

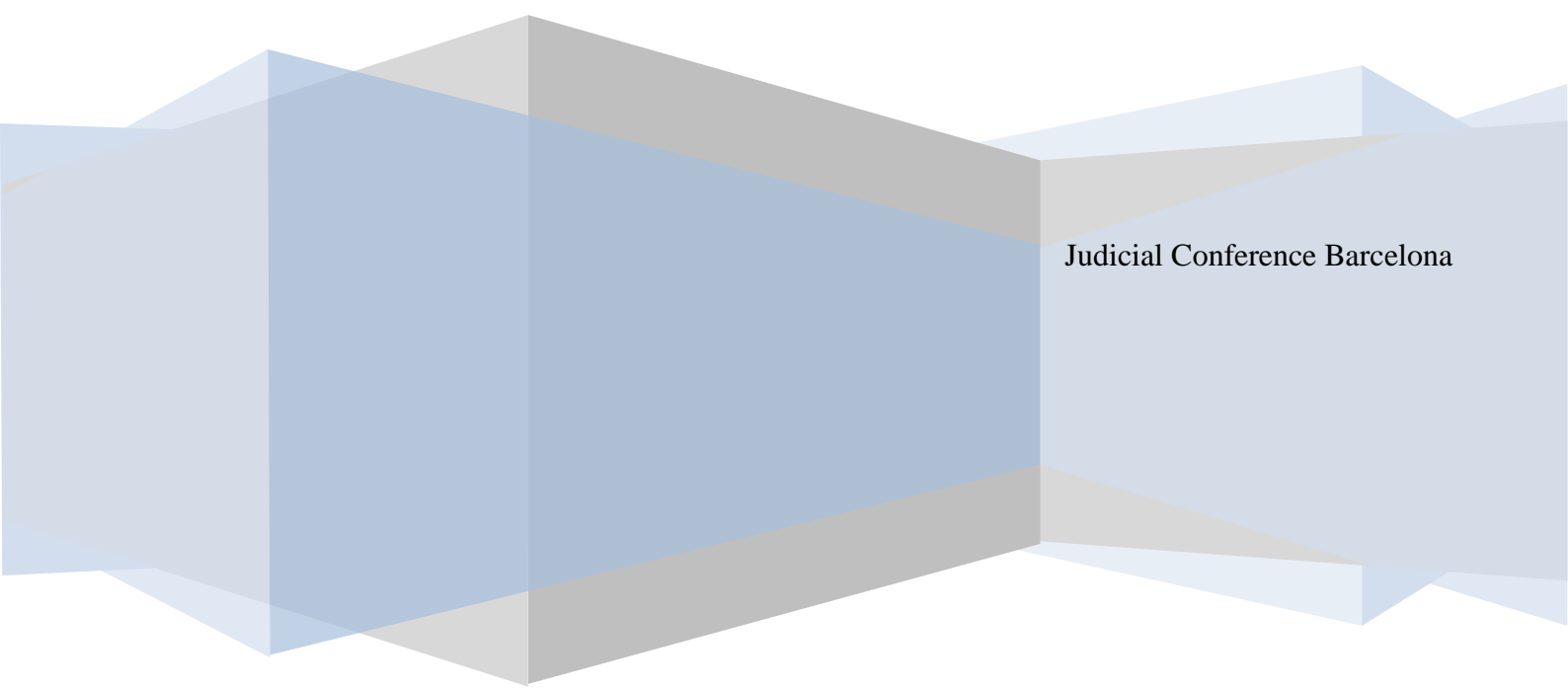
# Interaction between the EIA Directive and Articles 6.3 and 6.4 of the Habitats Directive

