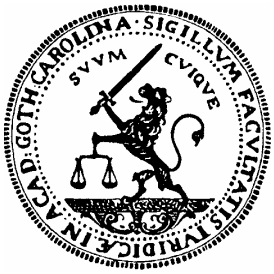


FACULTY OF LAW
University of Lund

Magnus Forshufvud

The Environmental Impact Assessment Directive

- on the implementation and application of the EIA Directive in the United Kingdom

Master thesis
20 points

Xavier Groussot

Environmental Law

Spring 2007

Contents

Summary

Environmental Assessment is an assessment of the likely effects a project might have on the environment. The purpose of the assessment is to ensure that decision-makers consider environmental impacts before deciding whether to grant permission to new projects. The method originated in the United States in the 1960s and it can be defined as the process of identifying, predicting, evaluating and mitigating the biophysical, social and other relevant effects of development proposals prior to major decisions being taken and commitments made. Environmental Impact Assessment (EIA) is a policy and management tool for both planning and decision making. It assists to identify, predict and evaluate the foreseeable environmental consequences of proposed development projects, plans and policies. EC Directive 85/337/EEC or the EIA Directive was agreed on in 1985 and required Member States of the European Community to achieve formal compliance by July 1988. The Directive sought to ensure that, before a development consent decision is taken, a minimum level of information describing the potential significant effects on the environment of certain development projects is supplied both to the relevant competent authority and to the public. The original Directive comprised fourteen articles which outlined the minimum procedural requirements for EIA along with Annex I and II that listed categories of projects that might be subject to assessment.

This thesis describes the EIA Directive together with its related pieces of legislation and the relevant case law. The thesis also aims to investigate how well the EIA Directive has been implemented and applied in the United Kingdom with focus on England and Wales. I have written my thesis together with a newly founded Swedish company, Minesto that have invented a unique tidal turbine which generates energy through the tidal streams and currents. Minesto's primal target market is the UK, hence my choice of focusing on this EU Member State. Using Minesto and their "Deep Green"-project as a practical example, I will show how the EIA works in practise in the UK. However, since an EIA procedure is very lengthy and complicated, I will only briefly make the attempt to make an outline of the basic steps and measures needed to be taken by Minesto.

The procedural implementation of the EIA Directive in the UK was initially made through secondary legislation under section 2(2) of the European Communities Act 1972. The introduction of the Town and Country Planning Regulations aimed to incorporate the requirements of the Directive but several project types was not included in the planning system and as a result, the EIA Directive was implemented in the UK by a set of over forty different regulations. Since it would be impossible for me to describe the UK EIA system as a whole, Minesto have proven a great way for me to focus on some pieces of legislation that I have deemed to be most important.

Sammanfattning

Miljökonsekvensbeskrivning, MKB, är ett verktyg eller en metod för att förutsäga framtida miljöpåverkan av en planerad verksamhet. Metoden har sitt ursprung i 1960-talets USA and är idag spritt över hela världen och de olika ländernas ”MKB-system” uppvisar en stor variation. MKB är dock alltid en process som skall syfta till att integrera miljöhänsyn när en verksamhet eller åtgärd utformas och planeras. Processen syftar vidare till att ge allmänheten, organisationer, myndigheter och andra intressenter möjlighet att påverka verksamheten/åtgärden och det beslutsunderlag som tas fram. MKB är också ett dokument som är ämnat att fungera som beslutsunderlag vid tillståndsprövning och motsvarande.
Rådets Direktiv om bedömning av inverkan på miljön av vissa offentliga och privata projekt (85/337/EEG) var det första EG-rättsliga dokumentet som behandlade MKB och riktade sig till EU:s medlemsstater. Direktivet skulle införlivas i de nationella lagarna senast i juli 1988 och behandlade miljökonsekvensbeskrivningsprocessens många faser såsom *behovsbedömning, bakgrundsdata, alternativ, samråd/dialog, avgränsningar, effekter, åtgärder* för att slutligen sammanställas i ett *MKB-dokument*. Flera ytterliggare direktiv har publicerats och detta examensarbete ämnar att beskriva det ursprungliga MKB-direktivet och de förändringar som gjorts samt relevant rättspraxis. Arbetet syftar också till att undersöka hur väl MKB-direktivet har implementerats och uppfylls i Storbritannien. Anledningen till detta är att jag skrivit arbetet i samarbete med ett nystartat svenskt företag, Minesto, som har utvecklat ett unikt tidvattenskraftverk vars huvudmarknad är just Storbritannien. Genom att använda mig av Minesto och deras ”Deep Green”-projekt som ett praktiskt exempel ämnar jag att visa hur MKB-direktivet fungerar i praktiken. Det är dock viktigt att påpeka att då en miljökonsekvensbeskrivning av detta slag består av en stor mängd teknisk data så har jag valt att koncentrera mig på den delen av processen med mest juridisk relevans. Jag skall också diskutera den specifika, i Storbritannien berörda inhemska lagstiftningen som MKB-direktivet implementerats genom.

Abbreviations

CSE	Chalmers School of Entrepreneurship
DEFRA	The Department for Environment, Food and Rural Affairs
DETR	The Department of the Environment, Transport and the Regions
DG Environment	The European Commission's Environment Directorate-General
DOE	The Department of the Environment (UK)
DTI	Department of Trade and Industry
EA	Environmental Assessment
EC	European Community
ECJ	European Court of Justice
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
ES	Environmental Statement
EU	European Union
IMPEL	The European Union Network for the Implementation and Enforcement of Environmental Law
IPPC	Integrated Pollution Prevention and Control
LPA	Local Planning Authority
MAFF	Ministry of Agriculture, Fisheries and Food
MS	Member States
SAC	Special Areas of Conservation
SCI	Site of Community Importance
SEA	Strategic Environmental Assessment
SPA	Special Protection Areas
SSSI	Sites of Special Scientific Interest
UK	The United Kingdom
UNECE	United Nations Economic Commission for Europe

1 Introduction

1.1 Background

After studying environmental law at the Universiteit Utrecht in the Netherlands in the fall of 2006, I became especially interested in environmental assessment and how the EIA Directive has been implemented and applied in various Member States. In December 2006, I met Anders Jansson, an good friend of mine who was telling me about a project at Chalmers School of Entrepreneurship in Gothenburg that he was involved with. The project, which now has been transformed into a company, Minesto, is focused on providing alternative energy solutions by the usage of a specially designed tidal-turbine, "Deep Green". In 2008, Minesto is to be a public stock company and hope to claim a world patent in order to commercialise this tidal power station. Due to its strong tides, the United Kingdom is deemed the most suitable country in Europe for this kind of power station and Minesto is therefore focusing on the British market.

I explained to Anders that it is most likely that a project of this statute need to go through several legal obstacles, such as an environmental impact assessment and to get the proper approval from relevant authorities before it is ready for the commercial market. Since I wanted to write my master thesis in this particular field of law and especially investigating the implementation of the EIA Directive, we concluded that it would be to both our benefits for me to write on this subject.

1.2 Purpose

Environmental assessment is to be found on a global scale and is a multi-stage process that includes a wide numbers of actors. This thesis focuses solely on the process within the European Union and how the European Community's legislation in this area has been implemented and is being applied in the United Kingdom. The EIA directive[1] is the major piece of legislation but the Directive is linked to several other provisions, such as the SEA[2]- and Habitats[3] directive. The overlying purpose of this thesis is to analyse the implementation of the different EIA-instruments in the UK and to look at the effectiveness of the legislation in reaching the different objectives that the EC provisions set out. I will also try to investigate how the EIA process works in practise, by using Minesto as an example of a developer with a new project that needs to undergo EIA evaluation.

[1] Directive 85/337/EEC on the assessment of certain public and private projects on the environment.
[2] Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment.
[3] Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.

1.3 Scope

The scope of the EIA Directive has been deemed by the European Court of Justice to be very wide and covers numerous project types, mainly concerning infrastructure. EIA applies to the various projects listed in the original as well as the amended Directive 97/11/EC.

The EIA Directive was implemented in the UK in the form of a series of regulations in a number of policy sectors where different consent procedures operated. However, after the adoption of the amending Directive 97/11/EC, the 1999 Planning Regulations[4] was created for implementation. Together with the other project approval systems into which EIA requirements have been integrated, these Regulations have consolidated all previous regulations and provide for the assessment of most types of projects. Within the UK however, England, Scotland, Wales and Northern Ireland each administer their own forms of EIA legislation even though they are very similar. This thesis concentrates on the 1999 Regulations in England and Wales, even though the term UK is used frequently throughout the thesis, being the EU Member State that it is, only briefly touching the other approval systems.

1.4 Method, material and disposition

The traditional method for legal research has been used when writing this thesis. Literature, case law, Community publications and Government consultation papers have provided most of the information for this paper. Two fairly recent reports on EIA implementation from the IMPEL-network (1998) and the European Commission (2003) have proven to be of great value. The Internet have also provided me with valuable information. I have also been in contact with UK officials for guidance. Unfortunately, I have had a hard time finding real up to date material but have received notice from UK officials that nothing more recent has been published.

The thesis is both descriptive and analytical and consists of three sections. The first section describes the EA phenomena, with all its relevant provisions, from its conception to the most recent developments. The second section consists of an examination of the applicable national legislation in the UK and finally there is an analysis of the two implementation-reports. In the analytical section, I have also used Minesto as a practical example to show how the EIA procedure in the UK works in practise. My findings, as to the effectiveness of the law in England in complying with the EIA Directive are summarised in the conclusion.

[4] The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999, No. 293).

2 Environmental Assessment in the European Community

Environmental assessment (EA) can be described as the evaluation process of the effects that are likely to arise from a project (or other action) significantly affecting the natural, as well as the fabricated environment. The EA of projects is generally referred to as "Environmental Impact Assessment" (EIA) and the EA of programmes, plans and policies as "Strategic Environmental Assessment" (SEA) or, in the UK, environmental appraisal.[5]

2.1 Origin and development

The 1960s and 1970s saw a major development in environmental thinking on a global scale. Environmentalism had indeed been around since the mid-nineteenth century but merely on the academic stage. Ecology is a key phrase that in the late 1960s transcended on to the political arena and in 1972, in Stockholm, the United Nations (UN) held a conference on the Human Environment. This ultimately led to the UN Environment Programme (UNEP), designed to monitor environmental changes in the world and it was within this context that Environmental Impact Assessment was born.[6] An environmental impact assessment describes a process which ultimately produces a written statement (ES) consisting of environmental information that is to be used to guide decision-making, with several related functions.[7] The process of EIA is systematic and integrative and originated in the United States in 1969, mainly as a predictive tool for considering impacts and reporting them, prior to a decision being taken on whether or not a proposal should be given approval to proceed. Even though France is reported to have started to use a similar system to EIA in 1976, it first arrived in European Community law in 1980 through a Commission proposal[8] but was not adopted until 1985 through Directive 85/337/EEC. The EIA Directive represents an important milestone as the first Community instrument on EA on projects but it nevertheless lacked to include plans and programmes. Since 1985, a broad and wide-ranging set of EC rules on EIA has taken place as well as an increase in environmental legislation overall. I will in the following chapters describe how EIA and its related directives have developed since their adaptation and how they have been co-ordinated so far.

