11. Environmental Impact Assessment in the EU: More than only a Procedure?

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1. INTRODUCTION

The requirement to conduct an environmental impact assessment (EIA) is one of the cornerstones for implementing the principle of prevention.[1] Being a procedure designed to forecast environmental repercussions and influence decision-making processes, it has greatly affected a whole range of activities in the EU and generally removed the calm waters of national development consent procedures.[2] EU Member States have reluctantly or inefficiently incorporated the EIA directives' basic mandates, such as the definition of the activities subject to assessment, the prior verification of their likely effects or, in particular, the *integration* of EIA within existing development procedures, thus avoiding the Greek mathematician Euclid's 5th Postulate, according to which two parallels (authorisation procedure and environmental assessment) would merge but at the point of infinity.

More than 30 years have elapsed since the adoption of the first EIA Directive (1985).[3] During that period, the EU has imposed the EIA requirement on plans and programmes,[4] and progressively strengthened relevant obligations (e.g., number of activities subject to EIA, factors to assess, organisational requirements, or the duty to give reasons regarding the activity). The European Court of Justice's (CJEU) teleological (purposive) approach in interpreting the relevant provisions has certainly been key to (a) expand the reach of basic notions and assessment obligations,[5] (b) curtail Member States' margin of manoeuvre and (c) emphasise the duties of national judges,[6] and participatory rights

[1] Article 191(2) (second sentence) TFEU.

[2] See Angel Moreno Molina, 'Environmental Impact Assessment in EC Law; A Critical Appraisal', in Richard Macrory (ed.), *Reflections on 30 Years of EU Environmental Law* (Europa Law Publishing, 2006), 43–59.

[3] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ L 175, 5.7.1985 (EIA Directive). This Directive is now replaced by 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, OJ L 26, 28.1.2012.

[4] 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, OJ L 197, 21.7.2001 (SEA Directive); Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992 (Habitats Directive).

[5] Case C-567/10, *Inter-Environnement Bruxelles ASBL, Pétitions-Patrimoine ASBL, Atelier de Recherche et d'Action Urbaines ASBL v. Région de Bruxelles-Capitale*, ECLI:EU:C:2012:159, para. 37.

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

including, for instance, the right of affected parties to invoke the relevant provisions).[7] The continuous clarification of relevant concepts in the directives and notably in judgments has served to reinforce the mechanisms for considering the environmental effects in detail.[8] However, it is still arguable whether EIA could do away with the stigma of being a procedure without substantial impact on the protection of the environment or, on the contrary, have a 'material' clout on decisions.[9] Bearing in mind these considerations, the following paragraphs analyse some key questions regarding EIA in the light of the relevant obligations set out in the applicable EU directives and CJEU case law, such as its purposes (section 2), the legal instruments requiring the carrying out of this procedure (section 3), the specific activities subject to EIA (section 4), Member States' discretion as to the triggering of an EIA (section 5), and the adjustment of their organisational structure to comply with EU law (section 6).

2. THE PURPOSES OF EIA

EIA is still the subject of an on-going debate regarding its nature. The US experience with the US National Environmental Policy Act (NEPA, 1970) reflects the gap between, on the one hand, the original ambitious purposes underlying the Act in conjunction with its 'action-forcing' provisions and, on the other, the achievement of more modest objectives (i.e., an improvement of the quality of decision-making),[10] and the leading role of procedural matters over substantive ones.[11] Originally, the EU conceived EIA as a tool for the introduction of 'general principles' with a view to supplementing and coordinating development consent procedures governing public and private projects likely to have a major effect on the environment. This assessment was to be conducted on the basis of appropriate information supplied by the developer, which could be supplemented by the authorities and by the persons concerned by the project in question.[12] This approach, which may have in fact favoured a large amount of case law, could be termed as 'techno-rational', whereby decision-makers would give objective consideration to an issue, examine the environmental repercussions derived from an activity and endeavour to elude such effects, thus adopting a decision in the interest of society (and the environment).[13] EIA would neither lay down

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[7] Case C-201/02, *The Queen on the application of Delena Wells v. Secretary of State for Transport, Local Government and the Regions*, ECLI:EU:C:2004:12; Case C-570/13, *Gruber v. Unabhängiger Verwaltungssenat für Kärnten, EMA Beratungs- und Handels GmbH, Bundesminister für Wirtschaft, Familie und Jugend*, ECLI:EU:C:2015:231.

[8] See Case C-2/07, *Abraham v. Région wallonne, Société de développement et de promotion de l'aéroport de Liège Bierset SA, T.N.T. Express Worldwide (Euro Hub) SA, Société nationale des voies aériennes-Belgocontrol, État belge, Cargo Airlines Ltd.*, ECLI:EU:C:2008:133, para. 34.

[9] See point 2, below.

[10] Lynton Keith Caldwell, *The National Environmental Policy Act: An Agenda for the Future* (Indiana University Press, 1998).

[11] Richard Lazarus, 'The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains' (2012) 100 *The Georgetown Law Journal* 1507–86.

[12] Ninth recital to the preamble.

