.
 - ❖ If no Management Plan, the reference = list of habitats/species for which the site was designated

Management plans recommended:

- ✓ **explain conservation needs of the site**
- ✓ **Analyse the socio-economic context**
- ✓ **Help find practical management solutions**
- ✓ **forum for debate between different interest groups - ensure better integration with other land use sectors**
- ✓ **Create sense of shared responsibility for site's future**



Examples of management

Managing forests with capercaillie
in mind, Black Forest, Germany



Wildlife friendly farming using
RDP, Kiskunsag Hungary



Managing marine areas along the
coastline of Southern Spain



3. Protection of the sites: Article 6.2



Article 6.2: Avoid deterioration

- ❖ Preventive measures
- ❖ Requires surveillance & inspections, difficult to monitor & assess
- ❖ Deteriorations can be very progressive or brutal
- ❖ Important to stop deterioration at the very beginning
- ❖ Can result from the addition of successive "small" acts



4. New plan or project: Article 6.3





Step-by-step assessment of plans and projects affecting Natura 2000 sites

- Possible negative impact on Natura 2000 site?
 - No ⇒ OK
 - Yes ⇒ Appropriate Assessment (AA)
 - No impact ⇒ OK
 - Negative impact ⇒ Alternatives?
 - There are alternatives ⇒ **no authorization** ⇒ new AA
 - No alternative ⇒ Imp. Reasons of Overriding Public Interest?
 - No IROPI ⇒ **no authorization**
 - IROPI ⇒ Priority habitats/species?
 - No ⇒ OK with compensation measures, notification to EC
 - Yes ⇒ Commission opinion required



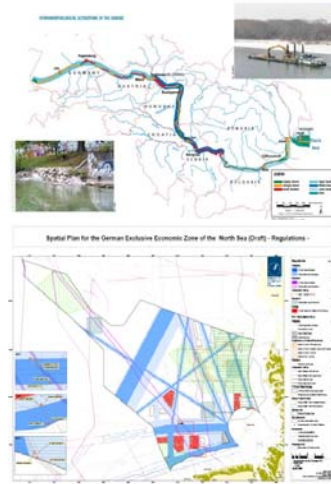
Appropriate Assessment (AA) – key elements

- ❖ **Step by step** process, triggered by the likelihood of significant effects
- ❖ Assessment focusing on **conservation objectives** of the site on the basis of habitats/species for which it has been designated.
- ❖ Consider **cumulative effects** .
- ❖ **Mitigation measures** form integral part of the process.
- ❖ **Objective and verifiable information** required to enable the competent authorities to decide on the basis of maintaining the integrity of the site.
- ❖ Authorisation if certainty, without any reasonable scientific doubt, that the plan or project will not affect the integrity of the site.
- ❖ Alternatives & compensation measures, if required, need to be properly analysed and implemented.
- ❖ Coordination with the **EIA process** is possible/advisable (less expensive and more effective).



Plans and projects

- HD: no definition of a "plan" or a "project"
- ECJ rulings provided some clarification: *Waddenzee* case (C-127-02), *Papenburg* case (C-226/08)
- Plans – wide interpretation (including land use or spatial plans, sectoral plans)
- Plans such as policy statements or other policy documents normally outside the scope
- Plans and projects related to conservation management excluded.



Determining likelihood of significant effect

- Certainty versus likelihood
- Precautionary principle - if in doubt, do the AA
- Spatial scope (plan and project inside and outside Natura 2000 sites)
- Significant effect - no arbitrary (quantitative) definition → case by case approach
- Related to specific features and ecological conditions of the protected site.



Cumulative impacts

- Modest impacts multiplied = significant impact
- Threshold of significance
- Plans and projects to be analysed:
 - ❖ completed
 - ❖ approved but uncompleted
 - ❖ or actually proposed.



Site's conservation objectives

- Information on each site in a Standard Data Form (SDF)
- Management plans
- Conservation objectives
- Article 6(1) → more ambitious objectives
- Guidance note of Commission services.

3.2.C. MAMMALS listed in Annex II of the Council Directive 92/43/EEC									
Code	Name	POPULATION				SITE ASSESSMENT			
		Resident	Migratory	Population		Conservation	Isolation	Global	
				Breed	Winter	Stage			
1337	Castor fiber	I P				B	A	C	A
1355	Lutra lutra	I P				B	A	C	B
1318	Myotis	I P				C	B	C	C
	dasycarpus								
1324	Myotis myotis	I P				C	B	C	C
3.2.D. AMPHIBIANS AND REPTILES listed in Annex II of the Council Directive 92/43/EEC									
Code	Name	POPULATION				SITE ASSESSMENT			
		Resident	Migratory	Population		Conservation	Isolation	Global	
				Breed	Winter	Stage			
1100	Bombina	I P				B	C	C	C
	bombina								
1166	Triturus	I 11-50				C	B	C	B
	cristatus								
3.2.E. FISHES listed in Annex II of the Council Directive 92/43/EEC									
Code	Name	POPULATION				SITE ASSESSMENT			
		Resident	Migratory	Population		Conservation	Isolation	Global	
				Breed	Winter	Stage			
1130	Alpius alpius	I C				C	A	C	B
1149	Cobitis taenia	I R				C	A	C	B
1124	Gobio	I C				A	A	C	A
	fluviatilis								
1059	Lampetra	I V				C	B	C	B
	trutta								

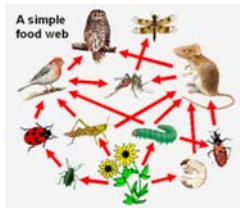


Integrity of the site:

Ecological
structure
function
processes

Linked to
conservation
objectives

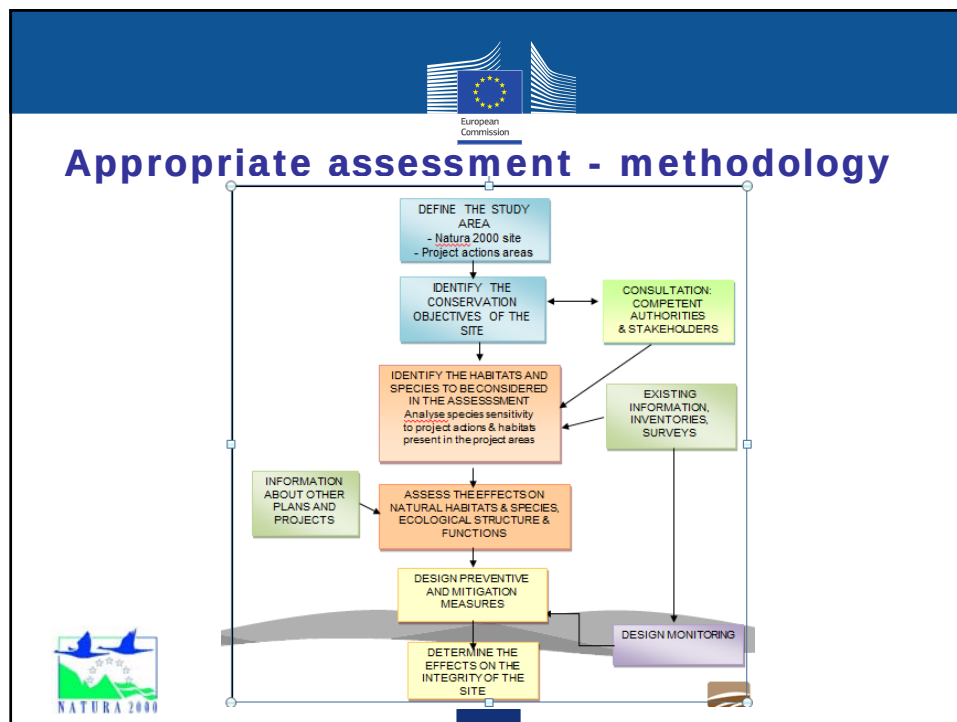
Site specific



Mitigation measures

- Eliminate negative effects or
- Reduce them to non-significant level
- Directly linked to the negative effects
- Must be described in sufficient detail
- Also based on best available knowledge.






European Commission

Relationship between EIA, SEA and AA

- Many similarities but also important differences (scope, content, implications - see Table)
- Procedures may run in parallel, or the AA be part of the SEA/EIA - can save time, money
- SEA and EIA cannot substitute for the AA
- In all cases the AA must be clearly identifiable, either within the EIA/SEA report or in a separate report, so that its conclusions can be distinguished from those of the overall impact assessment
- EIA: Environmental Impact Assessment
SEA: Strategic Environmental Assessment

 NATURA 2000



Comparison of appropriate assessment, EIA and SEA

	AA	EIA	SEA
Which type of development?	Any plan or project likely to have an adverse effect on a Natura 2000 site	Projects listed in Annex I. Annex II projects determined on a case by case	Any Plan or Programme (a) for certain sectors which set the framework for future development consent, or (b) require Art. 6 HD assessment
What impacts need to be assessed relevant to nature?	Assessment in view of the site's conservation objectives (for species/habitats for which site designated)	significant effects on ...fauna and flora	Likely significant effects on the environment , including on issues such as biodiversity, fauna, flora & interrelationship



Comparison of appropriate assessment, EIA and SEA

	Appropriate assessment	EIA	SEA
Who carries out the Assessment?	Responsibility of the competent authority but developer may need to provide necessary studies & information	The developer provides necessary information to be taken account by competent authorities	Competent authority for planning
How binding are the outcomes?	Binding . Agreement to the plan/project only if it will not affect the integrity of the site	The result of consultations and information must be taken into consideration in the development consent procedure	The environmental report & opinions expressed shall be taken into account during the preparation of the plan/program



Added value of strategic & integrated planning

- ❖ **Strategic and integrated planning (important projects or plans):**
 - ❖ **Sets the framework for future developments**
 - ❖ Taking into account the requirements of Natura 2000 ("working with nature")
 - ❖ Allows for more flexibility (all options taken into consideration from the outset)
 - ❖ Facilitates the permitting stage for individual projects
 - ❖ Facilitates the finding of win-win situations (more options possible)
- ❖ Submitted to an AA, part of a Strategic Environmental Assessment
- ❖ Does not exempt from an AA individual projects



Added value of strategic & integrated planning

SIGMA plan – Flood protection of the Scheldt in Netherlands and Belgium

- Floods in 1976, a first plan developed (technology-driven)
- All Scheldt Estuary Natura 2000 – new plan in 2005
- Combination of flood protection work and Natura 2000 restoration work
- Creation of 500ha of mudflats, 1500 ha of tidal marshes, 1500 ha of grasslands, 2000 ha of reed and riparian zones, 400 ha of marsh woodland



Examples of cases where Art. 6 are needed

- ❖ Roads and other major infrastructures
- ❖ Pressures on coast (e.g. recreation such as golf courses and coastal defence)
- ❖ Port operations and developments
- ❖ Afforestation & other major land use changes
- ❖ Wind farm developments on land and water
- ❖ Aquaculture & fisheries authorizations
- ❖ Waste management and disposal
- ❖ Wind farm development on land and water
- ❖ Peat extraction and drainage, etc.



Typical problems encountered with applying Article 6.3 / 6.4

- ❖ Trying to avoid Art 6.3. AA - inappropriate screening, non-respect of the Precautionary Principle
- ❖ Wrong interpretation of 'necessary for the management of the site', e.g. no AA of forest management plans
- ❖ No or inappropriate nature impact assessments:
 - ❖ e.g. no AA on projects outside Natura 2000 but which affect Natura 2000 nearby or downstream
 - ❖ effects on species or habitats not well assessed, poor expert input
 - ❖ effects assessed on species and habitats status quo, not on the conservation objectives
 - ❖ Lack of consideration of cumulative impacts (salami slicing)
- ❖ Mixing-up mitigation and compensation measures





Typical problems encountered with applying Article 6.3 / 6.4 (cont.)

- ❖ General species provisions of BD and HD neglected
- ❖ Trying to avoid going to Art 6.4.
- ❖ Negative results of assessments not respected
- ❖ No/insufficient alternatives considered
 - ❖ **Economic arguments only are not enough**
 - ❖ **Best alternatives are not assessed on purpose so as to stick to old plans**
 - ❖ **Zero alternative not assessed**
- ❖ No real IROPI (e.g. a private project)
- ❖ No or inadequate compensation measures
 - ❖ **Trying to avoid designating more sites**
 - ❖ **Usually best sites have been designated, or restoration takes time, so more than 1:1 in size expected**
 - ❖ **Using normal management measures such as restoration of existing sites as compensation**
- ❖ No designation/proposal of a qualifying site: provisions apply nevertheless (Court jurisprudence)



Role of competent authorities in AA

- Competent authorities have key role to play in AA determinations
- Different approaches in relation to 'competent authorities' linked to the national/regional systems for implementation of Directive
- Competent authorities need to have clear perspective on
 - Status of species/habitats,
 - Conservation objectives
 - Determining thresholds of significance
 - Cumulative effects.





Critical role of “expertise” for AA

- Developer normally pays for AA.....but authorities need to assure **quality and consistency** of assessments
- Competent authorities....are to authorise that plan or project only if they have made certain that it will not adversely affect the integrity of that site. That is the case where **no reasonable scientific doubt** remains as to the absence of such effects (Case C-127/02 Waddenzee).
- Therefore, need to ensure sufficient **ecological expertise**
- Approach of the Czech Republic – A System of special authorised persons for Natura 2000 & a special exam to be passed to be assessor



Role of the European Commission in AA

- Strong element of “subsidiarity” in application of Article 6
- Commission formal opinion where damaging development to affect priority habitats/species (12 COM Opinions provided)
- Commission must also be notified of compensatory measures
- Commission has provided interpretation and methodological guidelines
- Commission initiates legal action on basis of complaints

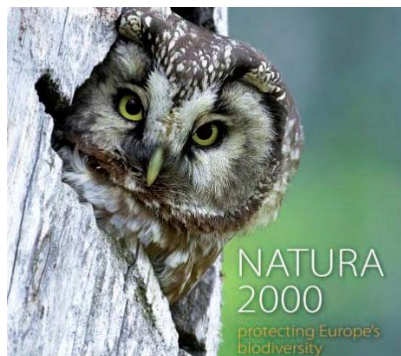


Commission guidance documents

- ❖ Managing Natura 2000 sites – the provisions of Art. 6
- ❖ Assessment of plans and projects : methodological guide Art 6 (3) & (4)
- ❖ Sector specific guidance:
 - ❖ Wind energy
 - ❖ Non-energy extractive industries
 - ❖ Ports & estuaries
 - ❖ Agriculture
 - ❖ Inland Waterways
 - ❖ Aquaculture
 - ❖ Climate Change
 - ❖ Forthcoming: Forests, Hydro-energy



6. Concluding comments



- ❖ Economic Development compatible with Natura 2000
- ❖ Birds and Habitats Directives provide clear framework within which appropriate decisions can be taken. **Flexible** instruments & key tool for achieving the EU 2020 target for halting the loss of biodiversity
- ❖ Natura 2000 is not a “no go area”, even a lot of win-win opportunities
- ❖ « Appropriate Assessments » is a key tool of Habitats Directive in ensuring **sustainable development** and **nature protection**. Prevention of conflicts.
- ❖ AA process can be combined with **EIA/SEA process** but with different focus/implications
- ❖ Value of **strategic approach** and integrated planning (e.g. spatial planning)
- ❖ Fudging makes things worse. Respecting the legislation is often at the end cheaper than trying to avoid it



- ❖ **Competent authorities** have key responsibility to ensure the standards for effective delivery of AA (conservation objectives, status of habitats/species, etc.)
- ❖ Practitioners need to have necessary **expertise** for delivery of assessments
- ❖ Guidelines and standards very important in helping ensure quality and consistency of assessments
- ❖ Need to integrate Natura 2000 into development and spatial planning strategies of authorities
- ❖ With good will, pragmatism, integrity and the right knowledge, each problem has a solution. **Natura 2000 is part of the solution**, not the problem.





I thank you for your attention

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<http://www.cc.cec/dgintranet/env/b3/index.htm>

WORKSHOP ON THE INTERACTION BETWEEN THE EIA AND THE NATURE
DIRECTIVES

Bucharest, 22-24 January 2014

Trier, 17-19 March 2014

The Habitats Directive in the case law of the CJEU

An Cliquet

Ghent University, Belgium



Objectives

- Overview of the case law of the CJEU on the Habitats Directive
- Importance of role of national judges to contribute to the proper and uniform application of the Habitats Directive



Overview of the presentation

1. Procedures at EU level
2. Introduction to the Habitats Directive
3. Most important case law by the CJEU on the Habitats Directive
4. Role of national courts



PROCEDURES AT EU LEVEL



Litigation at EU level

- EU case law on the Habitats Directive is massive:
 - Around 20% of all environmental cases
 - Up to now, more than 80 rulings at CJEU
- Most of the cases involve infringements for bad application (Art. 258 TFEU)
- Relatively few though interesting judgments on preliminary reference (Art. 267 TFEU)
- Up to now, inadmissibility of cases for the review of the legality of a decision with regards to the Habitats Directive (Art. 263 TFEU)



TFEU: Treaty on the functioning of the European Union

84 cases at CJEU (around 60 cases brought by commission)

20 cases at general court

Infringement Procedure

- Duty of Loyalty of Member States to apply EU Law
- Responsibility of the Commission to ensure compliance with EU law (“Guardian of the Treaties”)
- In case of non-compliance for incorrect transposition or bad application:
 - Pre-litigation procedure by Commission
 - Referral by Commission to CJEU (litigation procedure)
- Infringement procedure can be triggered by the Commission, either directly, or further to a complaint
- Complaints by individuals: no obligation for the Commission to initiate the litigation procedure



Each Member State is responsible for the implementation of EU law (adoption of implementing measures before a specified deadline, conformity and correct application) within its own legal system. Under the Treaties (Article 258 of the Treaty on the Functioning of the European Union (TFEU)), the Commission is responsible for ensuring that EU law is correctly applied. Consequently, where a Member State fails to comply with EU law, the Commission has powers of its own (action for non-compliance) to try to bring the infringement to an end and, where necessary, may refer the case to the European Court of Justice.

Under the non compliance procedure started by the Commission, the first phase is the pre litigation administrative phase also called “Infringement proceedings” The purpose of this pre-litigation stage is to enable the Member State to conform voluntarily with the requirements of the Treaty. There are several formal stages in the infringement procedure. The Commission may first have to carry out some investigation, namely when infringement procedures are launched further to a complaint.

The letter of formal notice represents the first stage in the pre-litigation procedure, during which the Commission requests a Member State to submit its observations on an identified problem regarding the application of EU law within a given time limit.

The purpose of the reasoned opinion is to set out the Commission’s position on the infringement and to determine the subject matter of any action, requesting the Member State to comply within a given time limit. The reasoned opinion must give a coherent and detailed statement, based on the letter of formal notice, of the reasons that have led it to conclude that the Member State concerned has failed to fulfil one or more of its obligations under the Treaties or secondary legislation. Referral by the Commission to the Court of Justice opens the litigation procedure.

In this respect, the Commission must point out that, in accordance with the established case-law of the Court of Justice, it enjoys a discretionary power in deciding whether or not to commence infringement proceedings and to refer a case to the Court. The Court has also acknowledged the Commission’s power to decide at its own discretion when to commence an action.

Infringement cases

- Non communication by the transposition deadline:
 - Case Comm. vs. Greece (C-329/96); Case Comm. vs. Germany (C-83/97)
- Incomplete or incorrect transposition (non conformity):
 - Faithful transposition is particularly important, where management of the common heritage is entrusted to the Member States in their respective territories
 - Examples: Cases Comm. vs. UK (C-6/04); Comm. vs. Germany (C-98/03); Comm. vs. Austria (C-508/04)



Infringement cases

- Bad application of the Habitats Directive:
 - More complex to address: factual dimension, vested interests at stake
- Infringements may vary:
 - Scope, or content of protective or conservation measures
 - Insufficient or bad implementation, e.g. conflicts between projects, plans or programmes and conservation objectives within a Natura 2000 site
 - But only few cases about management measures required by Habitats Directive, because of the margin of manoeuvre left to Member States
 - No ruling yet based on a general and persistent breach of EU law by a Member State



Infringement cases

- Source for interpretation, but judgments often come too late (the damage has occurred), except if interim measures are requested by the Commission (Art. 279 TFEU)
 - Example: Case Comm. vs. Poland (C-193/07 R)
- Member States must take the necessary measures to comply with a judgment, otherwise the Commission may refer the matter to the Court (may specify a lump sum or penalty payment) (Art. 260 TFEU)

The preliminary reference mechanism

- Art. 267 TFEU provides for two proceedings:
 - Interpretation
 - Interpretation and validity of acts of EU institutions
- Obligation for supreme courts, possibility for ordinary courts
- Few cases on Habitats Directive (+/- 10), mainly about sites' selection criteria, provisional measures before sites' designation, assessment mechanism under Art. 6 (3) - (4)

Review of legality

- Litigation triggered by companies, mainly to challenge the Commission decisions adopting lists of Sites of Community Importance
- Court of first instance: inadmissibility, because such decisions are not directly and individually addressed to those companies
- The CJEU, in appeal, confirmed this case law:
 - Natural or legal persons who own land within the sites of Community interest adopted by the contested decision are not individually concerned by that decision (Commission decision to adopt the list of Sites of Community Importance of the Boreal biogeographical region)
 - Case Markku Sahlstedt and Others (C-362/06 P)



INTRODUCTION TO THE HABITATS DIRECTIVE



Introduction to Habitats Directive

- The Birds Directive ('79, replaced in 2009) and Habitats Directive ('92) form the cornerstone of EU's nature conservation policy
- Overall goal of Habitats Directive: maintain or restore the natural habitats and species of wild fauna and flora of Community interest, at a favourable conservation status
- 2 pillars:
 - Creation of a European ecological network (Natura 2000 network), consisting of:
 - Special protection areas (SPAs) (Birds Directive)
 - Special areas of conservation (SACs) (Habitats Directive)
 - Strict species protection



Introduction to Habitats Directive

- Monitoring obligation under Art. 11 and reporting obligation under Art. 17 (every 6 years)
- Around 18% of EU territory is covered by Natura 2000
- Only 17% of habitats and 17% of species (other than birds) and 52% of birds species are in favourable conservation status
- Management and protection regimes are still far from being in place
- Habitats and Birds Directives are good pieces of legislation, but there is a lack of implementation!