---

[5] Wood, C *Planning & Environmental Action* – Wood, C *Environmental Assessment,* Hart Publishing, 2001, p 151.
[6] Sheate, W *Environmental Impact Assessment: Law & Policy Making an impact II* Cameron May Ltd 1996, p 17.
[7] Sands, P, *Principles of International Environmental Law* Cambridge, 2003 p 800.
[8] OJ 1980 C 169/14.

2.1.1 Three principal instruments

The first and primary EC instrument on environmental assessment is undoubtedly the EIA Directive. It was adopted before the EC Treaty contained any specific reference to the environment and Member States were given a period of three years to take the necessary measures to respect and comply with the requirements of the Directive. The Member States could then regulate the EIA procedure as either a permitting procedure or by adding it to existing permitting procedures under other pieces of Community (or national) legislation.[9] The EIA procedure aims to ensure that environmental consequences of projects are identified and assessed before authorisation is granted. In reaching this, the Directive manifests the influence of several different disciplines, notably land-use planning, the different environmental sciences and allows for the public the opportunity to give its opinion. Acting as a science- and knowledge based process of gathering and using information EIA provides proper guidance to decisions that are likely to affect the environment.[10] It is preventive in purpose since it seeks to avoid problems from the very beginning of a project instead of addressing them when they first emerge. The directive is said to have never been surpassed by any other EU environmental instrument and possibly even by any other piece of secondary Community legislation.[11] During the 1990´s, compliance with the Directive became a crucial issue in environmental controversies about major projects across the Community, especially in Member States going through a phase of rapid infrastructure-building such as Spain and Portugal. Legal issues regarding the interpretation and implementation of the directive arose throughout Europe and the European Court of Justice provided clarification in its rulings were the Directive's broad purpose and scope was confirmed.[12]

Since the adoption of the Directive in 1985, the EC Treaty has undergone three substantial revisions that have brought consequences for the EIA Directive. The first of these revisions, the Single European Act (1986) is the legally most significant one that together with the Maastricht Treaty (1992) consolidated the main principles of European environmental policy and made them a central concern of all EU policy areas. An insertion of an environmental chapter into the EC Treaty included reference to the principle of environmental integration. This means that the environment should not be dealt with as a policy apart but as an integral aspect of the design and implementation of all EC policies.[13] This principle was further enhanced through the Treaty of Amsterdam (1997) which inserted stronger wording in the new Article 6.[14]

---

[9] IMPEL Network - "Interrelationship between IPPC, EIA, SEVESO Directives and EMAS Regulation" Final Report, December 1998, p 4.
[10] Cashman, L *Europe and the Environment: Legal essays in Honour of Ludwig Krämer*, Europa Law Publishing, 2004, p 65.
[11] Cashman, L *Europe and the Environment: Legal essays in Honour of Ludwig Krämer*, Europa Law Publishing, 2004, p 66.
[12] Case C-72/95 *Kraaijeveld* [1996] ECR I-5403.
[13] Article 130r, second paragraph.
[14] Article 6.

Having the Treaty recognising that the environment should be an integral part of all EC policies reinforced arguments for a wider use of EIA at higher levels of decision-making on for example land-use plans, sectoral plans and programmes, policies and legislation. Environmental impact assessment at this level is commonly referred to as Strategic Environmental Assessment (SEA).[15] However, in the following years after 1985, Member States showed little inclination to accept additional EIA commitments such as SEA. The first significant breakthrough came in 1992 with the adoption of Directive 92/43/EEC, also known as the Habitats Directive, which aimed to conserve the Community's most important natural habitats and endangered plant and animal species. Even though the provisions aimed at nature conservation, they introduced a specific requirement on Member States to environmentally assess plans and projects. The Habitats Directive is considered the second major EC instrument on EA.[16]

International conventions on EA that has influenced the EC environmental policymaking also needs mentioning. The Community's participation with the United Nations Economic Commission for Europe (UNECE) has led to more strategic forms of EIA and has helped pave the way for the EC instrument on assessment of plans and programmes, SEA. During the 1990's, UNECE initiated two key conventions related to EIA, namely the Espoo Convention[17] (*Convention on environmental impact assessment in a transboundary context*, 1991) and the Aarhus Convention[18] (*Convention on access to information, public participation in decision-making and access to justice in environmental matters*, 1998). The Espoo (EIA) Convention sets out the obligations of its Parties to assess the environmental impact of certain activities at an early stage of planning. It also lays down the general obligations 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. The Espoo Convention entered into force in 1997.[19] Following the signature of the Aarhus Convention, the Community adopted Directive 2003/35/EC[20] or the Public Participation Directive, amending amongst others the EIA Directive. The Rio Conference (United Nations Conference on Environment and Development) of 1992 should also be mentioned since it makes reference to project EIA as well as to ensure that environmental consequences of programmes and policies likely to have significant impacts on biodiversity are taken into account. The recognition of EIA at the Earth Summit in Rio de Janeiro saw an explosion

[15] Cashman, L, *Europe and the Environment: Legal essays in Honour of Ludwig Krämer*, Europa Law Publishing, 2004, p 68.
[16] Cashman, L, *Europe and the Environment: Legal essays in Honour of Ludwig Krämer*, Europa Law Publishing, 2004, p 69.
[17] For further information on the Espoo Convention – http://www.unece.org/env/eia
[18] For further information on the Aarhus Convention – http://www.unece.org/env/pp
[19] http://www.unece.org/env/eia/welcome.html
[20] Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

of EIA application worldwide and today, EIA is being used in over 100 countries.[21] Principle 17 of the Rio Declaration states that:

environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

The Espoo and Rio conferences brought an increasingly positive view on EIA of plans and programmes that led to the publishing of a proposal[22] for a Directive on Strategic Environmental Assessment in 1996.
This eventually led to the adoption of Directive 2001/42/EC[23] or the SEA Directive, which is considered the third major instrument on EA.

2.1.2 The co-ordination of EIA and other legal requirements

The different issues of co-ordination do not only involve the three main EA instruments – *i.e.* the EIA, Habitats and SEA directives but also substantive requirements on EA and substantive requirements on other topics.[24] The challenge to make these different EA instruments interact coherently is an on-going process within the EC and the Commission has tried to address this through guidance documentation and by making some specific assessment provisions subject to explicit cross-reference. An example of this is Article 3 of the SEA Directive, which contains an explicit cross-reference to Article 6 of the Habitats Directive. Cross-references are as mentioned not only made between these three major directives since certain plans and project covered by EIA are also subject to other requirements under EC environmental law such as waste-management, risk-assessments and integrated pollution prevention and control (IPPC) requirements. EA processes should therefore not be seen in isolation. However, I will in the following chapters review the three major instruments separately, especially since it is the EIA Directive in particular that this thesis is investigating.

2.2 Directive 85/337/EEC – Environmental Impact Assessment of projects

The Directive on the assessment of the effects of certain public and private projects on the environment was adopted in 1985 as the EIA Directive. It requests that relevant public authorities, before they can give development consent for specific public and private projects, assess the direct and indirect effects which the project may have on humans and their environment. The Directive is procedural and seeks to ensure that before a decision is taken

[21] Morrisson-Saunders, A & Arts, J, *Assessing Impact – Handbook of EIA and SEA Follow-up*, Earthscan 2004, preface.
[22] COM (1996) 511 final, OJ 1997 C 129/14 and COM (99) 73 final, OJ 1999 C 83.
[23] Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment.
[24] Cashman, L, *Europe and the Environment: Legal essays in Honour of Ludwig Krämer*, Europa Law Publishing, 2004, p 71.

about whether consent should be given to proceed with a project, a minimum level of information regarding the likely significant effects on the environment has been provided to and reviewed by the competent authority. The Directive does not in itself prohibit Member States from allowing projects that might actually have significant effects, it rather provides a framework which the Member States must act within. Being the first established EIA instruments, the EIA Directive have established itself as the most-cited EC instrument[25] and a clear understanding of the principles underlying EIA is crucial to its effective implementation and application.

There are four key principles underlying the Directive and the first one is that EIA is inherently procedural and establishes a systematic procedure for incorporating environmental considerations into decision-making. The second principle is that EIA is informational. The procedures created by EIA enable information about the environment to be provided to the decision-making authority and the public in a clearly defined manner. The third principle is that EIA is preventive and assessments should be made at the earliest opportunity in the decision-making process and definitely before a consent decision is made. The fourth principle is that EIA is iterative, the information it provides feeds back into the EIA process and the design process of the activity concerned.[26] The application of EIA relates to different types of projects, listed in Annex I and II of the Directive and covers a very broad range of activities, from industrial to infrastructure projects. Projects such as large oil refineries, large thermal power stations, radioactive waste disposal installations, motorways, airports etc are examples of project types listed in Annex I, for which EIA is mandatory.

The second group of projects are found in Annex II that provides that an EIA has to be made where the project is likely to have significant effects on the environment by virtue, in particular of its nature, size or location.[27] The Directive further contains more precise rules as to when an EIA is required and how it is carried out. Questions regarding implementation and interpretation inevitably revolve around these three essential elements even though other issues such as the effects of EIA are relevant.