[13] Stephen Jay, Carys Jones, Paul Slinn, Christopher Wood, 'Environmental Impact Assessment: Retrospect and Prospect' (2007) 27 *Environmental Impact Assessment Review* 287–300, at 291–2.

measurable standards or targets on decision-makers,[14] nor necessarily prevail over other considerations (e.g., economic or societal) within the decision-making procedure. This state of affairs remains in spite of the elements to assess, but also the environmental goals to achieve, and the participation of different actors involved in the procedure. In conjunction with this vision, the European Commission has added that, as part of the permitting process, the EIA is also a tool to assess the environmental costs and benefits of specific activities with the aim of ensuring their sustainability.[15]

In the light of the Commission's position, it is arguable whether EIA remains firmly anchored to the idea of an informed procedure as to the environmental effects of an activity supplying conclusions to the public authorities, or may go beyond that straightjacket imposing real constraints to activities negatively affecting the environment in terms of environmental quality to achieve, compensation measures to implement together with its execution, viable consideration of alternatives (including the zero alternative) or withdrawal of the activity in view of its impacts. Although 'sustainability' shows the ability to absorb different concerns,[16] it raises the problem of verifying whether it is guaranteed particularly in the case of whole groups of activities (plans and projects) and by reference to the whole range of environmental matters to asses (e.g., impact on climate). None of the relevant EU EIA Directives[17] provides guidelines or thresholds to substantiate the impact of the EIA procedure in terms of sustainability. Moreover, bearing in mind the fragmented data in the hands of the Commission (as this EU institution acknowledges, albeit sometimes in footnotes)[18] it may difficult to attest whether sustainability (whatever its exact or approximate meaning) is actually being achieved by the Member States either individually or *en bloc*.

EIA is still a predictive procedure consisting of different stages to be followed. This is its original character albeit not entirely. The CJEU has clarified in its judgments, particularly in Case C-50/09, that the obligation to consider, at the conclusion of the decision-making process, the information gathered by the competent authority must not be confused with the assessment obligation. The latter involves an examination of the substance of the information gathered as well as a consideration of the expediency of supplementing it, if appropriate, with additional data. Hence, the public authority must undertake 'both an *investigation* and an *analysis*' to reach as complete an assessment as possible of the direct and indirect effects of the activity concerned.[19] The weight of environmental effects may be profound in decision-making, but this does not necessarily guarantee that activities with undesirable effects are barred from authorisation.[20] Despite pursuing a high level of environmental protection, as the CJEU reiterates, EIA does not prevent authorities

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[14] SWD(2012) 355 final at 1; COM(2017)234 final at 2.

[15] See SWD(2012) 355 final.

[16] Jane Holder, *Environmental Assessment. The Regulation of Decision Making* (Oxford University Press, 2006), at 59.

[17] See notes 3 and 4.

[18] In SWD(2012) 355 final, the Commission admits that '[t]here are no specific data related to the application of the EIA at regional/local levels' (at 10, footnote 56).

[19] Case C-50/09, *Commission v. Ireland*, ECLI:EU:C:2011:109, para. 40, emphasis added; Case C-441/03, *Commission v. Netherlands*, ECLI:EU:C:2005:233, para. 22 (Habitats Directive).

[20] See in the case of the Habitats Directive, Case C-43/10, *Nomarchiaki Aftodioikisi Aitoloakarnanias*, ECLI:EU:C:2012:560, para. 135.

from adopting such decisions despite (i) the negative conclusions of the assessment (no matter how thorough it may be);[21] and (ii) the duty to 'duly' take into account the information and consultations gathered during the EIA process.[22] Even within the EIA framework for the protection of habitats and species,[23] which enshrines a strict criterion for the assessment of plans and projects and prohibits their execution if the conclusions of the EIA are negative,[24] it is still possible to carry them out by resorting to open-ended justifications (e.g., 'imperative reasons of overriding public interest, including those of a social or economic nature').[25]

Nevertheless, the foregoing considerations do not explain the whole scenario. First, it is expedient to remember that environmental matters do not have an ancillary position in decision-making. Activities subject to development consent frequently pursue different objectives (e.g., social, economic, sanitary, among others) but owing to the EIA requirement, authorities are under an obligation to highlight the distinctiveness of the environmental angle. In addition, in a system governed by (EU) law, authorities cannot simply (or blatantly) ignore or sidestep the environmental repercussions derived from an activity. Even under the general exception included in the EIA Directive, a decision not to (wholly or partly) subject a project ('where the application of those provisions would result in adversely affecting the purpose of the project') must inter alia consider (i) whether another form of assessment would be appropriate and, in particular, (ii) make available to the public the information relating to the decision granting exemption and (more importantly) the reasons for granting it.[26] Therefore, the EIA Directive does demand justification *in law* for circumventing the assessment. The principle of prevention questions a narrow understanding of the EIA process, as it demands that activities cause the least damage to the environment or conversely a high level of protection. In other words, it cannot be regarded as a mere compilation of information with no impact on decision-making. EIA is not just a reflexive act regardless of thresholds and standards set out in binding environmental laws (e.g., industrial emissions). In fact, the latter are the starting point for the adoption of other unspecified (but more demanding) protection measures as required by the EIA process (e.g., alternatives in terms of design, output, location, or compensation measures beyond the ratio 1:1). As the CJEU has already explained,[27] EIA does not encompass a

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[21] See Article 2.3.

