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**HOW TO HANDLE COURT PROCEEDINGS INVOKING NON-COMPLIANCE
WITH EU NATURE PROTECTION LAW
FOCUS ON SITE PROTECTION**

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Interaction between Article 6 of the Habitats Directive and other assessment procedures under EU Environmental law



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Please feel free to interrupt



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In contrast to Art. 6 on its own there is very limited jurisprudence on its interaction with other assessment procedures. Nevertheless, there are some provisions that address this issue and, moreover, the general logic of these procedures and of Art. 6 allow us to specify how to organise the interaction.

Overview

Art. 6 of the Habitats Directive and

- the Environmental Impact Assessment (EIA - Directive 2011/92/EU as amended by Directive 2014/52/EU)
- the Strategic Environmental Assessment (SEA - Directive 2001/42/EC)
- Water Framework Directive (WFD - Directive 2000/60/EC)
- Agriculture



Art. 6 and the EIA

- Old Art. 2(2) of Dir. 2011/92 : EIA may be integrated into other procedures for consent (implicitly including consent under the Habitats Directive)
- Amended by Dir. 2014/52, Art. 2(3): where the obligation arises simultaneously from both Directives, MS shall, where appropriate, ensure coordinated and/or joint procedures [in relation to other Dirs. this is optional]
 - Coordination means that procedures are still conducted separately, but under single supervision
 - Joint procedures effect full integration



Coordination between the EIA and other permit procedures has been explicitly allowed since the amendments to the original EIA Directive by Directive 97/11. However, the most recent amendments create an obligation to “streamline” the EIA with the AA under the Habitats Directive while merely allowing streamlining with regard to other Directives. However, as the obligation only arises “where appropriate” MS still maintain some discretion.

The Commission has issued guidance on this topic (OJ 2016 C 273, 1).

Art. 6 and the EIA

Is the EIA sufficient to comply with Art. 6(3)?

- No: All requirements of both Directives need to be respected. In particular, the substantial requirements on plans and projects resulting from Art. 6(3) and (4) of the Habitats Directive are not part of the EIA Directive (COM/Ireland, EU:C:2007:780, para 231).
- But: Duplication is unnecessary and contradictions between the assessments are harmful
- Appropriate integration of both assessments allows to exploit synergies and avoid contradictions



Initially, there was a temptation to rely on existing EIAs to claim compliance with Art. 6(3) and (4) of the Habitats Directive. After all, both instruments require an assessment of impacts on nature and biodiversity. However, an EIA alone does not guarantee compliance. The main deficit would be the substantial requirements imposed by Art. 6(3) and (4) of the Habitats Directive. However, there may be additional points where an EIA could be insufficient.

Nevertheless, the Directives do not require double work and, moreover, any contradictions between the assessments could provide grounds to attack a permit.

Therefore, both assessments should and in some cases must be integrated while making sure that the specific requirements of both Directives are respected.

Obligation to conduct an EIA

An EIA must be conducted for all projects of Annex I (Art. 4(1)), eg.

- Thermal power stations and other combustion installations with a heat output of 300 megawatts or more (No. 2(a)).
- Construction of motorways and express roads (No. 7(b)).
- Waste disposal installations for the incineration, chemical treatment as defined in Annex I [of the Waste Directive] under heading D9, or landfill of hazardous waste, as defined in point 2 of Art. 3 of that Directive (No. 9).
- Groundwater abstraction ... schemes where the annual volume of water abstracted ... is equivalent to or exceeds 10 million cubic metres (No. 11).



The EIA only is necessary for certain types of projects listed in Annex I and II of the EIA Directive. The bigger projects of Annex I must always be assessed.

Obligation to conduct an EIA

Annex II lists smaller project types, eg

- Industrial installations for the production of electricity, steam and hot water (projects not included in Annex I) (No. 3(a)),
- Construction of roads ... (projects not included in Annex I)(No. 10(e)),
- Installations for the disposal of waste (projects not included in Annex I) (No. 11(b)),
- Groundwater abstraction and artificial groundwater recharge schemes not included in Annex I (No. 10(l)), or
- Installations of long-distance aqueducts (No. 10(j)).