2.2.1 Directive 97/11/EC

The European Commission is obliged, in accordance with Article 11(1-2) of the EIA Directive, to prepare a report on the Directive's application and effectiveness which is to be sent the European Parliament and the Council, five years after the notification of the Directive. Such review reports on implementation were conducted in 1993 and 1997 and it was concluded that there was a wide variation between the Member States on the application of some of the key stages required by the Directive. The 1993 review found that the discretion given by the Directive on establishing screening

[25] Cashman, L *Europe and the Environment: Legal essays in Honour of Ludwig Krämer*, Europa Law Publishing, 2004, p 67.
[26] Sheate, W *Environmental Impact Assessment: Law & Policy Making an impact II* Cameron May Ltd 1996, p 13.
[27] Krämer, L *EC Environmental Law* fourth edition, Sweet & Maxwell Ltd, 2000 p 113.

thresholds for Annex II projects could lead to a general devaluation of the provisions of Article 2(1). This review also identified concerns on the level and quality of the information provided by the developer to competent authorities.[28] As a result, an amending Directive[29] was adopted in March, 1997 that clarified and reinforced several key provisions of the EIA Directive. The amending Directive widened the scope by increasing the number of projects covered, as well as strengthening the procedural base by providing new screening arrangements and criteria for Annex II projects. It also introduced new minimum requirements for information to be supplied by the developer. A failure to provide adequate information now constitutes grounds for refusal of development consent, defined in Article 1(2) of the EIA Directive. The change in Article 2 regarding development consent is one of the main changes introduced by the amending Directive. Member States now have to ensure that all projects that are subject to EIA must also be the subject of development consent. In *Wells*[30], the ECJ further clarified what constitutes a development consent and confirmed that in a consent procedure with several stages, an assessment must, in principle be carried out as soon as possible to identify and assess all thee effects which the project may have on the environment.

The amending Directive also introduced a new Annex III that establishes screening criteria to be used for the creation of thresholds and for the case-by-case screening of Annex II projects. Member States were complied to consider the new Annex III when drawing up their national legislation and this also applies to competent authorities when making screening decisions for Annex II projects and the development of screening thresholds and criteria. Annex III includes matters such as the characteristics and location of projects and the characteristics of the potential impact such as accumulation with other projects and risk. The requirements of the Espoo Convention had consequences for Articles 7 and 9 of the EIA Directive and were subsequently amended by Directive 97/11/EC in order to provide for a greater level of information to be made available to affected MS where a significant transboundary impact is identified. The signing of the Espoo Convention also resulted in moving eight project types from Annex II to Annex I to make the EIA Directive compatible with the Convention. Besides the review reports and international conventions, there have been a large number of cases brought before the ECJ that have provided clarification and have helped to develop the interpretation and as a result, the implementation of the EIA Directive.

2.2.2 What constitutes a 'project'?

Projects likely to have significant effects on the environment by virtue inter alia of their nature, size or location must be made subject to an assessment

[28] Report from the Commission to the European Parliament and the Council: *On the application and effectiveness of the EIA Directive – How successful are the Member States in implementing the EIA Directive* 2006 p 14.
[29] Directive 97/11/EC amending Directive 85/337/EEC on the assessment of the effects of certain public or private projects on the environment.
[30] Case C-201/02 *Wells* [2004] ECR I-723.

of their effects before consent is given. In deciding what constitutes a 'project' for the purposes of the Directive, one must look at the Directive's definition, the scope of the lists set out in Annexes I and II and the case-law of the Court of Justice. The definition is to be found in Article 1(2):
project means:

- *the execution of construction works or other installations or schemes,*
- *other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources.*

Article 2(1) further states that:
Member States shall 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 an assessment with regard to their effects.

In accordance with Article 4, the intervention must also fall within a class of projects listed in the Annexes of the Directive. Annex I projects require EIA in all cases and include major chemical works, power stations, motorways, etc. Annex II on the other hand covers the majority of development projects subject to various criteria and thresholds set up by the individual MS. Both lists are extensive with a broad scope that leaves the Member States some discretion in deciding if a project falls under the Directive. This has led to considerable variation throughout the EC in the extent to which the Directive has been implemented and in its effectiveness in requiring EIA for any project likely to have significant effects on the environment.[31] In Greece for example, EIA is required for a project that is to house only 20 pigs, in Ireland the threshold is 1,000 pigs and in the UK, 5,000 pigs. Similar disparities can be seen for installation for the disposal of industrial and domestic waste where Ireland and the Netherlands have a threshold of 25,000 tonnes a year while the UK limit is 75,000 tonnes.

Regarding the modification of projects, there is an explicit provision through the amending Directive of 1997, Annex II 13 which states that project modification is also covered by the Directive. In *Kraaijeveld*[32] the ECJ noted that: '*The wording of the Directive indicates that it has a wide scope and a broad purpose'*.[33] This indicates that project classes should be interpreted broadly once likely significant environmental effects are identified.[34] It should be pointed out however, that limits do exist and the ECJ did for example not consider sheep grazing a project in *Commission v. Ireland*[35].

[31] Sheate, W *Environmental Impact Assessment: Law & Policy Making an impact II* Cameron May Ltd 1996, p 37.
[32] Case C-72/95 *Aanemersberdijf PK Kraaijeveld BV* v. *Gedeputeerde Staten van Zuid Holland* [1996] ECR I-5403.
[33] Paragraph 31.
[34] Cashman, L *Europe and the Environment: Legal essays in Honour of Ludwig Krämer,* Europa Law Publishing, 2004, p 73.
[35] C-392/96 [1999] ECR I-5901.

2.2.3 When should an EIA be undertaken?

This question is not easily answered and there are several aspects which to some extent overlaps the previous one concerning the definition of projects. Consideration needs to be given the type of decision-making that is involved, to the date on which the project was initiated, to whether the project falls within Annex I or II and to whether any exceptions apply.[36] For those projects listed in Annex I, EIA is compulsory while those in Annex II require the Member States to operate a screening system in order to determine whether individual projects require an EIA or not. The screening system may take the form of thresholds or case-by-case examination or a combination of both. No matter what form is chosen, account must be taken into the set of selection criteria introduced by the amending Directive of 1997.[37] These criteria's relate to the characteristics and location of projects and the characteristics of the potential impact. Member States are furthermore required to take measures to avoid circumvention of the screening system through so-called 'salami-slicing' or 'project-splitting' where proposed developments are being fragmented into component parts that fall below the thresholds set for mandatory assessment.[38] Exceptions to the need for EIA is to be found in Article 1(4-5) and 2(3) of the Directive.

2.2.4 How should an EIA be undertaken?

Community EIA follows a step-wise procedure and the European Commission services have since 1999 published a series of guidelines to assist practitioners on several aspects of the Directive.[39] Due to the information being very detailed, I will focus on what characterises the screening, scoping, review and public participation procedures.

2.2.4.1 Screening

Screening is the process of determining whether or not EIA is required for a particular project and is the first stage in the process required by the Directive. In *Commission v Ireland*[40] the Court of Justice held that screening criteria or thresholds could not be limited to a consideration of the size of projects and that the nature and location of the project also needed to be taken into consideration. The Commission's five-year review report of 1997 indicated that the application of EIA to projects of different types was very variable across the Member States. This influenced the amending

[36] Cashman, L *Europe and the Environment: Legal essays in Honour of Ludwig Krämer*, Europa Law Publishing, 2004, p 74.
[37] Directive 97/11/EC Annex III.
[38] Cashman, L *Europe and the Environment: Legal essays in Honour of Ludwig Krämer*, Europa Law Publishing, 2004, p 75.
[39] ISBN 92-894-1337-9 on Impacts, ISBN 92-894-1334-4 on Screening, ISBN 92-894-1335-2 on Scoping and ISBN 92-894-1336-0 on reviewing environmental impact statements.
[40] C-392/96: Commission of the European Communities v Ireland [1999] ECR I-5901.

Directive of 1997, which included some main changes regarding screening. Especially with the new Annex III which is devoted to screening criteria that must be taken into consideration by MS and by competent authorities when making screening decisions for Annex II projects and the development of screening thresholds and criteria. The requirements for screening are contained in Article 4 of the amending Directive. Article 4(1) aims at the mandatory EIA projects in Annex I and screening of these projects must lead to an affirmative decision that EIA is required. Article 4(2) however, concerns Annex II projects which defines about eighty categories of projects for which EIA is required if significant effects on the environment are likely to occur. It is then up to the Member States to determine whether a project should be subject to assessment through case-by-case examination or thresholds and criteria or both. The Directive requires the criteria in Annex III to be considered by the competent authority in reaching case-by-case screening decisions. The procedures by which screening is initiated also differ between Member States. In some, developers are required to notify the competent authority in advance of making an application for development consent for any Annex I or II project. The competent authority must then make an explicit and formal screening decision and advise the developer and the public whether an EIA is required.[41] In other MS, there is no requirement for advance notification of development consent applications. Developers may in this case either submit the environmental information voluntarily with the development consent application, or submit an application without environmental information, in which case the competent authority must consider the application and make a formal screening decision on whether EIA is needed. As shown, there are a variety of different approaches to screening which are all based on the Annex I and II lists and the Annex III criteria but developers and authorities have to refer to individual Member State's legislation and guidance to identify the requirements that apply.

The first step of the screening process is therefore to determine whether the project is listed in either one of the Annexes. Even if is deemed not to be listed, one must investigate if the project is likely to have significant effects on a Natura 2000 site which requires an EIA (see chapter 2.3). The second task is to determine whether there is a mandatory requirement for EIA for the project under national legislation in the MS. If the answer is yes, an EIA is required and if no, the third step is to check if there is any legal exemption for the project. Member States are allowed in their national legislation to set up exclusion lists even for Natura 2000 sites and an EIA is in that case not required. The next step is the case-by-case consideration. If a project is not on a mandatory or exclusion list a screening decision must be made on a case-by-case basis. In undertaking this, consideration must be given to the factors listed in Annex III along with any MS guidance. Some Member States use case-by-case screening for all Annex II projects and some use a mixture of thresholds and criteria and case-by-case screening.[42] The last

[41] European Commission, Guidance on EIA – Screening. 2001. http://ec.europa.eu/environment/eia/eia-guidelines/g-screening-full-text.pdf

[42] European Commission, Guidance on EIA – Screening. 2001. http://ec.europa.eu/environment/eia/eia-guidelines/g-screening-full-text.pdf

steps of the screening process is the recording and publishing of the screening decision.