CJEU CASE LAW ON HABITATS DIRECTIVE



Designation of SACs (Habitats Directive)

- Art. 4 Habitats Directive: designation of Special Areas of Conservation (SACs) for:
 - Annex I habitats
 - Annex II species
- Designation procedure for SACs in 3 phases:
 - List of Member States
 - List of Sites of Community Importance (SCIs) by Commission, in agreement with Member States
 - Designation by Member States of SACs + establishment of conservation priorities (within 6 years after adoption of Community list)
- Designation is based on criteria of Annex III (ecological criteria)
- As soon as a site is placed on the Community list, it shall be subject to Art. 6 (2)-(4)



Designation of SACs (CJEU)

- A Member State may not take account of economic, social and cultural requirements or regional and local characteristics when designating a site
 - Case First Corporate Shipping (C-371/98)
- Member States have a margin of discretion when making their site proposals, but they must do so in compliance with the criteria laid down by the Directive
- By failing to transmit the list of sites to the Commission, within the prescribed period, the Member State has failed to fulfil its obligations
 - Case Comm. vs. Ireland (C-67/99); Case Comm. vs. Germany (C-71/99); Case Comm. vs. France (C-220/99)



Designation of SACs (CJEU)

- The protection regime of Art. 6 only applies once sites are on the Community list; but Member States have to take protection measures in the meanwhile
 - Case Dragaggi (C-117/03)
- Member States must, in accordance with the provisions of national law, take all the measures necessary to avoid interventions which incur the risk of seriously compromising the ecological characteristics of the sites which appear on the national list transmitted to the Commission; it is for the national court to assess whether that is the case
 - Case Bund Naturschutz Bayern (C-244/05)



Designation of SACs (CJEU)

- A Member State cannot refuse to agree to the inclusion of a site in the draft list of SCIs drawn up by the Commission, on grounds other than environmental protection
 - Case Stadt Papenburg (C-226/08)
- Within a proposed SCI: a project for upgrading a country road, accompanied by corrective measures, does not constitute in itself an intervention of a kind which places the Iberian lynx on the site concerned in danger of extinction and which, accordingly, risks seriously compromising the ecological characteristics of that site
 - Case Comm. vs. Spain (C-308/08)



Designation of SACs (CJEU)

- By not establishing the conservation priorities within the required timeframe, Spain failed to fulfill its obligations
 - Case Comm. vs. Spain (C-90/10)



Designation of SPAs (Birds Directive)

- Art. 4 Birds Directive: designation of most suitable territories in number and size as Special Protection Areas for:
 - Birds of Annex I
 - Migratory birds



Designation of SPAs (CJEU)

- For the designation only ecological criteria can be used; conservation measures apply even without official classification as SPA
 - Case Comm. vs. Spain (Marismas de Santona) (C-355/90)
- All most suitable areas according to the scientific standard work 'Important Bird Areas' must be designated
 - Case Comm. vs. Netherlands (C-3/96)

Designation of SPAs (CJEU)

- For sites that have not been formally designated, but should have been classified, the stricter regime of Art. 4 (4) Bird Directive still applies, and not the regime of Art. 6 (2)-(4) Habitats Directive (which replaces Art. 4 (4) 1st sentence of the Birds Directive)
- A Member State cannot derive an advantage from its failure to comply with its Community obligations
 - Case Comm. vs. France (Basses Corbières) (C-374/98)

Designation of SPAs (CJEU)

- Maps demarcating SPAs, must be invested with unquestionable binding force; they must be capable of being relied upon as against third parties
 - Case Comm vs. Belgium (C-415/01)
- Designation obligation does not stop at the date of transposition of the Directive
 - Case Comm. vs. Austria (Corncrake) (C-209/04)



Conservation (Habitats Directive)

- Art. 6 Habitats Directive: conservation measures
- Art. 6 (1):
 - Only applies to SACs
- Art. 6 (2)-(4):
 - Applies to SACs and SPAs
- Interpretation guides by Commission on Art. 6

Conservation Art. 6 (1) (Habitats Directive)

- Member States have to take conservation measures which correspond to the ecological requirements of the habitats and species present in the sites
 - Applies only to SACs
 - Similar obligation in Art. 4 Birds Directive



Conservation Art. 6 (1) (CJEU)

- By not adopting the appropriate conservation measures, Spain failed to fulfill its obligations
 - Case Comm. vs. Spain (C-90/10)



Conservation Art. 6 (2) (Habitats Directive)

- Member States shall take appropriate steps to avoid, in the sites, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated
 - Applies to SACs and SPAs



Conservation Art. 6 (2) (CJEU)

- Overgrazing by sheep: by failing to take appropriate steps to avoid, in the Owenduff-Nephin Beg Complex SPA, the deterioration of the habitats of the species for which the site was designated, Ireland has failed to fulfil its obligations
 - Case Comm. vs. Ireland (Owenduff) (C-117/00)
- It may be necessary to adopt both measures intended to avoid external man-caused impairment and disturbance and measures to prevent natural developments that may cause the conservation status of species and habitats in SACs to deteriorate
 - Case Comm. vs. United Kingdom (C-6/04)



Conservation Art. 6 (2) (CJEU)

- Extension of a skiing area (felling of trees): incompatible with the protective legal status from which that area should have benefited pursuant to Art. 6 (2)
 - Case Comm. vs. Italy (C-304/05)
- Industrial development: by failing to take appropriate steps to avoid, in the SPA 'Valloni e steppe pedegarganiche', the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which that area was established, Italy failed to fulfil its obligations
 - Case Comm. vs. Italy (C-388/05)



Conservation Art. 6 (2) (CJEU)

- Member States cannot allow that certain types of activities, such as, fishing, aquaculture and hunting related activities, are to be generally exempted from the implementing provisions from Art. 6, § 2
 - Case Comm. vs. France (C-241/08)
- Open-cast mines
 - Case Comm. vs. Spain (Alto Sil) (C-404/09) (cf. workshop)



Conservation Art. 6 (3) (Habitats Directive)

- Assessment of plan/project:
 - Plan/project with likely significant effect: subject to an appropriate assessment in view of the site's conservation objectives
 - In case of an adverse effect: plan is not allowed
- Applies to SACs and SPAs
- Assessment of *new* projects or plans
- Commission:
 - Assessment also applies to plans or projects outside the sites with a likely effect within the site
 - Plans include for example sectoral plans, but not policy declarations
 - Projects include for example intensification of agriculture



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

Conservation Art. 6 (3) (CJEU)

- Meaning of plans and projects:
 - Projects include existing activities that require a new permit
 - Case Cockle fisheries (C-127/02)
 - Plans include policy plans (such as land use plans) that have great influence on subsequent decisions
 - Case Comm. vs. UK (C-6/04)
 - Projects include drains maintenance works
 - Case Comm. vs. Ireland (C-418/04)
 - Projects include dredging works in a navigable channel
 - Case Stadt Papenburg (C-226/08)



Conservation Art. 6 (3) (CJEU)

- Cannot be excluded from the assessment:
 - Certain categories of projects cannot be excluded from the assessment, if criteria cannot ensure that the excluded projects will not damage the sites
 - Case Comm. vs. Germany (C-98/03)
 - Member States cannot systematically exempt works and developments provided for in Natura 2000 contracts from the procedure of assessment of their implications for the site
 - Member States cannot systematically exempt works and development programmes and projects which are subject to a declaratory scheme from the procedure for assessing their implications for the site
 - Case Comm. vs. France (C-241/08); Case Comm. vs. Belgium (C-538/09)



Conservation Art. 6 (3) (CJEU)

- When is an assessment necessary?
 - An assessment is necessary if it cannot be excluded, on the basis of objective information, that the plan or project will have a significant effect on that site
- Meaning of significant effect:
 - Where a plan or project is likely to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site
- Application of the precautionary principle:
 - The competent national authorities, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects



Case Cockle fisheries (C-127/02)

Conservation Art. 6 (3) (CJEU)

- Direct effect of Art. 6 (3):
 - Where a national court is called on to ascertain the lawfulness of an authorisation for a plan or project within the meaning of Art. 6(3), it can determine whether the limits on the discretion of the competent national authorities set by that provision have been complied with, even though it has not been transposed into the legal order of the Member State
 - Case Cockle fisheries (C-127/02)



Conservation Art. 6 (3) (CJEU)

- Relationship between Art. 6 (2) and (3):
 - Authorisation of a plan or project granted in accordance with Art. 6(3) necessarily assumes that it is considered not likely adversely to affect the integrity of the site concerned and, consequently, not likely to give rise to deterioration or significant disturbances within the meaning of Art. 6(2)
 - However, it cannot be precluded that a plan or project granted in accordance with Art. 6 (3), subsequently proves likely to give rise to deterioration or disturbance. Art. 6(2) makes it possible to satisfy the essential objective of the preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora
 - Case Cockle fisheries (C-127/02)

Conservation art. 6, § 3 (CJEU)

- Meaning of ‘adverse effect on the integrity of the site’:
 - A plan or project will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of sites of Community importance; the precautionary principle should be applied for the purposes of that appraisal
 - Case Sweetman (C-258/11)



Conservation Art. 6 (4) (Habitats Directive)

- Exception Art. 6(4): a plan/project, in spite of a negative effect, is allowed under the following conditions:
 - No alternatives possible
 - Only for imperative reasons of overriding public interest (including social and economic reasons)
 - For priority habitats or species: only for reasons relating to human health, public safety or the environment or on advice of Commission for other reasons
 - Compensation is required

Conservation Art. 6 (4) (Habitats Directive)

- Alternatives:
 - Can include the zero-option
 - Cost of alternatives is not relevant (unless costs are disproportionate high)
 - Can include mitigation measures
- Compensation:
 - Last resort!
 - Additional to normal practices of implementation of Directives
 - Ensure overall coherence of Natura 2000
 - Compensation must be operational when damage occurs; or overcompensation for interim losses



Conservation Art. 6 (4) (CJEU)

- By authorising the proposed extension of a golf course despite a negative assessment of its implications for the habitat of the corncrake in the Wörschacher Moos SPA, Austria has failed to fulfil its obligations under Art. 6 (3)-(4)
 - Case Comm. vs. Austria (corncrake) (C-209/02)
- Alternatives must be examined, even if they could present certain difficulties
 - Case Comm. vs. Portugal (Castro Verde) (C-239/04)



Conservation Art. 6 (4) (CJEU)

- By authorising the extension of a ski area, without complying with the provisions which allow a project to be carried out, in spite of a negative assessment of the implications and in the absence of alternative solutions, only for imperative reasons of overriding public interest and then only after adopting all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected, Italy failed to fulfil its obligations under Art. 6 (3)-(4)
 - Case Comm. vs. Italy (C-304/05)
- Creation of infrastructure intended to accommodate a management centre cannot be regarded as an imperative reason of overriding public interest
 - Case Solvay (C-182/10)



Declassification (Habitats Directive)

- Art. 9 Habitats Directive: an SAC may be considered for declassification where this is warranted by natural developments noted as a result of the surveillance provided for in Art. 11
- Birds Directive: no similar provision

Declassification (CJEU)

- A Member State may not reduce the surface area of an SPA or alter its boundaries unless the areas excluded from the SPA are no longer the most suitable territories for the conservation of species of wild birds within the meaning of Art. 4(1) of the Directive
 - Case Comm. vs. Portugal (C-191/05)

Species protection (Habitats Directive)

- Art. 12 Habitats Directive: prohibition of deliberate capture or killing, deliberate disturbance, deterioration or destruction of breeding sites or resting places... of Annex IV animal species
- Art. 13 Habitats Directive: prohibition of deliberate picking, collecting, cutting, uprooting or destruction... of Annex IV plant species
- Art. 16 Habitats Directive: exceptions to prohibitions (prevention of damage, in interest of public health and safety...)
- Commission Guidance document on art. 12 and 16



Species protection (CJEU)

- Deliberate character:
 - The use of mopeds on the sand beach and the presence of pedalos and small boats in the sea area constitute the deliberate disturbance of the *Caretta caretta* turtle during its breeding period
 - Case Comm. vs. Greece (*Caretta caretta*) (C-103/00)
 - For the condition 'deliberate' action, it must be proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species or, at the very least, accepted the possibility of such capture or killing.
 - Case Comm. vs. Spain (snares) (C-221/04)



Species protection (CJEU)

- Protection of breeding or resting places:
 - By not limiting the prohibition laid down in Art.12(1)(d) to deliberate acts, which it has done in respect of acts referred to in Art.12(1)(a) to (c), the Community legislature has demonstrated its intention to give breeding grounds or resting places increased protection against acts causing their deterioration or destruction; given the importance of the objectives of protecting biodiversity which the Directive aims to achieve, it is by no means disproportionate that the prohibition laid down in Art. 12(1)(d) is not limited to deliberate acts
 - Case Comm. vs. Germany (C-98/03), Case Comm. vs. UK (C-6/04)



Species protection (CJEU)

- Protection measures:

- By failing to take, within the prescribed time-limit, the requisite measures to establish and implement an effective system of strict protection for the sea turtle *Caretta caretta* on Zakynthos so as to avoid any disturbance of the species during its breeding period and any activity which might bring about deterioration or destruction of its breeding sites, Greece has failed to fulfil its obligations
 - Case Comm. vs. Greece (*Caretta caretta*) (C-103/00)
- The system of strict protection presupposes the adoption of coherent and coordinated measures of a preventive nature
- By not having taken sufficient protection measures for the Cyclades blunt-nosed viper, Greece has failed to fulfil its obligations
 - Case Comm. vs. Greece (Cyclades blunt-nosed viper) (C-518/04)



Species protection (CJEU)

- By failing to take all the requisite specific measures for the effective implementation of the system of strict protection for several species (including the absence of species action plans and an appropriate monitoring system), Ireland failed to fulfil its obligations
 - Case Comm. vs. Ireland (C-183/05)
- By failing to establish a programme of measures to ensure strict protection of the European hamster, France has failed to fulfil its obligations under Article 12(1)(d)
 - Case Comm. vs. France (hamster) (C-383/09)
- By not having taken the requisite measures to establish and apply a system of strict protection for the Cypriot grass snake, Cyprus has failed to fulfil its obligations
 - Case Comm. vs. Cyprus (Cypriot grass snake) (C-340/10)



Species protection (CJEU)

- Exceptions:
 - Case Comm. vs. Finland (wolf hunt) (C-342/05) (cf. workshop)



ROLE OF NATIONAL COURTS



Role of national courts

- The national judge has a key role to play to ensure compliance with the Habitats and Birds Directives at the national level, in particular in the event of bad application
- Particular attention should be paid to the way the Court has interpreted both the objectives and content of the Habitats and the Birds Directives
- In case of unclarities, preliminary questions can be asked to the Court



Role of national courts

- Important case law by CJEU on access for individuals and NGO's to national courts (provided for in the Aarhus Convention)
- Slovakian Brown Bear Case:
 - In Slovakia NGOs are excluded from administrative proceedings leading up to the issuance of hunting derogations for protected species (e.g. brown bear)
 - CJEU: the Slovakian environmental NGO could not rely directly on Art.9(3) of the Aarhus Convention to have access to the proceedings; in so far as concerns a species protected by EU law, and in particular the Habitats Directive, it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Art.9(3) of the Aarhus Convention



Case Lesoochranárske zoskupenie VLK (C-240/09)

Role of national courts

- “Schutznorm”:

- Under German law environmental NGOs cannot request a review of an administrative action on the basis that it violates a provision protecting the environment as such; they may only act where they can point to a substantive individual right that is, or is at risk of, being impaired
- CJEU: An environmental NGO can derive from Art.10a (3), last sentence of Directive 85/337 a right to rely before the courts, in an action contesting a decision authorising projects on the basis of rules of national law flowing from Art. 6 of the Habitats Directive, even where national procedural law does not permit this
 - Case Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV (C-115/09)



(on the ground that the rules relied on protect only the interests of the general public and not the interests of individuals)

References

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- Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora, OJ L 206, 22 July 1992 (Habitats Directive)



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WORKSHOP ON THE INTERACTION BETWEEN THE EIA AND THE NATURE DIRECTIVES

Barcelona, 23-25 October 2013

Trier, 13-15 November 2013

The Habitats Directive in the case law of the CJEU

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Objectives

- Present the case law of the CJEU on the Habitats Directive, to understand and learn about, taken all together:
 - ✓ Both the objectives and content of the Habitats Directive
 - ✓ The challenges for Member States when transposing, implementing and enforcing the Habitats Directive
 - ✓ The interpretation method and conclusions of the CJEU with respect to the Habitats Directive
 - ✓ The role of the national judge to contribute to the proper and uniform application of the Habitats Directive



Plan of the presentation

1. How cases relating to the Habitats Directive are brought before the Court?
2. How does the Court interpret the Habitats Directive?
3. The effects of CJEU rulings on the Habitats Directive.
4. Conclusions for the national judge.



Introduction

- The Habitats Directive (+ Birds Directive) forms the cornerstone of EU's nature protection policy.
- 2 pillars: Natura 2000 network of protected sites throughout the EU + a strict regime of species protection.
- Need for coherence and to avoid transboundary threats: Natura 2000 is part of the EU's natural heritage!
- The Habitats Directive must be applied the same way in all Member States (duty of loyalty, Art. 4§3 TEU).
- ✓ But implementation is particularly complex and technical...and sensitive!
- ✓ And management and protection regimes are still far from being in place
- **Disputes are brought before both the CJEU and national judges**



Nature of Litigation at EU level

- EU Case law on the Habitats Directive is massive:
 - ❖ Around 20% of all environmental cases
 - ❖ Up to now, 85 rulings and ordinances
- Most of the cases involve infringements for bad application (Art. 258 TFEU)
- Relatively few though interesting judgments on preliminary reference (Art. 267 TFEU)
- Up to now, inadmissibility of cases for the review of the legality of the Habitats Directive (Art. 263 TFEU)



CJEU Case Law - Infringement Procedure

- Duty of Loyalty of Member States to apply EU Law
- If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties:
 - Non communication, non conformity or bad application
 - Can be triggered by the Commission as Guardian of the Treaties, either directly, or further to a complaint, a parliamentary question or a
- Enforcement procedure, launched after a pre-litigation phase:
 - ✓ No need for the Commission to demonstrate a specific motive or interest
 - ✓ No restrictions on timing
 - ✓ Complaints by individuals: no obligation to initiate the procedure



Infringement cases (1)

- Non communication by the transposition deadline:
 - ❖ “Objective” infringement, no value for interpretation
 - ❖ Promote the “useful effect” of the Directive: Member States must adopt transposing measures, the national judge shall ignore or set aside any incompatible national law (C-329/96 Com v. Greece)
- Incomplete or incorrect transposition (non conformity):
 - “Faithful transposition is particularly important (...), where management of the common heritage is entrusted to the Member States in their respective territories” (see Cases C-6/04 Com. v UK, C-98/03 Com. v Germany, and C-508/04, Com. V Austria, see § 59).
 - The Court has clarified a number of provisions: see for instance, about the scope of the EIA procedure under Art. 6(3), Case C-241/08, Com. V France, 4th March 2010)



Infringement cases (2)

- Bad application of the Habitats Directive:
 - ❖ More complex to address: factual dimension, vested interests at stake
- Infringements may vary:
 - Scope, or content, of protective or conservation measures
 - Insufficient or bad implementation, e.g. conflicts between projects, plans or programmes and conservation objectives within a Natura 2000 site
 - But only few cases about management measures required by Art. 4 (1), because of the margin of manoeuvre left to Member States
 - And no ruling yet based on a general and persistent breach of EU law by a Member State (see Case C-494/01 Com. v Ireland...on waste)
- Source for interpretation, but judgments come often too late (the damage has occurred), except if interim measures are requested by the Commission (Art. 279 TFEU)



The preliminary reference mechanism

- Art. 267 TFEU provides for two proceedings:
 - ✓ Interpretation
 - ✓ Interpretation and validity of acts of EU institutions
- Obligation for supreme courts, possibility for ordinary courts
- Precedent + “acte clair” theory (Case C-283/81, CILFIT)
- Few cases on Habitats Directive (+/- 10), mainly about sites’ selection criteria, provisional measures before sites’ designation, assessment mechanism under Art. 6 (3) + (4):
 - ✓ Case C-127/02 “Waddenzee”: “Article 6(3) of Directive 92/43 must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment; (...) where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site’s conservation objectives, it must be considered likely to have a significant effect on that site”.



Review of legality

- Litigation triggered by companies, mainly to challenge the Commission decisions adopting lists of sites of Community importance (2 others on access to documents, or refusal of the Commission to consider a complaint closed)
- Tribunal: inadmissibility, because such decisions are not directly and individually addressed to those companies
- The Court, in appeal, confirmed this case law:
 - Case C-362/06 “Makku”: “the contested decision is of concern to the appellants only in so far as they have rights in the lands covered by some of the sites of Community interest adopted by the Commission with a view to enabling the establishment of a coherent European ecological network of SACs, that is to say, by virtue of an objective legal or factual situation defined by the measure in question and not in accordance with criteria specific to the category of landowners. (...) Since the contested decision was not adopted in the light of the specific situation of the landowners, it cannot be regarded as a group of individual decisions addressed to each landowner



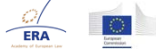
Interpretation of key provisions of the “HD” (1)

- Article 4: list of SCI and designation of SAC
 - Although it follows from the rules governing the procedure for identifying sites eligible for designation as SACs, set out in Article 4(1), that Member States have a margin of discretion when making their site proposals, the fact none the less remains that they must do so in compliance with the criteria laid down by the Directive. (Cases C-67/99, Com. v Ireland; C-71/99, Com. v Germany; C-220/99, Com. v France)
 - Member State may not take account of economic, social and cultural requirements or regional and local characteristics
 - Article 4(5): protective measures prescribed in Article 6(2), (3) and (4) are required only as regards sites which, in accordance Article 4(2)§3, are on the list of sites selected as SCI
 - Most recent cases: Cases C-117/03, “Dragaggi and others”, and C-226/08 “Stadt Papenburg”



Interpretation of key provisions of the “HD” (2)

- Art. 6(2) obliges Member States to avoid the deterioration of natural habitats and the habitats of species.
 - It is clear that, in implementing Art. 6(2) of the Habitats Directive, it may be necessary to adopt **both measures intended to avoid external man-caused** impairment and disturbance and measures to prevent natural developments that may cause the conservation status of species and habitats in SACs to deteriorate (Case C-6/04, Com. V UK)
 - Art. 6(2), in conjunction with Art. 7, requires MS to take appropriate steps to avoid, in SPAs, the deterioration of habitats and significant disturbance of the species for which the areas have been designated.
 - Authorization of a plan or project granted in accordance with Art. 6(3) of the Habitats Directive necessarily assumes that it is considered not likely adversely to affect the integrity of the site concerned and, consequently, not likely to give rise to deterioration or significant disturbances within the meaning of Art. 6(2) (Case C-127/02, Wadden)



Interpretation of key provisions of the “HD” (3)

- Art. 7: Article 6(2) to (4) apply, in substitution for the first sentence of Art. 4(4) of the Birds Directive, to the areas classified under Art. 4(1) or (2) of the latter Directive:
 - ✓ Only **areas classified as special protection areas** fall under the influence of Art. 6(2) to (4) of that Directive. The fact that the protection regime under the first sentence of Art. 4(4) of the Birds Directive applies to **areas that have not been classified as special protection areas but should have been so** classified does not in itself imply that the protection regime referred to in Art. 6(2) to (4) of the Habitats Directive replaces the first regime referred to in relation to those areas. (Case C-374/98, Com. v France - “Basses Corbières”)
- **The legal status of protection of SPAs must also** guarantee the avoidance therein of 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 (Case C-415/01, Com. v Belgium)



Interpretation of key provisions of the “HD” (4)

- Art. 11 + 14: Surveillance obligation and conservation status:
 - Surveillance is fundamental to the effectiveness of the HD and it must be transposed in a detailed, clear and precise manner...The argument that the list of surveillance activities carried out proves that surveillance is undertaken effectively cannot be upheld (C-6/04, Com. v UK)
- Art. 12: Protection of species
 - Art. 12(1)(b) and (d) require that the requisite measures be taken to establish a system of strict protection for the animal species listed in Annex IV(a) of that Directive in their natural habitats, prohibiting the deliberate disturbance of those species, particularly during the period of breeding, rearing, hibernation and migration, and the deterioration or destruction of breeding sites or resting places (Case C-103/00, Com. v Greece)
 - It supposes the adoption of coherent and coordinated measures, of a preventive nature (Case C-518/04, Com. v Greece)



Interpretation of key provisions of the “HD” (5)

- Article 15: capture or killing of wild fauna listed in Annex V (a) to the HD:
 - Article 15 imposes a general obligation designed to prohibit the use of all indiscriminate means of capture or killing of the species of wild fauna concerned (Case C-6/04, Com. v UK)
- Article 16: Derogations from the provisions of Articles 12, 13, 14 and 15 (a) and (b):
 - Member States are (...) under a particular duty to ensure that their legislation intended to transpose [the HD] is clear and precise. Articles 12, 13 and 16 form a coherent body of provisions. Articles 12 and 13 require Member States to establish a system of strict protection for animal and plant species. (C-98/03, Commission v. Germany)



Method of interpretation

- Together with the Tribunal, the CJEU is tasked to ensure the uniform interpretation and application of EU law
- Settled Case law: “in interpreting a provision of Community law it is necessary to consider its wording, its context and its aims”
- Systemic approach and theological method: in the light of the context and given the pursued objectives
- “Useful effect” theory: has given a significant legal effect to the provisions of the Habitats Directive
 - Birds Directive: Case C-374/98 Com. V France “Basses Corbières” (point 26): “where a given area fulfils the criteria for classification as an SPA, it must be made the subject of special conservation measures capable of ensuring, in particular, the survival and reproduction of the bird species mentioned in Annex I ”
 - Habitats Directive: Case C-117/03 “Dragaggi”: minimal protection status applies to sites not yet in the list of SCI + Case C-404/09 “Alto Sil”: obligation to avoid the perturbation of species even outside the ZSC.