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The objective of this paper is to illustrate the important interactions between EIA and Articles 6.2 and 6.3 of the Habitats Directive. In the early phases of implementation of the requirements of the EIA and Habitats Directives, many practitioners assumed that an EIA of a project would also satisfy the requirements for an AA of the same project. Frequently, AAs were submitted in the chapter of an Environmental Impact Statement describing the likely significant effect of the project on fauna and flora and the cultural heritage, especially the last mentioned. This assumption has proved to be wrong as is illustrated by the decisions of the ECJ and evolving practice on the implementation of both Directives.<sup>1</sup> The Commission advises that AAs must now be clearly identifiable in an EIS or reported separately.<sup>2</sup> Many EIA projects will also be AA projects because the requirement for EIA of sub-threshold projects is triggered by likely effects on environmentally sensitive locations which include SPAs and SACs so there will often be overlaps between the requirements of both Directives. This paper addresses some of the issues which occur when implementation of these Directives is involved. It will illustrate that, although there are superficially many common features in the requirements for both Directives, there are also significant differences. The learning points are illustrated in the tables below.

<b>EIA Directive</b>	<b>Habitats Directive</b>
Requires EIA for listed projects only. <sup>3</sup>	Can apply to <i>any</i> kind of plan or project - big or small -including EIA projects <sup>4</sup>
Exemptions for defence projects, projects adopted by legislation and in exceptional cases <sup>5</sup>	Only exemption is if the plan or programme is directly connected with or necessary to the management of the site. <sup>6</sup>

<sup>1</sup> See Case c-418/04 *Commission v Ireland* at *para* 232 “Assessments carried out pursuant to Directive 85/337 or 2001/42 cannot replace the procedure provided for in Article 6(3) and (4) of the Habitats Directive.”

<sup>2</sup> The Commission Guidelines advise that although an AA may be part of an EIA, the Article 6(3) assessment must be clearly distinguishable and identified within an environmental impact statement or reported separately. See Methodological Guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/42/EEC, section 4.2.

<sup>3</sup> EIA Directive, Arts. 2.1 & 2.3 and See Case 418/04 *Commission v Ireland*, *para* 231. EIA and SEA Directives “contain provisions relating to the deliberation procedure, without binding the Member States as to the decision, and relate to only *certain* projects and plans” .....Accordingly, assessments carried out pursuant to Directive 85/337 or Directive 2001/42 cannot replace the procedure provided for in Article 6(3) and (4) of the Habitats Directive.”

Projects are defined in Art.1 of the EIA Directive as

- the execution of construction works or of other installations or schemes,
- other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

<sup>4</sup> Art.6.3. “Any plan or project..”

<sup>5</sup> EIA Directive, Arts.1.3, 1.4, 2.4.

<sup>6</sup> Article 6.3 but note that in Case C-241/08 *Commission v France*, the ECJ held that such plans and programmes to be exempted must be specifically tailored to conservation or restoration objectives for the site in question, not just generic plans and programmes.

Annex 11 screening decisions to be publicly available and reasons given for them if requested. <sup>7</sup>	No explicit obligation to publish screening decisions but they must be available to requesting third parties. <sup>8</sup> Guidance document requires publication.
Mitigation measures may/must be considered when screening for EIA subject to satisfying certain criteria. <sup>9</sup>	Methodological Guidelines say mitigation measures should not be considered. <sup>10</sup> Criteria for mitigation measures in UK and Ireland arguably somewhat stricter when screening for AA <sup>11</sup>
Applies to projects likely to have significant effects <i>on the environment as defined in the EIA Directive</i> . <sup>12</sup> Significant effects to be	Applies to plans and projects likely to have a significant effect <i>on a site in view of the site's conservation objectives</i> . <sup>13</sup> Significant

<sup>7</sup> EIA Directive, Art. 4.4. “Member States shall ensure that the determination made by the competent authorities under paragraph 2 are made available to the public.” See *Case C-7/02 Commission v Italy [2004] ECR I-5975*, the ECJ found that Italy had breached its obligations under the EIA Directive because there no evidence was provided that showed that the relevant authorities had undertaken an evaluation for the relevant project. The reasoning would also apply to screening decisions for AA especially negative screening decisions. See also *Case C-75/08 Mellor* holding that while there was no duty in the EIA Directive to give reasons for screening decisions, the competent authority must provide them on request.

