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The Interaction between the EIA Directive and Article 6(3) and (4) of the Habitats Directive

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Abbreviations

AA	Appropriate Assessment
CFR	Charter of Fundamental Rights and Freedoms of the European Union
EC	European Community
ECJ	European Court of Justice
EEC	European Economic Community
EIA	Environmental Impact Assessment
EU	European Union
IROPI	Imperative Reasons of Overriding Public Interest
SAC	Special Area of Conservation
SCI	Site of Community Importance
SEA	Strategic Environmental Assessment
SPA	Special Protected Area
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of European Union

I. Introduction

In order to survive and reproduce, all species develop the necessary characteristics that will allow them to better adapt to changes in their environment. Admittedly, this adaptation is far from easy; in addition to their struggle to adapt to the conditions of the abiotic environment (e.g., weather, geomorphology of the area, etc.), at the same time, species struggle to fulfill their role in the chain of their ecosystem. For example, predators must remain able to obtain their food efficiently, while prey must retain the ability to escape from their hunters. As a result, adaptations on one side (e.g., sharper teeth) trigger counter adaptations on the other side (e.g., longer legs); the latter, in turn, trigger more adaptations and so on. This paradoxical phenomenon, where the improvement of a species essentially enables the improvement of its natural antagonist, is often described by biologists as an "evolutionary arms race"[1]. While this Darwinian process is unquestionably harsh and unforgiving, it ultimately contributes to the diversity and complexity of the natural world.

The approach in the present dissertation is deeply influenced by the contradiction described here above. It is the author's opinion that, if the mechanism of the "evolutionary arms race" were used as a basis for an analogy in the EU legal context, it could successfully describe the workings of the principle of sustainable development, which reflects the interactions between two very important aspects of EU policy, i.e., environmental protection and economic development[2]. While the two concepts are usually regarded as conflicting with each other, in reality they both serve the same goal, i.e., to ensure the best possible living conditions for the residents of the EU Member States. In that sense, respect for the environment as a collective good and the preservation of its quality are facilitated by economic development. Vice versa, economic development is achieved through the use of natural resources and cannot be sustainably pursued without the necessary legislative and administrative measures for the protection of those resources.

In this context, the present dissertation will summarize, at first, the historical evolution of the institutionalization of environmental protection as an EU policy (**I.A.**); it will then focus on the basic structure of Directives 2011/92/EU[3] and 92/43/EEC[4], as amended, which form the spine of environmental protection within the EU legal order and provide a brief overview of their provisions (**I.B.**); following that, an extensive analysis of the methodological tools provided for by the aforementioned Directives - the EIA and the AA report respectively - will be offered. That analysis will attempt to showcase their usefulness not only as means of ensuring the protection of

[1] For a comprehensive analysis of the concept of "evolutionary arms race" in the context of the evolution of species by natural selection, see, R. Dawkins, *The Blind Watchmaker: Why the Evidence of Evolution Reveals a Universe without Design*, 4th edition, New York – London, W. W. Norton and Company, 2015, Chapter 7: Constructive Evolution, pp. 239-276.

[2] For an early definition of the principle of sustainable development, see, G.H. Brundtland, *Our Common Future: Report of the World Commission on Environment and Development*, Geneva, 1987, UN-Document A/42/427, http://www.un-documents.net/ocf-ov.htm (last accessed on 18.10.2021).

[3] 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 [2012] OJ L 26; also called the EIA Directive.

[4] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206; also called the Habitats Directive.

the environment (**II.A.**) but also as facilitating agents of sustainable economic development (**II.B.**) before drawing the final conclusions (**III**).

I.A. The establishment and evolution of environmental protection as an EU Policy

i. From the Treaty of Rome to the Treaty of Amsterdam

(a) The Treaty of Rome: Creating "something out of nothing"

Environmental protection was not initially included in the policies or goals of the European Union; the original version of the Treaty of Rome focused primarily on the function of the internal market. However, a broad interpretation of certain phrases of the Treaty's preamble (: "constant improvement of the living […] conditions of their peoples" and "harmonious development" of the contracting parties' economies[5]) served as a first basis for further discussions[6].

Given the lack of any express Treaty provision, only the indirect adoption of measures for the protection of the environment was possible; such measures used articles 100[7] and 235[8] of the EEC Treaty, as in force at the relevant time, as a legal basis even though said articles made no reference at all to environmental protection and concerned the function of the internal market[9]. Interestingly enough, the initial version of the EIA Directive[10] – which is the first of the two EU law instruments analyzed in the present dissertation – as well as the initial version of the Birds Directive[11] – which is very closely linked to the Habitats Directive, i.e., the second of the two EU law instruments at the core of this dissertation – were adopted on the basis of article 235 of the EEC Treaty.

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[5] Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957, available at: https://www.refworld.org/docid/3ae6b39c0.html [last accessed on 27.10.2021].

[6] A. D. Papapetropoulos, *The Environmental Impact Assessment in the European and the Greek legal order (in Greek)*, Athens – Komotini, Ant. N. Sakkoulas Publishers, 2003, p. 27.

[7] Article 100 of the EEC Treaty provided for the adoption of directives for the approximation of laws pertaining to establishing and proper functioning of the internal market.

[8] Article 235 of the EEC Treaty provided that: "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures".

[9] A. D. Papapetropoulos, op. cit., p. 27.

[10] Directive 85/337/EEC "on the assessment of the effects of certain public and private projects on the environment" [1985], OJ L 175.

[11] Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [1979], OJ L 103.

When called upon to interpret the abovementioned provisions, the ECJ concluded that, in principle, article 100 of the EEC Treaty could serve as a legal basis for the adoption of environmental protection measures since,

> provisions which are made necessary by considerations relating to the environment and health may be a burden upon the undertakings to which they apply and if there is no harmonization of national provisions on the matter, competition may be appreciably distorted[12].

Later, in the context of another case concerning the safe collection and disposal of waste oils, the Court went even further. After reiterating that the principle of freedom of trade is not absolute but may be limited "by the objectives of general interest pursued by the Community", it went on to declare that environmental protection constitutes "one of the Community's essential objectives"[13].

(b) The Single European Act: The first breakthrough

Despite ECJ's approach, the fact remained that articles 100 and 235 of the EEC Treaty were far from ideal in order to serve as a solid basis for the adoption of environmental protection measures, *inter alia*, since they remained closely connected to the functioning of the common market. Hence, the first breakthrough in this matter was made in the Single European Act which sought to revise the EEC Treaty in order to push forward European integration and complete the internal market[14]. Through the amendments it introduced, namely the addition of articles 130r, 130s and 130t, environmental protection was afforded an autonomous and firm legal basis; these provisions defined the Union's objectives in relation to the environment[15] and introduced the principle of prevention, the rectification at source principle, the "polluter pays" principle[16], the integration principle[17] and the principle of subsidiarity[18].

(c) The Treaty of Maastricht: Elaboration of EC's environmental dimension

The creation of new Union competencies and the reformation of its existing institutions by the Single European Act paved the way to the political integration and the economic and monetary

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[12] Commission of the European Communities v Italian Republic, C-91/79, EU:C:1980:85, paragraph 8.

[13] Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU), C-240/83, EU:C:1985:59, paragraph 13.

[14] Single European Act, 17 February 1986, 1987 O.J. (L 169) 1, 25 I.L.M. 506, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A11986U%2FTXT [last accessed on 27.10.2021].

[15] That is, *inter alia*, "to preserve, protect and improve the quality of the environment" [article 130r(1)(a)].

[16] Article 130r(2).

[17] "Environmental protection requirements shall be component of the Community's other policies" [article 130r(2)].

[18] "The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph can be attained better at Community level than at the level of the individual Member States" [article 130r(4)].

union provided for in the subsequent Maastricht Treaty (TEU)[19]. As far as environmental protection is concerned, the differences in the TEU in relation to the Single European Act may not have been radical but they were not insignificant; in essence, the European legislature attempted to elaborate and improve on the scope of environmental protection by adding that the Union's policy on environment "shall aim at a high level of protection" and by expressly recognizing the precautionary principle[20]. Furthermore, the Maastricht Treaty declared that "environmental protection requirements must be integrated into the definition and implementation of other Community policies"[21].

(d) The Treaty of Amsterdam: Further elevation of environmental protection

Finally, while it may not be so evident at first sight, a careful reading of the Treaty of Amsterdam[22], reveals that the amended TEU elevates even further the role of environmental protection within the EU legal context; according to the preamble of the amended TEU, in the achievement of its objectives, the Union takes into account "the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields". Moreover, article 2 of the TEU, as amended by the Treaty of Amsterdam, declared that, among its other objectives, the Union aims to "promote economic and social progress" and "to achieve balanced and sustainable development"[23]. This is significant because it is, in essence, a tacit recognition of the importance of environmental protection at the same level as the other objectives of the EU[24].

ii. Environmental protection under the Treaty of Lisbon – the "status quo"

Under the current regime, i.e., after the entry into force of the Treaty of Lisbon[25], EU policy on the environment – which is a field where the EU has shared competence[26] – is established in

[19] Treaty on European Union, Treaty of Maastricht, 7 February 1992, OJ C 191, 29.7.1992, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A11992M%2FTXT [last accessed 27.10.2021].

[20] Article 130r(2), as amended by the Treaty of Maastricht.

[21] In contrast with the previous phrasing, according to which environmental requirements were "component" to the other policies of the EU, the new provision made reference to the "definition" and the "implementation" of other policies in order to further specify the integration principle and imbue it with normativity. See, in this respect, A. D. Papapetropoulos, op. cit., p.33.

[22] Treaty on European Union (Consolidated Version), Treaty of Amsterdam, 2 October 1997, available at: https://www.refworld.org/docid/3dec906d4.html [last accessed 27.10.2021].

[23] Article 2 TEU, as amended after the Amsterdam Treaty.

[24] A. D. Papapetropoulos, op. cit., p. 35.

[25] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01, available at: https://www.refworld.org/docid/476258d32.html [accessed 27 October 2021].

articles 191-193 TFEU. All fundamental rules concerning that policy, its objectives, its guiding principles and the criteria taken into account during its implementation are provided for in article 191 TFEU. The provisions of that article must not be considered alone but within their systemic position: as the core of a wider complex of provisions comprising of the ninth recital of the preamble to the TEU[27], article 3(3) of the TEU[28], article 11 of the TFEU[29], as well as article 37 of the CFR[30]; the combination of these provisions form the specific and, in some cases, somewhat overlapping aspects of the broader scope of environmental protection, to which all the EU policies and actions are aligned with in view of the principle of integration[31]. It has to be noted that the rules contained within the provisions of article 191 TFEU, while unquestionably binding for the EU legislator[32], are worded with a degree of vagueness, which generates a margin of appreciation for the legislature and allows only for marginal scrutiny by the ECJ[33].

If one reads the provisions of article 191 TFEU carefully and takes into account the relevant jurisprudence of the ECJ case-law, one may easily conclude that environmental protection does not enjoy a privileged position in relation to the other objectives of the EU and, more so, that of economic development. While EU policies ought to ensure a "high level of protection"[34], such a level of protection, "does not necessarily have to be the highest that is technically possible"[35]. What is more, that protection has to take into account "the diversity of situations in the various regions of the Union"[36] and assess, *inter alia*, "the potential benefits and costs of action or lack

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[26] Article 4(2)(e) TFEU.

[27] Its text has remained unchanged since the Treaty of Amsterdam.

[28] According to its provision: "The Union shall establish an internal market. It shall work for the *sustainable development* of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and *a high level of protection and improvement of the quality of the environment*. It shall promote scientific and technological advance" (italics added by the author).

[29] Its provision stresses the integration principle: "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development".

[30] According to article 6 TEU, as currently in force, the CFR has "the same legal value as the Treaties". Article 37 of the CFR reads: "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development".

[31] K. Gogos in *V. Skouris, The Treaty of Lisbon, Article Interpretation*, Athens – Thessaloniki, Sakkoula Publishers, 2020, p. 1509.

[32]Safety Hi-Tech Srl v S & T. Srl, C-284/95, EU:C:1998:352, paragraph 36.

[33] Gianni Bettati v Safety Hi-Tech SrL, C-341/95, EU:C: 1998:353, paragraphs 34-35: "[…] in view of the need to strike a balance between certain of the objectives and principles mentioned in Article 130r and of the complexity of the implementation of those criteria, review by the Court must necessarily be limited to the question whether the Council […] committed a manifest error of appraisal regarding the conditions for the application of Article 130r of the Treaty".

[34] Article 191(2) TFEU.

[35] *Supra* note 32, paragraph 49.

[36] Article 191(2) TFEU.

of action" as well as "the economic and social development of the Union as a whole and the balanced development of its regions"[37]. In other words, the perspective of economic and social growth of the less developed Member States cannot be undermined by the adoption of disproportionately strict environmental protection measures[38]. Therefore, it becomes evident that the provisions at issue attempt to balance, on one hand, preservation of the environment and, on the other hand, economic development, ultimately achieving the goal of sustainability.

