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SAFETY, SECURITY & ENVIRONMENT

THE IMPACT OF EU ENVIRONMENTAL LAW ON WATERWAYS AND PORTS
including a proposal for the creation of Portus 2010, a Coherent EU Network of Strategic Port Development Areas
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Executive summary

The problem

The present study investigates the problematic implementation of EU environmental law on the protection of natural habitats and surface waters in the field of waterway and port-related plans, projects and activities. The below analysis of the existing policy and legal frameworks, current implementation practice, contentious cases, policy integration initiatives and unresolved legal problems reveals that waterway and port authorities and private investors encounter tremendous difficulties in complying with applicable environmental obligations. Frequent disruptions of new projects increasingly jeopardise the achievement of national and EU transport policy objectives which presuppose the provision of additional waterway and port capacity in order to cope with growing demand and support a modal shift as well as economic development. The prevailing malaise is mainly caused by (i) the fact that both natural habitats and potential waterway and port development areas are scarce and in many cases overlap geographically and (ii) the undeniable ambiguity of the Birds, Habitats and Water Framework Directives.

Main findings

Under the EC Treaty, the European institutions are under a duty both (i) to ensure the protection of the environment and to promote sustainability of economic development and (ii) to develop a transport policy and trans-European transport networks. The use, maintenance and improvement of waterway infrastructure and port facilities is subject to compliance with international and EU environmental rules, esp. the EU Birds, Habitats and Water Framework Directives. Several legal instruments adopted within the framework of EU transport policy, such as regulations and directives on liberalisation, presuppose the availability of adequate waterway infrastructures and port facilities. Under the TEN-T Guidelines, the EU supports concrete projects for the improvement of waterways and ports. EU modal shift and state aid policies further contribute to the provision of adequate facilities for maritime and inland waterway shipping. Moreover, international law guarantees freedom of navigation in marine areas including inland waters, and obliges States to carry out maintenance and in some cases improvement works in international waterways. As a result, environmental policy and law potentially conflict with policy and law pertaining to transport and esp. the provision of waterway infrastructure and port facilities.

The EC Treaty obliges the Community to integrate environmental protection requirements into inter alia its transport policy. Such integration is effectively implemented in the TEN-T instruments, which make Community support and funding for TEN-T projects dependent upon compliance with environmental rules. State aid decisions and modal shift instruments refer to environmental requirements and objectives as well. As a general rule, transport policy requirements appear to be less well integrated into environmental policy than vice versa. Under the Habitats and Water Framework Directives, waterway and port-related plans and projects are subject to several economic and environmental tests and can only be implemented on the basis of strictly conditional derogations. As waterway and port development areas very often overlap with nature conservation areas, waterway and port policies de facto enjoy the unenviable status of being mere derogations from environmental policy. In practice, the priorities of waterway and port policies are increasingly determined within the framework of environmental policy rather than transport policy. Yet it has to be noted that the Water Framework Directive acknowledges the need for flexibility and policy integration and pays specific attention to navigational uses of watercourses. Within the framework of the Common Implementation Strategy for the latter Directive, shipping and port stakeholders are fully involved. Specific
guidance on best practices and legal aspects in the field of hydromorphological impacts is forthcoming. Finally, apart from policy integration at EU level, it seems reasonable to expect that EU environmental measures would at least be coordinated and reconciled with international requirements regarding the use and management of international waterways.

Available case law shows that many, if not most, legal disputes relating to the application of the EU Birds and Habitats Directives – and at least most of the causes célèbres – involve waterways and ports. The Dibden Bay, Deurganckdok, WCT and Second Maasvlakte cases make abundantly clear that the impact of the Birds and Habitats Directives on major waterway and port projects can be tremendous. The application of these Directives has led to severe delays and even the cancellation of projects. The Cockle Fisheries case shows that even routine maintenance of waterways and ports can become subject to a prior environmental assessment under the Habitats Directive. Next, it appears that national and EU authorities and courts tend to apply and interpret the Birds and Habitats Directives rather rigidly vis-à-vis waterway and port-related interests. The European Commission and both European and national courts are particularly reluctant to accept economic considerations to justify exemptions from designation and protection obligations. Further, legal uncertainty prevails even in cases where the project was well prepared by public authorities and where the European Commission itself gave a favourable opinion, as in the case of the Second Maasvlakte. The latter case shows that national courts may produce judgments that are totally unpredictable. As a result, it becomes increasingly difficult for competent authorities to comply with the requirements arising under the Birds and Habitats Directives. Also, there is an imminent risk that divergent interpretations may distort competition between EU ports. Next, the TEN-T status of a plan or project appears hardly to influence its assessment under the Birds and Habitats Directives.

Over the past years, the Commission has taken or supported numerous useful initiatives for a better integration of nature and water protection objectives and waterway and port policies. These initiatives have strengthened the environmental awareness of waterway and port authorities and have contributed to a substantial greening of their policies over the past decade or so. Next, these initiatives may enhance awareness of the economic importance of waterways and ports among environmental authorities and NGOs. Finally, they offer guidance on best practices and therefore they contribute, albeit to a limited extent, to creating more legal certainty. Nonetheless, the initiatives referred to have not prevented recourse to the Birds and Habitats Directives to substantiate NIMBY-inspired litigation and have certainly not ensured a sufficient degree of legal certainty and policy integration.

From an analysis of remaining legal problems relating to the implementation of the Birds, Habitats and Water Framework Directives, it emerges that there still exist serious legal barriers to policy integration. The implementation process of the Birds and Habitats Directive is an example of an almost total lack of policy integration. Transport policy objectives did not come into play at all during the designation of protected natural habitats; stakeholders were hardly consulted, suffered economic losses and were not compensated. To this day, transport policy priorities, TEN-T status of waterways and ports and pre-existing international and national legal regimes of waterways and ports are, as a rule, ignored when the ‘imperative reasons of overriding public interest’ of a plan or project to be realised in a protected zone are assessed under the Habitats Directive. Waterway and port-related projects have encountered numerous legal difficulties including severe delays, resulting in additional economic and environmental damage, and, at least potentially, in competitive distortions. The main causes of these difficulties are (i) the fact that both natural habitats and potential waterway and port development areas are scarce and that they often overlap and (ii) the fundamental ambiguity of the provisions of the Birds and Habitats Directives. For these reasons, there exists an urgent need for additional waterway and port-specific guidance instruments. The invaluable Common Implementation
Strategy notwithstanding, numerous legal problems have also been identified in relation to the Water Framework Directive. These may lead to further disruptions of waterway and port-related projects in the near future.

**Policy recommendations**

It is recommended that the Commission consider additional initiatives aimed at better integrating relevant environmental and transport policies.

First, we have formulated recommendations for a clearer definition of policy objectives. These include:

- increasing the awareness of integration problems
- defining two-way integration as a key objective of waterway and port policies
- addressing specific environmental issues in future waterway and port policies.

Second, the present study contains elaborate recommendations for a better implementation of the existing legal framework. These include:

- exchanging knowledge and building legal capacity
- recommending consultation at the designation stages under the Birds and Habitats Directives
- providing additional general guidance on the Birds, Habitats and Water Framework Directives
- providing waterway and port-specific guidance on the Birds, Habitats and Water Framework Directives
- linking TEN-T and other statuses of waterway and port plans and projects to environmental assessments.

Third, we have made recommendations for a reinforcement of the legal status of waterway and port development. These include:

- attaching a legal status to the forthcoming EU Network of Inland Waterways
- creating Portus 2010, a Coherent EU Network of Strategic Port Development Areas that should:
  - reserve sufficient port expansion areas for unhindered future development while respecting environmental requirements
  - provide tools for a proper economic assessment and risk management of port plans and projects
  - be an instrument for a better integration of transport and environmental policies
  - introduce a strong legal status for port expansion areas
  - form a guarantee for commercial adaptability and managerial flexibility
  - provide a basis for just compensation of port authorities
  - support strategies for the management of non-socioeconomic values of waterways and ports
- linking TEN-T and other statuses of waterway and port plans and projects to environmental assessments
- considering amendments to the proposed Marine Strategy Directive
- taking opportunities to clarify the Birds, Habitats and Water Framework Directives
- inserting a provision on waterways and ports in the EC Treaty and introduce an Infrastructure Impact Assessment Report.

The study comprises a tentative timetable for recommended actions.
1. BACKGROUND AND APPROACH OF THE STUDY

1.1. BACKGROUND

1.1.1. The Maritime Transport Coordination Platform (MTCP)

1. The Maritime Transport Coordination Platform (MTCP) is a coordination initiative in maritime transport supported by the European Commission. MTCP addresses the need to enhance the relevance of Europe’s maritime research and education to maritime policy issues in the fields of sustainable surface transport, European competitiveness and safe, secure and efficient operations.

The concept of the platform is a managed activity open to a wide range of European organisations. The activities and the membership have both fixed elements (for continuity) and flexible, adaptive parts in order to be able to respond to changing policy imperatives over the life of the coordination action. A key feature is the engagement of stakeholders from customers, industry and government.

The objective of the maritime coordination action is to build an integrated maritime research community through networking activities, to develop a sound knowledge base to support decision-making, to draw up scenarios for the integration of research results into maritime policies and to provide tools for the assessment and revision of policy measures.

Within the framework of the MTCP project, an Expert Group on institutional and legal aspects of maritime transport was established. It is chaired by the author of the present study. Its other members are Professor Aldo Chircop (World Maritime University, Malmö, Sweden and currently Dalhousie University, Halifax, Nova Scotia, Canada), Professor Francesco Munari (University of Genoa, Italy) and Dr Vincent Power (A & L Goodbody Solicitors, Dublin, Ireland).

In 2004, this Expert Group proposed to carry out, inter alia, a study on the impact of environmental legislation on infrastructure development and maintenance for inland waterways and ports. This candidate study was selected by the European Commission as a MTCP Year 2 Study. Subsequently, it was carried out by the author.

1.1.2. Definition of the problem: the difficult implementation of EU environmental legislation in and around waterways and ports

2. Environmental legislation can have a significant impact on the development and even on the mere maintenance of inland waterway and port infrastructure. Many waterways and ports are located in or in close vicinity of environmentally valuable and sensitive areas such as coasts, estuaries, rivers, wetlands and other natural habitats, where the water, its flow, the tide and/or the transition between fresh and salt water create special ecological conditions. The protection of these areas by environmental law often constitutes an obstacle to or at least imposes constraints on maintenance or improvement works in fairways for navigation and in port areas. Moreover, the concrete impact of existing environmental legislation on transport infrastructure projects is not always clear. In some cases, important projects have been delayed or even cancelled as a result of interventions of public authorities and courts of law. Consequently, many stakeholders complain that the vital importance and environmental benefits of the utilisation of waterways and ports are often not sufficiently taken into account when a balance needs to be struck between environmental requirements and transport needs.
With a view to solving potential conflicts between environmental constraints and transport infrastructure-related plans and projects, the Directorate General for Energy and Transport (DG TREN) of the European Commission acknowledged the need for a legal analysis which would identify legal problems and formulate recommendations for a better integration of policies. According to the Terms of Reference of the present study, such an analysis should esp. explore the positive potential of the current legislative framework, e.g. possibilities for taking more adequate account of waterbound transport needs when assessing projects in the light of applicable environmental rules.

3. The problem definition above should also be considered in the broader context of public acceptance of shipping and port activities. There exists a widespread feeling that waterways, and particularly ports, have an essentially negative impact on the environment if not on society as a whole. Apart from continuously taking possession of and destroying valuable natural sites, port areas are perceived to cause air pollution, noise, vibration and lighting nuisance, to damage the landscape, to generate additional road transportation and to increase the risk of accidents, calamities and contamination with hazardous substances. Public support for waterway and port improvement and expansion works is weakening dramatically. New plans or projects almost inevitably stir up protest from environmental groups, if not from public opinion generally, and proponents are confronted with a stiff opposition, often leading to legal action. Waterway and port authorities, operators and users have to reconcile themselves with such reactions, which are often prompted by the NIMBY-syndrome. We hope that the present study can to some extent contribute to the badly needed normalisation of relations between waterways, ports, the environment and society.

1.2. OBJECTIVES

4. In the Terms of Reference, the main objectives and outcome of the present study are defined as follows:

(i) to contribute to the identification of remaining frictions between the relevant environmental directives of the EU on the one hand and EU ports and inland waterway policies and laws on the other;

(ii) to contribute to a better coordination and integration of both policy areas and legal instruments through concrete policy and/or legal measures.

The study was to focus on the implementation of *existing* environmental directives and other relevant hard law provisions, to explore the potential of these existing instruments in order to offer more guidance on their application, and to formulate suggestions for future action in this respect. Its main purpose was *not* to suggest amendments to the current environmental instruments (if, however, a pressing need or a special opportunity for such an amendment were to be identified, it would have to be touched upon as well). During the study, it was agreed that proposals could be made for the introduction of new hard or soft law instruments within the framework of EU transport policy. The recommendations below are directed at the European Commission only; it is however hoped that Member States and stakeholders of the shipping and port industries will gain some insights as well.

Nor does this study intend to provide a comprehensive discussion of all the legal aspects of the Birds, Habitats and Water Framework Directives and other instruments referred to. In other words, the present study is not a treatise on relevant environmental and transportation law, but merely a policy-oriented document that identifies a number of legal problems and formulates a set of recommenda-
tions for future waterway and port policies. Consequently, its ambition was certainly not to discuss the relevant case law and legal doctrine in its entirety or to provide interpretative guidance. We refer the readers to the excellent general commentaries by learned specialists that are available on most of the subjects that we touch upon. Some of these reference works are listed in the selected bibliography.

1.3. STRUCTURE

5. After the present introduction (Chapter 1), the study begins with a substantial chapter that recalls and summarises the current EU and international legal frameworks for (i) the protection and management of natural sites and water bodies which have an (actual or potential) navigational or port-related function, (ii) the use, maintenance and improvement of waterways and ports and (iii) the mutual integration of legal rules and policies pertaining to environmental protection and transport (Chapter 2). This overview will help us gain an understanding of the sources of potential tensions and conflicts between environmental protection and waterway and port infrastructure policies, and at the same time provide an insight into the legal instruments that are available to prevent or resolve such conflicts.

In order to exemplify the legal difficulties that may arise, as well as their considerable impact on waterway and port-related projects, the subsequent chapter presents a (non-exhaustive) digest of contentious cases relating to the application of nature protection rules in those areas (Chapter 3). This chapter contributes towards a better understanding of the tremendous impact that the application of EU environmental law can have on infrastructure projects and why.

Further, a brief overview will be given of selected past and ongoing initiatives for a better coordination and integration of policies and relevant legal rules (Chapter 4). As a matter of fact, the issue of a better integration of environmental and transport policies is not new by any means and numerous useful integration initiatives have already been taken in the past, partly on the initiative of the European Commission, partly on the initiative of waterway and port industries or environmental NGOs.

On the basis of aforementioned data, a critical analysis of remaining problems shall be made (Chapter 5) and policy and legal suggestions shall be formulated in order to improve the integration of nature protection rules and rules on the maintenance and improvement of waterways and ports (Chapter 6).

1.4. METHODOLOGY

6. The present study was carried out on the basis of substantial desk research into international conventions, EU legislation, case law, legal doctrine and policy documents. A selected bibliography is provided in the Annex to the study. For the sake of readability for non-lawyers, we have opted for a continental law-inspired citation style rather than the more hermetic Anglo-Saxon style. Many documents were downloaded from the Internet. Some of the web addresses shall not be referred to in the footnotes, but only in the bibliography. All web addresses were revisited and confirmed on 28 March 2006.

In addition to the desk research, interviews were held with a number of responsible officers, experts and stakeholders whose names are listed under item 5 of the Annex. We sincerely thank all these individuals for their willingness to cooperate and for their invaluable input.
A special word of gratitude is extended to Mr Felix Leinemann of the Inland Navigation and Ports Unit of DG TREN (Directorate G), who was the European Commission’s responsible officer for this study and whose kind cooperation and unremitting support was highly appreciated, to Ms Natascha Dofferhoff of the AVV Transport Research Centre of the Dutch Ministry of Transport at Rotterdam, who made an especially valuable contribution to the discussions with the European Commission, to Messrs Mel Davies and Jerry Stanley of British Maritime Technology in Southampton, who acted as the main contractors and enthusiastic co-ordinators of the MTCP project, and, last but not least, to my beloved Mia for ICT and other support.

1.5. LIST OF ABBREVIATIONS

7. Given the frequent use of abbreviations and acronyms, an explanatory list is provided below.

AFS International Convention on the Control of Harmful Anti-fouling Systems on Ships
AGN European Agreement on Main Inland Waterways of International Importance
AVV Adviesdienst Verkeer en Vervoer
BBL Bond Beter Leefmilieu
BRAL Brusselse Raad voor het Leefmilieu
BWM International Convention for the Control and Management of Ships’ Ballast Water and Sediments
CARDS Community Assistance for Reconstruction, Development and Stability in the Balkans
CBD Convention on Biological Diversity
CEDA Central Dredging Association
CIS Common Implementation Strategy
CCNR Central Commission for Navigation on the Rhine
CMS Convention on the Conservation of Migratory Species of Wild Animals
DG Directorate General for Environment
DG ENV Directorate General
DG TREN Directorate General for Transport and Energy
EC European Community
ECMT European Conference of Ministers of Transport
ECR European Court Reports
EC Treaty Treaty establishing the European Community
EEC European Economic Community
EEZ Exclusive Economic Zone
EFIP European Federation of Inland Ports
EIA Environmental Impact Assessment
EJIL European Journal of International Law
EMIS Environmental Management Information System
EPF EcoPorts Foundation
ESDP European Spatial Development Perspective
ESPO European Sea Ports Organisation
ESPON European Spatial Planning Observatory Network
ETS European Treaty Series
EU European Union
EuDA European Dredging Association
IADC International Association of Dredging Companies
ICZM Integrated Coastal Zone Management
<table>
<thead>
<tr>
<th>Acronym</th>
<th>Full Name</th>
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<tbody>
<tr>
<td>IEB</td>
<td>Inter-Environnement Bruxelles</td>
</tr>
<tr>
<td>IEW</td>
<td>Fédération wallonne des associations d’environnement</td>
</tr>
<tr>
<td>ILM</td>
<td>International Legal Materials</td>
</tr>
<tr>
<td>IMO</td>
<td>International Maritime Organisation</td>
</tr>
<tr>
<td>IROPI</td>
<td>Imperative Reasons of Overriding Public Interest</td>
</tr>
<tr>
<td>ISPA</td>
<td>Instrument for Structural Policies for Pre-Accession</td>
</tr>
<tr>
<td>IWT</td>
<td>Inland Waterway Transport</td>
</tr>
<tr>
<td>LOSC</td>
<td>United Nations Law of the Sea Convention</td>
</tr>
<tr>
<td>MARPOL</td>
<td>International Convention for the Prevention of Pollution from Ships</td>
</tr>
<tr>
<td>M &amp; R</td>
<td>Tijdschrift voor Milieu en Recht</td>
</tr>
<tr>
<td>MTCP</td>
<td>Maritime Transport Coordination Platform</td>
</tr>
<tr>
<td>NAIADES</td>
<td>Navigation and Inland Waterway Action and Development in Europe</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
</tr>
<tr>
<td>NIMBY</td>
<td>Not in my backyard</td>
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<tr>
<td>OJ</td>
<td>Official Journal of the European Communities</td>
</tr>
<tr>
<td>OSPAR</td>
<td>Convention for the Protection of the Marine Environment of the North-East Atlantic</td>
</tr>
<tr>
<td>PERS</td>
<td>Port Environmental Review</td>
</tr>
<tr>
<td>PIANC</td>
<td>International Navigation Association</td>
</tr>
<tr>
<td>RSPB</td>
<td>Royal Society for the Protection of Birds</td>
</tr>
<tr>
<td>SAC</td>
<td>Special Area of Conservation</td>
</tr>
<tr>
<td>SCI</td>
<td>Site of Community importance</td>
</tr>
<tr>
<td>SEA</td>
<td>Strategic Environmental Assessment</td>
</tr>
<tr>
<td>SPA</td>
<td>Special Protection Area</td>
</tr>
<tr>
<td>TEN</td>
<td>Trans-European Network</td>
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<tr>
<td>TEN-T</td>
<td>Trans-European Network for Transport</td>
</tr>
<tr>
<td>UNECE</td>
<td>United Nations Economic Commission for Europe</td>
</tr>
<tr>
<td>UNTS</td>
<td>United Nations Treaty Series</td>
</tr>
<tr>
<td>WFD</td>
<td>Water Framework Directive</td>
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<tr>
<td>WWF</td>
<td>World Wildlife Fund</td>
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</table>
2. OVERVIEW OF RELEVANT LEGAL INSTRUMENTS

2.1. INTRODUCTION

8. The present chapter recalls and summarises the current EU and international legal frameworks for (1) the protection of natural sites and water bodies which have an (actual or potential) navigational function, (2) the maintenance and improvement of waterways and ports and (3) the integration of rules and policies on environmental protection and transport.

Its purpose is to ‘set the scene’: on the basis of this introductory chapter on existing law, the current difficulties related to the practical application of rules on environmental protection shall be identified and analysed in the subsequent chapters.

The below overview of existing law will highlight that the Community Institutions are currently pursuing – are obliged to pursue, even – clear-cut objectives in both policy areas. On the one hand, there exists under the EC Treaty an obligation for the Community to protect the environment and to promote sustainability of economic development; this objective has been implemented in a number of secondary instruments, the most important of which are – for the purposes of the present study – the Birds and Habitats Directives and the Water Framework Directive. On the other hand, the Community is under a duty to develop a common transport policy. This obligation is also rooted in the EC Treaty and it has been, and indeed is still, fulfilled through the enactment of secondary legal instruments as well. A major implication of EU measures for the liberalisation of transport services, the promotion of a modal shift, state aid control of public infrastructure investments and the creation of trans-European networks is that waterways and ports should be used to their full potential, maintained in good order and further developed in order to meet additional demand.

As a consequence, environmental and transport policies and their corresponding legal frameworks potentially conflict with one another: there is an imminent risk that the free use, maintenance and improvement of waterways and ports will encounter obstacles due to the application of nature conservation and water protection rules. The preliminary discussion of applicable legal provisions below should contribute towards a better understanding of this tension. A second reason why this introductory chapter was inserted is that suggestions for a better coordination of both policies should be sought first and foremost in tools that are part and parcel of existing legal instruments, rather than through new legislative initiatives.

In order to present a comprehensive picture, we deemed it useful also to mention a number of international conventions on environmental protection and on the use and management of waterways and ports. These international law regimes may complicate the potential conflicts between policies and legal rules even further. For example, nature or water protection measures may conflict with rights of navigation as established under international law. It goes without saying that such interference from international law sources seriously threatens to aggravate the situation and to render the solution of policy and legal conflicts even more difficult.

We should also point out that the EU legislative acts and international conventions discussed below by no means constitute a comprehensive catalogue of relevant instruments, so that competition be-
tween legal instruments can in practice be far more intricate than our introductory presentation would suggest.

2.2. THE LEGAL FRAMEWORK FOR THE PROTECTION OF NATURAL HABITATS AND WATER BODIES

2.2.1. EU law

2.2.1.1. The EC Treaty

9. The initial EEC Treaty of 1957 did not contain specific provisions pertaining to the protection of the environment. However, this lacuna has not prevented a continuous increase over the ensuing decades in the political awareness that many environmental challenges need to be addressed at the European rather than the national level – either because of the nature of the problem or the response required.

The Community’s first Communication on Community environmental policy, which was published in 1971, paved the way for the first generation of legally binding instruments on environmental issues at the European level. In the absence of an explicit legal foundation for such a policy in the EC Treaty, this legislation was based on the current Articles 94 and 308 of the EC Treaty.

With the adoption of the Single European Act in 1986, a specific title on the environment was inserted into the EC Treaty. Apart from setting out the so-called objectives (Art. 174(1)) and principles (Art. 174(2)) of Community action relating to the environment, this title provided a firm legal basis for further action in this field.

10. Article 2 of the EC Treaty describes the general (environmental) objectives of the Community by stipulating that

\[ \text{[t]he Community shall have as its task [...] to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, [...] sustainable and non-inflationary growth, [...] a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life [...]}. \]

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1 For example, reference might be made to several universal and regional conventions for the protection of the marine environment, to more thematic conventions such as the Convention on the Conservation of Migratory Species of Wild Animals signed at Bonn on 23 June 1979 (also known as CMS; see www.cms.int), to numerous international, mainly bilateral conventions governing navigation on rivers and canals such as those on the Ems, the Meuse, the Moselle and the Ghent-Terneuzen Ship Canal, and to conventions on the environmental protection of international rivers, some of which form the institutional framework for the transboundary implementation of the EU Water Framework Directive. As for the selection of EU instruments, see infra, no. 31.

2 Article 94 of the EC Treaty deals with the approximation of laws, regulations or administrative provisions of the Member States by means of directives.

3 Article 308 reads: “If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures”.


The environmental objectives of the Community are further elaborated in Article 174(1) of the EC Treaty. According to this provision Community policy on the environment shall contribute to the pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems.

Pursuant to Article 174(2) of the EC Treaty, Community policy on the environment shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.6

11. A very important principle in European environmental law, which is however not mentioned in Article 174(2) of the EC Treaty, is the so-called ‘integration principle’. This principle is laid down in Article 6 of the EC Treaty, which stipulates:

Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.

The purpose of this provision is to ensure that environmental considerations are fully taken into account in the elaboration and implementation of other Community policies. It is based on the notion that environmental requirements and, subsequently, environmental policy cannot be seen as an isolated green policy which groups specific actions on the protection of water, air, soil, fauna and flora.8 As a matter of fact, the environment is affected by other policies, such as those relating to transport and economic development.

Although Article 6 of the EC Treaty calls for a permanent, continuous ‘greening’ of all Community policies, it does not allow priority to be given to environmental requirements over other requirements; the different objectives of the Community rank at the same level and the policy must endeavour to achieve all of them.9 In case of a conflict between environmental protection and other policies – for instance the policy with regard to the maintenance and improvement of waterways and ports – the Community Institutions and the Member States must try to find a compromise.10

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7 This provision sets out the activities of the Community.
8 Krämer, L., EC Environmental Law, o.c., 19, no. 1-24.
9 Ibid.
10 See infra, no. 77.
2.2.1.2. The Birds Directive\textsuperscript{11}

12. The Birds Directive was adopted in 1979. It lays down general rules on the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States. It covers the protection, management and control of these species and lays down rules for their exploitation (Art. 1). In other words, the Directive aims at a comprehensive protection of all wild birds within the Community; for that purpose, it outlines detailed provisions, including on the hunting, capturing and trading of birds\textsuperscript{12}.

13. Case law shows that Member States not only have a responsibility to protect species occurring in their own territory, but that their responsibility extends to the whole territory of the Community. This is borne out by the Court’s regular confirmation that the effective protection of birds is typically a transfrontier environment problem entailing common responsibilities for the Member States\textsuperscript{13}.

14. In the view of the European Commission, Member States have an obligation to apply the Birds Directive (and all nature legislation) not only on land, but also in the waters where they exercise sovereign rights. Therefore the Birds Directive must also be applied within the territorial waters of the Member States, in their exclusive economic zones and on their continental shelves\textsuperscript{14}. It is obvious that this obligation may sometimes be difficult to reconcile with the navigational function of these waters and in particular with internationally recognised rights of navigation (including the freedom of navigation in the EEZ, the right of innocent passage through the territorial sea, the right of navigation on international rivers and the right of access to ports)\textsuperscript{15}.

15. Article 2 of the Birds Directive obliges Member States to take the requisite measures to maintain the population of the species in question at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level. In order to maintain the population of wild birds, Member States are required to take the necessary measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all birds by the creation of protected areas or biotopes and the upkeep, management and re-establishment of biotopes (Art. 3).

Since economic requirements may be taken into account, the Birds Directive allows, at least at this point, a balancing of environmental objectives and the maintenance and improvement of waterways and ports.

16. In addition to the general obligations laid down in Articles 2 and 3 of the Birds Directive, its Article 4 requires Member States to designate Special Protection Areas (SPAs) for the threatened species listed


\textsuperscript{12} Krämer, EC Environmental Law, o.c., 180, no. 5-10.

\textsuperscript{13} ECJ 8 July 1987, 262/85, Commission v. Italy, ECR 1987, p. 3073, para 6.


\textsuperscript{15} On these rights and freedoms, see \textit{infra}, nos. 70 et seq.
in Annex I as well as for migratory bird species. SPAs are scientifically identified areas such as wetlands which are critical for the survival of the targeted species. The SPAs form part of Natura 2000, the EU’s network of protected nature sites, which was established under the Habitats Directive.

According to Article 7 of the Habitats Directive, the obligations arising from Article 6(2), 6(3) and 6(4) of the Habitats Directive are applicable to the areas classified pursuant to Article 4 of the Birds Directive. As a consequence, the designation of an area as an SPA gives it a high level of protection from potentially damaging developments.

17. The objectives of the Birds Directive may conflict with economic requirements, in particular those relating to the development of waterways and ports. Nevertheless, SPAs must be designated exclusively on the basis of the – esp. ornithological – criteria of Article 4 of the Birds Directive; economic concerns cannot be taken into account\(^\text{16}\). Since many SPAs and in particular wetlands are located in the vicinity of waterways and ports, the danger of conflicting interests is imminent.

3.2.1.3. The Habitats Directive\(^\text{17}\)

18. The aim of the Habitats Directive is to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States (Art. 2(1)). Measures taken pursuant to the Habitats Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest (Art. 2(2)).

The Habitats Directive contains substantial provisions on the conservation of natural habitats and habitats of species (Arts. 3-11) and on the protection of species (Arts. 12-16). In this study, we shall focus on the former provisions.

19. Like the Birds Directive\(^\text{18}\), the Habitats Directive is applicable not only on land, but in all areas under the jurisdiction of the Member States, including their territorial waters and the Exclusive Economic Zone\(^\text{19}\). The Habitats Directive defines a habitat as “terrestrial or aquatic areas distinguished by geographic, abiotic and biotic features, whether entirely natural or semi-natural” (Art. 1(b)). Annex I to the Directive, which defines natural habitat types of Community interest whose conservation requires the designation of special areas of conservation in order to include them in Natura 2000, expressly mentions open sea and tidal areas such as sandbanks which are slightly covered by sea water all the time, estuaries, mudflats and sandflats not covered by seawater at low tide, large shallow inlets and bays and reefs, sea cliffs and shingle or stony beaches, salt marshes and salt meadows, sea dunes and rivers\(^\text{20}\). It goes without saying that works for the maintenance or expansion of waterways and maritime or inland ports will in many cases affect such habitat types.

\(^{16}\) See, i.a., De Sadeleer, N., “La conservation des habitats naturels en droit communautaire”, in X., Natura 2000 et le droit, o.c., (9), 11 and 16-17 and the references given there.


\(^{18}\) See supra, no. 14.

\(^{19}\) ECJ 20 October 2005, C-6/04, Commission v. United Kingdom, paras 115 et seq. and esp. Advocate General Kokott’s Opinion at paras 122 et seq.; see also Backes, CH.W., Oude Elferink, A.G. and van der Ree, P., Onderzoek Wetgeving EEZ. Internationalrechtelijke Verplichtingen, Gemeenschapsrecht, Nationaal Beleid en Nationaalrechtelijk Instrumentarium, o.c., 30; De Sadeleer, N., “La conservation des habitats naturels en droit communautaire”, in X., Natura 2000 et le droit, o.c., (9), 27.

\(^{20}\) On the management of landscape features of rivers, see also Art. 10 Habitats Directive.
20. Pursuant to Article 2(3) of the Habitats Directive, measures taken under that Directive shall take account of economic, social and cultural requirements and regional and local characteristics. This express reference in the Directive to a balancing with *inter alia* economic requirements does not prevent the European Commission, national authorities and EU and national courts from imposing particularly strict conditions upon waterway or port-related projects situated in or near protected habitats on the strength of Article 6 of the Habitats Directive. We shall discuss a number of leading cases in Chapter 3 below.

21. Under the Habitats Directive, Member States are required to propose national lists of sites that are important for the conservation of habitat types or fauna and flora species. The lists must indicate which natural habitat types and which species that occur in their territory are eligible for protection (Art. 4(1)). Guidance on the interpretation of habitat types is given in the *Interpretation Manual of European Union Habitats* issued by the European Commission. At this stage economic concerns cannot be taken into account: proposals for the designation of areas as SACs are to be based solely upon the ecological criteria laid down in Annex III of the Habitats Directive.

On the basis of the national lists, the Commission, in agreement with the Member States concerned, establishes a list of Sites of Community Importance (SCIs) (Art. 4(2) Habitats Directive). For the purpose of adopting the lists of SCIs, the territory of the Union is divided into six bio-geographic regions (Boreal, Continental, Atlantic, Alpine, Macaronesian and Mediterranean). The list for the Macaronesian region (Madeira, Azores and Canary islands) was adopted by the Commission on 28 December 2001. The list for the Alpine region was adopted on 22 December 2003, the list for the Atlantic and Continental regions on 7 December 2004 and the list for the Boreal region on 13 January 2005. At the time of writing, a reference list for the Mediterranean region had been established, but the definitive list of SCIs for this region had yet to be adopted.

Next, the Member States must, as soon as possible and within six years at most, designate the sites on this list as Special Areas of Conservation (SACs) (Art. 4(4) Habitats Directive), which, together, form a coherent European ecological network called Natura 2000. As we have mentioned above, the Natura 2000 network also includes the SPAs classified by the Member States pursuant to the Birds Directive (Art. 3(1) Habitats Directive).

22. Article 6 of the Habitats Directive sets out the legal consequences of the designation of a Special Area of Conservation.

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21 *Interpretation Manual of European Union Habitats*, version EUR 15/2, adopted by the Habitats Committee on 4 October 1999 and Amendments to the “Interpretation Manual of European Union Habitats with a view to EU enlargement” (Hab. 01/11b-rev. 1), adopted by the Habitats Committee on 24 April 2002 after written consultation.


29 See supra, no. 16.
In the first place Member States must establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types (Art. 6(1)).

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

Article 6(3) states that any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of Article 6(4) – which we shall discuss below – 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. This provision is so worded as to imply that it also applies to projects and plans outside the protected area but having effects within it.30

The only permitted derogations from the obligation contained in Article 6 (3) of the Habitats Directive are set out in Article 6 (4) of the Habitats Directive. Since this provision has played and continues to play a pivotal role in many contentious cases pertaining to waterway and port-related projects, we quote it in full:


guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/ECC\textsuperscript{32} that were issued by the European Commission. From the latter document we have taken the useful flowchart below which clarifies the assessment procedures under Article 6(3) and 6(4) of the Directive, which we shall refer to frequently in this study.

CONSIDERATION OF A PLAN OR PROJECT (PP) AFFECTING A NATURA 2000 SITE

Figure 1. Flowchart clarifying the assessment procedures under Article 6(3) and 6(4) of the Habitats Directive
2.2.1.4. The Water Framework Directive

23. The Water Framework Directive (hereinafter WFD) establishes a framework for a comprehensive management of water resources in the European Community, on the basis of a common approach and with common objectives.

It applies to inland surface waters, transitional (or estuarine) and coastal waters as well as groundwater. The fundamental objectives of the Water Framework Directive are to maintain a “high status” of waters where it exists, to prevent any deterioration in the existing status of waters and to achieve at least “good status” of all waters by 2015. The main purpose of the WFD is the improvement of the overall quality of water bodies, but in addition to setting environmental quality targets based on avoiding pollution and limiting discharges and emissions of dangerous chemical substances, the Directive introduces broader ecological objectives designed to protect and prevent the deterioration of the status of all water bodies and to restore the structure and function of aquatic ecosystems.

24. Within the framework of the present study, surface waters appear to be the most relevant category of water bodies. Surface waters are defined as

\[ \text{inland waters}^{34}, \text{except groundwater}^{35}; \text{transitional waters}^{36} \text{ and coastal waters}^{37}, \text{except in respect of chemical status for which it shall also include territorial waters} \text{ (Art. 2(1) WFD).} \]

For surface waters, the WFD identifies specific objectives to be reached through programmes of measures specified in river basin management plans. First of all, Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water (Art. 4(1)(a)(i)). Next, Member States shall protect, enhance and restore all bodies of surface water with the aim of achieving good surface water status\(^{38}\) by 2015 (Art. 4(1)(a)(ii)). Also, Member States shall implement measures with the aim of progressively reducing pollution from priority substances\(^{39}\) and ceasing or phasing out emissions, discharges and losses of priority hazardous substances\(^{40}\) (Art. 4(1)(a)(iv)).

25. A special regime applies to artificial and heavily modified water bodies.

An artificial water body means

\[ \text{a body of surface water created by human activity} \text{ (Art. 2(8) WFD).} \]

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34 Inland water means all standing or flowing water on the surface of the land, and all groundwater on the landward side of the baseline from which the breadth of territorial waters is measured (Art. 2(3) WFD).

35 Groundwater means all water which is below the surface of the ground in the saturation zone and in direct contact with the ground or subsoil (Art. 2(2) WFD).

36 Transitional waters are bodies of surface water in the vicinity of river mouths which are partly saline in character as a result of their proximity to coastal waters but which are substantially influenced by freshwater flows (Art. 2(6) WFD).

37 Coastal water means surface water on the landward side of a line, every point of which is at a distance of one nautical mile on the seaward side from the nearest point of the baseline from which the breadth of territorial waters is measured, extending where appropriate up to the outer limit of transitional waters (Art. 2(7) WFD).

38 Good surface water status means the status achieved by a surface water body when both its ecological status and its chemical status are at least “good” (Art. 2(18) WFD).

39 See Art. 2(30) WFD.

40 See Art. 2(29) WFD.
A heavily modified water body means

>a body of surface water which as a result of physical alterations by human activity is substantially changed in character, as designated by the Member State in accordance with the provisions of Annex II (Art. 2(9)).

The WFD obliges Member States to protect and enhance all artificial and heavily modified bodies of water, with the aim of achieving good ecological potential\(^{41}\) and good surface water chemical status by 2015 (Art. 4(1)(a)(iii))\(^{42}\). This means that the quality targets for heavily modified water bodies will be set according to their nature and use rather than to a theoretical reference status which is determined by the pristine state of the natural water body\(^{43}\). As a consequence, obligations upon Member States are less stringent for these two special categories of water bodies.

The designation of waters as artificial and heavily modified is optional for Member States. However, a number of conditions must be fulfilled. Member States may only designate a body of surface water as artificial or heavily modified, when:

(a) the changes to the hydromorphological characteristics of that body which would be necessary for achieving good ecological status would have significant adverse effects on:
   (i) the wider environment;
   (ii) navigation, including port facilities, or recreation;
   (iii) activities for the purposes of which water is stored, such as drinking-water supply, power generation or irrigation;
   (iv) water regulation, flood protection, land drainage, or
   (v) other equally important sustainable human development activities;
(b) the beneficial objectives served by the artificial or modified characteristics of the water body cannot, for reasons of technical feasibility or disproportionate costs, reasonably be achieved by other means, which are a significantly better environmental option.

Such designation and the reasons for it shall be specifically mentioned in the river basin management plans required under Article 13 and reviewed every six years (Art. 4(3) WFD) (emphasis added).

Within the framework of the Common Implementation Strategy (CIS) for the WFD, some guidance has been provided on the conditions under which waters are eligible for inclusion in one of the two special categories referred to. It appears from these guidance documents that in many cases canals, harbours and docks may be considered to be artificial water bodies, while access channels in rivers that are extensively modified for navigation will often fall under the category of heavily modified bodies of water\(^{44}\).

26. In addition to the regime of heavily modified and artificial water bodies, the WFD allows a number of strictly conditional – derogations of a more general nature. Under certain conditions, deadlines may be extended\(^ {45}\). A separate provision is devoted to the effects of force majeure\(^ {46}\).

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\(^{41}\) Good ecological potential is the status of a heavily modified or an artificial body of water, so classified in accordance with the relevant provisions of Annex V (Art. 2(23) WFD).

\(^{42}\) Good surface water chemical status means the chemical status required to meet the environmental objectives for surface waters established in Article 4(1)(a), i.e. the chemical status achieved by a body of surface water in which concentrations of pollutants do not exceed the environmental quality standards established in Annex IX and under Article 16(7), and under other relevant Community legislation setting environmental quality standards at Community level (Art. 2(24) WFD).


\(^{44}\) Identification and Designation of Heavily Modified and Artificial Water Bodies, CIS Guidance Document no. 4, 13 and 25.

\(^{45}\) See Art. 4(4) WFD.

\(^{46}\) See Art. 4(6) WFD.
More importantly for the purposes of the present study, Member States may aim to achieve less stringent environmental objectives for specific bodies of water when they are so affected by human activity, as determined in accordance with Article 5(1)\textsuperscript{47}, or their natural condition is such that the achievement of these objectives would be infeasible or disproportionately expensive, and all the following conditions are met:

\begin{enumerate}
\item[(a)] the environmental and socioeconomic needs served by such human activity cannot be achieved by other means, which are a significantly better environmental option not entailing disproportionate costs;
\item[(b)] Member States ensure,
\begin{itemize}
\item for surface water, the highest ecological and chemical status possible is achieved, given impacts that could not reasonably have been avoided due to the nature of the human activity or pollution,
\end{itemize}
\item[(c)] no further deterioration occurs in the status of the affected body of water;
\item[(d)] the establishment of less stringent environmental objectives, and the reasons for it, are specifically mentioned in the river basin management plan required under Article 13 and those objectives are reviewed every six years (Art. 4(5) WFD)\textsuperscript{48}.
\end{enumerate}

27. The following conditional exemption, relating to new modifications of water bodies, can be particularly relevant to waterway or port development projects as well:

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

\begin{itemize}
\item failure to achieve good groundwater status, good ecological status or, where relevant, good ecological potential or to prevent deterioration in the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or
\item failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities and all the following conditions are met:
\begin{enumerate}
\item[(a)] all practicable steps are taken to mitigate the adverse impact on the status of the body of water;
\item[(b)] the reasons for those modifications or alterations are specifically set out and explained in the river basin management plan required under Article 13 and the objectives are reviewed every six years;
\item[(c)] the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and
\item[(d)] the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option (Art. 4(7) WFD).
\end{enumerate}
\end{itemize}

28. In addition to laying down environmental objectives for water status, the WFD obliges Member States to develop a number of specific policy tools, some of which may in the near future turn out to have vital importance for waterway and port authorities, operators and users.

First and foremost, Member States must identify individual river basins lying within their national territory and, for the purposes of the WFD, must assign them to individual river basin districts. Coastal waters

\textsuperscript{47} See infra, no. 26.

\textsuperscript{48} Introductory recital (31) reads: “In cases where a body of water is so affected by human activity or its natural condition is such that it may be unfeasible or unreasonably expensive to achieve good status, less stringent environmental objectives may be set on the basis of appropriate, evident and transparent criteria, and all practicable steps should be taken to prevent any further deterioration of the status of waters”.

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shall be identified and assigned to the nearest or most appropriate river basin district or districts. Member States must ensure the appropriate administrative arrangements, including the identification of the appropriate competent authority, for the application of the rules of the WFD within each river basin district lying within their territory. Member States must also ensure that a river basin covering the territory of more than one Member State is assigned to an international river basin district. The requirements of the WFD for the achievement of the environmental objectives and all programmes of measures must be coordinated for the whole of the river basin district.

Next, each Member State had to ensure that for each river basin district or for the portion of an international river basin district falling within its territory:

- an analysis of its characteristics,
- a review of the impact of human activity on the status of surface waters and on groundwater, and
- an economic analysis of water use

is undertaken according to the technical specifications set out in the Annexes to the Directive (Art. 5(1) WFD).

This obligation had to be complied with by 2004. In this respect, it is important to note that the WFD obliged Member States inter alia to collect and maintain information on the type and magnitude of the significant anthropogenic pressures to which the surface water bodies in each river basin district are liable to be subject, including pollution, significant morphological alterations to water bodies and other significant anthropogenic impacts on the status of water bodies, and an estimation of land use patterns among which industrial areas. Emissions from boats, antifouling paints, water management and transfer, waterway maintenance (dredging, bank protection, aquatic weed control, dewatering, channel relining), customer facilities (moorings, marinas, wharves), operational structures (weirs, barrages, intakes / outfalls, feeders, reservoirs) and restoration / construction of waterways are examples of potential navigational pressures. The act of navigation in itself is considered to imply certain pressures as well.

Further, the WFD obliges Member States to establish a register that includes protected areas within a river basin district which have been designated under specific Community legislation for the conservation of habitats and species directly depending on water, to ensure the establishment of programmes for the monitoring of water status and to take account of and implement the principle of recovery of the costs of water services.

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49 See Art. 3(1) WFD.
50 See Art. 3(2) WFD.
51 See Art. 3(3) WFD.
52 Art. 3(4) WFD.
53 The analyses and reviews will have to be reviewed periodically (see Art. 5(2) WFD).
54 Annex II, item 1(4).
57 See Art. 6 WFD.
58 See Art. 8 WFD.
59 See Art. 9 WFD.
Furthermore, each Member State shall ensure the establishment for each river basin district, or for the part of an international river basin district within its territory, of a programme of measures, taking account of the results of the analyses required under the WFD, in order to achieve the objectives established under the Directive. Measures must be taken \textit{inter alia} with regard to the hydromorphological conditions of the water bodies\textsuperscript{60}.

Also, Member States must ensure that a river basin management plan is produced for each river basin district lying entirely within their territory\textsuperscript{61}. The river basin management plans lay down \textit{inter alia} the framework for future waterway and port development projects affecting the hydromorphology of surface waters. As a consequence, the importance of these plans for waterway and port managers and users cannot be overestimated.

Finally, Article 16 of the Water Framework Directive, which provides for strategies against pollution of water, may have a considerable impact on the activities of industrial plants located along waterways or in port areas and on dredging activities. Article 16(1) WFD requires the adoption by the European Parliament and the Council of specific measures to progressively reduce discharges, emissions and losses of polluting substances, and to cease or phase out discharges, emissions and losses of priority hazardous substances\textsuperscript{62}.

A daughter Directive on environmental quality standards and pollution control in the field of water policy is under preparation.

29. The introductory recitals to the WFD acknowledge that the success of the Directive relies on close cooperation and coherent action at Community, Member State and local level as well as on information, consultation and involvement of the public, including users\textsuperscript{63}. Therefore, the WFD contains elaborate provisions on public information and consultation which oblige Member States to encourage the active involvement of “all interested parties” in the implementation of the Directive, in particular in the production, review and updating of the river basin management plans. Member States shall ensure that, for each river basin district, they publish and make available for comments a number of documents relating to the plans to the public, including users\textsuperscript{64}.

\textsuperscript{60} So-called basic measures shall consist of, \textit{i.e.}, “for any other significant adverse impacts on the status of water identified under Article 5 and Annex II, in particular measures to ensure that the hydromorphological conditions of the bodies of water are consistent with the achievement of the required ecological status or good ecological potential for bodies of water designated as artificial or heavily modified. Controls for this purpose may take the form of a requirement for prior authorisation or registration based on general binding rules where such a requirement is not otherwise provided for under Community legislation. Such controls shall be periodically reviewed and, where necessary, updated” (Art. 11(3)(i) WFD).

\textsuperscript{61} See Art. 13 WFD.

\textsuperscript{62} Priority substances means substances identified in accordance with Article 16(2) and listed in Annex X. Among these substances there are priority hazardous substances which means substances identified in accordance with Article 16(3) and 16(6) for which measures have to be taken in accordance with Article 16(1) and 16(8) (Art. 2(30) WFD).

\textsuperscript{63} Introductory recital (14).

\textsuperscript{64} See Art. 14 WFD, which reads:

“1. 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. Member States shall ensure that, for each river basin district, they publish and make available for comments a number of documents relating to the plans 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.”
30. For its part, the European Commission has set up an extensive programme for a well thought-out and balanced implementation, called the Common Implementation Strategy (CIS)\textsuperscript{65}. Such a specific integration effort was called for by the legislator\textsuperscript{66}. Under the extremely valuable Common Implementation Strategy, a number of important guidance documents have already been prepared, at least some of which pay particular attention to the impact of the WFD on navigation and ports. Also, professional organisations of the inland waterway transport and seaport industries were invited to participate in several strategic groups including the Strategic Coordination Group and a newly created Strategic Steering Group on the WFD and Hydromorphology\textsuperscript{67}. Integration of EU policies is indeed a key objective of the CIS. Below, we shall discuss these aspects in more detail. Also, we shall identify a number of outstanding issues which, due to continuing legal uncertainty, have caused and continue to cause concern to stakeholders of the shipping and port industries\textsuperscript{68}.

2.2.1.5. Selected other instruments

31. This section does not aim to provide an exhaustive overview of all other secondary EU legislation pertaining to the protection of the environment that may have a bearing on the use, maintenance and improvement of waterways and ports. It shall merely discuss a number of selected instruments that may be of particular relevance.

Other EU environmental law instruments such as the Directives on waste reception facilities in ports\textsuperscript{69} and the use of marine fuels\textsuperscript{70} impose certain obligations upon waterway and port authorities, operators and users as well, but do not relate directly to infrastructural developments and will not be commented upon further. Directives on air quality will not be discussed either\textsuperscript{71}. The recent proposal for a Directive establishing a Framework for Community Action in the field of Marine Environmental Policy will be discussed in Chapter 6\textsuperscript{72}.

\textsuperscript{66} See \url{http://europa.eu.int/comm/environment/water/water-framework/implementation.html}.

\textsuperscript{67} See infra, nos. 87 and 215 et seq.

\textsuperscript{68} See infra, nos. 221 et seq.


\textsuperscript{72} See infra, nos. 277-278.
2.2.1.5.1. The EIA Directive

32. Since the best environmental policy consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects, a first version of a Directive on the assessment of the effects of certain public and private projects on the environment was adopted by the Council back in 1985.

Under Article 2(1) of the current – revised – version of Directive 85/337/EEC, Member States are required to adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects.

Such an Environmental Impact Assessment (EIA) must identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect effects of a project on (i) human beings, fauna and flora, (ii) soil, water, air, climate and the landscape, (iii) material assets and the cultural heritage and (iv) the interaction between the aforementioned factors (Art. 3).

33. For a first group of projects listed in Annex I to the Directive, an EIA must always be made (Art. 4(1)). Item 8 of Annex I to Directive 85/337/EEC mentions, inter alia:

(a) Inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1 350 tonnes;
(b) Trading ports, piers for loading and unloading connected to land and outside ports (excluding ferry piers) which can take vessels of over 1 350 tonnes.

For a second group of projects (Annex II to Directive 85/337/EEC), the Member States determine through a case-by-case examination or on the basis of thresholds or criteria set by the Member State whether the project shall be made subject to an assessment (Art. 4(2)). When a case-by-case examination is carried out or thresholds or criteria are set, the relevant selection criteria set out in Annex III shall be taken into account (Art. 4(3)). Item 10 of Annex II to Directive 85/337/EEC mentions, inter alia, the following projects which can be particularly relevant to waterway and port-related developments:

[...]
(c) Construction of railways and intermodal transshipment facilities, and of intermodal terminals (projects not included in Annex I);
[...]
(e) Construction of roads, harbours and port installations, including fishing harbours (projects not included in Annex I);
(f) Inland-waterway construction not included in Annex I, canalisation and flood-relief works;
(g) Dams and other installations designed to hold water or store it on a long-term basis (projects not included in Annex I);
[...]
(k) Coastal work to combat erosion and maritime works capable of altering the coast through the construction, for example, of dykes, moles, jetties and other sea defence works, excluding the maintenance and reconstruction of such works;
[...].

Item 11(d) adds sludge-deposition sites and item 12(b) mentions marinas.

34. The Directive further contains detailed provisions on, *inter alia*, the information of the public and its right to participate (Art. 6), the information of the public on decisions to grant or refuse development consent (Art. 9) and the right of access to justice (Art. 10a).

2.2.1.5.2. The SEA Directive

35. Article 3(1) of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment obliges Member States to make an environmental assessment for plans and programmes which are likely to have significant environmental effects. Plans and programmes for which such a Strategic Environmental Assessment (SEA) is always required are listed in Article 3(2) of Directive 2001/42/EC. These include plans and programmes (a) which are prepared for, *inter alia*, transport, water management and tourism 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 the Habitats Directive.

For plans and programmes which determine the use of small areas at local level and for minor modifications to existing plans and programmes, an environmental assessment is only necessary where the Member States determine that they are likely to have significant environmental effects (Art. 3(3)). For these and other plans which set the framework for future development consent of projects, Member States shall determine whether they are likely to have such effects, either through case-by-case examination or by specifying types of plans and programmes or by combining both approaches (Art. 3(5)).

The environmental assessment referred to must be carried out during the preparation of a plan or programme and before its adoption or submission to the legislative procedure (Art. 4(1)). It takes the form of an environmental report in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated (Art. 5(1)).

The SEA Directive contains provisions on mandatory public and transboundary consultations, decision-making, information and monitoring (Arts. 6-10).

2.2.1.5.3. The Environmental Information Directive

36. Directive 2003/4/EC on access to environmental information aligns Community legislation with the provisions on public access to environmental information of the Aarhus Convention, which we shall discuss below. Increased public access to environmental information and the dissemination of such information should contribute to a greater awareness of environmental matters, a free exchange of

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76 See infra, no. 48.
views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.\textsuperscript{77}

Article 3 of Directive 2003/4/EC grants every natural or legal person, regardless of citizenship, nationality or residence, and without his having to state an interest, a right of access to environmental information held or produced by public authorities. The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases only. The grounds for refusal, laid down in Article 4 of the Directive, should be interpreted in a restrictive way, whereby the public interest served by disclosure should be weighed against the interest served by the refusal.\textsuperscript{78}

\subsection*{2.2.1.5.4. The Environmental Participation Directive}\textsuperscript{79}

37. The provisions on public participation in environmental decision-making of the Aarhus Convention are implemented into EU law by Directive 2003/35/EC on public participation in environmental decision-making. Effective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken.\textsuperscript{80} The provisions of the Directive on public participation concerning plans and programmes are however not applicable to plans and programmes for which a specific public participation procedure is carried out under Directive 2001/42/EC or under the Water Framework Directive (Art. 2(5)).

\section*{2.2.2. International law}

\subsection*{2.2.2.1. The CBD}\textsuperscript{81}

38. The objectives of the Convention on Biological Diversity signed at Rio de Janeiro on 5 June 1992, also known as the CBD, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising from the utilisation of genetic resources (Art. 1). The Convention was signed by a large number of Contracting Parties, including the EC.

The Convention translates its guiding objectives into binding commitments in its substantive provisions (Arts. 6-20). These contain, \textit{inter alia}, obligations on the protection and management of natural habitats (Art. 8) and on impact assessment and minimizing adverse impacts (Art. 14).

\textsuperscript{77} Directive 2003/4/EC, introductory recital (1).
\textsuperscript{78} Directive 2003/4/EC, introductory recital (16).
\textsuperscript{80} Directive 2003/35/EC, introductory recital (3).
2.2.2.2. The Bern Convention

39. The European Community is a contracting party to the 1979 Convention on the Conservation of European Wildlife and Natural Habitats, generally known as the Bern Convention.

This Convention is intended to promote cooperation between the Signatory States in order to conserve wild flora and fauna and their natural habitats and to protect endangered migratory species. Article 4 of the Convention obliges each Contracting Party, inter alia, to take appropriate and necessary legislative and administrative measures to ensure the conservation of the habitats of wild flora and fauna species and the conservation of endangered natural habitats. Also, the Contracting Parties must, in their planning and development policies, have regard to the conservation requirements of the protected areas, so as to avoid or minimise as far as possible any deterioration of such areas. Article 9 of the Convention allows each Contracting Party to make certain exceptions from these obligations, inter alia in the presence of overriding public interests and provided that there is no other satisfactory solution and that the exception will not be detrimental to the survival of the population concerned.

2.2.2.3. The Ramsar Convention

40. The Convention on Wetlands, signed at Ramsar in 1971, provides a framework for national action and international cooperation for the conservation and wise use of wetlands and their resources.

Each Contracting Party is under a duty to designate suitable wetlands within its territory for inclusion in a List of Wetlands of International Importance (Art. 2(1)). The Contracting Parties must formulate and implement their planning so as to promote the conservation of the wetlands included in the list, and as far as possible the wise use of wetlands in their territory (Art. 3(1)).

The deletion or restriction of protected wetlands is governed by Article 4(2) of the Convention, which provides:

Where a Contracting Party in its urgent national interest, deletes or restricts the boundaries of a wetland included in the List, it should as far as possible compensate for any loss of wetland resources, and in particular it should create additional nature reserves for waterfowl and for the protection, either in the same area or elsewhere, of an adequate portion of the original habitat.

The “urgent national interest” criterion would appear to be less stringent than the “imperative reasons of overriding public interest” test under Article 6(4) of the EU Habitats Directive.

2.2.2.4. The Transboundary Watercourses Convention

40-1. The 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes has been ratified by 34 UNECE countries and the European Community. It is
intended to strengthen national measures for the protection and ecologically sound management of transboundary surface waters and groundwaters. The Convention obliges Parties to prevent, control and reduce water pollution from point and non-point sources. The Convention also includes provisions for monitoring, research and development, consultations, warning and alarm systems, mutual assistance, institutional arrangements, and the exchange and protection of information, as well as public access to information. It obliges the Contracting Parties *inter alia* to ensure that sustainable water-resources management, including the application of the ecosystems approach, is promoted (Art. 3(1)(i)).

2.2.2.5. The Marine Dumping Conventions

41. Dredged material accounts for the largest part of all marine dumping. Most of this material originates in maintenance operations to prevent that harbours, rivers and other waterways would silt up, and a small percentage of it is moderately to heavily contaminated. International action to control dumping, including of dredged material, began in the early seventies and resulted in one treaty of a global nature, i.e. the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (hereinafter the London Convention)*86*, and a number of regional agreements. The UN Law of the Sea Convention contains a number of framework rules of a more general nature. Since the EU Birds, Habitats and Water Framework Directives can have major implications for dredging, we shall briefly outline these international instruments as well.

42. The London Convention aims at controlling and preventing marine pollution through the regulation of dumping into the sea of waste materials*87*. The Convention is universal in its scope; the internal waters are however excluded from it (Art. III(3)).

Article I of the London Convention lays down its basic principle which obliges the Contracting Parties to promote individually and collectively the effective control of all sources of pollution of the marine environment, and especially to take all practicable steps to prevent the pollution of the sea by the dumping of waste and certain other harmful matter. The London Convention applies a so-called ‘black- and grey-list’ approach for wastes, with the dumping of certain materials being prohibited, and that of other matters being conditional upon the delivery of a permit.

The London Convention was updated by the 1996 Protocol*88*. Upon its entry into force it is intended to replace the London Convention. The 1996 Protocol is however much more restrictive. It follows an approach under which dumping of wastes or other matter is prohibited except for those materials specifically enumerated in Annex I (Art. 4). The latter again includes dredged material.

43. The London Convention was supplemented with several regional agreements. Most of these conventions share the abovementioned ‘black- and grey-list’ approach.