2.2.4.2 Scoping

Scoping is made at an early stage in the EIA procedure and can be described as the process of determining the content and extent of the matters, which should be covered in the environmental information to be submitted to a competent authority for projects that are subject to EIA.[43] Scoping is designed to ensure that the environmental studies provide all the relevant information on:

- *the impacts of the project, in particular focusing on the most important impacts*
- *the alternatives to the project*
- *any other matters to be included*

The findings of scoping define the "scope" of the environmental information that is to be submitted to the competent authority. Scoping involves the identification of the issues to be covered by the Environmental Impact Statement (EIS or ES). This document is used in almost all of the EIA regimes and contains the environmental information required under Article 5 of the EIA Directive. The scoping procedure was first recommended by the Commission in 1997 in their five-year review report on the EIA Directive and scoping was finally introduced in Directive 97/11/EC. However, even though scoping was not made mandatory, all Member States which do not have scoping included in their EIA procedure, are now required to introduce, as a minimum, a voluntary scoping stage. It is also allowed for MS to make scoping a mandatory part of their own national EIA procedure. The Directive provides that developers may request a "Scoping Opinion" from the competent authorities which are required to provide it. [44] This will identify the matters that are covered in the environmental information and enable the developer to concentrate on the most important aspects of the project in terms of environmental impacts.[45] According to Article 5(2) of Directive 97/11/EC, the competent authority must consult the environmental authorities, and may consult other interested parties and the general public when preparing its opinion. The same provision also makes it possible for Member States to make scoping mandatory. Even though the scoping process is voluntary, the developer is required to submit specific environmental information, the "Scoping Report", to the authorities in order for the EIA to proceed.[46] Depending on the type of project, this information can extend across a wide spectrum of topics and eventually becomes the basis on which consultation from environmental authorities and the concerned public takes place.[47] Effects on

[43] European Commission, Guidance on EIA – Scoping. 2001. http://ec.europa.eu/environment/eia/eia-guidelines/g-scoping-full-text.pdf
[44] Article 5(2) Directive 97/11/EC.
[45] Cashman, L *Europe and the Environment: Legal essays in Honour of Ludwig Krämer*, Europa Law Publishing, 2004, p 76.
[46] Article 5 in combination with Annex IV.
[47] Article 6.

the environmental media, plants and animals as well as those on the archaeological heritage and the landscape are examples of what might be included. Effective scoping will eventually raise a dialogue about the project and its issues between the developer and the competent authorities. The scoping procedure should continue throughout the EIA procedure and be flexible in the sense that the scope of work can be easily amended should new issues or information be raised. Furthermore, should it be deemed that the project might have effects in other Member States other than where it is proposed, the information shall be forwarded to that State in accordance with Article 7.

2.2.4.3 Review

Review is the process of establishing whether the environmental information submitted by developer to a competent authority, as part of an EIA procedure, is adequate to inform the decision on development consent.[48] In most of the Member States, this information is presented in the form of an EIS or as in the UK, ES. The environmental information that developers are required to provide under the EIA Directive is defined in Article 5(3) and Annex IV of Directive 97/11/EC. The information must include at least:

- *a description of the project comprising information on the site, design and size of the project*
- *a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects*
- *the data required to identify and assess the main effects which the project is likely to have on the environment*
- *an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects*
- *a non-technical summary of the information mentioned in the previous indents*

Should the ES be deemed inadequate, the developer will be asked to provide additional information and the development consent process will not start until this information has been provided. The review procedure is mandatory in some Member States and in others there is no formal stage of review.[49]

2.2.4.4 Public participation

One of the principles underlying EIA is to consider the environmental effects of a proposal at the earliest possible opportunity in the planning process. In order to achieve such an objective, it is imperative to consult the people who are most likely to be affected by a particular proposal. They,

[48] European Commission, Guidance on EIA – EIS Review. 2001. http://ec.europa.eu/environment/eia/eia-guidelines/g-review-full-text.pdf
[49] European Commission, Guidance on EIA – EIS Review. 2001. http://ec.europa.eu/environment/eia/eia-guidelines/g-review-full-text.pdf

better than anyone else, know their own local environment and will be able to identify key areas of concern. By involving the public as early as possible issues may be identified which 'expert-consultees', might not even have considered. In accordance with Article 6 of the Directive, the public concerned is one of the categories of consultees that are to be able to review the developer's information and must be consulted before the project is initiated.[50] How these arrangements are performed in detail is left to the discretion of the Member States. However, several complaints have reached the Commission, mainly focused on the short length of time that some Member States give the public to express an opinion.[51] This participative process is a crucial part of EIA since it recognizes the benefits of making use not only of professional disciplines but also of the experience and concerns of the individual citizen and the general public.

2.2.5 Effects and absence of EIA

A common assumption regarding the conduct of EIA is that decision-makers may grant consent and allow proceedings of a project despite predicted negative effects on the environment.[52] The information gathered and provided by the developer must, after above-mentioned consultation, be taken into consideration in the development consent procedure.[53] This duty is yet to be interpreted by the ECJ and until it does, the question whether decision-makers are free to ignore negative findings of an EIA remains unclear. The findings of an EIA may also raise issues of substantive compliance with other EC environmental legislation such as the potential breaches of binding directives. Due to the Directive's preventative character, it would be inconsistent with its requirements to allow a project to be executed before the decision-making process is completed. If a failure to undertake an EIA in the correct manner is at hand, what are the consequences? Under Article 226 of the Treaty, the Commission can initiate infringement proceedings. It can also, in principle, ask the ECJ to halt a project being executed pending the completion of an EIA, so-called interim relief. If no EIA is undertaken for a project that is co-financed within the EC, the Commission can suspend the payment of Community funds. On national level, the *Wells*[54] Case provided clarification regarding the failure to carry out an assessment. The Court declared that the competent authorities are obliged to take all general or particular measures for remedying the failure and that a Member State is required to make good any harm caused by the failure to carry out an EIA. It is up to the national court to determine whether it is possible under domestic law for a consent already

[50] Article 6(2).
[51] Ireland has even required the public to pay a participation fee in order to express an opinion which the Commission has announced a legal challenge against.
[52] Cashman, L *Europe and the Environment: Legal essays in Honour of Ludwig Krämer*, Europa Law Publishing, 2004, p 77.
[53] Article 8.
[54] Case C-201/02 *Wells* [2004] ECR I-723.

granted to be revoked or suspended and if an individual can claim compensation for any harm suffered.

2.2.5.1 Access to justice

The *Wells* Case is also significant regarding access to justice and whether it is possible for an individual to invoke the EIA Directive directly before the national courts? In other words, does it have direct effect? The Court confirmed that, under certain circumstances, an individual is entitled to invoke before a national court the provisions of the Directive in relation to a failure to carry out an EIA. This was later reinforced by Directive 2003/35/EC[55], which inserted additional clauses into the EIA Directive and the deadline for adapting national laws to these new clauses was June 25, 2005. Under these clauses, Member States are obliged to ensure that members of the public have access to judicial review to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the Directive.[56] The objective of this amending Directive is to contribute to the implementation of the obligations arising under the Aarhus Convention mentioned above.

2.3 Directive 92/43/EEC – Assessment of habitat impacts

The aim of the Habitats Directive is to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States.[57] The adoption of the Directive is the means by which the Community meets its obligations as a signatory of the Convention on Conservation of European Wildlife and Natural Habitats (Bern Convention). The provisions of the Directive require Member States to introduce a range of measures including the protection of species listed in the Annexes, to undertake surveillance of habitats and produce a report every six years on the implementation of the Directive. Annex I lists the various types of natural habitat of Community interest that require conservation, while Annex II lists the species of animals and plants whose habitats require protection. The Directive provides for measures to protect conservation areas (Articles 3 to 11) and species (Articles 12 to 16). It has been said that the Directive is not only applicable on the territory of the Member States, but on all areas under their jurisdiction, including the Continental Shelf and/or any Economic and Exclusive Zone.[58] The key measure designed to protect conservation areas is the designation of Special

[55] Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.
[56] Cashman, L, *'Europe and the Environment: Legal essays in Honour of Ludwig Krämer'*, Europa Law Publishing, 2004, p 79.
[57] Article 2(1).
[58] Jans, H.J *European Environmental Law* 2nd edition, Europa Law Publishing, 2000, p 418.

Areas of Conservation (SAC) that together with the Birds Directive's[59] Special Protection Areas (SPA), make up the Natura 2000 network. Covering more than 15% of the EU's land surface, this nature conservation initiative aims to conserve important habitats and its policies are based on the Habitats Directive as well as the Birds Directive. In designating SACs, the Member States must propose a list indicating which natural habitat types and which species occur in their territory that are eligible for protection. On the basis of these national lists, the Commission is required to establish their own list of sites of Community importance.[60] When a site has been adopted as a "Site of Community Importance" (SCI), the Member State concerned must designate it as a SAC as soon as possible with a limit of six years at the most.[61] However, this procedure can take as long as 12 years to accomplish.[62] In the United Kingdom, the protection of wildlife habitats has been the key point of nature conservation law ever since 1947. Habitat protection in UK law is now based on the network of 'Sites of Special Scientific Interest (SSSIs) and the legal regime for protecting wildlife sites is founded in the general principles of property law.[63] The SSSI network is the chosen medium for transposing the Habitats Directive into domestic law. The Habitats Directive introduced the precautionary principle for the first time for protected areas. This means that projects can only be permitted having ascertained no adverse effects on the integrity of the site. The Habitats Directive also contains specific assessment provisions to help protect the EU's richest concentrations of biodiversity from threats posed by damaging plans and projects. Article 6(3) states the impact assessment provisions and relates to the first step of a process governing plans or projects likely to have a significant effect on Natura 2000 sites.[64] The process of considering significant projects and plans is a stepwise procedure that initially involves assessment. Should a project or plan be deemed to have damaging effects, they not, in principle, be allowed. There are possible exceptions to this, as stated in Article 6(4) of the Directive. The scope of the assessment requirement is at once broader and narrower than that of the EIA Directive.[65] It is broader in the sense that it refers to plans and is, when it comes to projects, not limited to certain specified project types. It is in turn narrower since it only focuses on impacts on nature. It should however be pointed out that the provision for assessment of plans had been widely ignored by the Member States which have led to several infringement proceedings by the Commission.[66]

[59] Directive 79/409/EEC on the conservation of wild birds.
[60] Article 4(2).
[61] Article 4(4).
[62] Jans, H.J *European Environmental Law* 2nd edition, Europa Law Publishing, 2000, p 418.
[63] Rodgers, C, *Planning and Environmental Protection*, Hart Publishing 2001, p 91.
[64] Cashman, L *Europe and the Environment: Legal essays in Honour of Ludwig Krämer*, Europa Law Publishing, 2004, p 79.
[65] Cashman, L *Europe and the Environment: Legal essays in Honour of Ludwig Krämer*, Europa Law Publishing, 2004, p 81.
[66] For example; France, Spain, Greece, Ireland, Poland.