Effects of the case law

- Declaratory effect of judgments: effect to be assessed on a case by case basis
- Article 260 TFEU:
 - Member States must take the necessary measures to comply with a judgment, otherwise the Commission may refer the matter to the Court (may specify a lump sum or penalty payment)
- Easy for non communication + bad transposition cases
- Far more complex for bad application cases, if the damage has occurred: Case C-491/08 Com. V Italy "In Arenas"
- Indirect effect of ruled infringements on other MS:
 - ✓ Insufficiently acknowledged, see Cases *Basses Corbières*, *Dragaggi* and *Bund Naturschutz in Bayern*, all about the need to give a provisional protection status to candidate sites



Conclusions

- The national judge has a key role to play to ensure compliance with the Habitats (and Birds) Directive(s) at national level, in particular in the event of bad application
- Particular attention should be paid to the way the Court has interpreted both the objectives and content of the Habitats (and the Birds) Directive(s), in taking account of
 - ❖ The nature of litigation
 - ❖ The interpretation method used
 - ❖ The effect of each judgment referred to



WORKSHOP ON THE INTERACTION BETWEEN THE EIA AND THE NATURE DIRECTIVES
Bucharest, 22-24 January 2014
Trier, 17-19 March 2014

Case studies Case C-342/05 and Case C-409/09

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DISPUTES



Case n° 1, derogation of strict species protection

- Case C-342/05
- Commission vs. Finland
- Dispute about derogations under Art. 16 Habitats Directive for wolves (protected under Art. 12 Habitats Directive)



Case n° 1, derogation of strict species protection

- Art. 16 (1), Habitats Directive:
 - Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Art. 12, 13, 14 and 15 (a) and (b):
 - (b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property



Case n° 1, derogation of strict species protection

- Arguments of the Commission:
 - Authorities in Finland permit wolf hunting each year, to a limited extent, by way of derogation (to prevent damage caused by wolves)
 - The wolf population is in an unfavourable conservation status
 - Damage may be avoided by alternative methods
 - Permits are issued without any relationship with the particular wolves causing damage being established
 - Annual regional quotas set in advance are not justified as derogations must be considered separately for each permit



Case n° 1, derogation of strict species protection

- Are the conditions set by Art. 16 (1) to derogate from Art. 12 (1) of the Habitats Directive respected by Finland?



Case n° 2, exploitation of open-cast mines

- Case C-404/09
- Commission vs. Spain
- Dispute about open-cast mining (Alto Sil site) causing deterioration of habitats and disturbance of species (capercaillie and brown bear) (infringement of Art. 6 (2) Habitats Directive)
- (Dispute about infringement of Directive 85/337 and infringement of Art. 6 (3)-(4) Habitats Directive)



Case n° 2, exploitation of open-cast mines

- Art. 6 (2), Habitats Directive:
 - Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive



Case n° 2, exploitation of open-cast mines

- Arguments of the Commission (with regards to SCI Alto Sil):
 - Open-cast mines operations destroyed habitats, which is used by the brown bear as a transit route
 - Operations create a barrier effect, leading to the closing of a corridor
 - The barrier effect causes even more fragmentation of the species



Case n° 2, exploitation of open-cast mines

- Is there an obligation for the Member State to stop the open-cast mines exploitation in the SAC according to Art. 6 (2) of the Habitats Directive?



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COURT FINDINGS



Case n° 1, findings of the CJEU

- The Commission has not adduced sufficient evidence as to the existence of an administrative practice by the Finnish authorities of issuing wolf hunting permits without relying on an assessment of the conservation status of the species or without providing a clear and sufficient statement of reasons as to the absence of a satisfactory alternative (par. 39)



Case n° 1, findings of the CJEU

- By authorising wolf hunting on a preventive basis, without it being established that the hunting is such as to prevent serious damage within the meaning of Art. 16(1)(b) of the Habitats Directive, Finland has failed to fulfil its obligations under Art. 12(1) and 16(1)(b) of the Directive (par. 47)



Case n° 2, findings of the CJEU

- An area of at least 19 hectares of protected habitat types was affected (par. 186)
- An environmental report shows that:
 - The loss of habitats for the Cantabrian brown bear caused by the 'Feixolín' operation has been significant within what is called the 'Leitariegos corridor',
 - That the bears move 3.5 to 5 kilometres from the areas of impact of the noise and vibrations caused by mining operations, and
 - That this operation will prevent access for the brown bear to that corridor, or make it much more difficult, whereas that corridor is a north-south transit route of critical importance for the western population of that species (par. 188)



Case n° 2, findings of the CJEU

- The noise and vibrations caused by the open-cast mines, and the closure of the Leitariegos corridor by reason of those mines, constitute disturbances of the 'Alto Sil' SCI, which are significant having regard to the conservation of the brown bear (par. 191)



Case n° 2, findings of the CJEU

- By failing to adopt the necessary measures to prevent the deterioration of habitats, including the habitats of species, and the disturbances caused to species by the mining operations, Spain has failed, in relation to the 'Alto Sil' SCI to fulfil its obligations under Art. 6(2) of the Habitats Directive (197)



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Case study based on Case C-342/05 And Case C-409/09

Matthieu Wemaëre
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Brussels and Paris Bar Associations



Case n° 1, the facts

Authorities permitted the hunting of a fixed number of wolves in a well defined geographical area, but

- without relying on an assessment of the conservation status of the species,
- without providing a clear and sufficient statement of reasons as to the absence of a satisfactory alternative and
- without specifically identifying the wolves causing serious damage which could be killed.



Case n° 1, the Dispute

Are the conditions set by article 16 (1) to derogate to article 12 (1) respected?



Case n° 1, solution

Article 16 (1) set **3 conditions**:

- 1) The derogation is not detrimental to the maintenance of the populations of the species concerned at a favorable conservation status in their natural range;
- 2) There is no satisfactory alternative;
- 3) The derogation is (b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property; (c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest; or for an other purpose detailed in article 16

Article 16 (1) must be **interpreted strictly** and impose on the authority taking the decision the burden of **proving that the necessary conditions are met for each derogation**



Case n° 1, solution

First grief:

The issued hunting permits are contrary to Article 16(1) of the Habitats Directive because:

- they are **not based on an assessment** of the effect of the killing of the wolves that they authorize on the maintenance at a favorable conservation status
- And **do not contain a clear and sufficient statement of reasons** as to the absence of a satisfactory alternative



Case n° 1, solution

Second grief:

The issued hunting permits are contrary to Article 16(1) of the Habitats Directive because:

- It is not being established that the hunting **is such as to prevent serious damage** within the meaning of Article 16(1)(b)



Case n° 2, the facts

- Open-cast mines permits were issued before the site's designation as special area of conservation (SAC)
- The site was designated as SAC because of the presence of wolfs
- The wolfs population present on site is declining



Case n° 2, dispute

Is there an obligation for J... to stop the open-cast mines exploitation in the SAC according to article 6 (2) of Habitats Directive 92/43/EEC?



Case n° 2, solution

- Article 6(2) applies to existing open-cast mines,
 - notwithstanding the fact that operation of the latter was authorised before the system of protection laid down by the Habitats Directive became applicable to the site (124).
 - although such projects are not subject to the requirements of article 6 (3)



Case n° 2, solution

According to article 6 (2): Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

- An activity complies with that provision only if it is guaranteed that it will not cause **any disturbance** likely significantly to affect the objectives of the Habitats directive, particularly its conservation objectives
- The question is: Do the mines cause **any significant disturbance to the wolfs?**



Case n° 2, solution

The disturbances must be appreciated on a case-by-case basis :

- 1) Do the mines occupy surfaces which constitute appropriate habitats for the wolf but cannot be used by that species during the operation of those mines ?
- 2) Are the mining operations, by reason of the noise and vibrations which they produce, likely significantly to disturb the wolf population protected (the wolf's sensitivity especially for its reproduction must be taken in account)
- 3) Do the mining activity create a barrier effect likely to contribute to the fragmentation of the habitat ?

The circumstance that the decline in the populations of that species has also been observed outside the mining is non-relevant



Case n° 2, solution

Conclusion: If a disturbance can be demonstrated, the mines activity is contrary to article 6 (2) of the Habitats Directive and should be stopped.



Thank you for your attention!



Case Study n°1

The facts:

In the Member State J., wolf hunting is authorized on a case-by-case basis by the competent management district. On the other hand, the upper regional limits, that is to say the maximum number of wolves which may be hunted in each district during the hunting season from 1 October until 31 February, are set by the Ministry of Agriculture and Forestry. According to the legislation, the limits are set so that the wolf population should not be threatened in those districts. All information on mortality should be taken into account, particularly mortality resulting from road accidents and human activities.

In order to authorize hunting the game management districts must consider whether the conditions set out in Article 16(1) of the Habitats Directive, which have been transposed into national law, are satisfied. Furthermore, where an upper regional limit has been reached it may be exceeded only if the conditions laid down in Article 16(1) of the said Directive are complied with and a special ministerial authorization is granted.

The J... authorities issued two decisions for permitting wolf hunting permit. In both cases, J... authorities permitted the hunting of a fixed number of wolves in a well defined geographical area, but without relying on an assessment of the conservation status of the species, without providing a clear and sufficient statement of reasons as to the absence of a satisfactory alternative and without specifically identifying the wolves causing serious damage which could be killed.

The permits were challenged by an association for environment protection.

Supposing the appeal is admissible, please consider if these hunting permits comply with articles 12 (1) and 16 (1) of Habitats Directive 92/43/EEC.

The legal framework:

Article 12 of Habitats Directive 92/43/EEC

1. Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV (a) in their natural range, prohibiting:

- a) all forms of deliberate capture or killing of specimens of these species in the wild;
- (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;
- (c) deliberate destruction or taking of eggs from the wild;
- (d) deterioration or destruction of breeding sites or resting places.

Article 16 of Habitats Directive 92/43/EEC

1. Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15 (a) and (b):

- (a) in the interest of protecting wild fauna and flora and conserving natural habitats;

- (b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;
- (c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;
- (d) for the purpose of research and education, of repopulating and reintroducing these species and for the breedings operations necessary for these purposes, including the artificial propagation of plants;
- (e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.

Case study n°2

The facts:

In an other case in J..., according to Article 6(2), the authorities took the decision to stop the activities of one open-cast mine (operation “Pri”) in the Forest B....

The Forest B... was included under the code XXXX by the list of sites of Community importance (SCI) for the S... region adopted by Decision XX/XX/EC of 3 March 2010.

At the time of the proposal, formulated in January 2009, to classify that site as an SCI, the national authorities had indicated to the Commission the presence of 15 to 20 specimens of the bear. It was also indicated in the form that the population of bear species present on the site is of regional importance (50% of the male specimens of the Autonomous Community of XX) and of national importance (2% of the male specimens present on J... territory).

The site was classified as special area of conservation on 12 June 2010.

According to the recovery plan for the bear, approved by Decree XXX, in 2012, the population present in that autonomous community amounted to about 12 adult specimens and risked becoming extinct in about 20 years.

The permit for the open-cast mine “Pri” was issued on the 12 February 2009 without any assessment of the impacts of those operations on the bear population present in the Forest B.

The operator of the mine “Pri” challenges the decision to stop the mining activity.

Supposing the appeal is admissible, please considerer if there is an obligation for J... to stop the open-cast mines exploitation in the Forest B... according to article 6 (2) of Habitats Directives 92/43/EEC.

The legal framework

Article 1 of Habitats Directive 92/43/EEC

k) site of Community importance means a site which, in the biogeographical region or regions to which it belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute significantly to the coherence of Natura 2000 referred to in Article 3, and/or contributes significantly to the maintenance of biological diversity within the biogeographic region or regions concerned. For animal species ranging over wide areas, sites of Community importance shall correspond to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction;

(l) 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;

Article 6 of Habitats Directive 92/43/EEC

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

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

Solutions:

Solution based on Case C-342/05, Court of Justice of the European Union, Commission/Finland, 14 June 2007

Since Article 16 (1) provides for exceptional arrangements which must be interpreted strictly and must impose on the authority taking the decision the burden of proving that the necessary conditions are present for each derogation, the Member States are required to ensure that all action affecting the protected species is authorized only on the basis of decisions containing a clear and sufficient statement of reasons which refers to the reasons, conditions and requirements laid down in Article 16(1) of the Habitats Directive (see, to that effect, Case C-60/05 *WWF Italia and Others* [2006] ECR I-5083, paragraph 34) (25).

The grant of such derogations remains possible by way of exception where it is duly established that they are not such as to worsen the unfavorable conservation status of those populations or to prevent their restoration at a favorable conservation status. Following the example of the views formulated by the Commission, in particular in paragraphs 47 to 51 of Section III of its Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC (final version, February 2007), it is possible that the killing of a limited number of specimens may have no effect on the objective envisaged in Article 16(1) of the Habitats Directive, which consists in maintaining the wolf population at a favorable conservation status in its natural range. Such derogation would therefore be neutral for the species concerned (29).

But in the case C-342/05, the Court considered that hunting permits, which are not based on an assessment of the effect of the killing of the wolves that they authorize on the maintenance at a favorable conservation status of the population of that species in its natural range, and which do not contain a clear and sufficient statement of reasons as to the absence of a satisfactory alternative, are contrary to Article 16(1) of the Habitats Directive (31).

However, it must be observed, that in the case C-342/05, the Court considered that the Commission has not adduced sufficient evidence as to the existence of an administrative practice by the Finnish authorities of issuing wolf hunting permits without relying on an assessment of the conservation status of the species or without providing a clear and sufficient statement of reasons as to the absence of a satisfactory alternative, because :

- by this action the Commission did not seek to complain of specific cases, but criticises the administrative practice of the Finnish authorities regarding wolf hunting, but has not provided the Court with any decision of that kind dating from the period corresponding to the end of the pre-litigation procedure and capable of providing the Court with the evidence necessary to ascertain whether the complaints are well founded (36);

- data were produced, showing that, in spite of the wolf hunting authorised by way of derogation in Finland, the conservation status of the species concerned substantially and consistently improved in that Member State during the pre-litigation phase and a significant part of the period before the present action was brought (38).

Furthermore, in the case C-342/05, the Court indicated, that it cannot be automatically ruled out that authorizing the killing of one or several wolves in a pack certain of whose members cause or are likely to cause such damage may prevent, eliminate or reduce that damage, it must be stated that the information on the file is not capable of confirming that hypothesis (42).

In that regard, certain parties are of the opinion that continued hunting keeps wolves wary of humans and thus helps to reduce damage, while others consider that hunting of wolves which belong to packs only increases damage. Furthermore, it is stated that little biological research on this topic is available (43).

In these conditions the Court considered that hunting permits were issued on a preventive basis, without it being established that the hunting is such as to prevent serious damage within the meaning of Article 16(1)(b) of the Habitats Directive (47). In consequence, it can be concluded that there are contrary to Articles 12 and 16(1) of the Habitats Directive.

2) Solution based on the case C-409-09, Court of Justice of the European Union, Commission/Kingdom of Spain, 24 November 2011

a) Application to activities authorized before the classification as special area of conservation

Firstly, it should be noted that Article 6(2) of the Habitats Directive applies to existing open-cast mines, notwithstanding the fact that operation of the latter was authorised before the system of protection laid down by the Habitats Directive became applicable to the Forest B... site (124). The Court holds that, although such projects are not subject to the requirements relating to the procedure for prior assessment of the implications of the project for the site concerned, laid down by the Habitats Directive, their implementation nevertheless falls within the scope of Article 6(2) of that directive (see, to that effect, Case C-226/08 Stadt Papenburg [2010] ECR I-131, paragraphs 48 and 49) (125).

b) Link between article 6(2) and article 6(3)

It should be recalled that the fact that a plan or project has been authorised according to the procedure laid down in Article 6(3) of the Habitats Directive renders superfluous, as regards the action to be taken on the protected site under the plan or project, a concomitant application of the rule of general protection laid down in Article 6(2) (Case C-418/04 *Commission v Ireland* [2007] ECR I-10947, paragraph 250) (122).

However, if the authorisation for a project was granted without complying with Article 6(3) of the Habitats Directive, the case-law shows that a breach of Article 6(2) may be found where deterioration of a habitat or disturbance of the species for which the area in question was designated has been established (Case C-304/05 *Commission v Italy* [2007] ECR I-7495, paragraph 94) (121).

It follows that firstly it must be checked if the authorisation for the project “Pri” did comply with Article 6(3) of the Habitats Directive.

In this case, the lack of assessment demonstrates that the competent national authorities couldn’t have acquired the certainty that the operation « Pri » would be free of damaging effects for the integrity of the said site. It follows that the authorisation for the said projects did not comply with Article 6(3) of the Habitats Directive.

In those circumstances, the compliance of the activity with article 6(2) must be checked.

c) Appreciation of the compliance with Article 6(2)

It should be recalled that an activity complies with that provision only if it is guaranteed that it will not cause any disturbance likely significantly to affect the objectives of that directive, particularly its conservation objectives (see, to that effect, Case C-241/08 *Commission v France* [2010] ECR I-1697, paragraph 32) (126).

Moreover, by virtue of Article 6(2) of the Habitats Directive, the protective legal status of SACs must guarantee the avoidance therein of the deterioration of natural habitats and the habitats of species as well as significant disturbance of the species for which those areas have been classified (see, in particular, Case C-535/07 *Commission v Austria* [2010] ECR I-0000, paragraph 58 and case-law cited) (applied to SPAs in the case C-409-09 (127)).

It follows that J... should have taken the appropriate protective measures, consisting in preventing the operational activities of the mine, in so far as they took place after the classification of the Forest B... site as a site of Community importance, from producing deteriorations of the habitats of the bear and disturbances of that species likely to have significant effects having regard to the objective of that directive consisting in ensuring the conservation of that species (128).

In that respect, it needs to be examined, whether the mines in question occupy surfaces which constitute appropriate habitats for the bear but cannot be used by that species during the operation of those mines (129).

The disturbances must be appreciated on a case-by-case basis.

It must be considered, if the mining operations concerned are, by reason of the noise and vibrations which they produce and which are felt within the site, likely significantly to disturb the bear population protected by taken in account is sensitivity especially for its reproduction (137-145).

The barrier effect likely to contribute to the fragmentation of the habitat and the isolation of certain sub-population of that species should be taken in account (146-148).

It should be noted that the circumstance that the decline in the populations of that species, including on the Forest B... site, has also been observed outside the mining basin and is even more marked there, does not in itself prevent the said nuisances produced inside the SAC by the mining operations in question from being capable of having had

significant impacts on that species, even if the decline of that species may have been greater yet for populations relatively distant from those operations (141).

Furthermore, the failures to fulfil obligations under Article 6(2) of the Habitats Directive which have been established cannot be justified by reference to the importance of mining activities for the local economy (160).

Conclusion : If a disturbance can be demonstrated, the mines activity is contrary to article 6 (2) of the Habitats Directive and should be stopped.

Jerzy Jendrośka
**Introduction to the Environmental Impact
Assessment (EIA) and the Strategic
Environmental Assessment (SEA) Directives**

INTERACTION BETWEEN THE ENVIRONMENTAL IMPACT
ASSESSMENT AND THE NATURE DIRECTIVES

ACADEMY OF EUROPEAN LAW (ERA) ON BEHALF OF THE EUROPEAN
COMMISSION (CONTRACTING AUTHORITY)

Bucharest, 22-24 January 2014



Content

- Introduction to environmental assessment: concept , role, origins, development and key elements
- Environmental assessment in international law
- Legal framework in Europe - an overview
- EIA Directive
- SEA Directive
- EIA/SEA and Habitat Assessment - a comparison of approaches



Concept of environmental assessment

- Preventive tool related to planned activities
- Scope
 - Environmental impact assessment (EIA):
 - individual projects
 - Strategic environmental assessment (SEA):
 - plans and programs
 - *policies*
 - *Legislation*
 - Habitat/biodiversity assessment
 - EIA and SEA limited to impact on habitat



Origins and development of environmental assessment

- US National Environmental Policy Act of 1969
 - covers: plans, programs, policies, legislative proposals, concrete projects
 - key role of discussing alternatives
 - concept of tiering
- Currently in all developed environmental national frameworks
- International and supra-national (EU) framework in Europe
 - Harmonization of national procedures
 - Transboundary procedure



As the Second Environmental Action Programme of 1977 acknowledged, the concept of environmental assessment, including the inspiration for the EIA Directive, had come from the U.S. - from the National Environmental Policy Act (NEPA) of 1969.

However NEPA, as opposed to EIA Directive, is not primarily a procedural law. Its larger

mandate is a substantive one. As the original drafter of NEPA points out: "the primary purpose of the act is to declare a national policy". However, in the course of NEPA implementation, concern with its substantive intent has been displaced by preoccupation with administrative arrangements to make effective the objectives of national policy for the environment. Regulations that have been issued to implement NEPA address only the procedural provisions of impact assessment and courts have limited their review of compliance with NEPA to these provisions. Both regulations and courts rulings have established a set of procedural rules regulating the so-called "NEPA Process". The NEPA Process, though it was meant to be ancillary to the larger purpose of NEPA, have been widely misunderstood to be the essence of the Act. As a result the entire NEPA is regarded as if it were essentially

procedural .

