TOOLKIT

how to use EU and international environmental law

to protect rivers from hydropower development

by Małgorzata Smolak

Wetlands International · EURONATUR · RiverWatch · blue heart · geota · WWF · MAVA

COLOPHON

AUTHOR

Małgorzata Smolak
Environmental and Energy Lawyer
Independent expert

ACKNOWLEDGEMENTS

Maja Pravuljac
Wildlife, Habitats and Hydro-energy
Lawyer/Juriste, ClientEarth

ADDITIONAL EDITING

Amelie Huber
EuroNatur
Henk Zingstra
Wetlands International-European Association
Marjel Neefjes
Communicatiebureau de Lynx

PHOTOGRAPHY

p.1: Sava River, Odransko Polje, Croatia, © GoranŠafarek
p.4: Vjosa River, Albania, © GregorŠubic
p.7: Lake Bohinj, Slovenia, © Matic Oblak
p.9: Sana River, Medna HPP, © Matic Oblak
p.17: Protest Tirana, Albania, 20/05/2016 © Andrew Burr
p.30: Bojana Buna Delta, Montengro/Albania, © GregorŠubic
p.42: Sava Bohinjka River, Slovenia, © Jan Pirnat
p.44: Neretva River, Bosnia and Herzegovina, © Jan Pirnat
p.45: Vjosa River, Albania, © Gernot Kunz
p.48: Neretva River, Bosnia and Herzegovina, © Theresa Schiller
p.50: Birds tracks, Neretva River, Bosnia and Herzegovina, © Theresa Schiller
p.63: Soča River, Slovenia, © Mitja Legat

VERSION
April 2021

On https://legaltoolkit4rivers.eu you will find a frequently updated version of the toolkit.

This *Toolkit on the use of EU and international environmental law to protect rivers from hydropower development* has received funding from the LIFE Programme of the European Union.

INDEX

1.

INTRODUCTION

The construction of hydropower projects worldwide is rapidly increasing, with significant environmental and social impacts. In the European context, especially small hydropower projects are widely promoted for providing cheap, green energy at relatively low investment costs. This happens despite growing evidence about the disastrous ecological damage these plants cause to rivers and streams and despite a clear overestimation of their energy contribution.

Moreover, existing legal procedures and environmental impact assessment provisions have regularly been found to be sidestepped or not properly implemented to make way for the rapid construction of hydropower stations. For years, activists and civil society organisations in Europe have been arguing against the further damming of rivers, especially of the remaining undisturbed, free-flowing rivers such as those found in South-Eastern Europe. International and EU environmental legal provisions have emerged as valuable tools to challenge the construction of new hydropower projects.

The aim of this toolkit is to provide activists and civil society organisations an easy, accessible overview of EU and international legislation that can be used when considering a legal procedure against the planning or construction of new hydropower plants in ecologically sensitive areas.

This toolkit is meant to support those without a legal background to understand the possibilities for legal action. The toolkit provides an overview of most relevant (EU and international) environmental legislation that is, or can be applicable for obtaining a permit for the construction of hydropower plants. The toolkit presents a step by step process for each Directive and convention mentioned to be followed when a permit for a hydropower plant is requested.

This step by step procedure can also be used by those who want to make an assessment about whether all legal steps have been followed when a permit has been issued and whether there are flaws in the procedures applied. It goes without saying that when based on a first screening a legal case seems worthwhile pursuing, legal expertise is required to make a final assessment about the possible successes of filing a lawsuit. Examples of legal cases including legal arguments will be presented to elucidate the possibilities for starting a procedure.

The toolkit starts with providing information about a number of EU environment Directives including:

- **The Environmental Impact Assessment Directive** (EIA Directive). Basically, any project, likely to have significant effects on the environment needs to be preceded by an Environmental Impact Assessment, which needs to show what the impact of the given project is on the environment. The EIA Directive offers private persons and organisations ample opportunities to become involved and express their opinions and views. Although opinions and comments have to be "taken into account" by the competent authority, they are not binding. However, eligible persons and organisations have right to challenge procedural and substantive (content) elements of decision-making.

- **The Strategic Environmental Assessment Directive** (SEA Directive). The procedure is rather similar to the EIA but does not relate to projects but to plans and programmes adopted by parliaments and councils at local, regional and national level. These plans and programmes, however, pave the way for concrete investments and projects and are for that reason very relevant. Unlike the EIA Directive, the text of the SEA Directive does not provide for a review procedure before a court to challenge the substantive or procedural legality of plans and programmes.

- **Birds and Habitats Directives**. The aim of these Directives is to protect species and habitats in the EU. Based on the Habitats Directive and its Annexes each Member State compiles a list of habitat types and species for which it will designate protected areas, so-called Natura 2000 sites. Any plan or project inside or outside of a Natura 2000 site, which will have a significant negative impact on the conservation status of those species and habitats is not allowed (with an exception for some specific situations). If there is a likelihood that a plan or project has a negative impact, an Appropriate Assessment has to be carried out, and in case the project impacts the conservation status of the species and habitats of the site, the competent authority has to refuse the permit unless certain conditions are met. Individuals have a right to challenge before national courts plans or projects likely to have a significant effect on Natura 2000 sites.

- **The Water Framework Directive** (WFD). It aims at bringing all water bodies in the European Union into good ecological status and preventing further deterioration of any status. Or, in case the water body is already heavily modified, good ecological potential. However, for hydropower plants there is a way to issue permits despite this overall objective, through article 4(7) of the Directive. According to Article 4(7), exemptions can be approved by the authorities for new modifications and sustainable human development activities, which result in the deterioration of the status of the water body or which prevent the achievement of good ecological status or potential. The text in the related chapter indicates what can be done to check whether the right procedures for issuing a permit have been followed and what opportunities exist to challenge the decision by a competent authority.

- **The Environmental Liability Directive** (ELD). The ELD imposes liability on an economic operator for preventing and remediating an imminent threat of, or actual, environmental damage. The operator can be held accountable for the environmental harm they have caused, based on so called "polluter pays" principle.

The toolkit will also provide information about the possibility to lodge a complaint about a breach of EU law by authorities in an EU Member State. EU Member States are obliged to follow EU values, including the rule of law[1], and adhere to the acquis communautaire.[2] According to the EU treaties, the Commission may take legal action – an infringement procedure – against an EU country, which fails to implement EU law.

1 The rule of law is one of the EU's fundamental values. It is the idea that both the EU itself and all EU countries are governed by a body of law (legal codes and processes) adopted by established procedures, rather than discretionary or case-by-case decisions. (https://eur-lex.europa.eu/summary/glossary/rule_of_law.html)

2 The EU's 'acquis' is the body of common rights and obligations that are binding for all EU Member States. It constantly evolves and comprises: the content, principles and political objectives of the Treaties; legislation adopted in application of the treaties and the case law of the Court of Justice of the EU; declarations and resolutions adopted by the EU; measures relating to the common foreign and security policy; measures relating to justice and home affairs; international agreements concluded by the EU, as well as those concluded by EU countries between themselves in fields relevant to the EU's activities. (https://eur-lex.europa.eu/summary/glossary/acquis.html)

Relevant for the construction of hydropower dams in the EU's neighbouring countries is the Energy Community Treaty. The key objective of the Energy Community is to extend the EU internal energy market rules and principles to countries outside of the EU (e.g. South-East Europe, the Black Sea region), on the basis of a legally binding framework. The parties to the Treaty committed themselves to implement the relevant EU law, to develop an adequate regulatory framework and to liberalise their energy markets in line with the acquis under the Treaty.

Last but not least, the toolkit will present information about three international conventions, whose application goes beyond the borders of the European Union. These are:

- **the Aarhus Convention**, which stands on three "pillars": access to information on environment, public participation in environmentally relevant decisions and access to justice;

- **the Espoo Convention and the Kyiv (SEA) Protocol**, the Espoo Convention obliges the Parties to assess the environmental impact of certain activities at an early stage of planning, and to notify and consult each other on all major projects under consideration, which are likely to have a significant adverse environmental impact across national boundaries; the Kyiv Protocol requires its Parties to evaluate the environmental consequences of their official draft plans and programmes;

- **the Bern Convention**, covering most of the natural heritage of the European continent and extending to some states of Africa, which aims at protecting wild flora and fauna, their natural habitats and endangered migratory species

There is obviously a big difference between EU Member States and non-EU countries in the legislation that is applicable and thus in the procedures that have to be followed when building a hydropower plant. For EU Member States the EIA

Directive, the Birds and Habitats Directives and the Water Framework Directive can be powerful tools to challenge the issuing of permits. Although the Energy Community Treaty is meant to extend EU legislation related to energy beyond EU countries, the acquis on environment is limited to the EIA Directive, the Article 4(2) of Birds Directive, the SEA Directive and the Environmental Liability Directive. It does not cover the Habitats Directive, the rest of the Birds Directive, nor the Water Framework Directive.

Finally, the toolkit only presents the legal framework and the complaint mechanisms that can be used directly by private persons and non-governmental organisations at the EU and international level.

Annex I presents a checklist on EU environmental law concerning hydropower plants that can be used to check whether the right procedures have been followed.

Guidance for the reader

Although we have tried to make the text accessible to the layman, it is unavoidable to use legal phrases. And in any case it requires time and perseverance to assess whether the right procedures have been followed for issuing a permit for a hydropower dam in a certain situation. Apart from assessing whether the right procedures have been followed also content wise (the "substance"), the permit may have been issued unjustified for instance because of not using the latest information or simply avoiding available information. Thus, next to legal knowledge the screening of the legality of permits will require technical and scientific knowledge.

Note that for EU countries all EU Directives have to be transposed into national legislation and thus national procedures should be similar one to another. Only in areas not covered by the EU Directive national procedures may differ per country.

Starting with assessing whether the **Environmental Impact Assessment** has been carried out comprehensively and in accordance with national and EU legislation will serve to be useful as a first step.

When a planned hydropower or dam has impacts across the border either downstream or upstream, the **EIA Directive** and the **Espoo Convention** require that neighbouring and other affected countries become involved in the procedure and should be invited to express their opinion. This possibility for involvement in the EIA also applies to environmental NGOs in the affected country.

Next, the **Habitats Directive** and the **EU Water Framework Directive** are important pieces of legislation that come into the picture when a hydropower plant is being planned. For both Directives, separate procedures have to be followed before permits can be issued. In addition, mind that the **Habitats and Birds Directives** are not only relevant when a hydropower plant is proposed in an area that is protected under one of the two Directives. Also, damage done to the species and habitats from outside the borders of a protected area (Natura 2000 site) needs to be taken into account. For the **Habitats and Birds Directives**, the procedure laid down in Articles 6(3) and 6(4) need to be followed and for the **EU Water Framework Directive** Article 4 is the most important.

The **Infringement Mechanism** of the European Commission is meant to ensure proper implementation and enforcement of EU Directives, i.e. the *acquis communautaire*. The Commission identifies possible infringements of EU Directives on the basis of its own investigations or following complaints from citizens, businesses or other stakeholders.

The European Commission can only take up the complaint if it is about a breach of Union law by authorities in an EU country (not by a private individual or body).

The **Energy Community** is relevant for non-EU Member States in South-East Europe, the Black Sea region and beyond. It is meant to extend the EU internal energy market rules and principles to non-EU countries on the basis of a legally binding framework. The parties committed themselves to implement the relevant EU law (acquis communautaire), to develop an adequate regulatory framework and to liberalise their energy markets in line with the acquis under the Treaty. The Energy Community is especially meant to create a level playing field for energy producers and prevent unfair competition.

In a situation where damage has been caused to the environment by an already functioning hydropower plant, the **Environmental Liability Directive** comes into play.

The **Aarhus Convention** establishes a number of rights of the public (individuals and NGOs) with regard to the environment. The Convention is based on three pillars: Access to environmental information, public participation in environmental decision-making and access to justice.

2.

EU environmental law related to hydropower development

The EU has put in place clear and ambitious policies with respect to protecting the natural environment, backed by environmental legislation. It is important to note that the six Directives presented in this chapter have been (or should have been) transposed into national legislation in EU Member States. Besides looking at the text of the EU Directives, it is therefore important to also assess the applicable national legislation, as national governments have a certain level of freedom to deviate from the EU Directives, as long as their main objectives are not violated.

Although these six Directives provide a basis for the protection of the environment and aim to prevent any deterioration of the current situation, they provide for several derogations and are sometimes not properly implemented or enforced. For example, it should not be taken for granted that when an Environmental Impact Assessment (EIA) is available or when the Appropriate Assessment (AA) in accordance with the Habitats Directive is carried out, that this has been done in a manner that meets the required standards.

Often the EIA or the AA is drawn up by the developer who has an interest in the approval of the project. It is up to the competent authority (the body designated by Member State as responsible for the implementation of the Directive) to assess whether the EIA or AA meets the requirements. Yet, this assessment is not always thoroughly done. In-depth screening of the procedure and content by environmental NGOs can pay off and can lead to successful court cases, putting initiatives to build new hydropower plants on hold or amending plans to the benefit of the environment.

The toolkit provides information about the following six EU Directives.
The full text of each Directive can be found when clicking on the footnote:

- **Environmental Impact Assessment Directive** (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 as amended by Directive 2014/52/EU)[3];
- **Strategic Environmental Impact Assessment Directive** (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)[4];
- **Habitats Directive** (Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora)[5];
- **Birds Directive** (Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds)[6];
- **Water Framework Directive** (2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy)[7];
- **Environmental Liability Directive (ELD)** (Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, as amended by Directive 2006/21/EC, Directive 2009/31/EC and Directive 2013/30/EU).[8]

3. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02011L0092-20140515
4. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32001L0042
5. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:01992L0043-20130701
6. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02009L0147-20190626
7. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02000L0060-20141120
8. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02004L0035-20190626

2.1 The Environmental Impact Assessment Directive

Before any project or investment likely to have significant effects on the environment can start, an Environmental Impact Assessment (EIA) has to be carried out in order to identify, describe and assess the direct and indirect significant effects on the environment. No clear definition of 'significance' is provided by the EIA Directive, and it has to be assessed in light of the project's specific circumstances.

All projects listed in Annex I of the EIA Directive are considered as having significant effects on the environment and require an EIA (e.g. dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres.)

For projects listed in Annex II (e.g. installations for hydroelectric energy production), the national authorities have to decide whether an EIA is needed. This is done by the "screening procedure", which determines the significance of effects of projects on the basis of thresholds/criteria or a case by case examination. However, the national authorities must take into account the criteria laid down in Annex III.

In the following we will clarify when an EIA is mandatory, what procedure has to be followed and when there are opportunities to become involved in the procedure. EIA's are meant to clearly assess and explain the possible impact on the environment to support decision making about the issuing of permits. The EIA also helps to re-design a project to limit or mitigate environmental damage.