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*87* Whilst the London Convention controls disposal of waste from ships, MARPOL (i.e. the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, done at London on 2 November 1973 and on 1 June 1978) regulates accidental spills or other discharges resulting from ship operations.

The first regional agreement to be concluded was the 1972 Oslo Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft\(^99\). This Convention applied to the North-East Atlantic and the North Sea. Its approach was similar to that of the London Convention.

In 1992 in Paris, the Parties to the Oslo Convention signed the Convention for the Protection of the Marine Environment of the North-East Atlantic (the OSPAR Convention)\(^90\), which entered into force on 25 March 1998 and replaced the Oslo Convention. Annex II to the OSPAR Convention prohibits the dumping of all wastes or other matter except for those wastes which are specifically listed, such as dredged material, and on condition that an authorisation is issued\(^91\).

Another regional agreement to deal with dumping is the Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area\(^92\), which entered into force on 17 January 2000. Article 11 of the Helsinki Convention prohibits dumping in the Baltic Sea area. Dredged material may however be dumped subject to a prior special permit issued by the appropriate national authority in accordance with the provisions of Annex V to the Helsinki Convention.

44. The UN Law of the Sea Convention\(^93\) (hereinafter LOSC) provides a general framework for the rights and obligations of states relating to the oceans. Contrary to the abovementioned agreements, the rules of the LOSC in relation to dumping are not aimed at elaborating standards to govern this form of pollution, but rather to lay down a jurisdictional framework within which such standards, developed in other fora, may be prescribed and enforced\(^94\).

Article 210(1) and 210(2) LOSC obliges States to adopt laws and regulations and to take all other measures necessary to prevent, reduce and control pollution of the marine environment by dumping\(^95\). Such national laws, regulations and measures shall ensure that dumping is not carried out without the permission of the competent authorities of States (Art. 210(3)). The Article further urges the Contracting Parties to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution by dumping (Art. 210(4)). Dumping within the territorial sea and the exclusive economic zone or onto the continental shelf may not be carried out without the express prior approval of the coastal State, which has the right to permit, regulate and control such dumping after due consideration of the matter with other States which by reason of their geographical situation may be adversely affected thereby (Art. 210(5)). Finally, the national rules may not be less effective than the global rules and standards (Art. 210(6)), which are considered to be those of the London Convention, and after its entry into force, those of the 1996 Protocol.

In accordance with Article 216 of the Law of the Sea Convention, States that are Parties to the Law of the Sea Convention are also legally bound to enforce the laws, regulations, applicable international rules and standards adopted with respect to the prevention of marine pollution by dumping.

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\(^99\) Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, done at Oslo on 15 February 1972 (\textit{UNTS}, Vol. 932, 3).


\(^91\) See Art. 3 and 4 of Annex II to the OSPAR Convention.


\(^95\) According to Article 1(1)(5)(a) of the Law of the Sea Convention “dumping” means “any deliberate disposal of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea” or “any deliberate disposal of vessels, aircraft, platforms or other man-made structures at sea”.
2.2.2.6. The AFS Convention*

45. The International Convention on the Control of Harmful Anti-Fouling Systems on Ships signed at London in 2001 (hereinafter the AFS Convention) defines anti-fouling systems as “a coating, paint, surface treatment, surface, or device that is used on a ship to control or prevent attachment of unwanted organisms” (Art. 2(2)). Studies have shown that these compounds persist in the water, killing sealife, harming the environment and possibly entering the food chain. The AFS Convention aims at reducing or eliminating the adverse effects of anti-fouling systems on the marine environment and human health.

The Convention will enter into force 12 months after 25 states representing 25 per cent of the world’s merchant shipping tonnage have ratified it. At the time of writing, these conditions had not been met.


In view of the case law we shall discuss below, the possibility of the AFS Convention having some relevance to the assessment of waterway or port projects under the Birds, Habitats and Water Framework Directives cannot be ruled out.

2.2.2.7. The BWM Convention**

46. Ships’ ballast water and sediment discharges cause invasion of unwanted species in many areas of the world, the effects of which are devastating to the ecology. The issue has also attracted some attention on the occasion of the implementation of the EU Birds and Habitats Directives.

The objective of the International Convention for the Control and Management of Ships’ Ballast Water and Sediments signed at London in 2004 (the BWM Convention) is to prevent, minimise and ultimately eliminate the transfer of harmful aquatic organisms and pathogens through the control and management of ships’ ballast water and sediments (Art. 2(1)).

The Convention obliges each Contracting Party to require that ships which are entitled to fly its flag or operating under its authority comply with the requirements set forth in the Convention, including the applicable standards and requirements in the Annex, and to take effective measures to ensure that

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those ships comply with those requirements (Art. 4(1)). Moreover, each Party shall, with due regard to its particular conditions and capabilities, develop national policies, strategies or programmes for ballast water management in its ports and waters under its jurisdiction that accord with, and promote the attainment of the objectives of the Convention (Art. 4(2)). Also, the Contracting Parties must ensure adequate sediment reception facilities in ports and terminals (Art. 5). The Convention further calls upon the Parties to promote research and to cooperate between them, and it contains provisions on survey, certification and inspection of ships.

The Convention will enter into force 12 months after ratification by 30 states, representing 35 per cent of the world’s merchant shipping tonnage.

2.2.2.8. The Espoo Convention

47. The Convention on Environmental Impact Assessment in a Transboundary Context was signed at Espoo in 1991. It sets out the obligations of Parties to assess the environmental impact of certain activities that are likely to cause significant adverse transboundary effects (Art. 2(3)). It also lays down the general obligation of States to notify and consult each other on all major projects under consideration that are likely to have a significant adverse environmental impact across borders (Art. 3). Upon signature, the European Community, which is a party to the Espoo Convention, formulated a reservation concerning its application “in accordance with the Community’s internal rules”.

In the context of the Espoo Convention, a Protocol was signed at Kiev in May 2003. Once in force, this Protocol will require a Strategic Environmental Assessment (SEA) to evaluate the environmental consequences of official draft plans and programmes. An SEA is undertaken much earlier in the decision-making process than an EIA and is therefore seen as a key tool for sustainable development. An SEA shall be carried out for plans and programmes which are prepared for, inter alia, transport, water management and tourism, and which set the framework for future development consent for projects listed in Annex I and any other project listed in Annex II that requires an Environmental Impact Assessment under national legislation (Art. 4(2)). The Protocol also provides for extensive public participation (Art. 8). The Protocol’s content is very similar to that of the abovementioned EU Directive 2001/42/EC.

2.2.2.9. The Aarhus Convention

48. The 1998 Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters establishes a number of rights of the public with regard to the environment. The Convention provides for the right of everyone to receive environmental information that is held by public authorities (the first pillar), the right to participate from an early stage in environmental decision-making (the second pillar), and the right to challenge, in a court of law, public information.

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102 Krämer, L., EC Environmental Law, o.c., 155, no. 4-35.
103 Council Decision 8962/1/03 REV 1 of 15 May 2003.
104 Convention on access to information, public participation in decision-making and access to justice in environmental matters, done at Aarhus, Denmark, on 25 June 1998 (UNTS, Vol. 2161, 447; see http://europa.eu.int/comm/environment/aarhus).
decisions that have been taken without respecting the two aforementioned rights or environmental law in general (the third pillar).

It may be recalled that the first pillar of the Aarhus Convention was implemented in Community law by Directive 2003/4/EC on access to environmental information\textsuperscript{105}, and the second pillar by Directive 2003/35/EC on public participation in environmental decision-making\textsuperscript{106}. In order to implement the third pillar of the Aarhus Convention, the Commission has adopted a proposal for a Directive to fully address the requirements of the Aarhus Convention on access to justice in environmental matters\textsuperscript{107}. Another proposal comprises a Regulation on the application of the provisions of the Aarhus Convention to EC institutions and bodies\textsuperscript{108}.

2.3. THE LEGAL FRAMEWORK FOR THE USE, MAINTENANCE AND IMPROVEMENT OF WATERWAYS AND PORTS

2.3.1. EU law

2.3.1.1. The EC Treaty

49. Whilst existing EU and international law spell out far-reaching obligations with respect to environmental protection in and around waterways and port areas, another weighty body of EU and international rules ensures the free use, maintenance and improvement of transport infrastructures, including waterways and ports. Some of these rules directly concern the execution and financing of construction and maintenance works; other relevant rules facilitate the development of waterborne transport in a more general way and only presuppose the maintenance and development of adequate waterway and port infrastructures. It should however be clear from the outset that under EU law obligations to carry out infrastructure works are less strict than those relating to the conservation and management of natural habitats and water bodies\textsuperscript{109}. The regime of TEN-T projects comes closest to legally imposing the realisation of certain waterway and port projects of common interest, but this remains conditional upon compliance with applicable environmental rules.

50. As mentioned above, the European Community is assigned with the task of promoting throughout the Community a string of objectives as set out in Article 2 of the EC Treaty. For these purposes, Article 3(1)(f) of the EC Treaty obliges the Community to develop, \textit{inter alia}, a common policy in the sphere of transport.

The objectives of the common transport policy coincide with those of the Treaty itself. Article 70 of the EC Treaty, which is the first of the specific provisions on transport contained in Title V of Part Three of the EC Treaty\textsuperscript{110}, refers to the objectives set out in Articles 2 and 3 of the EC Treaty by stating that “the objectives of this Treaty shall, in matters governed by this title, be pursued by Member States within

\begin{itemize}
\item \textsuperscript{105} See \textit{supra}, no. 36.
\item \textsuperscript{106} See \textit{supra}, no. 37.
\item \textsuperscript{109} Comp. Royal Haskoning, \textit{Environmental Impact of Inland Shipping and Waterway Development – DGG/TB/26000415}, Draft Final Report, 16 August 2005, 60, no. 5.2.2.
\item \textsuperscript{110} Title V of Part Three embodies Articles 70 to 80 of the EC Treaty.
\end{itemize}
the framework of a common transport policy”\(^{111}\). Therefore, far from involving a departure from the fundamental provisions of the Treaty, such as those concerning the establishment of the common market, the object of the rules relating to the common transport policy is to implement and complement them by common action\(^{112}\).

Although the obligation to develop a common transport policy was already provided for in the EEC Treaty of 1957, progress towards the materialisation of a common transport policy – including the enactment of legal rules on the development and maintenance of waterways and ports – was slow\(^{113}\). For nearly thirty years the European Community was unable to implement the common transport policy envisaged by the EC Treaty\(^{114}\). The European Parliament even brought an action before the European Court of Justice because the Council had – contrary to its obligations under the Treaty – failed to develop a common transport policy and esp. to extend freedom to provide services to the transport sector. In 1985, the Court found that the Council was indeed in breach of the relevant Treaty provisions, namely (current) Article 71(1)(a) and 71(b) of the EC Treaty\(^{115}\). The next year, the Single European Act accelerated the decision-making process by introducing majority voting in the Council for decisions relating to, \textit{inter alia}, maritime shipping.

The first steps in the common transport policy were initiatives aimed at creating a single market in the transport sector. In the 1980s and 1990s, several instruments for the liberalisation of the sector were adopted. Interestingly, the 1986 regulatory package for maritime transport already comprised a regulation on the granting of financial support to certain transport infrastructure projects, including one in a seaport\(^{116}\).

In 1992, the Treaty of Maastricht reinforced the political, institutional and budgetary foundations for a common transport policy. The Treaty inserted into the EC Treaty specific provisions on the establishment and development of trans-European networks (TENs) in the areas of transport, telecommunications and energy infrastructure. First, the revised Article 3(o) of the EC Treaty expressly obliges the Community to encourage the establishment and development of trans-European networks. Secondly, Article 154(1) of the EC Treaty specifies that, in order to help achieve the internal market and economic and social cohesion and to enable citizens of the Union, economic operators and regional and local communities to derive full benefit from the setting-up of an area without internal frontiers, the Community is obliged to contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures. Within the framework of a system of open and competitive markets, action by the Community is to aim at promoting the interconnection and interoperability of national networks as well as access to such networks. It shall take account in particular of the need to link island, landlocked and peripheral regions with the central regions of the Community (Art. 154(2)). In order to achieve these objectives, the Community (i) shall establish a series of guidelines covering the objectives, priorities and broad lines of measures envisaged in the sphere of trans-European networks, which shall identify projects of common interest, (ii) shall implement any measures that may prove necessary to ensure the interoperability of the networks, in particular in the field of technical standardisation and (iii) may support projects of common interest supported by Member States, which are identified in the framework of the guidelines referred


\(^{112}\) Ibid., para 25.

\(^{113}\) For an overview, see, \textit{i.a.}, Greaves, R., \textit{EC Transport Law}, Pearson Education, Harlow, 2000, 3 et seq.


to, particularly through feasibility studies, loan guarantees or interest-rate subsidies; the Community may also contribute, through the Cohesion Fund, to the financing of specific projects in Member States in the area of transport infrastructure. The Community’s activities shall take into account the potential economic viability of the projects (Art. 155(1)). The guidelines and other measures referred to above must be adopted by the Council. Guidelines and projects of common interest which relate to the territory of a Member State require the approval of the Member State concerned (Art. 156). Several commentators believe that, once a TEN project has been identified by the Council, Member States are obliged to carry it out\textsuperscript{117}, but others, in our view without foundation, hesitate on this important point\textsuperscript{118}. Be that as it may, Community guidelines for the development of the trans-European transport network (TEN-T) were adopted in 1996; we shall discuss these guidelines separately below\textsuperscript{119}.

In September 2001, the European Commission’s White Paper \textit{European transport policy for 2010: time to decide} identified sustainable development – i.e. to meet the needs of the present generation without compromising those of future generations – as a new imperative in order to offer an opportunity, if not a lever, for adapting the common transport policy. This objective, as introduced by the Treaty of Amsterdam, has to be achieved by integrating environmental considerations into Community policies\textsuperscript{120}. A few months earlier, a strategy for sustainable development had already been agreed upon by the Gothenburg European Council of 15 and 16 June 2001. The Council declared that shifting the balance between modes of transport was at the heart of the sustainable development strategy and called specifically for a shift from road to rail, water and public passenger transport. Several instruments for the shifting of the balance between modes of transport and making sustainable development a reality will be discussed below.

2.3.1.2. Liberalisation instruments

51. After the warning issued in the 1985 Court ruling referred to above, the publication in the same year of the Commission’s White Paper \textit{Completing the internal market} which placed transport in the forefront of the moves towards completion of the internal market\textsuperscript{121} and the adoption of the Single European Act, the Common transport policy rapidly developed initiatives aimed at creating a single market in the transport sector.

Generally speaking, the opening up of the transport market has been achieved. In the air, road and maritime transport sectors the process of liberalisation is almost complete. In essence, the objective of the several liberalisation measures was to increase the quality and performance of these sectors and to support their further development\textsuperscript{122}. Whilst the relevant liberalisation instruments do not as


\textsuperscript{119} See infra, nos. 54 et seq.

\textsuperscript{120} European Commission, \textit{White Paper ‘Europeans transport policy for 2010: time to decide’}, o.c., 9-10.

\textsuperscript{121} European Commission \textit{White Paper ‘Completing the internal market’}, COM(85) 310 final, 29-30, nos. 108-112.

\textsuperscript{122} Relevant legal instruments include:
- Council Regulation 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (\textit{OJ}, no. 378, 31 December 1986, 1);
- Council Regulation 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (\textit{OJ}, no. 364, 12 December 1992, 7).
such regulate the use and development of waterway and port infrastructures, their general drift is to provoke a further growth of maritime and inland waterway transportation. As a result, these instruments may be held to presuppose the provision of adequate waterway connections and port facilities.

52. Similarly, in order to ensure the proper functioning of the internal market, the so-called Strawberry Regulation obliges Member States to take action in the case of interruptions of the free movement of goods through blockades of ports, waterways and roads.  

53. In the Commission’s 1997 *Green Paper on Sea Ports and Maritime Infrastructure*, which was the first step towards the development of a specific EU port-oriented policy, the Commission stressed that port services must function in conformity with competition rules as well as with the major freedoms. It was also stated that, complementary to the case-by-case approach on the basis of the EC Treaty, a specific regulatory framework should be developed at Community level aiming at a more systematic liberalisation of the port services market in main ports attracting international traffic. This led to a Communication from the Commission to the Council and the European Parliament entitled *Reinforcing quality services in seaports: a key for European transport*, which included a first proposal for a Directive of the European Parliament and of the Council on market access to port services. The explanatory memorandum to the 2001 Proposal recognised the crucial role ports play in intra and extra Community trade:

> They [the ports] will be called upon to play an increasing role in attempts to transfer more goods and passengers to the environmentally less damaging and less congested sea transport mode and to encourage intermodal transport and make it less costly; there is hence a need to ensure their effectiveness.

- Council Regulation 1356/96 of 8 July 1996 on common rules applicable to the transport of goods or passengers by inland waterway between Member States with a view to establishing freedom to provide such transport services (*OJ L*, no. 175, 13 July 1996, 7);  
- Council Regulation 3921/91 of 16 December 1991 laying down the conditions under which non-resident carriers may transport goods or passengers by inland waterway within a Member State (*OJ L*, no. 373, 31 December 1991, 1);  
- Council Regulation 2919/85 of 17 October 1985 laying down the conditions for access to the arrangements under the Revised Convention for the navigation of the Rhine relating to vessels belonging to the Rhine Convention (*OJ L*, no. 280, 22 October 1985, 4);  

125 European Commission, *Green Paper on seaports and maritime infrastructure*, o.c., 4-5, no. 20.  
In other words, the need was felt for a specific Community regulatory framework that would facilitate access to the port services market in order to increase efficiency and flexibility with in ports, and thereby contribute to the promotion of short sea shipping and combined transport.\textsuperscript{129}

The 2001 Port Services Proposal was rejected by the European Parliament in 2003.\textsuperscript{130} In 2004, the Commission put forward a new proposal for a Directive of the European Parliament and of the Council on market access to port services.\textsuperscript{131} The key philosophy, principles and objectives the Commission wished to attain with its 2001 Proposal remained the same.\textsuperscript{132} With its 2004 Proposal, the Commission aimed to improve the performance of the ports and encourage their development in order “to tackle the EU’s ever growing transport needs [...] to transfer more goods and passengers to maritime transport”.\textsuperscript{133} Short sea shipping and motorways of the sea, which were to absorb most of the freight increase forecast up to 2010 (50% more than 1998), are expected to bring much more business to ports, which therefore had to improve their performance.\textsuperscript{134} Also, the 2004 Proposal expressly stated that “[i]t is important to ensure that development of new ports and port facilities is encouraged by this Directive”.\textsuperscript{135} Meanwhile, the 2004 Directive proposal was also rejected by the European Parliament; on 8 March 2006, it was withdrawn by the Commission, which did, however, announce that other seaport policy instruments would be presented in the near future.

Irrespective of their political fate, the Commission’s proposals for a Port Services Directive, very much in the same vein as the previously discussed liberalisation measures, presupposed the establishment of adequate – including new – port facilities.

2.3.1.3. The TEN-T Guidelines

54. In addition to the abovementioned EC Treaty provisions on the TENs\textsuperscript{136} and general secondary legislation on the networks\textsuperscript{137}, network-specific Guidelines were adopted. Based on Article 156 of the EC Treaty, Decision 1692/96/EC of 23 July 1996\textsuperscript{138} establishes Guidelines for the development of the trans-European transport network (TEN-T). Since we shall return to this instrument in our recommendations, it is worthwhile recalling the provisions it contains with special relevance to waterways and ports.

\textsuperscript{129} Introductory recital (5) of the 2001 Proposal for a Directive on market access to port services.


\textsuperscript{133} Proposal for a Directive of the European Parliament and of the Council on market access to port services, o.c., 3.

\textsuperscript{134} Ibid.

\textsuperscript{135} Introductory recital (45) of the 2004 Proposal for a Directive on market access to port services.

\textsuperscript{136} See supra, no. 50.


The Guidelines cover the objectives, priorities and broad lines of measures envisaged in the area of the TEN-T (Art. 1(1)). Pursuant to their Article 1(2), the Guidelines “constitute a general reference framework intended to encourage the Member States and, where appropriate, the Community in carrying out projects of common interest, the purpose of which is to ensure the cohesion, interconnection and interoperability of the trans-European transport network, as well as access to that network”. The same provision stipulates that the implementation of the projects of common interest “depends on their degree of maturity and the availability of financial resources, without prejudging the financial commitment of a Member State or the Community” and that the Guidelines are also intended to facilitate the involvement of the private sector. Decision 1692/96 further contains a clear time schedule by stating that the TEN-T is to be established gradually by 2020 by integrating land, sea and air transport infrastructure networks throughout the Community (Art. 2 (1)).

The detailed objectives of the TEN-T are described as follows:

The network must:
(a) ensure the sustainable mobility of persons and goods within an area without internal frontiers under the best possible social and safety conditions, while helping to achieve the Community’s objectives, particularly in regard to the environment and competition, and contribute to strengthening economic and social cohesion;
(b) offer users high-quality infrastructure on acceptable economic terms;
(c) include all modes of transport, taking account of their comparative advantages;
(d) allow the optimal use of existing capacities;
(e) be, insofar as possible, interoperable within modes of transport and encourage intermodality between the different modes of transport;
(f) be, insofar as possible, economically viable;
(g) cover the whole territory of the Member States of the Community so as to facilitate access in general, link island, landlocked and peripheral regions to the central regions and interlink without bottlenecks the major conurbations and regions of the Community;
(h) be capable of being connected to the networks of the European Free Trade Association (EFTA) States, the countries of Central and Eastern Europe and the Mediterranean countries, while at the same time promoting interoperability and access to these networks, insofar as this proves to be in the Community’s interest (Art. 2(2)).

The TEN-T comprises transport infrastructure, traffic management systems and positioning and navigation systems (Art. 3(1)). The transport infrastructure comprises road, rail and inland waterway networks, motorways of the sea, seaports and inland waterway ports, airports and other interconnection points between modal networks (Art. 3(2)).

The Guidelines further set out the broad lines of Community measures (Art. 4) as well as the priorities (Art. 5). The latter are:

(a) establishment and development of the key links and interconnections needed to eliminate bottlenecks, fill in missing sections and complete the main routes, especially their cross-border sections, cross natural barriers, and improve interoperability on major routes;
(b) establishment and development of infrastructure which promotes the interconnection of national networks in order to facilitate the linkage of islands, or areas similar to islands, and landlocked, peripheral and outermost regions on the one hand and the central regions of the Community on the other, in particular to reduce the high transport costs of these areas;
(c) the necessary measures for the gradual achievement of an interoperable rail network, including, where feasible, routes adapted for freight transport;
(d) the necessary measures to promote long-distance, short sea and inland shipping;
(e) the necessary measures to integrate rail and air transport, especially through rail access to airports, whenever appropriate, and the infrastructures and installations needed;
(f) optimisation of the capacity and efficiency of existing and new infrastructure, promotion of intermodality and improvement of the safety and reliability of the network by establishing and improving intermodal terminals and their access infrastructure and/or by deploying intelligent systems;
(g) integration of safety and environmental concerns in the design and implementation of the trans-European transport network;
(h) development of sustainable mobility of persons and goods in accordance with the objectives of the European Union on sustainable development.

The Guidelines provide that any project which (i) pursues the objectives set out in Article 2, (ii) concerns the network described in Article 3, (iii) corresponds to one or more of the priorities set out in Article 5 and (iv) is potentially economically viable on the basis of the socioeconomic costs and benefits, shall be considered to be of common interest (Art. 7(1)). Member States must “take any measures which they consider necessary within the framework of the principles laid down in Article 1 (2)”(Art. 7(3)).

Further, the Guidelines contain express provisions on compliance with environmental legislation (Art. 8).139

56. The importance of the further development of the main Community’s waterways was already recognised in 1992 in the Commission’s White paper The future development of the common transport policy, which stated the following:

Waterways are particularly efficient for bulk traffic but have not yet been widely exploited for other trades; the possibilities are limited by accessibility to suitable, well-equipped waterways, such as the Rhine and the Rhone. Evidence available suggests that the overall European waterway network is capable in time of handling much more than the current traffic, provided realistic investment is made in maintenance and works to improve the existing network, in particular, to remove some major bottlenecks and stimulate transport particularly along the north-south axis and eastwards towards the new Länder of Germany and Central and Eastern Europe. Improved handling facilities to cope with the increase in container traffic are particularly necessary if any expansion in this sector is to occur140.

According to the TEN-T Guidelines, the trans-European inland waterway network is to comprise rivers and canals and various branches and links which connect them. It shall, in particular, render possible the interconnection between industrial regions and major conurbations and link them to ports (Art. 11(1)). The minimum technical characteristics for waterways forming part of the network shall be those laid down for a class IV waterway, which allows the passage of a vessel or a pushed train of craft 80 to 85 m long and 9.50 m wide. Where a waterway forming part of the network is modernised or constructed, the technical specifications should correspond at least to class IV, should enable class Va/Vb to be achieved at a later date and should make satisfactory provision for the passage of vessels used for combined transport. Class Va allows the passage of a vessel or a pushed train of craft 110 m long and 11.40 m wide and class Vb allows the passage of a pushed train of craft 172 to 185 m long.

139 See infra, no. 79.
Inland ports shall form part of the network, in particular as points of interconnection between the waterways referred to above and in the trans-European combined transport network and other modes of transport (Art. 11(3)).

The network includes inland ports (a) open to commercial traffic, (b) located on the network of inland waterways as shown in the outline in Annex I, Section 4 to the Guidelines, (c) interconnected with other trans-European transport routes as shown in Annex I, and (d) equipped with transhipment facilities for intermodal transport or with an annual freight traffic volume of at least 500 000 tonnes (Art. 11(3a)). The inland ports of the network equipped with transhipment facilities for intermodal transport or with an annual freight traffic volume of at least 500 000 tonnes are shown in Annex I to the Guidelines (Art. 11(3b)).

The network shall also include the traffic management infrastructure. This shall entail in particular the establishment of an interoperable, intelligent traffic and transport system known as the ‘River Information Services’ intended to optimise the existing capacity and safety of the inland waterway network and to improve interoperability with other modes of transport (Art. 11(4)).

Annex II to the Guidelines sets out criteria and specifications for TEN-T projects of common interest. For the inland waterway network and inland ports, the criteria and specifications are as follows:

**Inland ports**

Projects of common interest must relate solely to infrastructure open to any user on a non-discriminatory basis.

In addition to projects relating to the connections and inland ports mentioned in Annex I, projects of common interest will be deemed to include any infrastructure project corresponding to one or more of the following categories:

1. access to the port from waterways;
2. port infrastructure inside the port area;
3. other transport infrastructures inside the port area;
4. other transport infrastructures linking the port to other elements of the trans-European network.

Any project which concerns the following work will be deemed to be of common interest: construction and maintenance of all elements of the transport system generally open to all transport users within the port and of links with the national or international transport network; in particular, this includes the development and maintenance of land for commercial and other port-related purposes, the construction and maintenance of road and rail connections, the construction and maintenance, including dredging, of access routes and of other areas of water in the port, and the construction and maintenance of navigation aids and traffic management, communication and information systems in the port and on the access routes (Annex II, Section 4).

Since their 2004 revision, the Guidelines pay considerable attention to the position of seaports in the TEN-T.

According to the Guidelines, seaports shall permit the development of sea transport and shall constitute shipping links for islands and the points of interconnection between sea transport and other modes of transport. They shall provide equipment and services to transport operators. Their infrastructure shall provide a range of services for passenger and goods transport, including ferry services and short- and long-distance shipping services, including coastal shipping, within the Community and between the latter and non-member countries (Art. 12(1)). The seaports included in the network
shall correspond to one of the categories, A (international seaports), B (Community seaports) or C (regional ports), defined as follows:

A. international seaports: ports with a total annual traffic volume of not less than 1,5 million tonnes of freight or 200 000 passengers which, unless it is an impossibility, are connected with the overland elements of the trans-European transport network and therefore play a major role in international maritime transport;

B. Community seaports, not included in category A: these ports have a total annual traffic volume of not less than 0,5 million tonnes of freight or between 100 000 and 199 999 passengers, are connected, unless it is an impossibility, with the overland elements of the trans-European transport network and are equipped with the necessary transhipment facilities for short-distance sea shipping;

C. regional ports: these ports do not meet the criteria of categories A and B but are situated in island, peripheral or outermost regions, interconnecting such regions by sea and/or connecting them with the central regions of the Community.

The seaports in category A shall be shown on the indicative maps in the outline plans in Section 5 of Annex I, on the basis of the most recent port data (Art. 12(2)).

In addition to the criteria set out in Article 7, seaport projects of common interest related to seaports included in the trans-European seaport network shall comply with the criteria and specifications in Annex II (Art. 12(3)).

These criteria and specifications read:

1. **Common conditions for projects of common interest relating to seaports in the network**

Projects of common interest must relate solely to infrastructure open to any user on a non-discriminatory basis.

Any project which concerns the following work will be deemed to be of common interest: construction and maintenance of all elements of the transport system generally open to all transport users within the port and of links with the national or international transport network; in particular, this includes the development and maintenance of land for commercial and other port-related purposes, the construction and maintenance of road and rail connections, the construction and maintenance, including dredging, of access routes and of other areas of water in the port, and the construction and maintenance of navigation aids and traffic management, communication and information systems in the port and on the access routes.

2. **Specifications for projects of common interest relating to the seaport network**

Any project which meets the following specifications will be deemed to be of common interest:

<table>
<thead>
<tr>
<th>Project specifications</th>
<th>Port category</th>
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<tbody>
<tr>
<td>I. Promotion of short-distance sea shipping</td>
<td>Projects relating to ports in category A</td>
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<tr>
<td>Infrastructure necessary for the development of short-distance sea and sea-river shipping</td>
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<td>II. Access to ports</td>
<td>Projects relating to ports in categories A and B</td>
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<tr>
<td>Access to ports from sea or inland waterway</td>
<td>Projects relating to ports in categories A, B and C</td>
</tr>
<tr>
<td>Permanent accessibility of ports in the Baltic Sea situated at approximately latitude 60° north and beyond, including capital costs for icebreaking works during winter</td>
<td></td>
</tr>
</tbody>
</table>
Creation or improvement of hinterland access linking the port to other elements of the trans-European transport network through rail, road and inland-waterway connections

Projects relating to ports in category A

Development of existing hinterland access linking the port to other elements of the trans-European transport network through rail, road and inland-waterway connections

Projects relating to ports in categories A and B

III. Port infrastructure within the port area

Development of port infrastructure in order to increase intermodal efficiency

Projects relating to ports in categories A and B

Upgrading of the port infrastructure, in particular in ports on islands and in peripheral and outermost regions

Projects relating to ports in category C

Development and installation of management and information systems such as EDI (electronic data interchange) or other systems of intelligent management of goods and passenger traffic using integrated technologies

Projects relating to ports in categories A, B and C

Development of port installations to receive waste

Projects relating to ports in categories A, B and C

(Annex II, Section 5).

58. The concept of motorways of the sea was first mentioned by the Commission in its White Paper European transport policy for 2010: time to decide\(^{141}\). According to the Commission, shipping within Europe does not use its full potential. The Commission however considers it to be a really competitive alternative to land transport. The White Paper stressed that

\[\text{for this reason, certain shipping links, particularly those providing a way around the bottlenecks in the Alps and Pyrenees, should be made part of the trans-European network, just like motorways or railways. At national level, shipping routes between European ports will have to be chosen to create networks […]}.\] However, these lines will not develop spontaneously. Based on proposals from the Member States, they will have to be “sign-posted”, notably by granting funds (from the Marco Polo Programme and the Structural Funds) to encourage start-ups and give them an attractive commercial dimension.

The revised version of the TEN-T Guidelines provides that the trans-European network of motorways of the sea is intended to concentrate flows of freight on sea-based logistical routes in such a way as to improve existing maritime links or to establish new viable, regular and frequent maritime links for the transport of goods between Member States so as to reduce road congestion and/or improve access to peripheral and island regions and States. Motorways of the sea should not exclude the combined transport of persons and goods, provided that freight is predominant (Art. 12a(1)). The trans-European network of motorways of the sea shall consist of:

\[^{141}\text{European Commission, White Paper 'European transport policy for 2010: time to decide', o.c., 42-43.}\]
facilities and infrastructure concerning at least two ports in two different Member States. The facilities and infrastructure shall include elements, in at least one Member State, such as the port facilities, electronic logistics management systems, safety and security and administrative and customs procedures, as well as infrastructure for direct land and sea access, including ways of ensuring year-round navigability, in particular the availability of facilities for dredging and icebreakers for winter access (Art. 12a(2)).

Also, waterways or canals, as identified in Annex I, which link two European motorways of the sea, or two sections thereof, and make a substantial contribution to shortening sea routes, increasing efficiency and saving shipping time shall form part of the trans-European network of motorways of the sea (Art. 12a(3)).

According to the Guidelines, the projects of common interest of the trans-European network of motorways of the sea shall be proposed by at least two Member States and shall be geared to actual needs. The projects proposed shall in general involve both the public and private sectors in accordance with procedures which, before aid granted from the national budgets can be supplemented, if necessary, by aid from the Community, provide for a tendering process in one of the following forms: (a) a public call for tenders organised jointly by the Member States concerned, intended to establish new links from the category A port, as defined in Article 12(2), which they select in advance within each sea area, as referred to in project No 21 in Annex III; (b) in so far as the location of the ports is comparable, a public call for tenders organised jointly by the Member States concerned and targeting consortia bringing together at least shipping companies and ports located in one of the sea areas, as referred to in project No 21 in Annex III (Art. 12a(4)).

The projects of common interest of the trans-European network of motorways of the sea shall focus on the facilities and infrastructure which make up the network of motorways of the sea. They may include, without prejudice to Articles 87 and 88 of the Treaty, start-up aid if, as a result of the tendering process, public support is deemed necessary for the financial viability of the project. Start-up aid shall be limited to two years and shall be granted only in support of duly justified capital costs. The aid may not exceed the minimum estimated amount required to start up the links concerned. The aid may not lead to distortions of competition in the relevant markets contrary to the common interest. They may also include activities which have wider benefits and are not linked to specific ports, such as making available facilities for icebreaking and dredging operations, as well as information systems, including traffic management and electronic reporting systems (Art. 12a(5)).

The projects of common interest of the trans-European network of motorways of the sea shall be submitted to the Commission for approval (Art. 12a(7)).

Interestingly, for the purposes of the present study, these provisions expressly mention dredging operations as a part of projects of common interest. In 2003, the High-Level Group on the Trans-European Transport Network chaired by Mr Van Miert also suggested a number of measures including the provision of port facilities preferably reserved for motorways of the sea such as Ro-Ro terminals, logistics equipment, parking spaces and facilities for lorry drivers.

59. The TEN-T Guidelines also identify a combined transport network which comprises, inter alia, certain inland waterways and intermodal terminals suitable for combined transport (Art. 14).

142 These provisions deal with state aids.
143 High Level Group on the Trans-European Transport Network, Report, 42.
60. Furthermore, the TEN-T Guidelines designate a number of priority projects (Art. 19). Following the recommendations in the report submitted by the High-Level Group on the TEN-T to the Commission in 2003, the revised TEN-T Guidelines now contain 30 priority projects on which work is due to start before 2010, including two inland waterway projects and motorways of the seas.

The priority projects identified in Annex III to the Guidelines are declared to be of European interest (Art. 19a).

The inland waterway priority projects of the revised TEN-T Guidelines include the Seine-Scheldt waterway connection and certain sections of the Rhine/Meuse-Main-Danube corridor linking the North Sea to the Black Sea. A number of motorways of the sea are also comprised in the list of priority projects.

61. To conclude, making available additional infrastructure capacity for maritime and inland waterway transportation is expressly recognised as a priority of EU policy on trans-European networks for transport. Relevant TEN-T measures may include the adaptation of inland waterways, construction works for new port facilities and dredging works inside and outside port areas.

2.3.1.4. Modal shift instruments

62. The Commission’s White Paper *European transport policy for 2010: time to decide* acknowledged that there is a growing imbalance between modes of transport in the EU and a need to shift the balance between these modes. In order to resolve these problems, the Commission set two priority objectives to be attained by 2010: regulated competition between modes and a link-up of the modes of transport for successful intermodality. Such a regulated competition between the modes of transport is needed in order to enhance the chances of more environmentally friendly modes such as sea, inland waterway or railway transport to become competitive alternatives.\(^\text{144}\)

One of the principal measures proposed is the promotion of two key components of intermodality, transport by sea and inland waterway transport, in order to cope with road congestion and the inadequacy of railway infrastructure. Both modes have been underused in the past. In the White Paper, the Commission considered that the way to revive short sea shipping is to develop motorways of the sea within the framework of the TEN-T. In order to reinforce the position of inland waterway transport, which, by nature, is intermodal, “waterway branches” should be established and transhipment facilities installed to allow a continuous service all year round. Further, the Commission argued that a modal shift depended largely on the availability and quality of transhipment installations to enable integrated solutions for door-to-door concepts.

The Commission proposed in the White Paper to launch a large-scale Marco Polo programme to support intermodal initiatives and alternatives to road transport in the early stages until they become commercially viable. The ultimate objective of the programme, which was adopted on 22 July 2003, is to reduce road congestion and improve the environmental performance of the whole transport system.

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\(^{145}\) See also European Commission, *Intermodality and intermodal freight transport in the European Union - A system’s approach to freight transport - Strategies and actions to enhance efficiency, services and sustainability*, COM(97) 243 final, 29 May 1997.
by shifting international freight transport from road to short sea shipping, rail and inland waterway or to a combination of modes of transport in which road journeys are as short as possible\(^\text{146}\).

63. On 15 July 2004 the Commission presented a proposal to establish a second, significantly expanded Marco Polo programme from 2007 onwards\(^\text{147}\). In addition to the existing actions that are eligible for funding under the programme, such as modal shift measures, Marco Polo II includes new actions such as motorways of the sea and traffic avoidance measures. At the time of writing, the legislative procedure had not yet been concluded.

64. In its most recent Communication on Short Sea Shipping the Commission highlighted the progress in the sector and expressed its intention to continue to promote short sea shipping in order to alleviate current and future transport problems in Europe\(^\text{148}\).

65. To conclude, the EU institutions are pursuing a more intensive use of the potential of maritime and inland waterway transportation. Promoting the provision of adequate waterway and port facilities is part and parcel of this modal shift policy.

2.3.1.5. State aid policy

66. The EC Treaty rules on state aid are contained in Articles 87 to 89 of the EC Treaty which also apply to the transport sector\(^\text{149}\). While Article 87(1) of the EC Treaty prohibits in principle the granting of aid to an undertaking by a Member State, Articles 87(2) and 87(3) of the EC Treaty set out the exceptions and identify a number of situations that shall or may be considered to be compatible with the common market.

The aforementioned provisions on state aid are supplemented by Article 73 of the EC Treaty, which is part of the specific provisions on (inland) transport contained in Title V of Part Three of the EC Treaty and provides that aid measures are compatible with the Treaty if they meet the needs of transport coordination or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.

67. In order to implement and clarify the application of the Treaty rules on state aid for the maritime and shipbuilding industries, specific Community instruments were adopted\(^\text{150}\). For several years now, the EU seaports industry and the EU Parliament have been advocating the need to establish specific

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\(^{147}\) Proposal for a Regulation of the European Parliament and of the Council establishing the second “Marco Polo” programme for the granting of Community financial assistance to improve the environmental performance of the freight transport system (Marco Polo II), COM(2004) 478 final.


guidelines on state aid for seaports. So far, such guidelines have not been adopted. Instead, the issue of financing of seaports and maritime infrastructure has been dealt with in several other instruments\textsuperscript{151} and in a number of individual decisions.

68. The Commission generally holds that state aid to port and transport infrastructure does not involve aid within the meaning of Article 87(1) EC Treaty if it concerns investments in ‘public general’ infrastructure being \textit{de facto} and \textit{de jure} open to all users on a non-discriminatory basis\textsuperscript{152}. ‘Public general’ infrastructure includes maritime access and maintenance (e.g. dikes, breakwaters, locks and other high water protection measures; navigable channels, including dredging and ice-breaking navigation aids, lights, buoys, beacons; floating pontoon ramps in tidal areas), public land transport facilities within the port area, short connecting links to the national transport networks or TENs, and infrastructure for utilities up to the terminal site.

In its landmark decision on the Flemish Seaports Decree\textsuperscript{153}, the European Commission considered that the public financing made available for the construction, maintenance (including the processing of dredging material) and exploitation of maritime access routes and the maintenance and exploitation of sea locks, does not constitute state aid. The Commission was of the opinion that the activity of ensuring adequate access to and inside ports does not constitute an economic activity liable to distort competition between Member States but is rather a public task in the general interest. The funding scheme at hand had to be regarded as a public compensation limited to the actual costs, not giving an advantage to the port authority. With regard to investments in project-related infrastructure (such as docks, mooring infrastructure and light port infrastructure) and maintenance of berths along the maritime access routes, the Commission could not exclude the existence of state aid as these could be used to support an economic activity carried out by the port authority and hence could provide an economic advantage vis-à-vis its competitors. Next, the Commission investigated whether this type of state aid could be considered compatible with the common market on the basis of Article 87(3)(c) of the EC Treaty. Pursuant to the latter provision, state aid may be considered compatible with the common market on condition that it facilitates the development of certain economic activities or of certain economic areas, and that the aid does not adversely affect trading conditions to an extent contrary to the common interest. In this respect, the Commission first noted that the Community had for some time pursued a policy of promoting the transfer of goods from road to more environmentally friendly modes such as maritime transport in order to achieve a balanced and sustainable intermodal transport system for the development of which ports are key components. The Commission further referred to its White paper \textit{European transport policy for 2010: time to decide} by stating that short-sea shipping is a priority for the Community, as it could ease road congestion and provide the means to link up different modes of transport, thus making intermodal transport a real competitive alternative to road transport. The Commission pointed out that in order to develop such services the necessary infrastructure had to be put in place. The Commission continued that:

It is therefore in the Community interest to develop ports and, in particular, to promote investments in port infrastructure so that they can accommodate an increase in maritime transport and also that a high level of efficiency and safety can be realised. As a consequence, investments in port infrastructure serve the common interest within the meaning of Article 87(3)(c) of the Treaty.

The Commission also observed that the measure at hand complied with the criteria that it commonly applies to transport infrastructure under which public funding of 50% of the project costs is accepted on condition that the infrastructure is available to all potential users on a non-discriminatory basis.

On the basis of Article 87(3)(c) of the EC Treaty the Commission for example also authorised Flemish aid to develop intermodal terminals along waterways holding that the development of activities shifting traffic from road to other modes was in the common interest within the meaning of the said provision\textsuperscript{154}. In other cases, the Commission found that state aid for the acquisition of combined transport equipment, transhipment equipment and aid for information systems contributed to the development of the combined transport sector and was thus covered by Article 87(3)(c) of the EC Treaty\textsuperscript{155}. Aid for the development of seaports in order to replace road transport by new short-sea shipping lines was authorised on the same basis\textsuperscript{156}.

\textbf{69.} Apart from Article 87(3)(c) of the EC Treaty, Article 73 of the EC Treaty is increasingly applied by the Commission in order to authorise aid measures aimed at developing inland waterway transport and inland waterway infrastructure. As we explained earlier, Article 73 of the EC Treaty establishes that aid measures are compatible with the Treaty if they meet the needs of transport coordination. The Commission considered that public financing meets the needs of transport coordination if the following conditions are met: first, the state contribution towards the total financing of the project is necessary to enable the materialisation of the project or activity in the interest of the Community; second, the aid must be granted on non-discriminatory terms; third, the aid must not distort competition contrary to the common interest\textsuperscript{157}.

For example, the Commission considered aid that was granted by the Austrian Government to support operational costs of intermodal inland navigation liner services on the River Danube to be compatible with these conditions. The expected shift from road transport to inland navigation was not seen as a distortion of competition contrary to the common interest but considered to be in line with the common transport policy which aims to promote such a shift\textsuperscript{158}. Public financing for the construction of loading and unloading facilities along the Flemish waterways was also found to be compatible with the Treaty by virtue of Article 73 of the EC Treaty\textsuperscript{159}. The Commission reiterated, \textit{inter alia}, that the Community had pursued a policy of achieving a balanced intermodal transport system and that a policy of fostering a modal shift was part and parcel of this policy. In order to achieve this policy “priority should be given to infrastructure investments for e.g. inland waterways and intermodal operations”. The Commission further considered that there was a need to revitalise the position of inland waterway transport in the overall transport system by way of establishing transhipment facilities. The

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Commission saw inland waterway transhipment facilities, by their nature, to be nodal points for intermodal transport operations\textsuperscript{160}.

\subsection*{2.3.2. International law}

\textbf{70.} As indicated above, the use, maintenance and improvement of waterways and ports is also determined by a number of rules which are part of international law of the sea. This branch of international law distinguishes between several marine areas each of which enjoys a particular legal status. Rules and measures for the protection of natural habitats and water bodies that create an obstacle to the free use, maintenance or improvement of international shipping routes and ports may, as a consequence, conflict with applicable – written or unwritten – international law as well.

\subsubsection*{2.3.2.1. The regime of inland waterways and ports}

\textbf{71.} First, the internal waters are those waters which lie landward of the baseline from which the territorial sea and other maritime zones are delimited\textsuperscript{161}. Internal waters thus comprise bays, estuaries, rivers, canals and ports as well as waters enclosed by straight baselines\textsuperscript{162}. The coastal state enjoys full territorial sovereignty over these waters. Consequently, there exists no right of innocent passage through them, such as it exists in the territorial seas\textsuperscript{163}. This also implies the absence of any right under customary international law for foreign ships to enter a state’s ports. However, while there is no such right of entry in customary law, the position in treaty law is very different, for many treaties confer rights of entry\textsuperscript{164}. Most commonly, those rights are found in bilateral treaties. In addition, the 1923 multilateral Convention and Statute on the International Regime of Maritime Ports\textsuperscript{165} ensures non-discrimination in the granting of access to ports. The Convention has been ratified by a number of Member States of the EU in which important European ports are located. Article 2, para 1 of the Convention reads:

\begin{quote}
Subject to the principle of reciprocity [...], every Contracting State undertakes to grant the vessels of every other Contracting State equality of treatment with its own vessels, or those of any other State whatsoever, in the maritime ports situated under its sovereignty or authority, as regards freedom of access to the port, the use of the port, and the full enjoyment of the benefits as regards navigation and commercial operations which it affords to vessels, their cargoes and passengers.
\end{quote}

To summarise, although there is no customary right to enter ports, many states enjoy such rights under a multilateral or bilateral treaty\textsuperscript{166}.

\textbf{72.} Navigable rivers and canals in a state are also part of the internal waters. Whilst it is commonly accepted that there exists under international customary law no right of free navigation for the benefit of all states on international rivers, i.e. rivers that flow through the territory of more than one state or

\textsuperscript{160} Ibid., para 34.
\textsuperscript{161} Art. 8 LOSC.
\textsuperscript{163} Ibid., 61.
\textsuperscript{164} Ibid. 63.
\textsuperscript{165} Convention and Statute on the International Regime of Maritime Ports, signed at Geneva on 9 December 1923 (\textit{LNTS}, Vol. 58, 285).
\textsuperscript{166} Churchill, R.R. and Lowe, A.V., \textit{The law of the sea, o.c.}, 63-64.
constitute the boundary of a state, many international rivers are subject to such a right established by treaty or by unilateral act of a riparian state.

Article 5(1) of the first Peace Treaty of Paris, signed on 30 May 1814, established freedom of navigation on the Rhine, whilst the declaration on the freedom of navigation on the Scheldt was contained in a secret article. The principle of freedom of navigation on the navigable course of international rivers was subsequently confirmed in the Final Act of the Congress of Vienna of 1815, which laid down a number of basic rules for the management of European rivers. Its Article 109 reads:

La navigation dans tout le cours des rivières indiquées dans l’article précédent, du point où chacune d’elles devient navigable jusqu’à son embouchure, sera entièrement libre, et ne pourra, sous le rapport du commerce, être interdite à personne […]

Article 113 of the Final Act of the Congress of Vienna obliged each state bordering on the rivers to execute the necessary works in the bed of the river so that navigation does not encounter any obstacle.

The provisions of the Final Act of the Congress of Vienna are considered as minimum obligations that continue to bind the riparian states. The riparian states can only agree upon facilities of navigation that are greater than those provided for in the Final Act167.

As regards navigation on the Rhine, the principles of the Final Act of the Congress of Vienna were first implemented by the Act of Mainz of 31 March 1831, and subsequently by the Act of Mannheim, signed on 17 October 1868168. Apart from establishing the right of free navigation on the Rhine, the Act of Mannheim contains express provisions on maintenance and improvement works. In particular, pursuant to Article 28 of the Act of Mannheim, the Contracting Parties undertake, each for its territory, to put into good order and maintain the Rhine channel. Article 30 further obliges the riparian states to take the necessary steps to ensure that navigation on the Rhine is not obstructed by any structure, such as bridges. Pursuant to Article 31 of the Act of Mannheim hydraulic engineers delegated by the riparian states will conduct surveys to examine the state of the river, to observe the results of measures taken for its improvement and to note new obstacles which impede navigation.

Article 9(1) of the Treaty of Separation between Belgium and Holland of 1839 states that the Articles 108 to 117 of the Final Act of the Congress of Vienna are applicable to the navigable rivers separating the two countries or traversing both Belgian and Dutch territory. The 1839 Treaty recognised the equal rights of all nations to enjoy freedom of navigation on the rivers Scheldt and Meuse169 and laid down a number of additional guarantees in order to secure free navigation between Antwerp and the sea over Dutch territory170. According to the Belgian government, the Scheldt regime obliges the Netherlands to deepen the Dutch part of the river so as to enable the port of Antwerp to receive deep-draught vessels.

The Final Act of Vienna remained silent on the navigation of the Danube. Article 1 of the Definitive Statute of the Danube, signed on 23 July 1921, declared navigation of the Danube free and open to all

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168 Revised convention for Rhine navigation, signed in Mannheim on 17 October 1868 (consolidated version on http://www.ccr-zkr.org).
169 Ibid., 80.
flags under conditions of perfect equality. The latter treaty is however no longer valid\textsuperscript{171}. The regime of the Danube was subsequently dealt with in the Belgrade Convention, signed on 18 August 1948, which obliges the Danubian States to maintain their sections of the Danube in a navigable condition for inland waterway vessels and, on the appropriate sections, for sea-going vessels, to carry out the works necessary for the maintenance and improvement, of navigation conditions and not to obstruct or hinder navigation on the navigable channels of the Danube (Art. 3).

The multilateral Barcelona Convention and Statute concerning the Regime of Navigable Waterways of International Concern\textsuperscript{172}, signed in 1921, laid down a comprehensive regime for freedom of navigation on international waterways on the basis of reciprocity. The convention, which was not widely ratified, contains express provisions on maintenance and improvement works. Pursuant to Article 10(1) of the Barcelona Statute, each riparian state is under a duty, on the one hand, to refrain from all measures likely to prejudice the navigability of the waterway or to reduce the facilities for navigation, and, on the other, to take as rapidly as possible all necessary steps for removing any obstacles and dangers which may occur to navigation. Article 10(2) further stipulates, \textit{inter alia}, that if such navigation necessitates regular upkeep of the waterway, each of the riparian States is obliged as towards the others to take such steps and to execute such works on its territory as are necessary for this purpose as quickly as possible. Article 10(3) even regulates the right of States to carry out improvement works. In the absence of legitimate grounds for opposition by one of the riparian States, including the State territorially interested, based either on the actual conditions of navigability in its territory, or on other interests such as, \textit{inter alia}, the maintenance of the normal-water conditions, requirements for irrigation, the use of water-power, or the necessity for constructing other and more advantageous ways of communication, a riparian State may not refuse to carry out works necessary for the improvement of the navigability which are asked for by another riparian State, if the latter State offers to pay the cost of the works and a fair share of the additional cost of upkeep. It is understood, however, that such works cannot be undertaken so long as the State on the territory of which they are to be carried out objects on the ground of vital interests.

More recently, freedom of navigation was confirmed in Article 43 of the Berlin Rules on Water Resources, which were adopted by the International Law Commission in 2004 and are supposed to reflect the contemporary status of customary international river law. Moreover, Article 46 states:

\begin{quote}
Each riparian State is, to the extent of the means available, required to maintain in good order that portion of a navigable watercourse within its jurisdiction\textsuperscript{173}.
\end{quote}

Whilst the Berlin Rules devote considerable attention to other, non-navigational uses of watercourses and to environmental aspects, the quoted provision highlights that the obligation to carry out maintenance works does not reflect an outdated 19\textsuperscript{th}-century concern but remains an essential feature of the international regime of navigable waterways.

On 19 January 1996, a European Agreement on Main Inland Waterways of International Importance (AGN) was signed at Geneva\textsuperscript{174}. This Convention was prepared under the auspices of UNECE and lays down a coordinated plan for the development and construction of a network of inland water-

\textsuperscript{171} Vitányi, B., \textit{The International Regime of River Navigation}, o.c., 111.

\textsuperscript{172} Convention and statute on the regime of navigable waterways of international concern, signed at Barcelona, 20 April 1921 (LNTS, Vol. 7, 35).


\textsuperscript{174} Contracting Parties are Bulgaria, Croatia, Czech Republic, Hungary, Italy, Lithuania, Luxembourg, the Netherlands, the Republic of Moldova, Romania, the Russian Federation, Slovakia and Switzerland.
ways, referred to as the “network of inland waterways of international importance” or “E waterway network” which the Parties intend to undertake within the framework of their relevant programmes. The E waterway network consists of inland waterways and ports of international importance as described in Annexes I and II to the Agreement (Art. 1). The Agreement sets out the technical characteristics to which the network must conform.

Currently, the European Commission is considering *inter alia* the option of adhering to the conventional regime of the Rhine and the Danube, whereby the Community would become a member of the CCNR and the Danube Commission; another option would be to create an intergovernmental Pan-European Inland Navigation Organisation on the basis of a new international convention. These developments again underline the continuing importance of the treaty law regime of Europe’s international waterways.

### 2.3.2.2. The regime of the territorial sea

According to Article 2(1) of the United Nations Convention on the Law of the Sea (LOSC), the sovereignty of a coastal state extends, beyond its land territory and internal waters, to an adjacent belt of sea, described as the territorial sea. The breadth of the territorial sea may not exceed 12 nautical miles measured from the baseline (Art. 3 LOSC).

The sovereignty of a coastal state over the territorial sea is however less extensive than over its land territory or internal waters. Pursuant to Article 17 LOSC, ships of all states, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.

The right of innocent passage means that ships have the right to navigate through the territorial sea for the purpose of (i) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters, or (ii) proceeding to or from internal waters or a call at such roadstead or port facility (Art. 18(1) LOSC).

The coastal state shall not hamper the innocent passage of foreign ships through the territorial sea, except in accordance with the LOSC. In particular, it is not lawful for the coastal state to impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage, or to discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State (Art. 24(1)). In those areas of the territorial sea used as shipping routes towards ports, a state would not be empowered to limit or prohibit passage.

The coastal state may regulate innocent passage through the territorial sea with a view to the conservation of the living resources of the sea, the preservation of the environment of the coastal state and the prevention and the reduction and control of the pollution thereof (Art. 21(1)). Coastal states are entitled to established sea lanes and traffic separation schemes for environmental purposes. Environmental motives may justify the adoption of ships’ routing systems. It has been argued that a

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175 See Art. 2 and esp. Annex III.
179 Ibid., 212.
coastal state is entitled to limit or prohibit shipping through particular areas of the territorial sea, such as marine habitats, for the purpose of environmental protection, on condition that the marine reserve does not extend over such a large part of the territorial sea that innocent passage becomes impossible.\textsuperscript{180}

2.3.2.3. The regime of the EEZ

\textbf{74.} The exclusive economic zone (hereinafter EEZ) is an area beyond and adjacent to the territorial sea, which may not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured (Arts. 55 and 57 LOSC). The coastal state only enjoys limited sovereign rights within the EEZ, more in particular for the exploration and exploitation of the available natural resources. In the EEZ all states enjoy freedom of navigation (Art. 58). In the EEZ, the coastal state has jurisdiction with regard to, \textit{inter alia}, the protection and preservation of the marine environment (Art. 56(1)(b)(iii)). In order to conform to and give effect to generally accepted international rules and standards, coastal states may adopt laws and regulations for the prevention, reduction and control of vessel-source pollution (Art. 211(5)). A state is not entitled to unilaterally restrict shipping for, for example, environmental reasons. Restrictions on shipping within a special protected area of the EEZ can only be introduced through the competent international organisation, the International Maritime Organisation (Art. 211(6))\textsuperscript{181}.

2.3.2.4. The regime of the high seas

\textbf{75.} Article 86 LOSC states that its provisions on the high seas apply to “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state, or in the archipelagic waters of an archipelagic state”. The high seas are open to all states and no state may validly purport to subject any part of them to its sovereignty (Arts. 87(1) and 89). Freedom of the high seas comprises, \textit{inter alia}, freedom of navigation which is the right for every state to sail ships flying its flag on the high seas (Arts. 87(1)(a) and 90). Except for its own ships, a state can take no action in order to restrict shipping on the high seas; such initiatives are reserved to the IMO\textsuperscript{182}.

2.4. THE INTERRELATION AND INTEGRATION OF EU LAWS AND POLICIES ON ENVIRONMENTAL PROTECTION, WATERWAYS AND PORTS

2.4.1. Importance of the issue

\textbf{76.} As explained above, elaborate bodies of law and numerous policy statements strive to enhance environmental protection of natural habitats and water bodies in and around waterways and ports on the one hand, and to ensure unhampered use, maintenance and improvement of these waterways and

\textsuperscript{180} Cliquet, A., “Gevolgen van natuurbehoud in de zeegebieden voor de scheepvaart”, \textit{o.c.}, 223-224.


\textsuperscript{182} Cliquet, A., “Gevolgen van natuurbehoud in de zeegebieden voor de scheepvaart”, \textit{o.c.}, (213), 225; see further Thiel, H., “Approaches to the Establishment of Protected Areas on the High Seas”, in Kirchner, A. (Ed.), \textit{International Marine Environmental Law}, \textit{o.c.}, 169-192.
ports on the other. These competing law and policy tools exist and are continuously being developed further, both at EU and international levels, which considerably complicates the issue of policy integration.

In order to be able to formulate suggestions for a better integration of policy objectives and legal measures, insight is required into applicable provisions that currently regulate the interrelation between environmental and transport policies and legal rules. In this respect, we shall distinguish between the integration principle of the EC Treaty, the materialisation of that principle in secondary EU legislation, the interrelation of conflicting provisions of EU law, the relation between EU law and relevant international law, and the interrelation between international conventions.