Alternatives

For the activity

For example: highways or railroads

Within the activity

Locational (northern or southern bypass)

Technological (concrete or asphalt)

Mitigation measures (speed limit or noise ecran)

Wariant „0”

Wariant „the most ecological”

Concept of „tiering”

Transport policy

highways or railroads

National highway program

locational alternatives

Regional plan

locational alternatives

Stretches

technological and mitigation alternatives

Role of environmental assessment

- collection of information
- consideration of alternatives
- integration of environmental concerns with economic, social etc concerns
- avoidance of irreversible effects
- procedural tool
 - advisory vs decisive role
 - specific situation in case of significant adverse effect on integrity of Natura 2000 site



Procedural steps

- Screening and informing about its results
- Stages
 - scoping
 - submitting assessment documentation
 - taking into account information gathered
 - informing about the decision together with reasons
- Obligatory elements (at various stages)
 - consultation with environmental authorities
 - public participation
- Transboundary consultation (if applicable)



In most legislations (including in EIA and SEA Directives) the procedural steps are very similar for EIA and SEA.

Screening is a necessary step in order to identify projects/plans/programs likely to have significant environmental impact and therefore requiring environmental assessment

According to the Guidelines FOR INCORPORATING BIODIVERSITY-RELATED ISSUES INTO ENVIRONMENTAL IMPACT ASSESSMENT LEGISLATION AND/OR PROCESS AND IN STRATEGIC ENVIRONMENTAL ASSESSMENT

Environmental impact assessment is a process of evaluating the likely environmental impacts of a proposed project or development, taking into account inter-related socio-economic, cultural and human-health impacts, both beneficial and adverse. Although legislation and practice vary around the world, the fundamental components of an environmental impact assessment would necessarily involve the following stages:

- Screening to determine which projects or developments require a full or partial impact assessment study;
- Scoping to identify which potential impacts are relevant to assess, and to derive terms of reference for the impact assessment;
- Impact assessment to predict and identify the likely environmental

impacts of a proposed project or development taking into account inter-related consequences of the project proposal, and the socio-economic impacts;

Identifying mitigation measures (including not proceeding with the development, finding alternative designs or sites which avoid the impacts, incorporating safeguards in the design of the project, or providing compensation for adverse impacts);

Deciding whether to approve the project or not; and

Monitoring and evaluating the development activities, predicted impacts and proposed mitigation measures to ensure that unpredicted impacts or failed mitigation measures are identified and addressed in a timely fashion;

Strategic environmental assessment is the formalized, systematic and comprehensive process of identifying and evaluating the environmental consequences of proposed policies, plans or programmes to ensure that they are fully included and appropriately addressed at the earliest possible stage of decision-making on a par with economic and social considerations⁽³⁾. Strategic environmental assessment, by its nature, covers a wider range of activities or a wider area and often over a longer time span than the environmental impact assessment of projects. Strategic environmental assessment might be applied to an entire sector (such as a national policy on energy for example) or to a geographical area, (for example, in the context of a regional development scheme). The basic steps of strategic environmental assessment are similar to the steps in environmental impact assessment procedures⁽⁴⁾, but the scope differs. Strategic environmental assessment does not replace or reduce the need for project-level environmental impact assessment, but it can help to streamline the incorporation of environmental concerns (including biodiversity) into the decision-making process, often making project-level environmental impact assessment a more effective process.

Environmental assessment documentation

- Different names (report, statement, study)
- Obligatory elements
 - Description of activity
 - Description of environment to be affected
 - Alternatives
 - Description of impact
 - Mitigation measures
 - Gaps in knowledge
 - Non-technical summary



Environmental assessment in international law

- Development of general principles of international law – role of the verdict of ICJ in Pulp Mill case of 2010
- Rio Declaration on Environment and Development
- Environmental assessment in binding agreements
 - concerning use of natural resources
 - Convention on Biological Diversity – art. 14 and Guidelines adopted by COP 6 in the Hague in 2002
 - bilateral agreements
- 2 specific UNECE agreements: with details of transboundary procedure
 - Convention on Transboundary EIA (Espoo) 1991
 - SEA Protocol of 2003



Development of general principles of international law

- Trail Smelter case - arbitration tribunal
- Nagymaros-Gabcikovo case – ICJ
- Pulp Mill case - ICJ

Rio Declaration on Environment and Development

Rio Declaration belongs to the instruments of so called "soft law" i.e. having not binding legal nature but only a form of recommendations or political declarations.

- Rio Declaration on Environment and Development
 - Integration principle –Principle 4
 - Environmental Assessment –Principle 17
 - Responsibility for transboundary environmental damage - Principle 2

•Transboundary procedure (Principles 18 and 19)

•Principle 4

–In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

•Principle 17

–Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

CBD

Article 14. Impact Assessment and Minimizing Adverse Impacts

1. Each Contracting Party, as far as possible and as appropriate, shall:

(a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures;

(b) Introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account;

(c) Promote, on the basis of reciprocity, notification, exchange of information and consultation on activities under their jurisdiction or control which are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional or multilateral arrangements, as appropriate;

(d) In the case of imminent or grave danger or damage, originating under its jurisdiction or control, to biological diversity within the area under jurisdiction of other States or in areas beyond the limits of national jurisdiction, notify immediately the potentially affected States of such danger or damage, as well as initiate action to prevent or minimize such danger or damage; and

(e) Promote national arrangements for emergency responses to activities or events, whether caused naturally or otherwise, which present a grave and imminent danger to biological diversity and encourage international cooperation to supplement such national efforts and, where appropriate and agreed by the States or regional economic integration organizations concerned, to establish joint contingency plans.

2. The Conference of the Parties shall examine, on the basis of studies

to be carried out, the issue of liability and redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter.

GUIDELINES FOR INCORPORATING BIODIVERSITY-RELATED ISSUES INTO ENVIRONMENTAL IMPACT ASSESSMENT LEGISLATION AND/OR PROCESS AND IN STRATEGIC ENVIRONMENTAL ASSESSMENT

UNECE

UN Economic Commission for Europe (UNECE) is one of the regional commissions of the UN system. It covers all European countries, countries of northern America (USA and Canada) and all countries of former Soviet Union (thus includes also Central Asian countries).

Pulp Mill case - ICJ verdict of 2010

- Case between Argentina and Uruguay
- ICJ confirmed
 - environmental assessment is „ a requirement under general international law „
 - „ must be conducted prior to the implementation of a project”
 - „once operations have started continuous monitoring of its effects on the environment shall be undertaken”
 - details of the content of environmental documentation to be determined by each State



Pulp Mill case - ICJ
para 205

„it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works”

„it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment. The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken”

Transboundary procedure

- Stage I initiation of the procedure
 - Notification
 - Confirmation from affected country
- Stage II - full procedure
 - Provision of information and documentation
 - Possibility for commenting (authorities and public)
 - Consultation
 - Final decision and Information about the decision
 - Post-project analysis (if applicable)



General obligations under Espoo/SEA protocol

Related to national EIA/SEA procedure

Establishing proper framework for national EIA/SEA procedure

Conducting in practice national EIA/SEA procedure

Related to initiating transboundary EIA/SEA procedure - notification

Related to conducting transboundary EIA/SEA procedure

Two aspects

as the affected Party

as the Party of origin

„initiation of the transboundary procedure under the Convention does not prevent the Party of origin from undertaking such proposed activities after having carried out the transboundary procedure, provided that due account is taken of the transboundary procedure's outcome in the final decision" (EIA/IC/S/1, para 56 - ECE/MP.EIA/10)

Development of legal framework in Europe

- EIA Directive 1985 - impact of projects
- Espoo Convention 1991 - transboundary impact of projects
- Habitat Directive 1992 - impact of plans, programs and projects on protected habitats (Natura 2000 sites)
- SEA Directive 2001 - impact of plans and programs
- Kiev SEA Protocol 2003 - transboundary impact of plans and programs



EIA Directive

- EIA Directive 85/337
- Amended by
 - Directive 97/11 of 1997
 - Public participation Directive 2003/35
 - Directive 2009/31/EC
- Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification)
- 2012 Commission proposal for draft amendment - pending



Genesis

Development control systems in Europe

Early EIA laws in Europe

France and Ireland 1976

element of existing planning control by local authorities

developers responsible for EIS

II Environmental Action Program 1977 - call for EIA in Europe

Assumptions and legislative dilemmas

Only a procedural instrument to harmonise approaches in Member States

Broad application vs scientific approach

New procedure or existing procedures

Process

More than 20 drafts

EC proposal 1980

Heavy negotiations

Outcome

Scope of application

Projects only - no plans, programs etc.

Screening

based on list and not on criteria

two lists

„Information to be provided by developer”

Cautious approach to alternatives („if appropriate”)

Process

no scoping

limited public participation, no access to

justice

no quality control and post-project monitoring

Amendment 1997

Introduced

new categories of activities

screening criteria

elements of scoping
obligation to establish development
control for Annex I and II projects

Improved

transboundary procedure (but still
doubts as to full compliance with
Espoo)

alternatives (no „as appropriate” but
still not fully mandatory)

public participation improved

EIA Directive - definitions (art. 1)

- No definition of environmental impact assessment
- Key definitions determining the scope
 - - project
 - -development consent
developer
- Definitions added in 2003 following the Aarhus Convention
 - Public
 - Public concerned



‘project’ means:

— 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;

‘developer’ means:

the applicant for authorization for a private project or the public authority which initiates a project;

‘development consent’ means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project;

Added in 2002

‘public’ means:

one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

‘public concerned’ means:

the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2 (2); 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.

Basic requirements - art. 2

- Projects likely to have significant effects on the environment are subject to
 - development consent
 - EIA procedure **before** development consent is granted
- Possibility to exempt specific project
- **EC Guidance materials**



1. Member States shall adopt all measures necessary to ensure that, before consent is given, 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. These projects are defined in Article 4.

Thus development consent is
obligatory (project may not be executed without consent)
binding (Case 96/81 Commission v. Netherlands)

2. The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive

Modalities:

Special EIA procedure

Existing consent procedures (Case 431/92)

Commission v. Germany and Case 435/97 WWF v. Autonome Provinz Bozen) New consent procedures Single procedure for EIA and IPPC

2a. Member States may provide for a single procedure in order to fulfil the requirements of this Directive and the requirements of Council Directive 96/61/EC of 24 September 1996 on integrated pollution prevention and control

Now it is integrated permit under the IED Directive

3. Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.

In this event, the Member States shall:

- (a) consider whether another form of assessment would be appropriate;
- (b) make available to the public concerned the information obtained under other forms of assessment referred to in point (a), the information relating to the exemption decision and the reasons for granting it;

▼ B

- (c) inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, where applicable to their own nationals.

The Commission shall immediately forward the documents received to the other Member States.

The Commission shall report annually to the Council on the application of this paragraph.

1985L0337— EN— 25.06.2009 — 003.001— 4

(1) OJ No L 257, 10.10.1996, p. 26.

Assessment - art.3

The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 12, the direct and indirect effects of a project on the following factors:

- (a) human beings, fauna and flora;
- (b) soil, water, air, climate and the landscape;
- (c) material assets and the cultural heritage;
- (d) the interaction between the factors referred to in points (a), (b) and (c).



Projects subject to assessment - art.4

- Environmental assessment is required for projects likely to have significant effects on the environment
- Projects subject to EIA Directive are listed in Annex I and Annex II
 - Projects listed in Annex I - by definition are likely to have significant effects on the environment and therefore always require assessment
 - Projects listed in Annex II - Member States must determine (using screening methods and criteria listed in Annex III) if a project belonging to a category of projects listed in Annex II is likely to have significant effects on the environment and therefore assessment is needed



Projects in Annex II include for example: afforestation, storage of scrap iron, intensive fish farming

EIA Directive - procedural steps

- Screening for projects in Annex II - art.4,2 and Annex III
- Scoping - art.5.2
- Preparation of EIA documentaton - art.5.3 and Annex IV
- Consultation with environmental authorities - art.6.1
- Public participation - art.6,2- 6.6
- Transboundary procedure - art.7
- Decision and informing thereof - art. 8 and 9
- Access to justice - art.11



Screening of Annex II projects

- Screening methods
 - Case-by case
 - Thresholds/criteria
 - mixed
- Screening criteria (Annex III)
 - Characteristics of projects
 - Location of projects
 - Characteristics of impact
- Results of determination must be made available to the public
- Procedural forms of determination
- Access to justice?



Screening results often with a special „screening decision” which in some Member States is a separate administrative decision and in some is a part of the development consent.

Screening procedure resulting in positive screening is often combined with scoping.

Screening methods – approaches in Member States

Including Annex II projects to mandatory EIA

Thresholds or criteria set in law for Annex II projects to be mandatory

Inclusive (above – YES)

Exclusive (below – NO)

Mixed approach („Traffic Light”)

Indicative or guidance thresholds or criteria

Scoping - art. 5.2

- In EIA Directive - necessary only if the developer so requests (art.5.2)
- In many Member States - mandatory element of EIA procedure
- For Annex II projects often combined with screening
- **Procedural consequences**
 - public participation provided (Aarhus) ?
 - transboundary procedure (Espoo)
 - no subsequent requirement for further information?



Proposed as mandatory in the 2012 Commission proposal

Usual content of scoping decision

alternatives

methods of assessment

mitigation measures

EIA documentation - art. 5 and Annex IV

- Misleading name - „information to be provided by the developer”
- Details in art.5.3 and Annex IV
 - a description of the project (site, design and size of the project);
 - a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects;
 - the data required to identify and assess the main effects which the project is likely to have on the environment;
 - an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects;
 - a non-technical summary



Alternatives actually studied by the developer

approach historically agreed by Member States

pros and cons

pros: realistic alternatives examined during EIA

cons: possibility of no alternatives examined at all

Alternatives required to be studied

approach commonly employed worldwide and advocated by EC

pros and cons

pros: examination of alternatives mandatory
cons: sometimes artificially elaborated
alternatives presented in EIA

Consultation with environmental authorities - art.6.1

- Authorities likely to be concerned by reason of their specific responsibilities
 - only under EU law?
 - all authorities with environmental responsibilities?
- „are given an opportunity to express their opinion,, - thus not necessarily do have to express such an opinion
- Opinion on both
 - The project
 - EIA documentation
- Detailed arrangements to be made by Member States, including reasonable time-frames



1. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the information supplied by the developer and on the request for development consent. To that end, Member States shall designate the authorities to be consulted, either in general terms or on a case-by-case basis. The information gathered pursuant to Article 5 shall be forwarded to those authorities. Detailed arrangements for consultation shall be laid down by the Member States

Public participation - art.6.2-6.6, art.8 and art.9.1

- Meant to implement art.6 of the Aarhus Convention
- Relation with transboundary procedure in the context of non-discrimination clause in the Aarhus Convention (art.3.9)
- Elements of the procedure
 - Informing (notifying) the public– art. 6.2 and 6.5
 - Making available relevant information – art. 6.3
 - Possibility to submit comments and opinions– art. 6.4 and 6.5
 - Taking into consideration the results of public participation – art. 8
 - Informing the public on the decision and its availability (together with the reasons and considerations on which the decision is based) – art. 9.1



Non-discrimination clause in Aarhus Convention (art.3.9)

9. Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.

Relevant information

M

All information relevant to decision-making

Problematic issues

EIA Documentation and copyright (case ACC/C/15 Romania)

Comments and opinions

- Any comments and opinions – no need to be motivated (Art.6.7 Aarhus)
- In written form or at public inquiry (hearing)

Informing the public

- Form
 - public notices or by other appropriate means such as electronic media where available,
 - bill posting within a certain radius
 - publication in local newspapers
- Detailed content of the notification
- Relation to art. 6 Aarhus Convention
 - public vs public concerned
 - timely, effective and adequate manner of informing



Nor clear requirement in EU and most MS for the public to be informed in an „adequate, timely and effective manner”

Legal issues (ACC/C/17 – EC case)

are „specific requirements” in EIA and IPPC Directives enough?
is it needed bearing in mind
the character of the Directive
direct applicability of the Convention

Adequate notice

„it has been clearly shown that what the public concerned was informed about

were possibilities to participate in a decision-making process concerning “development possibilities of waste management in the Vilnius region” rather than a process concerning a major landfill to be established in their neighbourhood. Such inaccurate notification cannot be considered as “adequate” and properly describing “the nature of possible decisions” as required by the Convention.” (Case CCC/C/16 Lithuania)

Effective notice

„The requirement for the public to be informed in an “effective manner” means that public authorities should seek to provide a means of informing the public which ensures that all those who potentially could be concerned would have a reasonable chance to learn about proposed activities and their possibilities to participate” (Case CCC/C/16 Lithuania)

Therefore, if the chosen way of informing the public about possibilities to participate in the EIA procedure is via publishing information in local press, much more effective would be publishing a notification in a popular daily local newspaper rather than in a weekly official journal, and if all local newspapers are issued only on a weekly basis, the requirement of being “effective” established by the Convention would be met by choosing rather the one with the circulation of 1,500 copies rather than the one with a circulation of 500 copies. ” (Case CCC/C/16 Lithuania)

General principles - early participation and reasonable timeframes

- Early participation -
 - when all options are open
 - before decision is taken
- Reasonable timeframes -change of approach
 - (original Directive) „appropriate time limits for the various stages of the procedure in order to ensure that **a decision is taken within a reasonable period**”
 - (current version after Aarhus) „Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article.
- Different phases



4.The public concerned shall be given early and effective opportunities to participate in the environmental decision- making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

Reasonable time-frames

Phases

Notification

Inspection of relevant documents

Submission of comments

Consideration of comments

(ACC/C/3 Ukraine)
Fixed vs diversified time
frames(CCC/C/16 Lithuania)
Timing

traditional holiday season (ACC/C/24 Spain)

Transboundary procedure - art.7

- Espoo Convention approach and methodology applies
- Stage I initiation of the procedure
 - Notification
 - Confirmation from affected country
- Stage II - full procedure
 - Provision of information and documentation
 - Possibility for commenting (authorities and public)
 - Consultation
 - Final decision and Information about the decision
 - Under Espoo also post-project analysis (if applicable)
- Practical arrangements needed to be establish
 - Ad hoc
 - In bilateral agreements



Not only Member States but also other Parties to Espoo Convention

No right of veto

„initiation of the transboundary procedure under the Convention does not prevent the Party of origin from undertaking such proposed activities after having carried out the transboundary procedure, provided that due account is taken of the transboundary procedure's outcome in the final decision" (EIA/IC/S/1, para 56 - ECE/MP.EIA/10)

Initiation of the procedure

„Normal" situation – procedure initiated by the Party of origin - - notification

„Exceptional" situation – procedure initiated by the affected Party

Decision - art.8 and 9

- Due account taken of the
 - EIA documentation
 - Consultation with environmental authorities
 - Transboundary consultation
 - Public participation
- Need for statement of reasons
 - No clear requirement in the Directive
 - Requirements in Aarhus and Espoo Conventions
- Need to inform and make decision available to
 - the public
 - affected Parties



Art.6.8 of the Aarhus Convention:

„Each Party shall ensure that in the decision due account is taken of the outcome of the public participation”

The Parties shall ensure that, in the final decision on the proposed activity, due account is taken of the outcome of the environmental impact assessment, including the EIA documentation, as well as the comments thereon received pursuant to Art.3, para 8 and Art. 4, para 2, and the outcome of the consultations as referred to in Art.5.

Espoo

2. The Party of origin shall provide to the affected Party the final decision on the proposed activity along with the reasons and considerations on which it was based.

Access to justice

- Added in 2003 to implement art.9.2 of the Aarhus Convention
- Possibility to challenge substantive or procedural legality of decisions, acts or omissions
- For those
 - Having a sufficient interest, or
 - Maintaining impairment of rights
- Including NGOs
- Problematic issues
 - Screening
 - Standing for NGOs
 - Standing and scope of review in countries with system based on protection of subjective rights



Problems in legislations based on
„protection of rights” with
addressing
procedural legality (ACC/31/
Germany)
substantive legality (ACC/50/Czech
Republic)
general environmental issues
(ACC/48/ Austria)

Screening decisions and Art. 9
(ACC/50/Czech Republic and

(ACC/48/ Austria)
„Sufficient” vs „substantial’ interest
(Case C-427/07 Commission vs
Ireland)

EIA Directive - practice

- Full EIAs yearly - appr 20 000-25 000
- Screening of Annex II projects
 - Appr 27 000-33 000 yearly (positive 1400-3500)
- Average duration - 11,6 months
- Average costs - 1% of project costs (41 000 Euro per EIA average)



SEA Directive - scope of application

- Plans and programs (names irrelevant)
- 1) In certain areas
 - if set the framework for future development consent of projects listed in Annexes I and II to EIA Directive
- 2) Any plan/program - if has impact on Natura 2000 site
- 3) Any other plans and programs with significant environmental effect - to be determined by member State



Plans and programs

Plans and programs may have various names: concepts, strategies, policies, conditions etc – not name but content is important

Areas (sectors of economy)

- Agriculture, forestry, fisheries, energy, industry including mining, transport, regional development, waste management, water management, telecommunications, tourism, town and country planning, land use
- other sectors – for example: recultivation of former military basis, nature protection

- „which set the framework for future development consent for projects”
 - with regard to location, nature, size, operating conditions, or allocating resources (Annex III.2)

- Directly or indirectly (by influencing other plans - Annex III.3)

- Development consent = „final decision” Espoo

All projects listed in Annex I and II to EIA Directive

SEA Directive - exemptions

- 8. The following plans and programmes are not subject to this Directive:
 - – plans and programmes the sole purpose of which is to serve national defence or civil emergency,
 - – financial or budget plans and programmes.
- 9. This Directive does not apply to plans and programmes co-financed under the current respective programming periods (1) for Council Regulations (EC) No 1260/1999 (2) and (EC) No 1257/1999 (3).



Exemptions for plans and programmes co-financed related to the previous programming period and now has only historic importance.

SEA Directive - screening

- Needed for
 - Plans and programs which determine the use of small areas at local level
 - minor modifications to plans and programmes
 - other plans and programs with significant environmental effect
- Methods of screening
 - Case-by case
 - Thresholds/criteria
 - mixed
- Screening criteria (Annex II)



Plans and programmes referred to in paragraph 2 which determine the use of small areas at local level and minor modifications to plans and programmes referred to in paragraph 2 shall require an environmental assessment only where the Member States determine that they are likely to have significant environmental effects.

SEA Directive - procedure

- Screening -art. 3.5-7
- Scoping - art.5.4
- Environmental report - art.5 and Annex III
- Consultation with environmental authorities - art.6
- Public participation - art. 6
- Transboundary procedure (if applicable) - art.7
- Decision-making and informing thereof- art. 8 and 9
- Monitoring - art. 10

- No access to justice requirement



SEA Directive - practice

- Full SEA procedures
 - about 1500 yearly in Finland
 - about 400-500 yearly in UK and France
 - about 270 yearly in Austria
- Screening procedures
 - in Salzburg region (Austria) - about 300 yearly!