2.3.1 Assessment under Article 6(3)

A specific additional requirement for EA arises under Article 6(3) of the Habitats Directive, which provides that the competent authorities must agree to any plan or project likely to have a significant effect on the site only after having ascertained that it will not adversely affect the integrity of the site concerned.[67] Member States must implement legislation requiring an assessment to be made of any project which is likely to have significant effects on a Natura 2000 site (SPA or SAC). The wording of the Article implies that it also applies to projects and plans outside the protected area but that has effects within it.

The competent national authorities may only approve a plan or project after an 'appropriate assessment' has been carried out and after the opinion of the general public has been obtained. The determination of when an 'appropriate assessment' under the Habitats Directive is required has two aspects. The first is the substantive aspect of determining whether a threshold of significance is reached, which has clear parallels with the EIA Directive's "likely to have significant effects". The second aspect is that of the provisions' application date which is complicated since it is linked to SPA-sites classified under the Birds Directive as well as the Habitats Directive's SAC. Both components need to be taken into account when determining an application date. The Commission have published a guidance document on the legal aspect of Article 6 and for further information regarding the application date, the reader is referred to this document.[68]

Regarding the methodology for assessments, the Habitats Directive does not explicitly specify this and yet another guidance document on how to apply Article 6(3-4) was published by the Commission.[69] An assessment under the EIA Directive can, in principle, satisfy the requirements of Article 6(3) but since those requirements are an integral part of a wider set of safe-guards the decision-maker is more constrained where Natura 2000 is involved. Assessment methodologies need to take account of several different factors also because of the many different types of living environments throughout the Natura 2000 network. Stretching from the Canaries to Crete and from Sicily to the Finnish Lapland the sites differ significantly when it comes to the susceptibilities of human influence.

---

[67] Jans, H.J *European Environmental Law* 2nd edition, Europa Law Publishing, 2000, p 419.
[68] 'Managing Natura 2000 sites, The provisions of Article 6 of the Habitats' Directive, 92/43/EEC', ISBN 92-828-9048-I.
http://europa.eu.int/comm/environment/nature/art6_en.pdf
[69] '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/EEC', ISBN 92-828-1818-7.
http://europa.eu.int/comm/environment/nature/natura_2000_assess_en.pdf

2.3.2 Implementation of the Habitats Directive

The UK ratified the Bern Convention in 1982 and the Wildlife and Countryside Act 1981 implemented it in UK law. The implementation process for the Directive has been complex, as have the timetable for implementation. Once the Member States drafted their SACs-lists, the European Commission was required to draw up two further lists – one of sites hosting priority species or habitats under Annexes I and II and another of 'Sites of Community Importance' under Annex III. The draft lists of the Member States was amended on several occasions and the legislative timetable was behind schedule. In the UK, the 'Habitats Regulations[70] and 'Planning Policy Guidance Note 9 (DOE, 1994e) was chosen to transpose the Habitats Directive into UK law by building upon the regulatory model developed in English law for protecting SSSIs. The Habitats Directive has received criticism regarding the discretion given to the Member States on deciding the criteria for assessing the appropriateness of public consultation. According to Professor Rodgers, at the University of Wales, this is a major weakness in the legal order established by the Directive and he continues to say that this has been exploited to the fullest in the procedures adopted for implementing the Directive in the UK.[71] It is left to see whether Directive 2003/35/EC will improve the extent of the public consultation in this area.

2.4 Directive 2001/42/EC – Environmental Assessment of Plans and Programmes

In order to move towards a truly sustainable society, environmental assessment has to be applied earlier than in the project planning phase. It is therefore recognized that Strategic Environmental Assessment (SEA) is described as the next evolution in EIA.[72] The purpose of the SEA Directive is to ensure that environmental consequences of certain plans and programmes are identified and assessed during their preparation and before their adoption. Article 1 of the Directive lays down two objectives for the carrying out of an environmental assessment in accordance with the Directive:

- *to provide for a high level of protection of the environment*
- *to contribute to the integration of environmental considerations into the preparation and adoption of certain plans and programmes with a view to promoting sustainable development*

These provisions link the SEA Directive to the general objectives of Community environmental policy as laid down in Article 174 of the EC Treaty. Plans and programmes are not defined per se but the Directive is

[70] Conservation (Natural Habitats & c.) Regulations 1994 (SI 1994, No. 2716).
[71] Rodgers, C, *Planning and Environmental Protection*, Hart Publishing 2001, p 104-105.
[72] Morrisson-Saunders, A & Arts, J, *Assessing Impact – Handbook of EIA and SEA Follow-up*, Earthscan 2004, preface.

meant to entail the similar wide scope and broad purpose as the EIA Directive was deemed to have by the ECJ in *Kraaijeveld*.[73] There is however an important qualification for a plan or programme to be subject to the Directive, it must be required by legislative, regulatory or administrative provisions. If these conditions are not met, the Directive does not apply. Following a similar procedure as the EIA and Habitats directives, the SEA Directive also sets rules for defining when individual plans and programmes should undergo assessment[74] and contains provisions governing the way in which an assessment should be carried out.[75] Article 3 sets out the scope of application and like the EIA Directive, the SEA Directive requires assessments of plans or programmes which are likely to have significant environmental effects. However, assessments under the EIA Directive takes place at a stage when options for significant change are often limited and decisions on the site of a project, or on the choice of alternatives, may already have been taken in the context of plans for a whole sector geographical area.[76] This gap is plugged by the SEA Directive by requiring the environmental effects of a broad range of plans and programmes to be assessed so that they can they can be taken into account while plans are actually being developed, and at a later stage, adopted.

It also allows for the general public to give their opinion which is then integrated in the course of the planning procedure. Another distinction compared to the EIA Directive is that the SEA Directive entails the requirement to carry out monitoring of the significant environmental effects of the implementation of plans and programmes in order to identify unforeseen adverse effects and to be able to undertake appropriate remedial action.[77] The definition of 'plans and programmes' is broad and covers Community co-financed ones as well as plans and programmes adopted through a legislative procedure. It is for the authorities of the Member States to determine if the plans or programmes are likely to have a significant effect and the Commission services have published a non-binding guidance document intended to promote a clear understanding of the Directive.[78]
On May 21st 2003, the UNECE Protocol on Strategic Environmental Assessment[79] or the Kiev Protocol was adopted. Once in force, this Protocol will require its Parties to evaluate the environmental consequences of their official draft plans and programmes. The Protocol also provides for extensive public participation in government decision-making in numerous

[73] Commission's Guidance on the implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment p 5. http://ec.europa.eu/environment/eia/pdf/030923_sea_guidance.pdf
[74] Articles 2 and 3.
[75] Articles 4 to 9.
[76] Commission's Guidance on the implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment p 1.
[77] Cashman, L *Europe and the Environment: Legal essays in Honour of Ludwig Krämer*, Europa Law Publishing, 2004, p 84.
[78] 'Implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment', European Communities, 2003, ISBN 92-894-6098-9. http://europa.eu.int/comm/environment/eia/home.hmt
[79] Protocol on Strategic Environmental Assessment to the convention of on Environmental Impact Assessment in a Transboundary Context.
http://www.unece.org/env/eia/documents/protocolenglish.pdf

development sectors. Even though the concept of SEA is relatively straightforward, implementation of the Directive could prove to be a considerable challenge for the Member States. Compared to EIA, SEA will require more structured planning and consultation procedures as well as obliging public authorities to consider systematically whether the plans or programmes they prepare come within its scope of application.[80]
The SEA Directive had to be implemented by the Member States before 21st July 2004.

2.4.1 The SEA Directive in the UK

The SEA Directive was implemented in the UK in July 2004 and from this date, SEAs are formally required for certain plans and programmes which established the framework for future development consent of projects listed in the EIA Directive. The Office of the Deputy Prime Minister published an indicative list of affected plans and programmes affected in September 2005. The implementation process of the Directive has proven to have major implications for local authorities, regional planning bodies, government departments as well as those with an interest in scrutinising plans produced by others. The Regulation that transposed the SEA Directive into UK (England) law is The Environmental Assessment of Plans and Programmes Regulations 2004, which simply reproduced the Directive without adding any further requirements.[81]

[80] Commission's Guidance on the implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment p 2.
[81] A Practical Guide the Strategic Environmental Assessment Directive – Practical guidance on applying the European Directive 2001/42/EC "on the assessment of the effects of certain plans and programmes on the environment", 2005, p 6.

3 Enviromental Assessment in the United Kingdom

In order to understand the implementation of EIA in the UK, I feel that it is necessary to get somewhat acquainted with the United Kingdom's environmental law and especially the 'Town and Country Planning-system', which is of significant importance. It should also be pointed out that England and Wales, Scotland and Northern Ireland each administer their own forms of EIA legislation and to label the procedures under one United Kingdom-standard would be misleading. Therefore, this thesis will solely focus on the English and Welsh system even though the United Kingdom will be occasionally used since the UK is viewed as a Member State of the European Union and this name is used in the Community reports.

3.1 Introduction[82]

The United Kingdom's planning system can be traced back to the 'sanitary reform' period of the middle decades of the nineteenth century. The improvement of the public health through better sewerage, water supply and waste disposals eventually led to minimum standards in housing and the slums in the old urban centres were replaced by suburban estates. The first town planning powers were provided in 1909 and in 1947, the Town and Country Planning Act was passed. A specialised inspectorate regulated industrial sources of air pollution and local departments exercised controls over sources of smoke, dust, noise and odour. The Planning-phenomena now had its own Ministry but the word environment was not mentioned in the 1947 Act, which rather focused on public health. The post-war reconstruction was dealt with urgently and any objections against the speed of construction and the need for planning would be dismissed. The 1947 Act contained provisions on planning consent but did not specify any conditions or time limits, which indeed delayed sustainability in the UK.