When the outcome of the EIA shows that there is significant environmental impact, this does not mean that the hydropower project (HPP) cannot be built. It is up to the competent authority to assess whether all procedural steps for drawing up the EIA have been followed. It is also up to the competent authority to decide whether a permit will be issued for the construction of the HPP after the EIA procedure has been completed.

Before the competent authority concludes on issuing a permit, the draft EIA has to be open for the public to comment and present their views. Once a permit is issued it include information on environmental conditions; a description of features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment; and, where appropriate, monitoring measures.

The EIA may be integrated into existing procedures for project development consent (e.g. construction permit), or, failing this, into other procedures established to comply with the aims of the EIA Directive.

According to the EIA Directive, a coordinated or joint procedure should be undertaken if an assessment of a project is required under both the EIA Directive and the Nature Directives (Habitats and Bird Directives).

The screening procedure

The process of determining whether an environmental impact assessment is required for a project listed in Annex II (e.g. installations for hydroelectric energy production) is called screening. Member States may conduct screening through: a) a case-by-case examination; b) thresholds or criteria set by the Member State; or a combination of the two approaches.

Where a case-by-case examination is carried out or thresholds and/or criteria are set to determine whether the projects listed in Annex II should be subject to an EIA, the relevant selection criteria set out in Annex III shall be taken into consideration. It is required, however, that all the relevant selection criteria listed in Annex III be taken into account.[9] Accordingly, a Member State, which has applied case-by-case examination or established thresholds and/or criteria taking only some of these criteria (i.e. size of project) into consideration, exceeds the limits of discretion granted under the EIA Directive.[10]

9 See for example C-66/06, Commission v Ireland; C-255/08, Commission v Netherlands; C-435/09, Commission v Belgium.

10 See C-66/06, Commission v Ireland, paragraph 64

Annex III

CRITERIA TO DETERMINE WHETHER THE PROJECTS LISTED IN Annex II SHOULD BE SUBJECT TO AN ENVIRONMENTAL IMPACT ASSESSMENT

1. Characteristics of projects

The characteristics of projects must be considered, with particular regard to:

(a) the size and design of the whole project;
(b) cumulation with other existing and/or approved projects;
(c) the use of natural resources, in particular land, soil, water and biodiversity;
(d) the production of waste;
(e) pollution and nuisances;
(f) the risk of major accidents and/or disasters which are relevant to the project concerned, including those caused by climate change, in accordance with scientific knowledge;
(g) the risks to human health (for example due to water contamination or air pollution).

2. Location of projects

The environmental sensitivity of geographical areas likely to be affected by projects must be considered, with particular regard to:

(a) the existing and approved land use;
(b) the relative abundance, availability, quality and regenerative capacity of natural resources (including soil, land, water and biodiversity) in the area and its underground;
(c) the absorption capacity of the natural environment, paying particular attention to the following areas:
(i) wetlands, riparian areas, river mouths;
(ii) coastal zones and the marine environment;
(iii) mountain and forest areas;
(iv) nature reserves and parks;
(v) areas classified or protected under national legislation; Natura 2000 areas designated by Member States pursuant to Directive 92/43/EEC and Directive 2009/147/EC;
(vi) areas in which there has already been a failure to meet the environmental quality standards, laid down in Union legislation and relevant to the project, or in which it is considered that there is such a failure;
(vii) densely populated areas;
(viii) landscapes and sites of historical, cultural or archaeological significance.

3. Type and characteristics of the potential impact

The likely significant effects of projects on the environment must be considered in relation to criteria set out in points 1 and 2 of this Annex, with regard to the impact of the project on the factors specified in Article 3(1), taking into account:

(a) the magnitude and spatial extent of the impact (for example geographical area and size of the population likely to be affected);
(b) the nature of the impact;
(c) the transboundary nature of the impact;
(d) the intensity and complexity of the impact;
(e) the probability of the impact;
(f) the expected onset, duration, frequency and reversibility of the impact;
(g) the cumulation of the impact with the impact of other existing and/or approved projects;
(h) the possibility of effectively reducing the impact.

For each HPP not subject to an EIA, a decision of the relevant competent authority must contain or be accompanied by all the information that makes it possible to check that it is based on adequate screening, carried out in accordance with the requirements of the EIA Directive.[11] The determination must be such that it can enable interested parties to decide whether or not to appeal against said determination, taking into account any factors, which might subsequently be brought to their attention.[12] This implies that interested parties can bring in new information, which was not available or not used during the screening.

The EIA report

When the screening stage ascertains that the project can be expected to have significant effects on the environment, an EIA is necessary. In the first step of the EIA procedure, the developer must prepare and submit an environmental impact assessment report.

According to Article 3, the environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case, the significant, direct and indirect effects of a project on the following parameters:

- population and human health;
- biodiversity, with particular attention to species and habitats protected under the Habitats and Birds Directives;
- land, soil, water, air and climate;
- material assets, cultural heritage and the landscape;
- the interaction between the above factors.

The assessment of effects shall include the expected effects deriving from the vulnerability of the project to risks of major accidents or disasters relevant to the project concerned.
Article 5 of the EIA Directive sets out what must be included in the EIA report, and how to ensure that it is both complete and of sufficiently high quality. The EIA report should be prepared by competent experts and provide all required information, including:

- Project description;
- Baseline scenario;
- Environmental factors (including impacts on climate);
- Assessment of effects on the environment (including cumulative effects);
- Assessment of alternatives (e.g. its locations, technologies, different scales or designs of development, different methods of construction, configuration of hydropower plants at this location, or other ways of fulfilling the objectives of the project);
- Mitigation and compensation measures;
- Monitoring measures;
- Non-technical summary.

The Report should match the scope and level of detail requested by the competent authority in the scoping decision, where one exists.

11 See C-87/02, Commission v Italy, paragraph 49.
12 See C-75/08, Mellor, paragraph 64.

ARTICLE 5(1)

Where an environmental impact assessment is required, the developer shall prepare and submit an environmental impact assessment report. The information to be provided by the developer shall include at least:

(a) a description of the project comprising information on the site, design, size and other relevant features of the project;
(b) a description of the likely significant effects of the project on the environment;
(c) a description of the features of the project and/or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment;
(d) a description of the reasonable alternatives studied by the developer, which are relevant to the project and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the project on the environment;
(e) a non-technical summary of the information referred to in points (a) to (d); and
(f) any additional information specified in Annex IV relevant to the specific characteristics of a particular project or type of project and to the environmental features likely to be affected.

[...] the environmental impact assessment report [...] include the information that may reasonably be required for reaching a reasoned conclusion on the significant effects of the project on the environment, taking into account current knowledge and methods of assessment. The developer shall, with a view to avoiding duplication of assessments, take into account the available results of other relevant assessments under Union or national legislation, in preparing the environmental impact assessment report.

ARTICLE 5(3)

In order to ensure the completeness and quality of the environmental impact assessment report:

(a) the developer shall ensure that the environmental impact assessment report is prepared by competent experts;
(b) the competent authority shall ensure that it has, or has access as necessary to, sufficient expertise to examine the environmental impact assessment report; and
(c) where necessary, the competent authority shall seek supplementary information from the developer, in accordance with Annex IV, which is directly relevant to reaching the reasoned conclusion on the project's significant effects on the environment.

Consultations and decision-making

Once the developer has prepared the EIA report, it has to be scrutinised by the public and various concerned authorities. Consultations on different information should take place with:

- public authorities likely to be concerned;
- the public concerned;
- relevant parties in other affected Member States (i.e. if a project is likely to cause significant environmental effects in another Member State, or if another Member State so requests, then transboundary consultations must be carried out).

In order to ensure the effective participation of the public concerned in the decision-making procedures, the public shall be informed electronically and by public notices or by other appropriate means. The public concerned shall be informed early in the environmental decision-making procedures and, at the latest, as soon as information can reasonably be provided of the following matters:

- the request for development consent;
- the fact that the project is subject to an environmental impact assessment procedure;
- details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;
- the nature of possible decisions or, where there is one, the draft decision;
- an indication of the availability of the information gathered during the preparation of the EIA report;
- an indication of the times and places at which, and the means by which, the relevant information will be made available;
- details of the arrangements for public participation.

The public and the public concerned must have access to any information gathered during the preparation of the EIA report, the reactions of the competent authority at the time the information is made available, and any other relevant information, which may arise later. The public concerned must be given early and effective opportunities to participate, and be able to provide their comments and opinions. An explicit timeframe is provided by the Directive whereby a minimum of thirty days is required for public consultation.

In order to decide on issuing the permit , the competent authority must take the results of consultations duly into account, i.e. the competent authority must examine the information provided in the EIA report, as well as the results of the consultations and, where appropriate, must request any supplementary information.

Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public, inter alia:

- a description of the project, together with any available information on its possible transboundary impact;
- information on the nature of the decision which may be taken.

In other words: a Member State should start the transboundary procedure in two cases: 1) when it is aware of a transboundary impact or 2) when it is not aware but another country, likely to be significantly affected, requests such a procedure.

The Member States shall also make the relevant information available within a reasonable time, to the authorities and the public concerned in the territory of the Member State likely to be significantly affected.

The Member State shall ensure that the authorities and the public concerned in the affected country are given an opportunity, before development consent for the project is granted, to forward within a reasonable time their opinion on the information supplied to the competent authority in the Member State in whose territory the project is intended to be carried out.

FLOW CHART **of the different stages of the EIA**[13]

Screening
(as appropriate)

The competent authority makes a decision about whether an EIA is required.
At the end of this stage, a screening decision must be issued and made public.

Scoping
(as appropriate)

The directive provides that developers may request a scoping opinion from the competent authority which identifies the content and the extent of the assessment and specifies the information to be included in the EIA Report.

EIA Report

The developer, or the expert(s) on his behalf, carries out the assessment.
The outputs of the assessment are presented in the EIA Report which contains:

- information regarding the project,
- the baseline scenario,
- the likely significant effect of the project,
- the proposed alternatives,
- the features and measures to mitigate adverse significant effects,
- a non-technical summary and any additional information specified in Annex IV of the EIA Directive.

Information & consultation

The competent authority makes the EIA Report available to authorities with environmental responsibilities, local and regional authorities with environmental responsibilities, local and regional authorities and to other interested organisations and the public for review. They are given the opportunity to comment on the project and its environmental effects.

Decision making & development consent

The competent authority examines the EIA Report including the comments received during consultation and issues a reasoned conclusion on whether the projec entails significant effects on the environment. this must be incorporated into the final development consent decision.

Information on development consent

The public is informed about the development consent decision.

Monitoring
(as appropriate)

During construction and operation phase of the project the developer must monitor the significant adverse effects on the environment identified as well a measures taken to mitigate them.

13 Environmental Impact Assessment of Projects Guidance on the preparation of the Environmental Impact Assessment Report: http://ec.europa.eu/environment/eia/pdf/EIA_guidance_EIA_report_final.pdf

Rights of the public concerned

Organisations or individuals affected or likely to be affected or having an interest in the EIA procedure should be given the right to express their comments and opinions on the EIA before a decision on the project is made.

A summary of the results of the consultations and the information gathered, and how those results have been incorporated or otherwise addressed, shall be made available as well. Organisations and individuals with a direct interest in the case have the right to challenge the procedure or the content of the EIA before a court of law or another independent body indicated by national law. Member States shall ensure that practical information is made available to the public regarding access to administrative and judicial review procedures.

Step-by-step examination and actions

Individuals and organisations who wish to assess whether an EIA has been conducted in accordance with applicable legislation are advised to follow the steps described below:

1. Check and if necessary request the screening decision about whether an EIA is required for the HPP in question. The screening decision must be issued and made public.
2. Check if the screening decision was made based on all relevant criteria listed in Annex III of the EIA Directive. If not challenge the decision.
3. If the screening decision requires an EIA to be carried out, check and if necessary request the EIA report.
4. Check if the EIA report is prepared by competent experts and if it contains all required information, including: information on the project, the baseline scenario, a description of reasonable alternative options, a description of any likely significant effects of the project on the environment resulting from the cumulation of effects with other existing and/or approved projects, the features and measures to mitigate negative impacts, a non-technical summary.
5. Check, preferably with a relevant expert, whether the HPP would have a significant effect on the environment.
6. Take part in public consultations.
7. Check whether a) the public was electronically and by public notices informed about the EIA procedure; b) relevant information was accessible electronically; c) the time-frame for pubic consultations on the EIA report was at least 30 days; d) the content and main reasons of the final EIA decision were made available to the public.
8. Check and if necessary request the content and main reasons of the final EIA decision.
9. Appeal against any illegal decisions (for failure to follow the legal procedures or not using the right information), acts or failure to act of the competent authority before a court or another independent and impartial public body in your Member State.
10. File an infringement complaint to the European Commission.

CASE LAW EXAMPLE

Case C-244/12, Salzburger Flughafen GmbH vs. Umweltsenat[14] [15]

Judgement of the Court of Justice about setting a threshold. In this specific case, the Court of Justice was asked to give its opinion about exempting in advance an entire class of projects from an environmental impact assessment. The Court ruled that this was exceeding the discretion of the Member States.

The case concerned the permit and environmental assessment for infrastructural extension works at Salzburg Airport. The procedure started in 2002, when Salzburg Airport had obtained a permit to construct an additional terminal. In 2004, Salzburg Airport made further applications for an expansion of the airport through the construction of buildings, in particular warehouses, parking areas and aircraft parking positions.

According to Article 2(3) and Annex II of the EIA Directive (85/337/EEC), Member States have a certain discretion in determining whether the construction of airfields and the extension of airports shall be subject to an environmental assessment. Member States shall determine whether an environmental assessment is required for projects listed in Annex II through a case-by-case examination, or by setting thresholds or criteria.

The national legislation had (a) set a threshold – an increase of flight movements of at least 20.000 – which excluded small and medium-sized airport projects from the scope of mandatory environmental assessment; and (b) it did not provide a list of sites requiring special protection. The Court of Justice ruled that the EIA Directive (85/337/EEC) precludes such a threshold. However, the Court recalled that Member States have discretion in determining through a case-by-case examination whether a project listed in Annex II, which has already been authorised or executed, should be made subject to an environmental impact assessment. Nevertheless, this discretion can only deliberate that projects, which are likely to have a significant effect on the environment by virtue of their nature, size or location should be made subject to an environmental impact assessment. Setting a threshold, which in advance exempts an entire class of projects from an environmental impact assessment, exceeds this discretion.