EIA/SEA and Habitat Assessment

- EIA Directive
 - No formal link under EU law
 - In many Member States procedures combined
 - Different approach to alternatives
- SEA Directive
 - Formal link with Habitat Assessment
 - Plans under Habitata Directive understood as plans and programs under SEA Directive



EIA and Habitat Assessment

■ EIA

- Project defined
- Categories of projects listed
- Consultation with env.authorities
- Transboundary procedure
- Access to justice
- Public participation
- No substantive effect on decision

■ Habitat Assessment

- Same as in EIA
- No list of projects
- No consultation with env. authorities
- No transboundary procedure
- No access to justice (but aarhus)
- Public participation if appropriate (but Aarhus)
- Substantive effect on decision



Jerzy Jendrośka

The EIA Directive in the case law of CJEU

INTERACTION BETWEEN THE ENVIRONMENTAL IMPACT
ASSESSMENT AND THE NATURE DIRECTIVES

ACADEMY OF EUROPEAN LAW (ERA) ON BEHALF OF THE EUROPEAN
COMMISSION (CONTRACTING AUTHORITY)

Bucharest, 22-24 January 2014



Content

- Transposition of the Directive
- Approach to applying the Directive and need for assessment
- Definition of a project and screening
- Place in development control and concept of development consent
- Public participation and access to justice
- Transboundary procedure



Publication

- **ENVIRONMENTAL IMPACT ASSESSMENT OF PROJECTS**
- **RULINGS OF THE COURT OF JUSTICE**
- European Commission 2013



Transposition of the Directive

- Main principles - transposition must
 - Assure full application of the directive in a **sufficiently clear and precise manner**
 - Be in the act with unquestionable **binding force**
- Leading cases
 - C-332/04, Commission v. Spain,
 - C-427/07, Commission v. Ireland



The transposition of a directive into domestic law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient if it actually ensures the full application of the directive in a

sufficiently clear and precise manner.

The provisions of a directive must be implemented with unquestionable **binding force** and with the

specificity, precision and clarity required in order to satisfy the need for legal certainty, which requires

that, in the case of a directive intended to confer rights on individuals, the persons concerned must be

enabled to ascertain the full extent of their rights.

(C-332/04, Commission v. Spain, paragraph 38; C-427/07, Commission v. Ireland, paragraphs 54-55)

Approach to applying the Directive and need for assessment

- **EIA Directive has a wide scope and a broad purpose**
 - (C-72/95, Kraaijeveld and Others, 39; C-435/97, WWF and Others; C-2/07, Abraham and Others - *Liège airport*, C-275/09, Brussels Hoofdstedelijk Gewest and Others)
- **Procedural nature of EIA** ((C-420/11, Leth)
- **Consent granted in breach of EIA Directive**
 - EIA must be carried out before consent! - C-215/06 (EC vs Ireland)
 - In case of breach the national court shall consider if the consent should be **revoked or suspended** - or **alternatively the harm compensated** - (C-201/02, Wells, C-215/06 EC vs Ireland)



A purposive interpretation of the directive cannot, in any event, disregard the **clearly expressed intention** of the legislature of the European Union.
(C-275/09, Brussels Hoofdstedelijk Gewest and Others, paragraph 29)

Procedural nature of eIA

Nature of the rules set by the EIA

Directive 85/337 prescribes an assessment of the environmental impact of a public or private project, but does **not lay down the substantive rules in relation to the balancing of the environmental effects with other factors or prohibit the completion of projects which are liable to have negative effects on the environment**. Those characteristics suggest that the breach of Article 3 of Directive 85/337, that is to say, in the present case, the failure to carry out the assessment prescribed by that article, does not, in principle, by itself constitute the reason for the decrease in the value of a property.
(C-420/11, Leth, paragraph 46)

The obligation to remedy the failure to carry out an EIA

Under Article 10 EC [Article 4(3) TEU] the competent authorities are obliged to

take, within the sphere of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project as provided for in Article 2(1) of the EIA

Directive.

The detailed procedural rules applicable in that context are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that

they are not less favourable than those governing similar domestic situations (principle of equivalence)

and that they do not render impossible in practice or excessively difficult the exercise of rights

conferred by the Community legal order (principle of effectiveness).

In that regard, it is for the national court to determine whether it is possible under domestic law for a

consent already granted to be **revoked or suspended** in order to subject the project to an assessment

of its environmental effects, in accordance with the requirements of the EIA Directive, or

alternatively, if the individual so agrees, whether it is possible for the latter to claim **compensation** for the harm suffered.

(C-201/02, Wells, paragraph 70, operative part 3)

While Community law cannot preclude the applicable national rules from allowing, in certain cases,

the **regularisation of operations or measures which are unlawful in the light of Community law**,

such a possibility should be subject to the condition that it does not offer the persons concerned the

opportunity to circumvent the Community rules or to dispense with applying them, and that it should

remain the exception.

Under the principle of cooperation in good faith laid down in Article 10 EC [Article 4(3) TEU],

Member States are required to nullify the unlawful consequences of a breach of Community law. The

competent authorities are therefore obliged to take the measures necessary to remedy failure to carry

out an environmental impact assessment, for example the revocation or suspension of a consent

already granted in order to carry out such an assessment, subject to the limits resulting from the

procedural autonomy of the Member States.
(C-215/06, Commission v. Ireland, paragraphs 57 and 59)

Concept of project

- Broad definition of „construction”
 - modernisation of existing road i C-142/07 (CODA)
 - Modernisation of existing runway (Abraham and Others,)
 - Demolition works (C-50/09, Commission v. Ireland,)
- Current tendency to restrictive interpretation of the concept of project
 - Extension of consent for operation of the landfill ((C-121/11, Pro-Braine and Others)
 - Extension of consent for operation of the airport ((C-275/09, Brussels Hoofdstedelijk Gewest and Others,)



the Court has given a broad interpretation of the concept of ‘construction’, accepting that works for the refurbishment of an existing road may be equivalent, due to their size and the manner in which they are carried out, to the construction of a new road (Case C-142/07 *Ecologistas en Acción-CODA* [2008] ECR I-6097, paragraph 36). Similarly, the Court has interpreted point 13 of Annex II, read in conjunction with point 7 of Annex I, to Directive 85/337 as also encompassing works to alter the infrastructure of an existing airport, without extension of the runway, where they may be regarded, in particular because of their nature, extent and characteristics, as an alteration of the airport itself (*Abraham and Others*, paragraph 40) – However, it is clear from reading those judgments that each of the cases which gave rise to them involved physical works, which is not the case in the main proceedings according to the information provided by the Raad van State. As the Advocate General points out at point 28 of his Opinion, while it is established case-law that the

scope of Directive 85/337 is wide and its purpose very broad (see, inter alia, Abraham and Others, paragraph 32, and Ecologistas en Acción-CODA, paragraph 28), a purposive interpretation of the directive cannot, in any event, disregard the clearly expressed intention of the legislature of the European Union.

It follows that, in any event, **the renewal of an existing consent to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a ‘construction’** within the meaning of point 7(a) of Annex I to Directive 85/337.

(C-275/09, Brussels Hoofdstedelijk Gewest and Others, paragraphs 27-30)

The **definitive decision relating to the carrying on of operations at an existing landfill site**, taken

on the basis of a conditioning plan, pursuant to Article 14(b) of Council Directive 1999/31/EC of

26 April 1999 on the landfill of waste, does not constitute a ‘consent’ within the meaning of Article

1(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain

public and private projects on the environment, as amended by Directive 2003/35/EC of the European

Parliament and of the Council of 26 May 2003, unless that decision authorises a change to or

extension of that installation or site, through **works or interventions involving alterations** to its

physical aspect, which may have significant adverse effects on the environment within the meaning of

point 13 of Annex II to Directive 85/337, and thus constitute a ‘project’ within the meaning of Article

1(2) of that Directive.

(C-121/11, Pro-Braine and Others, paragraph 38)

Screening

- need for cumulative assessment and no for salami-slicing - C-392/96 (EC vs Ireland) or C-227/01 (EC vs Spain)
- Not whole class to be excluded (Case C-133/94 Com. v. Belgium and Grosskrotzenburg Case C-301/95 Com. V. Germany)



Criteria/thresholds

Even a **small-scale project** can have significant effects on the environment if it is in a location where

the environmental factors set out in Article 3 of the EIA Directive, such as fauna and flora, soil, water,

climate or cultural heritage, are sensitive to the slightest alteration.

(C-392/96, Commission v. Ireland, paragraph 66)

As regards the **cumulative effect** of projects, it is to be remembered that **the criteria and/or**

thresholds mentioned in **Article 4(2)** are designed to facilitate the examination of the actual

characteristics exhibited by a given project in order to determine whether it is subject to the

requirement to carry out an assessment, and not to exempt in advance from that obligation certain

whole classes of projects listed in Annex II which may be envisaged on the territory of a Member

State (C-133/94, Commission v Belgium, paragraph 42; C-72/95 Kraaijeveld and Others, paragraph

51; and Case C-301/95 Commission v Germany, paragraph 45).

(C-392/96, Commission v. Ireland, paragraph 73)

A Member State which has established thresholds and/or criteria at a level such

that, in practice, all

projects of a certain type would be exempted in advance from the requirement of an impact

assessment exceeds the limits of that discretion, unless all the projects excluded could, when viewed

as a whole, be regarded as not likely to have significant effects on the environment

(C-392/96, Commission v. Ireland, paragraph 53; C-72/95, Kraaijeveld and Others, paragraph 53; C-435/97,

WWF and Others, paragraph 38; C-392/96 Commission v. Ireland, paragraph 75; C-66/06, Commission v.

Ireland, paragraph 65; C-427/07, Commission v. Ireland, paragraph 42)

A Member State which, on the basis of **Article 4(2)** of the EIA Directive, has established thresholds

and/or criteria taking account **only the size of projects**, without taking into consideration **all the**

criteria listed in Annex III [i.e. nature and location of projects], exceeds the **limits of its discretion**

under Articles 2(1) and **4(2)** of the EIA Directive.

(C-392/96, Commission v. Ireland, paragraphs 65, 72; C-66/06, Commission v. Ireland, paragraph 64; C-

255/08, Commission v. Netherlands, paragraphs 32-39)

By limiting the environmental impact assessment for urban development projects exclusively to

projects located on non-urban land, the Spanish Government is **confining itself to applying the**

criterion of location, which is only one of three criteria set out in Article 2(1) of the EIA Directive,

and is **failing to take account of the other two criteria, namely the nature and size of a project**.

Moreover, insofar as Spanish law provides for environmental impact assessment only in respect of

urban development projects outside urban areas, it fails to apply completely the criterion of location.

Indeed, densely populated areas and landscapes of historical, cultural or archaeological significance

in points 2(g) and (h) of Annex III of the EIA Directive are among the selection criteria to be taken

into account by Member States, under Article 4(3) of the Directive, in the event of a case-by-case

examination or of setting thresholds or criteria for the purpose of Article 4(2) to determine whether a

project should be subject to an assessment. These selection criteria relate more often to urban areas.

(C-332/04, Commission v. Spain, paragraphs 75-79)

Screening cd

- all Annex III criteria to be used
 - not only size of project C-392/96 (EC vs Ireland) and Crystal Palace/White City (C-508/03)
 - in all screening methods - C-156/07 (Aiello)
- negative screening require justification - C-87/02 (EC vs Italy)
 - but only upon request (C-75/08 Mellor)



Link between Articles 2(1) and 3

Even a **small-scale project** can have significant effects on the environment if it is in a location where the environmental factors set out in Article 3 of the EIA Directive, such as fauna and flora, soil, water, climate or cultural heritage, are sensitive to the slightest alteration. (C-392/96, Commission v. Ireland, paragraph 66)

Splitting of projects – cumulative effects

The purpose of the EIA Directive cannot be circumvented by the **splitting of projects** and the failure to take account of the **cumulative effect** of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the EIA Directive. (C-392/96, Commission v. Ireland, paragraphs, 76, 82; C-142/07, Ecologistas en Acción-CODA, paragraph 44 ; C-205/08, Umweltanwalt von Kärnten, paragraph 53)

Content of the screening decisions

A decision by which the national competent authority takes the view that a project's characteristics do not require it to be subjected to an assessment of its effects on the environment

must contain or be

accompanied by all the **information** that makes it possible to check that it is based on **adequate**

screening, carried out in accordance with the requirements of the EIA Directive.

(C-87/02, Commission v. Italian Republic, paragraph 49)

Article 4 of the EIA Directive must be interpreted as **not requiring** that a determination, that it is

unnecessary to subject a project falling within Annex II to that directive to an environmental impact

assessment, should **itself contain the reasons** for the competent authority's decision that the latter

was unnecessary. However, if an interested party so requests, the competent administrative authority

is obliged to communicate to him the reasons for the determination or the relevant information and

documents. If a negative screening decision of a Member State states the reasons on which it is based,

that **determination is sufficiently reasoned** where the reasons which it contains (added to factors

which have already been brought to the attention of interested parties, and supplemented by any

necessary additional information that the competent national administration is required to provide to

those interested parties at their request) can enable the interested parties to decide whether to appeal

against that decision.

(C-75/08, Mellor, paragraphs 61, 66, operative part 1-2)

Place in development control and concept of development consent

- Place in development control
 - Multiple decision-making (C-416/10, Križan)
 - main and implementing decision - C-201/02 (Delena Wells)
 - need for repeating EIA - Crystal Palace/White City (C-508/03), Barker (C-290/03)
- Concept of development control
 - Binding (Case 96/81 Commission v. Netherlands)
 - no tacit agreement -C-360/87 and C-230/00 (EC vs Belgium)



It is apparent from settled case-law that an authorisation within the meaning of Directive 85/337 may be formed by the **combination of several distinct decisions** when the national procedure which allows the developer to be authorised to start works to complete his project includes **several consecutive steps** (see, to that effect, Case C-201/02 *Wells* [2004] ECR I-723, paragraph 52, and Case C-508/03 *Commission v United Kingdom* [2006] ECR I-3969, paragraph 102). It follows that, in that situation, the date on which the application for a permit for a project was formally lodged must be fixed as the day on which the developer submitted an application seeking to initiate the first stage of the procedure. (C-416/10, Križan, paragraph 103)

Need for repeating EIA

Articles 2(1) and 4(2) of the EIA Directive are to be interpreted as requiring an environmental impact assessment to be carried out if, in the case of grant of **consent comprising more than one stage**, it

becomes apparent, in the course of the second stage, that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location. (C-290/03, Barker - *Crystal Palace*, paragraph 49, operative part 2)

Consent procedure comprising several stages and EIA

Articles 2(1) and 4(2) of the EIA Directive are to be interpreted as requiring an environmental impact assessment to be carried out if, in the case of grant of **consent comprising more than one stage**, it becomes apparent, in the course of the second stage, that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location. (C-290/03, Barker - *Crystal Palace*, paragraph 49, operative part 2)

Concept of development consent

While the term '**development consent**' is modelled on certain elements of national law, it remains a Community concept which falls exclusively within Community law. According to settled case-law, the terms used in a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope are normally to be given throughout the Community **an autonomous and uniform interpretation** which must take into account the context of the provision and the purpose of the legislation in question. Thus the classification of a decision as a '**development consent**' within the meaning of **Article 1(2)** of the EIA Directive must be carried out pursuant to national law in a manner consistent with Community law. (C-290/03, Barker - *Crystal Palace*, paragraphs 40-41)

An **agreement signed between the public authority**, a company in charge of the development and promotion of an airport and an air freight company which provides for certain modifications to the infrastructure of that airport in order to enable it to be used 24 hours per day and 365 days per year is **not a project** within the meaning of the EIA Directive. However, it is for the national court to

determine, on the basis of the applicable national legislation, whether such an agreement constitutes a **development consent** within the meaning of **Article 1(2)** of the EIA Directive. It is necessary, in that context, to consider whether that consent forms **part of a procedure carried out in several stages** involving a principal decision and **implementing decisions** and whether account is to be taken of the **cumulative effect** of several projects whose impact on the environment must be assessed globally.
(C-2/07, *Abraham and Others – Liège airport*, paragraph 28, operative part 1)

Public participation and access to justice

- Right to have the consequences assessed (C-420/11, Leth
- Right of individuals to rely on a directive and of the national court to take it into consideration ((C-72/95, Kraaijeveld and Others, C-435/97, WWF and Others; C-287/98, Linster, C-201/02, Wells)
- Aarhus Convention is part of *acquis* (C-240/09, Lesoochranské zoskupenie - Slovak bear Case)
- Access to justice
 - Not confined only to participation in administrative procedure ((C-263/08, Djurgården)
 - *Vide acces* to justice required ((C-263/08, Djurgården)
- Fee for public participation in line with EIA Directive - verdict controversial in light of Aarhus Convention



Rights of individuals concerned to have the environmental effects of projects assessed and be consulted

It must therefore be held that the environmental impact assessment, as provided for in Article 3 of

Directive 85/337, does not include the assessment of the effects which the project under examination has on the value of material assets.

That finding, however, does not necessarily imply that Article 3 of Directive 85/337 must be

interpreted as meaning that the fact that an environmental impact assessment has not been carried out,

contrary to the requirements of that directive, in particular an assessment of the effects on one or more

of the factors set out in that provision other than that of material assets, does not entitle an individual

to any compensation for pecuniary damage which is attributable to a decrease in the value of his

material assets.

It must be recalled, from the outset, that the Court has already ruled that an individual may, where

appropriate, rely on the duty to carry out an environmental impact assessment

under Article 2(1) of Directive 85/337, read in conjunction with Articles 1(2) and 4 thereof (see Case C-201/02 Wells [2004] ECR I-723, paragraph 61). That directive thus confers on the individuals concerned a right to have the environmental effects of the project under examination assessed by the competent services and to be consulted in that respect.

Accordingly, it is necessary to examine whether Article 3 of Directive 85/337, read in conjunction with Article 2 thereof, is intended, in the event of an omission to carry out an environmental impact assessment, to confer on individuals a right to compensation for pecuniary damage such as that invoked by Ms Leth.

In that respect, it follows from the third and eleventh recitals in the preamble to Directive 85/337 that

the purpose of that directive is to achieve one of the European Union's objectives in the sphere of the protection of the environment and the quality of life and that the effects of a project on the environment must be assessed in order to take account of the concerns to contribute by means of a better environment to the quality of life.

In circumstances where exposure to noise resulting from a project covered by Article 4 of Directive 85/337 has significant effects on individuals, in the sense that a home affected by that noise is rendered less capable of fulfilling its function and the individuals' environment, quality of life and, potentially, health are affected, a decrease in the pecuniary value of that house may indeed be a direct economic consequence of such effects on the environment, this being a matter which must be examined on a case-by-case basis.

It must therefore be concluded that **the prevention of pecuniary damage**, in so far as that damage is the direct economic consequence of the environmental effects of a public or private project, **is covered by the objective of protection pursued by Directive 85/337**. As such economic damage is a direct consequence of such effects, it must be distinguished from economic damage which does not have its

direct source in the environmental effects and which, therefore, is not covered by the objective of protection pursued by that directive, such as, inter alia, certain competitive disadvantages.

(C-420/11, Leth, paragraphs 30-36)

Right of individuals to rely on the EIA directive and invoke it before national courts

As regards the **right of individuals to rely on a directive** and of the **national court** to take it into

consideration, it would be incompatible with the binding effect conferred on directives by that

provision to exclude, as a matter of principle, any possibility for those concerned to rely on the

obligation which directives impose. Particularly where the Community authorities have, by directive,

imposed on Member States the obligation to pursue a particular course of conduct, the effectiveness of

such an act would be diminished if individuals were prevented from relying on it in legal proceedings

and if national courts were prevented from taking it into consideration as a matter of Community law

in determining whether the national legislature, in exercising its choice as to the form and methods for

implementing the directive, had kept within the limits of its discretion set by the directive.

(C-72/95, Kraaijeveld and Others, paragraph 56; C-435/97, WWF and Others, paragraph 69; C-287/98, Linster, paragraph 32, C-201/02, Wells, paragraph 57)

Aarhus Convention as an integral part of the EU legal order

The Aarhus Convention was signed by the Community and subsequently approved by Decision

2005/370. Therefore, according to settled case-law, the provisions of that convention now form an

integral part of the legal order of the European Union (see, by analogy, Case C-344/04 IATA and

ELFAA [2006] ECR I-403, paragraph 36, and Case C-459/03 Commission v Ireland [2006] ECR

I-4635, paragraph 82). Within the framework of that legal order the Court therefore has jurisdiction to

give preliminary rulings concerning the interpretation of such an agreement (see, inter alia, Case

181/73 Haegeman [1974] ECR 449, paragraphs 4 to 6, and Case 12/86 Demirel [1987] ECR 3719, paragraph 7).

(C-240/09, Lesoochránárske zoskupenie, paragraphs 30-38, 43, 50-52)

Members of the “**public concerned**” within the meaning of **Article 1(2)** and 10a of the EIA Directive must be able to have **access to a review procedure** to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent, regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views.

Article 10a of the EIA Directive leaves, by its reference to **Article 1(2)** thereof, to national legislatures the task of determining the conditions which may be required in order for a non governmental organisation which promotes environmental protection to have a right of appeal under the conditions set out above, the national rules thus established must, first, ensure ‘**wide access to justice**’ and, second, render **effective** the provisions of the EIA Directive on judicial remedies.

Accordingly, those national rules must not be liable to nullify Community provisions which provide that parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, are to be entitled to bring actions before the competent courts.

From that point of view, a national law may require that such an association, which intends to challenge a project covered by the EIA Directive through legal proceedings, has as its object the protection of nature and the environment. Furthermore, it is conceivable that the condition that an environmental protection association must have a minimum number of members may be relevant in order to ensure that it does in fact exist and that it is active. However, the number of members required cannot be fixed by national law at such a level that it runs counter to the objectives of Directive and in particular the objective of facilitating judicial review of projects which fall within its scope. Therefore Article 10a of the EIA Directive precludes a provision of national law which

reserves the right to
bring an appeal against a decision on projects which fall within the scope of that
directivesolely to
environmental NGOs which have at least 2.000 members.
(C-263/08, Djurgården, paragraphs 39, 45-47, 52)

Access to justice cd

- Rights of Ngos (C-263/08, Djurgården and C-115/09, Trianel Kohlekraftwerk Lünen)
- Subjective rights and protection of public interest (C-115/09, Trianel Kohlekraftwerk Lünen)
- Interests capable of being impaired - under EU law and domestic law (C-115/09, Trianel Kohlekraftwerk Lünen)
- Injunctive relief - opinion AG Kokott in C-416/10 Križan
- Information on access to justice C-427/07, Commission v. Ireland,



Access to justice for non-governmental organisations (NGOs) which promote environmental protection – interests protected

Non-governmental organisations promoting environmental protection, as referred to in Article 1(2) of that directive, can derive from the last sentence of the third paragraph of Article 10a of Directive

85/337 a right to rely before the courts, in an action contesting a decision authorising projects 'likely to have significant effects on the environment' for the purposes of Article 1(1) of Directive 85/337, on

the infringement of the rules of national law flowing from Article 6 of the Habitats Directive, even

where, on the ground that the rules relied on protect only the **interests of the general public and not**

the interests of individuals, national procedural law does not permit this.

(C-115/09, Trianel Kohlekraftwerk Lünen, paragraph 59)

Absence of EU rules on actions for safeguarding rights

Where, in the absence of EU rules governing the matter, **it is for the legal system of each Member**

State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural

rules governing actions for safeguarding rights which individuals derive from EU law, those detailed rules must not be less favourable than those governing similar domestic actions **(principle of equivalence)** and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law **(principle of effectiveness)**.

Thus, although it is for the Member States to determine, when their legal system so requires and within the limits laid down in Article 10a [11 as per codification] of Directive 85/337, what rights can give rise, when infringed, to an action concerning the environment, they cannot, when making that determination, deprive environmental protection organisations which fulfil the conditions laid down in Article 1(2) of that directive of the opportunity of playing the role granted to them both by Directive 85/337 and by the Aarhus Convention.