[22] Article 8 of the EIA Directive, as amended by Directive 2014/52.

[23] Article 6(3) of Directive 92/43.

[24] Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee y Nederlandse Vereniging tot Bescherming van Vogels v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij*, ECLI:EU:C:2004:482, para. 41.

[25] Article 6(4). See Ludwig Krämer, 'The European Commission's Opinions under Article 6(4) of the Habitats Directive' (2009) *Journal of Environmental Law* 59–85; Agustín García-Ureta, 'Habitats and Environmental Assessment of Plans and Projects' (2007) *Journal of European Planning and Environment Law* 91–6; Donald Mcgillivray, 'Compensatory Measures under Article 6(4) of the Habitats Directive: No Net Loss For Natura 2000', in Charles Hubert-Born, *The Habitats Directive After 20 Years: European Nature's Best Hope?* (Routledge, London, 2015), 101–18.

[26] Article 2(4) (second paragraph). Member States must also inform the Commission, prior to granting consent, of the reasons justifying the exemption granted.

[27] See Case C-201/02, o.c.

mere bilateral relationship between, on the one hand, a developer (either private or public) and, on the other, an authority; rather, it involves third parties' interests (e.g., their own health) that must necessarily be considered (and safeguarded) before a decision is taken.[28] Finally, yet importantly, authorities are under a duty to provide reasons for their decision, thus revealing the significance the protection of the environment has played vis-à-vis the other considerations that may have been contemplated.

3. LEGAL INSTRUMENTS

Unlike the US NEPA signed into law in 1970,[29] the birth of a legally binding instrument requiring the carrying out of an EIA of 'activities' was not approved in the EU until 1985 (Directive 85/337, on the assessment of the effects of certain public and private projects on the environment), which consisted of 14 articles and three annexes.[30] Six more years were needed for the EU to adopt a directive on the assessment of plans and programmes (Directive 2001/42).[31] From a chronological viewpoint this approach could be regarded as inconsistent since plans largely predetermine the features and location of specific projects.[32]

In the meantime, the EU had adopted Directive 92/43, on the conservation of natural habitats and of wild fauna and flora,[33] which requires the carrying out of environmental assessments of 'any' plans or projects affecting Natura 2000 sites.[34] The EU has not attempted to merge the environmental assessment procedure of the Habitats Directive with the EIA and SEA Directives albeit these latter Directives contain references to habitats and species, and the SEA Directive expressly indicates that its requirements are to be applied without prejudice to any requirements under the EIA Directive and to any other Community law requirements.[35]

Directives guarantee a margin of manoeuvre for the Member States[36] However, they have favoured disparate approaches the case law has progressively standardised as considered below.[37]

Unlike the SEA and Habitats Directives,[38] the EIA Directive has been subject to several amendments. Directive 97/11,[39] widened the scope of the former EIA directive

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28 See Article 3(1) and recital (14) of the EIA Directive.
29 42 USC § 4321, Section 102(2)(C). Hereinafter NEPA.
30 Hereinafter EIA Directive; see note 3.
31 Herein after SEA Directive.
32 Norman Lee and Christopher Wood, 'EIA-A European perspective', (1978) *Built Environment* 101 at 102.
33 Habitats Directive.
34 Ibid., Article 6(3).
35 Ibid., Article 11(1).
36 Article 288 TFEU.
37 See points 4.3 and 5.
38 The Habitats Directive was subject to a fitness check by the Commission that concluded that it was fit for purpose, thus including the assessment requirements, see SWD(2016) 472 final.
39 Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, OJ L 073, 14/03/1997.

by increasing the types of projects covered and the number of projects requiring mandatory environmental impact assessment (Annex I). It also provided for new screening arrangements, including new screening criteria (at Annex III) for Annex II projects, and established minimum information requirements. This was followed by Directive 2003/35/EC,[40] which sought to align the provisions on public participation with the Aarhus Convention on access to information, participation and access to justice in environmental matters.[41] After this Directive, the EU considered it expedient to consolidate the existing legislation and adopted Directive 2011/92 (replacing Directive 85/337). A further wave of reforms is represented by Directive 2014/52/EU that has bolstered the basic pillars of the EIA process (as it is now defined),[42] including the quality of environmental assessments, or the responsibility of authorities to perform their duties in an 'objective manner'.

There is no EU rule requiring the environmental assessment of 'policies' and legislation. The difficulties in delimiting the former notion (e.g., policy instruments expressly employing that label; or generally those that may give way to courses of action by the authorities) but more probable the attempt to avoid legal constraints and guarantees (e.g., transparency) may explain the reluctance to give the environment the importance it deserves in the drafting of upper instruments in decision-making.[43] The European Commission makes assessments of the impact of its proposals that include inter alia the environment, albeit practice shows a limited value of such assessments.[44]

The EU (and its Member States) are also parties to international law instruments, notably the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention, 1991), and the Protocol on Strategic Environmental Assessment to the Convention (2003).[45]

4. PROJECTS AND PLANS SUBJECT TO EIA

A basic step is to decide whether an EIA is necessary. The implementation of the EIA Directives (and the subsequent case law) have exposed that defining (screening) the types of activities that may be subject to EIA is a thorny matter. The three EIA Directives refer to a similar principle, according to which the triggering of the procedure depends on the

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Neither the SEA Directive nor the Habitats Directive has been altered in respect of the assessment requirements.