Examples – Annex II categories are often, but not always, the smaller versions of Annex I categories

Obligation to conduct an EIA

An EIA must be conducted for projects of Annex II, if

- MS determine that the project shall be made subject to an EIA by a case-by-case examination or by thresholds or criteria, taking into account the selection criteria set out in Annex III (Art. 4(2) & (3)).
- CJEU: MS discretion is limited by the objective of Art. 2(1) that projects likely to have significant effects on the environment are subject to an EIA (Kraaijeveld, EU:C:1996:404, para 50, Salzburger Flughafen, EU:C:2013:203, para 29).
- Such effects are likely if an AA is necessary (cf. Annex III, no 2(c)(v) & Lesoochránárske zoskupenie VLK, EU:C:2016:838, para 47).



For the smaller projects of Annex II the situation is more complicated. It is true that Article 4(2) of the EIA Directive allows the Member States a measure of discretion when it comes to case-by-case examinations or to the setting of thresholds or criteria for determining whether such a project must be made subject to an environmental impact assessment. However, that discretion is limited by the objective, laid down in Article 2(1), to the effect that projects likely, by virtue inter alia of their nature, size and location, to have significant effects on the environment must be made subject to an assessment with regard to their effects.

As regards the likelihood of significant effects Art. 6(3) of the Habitats Directive and Art. 4(2) of the EIA should be applied in parallel: If there is a sufficient probability of significant effects on a protected site to require an AA there should also be sufficient probability of such effects for the purposes of the EIA directive.

The EIA Directive does not explicitly make this point but requires in Annex III, no. 2(c)(v) that the environmental sensitivity of geographical areas likely to be affected by projects must be considered, with particular regard to ... Natura 2000 areas designated by Member States pursuant to Directive 92/43/EEC and Directive 2009/147/EC.

The case mentioned in this regard does not directly deal with the EIA Directive, but with Art. 6(1)(b) of the Aarhus Convention, a provision that is partly implemented by Art. 4(2) & (3) and Annex II & III of the EIA Directive.

Obligation to conduct an EIA

The EIA Directive does not apply to projects that do not come under any of the types listed in Annex I and II (Aiello, EU:C:2008:398, para 34).

Conversely, there is no limitation to the plans and projects subject to the AA under Art. 6(3) (cf. COM/Germany, EU:C:2006:3, paras 39 et seq.).

Moreover, it's not excluded that Art. 6(1)(b) and (6) of the Aarhus Convention will require some general environmental assessment for projects requiring an AA (cf. Lesoochránárske zoskupenie VLK, EU:C:2016:838, para 47).



An important distinction between the EIA and the AA is the limitation of the former to the projects listed in Annex I and II. No comparable limitation exists for the latter.

As a consequence of the LZ case it may be that the limitations of the EIA will be less relevant for cases where an AA is necessary. While this case only concerned access to justice, Art. 6(6) of the Aarhus Convention lays down minimum requirements for the information on environmental impacts that need to be made available to the public, implying that this information may need to be generated first.

Content of the EIA

Art. 3(1)(b) of the EIA Directive: The [EIA] shall identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project on ... biodiversity, with particular attention to species and habitats protected under [the Habitats Directive and the Birds Directive]

Art. 5 and Annex IV of the EIA Directive further specify the content of the Environmental Impact Assessment Report, including, in particular cumulative effects.

However, objectives of the AA must be met in case of integration in the EIA.

Practical aspect: Scoping is optional, but can help (Art. 5(2)).



Obviously the EIA is much broader than the AA. And it is unlikely that all types of environmental impacts must or even can be assessed to the standards of the AA. Therefore, separation of EIA and AA would reduce the risk that the specific requirements of the AA are not respected.

However, as regards impacts on Natura 2000 sites the EIA Directive is sufficiently open to allow for the integration of an AA into the EIA. Moreover, it would be contradictory to “identify, describe and assess” impacts on Natura 2000 differently in the two assessments.

Scoping means that the scope of the assessment is defined in advance. In some form this will always be necessary to define the objectives of the assessments. However, Art. 5(2) provides for a scoping opinion by the competent authorities. Any such opinion will need to be focused on the requirements of Art. 6(3) and (4) of the Habitats Directive if impacts on Natura 2000 are part of the EIA.

Public Participation

Art. 6 of the EIA Directive

- Public Authorities (para 1)
- Public Concerned (para 2)
- Access to information collected
- Early and effective opportunities to participate
- Reasonable time-frames, at least 30 days of consultation of the environmental report!