14 https://curia.europa.eu/juris/document/document.jsf?text=&docid=135401&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=881827

15 https://www.clientearth.org/european-environmental-law-observatory-may-2013

2.2 The Strategic Environmental Assessment Directive

In addition to the Environmental Impact Assessment through which the impacts of projects on the environment are assessed, the Strategic Environmental Assessment (SEA) assesses the environmental impacts of plans and programmes to be adopted by an authority at local, regional or national level, and which are required by legislative, regulatory or administrative provisions. To simplify the difference between an EIA and an SEA: when draglines and bulldozers are to be released, an EIA is needed. When a plan or program is required by law and is prepared or adopted by an authority at local, regional or national level, an SEA is required.

Specifically, an SEA shall be carried out for plans and programmes pertaining to:

- agriculture;
- forestry;
- fisheries;
- energy;
- industry;
- transport;
- waste management;
- water management;
- telecommunications;
- tourism;
- town and country planning or land use;
- which set the framework for future development consent of projects listed in Annexes I and II of the EIA Directive;
- which, because of their likely significant effect on Natura 2000 sites, require an assessment pursuant to the Habitats Directive.

For plans and programmes, which determine the use of small areas at local level, and for minor modifications to plans and programmes Member States are required to make determination whether they are likely to have significant environmental effects and thus require a strategic environmental assessment.

Member States are also required to determine whether other plans and programmes, which set the framework for future development consent of projects other than those listed in Annexes I and II of the EIA Directive, are likely to have significant environmental effects. This includes all those plans and programmes that set the framework for future development consent of projects in sectors not listed above, as well as projects in those sectors, but which are not listed in the Annexes of the EIA Directive.

To conclude; for plans and programmes not listed above but which:

1. determine the use of small areas at local level, and for minor modifications to plans and programmes; or
2. set the framework for future development consent of projects other than those listed in Annexes I and II of the EIA Directive

Member States need to determine whether an SEA is required.

It is important to underline that the projects based on the plans or programmes, for which an SEA was conducted, still need to be assessed through an EIA if they meet the criteria of the EIA Directive.

The screening procedure

Annex II of the SEA Directive sets out criteria, which Member States shall take into account when determining whether plans or programmes are likely to have significant effects on the environment. The conclusions, including any reasons for not requiring an environmental assessment must be made available to the public.

All plans and programmes likely to have a significant effect on the environment are required to be the subject of an SEA. The competent authorities do not have the discretion to exempt an entire class of plans or programmes purely on quantitative criteria.[16] The only valid reason for exempting plans or programmes is when, based upon screening, no significant impact on the environment is foreseen.

16 See C-295/10, Valčiukienė and Others, paragraphs 44-47 and 53.

Annex II

1. Characteristics of projects

The characteristics of plans and programmes, having regard, in particular, to:

- the degree to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by allocating resources;
- the degree to which the plan or programme influences other plans and programmes including those in a hierarchy;
- the relevance of the plan or programme for the integration of environmental considerations in particular with a view to promoting sustainable development;
- environmental problems relevant to the plan or programme;
- the relevance of the plan or programme for the implementation of Community legislation on the environment (e.g. plans and programmes linked to waste-management or water protection).

2. Location of projects

Characteristics of the effects and of the area likely to be affected, having regard, in particular, to:

- the probability, duration, frequency and reversibility of the effects;
- the cumulative nature of the effects;
- the transboundary nature of the effects;
- the risks to human health or the environment (e.g. due to accidents);
- the magnitude and spatial extent of the effects (geographical area and
  size of the population likely to be affected);
- the value and vulnerability of the area likely to be affected due to:
  - special natural characteristics or cultural heritage;
  - exceeded environmental quality standards or limit values;
  - intensive land-use;
- the effects on areas or landscapes which have a recognised national, Community or international protection status.

The strategic environmental assessment report

The strategic environmental assessment shall be carried out during the preparation of a plan or programme and before the plan is submitted for adoption to the legislative procedure. Under the strategic environmental assessment process, Member States are required to prepare an environmental report, which assesses the likely significant environmental effects of plans and programmes, as well as the effects of any reasonable alternatives. The SEA should contain the following information:

- an outline of the contents and main objectives of the plan or programme and its relationship with other relevant plans and programmes;
- the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme;
- the environmental characteristics of areas likely to be significantly affected;
- any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of particular environmental importance, such as areas designated pursuant to the Birds and Habitats Directives;
- the environmental protection objectives, established at international, EU or Member State level, which are relevant to the plan or programme, and the way those objectives and any other environmental considerations have been taken into account during its preparation;
- the likely significant effects on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors (these effects should include secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative effects);
- the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment, which implementation of the plan or programme may have;
- an outline of the reasons for selecting the alternatives dealt with and a description of how the assessment was undertaken, including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information;
- a description of the measures envisaged concerning monitoring;
- a non-technical summary of the information provided.

Consultations, decision-making and rights of the public

Before the adoption of the plan or programme or its submission to the legislative procedure, the draft plan or programme and the environmental report shall be evaluated by environmental authorities.

Likewise, the public, including the public affected or likely to be affected by, or having an interest in the decision-making subject to the SEA Directive (including relevant non-governmental organisations) shall be given early and effective opportunities to express their opinion on the draft plan or programme and the accompanying environmental report.

The SEA Directive does not provide a set time frame for the consultation on a given draft plan or programme. However, the period laid down for consultation must be sufficient to allow the public and the authorities the opportunity to express their opinions effectively.[17] The process of developing the SEA is intended to be coordinated with the plan's development, so that environmental considerations can be included into the final version of this plan.

Moreover, Member States shall ensure that when a plan or programme is adopted, the public is informed and the following items are made available:

- the plan or programme as adopted;
- a statement summarising how environmental considerations have been integrated into the plan or programme and how the environmental report, the opinions expressed and the results of consultations have been taken into account, as well as the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with;
- the measures decided concerning monitoring.

Unlike the EIA Directive, the text of the SEA Directive does not explicitly provide for a review procedure before a court or other independent impartial body to challenge the substantive or procedural legality of decisions, acts or omissions, which are subject to its public participation provisions. However, a Commission Notice suggests that Member States must ensure that individuals can rely on procedural provisions before national courts.[18]

Step-by-step examination and actions

1. **Check whether for plans and programmes, for which an SEA is required, the SEA procedure is conducted. If necessary, request for the SEA to be conducted (see above criteria for conducting an SEA).**
2. **Take part in the consultations on the draft plan or programme and the environmental report.**
3. **Check and request if needed: the plan or programme as adopted; a statement summarising how environmental considerations have been integrated into the plan or programme and the reasons for deciding for it to be adopted in the light of the other reasonable alternatives dealt with decisions on monitoring measures.**
4. **Appeal to a court any illegal procedural decisions, acts or failure to act of the competent authority. You cannot appeal decisions about the content.**
5. **File an infringement complaint to the European Commission.**

17 See C-474/10 - Seaport (NI) and others, paragraphs 45 and 50.
18 See Commission Notice on Access to Justice in Environmental Matters, https://ec.europa.eu/environment/aarhus/pdf/notice_accesstojustice.pdf

CASE LAW EXAMPLE

Case C-463/11, L v M [19]

Decision of the European Court of Justice about a plan adopted without having been subject to a mandatory strategic environmental impact assessment. The Court of Justice ruled that the EU Directive was not correctly transposed in German law and ruled that the German law was not legally valid and had to be amended.

A German municipality adopted a building plan (11.800 m^2) without an environmental assessment as required under the SEA Directive. The Court of Justice was asked whether one of the derogations of the Directive applied to the plan. The Court found that the answer to that question depended on the application of a provision in German law, according to which a derogation could apply to plans "within an urban area"; it was up to the national court to decide whether the plan in question was indeed within an urban area.

However, German law contained another provision, which makes this judgment relevant. German law provided that even when a strategic environmental impact assessment should have been made, but was not made, the building plan remained valid. The Court found that such a provision "effectively deprives of its effectiveness Article 3(1) of the directive". Consequently, the national judge had to give "full effect" to the provisions of European Union law, refusing to apply the German legislative provision, which provided for the validity of the building plan and which would lead, if applied, the national court "to deliver a decision contrary to the directive".

The judgment thus confirms the supremacy of EU law over national law and practically requires Germany to amend its building legislation and to align it to EU law.

19 https://www.clientearth.org/european-environmental-law-observatory-may-2013

2.3 The Birds and Habitats Directives (Nature Directives)

Whereas the EIA deals with the environmental impacts on water, air, soil and biodiversity (environment in a in a broad sense), the Birds and Habitats Directives are specifically designed at protecting biodiversity. In the case of the EIA and SEA assessments, the authorities have to take the impacts on the environment into account, but can still issue a permit, even if the plan or project has significant adverse impacts on the environment (see relevant text under EIA).

When a project is likely to have a negative impact on a Natura 2000 site or on a species protected by the Birds and/or Habitats Directive, a so-called Appropriate Assessment (AA) has to be carried out. An Appropriate Assessment is an impact assessment specially designed to assess the impact of a plan or project on Natura 2000 sites or on the species to be protected by the Birds and Habitats Directives.

In case the outcome of the AA reveals that the adverse effects on the integrity of the site concerned cannot be excluded, a permit cannot be issued – except if it can be demonstrated that there is an absence of less damaging alternatives, and because of imperative reasons of overriding public interest, including those of a social or economic nature. In such case, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. Moreover, where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised when issuing a permit are those relating to human health or public safety.

Although the EIA and the AA serve different purposes, the procedures are often combined. However, the AA under EU nature legislation should nevertheless remain a clearly distinguishable and identifiable part of the overall environmental report.

The Birds and Habitats Directives (Nature Directives), aim to ensure that the species and habitat types occurring in a particular area are protected or, in case their situation is in danger of extinction, restored to a level that secures their survival ("favourable conservation status"). The Birds and Habitats Directives do not require that each and every species or habitat is protected everywhere; rather, certain habitats and species are protected by the designation of Natura 2000 sites. In addition certain species are protected wherever they occur within their natural distribution area (natural range).

It is important to know that the legal implications laid down in the Habitats Directive, and especially in article 6 of the Habitats Directive, are similar for areas designated under the Birds Directive and for species listed in the Birds Directive.

To achieve the objectives, the EU Nature Directives require Member States to implement two main types of measures in particular:

- The designation and conservation of core sites for the protection of species and habitat types – the Natura 2000 sites (formally Special Areas of Conservation and Special Protection Areas), which together form the Natura 2000 network. These areas can be designated because of the occurrence of specific habitat types and/or because specific species are occurring in an area.

- The establishment of a species protection regime for all wild European bird species and other species listed in the Habitats Directive. These measures apply across the entire natural range of those species within the EU, i.e. both within and outside the Natura 2000 sites.

For areas designated as Natura 2000 sites, Member States shall do their utmost to protect the species and habitats in these areas and make plans to improve the situation of the habitats and species in case the situation is "not favourable". This can be done through the elaboration of management plans for the Natura 2000 sites, although Member States can also decide to use other legal measures (i.e. measures integrated into other development plans, and appropriate statutory, administrative or contractual measures).

Not only are Member States required to protect and if needed restore the habitats and species but they are also obliged to avoid that the situation of the habitats and species in a designated Natura 2000 deteriorates. This counts for the habitat types for which the site has been designated, as well as for the habitat in which species occur and for which the site has been designated.

Each country maintains a data base indicating which habitat types and species occur in a certain Natura 2000 site, and for which the area was designated as a Natura 2000 site.

There are also some gaps in the Natura 2000 network (i.e. habitats or species for which not enough sites have been designated, but which still require protection). In cases where there is clear evidence that a site should have been designated as a Natura 2000 site, the same protections may apply. In the case of species covered by Annex IV of the Habitats Directive, and of all naturally occurring wild birds, these species require full protection and disturbance of their habitat (e.g. nest, den. etc) is usually a violation of the Habitats Directive and the Birds Directive.

Natura 2000 sites: Appropriate Assessment (AA) of plans and projects

Article 6(3) and 6(4) of the Habitats Directive require that any plan or project not directly connected with, or necessary to the management of a Natura 2000 site, but which is likely to have a significant effect on the site (either individually or in combination with other plans or projects) shall be subject to an Appropriate Assessment of its implications. The obligation of such an assessment is not restricted to plans and projects inside a Natura 2000 site – it also covers developments anywhere outside a Natura 2000 site as long as they are likely to have a significant effect on the site.

The competent authority can only agree to the plan or project if, based on the findings of the AA, it has ascertained that it will not have an adverse effect on the integrity of the site concerned (i.e. it will demonstrate the absence, rather than the presence, of significant negative effects), and if appropriate, after having obtained the opinion of the general public.

Note: the Habitats Directive does not contain an explicit obligation to obtain the opinion of the general public when authorising plans or projects. However, consultation with the public is an essential feature of the EIA and SEA Directives and therefore, where the AA is coordinated with the assessment under these directives, public consultation is necessary in line with their requirements.

The question of "significance" comes into play at a separate stage of the article 6(3) process and goes in 2 stages:

1. Examining if there is a likely significant effect. The bar for "significance" is quite low. The Waddenzee case (C-127/02) basically says that in case of doubt as to the absence of significant effects such an assessment must be carried out and that such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned.

2. If there is a likely significant effect, carrying out an Appropriate Assessment of the impact of the plan or project on the site in the light of its conservation objectives and assessing whether there will be an adverse effect on integrity of the site concerned.

Moreover, the Court of Justice held that Article 6(3) of the Habitats Directive, read in conjunction with Article 6(1)(b) of the Aarhus Convention, provides the public with a right to participate in the procedure for authorisation of a project likely to have a significant effect on the environment.[20] This means that the right of participation exists even for proposed activities not listed in Annex I of the Aarhus Convention.

Also according to a Court of Justice of the European Union (CJEU) ruling, individuals must be able to challenge before national courts decisions to permit plans or programmes likely to have a significant effect on Natura 2000 sites.[21]

20 See, C-243/15, Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín (Slovak Bears II), para 46-49.

21 See C-127/02, Waddenzee, paragraphs 66 – 70. In case C-243/15, the Court of Justice also confirmed that decisions adopted by the competent national authorities within the framework of Article 6(3) of Directive 92/43 (whether they concern a request to participate in the authorisation procedure, the assessment of the need for an environmental assessment of the implications of a plan or project for a protected site, or the appropriateness of the conclusions drawn from such an assessment as regards the risks of that plan or project for the integrity of the site, and whether they are autonomous or integrated in a decision-granting authorisation) are decisions, which fall within the scope of Article 9(2) of the Aarhus Convention.

To authorise a plan or project, which may adversely affect a Natura 2000 site, the competent authorities shall ensure that the following conditions are met:

- The alternative put forward for approval is the least damaging for habitats, for species and for the integrity of a Natura 2000 site, and no feasible other alternative exists, which would not affect the integrity of the site.
- There are imperative reasons of overriding public interest, including those of a social or economic nature, to authorise the plan or project.
- All compensatory measures required to ensure protection of the overall coherence of the Natura 2000 network have been taken.