[40] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L 156, 25/06/2003.

[41] These issues are not considered in this contribution; see Chapter 9.

[42] Article 1.2(g).

[43] See European Commission, *Managing Natura 2000 Sites. The provisions of Article 6 of the 'Habitats' Directive*, para. 4.3.2.; Case C-179/06, *Commission v. Italy*, ECLI:EU:T:2009:17, para. 41.

[44] Krämer, o.c. at 173.

[45] The EU feels 'inappropriate' to return a completed questionnaire to the Convention on its application. Instead, it sends a paper explaining the current law in the EU; see Fifth review of implementation of the Convention on Environmental Impact Assessment in a Transboundary Context, ECE/MP.EIA/2017/9, at para. 6.

likelihood of 'significant environmental effects'. Therefore, EU law adopts a 'circular' approach as it is first necessary to establish this matter to subsequently assess it.[46]

4.1 Projects

The EIA Directive defines 'project' in broad terms as the execution of construction works or of other installations or schemes, and other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources.[47] The Directive opted for setting out lists of projects. Lists initially provide certainty as to the activities that are to be subjected to EIA but, as the judgments reflect, they may also be employed to leave aside cases that, under certain circumstances, may fall within the general obligation to assess those having significant effects. Annex I list is based on a main criterion (type of development) plus a second benchmark (size or output). Annex II describes certain categories without reference to any other criteria. Whilst complete harmonisation is achieved in the first case, Annex II favours a variety of results among the Member States as the decision as to whether a project is to be subjected to EIA depends on two different albeit intertwined mechanisms: (i) a case-by-case examination; or (ii) the setting out thresholds or criteria. Directive 97/11 included a third option (iii) the combination of those two methods.[48]

As examined below, the approach adopted with Annex II projects and the conditions under which they may be subjected to assessment have led to a variety of approaches in the Member States and to successive and consistent CJEU cases reducing their margin of manoeuvre. It also motivated the adoption of Directive 97/11 setting out a new Annex including different criteria to help them define such projects according to their nature size and location.

As regards projects adopted by a specific act of legislation, the CJEU noted that the legislative process necessarily had to satisfy the objectives of the EIA Directive and that it was only where the legislature had available to it information equivalent to that which would be submitted to the competent authority in an ordinary procedure for authorising a project that the objectives of the EIA Directive could be regarded as having been achieved through that process.[49] The last reform operated by Directive 2014/52[50] has amended this matter by requiring that where a project is adopted by a specific act of national legislation, Member States may exempt it from the provisions 'relating to public consultation' laid down in the Directive, provided its objectives are met.[51]

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[46] Holder, o.c. at 107.

[47] EIA Directive, Article 1(2) (first and second indents).

[48] This Directive excluded other methods by deleting the expression 'inter alia' from the original text. Compare with Case C-87/02, *Commission v. Italy*, ECLI:EU:C:2004:363, at paras 41–42.

[49] Case C–287/98, *Linster v. Luxembourg*, ECLI:EU:C:2000:468, paras 51–54.

[50] Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, OJ L 124, 25.4.2014.

[51] Article 2(5) (as amended). See Case C-411/17, *Inter-Environnement Wallonnie ASBL, Bond Beter Leefmilieu Vlaanderen ASBL v. Council of Ministers*, ECLI:EU:C:2019:622.

4.2 Plans

The SEA Directive has an intrinsic deficiency, as the notion of 'plan' is badly defined. This notion basically focuses on (i) the decision level at which it is adopted and (ii) its subject-matter but not on its nature. According to the Directive, plans are 'plans' which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and which are required by legislative, regulatory or administrative provisions.[52] The CJEU has provided a more elaborated definition as 'any measure which establishes, by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment'.[53] As usual the devil is in the details. In the case of the Habitats Directive, the CJEU has indicated that it would be necessary to go beyond the stage of 'preliminary administrative reflection' and carry a 'degree of precision' in the planning in question to conclude that a document is to be regarded as a plan.[54] The methodology followed by the SEA Directive is similar to the EIA Directive as it refers to 'all' plans likely to have significant environmental effects which (a) are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to the EIA Directive, or (b) which require an assessment pursuant to the Habitats Directive. In fact, any plans having significant effects may be subject to assessment since the Directive only excludes those the sole purpose of which is to serve national defence or civil emergency, or financial or budget plans and programmes. Other plans with limited territorial reach determining the use of 'small areas at local level' or 'minor modifications' to plans subject to SEA may also require an EIA subject to the main condition.[55]

The Habitats Directive adopts a broader and stricter approach as it lacks any lists. It refers to '[a]ny plan or project' save those directly linked with or necessary to the management of the site. However, the latter plans or projects may also be subject to EIA if they anticipate the carrying out of activities going beyond the site's management.[56]

4.3 CJEU's Harmonising Role

The CJEU has constantly reaffirmed the EU dimension of EIA by holding that the Directives contain 'autonomous' concepts of EU law the interpretation of which corresponds to the legislature and last but not least to the Court.[57] This certainly provides a coherent construction and more uniform application of their meaning.

