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LEGAL DISSONANCE OF STRENGTHENING HARMONISATION IN EU PUBLIC CONSTRUCTION LAW

HABILITATION THESIS

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ABSTRACT

The thesis determines the level of indirect harmonisation of spatial planning and construction permitting in EU law and the scope of the corresponding requirements. It focuses on the gradual development of EU law, the relationships, differences, and synergies between the various conditions to provide a more comprehensive picture, and then concentrates on the most critical issues identified, namely the interpretation of the general concepts used in environmental legislation and the explanation of the content of the public participation requirements. It also examines the interrelationship of the Aarhus Convention and EU law, emphasising the fundamental guarantees of participation in decision-making and access to justice.

Furthermore, the thesis analyses the planning and construction requirements that stem from other EU policies than environmental. Mainly, it focuses on developing the Cohesion Policy and Urban Agenda, maritime spatial planning, development of the TEN-T and TEN-E networks, building materials requirements, building energy efficiency, and promoting renewable energy.

The thesis concludes that while the EU environmental regulations set out extensive requirements, their application to spatial planning and construction permitting is only implicit and rarely explicit. EU legislation often uses a general description of the acts to be adopted but rarely the terminology typical of public construction law and rarely directly references land-use plans or building permits. Implementing the requirements in public construction law is expected and necessary but not explicitly required. The analysis also shows that the EU environmental legislation frequently supports the merging and optimisation of processes based on considerations of the feasibility of combining the obligations under different directives, which overlap in fundamental respects. However, it rarely actually attempts to synchronise requirements from different areas of regulation. The core work is left to the transposition by the Member States, which requires a considerable degree of inventiveness.

The regulatory initiatives aimed at accelerating the energy transition in Europe following the 2020 Clean Energy Package form a comprehensive set of legislation that defines European climate and energy policy much beyond the requirements of the traditional EU environmental legislation. Its implementation will affect many areas, including national long-term planning, electromobility, and energy transport. The ambition of the overall EU energy efficiency target and national contributions directly impact the aspiration of national renovation policy: the higher the targets, the more stringent the measures the Member States must adopt to reduce energy consumption in the buildings sector. A new wave of integration tendencies can be seen as promoting good practice examples in implementing sustainable urban mobility and energy. The EU policy documents emphasise the relevance of a holistic approach to both large-scale and local infrastructure planning.

Yet the EU legislation undergoing rapid changes in the wake of the European Green Deal does not seem to be developing as a coherent system. Most notably, the provisions of other EU policies than environmental policy employ a different approach to achieve their aims.

While environmental legislation often relies on protective regimes and balancing public interests in the planning and permitting procedures, climate-related legislation frequently prescribes rather precise goals to be achieved in procedures within set time limits. Other procedural aspects or substantive issues are left aside. In comparison to environmental law, different terminology is used, which can be confusing.

Indirect measures inherently bring several barriers to implementing the EU's ambitious aims. For example, the AFIR regulation does not put forward any measures on how to achieve building a vast amount of infrastructure, nor does it deal with aspects of its operation after the infrastructure network is complete.

The lack of spatial planning standards may seem to be a gap in the development of the EU and a missed opportunity for the Member States. The policy documents will only have a limited impact as the EU lacks the competence to take further steps in spatial planning. Most notably, given the scale of its financial support and objectives, Cohesion Policy effectively contributes to the harmonisation of spatial planning, albeit not in a procedural sense. Financial or cooperation measures are only able to address new spatial challenges indirectly.

EU legislation plays a key role in reinforcing Aarhus values in practice through detailed requirements of individual directives or through direct application. However, the approach of the European Union to implementation of the public participation requirements has been piecemeal. The requirements for public participation regarding adopting plans and programmes in the recently adopted legislation are unclear or completely absent. The public is invited if the plan or programme falls under the SEA Directive. This seems contrary to the obligations that stem from the Aarhus Convention. Despite the crucial role of the EU, since 2005, the implementation measures have been kept to a minimum. Instead, the focus has been on lightening administrative burdens for industry and enterprises. This minimalistic approach and general indecisiveness towards the international requirements for broader access to justice in environmental matters has also been shared by most Member States - and this development has been counterbalanced only by the CJEU.

KEYWORDS

Public construction law; EU law; harmonisation; spatial planning; construction permitting; land use; public participation; Aarhus Convention; environmental impact assessment; Natura 2000; waste management; prevention of industrial hazards; noise pollution, maritime spatial planning; Trans-European Transport Network; energy efficiency of buildings; climate change; European Green Deal

DECLARATION

I declare that I have written the habilitation thesis on Legal Dissonance of Strengthening Harmonisation in EU Public Construction Law by myself. All sources of information have been cited in the text and listed in the list of sources.

September 15, 2023

Vojtěch Vomáčka

CONTENT

ABBREVIATIONS

1979 Birds Directive	Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds
1985 EIA Directive	Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment
2002 EPBD	Directive 2002/91/EC of the European Parliament and of the Council of 16 12. 2002 on the energy performance of buildings
2010 EPBD	Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings (recast)
Aarhus Convention	UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters
ACCC	Aarhus Convention Compliance Committee
Air Quality Framework Directive	Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe
ARE Regulation	Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy
Asbestos at Work Directive	Directive 2009/148/EC of the European Parliament and of the Council of 30 November 2009 on the protection of workers from the risks related to exposure to asbestos at work
BATs	Best available techniques
CEAP	2015 Circular Economy Action Plan [COM (2015) 614 final]
CEN	European Committee for Standardization
CENELEC	European Committee for Electrotechnical Standardization (*Comité Européen de Normalisation Électrotechnique*)
CJEU	Court of Justice of the European Union
CEMAT	European Conference of Ministers responsible for Regional Planning
COTER	Commission for Territorial Cohesion Policy and EU Budget
DG MOVE	Directorate-General for Mobility and Transport
Directive on waste	Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste
EAD	European Assessment Document
EED	Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC

Environmental Noise Directive	Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise - Declaration by the Commission in the Conciliation Committee on the Directive relating to the assessment and management of environmental noise
EPCs	Energy Performance Certificates
EPB Standards	Energy Performance of Buildings Standards
EPD	Environmental Product Declaration
EPER	European Pollutant Emission Register
EPRTR	European Pollutant Release and Transfer Register
ERDF	European Regional Development Fund
ERDF Regulation	Regulation (EU) 2021/1058 of the European Parliament and of the Council of 24 June 2021 on the European Regional Development Fund and on the Cohesion Fund
ERSP Charter	European Regional/Spatial Planning Charter
ESDP	European Spatial Development Perspective
ESPON	European Spatial Planning Observation Network
Espoo Convention	UNECE Convention on Environmental Impact Assessment in a Transboundary Context (1991)
ETA	European Technical Assessment
ETSI	European Technical Standard Institute
Euratom	European Atomic Energy Community
ILO	International Labour Organization
INSPIRE Directive	Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE)
IPPC	Integrated Pollution Prevention and Control
IPPC Directive	
LTRS	Long-Term Renovation Strategy
Maastricht Treaty	Treaty on European Union (1992)
Maritime Spatial Planning Directive	Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a framework for maritime spatial planning
MSP	Maritime Spatial Plan
nCEAP	2020 new Circular Economy Action Plan [COM (2020) 98 final]

Nitrates Directive	Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources
NGO	Non-governmental organisation
NZEBs	Nearly Zero-Energy Buildings
OJ	The Official Journal of the European Union
REACH Regulation	Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC
RED I	Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC
RED II	Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources
SAVE Directive	Council Directive 93/76/EEC of 13 September 1993 to limit carbon dioxide emissions by improving energy efficiency (SAVE)
SEA	Strategic environmental assessment
SEA 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
Seveso I Directive	Council Directive 82/501/EEC of 24 June 1982 on the major-accident hazards of certain industrial activities
Seveso II Directive	Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances
Seveso III Directive	Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC
TAB	Technical Assessment Body
TEIA	Transboundary environmental impact assessment
TEN-E	Trans-European Energy Network
TEN-E Regulation	Regulation (EU) 2022/869 of the European Parliament and of the Council of 30 May 2022 on guidelines for trans-European energy infrastructure, amending Regulations (EC) No 715/2009, (EU)

	2019/942 and (EU) 2019/943 and Directives 2009/73/EC and (EU) 2019/944, and repealing Regulation (EU) No 347/2013
TEN-T	Trans-European Transport Network
TEN-T Directive	Directive (EU) 2021/1187 of the European Parliament and of the Council of 7 July 2021 on streamlining measures for advancing the realisation of the trans-European transport network (TEN-T)
TEN-T Regulation	Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU
UK	United Kingdom
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNECE	United Nations Economic Commission for Europe
Waste Framework Directive	Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives
WEEE Directive	Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE) (recast)
WFD	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

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7. CJEU judgment of 15 March 1990, *Commission v. Netherlands* (C-339/87, EU:C:1990:119)
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133. Opinion of Advocate General Stix-Hackl of 22 June 2006, *Commission v Ireland* (C-216/05, EU:C:2006:424)
134. Opinion of Advocate General Sharpston of 2 July 2009, *Djurgården-Lilla Värtans Miljöskyddsförenin* (C-263/08, EU:C:2009:421)
135. Opinion of Advocate General Kokott of 4 March 2010, *Terre wallonne and Inter-Environnement Wallonie* (C-105/09 and C-110/09, EU:C:2010:120)
136. Opinion of Advocate General Kokott of 23 September 2010, *Stichting Natuur en Milieu and Others* (C-266/09, EU:C:2010:546)
137. Opinion of Advocate General Sharpston of 16 December 2010, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* (C-115/09, EU:C:2010:773)

138. Opinion of Advocate General Sharpston of 19 May 2011, *Boxus and Others* (C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:319)
139. Opinion of Advocate General Kokott of 28 June 2011, *Commission v Spain* (C-404/09, EU:C:2011:425)
140. Opinion of Advocate General Kokott of 13 October 2011, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10, EU:C:2011:651)
141. Opinion of Advocate General Kokott of 14 July 2016, *D'Oultremont and Others* (C-290/15, EU:C:2016:561)
142. Opinion of Advocate General Kokott of 10 November 2016, *Commission v Bulgaria* (C-488/15, EU:C:2016:862)
143. Opinion of Advocate General Kokott, 30 March 2017, *Comune di Corridonia* (C-196/16 and C-197/16, EU:C:2017:249)
144. Opinion of Advocate General Bobek of 19 October 2017, *North East Pylon Pressure Campaing and Sheehy* (C-470/16, EU:C:2017:781)
145. Opinion of Advocate General Kokott of 25 January 2018, *Inter-Environnement Bruxelles and Others* (C-671/16, EU:C:2018:39)
146. Opinion of Advocate General Kokott of 30 April 2020, *Friends of the Irish Environment* (C-254/19, EU:C:2020:320)
147. Opinion of Advocate General J. Kokott of 27 January 2022, *FCC Česká republika* (C-43/21, EU:C:2022:64)
148. Opinion of Advocate General Pikamäe of 3 February 2022, *Czech Republic v Poland (Mine de Turów)* (C-121/21, EU:C:2022:74)

AARHUS CONVENTION COMPLIANCE COMMITTEE

1. Case *Spain* ACCC/C/2009/36
2. Case *Armenia* ACCC/C/2009/43
3. Case *Ukraine* ACCC/C/2004/3, ACCC/S/2004/1
4. Case *Belgium* ACCC/C/2005/11
5. Case *Bulgaria* ACCC/C/2011/58
6. Case *European Union* ACCC/C/2010/54
7. Case *Netherlands* ACCC/C/2014/104
8. Case *Slovakia* ACCC/C/2009/41

1. INTRODUCTION

1.1 STATEMENT OF THE PROBLEM AND TERMINOLOGY

As its title suggests, the thesis focuses on public construction law in the EU. The **aim of the thesis** is to determine the level of indirect harmonisation of spatial planning and construction permitting in EU law and the scope of the corresponding requirements.

It is striking that European integration has literally revolutionised the construction industry, but there is **no comprehensive overview of EU requirements in this area**. This applies equally to the strategic macro level and regulation as specific as the requirements for building materials. To estimate the overall harmonisation level, one needs to delve into the pile of fragmented legislation.

Thus, while simplifying the scientific objectives of the thesis as much as possible to present the work, the thesis should explain *how we got here*, *where we are*, and what we ar*e dealing with*? This approach allows two perspectives: To view the development and the scope of public construction law mainly through environmental and energy regulation or *vice versa*. An analysis of the legislation should show how much progress indirect harmonisation has made over the last few years in applying the EU's progressive climate policy.

The **ratio behind the aim** of the thesis builds on the author's trope of *legal dissonance*, which refers to a situation where EU law significantly influences public construction law in Member States through advanced albeit vague requirements. Similarly, public participation is simultaneously pushed forward and hindered by ambitious but inconsistent legislation.

It seems no exaggeration to assert that public construction law is at the centre of the attention of Member States but at the margins of the attention of the EU institutions for many of the reasons addressed in this thesis. It is foremost important for the national legislator to know **how much room for manoeuvre** the EU legislation provides and for building authorities and other administrative bodies to **interpret the law in line with EU requirements**. Failures to do so undermine the protection of the environment and other public interests, making urban development more expensive and increasing the costs of public administration.

The thesis **concludes** that the harmonisation of public construction law in the Member States has largely developed indirectly through EU environmental and energy requirements: Nowadays, essentially every intensive construction activity and every land-use plan that provides a framework for such activity is significantly influenced by EU law. This includes public participation, which is gradually being strengthened. However, this development – although understandable from a historical standpoint – has been somewhat inconsistent and cautious, and its lack of coordination may cause significant problems in enforcing EU requirements at present. In this respect, the thesis attempts to clarify the meaning of the key concepts for determining the scope of environmental requirements. It also examines the interrelationship of the Aarhus Convention and European Union law with an emphasis on the basic guarantees of participation in decision-making and access to justice.

A complex analysis of some important EU law areas remains outside this thesis's scope: **state aid, public procurement, corporate social responsibility,** and **market access**. While their impact on planning and construction practice extending to concepts such as smart cities[1] is undoubtedly significant, they are part of public construction law (and environmental law[2]) in the broadest sense, much more comprehensive than the already extensive scope of this thesis. Moreover, some measures in these areas often apply on a voluntary basis or after a threshold is reached. This also applies to other policies with an indirect impact on spatial development[3] within the framework of the common market.[4]

State aid exceeding a certain threshold must be notified to the European Commission, which will assess whether or not the aid is permissible. State aid may be admissible if it does not distort the national or international market or if overriding public interests are at stake.[5] It is not always clear whether particular policies, investments, or transactions should be considered State aid for planning purposes. In practice, the European Commission takes an expansive view of what constitutes State aid, and it seems to include not only the payment of subsidies but also the sale of land below its market value. If the Commission doubts whether the measure aligns with EU State aid rules, particularly the Guidelines on Regional State aid,[6] it opens an in-depth investigation. Recently, for example, this was the case of public support for the construction of a new automotive components plant in Hungary.[7]

The attention to **public procurement** is paid only where relevant for the more related topics. Most notably, building materials and energy efficiency of buildings are some of the few fields of public purchasing in which the mandatory criteria on green public procurement apply. Therefore, government and administrative bodies' purchasing requirements for energy-efficient products, services, and buildings can seriously impact the building sector and environmental protection (see Chapters 5.5 and 5.6).[8] Furthermore, innovative and

[1] See Vergnon, B. Warum Smart City ohne Corporate Social Responsibility scheitert. In: Herzner, A., Schmidpeter, R. (eds.) *CSR in Süddeutschland. Unternehmerischer Erfolg und Nachhaltigkeit im Einklang*. Berlin: Springer Gabler, p. 67–80.

[2] Legislation in these areas plays an important role to play in enabling and supporting the Union in fulfilling its Green Deal policy objectives. See European Commission. Communication from the Commission – Guidelines on State aid for climate, environmental protection and energy 2022. OJ C 80, 18. 2. 2022, p. 1–8.

[3] See Lezaun, J., Groenleer, M. Food control emergencies and the territorialization of the European Union. *European Integration*, 2006, vol. 28, no. 5, p. 437–455.

[4] See Korthals Altes, W., K. The Single European Market and land development. *Planning Theory and Practice*, 2006, vol. 7, no. 3, p. 247–266.

[5] See the Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification). OJ L 248, 24. 9. 2015, p. 9–9.

[6] European Commission. Communication from the Commission Guidelines on regional State aid. C (2021) 2594, OJ C 153, 29. 4. 2021, p. 1–46.

[7] European Commission. State aid: Commission opens in-depth investigation into Hungarian support for new auto parts plant in Észak Magyarország. Press Release, 27. 10. 2022, IP/22/6371.

[8] See European Commission. JRS Technical Report. EU Green Public Procurement (GPP) criteria for the design, construction, renovation, demolition and management of buildings, February 2022; Uttam, K., Balfors, B., Faith-Ell, C. Green public procurement (GPP) of construction and building materials. In: Pacheco-Torgal, F., Cabeza, L., F., Labrincha, J., de Magalhães, A. (eds.) *Eco-efficient Construction and Building Materials Life Cycle Assessment (LCA), Eco-Labelling and Case Studies*. Sawston: Woodhead Publishing, 2014, p. 166–195; Braulio-Gonzalo, M., Bovea, M., D. Relationship between green public procurement criteria and sustainability assessment tools applied to office buildings. *Environmental Impact Assessment Review*, 2020, vol. 81, 106310; Opoku, A., Deng, J., Elmualim. A., Ekung, S., Hussein, A., A., Buhashima Abdalla, S. Sustainable procurement

responsible public procurement is one of the fourteen partnerships defined under the Urban Agenda of the EU (Chapter 5.1).

Market access requirements are without doubt of high importance to the construction industry. However, the construction service provisions[9] apply only to conditions that concern access to or exercise of a service activity. They do not cover requirements such as rules on spatial planning, construction, building standards, etc.

In addition, **worker safety** is left aside as a specific, separate area of law,[10] except for its close relationship to the use of construction materials, i.e., asbestos (see Chapter 5.5).

To be clear from the outset, **there is no EU public construction law in the sense of a specific EU competence and corresponding legislation**, except for the limited competence to adopt measures concerning town and country planning (see below) and specific rules on the maritime spatial planning (see Chapter 5.2) which only complements *traditional* spatial planning. However, it is possible to identify a range and scope of requirements from other areas that indirectly but significantly shape what is commonly considered to be public construction law. Although the EU has no mandate in the field of spatial planning and construction permits, European legislation can and does considerably influence planning and permitting processes.

In terms of **terminology**, *public construction law* is conceived in line with the German legal theory (*Öffentliches Baurecht*) as encompassing land use planning and permitting procedures,[11] including substantive technical standards and environmental protection requirements.[12] It is, first and foremost, geared to the interests of the common good.[13]

Such a concept is used in numerous Member States and consequently reflected at the EU level, even though EU law does not use the same term (or any other for the same purpose). The spectrum of public construction law seems much broader than generally assumed by the

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in construction and the realisation of the sustainable development goal (SDG) 12. *Journal of Cleaner Production*, 2022, vol. 376, 134294.

[9] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. OJ L 376, 27. 12. 2006, p. 36–68.

[10] See, for example, Council Directive 92/57/EEC of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites (eighth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC). OJ L 245, 26. 8. 1992, p. 6–22.

[11] See Battis, U. *Öffentliches Baurecht und Raumordnungsrecht*. 2022, Kohlhammer Verlag, p. 1: *"Das öffentliche Baurecht umfasst die Gesamtheit der Rechtsvorschriften, die die Zuläsigkeit un Grenzen, die Ordnung und die Förderung der Nutzung des Bodens, insbesondere durch Errichtung baulicher Anlagen, deren bestimmungsgemäße Nutzung, wesentliche Verärderung und Beseitigung betreffen."*

[12] See Conrad, C. *Öffentliches Baurecht und die Genehmigungsvoraus setzungen Schnelleinstieg für Architekten und Bauingenieure*. Springer Vieweg, 2020, p. VII: *"Der eigentlichen Bauausführung voraus geht im weitesten Sinne das öffentliche Baurecht. Dieses befasst sich mit der Frage der Genehmigungs- notwendigkeit und -fähigkeit eines Bauwerks, mit den von ihm zu erfüllenden technischen Standards in Bezug auf die zu verwendenden Materialien, der Frage der Ausführung in Bezug auf Standsicherheit und Feuerbeständigkeit und den sonstigen Anforderungen wie bspw. Der Energieeffizienz oder des Abstands zwischen Bauwerken. Es kann grob eingeteilt werden in das Raumordnungsrecht, das Landesplanungsrecht, das Bauplanungsrecht, das Bauordnungsrecht und das sonstige öffentliche Baurecht, bspw. die Musterrichtlinien der Gefahrenabwehr im Brandschutz."*

[13] See Muckel, S., Ogorek, M. *Öffentliches Baurecht*. C.H. Beck: München, 2014, p. 5.

public,[14] and it is not an ambition of the thesis to cover all its elements. It nevertheless helps to make a distinction between public and private aspects of construction law, while the latter are not paid any particular attention in this thesis.

Terminology on *spatial planning* and *construction permitting* is decisively neutral, without prejudicing or favouring a specific national or regional system.[15] This helps to stay faithful to the EU dimension of the legal requirements (*Euro-English*). The fact that EU law covers a large variety of planning acts without direct harmonisation, makes this neutral approach necessary, which also applies to the interpretation of areas of various plans and programmes. For example, the terms *development of land* and *town and country planning* used by the CJEU[16] should not be interpreted as having a specific legal meaning that would limit the scope of application of EU requirements but as general categories even for all specific acts subject to Art. 3(2)(a) of the SEA Directive, irrespective of the translation of both terms into national languages.[17]

The term *spatial planning* is relatively common in EU legislation. Although not precisely defined, it generally covers methods used by the public sector to influence the distribution of various activities in specific locations. As the EU Compendium of spatial planning systems and Policies describes, *"…it should be understood that spatial planning when used in the 'EU sense' does not mean precisely 'aménagement du territoire', town and country planning, Raumordnung, ruimtelijke ordening or any of a number of other terms used by member states and regions to describe their particular arrangements for managing spatial development which apply in their territories."*[18]

Within the broad category of spatial planning, the EU is more active towards *spatial development policy* (long-term strategy) than towards *mere* development or planning procedures (*land-use planning*). The spatial development policy aligns with the broader meaning than the concept of development, which is why it is more appropriate to use when related to general policy issues discussed, for example, by the European Spatial Development Perspective (ESDP) and the Territorial Agenda. Therefore, the term *spatial development* is used mainly to emphasise the predominantly political dimension of spatial planning, meanwhile, *land use planning* is used to emphasise the indirect effect of the EU environmental requirements on the specific procedure of spatial planning. This distinction

[14] See examples in Wirth, A., Schneeweiß, A. *Öffentliches Baurecht praxisnah. Basiswissen mit Fallbeispielen*. 2019, Springer Vieweg, p. 2.

[15] A number of definitions of spatial planning exist and the scope of spatial planning differs greatly from one country to another. See UNECE. Spatial Planning: Key Instrument for Development (ECE/HBP/146). Economic and Social Council. Geneva: UNECE, 2008, p. 5.

[16] CJEU judgment of 22 March 2012, *Inter-Environnement Bruxelles and Others* (C-567/10, EU:C:2012:159, paras 28–29).

[17] The French text of the SEA Directive uses the words *"l'aménagement du territoire"* and *"l'aménagement des sols"*, the German version *"Raumordnung"* and *"Bodennutzung"*, Italian *"assetto del territorio"* and *"pianificazione del territorio"*, Dutch text refers in both cases to *"de ruimtelijke ordening",* Polish text uses *"planów zagospodarowania przestrzennego lub użytkowania gruntu", similarly to Slovak ("plánovanie miest a vidieka alebo využívanie územia")* language version, while the Czech translation seems too literal regarding the latter term (*"územního plánování nebo využívání půdy"*).

[18] European Commission. The EU compendium of spatial planning systems and policies, 1997, para. 23.

between *land-use planning* and *development policy* is also inherent in EU environmental legislation - and has been used since the early 1990s.[19]

Construction permitting is not a term used by EU law, which instead refers to a specific act (*development consent*) or a process (*development and construction*). To keep the text accessible, *construction permitting* covers all necessary procedures for permitting a particular project, usually a land use permit procedure and a building permit procedure or a single merged procedure with one stand-alone permit.

This thesis aims not to solve the problem of terminology, which is very complex. For example, one can spend hours debating the differences and similarities between the terms *spatial* and *territorial*. However, these debates provide a first insight into the various obstacles to the implementation of EU environmental and energy requirements in the public construction law of the Member States.

Similarly, the thesis does not differentiate among various concepts of *public participation*. The literature uses a bundle of similar terms relating to involving and engaging the public in planning processes in some way – *civic engagement*, *public involvement*, *advocacy planning*, *citizen participation*, *collaborative planning*, and *inclusive partnership*.[20] For this thesis, however, it seems more appropriate to stick to the general concept of public participation, which is most commonly used in EU law, and to focus more on the types of public participation within this concept, particularly consultation and active involvement (see below).

The *EU* or the *European Union* is used for both the EU and the European Community, except where it is necessary or helpful to distinguish between them in the historical context. Similar logic is applied to the names of EU institutions and *Member States*, including the United Kingdom. The *Court of Justice* and the *General Court/Tribunal* are generally distinguished when it comes to individual court decisions, although the Court of Justice is usually referred to as the CJEU.

1.2 BACKGROUND/RATIONALE FOR THE THESIS AND STATE OF KNOWLEDGE

European integration has revolutionised the construction industry. The successful Schuman Plan brought together the two most essential resources of France and Germany – coal and steel – in an organisation open to other European countries. The war brought much destruction to Europe, and a newly conceived industrialisation policy became a common approach to recovery. The corresponding issues of urban growth management were naturally expected to arise in the hotspots of coal and steel production.[21]

The common market allowed the free movement of construction workers, building materials, and services between all the member countries of the Community. Today, the EU provides the

[19] See the Habitats Directive, preamble: *„…land-use planning and development policies should encourage the management of features of the landscape which are of major importance for wild fauna and flora"*.
[20] See Healey, P., Civic Engagement, Spatial Planning and Democracy as a Way of Life. *Planning Theory and Practice*, 2008, vol. 9, no. 3, p. 379–382.
[21] See Drevet, J. *Histoire de la politique régionale de l'Union européenne*. 2008, Paris: Edition Belin, 285 p.

construction industry with significant opportunities for innovation and change in many areas, from an integrated approach to sustainable development to new technologies in construction. The gross value added of the construction sector in the EU reaches approximately 5.5 % of GDP,[22] and the European construction market attained a value of USD 2624.17[23] or 3019.39[24] billion, depending on the source. The market reports provide pertinent insights into how the EU requirements affect the industry: *"The increasing demand for energy-efficient buildings is another trend shaping the Europe construction market. With stringent energy-efficiency regulations in place and the growing awareness of the benefits of energy-efficient buildings, the construction sector is focusing on the development of energy-efficient and sustainable designs."* As we see, the European construction market is driven by legislation that is adopted at the EU level when it comes to energy-efficiency regulations.

Spatial planning and construction permitting are not subject to direct harmonisation at the EU level, although international projects and other cross-border activities have become a standard part of the European construction scene, and it is in the Union's interest to coordinate the development of its territory. Moreso as climate change has recently become a dominant topic in international, European, and national politics. This also applies to local politics, where it is dominantly reflected in the climate policy representations and determinations of urban land use planning and, at the regional level, in spatial planning. On the one hand, the EU rules might restrict specific planning initiatives, but on the other hand, they may stimulate developments in the spatial planning system. Similarly, individual projects can be significantly boosted or postponed due to EU legal requirements and funding.

The **EU's influence on national public construction law** systems is somewhat complex and, in many cases, not even intended but a by-product of various measures. Accordingly, the content of legislation or policy itself and the actual impact on the Member States should be considered when identifying the main EU legislation and policies influencing spatial planning and construction permitting in individual Member States.

In other words, public construction law is formed indirectly at the EU level and to a large extent. It is acknowledged that such influence is increasing.[25] In particular, the environmental policy (Art. 191 TFEU) and energy policy (Art. 194 TFEU) of the EU give shape to public construction law in the Member States, besides the transport policy and projects of common

[22] Eurostat. Gross fixed capital formation by AN_F6 asset type [online]. 2022 [accessed on: 11 February 2023]. Available at: <https://ec.europa.eu/eurostat/databrowser/view/NAMA_10_AN6__custom_1514561/bookmark/table?lang=en&bookmarkId=e05fdc50-ed14-439a-8623-c5205dc1835a>.

[23] EMR. Europe Construction Market Share, Size, Analysis, Trends: By End Use: Residential, Healthcare, Hospitality, Others; By Residential Buildings and Single Units: Apartments/Flats, Detached Houses, Semi-Detached, Terraced Houses, Others; Regional Analysis; Competitive Landscape; Key Trends and Developments in the Market; 2023-2028 [online]. 2023 [accessed on: 10 March 2023]. Available at: <https://www.expertmarketresearch.com/reports/europe-construction-market/toc>.

[24] Research and Markets. Europe Construction Market Report and Forecast 2023-2028 [online]. 2023 [accessed on: 10 March 2023]. Available at: <https://www.researchandmarkets.com/reports/5775269/europe-construction-market-report-forecast>.

[25] See Battis, U. *Öffentliches Baurecht und Raumordnungsrecht*. 2022, Kohlhammer Verlag, p. 2*: „In der EU, die auf einem Binnemarkt und ein hohes Maß an Umweltschutz un territorialem Zussamenhalt ausgerichtet ist, wird das öffentliche Baurecht zunehmend verändert, inbesondere durch die Pflicht zur Umsetzung umwelt- oder wirtschaftsrechtlicher Richtlinien."*

interest (Art. 171 and 172 TFEU) - e.g., in the definition of essential critical transport networks. Or, from a different perspective, these policies and the corresponding legal regulations have defined the playing field for national legislators by focusing on the impact of construction activity and sustainable energy requirements. It is not just the impacts of construction alone. Among other things, spatial planning also sets conditions for the possible location of large industrial plants and other sources of emissions and risks to the population and nature. It is, therefore, not surprising that even relevant legislation adopted under Art. 114 TFEU (*approximation of laws*) has been gradually targeted at broader environmental and energy aims, particularly under the recent EU Climate Policy.

It is possible to debate at length which EU environmental requirements significantly impact public construction law in individual Member States.[26] However, there is probably no doubt about the most important ones: these are (1) strategic environmental impact assessment (SEA) of the plans and programmes, (2) environmental impact assessment (EIA) of the projects, (3) impact assessment of the plans, programmes, and projects on Natura 2000 sites, (4) technical requirements for building materials and waste management, and (5) public participation in environmental protection. These requirements are closely interlinked. Relevant EU energy requirements come mainly from the fields of promotion of renewable energy and energy efficiency of buildings.

Among other policies with a spatial impact are the EU's Regional Policy and the Transport Policy concerning projects of common interest (Art. 171 and Art. 172 TFEU), which provides the definitions of essential key transport networks, effectively forming the Trans-European Network for Transport (TEN-T) Policy.

A significant influence on spatial planning in the Member States by the EU is, therefore, driven by existing sectoral competencies and activities that indirectly influence spatial planning instruments and spatial developments. These include a wide range of EU legislation and incentives, e.g., EU funding and the agenda and discourse set by European institutions.[27] This relationship works both ways. As Blaas nicely points out, *„EU-policies have a lot of spatial impacts, and the spatial structures are, at the same time, a precondition and the subject matter of various EU-policies."*[28]

The **EU environmental policy enjoys a unique position** in this respect for two main reasons. Firstly, primary EU law requires the integration of environmental protection into other policies.[29] Secondly, the adoption of *measures affecting town and country planning* and *land*

[26] For example, within the ESPON COMPASS project, experts from each Member State have identified the most influential legislation and policies regarding spatial planning within their country. The impact strongly varies by sector and geographical area. ESPON. COMPASS – Comparative Analysis of Territorial Governance and Spatial Planning Systems in Europe. Draft final Report, 2018, p. 40–54.

[27] COTER. Spatial planning and governance within EU policies and legislation and their relevance to the New Urban Agenda, 2018, p. 2.

[28] Blaas, W. Introduction and Summary. In: Blaas, W. (ed.) *A New Perspective for European Spatial Development Policies*. 2019, Routledge, p. 11.

[29] Art. 11 of the TFEU provides that *"Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development."*

use or *choice between different energy sources and the general structure of its energy supply* is expressly foreseen by Art. 192(2)(b) TFEU.

Such competence does not equal direct harmonisation, though. Besides targeting exclusively environmental measures, the EU may only adopt measures that *affect* but do not *harmonise* national laws and regulations. In addition, such competence is subject to the principles of subsidiarity and proportionality. This means that the EU can only act if the objectives of a proposed measure cannot be achieved by Member States acting alone. The EU must also ensure that any proposed measure is proportionate to the objectives it seeks to achieve.

To provide an example of its application, Art. 192 TFEU was used as a legal basis for the adoption of directives and regulations on energy efficiency and renewable energy between 2001 and 2009. Settled case law on the choice of a legal basis seems to preclude using Art. 192 TFEU as a legal basis for direct action in the energy sector after the adoption of Art. 194 TFEU.[30] Legal instruments that combat climate change within the meaning of Art. 191 TFEU, for instance, would continue to be adopted using Art. 192 TFEU as their legal basis, even if their effects on the energy sector were immediate and considerable. However, legal instruments that directly pursue the objectives of Art. 194 TFEU, such as the promotion of renewable energy, would have to be adopted using Art. 194 TFEU as their legal basis.[31]

The EU requirements on the protection of the environment have introduced a particular element in both the EU and national law following the adoption of the international Espoo Convention and, even more significantly, the Aarhus Convention: **Requirements on public participation,** including access to justice.

It is deemed that the public participation requirements have been the key aspect in strengthening the EU environmental legislation enforcement.[32] However, participation itself is not a rigid, homogeneous concept. To be effective, it must be balanced at the EU and national level and enforced accordingly. Otherwise, it will not fulfil its purpose and will, at best, resemble a Ferrari with closed doors, to use the same analogy as Advocate General Sharpston famously used when describing the German system of judicial review.[33]

There seems to be a general agreement that participation is a fundamentally multi-dimensional concept. Following Fung[34] and Newig and Kvarda,[35] participatory processes may

[30] See the CJEU judgments of 21 June 2018, *Poland v Parliament and Council* (C-5/16, EU:C:2018:483, paras 37–49); of 3 October 2013, *Commission v Latvia* (C-267/11 P, EU:C:2013:46, para. 57).

[31] Huhta, K. The scope of state sovereignty under Article 194(2) TFEU and the evolution of EU competences in the energy sector. *International & Comparative Law Quarterly*, 2021, vol. 70, no. 4, p. 1000.

[32] See Morgan, R., K. Environmental impact assessment: the state of the art. *Impact Assessment and Project Appraisal*, 2012, vol. 30, no. 1, p. 5– 14.

[33] Opinion of Advocate General Sharpston of 16 December 2010, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* (C-115/09, EU:C:2010:773), para. 77: *"The German Government has explained that its system of judicial review involves a careful and detailed scrutiny of administrative decisions and results in a high level of protection of individual rights. However, like a Ferrari with its doors locked shut, an intensive system of review is of little practical help if the system itself is totally inaccessible for certain categories of action."* See Appel, M. Umweltverbände im Ferrari des deutschen Umweltrechtsschutzes – Anmerkung zur Trianel-Entscheidung des EuGH, Urt. v. 12.5.2011 – C-115/09. *Natur und Recht*, 2011, vol. 33, p. 414–416.

[34] Fung, A. Varieties of participation in complex governance. *Public Administration Review*, 2006, vol. 66, Special Issue: Collaborative Public Management, p. 66–75.

be assessed by considering at least three dimensions: (1) participation may be more or less inclusive of relevant stakeholders and the public; (2) information exchange may be more or less intensive, ranging from simple one-way provision or elicitation of information to intensive and repeated face-to-face dialogue and deliberation; and (3) power, in the form of process and decision control, may be delegated to participants to a greater or lesser extent, affording differing degrees of influence over the final plan or decision. This initial classification seems appropriate for evaluating EU legislation because, as will be seen, individual EU legislation differs in the degree of public involvement in terms of how broadly it sets out Member States' obligations or whether it sets them out at all.

Participation is assumed to lead to *"a higher degree of sustainable and innovative outcomes."*[36] Different fields of study have made various arguments on the pros and cons of participation with respect to environmental outcomes. The existing literature is, therefore, fragmented and leaves us with logical inconsistencies. It seems the environmental benefits of participatory decision-making are not automatic but contingent on various intervening factors.[37]

The literature is replete with hypotheses on the relationship between participation and environmental performance,[38] but the evidence is highly conflicting, with findings supporting a variety of competing claims.[39] This is not surprising as there are many links in the chain between the legislation and its outcomes. Even judging legislation itself on outcomes is complicated, not to say impossible, if the performance of legislation is not studied further.[40] For example, Terpstra and Havinga[41] argue that policy implementation should be situated in a developmental context, the implementation practices should be analysed in relation to their institutional context, and that styles of regulations should be compared not only between sectors and organisations but also between different periods of time. The same applies to public participation, which is affected by numerous factors.

Despite somewhat conflicting evidence, it is assumed that public participation can improve the environmental quality of decisions by opening decision-making up to environmental concerns, incorporating environmentally relevant lay or local knowledge, fostering learning, innovation, and creative solutions, and producing common-good-oriented solutions and

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[35] Newig, J., Kvarda, E. Participation in environmental governance: Legitimate and effective? In: Hogl, K., Kvarda, E., Nordbeck, R., Pregernig, M. (eds.) *Environmental Governance: The Challenge of Legitimacy and Effectiveness*. Edward Elgar: Cheltenham, UK, 2012, p. 29–45.

[36] Heinelt, H. Achieving Sustainable and Innovative Policies through Participatory Governance in a Multi-Level Context: Theoretical Issues. In: Heinelt, H., Getimis, P., Kafkalas, G., Smith, R., Swyngedouw Opladen, E. (eds.) *Participatory Governance in Multi-Level Context. Concepts and Experience*. Germany: Leske + Budrich, 2002, p. 17.

[37] See Irvin, R., A., Stansbury, J. Citizen Participation in Decision Making. Is It Worth the Effort? *Public Administration Review*, 2004, vol. 64, no. 1, p. 55–65.

[38] Newig, J., Challies, E., Jager, N.W., Kochskämper, E., Adzersen, A. The Environmental Performance of Participatory and Collaborative Governance: A Framework of Causal Mechanisms. *Policy Studies Journal*, 2017, vol. 46, no. 2, p. 269–297.

[39] See Newig, J., Fritsch, O. Environmental Governance: Participatory, Multi-level—And Effective? *Environmental Policy and Governance*, 2009, vol. 19, no. 3, p. 197–214.

[40] Faludi, A. The performance of spatial planning. *Planning Practice & Research*, 2000, vol. 15, no. 4, p. 299–318.

[41] Terpstra, J., Havinga, T. Implementation between tradition and management: structuration and styles of implementation. *Law and Policy*, 2001, vol. 23, no. 1, p. 95–116.

mutual gains.[42] Furthermore, participation may improve implementation and compliance by producing more feasibly implementable decisions, generating acceptance among stakeholders, resolving stakeholder conflicts and conflicts of interest, and building trust and social capital relevant to implementation.[43]

Even without specific regard to their benefits, the public participation requirements seem inherent to more complex regulations in the field of public construction law. They can be conceived as a stand-alone phenomenon, in line with the conclusions of Habermas,[44] who understands the growth of the environmental movement as a response to the increasing tendency of institutional systems to take over decisions traditionally handled through rational debate. Similarly, following the perspective of Beck,[45] these requirements can be conceived as a logical outcome of reflexive modernity, which has led to widespread risks containing a *boomerang effect* and demystification of science and technology, areas previously excluded from the public debate.[46]

However, requirements on public participation are not articulated in a precise manner and are not easy to adapt for the national legislator. The same applies to other environmental or energy requirements that are not tailored to the public construction law. Fairbrass[47] explains that the nature of decision-making in the EU is such that it compels the decision-makers to frame loosely worded legislation. The reason is that the Member States must agree with the formulated legislation and that the EU can be seen as both a polity as well as an experimental exercise in international cooperation.[48] To encompass different views, interests, and opinions, it is the EU's practice to draft legislation that is necessarily vague.

As for the most notable example, it is not always clear what is considered *a plan* or *a project* for the purposes of public construction law. On the one hand, the EU environmental legislation can be interpreted and applied very strictly, thus frustrating a high number of plans and projects. On the other hand, the legislation offers space for interpretation, laying it open to the accusation that it is too vague.[49] Therefore, correct understanding and implementation of EU environmental requirements is crucial.

Finally, it is not the case that the lack of conditions for public participation is simply a matter of complex legislation. As several decisions of the CJEU cited below demonstrate, the low

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[42] See Baird, J., Plummer, R., Haug, C., Huitema, D. Learning effects of interactive decision-making processes for climate change adaptation. *Global Environmental Change*, 2014, vol. 27, p. 51–63.

[43] See Bulkeley, H., Mol, A. P. J. Participation and environmental governance: Consensus, ambivalence and debate. *Environmental Values*, 2003, vol. 12, no. 2, p. 143–154.

[44] Habermas, J. *Theorie des kommunikativen Handelns, Band 2: Zur Kritik der funktionalistischen Vernunft*. Frankfurt: Suhrkamp Verlag Frankfurt, 1982, 633 p.

[45] Beck, U. *Risikogesellschaft Auf dem Weg in eine andere Moderne.* Frankfurt: Suhrkamp Verlag Frankfurt, 1986, 391 p.

[46] *Ibid*, p. 26. *"Es geht nicht mehr [nur] um die Nutzbarmachung der Natur, um die Herauslösung des Menschen aus traditionalen Zwängen, sondern […] wesentlich um Folgeprobleme der technisch-ökonomischen Entwicklung selbst. Der Modernisierungsprozeß wird ‚reflexiv', sich selbst zum Thema und Problem."*

[47] Fairbrass, J. *EU and British biodiversity policy: ambiguity and errors of judgement*. CSERGE Working Paper, 2000, GEC 2000-04.

[48] Peterson, J. The choice for EU theorists: establishing a common framework for analysis, *European Journal of Political Research*, 2001, vol. 39, no. 3, p. 289–318.

[49] Beunen, R. European nature conservation legislation and spatial planning: For better or for worse? *Journal of Environmental Planning and Management*, 2006, vol. 49, no. 4, p. 611.

ambition of Member States and the conflicting interests that generally clash in environmental protection are also to blame. In general, there is no dispute that the level of enforcement of EU environmental law by Member States is unsatisfactory. However, it might seem that proper application is something natural or even self-evident in the case of legally binding rules.[50]

The most influential monographs on spatial planning in Europe[51] do not deal in depth with the emerging legal dimension of public construction law in the EU. Instead, they look at the various economic and social aspects that influence European planning systems. Even without formal EU competence for spatial planning, in the past twenty-five years, we have witnessed the emergence of a European spatial planning discourse, which is carried forward by, amongst others, the ESDP, the INTERREG programmes, which stimulate transnational cooperation on territorial issues, and the European Spatial Planning Observation Network (ESPON), facilitating research into structures and trends in the EU territory.[52]

Still, requirements of various EU policies and corresponding legislation are usually analysed in isolation, without regard to the planning and construction processes, or only to the extent of partial requirements. For example, a wide range of publications discuss the problematic implementation of environmental directives in particular Member States[53] or the impact of EU law on national environmental policies.[54] For example, Liefferink and Jordan[55] conclude that while the EU has influenced some aspects of the contents of national environmental policies, it has not managed to change either their fundamental composition or design. In other words, policy content is more susceptible to convergence under the influence of the EU than either policy structure or style. This seems to provide more relevance to legal regulation adopted at the EU level, which must be implemented in a prescribed way.

There seems to be a lack of more comprehensive works that would clearly explain which planning concepts, and construction projects are subject to environmental requirements, including public participation, related to environmental impact assessment, how duplicate assessments can be avoided in construction processes, whether it is possible to integrate assessment or permitting of operations into construction procedures, etc. The national

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[50] See Farber, D. A. Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law. *Harvard Environmental Law Review*. 1999, vol. 23, p. 299.

[51] See Newman, P., Thornley, A. *Urban Planning in Europe. International competition, national systems and planning projects*. 1996, London: Routledge, 304 p.; Balchin, P., Sýkora, L., Bull, G. *Regional Policy and Planning in Europe*. London: Routledge, 1999, 304 p.; Larsson, G. *Spatial Planning Systems in Western Europe. An Overview*. Stockholm: Royal Institute of Technology, 2006, 290 p.

[52] See Böhme, K., Schön, P. From Leipzig to Leipzig. Territorial Research Delivers Evidence for the New Territorial Agenda of the European Union. *disP - The Planning Review*, 2006, vol. 42, no. 165, p. 61–70.

[53] See Hiedanpää, J. European-wide conservation versus local well-being: the reception of the Natura 2000. Reserve Network in Kaarvia, SW-Finland. *Landscape & Urban Planning*, 2002, vol. 61, p. 113–123; Krott, M., Julien, B., Lammertz, M., Barbier, J.-M., Jen, S., Ballestreros, M. & De Bovis, C. Voicing Interests and Concerns: Natura 2000: An ecological network in conflict with people. *Forest Policy and Economics*, 2000, no. 1, p. 357–366; Ledoux, L., Crooks, S., Jordan, A. & Kerry Turner, R. Implementing EU biodiversity policy: UK experiences. *Land Use Policy*, 2000, vol. 17, p. 257–268.

[54] See Ravesteyn, N. van, Evers, D. Unseen Europe. *A survey of EU politics and its impact on spatial development in the Netherlands*. The Hague/Rotterdam: Ruimtelijk Planbureau/NAI Uitgevers, 2004, 86 p.

[55] Liefferink D., Jordan A. An 'Ever Closer Union' of National Policy? The Convergence of National Environmental Policy in the European Union. *Queens papers*, 2002, no. 10.

legislator cannot prevent these considerations even in a minimalist approach to planning and permitting construction processes.

In summary, public construction law, European harmonisation, and public participation form three separate areas of academic work. This seems to make an overall, albeit simplified, analytical approach chosen by this thesis legitimate to focus on the underlying issues in context and to look more closely at some of the systemic aspects of the interconnection of the three areas in terms of Member States' obligations and the possibility of optimising planning and permitting processes.

Many scholars have tried to express the advantages of public interventions in spatial planning, implementation, and control. Some attempt to track the EU influences, particularly Faludi, who successfully summarises arguments concerning public interventions as externalities, lost opportunities, public goods, and equity considerations,[56] and Waterhout, who focuses on the institutionalisation of European Spatial Planning.[57]

The Europeanisation of spatial planning through territorial cooperation has been addressed repeatedly.[58] However, environmental law and public participation have been mostly left from the analysis except for some notable remarks. As noted by Evans in 1997,[59] planning has been found to be lacking in tackling the complex environmental problems characterising today's society. In 2008, Meijer and Visscher concluded that the building regulatory field has not yet been a point of scholarly attention.[60]

As regards my work, in 2020, **I published a book on EU environmental law requirements in the field of public construction law**[61] (reviewed by Vícha), which was deliberately conceived as a research book for further work. Instead of following the same structure and approach, I decided to start anew with this thesis to reflect significant changes introduced in EU law following the European Green Deal and to present more coherent and balanced chapters that would address the topics more sensibly. Ideologically, therefore, the thesis is based on the same premises but wholly rewritten. To my knowledge, no other monograph covers the same topic to a comparable extent.

1.3 OBJECTIVES, METHODOLOGY AND STRUCTURE OF THE THESIS

Identifying the most essential requirements that indirectly affect public construction law is inevitably subjective to some extent. Therefore, the thesis focuses on such provisions, which

[56] See for example Faludi, A. The performance of spatial planning, *Planning Practice & Research*, 2000, vol. 15, no. 4, p. 299–318; Faludi, A. Centenary paper: European spatial planning: past, present and future. *Town Planning Review*, 2010, no. 81, p. 1–22.
[57] Waterhout, B. *The institutionalisation of European Spatial Planning*. Amsterdam: IOS Press 2008, 240 p.
[58] For an overview academic papers, see Dühr, S., Stead, D., Zonneveld, W. The Europeanization of spatial planning through territorial cooperation. *Planning Practice & Research*, 2007, vol. 22, no. 3, p. 291-307.
[59] Evans, B. From town planning to environmental planning in Blowers, A., Evans, B. (eds.) *Town planning into the 21st century*. London: Routledge, 1997, p. 1–14.
[60] Meijer, F., Visscher, H. Building regulations from an European perspective. *COBRA 2008: The construction and building research conference of the Royal Institution of Chartered Surveyors*, 2008, p. 5.
[61] Vomáčka, V. *Stavební právo a požadavky Evropské unie v oblasti ochrany životního prostředí*. Brno: Masaryk University, 2020, 242 p.

are usually applied in the preparation of land-use plans at a level that is significant for the development of the territory and for decisions on the construction of substantial buildings, both public and private, that may significantly affect the surrounding area by their location, size or operation. In addition, the requirements for building materials and energy efficiency of buildings, which are necessarily reflected in the construction industry as a whole, are taken into account.

There are **two basic ways to approach the analysis of these requirements**: Either one can provide an overview of the legislation in each area and describe these requirements, or one can add a timeline and explain when and why these requirements were enshrined in EU law.

This **thesis chooses the latter approach** because it better highlights the gradual, even spontaneous, development of EU law in this area. Alongside existing law, it allows highlighting failures, paths that have led in a different direction from the desired or expected one. Most importantly, it will enable a better description of when and how particular requirements found their way into EU law. The *strengthening* in the title of the thesis implies a gradual process, so some time perspective is needed.

The analysis of public participation requirements focuses foremost on their **scope and clarity**. For this purpose, attention is paid to whether the Member States are explicitly required to 1) identify the public concerned or even address specific target groups,[62] 2) encourage active participation,[63] 3) provide information actively, 4) consider the outcome of the consultation,[64] 5) provide access to justice. Regarding point 2), a distinction is made between consultation and active involvement. At the same time, the latter implies that stakeholders are invited to contribute actively to the planning or decision-making process by discussing issues and contributing to their solutions. This form is classified as a more advanced type of participation than, e.g., consultation.[65]

Whether or not a participatory process substantially increases the representation of environmental concerns depends not only on how the process is designed but also on the

[62] Targeted inclusion mechanisms help to offset underrepresentation of environmental concerns: *„When the inclusion process in collaborative governance structures is managed appropriately, it can be an active force in creating the "virtuous" and reinforcing cycle of trust, commitment, understanding, communication, and outcomes that mark successful collaboration."* Johnston, E., W., Hicks, D., Nan, N., Auer, J. C. Managing the Inclusion Process in Collaborative Governance. *Journal of Public Administration Research and Theory*, 2011, vol. 21, no. 4, p. 721.

[63] The early involvement of stakeholders in the decision-making process is widely considered essential to produce high-quality and durable decisions. See Reed, M. S. Stakeholder participation for environmental management: a literature review. *Biological Conservation*, 2008, vol. 141, no. 10, p. 2417–2431; or Fung, A. Varieties of Participation in Complex Governance. *Public Administration Review*, 2006, vol. 66, Special Issue, p. 66–75.

[64] We may assume that in environmental matters the participants even more than usually weigh up expected costs and benefits of participation, considering the likelihood of their influencing the decision. See Turner, M., A., Weninger, Q. Meetings with Costly Participation: An Empirical Analysis. *Review of Economic Studies*, 2005, vol. 72, no. 1, p. 247–268.

[65] See Unnerstall, H. Legal Framework for Public Participation in Flood Risk Mapping. A comparative study of the responses of different European Member States to some requirements of the Floods Directive. *UFZDiskussionspapiere*, 2010, no. 13.

potential participants.[66] The thesis, however – as it focuses on EU requirements – leaves aside a comprehensive topic of the stakeholder credibility[67] or capacity to participate,[68] except for legal conditions which may affect wide access to participation, in particular regarding costs of the proceedings and additional requirements on participants such as size, previous activity or relationship to the area affected.

Similarly, the effects of legal measures on the participants or outcomes of the procedures are not analysed as both topics are largely beyond the scope of the thesis. However, this does not negate their importance and complementary nature to legal requirements, nor does it mean that research in these areas is insufficient. For example, the systematic reviews of the literature on social learning in natural resource management conducted by Rodela[69] and Rodela *et al.*[70] conclude that few studies even attempt to assess the learning effects of specific measures on participants empirically.

The thesis is divided into four main parts:

The **first part of the thesis** traces together the early harmonisation attempts of public construction law and the first environmental requirements to 1) illustrate the development of the important that have manifested themselves in public construction law and 2) trace the origin of the public participation requirements. This part is analytical and descriptive and serves as an input to the following parts. It aims to answer the following questions:

- *What was the extent of the first attempts to harmonise public construction law at the European level?* The answer is vital for understanding the current EU spatial planning and construction permitting approach.
- *What were the motives behind the first attempts to harmonise public building law at the European level?* The answer should serve as a basis for an analysis of EU environmental requirements to see if they are aimed at achieving the same objectives.
- *How did the first- and second-generation EU environmental requirements address spatial planning or construction permitting?* The answer should help analyse the scope of these requirements and their impact on public construction law. It will also help to identify key definitions used for public construction procedures or acts adopted, which are analysed in the following sections.
- *Did EU law introduce public participation requirements relevant to public construction law before the ratification of the Aarhus Convention? If so, did EU law follow the public participation requirements in the terminology of public construction*

[66] See Newig, J., Challies, E., Jager, N.W., Kochskämper, E., Adzersen, A. The Environmental Performance of Participatory and Collaborative Governance: A Framework of Causal Mechanisms. *Policy Studies Journal*, 2017, vol. 46, no. 2, p. 269-297.
[67] See Holzinger, K. Limits of Co-Operation: A German Case of Environmental Mediation. *European Environment*, 2000, vol. 10, no. 6, p. 293–305.
[68] See Ansell, C., Gash, A. Collaborative Governance in Theory and Practice. Journal of Public Administration Research and Theory, 2008, vol. 18, no. 4, p. 543–571.
[69] Rodela, R. Social learning and natural resource management: the emergence of three research perspectives. *Ecology and Society*, 2011, vol. 16, no. 1, Art. 30.
[70] Rodela, R., Cundill, G., Wals, A. E. J. An analysis of the methodological underpinnings of social learning research in natural resource management. *Ecological Economics*, 2012, vol. 77, p. 16–26.

law? The answers will be used to compare the pre-Aarhus and post-Aarhus requirements in the different EU Directives.

The **second part of the thesis** focuses on implementing the Aarhus Convention in EU law in relation to Member States and on its aspects common to current EU legislation. It forms, therefore, a framework section (hence the *intermezzo* in the Chapter title) that helps to understand the different regimes of requirements under which EU directives fall. It then looks in detail at the content of public participation requirements, drawing in particular on the recent case law of the CJEU. It aims to answer the following questions:

- *How was the Aarhus Convention implemented in EU law? Are there any gaps in the implementation?* The answer identifies the insufficiencies that the national authorities must deal with. Furthermore, it may suggest that effective implementation is still needed/ongoing.
- *What is the scope of the public participation in decision-making and access to justice in environmental matters?* The answer should explain the typical requirements of EU legislation implementing Art. 6 and Art. 7 of the Aarhus Convention.
- *How much discretion is left to the Member States regarding the aspects of the judicial review?* The answer should illustrate how precisely the EU law affects access to justice in environmental matters at the national level, given that a general directive has not been adopted. Specific aspects of judicial review addressed by the CJEU and relevant to public construction law should be emphasised to estimate the minimum standard which should be harmonised if the EU finds the courage to do so.

The third and the fourth part of the thesis provide an overview and analysis of the current EU requirements on public construction law. In the **third part of the thesis**, the environmental requirements are analysed with particular attention to how they affect spatial planning and construction permitting. This part, therefore, defines the scope of the most important EU requirements for protecting the environment and public participation by explaining the concepts of *a project* and *a plan/programme*. The content of the relevant public participation requirements is discussed in detail, primarily based on the case law of the CJEU. The analysis also looks for synergies in the basic requirements to assess which processes can be combined and carried out simultaneously and which obligations can be fulfilled simultaneously to reduce administrative and time burdens. The following questions are raised:

- *What is the scope of the main EU environmental requirements which affect public construction law?* The answer should determine the impact of EU environmental law on spatial planning and construction permitting. Furthermore, it should explain how the individual requirements have developed.
- *Are the definitions of the key terms for spatial planning and construction permitting clearly worded? If not, is the use of general and ambiguous terminology necessary for the EU regulation to cover the wide range of different concept documents and authorisation acts adopted at the national level?* The answer should make clear whether at least partial clarification of the terms used by EU environmental directives is possible, in particular on the basis of the interpretation provided by the case law of the CJEU.

- *Does EU environmental law support the merging and optimisation of processes?* The answer should indicate whether the EU legislator recognises the problems caused by fragmented legislation and is leading Member States towards more efficient spatial planning and building permitting.

Similarly, the **fourth part of the thesis** analyses the current planning and construction requirements that stem from other EU policies than environmental. Mainly, it focuses on developing the Cohesion Policy and Urban Agenda, maritime spatial planning, development of the TEN-T and TEN-E networks, building materials requirements, building energy efficiency, and promoting renewable energy. The following questions are raised:

- *Do current EU planning and construction requirements of other than environmental policy set conditions for spatial planning or construction permitting?* The answer should explain whether the EU law in this area relies on specific legal measures to be adopted or counts on spatial planning and construction permitting.
- *Do current EU planning and construction requirements of other than environmental policy set the conditions for public participation? Do they refer to the relevant provisions of traditional environmental directives?* The answer should help to understand whether the applicable EU legislation is evolving as a coherent system implementing the Aarhus regime.

Whenever spatial decisions – such as land-use plans or building permits – depend on EU policy, some authors, such as Evers and Tennekes,[71] speak of *coupling*, the degree of which is categorised as strong or weak but not precisely determined. Strong coupling mostly means expressive, direct requirements that must be reflected in the public construction law procedures. Weak coupling indicates relevance to the public construction law procedures, which also present suitable means for implementing the requirements. Coupling will be employed as a basic criterion to assert the individual requirements.

The thesis structure follows the above-mentioned content division and divides the text into thematic units, which are not too extensive. For example, the first part does not devote one chapter to all EU requirements but is divided according to the time periods framed by adopting the main environmental legislation and EU environmental action programmes. Such a structure seems more practical for an interpretation that takes into account the temporal context than separate chapters describing the full development of each piece of legislation.

The content of the individual chapters is strongly interrelated. For example, issues of process integration cannot be approached without taking into account the requirements for public participation. This also applies to the sub-topics: the problem of possible charging for participation in decision-making cannot be separated from the costs of court proceedings, nor can it be separated from the definition of the public concerned. The objectives of EU directives are decisive in this respect and, together with the principles of EU environmental law, are the *leitmotif* of the CJEU's decision-making - and should be so when setting and interpreting national legislation.

[71] See Evers, D., Joost, T. *The Europeanisation of spatial planning in the Netherlands. Policy Report*. Hague: PBL Netherlands Environmental Assessment Agency, 2016, 106 p.

The methodology described above has obvious **drawbacks:**

First, the **scope of the thesis is extensive**, which does not allow for a proper in-depth analysis of all relevant issues relating to the different EU requirements. The thesis focuses instead on the gradual development of EU law, the relationships, differences, and synergies between the various requirements to provide a more comprehensive picture, and then concentrates on the most critical issues identified, namely the interpretation of the general concepts used in environmental legislation and the explanation of the content of the public participation requirements.

Second, while there is little debate about which EU requirements have the most significant impact on national public construction law, **it seems complicated to establish criteria for determining which *other* EU requirements should be analysed**. This is because many of them have an environmental, economic, or social dimension, which indirectly influences the approach to spatial policy and construction with varying degrees of intensity.

Third, the overview of the substantive requirements of EU law is of necessity primarily related to the processes and procedural aspects that are intended to meet the substantive objectives. However, the excessive attention to process at the expense of substance seems to characterise the bureaucratisation of EU law and some of the more consistently harmonised areas. The thesis cannot analyse all the substantive requirements in a limited space. Instead, it seeks to highlight two factors crucial to the procedural and substantive enforcement of EU law – the substantive scope of EU requirements and the aims to be achieved.

The habilitation thesis is based on the legal situation as of **1 August 2023**.

2. EARLY HARMONISATION ATTEMPTS OF PUBLIC CONSTRUCTION LAW

This chapter describes the early development of the EU dimension of public construction law between years 1960 and 2000.

There have been several attempts to make spatial planning part of the embryonic European project.[72] Even without formal success, the link – and, given the definition of EU competencies, the imbalance – between EU policies and the regulation of public construction law in individual Member States has long been perceived and addressed. Therefore, as early as the early 1960s, there were efforts to steer and coordinate, particularly the starting points and objectives of the spatial planning processes in European countries.[73]

These attempts closely followed activities at the national level: The benefits of collaborating on spatial development issues across national borders have long been recognised. Initiatives such as the Conference of Regions of Northwest Europe (CRONWE), set up in 1962, or the establishment of the German-Dutch Spatial Planning Commission (*Deutsch-Niederländische Raumordnungskommission*) in 1967 helped to increase the awareness for the interlinkages between the nation-states and regions of Europe, and the need for coordinated action. The Benelux countries have arguably been most active in spatial planning cooperation, followed by the Baltic Sea Region countries.[74]

On the other hand, the requirements for construction materials and building permit processes have remained aside from the early discussion. For a long time, the focus of the negotiations at the European level was more on *how to develop* in the shared European territory than on *how to build*. This is not overly surprising because, unlike political disputes over synergy or cooperation of the most important urban areas of the continent, there was no significant political or social incentive – a push – to start harmonising building rules.

The situation substantially changed as the common market strengthened and matured. The construction industry could no longer escape efforts to remove technical barriers to the market. One such example is the development of the construction products *acquis* in the late 1980s (see Chapter 2.2).

A second essential and related factor was the concern to develop the necessary public health and safety protection. For example, the European standardisation of fire and safety measures had not started before the 1990s; its growth phase can be tracked to a relatively recent period between 2000 and 2010 which witnessed the final version of EN test methods, development

[72] Faludi, A., van der Valk, A. J. *Rule and Order: Dutch Planning Doctrine in Century*, Dordrecht Kluwer, 1994, 318 p.
[73] Faludi, A. Centenary paper: European spatial planning: past, present and future. *Town Planning Review*, 2010, no. 81, p. 1–22.
[74] See Dühr, S., Stead, D., Zonneveld, W. The Europeanization of spatial planning through territorial cooperation. *Planning Practice & Research*, 2007, vol. 22, no. 3, p. 291.

of classification standards EN 13501 series, development of extended applications rules, European Technical Approvals, etc.[75]

Finally, environmental concerns gradually emerged on the European scene long before an EU stand-alone environmental policy was established. Many of the environmental requirements set by the EC/EU have significantly impacted both spatial planning and construction permitting. As will be seen, however, these requirements are not directly or explicitly targeted at public construction law. This places increased demands on their interpretation and implementation in the Member States.

Public participation requirements were not a firm part of the first attempts to harmonise public building law on the European scene. At the national level, however, it is possible to recognise commitments to deepening democracy through widening citizen participation, often dating back to the 1970s.[76] Arguably, it is these commitments and their associated tendencies, which later intensified after the collapse of the communist regime in the Central and Eastern European countries, that set the stage for public engagement at the EU level, either directly or indirectly through the implementation of the Aarhus Convention.

2.1 SPATIAL PLANNING AND CONSTRUCTION PERMITTING

The first initiatives at the European level regarding spatial planning with sophisticated output were made outside the European Community. They were channelled through the Council of Europe, which already in 1961 passed a resolution pointing to the spatial dimension of human rights.[77]

Subsequent works and the meetings of the CEMAT conference (*Coferénce Européene des Ministres responsible de l'aménagement du territoire*) resulted in the adoption of the European Regional/Spatial Planning Charter (*ERSP Charter*, sometimes also Torremolinos Charter) in 1983 with the aim of ensuring spatially balanced and sustainable development in accordance with the principle of a *polycentric approach*[78] to spatial planning.

The **ERSP Charter** defines regional/spatial planning as a scientific discipline, an administrative technique, and a policy developed as *"an interdisciplinary and comprehensive approach directed towards balanced regional development and the physical organisation of space according to an overall strategy."*[79] The ERSP Charter also identifies common planning principles: balanced social-economic development, quality of life, responsible

[75] See Lopéz, S. Benefits and Disadvantages of the European Standardisation. In: Carvel, R. (ed.) *Fire & Building Safety in the Single European Market*. University of Edinburg, School of Engineering and Electronics, 2008, p. 34–38.
[76] See Healey, P., Civic Engagement, Spatial Planning and Democracy as a Way of Life. *Planning Theory and Practice*, 2008, vol. 9, no. 3, p. 379–382.
[77] See Déjeant-Pons, M. The European Conference of Ministers responsible for Regional Planning (CEMAT). *Infomrationen zur Raumentwicklung*. 2003, no. 7, p. 401–410.
[78] Davoudi, S. Polycentricity in European Spatial Planning: From an Analytical Tool to a Normative Agenda. *European Planning Studies*, 2003, vol. 11, no. 8, p. 979–999.
[79] ERSP Charter, Art. 9.

management of nature and the environment, and a rational use of land.[80] Many of these principles have been gradually embodied in the EU environmental legislation (see Chapter 2.3) and incorporated into national and regional planning legislation and policies in many European countries.[81]

The ERSP also underlines the **right to participate** and underscores the importance of relevant actors in decision-making. Art. 22 states that *"Any regional/spatial planning policy, at whatever level, must be based on active citizen participation. It is essential that the citizen be informed clearly and in a comprehensive way at all stages of the planning process and in the framework of institutional structures and procedures."* At the same time, public participation is differentiated from mere political representation as Art. 12 of the ERSP stipulates that regional/spatial planning *"should be conducted in such a way as to ensure participation of the people concerned and their political representatives."*

The approach of the ERSP towards public participation was in line with the development at the international level: As long ago as 1976, the Vancouver Declaration on Human Settlements adopted at the UN Conference on Human Settlements identified the central role of spatial planning for future urban development. It also emphasised as one of the general principles that *"All persons have the right and the duty to participate, individually and collectively in the elaboration and implementation of policies and programmes of their human settlements."*[82] Two of its eleven guidelines for actions were focused on public participation. They recommended that, *inter alia*, *"national Governments promote programmes that will encourage and assist local authorities to participate to a greater extent in national development"*[83] and that *"since a genuine human settlement policy requires the effective participation of the entire population, recourse must therefore be made at all times to technical arrangements permitting the use of all human resources, both skilled and unskilled. The equal participation of women must be guaranteed."*[84]

Later on, the Agenda 21 Action Plan, adopted at the 1992 UNCED, devoted a whole chapter to the planning and management of land resources[85] with one of the four key objectives *"to create mechanisms to facilitate the active involvement and participation of all concerned, particularly communities and people at the local level, in decision-making on land use and management, by not later than 1996."*[86] Such mechanisms should not be passive; instead, the public must be encouraged to get involved in spatial planning, including vulnerable or excluded groups of individuals.[87]

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[80] ERSP Charter, Art. 14–17. See Albers, G. Die Ziele der Raumplanung und die Charta von Torremolinos, *disP - The Planning Review*, 1987, vol. 23, no. 87, p. 5–12.

[81] See Öhlinger, T., Weimar, R. (eds.) *Die Europäische Raumordnungscharta -The European Regional/Spatial Planning Charta-La Charte Européenne de l'Aménagement du Territoire*, 1991, Peter Lang GmbH, Internationaler Verlag der Wissenschaften, 362 p.

[82] Vancouver Declaration on Human Settlements, Part II, para 13.

[83] *Ibid*, Part III, para. 10.

[84] *Ibid*, Part III, para. 11.

[85] Agenda 21, Section II, Chapter 10 Integrated approach to the planning and management of land resources.

[86] *Ibid*, Chapter 10.5(d).

[87] *Ibid*, Chapter 10.10: *"Governments at the appropriate level, in collaboration with national organizations and with the support of regional and international organizations, should establish innovative procedures, programmes, projects and services that facilitate and encourage the active participation of those affected in the*

In comparison to EU law, particularly the SEA Directive, public participation in ERSP is conceived wider, covering also planning policies, but narrower regarding personal scope. The ERSP refers to European citizens,[88] while the SEA Directive refers simply to the public,[89] defined as *"one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups."*[90] And while the ERSP does not provide any details on the effectiveness of public participation, the SEA Directive takes a step forward to ensure that appropriate time frames are set, allowing sufficient time for consultations, including the expression of opinion.

The initiatives of the **Council of Europe,** despite being slowly curtailed, paved the way for the parallel activities of the European Parliament and the Commission. The informal Conference of Ministers responsible for Regional Policy and Spatial Planning (1989) and the Committee on Spatial Development (1991) were established.

In 1990, the **INTERREG** initiative was launched and gradually became the EU's primary instrument to support cooperation across national borders, financed by the European Regional Development Fund (ERDF). The INTERREG II 1994 to 1999 followed.[91]

In 1991, the European Commission published a strategy document *Europe 2000: Outlook for the Development of the Community's Territory*.[92] It was accompanied by an urban research programme including twenty-four city case studies of responses to economic change. In 1994, its follow-up *Europe 2000+: Cooperation for European Territorial Development*.[93]

Simultaneously, the removal of trade restrictions and trade barriers in many areas by the Single European Act in 1992 also had its effect on urban planning, as Newman and Thornley describe: *"For example at the professional and educational levels we have witnessed the formation of the European Council of Town Planners and the Association of European Planning Schools. There has been a greater interest in the exchange of ideas about urban planning theory and practice."*[94]

Europe+ most notably suggests areas of transnational cooperation, broad factors in regional organisation, rural, urban, and border development, and principles and proposals for transnational action and collaboration. As regards **public participation**, it points out that *"to give the ordinary citizen a constructive role in a sphere which significantly affects future living conditions, the Committee emphasizes the urgent need to devise better arrangements for involving the public and more especially the socio-economic groupings who are directly*

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decision-making and implementation process, especially of groups that have, hitherto, often been excluded, such as women, youth, indigenous people and their communities and other local communities."

[88] See preamble, para. 5 which refers to all European citizens.

[89] See, most notably, SEA Directive, Art. 6(4).

[90] SEA Directive, Art. 2(d).

[91] See Miosga, M. *Europäische Regionalpolitik in Grenzregionen : die Umsetzung der INTERREG-Initiative am Beispiel des nordrhein-westfälisch-niederländischen Grenzraums. Münchner geographische Hefte*. 1999, Passau: LIS-Verlag, 194 p.

[92] European Commission. Europe 2000 - Outlook for the Development of the Community's Territory. 7. 11. 1991, COM (1991) 0452 final.

[93] Economic and Social Committee of the European Communities. Europe 2000+: Cooperation for European Territorial Development, 1994.

[94] Newman, P., Thornley, A. *Urban Planning in Europe. International competition, national systems and planning projects*. 1996, London: Routledge, p. 3.

involved in this unavoidable process of adaptation and change."[95] Furthermore, according to Europe 2000+, *"it must be acknowledged* [by the Commission and Council] *that the fundamental problem of how to inform, consult and involve the socio-economic partners raises complex questions which must mainly be resolved at local, regional or national level, depending on the system operated in the individual Member States. Comparative studies can act as a spur and facilitate change. The "compendium" of spatial planning systems should therefore also cover public participation. New forms of consultation should also be devised, and the spatial planning observatory could perhaps play a useful role in this"*.[96]

Nevertheless, such a compendium, including general requirements on public participation in spatial planning, has never been adopted at the EU level. All attempts to make spatial planning part of the European project during the launch era of the European Union turned out unsuccessful.

Starting from Europe 2000+, in 1995, the Council of Ministers expressed its commitment to the joint work on a spatial development strategy for the EU territory.[97] In 1999, the European Spatial Development Perspective (**ESDP**) was approved by the Informal Council of Ministers of Spatial Planning of the European Commission as a non-binding document forming a policy framework with numerous policy options for all tiers of administration with a planning responsibility. It is a first step towards a genuine European spatial planning policy, even though it is abstract. It aimed to achieve a balanced and sustainable spatial development strategy following an integrated approach, which requires recognising how the specific sectors of development activity affect each other.[98]

Moreover, the ESDP provided a framework for EU funding programmes, helping to guide the allocation of funds towards projects that were consistent with the principles of the ESDP. Therefore, the ESDP significantly promoted a more integrated, sustainable, and coordinated approach to spatial planning and development in Europe.[99] It helped to guide EU funding, influence national and regional policies, and stimulate research and analysis.

The adoption of the ESDP also seems to settle the discussion on whether spatial planning falls under the EU competence with a negative response. The ESDP cemented that the Member States *"want to retain variety and achieve regionally more balanced and sustainable development in the EU"*[100] but not harmonised rules on spatial planning. The ESDP instead refers to *spatial development*. As Williams observes, *"There was far from being a shared understanding among the spatial policy community concerning the form and scope of such a document, and of course no EU competence."*[101]

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[95] *Ibid*.
[96] *Ibid*.
[97] Kunzmann, K., R. Euro-Megapolis or Theme Park Europe. In: Blaas, W. (ed.) *A New Perspective for European Spatial Development Policies*. Routledge, 2019, p. 91.
[98] For more details, see Faludi, A., Waterhout, B.: *The Making of The European Spatial Development Perspective: No Masterplan*, Routledge, 2002, 224 p.
[99] See Shaw, D., Sykes, O. Investigating the application of the European Spatial Development Perspective (ESDP) to regional planning in the United Kingdom. *Town Planning Review*, 2003, vol. 74, no. 1, p. 31–50.
[100] ESDP, Chapter 1.4.
[101] Williams, R., H. Constructing the European Spatial Development Perspective—For Whom? *European Planning Studies*, 2000, vol. 8, no. 3, p. 358.

Furthermore, after the Member States, particularly Germany, disregarded that spatial planning was implied in EU policy to strengthen economic and social cohesion, the Commission switched to invoking the concept of *territorial cohesion* in the early 2000s.[102] This trend continued and became permanent. As Dühr, Stead, and Zonneveld note, *"Transboundary cooperation is set to continue in the EU Cohesion Policy period 2007 – 2013. However, as a result of the ambiguity over the European Community's involvement in spatial planning activities and spatial development, these terms have meanwhile been replaced in the Commission's vocabulary by a discourse on 'territorial cohesion' and by the term 'territorial cooperation' in the guidelines and regulations of the 2007 – 2013 Cohesion Policy."*[103]

Germany was not alone in opposing the harmonisation of spatial planning at the European level. Several Member States were reluctant to give up their public administration and planning systems, which had been adapted to their specific needs either for decades or centuries[104] or recently.

For example, decentralisation reforms in the 1980s created France's highly fragmented planning system. A similarly radical step, as is well known, was taken by Belgium in the same decade when it was decided to give a significant degree of autonomy to the Flemish, Walloon, and Brussels regions. Larsson adds about the increased role of municipalities, which must be taken into account when considering the reasons for the lack of harmonisation: *"In all the countries in Western Europe new functions have been turned over from state to municipal responsibilities, especially in the Nordic countries. Partly this has been possible by creating new administrative units. In Sweden for example earlier municipalities have been put together on a big scale and the number today is less than one tenth of the number in 1950. This has made it possible to increase the responsibilities of the municipalities at the same time as the direct interfering by the central and regional government has diminished. We can find a similar development in several other countries even if not so pronounced. France is an exception."*[105]

Harmonisation of spatial planning, therefore, presents a systematic question: Regional planning in Europe has evolved within five very distinct legal and administrative frameworks: British, Napoleonic, Germanic, Scandinavian, and East European, with one of the main differences lying in the approach to the role and powers of the local authorities.[106] Austria,

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[102] See Battis, U., Kersten, J. *Europäische Politik des territorialen Zusammenhalts: Europäischer Rechtsrahmen und nationale Umstetzung*, Bonn, Bundesamt für Bauwesen und Raumordnung [online]. 2008 [accessed on: 1 April 2023]. Available at: < https://www.bbsr.bund.de/BBSR/DE/veroeffentlichungen/izr/2010/8/Inhalt/izr-8-2010-komplett-dl.pdf?__blob=publicationFile&v=1>.