When based on the AA, it turns out that the plan or project will have an adverse effect on the integrity of the site, but the three conditions listed above are met, the competent authority may authorise the development. However, when the site holds priority habitat types and species, which require a higher degree of protection, authorisation of the plans can only be given when the imperative reasons of overriding public interest are related to human health, public safety, to consequences of primary importance for the environment, or other imperative reasons as accepted by the Commission.

Full text of Article 6 of the Habitats Directive

Art 6(1)
For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

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

Art 6(3)
Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

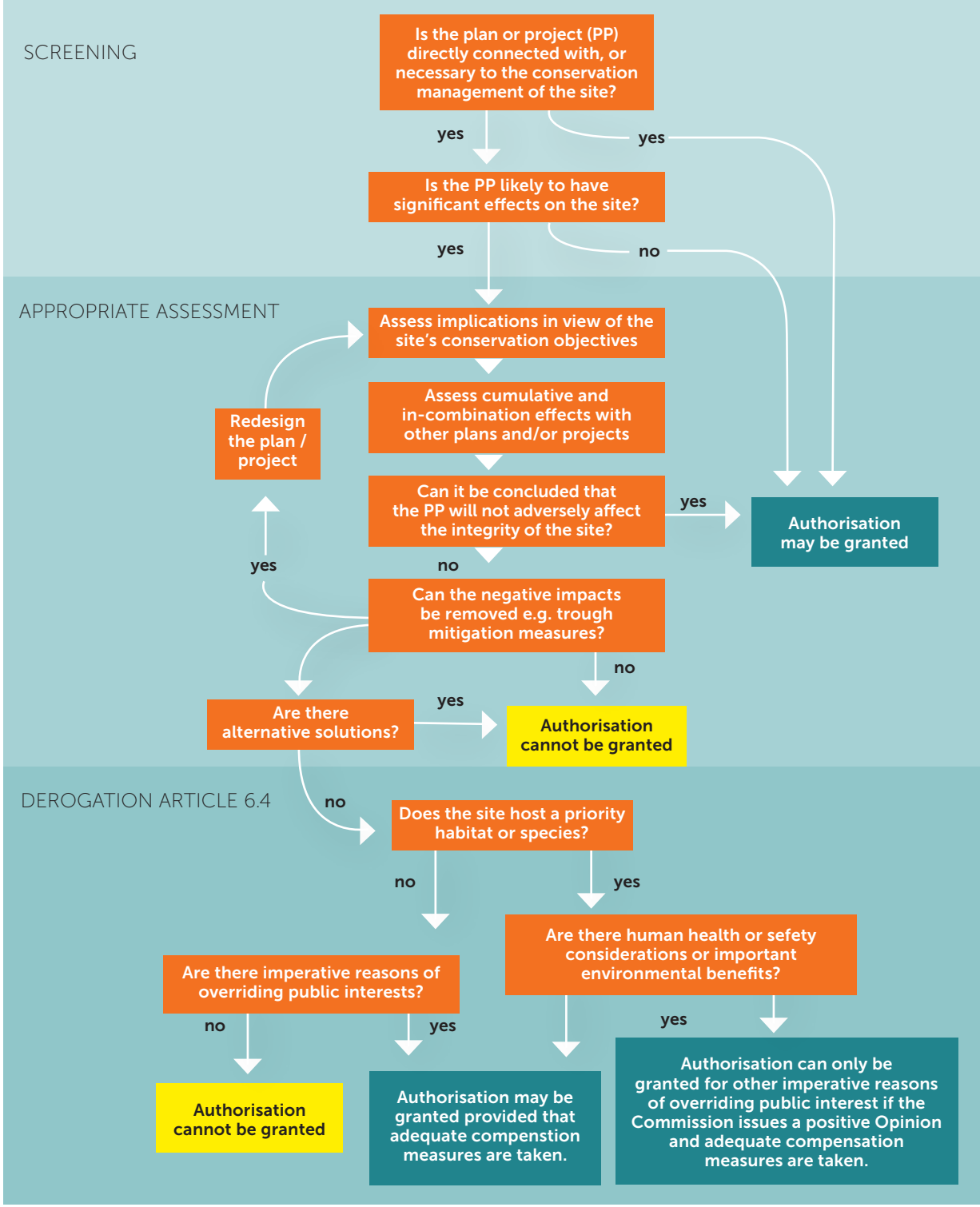
Art 6(4)
If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted. Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.

FLOW CHART **of Article 6(3) and 6(4) procedure (based on European Commission methodological guidelines)**[22]

The flowchart on the right describes the procedural steps required to assess whether an AA is needed in accordance with Articles 6(3) and 6(4) of the Habitats Directive.[23] The AA is needed where a plan or project not directly connected with, or necessary to the management of the site, is likely to have a significant effect, either individually or in combination with other plans or projects. Such plans or projects shall be subject to an appropriate assessment of their implications for the site, in view of the site's conservation objectives.

The assessment report should in particular:

- describe the project or plan in detail to understand its size, scale and objectives;
- describe the baseline conditions and conservation objectives of the Natura 2000 site;
- describe all possible effects that might occur;
- analyse the interaction between those characteristics of the project and the ecological requirements of the species and habitat types for which the site has been designated, in order to identify the potential effects of the project or plan on the Natura 2000 site, and their level of significance;
- explain how such effects will be avoided or mitigated to the extent possible;
- set out a timescale and the mechanisms through which any mitigation measures will be secured, implemented and monitored;
- contain a reference list of all sources of information.[24]



22 Guidance on the requirements for hydropower in relation to Natura 2000: https://ec.europa.eu/environment/nature/natura2000/management/docs/Hydro%20final%20May%202018.final.pdf

23 Guidance on the requirements for hydropower in relation to Natura 2000, p. 70: https://ec.europa.eu/environment/nature/natura2000/management/docs/Hydro%20final%20May%202018.final.pdf

Natura 2000 species protection

The species protection measures apply to species listed in Annex IV of the Habitats Directive and all wild bird species in the EU regardless of whether they are inside or outside Natura 2000 sites. Member States shall take the requisite measures to establish a system of strict protection prohibiting for instance:

- deliberate disturbance during the period of breeding, rearing, hibernation and migration;
- deliberate destruction of nests or eggs, or the uprooting or destruction of protected plants;
- deterioration or destruction of breeding sites or resting places.

The species protection provisions are relevant to hydropower facilities also operating outside Natura 2000 sites, especially in cases where the HPP is situated on a river harbouring migratory species, such as migratory birds or fish. The aim is to ensure that any new developments do not destroy the breeding and resting sites of any wild bird or any species listed under Annex IV of the Habitats Directive, unless they have sought from the competent authorities a derogation in accordance with the terms of the Directives.

In case of the protection of species listed in Annex IV of the Habitats Directive and of all wild bird species, for which site designation is not required and which live outside Natura 2000 sites, there is no obligation for an AA. The only requirement is that these species and their habitat may not be disturbed or destroyed, and nesting sites, hiber-nation hides, spawning areas, etc. are protected.

Step-by-step examination and actions

Individuals and organisations who wish to assess whether an AA has been conducted in accordance with applicable legislation are advised to follow the steps described below:

1. **Check if the HPP (individually or in combination with other plans or projects) may have a significant effect on a Natura 2000 site or protected species, regardless of whether the project is situated in or outside a Natura 2000 site.**

2. **Check whether an appropriate assessment of the implications of the HPP for the Natura 2000 site has been conducted.**

3. **If the HPP has been authorised despite adversely affecting a Natura 2000 site, check if the competent authorities have ensured: there are no alternative solutions, there are imperative reasons of overriding public interest, all compensatory measures required to ensure protection of the overall coherence of the Natura 2000 network have been taken.**

4. **Appeal any procedural and substantive illegal decisions, acts or failure to act of the competent authority to a court in your Member State (According to a Court of Justice of the European Union (CJEU) ruling, individuals must be able to challenge before national courts decisions to permit plans or programmes likely to have a significant effect on Natura 2000 sites.[24])**

5. **File an infringement complaint to the European Commission against the procedural or substantive illegal decisions, acts or failure to act of the competent authority.**

24 See C-127/02, Waddenzee, paragraphs 66 – 70. In case C-243/15, the Court of Justice also confirmed that decisions adopted by the competent national authorities within the framework of Article 6(3) of Directive 92/43 (whether they concern a request to participate in the authorisation procedure, the assessment of the need for an environmental assessment of the implications of a plan or project for a protected site, or the appropriateness of the conclusions drawn from such an assessment as regards the risks of that plan or project for the integrity of the site, and whether they are autonomous or integrated in a decision-granting authorisation) are decisions, which fall within the scope of Article 9(2) of the Aarhus Convention.

CASE LAW EXAMPLE

Case C-258/11, Peter Sweetman and Others v An Bord Pleanála[25] [26]

Below the ruling of the European Court of Justice with respect to building a road through a Natura 2000 site in Ireland is presented. The ruling shows that even the destruction of a small part of a habitat (less than 1%) may adversely affect the integrity of the habitat and should therefore be forbidden.

Irish authorities planned the construction of a new road, part of which would cross a Natura 2000 area, which included 14 habitats listed in Annex I to the Directive, six of these being priority habitats. The planned road would have led to the permanent loss of about 1.47 hectares of limestone pavement, a protected priority habitat type. The whole Natura 2000 site covered some 20.000 hectares, 270 hectares of which consisted of limestone pavement.

The Irish authorities considered that the construction of the road would not have an adverse effect on the integrity of the site, given the small size of the section of the site to be affected. The Court of Justice, however, held that authorisation for the road project could only be given, when the authorities were "certain" (meaning no reasonable doubts remained) that the project would not have had lasting adverse effects on the integrity of the site. Moreover, the conservation status of a habitat, which Member States must ensure under the Habitats Directive, is favourable when its natural range and areas "are stable or increasing". In this case, part of the limestone pavement would be destroyed, could not be replaced and would lead to the "lasting and irreparable loss" of part of a priority habitat type. Therefore, the road construction would adversely affect the integrity of the site. For these reasons, an authorisation under Article 6(3) of the Habitats Directive could not be granted.

25 https://curia.europa.eu/juris/document/document.jsf?text=&docid=136145&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=880619

26 https://www.clientearth.org/european-environmental-law-observatory-may-2013

2.4 The Water Framework Directive

The purpose of the Water Framework Directive is to establish a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater which:

- prevents further deterioration and protects and enhances the status of aquatic ecosystems and, with regard to their water needs, terrestrial ecosystems and wetlands directly depending on the aquatic ecosystems;
- promotes sustainable water use based on a long-term protection of available water resources;
- aims at enhanced protection and improvement of the aquatic environment, inter alia, through specific measures for the progressive reduction of discharges, emissions and losses of priority hazardous substances and the cessation or phasing-out of discharges, emissions and losses of priority substances;
- ensures the progressive reduction of groundwater pollution and prevents its further pollution; and
- contributes to mitigating the effects of floods and droughts.

The main objectives of the WFD for surface waters are:

- to prevent the deterioration of any status;
- to reach good ecological status and good chemical status (good ecological potential and good chemical status in artificial and heavily modified water bodies) as a rule by 2015 and 2027 by the latest, provided that no further deterioration occurs in the status of the affected body of water;
- to implement all necessary measures to progressively reduce pollution from priority substances and ceasing or phasing out emissions, discharges and losses of priority hazardous substances.

Additional objectives may complement the WFD objective of good status in order to ensure that conservation objectives for protected areas are achieved. In such cases, where more than one of the objectives relates to a given body of water, the most stringent shall apply.

River Basin Management Plans

The Water Framework Directive obliges Member States to draw up river basin management plans (RBMPs) to safeguard each river basin district. RBMPs shall be reviewed and updated every six years.

Member States shall ensure that the public has the opportunity to be involved in the production, review and updating of the RBMPs. Member States will also make the following available to the public:

- a timetable and work programme for the production of the plan, including a statement of the consultation measures to be taken, at least three years before the beginning of the period to which the plan refers;
- an interim overview of the significant water management issues identified in the river basin, at least two years before the beginning of the period to which the plan refers;
- draft copies of the RBMP, at least one year before the beginning of the period to which the plan refers.

On request, access shall be given to background documents and information used for the development of the draft RBMP. Member States shall allow at least six months for the public to comment in writing on those documents.

Authorisation of projects (exemptions under Article 4(7))

Any new developments[27] in a river or river basin have to be assessed, to conclude whether they:

- cause deterioration of the status (or potential) of a surface or groundwater body; or
- prevent the achievement of good groundwater status or good ecological status/potential for water bodies currently failing to achieve this status/potential.

If one of the above is the case, Member States are required — unless an exemption under Article 4(7) is granted — to refuse authorisation for an individual project.[28]

According to Article 4(7) of the WFD, exemptions can be approved by the authorities for new modifications and sustainable human development activities that result in the deterioration of the status of the water body or that prevent the achievement of good ecological status or potential, or good groundwater status if all the following conditions are met:

- all practicable steps are taken to mitigate the adverse impact;
- the reasons for those modifications or alterations are set out and explained in the RBMP;
- the reasons for those modifications or alterations are of overriding public interest;
- the beneficial objectives served by those modifications or alterations cannot for reasons of technical feasibility or disproportionate cost be achieved by other means.

An assessment to conclude whether all conditions described above are met needs to be carried out before any permit is issued. Only if the plan complies with the conditions laid down in article 4(7), a permit can be issued. If there is no RBMP, the conditions for applying article 4(7) are not met because the reasons for the modifications or alterations must be set out and explained in the RBMP.

27 This includes new modifications to the physical characteristics of a surface water body, alterations to the level of groundwater, and new sustainable human development activities.

28 See C-461/13, Bund für Umwelt und Naturschutz Deutschland e.V. v Bundesrepublik Deutschland.

Full text of Article 4(7)

Member States will not be in breach of this Directive when:

- failure to achieve good groundwater status, good ecological status or, where relevant, good ecological potential or to prevent deterioration in the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater; or

- failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities and all the following conditions are met:

  a) All practicable steps are taken to mitigate the adverse impact on the status of the body of water;

  b) The reasons for those modifications or alterations are specifically set out and explained in the RBMP required under Article 13 and the objectives are reviewed every six years;

  c) The reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development; and

  d) The beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option.

The competent authority may authorise a project in absence of an article 4(7) test only if there is sufficient certainty that it will not cause deterioration or compromise the achievement of good status/potential. The evidence on which this decision is based should be documented.

The potential effect of the new modification/alteration or new sustainable development activity on the water body status should be examined, irrespective of whether it is:

- an entirely new activity;
- an amendment to already existing activities or infrastructure;
- the renewal of an existing authorisation or licensed activity, if the conditions of the permit are changed and could cause deterioration.