2.4.2. The integration principle of the EC Treaty

77. As mentioned above\(^\footnote{See supra, no. 11.}\), the integration principle is laid down in Article 6 of the EC Treaty which stipulates:

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\text{Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.}\(^\footnote{The integration principle is also enshrined in the following provisions of the CBD:}^\footnote{See Dhondt, N., \textit{Integration of environmental protection into other EC policies}, Groningen, Europa Law Publishing, 2003, 106-107.}}
\]

The Community policies and activities referred to in this provision are listed in Article 3 of the EC Treaty and include a common transport policy. The environmental protection requirements are the different objectives laid down in Articles 2, 174(1), 174(2) and possibly 174(3) of the EC Treaty. This means, \textit{inter alia}, that the objective of preserving, protecting and improving the quality of the environment must also be considered within the framework of the common transport policy. However, as we mentioned earlier, Article 6 of the EC Treaty does not allow priority to be given to environmental requirements over other requirements\(^\footnote{Krämer, L., \textit{EC Environmental Law}, London, Sweet & Maxwell, 2003, 19, no. 1-24; Jans, J.H., Sevenster, H.G. and Vedder, H.H.B., \textit{Europees milieurecht in Nederland}, The Hague, Boom Juridische uitgevers, 32-33.}^\footnote{Dhondt, N., \textit{Integration of environmental protection into other EC policies}, Groningen, Europa Law Publishing, 2003, 106-107.}. On the contrary, the integration principle was basically a means to ensure that the more recently included environmental objective of Article 2 of the EC Treaty would be given the same, though no more, weight as the much older economic objectives\(^\footnote{Krämer, L., \textit{EC Environmental Law}, o.c., 19, no. 1-24.}^\footnote{Ibid., 8, no. 1-10.}. The different objectives of the Community rank at the same level and the Community must try to achieve all of them\(^\footnote{See also Dhondt, N., \textit{Integration of environmental protection into other EC policies}, o.c., 94-96.}. Should different objectives conflict in a specific case, then the Community institutions must try to find a compromise\(^\footnote{See supra, no. 11.}\)\(^\footnote{See Dhondt, N., \textit{Integration of environmental protection into other EC policies}, Groningen, Europa Law Publishing, 2003, 106-107.}. This means that the environmental and non-environmental objectives have to be balanced against each other\(^\footnote{See supra, no. 11.}\).

\(^{183}\) See supra, no. 11.

\(^{184}\) The integration principle is also enshrined in the following provisions of the CBD:

- “Each Contracting Party shall, in accordance with its particular conditions and capabilities:
  
  [...]” (Art. 6);

- “Each Contracting Party shall, as far as possible and as appropriate:
  
  (a) Integrate consideration of the conservation and sustainable use of biological resources into national decision-making;
  
  [...]” (Art. 10).


\(^{188}\) Ibid., 8, no. 1-10.

\(^{189}\) See also Dhondt, N., \textit{Integration of environmental protection into other EC policies}, o.c., 94-96.
Article 6 of the EC Treaty further stipulates that integration must take place “with a view to promoting sustainable development”. Environmental integration is therefore not a goal in itself but a means to achieve sustainable development, a concept that was already briefly touched upon above. Although the objective of sustainable development is mentioned in Article 2 of the EC Treaty as well as in Article 2 of the Treaty on European Union, nowhere is the concept defined. It gives more of a guideline to policy action than being an actual legal concept.

It is worth noting that the integration principle does not only seem to apply when Community measures are defined, but also when they are implemented. Whilst the main responsibility for applying the integration principle lies with the Community institutions when defining Community instruments or implementing, applying and enforcing Community law, Article 6 of the EC Treaty, in conjunction with Article 10 of the EC Treaty, would also imply a passive obligation for the Member States to refrain from adopting policies that would hinder the achievement and the observance of environmental objectives and principles.

Applying Article 6 of the EC Treaty in practice is not without difficulties. As we mentioned above, the integration principle requires environmental protection to be taken into account or considered when formulating other EC policies without giving outright priority to environmental considerations. However, Article 6 of the EC Treaty does not provide for any rule or does not give any practical guideline on the manner in which conflicts between environmental and other policy objectives should be resolved. In this respect, it has been argued that the proportionality principle should be applied and, more in general, that the most environmentally friendly or the least environmentally damaging solution must be chosen. In any case, the policymaker has a broad discretion in putting the integration principle into practice. The question, for example, to what extent transport-related measures – for or against each of which a number of environmental and other arguments can often be raised – are to be taken and implemented is of a political rather than a legal nature. This means that the Court of Justice may judge only in very exceptional cases that the definition or implementation of a particular measure does not sufficiently take into account environmental requirements.

2.4.3. The integration principle in secondary EU law on waterways and ports

In this section, we explore to what extent environmental provisions have been incorporated in the above-described legislative framework for the maintenance and improvement of waterways and ports.

As for the aforementioned liberalisation regulations for maritime and inland waterway transport, these do not explicitly refer to environmental concerns.

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190 See supra, no. 50.
192 Dhondt, N., Integration of environmental protection into other EC policies, o.c., 52.
193 Dhondt, N., Integration of environmental protection into other EC policies, o.c., 108.
195 Ibid., 33.
196 Dhondt, N., Integration of environmental protection into other EC policies, o.c., 109-110.
In its *Green Paper on Sea Ports and Maritime Infrastructure*, the Commission insisted upon the need for ports to comply with existing EU environmental laws:

*Infrastructure projects can have a negative impact on the environment and have always to be considered in the context of environmental legislation and through appropriate environmental impact assessment. Ports are often in proximity to populated areas, or areas where particular attention must be given to protected or endangered habitats and species. As a result, port development is often confronted with special circumstances and constraints. Community legislation is already in place to address this problem and promote environmentally friendly solutions, such as the Directive on environmental impact assessment and the Wild Birds and Habitats Directive*.198

Also, the European Commission announced:

*In order to improve the integration of environmental considerations in the planning of port development, the Commission will continue to promote the development of integrated coastal planning and management, including strategic environmental assessment*.199

The Commission repeatedly referred to environmental considerations in its 2004 proposal for a Port Services Directive200. For example, Article 1(2) of the proposed Directive stated that freedom to provide port services

*may be subject to a port’s or port system’s constraints relating to available space or capacity, maritime-traffic-related safety, security or the development policy of the port in compliance, with requirements in respect of safety, environmental protection and public service obligations* (emphasis added).

Article 5 provided that the Directive would in no way affect the rights and obligations of Member States or of competent authorities appointed by them in respect of law and order, safety and security at ports or environmental protection.

Article 7(3)(d) provided that the criteria for the granting of authorisations by the competent authority could only relate, where applicable, to, *inter alia*, “compliance with local, national and international environmental requirements”.

Furthermore, the proposal aimed at stimulating short sea shipping and motorways of the sea operations in order to reduce land (road) transport201.

79. The TEN-T Guidelines comprise several environmental safeguards. The initial version was in fact revised with a view to reducing road congestion and to incorporating the integration principle into the TEN-T policy202. Introductory recital (10) of the 2004 amendments to the Guidelines explicitly referred to Article 6 of the EC Treaty and read:

*Environmental protection requirements should be integrated into the definition and implementation of Community policy in the field of the trans-European networks in accordance with Article 6 of the*

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199 Ibid., 13 (boxed text).
201 See Art. 13(2) of the proposed Directive.
202 Dhondt, N., *Integration of environmental protection into other EC policies*, o.c., 358.
Treaty. This entails the promotion as a priority of infrastructure for transport modes that cause less damage to the environment, namely rail transport, short sea shipping and inland waterway shipping.

Further, the objectives set out in Article 2 of the TEN-T Guidelines refer to the need to ensure the sustainable mobility of persons and goods “while helping to achieve the Community’s objectives, particularly in regard to the environment and competition”. Next, Article 5 of the TEN-T Guidelines identifies the priorities, including *inter alia* “the necessary measures to promote long-distance, short sea and inland shipping”, the “integration of safety and environmental concerns in the design and implementation of the trans-European transport network”, and the “development of sustainable mobility of persons and goods in accordance with the objectives of the European Union on sustainable development”. Only projects which pursue the objectives set out in Article 2 and correspond to one or more priorities set out in Article 5, may be considered as projects of common interest (Art. 7(1)). Considering the significant potential impact of infrastructure projects on land use and on the environment, it is further not surprising that the revised TEN-T Guidelines for example recall obligations of Member States to follow environmental impact assessment procedures pursuant to the Birds, Habitats, EIA and SEA Directives when projects of common interest are planned and carried out (Art. 8). Recently, the European Commission took initiatives to provide more guidance on the strategic environmental assessment of transport infrastructure plans and programmes.

Regulation (EC) 2236/95 laying down general rules for the granting of Community financial aid in the field of TENs makes EU funding for, *inter alia*, TEN-T projects conditional upon compliance with EU environmental legislation. First, Article 2 of the Regulation states that only projects of common interest identified within the framework of the Guidelines are eligible for Community aid. Under Article 5(3)(c), projects of European interest that *inter alia* favour the most environmentally friendly transport modes can exceptionally obtain a higher percentage of funding. Article 6(3) of the Regulation provides that the decision to grant Community assistance should take account of, *inter alia*, the environmental consequences. It has been argued that this wording is rather weak, as it does not seem to imply that Commission is obliged to refuse financial assistance to a project when the environmental impact assessment made clear that the project has significant environmental effects. Next, Article 7 of the same Regulation, which is formulated somewhat more forcefully, states that the projects financed under it “shall comply with Community law and Community policies, in particular in relation to environmental protection, competition and the award of public contracts”. In practice, this means that the Commission is required to suspend aid if it becomes clear, during the course of the project, that environmental legislation, such as the Habitat Directive, is being breached. Further, Article 9(1) of Regulation (EC) 2236/95 stipulates that the application for financial aid shall include a summary description of the environmental impact, based on assessments carried out in accordance with the EIA Directive. Finally, according to Article 15(4) of the Regulation (EC) 2236/95, which deals with the appraisal, monitoring and evaluation of the project, the evaluation must cover, *inter alia*, the impact of projects on the environment.

In sum, EU support and funding for TEN-T projects are conditional upon compliance with applicable environmental rules, and the TEN-T Guidelines contain express cross-references to environmental

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204 See infra, no. 185.

205 Dhondt, N., *Integration of environmental protection into other EC policies*, o.c., 365.

206 Ibid., 365; see also infra, no. 180.
instruments, including the Birds, Habitats, EIA and SEA Directives (but thus far excluding the Water Framework Directive\textsuperscript{207}).

80. An attempt at integrating environmental objectives is also apparent in several Community instruments promoting intermodality and modal shift. As mentioned above, the objective of the White paper \textit{European transport policy for 2010: time to decide} is to establish a modal shift and to promote alternative, more environmentally friendly modes of transport, such as inland waterway transport and short sea shipping. In this respect, intermodality is seen as of fundamental importance.

The concepts of intermodality and modal shift have been integrated into other transport policies pursued by the EU institutions. As we have seen above, in a growing number of state aid cases, the Commission considers public support for maritime and inland waterway transport activities, as well as public financing of port and inland waterway infrastructures, to be compatible with the EC Treaty if they are aimed at promoting a modal shift or combined transport. Further, legislation has been adopted requiring the Member States to liberalise certain combined transport operations. It should also be recalled that, in the past, EC funding has been used to support the development of infrastructure for combined transport\textsuperscript{208}. Finally, the TEN-T Guidelines identify a separate combined transport network.

81. To be complete, the \textit{Community guidelines on State aid for environmental protection} refer to the integration principle of Article 6 of the EC Treaty as well. These Guidelines stipulate that the Commission, when adopting or revising other Community guidelines or frameworks on state aid, will consider how environmental requirements can best be taken into account. It is further stated that the Commission will examine whether it would not be expedient to ask the Member States to provide an environmental impact study whenever they notify it of an important aid project, irrespective of the sector involved\textsuperscript{209}.

\subsection{2.4.4. Integration of EU transport policy objectives into EU environmental policy}

82. The EC Treaty does not oblige Community institutions to integrate transport policy objectives systematically into their environmental policy actions. Therefore it does not come as a surprise that, whilst transport policy instruments to a large extent take into account environmental policy objectives, and even contain clear cross-references to applicable EU environmental legislation, specific transport policy-related objectives and rules are only weakly integrated into the legal framework for the protection and management of the environment, esp. natural habitats and water bodies. In other words, the integration of environmental and transport rules appears rather to be a one-way process.

83. Strikingly, the Birds and Habitats Directives only refer to other policy objectives and interests in a very general way\textsuperscript{210}.

Article 2 of the Birds Directive merely provides:

\begin{itemize}
\item \textsuperscript{207} Which does of course \textit{not} mean that this Directive must not be complied with.
\item \textsuperscript{208} For a brief overview, see Dhondt, N., \textit{Integration of environmental protection into other EC policies}, o.c., 374-375.
\item \textsuperscript{209} Community guidelines on State aid for environmental protection, \textit{OJ C}, no. 37, 3 February 2001, (3), 14, para 83.
\item \textsuperscript{210} Comp. also Art. 2 of the Bern Convention, which reads: “The Contracting Parties shall take requisite measures to maintain the population of wild flora and fauna at, or adapt it to, a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements and the needs of sub-species, varieties or forms at risk locally”.
\end{itemize}
Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.

As we shall see later, this provision can however not be used as a general derogation. As a consequence, its practical impact as an integration tool would appear to be negligible.

Moreover, it is not applicable at the stage where protected areas are designated. At that stage, only ecological criteria can be taken into account and any balancing of ecological with other interests is precluded – which is indeed very unusual both in EU and national law.

The same holds for Article 2(3) of the Habitats Directive, which provides:

Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.

The introductory recitals to the Habitats Directive state:

Whereas, the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements, this Directive makes a contribution to the general objective of sustainable development; whereas the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities.

These reassurances do not alter the fact that the complex designation process under the Habitats Directive is also based on purely ecological criteria, which again precludes any reference being made to economic considerations.

84. Article 6 of the Habitats Directive, which sets out the framework for site conservation and protection and which also applies to sites protected under the Birds Directive, is considered by DG Environment of the European Commission as

a key framework for giving effect to the principle of integration, since it encourages Member States to manage the protected areas in a sustainable way and since it sets the limits of activities which can impact negatively on protected areas while allowing some derogations in specific circumstances.

Article 6(1) of the Habitats Directive obliges Member States 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 [...] (emphasis added).

According to the Commission, the latter provision is in conformity with the principle of integration of the environment in the other Community policies.

211 See infra, nos. 103 et seq.
212 See infra, nos. 111 et seq.
Next, article 6(4) of the Habitats Directive allows for plans or projects affecting protected sites to be carried out “for imperative reasons of overriding public interest, including those of a social or economic nature”, on condition that no alternatives are available and that the Member State takes all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. As we shall see later, these conditions are interpreted very strictly.

85. To conclude, the European legislator seems only reluctantly to have taken account of economic imperatives in the Birds and Habitats Directive. These Directives do not refer even once to the particular interests of navigation and ports, although (i) many protected sites are situated in close vicinity to navigational fairways and port facilities and (ii) these infrastructures are recognised by the EU institutions as being of paramount importance with a view to sustainable development. What is more, infrastructure developments that negatively and significantly affect nature conservation areas can only be sanctioned if a number of particularly strict conditions are met.

Since potential waterway and port development areas are very often located in or near such conservation areas, this “no, unless” approach results in vital and urgent waterway and port projects being treated as an exception. In other words, waterway and port policy in practice enjoys the unenviable status of being a mere derogation from nature policy.

Whether this rather unbalanced situation serves the objective of policy integration is doubtful. Theoretically, given the scarcity of both natural sites and potential waterway and port development areas, a completely opposite approach might be conceived. Indeed, a rule could be imagined under which (i) areas geographically and technically suitable for future waterway and port projects can be developed solely for these particular purposes, and (ii) nature conservation measures in these areas are treated as exceptional and must meet strict conditions. Similar observations can be made with regard to the derogation provisions of the Water Framework Directive. However, since the purpose of the present study is not to suggest amendments to existing environmental Directives, we shall only elaborate on these ideas in our recommendations for the strengthening of the legal status of port expansion areas below. Suffice it to note here that the current “no, unless” approach threatens to hamper the development of a comprehensive strategy for waterways and ports. This is especially the case when each and every individual project is to be tested against the conditions for a derogation and when the derogation test, as we shall see below, ignores pre-existing international and other rights relating to the use, maintenance and improvement of waterways and ports. To say the least, we believe that the current approach is certainly not the only possible means to integrate policies.

In sum, and speaking from the perspective of legislative technique, transport policy does not really appear to have been integrated into the Birds and Habitats Directive. The “no, unless” approach reflects the view that, as a general rule, environmental policy objectives take precedence over transport policy objectives. As we have already pointed out, waterway and port developments are, in many cases, only possible on the basis of a derogation that is made dependent upon meeting very strict environmental criteria. This approach has undoubtedly given rise to many misunderstandings, tension, conflicts and even lawsuits between stakeholders of the shipping and ports industries, environmental NGOs, citizens and public authorities both at EU and Member States’ levels.

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214 Ibid., 20.
215 See supra, no. 22.
216 See infra, nos. 251 et seq.
86. Whilst it may also be based on a “no, unless” approach, the Water Framework Directive at least pays special attention to the need for policy integration, flexibility and involvement of stakeholders and water users.

The introductory recital announce, *inter alia*:

*Further integration of protection and sustainable management of water into other Community policy areas such as energy, transport, agriculture, fisheries, regional policy and tourism is necessary. This Directive should provide a basis for a continued dialogue and for the development of strategies towards a further integration of policy areas*\(^{217}\);

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\(^{218}\), and

*This Directive should provide mechanisms to address obstacles to progress in improving water status when these fall outside the scope of Community water legislation, with a view to developing appropriate Community strategies for overcoming them*\(^{219}\).

87. The WFD is being implemented on the basis of an elaborate Common Implementation Strategy (CIS) which we already referred to above\(^{220}\). Representatives of the shipping and port industries have been invited to participate in this process. Moreover, some of the available guidance documents issued as part of the CIS specifically refer to navigation and ports\(^{221}\).

Recently, an activity on the WFD and hydromorphology was launched under the CIS, where navigation and port-related issues attract considerable attention. The basic document in this respect is the *Mandate for an activity on Water Framework Directive and hydromorphological pressures – First Phase: resulting from hydropower, navigation and flood defence activities*, which was extensively discussed at an important European Workshop held at Prague from 17 to 19 October 2005\(^{222}\).

The Mandate recalls that, in early 2005, Member States delivered their reports on the risk assessment of water bodies according to Article 5 of the WFD. This provision required a review of the impact of human activity on the status of surface water bodies, i.e. the identification of the type and magnitude of significant anthropogenic pressures including point sources, diffuse sources of pollution, abstraction or regulation and hydromorphological alterations as well as an assessment of their impacts according to the Annexes to the WFD. The main hydromorphological driving forces causing pressures that were identified in risk analysis are hydropower, flood protection, navigation and agriculture, but other activities such as urbanisation, gravel and water abstractions (e.g. for irrigation), outdoor recreation activities and fisheries are also of some importance. Also, hydromorphological alterations are often undertaken for more than one reason, e.g. a multipurpose dam for hydropower generation, flood protection, and water abstraction or river channelisation for navigation and flood protection. The main hydromorphological alterations driven by these forces are dams/weirs, surface water body

\(^{217}\) Introductory recital (16).

\(^{218}\) Introductory recital (46).

\(^{219}\) Introductory recital (47).

\(^{220}\) See *supra*, no. 30.

\(^{221}\) See also *infra*, nos. 215 et seq.

\(^{222}\) See a Workshop summary report and presentations on http://www.ecologic-events.de/hydromorphology/index.htm.
maintenance, e.g. sediment management, channelisation/straightening, land drainage and alterations of the surface water body profile. These alterations cause hydromorphological changes, such as disruption of sediment transport, alteration of the hydraulic and hydrological characteristics (e.g. reduced water flow), loss of flooding areas, drying of wetlands as well as disruption of the biological continuity and direct damage of biota. The impacts of these subsequent changes and effects endanger the occurrence of the type-specific aquatic communities, i.e. the good ecological status. Therefore the Water Directors agreed at their meeting in Luxembourg in June 2005 to start a new activity referring to hydromorphological alterations as one of the most important pressures on surface water bodies resulting in a high percentage of surface water bodies probably failing the good ecological status.

The main aim of this new activity is:

- To identify how best to manage synergisms and antagonisms between the management of hydromorphological alterations in river basin management planning and the requirements of other policies (e.g. renewable energy, transport and flood management). Taking into account WFD requirements, economic tools shall contribute towards this goal by appraising social, economic and environmental impacts and benefits;
- To exchange information on approaches to the assessment and management of significant hydromorphological pressures and impacts in order to facilitate the transfer of expertise between Member States and to promote common and comparable approaches to implementation;
- To exchange information on approaches and strategies for the protection and/or restoration from hydromorphological deteriorations;
- To identify available knowledge about the link between hydromorphological changes and ecological/biological impacts;
- To identify pragmatic approaches to the designation tests for HMWBs.


Some of the key questions emerging from the current discussions are:

- Are specific recommendations on good practice for avoiding deterioration, restoration and mitigation instruments and measures useful ?
- How can the co-operation and exchange of information between the competent authorities for the relevant policies and stakeholders be optimised in order that they make full use of their potential to support each other's objectives ?
- What is the extent of the hydromorphological pressures and impacts resulting from human activity (especially from flood-defence, hydropower and navigation activities) ?
- Where are the potential areas of conflicts of those activities with the water policy ?
- What instruments and measures exist or should be established to reconcile those different policies and what result do they achieve/are likely to achieve as regards reducing the pressures ?
- What are the fundamentals of surface water maintenance for navigation including sediment management concerning GES or GEP ? How can a common understanding be developed ?
- How to combine the experiences of the current practice of local authorities with the outlines of the designation tests provided by the HMWB guidance ?

According to the Mandate, answering those questions will require 2 different types of approach:
- A technical approach, targeted at the identification of good practice in relation to preventing deterioration, restoring hydromorphological conditions and mitigation measures. Knowledge and research gaps will also be identified;
- A political approach, targeted to policy recommendations for a better integration between the different policies.

The purpose of the technical activity is to facilitate the exchange of information on, and where possible identify common criteria for, the hydromorphological conditions considered necessary to enable the achievement of good ecological status, and mitigation measures considered necessary to enable the achievement of good ecological potential. Information exchange on existing cooperation processes between the different relevant authorities and stakeholders is also part of the activity.

The purpose of the policy integration activity is twofold:

- To examine how water policy and other policies that can lead to hydromorphological pressures on surface water bodies interact;
- To make recommendations for better policy integration at the different levels and scales.

The main tasks assigned to the activity will be organised in two steps:

**Step 1: Identification of the interactions between water policy and other policies (energy, navigation and flood management)**
- Assessment of the current situation, future trends and expected policy developments; and
- Identification of the potential synergies and antagonisms between these policies.

The findings of this step will be illustrated with examples of synergies and antagonisms between the different policy areas.

**Step 2: Suggestions for better policy integration at the different levels and scale**
- Provide recommendations for further improvements of the relevant policies at the different levels and scales;
- Develop approaches and strategies for the protection and/or restoration from hydromorphological deteriorations and mitigation measures;
- Identify how best use can be made of the potential synergies between the different policies;
- Identify how potential antagonisms between the different policies can be prevented and where necessary managed;
- Identify how co-operation and co-ordination between the different relevant authorities and stakeholders can be improved.

The expected outcome consists of a technical report and a policy paper on hydromorphology which will make recommendations on the integration of energy (hydropower) policy, transport (navigation) policy and flood management policy with water policy.

88. As explained above, the definitions of artificial and heavily modified water bodies explicitly take into account existing uses of water bodies by navigation and ports, and allow for the setting of less stringent environmental objectives\(^{223}\). Hopefully, this and other derogations envisaged by the Water Framework Directive will facilitate policy integration and limit conflicts between water uses. On the

\(^{223}\) See supra, nos. 25 et seq.
other hand, derogations are again strictly conditional so that the possibility of litigation in the style of the Birds and Habitats Directives can certainly not be ruled out.

89. The participation process is governed by a separate provision of the WFD which expressly mentions water users as interested parties.\footnote{See supra, no. 29.}

90. To conclude, the strategy for the implementation of the WFD is, from the perspective of integration of environmental and transport policies, an enormous step forward as compared to the application of the Birds and Habitats Directives. To what extent this will prevent legal problems cannot be assessed at the present moment, since no court judgments on the application of the WFD are available as yet. However, we shall attempt to comment further upon the expected efficiency of integration initiatives under the WFD in Chapter 5 below. It is worth noting here that the parties involved in the CIS for the WFD are perfectly aware that policy integration should be a two-way process, that WFD/CIS activities should be coordinated with other international and national regulations, and that, in order to achieve a coherent legislative framework, more guidance is needed.\footnote{See infra, nos. 217 et seq.}

2.4.5. The interrelation between conflicting provisions of EU law

91. The interrelation of competing provisions of EC and EU law is not governed by specific treaty provisions. Generally speaking, primary law (including the Treaties) and international agreements concluded by the EC take precedence over secondary law instruments such as regulations, directives and decisions. A separate, tertiary source of EU law consists of soft law instruments which are not legally binding.

In a number of cases, however, the Court of Justice consistently judged that where a matter is regulated in a harmonised manner at Community level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not those of the EC Treaty.\footnote{See, i.a., ECJ 15 December 2001, C-324/99, DaimlerChrysler, ECR 2001, I-9897, para 32; ECJ 11 December 2003, C-322/01, Deutscher Apothekerverband, ECR 2003, I-14887, para 64; ECJ 14 December 2004, Case C-463/01, Commission v. France, ECR 2004, I-11705, para 36.}

Where all the aspects of a given case are for example covered by the Habitats Directive, decisions of public authorities must only be tested against that Directive, and not against the Treaty provisions on free movement of goods. Contravening the requirement to carry out an appropriate assessment under Article 6(3) of that Directive cannot be justified on the strength of the free movement of goods.\footnote{Raad van State (Netherlands), 22 March 2006, case 200505040/1.}

2.4.6. The interrelation between EU law and international law

92. The integration of environmental and transport policies can be negatively affected by conflicts between relevant EU rules and international conventions. Therefore, we shall briefly explain how EU law relates to international law.\footnote{We shall not go into the question of the direct effect or ‘self-executing’ nature of international treaties, which determines – at least in some countries – the extent to which parties can rely upon them before national courts of law. The answer depends on the objectives and contents of each particular convention, so that no general yes-or-no answers are possible. If a convention cannot be invoked directly before an internal court, this obviously diminishes its practical meaning considerably. In practice,}
93. Article 307, first paragraph of the EC Treaty establishes that the provisions of the EC Treaty do not affect

\[ \text{The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other.} \]

The European Court of Justice noted that the Treaty provision referred to

\[ \text{is of general scope and [...] applies to any international agreement, irrespective of the subject-matter, which is capable of affecting the application of the Treaty}^{229}. \]

The Court further held that Article 307, first paragraph of the EC Treaty has as its purpose “to lay down, in accordance with the principles of international law\(^{230}\), that the application of the Treaty does not affect the duty of the Member State concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder”\(^{231}\). Article 307 of the EC Treaty further implies the obligation for the Community institutions not to hinder the exercise of the rights or the fulfillment of the obligations arising from pre-Community agreements\(^{232}\). However, respect of the rights and obligations arising from pre-Community agreements does, as a rule, not extend to the relationship between Member States.

The second paragraph of Article 307 of the EC Treaty provides that, to the extent that the pre-Community agreements are not compatible with the Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

Next, the Community is also bound by the agreements that it has concluded itself with third states or international organisations. Such agreements are binding on the institutions of the Community and on Member States\(^{233}\). The primacy of these international agreements requires that secondary legislation provisions must, as much as possible, be interpreted in a manner that is consistent with those agreements\(^{234}\).

Finally, the European Court of Justice has had recourse to international law and its general principles as grounds for interpreting and assessing the validity of Community acts. In Poulsen and Diva Navigation, the Court observed that the European Community must respect international law in the exercise of its powers and that Community acts must be interpreted, and their scope limited, in the light of the relevant rules of the international law of the sea\(^{235}\). The Court further held that account should be taken of the current state of customary international maritime law\(^{236}\). In Racke, the Court confirmed

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233 Art. 300(7) of the EC Treaty.
236 Ibid., para 10.
that the European Community must respect international law and comply with customary interna-
tional law in the exercise of its powers\textsuperscript{237}.

94. Several authors argue that the multilateral and bilateral river conventions – including the Vienna
Final Act and the Mannheim, Belgrade and London Conventions governing the Rhine, Danube and
Scheldt rivers respectively – take priority over the EC Treaty with respect to the relations between
Member States and non-Member States\textsuperscript{238}. As a consequence, the EU institutions must not hinder
the fulfilment of the obligation of Member States towards third countries to establish and maintain a
regime of free navigation on international rivers. As we have seen above, the international river
conventions referred to for example contain express provisions on the maintenance and improvement of the
fairways\textsuperscript{239}. If the theory on the priority of river conventions advanced by the aforementioned authors
is correct, EU environmental rules could never constitute a valid obstacle to such maintenance or im-
provement projects.

Further, it has even been argued that Member States are obliged to observe river conventions which
are found to be contrary to EU law even in their mutual relations. As the Final Act of the Congress of
Vienna intended to establish the freedom of navigation permanently as a binding principle on the
European continent, that freedom has been considered as a fundamental rule of European public law
ever since. This has been repeatedly confirmed in bilateral and multilateral conventions. After the
entry into force of the EC Treaty, the principle of freedom of navigation was accepted without any
objection by the European Community. Accordingly, the above authors hold the view that the funda-
mental rule of freedom of navigation is part of the generally accepted rules of international law which
should also be respected by the European Community when establishing secondary legislation.

In the same vein, the Poulsen and Diva Navigation judgment of the ECJ referred to above is understoo-
d to confirm that the European Community, when establishing secondary legislation, must observe
international conventions relating to marine areas and rivers\textsuperscript{240}. As a consequence, the Birds, Habitats
and Water Framework Directives must at least be interpreted in a manner that is consistent with, and
fits in as much as possible with, existing international conventions\textsuperscript{241}.

It must be said, however, that the European Commission has, to our knowledge, never issued a state-
ment on the interrelation of provisions of river conventions pertaining to maintenance and improve-
ment works on the one hand and secondary EU environmental law on the other. Specific case law on
this particular point is not available either. As a consequence, the exact legal position remains unce-
tain. Suffice it to conclude here that, with respect to the interrelation of EU environmental law and
international river conventions, complex legal issues can arise.


\textsuperscript{238} De Decker, M., Juridische aspecten van de codificatie en harmonisering van de Europese internationale rivierenregimes, o.c., II, 605 et seq.; Van Hooydonk, E., “Het juridisch statuut van de Belgisch-Nederlandse verkeersverbindingen in actueel en Europees perspectief”, o.c., (91), 269, no. 92; Van Hooydonk, E., “Het internationaal juridisch statuut van de IJzere Rijn: van het Scheidingsverdrag tot de trans-Europese netwerken”, in Witlox, F. (Ed.), De IJzere Rijn en de Betuweroute, Leuven/Apeldoorn, Gar-

\textsuperscript{239} See supra, no. 72.

\textsuperscript{240} Van Hooydonk, E., “Het juridisch statuut van de Belgisch-Nederlandse verkeersverbindingen in actueel en Europees perspectief”, o.c., (91), 26, no. 917.

\textsuperscript{241} Van Hooydonk, E., “Het juridisch statuut van de Belgisch-Nederlandse verkeersverbindingen in actueel en Europees perspectief”, o.c., (91), 312, no. 112 and 336, no. 133; see also De Decker, Juridische aspecten van de codificatie en harmonisering van de Europese internationale rivierenregimes, o.c., II, 629-636.
95. Finally, inasmuch as EU secondary legislation applies to the various marine areas, it should be considered to what extent international law of the sea limits the scope of such legislation. In this respect, it should be noted that the European Community is a party to the LOSC and that, through its act of ratification, the relevant provisions of the LOSC have been incorporated into Community law. It should further be recalled that, in the event of a conflict between EU and international obligations, the primacy of the international agreements which the Community has concluded requires that secondary legislation provisions be interpreted in a manner that is consistent with those agreements. This means that, in our case, EU secondary legislation, such as the Habitats and Birds Directives, must be interpreted consistently with the principles of freedom of navigation on the high seas and in the exclusive economic zone as well as the right of innocent passage through the territorial sea. If no consistent interpretation is possible, the EU legislation cannot be applied. Thus, EU regulations cannot be applied by national administrations or national judges if they are not in accordance with international law of the sea.

2.4.7. The interrelation between conflicting international conventions

96. Given the large number of treaties that are relevant to the issues discussed in the present study, questions may also arise in respect of the relationship between these treaties.

Article 30 of the Vienna Convention on the Law of Treaties, which is a residual rule that codifies customary international law, provides part of the answer by stating, *inter alia*:

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.
4. When the parties to the later treaty do not include all the parties to the earlier one:
   (a) as between States parties to both treaties the same rule applies as in paragraph 3;
   (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

Many treaties remedy the problem by including an express conflict clause. Such a provision may state that the treaty prevails over all other treaties, past and future. Other clauses stipulate that the existing treaties shall not be affected. An example of such a provision is the abovementioned Article 307 of the EC Treaty. In particular, given the importance of its subject matter, its universal application and the many existing treaties, the relationship to other conventions was also spelled out in Article 311 of the Vienna Convention on the Law of Treaties.

242 See Backes, Ch. W., Oude Elferink, A.G. and van der Ree, P., Onderzoek wetgeving EEZ. Internationaalrechtelijke verplichtingen, gemeenschapsrecht, nationaal beleid en nationaalrechtelijk instrumentarium, o.c., 27 et seq.
243 Ibid., 33.
245 Article 59 of the Vienna Convention reads:
   “1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:
   (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
   (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.
   2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties”.

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LOSCL. For the purposes of this study, it is worth noting that several relevant environmental conventions, such as the CBD and the BWM Convention, expressly state that they do not affect the rights and obligations of States under international law of the sea or the LOSC.

### 2.5. INTERIM CONCLUSIONS

97. From the above overview of the existing legal framework, the following interim conclusions can be drawn.

First, the European institutions are, pursuant to EU law, under a duty both (i) to ensure the protection of the environment and to promote sustainability of economic development and (ii) to develop transport policy and trans-European networks for transport infrastructure. As a result, environmental policy objectives and legal instruments compete and potentially conflict with policies and laws pertaining to transport and esp. the provision of waterway infrastructure and port facilities.

Second, as far as secondary law is concerned, several legal instruments adopted within the framework of EU transport policy, such as regulations and directives on liberalisation, presuppose the availability of adequate waterway infrastructures and port facilities. Under the TEN-T Guidelines, the European institutions support projects relating to inland waterways, motorways of the sea, inland ports and seaports. The EU modal shift and state aid policies further contribute to the provision of adequate facilities for maritime and inland waterway shipping. Yet it has to be noted that the use, maintenance and improvement of waterway infrastructure and port facilities is always subject to compliance with important EU and international environmental rules, inter alia the EU Birds, Habitats, Water Framework, EIA and SEA Directives. Moreover, EU environmental law, and esp. the obligation for Member States to take nature conservation measures, are tougher and more committed than provisions on the development of waterways and ports, which are based either on legal requirements of a less specific nature, soft law instruments or mere policy declarations.

Third, the EC Treaty obliges the Community to integrate environmental protection requirements into, inter alia, its transport policy. Such integration is effectively implemented in the TEN-T instruments,

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246 The key provisions of Article 311 of the LOSC read:

1. This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1982.

2. This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

3. Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

247 Art. 22(2) CBD reads: “Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea”.


249 Yet another example is provided by the Convention on the non-navigational uses of international watercourses, adopted by the UN General Assembly on 21 May 1997 (UN Doc. A/51/869, ILM, Vol. 36, 700). Art. 3 of this convention states, i.a.: “In the absence of an agreement to the contrary, nothing in the present Convention shall affect the rights or obligations of a watercourse State arising from agreements in force for it on the date on which it became a party to the present Convention”.
which make Community support and funding for TEN-T projects conditional upon compliance with environmental rules. State aid decisions and modal shift instruments refer to environmental requirements and objectives as well. There exists no general requirement for the Community to integrate transport policy objectives into its environmental policy.

Fourth, the EU Birds and Habitats Directives only to a minor extent take into account economic needs. Economic considerations are irrelevant when protection zones for natural habitats are designated and delimited. These Directives are moreover based on a “no, unless” approach, under which waterway and port projects significantly affecting protected sites can only by carried out by way of a strictly conditional derogation. In practice, this gives environmental objectives a higher priority than waterway and port policy-related objectives. Consequently, since waterways and port expansion areas often overlap with or lie in close vicinity to protected habitats, waterway and port policy enjoys the unenviable status of being a mere derogation from nature policy. While the Water Framework Directive is based upon a similar “no, unless” approach, it pays specific attention to the use of water bodies for navigational and port-related purposes and expressly acknowledges the need for policy integration and flexibility. Waterway and port stakeholders are involved in the extremely valuable Common Implementation Strategy for this Directive. Recently, a new activity on hydromorphological impacts was launched under that strategy. The mutual integration of navigation and port-related policy and water policy is a key objective of this activity, which should lead to further technical and political recommendations and guidance in 2006. These developments do not alter the fact that, generally speaking, transport policy requirements appear to be less well integrated into environmental policy than vice versa. In addition, the priority of the EC Treaty over secondary law instruments does not prevent specific environmental legislation such as the Habitats Directive from taking precedence over treaty provisions on the economic freedoms.

Fifth, international law contains several specific instruments for the protection of the environment, but also guarantees freedom of navigation in marine areas, including inland waters, and sometimes obliges States to carry out maintenance and improvement works in international waterways. The existence of an international layer of environmental and transport-oriented legal instruments considerably complicates policy integration. The interrelation between EU law and international law is mainly governed by Article 307 of the EC Treaty. In sum, it can be argued that the implementation of EU environmental law should at least be reconciled with international requirements on the use, management and improvement of international waterways. The interrelation between international conventions is regulated by international law and is determined by factors such as the subject-matter and the date of conventions as well as the identity of the parties thereto.
3. SELECTED CASES ON THE BIRDS AND HABITATS DIRECTIVES

3.1. INTRODUCTION

98. In this chapter, we discuss selected cases relating to waterway and port development plans, projects and activities where the application of the EU Birds and Habitats Directives gave rise to interesting legal problems. Some of the plans or projects involved major new construction or improvement works, others mere maintenance works or even ongoing activities and uses.

The below digest of cases serves four purposes:
- first, it reveals how the application of these Directives has caused severe disruptions of important waterway or port-related projects;
- second, it helps identify remaining legal issues that need further clarification;
- third, it holds lessons for stakeholders with regard to the future implementation of the Birds and Habitats Directives;
- fourth, it contributes to a better understanding of the preferable approach towards a smooth implementation of the Water Framework Directive.

The cases – which we have subdivided into ten leading cases or causes célèbres that attracted wide attention and eight other cases – were taken from various regions of the EU (esp. Belgium, Finland, France, Germany, Italy, the Netherlands and the United Kingdom). Some were concluded with a national decision without any further litigation, others prompted complaints by environmental action groups or inhabitants and interventions of the European Commission, while a third category ended in national or EU court proceedings. What the selected cases have in common is that they highlight a number of typical legal and policy issues which we deemed worthwhile analysing further in the subsequent chapters. Of course, we do not intend to call into question individual decisions such as the approval or the defeat of this or that particular container terminal project; we shall merely attempt to collect interesting building blocks for an overall criticism of the current state of policy integration and for recommendations for improvement.

It is worth noting from the outset that the implementation of the two Directives has caused problems across Europe, from the extreme North to the far South and regardless of the geographical or infrastructural circumstances: some cases relate to estuaries, others to inland waterways or port areas artificially reclaimed from the sea. Moreover, the list of cases that we shall discuss by no means constitutes a complete inventory. Other major projects that were at least objected against on the basis of the Birds and Habitats Directives and which we have omitted from the below digest include the improvement of the German stretches of the Upper Elbe for inland navigation, the possible construction of the Danube-Odra-Elbe canal, the construction by Tallinna Sadam of a new ferry and cruise port at Këdema cove on Saaremaa island in Estonia and the construction of new port facilities at Donges near the French port of Nantes in the Loire estuary. Further, the European Commission announced an infringement procedure against Germany which had not ensured sufficient protection of the Elbe, Ems, Trave and Weser estuaries and part of the Rhine including their navigable channels; one of the pending issues is works in the bed of the Ems river, which are necessary to maintain the accessibility of a major shipyard in Papenburg. At the time of writing, heated debates – including a formal petition procedure before the European Parliament – were taking place over the construction of a new port at Granadilla on the Spanish Isle of Tenerife and its assessment under Article 6(4) of the Habitats Directive. The Commission’s opinion in this case was not yet available. Finally, we have limited our selec-
tion to cases relating directly to waterways and ports. Yet one should be aware that difficulties can also emerge in the development of hinterland connections of ports. A case in point is the reactivation of the Iron Rhine, a 19th-century railway link between the port of Antwerp and the German industrial Ruhr area that runs partly over Dutch territory and enjoys a specific treaty status. The railway line traverses an area where the Netherlands have created protected sites, *inter alia*, under the Birds and Habitats Directives.

We deemed it useful also to include in the digest below the Leybucht case which, from a purely legal perspective, may seem somewhat outdated, since it has led to an amendment of the regime established under the Birds Directive. Cases related to other environmental directives, such as the EIA Directive 85/337/EEC, shall not be discussed, although considerable legal difficulties emerged in these areas as well. Thus far, no legal cases have been reported in relation to the implementation of the Water Framework Directive. Therefore, the latter Directive shall not be discussed in this chapter.

Since our purpose is not to present a comprehensive overview of the case law relating to the interpretation of the Birds and Habitats Directives, but merely to underpin a number of policy recommendations, we shall not pay attention either to decisions which – although important and generally considered in legal doctrine to be landmark judgments – have no bearing on waterway or port-related projects. For comprehensive commentaries on the Birds and Habitats Directives, we refer to the general literature on environmental law.

### 3.2. LEYBUCHT (PORT OF GREETSIEL)

#### 3.2.1. Background

99. The Leybucht is a 2,800-hectare bay in the Wattenmeer (Watten Sea) in the Land of Lower Saxony, Germany. A dyke has been constructed around the bay to prevent flooding. The bay consists of water areas, flats, salt marshes and summer polders.

In the south corner of the bay lies the historical port of Greetsiel, which in 1990 was described by the Advocate General at the Court of Justice as the most important crab fishing port of Germany. The port of Leybucht, which was mainly used by the coastguard and by pleasure craft, used to be situated at the north end of the bay.

The Leybucht is part of the Niedersaechsisches Wattenmeer National Park, which was designated in a regulation of 13 December 1985 of the Land of Lower Saxony as a protected area. This ‘protection regulation’ divided the area into three zones: a rest zone, an intermediate zone (the two channels which crossed the Leybucht had this status) and a recreation zone (the area around the port of Greetsiel). Access to the rest area was, as a general rule, prohibited. In 1988, the German Government informed the European Commission pursuant to Article 4(3) of the Birds Directive that it had classified the Leybucht as a special protection area (SPA). The Leybucht is also part of a wetland of international importance under the Ramsar Convention.

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280 On the latter case, see Van Hooydonk, E., "Het juridisch statuut van de Belgisch-Nederlandse verkeersverbindingen in actueel en Europees perspectief", in Id. (Ed.), *De Belgisch-Nederlandse verkeersverbindingen. De Schelde in de XXIste eeuw*, Antwerp/Apeldoorn, Maklu, 2002, (91), 311 et seq., nos. 112 et seq., as well as the award of the Arbitral Tribunal of 24 May 2005, available on http://www.pca-cpa.org/ENGLISH/RFC/#Belgium/Netherlands; see further infra, no. 204.
In order to protect the land inside the dykes against the heaviest storm tides, a coastal defence project was introduced that included the development of the Leybucht. To the south-east, the project provided for the reinforcement, heightening and extension of the existing dyke and the construction of a drainage channel behind the new dyke. This new dyke would stretch out 50 metres further into the sea than the existing one. To the north-east, the project provided for the closure of part of the bay by a new dyke, along with some sluices and drainage work. Finally, it provided for the construction of a reservoir enclosed by a dyke with locks leading to the sea and a ship canal in order to ensure maritime access to the port of Greetsiel.

3.2.2. Environmental issues

100. For a long time, the Leybucht had been a nesting, feeding and staging area for various species of both sedentary and migratory birds and it was in particular an important breeding area for the avocet.

The completion of the coastal defence project entailed a clear loss of protected area, esp. some important nesting, rest and refuge areas for birds and valuable salt marshes. The ecological characteristics of about a quarter of the Leybucht would be altered by the implementation of the planning decision. The European Commission was of the opinion that the dyke-building operations disturbed the habitats of birds that enjoy special protection under the provisions of Article 4(1) of the Birds Directive, in conjunction with Annex I.

However, the project was not entirely detrimental from an ecological point of view. The German government emphasised that the completion of the project would permit the closure of the two channels crossing the Leybucht, which required regular dredging. With their closure, disruptive dredging work would be superfluous and dredgings would no longer need to be dumped elsewhere in the area. Consequently, the Leybucht would be left in absolute peace. Moreover, new salt marshes would be formed in an area that had previously been protected by the dyke but would now be opened up.

The European Commission brought an action under Article 169 (current Art. 226) of the EC Treaty for a declaration that, by planning or undertaking works detrimental to the habitat of protected birds in special protection areas contrary to Article 4(4) of the Birds Directive, Germany had failed to fulfil its obligations under the Treaty. Article 4(4) of the Birds Directive states that in respect of SPAs, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of that Article. Pursuant to the second sentence of Article 4(4), Member States must strive to avoid pollution or deterioration of habitats also outside these protection areas.

It is interesting to note that the dyke project was preceded by a lengthy public procedure. In the initial stage, a large number of organisations and associations were consulted, including a number of nature protection societies. The project was then made public and the plans were made available for public consultation. Over 300 objections to the project were submitted, many of which concerned the effects of the project on the fauna to be protected in the Leybucht. After a balancing of the interests involved and a study of alternatives, those objections were replied to one by one in the planning decision. The German Government thus submitted the project to a de facto environmental impact assessment.


3.2.3. Court judgment

101. The Court of Justice found that the displacement of the dyke towards the sea, as part of the coastal defence project, entailed a reduction in the protected area (para 17).

The Court stated:

Although the Member States do have a certain discretion with regard to the choice of the territories which are most suitable for classification as special protection areas pursuant to Article 4(1) of the [Birds] directive, they do not have the same discretion under Article 4(4) of the directive in modifying or reducing the extent of the areas, since they have themselves acknowledged in their declarations that those areas contain the most suitable environments for the species listed in Annex I to the directive. If that were not so, the Member States could unilaterally escape from the obligations imposed on them by Article 4(4) of the directive with regard to special protection areas (para 20).

The Court ruled that “the power of the Member States to reduce the extent of special protection areas can be justified only on exceptional grounds” (para 21) corresponding to “a general interest which is superior to the general interest represented by the ecological objective of the directive” (para 22).

The danger of flooding and the protection of the coast were found to “constitute sufficiently serious reasons to justify the dyke works and the strengthening of coastal structures as long as those measures are confined to a strict minimum and involve only the smallest possible reduction of the special protection area” (para 23).

The economic and recreational requirements referred to in Article 2 of the Birds Directive did not enter into consideration, since that provision, as the court had previously pointed out252, does not constitute an autonomous derogation from the general system of protection established by the Directive (para 22).

The line of the new dyke was determined in part by considerations relating not only to coastal protection but also to the concern of ensuring that fishing vessels from Greetsiel would have access to the harbour. This was considered in principle to be incompatible with the requirements of Article 4(4) of the Directive (para 24), but the Court judged that because of the aforementioned offsetting ecological benefits, and solely for that reason, the desire to ensure the survival of the fishing port of Greetsiel could be taken into account in order to justify the decision on the line of the new dyke (para 26).

Finally, the disturbance arising from the construction work itself was not considered to exceed what was necessary to carry it out. The information concerning the number of avocets showed no significant change, within the meaning of Article 4(4) of the Directive, in population trends (para 27).

3.2.4. Consequences

102. In the Leybucht judgment, which was the first to deal with habitats protection under the Birds Directive, the Court put forward the rule that economic requirements cannot justify a significant pol-

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olution, deterioration or disturbance of an SPA because these cannot be considered to represent a general interest overriding the ecological interests. In essence, the Court concurred with the Commission’s view that the significant problems for *inter alia* the important fishing port of Greetsiel were the price that had to be paid for nature conservation.

This case law was however reviewed through a legislative intervention. Article 7 of the Habitats Directive states that the obligations of the Member States arising under the first sentence of Article 4(4) of the Birds Directive (namely to take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of Article 4) are replaced by the obligations arising under Articles 6(2), 6(3) and 6(4) of the Habitats Directive.

As we have previously explained, Article 6(2) of the Habitats Directive repeats the requirement to take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of the Directive. Article 6(3) states that any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives, and that the competent national authorities shall only agree to the plan or project 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. The applicability of Article 6(4) of the Habitats Directive marks an important change since it creates a possibility to justify a project with negative implications for a protected area by social or economic interests. As we have explained, it provides that, in the absence of alternative solutions, a plan or project with negative implications, which must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, may be carried out on condition that it is accompanied by all necessary compensatory measures. If the site hosts a priority habitat or species, the Member State shall request the Commission to deliver an opinion. Article 6(4) clearly allows the Member States more discretion to derogate from the obligations resulting from the designation as an SPA than was allowed by the Court in the Leybucht case.

It should be pointed out that, in the Leybucht case, the Commission separately submitted a separate application for interim measures and requested that the Court order the Federal Republic of Germany to take the necessary measures to suspend dyke construction work in the area of the Leybucht and in particular to refrain temporarily from starting work on stage IV of the construction programme until the Court had given its decision on the main application. In its order of 57/89R the Court rejected that application of the Commission as well, since it (the Commission) had failed to establish that there was an urgent need to interrupt the work already started.

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253 See the Advocate’s General Opinion at para 40.
254 See *supra*, no. 22.
3.3. LAPPEL BANK (PORT OF SHEERNESS)

3.3.1. Background

103. The Medway Estuary and Marshes is a wetland area of international importance covering 4,681 hectares on the north coast of Kent (United Kingdom) that is listed under the Ramsar Convention. It also supports bird species, which are listed under Annex I of the Birds Directive. Lappel Bank was an area of about 22 hectares immediately adjoining the Port of Sheerness and falling geographically within the bounds of the Medway Estuary and Marshes. Lappel Bank was an important component of the overall estuarine ecosystem and the loss of that inter-tidal area would probably result in a reduction in the wader and wildfowl populations of the Medway Estuary and Marshes.

The Port of Sheerness, which was at the time the fifth largest port in the United Kingdom in terms of cargo and freight handling and a significant employer in an area with a serious underemployment problem, planned an extension into Lappel Bank, the only area where an expansion could realistically be envisaged. The port wished to extend its facilities for car storage, value added activities on vehicles and fruit and paper handling in order better to compete with continental ports offering similar facilities.

On 15 December 1993, the Secretary of State for the Environment of the UK decided to designate the Medway Estuary and Marshes as an SPA. At the same time, though, he excluded Lappel Bank from it, considering that the need not to inhibit the viability of the port and the significant contribution that its expansion into the area of Lappel Bank would make to the local and national economy outweighed its nature conservation value.

3.3.2. Environmental issues

104. The Royal Society for the Protection of Birds (RSPB) applied to the Divisional Court of the Queen’s Bench Division to have the Secretary of State’s decision annulled on the ground that he was not entitled, by virtue of the Birds Directive, to have regard to economic considerations when classifying an SPA. The Court found against the RSPB and on appeal the judgment was upheld.

The RSPB appealed to the House of Lords, who asked the Court of Justice for a preliminary ruling on the following questions.

Firstly, the Court of Justice had to decide whether a Member State was entitled to take account of the economic requirements mentioned in Article 2 of the Birds Directive when designating an SPA and defining its boundaries pursuant to Articles 4(1) and 4(2) of the Birds Directive.

Secondly, in case of a negative answer, the Court of Justice was asked to consider whether a Member State, when designating an SPA and defining its boundaries, could nevertheless take account of economic requirements as constituting a general interest superior to the ecological objective of the Birds Directive (the Leybucht test), or as constituting imperative reasons of overriding public interest as referred to in Article 6(4) of the Habitats Directive.
3.3.3. Court judgment

105. The Court of Justice held that Article 4 of the Birds Directive lays down a special protection regime that is specifically targeted and reinforced for the most endangered species listed in Annex 1 of the Birds Directive and for migratory species (para 23). The Court noted that Article 4 of the Birds Directive, unlike Article 3 of the same Directive dealing with general conservation measures, does not refer to the requirements mentioned in Article 2 of the Directive for the implementation of special conservation measures, in particular the creation of SPAs (para 24). Consequently, having regard to the aim of special protection pursued by Article 4, and to the fact that Article 2 of the Birds Directive does not constitute an autonomous derogation from the general system of protection established by the Directive, the ecological requirements laid down by the former provision do not have to be balanced against the economic requirements listed in the latter provision (para 25). The Court’s conclusion was that it is only the ornithological criteria of Articles 4(1) and 4(2) of the Birds Directive which are to guide the Member States in designating and defining the boundaries of SPAs (para 26). A Member State is not authorised to take account of economic requirements (para 27).

Subsequently, the Court referred to its rulings in the Leybucht and the Santoña Marshes cases, stating that, respectively in the context of Article 4(4) of the Birds Directive and in the context of Article 4 as whole, economic requirements cannot correspond to a general interest superior to that represented by the ecological objective of the Directive (para 30).

Finally, the Court decided that the imperative reasons of overriding public interest that may, pursuant to Article 6(4) of the Habitats Directive, justify a plan or project which would affect an SPA, include grounds of a social or economic nature (para 38). However, these economic requirements cannot be taken into consideration at the initial stage of classification of an area as an SPA within the meaning of Article 4(1) and 4(2) of the Birds Directive, because the latter provisions were not amended by Articles 6(3) and 6(4) of the Habitats Directive; as a result, the classification of sites as SPAs must in all circumstances be carried out in accordance with the criteria permitted under Article 4(1) and 4(2) of the Birds Directive. The Court however confirmed that economic requirements may be taken into account at a later stage under the procedure provided for by Articles 6(3) and 6(4) of the Habitats Directive as the latter provisions did make amendments to Article 4(4) of the Birds Directive (paras 39-41).

3.3.4. Consequences

106. The Lappel Bank proceedings, which constituted a test case for the future classification of a large number of SPAs throughout the UK, demonstrated that, at the initial classification of a specific area under Article 4 of the Birds Directive, one cannot exempt a specific part of that area on grounds that it might be needed for the future extension of a nearby commercial port. It confirmed that economic considerations cannot be taken into account at the stage of classification of an area as an SPA. At a later stage, however, economic requirements can be considered imperative reasons of overriding pub-


lic interest enabling Member States, pursuant to Article 6(4) of the Habitats Directive, to adopt plans adversely affecting an SPA and as such making it possible to go back on a decision designating such an area by reducing its extent.

3.4. SEINE ESTUARY (PORTS OF LE HAVRE AND ROUEN)

3.4.1. Background

107. The Seine flows through Northern France and empties into the English Channel in an estuary between Le Havre and Honfleur. Le Havre and Rouen are Seine seaports.

In 1985, the French Ministry of the Environment entered into a ten-year agreement with the Autonomous Ports of Le Havre and Rouen for the protection of 3,300 hectares of state-owned land in the Seine estuary. 2,000 hectares of this area were designated as being of long-term ecological interest, while the remaining 1,300 hectares were to be preserved pending their use by industry or the ports. Part of this territory, an area of 2,750 hectares, was formally classified as an SPA in 1990.

At Le Hode, in the Seine estuary, a plant was constructed for the treatment and deposit of titanogypsum.

3.4.2. Environmental issues

108. From an ornithological point of view, the Seine estuary is one of the most important wetlands on the French coast. It is visited by large numbers both of protected species listed in annex I to the Birds Directive and of migratory species whose special protection is required by virtue of Article 4(2) of the Directive.

The European Commission submitted that the creation by the French Republic in 1990 of an SPA of 2,750 hectares did not fulfil that country’s obligations under Articles 4(1) and 4(2) of the Directive. On account of its scientifically proven ornithological interest, an area of 21,900 hectares in the Seine estuary was recognised in 1994 by the French authorities as an ‘important area for bird conservation’. The European ornithological inventory ‘Important Bird Areas in Europe’, published in 1989, included an area of 7,800 hectares in the estuary.

The European Commission further maintained that France had failed to establish for the Seine estuary a legal regime which would satisfactorily have preserved the integrity of the SPA created in 1990. More specifically, the protection regime which the agreement with the Autonomous Ports of Le Havre and Rouen had provided for that SPA had failed, in the Commission’s submission, to meet the conservation requirements defined in Articles 4(1) and 4(2) of the Directive.

The Commission claimed that the titanogypsum plant had been built in wet prairies within the abovementioned ‘important area for bird conservation’. It maintained that these lands should therefore have been included within the Seine estuary SPA in accordance with Articles 4(1) and 4(2), and that the harm occasioned by the constructions, taken as a whole, was incompatible with the conservation requirements set out in the first sentence of Article 4(4) of the Directive.
The Commission submitted that, even assuming that the effects produced by those constructions could not be assessed by reference to that provision because they were situated outside the SPA, the French Republic should nevertheless be held to have failed to fulfil its obligations under the second sentence of Article 4(4) of the Birds Directive. That provision requires Member States to take all reasonable steps to avoid irreparable deterioration so that the site can later be classified as an SPA, and to respect the conservation objectives for the site arising from Article 4. The French Republic ought therefore to have chosen the site which would have given rise to the least harm from the point of view of the conservation objectives for the SPA.

In addition, the Commission stated that no assessment of the titanogypsum plant’s implications for the SPA had been carried out in accordance with Article 6(3) of the Habitats Directive. Nor could the plant be justified for imperative reasons of overriding public interest under Article 6(4) of that Directive. It considered that the requisite conditions for applying that provision were lacking because there was no overriding public interest, there were no compensatory measures, and there were alternative solutions.

3.4.3. Court judgment

109. The French government conceded that the area classified as an SPA was insufficiently large, but argued that its extension, in 1997, had been delayed in order for the local population to be consulted and its support obtained. The Court confined itself to the observation that, according to the settled case law, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive. Therefore the Court held that France had failed to classify a sufficient large area of the Seine estuary as an SPA (pars 12-15).

The Court further held that there was no need to consider whether the protection regime which the agreement with the port authorities of Le Havre and Rouen provided for the SPA satisfied the conservation requirements defined in Articles 4(1) and 4(2) of the Directive, because that agreement was no longer in force at the end of the period laid down in the Commission’s reasoned opinion (pars 16-20). Consequently, at that time, the only status enjoyed by the SPA created in 1990 was that of state-owned land and of a maritime game reserve. The Court was of the opinion that, for want of any specific substantive measures, except in relation to hunting, such a regime is incapable of providing an adequate legal protection regime for the purposes of Articles 4(1) and 4(2) of the Birds Directive (pars 24-25).