[103] Dühr, S., Stead, D., Zonneveld, W. The Europeanization of spatial planning through territorial cooperation. *Planning Practice & Research*, 2007, vol. 22, no. 3, p. 294.

[104] See Larsson, G. *Spatial Planning Systems in Western Europe. An Overview*. Stockholm: Royal Institute of Technology, 2006, p. 5: *"Historically, the view concerning public interfering has also in Western Europe varied between countries and with time. In the strong national states, which developed during the nineteenth century it was almost self-evident that the State exercised direction and control concerning land use. There were traditions from previous centuries when, because of considerations like taxes, the State interfered in ownership structures, the management of farms and forests and in the establishment of new market centres."*

[105] *Ibid*, p. 15.

[106] See Newman, P., Thornley, A. *Urban Planning in Europe. International competition, national systems and planning projects*. 1996, London: Routledge, 304 p.

Switzerland, Germany, Belgium and to a large extent also Italy and Spain bring the federal element of planning and permitting other states lack.

Any attempts to set requirements on spatial planning would also present a demanding task after the massive enlargement of the European Union in 1995 and, in particular, 1998, which was quickly followed by accession talks with the candidate states from Central and East Europe with their administrative systems still transitioning from robust central planning and planning missing a greater involvement of the private sector. The enlargement also brought a need to adjust budgetary allocations to the Structural Fund, which had been continuously enlarged and revised with a large concentration of spending on lagging regions perusing the Maastricht aims.[107]

The Maastricht Treaty, for the first time, allowed the Union to undertake measures concerning town and country planning mentioned in the introduction to this thesis. However, this competence was made subject to the unanimity rule requiring agreement from all Member States and the subsidiarity rule stating that the Union will only intervene when action cannot be undertaken by Member States themselves. Newman and Thornley conclude that *"The likelihood of any Union intervention in town and country planning is therefore extremely unlikely. However, many of its other actions will have a significant bearing on planning within nation-states, such as the environmental and regional programmes"*.[108]

In 1999, Balchin, Sýkora, and Bull[109] identified multiple systems of planning among European countries and described the development in spatial planning as follows: *"Whereas it had long been recognised that the competence for regional planning on a continental scale should appropriately be assumed by a supranational organisation rather than by a loose collection of national states, it was becoming clear that regional planning within individual countries could be handled more effectively by the regions themselves rather than by the centralised state. However, the formation of regional tiers of government and the development of various forms of regional planning were proceeding at a different pace from country to country. Only where cross-border planning was undertaken was there a possibility that a cohesive approach to regional planning would emerge – short of a uniform system of planning being imposed across the EU."*[110]

In other words, instead of introducing spatial planning at the EU level, the tendency has been in the opposite direction, towards regions (not in the sense of strengthening public participation, though), both from the state level and from the level of municipalities as urban areas that are integrated into the economy of their regions, requiring regional rather than isolated urban solutions. Such a development is logical, but given the ongoing European integration process, it may have changed, eventually widening differences. This will be

[107] See the Maastricht Treaty, Art. 130A: *"In order to promote its overall harmonious development, the Community shall develop and pursue its actions leading to the strengthening of its economic and social cohesion. In particular, the Community shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least-favoured regions, including rural areas."*
[108] See Newman, P., Thornley, A. *Urban Planning in Europe. International competition, national systems and planning projects*. 1996, London: Routledge, p. 18.
[109] Balchin, P., Sýkora, L., Bull, G. *Regional Policy and Planning in Europe*. London: Routledge, 1999, 304 p.
[110] *Ibid*, p. 14.

illustrated by the more recent development of harmonisation tendencies in spatial planning (see Chapter 5.1).

The end of relatively strong tendencies toward harmonisation of spatial planning nevertheless also marked the end of **common rules on public participation** in spatial planning. The ESDP, a comprehensive document of 87 pages, leaves public participation aside, with a sole reference regarding the loss of biological diversity and natural areas, which points out that: *"a well-co-ordinated spatial development policy across the various administrative levels, including participation of the public, can assist in protecting habitats and ecosystems, thereby reversing the loss of biodiversity."*[111]

To put things into perspective, **construction permitting** was utterly absent from the early integration tendencies. While there could be doubts regarding how far the concept of territorial alongside economic and social cohesion reaches, there has not even been a serious discussion on harmonisation of the permitting procedures. The decision-making is not addressed by the ESDP or, in the following decade, the 2007 Territorial Agenda. It was, however, precisely in this area of public construction law where the harmonised environmental requirements showed their teeth in 1985 when the EIA Directive was adopted. The same directive also took a first step in requiring that Member States allow the public to express their opinion before the project is initiated. This was even before the Single European Act, which amended the original Treaty of Rome, legitimised this environmental interest, and gave the Union a firm mandate to intervene in environmental and regional affairs.[112]

The development of the environmental requirements will be provided more attention. Still, for now, it seems sufficient to note that since the end of the 1980s, at least, it has no longer been possible to regard the public construction law of the Member States as the exclusive domain of the Member States, influenced only by the common principles of spatial planning.

2.2 BUILDING MATERIALS AND ENERGY EFFICIENCY

The end of the 1980s was also marked by the adoption of the New Approach Directives,[113] a series of measures that aimed to remove technical barriers to trade within the EU by harmonizing technical standards and regulations for large families of products such as gas appliances, machinery, pressure equipment, etc. In addition, the setting of the major technical product requirements was given to unique European standards bodies.

Until the end of the 1980s, more than 200 directives relating to industrial products and foodstuffs had been adopted. The 1988 **Construction Products Directive** (CPD)[114] introduced the first substantive rules on building materials and followed the tendency to define product categories rather than single products. The legal basis for its adoption was Art.

[111] ESDP, Chapter 2.4.1.
[112] See Davies, H., W., E, Gosling, J. *The Impact of the European Community on Land Use Planning in the United Kingdom*. London: Royal Town Planning Institute, 1994.
[113] See Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards. OJ C 136, 4. 6. 1985, p. 1–9.
[114] Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products. OJ L 40, 11. 2. 1989, p. 12–26.

100 of the Treaty of Rome, which allowed for the harmonisation of technical regulations to facilitate the free movement of goods.

The White Paper preceded the CPD on completing the internal market, approved by the European Council in June 1985,[115] which asked for a particular emphasis to be placed on specific sectors, including construction. In contrast, the removal of technical barriers in the construction field, to the extent that they cannot be removed by mutual recognition of equivalence among all the Member States, should follow the new approach, which calls for the definition of essential requirements on safety and other aspects which are necessary for the general well-being, without reducing the existing and justified levels of protection in the Member States.[116]

The CPD established a common technical framework for marketing construction products in the EU and aimed to ensure the free movement of these products across EU member states. The directive established a common technical language for assessing the performance of construction products and ensuring that they met essential requirements related to health and safety, energy efficiency, and environmental protection. The directive required that construction products be tested and certified by independent third-party bodies and labelled with a CE mark indicating compliance with the Directive.

The 1990s also witnessed serious steps toward **harmonisation of energy savings rules** which affected the building industry, paved the way for the 2002 Directive on the energy performance of buildings,[117] and provided a model for the introduction of the Energy performance certificates, a rating scheme to summarise the energy efficiency of buildings (see Chapter 5.6).

Most notably, the 1993 **SAVE Directive**[118] required the Member States to develop, implement and report on several programmes: a) on the energy certification of buildings, b) on the billing of heating, air-conditioning, and hot water costs calculated, in an appropriate proportion, on the basis of actual consumption, c) to permit third-party financing for energy efficiency investments in the public sector, d) so that new buildings receive effective thermal insulation, taking a long-term view, on the basis of standards laid down by the Member States, taking account of climatic conditions or climatic areas and the intended use of the building, e) on the regular inspection of heating installations of an effective rated output of more than 15 Kw, f) with the aim of promoting the regular completion of energy audits of industrial undertakings with high energy consumption.[119]

The first two programmes are user-oriented, providing information on the energy performance of the building and the costs of these services to be shared among the building users. This is not exactly an example of **public participation** in the strict sense. Still, such a requirement

[115] European Commission. Completing the Internal Market: White Paper from the Commission to the European Council. 28.-29. 6. 1985, COM (85) 0310 final.
[116] *Ibid*, para. 71.
[117] Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 on the energy performance of buildings. OJ L 1, 4. 1. 2003, p. 65–71.
[118] Council Directive 93/76/EEC of 13 September 1993 to limit carbon dioxide emissions by improving energy efficiency (SAVE). OJ L 237, 22. 9. 1993, p. 28–30.
[119] SAVE Directive, Art. 2–7.

fits into the category of enabling individuals to make an informed choice for cost-effectiveness, environmental protection, or both. The effectiveness of the requirements was challenged by the broad discretion given to Member States to determine the scope of the programmes *"on the basis of potential improvements in energy efficiency, cost-effectiveness, technical feasibility and environmental impact"*.[120]

The **CE mark** for harmonised products was introduced in 1985 as a symbol of conformity with the essential health and safety requirements set out in the New Approach Directives. Products that meet these requirements can be sold freely throughout the EU without further testing or certification in each member state.

The CE mark is mandatory for many products subject to harmonised EU regulations, including construction products, machinery, electrical equipment, medical devices, and personal protective equipment. The mark indicates that the product meets the relevant safety and performance requirements and has undergone the necessary conformity assessment procedures. When a harmonised product standard exists, products can be provided with a CE mark, enabling the marketing of such products throughout the EU. That means increasing trade among countries, which is vital for manufacturers, architects/engineers, and the European economy.[121]

The prudent and rational utilisation of natural resources required by primary law[122] was behind the adoption of the **Energy Label Directive 1992** (92/75/EEC).[123] It was not the first legislation to harmonise voluntary schemes for energy labelling used in certain Member States. However, it was considerably more ambitious than the previous attempt: The Label Directive adopted in 1979 (79/530/EEC)[124] was not met with much success as only one implementing Directive for electric ovens[125] had been adopted, and few Member States have introduced this label.[126] The 1992 version offered consumers a guideline for purchasing a more comprehensive range of energy-efficient household appliances through a simple coloured scale reaching from A (most efficient) to G (least efficient).

The implementation of the Energy Labelling Directive 1992 consequently led to the requirement that most white goods, light bulb packaging and cars must have an EU Energy Label clearly displayed when offered for sale or rent. The labelling aimed to achieve energy savings in the use of household appliances indirectly, via the choice of the customers: The consumers are provided basic data in a recognisable standard format to choose the most energy-efficient product, lowering energy bills and reducing the impact on the environment.

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[120] SAVE Directive, Art. 8.
[121] See Lopéz, S. Benefits and Disadvantages of the European Standardisation. In: Carvel, R. (ed.) *Fire & Building Safety in the Single European Market*. University of Edinburg, School of Engineering and Electronics, 2008, p. 36.
[122] See Art. 191(1) TFEU.
[123] Council Directive 92/75/EEC of 22 September 1992 on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances. OJ L 297, 13. 10. 1992, p. 16–19.
[124] Council Directive 79/530/EEC of 14 May 1979 on the indication by labelling of the energy consumption of household appliances. OJ L 145, 13. 6. 1979, p. 1–6.
[125] Council Directive 79/531/EEC of 14 May 1979 applying to electric ovens Directive 79/530/EEC on the indication by labelling of the energy consumption of household appliances. OJ L 145, 13. 6. 1979, p. 7–15.
[126] Energy Labelling Directive 1992, preamble.

2.3 THE FIRST GENERATION OF EU ENVIRONMENTAL REQUIREMENTS (1970–1989)

Environmental requirements on public construction law did not appear in EU law all at once; they have developed over more than three decades. Indications of integrating environmental protection into other policies can be traced back to the late 1970s and early 1980s. EU primary law did not yet contain a separate environmental policy at that time.

The **First Environmental Action Programme** (1974–1975)[127] only set objectives for two years but established the main goals of the Community Environmental Policy. One of them was to *"ensure that more account is taken of environmental aspects in town planning and land use"*.[128] The objective was elaborated in detail in Chapter 3 *Urban development and improvement of amenities*. The Council announced it intended *"to concentrate its efforts upon four sets of problems, carefully selected on the basis of the general nature and Community scale of the problems"*[129] and the Action Programme provided a brief description of environmental problems relating to the development of urban areas and issues specific to town centres, open spaces and landscape, and the coastal regions.[130]

The Action Programme established a strong parallel between the early harmonisation tendencies in public construction law and environmental protection. It stressed that the four sets of the abovementioned problems *"are closely linked to one another and therefore cannot be solved separately. Consequently, the Commission intends to study them together with a working party of national experts. The working party will work closely with the "Standing Committee for Regional Development" provided for as part of the common regional policy. In preparing the working party's discussions, the Commission will pay particular attention to work already in progress at the national and international levels. If necessary, the Commission will set up study groups to examine specific questions covered by the working party."*[131]

There was an additional remark on the importance of spatial planning in Chapter 5 of the First Action Programme devoted to creating a European foundation for improving working and living conditions. The Council called for the improvement of living conditions which would come mainly out of changes to living space in towns (different types of dwelling, optimum utilisation of available territory, preservation, and renovation of old quarters and town centres, new towns, optimum size of towns), the development of transport, the development of communications and the data-processing revolution, the "push-button" society, political and cultural implications, social integration of immigrants, notably those from non-Member States.[132]

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[127] Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment. OJ C 112, 20. 12. 1973, p. 1–53.
[128] *Ibid*, Chapter 3, Part I, Title I.
[129] *Ibid*, Chapter 3, Part B (Projects).
[130] *Ibid*.
[131] *Ibid*, Chapter 3, Part C (Procedure).
[132] *Ibid*, Chapter 5, Part B (Projects).

Measures towards harmonised **public participation** requirements were absent in the First Environmental Action Programme. It, however, emphasised the role of promoting awareness of environmental problems and education in Chapter 6, and the dissemination of knowledge relating to environmental protection is underlined in Chapter 12.

Several environmental directives were adopted in the second half of the 1970s or early 1980s. Most of them were relatively narrow in scope and focused on specific problems. However, some of these directives have remained in force for several decades or are even in force now in a recast form. For example, the twin directives on waste from the titanium dioxide industry from 1978 and 1982[133] were recast by the IED in 2010.

The most notable legislative piece adopted in this era with considerable impact on public construction law in the Member States was the **1975 Waste Framework Directive** (75/442/EEC)[134] which required Member States to take appropriate steps to encourage the prevention, recycling, and processing of waste. This required effective waste management and infrastructure, including construction measures, provided that the Member States also had to ensure that waste was disposed of without endangering human health and without harming the environment, and in particular without risk to water, air, soil and plants and animals, without causing a nuisance through noise or odours and without adversely affecting the countryside or places of special interest.[135] Permitting procedures had to be set up, and planning was foreseen as Member states had to establish or designate the competent authority to be responsible, *inter alia*, *"for the planning, organization, authorisation and supervision of waste disposal operations"*.[136]

The 1975 Waste Framework Directive contained no requirement for **public participation** in permitting or planning procedures. It was only much later, after the EC acceded to the Aarhus Convention, that the public was invited to the adoption of waste management plans (which the first version of the Directive did not explicitly require) and, through amendments to the EIA and the IPPC Directives, public participation in decision-making on major industrial activities was ensured (see Chapter 3.1). This illustrates the evolution of EU environmental legislation to more comprehensive regulation, embracing strategic instruments and public engagement.

Two subsequent **Action Programmes** had taken a slightly different approach. They significantly broadened the range of environmental problems to be addressed at the Community level and introduced specific instruments to this end, which were to be translated into binding legal requirements. These instruments were based on the prevention principle and environmental policy integration into other sectoral policies. The **Second Action Programme** (1977–1981)[137] announced the Commission would continue to investigate several

[133] Council Directive 78/176/EEC of 20 February 1978 on waste from the titanium dioxide industry. OJ L 54, 25. 2. 1978, p. 19–24; Council Directive 82/883/EEC of 3 December 1982 on procedures for the surveillance and monitoring of environments concerned by waste from the titanium dioxide industry. OJ L 378, 31. 12. 1982, p. 1–14.
[134] Directive 75/442/EEC of 15 July 1975 on waste. OJ L 194, 25. 7. 1975, p. 47–49.
[135] *Ibid.*, Art. 4.
[136] *Ibid.*, Art. 5.
[137] Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting within the Council of 17 May 1977 on the continuation and implementation of

environmental problems connected with the development of certain urbanised areas and would put appropriate proposals to the Council after consulting a panel of national experts.[138]

At the same time, the Council acknowledged that the measures and schemes referred to in the parts of the Action Programme concerning environmental impact assessment (EIA) and the development of an ecological mapping system *"will greatly influence the policies and decisions of bodies dealing with urban planning and land management."*[139] This was still years before the binding requirements on the EIA were adopted, and the ecological mapping system became effective. In comparison with the environmental problems connected with the development of certain urbanised areas, the Second Action Programme provided more specific phases for developing an ecological mapping system.[140] Also, it urged the Commission to draw up appropriate proposals for the EIA procedure and submit them to the Council.[141]

The demand for data on the existing stage of the environment within the Community and the trends in these conditions was formulated by the Council in 1974 and preceded the adoption of the Action Programme. The Council particularly requested the Commission to *"embark upon a classification of the territory of the community on the basis of its environmental characteristics so that the required objectives and measures could be identified and determined."*[142] The ecological mapping system was considered a necessary tool with a broad scope, applicable to the cohesion policy (rational policies of aid), the inclusion of an environmental dimension in the sectoral policies, and the development of specific measures on environmental protection. In addition, it could help the Member States develop consistent and compatible environmental information and evaluation systems.[143]

The specific measures on environmental protection that should benefit from ecological mapping have not been explicitly named in the Second Environmental Action Programme. Nevertheless, some of them had been on the horizon already: The works on the proposal of the **1979 Birds Directive** (79/409/EEC)[144] were complete, with ongoing discussions and working groups. The Directive expected a designation of special protected areas, but some Member States regretted the absence of criteria for selecting sites.[145]

Several proposals by Member States, notably Denmark, suggested the future inclusion of special protected areas in the broader network for wildlife conservation. Jackson recalls that the Second Action Programme *"noted the ongoing discussions regarding the proposed Birds*

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a European Community policy and action programme on the environment (Second Action Programme). OJ C 139, 13. 6. 1977, p. 1–46.

[138] *Ibid*, Title III (Non-damaging use and rational management of land, the environment and natural resources), Chapter 1 (Non-damaging use and rational management of land), Section 3 (Urban and rural areas, and coastal and mountain regions), para. 116.

[139] *Ibid*, para. 117.

[140] *Ibid*, para. 92.

[141] *Ibid*, para. 209.

[142] *Ibid*, Title III, Chapter 1, Introduction, para. 87.

[143] Briggs, D. The Ecological Mapping of the European Community. *Ekistics*, 1982, vol. 49, no. 294, p. 236.

[144] Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds. OJ L 103, 25. 4. 1979, p. 1–18.

[145] Jackson, A., L., R. *Conserving Europe's Wildlife: Law and Policy of the Natura 2000 Network of Protected Areas*. Routledge, 2018, p. 61.

Directive, and effectively sowed the first seeds at EU level of the idea of a broader EU nature conservation instrument applying to flora and fauna in addition to birds, as adverted to by the Denmark's draft resolution."[146]

The result was the essentially simultaneous adoption of the 1979 Birds Directive and the 1979 Bern Convention (the Council of Europe's Convention on the Conservation of European Wildlife and Natural Habitats). The discussions on the need for complex protection of wild fauna and flora ultimately opened the doors for the preparation of the Habitats Directive and the establishment of the Natura 2000 network (see Chapter 2.4) as the Council finally called upon the Commission to take the necessary coordinating steps to see that the network fulfils the objective of the Birds Directive and can be integrated into a more extensive network.

This development aptly illustrates the interdependence between emerging policies and specific instruments. Indeed, it cannot be said that it is consistently the case that a policy with explicit content precedes the adoption of any particular regulation. In this case, the two processes ran in parallel and complemented each other, including in relation to the Community's external policies.

The requirement for the proposals on the harmonised EIA procedure identified the EIA to correspond to the mentioned objective of the First Action Programme to ensure that more account is taken of environmental aspects in *town planning* and *land use*.[147] No other measures had been linked to this objective. Therefore, the EIA was viewed not only as the pivotal instrument of the preventive policy, but also as an exclusive environmental measure tailored to town planning *and* land use, which is a broader field than a *normal* EIA (assessment of the large projects) encompasses. This explains the importance of the EIA as the minimum standard and the regulatory gap filled by the SEA Directive in 2000 (see Chapter 4.2).

The **Third Action Programme** (1982–1986)[148] introduced a strategy for the protection of natural resources and the rational management of land, changed the approach from pollution control to pollution prevention, and raised the role of spatial planning in environmental protection. In Part II (Developing an overall strategy), it stated that *"it is necessary to seek the level of action - local, regional, national, community or international - best suited to the problems in question; consequently, the community level should be reserved for those measures which can be most effective there. This is particularly important, for instance, in spatial planning, where responsibilities are often very widely dispersed within the community. Conservation requirements, moreover, should be considered as early as possible in socioeconomic development planning and decision-making processes."*[149] This approach indicated the need for complex, preventive measures which would apply at the early stages of planning and permitting procedures.

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[146] *Ibid*.
[147] Second Action Programme, para. 205.
[148] Resolution of the Council of the European Communities and of the representatives of the Governments of the Member States, meeting within the Council, of 7 February 1983 on the continuation and implementation of a European Community policy and action programme on the environment (1982 to 1986). OJ C 46, 17. 2. 1983, p. 1–16.
[149] *Ibid*, Part II, para. 9.

The scope of the Action Programmes was still limited, and the targets were rather vague. For the rational management of land, for example, the Third Action Programme aimed at *"the search for solutions to the problems shared by the different member states and the widest possible distribution of the common stock of knowledge (through manuals of integrated management, guides, information schemes, etc.)"*[150] and *"the incorporation of these objectives into community policies"*.[151]

On the other hand, the Third Action Programme was accurate in indicating the further development of critical environmental instruments that have changed the shape of public construction law in the Member States. For example, it strongly emphasised the EIA procedure and its future development.[152]

As the Birds Directive put in place, *inter alia*, a strict protection regime for habitats, it is somewhat surprising that the requirement of the EIA had not been referred to by the chapter of the Third Action Programme on biodiversity protection: In practice, it would be difficult to comply with these requirements without sort of assessment. Nevertheless, it took several years before such a legal requirement was introduced.

In the 1980s, several important areas have been addressed by new regulative requirements. For example, nine specific EC directives[153] on **noise pollution** (seven on products and two on test procedures) were issued between 1979 and 1986. They established requirements on noise emission limits (in terms of permissible sound power levels), noise test codes, marking, and conformity assessment procedures, for some types of outdoor equipment (including construction machinery) and provided a solid basis for further harmonisation. The noise emission limits established by this set of legislation have been evolving towards a progressive reduction and can be considered as points of comparison concerning those introduced by Directive 2000/14/EC for outdoor equipment in Art. 12 (see Chapter 4.8).

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[150] *Ibid*, Part IV, para 26.

[151] *Ibid*.

[152] *Ibid*, Part II, para. 11: *"Environmental impact assessment is the prime instrument for ensuring that environmental data is taken into account in the decision-making process. It should be gradually introduced into the planning and preparation of all forms of human activity likely to have a significant effect on the environment such as public and private development projects, physical planning schemes, economic and regional development programmes, new products, new technologies, and legislation."*

[153] Council Directive 79/113/EEC of 19 December 1978 on the approximation of the laws of the Member States relating to the determination of the noise emission of construction plant and equipment, OJ L 33, 8. 2. 1979, p. 15–30; Council Directive 84/532/EEC of 17 September 1984 on the approximation of the laws of the Member States relating to common provisions for construction plant and equipment, OJ L 300, 19. 11. 1984, p. 111–122; Council Directive 84/533/EEC of 17 September 1984 on the approximation of the laws of the Member States relating to the permissible sound power level of compressors, OJ L 300, 19. 11. 1984, p. 123–129; Council Directive 84/534/EEC of 17 September 1984 on the approximation of the laws of the Member States relating to the permissible sound power level of tower cranes, OJ L 300, 19. 11. 1984, p. 130–141; Council Directive 84/535/EEC of 17 September 1984 on the approximation of the laws of the Member States relating to the permissible sound power level of welding generators, OJ L 300, 19. 11. 1984, p. 142–148; Council Directive 84/536/EEC of 17 September 1984 on the approximation of the laws of the Member States relating to the permissible sound power level of power generators, OJ L 300, 19. 11. 1984, p. 149–155; Council Directive 84/537/EEC of 17 September 1984 on the approximation of the laws of the Member States relating to the permissible sound power level of powered hand-held concrete-breakers and picks, OJ L 300, 19. 11. 1984, p. 156–170; Council Directive 84/538/EEC of 17 September 1984 on the approximation of the laws of the Member States relating to the permissible sound power level of lawnmowers, OJ L 300, 19. 11. 1984, p. 171–178; Council Directive 86/662/EEC of 22 December 1986 on the limitation of noise emitted by hydraulic excavators, rope-operated excavators, dozers, loaders and excavator-loaders, OJ L 384, 31. 12. 1986, p. 1–11.

Furthermore, the 1982 **Seveso I Directive** (82/501/EEC)[154] established one single performance standard in the prevention of major accidents in fixed industrial installations, which requires the operators to take all necessary measures (both technical and organisational) to prevent accidents and limit their impact. Even though the first requirements were formulated very broadly and left much discretion to the Member States,[155] their implications for planning and construction have been considerable as the integration of safety aims at the various stages of operation, design, and construction.[156] The Member States were effectively forced to reduce the risk of domino effects, where establishments are sited in such a way or so close together as to increase the probability and possibility of major accidents or aggravate their consequences. This general requirement has been further elaborated by the 1996 **Seveso II Directive** (96/82/EC)[157] and the 2012 **Seveso III Directive,** which also introduced conditions on public participation that were absent in the Seveso I Directive (see Chapter 4.6).

The adoption of the **1985 EIA Directive** (85/337/EEC)[158] marked a notable step towards an integrated preventive approach in environmental protection and also towards the engagement of both the public and the authorities likely to be concerned by the project to be allowed to express their opinion on the request for development consent.

The 1985 EIA Directive established a number of basic assessment principles and procedural requirements for ensuring that an environmental impact assessment is undertaken for those projects which may give rise to significant environmental impacts and that these impacts are then taken into account before the projects are approved and implemented.

Once again, the harmonised EIA rules did not come out from anywhere: Formalised, mandatory environmental assessment systems originated outside Europe and, for many years, developed very slowly within it.[159] The Second Action Programme already acknowledged the inspiration and practice in the Member States.[160]

The adoption of the 1985 EIA Directive also presented a notable success in strengthening **public participation** in the Member States. Firstly, it introduced a requirement to ensure that any request for development consent and any information (gathered pursuant to Art. 5) were

[154] Council Directive 82/501/EEC of 24 June 1982 on the major-accident hazards of certain industrial activities. OJ L 230, 5. 8. 1982, p. 1–18.
[155] *Ibid*, Art. 3: *"Member States shall adopt the provisions necessary to ensure that, in the case of any of the industrial activities specified in article 1, the manufacturer is obliged to take all the measures necessary to prevent major accidents and to limit their consequences for man and the environment."*
[156] *Ibid*, preamble.
[157] Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances. OJ L 10, 14. 1. 1997, p. 13–33.
[158] 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, p. 40–48.
[159] Lee, N. Environmental assessment in the European Union: a tenth anniversary. *Project Appraisal*, 1995, vol. 10, no. 2, p. 77.
[160] Second Environmental Action Programme, para. 206: *"There is a considerable body of current laws, regulations and administrative provisions, and much current administrative practice in the Member States, some of it long standing, enabling account to be taken to some extent of environmental impact in one sector or another. Furthermore, in parallel with a practice which originated in the United States and in other industrialized countries, certain Member States have introduced or given consideration to specific provisions under which systematic analysis of the environmental impact of certain plans and projects becomes compulsory".*

made available to the public and that the public concerned was given the opportunity to express an opinion before the project is initiated.[161]

For that purpose, Member States were required to a) determine the public concerned, b) specify the places where the information can be consulted, specify the way in which the public may be informed, for example, by bill-posting within a certain radius, publication in local newspapers, organisation of exhibitions with plans, drawings, tables, graphs, models, c) determine how the public is to be consulted, for example, by written submissions, by public enquiry, and fix appropriate time limits for the various stages of the procedure in order to ensure that a decision is taken within a reasonable period.[162]

Secondly, when a decision has been taken, the competent authority must inform the public concerned of the content of the decision and the reasons and considerations on which the decision is based.[163] Thirdly, if a specific project was excluded from the assessment, Member States were required to make available to the public concerned the information relating to the exemption and the reasons for granting it and consider whether another form of assessment would be appropriate and whether the information thus collected should be made available to the public.[164]

Without a doubt, the EIA Directive had a massive impact on the public construction law of the Member States as many of the projects that require the assessment are buildings (in a broad sense). The Member States were given considerable discretion in transposition into their national legislation, provided the basic principles and procedural requirements were satisfied.

Despite discretion provided to the Member States, the EIA Directive's procedural and substantive requirements had to be fulfilled. This means, *inter alia*, that the development consent for public and private projects that are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out. The outcome of the assessment must be respected, even though the Directive does not lay down the substantive rules in relation to balancing the environmental effects with other factors or prohibit the completion of projects that are liable to have adverse effects on the environment.[165] It is no surprise that many Member States found it necessary to modify a considerable number of their existing laws and regulations or enact entirely new ones.[166]

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[161] 1985 EIA Directive (first version), Art. 6(2).
[162] *Ibid*, Art. 6(3).
[163] *Ibid*, Art. 9.
[164] *Ibid*, Art. 2(3)(a), (c).
[165] See the CJEU judgment of 14 March 2013, *Leth* (C-420/11, EU:C:2013:166, para. 46).
[166] Lee, N. Environmental assessment in the European Union: a tenth anniversary. *Project Appraisal*, 1995, vol. 10, no. 2, p. 78–80: *"This approach was deliberately chosen because it was recognised that the project authorisation procedures and institutional arrangements into which the EIA requirements were to be integrated were highly variable within the EU. (...) Indeed, because of the multi-sectoral nature of EIA, and its application (particularly in federal systems of government) at different levels of public administration, many Member States have found it necessary to modify a very considerable number of their existing laws and regulations and/or enact entirely new ones."*

After the deadline for transposition in 1988, Member States were no longer free to regulate what a *project* is, to specify individual *types* of projects,[167] to set conditions for the derogatory regime (to exempt a specific project from the assessment procedures),[168] or similarly to set thresholds that would exclude a whole group of projects from the obligation to carry out an EIA.[169] According to the CJEU, even a small-scale project can have significant effects on the environment if it is in a location where the environmental factors set out in the Directive, such as fauna and flora, soil, water, climate, or cultural heritage, are sensitive to the slightest alteration.[170]

The 1985 EIA Directive was recast in 2011 (2011/92/EU), and the new version is given more attention in Chapter 4.2. However, from a historical perspective, it seems necessary to highlight that the importance of the EIA Directive has increased significantly over time.

First, regarding its content, it became settled case law of the CJEU that the wording of the EIA Directive indicates that it has a wide scope and a broad purpose.[171] As a result, the EIA Directive became a living instrument that reflected science and technology changes. Despite its amendments, it has retained its flexible, holistic approach. Furthermore, its scope has been widened towards a transboundary context to account for international developments. The European Community signed the Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention) in 1991 and ratified it in 1997. The EIA Directive now adopts an overall assessment of the effects of projects on the environment, irrespective of whether the project might be transboundary.[172]

Second, the public became involved in the EIA. The requirements of the Aarhus Convention[173] on public participation in decision-making and access to justice were implemented mainly by the amendment of the 1985 EIA Directive and the 1996 IPPC Directive (see Chapters 3.1, 3.2, and 3.3).[174] Later on, the CJEU ruled that the provisions of the EIA Directive, which require the competent national authorities to carry out the assessment, have a direct effect, which means that individuals can rely on them.[175]

For the developers, the requirement of the EIA brought a considerable burden. They are expected to carry the significant costs of the procedure because it is their obligation to supply

[167] See the CJEU judgments of 30 April 2009, *Mellor* (C-75/08, EU:C:2009:279, para. 50); of 16 July 2009, *Commission v Ireland* (C-427/07, EU:C:2009:457, para. 41).
[168] See the CJEU judgment of 16 September 1999, *WWF and Others* (C-435/97, EU:C:1999:418, paras 65–67).
[169] See the CJEU judgments of 5 July 2007, Commission v Italy (C-255/05, EU:C:2007:406, para. 52); of 20 November 2008, *Commission v Ireland* (C-66/06, EU:C:2008:637, para. 65); of 16 July 2009, *Commission v Ireland* (C-427/07, EU:C:2009:457, para. 42); of 21 March 2013, *Salzburger Flughafen* (C-244/12, EU:C:2013:203, para. 31); of 28 February 2018, *Comune di Castelbellino* (C-117/17, EU:C:2018:129, para. 39).
[170] See the CJEU judgments of 21 September 1999, *Commission v. Ireland* (C-392/96, EU:C:1999:431, para. 66); of 24 March 2011, *Commission v Belgium* (C-435/09, EU:C:2011:176, para. 50).
[171] See the CJEU judgments of 27 March 2014, *Iberdrola Distribución Eléctrica* (C-300/13, EU:C:2014:188, para. 22); of 7 August 2018, *Prenninger and Others* (C-329/17, EU:C:2018:640, para. 36); CJEU order of 10 July 2008, *Aiello and Others* (C-156/07, EU:C:2008:398, para. 33).
[172] See the CJEU judgment of 10 December 2009, *Umweltanwalt von Kärnten* (C-205/08, EU:C:2009:767, para. 51).
[173] The Aarhus Convention was ratified by the European Community in February 2005.
[174] Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control. OJ L 257, 10.10.1996, p. 26–40.
[175] See the CJEU judgment of 21 March 2013, *Salzburger Flughafen* (C-244/12, EU:C:2013:203, para. 48).

information that expressly addresses the significant effects of its project on all species identified in the statement that is supplied pursuant to those provisions.[176] At the same time, the EIA significantly supports legitimate expectations of the developers that the project will likely come to fruition after successful EIA. It seems that a reasonable financial burden was considered a feature of the EIA as there were more fears that the EIA would negatively cause unwarranted delays in investment programmes and overburden the administrative procedures.[177]

Although the adoption of the first environmental directives seems to have been a rapid process, which to some extent compensated for the cautious approach of the Member States to the harmonisation of spatial planning, the opposite is true. The adoption of the Birds Directive was secured *against all odds*[178] , and the negotiation of the EIA Directive proved at least as difficult and controversial. The first draft of the EIA Directive was issued in 1978; twenty other drafts were needed before the proposal was adopted in 1980.[179] The discussion on the draft might be compared perhaps only to the failed attempts to introduce a Directive on Soil Protection in 2007.[180]

This may explain a certain reluctance to harmonise rules which would affect (obstruct) local and regional development after the beginning of the 2000s, a period in which the first environmental requirements settled and became more enforced in practice. The considerable time gaps between the adoption of crucial directives can be perhaps attributed to the evolution of European integration, which was undergoing a significant crisis of Euro-ism, and the call for a multi-speed Europe. Nevertheless, the approach to harmonisation of environmental requirements seems to have stabilised through small incremental steps.

2.4 THE SECOND GENERATION OF EU ENVIRONMENTAL REQUIREMENTS (1990–2000)

The nuclear accident of Chernobyl in 1986 led to the harmonisation of rules at the European level aimed at ensuring transparency in environmental decision-making procedures. Thus, Directive 90/313/EC on **access to environmental information**[181] was adopted, setting forth the principle of access to environmental information as a public right for the first time. Unlike national provisions on access to information, the EU rules introduced a new element that general information should *actively* be provided to the public on the state of the environment.

[176] See the CJEU judgment of 7 November 2018, *Holohan and Others* (C-461/17, EU:C:2018:883, paras 58–59).
[177] Second Environmental Action Programme, para. 209.
[178] See Meyer, J., H. Greening Europe? Environmental Interest Groups and the Europeanization of a New Policy Field. *Comparativ*, 2010, vol. 20, no. 3, p. 83–104.
[179] Glasson, J., Therivel, R., Chadwick, A. *Introduction to Environmental Impact Assessment. 2nd Edition*. UCL Press, 2005, p. 40 (492).
[180] See Heuser, I., L. Milestones of Soil Protection in EU Environmental Law. *Journal for European Environmental and Planning Law*, 2006, no. 3, p. 190–203; Louvagie, G., Gay, S., H., Sammeth, F., Ratinger, T. The Potential of European Union Policies to Address Soil Degradation in Agriculture. *Land Degradation & Development*, 2011, vol. 22, no. 1, p. 5–17; Petersen, M. European Soil Protection Law after the Setback of December 2007 – Existing Law and Outlook. *European Energy and Environmental Law Review*, 2008, vol. 17, no. 3, p. 146–155.
[181] Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment. OJ L 158, 23. 6. 1990, p. 56–58.

Many EU directives adopted later build on this principle and require *active* dissemination of information.

The Fifth Environment Action Programme called *Towards sustainability - A European Community programme of policy and action in relation to the environment and sustainable development* adopted in 1993[182] led to the development of regional and national sustainability plans and strategies which affected spatial planning[183] and affirmed the importance of assessing the likely environmental effects of plans and programmes. Together with a Council and Parliament decision adopted in 1998,[184] it laid down the basis for the SEA Directive (see below) as it emphasised sustainability and affirmed the importance of assessing the likely environmental effects of plans and programmes.[185]

The principle of integrating the environmental dimension in all major policy areas was an underpinning principle of the Fifth Environment Action Programme. However, it was quickly discovered that *"broadening the range of instruments has proved more difficult than envisaged"*[186] as several sectors failed to implement environmental measures.

In comparison to the first environmental action programmes, the fifth one devoted sectoral and spatial planning in a separate chapter (*7.3 Sectoral and spatial planning*) and called for *integrated planning* which would encompass all three levels of planning as the *"comprehensive planning/development/environmental protection framework calls for the application of the principle of subsidiarity through decision-making at the most appropriate level"*.[187] To achieve sustainable development, it noted, *"it seems only logical, if not essential, to apply an assessment of the environmental implications of all relevant policies, plans and programmes."*[188]

The policies which formulate the development goals were considered to be assessed within the environmental protection framework. However, it is clear from the plan of practical reforms, which is a part of the Fifth Environment Action Programme, that Member States should only undertake integration by applying environmental impact assessments to their plans and programmes, meanwhile *"an assessment of the implications for the environment will be made in the course of drawing up Community policies and legislation with special*

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[182] The Fifth Environment Action Programme. Towards sustainability - A European Community programme of policy and action in relation to the environment and sustainable development. OJ C 138, 17. 5. 1993, p. 5.
[183] See Hull, R., Donkers, R. Progress Towards Sustainable Development in the European Union. In: Mather, A., Bryden, J. (eds.) *Area Studies - Regional Sustainable Development:Europe - Volume 1*. Oxford: Eolss Publishers, 2009, p. 352.
[184] Decision No 2179/98/EC of the European Parliament and of the Council of 24 September 1998 on the review of the European Community programme of policy and action in relation to the environment and sustainable development 'Towards sustainability". OJ L 275, 10. 10. 1998, p. 1–13.
[185] The Fifth Action Programme, Chapter 7.3: *"Within the Community, land-use and structural planning generally follows an identifiable sequence starting with national or regional economic plans and ending with local physical development and environmental protection plans. The sequence has two principal components - the upstream policies or plans including control principles and statements of intent, and the downstream programmes and projects which form the basis of action. Given the goal of achieving sustainable development it seems only logical, if not essential, to apply an assessment of the environmental implications of all relevant policies, plans and programmes."*
[186] Decision No 2179/98/EC, para. 21.
[187] *Ibid*.
[188] *Ibid*.

care taken in the areas of internal market, international trade, industrial, energy, agriculture, transport, regional development and tourism."[189] In other words, only the Community policies were to be assessed.

Such ambitious goals have never been achieved, and even legislation towards Member States of a narrower scope, which introduced the requirement of strategic environmental assessment of plans and programmes, came out much later. Even after the 1999 review of the Fifth Environment Action Programme[190] in which the Commission admitted that the *"practical progress towards sustainable development has been rather limited, mainly because there was no clear recognition of commitment from Member States and stakeholders and little ownership by other sectors of the Programme."*[191]

In the same review, the SEA was praised as a key tool promoting a *new culture* of open management to *„ensure that relevant and timely information is available to the decision-makers and that the stakeholders and the general public are informed and consulted in the decision-making process, and improves the quality of decision-making at all levels."*[192] This illustrates the importance of the SEA for implementing the integration policy and sustainable development - and its strong relationship with public participation.

The slow integration of sustainable development requirements in other sectors has increased the relevance of environmental directives, which, when applied, often come into conflict with the public interests prevailing in these sectors. The constant tension surrounding the implementation of the Birds and Habitats Directives is a fitting example.

The **Habitats Directive** (92/43/EEC)[193] was adopted in 1992 as the central piece of Community legislation on biodiversity conservation. It complemented the 1979 Birds Directive in its objective to protect biological diversity mainly through establishing protected areas (Natura 2000 network) and a formal assessment of any plans or projects that are likely to significantly affect the protected sites [Art. 6(3)]. If a plan or project has a negative effect on such goals, authorisation should be denied.

What seemingly looked like a straight reference to the EIA procedure turned out to be a considerably different requirement: As there was no Annex with the project types and no option to set thresholds for the projects, the Habitats Directive went much beyond the EIA. Furthermore, the appropriate assessment of plans was required for the first time in EU law.

Despite the generally formulated requirements of The Habitat Directive and the Birds Directive, it seems that even the CJEU understood very early on that care had to be taken to ensure that their implementation was in line with the objectives of the EU legislator: The requirement of *faithful transposition*, which relates to the terms of the derogation regime under the Birds Directive and later the Habitats Directive, appears in a number of judgments

[189] *Ibid*, Chapter 9.
[190] European Commission. Communication from the Commission - Europe's environment: What directions for the future? The global assessment of the European community programme of policy and action in relation to the environment and sustainable development, 'Towards sustainability'. COM (99) 0543 final.
[191] *Ibid*.
[192] *Ibid*.
[193] 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, p. 7–50.

of the CJEU from the 1980s and later.[194] The CJEU concludes that *"the Member States are under a particular duty to ensure that their legislation intended to transpose that directive is clear and precise."*[195] The point is that the CJEU does not use this formulation when interpreting other EU rules, even other environmental legislation, which shows how much emphasis it places on the transposition of the Natura 2000 directives.

There is no direct reference in the Habitats Directive to any of the abovementioned strategic documents or guidelines on spatial planning. Nevertheless, given the logic and time confluence behind the preparations of the ESDP, it is apparent that the establishment of the Natura 2000 network provided planners with many possibilities for pursuing the policy options later embodied in the ESDP, in particular those concerning the use of integrated territorial development strategies: Similar to the Habitats Directive, the ESDP shares a great concern about ecologically sensitive areas, which in the densely populated EU are often being threatened by urban development.[196] The ESDP and the Habitats Directive complement each other considerably. While the former urges reducing urban sprawl to protect sensitive areas, the latter requires the protection of sensitive areas, effectively reducing urban sprawl.

There are two main requirements of the Habitats Directive to strengthen this approach: The first is to assess the *alternatives* of plans and projects and to opt for the best option available, and a corresponding requirement of the derogatory regime.[197] The second one is the requirement of *ecological coherence* of the network, which should be achieved, *inter alia*, by land-use planning and development policies, in particular by the management of features of the landscape.[198]

While such a requirement is considerably weakened by its application where the Member States *consider it necessary*, this is perhaps the first time that the need for sustainable development in spatial planning has found its way into binding EU environmental legislation. The use of integrated territorial development strategies has become a core logic of the EU's approach to protecting water quality and air quality, but this was more than a decade after the Habitats Directive (see Chapters 4.4. and 4.7). Such a novel approach was demanding, and the Member States often lacked the necessary resources or knowledge to establish a protective regime in line with the Directive.[199]

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[194] See the CJEU judgments of 8 July 1987, *Commission v. Italy* (C-262/85, EU:C:1987:340, para. 39), of 8 July 1987, *Commission v. Belgium* (C-247/85, EU:C:1987:339, para. 9), of 13 October 1987, *Commission v. Netherlands* (C-236/85, EU:C:1987:436, para. 5), of 27 April 1988, *Commission v. France* (C-252/85, EU:C:1988:202, para. 5), of 15 March 1990, *Commission v. Netherlands* (C-339/87, EU:C:1990:119, para. 28), of 7 December 2000, *Commission v. France* (C-38/99, EU:C:2000:674, para. 53).

[195] CJEU judgment of 20 October 2005, *Commission v United Kingdom* (C-6/04, EU:C:2005:626, para. 26).

[196] See the ESDP, Chapter 3.4.2 (*Preservation and Development of the Natural Heritage*).

[197] Habitats Directive, Art. 6(3), (4).

[198] Habitats Directive, Art. 10: *"Member States shall endeavour, where they consider it necessary, in their land-use planning and development policies and, in particular, with a view to improving the ecological coherence of the Natura 2000 network, to encourage the management of features of the landscape which are of major importance for wild fauna and flora."*

[199] See Beunen, R. European nature conservation legislation and spatial planning: For better or for worse? *Journal of Environmental Planning and Management*, 2006, vol. 49, no. 4, p. 616: *"The study of decision-making processes in which the Habitats Directive played an important role revealed that in many cases the courts annulled decrees because the requirements of the Habitats Directive were insufficiently met, owing to a lack of attention, knowledge or awareness."*

The Birds and Habitats Directives and the EIA Directive have also increased the scope to take legal action against plans and projects with possible adverse effects on nature values. The Habitats Directive does not expressly provide detailed **participatory rights,** and it has not been amended after the European Community signed the Aarhus Convention. Its Art. 6(3) merely states that *"[i]n 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"* (emphasis added). The CJEU, however, ruled[200] that this provision indeed implements the second pillar of the Aarhus Convention (*public participation in decision-making*) and, therefore, public concerned must be allowed to step in the corresponding administrative procedures (see Chapters 3.1 and 3.2).

In 1996, the **IPPC Directive** (96/61/EC)[201] was adopted. Its objective was to establish a single legislative instrument to regulate industrial emissions throughout the EU. It aimed to prevent or reduce adverse environmental impacts caused by a wide range of industrial activities, such as energy production, waste management, chemical manufacturing, and other industrial processes. The Directive introduced the concept of Integrated Pollution Prevention and Control (IPPC), a holistic approach to managing industrial emissions. The IPPC framework emphasises the prevention and reduction of pollution through the implementation of the best available techniques (BATs) to achieve a high level of environmental protection as a whole. A complementing permitting system was established to require the operators of industrial installations to obtain permits (IPPC permits) before commencing their activities. These permits set stringent emission limits based on the BATs, thus ensuring compliance with environmental standards.

Prior to the enactment of the IPPC Directive, the EU operated under various environmental regulations that addressed specific sectors separately. These regulations lacked a cohesive framework, resulting in inconsistencies and gaps in environmental protection. The need for a comprehensive and integrated approach to industrial emissions management prompted the adoption of the new directive. The IPPC Directive broadened the scope of the previous regulation by including additional industrial sectors and activities. It encompassed specific industries and diverse installations capable of emitting pollutants, thus ensuring a comprehensive approach to environmental protection.

Considering the objective of the IPPC Directive, its relationship to public construction law might not be evident at first glance. The Directive does not directly impose requirements on construction and building activities. The main focus of the Directive is on industrial installations and activities that potentially emit pollutants into the environment. These include sectors such as energy production, waste management, chemical manufacturing, and other industrial processes. However, according to Art. 2(11) of the Directive, the definition of *techniques* includes both the technology used and how the installation is designed, *built*, maintained, operated and decommissioned. The IPPC system has also made it possible to

[200] See the CJEU judgment of 8 November 2016, *Lesoochranárske zoskupenie II* (C-243/15, EU:C:2016:838).
[201] Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control. OJ L 257, 10. 10. 1996, p. 26–40.

operate industrial plants that have become more environmentally sustainable, even in the vicinity of urbanised areas and nature, which could be taken into account already at the planning and land use stage.

Regarding **public participation**, the first version of the IPPC Directive provided access to information requirements to inform the public of the operation of installations and their potential effect on the environment and to ensure the licensing process's transparency.[202] According to Art. 15, Member States were required to take the necessary measures to ensure that applications for permits for new installations or substantial changes are made available at an appropriate time to the public to enable it to comment on them before the competent authority reaches its decision. That decision, including at least a copy of the permit and any subsequent updates, had to be made available to the public. Furthermore, the results of monitoring of releases as required under the permit conditions must be made available to the public. Last, an inventory of the principal emissions and sources responsible had to be published every three years by the Commission based on the data supplied by the Member States.

As is clear, the public was informed and invited to comment on them during the permitting procedure or at least before the decision was taken. The Directive did not set deadlines for comments, nor did it provide details on how the permitting authority would take the comments into account.

As noted, in 2003, the requirements of the Aarhus Convention on public participation in decision-making and access to justice were implemented mainly by the amendment of the IPPC Directive[203] and the 1985 EIA Directive. Further development of the IPPC Directive is analysed in Chapter 4.5.

1996 also witnessed the adoption of the **Seveso II Directive**, which replaced and repealed the Seveso I Directive. Most notably, its Art. 12 (*Land-use planning*) introduced direct and far-reaching requirements for spatial planning. It required the Member States to ensure that the objectives of preventing major accidents and limiting the consequences of such accidents are taken into account in their land-use policies and other relevant policies. Those objectives had to be pursued through controls on (a) the siting of new establishments, (b) modifications to existing establishments covered by Art. 10 of the directive (*which could have significant repercussions on major-accident hazards*), (c) new developments such as transport links, locations frequented by the public and residential areas in the vicinity of existing establishments, where the siting or developments are such as to increase the risk or consequences of a major accident.[204] The land-use and other relevant policies and the procedures for implementing those policies had to be adjusted to take account of the need, in the long term, to maintain appropriate distances between establishments covered by this directive and residential areas, areas of public use and areas of particular natural sensitivity or

[202] IPPC Directive, preamble, para. 23.
[203] 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. 6. 2003, p. 17–25.
[204] Seveso II Directive, Art. 12(1).

interest, and, in the case of existing establishments, of the need for additional technical measures per Art. 5 of the Directive (*General obligations of the operator*) so as not to increase the risks to people.[205] To facilitate the implementation of the abovementioned policies, all competent authorities and planning authorities responsible for decisions in this area must set up appropriate consultation procedures.[206]

Given a short implementation period of two years, fulfilling such a complex requirement seems *Sisyphean*. Even in most European Countries, specific legislative prescriptions already existed to separate certain industrial facilities from neighbouring developments, and regulatory urban plans distinguished between industrial zones and other land uses. However, despite this, demographic pressure led to the gradual creation of high-risk situations.[207]

The new requirement has, however, not attracted much academic attention initially.[208] It also does not seem to reflect the difficulties in the application of the process of transposing the Seveso I Directive into Member States' legislation, which was difficult as between 1982 and 1991, this directive was amended three times to clarify its provisions and in response to the concerns of the Member States. The requirement seems to have roots in the 1989 Council resolution, which invited the Commission to consider ways of including in the directive planning controls on land use, taking into account, in particular, the consequences of the accident at Bhopal.[209] The primary aim of the requirement – further enriched by the Seveso III Directive – was to maintain or achieve adequate separation between hazardous and sensitive areas.[210]

The Seveso II Directive also introduced specific requirements on **public participation**: The public was guaranteed access to information regarding safety measures, inspections,[211] and safety reports produced by operators.[212] Furthermore, according to Art. 11(3), internal emergency plans must be drawn up in consultation with personnel employed inside the establishment, and the public (not defined) must be consulted on external emergency plans, according to Art. 13(5), the public must be able to give its opinion in the case of planning for new establishments, modifications to existing establishments, and developments around existing establishments.

In 2012, the Seveso II Directive was replaced and repealed by the Seveso III Directive, which is – together with the amendments to the Seveso II Directive – further analysed in Chapter 4.6.

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[205] *Ibid*.
[206] *Ibid*, Art. 12(2).
[207] Christou, M. D., Amendola, A., Smeder, M. The control of major accident hazards: The land-use planning issue. *Journal of Hazardous Materials*, 1999, vol. 65, no. 1–2, p. 151–152.
[208] See Wettig, J., Porter, S., Kirchsteiger, C. Major industrial accidents regulation in the European Union. *Journal of Loss Prevention in the Process Industries*, 1999, vol. 12, p. 19–28.
[209] Council Resolution of 16 October 1989 on guidelines to reduce technological and natural hazards. OJ C 273, 26. 10. 1989, p. 1–2.
[210] See European Commission. Proposal for a Council Directive on the control of major- accident hazards involving dangerous substances (COMAH), COM (94) 4 final.
[211] *Ibid*, Art. 13(1), Art. 18(1).
[212] *Ibid*, Art. 13(4).

2.5 PARTIAL CONCLUSIONS AND TAKEOUTS

The first debate on European spatial planning seems to be set in the context of the objectives of the European Community, which are based on a concern for citizens' social, economic and cultural experiences. The extent of the first attempts to harmonise public construction law at the European level seems significant, fuelled by the post-war discussion on rapid urban development. The interest in spatial differences in socio-economic conditions also means there appears to be a much closer relationship between regional planning and regional policy in European spatial planning than in most domestic planning systems. Therefore, the concept of European planning should be understood in the context of the broader concept of spatial development, not in the narrower category of spatial planning, which has not been subject to harmonisation due to persistent opposition from Member States.

The period 1989–1993 can be regarded as a pre-plan-making period during which time the institutional infrastructure for the ESDP was put in place, and preliminary ideas were exchanged. The ESDP, the latest in a line of studies reviewing the spatial structure of the EU, following Europe 2000 and Europe 2000+, established a reference point for spatial policy which concentrates on establishing better co-ordination of the territorial impacts of policy horizontally across different sectors; vertically among varying levels of government; and geographically across administrative boundaries. Polycentricity became a central concept in European spatial planning in the 1990s. Nevertheless, the ESDP is owned by the CSD and is not a body accountable to any formal institution at the national or EU level. Consequently, it can only complement but not replace harmonised rules.

However, attempts to harmonise public construction law, particularly spatial planning, were met with opposition or reluctance from Member States. It is understandable that the Member States do not want to lose their sovereignty in the development and planning of their territory. To a certain extent, the planning and permitting procedures can be dealt with bilaterally between neighbouring countries. However, the considerable spatial aspects of EU sectoral policies in the fields of environment, transport, rural development, and regional policy require at least institutional adjustments within member states.[213] Moreover, many social, economic, environmental, and public health requirements became associated with public construction law processes.

Therefore, the lack of spatial planning standards may seem to be a gap in the development of the EU and a missed opportunity for the Member States. Spatial planning was nevertheless considered elemental for both the economic and social development of the Community and the protection of the environment as pronounced by the first environmental action programmes. The European project was counting on planning, and inevitably, the indirect requirements would come up, for example, in the activities of DG Regio. The need in the late 1980s to establish some form of rudimentary regional plan as a precondition for obtaining financial support from the Structural Funds has proved to be one of the most essential

[213] See Van Ravesteyn, N., Evers, D. *Unseen Europe: A survey of EU politics and its impact on spatial development in the Netherlands*, The Hague: Netherlands Institute for Spatial Research, 2004, 86 p.

building blocks in the reconstruction of regional strategic planning in some Member States, most notably in the UK.[214]

Without a doubt, the ERSP, Agenda 21 and similar non-binding documents were crucial inspirations for **public participation requirements** at the EU level. Even though public participation was a common requirement for European planning systems in the 1990s, they varied considerably.[215] Without any framework legislation on spatial planning or public participation in adopting plans and programmes, it was not until the 2000s that the public guaranteed a corresponding yet still limited right (see Chapter 3.1).

The first European Directive providing clear, far-reaching requirements on decision-making, public participation, and a tight link with environmental protection was the 1985 EIA Directive. Understood in a broad sense, such participation requires not only that those directly affected individuals by an administrative measure or decision be involved but that a more extensive scope of participants be involved, including environmental NGOs. This expansive interpretation has been discussed critically in some Member States, most notably in Germany, because of the difficulties in considering the interests of such a large number of participants in a manageable way.[216]

The 1985 EIA Directive introduced strict procedural and substantive requirements for assessing and permitting major projects, especially buildings, and infrastructure. For the first time, Member States did not have complete freedom in deciding what to plan and build. It was followed by other key environmental directives, of which the Habitats Directive significantly extended the scope of assessment to other projects and even plans, including humble requirements on consultation with the public, more than a decade before the EU ratification of the Aarhus Convention. It also introduced a systematic and sustainable approach to EU environmental law, which some believe has the potential for conflict because it does not address the fundamental coordination issue between the different poles of scientific knowledge, social practice, and political decision-making.[217] And it was perhaps the conflicts caused by the implementation of the environmental directives that revealed their importance and also their weaknesses.

None of these directives expressly addressed spatial planning or construction permitting, and their vague wording presents problems in implementation until today. The impact of the first environmental directives is nicely described by Beunen: *"On the one hand the directives were too strict and if they were to be followed in land use development, no plan or project would ever be possible. On the other hand, the directives were described as too vague. Terms like 'significant effects', 'appropriate assessment' or 'imperative reasons of overriding public interest' did not give enough clarity about how to meet the Habitats Directive's requirements.*

[214] Roberts, P. *Partnerships, Programmes and the Promotion of Regional Development: An Evaluation of the Operation of the Structural Funds Regional Programmes*. Pergamon (Progress in Planning), 2003, vol. 59, 69 p.
[215] CEMAT. The challenges facing European society with the approach of the year 2000: Public participation in regional/spatial planning in different European countries. Council of Europe Press, European regional planning, 1995, no. 58.
[216] Ortloff, K.-M. Rechtsschutz durch Mediation. In: Dolde, K.-P. et al. (eds.) *Verfassung – Umwelt – Wirtschaft: Festschrift für Dieter Sellner zum 75. Geburtstag*. München: C.H. Beck, 2010, p. 533–540.
[217] Pinton, F. Conservation of biodiversity as a European directive: the challenge for France. *Sociologia Ruralis*, 2001, vol. 41, no. 3, p. 329–342.

The criticisms that the directive is both too strict and too ambiguous can be linked with the contradiction between flexibility and uniformity. On the one hand, this nature conservation legislation can be interpreted and applied very strictly, thus frustrating all plans and projects. On the other hand, the legislation offers space for interpretation, laying it open to the accusation that it is too vague." [218] This observation helps explain why, even today, it is important to focus on interpreting the critical definitions of EU environmental law. To that extent, the analysis of the current requirements will focus on their scope, which is determined by the definition of a project, a plan or a programme.

The first directives on construction materials, particularly the CPD, had a significant impact on the construction industry in the EU, as it harmonised the technical requirements for construction products and facilitated their free movement across the EU. Unlike the first environmental requirements, the aim of this legislation was the removal of technical barriers. However, they have also developed into essential measures in environmental protection (see Chapters 5.5 and 5.6).

[218] Beunen, R. European nature conservation legislation and spatial planning: For better or for worse? *Journal of Environmental Planning and Management*, 2006, vol. 49, no. 4, p. 611.

3. THE ARHUS INTERMEZZO

This Chapter aims to explain the impact of the Aarhus Convention on EU environmental law and, consequently, on the public construction law of the Member States. It will determine the scope of the public participation in decision-making and access to justice in environmental matters and also identify the gaps in the implementation of the Aarhus Convention.

The existence of public participation requirements no longer seems a simple yes/no question for EU or national policymakers. It is a question of establishing a level playing field, optimising procedures, and ultimately ensuring fair and sustainable planning and decision-making. This vast difference materialised in only two decades from the first influential driving forces for the development of environmental policies, such as the 1972 United Nations Conference on the Human Environment, which did not yet make explicit the role of public participation.[219]

The Aarhus Convention was the first international instrument applied to the EU institutions. It was adopted in 1998[220] and entered into force on 30 October 2001. The EC signed the Convention in June 1998 and concluded it in February 2005.[221]

In contrast to the specific scope of individual directives, the requirements for public participation in environmental matters – which have become *en bloc* part of EU law – cover the entire environmental *acquis*. Nevertheless, their implementation has not been without its problems, and the CJEU has had to fill in several gaps that have gone unaddressed by the EU legislator. A number of crucial CJEU cases concerned either land-use planning or building permits. In addition to clarifying the rules on public participation, these cases have helped explain the mechanisms for enforcing EU law, including the various exemptions that apply to the compelling interest in environmental protection.

Between 1998 and 2005, the WFD and the SEA Directive were adopted with the Aarhus Convention in mind, but older environment-related directives needed amendments to improve or include public participation provisions. To some extent, this was not a difficult task given that the preparation of the Aarhus Convention was also intertwined with EU law: The 1985 EIA Directive and the original Directive on access to environmental information

[219] Arguably, it was after the 1992 Rio Conference that public participation became a widespread element of environmental policy documents adopted at different levels and with various outcomes.

[220] The first steps towards adoption of the Aarhus Convention can be traced to the First Ministerial Conference within the Environment for Europe process which was held in 1991 at Dobríš Castle in the then Czech and Slovak Federal Republic. The conference discussed ways of strengthening cooperation to protect and improve the environment, and of long-term strategies toward an environmental programme for Europe. A set of basic guidelines for a Pan-European cooperation strategy was laid down. Nevertheless, the conclusions of the conference were silent as regards particular steps for strengthening public participation. See UNECE. Conclusions of the Conference "Environment For Europe" Dobris Castle. Czech and Slovak Federal Republic June 21–23 [online] 1991 [accessed on: 10 February 2023]. Available at: <https://unece.org/fileadmin/DAM/env/efe/history%20of%20EfE/Dobris.E.pdf>.

[221] Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters. OJ L 124, 17. 5. 2005, p. 1–3.

(90/313/EEC)[222] served as *"a model at the international level and their basic philosophy is taken up by the Aarhus Convention.*"[223]

On the other hand, drafting the new legislation was based on the assumption that a general EU directive on access to justice would be adopted, which has not happened. As a result, some key directives (such as the WFD and the SEA mentioned above) completely lack any judicial review requirements.

Before implementing legislation, the Aarhus efforts in Europe were reinforced cautiously by non-binding[224] and binding[225] instruments. The far-reaching Aarhus principles[226] deserved a different take on the environmental legislation as a whole, which, however, never materialised despite initial enthusiasm: The turn of the century saw a major push for EU environmental policy to integrate with other EU policies and empower the public, underlined by accession to the Aarhus Convention. There was a growing interest in the early 2000s in citizen involvement among politicians, public managers, and urban planners. Torfing and Sørensen[227] suggest that this *"renewed focus on participatory governance is spurred by the urgent need to remove policy deadlocks by enhancing collaborative innovation, to mobilize private resources and energies from civil society by experimenting with new forms of participation, and to reduce implementation resistance by creating a broad ownership to public governance in general and spatial planning in particular."*[228]

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[222] Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment. OJ L 158, 23. 6. 1990, p. 56–58.

[223] European Commission. Proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies, 24. 10. 2003, COM (2003) 622 final, p. 3.

[224] The Aarhus efforts in Europe were reinforced by the non-binding Council of Europe Landscape Convention of 2000 (ETS No. 176, originally the Council of Europe Landscape Convention) which requires – with a reference to the Aarhus Convention – "to establish procedures for the participation of the general public, local and regional authorities, and other parties with an interest in the definition and implementation of the landscape policies" [Art. 5(c)]. In particular, landscape quality objectives for the landscapes should be identified and assessed after such public consultation [Art. 6(2)(d)]. Nevertheless, there are at present no mechanisms for ongoing involvement of stakeholders in decision-making, where landscape is specifically concerned. Public participation is guaranteed in spatial planning that sets out a framework to co-ordinate the interaction of different policies and actions across space, which directly impacts landscapes. See Majchrowska A. What do we not know to implement the European Landscape Convention? *The Problems of Landscape Ecology*, 2010, vol. 28, p. 209–216.

[225] The 1991 UNECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) which entered into force in 1997, shows the link between public participation and environmental impact assessment. Its Art. 2(6) is especially relevant for public participation: *"The Party of origin shall provide, in accordance with the provisions of this Convention, an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin."*

[226] The Aarhus principles grew out of the Agenda 21 and Principle 10 of the Rio Declaration, carving out the key role for the environmental non-governmental organisations (NGOs). See Toth, B. Public Participation and Democracy in Practice – Aarhus Convention Principles as Democratic Institution Building in the Developing World. *Journal of Land Resources and Environmental Law*, 2010, vol. 30, no. 2, p. 295.

[227] Torfing, J., Sørensen, E. Enhancing Effective and Democratic Governance through Empowered Participation: Some Critical Reflections. *Planning Theory and Practice*, 2008, vol. 9, no. 3, p. 394–400.

[228] *Ibid*, p. 394.

At the international level, for example, one of the standard requirements for spatial planning systems identified for the UNECE countries in 2003 was *"to enhance broad participation, improve community involvement and build support for sustainable planning policies and programmes; to promote community identity through creation of meeting places, public spaces, pedestrian networks, preservation of historic buildings and attractive streetscapes."*[229] Later, in 2008, UNECE introduced the participation principle and emphasised that effective participation during spatial planning procedures should go beyond the normal democratic process.[230]

A boost in EU policy towards citizen involvement was also suddenly flying high on the political agenda of the EU as the Commission published several vital documents for strengthening environmental democracy.[231]

The developments described above can be attributed to the Aarhus Convention and the debates that led to its adoption. The Aarhus Convention has been swiftly integrated into EU environmental policy, even though not necessarily into the EU legislation. International commitments to public participation have resulted in a change of approach in preparing new EU legislation and changes to existing legislation. Therefore, an analysis of the development of EU law after 2000 deserves attention and a chapter of its own.

The **Sixth Environmental Action Programme** entitled *Environment 2010: Our Future, Our Choice* (2002-2012)[232] promoted full integration of environmental protection requirements into all Community policies and linked the environment and European objectives for growth, competitiveness, and employment. As regards public participation, the Programme expressed hope that the ratification and implementation of the Aarhus Convention *"will also contribute to better implementation of Community legislation by the Member States"*.[233]

A standalone chapter of the Programme *Empowering Citizens and* Changing Behaviour promised that revisions to legislation and procedures were already underway and *"will be*

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[229] UNECE. Sustainable Development of Human Settlements in the UNECE Region. Progress and Challenges (ECE/AC.25/2004/4). Economic and Social Council. 2003, Geneva: UNECE, Geneva.

[230] UNECE. Spatial Planning: Key Instrument for Development (ECE/HBP/146). Economic and Social Council. UNECE, Geneva, 2008, p. 11: *"Spatial planning decisions have such a wide and direct impact that opportunities to participate in those decisions should extend beyond the normal democratic process. Effective procedures for community involvement will enhance the legitimacy of policy- and decision-making by creating a sense of local ownership and ensuring consideration of citizens' and property owners' rights. The decision-making process should be transparent so that all citizens are made aware of the reasoning behind decisions. Citizens should have access to information about development proposals, plans and policies, as well as to the officers and political committees which make such decisions. They should be able to comment on proposals and if necessary make formal objections on draft plans and appeals against planning decisions. Those making proposals should be able to appeal to a higher authority on negative decisions."*

[231] See European Commission. European Governance: A White Paper, COM (2001) 428 final; General Principles and Minimum Standards for Consultation of Interested Parties, COM (2002) 704 final; Plan D for Democracy, Dialogue and Debate, COM (2005) 494 final; White Paper on a European Communication Policy, COM (2006) 35 final.

[232] European Commission. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the sixth environment action programme of the European Community 'Environment 2010: Our future, Our choice' - The Sixth Environment Action Programme, 24. 1. 2001, COM (2001) 0031 final.

[233] *Ibid*, point 2.4.

completed in the coming years"[234] and cemented the key role of the EIA Directive and the highly anticipated directive on strategic environmental assessment: *"The full implementation of the directive on Environmental Impact Assessment and the proposed Strategic Environmental Assessment will help empower citizens by giving greater opportunity for a say in decisions on planning, projects and policies."*[235]

Even though the Programme recognised and encouraged public participation more strongly than ever before,[236] the proposed measures towards more effective public participation seem a little ambitious and not fully corresponding with the Aarhus Convention requirements. It was merely proposed to focus on 1) measures to improve accessibility and quality of information to citizens on the environment (e.g., polluting emission levels at the local level) and 2) preparation of practical toolkits aimed at the regional or local level to allow citizens to benchmark their individual or household environmental performance and to give information on how to improve it.[237]

These low ambitions, combined with the complex negotiations on environmental protection at the beginning and during the financial crisis that hit at the end of the first decade of the new century, seem to have significantly affected the efforts of the EU to strengthen the implementation of the Aarhus Convention.

3.1 THE IMPLEMENTATION OF THE AARHUS CONVENTION IN EU LAW

The Aarhus Convention was implemented in EU law towards Member States by the 2003 Aarhus Directive (2003/35/EC)[238] , which was later amended in 2012 by the EIA Directive (codified version) and in 2016 by the Directive on the reduction of national emissions of certain atmospheric pollutants (2016/2284).[239]

The EU also adopted a revised directive on public access to environmental information (Directive 2003/4/EC).[240] Access to information is not the primary concern of the thesis. It should be emphasised that the CJEU adopts a broad interpretation of both the *environmental information* and the *public authority*, which means that, for example, even ministries are obliged to provide information when they prepare and adopt normative regulations of a lower rank than a law.[241] The requirements of EU law, therefore, cover various information used for the preparation of different planning and construction bylaws and guidelines. Furthermore,

[234] *Ibid*.
[235] *Ibid*.
[236] De Marchi, B. Public participation and risk governance. *Science and Public Policy*, 2003, vol. 30, no. 3, p. 171.
[237] Sixth Environmental Action Programme.
[238] 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 - Statement by the Commission. OJ L 156, 25. 6. 2003, p. 17–25.
[239] Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC. OJ L 344, 17. 12. 2016, p. 1–31.
[240] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC. OJ L 41, 14. 2. 2003, p. 26–32.
[241] See the CJEU judgment of 18 July 2013, *Deutsche Umwelthilfe* (C-515/11, EU:C:2013:523).

multiple operators active in the construction industry might be classified as public authorities if they do not determine how they provide some public services in a genuinely autonomous manner.[242]

The Aarhus Directive provides for **public participation in drawing up specific plans and programmes** and **for participation in decision-making,** the latter being implemented by the amendment to the 1985 EIA Directive and the 1996 IPPC Directive. Therefore, significant achievements of the Aarhus Convention regarding public participation are at project-level decision-making, that is, public participation within the EIA process.[243]

Firstly, the Aarhus Directive provides for **public participation regarding the drawing up certain plans and programmes** relating to the environment listed in Annex I. For that purpose, the *public* is defined widely as *"one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups."*[244] Member States are obliged to identify the public entitled to participate in drawing up a plan or a programme, including relevant non-governmental organisations meeting any requirements imposed under national law, such as those promoting environmental protection. They must determine detailed arrangements for public participation, and these arrangements must *"enable the public to prepare and participate effectively"*[245] which also means that *"reasonable time-frames shall be provided allowing sufficient time for each of the different stages of public participation"*.[246]

Regarding the scope of participation in respect of drawing up certain plans and programmes, pursuant to Art. 2(2) of the Aarhus Directive, *"Member States shall ensure that the public is given early and effective opportunities to participate in the preparation and modification or review of the plans or programmes required to be drawn up under the provisions listed in Annex I."*

Annex I of the Aarhus Directive identifies six environmental plans and programmes required under various environmental directives: 1) waste management plans,[247] 2) a specific chapter on the management of packaging and packaging waste that should be included in the waste management plans,[248] 3) plans for the management of hazardous waste,[249] 4) programmes to achieve objectives regarding batteries and accumulators containing certain dangerous substances,[250] 5) action programmes in respect of designated vulnerable zones under the

[242] See the CJEU judgment of 19 December 2013, *Fish Legal and Shirley* (C-279/12, EU:C:2013:853).
[243] Palerm, J., R. Public Participation in Environmental Decision Making: Examining the Aarhus Convention. *Journal of Environmental Assessment Policy and Management*, 1999, vol. 1, no. 2, p. 236.
[244] Aarhus Directive, Art. 2(1).
[245] Aarhus Directive, Art. 2(3).
[246] *Ibid*.
[247] Council Directive 75/442/EEC, Art. 7(1)
[248] European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste. OJ L 365, 31. 12. 1994, p. 10–23, Art. 14.
[249] Council Directive 91/689/EEC of 12 December 1991 on hazardous waste. OJ L 377, 31. 12. 1991, p. 20–27, Art. 6(1).
[250] Council Directive 91/157/EEC of 18 March 1991 on batteries and accumulators containing certain dangerous substances, OJ L 78, 26. 3. 1991, p. 38–41, Art. 6.

Nitrates Directive,[251] 6) plans or programmes for zones and agglomerations where levels of air pollution are higher than the limit value.[252] The 2016 amendment of the Aarhus Directive added national air pollution control programmes[253] to Annex I, making the total number of plans and programmes seven. However, several plans and programmes required by more recent legislation have not been included in this list and do usually not refer to the SEA Directive (see below). Therefore, public participation is ensured only if these plans and programmes fall under the SEA Directive, which is open to debate until confirmed or refused by the CJEU.

The list of plans and programmes complemented the **SEA Directive** and the **WFD** (see Chapters 4.2 and 4.5). The plans and programmes for which a public participation procedure is carried out under these two directives, are explicitly excluded from application of the Aarhus Directive.[254] The other exception is plans and programmes designed for the sole purpose of serving national defence or taken in case of civil emergencies.[255]

The fact that the Aarhus Directive does not cover the SEA Directive and the WFD does not mean that they do not implement the requirements of the Aarhus Convention. On the contrary, both Directives are essential for implementing the Aarhus Convention in EU law. They both had been adopted relatively shortly before the Aarhus Directive and already included their requirements on public participation, tailored for the needs of a strategic environmental assessment or adoption of the river basin management plans.

Nevertheless, neither the SEA Directive nor the WFD explicitly refers to the Aarhus Convention, and the standard of public participation required by the SEA Directive and the WFD is slightly different than that of the Aarhus Directive. This discrepancy has never been balanced as neither of the two Directives has been amended in this respect.

According to the Aarhus Directive, when one of the listed plans or programmes is being adopted, Member States must ensure that: *"(a) the public is informed, whether by public notices or other appropriate means such as electronic media where available, about any proposals for such plans or programmes or for their modification or review and that relevant information about such proposals is made available to the public including inter alia information about the right to participate in decision-making and about the competent authority to which comments or questions may be submitted; (b) the public is entitled to express comments and opinions when all options are open before decisions on the plans and programmes are made; (c) in making those decisions, due account shall be taken of the*

[251] Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources. OJ L 375, 31. 12. 1991, p. 1–8, Art. 5(1).
[252] Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management. OJ L 296, 21. 11. 1996, p. 55–63, Art. 8(3).
[253] Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC. OJ L 344, 17. 12. 2016, p. 1–31, Art. 6(1).
[254] Aarhus Directive, Art. 2(5): *„This Article shall not apply to plans and programmes set out in Annex I for which a public participation procedure is carried out under 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 or under 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."*
[255] Aarhus Directive, Art. 2(4).

results of the public participation; (d) having examined the comments and opinions expressed by the public, the competent authority makes reasonable efforts to inform the public about the decisions taken and the reasons and considerations upon which those decisions are based, including information about the public participation process."[256]

These requirements present a significant step in strengthening public participation, as before the adoption of the Aarhus Directive, the EU law did not even require making the abovementioned plans and programmes public. The only exception was the plans for the management of hazardous waste.

Secondly, the Aarhus Directive amended the 1985 EIA Directive and the 1996 IPPC Directive with provisions on **public participation in decision-making and access to justice** (see Chapters 4.1 and 4.5). The CJEU has developed extensive jurisprudence on the subject, particularly concerning access to justice under the EIA Directive (see Chapter 3.3). In addition, the number of access to justice provisions in new and revised EU law has been expanded beyond the Aarhus Directive. An example is the Seveso III Directive (2012/18/EU[257]), which provides for access to justice in cases of acts and omissions in the context of prevention of major accidents involving dangerous substances (see Chapter 4.6).