The UK was initially reluctant towards a Community mandatory EIA system and under the deregulatory phase of Thatcher, the 'enterprise culture' imposed a presumption on planning authorities; 'in favour of development'. It should be pointed out that this presumption most likely did not refer to 'sustainable development' of the environment but rather on enterprises and industry. The British Town and Country Planning system relies on a handful of principles that will be described shortly. The 'executive responsibility principle' implies how the Secretary of State has ultimate control over the Town and Country Planning system by means of a range of legislative, administrative and adjudicative powers. The Secretary of State also has wide-ranging powers to issue guidance to local authorities to ensure that they act in accordance with general planning policy. The 'de minimis exception' means that in order to prevent the development control

[82] Miller, C, '*Planning and Environmental Protection,*' Hart Publishing 2001, Chapter 1.

system of becoming overloaded with applications for authorisation of minor developments, a wide range of developments are given deemed planning permission. However, the deemed permission may be withdrawn by either the Secretary of State or by local authorities. It is not, in the British Town and Country Planning system a criminal offence to initiate a development of land without planning permission. However, an unauthorised development will normally lead to an enforcement notice from the local planning authority, requiring the development to cease or to be removed. If the developer does not comply, a criminal offence is committed. This phenomenon goes under the name of the 'authorisation principle'.
The 'consultation obligation' is another axiom in the British planning system that relates to the fact that opinions of specified consultees must be sought on applications for particular categories of development. It is deemed to be of the utmost importance, in certain cases, to have applications and base decisions on, the fullest practicable input of relevant opinion and expertise.

3.2 Overview – EIA in Britain

The UK Government was in the late 1970's initially hesitant to EIA and officially only favoured the limited use of the process. It was further rejecting the idea of any mandatory EIA system but nevertheless held the position that EIA indeed was a useful element in the planning process for considering large and significant project proposals. The UK and Denmark in particular delayed the adoption of the original EIA Directive raising objections in principle or to parts of the draft Directive. In 1983, the UK Government went as far as saying that it would never agree to the European Community extending EIA to more strategic levels of policies, plans and programmes (SEA).[83] As a result of intensive negotiation in Brussels, major concessions limiting the coverage of an EIA report as well as the range of projects to be subject to mandatory EIA, the British environment minister could finally accept the Directive of 1985 which came into effect in 1988.[84]
The EIA Directive was implemented in the UK through secondary legislation under section 2(2) of the European Communities Act 1972. It was made in the form of a series of regulations implementing the Directive in a number of policy sectors where different consent procedures operate.[85] However, since regulations under 2(2) of the EC Act 1972 allowed implementation only of the strict letter of the parent Directive, primary legislation was required. In 1990, the Town and Country Planning Act 1990 was passed in order to better regulate the way in which developments were approved by local authorities in England and Wales. Current planning legislation is consolidated in the 1990 Act with attached regulations. The UK implementing regulations of the EIA Directive consists of over twenty

[83] Sheate, W *Environmental Impact Assessment: Law & Policy Making an impact II* Cameron May Ltd 1996, p 13.
[84] Wood, C, *Planning and Environmental Protection*, Hart Publishing 2001, p 152.
[85] Sheate, W *Environmental Impact Assessment: Law & Policy Making an impact II* Cameron May Ltd 1996, p 51.

different regulations but the most important one is the Planning Regulations[86] that implemented the original Directive. Even though it can be argued that the Directive can have direct effect, in practise it is the implementing legislation of the Member States that act as guidelines for the local authorities and developers. This is why it is of the utmost importance that the implementing legislation fully implements the 'parent' directive. The UK Government chose to employ the term 'environmental statement' (ES) instead of the EIS, as is used in EC texts. It should also be pointed out that the Department of the Environment (DOE) adopted the term 'environmental assessment' rather than the US 'environmental impact assessment', most likely due to its earlier opposition to a formal EIA system.[87] The 1988 Regulations were later superseded and augmented by a succession of amendments and additions, namely:

- The Town and Country Planning (Assessment of Environmental Effects) (Amendment) Regulations 1990 (Statutory Instrument 1990/367)
- The Town and Country Planning (Assessment of Environmental Effects) (Amendment) Regulations 1992 (Statutory Instrument 1992/1494)
- The Town and Country Planning (Simplified Planning Zones) Regulations 1992 (Statutory Instrument 1992/2414)
- The Town and Country Planning (Assessment of Environmental Effects) (Amendment) Regulations 1994 (Statutory Instrument 1994/677)
- The Town and Country Planning (Environmental Assessment and Permitted Development) Regulations 1995 (Statutory Instrument 1995/417)
- The Town and Country Planning (Environmental Assessment and Unauthorised Development Regulations 1995 (Statutory Instrument 1995/2258)

In 1997 however, when the amending Directive was about to be adopted, the attitude towards EIA seemed to have developed. The later renamed, Department of the Environment, Transport and the Regions (DETR) issued a consultation paper where it was stated how the British Government wholly endorsed the use of the EA process and that significant effects of development projects are to be fully assessed.[88] New Planning Regulations[89] and a circular (DETR, 1999a) implemented the amended Directive and here the term EIA, rather than EA, was used, bringing the British usage closer to European and accepted international terminology.[90] In June 2001, the Department for Environment, Food and Rural Affairs (DEFRA) was formed when the Ministry of Agriculture, Fisheries and Food

[86] Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI 1988, No. 1199).
[87] Wood, C, *Planning and Environmental Protection*, Hart Publishing 2001, p 152.
[88] DETR, 1997d, Regulation 18.
[89] The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999, No. 293).
http://www.opsi.gov.uk/si/si1999/19990293.htm
[90] Wood, C, *Planning and Environmental Protection*, Hart Publishing 2001, p 153.

(MAFF) was merged with the DETR. The new department was created after the failure of MAFF to deal adequately with an outbreak of Foot-and-mouth disease.

3.2.1 Marine environment - related legislation

The EIA legislation in the UK is very vast and consists of numerous Regulations and Acts. Since this thesis focuses on a marine development project, I would however briefly like to give some examples of relevant legislation on this area. The marine environment in the UK is protected under the Food and Environment Protection Act 1985, the Coast Protection Act 1949 and the Harbour Works (EIA) Regulations 1999[91]. However, in 2007, DEFRA has proposed a new Regulation[92] that will replace and amend the above mentioned pieces of legislation (see chapter 4.5.1.7).

3.3 The Town and Country Planning Regulations (EIA) 1999

The Town and Country Planning Regulations of 1999[93] (EIA Regulations) have implemented the provisions of the Directive almost to the letter and covers a wider range of projects than the previous Regulations did. It also encourages an active dialogue between the developer and the relevant authority far more than the previous Regulations.[94] The EIA Regulations apply to two, Annex based, separate lists (Schedule 1-2) of projects containing screening thresholds and criteria not specified in the Directive. The Planning and Compensation Act 1991 enables the Secretary of State to require the EIA of planning projects other than those listed in the Directive and this power was used in the EIA Regulations to include leisure centers and golf courses inter alia. The EIA Regulations further contain provisions for local planning authorities (LPA) to give a formal 'screening opinion' where they are requested to do so by developers.[95] LPAs must also notify developers that EIA is required where a planning application is submitted without an 'environmental statement'. An ES is a developer's report or statement of the findings of the assessment made. The provisions on what are to be included in this report is stated in Schedule 4 of the EIA Regulations. The Regulations permit the developer to appeal to the Secretary of State for a 'screening direction' on whether an EIA is required or not. Another result of the amendments to the original Directive is that a developer may request a formal 'scoping opinion[96] from the LPA, or if the

[91] Statutory Instrument 1999 No. 3445 – The Harbour Works (Environmental Impact Assessment) Regulations 1999
[92] The Marine Works (Environmental Impact Assessment) Regulations 2007
[93] The Town and Country Planning (Environmental Impact Assessment) (England and Wales) 1999 (SI 1999, No. 293)
[94] Carroll, B & Turpin, T, *Environmental Impact Assessment Handbook: A Practical Guide for Planners, Developers and Communities* Thomas Telford 2002, p 7.
[95] Part II Screening, Article 4(2)(b)
[96] Part IV Preparation of environmental statements, Article 10(1)

LPA fails to provide one, a 'scoping direction' from the Secretary of State, regarding the information to be included in an ES.[97] The developer can besides the above-mentioned consultees, also turn to statutory ones such as the Environment Agency, which is required to provide the developer with information, should it be requested.

The 'environmental information', which is the basis for reaching a consent decision, consists of the ES, together with any further information and the representations of consultees and members of the public about the impacts of the development.[98] Another new requirement of the 1999 Regulations is that the reasons for the decisions to grant or to refuse planning permission in cases involving EIA must be stated. [99]
Advice and guidance on the procedure is accordingly available through a number of different ways but can also be found in two documents, presented as Circular 2/99 (DETR 1999a and 2000h). The circular provides clear guidance on the operation of the procedures as well as the detailed indicative criteria and thresholds to be used by LPAs in reaching decisions on whether EIA is required for Schedule 2 (Annex II) projects. The criteria and thresholds can be changed easily and do not have regulatory force.