<sup>8</sup> The jurisprudence on EIA suggests that reasons for screening decisions must be available to requesting third parties. See fn7. There is an obligation under Freedom of Information legislation to give reasons for decisions. The Methodological Guidelines on AA state at p.12 “if it is decided at that stage that there are no significant effects, then it would be necessary to record and report the information relied upon to draw this conclusion. “

<sup>9</sup> See McGillivray “Mitigation and Screening for Environmental Assessment” 2011 *Journal of Planning and Environmental Law* 1539-1559. There are no express EU requirements on this question. English and Irish law is uncertain. Broadly, the arguments for considering mitigation measures in screening are that the objectives of EIA, AA have been achieved if developers incorporate screening measures, that mitigation measures are integral parts of projects and that there would be legislative overburden if they were not taken into account. The argument against is that there may be a legitimate public interest in subjecting mitigation measures to public participation procedures especially when they are controversial, the prospects for success are uncertain or they are unproven. See *Bellway Urban Renewal Southern v Gillespie* [2003] EWCS Civ 400 where Laws J stated that mitigation measures can be taken into account when their “nature , availability and effectiveness are already plainly established and plainly uncontroversial.” On the other hand, see *R (on the application of Birch) v Barnsley MBC* [2010]EWCA Civ.1180 stating that the adequacy of the mitigation measures in that case ought to have been “thoroughly tested through the EIA process.”Much depends on the facts of a case but obviously the more thorough and potentially effective the mitigation measures proposed, the more likely a developer is to have them taken into account. There are arguments as to what constitutes a mitigation or compensatory measure and this question has been referred for a preliminary ruling in *Case C521/12 Briels*.

<sup>10</sup> Methodological Guidelines at p.14 :“However, it is important to recognise that the screening assessment should be carried out in the absence of any consideration of mitigation measures that form part of a project or plan and are designed to avoid or reduce the impact of a project or plan on a Natura 2000 site.”

<sup>11</sup> It is arguable that mitigation measures in AA should probably be such that there is no scientific doubt that they will work.

<sup>12</sup> EIA Directive, Art.1.1.

assessed (on all the environment) theoretically very extensive	effects relatively narrowly focused. Only effects on <i>site's conservation objectives</i> must be considered for significant effect. <sup>14</sup>
Applies to cumulative effects of various <i>projects</i> .	Applies to cumulative effects of <i>plans or projects</i> either alone or in combination with other <i>plans or projects</i>
Information required is having regard, <i>inter alia</i> , to “current knowledge and methods of assessment” in so far as it is reasonable to ask developer to provide. <sup>15</sup>	Information for assessment to be based on best scientific knowledge. <sup>16</sup>
The quality of the environment which will likely be affected may possibly be unknown when the project is proposed. <sup>17</sup>	The aspects of the site to be protected will be ascertainable from the conservation objectives specific to the site which reflect the “ecological requirements of the natural habitat types and species in Annex 1 and 11.” <sup>18</sup>
Public consultation mandatory <sup>19</sup>	Public consultation “if appropriate” <sup>20</sup>