(C-115/09, Trianel Kohlekraftwerk Lünen, paragraphs 43-44)

'Rights capable of being impaired'

The last sentence of the third paragraph of Article 10a [11 as per codification] of Directive 85/337 must be read as meaning that the 'rights capable of being impaired' which the environmental protection organisations are supposed to enjoy must necessarily include the rules of national law implementing EU environment law and the rules of EU environment law having direct effect.

(C-115/09, Trianel Kohlekraftwerk Lünen, paragraph 48)

What constitutes impairment of a right

Article 10a [11 as per codification] of Directive 85/337 leaves the Member States a significant discretion both to determine what constitutes impairment of a right and, in particular, to determine the **conditions for the admissibility** of actions and the bodies before which such actions may be brought.

The same is not true, however, of the provisions laid down in the **last two sentences of the third paragraph of Article 10a** [11 as per codification] of Directive 85/337. By providing that the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) of Directive 85/337 are to be deemed sufficient and that such organisations are also to be deemed to have

rights capable of being impaired, **those provisions lay down rules which are precise and not subject to other conditions.**

(C-115/09, Trianel Kohlekraftwerk Lünen, paragraphs 55-57)

*Injunctive relief*¹

Injunctive relief is recognised by the case-law of the Court of Justice as a

cornerstone to access to

justice. In order to enhance the effectiveness of the legal protection of rights, it was specifically

referred to by the Court in case C-213/89, Factortame (see also case C-432/05, Unibet). The courts

have consistently held that the principle of **effective judicial protection** requires the national court to

be able to grant interim relief as necessary to ensure that rights derived from EU law are respected.

Thus, the right to apply for injunctions are considered inherent in the concept of effective access to

justice, guaranteeing effective interim protection of rights.

Therefore, independently of Article 9(4) of the Aarhus Convention which requires injunctive relief to

be provided where appropriate, **injunctive relief can be considered an essential element for**

ensuring effective judicial protection, to avoid irreversible damage to the environment amongst

other reasons. This has been confirmed by AG Kokott in case C-416/10 Križan (paragraphs 170-

177), where she concluded that the right to effective access to justice under the Environmental Impact

Assessment Directive and the IPPC Directive also includes the right to apply for injunctive relief. The

Court went on to follow the Advocate-General in its ruling delivered (paragraphs 105-110).

The Court highlighted that by virtue of their procedural autonomy, the Member States have discretion

in implementing Article 9 of the Aarhus Convention and Article 15a of Directive 96/61, subject to

compliance with the principles of equivalence and effectiveness. It is for them, in particular, to

determine, in so far as the abovementioned provisions are complied with, which court of law or which

independent and impartial body established by law is to have jurisdiction in respect of the review

procedure referred to in those provisions and what procedural rules are applicable. It must be added

that the guarantee of effectiveness of the right to bring an action provided for in that Article 11 of the EIA Directive (also applicable by way of analogy to the access to justice provisions of the Industrial Emissions Directive) requires that the members of the public concerned should have the right to ask the court or competent independent and impartial body to order interim measures such as to prevent pollution, including, where necessary, by the temporary suspension of a disputed permit pending the final decision.

Availability to the public of practical information on access to justice

It must be borne in mind that one of the underlying principles of Directive 2003/35 is to promote access to justice in environmental matters, along the lines of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters.

In that regard, the obligation to make available to the public practical information on access to

administrative and judicial review procedures laid down in the sixth paragraph of Article 10a of

Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and in the sixth paragraph of Article

15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, amounts to an obligation to

obtain a precise result which the Member States must ensure is achieved.

In the absence of any specific statutory or regulatory provision concerning information on the rights

thus offered to the public, the mere availability, through publications or on the internet, of rules

concerning access to administrative and judicial review procedures and the possibility of access to

court decisions cannot be regarded as ensuring, in a sufficiently clear and precise manner, that the

public concerned is in a position to be aware of its rights on access to justice in environmental matters.

(C-427/07, Commission v. Ireland, paragraphs 96-98)

Decision on development consent

- Assessment under art.3 and consideration under art.8 (C-50/09, Commission v. Ireland,)
- Statement of reasons must be prepared only if the interested party so requests (C-182/10, Solvay and Others) verdict controversial in light of art.6.9 of the Aarhus Convention
- The public must be informed ((C-332/04, Commission v. Spain)



Difference between Articles 3 and 8

Admittedly, Article 8 of Directive 85/337 provides that the results of the consultations and the information gathered pursuant to Articles 5 to 7 must be taken into consideration in the development consent procedure.

However, that obligation to take into consideration, at the conclusion of the decision-making process, information gathered by the competent environmental authority must not be confused with the **assessment obligation laid down in Article 3** of Directive 85/337. Indeed, that assessment, which

must be carried out before the decision-making process (Case C-508/03 Commission v United Kingdom [2006] ECR I-3969, paragraph 103), involves an **examination of the substance of the**

information gathered as well as a consideration of the expediency of supplementing it, if

appropriate, with additional data. That competent environmental authority must thus undertake both

an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the project concerned on the factors set out in the first three indents of Article 3 and the interaction between those factors. It follows therefore both from the wording of the provisions at issue of Directive 85/337 and from its general scheme that Article 3 is a fundamental provision. The transposition of Articles 4 to 11 alone cannot be regarded as automatically transposing Article 3. As regards section 173 of the PDA, according to which the planning authority, where it receives an application for planning permission accompanied by an environmental impact statement, must take that statement into account as well as any additional information provided to it, it is clear from the very wording of that article that it is confined to laying down an obligation similar to that provided for in Article 8 of Directive 85/337, namely that **of taking the results of the consultations and the information gathered for the purposes of the consent procedure into consideration**. That obligation does not correspond to the broader one, imposed by Article 3 of Directive 85/337 on the competent environmental authority, to carry out itself an environmental impact assessment in the light of the factors set out in that provision. (C-50/09, *Commission v. Ireland*, paragraphs 39-41, 44)

Reasons for the competent authority's decision

Article 6(9) of the Aarhus Convention and Article 9(1) of Directive 85/337 must be interpreted as not requiring that the decision should itself contain the reasons for the competent authority's decision that it was necessary. However, if an interested party so requests, the competent authority is obliged to communicate to him the reasons for that decision or the relevant information and documents in response to the request made. (C-182/10, *Solvay and Others*, paragraph 64)

Publication of the decision to grant or refuse development consent

Under Article 9 of the EIA Directive the public is to be informed once the decision to grant or refuse development consent has been taken. The purpose of issuing this information is

not merely to inform the public but also to enable persons who consider themselves harmed by the project to exercise their right of appeal within the appointed deadlines.

It follows from the foregoing that the publication by a Member State of an environmental impact statement issued by a competent administrative authority in environmental matters, an action not required under Community law, is no substitute for the obligation, under Article 9 of Directive 85/337/EEC as amended, to inform the public of the granting or refusal of consent to proceed with a project under Article 1(2) of the Directive.

This interpretation is supported by the purpose of Directive 85/337/EEC, in its original version, which is, according to the first recital, to prevent the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects. This purpose was confirmed by Directive 97/11/EC, which recalls, in its second recital, that, pursuant to Article 130r(2) of the EC Treaty (Article 174(2) in the amended Treaty), Community policy on the environment is based on the precautionary principle and the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

By imposing, in Article 9, the obligation on Member States to inform the public when a decision granting or refusing development consent is adopted, the amended Directive 85/337/EEC is intended to involve the public concerned in supervising the implementation of these principles. Informing the public only of the content of the opinion which is to be taken into account by the competent authority before adopting its decision is a less effective way of involving the public in supervision than informing the public of the final decision which concludes the consent procedure.

Inasmuch as national law does not require the publication of the decision to grant or refuse consent for the project, Article 9(1) of Directive 85/337/EEC as amended has not been correctly implemented.

(C-332/04, Commission v. Spain, paragraphs 55-59)

Transboundary EIA

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EU Member States A and B

- State A on northern shores of Port of Sevilla
- State B on southern shores
- All State A foreshore is an SPA and it has a priority species there , the iudex bukarestis
- State B foreshore is the habitat of migratory birds and an SPA also

The Greenstar development

- New quay wall and berth for luxury liners
- Reclamation of lands from the sea
- An oil refinery on reclaimed lands
- Dredging in State A and B waters

Benefits in State B

- More tourism from luxury liners
- Ensures some security of supply of energy by having the refinery
- Having a refinery for new oil discovered offshore in State B

Environmental impacts

- Depositing massive amounts of soil, rock and waste from State A on the foreshore in State B
- Sending polluted dredging material from State B to State A for disposal
- Deflected currents may create new wetlands in State A, de-water existing ones and maybe increase the risk of flooding there

Mitigation measures

- New wave control technology to deflect currents from State B

Compensatory measures

- Construction of new wetlands in State A to compensate for loss of any existing wetlands

Case Study on Transboundary EIA

PROPOSED DEVELOPMENT

The port of Sevilla is a harbor area which comes within the jurisdiction of two EU Member States - *State A and State B*. *State A* is on the northern shores and *State B* on the southern shores. Greenstar Ltd proposes to develop additional port facilities at Drogheda, a small town in Sevilla Port in Member *State B*.

The development will consist of:

- (i) The reclamation of 32 hectares from the foreshore in the Port. This will involve the deposition of over one million tonnes of rock, soil and other construction materials and waste on the existing foreshore.
- (ii) The construction of a new quay to accommodate visiting luxury cruisers and other ships and the construction of an oil refinery on the reclaimed lands.
- (ii) Dredging over an area of 220,000 square metres involving the removal of 1,475,000 cubic metres of materials at the existing southern and eastern berths in the Port and the approaches from the main channel.

The shore in *State A* is the habitat of overwintering migratory birds. The prevailing winds are southwestern so that any air pollution from Drogheda in *State B* is more liable to have significant effects in *State A* than in *State B*.

The entire foreshore of the port of Drogheda in *State B* is a Special Protected Area since 2008. The southern shore of the port of Sevilla in *State B* is also the habitat of the *iudex bukarestis*, which is rare and vulnerable and a priority species under the Habitat Directive.

THE DEVELOPER

The developer is Greenstar, a multinational company that operates a privately owned port in Drogheda in *State B* in Sevilla harbour.

BENEFITS OF THE DEVELOPMENT

Greenstar claim, *inter alia*, that the expanded port at Drogheda would attract luxury cruise liners to berth in Drogheda thereby increasing the tourism potential of the area. These luxury cruise liners currently dock in *State A*. The proposed oil refinery is required to ensure the security of energy supplies in *State B* which is almost totally dependent on imported energy from *State A*. *State B* has a policy to encourage the development of an oil refinery in the State to refine crude oils which have recently been discovered offshore near the port of Sevilla. The expanded port is vitally necessary for the economic development of State B.

SOME OF THE LIKELY IMPACTS

Investigations by Greenstar's environmental consultants indicate that the proposed expansion will involve the deposition of massive amounts of reclamation materials including topsoil, rock and construction waste on the foreshore at Drogheda and some disruption of water flows by dredging. These materials will be brought from various construction sites and quarries in *State A* (which is enjoying a construction boom) and polluted dredged materials will be sent for land filling in *State A*. There is a risk that the deposition of reclamation materials on the foreshore will deflect currents in the Port of Sevilla and this may result in increased flooding on the foreshore of *State A*, create new wetlands there and possibly dewater existing wetlands. Greenstar proposes compensating for these effects by constructing new wetlands in *State A* on lands which it has purchased there and mitigating any possible damage by using a new wave control technology invented by a world famous engineering professor in a leading University in *State A* which will deflect currents in the Port of Sevilla away from the foreshore in *State A*. (Many are skeptical about the potential of this technology which has only been tested as a source of wave energy.)

LEARNED JUDGES CONSIDER:

- (i) Are authorizations needed for this development under either or both the EIA and Habitats directives?
- (ii) Should this project be screened for EIA and /or AA?
- (iii) Do you think the mitigation measures proposed in this example should be taken into account in screening this project for any assessment that might be needed under the Habitats or Birds directives?
- (iv) Are authorizations required in State A or State B or both?
- (v) Assuming that the competent authority in State B is dealing with the application for the proposed development, what are its obligations towards State A?
- (vi) Are ordinary citizens in Member State A entitled to participate in the decision making process on this project in Member State B?
- (vii) Are NGOs in Member State A entitled to participate in decision making on this project in Member State B?
- (viii) Are NGOs in Member State A entitled to challenge the substantive merits of any decision on this project in Member State A?
- (ix) Assume that *Oilco*, the owner of an oil refinery in Member State A, discovers that permission for a new oil refinery has been granted in Member State B and that no notice of this proposed development had ever been given to Member State B or in Member State B.
Has *Oilco* a right to challenge the legality of the permission for the project in Member State B?
- (x) Assume that the competent authorities in Member State B grant permission for this development having totally ignored any effects on the environment in Member State A, what remedies are available against Member State A?
- (xi) Does it matter that the developer is not a public authority?

Interaction between EIA and Articles 6.3 and 6.4 of Habitats Directive

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Cf EIA to AA

- Requires EIA for **listed projects** only.
- Can apply to **any** kind of plan or project big or small- including EIA projects
- Art.6.3.

EIA Directive, Arts. 2.1 & 2.3 and See Case 418/04 *Commission v Ireland*, para 231. 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.”

Projects are defined in Art.1 of the EIA Directive 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.

Can apply to *any* kind of plan or project big or small including EIA projects
Art.6.3. of the Habitats Directive requires AA for “Any plan or project..”

Exemptions

- Exemptions for defence projects, projects adopted by legislation and in exceptional cases
- EIA Directive, Arts.1.3, 1.4, 2.4.
- Only exemption is if the plan or programme “is directly connected with or necessary to the management of the site”. Art 6.3

Note that in Case C-241/08 *Commission v France*, the ECJ held that such plans and programmes to be exempted must be specifically tailored to conservation or restoration objectives for the site in question, not just generic plans and programmes.

Publication requirements for screening

- Annex 11 screening decisions to be publicly available and ECJ says reasons must be given for them if requested.
- No *explicit* obligation to publish screening decisions but they must be available to requesting third parties.
- Methodological Guidelines say reasoning and decision to be published

EIA Directive, Art. 4.4. "Member States shall ensure that the determination made by the competent authorities under paragraph 2 are made available to the public." See *Case C-7/02 Commission v Italy [2004] ECR I-5975*, the ECJ found that Italy had breached its obligations under the EIA Directive because no evidence was provided that showed that the relevant authorities had undertaken an evaluation for the relevant project. The reasoning would also apply to screening decisions for AA especially negative screening decisions. See also *Case C-75/08 Mellor* and *Solvay* *Case C -182/2010* holding that while there was no duty in the EIA Directive to give reasons for screening decisions, the competent authority must provide them on request.

SCREENING & MITIGATION

- Mitigation measures may/must be considered when screening for EIA subject to satisfying certain criteria.
- Methodological Guidelines say no but argued mitigation measures can be considered but criteria for mitigation measures arguably somewhat stricter when screening for AA

See McGillivray "Mitigation and Screening for Environmental Assessment" 2011 *Journal of Planning and Environmental Law* 1539-1559. There are no express EU requirements on this question. English and Irish law is uncertain. Broadly, the arguments for considering mitigation measures in screening are that the objectives of EIA, AA have been achieved if developers incorporate screening measures, that mitigation measures are integral parts of projects and that there would be legislative overburden if they were not taken into account. The argument against is that there may be a legitimate public interest in subjecting mitigation measures to public participation procedures especially when they are controversial, the prospects for success are uncertain or they are unproven. See *Bellway Urban Renewal Southern v Gillespie* [2003] EWCS Civ 400 where Laws J stated that mitigation measures can be taken into account when their "nature, availability and effectiveness are already plainly established and plainly uncontroversial." On the other hand, see *R (on the application of Birch) v Barnsley MBC* [2010] EWCA Civ.1180 stating that the adequacy of the mitigation measures in that case ought to have been "thoroughly tested through the EIA process." Much depends on the facts of a case but obviously the more thorough and potentially effective the mitigation measures proposed, the more likely a developer is to have them taken into account. There are arguments as to what constitutes a mitigation or compensatory measure and this question has been referred for a preliminary ruling in Case C521/12 *Briels*

Screening tests

- Environmental features must be *likely* to be affected to justify requiring EIA
- Directive, Art.5.1.a
- If there is a *mere probability* that the plan or project will have effects, or if there is a risk or doubt re significant effects or it cannot be excluded that there will be significant effects, AA required.
- *Waddenzee*, para 45
- Pfizer – proportionality principle applies to risk assessment

See *Waddenvereniging and Vogelbeschermingsvereniging*, para 41 where the Court talks of an appropriate assessment being required if there is a 'mere probability' that there may be significant effects. In paragraph 43, it refers to there being a 'probability or a risk' of such effects. In paragraph 44, it uses the term 'in case of doubt'. But see AG Opinion in Case C-258/11 *Sweetman* at paras 47-49

"It follows that the *possibility* of there being a significant effect on the site will generate the need for an appropriate assessment for the purposes of Article 6(3). The requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry out an appropriate assessment. There is no need to *establish* such an effect; it is, as Ireland observes, merely necessary to determine that there *may be* such an effect. But the CFI in *Pfizer* Case T-13/99

expressed the view that a 'zero-risk' test is not an appropriate test for a public authority to apply. Similarly, the *Commission in its Communication on the Precautionary Principle* has stated that aiming at 'zero-risk' would not be compatible with the principle of proportionality, a long-standing general principle of Union law that applies to all risk management measures. The principle of proportionality is one of a number of general principles of risk management, which the Commission maintains should always apply when precautionary measures are taken. Other principles include that of non-discrimination, consistency and a cost/benefit analysis of action or inaction..

Commission's Communication, note 20, at 18.

WHAT HAS TO BE STUDIED?

- **Likely** significant effects *on the environment* as defined in the EIA Directive. Significant effects to be assessed (on all the environment) theoretically very extensive

Applies to plans and projects likely to have a significant effect *on a site in view of the site's conservation objectives*

CUMULATIVE EFFECTS

- Applies to cumulative effects of various *projects*.
- Applies to cumulative effects of *plans or projects* either alone or in combination with other *plans or projects*

QUALITY OF INFORMATION REQUIRED

- Information required is having regard, *inter alia*, to “current knowledge and methods of assessment” in so far as it is **reasonable to ask developer to provide**.
- Information for assessment to be based on **best scientific knowledge**.
- (Requirements “excellence, independence and transparency.”)

Ibid.

In Pfizer, the CFI said that scientific evidence relied on instead must be the result of a proper and impartial examination, meeting the requirements of “excellence, independence and transparency.” *Ibid*, para 158, 159 and 268.

Affected environment different for each

- The environment which will likely be affected may possibly be unknown when the project is proposed.
- The aspects of the site to be protected will be ascertainable from the **conservation objectives specific to the site** which reflect the “ecological requirements of the natural habitat types and species in Annex 1 and 11”.

Consultation

- Public consultation mandatory
- EIA Directive Arts.4.4, 5.2, 6, 7, 8, 9, 11.
- Aarhus.
- Public consultation “if appropriate” for Stage 2 Art.6.3.
- Required if Aarhus applies

Must the assessment be written?

- No explicit requirement for *written assessment* of EIS but ECJ implies it
- English and Irish courts say reasoned decision on conclusions of the AA required. Methodological Guidelines say yes.

See Case C-50/09 Commission v. Ireland at *para* 40:

“However, that obligation to take into consideration, at the conclusion of the decision-making process, information gathered by the competent environmental authority must not be confused with the assessment obligation laid down in Article 3 of Directive 85/337. Indeed, that assessment, which must be carried out before the decision-making process (Case C-508/03 *Commission v United Kingdom* [2006] ECR I-3969, paragraph 103), involves an examination of the substance of the information gathered as well as a consideration of the expediency of supplementing it, if appropriate, with additional data. That competent environmental authority must thus undertake both an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the project concerned on the factors set out in the first three indents of Article 3 and the interaction between those factors.”

On reasoned decisions on conclusions See Case C-50/09 Commission v. Ireland at *para* 40:

“However, that obligation to take into consideration, at the conclusion of the decision-making process, information gathered by the competent environmental authority must not be confused with the assessment obligation laid down in Article 3 of Directive 85/337. Indeed, that assessment, which must be carried out before the decision-making process (Case C-508/03 *Commission v United Kingdom* [2006] ECR I-3969, paragraph 103), involves an examination of the substance of the information gathered as well as a consideration of the expediency of supplementing it, if appropriate, with additional data. That competent environmental authority must thus undertake both an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the project concerned on the factors set out in the first three indents of Article 3 and the interaction between those factors.”

Outcomes of assessment

- In principle projects *can* be authorised even if there are better alternatives.
- In principle, plans and projects adversely affecting site **integrity of site** cannot be approved. Article 6.3
- Unless ROPI

EIA, Art. 5.3 Developer to provide “—an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects.” See Case 418/04 *Commission v Ireland*, para 231. 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.” However, competent authorities may sometimes require that a better alternative than that chosen by the project promoter is adopted. Many devices have been used to limit the developer’s freedom to choose an alternative. For example, the competent authority may decide that alternatives not *adequately* considered, that the method chosen will result in contravention of an environmental standard or binding legal requirement or authorisation may be refused .for reasons which imply that alternative solutions would be more likely to result in a successful application for the authorisation. In N2 Slane Bypass Road Scheme – Application for Approval of Proposed Road Development at <http://www.pleanala.ie/casenum/HA0026.htm>, the Planning Appeals Board refused permission for a bypass road because alternative routes had not been “adequately explored.”

Article 6.3

Alternatives

- Only alternatives considered need to be described but some competent authorities have invented ways of requiring a proper examination of alternatives
- Project cannot be allowed unless there is NO alternative and unless there are reasons of overriding **public** interest.

Compensatory measures

- No obligation on Member State/developer to take compensatory measures if significant adverse effects on the environment.
- Obligation on Member State “to take all compensatory measures to ensure that the overall coherence of *Natura* 2000 is protected”

As a matter of practice, developers of EIA projects may be required to provide community gains which sometimes consist of compensating for impaired environmental amenities.

Obligation to consult Commission

- Obligation to inform Commission of reasons for exemption from EIA under Art.2.4
- No obligation to justify negative screenings in Habitats Directive to Commission.

Procedures

- Procedures for EIS and EIA prescribed in detail
- No prescribed procedures for AA

Aarhus Convention is part of the acquis

- Picture of a brown bear!

Transboundary issues

- EIA Directive requirement to involve other Member States significantly affected by project
- No requirement *in Habitats Directive* to involve other MS. But..
- Aarhus rights of public participation, access to information and access to justice
- Aarhus rights to be implied
- Espoo

Some remedies

- **EIA Directive,**

- Complaint against State to Espoo Compliance committee but..MOX

Directive obligations can be enforced in domestic courts

Complaint to EU Commission

- **Habitats**

- Anyone in any State party or NGO can complain against another State party to Aarhus Compliance committee
- Directive obligations can be enforced in domestic courts
- Complaint to Commission

Aarhus – people in any State party have access to justice in another State party

Publicity for decisions and reasons

- Obligation to publish screening decision, final decision and reasons and considerations for it.
- Aarhus and Art 10 A
- No express requirement to publish decisions but implied.
- Aarhus

EIA Directive, Art.4.4.

EIA Directive, Art.9.

Aarhus

- Obligation to implement Aarhus requirements on access to justice
- EIA Directive, 10A
- Aarhus doesn't apply to Habitats but CJEU has stated that it should!