With regard to the alleged infringement of the first sentence of Article 4(4) of the Birds Directive, the Court recalled, referring to its case law, that Member States must comply with the obligations arising inter alia under that provision, even when the area in question has not been classified as an SPA, provided that it should have been so classified (para 38). It follows that any infringement of Article 4(4) “presupposes that the area in question is one of the most suitable territories in number and size for the conservation of the protected species, within the meaning of the fourth subparagraph of Article 4(1)” (para 39). The mere inclusion of the site by the Member State in an inventory of ‘important areas for bird conservation’ was not considered sufficient proof that it ought to have been classified as an

SPA (para 42). The consideration of the conclusions of scientific studies did not furnish sufficient proof either (paras 44-47).

In respect of the alleged infringement of the second sentence of Article 4(4) of the Directive, the Commission was found not to have demonstrated that the French Republic had not endeavoured to avoid pollution or deterioration of the habitat where the titanogypsum plant was constructed (para 48).

The complaint alleging infringement of Articles 6(3) and 6(4) of the Habitats Directive was rejected because the application contained no particulars on the precise date from which, according to the Commission, the conduct of the French authorities had contravened the obligations arising under those provisions, the determination of which was necessary in order to define the extent of the complaint (paras 36-37).

3.4.4. Consequences

110. In the Seine Estuary judgment, the Court reiterated that the obligation to take the appropriate steps to avoid pollution and deterioration of habitats, arising under Article 4(4) of the Birds Directive, also applies to areas that have not been classified as SPAs, but ought to have been. This presupposes that the area in question is one of the most suitable territories in number and size for the conservation of the protected species, within the meaning of the fourth subparagraph of Article 4(1) of the Birds Directive.

3.5. SEVERN ESTUARY (PORT OF BRISTOL)

3.5.1. Background

111. The Severn Estuary is one of the largest estuaries in the UK, spanning the upper reaches of the Bristol Channel on the west coast of Britain, between South Wales and the South West of England. A large proportion of the Estuary is designated under the Ramsar Convention.

The Secretary of State for the Environment, Transport and the Regions of the UK indicated that he intended to propose the Severn Estuary to the Commission as a site eligible for designation as an SAC under Article 4(1) of the Habitats Directive.

3.5.2. Environmental issues

112. First Corporate Shipping Ltd (hereinafter FCS), the statutory port authority for the port of Bristol, which is situated on the Severn Estuary, owned considerable land in the neighbourhood of the port, and at the time had invested, in partnership with other undertakings, nearly 220 million GBP in capital in developing its facilities. FCS considered that its rights as owner of the land had been infringed by the Secretary of State’s decision and sought judicial review.

FCS submitted before the High Court of Justice of England and Wales that Article 2(3) of the Habitats Directive obliged the Secretary of State to take account of the considerations laid down in that provision, namely economic, social and cultural requirements and regional and local characteristics, when
deciding which sites to propose to the Commission pursuant to Article 4(1) of that Directive and/or in defining the boundaries of such sites. The High Court of Justice stayed proceedings and referred the abovementioned question of interpretation for a preliminary ruling to the European Court of Justice.

The Court thus had to rule on a question that resembled the issue in the Lappel Bank case, namely whether ecological requirements have to be balanced against economic considerations, and whether Member States have any discretion in this respect.

3.5.3. Court judgment

113. The Court of Justice noted that the question of interpretation referred for a preliminary ruling related only to Stage 1 of the procedure for classifying natural sites as Special Areas of Conservation (SACs) laid down by Article 4(1) of the Habitats Directive (para 12).

Under that provision, on the basis of the criteria set out in Annex III (Stage 1) together with relevant scientific information, each Member State is to propose and transmit to the Commission a list of sites, indicating which natural habitat types in Annex I and habitats of the species listed in Annex II are to be found there (para 13). Annex III to the Habitats Directive, which deals with the criteria for selecting sites eligible for identification as sites of Community importance (SCIs) and designation as SACs, sets out, as regards Stage 1, criteria for the assessment at national level of the relative importance of sites for each natural habitat type in Annex I and each species in Annex II (para 14). Those assessment criteria are defined exclusively in relation to the objective of conserving the natural habitats or the wild fauna and flora listed in Annexes I and II respectively (para 15). It follows that Article 4(1) of the Habitats Directive does not as such provide for requirements other than those relating to the conservation of natural habitats and of wild fauna and flora to be taken into account when choosing, and defining the boundaries of, the sites to be proposed to the Commission as eligible for identification as SCIs (para 16).

The first subparagraph of Article 3(1) of the Habitats Directive provides for the setting up of a coherent European ecological network of SACs, to enable them to be maintained or, where appropriate, restored at a favourable conservation status in their natural range (para 19). The Court considered that, to produce a draft list of SCIs, capable of leading to the creation of a coherent European ecological network of SACs, the Commission must have available an exhaustive list of the sites which, at national level, have an ecological interest which is relevant from the point of view of the Habitats Directive's objective of conservation of natural habitats and wild fauna and flora (para 22).

The Court considered that the favourable conservation status of a natural habitat or a species must be assessed in relation to the entire European territory of the Member States to which the Treaty applies and that a Member State, when drawing up the national list of sites, is not in a position to have precise detailed knowledge of the situation of habitats in the other Member States. Therefore, the Court found that a Member State cannot of its own accord, whether because of economic, social or cultural requirements or because of regional or local characteristics, delete sites which at national level have an ecological interest relevant from the point of view of the objective of conservation without jeopardising the realisation of that objective at Community level (para 23). In particular, if the Member States could take account of economic, social and cultural requirements and regional and local characteristics...

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when selecting and defining the boundaries of the sites to be proposed to the Commission, the Commission could not be sure of having available an exhaustive list of sites eligible as SACs, with the risk that the objective of bringing them together into a coherent European ecological network might not be achieved (para 24). The Court concluded that a Member State cannot take account of the requirements and characteristics, as mentioned in Article 2(3) of the Habitats Directive, when selecting and defining the boundaries of the sites to be proposed to the Commission as eligible for identification as SCIs (para 25).

### 3.5.4. Consequences

114. In the Severn Estuary case the Court of Justice merely clarified the discretionary powers of the Member States in the first stage of the procedure for designating SACs laid down by Article 4(1) of the Habitats Directive. The Court made clear that, at this stage of drawing up a list of natural sites, the Member States cannot take account of economic, social and cultural requirements and regional and local characteristics.

Advocate General Léger did not exclude in his opinion\(^{263}\) that economic, social or cultural considerations or regional and local characteristics could be taken into account in the second stage of the procedure\(^{264}\). At this stage, as set out in Article 4(2) and 4(3) of the Habitats Directive, the Commission, in agreement with each Member State, establishes a draft list of SCIs drawn from the Member States’ lists. Thus, as economic and social considerations could already be taken into account at least at one point in the stage of designating SACs, the Lappel Bank judgment could not as such be applied in the context of the Habitats Directive\(^{265}\).

The Advocate General reasoned that Article 2(3) of the Habitats Directive is worded in general terms and does not exclude account being taken of economic, social and regional requirements when measures are taken to designate SACs and define their boundaries\(^{266}\). The third recital in the preamble of the Habitats Directive states that the Directive, the aim of which is to “promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements”, makes “a contribution to the general objective of sustainable development”. The Advocate General held that the concept of sustainable development does not necessarily mean that the interests of the environment have to prevail over the interest in other policy areas. On the contrary, it emphasises the necessary balance between various interests which sometimes clash, but which must be reconciled\(^{267}\). The Advocate General further referred to the principle of integration as the basis of the strategy of sustainable development\(^{268}\).

Therefore, the Advocate General argued that the approach of the Commission and the Member States in the second stage of the procedure must, considering the objective of sustainable development and the principle of integration, consist in assessing the interests concerned, ascertaining whether or not the maintenance of human activities in the area concerned may be reconciled with the objective of conservation or restoration of natural habitats and wild fauna and flora, and drawing the necessary

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\(^{264}\) Opinion, para 51.

\(^{265}\) Opinion, para 30.

\(^{266}\) Opinion, para 52.

\(^{267}\) Opinion, para 54.

\(^{268}\) Opinion, para 57.
consequences as regards setting up an SAC\textsuperscript{269}. The Advocate General also pointed out that, pursuant to Commission Decision 97/266/EC concerning a site information format for proposed Natura 2000 sites\textsuperscript{270}, Member States were requested to supply information on activities connected with transportation and communication relating, \textit{inter alia}, to port areas and shipping\textsuperscript{271}.

For waterway and port authorities and operators, the main message of the Severn Estuary judgment was that economic interests cannot play a role at the initial stage of the designation by Member States of proposed nature conservation areas under the Habitats Directive. The suggestion made by Advocate General Léger to take such interests into account at the next stage of the designation process, when the European Commission selects SCIs, meanwhile appears not to have been acted upon.

\section*{3.6. SECOND DEEPENING OF THE RIVER SCHELDT}

\subsection*{3.6.1. Background}

\textbf{115.} The Western Scheldt is the estuary of the river Scheldt, which flows through the South Western part of the Netherlands into the North Sea. Some 80 kms upstream, just across the Belgian border, the Scheldt gives access to the port of Antwerp, which is the second largest seaport of the EU.

The Western Scheldt, except for its channel, and the adjacent mudflat and salt marsh area known as the Submerged Land of Saeftinghe, were both designated as SPAs in the sense of the Birds Directive and proposed as SCIs under the Habitats Directive; later, the navigable channels were included in the SCI\textsuperscript{272}.

In 1995, the Netherlands and the Belgian Region of Flanders reached an agreement over the deepening of the river that was laid down in a bilateral treaty signed at Antwerp on 17 January 1995. This project mainly involved a large-scale dredging operation on local bars in the riverbed in the Dutch stretch of the river to bring its navigable depth to 11.6 metres at low tide (and to 15.25 m in two tides for vessels sailing up). This would ensure a better accessibility of the port of Antwerp, and was necessitated by the increasing draught of ships. The works were effectively carried out as from 30 June 1997 and have meanwhile been completed.

\subsection*{3.6.2. Environmental issues}

\textbf{116.} Studies showed that the deepening project would lead to a smaller diversity of habitats and a loss of habitats (375 hectares of shallow water, 40 hectares of silty and sandy areas and 60 hectares of salt marshes with spartina grass).

\textsuperscript{269} Opinion, para 58.
\textsuperscript{271} Opinion, para 37.
\textsuperscript{272} The Submerged Land of Saeftinghe was designated as an SPA and as a wetland of international importance by a Dutch Ministerial Order of 18 July 1995 which expressly stated that its intent was not to hinder navigation or its further development. This double protection status was extended to the Western Scheldt as a whole – but with exception of the navigable channels – by a Dutch Ministerial Order of 24 March 2000. With a similar exception, the Western Scheldt was proposed as an SCI by a Dutch Ministerial Order of 7 December 2001. In February 2003, however, the Netherlands reportedly decided to propose as an SCI the Western Scheldt \textit{including} the navigable channels.
The treaty between the Flemish Region and the Netherlands comprised a compensation programme for the loss of natural assets. The Netherlands were responsible for the preparation, the execution and the maintenance of the compensation works and the monitoring of the effects of the deepening operation. Compensation measures were intended to prevent or reduce unwanted effects on the natural assets of the Western Scheldt. Flanders bore the costs of the measures.

3.6.3. Intervention of the European Commission

117. In 1998, the European Commission sent a letter of formal notice to the Netherlands with regard to the nature compensation programme for the deepening of the Western Scheldt\[^{273}\]. In 2001, it issued an additional letter of formal notice\[^{274}\]. In 2003, the European Commission sent a reasoned opinion to the government of the Netherlands\[^{275}\].

The Commission was of the opinion that the Netherlands had not sufficiently investigated the consequences of the deepening project for natural assets and that it had not carried out an appropriate assessment of its implications in the sense of Article 6(3) of the Habitats Directive. Also, the Netherlands had failed to demonstrate imperative reasons of overriding public interest in the sense of Article 6(4) of the Directive. The Commission went so far as to put the need and desirability of the deepening of the Western Scheldt into a long-term perspective with a view to possible further deepening projects:

> In this respect, the main question is whether the further deepening of the Western Scheldt – also having regard to studies [...] that suggest that it can cause additional safety problems – can provide a sustainable solution for the problem of the accessibility of the port of Antwerp for large vessels and whether this is really a problem given the long-term perspective that the port Antwerp has to offer in view of the ever increasing size of vessels\[^{276}\].

In making this rather astonishing statement, the Commission, on the strength of EU nature conservation law, questioned the very existence of the second largest seaport of the EU. Moreover, the Commission asserted that the Netherlands had not investigated alternative solutions that could have had less negative effects on nature values. For these reasons, the Commission insisted on the need for a better preparation of future deepening projects. As to the past deepening project, the Commission was of the opinion that the Netherlands had failed to fulfil its obligations arising under Article 4(4) of the Birds Directive and under Articles 6(2), 6(3) and 6(4) of the Habitats Directive.

Given the fact that the deepening works had been carried out, the Commission later focused on the issue of compensations. It took the view that the only appropriate measure would have been to ‘give back’ to the river land that had been previously reclaimed. This land would then once again have been exposed to the tides so that additional habitats might have been created in the estuary. Local opposition against such a far-reaching nature development scheme was no valid excuse for merely taking inappropriate compensation measures that were located on the landside of the main dykes and whereby the new compensation areas were of a different type than the tidal areas lost. Further, the precautionary principle requires that a Member State should launch a compensation programme even before the negative effects of the deepening works on nature can be ascertained. Difficulties in acquiring the land needed for carrying out compensation works were no valid excuse either.

\[^{276}\] Letter of 7 May 2001, para 27.
3.6.4. Consequences

118. According to Article 226 of the EC Treaty, the European Commission may, if it retains its view that the Netherlands is not fulfilling its obligations, eventually bring the matter before the European Court of Justice.

Recently, however, the Commission stated that it is evaluating whether the compensatory measures that have meanwhile been undertaken can ensure that the overall coherence of Natura 2000 is protected. The Commission was also considering the new development plan for the Scheldt estuary which includes a package of nature restoration and development measures aimed at increasing the overall resistance of the Scheldt estuary, as an ecosystem, to the expected negative impacts of development projects (such as the further deepening of the navigational channel, which is set to commence in 2007 and to be finished by the end of 2009). The new package includes the provision of additional intertidal areas and the improvement of existing habitats for protected species. The Commission accepted that these are management measures taken in the context of Article 6(1) of the Habitats Directive, and that they are not considered nature compensation measures in the sense of Article 6(4) of the Directive\(^\text{277}\).

After the Netherlands had provided guarantees in relation to the implementation of compensation measures for the previous deepening project agreed upon in 1995, the European Commission closed the infringement case by letter of 23 December 2005\(^\text{278}\). The infringement case opened by the Commission did not affect the carrying out of these deepening works (they were however delayed due to the annulment of the initial Dutch decision by the Dutch Supreme Administrative Court for non-compliance with Dutch domestic environmental law). Nonetheless, the pending infringement case had a serious impact on the preparation of the new deepening project by the Netherlands and Flanders, which was based on thorough economic and environmental research and which comprises, as we have seen, a separate nature development plan.

3.7. DEURGANCK DOCK (PORT OF ANTWERP)

3.7.1. Background\(^\text{279}\)

119. The Belgian port of Antwerp, located on the river Scheldt, is a thriving container port. In the 1990s, it was felt that, in order for the port to be able to cope with the exponential growth of container freight, a new dock was needed.

A number of possible construction sites on the left bank of the Scheldt (hereinafter the Left Bank Area) were weighed against each other in a 1995 assessment document drawn up by the Flemish administration. The selected tidal dock alternative was subsequently examined in an EIA. On 20 January 1998, the Flemish government took the political decision to build the new tidal container dock, which would

\(^{277}\) Letter from Mr Stavros Dimas to Mr Jan Geluk of 1 August 2005, A(05) 1857-D(05).
\(^{279}\) See the Report of Belgium’s Rekenhof (State Auditor’s Office) on the construction of the Deurganck Dock of 14 June 2005 in the Documents of the Flemish Parliament, 2004-2005, no. 37-F/1; see also www.deurganckdok.be which has a brief legal background page.
be known as Deurganck Dock\textsuperscript{280}. The construction of the dock was seen as crucial to the port of Antwerp. Without it, the port would not be able to maintain its role as a hub for international trade. The total length of mooring space inside the dock would amount to 5,000 metres. Construction of the first quay wall was begun in September 1999.

It should be noted at this point that the Left Bank Area had been under development as a port area since the early 1970s. When the Birds Directive entered into force in 1981, the lock of Kallo and a number of docks were already operational. The construction of the tidal Deurganck Dock, which was not envisaged in the original lay-out of the port area, entailed the partial filling in of a large existing, unused non-tidal industrial dock with sloping banks rather than quay walls (the Doel Dock).

### 3.7.2. Environmental issues

120. The vast construction project for Deurganck Dock would unavoidably lead to the destruction of a large natural habitat area within the Left Bank Area. A Decree of the Flemish Government of 17 October 1988 had designated a number of habitats spread over almost the whole Left Bank Area as an SPA called ‘Salt Marshes and Polders of the Lower Scheldt’ (hereinafter SPA no. 3.6) within the meaning of Article 4(1) of the Birds Directive. The area had also been listed under the Ramsar Convention. As a result of the construction of Deurganck Dock, SPA no. 3.6, as well as the proposed SCI called ‘Scheldt and Durme Estuary between the Dutch border and Wetteren’, would be affected.

In order to realise the Deurganck Dock project, the Flemish Government reduced SPA no. 3.6 by its Decision of 23 June 1998 amending the abovementioned Decision of 17 October 1988. At the same time, the Flemish government took compensatory measures by extending another SPA, namely SPA no. 3.5 ‘Durme and Middle Reach of the Scheldt’, with the ‘Flood Control Area Kruiibeke – Bazelo – Rupelemonde’ (hereinafter KBR area).

The European Commission received complaints in which it was alleged that the Birds Directive and the Habitats Directive had not been complied with. At the same time, some inhabitants and environmental NGOs lodged complaints with the Belgian Raad van State or Council of State (the Supreme Administrative Court of Belgium).

### 3.7.3. Intervention of the European Commission\textsuperscript{281}

121. On 18 January 2001, the European Commission sent a first letter of formal notice to Belgium (of which the Flemish Region is a part) claiming that Belgium had, in connection with the Deurganck Dock project, failed to comply with its obligations under, \textit{inter alia}, the Birds and Habitats Directives.

The Commission made the following remarks with respect to the effects of the Deurganck Dock project on nature conservation areas.

122. First of all, the Commission stated that a Member State cannot call into question its own previous decision to designate an area as an SPA on the grounds that the ornithological interest is doubtful.

\textsuperscript{280} Deurganck is a toponym meaning passageway and refers to a local natural channel that used to flow into the River Scheldt.

\textsuperscript{281} Letter from Ms Margot Wallström to Mr Louis Michel of 18 January 2001, SG(2001) D/285212, 1998/4669 and 1998/5005; Letter from Ms Margot Wallström to Mr Louis Michel of 20 March 2002, 2000/2212 C(2002) 1078. It should be noted that there was considerable other correspondence which we were however unable to consult.
Member States are always entitled to offer a more stringent environmental protection than required by EU law. Moreover, a number of scientific reports – including those published by BirdLife International – had highlighted the importance of the area as a habitat for wild birds. Only in exceptional cases, where it would be obvious that a designated SPA can absolutely not be regarded as an area in the sense of Article 4(1) and 4(2) of the Birds Directive, could the Commission overrule the Member State’s decision.

123. Next, the Commission made it clear that the Birds Directive does not limit SPA status to natural or semi-natural areas. The fact that the Left Bank Area had already been raised with a sand-in-water slurry before the entry into force of the Birds Directive in 1981, and that its original ecological values had been annihilated, did not prevent it from becoming subject to obligatory designation as an SPA under that Directive. Areas that have been left in peace for a number of years and where new ecological characteristics have developed should be regarded as habitats within the meaning of the Directive.

124. The fact that the Left Bank Area was already destined for future port extension projects under zoning decisions of 1978, i.e. also prior to the Birds Directive becoming operational, was not found to be relevant either. A reservation for future projects does not grant absolute and acquired rights to have works carried out, since competent authorities can always go back on their previous decisions or impose new limitations and constraints. The fact that a zoning decision had mentioned the future construction of certain docks in 1978, did not amount to a definitive approval of any concrete project. The principle of legitimate expectation was not violated either since the relevant SPA had been designated back in 1988, so that economic actors should have been well aware of the situation when the Deurganck Dock project was launched. For these reasons, Belgium’s defence that the Commission was attempting to apply the Birds Directive with retroactive effect was rejected.

125. As regards the absence of alternative solutions, which is a requirement under Article 6(4) of the Habitats Directive, the Commission accused Belgium of not having considered the possibility of using another Belgian seaport than Antwerp. In order to justify the construction of a new dock, Belgium should have reflected on the utilisation rate at the Belgian coastal port of Zeebrugge. The Commission did not exclude the possibility that the imperative reasons of overriding public interest could only be met in the Left Bank Area of the port of Antwerp, but it held that the competent authorities should be able to actually demonstrate this. Furthermore, the Commission complained that the selection of the Deurganck Dock alternative in the inception note of 1995 was solely based upon economic and technical considerations, while environmental aspects had only played a subordinate role and the existence of an SPA and a proposed SCI had not even been mentioned once in the note. The Commission also referred to the renovation of Churchill Dock, an older general cargo dock on the right bank of the Scheldt that was being adapted for container handling, which proved that a more rational use of available space was feasible. The fact that the chosen site was the only one to offer sufficient space for the construction of Deurganck Dock was not considered decisive, since no study had been made on the logistical management of containers. For all these reasons, Belgium was found not to have sufficiently examined the availability of alternative solutions.

126. As regards the imperative reasons of overriding public interest in the sense of Article 6(4) of the Habitats Directive, Belgium relied on the positive effects that the project would have on the economic development of the port of Antwerp and on the economy and employment in Flanders as a whole. Belgium also referred to the strong growth in container trade and the importance of enabling the port of Antwerp to offer adequate services that meet the real needs of the market. The Commission however declared that, since the negative effects of a nearby industrial development project had not been assessed properly, it was impossible to weigh the invoked imperative reasons against the conservation
objectives. Next, the Commission was of the opinion that the economic benefits had been overestimated in view of the fact that a leading Antwerp cargo handler was planning a new project at Flushing\textsuperscript{282}. Moreover, the Commission questioned the need for additional capacity in view of the rate of utilisation of existing container handling facilities at Zeebrugge.

127. Further, the Commission was not convinced of the sufficiency of the compensatory measures, arguing, \textit{inter alia}, that it had not been demonstrated that the compensation – the extension of SPA no. 3.5 with the KBR area (mainly a fresh water area) – was of at least equal value to the lost part of SPA no 3.6 (where salt water prevails). Moreover, the KBR area had already been proposed by the Belgian authorities to the Commission as an SCI within the meaning of the Habitats Directive. Therefore, designation of the KBR area as an SPA did not provide any additional protection. Moreover, the compensation measures had only reached the design stage. The Commission concluded that Belgium had not fulfilled its obligations under Article 4(4) of the Birds Directive as amended by Article 6(4) of the Habitats Directive.

128. An environmental impact assessment of the Deurganck Dock project had been carried out in November 1996. The Commission found that the 1996 EIA had failed to take proper account either of the impact of the Deurganck Dock project on bird life on the Dutch stretch of the river Scheldt or of its impact considered cumulatively with the effects of other projects carried out previously in the Left Bank Area. As Belgium had not carried out an appropriate EIA, it had failed to fulfil its obligations under, \textit{inter alia}, Article 4(4), first sentence of the Birds Directive as amended by Article 6(3) of the Habitats Directive.

129. On 20 March 2002, the European Commission sent a second letter of formal notice to Belgium in relation to a new zoning decision of the Flemish government taken with a view to continuing the Deurganck Dock project, which had already met with serious reservations on the part of Belgium’s Council of State.

The Commission noted that the governmental decision would lead to the deletion of some 2,000 hectares of unaffected polder landscape from the existing SPA, in order to make this land available for the long-term development of additional docks, logistical facilities and industries. Reference was already made to the future construction of a second tidal container dock (the Saeftinghe Dock). The Commission considered that Belgium had failed to carry out an appropriate assessment of the cumulative effects of the plan in the sense of Article 6(3) of the Habitats Directive. Neither had Belgium demonstrated the absence of alternative solutions, the presence of imperative reasons of overriding public interest or the suitability of compensatory measures.

3.7.4. Court judgments

130. Apart from the interventions by the European Commission, the construction of Deurganck Dock was constantly subject to legal challenges before the Council of State.

In May 2000, a single inhabitant of the tiny village of Doel, in the immediate vicinity of Deurganck Dock, and the owner of polder lands threatened by the project obtained a suspension of the governmental zoning decision and the building permit on grounds relating to Belgian internal administrative

\textsuperscript{282} See \textit{infra}, no. 136 et seq. on the Western Scheldt Container Terminal project.
law that have nothing to do with nature conservation\textsuperscript{283}. The administrative errors were quickly rectified by the Flemish authorities, so that the construction works were only briefly interrupted in June 2000\textsuperscript{284}.

On 7 March 2001 the Council of State suspended the new construction permit for Deurganck Dock\textsuperscript{285}. The Council reasoned that the Flemish authorities should have organised a new public enquiry before granting the permit. As a result, construction works would be interrupted for more than one year as from March 2001\textsuperscript{286}.

On 30 July 2002, the Council of State suspended the second revision of the zoning decision\textsuperscript{287}. The Council held that Articles 4(1), 4(2) and 4(4), first sentence of the Birds Directive and Articles 6(2), 6(3) and 6(4) of the Habitats Directive were directly applicable in the Flemish Region and that the new compensation area SPA no. 3.6 overlapped with the area ‘Scheldt and Durme Estuary between the Dutch border and Wetteren’, which Belgium had already proposed to the European Commission as an SCI, so that no effective compensation was offered.

A considerable number of other claims filed with the Council of State against the Deurganck Dock project were rejected. Thus the overview of judgments given above is by no means complete.

### 3.7.5. Consequences

\textbf{131.} In response to the objections raised by the European Commission and the Council of State, the Antwerp Port Authority commissioned a new environmental impact assessment. The new EIA for the Left Bank Area thoroughly analysed the impact of the Deurganck Dock project. A detailed compensation plan was drawn up for the loss of flora and fauna, in particular the loss of bird habitat and interference with birdlife in the area. Eleven nature compensation measures were implemented to accompany the extension of port facilities on the left bank. The nature compensation areas are said to provide a serious and comprehensive response to all the objections that were raised by the EU and environmental organisations in relation to the construction of Deurganck Dock. With a view to effectively implementing the compensation measures, the Flemish government set up a supervisory commission on 16 September 2002.

In order to restart the works within a reasonable time span, the Flemish legislator enacted several \textit{ad hoc} emergency bills which declared the project to be of general interest and strategic importance\textsuperscript{288}. The Act of 14 December 2001 also specified the nature compensation measures, amounting to a cost of 24,100,000 EUR. The parliamentary documents contain a lengthy presentation of the imperative reasons of overriding public interest justifying the Deurganck Dock project, including arguments relating to economic needs and prosperity, employment, effects on mobility and even the strategic military interest of the dock\textsuperscript{289}.

\textsuperscript{283} See Raad van State, 31 May 2000, Apers, no. 87.739; see also Raad van State, Apers, no. 87.740 and Raad van State, Bond Beter Leefmilieu, no. 87.741, both of the same date.

\textsuperscript{284} Subsequently, the suspended decisions referred to were also annulled by the Council of State (Raad van State, 24 June 2003, Apers, no. 120.810).

\textsuperscript{285} Raad van State, 7 March 2001, Apers, no. 93.767.

\textsuperscript{286} Subsequently, the permit was annulled by the Council of State (Raad van State, 11 April 2003, Apers, no. 118.229).


\textsuperscript{288} Flemish Decree of 14 December 2001 relating to building permits of compelling major general interest (Moniteur belge, 20 December 2001).

\textsuperscript{289} See Parliamentary documents of the Flemish Parliament, 2001-2002, no. 872/1, at p. 12 et seq.
The Act was in its turn unsuccessfully challenged before Belgium’s Arbitragehof (the Constitutional Court of Belgium), where the plaintiffs again developed arguments based on the Birds and Habitats Directives and demanded in vain that the case be referred to the Court of Justice for a preliminary ruling\textsuperscript{290}. The Arbitragehof ruled that the Act of 14 December 2001 does not infringe any of the requirements imposed by Article 6(4) of the Habitats Directive\textsuperscript{291}. Building permits issued on the basis of the Act were subsequently ratified by five new Acts of Parliament\textsuperscript{292} and could not be challenged before the Council of State\textsuperscript{293}. The European Commission, for its part, has not yet formally closed the infringement procedure.

The construction works, which were suspended in March 2001, were resumed in April 2002 and could be pursued without further interruptions. A first berth at Deurganck Dock was opened mid-2005. On the other hand, since compensation was sought within the port extension zone, the environmental issues raised have led to a considerable reduction in the area previously assigned to the port for future expansion on the left bank. Consequently, there is believed to be room for just one more major expansion project in the port of Antwerp (Saeftinghe Dock). In view of the Deurganck Dock experience, the Rekenhof (the Belgian State Auditor’s Office) issued recommendations for a better preparation of future strategic infrastructure projects\textsuperscript{294}.

3.8. DIBDEN BAY (PORT OF SOUTHAMPTON)

3.8.1. Background

132. In 2000, Associated British Ports proposed to build a 1,850-metres long, six-berth deep water quay at Dibden Bay near the port of Southampton in the UK, covering some 240 hectares and taking some 76 hectares of intertidal foreshore to provide new container terminal facilities.

The site of the proposed Dibden Terminal was on the west bank of the River Test, just above the point at which that river joins the River Itchen to form Southampton Water. For the most part, the proposed Terminal would have occupied land that had been reclaimed from the intertidal area by the deposit of dredgings.

3.8.2. Environmental issues

133. The proposed terminal would have caused substantial environmental damage. Apart from adverse effects in terms of noise disturbance and visual impact, the most significant harm arising from the Dibden terminal would have been to nature conservation sites. There would have been direct impacts on sites of local and national conservation importance and on internationally protected sites. The proposed development would have damaged the integrity of the Solent and Southampton Water Ramsar site and SPA. It could not be ascertained that the proposed development would not adversely


\textsuperscript{291} See Arbitragehof, 2 July 2003, no. 94/2003, paras B.33 et seq.


\textsuperscript{293} See Raad van State, 24 June 2003, Apers, no. 120.811; Raad van State, 7 February 2006, Apers, no. 154.603.

\textsuperscript{294} See supra, fn. 279 and infra, no. 268.
affect the integrity of the Solent Maritime and River Itchen candidate SACs. Pending the inquiry, the New Forest National Park was established on the site.

Associated British Ports proposed large-scale offsetting measures, in which a large part of the total project cost was to be invested.

During the public inquiry, innumerable protests were filed against the project. A total of 6,141 persons or organisations objected to the proposed development. Most public bodies were also opposed to it. Only the Southampton City Council spoke out in favour of the project.

3.8.3. Decision of the UK government

On 20 April 2004, the UK Transport Secretary of State accepted the recommendation of the Dibden Bay Inquiry Inspector to turn down the proposal of Associated British Ports. Consequently, the building of the new container terminal facilities was cancelled.

To go ahead the project had to satisfy the criterion of imperative reasons of overriding public interest (IROPI), in accordance with the UK Habitats Regulations which had transposed the EU Birds and Habitats Directives. In line with the consistent view of the European Commission, the Inspector applied a particularly strict approach:

"...it is not axiomatic that a proposal to expand the port should be given greater weight than the protection of the European sites. Paragraph 5.3.2 of Managing Natura 2000 suggests that the term “imperative reasons of overriding public interest” refers to projects that are “indispensable” [...] There are clearly competing public interests that must be weighed. However, the form of Regulation 49 is such that the derogation from the requirements of Regulation 48(5) will not apply unless the competent authority is satisfied that an overriding public interest would be served by carrying out the development. So, if the competing public interests are evenly balanced, or if the competent authority is uncertain for lack of information, the derogation will not be available."  

For a number of reasons, the Inspector doubted that the project could satisfy the IROPI criterion. There was no assurance the works would go ahead if authorised and no contract, provisional or otherwise, was in place with a potential terminal operator (Decision Letter, para 30). The Inspector considered that a project satisfying a test of public interest might reasonably be expected to attract a substantial degree of support from bodies representing the public interest. However, he noted that, with the exception of the Southampton City Council, no public body had expressed support for the Dibden Terminal project at the Public Inquiries. The weight of public opinion, as expressed at the Inquiries and in the written representations, was heavily against the proposed development (para 31). The Inspector doubted whether local advantages in terms of benefits to the Port of Southampton and the

297 The Inspector noted: “The second test is that the project “must be carried out for imperative reasons of overriding public interest”. If a project is to satisfy this requirement, the public might reasonably expect some assurance that the requisite works would be undertaken if authorised. However, in the present case there is no such assurance. On the contrary, ABP have indicated that they do not intend to operate the Dibden Terminal themselves; and that they would not proceed with construction of the Terminal unless they had a binding long-term contract with a prospective operator. As far as I am aware, they do not yet have even a provisional contract” (para 36.656).
local economy amounted to imperative matters of public interest that should override the protection of habitat to which the UK is committed by international agreement and international law. He considered that if the foreseeable national need could be met without the Dibden Terminal, there would be no imperative reasons of public interest that should override the protection of the internationally designated nature conservation sites (para 32). The Inspector recognised the potential adverse competitive consequences to the national economy of a failure to proceed with the proposal in the absence of sufficient container handling capacity at UK ports. The key question for the Inspector was therefore whether without the proposed terminal there was a reasonable prospect of sufficient capacity being provided at UK ports to handle the expected growth in the UK's container trade in the foreseeable future (para 33).

As to the alternative means of serving the public interest, the Inspector accepted that unless substantial new port development took place in the South East of England, the UK would have insufficient container handling capacity to handle its foreign trade. He considered that the problem was likely to start to have an effect in about 2006 and that, by 2015, the shortfall would be of the order of 3km of deep water container quay. He doubted the usefulness of predictions beyond 2015 (para 34). There were three other schemes being developed in the South East for expanded deep-water container handling capacity, at London Gateway (Shellhaven), Harwich (Bathside Bay) and Felixstowe (Landguard Terminal) which could, in various combinations, address or exceed the identified quantitative national need for additional capacity. The Inspector could not predict whether these developments would proceed but nor was he able to rule out them not proceeding (para 35). The Inspector considered it unlikely that any of the other three South Eastern proposed container terminals could become operational before the forecast shortfall in national handling capacity would begin to have an impact in 2006. On the other hand, he concluded that there was no guarantee that the proposed Dibden Terminal would be operational in 2006. However, the Inspector, who in support of his views cited European Commission guidance contained in Managing Natura 2000, was not convinced that a temporary lack of handling capacity should be regarded as an imperative reason of public interest that should override the protection of internationally designated sites (para 37). The Inspector considered it a reasonable prospect that any shortfall in national container handling capacity would be short-lived and that thus there were, at present, no imperative reasons of overriding public interest to support the Dibden Terminal project, sufficient to outweigh its adverse impacts. He recognised that this conclusion was based on a finely-balanced judgment on which others might conclude differently and that a different conclusion might be drawn if certain other proposed developments failed to materialise (para 38).

298 Report, para 36.661.
299 The Inspector considered: “The County and District Councils postulate that, if the UK had an ample supply of deep-water container wharfage, there would be no realistic case for developing a further container terminal on a sensitive, internationally protected site such as Dibden Bay [...]. I agree. It follows that the case for the Dibden Terminal is contingent upon the national need for capacity. To the extent that that need could be accommodated by other means, the public interest in providing the Dibden Terminal must be diminished. If the foreseeable national need could be met without the Dibden Terminal, I consider that there would be no imperative reasons of public interest that should override the protection of the internationally designated nature conservation sites” (para 36.662), and: “On the other hand, in the absence of sufficient container handling capacity at UK ports, failure to proceed with the Dibden Terminal would put our national economy at a competitive disadvantage. Initially, transhipment traffic would be captured by continental ports, limiting the range of short-sea feeder services available to carry Britain’s trade. Ultimately, direct calls by deep-sea container services would be affected. A proportion of Britain’s imports and exports would have to be transshipped through foreign ports. The resulting delays and costs of double handling would plainly be damaging. In my view, that could amount to an imperative reason for proceeding with the Dibden Terminal development that would be of overriding public interest. The key question is therefore whether, without the Dibden Terminal, there is a reasonable prospect of sufficient capacity being provided at UK ports to handle the expected growth in the UK’s container trade in the foreseeable future” (para 36.663).
The proposed offsetting measures were considered inadequate compensatory measures (para 39). Moreover, it was found that the applicant’s appropriate assessment was fundamentally flawed in that it confused mitigation and compensation measures (para 17).

Basically, the Secretary of State agreed with the Inquiry Inspector’s views (paras 42 et seq.). The decision further highlighted the adverse impact the proposal would have on the integrity of the sites. Overall, the disbenefits of the scheme, as borne out by its impact on internationally and nationally environmentally sensitive sites, were deemed to outweigh its potential benefits (para 68). The importance which the UK government places on meeting its obligations under European Community law and the Ramsar convention was emphasised strongly in the negative decision (para 69).

3.8.4. Consequences

135. The decision meant the end of the Dibden Bay container terminal project. Although it was not challenged before the courts and did not give rise to legal proceedings, it is interesting from a legal point of view because it shows that EU and other nature conservation rules can substantially delay decisions on major waterway and port-related projects and even lead to their outright cancellation. In fact, Dibden Bay was the first major port extension project to be dropped as a result of the application of EU nature conservation law.

3.9. WESTERN SCHELDT CONTAINER TERMINAL (PORT OF FLUSHING)

3.9.1. Background

136. The port of Flushing (Dutch name: Vlissingen) is a Dutch seaport located on the northern bank of the mouth of the Western Scheldt estuary. It consists of two separate parts: Flushing East (the new port) and Flushing West, which is located in the old town centre.

The competent port authority of Zeeland Seaports developed a plan to construct a Western Scheldt Container Terminal (WCT) next to the Flushing East port. This ‘world class’ terminal would have a quay measuring 2,650 metres in length and 500 metres in width. The construction works would require 41 hectares of existing land and 141 hectares of newly reclaimed land. The terminal would have a capacity of 1.5m containers a year.

In October 2002, the provincial authorities of Zeeland agreed on an amendment of the regional land use plan, paving the way for the construction of the WCT. The amendment changed the reservation of the area as an ecological development area to that of a seaport area. By way of compensation, another area was designated for ecological development.

3.9.2. Environmental issues

137. The area destined for the WCT in the amended regional land use plan included a piece of nature reserve that is part of an SPA under the Birds Directive (the Western Scheldt) and was on the list of SCIs proposed by the Netherlands under the Habitats Directive. An environmental assessment found
that the plan would have negative consequences for the natural assets in the area concerned. Some claimed that the nature reserve would completely disappear due to the construction of the WCT.

3.9.3. Court judgment

A case was brought before the Dutch Raad van State or Council of State (the Supreme Administrative Court of the Netherlands) by the municipality of Goes, environmental interest groups, a residents’ association and 13 private persons. On 16 July 2003, the Council of State annulled the decision to amend the land use plan.

The provincial authorities had assumed that the negative effects of the project on natural assets would prevent the terminal from being constructed, unless the derogation criteria of Article 6(4) of the Habitats Directive were met. Consequently, the Council of State found that neither the significance of the effects of the WCT on the SPA, nor the applicability of Article 6(4) of the Directive were disputed (para 2.12). The decision of the provincial authorities would have to be tested directly against the latter EU legal provision (para 2.14).

The Council of State judged that the provincial authorities had not investigated sufficient alternatives to the project, as required by Article 6(4) of the Habitats Directive. They had considered neither alternatives outside the region of the province of Zeeland, nor other activities providing employment inside the region, nor other locations for the construction of the container terminal or other activities with which to expand and strengthen the position of the port of Flushing East (para 2.16).

Taking a particularly stringent approach, the Council of State further considered that, since the importance of the project for regional employment had not been demonstrated convincingly and since it had not been unequivocally established that such importance would in the long term outweigh the importance of preserving the SPA, it could see no imperative reason of overriding public interest that could justify the project in accordance with the provisions of Article 6(4) of the Directive. The Council of State could not find any proof of a sufficiently thorough investigation of the expected development of employment in Zeeland. The Council saw no sufficient grounds for attaching a larger importance to economic interests than to the preservation of the nature area. To this the Council added:

*The suitability of an area for the construction of a container terminal, the expected growth of container transport and the supposed need for a so-called world class terminal – while relevant to the decision-making process – can play no role in the assessment of imperative reasons of overriding public interest. As a matter of fact, these factors only determine the appropriateness of the selected development and do not answer the question whether the importance of creating employment is to be considered an imperative reason of overriding public interest in this case* (para 2.19).

The suggested compensation measures, which consisted in the creation of an estuarine area outside the dykes and a wet and saline nature reserve inside the dykes, totalling an area that was larger than the area needed for the construction of the WCT, were deemed adequate and their effective realisation sufficiently ensured that the requirements of Article 6(4) of the Directive would be met (paras 2.21-2.25).

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300 Raad van State, 16 July 2003, Case 200205582/1, M & R jurisprudentiekatern, November 2003, no. 11, p. 341, with obs. Verschuuren.
The Council of State judged that, although the list of SCIs had not yet been established at the time of the amendment of the land use plan, the fact that the area concerned was on the list of habitat sites which the Netherlands had proposed in accordance with Article 4(1) of the Habitats Directive brought about the duty, based on the principle of loyal cooperation enshrined in Article 10 of the EC Treaty, not to gravely endanger the achievement of the prescribed result of the Directive. Because of the insufficient consideration of alternatives and the lack of an imperative reason of overriding public interest, the aforementioned duty was found to be breached (para 2.27).

Additionally, the Council of State judged that neither the consequences of the proposal for the hinterland and its inhabitants, mainly with regard to nuisance due to increasing carriage of goods by rail, nor the necessary mitigation measures, had sufficiently been investigated at the time of the amendment of the land use plan, which resulted in a breach of Dutch administrative law (paras 2.34-2.36).

### 3.9.4. Consequences

139. The decision of the Council of State constituted a serious setback for the Western Scheldt Container Terminal project and it was an “unpleasant surprise”\(^{301}\) for the provincial authorities, who had put a considerable effort into preparing it. However, the proposal was not cancelled altogether. After the decision, the provincial authorities commissioned an analysis of the situation and an opinion on the possible continuation of the project\(^{302}\).

The Provincial Executive Council is currently preparing an adapted plan for the WCT, taking into account the objections put forward by the Council of State\(^{303}\). If the project is brought back to life, the quay wall is likely to be considerably shortened to approx. 2,000 metres and the project will encounter a delay of at least 3 years. Apparently, the new objective is to avoid the amended project having significant effects in the sense of Article 6(3) of the Habitats Directive or at least to minimise such effects. Given the impossibility to compensate for certain dune losses and the legal uncertainty about whether the overriding public interest may be considered to support “imperative reasons”, the competent authorities wish to avoid another test against 6(4) of the Habitats Directive. Also, in the assessment of alternatives, preference would have to be given to the most environmentally friendly one\(^{304}\).

### 3.10. COCKLE FISHERIES (WADDENZEE)

#### 3.10.1. Background

140. The Waddenzee is a body of water and associated coastal wetlands stretching from Den Helder in the Netherlands, past the river estuaries of Germany to Esbjerg in Denmark over a total length of some 500 km (the previously discussed Leybucht judgment\(^{305}\) related to a marine area adjoining the Waddenzee – or Wattenmeer in German).


\(^{302}\) ten Thij, F. (Ed.), Analyse van en advies over het dossier Westerschelde Containerterminal. Eindrapport, 4.

\(^{303}\) See www.portofzeeland.com. All the relevant decisions and official political publications can be found on the official website of the Provincial States of Zeeland: http://www.zeeland.nl/bestuur_organisatie/beleid/wct/publicaties.

\(^{304}\) Draft decision of the Provincial States of Zeeland attached to the proposal for the PS session of 7 October 2004, no. RMW-161.

\(^{305}\) See supra, no. 99 et seq.
The Waddenzee is an important habitat for many birds. Therefore, the Dutch Waddenzee was designated as an SPA within the meaning of the Birds Directive. To some bird species, cockles are a significant source of food.

For many decades cockles for human consumption have been fished in the Waddenzee using mechanical methods. In order to avoid overfishing, fishing for cockles requires an annually renewable authorisation under Dutch legislation. In 1999 and 2000, on the basis of the applicable law, the Dutch Secretary of State for Agriculture, Nature Conservancy and Fisheries issued licences to a company to engage in mechanical cockle fishing in the Waddenzee, subject to certain conditions.

### 3.10.2. Environmental issues

141. Two nature protection associations challenged the aforementioned authorisations for 1999 and 2000. They brought an action before the Dutch Council of State claiming that the authorisations were contrary to the Birds and Habitats Directives. The Council of State referred the following questions of interpretation for a preliminary ruling to the Court of Justice.

The Council of State first asked the Court of Justice to consider the meaning of the concepts “plan” or “project” under Article 6(3) of the Habitats Directive.

The Council of State further asked the Court of Justice to clarify the relation between Article 6(3) of the Habitats Directive and Article 6(2) of the same Directive, namely whether Article 6(3) of the Habitats Directive had to be regarded as a specific application of the rules laid down in Article 6(2) of the same Directive, so that those two paragraphs can be applied cumulatively.

The Council of State further asked under what conditions an appropriate assessment – within the meaning of Article 6(3) of the Habitats Directive – of the effect of the plan or project on the site concerned had to be carried out. In addition, it asked for a clarification of the concepts of appropriate steps and of an appropriate assessment and the conditions under which an activity such as mechanical cockle fishing may be authorised.

Finally, the Council of State requested guidance on whether Article 6(2) and 6(3) of the Habitats Directive had direct effect.

### 3.10.3. Court judgment

142. In order to define the concepts of a “project” or “plan”, the Court referred to the EIA Directive.

In Article 1(2) of the latter Directive a “project” is defined as the execution of construction works or of

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306 As we have previously pointed out, Member States must, pursuant to Article 6(2) of the Habitats Directive, take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated. Article 6(3) of the Directive provides that any plan or project likely to have a significant impact on the site should be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives.


308 See supra, nos. 32-34.
other installations or schemes (first indent), or as other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources (second indent) (para 24).

The Court found that an activity such as mechanical cockle fishing was within the concept of project as defined in the second indent of Article 1(2) of EIA Directive and therefore also covered by the concept of plan or project set out in Article 6(3) of the Habitats Directive (para 25).

The Court stated that the fact that the activity had been carried on periodically for several years on the site concerned and that a licence had to be obtained for it every year did 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 (para 28).

The Court further held that Article 6(3) of the Habitats Directive, which establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site, cannot be applicable concomitantly with Article 6(2) of the Habitats Directive, which latter provision establishes an obligation of general protection consisting in avoiding deterioration and disturbances which could have significant effects in the light of the Directive’s objectives (para 38).

The Court considered that the requirement for an appropriate assessment of the implications of a plan or project is conditional on its being likely to have a significant effect on the site. Therefore, the triggering of the environmental protection mechanism provided for in Article 6(3) of the Habitats Directive does not presume that the plan or project considered definitely has significant effects on the site concerned, but follows from the mere probability that such an effect attaches to that plan or project. Consequently, an appropriate assessment of the implications of a plan or project is required as soon as there is a probability or a risk that the plan or project would have significant effects on the site concerned. In the light of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned. In other words, in case of doubt as to the absence of significant effects such an assessment has to be carried out. The Court further considered that a plan has significant effects when it is likely to undermine the site’s conservation objectives. The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by the plan or the project. As a result, any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site’s conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects (paras 40-45).

Pursuant to the first sentence of Article 6(3) of the Habitats Directive, where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site’s conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project (para 49).

Under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site’s conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent
national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects (para 61).

Finally, the Court held that Article 6(3) of the Habitats Directive might be taken into account by the national courts in determining whether a national authority, which has granted an authorisation relating to a plan or project, kept within the limits of the discretion set by the provision. That was the case even though Article 6(3) of the Habitats Directive had not been transposed into the legal order of the Member States (para 70).

3.10.4. Consequences

143. The Cockle Fisheries judgment gave a maximalist interpretation to the scope of application of the Habitats Directive and it has serious implications for activities in protected sites that are carried on periodically, need renewable licences and are not connected with or necessary to the management of the site (such as fishery licences). Each activity is considered as a distinct project under Article 6(3) of the Habitats Directive.

As soon as there is a probability or a risk that the activity will have significant effects on the site concerned, an appropriate assessment of its environmental implications has to be carried out. Such an appropriate assessment implies a serious, expensive and time-consuming scientific study of all the aspects of the plan or project that could affect the site's conservation. Only if no reasonable scientific doubt remains as to the absence of adverse effects on the integrity of the site may the activity be authorised (unless a strictly conditional derogation is allowed under Article 6(4)).

Even though the Cockle Fisheries judgment did not directly concern navigation or port activities, it could have far-reaching consequences for such activities, esp. for routine maintenance dredging in navigable channels, which are vital to many sea and inland waterway ports and to the maritime and inland shipping industries in general.

3.11. SECOND MAASVLAKTE (PORT OF ROTTERDAM)

3.11.1. Background

144. The Second Maasvlakte is an area of land to be reclaimed from the North Sea near Rotterdam, the Netherlands. It would become an area for port and industrial activity, destined for a large-scale expansion of the seaport of Rotterdam, which is the largest seaport in Europe.

The creation of the Second Maasvlakte is part of the Rotterdam Mainport Development Project of the Dutch government and the port authority of Rotterdam. Other elements of this project are the more

310 Maasvlakte translates as Meuse Plain, the Meuse referring to the mouth of the Rivers Rhine and Meuse and Nieuwe Waterweg (New Waterway), which leave the Netherlands downstream of Rotterdam.
efficient use of the existing port facilities and the development of an area of 750 hectares for nature and recreation.

### 3.11.2. Environmental issues

145. The project would have significant direct effects on several species and natural habitats, including a priority habitat, protected under the Birds and Habitats Directives.

Additionally, the project could well affect the SPA of the Waddenzee, which is located far to the north of the project area, but which, for the conservation of its natural environment, depends greatly on the stability of a process of alternating silting-up and erosion, caused by the transport of silt from the southern part of the North Sea along the Dutch coast. While scientific data suggests this effect will be rather small, the margin of error of these findings is considerable.

### 3.11.3. Opinion of the European Commission

146. Because a priority habitat was at stake, the Dutch government requested the European Commission, in accordance with Article 6(4) of the Habitats Directive, second sentence of the Habitats Directive, to formulate an opinion.

In its conditionally favourable opinion, the Commission found that the selection between alternative approaches and between alternative designs for the land reclamation works had been made in an appropriate way.

Importantly, it implicitly accepted (at least some of) the imperative reasons of overriding public interest put forward by the Dutch government. These comprised the fact that the Rotterdam port and industry form a cornerstone of the Dutch economy, the increasing demand for space in the container and chemical industry sectors which must be met in order to enable the Rotterdam port to maintain its competitive position, the fact that the port of Rotterdam is an essential multimodal junction in the TEN-T network as established by Decision 1692/96/EC and as such of common interest, the fact that the project at hand is to be considered a TEN-T project of common interest within the meaning of Decision 1346/2001/EC amending the aforementioned TEN-T Decision and the fact that the chosen approach offers an optimal balance between the human and the natural environment in the Rotterdam city and port area.

The Commission was of the opinion that the suggested compensation measures, consisting of the establishment of new dune areas, beach habitats and a sea reserve off the coast, were sufficient to outweigh the effects on the Natura 2000 areas, provided that the measures were implemented in a timely manner.

The Commission stated that the effects of the project on the Waddenzee had been studied as thoroughly as scientifically possible, and that, in the light of the precautionary principle, the project should include careful monitoring of these effects and correcting measures in case of problems.

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312 See supra, nos. 54 et seq.
3.11.4. Court judgment

147. Notwithstanding the favourable opinion of the European Commission, the Dutch Raad van State or Council of State annulled the decision of the Dutch government to develop the Rotterdam Mainport Development Project.

Referring to the judgment of the European Court of Justice in the Cockle Fisheries case, the Council of State held that Articles 6(3) and 6(4) of the Habitats Directive have direct effect. Even though the said provisions had not been implemented in Dutch legislation, they could be taken into account by the national courts, in casu the Council of State (paras 2.12.2-2.12.3 and 2.12.9).

The Council of State came to the conclusion that it could not be excluded that the land reclamation would have consequences for the transport of fish larvae and silt along the coast which in turn may have a significant impact on the Waddenzee, which is an SPA within the meaning of the Birds Directive. In the Council’s opinion, the government had failed to properly assess that impact. Therefore, the Dutch government had failed to comply with its obligations under Article 6(3) of the Habitats Directive (paras 2.12.5-2.12.6).

On the other hand, the Council of State considered that the investigation of alternatives was sufficient and that the choice by the Dutch government for an expansion of the port of Rotterdam, instead of possible alternative projects, was reasonable (para 2.12.13).

Regarding the imperative reasons of overriding public interest in the sense of Article 6(4) of the Habitats Directive, the Council of State applied the same test as in Western Scheldt Container Terminal: these reasons – which may be of an economic nature – must be demonstrated convincingly and it must be established unequivocally that the importance of the execution of the plan or project outweighs the importance of preserving the SPA in the long term. In the Second Maasvlakte case, the Council of State found the imperative reasons of overriding public interest set out by the Dutch government to be appropriate in the light of Article 6(4) of the Habitats Directive. In this respect, the Council’s reasoning concurred with that of the Commission (paras 2.12.12-2.12.15).

The Council of State however noted that the Dutch government had not provided sufficient guarantees that planned compensation measures for the loss of other nature conservation areas would effectively be implemented. Therefore, the Dutch government had not complied with its obligations under Article 6(4) of the Habitats Directive and the principle of loyal cooperation enshrined in Article 10 of the EC Treaty (para 2.12.19.5).

3.11.5. Consequences

148. The Dutch government and the Rotterdam port authority are not considering cancelling the Second Maasvlakte project. On the contrary, they are currently trying to adapt the plan, taking into account the objections of the Council of State and the results of additional research. If everything goes as planned, the revised project will be approved by Parliament in September 2006 and construction...
works will commence in 2008. It is envisaged that containers will be handled at the site from between 2012 and 2014. If this timetable is achieved, the overall delay suffered by the project will have amounted to just one and a half years.

On a broader scale, the Second Maasvlakte case shows that even carefully prepared projects that have been given the green light by the European Commission, and that are widely recognised as examples of good practice, may be found to be contrary to EU nature conservation rules by national courts of law that are empowered or even obliged to thoroughly screen decisions taken by competent authorities. Equally importantly, the European Commission, in its opinion on the Second Maasvlakte project, appears to have accepted an express link between article 6(4) of the Habitats Directive and the TEN-T status of the project.

3.12. OTHER CASES

3.12.1. Port of Zeebrugge

3.12.1.1. Background

149. The port of Zeebrugge is a seaport on Belgium’s North Sea coast. Over the past 30 years, it has become one of the fastest growing ports in the Hamburg-Le Havre range. The growth of traffic was accompanied by the construction of new port infrastructure, both in the inner port and the outer port. In the coming years, the port infrastructure must be adapted further in order to be able to cope with the anticipated growth in throughput. This includes, among other things, the creation of new lands for container traffic in Albert II Dock in the outer port, the conversion of part of the current inner port into a tidal port for short sea traffic, and the further expansion of the inner port.

3.12.1.2. Environmental issues

150. The further development of the inner port (Southern Canal Dock and the planned tidal area) is impeded by the requirements laid down in the Birds and Habitats Directives. First of all, the port expansion zone contains the unspoilt area of Dudzeelse Polder which is partly included in an SPA and an SCI. Its natural value will be preserved pursuant to the 2004 ‘Strategic Plan for the Port of Brugge-Zeebrugge’\textsuperscript{315}. At least for the time being, there is no imperative reason to start using this area for port development; in the long term, however, port developments cannot be excluded here. In 2000, the Flemish government made another port expansion area of 282 hectares available for port activities that had formerly been part of an SPA. A special technical commission supervises the development of this area and the management of the remaining natural values. The loss of the SPA was compensated for by the designation and development of other sites as a new SPA outside the port area\textsuperscript{316}. These decisions were reached after environmental groups had lodged complaints with the European Commission.


The new, artificially constructed, outer port, which was in its entirety reclaimed from the North Sea, has become a breeding area for several bird species mentioned in Annex I to the Birds Directive. In the light of the gradual development of port activities, which will reduce the available breeding area in the future, a ‘tern island’ was artificially constructed in 1997 as an alternative nesting place in the eastern outer port, near the Liquefied Natural Gas Terminal. The tern island was recently restored and extended to 9 hectares. In the future, it may be further extended to 22 hectares. On 22 July 2005, the Flemish government classified part of the outer port, including the tern island and inlet docks, and the ‘Baai van Heist’ (a bay-like area of around 50 hectares of beach, dune, silt and salt marsh adjacent to the port), totalling 498 hectares, as an SPA\textsuperscript{317}. The government stated that this designation would not hamper regular port activities.

The Port of Zeebrugge case did not give rise to legal proceedings but it shows that EU nature conservation rules may impede the putting into use of areas reserved for future port expansion or even artificially constructed port areas that were reclaimed from the sea solely for that (purely economic) purpose. In this respect, the problems are similar to those encountered in the Left Bank Area of the port of Antwerp, where the previous reservation of areas for future port developments was also ignored\textsuperscript{318}.

### 3.12.2. Verrebroek Dock (Port of Antwerp)

#### 3.12.2.1. Background

151. Verrebroek Dock is a large inlet dock located in the Left Bank Port Area of the port of Antwerp in Belgium. While nearby Deurganck Dock is a tidal dock reserved for container handling\textsuperscript{319}, Verrebroek Dock is situated behind the lock of Kallo and is destined for the handling of conventional cargo and break bulk. The construction of the dock had already been envisaged in a zoning decision of 1978, but actual construction work only began in 1998, after an environmental impact study had been carried out and the necessary construction permits had been issued by the Flemish authorities.

#### 3.12.2.2. Environmental issues

152. As we have explained earlier, the left bank port extension area was designated in 1988 as an SPA under the Birds Directive. Consequently, the construction of Verrebroek Dock conflicted with this environmental protection status.

#### 3.12.2.3. Intervention of the European Commission

153. On the basis of complaints, the European Commission expressed a number of interesting views on the impact of the Birds and Habitats Directives in its letter of formal notice of 18 January 2001, which also dealt with the Deurganck Dock project discussed above\textsuperscript{320}.


\textsuperscript{318} See supra, nos. 119 et seq. See also the Commission Opinion of 6 June 2005 relating to the Airport of Karlsruhe / Baden-Baden (K(2005)1641 end.).

\textsuperscript{319} See supra, nos. 119 et seq.

\textsuperscript{320} See supra, no. 121 et seq.
In relation to Verrebroek Dock, the Commission found that, contrary to Article 6(4) of the Habitats Directive, Belgium had not investigated alternative solutions. It referred to the availability of unused capacity in nearby Vrasene Dock, which had been built only recently and which showed similar technical characteristics. Belgium should have taken this alternative into account in view of the conservation objectives of the Habitats Directives.