I.B. The mechanisms of Directives 2011/92/EU and 92/43/EEC – A General Overview

The considerations elaborated here above are very relevant for the topic of the present dissertation since they inform the European legislature's choices in structuring and adopting Directives 2011/92/EU (EIA Directive) and 92/43/EEC (Habitats Directive). However, before an extensive and comparative analysis of their individual provisions is attempted, it would be useful to provide a very brief overview of their mechanics.

i. Directive 2011/92/EU – The EIA Report

Directive 2011/92/EU codified the secondary EU legislation relating to the assessment of the impact that certain categories of projects may have on the environment[39]. In its current form, after setting out its purpose and basic definitions (article 1), the EIA Directive requires Member States to ensure that projects which have or may have significant effects on the environment are subject to the EIA process described in its provisions (article 2), at the core of which lies the EIA report. Article 3 of the Directive deals with the content of the EIA report, while Article 4 (and Annexes I, II and III, to which it refers) defines the projects that have or may have a significant impact on the environment and should, therefore, be subject to EIA.

Following that, the procedural aspect of the process is laid out in articles 5-10 (submission of an EIA report by the developer, public – and potentially transboundary – consultation, content of the

[37] Article 191(4) TFEU.

[38] K. Gogos, op. cit., p. 1515.

[39] As already mentioned, the original Directive on this matter was Directive 85/337/EEC "on the assessment of the effects of certain public and private projects on the environment" [1985] OJ L 175. It was systematically amended throughout the years. Firstly, by Council Directive 97/11/EC of 3 March 1997 "amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment" [1997], OJ L 73. Secondly, by 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 Council Directives 85/337/EEC and 96/61/EC" [2003], OJ L 156. Thirdly, by Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 "on the geological storage of carbon dioxide" [2009], OJ L 140. It is noted that the current version of the EIA Directive was amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU "on the assessment of the effects of certain public and private projects on the environment" [2014] OJ L 124.

requested permit, publicity requirements, etc.). Article 10a concerns the determination of penalties for infringement of the relevant law, while article 11 sets out the conditions for the effective exercise by the public of its right to judicial protection in relation to projects under the ambit of the Directive. The remaining articles provide for the exchange of information between Member States on the implementation of the Directive (article 12) and the relevant notifications to the EC (article 13). Finally, the Directive also contains Annexes I (projects for which an EIA is always required), II (projects for which an EIA may be required), III (criteria applied to determine the necessity of an EIA) and IV (information to be included in the EIA report).

ii. Directive 92/43/EEC – The AA Report

Directive 92/43/EEC, as in force[40], along with the Birds Directive[41], is considered the cornerstone of the European Union's biodiversity policy as it creates the necessary scheme for all Member States to collaborate under a shared legislative framework in order to protect Europe's most endangered and valuable habitats and species over their entire natural range inside the EU. This is to be achieved through the maintenance and restoration of certain species and types of habitats (listed in the Directive's Annexes) at a level that secures their long-term survival (article 2).

Articles 3, 4 and 5 of the Habitats Directive establish a coherent European ecological network (Natura 2000 sites) of special areas of conservation (SACs). Articles 6(1) and 6(2) require the adoption of conservation measures for these areas in order to avoid a deterioration of their status, while article 6(3) outlines the permit procedure (AA report) for plans and projects not connected to the management of the protected sites. Article 6(4) lays down the procedural safeguards for the exceptional approval of such plans or projects, in case they do adversely affect the integrity of the areas. It has to be noted that this permit procedure also applies to the special protected areas (SPAs) for birds provided for in article 4 of the Birds Directive (article 7).

The remaining articles of the Habitats Directive concern the requirements of establishing strict protection systems for specific species of fauna and flora (articles 12 and 13 respectively), the safeguards that need to be observed in the taking of certain wild specimens of fauna and flora (article 14), the prohibition on the use of means of killing or capturing wild species and its

[40] The initial text of the Habitats Directive was amended several times. Firstly, by Council Directive 97/62/EC of 27 October 1997 "adapting to technical and scientific progress Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora" [1997], OJ L 305. Secondly, by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 "adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty" [2003] OJ L 284. Thirdly, by Council Directive 2006/105/EC of 20 November 2006 "adapting Directives 73/239/EEC, 74/557/EEC and 2002/83/EC in the field of environment, by reason of the accession of Bulgaria and Romania" [2006], OJ L 363. And, finally, by Council Directive 2013/17/EU of 13 May 2013 "adapting certain directives in the field of environment, by reason of the accession of the Republic of Croatia" [2013], OJ L 158.

[41] Initially adopted in 1979, the Birds Directive is the oldest piece of EU legislation on the environment. It was codified by Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2010], OJ L 20.

exceptions (articles 15 and 16) and the reporting obligations of the Member States (articles 16 and 17)[42].

As illustrated by this brief summary of their provisions, both systems introduce similar methodological tools, i.e. the EIA and AA processes, which allow the assessment of the impact of plans or projects on the environment. While at times these tools overlap, their characteristics are far from identical. In other words, use of the EIA process does not absolve developers or the competent authorities from their obligation to resort also to the AA process, should that be required under the circumstances. As held by the ECJ, "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"[43]. That being said, during their implementation, both tools very often interact with each other; this interaction reveals the existence of significant points of convergence as well as divergence between them. These points will be thoroughly analyzed in the following part (**II**) in light of the central consideration of the present dissertation, i.e. the seemingly constant "tug of war" between environmental protection and economic development.

II. MAIN SUBJECT

II.A. EIA & AA as standards of environmental protection

As already mentioned, the EIA Directive was adopted as early as 1985, even before the Singe European Act. According to its preamble, its adoption was regarded necessary in order to safeguard human health and contribute to better quality of life[44]; in view of that goal, the EU legislator considered that a project's environmental effects must be evaluated appropriately and take into account concerns about preserving species diversity as well as the stability of the ecosystem[45]. A few years later, the adoption of the Habitats Directive completed and enhanced species and habitat protection in the EU recognizing that the preservation of the fauna and flora of Europe was an integral part of EU's natural heritage that required supranational coordination[46]. In this part of the present dissertation an analysis will be provided on the elements of the EIA and the Habitats Directives that serve the goal of environmental protection; at the same time, this analysis will attempt to showcase the similarities and differences in the approach of both instruments.

[42] The system established in the Birds Directive is very similar (see, mainly, the provisions of articles 1, 4-7, 9 and 12 of the Birds Directive).

[43] Commission of the European Communities v Ireland, C-418/04, EU:C:2007:780, paragraph 232.

[44] See the third recital of the preamble to Directive 85/337/EEC.

[45] Eleventh recital of the preamble to the EIA Directive.

[46] See the first and fourth recitals of the preamble to Directive 92/43/EEC.

i. The EIA and AA reports' content and broad scope of application

(a) Scope of application

i. The broad meaning of the term "project"

The preconditions for the activation of the EIA and the AA procedures are not the same; on the one hand, the EIA process is required only for projects listed in the Directive's Annexes[47]. On the other hand, the AA process may apply to any kind of plan or project, including projects subject to EIA[48]. In view of that, as previously stated, any environmental impact assessment implemented in accordance with the EIA Directive cannot substitute the AA process[49]. Regardless of its importance, this clarification cannot provide full insight as to which projects call for the application of the EIA or the AA process. In order for that to be determined, the term "project" must be properly defined.

In that regard, the Habitats Directive does not offer any definition of the terms "plan" or "project". By contrast, the EIA Directive defines projects as "the execution of construction works or of other installations or schemes" or any "other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources", which are "likely to have significant effects on the environment"[50]. As consistently held by the ECJ, this admittedly very broad definition contained in the EIA Directive, is of valuable relevance in defining the term "plan" or "project" of the Habitats Directive[51].

It follows that, where an activity falls within the ambit of the EIA Directive, it may easily constitute a plan or project within the meaning of the Habitats Directive as well; however, the opposite is not self-evident. As also held by the Court in a case concerning the classification of the grazing of cattle and the use of fertilizers as projects in the sense of article 6 of the Habitats Directive, the crucial factor to be assessed is whether the impugned activities may "have a significant effect on a protected site"[52]. In that respect, regional or geographically extensive spatial plans that serve as the basis for other projects within the meaning of the EIA Directive or sectoral plans, such as transport network plans, waste management plans and water management

[47] Articles 1, 2, 4 in conjunction with Annex I and II of the EIA Directive.

[48] Article 6(3) of the Habitats Directive refers to "any plan or project".

[49] *Supra* note 43.

[50] Articles 1(1) and (2) of the EIA Directive.

[51] See, indicatively, Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij, C-127/02, EU:C:2004:482, paragraph 26.

[52] Coöperatie Mobilisation for the Environment UA and Vereniging Leefmilieu κατά College van gedeputeerde staten van Limburg v College van gedeputeerde staten van Gelderland, C-293/17 & 294/17, EU:C:2018:882, paragraph 66. See, also Friends of the Irish Environment, C-254/19, EU:C:2020, paragraph 29; and Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen, C-411/17, EU:C:2019:622, paragraph 123.

plans should be considered to fall within the scope of application of the Habitats Directive if they may affect protected sites[53].

ii. High threshold of protection

As required by the TFEU itself[54], the threshold of environmental protection afforded by both instruments is high; that being said, it is not identical.

The EIA Directive requires an overall assessment to be made on the effects that listed projects may have on the environment, including any alterations made to it. In view of that approach, it is irrelevant if such effects are caused directly or indirectly. As the ECJ has held,

> in the same way as Directive 85/337, the amended directive adopts an overall assessment of the effects of projects or the alteration thereof on the environment. It would be simplistic and contrary to that approach to take account, when assessing the environmental impact of a project or of its modification, only of the direct effects of the works envisaged themselves, and not of the environmental impact liable to result from the use and exploitation of the end product of those works[55].

It is also irrelevant if those effects are confined within the borders of the Member State where the activity at issue takes place or if they are transboundary in nature[56]. As held in the *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen* case, the location of power stations close to the border makes it "indisputable" that the planned project was in a position to adversely affect the environment of the Netherlands as well[57].

What is more, the size of the planned project is not decisive in determining whether or not its effects on the environment may be significant; this is so, since even small-scale projects may be of severe detriment to the environment if they take place in an area where the crucial environmental factors[58], are very sensitive to even the slightest of changes[59]. In that respect, in a Belgian case concerning the insertion of a statutory annual threshold for the manufacture of

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[53] Commission Guidance booklet, *Managing Natura 2000 sites, The provisions of Article 6 of the "Habitats" Directive 92/43/EEC*, Office for Official Publications of the European Communities, 2000, p. 31. It is noted that this EC document makes the distinction between actual plans and policy statements showing a general political will or intention. In relation to the latter, the EC expresses the view that such policy documents cannot be regarded as plans or projects in the sense of article 6 of the Habitats Directive.

[54] See the relevant analysis made in part I of the present dissertation.

[55] Commission v Spain, C-560/08, EU:C:2011:835, paragraph 98 ; Abraham and Others, C-2/07, EU:C:2008:133 paragraphs 42-43; and Ecologistas en Acción-CODA, C-142/07, EU:C:2008:445, paragraph 39.

[56] Umweltanwalt von Kärnten, C-205/08, EU:C:2009:767, paragraph 51.

[57] Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen, C-411/17, EU:C:2019:622, paragraphs 76-81.

[58] Set out in article 3 of the EIA Directive (e.g. fauna and flora, soil, water, climate or cultural heritage).

[59] Commission v Belgium, C-435/09, EU:C:2011:176, paragraph 50; see, also, Commission v. Ireland, C-392/96, EU:C:1999:431, paragraph 66.

paper pulp, the ECJ has held that Member States do not enjoy any discretion in deciding to subject or not projects listed in Annex I of the EIA Directive to impact assessment[60].

Furthermore, it is of imperative importance to note that the assessment of a project's environmental impact cannot take place at a later time. On the contrary, in accordance with the principle of prevention, it must occur at the earliest possible stage so that the competent authorities may take it into account during their decision making process and prevent the unwanted effects from happening instead of simply counteract them later[61]. At any event, if the EIA process is not carried out properly and in due time, according to the jurisprudence of the ECJ, under the principle of cooperation in good faith (article 4 TEU) Member States are obliged "to nullify the unlawful consequences of that breach of EU law" by taking any necessary measure to remedy their failure, including the revocation or suspension of the granted permit[62].

While all the foregoing considerations prove that the EIA Directive operates affording a substantial level of environmental protection in the course of permitting projects, the scope of protection granted by the Habitats Directive is arguably even higher. Firstly, as already explained, the provisions of article 6(3) of the Habitats Directive apply to all plans or projects that may affect protected areas and not only listed projects, as is the case with the EIA Directive.