On the other hand, the EU has not attempted to harmonise requirements implementing Art. 8 of the Aarhus Convention; minimum procedural requirements that the Member States must follow when granting public participation in the preparation of executive regulations or generally applicable legally binding instruments, in particular accompanying the final version of the normative act by an explanation of the public participation process and how the results of the public participation were taken into account.[258]

Furthermore, there is no EU Directive specifically dedicated to access to justice in EU Member States, which would apply horizontally in all sectors and implement the requirements of Art. 9(3) of the Aarhus Convention. This opens many questions regarding the standard of judicial protection EU law guarantees in environmental matters.

3.2 THE SCOPE OF PUBLIC PARTICIPATION IN DECISION-MAKING

Currently, only a few EU Directives require public participation in decision-making: Art. 6(4) of the EIA Directive, Art. 24 of the IED, Art. 15 of the Seveso III Directive and Art. 6(3) of the Habitats Directive. In this respect, the EU law implements Art. 6 of the Aarhus Convention, even though not in a coherent way and not entirely. The EU law also does not seem to pay sufficient attention to the requirement of Art. 6(7)[259] of the Aarhus Convention to open the decision-making procedures to wide *public* at least to submit comments relevant to

[256] Aarhus Directive, Art. 2(2).
[257] Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC. OJ L 197, 24. 7. 2012, p. 1–37.
[258] See the ACCC case ACCC/1/2014/1, *Belarus*, ECE/MP.PP/C.1/2017/11, para. 59.
[259] *"Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity."*

the proposed activity. The CJEU attempts to fill some gaps: For example, in its judgment in **C-826/18** (***Stichting Varkens in Nood and Others***),[260] the CJEU acknowledged that Art. 6(2) of the Convention enshrines a right to information which is granted to the public concerned as a part of the right to participate in the decision-making procedure.[261]

In general, however, the CJEU has had little opportunity to comment on the claims for public participation in permitting procedures or in the adoption of various plans and programmes, which raises the importance of the case law of the Aarhus Convention Compliance Committee and also the 2015 Maastricht recommendations on public participation in multistage proceedings[262] adopted under the Aarhus Convention as additional guidance.

Most notably, the CJEU has confirmed that the application of the second pillar of the Aarhus Convention extends **beyond the explicit requirements of the EIA Directive and the IED** and covers even permitting procedures following the assessment, according to Art. 6(3) of the Habitats Directive. This was not surprising given the requirements of Art. 6 of the Aarhus Convention, but the Aarhus Directive did not amend the Habitats Directive and only provides very vague wording from which the CJEU derived the basis for public participation in decision-making. It merely requires that "*...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*" (emphasis added). In the 2016 judgment in Case **C-243/15** (***Lesoochranárske zoskupenie II***),[263] the CJEU ruled that this provision *"must be read in conjunction with Article 6(1)(b) of the Aarhus Convention, an instrument which forms an integral part of the EU legal order."*[264]

In this way, the relationship between Art. 6(3) of the Habitats Directive and Art. 6 of the Aarhus Convention can be interpreted as becoming *acte éclairé* almost two decades after the EU adopted the Aarhus Convention. In Member States, that did not allow for public participation following the Natura 2000 assessment of projects, the scope of public participation has widened considerably.

The CJEU judgment did not trigger any legislative action at the EU level to supplement Art. 6(3) of the Habitats Directive with more detailed requirements in line with the IED and EIA Directives. Therefore, it was up to the Member States themselves to provide the public with sufficient procedural guarantees at least respecting the minimum standard of the Aarhus Convention. Such a solution would not render any issues if the Member States merged the EIA and Natura 2000 assessment under the same procedural framework, including public participation. On the other hand, this was not a general practice required by EU law.

There is an additional scenario in which EU law requires public participation in decision-making outside the EIA/IED/Natura 2000 regime. Member States must open the

[260] CJEU judgment of 14 January 2021, *Stichting Varkens in Nood and Others* (C-826/18, EU:C:2021:7).
[261] *Ibid*, paras 40–43.
[262] UNECE. Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters prepared under the Aarhus Convention [online]. 2015 [accessed on: 1 January 2023]. Available at: <https://unece.org/DAM/env/pp/Publications/2015/1514364_E_web.pdf>.
[263] CJEU judgment of 8 November 2016, *Lesoochranárske zoskupenie II* (C-243/15, EU:C:2016:838).
[264] *Ibid*, para. 45.

administrative procedures to the public if the **previous participation in the administrative procedure is required as a condition for access to justice**.[265] However, the admissibility of the court action subject to the prior involvement in the decision-making procedure is not a suitable condition **within the regime of Art. 9(2) of the Aarhus Convention** (EIA, IED, Natura 2000).[266] **Art. 9(3) of the Aarhus Convention** (small projects, review of plans and programmes, etc.) does not preclude such condition unless the applicant cannot reasonably be criticised, in the light of the circumstances of the case, for not having intervened in that procedure.[267] This approach is more in line with general EU law, which respects the possibility for Member States to make access to judicial protection conditional on prior participation in the authorisation procedure and finds that such a procedure is not contrary to Art. 47 of the EU Charter of Fundamental Rights.[268]

The condition of previous participation in administrative procedure is different from the condition of exhaustion of administrative review. According to Art. 11(4) of the EIA Directive, "*The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law*". An essentially identical provision is contained in Art. 25(4) of the IED: "*Paragraphs 1, 2 and 3 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.*"

Member States therefore have a relatively wide margin of discretion in the way they regulate the conditions for the use of appeals against administrative decisions in environmental matters. The wording of the requirement corresponds to the differences in the concept of permitting procedures and remedies in the individual Member States.[269] In comparison, an

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[265] See the CJEU judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftschutz Umweltorganisation* (C-664/15, EU:C:2017:987), para. 69: "*If national law establishes a link between the status of party to the administrative procedure and the right to bring judicial proceedings, the refusal of such status would deprive the right to bring proceedings of all useful effect, and even of its very substance, which would be contrary to Article 9(3) of the Aarhus Convention, read in conjunction with Article 47 of the Charter"*.

[266] See the CJEU judgment of 14 January 2021, *Stichting Varkens in Nood and Others* (C-826/18, EU:C:2021:7).

[267] *Ibid*, para. 69: *„In the light of the foregoing considerations, the answer to the first to sixth questions is that Article 9(2) of the Aarhus Convention must be interpreted as precluding the admissibility of the judicial proceedings to which it refers, brought by non-governmental organisations which are part of the 'public concerned' referred to in Article 2(5) of that convention, from being made subject to the participation of those organisations in the procedure preparatory to the contested decision, even though that condition does not apply where such organisations cannot reasonably be criticised for not having participated in that procedure. However, Article 9(3) of that convention does not preclude the admissibility of judicial proceedings to which it refers from being made subject to the participation of the applicant in the procedure preparatory to the contested decision, unless the applicant cannot reasonably be criticised, in the light of the circumstances of the case, for not having intervened in that procedure."*

[268] See the CJEU judgment of 27 September 2017, *Puškár* (C-73/16, EU:C:2017:725).

[269] See the opinion of Advocate General Bobek of 19 October 2017, *North East Pylon Pressure Campaing and Sheehy* (C-470/16, EU:C:2017:781), para. 104: *"Differences in decision-making structures and outcomes will then naturally impact on review mechanisms. Other fundamental differences also exist between review procedures. For example, before an action can be introduced before national courts, Member States may (or may not) require an administrative challenge to be brought. Institutional differences also exist in relation to such challenges (appeal to ministry, competent authority, or specific appeals board and so on)."*

administrative appeal concerning access to information is governed by a different rule as Art. 6(1) of Directive 2003/4/EC requires that the refused or ignored applicants have *"access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive."*

It may not be clear from the cited provisions whether **full participation or consultation** of the public concerned is required if the national law provides for more regimes of including public decision-making. The relevant criterium seems to be the possibility to consider the outcome of public participation. The requirements to ensure public participation are based on the sub-provisions of the Aarhus Convention: provision of information on the decision-making process in a timely, proportionate, and effective manner, with a privileged position for the public concerned [Art. 6(2)]; public involvement at an early stage of the decision-making process "*when all options are open and effective public participation can take place*" [Art. 6(4)];[270] allowing the public to submit any comments, information, analyses or opinions that the public considers relevant in relation to the proposed activity [Art. 6(7)]; taking due account of the outcome of public participation in the decision [Art. 6(8)].

The Convention does not prescribe specific forms of public participation. Therefore, it is up to the Contracting States to determine the procedural means to ensure such participation. Several Member States handle permitting procedures differently so that public participation is the opportunity for the public concerned to express their views on permitting procedures.

Nevertheless, the language used by the EIA Directive makes a difference between consultation and *opportunities to participate*,[271] to cover a broader range of participatory rights. Mere consultation, therefore, does not seem sufficient, in particular given the abovementioned Art. 6(7) of the Aarhus Convention, which enables the *public* to submit comments relevant to the proposed activity. Insofar as EU directives require **consultation with the authorities concerned and the public**, it is clear from the case law of the CJEU that the purpose of such regulation is to provide a basis for decisions that are of a preparatory

[270] See, for example, the opinion of Advocate General Kokott, 30 March 2017, *Comune di Corridonia* (C-196/16 and C-197/16, EU:C:2017:249), para. 26: "*In addition, reference must be had to Article 6 of the Aarhus Convention, which is implemented by Directive 2011/92. The public participation in decisions that may have a significant effect on the environment provided for therein must take place at an early stage, when all options are still open and effective public participation can take place. That formulation illustrates the purpose of early participation. It is more effective when it can be taken into account in full in the realisation of the project. In particular, it can demonstrate how — without avoidable additional efforts — a plant must be constructed in order to reduce the environmental effects to a minimum*."

[271] EIA Directive, Art. 6(4), (5).

nature and generally not subject to appeal (in the sense of review),[272] while judicial review is *"directed at a decision adopted at the end of that procedure"*.[273]

It follows from the above that Member States have a relatively wide margin of discretion in regulating **remedies against the adopted decisions**. The public concerned must be able to challenge the court's decision.[274]

As regards various **aspects of the permitting procedures**, the rules laid down by the Member States must not create an obstacle to the exercise of the participatory rights, nor must they be applied in contravention of general legal principles of the Union, which include in particular the principles of effectiveness and equivalence.[275] The CJEU applies those principles not only to national judicial proceedings but also in the context of administrative proceedings[276] so that the procedural and substantive rules laid down in the national rules governing a particular administrative procedure cannot tend to make the implementation of EU law practically impossible or excessively difficult, and national law must be applied in a way which is not discriminatory compared with the relevant procedures which concern purely national law.[277]

As regards the possibility of **charging for participation in administrative proceedings**, the CJEU considers that the fees are not incompatible with Art. 6 of the Aarhus Convention. In Case **C-216/05** (***Commission v Ireland***),[278] it concluded that the fees *"cannot, however, be fixed at a level which would be such as to prevent the directive from being fully effective, in accordance with the objective pursued by it (...) The amount of the fees at issue here, namely EUR 20 in procedures before local authorities and EUR 45 at the Board level, cannot be regarded as constituting such an obstacle. Nor has the Commission succeeded in refuting*

[272] See the CJEU judgment of 16 March 2006, *Commission v Spain* (C-332/04, EU:C:2006:180), para. 54: *"Although Articles 6(1) and 6(2) of the EIA Directive require the Member States to conduct a consultation procedure in which the public and the authorities likely to be affected by the project are invited to comment, the fact remains that such a procedure must necessarily be carried out before a project is authorised. The opinions obtained - and such other opinions as may be determined by the Member States - become part of the permitting process and are intended to assist the competent authority's decision to grant or refuse a permit. They are therefore of a preparatory nature and are generally not subject to appeal"* (own translation).

[273] CJEU judgment of 15 October 2009, *Djurgården-Lilla Värtans Miljöskyddsförening* (C-263/08, EU:C:2009: 631, para. 38).

[274] See the CJEU judgment of 16 April 2015, *Gruber* (C-570/13, EU:C:2015:231), para. 44: *"...an administrative decision not to carry out an EIA taken on the basis of such national legislation cannot prevent an individual, who is part of the 'public concerned' within the meaning of that directive and satisfies the criteria laid down in national law regarding 'sufficient interest' or, as the case may be, 'impairment of a right', from contesting that administrative decision in an action brought against either that decision, or against a subsequent development consent decision."*

[275] See the CJEU judgment of 11 September 2019, *Călin* (C-676/17, EU:C:2019:700).

[276] For the application of these principles to administrative proceedings relating to the settlement of disputes concerning the levying of a national tax, see the CJEU judgment of 3 February 2000, *Dounias* (C-228/98, EU:C: 2000:65, paras 62–67); for the levying of agricultural duties, see the CJEU judgment of 27 March 1980, *Salumi and Others* (C-66/79, 127/79 and 128/79, EU:C:1980:101, paras 17–20).

[277] See the CJEU judgments of 21 September 1983, *Deutsche Milchkontor and Others* (205/82 to 215/82, EU:C: 1983:233, para. 19); of 16 July 1998, *Oelmühle and Schmidt Söhne* (C-298/96, EU:C:1998:372, para. 24), of 24 September 2002, *Grundig Italiana* (C-255/00, EU:C:2002:525, para. 33); of 7 January 2004, *Wells* (C-201/02, C: 2004:12, para. 70).

[278] CJEU judgment of 9 November 2006, *Commission v Ireland* (C-216/05, EU:C:2006:706).

Ireland's argument that the level of the fees is justified in the light of the administrative costs involved in processing the observations received from persons concerned."[279]

The CJEU did not define precisely what criteria should be taken into account when assessing whether the fee level is proportionate to the directive's objectives (in this case, the EIA Directive). In interpreting the cited conclusions, the case's broader context must be considered. The Irish Government has set the fee for making representations in proceedings before local planning authorities at 20 euros and before the appeal committee at 45 euros. The relevance or (disincentive) effect of these fees for persons wishing to participate in the hearing depended essentially on whether, given the assets they had and in particular, their respective incomes, they could bear the fees more or less easily. The Advocate General offered the average salary in the Member State as the primary criterion for assessing the reasonableness of the fee.[280]

The CJEU considered the criterion that the level of the fees is related to the administrative complexity of dealing with the objections to be relevant. Still, it can be assumed that, especially in the case of a higher fee, it would not only follow this criterion, and would also take into account the economic circumstances of the public concerned in the Member State concerned. It may also play a role that the CJEU's conclusions refer to the wording of the EIA Directive from a time when the Aarhus Convention had not yet been implemented in EU law.[281] If the CJEU were to consider a similar case today, its approach would not be more probably permissive in relation to defining the breadth of discretion afforded to Member States.

Another aspect of the decision-making proceedings the CJEU has been dealing with is the publication of the permit. Again, the case came from the construction field. In its judgment in Case **C-280/18** (***Flausch and Others***)[282], the CJEU, in interpreting the provisions of the EIA Directive, considered whether national legislation which provides that the publication on a relevant website of a decision approving environmental requirements for construction projects gives rise to a presumption that all interested parties are fully aware of the issue to bring an action is compatible with EU requirements. The CJEU may consider such a procedure insufficient to ensure the protection of the rights of the public concerned. In other words, the information channels used, including electronic media, must be appropriate to reach the members of the public concerned.[283]

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[279] *Ibid*, paras. 42–45.

[280] Opinion of Advocate General Stix-Hackl of 22 June 2006, *Commission v Ireland* (C-216/05, EU:C:2006: 424), para. 45: *"The weekly income of the category of persons constituted by social welfare recipients, the yardstick used by the Commission, is as extreme a yardstick as, for example, the average annual income of people in the highest income brackets would be. An assessment having regard to average monthly income in Ireland appears to me more sensible, even though no clear conclusions can be drawn from this either. On the whole, however, Ireland's view that EUR 20 and EUR 45 are, generally, affordable sums is probably to be accepted as correct. Furthermore, as is apparent from the case-file and Ireland's submissions, the amount of these fees falls perfectly within the normal range for various fees and charges in connection with administrative procedures in Ireland."*

[281] The Aarhus Convention states in its preamble that "*the public needs to be aware of the procedures for participation in environmental decision-making, have free access to them and know how to use them*".

[282] CJEU judgment of 7 November 2019, *Flausch and Others* (C-280/18, EU:C:2019:928).

[283] See the ACCC case ACCC/C/2009/36, *Spain*, ECE/MP/PP/C.1/2010/4/Add.2, para. 62.

Consequently, according to the CJEU, the procedure under which the time limit for bringing an action started to run from the date of the notification of the approval of the project on a specific website, without the public concerned being notified of the start of the permit procedure, was also contrary to the requirements of the EU directive.[284] Another case law suggests that incomplete files or data that are scattered, incoherently, across a multitude of documents do not make it possible for the public concerned to participate effectively,[285] rendering an obstacle to judicial protection.[286]

The CJEU has not been dealing with public participation provisions concerning the elaboration of plans and programmes, such as the ones provided by the SEA Directive, the WFD, the Air Quality Directive, the Waste Framework Directive, or the Environmental Noise Directive (see below). Nevertheless, many conclusions regarding participation in decision-making or access to justice may be applied *per analogiam*, considering the overlap between public participation in the Aarhus Directive and the broader requirement for an environmental assessment in the SEA Directive.[287]

3.3 ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

The Commission adopted a proposal for a Directive on access to justice in environmental matters in 2003.[288] Still, the proposal did not gather sufficient support from the national governments and was finally withdrawn by the Commission in 2014.[289] The Member States believed that access to national courts belonged to their competence due to the principle of subsidiarity.[290]

As a result, the specific provisions aimed at ensuring effective judicial protection are currently restricted to a few areas of EU environmental law,[291] and the number of access to justice provisions in new and revised EU law other than the EIA Directive and the IED is deficient. An example is the Seveso III Directive (2012/18/EU), which provides access to justice in

[284] *Ibid*, paras 58–59: *"…the public concerned must be informed of the consent procedure and of its opportunities to participate in it adequately and sufficiently in advance. If that is not the case, members of the public concerned cannot expect to be informed of a final decision granting consent. That is especially so in circumstances such as those at issue in the main proceedings. Indeed, the mere ability to have access ex post on the Ministry of the Environment's website to a decision granting consent cannot be regarded as being sufficient in the light of the principle of effectiveness since, in the absence of sufficient information on the launch of the public participation procedure, no one can be deemed informed of the publication of the corresponding final decision."*

[285] See the CJEU judgment of 15 October 2015, *Commission v Germany* (C-137/14, EU:C:2015:683, para. 55), of 28 May 2020, *Land Nordrhein-Westfalen* (C-535/18, EU:C:2020:391, para. 49).

[286] See the opinion of Advocate General Pikamäe of 3 February 2022, *Czech Republic v Poland (Mine de Turów)* (C-121/21, EU:C:2022:74, paras 96–102).

[287] See the CJEU judgment of 17 June 2010, *Terre wallonne and Inter-Environnement Wallonie* (C-105/09 and C-110/09, EU:C:2010:355, para. 40).

[288] European Commission. Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters. COM (2003) 624.

[289] European Commission. Withdrawal of obsolete Commission proposals, 21. 5. 2014, OJ C 153/3.

[290] Krämer, L. *EU Environmental Law*, 7th ed., London: Sweet & Maxwell, 2012, p. 147.

[291] European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness, 7. 3. 2012, COM (2012) 95 final, p. 9.

cases of acts and omissions in preventing major accidents involving dangerous substances. Instead of its specific requirements, it simply references the EIA Directive and the Aarhus Directive (see Chapter 4.6).[292]

Another example is Art. 13(1) of the **Environmental Liability Directive** (2004/35/EC[293]), which guarantees the affected natural or legal persons[294] 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 under this Directive. There are no detailed requirements except that the Directive requires that administrative review procedures be exhausted before recourse to judicial proceedings.[295] In Case **C-529/15** (***Folk***)[296], the CJEU ruled that persons with a fishing license must be able to initiate review proceedings before a court or other competent public authority following Art. 12 and 13 of the Directive.

The guarantee of the Environmental Liability Directive is formulated in a manner that draws very closely on the wording used in Art. 9(2) of the Aarhus Convention and the provisions of the EIA Directive. Those entitled to make submissions and request action are also entitled to legally challenge the procedural and substantive legality of a competent authority's decision, act, or failure to act based on the submissions and the request. The similarity in wording, including regarding the privileged entitlement of environmental NGOs, means that the CJEU case law on legal standing can also be considered in interpreting the Environmental Liability Directive.

The application of the Environmental Liability Directive on **construction activities** is limited as it applies primarily to environmental damage caused by any of the occupational activities listed in Annex III,[297] which does not contain construction other than related discharges of substances into the environment. However, the Directive also applies to damage caused by occupational activities (carried out during an economic activity) other than those listed in Annex III but only on protected species and natural habitats.[298]

After the failure of the proposal on general access to justice directive, the Commission has not given up and continually explored the possibility of defining at the EU level the conditions for

[292] Art. 23 of the Seveso III Directive requires that Member States ensure that: *„(a) any applicant requesting information pursuant to points (b) or (c) of Article 14(2) or Article 22(1) of this Directive is able to seek a review in accordance with Article 6 of Directive 2003/4/EC of the acts or omissions of a competent authority in relation to such a request; (b) in their respective national legal system, members of the public concerned have access to the review procedures set up in Article 11 of Directive 2011/92/EU for cases subject to Article 15(1) of this Directive."*

[293] Directive 2004/35/CE 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. OJ L 143, 30. 4. 2004, p. 56–75.

[294] *Ibid*, Art. 12(1): *„Natural or legal persons: (a) affected or likely to be affected by environmental damage or (b) having a sufficient interest in environmental decision making relating to the damage or, alternatively, (c) alleging the impairment of a right, where administrative procedural law of a Member State requires this as a precondition, shall be entitled to submit to the competent authority any observations relating to instances of environmental damage or an imminent threat of such damage of which they are aware and shall be entitled to request the competent authority to take action under this Directive. What constitutes a 'sufficient interest' and 'impairment of a right' shall be determined by the Member States."*

[295] *Ibid*, Art. 13(2).

[296] CJEU judgment of 1 June 2017, *Folk* (C-529/15, EU:C:2017:419).

[297] Directive 2004/35/CE, Art. 3(1)(a).

[298] *Ibid*, Art. 3(1)(b).

effective access to national courts in respect of all areas of EU environment law. Finally, however, it only chose to develop guidance to take account of a significant body of case law to improve implementation of existing access to justice provisions: A **Notice on access to justice in environmental matters** was prepared in 2017.[299] It summarises the case law of the CJEU and serves as an essential guide for the national judges and legislators. On the other hand, it also illustrates the various issues related to the fact that access to justice rules have not been harmonised. The legislation and the case law of the CJEU are developing further, while the Notice remains anchored in 2017. For that reason, the following text focuses more on the development after 2017.

The role of the CJEU is vital to the enforcement of access to justice at the national level as it has not been without flaws: In 2019, the Commission published the Environmental Implementation Review,[300] which identified a series of systemic shortcomings concerning on-the-ground implementation of access to justice in environmental matters in national legal systems. In particular, it highlighted problems faced by NGOs in obtaining legal standing to bring legal challenges on EU-related environmental issues and procedural hurdles, such as prohibitively high costs. The **Seventh Environmental Action Programme** evaluation concludes that *"significant barriers still exist in several Member States"*, and *"the emerging evidence base indicates that more needs to be done at Member State level"*.[301]

In October 2019, the European Council called upon the Commission to present, at the latest in early 2020, an ambitious and focused proposal for the Eighth Action Programme for 2021-2030. It underlined that the new programme must address environmental governance, such as public participation and access to justice.[302] In the European Green Deal, the Commission committed itself to, among other things, to *take action* to improve the access of the citizens and the NGOs to justice before national courts in all Member States[303] and confirmed its position in the 2020 communication to the Parliament and the Council.[304] **The Eighth Action Programme**,[305] however, only lists *"effectively applying high standards of transparency, public participation and access to justice in accordance with the Aarhus Convention both at Union and Member State level"* among the enabling conditions to attain the priority objectives without any details.[306]

[299] European Commission. Commission Notice on access to justice in environmental matters. OJ C 275, 18. 8. 2017, p. 1–39.
[300] European Commission. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions. Environmental Implementation Review 2019: A Europe that protects its citizens and enhances their quality of life. 4. 4. 2019, COM (2019) 149 final.
[301] European Commission. Commission staff working document. Evaluation of the 7th Environment Action Programme to 2020. 15. 5. 2019, SWD (2019) 181.
[302] European Parliament. Outcome of the Proceedings. The 8th Environment Action Programme - Turning the Trends Together - Council conclusions. 4. 10. 2019, 12795/19.
[303] European Green Deal, Chapter 4.
[304] European Commission. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions. Improving access to justice in environmental matters in the EU and its Member States. 14. 10. 2020, COM (2020) 643 final.
[305] Decision (EU) 2022/591 of the European Parliament and of the Council of 6 April 2022 on a General Union Environment Action Programme to 2030. PE/83/2021/REV/1, OJ L 114, 12. 4. 2022, p. 22–36.
[306] *Ibid*, Art. 3(af).

Despite the lack of activity at the EU level, there are several reasons to strengthen further and clarify the access to justice guarantees, the foremost being that access to justice is believed to be crucial for environmental protection. The Commission has opined that the main reason the EU environmental legislation is less enforced, compared to laws concerning the internal market, is the lack of financial motivation in environmental protection cases.[307] It seems evident that adopting a new directive defining the conditions for effective access to national courts with respect to all areas of EU environmental law would contribute to facilitating access to justice at the national level and stimulating cooperation and dialogue between national authorities and courts.[308]

Furthermore, the practice shows there are many issues concerning Art. 9(4) of the Aarhus Convention requirements that the review procedures should, *inter alia*, provide adequate and effective remedies, including legally mandated relief where appropriate, and should be fair, equitable, timely, and not costly. These requirements are reflected in the various EU Directives, notably Art. 11 [formerly Art. 10(a)] of the EIA Directive, but not in the vast majority of EU environmental law, even though they should apply to all court proceedings concerning environmental matters based on the Aarhus Convention.

However, unlike Art. 9(2) or Art. 9(3) of the Aarhus Convention, Art. 9(4) is not capable of direct applicability in EU law, despite the broader requirement of Art. 47 of the EU Charter of Fundamental Rights, which enshrines the right to an effective remedy. The national courts are merely obliged to interpret national law in such a way as to achieve, as far as possible, a result that is consistent with the objective pursued by these rules.[309] This means that the representatives of the public concerned may invoke the direct effect of EU law to achieve access to judicial protection but no longer to ensure that the proceedings are not disproportionately costly or too lengthy.

As a result, when the CJEU interprets what exactly is meant by *excessive costliness* of legal proceedings in cases such as **C-260/11** (***Edwards and Pallikaropoulos***),[310] **C-427/07** (**Commission v Ireland**),[311] or **C-530/11** (***Commission v United Kingdom***),[312] the impact of its conclusions is limited. This is of crucial importance for planning and construction disputes

[307] European Commission. Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters. COM (2003) 624.
[308] Pánovics, A. The Missing Link: Access to Justice in Environmental Matters. *EU and Comparative Law Issues and Challenges Series (ECLIC)*, 2020, vol. 4, p. 121.
[309] CJEU judgment of 17 October 2018, *Klohn* (C-167/17, EU:C:2018:833), para. 29*: "In that regard, it must be borne in mind, first, that the fifth paragraph of Article 10a of Directive 85/337 as amended simply provides that the judicial proceedings concerned 'shall be fair, equitable, timely and not prohibitively expensive'. Given the general nature of the words used, it is difficult to envisage how those provisions may be regarded as imposing sufficiently precise obligations on the Member States in order to dispense with national implementing measures."*
[310] CJEU judgment of 11 April 2013, *Edwards and Pallikaropoulos* (C-260/11, EU:C:2013:221), para. 33: *"…the requirement that the cost should be 'not prohibitively expensive' pertains, in environmental matters, to the observance of the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, and to the principle of effectiveness, in accordance with which detailed procedural rules governing actions for safeguarding an individual's rights under European Union law must not make it in practice impossible or excessively difficult to exercise rights conferred by European Union law…"*.
[311] CJEU judgment of 16 July 2009, *Commission v Ireland* (C-427/07, EU:C:2009:457).
[312] CJEU judgment of 13 February 2014, *Commission v United Kingdom* (C-530/11, EU:C:2014:67).

as these often pose high financial risks the national legislator (or the court) is tempted to delegate to the public concerned.

The rules following from the first abovementioned judgment (*Edwards*) can be summarised as follows: 1) as regards the means capable of achieving the objective of effective legal protection in the field of environmental law without disproportionate costs of proceedings, all relevant provisions of national law, and in particular the national legal aid system, must be taken into account; 2) the national court must also take into account the interest of the person seeking to defend his rights and the general interest in protecting the environment. The requirement that there be no disproportionate legal costs cannot be assessed differently by the national court depending on whether it is ruling at first instance, on appeal, or on a further appeal. The second judgment (*Commission v Ireland*) emphasises that all costs associated with the proceedings must be taken into account and that the mere possibility for the courts to waive the imposition of fees (administrative practice) does not stand up to the requirements of the EIA Directive. The third judgment (*Commission v United Kingdom*) then shows that the requirement that the costs of the proceedings not be disproportionate also applies to granting interim measures (and thus, for example, to the granting of suspensive effect).

The CJEU generally recognises that it is possible to set a reasonable **time limit for bringing an action** in environmental matters - as long as such a time limit does not prevent broad public access to judicial protection. As regards the possibility of a time limit for judicial review, such a procedure is, in principle, not possible if it could fundamentally impede the effective implementation of EU law or, in practice, make it impossible or excessively difficult to exercise the rights conferred by EU law.[313] The CJEU thus concludes that the time limit cannot prevent the remedy of a situation where an environmental impact assessment has not been carried out. In such a case, it will not be applied by the national courts (and, where appropriate, the contested act will be annulled unless the reasons for temporarily maintaining it in force prevail). This discretion of Member States also applies, for example, to the setting of the start of the limitation period.[314] At the same time, however, the time limit cannot wholly prevent the remedy of violating EU environmental requirements.[315]

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[313] See the CJEU judgment of 15 April 2010, *Barth* (C-542/08, EU:C:2010:193), para. 28: *"As regards the principle of effectiveness, the Court has stated that it is compatible with European Union law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty which protects both the individual and the authorities concerned. Such time-limits are not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by European Union law. In that regard, a national limitation period of three years appears to be reasonable."* Or the CJEU judgment of 16 January 2014, *Pohl* (C-429/12, EU:C:2014:12), para. 29: *"As regards the principle of effectiveness, the Court has stated that it is compatible with European Union law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty to the extent that such time-limits are not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by European Union law."*

[314] See the CJEU judgment of 8 November 2011, *Q-Beef and Bosschaert* (C-89/10 and C-96/10, EU:C:2011:555, para. 32).

[315] See the CJEU judgment of 17 November 2016, *Stadt Wiener Neustadt* (C-348/15, EU:C:2016:882), paras. 42–44: *"…EU law, which does not lay down any rules on the time limits for bringing proceedings against the consents issued in breach of the obligation first to assess the effects on the environment, set out in Article 2(1) of Directive 85/377, does not preclude, in principle and subject to compliance with the principle of equivalence, the Member State concerned from setting a time limit of three years for bringing proceedings, such as that provided for in Paragraph 3(6) of the UVP-G 2000, to which Paragraph 46(20)(4) of the UVP-G 2000 refers. However, a national provision under which projects in respect of which the consent can no longer be subject to challenge*

3.3.1 SPECIFIC REQUIREMENTS ON ACCESS TO JUSTICE AND FILLING THE GAPS

There are specific requirements for access to justice in several EU environmental directives. As regards **judicial review concerning access to information**, Directive 2003/4/EC provides that in addition to the administrative review procedure, the applicants must have access to a review procedure before a court of law or another independent and impartial body established by law, *"in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final. Member States may furthermore provide that third parties incriminated by the disclosure of information may also have access to legal recourse."*[316] Furthermore, final decisions must be binding on the public authority holding the information; reasons must be stated in writing, at least where access to information is refused.[317] These requirements implement Art. 9(1) of the Aarhus Convention. However, the Directive does not implement Art. 9(4) of the Convention that, *inter alia*, all judicial procedures, including those under Art. 9(1) must be fair, equitable, timely, and not prohibitively expensive, and all the court decisions must be publicly accessible.

Nevertheless, there seem to be no significant issues reported concerning judicial review regarding environmental information; there is no corresponding case law of the CJEU and only limited case law of the Aarhus Convention Compliance Committee.[318]

Regarding **judicial review concerning participation in decision-making**, the specific requirements of the Art. 11 of the 2011 EIA Directive and Art. 25 of the IED cover the judicial review of the decisions concerning large projects, in particular the land-use permit, the building permit, and the operation permit. These requirements are largely copied from the Aarhus Convention and, therefore, very similar. For example, both Directives guarantee the public concerned with the right to challenge the substantive or procedural legality of acts[319] and require the proceedings to be fair, equitable, timely, and not prohibitively expensive.[320]

There is no explicit EU access to justice requirement for smaller construction projects, plans, or programmes relevant to public construction law. It is, therefore, unclear whether and who has access to the courts in these matters based on the criteria and the requirements for judicial review.

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before the courts, because of the expiry of the time limit for bringing proceedings laid down in national legislation, are purely and simply deemed to be lawfully authorised as regards the obligation to assess their effects on the environment, which it is for the referring court to ascertain, is not compatible with that directive. As the Advocate General noted, in essence, in points 42 to 44 of her Opinion, Directive 85/337 already precludes, as such, a provision of that nature, if only because that provision has the legal effect of relieving the competent authorities of the obligation to have regard to the fact that a project within the meaning of that directive has been carried out without its effects on the environment having been assessed and to ensure that such an assessment is made, where works or physical interventions connected with that project require subsequent consent (see, to that effect, judgment of 17 March 2011, Brussels Hoofdstedelijk Gewest and Others, C-275/09, EU:C:2011:154, paragraph 37)."

[316] Directive 2003/4/EC, Art. 6(2).

[317] Directive 2003/4/EC, Art. 6(3).

[318] See Darpö, J. *Access to Justice in Information Cases. Report for the Task Force on Access to Justice under the Aarhus Convention* [online]. 2021, p. 5 [accessed on: 11 May 2023]. Available at: <https://unece.org/sites/default/files/2021-03/A2J_Info_study_JD_toTFAJ_final.pdf>.

[319] EIA Directive, Art. 11(1), IED, Art. 25(1).

[320] EIA Directive, Art. 11(4), IED, Art. 25(4).

The CJEU recognises the procedural autonomy of Member States, which in principle enjoy considerable freedom in setting up their procedural system. This discretion is generally limited by the requirement of effective judicial protection under Art. 47 of the Charter of Fundamental Rights of the EU[321] and by the principle of loyal cooperation set out in Art. 4(3) of the TEU.

The scope of the procedural autonomy has been explained that in the absence of EU rules governing the matter, it is for the legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law. The CJEU clarified this premise, for example, in **C-416/10 (*Križan*):**[322] "*The Member States have discretion in implementing Article 9 of the Aarhus Convention and Article 15a of Directive 96/61, subject to compliance with the principles of equivalence and effectiveness. It is for them, in particular, to determine, in so far as the abovementioned provisions are complied with, which court of law or which independent and impartial body established by law is to have jurisdiction in respect of the review procedure referred to in those provisions and what procedural rules are applicable.*"[323]

Those detailed rules must not be less favourable than those governing similar domestic actions (principle of equivalence). They must not make it impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness).[324] The principle of equivalence means that the procedural conditions of proceedings established by national law to ensure the protection of the rights of procedural subjects under Union law cannot be less favourable than the conditions of similar proceedings designed to ensure the protection of the rights of procedural subjects based on national provisions. The principle of effectiveness requires that the protection of rights should not be subject to conditions which, in practice, are liable to make exercising those rights impossible or excessively difficult. [325]

At a more specific level, the discretion of Member States is limited by the purpose of regulating access to judicial protection for the public concerned.[326] In addition, the purpose of access to judicial protection for the public concerned at the national level is also to enforce EU law. Thus, according to the CJEU, the useful effect of the individual directives and their purpose of protecting the environment requires that individuals or NGOs can invoke them before the courts. This means that restricting access to judicial protection would not only be a violation of the Aarhus Convention and the relevant EU Directives but would also be

[321] See the CJEU judgment of 13 March 2007, *Unibet* (C-432/05, EU:C:2007:163, para. 37).
[322] CJEU judgment of 15 January 2013, *Križan* (C-416/10, EU:C:2013:8).
[323] *Ibid*, para. 106.
[324] See the CJEU judgments of 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* (C-115/09, EU:C:2011:289, para. 43), of 16 April 2015, *Gruber* (C-570/13, EU:C:2015: 231, para. 37).
[325] CJEU judgment of 6 October 2015, *East Sussex County Council* (C-71/14, EU:C:2015:656, paras 54–55).
[326] See, regarding the EIA Directive, the CJEU judgment of 12 May 2011, *Bund für Umwelt und Naturschutz* Deutschland, *Landesverband Nordrhein-Westfalen* (C-115/09, EU:C:2011:289), para. 44: *"Thus, although it is for the Member States to determine, when their legal system so requires and within the limits laid down in Article 10a of Directive 85/337, what rights can give rise, when infringed, to an action concerning the environment, they cannot, when making that determination, deprive environmental protection organisations which fulfil the conditions laid down in Article 1(2) of that directive of the opportunity of playing the role granted to them both by Directive 85/337 and by the Aarhus Convention."*

incompatible with the binding effect that Art. 288 TFEU gives to the Directive, which requires that the persons concerned can invoke the obligations it imposes.[327]

The CJEU (and, by extension, the EU) therefore seeks to promote public participation in environmental protection at the national level to ensure the effectiveness of EU law. In this way, to some extent, it may also compensate for the shortcomings of environmental democracy at the EU level. Thus, proceedings before the administrative authorities and courts of the Member States also check the legality of acts issued by the EU institutions through the preliminary ruling procedure. As the Commission notes in its 2020 Communication, "*The EU's system of administrative and judicial redress as a whole encompasses not only the internal review mechanism under the Aarhus Regulation and access to the CJEU, but it also relies on national courts. In particular, Article 267 of the Treaty on the Functioning of the European Union (TFEU) allows any natural or legal person who is party to proceedings before national courts to request a preliminary reference to the CJEU regarding the validity of acts adopted by EU institutions. The EU and the national systems of redress taken together are essential to provide effective access to justice in environmental matters in the EU*."[328]

3.3.2 DIRECT EFFECT OF EU DIRECTIVES UNDER ARTICLES 6 AND 9(2) OF THE AARHUS CONVENTION

The CJEU interprets the concept of the direct effect of EU directives in the field of environmental protection to ensure not only the protection of the individuals concerned but also to enable effective enforcement of EU law.

The prerequisite for direct effect is the fulfilment of all the conditions which the CJEU case law associates with the possibility (or obligation) of direct application of EU law. In any event, the courts of the Member States are obliged to interpret national law in accordance with the requirements of the Aarhus Convention. They can only consider the direct effect of directives if a consistent interpretation of national law is not possible.[329]

In the case of **activities covered by Art. 9(2) of the Aarhus Convention,** the situation is relatively simple. The CJEU had already concluded in 1996 that specific provisions of the EIA Directive could have a direct effect,[330]and in 2011 extended the set of provisions to include Art. 11, which sets out specific conditions for public participation in decision-making and access to judicial protection.[331] The CJEU has not directly addressed the direct effect of the IED. Still, the conclusions regarding the EIA Directive can be used *per analogiam*, given that the provisions of both directives are very similar.

[327] See the CJEU judgment of 25 July 2008, *Janecek* (C-237/07, EU:C:2008:447, para. 37).
[328] European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Improving access to justice in environmental matters in the EU and its Member States, 14. 10. 2020, COM (2020) 643 final.
[329] See the CJEU judgment of 18 December 2007, *Frigerio Luigi & C.* (C-357/06, EU:C:2007:818, paras 28–29).
[330] See, on the then Art. 2(1) and 4(2) of the 1985 EIA Directive, the CJEU judgment of 24 October 1996, *Kraaijeveld and Others* (C-72/95, EU:C:1996:404).
[331] CJEU judgment of 12 May 2011*, Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* (C-115/09, EU:C:2011:289).

In 2016, the CJEU concluded in Case **C-243/15** (***Lesoochranárske zoskupenie II***)[332] that also the requirements of Art. 6(3) of the Habitats Directive on the assessment of projects falls under the regime of Art. 6 and Art. 9(2) of the Aarhus Convention and can be directly applicable. It was already noted that Art. 6(3) of the Habitats Directive contains no provisions on participation in decision-making. The same applies to access to justice. The assessment of plans and programmes according to the same requirement logically falls under Art. 9(3) of the Aarhus Convention as the act adopted will not be a decision under Art. 6 of the Convention.

3.3.3 DIRECT APPLICABILITY OF OTHER ENVIRONMENTAL DIRECTIVES

The CJEU has confirmed that many other EU directives can be directly applicable, this time in the regime of Art. 9(3) of the Aarhus Convention. Provisions that do not provide for public participation may, therefore, have a direct effect. The CJEU adopted the formulation that it would be "*incompatible with the binding effect attributed to a directive by Article 288 TFEU to exclude, in principle, the possibility that the obligations which it imposes may be relied on by those concerned*".[333]

The CJEU initially mentioned directives on air quality and drinking water to protect health, but this rationale goes beyond and covers other rights. Already in **C-361/88** (***Commission v. Germany***,[334] the CJEU found a link between air protection and the rights of individuals – even though the air quality legislation (other than the EIA and IED) does not contain comprehensive rules as regards access to justice. The Court concluded that the quality (concentration) limit values aim at the protection of human health. Thus, they have the objective to protect the individual right to health. They are sufficiently precise and unconditional to be of direct application. This means that the individual person has a right to trace back the limit values in his national legislation; it follows from this that Member States are obliged to transpose the limit values of the air pollution directive into their national law.

Later on, in its judgment in Case **C-237/07** (***Janecek***), the CJEU held that individuals directly affected must be able to request the drawing up of an action plan to reduce air pollution, irrespective of the form in which such a plan is adopted.[335] In **C-404/13** (***ClientEarth***),[336] the CJEU reached the same conclusion in relation to the Air Quality Framework Directive.

The conclusions regarding air quality directives have been used in cases concerning water management: In **C-664/15** (***Protect Natur-, Arten- und Landschaftschutz***

[332] CJEU judgment of 8 November 2016, *Lesoochranárske zoskupenie II* (C-243/15, EU:C:2016:838).
[333] Judgment of the CJEU of 20 December 2017, *Protect Natur-, Arten- und Landschaftschutz Umweltorganisation (*C-64/15, EU:C:2017:987, para. 57).
[334] CJEU judgment of 30 May 1991, *Commission v Germany* (C-361/88, EU:C:1991:224).
[335] CJEU judgment of 25 July 2008, *Janecek* (C-237/07, EU:C:2008:447), paras 37, 39: *"…the natural or legal persons directly concerned by a risk that the limit values or alert thresholds may be exceeded must be in a position to require the competent authorities to draw up an action plan where such a risk exists, if necessary by bringing an action before the competent courts (…) the failure to observe the measures required by the directives which relate to air quality and drinking water, and which are designed to protect public health, could endanger human health, the persons concerned must be in a position to rely on the mandatory rules included in those directives"*.
[336] CJEU judgment of 19 November 2013, *ClientEarth* (C-404/13, EU:C:2014:2382, para. 56).

Umweltorganisation),[337] the CJEU concluded that environmental associations must be able to challenge before a court a decision to approve a project which does not require the EIA [and therefore the access to justice does not fall under the Art. 9(2) of the Aarhus Convention and detailed requirements of the EIA Directive] but which may be contrary to an obligation under the WFD.[338] More specifically, the case concerned a permit for a project of abstracting water from the river to produce snow for a ski resort under EU law. The judgment leads to a simple conclusion: Where the case concerns matters governed by EU law, Member States cannot prevent environmental NGOs from accessing the courts, even if, for example, they exclude their participation in permit procedures. Moreover, environmental NGOs can seek the direct effect of EU directives. Therefore, access to justice in such cases does fall under the Art. 9(3) of the Aarhus Convention and the WFD is directly applicable even though it does not provide any requirements on access to justice.

In Case **C-535/18 (*Land Nordrhein-Westfalen*)**[339], also concerning the WFD, the CJEU held that the members of the public concerned by a project must be able to assert, before the competent national courts, that there has been a breach of the requirements to prevent the deterioration of bodies of water; EU law permits Member States to provide that when a procedural defect vitiating the decision approving a project does not alter the meaning of that decision, an application for annulment of that decision is admissible only if the irregularity at issue has denied the claimant their right to participate in the environmental decision-making process. The claimants in the main proceedings were subject to expropriation or had a domestic well within the area covered by the project for their private water supply. The CJEU concluded they could be affected by the decision, though not entirely: While the protection of groundwater as a resource for human use is of their concern, the state of bodies of surface water does not seem to affect them.[340]

In Case **C-197/18** (***Wasserleitungsverband Nördliches Burgenland and Others***),[341] the CJEU concluded that also the Nitrates Directive is directly applicable on the basis of the construction of the section of the motorway/federal road comprising three to four lanes over a distance of approximately 3.7 kilometres. The challenged decision authorised the developer to discharge rainwater running off the road surfaces into three bodies of surface water or the

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[337] CJEU judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftschutz Umweltorganisation* (C-664/15, EU:C:2017:987).

[338] *Ibid*, para. 30: *"By its first question, the referring court asks, in essence, whether Article 4 of Directive 2000/60 or that directive as a whole must be interpreted as meaning that, under Article 9(3) of the Aarhus Convention, an environmental organisation must be able to contest before a court a decision on a permit that is governed exclusively by the legislation governing water-related matters in respect of a project that is not subject to an environmental impact assessment under Directive 2011/92."*

[339] CJEU judgment of 28 May 2020, *Land Nordrhein-Westfalen* (C-535/18, EU:C:2020:391).

[340] Ibid, paras 124, 128: *"However, neither the information contained in the order for reference nor the observations submitted to the Court are capable of establishing the relevance, for the claimants in the main proceedings, of the bodies of surface water that may also be affected by the project at issue. In those circumstances, it does not appear that the claimants in the main proceedings can be concerned by a possible infringement of obligations deriving from Article 4(1)(a) of Directive 2000/60, with the result that the Court's examination will concern only Article 4(1)(b), regarding groundwater (…) it must be held that, by its objective and the obligations laid down in Article 4(1)(b) in order to attain that objective, Directive 2000/60 also pursues the specific objective of protecting groundwater as a resource for human use."*

[341] CJEU judgment of 3 October 2019, *Wasserleitungsverband Nördliches Burgenland and Others* (C-197/18, EU:C:2019:824).

groundwater. In that regard, the decision contained a number of provisions in annexes intended to ensure that waters are protected, with respect to both the discharge of rainwater into surface waters and its infiltration into the groundwater. The CJEU ruled that the affected natural and legal persons, such as the applicants in the main proceedings (**incl. municipality and a water distribution association**), should be able to require the competent national authorities to amend an existing action programme or adopt additional measures or reinforced actions.[342]

Therefore, the case law CJEU helps eliminate the double standard in the implementation of Art. 9(3) of the Aarhus Convention at the EU and national level.[343] Nevertheless, it is dependent on preliminary questions asked by the national courts. The conclusions of the CJEU, although binding for all Member States, usually reflect the specific situation in one Member State. Such a patchy solution does not seem capable of establishing clear and transparent rules on access to justice, jeopardising the aim to promote environmental awareness among the public [Art. 3(3) and 9(5) of the Aarhus Convention].

3.3.4 LEGAL STANDING

The CJEU's conclusions regarding direct effect of EU Directives can be simplified for the purposes of assessing the potential concern of individuals in the event of breaches of various EU directives that are relevant to national **public construction law**: first, the purpose of the directive, which constitutes a specific protective regime in relation to the protection of human health or the environment, including the provision of natural resources for human use, is relevant. The specific circumstances of the case must always be examined.

The *locus standi* of **individuals** is based on sufficient interest or impairment of rights.[344] The CJEU recognises the rights of individuals based on the scope of the previous administrative procedure (decision challenged) if there is one. For example, under the EIA Directives, individuals possibly affected on their property may contest the development consent because the scope of the EIA is broad and includes the impact of the project on the property.[345] If the

[342] *Ibid*, para. 73: *„…natural and legal persons, such as the applicants in the main proceedings, should be in a position to require the competent national authorities to amend an existing action programme or adopt additional measures or reinforced actions, provided for in Article 5(5) of that directive, as long as the nitrate levels in the groundwaters exceed or could exceed, in the absence of such measures, 50 mg/l at one or more measuring points within the meaning of Article 5(6) of that directive"*

[343] See Pernice-Warnke, S. Der Zugang zu Gericht in Umweltangelegenheiten für Individualkläger und Verbände gemäß Art. 9 Abs. 3 Aarhus-Konvention und seine Umsetzung durch die europäische Gemeinschaft – Beseitigung eines Doppelstandards? *Europarecht (EuR)*, 2008, vol. 43, no. 3, p. 410–435.

[344] See the CJEU judgment of 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* (C-115/09, EU:C:2011:289), para. 38: *"With regard to the conditions for the admissibility of such actions, Article 10a of Directive 85/337 provides for two possibilities: the admissibility of an action may be conditional on 'a sufficient interest in bringing the action' or on the applicant alleging 'the impairment of a right', depending on which of those conditions is adopted in the national legislation."*

[345] See the CJEU judgment of 16 April 2015, *Gruber* (C-570/13, EU:C:2015:231), paras. 40-43: *"…although the national legislature is entitled, inter alia, to confine the rights whose infringement may be relied on by an individual in legal proceedings contesting one of the decisions, acts or omissions referred to in Article 11 of Directive 2011/92 to individual public-law rights, that is to say, individual rights which, under national law, can be categorised as individual public-law rights (see, to that effect, judgment in Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen, C-115/09, EU:C:2011:289, paragraphs 36 and 45), the*

national law restricted the right of the neighbours to bring an action against the development consent decision, it would deprive a large number of individuals of exercising that right and limit the scope of Art. 11 of the EIA Directive. The national judge would be required to put the conflicting national law aside and allow the neighbours to access the court based on the direct applicability of the EIA Directive. In this respect, the rights of the individuals cannot be replaced by *locus standi* of the NGOs or specific institutions such as the ombudsperson.[346]

The CJEU usually speaks of affected or directly affected individuals, in other cases of individuals and their organisations (associations). However, It is clear that it relies precisely on the definition in the Aarhus Convention. Still, it has never given a detailed definition of the public concerned, i.e., it has not defined which persons it considers potentially affected. The CJEU did respect, for example, a natural person as an affected person based on his residence (not primarily by right of ownership).[347]

However, if the legislation is only generally aimed at protecting the environment, it is more challenging to demonstrate **sufficient concern for individuals**. In effect, this should strengthen the position of the NGOs that should easily access the courts.

The Commission states that *"This is especially important in the field of nature protection, because in this field it may be difficult to argue that decisions, acts of omissions of public authorities can affect specific rights of individuals, such as those relating to human health."*[348] An apt illustration is provided by the CJEU judgment in **C-826/18** (***Stichting Varkens in Nood and Others***).[349] The CJEU was dealing with a permit to build a new pen for approx. 1500 sows. The action at the national level had been lodged by an NGO active in animal welfare and by a veterinarian, the latter living 20 km from the project's place. The decision-making procedure included the EIA. According to the Court, who is part of the public concerned has to be indicated by Member States *"reasonably and in accordance with the objective of giving the public concerned wide access to justice"*,[350] meaning access to justice under art 9(2) of the Aarhus Convention. The Court nevertheless concluded that only the first applicant (the NGO) could be considered as being a member of the public concerned.

The **standing of the NGOs in the Art. 9(2) regime** (EIA, IED, Natura 2000 projects) cannot be made conditional on a requirement that depends on the rights of individuals or the relationship to the project/area concerned. As indicated, unlike natural or legal persons,

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provisions of that article relating to the rights to bring actions of members of the public concerned by the decisions, acts or omissions which fall within that directive's scope cannot be interpreted restrictively (...) In the present case, it appears from the order for reference that Ms Gruber is a 'neighbour', within the meaning of Paragraph 75(2) of the Gewerbeordnung, a concept which includes persons to whom the construction, continued existence or operation of a facility might pose a risk or cause a nuisance or whose property or other rights in rem might be put at risk. (...) it appears that persons falling within the concept of 'neighbour' may be part of the 'public concerned' (...) Those 'neighbours' can bring an action only against a consent granted for the construction and operation of a facility."

[346] *Ibid*, para. 42.

[347] See the CJEU judgment of 25 July 2008, *Janecek* (C-237/07, EU:C:2008:447), para. 13: *"Mr Janecek lives on the Landshuter Allee on Munich's central ring road, approximately 900 metres north of an air quality measuring station."*

[348] European Commission. Commission Notice on access to justice in environmental matters. OJ C 275, 18. 8. 2017, p. 1–39, para. 41.

[349] CJEU judgment of 14 January 2021, *Stichting Varkens in Nood and Others* (C-826/18, EU:C:2021:7).

[350] Ibid, para. 43.

environmental NGOs in this regime are deemed affected.[351] Therefore, Member States cannot define what constitutes a sufficient interest of environmental NGOs, nor can they limit their *locus standi* in this regime to legal provisions establishing individual rights.[352]

This does not mean, however, that Member States cannot set other **conditions** for the active legitimation of the environmental NGOs. These can, in principle, be divided into two types, the first concerning their registration and the second relating to their activities.[353] The CJEU has confirmed the Member States may restrict access to judicial protection only to the NGOs that promote environmental protection.[354] The concept of *environment* in EU law is nevertheless not limited to the natural environment, which is relevant for defining the scope of the objections that environmental NGOs may raise.[355] Therefore, the condition that the NGO promotes environmental protection should be interpreted broadly.

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[351] See the opinion of Advocate General Sharpston of 2 July 2009, *Djurgården-Lilla Värtans Miljöskyddsförenin* (C-263/08, EU:C:2009:421), para. 43: *"Such organisations therefore have an automatic right of access to justice. The presumption in favour of environmental organisations introduced by Article 1(2), when applied in conjunction with Article 10a, means that they benefit from a more advantageous regime than natural or legal persons who are not committed to promoting environmental protection."*

[352] See the CJEU judgment of 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* (C-115/09, EU:C:2011:289), para. 59: *"…non-governmental organisations promoting environmental protection, as referred to in Article 1(2) of that directive, can derive from the last sentence of the third paragraph of Article 10a of Directive 85/337 a right to rely before the courts, in an action contesting a decision authorising projects 'likely to have significant effects on the environment' for the purposes of Article 1(1) of Directive 85/337, on the infringement of the rules of national law flowing from Article 6 of the Habitats Directive, even where, on the ground that the rules relied on protect only the interests of the general public and not the interests of individuals, national procedural law does not permit this."* Or the CJEU judgment of 15 October 2015, *Commission v Germany* (C-137/14, EU:C:2015:683), para. 91: *"Although the national legislature is entitled to confine to individual public-law rights the rights whose infringement may be relied on by an individual in legal proceedings contesting one of the decisions, acts or omissions referred to in Article 11 of Directive 2011/92, such a limitation cannot be applied as such to environmental protection organisations without disregarding the objectives of that provision…"*

[353] See Opinion of Advocate General Sharpston of 2 July 2009, *Djurgården-Lilla Värtans Miljöskyddsförening* (C-263/08, EU:C:2009:421), para. 73: *"First, there are conditions relating to national requirements as to the registration, constitution or recognition of associations, the purpose of which is to obtain a legal declaration of the existence of such bodies under national law. Second, there are conditions relating to such organisations' activities and how these are linked to the legitimate protection of environmental interests".*

[354] See the CJEU judgment of 15 October 2009, *Djurgården-Lilla Värtans Miljöskyddsförening* (C-263/08, EU: C:2009:631), paras 45-46: *"While it is true that Article 10a of Directive 85/337, by its reference to Article 1(2) thereof, leaves to national legislatures the task of determining the conditions which may be required in order for a non-governmental organisation which promotes environmental protection to have a right of appeal under the conditions set out above, the national rules thus established must, first, ensure 'wide access to justice' and, second, render effective the provisions of Directive 85/337 on judicial remedies. Accordingly, those national rules must not be liable to nullify Community provisions which provide that parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, are to be entitled to bring actions before the competent courts. From that point of view, a national law may require that such an association, which intends to challenge a project covered by Directive 85/337 through legal proceedings, has as its object the protection of nature and the environment."*

[355] Opinion of Advocate General Kokott of 23 September 2010, *Stichting Natuur en Milieu and Others* (C-266/09, EU:C:2010:546), para. 57: *"However, the notion of environment in Union law is not always restricted to the natural environment. For example, the assessment of environment effects includes the effects on population and material assets, including the architectural and archaeological heritage. The Water Framework Directive also provides for environmental quality standards for artificial bodies of water. And finally, as the Commission submits, the old Environmental Information Directive regarded information on the state of fauna and flora as environmental information, regardless of whether this concerned the natural fauna and flora environment."*

Other conditions may require a certain size of the NGO (number of members). However, the number of members laid down cannot contradict the objectives of EU law and make access to judicial protection for environmental associations impossible.[356] Similarly, a requirement of p**revious activities (history of an NGO) and other criteria** may not in itself conflict with the EU regulation of public participation or with the Aarhus Convention. However, it does not correspond to broad public access. In this respect, the length of the required prior activity, other conditions for public participation, and the situation in the specific Member State are decisive.[357] Additional criteria may relate to the independence or non-profit character of the NGO or its separate legal personality under national law. Alternatively, they may involve an NGO that demonstrates that it has a sound financial basis for pursuing the objective of promoting environmental protection. The establishment of such criteria for the participation of environmental associations in environmental protection should be preceded at least by an analysis of the actual exercise of the participation rights of the public concerned at the level of judicial review to see how many environmental associations will be affected by the restrictive regulation and to what extent access to judicial protection will be maintained.

The conclusions are applicable even to cases under the **Art. 9(3) regime of the Aarhus Convention** (other violations of environmental law, including, for example, various plans and programmes),[358] which, however, provides a more expansive manoeuvring space to the national legislator is wider as it refers to members of the *public, where they meet the criteria, if any, laid down in its national law*. It does not exclude a condition that a relationship between the NGO and the matter/area concerned must exist. The conditions laid down, either separately or in combination, must still ensure (or not prevent) broad access to judicial protection.

The difference between Art. 9(2) and Art. 9(3) of the Aarhus Convention may cause paradoxical situations: For example, an NGO which challenges a regional land-use plan fails

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[356] See the CJEU judgment of 15 October 2009, *Djurgården-Lilla Värtans Miljöskyddsförening* (C-263/08, EU: C:2009:631), paras 47-51: *"Furthermore, it is conceivable that the condition that an environmental protection association must have a minimum number of members may be relevant in order to ensure that it does in fact exist and that it is active. However, the number of members required cannot be fixed by national law at such a level that it runs counter to the objectives of Directive 85/337 and in particular the objective of facilitating judicial review of projects which fall within its scope. (...) The Swedish Government, which acknowledges that at present only two associations have at least 2 000 members and thereby satisfy the condition laid down in Paragraph 13 of Chapter 16 of the Environment Act, has in fact submitted that local associations could contact one of those two associations and ask them to bring an appeal. However, that possibility in itself is not capable of satisfying the requirements of Directive 85/337 as, first, the associations entitled to bring an appeal might not have the same interest in projects of limited size and, second, they would be likely to receive numerous requests of that kind which would have to be dealt with selectively on the basis of criteria which would not be subject to review."*

[357] *Ibid*, para. 50. It is worth considering that according to the Aarhus Convention Compliance Committee, foreign or international environmental NGOs that express an interest in the case also fall within the definition of Art. 2(4) and (5) of the Aarhus Convention (Case *Ukraine* ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, para. 26) which should be taken into account while assessing the conditions for access to justice in a particular Member State.

[358] The Aarhus Convention Compliance Committee elaborates *that "Whether or not an NGO promotes environmental protection can be ascertained in a variety of ways, including, but not limited to, the provisions of its statutes and its activities. Parties may set requirements under national law, but such requirements should not be inconsistent with the principles of the Convention"* (Case *Armenia* ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, 2011, para. 81).

to prove its sufficient interest but can afterward participate in the decision-making concerning the EIA projects regulated by the plan and challenge the decisions as it is *deemed interested*. On the other hand, a local NGO may challenge the land-use plan but fail to meet the criteria to participate in the decision-making and access the court.

Municipalities are not members of the public concerned because the Aarhus Convention considers them primarily part of the state.[359] They may, however, be affected in their rights by violations of EU directives and thus have access to judicial protection, including through the direct effect of the directives. This conclusion is based on the judgment in Case **C-197/18** (***Wasserleitungsverband Nördliches Burgenland and Others***)[360], in which the CJEU held that the individuals concerned must be able to seek redress before the national courts under the Nitrates Directive. The applicants in the original proceedings were a water distribution association, an individual owner of a private fountain, and the municipality of Zillingdorf, which operates a municipal fountain. The CJEU, therefore, made a positive contribution in terms of enhancing access to justice before national courts, mainly by ensuring the standing rights of the individual applicants through the enrichment of the concept of those *directly concerned* with the element of the *legitimate use* of the protected environmental good.[361]

The direct effect of the EU directives can also be invoked by **other legal persons**. However, it might not be clear how far this possibility reaches. There is a pending case before the CJEU concerning whether a law firm partnership may fall under the definition of the public concerned.[362]

3.3.5 SCOPE OF THE JUDICIAL REVIEW AND EFFECTIVE REMEDIES

Reflections on access to justice without specific provisions of EU law bring us to the crucial question of which acts can be brought before national courts. The basis for legal standing

[359] See the ACCC. Minutes of the 49th meeting of the Committee, 30 June to 3 July, para. 52: *"While under the domestic law of Parties municipalities might exercise their right to self-government and other subjective rights, even before courts, in the context of the Convention and international law in general, a "public authority" under article 2, paragraph 2 (a), of the Convention was considered an emanation of the Party concerned. Hence, an allegation brought to the Committee by the communicant would give rise to an internal dispute between authorities of a Party concerned, which was not within the remit of the Committee. The Committee therefore found that the communicant was not a member of the public for the purposes of article 15 of the Convention..."*

[360] CJEU judgment of 3 October 2019, *Wasserleitungsverband Nördliches Burgenland and Others* (C-197/18, EU:C:2019:824).

[361] See Karageorgou, V., Pouikli, K. Access to Justice for Challenging the Decisions of the Competent Authorities for Alleged Violations of the EU Water Legislation before National Courts. Relevant Developments and Trends Through the Lens of the CJEU Judgments in Cases C-197/18 and C-535/18. *European Energy and Environmental Law Review*, 2021, vol. 30, no. 4, p. 128–138.

[362] See the preliminary question in Case *Societatea Civilă Profesională de Avocaţi AB & CD* (C-252/22): *"Are [the first paragraph of Article 47 of the Charter], read in conjunction with [the second subparagraph of Article 19(1) TEU], and Article 2(4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus, Denmark, on 25 June 1998, and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 1 [('the Convention')], read in conjunction with Article 9(3) thereof, to be interpreted as meaning that the concept of 'the public' includes a legal entity such as a law firm partnership, which does not rely on the infringement of any right or interest specific to that entity, but rather the infringement of the rights and interests of natural persons – namely the lawyers of which that partnership is comprised – [and] can such an entity be treated as a group of natural persons acting through an association or organisation for the purposes of Article 2(4) of the Convention?"*

varies according to the subject matter of the decision, act, or omission sought to be challenged. It is possible to distinguish between decisions, acts, and omissions concerning: a) requests for environmental information and entitlement to receive information, b) specific activities that are subject to public participation requirements, c) requests for action under environmental liability rules, d) other subject matter, such as national implementing legislation, general regulatory acts, plans and programmes, and derogations. For the last category, legal standing depends on general principles governing legal standing as interpreted by the CJEU.

The acts disputed do not have to be addressed to the public concerned. For example, in Case **C-873/19** (***Deutsche Umwelthilfe***),[363] the CJEU concluded that an environmental NGO must be able to challenge before a national court an administrative decision granting or amending EC-type approval which may be contrary to EU rules on motor vehicles concerning emissions.[364] This suggests that environmental NGOs might be able to challenge various decisions or acts relating to technical requirements on building and building materials. Some of these requirements have been adopted to harmonise common markets, but they also serve to fight and adapt to climate change under the EU environmental policy.

Many pieces of EU environmental legislation require that plans and programmes be adopted to achieve envisaged environmental objectives. These documents can serve as a means of managing interventions over time (e.g., river basin management plans) or setting out actions to respond to specific problems (e.g., air quality plans to lower excessive levels of air pollution). In addition to requiring certain kinds of plans and programmes to be adopted, EU environmental legislation also sets requirements for the environmental assessment of plans and programmes (e.g., land-use plans), which can significantly impact the environment. Nevertheless, the SEA Directive contains provisions comparable to, for example, Art. 11 of the EIA Directive.

It is, however, clear that even the **land-use plans should be subject to judicial review** as they fall within the scope of Art. 9(3) of the Aarhus Convention,[365] similar to other plans and programmes related to the environment.[366] If the spatial planning documents implement the requirements of EU law, access to justice can possibly be based on the direct effect of EU Directives.

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[363] CJEU judgment of 8 November 2022, *Deutsche Umwelthilfe (Réception des véhicules à moteur)* (C-873/19, EU:C:2022:857).

[364] Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information. OJ L 171, 29. 6. 2007, p. 1–16.

[365] See the ACCC Cases *Belgium*, ACCC/C/2005/11, and *Bulgaria*, ACCC/C/2011/58. In the latter, the Committee explicitly commented on the reviewability of the SEA conclusions: *"In other cases, the SEA procedure forms a part of the process for the preparation of a plan relating to the environment according to article 7 of the Convention. The possibility of members of the public to challenge the SEA statement should then be ensured in accordance with article 9, paragraph 3, of the Convention."*

[366] See the CJEU judgments of 17 June 2010, *Terre Wallonne and Inter-Environnement Wallonie* (C-105/09 and C-110/09, EU:C:2010:355), of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne* (C-41/11, EU:C:2012:103), para 46: *„…courts before which actions are brought in that regard must adopt, on the basis of their national law, measures to suspend or annul the 'plan' or 'programme' adopted in breach of the obligation to carry out an environmental assessment…"*.

The CJEU case law indicates that legal standing is also relevant for national legislation and general regulatory acts establishing the procedural requirements for such plans and programmes. At first sight, judicial review of legislative acts falls outside the requirements of EU directives, but this is not entirely the case. The Aarhus Convention excludes legislation from its scope, which is clear from the definition of *public authority* in its Art. 2(2).[367] However, the CJEU concludes that the legal order of the Member States must provide the possibility to review even these acts in terms of whether the objectives of the Directive have been respected when they were adopted.[368]

Several EU directives that expressly provide access to justice contain provisions relevant to the **scope of judicial review**. However, most environmental secondary legislation lacks such provisions, and to understand the appropriate coverage, it is necessary to refer to the case law of the CJEU. The CJEU has repeatedly indicated that the public concerned may, in principle, object to any defect in the contested decision.[369] The aspects that can be challenged include even technical criteria, which are important for planning or construction measures. For example, in Case **C-723/17** (***Craeynest and Others***),[370] the CJEU ruled that individuals must be able to challenge the air pollution monitoring system in their cities because the EU law lays down detailed rules concerning the use and location of sampling points to measure air quality in zones and agglomerations comprising the territory of each Member State. The obligation to establish sampling points in such a way that they provide information on the most polluted locations and the obligation to establish at least a minimum number of sampling points are clear, precise, and unconditional. In this respect, the average values across a whole zone or city are insufficient as they may underestimate the exposure to polluted air.

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[367] *"This definition does not include bodies or institutions acting in a judicial or legislative capacity." Similarly, the EIA Directive states in recital 22 that "this Directive should not be applied to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process"*.

[368] See the CJEU judgment of 18 October 2011, *Boxus and Others* (C-128/09, EU:C:2011:667), para. 57: *"Article 9(2) of the Aarhus Convention and Article 10a of Directive 85/337 must be interpreted as meaning that when a project falling within the ambit of those provisions is adopted by a legislative act, it must be possible for the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive to be submitted, under the national procedural rules, to a court of law or an independent and impartial body established by law; if no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous indent and, as the case may be, drawing the necessary conclusions by disapplying that legislative act"*. Also see the CJEU judgment of 16 February 2012, *Solvay and Others* (C-182/10, EU:C:2012:82, para. 52).

[369] See the CJEU judgment of 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* (C-115/09, EU:C:2011:289), para. 37, concerning the EIA Directive: *"The first paragraph of Article 10a of Directive 85/337 provides that the decisions, acts or omissions referred to in that article must be actionable before a court of law through a review procedure 'to challenge [their] substantive or procedural legality', without in any way limiting the pleas that could be put forward in support of such an action."* And the CJEU judgment of 7 November 2013, *Gemeinde Altrip and Others* (C-72/12, EU:C:2013:712), para. 48: *"Moreover, given that one of the objectives of that directive is, in particular, to put in place procedural guarantees to ensure the public is better informed of, and more able to participate in, environmental impact assessments relating to public and private projects likely to have a significant effect on the environment, it is particularly important to ascertain whether the procedural rules governing that area have been complied with. Therefore, as a matter of principle, in accordance with the aim of giving the public concerned wide access to justice, that public must be able to invoke any procedural defect in support of an action challenging the legality of decisions covered by that directive."*

[370] CJEU judgment of 26 June 2019, *Craeynest and Others* (C-723/17, EU:C:2019:533).

The case law of the CJEU allows the grounds for annulment of an unlawful act to be limited to cases of infringement of the subjective right of the applicant - an individual [natural or legal person, but not an environmental NGO in the Art. 9(2) regime, which are deemed to have sufficient interest].[371] On the other hand, the national rules on judicial review cannot restrict access by the public concerned in that it limits the grounds for setting aside the contested decision to cases where there is a possibility that the contested decision would have been different without the procedural defect and the applicant's 'substantive position' (which the applicant would have to prove) is affected. According to the CJEU, it is incompatible with the objective of broad access to judicial protection to require the applicant to prove that a procedural defect is causally linked to the outcome of the decision.[372]

The possibility of submitting the objections conditional on their prior assertion in the administrative proceedings is complicated but not excluded. Such a restriction must take the form of a procedural institute that is directed at exceptional cases. The CJEU's findings preclude a blanket limitation on the scope of the substantive review but not a mechanism that would declare specific objections inadmissible (and therefore unsuitable for closer examination) unless, for example, they were raised without a rational basis.[373] This approach seems to be in line with the practice in a number of Member States. Some of them similarly require the plaintiffs to state directly in the action against the decision why they have not already raised the objections they are raising at this stage. It is possible to legislate for such a procedure, as the CJEU explicitly allows for specific procedural rules, such as the inadmissibility of an argument not raised in good faith or an abusive manner. But still in such a way as to guarantee the efficiency of the judicial procedure. Situations that can be described as abuses of law are rather exceptional in EU law.[374]

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[371] See the CJEU judgment of 15 October 2015, *Commission v Germany* (C-137/14, EU:C:2015:683), para. 32: *"In those circumstances and with regard to the present complaint, it must be pointed out that, if the Member State in question can, pursuant to the abovementioned provisions of Directives 2011/92 and 2010/75, make the admissibility of actions brought by individuals against the decisions, acts or omissions which fall within the scope thereof subject to conditions such as the requirement of impairment of an individual public-law right, that Member State is also authorised to provide that the annulment of an administrative decision by the court having jurisdiction requires the infringement of an individual public-law right of the applicant."*

[372] See the CJEU judgment of 28 May 2020, *Land Nordrhein-Westfalen* (C-535/18, EU:C:2020:391), para. 63: *"…when a procedural defect vitiating the decision approving a project does not alter the meaning of that decision, an application for annulment of that decision is admissible only if the irregularity at issue has denied the claimant his or her right, guaranteed by Article 6 of that directive, to participate in the environmental decision-making process".*

[373] See the CJEU judgment of 15 October 2015, *Commission v Germany* (C-137/14, EU:C:2015:683), paras 80–81: *"As regards the argument concerning the efficiency of administrative procedures, although it is true that the fact of raising a plea in law for the first time in legal proceedings may, in certain cases, hinder the smooth running of that procedure, it is sufficient to recall that the very objective pursued by Article 11 of Directive 2011/92 and Article 25 of Directive 2010/75 is not only to ensure that the litigant has the broadest possible access to review by the courts but also to ensure that that review covers both the substantive and procedural legality of the contested decision in its entirety. None the less, the national legislature may lay down specific procedural rules, such as the inadmissibility of an argument submitted abusively or in bad faith, which constitute appropriate mechanisms for ensuring the efficiency of the legal proceedings."*

[374] See the Opinion of Advocate General Bobek of 19 October 2017, *North East Pylon Pressure Campaing and Sheehy* (C-470/16, EU:C:2017:781), para. 116*: "Whilst it is in theory correct that even basic rules on access to justice may not apply in cases of vexatious litigation, which could also extend to the NPE rule leading for all practical purposes to its 'disapplication', such situations are truly exceptional. On the basis of the information*

As regards the **intensity of the review**, judicial review may be limited in substance, but instruments to ensure the full effectiveness of EU law must be put in place.[375] The competent courts must enforce EU rules to ensure that the decisions adopted by national authorities comply with EU law requirements and that – as much as possible – the actual situation is in accordance with the criteria laid down in the EU Directive.[376] The national judge must also be able to review the validity of EU acts and ask the CJEU a corresponding preliminary question (Art. 267 of the TFEU). While several preliminary questions have asked the CJEU on the validity of EU environmental acts,[377] none has disputed EU acts directly relevant to public construction law.

The role of the national judge is not limited to determining whether a particular decision, act or omission was lawful but also covers the decision on **effective remedies** where the public authority's conduct is found to have been contrary to EU law. This obliges the national courts to order *any measure necessary* to bring the practice in the Member States in line with EU legislation.[378] In particular, the national court dealing with a dispute governed by EU environmental law must be in a position to order interim measures.[379] Only in cases of minor procedural mistakes is there no obligation for effective remedies, provided it can be established that these mistakes did not impact the contested decision of the public authority.[380]

When necessary, national courts must set aside any provisions contrary to EU law, even if these are of a legislative or regulatory nature.[381] Only in exceptional circumstances can

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provided by the referring court, the type of action in the present case is very far from falling into that exceptional category".

[375] See the CJEU judgment of 6 October 2015, *East Sussex County Council* (C-71/14, EU:C:2015:656), para. 58: *"In this respect, the Court has held that the exercise of the rights conferred by EU law is not made impossible in practice or excessively difficult merely by the fact that a procedure for the judicial review of decisions of the administrative authorities does not allow complete review of those decisions. However, also according to that case law, any national judicial review procedure must none the less enable the court or tribunal hearing an application for annulment of such a decision to apply effectively the relevant principles and rules of EU law when reviewing the lawfulness of the decision (see, to that effect, judgments in Upjohn, C-120/97, EU:C:1999:14, paragraphs 30, 35 and 36, and HLH Warenvertrieb and Orthica, C-211/03, C-299/03 and C-316/03 to C-318/03, EU:C:2005:370, paragraphs 75 to 77). Judicial review that is limited as regards the assessment of certain questions of fact is thus compatible with EU law, on condition that it enables the court or tribunal hearing an application for annulment of such a decision to apply effectively the relevant principles and rules of EU law when reviewing the lawfulness of the decision (see, to that effect, judgment in HLH Warenvertrieb and Orthica, C-211/03, C-299/03 and C-316/03 to C-318/03, EU:C:2005:370, paragraph 79)."*

[376] See the CJEU judgment of 26 June 2019, *Craeynest and Others* (C-723/17, EU:C:2019:533).