Art. 7 of EIA Directive: Transboundary EIA

Art. 6(3) of the Habitats Directive: „the competent national authorities shall agree ... if appropriate, after having obtained the opinion of the general public”



The requirements for public participation are laid down in Art. 6 and 7 of the EIA Directive. In the context of the AA public participation only is foreseen “if appropriate”. I would argue that for a project that is subject to an EIA the requirement of public participation also is appropriate with regard to the AA. This means that the studies that constitute the AA will in principle, subject to justified exceptions, need to be available to the public for comment.

Decision Making

The EIA Directive sets no substantial requirements (COM/Ireland, EU:C:2007:780, para 231, & Leth, EU:C:2013:166, para 46) but demands that the EIA is duly taken into account (Art. 8). Therefore the outcome of the EIA must at least be analysed with regard to all requirements of EU environmental law

- Art. 6(3)&(4) of the Habitats Directive provides for a very strict standard (absence of reasonable doubt)
- Other EU standards may also be relevant (eg. WFD, Industrial Emissions, Ambient Air Quality)

Laid down in a reasoned conclusion by the competent authority (Art. 1(g)(iv), 8a EIA).



While the EIA Directive does not lay down substantial requirements for the projects concerned, the outcome of the EIA is relevant for the assessment whether the project complies with environmental law, in particular with EU environmental requirements. In this regard the requirements of Art. 6(3) and (4) of the Habitats Directive obviously are central if the project is subject to an AA. However, other provisions of EU environmental law and of MS law can also become relevant.

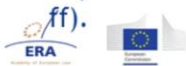
The outcome of the EIA is of particular importance where the decision on the permit is discretionary because it must be taken into account in the exercise of discretion.

The final development consent (or its refusal) must include a reasoned conclusion on all these aspects, relying on the information resulting from the EIA.

Access to Courts

Art. 11 EIA Directive (Art. 9(2) Aarhus Convention) - specific regime for decisions subject to EIA.

- Scope: substantive or procedural legality (at least EU environmental law, in particular the Habitats Directive (Trianel, EU:C:2011:289, para 58, also C-470/16, pend.)
- Admissibility: ‘a sufficient interest’ or ‘the impairment of a right’ >> MS discretion, but ‘wide access to justice’, and interest of recognised ENV NGOs shall be deemed sufficient or they shall be deemed to enjoy the rights in question (Trianel, EU:C:2011:289, para 45)
- Beyond EIA see Lesoochránárske zoskupenie VLK, EU:C:2016:838, para 54



The EIA Directive is one of the few instruments of EU environmental law that provides for specific rules on access to Courts (The others are the Directive on Industrial Emissions (IED - Dir 2010/75) and the Directive on Environmental Liability (Directive 2004/35). Both the EIA Directive and IED transpose Art. 9(2) of the Aarhus Convention. The Directive on Environmental Liability largely follows this model.

The scope of judicial review is not limited to the requirements of the EIA Directive, but in principle exhaustively covers the substantive and procedural legality, including non-environmental and MS law. However, up to now the CJEU has only confirmed that infringements of EU environmental law can be relied on (Cf. the Opinion of Advocate General Bobek in North East Pylon Pressure Campaign and Sheehy (C-470/16, EU:C:2017:781) who avoids a clear position the scope of review with regard to MS law when analysing protection from prohibitive costs).

As regards the admissibility of such actions MS enjoy some discretion with regard to actions by individuals. In particular, it may be possible to prevent individuals from relying on the Habitats Directive as this Directive does not aim to protect them. However, environmental NGOs, recognised under Art. 1(2) of the EIA Directive, must be able to rely on provisions of environmental law that aim to protect the public interest.

It should be remembered that in the LZ case the CJEU has extended this approach to

cases under the Habitats Directive where the EIA Directive doesn't apply, but nevertheless there may be an obligation to ensure public participation under Art. 6(1)(b) of the Aarhus Convention.

Art. 6 and the SEA

- Art. 4(2) and 11(2) SEA : SEA may be integrated into existing procedures or be incorporated in a specific (new) procedure >> integration with or separation from the AA possible
- As with the EIA an SEA alone is not sufficient to implement the AA because the substantive requirements are missing
- Again: duplication and contradictions to be avoided, reference to other reports explicitly allowed (cf. Art. 4(3) and 5(2) & (3))



The SEA Directive has anticipated the “streamlining” of the EIA Directive, and therefore the SEA and the AA can be integrated. As with the EIA the SEA alone will not guarantee compliance with the AA, but duplication of and contradictions between assessments are to be avoided. With regard to different levels of plans or programmes this is explicitly recognised in Art. 4(3) and 5(2) & (3); in addition Art. 5(3) expressly allows to refer to existing information on environmental effects resulting from other legislation.