The size of the project is not a relevant criteria to trigger Article 4(7). The permit for any project, small or big, which will have negatively affect achieving good ecological status or potential of a water body will have to be refused, unless the conditions of article 4(7) are met. Thus, projects of any size may fall under article 4(7).[29]

29 Hydropower Development under the Water Framework Directive - Statement of the Water Directors: https://circabc.europa.eu/sd/a/4e0cb9d2-c268-4d67-ac56-f1977c1b85fc/WD%20statement%20May%202010-%20Hydropower%20Development%20under%20the%20Water%20Framework%20Directive.pdf

FLOW CHART **on the application of Article 4(7)**[30]

30 CIS Guidance no 36 Exemptions to the Environmental Objectives according to Article 4(7): https://circabc.europa.eu/sd/a/e0352ec3-9f3b-4d91-bdbb-939185be3e89/CIS_Guidance_Article_4_7_FINAL.PDF

Rights of the public

Article 14 requires Member States to encourage the active involvement of all interested parties in the implementation of this Directive. The Court of Justice of the European Union ruled that "a duly constituted environmental organisation operating in accordance with the requirements of national law"[31] (in short any legally established environmental NGO) must be able to legally contest a decision granting a permit for a project, which does not comply with the obligation to prevent the deterioration of the status of bodies of water, as set out in Article 4 of the WFD.

Moreover, national procedural rules cannot deprive environmental organisations of the right to participate, as a party to the procedure, in a permit procedure intended to implement the WFD, nor can they limit the right to bring proceedings contesting decisions resulting from such procedure solely to persons who do have the status of a party.[32] In other words, environmental organisations have the right to participate in both administrative and judicial procedures related to the implementation of the WFD.

Step-by-step examination and actions

1. **Check whether public consultations for RBMPs are properly conducted, as described above.**

2. **Take part in public consultations for RBMPs.**

3. **Check if for HPP project the Article 4(7) test was conducted. If not, whether the reasoning for this was documented.**

4. **If the HPP project was authorised under the Article 4(7) check if all following conditions were met:**

    - **all practicable steps are taken to mitigate the adverse impact;**
    - **the reasons for those modifications or alterations are set out and explained in the RBMP;**
    - **the reasons for those modifications or alterations are of overriding public interest;**
    - **the beneficial objectives served by those modifications or alterations cannot for reasons of technical feasibility or disproportionate cost be achieved by other means.**

5. **Note: If there is no RBMP, the conditions are not met, i.e. Members States cannot use article 4(7) derogations, as the reasons for the modifications or alterations must be set out and explained in the RBMP.**

6. **Appeal against the procedural and substantive illegal decisions, acts or failure to act of the competent authority before a court in your Member State.**

7. **File an infringement complaint to the European Commission against the procedural or substantive illegal decisions, acts or failure to act of the competent authority.**

31 See C-664/15, Protect, paragraph 102
32 See C-664/15, Protect, paragraph 81

CASE LAW EXAMPLE

Case C-461/13, BUND v. Germany[33] [34]

The following presents the ruling of the Court of Law with respect to issuing a permit that would cause deterioration of the status of a water body. It says that Member States are obliged to refuse authorization of a project that may cause a deterioration of the status of a body of surface water.

The German authorities granted consent for three independent projects concerning the deepening of the river Weser (North Germany), a navigable waterway classified as a heavily modified water body within the meaning of the WFD. All three projects would cause direct effects through initial and regular dredging of the riverbed and in addition, hydrological and morphological consequences for the sections of river concerned.

The Court found that Article 4 of the WFD requires Member States to prevent the deterioration of waters and to enhance water quality. The Court then considered what constituted a "deterioration" of waters. It rejected the argument of the German government that only a "serious impairment" of the water quality constituted a deterioration. The Annex V to the WFD fixed, for "high", "good" and "moderate" water quality a number of biological, hydro-morphological and physico-chemical elements, which determined each of these classes of quality. The Court found that the Directive contained two other classes, namely "poor" and "bad". It determined that there existed "deterioration" in the sense of the Directive, "as soon as the status of at least one of the quality elements falls by one class, even if that fall does not result in a fall in classification of the body of surface water as a whole". If the water was already in the lowest class, any deterioration was not allowed. However, Article 4(7) of the Directive allows derogations to be granted under certain conditions (see above under "exemptions under Article 4(7)).

33 https://curia.europa.eu/juris/document/document.jsf?text=&docid=165446&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=883931

34 https://www.documents.clientearth.org/wp-content/uploads/library/2015-09-29-eelo-newsletter-september-2015-ce-en.pdf

CASE LAW EXAMPLE

Case C-346/14, Commission v. Austria[35] [36] [37]

Judgement of the Court of Justice about the scope of overriding public interest. In this case, the Court of Justice ruled that as part of that margin of discretion, the Republic of Austria was entitled to consider that the HPP, the aim of which is to promote the production of renewable energy through hydroelectricity, is an overriding public interest.

The Commission acted against Austria regarding its authorisation of a hydropower plant in the Schwarze Sulm River in the Steiermark Region. The Commission considered that this construction led to a deterioration of the water quality of the river and could not be justified by the derogation, which Article 4(7) of the Water Framework Directive permitted under certain circumstances. The Court found that indeed the construction of the plant would lead to a deterioration of the water quality of the Schwarze Sulm over a stretch of eight kilometres, and that the construction of a hydropower plant may be of such an overriding public interest referred to in Article 4(7). Nevertheless, it concluded that Member States had a margin of discretion as to the question of whether a specific project was of overriding public interest, and that Austria could not be blamed for declaring the construction of being in the public interest.

One of the core conclusions of the judgement was that a small-scale renewable energy project with mainly regional effects can fulfil the requirement of 'overriding public interest. The Court of Justice referred to the Union's energy policy objectives in accordance with Treaty on the Functioning of the EU, concluding that renewable energy is one of the top priorities in the Union's actions, and that the Member State fulfil their obligation under the Kyoto Protocol by initiating new renewable energy projects.

The Commission argued in particular that hydroelectricity was only one source of renewable energy, among others, and that the energy produced by the envisaged hydropower plant would have only a minor impact on the regional and national energy supply.
The Court reproached the Commission for not putting forward any specific complaints showing, for example, how the study whose conclusions were incorporated into the decision was incomplete or incorrect – either due to inadequate analysis of the ecological impact of the project on the status of the body of surface water of the Schwarze Sulm, or due to a reliability issue impairing the hydroelectricity production forecasts. Or comparative factors permitting a classification of the forecasted electricity production as low in comparison to the scale of the project.

35 https://curia.europa.eu/juris/document/document.jsf?text=hydropower&docid=181400&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1792681#ctx1
36 https://www.cev6.clientearth.org/wp-content/uploads/2016-10-17-european-environmental-law-observatory-july-2016.pdf
37 https://epublications.uef.fi/pub/urn_nbn_fi_uef-20190262/urn_nbn_fi_uef-20190262.pdf

2.5 The Environmental Liability Directive

The purpose of the Environmental Liability Directive (ELD) is to establish a framework of environmental liability based on the 'polluter-pays' principle, to prevent and remedy environmental damage. The ELD imposes liability on an economic operator (for instance an industry or public body) for preventing and remediating an imminent threat of, or actual environmental damage. The ELD is based on the powers and duties of public authorities and is limited to pure ecological damage (it does not cover damage to property, economic loss or personal injury, for example).

There are three categories of environmental damage under the ELD:

- Damage to protected species and natural habitats, which basically is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The habitats and species concerned are defined in the relevant parts of the Birds Directive and the Habitats Directive. Damage to protected species and natural habitats does not include previously identified adverse effects authorised under the nature protection legislation, as described in the previous chapter.

- Water damage, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in the Water Framework Directive (WFD), of the waters concerned, with the exception of adverse effects where article 4(7) of that Directive applies.

- Land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms.

The ELD provides for two liability regimes:

- A strict liability regime applies to operators of certain activities listed in Annex III to the ELD – among others water abstraction and impoundment of water subject to prior authorisation in pursuance of the WFD – who can be held liable in the event of damage to protected species and natural habitats, water damage and land damage.

- A fault-based liability regime applies only to damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III of the ELD whenever the operator has been at fault or negligent.

The ELD does not apply in the following cases:

- If the damage was caused by an emission, event or incident that took place before 30 April 2007, or when the activity causing the damage was finished before that date.

- If more than 30 years have passed since the emission, event or incident causing the damage occurred.

- Where environmental damage or an imminent threat of such damage is caused, among others by an act of armed conflict, hostilities, civil war or insurrection, a natural phenomenon of exceptional, inevitable and irresistible character, pollution of a diffuse character, where it is not possible to establish a causal link between the damage and the activities of individual operators.

Moreover, an operator is not required to bear the cost of preventive or remedial actions when he can prove that the environmental damage or imminent threat of such damage:

- was caused by a third party and occurred despite the fact that appropriate safety measures were in place; or
- resulted from compliance with a compulsory order.

In addition, Member States may allow the operator not to bear the cost of remedial actions where he demonstrates that he was not at fault or negligent and that the environmental damage was caused by:

- an emission or event expressly authorised by, and fully in accordance with the conditions of an authorisation; or
- an emission or activity or any manner of using a product in the course of an activity, which the operator demonstrates was not considered likely to cause environmental damage, according to the state of scientific and technical knowledge at the time when the emission was released or the activity took place.

Where environmental damage has not yet occurred but there is an imminent threat of such damage occurring, the operator shall, without delay, take the necessary preventive measures. Where environmental damage has occurred, the operator shall, without delay, inform the competent authority of all relevant aspects of the situation and take:

- all practicable steps to immediately limit or prevent further environmental damage and adverse effects on human health or further impairment of services; and
- the necessary remedial measures, in accordance with the relevant provisions of the ELD.

The obligations of the competent authorities are to identify liable polluters and determine which remedial measures they have to take. Operators can be required to disclose to the competent authority the relevant data and information to help establish the facts of a case. At the end of this process, the competent authority should be in a position to reasonably assess whether an operator is liable.

Remedying of environmental damage in relation to water or protected species or natural habitats is achieved through the restoration of the environment to its baseline condition.

Rights of the public

The following persons and entities are entitled to request the competent authority to take action under the ELD:

- natural or legal persons affected or likely to be affected by environmental damage;
- non-governmental organisation promoting environmental protection;
- other natural or legal persons having a sufficient interest or whose rights have been impaired.

Together with the request for action, they have to submit the relevant information and their observations with supporting evidence.

The authorities are obliged to respond to the request for action. If the alleged environmental damage has occurred and if the polluter is liable under the Directive, the authorities must require the polluter to take action to remedy or prevent it.

The persons or NGOs concerned shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority.

Member States are allowed not to apply the above procedures for requesting the competent authority to take action in cases where there is only an imminent threat of damage, but no damage has actually occurred.

Step-by-step examination and actions

1. **Check if environmental damage occurred after 30 April 2007[38], otherwise, the ELD does not apply.**

2. **Check if HPP related to water abstraction or impoundment of water causes imminent threat; or**
   a. **damage to protected species and natural habitats (threshold: damage that has significant adverse effects[39] on reaching or maintaining the favourable conservation status of natural habitats or protected species[40]) and the damage does not result from an act by an operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Article 6(3) and (4) or Article 16 of Habitats Directive or Article 9 of Birds Directive. Or, in the case of habitats and species not covered by Community law, in accordance with equivalent provisions of national law on nature conservation (check the permits and whether the adverse impacts are mentioned in the permits); or**
   b. **water damage (threshold: any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in the WFD) and Article 4(7) of WFD does not apply for the adverse effects (check the permits and whether the adverse impacts are mentioned); or**
   c. **land damage (threshold: any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms).**

3. **In case the HPP does not abstract or impound water, check if it causes imminent threat or actual damage to protected species and natural habitats and the operator has been at fault or negligent, otherwise, the ELD does not apply.**

4. **Check if environmental damage or imminent threat of damage does not result from:**

38 Damage took place not earlier than 30 April 2007 or the activity causing the damage was finished not earlier than 30 April 2007, or less than 30 years have passed since the emission, event or incident, resulting in the damage, occurred.

39 The significance of any damage that has adverse effects on reaching or maintaining the favourable conservation status of habitats or species has to be assessed by reference to the conservation status at the time of the damage, the services provided by the amenities they produce and their capacity for natural regeneration. Significant adverse changes to the baseline condition should be determined by means of measurable data such as:
- the number of individuals, their density or the area covered;
- the role of the particular individuals or of the damaged area in relation to the species or to the habitat conservation, the rarity of the species or habitat (assessed at local, regional and higher level including at Community level);
- the species' capacity for propagation (according to the dynamics specific to that species or to that population), its viability or the habitat's capacity for natural regeneration (according to the dynamics specific to its characteristic species or to their populations);
- the species' or habitat's capacity, after damage has occurred, to recover within a short time, without any intervention other than increased protection measures, to a condition which leads, solely by virtue of the dynamics of the species or habitat, to a condition deemed equivalent or superior to the baseline condition.

Damage with a proven effect on human health must be classified as significant damage. The following does not have to be classified as significant damage:
- negative variations that are smaller than natural fluctuations regarded as normal for the species or habitat in question;
- negative variations due to natural causes or resulting from intervention relating to the normal management of sites, as defined in habitat records or target documents or as carried on previously by owners or operators;
- damage to species or habitats for which it is established that they will recover, within a short time and without intervention, either to the baseline condition or to a condition which leads, solely by virtue of the dynamics of the species or habitat, to a condition deemed equivalent or superior to the baseline condition.

40 The habitats and species concerned are defined by reference to species and types of natural habitats identified in the relevant parts of the Birds Directive and the Habitats Directive. The scope of the ELD is not restricted to the Natura 2000 network. The species mentioned in ELD which occur outside the SACs and SPAs and even migratory species are also included.

a. an act of armed conflict, hostilities, civil war or insurrection (includes terrorism);
b. a natural phenomenon of exceptional, irresistible and inevitable character;
c. activities, the main purpose of which is to serve national defence or international security, or to protect against natural disasters;
d. activities, the sole purpose of which is to protect from natural disaster;
e. activities covered by some international conventions relating to oil pollution damage at sea, carriage of hazardous substances or dangerous goods by sea, rail or road, and nuclear damage;
f. an activity in the case of diffuse pollution, if causality cannot be established between the activity and the damage.

If any of the above situations occur the ELD does not apply.