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[52] Article 2.

[53] Case C-290/15, *D'Oultremont v. Région wallonne*, ECLI:EU:C:2016:816, para. 49.

[54] Case C-179/06, *Commission v. Italy*, ECLI:EU:C:2007:578, para. 41.

[55] Case C-473/14, *Dimos Kropias Attikis v. Ipourgos Perivallontos, Energias kai Klimatikis Allagis*, ECLI:EU:C:2015:582.

[56] Article 6(3).

[57] See, in particular, Case C-142/07, *Ecologistas en Acción-CODA v. Ayuntamiento de*

Despite the definitions in the EIA and SEA Directives,[58] it is noteworthy that the CJEU has been regularly requested to clarify the meaning of different notions owing to the Directives' profound influence on national development consent procedures. Hence, a series of cases reflects its role in describing basic (static) concepts such as 'project' (works or alterations to the physical aspect of a site but not the mere renewal of an existing permit or an agreement),[59] or 'plan' (mentioned above).[60] Likewise, the CJEU has specified that whilst the notion of 'class of projects' in Annex I and II of the EIA Directive cannot differ, the categories included into the former Annex do not correspond to those of Annex II but to its subdivisions.[61] Other (dynamic) matters have also been considered, such as (a) the transitional enforcement of the EIA Directive to applications submitted before the deadline for implementation,[62] (b) the need to table a formal application (thus rejecting that informal meetings could be regarded as an application for consent),[63] (c) the incompatibility of a system of tacit authorisation with the duty to examine individually every request from authorisation,[64] (d) whether the prevention of pecuniary damage, in so far as that damage is the direct economic consequence of the environmental effects of an activity, is covered by the objective of protection pursued by the EIA Directive,[65] or (e) the need to take account of the environmental effects when adopting a principal decision if the consent procedure is divided into several stages.[66]

5. SCREENING OF PROJECTS AND MEMBER STATES' 'MARGIN OF DISCRETION'

As seen before, an EIA is to be performed provided an activity is likely to produce significant environmental effects. Nowhere does the EIA Directive (nor the SEA or Habitats Directives) define the meaning of 'significant'. Whilst Annex I of the EIA Directive does not require further clarification, the Member States have to delineate the different categories included into Annex II by reference to three basic criteria: nature, size or location. They can either employ (a) a case-by-case analysis, or (b) define

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Madrid, ECLI:EU:C:2008:445 (projects); Case C-287/98, *Grand Duchy of Luxemburg v. Linster*, ECLI:EU:C:2000:468 (plans).

[58] The Habitats Directive lacks definitions regarding the EIA obligation. The EIA Directive now includes seven definitions (three in its original version). The SEA Directive contains four definitions.

[59] Case C-275/09, *Brussels Hoofdstedelijk Gewest v. Vlaams Gewest*, ECLI:EU:C:2011:154, paras 20, 24 and 38; Case C-121/11, *Pro-Braine ASBL v. Commune de Braine-le-Château*, para. 32; Case C-2/07, *Abraham v. Région wallonne*, ECLI:EU:C:2012:225, para. 23.

[60] Case C-671/16, *Inter-Environnement Bruxelles ASBL v. Région de Bruxelles-Capitale*, ECLI:EU:C:2018:403, paras 53–55.

[61] Case C-301/95, *Commission v. Germany*, ECLI:EU:C:1998:493, paras 38–42.

[62] Case C-396/92, *Bund Naturschutz in Bayern e.V. and Richard Stahnsdorf v. Freistaat Bayern, Stadt Vilsbiburg and Landkreis Landshut*, ECLI:EU:C:1994:307.

[63] Case C-431/92, *Commission v. Germany*, ECLI:EU:C:1995:260, para. 32.

[64] Case C-230/00, *Commission v. Belgium*, ECLI:EU:C:2001:341.

[65] Case C-420/11, *Leth v. Republik Österreich, Land Niederösterreich*, ECLI:EU:C:2013:166.

[66] Case C-201/02, o.c., paras 50–52.

different categories setting out thresholds; or (c) combine the previous two approaches. The risk that a majority of projects could be excluded (as Spain initially did),[67] or that the criteria or thresholds could be upgraded artificially to avoid the triggering of an EIA was not a mere academic conjecture. The CJEU relatively soon held that the Member States lacked unfettered discretion in this particular regard and that the obligation to specify projects was subordinated to the main obligation requiring their assessment. In fact, as the CJEU held in an important case against Belgium, the EU itself had considered that 'all the classes' of projects listed in Annex II could possibly have significant effects on the environment depending on the characteristics exhibited by those projects at the time when they were drawn up.[68] Whilst the criteria and/or the thresholds were designed 'to facilitate' the examination of the characteristics exhibited by a given project in order to determine whether it was subject to the requirement to carry out an assessment, they could not exempt 'in advance' from that obligation certain whole classes.