Obligation to conduct an SEA

Art. 3(2): An SEA must be conducted for all all plans and programmes

- (a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects under the EIA, or
- (b) which, in view of the likely effect on sites, have been determined to require an AA under the Habitats Directive.



The SEA is triggered by links to future EIAs or AAs.

Obligation to conduct an SEA

Plans and programmes (PP)

- Art. 2(a) PP = PP adopted by administration or legislator and required (=whose adoption is regulated, Inter-Environnement Bruxelles, EU:C:2012:159, para 24 ff) by legislative, regulatory or administrative provisions
- relates to any measure which establishes ... a *significant body of criteria and detailed rules* for ... projects likely to have significant effects on the environment (D'Oultremont, EU:C:2016:816, para 49) -
- only relevant for Art. 3(2)(a) or also to (b) = PP subject to AA?



A key issue relevant to the obligation to conduct an SEA is the notion of PP. The „definition“ of Art. 2(2) clarifies two criteria, namely the adoption by a public body, including by way of legislation, and the a requirement of the PP by some provision. Incidentally, the CJEU has decided that PP whose adoption is regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them, must be regarded as ‘required’ .

However, the CJEU has recently defined the notion of PP by requiring that a significant body of criteria and detailed rules for projects subject to a later EIA is established. At the same time the CJEU has recognised that circumvention of SEA by dividing planning needs to be prevented. We will see how this definition will be applied in future. Pending case C-671/16 – Inter-Environment Bruxelles might provide some insights.

The D’Oultremont case was based on Art. 3(2)(a), that is PP setting up a framework for projects subject to the EIA. While Art. 3(2)(b) only applies to PP and therefore the definition appears relevant in this context as well it would be surprising if a planning or programmatic measure was subject to an AA, but excluded from SEA because the criteria or rules established were considered insignificant.

Obligation to conduct an SEA

Art. 3(2)(b) - PP which, in view of the likely effect on sites, have been determined to require an AA under the Habitats Directive

- Is it sufficient to find that a particular plan is connected in some way with an SCI? No, it must be examined whether it can be excluded, on the basis of objective information, that that plan or project will have a significant effect on the site (Syllogos Ellinon Poleodomon kai chorotakton, EU:C:2012:378).



There has not been much jurisprudence on Art. 3(2)(b) yet, but the CJEU had the opportunity to clarify that under this provision an SEA only is necessary if an AA is needed, that is, if it cannot be excluded, on the basis of objective information, that the PP will have a significant effect on the site.

Obligation to conduct an SEA

Art. 3(3) - Exception: PP of Art. 3(2) which determine the use of small areas at local level and minor modifications to PP of Art. 3(2) shall require an environmental assessment only where the Member States determine that they are likely to have significant environmental effects.

- Small areas at local level (Associazione Italia Nostra Onlus, EU:C:2016:978)?
 - PP is prepared and/or adopted by a local authority, as opposed to a regional or national authority
 - Area is small in size relative to that territorial jurisdiction
 - But likelihood of significant effects must be examined (paras 50 ff)!



Art. 3(3) provides for two exceptions to the obligation to conduct an SEA, namely for small areas at local level and for minor modifications to existing PP. The exception for small areas has been examined by the CJEU. It clarified that it only applies to measures by local authorities and that the size of the area must be appreciated relative to the territory of the local authority.

As regard the obligation to examine whether nevertheless significant effects are likely, in this context it would appear that the need to conduct an AA (impossibility to exclude significant effects on a site) on its own would not be sufficient to assume this likelihood. Otherwise this exception would lose all practical effect. However, the CJEU has not yet had an opportunity to address this issue.

Obligation to conduct an SEA

Art. 3(1), (4) & (5) and Annex II - Either through case-by-case examination or by specifying types of PP or by combining both approaches, taking into account relevant criteria set out in Annex II, MS shall determine whether other PP are which set the framework for future development consent of projects, are likely to have significant environmental effects and conduct an SEA if this is the case).