As to the presence of imperative reasons of overriding public interest in the sense of Article 6(4) of the Habitats Directive, Belgium had invoked the positive effects of the project on the economic development of the port of Antwerp, the strengthening of its competitive position, the need to meet the present-day logistical need for very spacious transhipment and storage areas, the effect on employment and the favourable geographical location of the port. To this the Commission replied that Vrasene Dock was not being used to its full capacity yet, and that past experience had shown that the realisation of similar projects had appeared not to have been entirely necessary, since nothing was done with them for years.

Finally, the Commission noted that Belgium had not taken sufficient compensation measures in the sense of Article 6(4) of the Habitats Directive. Belgium had not demonstrated that the compensation areas offered characteristics and functions of at least an equal ecological value as the areas lost. Moreover, the measures had only reached the design stage.

Meanwhile, a number of compensation measures were implemented; the infringement procedure has however not been formally closed.

3.12.3. Haringvliet Yachting Harbours

3.12.3.1. Background

154. On 24 Mach 2000, the Dutch Secretary of State for Agriculture, Nature Management and Fisheries designated Haringvliet as an SPA under the Birds Directive. Haringvliet is a former tidal arm of the Rhine-Scheldt-Meuse delta, which was closed off from the North Sea in 1970. Since then, Haringvliet has been a large fresh water basin that can only be reached from the sea via other waterways, including Nieuwe Waterweg, which is the access route to the port of Rotterdam. Haringvliet is used for recreational purposes such as pleasure cruising.

3.12.3.2. Environmental issues

155. A hunting society and a local land management authority challenged the designation decision before the Dutch Council of State. The plaintiffs argued among other things that the Secretary of State should have taken into account agricultural and recreational interests, including the need to expand yachting harbours in the future.
3.12.3.3. Court judgment\textsuperscript{321}

156. Referring to the case law of the Court of Justice, the Council of State held that the Birds Directive leaves no room for Member States to take into account the possible future expansion of a yachting harbour or a recreational area. The balancing of interests is only a matter of later concern, when decisions are made on intended activities in the future (para 2.7.1). Recreational and, more generally, economic interests cannot support the view that an area to be designated on the basis of ornithological criteria should – wholly or partly – be exempt from such designation. The Council accepted as “not unreasonable” the assumption made by the State that normal economic activities carried out prior to the designation as an SPA could be continued, since these activities had not prevented the presence of the ornithological values. This, however, does not alter the fact that an expansion or intensification of economic activities, specifically the expansion of a yachting harbour or recreational areas, can only be permitted on condition that the ornithological values in the area are not damaged, particularly within the framework of Article 6 of the Habitats Directive (paras 2.7.2 and 2.10.1).

3.12.3.4. Consequences

157. The Haringvliet case – the reasoning of which was literally reiterated by the Council of State in later judgments\textsuperscript{322} – shows very explicitly that the possible need for future port expansion is irrelevant to the designation of SPAs. It also highlights the fact that the issues discussed in the present study pertain to non-commercial ports, such as yachting harbours.

3.12.4. Port of Vuosaari

3.12.4.1. Background\textsuperscript{323}

158. The Vuosaari port project aimed to replace the two existing main cargo ports in the Helsinki metropolitan area. The vacated port zones near the city centre would be freed from road traffic pressure and safety hazards and be redeveloped as residential, recreational and office areas. The new port would be situated on the site of a former shipyard, near the residential area of Vuosaari, a suburb of Helsinki. The total quay length would amount to 3,600 metres, offering 20 berths. It is worth noting that, back in 1966, Vuosaari was added to Helsinki, one of the reasons being its suitability for future port expansion. Environmental studies for the Vuosaari port project started in the late 1980s, and the plans were finalised in 1996. Construction of the new port was started in January 2003. Upon completion, Sompasaari city port will be vacated, while some Ro-Ro and passenger traffic will remain at the city ports of Länsisatama (West Harbour) and Eteläsatama (South Harbour).

3.12.4.2. Environmental issues

159. Adjacent to the project area lies the Natura 2000 site called ‘Mustavuori grove and Östersundom bird waters’. It consists of a grove area and four sea inlets with some surrounding shore areas. The

\textsuperscript{321} Raad van State, 19 March 2003, Case no. 200201933/1.

\textsuperscript{322} See the IJmeer case: Raad van State, 16 April 2003, Case no. 200201920/1 AB Rechtspraak Bestuursrecht, 2003, 1676, no. 347, obs. ChB.

\textsuperscript{323} See www.vuosaarensatama.fi.
harbour itself will not be situated in the Natura 2000 site, but its land traffic connections will cross the nearest sea inlet called the Porvarinlahti bay and the neighbouring Labbacka nature area.

In order to minimise the impact on the natural values in general, a choice was made for land traffic connections consisting in double tunnels and a railroad bridge. The entire road connection passes through a tunnel under the Natura 2000 site, which means that it has no impact at all on the area. The railroad enters into a tunnel immediately after the Porvarinlahti Bay and resurfaces at the northern border of the Natura 2000 site. The railroad bridge passing over the Porvarinlahti Bay has been designed to absorb sound and protect the watercourses. The speed limit for trains on the bridge will be set at 30 km/h. The bridge pillars will not be placed in the water. The authorities and the Port of Helsinki say the overall impact of the harbour project on the Natura 2000 site will be extremely limited and they pride themselves in the unprecedentedly detailed study on the environmental impact of the project as well as on the creative and efficient approach towards all kinds of environmental mitigation measures\textsuperscript{324}.

However, environmentalists claim the project does have a significant impact on the Natura 2000 site. They argue that, contrary to the results of environmental impact assessments, the authorities judge the impact to be insignificant in order to avoid the strict derogation procedure under Article 6(4) of the Habitats Directive\textsuperscript{325}. Furthermore, opponents point out that the authorities have moved away from their earlier position, which acknowledged the impact on the natural sites and which accepted the need for such a derogation procedure. Also, it is claimed that the delimitation of the Natura 2000 site was inaccurate, since large parts destined for the port project were left out. Finally, it has been argued that the precautionary principle brings about a duty to obey Article 6(4) in case of doubts over the environmental impact.

For their part, port circles suggest that the environmentalists are being supported and incited by two owners of large estates located in the close vicinity of the project area, and that the Birds and Habitats Directives are being abused for purely private purposes.

3.12.4.3. Court judgments\textsuperscript{326}

160. By March 2004, the Vuosaari Harbour project had already given rise to at least 20 administrative legal proceedings in Finland. The complaints pertained to every possible aspect or stage (permits, notifications, road plans, land use plans, etc.) relating directly or indirectly to the port project. The arguments relating to Natura 2000 were presented in every procedure.

In all the cases examined by the Supreme Administrative Court of Finland, the Court reportedly concluded that the project has an insignificant impact on the Natura 2000 site and its conservation objectives. Therefore, the decisions could be taken lawfully without the need to refer to an overriding public interest, alternative solutions and compensatory measures as set forth in Article 6(4) of the Habitats

\textsuperscript{324} Vuosaari harbour project (Helsinki) and Natura 2000 area of Mustauouri Grove & Östersundom Birds waters – Conflicting or mutual interests ?, Annex 5 to the minutes of the ESPO-DG Environment discussion on Ports & Natura 2000, 10 March 2004, presented by K. Tarnanen-Sariola; X, Vuosaari Harbour – sustainable development and X, The Vuosaari Harbour Project and the environment, brochures of the Vuosaari harbour project.

\textsuperscript{325} Niemelä, S., The Vuosaari Port Project (Finland), presentation at the Greens/EFA Natura 2000 Conference, 12 December 2002; Nordberg, L., “Finland: toxics threaten the Baltic Sea and the Vuosaari harbour in Helsinki”, in Coalition Clean Baltic, Checking coastal conservation. International requirements to safeguard nature on the Baltic Sea’s coast, 36-37.

\textsuperscript{326} Reference is made to Supreme Administrative Court judgments nos. 1367 of 14 June 2000, nos. 1607 and 1608 of 26 June 2002 and nos. 417, 418 and 419 of 3 March 2004. We have not consulted the original judgments.
Directive. In its decisions of 26 June 2002 on complaints concerning the regional plan and city plan of Vuosaari Harbour, the Supreme Administrative Court again ruled that the integrity of the Natura 2000 site was not endangered by the project, since the impacts of the project on the habitat types and the species in the bay section of the Natura 2000 site were insignificant. It also felt that other areas were not at all affected by the project. All the complaints were thus rejected. Reportedly, further decisions of the Supreme Administrative Court of 3 March 2004 made an end to any possibility to refer to the Natura 2000 impacts in any future administrative proceedings relating to the project.

3.12.4.4. Interventions of the European Commission and the European Parliament

161. The Commission announced in November 2001 that an opinion within the meaning of Article 6(4) of the Habitats Directive, which was requested from it by the Finnish Ministry of the Environment, was not necessary, as the project would probably not affect natural habitat types or species that are the priority focus of conservation in the area.

In 2002, the Finnish Association for Nature Conservation filed a complaint pertaining to the Vuosaari Harbour project with the European Commission and called upon the Committee on Petitions of the European Parliament to investigate the impacts of the Vuosaari Harbour project on the adjacent Natura 2000 site. The report of the fact-finding mission to Finland of 24 to 26 March 2004 was very critical of the Finnish approach to the project. Contrary to the view of the competent Finnish authorities, it claimed that the project dramatically affected the Natura 2000 site. The Committee on Petitions called upon the European Commission – which was at the time considering several complaints relating to the matter – to conduct an urgent review of the project in order to ensure that the provisions of the Birds Directive and the Habitats Directive were properly complied with, and it suggested that the Finnish authorities may have infringed EU law327. It is noteworthy that three out of the five MEPs on the mission were members of the group of the Greens/European Free Alliance in the European Parliament.

The Commission, which had previously asked Finland for detailed reports on the project, announced in July 2004 that it would cease to investigate complaints against the Vuosaari Harbour project. It noted that the Finnish Supreme Court had ruled that ornithological and scientific criteria had been taken into account when mapping out the area of the proposed harbour. It had not been demonstrated that the impact on nature would be significant, and the materials submitted by those appealing against the port did not bring forth any new information to call these conclusions into question.

3.12.4.5. Consequences

162. The environmentalist protesters were unable to stop the construction of the new cargo port of Vuosaari. In 2008, the cargo port functions will be moved from one of the existing ports in the city centre to Vuosaari. By the end of the year 2009, the new port should be completed. Reportedly, the procedures discussed above did not cause any delays.


3.12.5.1. Background

163. Recently, several UK ports envisaged expansion projects in order to cope with the increasing demands for several types of handling facilities:

- The Felixstowe Dock and Railway Company wished to extend and realign the quayline at the southern end of the port of Felixstowe;

- Harwich International Port Ltd applied for permission to construct a quay wall and reclaim an inter-tidal area with a view to the operation of a new container terminal;

- Associated British Ports planned the construction of a Lo-Lo handling facility near the existing port of Kingston-upon-Hull on the River Humber called Quay 2005;

- Associated British Ports also planned the development of a five-berth Ro-Ro terminal dredged into the foreshore behind the existing bulk terminal at Immingham;

- London Gateway Port, a harbour authority that was to be newly established, envisaged various works for the construction and operation of a new port centre at the site of the former Shell Haven oil refinery by the River Thames.

3.12.5.2. Decisions of the UK government

164. Between 2004 and 2006, the competent UK Secretary of State approved or at least took ‘minded view’ decisions on all the projects referred to above. It is interesting to consider the manner in which some of the applications were tested against the requirements of the UK Habitats Regulations, which, as we have previously mentioned, transposed Article 6(4) of the EU Habitats Directive into UK law, and to compare the conclusions of these assessments with the outcome in the Dibden Bay case discussed above\[328\].

In the case of Immingham, the Secretary of State readily accepted the existence of imperative reasons of overriding public interest. The following observations deserve particular attention:

33. The Secretary of State accepts the Applicant’s statement that ro-ro traffic through UK ports, particularly on the Humber, has increased and will continue to increase. The Secretary of State notes the Applicant’s statement of predicted growth of 96.7% in ro-ro traffic over ten years. The Secretary of State agrees with industry forecasts that the market will continue to grow and that new capacity will be required. It is the Government’s policy that port promoters are best placed to make a commercial judgement of market potential in relation to their proposal.

35. The Secretary of State notes the key importance of the port of Immingham to the national and regional economy. The flow of traffic through the port of Immingham makes it, combined for statistical purposes with its neighbour Grimsby, the UK’s busiest port in terms of throughput of freight tonnes. […] Good road and rail links provide the port with uncongested access to the major centres of population and markets of the north of England and beyond.

\[328\] See supra, nos. 132 et seq. and infra, nos. 209-212.
36. The Secretary of State notes the Applicant’s statement that, further to major rail investment, 20% of the UK’s rail freight is generated through activities at Immingham. Immingham is well served by the national road network and the EC Trans-European Network (Transport). It is Government policy, as set out in the Transport 10 Year Plan and the White Paper “A New Deal for Transport”, to promote the growth of rail freight, thereby relieving pressure on the road network and bringing environmental benefits. The proposed development would be compatible with this policy.

37. The Secretary of State notes that Immingham is located within an area of relatively high unemployment. [...] The Secretary of State considers that the port of Immingham is of high social and economic importance.

38. The Secretary of State notes the Applicant’s evidence on the increase in cargo growth over a decade, and in particular the strong development of the unit load trade, together with future projections of growth. He accepts the Applicant’s case that without the proposed works the existing port will not be able to serve larger, new design vessels and risks losing business as a result of changes in trade patterns, with potentially adverse consequences for business and employment in the region and beyond. The Secretary of State accepts the Applicant’s case that there is not enough existing capacity elsewhere and that new development would therefore be required at other locations, which could have environmental effects in those areas. He notes [...] the absence of other credible proposals to provide sufficient capacity.

39. For the social, economic and other reasons set out above the Secretary of State concludes that there are imperative reasons of overriding public interest as to why permission should be given for the Applicant’s proposed works.

A similar conclusion was reached in the case of Hull:

136. The Secretary of State accepts the Applicant’s case that the port of Hull plays a crucial role in the regional economy of Yorkshire and the Humber, both as a major employer in its own right and as providing a gateway for regional imports and exports. [...] 137. The Secretary of State accepts the Applicant’s case that the port forms part of the national infrastructure and is a valuable component in the national and regional logistics chain. The port plays a vital role in the national feeder container market and in the continental short sea shipping market. [...] 138. The Secretary of State considers that continued expansion of the port would enable it to underpin regional and local economic performance and that without such expansion there is a realistic prospect of the port not being able to maintain even its current trade, in the light of modern trends for the use of increasingly larger vessels. He accepts the case that the present configuration of the port, with the limitations imposed by the lock system, restricts the dimensions of the vessels which can be catered for and that unrestricted berths are therefore needed to meet the requirements of present and future customers. Without such facilities at Hull there is a risk of trade moving elsewhere. 139. There would be consequential adverse effects on regional and local employment and business of a failure to maintain Hull’s economic position. The Secretary of State disagrees with objections that the importance of the port of Hull is diminishing and notes the Applicant’s evidence of the demand by customers for new berths. He agrees with the Inspector’s conclusion that the levelling off of container volumes at Hull in recent years, against the national trend, is not due to a lack of demand but to lack of the requisite facilities at the port to meet nationally rising demand. He agrees moreover with the Inspector’s conclusion that the provision of lo-lo facilities at Hull would be in the national and public interest. 140. The Secretary of State considers for the above-mentioned reasons that there are imperative reasons of overriding public interest, including those of a social and economic nature, as to why consent should be given for Quay 2005.

330 Hull Harbour Revision Order Decision Letter, published 22 December 2005,
In the case of the Bathside Bay container terminal, the Secretary of State considered the argument that, for reasons of overriding public interest to be imperative they also need to be immediate. He believed, in line with the Inspector, that the timescales required to plan and implement new container capacity, including dealing with surface access implications, which were not far advanced in the case of Bathside Bay, meant that it was appropriate to take decisions approving such capacity sufficiently in advance of such need arising to allow for sensible planning and implementation of those proposals.

The investigations of alternatives proceeded along almost identical lines: in all cases the use or development of other ports in the vicinity of the project area or elsewhere in the UK was found to offer no realistic alternative meeting the same needs.

### 3.12.6. Port of Monfalcone

#### 3.12.6.1. Background

165. The Società Italiana Dragaggi SpA had tendered for a contract to carry out dredging works in the Italian port of Monfalcone. The contract was awarded to the company in an award notice. The sediment brought up was to be deposited on reclaimed land located inside the Foce del Timavo (Mouth of the Timavo) site.

However, Italy’s Environment Ministry disapproved. Four months later, the invitation to tender was annulled on the ground that the reclaimed land was to be regarded as an SCI; it was argued that the depositing of dredged material should therefore be subjected to an assessment of implications under Italian law and that the project could not possibly be approved in that procedure. Italy had proposed the Foce del Timavo site to the Commission as an SCI. The site hosted, inter alia, priority habitats listed in Annex I to the Habitats Directive. The Commission had not yet decided whether that site would be included on the list of SCIs under Article 4(2) of the Habitats Directive.

Dragaggi considered that the annulment of the invitation to tender was unlawful since the protective regime for SCIs is applicable only after the Commission has placed the relevant site on the list of SCIs. It challenged the legality of the decision to annul the tender procedure before the Italian administrative courts.

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331 The Inspector’s Report contains the following interesting clarification:

“18.65 P&O examines the word “imperative” from the IROPI test and says that it means “commanding, peremptory, urgent, obligatory” and it concludes that a development that is purportedly only justified on a 30-year time horizon but is not needed before 2017 is neither “urgent” nor indispensable now. P&O also argues that capacity for BBCT would not be needed until after 2020 (assuming that LG and FSR were approved) and – allowing 5 years for consents to be obtained and for construction to be completed – any such consents would not need to be approved until 2016. And capacity that is not needed until 2020 cannot be “imperative” at the time applied for.

18.66 The above argument by P&O misses the point. Equally, so does the RSPB’s “wait and see” approach. IROPI, with “imperative” used as an adjective that qualifies “reasons”, means reasons of public interest that are judged now to be of vital importance, that something must be done or performed. A very large scale infrastructure project must inevitably be planned over a long timescale. The work and the complexities involved in such developments involve a long leadtime. [...]” (Smith, K.G., The Bathside Bay, Harwich, Container Terminal Inquiry Report, 23 March 2005, http://www.dft.gov.uk/stellent/groups/dft_shipping/documents/page/dft_shipping_610900.pdf).

3.12.6.2. Environmental issues

166. On appeal, the Italian Council of State referred the following (somewhat complicated) question to the Court of Justice for a preliminary ruling:

Is Article 4(5) of Directive 92/43 of 21 May 1992 to be interpreted as meaning that the measures under Article 6 and, in particular, under Article 6(3) of that directive are mandatory for the Member States only after final approval at Community level of the list of sites under Article 21 or, alternatively, in addition to determination of the ordinary commencement date of conservation measures, must a distinction be drawn between declaratory listing and determinative listing (including in the first category the listing of priority sites) with the result that, in order to ensure the effectiveness of the directive, where a Member State identifies a site of Community importance sustaining priority natural habitat types or species, there must be considered to be an obligation to carry out an assessment of plans and projects with a significant effect on the site even before the Commission draws up the draft list of sites or the adoption of the final version of that list pursuant to Article 21 of the directive and, in fact, with effect from the drawing-up of the national list?

3.12.6.3. Court judgment

167. The Court of Justice held that, on a proper construction of Article 4(5) of the Habitats Directive, the protective measures prescribed in Article 6(2), (3) and (4) of the Directive are required only as regards sites which, in accordance with the third subparagraph of Article 4(2) of the Directive, are on the list of sites selected as SCIs adopted by the Commission in accordance with the procedure laid down in Article 21 of the Directive (para 30).

However, in the case of sites eligible for identification as SCIs which are included in the national lists transmitted to the Commission and, in particular, sites hosting priority natural habitat types or priority species, the Member States are, by virtue of the Habitats Directive, required to take protective measures that are appropriate, from the point of view of the Directive’s conservation objective, for the purpose of safeguarding the relevant ecological interest which those sites have at national level (ibid.)

168. Advocate General Kokott considered the effect of the latter obligation of Member States on third parties. Since the Italian authorities were required to protect the Foce del Timavo site against deterioration, it was open to question whether that requirement could be relied upon against private persons, such as Dragaggi in this case. In the light of case law on the effects of directives on individuals, the Advocate General concluded that only a legal position protected by Community law that was enjoyed by Dragaggi as successful tenderer for the contested contract could preclude application of the prohibition of deterioration. There are elements in procurement law to suggest that the Italian authorities could comply with their duty of protection by annulling the award procedure. The Community rules on the award of public contracts do not require a contracting authority to carry an award procedure through to its conclusion. Community law has not thus far even provided that the discontinuation of an award procedure is to be limited to exceptional cases or has necessarily to be based on serious

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334 On the time of application of Article 6 of the Habitats Directive, which we shall not explore further in this study, we refer also to European Commission, Managing Natura 2000 sites. The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC, Luxembourg, Office for Official Publications of the European Communities, 2000, 11 et seq.
grounds. If Dragaggi had already been in a position protected by Community law, the Italian authorities would at least have been required to exhaust all other possibilities to avoid harm to the site. They could, conceivably, have relied on any rights they might have to terminate the contract or try to reach an amicable solution, for example with a view to avoiding damage when the contract is performed.

3.12.6.4. Consequences

169. Whilst the Monfalcone judgment did not directly affect the legality of a port project as such, it made clear that the Habitats Directive can also affect the position of contractors who have won a tender to carry out port-related works.

3.12.7. Seed Mussels (Eastern Scheldt)

3.12.7.1. Background

170. In 2004 and 2005, the Dutch Minister of Agriculture, Nature and Food Quality delivered 40 identical permits for the planting of Irish and British seed mussels and oysters and the re-catch of the produce in the Eastern Scheldt, which is arguably the main production area for seafood in the Benelux.

The decisions were challenged before the Dutch Council of State by one applicant who submitted that the permit contained an unjustified condition relating to the cleaning of the seed, and by three environmental NGOs who maintained that the Habitats Directive had not been complied with.

3.12.7.2. Environmental issues

171. In the Seed Mussels case, two issues were at stake. First, the Dutch State referred to Article 28 of the EC Treaty on free movement of goods in order to justify the permits. The State claimed that this rule of primary EU law takes precedence over the stipulations of the Habitats Directive, and that the requirements of that Directive would hamper the free movement of goods between the Member States concerned. As a consequence, the State was compelled to deliver the permits without an assessment under the Habitats Directive.

The second question put before the Council was whether the permits could legally be issued without a prior assessment of the effects of the activities on the SPA and SCI of the Eastern Scheldt under Article 6(3) of the Habitats Directive.

3.12.7.3. Court judgment335

172. In conformity with established case law of the Court of Justice, the Council of State ruled that, since all the aspects of the case were covered by the Habitats Directive, the decisions could only be

335 Raad van State, 22 March 2006, Case 200505040/1.
tested against that Directive, and not against the Treaty provisions on free movement of goods (para 2.8.3).

As to the existence of significant effects, the Council first referred to the Court’s judgment in *Cockle Fisheries*, according to which any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site’s conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects (para 2.8.4).

Next, the Council observed that the Dutch Minister, in the light of available expert opinions that revealed a risk of exotic organisms entering surface waters, could not reasonably have reached the conclusion that the activities had no significant effects on the protected sites, having regard to its conservation objectives. The fact that shellfish had been sown into the Eastern Scheldt for decades did not imply that the risk of an unintentional introduction of invasive exotic organisms was negligible. The circumstance that it could not be excluded that these species were introduced via other ways, for example through the discharge of ships’ ballast water, did not mean that the planting of seed mussels and oysters from the Irish and Celtic Seas could not have significant effects on the area. For these reasons, the Council held that, in issuing permits without a prior assessment under Article 6(3) of the Habitats Directive, the Minister had acted unlawfully. Consequently, the decisions whereby the permits were delivered were annulled (paras 2.8.4-2.8.5).

3.12.7.4. Consequences

173. The Seed Mussels judgment highlights first of all that the Habitats Directive is applied in an increasingly rigid manner and that it jeopardises regular activities in protected areas that have been going on for decades. It also confirms that the Directive takes priority over the Treaty provisions on free movement of goods.

In the light of this judgment, the question was raised whether the judgment does not pose a threat to shipping activities. Before the Council of State, the defendant referred in vain to the introduction of foreign species by discharges of ballast water and through the presence of sealife attached to ships’ hulls. Immediately after the judgment, some observers suggested that, logically speaking, navigation on the Western Scheldt should also be prohibited. Whatever the case, the judgment again makes clear that the Habitats Directive can have serious consequences for regular shipping and port activities. It is worth noting in the context of this report that many waterways and (esp. locked) harbours contain a rich fauna of exotic species, both aquatic and terrestrial.

3.12.8. Vilshofen – Straubing stretch of the River Danube

3.12.8.1. Background

174. The Danube is the second longest river in Europe, and it has a huge potential for freight transport. At the same time, it is considered to be one of the world’s most valuable eco-regions.

336 See supra, no. 91; comp. Raad van State, 26 February 2003, AB Rechtspraak Bestuursrecht, 2003, 1750, No. 361, obs. ChB.

The Rhine/Meuse-Main-Danube inland waterway axis is listed as one of the priority projects in the revised TEN-T guidelines on which work is due to start before 2010 (priority project no. 18). Various sections of the Danube have been identified as bottlenecks, as they pose considerable navigability problems, with draughts of less than 2.8 metres at some times of the year. Construction works (artificial deepening or other hydraulic measures) are therefore needed in Germany, Austria, Slovakia, Hungary, Romania and Bulgaria to ensure a minimum draught of 2.5 metres at most times of the year. Priority project no. 18 further includes work on one of the main branches of the Rhine, the River Meuse, to ensure a draught of 3.5 metres providing access into Belgium for vessels up to 6,000 tonnes. Removing these bottlenecks would improve the competitiveness of the waterway in relation to other modes of transport and encourage a shift of freight traffic from road to waterways. Such a modal shift is vital along the Danube corridor, which is increasingly congested due to sharp increases in the volume of traffic, which are expected to continue.

The main bottleneck on the Rhine-Main-Danube line is the Vilshofen-Straubing section in Germany, which will be discussed further below.

3.12.8.2. Environmental issues

175. The almost 70-km stretch of Danube between the towns of Vilshofen and Straubing is the last free-flowing section of the river in Germany. It has been described critically important from a nature conservation perspective. There are several Natura 2000 sites along this stretch of Danube.

The Vilshofen-Straubing section, which is considered a priority for development in the revised TEN-T guidelines and where works are due to be completed by 2013, has the most restricted draught on the entire Rhine-Main-Danube route, with a navigational depth of only 2 meters; for several days or even weeks, ships cannot pass the stretch at all. The High Level Group on the TEN-T observed in its 2003 report that this section constitutes a major bottleneck and called for “a draught of at least 2.50 metres during all seasons, in order to develop long-distance and reliable inland waterway transport, compatible with environment, from the North Sea to the Black Sea”.

Over the past 20 years, development plans for the Vilshofen-Straubing section have generated heated debates between environmentalists and local communities on the one hand, and advocates of improved navigability on the other. Various development alternatives were studied. The most comprehensive variant (D2) encompassed the construction of three dams on the Danube and the digging of a lateral canal upstream of Vilshofen. Variant C included only one centrally located dam together with other engineering works in the river, while sub-variant C2.80 differed from variant C in that it envisaged deeper dredging. Ecologically, variant A was the most acceptable option, with a soft development of the Danube by non-impounding river bed works. Other alternatives were considered as well.

339 European Commission, Trans-European Transport Network. TEN-T priority projects, Luxembourg, Office for official publications of the European Communities, 2002, 44.
343 WWF, Waterway transport on Europe’s lifeline, the Danube. Impacts, threats and opportunities, l.c., 62-63.
On 7 June 2002, the German Bundestag rejected damming on environmental and economic grounds and voted for river improvement works in line with variant A. However, the High Level Group on the TEN-T noted in its 2003 report that this option for the Vilshofen-Straubing section would not guarantee a draught of at least 2.50 metres throughout the year.

Recently, regional planning and public consultation procedures were finalised in which the above-mentioned options were further assessed. The government of Lower Bavaria only evaluated variant C/C\textsubscript{2,80} positively while variant A and D2 were rejected. According to the government, variant A would not be able to cope with the expected increases in the volume of traffic on the Danube, while variant C/C\textsubscript{2,80} would guarantee a navigability for ships with a draught of 2.50 metres during 220 to 290 days per year.

176. Reportedly, the Vilshofen-Straubing case has not given rise to legal proceedings. However, it cannot be excluded that environmental organisations and local communities will challenge the recent compromise put forward by the government of Lower Bavaria. According to close observers, it would not come as a surprise if arguments would then be based on alleged infringements of the Birds, Habitats and Water Framework Directives.

### 3.13. INTERIM CONCLUSIONS

177. The overview of cases above leads to the following interim conclusions.

First, it shows that many – if not most – contentious cases relating to the application of the EU Birds and Habitats Directives – and at least most of the causes célèbres – involve waterways and ports. Cases such as Dibden Bay, Deurganckdok, WCT and Second Maasvlakte make abundantly clear that the impact of the Birds and Habitats Directives on major waterway and port projects can be tremendous. The application of these Directives has led to severe delays and even to the outright cancellation of projects. Unsurprisingly, these Directives have become particularly notorious throughout the entire waterway and port sectors. The Cockle Fisheries and Seed Mussels cases show that even routine maintenance projects in waterways and ports may become subject to recurrent obligatory assessment procedures under the Habitats Directive. Given the commonly found geographical overlap of waterways, port areas and protected habitats, virtually every plan and project in EU waterways and ports has to stand stringent ‘no-alternatives’ and ‘imperative-reasons-of-public-interest’ tests under EU nature conservation law. Therefore, our analysis fundamentally contradicts the view of some learned commentators on the EU Birds and Habitats Directives that “in almost all cases where economic interests in building a bridge, a port, an airport, a motorway or a new high-speed train clash with the environmental interests of preserving a habitat, the environmental interests lose” and that it is “not likely” that the Habitats Directive can “significantly change” this situation. Quite the contrary, the Birds and Habitats Directives have become an inevitable battlefield for sponsors of waterway or port-related projects, and, in a growing number of cases, also a graveyard for their time schedules, building plans, traffic forecasts and even their mere maintenance arrangements.

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344 Written question E-4003/03 by Hiltrud Breyer (Verts/ALE) to the Commission (7 January 2004), OJ C, no. 84E, 3 April 2004, 281.


Second, it appears that the European Commission, as well as national and EU courts, tend to apply and interpret the Birds and Habitats Directives rigidly vis-à-vis waterway and port-related interests. Whatever the precise legal context, the European Commission and courts are particularly reluctant to accept economic considerations supporting exemptions from designation and conservation obligations. In addition, a number of Member States decided, on the occasion of transposing the Directives, to exceed their requirements and to impose even stricter rules than those laid down by the European legislator. A discussion of these cases of so-called gold-plating is however outside the scope of the present study.

Third, legal uncertainty prevails even in cases where the project was well prepared by public authorities and where the European Commission itself gave a favourable opinion, as in the Second Maasvlakte case. The latter case shows that national courts may issue judgments that are totally unpredictable. As a result, it becomes increasingly difficult for public administrations to fully comply with the obligations arising under the Birds and Habitats Directives. Even when serious efforts are undertaken for consultation with the general public and environmental NGOs and where indeed memoranda of understanding with stakeholders were signed or where the competent authorities committed themselves to investing in mitigation or compensation measures, these arrangements can never prevent other groups or individuals from challenging decisions before the courts. Whilst the basic human right of access to courts should of course never be called into question, the fact of the matter is that the ambiguity of the Birds and Habitats Directives provides citizens and NGOs with endless arguments with which to challenge every single waterway and port project. There is no denying that EU environmental law is increasingly used as a weapon to defend NIMBY-inspired interests of individuals. The Deurganck Dock and Vuosaari cases show that one single project may even become subject to dozens of claims over many years and even continuing after construction works have commenced or operations started.

Fourth, it should be stressed that the prevailing legal uncertainty is generally not caused by ambiguities or other problems inherent in the national implementing legislation. As a matter of fact, most problems are related to the application of the EU Directives themselves (either by EU courts or by national courts who are required to apply EU Directives directly) or of their literal transpositions into domestic law of the Member States. Consequently, the legal uncertainty in the application of nature conservation rules in relation to waterway and port plans and projects is not a national issue, but rather a European one. Logically, the problem should primarily be addressed at EU level.

Fifth, the TEN-T status of a project appears hardly to influence the assessments of projects under the Birds and Habitats Directives. In the Second Maasvlakte case, however, the European Commission appears to have accepted that status as evidence of imperative reasons of overriding public interest for the project at hand. The Dutch Supreme Administrative Court expressly supported this view. Apparently, other relevant legal regimes for maintenance and improvement works are being ignored completely. In Deurganck Dock, Verrebroek Dock, Vuosaari and Zeebrugge, port expansion areas that had been designated or prepared decades ago were all of a sudden turned into protected habitat areas.

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347 In this respect, it may be recalled that also in its guidance instruments the European Commission takes the view that any derogation from Article 6(3), Article 6(4) of the Habitats Directive “has to be interpreted in a restrictive way, so that its application is limited to circumstances where all the conditions required are satisfied. In this regard, it falls on whoever wants to make use of this exception to prove, as a prerequisite, that the aforementioned conditions indeed exist in each particular case” (European Commission, Managing Natura 2000 sites. The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC, Luxembourg, Office for Official Publications of the European Communities, 2000, 43).
Sixth, the Monfalcone case highlights that problems related to the Birds and Habitats Directives can even directly influence the legal position of third parties such as building contractors. To the extent that these problems affect the legality of zoning schemes or building permits, this evidently also applies to terminal operators and even waterway and port users.

The overall conclusion is that the application of the EU Birds and Habitats Directives in relation to waterway and port projects is, to say the least, very problematic. Such projects are constantly being challenged on the basis of these two Directives and even well prepared and urgent projects are frequently being suspended or delayed. This state of affairs jeopardises the policy objective to promote maritime and inland shipping and offends against the integration principle. It does not come as a surprise, then, that the matter has led to a general malaise and that interested parties – not just waterway and port operators, users and investors, but also environmental groups and citizens – are getting increasingly frustrated. At the end of the day, the very legitimacy of current transport and environmental policies is at stake.
4. POLICY INTEGRATION INITIATIVES

4.1. INTRODUCTION

178. This chapter consists of a general description of selected past and ongoing procedures, projects, studies and other initiatives which aim at a better coordination and mutual integration of relevant policy fields and legal rules. We shall again focus on the Birds, Habitats and Water Framework Directives in relation to waterways and ports.

4.2. CONSULTATIONS UNDER THE RELEVANT DIRECTIVES

179. As explained above, the Water Framework Directive imposes obligations on Member States for the involvement of all interested parties in the implementation of the Directive and for the participation by the public, including water users. Consequently, waterway and port authorities, operators and users must be invited to contribute actively to the implementation of the Directive.

The Birds and Habitats Directives do not provide for such a framework for obligatory participation or consultation. Article 6(3) of the Habitats Directive merely provides that the competent national authorities shall agree to the plan or project having significant effects on a SAC 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”.

As we have mentioned, several other instruments including the EIA and SEA Directives ensure that the general public is informed and consulted with a view to the adoption or authorisation of certain plans and projects. These instruments, however, do not grant a particular consultative status to waterway and port authorities or other stakeholders of the shipping and port industries.

4.3. COMMISSION INITIATIVES

4.3.1. Cooperation between Directorates General

180. In practice, the competent Directorates General of the European Commission constantly cooperate on waterway and port-related plans and projects. The most directly involved DGs are DG Environment (DG ENV) and DG Energy and Transport (DG TREN).

For example, DG TREN is always involved when the Commission is asked to issue an opinion on the basis of Article 6(4) of the Habitats Directive.

Since TEN-funding is conditional upon compliance with EU environmental law, it can in practice not be granted without the agreement of DG ENV. Recently, DG TREN and DG ENV agreed on an internal Modus Operandi which sets out clear rules for the treatment of individual cases and contains, inter alia, detailed provisions on the impact on funding decisions of infringement procedures based on environmental law. If an infringement procedure that has led to a reasoned opinion is, for example

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348 See supra, nos. 29 and 89 and infra, nos. 215-216.
349 See supra, no. 79.
directly linked to the project, no positive funding decision can be taken “unless the Commission uses its discretion in exceptional cases to finance the project in view of its significant beneficial environmental effects that outweigh the effect of the infringement at issue”. In some cases, the application for TEN-funding was used by the Commission as a lever in order to force Member States to designate protected sites under the Birds and Habitats Directives.

Also, DG ENV and DG TREN have taken joint initiatives to issue guidance on the interpretation of the Water Framework Directive. These valuable cooperation arrangements do not alter the fact that in some individual cases balancing environmental and transport policy objectives has turned out to be a difficult task.

4.3.2. Specific guidance documents and integration activities

181. In the course of time, the European Commission has published various documents clarifying the provisions of the Habitats Directive. As mentioned above, in 1995, the Habitats Committee adopted a first version of the Interpretation Manual of European Union Habitats which provides guidance on the definition of priority and non-priority habitats within the context of Annex I to the Habitats Directive. In 2000, the key guidance document entitled Managing Natura 2000 sites. The provisions of Article 6 of the ‘Habitats' Directive 92/43/EEC was published, which is intended to facilitate the interpretation of Article 6 of the Habitats Directive. In a publication dating from November 2001, the Commission provides further guidance on the provisions of Article 6(3) and 6(4) of the Habitats Directive. In addition, the European Commission from time to time publishes on its website opinions issued on the basis of Article 6(4) of the Habitats Directive, which also contributes to a better understanding of that Directive.

182. In 2002, the European Commission issued an interpretation note on the selection, delimitation and management of estuaries. At the time of writing, the Commission’s DG Environment was preparing a new interpretative guide on the management of estuaries.

350 The forthcoming guidance document on Art. 4(7) of the WFD is a joint initiative of DG ENV and DG TREN. The leading guidance document Managing Natura 2000 sites. The provisions of Article 6 of the ‘Habitats' Directive 92/43/EEC was drafted exclusively by the services of DG ENV.

351 See supra, nos. 21-22.


355 European Commission, Interpretation note on “Estuaries” (habitat type 1130), with a view to aiding the selection, delimitation and management of Sites Of Community Interest hosting this habitat type, forwarded to the Members of the Habitats Committee on 16 January 2002 (letter DG.ENV.B2/NH/ILF/in D(320057).

environment into transport policy - from strategies to good practice\textsuperscript{357} that provides inspiration and insights into how to promote the integration of environmental considerations into transport policy. These integration initiatives did however not focus on the problems related to the application of the Birds, Habitats and Water Framework Directives in and around waterways and ports.

\textbf{183.} In 2005, the Commission published a practical guide to EU funding mechanisms for environmental projects\textsuperscript{358}. The handbook guides practitioners, professionals and volunteers through the sources, procedures and practices of EU environmental project funding. One of the relevant instruments is LIFE, the Financial Instrument for the Environment, which was introduced in 1992 and co-finances projects in three areas\textsuperscript{359}. LIFE-Nature contributes to the implementation of the Birds and Habitats Directives, thus supporting the establishment of the Natura 2000 Network; LIFE-Environment aims to implement Community policy and legislation on the environment in the European Union and candidate countries, while LIFE-Third countries provides technical assistance to third countries in the development of an environmental policy and the establishment of capacities and administrative structures within the environment. These funding mechanisms are regularly used for waterway and port-related projects.

\textbf{184.} The Common Implementation Strategy (CIS) for the Water Framework Directive has been extensively discussed above. As previously indicated, organisations representing the navigation and port industries are now represented in several activities. Some previously published guidance documents already devoted some attention to specific navigation and port-related aspects\textsuperscript{360}.

\textbf{185.} Guidance is provided on the implementation of other environmental instruments as well. In 2005, for example, the Commission published a new version of its \textit{SEA Manual} for TEN-T projects, which is presented as a ‘Sourcebook on Strategic Environmental Assessment of Transport Infrastructure Plans and Programmes’\textsuperscript{361}.

To be complete, reference should be made to more general guidance documents issued by the European Commission that may also be relevant to the implementation of the Birds, Habitats and Water Framework Directives, such as the Communication from the Commission on the precautionary principle\textsuperscript{362}.

\textbf{4.3.3. Integrated Coastal Zone Management}

\textbf{186.} The European Union’s coastal zones are of great environmental, economic, social, cultural and recreational importance. They are home to a large percentage of the population, a major source of food and raw materials, a vital link for transport and trade, the location of some of the most valuable habitats, and the favoured destination for leisure time. Yet the EU’s coastal zones are facing serious prob-

\textsuperscript{359} See http://europa.eu.int/comm/environment/life/home.htm.
\textsuperscript{360} See supra, no. 87 and infra, nos. 215 et seq.
\textsuperscript{362} Communication from the Commission on the precautionary principle, COM/2000/0001 final.
lems of habitat destruction, water contamination, coastal erosion and resource depletion. This depletion of the limited resources of the coastal zone (including the limited physical space) is leading to increasingly frequent conflict between uses, such as between aquaculture and tourism. Coastal zones also suffer from serious socioeconomic and cultural problems.

Since 1996, the European Commission has been working to identify and promote measures to remedy these problems. From 1996 to 1999, the Commission operated a Demonstration Programme on Integrated Coastal Zone Management. Based upon the experiences and outputs of this programme, the Commission in 2000 adopted a Communication on Integrated Coastal Zone Management: a strategy for Europe. This document addresses the problems that the European coastal zones are faced with and identifies the underlying causes. Incidentally, port construction works are mentioned as a problem area. The Communication recognises that there is no simple, legislative solution, but that a flexible strategy is needed that focuses on addressing the real problems on the ground. It calls for an integrated, participative territorial approach, to ensure that the management of Europe’s coastal zones is environmentally and economically sustainable, as well as socially equitable and cohesive. Those integrated solutions could only be implemented at local and regional level. At EU level, the Communication proposes a European Strategy for Integrated Coastal Zone Management (ICZM), aimed at promoting a collaborative approach to planning and management of the coastal zone, within a philosophy of governance by partnership with civil society. The EU’s role is thus defined as one of providing leadership and guidance to support the implementation of ICZM by the Member States at local, regional and national levels. The Strategy also underlines the need for continued collaboration between the services of the Commission. The EU Strategy for ICZM proposes further action on, inter alia, promoting ICZM within Member States, making EU policies compatible with ICZM, promoting dialogue between European coastal stakeholders, developing best ICZM practice, generating information and knowledge about the coastal zone, and diffusing information and raising public awareness.

Recommendation 2002/413 of 30 May 2002 concerning the implementation of Integrated Coastal Zone Management in Europe recommended that the Member States should take into account the sustainable development strategy and to take a strategic approach to the management of their coastal zones (Chapter I). In formulating national strategies and measures based on these strategies, Member States should follow the principles of integrated coastal zone management (Chapter II). Member States should conduct or update an overall stocktaking to analyse the major actors, laws and institutions which influence the management of their coastal zone, which considers, inter alia, transport and habitat protection (Chapter III). Based on the result of the stocktaking, each Member State concerned, in partnership with the regional authorities and inter-regional organisations, as appropriate, should develop a national strategy or, where appropriate, several strategies, to implement the principles for integrated management of the coastal zone (Chapter IV).

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364 On coastal zone policy, see http://europa.eu.int/comm/environment/iczm/home.htm.


366 The Communication states on p. 6 that engineering works in some port areas have contributed to accelerated erosion of the adjacent shoreline because the works did not adequately account for coastal dynamics and processes.

To support the implementation of the ICZM Recommendation, the Commission facilitates an expert group, which holds regular meetings\(^{368}\).

It may be recalled that in its 1997 *Green Paper on Sea Ports and Maritime Infrastructure*, the Commission already announced that it would promote integrated coastal planning and management in order to improve the integration of environmental considerations in port planning\(^{369}\).

### 4.3.4. Forthcoming EU Maritime Policy

187. In March 2005, the European Commission announced that it intended to develop a comprehensive Maritime Policy for the Union.

In a Communication to the Commission from the President and Mr Borg, entitled *Towards a future Maritime Policy for the Union: a European vision for the oceans and seas*, it was stated that the competing uses of the seas must be managed carefully if their full economic potential is to be realised in a sustainable manner and that this requires taking stock of all activities that may have an impact on oceans and seas\(^{370}\).

The European Commission observed that, even if measures are in place to manage individual maritime activities, the fragmentation among the different policy areas makes it difficult to apprehend the potential impact of one set of activities on other sets or potential conflict among them. There is scope therefore in looking at replacing a fragmented approach to oceans and seas management with a collaborative, integrated approach. The Commission stressed that this integrated approach is at the heart of any future maritime policy.

The Commission expressly mentioned the case of port development in coastal areas:

> If we look at the coastal areas, for example, we see increasing competition, sometimes conflict, for space. All activities have an impact on others. Let us take the building or extending of ports and marinas, the mooring of fish or shellfish cages or installations or the creation of wind parks, all of them have an impact on, for example, fisheries resources when fish nurseries are destroyed or when the quality of the water around them is adversely affected. Fishing activities may also be displaced, resulting in a shifting of fishing effort to other, sometimes more vulnerable areas. These developments may also reduce the space available for recreational activities which in turn has an economic and social impact on the region concerned\(^{371}\).

The Commission also acknowledged that maritime transport is a key link in the trade chain that is Europe’s lifeblood. Recognition of the environmental costs of road transport has further raised the importance of maritime transport. This, together with the relocation of manufacturing activities outside Europe, poses a major challenge to the European economy, the ports and the maritime transport sector\(^{372}\).

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\(^{368}\) See [http://europa.eu.int/comm/environment/iczm/home.htm](http://europa.eu.int/comm/environment/iczm/home.htm).

\(^{369}\) See *supra*, no. 78.

\(^{370}\) Communication to the Commission from the President and Mr Borg, *Towards a future Maritime Policy for the Union: a European vision for the oceans and seas*.

\(^{371}\) *Towards a future Maritime Policy for the Union*, MEMO/05/72, Brussels, 2 March 2005.

\(^{372}\) Ibid.
A Task Force is seeking to identify the potential for beneficial synergies between sea-related sectoral policies as well as to examine how these could help improve competitiveness, encourage growth and boost employment in an economically, socially and environmentally sustainable manner. In April 2006, a Green Paper was expected. Stakeholders are involved before and after the publication of this consultation document.

4.4. SELECTED PRIVATE INITIATIVES SUPPORTED BY THE COMMISSION AND/OR THE INDUSTRIES

4.4.1. Ecoports

Ecoports was a research and development project co-funded by the European Commission and 12 ports and port organisations. The project, which was based upon the earlier ECO-Information project (1997-1999) and which was voluntarily initiated by the port administrations, started formally on 1 June 2002 and lasted for three years. The main goal of Ecoports was to harmonise the environmental management approach of port administrations in Europe, through the establishment of an environmental management system as well as the exchange of experiences and the implementation of good practices in respect of port-related environmental issues. Specific goals were, among others, to create a level playing field in terms of the implementation of environmental legislation and to remove the environmental component as a competitive factor between ports. Most importantly, the project was aimed at developing the Environmental Management Information System (EMIS), which was to integrate a range of practical tools for delivering cost-effective environmental management response options for ports.

EMIS tools include, *inter alia*, the online environmental self-audit for ports Self-Diagnosis Methodology, an online database of practical, proven and cost-effective solutions to environmental port issues, and a standard Environmental Management Scheme which can be applied in port communities all around Europe. Further, a Port Environmental Review System (PERS) was developed which defines a standard for port environmental management. PERS carries the voluntary option of independent review with a Certificate of Validation for ports that reach the standard.

Although the Ecoports project was terminated on 1 June 2005, the practical outputs of the project remain of relevance through the activities of the EcoPorts Foundation (EPF). The latter has been established as a non-profit organisation providing a platform for the continuation into the future of the products and services developed through the Ecoports project. The EPF provides a port environmental management support package consisting of the abovementioned EMIS tools. The EPF further plays an important role as a project partner by encouraging and coordinating membership from as many seaports and inland ports as possible, by identifying new topics for collaborative research, setting up European cooperation projects relating to sustainability in the port area and the logistic chain and acting as a focal point for environmental managers to exchange environmental good practice experiences. All European ports can become affiliated to the EPF, which gives them access to the EPF tools and methodologies.

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*373 See www.ecoports.com.*
4.4.2. ESPO’s Environmental Codes of Practice

189. In 1994, the European Sea Ports Organisation (ESPO) published its first *European Environmental Code of Practice*. This code was intended to be an expression of the collective commitment of the European port administrations to environmental improvement. It therefore made a series of recommendations on the integration of environmental protection policies into all aspects of their operations.

Having produced the 1994 Code, ESPO set about the task of assessing whether the Code was being properly used and implemented. For this purpose, it launched a port study in 1996, which analysed the port responses and gathered further information about the sector. Port environmental managers who were asked to rank the importance of each environmental issue for their port, qualified port development (water related), water quality, dredgings disposal and dredging as the most important issues.

In the light of increased concerns about the environment and the development of sustainable policies, ESPO published an Environmental Review in 2001. The next year, ESPO carried out a survey on the impact of the Birds and Habitats Directives on port development. In 2003, ESPO published the most recent version of its *Environmental Code of Practice*. The Code sets out ten environmental objectives for European ports. It further highlights the achievements of the port sector over the past ten years in the field of environment. The 2003 Code also presents an overview of applicable environmental legislation as well as its effects on ports. For each environmental issue, the 2003 Code provides port administrations with practical guidelines for developing their environmental policies. Finally, port administrations are recommended to use the EMIS tools as important means towards self-regulation.

In the course of 2004, ESPO carried out an environmental survey, updating the results of its 1996 survey. It was found that the main environmental issues which EU ports commonly face concern waste, dredging, dust, noise, and air pollution. The survey further revealed that a great majority of European ports experience or anticipate restrictions on port developments due to EU environmental legislation.

ESPO is currently preparing a guidance document on port development and nature protection. Its purpose is to assist ports and national authorities in complying with the requirements of EU nature protection laws during port development procedures.

4.4.3. Paralia Nature

190. The Paralia Nature project was set up in December 2000 as an informal platform for the discussion of the Habitats Directive and related issues and projects. It is intended to bring about a broad multidisciplinary cooperation between governments, ports, universities, NGOs and knowledge centres in terms of exchanging experiences and information throughout the creation of a network that is focused on the development of practical and applicable solutions as well as the development of ideas for improvement. Paralia Nature further aims at giving guidance on how to deal properly and efficiently with the different steps involved in Article 6 of the Habitats Directive.

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374 See www.espo.be.
376 See www.imiparalianature.org.
The first phase of Paralia Nature unfolded between December 2000 and April 2001 and covered issues such as effect analysis and mitigation, creation of alternative solutions, proofing imperative reasons of overriding public interest and compensation for remaining adverse impacts on nature. The second phase of Paralia Nature, which spanned the period from May 2002 to August 2004, was directed at providing solutions and developing guidance on three main priorities: species protection, marine protected areas and management plans, compensatory measures, and monitoring. Paralia Nature Phase III started in August 2004 and will run until end 2008.

The co-ordinator and initiator of the Paralia Nature project is the Institute for Infrastructure, Environment and Innovation which is a network organisation set up to initiate European cooperation projects focusing on efficient and effective implementation of EU environmental policy and sustainability goals through innovation in infrastructure projects. On the basis of experiences and achievements from Paralia Nature, the Institute also initiated the NEW! Delta project, which will be discussed below.

4.4.4. NEW! Delta

191. The NEW! Delta project, which was launched in July 2004, also focuses on the implementation of the Birds and Habitats Directives. The project brings together 10 partners from 4 countries in North-West Europe (England, France, Belgium and The Netherlands) among which are port authorities, (regional) administrations and knowledge and research institutions. The project is co-financed by the European regional development Fund Interreg IIIB - North West Europe. The partnership will create best-case scenarios, manuals and comparative studies. A first NEW! Delta Conference was held on 29 and 30 September 2005 at Rotterdam, focusing on ports working together on nature and the environment. The NEW! Delta project will continue until June 2007.

4.4.5. SedNet

192. The Sediment Network (SedNet) is a European network, whose purpose is to incorporate sediment issues and knowledge into European strategies to support the achievement of a good environmental status and to develop new tools for sediment management. SedNet’s focus is on all sediment quality and quantity issues on a river basin scale, ranging from freshwater to estuarine and marine sediments. It brings together experts from science, administration and industry. It interacts with the various networks in Europe that operate at the national or international level or that focus on specific fields (such as science, policymaking, sediment management, industry, education). SedNet was funded by the European Commission’s DG Research under the 5th RTD Framework Programme. With regard to waterway maintenance for shipping, SedNet has, for example, paid specific attention to sediments management in the context of the Water Framework Directive.

4.5. NATIONAL AND LOCAL INITIATIVES

193. As mentioned above, the European ports are committed to reconciling port activities and port expansion with environmental concerns. In many ports such commitment has materialised in the crea-
tion of cooperation platforms between the various stakeholders. Below we provide examples of such initiatives in which a constructive dialogue between ports, NGOs and local authorities is organised in an attempt to harmonise economic interests, in particular port developing projects, with nature conservation.

The expansion of the port of Rotterdam, in particular the Second Maasvlakte project\(^{379}\), initially led to tensions between stakeholders. Yet an agreement was reached between the port of Rotterdam, competent authorities and local NGOs in order to solve these conflicts and combine the various ecological and economic interests. This cooperation between the port of Rotterdam and the stakeholders thus made it possible to reach a win-win situation whereby the port authority could carry out its expansion project while at the same time large additional nature and recreational areas were created. As we have seen above, though, this close cooperation has not prevented the Dutch Council of State from annuling the final decision to carry out the project\(^{380}\).

Elsewhere as well, voluntary nature development plans in and around port areas are set up in cooperation between port authorities and environmental NGOs. In Antwerp, for example, the port authority and Natuurpunt (‘Nature Point’, the main nature conservation organisation in Flanders) signed a charter in 2002 in which they set out their common vision of sustainable development. The parties agreed that cohabitation between nature and port is a realistic goal in the port of Antwerp. In 2001 and 2002, the Port of Antwerp signed two agreements with Natuurpunt dealing with the establishment and management of a network of ecological infrastructure within the Antwerp port area. At the same time, they agreed upon the continuation of pilot projects relating to specific species and the preparation of new projects.

There are numerous other examples of port authorities greening their policies, including outside the field of nature protection. Under the Green Award project, for instance, port authorities offer special rates and other benefits to vessels complying with certain safety and environmental rules\(^{381}\). Recently, the Port of Rotterdam authority announced that, for the construction of the Second Maasvlakte, it is expressly on the lookout for clients who operate their container terminal with a view to sustainability. This means that when selecting the first client for this port expansion, the port will look not only at financial returns, but also at environmental aspects. This also involves looking further than the terminal itself: in particular, thought will be given to the traffic movements generated by the new container terminal. Fourteen companies came forward, hoping that the Port of Rotterdam Authority would select them as the first to start operating in the new port area. The Port Authority is conducting an open, transparent and non-discriminatory procedure for the granting of this terminal contract. The proposals will be assessed on the basis of the following four criteria: financial aspect (40%), strategy & marketing (25%), sustainability (20%) and terminal concept (15%). With ‘sustainability’, it is a question, among other things, of the degree to which cargo is transported to the hinterland by inland shipping and rail, rather than by road, and the emissions of noise, light and air pollution. In the assessment of the terminal concept, such issues as the productivity of the terminal, the efficient set-up for handling the different modes of transport and the choice of equipment used at the terminal come into play. The latter item again encompasses an important environmental component.

\(^{379}\) See www.maasvlakte2.com.
\(^{380}\) See supra, nos. 144 et seq.
\(^{381}\) See www.greenaward.org.
4.6. CONFERENCES, SEMINARS, ETC.

194. In the past, various conferences and seminars have been organised with a view to exchanging know-how and experience and to discussing controversial issues in relation to the implementation of the Birds, Habitats and Water Framework Directives in waterways and ports.

In 2002, for example, ESPO organised a seminar in Genoa on sustainable port management. In the same year a symposium on sustainable development of ports was held at Ghent. Later in 2002, the implications of Article 6 of the Habitats Directive for port expansion in Europe were discussed at an international seminar in Brussels organised by the International Navigation Association (PIANC). The latter was also a co-organiser of a 2003 seminar on ports and habitats for the purpose of contributing to a better understanding of the Birds and Habitats Directives. In the same year, ESPO, in cooperation with six other international and European associations, organised a seminar in Brussels on the implications of the Water Framework Directive for the maritime and inland waterway sector. The successful GreenPort 2006 Conference, which was held in Antwerp from 22 to 24 February 2006, provided a forum for discussion on environmental issues for maritime and inland ports.

An important European Workshop held from 17 to 19 October 2005 at Prague focused, on the one hand, on hydromorphological risk assessment criteria used in the pressures and impacts analyses imposed by the Water Framework Directive and, on the other, on criteria for the identification and designation of heavily modified water bodies (HMWB). Also, it contributed to the drafting of the final Mandate for the new implementation activity on the Water Framework Directive and Hydromorphology which we have discussed above.

4.7. CRITICAL ASSESSMENT AND INTERIM CONCLUSIONS

195. As regards past and ongoing policy integration initiatives, two important concluding observations can be made.

First, the numerous initiatives for a better mutual integration of nature and water protection objectives on the one hand and waterways and ports policies on the other are of course extremely valuable. To begin with, cooperation between competent services and authorities at EU and other levels is a prerequisite for policy integration. Next, many of the initiatives discussed above have contributed to bringing about a greater environmental awareness on the part of waterway and port authorities and a more environmentally friendly approach towards waterway and port management. Not only have waterway and port policies at different levels greened considerably over the past decade or so, but the integration initiatives have also increased awareness of the economic importance of waterways and ports with environmental authorities and – at least some – environmentalist NGOs. Finally, the integration initiatives offer guidance on best practices and therefore they contribute, albeit to a limited extent, to creating more legal certainty.

Nonetheless, these integration initiatives have clearly been unable to prevent political frictions and legal difficulties. Under the Birds and Habitats Directives, important stakeholders of the shipping and port industries, including waterway and port authorities, have no consultative status whatsoever. Very often, new waterway and port-related projects stir up public opinion and provoke vehement...

382 See www.green-port.net.
383 See supra, nos. 30 and 87-90 and infra, nos. 215 et seq.
protests. Private individuals and NGOs continue to challenge these projects, preferably on the basis of the Birds and Habitats Directives, and in some cases primarily inspired by the NIMBY-syndrome rather than by a genuine concern about the preservation of environmental values. Available guidance instruments do not prevent law courts from enforcing these Directives in rather unexpected ways. In sum, the current integration and guidance procedures, instruments and projects have ensured neither a perfect coordination of policies, nor a sufficient degree of legal certainty, nor a flawless mutual understanding of stakeholders. In the next chapter, we shall further analyse a selection of remaining problems.
5. UNRESOLVED PROBLEMS

5.1. INTRODUCTION

196. This chapter identifies a number of problems relating to the implementation of the Birds and Habitats Directives and the Water Framework Directive that are not likely to be resolved by the integration initiatives and instruments discussed in the previous chapter and that should, in our opinion, be considered suitable areas for further action. With regard to the Birds and Habitats Directives, our analysis draws mainly upon the findings of the digest of cases above. As far as the Water Framework Directive is concerned, we have considered the provisional results of CIS activities and remarks by other commentators. To these elements, we have added some personal observations.