According to the ECJ, the restrictive interpretation of the terms "plan" or "project" goes against the objectives of the Habitats Directive. In view of that approach, in 2003 the European Commission brought infringement proceedings against Germany for using a strict definition of the term project and, specifically, for limiting the application of the Directive's provisions only to projects occurring within the demarcated SACs and excluding the use of soil for agriculture, forestry and fishing purposes. In that case, the Court noted at first that the Directive makes no distinction between activities taking place inside or outside of a protected area and stressed the fact that assessment under article 6(3) of the Directive cannot be circumvented with regard to certain categories of projects based on inadequate criteria that fail to ensure that such projects will not adversely affect protected areas. It then went on to rule that, the particular national system did not fulfill the Directive's aim as there were no "established scientific criteria which would a priori rule out emissions affecting a protected site situated outside the area of impact" that were taken into account[63].

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[60] *Ibid.*, paragraphs 86 and 88. See also Commission v Italy, C-255/05, EU:C:2007:406, paragraph 52 and Commission v Ireland, C-465/04 [2006] EU:C:2006:199, paragraph 45.

[61] Comune di Castelbellino, C-117/17, EU:C:2018:129, paragraph 25; see, also, IL and Others v Land Nordrhein-Westfalen, Case C-535/18, EU:C:2020:391, paragraph 78, Comune di Corridonia and Others, C-196/16 and C-197/16, EU:C:2017:589, paragraph 33; and Commission v Ireland, C-215/06, EU:C:2008:380, paragraph 58. Similar obligations are also outlined in the 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" [2001, OJ L 197 (SEA Directive).

[62] Inter-Environnement Wallonie and Terre wallonne, C-41/11, EU:C:2012:103, paragraphs 42, 43 and 46; Commission v Ireland, C-215/06, EU:C:2008:380, paragraph 59; and Wells, C-201/02, EU:C:2004:12, paragraphs 64 and 65.

[63] Commission v Germany, C-98/03, EU:C:2006:3, paragraphs 43 –52. In that respect see, also, Commission v Belgium, C-538/09, EU:C:2011:349; the Court found that Belgium failed to fulfill its obligations under article 6(3) of the Habitats Directive by *a priori* subjecting certain activities to a declaratory scheme.

It has to be noted that the ECJ did not apply a broad interpretation of the terms plan or project only in relation to geographical considerations. In 2010, on account of infringement proceedings instituted by the European Commission against Cyprus for failing to designate the site of "Paralimni" in its list of protected areas and allowing for the deterioration of its condition, the Court ruled that the protective ambit of the Habitats Directive applied also on sites that were not included in the national list of SCIs, even though they should have been included on account of their ecological characteristics[64].

What is more, regardless of the width given to the definition of the terms plan or project, reference has to be made also to the standard of proof required by article 6(3) of the Directive in order for the AA process to be triggered. In view of the precautionary principle, which forms the foundation of EU environmental law, the AA process must be applied "if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned"[65]. This holds true, according to the Court, even for activities relating to the preservation of a protected area's integrity. As held in a case, where specific categories of works and developments provided for under the French regime for the protection of Natura 2000 sites were systematically exempted from the AA process, it could not be ruled out that the works at issue may not have been directly connected to the management of the sites despite their inclusion in the Natura 2000 contracts[66].

At any event, it has to be clarified that the assessment carried out in relation to the effects of plans or projects on protected sites and their elements does not take place *in abstracto*, as is the case with the EIA process; indeed, the latter assesses significant effects on all environment and as such, these effects are theoretically very extensive[67]. However, the assessment during the AA process is carried out in the light of the requirement set out in the provisions of article 6(3) of the Habitats Directive, which demand any assessment to be done "in view of the site's conservation objectives". Therefore, only the effects on a site's conservation goals are regarded significant by the Directive[68].

The above considerations were confirmed by the ECJ in an Irish case concerning the construction of a road scheme planned to cross the territory of a protected area hosting priority

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[64] Commission v Cyprus, C-340/10, EU:C:2012:143, paragraphs 44- 47. For the application of the Directive's provision also to sites notified to the Commission and prior to the publication of the latter's decision, see Nomarchiaki Aftodioikisi Aitoloakarnanias and Others, C-43/10, EU:C:2012:560, paragraph 105. The same applies for maintenance works in projects authorized prior to the entry into force of the Directive. Such maintenance works may constitute separate projects within the meaning of the Directive and require AA under article 6(3); see, in that respect, Stadt Papenburg v Bundesrepublik Deutschland, C-226/08, EU:C:2010:10, paragraphs 35-51.

[65] See, by analogy, Case C-180/96 United Kingdom v Commission [1998] EU:C:1998:192, paragraphs 50, 105 and 107.

[66] Commission v France, C-241/08 EU:C:2010 :114, paragraphs 51-62.

[67] According to the general wording of article 1(1) of the EIA Directive: "This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment".

[68] *Supra* note 51, paragraph 46.

types of habitats. The implementation of the road scheme would undoubtedly lead to the permanent loss of a large area of limestone pavement (a priority habitat). The Irish authorities considered this adverse effect as severe but localized so they determined it could not damage the integrity of the protected area. That decision was challenged in national courts and, finally, the Irish Supreme Court stayed the proceedings before it and referred a preliminary ruling to the ECJ. The Court, noted that the proposed project would cause "permanent and irreparable loss" of a priority type of natural habitat[69]; it then stressed that the Directive's provisions constitute a coherent whole that forbid the authorization of such a plan or project unless national authorities have ascertained, in view of the project's specific characteristics (which must be identified), that "no reasonable scientific doubt remains" as to the possibility of it having adverse effects on the protected area[70].

In the case at issue, the permanent loss of the limestone pavement, even though localized, was deemed to affect the "constitutive characteristics" of the area's conservation goals[71]. It has to be noted that, with the exception of the satisfaction of the ROPI requirements of the provisions of article 6(4) of the Habitats Directive (which will be analyzed in part II.B. of the present dissertation), plans or projects in respect of which the results of the AA reports were negative, i.e. they were found to affect the integrity of a protected area, cannot be authorized by Member States[72].

Finally, the ECJ had the opportunity to reiterate the importance of a site's conservation goals and elaborate on their significance on account of the Hellenic Republic's failure to establish such goals for a number of Greek protected sites. Thus, in the Commission v Greece case[73] the Court observed that even though the text of article 4 of the Habitats Directive makes no reference to the establishment of conservation goals, defining the necessary priorities in order to maintain the integrity of the site to a favorable conservation status presupposes their establishment[74]. Besides, always according to the Court, the establishment of conservation goals is extremely important

[69] As regards the disappearance of priority species, see, Commission v Spain, C-404/09, EU:C:2011:768, paragraph 163; see, also, Commission v Spain, C-308/08, EU:C:2010:281, paragraph 21.

[70] Peter Sweetman et. al v An Bord Pleanála, C-258/11, EU:C:2013:220, paragraphs 26 and 40. See, also, Marie-Noëlle Solvay and Others v Région wallonne, C-182-10, EU:C:2012:82, paragraph 67.

[71] *Ibid,* paragraph 45.

[72] See, Commission v Austria, C-209/02, EU:C:2004:61, paragraphs 26-29; in that particular case the Court found that Austrian authorities had failed to fulfil its obligations under Article 6(3) and (4), in conjunction with Article 7, of the Habitats Directive because they authorized the extension of a golf course despite a negative assessment of its implications for the habitat of the protected species corncrake (crex crex) in the Wörschacher Moos SPA. See, also, Commission v Portugal, C-239/04, EU:2006:665, paragraphs 16 – 25; in this case it was the Portuguese authorities that authorized a road project despite its negative impacts (disturbance and fragmentation of their environment) on the Castro Verde SPA, which hosted 17 species of bird listed in Annex I to the Birds Directive. It should be pointed out that the Court found Portugal to be in violation of its obligations under the Habitats Directive irrespective of the fact that the completed project did not eventually produce negative effects, since the crucial time for concluding on Portugal's violation, was the time when the decision to authorize the adoption was taken. In that respect, see, Bund Naturschutz in Bayern eV and Others v Freistaat Bayern, C-244/05, EU:C:2006:579, paragraphs 35- 47.

[73] European Commission v Hellenic Republic, C-849/19, EU:C:2020:1047.

[74] *Ibid*, paragraph 46-50. See, also in that respect, Commission v Poland, C-441/17, EU:C:2018:255, paragraph 214; Commission v Poruguese Republic, C-290/18, EU:C:2019:669, paragraphs 36 and 45.

since without them no conservation measures can be correctly implemented and, therefore, their designation must occur as soon as possible and, at any event, within 6 months from the designation of the site as a protected area[75].

(b)Transparent form of assessment and access to relevant information

As held by the ECJ, the competent national authorities must gather all available information in the course of their decision-making process to grant or withhold development concern for proposed projects and thoroughly assess their substance. Furthermore, they must examine the expediency of the proposed project and provide, if need be, supplementary data to substantiate it further. In other words, the competent authorities must both investigate and analyze the data at hand to reach a safe conclusion[76]. What is more, also according to the ECJ, the decision not to subject a project to an EIA based on the results of the screening process[77] does not have to contain the relevant reasons; however, if requested by an interested third party, the determination by the authorities including the grounds on which it was based must be communicated to it along with the relevant information and documents[78]. That determination is considered to be sufficiently reasoned only when it contains all the necessary information that allow interested parties to conclude on whether they wish to appeal that decision or not[79].

As far as the form of assessment in the context of article 6(3) of the Habitats Directive is concerned, an analogous to the above conclusion must be drawn regardless of whether both processes are carried out simultaneously[80] or not. According to the European Commission's Guidance book on the management of Natura 2000 sites, the assessment under article 6(3) of the Habitats Directive must be recorded and sufficiently reasoned. If the reasons for the competent authorities' decision are not provided, the assessment is not "appropriate"[81]. It goes without question that this assessment must take place prior to any approval or refusal of the plan or project in question[82]. At any event, the following considerations should be taken into account, in

[75] *Ibid*, paragraphs 52-53.

[76] Commission v Ireland, C-50/09, EU:C:2011:109, paragraph 40.

[77] For an extensive analysis of the requirements that must be met in the screening phase, see, the Commission Guidance on Screening (Directive 2011/92/EU as amended by 2014/52/EU), European Union, 2017. For the requirements necessary during the scoping phase, see, Commission Guidance on Scoping (Directive 2011/92/EU as amended by 2014/52/EU), European Union, 2017.

[78] Christopher Mellor v Secretary of State for Communities and Local Government C-75/08, EU:C:2009:279, paragraphs 61 and 66.

[79] *Ibid*, paragraph 66.

[80] That occurs often when the same project is subject both to an EIA and an AA, for reasons of time expediency.

[81] Commission Notice "*Managing Natura 2000 sites, The provisions of Article 6 of the "Habitats" Directive 92/43/EEC,* C(2018) 7621 final, p. 44.

[82] *Ibid.*

relation to the content of information required in order for the assessment to be regarded sufficient under the Directives analyzed in the present dissertation:

On one hand, article 5 of the EIA Directive (in conjunction with Annex IV) refers in detail to the standards of the quality of information and the methods of its assessment. As stated in its provisions, the developer must supply all information relevant for any stage of the process in an appropriate manner and having regard "to current knowledge and methods of assessment"[83]. That information includes, at a minimum, a description of the project's site, design and size; a description of the measures to be taken to ensure environmental protection; the data identifying the project's primary effects on the environment; an outline of the main alternatives examined and the reasons for the developer's choice; a non-technical summary[84]. This standard is reasonable in view of the fact that the environment to be protected is broadly defined[85] and there may be no baseline data or information on the existing quality of its features, which are likely to be impacted.

On the other hand, the provisions of the Habitats Directive provide no specific insight as to the nature and quality of the information necessary for the undertaking of a sufficient AA. However, the ECJ, has shed light in those requirements, holding that the prepared assessment cannot have "gaps and lack complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the SPA concerned"[86]. The Court had the opportunity to elaborate on the relevant jurisprudence in the context of the diversion of the river Acheloos case[87], where the Greek Council of State referred the question to the ECJ on whether such a project may be approved if all the studies that are contained in the file for that project record a complete lack of information or an absence of reliable and updated data regarding the birds in that district. The Court ruled that such a lack of information precluded the permitting of said project at the material time but not in the future, on condition that the competent authorities managed to gather reliable and sufficient evidence[88]. Finally, as regards to the expected quality and specificity of the information to be gathered, the Court has held that it

[83] Article 5(1)(b).