- Discretion of MS is limited by objective to guarantee SEA of PP likely to have significant effects on the environment (Valčiukienė, EU:C:2011:608, para 46)



In contrast to the EIA Directive the SEA Directive in principle is not limited to certain types of PP. An SEA should always be necessary if the PP in question could have significant effects on the environment.

Content of the SEA

Art. 5 (1) SEA Directive: ..., an environmental report shall be prepared in which the likely significant effects on the environment of implementing the PP, and reasonable alternatives taking into account the objectives and the geographical scope of the PP, are identified, described and evaluated.

Specific information listed in Annex I, in particular under (d) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental importance, such as SCIs and SPAs and under (f) likely significant effects on the environment, including inter alia biodiversity.



Like the EIA the SEA is much broader than the AA. However, impacts on protected sites should also be covered. In this regard, according to Art. 5(3) it would be sufficient to refer to an AA, though it would still be necessary to include the outcome of the AA in the non-technical summary required by Annex II(j).

Public Participation

Art. 6 of the SEA Directive

- Public Authorities
- Public Concerned
- Access to information collected
- Early and effective opportunities to participate
- Reasonable time-frames, at least 30 days of consultation of the environmental report!

Art. 7 of SEA Directive: Transboundary SEA

Art. 6(3) of the Habitats Directive: „the competent national authorities shall agree ... if appropriate, after having obtained the opinion of the general public”



The requirements for public participation are laid down in Art. 6 and 7 of the SEA Directive. In the context of the AA public participation only is foreseen “if appropriate”. I would argue that for a project that is subject to an SEA the requirement of public participation also is appropriate with regard to the AA. This means that the studies that constitute the AA will need to be available to the public for comment.

Decision Making

The SEA Directive sets no substantial requirements (COM/Ireland, EU:C:2007:780, para 231) but demands that the SEA is taken into account (Art. 8). Therefore the outcome of the SEA must at least be analysed with regard to all requirements of EU environmental law

- Art. 6(3)&(4) of the Habitats Directive provides for a very strict standard (absence of reasonable doubt)
- Other EU standards may also be relevant (eg. WFD, Industrial Emissions, Ambient Air Quality)

Art. 9(1)(b) requires a statement summarising how environmental considerations have been integrated into the PP and how the SEA has been taken into account.



While the SEA Directive does not lay down substantial requirements for the PP concerned, the outcome of the SEA is relevant for the assessment whether the PP complies with environmental law, in particular with EU environmental requirements. In this regard the requirements of Art. 6(3) and (4) of the Habitats Directive obviously are central if the project is subject to an AA. However, other provisions of EU environmental law and of MS law can also become relevant. Moreover, as far as the decision on PP is discretionary in nature the information received should inform the exercise of discretion.

The adopted PP must be accompanied by a statement summarising the integration of environmental considerations and the taking into account of the SEA.

Monitoring

Art. 10 SEA Directive requires a monitoring of PP in order, inter alia, to identify at an early stage unforeseen adverse effects, and to be able to undertake appropriate remedial action.

- Monitoring only is implicit in Art. 6 of the Habitats Dir
- Therefore, monitoring of PP is of particular relevance
- Consequences of monitoring with regard to protected sites must be drawn under Art. 6(2) of the Habitats Dir



One element of the SEA Directive that is not present in the EIA Directive and only implicit in Art. 6 of the Habitats Directive is the obligation to monitor the effects of PP. This can help to identify and remedy unforeseen effects. Therefore it is an important complement to the substantial obligations, resulting in particular from Art. 6(2) of the Habitats Directive.

Access to Courts

- The SEA Directive does not explicitly provide for access to Courts.
- The specific approach of *Lesoochránárske zoskupenie VLK*, EU:C:2016:838, probably cannot be directly transposed, because PP are not subject to Art. 6 of the Aarhus Convention, but to Art. 7.
- However, the general principles of the invocation of EU environmental law could enable recognised NGOs to rely on infringements of the SEA Directive.



In contrast to the EIA Directive the SEA Directive does not explicitly address Access to Courts. The employment of Art. 6 and 9(2) of the Aarhus convention by the LZ case cannot be transposed directly because the Convention has a specific article on PP (Art. 7) that is not referred to by Art. 9(2). However, the general principles of the invocation of EU environmental law could allow reliance on infringements of directly applicable provisions of the SEA Directive.