5. Check if environmental damage or imminent threat of damage:

a. was not caused by a third party and occurred despite the fact that appropriate safety measures were in place;
b. did not result from compliance with a compulsory order or instruction emanating from a public authority, other than an order or instruction in response to an emission or incident caused by the operator's own activities;
c. did not result from an emission or event expressly authorised by the regulatory authority (so called "permit defence"), when the operator acted fully in accordance with the conditions of the authorisation and the operator is not at fault or negligent (this defence is possible in some Member States only);
d. did not result from an emission or event considered unlikely to cause environmental damage, according to the state of scientific and technical knowledge at the time the emission was released or the activity took place, and the operator is not at fault or negligent (this defence is possible in some Member States only).

If any of the above situations occur, the ELD applies, but an operator shall not be required to bear the cost of preventive or remedial actions taken.

6. Collect and submit to the competent authority any observations supporting evidences of environmental damage or an imminent threat of such damage and request the competent authority to take action.

7. Request the decision of the competent authority containing information about the legal remedies and the action taken.

8. Review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority (e.g. the duty of the competent authority to establish which operator has caused the damage or the imminent threat of damage, to assess the significance of the damage and to determine which remedial measures should be taken).

9. Appeal against the procedural and substantive illegal decisions, acts or failure to act of the competent authority before a court or another independent and impartial public body in your Member State.

10. File an infringement complaint to the European Commission.

CASE LAW EXAMPLE

Case C-529/15, Gert Folk[41]

The following Case law example presents a ruling of the Court of Justice indicating that national law cannot exclude the rights of persons affected by environmental damage to go to the national court and ask for a review procedure of the issuing of a permit. The Court ruled that this is incompatible with the ELD.

The case concerned an application by an individual holding fishing rights downstream from a hydroelectric power station, which allegedly caused fish to die along extended stretches of the river. National provision did not entitle persons holding fishing rights to initiate a review procedure in relation to environmental damage.

The Court of Justice addressed a situation where national authorities had granted an authorisation for the construction of a hydropower station under the WFD that was alleged to have caused damage to the environment. The Court held that in such a case, the national courts must assess if the national authorities had examined whether the conditions laid down in Article 4(7) of the Directive had been complied with.

The absence of such an assessment should lead to the conclusions that the measure was unlawful. Moreover, even if the national authorities did examine the conditions laid down in this provision, the national courts may review whether the authority which issued the authorisation complied with the conditions laid down in Article 4(7) of the WFD.

The Court of Justice held that it was not permissible under the ELD to generally exclude environmental damage because it resulted from the operation of a permitted facility. The national court was accordingly required to assess substantively whether environmental damage had arisen.

The case demonstrates that, in the context of the ELD, national judges are required to assess substantively compliance with applicable legislation, to determine whether decisions under the WFD are lawful.

The Court ruled that although the Member States have discretion to determine what constitutes a sufficient interest in environmental decision-making relating to the damage or impairment of a right, the concept laid down in the ELD, they do not have such discretion as regards the right to ask for a review procedure for those persons affected or likely to be affected by environmental damage.

An interpretation of national law, which would deprive all persons holding fishing rights of the right to initiate a review procedure following environmental damage (in this case an increase in the mortality of fish), although those persons are directly affected by that damage, does not respect the scope of the ELD and is thus incompatible with that directive.

41 https://www.documents.clientearth.org/wp-content/uploads/library/2019-02-26-access-to-justice-in-european-union-law-a-legal-guide-on-access-to-justice-in-environmental-matters-ce-en.pdf

3.

The European Commission's Infringement Mechanism

The European Commission is the guardian of its Treaties. As such, it has a responsibility to ensure proper implementation and enforcement of EU law, i.e. the acquis communautaire. The Commission identifies possible infringements of EU law on the basis of its own investigations or following complaints from citizens, businesses or other stakeholders. It may refer to any measure (law, regulation or administrative action) or the absence of a measure or practice by a country of the European Union that is against Union law. The European Commission can only take up the complaint if it is about a breach of Union law by authorities in an EU country (not by a private individual or body).

A complaint must be submitted via the standard complaint form[42]. The complaint may be submitted in any official EU language and should include the following details:

- description of how national authorities have infringed Union law, and which is the Union law infringed;
- details of any steps already taken to obtain redress.

Complaints to the European Commission go through the following process[43]:

- The European Commission will confirm that it has received your complaint within 15 working days.
- Within the following 12 months, the European Commission will assess your complaint and aim to decide whether to initiate a formal infringement procedure against the country in question.
- If the issue raised is particularly complicated, or if the European Commission needs to ask for more information or details, it may take longer than 12 months to reach a decision.
- If the European Commission decides that the complaint is well-founded and initiates a formal infringement procedure against the country in question, it will inform the complainant about case progresses.
- Should the Commission contact the authorities of the country against which the complaint is made, it will not disclose the identity of the complainant unless permission is given.
- At any time, the complainant may give the European Commission additional material about the complaint or ask to meet representatives of the European Commission.

A formal infringement procedure follows a number of steps, each ending with a formal decision[44]:

- The Commission sends a letter of formal notice requesting further information to the country concerned. The latter must send a detailed reply within a specified period, usually two months.
- If the Commission concludes that the country is failing to fulfil its obligations under EU law, it may send a reasoned opinion: a formal request to comply with EU law. It explains why the Commission considers that the country is breaching EU law and requests, that the country informs the Commission of the measures taken within a specified period, usually two months.
- If the country still does not comply, the Commission may decide to refer the matter to the Court of Justice. Most cases are settled before being referred to the Court.
- If the Court finds that a country has breached EU law, the national authorities must take action to comply with the Court's judgment.
- If, despite the Court's judgment, the country still does not rectify the situation, the Commission may refer the country back to the Court.
- When referring an EU country to the Court for the second time, the Commission proposes that the Court imposes financial penalties, which can be either a lump sum and/or a daily payment.

42 https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/ https://ec.europa.eu/info/about-european-commission/contact/problems-and-complaints/complaints-about-breaches-eu-law/how-make-complaint-eu-level_en

43 https://ec.europa.eu/info/about-european-commission/contact/problems-and-complaints/complaints-about-breaches-eu-law/how-make-complaint-eu-level_en

44 https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en#stages-of-an-infringement-procedure

CASE LAW EXAMPLE

Case C-441/17 European Commission v Republic of Poland[45]

The following Case law example presents a ruling of the Court of Justice indicating that the Republic of Poland did not comply with the Habitats Directive when it started the logging of trees in a Natura 2000 site

In July 2017 the European Commission referred Poland to the Court of Justice and requested interim measures to stop increased logging operations in the Białowieża Forest - one of Europe's last remaining primeval forest, which is a protected Natura 2000 site. The removal of century old trees posed a major threat to the integrity of this Natura 2000 site. The site protects species and habitats that are dependent on old-growth forests, including the availability of dead wood. For some of these species, the Białowieża Forest is the most important or the last remaining site in Poland.

As logging operations have started on a significant scale, the Commission also requested the Court for interim measures compelling Poland to suspend the works immediately. According to EU law, the Court of Justice can prescribe interim measures to require a Member State to hold back from activities causing serious and irreparable damage before a judgement is given.

In the case C-441/17 European Commission v Republic of Poland the Court of Justice, first issued the emergency ban on logging in Bialowieza Forest, saying it will impose fines of at least €100,000 a day if Poland's Environment Minister keeps ignoring the Court's decisions, and later ruled that the Republic of Poland has failed to fulfil its obligations under the Habitats and Birds Directives.

45 https://curia.europa.eu/juris/liste.jsf?num=C-441/17

4.

The Energy Community Treaty[46]

The key objective of the Energy Community is to extend the EU internal energy market rules and principles to countries in South-East Europe, the Black Sea region and beyond, on the basis of a legally binding framework. The parties committed themselves to implement the relevant EU law (acquis communautaire), to develop an adequate regulatory framework and to liberalise their energy markets in line with the acquis under the Treaty.

46 https://energy-community.org/legal/treaty.html

The Energy Community acquis communautaire relevant to hydropower development is part of the acquis on environment and applies to the following Directives:

- EIA Directive[47]
- Article 4(2) of Birds Directive[48]
- ELD[49]
- SEA Directive[50]

Dispute settlement mechanism[51]

The Energy Community's dispute settlement mechanism bears a certain resemblance to the European Community's infringement procedure, however, without providing for a judicial decision in the last instance.

In case of non-compliance by a Party with Energy Community law, any person or entity (i.e. all natural and legal persons as well as companies, firms or associations having no legal personality) has a right to submit complaints to the Energy Community's Secretariat.

The complaint may be general or relating to a particular project. For example, the complaint may refer to the national laws, which do not ensure the effective participation of the public concerned in the EIA decision-making procedures. Or it may refer to certain HPP permitting procedures where public consultation, although required, was not conducted.

Interested third parties may access the case file and/or submit written observations to the Secretariat, provided they substantiate their legitimate interest. If the Secretariat decides not to pursue a case, the complainant may directly approach the Permanent High Level Group, which can either hear the complaint directly or initiate a preliminary procedure.

With the Opening Letter, the Secretariat initiates a preliminary procedure, the purpose of which is giving the Party concerned the possibility to react to the allegation of non-compliance with Energy Community law, and enabling the Secretariat to establish the full factual and legal background of the case. The Party is given two months to comply of its own accord with the requirements of the Treaty, to justify its position.

A Reasoned Opinion is the second step in a dispute settlement procedure. With the Reasoned Opinion, the Party concerned is requested to rectify the identified issues of non-compliance within a time-limit of two months. Depending on the reply of the respective Government, the Secretariat may submit the case to the Energy Community's Ministerial Council for a decision on the Party's compliance with Energy Community law.

Thereafter, in a Reasoned Request, the Secretariat seeks a decision from the Ministerial Council on the Party's failure to comply with its obligation under the Energy Community Treaty. Before taking a decision, the Advisory Committee is asked for its opinion on the Secretariat's Reasoned Request, for which it conducts a public hearing. At the meeting following the adoption of the Advisory Committee's opinion,

47 Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directives 97/11/EC of 3 March 1997 (implementation on the entry into force of the Treaty i.e. 1 July 2006), 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 (implementation by 14 October 2016) and Directive 2014/52/EU (implementation by 1 January 2019).

48 Directive 79/409/EEC of the Council of 2 April 1979 on the conservation of wild birds (implementation on the entry into force of the Treaty i.e. 1 July 2006).

49 Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, as amended by Directive 2006/21/EC, Directive 2009/31/EC and Directive 2013/30/EU (implementation by 1 January 2021).

50 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 (transposition by 1 January 2018 and implementation by 31 March 2018).

51 https://www.energy-community.org/legal/cases/dispute.html

the Permanent High Level Group shall hear both parties to the case as well as the President of the Advisory Committee, before including the case on the agenda of the next meeting of the Ministerial Council.

In case the concerned Party does not rectify the breach identified by the Ministerial Council, or in other cases of a serious and persistent breach of Energy Community law, a Party, the Secretariat or the Regulatory Board may request a decision of the Ministerial Council for concrete measures to be taken. Such measures relate to the suspension of certain rights, including but not limited to the suspension of voting rights and the exclusion from the meetings or mechanisms provided for in the Treaty.

Dispute Resolution and Negotiation Centre[52]

Before the Secretariat opens a dispute settlement procedure against a Party to the Treaty due to non-compliance, the Dispute Resolution and Negotiation Centre (hereafter "Center") shall review whether the case is suitable for a settlement. A case is suitable for a settlement in particular where compliance can be reached within a commonly agreed timeframe, and/or where the Party concerned can reach compliance with the assistance of the Secretariat. The suitability assessment shall be included in the case file.

The purpose of the Centre is to promote and provide facilities for the resolution of:

- disputes within the Energy Community between states and national authorities on the one hand, and private parties on the other;
- commercial disputes between private parties;
- disputes between states and national authorities;
- or disputes between the Parties to the Energy Community Treaty and the Secretariat.

Any interested party is invited to submit a request to have negotiations of a dispute facilitated by the Centre. The request shall be made in writing and shall contain:

- the name and address of the disputing parties;
- a summary of the dispute (including any claims for damages);
- a presentation of any related pending proceedings;
- and any documents deemed necessary for the purposes of the negotiations.

Following the registration of the request, the Centre shall provide the disputing parties with a draft Memorandum of Understanding, to be signed by all disputing parties consenting to the facilitation of the resolution of the dispute, and the chair of the Centre.

Unless the disputing parties and the Centre agree to a longer period, negotiations shall take place within a period of three months. The negotiation proceedings are considered terminated in one of the following circumstances:

- when a settlement agreement is reached by the disputing parties;
- when one of the disputing parties, or all the disputing parties jointly, submit a note to the facilitator, the Centre and the Secretariat, that the negotiations are terminated;
- and upon expiry of the deadline, when no extension has been agreed.

52 https://www.energy-community.org/aboutus/disputeresolution.html

5.

International treaties

5.1 The Aarhus Convention[53]

The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted on 25th June 1998 in the Danish city of Aarhus at the Fourth Ministerial Conference in the 'Environment for Europe' process.

Together with its Protocol on Pollutant Release and Transfer Registers, it protects every person's right to live in an environment adequate to his or her health and well-being. They are the only global legally binding global instruments on environmental democracy that put Principle 10 of the Rio Declaration on Environment and Development in practice.

The objective of the Aarhus Convention is to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being.

The Aarhus Convention establishes a number of rights of the public (individuals and their associations) with regard to the environment. The Parties to the Convention are required to make the necessary provisions so that public authorities (at national, regional or local level) will ensure that these rights become effective. The Convention provides for:

- **Access to environmental information:** Every individual or association has a right to receive environmental information held by public authorities. This can include information on the state of the environment, on policies or measures taken, or on the state of human health and safety where this can be affected by the state of the environment. Applicants are entitled to obtain this information within one month of the request and without having to say why they require it. In addition, public authorities are obliged to actively disseminate environmental information in their possession.

- **Public participation in environmental decision-making:** Arrangements are to be made by public authorities to enable the public affected and environmental NGOs to comment on issues related to the environment, to ensure that these comments are taken into due account in decision-making, and that information is provided on the final decisions and the reasons for them. The public participation provisions of the Convention are divided into three parts:

  - public participation in decisions on specific activities with a potential significant effect on the environment;
  - public participation in the development of plans, programmes and policies relating to the environment, which include sectoral or land-use plans, environmental action plans, and environmental policies at all levels;
  - public participation in the preparation of laws and regulations by public authorities.