<sup>13</sup> Only effects which affect the site in view of its conservation objectives must be considered. See *Commission v Ireland*, Case C-258/11, *para 29* “The first, envisaged in the provision’s first sentence, requires the Member States to carry out an appropriate assessment of the implications for a *protected site* of a plan or project when there is a likelihood that the plan or project will have a significant effect *on that site* (see, to this effect, *Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 41 and 43). However, this is arguably not as narrow a requirement as it might seem. It is arguable that activities which could have significant effects on aspects of the environment connected with the site (say poisoning a protected bird species/disturbing breeding of priority species by noise) but not on the *site* as such should be assessed. Article 6.3 states that the AA must address the implications of the plan or project for the site *in view of the site’s conservation objectives*. If the conservation objectives include the protection of species that may be disturbed or damaged by activities which do not impact on the physical site itself, it seems obvious that implications on the protected species must also be addressed. See *Waddenzee*, *para 46*: “As is clear from the first sentence of Article 6(3) of the Habitats Directive in conjunction with the 10th recital in its preamble, the significant nature of the effect on a site of a plan or project *...is linked to the site’s conservation objectives*.” *Para 47* “So, where such a plan or project has an effect on that site but is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned.” See also *Commission v Ireland Case C-258/11 (Sweetman)* to the effect that preserving a site at a favourable conservation status entails “the lasting preservation of the constitutive characteristics of the site concerned.”

<sup>14</sup> *Commission v Ireland Case*, 418/04, *para 30*;

<sup>15</sup> EIA Directive, Art.5.1.b. “(b) the Member States consider that a developer *may reasonably be required* to compile this information having regard *inter alia* to current knowledge and methods of assessment.”

<sup>16</sup> *Waddenzee*, Case 127/02, *para 54*. “Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of *the best scientific knowledge in the field*.” The CFI in *Pfizer* stated that, the expert scientific evidence should be “be the result of a proper and impartial examination, meeting the requirements of excellence, independence and transparency. The most reliable scientific evidence available and the most recent results of international research must be used (C-236/01, *para 113* [novel food])

<sup>17</sup> This is because the environment is very broadly defined in Art.4 of the EIA Directive and there may be no baseline data or an absence of information on the existing quality and features which are likely to be impacted.

<sup>18</sup> Art.6.1; Art.6. 3. See Case C-241/08 *Commission v France* where the ECJ held that management plans for sites must be tailored to the particular site and not just generic objectives

<sup>19</sup> EIA Directive Arts.4.4, 5.2, 6, 7, 8, 9, 11. .

No explicit requirement for <i>written assessment</i> of EIS but ECJ implies it <sup>21</sup>	English and Irish courts say reasoned decision on conclusions of the AA required. <sup>22</sup>
Theoretically projects <i>can</i> be authorised even if there are better alternatives. <sup>23</sup>	Theoretically plans and projects adversely affecting site integrity cannot be approved. <sup>24</sup>
Environmental features must be <i>likely</i> to be affected to justify requiring EIA <sup>25</sup>	If there is a <i>mere probability</i> that the plan or project will have effects, <sup>26</sup> or if it cannot be excluded that there will be significant effects, <sup>27</sup> AA required.
In <i>theory</i> project <i>can</i> be authorised even if there will be significant effects on the <i>environment</i> . <sup>28</sup>	In <i>theory</i> authorisation <i>cannot</i> be granted if the plan or project will adversely affect the integrity of the <i>site</i> . <sup>29</sup>

<sup>20</sup> Art.6.3. In most situations it will be “appropriate” to consult the public. It may not if it is not in the interests of conservation to reveal the location of certain sites.

<sup>21</sup> See Case C-50/09 *Commission v. Ireland* at *para* 40:

“However, that obligation to take into consideration, at the conclusion of the decision-making process, information gathered by the competent environmental authority must not be confused with the assessment obligation laid down in Article 3 of Directive 85/337. Indeed, that assessment, which must be carried out before the decision-making process (Case C-508/03 *Commission v United Kingdom* [2006] ECR I-3969, paragraph 103), involves an examination of the substance of the information gathered as well as a consideration of the expediency of supplementing it, if appropriate, with additional data. That competent environmental authority must thus undertake both an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the project concerned on the factors set out in the first three indents of Article 3 and the interaction between those factors.”

<sup>22</sup> *Akester v Department of the Environment, Food and Rural Affairs* [2010] EWHC 232.