197. In 2002, we presented a first critical legal analysis of the impact of the Birds and Habitats Directives on the port industry at an international workshop hosted by the European Sea Ports Organisation and the Port of Genoa. On that occasion, we highlighted, inter alia, the lack of coordination and integration in EU nature conservation and port policies. In the same year, we briefly presented a number of policy recommendations in this field in a study on the impact of European law and policy on the Flemish seaport sector, commissioned by the Flemish Ports Commission. Below, we shall reiterate and substantially elaborate some of the views put forward on these occasions.

In addition, it should be noted that several professional associations of the inland waterway, seaports and dredging sectors have further contributed to the identification of legal problems through surveys of members and in policy statements. In January 2005, the European maritime umbrella organisation Maritime Industries Forum (MIF) issued a joint declaration insisting on the need for a better integration of EU nature conservation and maritime policies and raising a number of legal questions. Some national authorities have also taken initiatives to resolve certain implementation problems as well.

The impact of the Water Framework Directive on waterways, ports and dredging activities, and the specific potential legal difficulties related thereto, have received attention at several conferences and in policy papers, which we shall also consider below. In addition, we have attempted to identify a number of further legal issues ourselves.

5.2. IMPLEMENTATION OF THE BIRDS AND HABITATS DIRECTIVES

5.2.1. A battle for scarce areas

5.2.1.1. The economic need for additional capacity on waterways and in ports

198. As we have seen above, many problems relating to the implementation of the Birds and Habitats Directives relate to improvement or expansion projects in waterways and port areas. Often, these projects are aimed at meeting an urgent need for additional transportation or port throughput capacity, either for inland or maritime shipping.

There are still many bottlenecks and missing links in the European inland waterway infrastructure of the E Waterway Network\(^{387}\). On 17 January 2006, the European Commission presented its Naiades Communication on the promotion of inland waterway transport, which comprises an Integrated European Action Programme for Inland Waterway Transport\(^{388}\). Infrastructure is one of the pillars of this new programme. The Commission again points out that Europe’s waterway network contains massive capacity reserves, which are either already available or can be activated with relatively limited financial investments. However, the inland waterway and transhipment infrastructure still faces a limited number of strategic bottlenecks caused by limited draught, bridge clearance and lock dimensions, and it also suffers from a backlog of maintenance. Therefore, a European Development Plan for improvement and maintenance of waterway infrastructures and transhipment facilities should be initiated so that trans-European waterway transport could be made more efficient while respecting environmental requirements. It should provide guidance for financing and prioritise improvement and maintenance of waterway infrastructures, transhipment facilities and eliminate bottlenecks while reconciling different policy objectives, in relation to, for example, transport, energy, the environment, and sustainable mobility. Such a plan should be oriented along the TEN-T network, but it should also include smaller networks. A European Coordinator could facilitate its implementation. Also, the Commission is aware that opposition against inland waterway projects is increasing and that construction works on inland waterways are often contested on environmental grounds; therefore, it calls for an open and rational dialogue on project basis. As regards inland ports, these are confronted with a lack of spare capacity. This results in longer waiting times at terminals, which in turn leads to a reduced operational efficiency of inland vessels and crews. Expansion of port activities is complicated by the spatial claims of other functions, e.g. residential areas, recreation, nature, etc.

According to the Commission, the improvement of the European inland waterway network primarily remains a national matter, but should be supported and guided at the European level. Therefore, the proposed European Development Plan for the improvement and maintenance of waterway infrastructure and transhipment facilities would go beyond the existing TEN-T priority projects and also include other projects of ‘common interest’ and it would, as we have already mentioned, take account of the smaller waterway networks as well. It should be developed in accordance with initiatives of the UNECE in this field. The development plan supports the creation of a coherent European inland waterway network in the long-term by providing Member States guidance with regard to the following aspects:

- Definition of standards for waterway width and depth, bridge clearance, lock dimensions and average structural waiting times at terminals and locks;
- Prioritisation of required investments in both main transport axes and small waterways from a European network perspective;
- Elimination of missing links, strategic bottlenecks and crucial maintenance backlogs;
- Incorporation of environmental requirements and coordination with river basins management plans that are required by the Water Framework Directive;
- Regular examination of the condition and status of Europe’s waterway network and port infrastructure\(^{389}\).

\(^{387}\) See the recent inventory of most important bottlenecks and missing links in the E Waterway Network on http://www.cemt.org/online/Water05/Bottlenecks.pdf.


\(^{389}\) Naiades Commission Staff Working Document, 29.
In order to foster the mutual understanding of multipurpose use of waterways, the Commission also notes:

*The need for improvements of waterway and port infrastructure for the benefit of inland navigation cannot be regarded in isolation. An integral infrastructure planning approach is required, which respects both economic and ecological interests. Investments in transport infrastructure must be carried out in the framework of existing law, spatial planning and environmental policies. An interdisciplinary dialogue at the project level and a generally accepted assessment framework can achieve the integration of all relevant aspects best. Such a planning process will allow transparent and objective reporting and balancing of the different policy objectives. This way, the mutual understanding of multipurpose use of waterways can be fostered effectively.*

Further, the Commission wishes to encourage the development of port and transhipment facilities. The creation of a network of inland terminals, especially in new Member States and candidate countries, is deemed necessary to cope with imbalances and fluctuations in transport demand and to guarantee sufficient capacity utilisation for each individual port. Linking up with market initiatives, the European Development Plan should be used to prioritise port projects, whereas national funding schemes and European support programmes such as PHARE, ISPA, CARDS, and INTERREG should provide financial support. This may refer to investments in new or refurbished transhipment equipment.

200. As regards seaport improvement works, these are in many cases necessitated by the increase in the size and esp. draught of maritime vessels, particularly containerships. Congestion is also a permanent cause of concern at many European seaports. There is a massive demand increase in the sector. In North Europe, for example, non-transhipment container handling demand is forecast to grow by 42-51 per cent over 2004-10. In 2015, further expansion of 25-34 per cent is anticipated. North European transhipment demand is even forecast to increase by 56-68 per cent over 2004-10 and by a further 31-42 per cent over 2010-15. In South Europe and the Mediterranean, even higher percentages are expected. Experts however warn that the environmental process is the ‘critical path’. A recent study on *The European & Mediterranean Containerport Markets to 2015* by Ocean Shipping Consultants observed, esp. in relation to North European ports, that:

 [...] environmental pressures to port development have been mounting in recent years. This has a number of consequences for new container terminal projects:

- Project start-ups are typically delayed by the need to demonstrate that environmental requirements have been fully taken into account, that unavoidable adverse environmental impacts have been mitigated, that there is an overriding need for development and that projects are designed to provide new capacity as efficiently and economically as possible. Delays due to planning and environmental considerations have affected projects throughout Europe – especially where major dredging is required to provide sufficient access depth for the largest vessels.

- Because of delays in starting up new projects, the time horizon for planning has increased.

- Pressures on the use of land have contributed to a general rise in terminal productivity. Because of the greater difficulty in securing land and berthing, project sponsors must demonstrate economy with re-

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390 Ibid., 30.
391 Ibid., 30.
393 Thus Ocean Shipping Consultants’ expert Andrew Penfold at the Greenport 2006 Conference at Antwerp on 22 February 2006.
gard to their utilisation. Thus, the productivity rate assumed in new projects is significantly higher now than it was a few years ago394.

The development of short sea shipping and motorways of the sea – which are actively promoted and supported by the EU – also implies a need for additional waterway and port capacity as well.

Next, as the increasing volumes must be carried to and from the hinterland of seaports, there is a general need for additional capacity on railway links and roads as well.

Finally, it is worth noting that, in some Member States, there is also an urgent need for additional marinas and moorings in yachting harbours395.

5.2.1.2. The scarcity of both nature conservation areas and waterway and port development areas

201. In many cases, areas suited for waterway or port improvement or expansion projects overlap with or lie at least in close vicinity to nature protection areas designated as SPAs, SCIs and/or SACs under the Birds and Habitats Directives. As a matter of fact, both categories of areas are typically located in or near coastlines, estuaries or the courses of rivers and canals. Conflicts of interests, clashes of policy objectives, legal battles and other tensions are thus provoked by plain and inevitable geographical facts.

Whilst nature protection measures are generally based upon the scarcity of relevant areas, it is often overlooked that potential waterway and port development areas are probably just as scarce. Basic preconditions for the very existence of such areas are that they should be located near a sufficiently accessible waterway and a centre of economic activity, and that they should have a suitable geographic relief, adequate hinterland connections and an available workforce living nearby. The scarcity of such areas is, however, not expressly acknowledged in current international and EU legislation. The potential future use of such areas as waterway and port development zones is not protected or even envisaged by any EU legal instrument. The situation is aggravated by the fact that very large parts of existing port areas and, in many cases, existing navigational channels and hinterland connections are often already included in environmental protection areas, and that ports cannot easily relocate to other areas.

5.2.1.3. Problems relating to the designation of nature conservation areas

202. A major legal problem is that the designation of nature protection zones under the Birds and Habitats Directives did and does not take into account the pre-existing legal regime of port infrastructure and waterways. The applicable texts are applied mechanically, on the basis of environmental values only: pre-existing legislative reservations, international rights of use, zoning schemes, property rights, rights of use and national and local transport and port policies etc. are completely ignored. In some cases, such as Deurganck Dock, Vuosaari and Zeebrugge, conservation status was granted or assessment procedures under the Birds and Habitats Directives were applied to areas that had been earmarked for future port expansion decades ago. The TEN-T status of waterways and ports play no

394 Ocean Shipping Consultants, The European and Mediterranean Containerport Markets to 2015, o.c., 17 and 99.
role either in the designation processes under these Directives. In extreme cases, it appears that competent authorities or landowners – also in other sectors – are not even aware of the designation of their lands as an SPA or a proposed SCI. The consolation prize, consisting of Advocate General Léger’s statement in the Severn Estuary case that economic aspects could be taken into account in the second stage of area designation under the Habitats Directive, has in the meantime proved to be utterly worthless: there is no single trace of economic considerations having influenced the final establishment of the list of SCIs by the European Commission and the general view is that such a balancing of interests is precluded by law.

Whilst this purely environmentally inspired approach is fully supported by case law of the Court and is defended by some commentators as the only means of ensuring that a coherent European network of protected sites is established, there is no denying that (i) the absolute prohibition to balance ecological with other interests is very unusual in both EU and national law, (ii) it has led to misunderstandings, frustrations and economic losses and (iii) it has resulted in the designation process being considered by many to be an ecological and undemocratic diktat.

Furthermore, owners and managers of waterways and ports were in many cases not consulted during the designation processes. According to a survey carried out by the European Sea Ports Organisation, port authorities were not consulted at the time of designations of SPAs under the Birds Directive. Whilst they appear to have been consulted in most cases concerning the initial designation of proposed SCIs under the Habitats Directive, they did not have a real say in the process since no consideration could be given to socioeconomic interests. The fact that the Birds and Habitats Directives do not impose any consultation of port and waterway owners, authorities, operators or users sharply contrasts with the approach followed by the draughtsmen of the Water Framework Directive and by the Commission’s services responsible for the Common Implementation Strategy (CIS) for that Directive. It is also contrary to the purport of the EU ICZM Recommendation which invites Member States and Community institutions to examine the need for a European Coastal Stakeholders forum, in order to facilitate progress towards a common approach to integrated coastal zone management.

Another problem related to the designation of nature conservation areas under the Birds and Habitats Directives is that the applicable rules may be abused and applied in a different way by Member States. This may result in a distortion of competition between waterways and port systems. In the case of cross-border projects, the Habitats Directive may even be abused for competitive or protectionist purposes.
ist reasons. In this respect, reference can be made to assertions by Belgian observers on obstacles created by the Netherlands against the reactivation of the Iron Rhine rail connection between Antwerp and the German hinterland on the strength of the Birds and Habitats Directives and to the statement by the Commission in relation to this case that, while Member States have the right to impose more stringent environmental framework conditions and conservation measures than what is required by Community directives, they should not, however, fall back on EC nature protection directives to justify measures that go beyond their contents. In any case, the Birds and Habitats Directives do not contain specific rules for the assessment of cross-border projects.

In a number of cases, navigable channels of rivers and estuaries and marine areas reserved for future port expansion projects were left out of designated SPAs or proposed SCIs for economic reasons. Even when they run counter to the Birds and Habitats Directives as understood by the Court of Justice and the European Commission, such implementing measures can cause competitive distortions as well.

Finally, such distortions may also result from the actual delimitation of protected areas: where a waterway improvement or port expansion plan is located in or near a relatively small protected habitat zone consisting of, say, one or more individual sandbanks, “significant effects” on these habitats will occur rather easily, while such effects will emerge less rapidly in the case of a very large protection or conservation zone covering, for example, an entire river estuary. Even if delimitations would be perfectly justified from an ecological perspective, this could put waterway and port developers operating in the vicinity of large nature protection areas in a relatively advantageous competitive position – which would threaten not only to distort competition, but perhaps also to run counter to the Birds and Habitats Directives’ own objectives.

205. The loss of potential waterway and port development areas or at least the difficulties and constraints imposed on future plans and projects have caused serious additional costs and revenue losses for competent authorities, operators and users. Existing EU law does not however provide for compensation of these parties. According to an ESPO survey, port authorities have in practice never been compensated. Earlier legal doctrine pointed out that designations under the Habitats Directive may entail an encroachment upon property rights and that, consequently, a compensation issue arises. Recently, a Dutch analysis of the impact of the Birds and Habitats Directives noted that these Directives leave the regime of compensation to the discretion of the Member States. Under the first Additional Protocol to the European Convention for the Protection of Human Rights, property owners must be fully compensated, not only in the case of compulsory acquisition of land, but also where public authorities impose restrictions on their rights of use that to an extreme or disproportional de-

404 Letter from Mr Nicholas Hanley, Head of Unit at DG Environment to Belgian, Dutch and German officials of 19 January 2001, ref. ENV.B.2/JVV/A D(2001) 320891. On 24 May 2005, an Arbitral Tribunal rendered an award that clarified i.a. the allocation of costs that Belgium and the Netherlands have to bear with a view to the reactivation of the line (see http://www.pca-cpa.org/ENGLISH/RPC/#Belgium/Netherlands).
405 The European Commission insists that shipping lanes be included in the designation of rivers and estuaries (see European Commission, Interpretation note on “Estuaries” (habitat type 1130), with a view to aiding the selection, delimitation and management of Sites Of Community Interest hosting this habitat type, forwarded to the Members of the Habitats Committee on 16 January 2002 (letter DG.ENV.B2/NH/ILF/in D(320057) and Reasoned Opinion on the designation of the Elbe, Weser, Ems and Trave estuaries under the Habitats Directive, no. 1995/2225).
406 Comp. infra, no. 207 in footnote relating to the Western Scheldt Container Terminal.
gree deprive the owner of economic benefits so as to amount to a *de facto* expropriation\(^\text{409}\). Although environmental constraints imposed on the use of land are normally not considered a *de facto* expropriation\(^\text{410}\), in cases where a waterway or port development area is definitively turned into a protected habitat zone or even a nature reserve and, as a consequence, completely loses its economic value, we believe that the constraints might be sufficiently severe to conclude that the waterway or port authority or, as the case may be, commercial operator is entitled to compensation. Moreover, the principles of non-discrimination, legal certainty and legitimate expectation – which are also recognised in EU law – might in our opinion be infringed upon in cases where public authorities issue contradicting zoning and environmental regulations, for example where a given area at the same time enjoys a status as a zone for future port development and is designated as a nature conservation site. Where the latter status becomes an obstacle to port expansion, public authorities could be held responsible for the consequences of unlawful legislation. To conclude, waterway and port authorities would appear, in extreme cases, to be entitled to compensation under existing international and EU law. Consequently, it would appear entirely justifiable that general rules on compensation for waterway and port authorities should be studied and developed at EU level.

206. In sum, the designation of protection areas under the Birds and Habitats Directives was marked by an almost complete lack of integration with EU and national waterway and port policies. Whilst the fact that only environmental criteria were applied may have contributed to the creation of a comprehensive European network of conservation areas, it was detrimental to the understanding of waterway and port stakeholders for EU environmental policy. Moreover, it has contributed to the emergence of legal problems and disputes and caused serious economic losses.

Regrettably, the fact that designation processes are presently being finalised appears to leave little if any room for adjustments or, more specifically, for an integration of nature conservation and waterway and port policies at the designation stage. For Member States where the designation process is not yet complete and for all cases of future designations of protected habitats, additional integration measures would still be useful. Such measures should also take account of and highlight the scarcity of waterway and port development areas. Another issue that would appear to deserve further attention is the possible introduction of EU rules or recommendations on compensation for waterway and port authorities, operators or users. We shall elaborate these thoughts further in our policy recommendations below.

### 5.2.2. Fundamental legal uncertainty

#### 5.2.2.1. A growing malaise

207. There is a widespread feeling in the waterway and port-related industries that key concepts of the Birds and Habitats Directive are fundamentally unclear, and that these Directives do not offer a minimum level of legal certainty for public authorities and investors. Apart from the inevitable competition for the same scarce areas described above, this lack of legal certainty is perhaps the main cause of


\(^{410}\) On the constraints imposed by the designation as an SPA under the Habitats Directive, see for example Raad van State (Netherlands), 19 March 2003, Case 200201933/1; Raad van State (Netherlands), 16 April 2003, no. 200201920/1 *AB Rechtspraak Bestuursrecht*, 2003, 1676, no. 347, obs. ChB.
the present malaise over the implementation of the Birds and Habitats Directives in the waterway and port sectors.

Below we shall discuss three selected points of specific concern to these sectors. It should be emphasised, however, that the lack of clarity of the Birds and Habitats Directive is a general problem that has been acknowledged by many parties, including national environmental authorities. In 2003, the Dutch government published a highly critical interdepartmental analysis of bottlenecks in the implementation of these Directives under the telling title *The Netherlands locked up*?411. It provides a comprehensive and actually rather astonishing overview of ambiguities in the two Directives and suggests various measures for better guidance and to ensure a less controversial implementation, and, as a last resort, for the amendment of these Directives. Among the ambiguities identified are the exact meaning of concepts such as ‘significant effects’, ‘appropriate measures’, ‘alternative solutions’ and ‘imperative reasons of overriding public interest’, the assessment of existing uses and the possibility of limitations or prohibitions on such uses, and the impact of the precautionary principle in relation to scientific uncertainty412. Other commentators have pointed out that the concepts of ‘mitigation’ vs. ‘compensation’ also remain unclear. Another open question is to what extent economic considerations can be taken into account in the drawing up of ‘management plans’ for Natura 2000 sites413. More specifically, the issue has arisen whether strategic port plans and management plans established under Article 6(1) of the Habitats Directive can be integrated, so as to avoid assessment procedures for routine maintenance works and other activities that are normally carried out within port areas. Thus far, no guidance is available on this crucial point.

For these reasons, often-heard complaints about legal uncertainty in the waterway and port sectors cannot be disposed of as biased outpourings of lobby groups. The issues referred to can have tremendous consequences for these sectors and are widely recognised as major impediments to a smooth implementation process414. Last but not least, additional guidance is also insisted upon by environmental NGOs.

It should be recalled that the European Commission has made substantial efforts at clarification through the publication of the guidance documents referred to above. Moreover, at the time of writing an important additional guidance instrument on the management of estuaries was forthcoming. Such initiatives should, in our view, be fully supported by all stakeholders of the shipping and port industries. Yet it has to be noted that some of the available and forthcoming guidance is oriented primarily towards ecological, management or scientific issues, including ‘best practices’, and not so much towards clarification of legal concepts and rules. Moreover, whilst the guidance is sometimes referred to in court judgments415, there is general agreement that it merely constitutes soft law with no binding

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412 Ibid., 29 et seq.
413 At the Greenport 2006 Conference at Antwerp on 22 February 2006, Mr Peter Gammeltoft of DG ENV stated that management plans provide “an excellent tool to help reconcile existing uses with environmental protection and for engagement of the port authorities and other stakeholders in this process”.
414 Commenting on *Western Scheldt Container Terminal*, Pieters and ten Thij for example pointed out that the Council of State took into account the ‘significant effects’ on the Kaloot river bank, while the effects on the notified SCI of the Western Scheldt estuary would probably have been far less (Pieters, S., “Luctor et emergo. Afdeling bestuursrechtspraak richt blik bij MER Westerschelde Container Terminal op Vogelrichtlijngebied”, *Kenmerken*, 2003, no. 5, 20; ten Thij, F., *Analyse van en advies over het dossier Westerschelde Containerterminal*, Delft, FTT Procesontwikkeling, 2004, 7-8). For a case where the construction of a yachting harbour was held not to have significant effects on an SPA, see Raad van State (Netherlands), 12 December 2001, Case 199901906/2, *M & R jurisprudentiearttern*, October 2002, no. 10, 299, obs. Verschuuren; for a similar conclusion in relation to a port and a proposed SCI, see Raad van State (Netherlands), 27 March 2001, Case E01.99.0035, *Milieurechtspraak*, 2001, 32.
415 See for example *Cockle Fisheries*, at para 41.
effect\textsuperscript{416}. Finally, as we shall argue below, the available and forthcoming guidance does not address a number of fundamental waterway and port-specific issues.

\subsection*{5.2.2.2. Lack of clarity on obligation to assess maintenance dredging}

\textbf{208.} Serious concern has been expressed by several waterway and port authorities on the regime of maintenance dredging under the Habitats Directive. It is unclear whether ongoing maintenance schemes for a fairway in a river should be considered as plans or projects within the meaning of Article 6(3) of the Directive\textsuperscript{417}. On the strength of the \textit{Cockle Fisheries} and \textit{Seed Mussels} judgments discussed above, it would appear that the answer is or at least can be affirmative. In an interpretation note issued in 2002, the European Commission stated:

\begin{quote}
\textit{Article 6 applies to new dredging projects as well as ongoing (maintenance) activities. There is no immediate reason to believe that existing activities associated with port maintenance, which had been carried out over a long period of time in an estuary prior to its proposal as a site of Community interest, cannot continue. The majority of such activities would be expected to continue where they did not have significant negative effects in relation to the conservation objectives of the site. Major new dredging involving extension of width or depth of the channel would be likely to require a full assessment in accordance with Article 6(3) of the directive}\textsuperscript{418}.
\end{quote}

Another issue is whether maintenance dredging can be part of a management plan within the meaning of Article 6(1) and 6(3) of the Habitats Directive, which may lead to an exemption from the obligation to carry out an assessment\textsuperscript{419}. The Commission has announced guidance on this issue through a new interpretative note on the management of estuaries.

What is certain is that the practice of Member States varies considerably. According to the results of an ESPO questionnaire, maintenance dredging is treated as a plan or project in the UK and Denmark, but not in Germany\textsuperscript{420}, Ireland and some French ports.

It would be wrong to think that an assessment can be avoided by granting maintenance dredging permits for a very long or unlimited period. In \textit{Cockle Fisheries}, Advocate General Kokott warned that the applicability of Article 6(3) of the Habitats Directive cannot be based solely on the fact that the competent authority has granted no permanent authorisation but rather renew the authorisation annually. If the need for an appropriate assessment turned solely on whether national law provided for permanent authorisation or annually renewable authorisation for the relevant measure, there would be an incentive to grant authorisations relating to special protection areas for an unlimited period in order to circumvent the application of Article 6(3) of the Habitats Directive\textsuperscript{421}. According to the Advocate General, precisely in the case of repeated measures, a broad interpretation of the terms plan

\textsuperscript{416} Reportedly, this was also confirmed in the \textit{Vuosaari} court judgment of 7 June 2002.

\textsuperscript{417} We should add that the position of capital and maintenance dredging and the deposition or discharge of the sludge under the EIA Directive is unclear as well.

\textsuperscript{418} European Commission, Interpretation note on “Estuaries” (habitat type 1130), with a view to aiding the selection, delimitation and management of Sites Of Community Interest hosting this habitat type, forwarded to the Members of the Habitats Committee on 16 January 2002 (letter DG.ENV.B2/NH/ILF/in D(320057).


\textsuperscript{420} See also the memorandum of the Dutch-German Exchange (DGE) on Dredged Material, Part I, \textit{Dredged Material and Legislation}, April 2003, 5-4.

\textsuperscript{421} Opinion of Advocate General Kokott, delivered on 29 January 2004 in Case C-127/02, para 33.
and project does not lead to disproportionate harm. If the effects remain the same from year to year, at the next stage of the assessment it can easily be determined, with reference to the assessments in previous years, that no significant effect is likely. However, where such reference is not possible on account of changing circumstances, the need to carry out more comprehensive fresh assessments cannot be ruled out and is actually also justified\textsuperscript{422}.

While maintenance dredging is quite literally of vital importance to innumerable EU waterways and ports and, indeed, to the entire EU shipping industry, it is to be regretted that no clearer and more specific legal framework for the assessment of that activity is available, and that, as a result of the current particularly strict interpretation by the Court, the regular upkeep of rivers, canals and ports, as has been carried out for decades if not centuries, may be jeopardised on the strength of EU nature conservation rules. The very reserved and conditional interpretative statement by the Commission quoted above does not appear to provide any legal certainty. In our opinion, the very existence of EU waterways and ports deserves a better legal regime which should also take into account existing rights of navigation as established under international customary law and numerous international conventions. As we have mentioned, it is hoped that an interpretative instrument on estuaries which is currently being prepared by the European Commission will shed more light on this issue.

5.2.2.3. Insufficient guidance on the alternative solutions test

\textsuperscript{209} Whilst the European Commission may have provided some general clarification on the alternative solutions test under Article 6(4) of the Habitats Directive\textsuperscript{423}, the \textit{Western Scheldt Container Terminal} case highlighted the need for additional guidance on its exact purport and criteria. As we have seen, the Dutch Council of State judged that the competent authorities had not investigated sufficient alternatives to the project, since they had considered neither alternatives outside the region of the province of Zeeland, nor other activities providing employment inside the region, nor other locations for the construction of the container terminal or other activities with which to expand and strengthen the position of the port of Flushing East. First of all, this judgment made clear that the assessments made by competent authorities are – quite naturally – subject to judicial review. Next, it suggests that, depending on the identification of the objectives of the project, the authorities can be under an obligation to call into question the very idea of developing, for example, a new port facility, and to examine whether a completely different economic project might not equally well or even better serve the same purposes. Regional authorities are even expected to look for alternatives outside their own region\textsuperscript{424}.

In this respect, it is important to note that it is common for environmental assessments also to consider

\textsuperscript{422} \textit{Ibid.}, para 38.

\textsuperscript{423} See European Commission, \textit{Managing Natura 2000 sites. The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC}, Luxembourg, Office for Official Publications of the European Communities, 2000, at p. 42-43: “The first step of the competent authorities is to examine the possibility of resorting to alternative solutions which better respect the integrity of the site in question. Such solutions should normally already have been identified within the framework of the initial assessment carried out under Article 6(3). They could involve alternative locations (routes in case of linear developments), different scales or designs of development, or alternative processes. The ‘zero-option’ should be considered too. In conformity with the principle of subsidiarity, it rests with the competent national authorities to make the necessary comparisons between these alternative solutions. It should be stressed that the reference parameters for such comparisons deal with aspects concerning the conservation and the maintenance of the integrity of the site and of its ecological functions. In this phase, therefore, other assessment criteria, such as economic criteria, cannot be seen as overruling ecological criteria. [...] It rests with the competent national authorities to assess alternative solutions. This assessment should be made against the site’s conservation objectives” (original lay-out omitted).

\textsuperscript{424} See also Verschuuren, obs. in \textit{M & R jurisprudentiekatern}, November 2003, no. 11, 348.
“obviating development” options, whereby anticipated demand is to be managed rather than automatically met.\footnote{Comp. for example European Commission (DG TREN), The SEA Manual. A Sourcebook on Strategic Environmental Assessment of Transport Infrastructure Plans and Programmes, Brussels, 2005, 17-18.}

That does not alter the fact that in connection with the alternatives test under Article 6(4) of the Habitats Directive, particular attention should be given to the substitutability of waterway and port systems. Can the investigation of alternatives be based on a given, undisputable need for additional transportation or port capacity in the Member State concerned? Does every Member State in other words have a ‘right’ to have its own port facilities? Or should certain Member States be content with being served through hubs in other Member States if the construction of their own facilities would cause irreparable harm to nature conservation areas? Can a Member State legally restrict the search for alternatives to a certain part of its national territory, as appears to have been the case in the UK in one of its recent decisions on a new container terminal project?\footnote{In the Bathside Bay decision, the south east quadrant of the UK was considered the only correct location for new container port capacity.} Is it lawful to look only for alternatives inside the port area or in its close vicinity? And is it lawful only to consider certain lay-out alternatives within the same port?\footnote{Comp. the mere lay-out alternatives for an airport runway in Commission Opinion of 6 June 2005 relating to the Airport of Karlsruhe / Baden-Baden (K(2005)1641 end.)} Is it sufficient that only one particular site within the port offers enough space for a given project? Should a port authority always investigate alternative logistic concepts in order to minimise greenfield development? Or does the answer to these questions merely depend on the broad or narrow definition of the needs and objectives underlying the plan or project? Can the investigation of alternatives be limited to scenarios that are economically (and esp. financially) realistic and, if so, when exactly do alternatives become unrealistic? Is the mere commercial preference expressed by market partners for a given port or a certain project sufficient reason to reject alternatives? And, ultimately, who is responsible for the definition of the objectives of the plan or project and for the assessment of the alternatives? To what extent can a Member State rely on economic analyses presented by private project developers?\footnote{In this respect, the Commission declared: - “The examination of alternative solutions requires [...] that the conservation objectives and status of the Natura 2000 site will outweigh any consideration of costs, delays or other aspects of an alternative solution. The competent authority should not, therefore, limit its consideration of alternative solutions to those suggested by the project or plan proponents. It is the Member State’s responsibility to consider alternative solutions, which could be located even in different regions/countries” (European Commission, Assessment of plans and projects significantly affecting Natura 2000 sites. Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/ECC, Luxembourg, Office for Official Publications of the European Communities, 2001, p. 33); - “While it is the responsibility of the competent authority to consider whether alternative solutions exist, its determination will inevitably rely, to some extent, on information provided by the project or plan proponent. The first step in assessing whether alternatives exist is for the competent authority to identify the objectives of the project or plan. From that starting point, it is possible to identify a range of alternative ways of achieving the objectives of the project or plan and these alternatives can then be assessed against their likely impact upon the conservation objectives of the Natura 2000 site” (ibid., p. 35). Compare however the statements on IROPI in the Immingham case (supra, no. 164).} What if the plan or project is initiated by the authority responsible for the assessment of alternatives itself? If the competent authority relies on data provided by a third proponent, how thoroughly should these data be screened? And on what basis should a competent authority identify other possible alternatives than those already envisaged by the promoter of the plan or project? In our view, available guidance provided by the European Commission does not provide sufficient answers to these important questions. Moreover, an analysis of implementation practice in certain Member States suggests that, if it is taken literally, this guidance is in the case of port projects often not or at least imperfectly complied with – which is another potential source of conflicts, if not litigation.
Another question which was raised by the Commission in the Verrebroek Dock and Deurganck Dock cases is whether a Member State is in fact entitled to develop reserve port capacity in order to anticipate future demands, so that a future investor or user would always be sure to find available capacity. Or is it under an obligation to first exhaust the capacity of existing facilities? Is it obliged to redevelop older facilities before starting any greenfield development? Should Member States not ensure – as was suggested by the European Commission in its Naiades communication – that sufficient port facilities are available in order to cope with market imbalances and fluctuations?

These are basic issues of port management, port economics and port policy which are currently, and surprisingly, not being dealt with within the framework of EU transport policy, but rather within the implementation of EU nature conservation law. Here one of the main roots of the current frustration of waterway and port-related authorities and operators is uncovered: since, for the geographical reasons set out above, EU environmental law inevitably applies to many waterway and port projects and since it imposes fundamental ecological but also economic assessments, it increasingly becomes the forum where essential questions of waterways and ports policy are discussed and where existential decisions on future waterway and port developments are taken. The fact that the alternatives test of the Habitats Directive is surrounded by legal uncertainty only adds to the general dissatisfaction.

5.2.2.4. Insufficient guidance on the overriding public interest test

210. Implementation practice has shown there to be considerable uncertainty over the exact meaning of the ‘imperative reasons of overriding public interest’ (IROPI), a fundamental concept when green light is sought for waterway and port projects situated in nature protection areas designated under the Birds or Habitats Directives. The available guidance provided by the European Commission in several instruments would appear to be useful, but often too general in order to correctly assess waterway and port-related projects. Here again, the draughtsmen of the Habitats Directive have applied extremely ambiguous wording. Implementation practice and case law show that the IROPI concept can be interpreted in different ways. In Dibden Bay, the UK authorities expressly admitted that others might have reached a different conclusion on IROPI. In the light of the vital importance of the IROPI criterion, this uncertainty is extremely worrying. Moreover, the interrelation of the IROPI criterion and the alternatives test discussed above is anything but clear. In Dibden Bay, the competent authori-

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430 The document Managing Natura 2000 sites elucidates the concept as follows:

“(a) The public interest must be overriding; it is therefore clear that not every kind of public interest of a social or economic nature is sufficient, in particular when seen against the particular weight of the interests protected by the directive [...].

(b) In this context, it also seems reasonable to assume that the public interest can only be overriding if it is a long-term interest; short-term economic interests or other interests which would only yield short-term benefits for society would not appear to be sufficient to outweigh the long-term conservation interests protected by the directive.

It is reasonable to consider that the “imperative reasons of overriding public interest, including those of a social and economic nature” refer to situations where plans or projects envisaged prove to be indispensable:
- within the framework of actions or policies aiming to protect fundamental values for citizens’ lives (health, safety, environment);
- within the framework of fundamental policies for the State and society;
ties found that, to the extent that the need could have been accommodated by other means, the public interest in providing the new terminal had to be diminished. In their view, the key question on IROPI was whether, without the terminal, there would have been a reasonable prospect of sufficient capacity being provided at UK ports to handle the expected growth; the presence of IROPI would have been supported if Britain’s imports and exports were to be shipped through foreign ports. This reasoning shows that the alternatives test is sometimes simply repeated in IROPI assessments. The mixing up of criteria even goes a step further when, as in Second Maasvlakte, competent authorities additionally rely on their efforts in the environmental field in order to justify IROPI. Here, environmental considerations re-enter into the equation through the backdoor: if the presence of IROPI – even partly – depends upon environmental elements, the derogation offered by Article 6(4) of the Habitats Directive threatens to become utterly meaningless. These examples taken from implementation practice already reveal that the exact purport and meaning of the IROPI criterion is extremely difficult to grasp.

211. Next, the TEN-T status of infrastructure projects is not systematically taken into account when the IROPI are assessed. As a result, there is insufficient coherence between EU transport and environment policies (and, as we have seen, they may even directly impede each other).

In some exceptional cases, however, the European Commission has taken into account the TEN-T status of a transport-related project. In its positive opinion on the Second Maasvlakte project in the port of Rotterdam, the TEN-T status of the port was at least implicitly referred to. Similarly, the Commission did take into account TEN-T status in its assessments of the Mecklenburg-Vorpommern motorway in the Peene Valley in Germany and in that of the development of Karlsruhe / Baden-Baden airport. In the Development Plan for the further deepening of the River Scheldt, the Dutch and Flemish governments also rely, inter alia, on the position of the port of Antwerp as a port of international importance within the TEN-T and on the contribution of the envisaged works towards the sustainability of the EU transport system, as addressed in the Commission’s White Paper on transport policy.

In order to integrate policies, legal doctrine has recommended a more systematic reference to TEN-status in the IROPI assessments under the Habitats Directive. It is only logical to accept that projects that are considered of importance to the EU in one instrument should be automatically treated as such in other EU legal contexts. Moreover, competition may be seriously distorted if TEN-T status is referred to in some Member States or ports while it is completely ignored in others.

Upon closer scrutiny, further guidance is also advisable on what exactly should be considered to enjoy TEN-T and IROPI status. In the Second Maasvlakte case, not only the TEN-T status of the project at hand was invoked, but also that of the port of Rotterdam as such (the port being an “essential multimodal junction”). In our opinion, both aspects are indeed of relevance. Endorsement of this view by the Commission or the EU legislator would be useful.

431 See supra, nos. 146-147.
433 Commission Opinion of 6 June 2005 relating to the Airport of Karlsruhe / Baden-Baden (K(2005)1641 end.).
In addition, the question can be raised whether other special legal regimes should not be taken into consideration as well. For example, the fact that the use, management or operation of a given waterway or port is governed by international conventions, serves international interests and is subject to rights of navigation and use benefiting users from EU or even non-EU countries should in our view be considered sufficient proof of IROPI as well. In relation to cross-border waterway projects, Dutch observers have pointed out that, in spite of the existence of a variety of international treaties and conventions, neither a general procedure nor criteria have as yet been developed to deal with the international aspects of the overriding public interest principle\textsuperscript{436}. The same applies to all cross-border transport infrastructure projects.

212. In our opinion, the provision of specific waterway and port-oriented guidance on criteria to assess the IROPI is highly advisable.

Here again, the phenomena of legal uncertainty and of environmental authorities taking over the task of transport policymakers are causes of considerable discontent. Even more so than with respect to the alternative solutions test, which is carried out mainly in view of environmental objectives, the IROPI test lays the responsibility for assessing the economic soundness of waterway and port projects in the hands of authorities and judges implementing EU nature conservation rules.

Legal uncertainty follows from judgments such as \textit{Western Scheldt Container Terminal}, where the Dutch Council of State considered that, since the importance of the project for regional employment had not been demonstrated convincingly and since it had not been unequivocally established that such importance would in the long term outweigh the importance of preserving the SPA, it could see no IROPI. The Council saw no sufficient grounds for attaching greater importance to economic interests than to the preservation of the nature area. It stated that the suitability of an area for the construction of a container terminal, the expected growth of container transport and the supposed need for a so-called world class terminal – while relevant to the decision-making process – can play no role in the assessment of IROPI. Remarkably, the Council of State required not only an unequivocal demonstration of the economic importance outweighing the nature interest, but it also declared in a sweeping statement that it saw no sufficient grounds for attaching greater importance to economic interests than to the preservation of the nature area. The latter declaration, which, it must be said, appears to find some support in the guidance issued by the European Commission\textsuperscript{437}, adds to the literal requirements of Article 6(4) of the Habitats Directive considerations of a purely political nature and introduces a test that, if strictly applied, no infrastructure plan or project can ever stand.

The continuing legal uncertainty was also highlighted in the Dutch government’s general assessment of the impact of the Birds and Habitats Directives referred to above, where it was observed \textit{inter alia} that it remains an open question whether local or regional interests can result in sufficient IROPI\textsuperscript{438}. In \textit{Dibden Bay}, the UK authorities expressly doubted whether local advantages in terms of benefits to the port of Southampton and the local economy amounted to IROPI, while in the case of Hull, for example, (mainly) regional and local positive economic effects were deemed sufficient. Also, one wonders whether the mere scale of the economic effects should be deemed relevant. For example, local effects within an existing world port or even in a smaller port that however has strategic importance to a


\textsuperscript{437} European Commission, \textit{Managing Natura 2000 sites}, o.c., 44.

remote island can perhaps be more “imperative” than national effects in a small Member State that is able to rely on services offered by nearby ports in neighbouring states. What is national, regional and local varies considerably depending on the surface, size, geography, population and economic structure of the Member State, so that the scale of the economic effects would not appear an extremely pertinent criterion in order to assess IROPI. Here, the IROPI and “no alternatives” criteria moreover work like Scylla and Charybdis: if the economic objectives of a port development project are defined narrowly in geographical terms, it may seem relatively easy – in some cases at least – to demonstrate the absence of alternatives, but the IROPI justification for such a locally oriented project automatically loses weight. If, on the contrary, the project is presented as serving large-scale economic objectives, the presence of IROPI becomes more plausible, but the extent of possible alternatives may broaden considerably. For these reasons, developers in many cases appear to refer to a varied set of national, regional and local IROPI. Still, given the lack of proper guidance at EU level, implementation practice remains, in this respect too, essentially a trial-and-error process.

Similarly, guidance is needed on the relation between IROPI and employment effects. Implementation practice and case law show that both high and low employment levels are invoked by proponents in order to justify IROPI. This leaves the impression that any effect on employment can be sufficient and, ultimately, that any economic effect may be taken into account.

Furthermore, implementation practice at EU and national levels reveals extreme differences in the application of the IROPI test. In recent UK decisions, the need to preserve the very existence of even smaller regional ports such as Hull by enabling them to give access to larger vessels was repeatedly mentioned and accepted as a relevant economic motivation in IROPI statements. In Leybucht, on the other hand, the European Commission suggested that, as a consequence of implementing EU nature conservation rules, important ports may have no further raison d’être, and that this is the price that must be paid for the protection of the environment. In the Deurganck Dock case, the European Commission questioned whether it would be wise in a long term perspective to improve the accessibility of the international transhipment port of Antwerp – the second largest in Europe – in the light of future trends in vessel size. In Western Scheldt Container Terminal, the port authority was flatly denied the right to develop a container terminal of its own (at least on the basis of the available economic arguments). Such interventions were based on a reassessment of the economic merits of the plan or project at hand and tended to fundamentally encroach upon the discretion of Member States and the traditional autonomy of port authorities to develop new port facilities and freely compete on the market. If such discretion and autonomy however continue to be fully respected in other Member States, the risk of competitive distortions is imminent.

Moreover, in recent UK decisions the national authorities were willing to accept, apparently without much further screening, IROPI statements presented by the applicants, who included commercially managed and profit-seeking private port authorities. In the Immingham case, the UK stated that it is “the Government’s policy that port promoters are best placed to make a commercial judgement of market potential in relation to their proposal”\(^439\). In other cases, such as Deurganck Dock and Western Scheldt Container Terminal, the IROPI claims of competent public authorities were subjected to a particularly strict screening by the European Commission or national courts. In its guidance documents, the European Commission takes the view that IROPI should not be assessed by the project proponents\(^440\). Nonetheless, further guidance on the responsibility for and the reliability of IROPI statements would be welcome. Rather alarmingly, the Dibden Bay decision expressly referred to the “weight of public opinion” as a relevant indication. Such an approach threatens to provoke ever more public pro-

\(^{439}\) See supra, no. 164.

\(^{440}\) See, i.a., European Commission, Managing Natura 2000 sites, o.c., 44.
tests against waterway and port developments: the more vehement public commotion and the louder public outcries, the better the chance of the project being cancelled.

The required degree of detail of IROPI statements and their economic underpinnings should also be regulated at EU level. Producing common tools and criteria for evaluating the economic importance of waterway and port-related projects would be very useful. Policy integration would stand to gain substantially if economic analysis and environmental assessments were aligned more closely.

It appears from the Commission’s guidance documents that IROPI should be based on long-term economic interests. However, it is totally unclear what the long term means in the case of port investments. Traffic forecasts normally cover ten or even twenty-five year periods, but often port infrastructure continues to be used for one or in some cases even two centuries. Also, the question can be raised whether there should be any relation to the actual duration of the terminal contract. If that contract lasts only 8, 12 or 30 years, as was proposed as maximum durations by the European Commission in its 2004 proposal for a Port Services Directive\textsuperscript{441}, or an even shorter period, one wonders whether this can ever meet the long-term interest test under the Habitats Directive. Moreover, some commentators argue that the increase in employment at a given port facility over the next few decades can never outweigh the conservation of a natural area for eternity, so that any serious comparison cannot be made\textsuperscript{442}. If such an interpretation would be upheld in court decisions, waterway and port authorities and operators should perhaps better wind up their businesses altogether. In \textit{Dibden Bay}, the UK authorities moreover doubted the usefulness of predictions beyond a ten-year period. If it were to be accepted that reasonable port throughput or demand forecasts beyond the next decade are useless, the logical conclusion should be that port plans or projects can never be based on sufficiently established long-term economic effects and, as a consequence, that they can never stand the IROPI test. The statement in the \textit{Dibden Bay} decision that Member States must accept a temporary lack of handling capacity raises yet another, though related, issue, namely for how long such a lack of capacity should be suffered.

In \textit{Bathsie Bay}, an interesting point was raised on the need for a pressing short-term need for additional port capacity in order to convincingly establish an IROPI. Whilst the latter element was ultimately not considered a requirement by the UK authorities, it again reveals how difficult the IROPI test can become: if the additional requirement suggested were to be upheld in case law, that could result in port projects having to be not only necessary in the long term, but also urgent in the immediate short term. Here again, reference can be made to the Commission’s statement in its \textit{Naiades} communication that there should be sufficient port facilities in order to cope with imbalances and fluctuations in transport demand.

A related question is whether IROPI can only be accepted on condition that the promoter of the project already has a binding contract with a terminal operator. In \textit{Dibden Bay}, the UK authorities considered that at least to be a relevant criterion. In many other cases, it appears that no such contact was available when the project was launched and the IROPI assessed. Such a situation also threatens to generate unjustified discriminations and competitive distortions. And if the signed contract subcriterion were to be applied \textit{mutatis mutandis} to projects for the construction or the improvement of waterways, would one then have to establish that shipping operators have already committed themselves to making use of the new route ?

\textsuperscript{442} Verschuuren, obs. in \textit{M & R jurisprudentiekatern}, November 2003, no. 11, 349.
Also, it remains unclear to what extent port projects for the construction of dedicated terminals might be based on IROPI. The Commission expressed the view that projects that lie entirely in the interest of companies or individuals would not be considered to be covered. Environmental NGOs have urged the Commission never to accept the overriding public interest of dedicated port infrastructure that is built for and operated by one private company and is not accessible in a non-discriminatory way to all infrastructure users. In our view, as the development of a dedicated terminal exclusively reserved for one port user or a terminal for one single terminal operator often serves the general interest, such a project may well stand the IROPI test. A similar reasoning was accepted by the Commission in relation to the extension of the Airbus works at Hamburg-Finkenwerder, which involved the filling in of a part of the Elbe river. In this respect, specific guidance and criteria would be helpful as well. These should also address the specific position of waterway or port projects that are driven by PPP schemes, which are becoming a trend given budgetary constraints in many Member States.

As we have previously discussed, Article 6(4) of the Habitats Directive states that where a site hosts a priority natural habitat type and/or a priority species, “the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest” (emphasis added). The European Commission drew attention to the fact that a shift in transport mode may allow for growth of more environmentally friendly ways of transport and might eventually imply “beneficial consequences of primary importance for the environment” within the meaning of that provision. In such case, there would be no requirement to seek an opinion from the Commission. This opens up opportunities to include environmental benefits in IROPI assessments, to simplify procedures and to integrate environmental and transport policies. More guidance on this interesting aspect would be most welcome.

Finally, implementation practice shows that a wide variety of considerations is being included in IROPI tests. It is however unclear what the relative weight of each of these subcriteria is or should be, whether the test should be based on a general ‘set-of-indications’ methodology or whether there are subcriteria that are essential in their own right and must always be met.

5.2.2.5. Causes and effects of legal uncertainty

213. It is worthwhile to consider the causes and effects of the prevailing legal uncertainty in some greater detail.

To begin with, one should be aware of its extremely damaging effects.

First, legal uncertainty obviously renders difficult the realisation of important waterway and port-related projects, and causes considerable delays and economic losses.

Second, the more cumbersome and capricious assessment procedures and the greater the risk of litigation, the more costly the process of correctly implementing the Birds and Habitats Directives. Not only

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443 European Commission, Managing Natura 2000 sites, o.c. 44.
446 Letter from Mr Nicholas Hanley, Head of Unit at DG Environment to Belgian, Dutch and German officials of 19 January 2001 relating to the reactivation of the Iron Rhine, ref. ENV.B.2/JVV/AD(2001) 320891.
447 Available guidance is very limited: see European Commission, Managing Natura 2000 sites, o.c., 49.
are expensive environmental, economic, hydromorphological and biological studies (and their second opinions) and investments in stakeholder management required, but specialised legal advice and litigation also absorb considerable amounts; if the plan or project is suspended or annulled, it has to be repaired, which can make the cost extremely high. These purely procedural costs come on top of the costs of mitigation and compensation measures which can easily amount to five or ten percent of total project costs.

Third, it has been correctly observed that the current legal uncertainty is likely to incite competent authorities to opt for unnecessarily rigid interpretations in order to be on the safe side.448

Fourth, legal uncertainty creates legal inequality if not outright competitive distortions, since Member States and national judges will then decide on the exact meaning of the Directives on a case-by-case basis.449 For example, the Commission’s IROPI assessments in Deurganck Dock and Second Maasvlakte differed considerably in tone and contents, although the two projects were of equally vital importance to container transhipment in the EU.450

Fifth, the fact that political assessments of the economic need for waterway and port plans and projects and of their environmental impact are increasingly subject to judicial review leads to a gouvernement des juges, where the judiciary is tempted, incited or obliged to exercise political authority and where waterway and port policies are decided upon in courtrooms. A case in point is Tweede Maasvlakte, where the Dutch Council of State screened both the “reasonableness” of the investigation of alternatives and the “appropriateness” of the IROPI statement. We certainly do not wish to suggest that access to justice should be denied, but it would be wise to limit the intervention of courts to their proper purpose, namely to correct, suspend or annul manifestly wrongful decisions – not to reassess the political and economic merits of important investment projects.

Sixth, legal uncertainty threatens to deter investors. Given the increasing need in the EU to attract private financing for infrastructure development, the prevailing legal uncertainty over the impact of EU environmental law could in the medium term result in serious capacity and congestion problems.

Seventh, the current situation undermines public confidence in environmental policy, which is a sad thing. There is no denying that EU nature conservation measures lagged behind for a long time, but many observers feel that the balance has tipped too far. Political comments and public commotion after some of the more unexpected court judgments such as Cockle Fisheries, Second Maasvlakte and Seed Mussels suggest that the legitimacy of EU environmental policy is at stake. In the Vuosaari case, some suggested that the Birds and Habitats Directives were being abused for purely private purposes.

214. As for the causes of the legal uncertainty and the problems encountered in the waterway and port sectors, these are various – and, moreover, opinions on this issue differ.

First of all, some observers simply claim that all the problems origirinate at national level: either by negligent preparation of projects, by deficient national implementing legislation or by uncontrollable national court judgments. While we would certainly not suggest that national authorities or project

449 Comp. ibid., 27.
450 In our view, the possibility that the thoroughness of preparatory studies etc. may have differed in these cases and the fact that the former case concerned an infringement procedure and the second a Commission opinion cannot provide a sufficient explanation.
developers have made no errors – much the contrary, as appears from the above discussion of cases – this explanation is in our opinion unconvincing. As we pointed out above\(^{451}\), most of the problems are related to the application of the EU Birds and Habitats Directives themselves or of their literal trans-
position into national law. As our digest of cases demonstrates, it is constantly the ambiguities of con-
cepts, rules, criteria, tests and procedures contained in the EU Directives that cause difficulties. Whether it is EU or national courts or public authorities that are responsible for the application of the Direc-
tives in a given case is not relevant: the root of the problem is in the excessive ambiguities in the pro-
visions of the Directives. The statement by the European Commission that its guidance documents on these Directives are not intended to give absolute answers to site-specific questions, and that such matters should be dealt with on a case-by-case basis\(^{452}\), and the identical observation by the Court of Justice that some concepts such as ‘significantly adverse effects’ can only be clarified on a case-by-case basis\(^{453}\) do not alter the fact that a lot more guidance is needed on several outstanding issues raised by implementation practice and case law. It would also be wrong to expect that guidance will be automatic-
ally provided by the Court of Justice in later judgments and to conclude that legal uncertainty is only temporary and does not need further action. Given the tremendous interpretation problems, the severe economic effects for the shipping, inland waterway and port sectors and the increasing diver-
gence of implementing decisions and court judgments, such a wait-and-see approach would be a case of inexcusably negligence. In our opinion, there is a pressing need for sector-specific guidance on wa-
terways and ports. That it is feasible to work out such specific guidance is demonstrated by the follow-
ing ‘Worked example of compensatory measures assessment matrix for harbour works (project)’, which we have taken from the general guidance document Assessment of plans and projects significantly affecting Natura 2000 sites\(^{454}\) - and which is at the same time the only really port-specific guidance that we could find in the numerous available clarification instruments.

\(^{451}\) See supra, no. 177.

\(^{452}\) European Commission, Managing Natura 2000 sites, o.c., 6.

\(^{453}\) In the Cockle Fisheries case Advocate General Kokott pointed out that: “it would be disproportionate to regard any conceivable adverse effect as grounds for carrying out an appropriate assessment. Adverse effects, which are not obvious in view of the site’s conservation objectives, may be disregarded. However, this can be assessed and decided on only on a case-by-
case basis” (Opinion delivered on 29 January 2004, C-127-02, Cockle Fisheries, ECR 2004, I-7405, para 72).

\(^{454}\) European Commission, Assessment of plans and projects significantly affecting Natura 2000 sites, o.c., 43.
**WORKED EXAMPLE OF THE COMPENSATORY MEASURES ASSESSMENT MATRIX FOR HARBOUR WORKS (PROJECT)**

**Name and brief description of the project or plan and how it will adversely affect the Natura 2000 site**

The proposal is to provide navigable deep water within an existing port facility and the disposal of dredged material onto mudflats that form part of a Natura 2000 site. These works would result in the loss of a significant area of the intertidal mudflats.

**Description of the compensatory measures**

Dredged material will be used to recharge the intertidal mudflats in the harbour and 4 hectares of intertidal habitat will be created at an existing nearby area of marshland. A managed realignment will compensate for the intertidal habitat lost as a result of the dredging. The area and quality of the available habitat for the birds using the site will be maintained.

**Assessment questions**

<table>
<thead>
<tr>
<th>Assessment questions</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>How were compensatory measures identified?</td>
<td>Through consultation with the national nature conservation agency, relevant NGOs, landowners, etc., through a steering group.</td>
</tr>
<tr>
<td>What alternative measures were identified?</td>
<td>A number of other sites were considered for the replacement habitat but the chosen site met the nature conservation agency’s criteria.</td>
</tr>
<tr>
<td>How do these measures relate to the conservation objectives of the site?</td>
<td>The measures are a ‘like-for-like’ replacement that is sufficiently close to the Natura 2000 site to be considered capable of recreating the ecological conditions of the lost site.</td>
</tr>
<tr>
<td>Do these measures address, in comparable proportions, the habitats and species negatively affected?</td>
<td>The area of new habitat is the same as that being lost, with further compensatory areas planned for the future.</td>
</tr>
<tr>
<td>How would the compensatory measures maintain or enhance the overall coherence of Natura 2000?</td>
<td>The compensatory measures would be a direct replacement for the existing site and future plans would expand and further maintain and enhance the coherence of Natura 2000.</td>
</tr>
<tr>
<td>Do these measures relate to the same biogeographical region in the same Member State?</td>
<td>Yes.</td>
</tr>
<tr>
<td>If the compensation measures require the use of land outside the affected Natura 2000 site, is that land under the long-term ownership and control of the project or plan proponent or relevant national or local authority?</td>
<td>The land is to be secured through purchase and through a legal agreement between the relevant parties.</td>
</tr>
<tr>
<td>Do the same geological, hydrogeological, soil, climate and other local conditions exist on the compensation site as exist on the Natura 2000 site adversely affected by the project or plan?</td>
<td>Some work will be necessary to enable the site to have the same conditions as the lost habitats. However, the nature conservation agency considers intertidal habitat replacement to be a ‘proven technique’.</td>
</tr>
<tr>
<td>Do the compensatory measures provide functions comparable to those that had justified the selection criteria of the original site?</td>
<td>The nature conservation agency considers that once the site has been secured and the legal protection measures are in place, the site will meet the terms of reference for inclusion in the Natura 2000 network. The boundaries of the SPA will be adjusted to include the area of newly created habitat.</td>
</tr>
<tr>
<td>What evidence exists to demonstrate that this form of compensation will be successful in the long term?</td>
<td>The nature conservation agency is of the opinion that there are good grounds to conclude that the compensatory measures have a reasonable prospect of success. However, estuaries are complex and dynamic systems and there are uncertainties as to whether the compensatory site will ever be an exact replacement for the lost habitat.</td>
</tr>
</tbody>
</table>

*Figure 2. Compensatory measures assessment matrix for harbour works*
Second, some assert that the ambiguity of the Directives is inevitable because they are based on the subsidiarity principle and need further transposition into and implementation through domestic laws. In other words, they argue that the EU Directives only provide a general framework and that it is up to the Member States to render their meaning more concrete. While this argument certainly contains an element of truth, it does not provide a sufficient explanation either. The fundamental lack of clarity of the Directives is a problem that is widely recognised by public authorities and courts at all levels. The very fact that the EU continues to produce additional – and useful – guidance instruments, proves that the Directives do not provide enough clarification themselves. As discussed above, national administrations have repeatedly complained about the ambiguities in the Directives. At the point where national interpretations by competent authorities and courts start to caper around and fundamentally to diverge, we feel that the EU has a responsibility to restore legal unity within the Union and to prevent that the more or less stringent implementation of EU nature conservation rules becomes a competitive issue. Also, it would be welcome to know whether the EU endorses certain (sometimes far-reaching if not completely surprising) national interpretations or not. Here, there is a clear problem of the Commission, by lack of adequate information, often not being aware of the exact purport of national court decisions. In sum, we believe that, in the present circumstances, subsidiarity is less relevant, that the main issue is to restore legal certainty at EU level and that this is a responsibility for the EU institutions.

Third, some interviewees flatly denied that waterway and port policy is increasingly determined by EU or national authorities responsible for environmental policy. When, for example, the European Commission issues an opinion on the basis of Article 6(4) of the Habitats Directive, it is always a joint decision supported by all the Commissioners and their Directorates General. Member States for their part are free to designate competent authorities for assessments and procedures under the Birds and Habitats Directives; it is up to them to involve waterway and port-related bodies and interests in the decision-making process if they so prefer. In our view, these arguments are beside the point. Whereas it is certainly correct that Commission decisions are not taken by DG ENV alone and that it is up to Member States to organise national procedures, the problem is not so much who is ultimately responsible for reaching decisions, but rather the fact that EU nature conservation law is increasingly becoming the primary legal framework for waterway and port policies and for the assessment of related projects. In other words, priorities of waterway and port policy are increasingly determined within the framework of environmental law, and not, as one would expect, transport law.