- **Access to justice:** Members of the public have a right to access to legal review procedures to enforce the Convention's standards on access to information and public participation, as well as the provisions of domestic environmental law. The provisions on access to justice apply to all matters of environmental law, but a distinction is made in the Convention between three categories of decisions, acts and omissions:

  - refusals and inadequate handling by public authorities of requests for environmental information;
  - decisions, acts and omissions by public authorities concerning permits, permit procedures and decision-making for specific activities;
  - all other kinds of acts and omissions by private persons and public authorities, which may have contravened national law relating to the environment.
  - Depending on the kind of decision, act or omission in question, the Convention sets different criteria and allows different degrees of flexibility for the Parties in providing access to justice.[54]

53 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, https://www.unece.org/environmental-policy/conventions/public-participation/publications/public-participation/convention-on-access-to-information-public-participation-in-decision-making-and-access-to-justice-in-environmental-matters/convention-on-access-to-information-public-participation-in-decision-making-and-access-to-justice-in-environmental-matters/doc.html

54 United Nations Economic Commission for Europe, The Aarhus Convention: An implementation guide, 2014.

Compliance mechanism of the Aarhus Convention[55]

An interesting example of a non-compliance case is the one brought by ClientEarth against the EU for stopping citizens from taking environmental cases to the European Court of Justice (ACCC/C/2008/32(EU)).

The Aarhus Convention Compliance Committee (ACCC) confirmed that the EU was breaching the access to justice provisions of the Aarhus Convention by preventing individuals and NGOs from bringing cases in EU courts. The Committee also found that the EU's internal review procedure did not compensate for the lack of court access.

The Committee said that the regulation, which applies the Convention, puts the EU in violation of the Convention and called for the regulation to be amended to ensure that individuals and NGOs go to court to challenge the decisions of EU institutions in environmental matters. It further recommended that the ECJ interprets EU law in a way, which is consistent with the objective of providing adequate and effective judicial remedies for members of the public to challenge acts, which contravene national law relating to the environment.

In consequence, the Council adopted a common a common position on the legislative proposal to amend the Aarhus Regulation. [56] However, the ACCC adopted its advice stating that the legislative proposal, in its current form, is insufficient to ensure the EU's compliance with the Convention.[57]

The Committee's role is to further implement the Convention. It is not a redress mechanism. The Committee may examine compliance issues and make recommendations if and as appropriate. The Committee adopts findings and if non-compliance is found, may make recommendations either to the Meeting of the Parties, or, with the Party's agreement, directly to the Party concerned.

55 Guide to the Aarhus Convention Compliance Committee, https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_Guidance/Guide_to_the_Aarhus_Convention_Compliance_Committee__2019.pdf#page=1&zoom=auto,-82,848

56 https://www.consilium.europa.eu/en/press/press-releases/2020/12/17/council-reaches-agreement-on-improving-access-to-justice-in-environmental-matters/

57 https://unece.org/sites/default/files/2021-02/M3_EU_advice_12.02.2021.pdf

Rights of the public

Any member of the public may bring before the Committee a communication concerning a Party's compliance with the Convention. The communication shall be addressed to the secretariat in writing, using the required format[58], and should be submitted in electronic form supported by corroborating information.

The communication should be concise: no more than 6,000 words and in exceptionally complex cases up to 12,000 words. The facts and circumstances of the alleged non-compliance should be provided, including all matters of relevance to the assessment and consideration of the communication.

The communication should indicate whether it concerns a specific case of a person's rights of access to information, public participation or access to justice being violated as a result of the alleged non-compliance of the Party concerned; or whether it relates to a general failure by the Party concerned to implement, or to implement correctly, the provisions of the Convention. For each of the provisions of alleged non-compliance, an explanation of how the Party concerned has failed to comply with that provision, based on the facts of your case is needed. The key supporting documentation will help the Committee to substantiate the allegations.

Although there is no formal requirement to use domestic remedies before submitting communication to the Committee, it is advised to do so. The Committee takes into account at all relevant stages any available domestic remedy, unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress.

Following receipt of a new communication, the Secretariat sends an acknowledgement of receipt.

No later than four weeks before the meeting, the Secretariat informs the communicants and the Party concerned that a communication concerning its compliance will be considered as to its preliminary admissibility at the next meeting, and provides a link to where the communication is posted on the Committee's website.

The Party concerned and the communicants are informed that the preliminary admissibility will be discussed in open session at the upcoming meeting and, though there is no requirement to do so, a representative of the Party concerned and the communicants may participate either by audio-conference or in person in that session.

No later than two weeks after the meeting, the Secretariat informs the Party concerned and the communicant about the Committee's decision regarding the preliminary admissibility of the communication.

If the communication was considered to be preliminarily admissible, the Committee proceeds to consider the substance of the file.

The Committee starts the preparation of its draft findings and, where applicable, prepares recommendations as soon as it considers that it has a sufficiently complete picture of the case. Once prepared and agreed by the Committee, the draft findings with any measures or recommendations are transmitted to the Party concerned and the communicant, with an invitation to comment on these within six weeks.

In order to effectively examine the follow-up to decisions of the Meeting of the Parties concerning compliance by individual Parties, the Committee prepares periodic progress reviews, which examine the extent to which the Party concerned has by that date fulfilled the recommendations set out in the decision of the Meeting of the Parties.

58 https://www.unece.org/env/pp/cc/com.html

5.2 The Espoo Convention[59] and the Kyiv (SEA) Protocol[60]

The Espoo (EIA) Convention sets out the obligations of Parties to assess the environmental impact of certain activities at an early stage of planning. It also lays down the general obligation of States to notify and consult each other on all major projects under consideration that are likely to have a significant adverse environmental impact across boundaries (see some examples).

The Convention was adopted in 1991 and entered into force on 10 September 1997 (see which countries are Parties to the Convention).[61]

The Espoo Convention, and in particular Article 2 requires Parties to take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impacts of proposed activities and to establish an environmental impact assessment procedure that permits public participation. A transboundary EIA must be carried out before the decision to authorise or undertake these activities is taken.

The key steps in the EIA procedure are:

- notification and transmission of information;
- determination of the content and extent of the matters of the EIA information (Scoping);
- preparation of the EIA information/report by the developer;
- public participation, dissemination of information and consultation;
- consultation between concerned Parties;
- examination of the information gathered and final decision;
- dissemination of information on the final decision.

According to the Convention, the affected Party (e.g. in the case of HPPs an upstream or downstream country) must express an interest in participating in the EIA procedure of the country of origin, following notification. The Party of origin is obliged to notify affected Parties even if there is only a low likelihood of such impacts. This means that notification is always necessary, unless significant adverse transboundary impacts can be excluded with certainty.[62]

If this interest is expressed, the Party of Origin shall provide opportunities for the public of the affected country to participate in the EIA process. These opportunities must be equivalent to those provided to the public in the Party of origin. The concerned Parties (Party of origin and affected Party) must ensure that the public in the areas likely to be affected:

- is informed of the proposed activity; and
- is provided with possibilities for making comments on or objections to the proposed activity.

The concerned parties shall be responsible for the transmission of these comments or objections to the competent authority of the party of origin, either directly to this authority or, where appropriate, through the party of origin. Comments or objections of the public of the affected Party (resulting from the consultation) on the proposed activity and on the EIA documentation must be taken into account in the final decision on the proposed activity.[63]

The following flowchart presents the steps to be followed in case of a transboundary EIA.[64]

59 https://www.unece.org/fileadmin//DAM/env/eia/eia.htm
60 https://www.unece.org/environmental-policy/conventions/environmental-assessment/about-us/protocol-on-sea/enveiasea-protocol/about-the-sea-protocol.html
61 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-4&chapter=27&lang=en
62 Guidance on the Application of the Environmental Impact Assessment Procedure for Large-scale Transboundary Projects: https://ec.europa.eu/environment/eia/pdf/Transboundry%20EIA%20Guide.pdf
63 Guidance on Public Participation in Environmental Impact Assessment in a Transboundary Context: https://www.unece.org/fileadmin/DAM/env/documents/2006/eia/ece.mp.eia.7.pdf
64 Guidance on the Application of the Environmental Impact Assessment Procedure for Large-scale Transboundary Projects: https://ec.europa.eu/environment/eia/pdf/Transboundry%20EIA%20Guide.pdf

FLOW CHART **of the transboundary EIA procedure and summary of guidance based upon best practise**

STEP 1 **Notification and transmittal of information**
Art. 7.1 and 7.2 EIAD - Art. 3 Espoo

- Establish contact with a view to creating a coordination body for the concerned Parties;
- Consult potentially affected Parties early on;
- Always notify affected Parties if significant adverse transboundary effects cannot be excluded;
- Notify affected Parties preferably before scoping;
- Pay attention to the notification's format;
- Parties of origin schould notify each other;
- Affectes Parties should provide information on significant transboundary effects.

STEP 2 **Determination of the content and extent of the matters of the EIA information scoping**
Art. 5.2 EIAD

- Develop close cooperation between the developer and competent authoritties
- Create a coordination body for the concerned Parties
- Identify significant adverse transboundary effects;
- Set out the scope of a joint EIA report for the whole project.

STEP 3 **Preperation of the EIA information/report by the developer**
Art. 5.1 and 5.3 and Annex IV EIAD
Art. 4 and Appendix II Espoo

- Ensure overall assessment of the effects
- Consider impacts of associated works
- Assess reasonable alternatives
- Prepare a joint EIA report for the whole project;
- Prepare a non-technical report summary.

STEP 4 **Public participation - information and consultation**
Art. 6 and 7.3 EIAD
Art. 3.8, 2.2, 2.6 and 4.2 Espoo

- Distribute tasks and responsibilities among the Parties;
- Make information widely available;
- Ensure accessibility of all documentation;
- Use appropriate means of consultation (e.g. open discussions and public hearings);
- Ensure that the authorities and developer; are present at the herarings.

STEP 5 **Consultation between concerned Parties**
Art. 7.4 EIAD and Art. 5 Espoo

STEP 6 **Decision-making: examination of the information gathered and final decision**
Art. 8 EIAD and Art. 6.1 Espoo

- Take into account the overall significant effects;
- Coordinate national consent procedures.

STEP 7 **Information on final decision**
Art. 9 EIAD and Art. 6.2 Espoo

- Inform the public, the environmental authorities and the affeccted Parties where appropriate.

The Espoo Convention has been supplemented by a Protocol on Strategic Environmental Assessment (SEA). The so-called Kyiv (SEA) Protocol requires its Parties to evaluate the environmental consequences of their official draft plans and programmes. A strategic environmental assessment (SEA) is undertaken much earlier in the decision-making process than a project environmental impact assessment (EIA), and it is therefore seen as a key tool for sustainable development. The Protocol also provides for extensive public participation in government decision-making in numerous development sectors.

The Protocol was adopted on 21 May 2003 during the Ministerial 'Environment for Europe' Conference in Kyiv.

On a practical level, SEA procedures should be initiated together (or with only a slight delay) with the planning or programme development process. This approach provides an opportunity to integrate SEA inputs in the plan or programme during its preparation and thus ensures that the results of the SEA are properly considered when adopting a strategic document, or even before the adoption.

According to the Protocol, an SEA is obligatory for governmental plans and programmes and their modification in thirteen economic sectors (agriculture, forestry, fisheries, energy, industry, including mining, transport, regional development, waste management, water management, telecommunications, tourism, town and country planning, land use) when the plans and programmes set the framework for future development consent for specific projects that require an EIA under national legislation.

For plans and programmes in other economic sectors as well as for plans and programmes determining use of small areas at the local level, and for minor modifications, an SEA is not applied automatically. Governments should determine whether an SEA is required or not.

Procedures for review of compliance[65]

The objective of the Espoo Convention's Implementation Committee (hereafter "the Committee") is to assist Parties to comply fully with their obligations under the Convention. To this end, the Committee shall also consider any possible non-compliance by a Party with a view to securing a constructive solution.

The Committee might become aware of a possible non-compliance by submissions of the Parties or by any other source, including the public[66], and should consider this information on a non-discriminatory, non-arbitrary and unbiased basis.

Where the Committee becomes aware of possible non-compliance by a Party with its obligations, it may request the Party concerned to furnish necessary information about the matter. Any reply and information in support shall be provided to the Committee within three months (or within a longer period, if the circumstances of a particular case require). The Committee shall consider the matter as soon as it receives the reply.

To assist the performance of the above functions, the Committee may:

- request further information on matters under its consideration, through the Secretariat;
- undertake, at the invitation of the Party of origin and/or the affected Party, information gathered in the territory of that Party;
- consider any information forwarded by the Secretariat concerning compliance with the Convention;
- as appropriate, seek the services of scientific experts and other technical advice, or consult other relevant sources.

The Committee shall decide on the content of any report or recommendations by consensus, send a copy of the draft report or recommendations to the Parties concerned, and shall take into account any representations from such Parties in the finalization of the report.

65 https://www.unece.org/?id=2805
66 https://www.unece.org/fileadmin/DAM/env/eia/documents/ImplementationCommittee/2014_Structure_and_functions/IC_form_for_information_2018.docx

The Committee shall report on its activities at each meeting of the Parties through the Secretariat and make such recommendations as it considers appropriate, taking into account the circumstances of the matter. Each report shall be finalised by the Committee not later than ten weeks in advance of the session of the Meeting of the Parties at which it is to be considered.

The Meeting of the Parties may, upon consideration of a report and any recommendations of the Committee, decide upon appropriate general measures to bring about compliance with the Convention, as well as measures to assist an individual Party´s compliance. The Parties shall make every effort to reach a decision by consensus. If all efforts at consensus have been exhausted and no agreement is reached, the decision shall, as a last resort, be adopted by a three-fourths majority vote of the Parties present and voting at the meeting.

5.3 The Bern Convention[67]

The Bern Convention is an initiative of the Council of Europe and is a binding international legal instrument in the field of nature conservation, covering most of the natural heritage of the European continent and extending to some States of Africa. It was the first international treaty to protect both species and habitats and to bring countries together to decide how to act on nature conservation. The implementation of the Bern Convention in EU Member States is established through the Birds and Habitats Directives.

The Convention aims to ensure the conservation of wild flora and fauna species and their habitats, especially those species and habitats whose conservation requires the co-operation of several states, and to promote such co-operation. Special attention is given to endangered and vulnerable species, including endangered and vulnerable migratory species specified in the appendices (see text box), and to the protection of habitats. The Treaty also takes account of the impact that other policies may have on natural heritage, and recognises the intrinsic value of wild flora and fauna, which needs to be preserved and passed to future generations.

Contracting Parties are obliged by the Convention to:

- take all appropriate measures to ensure the conservation of the habitats of wild flora and fauna species and the conservation of endangered natural habitats. Such measures should be included in the Parties' planning and development policies and pollution control;
- give special attention to the protection of areas of importance for migratory species, and which are appropriately situated in relation to migration routes, especially when used as staging, feeding, breeding or moulting areas;
- promote education and to disseminate information on the need to protect species and habitats and to control the introduction of exotic species.