Lesoochránárske zoskupenie VLK, EU:C:2016:838, para 44): “It would be incompatible with the binding effect attributed to a directive by Article 288 TFEU to exclude, in principle, the possibility that the obligations which it imposes may be relied on by those concerned. The effectiveness of Directive 92/43 and its aim, which is recalled in the previous paragraph of the present judgment, require that individuals be able to rely on it in legal proceedings, and that the national courts be able to take that directive into consideration as an element of EU law in order, inter alia, to review whether a national authority which has granted an authorisation relating to a plan or project has complied with its obligations under Article 6(3) of the directive, recalled in paragraph 42 of the present judgment, and has thus kept within the limits of the discretion granted to the competent national authorities by that provision (...).”

This consideration should also apply to the SEA Directive.

Art. 6 and the WFD

The WFD is

- very ambitious,
 - prohibiting deterioration
 - setting water quality objectives
- very comprehensive,
 - covering all inland water bodies
 - including groundwater + some marine waters
- but not well-explored by the CJEU!



The WFD aims to protect waterbodies from deterioration while at the same time requiring that a minimum standard is achieved. Moreover, it applies to all inland water bodies, including groundwater and some marine waters. Parallel legislation exists for other marine waters.

However, EU jurisprudence is still limited. Therefore many questions are not yet resolved and caution is advised.

Art. 6 and the WFD

Core mechanisms

- Art. 4(1)(a)(i) + (b)(i): prohibiting deterioration
- Art. 4(1)(a)(ii) + (b)(ii): water quality objectives
- Art. 4(7) : Exemptions can be justified
- All Integrated in a comprehensive River Basin Management Plan (RBMP) and a Programme of Measures, to be reviewed every six years



These are the most important mechanisms of the WFD with regard to the Habitats Directive.

Art. 6 and the WFD

The RBMP - Art. 13 to 15 WFD

- Covers the complete river basin, international basins require coordination between MS eventually also with 3rd States, e.g. Danube
- First RBMP were due 2009, review every 6 years
- Includes „programme of measures“ (Art. 11)
- Art. 14, 15: Public information and participation + participation of other MS



The RBMP is the principal instrument to implement the WFD. As the name indicates a RBMP should cover a complete river basin. Many of these touch several MS or even third states, eg. the Danube or the Rhine. Therefore, coordination is required. Ideally this would result in international plans, but if this is not possible the national RBMPs must at least be coordinated.

At the moment the first generation of RBMPs has been reviewed and the second generation of RBMPs applies. In the year 2021 the next generation should come into force.

The core of the RBMP is the programme of measures that aims to realise the objectives of Art. 4(1).

Art. 14 specifies the requirements of public information and participation.

Integration of Art. 6 in the WFD

- Art. 6 and Annex IV of the WFD require, for each river basin district, the establishment of a register of protected areas, including sites designated “for the conservation of habitats and species directly depending on water”.
 - Species living in water (eg fish) or having an aquatic life stage (eg. amphibians) or using habitats that depending on water
 - Habitats consisting of water (eg lakes), depending on regular inundations (eg alluvial forest 91E0), high level of groundwater or humidity



The register foreseen in Art. 6 aims to ensure that the requirements relating to protected areas under other EU legislation are known and can be taken into account in the implementation of the WFD. As regards Natura 2000 sites, the inclusion depends on whether protected habitats or species within a site directly depend on water. Relying on standard data forms it shouldn't be too difficult to identify the relevant sites. If in doubt I would probably assume water dependence.

Integration of Art. 6 in the WFD

- Art. 8 of the WFD requires a monitoring of water status, including the specifications for protected areas (cf. Art. 11 and 17 of the Habitats Directive)
- Programme of Measures must include measures required by the Habitats Directive (Annex VI(x))
- Art. 4(1)(c) WFD: For protected areas MS shall achieve compliance with any standards and objectives at the latest by 2015, unless otherwise specified for a protected area >> Deadline for favourable conservation status of Natura 2000? Conversely prohibition of deterioration has been binding since site designation!



Art. 8 WFD provides for monitoring obligations that also focus on the specific requirements of Natura 2000 sites identified under Art. 6. This monitoring integrates monitoring requirements that apply to Natura 2000 sites.

The programme of measures that is at the core of the RBMP must include the measures that are required by the Habitats Directive.