Fourth, the legal uncertainty which is, as it were, inherent in the provisions of the Birds and Habitats Directives, is considerably aggravated by the fact that these provisions refer to scientific assessments the methodology and outcome of which are particularly uncertain themselves. A case in point is Cockle Fisheries, where the Court of Justice stated that competent authorities are to authorise certain activities only if they have made certain that these will not adversely affect the integrity of a nature conservation site. They have to ensure that no reasonable scientific doubt remains as to the absence of such effects. Some commentators have pointed out quite correctly that this is a rather strict interpretation of Article 6(3) of the Habitats Directive; the only element of flexibility is the word reasonable. In its Communication on the precautionary principle, the European Commission however accepted that measures based on that principle must not be disproportionate to the desired level of protection and must not aim at zero risk, something which rarely exists.

\[455\] See also European Commission, Managing Natura 2000 sites, o.c, 6.

\[456\] See supra, no. 180.


\[458\] Communication from the Commission on the precautionary principle, COM/2000/0001 final, item 6.3.1.
scientific uncertainty is a sword of Damocles hanging over many projects, especially those involving alterations of water flows and hydromorphology in sea and river beds. The fact that, in *Second Maasvlakte*, the European Commission accepted the scientific assessment of the impact of the port development project on sea currents, while the Dutch Council of State rejected it, is a perfect illustration.

5.3. IMPLEMENTATION OF THE WATER FRAMEWORK DIRECTIVE

5.3.1. Involvement of shipping and port stakeholders at EU level

215. First of all, we would like to point out – again – some extremely positive features of the ongoing implementation process of the WFD.

As we have seen, organisations representing the navigation and port industries were invited to participate in the Strategic Coordination Group for the implementation of the WFD as well as in a recently commenced specific activity on the WFD and hydromorphology.

Next, the Common Implementation Strategy (CIS) for the WFD ensures a very valuable input of expertise by these organisations. For example, the beneficial role of dredging and sediment management in estuarine and coastal systems was highlighted by several experts.

For these reasons, the implementation strategy followed by the European Commission cannot but be applauded.

216. The WFD also obliges *Member States* to encourage the active involvement of “all interested parties” in the implementation of the Directive, in particular in the production, review and updating of the river basin management plan. Given the fact that the Directive expressly refers to the importance of navigation and ports, it may be safely assumed that waterway and port authorities, operators and users must be regarded as “interested parties” within the meaning of the provision referred to. As a consequence, Member States are under a hard legal obligation to involve these parties in the implementation process. A breach of that rule could entail the illegality of decisions for the implementation of the WFD.

Moreover, the WFD obliges Member States to invite water “users” to comment on a number of documents or draft decisions, including the draft river basin management plan. In our view, waterway and port authorities, operators and users are water users in the sense of this provision.

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459 Art. 14(1) WFD.
460 Art. 4(3)(a)(ii) WFD.
461 The fact that the provision referred to only obliges Member States to “encourage” involvement of stakeholders, does not mean that Member States have a choice to organise involvement or not. Clearly, the word “encourage” was only used because stakeholders should have the right not to participate if they would – unwisely – deem it unnecessary. For their part, Member States *must* take all measures in order to ensure that all the interested parties have the opportunity to participate.
462 Art. 14(1) WFD.
463 Comp. also the definition of water use in Art. 2(39) WFD which however does not appear relevant to Art. 14.
5.3.2. Acknowledgement of the need for policy integration and further guidance

217. The preparation of the new CIS activity on hydromorphology shows that all parties concerned are aware of the need for policy integration as well as further guidance on a number of issues that are particularly important to waterways and ports.

Regarding the integration of water policy and other policies including transport, the following aspects were highlighted during the 2005 Prague Workshop on the WFD and hydromorphology referred to above:

- It should be emphasised that integration is not a one-way process.
- It was emphasised that environmental objectives are the core of the WFD. Therefore, it should be kept in mind that we should be integrating to achieve these environmental objectives and not be integrating per se.
- It should be more concretely described what policy integration is, e.g. in terms of funding instruments, legal instruments etc.

A number of extremely important – and sound - key conclusions on policy integration were reached at the workshop, including inter alia:

**Integration is a key goal of the WFD**
- The purpose of the WFD includes the following:
  - Protect and improve the water environment,
  - Promote sustainable water use,
  - Contribute to mitigating the effects of floods and droughts.
- The provisions for protected areas integrate EU conservation policy (Natura 2000) into water management.
- Hydropower, navigation and flood defence are recognised in EU policies and initiatives as important and legitimate water uses.
- Successful implementation means achieving an appropriate balance between protection and use.

**Vision for the role of the WFD in policy integration**
- “This Directive should provide a basis for a continued dialogue and for the development of strategies towards a further integration of policy areas”

**Integration is a two-way process**
- The WFD does not impose fixed objectives for the water environment.
- It provides Member States with the flexibility to set objectives that reflect environmental, social and economic needs and priorities.
- This flexibility means that the needs and priorities of other policy areas can be taken into account in water management decisions.
- Policy antagonisms will arise if this flexibility is not used appropriately, or if other policy areas do not provide comparable flexibility.

**Using the WFD’s flexibility**
This was exemplified by the flexibility provided by the WFD in the process of HMWB designation. We can designate a water body as heavily modified if:
- Restoration would have a significant adverse effect on navigation, hydropower, flood defence, water supply, and

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464 See supra, no. 87.
Providing the benefits of these water uses by other significantly less environmentally damaging means would be technically unfeasible or disproportionately expensive. In many cases, it will be obvious that this would be the case. If time is wasted on complicated economic analyses to prove it, no time will be available to integrate other policy objectives into our objectives for the water environment.

**Integration is needed at different levels**
- At European level, e.g. through co-operation with the relevant Commission DGs,
- At national level, e.g. through co-operation between those responsible for land use planning and those responsible for river basin planning,
- At river basin district level, e.g. through co-operation with the navigation commissions for the Danube and Rhine international river basin districts.

**Key policy recommendations**
- Ensure that EU flood defence policy, energy policy and navigation policy continue to provide comparable flexibility to accommodate other environmental, social and economic considerations,
- Take account of the benefits of flood defence, hydropower, navigation and other water uses in setting objectives for the water environment. 

218. At the Prague Workshop, the following conclusions on mitigation measures were reached in a separate navigation working group:

**Identification of mitigation measures compatible with navigation**
- A wide range of activities are currently undertaken by relevant stakeholders, which were present in the working group (PIANC and CEDA).
- Specifically for the pressure of dredging, possible mitigation measures were discussed, such as imposing seasonal and tidal constraints on dredging, constraint on overflow from dredger, passage planning and vessel movement, keeping certain areas out of use and habitat mitigation in the case of dredging.
- Various mitigation measures in the area of navigation maintenance exist, mostly in response to current regulations at the national and international level.
- There is need for the exchange of information, consultation and building trust between sectors and regulators.

**Mitigation measures practicable in case of new navigation developments**
- Mitigation measures applied so far (for existing navigation) can/could equally be applied to new alterations.
- Procedures of identifying measures for new modifications are similar to those for existing navigation. However, use of best practices should be expanded.
- There was general consensus that the precautionary approach should be the overriding principle.
- It is necessary to consider natural and climate variability in designing mitigation measures.

**Proposals for follow-up CIS work on hydromorphological mitigation measures**
- Support information and consultation to increase transparency on the necessary tasks to maintain navigation (in accordance with and building on WFD Art.14).
- Facilitate the exchange of good or best existing practice among Member States and all relevant actors involved.
- Include the issue of sediment in the discussion process. In this respect, clear linkage should be established to other relevant aspects of the WFD implementation, such as priority substances, to avoid duplication of work.
- Examine the issue of the design of ships and navigation corridors.
- Explore linkage of navigation (and measures) to other uses – cross-references should be strengthened.

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Ibid., 6-7.
- Co-ordinate WFD/CIS activities with other international, national regulations and guidance to achieve a coherent legislative framework.
- Explore the long-term and short-term dimensions and steps of the programmes of measures, e.g. with view to technological developments.
- No isolated sub-working group on navigation is needed but rather a concerted activity on different sectors (also addressing common impacts). For example, dredging is not only necessary for navigation but also to maintain land use (agriculture and urban development).
- Establish mitigation measures as a central topic for future activities and go beyond discussions on the designation of water bodies.
- Provide further guidance on communicating knowledge on technical issues to a wider range of stakeholders.
- Include all relevant stakeholder groups in the steering group of the new CIS activity on WFD and hydromorphology\textsuperscript{467}.

219. Some other relevant remarks made at the Prague Workshop were the following:

- For the navigation sector, it was argued that current standards for navigation are only technical while environmental issues are not considered yet in the external costs of this mode of transport. It was confirmed that consideration of environmental issues still needs to be done. In this respect, the aim of policy integration should be to explore how to identify external costs in a common way and have a broader approach to cost-benefit analysis given the respective legal requirements of the WFD.
- Although it was not disputed that unnecessary adverse impacts should be avoided, it was proposed to focus on adverse impacts from necessary infrastructures.\textsuperscript{468}
- In terms of economic tools/assessments for the designation of HMWB, further development of guidance is required across Europe\textsuperscript{469}.

5.3.3. Forthcoming guidance on technical and policy-related issues

220. As we have explained above\textsuperscript{470}, the activity on hydromorphology will result in the issuance of a technical report – which will include \textit{inter alia} common principles and criteria on mitigation for navigation activities – and a policy paper which will make recommendations on the integration of transport and navigation policy with water policy. These important announcements should be welcomed as well. At the time of writing, interesting draft papers were under preparation at the European Commission, including a guidance document on exemptions for new modifications under Article 4(7) of the WFD and a technical document on good practice in managing the ecological impacts of hydropower schemes, flood protection works and works designed to facilitate navigation under the WFD.

\textsuperscript{467} Ibid., 21-22.
\textsuperscript{468} Ibid., 6.
\textsuperscript{469} Ibid., 14.
\textsuperscript{470} See supra, no. 87.
5.3.4. The need for more legal guidance and integration

5.3.4.1. The CIS not a guarantee against legal disputes

221. The extremely positive features of the ongoing implementation process notwithstanding, some causes of continuing legal concern cannot be overlooked.

From a lawyer’s perspective, the main question is whether the ongoing CIS will be able to avoid legal problems and disruptions of waterway and port-related projects. As the severe difficulties encountered during the implementation of the Birds and Habitats Directives have shown, such problems and disruptions can have a tremendous economic impact. For a number of reasons set out below, some caution is advised with regard to the WFD as well.

To begin with, and although it recognises the need for policy integration and consultation and leaves ample room for derogations, the WFD considers activities such as navigation as being harmful by their nature. This is apparent from the identification of ports in the river basin reports drawn up under Article 5 of the Directive as ‘driving forces’ for the hydromorphological water quality that cause so-called ‘pressures’471. As regards the driving forces for hydromorphological water quality, it was noted that the most important ones are hydropower, flood protection, agriculture and navigation on a European scale; in addition, urbanisation and irrigation on a regional level are of high importance472. The most important pressures identified are dams and weirs causing disruption of continuity and impoundments, changing of profiles, maintenance including sediment management, straightening, water level fluctuations and bank fixation, but specific pressures due to navigational uses and projects were identified as well. In other words, waterway and port interests should be left under no illusion as to the consequences of the WFD. The assurance in the CIS that navigation is recognised in EU policy and initiatives as an important and legitimate water use473 does not alter the fact that the legislator has seen waterways and ports – once again – in an essentially negative perspective and that, even if the WFD allows for a certain flexibility, plans and projects related to waterways and ports will have to meet strict standards and in many cases strict conditions for derogations.

Moreover, the European Commission and stakeholders already warned that policy antagonisms will arise if the flexibility which characterises the WFD is not used appropriately, or if other policy areas do not provide comparable flexibility474 – an observation which, if transposed into legal contexts, confirms that legal disputes may well arise.

Further, commentators pointed towards the large number of loose definitions in the WFD, such as “no or very minor [...] alterations, “low levels of distortion”, “deviate moderately”, “corresponds totally or nearly totally to undisturbed conditions”, “slight changes in the composition and abundance”. The application of a number of derogations remains uncertain and untested as well475.

In addition, environmental NGOs insist on the need for a stringent interpretation of the WFD’s objectives and requirements and for other EU policy and laws, funding instruments and guidelines to be

471 See already supra, no. 28.
472 Kampa, E. and Kranz, N., WFD and Hydromorphology, o.c., 16.
473 Ibid., 6.
474 See supra, no. 217.
aligned with the WFD objectives. They already question the legality of policies in other fields. It would not come as a surprise if similarly stringent interpretations were pleaded by some parties before the courts. For example, environmental NGOs have already protested that some provisional designations of heavily modified water bodies cannot be justified. As a consequence, legal disputes would appear to be looming up long before river basin management plans are adopted. Risks are even greater in Member States where the national legislature has gold-plated the Water Framework Directive, for example by imposing stricter tests for new modifications than required under the Directive’s provisions.

Next, whilst all stakeholders expressly agree that building trust is a priority objective of the implementation activities, experience has shown that, even if stakeholders cooperate and develop perfect mutual confidence, it can never be excluded that other groups or individuals – sufferers or not from the NIMBY syndrome – lodge complaints or start legal proceedings directed against individual projects. In other words, no confidence building effort is ever able to totally exclude the risk of legal disputes.

Another threat is that soft law guidance instruments agreed upon during the CIS either may focus too much upon practical management issues, not provide sufficient legal clarity or not even reach courts at all.

Worryingly, most Member States appear not to have identified any formal role for ports or navigation authorities in WFD implementation. In national and transboundary implementation processes, environmental NGOs generally seem to be represented extremely well, while waterway and port authorities, operators and users often remain totally absent. More in general, many observers feel that all the implementation efforts at national level are far more focused on meeting the deadlines and attaining the ecological objectives of the WFD than on policy integration, and that waterway and port interests themselves are insufficiently aware of the consequences that the policy tools and rules to be produced under the WFD can have. Involving all stakeholders including waterway and port interests is a legal obligation for Member States and failing to observe it can, as we have noted before, lead to decisions being held illegal afterwards.

For these reasons alone, we are not yet reassured that the enormous efforts made within the CIS will be able to avoid legal problems similar to those encountered in relation to the Birds and Habitats Directives. This concern is aggravated by the emergence – already at this stage – of a large number of specific legal ambiguities, which we shall identify below.

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476 Cunningham, R., Bratrich, C., Nagl, G. and Toniutti, N., WFD Hydro-morphology: A Challenge for Policy Integration. One other ominous comment from NGOs on the Draft Mandate for the WFD and Hydromorphology activity was: “The WFD cannot be “forced” to fit other policies. The Directive establishes legally binding objectives which can only be relaxed where strict exemption tests are passed. Other polices must be shown to be compatible with WFD objectives, or pass exemption tests. If these “other polices” do not, they cannot be implemented legally” (http://www.ecologic-events.de/hydromorphology/documents/royo.pdf, 3).

477 For the example of Flanders, see Gonsaeles, G. and Vanderstraeten, F., “De verwezenlijking van de milieudoelstellingen in het Vlaamse Gewest”, Maes, F. and Lavrysen, L. (Eds.), Integraal waterbeleid in Vlaanderen en Nederland, Brugge, Die Keure, 2003, (223), 250 et seq., nos. 327 et seq.

5.3.4.2. Designation of heavily modified water bodies

The concept of a heavily modified water body was created to allow for the continuation of specified uses such as navigation which provide valuable social and economic benefits (but at the same time allow mitigation measures to improve water quality)\(^{479}\).

Article 4(3)(b) of the WFD, however, only allows Member States to designate a water body as heavily modified on condition that \textit{inter alia} the beneficial objectives served by the modified characteristics of the water body cannot reasonably be achieved by other means. According to the relevant guidance document, an example of “other means” would be stopping navigation in one river because a canal connection would provide alternative transport links, or even replacing navigation with rail and road transport at lower environmental costs\(^{480}\). If there are “other means” of delivering the beneficial objectives then the water body should be regarded as natural\(^{481}\). It is uncertain whether this “other means” test could or should look into the possible specific and pre-existing legal status of a given waterway or port. It may well be the case that Member States or even third states and vessels flying their flags enjoy a right of free navigation on that very river or canal or in that port. For legal reasons, then, it would be unrealistic, if not totally impossible, to assess whether the given waterway or port can be replaced by another solution. Here again, the problem emerges of EU environmental legislation imposing tests that ignore or even contradict the pre-existing legal regime of waterways and ports. To what extent the TEN-T status will play a role in the “other means” test is not clear either. Regrettably, the EU legislator has not inserted concrete provisions on legal integration in the WFD itself\(^{482}\).

At the Prague Workshop on the WFD and Hydromorphology, the coordination of WFD/CIS activities with other international and national regulations and the provision of guidance to achieve a coherent legislative framework were identified as a part of the follow-up work\(^{483}\). We feel that this was an extremely valuable recommendation and propose that it be acted upon as soon as possible. This is also necessary in order to avoid competitive distortions. In some scarce national Article 5 economic analyses of water use, attention was paid to legal aspects such as statutory duties of ports to maintain waters to specified depths and undertake dredging activities to maintain and deepen channels\(^{484}\). In other river basins, these aspects were completely ignored. In the framework of WFD assessments under other articles and the drawing up of river basin management plans, such implementation differences can have considerable legal – and competitive – consequences and lead to an unequal level of policy integration in Member States.

Another precondition for the designation of a water body as heavily modified is that the changes necessary for achieving good ecological status would have “significant adverse” effects on \textit{inter alia} navigation, including port facilities\(^{485}\). What exactly the terms significant and, conversely, insignificant mean is unclear. Identical terminology used in the Habitats Directive has caused serious difficulties\(^{486}\). With regard to significant adverse effects on navigation or port facilities, it also remains doubtful

\(^{479}\) Identification and Designation of Heavily Modified and Artificial Water Bodies, CIS Guidance Document No. 4, 12.

\(^{480}\) Ibid., 43-44.

\(^{481}\) Ibid., 47.

\(^{482}\) Comp., for the latter observation, Stojanovic, T. and Wooldridge, C., Implications of the EU Water Framework Directive for Ports and Harbours, o.c., 23.

\(^{483}\) http://www.ecologic-events.de/hydromorphology/documents/kranz_navigation.pdf, 4; see also supra, no. 218.


\(^{485}\) Art. 4(5)(a) WFD.

\(^{486}\) See supra, no. 207.
whether effects on the future or planned development potential of navigation or ports can be taken into account.

5.3.4.3. New modifications

223. Other commentators have pointed out that the WFD is particularly unclear on the procedures and criteria for the assessment of new projects, for example for adaptations of a navigable channel in a river or the construction of new port facilities. As we have explained above, the conditions that must be met are laid down in Article 4(7) of the WFD, which is analogous to Article 6(4) of the Habitats Directive. It should be noted that Article 4(7) only applies to new modifications or activities, and not to existing activities such as maintenance dredging. In the context of such activities, other derogations may apply.

Upon closer scrutiny, the conditions against which the execution of waterway or port projects that negatively affect the ecological or chemical status of a surface water body – such as the deepening of a river, the construction of a harbour dam or a new port or dock – must be tested under the WFD, are, in our opinion, certainly not more lenient than those set out in the Habitats Directive.

224. First of all, the reasons for modifications to the physical characteristics of a surface water body must be “specifically set out and explained” in the river basin management plan. This can be understood to entail the obligatory insertion into the river basin management plan of detailed plans for future waterway and port projects. As river basin management plans will in most cases be issued by another authority than the competent waterway or port authority, planning initiatives by waterway and port authorities threaten to become subject to the higher authority of the authors of the river basin management plan, if not completely redundant and meaningless. Such a result would gravely affect the necessary commercial autonomy of waterway and esp. port authorities and run counter to the idea of policy integration.

Another issue is what should happen if the “reasons” for a new project are not set out in the river basin management plan for the simple reason that this project was launched after the adoption of the plan and in order to meet a new economic demand. Here, the key question arises whether the river basin management plan must be amended before the project can be developed. The problem would certainly not be solved by inserting in the plan a general clause allowing waterway and port authorities to start new modifications if that is within their statutory powers and if these meet the other conditions imposed by Article 4(7). The latter provision indeed requires that the reasons for new modifications be “specifically set out and explained” in the plan. Undoubtedly, such issues are fertile soil for endless litigation.

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487 In its Position Paper on the WFD, EuDA for example stated: “Further development of ports, if not already governed by the requirements of the Habitats Directive, would be subject to a similar evaluation via which overriding public interests of economic use would have to be demonstrated. The reason is that either a water body could be turned into a HMWB or a new HMWB could be created. It is too early to tell how this will develop in practice, but in most cases the existing Habitats Directive applies already and would be more restrictive” (EuDA Position Paper on Water Framework Directive, 10).

488 See supra, no. 27.

489 On these provisions, see supra, nos. 25 et seq.

490 Art. 4(7)(b) WFD. Compare Art. 4(3) on the reasons for the designation as a heavily modified water body.

491 In itself, Article 4(7) does not make clear whether its conditions must also be met when plans – as opposed to projects – are prepared or designed.
Next, the WFD requires that “the objectives” must be reviewed every six years. The relevant provision of the WFD does not make clear whether this refers to the “objectives” of the river basin management plan or to those of the modifications of the physical characteristics of the surface water body. Whatever the case, such an obligatory review of objectives may undermine stability and commercial confidence of port users and investors. In addition, the legal implications of changes in the relevant “objectives” are not set out in the Directive.

225. In the Water Framework Directive, the “overriding public interest” test of a project for a modification of the physical characteristics of a surface water body is nowhere linked to the TEN-T or other pre-existing statuses of waterways and ports – a problem that we have already encountered in relation to the Habitats Directive.

What is more, it is unclear whether the concept of “overriding public interest” has the same meaning as under the Habitats and Water Framework Directives. As a result, it is unclear whether available case law on the Habitats Directive would be relevant for the interpretation of the Water Framework Directive. Strikingly, the WFD does not require imperative reasons of overriding public interest, but merely an “overriding public interest” as such. This would appear to indicate that the WFD regime is less strict.

If no “overriding public interest” can be demonstrated, it must at least be shown that the benefits to the environment and to society of achieving the objectives of the WFD are outweighed by the benefits of the new modification “to human health, to the maintenance of human safety or to sustainable development”, although the WFD expressly recognises navigation and port facilities as “important sustainable human development activities”, these criteria not only seem difficult to meet, but they are also extremely vague and – as experience with the application of Article 6 of the Habitats Directive has learned – threaten to provoke endless disputes before courts and to have totally unpredictable effects on waterway and port plans and projects.

To this should be added that the WFD does not pay attention to the specific environmental and economic benefits of waterway transportation and port operations.

As we already pointed out, neither does the WFD acknowledge the relevance of the pre-existing legal regime of waterways and ports under international and national law.

226. In addition, several articles of the WFD impose an alternatives or so-called “other means” test. Article 4(7) requires that the beneficial objectives served by the modifications to the characteristics of a surface water body “cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option”. As we know from experience with the analogous alternatives test under Article 6 of the Habitats Directives, the outcome of such a test can be extremely uncertain.

492 Ibid.
493 Probably, an implicit reference is made to the obligatory revision of plans pursuant to Art. 13(7) of the WFD.
494 See supra, no. 211.
495 Art. 4(7)(c) WFD.
496 This may be inferred from combined reading of Art. 4(3)(a)(iii) and (v) (see the word “other” in the latter item).
497 Art. 4(7)(d) WFD. Compare Art. 4(3)(b) WFD on designation as a heavily modified water body and Art. 4(5)(a) on conditions for aiming at less stringent environmental objectives for water bodies affected by human activity.
227. We should also recall that new modifications are under Article 4(7) conditional upon the taking of all practicable steps "to mitigate the adverse impact on the status of the body of water". The term "practicable" leaves room for flexibility, but its general nature will inevitably lead to a case-by-case approach by competent authorities and courts. The article does not impose spatial compensation analogous to that provided for in the Habitats Directive.

228. Generally, the WFD remains silent on the issue of financial compensation for public or private entities who suffer damage as a result of projects having to be modified or cancelled in consequence of the assessments under the WFD.

229. Finally, it must be pointed out that the tests that are introduced by the WFD are more or less based on the same "no, unless" approach as the Habitats Directive, and therefore tend to attach a higher priority to environmental objectives than to other legitimate policy objectives, which does not seem perfectly to conform to the integration principle as set out in the EC Treaty.

At the time of writing, the European Commission was preparing a guidance document on Article 4(7) of the WFD that would draw upon available guidance under the Habitats Directive. However, it would not seem to address specific waterway and port-related issues.

5.3.4.4. Issues related to dredging

230. For waterways and ports, dredging is a vital matter. Below we shall merely reiterate a selection of interesting comments on this issue made by specialists in this field.

In a profound and highly critical analysis prepared for the Central Dredging Association, Ms Jan Brooke made, inter alia, the following observations in this respect:

- From the point of view of maintenance dredging in particular, there are likely to be water bodies for which Article 4(5) will be of great significance. However, there remains uncertainty over how the relevant target environmental standards (status or potential) will be set in the light of the very different characteristics of waters in which dredging takes place. How will water uses which depend on dredging for their continued viability be evaluated, who will do this, and how will consistency be achieved?

- In practical terms, [measures in the sense of Article 11 of the WFD] could directly or indirectly affect dredging in a number of ways - the extreme measure in this respect being a prohibition on dredging in a certain water body. More likely, those responsible for the dredging of ports, harbours and navigable waterways could see measures leading to increased levels of regulation (with associated requirements in terms of the collection and provision of information), and the increased application of constraints and conditions.

Regarding Article 9 on the recovery of costs for water services, which is based upon the polluter pays principle, Ms Brooke raised the question

if sediments are contaminated, who is the polluter - the original polluter or the port or the dredging company? And who will pay? There is also the wider issue of water pricing and how, if at all, the principle of

498 Art. 4(7)(a) WFD.
499 Perhaps with the exception of the outweighing possibility provided by Art. 4(7)(c) WFD.
500 See supra, no. 85.
recovery of costs for water services will apply to, or affect, ports, harbours, navigation, and associated dredging.

With regard to the obligatory assessment of new development proposals involving dredging under Article 4(7) of the WFD,

experience with proposed developments in or near sites designated under the 1992 Habitats Directive (which has similar requirements) suggests that providing the information necessary to demonstrate all of the above will involve would-be developers in significant investigative work, often with associated delays and uncertainties. Promoters of some smaller projects may find it particularly difficult to demonstrate reasons of overriding public interest depending on how the latter is interpreted. It is important to note, however, that the WFD does explicitly allow socioeconomic considerations to be taken into account in decision making to a much greater extent than the Habitats Directive. Nonetheless, and given that the WFD applies to all water bodies, the practical implications of implementing this Directive could mean that some projects involving dredging are subject to greater constraints, delayed or, in some cases, even refused consent as a result of their predicted implications for water quality status.502

Still other observations on the impact on dredging were made by the European Dredging Association:

- For coastal waters there is no analogy spelled out to the concept of ‘specified uses’: this could be fishing, aggregate dredging, maintenance of navigation channels, recreation, … Although these activities do not affect the quality of the water body as such, much depends on how the biological indicators will be interpreted in the classification process. (E.g. does disturbance of the benthic community affect the water quality?)

- The role of sediment is not covered explicitly in the WFD. Reference is made to ‘materials in suspension’ as a potential pollutant. What is meant is probably contaminants in the form of suspended particles, but the wording does not exclude that a natural phenomenon as sediment transport is seen as degrading water quality. This must be clarified.503

Another interesting remark was made in an assessment made by the Port of London Authority:

It is difficult and may be uneconomic to carry out activities such as dredging without causing some (temporary) deterioration in water status. However, activities which cause “deterioration” will be constrained. The interpretation of “no deterioration” is therefore crucial. Whereas its application as an overriding principle would clearly have significant implications, a broader interpretation based primarily on ensuring that dredging does not cause the water body to drop a class (e.g. from good to moderate, or from moderate to poor, and so on) may not lead to unacceptable constraints.504

5.3.4.5. Other ambiguities

231. Other legal issues have emerged as well, a number of which we have listed below.

The WFD provides for the mandatory adoption of river basin management plans but, if the text were to be taken literally, it is doubtful that this obligation would also apply to surface waters flowing into the sea through an artificial ship canal, port channel or port basin along the coast and to the waters of such port. In practice, however, these waters seem to have been included in the river basins.

In the framework of mitigation measures, new constraints on navigation, dredging and constructing works may be imposed, the issuance and implementation of which may not only lead to additional costs, but may also entail legal disputes.

It is widely acknowledged that a better understanding of the links between hydromorphology and ecology (via monitoring) is needed. As became clear in the implementation of the Habitats Directive, such technical or scientific uncertainty may give rise, too, to serious legal uncertainty.

As indicated in the comments by Ms Jan Brooke above, the issue of recovery of costs for water services is particularly unclear; while we believe that the provision of waterway and port infrastructure services to vessels cannot reasonably be regarded as “water services” within the meaning of the Directive, the Directive obliges Member States to ensure an adequate contribution of the different water uses – which in our view could include navigation and port operations – to the recovery of the costs of water services. Although the relevant provision allows Member States to have regard to the “economic effects of the recovery” and, in order to derogate from said obligation, to “established practices”, the potential impact of recovery policies on the financing of waterway and port-related projects and on charging for waterway and port services remains anything but clear. What is certain is that environmentalist groups such as the WWF already insist that the cost recovery principle contained in the Water Framework Directive must lead to the charging of all infrastructure and environmental impact and aquatic resource costs in the field of navigation. Such statements – again –

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505 According to Art. 2(13) of the WFD, ‘river basin’ means “the area of land from which all surface run-off flows through a sequence of streams, rivers and, possibly, lakes into the sea at a single river mouth, estuary or delta”. The wording seems to exclude surface water flowing into the sea through an artificial ship canal, port channel or basin immediately situated along the coast. It is unclear whether such port waters might be considered part of “coastal waters” in the sense of Art. 2(7). Pursuant to Art. 3(1), coastal waters shall be identified and assigned to the nearest or most appropriate river basin districts or districts. Personally we feel that the particular situation of coastal ports and ship canal mouths was somewhat overlooked during the drafting of the Directive.

506 See supra, no. 218.

507 In this respect, the industries explicitly referred to a possible contradiction of EU policies: “If the constraints (whether directly, or indirectly because of prohibitive cost) lead to an inability to provide the necessary safe navigable water depth, increased costs would also be incurred in the form of trans-shipment and double handling costs. If waterborne freight were to be transferred to land transport as a result of such constraints, there would be additional environmental ‘costs’ associated with air quality, noise, congestion, quality of life, etc. The consequences of such constraints would also be to contradict political efforts towards modal shift in European transport policy, as laid down in the White Paper on European Transport Policy” (Potential implications for navigation (including ports, harbours, waterways and dredging) of EU Water Framework Directive Articles 16(1) and 16(7), paper prepared by representatives of the International Navigation Association (PIANC), the Central Dredging Association (CEDA) and the International Association of Dredging Companies (IADC) and supported by the European Sea Ports Organisation (ESPO) and the European Federation of Inland Ports (EFIP), 24 November 2004).

508 Kampa, E. and Kranz, N., o.c., 16.

509 See again the somewhat ambiguously worded Art. 2(39) WFD.

510 Art. 9(1) WFD.

511 Art. 9(4) WFD.

512 See also the rather general terms used in introductory recital (38) to the WFD: “The use of economic instruments by Member States may be appropriate as part of a programme of measures. The principle of recovery of the costs of water services, including environmental and resource costs associated with damage or negative impact on the aquatic environment should be taken into account in accordance with, in particular, the polluter-pays principle. An economic analysis of water services based on long-term forecasts of supply and demand for water in the river basin district will be necessary for this purpose”.

513 See for example WWF, The Danube – a lifeline or just a navigation corridor,
threaten to overlook applicable conventional and customary rules of international river law that preclude general navigational dues in the absence of specific services being rendered to individual vessels.

Where monitoring or other data indicate that the objectives set under the WFD for the body of water are unlikely to be achieved, the Member State is under a duty to ensure *inter alia* that the causes of the possible failure are investigated and that “relevant permits and authorisations are examined and reviewed as appropriate”\(^5\). This suggests that, for example, port authorities and port operators risk losing their environmental or other permits or authorisations even if they are not responsible for the deterioration of the environmental situation of the water body. Yet it is unclear whether the relevant provision of the WFD would also allow termination of permits or authorisations. Finally, the rule referred to does not provide for a compensation regime for parties whose permit or authorisation is reviewed or terminated.

The WFD obliges Member States to take, for significant adverse impacts on the status of water – which may include uses or projects in relation to navigation and ports – measures to ensure that the hydro-morphological conditions of the bodies of water are consistent with the achievement of the required ecological status or good ecological potential for bodies of water designated as artificial or heavily modified. The WFD suggests that controls for this purpose “take the form of a requirement for prior authorisation or registration based on general binding rules where such a requirement is not otherwise provided for under Community legislation” and that such controls “be periodically reviewed and, where necessary, updated”\(^6\). Here, too, lies a risk for waterway and port authorities, users or operators of being confronted with additional obligations in the form of mandatory authorisations. This would not only cause additional bureaucracy, but also add to the legal uncertainty, since authorisations must be reviewed and updated and may, eventually, also be terminated. To this should be added that authorisation rules may be contrary to the existing international legal status of waterways, navigation and port operations.

At this point, it is still unclear whether disturbance due to activities such as vessel movements, the overflow from a dredger or the aquatic disposal of dredged material would constitute a “loss” to the water body (i.e. discharge, emission, loss or transfer) under the terms of article 16(1) of the WFD on strategies against pollution of water\(^7\).

### 5.4. INTERIM CONCLUSIONS

232. During the above mentioned Workshop on the Water Framework Directive and Hydromorphology, Mr G. Crosnier of the European Commission quite correctly pointed out that a number of barriers for policy integration must be reckoned with, including institutional, cultural and geographical barriers as well as economic, time and expertise barriers\(^8\). To these we would like to add legal barriers. If legislation is not sufficiently integrated, if environmental legislation provokes outright conflicts with

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\(^5\) Art. 11(5) WFD.

\(^6\) Art. 11(3)(i) WFD.

\(^7\) PIANC, CEDA and IADC, *Potential implications for navigation (including ports, harbours, waterways and dredging) of EU Water framework Directive Articles 16 (1) and 16 (7)*, o.c., 4.

other rights and interests or if it merely lacks clarity, policy integration becomes an illusion and stakeholders will suffer serious frustration.

In his presentation, the European Commission’s representative also pointed out that integration can either have a minimalist goal – at least avoid undermining one policy by the other – or an ambitious goal – creating synergies between the different policies. In our view, attempting to exclude or at least reduce the risk of legal disputes and ensuing interruptions or other disturbances of plans and projects in the field of navigation and ports, which indeed threaten to ‘undermine’ EU transport policy, should clearly be a minimalist goal. In other words, it should be one of the priority objectives of any integration strategy. This is all the more important since the Birds, Habitats and Water Framework Directives treat navigation and port activities, plans and projects as essentially harmful and only tolerate them as derogations on condition that they comply with particularly strict conditions.

In our opinion, the implementation process for the Birds and Habitats Directives is an example of an almost total lack of policy integration. The assurances by the Commission that both Directives aim to promote the maintenance of biodiversity while taking account of economic, social, cultural and regional requirements, that they contribute to the general objective of sustainable development and that Natura 2000 is not to be considered as a collection of strict nature reserves where no other activities than conservation related ones are allowed – which as such are quite correct – do not alter the fact that transport policy objectives did not come into play at all at the stage of designation of nature conservation areas, and that stakeholders were hardly consulted, suffered economic losses and were not compensated. To this day, the impact of transport policy priorities, TEN-T status of waterways and ports and pre-existing international and national legal regimes is often overlooked when the ‘imperative reasons of overriding public interest’ for a project to be realised in a nature conservation zone are assessed. Waterway and port-related projects have encountered numerous legal difficulties including severe delays, resulting in additional economic and environmental damage. Costly and time-consuming consultation processes have not prevented individuals and NGOs from challenging decisions before the courts and obtaining their annulment or suspension. The fundamental ambiguity of the Birds and Habitats Directives’ provisions has resulted in a massive legal uncertainty for the shipping and port sectors and in an imminent risk of competitive distortions. The availability of some general guidance instruments issued by the European Commission has not sufficed to avoid unexpected interpretations of the Directives by competent authorities and courts of law. For all these reasons, there exists a genuine and urgent need for additional, waterway and port-specific guidance instruments and for a reinforcement of the legal status of waterway and port-related projects.

With a view to the implementation process for the Water Framework Directive, lessons could and were in fact learned from the experience with the Birds and Habitats Directive. The European Commission set up a comprehensive strategy for the implementation of the WFD, in which waterway and port stakeholders are fully involved. The Commission strives for a two-way integration, for more specific guidance and for coordination with other legislative regimes. This new approach is to be heartily welcomed and efforts should be sustained. On the other hand, numerous legal problems and esp. ambiguities in the Directive’s provisions have already been identified at this stage. Issues that need guidance include, for example, the assessment of new modifications of water bodies and the relevance of pre-existing legal regimes governing the management of certain water bodies. It would not come as

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518 Ibid., 3.
519 See in this sense for example the Letter from Mr Stavros Dimas to Mr Geluk of 1 August 2005 regarding the Second Deepening of the River Scheldt, A(05) 1857-D(05).
520 Letter from Mr Nicholas Hanley, Head of Unit at DG Environment to Belgian, Dutch and German officials of 19 January 2001 relating to the reactivation of the Iron Rhine, ref. ENV.B.2/JVV/AD(2001) 320891.
a surprise if the implementation of the Water Framework Directive were to involve considerable legal
difficulties and disputes and give rise to court proceedings. Another threat is that the flexibility that is
inherent in the WFD, together with its ambiguities, can lead to substantially divergent implementation
policies in Member States. In that case, the Directive may distort normal competitive patterns in the
waterway and port sectors. For these reasons, additional measures to prevent lapses are warranted
here as well.
6. PRINCIPAL CONCLUSIONS AND RECOMMENDATIONS

6.1. PRINCIPAL CONCLUSIONS

6.1.1. Conclusions on the existing legal framework

233. From our overview of the existing legal framework, we draw the following conclusions.

First, the European institutions are, pursuant to EU law, under a duty both to ensure (i) the protection of the environment and to promote sustainability of economic development and (ii) to develop a transport policy and trans-European networks for transport infrastructure. As a result, environmental policy objectives and legal instruments compete and potentially conflict with policies and laws pertaining to transport and esp. the provision of waterway infrastructure and port facilities.

Second, as far as secondary law is concerned, several legal instruments adopted within the framework of EU transport policy, such as regulations and directives on liberalisation, presuppose the availability of adequate waterway infrastructures and port facilities. Under the TEN-T Guidelines, the European institutions support projects relating to inland waterways, motorways of the sea, inland ports and seaports. The EU modal shift and state aid policies further contribute to the provision of adequate facilities for maritime and inland waterway shipping. Yet it has to be noted that the use, maintenance and improvement of waterway infrastructure and port facilities is always subject to compliance with important EU and international environmental rules, inter alia the EU Birds, Habitats, Water Framework, EIA and SEA Directives. Moreover, EU environmental law, and esp. the obligation for Member States to take nature conservation measures, is of a more stringent and more committed nature than provisions on the development of waterways and ports, which are based either on legal requirements of a less specific nature, soft law instruments or mere policy declarations.

Third, the EC Treaty obliges the Community to integrate environmental protection requirements into, inter alia, its transport policy. Such integration is effectively implemented in the TEN-T instruments, which make Community support and funding for TEN-T projects conditional upon compliance with environmental rules. State aid decisions and modal shift instruments refer to environmental requirements and objectives as well. There exists no general requirement for the Community to integrate transport policy objectives into its environmental policy.

Fourth, the EU Birds and Habitats Directives only to a minor extent take into account economic needs. Economic considerations are irrelevant when protection zones for natural habitats are designated and delimited. These Directives are moreover based on a “no, unless” approach under which waterway and port projects significantly affecting protected sites can only by carried out by way of a strictly conditional derogation. In practice, this gives environmental objectives a higher priority than waterway and port policy-related objectives. Consequently, since waterways and port expansion areas often overlap with or lie in close vicinity to protected habitats, waterway and port policy enjoys the unenviable status of being a mere derogation from nature policy. While the Water Framework Directive is based upon a similar “no, unless” approach, it pays specific attention to the use of water bodies for navigational and port-related purposes and expressly acknowledges the need for policy integration and flexibility. Waterway and port stakeholders are involved in the extremely valuable Common Implementation Strategy for this Directive. Recently, a new activity on hydromorphological impacts was launched under that strategy. The mutual integration of navigation and port-related policy and water policy is a key objective of this activity, which should lead to further technical and political recom-
mendations and guidance in 2006. These developments do not alter the fact that, generally speaking, transport policy requirements appear to be less well integrated into environmental policy than vice versa. In addition, the priority of the EC Treaty over secondary law instruments does not prevent specific environmental legislation such as the Habitats Directive from taking priority over treaty provisions on the economic freedoms.

Fifth, international law contains several specific instruments for the protection of the environment, but also guarantees freedom of navigation in marine areas, including inland waters, and sometimes obliges States to carry out maintenance and improvement works in international waterways. The existence of an international layer of environmental and transport-oriented legal instruments considerably complicates policy integration. The interrelation between EU law and international law is mainly governed by Article 307 of the EC Treaty. Summarizing, it can be argued that the implementation of EU environmental law should at least be reconciled with international requirements on the use, management and improvement of international waterways. The interrelation between international conventions is regulated by international law and is determined by factors such as the subject-matter and the date of conventions as well as the identity of the parties thereto.

6.1.2. Conclusions on past implementation of the Birds and Habitats Directives

Our analysis of selected cases on the implementation of the Birds and Habitats Directives shows that many – if not most – contentious cases relating to the application of these EU Directives – and at least most of the causes célèbres – involve waterways and ports. Cases such as Dibden Bay, Deurganckdok, WCT and Second Maasvlakte make abundantly clear that the impact of the Birds and Habitats Directives on major waterway and port projects can be tremendous. The application of these Directives has led to severe delays and even to the outright cancellation of projects. Unsurprisingly, these Directives have become particularly notorious throughout the entire waterway and port sectors. The Cockle Fisheries and Seed Mussels cases show that even routine maintenance projects in waterways and ports may become subject to recurrent obligatory assessment procedures under the Habitats Directive. Given the commonly found geographical overlap of waterways, port areas and protected habitats, virtually every plan and project in EU waterways and ports has to stand stringent ‘no-alternatives’ and ‘imperative-reasons-of-public-interest’ tests under EU nature conservation law. The Birds and Habitats Directives have become an inevitable battlefield for sponsors of waterway or port-related projects, and, in a growing number of instances, also a graveyard for their time schedules, building plans, traffic forecasts and even their mere maintenance arrangements.

Second, it appears that the European Commission as well as national and EU courts tend to apply and interpret the Birds and Habitats Directives rigidly vis-à-vis waterway and port-related interests. Whatever the precise legal context, the European Commission and courts are particularly reluctant to accept economic considerations supporting exemptions from designation and conservation obligations. In addition, a number of Member States decided, on the occasion of transposing the Directives, to exceed their requirements and to impose even stricter rules than those laid down by the European legislator.

Third, legal uncertainty prevails even in cases where the project was well prepared by public authorities and where the European Commission itself gave a favourable opinion, as in the Second Maasvlakte case. The latter case shows that national courts may issue judgments that are totally unpredictable. As a result, it becomes increasingly difficult for public administrations to fully comply with the obligations arising under the Birds and Habitats Directives. Even when serious efforts are undertaken for
consultation with the general public and environmental NGOs and where indeed memoranda of understanding with stakeholders were signed or where the competent authorities committed themselves to investing in mitigation or compensation measures, these arrangements can never prevent other groups or individuals from challenging decisions before the courts. Whilst the basic human right of access to courts should of course never be called into question, the fact of the matter is that the ambiguity of the Birds and Habitats Directives provides citizens and NGOs with endless arguments with which to challenge every single waterway and port project. There is no denying that EU environmental law is increasingly used as a weapon to defend NIMBY-inspired interests of individuals. The Deurganck Dock and Vuosaari cases show that one single project may even become subject to dozens of claims over many years and even continuing after construction works have commenced or operations started.

Fourth, it should be stressed that the prevailing legal uncertainty is generally not caused by ambiguities or other problems inherent in the national implementing legislation. As a matter of fact, most problems are related to the application of the EU Directives themselves (either by EU courts or by national courts who are required to apply EU Directives directly) or of their literal transpositions into domestic law of the Member States. Consequently, the legal uncertainty in the application of nature conservation rules in relation to waterway and port plans and projects is not a national issue, but rather a European one. Logically, the problem should primarily be addressed at EU level.

Fifth, the TEN-T status of a project appears hardly to influence the assessments of projects under the Birds and Habitats Directives. In the Second Maasvlakte case, however, the European Commission appears to have accepted that status as evidence of imperative reasons of overriding public interest for the project at hand. The Dutch Supreme Administrative Court expressly supported this view. Apparently, other relevant legal regimes for maintenance and improvement works are being ignored completely though. In the cases of Deurganck Dock, Verrebroek Dock, Vuosaari and Zeebrugge, port expansion areas that had been designated or prepared decades ago, were all of a sudden turned into protected habitat areas.

Sixth, the Monfalcone case highlights that problems related to the Birds and Habitats Directives can even directly influence the legal position of third parties, such as building contractors. To the extent that these problems affect the legality of zoning schemes or building permits, this evidently also applies to terminal operators and even waterway and port users.

The overall conclusion is that the application of the EU Birds and Habitats Directives in relation to waterway and port projects is, to say the least, very problematic. Such projects are constantly being challenged on the basis of these two Directives and even well prepared and urgent projects are frequently being suspended or delayed. This state of affairs jeopardises the policy objective to promote maritime and inland shipping and offends against the integration principle. It does not come as a surprise, then, that the matter has led to a general malaise and that interested parties – not just waterway and port operators, users and investors but also environmental groups and citizens – are getting increasingly frustrated. At the end of the day the very legitimacy of current transport and environmental policies is at stake.
6.1.3. Conclusions on policy integration initiatives relating to the Birds, Habitats and Water Framework Directives

235. The numerous initiatives for a better mutual integration of nature and water protection objectives on the one hand and waterways and ports policies on the other are of course extremely valuable. To begin with, cooperation between competent services and authorities at EU and other levels is a prerequisite for policy integration. Next, many of integration initiatives have contributed to a greater environmental awareness on the part of waterway and port authorities and to a more environmentally friendly approach towards waterway and port management. Not only have waterway and port policies at different levels greened considerably over the past decade or so, but the integration initiatives have also increased awareness of the economic importance of waterways and ports with environmental authorities and – at least some – environmentalist NGOs. Finally, the integration initiatives offer guidance on best practices and therefore they contribute, albeit to a limited extent, to creating more legal certainty.

Nonetheless, these integration initiatives have clearly been unable to prevent political frictions and legal difficulties. Under the Birds and Habitats Directives, important stakeholders of the shipping and port industries, including waterway and port authorities, have no consultative status whatsoever. Very often, new waterway and port-related projects stir up public opinion and provoke vehement protests. Private individuals and NGOs continue to challenge these projects, preferably on the basis of the Birds and Habitats Directives, and in some cases primarily inspired by the NIMBY-syndrome rather than by a genuine concern about the preservation of environmental values. Available guidance instruments do not prevent law courts from enforcing these Directives in rather unexpected ways. In sum, the current integration and guidance procedures, instruments and projects have ensured neither a perfect coordination of policies, nor a sufficient degree of legal certainty, nor a flawless mutual understanding of stakeholders.

6.1.4. Conclusions on unresolved problems relating to the Birds, Habitats and Water Framework Directives

236. In our opinion, the implementation process of the Birds and Habitats Directives is an example of an almost total lack of policy integration. The assurances by the Commission that both Directives aim to promote the maintenance of biodiversity while taking account of economic, social, cultural and regional requirements, that they contribute to the general objective of sustainable development and that Natura 2000 is not to be considered as a collection of strict nature reserves where no other activities than conservation related ones are allowed – which as such are quite correct – do not alter the fact that transport policy objectives did not come into play at all at the stage of designation of nature conservation areas, and that stakeholders were hardly consulted, suffered economic losses and were not compensated. To this day, the impact of transport policy priorities, TEN-T status of waterways and ports and pre-existing international and national legal regimes is often overlooked when the ‘imperative reasons of overriding public interest’ for a project to be realised in a nature conservation zone are assessed. Waterway and port-related projects have encountered numerous legal difficulties including severe delays, resulting in additional economic and environmental damage. Costly and time-consuming consultation processes have not prevented individuals and NGOs from challenging decisions before the courts and obtaining their annulment or suspension. The fundamental ambiguity of the Birds and Habitats Directives’ provisions has resulted in a massive legal uncertainty for the shipping and port sectors and in an imminent risk of competitive distortions. The availability of some gen-
eral guidance instruments issued by the European Commission has not sufficed to avoid unexpected interpretations of the Directives by competent authorities and courts of law. For all these reasons, there exists a genuine and urgent need for additional, waterway and port-specific guidance instruments and for a reinforcement of the legal status of waterway and port-related projects.

With a view to the implementation process for the Water Framework Directive, lessons could and were in fact learned from the experience with the Birds and Habitats Directive. The European Commission set up a comprehensive strategy for the implementation of the WFD, in which waterway and port stakeholders are fully involved. The Commission strives for a two-way integration, for more specific guidance and for coordination with other legislative regimes. This new approach is to be heartily welcomed and efforts should be sustained. On the other hand, numerous legal problems and esp. ambiguities in the Directive’s provisions have already been identified at this stage. Issues that need guidance include, for example, the assessment of new modifications of water bodies and the relevance of pre-existing legal regimes governing the management of certain water bodies. It would not come as a surprise if the implementation of the Water Framework Directive were to involve considerable legal difficulties and disputes and give rise to court proceedings. Another threat is that the flexibility that is inherent in the WFD, together with its ambiguities, can lead to substantially different implementation policies in Member States. In that case, the Directive may distort normal competitive patterns in the waterway and port sectors. For these reasons, additional measures to prevent lapses are warranted here as well.

6.2. RECOMMENDATIONS

6.2.1. Recommendations for a clearer definition of policy objectives

6.2.1.1. Increase awareness of the integration problem

Worryingly, the insufficient degree of integration of EU environmental and transport policies undermines public confidence in environmental policy objectives and legislation. To give one example, back in 1995 British commentators expressed the following harsh verdict on nature conservation policy in a paper published in a leading maritime economics review:

The present situation with regard to ports [...] adds up to an undemocratic and muddled assemblage of environmental ideology, which seems to have no sensible controlling mechanism or consideration for necessary economic development.\(^{521}\)

Ten years later, a policy adviser of the Dutch Transport Ministry expressed a less sharply formulated yet essentially quite similar view when he stated, with respect to inland shipping, that:

the transport policies and environmental policies are not integrated. There are strategic visions for e.g. the water quality (Water Framework directive), but a strategic international IWT vision is missing. This handicaps balanced decision making.\(^{522}\)


Remarkably, this constant criticism is now also getting through to the EU decision-making level\footnote{It is worth noting that in 2000, the Council of Ministers of the European Conference of Ministers of Transport (ECMT) already formally agreed “that they need to take a more proactive lead in achieving sustainable development. Integration of transport and environment policy is essential to sustainable development and it is a two way process. Transport ministries cannot make their full contribution unless they have a strong voice in the traffic and mobility impacts of decisions taken outside their sector” (ECMT/CM(2000)1/FINAL, p. 2).}. At a gathering of the European Sea Ports Organisation (ESPO) in 2005, European Commissioner Jacques Barrot said:

\begin{quote}
It can be difficult to develop port activities and respect of environmental standards at the same time. This problem is not new. It is at the heart of the Lisbon strategy: we must match economic growth and sustainable development.

Are our legal tools for environment policy appropriate for allowing investment in ports? If not you should tell me, and we will start a reflection process on the issue.

If our rules on environment unduly hamper investments in ports, trucks will stay on the road with all the negative consequences\footnote{Barrot, J., Towards a European Port Policy, speech at the ESPO Annual Luncheon, Brussels, 22 November 2005, 2.}. 
\end{quote}

This statement makes clear that the European Commission is becoming aware that there is an urgent need to increase efforts towards a better integration of policies.

In the same vein, European Commissioner Joe Borg declared at the ESPO Conference in 2005:

\begin{quote}
A trend towards maritime transport brings about a challenge. The challenge is for Europe to be equipped with efficient ports and to maintain a competitive commercial fleet and ship building industry, whilst simultaneously ensuring that these operate in a sustainable manner. This requires proactive policies and an overarching, sustainable maritime policy framework\footnote{Borg, J., Seaports in the context of a European Maritime Policy, speech at the ESPO Conference, Valletta, 28 April 2005, Speech 05/261.}. 
\end{quote}

During the preparation of the present study, however, we noted that several interested parties still deny the existence of an integration problem, or are inclined rather to minimise it. Problems are often blamed on incorrect implementation by the Member States, on unclear transposition of the Directives into national legislation, or on the freedom of national courts to interpret that legislation. With the above analysis, we believe to have demonstrated that these explanations are either unjustified or at least beside the point, and that a huge integration problem does exist at EU level.

Since there is, at this stage, still no general agreement on the very existence of the integration problem, we recommend that, first and foremost, the European Commission take action in order to increase awareness within the Commission and other EU institutions that waterway and port policies and environmental policies are insufficiently integrated. Such action could take the form of internal discussions, but also of external communications.

\section*{6.2.1.2. Define two-way integration as a key objective of waterway and port policies}

\textbf{238.} As we have explained, the need for full compliance with EU environmental law is a constant element in TEN policy. Instruments on seaports policy such as the two proposals for a Port Services Directive also referred to environmental aspects.
Yet, none of the policy initiatives of the European Commission for waterways and ports devote specific attention to the problem of policy integration\(^{526}\). However, that is not to say that the Commission is unaware of it. We again refer to the statements of Commissioners Barrot and Borg cited above. The Naiades Communication on inland waterway policy also refers to the need for a better management of environmental issues.

The recent commitment of the European Commission to developing a new seaports policy is an excellent opportunity to launch a wide debate on solutions for the integration problem. Since the Commission has already stated that the ambition of that policy should be to assist European ports in responding effectively to the increase in maritime traffic and the risk of saturation of port capacity\(^{527}\), the integration with environmental requirements in order to ensure that new capacity can be provided, should in our view be a key element of that policy. As the participants in the CIS for the Water Framework Directive stressed, integration should moreover be a two-way process whereby transport and other policy objectives are also integrated into environmental policy.

*We therefore recommend that a two-way integration of seaports and environmental policies be made a key objective of the former policy. Integration should also be pursued as a priority within the framework of the Commission’s newly defined inland navigation policy.*

### 6.2.1.3. Address specific environmental issues in future waterway and port policies

240. As a logical outgrowth of the previous recommendation, we recommend that the European Commission address specific environmental issues in its future waterway and port policies and insert concrete proposals for a better and two-way integration in its forthcoming policy documents. In this respect, we suggest that consideration be given to the concrete recommendations below.

### 6.2.2. Recommendations for a better implementation of the existing legal framework

#### 6.2.2.1. Exchange knowledge and build legal capacity

241. From the start of the CIS for the Water Framework Directive, it was clear that capacity building would have to be a major component of a successful implementation strategy\(^{528}\). We are of the opinion that exchange of knowledge and capacity building should also cover legal aspects. In order to be able to integrate policies and provide guidance on the interrelation of legal regimes for environmental protection and transportation activities, a basic insight into the existing law is a *conditio sine qua non*. As far as we were able to ascertain, environmental authorities and stakeholders have, as a rule, only limited knowledge of the legal framework for waterway and port management, navigation and port operations. Their experience with relevant international law sources seems even more limited.

\(^{526}\) See, however, the brief reference to integration in the 1997 *Green Paper on Sea Ports and Maritime Infrastructure* quoted *supra*, no. 78.

\(^{527}\) At the time of writing, the Commission had announced that it would return to this issue in its mid-term review of the White Paper on transport policy at the end of April 2006. Vice-President Jacques Barrot was expected to launch a wide debate with stakeholders, Parliament and Member States on the strategic orientations which the White Paper would put forward.

\(^{528}\) See for example the CIS *Strategic document* of 2 May 2001, 1.
Consequently, **we recommend that the Commission take initiatives in order to make clear to all stakeholders which pre-existing EU and international legal regimes for waterway and port-related activities may be relevant to the implementation of the EU Birds, Habitats and Water Framework Directives.** Such initiatives could be part of ongoing processes, such as the CIS for the Water Framework Directive, or be independent actions, such as *ad hoc* conferences and workshops. In all these cases, input from external legal experts would seem useful.

As regards river law, attention should not only be paid to the regimes of the Danube and the Rhine, but also to the particular status of other European rivers and river basins, as well as to customary international law and applicable multilateral conventions.

To be clear, the proposed dissemination of legal knowledge should not be aimed at provoking a debate on the legal priority of one or the other instrument, but merely at fostering mutual understanding, reconciling legal regimes and preventing subsequent frictions and conflicts.

**6.2.2.2. Recommend consultation at the designation stages under the Birds and Habitats Directives**

242. In the above analysis, we found that waterway and port-related interests, and even owners of land reserved for future projects, were in most cases not consulted at the stage of designation of nature conservation areas under the Birds and Habitats Directives. In order to avoid frictions and legal claims, **we recommend that the European Commission incite Member States to consult with waterway and port authorities, operators and, where warranted also users before designating and proposing further SPAs and SCIs respectively under the Birds and Habitats Directives.** This seems to us an absolute policy integration minimum. Our recommendation is supported by the fact that the Water Framework Directive attaches great importance to similar consultations.

**6.2.2.3. Provide additional general guidance on the Birds, Habitats and Water Framework Directives**

243. As we have pointed out above, there exists a general feeling at almost all levels that additional guidance on the interpretation of the Birds, Habitats and Water Framework Directives is needed and that several key concepts of these Directives require further clarification.\(^{529}\) Personally, we feel that such clarification, for the purpose of ensuring legal certainty, ought to be provided through a legislative intervention. Since recommendations to that effect are however outside the scope of the present study, **we recommend that the European Commission continue its ongoing initiatives to provide additional guidance on the interpretation of the Birds, Habitats and Water Framework Directives.** In particular, we recommend that the European Commission continue its preparation of guidance documents on estuaries in relation to the Habitats Directive and on hydromorphology and the Article 4(7) derogation within the framework of the Water Framework Directive. Also, we recommend that the Commission urgently draw up an complete inventory of outstanding interpretation issues using available national implementation practice, case law and policy assessments and that it consider providing guidance of a specifically legal – rather than technical or management-oriented – nature on these issues. Finally, we recommend that the Commission incite Member States to systematically provide it with adequate information on new national interpretations and esp. on national court judgments and that, where warranted, the Commission endorse certain national interpretations. The

\(^{529}\) Available guidance documents state that they can be revised according to experience arising from implementation practice and case law (see European Commission, *Managing Natura 2000 sites. The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC*, Luxembourg, Office for Official Publications of the European Communities, 2000, 6).
latter recommendation would further contribute to providing legal certainty and unity, and to creating a level playing field for the implementation of the Directives and for port competition.

6.2.2.4. Provide waterway and port-specific guidance on the Birds, Habitats and Water Framework Directives

244. For a number of reasons, we recommend that the European Commission issue sector-specific guidance instruments on the Birds, Habitats and Water Framework Directives focusing on waterway and port-related issues.