[84] Article 5(3). Annex 4 of the EIA Directive goes into more detail regarding the information required in article 5 thereof, further elaborating on what the description of a project entails and requiring, *inter alia*, "an outline of the main alternatives studied by the developer and an indication of the main reasons for this choice, a description of the aspects of the environment likely to be significantly affected, a description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment, a non-technical summary of the information provided and an indication of any difficulties (technical deficiencies or lack of know-how) encountered by the developer in compiling the required information".

[85] Article 4 of the EIA Directive.

[86] Commission v Italy, C-304/05, EU:C :2007 :532, paragraph 69.

[87] Nomarchiaki Aftodioikisi Aitoloakarnanias and Others v Ipourgos Perivallontos, Chorotaxias kai Dimosion ergon and Others, C-43/10, EU :C :2012 :560.

[88] *Ibid.*, paragraphs 106-117.

must relate to the protected elements of the designated site in view of its conservation goals and "identified in the light of the best scientific knowledge in the field"[89].

ii. Prohibition of "salami slicing" of projects and consideration of cumulative effects

As already explained, in order for the assessment carried out in the context of the EIA and Habitats Directives to be considered sufficient, both direct and indirect effects of plans or projects must be taken into account. The same applies for cumulative effects, i.e., the effects the proposed projects may have on the environment in combination with other plans or projects. Otherwise, the objectives of the Directives would be compromised. As held by the ECJ, the examination of all indirect effects of proposed projects necessarily includes an analysis of the project's cumulative effects in connection with other projects so that all significant implications are taken in due account[90]. Failure to abide by that requirement would entail that the Directive's protective provisions would be circumvented by the "salami slicing" of projects and allow them to avoid being subject to the EIA process even though they fall under the ambit of article 2(1) of the Directive[91]. It has to be noted, that the obligation to examine a project's impact in relation to other projects as well is not limited only to projects of the same kind. On the contrary, the assessment must be made in connection with the existence of other types of projects as well, which may aggravate the impact of the proposed project[92].

In the context of the EIA Directive, this requirement has to be understood also in view of Annex III(1) of the Directive, under which cumulation with other projects is one of the selection criteria for assessing whether a projects are likely to have significant impact on the environment and must, therefore, be subject to EIA. Moreover, Annex III (3) of the Directive requires that potential significant effects of a project must be considered in connection to the criteria set out under (1) and (2) of that annex, having regard in particular to the probability, magnitude, duration and reversibility of the impact. Besides, the examination of cumulative effects is required by Annex IV of the Directive as information that has to be submitted by the developer in order for consent to be granted[93].

In relation to the Habitats Directive, the obligation is set out more clearly since it forms part of the provisions of article (3) of the Directive[94]. As explained in the relevant guidance document of

[89] Monsanto Agricoltura Italia SpA and Others v Presidenza del Consiglio dei Ministri and Others, C-236/01, EU:C:200:431, paragraph 113. See, also, Commission v France, C-241/08, EU:C:2010:114, where the ECJ held that management measures must be specific to the ecological requirements of each site and not measures of a generic character.

[90] Commission v Spain, C-404/09, EU:C:2011:768, paragraph 80.

[91] Brussels Hoofdstedelijk Gewest and Others v Vlaamse Gewest, C-275/09, EU:C:2011:154, paragraph 36.

[92] Commission v Bulgaria, C-141/14, EU:C:2016:8, paragraphs 95-96; Marktgemeinde Straβwalchen and Others, C-531/13, EU:C:2015:79, paragraphs 43-45.

[93] Article 5(1) of the Directive.

[94] "[…] in combination with other plans or projects […]".

the European Commission, the underlying idea behind this requirement is to take due account of potential effects on the protected sites that may take place over time; in that regard, even though completed projects are not –in principle- taken into account during the AA process, some considerations should be made of them, especially if they have long-term effects that are of relevance to the sites' conservation status. In addition, while the AA process must also include projects that have already been approved but not yet completed, this is not the case for plans or projects not yet proposed, since that would contravene the principle of legal certainty[95].

iii. The role of alternative solutions and mitigation measures as "safety valves"

The position of alternative solutions and mitigation (and compensation) measures is not the same in the mechanisms provided for in the EIA and Habitats Directives.

According to article 5(3) of the EIA Directive, the developer of a project must provide the competent authorities, *inter alia*, with "an outline of the main alternatives studied […] and an indication of the main reasons for his choice, taking into account the environmental effects"; in that regard, no definition of the term "main alternatives" is provided by the Directive. However, the European Commission's guidelines[96] on the EIA report provide some useful insights as to their nature and characteristics: alternative solutions are considered imperative for minimizing unwanted environmental impacts of proposed projects and, in that sense, identifying them properly must take into account the project's specific characteristics. Thus, appropriate alternatives must definitely include the "do nothing scenario" to act as a baseline and may relate, *inter alia*, to the project's nature or design, the technology or equipment used for its implementation, the exact location of its construction or the site's layout, the process, timeframe and operating conditions during its implementation, its size or scale[97]. This approach of the Commission's guidelines is in line with the reasoning of the ECJ in the matter. As held by the Court, alternatives that may affect the proposed project's environmental impact, whether proposed by the developer or the authorities or other stakeholders, must be assessed by the developer and the reasoning for the latter's choice must be evidenced in the EIA report; the opposite would not allow the competent authorities to properly conduct their assessment before giving or withholding development consent[98].

What is more, the assessment of alternatives does not take place in a vacuum, in the sense that the examination of their efficiency is not unconnected with the other requirements of article 5 of the EIA Directive, including those features or measures of the proposed project "envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the

[95] *Supra* note, pp. 34-35.

[96] Commission's Guidance on the preparation of the Environmental Impact Assessment Report (Directive 2011/92/EU as amended by 2014/52/EU), European Union, 2017.

[97] *Ibid.,* pp. 54-55.

[98] Brian Holohan et. al v An Bord Pleanála, C-461/17, EU:C:2018:883, paragraphs 63-69.

environment"[99]. In other words, alternative solutions should be assessed keeping in mind the different kind of mitigation or even compensation measures that may be taken in each case. Such measures may aim to the prevention (e.g. by using alternate technological or technical means during construction or avoiding operation near the most sensitive environmental features of the area), the reduction (e.g. scaling down of the proposed project, redesigning some of its elements or taking supplementary measures) or the offset (e.g. restoring the site after the construction of the project) of negative environmental effects of the proposed project[100]. It has to be noted that, in light of the precautionary principle and the principle of preventive action, measures aiming to the avoidance of negative effects must be preferred and remediation or compensatory measures should be considered only as a last resort. In that regard, use should be made of the best available techniques[101]. At any event, in cases where development consent is given, it must include precise and detailed monitoring measures[102] in order to secure that the operation of proposed projects is in line with all legal requirements and do not go beyond the environmental effects predicted in the EIA report[103].

In contrast with the EIA process, where alternative solutions and mitigation or compensatory measures are incorporated as "safety valves" for the development of the project, they do not even form part of the initial stages of the AA process provided for by article 6(3) of the Habitats Directive. This is reasonable taken into consideration the whole structure of the AA process. More specifically, stage one requires screening for likely impacts of a proposed plan or project on protected areas, either alone or in combination with other plans or projects and, always, in view of the site's conservation goals; stage two is where the AA process examines the impacts identified in stage one with respect to the site's structure and function and its conservation objectives; alternative solutions and mitigation measures are only considered in the following stage three and if no alternatives are found, then, the process moves on to stage four where it is examined whether reasons of overriding public interest (ROPI) could justify the implementation of the project despite its effects[104].

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[99] Article 59(1)(c) of the EIA Directive in conjunction with Annex IV point 7.

[100] *Supra* note 96, pp. 56-57.

[101] *Ibid.*

[102] Article 8a(1) of the EIA Directive states that: "The decision to grant development consent shall incorporate at least the following information: [….] (b) any environmental conditions attached to the decision, a description of any features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment as well as, where appropriate, monitoring measures". According to paragraph 4 of the same article: "[…] the features of the project and/or measures envisaged to avoid, prevent, or reduce and, if possible, offset significant adverse effects on the environment are implemented by the developer, and shall determine the procedures regarding the monitoring of significant adverse effects on the environment. The type of parameters to be monitored and the duration of the monitoring shall be proportionate to the nature, location and size of the project and the significance of its effects on the environment. Existing monitoring arrangements resulting from Union legislation other than this Directive and from national legislation may be used if appropriate, with a view to avoiding duplication of monitoring". See, also, Annex IV point 7 of the Directive.

[103] *Supra* note 96, pp. 57-62.

[104] Commission Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC, November 2001, Office for Official Publications of the European Communities, 2002. However, see *supra* note 53, pp. 36-37, where the Commission states that the early examination of alternative solutions and

The ECJ dealt with the matter in a Dutch case concerning the approval of a motorway's extension which would adversely affect some specific parts of a protected area while, at the same time, would improve the hydrological situation of other parts of the same area. When the authorities' decision was challenged before national courts, a preliminary reference was put before the ECJ, on whether the approval of such a project was in line with article 6(3) of the Habitats Directive and whether the hydrological improvement of the protected site would constitute a mitigation measure. The Court reiterated, first, that mitigation or compensatory measures cannot be considered during the AA process and stated that a measure such as the one at issue in that specific case was in fact compensatory in nature as it did not contribute to the avoidance or mitigation of the negative impact of the approved project; it simply aimed to offset those impacts in a vague manner which was difficult to prove. The ECJ went on to stress that such measures, in essence, attempt to circumvent the protective provisions of article 6(3) of the Directive and ruled that the impugned project contravened those provisions; such a measure could only be regarded as lawful within the context of article 6(4) of the Directive[105].

At any event, even in the context of article 6(4), potential alternatives must be sought, including the "do nothing" scenario which serves as a baseline for the assessment of other alternatives. The consideration of alternatives, as in the case of the EIA Directive, may take into account aspects such as the scale, the location, the design and the techniques employed for the implementation of the plan and requires a comparative assessment of all available alternatives in order to conclude on the one with the least impact on the protected site[106].

iv. Public participation in decision-making – securing the right to quality environment

At first sight, the requirement of public participation seems to apply without exceptions only in the course of the EIA process, while public opinion during the AA process seems to be requested only if it is "appropriate". However, that assumption does not properly reflect reality.

It is true that the EIA Directive considers consultation to be an important part of development consent, maximizing transparency and accountability and, as a result, securing higher standards of environmental protection[107]. In that regard, it contains a complex of provisions relating to consultations; at the core of those provisions are articles 6 and 7 of the Directive but articles 4(5) on the screening phase, 5(2) on the scoping phase are also of relevance. The sum of these

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mitigation measures, within the context of the screening procedure and before the application of article 6(4) of the Directive may serve to the benefit of the site as it would allow for the early identification of those scenarios that would eventually prove less harmful for the integrity of the site.

[105] T.C. Briels and Others v Minister van Infrastructuur en Milieu, C-521/12, EU:C:2014:330, paragraphs 29-35, 38-39.

[106] Commission notice on assessment of plans and projects in relation to Natura 2000 sites – Methodological guidance on Article 6(3) and (4) of the Habitats Directive 92/43/EEC, 28.9.2021, C(2021) 6913 final, p. 69-71.

[107] Recital 16 of the preamble to the EIA Directive.

provisions set out the type of information that has to be available, to whom and through what kind of procedure.

The provisions of article 6 mention the types of groups that should be consulted during the EIA process, i.e., the public authorities, the public concerned and the relevant parties in other Member States; however, the same provisions do not offer any definition of the terms. According to the guidance of the European Commission, the term "authorities" includes all public bodies likely to be concerned due to their environmental or local competencies; the "public concerned" is a very broad term that except for natural persons it also includes associations, organizations and groups, in particular non-governmental organizations promoting environmental protection[108]; their inclusion ensures that anyone may access all crucial information, such as the EIA report itself, the opinions of the consulted authorities, etc; finally, if the proposed project is likely to have transboundary effects, then the opinion of the Member State likely to be affected as well must be requested[109].

As far as informing the public and arranging the consultation procedure is concerned, the details of it are left to the discretion of the Member States[110]. However, that discretion is not unlimited, but it should at least adhere to some minimum standards; article 6(7) requires a minimum period for consultation of 30 days and, in any case, the consultees must be given enough time to prepare and participate effectively and the consultation should take place at the earliest stage possible[111]; at any event the consultation procedure must take place before consent is given[112]. Furthermore, the way the consultation procedure is organized must not constitute an obstacle for the effective participation of the public. In that regard, as held by the ECJ, the imposition of an administrative fee is not in principle incompatible with the requirements of the EIA Directive so long as it is not arranged at such a level as to become a counterincentive[113].

Finally, the consultation procedure would be devoid of all meaning if the authorities' final decision to grant or refuse consent was not published; its publication is not simply a typical step, but it fulfills a bigger role, i.e., to allow harmed individuals to promptly challenge that decision before the competent administrative or judicial bodies. In that regard, the publication of an

[108] Recital 17 of the preamble to the EIA Directive.