This understanding was highlighted in one of the EIA landmark judgments (*Kraaijeveld*),[69] according to which the key EIA obligation has (a) a 'very' wide scope and (b) a broad purpose. This brief (but plain and since then reiterated) holding (i) curtails Member State's theoretical faculty to exclude projects from EIA, (ii) enlarges their duty to assess '*all notable* impacts on the environment',[70] and (iii) offers sound ground for challenges before national courts. Therefore, the Member States cannot employ a single criterion (e.g., size) when defining Annex II projects. Quite the contrary, they must take account of 'all the characteristics of a project, not a single factor of size or capacity'.[71] Arguably, combining the three criteria (nature, size and location) may led to open-ended types national lists may easily fail (or ignore) to reflect *in detail* as the Member States are under the obligation to inter alia avoid the splitting of projects, consider the 'accumulation' with others, the absorption capacity of the natural environment, or the existence of densely populated areas as criteria for the definition of Annex II projects.[72] However, this is the outcome derived from the obligation to assess activities likely to have significant environmental effects according to the aforesaid three benchmarks and the corresponding aspects set out in Annex III to the EIA Directive (Annex II of the SEA Directive). As it happens in other environmental cases (e.g., designation of Natura 2000 sites) Member States' 'margin' of appreciation is nothing more (but nothing less) than an obligation of

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[67] The Commission challenged the Spanish legislation transposing the EIA Directive in 1999, that is 11 years after the deadline for its implementation (2 July 1988); Case C-474/99, *Commission v. Spain*, ECLI:EU:C:2002:365.

[68] Case 133/94, *Commission v. Belgium*, ECLI:EU:C:1996:181, para. 41.

[69] Case 72/95, o.c.

[70] Case C-404/09, *Commission v. Spain*, ECLI:EU:C:2011:768, para. 80.

[71] Case C-392/96, *Commission v. Ireland*, ECLI:EU:C:1999:431, para. 65; Case C-255/08, *Commission v. The Netherlands*, ECLI:EU:C:2009:630; Case C-427/07, *Commission v. Ireland*, ECLI:EU:C:2009:457; Case C-486/04, *Commission v. Italy*, ECLI:EU:C:2006:732; Case C-87/02, *Commission v. Italy*, ECLI:EU:C:2004:363; Case C-474/99, note 67.

[72] Case C-392/96, note 71, para. 76. Case C-244/12, *Salzburger Flughafen GmbH v. Umweltsenat*, ECLI:EU:C:2013:203, para. 32; Case C-300/13, *Ayuntamiento de Benferri v. Consejería de Infraestructuras y Transporte de la Generalitat Valenciana e Iberdrola Distribución Eléctrica SAU*, ECLI:EU:C:2014:188, paras 23–25.

result. Therefore, an infringement of the rules for determining whether an activity must be made subject to prior assessment necessarily constitutes an infringement of the EIA obligation.[73]

The CJEU's doctrine regarding Member States' margin of appreciation has endowed the EIA procedure with greater coherence and provided better protection of the environment whilst abiding by the express wording of the directives. Accordingly, (a) 'modifications' to Annex II projects cannot be construed as to enable certain works to escape the requirement of an EIA;[74] (b) 'demolitions' are also subject to assessment in spite of the absence of an initial express reference (as well as other cases, e.g., clearance of paths in forests);[75] (c) dredging operations or nitrogen depositions may be regarded as single operations provided a common purpose is pursued under the same conditions';[76] or (d) Member States are barred from invoking the 'national' features of a certain works (e.g., Dutch dykes) to exempt them from assessment (since it is the environment that must be protected).[77]

The line of reasoning regarding the screening of activities also applies to the SEA and Habitats Directives.[78] Accordingly, plans and programmes cannot avoid the application of the Directives merely because their adoption may not be compulsory in all circumstances.[79] In other words, 'a Member State *cannot assume* that categories of plans or projects defined by reference to spheres of activity and special installations will, by definition, have a low impact on humans and on the environment'.[80] In a leading judgment concerning the EIA obligation under the Habitats Directive,[81] the CJEU held that it is not 'the *certainty* of the effects' but its '*mere* probability' the criterion that triggers the assessment procedure. In short, the discretion lies in checking whether significant effects may occur. This obligation has been tightened by the CJEU by holding that a project not situated in Natura 2000 areas, 'but rather at a considerable distance from them' (i.e., 600 km), in no way precludes the applicability of the requirements laid down in Article 6(3) of the Habitats Directive.[82] Likewise, a national rule that requires verification that serious environmental damage which may be prevented by current technology is in fact prevented, and that damage which cannot be prevented by that technology is reduced to

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[73] Case 83/03, *Commission v. Italy*, ECLI:EU:C:2005:339, para. 20.

[74] Case 72/95, o.c., paras 38–41.

[75] Case C-329/17, *Prenninger, Helmberger, Zimmer, Scharinger, Pühringer, Agrargemeinschaft Pettenbach, Marktgemeinde Vorchdorf, Marktgemeinde Pettenbach, Gemeinde Steinbach am Ziehberg v. Oberösterreichische Landesregierung*, ECLI:EU:C:2018:640, at para. 37.