[377] See the CJEU judgments of 14 July 1998, *Safety Hi Tech* (C-284/95, EU:C:1998:352), of 29 April 1999, *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Standley and Others* (C-293/97, EU:C:1999:215), of 10 November 2016, *Eco-Emballages SA* (C-313/15 and C-530/15, EU:C:2016:859).

[378] See the CJEU judgments of 19 November 2013, *ClientEarth* (C-404/13, EU:C:2014:2382), of 26 May 2011, *Stichting Natuur en Milieu and Others* (C-165/09 to C-167/09, EU:C:2011:348).

[379] CJEU judgment of 15 January 2013, *Križan* (C-416/10, EU:C:2013:8), para. 109: *"…the exercise of the right to bring an action provided for by Article 15a of [the then] Directive 96/61/EC would not make possible effective prevention of that pollution if it were impossible to prevent an installation which may have benefited from a permit awarded in infringement of that directive from continuing to function pending a definitive decision on the lawfulness of that permit. It follows that the guarantee of effectiveness of the right to bring an action provided for in that Article 15a requires that the members of the public concerned should have the right to ask the court or competent independent and impartial body to order interim measures such as to prevent that pollution, including, where necessary, by the temporary suspension of the disputed permit".*

[380] CJEU judgment of 7 November 2013, *Gemeinde Altrip and Others* (C-72/12, EU:C:2013:712).

[381] See the CJEU judgment of 18 October 2011, *Boxus and Others* (C-128/09, EU:C:2011:667), para. 57: *"Article 9(2) of the Aarhus Convention and Article 10a of Directive 85/337 must be interpreted as meaning that*

Member States keep legislation that conflicts with EU law in force or **maintain the effects of, for example, a land-use plan that has not been assessed for its environmental impact** according to the SEA Directive or the Habitats Directive. This is a significant exception from the general rule of EU law – and so far, the only one the CJEU has developed in this respect. However, such a procedure must only be temporary until a new one replaces the contested regulation. Moreover, it should be clear that the environmental risks of repealing the contested regulation in force are likely greater than if its effects are maintained temporarily.[382]

The exceptional possibility of maintaining the effects of measures contrary to EU law cannot be equated with the possibility of using derogation schemes under the EU Directives. It is always necessary to assess whether, taking into account other reasons and alternative solutions available to the Member State concerned to safeguard a particular public interest, the exceptional maintenance of the effects of a measure is justified by the need to counter a threat to that public interest. In any event, such maintenance of effects may only apply for a period of time, which is strictly necessary to remedy the illegality.[383] Such an exceptional rule cannot even be considered a means of alleviating the legal uncertainty resulting from the unclear definitions of EU law, such as *plans and programmes* under the SEA Directive[384] (see Chapter 4.2).

It should be added that the exception does not appear to apply to defective legislation governing spatial planning but only to acts adopted based on such legislation. In other words, the national court, which is responsible for assessing whether those conditions have been met, may, for example, exceptionally not annul a spatial plan because of defects in the SEA process, but it cannot treat the law under which the spatial plan was adopted in the same way. That does not mean, however, that a concept whose effects must be preserved cannot take the form of legislation.[385]

The national court also should not put the EU requirements aside because of the difficulties related to the transposition and practical application for the Member States, which may easily occur in planning and construction-related areas - such as socio-economic situation, large-scale investments and structural changes, or technical difficulties. A Member State that

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when a project falling within the ambit of those provisions is adopted by a legislative act, it must be possible for the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive to be submitted, under the national procedural rules, to a court of law or an independent and impartial body established by law; if no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous indent and, as the case may be, drawing the necessary conclusions by disapplying that legislative act". Also see the CJEU judgment of 16 February 2012, *Solvay and Others* (C-182/10, EU:C:2012:82, para. 52).

[382] See the CJEU judgment of 17 November 2016, *Stadt Wiener Neustadt* (C-348/15, EU:C:2016:882).

[383] See the CJEU judgment of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622).

[384] See the opinion of Advocate General Kokott of 25 January 2018, *Inter-Environnement Bruxelles and Others* (C-671/16, EU:C:2018:39), paras 38–39: *"Finally, Belgium emphasises the legal uncertainty resulting from the case law of the Court as this case law covers numerous general provisions which, since the expiry of the deadline for transposition of the SEA Directive, have been adopted without an environmental assessment. However, this uncertainty is mitigated at least in part by the 2016 judgment in Association France Nature Environnement, which allows national courts, under certain conditions, provisionally to maintain the effects of measures which were adopted in breach of the SEA Directive."*

[385] See the CJEU judgment of 25 June 2020, *A. and Others* (C-24/19, EU:C:2020:503, para. 179).

encounters temporarily insuperable problems preventing it from complying with its obligations under European Union law may plead force majeure only for the period necessary to resolve those difficulties.[386]

Finally, a national court dealing with a dispute governed by EU environmental law must be able to order **interim measures** and award **compensation** for pecuniary damages, provided the conditions for state liability are met.[387] The requirement of effectiveness is also restricted by the protection of human rights. The national court, which has the task of applying EU law, sometimes has to balance a number of fundamental rights. In particular, deprivation of liberty must be a measure of last resort; the judicial protection then lies in compensating damages.[388]

3.4 PARTIAL CONCLUSIONS AND TAKEOUTS

The adoption of the Aarhus Convention by the EU marked a milestone in the development of environmental rights. Notwithstanding EU law, all Member States, as individual Parties to the Convention, are obliged to take the necessary legislative, regulatory, and other measures to implement the provisions of the Convention. However, EU legislation plays a key role in reinforcing Aarhus values in practice through detailed requirements of individual directives or through direct application. It is worth noting that in some Member States, such as Germany,[389] there have been long-lasting calls especially for the NGOs to be given legal standing to ensure the correct application and enforcement of environmental law.

However, the approach of the European Union to implementation of the public participation requirements has been piecemeal, which is somewhat disappointing given that the relevance of the Aarhus Convention as regards the EU on public participation is mainly linked with its legislative role, i.e., with its function of setting forth obligations for its Member States, as the Aarhus Compliance Committee pointed out.[390] It seems that it was relatively underestimated that the inclusion of both troublesome areas, access to justice and public participation in the adoption of plans and programmes, in the Aarhus Convention was fairly swift and

[386] See the CJEU judgments of 19 December 2012, *Commission v Italy* (C-68/11, EU:C:2012:815), of 5 April 2017, *Commission v Bulgaria* (C-488/15, EU:C:2017:267), of 22 February 2018, *Commission v Poland* (C-336/16, EU:C:2018:94). Or the opinion of Advocate General Kokott of 10 November 2016, *Commission v Bulgaria* (C-488/15, EU:C:2016:862), para. 96: *"The air quality plans under Article 23(1) of Directive 2008/50 can also be adopted only on the basis of such a balance of interests. The high importance of ambient air quality for the protection of life and health leaves only very little room for consideration of other interests. It therefore also requires a strict review of the assessment made. However, there are undeniably overriding interests which may preclude certain appropriate measures."*

[387] See the CJEU judgments of 14 March 2013, *Leth* (C-420/11, EU:C:2012:701, paras 36-46); of 22 December 2022, *Ministre de la Transition écologique and Premier ministre (Responsabilité de l'État pour la pollution de l'air)* (C-61/21, EU:C:2022:1015).

[388] See the CJEU judgment of 19 December 2019, *Deutsche Umwelthilfe* (C-752/18, EU:C:2019:1114).

[389] Ziehm, C. Legal Standing for NGOs in Environmental Matters under the Aarhus Convention and under Community and National Law. *Journal for European Environmental & Planning Law*, 2005, vol. 2, no. 4, p. 287.

[390] Case *European Union* ACCC/C/2010/54, ECE/MP.PP/C.1/2012/12, paras 75–76.

uncontroversial, even though those fields had hardly been touched before in Community law.[391]

The EU's legislative role is more important given that not all Member States supported the Convention. When Ireland eventually ratified the Convention in 2012, all Member States became Parties to the Convention, the others having ratified at about the same time as the EU, namely 2005. Despite the obligations stemming from the Aarhus Convention and EU law, the situation in Ireland concerning public participation in environmental matters was described as *„simply dreadful"*.[392]

Despite the crucial role of the EU, since 2005, the implementation measures have been kept to a minimum. Instead, the focus has been on lightening administrative burdens for industry and enterprises. Given the cost, time, and effort involved in designing and implementing interactive environmental governance processes, one would expect a significant degree of evaluation activity to assess their outcomes. The analysis necessarily has to be complex but can focus on the defining knots of the regulatory framework. For example, a recent survey among 103 EIA researchers worldwide[393] shows that keywords associated with problems with public participation feature as one central point in the discourse on EIA procedures.

This minimalistic approach and general indecisiveness towards the international requirements for broader access to justice in environmental matters has also been shared by most Member States - and this development has been counterbalanced only by the CJEU.[394] As a result, the Member States have different public participation standards. Main participatory arenas include formal ones intended for traditional two-way interaction mechanisms (e.g., public hearings). Still, informal arenas are also emerging,[395] which is not reflected by EU law or implementation guidelines, which should focus on good practice in the Member States.

The requirements of EU law on public participation in environmental decision-making, particularly in access to justice, seem complicated to explain and understand even for legal professionals. The adoption of a general directive on access to justice is not probable. The Commission is more likely to include provisions on access to justice in EU legislative proposals for new or revised EU law concerning environmental matters.[396] This will, however, contribute to further fragmentation of EU law and require support by both the

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[391] See Jendrośka, J. Aarhus Convention and Community Law: the Interplay. *Journal for European Environmental and Planning Law*, 2005, vol. 2, no. 1, p. 14–15.

[392] Swords, P. Seveso III – The Public Participation Challeng. In: Institution of Chemical Engineers. *25th Institution of Chemical Engineers Symposium on Hazards 2015 (HAZARDS 25)*. Edinburg: Institution of Chemical Engineers, 2015, p. 439.

[393] Nita, A., Fineran, S., Rozylowicz, L. Researchers' perspective on the main strengths and weaknesses of Environmental Impact Assessment (EIA) procedures. *Environmental Impact Assessment Review*, 2022, vol. 92, no. 1, 106690.

[394] Darpö, J. Pulling the Trigger: ENGO Standing Rights and the Enforcement of Environmental Obligations in EU Law. In: Bogojević, S., Rayfuse, R. (eds.) *Environmental Rights in Europe and Beyond. Swedish Studies in European Law*. Oxford: Hart Publishing, 2018, 255–256.

[395] See Suškevičs, M., Ehrlich, T., Peterson, K., Hiiemäe, O., Sepp, K. Public participation in environmental assessments in the EU: A systematic search and qualitative synthesis of empirical scientific literature. *Environmental Impact Assessment Review*, 2023, vol. 98, no. 1.

[396] European Commission. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions. Improving access to justice in environmental matters in the EU and its Member States. 14. 10. 2020, COM (2020) 643 final, para. 33.

Parliament and the Council. While the Parliament seems to be willing to support public participation in environmental matters, the Council has been very reluctant to adopt such provisions, for example, in water management. This seems to be the main reason why the detailed access to justice requirements are enshrined in the Seveso III Directive, and the Environmental Liability Directive adopted around the same time but not yet in other legislation proposed later on for almost a decade.[397]

Therefore, on the one hand, we may witness a declared interest in strengthening public participation. On the other hand, the legal measures do not correspond to this interest, and the main challenges associated with the low impact of the public or the stakeholders on decisions and timing of participation are not addressed.

Furthermore, the new legislation which is adopted leaves much to be desired. For example, the Aarhus Directive does not reflect further developments in EU legislation. As observed, it was first amended to complete the list of the plans and programmes which require public consultation for their adoption. Nevertheless, such amendments have not been adopted later on, despite numerous new plans and programmes required by EU directives (see Chapters 4 and 5). These are some of the insufficiencies in the implementation of the Aarhus Convention at the EU level that the national authorities must regularly deal with. Similarly, the Habitats Directive has not been amended to set rules for public participation and access to justice after the CJEU clarified it falls under Art. 6 of the Aarhus Convention. One may argue that public participation requirements are met in this case as the assessment procedure is usually merged with the EIA or the SEA. But it does not have to be because the scope of the Directives is different.

The CJEU case law nevertheless strongly echoes the Aarhus *ethos* and emphasises the need for effective public participation, including costs and time limits. According to the CJEU, Member States cannot completely exclude the participation of the public concerned in the permitting procedure if it follows (or is part of) the EIA process and the Natura 2000 assessment or integrated permitting under the IED. Nor can the Member States completely exclude access to judicial protection in decision-making or planning where EU law is applied, in line with the general guarantee provided by Art. 47 of the EU Charter. This seems to form the minimum standard of judicial protection in environmental matters. The discretion left to the Member States regarding the aspects of the judicial review is narrower under the Art. 9(2) of the Aarhus Convention regime and considerably wider under the Art. 9(3) of the Aarhus Convention regime.

Recent case law of the CJEU focuses on the intensity of judicial review and effective remedies, further explaining basic requirements for adequate judicial protection. Given the technical nature of EU environmental legislation and its problematic enforcement, such case law seems extremely valuable.

To sum up, the scope of public participation in decision-making and access to justice in environmental matters is rather broad. However, It is dependent on the CJEU case law and provisions of EU Directives implementing the Aarhus Convention, which determine the scope

[397] See the proposal for a Directive on the quality of water intended for human consumption (recast), 1. 2. 2018, COM (2017) 0753, Art. 16 (*Access to justice*).

of the planning and permitting procedures, particularly the EIA Directive, the SEA Directive, and the Habitats Directive. Therefore, further analysis of this legislation is needed.

4. CURRENT ENVIRONMENTAL REQUIREMENTS

This chapter focuses on the environmental requirements developed under the EU directives and regulations since 2000, their aim, scope, and public participation requirements.

The scope is analysed with regard to the applicability of the requirements to spatial plans and construction projects. This is because the terminology of the EU legislation is not consistent. For example, a project refers to a *proposed activity which may have a significant effect on the environment*.[398] However, which specific activities fall under such a definition varies from directive to directive. Some directives do not even use the terms project, activity, or any other term for development activities - and their impact on construction permitting is only apparent from the requirement of the result to be achieved.

The scope of the major EU environmental requirements is much tied with the basic terms which determine the applicability of environmental directives – *a project*, *a development consent*, *a plan*, or *a programme*. Generally, only after a specific construction activity, a decision, or a planning act is subsumed under these terms. Similarly, outside public construction law, one of the key terms of the EU environmental law is *installation*.[399]

The Member states are provided with seemingly broad discretion when implementing the EU environmental directives. Such discretion, however, does not apply to their interpretation. While too broad a scope of impact assessment burdens administrative authorities and developers unnecessarily, a narrowly defined scope can clash with EU requirements. Both may, as a result, frustrate the development of an area for a long time.

The uncertainty as to which specific acts need to be assessed and to what extent when new rules are developed for planning and permitting processes may easily hinder the attempts to optimise impact assessment and public construction procedures. In the case of various special permits, hybrid acts, or general technical requirements, mapping the EU requirements is not trivial. The case law of the CJEU provides useful if still limited, guidance, which is not surprising given the diversity of national planning and permitting systems.

Moreover, it is possible to assume that the complexity of EU rules undermines the objective of effective public participation in decision-making. It cannot be simply concluded that Member States intend to exclude the public from decision-making or make such participation unnecessarily difficult. However, as will be seen, it may not be clear which projects require public participation for permitting. It is even less clear from the EU legislation what the relationship is between the various permitting procedures under the various directives, including those related to each other, which in practice often form a coherent set of permits required for project implementation.

The analysis focuses on the main requirements of the backbone legislation. However, other requirements should not be neglected as their importance may increase depending on the specific location or time.

[398] See the Aarhus Convention, Art. 6(1).
[399] See the CJEU judgment of 15 December 2011, *Møller* (C-585/10, EU:C:2011:847).

An example is the requirements for the **selection of storage sites for carbon dioxide** according to Art. 4 of Directive 2009/31/EC.[400] Member States retain the right to determine (or not to determine) the areas from which storage sites may be selected. Nevertheless, the suitability of a geological formation for use as a storage site must be determined by characterising and assessing the potential storage complex and surrounding area pursuant to the criteria specified in Annex I of the Directive.[401] Furthermore, a geological formation shall only be selected as a storage site if there is no significant risk of leakage under the proposed conditions of use and if no significant environmental or health risks exist.[402] The Directive, therefore, sets specific rules complementing the EIA – and with the adoption of the Directive, the 1985 EIA Directive was amended to include storage facilities and infrastructure.

Another example is **soil protection,** which is spread among many EU directives,[403] and the call for its comprehensive regulation was already formulated in the 2001 Sixth Environmental Action Programme.[404] However, the 2006 Soil Protection Framework Directive proposal[405] was somewhat surprisingly[406] rejected by the Member States[407] and later withdrawn by the Commission.[408] The objections against the proposal pointed at, *inter alia*, the vast scope of the Directive and its unclear relationship with the SEA procedure.[409] Recently, a new Soil Monitoring Directive[410] has been proposed following the EU Soil Strategy for 2030[411] and the EU Biodiversity Strategy for 2030.[412] However, the impact of this Directive on public construction law appears to be very limited so far. This is because the soil monitoring framework will primarily provide the data and information needed to determine the suitable measures.

One of the five priority avenues of strategic action to meet the environmental objectives of the **Sixth Environmental Action Programme** (2002–2012) was to encourage better land-use

[400] Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006. OJ L 140, 5. 6. 2009, p. 114–135.
[401] *Ibid*, Art. 4(3)
[402] *Ibid*, Art. 4(4).
[403] See Heuser, I., L. Milestones of Soil Protection in EU Environmental Law. *Journal for European Environmental & Planning Law*, 2006, vol. 3, no. 3, p. 190–203.
[404] Sixth Environmental Action Programme, Art. 6(1).
[405] European Commission. Proposal for a Directive of the European Parliament and the Council establishing a framework for the protection of soil and amending Directive 2004/35/EC. 22. 9. 2006, COM (2006) 0232 final.
[406] See Vanheudsen, B. Recent Developments in European Policy Regarding Brownfield Remediation. *Environmental Practice*, 2009, vol. 11, no. 4, p. 258.
[407] European Commission. Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 13. 2. 2012, COM (2012) 46 final.
[408] European Commission. Withdrawal of obsolete Commission proposals, 21. 5. 2014, OJ C 153/3.
[409] See Vomáčka, V. Unijní požadavky na ochranu půdy: Co se stalo s rámcovou směrnicí? In: Tkáčiková, J., Vomáčka, V., Židek, D. et al. *Půda v právních vztazích – aktuální otázky*. Brno: Masaryk University, 2020. p. 88.
[410] European Commission. Proposal for a Directive of the European Parliament and the Council on Soil Monitoring and Resilience (Soil Monitoring Law). 5. 7. 2023, COM (2023) 416 final.
[411] European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU Soil Strategy for 2030 Reaping the benefits of healthy soils for people, food, nature and climate. 17. 11. 2021, COM (2021) 699 final.
[412] European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Biodiversity Strategy for 2030 Bringing nature back into our lives. 20. 5. 2020, COM (2020) 380 final.

planning and management decisions, which is crucial to address the complex interplay of different forces and pressures that give rise to environmental problems. In this respect, the role of the Structural Funds was emphasised.[413]

Nevertheless, of all environmental and other legislation adopted at the EU level, the chapter *Greening Land-Use Planning and Management Decisions* only pointed out that the EIA and SEA will *"help ensure that the environmental considerations are better integrated into planning decisions. Beyond this the Community can only play a role of encouraging and promoting effective planning and adequate policies at the local and regional levels."*[414]

Indeed, initiatives such as the Sustainable Cities Network and the Integrated Coastal Zone Management pilot programme could contribute to better planning and decision-making. However, such a statement seems to downplay the apparent tendency in EU environmental law, in contrast to other parts of the Programme,[415] to introduce planning requirements in many areas, from waste management to air protection, which must be reflected in general planning procedures.

The Sixth Environmental Action Programme, therefore, captured an inevitable political stalemate that the Union has reached: On the one hand, it could hardly back away from the requirement to address complex environmental problems by integrating them into other policies with a critical role for spatial planning; on the other hand, it could not come up with direct regulation of spatial planning. The actions of the Programme for greening land-use planning and management decisions mostly focus on raising attention or spreading best practices for sustainable planning. This indecision is characteristic of the entire Programme, which mostly lacks clear objectives and deadlines and leaves the adoption of more detailed policy proposals and the selection of specific policy instruments to the thematic strategies.

The hostile overall political atmosphere and disputes regarding the future of the European project affected the preparation of the **Seventh Environmental Action Programme** (2014–2020),[416] which was adopted with a three-year gap in 2014 and unlike the previous action programmes, it did not set any clear targets for the preparation of specific legislation, and logically no deadlines for the implementation of such targets. The change in the conceptual approach emphasised the growth strategy to create a smart, green, and inclusive economy[417] which helps to develop areas such as waste management further (see Chapter 5.7). Moreover, fighting climate change was identified as the primary motive for progress on integrating

[413] *Ibid*, Executive summary: *"Land use planning and management decisions in the Member States can have a major influence on the environment, leading to fragmentation of the countryside and pressures in urban areas and the coast. The Community can provide support by promoting best practice and through the Structural Funds."*

[414] Sixth Environmental Action Programme, point 2.5.

[415] See chapter 5.6 (*Ensuring the Sustainable Use and High Quality of Our Water Resources*): *"There is also a need to update certain legislation such as the Bathing Water Directive to take account of new scientific evidence and technological developments. Member States also need to take steps to ensure they are integrated into local planning and land-use decisions."*

[416] Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet'. OJ L 354, 28. 12. 2013, p. 171–200.

[417] See Vomáčka, V., Jančářová, I. Sedmý akční program pro životní prostředí – Obr na nejistých nohách. *České právo životního prostředí*, 2015, vol. 15, no. 1, p. 61–110.

resource efficiency, climate change, and energy efficiency concerns into other vital sectors, such as transport and buildings.

The Seventh Environmental Action Programme stressed the role of sustainable maritime spatial planning.[418] It emphasised that *"Environmental considerations including water protection and biodiversity conservation should be integrated into planning decisions relating to land use so that they are made more sustainable, with a view to making progress towards the objective of 'no net land take', by 2050."*[419] For soil protection, coordinated decision-making involving all relevant levels of government, supported by the adoption of targets on soil and land as a resource, and land planning objectives was foreseen without any details provided.[420] Sustainable development was supposed to build on *"effective and efficient coordination between different levels of administration and across administrative boundaries and the systematic involvement of regional and local authorities in the planning, formulation and development of policies which have an impact on the quality of the urban environment"*[421] with integrated approaches to urban and spatial planning, in which long-term environmental considerations are fully taken into account.

Nevertheless, no new legislative measures were proposed to achieve such integration. The EIA and SEA were identified as practical tools for ensuring that environmental protection requirements are integrated into plans and programmes as well as in projects[422] with a particular emphasis on the decision-making of the local and regional authorities,[423] which, however, does not seem to be capable of solving the task of more effective integration of environmental and climate-related considerations into other policies.

Regarding **public participation**, the Seventh Environmental Action Programme mainly promised that the Union citizens would have effective access to environmental justice and legal protection.[424]

The **Eighth Environmental Action Programme** to 2030, adopted in April 2022,[425] establishes the objective to achieve a non-toxic environment protecting the health and well-being of people, animals, and ecosystems from environment-related risks and negative impacts, and, for that purpose, stipulates that further improvement of monitoring methods, better information to the public and access to justice are needed. It is more streamlined and targeted compared to the previous action programme.[426] Unlike the Seventh Environmental Action Programme, the new action programme does not mention spatial (or any other)

[418] *Ibid*, para. 21.
[419] *Ibid*, para. 23.
[420] Ibid, Thematic priorities, Priority objective 1.
[421] *Ibid*, para. 95.
[422] *Ibid*, para. 85.
[423] *Ibid*, para. 86: *"Local and regional authorities, which are generally responsible for decisions on the use of land and marine areas, have a particularly important role to play in assessing environmental impacts and protecting, conserving and enhancing natural capital, thus also achieving greater resilience to the impact of climate change and to natural disasters."*
[424] *Ibid*, para. 62.
[425] Decision (EU) 2022/591 of the European Parliament and of the Council of 6 April 2022 on a General Union Environment Action Programme to 2030, OJ L 114, 12. 4. 2022, p. 22–36.
[426] See Pindaru, L., C., Nita, A., Niculae, I., M., Manolache, S., Rozylowicz, L. More streamlined and targeted. A comparative analysis of the 7th and 8th Environment Action Programmes guiding European environmental policy. *Heliyon*, 2023, vol. 9, no. 9, e19212.

planning, building materials or construction permitting. The integrated approach to policy development and implementation should be strengthened by mainstreaming the priority objectives, maximising the benefits from implementing the EIA Directive and the SEA Directive, systematically screening, and, where appropriate, assessing synergies and potential trade-offs between environmental, social, and economic objectives for all initiatives, adopting a 'Think Sustainability First' approach and regularly evaluating existing policies.[427]

As regards **public participation**, the Eight Environmental Action Programme merely proclaimed that *"access to environmental information, public participation in environmental decision-making, and access to justice, including transparent engagement with and between public authorities at all levels of decision-making, non-governmental actors and the broader public, in line with the Convention on access to information, public participation in decision-making and access to justice in environmental matters (the 'Aarhus Convention'), are important for ensuring the success of the 8th EAP"*[428] with one of the enabling conditions to attain the priority objectives being *"effectively applying high standards of transparency, public participation and access to justice in accordance with the Aarhus Convention both at Union and Member State level."*[429]

It is rather striking to see the significant differences between the two most recent action programmes, given that the goals of the Seventh Environmental Action Programme have not been fulfilled. The analysis of the legislation and case law in the following chapters will show that the efforts to achieve a higher level of integration have not materialised. Similarly, public participation requirements have not been considerably strengthened over the last decade.

4.1 ENVIRONMENTAL IMPACT ASSESSMENT

The current version of the EIA holds to all significant requirements introduced in 1985. Its amendments often follow the conclusions of the CJEU case law. They are led by the need to adapt the Directive to the policy, legal, and technical context, which has evolved considerably.[430] Furthermore, the evolution of the EIA requirements is marked by attempts to reduce administrative complexity, raise the quality of the assessment, and cover emerging fields such as climate protection or vulnerability to major accidents or disasters.[431]

The application of the 1985 EIA Directive has not been without issues. Its evaluation in 2009 pointed out an increasing complexity of the EIA, considerable overlaps with other directives, the need for simplification, a lack of standardised approach to dealing with transboundary issues, and inadequate training of the necessary skills and competence at the local

[427] Eighth Environmental Action Programme, Art. 3(d).
[428] *Ibid*, preamble para. 35.
[429] *Ibid*, Art. 3(af).
[430] See European Commission. Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application and effectiveness of the EIA Directive (Directive 85/337/EEC, as amended by Directives 97/11/EC and 2003/35/EC). COM (2009) 0378 final.
[431] See Jiricka-Pürrer, A., Wachter, T., F., Margelik, E., Leitner, M., Völler, S., Czachs, C., Formayer, H. "UVPklimafit-Infoportal": ein Wegweiser zur Bearbeitung der Klimafolgenanpassung in der Umweltverträglichkeitsprüfung. *UVP-report*, 2018, vol. 32, no. 4, p. 189–197.

administrative level.[432] Research has demonstrated that the EIA practised in the EU is heavily biased towards investigating economic impacts.[433] To a considerable extent, the EU legal regulation shares or inherits weaknesses of the international requirements on transboundary EA (TEIA):[434] a) difficulties in identifying which decision constitutes the *final decision*, because multiple decisions may be involved in permitting and licensing systems; b) difficulties in determining whether or not an activity, and in particular a modification to an existing activity, fell under the provisions of the Convention; c) a lack of clarity over time frames for carrying out public participation and consultation; d) a lack of information on opportunities for the affected Party to participate in the procedure to determine the content of the environmental impact assessment documentation; e) a lack of clarity over whether transboundary impacts should be identified based on the Party of origin's or the affected Party's legislation; f) uncertainty over, and a lack of specification of, provisions for translation.[435]

Other problems are provided by the 2006 collection on the Czech, Slovak, Polish, Hungarian, and Estonian EIA and transport infrastructure cases composed by Justice & Environment (European network on environmental law organisations):[436] failures to carry out the EIA of the whole project (*salami-slicing* of the roads), insufficient assessment of all the impacts of the projects, particularly indirect and synergic effects, non-assessment of alternatives of the projects, failure to guarantee effective and timely public participation, especially to present all information in reasonable form and time frames and to take into account comments by the public.[437]

The 1997 amendment[438] to the 1985 EIA Directive admitted it was *„necessary to introduce provisions designed to clarify, supplement and improve the rules on the assessment procedure, in order to ensure that the Directive is applied in an increasingly harmonized and efficient manner"*.[439] Accordingly, the amendment mainly focused on a) determining which projects should be subject to assessment based on the significance of their environmental effects and b) the scope of the assessment.

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[432] Van Nierop, P. *Evaluation on EU Legislation – Directive 85/337/EEC (Environmental Impact Assessment)*, 2010, European Institute for Gender Equality [online]. 2022 [accessed on: 11 June 2023]. Available at: < https://policycommons.net/artifacts/1955100/evaluation-on-eu-legislation/2706868/>.

[433] Lee, N., Kirkpatrick, C. Evidence-based policy-making in Europe: an evaluation of European Commission integrated impact assessments. *Impact Assessment and Project Appraisal*, 2006, vol. 24, no. 1, p. 23–33.

[434] See UNECE. Implementation of the Convention on Environmental Impact Assessment in a Transboundary Context (2016–2018). Sixth review, 2021, ECE/MP.EIA/32.

[435] *Ibid*, p. 15. The report states that these difficulties result from a lack of clarity in the legal provisions and lists a major general weakness in the Convention's implementation that *„Parties' definitions of and approaches to key terms in the Convention, such as "impact", "transboundary impact" and "major change", continue to differ, with a few Parties not defining some of these terms in their national legislation. This may lead to potential problems, particularly if the consequence is a lack of clarity about which proposed activities fall within the scope of the Convention (arts. 1 and 6)."*

[436] Justice & Environment. Case Study Collection EIA and transport infrastructure. Implementation of the EIA Directive and Transport Infrastructure Case Study Summary. 2006, Amsterdam.

[437] *Ibid*, p. 11.

[438] 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. Official Journal L 073, 14. 3. 1997, p. 5–15.

[439] *Ibid*, preamble para. 4.

The **requirements on public participation** had not gone through any major overhaul in 1997;[440] only Art. 6(2) of the 1985 EIA Directive was adjusted to stipulate the information gathered according to Art. 5 must be made available to the public *within a reasonable time*. Significant updates to the public participation requirements, in particular access to justice, were brought by the already mentioned Aarhus Directive.

An apparent deficiency of the 1985 EIA Directive was the insufficient implementation of the principles concerning the final decision covered by the provisions of the Art. 6(8) of the Aarhus Convention, i.e., the decision has to be justified, mentioning how the public input was considered and made publicly available. Art. 9(1) of the 1985 EIA Directive only required the decision to be justified, without the need for the decision to justify how the public input was taken into consideration. The 2011 EIA Directive after the 2014 amendment[441] requires that when a decision to grant or refuse development consent is taken, the public is *promptly* informed, and the following information is made available: (a) the content of the decision and any conditions attached thereto; (b) the main reasons and considerations on which the decision is based, including information about the public participation process. This also includes the summary of the results of the consultations and the information gathered pursuant to Art. 5–7 and how those results have been incorporated or otherwise addressed.[442]

Furthermore, new Art. 8a(1) requires the decision to grant development consent to incorporate at least the reasoned conclusion referred to in Article 1(2)(g)(iv) of the EIA Directive and *"any environmental conditions attached to the decision, a description of any features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment as well as, where appropriate, monitoring measures"*. According to Art. 8a(2) of the EIA Directive, the decision to refuse development consent shall state the main reasons for the refusal.

The 2014 amendment was extensive, affecting almost every Article of the pre-existing legislation and introducing significant additions in four broad categories: 'purely' procedural requirements, screening, quality, and monitoring.[443] It also helped to clarify important definitions, purpose, and scope of the EIA, duties of the authorities (new Art. 9a), and rules on penalties applicable to infringements of the national provisions adopted pursuant to the EIA Directive (new Art. 10a). Minimum content of the development consent has been enacted in the new Art. 8a of the EIA Directive. Not all changes were made for the protection of the environment, though. For example, the scoping phase was restricted, and fracking ceased to be subject to mandatory EIA.[444] In sum, the amendment does not represent the desired big

[440] See Sheate, W., R. The environmental impact assessment amendment Directive 97/11/EC - A small step forward? *European Environmental Law Review*, 1997, vol. 6, no. 8/9, p. 235–243.
[441] 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, p. 1–18.
[442] EIA Directive, Art. 9(1).
[443] See Arabadjieva, K. 'Better Regulation' in Environmental Impact Assessment: The Amended EIA Directive. *Journal of Environmental Law*, 2016, vol. 28, no. 1, p. 159–168.
[444] See Hartlik, J. Bleibt alles anders?: die UVP-Richtlinien-Novellierung. *UVP-REPORT*, 2014, vol. 28, no. 1, p. 2–5.

step forward in creating a viable regime of EIA, but on the other hand, it has to be seen as more than a mere minimum consensus of the Member States in this field.[445]

Some improvements have also been made to the **public participation** requirements, but not in a significant way. For example, the EIA Directive now reflects that timely environmental information should also be accessible in electronic format.[446] Such a requirement is also applicable to decision-making procedures following the EIA.[447] Furthermore, Art. 6(7) of the Directive stipulates that the timeframes for consulting the public concerned on the environmental impact assessment report referred to in Article 5(1) of the Directive shall not be shorter than 30 days. However, there is no minimum limit for the timeframes for the public concerned to prepare and participate effectively in environmental decision-making. It must be *only* reasonable.[448]

These changes brought the EIA Directive finally more in line with the Aarhus Convention, which mentions that the notification should be *"by public notice or individually"*,[449] *"early in the environmental decision-making procedure"*,[450] and *"in an adequate, timely and effective manner"*.[451] The previous requirement that the notification should be made *within a reasonable time* left open for Member States to specify measures of notification, which does not seem sufficient from the Aarhus perspective. The 2014 amendment adjusted how the consultation is reflected in the development procedure. Before, it was *taken into consideration*; now, it must be *duly taken into account*.[452]

In summary, the 2014 amendments have succeeded in strengthening decision-making in two respects: firstly, a more formal and transparent justification for decision-making has been achieved; secondly, the amendments aim to ensure that environmental considerations continue to be assessed during the actual construction phase or the operational phase of the project, as well as in all subsequent authorisation procedures. The question arises, however, as to why similar requirements were not included in the original version of the Directive, or in the 1985 EIA Directive as amended by the Aarhus Directive.

Tab. 1: DEVELOPMENT OF KEY PROVISIONS OF THE EIA DIRECTIVE

Year	**1985**	**1997**	**2011**	**2014**
Derogatory regime [Art. 2(3), Art. 2(4)]	Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive. In this event, the Member States	no change	Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.	no change

[445] Mayer, C. Directive 2014/52/EU: Big Step Forward or Merely Minimum Consensus? – An Attempt to Evaluate the New EU – Regulations on the Assessment of the Effects of Certain Public and Private Projects on the Environment. *Law Review*, 2016, no. 1, p. 97–108.
[446] Directive 2014/52/EU, preamble para 18.
[447] EIA Directive, Art. 6(2).
[448] EIA Directive, Art. 6(6)(b).
[449] Aarhus Convention, Art. 6(2).
[450] *Ibid.*
[451] *Ibid.*
[452] EIA Directive, Art. 8.

	shall: (a) consider whether another form of assessment would be appropriate and whether the information thus collected should be made available to the public; (b) make available to the public concerned the information relating to the exemption and the reasons for granting it; (c) inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, where appropriate, to their own nationals.		In that event, the Member States shall: (a) consider whether another form of assessment would be appropriate; (b) make available to the public concerned the information obtained under other forms of assessment referred to in point (a), the information relating to the decision granting exemption and the reasons for granting it; (c) inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, where applicable, to their own nationals.	
Public participation in decision-making [Art. 6(2)]	Member States shall ensure that: - any request for development consent and any information gathered pursuant to Article 5 are made available to the public, - the public concerned is given the opportunity to express an opinion before the project is initiated. 3. The detailed arrangements for such information and consultation shall be determined by the Member States, which may in particular, depending on the particular characteristics of the projects or sites concerned: - determine the public concerned, - specify the places where the information can be consulted, - specify the way in which the public may be informed, for example by bill-posting within a certain radius, publication in local newspapers, organization of exhibitions with plans, drawings, tables, graphs, models, - determine the manner in which the public is to be consulted, for example, by written submissions, by public enquiry, - fix appropriate time limits for the various stages of the procedure in order to ensure that a decision is taken within a reasonable period.	Member States shall ensure that any request for development consent and any information gathered pursuant to Article 5 are made available to the public within a reasonable time in order to give the public concerned the opportunity to express an opinion before the development consent is granted.	The public shall be informed, whether by public notices or by other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided: (a) the request for development consent; (b) the fact that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that Article 7 applies; (c) 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; (d) the nature of possible decisions or, where there is one, the draft decision; (e) an indication of the availability of the information gathered pursuant to Article 5; (f) an indication of the times and places at which, and the means by which, the relevant information will be made available; (g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.	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, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided: (a) the request for development consent; (b) the fact that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that Article 7 applies; (c) 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; (d) the nature of possible decisions or, where there is one, the draft decision; (e) an indication of the availability of the information gathered pursuant to Article 5; (f) an indication of the times and places at which, and the means by which, the relevant information will be made available; (g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.
Public participation in decision-making [Art. 6(3)–6(7)]			Art. 6(3) – Art. 6(6): 3. Member States shall ensure that, within reasonable time-frames, the following is made available to the public concerned: (a) any information gathered pursuant to Article 5; (b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article; (c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information (6), information other than that referred to in paragraph 2	Art. 6(3) – Art. 6(6): 3. Member States shall ensure that, within reasonable time-frames, the following is made available to the public concerned: (a) any information gathered pursuant to Article 5; (b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article; (c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public

			of this Article which is relevant for the decision in accordance with Article 8 of this Directive and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article. 4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken. 5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States. 6. Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article.	access to environmental information (7), information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 of this Directive and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article. 4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken. 5. The detailed arrangements for informing the public, for example by bill posting within a certain radius or publication in local newspapers, and for consulting the public concerned, for example by written submissions or by way of a public inquiry, shall be determined by the Member States. Member States shall take the necessary measures to ensure that the relevant information is electronically accessible to the public, through at least a central portal or easily accessible points of access, at the appropriate administrative level. 6. Reasonable time-frames for the different phases shall be provided for, allowing sufficient time for: (a) informing the authorities referred to in paragraph 1 and the public; and (b) the authorities referred to in paragraph 1 and the public concerned to prepare and participate effectively in the environmental decision-making, subject to the provisions of this Article. 7. The time-frames for consulting the public concerned on the environmental impact assessment report referred to in Article 5(1) shall not be shorter than 30 days.
Informing of the decision [Art. 9]	When a decision has been taken, the competent authority or authorities shall inform the public concerned of: - the content of the decision and any conditions attached thereto, - the reasons and considerations on which the decision is based where the Member States' legislation so provides. The detailed arrangements for such information shall be determined by the Member States. If another Member State has been informed pursuant to Article 7, it will also be informed of the decision in question.	1. When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public thereof in accordance with the appropriate procedures and shall make available to the public the following information: - the content of the decision and any conditions attached thereto, - the main reasons and considerations on which the decision is based,	…information: (a) the content of the decision and any conditions attached thereto; (b) having examined the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process; (c) a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects. 2. The competent authority or authorities shall inform any Member State which has been consulted pursuant to Article 7, forwarding to it the information	no change

		- a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects. 2. The competent authority or authorities shall inform any Member State which has been consulted pursuant to Article 7, forwarding to it the information referred to in paragraph 1.	referred to in paragraph 1 of this Article. The consulted Member States shall ensure that that information is made available in an appropriate manner to the public concerned in their own territory.	
Access to justice [Art. 11]			1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned: (a) having a sufficient interest, or alternatively; (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition; have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive. 2. Member States shall determine at what stage the decisions, acts or omissions may be challenged. 3. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To that end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 of this Article. 4. The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law. Any such procedure shall be fair, equitable, timely and not prohibitively expensive. 5. In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.	no change

The role of the public in the EIA procedure has also been elevated indirectly. For example, after the 2014 amendment, the EIA directive puts more emphasis on the alternatives to the project: Before, the developer had to provide *"an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the*

environmental effects,"[453] meanwhile now the information must include *"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"*.[454] In this respect, public consultations can help to identify reasonable alternatives which is recognised by the 2017 guideline on the preparation of the EIA report:[455] "*Not only do the public concerned have local knowledge, which should be utilised, they may also give an indication of the reasonableness of an Alternative. Moving a bridge 15km downstream may increase environmental benefits, but if Developers have to fight or compensate commuters upset about an increased journey to work, then the Alternative may be deemed unreasonable."*[456]

Even after amendments, the revised EIA Directive leaves room for different interpretations on core issues. Tegner Anker assumes that this is likely to result in diverging practices in the Member States as well as in further litigation on EIA matters, as the review missed out on a more thorough discussion of fundamental issues linked to the character and scope of EIA.[457] This conclusion is supported by the recent case law of the CJEU cited below.

Key elements to determine the scope of the EIA Directive are the concepts of *a project* and *a development consent*. The EIA Directive provides a **definition of a project** *('project' means the execution of construction works or of other installations or schemes, other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources*[458]) and lists categories of projects in its Annex I and Annex II.

Regarding ***smaller*** **projects**, the EIA Directive suggests that the decisive factors in determining whether a project requires the EIA are its nature, location, and size.[459] Some types of projects may not have significant effects on the environment in every case. For these projects, Member States may set thresholds or criteria for the purpose of determining projects of types which should be subject to assessment on the basis of the significance of their environmental effects. The thresholds should reflect the relevant selection criteria set out in Annex III (characteristics, location, potential impact). Member States should not be required to examine projects below those thresholds or outside those criteria on a case-by-case basis.[460]

In practice, however, the Member States often set thresholds in a similar way as the EIA Directive sets limits for Annex I or Annex II projects based on the capacity or size of the projects, not their location. Such practice has been criticised by the CJEU, which held that a Member State that establishes thresholds or criteria that take account only of the dimension of the projects, without taking into consideration the criteria in Annex III of the EIA Directive,

[453] EIA Directive, Art. 5(3)(d).
[454] EIA Directive, Art. 5(1)(d).
[455] European Commission. Environmental Impact Assessment of Projects Guidance on the preparation of the Environmental Impact Assessment Report. 2017, Brussels, 130 p.
[456] *Ibid*, 1.5.2, p. 55.
[457] Tegner Anker, H. Simplifying eu Environmental Legislation – Reviewing the EIA Directive? *Journal for European Environmental & Planning Law*, 2014, vol. 11, no. 4, p. 321–347.
[458] Directive EIA, Art. 2(2)(a).
[459] See EIA Directive, Art. 2(1), Art. 4(6), Art. 5(2), Art. 8a(4); CJEU judgment of 3 March 2011, *Commission v Ireland* (C-50/09, EU:C:2011:109, para. 100).
[460] See the EIA Directive, preamble paras 9–10, Art. 4(1), Art. 4(3).

exceeds its margin of discretion under Article 2(1) and Article 4(2) of that Directive.[461] The Member States, therefore, cannot exclude expressly or impliedly one or more of the criteria in Annex III, in so far as any of those criteria may, depending on which project in the categories listed in Annex II is concerned, be relevant for ascertaining whether an environmental impact assessment procedure must be organised.[462] For example, the CJEU has already rejected the argument that the environmental impact of urban development projects in urban areas is practically non-existent because Annex III lists criteria relating to densely populated areas and landscapes of historical, cultural, and archaeological significance.[463] Such guidance was, however, provided in the proceedings against a Member State, and therefore, it was not binding on all Member States.

Nevertheless, recently, in judgment in Case **C-575/21** (***WertInvest Hotelbetrieb***),[464] the CJEU concluded that the EIA Directive prevents national (in this case Austrian) legislation which provides that urban development projects are subject to an environmental impact assessment only when they occupy at least 15 hectares and have a gross floor area above 150 000 m², without taking account of their location, thereby excluding a case-by-case examination of the need to carry out environmental impact assessments of urban development projects in sites of historical, cultural or archaeological significance, such as UNESCO World Heritage Sites. This means that a Member State that establishes criteria or thresholds limited to the size of projects only, without considering their nature and location, exceeds the limits of its discretion in the transposition of the EIA Directive.

The CJEU added that in the context of a case-by-case examination as to whether a project is likely to have significant effects on the environment, the competent authority must examine the project concerned with regard to all the selection criteria listed in Annex III of the EIA Directive, in order to determine the relevant criteria in the particular case and must then apply those relevant criteria to the particular situation.[465] Furthermore, members of the public concerned must be able to challenge a decision that there is no need for an environmental impact assessment.[466]

Larger projects are likely to fall under the requirements of multiple directives. In particular, the CJEU held that if an activity falls within the definition of a project under the EIA Directive, it is all the more likely to fall within the Habitats Directive.[467] However, this may not always be the case. As the CJEU held in Case **C-293/17** (***Coöperatie Mobilisation for the***

[461] See the CJEU judgment of 24 March 2011, *Commission v Belgium* (C-435/09, EU:C:2011:176, para. 55).
[462] See the CJEU order of 10 July 2008, *Aiello and Others* (C-156/07, EU:C:2008:398, para. 50).
[463] See the EIA Directive, point 2(c)(vii) and (viii) of Annex III; CJEU judgment of 16 March 2006, *Commission v Spain* (C-332/04, EU:C:2006:180, paras 79–80)
[464] CJEU judgment of 25 May 2023, *WertInvest Hotelbetrieb* (C-575/21, EU:C:2023:425).
[465] *Ibid*, para. 81.
[466] *Ibid*, para. 71.
[467] CJEU judgment of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU: C:2004:482, paras 26–27: "*Such a definition of 'project' is relevant to defining the concept of plan or project as provided for in the Habitats Directive, which, as is clear from the foregoing, seeks, as does Directive 85/337, to prevent activities which are likely to damage the environment from being authorised without prior assessment of their impact on the environment. Therefore, an activity such as mechanical cockle fishing is covered by the concept of plan or project set out in Article 6(3) of the Habitats Directive*.").

Environment and Others)[468], "*if an activity is regarded as a 'project' within the meaning of the EIA Directive, it may constitute a 'project' within the meaning of the Habitats Directive. However, the mere fact that an activity may not be classified as a 'project' within the meaning of the EIA Directive does not suffice, in itself, to infer therefrom that the activity may not be covered by the concept of 'project' within the meaning of the Habitats Directive.*"[469]

The decisive factor is, therefore, the possible negative effect on the natural area, so that, according to the same judgment, grazing of cattle or application of manure to land can also be a project within the meaning of the Habitats Directive. Thus, a project that is not listed in Annexes I and II of the EIA Directive may still present a project within the meaning of the Habitats Directive.

The EU legislation is neutral towards dividing projects into smaller parts. However, it prohibits a practice that leads to circumvention of the EIA process by deliberately dividing projects into smaller units excluded from the scope of the EIA regulations – the so-called *salami slicing* method.

The prohibition of the *salami slicing* method follows the crucial requirement for a comprehensive assessment embodied in the 1985 EIA Directive. The main objective of the Directive was, according to its preamble and per its Art. 2, to subject to prior assessment all projects likely to have a significant effect on the environment by virtue, *inter alia*, of their nature, scale, or location.[470] As noted above, the 2011 EIA Directive adopts the same logic,[471] and its content is essentially identical.[472] Therefore, the CJEU interprets the EIA Directive in favour of assessing projects with a potentially significant effect on the environment[473] and even concludes that its general provisions requiring the assessment are directly applicable.[474] However, it is unclear whether **associated/ancillary works** must be considered parts of the project. The Commission argues that a *centre of gravity* test should be carried out to determine whether these works present and integral part of the project.[475] This is understandable given the variety of the projects, but the vague rules create thin ice for the national administrative bodies.[476]

The principle of comprehensive assessment is also invoked by the CJEU when interpreting the regulation of the various exceptions and derogations that limit the scope of the EIA

[468] CJEU judgment of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others* (C-293/17 and C-294/17, EU:C:2018:882).
[469] *Ibid*, para. 66.
[470] See the CJEU judgment of 18 October 2011, *Boxus and Others* (C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:667, para. 41), and of 16 February 2012, *Solvay and Others* (C-182/10, EU:C:2012:82, para. 35).
[471] EIA Directive, preamble paras. 7, 14 and 15, Art. 2(1).
[472] See the CJEU judgment of 26 July 2017, *Comune di Corridonia and Others* (C-196/16 and C-197/16, EU:C:2017:589, para. 31).
[473] See, for example, the CJEU judgment of 19 September 2000, *Linster* (C-287/98, EU:C:2000:468, para. 52).
[474] CJEU judgments of 24 October 1996, *Kraaijeveld and Others* (C-72/95, EU:C:1996:404, para. 62), and of 7 January 2004, *Wells* (C-201/02, EU:C:2004:12, para. 61).
[475] European Commission. Note Interpretation line suggested by the Commission as regards the application of Directive 85/337/EEC to associated/ancillary works, 2012.
[476] The EIA Directive already stipulates that associated developments are part of certain categories of the projects, namely ski runs, ski lifts and cable cars and holiday villages and hotel complexes outside urban areas. See the EIA Directive, Annex II, point 12(a), (c).

process. These exemptions must be interpreted restrictively so that it is not possible to circumvent the essential requirements of the Directive by completely excluding specific projects from the EIA process[477] or – as noted – by setting excessively high thresholds and criteria for whole groups of projects for which environmental effects cannot be completely excluded.[478]

By the same token, in order to escape environmental impact assessment, a project cannot be artificially divided or the cumulative effect of different projects overlooked,[479] or to take into account, for the assessment of the environmental effects of a project or a modification thereof, only the direct effects of the proposed works themselves, without taking into account the environmental effects that may be caused by the use or operation of the works resulting from those works.[480] Nor is it possible to artificially divide projects simply because they cross the borders of several Member States.[481] These procedures would render the regulation of the EIA process meaningless.

Indeed, the above also applies to **large constructions** such as transport infrastructure projects. The CJEU, for example, in its judgment in Case **C-227/01** (***Comission v Spain***),[482] which concerned the construction of a section of a railway line, held that *"If the argument of the Spanish Government were upheld, the effectiveness of Directive 85/337 could be seriously compromised, since the national authorities concerned would need only to split up a long-distance project into successive shorter sections in order to exclude from the requirements of the Directive both the project as a whole and the sections resulting from that division*".[483] These conclusions were confirmed by the CJEU in its judgment in Case **C-142/07** (***Ecologistas en Acción-CODA***),[484] concerning the construction of a ring road around the city of Madrid.

The EU legislation, as interpreted by the case law of the CJEU cited above, is therefore based on the requirement that projects be seen as logical functional units in the assessment of their environmental impact and counteracts the circumvention of the requirement to assess them by means of their purposeful subdivision. This does not preclude such projects from being permitted in stages or parts in subsequent procedures, provided that this does not undermine the assessment requirements. The way the investor approaches the division of the project may be influenced by the requirements of various legal provisions (e.g., in relation to the nature of the facilities used[485]) but is in principle left to the discretion of the investor. It is essential that a timely and complete assessment of the project as a whole is carried out, i.e., irrespective of the subdivision or sequence in which the individual parts are authorised.

[477] See the CJEU judgment of 16 September 1999, *WWF and Others* (C-435/97, EU:C:1999:418, para. 65).
[478] See the CJEU judgment of 2 May 1996, *Commission v Belgium* (C-133/94, EU:C:1996:181, para. 42).
[479] See the CJEU judgment of 21 September 1999, *Commission v Ireland* (C-392/96, EU:C:1999:431, para. 76).
[480] See the CJEU judgment of 28 February 2008, *Abraham and Others* (C-2/07, EU:C:2008:133, para. 43).
[481] See the CJEU judgment of 10 December 2009, *Umweltanwalt von Kärnten* (C-205/08, EU:C:2009:767, paras 53 and 57).
[482] CJEU judgment of 16 September 2004, *Comission v Spain* (C-227/01, EU:C:2004:528).
[483] *Ibid*, para. 53.
[484] CJEU judgment of 25 July 2008, *Ecologistas en Acción-CODA* (C-142/07, EU:C:2008:445, paras 39, 44).
[485] See, for example, the CJEU judgment of 4 December 2008, *Lahti Energia* (C-317/07, EU:C:2008:684).

On the other hand, it cannot be assumed that every functional unit of construction or other activity generally subject to impact assessment should constitute a project for the EIA process. The definition of categories of projects in Annexes I and II to the EIA Directive and, with regard to public participation requirements, also in Annex 1 to the Aarhus Convention is fundamental in this respect.

While for some categories of projects, the interpretation is relatively straightforward, for others, this is not the case - and it may be disputable whether and to what extent a project must be subject to an EIA. In this respect, the interpretation of the different categories of projects should not follow the different, too narrow, or too broad meaning given to the project in national practice; instead, it should be consistent with the autonomous concept of the project in EU or international law.[486]

Typically, if we stick to the example provided by the abovementioned judgment in Case C-293/17, these are business centre projects under the category in Annex II, point 10(b) of the EIA Directive (*urban development projects, including the construction of shopping centres and car parks*). Under the Aarhus Convention, these projects fall under point 20 of Annex I: *"Any activity not covered by paragraphs 1-19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation"*.

The EIA Directive indicates that the subject of the assessment is not the project of the whole commercial zone but its unit (the commercial centre).[487] The practice of Member States in interpreting this category is referred to in a guide published by the European Commission.[488] It shows that the definition of the relevant category gives Member States relatively broad discretion as to which projects they classify as *urban development*, with one Member State setting the threshold for assessing the impact of shopping centres at 2,500 m^2 of built-up area. It is the sub-categorisation of various urban development projects (from leisure centres to infrastructure) that may have a significant environmental impact due to their size or location that the Guide identifies as key to meeting the objectives of the Directive.[489]

A related issue is the adequacy of the limit value for the category of projects, which includes the type of building to be located. In general, EU law prohibits setting such a limit at a level that would make it impossible to assess the whole group of projects for which significant environmental effects cannot be ruled out. This may also apply to a part of the category, precisely due to setting a disproportionately high assessment limit or carrying out a screening procedure.[490]

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[486] See the CJEU judgment of 24 November 2016, *Bund Naturschutz in Bayern and Wilde* (C-645/15, EU:C:2016:898), on the interpretation of the concept of "expressway".

[487] Cf., for example, various language versions (*"construction of shopping centres"*, *"der Errichtung von Einkaufszentren"*, *"la construction de centres commerciaux"*).

[488] European Commission. Interpretation of definitions of project categories of annex I and II of the EIA Directive [online]. 2015 [accessed on: 2 March 2023]. Available at: <https://ec.europa.eu/environment/eia/pdf/cover_2015_en.pdf >.

[489] *Ibid*, p. 49–51.

[490] On the concept of leisure purposes, see CJEU judgment of 16 March 2006, *Commission v Spain* (C-332/04, EU:C:2006:180).

The EIA Directive allows the setting of limit values for shopping complexes or shopping centres, so it foresees that there are also projects in this category that do not have a significant environmental impact. In practice, as mentioned, the limit of 2,500 m^2 of built-up area is applied according to the interpretative guide.

A brief look at Austrian legislation,[491] which was criticised by the CJEU, with some of its neighbouring countries shows not only that the thresholds for the same category of project vary considerably, but also that these thresholds rarely consider the project's location. For example, the Slovak EIA Act adopted in 2006[492] provides for the category *Municipal development projects, including ground structures or their files (complexes), if not listed in other categories*[493] a limit value for the screening procedure of 10 000 m^2 of floor area outside the built-up area and 1 000 m^2 in the built-up area. The Czech regulation[494] does not even differentiate between the built-up area and location outside of it for the category *Construction of commercial complexes and shopping centres with a total built-up area from the established limit* (screening threshold of 6,000 m of built-up area[495]) or *Urban development projects* (screening threshold of 5 ha[496]).

Even the German Act on the Assessment of Environmental Impacts of 1990 (*Gesetz über die Umweltverträglichkeitsprüfung, UVPG*)[497] does not opt for a much more nuanced approach: It requires *Construction of a shopping centre, a large-scale retail business or another large-scale commercial enterprise in the previous outdoor area* of a floor area over 5,000 m^2 to be subject to the EIA, while the same projects with a floor area between 1,200 m^2 and 5,000 m^2 are subject to the screening procedure.[498] Similarly, *Construction of an urban development project for other structures* with a floor area over 100,000 m^2 is subject to the EIA. In contrast, the same project with a floor area between 20,000 m^2 and 100,000 m^2 is subject to the screening procedure.[499] Projects which meet these thresholds are also subject to screening procedure if a development plan is drawn up, amended, or supplemented for them in other areas.[500]

The simple comparison above indicates that the EIA thresholds vary significantly and do not respect the criteria emphasised by the CJEU case law. This confirms the importance of the preliminary reference procedure, as none of the shortcomings was brought to the CJEU by the Commission.

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[491] The Austrian EIA Act of 2000 (*Umweltverträglichkeitsprüfungsgesetz, UVP-G 2000*) currently sets the limit for shopping centres at 10 ha and 5 ha respectively (point 19 of Annex 1).
[492] Act No. 24/2006 Coll., on Environmental Impact Assessment and Amending of Other Acts *(zákon č. 24/2006 Z. z., o posudzovaní vplyvov na životné prostredie a o zmene a doplnení niektorých zákonov)*.
[493] *Ibid*, Annex 8, point 9.16(a).
[494] Act. 100/2001 Coll., on the Environmental Impact Assessment and Amending Related Acts (the EIA Act) [*zákon č. 100/2001 Sb., o posuzování vlivů na životní prostředí a o změně některých souvisejících zákonů (zákon o posuzování vlivů na životní prostředí)*].
[495] *Ibid*, Annex I, point 108.
[496] *Ibid*, Annex I, point 110.
[497] Gesetz über die Umweltverträglichkeitsprüfung in der Fassung der Bekanntmachung vom 18. März 2021, BGBl. I p. 540, last amended in March 2023 (BGBl. 2023 I No. 88).
[498] *Ibid*, points 18.6, 18.6.1, 18.6.2.
[499] *Ibid*, points 18.7, 18.7.1, 18.7.2.
[500] *Ibid*, point 18.8.

Distinguishing based on category or potential effects does not entirely answer the question of *what* a project is - and, therefore, which specific activities must be assessed.

Under the EIA Directive, the decisive criterion to recognise a project is the execution of the physical works.[501] As set out in Article 1(2)(a) of the EIA Directive, it is the execution of construction works or of other installations, schemes, or other interventions in the natural surroundings and landscape, including those involving the extraction of mineral resources.

In its judgment in Case **C-215/06** (***Commission v Ireland***)[502], the CJEU stated that *"[g]iven that this wording regarding the acquisition of entitlement is entirely unambiguous, Article 2(1) of that directive must necessarily be understood as meaning that, unless the applicant has applied for and obtained the required development consent and has first carried out the environmental impact assessment when it is required, he cannot commence the works relating to the project in question, if the requirements of the directive are not to be disregarded."*[503] Then, in its judgment in Case **C-121/11** (***Pro-Braine and Others***)[504], the CJEU added that "*the definitive decision relating to the carrying on of operations at an existing landfill site, taken on the basis of a conditioning plan, pursuant to Article 14(b) of Directive 1999/31, does not constitute a 'consent' within the meaning of Article 1(2) of Directive 85/337 unless that decision authorises a change to or extension of that installation or site, through works or interventions involving alterations to its physical aspect, which may have significant adverse effects on the environment within the meaning of point 13 of Annex II to Directive 85/337 and thus constitute a 'project' within the meaning of Article 1(2) of that Directive.*"[505]

Physical works within the meaning of the EIA Directive can also include the removal of structures. Therefore, even a structure being demolished must be considered a project and unless significant environmental effects cannot be ruled out, a binding EIA opinion must also be issued with binding effects for the procedure authorising or ordering the removal of the structure. The CJEU also confirms that demolition works fall within the scope of the EIA Directive and may, therefore, constitute a project within the meaning of Art. 1(2) thereof. The annexes to the Directive refer rather to sectoral categories of projects without describing the precise nature of the proposed works.[506]

The same principle, which has been strengthened while amending the EIA Directive,[507] applies to the conversion of an existing site by demolishing the existing site and reconstructing a new site. Such character of construction is not such as to prevent such

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[501] See, for example, the CJEU judgment of 28 February 2008, *Abraham and Others* (C-2/07, EU:C:2008:133), para. 23: "*It is apparent from the very wording of Article 1(2) of Directive 85/337 that the term 'project' refers to works or physical interventions*."

[502] CJEU judgment of 3 July 2008, *Commission v Ireland* (C-215/06, EU:C:2008:380).

[503] *Ibid*, para. 51.

[504] CJEU judgment of 19 April 2012, *Pro-Braine and Others* (C-121/11, EU:C:2012:225).

[505] *Ibid*, para. 37.

[506] See the CJEU judgment of 3 March 2011, *Commission v Ireland* (C-50/09, EU:C:2011:109), para. 97: *"As regards the question whether demolition works come within the scope of Directive 85/337, as the Commission maintains in its pleadings, or whether, as Ireland contends, they are excluded, it is appropriate to note, at the outset, that the definition of the word 'project' in Article 1(2) of that directive cannot lead to the conclusion that demolition works could not satisfy the criteria of that definition. Such works can, indeed, be described as 'other interventions in the natural surroundings and landscape'."*

[507] See EIA Directive 2014/52/EU, preamble, para. 22: *"…during the construction, operational and, where relevant, demolition phases "*, Annex II.A(1)(a), Annex IV(1)(b).

a project from being regarded as falling within one of the categories under the EIA Directive (usually *urban development projects*).[508]

The second key definition which determines the impact of the EIA procedure on public construction law is a ***development consent***. The definition of *development consent* is also of high importance for public participation in decision-making as it determines the proceedings that should be open to the public concerned, with some exceptions mentioned below.

According to Article 1(2)(c) of the EIA Directive, a *development consent* is a decision by a competent authority that entitles the developer to proceed with the project. Such consent must take into account all project-related environmental impacts. This is so that the developer may move on with the project since, in accordance with that provision, the development consent is a decision adopted by the appropriate body or authorities.

Consequently, the decision-making process instituted by the EIA Directive must address impacts on the environment that the project is likely to have, without a preference for any type of significant effect or excluding any other type of significant effect from its scope.[509] For that reason, Art. 5 of the EIA Directive requires the developer to supply specific information on various subjects to the competent authority.[510]

The definition of a project and a development consent are closely related. Reading them together shows that it is irrelevant whether the project is carried out by one or more developers, how the private legal relations between the developers are regulated, whether the project is authorised in one or more authorisation procedures, or whether these procedures coincide. The definitions are not tied to a single procedure or a single notifier. Indeed, it would be contrary to the spirit and purpose of the legislation if a developer could escape the obligation to carry out an EIA by transferring part of the project to another person or splitting it up.

As the development consent entitles the developer to proceed with the project, it is, in principle, a decision on activities that are physical works. There is an exception, though. A development consent can also be a decision on activities that are not physical works, but the final decision on the project permit is conditional on its implementation. Such an interpretation is, however, not entirely intuitive because, as mentioned, the EIA Directive contains provisions on the coordination of authorisation procedures, which suggest that it is not necessary to decide on all the environmental effects of a project in a single process.

For example, the authorisation to derogate from the requirements of species protection concerning the project could fall under the definition of a development consent and must be challengeable based on the environmental impact assessment per Art. 11 of the EIA Directive. The CJEU held recently in **C-463/20** (***Namur-Est Environment***):[511] *"Admittedly, the said* [textual] *elements* [of Art. 1(2)(c) of the EIA Directive] *define the concept of 'development*

[508] *Ibid*, para. 100, CJEU judgment of 25 May 2023, *WertInvest Hotelbetrieb* (C-575/21, EU:C:2023:425), para. 36.
[509] See the CJEU judgment of 24 November 2011, *Commission v Spain* (C-404/09, EU:C:2011:768, paras 84–87).
[510] See the CJEU judgment of 24 February 2022, *Namur-Est Environment* (C-463/20, EU:C:2022:121, para. 51).
[511] CJEU judgment of 24 February 2022, *Namur-Est Environment* (C-463/20, EU:C:2022:121).

consent' by referring to a decision different in nature from the derogation decision and they exclude, consequently, that latter decision from being regarded, in isolation and as such, as amounting to a 'development consent', within the meaning of Article 1(2)(c) of Directive 2011/92, for the project to which it relates. Nevertheless, those elements do not preclude such a decision from being regarded, when taken together with the subsequent decision on the developer's entitlement to proceed with the project, as forming part of the development consent for that project or, as the case may be, of the refusal of development consent for it."[512]

The CJEU gave preference to the interpretation of the definition, which reflects objectives pursued by the EIA Directive and concluded that *"the development consent decision is meant to be taken upon the conclusion of the entire process for the assessment"*[513] which means that the competent authority can take complete account of the effects of the project. Otherwise, it would be possible to argue that it is sufficient to involve the authorities in charge of various environmental matters in the EIA based on requirement in Art. 6(1) of the EIA Directive. However, the process for the environmental impact assessment and the approval issued on that basis need not include all permits relevant to the project or even all permits under environmental legislation, as is evident, in particular, from Art. 2(3) of the EIA Directive.

That clause enables Member States to establish a single procedure to satisfy the requirements of both the IED and the EIA Directive. Contrarily, it follows that using distinct processes to implement the two directives and granting separate authorisations are equally permitted under that clause. This is supported by Art. 2(2) of the EIA Directive, which states that *"The environmental impact assessment may be integrated into the existing procedures for development consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive."* It should be noted that the new version of Art. 2(3) of the EIA Directive introduced by the 2014 amendment makes no changes to this at all and only calls for coordination concerning impact assessments related to protected areas under the Habitats Directive and the Birds Directive.

The CJEU's expansive interpretation of the definition of development consent appears to overcome two shortcomings: first, the Habitats Directive requires only an assessment of the project's impact on the protected site (see Chapter 4.3). Second, both the EIA and Habitats Directives lack comprehensive provisions for their relationship. The CJEU made clear that the Habitats Directive is independent in scope from the EIA Directive and applies without prejudice to the environmental impact assessment obligation.

However, the findings of the CJEU imply, *inter alia*, that the authorities in the Member States cannot decide on a derogatory regime under Art. 16 of the Habitats Directive without the EIA if the assessment is required, as the EIA must precede the adoption of the development consent. Consequently, the Member States must adjust their administrative procedural rules accordingly and tie the EIA and the permitting procedure. Moreover, the conclusions of the CJEU seem applicable *per analogiam* to decision-making concerning derogatory regime under Art. 9 of the Birds Directive.

[512] *Ibid*, para. 44.
[513] *Ibid*, para. 46.

Somewhat confusing from the perspective of **public participation** are the requirements of Art. 6 and Art. 8 of the EIA Directive for the exception under Art. 16 of the Habitats Directive, which is permitted by the development consent. In the interpretation of the general requirement that the communication to the public and the opportunity for the public to express comments and opinions must occur at an early stage, the jurisprudence of the CJEU seems to make a difference between two types of development consent where it is impossible to identify and assess all of the effects on the environment at one stage: **a principal decision and an implementing decision**.[514] In the mentioned judgment in C-463/20, the CJEU added that *"…the requirement of early participation of the public in the decision-making process provided for in Article 6 of Directive 2011/92 does not mean that the adoption of a preliminary decision relating to some of the project's effects on the environment must be preceded by public participation, provided that that participation is effective, a requirement which implies, first, that it takes place before the adoption of the decision to be taken by the competent authority on development consent for that project, secondly, that it enables the public to express its views in a useful and comprehensive manner on all the environmental effects of that project and, third, that the authority competent for granting consent for the project may take full account of that participation."*[515]

The first condition does not seem to pose a problem in practice, as it merely requires the public concerned to participate effectively before the implementing decision is taken. The second condition is more challenging to fulfil, since the individual procedures leading to the adoption of a decision are usually characterised by a specific subject matter which determines the objections that the parties may raise. The second condition, on the other hand, requires the public concerned to be able to comment on the subject matter of the previous procedure, which may require specific procedural arrangements.

Decisions authorising the operation of installations may also require an EIA if they are linked to the implementation of construction modifications, as well illustrated by the judgment in Case **C-411/17** (***Inter-Environnement Wallonie et Bond Beter Leefmilieu Vlaanderen***),[516] in which the CJEU concluded that the decision to extend the operation of the reactors of the Belgian nuclear power plant Doel 1 and Doel 2 is subject to an EIA and also assessment under the Habitats Directive.[517] It is important to note that the extension of operation in this case involved extensive upgrading and refurbishment work, which included construction work affecting the physical condition of the site. Reference may also be made to the general conclusions of the CJEU judgment in Case **C-201/02** (***Wells***),[518] from which it follows that a

[514] CJEU judgments of 7 January 2004, *Wells* (C-201/02, EU:C:2004:12, paras 52–53), of 28 February 2008, *Abraham and Others* (C-2/07, EU:C:2008:133, para. 26), of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, paras 85–86).
[515] CJEU judgment of 24 February 2022, Namur-Est Environment (C-463/20, EU:C:2022:121, para. 79).
[516] CJEU judgment of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622).
[517] Cf. the Committee's conclusions in cases *Netherlands* ACCC/C/2014/104 and *Slovakia* ACCC/C/2009/41.
[518] CJEU judgment of 7 January 2004, *Wells* (C-201/02, EU:C:2004:12).

decision which is necessary to avoid the termination of an existing permit is considered to be a new permit within the meaning of the EIA Directive which requires assessment.[519]

Conversely, a **simple extension of operation** is not considered a project if it does not involve any works that change the physical condition of the site, as the CJEU held regarding the operation of an airport in Case **C-275/09** (***Brussels Hoofdstedelijk Gewest and Others***).[520] In the same judgment, the CJEU concluded that "*If it should prove to be the case that, since the entry into force of Directive 85/337, works or physical interventions which are to be regarded as a project within the meaning of the directive were carried out on the airport site without any assessment of their effects on the environment having been carried out at an earlier stage in the consent procedure, the national court would have to take account of the stage at which the operating permit was granted and ensure that the directive was effective by satisfying itself that such an assessment was carried out at the very least at that stage of the procedure.*"[521]

In principle, **the extension of a permit** must also be considered as an authorisation of the project within the meaning of the EIA and Habitats Directives if the original permit has expired and ceased to have legal effects after the expiry of the period for carrying out the construction work. The opposite approach is appropriate where the extension with the original permit constitutes the only measure, in particular with regard to the repetition, nature, or conditions of the activities[522] - in such a case, only the application of the prohibition of harm under Art. 6(2) of the Habitats Directive,[523] which only requires an assessment of compatibility with the conservation objectives of protected sites in certain circumstances, would be relevant for projects under the Habitats Directive.[524] In Case **C-127/02** (***Waddenvereniging and Vogelbeschermingsvereniging***),[525] the CJEU concluded on the Habitats Directive: "*The fact that the activity has been carried on periodically for several years on the site concerned and that a licence has to be obtained for it every year, each new issuance of which requires an assessment both of the possibility of carrying on that activity*

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[519] *Ibid*, paras 45–47: *"Without new decisions such as those referred to in the previous paragraph, there would no longer have been consent, within the meaning of Article 2(1) of Directive 85/337, to work the quarry. It would undermine the effectiveness of that directive to regard as mere modification of an existing consent the adoption of decisions which, in circumstances such as those of the main proceedings, replace not only the terms but the very substance of a prior consent, such as the old mining permission. Accordingly, decisions such as the decision determining new conditions and the decision approving matters reserved by the new conditions for the working of Conygar Quarry must be considered to constitute, as a whole, a new consent within the meaning of Article 2(1) of Directive 85/337, read in conjunction with Article 1(2) thereof."*

[520] CJEU judgment of 17 March 2011, *Brussels Hoofdstedelijk Gewest and Others* (C-275/09, EU:C:2011:154), paras 20–21: "*It is apparent from the very wording of Article 1(2) of Directive 85/337 that the term 'project' refers to works or physical interventions. It is expressly stated in the order for reference that the measure at issue in the main proceedings is limited to the renewal of the existing consent to operate Bruxelles-National Airport and does not entail works or interventions which alter the physical aspect of the site*."

[521] *Ibid*, para. 37.

[522] See the CJEU judgments of 14 January 2010, *Stadt Papenburg* (C-226/08, EU:C:2010:10, para. 48); of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others* (C-293/17 and C-294/17, EU:C:2018:882, para. 80).

[523] See the CJEU judgment of 14 January 2010, *Stadt Papenburg* (C-226/08, EU:C:2010:10, para. 49).

[524] See the CJEU judgment of 14 January 2016, *Grüne Liga Sachsen and Others* (C-399/14, EU:C:2016:10, para. 44).

[525] CJEU judgment of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482).

and of the site where it may be carried on, does not in itself constitute an obstacle to considering it, at the time of each application, as a distinct plan or project within the meaning of the Habitats Directive."[526]

The above-quoted conclusions reflect a well-established interpretative approach according to which repetitive activities should not permanently escape assessment.[527] It is irrelevant that, in the case of construction projects, EU law does not limit the validity of their authorisation, as it does in the case of various operating permits.[528] Suppose a longer period of time elapses between the time when the EIA process took place and the time when the administrative authorities decide in the subsequent proceedings; it may happen that there is a substantial change in circumstances, which will result in the need to supplement the facts established in the EIA process or to reconsider certain conclusions. Furthermore, the opinions of the public concerned may become outdated, and even the public concerned may change considerably over time. The above does not mean, however, that the expiring development consent cannot be taken into account or that the new assessment cannot be based mainly on the original assessment.[529]

Regarding derogatory regime, projects intended for national defence purposes or in response to civil emergencies may be **exempted from the EIA process** after considering the specific circumstances of the project to be exempted, which must be for national defence or in response to a civil emergency. This purpose must be primary and overriding, as is evident from the CJEU case law.[530] Member States may decide whether to apply the derogation regime. Still, they do not have complete discretion as to whether a particular project serves national defence purposes or is a response to a civil emergency. For this reason, following the conclusions of the CJEU case law, the provisions of Art. 1(3) of the EIA Directive have also been clarified so that the term "*projects serving national defence purposes*" has been changed

[526] *Ibid*, para. 28.

[527] In addition to the CJEU judgments cited in this subchapter, see also the judgment of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, para. 127: "*Last, the fact that a recurrent activity has been authorised under national law before the entry into force of the Habitats Directive does not constitute, in itself, an obstacle to such an activity being regarded, at the time of each subsequent intervention, as a distinct project for the purposes of that directive, at the risk of permanently excluding that activity from any prior assessment of its implications for that site…*").

[528] See the opinion of Advocate General Kokott of 30 April 2020, *Friends of the Irish Environment* (C-254/19, EU:C:2020:320), para. 41: *"The expiry of the time limit allows and usually requires a review as to whether the conditions of the development consent are still met. Therefore, the Industrial Emissions Directive and the Plant Protection Regulation, for example, provide that permits and approvals, respectively, are granted only for a limited period of time and are reviewed before they are extended. Although those permits and approvals do not relate to the construction phase of a project, but rather to the operation or use phase, it is also the case for the construction phase that the relevant circumstances and regulations existing after the expiry of the temporary period may differ from those existing at the time of first authorisation."*

[529] See the CJEU judgment of 9 September 2020, *Friends of the Irish Environment* (C-254/19, EU:C:2020:320), para. 55: *"…the taking into account of such previous assessments when granting a consent extending the construction period for a project, such as the consent at issue in the main proceedings, cannot rule out the risk that it will have significant effects on the protected site unless those assessments contain complete, precise and definitive conclusions capable of removing all reasonable scientific doubt as to the effects of the works, and provided that there are no changes in the relevant environmental and scientific data, no changes to the project and no other plans or projects that must be taken into account."*.