[109] *Supra* note 96, p. 74.

[110] Article 6(5) of the EIA Directive. According to the guidance of the Commission, "pursuant to the principle of subsidiarity, the EIA Directive leaves the precise determination of the time-frames applicable to consultations to Member States. Indeed, as is demonstrated in the box below, Projects requiring an EIA differ in size, scale, location and complexity, and therefore setting standard and explicit time limits applicable to all Projects for the different stages, may not be considered to be appropriate" (*supra* note 96, p. 75).

[111] *Supra* note 96, p. 75. See, also, Alain Flausch and Others v Ypourgos Perivallontos kai Energeias and Others, C-280/18, EU:C:2019:928, paragraph 32: "The competent authorities must ensure that the information channels used may reasonably be regarded as appropriate for reaching the members of the public concerned, in order to give them adequate opportunity to be kept informed of the activities proposed, the decision-making process and their opportunities to participate early in the procedure".

[112] Commission v Spain, C-332/04, EU:C:2006:180, paragraph 54.

[113] Commission v Ireland, C-216/05, EU:C:2006:706, paragraphs 37-38 and 42-45.

environmental impact statement by the competent authorities does not absolve them from the obligation to publish the decision granting or refusing consent, since that would be contrary to 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. As held by the ECJ,

> 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[114].

It is apparent that, when the AA process is coordinated with the EIA process (regarding projects which are subject to both procedures), the same obligations apply[115]. Nonetheless, even in cases where a proposed plan or project is not subject to the EIA procedure, resort to public consultation must be had in view of the provisions of the Aarhus Convention[116], according to which access to environmental information and participation in the decision-making in environmental matters is essential for individuals to secure their right to live in a quality environment[117]. This approach was confirmed by the ECJ in one of its judgments relating to the requirements of the Aarhus Convention. The Court held that participation of the public, including NGOs, must be made available during the authorization of a plan or project subject to article 6(3) of the Habitats Directive[118]. The right of participation must guarantee "the right to participate […] effectively during the environmental decision-making" by submitting, "in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity"[119].

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[114] *Supra* note 112, paragraphs 55-59.

[115] *Supra* note 81, p. 53. For the coordination of the EIA and Habitats Directives' procedures, see, article 2(3) of the EIA Directive; see, also, Commission notice – Commission guidance document on streamlining environmental assessments conducted under Article 2(3) of the Environmental Impact Assessment Directive, 2016/C 273/01.

[116] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, to which the EU is one of the signatories since 2005 under Decision 2005/370/EC http://ec.europa.eu/environment/aarhus/legislation.htm. It has to be noted that the amendments made to the EIA Directive by Directive 97/11/EC, brought the former in line with the Espoo "Convention on Environmental Impact Assessment in a Transboundary Context", widened its scope, provided for new screening criteria and established minimum information requirements. What is more, the amendments made subsequently by Directive 2003/35/EC, brought its provisions on public participation in line with the Aarhus "Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters".

[117] Recitals 7-8 of the preamble to the Aarhus Convention.

[118] Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín, C-243/15, EU:C:216:838, paragraph 49.

[119] *Ibid.*, paragraph 46.

v. Access to justice – strengthening accountability in environmental matters

Similarly to public participation, the foundation of the public's right to challenge development consent decisions under the EIA Directive is twofold; on one hand, it is based on the provisions of the EIA Directive itself and, specifically, article 11 which requires that Member States must ensure in their legal systems the right of the public "to have access to a review procedure before a court of law" in order to challenge "the substantive and procedural legality of decisions" by the national authorities. On the other hand, the same obligations are imposed by the Aarhus Convention to which the EIA Directive makes an express reference[120] as a means of strengthening accountability and transparency in decisions relating to environmental matters[121]. It has to be noted though, that even though they are similar, the two procedures (consultation and access to justice) are not interconnected, in the sense that, participation to the former is not a precondition for access to the latter[122].

Article 11 of the EIA Directive leaves it to the Member States to take all the necessary measures to ensure effective access to justice by the public; as in the case of public participation, that discretion is also limited. As held by the ECJ, on account of their procedural autonomy, Member States may themselves determine matters such as competency of the courts or procedural safeguards, as long as the principles of equivalence and effectiveness are complied with. However, that discretion does not include the possibility to adopt a project by a legislative act that does not assimilate the characteristics of "consent" in the meaning of the EIA Directive, and exclude the judicial review of that act impossible[123]. What is more, it has been held that individuals may invoke the provisions of the Directive directly before national courts in order to challenge the competent authorities' actions and argue that they exceeded the limits of their discretion; in parallel, national courts are obliged to take the Directive's provisions into account in determining the complaint made by individuals[124].

As far as which remedies are considered appropriate in order for effective access to justice to be guaranteed, the Court has determined that a legal action claiming compensation for the loss of value of material assets situated in the area of the proposed project is not excluded, if the proposed project's do affect the quality of life and, possibly, the health of an individual[125].

[120] Recital 21 of the preamble to the EIA Directive.

[121] Recital 10 of the preamble to the Aarhus Convention.

[122] Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd, C-263/08, EU:C:2009:631, paragraphs 36 and 38.

[123] Antoine Boxus and Willy Roua and Others C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:667.

[124] Delena Wells v Secretary of State for Transport, Local Government and the Regions C-201/02, EU:C:2004:12, paragraph 57; Grand Duchy of Luxemburg v Berthe Linster, Aloyse Linster and Yvonne Linster. C-287/98, EU:C:2000:468, paragraph 32; World Wildlife Fund (WWF) and Others v Autonome Provinz Bozen and Others, C-435/97, EU:C:1999:418, paragraph 69; Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland, C-72/95, EU:C:1996:404, paragraph 56.

[125] Leth v Republik Österreich, Land Niederösterreich, C-420/11, EU:C:2013:166, paragraphs 30-36. See, also, Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen C-115/09, EU:C:2011:289, paragraph 37.

Finally, as regards the scope of pleas that individuals are allowed to argue in the context of proceedings relating to the legality of decisions of development consent, the ECJ held that "article 11 of Directive 2011/92 has in no way restricted the pleas that may be put forward in support of the actions covered by that provision"[126] and, therefore, its application cannot be restricted only in situations where no environmental impact assessment took place[127].

In contrast with the EIA Directive, the Habitats Directive makes no express reference to the public's right of access to justice; not does it refer expressly to the Aarhus Convention. However, as with the right to participation during the AA process, the jurisprudence of the ECJ answers the question of the application of the right to justice in the context of the Habitats Directive in the affirmative. Thus, on account of a preliminary reference regarding whether an environmental NGO could be a party to administrative proceedings concerning the grant of derogations (article 16 of the Habitats Directive) from the measures of protection of the brown bear (included in Annex IV(a) to the Habitats Directive) according to article 12 of the Directive, the Court ruled that national courts must ensure effective access to justice in the areas falling within the scope of EU environmental law and are required, therefore, to "interpret [their] national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention"[128].

II.B. EIA & AA as facilitating agents of social and economic development

The previous part (II.A.) of the present dissertation attempted to establish and analyze the aspects of the EIA and Habitats Directives serving to the achievement of a high level of environmental protection during the development of projects and the authorization of plans. However, as already stated, in order for that protection to be compatible with EU law, it does not have to be absolute nor the highest technically possible[129]. With that in mind, this part (II.B.) of the dissertation will focus on the limitations of the Directives' protective systems, in other words, on the occasions where economic development seems to be favored over environmental protection.

i. The exclusion of plans and projects from the EIA and AA procedures

(a) EIA limits and exemptions

[126] Gemeinde Altrip and Others v Land Rheinland-Pfalz C-72/12, 101 EU:C:2013:712, paragraph 36.

[127] Commission v Germany, C-137/14, EU:C:2015:683, paragraphs 47-48.

[128] Lesoochranárske zoskupenie, C-240/09, EU:C:2011:125, paragraphs 30-38, 43, 50-52. See, also, Lesoochranárske zoskupenie, C-243/15, EU:C:2016:838, paragraph 56.

[129] Associazione Italia Nostra Onlus v Comune di Venezia and Others, C-444/15, EU:C:2016:978, paragraphs 41-44.

Even from the adoption of its original version, not every proposed project was subject to the provisions of the EIA Directive; on the contrary, it applied only on those projects deemed likely to have "significant" effects on the environment. Besides, the rules it introduced aimed to harmonize the permitting of projects among Member States in order to avoid distortions in competition and ultimately the dysfunction of the internal market[130]. In other words, its operation was included into the wider scheme of EU objectives. This is evidenced in all of its subsequent amendments, including the last one by Directive 2014/52; the latter's preamble refers to the necessity of its application in line with the principle of sustainable development in order to avoid any "compromise [to] economic development"[131]. The limitations and exemptions from its scope must, therefore, be seen in light of this consideration.

i. Annex II projects: exclusion thresholds/criteria – individual examination

As already stated, not every project is subject to the provisions of the EIA Directive; only those with a "significant" impact on the environment are required to undergo the EIA process. In that regard, the Directive makes a distinction between projects that are always considered to significantly impact the environment and projects that on certain conditions may significantly impact the environment. These projects are listed in Annexes I and II of the Directive respectively[132].

As far as Annex II projects are concerned, the Directive provides that they may be excluded from the obligation to undergo the EIA process, on condition that the competent authorities determine that they will not significantly affect the environment. This determination, according to article 4(1) and (2) of the Directive, can be made through, either, the examination of every individual case or by setting out thresholds or criteria or a combination of the two[133]. As clarified by the Commission's guidance, typically, thresholds and criteria constitute quantitative and qualitative factors contributing to the inclusion or exclusion of a project from the ambit of the Directive; usually thresholds are associated with quantitative features of the project (such as the area it covers), while criteria are associated with qualitative elements (such as specific impact considerations on account of its characteristics)[134].

Generally, thresholds may be divided in three primary groups: thresholds based on the characteristics of the project, thresholds based on its anticipated capacity and thresholds based on the location of the project. The majority of these types of thresholds are of a technical nature. At any event, all types of thresholds must take into account the criteria of Annex III of the

[130] Recital 2 of the preamble to Directive 85/337/EEC.

[131] Recitals 13 and 17 of the preamble to Directive 2014/52/EU.

[132] Annex I projects include, *inter alia*, crude oil refineries, thermal power stations, nuclear power plants, construction of motorways, waste disposal installations, etc. Annex II projects include underground mining, deep drilling, industrial installations for the production of electricity or gas, the storage of fossil fuels, etc.

[133] See, also, recital 10 of the EIA Directive where it is clarified that, in case projects do not exceed the threshold or do not meet the criteria adopted by the competent authorities, they are exempted from the EIA obligation.

[134] *Supra* note 77, p. 28.

Directive.[135] If thresholds like the ones described above are not adopted at a national level or if a project does not fit into an inclusion or exclusion list, typically, this is when an individual examination is carried out in order for national authorities to determine whether it falls within the scope of the EIA Directive or not[136]; this determination is based on the supply of the necessary information by the developer, including potential measures envisaged to avoid the proposed projects significant effects on the environment[137].

The practice of including measures, which are essentially of a mitigation or compensatory nature, as early as in the screening phase is often referred to as "the tailored" approach. Through this practice, projects are basically modified during the screening phase, which leads to more certainty of what in different circumstances would have been unforeseen side-effects and makes the screening decision more robust. One example of a "tailored project approach" is a Danish electronic model used to calculate whether intensive farming projects will have significant environmental impact or not; developers may change the data entered into the model in order to conclude on what version of their proposed project would be less detrimental to the environment and, therefore, would be absolved of the obligation to undergo EIA. As explained by the Commission's guidance, the sole goal of this procedure is "to avoid unnecessary EIAs"[138].

At any event, in adopting these thresholds or criteria or in performing their individual examination, article 4(3) of the Directive requires that competent authorities must take into account (i) the criteria listed in Annex III, i.e., considerations regarding the specific characteristics of the project (e.g., size, design, pollution, risks of accident, impacts on health etc.), its location (e.g. land use of the area, abundance of natural resources, etc.) and the characteristics of the potential environmental impact (e.g. probability, magnitude, intensity, cumulation with other projects, etc.)[139]; and (ii) all necessary information provided by the developer (listed in Annex IIa of the Directive). If the aforementioned examination concludes that the proposed project may be exempted from the EIA procedure, a relevant decision from the authorities is issued with the appropriate reasoning[140].

It has to be noted that, as a general rule, the thresholds and criteria set in place by the EU Member States are considered reasonable by the Commission on account of the combined approaches they use, such as, simplified permit procedures for small scale projects, adoption of appropriate thresholds fulfilling the Directive's requirements and legislative ad administrative measures ensuring the avoidance of "salami slicing" of projects[141]. The combination of different

[135] *Supra* note 77, p. 39. At any event, all types of thresholds must take into account the criteria of Annex III of the Directive.