Protected species and prohibited means of exploitation

- Specially protected flora species are listed in **Appendix I**,
- specially protected fauna species in **Appendix II**,
- and protected fauna species, the harvesting of which is authorised but must be regulated, in **Appendix III**,
- **Appendix IV** lists prohibited means and methods of killing, capture and other forms of exploitation.

67 Convention on the Conservation of European Wildlife and Natural Habitats, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/104

The case-file system under the Bern Convention[68]

The case-file system is a monitoring tool based on complaints for possible breaches of the Convention, which can be submitted by NGOs or private citizens. Based on the information submitted, the complaints so received are processed by the Secretariat of the Council of Europe, the Bureau and, when particularly relevant, also by the Standing Committee, according to their merits. When the Standing Committee or its Bureau considers that further information is needed, they can arrange for on-the-spot visits by independent experts, who report to the Standing Committee.

The case-file system is unusual as it is not based on any provisions within the Convention, but stems from a decision taken by the Standing Committee itself, and has proven to be a very successful problem-solving instrument. The Standing Committee remains free to decide the solution in each case, without being constrained by strict obligations, which may be a burden for the smooth co-operation among Contracting Parties.

The Secretariat examines all letters sent to the Standing Committee of the Convention itself, or to its Chairman or Secretariat, by a Contracting Party, individual, non-governmental organisation or group of private persons, and which contain a complaint about the failure of one or more Contracting Parties to comply with one or more provisions of the Convention.

After receiving the complaint, the case goes through a first screening by the Secretariat. On the basis of the information provided, and after requesting further information from the complainant, if necessary, it decides whether to take the case forward or not.

The Contracting Party concerned has a period of about four months to reply to the request for information from the Secretariat. On-the-spot appraisals are carried out with the agreement of the Party concerned.

The Standing Committee assesses the case-files and takes decisions on the measures to be adopted and on the status of the file. In case of a vote, decisions would need to be taken by a two-thirds majority of the votes cast.

It is important to stress the freedom of the Committee when deciding on a case. The Bern Convention is an instrument of co-operation among equal Parties, and the Standing Committee plays the role of a forum to discuss and help resolve problems, rather than that of a watchdog. Therefore, the procedure governing the case-files system is flexible, allowing for rapid decision making, and for freedom of choice in terms of the solutions proposed.

The Standing Committee may decide to take different measures, such as:

- request for further information and reports to be presented;
- propose an on-the-spot appraisal;
- adopt a specific recommendation on the matter, whose implementation will be followed-up afterwards.
- The Standing Committee can adopt two types of recommendations:
- general recommendations, referred to all Parties or addressing a broad issue;
- specific recommendations, targeting a specific country or a specific subject.

Follow-up of Standing Committee Recommendations can be done at Standing Committee meetings, but also through reports, meetings and reviews by the Group of Experts.

68 https://rm.coe.int/1680746b75

6.

Bibliography and further reading

- Environmental Impact Assessment of Projects Guidance on the preparation of the Environmental Impact Assessment Report: https://ec.europa.eu/environment/eia/pdf/EIA_guidance_EIA_report_final.pdf
- Environmental Impact Assessment of Projects Guidance on Screening: https://ec.europa.eu/environment/eia/pdf/EIA_guidance_Screening_final.pdf
- Guidance on the Application of the Environmental Impact Assessment Procedure for Large-scale Transboundary Projects: https://ec.europa.eu/environment/eia/pdf/Transboundry%20EIA%20Guide.pdf
- Guidance on Public Participation in Environmental Impact Assessment in a Transboundary Context: https://www.unece.org/fileadmin/DAM/env/documents/2006/eia/ece.mp.eia.7.pdf
- CIS Guidance no 8 Public Participation in relation to the Water Framework Directive: https://circabc.europa.eu/sd/a/0fc804ff-5fe6-4874-8e0d-de3e47637a63/Guidance%20No%208%20-%20Public%20participation%20%28WG%202.9%29.pdf
- CIS Guidance no 36 Exemptions to the Environmental Objectives according to Article 4(7): https://circabc.europa.eu/sd/a/e0352ec3-9f3b-4d91-bdbb-939185be3e89/CIS_Guidance_Article_4_7_FINAL.PDF
- Guidance on the requirements for hydropower in relation to Natura 2000: https://ec.europa.eu/environment/nature/natura2000/management/docs/Hydro%20final%20May%202018.final.pdf
- Guide to the Aarhus Convention Compliance Committee: https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_Guidance/Guide_to_the_ACCC_for_CC56_clean.pdf
- Environmental Liability Directive Protecting Europe's Natural Resources: https://ec.europa.eu/environment/legal/liability/pdf/eld_brochure/ELD%20brochure.pdf
- The Aarhus Convention: An Implementation Guide: https://www.unece.org/index.php?id=35869
- Guide to the Aarhus Convention Compliance Committee: https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_Guidance/Guide_to_the_Aarhus_Convention_Compliance_Committee__2019.pdf#page=1&zoom=auto,-82,848
- Guide on Access to Justice in European Union law: https://www.documents.clientearth.org/library/download-info/16209

Annex 1

Checklist on EU environmental law concerning hydropower development

Environmental Impact Assessment procedure

1.	• Is the proposed project listed under the Annex I list of projects, for which the EIA is mandatory?
2.	• Is the proposed project listed under the Annex II list of projects, for which the EIA can be requested upon the adequate screening?
3.	• Does the national law on EIA procedure set the threshold/criteria for the hydropower projects that are listed under Annex II?
4.	• Does the national law require from the competent authorities to assess the project in the screening phase based on the factors, such as inter alia, projects nature, size and location, or only one or two of these factors?
5.	• Did you request the screening decision, and all of the documents that the developer submitted to the competent authority?
6.	• Did the investor obtain the location conditions?
7.	• Were there any other assessments conducted by the other authorities, such as the Nature Protection authorities or Water Agencies?
8.	• Did the developer request a water permit from the Water Agency? • Did the Water Agency conduct any assessment on the impact on the status of water and water flow? • Did they set the minimum environmental flow?
9.	• Did the Nature Protection authorities issue any Nature Protection Conditions?
10.	• Is the project in protected area, or Nature 2000? • If it is outside of these areas, will there be an impact on these areas by the proposed project? • Are there any protected species?
11.	• In case of the above, was there any appropriate assessment conducted whether inside of the EIA report or separately?
12.	• Was the proposed project included in any planning document? • Were there any reservations against the proposed type of projects in the planning document?
13.	• Were the project's characteristics assessed, inter alia, in relation to its cumulative effects with existing and/or approved projects of the same and different kind?
14.	• Is the determination by which the competent authority takes a view that a project's characteristics do not require it to be subjected to an EIA, accompanied by all of the information that makes it possible to check that it is based on adequate screening?
15.	• Did the competent authority take its decision within 90 days from the date on which the developer submitted all of the relevant information?
16.	• Was the screening decision based on all of the relevant criteria set under Annex III?
17.	• If the competent authorities decided that the project is not likely to have a significant effect on the environment, do you possess data or scientific information that makes you believe that the project will have a likely significant effect on the environment, or that the screening was not done properly?
18.	• Does the national law allow you to challenge the screening decision, whether before the Administrative authorities (e.g. Local municipality, Environmental Agency, Ministry of Environment etc.), or before the Court? • What is the deadline for challenging the screening decision?
19.	• Was the EIA report prepared by competent experts? • Does it include at least all of the necessary information listed under article 5(1) and Annex IV?
20.	• Does the environmental impact assessment identify, describe and assess in an appropriate manner, the direct and indirect significant effects of a project on the factors listed under article 3? • Did the competent authority carry out such an assessment itself?
21.	• Did you participate in the public participation? Did you receive a response on your comments? • Were these comments taken into account?
22.	• Does the planned project have transboundary environmental impact on the neighbouring state(s)? • Was this stare included in the EIA procedure?
23.	• Did the competent authority issue an approval on the EIA study? • What is the deadline for challenging this decision (i.e. 15 or 30 days)?
24.	• Did the competent authority grant a development consent? • What is the deadline for challenging this decision (i.e. 15 or 30 days)?

Strategic Environmental Impact Assessment

1.	• Is the proposed plan or programme covered by the type of plans and programmes for which the SEA procedure is required (e.g. for energy, water management, town and country planning or land use, which set the framework for future development consent of projects listed in the EIA Directive, which require an assessment pursuant to the Habitats Directive)?
2.	• Is the proposed plan and programme, listed under the article 3.2, determined to use small areas at local level, or is it a minor modification of the plan and programme?
3.	• Is the proposed plan and programme a type of plan and programme that sets the framework for future development consent of projects, but it is not listed under the article 3.2, or Annexes of the EIA Directive?
4.	• Did the competent authority conduct a screening procedure of plans and programmes under questions 2 and 3 by taking into account relevant criteria set out in Annex II?
5.	• Were the conclusions from the screening procedure and the reasons for not requiring an environmental assessment made available to the public? Are you allowed under the national law to challenge this decision?
6.	• Does the environmental report identify, describe and evaluate the likely significant effects on the environment of implementing the plan and programme, and reasonable alternatives? • Does the environmental report contain all of the information listed under Annex I of the Directive?
7.	• Would the planned plan or programme have a likely significant effects on protected sites and selected species under the Habitats Directive? • Was this assessment part of the environmental report?
8.	• Are the proposed alternatives realistic and identified, described and evaluated in a comparable way?
9.	• Is the proposed plan or programme likely to have significant effects on the environment in another country? • Was the proposed plan or programme subject of the transboundary consultations? • Did you notify the potentially affected state about the plan or programme?
10.	• Did you participate in the public participation on the proposed plan and programme and the environmental report? • Were the results of the consultation taken into account during the preperation of the plan or programme and before its adoption or submission to the legislative procedure?
11.	• Were the results of public consultations taken into account in the final decision?
12.	• Upon the adoption of the plan or programme, did the authorities make public: a) the plan or programme as adopted; b) a statement summarising how environmental considerations have been integrated into the plan or programme and how the environmental report and opinions have been taken into account; c) the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with, and d) the monitoring measures?

Water Framework Directive procedure

1.	• Did you take part during the public consultations for the River Basin Management Plan (RBMP)?
2.	• Was the SEA procedure conducted for the RBMP? Did you participate?
3.	• Is the proposed project expected to cause deterioration or compromise the achievements of good status/potential of the water body?
4.	• Does RBMP include the proposed project, and set out and explain the reasons for proposed project?
5.	• If yes, did the authorities apply the derogation test under article 4.7?
6.	• Did the assessment under the SEA include a chapter on article 4.7 of the WFD?
7.	• Was the assessment under the article 4.7 part of the EIA procedure for a specific project? Was the test under article 4.7 justified within the EIA study?
8.	• If the project was not required to go through the EIA procedure, was the article 4.7 procedure conducted separately?
9.	• Were all practicable steps taken to mitigate the adverse impact on the status/ potential of the affected water body(ies)?
10.	• Can the beneficial objectives served by those modifications or alterations of the water body(ies) be achieved by other means which are technically feasible, do not lead to disproportionate cost and are a significantly better environmental option?
11.	• Did the authorities consider the reasons for those modifications or alterations to be of overriding public interest and/or are the benefits to the environment and to society of achieving the WFD objectives outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development?
12.	• Did the authorities assess the cumulative effects of the proposed project on the status of the water body?
13.	• Do the exemptions (derogation) guarantee at least the same level of protection as existing EU legislation and do they ensure not to permanently exclude or compromise the achievements of the wider objectives of the WFD in other bodies of water within the same RBD?
14.	• Does the river host protected species or habitats under the Habitats Directive? If so, does the RBMP include additional conservation measures to protect those species or habitats?
15.	• If the project does not compromise the objectives of the WFD, does it adversely affect the integrity of a Natura 2000 site? If so, was the project anyways approved under the WFD?
16.	• Did you request a water permit for the proposed project? Did the water permit set any mitigation measures, or minimum ecological flow?
17.	• Did you challenge the water permit before the national authorities or courts?
18.	• Did you request and/or challenge any other document where the derogation under art. 4.7 was conducted?

Birds and Habitats Directive procedure

1.	• Is the plan or project directly connected with, or necessary to, the management of the site for nature conservation purposes?
2.	• If no, is the plan or projects likely to have significant effects on the site?
3.	• Did the authorities consider whether there are any likely significant effects on a protected site either alone or in combination with other plans or projects (pre-assessment stage or "screening")?
4.	• In the appropriate assessment, did the authorities assess implications in view of the site's conservation objectives?
5.	• Did they conduct in depth, documented, scientifically motivated analysis, taking into account the conservation objectives and the vulnerability of the site?
6.	• Was the information up-to-date, and did it comprehensively identify all of the potential effects?
7.	• Did they weigh economic and social interests against the conservation objectives of the site?
8.	• Did they assess cumulative and in-combination effects with other plans and/or projects in or outside of the Natura 2000 site?
9.	• Did the evaluation include plans or projects outside of the Natura 2000 and its impact on the site, as well as the synergic effects with other plans and projects?
10.	• Did the cumulative assessment consider already existing installations on the river (e.g. the "pre-load")?
11.	• Was the appropriate assessment done within the EIA or SEA study? • Did these studies separately assess the specificities of the site?
12.	• Can it be concluded that the plan or project will not be adversely affect the integrity of the site?
13.	• Can the negative impacts be removed, e.g. through mitigation measures?
14.	• Despite answering no to the questions 10 and 11, did the authorities grant the authorisation?
15.	• Was the removal of impact through mitigation measures designed in a way where the damage would be compensated, rather than avoided or removed?
16.	• Was each mitigation measure described in detail, with an explanation based on scientific evidence of how it will eliminate, or reduce the adverse impacts?
17.	• Did the authorities demonstrate the absence of adverse effects rather than their presence, reflecting the precautionary principle, meaning that no doubts remain as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered?
18.	• Despite the breach of art. 6.3, did the authorities apply derogations under the art. 6.4?
19.	• When applying the derogations despite the negative assessment, did the authorities show that there are no alternative solutions, and there are imperative reasons of overriding public interest, and provided compensation? In this order.
20.	• Does the site hosts a priority natural habitat type or a priority species? • If yes, was the only considerations which were raised those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest?
21.	• Would the project affect protection of certain species across their entire natural range within the EU, regardless of whether they are inside or outside of Natura 2000 sites?
22.	• If yes, was the derogation allowed to prevent damage to crops or livestock or in the interests of public health and safety? Were there other satisfactory solutions and the consequences of these derogations that are not incompatible with the overall aims of the Directive?
23.	• Did you request all the documents mentioned above? Did you request any other document that includes assessment or the conditions by other authorities, such as the Environmental Agency or Nature Protection authority?
24.	• Can you challenge a decision done on the appropriate assessment (art. 6.3) or the derogation (art. 6.4)? What is the deadline?


FREE
SOČA