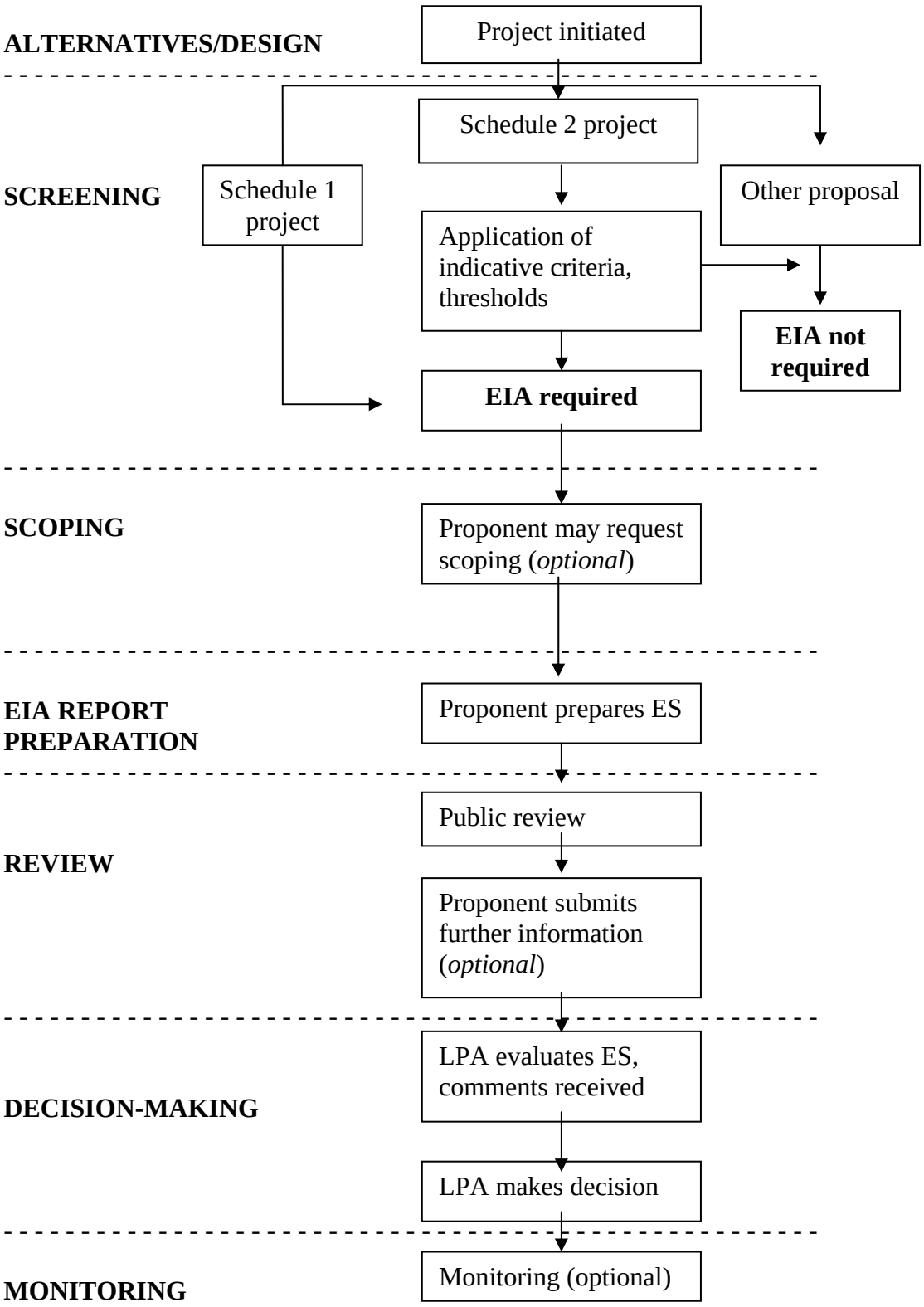
The EIA Regulations provide a right of appeal against an LPA determination that EIA is required and the Secretary of State can call applications in for determination by central government. There is therefore little discretion left to LPAs in determining whether or not the Regulations apply to particular applications. [100]

There are specific types of projects listed in Annex I-II of the EIA Directive that are authorised outside the British planning system, such as those relating to highways and forestry and additional regulations were adopted.[101] In 2006, the new Environmental Impact Assessment (Agriculture, England) Regulations came into force which were deemed necessary since the Town and Country Planning system does not consider any change in the use of land to agricultural use. Thus, some projects were not subject to the assessment process required by the EIA Directive under its original transposition. The Commission brought this point to the attention of the UK authorities in the late 1990s.[102] In 2006, the EIA Regulations were amended[103] and the new Regulations came into force on 15th January 2007 in respect of England only. The changes made mainly involve public participation and the duty for LPAs and the Secretary of State to send notices about applications to persons that are likely to be affected by or interested in the application. An outline of the main steps in the EIA process for planning decisions is shown in Box 1.

---

[97] Wood, C, *Planning and Environmental Protection,* Hart Publishing 2001, p 153.
[98] Article 2 EIA Regulations
[99] Wood, C, *Planning and Environmental Protection,* Hart Publishing 2001, p 154.
[100] Wood, C, *Planning and Environmental Protection,* Hart Publishing 2001, p 154.
[101] Highways (Assessment of Environmental Effects) Regulations 1999 (SI 1999, No. 369) and Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999 (SI 1999, No. 2228).
[102] Explanatory memorandum to the Environmental Impact Assessment (Agriculture, England) 2006 No. 2362.
[103] The Town and Country Planning (Environmental Impact Assessment) (Amendment) Regulations 2006 (SI 2006, No. 3295).

3.3.1 Box 1: Main steps in the EIA process for UK planning decisions[104]



[104] Wood, C, '*Planning and Environmental Protection,*' Hart Publishing 2001, p 155.

3.3.2 Legal basis and coverage

The EIA Regulations provide the legal basis for each of the steps shown in Box 1 as well as time limits specified for each step. The only step in Box 1 not mentioned in the Regulations is the last one, 'monitoring'. There is no third party right of administrative appeal in the British planning system but there is a possibility to access the courts where the EIA requirements have not been properly discharged. In practise, there have only been two or three of such cases each year in the UK. However, they have, despite of the low quantity, proved influential and it is now possible to cite a number of cases in which LPAs have been adjudged the to be at fault in not requiring EIA or in accepting inadequate ESs.[105]

The 1999 Regulations contain descriptions of developments and both indicative criteria and *de minimis* thresholds to be used by LPAs in reaching a judgement about whether EIA is or could be required for Schedule 2 projects.[106] The various projects listed in the EIA Directive are subject to the use of screening criteria, no matter under which national legislation they fall in the Member States. Nearly all types of projects are subject to assessment but the screening criteria and thresholds that apply to a project type and how these are applied by the competent authority are crucial to whether a particular project is to be assessed or not. It is for example not stated in the Directive that social and economic impacts are to be included in the assessment but in Britain, LPAs are free to consider these matters if they choose to. The range of effects adopted in Britain are defined in the EIA Regulations as including 'direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects'.[107] The coverage of projects requiring assessment and planning permission can therefore be described as comprehensive but some discretion relating to the coverage of certain types of environmental impacts remains.[108]

3.3.2.1 Screening

The ECJ's position in *Kraaijeveld* that the EIA Directive in its application is to be interpreted as having a "wide scope and broad purpose" has implications LPAs when they are screening for EIA. The screening procedure regarding Schedule 1 projects, for which EIA is mandatory, is normally free from complications in determining whether a particular project requires EIA or not. Schedule 2 projects however, consists of a longer list of project-types and the question whether an EIA is required depends on the likely significance of its environmental effects. These effects, in turn, will depend on the characteristics of the development, the environmental sensitivity of the location, and the characteristics of the potential impact. Therefore, if a Schedule 2 development is of a large scale

[105] *Twyford Parish Council and others v. Secretary of State for Transport* (1992) 4 JEL 273 & *R. v. North Yorkshire County Council ex parte Brown* [1998] JPL 764.
[106] Wood, C, *Planning and Environmental Protection,* Hart Publishing 2001, p 158.
[107] Schedule 4, Part I, Regulation 4.
[108] Wood, C, *Planning and Environmental Protection,* Hart Publishing 2001, p 158.

that exceeds an exclusive threshold, it is considered to be a potential 'EIA development', *i.e.* one for which EIA may be required.[109] If the development does not meet the indicative criteria and thresholds listed in Annex A of the Circular (DETR, 1999a), EIA is unlikely to be required. LPA officials shall however not assume a project is excluded simply because it is not expressly mentioned in either the Directive or the Regulations. For example, neither the Directive nor the EIA Regulations refer to "housing development". It would however be a mistake to consider that housing development does not fall within the ambit of "urban development projects".[110] In *R v St Edmundsbury Borough Council* of 1999 a decision of the planning authority to grant planning permission was overturned because a decision not to require EIA was taken by an officer who had no formal delegation.[111] All developments in sensitive areas such as national park and nature reserves are potentially subject to EIA and must be screened. LPAs are generally responsible for screening decisions in the first instance and are required to reach and record a 'screening opinion' for all Schedule 2 developments unaccompanied by an ES. For projects within a category of development listed in Schedule 2, a screening opinion has to be made if the project meets or exceeds the thresholds and criteria listed in column 2 of the Table at Schedule 2. The proponent may request a formal opinion of this kind and the LPA may refer to the statutory consultees for advice. It is important to remember that that the thresholds within the indicative guidance are not determinative. Individual projects that fall below these indicative thresholds and criteria may require EIA just as those above them may not.[112] Should the LPA, based on this information, determine that an ES is required, there is provision for the developer to appeal to the Secretary of State for the Environment against this screening decision.[113] The most important screening criteria in deciding whether to request an ES is the nature of the project and its proximity to a sensitive environmental receptor. In case *Regina oao Jones v Mansfield DC*[114] it was held that in general a lesser degree of information is needed at the first stage of deciding whether EIA is required at all than at the second stage where it is necessary to provide the information. Judge Richards commented; "*it is for the authority to judge whether a development would be likely to have significant effects. The authority must make an informed judgment, on the basis of the information available and to any gaps in that information and to any uncertainties that may exist, as to the likelihood of significant effects.*

3.3.2.2 Scoping

As stated in Box 1, scoping is optional and there is no requirement in the UK for the proponent to consult the LPA, prior to submission of the ES or to undertake any form of scoping whatsoever. However, the EIA

[109] Wood, C, *Planning and Environmental Protectio*n, Hart Publishing 2001, p 159.
[110] Note on environmental impact assessment directive for local planning authorities, 2004.
[111] R v St Edmundsbury Borough Council, ex parte Walton [1999 Env LR 879]
[112] Note on environmental impact assessment directive for local planning authorities, 2004.
[113] Wood, C, *Planning and Environmental Protection*, Hart Publishing 2001, p 160.
[114] Regina oao Jones v Mansfield DC (January 20, 2003)

Regulations makes it possible for a developer to request a formal 'scoping opinion' from the LPA. The LPA is then under a statutory requirement to consult the various EIA statutory consultees and to provide an opinion within five weeks. Should it fail to do so, the developer may apply to the Secretary of State for a 'scoping direction' instead. Scoping is about setting out the issues to be considered in the environmental statement, the parameters and the broad approach that is to be taken during the assessment. DETR has consistently advised developers to consult LPAs about the coverage of ESs and has also recommended consultation of statutory consultees and even the general public.[115] It is said that the informal scoping arrangements between the developer/consultant and the LPA are working reasonably well in the UK but that the public involvement in scoping is less satisfactory.[116]

3.3.2.3 The preparation of the Environmental Statement

The statutory minimum content of an ES consists of a description of the development, the mitigation measures, the data necessary to identify and assess the main effects, an outline of the main alternatives considered by the applicant and a non-technical summary of the information.[117] The ES has to address the direct and indirect effect s of the development on a number of factors including the population, flora, fauna, soil, air, water, climatic factors, landscape and archaeology.[118] The ES should also address where alternatives have been considered, *i.e* alternative locations or different ways of executing the project. Also details of any measures proposed by way of mitigation should be included. Further information, describing the environment and the likely significant effects, is to be included to the extent that is reasonably required for the effects to be assessed.[119] There is no prescribed format for an ES, the key issue is that it contains the relevant environmental information specified in Schedule 4 of the EIA Regulations. In the case of *Berkeley v SSETR*[120] the House of Lords commented that an ES must not be a "paper chase". The developer is responsible for the content and the assessment methods of the ES but the EIA Regulations enables him to collect relevant information from the statutory consultees who are under a duty to provide it. It is therefore mandatory for an LPA, when informed that an ES is in preparation, to notify the statutory consultees so that they are ready to provide the developer upon request. So the first indication the public may get that a developer is required to submit an ES with a planning application is if the developer has made a formal request to the LPA for an opinion on the need for EIA. The LPA must in that case give its opinion within three weeks of being requested and place its opinion upon the public

[115] DETR 2000h, Regulation 39.
[116] Wood, C, *Planning and Environmental Protection,* Hart Publishing 2001, p 161.
[117] Schedule 4 EIA Regulations 1999.
[118] Note on environmental impact assessment directive for local planning authorities. April 2004.
[119] Schedule 4, Part II Regulations 1-5.
[120] Berkeley v SSETR (2000) [WLR21/7/2000 p 420].

register.[121] If a developer should disagree with the opinion of the LPA, there is a possibility to appeal to the Secretary of State. There are no formal checks to prevent the release of inadequate EIA reports and checks on content and adequacy are made at the review stage.