[530] See the CJEU judgment of 16 September 1999, *WWF and Others* (C-435/97, EU:C:1999:418, paras 65–67).

to "*projects, or parts of projects, having defence as their sole purpose*" by Directive 2014/52/EU.[531]

It is clear from the cases examined by the CJEU that the exceptional circumstances of a particular case must be demonstrated.[532] They must not be merely hypothetical and seem related to time pressure and the difficulty or impossibility of implementing the project if an impact assessment (typically flood protection measures) were carried out. The Member State, therefore, should (a) consider whether another form of assessment would be appropriate; (b) make available to the public concerned the information obtained under other forms of assessment referred to in point (a), the information relating to the decision granting exemption and the reasons for granting it; (c) inform the Commission, before granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, where applicable, to their nationals.

According to the case law of the CJEU, where a **specific legislative act adopts a project**, the legislative process does not automatically guarantee the achievement of the objectives of the EIA Directive. Rather than being a complete exemption from the EIA process, it is a specific assessment procedure in which the adoption of the plan must be carried out based on adequate information provided by the notifier and supplemented, where appropriate, by the administrative authorities and the public which may be affected by the project under consideration. The CJEU set out two conditions that must be met simultaneously for that purpose: First, the various parts of the project must be adopted by a specific national legislation that contains with sufficient precision and specificity all the project elements relevant to the EIA.[533] Secondly, to meet the environmental protection objectives pursued by the EIA Directive, the legislator must have available to it – and take into account in the legislative process – information comparable to that which would have been submitted to the competent authority in the context of the ordinary procedure for the authorisation of the project, so that it can carry out the required environmental impact assessment of the project.[534]

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[531] As a result of the 2014 amendment, the set of projects in Art. 1(3) of the EIA Directive has been extended to include projects (or parts of projects) having defence as their sole purpose, or to projects having the response to civil emergencies as their sole purpose, in order to avoid the need to classify these projects as exceptional cases within the meaning of Art. 2(4) of the Directive, as they do not usually meet the exceptionality conditions.

[532] See the CJEU judgment of 3 July 2008, *Commission v Ireland* (C-215/06, EU:C:2008:380), para. 61: *"By giving to retention permission, which can be issued even where no exceptional circumstances are proved, the same effects as those attached to a planning permission preceding the carrying out of works and development, when, pursuant to Articles 2(1) and 4(1) and (2) of Directive 85/337 as amended, projects for which an environmental impact assessment is required must be identified and then – before the grant of development consent and, therefore, necessarily before they are carried out – must be subject to an application for development consent and to such an assessment, Ireland has failed to comply with the requirements of that directive."*

[533] See the CJEU judgment of 16 September 1999, *WWF and Others* (C-435/97, EU:C:1999:418), para. 58: "*With regard to the first condition, it is to be observed that Article 1(2) of the Directive refers not to legislative acts but to development consent, which it defines as `the decision of the competent authority or authorities which entitles the developer to proceed with the project'. Therefore, if it is a legislative act, instead of a decision of the competent authorities, which grants the developer the right to carry out the project, that act must be specific and display the same characteristics as the development consent specified in Article 1(2) of the Directive*."

[534] See the CJEU judgments of 16 September 1999, *WWF and Others* (C-435/97, EU:C:1999:418), of 19 September 2000, *Linster* (C-287/98, EU:C:2000:468). These two conditions were described in the opinion of Advocate General Sharpston of 19 May 2011, *Boxus and Others* (C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:319), para. 72, as a *"twofold test for legislative effectiveness", adding that such a test*

It is, therefore, clear that the legislative process does not automatically guarantee the achievement of the objectives of the EIA Directive.[535]

In its judgment in Case **C-287/98** (***Linster***)[536], the CJEU concluded that in certain circumstances, the objectives of the EIA Directive would be met even if the national legislative act does not lay down the exact route of the road, for example, if several alternative routes have been sufficiently examined based on information provided by the developer and supplemented, where appropriate, by the administrative authorities and the public, with the conclusion that all these routes under consideration have a comparable environmental impact. An implementing parliamentary measure then adopted the specific project following a more general measure adopted by *a parliament* after a public parliamentary debate. The CJEU left it to the national courts to decide whether the Luxembourg legislature had fully complied with the requirements of the Directive.[537]

With the adoption of Directive 2014/52/EU, an explicit option not to consult the public was added to the provisions of Art. 2(5) of the EIA Directive, but the aim of the chosen wording seems to clarify that it is possible to limit public participation "only" in the consultation of the plan to make it clear that all other obligations towards the public remain and are in line with the case law of the CJEU.[538]

4.2 STRATEGIC ENVIRONMENTAL IMPACT ASSESSMENT

The preparation of the SEA Directive was pushed by adopting the Aarhus Convention and the works on a legally binding protocol on strategic environmental assessment, which would

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"appears clearly to favour construing Article 1(5) as containing a prior condition that the objectives of the EIA Directive must be achieved by the legislative process, rather than a presumption that they are so achieved. The Court has indicated that it is concerned with whether the public participation that the EIA Directive seeks to achieve has in fact been achieved through the legislative process."

[535] Also see the CJEU judgment of 18 October 2011, *Boxus and Others* (C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:319), para. 48: *"A legislative act which does no more than simply 'ratify' a pre-existing administrative act, by merely referring to overriding reasons in the general interest without a substantive legislative process enabling those conditions to be fulfilled having first been opened, cannot be regarded as a specific legislative act for the purposes of that provision and is therefore not sufficient to exclude a project from the ambit of Directive 85/337."* Or the CJEU judgment of 16 February 2012, *Solvay and Others* (C-182/10, EU: C:2012:82, para. 43: "*Article 2(2) of the Aarhus Convention and Article 1(5) of Directive 85/337 must be interpreted as meaning that only projects the details of which have been adopted by a specific legislative act, in such a way that the objectives of the Convention and the directive have been achieved by the legislative process, are excluded from the scope of those instruments*.").

[536] CJEU judgment of 19 September 2000, *Linster* (C-287/98, EU:C:2000:468).

[537] *Ibid*, para. 58: "*In certain specific circumstances, it is possible for the objectives of the Directive to have been met where the route of a planned motorway has not been laid down in the legislative act, for example where several alternative routes were studied in detail, on the basis of information supplied by the developer and possibly supplemented by the authorities and members of the public liable to be concerned by the project, and those alternatives were recognised by the legislature as having an equivalent environmental impact. It is for the national court to determine whether that was so in the present case*."

[538] See the opinion of Advocate General Léger of 11 January 2000, *Linster* (C-287/98, EU:C:2000:3), para. 114: *"By making an exception for cases where a project is adopted by a legislative act, the Community legislature did not intend to lay down a formal criterion enabling Member States to exclude such projects from an assessment of their environmental impact and from the requirement to inform and consult the public concerned merely on the basis of the nature of the act in question and the status of the authority which adopted it. Only legislative acts which provide the same safeguards as those which would have been required under the Directive fall outside the scope of the Directive."*

supplement the existing provisions on environmental impact assessment in a transboundary context of the 1991 Espoo Convention.[539]

In 2001, the **SEA Directive** introduced the SEA of various public plans and programmes which are likely to have significant effects on the environment. Such effects are presumed if the plan or programme presents a framework for a future project which needs the EIA, or which may affect a Natura 2000 site: *"plans and programmes, (a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or (b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC"*.[540] Similarly to the EIA Directive, the SEA Directive **excludes from its scope** plans and programmes the sole purpose of which is to serve national defence or civil emergency, and financial or budget plans and programmes.[541]

Therefore, town and country planning are explicitly covered by the SEA Directive, albeit without detailed guidance on which plans and programmes fall into this category. In Case **C-671/16** (***Inter-Environnement Bruxelles and others***),[542] the CJEU concluded that regional town planning regulations, such as the blueprint for the European Quarter of the City of Brussels,[543] laying down specific requirements for the completion of building projects, fall under the definition of plans and programmes which are likely to have significant environmental effects. In particular, the judgment **clarifies the meaning of the definition of the category of *town and country planning or development of land***, within which the various plans and programmes are adopted within the meaning of Art. 3(2)(a) of the SEA Directive. This sector is not limited to land use *sensu stricto*, namely the dividing of land into zones and the defining of activities permitted within those zones, but necessarily covers a broader field.[544]

Member States are provided a choice whether to assess other plans and programmes, plans and programmes for smaller areas and minor modifications based on a case-by-case examination, based on the specification of their types or by combining both approaches.[545] A typical example of a plan or a programme is the land use planning documents, which vary in form and content from one Member State to another. The plans and programmes also

[539] SEA Directive, preamble para. 7.
[540] *Ibid*, Art. 3(2).
[541] *Ibid*, Art. 3(8).
[542] CJEU judgment of 7 June 2018, *Inter-Environnement Bruxelles and Others* (C-671/16, EU:C:2018:403).
[543] The aim of the plan was to build a concentrated and varied neighbourhood combining elements of mixed-use developments.
[544] *Ibid*, paras 43-45: *"As the European Commission notes, the fact that that provision refers both to 'town and country planning' and 'land use' clearly shows that the sector mentioned is not limited to land use sensu stricto, namely the dividing of land into zones and the defining of activities permitted within those zones, but necessarily covers a broader field. It is apparent from Article 88 of the CoBAT that regional town planning regulations are to concern, in particular, buildings and their surroundings in terms of, inter alia, highways, preservation, safety, salubriousness, energy, acoustics, waste management, and aesthetics. Accordingly, such measures fall within the category of 'town and country planning or land use' for the purpose of Article 3(2)(a) of the SEA Directive."*
[545] SEA Directive, Art. 3(7).

include flood risk management plans adopted under the FD and programmes of measures adopted under the WFD.[546]

Like the EIA Directive, the SEA Directive is somewhat minimalistic in words but very ambitious in its aims. The SEA assesses the plans and programmes in a complex way, taking into account cumulative impacts in the fields of fauna, flora, human health, soil water, air, cultural heritage, etc. Furthermore, measures to reduce adverse effects need to be identified. Unlike the EIA Directive, however, the SEA Directive requirements have not been amended to address the recent challenges such as climate change in a more complex way.[547]

The SEA Directive also introduced post-decision follow-up stages such as monitoring, evaluation, and management. However, several authors argue that the SEA Directive is seriously constrained and that a more ambitious interpretation of SEA follow-up is necessary to enable strategic decision-making and learning. Persson and Nilsson,[548] for example, point out that SEA follow-up displays several critical differences, including enhanced risk of implementation gaps, a focus on performance rather than compliance, and less direct linkages between decisions and impacts.

The Member States had to implement the SEA Directive by July 2004 meaning they had rather short time to consider how to handle the assessment procedure and which national plans and programmes meet the criteria of the Directive.

As regards **public participation**, the *public* is defined the same way as in the Aarhus Directive as *"one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups."*[549] The Aarhus Convention requirements, however, do not venture to be as detailed for the SEA process as it is for EIA. The only provisions the Convention makes regarding SEA are that reasonable time frames for the different phases are to be established, that sufficient time should be allowed for informing the public so that it can prepare and participate effectively, that early participation should occur when options are still open, and that the decision must take into account the outcome of the public participation.

According to the SEA Directive, the Member States are obliged to identify the public – and in comparison with the Aarhus Directive, the SEA Directive stipulates that it *"including the public affected or likely to be affected by, or having an interest in, the decision-making subject to this Directive, including relevant non-governmental organisations, such as those promoting environmental protection and other organisations concerned."*[550] They must also determine detailed arrangements for the information and consultation of the authorities and

[546] See Albrecht, J. Legal framework and criteria for effectively coordinating public participation under the Floods Directive and Water Framework Directive: European requirements and German transposition. *Environmental Science & Policy*, 2014, vol. 55, Part 2, p. 368–375.
[547] The SEA Directive only stipulates in Annex I that the information provided under Art. 5(1) must include, *inter alia*, likely significant effects on climatic factors.
[548] See Persson, Å., Nilsson, M. Towards a Framework for SEA Follow-Up: Theoretical Issues and Lessons from Policy Evaluation. *Journal of Environmental Assessment Policy and Management*, 2007, vol. 9, no. 4, p. 473–496.
[549] SEA Directive, Art. 2(d).
[550] *Ibid*, Art. 6(4).

the public.[551] Still, unlike the Aarhus Directive, the SEA does not add the purpose of these arrangements that they must enable the public to prepare and participate effectively. Public participation is not required for the follow-up stages.

According to Art. 3(7) of the SEA Directive, conclusions to require the SEA or not for the smaller plans and programmes and modifications of plans and programmes, including the reasons for not requiring the SEA, must be made available to the public. If the SEA is carried out, Art. 6(1) of the SEA Directive requires that the environmental reports produced for draft plans, and both reports and the draft plans be made available to the public for consultation procedure.

Compared to Art. 10 FD and Art. 14 WFD, the SEA Directive **does not require the active involvement of the public**. The public must be given an *"early and effective opportunity within appropriate time frames"* to express their opinion on the draft plan or a programme and the accompanying environmental report before they are adopted or submitted to the legislative procedure.[552] These consultations may take place in a transboundary context, if implementing a plan or programme is likely to significantly affect the environment in another Member State. In such case, the public in the Member State likely to be significantly affected are informed and given an opportunity to forward their opinion within a reasonable timeframe.[553]

The opinion of public shall be *taken into account* during the preparation of the plan or programme and before its adoption or submission to the legislative procedure.[554] This is perhaps the trickiest part of the SEA Directive to implement, as no further details on how exactly the comments should be taken into account are provided. After a plan or a programme is adopted, the public must be informed not only about its adoption but also about the opinions expressed and how the results of consultations have been taken into account, and the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with. Furthermore, a statement on the integration of environmental considerations and the measures concerning monitoring is provided.[555]

The SEA Directive does not require nor reflect any innovative meta trends in participatory practices present in the Member States, which have been helping bridge the divide between planners, decision-makers, and the citizens.[556]

While the concept of a *projec*t is rather intuitive, the **concept of *plan and programme*** appears to be much more challenging to grasp and describe using clear criteria. Art. 7 of the Aarhus

[551] *Ibid*, Art. 6(5).
[552] *Ibid*, Art. 6(2).
[553] *Ibid*, Art. 7(2).
[554] *Ibid*, Art. 8.
[555] *Ibid*, Art. 9(1).
[556] See Hossu, C.-A., Oliveira, E., Niță, A. Streamline democratic values in planning systems: A study of participatory practices in European strategic spatial planning. *Habitat International*, 2022, vol. 129, no. 102675: *"One, categorised as citizen-led participatory practices, is common in countries embedded in market-led neo-performative systems such as The Netherlands, Germany and Austria. A second, categorised as triparty knowledge exchange participatory practices involving citizens and public and private actors, is dominant in countries embedded within conformative (Spain, Belgium, Portugal and Italy) and state-led systems (Denmark, Finland, Norway, Sweden, France, Ireland and the UK)."*

Convention simply refers to participation during the preparation of plans and programmes *relating to the environment* without providing their definition: According to the 2014 Implementation Guide, *"The Convention does not define the terms "plans", "programmes" and "policies". These terms do have common-sense and sometimes legal meanings throughout the ECE region, however."*[557] Without definition, the characteristics of the plans and programmes must be assumed. For example, the public participation requirement is limited to the strategic documents prepared by public authorities. However, given that the Convention imposes obligations on the Contracting Parties themselves, it seems likely that such a limitation follows. Obviously, there are also no conditions for the screening procedure provided by the Aarhus Convention and no other characteristics than *relating to the environment.*

The SEA Directive differs from the Aarhus Convention inasmuch as it does not contain any special provisions in relation to policies or general legislation that would call for them to be distinguished from plans and programmes. It defines plans and programmes as *"plans and programmes, including those co-financed by the European Community, as well as any modifications to them: - 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"*.[558] Art. 3(1), (2), and (3) of the SEA Directive add that environmental impact assessment shall be carried out only for those plans and programmes which are likely to have significant environmental effects (even beneficial to the environment[559]), specifically which fall under one of the two groups: 1) plans and programmes which set the framework for future development consent of projects listed in Annexes I and II to the EIA Directive and adopted in areas including town and country planning or land use, 2) plans and programmes which have been determined to require an assessment pursuant to Art. 6 or 7 of the Habitats Directive.

Both categories are narrower than the scope of the Aarhus Convention. The main difference is evident: The SEA Directive requires plans and programmes to set the framework for certain projects, except plans significantly affect Natura 2000 sites. A plan within the meaning of the Habitats Directive is not linked to the future approval of projects listed in Annexes I and II to the EIA Directive. The decisive criterion is potential significant effects on the site.[560]

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[557] 2014 Implementation guide, p. 173.

[558] SEA Directive, Art. 2

[559] See the CJEU judgment of 12 June 2019, *Terre wallonne* (C-321/18, EU:C:2019:484), paras 27–28: *"In that connection, first, the Belgian Government and Ireland argue that, in so far as the Decree of 1 December 2016 establishes conservation objectives, it could have only beneficial effects and, accordingly, would not require an environmental impact assessment. It must, however, be borne in mind that, as regards Directive 85/337, the Court has already ruled that the fact that projects should have beneficial effects is not relevant in determining whether it is necessary to make those projects subject to an assessment of their environmental impact (judgment of 25 July 2008, Ecologistas en Acción-CODA, C-142/07, EU:C:2008:445, paragraph 41)."*

[560] See the CJEU judgment of 21 June 2012, *Sillogos Ellinon Poleodomon kai Khorotakton* (C-177/11, EU:C: 2012:378), para. 24: "…*the obligation to make a particular plan subject to an environmental assessment depends on the preconditions requiring an assessment under the Habitats Directive, including the condition that the plan may have a significant effect on the site concerned, being met in respect of that plan. The examination carried out to determine whether that latter condition is fulfilled is necessarily limited to the question as to*

As regards the difference between the plan and the programme, there does not seem to be any. It is generally understood that the SEA Directive does not distinguish between these two terms and stipulates identical requirements for both.[561] The terminology used can be however confusing given that the Habitats Directive only uses the term *plan*.

The CJEU case law deals with the fact that the SEA Directive does not contain a more precise definition of plans and programmes subject to impact assessment. The CJEU generally follows the basic objective of the Directive, which is that plans and programmes likely to have significant effects on the environment should be subject to impact assessment. This principle was first defined by the CJEU in relation to the EIA Directive,[562] to be subsequently reaffirmed for assessing plans and programmes.[563] It serves as an interpretative guide in general terms when interpreting the provisions defining the measures intended by the SEA Directive,[564] or more specifically, when interpreting the interpreting requirements on the legal form of the plan or programme (see below) or when determining the scope of Art. 3(3) of the SEA Directive.

Art. 3(3) of the SEA Directive provides that plans and programmes which determine the use of small areas at the local level and minor modifications to plans and programmes require an environmental assessment only where the Member States determine that they are likely to have significant environmental effects. This way, a high level of protection can be achieved.[565] Such plans or programmes must be adopted by a local authority instead of a regional or national authority. Small areas should be interpreted in accordance with their usual meaning in everyday language.[566]

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whether it can be excluded, on the basis of objective information, that that plan or project will have a significant effect on the site concerned."

[561] See European Commission. Implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment [online]. 2003 [accessed on: 11 February 2023]. Available at: <http://ec.europa.eu/environment/archives/eia/pdf/030923_sea_guidance.pdf>.

[562] See the CJEU judgments of 24 October 1996, *Kraaijeveld and Others* (C-72/95, EU:C:1996:404, para. 61), of 16 September 1999, *WWF and Others* (C-435/97, EU:C:1999:418, para. 70), and of 7 January 2004, *Wells* (C-201/02, EU:C:2004:12, para. 65).

[563] See the CJEU judgments of 17 June 2010, *Terre wallonne and Inter-Environnement Wallonie* (C-105/09 and C-110/09, EU:C:2010:355, para. 32: "*…as is apparent from Article 1 of Directive 2001/42, the fundamental objective of that directive is, where plans and programmes are likely to have significant effects on the environment, to require an environmental assessment to be carried out at the time they are prepared and before they are adopted*."); of 22 September 2011, *Valčiukienė and Others* (C-295/10, EU:C:2011:608, para. 37).

[564] See the CJEU judgment of 27 October 2016, *D'Oultremont and Others* (C-290/15, EU:C:2016:816, para. 40: "*…given the objective of Directive 2001/42, which is to provide for a high level of protection of the environment, the provisions which delimit the directive's scope, in particular those setting out the definitions of the measures envisaged by the directive, must be interpreted broadly…*").

[565] See the CJEU judgment of 21 December 2016, *Associazione Italia Nostra Onlus* (C-444/15, EU:C:2016:978), para. 56: *"…by not excluding any plan or programme likely to have significant effects on the environment from an environmental assessment under that directive, falls within the scope of the objective pursued by that directive of providing a high level of environmental protection."*

[566] *Ibid*, paras 71–72: "*Consequently, in order for a plan or programme to be qualified as a measure which determines the use of a small area 'at local level', for the purposes of Article 3(3) of Directive 2001/42, that plan or programme must be prepared and/or adopted by a local authority, as opposed to a regional or national authority. As regards the term 'small area', the qualifier 'small', in accordance with its usual meaning in everyday language, refers to the size of the area. Thus, as the Advocate General stated in point 59 of her Opinion, that criterion of the size of the area may be understood only as referring to a purely quantitative factor, that is to say, the size of the area concerned by the plan or programme referred to in Article 3(3) of Directive 2001/42, irrespective of the effects on the environment*."

While relatively soon after the adoption of the EIA Directive, case law began to emerge, providing interpretation of the most important provisions, the delay in the case of the SEA Directive was much longer for various reasons. In particular, it seems that less attention was paid to the implementation of the Directive by both the Commission and the Member States. It has, therefore, taken some time for the application of the SEA Directive to give rise to several major disputes referred to the CJEU.

As regards the interpretation of the characteristics of the plans and programmes to *set the framework*, it is only in recent years that a significant CJEU decisions in this respect can be traced. Until then, the most comprehensive description of the *framework* had been provided by opinion in Joined Cases **C-105/09** and **C-110/09** (***Terre wallonne and Inter-Environnement Wallonie***).[567] In particular, the Advocate General contemplates how strongly the requirements of plans and programmes must influence individual projects for those requirements to set a framework. She leans towards a broader interpretation of the concept because of the historical context of adoption of the SEA Directive[568] and also refers to Art. 3(5) of the SEA Directive and a criterion considered by the Member States when they appraise the likely significance of the environmental effects of plans or programmes. They are to take account of the degree to which the plan or programme sets a framework for projects and other activities, either about the location, nature, size, and operating conditions or by allocating resources – therefore, the term *framework* must be construed flexibly.[569]

A broad interpretation of the term *framework* is therefore supported by the relationship between the SEA Directive and the EIA Directive. In its reasoning in the same Case,[570] the CJEU remained brief, stating merely that "*it is necessary to examine the content and purpose of those programmes, taking into account the scope of the environmental assessment of projects*".[571] However, it is clear from the outcome of the proceedings that the CJEU agreed with the Advocate General's approach, as it concluded that the action programme adopted under the Nitrates Directive is a plan or a programme subject to the SEA.[572]

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[567] Opinion of Advocate General Kokott of 4 March 2010, *Terre wallonne and Inter-Environnement Wallonie* (C-105/09 and C-110/09, EU:C:2010:120).

[568] *Ibid*, paras 62–64: *"During the legislative procedure the Netherlands and Austria proposed that it should be made clear that the framework must determine the location, nature or size of projects requiring environmental assessment. In other words, very specific, conclusive requirements would have been needed to trigger an environmental assessment. As this proposal was not accepted, the concept of 'framework' is not restricted to the determination of those factors. The view of the Czech Republic is based on a similarly narrow understanding of the setting of a framework. It calls for certain projects to be explicitly or implicitly the subject of the plan or programme. Plans and programmes may, however, influence the development consent of individual projects in very different ways and, in so doing, prevent appropriate account from being taken of environmental effects. Consequently, the SEA Directive is based on a very broad concept of 'framework'."*

[569] Ibid, para. 65.

[570] CJEU judgment of 17 June 2010, *Terre wallonne and Inter-Environnement Wallonie* (C-105/09 and C-110/09, EU:C:2010:355).

[571] *Ibid*, para. 45.

[572] *Ibid*, paras 53–54: *"Also, it is clear from Article 5(4) of Directive 91/676 that action programmes adopted under Article 5(1) must provide for a set of measures compliance with which can be a requirement for issue of the consent that may be granted for projects listed in Annexes I and II to Directive 85/337, and in respect of the definition of which Directive 91/676 gives Member States a certain discretion. That is so in particular in the case of measures concerning the storage of livestock manure provided for in Annex III to Directive 91/676 as regards the intensive rearing installation projects listed in Annexes I and II to Directive 85/337. In such a situation, the existence and scope of which it is nevertheless for the national court to assess in the light of the action*

Later on, in 2012, the CJEU added that a plan or a programme is defined by balancing and coordinating as *"the criteria and the detailed rules for the development of land and normally concern[s] a multiplicity of projects whose implementation is subject to compliance with the rules and procedures provided for by those measures"*.[573] In 2016, 15 years after the adoption of the SEA Directive, the CJEU finally provided further guidance on the interpretation of terms plan and programme. According to its conclusions in Case **C-290/15** (***D'Oultremont and Others***),[574] term plan and programme "*relates to 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…*"[575]

Framework in the meaning of the SEA Directive can therefore be interpreted as establishing a significant body of criteria and detailed rules for the grant and implementation, which means that the plan or programme must be substantial and set criteria or conditions for the projects which require the EIA. Although the interpretation provided by the CJEU is still broad, it seems that the CJEU has not fully sided with the abovementioned approach of the Advocate General and tried to set a compromise between the *very* broad and overly narrow concepts of plan and programme. This has raised some critique.[576] A requirement of *significant body of criteria* is far from a *complete set of criteria* but also far from *related to environment* in the spirit of the Aarhus Convention.

On the one hand, this interpretation is intended to ensure that environmental impact assessments are carried out for acts that significantly impact the environment. On the other hand, however, it is also intended, in the sense of the *de minimis* rule, to prevent the separate determination of individual criteria or conditions from triggering the need for the SEA. In this logic, it is possible to identify various *ad hoc* normative acts which authorise the project, as the CJEU has done, for example, in Case **C-387/97** (***Commission v Greece***)[577] or **C-43/10** (***Nomarchiaki Aftodioikisi Aitoloakarnanias and Others***).[578]

Nevertheless, the criterion of a number of specifications set by the plan or programme to become substantial is not without issues. The Member States might be tempted to circumvent

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programme concerned, it must be held that the action programme is to be regarded, in respect of those measures, as setting the framework for future development consent of projects listed in Annexes I and II to Directive 85/337 within the meaning of Article 3(2)(a) of Directive 2001/42."

[573] CJEU judgment of 22 March 2012, *Inter-Environnement Bruxelles and Others* (C-567/10, EU:C:2012:159, para. 30), also see the CJEU judgment of 7 June 2018, *Thybaut and Others* (C-160/17, EU:C:2018:401, para. 43).

[574] CJEU judgment of 27 October 2016, *D'Oultremont and Others* (C-290/15, EU:C:2016:816).

[575] *Ibid*, para. 49.

[576] See Opinion of Advocate General Kokott of 25 January 2018, *Inter-Environnement Bruxelles and Others* (C-671/16, EU:C:2018:39).

[577] CJEU judgment of 4 July 2000, *Commission v Greece* (C-387/97, EU:C:2000:356), para. 76: *"Contrary to the claims of the Greek Government, legislation or specific measures amounting only to a series of ad hoc normative interventions that are incapable of constituting an organised and coordinated system for the disposal of waste and toxic and dangerous waste cannot be regarded as plans which the Member States are required to adopt…"*

[578] CJEU judgment of 11 September 2012, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10, EU: C:2012:560), para. 95, on a plan to partially divert the course of a river: "*It is not evident that the project concerned constitutes a measure which defines criteria and detailed rules for the development of land and which subjects implementation of one or more projects to rules and procedures for scrutiny…"*

the obligations laid down in the SEA Directive, including public participation, by splitting measures, thereby reducing the practical effect of that Directive.[579] Indeed, breaking programmes for individual projects does not seem to present an escape from the requirement to carry out the SEA.[580] Nevertheless, the key takeaway seems to be that the CJEU excluded planning for a given area as one of the characteristics of a plan or a programme under the SEA Directive. It is sufficient if the planning acts *"cover, in the wider sense, regional and district planning in general"*.[581]

As regards the condition of Art. 2(a) of the SEA Directive that plans and programmes **are required by law and administrative provisions**, it was at first understood by the Commission and most Member States to include only mandatory plans and programmes.[582] However, it follows from the judgment in Case **C-567/10** (***Inter-Environnement Bruxelles and Others***)[583] that the SEA Directive also applies to plans and programmes adopted on an optional basis (in this case, specific spatial plans), since "*…plans and programmes whose adoption is regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them, must be regarded as 'required'…*"[584] It is, therefore, irrelevant whether the adoption of the plan or programme is imposed as an obligation by national legislation. Their adoption at the discretion is already sufficient for the purposes of the SEA Directive.

In practice, the legal form and content of plans and programmes in *town and country planning or development of land* varies among Member States. The CJEU emphasises the content and regulatory function of the specific plan or programme.[585] As spatial planning is a continuous

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[579] Opinion of Advocate General Kokott of 25 January 2018, *Inter-Environnement Bruxelles and Others* (C-671/16, EU:C:2018:39), paras 25–26: "*However, I do not find a quantitative approach, which focuses on the number of specifications, convincing. For, the Court has also held that it is necessary to avoid strategies which may be designed to circumvent the obligations laid down in the SEA Directive by splitting measures, thereby reducing the practical effect of that directive. Consequently, the clarification of the criterion of a 'significant body' should be aligned qualitatively to the specific objective laid down in Article 1 of the SEA Directive, inter alia, to subject plans and programmes which are likely to have significant effects on the environment to an environmental assessment*.".

[580] The CJEU held that rules with a planning character that have been set up for a single project may also fall within the scope of the SEA Directive. See the CJEU judgment of 22 September 2011, *Valčiukienė and Others* (C-295/10, EU:C:2011:608), paras 39–40: *"In this respect, Article 3(2)(a) of Directive 2001/42 must be interpreted as meaning that it also covers a plan which, in only one sector, sets the framework for a project which has only one subject of economic activity. The wording of Article 3(2)(a), read in the light of the 10th recital in the preamble to Directive 2001/42, does not lead to the conclusion that its field of application should be limited to plans and programmes that set the framework for projects concerning several subjects in one or more of the sectors referred to by that provision."*

[581] CJEU judgment of 27 October 2016, *D'Oultremont and Others* (C-290/15, EU:C:2016:816, paras 47-48).

[582] Bunge, T. Strategic Environmental Assessment: The Term "Plans and Programmes" as Interpreted by the European Court of Justice. *Elni review*, 2019, no. 1, p. 3.

[583] CJEU judgment of 22 March 2012, *Inter-Environnement Bruxelles and Others* (C-567/10, EU:C:2012:159).

[584] *Ibid*, para. 31.

[585] CJEU judgment of 17 June 2010, *Terre wallonne and Inter-Environnement Wallonie* (C-105/09 and C-110/09, EU:C:2010:355), paras 47–49: *"…in order to establish whether regional town planning regulations, such as those at issue in the main proceedings, set the framework for future development consent of projects listed in Annexes I and II to the EIA Directive, it is necessary to examine the content and purpose of those regulations, taking into account the scope of the environmental assessment of projects as provided for by that directive" , whereby "Concerning, in the first place, the projects listed in Annexes I and II to the EIA Directive, it should be borne in mind that infrastructure projects are listed under Title 10 of that second annex, including, under point (b) of that title, urban development projects. It should be noted that the contested decree contains*

process that includes both adoption and cancellation of various planning acts, it should be stressed that even the **cancellation** of a plan or programme can also be regarded as a plan or programme, although the SEA Directive only refers to acts which amend plans and programmes.[586] That conclusion implies an obligation to carry out an assessment in the procedure, which was the subject of the complete or partial repeal of the spatial plan.

Regarding various hybrid acts, the conclusions of the CJEU judgment in Case **C-160/17** (***Thybaut and others***) [587] are particularly relevant. The CJEU examined the nature of a decree of the Walloon Minister for Housing, Transport and Territorial Development, which defined an urban land-use planning district for the centre of Orp-le-Petit, which falls within the jurisdiction of the smaller municipality of Orp-Jauche (8,000 inhabitants, 15 km south-east of Louvain). According to the referring court, the purpose of the plan was merely to define the perimeter of the area, that is to say, the boundaries of the geographical area within which the urban development plan for renovation and development of urban functions requiring the creation, modification, extension, removal or overhang of roads and public spaces are capable of being carried out. The CJEU concluded that the plan "*due both to the manner in which it is defined and to its purpose, which is to allow for derogation from the planning requirements for plans concerning buildings and town and country planning, comes within the 'town and country planning or land use' sector within the meaning of Article 3(2)(a) of the directive*."[588]

According to the CJEU, the plan also established a framework for future planning approvals, even though it did not contain any positive legal regulation, because the definition of the district by the contested decree "*amounts to accepting the principle of a future urban development plan, which will be able to be carried out by means of derogations from the planning requirements in force being granted more easily […]. It follows that, although such an instrument does not, and cannot, lay down positive requirements, the possibility which it lays down of allowing a derogation from the planning rules in force to be obtained more easily amends the legal process and consequently brings the consolidation area at issue in the main proceedings within the scope of Article 2(a) and Article 3(2)(a) of the SEA Directive*."[589] Thus, in terms of its content and purpose, such a plan contributes to the implementation of the projects included in the Annex to the EIA Directive. The same conclusion would apply even if the concept concerned exclusively land development since, according to the CJEU, "*the words 'all plans and programmes which are prepared for a number of sectors' in that*

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rules applicable to all buildings, whatever their nature, and to all their surroundings, including 'areas of open space' and 'areas on which building is permissible', whether public or private. In that regard, that measure contains a map which not only sets out the area to which it applies, but also defines various islands to which different rules apply as regards the location and height of buildings."

[586] CJEU judgment of 22 March 2012, *Inter-Environnement Bruxelles and Others* (C-567/10, EU:C:2012:159), paras 38–39: *"In this regard, it is possible that the partial or total repeal of a plan or programme is likely to have significant effects on the environment, since it may involve a modification of the planning envisaged in the territories concerned. Thus, a repealing measure may give rise to significant effects on the environment because, as has been observed by the Commission and by the Advocate General in points 40 and 41 of her Opinion, such a measure necessarily entails a modification of the legal reference framework and consequently alters the environmental effects which had, as the case may be, been assessed under the procedure prescribed by Directive 2001/42."*

[587] CJEU judgment of 7 June 2018, *Thybaut and Others* (C-160/17, EU:C:2018:401).

[588] *Ibid*, para. 49.

[589] *Ibid*, paras 56 and 58.

recital confirm that Article 3(2)(a) of Directive 2001/42 concerns all plans and programmes which are prepared for each of the sectors referred to in that provision, including country planning by itself, and not only the plans and programmes which are prepared concomitantly for several of those sectors."[590]

The acts of a mixed form between plans and permits may also be subject to the SEA. One such example is a measure (in this case, a Prime Ministerial Decree) that determines the total treatment capacity of existing waste incineration plants already in operation, the use of this capacity, and the construction of new incineration plants, as follows from the judgment in Case **C-305/18** [***Verdi Ambiente e Società (VAS) — Aps Onlus and Others***].[591]

In principle, it cannot be ruled out that even a law proposed by a national government and approved by parliament meets all the conditions to be considered a plan or a programme. Indeed, legislative measures are explicitly included in the definition contained in the first indent of Art. 2(a) of the SEA Directive,[592] and while interpreting this provision, the CJEU rejected the categorical exclusion of **legislative measures** from plans and programmes subject to assessment, as well as the analogy to the categories resulting from the Aarhus Convention and the so-called Kiev Protocol. As noted, the SEA Directive differs from the Aarhus Convention and the Kiev Protocol in that it does not precisely contain specific provisions for policies or general regulations that would require a distinction from plans and programmes.[593]

The conclusions of the cited judgment in Case **C-671/16** (***Inter-Environnement Bruxelles and others***), which concern the interpretation of the categories of plans and programmes and the obligation to assess essential sets of criteria and conditions, can be linked in particular to the conclusions of the CJEU judgment in Case **C-290/15** (***D'Oultremont and Others***) that programmes can take the form of fragmented measures, including general technical requirements.

Even a **decree and a circular** adopted by the federal government can be considered a plan or a programme for the purposes of SEA, provided that these contain **different provisions concerning the siting and operation** of the projects such as wind farms.[594]

The above judgments imply the need to carry out a SEA for regulations setting out requirements for the implementation of construction projects (requirements for the use of land, technical requirements for buildings), where the environmental impact consists in the fact that a set of established conditions and criteria serve to approve and implement one or more of the projects that may have a significant impact on the environment. In simple terms, it is the basis for the authorisation of projects subject to EIA.

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[590] CJEU judgment of 22 September 2011, *Valčiukienė and Others* (C-295/10, EU:C:2011:608, para. 41).
[591] CJEU judgment of 8 May 2019, *Verdi Ambiente e Società (VAS) — Aps Onlus and Others* (C-305/18, EU:C:2019:384).
[592] See the CJEU judgmentss of 17 June 2010, *Terre wallonne and Inter-Environnement Wallonie* (C-105/09 and C-110/09, EU:C:2010:355, para. 47); of 27 October 2016, *D'Oultremont and Others* (C-290/15, EU:C:2016:816, para. 52).
[593] CJEU judgment of 27 October 2016, *D'Oultremont and Others* (C-290/15, EU:C:2016:816, para. 52: "*…it is apparent from the actual wording of Article 2(a), first indent of that directive, borne out by the case law referred to in paragraph 49 of the present judgment, that the notion of 'plans and programmes' can cover normative acts adopted by law or regulation*.").
[594] See the CJEU judgment of 25 June 2020, *A. and Others* (C-24/19, EU:C:2020:503).

However, it may not be obvious how specific this basis must be. Case **C-290/15** concerned the conditions for the establishment of wind farms laid down in an order *(*"*The present sector-specific conditions apply to wind farms the total power of which is at least 0.5 MW of electricity, referred to in sections 40.10.01.04.02 and 40.10.01.04.03 of Annex I*"). The order at issue did not define a "complete framework" for the implementation of the projects; the conditions set out consisted of technical standards, operating conditions, accident and fire prevention, noise standards, restoration to its original state, and the posting of financial security for the operation of the wind farms. At the same time, however, the provisions of the order were separated from the reference framework and the mapping of areas for the siting of wind power plants so that it was a classic technical order. The CJEU concluded that the order was subject to impact assessment because it was substantively relevant to the energy sector and contributed to defining the framework for implementing wind farm projects, among the projects listed in Annex II of the EIA Directive.

The CJEU's conclusions can be generalised. Given that the SEA Directive does not envisage the assessment of plans and programmes for the separate *construction* sector, the question arises whether regulations containing general requirements for the construction of land use can be considered concepts in the spatial planning sector and similar regulations governing technical requirements for buildings can be considered concepts in individual sectors - or whether they have already reached such a level of abstraction that they are not concepts. If the technical standards for wind farms are considered a plan, so should the technical standards for (all) buildings be.[595] In the case of land use requirements, one can follow the CJEU's reasoning that the objectives of the Directive cannot be circumvented.[596]

However, there seems to exist an alternative scenario in which even the abovementioned order will not qualify as a plan within the meaning of the SEA Directive. This would be the case if the plan could not have any impact on the environment. In that case, it would indeed regulate binding criteria but inert to the environment.[597] Furthermore, considering the order as a plan would probably not be necessary if the SEA process carried out in preparing land-use planning documents or other plans went so far as to examine the technical criteria set out in the order, subject to the requirements for public participation.[598] Finally, a different situation

[595] In principle, it will be a regulation that can be classified under the "development criteria", which is one of the examples of the concepts mentioned in the UNECE handbook. See UNECE. Resource to Support Application of the UNECE Protocol on Strategic Environmental Assessment [online]. 2011, p. 50 [accessed on: 11 February 2023]. Available at: <http://www.unece.org/fileadmin/DAM/env/documents/2011/eia/ece.mp.eia.17.e.pdf>.

[596] CJEU judgment of 27 October 2016, *D'Oultremont and Others* (C-290/15, EU:C:2016:816), para. 48: "*Furthermore, as the Advocate General stated in point 55 of her Opinion, it is necessary to avoid strategies which may be designed to circumvent the obligations laid down in Directive 2001/42 by splitting measures, thereby reducing the practical effect of that directive…"*

[597] See the opinion of Advocate General Kokott of 14 July 2016, *D'Oultremont and Others* (C-290/15, EU:C: 2016:561), para. 82: "*EDORA is of the view that the provisions contained in the contested order will not have any significant environmental effects. Strictly speaking, however, this is not a prerequisite for the obligation to carry out an environmental assessment under Article 3(2)(a) of the SEA Directive. It is true that the opposite might be inferred from a reading of the judgment in Dimos Kropias Attikis. In that event, however, the examination of the potential for significant environmental effects would be confined to the question of whether it can be excluded, on the basis of objective information, that that plan or project will have a significant effect on the site concerned. It seems unlikely that this is readily feasible in the context of setting limit values, in particular where these relate to noise generation and shadow flicker*."

[598] *Ibid*, para. 83.

would also arise if the criteria laid down were not binding and were only subsidiary, as the CJEU concluded: "…a *regulatory order, such as that at issue in the main proceedings, containing various provisions on the installation of wind turbines which must be complied with…*"[599] There would, therefore, be no binding framework, which is a prerequisite for the SEA process to be necessary.

4.3 NATURA 2000 DIRECTIVES

Despite extensive requirements stemming from the Natura 2000 protection, no further details have been provided, except for a derogation regime allowing other public interests to override nature conservation in Art. 6(4) of the Habitats Directive. This is still the case, as thirty years after the Habitats Directive was adopted, not a word of its Art. 6 has been changed. Unlike the EIA Directive, the Habitats Directive has not been amended to reflect the CJEU case law or practical needs. The Commission only prepared several guidelines to support synergy between nature protection and other policies, such as increasing the share of renewable energy.[600]

The possible explanation lies in a different concept of the EIA Directive and the Birds/Habitats Directives: While the first is more process-driven, the latter seems to be more outcome-oriented. This seems to cause confusion in practice, as confirmed by the case law of the CJEU because the Member States must coordinate both assessments. Beunen correctly notices that *"The Birds and Habitats directives have far-reaching consequences for planning and decision making in Member States. One important consequence is the need to take into account the requirements of the Birds and Habitats directives in the decision making about physical interventions. Activities in and around protected areas can have significant effects on protected nature values, and need to be assessed. Not only do conflicts arise over new developments, but current use is also subject to an appropriate assessment."*[601]

The Habitats Directive **does not list projects** with the adverse impact on the protected sites. Therefore, the Habitats Directive's assessment requirement applies to a broader range of projects, as the principal criterion for identifying these projects is their potential impact on the site. This makes perfect sense from the perspective of the Natura 2000 protection but may cause confusion in practice, given the different approach taken by the most important EU legislative pieces. The approach of Natura 2000 is closer to the EIA requirement for *smaller* projects.

Unlike the EIA Directive, a project within the meaning of the Habitats Directive does not have to consist of physical works. The CJEU held in Case **C-293/17** (***Coöperatie Mobilisation for the Environment and Others***), that "*Article 6(3) of the Habitats Directive must be interpreted as meaning that the grazing of cattle and the application of fertilisers on*

[599] CJEU judgment of 27 October 2016, *D'Oultremont and Others* (C-290/15, EU:C:2016:816, para. 54).
[600] See European Commission. Wind energy developments and Natura 2000. Guidance document [online]. 2010 [accessed on: 11 February 2023]. Available at: <https://op.europa.eu/en/publication-detail/-/publication/65364c77-b5b8-4ab6-919d-8f4e3c6eb5c2>.
[601] Beunen, R. European nature conservation legislation and spatial planning: For better or for worse? *Journal of Environmental Planning and Management*, 2006, vol. 49, no. 4, p. 606.

the surface of land or below its surface in the vicinity of Natura 2000 sites may be classified as a 'project' within the meaning of that provision, even if those activities, in so far as they are not a physical intervention in the natural surroundings, do not constitute a 'project' within the meaning of Article 1(2)(a) of the EIA Directive."[602]

As noted, the Habitats Directive does not define a project; only the potential effects on Natura 2000 sites are decisive in determining activities that correspond to the project and require assessment based on Art. 6(3) of the Habitats Directive. As Möckel rightly concludes, the pre-assessment of impacts of the proposed activity (screening) is therefore inherent to the concept of project under the Habitats Directive: *"There is only a project in the sense of Articles 6(3) HD, requiring an appropriate assessment, if significant effects could not be ruled out in the screening process. The screening is therefore not an expendable process step, not mentioned in Article 6(3) HD, but is part of the project definition."*[603]

The Habitats Directive does not require the assessment to be a part of the planning or permitting procedure. It does not provide a provision similar to Art. 2(2) of the EIA Directive which stipulates that the EIA may be integrated into the existing procedures for development consent to projects or into other procedures to comply with the aims of this Directive.

So far, the CJEU has still **not defined the term *plan*** according to Art. 6(3) of the Habitats Directive.[604] Provided it is one of the key provisions in Natura 2000 protection, more guidance would be helpful.[605] Otherwise, the national authorities could be inclined to interpret the term the same way as for the SEA Directive. Such an approach is logical but would be overly simplistic.[606] On the one hand, the Habitats Directive implies that the plans must be binding and, therefore – similar to the SEA plans and programs – devised or accepted by national, regional or local authorities.[607] On the other hand, the conditions for these plans to *set the framework* is absent in the Habitats Directive. The decisive factor is that they are *likely to have a significant effect* on a site that does not require detailed rules for future activities.

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[602] CJEU judgment of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others* (C-293/17 and C-294/17, EU:C:2018:882, para. 73).

[603] Möckel, S. The terms "project" and "plan" in the Natura 2000 appropriate assessment. *Nature Conservation*, 2017, no. 23, p. 40.

[604] See the opinion of Advocate General Fenelly of 16 September 1999, *Commission v France* (C-256/98, EU:C:1999:427), para. 33: *"In the context of Article 6(3), (24) the term 'plan' must in my view be interpreted extensively. The sites likely to be affected by such plans are, by definition, sites of Community importance, which benefit from the protection regime established in accordance with Article 6(1) and (2); the adoption of a narrow interpretation of the term 'plan' would be contrary to both the wording of Article 6(3) ('[any] plan or project'), and the conservation objectives which the designation of SACs seeks to pursue. As the possible future development of a site depends primarily on the assessment, it seems to me that the obligation ratione materiae to carry out a site assessment must therefore cover all development activities with the exception of those which are unlikely to have any significant effect, either individually or in combination with other development activities, on the site's conservation objectives. This is consistent with the principle of Community law that exceptions to the general rule (here, development activities which do not require a site assessment) are to be interpreted restrictively."*

[605] It is nevertheless clear that the exemptions must be interpreted narrowly as the CJEU insists that any connection with the management of the site must be direct. See the CJEU judgment of 4 March 2010, *Commission v France* (C-241/08, EU:C:2010:114, paras 50–51).

[606] See Möckel, S. The terms "project" and "plan" in the Natura 2000 appropriate assessment. *Nature Conservation*, 2017, no. 23, p. 38.

[607] See the CJEU judgment of 16 February 2012, *Solvay* (C-182/10, EU:C:2012:82, para. 69).

The Habitats Directive and the Birds Directive do not rely exclusively on the assessment procedure. In particular, Member States are required to manage the protected sites[608] , including the obligation to establish the necessary conservation measures for special areas of conservation involving, if need be, appropriate **management plans** specifically designed for the sites or integrated into other development plans.[609] Development plans are not further defined, but depending on the system of spatial planning in the particular Member State, they can be spatial planning documents at the local geographical level.

The practical implementation of management plans for biodiversity conservation can conflict with planning tools already in place at the regional and local levels, prominently land-use plans and territorial plans for economic development.[610] Nevertheless, Member States are provided with some degree of flexibility as regards the management of the network, as they can choose either to *simply* identify conservation measures that should be implemented or to integrate them within planning tools.[611]

Moreover, both Directives also provide for separate protection of species alongside the protection of sites. Such protection specifically affects construction permitting procedures that must consider the existence of endangered fauna, flora, and all wild bird species. Member States may derogate from the protective regime only for the reasons provided by the Directives and specify the scope and conditions of the derogations.[612] Where a project **requires an exemption from the protection of endangered species of animals and plants** protected under EU law, the decision to authorise the project must assess the conditions of the derogation regime, i.e., the existence of a specified public or private interest, the absence of any other satisfactory solution, and the populations of the species concerned persist in their natural range despite the derogation being granted without adversely affecting their conservation status.[613] Similarly, suppose the **project requires a derogation procedure for the protection of birds or an exemption from the protection of an endangered bird species**. In that case, the decision to authorise the project must assess the conditions of the derogation regime, i.e., the existence of a specified public interest and the absence of any other satisfactory solution, or the conditions of small-scale take, which requires an assessment of the reasonableness of the use of birds.[614]

The Directives do not require this derogation procedure to be integrated into the procedures for granting development consent to such projects, nor do they need provision to be made for public participation in such a derogation procedure, as confirmed recently by the CJEU in

[608] See Sobotta, C. The European Union legal boundaries for semi-natural habitats management in Natura 2000 sites. *Journal for Nature Conservation*, 2018, vol. 43, no. 3, p. 261–267.
[609] Habitats Directive, Art. 6(1).
[610] Gibbs, D., While, A., Jonas, A.E.G. Governing nature conservation: The European Union Habitats Directive and conflict around estuary management. *Environment and Planning*, 2007, vol. 39, no. 2, p. 339–358.
[611] See Bouwma, I., Beunen, R., Liefferink, D. Natura 2000 management plans in France and the Netherlands: Carrots, sticks, sermons and different problems. *Journal of Natural Conservation*, 2018, vol. 46, p. 56–65; Lai, S. Hindrances to Effective Implementation of the Habitats Directive in Italy: Regional Differences in Designating Special Areas of Conservation. *Sustainability*, 2020, vol. 12, no. 6, p. 1–18.
[612] Birds Directive, Art. 9; Habitats Directive, Art. 16. See Vomáčka, V. Balancing Nature Protection and Other Public Interests: Czech Example. In: Tegner Anker, H., Egelund Olsen, B. (eds.) *Sustainable Management of Natural Resources: Legal Instruments and Approaches*. Cambridge: Intersentia, 2018, p. 177–192.
[613] Habitats Directive, Art. 16(1).
[614] Birds Directive, Art. 9(1).

Case **C-166/22** (***Hellfire Massy Residents Association***).[615] Nevertheless, the requirements of the individual Directives restrict the discretion of the Member States as regards the order of the procedures, for example, if both the EIA and derogation from the species protection are needed.[616]

However, Art. 6(3) of the Habitats Directive seems to be the one provision to attract the particular attention of national legislators, public authorities, and undertakings. Arguably, it does not leave much manoeuvring space for the Member States, similar to the EIA Directive. This creates a strong tension between the conservation of the sites and development. Squintani explains that *"Habitats – especially the European priority areas forming the Nature 2000 network established under the Habitats Directive – are under constant pressure due to human activities. During the economic crisis that started in 2008, reforms of permitting procedures took place in several Member States to foster economic recovery. The pursuit of climate change mitigation highlights the at times difficult relationship between nature conservation and renewable energy projects. More generally, the pursuit of economic welfare, coupled with the abundant supply of agricultural products, are a constant threat to this environmental field."*[617]

As regards the requirements for the assessment under Art. 6(3) of the Habitats Directive, it must be organised in such a manner that the competent national authorities can be certain that a plan or project will not have adverse effects on the integrity of the site concerned, given that, where doubt remains as to the absence of such effects, the competent authority will have to refuse development consent. Concerning the factors on the basis of which the competent authorities may gain the necessary level of certainty, it must be ensured that no reasonable scientific doubt remains, and those authorities must rely on the best scientific knowledge in the field.[618] In practice, the Habitats Directive has proved to be very powerful in promoting sustainable planning. Nevertheless, the success of individual cases seems to be due mainly to elements specific to the particular planning process, such as the use of deliberative public participation mechanisms as well as detailed assessment tools.[619]

As regards the **derogatory regime**, unlike the EIA Directive, the Habitats Directive **does not foresee alternative ways of assessing impacts**, nor does it foresee cases in which it would be

[615] CJEU judgment of 6 July 2023, *Hellfire Massy Residents Association* (C-166/22, EU:C:2023:545, para. 30).
[616] *Ibid*, para 36: *„…in the specific case where, first, the execution of a project that is subject to the dual requirement for assessment and development consent laid down in Article 2(1) of Directive 2011/92 involves the developer applying for and obtaining a derogation from the plant and animal species protection measures prescribed in the provisions of national law transposing Articles 12 and 13 of Directive 92/43 and where, second, a Member State confers power to grant such a derogation on an authority other than the one on which it confers power to give development consent for the project, that potential derogation must necessarily be adopted before development consent is given. If it were otherwise, that development consent would be given on an incomplete basis and would not, therefore, meet the applicable requirements"*. With a reference to the CJEU judgment of 24 February 2022, *Namur-Est Environnement* (C-463/20, EU:C:2022:121, paras 52 and 59).
[617] See Squintani, L. Balancing nature and economic interests in the European Union: On the concept of mitigation under the Habitats Directive. *Review of European, Comparative & International Environmental Law*, 2019, vol. 29, no. 1, p. 129.
[618] CJEU judgment of 11 September 2012, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10, EU: C:2012:560, paras 110–113).
[619] See Palerm, J. The Habitats Directive as an instrument to achieve sustainability? An analysis through the case of the Rotterdam Mainport Development Project. *European Environment*, 2006, vol. 16, no. 3, p. 127–138.

possible to dispense with the assessment altogether for certain reasons. The requirement in Art. 6(3) of the Directive that an assessment shall be carried out for projects and concepts with a potential impact on sites is, therefore, in principle, unconditional. The implementation of a project or concept involving a negative impact on a site is, according to Art. 6(4) of the Directive, conditional not only on the existence of overriding reasons of public interest but also on an assessment being carried out.[620]

The fundamental difference between the derogatory regime in comparison to the EIA lies in the exceptionality condition (EIA Directive) and the urgency condition (Habitats Directive). The addition to the exceptional condition that the application of the EIA Directive would adversely affect the purpose of the project makes it clear that a particular urgency, which makes the implementation of the project undelayable, is also required by the Directive. It is difficult to imagine a private project, the implementation of which would be exceptional and not subject to delay, even from the point of view of the State. The application of the derogation regime under the EIA Directive should not be based on private interest. Therefore, it can be concluded that the derogation regimes under the two directives are very close and that similar projects will generally comply with their conditions.[621]

Requirements of the Habitats Directive on **public participation** in decision-making according to Art. 6(3) have been analysed in Chapter 3.2 (*if appropriate, after having obtained the opinion of the general public*). Besides the insufficient implementation of Art. 6 and 7 of the Aarhus Convention, the Habitats Directive only provides in Art. 22(a) for obligatory *proper* consultation of the public concerned before the re-introduction of the species in Annex IV that are native to their territory. Public participation in the adoption of the management plans is not required; the Directive does not provide any requirements on access to justice, and the guarantees in the first Aarhus pillar are minimal: The public must have access to the national report on the implementation of the measures taken under this Directive pursuant to Art. 17(1) of the Directive. The Birds Directive does not set any requirements on public participation,

[620] See Garcia Ureta, A. Habitats Directive and Environmental Assessment of Plans and Projects. *Journal for European Environmental & Planning Law*, 2007, vol. 4, no. 2, p. 84–96.

[621] See the CJEU judgment of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622). The referring court asked, among other things, whether the EIA Directive allows for the deferral of the decommissioning of a nuclear power plant on grounds of overriding reasons of public interest relating to the security of the country's electricity to be exempted from the assessment requirements and whether the same grounds can be considered an overriding reason of overriding public interest within the meaning of Art. 6(4) of the Habitats Directive. The CJEU held that *"Article 2(4) of the EIA Directive must be interpreted as meaning that a Member State may exempt a project such as that at issue in the main proceedings from the requirement to conduct an environmental impact assessment in order to ensure the security of its electricity supply only where that Member State can demonstrate that the risk to the security of that supply is reasonably probable and that the project in question is sufficiently urgent to justify not carrying out the assessment, subject to compliance with the obligations in points (a) to (c) of the second subparagraph of Article 2(4) of that directive. However, that possibility of granting an exemption is without prejudice to the obligations incumbent on the Member State concerned under Article 7 of that directive."* And that *"Article 6(4) of the Habitats Directive must be interpreted as meaning that the objective of ensuring security of the electricity supply in a Member State at all times constitutes an imperative reason of overriding public interest, within the meaning of that provision. The second subparagraph of Article 6(4) of that directive must be interpreted as meaning that if a protected site likely to be affected by a project hosts a priority natural habitat type or priority species, a finding which it is for the referring court to make, only a need to nullify a genuine and serious threat of rupture of that Member State's electricity supply constitutes, in circumstances such as those in the main proceedings, a public security ground, within the meaning of that provision"* (para. 159).

and it does require the Member States to make any documents public, not even the report on implementing the use of the derogatory regime according to Art. 9(3) of the Directive or the general report on the implementation of national provisions taken under this Directive according to the Art. 12(1) of the Directive.

The approach of the Natura 2000 Directives to public participation is inadequate compared to more recent EU legislation in other areas discussed in other chapters. It does not seem to reflect the specificities of biodiversity conservation, which is a matter of common interest. It would probably deserve more transparency to achieve and maintain a high level of protection. In addition, the role of NGOs in conservation, which have no rights in themselves, is crucial. But it seems undermined by the lack of detailed rules and procedural guarantees.

4.4 WATER PROTECTION AND MANAGEMENT

As noted, the activity in spatial planning harmonisation was taken over by the Member States after 2000. The Commission stepped aside, respecting its areas of competence and the principle of subsidiarity. This has not restricted its capacity in EU environmental policy. In particular, the **Water Framework Directive** (WFD, 2000/60/EC)[622] adopted in 2000 marks the Commission's overall increasing attention towards territorial issues in various environmental fields, such as the sustainable management and protection of freshwater resources.

The WFD is the first piece of EU environmental legislation that explicitly refers to the ESDP. In the preamble, it describes that: *„This Directive should provide a basis for a continued dialogue and for the development of strategies towards a further integration of policy areas. This Directive can also make an important contribution to other areas of cooperation between Member States, inter alia, the European spatial development perspective (ESDP).“*[623]

The WFD does not impose precise requirements on spatial planning or assessment of plans for that purpose. Nevertheless, the management challenges associated with the water environment can hardly be addressed without spatial planning. More specifically, the key procedural requirement of the WFD is the preparation of river basin management plans covering river basin districts.[624] Competent authorities can adopt these plans as stand-alone documents. To become effective, however, they must be taken into account by the spatial planning documents. Consequently, spatial planning is a mechanism through which, *inter alia*, the water management requirements are fulfilled.

The abovementioned broad objectives differentiate the WFD from the 1991 **Nitrates Directive,** which also foresees being respected by the spatial planning documents, but only to a limited extent, as it is aimed at reducing water pollution caused or induced by nitrates from

[622] 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. OJ L 327, 22. 12. 2000, p. 1–73.
[623] Para. 16.
[624] WFD, Art. 13.

agricultural sources and - preventing further such pollution. Therefore, the main focus is agricultural activities and less so complex water management.

The successful achievement of the WFD's goals ultimately depends on the effective integration of land and water management processes. Planning authorities, therefore, have a key role to play in implementing the WFD by ensuring that the development and use of land is undertaken in a manner that is sensitive to the requirements of the WFD.[625] In this regard, the Commission guidance document on planning in relation to WFD notes that *"(a)lthough WFD contains no explicit provisions in relation to land-use planning, the arrangements for implementation will need to ensure that bodies responsible for land use planning take account of the objectives, which it creates. Therefore, it will be advisable to ensure that the land use and water planning processes support one another as far as possible."*[626]

In 2007, based on experience from Germany, Latvia, Sweden, and the UK, Carter noticed that *„(n)ational governments and other stakeholders responsible for the WFD are increasingly recognising that spatial planning provides an established mechanism that can help them to meet this requirement."*[627] He also identified three main ways spatial planning can contribute to the sustainable use and management of water: *„through the preparation of spatial plans, development control, and the application of planning techniques and approaches such as SEA. Via these mechanisms, spatial planning can contribute to the successful implementation of the WFD's 'basic measures' and can consequently help to encourage the sustainable management and protection of freshwater resources."*[628] Similarly, Frederiksen, Mäenpää, and Hokka address three aspects for improved efficiency of integrated river basin management planning: *„The first is to consider environmental management in a spatial perspective coordinating different environmental and physical planning processes. Suitable combinations of collaborative platforms, proper hierarchical procedures and spatial environmental information databases could support this. The second is to ensure that water goals are addressed in sectoral policies. Invoking strategic environmental assessment at regional level could be a strong instrument for this type of policy integration. Thirdly, on the practical level, the adjustment of the timing and the level of planning and public participation processes within different environmental legislative contexts should be coordinated, and data and information systems should be shared. In future, different models for institutional collaboration with respect to the issues studied should be analysed and experiences shared."*[629]

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[625] See White, I., Howe, J. Planning and the European Union Water Framework Directive. *Journal of Environmental Planning and Management*, 2003, vol. 46, p. 621–631.

[626] European Commission. Common Implementation Strategy for the Water Framework Directive (2000/60/EC). Guidance document no. 11. Planning process [online]. 2003 [accessed on: 1 January 2023]. Available at: < http://forum.europa.eu.int/Public/irc/env/wfd/library?l ¼ /framework_ directive/guidance_documents/guidancesnos11splannings/_EN_1.0_&a ¼ d >.

[627] *Ibid*.

[628] Carter, J. Spatial planning, water and the Water Framework Directive: Insights from theory and practice. *The Geographical Journal*, 2007, vol. 173. p. 336.

[629] Frederiksen, P., Mäenpää, M., Hokka, V. The Water Framework Directive: spatial and institutional integration, Management of Environmental Quality, 2008, vol. 19, no. 1, p. 114.

Note that all authors emphasise strategic environmental assessment as a powerful tool for environmental protection. This confirms the importance of adopting the SEA Directive soon after the WFD (see Chapter 4.2).

The requirements of the WFD reach beyond planning (management) and affect **permitting procedures** as well. The construction and operation permitting must ensure that the good status of surface water and groundwater is achieved and maintained. Such a requirement implies some form of project-specific impact assessment, which, to some extent, duplicates the rules of the EIA Directive - and paves the way for integrated processes. These enormous indirect impacts of the WFD requirements, combined with the significance of water resources, made the WFD not only one of the most significant pieces of EU environmental legislation but arguably the first *sustainable development* directive.[630] Simultaneously, the need for integration to other sectors, including public construction law, presents one of the biggest obstacles to the effective implementation of the WFD.[631]

Compared to the EIA Directive, the WFD does not provide any **list of projects** with an adverse impact on the status of the body of water. The WFD simplistically requires the achievement of good water status while allowing exemptions from this obligation. Both the requirement and the derogatory regime apply to development that may affect water status. However, the WFD only uses the terms *modifications* and *alterations* to the impact on water (*modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater*).[632]

The **derogation regime** in the WFD is drafted similarly to the Habitats Directive. In practice, therefore, the general conclusions reached by the CJEU in relation to the derogation regime in the Directive are being adopted to interpret, in particular, Art. 6(4) of the Habitats Directive.[633] However, the WFD already announces in its preamble that "*There may be grounds for exemptions from the requirement to prevent further deterioration or to achieve good status under specific conditions, if the failure is the result of unforeseen or exceptional circumstances, in particular floods and droughts, or, for reasons of overriding public interest, of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, provided that all practicable steps are taken to mitigate the adverse impact on the status of the body of water*."[634]

An elaboration of this premise is contained in Art. 4(6) of the WFD, in relation to temporary deterioration in the status of bodies of water due to exceptional circumstances, and in Art. 4(7) of the WFD, which lays down conditions under which Member States will not breach the requirements of the WFD. The Directive seems to distinguish between situations where the reason for the derogation is an *overriding* public interest and where it is a public interest specified as the protection of human health, the protection of the population, or sustainable

[630] World Wildlife Fund. Elements of good practice in integrated river basin management: a practical resource for implementing the EU Water Framework Directive. Brussels, 2001, p. 1.
[631] European Environmental Bureau. Making the EU Water Framework Directive work: ten actions for Implementing a better European water policy. 2001, Brussels.
[632] See the WFD, Art. 4(7).
[633] See the opinion of Advocate General Kokott of 13 October 2011, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10, EU:C:2011:651, para. 222).
[634] WFD, preamble para. 32.

development, but which may not be overridden by the interest in achieving and maintaining a favourable status of water bodies.

Van Hooydonk[635] notes that it is unclear whether the concepts of overriding public interest under the Water Framework Directive and the Habitats Directive are the same – and whether, for example, the CJEU's case law on Art. 6(4) of the Habitats Directive can be used by analogy in cases of water protection. However, there is no reason why this should not be the case, taking into account the specificities and objectives of the area concerned, particularly regarding the temporary nature of the measures taken and the possibilities of remedying their effects.[636]

On the other hand, the cited provision of the WFD lacks the requirement for *imperative* reasons of overriding public interest, as in Art. 6(4) of the Habitats Directive. It can, therefore, be concluded that it lays down less stringent conditions for a derogation regime than the Habitats Directive.[637]

The CJEU has not directly commented on the interpretation of the conditions for a derogation regime under the WFD. Still, it has provided some guidance in its judgment in Case **C-43/10** (***Nomarchiaki Aftodioikisi Aitoloakarnanias and Others***)[638], in which it held that a project might be authorised at least if the conditions set out in Art. 4(7)(a) to (d) of the WFD are satisfied.[639] It follows that the conditions must be observed cumulatively, as has also been established by subsequent case law.[640] In its judgment in Case **C-461/13** (***Bund für Umwelt und Naturschutz Deutschland***)[641], concerning the modifications to make the German river Weser accessible for container traffic, the CJEU confirmed the binding nature of the objectives laid down in Art. 4(1) of the WFD, which is supported by the exemption scheme provided for in Art. 4(7) of the WFD, stating that "*The structure of the categories of derogation which are laid down in Article 4(7) of Directive 2000/60 permits the inference that*

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635 Van Hooydonk, E. *The Impact of EU Environmental Law on Ports and Waterways and Ports: Including a Proposal for the Creation of Portus 2010, a Coherent EU Network of Strategic Port Development Areas*. Antwerp: Maklu, 2006, p. 242–243.

636 This conclusion is also confirmed by a 2011 Commission-sponsored analysis which states that the two directives allow for divergent practices for socio-economic reasons, although the procedural arrangements differ. According to the analysis, the overriding public interest may vary *"depending on the size of the project and the expected impacts and benefits (e. g., if they are relevant at the local, regional or national scale). What 'overriding public interest' means will need to be defined on a case by case basis and is ultimately up to the Member State. Generally, the reasons of overriding public interest refer to situations where plans or projects envisaged prove to be indispensable within the framework of: actions or policies aiming to protect fundamental value for citizen's lives (health, safety, environment); fundamental policies for the state and the society; carrying out activities of an economic or social nature, fulfilling specific obligations of public services."* See European Commission. Links between the Water Framework Directive (WFD 2000/60/EC) and Nature Directives (Birds Directive 2009/147/EC and Habitats Directive 92/43/EEC): Frequently Asked Questions [online]. 2011, p. 26 [accessed on: 11 November 2022]. Available at: <http://ec.europa.eu/environment/nature/natura2000/management/docs/FAQ-WFD%20final.pdf>.

637 See also Grimeaud, D. The EC Water Framework Directive – An instrument for integrating water policy. *Review of European community and International Environmental Law*, 2004, no. 1, p. 33–34; Mardsen, S. *Strategic Environmental Assessment in International and European Law: A Practitioner's Guide*. London: Routledge, 2012, p. 265.

638 CJEU judgment of 11 September 2012, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10, EU:C:2012:560).

639 *Ibid*, paras 67 and 69.

640 CJEU judgment of 1 June 2017, *Folk* (C-529/15, EU:C:2017:419, para. 33).

641 CJEU judgment of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland* (C-461/13, EU:C:2015:433).

Article 4 of the directive does not contain solely basic obligations, but that it also concerns individual projects."[642]

In addition, the judgment of the CJEU in Case **C-529/15** (***Folk***)[643] shows that the WFD requirements apply not only to projects subject to authorisation, but to all situations of deterioration of bodies of water, whether due to a facility operation or not.[644] A similar reason seems to have led to the absence of a definition of a project in the Habitats Directive, so activities or changes to projects that do not require a permit under national legislation can be affected. It can be inferred that the obligations under both directives (and the conditions for applying the derogation regimes) apply even in the case of old, already authorised projects.[645] In the case of applying the derogation regime under the WFD, as in the case of plans and concepts assessed under other directives, it is necessary to rely on up-to-date expert information.[646]

As regards **public participation**, Art. 14(1) of the WFD stipulates that *"Member States shall encourage the active involvement of all interested parties in the implementation of this Directive, in particular in the production, review and updating of the river basin management plans* (or updated river basin management plans[647]). *Member States shall ensure that, for each river basin district, they publish and make available for comments to the public, including users: (a) 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; (b) 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; (c) draft copies of the river basin management plan, 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 river basin management plan."* Furthermore, Member States are required to allow at least six months to comment in writing on those documents.[648]

The scope of public participation is limited as the requirements of Art. 14 WFD are applicable only to the river basin management plans. They do not apply to programmes of measures prepared under Art. 11 of the WFD, which is not systematic, given that the content of the programmes of measures could also be of importance to the public, arguably even more than the content of river basin management plans. The summary of these programmes, including the ways in which the objectives established under Art. 4 of the WFD, are thereby to be

[642] *Ibid*, paras 44 and 47.
[643] CJEU judgment of 1 June 2017, *Folk* (C-529/15, EU:C:2017:419).
[644] *Ibid*, para. 32.
[645] In addition to the judgment cited above, see the opinion of Advocate General Kokott of 28 June 2011, *Commission v Spain* (C-404/09, EU:C:2011:425), para. 111: "*Consequently, in the case of old projects, damage to or significant disturbance of protected areas must also be allowed under Article 6(2) of the Habitats Directive if the substantive conditions of Article 6(2) of the Habitats Directive are met. 6(4), i.e. overriding reasons of overriding public interest, including social and economic reasons, where no alternative solution is available, in order to ensure the protection of the overall coherence of the NATURA 2000 network."*
[646] See the CJEU judgment of 4 May 2016, *Commission v Austria* (C-346/14, EU:C:2016:322, para. 82).
[647] WFD, Art. 14(3).
[648] WFD, Art. 14(3).

achieved, must be covered by the river basin management plans.[649] However, this alone does not seem to compensate for comprehensive participation.

On the other hand, the requirements of the SEA Directive seem to be applicable to the programmes of measures prepared under Art. 11 of the WFD, including the consultation procedure laid down in Art. 6 of the SEA Directive. Therefore, at least certain consultation is required. To make things more confusing, the (additional) SEA requirements are not applicable to the preparation of the river basin management plans as they do not present a framework for the approval of water-related projects.[650]

The **differences in requirements of the Aarhus Directive** are apparent. The *public* is not defined in the WFD, and Member States are not explicitly required to identify the public entitled to consultation. The WFD refers to the *active involvement of all interested parties* and the *public, including users*, which may suggest that the concept of the *public* is narrower in comparison to the *public* in the Aarhus Directive (and the Aarhus Convention). On the other hand, the preamble of the WFD uses the term *general public*,[651] which usually means broad public, but is confusing in the context of the Aarhus Directive. The academia consequently settled on the term *stakeholders* to describe the scope of public participation under the WFD (*"all those with an interest in the implementation, including local authorities, government agencies, sectoral users of water and catchments, and the general public"*[652]).

While the Aarhus Directive relies on the active dissemination of information by public notices or other appropriate means, such as electronic media, the WFD only asks to *publish and make available*. Background documents are provided on request. Given the advanced technical requirements of the WFD, it is somewhat surprising that a non-technical summary similar to the EIA Directive is not available to the general public. Member States are obliged to encourage active participation, but the means to do so are not specified, creating ambiguity.[653]

Most importantly, the WTF does not require the public to have the right to express their comments and views when all options are open and the results of public participation are given due consideration. In other words, the public is given a generous six-month comment period, but the fate of the comments made is unclear. The public may not even be informed of reasons and considerations behind the plan. Consequently, a *"lack of clarity regarding the role of stakeholders poses a particular impediment to success"*.[654]

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[649] WFD, Annex VII(A)(7).

[650] See Reinhardt, M. Die ''strategische'' Umweltprüfung im Wasserrecht. *Natur und Recht*, 2005, vol. 27, no. 8, p. 499–504.

[651] WFD, preamble para. 46: *„To ensure the participation of the general public including users of water in the establishment and updating of river basin management plans, it is necessary to provide proper information of planned measures and to report on progress with their implementation with a view to the involvement of the general public before final decisions on the necessary measures are adopted."*

[652] Irvine, K., O'Brien, S. Progress on Stakeholder Participation in the Implementation of the Water Framework Directive in the Republic of Ireland. *Biology and Environment: Proceedings of the Royal Irish Academy*, 2009, vol. 109B, no. 3, p. 366.

[653] See Ker Rault, P. A., Jeffrey, P. J. Deconstructing public participation in the Water Framework Directive: Implementation and compliance with the letter or with the spirit of the law? *Water and Environment journal*, 2008, vol. 22, no. 4, p. 241–249.

[654] *Ibid*.

As a result, it is easy to see how the attempt to involve the public in river basin-level planning can fail: Public is encouraged only formally, without identifying target groups and choosing a proper method of communication, to consult technical information, which is difficult to understand, without actual impact on the adopted plan. This has been confirmed by studies focused on the consultation process in various Member States. Scheuer and Rouillard[655] concluded that participation processes did not meet the expectations of environmental NGOs, who generally felt they were brought into the process too late and had insufficient influence over decisions.

Vague requirements or their lack also translate into massive variability of the implementing measures in the Member States. It seems that some countries have started implementing the policy pragmatically and with low ambitions. In contrast, others have made a quick and ambitious start but slowed down later in the process.[656] Keessen *et al.*,[657] after analysing the implementation of the WFD in 11 Member States, conclude that the Directive leaves so much room for policy discretion that it produces vastly different approaches to implementation. This is certainly not welcome, and – as they assume – there is a risk that unambitious national practices will lead to a lack of practical effectiveness.

Mostert *et al.*[658] identified more than seventy factors fostering or hindering social learning, particularly clarity of stakeholders' role in decision-making: the political and institutional attitude to multi-stakeholder engagement. Nevertheless, *"When steps toward a truly participatory approach were taken, this resulted in benefits for the stakeholders involved and for the environment,"*[659] which implies that the aims of effective public participation are achievable, though not achieved in general practice.

Jager *et al.*[660] conclude, after analysing the adaptation to the requirements of river basin management and participation in thirteen Member States, that there is a *„general tendency towards increased, yet circumscribed, stakeholder participation in river basin management in the member states examined, alongside clear continuities in terms of their respective pre-WFD institutional and procedural arrangements. Overall, the WFD has driven a highly uneven shift to river basin-level planning among the member states, and instigated a range of*

[655] Scheuer, S., Roullard, J. *Letting the Public Have Their Say on Water Management: A Snapshot Analysis of Member States' Consultations on Water Management Issues and Measures within the Water Framework Directive*. WWF, EEB: Brussels, 2008.
[656] See Bourblanc, M., Crabbé, A., Liefferink, D., Wiering, M. The marathon of the hare and the tortoise: Implementing the EU Water Framework Directive. *Journal of Environmental Planning and Management*, 2012, vol. 56, no. 10, p. 1449–1467.
[657] Keessen, A. M., van Kempen, J. J. H., van Rijswick, M., Robbe, J., Backes, C. W. European River basin districts: Are they swimming in the same implementation pool? *Journal of Environmental Law*, 2010, vol. 22, no. 2, p. 197–221.
[658] Mostert, E., Pahl-Wostl, C, Rees, Y., Searle, B., Tabara, D., Tippett, J. Social learning in European river-basin management: barriers and fostering mechanisms from 10 river basins. *Ecology and Society*, 2007, vol. 12, no. 19.
[659] *Ibid*.
[660] Jager, N. W., Challies, E., Kochskämper, E., Newig, J., Benson, D., Blackstock, K., Collins, K., Ernst, A., Evers, M., Feichtinger, J., et al. Transforming European water governance? Participation and river basin management under the EU water framework directive in 13 member states. *Water*, 2016, vol. 8, no. 4, p. 156-178.

efforts to institutionalize stakeholder involvement - often through the establishment of advisory groups to bring organized stakeholders into the planning process."[661]

This suggests that the Member States, while implementing sectoral EU legislation including requirements on public participation, are more likely to keep the existing procedural framework. And without more detailed requirements on public participation, the level of implementation will vary considerably among the Member States. Nevertheless, the same authors also found that the performance of the WFD encouraged the creation of organised boards that bring together authorities and stakeholders to develop river basin management plans. This implies that the organisational adjustments are easier to carry out and perhaps more likely to occur.