[136] *Ibid.,* p. 39.

[137] As per article's 4(4) requirements.

[138] *Supra* note 77, p. 44.

[139] As stated in the 11th recital of the Directive, national authorities are better suited to apply those criteria in view of the principle of subsidiarity.

[140] Article 4(4) and (5) of the EIA Directive.

[141] *Supra* note 77, p. 30.

categories of thresholds is often called "the traffic light" approach; in that regard, projects above the thresholds adopted require an EIA (red), projects below the thresholds adopted are exempted from the EIA process (green) and projects that require a more individual examination may require an EIA (orange)[142]. At any event, the crucial considerations, according to the ECJ, are whether the proposed projects are likely to affect the environment – individually or as a whole and whether all Annex III criteria are taken into account. If these two conditions are met, then even certain categories of projects could preemptively be exempted from the EIA process without Member States violating EU law[143].

ii. The exemptions of articles 1(3) and 2(4) and (5)

In addition to the potential exemptions of projects listed in Annex II, the EIA Directive provides for three more categories of projects that fall outside its scope: projects connected to national defense and civil emergencies, projects of "exceptional" character and projects adopted by legislative acts[144].

The first category comprises of projects related solely to national defense or civil emergencies; the EU legislature apparently regards the maintaining of a robust national defense –which is after all at the core of the Member States' sovereignty– and the effective handling of civil emergencies[145] as very important and sensitive matters allowing for the disapplication of the Directive's protective net. It has to be noted, nevertheless, that such projects must relate exclusively –or, at least, primarily – to the abovementioned objectives and not serve commercial purposes[146].

The second category is phrased rather vague; however, the ECJ has shed some insight on what may constitute an "exceptional case" under article 2(4) of the Directive justifying the disapplication of its provisions. In the *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen* case, the Court held that

> it is conceivable that the need to ensure the security of the electricity supply to a Member State could amount to an exceptional case, within the meaning of the first subparagraph of Article 2(4) of the EIA Directive, which would justify exempting a project from environmental impact assessment[147].

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[142] *Ibid.,* pp. 28-29.

[143] In respect of the first condition, see, Salzburger Flughafen GmbH v Umweltsenat, C-244/12, EU:C:2013:203, paragraph 31; Commission v Ireland, C-427/07, EU:C:2009:457, paragraph 42; Commission v. Ireland, C-66/06, EU:C:2008:637, paragraph 65; in relation to the observance of the second condition, see, Commission v Netherlands, C-255/08, EU:C:2009:630, paragraphs 32-39;

[144] Articles 1(3), 2(4) and 2(5) respectively.

[145] No definition of the term is provided in the Directive.

[146] World Wildlife Fund (WWF) and Others v Autonome Provinz Bozen and Others, C-435/97, EU:C:1999:418, paragraph 65-67.

[147] C-411/17, EU:C:2019:622, paragraph 97.

That is the case, provided that the rest of its preconditions are also met; besides, according to the same judgment of the Court,

> the exemption of a project under Article 2(4) of the EIA Directive from the requirement to conduct an environmental impact assessment is only permissible if the Member State concerned can show that the alleged risk to security of the electricity supply is reasonably probable and that that project is sufficiently urgent to justify not carrying out such an assessment[148].

So far, the exception under this provision of the EIA Directive was applied in three cases: in order to ensure the supply of gas, the serving of strategic interest concerning renewable energy and in the context of "high-level political commitments made by public authorities to build confidence between communities in the context of broader reconciliation negotiations"[149].

Finally, the third category refers to projects adopted by legislative acts. Such projects may be exempted from the EIA process, largely, under two conditions: firstly, the existence of a specific legislative act that encompasses all the characteristics of "development consent" in the meaning of the EIA Directive; secondly, the procedure must ensure the taking account of the projects impacts to the environment[150].

(b) AA limitations and exceptions

While the more stringent provisions of the Habitats Directive offer, arguably, a higher level of protection than the one achieved by the EIA Directive, its application is not completely devoid of economic or social considerations. So, even within its system, there are times when the authorization of plans or projects is considered so vital that calls for the retreat of the Directive's protective provisions. After all, maintaining biodiversity and preserving Europe's natural heritage is not the be-all and end-all of its goals; it is rather a means to attain the central goal of sustainable development[151].

i. Relativity of application "in view of the site's conservation objectives"

As already mentioned –albeit succinctly– in part II.A of the present dissertation, the fact that environmental impacts in the context of the AA process are examined in relation to each

[148] C-411/17, EU:C:2019:622, paragraphs 97-99.

[149] Commission Notice, Guidance document regarding application of exemptions under the Environmental Impact Assessment Directive (Directive 2011/92/EU of the European Parliament and of the Council, as amended by Directive 2014/52/EU) – Articles 1(3), 2(4) and 2(5) (2019/C 386/05), section 3.7.

[150] Antoine Boxus and Willy Roua and Others, C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:667, paragraphs 38, 45-48 and 50.

[151] Recital 3 of the preamble to the Habitats Directive, according to which, "the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements, this Directive makes a contribution to the general objective of sustainable development; whereas the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities".

protected sites' objectives means that the scope of the examination is relatively focused. According to the Commission's guidance on the subject, the examination of adverse effects of plans or project must be made as objectively as possibly in relation to the protected area's conservation objectives and its particular sensitivity[152]. That assessment may include, *inter alia*, the direct loss of habitat, the degradation of its quality, disturbance on its species, fragmentation or other indirect effects[153] but it must always take into account the site-specific goals and desirable conservation status. In that regard, what may be considered as "significant effects" for a protected area may be deemed irrelevant for another one. For example, loss of a few hundred square meters of habitat could be detrimental for a small protected area; the same loss of habitat could be insignificant for a large steppe[154]. What is more, imperceptible effects on a site, such as effects in the visual sense, are not considered "adverse effects" within the meaning of article 6(3) of the Habitats Directive[155]. Against this background, it is evident that not all effects of a proposed project on a protected area constitute sufficient reason for the undertaking of the AA process, even less so for the obstruction of its implementation; the only effects that matter are those relating to the site's ecological functions.

ii. Overriding AA for imperative reasons of public interest

Where the AA report has concluded that the impact of a proposed plan or project will indeed adversely affect the conservation goals of a protected area, its authorization is, in principle, denied; the same applies, in principle, also in cases where the results of the AA report were inconclusive. However, that is not an unbreakable rule. There are instances where the legitimate aim of environmental protection retreats in favour of reasons of social and economic expediency, referred to by the provisions of article 6(4) of the Habitats Directive as "imperative reasons of overriding public interest" (IROPI) [156]. In those cases, the authorization of a plan or project is allowed by way of derogation from the procedure of article 6(3).

It has to be noted at the outset that the Directive does not provide a definition of the meaning of IROPI; it only provides some examples in the second subparagraph of article 6(4), i.e. "human health", "public safety" and "beneficial consequences of primary importance for the environment". What is more, to this day, the ECJ has not provided many indications for the scope or content of that term. A preliminary reference from a Greek court in 2010 provided the Court one of the few opportunities it had to offer some insight as to what IROPI may entail: in the *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, concerning the partial diversion of the waters of Acheloos River, the ECJ was asked to give an answer on whether the securing of irrigation and water supply –aims which the proposed diversion pursued – constituted IROPI in the sense of article 6(4) of the Habitats Directive. The Court replied partly in the affirmative; it

[152] *Supra* note 81, p. 42.

[153] *Supra* note 106, p. 38.

[154] *Supra* note 106, p. 20 and 38.

[155] *Supra* note 81, p. 39.

[156] According to the wording of article 6(4) of the Directive, overriding reasons of public interest include "those of a social or economic nature".

noted, first, that ensuring irrigation and unobstructed water supply could in principle be regarded as IROPI justifying derogation from the provisions of article 6(3). As held by the Court,

> irrigation and the supply of drinking water meet, in principle, those conditions and are therefore capable of justifying the implementation of a project for the diversion of water in the absence of alternative solutions[157].

It then went on to clarify though, that under the specific circumstances of the case, since the protected area affected by the proposed project hosted priority habitats and priority species[158], only securing water supply could be accepted as IROPI[159]. In another case, concerning the authorization by decree of the construction of a management center of a private company, the Court stated that

> an interest capable of justifying, within the meaning of Article 6(4) of the Habitats Directive, the implementation of a plan or project must be both 'public' and 'overriding', which means that it must be of such an importance that it can be weighed up against that directive's objective of the conservation of natural habitats and wild fauna and flora. Works intended for the location or expansion of an undertaking satisfy those conditions only in exceptional circumstances[160].

That being said, the Court held that, in principle,

> it cannot be ruled out that that is the case where a project, although of a private character, in fact by its very nature and by its economic and social context presents an overriding public interest and it has been shown that there are no alternative solutions[161].

In view of the absence of a concise body of ECJ's case-law on the matter, a reference to similar concepts in other fields of EU law may prove of assistance in gaining a better understanding of the scope of IROPI. Firstly, there is the concept of "imperative requirement" introduced by the ECJ as derogation from the principle of the free movement of goods[162] and freedom of establishment[163]. Except for the protection of public health or of the environment, such requirements include restriction measures adopted for the attainment of several social and

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[157] *Supra* note 87, paragraph 122.

[158] Under the second subparagraph of article 6(4) of the Directive, in relation to protected areas hosting priority habitats and species, IROPI may constitute only reasons connected to human health or public safety and to beneficial consequences of primary importance for the environment.

[159] *Supra* note 87, paragraphs 123-128.

[160] Marie-Noëlle Solvay and Others v Région wallonne, C-182/10, EU:C:2012 :82, paragraphs 75-76.

[161] *Ibid.,* paragraph 77.

[162] Articles 28-29 of the TFEU.

[163] Articles 49-55 TFEU.

economic policies[164]. In that regard, and in the context of restrictions imposed on the freedom of establishment, the Court has ruled that a number of socioeconomic reasons may constitute imperative requirements justifying such restrictions, e.g. "the need to preserve the balanced allocation of powers of taxation between the Member States, the need to prevent the double use of losses and the need to combat tax avoidance"[165] or "the protection of the interests of creditors, minority shareholders and employees and the preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions"[166]. Secondly there is the concept of "service of general economic interest" which is defined by the Commission as "activities of commercial service fulfilling missions of general interest, and subject consequently by the Member States to specific obligations of public service. It is the case in particular of services in transport, energy, communication networks"[167].

Furthermore, Commission opinions delivered within the context of article 6(4) of the Directive throughout the years, are also useful for ascertaining the scope of what may constitute IROPI. In 1995, in the context of a German case concerning the intersection of the protected area of Peene Valley by a planned motorway A 20 motorway, the Commission took into account that the motorway at issue formed part of the trans-European road network and its implementation would allow its link with other regions; given that the region where the motorway would be structured was significantly underdeveloped, faced extremely high unemployment rates and its gross product in relation to its population was substantially lower than the average gross national product, the Commission declared that the project at issue could be regarded as IROPI[168]. In 2003, the Commission decided in the same way in a Dutch case relating to the development of the Rotterdam harbor. Its considerations included the importance of the Rotterdam harbor as "an essential multimodal crossroads in the TEN-T Network", the "expected growth in global container handling" and the need for the harbor at issue to keep its competitive advantage[169].

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[164] Commission Guidance document 2007/2012 on article 6(4) of the Habitats Directive 92/43/EEC, Clarification of the concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence, opinion of the Commission, p. 7.

[165] Groupe Steria SCA v Ministère des Finances et des Comptes publics, C-386/14, EU :C :2015 :524, paragraph 26 ; A Oy, C-123/11, EU:C:2013:84, paragraph 46 ; Oy AA, C-231/05, EU:C:2007:439, paragraph 51; and Marks & Spencer plc v David Halsey, C-446/03, EU:C:2005:763, paragraph 51.

[166] Commission of the European Communities v Kingdom of the Netherlands, C-297/05, EU:C:2007:531, paragraph 77; Criminal proceedings against Claude Nadin, Nadin-Lux SA and Jean-Pascal Durré, C-151/04 & C-152/04, EU:C:2005 :775, paragraph 49.

[167] *Supra* note 162, with further reference to a Commission Communication on services.

[168] 96/15/EC: Commission Opinion of 18 December 1995 on the intersection of the Peene Valley (Germany) by the planned A 20 motorway pursuant to Article 6 (4) of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, OJ L 6, 9.1.1996, p. 14–18.

[169] Opinion of the Commission of 24.4.2003, delivered pursuant to Article 6.4§2 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of the natural habitats and of wild fauna and flora (Habitats Directive), concerning the "Request by the Netherlands for advice and exchange of information with the European Commission within the framework of the Birds and Habitats Directives ", in relation to the "Project Mainport Rotterdam" Development Plan [available at: https://ec.europa.eu/environment/nature/natura2000/management/docs/art6/rotterdam_en.pdf (last accessed: 2.11.2021)].