Art. 4(1)(c) WFD requires that in addition to the quality standards of the WFD also the standards and objectives set for protected areas by the relevant EU legislation should, in principle, be attained by 2015. As regards Natura 2000, the objective of protected sites is favourable conservation status though no explicit deadline is provided (see Art. 2(2), 3(1) and 4(4) of the Habitats Directive). Read in combination with Art. 4(1)(c) WFD, does this mean, that in principle for all Natura 2000 sites that have been registered under Art. 6 WFD favourable conservation status should be attained by 2015? Or should this status at least be attained for the habitats and species directly depending on water?

There is no jurisprudence yet on this issue, but Commission Guidance (Links between the Water Framework Directive and Nature Directives,

<http://ec.europa.eu/environment/nature/natura2000/management/docs/FAQ-WFD%20final.pdf>, p. 16), claims that this obligation exists and that derogations need to be justified under the WFD.

Conversely, the objective of preventing deterioration of sites has been binding since Art. 6(2) of the Habitats Directive became applicable to the site in question. The WFD does not delay application of this objective.

Art. 6 and the WFD

As regards site protection under Art. 6 the WFD

- Promises significant synergies, e. g.
 - prohibition of deterioration prevents impacts +
 - achieving water quality objectives can improve sites,
- but both instruments apply in parallel and can contradict each other!



While implementation of the WFD can significantly contribute to the objectives of the Habitats Directive, attention must be paid to appropriately address contradictions in the application of both instruments.

Art. 6 and the WFD

E. g.: Waterway continuity, improved by removal of barriers such as dams or weirs or by construction of fish passes will in most cases help Natura 2000 sites on the river, eg. for salmon or sturgeon.



One objective of the WFD is river continuity. New barriers are to be avoided, existing ones should be removed or mitigated by creating fish passes. River continuity is essential for migrating fish species that breed in freshwater, but spend much of their lifecycle in the sea. Therefore many of these species are endangered and listed in annexes II and IV of the Habitats Directive.

The Moorburg case, EU:C:2017:301, was about such a fish pass that was intended to mitigate losses of protected fish species. According to Germany monitoring data demonstrated that the number migrating fish reaching the protected sites upriver significantly increased after the fish pass was built.

Art. 6 and the WFD

But creating river continuity can destroy populations of Annex II crustaceans, eg European fresh-water crayfish (*Austropotamobius pallipes*) or Stone crayfish (*Austropotamobius torrentium*), threatened by invasive American crayfish. They only survive in isolated water bodies.

>> need for an AA!



Austropotamobius torrentium, Photo: Christoph Leeb, CC Attribution-Share Alike 3.0 Unported



This example underlines that implementation of the WFD can come into conflict with the conservation objectives of the Habitats Directive. Unless such conflicts can be excluded on the basis of objective information, measures to implement the WFD require an AA under Art. 6(3) of the Habitats Directive and possibly a derogation under Art. 6(4).

Art. 6 and the WFD

Moreover, creating new barriers may support objectives of Art. 6, such as the creation of breeding places for protected amphibians. Such measures within sites probably require an assessment and justification under the WFD.



A practical solution to maintain continuity and create the habitat would probably be the creation of a fish pass.



Self explanatory.

Art. 6 and the WFD



If conflicts between the objectives of the Directives cannot be avoided, eg fish pass, the derogations under Art. 6(4) of the Habitats Dir and Art. 4(7) WFD both require striking a

balance between conflicting interests, eg protecting and improving amphibian populations and waterway continuity. I would expect EU law to allow a wide margin of discretion of the competent authorities (Cf. For the WFD COM/AT (Schwarze Sulm), EU:C:2016:322, para. 70).



In many cases it should be possible to avoid conflicts between the two Directives by carefully choosing the modalities of contentious measures, that is by assessing whether there are alternatives to the conflict and in particular mitigation measures. However, if a conflict cannot be avoided it may be necessary derogate from the requirements of one Directive to implement the other. Both derogations require a balance to be struck, but Art. 6(4) additionally requires compensation measures.

The necessary balancing exercise by nature is rather complex and technical. Commission guidance indicates a preference for the objectives of the WFD over the objectives of the Habitats Directive because the former are more comprehensive in scope and aim at establishing a more natural ecosystem (Links between the Water Framework Directive and Nature Directives, <http://ec.europa.eu/environment/nature/natura2000/management/docs/FAQ-WFD%20final.pdf>, p. 12 ff). However, the conservation of very rare species or habitats, eg the crayfish species mentioned, can certainly justify to forgo the perfect implementation of some objectives of the WFD.