Furthermore, it seems that the Member States did not take much into account the 2003 guidance document on the WFD,[662] which provided a comprehensive explanation of the public participation aims of the WFD, an overview of public participation techniques, and examples of public participation in various water management projects.[663] Perhaps such document should be prepared together with the Directive, or its main points should find their way to the binding text straight away.

Despite implementation issues, the public participation requirements of the WFD have not been subject to many cases before the CJEU. Only recently did several preliminary questions regarding access to justice in this area reach the CJEU (see Chapter 3.3.3). The conclusions of the CJEU on the direct applicability of the WFD may nevertheless turn out to be a significant boost towards more effective enforcement of EU water management law.

Following the general requirements of the WFD, the **Floods Directive** (FD, 2007/60/EC)[664] was adopted to prevent and reduce the adverse effects of floods on human health, cultural heritage, the environment, and economic activities. Under the FD, flood risk maps and flood risk management plans must be prepared by the Member States, which, among other instruments, should utilise spatial planning as a mitigation tool. The FD expects both the EU and the Member States to consider the potential impacts of developing policies referring to water and land uses on flood risks and the management of flood risks.[665] Coordination in establishing flood maps and flood risk management plans must be achieved,[666] and the same planning cycles of 6 years make it possible.

As regards public participation, the FD sets minimalistic requirements. Its Art. 10(1) requires that *"In accordance with applicable Community legislation, Member States shall make available to the public the preliminary flood risk assessment, the flood hazard maps, the flood risk maps and the flood risk management plans."* Furthermore, Art. 10(2) of the FD stipulates

[661] *Ibid*, p. 156.
[662] European Commission. Common Implementation Strategy for the Water Framework Directive (2000/60/EC); Guidance document no. 8; Public Participation in relation to the Water Framework Directive. European Commission: Brussels, 2003.
[663] *Ibid*, Annex I and II.
[664] Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks. OJ L 288, 6. 11. 2007, p. 27–34.
[665] *Ibid*, preamble, para. 9.
[666] *Ibid*, Art. 9(1).

that *"Member States shall encourage active involvement of interested parties in the production, review and updating of the flood risk management plans referred to in Chapter IV."* Art. 9(3) of the FD explicitly requires coordination of public consultation with the WFD but only *as appropriate*: *"the active involvement of all interested parties under Article 10 of this Directive shall be coordinated, as appropriate, with the active involvement of interested parties under Article 14 of Directive 2000/60/EC."* This is clearly to prevent multiple, unrelated participatory procedures running in parallel, which is beneficial for both participants and administrative authorities. However, it is not clear to which extent the public will be involved from the vague wording of the FD.

We can see that the requirements for public participation under the WFD are much more far-reaching and detailed compared to the FD. Art. 10 FD neither provides a formal consultation procedure for establishing the flood risk management plans nor sets any deadline.[667] Similar to the preparation of the programme of measures under the WFD, the requirements of the FD are complemented by the requirements of the SEA Directive, which seem to be applicable to the preparation of the flood risk management plans. Therefore, the consultation procedure laid down in Art. 6 SEA Directive is required.

4.5 INDUSTRIAL EMISSIONS

In 2010, the IPPC Directive was replaced by the Industrial Emissions Directive (IED). The IED consolidated and replaced seven existing directives to harmonise and streamline the EU legislation on industrial emissions. The existence of multiple separate directives addressing industrial emissions apparently contributed to inconsistencies and inefficiencies in the regulatory framework.

The IED relies on the same principles as the 1996 IPPC Directive. Similarly, it does not directly impose requirements on construction activities. The main focus of the IED is on industrial installations and activities that have the potential to emit pollutants into the environment. These include sectors such as energy production, waste management, chemical manufacturing, and other industrial processes. However, according to the definition of *techniques* in Art. 3(1)(10)(a) of the Directive, the definition of *techniques* includes both the technology used and the way in which the installation is designed, *built*, maintained, operated, and decommissioned.

Therefore, the consequent implementation of BATs via the integrated permit requires the implementation of building modifications and, in the case of new buildings, consideration in the design of the building. In contrast to EIA, which is always carried out for a specific permit (*development consent*), the IPPC permits are also required for existing projects (industrial operations), as these are dynamic decisions, changing with respect to the evolution of legal requirements and the course of the specific operation. At the same time, issuing IPPC permits often requires an EIA, opening up the possibility of an additional impact assessment of

[667] See Unnerstall, H. Legal Framework for Public Participation in Flood Risk Mapping. A comparative study of the responses of different European Member States to some requirements of the Floods Directive. *UFZDiskussionspapiere*, 2010, no. 13.

industrial operations that have not gone through the EIA process or at least an assessment according to current standards and conditions in the territory.

The IPPC system also has made it possible to operate industrial plants that have become more environmentally sustainable, even in the vicinity of urbanised areas and nature, which could be taken into account already at the planning and land use stage.

The IED introduced several improvements to enhance environmental protection: It incorporated new and more stringent emission limit values based on the BATs and set specific requirements for monitoring and reporting emissions. The objective was to reduce pollution levels, promote cleaner technologies, and ensure a high level of environmental protection. The IED also aimed to foster resource efficiency, waste reduction, and the exchange of by-products and energy among industrial installations, leading to improved environmental and economic outcomes. Finally, the IED sought to simplify administrative procedures and permit applications, reducing administrative burdens for both competent authorities and industrial operators. It introduced standardised permit applications, standard reporting formats, and streamlined procedures for permitting and monitoring industrial activities.

The **IED does not use the term development consent**. It ties requirements of public participation in decision-making to *"the taking of a decision on the granting or the updating of a permit or of permit conditions"* in the definition of the public concerned,[668] or - more specifically – primarily to granting of a *permit for (new) installations* or for *any substantial change*.[669]

While the interpretation of a decision on the granting permit for an installation does not cause problems, the term *substantial change* is more challenging to interpret. The CJEU guided the term for the first time in its judgment in a recent Case **C-43/21** (***FCC Česká republika***),[670] concerning the operation of a landfill. The CJEU held that, according to Art. 3(9) of the IED, a change must qualify as substantial if two conditions are met, the first relating to the content of the change and the second to its potential effects. These two conditions are cumulative.[671] The mere extension of the landfill period does not constitute a change in the dimensions of the facility or the storage capacity provided for in the original permit and is, therefore, not a *change in the scale* of the facility. It does not change the function or nature of the landfill in any way. The mere extension of the landfill period is, therefore, not in itself a change to the installation, whatever its nature or function.[672] As the IED does not mention the duration of operation as a characteristic of the function of the installation, which would necessarily have

[668] IED, Art. 3(17).
[669] *Ibid*, Art. 24(1)(a), (b).
[670] CJEU judgment of 2 June 2022, *FCC Česká republika* (C-43/21, EU:C:2022:425).
[671] *Ibid*, para. 34: *"Those two criteria are cumulative. A change in the nature or functioning, or an extension, of an installation is not 'substantial' within the meaning of Article 3(9) of Directive 2010/75 if it is not likely to have significant negative effects on human health or the environment. Conversely, it is not sufficient for a change to be able to have significant negative effects on human health or the environment for it to be 'substantial' within the meaning of that directive. If that were the case, the EU legislature would not have specified that a substantial change must consist of a change in the nature or functioning, or an extension, of an installation."*
[672] *Ibid*, para. 37.

to be included in the permit, it does not even require that the authorisation of the extension of operation be the subject of a new permit.[673]

It may be added that the Advocate General's opinion to the same Case[674] offers a different conclusion that an extension of operation may constitute a substantial change *"if it can have additional significant negative effects on human health or the environment"*.[675] This interpretation is, according to the Advocate General, consistent with the Aarhus Convention and requirements on public participation. Art. 6(10) of the Aarhus Convention requires each party to ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in Art. 6, the rules on public participation are applied *mutatis mutandis*, and where appropriate. The Aarhus Convention Compliance Committee considers that the permitted duration of an activity is clearly an operating condition for that activity and an important one at that.[676] However, the CJEU did not address the implications of categorising the change to the installation in terms of public participation in environmental protection.

As regards **public participation** requirements, the Aarhus Directive comprehensively amended the IPPC Directive. The *public* and *the public concerned* were defined in line with the Aarhus Convention [Art. 2(10)(b)], the Member States were required to ensure that the public concerned were given early and effective opportunities to participate in the most significant permitting procedures [Art. 15(1)] and to inform the public regarding the content of the decision and the concerns and opinions expressed by the public concerned, the reasons and considerations on which the decision is based, including information on the public participation process [Art. 15(5)]. Furthermore, new Art. 15e introduced requirements for access to justice.

The IED makes a similar reference to the Aarhus Convention as the EIA Directive, which is unsurprising as both Directives are crucial for the implementation of the Convention and had been prepared (the recast versions) around the same time. However, unlike the EIA Directive and most other EU environmental legislation and case law of the CJEU, the IED uses *Århus Convention*,[677] in the same way as the Aarhus Directive.

Compared to the consolidated version of the IPPC Directive amended by the Aarhus Directive, the IED has introduced several substantive changes: The definition of the *public* and *the public concerned* remains essentially the same [Art. 2(10)(b)] but especially the requirements on access to information [Art. 24(2), (3), Art. 65] and access to justice [Art. 25] have been considerably widened (see the table below).

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[673] *Ibid*, paras 39-40.
[674] Opinion of Advocate General J. Kokott of 27 January 2022, *FCC Česká republika* (C-43/21, EU:C:2022:64).
[675] *Ibid*, para. 41.
[676] *Ibid*, paras 44-46, with reference to the Findings and recommendations of the Compliance Committee of 4 October 2018, *Stichting Greenpeace Netherlands v Netherlands (Borssele nuclear power plant)*, ACCC/C/2014/104, ECE/MP.PP/C.1/2019/3, point 65; of 19 August 2019, *Cummins v Ireland (Trammon quarry)*, ACCC/C/2013/107, ECE/MP.PP/C.1/2019/9, point 79; and of 26 July 2021, *OEKOBUERO and Others v Czech Republic (Dukovany nuclear power plant)*, ACCC/C/2016/143, ECE/MP.PP/C.1/2021/28, point 97.
[677] IED, preamble, para. 27.

Besides the cited Articles, a new requirement to inform and consult the public of the Member State was introduced by Art. 26(2), (4). Furthermore, the IED sets specific obligations to inform the public about waste incineration plants and waste co-incineration plants (Art. 55) and on the inventories containing the annual plant-by-plant data [Art. 72(3)].

Tab. 2: DEVELOPMENT OF KEY PUBLIC PARTICIPATION REQUIREMENTS OF THE IED			
	Access to information	**Participation in decision-making**	**Access to justice**
IPPC Directive (consolidated)	Art. 15(5): When a decision has been taken, the competent authority shall inform the public in accordance with the appropriate procedures and shall make available to the public the following information: (a) the content of the decision, including a copy of the permit and of any conditions and any subsequent updates; and (b) having examined the concerns and opinions expressed by the public concerned, the reasons and considerations on which the decision is based, including information on the public participation process." Art. 15a: In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.	Art. 15(1): Member States shall ensure that the public concerned are given early and effective opportunities to participate in the procedure for: - issuing a permit for new installations, - issuing a permit for any substantial change in the operation of an installation, - updating of a permit or permit conditions for an installation in accordance with Article 13, paragraph 2, first indent.	Art. 15a: Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned: (a) having a sufficient interest, or alternatively, (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition; have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive. Member States shall determine at what stage the decisions, acts or omissions may be challenged. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(14) shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article. The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law. Any such procedure shall be fair, equitable, timely and not prohibitively expensive.
IED	**Art. 24(2), (3):** 2. When a decision on granting, reconsideration or updating of a permit has been taken, the competent authority shall make available to the public, including via the Internet in relation to points (a), (b) and (f), the following information: (a) the content of the decision, including a copy of the permit and	**Art. 24:** 1. Member States shall ensure that the public concerned are given early and effective opportunities to participate in the following procedures: (a) the granting of a permit for new installations; (b) the granting of a permit for any substantial change; (c) the granting or updating of a	**Art. 25:** 1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to Article 24

	any subsequent updates; (b) the reasons on which the decision is based; (c) the results of the consultations held before the decision was taken and an explanation of how they were taken into account in that decision; (d) the title of the BAT reference documents relevant to the installation or activity concerned; (e) how the permit conditions referred to in Article 14, including the emission limit values, have been determined in relation to the best available techniques and emission levels associated with the best available techniques; (f) where a derogation is granted in accordance with Article 15(4), the specific reasons for that derogation based on the criteria laid down in that paragraph and the conditions imposed. 3. The competent authority shall also make available to the public, including via the Internet at least in relation to point (a): (a) relevant information on the measures taken by the operator upon definitive cessation of activities in accordance with Article 22; (b) the results of emission monitoring as required under the permit conditions and held by the competent authority. **Art. 6(5):** 1. The decision of the competent authority, including at least a copy of the permit, and any subsequent updates, shall be made available to the public. The general binding rules applicable for installations and the list of installations subject to permitting and registration shall be made available to the public. 2. The results of the monitoring of emissions as required under Article 60 and held by the competent authority shall be made available to the public. 3. Paragraphs 1 and 2 of this Article shall apply, subject to the restrictions laid down in Article 4(1) and (2) of Directive 2003/4/EC.	permit for an installation where the application of Article 15(4) is proposed; (d) the updating of a permit or permit conditions for an installation in accordance with Article 21(5)(a). The procedure set out in Annex IV shall apply to such participation.	when one of the following conditions is met: (a) they have a sufficient interest; (b) they maintain the impairment of a right, where administrative procedural law of a Member State requires this as a precondition. 2. Member States shall determine at what stage the decisions, acts or omissions may be challenged. 3. What constitutes a sufficient interest and impairment of a right shall be determined by Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation promoting environmental protection and meeting any requirements under national law shall be deemed sufficient for the purpose of paragraph 1(a). Such organisations shall also be deemed to have rights capable of being impaired for the purpose of paragraph 1(b). 4. Paragraphs 1, 2 and 3 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law. Any such procedure shall be fair, equitable, timely and not prohibitively expensive. 5. Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.

The changes in public participation requirements help the implementation of the Aarhus Convention. However, they have not been explained by the IED, in particular, why they were not adopted by the amendment to the IPPC Directive already. Since the adoption of the IED, no additional adjustments to its provisions have been made.

As regards other requirements, in 2006, reporting requirements of the IPPC Directive were simplified and streamlined by the Regulation establishing a European Pollutant Release and

Transfer Register (166/2006).[678] The Regulation also widened the Aarhus implementation as it granted the public access to the information contained in the Register without an interest to be stated, primarily by ensuring that direct electronic access is provided through the Internet. According to Art. 12 and 13 of the Regulation, the public is also equipped with opportunities to participate in the further development of the European PRTR by the Commission and with access to justice in matters relating to public access to environmental information, which should be insured per Art. 6 of the Aarhus Directive.

4.6 PREVENTION OF INDUSTRIAL HAZARDS

In 2003, the Seveso II Directive underwent a minor amendment[679] which reflected studies on dangerous substances carried out by the Commission at the Council's request and recent industrial accidents such as the 2000 *fireworks accident* at Enschede in the Netherlands or the 2001 explosion at a fertiliser plant in Toulouse.[680] Most notably, the amendment is considered useful *"to facilitate land-use planning, to draw up guidelines defining a database to be used for assessing the compatibility between the establishments covered by Directive 96/82/EC and the areas described in Article 12(1) of that Directive."*[681]

As a result, the Commission was invited by a new provision of Art. 12(1a) of the Directive by 31 December 2006, in close cooperation with the Member States, to draw up guidelines defining a technical database, including risk data and risk scenarios, to be used for assessing the compatibility between the establishments covered by this Directive and the areas described in Art. 12(1). The definition of this database must, as far as possible, take into account the evaluations made by the competent authorities, the information obtained from operators, and all other relevant information, such as the socioeconomic benefits of development and the mitigating effects of emergency plans.

Public participation requirements of the Seveso II Directive had not been amended until the **Seveso III Directive** replaced and repealed the Seveso II Directive in 20012. The mentioned amendment did not address the adoption of the Aarhus Convention. The emergency plans were not listed in Annex I of the Aarhus Directive, even though they arguably relate to the environment in the sense of the Aarhus Convention; the Seveso II Directive has kept its own rules on public participation.

The **Seveso III Directive** considerably broadened the requirements on both the administrative bodies and the operators. For example, beside the general obligation to take all necessary measures to prevent major accidents and to limit their consequences for human health and the environment,[682] the operator of an upper-tier establishment must produce a safety report

[678] Regulation (EC) No 166/2006 of the European Parliament and of the Council of 18 January 2006 concerning the establishment of a European Pollutant Release and Transfer Register and amending Council Directives 91/689/EEC and 96/61/EC. OJ L 33, 4. 2. 2006, p. 1–17.
[679] Directive 2003/105/EC of the European Parliament and of the Council of 16 December 2003 amending Council Directive 96/82/EC on the control of major-accident hazards involving dangerous substances. OJ L 345, 31. 12. 2003, p. 97–105.
[680] *Ibid*, preamble, paras 2, 5, 6.
[681] *Ibid*, para. 12.
[682] Seveso III Directive, Art. 5(1).

demonstrating that, *inter alia*, that adequate safety and reliability have been taken into account in the construction of any installation, storage facility, equipment and infrastructure connected with its operation which are linked to major-accident hazards inside the establishment.[683]

Several minor yet significant changes have been made to the requirements on land-use planning of Art. 13 of the Seveso III Directive compared to Art. 12 of the Seveso II Directive. In particular, Member States must now also ensure that their land use or other relevant policies and the procedures for implementing those policies take account of the need to protect areas of particular natural sensitivity or interest in the vicinity of establishments, where appropriate, through appropriate safety distances or other relevant measures.[684] By Art. 24 of the Directive, the Commission is invited to develop guidance on safety distance and domino effects.

The Directive also explicitly confirms that the requirements stemming from the EIA Directive and the SEA Directive are not affected – and the Member States are invited to provide for coordinated or joint procedures to fulfil the requirements of all Directives, *inter alia*, to avoid duplication of assessment or consultations.[685] The Natura 2000 assessment, according to the Habitats Directive, is not mentioned.

Tab. 3: DEVELOPMENT OF LAND-USE PLANNING REQUIREMENTS OF THE SEVESO DIRECTIVES	
Seveso II Directive	Art. 12 (Land-use planning): 1. Member States shall ensure that the objectives of preventing major accidents and limiting the consequences of such accidents are taken into account in their land-use policies and/or other relevant policies. They shall pursue those objectives through controls on: (a) the siting of new establishments, (b) modifications to existing establishments covered by Article 10, (c) new developments such as transport links, locations frequented by the public and residential areas in the vicinity of existing establishments, where the siting or developments are such as to increase the risk or consequences of a major accident. Member States shall ensure that their land-use and/or other relevant policies and the procedures for implementing those policies take account of the need, in the long term, to maintain appropriate distances between establishments covered by this Directive and residential areas, areas of public use and areas of particular natural sensitivity or interest, and, in the case of existing establishments, of the need for additional technical measures in accordance with Article 5 so as not to increase the risks to people. 2. Member States shall ensure that all competent authorities and planning authorities responsible for decisions in this area set up appropriate consultation procedures to facilitate implementation of the policies established under paragraph 1. The procedures shall be designed to ensure that technical advice on the risks arising from the establishment is available, either on a case-by-case or on a generic basis, when decisions are taken.
Seveso II Directive (consolidated, changes in bold)	Art. 12 (Land-use planning): 1. Member States shall ensure that the objectives of preventing major accidents and limiting the consequences of such accidents are taken into account in their land-use policies and/or other relevant policies. They shall pursue those objectives through controls on: (a) the siting of new establishments, (b) modifications to existing establishments covered by Article 10, (c) new developments such as transport links, locations frequented by the public and residential areas in the vicinity of existing establishments, where the siting or developments are such as to increase the risk or consequences of a major accident. Member States shall ensure that their land-use and/or other relevant policies and the procedures for implementing those policies take account of the need, in the long term, to maintain appropriate distances between establishments covered by this Directive and residential areas, **buildings and** areas of public use, **major transport routes as far as possible, recreational areas** and areas of particular natural sensitivity or interest and, in the case of existing establishments, of the need for additional technical measures in accordance with Article 5 so as not to increase the risks to people. **1a. The Commission is invited by 31 December 2006, in close cooperation with the Member States, to draw up guidelines defining a technical database including risk data and risk scenarios, to be used for assessing the compatibility between the establishments covered by this Directive and the areas described in paragraph 1. The definition of this database shall as far as possible take account of the evaluations made by the competent**

[683] *Ibid*, Art. 10(1)(c).
[684] *Ibid*, Art. 13(2)(b).
[685] *Ibid*, Art. 13(4).

	authorities, the information obtained from operators and all other relevant information such as the socioeconomic benefits of development and the mitigating effects of emergency plans. 2. Member States shall ensure that all competent authorities and planning authorities responsible for decisions in this area set up appropriate consultation procedures to facilitate implementation of the policies established under paragraph 1. The procedures shall be designed to ensure that technical advice on the risks arising from the establishment is available, either on a case-by-case or on a generic basis, when decisions are taken.
Seveso III Directive (major changes in bold)	Art. 13 (Land-use planning): 1. Member States shall ensure that the objectives of preventing major accidents and limiting the consequences of such accidents **for human health and the environment** are taken into account in their land-use policies or other relevant policies. They shall pursue those objectives through controls on: (a) the siting of new establishments; (b) modifications to establishments covered by Article 11; (c) new developments including transport routes, locations of public use and residential areas in the vicinity of establishments, where the siting or developments may be the source of or increase the risk or consequences of a major accident. 2. Member States shall ensure that their land-use or other relevant policies and the procedures for implementing those policies take account of the need, in the long term: (a) to maintain appropriate safety distances between establishments covered by this Directive and residential areas, buildings and areas of public use, recreational areas, and, as far as possible, major transport routes; (b) **to protect areas of particular natural sensitivity or interest in the vicinity of establishments, where appropriate through appropriate safety distances or other relevant measures**; (c) in the case of existing establishments, to take additional technical measures in accordance with Article 5 so as not to increase the risks to human health and the environment. 3. Member States shall ensure that all competent authorities and planning authorities responsible for decisions in this area set up appropriate consultation procedures to facilitate implementation of the policies established under paragraph 1. The procedures shall be designed to ensure that operators provide **sufficient information** on the risks arising from the establishment and that technical advice on those risks is available, either on a case-by-case or on a generic basis, when decisions are taken. **Member States shall ensure that operators of lower-tier establishments provide, at the request of the competent authority, sufficient information on the risks arising from the establishment necessary for land-use planning purposes.** **4. The requirements of paragraphs 1, 2 and 3 of this Article shall apply without prejudice to the provisions of 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 (15), 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 (16) and other relevant Union legislation. Member States may provide for coordinated or joint procedures in order to fulfil the requirements of this Article and the requirements of that legislation, inter alia, to avoid duplication of assessment or consultations.**

The **two main, not mutually exclusive methodological approaches** adopted for land-use planning with respect to major accident hazards posed by fixed installations were identified already in 1999: *"the first focuses on the assessment of consequences of a number of conceivable event scenarios and can be typically called 'consequence based' approach, and the second on the assessment of both consequences and probabilities of occurrence of the possible event scenarios and can be called 'risk based' approach."*[686] In addition to these two methodological approaches, a third one consists of the determination and use of *generic* distances depending on the type of activity rather than on a detailed analysis of the specific site.[687] At that time, some Member States had already established well-structured procedures for taking major accident hazards into account in land-use planning, and countries in which such procedures were under development and no explicit regulations for land-use planning in the vicinity of hazardous installations existed.[688]

The differences among the Member States remain, even though the open scientific literature contains only a few results on the implementation of the EU Seveso directives, especially in terms of comparison between the Member States. Laurent, Pey, Gurtel, and Fabiano noticed in 2021 that the current European situation regarding land-use planning is *"quite jeopardized*

[686] Christou, M. D., Amendola, A., Smeder, M. The control of major accident hazards: The land-use planning issue. *Journal of Hazardous Materials*, 1999, vol. 65, n. 1–2, p. 157.
[687] *Ibid*.
[688] *Ibid*.

as shown in Fig. 1 where methodologies are divided into the following categories: deterministic approaches with implicit judgment of risk; consequence-based approaches; risk-based or "probabilistic" approaches; semi-quantitative approaches."[689]

Even though many guidance documents and reports have been prepared to help the implementation of Art. 13 of the Seveso III Directive (or Art. 12 of the Seveso II Directive),[690] a major problem seems to be how to cope with the historical legacy of incompatible development. Any legislative or regulatory decision should consider in a different way the historical heritage and future developments. Another challenge in which the correct land-use planning can be of great importance is the *domino effect* concerning the escalation of an accident across neighbouring process units and plants.

There is not much case law of the CJEU interpreting the land-use planning requirements of the Seveso Directives. In Case **C-53/10** (***Franz Mücksch***),[691] the CJEU assessed the compatibility of the authorisation of a garden centre close to the establishment with the requirement for appropriate distances. It concluded that the obligation *"to take account of the need, in the long term, to maintain appropriate distances between establishments covered by that directive and buildings of public use does not require the competent national authorities to prohibit the siting of a building of public use in circumstances such as those of the case in the main proceedings. By contrast, that obligation precludes national legislation that provides that it is mandatory to issue an authorisation for the siting of such a building without the hazards connected with the siting of the building within the perimeter of those distances having been duly assessed at the planning stage or at that of the individual decision."*[692]

It means that it is not compatible with the Directive to require a mandatory authorisation for the siting of a building without the hazards connected with the siting of such a building within the perimeter of the appropriate distances having been duly assessed at the planning stage or at that of the individual decision. Such legislation renders meaningless the obligation to take account of the maintenance of appropriate distances.

As regards **public participation**, the Seveso III Directive introduces requirements that, in many ways, exceed the provisions of the EIA Directive, the IED, or any EU Directive. The balancing of industry and local communities has become sort of a model of public participation.[693] All three pillars of the Aarhus Convention are provided in an individual dedicated Article that considers the specific character of hazardous operations that present considerable risks to health and the environment. The Seveso III Directive makes a reference to the Aarhus Convention, unlike the previous regulation, elaborating on its aims in a detailed way[694] and using the same definitions of the *public* and the *public concerned*.[695]

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[689] See Laurent, A., Pey, A., Gurtel, P., Fabiano, B. A critical perspective on the implementation of the EU Council Seveso Directives in France, Germany, Italy and Spain. *Process Safety and Environmental Protection*, 2021, vol. 148, p. 58.
[690] See Basta, C., Struckl, M., Michalis, C. *Implementing Art.12 of the Seveso II Directive - Overview of Roadmaps for Land-Use Planning in Selected Member States*. Luxembourg: OPOCE, 2008.
[691] CJEU judgment of 15 September 2011, *Franz Mücksch* (C-53/10, ECLI:EU:C:2011:585).
[692] *Ibid*, para. 53.
[693] See Marzotti, M., Fratter, M. Introduction. In: Pozzo, B. (ed.) *The Implementation of the Seveso Directives in an Enlarged Europe: A Look Into the Past and a Challenge for the Future*. Wolters Kluwer, 2009, p. XXX.
[694] Seveso III Directive, preamble, paras 19-21.

Access to information has been widened. The public is permanently provided electronic access to updated information in Annex V,[696] and further information is provided for upper-tier establishments on request.[697] Additional information is provided during decision-making, according to Art. 15(2), (3) and (5).

In principle, **participation in decision-making** has been restricted in scope because instead of the public, more substantial participatory rights must be guaranteed to the public concerned. Simultaneously, however, the Directive sets specific requirements such as that a reasonable timeframe for the different phases must be provided,[698] the results of the consultations concerning individual projects must be duly taken into account in the taking of a decision,[699] or that the procedures according to the Aarhus Directive or the SEA Directive are applied where general plans or programmes are being established.[700]

The **access to justice** requirements of the Seveso III Directive are brief and refer to the provisions of the Aarhus Directive regarding access to information and to Art. 11 of the EIA Directive concerning subject to Art. 15(1) of the Seveso III Directive. There are no requirements for access to justice regarding plans or programmes. In practice, it might not be clear which kind of acts is subject to such guarantee as Art. 15(1) of the Directive covers, *inter alia*, specific individual projects relating to planning for new establishments pursuant to Art. 13 of the Directive. Again, the scope of the Aarhus Convention is much broader in that under Art. 9(3), any breach of environmental law, whether it is by the public authority or the operator, should be subject to judicial review.

While one can aptly argue that these requirements considerably overlap with other EU legislation, it is the specific characteristics of the hazardous operations which can make their implementation demanding. For example, as regards access to information, many operators may conclude they just have to request confidentiality with their documents submitted.[701] However, the grounds for refusal of a request for information have to be interpreted by the public authority in a restrictive way, taking into account, for the particular case, the public interest served by disclosure. In every specific case, the public interest served by disclosure has to be weighed against the interest served by the refusal. In contrast, public authorities cannot provide for a request to be refused where the request relates to information on emissions into the environment.[702]

Tab. 4: DEVELOPMENT OF PUBLIC PARTICIPATION REQUIREMENTS OF THE SEVESO DIRECTIVES			
	Access to information	**Participation in decision-making**	**Access to justice**
Seveso II Directive	**Art. 13(1):** Member States shall ensure that information on safety measures and on the requisite behaviour in the event of an accident is supplied, without their having to request it, to	**Art. 11(3):** Without prejudice to the obligations of the competent authorities, Member States shall ensure that the internal emergency plans provided for in this Directive are drawn up	

[695] *Ibid*, Art. 3(17), (18).
[696] *Ibid*, Art. 14(1).
[697] *Ibid*, Art. 14(2).
[698] *Ibid*, Art. 15(7).
[699] *Ibid*, Art. 15(4).
[700] *Ibid*, Art. 15(6).
[701] Art. 22 of the Seveso III Directive clarifies that the competent authority may also decide for the same reasons that certain parts of the report or inventory shall not be disclosed. In such cases, and on approval of that authority, the operator shall supply to the competent authority an amended report or inventory excluding those parts.
[702] Directive 2003/4/EC, Art. 4.

	persons liable to be affected by a major accident originating in an establishment covered by Article 9. The information shall be reviewed every three years and, where necessary, repeated and updated, at least if there is any modification within the meaning of Article 10. It shall also be made permanently available to the public. The maximum period between the repetition of the information to the public shall, in any case, be no longer than five years. Such information shall contain, at least, the information listed in Annex V. **Art. 18(1):** Member States shall ensure that the competent authorities organize a system of inspections (…) that information has been supplied to the public pursuant to Article 13 (1). **Art. 13(4):** Member States shall ensure that the safety report is made available to the public. The operator may ask the competent authority not to disclose to the public certain parts of the report, for reasons of industrial, commercial or personal confidentiality, public security or national defence. In such cases, on the approval of the competent authority, the operator shall supply to the authority, and make available to the public, an amended report excluding those matters.	in consultation with personnel employed inside the establishment and that the public is consulted on external emergency plans. **Art. 13(5):** Member States shall ensure that the public is able to give its opinion in the following cases: - planning for new establishments covered by Article 9, - modifications to existing establishments under Article 10, where such modifications are subject to obligations provided for in this Directive as to planning, - developments around such existing establishments. 6. In the case of establishments subject to the provisions of Article 9, Member States shall ensure that the inventory of dangerous substances provided for in Article 9 (2) is made available to the public.	
Seveso II Directive (consolidated, changes in bold)	**Art. 13(1):** **Member States shall ensure that information on safety measures and on the requisite behaviour in the event of an accident is supplied regularly and in the most appropriate form, without their having to request it, to all persons and all establishments serving the public (such as schools and hospitals) liable to be affected by a major accident originating in an establishment covered by Article 9.** The information shall be reviewed every three years and, where necessary, repeated and updated, at least if there is any modification within the meaning of Article 10. It shall also be made permanently available to the public. The maximum period between the repetition of the information to the public shall, in any case, be no longer than five years. Such information shall contain, at least, the information listed in Annex V. **Art. 18(1):** Member States shall ensure that the competent authorities organize a system of inspections (…) that information has been supplied to the public pursuant to Article 13 (1). **Art. 13(4):** Member States shall ensure that the safety report is made available to the public. The operator may ask the competent authority not to disclose to the public certain parts of the report, for reasons of industrial, commercial or personal confidentiality, public security or national defence. In such cases, on the approval of the competent authority, the operator shall supply to the authority, and make available to the public, an amended report excluding those matters.	**Art. 11(3):** **Without prejudice to the obligations of the competent authorities, Member States shall ensure that the internal emergency plans provided for in this Directive are drawn up in consultation with the personnel working inside the establishment, including long-term relevant subcontracted personnel, and that the public is consulted on external emergency plans when they are established or updated.** **Art. 13(5):** Member States shall ensure that the public is able to give its opinion in the following cases: - planning for new establishments covered by Article 9, - modifications to existing establishments under Article 10, where such modifications are subject to obligations provided for in this Directive as to planning, - developments around such existing establishments. 6. In the case of establishments subject to the provisions of Article 9, Member States shall ensure that the inventory of dangerous substances provided for in Article 9 (2) is made available to the public.	
Seveso III Directive	**Art. 9(3)(b):** Member States shall ensure that operators of the establishments identified in accordance with paragraph 1 cooperate in informing the public and neighbouring sites that fall outside the scope of this Directive, and in supplying information to the authority responsible for	**Art. 12(5):** Member States shall ensure that the public concerned is given early opportunity to give its opinion on external emergency plans when they are being established or substantially modified. **Art. 15 (*Public consultation and***	**Art. 23 (*Access to justice*):** Member States shall ensure that: (a) any applicant requesting information pursuant to points (b) or (c) of Article 14(2) or Article 22(1) of this Directive is able to seek a review in accordance with

	the preparation of external emergency plans. **Art. 14 (*Information to the public*):** 1. Member States shall ensure that the information referred to in Annex V is permanently available to the public, including electronically. The information shall be kept updated, where necessary, including in the event of modifications covered by Article 11. 2. For upper-tier establishments, Member States shall also ensure that: (a) all persons likely to be affected by a major accident receive regularly and in the most appropriate form, without having to request it, clear and intelligible information on safety measures and requisite behaviour in the event of a major accident; (b) the safety report is made available to the public upon request subject to Article 22(3); where Article 22(3) applies, an amended report, for instance in the form of a non-technical summary, which shall include at least general information on major-accident hazards and on potential effects on human health and the environment in the event of a major accident, shall be made available; (c) the inventory of dangerous substances is made available to the public upon request subject to Article 22(3). The information to be supplied under point (a) of the first subparagraph of this paragraph shall include at least the information referred to in Annex V. That information shall likewise be supplied to all buildings and areas of public use, including schools and hospitals, and to all neighbouring establishments in the case of establishments covered by Article 9. Member States shall ensure that the information is supplied at least every five years and periodically reviewed and where necessary, updated, including in the event of modifications covered by Article 11. 3. Member States shall, with respect to the possibility of a major accident with transboundary effects originating in an upper-tier establishment, provide sufficient information to the potentially affected Member States so that all relevant provisions contained in Articles 12 and 13 and in this Article can be applied, where applicable, by the potentially affected Member States. 4. Where the Member State concerned has decided that an establishment close to the territory of another Member State is incapable of creating a major-accident hazard beyond its boundary for the purposes of Article 12(8) and is not therefore required to produce an external emergency plan under Article 12(1), it shall inform the other Member State of its reasoned decision. **Art. 20(2)(d):** Inspections shall be… (…) that information has been supplied to the public pursuant to Article 14.	***participation in decision-making*):** 1. Member States shall ensure that the public concerned is given an early opportunity to give its opinion on specific individual projects relating to: (a) planning for new establishments pursuant to Article 13; (b) significant modifications to establishments under Article 11, where such modifications are subject to obligations provided for in Article 13; (c) new developments around establishments where the siting or developments may increase the risk or consequences of a major accident pursuant to Article 13. 2. With regard to the specific individual projects referred to in paragraph 1, the public shall be informed by public notices or other appropriate means, including electronic media where available, of the following matters early in the procedure for the taking of a decision or, at the latest, as soon as the information can reasonably be provided: (a) the subject of the specific project; (b) where applicable, the fact that a project is subject to a national or transboundary environmental impact assessment or to consultations between Member States in accordance with Article 14(3); (c) details of the competent authority responsible for taking the decision, from which relevant information can be obtained and to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions; (d) the nature of possible decisions or, where there is one, the draft decision; (e) an indication of the times and places where, or means by which, the relevant information will be made available; (f) details of the arrangements for public participation and consultation made pursuant to paragraph 7 of this Article. 3. With regard to the specific individual projects referred to in paragraph 1, Member States shall ensure that, within appropriate time-frames, the following is made available to the public concerned: (a) in accordance with national legislation, the main reports and advice issued to the competent authority at the time when the public concerned was informed pursuant to paragraph 2; (b) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information (17), information other than that referred to in paragraph 2 of this Article which is relevant for the decision in question and which only becomes available after the public concerned was informed in accordance with that paragraph. 4. Member States shall ensure that the public concerned is entitled to express comments and opinions to the competent authority before a decision is taken on a specific individual project as referred to in paragraph 1, and that the results of the consultations held pursuant to paragraph 1 are duly taken into account in the taking of a decision.	Article 6 of Directive 2003/4/EC of the acts or omissions of a competent authority in relation to such a request; (b) in their respective national legal system, members of the public concerned have access to the review procedures set up in Article 11 of Directive 2011/92/EU for cases subject to Article 15(1) of this Directive.

		5. Member States shall ensure that when the relevant decisions are taken, the competent authority shall make available to the public: (a) the content of the decision and the reasons on which it is based, including any subsequent updates; (b) the results of the consultations held before the decision was taken and an explanation of how they were taken into account in that decision. 6. Where general plans or programmes are being established relating to the matters referred to in points (a) or (c) of paragraph 1, Member States shall ensure that the public is given early and effective opportunities to participate in their preparation and modification or review using the procedures set out in Article 2(2) of 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 (18). Member States shall identify the public entitled to participate for the purposes of this paragraph, including relevant non-governmental organisations meeting any relevant requirements imposed under national law, such as those promoting environmental protection. This paragraph shall not apply to plans and programmes for which a public participation procedure is carried out under Directive 2001/42/EC. 7. The detailed arrangements for informing the public and consulting the public concerned shall be determined by the Member States. Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article.	

At first glance, it could be challenging to determine whether the Directive engages a **permitting arrangements** and participation in decision-making as there is no explicit requirement to issue a specific *Seveso* permit. Swords notices that only exceptionally Member States require such permits. Many of them *"were naturally deeply wary of such a permitting procedure, as it inherently involves some joint acceptance of the installation's risk profile."*[703] However, he points to Art. 19 of the Directive,[704] which suggests there must clearly be sort of an application process and a defined set of documentation, while the permission to operate can be withdrawn at any period if it is not complied with. If there are significant environmental issues related to one of the *permitting* type activities, such as the permits

[703] Swords, P. Seveso III – The Public Participation Challeng. In: Institution of Chemical Engineers. *25th Institution of Chemical Engineers Symposium on Hazards 2015 (HAZARDS 25)*. Edinburg: Institution of Chemical Engineers, 2015, p. 434.

[704] *"Member States may prohibit the use or bringing into use of any establishment, installation or storage facility, or any part thereof if the operator has not submitted the notification, reports or other information required by this Directive within the specified period"*.

relevant to the Seveso activities, then depending on the legal effect of this decision, it could fall under the scope of Art. 6 of the Aarhus Convention.

There is no case law of the CJEU interpreting the public participation requirements of the Seveso III Directive. Some cases have nevertheless emerged from the Aarhus Convention Compliance Committee, such as on Communication ACCC/C/2005/12 (*Albania*), which concludes a decision on the industrial and energy park has more the character of a zoning activity, i.e., a decision that determines that within a specific designated territory, certain broad types of activity may be carried out (and other types may not), and would fall more closely under Art. 7 of the Convention.

4.7 AIR QUALITY PROTECTION

Air quality regulation has been part of the EU acquis since the 1970s, but its impact on public building law only increased significantly in the 2000s. Under the European Green Deal, the EU has committed itself to achieving a zero-pollution ambition for a toxic-free environment, including air pollution.[705]

The EC began addressing air pollution in the 1970s and 1980s, focusing primarily on specific pollutants like sulphur dioxide (SO_2) and nitrogen oxides (NO_x) emitted from large industrial facilities. These efforts were driven by the recognition of the transboundary nature of air pollution, where emissions in one country could affect air quality in neighbouring countries.[706]

In the 1980s, the EC signed the Vienna Convention for the Protection of the Ozone Layer (1985) and the Montreal Protocol (1987), an international treaty designed to protect the ozone layer by phasing out the production of substances like chlorofluorocarbons and halons. The reasons for the adoption of these conventions were not linked to public construction law but reflected the use of refrigerants that were damaging the ozone layer. However, because the content of substances regulated under the Montreal Protocol in insulation materials that are part of buildings, the regulation is relevant even in this area and is now becoming more critical, so that, for example, during demolition, there are no uncontrolled leaks of these substances. This is reflected in the review of the corresponding EU environmental legislation.[707]

In 1996, the Air Quality Framework Directive (96/62/EC) was adopted and laid the groundwork for a comprehensive approach to air quality management across the EU. It established a framework for assessing and managing air quality, requiring member states to develop air quality standards for key pollutants. The Ambient Air Quality Directive

[705] European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Pathway to a Healthy Planet for All, EU Action Plan: 'Towards Zero Pollution for Air, Water and Soil', 15. 5. 2021, COM (2021) 400 final.

[706] This ultimately led to the adoption of an international treaty addressing the transboundary transport of air pollution – the 1979 Convention on Long-Range Transboundary Air Pollution.

[707] See the proposal for a Regulation of the European Parliament and of the Council on fluorinated greenhouse gases, amending Directive (EU) 2019/1937 and repealing Regulation (EU) No 517/2014, COM (2022) 150 final, proposal on substances that deplete the ozone layer and repealing Regulation (EC) No 1005/2009, COM (2022) 151 final.

(1999/30/EC) built upon the Air Quality Framework Directive and set specific limit values and target values for the pollutants.

Neither of the two Directives set any direct requirements for public construction law. However, Member states were required to establish and implement air quality plans and programs to achieve the prescribed air quality standards, which affected urban development indirectly. For example, the evaluation of the air status during the preparation of spatial planning documentation, such as the identification of areas with exceeded emission limits may contribute to re-arrangement of the urban areas. In extreme cases, the emission limits set by the Air Quality Framework Directive can force the spatial planning to introduce a ban on new construction in areas with exceeded emission limits.

Directive 2008/50/EC on ambient air quality and cleaner air for Europe (**Air Quality Framework Directive**),[708] which consolidated and replaced the previous legislation, also strengthened requirements for air quality plans and introduced a new requirement of drawing up short-term action plans. These must be adopted if, in a given zone or agglomeration, there is a risk that the levels of pollutants will exceed one or more of the alert thresholds specified in Annex XII.[709] Those action plans may include measures in relation to *inter alia*, **construction**.[710]

The Air Quality Framework Directive does not make any requirements on **public participation** except dissemination of information. According to Art. 26(1), wide public defined as *"public as well as appropriate organisations such as environmental organisations, consumer organisations, organisations representing the interests of sensitive populations, other relevant health-care bodies and the relevant industrial federations are informed, adequately and in good time, of the following"* must be informed adequately and in good time, of ambient air quality, any postponement decisions pursuant to Art. 22(1); any exemptions pursuant to Art. 22(2), air quality plans and programmes referred to in Art. 17(2). When Member States have drawn up a short-term action plan, they shall make it available to the same wide public according to Art. 24(3). Lastly, the public must be informed if the thresholds for pollutants are exceeded.[711]

Most strikingly, the Air Quality Framework Directive does not make any reference to the Aarhus Convention, the SEA Directive, or requirements on public participation in the adoption of plans and programmes. It seems that this issue has not been appropriately addressed by academia which focuses more on access to information.[712] However, it seems plausible that both air quality plans and short-term action plans may set conditions on EIA projects and, therefore, present framework in the sense of the SEA Directive.

[708] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe. OJ L 152, 11. 6. 2008, p. 1–44.
[709] *Ibid*, Art. 24(1).
[710] *Ibid*, Art. 24(2).
[711] *Ibid*, Art. 19, Art. 25(4).
[712] See Gemmer, M., Xiao, B. Air quality legislation and standards in the European Union: Background, status and public participation. *Advances in Climate Change Research*, 2013, vol. 4, no. 1, p. 50–59.

The recent **proposal for a revision** of the Air Quality Framework Directive[713] sets more explicit specific requirements on public participation: The public concerned is defined in line with the Aarhus Convention,[714] the access to information is set significantly broader,[715] Art. 20 makes public consultation on short-term action plans mandatory and Art. 27 guarantees the public concerned access to justice to challenge the substantive or procedural legality of all decisions, acts or omissions concerning air quality plans referred to in Art. 19, and short term action plans referred to in Art. 20, in a way comparable to the EIA Directive and the IED. For the first time in EU law, the proposal articulates the conclusion of the CJEU that legal standing should not be made conditional on the role that the concerned member of the public played during a participatory phase of the decision-making procedures under this Directive.[716]

As in the case of the Seveso III Directive, the latest version of the EU's air protection legislation appears to be close to meeting the requirements of the Aarhus Convention. This is undoubtedly a welcome step. However, it also shows how incomplete the implementation of the Aarhus Convention has been and how long it has taken to translate these requirements into binding legislation through CJEU case law.

As regards other relevant legislation, construction machinery is addressed under the **Non-Road Mobile Machinery Regulation** (2016/1628),[717] which establishes for all engines referred to in Art. 2(1) emission limits for gaseous and particulate pollutants as well as the administrative and technical requirements relating to EU type-approval. The Regulation also lays down certain obligations in relation to non-road mobile machinery in which an engine, as referred to in Art. 2(1), is being, or has been, installed, as regards the emission limits for gaseous and particulate pollutants from such engines.

4.8 NOISE POLLUTION

The EU regulates noise pollution through various legislative measures and frameworks. Most notably, it encourages Member States to incorporate noise reduction measures into urban planning and building design. Furthermore, it addresses that construction and demolition areas are the most significant sources of noise in relation to outdoor machinery. The 2021 zero pollution action plan sets a specific target of reducing by 30% by 2030 the number of people chronically disturbed by transport noise in respect to 2017.[718]

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[713] Proposal for a Directive of the European Parliament and of the Council on ambient air quality and cleaner air for Europe (recast), COM (2022) 542 final/2.
[714] *Ibid*, Art. 4(38).
[715] *Ibid*, Art. 15(3), 18, 22
[716] *Ibid*, Art. 27(2): *"To have standing to participate in the review procedure shall not be conditional on the role that the member of the public concerned played during a participatory phase of the decision-making procedures related to Article 19 or 20."*
[717] Regulation (EU) 2016/1628 of the European Parliament and of the Council of 14 September 2016 on requirements relating to gaseous and particulate pollutant emission limits and type-approval for internal combustion engines for non-road mobile machinery, amending Regulations (EU) No 1024/2012 and (EU) No 167/2013, and amending and repealing Directive 97/68/EC. OJ L 252, 16. 9. 2016, p. 53–117.
[718] European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Pathway to a Healthy Planet for All, EU Action Plan: 'Towards Zero Pollution for Air, Water and Soil', 15. 5. 2021, COM (2021) 400 final.

The **Environmental Noise Directive** (2002/49/EC)[719] establishes a framework for assessing and managing environmental noise in urban areas, transportation, and industry. It requires Member States to create noise maps and action plans according to the minimum requirements laid down in Annex IV and V every five years for major cities and agglomerations: agglomerations with more than 100,000 inhabitants, major roads (more than 3 million vehicles a year), major railways (more than 30,000 trains a year) and major airports (more than 50,000 take-offs or landings a year, including small aircrafts and helicopters).[720] The full scope of the Directive came into force in 2013, increasing the number of entities covered considerably to 467 agglomerations, 92 airports, 72,341 km of railways, and 154,738 km of roads in the EU.[721]

The noise maps identify areas with high noise levels, and the action plans outline measures to reduce noise exposure and mitigate its impacts. Urban planning and building design can be key components of these action plans. According to the CJEU, the action plans are meant to manage noise rather than merely reduce it. The national limits serve as possible criteria when prioritising interventions. [722]

The EU encourages Member States to **integrate noise considerations into their urban planning and development processes**. This involves considering noise pollution at the earliest stages of urban development projects, including zoning decisions and land use planning. The zones should be designed for different types of land uses (residential, commercial, industrial, etc.) based on noise exposure levels. For example, noise-sensitive facilities like hospitals and schools should be located in areas with lower noise levels.[723]

Member States are further encouraged to designate quiet areas and zones where noise reduction is a priority. These areas could be residential zones, recreational spaces, or areas around hospitals and schools.[724]

Nevertheless, the Environmental Noise Directive does not set limits or target values for environmental noise, nor prescribes the measures to be included in the action plans. This is for the competent Member State authorities to decide.

The 2016 evaluation of the Environmental Noise Directive suggests that the direct use of noise mapping in land-use planning has been more of an unforeseen but actual positive impact of the Directive: *"…noise mapping data is being used in some Member States for land-use-*

[719] Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise - Declaration by the Commission in the Conciliation Committee on the Directive relating to the assessment and management of environmental noise. OJ L 189, 18. 7. 2002, p. 12–25.
[720] *Ibid*, Art. 7.
[721] European Commission. Commission Staff Working Document REFIT Evaluation of the Directive 2002/49/EC relating to the assessment and management of environmental noise, 13. 12. 2016, SWD (2016) 454 final, point 2.
[722] See the CJEU judgments of 13 January 2022, *Commission v Slovakia* (C-683/20, EU:C:2022:22); of 31 March 2022, *Commission v Portugal* (C-687/20, EU:C:2022:244).
[723] Environmental Noise Directive, Art. 2(1), Annex IV.
[724] *Ibid*, Art. 8(1)(b).

planning purposes, assisting in decision-making on future land use, particularly for new transport infrastructure and new noise sensitive developments."[725]

As regards **public participation**, the Environmental Noise Directive defines *the public* in line with the Aarhus Convention,[726] even though it makes no reference to the Aarhus Convention.

One of the objectives of the Directive is to ensure that information on environmental noise and its effects is made available to the public.[727] Member States must make available the information regarding designated authorities.[728] Furthermore, the strategic noise maps and the action plans available and disseminated to the public in accordance with relevant EU legislative acts, in particular the Aarhus Directive and the INSPIRE Directive (2007/2/EC),[729] in conformity with Annexes IV and V to the Environmental Noise Directive, including by means of available information technologies. This information must be clear, comprehensible, and accessible and include a summary of the most essential points.[730]

In practice, noise mapping data is being used even by stakeholders outside those directly involved in implementing the Directive for research purposes, particularly in large-scale epidemiological studies that are advancing the scientific understanding of the health effects of noise.[731] However, the most recent third implementation report (2023)[732] observes that despite progress, the Commission has launched infringement procedures against 15 Member States 22 for inadequate implementation concerning substantial delays during the first and the second rounds of maps and plans. The problems concern the lack of noise maps, action plans, and even public consultations.[733]

According to Art. 8(7) of the Directive, Member States must ensure that the public is consulted about proposals for action plans, given early and effective opportunities to participate in the preparation and review of the action plans and that the results of that participation are taken into account and that the public is informed on the decisions taken. Reasonable timeframes shall be provided, allowing sufficient time for each stage of public participation. Moreover, if the obligation to carry out a public participation procedure arises simultaneously from this Directive and any other Community legislation, Member States may provide for joint procedures in order to avoid duplication.

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[725] European Commission. Commission Staff Working Document REFIT Evaluation of the Directive 2002/49/EC relating to the assessment and management of environmental noise, 13. 12. 2016, SWD (2016) 454 final, point 14.
[726] Environmental Noise Directive, Art. 3(v).
[727] *Ibid*, Art. 1(b).
[728] *Ibid*, Art. 4(2)
[729] Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE). OJ L 108, 25. 4. 2007, p. 1–14.
[730] Environmental Noise Directive, Art. 9.
[731] European Commission. Commission Staff Working Document REFIT Evaluation of the Directive 2002/49/EC relating to the assessment and management of environmental noise, 13. 12. 2016, SWD (2016) 454 final, point 5.
[732] European Commission. Report from the Commission to the European Parliament and the Council on the implementation of the Environmental Noise Directive in accordance with Article 11 of Directive 2002/49/EC, 20. 3. 2023, COM (2023) 139 final.
[733] *Ibid*, chapter 3.

In practice, the process of publicly consulting draft action plans has not always been fully effective (with some competent authorities regretting a lack of interest from the public and some NGOs complaining of their comments not having been taken up.[734]

The public consultation typically took the form of a publication on the online sites of the competent authority,[735] which does not seem generally sufficient for effective participation.

It seems likely that the action plans can meet the criteria to be considered plans or programmes under the SEA Directive as they are designed to manage noise issues and effects, including noise reduction if necessary. The measures within the plans are at the discretion of the competent authorities but should notably address priorities that may be identified by the exceeding of any relevant limit value or by other criteria chosen by the Member States and apply in particular to the most critical areas as established by strategic noise mapping.[736] The measures can include constructions and be considered a project or a part of the project subject to the EIA or Natura 2000 assessment.

Furthermore, the CJEU has confirmed the Directive's aim is protecting health,[737] which means that, similarly to the air quality legislation, the purpose of the noise legislation is the protection of public health and environment, which may constitute direct applicability of the Directive the individuals in noisy urban areas can rely on to **access to court**.

As regards further legislation, the EU promotes noise reduction in **transport infrastructure** such as roads, railways, airports, and ports. This includes measures mainly focused on the vehicles[738] but also building noise barriers, using quieter pavement materials, and implementing noise-reducing techniques in rail and aviation operations.[739]

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[734] *Ibid*, point 6.3.
[735] *Ibid*, chapter 3.
[736] Environmental Noise Directive, Art. 8(1)(b).
[737] See the CJEU judgments of 13 January 2022, *Commission v Slovakia* (C-683/20, EU:C:2022:22); of 31 March 2022, *Commission v Portugal* (C-687/20, EU:C:2022:244).
[738] See Regulation (EU) No 540/2014 of the European Parliament and of the Council of 16 April 2014 on the sound level of motor vehicles and of replacement silencing systems, and amending Directive 2007/46/EC and repealing Directive 70/157/EEC, OJ L 158, 27. 5. 2014, p. 131–195; Regulation (EU) No 168/2013 of the European Parliament and of the Council of 15 January 2013 on the approval and market surveillance of two- or three-wheel vehicles and quadricycles, OJ L 60, 2. 3. 2013, p. 52–128; Regulation (EU) 2019/2144 of the European Parliament and of the Council of 27 November 2019 on type-approval requirements for motor vehicles and their trailers, and systems, components and separate technical units intended for such vehicles, as regards their general safety and the protection of vehicle occupants and vulnerable road users, amending Regulation (EU) 2018/858 of the European Parliament and of the Council and repealing Regulations (EC) No 78/2009, (EC) No 79/2009 and (EC) No 661/2009 of the European Parliament and of the Council and Commission Regulations (EC) No 631/2009, (EU) No 406/2010, (EU) No 672/2010, (EU) No 1003/2010, (EU) No 1005/2010, (EU) No 1008/2010, (EU) No 1009/2010, (EU) No 19/2011, (EU) No 109/2011, (EU) No 458/2011, (EU) No 65/2012, (EU) No 130/2012, (EU) No 347/2012, (EU) No 351/2012, (EU) No 1230/2012 and (EU) 2015/166, OJ L 325, 16. 12. 2019, p. 1–40; Regulation (EU) 2020/740 of the European Parliament and of the Council of 25 May 2020 on the labelling of tyres with respect to fuel efficiency and other parameters, amending Regulation (EU) 2017/1369 and repealing Regulation (EC) No 1222/2009, OJ L 177, 5. 6. 2020, p. 1–31.
[739] See Commission Regulation (EU) No 1304/2014 of 26 November 2014 on the technical specification for interoperability relating to the subsystem 'rolling stock — noise' amending Decision 2008/232/EC and repealing Decision 2011/229/EU. OJ L 356, 12.12.2014, p. 421–437; Commission Implementing Regulation (EU) 2015/429 of 13 March 2015 setting out the modalities to be followed for the application of the charging for the cost of noise effects. OJ L 70, 14. 3. 2015, p. 36–42; Regulation (EU) No 598/2014 of the European Parliament and of the Council of 16 April 2014 on the establishment of rules and procedures with regard to the introduction

EU legislation on **noise from outdoor equipment** is mainly addressed by the Outdoor Noise Directive (2000/14/EC).[740] The Directive was introduced with the specific aim to lessen the noise impact on the environment, especially in urban areas.[741] According to the Directive, outdoor equipment can be grouped into eight clusters including construction equipment. The Directive covers equipment used by both professional and private users, workers, and consumers.[742]

The 2020 evaluation of the Directive[743] concluded that it had significantly contributed to reducing noise emissions by outdoor equipment and to ensuring that manufacturers invest in the research and development of relevant designs, mechanisms, and strategies and that it was still the primary force driving noise reduction for this type of equipment.

The noise limits have been lowered throughout time. The evolution of noise limits for specific equipment used for construction can be illustrated in the following table.

Tab. 5: EVOLUTION OF NOISE LIMITS FOR SPECIFIC EQUIPMENT USED FOR CONSTRUCTION

Equipment	**Directive**	**Permissible sound power level [dB/1 pW]**				
		1986–1989	1989–1996	1997–2001	2002–2006	2006–
Concrete-breakers and picks, hand-held (m < 20/20 ≤ m ≤ 35/m > 35)	84/537/EEC 2000/14/EC	110/113/116	108/111/114	108/111/114	107/ 94+111gm/ 96+111gm	105/ 92+111gm/ 94+111gm
Excavators, hydraulic/rope-operated (P ≤ 70/70 < P ≤ 160/160 < P ≤ 350/P > 350)	86/662/EEC 89/514/EEC 94/27/EC 2000/14/EC	-	106/108/112/118	96	83+11lgP	80+11lgP
Tower cranes	84/534/EEC 2000/14/EC	-	102	100	98+lgP	96+lgP

Lastly, there is legislation protecting workers exposed to noise under Directive 2003/10/EC.[744] In the workplace, the noise exposure limit values, which must not be exceeded, mainly pertain to a daily or weekly exposure of 87 decibels (dB), considering any attenuation from hearing protection. The exposure action values, the decibel levels at which an employer must take certain actions, are set at a daily or weekly exposure of 80 dB (lower value) and 85 dB (upper value).

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of noise-related operating restrictions at Union airports within a Balanced Approach and repealing Directive 2002/30/EC. OJ L 173, 12. 6. 2014, p. 65–78.

[740] Directive 2000/14/EC of the European Parliament and of the Council of 8 May 2000 on the approximation of the laws of the Member States relating to the noise emission in the environment by equipment for use outdoors. OJ L 162 3. 7. 2000, p. 1–78.

[741] *Ibid*, preamble, para. 4.

[742] *Ibid*, Art. 12.

[743] European Commission. Commission staff working document, Evaluation of the Outdoor Noise Directive 2000/14/EC, 16. 11. 2020, SWD (2020) 266 final

[744] Directive 2003/10/EC of the European Parliament and of the Council of 6 February 2003 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (noise) (Seventeenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC). OJ L 42, 15. 2. 2003, p. 38–44.

4.9 WASTE MANAGEMENT

The construction industry is responsible for over 35% of the EU's total waste generation and 5-12% of national greenhouse gas emissions.[745] EU waste policy has been subject to constant development. Most notably, the EU decided to transform its linear economy (take-make-dispose) into a Circular Economy, which also affected the public construction law.

The 7th EU Environmental Action Programme (2013–2020) saw the emergence of the circular economy concept and its implementation in the EU's policymaking. It was coupled with the first Circular Economy Action Plan (CEAP) adopted in 2015,[746] which aimed at accelerating the transition from a linear to a circular economy model.

In 2008, the **Waste Framework Directive** (**2008/98/EC**)[747] replaced and repealed the 2006 Directive on waste.[748] This was a significant boost in strengthening the waste management legal framework. The Waste Framework Directive incorporated new concepts, principles, and objectives to align with the evolving environmental and resource management priorities. Most notably, a revised waste hierarchy was introduced, and a stronger emphasis was put on the promotion of the circular economy. The Waste Framework Directive also requires Member States to develop waste management plans and implement measures to promote the sustainable management of construction and demolition waste. It set the goal that a minimum of 70% (of non-hazardous) of building waste should be reused or recycled by 2020.

The Waste Framework Directive has been regularly interpreted by the CJEU, most often to provide more guidance on the definition of waste,[749] which is also crucial for construction and especially demolition waste. Once a material is identified as waste, waste management requirements apply. However, there is a vast grey area regarding several scenarios of what happens to construction materials. For example, after the demolition of a building, the material may be left for reuse and may remain so for months or years. In these cases, the actual use of the material, the method and rate of recovery after use, is critical as Art. 3 of the Waste Framework Directive defines the concept of *waste* as being any substance or object that the holder discards or intends or is required to discard.[750] If there is an intermediate period between the acquisition and use of the material, then it must be as short as possible

[745] European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A new Circular Economy Action Plan. For a cleaner and more competitive Europe. 11. 3. 2020, COM (2020) 98 final, point 3.6.
[746] European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Closing the loop – An EU action plan for the Circular Economy. 2. 12. 2015, COM (2015) 614 final.
[747] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives. OJ L 312, 22. 11. 2008, p. 3–30.
[748] Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste. OJ L 114, 27. 4. 2006, p. 9–21.
[749] See the CJEU judgment of 14 October 2020, *Sappi Austria Produktion and Wasserverband 'Region Gratkorn-Gratwein'* (C-629/19, EU:C:2020:824, paras 42–46).
[750] It is clear from the case law of CJEU that the criteria in the Annex to the Waste Framework Directive are not decisive in relation to the definition of waste, but merely illustrative, since the qualification of waste derives primarily from the behaviour of the holder and from the meaning of the term *discard*. See the CJEU judgments of 18 December 1997, *Inter-Environnement Wallonie* (C-129/96, EU:C:1997:628, para. 26); of 7 September 2004, *Van de Walle and Others* (C-1/03, EU:C:2004:490, para. 42); of 10 May 2007, *Thames Water Utilities* (C-252/05, EU:C:2007:276, para. 24).

(necessary) given the legal definition of waste.[751] The use of the material must be not only possible but also certain. At the same time, the actual storage of material not suitable for recovery cannot be accepted as non-waste, so the allocation of material for recovery (and the separation of other material that is waste) must take place essentially immediately after the completion of construction or excavation work.

The building waste may qualify as a *by-product* or meet the *end-of-waste* criteria under the Waste Framework Directive. In a recent Case **C-238/21** (***Porr Bau***),[752] the CJEU considered the application of these two specific regimes to uncontaminated excavated soil provided by a construction company to farmers in Austria for soil improvement. The Austrian authorities classified the soil as waste. The CJEU found that it was contrary to the Directive to classify excavated soil as waste where the holder did not intend nor was required to discard it and where the materials met the criteria under the Directive to be a by-product. It was for the national court to decide whether the soil constituted a "burden" to the produced, indicating it was waste, and whether criteria as a by-product, such as the lack of need for any further processing or treatment before use, were met. Imposing additional requirements under national law was contrary to the Directive and would impede progress towards implementing the waste hierarchy because *"…the use of excavated materials in the highest quality class, for the purpose of adapting and improving cultivation areas, makes it possible to comply with the waste hierarchy…"*.[753]

As regards **public participation**, the Directive on Waste provided no requirements in this respect. The Member States were required to draw up as soon as possible one or more waste management plans, but the public was not involved. Eventually, the SEA Directive – and consequently its requirements on public participation – would be applicable if the waste management plan presented a framework for permitting Annex I or Annex II EIA Directive projects, but not as a rule. Similarly, the permitting of the construction and operation of waste management facilities may fall under the regime of the EIA Directive or the IED, which translates to public participation in decision-making and access to justice.

The Waste Framework Directive changed the rules regarding participation in the adoption of waste management plans. Art. 31 of the Waste Framework Directive provides that Member States shall ensure that relevant stakeholders and authorities and the general public have the opportunity to participate in the elaboration of the waste management plans and waste prevention programmes and have access to them once elaborated. The plans and programmes must be published on a publicly available website. Furthermore, Art. 28(4)(c) of the Waste Framework Directive stipulates that the waste management plan *may* contain, considering the

[751] Certain circumstances may constitute circumstantial evidence of the existence of an act, intention or obligation to 'discard' a substance or object. See the CJEU judgment of 15 June 2000, *ARCO Chemie Nederland and Others* (C-418/97 and C-419/97, EU:C:2000:318, para. 83). Moreover, the way in which a substance is processed or used is not decisive for its classification as waste or not. See the CJEU judgment of 1 March 2007, *KVZ retec* (C-176/05, EU:C:2007:123, para. 52).

[752] CJEU judgment of 17 November 2022, *Porr Bau* (C-238/21, EU:C:2022:885).

[753] *Ibid*, para. 59. Also see CJEU judgment of 11 September 2003, *AvestaPolarit Chrome* (C-114/01, EU:C:2003:448), in which the CJEU concluded that leftover rocks from the operation of a mine can be used without further processing in the necessary filling-in of the underground galleries.

geographical level and coverage of the planning area, the use of awareness campaigns and information provision directed at the general public or a specific set of consumers.[754]

Nevertheless, the detailed rules on public participation in the elaboration of the waste management plans are not provided by the Waste Framework Directive, even after its several amendments. Similarly, the awareness campaigns are still carried out on a voluntary basis.

The Waste Framework Directive does not provide any requirements on **access to justice**. It seems to meet the criteria for direct applicability as established by the CJEU, most notably that its aim is the protection of human health and the environment. The Directive links waste management to the protection of human health and the environment at several points and as a part of specific requirements in individual Articles.[755] Already the preamble to the Directive states that *"The first objective of any waste policy should be to minimise the negative effects of the generation and management of waste on human health and the environment."*[756] Protection of human health is also the reason for, *inter alia*, strict regulation of hazardous waste management,[757] a consideration behind a decision that a certain substance is not waste,[758] or a criterion of activities of the waste producer and the waste holder.[759] Most notably, the protection of the environment and human health are the main goals of the Waste Framework Directive emphasised in its Art. 1 (Subject matter and scope): *"This Directive lays down measures to protect the environment and human health by preventing or reducing the adverse impacts of the generation and management of waste and by reducing overall impacts of resource use and improving the efficiency of such use."*

The Waste Framework Directive is supplemented by the **Construction and Demolition Waste Management Protocol**, which provides specific guidance on managing construction and demolition waste. The protocol encourages separating, recovering, and recycling waste materials generated from construction and demolition activities.

As regards other relevant regulations, the **End-of-Life Vehicles Directive** (2000/53/EC)[760] primarily addresses the automotive sector through its provisions regarding the recovery, recycling, and appropriate disposal of end-of-life vehicles. Nevertheless, construction vehicles and machinery fall within its scope, and specific requirements are in place for sustainable management at the end of their lifecycle. The Directive does contain minimal requirements for **public participation**. Agreements between the competent authorities and the economic sectors and results of monitoring the results achieved under the agreements must be made accessible to the public [Art. 10(3)(c), (d)].

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[754] Also see the Waste Framework Directive, Annex IV, points 5 and 12 (points 8 and 12 of the consolidated text).

[755] See, in particular, a general requirement in Art. 13 of the Waste Framework Directive (Protection of human health and the environment): *„Member States shall take the necessary measures to ensure that waste management is carried out without endangering human health, without harming the environment and, in particular: (a) without risk to water, air, soil, plants or animals; (b) without causing a nuisance through noise or odours; and (c) without adversely affecting the countryside or places of special interest."*

[756] Waste Framework Directive, preamble para. 6.

[757] *Ibid*, para. 14.

[758] *Ibid*, para. 22.

[759] *Ibid*, para. 26.

[760] Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on end-of life vehicles. OJ L 269, 21. 10. 2000, p. 34–43.

The **WEEE Directive** (2012/19/EU)[761] focuses on properly managing electrical and electronic waste, including waste from construction-related electrical and electronic equipment. It establishes obligations for the collection, recycling, and treatment of such waste to prevent its harmful effects on the environment and human health. Its main goal is that producers of electrical and electronic equipment (EEEs)[762] likewise put separate collection, treatment, and recovery facilities for their end-of-life products in place. Its application on building materials and waste is limited.

Nevertheless, when the various electric equipment is attached to parts of construction, it is not always evident whether it falls under the regime of the WEEE Directive as operating devices 'specifically designed and installed' as part of a structure for the purposes of Art. 2(3)(b) of the WEEE Directive are excepted from the scope of the Directive. A typical example is oil platforms, airport luggage transport systems, or elevators. In Case **C-369/14** (***Sommer Antriebs- und Funktechnik***),[763] the CJEU ruled that garage-door operating devices do not meet the criteria for the derogatory regime, similar to other equipment which *"…can be dismantled, re-installed and/or added to the building structure at any time…"*.[764] The preamble of the WEEE Directive provides two more examples of equipment that is not excluded from the scope of the Directive, namely lighting equipment and photovoltaic panels, which, although typically part of large-scale fixed installations, such as buildings, are nevertheless not regarded as 'specifically' intended to be part of such installations and are considered to be capable of fulfilling their function even if they are not an integral part of those installations.[765]

The WEEE Directive does contain very limited requirements on **public participation**. Art. 14 stipulates that Member States *may* introduce two voluntary regimes of information provided to users or the wide public: the costs of collection, treatment, and disposal in an environmentally sound way [Art. 14(1)] and public awareness campaigns on symbols placed on products or information provided to customers [Art. 14(5)]. Similar to the End-of-Life Vehicles Directive, agreements between the competent authorities and the economic sectors and results of monitoring the results achieved under the agreements must be made accessible to the public [Art. 24(3)(c), (d)].

Following the European **Green Deal**, a new **Circular Economy Action Plan** (**nCEAP**)[766] introduced a number of new circular economic development strategies. To intensify sustainable development in Europe, the nCEAP takes several measures. It includes measures and initiatives to reduce construction waste, promote the use of recycled materials in construction, and foster resource efficiency in the sector. Several steps are listed to address the opportunities for change in the construction industry: 1) Addressing the sustainability of

[761] Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE) (recast). OJ L 197, 24. 7. 2012, p. 38–71.
[762] The Directive applies to equipment designed for use with a voltage rating not exceeding 1.000 volts for alternating current and 1.500 volts for direct current. See the WEEE Directive, Article 3(1).
[763] CJEU judgment of 16 July 2015, *Sommer Antriebs- und Funktechnik* (C-369/14, EU:C:2015:491).
[764] *Ibid*, para. 55.
[765] WEEE Directive, preamble, para. 9.
[766] European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A new Circular Economy Action Plan. For a cleaner and more competitive Europe. 11. 3. 2020, COM (2020) 98 final.

building materials based on the Building Materials Regulation and the Construction Product Regulation), including recycling requirements for specific products for safety and functionality, 2) Promoting measures and dimensions to improve the durability and flexibility of building components in line with the circular economic principles for buildings design and developing digital logbooks for buildings, 3) Using "Level (s)", a framework developed by the Commission for mapping sustainability in buildings, to be able to evaluate the life cycle of public procedures and explore the appropriateness of setting carbon reduction targets and carbon storage potential, 4) Considering a revision of the material recovery targets set in the EU building and construction waste legislation and its material-specific fractions, 5) Promoting measures to reduce soil sealing, rehabilitate abandoned or contaminated brownfields, and increase safe, sustainable and circular use for excavated soil.[767]

The nCEAP also announces the Commission will propose mandatory requirements for recycled content and waste reduction measures for key products such as, *inter alia*, construction materials.[768]

In February 2021, the Parliament adopted a **resolution on the new circular economy action plan**[769] demanding additional measures, including those targeted at construction and buildings. And pointing out that, as 90 % of the 2050 built environment already exists, the attention should focus on the renovation sector in order to have fully modular, adaptable to different uses and energy-positive buildings by 2050, including deep renovations, on-site production, and reusability. This increases the importance of putting in place policies for high-calibre building planning that focus on renovation, conversion, and continuing use of buildings, where that is possible, rather than on new builds.[770] More specifically, the Parliament calls on the Commission to implement the Renovation Wave, to set horizontal and product-specific requirements; *"stresses the potential for greenhouse gas savings and environmental gains by prolonging the lifetime of buildings as opposed to demolition; asks the Commission to consider setting reduction targets for the carbon footprint and material footprint of EU buildings and applying the Levels(s) framework on sustainable buildings as a binding framework for construction performance; believes it to be necessary to include minimum legal requirements on the environmental performance of buildings in order to improve the resource efficiency and energy performance of buildings."*[771] Furthermore, the Commission should consider a revision of material recovery targets set in EU legislation for construction and demolition waste and its material-specific fractions, including a material recovery target for excavated soils; reuse and recycling targets and the use of secondary raw materials should be included in construction applications while making them more easily traceable; and the Commission should revise the Construction Products Regulation.[772]

Financing for building renovations has been gaining increasing interest from Member States, the European Commission, and financial institutions, as appropriate financing streams and

[767] *Ibid*, point. 3.6.
[768] *Ibid*, point 3.4.
[769] European Parliament. Resolution on the New Circular Economy Action Plan, 10. 2. 2021, 2020/2077(INI).
[770] *Ibid*, paras 87-88.
[771] *Ibid*, 85.
[772] *Ibid*, para. 86.

well-tailored financing mechanisms are essential to speed up the rate of deep renovations, therefore contributing to the achievement of the 2030 and 2050 targets. The European Commission has launched a number of financing initiatives like Smart Finance for Smart Buildings, which was approved by the European Investment Bank.[773]

4.10 PARTIAL CONCLUSIONS AND TAKEOUTS

The scope of the main EU environmental requirements that affect public construction law is significant, and it is easy to see how it has been widened rapidly. To some extent, the adoption of the IED marked the end of an impressive wave of EU environmental legislation in the first decade of the 2000s, including the 2004 Environmental Liability Directive[774] and the 2008 Environmental Crime Directive.[775] The consequences of this legislation for the industry were significant, combined with the financial crisis, which led to cooling off in the next decade.

To estimate the real impact of these requirements, combining them with data on spatial plans and large projects is necessary. For example, the average number of EIAs in the EU is in the range of 15,000 to 26,000 EIAs per year.[776] The total number of development consents delivered in the EU is not available as there is no data available, but it should be considerably higher. Or, from the field of industrial hazard prevention, Germany alone had 1.141 upper-tier and 2.123 lower-tier establishments in 2014.[777] The number of affected spatial planning documents is, therefore, also significant.

The individual directives lay down conditions for spatial development, which must be reflected in spatial planning. Furthermore, they define the content of the project authorisation, which significantly limits the possibility of issuing permits for an unlimited period of time, with simplified reasons or even automatically.