With similar terms, in 2003, the Commission expressed an opinion in favour: (a) of the extension of the site of Daimler Chrysler Aerospace Airbus Gmbh in Hamburg, in view, *inter alia*, of its significance for the aerospace industry in Europe and its positive impact on the local economy[170]; and (b) in favour of the adoption of an operational master plan of the Prosper Haniel coal mine authorizing the continuation of its operation, which aimed to guarantee the energy supply security of Germany, while at the same time, avoiding the direct loss of jobs and its indirect effects on the local economy[171]. It is noted that the Commission's stance is consistent throughout the years. In that regard, in 2019 the Commission found that a project deepening the Danube ship fairway fell within the meaning of IROPI of article 6(4) of the Directive, on account of the project's contribution to the development of the trans-European network and to the improvement of the connectivity for inland ports, as well as to the increase in transport of freight volumes[172].

In view of the above, the reasonable conclusion can be drawn that IROPI in the meaning of the provisions of article 6(4) of the Directive may constitute, *inter alia*, plans or projects proposed in the context of policies or initiatives achieving a good quality of life for the citizens of the Member States (e.g. health, safety, etc.) as well as activities "fulfilling specific obligations of public service"[173]. They also include economic and social activities that have a big positive impact on the economic and social situation of the region in which they are implemented. Regardless of the exact scope of the term IROPI, article 6(4) must be interpreted as requiring that the authorization of such projects must take place after the weighing in favour of the imperative reasons invoked against the conservation objectives of the protected areas[174].

ii. The consideration of "reasonable" alternatives

The requirement of considering "reasonable" alternative solutions is another element pointing to the balancing between environmental protection and economic development. Within the context

[170] *Supra* note 162, p. 9.

[171] Opinion of the Commission of 24.4.2003 delivered upon request of Germany according to Art. 6(4) Sub Par. 2 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of the natural habitats as well as the wild animals and plants1, concerning the approval of an operational master plan ("Rahmenbetriebsplan") of the Prosper Haniel Colliery operated by Deutsche Steinkohle AG (DSK), [available at: https://ec.europa.eu/environment/nature/natura2000/management/docs/art6/prosper_haniel_en.pdf (last accessed: 2.11.2021)].

[172] Commission Opinion of 19.11.2019, issued at the request of Germany pursuant to the second subparagraph of Article 6(4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora: deepening the Danube waterway between Straubing and Vilshofen; section Straubing-Deggendorf, available at: https://ec.europa.eu/environment/nature/natura2000/management/docs/C-2019-8090-EN.pdf (last accessed: 2.11.2021), C(2019) 8090 final.

[173] *Supra* note 162, p. 8.

[174] *Ibid.*, p. 8, where it is clarified that the weighing between the reasons invoked, and protection of the affected site's objectives must take into account the following: (a) the "overrinding" nature of the public interest served through the implementation of the proposed plan or project; and (b) the "long-term" effect of the public interest.

of the EIA process, according to the Commission's guidance, while the alternatives that could be suggested for a project are, in theory, "infinite", compliance with the EIA Directive is achieved by taking into account those regarded "reasonable". Whether an alternative is considered reasonable depends on the exact features of the proposed project; in that regard, if an alternative, offering higher standards of environmental protection is assessed as too expensive or too difficult (technically or legally), it should not be regarded as reasonable[175]. For instance, a particular alternative solution may be regarded as unreasonable, *inter alia*, if the technology necessary for its application is extremely costly or if there are no adequate resources to apply it properly[176].

As already stated in part II.A. of the present dissertation, alternative solution do not form part of the AA process described in the provisions of article 6(3) of the Habitats Directive; their examination is, however, provided for by paragraph 4 of the same article as a prerequisite for the activation of the IROPI derogation. As held by the ECJ, the term "alternatives" within article 6(4) also refers to reasonable or feasible alternatives[177]. What is more, the criteria for assessing alternatives are not solely environmental but they can also include social and economic criteria, such as the high cost of their implementation[178]. In the words of the Advocate General in the *Castro Verde* case,

> among the alternatives short-listed "the choice does not inevitably have to be determined by which alternative least adversely affects the site concerned. Instead, the choice requires a balance to be struck between the adverse effect on the integrity of the SPA and the relevant reasons of overriding public interest[179].

iii. Offsetting development risk – mitigation and compensatory measures

The concept of mitigation or compensation measures in the context of the EIA Directive was largely analyzed in part II.A. of the present dissertation. As already explained, mitigation and compensation measures are designed to prevent, reduce or offset any significant environmental effects a proposed project may have on the environment[180]. The latter category of mitigation measures, i.e., measures designed to offset any negative impact of a project's implementation, aim to mitigate or compensate for the unavoidable consequences of carrying out the proposed project. Such measures may include site restoration, resettlement or even monetary

[175] *Supra* note 96, pp. 52-56. It is noted, however, that this does not apply to alternatives that are simply inconvenient for the developer.

[176] *Ibid.*

[177] Commission v Portugal, C-239/04, EU:2006:665, paragraphs 36-39, where it is stated that "the absence of alternatives must be demonstrated before examining whether the plan or project is necessary for imperative reasons of public interest".

[178] *Supra* note 106, p. 67-70. It has to be noted that the Commission clarifies that social and economic considerations cannot be, at any event, the only determining factor for the developer.

[179] Opinion of the Advocate General in the case C-239/04, paragraph 44.

[180] *Supra* note 96, p. 55.

compensation[181]. At any event, mitigation and compensation measures are taken into account for the developer's choice among the alternatives, in view of whether the former are the most effective in relation to their financial cost[182].

Moving into the context of the Habitats Directive, it has to be reiterated, first, that, as is the case with alternatives, compensatory measures are introduced in the context of derogation under article 6(4) of the Directive. The latter does not provide any definition whatsoever of the concept of "compensatory measures". In that respect, the Commission suggests that compensatory measures under the Habitats Directive should be divided into two categories: mitigation measures, on the one hand, and *sensu stricto* compensatory measures on the other hand. The measures of the first category attempt to lessen or cancel entirely any adverse environmental effects caused to a protected site's conservation goals by the authorization of a plan or project; the measures of the second category are adopted independent of the proposed project and aim to offset the latter's impact on the overall integrity of the protected area[183]. For example, if the continuation of the operation of a coal mine causes subsidence or flooding and, thus, harm the sensitive features of a protected area's ecosystem, then compensatory measures may be taken, such as the reforestation of the area[184].

Whatever the case, in order to be appropriate, compensatory measures must be precise and custom-planned in relation to the plan's characteristics as well as the protected area's conservation objectives[185]; this is essential in order for the envisaged measures to correspond properly to the specific negative impact of the project and offset it[186]. In essence, compensatory measures are targeted enough when they correctly identify the population of species and the ecological functions of the protected area[187].

In general, appropriate compensatory measures entail, *inter alia*, the improvement of the ecological features of the remaining habitat, the re-introduction of species, the undertaking of initiatives for implementing economic activities that serve the ecological functions of the site and the overcompensation for interim losses in cases where the compensatory measures take effect after the damage to the site's conservation goals occurs[188]. It is noted that only effective compensatory measures are considered appropriate. According to the Commission's guidance, "measures for which there is no reasonable guarantee of success should not be considered under Article 6(4), and the likely success of the compensation scheme should influence the final

[181] *Ibid.*, p. 56.

[182] *Ibid.*, p. 57.

[183] *Supra* note 162, p. 10.

[184] *Ibid.*

[185] *Ibid.*, p. 11.

[186] *Ibid.*, p. 13.

[187] *Ibid.*, p. 16.

[188] *Ibid.*, p. 14.

approval of the plan or project […]"[189]. In that respect, compensatory measures must be technically feasible, in view of the best possible scientific data[190].

Furthermore, the location and timing of taking compensatory measures is important. According to the Commission, compensatory measures should be located in the same biogeographical region as the protected areas or within the same route of the migration or wintering area of the species affected by the proposed plan or project. That being said, the area selected should be as close as possible to the affected area[191]. As far as the criterion of timing is concerned, this should also be examined on a case-by-case scenario. While, in principle, they should be implemented from the time of the project's implementation, time lags are not absolutely excluded, depending on whether the effects identified arise in the short, medium or long term[192]. At any event, compensatory measures should not apply, in principle, only in the short-term but be based on a "sound legal and financial basis for long-term implementation and for their protection, monitoring and maintenance be secured in advance of impacts upon habitats and/or species occur"[193].

The analysis above indicates that compensatory measures, in the context of both Directives, have a similar meaning, i.e., measures aiming to offset the negative impact of the proposed plans or projects. While the stage of their inclusion in the EIA and AA process may differ – admittedly, their position in the framework of the Habitats Directive is that of the "last resort"[194] – their existence shows that the EU legislature accepted the risk of at least some degree of environmental impact retreating in favour of socio-economic reasons, such as the implementation of projects.

III. CONCLUSION

The mechanism introduced by the EIA Directive as well as the one provided for by articles 6(3) and (4) of the Habitats Directive dictate the necessary safeguards for the lawful permitting of projects that may affect the environment. In that regard, their function aims to reconcile seemingly opposing interests, i.e., environmental protection and social and economic development.

The preceding analysis attempted to demonstrate this very balancing exercise. As explained in part II of the present dissertation, on one hand, both Directives provide for a substantial threshold of environmental protection: firstly, the scope of their application is substantially broad. In the

[189] *Ibid.*, p. 17.

[190] *Ibid.*, p. 17.

[191] *Ibid.*, p. 18. Compensatory measures may be located, in essence, both inside and outside of the territory of the protected area so long as they serve their purpose.

[192] *Ibid.*, p. 19.

[193] *Ibid.*, p. 19-20.

[194] *Ibid.*, p. 11.

context of the EIA Directive, the term "project" is attributed a very broad definition that transcends considerations of size and scale and focuses on the crucial parameter of whether any proposed activity may affect the environment. Under the Habitats Directive, the same broad interpretation stands for plans or projects adversely affecting protected areas.

In addition, both the EIA and AA process are not simply typical procedural tools; on the contrary, they require a genuine assessment of the project, conducted at the earliest possible stage; that assessment must address both direct and indirect effects, including the proposed projects' cumulative effects in combination with other projects, regardless of their geographical proximity. What is more, any decision granting or refusing consent presupposes public consultation in order to guarantee the application of EU's primary principles governing environmental protection[195]. It is also required to be sufficiently reasoned on the basis of scientific data and relevant information. On top of that, national legislation must make it possible for any interested party to be able to challenge such decisions before courts, thus ensuring the accountability of competent authorities.

Of course, it has to be noted, that the workings of the EIA and Habitats Directives as tools for protecting the environment are supplementary; they are by no means identical. While the effects of projects on the environment under the EIA Directive are assessed, in principle, in general, the AA process under the Habitats Directive examines them in view of the conservation goals of the protected areas affected. Furthermore, the aforementioned examination of EIA projects must be based "on current knowledge", while AA projects require the use of the "best available scientific knowledge".

Authorization of projects is stricter under the Habitats Directive, for two additional reasons: firstly, because the standard of proof required for the authorization of a project to be refused is lower; mere doubts on whether the proposed project may affect a protected site suffice for its rejection. Secondly, in contrast with the EIA Directive, alternatives as well as mitigation and compensatory measures do not form part of the initial assessment of a project's impact on protected sites; such considerations are integrated only in the IROPI derogation of article 6(4), which takes effect after the initial AA report is compiled.

In that regard, it must be observed, that the very inclusion of derogations or exceptions from the protective ambit of both Directives implies that the legitimate goal of environmental protection is not assigned a non-negotiable higher value in relation to other EU policies. Indeed, not every project falls within the scope of the EIA Directive; only those which are deemed "likely to have a significant effect" on the environment. In that regard, in order to avoid unnecessary EIA reports, the provisions of the Directive allow national authorities to assess the need for an EIA based on predetermined thresholds and criteria, in view also of available "reasonable" alternatives. Similarly, not every plan is necessarily subject to the AA process under the Habitats Directive; only those capable of affecting a protected site's conservation goals.

Moreover, both Directives prescribe situations where the socioeconomic importance of a project outweighs the need for environmental protection. In the context of the EIA Directive, such

[195] *Supra* note 114.

derogations would include defense projects and civil emergencies, projects adopted through legislative acts, as well as other exceptionally important projects, such as those guaranteeing the energy supply of a country. In the context of the Habitats Directive, as clearly evidenced by the Commission's opinion under the second subparagraph of article 6(4), in the absence of alternatives, IROPI considerations may lead to the approval of projects in view of their large socioeconomic benefit despite their negative impact on protected areas.