First of all, available guidance instruments often continue to sin by too general if not ambiguous a wording and do not address waterway and port-related projects and activities – or at least not in sufficient detail. Second, in the waterway and port sectors, typical problems have emerged that cannot reasonably be expected to be covered in general guidelines. Third, it is worth recalling that, especially for the economic assessment of sea port-related projects, specific methodologies and tools are available, which should be better integrated with environmental assessments. Fourth, sector-specific guidance is warranted by the vital importance of waterways and ports for sustainable development in the EU. Fifth, specific guidance is needed in order to avoid competitive distortions in the port sector resulting from divergent interpretations. Sixth, our recommendation finds some support in a recommendation formulated at the recent EU Conference 25 Years of the Birds Directive: Challenges for 25 Countries, namely to develop sector-specific actions and codes of conduct or guidelines, including for waterways and ports, “to promote and strengthen a dialogue and common action on best ways to ensure that different economic sectors are in harmony with the requirements of the Directive” and “to promote wise use of birds and the sustainable management of their habitats by stakeholders”530. Whilst this proposal would appear to have been inspired primarily by the need for stricter compliance with the Directive’s provisions, it also stresses the importance of a sector-specific approach and policy integration.

It should be recalled that at the time of writing, the Commission’s DG Environment was preparing a specific interpretative guide on the management of estuaries in relation to the Birds and Habitats Directive, which is of course an excellent initiative.

245. As regards the Water Framework Directive, it goes without saying that we recommend that the extremely valuable CIS be continued and, where possible, intensified in order to further contribute to the prevention of problems affecting the waterway and port sectors.

At the time of writing, CIS guidance papers on hydromorphological aspects, with special attention to waterways and ports, were forthcoming.

Additional initiatives that take into account other policies and laws would fit perfectly into the intention of the draughtsmen of the WFD and the Commission services responsible for conducting its implementation. As a matter of fact, the introductory recitals to the WFD contain a very important statement on integration, which we have already quoted above:

Further integration of protection and sustainable management of water into other Community policy areas such as energy, transport, agriculture, fisheries, regional policy and tourism is necessary. This Directive should provide a basis for a continued dialogue and for the development of strategies towards a further integration of policy areas\(^{531}\).

This means that potential and actual tensions and conflicts with other policy areas must be addressed and that integration problems should be resolved. For that reason, additional guidance instruments on waterway and port-related aspects would be very useful. Hydromorphology is indeed only one relevant issue.

We also recommend that, in conformity with present implementation practice, industry associations and their expertise continue to be involved by the Commission in the preparatory discussions on all guidance instruments.

246. Moreover, Article 13(5) of the WFD provides:

> River basin management plans may be supplemented by the production of more detailed programmes and management plans for sub-basin, sector, issue, or water type, to deal with particular aspects of water management. Implementation of these measures shall not exempt Member States from any of their obligations under the rest of this Directive.

In our view, this provision could serve as a basis for the adoption by Member States of sub-programmes or management plans dealing with specific issues related to waterways and ports. Furthermore, such sub-programmes and plans could be coordinated with other programmes and plans for the management and development of waterways and ports. Given the importance of waterways and ports to economic development and their vital function with a view to the realisation of the EU’s transport policy objectives, we suggest that the Commission insert into its guidance documents a recommendation for Member States to draw up specific sub-plans or programmes for navigation and ports under the Water Framework Directive. Such plans and programmes could significantly contribute to a better coordination and integration of policies. It is worth noting that our suggestion is perfectly in line with the Commission’s 2006 Naiades Communication, where it was proposed that a European IWT network should consider the need for an incorporation of environmental requirements and coordination with river basin management plans as required by the WFD\(^{532}\).

247. In the light of our above analysis of outstanding legal issues, we recommend that sector-specific guidelines for the implementation of the Birds, Habitats and Water Framework Directives contain, inter alia, the following ingredients:

- good governance principles on prior consultation with shipping and port stakeholders at the stage of designation of protected areas;
- the mutual integration of (i) port planning and management instruments and (ii) management plans established under Article 6(1) of the Habitats Directive in order to avoid assessment procedures for routine maintenance works and all other activities normally carried out within port areas;
- more generally, and in line with consistent statements of the Commission and Member States in several cases, unambiguous reassurance that the objective of the Birds and Habitats Directives is not to jeopardise ongoing economic activities and their further development in waterways and within port areas;

\(^{531}\) Introductory recital (16).

\(^{532}\) See supra, no. 199.
- clear guidance on the conditions that maintenance dredging operations and other recurrent works in waterways and ports must fulfil under the Birds and Habitats Directives;
- a detailed methodological toolbox for the investigation of alternatives for waterway and port-related projects, taking into account existing implementation practice at EU and national level, available cases and the further observations made above;
- a detailed methodological toolbox for the assessment of imperative reasons of overriding public interest (IROPI) within the meaning of the Habitats Directive, based on a ‘set of indications’ methodology comprising a standard set of subcriteria, and also taking account of existing implementation practice at EU and national level, available cases and the further observations made above;
- for both these areas, common methodological standards that aim at ensuring a level playing field for competition;
- precise rules on the interrelation of TEN-T status, relevant international waterway and port law, pre-existing zoning schemes and other relevant laws on the one hand, and IROPI on the other hand;\(^{533}\);
- guidance on the ‘beneficial consequences for the environment’ within the meaning of Article 6(4) of the Habitats Directive that waterway and port development plans and projects as a general rule have, so that it would be unnecessary to seek an opinion from the Commission on such plans and projects;
- an exemplification of the waterway-specific and port-specific guidance with concrete cases;
- similar and if possible coordinated guidance on the implementation of analogous concepts used in the Water Framework Directive;
- clear interpretative guidance on a number of other ambiguities of the Water Framework Directive that we have identified above;
- in particular, the adoption of waterway and port-related sub-programmes and plans under the Water Framework Directive.

248. Since the issuance of sector-specific guidelines presupposes the input of specific expertise on waterway and port economics, and since their overall objective is to materialise policy integration, to balance interests and moreover to be a key element of the new seaports policy, we recommend that these specific guidelines be jointly prepared by DG Environment and DG Energy and Transport and that the drafting process be supported by independent experts and stakeholders of the shipping and port sectors. Undoubtedly, this would enhance overall support for these guidelines in these sectors.

249. As mentioned above, the European Sea Ports Organisation (ESPO) has announced that it is preparing a guidance tool of its own on the Birds and Habitats Directives, hoping that the European Commission would endorse it in some way or another. We recommend that the European Commission consider ESPO’s draft as a possible input for the sector-specific guidance referred to above.

250. Finally, we recommend that guidance instruments make clear that, where their provisions have been complied with, the final decision should only be subject to limited judicial review. This should ensure that the judiciary is not incited to unreasonably interfere with expert assessments and political decision-making. Courts should only intervene in cases of manifest errors or non-compliance.

\(^{533}\) See also infra, no. 251.
6.2.2.5. Link TEN-T and other statuses of waterway and port plans and projects to environmental assessments

251. A major flaw of current implementation practice is that TEN-T and environmental policies are insufficiently linked. Only in a limited number of cases was TEN-T status taken into account as evidence of imperative reasons of overriding public interest (IROPI) under the Habitats Directive.

As far as waterways and ports for inland navigation are concerned, the link between the existing TEN-T Guidelines and other policy areas and their assessments can be easily made, since these Guidelines not only contain a map of inland waterways and related projects forming part of the TEN-T, but they also describe in detail the required characteristics and dimensions of the waterways. A plan or project under which a waterway is to be adapted to the prescribed dimensions under the TEN-T Guidelines should be automatically considered to tie in with EU transportation policy objectives and therefore to find support in IROPI. As we have pointed out, other legal statuses, including international conventions on marine areas and rivers, could be relevant as well. UNECE’s inventory of bottlenecks in the E Waterway Network and the Commission’s proposed European Development Plan for improvement and maintenance of waterway infrastructures and transhipment facilities, which was proposed by the Commission in 2006 in its Naiades Communication, may also have a role to play. Projects identified as part of any of these instruments should also be regarded to have been based on sufficient IROPI.

As far as seaports are concerned, the TEN-T Guidelines also impose criteria for projects of common interest. Moreover, the maps annexed to the Guidelines identify a number of individual seaports that form part of the TEN-T. Here again, TEN-T status – which, as we have seen, takes into account environmental considerations – should be regarded as conclusive evidence of IROPI under the Habitats Directive.

In addition, the specific statuses referred to should play a significant role when alternatives are assessed under this Directive. Whilst it is true that the purpose of the alternatives test is to find environmentally better solutions for the same economic problem, so that this test is certainly not to be guided by economic considerations only, we believe that the specific legal statuses of waterways and ports referred to should be considered presumptive evidence of the absence of economic alternatives. This would mean that there is a presumption juris tantum that there is no alternative to the envisaged problem. Such a presumption could however be reversed on the basis of further economic and ecological investigations.

Mutatis mutandis, the above suggestions are also relevant with respect to the Water Framework Directive.

For these reasons, we recommend that waterway and port-specific guidance documents state that TEN-T status, inclusion of inland waterways and ports in the UNECE inventory of bottlenecks, in the E Waterway Network or in the EU European Development Plan for inland waterways and other relevant statuses of maritime and inland waterways and ports be systematically taken into account and regarded as conclusive evidence of the (imperative reasons of) overriding public interest within the meaning of the Birds, Habitats and Water Framework Directives and as presumptive evidence of the absence of alternatives under the same Directives.

534 See more infra, no. 276.
As we shall see below, the same principles could also be integrated into a pending proposal for a new Regulation on the granting of Community financial aid for TEN projects.\footnote{See infra, no. 276.}

The same integration-inspired logic could be applied in relation to state aid control: waterway and port-related plans or projects that have been cleared by the European Commission under state aid control provisions could, as a rule, be deemed to be based on (imperative reasons of) overriding public interest as well.

### 6.2.3. Recommendations for a reinforcement of the legal status of waterway and port development

#### 6.2.3.1. Attach a legal status to the forthcoming EU Network of Inland Waterways

Ideally, a hard legal status should be attached to the proposed European Development Plan for the improvement and maintenance of waterway infrastructures and transhipment facilities which is set to be established in 2009. Depending on the legal nature of the further proposals that the European Commission would put forward in this respect, we recommend the insertion of a provision into the forthcoming instrument on the European Development Plan for Inland Waterways to the effect that the inclusion of projects into this plan forms conclusive evidence of their being based on sufficient (imperative reasons of) overriding public interest within the meaning of the Birds, Habitats and Water Framework Directives and as presumptive evidence of the absence of alternatives under the same Directives. Again, this is entirely a matter of legislative logic and consistency.

#### 6.2.3.2. Create Portus 2010, a Coherent EU Network of Strategic Port Development Areas

##### 6.2.3.2.1. Conflicting views on the need for national port planning in Member States

For a number of reasons, quite divergent views are held on whether Member States should plan and coordinate port development at national level.

The first reason is that, across Europe, very different port policy and management traditions and beliefs prevail. In some countries, the central government is the driving force of port development or it may even directly control decision-making in port authorities. In others, port development plans are proposed by local, often municipally owned port authorities – sometimes in a partnership with a prospective private terminal operator – and are subsequently assessed, approved or further implemented under regional or central planning, zoning or other coordination instruments. In still another group of countries, government takes the view that port development should be totally market-driven and, consequently, all new projects are initiated by local port authorities, which are often commercially run port operators offering integrated port services.

These are but a number of general patterns; the reality of port policy and management in the EU is far more complex and varied. Importantly, the EU institutions should not and cannot, partly by reason of an express Treaty provision to that effect,\footnote{Art. 295 EC Treaty.} interfere with the systems of port management and port ownership. In practice, however, EU law and EU policy indirectly lead to a preference for the landlord
port policy model, whereby the port authority is seen as a public service-styled infrastructure provider – that can be controlled by public authorities – and whereby objectively selected terminal operators making use of port infrastructure are commercial actors competing in a market-oriented environment and receiving no state aids. This ‘unbundling’ logic also underlied the two proposals of a Port Services Directive and, in essence, already conforms to the present situation in a number of leading EU ports. Yet it is widely recognised that it would be futile to attempt a direct harmonisation of the internal management system of ports at EU level. Given the extreme diversity of views and systems, it would in our opinion be even less realistic to strive for a mandatory unified approach of national port development planning and coordination throughout the EU.

254. A second reason why it would not seem feasible to impose a unique system of national port planning throughout the EU is that stakeholders hold totally opposed views regarding its relation to economic and environmental needs.

As a matter of fact, several environmental NGOs have advocated national port strategies in order to avoid uncoordinated developments causing unnecessary harm to the environment. To give but one example, the British environmental campaigning network PortsWatch stated:

Despite their major economic, transport and environmental effects, the provision of port capacity in the UK is wholly market driven. There is no long-term strategic planning to assess and/or meet demand. Consequently, port expansion proposals have emerged from the private sector and are to be judged on their individual merits. Furthermore, there is no framework which will determine how the transport, environmental and economic implications can best be managed.

In this planning vacuum, the private sector has brought forward proposals for three new superports located in the South East and East of England at Dibden Bay, on the edge of The New Forest in Hampshire, London Gateway (Shell Haven) in Essex and at Bathside Bay, Harwich, also in Essex. A further expansion at Felixstowe South is also being proposed.

The risks are great. The strategy and policy guidance are nonexistent. The pressure is growing. The need for action to save our coasts from destruction is urgent.

PortsWatch wants a moratorium on decisions by the Secretary of State on all proposed deep sea container port developments including Dibden Bay, London Gateway and Bathside Bay until:

- a methodology for determining the possible need for greater port capacity has been widely agreed
- it is demonstrated that the best use is being made of existing ports
- a national spatial strategy has been developed to indicate suitable/preferred and environmentally responsible locations for major port developments
- the concept of ‘environmental footprinting’ of ports and their associated infrastructure is used to make decisions about proposed port developments
- demand management techniques have been introduced to promote short sea and coastal shipping in order to decrease over-concentration on ports in the South East and East of England and their associated landside transport infrastructure
- an assessment of how port developments contribute to meeting integrated transport objectives has been completed.

On the other hand, the EU umbrella organisation of seaport authorities ESPO has clearly stated that any attempt at imposing port planning and coordination would be unacceptable. In its initial views on

the forthcoming Green Paper of the European Commission on a future EU maritime policy, the organisation warned:

There have been several attempts in the past to develop policy measures or frameworks for European seaports which have either failed or fell into oblivion. This is due to a number of errors which have systematically been repeated, i.e.:

- policy-makers ignored or underestimated the fact that European seaports are naturally diverse and complex;
- policy-makers have not anticipated or fostered market developments, but responded ex post facto by wanting to regulate, co-ordinate and intervene;
- a lack of overall vision on the actual needs of seaports which has lead to contradicting policy initiatives (e.g. EU transport vs. environment policy);
- seaports were mostly approached in a negative way, by focusing on negative externalities and unjustified claims of inefficiency, rather than looking at the positive contribution of seaports to Europe’s welfare.

ESPO hopes these pitfalls will be avoided in the Maritime Green Policy Paper. In that context, it regrets that the Committee of the Regions, in its draft own-initiative opinion “EU maritime policy – a question of sustainable development for local and regional authorities” suggested to adopt an interventionist approach with regard to port development by suggesting that concentration on a few large ports must be avoided and that a new European strategy on port infrastructures must follow.

ESPO believes that large, medium-sized and small ports all have their role to play within the logistics network. Artificial intervention goes against the main regulating force of the market, which would only work counterproductive.

ESPO therefore strongly urges the Commission not to embark on such a route but to make sure that the forthcoming maritime policy of the European Union stimulates and facilitates the sound market-based and sustainable development of ports along the principles outlined above.

[...]

ESPO welcomes the opportunity of the Maritime Policy Green Paper to discuss the development of a more coherent policy framework for seaports.

Such a framework should focus on three key areas:

a) facilitation of development of adequate port capacity, maritime access and hinterland connections to allow ports to fulfil their role as gateways for Europe’s external and internal trade;

b) fostering provision of competitive and efficient services in ports and within the transport chain;

c) stimulation of the wider community responsibilities of ports.

The forthcoming maritime policy framework should facilitate the sound market-based and sustainable development of ports along these principles but refrain from interventionist measures.

255. To summarise, two diametrically opposed views are defended: the first one advocates strict national port development planning in order to avoid overcapacity and to preserve and protect scarce natural sites as much as possible, while the second stresses the need for a non-interventionist development of ports based solely on sound economic considerations, market-driven investments and the need for efficiency of operations.

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6.2.3.2.2. The happy medium: reserving port expansion areas for unhindered future development while respecting environmental requirements

256. In our view, a golden mean or a third way can be found. It should be based upon the obvious need to provide sufficient port capacity in order to meet real market demand and upon full respect for the autonomy of port authorities and flexibility of port operations, while at the same time complying with existing EU environmental law. In our view, the happy medium lies in a new scheme that ensures (i) the reservation of sufficient port expansion areas for unhindered future developments on the basis of local or commercial proposals, (ii) the attachment of a clear legal status to these areas protected by EU law, and (iii) that this status be used as both input for and foundation of applicable environmental assessments, which as a result will better reflect the idea of policy integration and become more efficient.

Below, we shall further explain the motivation for this new approach and then elaborate our proposal in greater detail.

257. To begin with, the issue of developing comprehensive and detailed national port planning policies is extremely delicate and personally we do not believe such policies to be sound. Whilst it is common practice for projects for the improvement of inland waterway connections to be initiated by national or regional administrations, port-related projects are often sponsored by local port authorities or commercial operators. This conforms not only to the general principle of subsidiarity (which is often also applied internally within Member States), but also to basic standards of good port management. In fact, the autonomy of esp. local – sometimes municipally controlled – seaport authorities is widely recognised as a key factor in the success of ports. In many Member States, important port improvement or expansion projects are even proposed and financed by commercial developers. The legal constraints on state aids in the EU, the increasing recourse to PPPs and other means of private funding of infrastructure projects, the emergence of strong EU and global market players, esp. in the container handling business, and the general competitive ambience of the ports and shipping industry result in ever more privately financed and market-driven investments which, at least from a theoretical point of view, should be considered economically justified by right.

Another very important issue is the necessity of flexibility: ports must be able to adapt plans, projects and even existing infrastructures to changing needs. In practice, it often occurs that planners have reserved an area or a dock for a certain type of trade and that, after completion of the construction works, market demand turns out to have substantially changed, so that the area or dock is then put into use for a totally different cargo, activity or transportation route. This problem is inherent in port management and can never be rectified – and would indeed only be aggravated – by the adoption of strict planning instruments. To a certain extent, all these considerations also apply to port-related waterway projects such as deepening works in access channels.

For all these reasons, it is perfectly understandable that local port authorities and commercial players tend to show little enthusiasm for having their commercial autonomy and flexibility curtailed by national or regional strategic plans or other co-ordinating instruments at a higher level. There are indeed strong economic and policy arguments against the call for more national coordination of port investment decisions. Last but not least, it would run counter to existing national port policies of many Member States. For all these reasons, we believe that the idea of strict national port planning policies should be abandoned.
258. On the other hand, there is no denying that the lack of planning and coordination puts ports in a very weak position in the environmental domain.

The strength of EU policies on nature and water protection derives to a large extent from the fact that they are based on a network approach at EU level. Birds’ and other habitats are expressly included in a coherent European network, and water policy is centred around the concept of river basins, which may even be transboundary. This umbrella approach supports a high protection level across the borders of Member States and reinforces a common understanding of the minimum level of nature and water protection throughout the EU. Moreover, the designation of protected habitats is expressly endorsed by the European Commission since these areas are declared ‘of Community importance’ under the Habitats Directive. This strong common and coherent position of environmental protection interests at EU level only confirms the belief that individual waterway and port projects encroaching upon the network should, by their nature, only be permitted on exceptional grounds. Furthermore, nature and water protection laws are, as we have explained, very stringent and contain precise obligations for Member States, public authorities and individuals.

The case for waterway and port developers is much weaker. Each plan or project must be assessed on its own merits and stand difficult tests under several environmental directives. As we have discussed at length, new initiatives will very often be located in or near protected natural habitats and their sponsors will have to demonstrate inter alia the absence of alternatives and the presence of imperative reasons of overriding public interest. Even if the proposal gets approved, courts may intervene in order to annul the decision so that the preparatory work must start all over again. In some Member States, port development projects are hardly supported by the government agencies, who prefer to passively await proposals from public or private investors. Furthermore, there is at present no comprehensive instrument either under which EU institutions endorse port plans or projects. The only exceptions are port-related investments and measures that are supported by the EU under the Motorways of the Seas and Marco Polo schemes. But plans or projects for the provision of deep-sea container terminals, to give but one – important – example, enjoy no particular EU status at all. What is more, potential port expansion areas are, as we have explained above, just as scarce as nature protection zones, so that realistic alternatives for projects are often non-existent. Suitable alternative locations for new or improved maritime access routes to and from ports are probably even harder to find. Potential port development areas are by no means protected under any instrument of EU law either. Finally, the lack of a comprehensive port development approach supported by higher authorities and based on objective economic analysis undermines public acceptance of port development projects.

259. For the reasons set out above, we believe that it would be in the interest of ports to have their plans and projects embedded in a more comprehensive framework. Such a framework should however not consist of national strategic port planning processes which set out strictly defined and conditioned directions for future developments that ignore real market needs and their constant evolution.

What we recommend is to establish a EU scheme called ‘Portus 2010’ – A Coherent EU Network of Strategic Port Development Areas for the reservation of port expansion areas that provide sufficient and, in a way, guaranteed room for expansion and improvement, while, on the other hand, respecting existing environmental law. In other words, we propose not interventionist planning, but forward-looking reservation in order to enhance legal certainty, better justify plans and projects, smoothen procedures and strengthen public support.

Precisely because such a reservation process would ensure that plans and projects are better prepared and economically justified and that existing environmental law is complied with in a less conflict-
ridden atmosphere, it would meet legitimate wishes of both industry associations and environmental NGOs. Therefore, we believe that our proposal would offer a way out of the present, no longer acceptable, impasse. In doing justice to the pleas of the main stakeholders set out above, it would reconcile their views and contribute to a better integration of policies. Also, it would rectify a number of huge implementation problems identified in the preceding chapters. Essentially, our proposal is aimed at bringing about a win-win solution for all parties involved.

260. Our recommendation is further supported by the recent Commission proposal contained in the Naiades policy paper to develop a European IWT Infrastructure Development Plan, which would include inland ports and be managed by a dedicated European coordinator. With regard to inland waterways, reference should again be made to the existing TEN-T Decision which lays down common rules for the dimensions of waterways, to the E Waterway Network established by UNECE and to the list of bottlenecks identified in that Network. In essence, Portus 2010 would only complement these tools for the seaport sector. The difference between waterways and ports is, however, that the former can be standardised on the basis of vessel dimensions, while each port is different inter alia due to its unique location and geographical characteristics. For that reason, Portus 2010 would probably have to be more complex, varied and flexible than the envisaged European IWT Infrastructure Development Plan.

261. Finally, our recommendations tie in perfectly with the objectives of the European Spatial Development Perspective (ESDP). This is a framework for policy guidance to improve cooperation among Community sectoral policies which have a significant impact in spatial terms. It is an intergovernmental document for guidance and is not legally binding.

Interestingly, it specifically mentions ports. On the one hand, it stresses that, to permit sustainable development, the integrated development strategies for towns and urban regions must cope with several challenges, among which is that of expanding the strategic role of the metropolitan regions and the gateway cities giving access to Union territory including large ports. On the other hand, the objective of parity of access to infrastructure and knowledge requires that all the regions of the EU should enjoy balanced access to intercontinental centres such as ports.

Under ESDP, the European Commission was recommended to examine periodically and systematically the spatial effects of Community policies and to carry out studies on the major spatial trends in Europe. ESDP also envisaged the establishment of a European Spatial Planning Observatory Network (ESPON).

In our view, the competition between nature and water protection and waterway and port development is a perfect example of existing spatial policies potentially impeding each other. The ESDP initiative confirms that such problems deserve special policy attention and supports further policy integration.

6.2.3.2.3. Portus 2010 – a mirror image of the Natura 2000 Network

262. The main feature of Portus 2010 is that it would serve as a mirror image of Natura 2000 in that it would consist in an inventory of the scarce available areas for, in this case, future seaport development which enjoy a particular protected status. These port development reserve areas would be de-
limited geographically and their location would be indicated on detailed maps. *Portus 2010* should include existing port zones but also provide space for sufficient greenfield developments. Like Natura 2000, *Portus 2010* should be based on a specific Directive.

263. There would also be an analogy in the designation process and criteria. Since *Portus 2010* would seek to ensure that future market demands – in the short, medium and long term – will be met, the designation of areas should be solely based on economic criteria, while taking into account geographical and technical characteristics of the areas that are envisaged. Other considerations should, as a rule, not be taken into account. On the other hand, designations should be realistic and therefore port authorities would act prudently if they were to take into account existing zoning schemes, applicable delimitations of port areas, available strategic and master plans for the port and other factors that may be reasonably held to prevent future port expansion in certain locations. If the boundaries of a port expansion area are already determined at local or national level, it should be possible simply to submit the existing scheme to the European Commission, so that it could be endorsed at EU level.

264. Ideally, proposals for inclusion of areas in *Portus 2010* should be based on purely economic considerations and, for that matter, be exempt from environmental impact assessments such as an SEA or an appropriate assessment under Article 6(3) of the Habitats Directive. Preferably, such assessments should be carried out at a later stage. Furthermore, since *Portus 2010* would only result in a preparatory identification of suitable areas for future port development and not prejudice the outcome of tests under applicable environmental law, provisions on access to justice and public participation should, ideally, remain inoperative at the *Portus 2010* designation stage as well. Yet, as soon as concrete plans and projects within *Portus 2010* areas are developed, laws on environmental impact assessments, public participation and access to justice would have to be fully complied with.

As far as EU law is concerned, it would in our opinion be within the powers of the EU institutions to introduce such a procedure and, if need be, to derogate from existing EU legislation, such as Article 6(3) of the Habitats Directive. Whether the international obligations of the Community would allow such a postponement of environmental checks and balances enshrined in international treaties such as the Espoo and Aarhus Conventions, will depend on the precise legal characteristics of *Portus 2010*, which we shall not elaborate on further within the scope of the present study, and of course also on political views on the issue. If certain environmental procedures would appear inevitable at the designation stage, this would not render *Portus 2010* useless. In that case, *Portus 2010* would still be able to serve as an important policy and legal tool.

265. Given the central concept of autonomy of port authorities, their unique economic and technical know-how, their privileged direct relations with port users and prospective investors, and the need for commercial flexibility, proposals for designation as *Portus 2010* areas should be made by competent port authorities – whatever their legal regime under national law. In that, *Portus 2010* would also resemble Natura 2000, which attaches considerable authority to ecological data gathered by environmental NGOs.

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543 Under the Kiev Protocol to the Espoo Convention – which has not entered into force yet – an SEA must be carried out for plans and programmes which are prepared for, i.a., transport and “which set the framework for future development consent” (Art. 4(2)). The SEA Directive 2001/42/EC uses identical wording (Art. 3(2)) which is interpreted in a rather broad way in the Commission’s guidance on its implementation. Whilst it should have clear legal consequences, *Portus 2010* should in our view not yet serve as the framework for “development consent” such as the delivery of building permits (cf. the definition in Art. 1(2) of the EIA Directive). Whether this would be sufficient in order not to carry out an SEA should be explored further. Additional legal analysis would also be useful in order to assess whether public participation should be organised (see, i.a., Art. 7 of the Aarhus Convention and the related guidance published by UNECE). Here again, one should reckon with prevailing stringent interpretations of environmental law.
Both large and small ports should be entitled to submit proposals. If greenfield developments outside existing port areas are envisaged, these new areas should be brought under the competence of a competent port authority.

As we shall explain later, the economic justification of the proposals would have to meet basic methodological standards that are common throughout the EU.

Normally, the role of Member States would be limited to the forwarding of the port authorities’ proposals to the European Commission. If national port or spatial planning policy so requires, Member States would however have the right to decide that proposals should be drawn up jointly by the port authorities and other competent agencies.

266. At a second stage, the European Commission would only have to verify whether the proposed areas can reasonably be expected to suffice for future short-, medium- and long-term demands. Only if the proposals appear manifestly insufficient for meeting forecast demands at either Member States or EU level, the Commission would have the right to refuse approval of the national proposals and to demand that additional areas be added. The Commission would not have the right to exclude proposed areas from Portus 2010.

Once the Commission has established the list of Portus 2010 areas, Member States would be responsible for ultimately designating them under national law.

267. To be clear, we only propose to use Portus 2010 for seaport developments. In this sector, spatial pressures appear far more severe than in the inland port sector. Moreover, inland ports will be covered in the forthcoming European Development Plan for inland waterways proposed in the Commission’s 2006 Naiades Communication.

6.2.3.2.4. Portus 2010 – a tool for a proper economic assessment and risk management of port plans and projects

268. There is no denying that some problems relating to the implementation of the Birds and Habitats Directives were caused by incorrect action, if not outright negligence on the part of public authorities or commercial actors.

After the Deurganck Dock vicissitudes, the Belgian State Auditor’s Office issued recommendations for a better preparation of large infrastructure projects of the future. These comprised the use of proper economic and risk assessment tools, including cost-benefit analysis and a system for the management of construction, societal, legal, economic and budgetary risks linked to alterations of projects. Given the increasing complexity of environmental and zoning law, structured consultations and communication between various competent authorities was recommended as well. To this was added a proposal to carry out a ‘nature test’ and to establish a nature management plan544.

It is obvious that such measures can contribute to avoiding legal conflicts and reducing costs. The proposals of the Belgian State Auditor’s Office would actually appear to be in line with current practice in several Member States and valid for the entire EU.

Moreover, they find considerable support in recommendations formulated by environmental NGOs. Recently, the UK Royal Society for the Protection of Birds stated:

>To set transport policy for the 21st century, including a port development strategy, we believe that more work is needed. The Government must:
- Agree how to measure demand for port capacity
- Develop reliable models of port productivity based on practical experience of how ports work, to see how much today’s ports could meet demand without new development
- Find ways to assess the impact of port proposals on transport infrastructure and transport use\(^\text{545}\).

For these reasons we recommend that competent port authorities or other proponents be obliged to apply adequate tools for a proper economic justification of the \textit{Portus 2010} designation proposals, which should be mainly based on objective traffic forecasts and objective geographical and technical aspects of the envisaged areas. Assessment tools and rules can be described in an Annex to the envisaged \textit{Portus 2010} Directive or in subordinate EU instruments. The rules should however only go into general methodological aspects and not interfere with the assessment of individual proposals.

At the project stage, further economic assessments and risk management tools should comply with basic standards as well. As for economic assessments, it is worth noting that applications for TEN funding must comprise \textit{inter alia} the result of cost/benefit analyses, including the results of a potential economic viability analysis and of a profitability analysis\(^\text{546}\). The creation of \textit{Portus 2010} would be an opportunity to lay down more detailed minimum economic assessment standards and methodologies for the entire EU. Logically, such methodologies should also look into the benefits of the project to the European economy and its further integration as well as to the overall functionality of TENs and the consistency with transport policy objectives, although these elements should, in the light of the principle of subsidiarity, certainly not be treated as a \textit{conditio sine qua non} in order to go ahead.

Similar standards could be devised for risk management tools, which are extremely important in order to avoid the current, far too frequent, disruptions of important projects.

\textbf{269.} We also recommend that economic assessments such as cost-benefit analyses be subject to approval by an independent body of economic experts in each Member State.

All these measures would contribute to plans and projects being based on objective, comprehensive and methodologically robust studies. They should prevent that, for example, flawed employment and traffic forecasts are put forward and that such forecasts or other economic parameters become topics of public debate if not of litigation before the courts. In this respect, the \textit{Western Scheldt Container Terminal} judgment is a case in point. In other cases too, economic justifications presented by project sponsors were questioned by opponents as being far too rosy. At the end of the day, such debates undermine the credibility of and the public support for ports, and they can impede policy integration.

If economic studies would be rubber-stamped by an independent body of experts, that should also have some legal consequences which we shall elaborate on below.


\(^{546}\) Art. 9(1)(a) Regulation (EC) 2236/95.
6.2.3.2.5. Portus 2010 – an instrument for a better integration of policies

270. As a policy integration tool, Portus 2010 should in a way counterbalance the force of the Natura 2000 Network and the river basin management plans, and highlight the primary importance that the EU attaches to the provision of adequate port infrastructure. It would serve as a strong EU policy instrument in support of the ports industry – and lack of support from EU institutions is precisely the main lament that is heard in this industry. But also from an ecological perspective, Portus 2010 does justice to a number of legitimate concerns, namely those over the need for objective economic assessments and a better coordination of individual projects. Over and above this, Portus 2010 would redress the present lack of integration resulting from priorities of port policy being determined within the framework of EU environmental law rather than transport law. In other words, transport policymakers would – to an extent – regain their say over a matter that is genuinely a central part of their own competencies.

From a practical perspective, Portus 2010 would, first and foremost, ensure the timely reservation of adequate areas for future port projects. Since foresight is the essence of government, an early reservation of land is not only a matter of political vision, but it is also essential both in order to (i) guarantee the availability of sufficient capacity to cope with future growth and (ii) offer legal certainty to landowners, inhabitants – and environmentalists. It is interesting to note that the Committee of the Regions, in its own-initiative opinion on EU maritime policy called for “sound spatial planning, for example by [...] distribution or reservation of areas that might be required for different uses”\textsuperscript{547}. Portus 2010 would substantially contribute to sound and balanced planning decisions, which were also called for in the European Spatial Development Perspective referred to above.

Next, Portus 2010 would evidence very clearly the spatial pressure under which waterway and port-related activities – which are widely recognised as contributing to sustainable development – are being developed. Moreover, it would suffice to project maps of Natura 2010, Portus 2010 and existing zoning plans on a single screen in order to detect, at a single glance, where exactly conflicts between port projects and nature conservation measures are likely to emerge. In that, it would have a preventive function and again contribute to policy integration.

Also, it should be made clear that Portus 2010 should not be a means for the ports industry to circumvent the Birds, Habitats and Water Framework Directives. These Directives remain unaffected and must be complied with. Portus 2010 should only contribute to a better integration of the implementation of these Directives and ports policy. One way to achieve this is by integrating elements of Portus 2010 into habitat and river management plans adopted under the environmental Directives referred to.

Finally, the availability of an EU catalogue of available port expansion areas could be of significant commercial interest, boost investments and competition in the port sector and contribute to its overall efficiency and attractiveness.

6.2.3.2.6. Portus 2010 – a strong legal status for port expansion areas

271. Apart from being a policy tool, Portus 2010 should – just as Natura 2000 – have some specific legal consequences. This should result in substantially improved legal certainty for all stakeholders includ-

\textsuperscript{547} Committee of the Regions, \textit{Own-initiative opinion on EU maritime policy – a question of sustainable development for local and regional authorities}, DEVE-037, 28 October 2005, para 2.10.
ing investors. What is more, Portus 2010 would give a message that the areas concerned may reasonably be expected to be developed as port areas in the future. Also, it would simplify a number of cumbersome and time-consuming tests.

First of all, Portus 2010 status should offer a reasonable guarantee that routine maintenance activities and regular port operations can continue undisturbed and without further assessments.

Second, Member States should be under an obligation of means to effectively develop the reserved areas according to objectively justified market demands and subject to compliance with applicable environmental law.

Third, the status of Portus 2010 areas should be considered conclusive evidence of the presence of the (imperative reasons of) overriding public interest under the Birds, Habitats and Water Framework Directives.

Fourth, Portus 2010 status should have an effect on the alternative solutions tests under the Habitats and Water Framework Directives. Here, it should be accepted that forming part of a Portus 2010 area creates a presumption that no alternatives are available. Only if further environmental and economic assessments conclude that alternative solutions which better respect the integrity of the site in question can offer the same economic benefits should the project be stopped.

Fifth, Portus 2010 status should facilitate economic assessments in the context of state aid control and TEN-T funding. The former principle could be inserted into the forthcoming guidance on state aids to seaports; the latter rule could be incorporated into the legal framework for the financing of TEN-T projects.

Sixth, an important legal consequence of Portus 2010 would be that the effects on future port development of any plan or project not directly related to port activities should be appropriately assessed. In other words, a port test should provide decision-makers with a clear insight into the economic effects of plans or projects that could impede future port developments. In this respect, port authorities should be invited to express an opinion, to which considerable weight should be attached. Decisions that deviate from that opinion should be based on specific and imperative grounds. As we shall see below, port authorities should also be compensated for any loss of potential development areas delimited under Portus 2010. Furthermore, the promoters of non-port developments that would exceptionally be allowed within Portus 2010 areas should be under an obligation to limit and mitigate the effects on existing and future port developments.

Finally, it should be noted that Member States, port authorities and other parties should retain the possibility to launch plans and projects outside Portus 2010 areas, but in such cases the current legal regime would apply, with all its deficiencies.

6.2.3.2.7. Portus 2010 – a guarantee for commercial adaptability and managerial flexibility

272. As we have pointed out, Portus 2010 should not be an interventionist national or EU port development plan that curbs the autonomy and flexibility of port authorities – much on the contrary. First of all, since they can best assess market demands and future needs, port authorities should be responsible for the initial proposal of areas. Next, Portus 2010 should not dedicate zones within port areas for
specific purposes or functions. The Portus 2010 network of areas should moreover be flexible and adaptable. It should always remain possible for new areas to be added.

In other words, Portus 2010 would offer port authorities a reasonable certainty that they will be able to launch new projects within clearly delimited geographical areas, and that these projects will not be questioned on economic grounds unless in very exceptional circumstances.

6.2.3.2.8. Portus 2010 – a basis for just compensation of port authorities

273. As we have mentioned above, the Birds and Habitats Directives leave to the discretion of Member States the issue of compensation to landowners and economic actors who suffer losses from the unavailability of areas or from limitations or prohibitions on existing activities.

A basic principle of Portus 2010 should be that it entitles port authorities and other owners or users of land destined for future port activities and expansion to just compensation when a given area is rendered unusable as a result of esp. environmental constraints.

First of all, such compensation should be sought in making available an alternative location with at least equal technical and operational characteristics and economic value.

If such compensation in kind cannot be offered, there should be a right to full financial compensation (including for lucrums cessans or lost profits) to be paid by the Member State.

6.2.3.2.9. Portus 2010 – a strategy for the management of non-socioeconomic values of waterways and ports

274. Apart from their economic importance, waterways and ports possess important non-socioeconomic or ‘soft’ values which are however often underrated if not totally ignored in public policies. These values include inter alia historical, archaeological, architectural, landscape, recreational, sociological and various other cultural values and consist both of historical heritage and of present-day features of port areas. Waterway and port developers often overlook these invaluable ‘soft’ assets that can however significantly contribute to gaining public support for ongoing activities and new developments. Therefore we recommend that comprehensive programmes be set up with which ports can exploit and develop their non-socioeconomic values.

As the implementation of the Birds and Habitats Directives shows, finding public support is today one of the most difficult tasks for waterway and port developers. In this respect, it is interesting to note that both Directives impose the taking into account of cultural values as a legal requirement. Also, SEAs and EIAs must look into the effects of plans and projects on inter alia the landscape and the cultural heritage. In our opinion, new port expansion projects can significantly contribute to the maintenance and the development of such values.

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548 We have elaborated further on this issue in our presentation at ESPO’s Conference at Stockholm on 1 June 2006. Our paper is to be published in the Liber Anicorum Willy Winkelmans ‘Ports are more than piers’, edited by Professor Theo Notteboom of the University of Antwerp.

549 See supra, nos. 15, 20 and 83.

550 See Annex I(f) of the SEA Directive and Art. 3 of the EIA Directive as well as Art. 1(vii) of the Espoo Convention and Art. 2(7) of the Kiev Protocol to the Espoo Convention.
In other words, port expansion projects often have a positive impact on certain non-socioeconomic values, so that soft values should not be monopolised by environmentalists. The natural environment is but one of the multifaceted soft values that determine human existence in and around ports. This does not mean that specific natural values of port areas – such as protected bird habitats and publicly accessible green areas – could not be integrated into measures to promote soft values of ports. Integrating ecological values into a holistic approach towards the management of soft values of ports could bring about a win-win situation for all stakeholders, including port authorities, port operators, port users, environmentalists and, last but not least, the general public.

For these reasons, promoting the soft values of waterways and ports would perfectly contribute to policy integration. Since gaining public support for waterways and ports and implementing relevant EU requirements are matters of EU interest, action at EU level is fully justified.

We therefore recommend that, as part of Portus 2010, Member States and waterway and port authorities be incited to inventory, develop and manage the non-socioeconomic values of waterway and ports. To that effect, provisions could be inserted in future seaport policy instruments. Ideally, each waterway and port authority should set up a comprehensive Soft Values Management Plan. This plan should also pay attention to, inter alia, the conservation and exploitation of the specific waterway and port-related heritage, the management of the city-port relationship and the accessibility of waterways and port areas to the general public. After the introduction of ship and port security measures, many land surfaces in ports threaten to be fenced off completely. Consequently, public experience of and support for port-related activities would become almost impossible.

Also, the European Commission may consider proposing a scheme for the financing of national or local plans for the drafting of a Soft Values Management Plan and its implementation.

Finally, management of soft values of ports could also provide an input for Integrated Coastal Zone Management.

6.2.3.2.10. Summary of recommendation

275. Summarizing, we recommend that a legislative instrument be prepared for the creation of Portus 2010 as a Coherent EU Network of Strategic Port Development Areas, with the following key legal characteristics that may also form the framework for the drafting of a Directive proposal:
- a delimitation of seaport development areas on the basis of economic criteria and of proposals by port authorities (possibly in conjunction with Member States) that are endorsed by the European Commission;
- a limitation of the scope of application to seaports;
- a reasonable guarantee that routine maintenance activities and regular port operations within Portus 2010 areas can continue undisturbed and without further assessments;
- an obligation of means for Member States to ensure the actual development of Portus 2010 areas in order to meet future demands;
- an obligation to base Portus 2010 proposals, other plans and individual projects upon objective economic assessments that conform to common methodological standards compliance with which should be screened by national bodies of independent experts;
- control by the European Commission of compliance with these methodological standards;

551 In some cases, such plans might be linked to or integrated into environmental management plans developed in the context of EIAs, habitat management plans or river basin management (sub-)plans or programmes, or merged with them.
- final declaration of Portus 2010 status by the European Commission;
- an obligation to formally designate Portus 2010 areas under national law;
- a non-intervention by the European Commission in the actual selection of areas, except in cases where proposals by port authorities or Member States are manifestly insufficient;
- adaptability and flexibility of Portus 2010 designations;
- full compliance with the Birds, Habitats and Water Framework Directives;
- integration of Portus 2010 status in management plans and river basin management plans under these Directives;
- conclusive evidence that all port-related plans and projects within Portus 2010 areas are automatically justified by (imperative reasons of) overriding public interest within the meaning of the Habitats and Water Framework Directives;
- presumptive evidence, under the same Directives, that there are no alternatives for port-related projects within Portus 2010 areas;
- a link between Portus 2010 status on the one hand and state aid control and TEN-T project assessments on the other hand;
- compensation in kind or at least full financial compensation (including for lost profits) for port authorities, owners of land and port users when Portus 2010 areas become unavailable for port development projects or if constraints are imposed;
- full freedom for port authorities to define and alter objectives and functions within Portus 2010 areas;
- a port test under which the effects on port development of all non-port related projects within Portus 2010 areas must be assessed, taking into account the opinion of the competent port authority;
- an obligation for port authorities and other project promoters to set up and implement risk management plans for large projects;
- a recommendation to port authorities to develop a Soft Values Management Plan;
- EU tools for the financing of plans and projects for the development of soft values of seaports;
- the residual possibility of developing port projects outside Portus 2010 areas on the basis of the existing legal framework.

6.2.3.3. Link TEN-T and other statuses of waterway and port plans and projects to environmental assessments

276. As we have concluded above, TEN-T and international law statuses of waterways and ports hardly play a role in the assessment of plans and projects under the Birds and Habitats Directives. As a provisional short-term solution, we have recommended above to integrate these statuses and assessments in a guidance document to be issued under the Birds, Habitats and Water Framework Directives552. For the sake of legal certainty, it would however be far more efficient to insert a provision to that effect in a legally binding tool. Existing TEN-T legislation could be supplemented with a provision stating that TEN-T status of ports is a decisive element in the assessment of the overriding public interest under the Birds, Habitats and Water Framework Directives, and offers presumptive evidence of the absence of alternative solutions under the same instruments. This would help redress the problem that transport-related projects generally enjoy a weaker status than environmental protection zones such as habitats and surface waters. Moreover, it would make policy integration more of a two-way process: if the European Commission considers the realisation of adequate transport networks as a priority, this view should logically be reflected in other EU policy areas as well. The suggested measure would also codify earlier individual opinions where the European Commission regarded

552 See supra, no. 251.
TEN-T status as a relevant element in the assessment of IROPI under the Habitats Directive. Legal certainty would be enhanced substantially if that rule were to be applied systematically throughout the EU.

Some interviewees objected that TEN-T status is too general in order to attach far-reaching consequences to it in environmental assessments. In the case of ports, for example, the existing TEN-T regime mentions almost all cargo and passenger ports of the EU as being of common interest, even the smaller ones. The TEN-T Guidelines only distinguish between A, B and C ports based on their annual throughput. Almost all important EU ports are also identified as part of the TEN-T in the maps attached to the TEN-T Guidelines. Some interviewees argued that linking TEN-T status automatically to overriding public interest assessments would be excessive. Almost every port project, whatever its nature, could in one way or another be claimed to enjoy some kind of TEN-T status, so that every proponent could, by simply invoking that status, be freed by right from any further assessment under the Birds, Habitats and Water Framework Directives. Therefore, while it cannot be denied that reference to TEN-T status was in some cases perfectly justified, it is argued that a generalisation of the link between TEN-T and the overriding public interest is not warranted. Also, reference can be made to the provisions of the TEN-T Guidelines on priority projects – among which there are however no specific port projects – and on their being declared of Community interest. This would suggest that there is a gradation in the “imperativeness” of TEN-T projects and that not every project of common interest is of equal importance.

We believe that these objections are ill-founded. Under the TEN-T Guidelines, projects of common interest must (i) pursue the objectives of the Guidelines, (ii) concern the network described in the Guidelines, (iii) correspond to one or more of the priorities of the Guidelines and (iv) be potentially economically viable on the basis of analysis of the socioeconomic costs and benefits (Art. 7(1) Decision 1692/96/EC). If all these conditions – which pay considerable attention to environmental objectives – are met, legislative consistency and policy integration require that the project concerned would also be treated as being of common interest within the framework of all other relevant EU laws, including the Birds, Habitats and Water Framework Directives.

At the time of writing, a proposal for a new Regulation of the European Parliament and the Council “determining the general rules for the granting of Community financial aid in the field of the trans-European transport networks and energy and amending Council Regulation (EC) n° 2236/95” was pending. We recommend the insertion into this proposal of a new provision to the effect that TEN-T status of projects must be regarded as conclusive evidence of the presence of the (imperative reasons of) overriding public interest within the meaning of the Birds, Habitats and Water Framework Directives and as presumptive evidence of the absence of alternative solutions under the same Directives.

6.2.3.4. Consider amendments to the proposed Marine Strategy Directive


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553 COM/2004/0475 final.
The proposed Directive would establish a framework for the development of Marine Strategies designed to achieve good environmental status in the marine environment by the year 2021 at the latest, and to ensure the continued protection and preservation of that environment and the prevention of deterioration (Art. 1). For the purposes of the draft Directive, “environmental status” means the overall state of the environment in marine waters, taking into account the structure, function and processes of the constituent marine ecosystems together with natural physiographic, geographic and climatic factors, as well as physical and chemical conditions including those resulting from human activities in the area concerned (ibid).

The proposed Directive would be applicable to all European waters on the seaward side of the baseline from which the extent of territorial waters is measured extending to the outmost reach of the area covered by the sovereignty or jurisdiction of Member States, including the bed of all those waters and its sub-soils (Art. 2). Undoubtedly, this would include numerous maritime access routes to seaports that are situated in the territorial seas and exclusive economic zones of Member States and that are maintained and improved by dredging works.

278. A separate Article on “Special areas” provides, inter alia:

Where a Member State identifies an area within its European marine waters where, because of any of the following reasons, the environmental targets cannot be achieved through measures taken by that Member State, it shall identify that area clearly in its programme of measures and provide the Commission with the evidence necessary to substantiate its view:

[...]

(c) modifications or alterations to the physical characteristics of marine waters brought about by actions taken for overriding reasons of public interest which outweighed the negative impact on the environment.

However, the Member State concerned shall take appropriate ad hoc measures to prevent further deterioration in the status of the marine waters affected and to mitigate the adverse impact within the Marine Region concerned (Art. 13(1)).

At first sight, this provision could cause severe difficulties to maintenance and capital dredging projects affecting the environmental status, including the hydromorphology of coastal waters or river mouths on the seaward side of the baseline\(^{555}\). Secondly, the “overriding reasons of public interest” test – while surprisingly worded in yet another manner\(^ {556}\) – is likely to create similar legal problems as those already resulting from the Habitats and Water Framework Directives. Thirdly, the proposed Marine Strategy Directive does not specifically refer to navigational or port-related activities at all.

The fact that the newly proposed Directive obliges Member States to ensure the active involvement of all interested parties\(^ {557}\) does not alter the fact that it does not guarantee a sufficient integration of environmental and transport policies. In its Communication that accompanies the proposal, the Commission highlights its continued efforts on integration with other policies, but transport, waterways and ports policies are not mentioned even once\(^ {558}\). Furthermore, there is every reason to believe that, in its

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\(^{555}\) See also the Impact Assessment attached to the Commission’s proposal, at p. 13.


\(^{557}\) Art. 18.

\(^{558}\) Communication from the Commission to the Council and the European Parliament ‘Thematic strategy on the protection and conservation of the marine environment’, 8, item 6.2.2. In the Impact Assessment, reference is made to possible measures in relation to ports, shipping and shipbuilding (at p. 41-42) and dredging (at p. 13 and 43-44), and to ports as sectors being affected by the degradation of the marine environment (at p. 19).
current wording, the Directive would only add to the severe legal uncertainty that affects the waterway and port-related industries today. The wording of the new proposal is perhaps even more ambiguous than that of its predecessors for birds, habitats and water protection.

Whilst the proposed Directive could not be investigated in great detail within the framework of the present study, we recommended that, based upon the findings of this study, amendments to the proposed Directive be considered in order to improve integration with waterway and port policy objectives.

6.2.3.5. Take opportunities to clarify the Birds, Habitats and Water Framework Directives

279. Whilst proposing amendments to EU environmental laws is outside the scope of the present study, we consider it worthwhile to recommend in a general way that the European Commission, possibly within the framework of periodical evaluations of the Birds, Habitats and Water Framework Directives, consider which amendments to these Directives could be proposed in order to better integrate policies and to make integration a genuinely two-way process. The ex-post evaluation of EU legislation so that it can be updated and adjusted taking into account implementation practice in Member States, is a general policy priority of the Commission.

6.2.3.6. Insert a provision on waterways and ports in the EC Treaty and introduce an Infrastructure Impact Assessment Report

280. With a view to possible future initiatives on the revision of the Treaties, we recommend that the insertion of specific provisions on waterways and ports into the EC Treaty (or its successor) be considered. In fact, the EC Treaty is currently completely silent on the specific need to develop waterway and port infrastructure, while it contains elaborate provisions on environmental policy. This situation further contributes to the general underrating of the importance of waterways and ports. Express provisions could also further policy integration and make it a genuinely two-way process.

281. Additionally, we recommend that the introduction into the Treaty of an Infrastructure Impact Assessment Report (IIAR) be considered. Such a report could set out the expected impact on future infrastructure development of the adoption and implementation of new environmental and other legislative provisions and individual decisions. Experience has shown that the enormous impact of the Birds and Habitats Directives on waterway and port development came as a big surprise to most Member States and stakeholders. This has considerably impeded policy integration. An IIAR would be fully justified in the light of the scarcity of both natural sites and waterway and port development areas, which warrants a more balanced approach towards spatial policies. It is worth noting that back in 2000, the Council of Ministers of the ECMT agreed that land use plans should be subject to assessments of their impact on transport. Reference should also be made to the existing commitment of the Commission to assess the impact of any legislative or policy initiative.

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6.2.4. Timetable

282. The timetable below recapitulates the aforementioned policy recommendations and provides a possible, very tentative prioritisation.

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<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
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<tr>
<td><strong>Definition of waterway and port policy objectives</strong></td>
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<td>Increase awareness of integration problem</td>
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<td>Define integration as waterway and port policy objective</td>
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<td>Address specific integration issues</td>
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<td><strong>Better implementation of existing framework</strong></td>
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<td>Exchange knowledge and build legal capacity</td>
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<td>Recommend consultation at designation stages</td>
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<td>Provide additional general guidance on Directives</td>
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<td>Provide waterway and port-specific guidance</td>
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<td>Link TEN-T and other statuses to environmental assessments</td>
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<td><strong>Reinforcement of legal status of waterways and ports</strong></td>
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<tr>
<td>Attach legal status to EU Network of Inland Waterways</td>
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<td>Propose Portus 2010 Directive</td>
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<td>Portus 2010 area proposals by port authorities</td>
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<td>Commission decision on Portus 2010 proposals</td>
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<td>Final Portus 2010 designation by MSs</td>
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<td>Link TEN-T and other statuses to environmental assessments</td>
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<tr>
<td>Consider amendments to Marine Strategy Directive</td>
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<tr>
<td>Clarify Birds, Habitats and Water Framework Directives</td>
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<tr>
<td>Ports and waterways in EC Treaty and IIAR</td>
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*Figure 3. Timetable of policy recommendations*
Annex – Selected sources

1. LEGISLATION

1.1. International conventions

- Treaty of separation between Belgium and Holland, done at London on 19 April 1839, Moniteur Belge, 21 June 1821

- Revised convention for Rhine navigation, done at Mannheim on 17 October 1868, consolidated version on http://www.ccr-zkr.org

- Convention and statute on the regime of navigable waterways of international concern, done at Barcelona on 20 April 1921, League of Nations Treaty Series, Vol. 7, 37


- Convention for the prevention of marine pollution by dumping from ships and aircraft, done at Oslo on 15 February 1972, United Nations Treaty Series, Vol. 932, 3


- Protocol to the convention on the prevention of marine pollution by dumping of wastes and other matter, 1972 and resolutions adopted by the special meeting, done at London on 7 November 1996, International Legal Materials, Vol. 36, 1


- International Convention on the control of harmful anti-fouling systems on ships, done at London on 5 October 2001, IMO document AFS/CONF/26


- International Convention for the control and management of ships’ ballast water and sediments, done at London on 13 February 2004, IMO document BWM/CONF/36

1.2. Community instruments

1.2.1. Secondary legislation


- Council Regulation (EEC) 2919/85 of 17 October 1985 laying down the conditions for access to the arrangements under the Revised Convention for the navigation of the Rhine relating to vessels belonging to the Rhine Convention, *OJ L*, no. 280, 22 October 1985, 4

- Council Regulation (EEC) 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, *OJ L*, no. 378, 31 December 1986, 1


- Council Regulation (EEC) 3921/91 of 16 December 1991 laying down the conditions under which non-resident carriers may transport goods or passengers by inland waterway within a Member State, *OJ L*, no. 373, 31 December 1991, 1


- Council Regulation (EC) 1356/96 of 8 July 1996 on common rules applicable to the transport of goods or passengers by inland waterway between Member States with a view to establishing freedom to provide such transport services, OJ L, no. 175, 13 July 1996, 7


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- European Commission Green Paper on seaports and maritime infrastructure, COM(97) 678 final, 10 December 1997


- Community guidelines on state aid for environmental protection, OJ C, no. 37, 3 February 2001, 3


- Framework on state aid to shipbuilding, OJ C, no. 317, 30 December 2003, 11


- Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on Short Sea Shipping, COM(2004) 453 final, 2 July 2004

- Proposal for a regulation of the European Parliament and of the Council establishing the second “Marco Polo” programme for the granting of Community financial assistance to improve the environmental performance of the freight transport system (Marco Polo II), COM(2004) 478 final, 14 July 2004


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- ECJ 4 April 1974, C-167/73, Commission v. French Republic, ECR 1974, 359
- ECJ 8 July 1987, C-247/85, Commission v. Belgium, ECR 1987, 3029
- ECJ 8 July 1987, C-262/85, Commission v. Italy, ECR 1987, 3073
- ECJ President 16 August 1989, C-57/89 R, Commission v. Germany, ECR 1989, 2849
- ECJ 2 August 1993, C-355/90, Santona Marshes, ECR 1993, I, 4221
- ECJ 11 July 1996, C-44/95, Lappel Bank, ECR 1996, I, 3805
- ECJ 18 March 1999, C-166/97, Commission v. France, ECR 1999, I, 1719
- ECJ 16 September 1999, C-435/97, WWF and others, ECR 1999, I, 5613
- ECJ 7 November 2000, C-371/98, Severn Estuary, ECR 2000, I, 9235
- ECJ 11 December 2003, C-322/01, Deutscher Apothekerverband, ECR 2003, I, 14887
- ECJ 7 September 2004, C-127/02, Cockle fisheries, ECR 2004, I-7405
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- Raad van State, 31 May 2000, Apers, no. 87.739

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2.4. Dutch court judgments


- Raad van State, 12 December 2001, Case 199901906/2, M & R jurisprudentiekatern, October 2002, no. 10, 299, obs. Verschuuren

- Raad van State, 26 February 2003, AB Rechtspraak Bestuursrecht, 2003, 1750, No. 361, obs. ChB

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4.2. ESPO


4.3. Other documents


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- www.londonconvention.com
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5. CORRESPONDENTS AND INTERVIEWEES

- René Bos (Port of Rotterdam)
- Jan Bouckaert (Stibbe)
- Michel Bruyneel (International Scheldt Commission)
- Diane Chevreux (European Federation of Inland Ports)
- Julio de la Cueva (European Commission, DG TREN)
- Massimo Costa (European Commission, DG TREN)
- Natascha Dotterhoff (Ministry of Transport, Netherlands)
- Debbie Fuggles (Royal Society for the Protection of Birds)
- Peter Gammeltoft (European Commission, DG ENV)
- Nicholas Hanley (European Commission, DG ENV)
- Plácido Hernández Aguilar (European Commission, DG ENV)
- Guy Jansens (Antwerp Port Authority)
- Herman Journée (Ecoports)
- Arnauld Lefebure (International Scheldt Commission)
- Felix Leinemann (European Commission, DG TREN)
- Els Martens (Ministry of the Flemish Community, Belgium)
- Frank Neumann (Institute for Infrastructure, Environment and Innovation)
- Klaus Rudischhauser (European Commission, DG TREN)
- Peter Symens (Natuurpunt)
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- Toon Tessier (Antwerp Port Authority)
- Kärt Vaarmari (Estonian Fund for Nature)
- Patrick Van Cauwenberghe (Zeebrugge Port Authority)
- Fabienne Vanderstraeten (Ministry of the Flemish Community, Belgium)
- Hans van der Werf (Central Commission for Navigation on the Rhine)
- Christien Van Vaerenberg (Antwerp Port Authority)
- Patrick Verhoeven (European Sea Ports Organisation)
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