<sup>23</sup> EIA, Art. 5.3 Developer to provide “—an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects.” See Case 418/04 *Commission v Ireland*, *para* 231. EIA and SEA Directives “contain provisions relating to the deliberation procedure, *without binding the Member States as to the decision*, and relate to only certain projects and plans” .....Accordingly, assessments carried out pursuant to Directive 85/337 or Directive 2001/42 cannot replace the procedure provided for in Article 6(3) and (4) of the Habitats Directive.” However, competent authorities may sometimes require that a better alternative than that chosen by the project promoter is adopted. Many devices have been used to limit the developer’s freedom to choose an alternative. For example, the competent authority may decide that alternatives not *adequately* considered, that the method chosen will result in contravention of an environmental standard or binding legal requirement or authorisation may be refused .for reasons which imply that alternative solutions would be more likely to result in a successful application for the authorisation. In N2 Slane Bypass Road Scheme – Application for Approval of Proposed Road Development at <http://www.pleanala.ie/casenum/HA0026.htm>, the Planning Appeals Board refused permission for a bypass road because alternative routes had not been “adequately explored.”

<sup>24</sup> Article 6.3

<sup>25</sup> EIA Directive, Art.5.1.a

<sup>26</sup> *Waddzee*, *para* 41.

<sup>27</sup> *Waddenzee*, *para* 45

<sup>28</sup> Case 418/04 *Commission v Ireland*, *para* 231 “EIA and SEA Directives “contain provisions relating to the deliberation procedure, *without binding the Member States as to the decision*, and relate to only *certain* projects and plans” .....Accordingly, assessments carried out pursuant to Directive 85/337 or Directive 2001/42 cannot replace the procedure provided for in Article 6(3) and (4) of the Habitats Directive”.

<sup>29</sup> Article 6.3. The exception is in Art. 6.4

No obligation on Member State to take compensatory measures if significant adverse effects on the environment. <sup>30</sup>	Obligation on Member State “to take all compensatory measures to ensure that the overall coherence of <i>Natura 2000</i> is protected” <sup>31</sup>
Obligation to consult or inform Commission of reasons for exemption from EIA under Art.2.3	No obligation to justify negative screenings in Habitats Directive to Commission.
Procedures for EIS and EIA prescribed in detail	No prescribed procedures for AA
Requirement to involve other Member States significantly affected by project <sup>32</sup>	No requirement <i>in Directive</i> to involve other MS.
Obligation to publish screening decision <sup>33</sup> , final decision and reasons and considerations for it. <sup>34</sup>	No express requirement to publish decisions but advised. <sup>35</sup>
Obligation to implement Aarhus requirements on access to justice <sup>36</sup>	No express Aarhus requirements in Directive but required by jurisprudence. <sup>37</sup>
No need to get Commission’s consent for permitting significant adverse effects on environment	Obligation to get EU Commission’s “opinion” on the reasons of OPI justifying plan or project affecting priority site or species. <sup>38</sup>

<sup>30</sup> As a matter of practice, developers of large EIA projects may be required to provide community gains which sometimes consist of compensating for impaired environmental amenities.

<sup>31</sup> Article 6.4.

<sup>32</sup> EIA Directive, Arts.7.9.

<sup>33</sup> EIA Directive, Art.4.4.

<sup>34</sup> EIA Directive, Art.9.

<sup>35</sup> See **EU Guidelines on Screening** at <http://ec.europa.eu/environment/eia/eia-guidelines/g-screening-full-text.pdf> : **Recording the Screening Decision** When a formal screening decision is made, whether to require or not to require EIA, the competent authority must keep a record of the decision and the reasons for it, and make this available to the public.

<sup>36</sup> EIA Directive, 10A

<sup>37</sup> See Case C-240/09 *Lesoochránárske Zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* (‘LZ’) [2011] ECR I-0000 para 50 where the court considers that national courts must interpret environmental laws in a way which to the fullest extent possible gives effect to article 9(3) of the Aarhus Convention.

<sup>38</sup> Art.6.4

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