See Case C-240/09 *Lesoochránárske Zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky ('LZ')* [2011] ECR I-0000 para 50.

Where the court considers that national courts must interpret environmental laws in a way which to the fullest extent possible gives effect to article 9(3) of the Aarhus Convention.

EU Commission

- No requirement to get Commission's consent for permitting significant adverse effects on environment
- Obligation to notify compensatory measures
- Obligation to get EU Commission's "opinion" on the reasons of OPI justifying plan or project affecting priority site or priority species.
Art.6.4

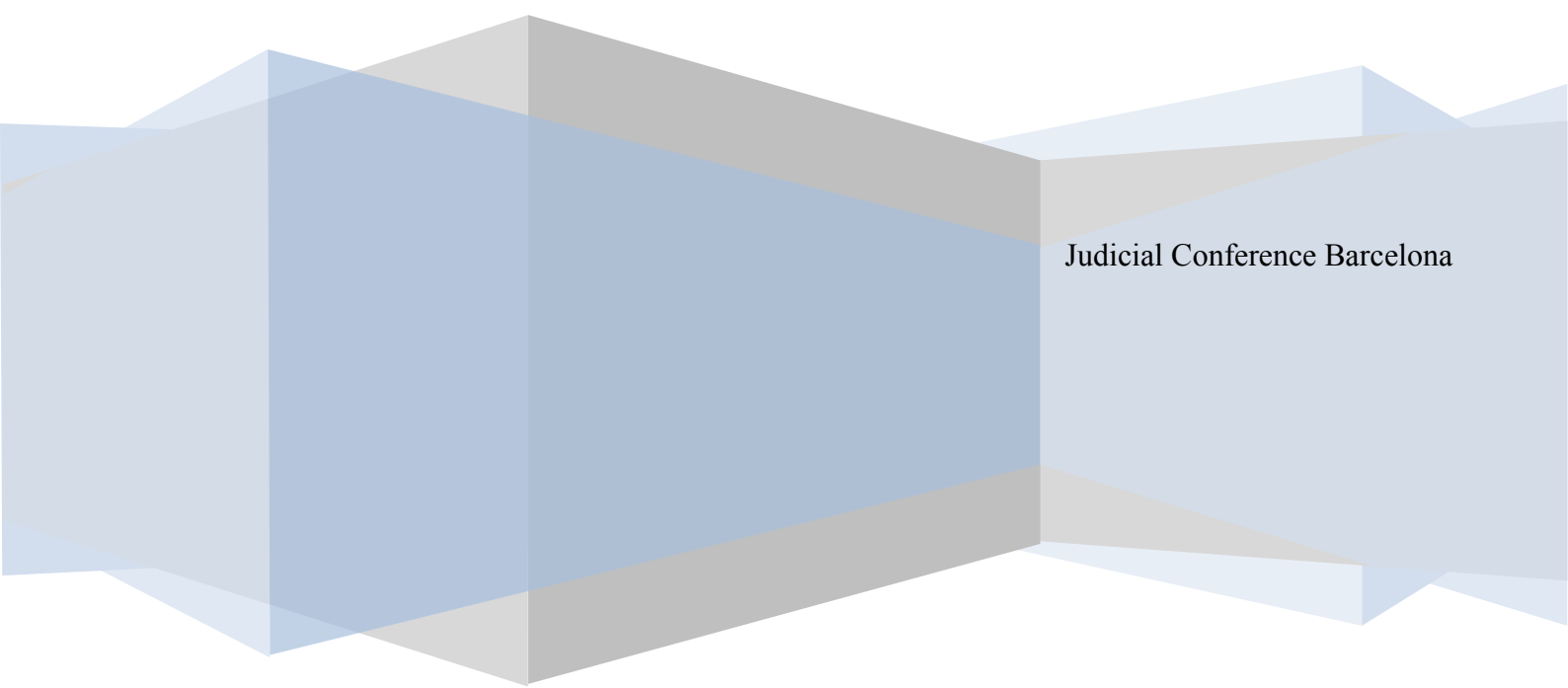
Interaction between the EIA Directive and Articles 6.3 and 6.4 of the Habitats Directive

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Judicial Conference Barcelona

The objective of this paper is to illustrate the important interactions between EIA and Articles 6.2 and 6.3 of the Habitats Directive. In the early phases of implementation of the requirements of the EIA and Habitats Directives, many practitioners assumed that an EIA of a project would also satisfy the requirements for an AA of the same project. Frequently, AAs were submitted in the chapter of an Environmental Impact Statement describing the likely significant effect of the project on fauna and flora and the cultural heritage, especially the last mentioned. This assumption has proved to be wrong as is illustrated by the decisions of the ECJ and evolving practice on the implementation of both Directives.¹ The Commission advises that AAs must now be clearly identifiable in an EIS or reported separately.² Many EIA projects will also be AA projects because the requirement for EIA of sub-threshold projects is triggered by likely effects on environmentally sensitive locations which include SPAs and SACs so there will often be overlaps between the requirements of both Directives. This paper addresses some of the issues which occur when implementation of these Directives is involved. It will illustrate that, although there are superficially many common features in the requirements for both Directives, there are also significant differences. The learning points are illustrated in the tables below.

EIA Directive	Habitats Directive
Requires EIA for listed projects only. ³	Can apply to <i>any</i> kind of plan or project - big or small -including EIA projects ⁴
Exemptions for defence projects, projects adopted by legislation and in exceptional cases ⁵	Only exemption is if the plan or programme is directly connected with or necessary to the management of the site. ⁶

¹ See Case c-418/04 *Commission v Ireland* at *para* 232 “Assessments carried out pursuant to Directive 85/337 or 2001/42 cannot replace the procedure provided for in Article 6(3) and (4) of the Habitats Directive.”

² The Commission Guidelines advise that although an AA may be part of an EIA, the Article 6(3) assessment must be clearly distinguishable and identified within an environmental impact statement or reported separately. See Methodological Guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/42/EEC, section 4.2.

³ EIA Directive, Arts. 2.1 & 2.3 and See Case 418/04 *Commission v Ireland*, *para* 231. 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.”

Projects are defined in Art.1 of the EIA Directive 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;

⁴ Art.6.3. “Any plan or project..”

⁵ EIA Directive, Arts.1.3, 1.4, 2.4.

⁶ Article 6.3 but note that in Case C-241/08 *Commission v France*, the ECJ held that such plans and programmes to be exempted must be specifically tailored to conservation or restoration objectives for the site in question, not just generic plans and programmes.

Annex 11 screening decisions to be publicly available and reasons given for them if requested. ⁷	No explicit obligation to publish screening decisions but they must be available to requesting third parties. ⁸ Guidance document requires publication.
Mitigation measures may/must be considered when screening for EIA subject to satisfying certain criteria. ⁹	Methodological Guidelines say mitigation measures should not be considered. ¹⁰ Criteria for mitigation measures in UK and Ireland arguably somewhat stricter when screening for AA ¹¹
Applies to projects likely to have significant effects <i>on the environment as defined in the EIA Directive</i> . ¹² Significant effects to be	Applies to plans and projects likely to have a significant effect <i>on a site in view of the site's conservation objectives</i> . ¹³ Significant

⁷ EIA Directive, Art. 4.4. "Member States shall ensure that the determination made by the competent authorities under paragraph 2 are made available to the public." See *Case C-7/02 Commission v Italy [2004] ECR I-5975*, the ECJ found that Italy had breached its obligations under the EIA Directive because there no evidence was provided that showed that the relevant authorities had undertaken an evaluation for the relevant project. The reasoning would also apply to screening decisions for AA especially negative screening decisions. See also *Case C-75/08 Mellor* holding that while there was no duty in the EIA Directive to give reasons for screening decisions, the competent authority must provide them on request.

⁸ The jurisprudence on EIA suggests that reasons for screening decisions must be available to requesting third parties. See fn7. There is an obligation under Freedom of Information legislation to give reasons for decisions. The Methodological Guidelines on AA state at p.12 "if it is decided at that stage that there are no significant effects, then it would be necessary to record and report the information relied upon to draw this conclusion. "

⁹ See McGillivray "Mitigation and Screening for Environmental Assessment" 2011 *Journal of Planning and Environmental Law* 1539-1559. There are no express EU requirements on this question. English and Irish law is uncertain. Broadly, the arguments for considering mitigation measures in screening are that the objectives of EIA, AA have been achieved if developers incorporate screening measures, that mitigation measures are integral parts of projects and that there would be legislative overburden if they were not taken into account. The argument against is that there may be a legitimate public interest in subjecting mitigation measures to public participation procedures especially when they are controversial, the prospects for success are uncertain or they are unproven. See *Bellway Urban Renewal Southern v Gillespie* [2003] EWCS Civ 400 where Laws J stated that mitigation measures can be taken into account when their "nature , availability and effectiveness are already plainly established and plainly uncontroversial." On the other hand, see *R (on the application of Birch) v Barnsley MBC* [2010]EWCA Civ.1180 stating that the adequacy of the mitigation measures in that case ought to have been "thoroughly tested through the EIA process."Much depends on the facts of a case but obviously the more thorough and potentially effective the mitigation measures proposed, the more likely a developer is to have them taken into account. There are arguments as to what constitutes a mitigation or compensatory measure and this question has been referred for a preliminary ruling in Case C521/12 *Briels*.

¹⁰ Methodological Guidelines at p.14 : "However, it is important to recognise that the screening assessment should be carried out in the absence of any consideration of mitigation measures that form part of a project or plan and are designed to avoid or reduce the impact of a project or plan on a Natura 2000 site."

¹¹ It is arguable that mitigation measures in AA should probably be such that there is no scientific doubt that they will work.

¹² EIA Directive, Art.1.1.

assessed (on all the environment) theoretically very extensive	effects relatively narrowly focused. Only effects on <i>site's conservation objectives</i> must be considered for significant effect. ¹⁴
Applies to cumulative effects of various <i>projects</i> .	Applies to cumulative effects of <i>plans or projects</i> either alone or in combination with other <i>plans or projects</i>
Information required is having regard, <i>inter alia</i> , to “current knowledge and methods of assessment” in so far as it is reasonable to ask developer to provide. ¹⁵	Information for assessment to be based on best scientific knowledge. ¹⁶
The quality of the environment which will likely be affected may possibly be unknown when the project is proposed. ¹⁷	The aspects of the site to be protected will be ascertainable from the conservation objectives specific to the site which reflect the “ecological requirements of the natural habitat types and species in Annex 1 and 11.” ¹⁸
Public consultation mandatory ¹⁹	Public consultation “if appropriate” ²⁰

¹³ Only effects which affect the site in view of its conservation objectives must be considered. See *Commission v Ireland*, Case C-258/11, *para* 29 “The first, envisaged in the provision’s first sentence, requires the Member States to carry out an appropriate assessment of the implications for a *protected site* of a plan or project when there is a likelihood that the plan or project will have a significant effect *on that site* (see, to this effect, *Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 41 and 43). However, this is arguably not as narrow a requirement as it might seem. It is arguable that activities which could have significant effects on aspects of the environment connected with the site (say poisoning a protected bird species/disturbing breeding of priority species by noise) but not on the *site* as such should be assessed. Article 6.3 states that the AA must address the implications of the plan or project for the site *in view of the site’s conservation objectives*. If the conservation objectives include the protection of species that may be disturbed or damaged by activities which do not impact on the physical site itself, it seems obvious that implications on the protected species must also be addressed. See *Waddenzee*, *para* 46: “As is clear from the first sentence of Article 6(3) of the Habitats Directive in conjunction with the 10th recital in its preamble, the significant nature of the effect on a site of a plan or project ...is linked to the site’s conservation objectives.” *Para* 47 “So, where such a plan or project has an effect on that site but is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned.” See also *Commission v Ireland* Case C-258/11 (*Sweetman*) to the effect that preserving a site at a favourable conservation status entails “the lasting preservation of the constitutive characteristics of the site concerned.”

¹⁴ *Commission v Ireland* Case, 418/04, *para* 30;

¹⁵ EIA Directive, Art.5.1.b. “(b) the Member States consider that a developer *may reasonably be required* to compile this information having regard *inter alia* to current knowledge and methods of assessment.”

¹⁶ *Waddenzee*, Case 127/02, *para* 54. “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*.” The CFI in *Pfizer* stated that, the expert scientific evidence should be “be the result of a proper and impartial examination, meeting the requirements of excellence, independence and transparency. The most reliable scientific evidence available and the most recent results of international research must be used (C-236/01, *para* 113 [novel food])

¹⁷ This is because the environment is very broadly defined in Art.4 of the EIA Directive and there may be no baseline data or an absence of information on the existing quality and features which are likely to be impacted.

¹⁸ Art.6.1; Art.6. 3. See Case C-241/08 *Commission v France* where the ECJ held that management plans for sites must be tailored to the particular site and not just generic objectives

¹⁹ EIA Directive Arts.4.4, 5.2, 6, 7, 8, 9, 11. .

No explicit requirement for <i>written assessment</i> of EIS but ECJ implies it ²¹	English and Irish courts say reasoned decision on conclusions of the AA required. ²²
Theoretically projects <i>can</i> be authorised even if there are better alternatives. ²³	Theoretically plans and projects adversely affecting site integrity cannot be approved. ²⁴
Environmental features must be <i>likely</i> to be affected to justify requiring EIA ²⁵	If there is a <i>mere probability</i> that the plan or project will have effects, ²⁶ or if it cannot be excluded that there will be significant effects, ²⁷ AA required.
In <i>theory</i> project <i>can</i> be authorised even if there will be significant effects on the <i>environment</i> . ²⁸	In <i>theory</i> authorisation <i>cannot</i> be granted if the plan or project will adversely affect the integrity of the <i>site</i> . ²⁹

²⁰ Art.6.3. In most situations it will be “appropriate” to consult the public. It may not if it is not in the interests of conservation to reveal the location of certain sites.

²¹ See Case C-50/09 *Commission v. Ireland* at *para* 40:

“However, that obligation to take into consideration, at the conclusion of the decision-making process, information gathered by the competent environmental authority must not be confused with the assessment obligation laid down in Article 3 of Directive 85/337. Indeed, that assessment, which must be carried out before the decision-making process (Case C-508/03 *Commission v United Kingdom* [2006] ECR I-3969, paragraph 103), involves an examination of the substance of the information gathered as well as a consideration of the expediency of supplementing it, if appropriate, with additional data. That competent environmental authority must thus undertake both an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the project concerned on the factors set out in the first three indents of Article 3 and the interaction between those factors.”

²² *Akester v Department of the Environment, Food and Rural Affairs* [2010] EWHC 232.

²³ EIA, Art. 5.3 Developer to provide “—an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects.” See Case 418/04 *Commission v Ireland*, *para* 231. 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.” However, competent authorities may sometimes require that a better alternative than that chosen by the project promoter is adopted. Many devices have been used to limit the developer’s freedom to choose an alternative. For example, the competent authority may decide that alternatives not *adequately* considered, that the method chosen will result in contravention of an environmental standard or binding legal requirement or authorisation may be refused for reasons which imply that alternative solutions would be more likely to result in a successful application for the authorisation. In N2 Slane Bypass Road Scheme – Application for Approval of Proposed Road Development at <http://www.pleanala.ie/casenum/HA0026.htm>, the Planning Appeals Board refused permission for a bypass road because alternative routes had not been “adequately explored.”

²⁴ Article 6.3

²⁵ EIA Directive, Art.5.1.a

²⁶ *Waddzee*, *para* 41.

²⁷ *Waddenzee*, *para* 45

²⁸ Case 418/04 *Commission v Ireland*, *para* 231 “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”.

²⁹ Article 6.3. The exception is in Art. 6.4

No obligation on Member State to take compensatory measures if significant adverse effects on the environment. ³⁰	Obligation on Member State “to take all compensatory measures to ensure that the overall coherence of <i>Natura 2000</i> is protected” ³¹
Obligation to consult or inform Commission of reasons for exemption from EIA under Art.2.3	No obligation to justify negative screenings in Habitats Directive to Commission.
Procedures for EIS and EIA prescribed in detail	No prescribed procedures for AA
Requirement to involve other Member States significantly affected by project ³²	No requirement <i>in Directive</i> to involve other MS.
Obligation to publish screening decision ³³ , final decision and reasons and considerations for it. ³⁴	No express requirement to publish decisions but advised. ³⁵
Obligation to implement Aarhus requirements on access to justice ³⁶	No express Aarhus requirements in Directive but required by jurisprudence. ³⁷
No need to get Commission’s consent for permitting significant adverse effects on environment	Obligation to get EU Commission’s “opinion” on the reasons of OPI justifying plan or project affecting priority site or species. ³⁸

³⁰ As a matter of practice, developers of large EIA projects may be required to provide community gains which sometimes consist of compensating for impaired environmental amenities.

³¹ Article 6.4.

³² EIA Directive, Arts.7.9.

³³ EIA Directive, Art.4.4.

³⁴ EIA Directive, Art.9.

³⁵ See EU Guidelines on Screening at <http://ec.europa.eu/environment/eia/eia-guidelines/g-screening-full-text.pdf> : **Recording the Screening Decision** When a formal screening decision is made, whether to require or not to require EIA, the competent authority must keep a record of the decision and the reasons for it, and make this available to the public.

³⁶ EIA Directive, 10A

³⁷ See Case C-240/09 *Lesoochránárske Zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* (‘LZ’) [2011] ECR I-0000 para 50 where the court considers that national courts must interpret environmental laws in a way which to the fullest extent possible gives effect to article 9(3) of the Aarhus Convention.

³⁸ Art.6.4

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Management of Natura 2000 sites: **Guidance** - European Commissionec.europa.eu/environment/nature/.../guidance_en.ht..

Heermann

Role of the EIA and the Nature directives
in judicial review proceedings at national
level:
substantive aspects



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1

1. Comparison of Environmental Impact Assessment (EIA) and Appropriate Assessment of Implications (AAoI) according to Article 6(3) FFH Directive

- EIA : No territorial limitation
AAoI: Limited on the impact on **Natura 2000 sites**
- EIA: Provided for projects identified in **Annex I** or **II** to the EIA Directive
AAoI: Comprises *any plan or project*
- Both EIA and AAoI: **Technical/scientific** assessment
- *Balancing of interests?* 
- EIA : Is a step in administrative *proceedings*, no substantive provision for the development consent

Comparison of EIA and AAol

Article 8 EIA Directive

*“The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 **shall be taken into consideration** in the development consent **procedure**.”*

- But: A binding effect (to a certain extent) of the conclusion of the EIA report is disputed.
- The Commission proposes an amendment of Article 8, See COM(2012) 628 final.

- AAol: The conclusion is binding, see



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3

COM(2012) 628 final

<http://ec.europa.eu/environment/eia/pdf/COM-2012-628.pdf>

"Article 8

1. The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 shall be taken into consideration in the development consent procedure. To this end, the decision to grant development consent shall contain the following information:

- (a)...
- (b)...
- (c)...
- (d)...

2. If the consultations and the information gathered pursuant to Articles 5, 6 and 7 conclude that a project will have significant adverse environmental effects, the competent authority, as early as possible and in close cooperation with the authorities referred to in Article 6(1) and the developer, shall consider whether the environmental report referred to in Article 5(1) should be revised and the project modified to avoid or reduce these adverse effects and whether additional mitigation or compensation measures are needed.

If the competent authority decides to grant development consent, it shall ensure that the development consent includes measures to monitor the significant adverse environmental effects, in order to assess the implementation and the expected effectiveness of mitigation and compensation measures, and to identify any unforeseeable adverse effects."

Comparison of EIA with AAol

Article 6(3) FFH Directive

*“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 ...”*

- EIA and AAol may be carried out together, but
- they cannot replace each other



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4

2. Margin of discretion (for the administrative authority)?

a) EIA

Where a screening is carried out by a case-by-case examination according to Article 4 (3) EIA Directive?

- Case C-72/95, Kraaijeveld, 24 October 1996 (discretion of administrative authorities is mentioned)

b) Aol

- Case C-127/02 “Waddenzee”, 7 September 2004:

Mechanical cockle
fishing



Case C-72/95, Kraaijeveld, 24 October 1996

„60 Consequently where, pursuant to national law, a court must ...examine ...whether the legislative or **administrative** authorities of the Member State remained within the limits of their **discretion** under Articles 2(1) and 4(2) of the directive, and take account thereof when examining the action for annulment.“

Margin of discretion? (case Waddenzee)

i. Screening according to Article 6 (3)sentence 1 FFH Directive

“44. In the light, in particular, of the precautionary principle, ...such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned ... in case of doubt as to the absence of significant effects such an assessment must be carried out, ...”

ii. Assessment according to Article 6 (3) sentence 2 FFH Directive

“59. Therefore, pursuant to Article 6(3) of the Habitats Directive, the competent national authorities, ...are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects...”



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6

But see the opinion of Advocate General Kokott:

C-127/02 “Waddenzee”, delivered on 29 January 2004

“109. In any event, the decisive considerations must be set out in the authorisation. They may be reviewed at least in so far as the authorising authorities’ margin of **discretion** is exceeded. This would appear to be the case in particular where the findings of an appropriate assessment on possible adverse effects are contested without cogent factual arguments.”

C-241/08, Commission v UK, delivered on 25 June 2009

“30. Whether the effects of certain activities, in particular the various activities the parties gave as examples, do in fact affect the conservation objectives may only be determined on an individual basis in the light of the specific objectives concerned. Particularly in borderline cases, that involves a difficult scientific prediction which requires the exercise of **a certain amount of discretion** by the competent national authorities.”

Margin of discretion?

iii. Balancing of interests according to Article 6 (4) FFH Directive

„imperative reasons of overriding public interest, including those of a social or economic nature“

CJEU: To be interpreted strictly

Limited extent of judicial review according to the legal traditions of the Member States?



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7

See Case -239/06, Commission v Portuguese Republic, 26 October 2006

35. That provision, which permits a plan or project which has given rise to a negative assessment under the first sentence of Article 6(3) of the Habitats Directive to be implemented on certain conditions, must, as a derogation from the criterion for authorisation laid down in the second sentence of Article 6(3), be interpreted strictly.

See German Federal Administrative Court, Judgment from 10 April 2013 (4 C 3.12)

<http://www.bverwg.de/entscheidungen/pdf/100413U4C3.12.0.pdf> (in German)

-Low flying exercises of the Air Force = project within the meaning of Article 6(3) Habitats Directive

-No exemption for defense projects provided in the Directive

-But a margin of discretion is to be respected concerning interest of defense policy

3. Conflict of national Law and EU Law

a) Primacy of EU Law

- Declaration No 17 to the Lisbon Treaty concerning primacy
- The national courts **must not** apply national rules not being in compliance with EU law (in case of doubts: reference for a preliminary ruling, Article 267 TFEU)
- But at first



Consistent interpretation possible?



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8

Declaration No 17 to the Lisbon Treaty concerning primacy

The Conference recalls that, in accordance in the midst of well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.

The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260):

'Opinion of the Council Legal Service of 22 June 2007

It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/64 (1)) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.

(1)

"It follows (...) that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question."

b) Consistent interpretation

Settled CJEU case law, see cases:

- C-106/89 , Marliesing, 13 November 1990
- C-397/01 - C-403/01, Pfeiffer and Others, 3 October 2004
- C-105/03, Pupino, 16 June 2005
- C-2012/04, Adeneler and Others, 4 July 2006

» Article 4 (3) TEU

“The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.”