If EU bodies were asked to strike such a balance EU courts therefore would grant them a wide margin of discretion. I would submit that EU law does not require stricter scrutiny of MS measures.

Agriculture

'Mandatory "greening" component of direct payments' - Art. 43(10) of Regulation (EU) No 1307/2013 - payments for areas in Natura 2000 require compliance with objectives of sites >> condition for payments for areas in question

Art. 45 of Regulation (EU) No 1307/2013 - permanent grasslands in Natura 2000: no ploughing as of 2015, 2012 ratio to be maintained (-5%)

'Cross Compliance' - Art. 91 ff + Annex II of Regulation (EU) No 1306/2013 refers to Art. 6(1) and (2) of the Habitats Directive >> administrative sanctions (not limited to affected areas)



EU agricultural law does not explicitly provide for assessments of agricultural practices and only very few agricultural projects will come under Art. 6(3), but payments to farmers increasingly depend on compliance with the Habitats Directive.

Art. 43(10) Regulation 1307/2013 requires that the use of areas within Natura 2000 complies with the objectives of the Habitats or Birds Directive, that is with the specific rules set up for the site in question, but also with the more general prohibitions of Art. 6(2).

Art 45 of Regulation 1307/2013 sets up specific requirements to maintain grasslands. There seems to be some discretion of MS to define such grasslands, but apparently it is limited by reference to earlier declarations of land as permanent pasture. Grasslands can be protected habitats, but they are also important as habitats of protected species.

Cross-compliance provides for administrative sanctions for breaches of obligations on agriculture. Among other obligations, it applies to infringements of Art. 6(1) and (2) of the Habitats Directive as well as to infringements of the ban on ploughing permanent grassland. The administrative penalty is a reduction of or the exclusion from certain EU payments. In case of negligence it is limited to 5%, 15% in case of re-occurrence. Sanctions of intentional infringements are from 20% to total exclusion for the year in question.

At first glance, the relationship between Art. 43(10) of Regulation (EU) No 1307/2013 and cross-compliance appears unclear: If compliance with Art. 6(1) and (2) of the Habitats Directive is a condition for payments how can in addition a reduction or exclusion be imposed? However, conditions for payments will only affect payments for

areas where obligations are infringed while the sanctions are calculated on the basis of all the payments for the holding for the year in question.

Art. 6(2) and Agriculture

Remember: 'no formal assessment required, but the existence of a probability or risk that that an operation might cause deterioration or significant disturbances establishes the infringement',

>> refutation of probability or risk is necessary to comply with Art. 6(2)

>> refutation requires removal of reasonable doubt as to the harmlessness of the impact in question

>> agricultural practices can create probability or risk

>> What happens in practice?



In view of the requirements of EU agricultural law a conscientious application of Art. 6(2) is necessary. If we apply the jurisprudence it is not even necessary to demonstrate harm to the site in question, but a probability or risk is sufficient. Once this is established either the agricultural practice in question needs to be adapted or the probability or risk need to be refuted, possibly by a study. And refutation requires the removal of any reasonable doubt as to the harmlessness of the practice in question. However, it is unlikely that Art. 6(2) is applied so strictly in practice.

Art. 6(1) and Agriculture

In practice specific provisions on agriculture in (and in the vicinity of) Natura 2000 sites adopted under Art. 6(1) will be much more relevant.

As far as active conservation by agriculture is concerned MS probably enjoy some discretion.

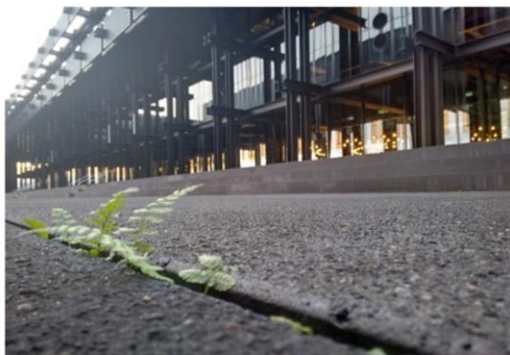
Perhaps stricter standards can be applied to passive conservation, that is the prohibition of certain impacts.

Again: What happens in practice? German ordinances on site protection in the past often excluded agriculture!



Self-explanatory

Thank you for your attention!



Case law: <http://curia.europa.eu/juris/recherche.jsf?language=en>
Guidance: http://ec.europa.eu/environment/nature/index_en.htm