Various directives prevent the issuing of simplified or automatic permits. Such a procedure may not meet the requirements for the content of the decision and may not ensure public participation in the decision-making process. The knowledge of the broader conditions in the

[773] European Investment Bank. More European funds available to support energy efficiency in residential buildings [online]. 2019 [accessed on: 11 February 2023]. Available at: < https://www.eib.org/en/press/all/2019-054-more-european-funds-available-to-support-energy-efficiency-in-residential-buildings>.
[774] Directive 2004/35/CE 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. OJ L 143, 30. 4. 2004, p. 56–75.
[775] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law. OJ L 328, 6. 12. 2008, p. 28–37.
[776] European Commission. Commission staff working paper. Impact assessment accompanying the document proposal for a Directive of the European Parliament and of the Council amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. 26. 10. 2012, SWD (2012) 355 final.
[777] Laurent, A., Pey, A., Gurtel, P., & Fabiano, B. A critical perspective on the implementation of the EU Council Seveso Directives in France, Germany, Italy and Spain. *Process Safety and Environmental Protection*, 2021, vol. 148, p. 55.

area, which may even extend to the territory of other countries, is often required, as confirmed by the case law of the CJEU.[778]

Several EU rules require the issuance of permits for a limited period, in particular for operating permits.[779] As the Advocate General pointed out in her opinion in Case **C-254/19** (***Friends of the Irish Environment***)[780], "*it is also the case for the construction phase that the relevant circumstances and regulations existing after the expiry of the temporary period may differ from those existing at the time of first authorisation*".[781] It is essential, therefore, that the purpose of the safeguard environmental regime cannot be circumvented by allowing construction permits to proceed beyond a period of time during which the circumstances of the site or the scientific requirements of the impact assessment have changed. Even if the project authorisation integrates the operational authorisation, it is at least necessary to treat this *operational* component of the authorisation separately.

However, while the EU regulations set out extensive requirements, their application to spatial planning and construction permitting is only implicit and rarely explicit, as can be seen from the table below.

Tab. 6: MAIN EU ENVIRONMENTAL REQUIREMENTS ON PUBLIC CONSTRUCTION LAW

Main requirements	Requirements on spatial planning	Requirements on construction permitting	Terminology of public construction law	Support the merging and optimisation of processes	
EIA Directive	Assessment of projects in Annex I and Annex II	NO	YES	NO	YES
SEA Directive	Assessment of plans and programmes for 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	YES	NO	YES	YES
Habitats Directive	Natura 2000 management, assessment of plans and projects with the adverse impact on the protected sites, protection of species	YES	NO	NO	NO
Birds Directive	Protection of bird species and their habitats	NO	NO	NO	NO
WFD	Preparation of river basin management plans, ensuring that good status of surface water and groundwater is achieved and maintained	NO	NO	NO	YES
FD	Preparation of flood risk maps and flood risk management plans	NO	NO	NO	YES
IED	Integrated permitting including bast available technologies	NO	NO	NO	YES
Seveso III Directive	Taking measures to prevent major accidents and to limit their consequences	YES	YES	YES	YES
Air Quality Framework Directive	Complying to air quality standards, assessment of ambient air quality, preparation of air quality plans	NO	NO	NO	NO
Environmental Noise Directive	Preparation of noise maps and action plans	YES	NO	NO	YES
Waste Framework Directive	Managing construction and demolition waste, adoption of the waste management plans	NO	NO	NO	NO

[778] See the CJEU judgment of 23 April 2020, *Commission v Finland* (C-217/19, EU:C:2020:291), para. 93: *"…the simple fact that a Member State is the only one to authorise a certain practice provides no ground for inferring that it may take over the entire quota available. For that reason, it is appropriate to contemplate hypothetically which other Member States might wish to use that quota and to reserve a relative portion thereof for each of them."*

[779] Se the IED, preamble para. 22, Art. 21(1).

[780] Opinion of Advocate General Kokott of 30 April 2020, *Friends of the Irish Environment* (C-254/19, EU:C: 2020:320).

[781] *Ibid*, para. 41.

To some extent, it is debatable which of the requirements already reach the level of precision to be claimed as explicit in relation to public construction law. Nevertheless, even in this way, the diversity of requirements is evident, where, moreover, in most cases EU law supports procedural optimisation. For the national legislator, correct implementation is undoubtedly a challenging task. Therefore, it is often supported by guidelines and made easier through funding[782] or taxonomy criteria.[783]

Although EU legislation often uses a general description of the acts to be adopted, it rarely uses the terminology typical of public construction law and rarely directly references land-use plans or building permits. The implementation of the requirements in public construction law is therefore both expected and necessary but not explicitly required, which can be confusing, especially for non-lawyers (politicians, planners). This contradicts the fact that the effectiveness of the key instruments, such as the SEA, depends critically on the context within which SEA legislation and guidelines are understood and implemented and the relationship of the SEA to the planning activity itself.[784]

The discretion left to the Member States varies considerably from one directive (regulation) to another. Usually, the organisational framework is entirely left to the Member States. Therefore, for example, the competent authorities dealing with road noise range from national network managers to small and very small municipalities. However, the choice of effective measures depends on the organisation – and is often limited in practice because the competent authorities are not always allowed to take all possible measures. More specifically, for noise mapping, challenges include a lack of centralised and consistent data input, a lack of effective coordination between the different competent authorities, and a lack of comparability of the resulting noise maps across jurisdictions.[785]

The depth and the scope of the major requirements differ as well. For example, the Seveso III Directive does not make any attempt to quantify the separation distances in detail. On the contrary, it allows the Member States and the competent authorities to quantify them and to decide what distance would be appropriate for each establishment. The competent authorities of each Member State are also responsible for setting up procedures facilitating the implementation of the land-use planning policies. On the other hand, the requirements in air quality protection and regulation of industrial emissions opt for much more detailed rules, including the procedural framework.

Simplification and streamlining of the legislative pieces following the Better Regulation Agenda in the 2000s helped to consolidate the key environmental requirements. The

[782] See Regulation (EU) 2021/1153 of the European Parliament and of the Council of 7 July 2021 establishing the Connecting Europe Facility and repealing Regulations (EU) No 1316/2013 and (EU) No 283/2014. OJ L 249, 14. 7. 2021, p. 38–81.

[783] See Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088. OJ L 198, 22. 6. 2020, p. 13–43.

[784] See Stoeglehner, G., Brown, A., Kørnøv, L. SEA and planning: 'ownership' of strategic environmental assessment by the planners is the key to its effectiveness. *Impact Assessment and Project Appraisal*, 2009, vol. 27, no. 2, p. 111–120.

[785] European Commission. Study on airport noise reduction [online]. 2022 [accessed on: 20 February 2023]. Available at: <https://op.europa.eu/en/publication-detail/-/publication/67225cf1-2d8c-11ed-975d-01aa75ed71a1>.

integration of related pieces of EU legislation was frequently used. Nevertheless, the benefits of codification for businesses or administration are highly debatable, and even *"of even greater questionability is the effort taken to codify a directive when, the month before its publication, a proposal for its recast is published. This hints at the Commission „ticking" a better regulation „box" rather than seeking concrete better regulation outcomes."*[786]

The analysis shows that the EU environmental legislation frequently supports the merging and optimisation of processes based on considerations of the feasibility of combining the obligations under different directives, which overlap in fundamental respects. However, it rarely actually attempts to synchronise requirements from different areas of regulation. The core work is left to the transposition by the Member States, which requires a considerable degree of inventiveness on the part of the national legislator to optimise national planning and permitting processes, ranging from piecemeal adjustments to the introduction of *one-stop-shop* permitting (mainly combining the EIA and the construction permit or other permits[787]) or even Single Environmental *Permitting* (*SEP*), which would replace all or most of the environmental acts that make the implementation of a project conditional.

The integration tendencies outlined in the EIA Directive and the Habitats Directive have been reinforced with similar requirements introduced most notably by the SEA Directive and the WTF, but especially with the introduction of integrated permitting (IPPC), which foresees the introduction of coordinated procedures for permitting the operation of large industrial installations.

Overlaps have been identified between the EIA Directive and other directives, leading to complexity. For example, projects, plans, or activities likely to have a negative impact on Natura 2000 sites are subject to an assessment procedure under Art. 6 of the Habitats Directive. The requirement of such an assessment does not preclude the need for an EIA or the SEA, and *vice versa*. Furthermore, the list of prescribed activities requiring integrated permits under the IED does, to some degree, overlap with the lists of projects in the EIA Directive. Where there is overlap, it has been recommended that the two procedures be undertaken in parallel as much as possible to prevent duplication of effort. However, the Member States do not appear to have a single procedure to comply with both Directives, due to the differences in the detail and order in which the regimes are to be complied with. The IPPC application is usually more detailed than the EIA in terms of describing the process, and it requires that the best available technology is used for a specific activity.

However, EU law does not **require that the various environmental instruments be linked**, nor that the various environmental processes be consistently linked to the permitting of a development project. What is essential is the functional links between these processes, which enable the objectives of the different directives to be met. Similarly, it is irrelevant how and into how many stages the spatial planning documentation is structured or whether the general requirements for construction appear in other, formally distinct documents.

[786] Hjerp, P., Homeyer, I., Pallemaerts, M., Farmer, A. *The Impact of Better Regulation on EU Environmental Policy under the Sixth Environment Action Programme, Report for the Brussels Institute for Environmental Management*. 2010, London: IEEP, p. 24.
[787] See the CJEU judgment of 24 February 2022, *Namur-Est Environment* (C-463/20, EU:C:2022:121, para. 56).

It seems that the high degree of fragmentation of planning and permitting processes supported by the resortism of public administration, may in practice represent a significant obstacle to the fulfillment of EU requirements: in particular, it is more demanding in terms of professional and material support, which may lead to increased error rates in the outputs of individual processes, and it is less flexible, so it does not allow to reflect changes in the territory. It is also difficult to ensure effective punishment or public participation in environmental protection. Paradoxically, various simplified regimes or alternative procedures may also prove problematic, which in relation to EU law, raises additional interpretative issues and application problems.[788]

While most of the significant environmental directives provide requirements for access to information, they do not always refer to the Aarhus Convention (see the table below). This is understandable for the legislation adopted before the EU acceded to the Convention. Nevertheless, the lack of references, the paucity or variability of definitions, different standards, and fragmented rules on public participation provided by the more recent or recently amended directives seem troublesome from the Aarhus perspective.

Tab. 7: PUBLIC PARTICIPATION REQUIREMENTS OF THE RELEVANT EU ENVIRONMENTAL DIRECTIVES

	Reference to the Aarhus Convention	Definition of the public/public concerned	Access to information	Participation in decision-making	Access to justice
EIA Directive	YES	YES/YES	YES	YES	YES
SEA Directive	NO	YES/NO	YES	YES	NO
Habitats Directive	NO	NO/NO	YES	YES	NO
Birds Directive	NO	NO/NO	NO	NO	NO
WFD	NO	NO/NO	YES	YES	NO
FD	NO	NO/NO	YES	YES	NO
IED	YES	YES/YES	YES	YES	YES
Seveso III Directive	YES	YES/YES	YES	YES	YES
Air Quality Framework Directive	NO	NO/NO	YES	NO	NO
Environmental Noise Directive	NO	YES/NO	YES	NO	NO
Waste Framework Directive	NO	NO/NO	NO	YES	NO

Most notably, participation in the adoption of various plans and programmes is often achieved by the SEA Directive, but only if the plan or the programme meets the criteria for assessment under the SEA Directive, which is not in line with the Aarhus Convention. Needless to say, even if the public participation provisions for SEA are not as comprehensive as those for project-level decision-making, they do represent an essential step in establishing binding conditions to allow for participation in the definition of plans and programmes. But the rules are far from coherent.

[788] See, for example, on the use of public law contracts instead of authorisation of a project, the CJEU judgment of 28 February 2008, *Abraham and Others* (C-2/07, EU:C:2008:133, para. 28: "*…while an agreement such as the one at issue in the main proceedings is not a project within the meaning of Directive 85/337, it is for the national court to determine, on the basis of the applicable national legislation, whether such an agreement constitutes a development consent within the meaning of Article 1(2) of Directive 85/337. It is necessary, in that context, to consider whether that consent forms part of a procedure carried out in several stages involving a principal decision and implementing decisions and whether account is to be taken of the cumulative effect of several projects whose impact on the environment must be assessed globally*.").

Guarantees on access to justice are often established only by the case law of the CJEU on the direct applicability of the directives (see Chapter 3.3.3) because the specific regulation is often absent which affects not only the *left-over* category of the judicial review under Art. 9(3) of the Aarhus Convention but also access to justice concerning important projects under Art. 9(2) of the Aarhus Convention.

5. CURRENT REQUIREMENTS OF OTHER EU POLICIES

This Chapter covers the indirect EU harmonisation of public construction law by other than environmental policies in the first two decades of the 2000s, and mainly the current state and outlook, following the Union's vision presented in December 2019 in the form of the *Green Deal for Europe*[789] which aims at *"putting the EU on a pathway towards climate neutrality by 2050 and to address environmental related challenges, while transforming the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy"*.

The Eighth Environmental Action Programme, as part of the European Green Deal, adopted the objective of a *"climate-neutral, resource-efficient and regenerative economy (which gives back to the planet more than it takes)."* To achieve this goal, it has been identified that coordination among sectoral policies should be enhanced. Furthermore, environmental and climate concerns should underline a large amount of future European policy-making. This way, climate policy has been put into the *shopping window* of the EU policies, even though the evolution of climate protection EU law can be traced back to the historical development of EU environmental policy.[790] However, as noted in Chapter 4, the Action Programme does not mention spatial (or any other) planning, building materials, or construction permitting. Therefore, the evolution of the planning and construction requirements analysed in the following sub-chapters follows individual specific policies following the Green Deal agenda instead of the general environmental blueprint of the Action Programme.

The EU's goal of having a net-zero emissions economy by 2050 means that all pertinent policies, including the cohesion policy, must be adjusted to align with the goals of the European Green Deal. Since the EU's climate objectives aim to achieve a just and socially equitable transition, the goal of good governance has been gradually and quickly transformed into good climate governance, and the Structural Funds have been changed accordingly. The new or revised environmental requirements are now at the forefront of integration efforts in public construction law because of the amendment of the legislation relating to climate, energy, and transportation.

All the traditional environmental requirements mentioned in the previous chapters apply, often amended to reflect the need for more stringent climate protection. Most notably, the 2014 amendment to the EIA Directive introduced more precise assessment requirements climate factors in the EIA process: The EIA Directive now establishes among the criteria for the assessment procedure the risk of major accidents or disasters relevant to the project in question, including accidents and disasters due to climate change, in accordance with scientific knowledge,[791] and among the requirements for the content of the documentation

[789] European Commission. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. A Green Deal for Europe. COM (2019) 640 final.
[790] Morgera, E., Kulovesi, K. Environmental law. In: Barnard, C., Peers, S. (eds.) *European Union Law (3rd edn)*, Oxford university Press, 2020, p. 673–673.
[791] EIA Directive, Annex III(1)(f).

there are also requirements for the climate impact of the project (e.g. the nature and quantity of greenhouse gas emissions) and the vulnerability of the project to climate change.[792]

In order to harmonise the implementation of the amended EIA Directive, the Commission issued a trio of guides in 2017 focusing on screening,[793] scoping[794] , and the preparation of the final opinion.[795] The last guide points out that it is also appropriate to assess indirect emissions to which the project contributes or which will not need to be emitted as a result of the project. This can obviously have a significant effect on large construction projects. As an example, the guide gives two groups of projects: Transport infrastructure, where the use of the project will result in an increase or even reduction in the total amount of greenhouse gases emitted, and the construction of commercial centres, where the use of the which can be expected to increase the burden due to the necessary transport of customers.[796]

However, in the new climate-focused framework, new measures such as building renovations are seen as a key tool to reduce emissions and provide healthy and affordable living and working environments for all. With specific regard to buildings, the Green Deal announced a Renovation Wave of the building stock to improve energy efficiency while ensuring affordability for EU citizens. Such an initiative's associated impacts are lowering energy bills, reducing energy poverty, boosting the construction sector, and supporting local jobs.[797]

The main initiatives to form the public construction law seem to be the Clean Energy Package for all Europeans, a new Circular Economy Action Plan (nCEAP), and the EU Energy Policy. The individual initiatives are explored more in-depth in the following sub-chapters. To introduce them shortly, the Clean Energy Package for all Europeans presents a comprehensive set of legislation that defines European climate and energy policy beyond 2020, relying on the 2010 EPBD, the Energy Efficiency Directive (EED), and the Renewable Energy Directive (RED II). It addresses some regulatory gaps in building legislation and tries to create a supporting framework for decarbonising the EU building sector. The nCEAP includes measures that should stimulate Europe's transition towards a circular economy and encompass the entire life cycle of products and key value chains, including construction and

[792] *Ibid*, Annex IV(5)(f).
[793] European Commission (COWI A/S, Milieu Ltd). Environmental Impact Assessment of Projects Guidance on Screening (Directive 2011/92/EU as amended by 2014/52/EU). 2017, 84 p.
[794] European Commission (COWI A/S, Milieu Ltd). Environmental Impact Assessment of Projects Guidance on Scoping (Directive 2011/92/EU as amended by 2014/52/EU). 2017, 80 p. The guide implies that the project description should answer the question to what extent the implementation of the project is likely to affect the atmosphere, including microclimate and larger scale climate conditions.
[795] European Commission (COWI A/S, Milieu Ltd). Environmental Impact Assessment of Projects Guidance on the preparation of the Environmental Impact Assessment Report (Directive 2011/92/EU as amended by 2014/52/EU). 2017, 130 p. The opinion should focus on climate change mitigation (p. 60: *"this considers the impact the Project will have on climate change, through greenhouse gas emissions primarily"*), and on climate change adaptation, for which the assessment should evaluate the vulnerability of the Project to future changes in the climate, and its capacity to adapt to the impacts of climate change, which may be uncertain (p. 38: *"this considers the vulnerability of the Project to future changes in the climate, and its capacity to adapt to the impacts of climate change, which may be uncertain"*).
[796] *Ibid*, p. 38.
[797] European Commission. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. A Renovation Wave for Europe - greening our buildings, creating jobs, improving lives. 14. 10. 2020, COM (2020) 662 final.

buildings. The EU energy product policy focuses on, *inter alia*, the Energy Labelling Directive and the Eco-Design Directive.

5.1 COHESION POLICY AND TERRITORIAL AGENDA

The intention of the Commission behind the switch from the spatial policy towards the concept of territorial cohesion in the early 2000s was *"to break out of the impasse concerning a Community competence for spatial planning"*.[798] Besides doubts regarding competence, it seems to simultaneously aim to mute questions addressing a shaky background of harmonisation such as *Who really needs European spatial planning?* and *What can European spatial planning achieve and with what instruments?*[799]

In the current form, Territorial Cohesion and the current agenda of DG Regio are arguably much closer to state aid and EU funding, the necessity of which is not disputed, than to public construction law in a narrow sense.[800] Although the programmes established by the EU offer general guidelines for a balanced and environmentally aware approach to spatial planning, they include no active planning policy. At present, interventions by the EU are limited to stimulating local projects. It is left to cities and (particularly in the case of capital cities) their respective national governments to initiate projects, use their geographical and infrastructural positions to develop their economies and promote themselves by attaching Europe to their names. Hosting EU agencies or activities is essentially a means of increasing the economic potential of a city.[801]

This step notably marks another phase of integration even though it had not come out of nowhere: The Committee of the Regions was set up after the Treaty of Maastricht came into operation in 1993 and gained its relevance with the enlargement of the Community. Spatial development became part of the Cohesion Policy, and its principles were embodied in the ESDP. It also lines with the activities of CEMAT, which in 2000 adopted the *Guiding principles for Sustainable Spatial Development of the European Continent* that highlight the local and regional dimension of human rights and democracy to achieve an acceptable standard of living.[802] The consequent 2002 Recommendation states, *inter alia*, that the Guiding principles constitute a policy framework in the field of Europe-wide spatial development policy and a coherent strategy for the integrated and regionally balanced

[798] Faludi, A. Centenary Paper: European Spatial Planning: Past, Present and Future. *The Town Planning Review*, 2010, vol. 81, no. 1, p. 2.
[799] These are some of the questions raised during a CSD seminar in 1998, organised by the Austrian Presidency. See Faludi, A., Waterhout, B.: *The Making of The European Spatial Development Perspective: No Masterplan!* Routledge, 2002, p. 169.
[800] This could be illustrated on the INTERREG evolution and the increase of it budget. The number of actors involved in INTERREG cooperation projects has been impressive, with an estimated thousands of actors, most of whom from regional and local planning authorities across Europe, now directly or indirectly involved in transnational cooperation networks. See Pedrazzini, L. Applying the ESDP through Interreg IIIB: a southern perspective. *European Planning Studies*, 2005, vol. 13, p. 297–317.
[801] Hein, C. European Spatial Development, the Polycentric EU Capital, and Eastern Enlargement. *Comparative European Politics*, 2006, no. 4, p. 256.
[802] See Jensen, O., B., Richardson, T. Nested Visions: New Rationalities of Space in European Spatial Planning. *Regional Studies*, 2001, vol. 35, no. 8, p. 703–717.

development of the European continent and recommends their use as a basis for spatial planning and development measures at regional level.[803]

In other words, the spatial planning harmonisation evolved towards establishing principles of sustainable development following the Agenda 21 programme, in particular its Chapter on an integrated approach to planning and management, and bringing attention to the regions so that regional government and administrative bodies would continue to be set up to facilitate better spatial integration of the regions in Europe. The conceptual merge of spatial development, territorial cohesion, and Agenda 21 is evident from the name of the key strategic document adopted in 2007: **Territorial Agenda of the European Union**.[804] While the first two decades of the twenty-first century did not bring significant progress in the institutionalisation of European spatial planning, they are characterised by consolidation in the use of strategic documents[805] – and the 2007 Territorial Agenda confirmed this trend.

Moreover, the motivation to elevate spatial planning among EU priorities became evident, even among the new Member States, after the massive enlargement of the EU with ten new member states.[806] As a result, the 2007 Territorial Agenda was developed exclusively by the Member States, accompanied by the 2007 **Leipzig Charter on Sustainable European Cities**.[807] Before adopting the Territorial Agenda, Member States agreed to share their spatial data, resulting in the adoption of the **INSPIRE Directive** which lays down general rules to establish the infrastructure for spatial information. Its scope is broader than spatial planning as it should serve EU environmental policies and policies or activities that may have an impact on the environment.

The Territorial Agenda was adopted as the ESDP's successor document. It does not replace the ESDP but complements it by focusing on the years to come on the background of future EU Presidencies. This has signalled that European spatial planning will continue to develop and become further institutionalised over the coming programming period. The Territorial Agenda is supplied with an unofficial background document from the same year, the Territorial State and Perspectives of the EU.[808] It mainly describes the ideas behind the Territorial Agenda.

The EU context, corresponding aims, and overall atmosphere changed the approach to spatial planning and the cohesion policy. The crisis of politicisation and national boundary reconstruction fuelled by the economic crisis of 2008 had consequences in the debate

[803] CEMAT. Recommendation Rec (2002) 1 of the Commitee of Ministers to the Member States of the Council of Europe on the Guiding Principles for Sustainable Spatial Development of the European Continent, 2002.
[804] Territorial Agenda of the European Union Towards a More Competitive and Sustainable Europe of Diverse Regions, 2007.
[805] See Alhke, B., Görmar, W., Hartz, A. Territoriale Agenda der Europäischen Union und transnationale Zusammenarbeit. *Informationen zur Raumordnung*, 2007, no. 7–8, p. 449–463.
[806] See Peterlin, M., Kreitmeyer McKenzie, J. The Europeanization of spatial planning in Slovenia. *Planning Practice and Research*, 2007, vol. 22, no. 3, p. 455–461.
[807] The Leipzig Charter on Sustainable European Cities complements the concern of the Territorial Agenda as it raises integrated urban development policy as a task with a European dimension. Therefore, integrated urban development policy and territorial cohesion policy each make complementary contributions to implementing the aims of sustainable development. See Eltges, M. Leipzig Charter on Sustainable European Cites - A Work in Progress. *European Spatial Research and Policy*, 2009, vol. 16, no. 2, p. 63–78.
[808] The Territorial State and Perspectives of the European Union. Background document for the Territorial Agenda of the European Union 2020, 2007.

regarding the future of cohesion policy. Following the Lisbon Strategy, the Commission reoriented the cohesion policy towards competitiveness. This translated to more emphasis on potentially well-performing regions and improvement of territorial main structures. The European spatial planning has become institutionalised as the planners still gather and prepare guideline documents. For example, in 2013, the European Council of Spatial Planners adopted **the Charter of European Planning**.[809]

Yet, spatial planning does not seem well embedded in the EU policy-making processes.[810] As noted above, it formed into spatial development, which is organised around a number of **interrelated programmes and initiatives**. From the perspective of EU policies, it has been getting closer to interacting with matters covered by the Cohesion Policy, which is further linked to EU environmental aims. For example, within the current 2021–2027 Cohesion Policy, at least 30% of funds received from the European Regional Development Fund must be devoted to climate objectives.[811] To support climate change adaptation and disaster risk management, the Policy will support building 229,000 hectares of new green infrastructure. Sustainable urban mobility will also be supported by 1,230 km of new and modernised tram and metro lines and 12,200 km cycling infrastructure. Clean water and improved wastewater infrastructure will reach 16.4 million people through Cohesion investments.[812] Cohesion Policy also supports projects in energy efficiency and renewable energy, which are particularly important to implement key actions under the REPowerEU plan (see Chapter 5.6).

Given the scale of financial support and its clear objectives, it can be argued that the Cohesion Policy, together with other EU policies which rely heavily on EU funding, effectively contributes to the harmonisation of spatial planning, albeit not in a procedural sense: The investment plan presented to finance the Green Deal and the transition to a clean economy envisages attracting up to 1 trillion euros in investment over the next decade.[813] The five cross-cutting objectives[814] of Cohesion Policy, which serve to support integrated investment strategies focused on the relevant territorial scale, to achieve many EU policy objectives and complement EU policies such as those dealing with energy or the environment, resemble simplified spatial planning principles which - among other things - prioritise the outcome of planning procedures.

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[809] ECTP-CEU. The Charter of European Planning, 2013.

[810] See Schön, K., P. Europäische Raumentwicklungspolitik. In: *Handwörterbuch der Stadt- und Raumentwicklung. Hamburg: ARL – Akademie für Raumforschung und Landesplanung (Hrsg.)*, 2018, p. 585.

[811] Regulation (EU) 2021/1058 of the European Parliament and of the Council of 24 June 2021 on the European Regional Development Fund and on the Cohesion Fund. OJ L 231, 30. 6. 2021, p. 60–93, Art. 4(6).

[812] European Commission. EU Cohesion Policy: 2021-2027 programmes expected to create 1.3 million jobs in the EU. Press release [online]. 2. 5. 2023 [accessed on: 21 June 2023]. Available at: <https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_23_2462/IP_23_2462_EN.pdf>.

[813] European Commission. Financing the green transition: The European Green Deal Investment Plan and Just Transition Mechanism. Press release. 14 January 2020, IP/20/17.

[814] The Joint Action Plan includes actions on 1) a more competitive and smarter Europe, 2) a greener, low carbon transitioning towards a net zero carbon economy, 3) a more connected Europe by enhancing mobility, 4) a more social and inclusive Europe, 5) Europe closer to citizens by fostering the sustainable and integrated development of all types of territories. See European Commission. Joint Action Plan between the European Committee of the Regions and the European Commission Directorate-General for Regional and Urban Policy, 25. 1. 2022.

Besides the Cohesion Policy, the Commission developed a new industrial strategy to ensure that commercial companies themselves are transformed towards greener operations. The 2021 Industrial Strategy[815] identified the construction ecosystems as one of the 14 priority European ecosystems closely monitored by the Commission. In addition, the Commission has also progressively presented a nCEAP (see below), a new Farm to Fork Strategy,[816] and a Biodiversity Strategy[817], for whose main objectives (expanding protected areas, protecting bees and other pollinators, planting trees) 20 billion euros per year are expected, not taking into account massive support under the Common Agricultural Policy.[818]

However, to understand the **position of spatial planning in the Cohesion Policy**, one must keep in mind its primary aim (reducing disparities[819]) and that the territorial cohesion builds on the common concerns shared with other policy areas (balanced development, competitiveness, sustainability) with a new element of good territorial governance.[820] This unique element is not only an expression of the general requirement of integrating individual policies but also a distinguishing feature from EU environmental regulation that does not primarily focus on the quality of (other than environmental) governance. Good governance also emphasises the strategic, visionary part of spatial planning. The major consequence of this tendency,[821] which follows the French concept of *aménagement du territoire* and the

[815] European Commission. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – A New Industrial Strategy for Europe. COM (2020) 102 final.

[816] European Commission. *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – A Farm to Fork Strategy for a Fair, Healthy and Environmentally-friendly Food System*. COM(2020) 381 final.

[817] European Commission. *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – Biodiversity Strategy for 2030: Bringing nature back into our lives*. COM(2020) 380 final.

[818] For example, over 60 billion euros is available for rural development under the current Common Agricultural Policy for the period 2023-2027. At least 35% of these funds will be allocated to measures to support local development, climate, biodiversity, environment and animal welfare. See Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005. OJ L 347, 20. 12. 2013, p. 487–548; Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008. OJ L 347, 20. 12. 2013, p. 549–607; Regulation (EU) No 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009. OJ L 347, 20. 12. 2013, p. 608–670; Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007. OJ L 347, 20. 12. 2013, p. 671–854.

[819] Bachtler, J., Polverari, L. Delivering Territorial Cohesion: European Cohesion Policy and the European Model of Society. In: Faludi, A. (ed.) *Territorial Cohesion and the European Model of Society*, 2007, Cambridge (MA): Lincoln Institute of Land Policy, p. 105–128.

[820] See Faludi, A. From European Spatial Development to Territorial Cohesion Policy. *Regional Studies*, 2006, vol. 40, p. 667–678.

[821] See for example Healey, P. *Urban Complexity and Spatial Strategies: Towards a Relational Planning for Our Times*, Routledge, 2007, 344 p.; Wiechmann, T. *Planung und Adaptation: Strategieentwicklung in Regionen, Organisationen und Netzwerken*, Dortmund: Rohn, 2008, 299 p.

model of the *Integrated Mediterranean Programmes*[822] is that the EU territorial policy operates mainly, although not exclusively, through area designations for Structural Funds and their programming.

While other policy areas opted for more precise requirements, good governance builds on joint strategies and cooperation instead of relying on statutory land-use plans.[823] Consequently, *"with its French roots, European spatial planning is not and will never become regulatory land-use planning."*[824] This is crucial for understanding the role and importance of the requirements that stem from various EU policies.

The **ERDF Regulation**[825] for the period 2021–2027, as the key part of the Cohesion Policy, pays particular attention to supporting disadvantaged regions, in specific areas with severe and permanent natural or demographic handicaps, and requires Member States, where appropriate, to set out an integrated approach in their programmes to address the challenges and specific needs of these regions.

Regarding **support for the rural areas**, the EU Rural Pact,[826] with specific flagship projects and new instruments, set out a long-term vision for the EU's rural areas up to 2040. The Rural Pact is not a binding legal regulation but a framework for cooperation among authorities and stakeholders dealing with rural territorial development. Most notably, not only public authorities but also civil society organisations and citizens can take part in the initiatives under the Rural Pact, which may boost the engagement of the public in regional development.

The Cohesion Policy is further accompanied by **macro-regional strategies** which form a framework that, at a larger territorial scale, allow for addressing shared issues involving Member States and third countries located in the same geographical area and, as a result, benefit from strengthened cooperation promoting economic, social, and territorial cohesion. The EU Strategy for the Baltic Sea Region (2009),[827] EU Strategy for the Danube Region (2010),[828] EU Strategy for the Adriatic and Ionian Region (2014),[829] and EU Strategy for the Alpine Region (2015)[830] have been enacted to date.

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[822] See Baudelle, G. Construire ensemble les territoires: les transformations récentes du modèle français d'aménagement. *Historiens & Géographes*, 2008, vol. 40, p. 145–158.
[823] Faludi, A. Centenary Paper: European Spatial Planning: Past, Present and Future. *The Town Planning Review*, 2010, vol. 81, no. 1, p. 2.
[824] *Ibid*, p.5.
[825] Regulation (EU) 2021/1058 of the European Parliament and of the Council of 24 June 2021 on the European Regional Development Fund and on the Cohesion Fund. OJ L 231, 30. 6. 2021, p. 60–93.
[826] European Commission. Rural Pact: European momentum to support the EU's rural areas [online]. 17. 6. 2022 [accessed on: 11 February 2023]. Available at: <https://agriculture.ec.europa.eu/news/rural-pact-european-momentum-support-eus-rural-areas-2022-06-17_en>.
[827] See European Council. Presidency Conclusions 29–30 October 2009, 15265/09.
[828] European Commission. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions. European Union Strategy for Danube Region, 8. 12. 2010, COM (2010) 0715 final.
[829] European Commission. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions concerning the European Union Strategy for the Adriatic and Ionian Region, COM (2014) 0357 final.
[830] European Commission. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions a European Union Strategy for the Alpine Region, COM (2015) 0366 final.

As regards **support for urban development**, the ERDF Regulation also aims at integrated territorial development based on territorial or community-led local development strategies[831] to support the European Urban Initiative (see below) implemented by the Commission in direct and indirect management.[832] This way, the **Cohesion Policy considerably widens its scope**, covering all urban areas, including functional urban areas, and supporting the participation of local authorities in the thematic partnerships developed under the Urban Agenda for the EU (support of capacity and knowledge building, territorial impact assessments, policy development, and communication).

An integrated and coordinated approach to the urban dimension of EU and national policies and legislation has been developed since 2016 within the **Urban Agenda for the EU** following the ministerial Pact of Amsterdam.[833] It mainly strives to establish a more effective integrated and coordinated approach to EU policies and legislation, attempts to improve accessibility and coordination of existing funding possibilities, and enhances a better urban policy knowledge base and the exchange of good practice[834] with partnerships, including sustainable use of land and nature-based solutions, energy transition, housing, air quality, climate adaptation or innovative and responsible public procurement. The European Urban Initiative under the Cohesion Policy supports the Urban Agenda for the EU and the inter-governmental cooperation on urban matters.

A political-strategic guiding document that provides a framework for post-2020 urban policy coordination in Europe was conceived as the **New Leipzig Charter** at the end of 2020**.**[835] Despite its name, the New Leipzig Charter is not binding; it serves as a guideline for integrated urban development policy within the framework of the European value model,[836] with the Urban Agenda for the EU as the key vehicle for its implementation. It presents a vision of the European city, which rests on three thematic dimensions, three spatial dimensions, and five principles of how urban policy should be handled. It particularly emphasises the goal of positioning Europe as the first climate-neutral continent. Compared to the previous Leipzig Charter, climate issues are much more prominent. A section devoted to active and strategic land policy and land use planning proposes rather precise objectives concerning polycentricity, the mitigation of urban sprawl, blue and green infrastructure, care for public spaces, etc. This could be considered a real step forward compared to the old Charter.[837]

[831] ERDF Regulation, Art. 11.
[832] *Ibid*, Art. 12.
[833] Pact of Amsterdam establishing the Urban Agenda for the EU, agreed at the Informal Meeting of EU Ministers Responsible for Urban Matters on 30 May 2016 in Amsterdam.
[834] *Ibid*.
[835] The New Leipzig Charter. The transformative power of cities for the common good, 2020.
[836] See Weigel, O., Zimmermann, M. The New Leipzig Charter: From Strategy to Implementation. In: Brears, R., C. (ed.) *The Palgrave Encyclopedia of Urban and Regional Futures*. Palgrave Macmillan, 2022, p. 1167–1174.
[837] See Geppert, A. Sorting the wheat from the chaff. An opinion on the draft for a New Leipzig Charter proposed by the German Presidency of the European Union. *disP - The Planning Review*, 2020, vol. 56, no. 3, p. 77–79.

The renewed **Territorial Agenda 2030**[838] adopted in December 2020 can be considered a spatial planning side piece to the New Leipzig Charter. It provides essential links between the Cohesion and other EU policies. It is a strategic framework document that underlines the importance of and provides orientation for strategic spatial planning and calls for strengthening the territorial dimension of policies at all governance levels. It calls for enhancing the territorial dimension of sector policies at all governance levels and promotes an inclusive and sustainable future for all places to achieve the UN Sustainable Development Goals.

To allow countries and regions to jointly tackle common challenges and find shared solutions in fields such as health, environment, research, education, transport, sustainable energy, and more, one of the two goals of Cohesion Policy is **INTERREG**. It stimulates cooperation at a transnational scale. Another programme to gather more knowledge and data about European territory, European Spatial Planning Observation Network (**ESPON**[839]), was set to support the formulation of European territorial development policies.

Spatial planning is nevertheless still rooted in traditional systems. That is also why **public participation in spatial planning** heavily relies on the requirements of the SEA Directive. Nadin, Dąbrowski, and Fernandez-Maldonado notice that *"While there is evidence of more participatory processes, more attention to sectoral coordination and a rescaling that reflects the reality of cross-border spatial development, the depth, reach and impact of these changes is still an open question. A key factor here is the rootedness of spatial planning in the underlying social model which should not be underestimated. Countries that already had more collaborative planning processes (broadly the Nordic and North-West European countries) have remained so, and those with a tradition of centralized planning likewise."*[840] They also note that where citizens were already partially engaged in 2000, the change to 2016 tends to be less marked.[841] This may be interpreted as some Member States have introduced only minimum standards but are unwilling to create new opportunities for citizen participation in planning.

Similarly, Berčič[842] writes about the differences in legislation in the field of public participation in spatial planning in the EU Member States and notices that the framework of

[838] Territorial Agenda 2030. A future for all places. Informal meeting of Ministers responsible for Spatial Planning and Territorial Development and/or Territorial Cohesion, 1. 12. 2020.
[839] The ESPON have been set up in response to demand of comparable spatial information. It was launched in 2002 to provide detailed spatial information for the EU territory and to set up a decentralised network of spatial research institutes across Europe. Until 2006, the programme funded thematic research on the spatial impacts of EU sector policies, projects on ESDP concepts (such as polycentricity and urban – rural partnerships) and cross-thematic studies. More than 500 researchers from research institutes and universities across Europe collaborated on ESPON projects. The main outputs were vast volumes of reports and maps, many of which of arguably limited practical relevance. See Gloersen, E., Lähteenmäki-Smith, K., Dubois, A. Polycentricity in transnational planning initiatives: ESDP applied or ESDP reinvented? *Planning Practice & Research*, 2007, vol. 22, no. 3, p. 417–437.
[840] Nadin, V., Stead, D., Dąbrowski, M., & Fernandez-Maldonado, A. M. Integrated, adaptive and participatory spatial planning: trends across Europe. *Regional Studies*, 2020, vol. 55, no. 5, p. 792.
[841] *Ibid*, p. 798.
[842] Berčič, J. The state of public participation in spatial planning in the European union: public participation in spatial planning between theory and practice. *Igra ustvarjalnosti - Creativity Game*, 2013, no. 1, p. 54–61.

directives that the EU has mandated has not changed the variety of national regulations. He concludes that more experience from practical research is needed.

The influence of the EU on **permitting procedures** is nowadays recognisable mainly in developments regarding the preconditions of the permit (mainly EIA) and the new requirements for integrated and speedy procedures described in the following chapters. There are apparent tendencies of development in building regulation: *"In recent decades, the historical differences between the building control systems in the various European countries have gradually been fading away, not only because of developments in regulations at the level of the European Union, but also because of such international trends as deregulation and the privatisation of technical building control."* [843]

However, the deregulation does not mean that the scope of technical requirements for regulating the minimal quality of buildings in the Member States is diminishing. Quite the contrary, *"nearly every country has adopted new regulations for energy performance and environmental issues, while the current regulations have stayed in place."*[844] There is a significant difference in permitting small-scale projects (the category of construction works that require building permits is arguably growing in size) and projects that fall under the stricter regime because of various, often environmental, requirements.

5.2 MARITIME SPATIAL PLANNING

One type of spatial planning has been harmonised to a more significant extent at the EU level: **The maritime spatial planning**. From the global perspective, maritime spatial planning was developed under the auspices of the Intergovernmental Oceanographic Commission of UNESCO and the European Commission's Directorate-General for Maritime Affairs and Fisheries in 2010s, following the Marine Spatial Planning Global Initiative. This activity has produced valuable guides.[845]

In the EU, the 2008 Integrated Maritime Policy identified maritime spatial planning as a cross-cutting policy tool enabling public authorities and stakeholders to apply a coordinated, integrated, transboundary approach. A 2011 Regulation (1255/2011)[846] supported and facilitated the implementation of maritime spatial planning and integrated coastal management.

The key piece of EU legislation is the 2014 **Maritime Spatial Planning Directive,**[847] which requires all coastal Member States to develop Maritime Spatial Plans (MSP) and submit them

[843] Meijer, F., Visscher, H. Building regulations from an European perspective. *COBRA 2008: The construction and building research conference of the Royal Institution of Chartered Surveyors*, 2008, p. 7.
[844] *Ibid*.
[845] UNESCO (Intergovernmental Oceanographic Commission). MSPglobal International Guide on Maritime Spatial Planning [online]. 2021 [accessed on: 5 June 2023]. Available at: <https://www.mspglobal2030.org/wp-content/uploads/2021/12/MSPglobal_InternationalGuideMSP_HighRes_202112.pdf>.
[846] Regulation (EU) No 1255/2011 of the European Parliament and of the Council of 30 November 2011 establishing a Programme to support the further development of an Integrated Maritime Policy. OJ L 321, 5. 12. 2011, p. 1.
[847] Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a framework for maritime spatial planning. OJ L 257, 28. 8. 2014, p. 135–145.

to the Commission by 31 March 2021. The plans must be reviewed at least every ten years. The European Structural and Investment Funds, including the European Maritime and Fisheries Fund, provided the opportunities to support the implementation of this Directive.[848]

The Maritime Spatial Planning Directive does not apply to town and country planning;[849] its scope is restricted to marine waters (waters, the seabed, and subsoil) of Member States.[850] Therefore, *maritime spatial planning* is defined as *"a process by which the relevant Member State's authorities analyse and organise human activities in marine areas to achieve ecological, economic and social objectives"*.[851] If Member States apply terrestrial planning to coastal waters or parts thereof, this Directive should not apply to those waters.[852]

The Directive sets minimum requirements for Member States to take into account land-sea interaction and other planning, for example, in the coastal zone. According to the Directive, maritime spatial planning must promote sustainable development, the sustainable use of marine resources, and sustainable growth in the maritime sectors while at the same time applying an ecosystem approach.[853]

The Directive provides Member States with wide discretion in designing and determining the format and content of the MSPs, including institutional arrangements and the adoption procedure. Nevertheless, to minimise additional administrative burdens, the Member States are encouraged to build upon existing national, regional and local rules and mechanisms to the greatest extent possible.[854]

Member States must also ensure that there is **broad participation of stakeholders** in the planning process and that cooperation takes place across country borders, as well as taking into account environmental, social, economic, and security aspects. According to Art. 9 of the Directive (*Public participation*), Member States must establish *"means of public participation by informing all interested parties and by consulting the relevant stakeholders and authorities, and the public concerned, at an early stage in the development of maritime spatial plans, in accordance with relevant provisions established in Union legislation. Member States shall also ensure that the relevant stakeholders and authorities, and the public concerned, have access to the plans once they are finalised."*

The Directive generally references *relevant provisions established in Union legislation* without much further guidance. The preamble states that *"A good example of public consultation provisions can be found in Article 2(2) of Directive 2003/35/EC of the European Parliament and of the Council."*[855] This is a reference to the general requirements of the Aarhus Directive concerning public participation in the preparation and modification or

[848] Regulation (EU) No 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund and repealing Council Regulations (EC) No 2328/2003, (EC) No 861/2006, (EC) No 1198/2006 and (EC) No 791/2007 and Regulation (EU) No 1255/2011 of the European Parliament and of the Council. OJ L 149, 20. 5. 2014, p. 1.
[849] Maritime Spatial Planning Directive, Art. 2(3).
[850] *Ibid*, Art. 2(1).
[851] *Ibid*, Art. 3(2).
[852] *Ibid*, preamble, para. 17.
[853] *Ibid*, Art. 4-6.
[854] *Ibid*, preamble, para. 12.
[855] *Ibid*, preamble, para. 21.

review of the plans or programmes required to be drawn up under the provisions listed in Annex I of the Aarhus Directive. The Annex I of the Aarhus Directive was not amended to include the Maritime Spatial Planning Directive. As a result, the Member States are not obliged to involve the public in adopting the MSPs, besides the requirements of the SEA Directive.

It is highly debatable whether the MSPs will meet the criteria to be considered *plans or programmes* under the SEA Directive and require public participation. It seems that the Directive assumes otherwise: The MSPs are expected to *"...contribute to the effective management of marine activities and the sustainable use of marine and coastal resources, by creating a framework for consistent, transparent, sustainable and evidence-based decision-making."*[856] Such a framework for decision-making does not mean it is a framework for the projects which require the EIA. Furthermore, the Directive itself mentions the need of the SEA and the assessment under the Habitats Directive as an option: *"Where maritime spatial plans are likely to have significant effects on the environment, they are subject to Directive 2001/42/EC. Where maritime spatial plans include Natura 2000 sites, such an environmental assessment can be combined with the requirements of Article 6 of Directive 92/43/EEC, to avoid duplication."*[857] Such an approach does not seem to align with the Aarhus Convention as there is no doubt the MSPs are *plans related to the environment* in the sense of the Aarhus Convention.

Nevertheless, all MSPs submitted to the Commission underwent an environmental assessment which was confirmed by the 2022 report on the implementation of the Maritime Spatial Planning Directive.[858] In the report, the Commission describes the varying transposition approaches taken by Member States and concludes that the transposition into national law is complete, albeit with some delays. The plans established by Member States and the implementation of the Directive's minimum requirements for maritime spatial plans are also included in the report: their overall objectives and ecosystem-based approach, land-sea interactions, and the identification of the spatial and temporal distribution of activities and uses. The report also evokes the respective national MSP processes: stakeholder involvement and public participation: *"At the time of assessment, all Member States with maritime spatial plans met the requirements of Article 9 of the Directive. The scope and extent of stakeholder engagement varied across Member States. The level of stakeholder engagement often reflected the political or legal requirements for participation that already existed in a particular Member State. The implementation of Article 9 was well documented. The process for public participation is clearly described, stakeholders using various methods were included in the entire process and their feedback was to a varied extent integrated in the maritime spatial plans."*[859]

[856] *Ibid*, preamble, para. 9.
[857] *Ibid*, preamble, para. 23.
[858] European Commission. Report from the Commission to the European Parliament and the Council outlining the progress made in implementing Directive 2014/89/EU establishing a framework for maritime spatial planning. 3. 5. 2022, COM (2022) 185 final.
[859] *Ibid*, point 4.3.6.

However, the report does not provide any details as regards the actual intensity of public participation. Only one example of good practice is described: *"Ireland held a three-month public consultation on its MSP baseline report. This was part of the broader consultation process which resulted in Ireland's first MSP. The MSP team hosted public engagement events in almost all coastal counties across Ireland.* (…) *…over 170 responses on the baseline report were received, and these had a significant impact on the content of the draft MSP."*[860] Based on this example, it seems that Ireland chose a tailor-made approach at least to reflect the specifics of the MSP preparation.

Perhaps the most comprehensive analysis of public participation in the adoption of the MSPs has been carried out by Tissière and Trouillet,[861] who conclude that the European framework for participation is poorly defined and then open to a range of approaches with three forms standing out as the most widespread: a) Nationally – hearings with representatives of maritime uses, b) Locally – topical workshops involving different stakeholder organisations, c) Information meetings for the general public. They also note with references to the additional academic literature that in the main, the many participatory initiatives were inherited from earlier national and EU regulations; they tie with the various land-based planning systems and the contrasts noted between different countries should also be considered in relation to the political and historical context in each state: *"Effectively, different contexts, such as young eastern European democracies (e.g., Bulgaria), decentralised countries (e.g., Spain) federal countries (e.g., Germany), or different ideological heritages (Socialist, liberal, social democracy), lead to many different participatory approaches."*[862]

5.3 TRANS-EUROPEAN TRANSPORT (TEN-T) AND ENERGY NETWORKS (TEN-E)

Similar to the Integrated Maritime Policy, the EU's trans-European transport network policy introduced specific harmonised rules on the development and coordination in the area which is of common European interest. The TEN-T regulation, however, focuses on identifying core network corridors and streamlining procedures that would otherwise lack necessary cooperation, be too cumbersome, or fail in creating a network with European added value. It is, therefore, an additional level to the development of a high-quality transport infrastructure across the EU, with considerable impact on public construction law in the Member States.[863] Practice shows that the TEN-T can increase cohesion between central and peripheral regions and consequently enhance regional welfare.[864]

[860] *Ibid*.
[861] Tissière, L., Trouillet, B. What Participation Means in Marine Spatial Planning Systems? Lessons from the French Case. *Planning Practice and Research*, 2022, vol. 37, no. 3, p. 355–376.
[862] *Ibid*, p. 20.
[863] See Fabbro, S., Mesolella, A. Multilevel Spatial Visions and Territorial Cohesion: Italian Regional Planning between the TEN-T corridors, ESDP polycentrism and Governmental 'Strategic Platforms'. *Planning Practice & Research*, 2010, vol. 25, no. 1, p. 25–48.
[864] See Goldman, K., Wessel, J. TEN-T corridors – Stairway to heaven or highway to hell? *Transportation Research Part A: Policy and Practice*, 2020, vol. 137, no. 7, p. 240–258.

The TEN-T policy is based on the 2013 **Regulation on the development of the trans-European transport network** (No 1315/2013, TEN-T Regulation[865]). The network consists of two layers: the core and the comprehensive network. The former includes the most essential connections linking major cities and nodes and must be completed by 2030. The latter connects all regions of the EU to the core network and needs to be completed by 2050 – and the Member States must make *all possible efforts* to achieve this goal.[866]

TEN-T is not a derogatory regime to other EU requirements. Art. 7(4) of the TEN-T Regulation reminds Member States to *"take all necessary measures to ensure that the projects are carried out in compliance with relevant Union and national law, in particular with Union legal acts on the environment, climate protection, safety, security, competition, state aid, public procurement, public health and accessibility."*

The directly binding form of regulation means that the discretion of the Member States is notably restricted in setting their own development priorities and transport infrastructure requirements. They are required to take account of the circumstances in the various parts of the Union, such as in particular, tourism aspects and topographical features of the regions concerned, and allowed to adapt the detailed route while ensuring compliance with the requirements set by the TEN-T Regulation.[867]

When drawing up their national plans and programmes, Member States should take into account the development of the TEN-T in accordance with Art. 49(2) of the TEN-T Regulation. Numerous TEN-T requirements present a challenge for spatial planning. For example, where feasible, Member States must aim for interconnection between various types of transport in urban nodes while mitigating the exposure of urban areas to the negative effects of transiting rail and road transport and promoting efficient low-noise and low-carbon urban freight delivery.[868]

As regards **public participation**, the TEN-T Regulation builds on a premise that the projects of common interest relate to all directly concerned stakeholders, including regional and local authorities, managers, and users of infrastructure as well as industry and civil society.[869]

However, the TEN-T Regulation does not require any specific way to help the engagement of the public in planning or decision-making concerning the TEN-T projects. Art. 50 of the Regulation (*Engagement with public and private stakeholders*) stipulates in its para. 2 that the *"National procedures regarding regional and local authorities as well as civil society affected by a project of common interest shall be complied with, where appropriate, in the planning and construction phase of a project. The Commission shall promote the exchange of good practice in this regard."*

This implies that the national procedures are the proper forum for the engagement of the public, *where appropriate*. It seems that the EU requirements on public participation are

[865] Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU. OJ L 348, 20. 12. 2013, p. 1–128.
[866] *Ibid*, Art. 9(2).
[867] *Ibid*, Art. 5(2).
[868] *Ibid*, Art. 30.
[869] *Ibid*, Art. 50(1).

downplayed as no reference to the SEA or EIA (TEIA) procedure is made in this respect, neglecting the fact that the TEN-T development is, in principle, subject to both procedures, as a plan and a project, including public participation.[870] Civil society and other stakeholders are forwarded to funding projects by Art. 50(3) of the TENT-T Regulation, which stipulates they *may also use*, in addition to the Connecting Europe Facility and the Cohesion Fund, other specific European programmes, in particular those supporting regional development (European Territorial Cooperation, Research and Innovation or Environment and Climate action).

A survey carried out in 2018 by Öberg, Nilsson, and Johansson[871] indicates that complementary governance is needed to involve all the stakeholders. Four areas for attention in the implementation process were identified: more directed information, extended involvement of private sector transport stakeholders, comprehensive involvement of regional and local stakeholders, and involvement of stakeholders located outside the immediate corridor. Several measures that are not required by EU law were proposed. For example, coordination conferences were suggested at the regional and local levels.

Following the European Green Deal and the 2020 Sustainable and Smart Mobility Strategy,[872] the Commission proposed[873] revising the TEN-T Regulation to put the transport sector on track to cut its emissions by 90%. In addition to the core and the comprehensive network, an extended core network will be introduced, which should be completed by 2040. The proposal mainly changes the quality standards but also introduces new measures. For example, Member States must develop sustainable urban action plans for all major cities to promote zero-emission mobility by 31 December 2025.[874] The provisions on engagement with public and private stakeholders remain virtually unchanged.

The TEN-T Regulation is accompanied by the 2021 **Directive on streamlining measures for advancing the realisation of the TEN-T** (2021/1187, TEN-T Directive[875]), which was adopted to facilitate the administrative processes for permitting procedures of cross-border infrastructure. The TEN-T Directive acknowledges that *"experience has shown that many investments aiming to complete the TEN-T are confronted with multiple, different and complex permit-granting procedures, cross-border procurement procedures and other*

[870] There is a general reference to the EIA, SEA and NATURA 2000 Directives in Art. 36 of the Regulation (*Environmental protection*) which states that *"Environmental assessment of plans and projects shall be carried out in accordance with the Union law on the environment, including Directives 92/43/EEC, 2000/60/EC, 2001/42/EC, 2009/147/EC and 2011/92/EU."*

[871] Öberg, M., Nilsson, K. L., Johansson, C., M. Complementary governance for sustainable development in transport: The European TEN-T Core network corridors. *Case Studies on Transport Policy*, 2018, vol. 6, no. 4, p. 674–682.

[872] European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Sustainable and Smart Mobility Strategy – putting European transport on track for the future. 9. 12. 2020, COM (2020) 789 final.

[873] European Commission. Proposal for a Regulation of the European Parliament and of The Council on Union guidelines for the development of the trans-European transport network, amending Regulation (EU) 2021/1153 and Regulation (EU) No 913/2010 and repealing Regulation (EU) 1315/2013. 14. 12. 2021, COM (2021) 812 final.

[874] *Ibid*, Art. 40(b).

[875] Directive (EU) 2021/1187 of the European Parliament and of the Council of 7 July 2021 on streamlining measures for advancing the realisation of the trans-European transport network (TEN-T). OJ L 258, 20. 7. 2021, p. 1–13.

procedures. This situation jeopardises the timely implementation of projects and, in many cases, results in significant delays and increased costs".[876]

The scope of the TEN-T Directive is restricted to projects for which the permit-granting procedures started before 10 August 2023 and that are part of pre-identified sections of the core network listed in the Annex to this Directive and other projects on the core network corridors with a total cost exceeding EUR 300 million. Member States may, however, apply this Directive to other projects on the core and comprehensive networks.[877] It is specially tailored for the EIA-related procedures. This means the Directive should cover project-related procedures, including those related to the EIA. However, it should be without prejudice to urban or land-use planning and to steps undertaken at the strategic level that are not project-related, such as the SEA or national and regional transport plans.[878] As a consequence, authorisations relating to urban planning are not subject to the Directive, irrespective of whether they are linked to a specific project or not.

The TEN-T Directive asks for priority treatment for projects falling within the scope of this Directive.[879] It also attempts to overcome the different environmental assessments provided for in relevant Union and national law, which are necessary for granting permits to projects in the core network. For that reason, Member States should put in place, where feasible and appropriate, a simplified procedure.

The TEN-T Directive uses different terminology compared to the EIA Directive: a *project* means a proposal for the construction, adaptation, or modification of a defined section of the transport infrastructure that aims to improve the capacity, safety, and efficiency of that infrastructure and which the implementation has to be approved utilizing an authorising decision;[880] the *authorising decision* means the decision or a set of decisions that determine whether or not a project promoter is entitled to implement the project.[881]

The streamlining measures can be briefly summarised as follows: 1) designation of a designated authority with guiding powers and optional decision-making and other additional powers,[882] 2) a permit-granting procedure that does not exceed four years, including the EIA[883] but excluding administrative and judicial appeal procedures,[884] 3) provision of general information to the project promoters as a guide to notification and an option to establish, upon request by the project promoter, a detailed application outline,[885] 4) coordination of cross-

[876] *Ibid*, preamble, para. 2.
[877] *Ibid*, Art. 1, 9, preamble, paras 4, 6.
[878] *Ibid*, preamble, para. 3.
[879] *Ibid*, Art. 3.
[880] *Ibid*, Art. 2(3).
[881] *Ibid*, Art. 2(1).
[882] *Ibid*, Art. 4.
[883] European Commission. Guidelines on the application of Directive (EU) 2021/1187 (the Streamlining Directive) [online]. 28. 7. 2023 [accessed on: 31 July 2023]. Available at: <https://transport.ec.europa.eu/system/files/2023-07/Challenges_and_best_practices_in_the_transposition_of_the_Streamlining_Directive.pdf>.
[884] TEN-T Directive, Art. 5.
[885] *Ibid*, Art. 6.

border permit-granting procedures with an option to establish a joint authority,[886] 5) joint public procurement in cross-border projects.[887]

There are no direct requirements for **public participation** in the TEN-T Directive and no references to other directives in this respect. Apparently, streamlining decision-making procedures may threaten the standards of public participation set by the EU and national law. The Directive does not allow for circumventing the public and presumes that shorter deadlines should be balanced by more efficient handling of procedures[888] and higher transparency.[889]

The TEN-T Directive pressures national legislators to optimise their permitting systems, particularly if they comprise multiple stages. However, the four-year time limit might be avoided, provided several separate permitting procedures exist. According to the guidelines prepared by DG MOVE, *"As long as the building of a project section requires separate permit-granting procedures, the four-year time limit should apply separately to each section of such a project."*[890] As a rule, the scope of the permitting procedure is determined by the project promoter, who may be more interested in working on more projects at once, which may even result in the salami slicing of the projects to obtain the authorising decision.

The EU legislation on the development of the trans-European energy network (**TEN-E**) already underwent a revision following the requirements of the European Green Deal and the 2018 Clean Planet for All[891] to ensure its consistency with climate neutrality objectives and to build a sufficient infrastructure to support the major developments framing the *"energy transmission and distribution landscape of tomorrow"*.[892] Furthermore, the EU Strategy for Energy System Integration[893] underlined the importance of smart electricity grids and the need for integrated energy infrastructure planning across energy carriers, infrastructures, and consumption sectors.

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[886] *Ibid*, Art. 7.

[887] *Ibid*, Art. 8.

[888] *Ibid*, preamble, para. 13: *"…the simplification of permit-granting procedures should be accompanied by a time-limit for procedures leading to the adoption of an authorising decision to build the transport infrastructure. That time-limit should encourage a more efficient handling of procedures and should, under no circumstances, compromise the Union's high standards for environmental protection and public participation."*

[889] According to Art. 6(4)(d) of the TEN-T Directive, a detailed application outline provided to the project promoters by the designated authority may be comprise of, inter alia, the details of the authorities and stakeholders to be involved in connection with the respective obligations, including during the formal phase of the public consultation.

[890] European Commission. Guidelines on the application of Directive (EU) 2021/1187 (the Streamlining Directive) [online]. 28. 7. 2023, p. 6 [accessed on: 31 July 2023]. Available at: <https://transport.ec.europa.eu/system/files/2023-07/Challenges_and_best_practices_in_the_transposition_of_the_Streamlining_Directive.pdf>.

[891] European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Clean Planet for all A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy, 28. 11. 2018, COM (2018) 773 final.

[892] *Ibid*, chapter 5.

[893] European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Powering a climate-neutral economy: An EU Strategy for Energy System Integration, 8. 7. 2020, COM (2020) 299 final.

The revised **TEN-E Regulation** (2022/869)[894] was adopted in June 2022, laying down new EU rules for cross-border energy infrastructure. It aims to also to promote the integration of renewables and new clean energy technologies into the energy system. For spatial planning and construction permitting procedures, the key requirements stem from the provisions of Chapter III (*Permit granting and public participation*), in particular its Art. 7, which requires that the *"projects on the Union list shall be granted the status of the highest national significance possible, where such a status exists in national law, and be appropriately treated in the permit granting processes and, if national law so provides, in spatial planning, including those processes relating to environmental assessments, in the manner such treatment is provided for in national law applicable to the corresponding type of energy infrastructure."*[895]

Such provision allows for the discretion of the Member States (*where such a status exists in national law… if national law so provides*), which is limited as it can be assumed that the status of significant projects usually exists in the Member States. Similarly, it can be assumed that all Member States provide for urgent review procedures, which is relevant for further requirements under Art. 7(4) of the Regulation that all dispute resolution procedures, litigation, appeals and judicial remedies related to projects on the Union list in front of any national courts, tribunals, panels, including mediation or arbitration, where they exist in national law, shall be treated as urgent, if and to the extent to which national law provides for such urgency procedures. Furthermore, the Member States are required to assess and streamline the environmental assessment procedures for projects on the Union list.[896]

The development of TEN-E should consider, where technically possible and most efficient, the possibility of repurposing existing infrastructure and equipment.[897] Nevertheless, due to its complexity, an integrated perspective in the planning processes of all onshore and offshore transmission and distribution infrastructure should be achieved,[898] which is also important for the protection of other common interests such as land.[899] On the other hand, if there is a conflict between the development of the TEN-E project and the protection of waters or habitats, it is balanced in favour of energy projects as the Regulation provides that projects on the Union list shall be considered as being of public interest from an energy policy perspective, and may be considered as having an overriding public interest for the purposes of Art. 6(4) of the Habitats Directive and Art. 4(7) of the WFD.[900]

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[894] Regulation (EU) 2022/869 of the European Parliament and of the Council of 30 May 2022 on guidelines for trans-European energy infrastructure, amending Regulations (EC) No 715/2009, (EU) 2019/942 and (EU) 2019/943 and Directives 2009/73/EC and (EU) 2019/944, and repealing Regulation (EU) No 347/2013. OJ L 152, 3. 6. 2022, p. 45–102.
[895] *Ibid*, Art. 7(3).
[896] *Ibid*, Art. 7(5).
[897] *Ibid*, preamble, para. 12.
[898] *Ibid*, preamble, para. 26.
[899] *Ibid*, preamble, para. 36: *„The planning and implementation of Union projects of common interest in the areas of energy, transport and telecommunication infrastructure should be coordinated to generate synergies where it is feasible from an overall economic, technical, environmental, climate or spatial planning point of view and with due regard to the relevant safety aspects. Thus, during the planning of the various European networks, it should be possible to give preference to integrating transport, communication and energy networks in order to ensure that as little land as possible is taken up."*
[900] *Ibid*, Art. 7(8).

The TEN-E Regulation provides **the most comprehensive requirements on the permit granting process** of any EU legislation. The procedure must be coordinated by a specific competent authority, and the decision must be issued within the time limits set in Art. 10(1) and (2) and in accordance with one of the schemes which are described more in detail: (a) integrated scheme, (b) coordinated scheme, (c) collaborative scheme.[901] As a general rule, the permit must be granted within 42 months in a process of two procedures: the pre-application procedure of an indicative period of 24 months, and the statutory permit granting procedure, which cannot exceed 18 months.[902] According to Art. 10(4) of the Regulation, the national authorities must take into consideration any valid studies conducted and permits or authorisations issued for a given project on the Union list before the project enters the permit granting process and cannot require duplicate studies and permits or authorisations.

The Regulation uses different terminology than EU environmental directives. Instead of the *development consent*, a new term *comprehensive decision* is for *"the decision or set of decisions taken by a Member State authority or authorities not including courts or tribunals, that determines whether or not a project promoter is authorised to build the energy infrastructure to realise a project of common interest or a project of mutual interest by having the possibility to start, or procure and start, the necessary construction works (ready-to-build phase) without prejudice to any decision taken in the context of an administrative appeal procedure"*.[903]

The cited definition suggests that the requirements of the Regulation affect only construction permitting and not spatial planning. This, however, does not seem correct, even though the Regulation does not use the term *spatial planning*. First, the Member States are not completely free to choose among the three permitting schemes; they must choose and implement the most effective scheme for them in light of national specificities in their *planning and permit granting* processes.[904] Second, Chapter IV (*Cross-sectoral infrastructure planning*) and Chapter V (*Offshore grid planning*) provide grounds for the analysis, which will cover the relevant sectors' interlinkages at all stages of *infrastructure planning* and preparation of the scenarios and high-level strategic integrated offshore network development plans for the Union-wide ten-year network development plan. The planning phase is, therefore, present in the Regulation and inherent to any development of the TEN-E. It is, however, seriously downplayed. Moreover, the use of the Union-wide ten-year network development plan in practice is restricted to updating a basis for identifying projects of common interest.

The **public participation** requirements of the TEN-E Regulation apply without prejudice to other relevant international and Union law, which means they present an additional layer mainly to the provisions of the EIA Directive, if applicable. It consists primarily of public consultation and providing information about the energy projects and their possible impacts. In this respect, the Regulation uses the term *public*, which is defined indirectly and very broadly in Annex VI among the principles of public participation, which require that *"the*

[901] *Ibid*, Art. 8(3).
[902] *Ibid*, Art. 10(1)
[903] *Ibid*, Art. 2(3).
[904] *Ibid*, Art. 8(2).

stakeholders affected by a project of common interest, including relevant national, regional and local authorities, landowners and citizens living in the vicinity of the project, the general public and their associations, organisations or groups, shall be extensively informed and consulted at an early stage, in an inclusive manner, when potential concerns by the public can still be taken into account and in an open and transparent manner."[905]

The Regulation introduces several novelties previously unseen in EU law. Of these, the most significant seems to be: 1) the project promoter is responsible for drawing up a concept for public participation, following the process outlined in the national manual,[906] 2) the concept for public participation includes information on the stakeholders concerned, and addressed; the measures envisaged, including proposed general locations and dates of dedicated meetings; the timeline; the human resources allocated to various tasks,[907] 3) public consultation procedures for projects of common interest must be grouped where possible,[908] 4) a website of the project must be prepared by the project promoter[909] and the transparency platform by the Member State[910], 5) the project promoter must prepare a report summarising the results of activities related to the participation of the public prior to the submission of the application file, including those activities that took place before the start of the permit granting process.[911]

5.4 PROMOTION OF RENEWABLE ENERGY

The promotion of renewable energy at the EU level took a great spin in 2009 with the adoption of the Directive on the promotion of the use of energy from renewable sources (2009/28/EC, RED I),[912] which established a 20% target for the overall share of energy from renewable sources in the EU's gross final consumption of energy in 2020, with corresponding national binding targets for EU Member States. Before that, the EU and national targets were only indicative.[913]

RED I was recast in 2018 as part of the *Clean energy for all Europeans package* by the RED II,[914] which raised the overall target to 32% to be achieved by 2030. The Commission maintains the right to revise this target upwards in 2023 in case of significant cost reductions

[905] *Ibid*, Annex VI(3)(a).
[906] *Ibid*, Art. 9(1).
[907] *Ibid*, Annex VI(4).
[908] *Ibid*, Annex VI(3)(b).
[909] *Ibid*, Art. 9(7), Annex VI(6).
[910] *Ibid*, Art. 23.
[911] *Ibid*, Art. 9(4).
[912] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC. OJ L 140, 5. 6. 2009, p. 16–62.
[913] See Art. 3 of Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market. OJ L 283, 27. 10. 2001, p. 33–40.
[914] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources. OJ L 328, 21. 12. 2018, p. 82–209.

resulting from technological development, to achieve the EU's decarbonisation commitments, or in case of a significant decrease in energy consumption.[915]

The RED II requirements assumably present a massive impact on the building industry.

First, Member States must introduce a minimum level of renewable energy in new buildings and buildings undergoing major renovations in their building regulations and codes. Member States should aim to increase the share of renewable energy in heating and cooling by an indicative 1.3% per year between 2020 and 2030.

Second, Member States must ensure that qualified authorities at national, regional, and local levels **include measures facilitating the deployment of renewables when carrying out spatial planning and when building or renovating urban infrastructure and commercial or residential areas**. They must introduce appropriate **measures in their building regulations and codes** to increase the share of all kinds of energy from renewable sources in the building sector.[916]

Most significantly, adjustments must be made to administrative procedures, regulations, and codes according to Art. 15 of RED II. Member States must ensure that *any* relevant national rules concerning the authorisation, certification, and licensing procedures are proportionate and necessary and contribute to the implementation of the *energy efficiency first* principle. This general rule is further elaborated on to several steps: a) streamlining administrative procedures; b) objective, transparent, and proportionate rules concerning authorisation, certification, and licensing which take fully into account the particularities of individual renewable energy technologies, c) cost-related administrative charges, d) simplified and less burdensome authorisation procedures for decentralised devices, and for producing and storing energy from renewable sources.[917]

The key provision for spatial planning is Art. 15(3) of RED II, which requires the Member States to *"...ensure that their competent authorities at national, regional and local level include provisions for the integration and deployment of renewable energy, including for renewables self-consumption and renewable energy communities, and the use of unavoidable waste heat and cold when planning, including early spatial planning, designing, building and renovating urban infrastructure, industrial, commercial or residential areas and energy infrastructure, including electricity, district heating and cooling, natural gas and alternative fuel networks. Member States shall, in particular, encourage local and regional administrative bodies to include heating and cooling from renewable sources in the planning of city infrastructure where appropriate, and to consult the network operators to reflect the impact of energy efficiency and demand response programs as well as specific provisions on*

[915] The Commission published an Inception Impact Assessment (IIA) to support the legislative proposal for the amendment of the RED, which will examine the potential to increase the 2030 renewable energy target and review the levels of ambition at the sectoral level. See European Commission. Commission Staff Working Document. Impact Assessment Report. Proposal for a Directive of the European Parliament and the Council amending Directive (EU) 2018/2001 of the European Parliament and of the Council, Regulation (EU) 2018/1999 of the European Parliament and of the Council and Directive 98/70/EC of the European Parliament and of the Council as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652. 14. 7. 2021, SWD (2021) 621 final.
[916] *Ibid*, Art. 15(4).
[917] *Ibid*, Art. 15(1).

renewables self-consumption and renewable energy communities, on the infrastructure development plans of the operators."

Third, the RED II introduced detailed procedural requirements for construction permitting procedure in its Art. 16, which are also a complete novelty in EU law. There is a direct requirement to **link construction and operational procedures,** which requires Member States to establish or designate contact points that "*shall, upon request by the applicant, guide through and facilitate the entire administrative permit application and granting process. The applicant shall not be required to contact more than one contact point for the entire process. The permit-granting process shall cover the relevant administrative permits to build, repower and operate plants for the production of energy from renewable sources and assets necessary for their connection to the grid*."[918] Without prejudice to the obligations under the applicable EU environmental law, the duration of the permitting procedure should not exceed 1 or 2 years, depending on the type of installation.[919]

The scope of these requirements is broad as the requirement of a simplified and swift permit-granting process, which must not exceed one year, applies to the repowering of existing renewable energy plants.[920] The length of the process can only be extended by up to one additional year on the grounds of extraordinary circumstances, such as on the grounds of overriding safety reasons where the repowering project impacts substantially on the grid or the original capacity, size or performance of the installation.[921]

Furthermore, Member States may establish **a simple-notification procedure for grid connections for repowering projects** as referred to in Art 17(1) of RED II. Where Member States do so, repowering shall be permitted following notification to the relevant authority where no significant adverse environmental or social impact is expected. That authority shall decide within six months of receipt of a notification whether this is sufficient. Where the relevant authority decides that a notification is sufficient, it shall automatically grant the permit.[922] The simple-notification procedure must be established for grid connections whereby installations or aggregated production units of renewables self-consumers and demonstration projects, with an electrical capacity of 10,8 kW or less, or equivalent for connections other than three-phase connections, are to be connected to the grid following a notification to the distribution system operator.[923] Member States may allow a simple-notification procedure for installations or aggregated production units with an electrical capacity of above 10,8 kW and up to 50 kW, provided that grid stability, grid reliability, and grid safety are maintained.[924]

Fourth, Member States must ensure that final customers, in particular household customers, are entitled to participate in a **renewable energy community** according to Art. 22 of RED II. For this purpose, Member States must carry out an assessment of the existing barriers and

[918] *Ibid*, *Art.* 16(1).
[919] *Ibid*, Art. 16(4) to (7).
[920] *Ibid*, Art. 16(6).
[921] *Ibid*.
[922] *Ibid*, Art. 16(8).
[923] *Ibid*, Art. 17(1).
[924] *Ibid*, Art. 17(2).

potential for the development of renewable energy communities in their territories and provide an enabling framework to promote and facilitate the development of renewable energy communities.[925] This includes, *inter alia*, removing unjustified regulatory and administrative barriers and introducing *"fair, proportionate and transparent procedures, including registration and licensing procedures"*.[926] In this respect, Art. 22 of RED II does not mention spatial planning or construction permitting. However, other provisions of the Directive, in particular the cited Art. 15(3), make it clear that both planning and permitting procedures must be adjusted to promote, *inter alia*, renewable energy communities.

As regards **public participation**, the RED II only requires certain information to be made public: The information on certification schemes or equivalent qualification schemes and the list of installers who are qualified or certified,[927] a failure to reach the average annual increase of the use of renewables in the heating and cooling sector[928] and the designated implementing entities which are to contribute to the average annual increase of the use of renewables in the heating and cooling sector.[929]

As noted above, the RED II does require a specific decision-making procedure for the entire administrative permit application and granting process and a simplified procedure for grid connections. However, for these procedures, the public participation requirements are completely absent, and the Directive is strictly applicant-oriented. For example, according to Art. 16(5) of RED II, *"Member States shall ensure that applicants have easy access to simple procedures for the settlement of disputes concerning the permit-granting process and the issuance of permits to build and operate renewable energy plants, including, where applicable, alternative dispute resolution mechanisms."* The Member States are not required to provide *easy access to simple procedures for the settlement of disputes* to other participants to the procedure. There is no reference to the Aarhus Convention or public participation requirements under the EIA Directive or the Habitats Directive.

There are several **additional EU legislative and policy measures** promoting the use of renewable resources with an impact on public construction law.

The EU **Offshore Renewable Energy Strategy**[930] was approved in 2020. To scale up the deployment of offshore renewable energy in Europe, the Strategy assumes the need to identify and use a much larger number of sites for offshore renewable energy production and connection to the power transmission grid. Simultaneously, offshore renewable energy development must comply with the EU environmental legislation and the Integrated Maritime Policy. For this purpose, maritime spatial planning must be used: *"A chief challenge is therefore to integrate offshore renewable energy development objectives when developing Member States' national maritime spatial plans based on their national energy and climate plans. This would signal to business and investors the governments' intentions with regard to*

[925] *Ibid*, Art. 22(3), (4).
[926] *Ibid*, Art. 22(4)(d).
[927] *Ibid*, Art. 18(4).
[928] *Ibid*, Art. 23(2).
[929] *Ibid*, Art. 23(3).
[930] European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. An EU Strategy to harness the potential of offshore renewable energy for a climate neutral future, 19. 11. 2020, COM (2020) 741 final.

the future development of the renewable offshore sector, helping both the private and the public sector to plan ahead."[931]

The **Hydrogen Strategy**[932] mentions the possibility of building on the provisions of RED II to regulate different aspects of this energy carrier further and promote its development. For example, the adoption of support measures, including demand-side policies in end-use sectors.[933]

The **Alternative Fuels Infrastructure Regulation** (**AFIR**)[934] adopted in July 2023 within the sustainable transport initiative under the Fit for 55 introduces requirements on recharging points and alternative fuel refuelling points in the EU for the cars, planes, and ships that use them. Recharging stations on main roads (TEN-T) for cars (light-duty electric vehicles) must be available at least every 60 km by the end of 2025 and for heavy-duty vehicles by the end of 2030. On other roads, the number of recharging stations must grow with the number of registered cars; for heavy-duty vehicles, at least two recharging points must be available in each safe and secure parking area by 2027 (and four by 2030). Similarly, hydrogen refuelling stations and liquefied methane refuelling points are supported. Regarding seaports, at least 90% of container ships and passenger ships must have access to shore-side electricity supply in the busiest seaports, and there must be at least one installation providing shore-side electricity in most of the inland waterway ports by 2030. All aircraft stands next to the terminal must be equipped with an electricity supply by 2025 and remote stands by 2030, except for the small airports.