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2014

9

Consistent interpretation

The obligation under Article 4 (3) TEU comprises the judiciary power

The national court must:

- ensure, for matters within its jurisdiction, the full effectiveness of Community law,
- interpret national law **as far as possible**, in the light of the wording and the purpose of the directive,
- favour the interpretation of the national rules which is **most consistent** with the purpose of the directive,
- consider the whole body of rules of national law applying the interpretative methods recognized by domestic law.



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2014

10

C-106/89, Judgment of 13 November 1990, “Marleasing”

“1 . The Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts . It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by it and thereby comply with the third paragraph of Article 189 of the Treaty. ”

C-397/01 – C403/01, Pfeiffer and Others, 3 October 2004

“114

The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it (see, to that effect, Case C-160/01 *Mau* [2003] ECR I-4791, paragraph 34).

115

Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive (see, to that effect, *Carbonari*, paragraphs 49 and 50).

116

In that context, if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive.”

Consistent interpretation

But the obligation

- is limited by general principles of law, particularly those of legal certainty and non-retroactivity,
- exists only, once the period for the transposition of the directive has expired,
- does not require an interpretation *contra legem*.

If consistent interpretation (of a directive) fails,
the court must check



direct effect?



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2014

11

C-212/04, Judgment of 4 July 2006, Adeneler and Others

“110 It is true that the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem* (see, by analogy, Case C-105/03 *Pupino* [2005] ECR I-5285, paragraphs 44 and 47).

115 Accordingly, where a directive is transposed belatedly, the general obligation owed by national courts to interpret domestic law in conformity with the directive exists only once the period for its transposition has expired.

121 In accordance with the Court’s settled case-law, it follows ... that, during the period prescribed for transposition of a directive, the Member States to which it is addressed must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by it (*Inter-Environnement Wallonie*, paragraph 45; Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraph 58; and *Mangold*, paragraph 67). In this connection it is immaterial whether or not the provision of national law at issue which has been adopted after the directive in question entered into force is concerned with the transposition of the directive (*ATRAL*, paragraph 59 and *Mangold*, paragraph 68).”

c) Direct effect

i. Ground rules

- The Directive must be
 - unconditional and
 - sufficiently precise
- No direct effect
 - against an individuals (never in favour of state authorities)
 - between private parties

ii. If the plaintiff claims direct effect to the detriment of an operator?



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2014

12

C-397/1 – 403/01, Judgment of 5 October 2004, Pfeiffer and others

“103

In that regard, it is clear from the settled case-law of the Court that, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see, inter alia, Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 11, and Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 25).

108

In that regard, the Court has consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual (see, inter alia, Case 152/84 *Marshall* [1986] ECR 723, paragraph 48; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20; and Case C-201/02 *Wells* [2004] ECR I-0000, paragraph 56).

109

It follows that even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties.”

Direct effect

CJEC allows direct effect, see cases:

- C-201/02, Wells, 7 January 2004 (failure to require EIA)
- C-115/09, Trianel, 12 May 2011 (extent of legal standing of a NGO)
- C-244/12, Salzburger Flughafen, 21 March 2013 (failure to require EIA)

If the conditions for direct effect are not met, the plaintiff may claim (possibly)



State liability



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2014

13

C-201/02, Wells, 7 January 2004

“56. As to that submission, the principle of legal certainty prevents directives from creating obligations for individuals. For them, the provisions of a directive can only create rights (see Case 152/84 *Marshall* [1986] ECR 723, paragraph 48). Consequently, an individual may not rely on a directive against a Member State where it is a matter of a State obligation directly linked to the performance of another obligation falling, pursuant to that directive, on a third party (see, to this effect, Case C-221/88 *Busseni* [1990] ECR I-495, paragraphs 23 to 26, and Case C-97/96 *Daihatsu Deutschland* [1997] ECR I-6843, paragraphs 24 and 26).

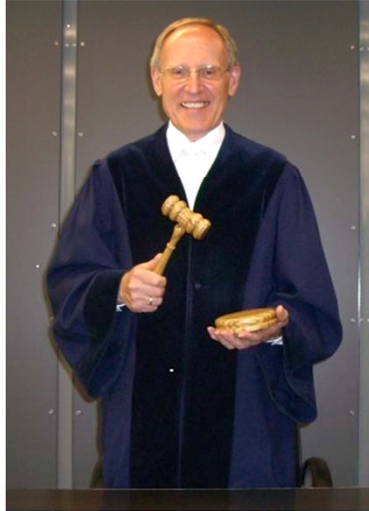
57. On the other hand, mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the Member State concerned (see to this effect, in particular, Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paragraphs 28 to 33, *WWF and Others*, cited above, paragraphs 69 and 71, Case C-194/94 *CIA Security International* [1996] ECR I-2201, paragraphs 40 to 55, Case C-201/94 *Smith & Nephew and Primecrown* [1996] ECR I-5819, paragraphs 33 to 39, and Case C-443/98 *Unilever* [2000] ECR I-7535, paragraphs 45 to 52). “

d) State liability

Ground rules

- EU law infringed must be intended to confer rights
- The breach of that rule must be **sufficiently serious**
- Causal link between that breach and the loss or damage sustained by the individuals
- See Case C-420/11, Leth, 14 March 2013

The session is closed!



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15

Heermann

Role of the EIA and the Nature directives
in judicial review proceedings at national
level:
procedural aspects



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1

A) Foreword

Respect for the judicial traditions of the Member States(MS)

- No general harmonisation of procedural law of the MS
- **Procedural autonomy** of the MS, but:
The detailed procedural rules governing actions for safeguarding an individual's rights under Community law
 - *must be no less favourable than those governing similar domestic actions (**principle of equivalence**) and*
 - *must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (**principle of effectiveness**).*



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2

B) The influence of International Law

1. General rules of primary EU law

- a) See European Court of Justice (ECJ) case 222/84, 15 May 1986

*“18: The requirement of judicial control ...reflects a **general principle of law** which underlies the constitutional traditions common to the Member States. That principle is also laid down in articles 6 and 13 of the European Convention for the protection of human rights and fundamental freedoms of 4 November 1950...”*

- b) Treaty on European Union (TEU) Article 19 (1) ...

“Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”



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2014

3

c) Charter of Fundamental Rights of the EU

Article 47 Right to an effective remedy and to a fair trial

*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an **effective** remedy before a tribunal in compliance with the conditions laid down in this Article...*

But see:

Article 51 Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and **to the Member States only when they are implementing Union law...**



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2014

4

Article 6 TEU

“1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
...”

2. The Aarhus Convention

a) History

- Signed 1998, in force 2001
- Under the aegis of UN Economic Commission for Europe (UNECE)

b) Parties:

- all EU MS and other states
- EU

c) Content (3 pillars)

- Access to information
- Participation in decision making
- Access to justice in environmental matters



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5

The Aarhus Convention

d) Implementation into EU law

- Approval on behalf of the Community by Council Decision of 17 February 2005

- Article 216(2) TFEU

„Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.”

(MS are bound in the fields covered by Union law)

- Regulation (EC) No 1367/2006 (applies solely to the EU institutions)
- Third pillar (Article 9, access to justice): **Directive 2003/35/EC** amending i.a. (EIA) Directive 85/337; see now: Article 11 (EIA) Directive 2011/92/EU

But: No implementation of Article 9 (3) Aarhus Convention



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2014

6

The Commission's proposal COM (2003) 624

http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0624en01.pdf

for a Directive implementing Article 9 (3) of the Aarhus Convention was not adopted until now.

C) Preconditions of efficient legal protection

1. Legal standing (particularly of NGOs)

Strengthened by CJEU jurisprudence

- Case C -263/08, **Djurgården**, 15 October 2009
 - Article 10 a Directive 85/33/EC (now: Article 11 Directive 2011/92/EU)
 - Provision of national law which reserves the right to bring an appeal solely to environmental protection associations which have at least 2 000 members
 - Not in compliance with EU law
- Case C -115/09, **Trianel**, 12 May 2011



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2014

7

Aftermath of the Trianel judgment of the CJEU:

- The Higher Administrative Court of Nordrhein-Westfalen annulled the permit by its Judgment of 1 December 2011.

The full text (in German) is available under:

http://www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2011/8_D_58_08_AK_Urteil_2011201.html

- The Federal Administrative Court did not admit appeal on point of law against this verdict , Order of 5 September 2012

The full text (in German) is available under:

<http://www.bverwg.de/entscheidungen/entscheidung.php?ent=050912B7B24.12.0>

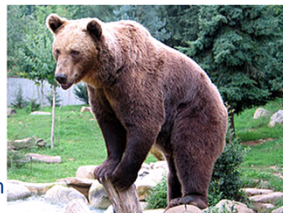
- The administrative procedure was reopened. A new EIA and a new AAoI was carried out. Again a permit was granted and the immediate execution of this decision was ordered by the administrative authority.
- The coal power plant is operating since 1 December 2013.
- The new permit was appealed by several plaintiffs. Subject to a judicial order in a interim relief procedure these actions do not have suspensive effect.

Legal standing

- NGO
- Article 10 a Directive 85/337/EC (now: Article 11 Directive 2011/92/EU)
- *“Impairment of a right”*
- Provision of national law, which limits the scope of judicial review following the German “protective norm doctrine”
- Not in compliance with EU Law

➤ Case 240/09, Slovak brown bear, 8 March 2011

- Species protected by EU law



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2014

8

Legal standing

- Hunting associations and other persons require derogations
- NGO wants to be a party to the administrative proceedings
- Request rejected, legal standing of NGO denied
- NGO appealed against

Answers of the CJEU:

- The Court has jurisdiction to interpret Article 9 (3) Aarhus Convention in this case
but
- No direct effect of Article 9(3) Aarhus Convention
but ...



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9

Legal standing

*“It is, however, 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 that convention and the objective of effective judicial protection of the rights conferred by European Union law, in order to enable an environmental protection organisation, ..., to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law.”*



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2014

10

2. Not prohibitively expensive

- Case C - 427/07, 16 July 2009 Commission v Ireland
 - The mere discretionary practice of national courts to apply or not the „loser pays” principle is not compliant with the EIA directive
- Case C-260/11, Edwards, 11 April 2013
 - Order to to pay the costs of the opposing parties
- Case C-530/11, Commission v UK, 13 February 2014
 - Conditions for a protective cost order
 - Conditions for the requirement of cross - undertakings in interim relief procedures
 - CJEU: uncertainty and imprecision of UK law

3. Legal remedies against failure to act

➤ C-201/02, Wells, 7 January 2004

70. "...the competent authorities are obliged to take, within the sphere of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project as provided for in Article 2(1) of Directive 85/337.

...

In that regard, it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered."



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2014

12

4. Consequences of defects in the administrative procedure

Case C-72/12, Altrip, 7 November 2013

- German law (Environmental Appeals Act) does not provide the challenge of an EIA, which is vitiated by defects-even serious defects-

CJEU: Such exclusion would run counter to the objective of ensuring **wide access** to courts of law

- Consequences of the procedural defect

CJEU: The burden of proof (that the decision would not have been different without the procedural irregularity) must not fall on the applicant



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2014

13

5. No judicial self restraint

- Aarhus Compliance Committee (see Article 15 Aarhus Convention)
Communication ACC/C/2008/33 concerning the “Wednesbury test” in UK, findings from 24 September 2010, para 125
- However, look at:
New version of the German Environmental Appeals Act (reaction to the Trianel judgment):
Judicial restraint if a margin of interpretation is recognized by environmental provisions



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2014

14

ACCC/C/2008/33 CONCERNING COMPLIANCE BY THE UNITED KINGDOM

http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/C33_Findings.pdf

“89. In respect of substantive legality, the so-called *Wednesbury* test and subsequent developments regarding that test are relevant. The *Wednesbury* test entails that the courts examine whether public authorities “have taken into account matters which they ought not to have taken into account or conversely have refused [...] or neglected to take into account matters which they ought to have taken into account” while thereafter “it may still be possible to say that [...] they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case I think the court can interfere.”

125. The Committee finds that the Party concerned allows for members of the public to challenge certain aspects of the substantive legality of decisions, acts or omissions subject to article 9, paragraph 2 and 3, of the Convention, including, inter alia, for material error of fact, error of law, regard to irrelevant considerations and failure to have regard to relevant considerations, jurisdictional error and on the grounds of *Wednesbury* unreasonableness (see paragraphs 87-89 above). The Committee, however, is not convinced that the Party concerned, despite the above mentioned challengeable aspects, meets the standards for review required by the Convention as regards substantive legality. In this context, the Committee notes for example the criticisms by the House of Lords,¹⁰⁰ and the European Court of Human Rights,¹⁰¹ of the very high threshold for review imposed by the *Wednesbury* test.”

Umwelt-Rechtsbehelfsgesetz (Environmental Appeals Act)

<http://www.buzer.de/s1.htm?g=UmwRG&f=1>

§ 4 a

- (2) Soweit der Verwaltungsbehörde bei der Anwendung umweltrechtlicher Vorschriften eine Beurteilungsermächtigung eingeräumt ist, ist eine behördliche Entscheidung im gerichtlichen Verfahren nur daraufhin zu überprüfen, ob
1. der Sachverhalt vollständig und zutreffend erfasst wurde,
 2. die Verfahrensregeln und die rechtlichen Bewertungsgrundsätze eingehalten wurden,
 3. das anzuwendende Recht erkannt wurde,
 4. sachfremde Erwägungen vorliegen.

6. Interim relief

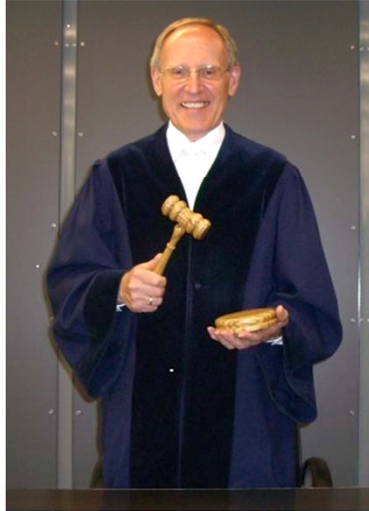
- Not mentioned in Article 11 EIA Directive
but
see Article 9 (4) Aarhus Convention:
„including injunctive relief as appropriate“
- Case C-416/10, Križan, 13 January 2013
„109. ...the guarantee of effectiveness of the right to bring an action ...requires that the members of the public concerned should have the right to ask the court or competent independent and impartial body to order interim measures such as to prevent that pollution, including, where necessary, by the temporary suspension of the disputed permit”



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2014

15

The session is closed!



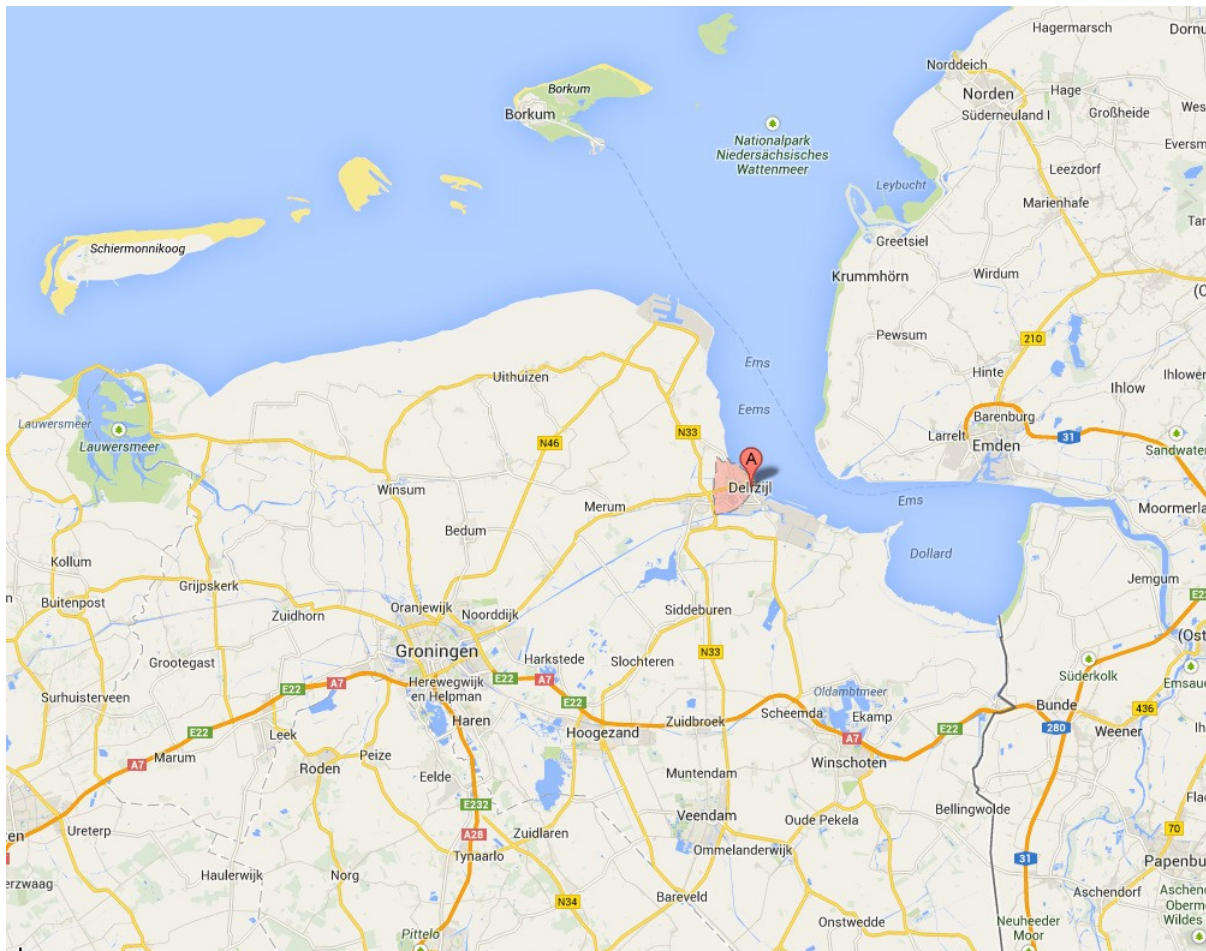
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2014



Case Study ERA workshop Interaction between EIA and Nature Directives

Drafted by Jan H. Jans

In the beautiful city of Delfzijl, in the province Groningen in the north of the Netherlands, the energy company EON applied to the regional authorities for a permit for the extension of an existing so called 'multi-fuel' power plant. Multi-fuel power plants are based on engines that are able to run on coal, natural gas, light fuel oil, heavy fuel oil or a number of other liquid fuels, offering the ultimate in fuel flexibility.



The location of the plant itself borders to the Waddenzee. The Waddenzee stretches from the Netherlands to Denmark, forming a shallow body of water with tidal flats and wetlands. As we all know the Waddenzee is a Natura 2000 site protected under the Habitats Directive. Both the Habitats and EIA Directive have been implemented in the Dutch nature conservation and environmental legislation. No infringement proceedings are pending at the moment. The regional authorities have carried out an environmental impact assessment and decided that although the EIA showed negative consequences for the habitat of in particular the avocet decided to approve the permit application. However, in order to comply with the Habitats Directive, and to mitigate the environmental consequences they attached the condition that under no circumstances "coal" may be used in the plant.



The permit was subsequently challenged before the Dutch administrative court, the Council of State by: a Dutch NGO called “Groningen Society for the Protection of Avocets” and the neighbouring German city of Borkum. The Dutch NGO argued that, in view of the consequences for the Avocet, the permit was granted in violation of both the Habitats and EIA Directive. In particular, they argue that the negative environmental consequences outweigh the economic benefits for EON. The regional authorities, however, argue that the way they have balanced the various interests at stake cannot be challenged in judicial review.

The NGO also announced to start proceedings against the Dutch state to sue for damages as a result of the permit.

The city of Borkum argued that the Dutch regional authorities failed to consider the environmental consequences of the power plant outside Dutch territory in general and for Borkum in particular. They also argued that the decision-making procedure was faulty, as the draft-permit was notified and made public in the Netherlands only. The regional authorities argue that the directives do not require cross-border consultation and participation. But even if that is the case, such a consultation would not have changed the final outcome of their decision and therefore this argument cannot result in the annulment of the permit by the court.

The permit was also challenged by EON; they considered that the prohibition for the use of coal is in violation of Dutch environmental law. EON argues that the authorities can only apply Dutch law and cannot rely on the directives in order to impose obligations on them. Please note that Dutch law does not contain a legal basis for a prohibition to use coal in power plants.

The case is heard before the Dutch Council of State, the highest court dealing with permits like these. The judge-rapporteur has identified the following issues:

1. To what extent are the Habitats and EIA Directive applicable to the facts of the case and which provisions are relevant in particular?
2. Both Directives have been transposed into Dutch legislation; does this prohibit the applicants to rely on their provisions?
3. Are the regional authorities in compliance with the Directives to approve the permit application, although the EIA showed negative consequences for the habitat of the avocet?
4. Are regional authorities allowed to prohibit the use of coal in order to mitigate the consequences?
5. Does the German city of Borkum have standing before the Dutch Council of State?
6. Does the fact that the draft-permit was notified and made public in the Netherlands only lead to the annulment of the permit?
7. Does the fact that the Dutch regional authorities failed to consider the environmental consequences of the power plant outside Dutch territory make the permit problematic?
8. What are the chances for the NGO for a successful claim for damages from the Dutch state?
9. What is the role of the Council of State in assessing the substantive arguments of the NGO (inappropriate balancing of interests)?
10. Is the Council of State required to refer the case to Luxembourg for a preliminary ruling?

Case Study on interaction between the EIA and the Habitats Directive

Comments to the solution



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1

1. Question

a) EIA

- Annex I 2. (a) and 24. to the Directive (if 300 or more MW)
- or
- Annex II 3. (a)

b) FFH

See: EU Commission's guidance

"MANAGING NATURA 2000 SITES

**The provisions of Article 6 of the 'Habitats' Directive
92/43/EEC"**



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2014

2

http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf

Page 31

“As regards geographical scope, the provisions of Article 6(3) are not restricted to plans and projects which exclusively occur in or cover a protected site; they also target developments situated outside the site but likely to have a significant effect on it.”

2. Question

Principally national law applies, but

- Interpretation consistent with the Directive
- In case of conflict: Eventually direct effect of the Directive



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2014

3

3. Question

- a) “Adversely effect” , yes
- b) Absence of alternative solutions, yes (extension!)
- c) “Imperative reasons of overriding **public interest**” ?

EU Commission’s guidance, page 43:

*„Thus, projects that lie **entirely** in the interest of companies or individuals would not be considered to be covered.”*

Security of energy supply = public interest

4. Question

A condition to the permit is better than refusal.



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2014

4

5. Question

Procedural autonomy of the Member States (MS)

6. Question

Procedural autonomy of the MS. Such a consequence seems not to be requested by EU law.

7. Question

- Transboundary effect: See Article 7 EIA Directive
- Insufficient EIA:
 - Case C-72/12, Altrip, 7 November 2013
 - Challenge of a irregularly carried out EIA cannot be excluded



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2014

5

- Condition of causality permissible
- But: Burden of proof (of a casual link) must not fall on the applicant

8. Question

The NGO has no damage

9. Question

- Judicial restraint?
- Procedural autonomy of the MS?
- Problematic!

10. Question

The answer depends on the solution according to the national law



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2014

6