[76] Case C-226/08, *Stadt Papenburg v. Bundesrepublik Deutschland*, ECLI:EU:C:2010:10; Joined Cases C-293/17 and C-294/17, *Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu v. College van gedeputeerde staten van Limburg, College van gedeputeerde staten van Gelderland*, ECLI:EU:C:2018:882.

[77] Case 72/95, note 6, para. 34.

[78] See Case C-538/09, *Commission v. Belgium*, ECLI:EU:C:2011:349, para. 45; Case C-295/10, *Genovaitė Valčiukienė v. Pakruojo rajono savivaldybė*, ECLI:EU:C:2011:608, paras 46–47.

[79] Case C-567/10, o.c., para. 28.

[80] Case C-538/09, o.c., para. 56, emphasis added.

[81] Case 127/02, o.c., para. 41. Jonathan Verschuuren, 'Shellfish for Fishermen or for Birds? Article 6 Habitats Directive and the Precautionary Principle', (2005) *Journal of Environmental Law* 265–83.

[82] Case 142/16, *Commission v. Germany*, ECLI:EU:C:2017:301, para. 29.

the minimum, cannot be sufficient to ensure compliance with the assessment duty of this Directive.[83]

6. THE REGULARISATION OF NON-PERFORMED EIAS

In its initial case law, the CJEU did not (strictly speaking) contemplate a 'regularisation' of an activity lacking an EIA as required by EU law or, in other words, the procedure whereby such activity could comply with its basic tenets after being executed. In fact, the directives lack any provisions regarding this particular aspect thus favouring disparate approaches in the Member States.[84] In later judgments, however, the CJEU has held that a regularisation is possible 'in certain cases', and subject to the conditions that (a) it does not offer the persons concerned the opportunity to circumvent EU rules or to dispense with applying them, and (b) that it should remain the exception.[85] Viewed from the perspective of the principle of prevention, it remains to be seen whether it is possible to regularise a project already executed and at the same time carry out an EIA compatible with the directive (also with basic participatory rights).

The case law has not so far examined the question of regularisations under the Habitats Directive, albeit the CJEU has considered the application of the EIA requirements to plans or projects adopted before the approval of the corresponding list of sites of Community importance (without the carrying out of an assessment) but executed once such lists are finally approved. The 'on-going nature' of Article 6(2) of the Directive,[86] which imposes the duty to avoid the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, has become so relevant that the CJEU has held in the *Grüne Liga* case that implementation of a project likely to significantly affect a site concerned and not subject, before being authorised, to an EIA may be pursued, after that project is placed on the list of sites of Community importance, '*only* on the condition that the probability or risk of deterioration of habitats or disturbance of species, which could be significant in view of the objectives of that directive, *has been excluded*'.[87] According to the CJEU, where such a probability or risk might appear because a subsequent review of the implications or a plan or project for the site concerned was not carried out, the general obligation of protection entails 'an obligation' to carry out that review. [88]

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[83] Case C-98/03, *Commission v. Germany*, ECLI:EU:C:2006:3, para. 43.

[84] Case C-201/02, o.c., para. 65.

[85] Case C-215/06, *Commission v. Ireland*, ECLI:EU:C:2008:380, para. 57. See also, Case C-117/17, *Comune di Castelbellino v. Regione Marche, Ministero per i beni e le attività culturali, Ministero dell'Ambiente e della Tutela del Territorio e del Mare, Regione Marche Servizio Infrastrutture Trasporti Energia—P. F. Rete Elettrica Regionale, Provincia di Anconaat*, ECLI:EU:C:2018:129.

[86] Case C-399/14, *Grüne Liga Sachsen eV v. Freistaat Sachsen*, ECLI:EU:C:2016:10, o.c., para. 39.

[87] Ibid., para. 43, emphasis added.

[88] Ibid., para. 44.

7. PUBLIC AUTHORITY'S ORGANISATION, ASSESSMENT AND INTEGRATION

7.1 Organisation and Procedural Autonomy

The EIA procedural dimension justified a 2014 wave of further restrictions tightening Member States' decision-making procedures affecting three noteworthy matters: (a) procedural autonomy; (b) separation of functions regarding the assessment and the grant of development consent; and (c) the justification that the public authorities have sufficient expertise. As in the case of the screening process, the CJEU had already acknowledged that the directives granted the Member States a margin of liberty as to the procedural rules to be applied to EIA, albeit it could only be exercised to 'ensure full compliance' with the directives' aims.[89] Accordingly, where national law provided that the consent procedure was to be carried out in several stages, one involving a principal decision and the other comprising an implementing decision which could not extend beyond the parameters set by the principal decision, the environmental effects had to be identified and assessed at the time of the procedure relating to the principal decision.[90]

Unlike the SEA and Habitat Directives, the EIA Directive now includes a distinction between 'coordinated' and 'joint procedures' depending on two different circumstances.[91] First, projects subject to EIA simultaneously under the EIA Directive, the Habitats Directive and the Wild Birds Directive. In this case Member States *must*, 'where appropriate', ensure that coordinated and/or joint procedures are provided for. Second, if the EIA arises concurrently from the EIA Directive and EU legislation *other than* the Habitats or Wild Birds Directives the Member States *may* make provision for coordinated and/or joint procedures. Coordination does not mean the substitution of the duties of coordinated authorities, let alone the adoption of the final decision on the project by the coordinating authority. Unlike the previous procedure, a joint procedure requires a single EIA and therefore a single reasoned conclusion.