The AFIR also lays the groundwork for an efficient and user-friendly refuelling experience across all EU Member States by advocating transparent pricing, standardised minimum payment options, and uniform customer information.

The AFIR will likely impact the public construction law as regards flexibility, which is needed to achieve the mandatory targets. Undoubtedly, the accessibility to electric recharging and hydrogen refuelling stations across Europe cannot be reached without planning measures considering charger location to ensure maximum utilisation and maintaining a balance between introducing electric vehicles and establishing public chargers. However, the severe challenge of the AFIR seems to lie in the (un)availability of suitable land and the actual building of the stations. Member States can hardly do the task themselves but must stimulate private investors via state aid to achieve the goals, which seem very ambitious for Member States with minimal public charging infrastructure. This also necessitates, for example, landlords, workplaces, and parking providers to expedite their efforts to provide charging services at affordable rates.

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[931] *Ibid*, point 4.1.

[932] European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A hydrogen strategy for a climate-neutral Europe, 8. 7. 2020, COM (2020) 301 final.

[933] *Ibid*, p. 22.

[934] Regulation of the European Parliament and of the Council on the deployment of alternative fuels infrastructure, and repealing Directive 2014/94/EU of the European Parliament and of the Council, not yet published in the Official Journal.

An **unprecedented short-term measure in the area of support for renewable energy** was introduced by Council Regulation (EU) 2022/2577, laying down a framework to accelerate the deployment of renewable energy (**ARE Regulation**).[935]

The ARE Regulation mainly serves as an exception from EU environmental requirements limited to 18 months with a review clause allowing the Commission to propose an extension if necessary. It was adopted to support a rapid deployment of renewables, which can help mitigate the impact of the energy crisis during and after the Russian Federation's war of aggression against Ukraine. The ARE Regulation applies to all permitting procedures initiated from 30 December 2022. Member States may also apply the RES regime to permitting procedures in which a final decision has not been taken before 30 December 2022, provided that this shortens the permitting procedure and preserves the previously acquired rights of the parties.[936] Applying the Regulation to procedures initiated before 30 December 2022 and not yet concluded by that date is, therefore, only an option, not an obligation.

The ARE Regulation establishes a rebuttable presumption that there is an overriding public interest in renewable energy projects and that such projects serve public health and safety for the purposes of the relevant EU environmental legislation, namely the WFD Directive, the Habitats Directive and the Birds Directive*: "The planning, construction and operation of plants and installations for the production of energy from renewable sources, and their connection to the grid, the related grid itself and storage assets shall be presumed as being in the overriding public interest and serving public health and safety when balancing legal interests in the individual case, for the purposes of Article 6(4) and Article 16(1)(c) of Council Directive 92/43/EEC, Article 4(7) of Directive 2000/60/EC of the European Parliament and of the Council and Article 9(1)(a) of Directive 2009/147/EC of the European Parliament and of the Council. Member States may restrict the application of those provisions to certain parts of their territory as well as to certain types of technologies or to projects with certain technical characteristics in accordance with the priorities set in their integrated national energy and climate plans."*[937] Moreover, at least for projects which are recognised as being of overriding public interest, Member States must ensure that in the planning and permit-granting process, the construction and operation of plants and installations for the production of energy from renewable sources and the related grid infrastructure development are given priority when balancing legal interests in the individual case. This applies to species protection to the extent that appropriate species conservation measures contributing to the maintenance or restoration of the populations of the species at a favourable conservation status are undertaken, and sufficient financial resources, as well as areas, are made available for that purpose.[938]

Art. 4 of the ARE Regulation then focuses on speeding up the permitting procedure for the installation of solar energy installations. It states explicitly that in the case of the authorisation procedure for the installation of solar energy installations, including self-consumers of

[935] Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy. OJ L 335, 29. 12. 2022, p. 36–44.
[936] *Ibid*, Art. 1.
[937] *Ibid*, Art. 3(1).
[938] *Ibid*, Art. 3(2).

renewable energy, with a capacity of 50 kW or less, the authorisation shall be deemed to have been granted if the competent authorities or bodies have not replied within one month of the application being submitted, provided that the capacity of the solar energy installation does not exceed the existing capacity of the connection to the grid.

According to Art. 5(1) of the ARE Regulation, the permit-granting process for the repowering of energy power plants must be shorter than six months, including the EIA where required. For repowering, which does not result in an increase in the capacity, the deadline is even shorter, set to 3 months maximum, unless there are justified safety concerns or there is technical incompatibility with the system components.[939] These are specific rules to the RED II requirements, which allow for longer deadlines, and also to the EIA Directive, because the screening and scoping procedure is simplified[940] or not carried out at all.[941]

5.5 BUILDING MATERIALS

There is no specific EU law exclusively focused on building materials. However, several EU regulations and directives govern aspects related to construction products and their use in buildings. Generally, these regulations aim to ensure building materials' safety, health, and environmental performance.

The CPD was revised in 2011 and replaced by Regulation (EU) No 305/2011, also known as the **Construction Products Regulation** (**CPR**), which came into force in 2013. It remains a key legislation that sets out harmonised rules for marketing construction products in the EU.

The legal basis for the CPR was Art. 114 of the TFEU, which provides for the harmonisation of laws and regulations to ensure the functioning of the internal market. Similarly to the CPD, the CPR aims to remove technical barriers to trade in construction products by establishing a common set of rules for assessing and verifying their performance and ensuring that construction products meet essential requirements related to health and safety, energy efficiency, and environmental protection.

The new regulation aims to simplify and streamline the procedures for assessing the performance of construction products and to promote the use of sustainable materials and energy-efficient technologies in construction. The CPR covers a wide range of construction products, including materials such as cement, steel, insulation, windows, and many others.

The CPR also establishes the conditions for **CE marking**, which indicates that a construction product meets essential performance requirements. In this respect, construction products must

[939] *Ibid*, Art. 5(2).
[940] Ibid, Art. 5(3): *"Where the repowering of a renewable energy power plant, or the upgrade of a related grid infrastructure which is necessary to integrate renewables into the electricity system, is subject to a determination whether the project requires an environmental impact assessment procedure or an environmental impact assessment pursuant to Article 4 of Directive 2011/92/EU, such prior determination and/or environmental impact assessment shall be limited to the potential significant impacts stemming from the change or extension compared to the original project."*
[941] Ibid, Art. 5(4): *"Where the repowering of solar installations does not entail the use of additional space and complies with the applicable environmental mitigation measures established for the original installation, the project shall be exempted from the requirement, if applicable, of being subjected to a determination whether the project requires an environmental impact assessment pursuant to Article 4 of Directive 2011/92/EU."*

be assessed and verified for their performance and labelled with a CE marking to indicate compliance with the regulation. The CE marking must be affixed to the product or its packaging and accompanied by a declaration of performance that provides information on the product's essential characteristics and performance.

The CPR also establishes a framework for assessing and verifying the constancy of the performance of construction products, and it requires that manufacturers or their authorised representatives keep the technical documentation and make it available to market surveillance authorities upon request. To comply with the regulation, manufacturers must declare the performance of their products using a harmonised European Assessment Document (EAD) or a European Technical Assessment (ETA). The EAD or ETA must be issued by a Technical Assessment Body (TAB) designated by a Member State.

The CPR is enforced through market surveillance by national authorities, which are responsible for ensuring that construction products placed on the market comply with the regulation. The regulation requires that manufacturers or their authorised representatives keep technical documentation and make it available to market surveillance authorities upon request. The authorities may carry out inspections, tests, and other measures to verify compliance with the regulation, and they may take appropriate enforcement actions, such as ordering the withdrawal of non-compliant products from the market or imposing fines or other penalties.

There are several issues with the implementation of the CPR. The 2016 Commission's implementation report[942] concluded that the objectives set for the CPR had not been fully attained and required further efforts. Mainly, implementation difficulties and delayed adaptation by stakeholders have been identified. The Commission's evaluation report of 2019[943] highlighted three overarching issues: the underperformance of the standardisation mechanism, the ineffectiveness of market surveillance activities in Member States and their varying quality, and suboptimal simplification activities that failed to fulfil expectations.

In 2022, the Commission adopted a proposal for a revised CPR.[944] Compared to the current version, the proposed regulation explicitly mentions the introduction of rules on how to express the environmental, climate, and safety performance of construction products in relation to their essential characteristics, as well as the establishment of environmental, climate, functional, and safety product requirements.[945] The scope of the regulation would also include, for instance, 3D-datasets permitting the 3D-printing of construction products and materials used in 3D-printing; construction products manufactured on the construction site for

[942] European Commission. Report from the Commission to the European Parliament and the Council on the implementation of Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC. 7. 7. 2016, COM (2016) 0445 final.
[943] European Commission. Commission Staff Working Document. Evaluation of Regulation (EU) No 305/2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC. 24. 10. 2019, SWD (2019) 1770.
[944] European Commission. Proposal for a Regulation of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products, amending Regulation (EU) 2019/1020 and repealing Regulation (EU) 305/2011. 30. 3. 2022, COM (2022) 144.
[945] *Ibid*, Art. 1.

immediate incorporation into construction works; and some types of pre-fabricated one-family houses.[946] The regulation would also apply to used construction products in some cases, e.g., if the intended use has changed compared to the use assigned by the initial manufacturer.

The critical indirect requirements are presented mainly by the 2006 **REACH Regulation** (1907/2006),[947] which applies to chemical substances used in building materials. It aims to ensure a high level of protection for human health and the environment. Manufacturers and importers of chemical substances must comply with the registration, evaluation, and authorisation procedures specified under REACH.

While REACH does not explicitly focus on building materials, it has implications for the substances used in construction products. The restrictions on the manufacture, placing on the market, and use of certain dangerous substances, mixtures, and articles affect the construction industry even though the REACH Regulation considers the need to use some chemicals for specific purposes in buildings, mainly as paint.

For example, lead carbonates and lead sulphates are forbidden from selling and using. Nevertheless, Member States may, in accordance with the provisions of International Labour Organization (ILO) Convention 13, permit the use of these substances or their mixtures on their territory for the restoration and maintenance of works of art and historic buildings and their interiors, as well as the placing on the market for such use.[948]

Similarly, arsenic compounds cannot be used, but wood treated with compounds of copper, chromium, or arsenic may be placed on the market for professional and industrial use for several types of buildings and constructions (for example, agricultural buildings, bridges, or various barriers) provided that the structural integrity of the wood is required for human or livestock safety and skin contact by the general public during its service life is unlikely.[949]

Further restrictions according to the REACH Regulation or detailed rules on their use in building products apply directly or indirectly to numerous other chemicals such as cadmium (limited use *inter alia* in mixtures for profiles and rigid sheets for building applications; doors, windows, shutters, walls, blinds, fences, and roof gutters; decks and terraces[950]), benzo[a]pyrene treated wood inside buildings,[951] or chromium VI compounds in cement and cement-containing mixtures.[952]

[946] *Ibid*, Art. 2.
[947] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC. OJ L 396, 30. 12. 2006, p. 1–850.
[948] REACH Regulation, Annex XVII, points 16 and 17.
[949] REACH Regulation, Annex XVII, point 19.
[950] REACH Regulation, Annex XVII, point 23.
[951] REACH Regulation, Annex XVII, point 31.
[952] REACH Regulation, Annex XVII, point 47.

Notable efforts to regulate and **restrict the use of asbestos** due to its well-documented health risks can be traced to the 1980s.[953] The EU has banned the use of all forms of asbestos since 2005.[954] This ban prohibits the extraction, manufacture, and processing of asbestos, as well as the use and sale of asbestos-containing products based on the **Asbestos-Containing Products Directive** (1999/77/EC).[955]

This Directive provided guidelines for the safe handling, removal, and disposal of asbestos-containing materials to protect workers' health and prevent environmental contamination. It was revoked and replaced as of 31 May 2009 by the REACH Regulation, which confirmed the asbestos ban. It allows for the use of articles containing asbestos fibres that were already installed before 1 January 2005 until they are disposed of or reach the end of their service life.

However, Member States may prohibit or make subject to specific conditions, the use of such articles before they are disposed of or reach the end of their service life.[956] Furthermore, the REACH Regulation sets special provisions on the labelling of articles containing asbestos.[957] The EU also has regulations for the safe handling and disposal of asbestos-containing waste materials. Disposal must comply with specific requirements to save the workers and prevent the release of asbestos fibres into the environment according to the **Asbestos at Work Directive** (2009/148/EC),[958] which was adopted on the basis of Art. 153(2)(b) TFEU to improve workers' health and safety. Furthermore, since asbestos is a carcinogenic substance, the provisions laid down in Directive 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens, mutagens, or reprotoxic substances at work[959] apply whenever they are more favourable to the health and safety of workers.

The asbestos remains present in older buildings, which is relevant in the context of the green transition and our EU ambition to increase the renovation rate of buildings. Therefore, in 2022, the Commission adopted a proposal[960] to amend the Asbestos at Work Directive, which

[953] See Council Directive 83/478/EEC of 19 September 1983 amending for the fifth time (asbestos) Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations. OJ L 263, 24. 9. 1983, p. 33–36; Council Directive 85/610/EEC of 20 December 1985 amending for the seventh time (asbestos) Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations. OJ L 375, 31. 12. 1985, p. 1–2.

[954] See Kameda, T. et al. Asbestos: use, bans and disease burden in Europe. *Bulletin of the World Health Organization*, 2014, vol. 92, no. 11, p. 790-797.

[955] Commission Directive 1999/77/EC of 26 July 1999 adapting to technical progress for the sixth time Annex I to Council Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (asbestos). OJ L 207, 6. 8. 1999, p. 18–20.

[956] REACH Regulation, Annex XVII, point 6.

[957] REACH Regulation, Appendix 7.

[958] See Directive 2009/148/EC of the European Parliament and of the Council of 30 November 2009 on the protection of workers from the risks related to exposure to asbestos at work. OJ L 330, 16. 12. 2009, p. 28–36.

[959] Directive 2004/37/EC of the European Parliament and of the Council of 29 April 2004 on the protection of workers from the risks related to exposure to carcinogens or mutagens at work (Sixth individual Directive within the meaning of Article 16(1) of Council Directive 89/391/EEC). OJ L 158, 30. 4. 2004, p. 50–76.

[960] European Commission. Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/148/EC on the protection of workers from the risks related to exposure to asbestos at work. 28. 9. 2022, COM (2022) 489 final.

would drastically lower the occupational exposure limit value from 100,000 to 10,000 fibres/m³.

The **labelling requirements** for products were complemented with a framework for the ecodesign requirements for energy-related products by the 2005 Ecodesign Directive (2005/32/EC) after the ecodesign of products became a crucial factor in the Community strategy on Integrated Product Policy in 2001.[961] The Directive was later recast as the **2009 ERPD** (2009/125/EC).[962]

The 2009 ERPD, similar to the labelling requirements, does not affect the public construction law directly. However, its impact on the construction industry is significant since it covers many electrical appliances and building products such as insulating materials. The Directive explains that *"(i)n addition to products which use, generate, transfer, or measure energy, certain energy-related products, including products used in construction such as windows, insulation materials, or some water-using products such as shower heads or taps could also contribute to significant energy savings during use."*[963] The Directive sets specific regulations and technical implementation requirements for each product category.

There is a strong synergy in the implementation of the energy performance of buildings, energy-related products, and product labelling requirements: When setting energy performance requirements for technical building systems, Member States should use, where available and appropriate, harmonised instruments, in particular testing and calculation methods and energy efficiency classes developed under measures implementing the product labelling requirements.[964]

The 1992 Energy Labelling Directive was replaced by the **2010 Energy Label Directive** (2010/30/EU)[965] and was again replaced by the **2017 Energy Label Regulation** (2017/1369/EU).[966] While the scope of the Energy Labelling Directive 1992 was restricted to household appliances, the 2010 recast version covered a wider range of energy-related products that have a significant direct or indirect impact on energy consumption during use. The aim was likely to create synergy with the **2009 ERPD.** The 2017 Energy Label Regulation maintains essentially the same scope as the 2010 Directive but modifies and enhances some of its provisions, reflecting the technological progress for energy efficiency in products achieved over recent years.

There are several voluntary schemes in place. For example, the EU Ecolabel and the Environmental Product Declaration (EPD) assess and label products based on their environmental impact, including the life cycle assessment of building materials. The EU also attempts to replace national standards that provide **common technical rules** for the design of

[961] European Commission. Green Paper on integrated product policy. 7. 2. 2001, COM (2001) 68 final.
[962] Directive 2009/125/EC of the European Parliament and of the Council of 21. 10. 2009 establishing a framework for the setting of ecodesign requirements for energy related products. OJ L 285, 31. 10. 2009, p. 10.
[963] *Ibid*, preamble, para. 4.
[964] See 2010 EPBD, preamble, para. 12.
[965] Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products. OJ L 153, 18. 6. 2010, p. 1–12.
[966] Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU. OJ L 198, 28. 7. 2017, p. 1–23.

buildings and other civil engineering works and construction products by the series of European Technical Standards (**Eurocodes**). These codes cover, for example, the basis of structural design, masonry, and the design of concrete or aluminium structures. They should help companies to become more competitive and increase safety in the construction industry. Furthermore, contracting authorities in public tenders must allow the use of Eurocodes in the structural design aspects of tenders.[967]

Public participation is not envisaged in the requirements for building materials and their labelling. Nevertheless, it is assumed that the public can invoke these requirements during the EIA procedure and in the permitting procedure. General requirements on buildings can be subject to the SEA procedure, either as a stand-alone act or as a part of a spatial planning document. Therefore, they form substantive law that affects the condition of the land development.

5.6 ENERGY EFFICIENCY OF BUILDINGS

As regards **energy savings**, the 2002 Energy Performance of Buildings Directive (**2002 EPBD**, 2002/91/EC)[968] was adopted to boost the energy performance of buildings. Its aim was not to harmonise the planning or permitting procedures but to set rules for the calculation of energy performance and certification of buildings, and to apply minimum requirements on the energy performance of new buildings or large existing buildings that are subject to major renovation.[969] In particular, the Member States were required to take the necessary measures to ensure the new buildings meet the minimum performance requirements.[970] Moreover, they had to ensure that when buildings with a total useful floor area over 1000 m^2 undergo major renovation, their energy performance would be upgraded in order to meet minimum requirements in so far as this is technically, functionally, and economically feasible.[971] Apparently, these rules had to be implemented in the national substantive rules and conditions on the construction permits, either within the existing permitting procedure or in a new specific procedure to assess and confirm whether the building undergoing the renovation meets the abovementioned criteria.

Furthermore, the 2002 EPBD introduced definitions for frequent terms used in the construction industry, such as *building*, *air-conditioning system*, *boiler*, or *heat pump*.[972] The definitions covered only the scope of the Directive. Nevertheless, given the need to take account of the requirements in the permit or inspection procedures, it was necessary to adjust the scope of these procedures accordingly. In other words, the national legislator still had the

[967] See Athanasopoulou, A., Dimova, S., Pinto, A. (eds.) *The implementation of the Eurocodes in the National Regulatory Framework. JRC Technical Reports*. Luxembourg: Publications Office of the European Union, 2019, 194 p.
[968] Directive 2002/91/EC of the European Parliament and of the Council of 16 12. 2002 on the energy performance of buildings. OJ L 1, 4. 1. 2003, p. 65–71.
[969] *Ibid*, Art. 1.
[970] *Ibid*, Art. 5.
[971] *Ibid*, Art. 6.
[972] *Ibid*, Art. 2.

option of keeping the different definitions outside the scope of the Directive, which seems impractical.

The 2002 EPBD was recast in 2010 (**2010 EPBD**, 2010/31/EU[973]) and amended twice in 2018 (by Directive 2018/844[974] and Regulation 2018/1999[975]) as part of the *Clean Energy for All Europeans* package. The 2010 EPBD lays down requirements in several key areas.

First, the 2010 EPBD sets minimum energy performance requirements for new buildings, major renovations, and existing buildings undergoing renovation (**Minimum Energy Performance Requirements**). These requirements aim to ensure that buildings meet certain energy efficiency standards and contribute to the overall reduction of energy consumption.

Second, the 2010 EPBD establishes a target for all new buildings to be nearly zero-energy buildings by a specific date (**Nearly Zero-Energy Buildings, NZEBs**). NZEBs are buildings with a very high energy performance, with most of their energy needs met by renewable sources produced on-site or nearby.

Third, the EPB standards are promoted as the Member States are required to describe their national calculation methodology following the national annexes of the overarching standards, namely ISO 52000-1, 52003-1, 52010-1, 52016-1, and 52018-1.[976] The 2010 EPBD thus does not force Member States to apply a set of EPB standards but forces them to explain where and why they deviate from these standards, which is likely to lead to a greater recognition and promotion of the EPB set of standards.

Fourth, the 2010 EPBD requires Member States to develop and implement long-term renovation strategies (**LTRS**). These strategies outline plans and objectives for the renovation of existing building stock to improve energy efficiency, reduce emissions, and promote sustainable practices.

These requirements present a significant step in harmonising public construction law as in each Member State, both spatial planning and construction permitting must be adjusted strategically and systematically towards existing and new buildings.

Furthermore, wide-reaching environmental concerns must be incorporated. For example, the LTRS should consider factors such as energy efficiency, use of renewable energy, cost-effectiveness, and environmental impact. Member states are pushed towards assessing the existing building stock, identifying priority areas for renovation, specific targets and measures, financial considerations, and monitoring mechanisms – all while these strategic steps and supportive measures are not carried out in all Member States.

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[973] Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings (recast). OJ L 153, 18. 6. 2010, p. 13–35.

[974] Directive (EU) 2018/844 of the European Parliament and of the Council of 30 May 2018 amending Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency. OJ L 156, 19. 6. 2018, p. 75–91.

[975] Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council. OJ L 328, 21. 12. 2018, p. 1–77

[976] 2010 EPBD, Annex I, point 1.

The key areas are supported by three groups of additional requirements concerning certificates, technical support and monitoring, and public participation:

The 2010 EPBD requires all buildings being constructed, sold, or rented to have an Energy Performance Certificate (**EPCs**). EPCs provide information about a building's energy performance and recommendations for improvements. They help prospective buyers or tenants make informed decisions regarding energy consumption and costs. Moreover, in buildings occupied by public authorities and frequently visited by the public (with a total useful floor area over 250 m^2) or other buildings frequently visited by the public (with a total useful floor area over 500 m^2), the EPCs must be is displayed in a prominent place clearly visible to the public.[977]

The certification might indeed be helpful in raising public awareness and creating pressure on the efficient use of energy in public services. Furthermore, the 2010 EPBD emphasises the importance of providing information and raising awareness about energy efficiency in buildings. It encourages member states to promote public awareness campaigns, provide access to information on energy efficiency measures, and ensure the availability of training and education for building professionals.[978]

The 2010 EPBD mandates **regular heating and air conditioning inspection**s in buildings to assess their efficiency, identify potential energy-saving measures and improve overall performance. Independent control systems for energy performance certificates and inspection reports must be established.

Furthermore, the 2010 EPBD establishes a framework for the development and implementation of **technical standards and guidelines** for both energy performance in buildings and building materials. More specifically, the Commission has established a set of standards and accompanying technical reports for both building materials and energy efficiency of buildings (see below) called the energy performance of buildings standards (EPB standards). In 2007-2008, all of the 2002 EPBD-related standards were published, and in 2010, the Commission gave a new mandate to revisit the standards following the 2010 EPBD.[979] The standards are managed by the European Committee for Standardisation (CEN), the European Committee for Electrotechnical Standardization (CENELEC), and the European Technical Standard Institute (ETSI) and provide specific methodologies, calculation methods, and performance indicators to assess and compare energy efficiency. Furthermore, the harmonised European standards specify technical requirements for construction products. The standards provide methods for testing and assessing the performance of building materials and establish the basis for CE marking.

Regarding **public participation** in the more narrow sense, after the 2018 amendment, the 2010 EPBD requires the Member States to conduct a public consultation on its long-term renovation strategy (LTRS) before submitting it to the Commission. The LTRS must include

[977] *Ibid*, Art. 13.
[978] *Ibid*, Art. 17.
[979] European Commission. Mandate to CEN, CENELEC and ETSI for the elaboration and adoption of standards for a methodology calculating the integrated energy performance of buildings and promoting the energy efficiency of buildings, in accordance with the terms set in the recast of the Directive on the Energy Performance of Buildings (2010/31/EU). 14. 12. 2010, M/480 EN.

an annex with a summary of the results of its public consultation.[980] It is not clear whether the LTRS also meets the criteria for application of the SEA Directive. Art. 2a(1) of the Directive may suggest that the strategy only provides an overview of the current state of the building stock and policies to stimulate the renovation. However, Art. 2a(2) explicitly requires that the strategy must also *"set out a roadmap with measures and domestically established measurable progress indicators, with a view to the long-term 2050 goal of reducing greenhouse gas emissions in the Union by 80-95 % compared to 1990, in order to ensure a highly energy efficient and decarbonised national building stock and in order to facilitate the cost-effective transformation of existing buildings into nearly zero-energy buildings"* including indicative milestones for 2030, 2040 and 2050.[981] This implies that the LTRS can be qualified as a plan or programme under the SEA Directive. The 2010 EPBD also requires the adoption of **national plans for increasing the number of NZEBs**. However, in this case, public participation is not explicitly required. Again, whether such a plan falls under the SEA Directive is debatable.

The next significant set of EU requirements on energy efficiency is embodied in the **Energy Efficiency Directive** (EED)[982] after its significant 2018 amendment.[983] The EED is aimed at promoting energy efficiency and reducing energy consumption. The Directive sets out measures to improve energy efficiency across various sectors, including buildings, transport, and industry.

The EED has significant implications for the construction industry, especially building standards and regulations. Member States must establish minimum energy performance requirements for new buildings and major renovations, ensuring that new constructions meet higher energy efficiency standards. This encourages the construction industry to adopt energy-efficient technologies and practices in their projects. The EED also emphasises the importance of renovating existing buildings to improve energy performance. Member states are encouraged to set renovation targets and develop long-term strategies to increase the energy efficiency of buildings. This creates opportunities for the construction industry to engage in retrofitting projects implementing energy-saving measures in older structures.

One of the major requirements set by Art. 6(1) of the EED (*Purchasing by public bodies*) requires Member States to ensure that central governments purchase only products, services, and buildings with high energy-efficiency performance insofar as that is consistent with cost-effectiveness, economic feasibility, wider sustainability, technical suitability, as well as sufficient competition. Furthermore, public bodies at regional and local levels must be encouraged to follow the exemplary role of their central governments.[984]

The **2018 amendment** introduced several fundamental changes. First, the amended Directive sets **a new binding energy efficiency target** for the EU, aiming for an energy efficiency

[980] 2010 EPBD, Art. 2a(5).
[981] *Ibid*, Art. 2a(2)
[982] Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC. OJ L 315, 14. 11. 2012, p. 1–56.
[983] Directive (EU) 2018/2002 of the European Parliament and of the Council of 11 December 2018 amending Directive 2012/27/EU on energy efficiency. OJ L 328, 21. 12. 2018, p. 210–230.
[984] EED, Art. 6(3).

increase of at least 32.5% by 2030. This headline energy efficiency target replaced the original EED's non-binding target of 20%. However, it is still non-binding, and its achievement relies strongly on the savings resulting from the implementation of national measures, which must be reported to the Commission and EU legislation such as the 2010 EPBD.

There are additional links between the EED and the 2010 EPBD. For example, while the EED requires the Member States to establish clear and transparent criteria for energy audits and energy auditors and promote the availability of these to all final energy consumers, for the building sector, the 2010 EPBD requires financial support to be linked to targeted or achieved energy savings – and those savings can be documented by different tools, including with an energy audit according to the EED.

Second, the amendment required EU member states to establish indicative **national energy efficiency targets** for 2030. These targets should be calculated based on methodologies set out in Annex IV of the amended Directive. The **energy savings obligation,**[985] extended beyond 2020 (originally in force only for 2014–2020), requires Member States to save a certain amount of energy annually by either stablishing an energy efficiency obligation scheme or adopting alternative measures that achieve the same effect. A combination of the two options is also possible. The first option means that the obligated parties under the scheme will need to achieve the required savings by implementing energy efficiency measures mainly on their customers' premises, for example, through building renovations or switching to more efficient lighting. The second option means that the Member States must implement measures such as financing schemes, fiscal incentives and energy or carbon taxes to achieve the required savings.[986]

Third, the amended EED strengthened the **energy efficiency obligation schemes**, which require energy companies to achieve energy savings by promoting energy efficiency measures. The new Directive mandated that each Member State ensure that energy distributors and/or retail energy sales companies achieve annual energy savings of 0.8% of their annual sales to end-users. The EED clarifies which savings from buildings can be counted: Annex V states that savings related to the renovation of existing buildings can be claimed as long as it can be demonstrated that they result from a specific direct action of a recognised actor, such as a public implementing authority.[987]

Fourth, the amendment introduced a new requirement for **public bodies to lead by example in renovating** at least 3% of their total floor area to meet minimum energy performance requirements each year. Besides emphasis on public bodies, there is a strong social element in

[985] EED, Art. 7.

[986] Four Member States are using the energy efficiency obligation only, 12 Member States have chosen to implement alternative measures and 12 Member States use a combination of both. See the European Commission staff working document evaluating the implementation of EED Article 7 [online]. 2020 [accessed on: 11 February 2023]. Available at:
<https://ec.europa.eu/energy/sites/ener/files/documents/3_en_autre_document_travail_service_part1_v3.pdf>.

[987] European Commission. Annex to Commission Recommendation on transposing the energy savings obligations under the Energy Efficiency Directive, C (2019) 6621 final.

the EED as the Member States must implement measures addressing vulnerable households, including those affected by energy poverty, and, where appropriate, social housing.

Fifth, the amendment introduced provisions to promote the use of **energy performance contracts** and facilitate access to financing for energy efficiency improvements in public and private buildings.

Sixth, the amendment strengthened the requirements for individual **metering and billing** of heating, cooling, and domestic hot water consumption in multi-apartment and multi-purpose buildings to encourage energy-saving behaviour. Previously, the adoption of transparent, publicly available national rules on allocating the costs accumulated in multifamily buildings was not binding, only suggested. For that purpose, the remote reading of water meters, heat meters, and heat cost allocators have been introduced as the new standard for new buildings, which will apply to all existing devices from 2027. This has serious practical implications because all meters must be replaced or retrofitted, which may require construction adjustments since the new meters could be larger in size due to the new remote transmitter and added functions.

Seventh, the amendment introduced a ***beyond cost-optimal*** **approach**, requiring member states to encourage investments in energy efficiency measures beyond the minimum energy performance requirements, considering broader societal benefits. Eighth, the amendment introduced the concept of a Smart Readiness Indicator aimed at assessing the technological readiness of buildings for the smart grid and smart appliances.

As regards **public participation**, the EED only requires certain information to be made public: The national rules on the allocation of the cost of heating, cooling, and domestic hot water consumption in multi-apartment or multi-purpose buildings [Art. 9b(3)], the certification and/or accreditation schemes or equivalent qualification schemes [Art. 16(3)] and a list of available energy service providers who are qualified and/or certified and their qualifications and/or certifications, or an interface where energy service providers can provide information [Art. 18(1)(c)].

The EED does not require or assume a specific decision-making procedure. Therefore, the absence of the public participation requirements in this respect is unsurprising. However, it is debatable whether the EED requires the adoption of specific plans or programmes, and to what extent the public can participate in adopting these plans. Several measures required by the EED seem to meet the plan or programme criteria. And for that purpose, a plan could present a framework for the EIA projects. For example, the *energy efficiency plan* (freestanding or as part of a broader climate or environmental plan), the *national energy efficiency action plan* or the *energy management system* which is defined as *"a set of interrelated or interacting elements of a plan which sets an energy efficiency objective and a strategy to achieve that objective"*.[988]

The sole reference by the EED to the SEA Directive is nevertheless made by Art. 14(3) of the EED, which follows the obligation of the Member States to assess the potential for the application of high-efficiency cogeneration and efficient district heating and cooling

[988] EED, Art. 2(11).

according to Art. 14(1) of the EED. Such assessment must carry out a cost-benefit analysis, which can be part of the SEA. As a result, the Member States are not instructed to consider whether the plans or programmes under the EED require the SEA and public participation.

As noted, the labelling scheme and the Ecodesign Directive paved the way for energy performance regulation for buildings and construction materials. Member States' sole responsibility is to set minimum requirements for the energy performance of buildings and building elements. Those requirements should be set to achieve the cost-optimal balance between the investments involved and the energy costs saved throughout the lifecycle of the building, without prejudice to the right of Member States to set minimum requirements that are more energy efficient than cost-optimal energy efficiency levels.[989]

The objective of cost-effective or cost-optimal energy efficiency levels may, in certain circumstances, for example, in the light of climatic differences, justify the setting by Member States of cost-effective or cost-optimal requirements for building elements that would, in practice, limit the installation of building products that comply with standards set by Union legislation, provided that such requirements do not constitute an unjustifiable market barrier.[990]

In addition to legislation, the EU has taken several initiatives to support Member States, increase knowledge of the EU building stock and track its evolution over time. For example, the Building Stock Observatory (BSO)[991] collects data on all building typologies in the EU, and national energy performance certificate databases are designed to provide up-to-date information on the energy performance of buildings that have been sold, rented, or undergone major renovation.

5.7 PARTIAL CONCLUSIONS AND TAKEOUTS

The current requirements of other EU policies than environmental policy for spatial planning and construction permitting set out several important procedural conditions and objectives for spatial planning or building permits. They also lay down comprehensive conditions for public participation.

The regulatory initiatives aimed at accelerating the energy transition in Europe following the 2020 Clean Energy Package form a comprehensive set of legislation that defines European climate and energy policy much beyond the requirements of the traditional EU environmental legislation. Its implementation will affect many areas, including national long-term planning, electromobility, and energy transport. The ambition of the overall EU energy efficiency target and national contributions directly impact the aspiration of national renovation policy: the higher the targets, the more stringent the measures the Member States must adopt to reduce energy consumption in the buildings sector.

[989] 2010 EPBD, preamble, para. 10.
[990] 2010 EPBD, preamble, para. 10.
[991] See the BSO Database [online]. 2023 [accessed on: 11 February 2023]. Available at: <https://building-stock-observatory.energy.ec.europa.eu/database/>.

Yet the EU legislation undergoing rapid changes in the wake of the European Green Deal does not seem to be developing as a coherent system. Most notably, the provisions of other EU policies than environmental policy employ a different approach to achieve their aims.

While environmental legislation often relies on protective regimes and balancing public interests in the planning and permitting procedures, climate-related legislation frequently prescribes rather precise goals to be achieved in procedures within set time limits. Other procedural aspects or substantive issues are left aside. In comparison to environmental law, different terminology is used, which can be confusing.

Indirect measures inherently bring several barriers to implementing the EU's ambitious aims. For example, the AFIR regulation does not put forward any measures on how to achieve building a vast amount of infrastructure, nor does it deal with aspects of its operation after the infrastructure network is complete. In other words, there might be market, ownership, environmental, or other reasons why recharging stations are currently unavailable in certain areas. A growth of recharging stations in numbers often requires spatial planning adjustments, significant road work, and, eventually, contracting an entrepreneur to operate the station.

Similarly, carrying out renovation measures in rented buildings means that the one responsible for implementing and paying for efficiency measures is not always the one who benefits from them. For example, tenants benefit from lower energy costs and higher comfort after a refurbishment, but they usually do not have to pay for it.

A new wave of integration tendencies can be seen as the promotion of good practice examples in implementing sustainable urban mobility and energy. The EU policy documents emphasise the relevance of a holistic approach to both large-scale and local infrastructure planning.[992] The objectives of the Cohesion Policy and the normative vision of related strategic documents such as the New Leipzig Charter seem to align with current perspectives on integrated and holistic sustainable urban transformations.[993]

However, provided the EU lacks the competence to take further steps in spatial planning, the policy documents will only have a limited impact. Most notably, given the scale of its financial support and objectives, Cohesion Policy effectively contributes to the harmonisation of spatial planning, albeit not in a procedural sense. Financial or cooperation measures are only able to address new spatial challenges indirectly. Still, it seems that the attempts to harmonise EU public building law have thus come full circle: Without adequate competence, the EU influences spatial planning as indirectly as possible because of the practical needs and significant new territorial challenges.

Similarly, the New Leipzig Charter and the Urban Agenda for the EU are not likely to initiate new binding regulations. Still, they will be regarded as an informal contribution to the design of the future and revision of existing EU regulations for it to reflect urban needs, practices,

[992] European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of The Regions. Stepping up Europe's 2030 climate ambition Investing in a climate-neutral future for the benefit of our people. 17. 9. 2020, COM (2020) 562 final.

[993] See Elmqvist, T., Bai, X., Frantzeskaki, N., Griffith, C., Maddox, D., McPhearson, T., Parnell, S., Romero-Lankao, P., Simon, D., Watkins, M. (eds.) *Urban Planet*. Cambridge: Cambridge University Press, 2018, 482 p.; Simon, D. (ed.) *Rethinking Sustainable Cities*. Bristol: Bristol University Press, 2016, 152 p.

and responsibilities better. Their existence confirms that the ambitious goals of EU policies put much pressure on the public construction law and that the topics and themes of the EU-level policy documents have been repeating since the early years of the European Project, despite different preferences for each decade. The objective of territorial cohesion seems first and foremost linked to a new perspective on the previous orientation of the EU's cohesion policy instruments, the design of these instruments, and the cooperation between all programme partners.[994] This new perspective makes it easier to scrutinise the effectiveness of previous policies and instruments but not support legislative harmonisation.

This creates a paradox: The policy documents are adopted without legal regulation to create a game-changing transformative potential to break through the constraints of outdated and messy institutional practices and procedures set by national legislation,[995] thus helping o to tackle long-term EU-wide societal challenges. However, they do not have binding character and power to enforce the goals and solve the national spatial planning problems, as Simon identified as *"being too bureaucratic, top-down and unrepresentative, often defending vested interests rather than being forward-looking. Most urban planning processes fit this picture because they are expert-led and do not engage residents or the wider public adequately. Even when public consultations are held, these tend to have limited scope, merely offering residents a choice among a few alternative schemes proposed by the planners as meeting mainly technical criteria. Alternative suggestions are not invited and there is no possibility to reject them all as not meeting local needs or priorities. Low voter turnouts in many local and regional elections reflect their perceptions of reduced relevance and powerlessness."*[996]

The EU requirements do not preclude Member States from opting for a *minimalist approach* to the implementation of spatial planning and relatively limited institutional adaptation, which happens in practice.[997] This is because EU law does not require that specific competent authorities accountable for planning are created, nor does it state that a particular implementation approach (such as centralised, regional, or local) is superior to the others. In addition, it recognises that the planning process may occur at different geographical scales. In the same vein, public participation may be carried out at the scale deemed most appropriate by Member States if the individual requirements are met. Furthermore, there seems to be a risk that the new progressive measures aimed at boosting renewable energy, while generally

[994] See Ahner, D., Feuchtner, N.-M. Territoriale Kohäsion: EU-Politik im Dienste regionaler Potenziale. *Informationen zur Raumentwicklung*, 2010, no. 8 (Europäische Politik des territorialen Zusammenhalts), p. 551.
[995] Fokdal, J., Bina, O., Chiles, P., Ojamäe, L., Paadam, K. *Enabling City: Inter-And Transdisciplinary Encounters*. Abingdon: Routledge: 2021, p. 18–19: *"Often processes are messy, complex, difficult and time consuming, and there is a large risk of failure. The kind of knowledge produced through these processes, however, is what we need in order to be able to localize the Sustainable Development Goals and the New Urban Agenda (NUA)"*.
[996] Simon, D. Co-Productive Tools for Transcending the Divide: Building Urban–Rural Partnerships in the Spirit of the New Leipzig Charter. *Land*, 2021, vol. 10, no. 9, p. 894.
[997] Also see Hedin, S., Dubois, A., Ikonen, R., Lindblom, P., Nilsson, S., Tynkkynen, V., Viehauser, M., Leisk, Ü., Veidemane, K. *The Water Framework Directive in the Baltic Sea Region Countries: Vertical Implementation, Horizontal Integration and Transnational Cooperation.* 2007, Stockholm: Nordregio, Nordic Centre for Spatial Development.

guided by legitimate objectives, are not properly balanced with the other EU environmental policies.[998]

The effective EU rules on **public participation** in spatial planning could help to address at least some issues of the current procedures. At the beginning of the 2000s, in most of the EU Member States, national, regional, and local governments were struggling to find new ways of engaging citizens and stakeholders in public policy and governance,[999] not least in the field of spatial planning.[1000] This negative trend seems to persist. The policy documents are not ambitious and precise to formulate requirements in this regard. They do not refer to the generous Aarhus regime, which accommodates itself in environmental protection. There is no doubt, though, that spatial planning, in principle, relates to the environment.

The existence of such deficiency seems to be echoed in the conclusions of Palerm,[1001] who asserts that the improvements of EU directives following the ratification of the Aarhus Convention fall short of principles for public participation developed based on Habermas' theory of communicative action. Thus, these concessions in terms of greater levels of participation actually focus on procedure and techniques rather than genuine empowerment and, thus, are a classic example of passive revolution used to strengthen the existing positions of political and economic power.

Furthermore, the requirements for public participation regarding adopting plans and programmes in the recently adopted legislation are unclear or completely absent. The public is invited if the plan or programme falls under the SEA Directive. This seems contrary to the obligations that stem from the Aarhus Convention, more so given the development in interpretation of the Convention.[1002] Even the preparation of climate change-related strategic documents at the national level should include consultation with the public and account for its outcome. The requirements of EU law, in fact, demand rather complex administrative and procedural adjustments by Member States.[1003] The implementation reports suggest that the Member States struggle to fulfil this task.

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[998] See Jendrośka, J., Anapyanova, A. Towards a Green Energy Transition: REPowerEU Directive vs Environmental Acquis. e*lni Review*, 2023, vol. 23, no. 1, p. 1–5.

[999] See Smith, G. *Power Beyond the Ballot: 57 Democratic Innovations from Around the World*. 2005, London, The Power Enquiry, 138 p.

[1000] See Healey, P. *Collaborative Planning: Shaping Places in Fragmented Societies*. 1997, Springer, 338 p.

[1001] Palerm, J., R. Public Participation in Environmental Decision Making: Examining the Aarhus Convention. *Journal of Environmental Assessment Policy and Management*, 1999, vol. 1, no. 2, p. 229–244.

[1002] For example, para. 7 of the Chisinau Declaration, adopted at the fourth Meeting of the Parties in 2011 emphasises that a broader interpretation of sustainable development must be achieved regarding public participation in adoption of plans and programmes: *"Similarly to the greening of the economy, public participation in decision-making is not a self-standing objective, but rather an instrument for achieving the sustainability and well-being of society. We consider that (…) citizens should be invited to participate in defining and implementing green economy programmes and in choosing the most appropriate road maps to sustainability."* See UNECE. Meeting of the Parties to the Convention on access to information, public participation in decision-making and access to justice in environmental matters Rio plus Aarhus – 20 years on: Bearing fruit and looking forward Chisinau Declaration, U.N. Doc. 2011, ECE/MP.PP/2011/CRP.4/rev.1.

[1003] For example, Newig and Koontz synthetised this new approach for policy implementation established at the EU level with the expression Mandated Participatory Planning (MPP). The latter tries to grasp the main aspects of this implementation style that are: the creation of new governance levels and the need to improve horizontal and vertical coordination for effective policy implementation, the participation of private actors in decision making; the creation of plans that are in themselves political programmes. See Newig, J., Koontz, T.M. Multi-

6. CONCLUSIONS

Creating a common market involves removing border barriers, promoting economic integration, and providing the necessary infrastructure to enable all Member States to compete in economic development. The EU is increasingly concerned about economic change's social and environmental impacts.

Current EU policies reflect that Member States face significant new territorial challenges such as the regionally differentiated impacts of climate change, rising energy prices, energy inefficiencies and different territorial options for new forms of energy supply, or the over-exploitation of environmental and cultural resources and the loss of biodiversity. Overall, while the EU does not have a direct role in spatial planning, its policies and initiatives can significantly impact how Member States approach land use and regional development issues. There is a prominent trend in Europe to prioritise renewable energy projects, which has been much emphasised recently because of the security concerns following the unprecedented Russian aggression against Ukraine.

While the integration of EU eco-policy in the 1990s took place through soft, non-hierarchical modes of regulation, after 2000, new pressures had to be faced, such as the unprecedented enlargement of the Community in 2004 or increasing global competition. The Lisbon Strategy for Growth and Jobs's competitive strategic paradigm is now based on the latter, which necessarily side-lines soft governance. In this context of European integration, it is essential to follow the development of EU environmental policy and EU environmental law, which continues to eliminate the adverse effects of the functioning of the internal market. The development of EU ecopolitics lacks a clear framework, which is a significant difference compared to more stable areas of EU policy, such as agriculture. Therefore, it is crucial how environmental concerns fit into the overall direction of the Union. This became apparent after the end of the Sixth Action Programme in 2010. At that time, there was a wave of scepticism about the usefulness of the Action Programmes and questioning of the EU's ecopolitics, including its objectives.

After years of searching for a conceptual approach to environmental protection at the EU level, environmental and climate protection is now becoming a *leitmotif* of the vision for the future direction of the continent. At the same time, there has been a significant integration of EU ecopolitics at the budgetary level, which can be seen as a vast, albeit indirect, advance in environmental protection in the European Union. The main elements for a coherent strategy to reduce emissions - innovation and research and technological development, energy efficiency, sustainable transport systems, and tax reforms – were already highlighted in Agenda 21. The EU's Climate Change Strategy provided the first example of a significant broadening of the range of instruments in the energy/environment field and the Union's commitment to stabilise CO_2 emissions at 1990 levels.

The EU policies and legislation significantly influence spatial planning and construction permitting in the Member States. The first part of the thesis identified the development of

level governance, policy implementation and participation: The EU's mandated participatory planning approach to implementing environmental policy. *Journal of European Public Policy*. 2014, vol. 21, p. 248–267.

essential requirements of EU law that have manifested themselves in public construction law and traces the gradual integration of public participation requirements.

Public construction law in the Member States incorporates harmonised environmental impact assessment instruments, reflects fundamental limits of land use in terms of preventing accidents with the presence of hazardous substances, protection of nature, water, air, or public health; construction is associated with the management of waste, fallout and hazardous materials, the use of construction products closely linked to the regulation of chemicals and, more loosely, to the rules on sustainable development and efforts to mitigate the effects of climate change, which are also reflected in requirements for energy efficiency in buildings or the promotion of renewable energy sources.

In this respect, EU environmental law does not only introduce protective conditions but also principles and correctives essential for balancing environmental protection and economic development. It is worth noting that the scope of environmental protection instruments is expanding as it often provides for a range of public interests beyond the purely environmental ones. A typical example is the EIA, which also covers the project's effects on property.[1004]

The planning and permitting processes are also critical for public participation in environmental protection in the spirit of the Aarhus Convention and the EU Directives that implement it. Since the early 1990s, these initiatives have resulted in a more robust awareness among planners and decision-makers of the need for improved horizontal, vertical, and geographical coordination in an integrated Europe. There seems to be a strong dichotomy between land-use planning, which is a sovereign right of the Member States, and the French-style EU spatial planning approach within the cohesion policy, making spatial planning a vital tool of EU-focused governance supported by statutory requirements.

The primary debate on the precise position of the territorial policy of the EU seems to be somewhat modified lately to define the role of territorial policy in the climate crisis. In this respect, environmental aspects may bridge the gap between the ESDP, which only brought the actors together with the potential for the future,[1005] and the territorial policy, which lacked precise content and comprehensive goals. Nevertheless, the concept of territorial cohesion, which became one of the general objectives of the EU after the ratification of the Lisbon Treaty, had an environmental dimension from the very beginning, with the primary purpose of finding a better and fairer balance between regions by, *inter alia*, supporting a trans-European network, a European macro-ecological structure, and interregional solid cooperation.

The review and reorientation of the EU's Territorial Agenda came at a time when long-term trends were being broken due to the economic and financial crisis, and the future is still uncertain. The competencies for European territorial cohesion have been formally clarified and found a strong alignment with the progressive climate policy of the EU.

Current European spatial development policy encompasses both vertical and horizontal *coordination* of European, national, and regional or local policy fields with the aim of

[1004] EIA Directive, Art. 3(1)(d).
[1005] See Waterhout, B. *The institutionalisation of European Spatial Planning*, Amsterdam: IOS Press 2008, 240 p.

creating coherent effects on the European territory. Transnational cooperation programs and the approach of macro-regional strategies have anchored spatial thinking and action in EU policy.

Tab. 8: EU INCENTIVES, POLICIES AND LEGISLATION RELEVANT FOR PUBLIC CONSTRUCTION LAW					
Incentives	**Spatial planning policies**	**Urban policies**	**Environmental legislation**	**Energy legislation**	**Maritime legislation**
Cohesion Policy Rural Development Policy Transport Policy	ESDP Territorial Agenda	New Leipzig Charter Urban Agenda for the EU	SEA Directive EIA Directive Habitats Directive Birds Directive WFD, FD Environmental Noise Directive Seveso III Directive Waste Framework Directive	RED II EED	Marine Spatial Planning Directive Marine Strategy Framework Directive

Increasingly, spatial aspects are also taken into account in the EU's structural and sectoral policies. The objective of strengthening territorial cohesion in Europe, which is close to the ESDP, has been included as a guiding principle in the EU Treaties since 2009. However, despite the ESDP and similar documents, there still seems to be no shared spatial vision for the development of the EU territory of the future. And despite the goal triad of economic, social, and territorial cohesion in the Lisbon Treaty, there is no formal council for European spatial development or territorial cohesion.

EU requirements significantly impact public construction law but are rather fragmented than homogeneous. Spatial planning or construction permitting is rarely addressed in an explicit way. Instead, Member States are expected to find ways to apply the requirements effectively, which means merging them with the planning or permitting procedures. The general and ambiguous terminology covers the wide range of planning documents and authorisation acts adopted at the national level. However, at least partial clarification of the terms used is possible, in particular, based on the interpretation provided by the case law of the CJEU. This should help to determine the range of conditions under which the national legislature may regulate the breadth of public participation in decision-making and access to judicial protection.

While environmental legislation often relies on protective regimes and balancing public interests in the planning and permitting procedures, climate-related legislation frequently prescribes rather precise goals to be achieved in procedures within set time limits. Other procedural aspects or substantive issues are left aside. In comparison to environmental law, different terminology is employed, which can be confusing.

Tab. 9: MAIN LEGISLATIVE REQUIREMENTS RELEVANT FOR PUBLIC CONSTRUCTION LAW		
Legal regulation	**Requirements relevant for spatial planning**	**Requirements relevant for construction permitting**
EIA Directive		assessment of construction projects in Annex I and Annex II binding for development consent
SEA Directive	assessment of plans and programmes prepared for town and country planning which set the framework for future development consent of projects listed in Annexes I and II of the EIA Directive	
Habitats Directive	assessment of plans likely to have a significant effect on the protected site, measures to protect the habitats; system of strict protection for selected species	assessment of projects likely to have a significant effect on the protected site, system of strict protection for selected species
Birds Directive	measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds; system of strict protection for birds	measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds; system of strict protection for birds
WFD	water management and implementation of the river basin	substantive requirements on water quality and management;

	management plans covering river basin districts	the construction and operation permitting must ensure that good status of surface water and groundwater is achieved and maintained
FD	implementation of the flood risk management plans	
IED		application of techniques including *inter alia* the way in which the installation is designed and built
Air Quality Framework Directive	implementation of the air quality plans	measures of the short-term action plans on construction
Environmental Noise Directive	implementation of the noise maps and action plans for major cities and agglomerations; designation of the quiet areas and zones	implementation of the noise maps and action plans for major cities and agglomerations
Seveso III Directive	objectives of preventing major accidents and limiting the consequences of such accidents must be taken into account in the land-use policies and/or other relevant policies; appropriate consultation procedures to facilitate implementation of the policies	
Waste Framework Directive		building and demolition waste management
TEN-T Regulation	take into account the development of the TEN-T when drawing up national plans and programmes, aim for interconnection between various types of transport in urban nodes, while mitigating the exposure of urban areas to negative effects of transiting rail and road transport and promoting efficient low-noise and low-carbon urban freight delivery.	
TEN-T Directive	Priority treatment for projects falling within the scope of this Directive	priority treatment for projects falling within the scope of this Directive, streamlining measures: organisation, length of the procedure, guide to the promoters, coordination of cross-border procedures, joint public procurement
TEN-E Regulation	projects on the Union list shall be granted the status of the highest national significance possible, where such a status exists in national law, and be appropriately treated in planning procedures; an integrated perspective in the planning processes of all onshore and offshore, transmission and distribution infrastructure should be achieved; all dispute resolution procedures shall be treated as urgent, if and to the extent to which national law provides for such urgency procedures; Member States must choose and implement the scheme which is most effective for them in light of national specificities in their planning and permit granting processes; grounds are set for the analysis which will cover the relevant sectors' interlinkages at all stages of infrastructure planning and preparation of the scenarios and high-level strategic integrated offshore network development plans for the Union-wide ten-year network development plan	projects on the Union list shall be granted the status of the highest national significance possible, where such a status exists in national law, and be appropriately treated in permitting procedures; all dispute resolution procedures shall be treated as urgent, if and to the extent to which national law provides for such urgency procedures; assessment and streamlining the environmental assessment procedures for projects on the Union list; the permitting procedure must be coordinated by a specific competent authority and the decision must be issued within set time limits and in accordance with one of the schemes which are described more in detail; the permit must be granted within 42 months in a process of two procedures, the pre-application procedure of an indicative period of 24 months, and the statutory permit granting procedure which cannot exceed 18 months
RED II	measures facilitating the deployment of renewables when carrying out spatial planning at national, regional and local level: including provisions for the integration and deployment of renewable energy, including for renewables self-consumption and renewable energy communities, and the use of unavoidable waste heat and cold; to consult the network operators to reflect the impact of energy efficiency and demand response programs as well as specific provisions on renewables self-consumption and renewable energy communities, on the infrastructure development plans of the operators; assessment of the existing barriers and potential of development of renewable energy communities in the territories	minimum level of energy from renewable sources in both new buildings and buildings undergoing major renovations; include measures facilitating the deployment of renewables when building or renovating urban infrastructure and commercial or residential areas; Member States must ensure that any relevant national rules concerning the authorisation, certification and licensing procedures are proportionate and necessary and contribute to the implementation of the energy efficiency first principle. This general rule is further elaborated on to several steps: a) streamlining administrative procedures, b) objective, transparent and proportionate rules concerning authorisation, certification and licensing which take fully into account the particularities of individual renewable energy technologies, c) cost-related administrative charges, d) simplified and less burdensome authorisation procedures for decentralised devices, and for producing and storing energy from renewable sources; requirement to link construction and operational procedures including establishment of contact points that must guide the applicant through and facilitate the entire administrative permit application and granting process; the permit-granting process shall cover the relevant administrative permits to build, repower and operate plants for the production of energy from renewable sources and assets necessary for their connection to the grid; the duration of the permitting procedure should not exceed 1 or 2 years depending on the type of installation; Member States may establish a simple-notification procedure for grid connections for repowering projects with decision within six months of receipt of a notification; provide an enabling framework to promote and facilitate the development of renewable energy communities
AFIR	requirements on recharging points and alternative fuel refuelling points for the cars, planes and ships	requirements on recharging points and alternative fuel refuelling points for the cars, planes and ships
ARE Regulation	exception from EU environmental requirements limited to 18 months with a review clause	exception from EU environmental requirements limited to 18 months with a review clause; speeding up the permitting procedure for the installation of solar energy installations including time limits for permitting procedures and automatic permitting; simplified EIA
CPR		harmonised rules for the marketing of construction products;

		covers a wide range of construction products, including materials such as cement, steel, insulation, windows, and many others
REACH Regulation		applies to chemical substances used in building materials to ensure a high level of protection for human health and the environment; rules on their use in building products apply directly or indirectly to numerous other chemicals
2009 ERPD		technical requirements on many electrical appliances and building products such as insulating materials
2010 EPBD		minimum energy performance requirements for new buildings, major renovations, and existing buildings undergoing renovation; target for all new buildings to be nearly zero-energy buildings by a specific date; requires that all buildings being constructed, sold, or rented must have an Energy Performance Certificate
EED		requires Member States to establish minimum energy performance requirements for new buildings and major renovations, ensuring that new constructions meet higher energy efficiency standards
Marine Spatial Planning Directive	minimum requirements for Member States to take into account land-sea interaction; requires all coastal Member States to develop Maritime Spatial Plans; does not apply to town and country planning; its scope is restricted to marine waters	

While the EU environmental requirements seem to provide broad discretion to the national legislator, they are often inflexible. Through its directives, the EU exercises a convergent influence on the contents, scope, and formulation of the technical requirements for planning and permitting procedures while pushing Member States towards streamlining administrative procedures. This is a trend that was already noticed by Visscher and Meijer[1006] in 2007 and seems to persist despite privatisation and deregulation trends in the construction sector.

The analyses reveal no evidence that the scope of technical requirements in European countries is diminishing. In addition, all Member States are expected to take steps to streamline their administrative procedures. For example, the TEN-T Directive pressures national legislators to optimise their permitting systems, particularly if they comprise multiple stages. Similarly, the TEN-E Regulation or the RED II Directive sets strict requirements for streamlining procedures. Overall, the need for the new energy regulation on the planning and permitting procedures goes far beyond the requirements of the environmental legislation, which mainly sets substantive requirements. Interventions in the procedural autonomy of Member States, which would have been difficult to imagine at the turn of the millennium, are now a relatively common part of the legislation passed.

As a result, when planning and permitting specific energy projects, a complete legal toolkit of the public construction law is employed: Procedural requirements on streamlined planning and permitting together with the substantive rules concerning both energy and environment. A different approach is employed by the AFIR, which requires specific projects (recharging points and alternative fuel refuelling points) to be carried out without further requirements on planning and permitting procedures. Therefore, it harmonises public construction law indirectly as it demands sufficient flexibility of the national rules, allowing the mandatory targets to be achieved.

Tab. 10: TARGETS OF SELECTED EU ENERGY LEGISLATION RELEVANT FOR PUBLIC CONSTRUCTION LAW				
	2010 EPBD	**EED**	**RED II**	**AFIR**
Main requirements	State level: Supporting	2030 energy efficiency	2030 renewable energy	requirements on

[1006] Visscher, H., Meijer, F. Dynamics of building regulations in Europe. In: *Legal Aspect of Housing, Land and Planning. ENHR International Conference on Sustainable Urban Areas*, 2007.

	building renovation – long term renovation strategies, mobilisation of investment, advisory tools	target of 32,5%, energy savings obligations beyond 2020 (Art. 7)	target of 32%	recharging points and alternative fuel refuelling points for the cars, planes and ships
Public construction law	minimum energy performance requirements for new buildings, major renovations, and existing buildings undergoing renovation; target for all new buildings to be nearly zero-energy buildings by a specific date; requires that all buildings being constructed, sold, or rented must have an Energy Performance Certificate	requires Member States to establish minimum energy performance requirements for new buildings and major renovations, ensuring that new constructions meet higher energy efficiency standards	renewable energy in buildings	implied (flexibility)
Public participation	no	no	no	no

There seem to be significant overlaps in the environmental requirements. For example, the environmental impact assessment under the EIA Directive covers all essential environmental effects, including, where relevant, significant effects on protected species protected under the Habitats Directive.[1007] The EIA also overlaps with the WFD requirements: For example, the information to be provided must contain the data that are necessary to assess the effects of a project on the status of the bodies of water concerned in the light of the criteria and requirements laid down in, *inter alia*, Art. 4(1) of the WFD, the so-called ban on deterioration.[1008]

Several directives seem to mandate a **strong coupling with spatial planning**, such as the Seveso III Directive and Natura 2000 Directives. The RED II Directive is an example of a directive that implies entitlements to land that must be allocated through the land-use planning system. It, therefore, implies a strong coupling through the application, as the feasibility of renewable energy use is mainly site-dependent. Similarly, in public procurement, there is no coupling in the text of EU directives but a more robust link through application. Authorities are then no longer completely free to choose with whom to work, as this is determined mainly by the requirement to select the most economically advantageous offer.

The Member States are further suggested to streamline their planning and permitting procedures. In this respect, EU law explicitly expresses a preference for the integration of decision-making processes in order to increase the efficiency of environmental impact assessments, reduce the complexity of administrative procedures, and improve economic efficiency. The complex planning or permitting regimes may conflict with the requirements of EU law because of the lack of effectiveness. Therefore, even the strict requirements of EU law provide scope for procedural and substantive optimisation.

EU law encourages the merging of processes, but is not very specific and clear, which can lead to the opposite of the desired result - too much consolidation and closure of procedures. The integration and coordination of processes cannot be an end in itself, removed from the

[1007] According to Art. 3(a) of the EIA Directive, it is to identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect effects of a project on, inter alia, fauna and flora. In accordance with Art. 5(1) and point 3 of Annex IV of the EIA Directive, such effects must therefore be described by the developer.

[1008] Judgment of the CJEU of 28 May 2020, *Land Nordrhein-Westfalen* (C-535/18, EU:C:2020:391, para. 81).

context of the substantive legal requirements and the demands on the material and staffing of the state administration.[1009]

Until recently, the EU's support for such integration took the form of recommendations, which have been little reflected in legislation, i.e., in the text of the relevant directives. However, this is changing, as illustrated by the EIA Directive following its 2014 amendment. Its Art. 2(3) encourages (1) the provision of coordinated and/or joint procedures for the Natura 2000 assessment and the EIA process, (2) the establishment of coordinated and/or joint procedures where the obligation to carry out an environmental impact assessment is imposed simultaneously by the EIA Directive and by other EU legislation. Coordination should be entrusted to a specific authority, and the environmental impact assessment of a particular project should be drawn up as a single assessment.[1010]

Similarly, several provisions of the SEA Directive foresee and recommend a coordinated approach mainly, but not exclusively, in the sense of linking with the assessment under the Habitats Directive.[1011] And similarly, Art. 3 of the WFD has implications for coordination across administrative levels at different geographical scales and cross-sectoral coordination among different water-use sectors that must align their interests and objectives to improve the state of the water bodies.

The integration tendencies are not only manifested by the appeal to combine or coordinate processes but also by the promotion of **sharing and wide use of the information obtained** so that even in the case of separate processes, it is not necessary to acquire the same information again, with the same result, but with unnecessarily higher financial costs and time delays.[1012]

On the other hand, many EU requirements concerning the adoption of strategic documents lack a link to spatial planning or more precise rules regarding the implementation, or even a reference to the SEA Directive, which seem to undermine the streamlining attempts and make public participation more difficult.

Tab. 11: AIMS AND REFERENCES OF THE MAIN PLANS OR PROGRAMMES

Plan	Legal basis	Aim	Link to spatial planning	Reference to the SEA Directive	Public participation requirements
Flood Risk Management Plans	Art. 7 FD	reduction of potential adverse consequences of flooding	no	yes (but only regarding a component of the Flood Risk Managements Plan providing a summary of flood related	preliminary flood risk assessment, flood maps and FRMPs available, encouraging active involvement of all interested parties in the production, review and updating of the FRMP

[1009] See Sobieraj, K. Implementation of the European Union Requirement to Coordinate Activities of Public Administration Authorities in the Process of the Authorisation, Certification, and Licensing of Renewable Energy Sources Investments. *Review of European and Comparative Law*, 2019, no. 4, p. 142: *"We will certainly not achieve an expected result either at the "expense" of values and objectives for accomplishing of which the administrative procedures subject to coordination have been established (environmental protection, spatial order, public safety), or the constitutional principles for shaping the structure and competence of administrative authorities established in a given Member State."*

[1010] Also see the EIA Directive, preamble para. 6, 37; Directive 2014/52/EU, preamble para. 21.

[1011] SEA Directive, Art. 11(2); CJEU judgment of 22 September 2011, *Valčiukienė and Others* (C-295/10, EU:C: 2011:608).

[1012] See the IPPC Directive, preamble para. 11; the SEA Directive, Art. 4(3).

				measures taken under other Community acts)	
River Basin Management Plans	Art. 14 WFD	protection and, where necessary, restoration water bodies to reach good status, and to prevent deterioration	no	no	consultation; access to background documents on request, timetables, interim overview and draft copies of the RBMP available, encouraging active involvement of all interested parties in the implementation of the WFD, in particular production, review and updating of the RBMP
Programmes of Measures	Art. 11 WFD	to achieve environmental objectives established under Art. 4 WFD	no	no	no
Various plans and programmes (assessment only)	Art. 6 SEA Directive	assessment of plans and programmes	applies to plans and programmes prepared for town and country planning which set the framework for future development consent of projects listed in Annexes I and II of the EIA Directive	x	draft plans available, consultation, early and effective opportunity to express opinion within appropriate time frames
Air quality plans	Art. 23 Air Quality Framework Directive	to achieve the related limit value or target in the zones and agglomerations where he levels of pollutants in ambient air exceed any limit value or target value	no	no	dissemination of information
Air quality short-term action plans	Art. 24 Air Quality Framework Directive	indicating the measures to be taken in the short term in order to reduce the risk or duration of an exceedance of the levels of pollutants	no	no	dissemination of information
Noise action plan	Art. 8 Environmental Noise Directive	manage and reduce noise	no	no	public is consulted about proposals for action plans, given early and effective opportunities to participate in the preparation and review of the action plans, that the results of that participation are taken into account and that the public is informed on the decisions taken; reasonable timeframes shall be provided allowing sufficient time for each stage of public participation
Waste Management Plan	Art. 28 Waste Framework Directive	analysis of the current waste management situation, as well as the measures to be taken to improve environmentally sound preparing for re-use, recycling, recovery and disposal of waste	no	yes (regarding access to plans and programmes)	the general public must have the opportunity to participate in the elaboration of the waste management plans and waste prevention programmes and have access to them once elaborated; the plans and programmes must be published on a publicly available website

Maritime Spatial Plan	Art. 4 Maritime Spatial Planning Directive	analyse and organise human activities in marine areas to achieve ecological, economic and social objectives	does not apply to town and country planning; its scope is restricted to marine waters	yes	broad participation of stakeholders in the planning process and that cooperation takes place across country borders; informing all interested parties and by consulting the relevant stakeholders and authorities, and the public concerned, at an early stage in the development of maritime spatial plans; access to the plans once they are finalised
Long-term Renovation Strategy	Art. 2a 2010 EPBD	outline plans and objectives for the renovation of existing building stock to improve energy efficiency, reduce emissions, and promote sustainable practices	no	no	consultation; the LTRS must include annex with a summary of the results of its public consultation

The logical step, which is being taken by a large number of Member States, is to **merge the planning and construction procedures into a single process**,[1013] ideally accompanied by the digitisation of the permitting process, which alone can speed up and streamline the process.[1014] In addition, Member States have also taken the approach of merging, in particular, operating permits issued under various component regulations (implementing individual EU Directives) in environmental protection. Some form of unified environmental permitting emerged in Sweden in 1969, in Denmark in 1972, and in the UK in 1990 before becoming the basis for adopting the IPPC Directive in 1996.[1015]

As a result, more recent regulations such as the TEN-T Directive, the TEN-E Regulation, the RED II Directive, and the ARE Regulation prescribe streamlining the procedures and establishing a single authority as a contact point for the project promoter. This seems to be a clear trend in attempts to boost the development of the core transport and energy network and renewable energy.[1016]

[1013] In 2011, roughly half of the Member States were involved, namely Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Germany, Italy, Malta, the Netherlands, Portugal and Slovenia. See Branco, J., Meijer, F., Visscher, H. *Comparison of building permit procedures in European Union Countries*. OTB Research Institute for the Built Environment, Delft University of Technology [online]. 2011 [accessed on: 2 May 2023]. Available at: <http://www.irbnet.de/daten/iconda/CIB_DC24512.pdf>.

[1014] See Jovanović, T., Aristovnik, A., Rogić Lugarić, T. A Comparative Analysis of Building Permits Procedures in Slovenia and Croatia: Development of a Simplification Model. *Theoretical and Empirical Researches in Urban Management*, 2016, no. 2, p. 21.

[1015] OECD. Guiding Principles of Effective Environmental Permitting Systems, 2007, p. 9. The foundations of the IPPC were also supported by a specific OECD Recommendation in 1991. See OECD. OECD Council Recommendation on Integrated Pollution Prevention and Control, 1991, C (90)1 64. However, as integrated permitting is mainly applicable to major industrial installations, there have also been efforts to promote more consistent integration of environmental permitting in relation to small and medium-sized installations, for example by the OECD – with the suggestion that these installations should be subject to simplified single permitting under the model of a national/regional authority for large installations and a regional/local authority for smaller installations. See OECD. Guiding Principles of Effective Environmental Permitting Systems, 2007, p. 10–11.

[1016] In 2011, the Commission commissioned a study on the permitting of energy infrastructure projects, which clearly recommends the concept of a *one-stop-shop* to deal more effectively with the high legal, technical and environmental demands, and mentions the arrangements in the Netherlands, England and Wales. If it is not

Adopting the Aarhus Convention in EU law has significantly boosted **public participation**. From its beginning, the Aarhus Convention has been closely connected with Community law and has profoundly impacted its development. Most of the requirements on public participation have been introduced in EU law based on the Aarhus Convention but not consistently. The key definitions essential to determining the scope of EU requirements, including public participation, do not follow the terminology of public construction law; therefore, their correct interpretation needs further analysis.

EU directives considerably widen the requirement for active dissemination of information by public authorities. This is in strong contrast to the 1990 directive on access to environmental information, which merely focused on the passive dissemination of information, i.e., access to information upon request.

As regards public participation in decision-making and access to justice, the requirements stemming from EU law can be summarised as follows: It is not possible to exclude the involvement of the public concerned in the permitting procedure if it is linked to (or part of) the EIA process and/or the Natura 2000 assessment or integrated permitting (IED). Such participation must be timely and effective, i.e., it must be an opportunity to influence the decision-making outcome unless it is designed to be purely consultative. In principle, it is impossible to exclude access to judicial protection for the public concerned in decision-making or planning where EU law is applied. It is impossible to impose conditions on environmental associations to participate in proceedings or have access to judicial protection. However, it is possible to set requirements for the associations themselves. It is also possible to define what constitutes a violation of individual rights.

Access to justice must be ensured in principle in all cases involving decision-making or planning where EU law is applied. It is possible to define what constitutes an infringement for the purposes of assessing the standing of individuals, but such discretion is limited so that, for example, the neighbours concerned cannot be excluded from access to judicial protection. Nor can the infringement be limited to intervening or close neighbours. The case law of the CJEU allows the grounds for annulment of an unlawful act to be limited to cases of infringement of the subjective right of the applicant - the individual. It is not possible to define what constitutes a sufficient interest in the case of environmental associations (in the case of actions following EIA, IPPC, and Natura 2000 assessment processes). It is possible to set a time limit for bringing an action, but a time limit cannot prevent the remedy of a situation where an EIA has not been carried out. In such a case, the courts will not apply such a time-limit regulation because it is contrary to EU law. Court proceedings may be subject to a fee,

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possible to create a single permitting point by a consistent transfer of competences – as is the case in some Länder – at least the creation of a coordinated *one-stop shop* system should be considered. According to the study, the most efficient permitting schemes consist of a small number of processes (ideally one), led by a single competent administrative authority. This study has become the basis for the regulation of projects of common interest, typically under the TEN-E Regulation. See the European Commission. Permitting procedures for energy infrastructure projects in the EU: evaluation and legal recommendations [online] 31. 7. 2011 [accessed on: 10 March 2023]. Available at:
<https://ec.europa.eu/energy/sites/ener/files/documents/2011_ten_e_permitting_report.pdf>.

but the costs must not be excessive. Procedural rules should include the possibility of exemption from court fees and the granting of legal aid (representation).

Nevertheless, the discrepancy between the Aarhus requirements and the implementing EU legislation has been present and evident for a long time: Public participation requirements were implemented. The difference is thus not so much in the scope of the activities covered but in the procedural details concerning public participation, which Art. 6 of the Convention elaborates in much more detail than the EIA or the IED.

The EU took the view that the provisions of Art. 7 of the Convention concerning policy-making and those of Art. 8 concerning public participation in rule-making and legislative drafting merely require practical arrangements to be made without an obligation to implement them via a legally binding framework. However, that seems to affect also the requirements of Art. 7 concerning participation in the adoption of plans and programmes. In this respect, the EU adopted the SEA Directive and the WFD as the main implementing instruments with the assumption that all environmental directives adopted since 2000 that envisage plans or programmes already make provision for public participation to implement the Convention. As shown, that is not always the case.

Even the directives that set requirements for public participation do not reach the Aarhus standard: Most often, they do not require reasonable time frames to be provided, early and effective opportunities to participate, or the way the public should be informed. The Aarhus Directive refers to some of the plans and programmes, but their selection is far from clear;[1017] some are subject to the SEA procedure and, therefore, its requirements for public participation. However, that does not encompass all plans and programmes relating to environment. For example, land-use plans that do not create framework for large projects but may affect water quality are not subject to the SEA. Similarly, plans relating to the management of Natura 2000 site do not require the SEA but apparently fall under Art. 7 of the Aarhus Convention.

To make things even more complicated, the requirement to enable access to justice is not provided in cases where the rights to participate in the preparation of plans and programmes are impaired. It is, therefore, very complicated to inform the public in line with Art. 9(5) of the Convention about review procedures regarding various plans and programmes of public construction law. The CJEU has not yet had an opportunity to confirm that the SEA Directive is directly applicable. Still, its case law shows that even though the Member States have well-established traditions concerning access to justice, judicial protection is not always granted.

The drawbacks in implementation of the public participation requirements may affect the environmental policy as *"public participation is not an end in itself but a tool to achieve the environmental objectives".*[1018] Simultaneously, deficiencies in this area may hurt the construction industry, lowering the general acceptance of proposed planning documents and

[1017] See Jendrośka, J. Aarhus Convention and Community Law: the Interplay. *Journal for European Environmental and Planning Law*, 2005, vol. 2, no. 1, p. 18.

[1018] European Commission. Common Implementation Strategy for the Water Framework Directive (2000/60/EC); Guidance document no. 8; Public Participation in relation to the Water Framework Directive, 2003. Also see the Aarhus Convention, preamble para. 5.

construction permits. The attempts to leave the public aside from the adoption of plans and decision-making seem short-sighted, especially given the approach of the CJEU, which strengthens judicial protection of both NGOs and affected individuals, including municipalities and legal persons.

The novelties in public participation seem to emerge outside of traditional environmental legislation. A perfect example is the TEN-E Regulation, which splits the requirements on informing the public and its participation in decision-making between the authority and the project promoter. Furthermore, to ensure compliance with the obligation to publish details on the project in a more accessible way, failure to provide or update information should result in the ineligibility of the proposed project until the default is remedied.

At the same time, however, other legislation, such as the RED II, is applicant-oriented and provides neither specific requirements on public participation in decision-making nor a reference to the Aarhus Convention or the implementing EU legislation.

It is certainly disappointing that only the last iterations of the EU legal acts finally appear to be close to meeting the requirements of the Aarhus Convention, many years after the implementation of the Aarhus Convention was supposed to be complete. That is the case of the Seveso III Directive or the latest proposal of the EU's air protection legislation. The case law of the CJEU helps to soften the absence of the Directive on access to justice in environmental matters. Still, it is demanding to put into practice and dependent on the preliminary questions.

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