The tug-of-war between environmental protection and social and economic development described here above in the context of the EIA and Habitats Directives does not occur in a vacuum; it, rather, takes place in the arena circumscribed by EU's primary objective. That objective is condensed in the provisions of article 3(3) TEU and is no other than "the sustainable development of Europe"[196] founded on three pillars: "economic growth and price stability", "full employment and social progress" and "high level of protection and improvement of the quality of the environment"[197].

Successfully facing contemporary challenges, such as adapting to climate-change-induced natural disasters, ensuring energy security and avoiding shortage of natural resources, requires the reconciliation of all three of those pillars[198]. This requirement is all the more true when it comes to granting consent for the implementation of new projects, whose characteristics and impact may prove decisive in tackling the ongoing climate crisis. In other words, it is imperative that the "evolutionary arms race" among these competing interests in the field of environmental permitting continues to lead to their improvement. Unlike the situation in the natural world, where the outcome of the "evolutionary arms race" between antagonistic species is often asymmetric and may ultimately favor one side[199], reconciliation of the three competing aspects of sustainability can be designed in such a way as to achieve the desirable balance.

[196] Article 3(3) TEU.

[197] Sadeleer N., *EU Environmental Law and the Internal Market*, Oxford University Press, 2014, p. 14.

[198] *Ibid.*

[199] Asymmetries in the context of evolution by natural selection are a byproduct of the inherent features of the process of evolution, i.e., the fact that it is essentially the *non-random* selection of *random* mutations. For an in-depth analysis, see, *supra* note 1, chapter 11: "Doomed Rivals", pp. 405-452.

Bibliography

Books

Dawkins R., *The Blind Watchmaker: Why the Evidence of Evolution Reveals a Universe without Design*, 4th edition, New York – London, W. W. Norton and Company, 2015

Papapetropoulos A. D., *The Environmental Impact Assessment in the European and the Greek legal order (in Greek)*, Athens – Komotini, Ant. N. Sakkoulas Publishers, 2003

Sadeleer N., *EU Environmental Law and the Internal Market*, Oxford University Press, 2014

Skouris V., The Treaty of Lisbon, Article Interpretation, Athens – Thessaloniki, Sakkoula Publishers, 2020

Legislation

International Law

Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)

Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)

EU *Primary Law*

Charter of Fundamental Rights of the European Union [2012] OJ C 326

Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01

Treaty on European Union (Consolidated Version), Treaty of Amsterdam, 2 October 1997

Treaty on European Union, Treaty of Maastricht, 7 February 1992, OJ C 191, 29.7.1992

Single European Act, 17 February 1986, 1987 O.J. (L 169) 1, 25 I.L.M. 506

Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957

EU *Secondary Law*

Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU "on the assessment of the effects of certain public and private projects on the environment" [2014] OJ L 124

Council Directive 2013/17/EU of 13 May 2013 "adapting certain directives in the field of environment, by reason of the accession of the Republic of Croatia" [2013], OJ L 158

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 [2012] OJ L 26

Council Directive 97/11/EC of 3 March 1997 "amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment" [1997], OJ L 73

Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2010], OJ L 20

Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 "on the geological storage of carbon dioxide" [2009], OJ L 140

Council Directive 2006/105/EC of 20 November 2006 "adapting Directives 73/239/EEC, 74/557/EEC and 2002/83/EC in the field of environment, by reason of the accession of Bulgaria and Romania" [2006], OJ L 363

Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 "adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty" [2003] OJ L 284

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 Council Directives 85/337/EEC and 96/61/EC" [2003], OJ L 156

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" [2001], OJ L 197

Council Directive 97/62/EC of 27 October 1997 "adapting to technical and scientific progress Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora" [1997], OJ L 305

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206

Directive 85/337/EEC "on the assessment of the effects of certain public and private projects on the environment" [1985], OJ L 175

Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [1979], OJ L 103

EU Soft Law Instruments

Commission notice on assessment of plans and projects in relation to Natura 2000 sites – Methodological guidance on Article 6(3) and (4) of the Habitats Directive 92/43/EEC, 28.9.2021, C(2021) 6913 final

Annex to the Commission notice on assessment of plans and projects in relation to Natura 2000 sites – Methodological guidance on Article 6(3) and (4) of the Habitats Directive 92/43/EEC, 28.9.2021, C(2021) 6913 final

Commission Notice, Guidance document regarding application of exemptions under the Environmental Impact Assessment Directive (Directive 2011/92/EU of the European Parliament and of the Council, as amended by Directive 2014/52/EU) – Articles 1(3), 2(4) and 2(5) (2019/C 386/05)

Commission Opinion of 19.11.2019, issued at the request of Germany pursuant to the second subparagraph of Article 6(4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora: deepening the Danube waterway between Straubing and Vilshofen; section Straubing-Deggendorf, C(2019) 8090 final

Commission Notice "*Managing Natura 2000 sites, The provisions of Article 6 of the "Habitats" Directive 92/43/EEC,* C(2018) 7621 final

Commission's Guidance on the preparation of the Environmental Impact Assessment Report (Directive 2011/92/EU as amended by 2014/52/EU), European Union, 2017

Commission Guidance on Scoping (Directive 2011/92/EU as amended by 2014/52/EU), European Union, 2017

Commission Guidance on Screening (Directive 2011/92/EU as amended by 2014/52/EU), European Union, 2017

Commission notice – Commission guidance document on streamlining environmental assessments conducted under Article 2(3) of the Environmental Impact Assessment Directive, 2016/C 273/01.

Commission Guidance document 2007/2012 on article 6(4) of the Habitats Directive 92/43/EEC, Clarification of the concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence, opinion of the Commission

Opinion of the Commission of 24.4.2003, delivered pursuant to Article 6.4§2 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of the natural habitats and of wild fauna and flora (Habitats Directive), concerning the "Request by the Netherlands for advice and exchange of information with the European Commission within the framework of the Birds and Habitats Directives ", in relation to the "Project Mainport Rotterdam" Development Plan

Opinion of the Commission of 24.4.2003 delivered upon request of Germany according to Art. 6(4) Sub Par. 2 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of the natural habitats as well as the wild animals and plants1, concerning the approval of an operational master plan ("Rahmenbetriebsplan") of the Prosper Haniel Colliery operated by Deutsche Steinkohle AG (DSK)

Commission Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC, November 2001, Office for Official Publications of the European Communities, 2002

Commission Guidance booklet, *Managing Natura 2000 sites, The provisions of Article 6 of the "Habitats" Directive 92/43/EEC*, Office for Official Publications of the European Communities, 2000

96/15/EC: Commission Opinion of 18 December 1995 on the intersection of the Peene Valley (Germany) by the planned A 20 motorway pursuant to Article 6 (4) of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, OJ L 6, 9.1.1996

ECJ Case-law

C-849/19, European Commission v Hellenic Republic, EU:C:2020:1047

C-254/19, Friends of the Irish Environment, EU:C:2020, paragraph 29; and Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen, C-411/17, EU:C:2019:622

C-535/18, IL and Others v Land Nordrhein-Westfalen, EU:C:2020:391

C-290/18, Commission v Poruguese Republic, EU:C:2019:669

C-280/18, Alain Flausch and Others v Ypourgos Perivallontos kai Energeias and Others, EU:C:2019:928

C-461/17, Brian Holohan et. al v An Bord Pleanála, EU:C:2018:883

C-441/17, Commission v Poland, EU:C:2018:255

C-411/17, Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen, EU:C:2019:622

C-293/17 & 294/17, Coöperatie Mobilisation for the Environment UA and Vereniging Leefmilieu v College van gedeputeerde staten van Limburg και College van gedeputeerde staten van Gelderland, EU:C:2018:882

C-117/17, Comune di Castelbellino, EU:C:2018:129

C-196/16 and C-197/16, Comune di Corridonia and Others, EU:C:2017:589

C-444/15, Associazione Italia Nostra Onlus v Comune di Venezia and Others, EU:C:2016:978

C-243/15, Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín, EU:C:216:838

C-386/14, Groupe Steria SCA v Ministère des Finances et des Comptes publics, EU :C :2015 :524

C-141/14, Commission v Bulgaria, EU:C:2016:8

C-137/14, Commission v Germany, EU:C:2015:683

C-531/13, Marktgemeinde Straβwalchen and Others, EU:C:2015:79

C-521/12, T.C. Briels and Others v Minister van Infrastructuur en Milieu, EU:C:2014:330

C-244/12, Salzburger Flughafen GmbH v Umweltsenat, EU:C:2013:203

C-72/12, Gemeinde Altrip and Others v Land Rheinland-Pfalz 101 EU:C:2013:712

C-420/11, Leth v Republik Österreich, Land Niederösterreich, EU:C:2013:166

C-258/11, Peter Sweetman et. al v An Bord Pleanála, EU:C:2013:220

C-123/11, A Oy, EU:C:2013:84

C-41/11, Inter-Environnement Wallonie and Terre wallonne, EU:C:2012:103

C-340/10, Commission v Cyprus, EU:C:2012:143

C-182/10, Marie-Noëlle Solvay and Others v Région wallonne, EU:C:2012:82

C-43/10, Nomarchiaki Aftodioikisi Aitoloakarnanias and Others, EU:C:2012:560

C-538/09, Commission v Belgium, EU:C:2011:349

C-435/09, Commission v Belgium, EU:C:2011:176

C-404/09, Commission v Spain, EU:C:2011:768

C-275/09, Brussels Hoofdstedelijk Gewest and Others v Vlaamse Gewest, EU:C:2011:154

C-240/09, Lesoochranárske zoskupenie, EU:C:2011:125

C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:667

C-115/09, Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen EU:C:2011:289

C-50/09, Commission v Ireland, EU:C:2011:109

C-560/08, Commission v Spain, EU:C:2011:835

C-308/08, Commission v Spain, EU:C:2010:281

C-263/08, Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd, EU:C:2009:631

C-241/08, Commission v France, EU:C:2010:114

C-226/08, Stadt Papenburg v Bundesrepublik Deutschland, EU:C:2010:10

C-255/08, Commission v Netherlands, EU:C:2009:630

C-205/08, Umweltanwalt von Kärnten, EU:C:2009:767

C-75/08, Christopher Mellor v Secretary of State for Communities and Local Government, EU:C:2009:279

C-427/07, Commission v Ireland, EU:C:2009:457,

C-142/07, Ecologistas en Acción-CODA, EU:C:2008:445

C-2/07, Abraham and Others, EU:C:2008:133

C-215/06, Commission v Ireland, EU:C:2008:380

C-66/06, Commission v. Ireland, EU:C:2008:637

C-304/05, Commission v Italy, EU:C :2007 :532

C-297/05, Commission of the European Communities v Kingdom of the Netherlands, EU:C:2007:531

C-255/05, Commission v Italy, EU:C:2007:406

C-244/05, Bund Naturschutz in Bayern eV and Others v Freistaat Bayern, EU:C:2006:579

C-231/05, Oy AA, EU:C:2007:439

C-216/05, Commission v Ireland, EU:C:2006:706

C-465/04, Commission v Ireland, EU:C:2006:199

C-418/04, Commission of the European Communities v Ireland, EU:C:2007:780

C-332/04, Commission v Spain, EU:C:2006:180

C-239/04, Commission v Portugal, EU:2006:665

C-239/04, Opinion of the Advocate General, EU:2006:255

C-151/04 & C-152/04,Criminal proceedings against Claude Nadin, Nadin-Lux SA and Jean-Pascal Durré, EU:C:2005 :775

C-446/03, Marks & Spencer plc v David Halsey, EU:C:2005:763

C-98/03, Commission v Germany, EU:C:2006:3

C-209/02, Commission v Austria, EU:C:2004:61

C-201/02, Delena Wells v Secretary of State for Transport, Local Government and the Regions EU:C:2004:12

C-127/02, Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij, EU:C:2004:482

C-236/01, Monsanto Agricoltura Italia SpA and Others v Presidenza del Consiglio dei Ministri and Others, EU:C:200:431

C-287/98,Grand Duchy of Luxemburg v Berthe Linster, Aloyse Linster and Yvonne Linster, EU:C:2000:468

C-435/97, World Wildlife Fund (WWF) and Others v Autonome Provinz Bozen and Others, EU:C:1999:418

C-392/96, Commission v. Ireland, EU:C:1999:431

C-180/96, United Kingdom v Commission EU:C:1998:192

C-341/95, Gianni Bettati v Safety Hi-Tech SrL, EU:C: 1998:353

C-284/95, Safety Hi-Tech Srl v S & T. Srl, EU:C:1998:352

C-72/95, Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland, EU:C:1996:404

C-240/83, Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU), EU:C:1985:59

C-91/79, Commission of the European Communities v Italian Republic, EU:C:1980:85

Other sources

Brundtland G.H., *Our Common Future: Report of the World Commission on Environment and Development*, Geneva, 1987, UN-Document A/42/427, available at: http://www.un-documents.net/ocf-ov.htm