An arguably more important matter addressed by the 2014 reform concerns the separation of functions in the assessment process, particularly if the same public authority evaluating an activity is also its promoter. Such collusion of interests may certainly lead to favourable development consent decisions neglecting the environmental perspective. The Directive indicates that conflicts of interest 'could be prevented by, inter alia, a functional separation of the competent authority from the developer'.[92] This obligation must be specified within the organisation of administrative powers

The third layer of reforms could thoughtlessly be regarded as a minor obligation. However, it openly challenges the idea that public authorities have sufficient knowledge on a particular subject owing to their legal nature and position. According to the Directive, the competent authority must also ensure that it has, or has access as

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89 Case C-50/09, *Commission v. Ireland*, o.c., paras 73–75.
90 Case C-201/02, o.c. para. 52; Case C-508/03, *Commission v. United Kingdom*, paras 104–105.
91 Article 2(3) of the EIA Directive (as amended by Directive 2014/52).
92 Article 9a.

necessary, sufficient expertise to examine the information submitted by a developer.[93] The expression 'to ensure' constitutes a transparency obligation to be guaranteed on a case-by-case basis, either by resorting to own human resources or to external knowledge.

7.2 Assessment and Integration

The authorities have a duty to ensure that the developer supplies information in as much as they consider that it is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project, or that a developer may reasonably be required to compile it having regard, inter alia, to current knowledge and methods of assessment.[94] This must be guaranteed as complete information is vital to carry out an assessment. As indicated before, the competent environmental authority cannot confine itself to identifying and describing an activity's direct and indirect effects on certain environmental factors. Hence, the authorities' first duty is to demand complete environmental reports from the developers including 'precise' and 'definitive findings and conclusions capable of removing reasonable scientific doubt as to the effects of the activities proposed.[95] The use of the conditional in the items to consider in an assessment (as set out in the EIA Directive)[96] does not prevent a broad interpretation of the duty to identify, describe and assess relevant environmental factors.[97]

The authority must also assess the data. This obligation is distinct from other obligations, namely, to collect and exchange information, or undertake consultations. Notwithstanding the aforesaid, one of the key features of the EIA process (and arguably its Achille's heel) is the *integration* of environmental concerns into the decision-making. Unlike the Habitats Directive,[98] a public authority may review the relevant environmental data but there being no obligation to abide by them, it may nevertheless grant development consent. Despite the lack of indication as to the degree of integration to achieve, it can be concluded that public authorities cannot disregard the environmental dimension derived from an activity by simply analysing its impact and authorising it.[99] The path between these two stages is strewn with different 'obstacles' directed at guaranteeing integration (e.g., reshaping of the activity, adoption of conditions for its execution and operation, or implementation of compensations) that necessarily force the public authorities to show how the environment has been integrated and the position it has reached vis-à-vis other diverse considerations.

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[93] Article 5(3)(b). See, for instance, Kilian Bizer, Jaqui Dopfer and Martin Führ 'Evaluation of the Federal German Act on Environmental Impact Assessment (EIA Act)', (2008) 2 *Elni Review* 70–77, at 75.

[94] Article 5(1) of the EIA Directive.

[95] This is the standard threshold under the Habitats Directive. See Case C-304/05, *Commission v. Italy*, paras 57–68; Case C-399/14, o.c., paras 49–50. Case C-441/03, o.c., para. 22.

[96] Annex IV.

[97] Case 404/09, o.c., paras 77–80.

[98] Case 127/02, o.c.4, paras 56 and 57

[99] See, for instance, Martin Führ, 'Effectiveness of EIA in the light of practical experience-Evaluation of the German Federal EIA Act in the light of Directive 2014/52/EU'.

8. CONCLUDING REMARKS

Constant litigation over the last 30 years has led to more than 80 CJEU judgments,[100] showing the variety of problems the Member States have encountered (or generated) while implementing the EIA basic requirements. The screening of activities remains as one of the most acute issues in spite of consistent case law demarcating Member States' duties. The difficulties in defining whole classes of projects according to the three basic criteria of nature, size and location are no justification to circumvent the EIA process, but, according to the Commission, failures to correctly transpose or apply the screening process requirements represent 69 per cent of the infringement cases, the central driver of the problem being the broad discretion given to Member States to determine whether an EIA is required.[101] Similar difficulties have appeared in the case of the SEA and Habitats Directives. Apart from this pivotal matter, the EU has enhanced existing obligations to guarantee that EIA is based on sound data (the Habitats Directive being perhaps its main illustration) and in particular is objectively carried out. Close scrutiny of these matters is central to a successful application of EIA as a forecasting mechanism, but also to the achievement of a high level of environmental quality.

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[100] This account does not include those cases regarding environmental impact assessment under the Habitats Directive.

[101] SWD(2012) 355 final at 13; see also COM(2009) 378 final, at. 5.