3.3.2.4 Review and public participation

There is a requirement for an ES to be made available for consultative and public review. The review made by LPAs is normally made in two stages. The first, is an early evaluation of the ES to see whether more information is needed and the second stage consists of a fuller review once the results of consultation and participation have been received. Government guidance on the review of ESs has been published and provides a framework for reviewing the content of the report and advice on evaluating the treatment of individual environmental effects.[122] Copies of the ES must be available for public inspection and sent to a set of statutory consultees. Apart from the usual statutory consultees, for planning applications, the Countryside Agency, English Nature and, for certain projects, the Environment Agency must be consulted. Consultation of neighbouring local authorities is at the discretion of the LPA while, in accordance with the EIA Directive, adjoining Member States must be notified whenever a project is likely to have significant effects on their environment.[123] The environmental statement must not only be made readily accessible to the public, but available for purchase at a 'reasonable' charge. The LPAs have some discretion in reviewing ESs and studies have shown that they rely on the EIA Regulations in a quarter of cases, on consultations in two fifths of cases and on combinations of both in a quarter of cases. In practice, LPAs appear to request additional information in about two thirds of EIA cases.[124]

3.3.3 Decision-making and monitoring

Before making the final decision, LPAs are required to have regard to the 'environmental information', which is defined in the EIA Regulations as the environmental statement, the various submissions by statutory consultees and the public.[125] It is further mandatory that the LPA, in writing, state that the environmental information has been taken into account in reaching its decision, which later must be published in a local newspaper. Furthermore, the decision, with its attached conditions and the reasons for it, whether the application is approved or refused, must be published in the planning register that every LPA is required to maintain. If permission is granted, the main mitigation measures must be listed. Guidance on decision-making involving EIA has been issued to LPAs in the United Kingdom and consists

[121] Sheate, W *Environmental Impact Assessment: Law & Policy Making an impact II* Cameron May Ltd 1996, p 84.
[122] Wood, C, *Planning and Environmental Protection,* Hart Publishing 2001, p 162.
[123] Wood, C, *Planning and Environmental Protection,* Hart Publishing 2001, p 166.
[124] Wood, C, *Planning and Environmental Protection,* Hart Publishing 2001, p 162.
[125] Part I, Regulation 2.

of two stages. Firstly, LPAs must balance the relative merits of different environmental topics. Secondly, LPAs must draw together environmental, economic and social factors in reaching their decisions.[126]

The 1999 Regulations are similar to the EIA Directive when it comes to the question of monitoring since none of the instruments mentions it. However, in practise, the monitoring of implemented project impacts does occur and it is customary for LPAs to impose planning conditions on permissions and for compliance with these to be checked if deemed necessary. Generally, this is the case when complaints are received. Where the developer is shown to have breached any of the conditions on the planning approval, enforcement action can be taken. It should nevertheless be pointed out that very little monitoring of project impacts on the environment actually occurs in the UK. It has been concluded that the monitoring of effects in the UK indeed has room for improvement, despite of the procedures optional character. How can potential negative impacts on the environment then be mitigated? The EIA Regulations require that the ES contains 'a description of the measures envisaged in order to avoid, reduce and if possible, remedy significant adverse effects'.[127] The DETR 1999a Circular also handles the subject and expect LPAs to impose conditions designed to mitigate impacts, or to require a legal planning agreement for this purpose, when granting planning permission.

3.3.4 The effect of ECJ judgements in the cases of Ex parte Barker and Crystal Palace/White City

The European Court of Justice recently handed down judgements which impact the way the British LPAs deal with applications for outline planning permissions that require EIA. The ECJ has ruled in cases C-290/03 *R v London Borough of Bromley, ex parte Barker* & C-508/03 *Commission v UK* that outline planning permission (OPP) and the decision that subsequently gives approval of reserved matters must now be considered to constitute a multi-stage development consent within the meaning of Article 1.2 of the EIA Directive. Article 1.2 defines development consent as the "decision of the competent authority or authorities which entitled the developer to proceed with the project".

The *Barker* case concerned an OPP to develop a leisure complex in Crystal Palace Park granted by the London Borough of Bromley. At the time of the grant of OPP Bromley determined that an EIA was not required and approval was granted. Ms Barker brought judicial review proceedings challenging that approval and the legal advice on which it was based. The House of Lords sought a preliminary ruling from the ECJ on a number of questions relating to EIA and OPP. The *Barker* proceedings have not yet been finally determined by the House of Lords.

[126] Wood, C, *Planning and Environmental Protection*, Hart Publishing 2001, p 164.
[127] Schedule 4, Part II.

Commission v UK involved proceedings brought by the EC Commission against the UK arising out of two EIA-related matters: (i) the *Barker* case (ii) the grant of OPP and subsequently reserved matters approval by the London Borough of Hammersmith & Fulham in 1996 for the development of retail and leisure facilities at White City. The two cases were considered together by the ECJ as they both related to EIA and OPPs.

The ECJ ruled that in such cases the UK has failed to correctly transpose Council Directive 85/337/EEC, as amended, because it allows for EIA only before the grant of outline planning permission and precludes such action at the later stage when reserved matters are approved. The ECJ observed that a developer cannot begin to implement a project granted OPP until reserved matters have been approved by the LPA. It has therefore ruled that the two decisions to grant OPP and approve reserved matters constitute multi-stage development consent within the meaning of Article 1(2) of the Directive.

It was after these rulings clear that the UK had to amend their EIA Regulations since they at present do not provide for EIA at the reserved matters stage in any circumstance. Such an amendment is yet to be made.

4 Analysis

The aim of this thesis is to examine how the EIA Directive has been implemented and applied in British law. So far, I have described environmental impact assessment in the European Community as well as in the United Kingdom and I will now try to analyse how successful the implementation of the EIA Directive is in the United Kingdom. In doing this, I have chosen to employ a set of evaluation criteria mainly based on Box 1 in Chapter 3 of this thesis. I will focus mainly on the three key areas of the process, namely Screening, Scoping and the EIS Review, including public participation and monitoring. Furthermore, I have used the European Commission's five-year report to the on the application and effectiveness of the EIA Directive of June 2003. The Commission is obliged, in accordance with Article 2 of Directive 97/11/EC and Article 11 (1-2) EIA Directive to conclude a report of this nature every five years. The report is based on the exchange of information on experience gained in applying the Directive and mainly through a questionnaire survey of Member States by DG Environment. This was the third review report on the Directive, the first one was carried out in 1993 and the second in 1997. I will also use Minesto and their "Deep Green" development project as a practical example in investigating how the EIA process is applied in England and Wales. I will however initially explain how an implementation study looks in most cases.

4.1 Implementation of EC law

The EC Treaty provides that directives are binding, as to the result to be achieved, but gives discretion to the Member States regarding the choice of form and methods.[128] A directive's provisions thus must be transposed into national legislation and Member States are to ensure that they are complied with. The effectiveness of EU environmental policy and law is therefore largely determined by its implementation at national, regional and local levels within the Member States. However, implementation in the terms of application and enforcement has turned out to be a major problem in the field of environmental law. A growing number of infringements procedures as well as an increasing numbers of complaints concerning non-compliance with EC law illustrate this. The need for improved implementation is recognised as a key priority of both the Fifth and Sixth Environmental Action Programmes.[129] In 1997, the European Parliament in a Resolution required the Commission to produce and publicise annual reports on progress in adopting and implementing EC environmental legislation. In 2001, the European Parliament and the Council adopted a recommendation providing for minimum criteria for environmental inspections in the

[128] Article 249 (3) EC Treaty.
[129] http://www.europarl.europa.eu/comparl/envi/implementation/default_en.htm

Member States in order to ensure greater compliance and a more uniform application and implementation of Community environmental legislation.[130]

4.1.1 The European Commission

The European Commission is often described as "guardian of the Treaty" that formally originates all legislative measures and is responsible for the implementation of all decisions agreed by the Council of Ministers. In order to check the correct implementation, the Commission acts at different stages. First, it checks that Member States transpose the Directives in their national legal systems within the set deadlines. Secondly, it checks, on one hand, the conformity of the MS's legislation with the Directives which the legislation is intended to transpose and then, on the other hand, the correct application of this legislation on the ground, as well as the correctness of administrative practises in each Member State.[131] To asses the correct application, the Commission bases its deliberations on reports from Member States regarding the application of the Directives, on complaints that might reveal breaches of EC law as well as facts raised through written questions and petitions brought to the Commission's attention by the European Parliament.

4.1.2 The European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL)[132]

The European Union Network for the Implementation and Enforcement of Environmental law, or the IMPEL Network, is an informal network of the environmental authorities of the EU Member States, acceding and candidate countries as well as Norway. The European Commission is also a member of IMPEL and shares the chairmanship of its plenary meetings. The Network's objective is to create the necessary impetus in the EC to make progress in ensuring a more effective application of environmental legislation. IMPEL was set up in 1992 and the expertise and experience of its participants enables the network to work on certain of the technical and regulatory aspects of EC environmental law. In accordance with the Sixth Environment Action Programme, the core of the IMPEL activities concerns the capacity building, minimum criteria for environmental inspections, exchange of information and experiences on implementation, enforcement collaboration on existing European environmental legislation and development on the coherence and practicality of current EC legislation.

[130] 2001/331/EC - Recommendation of the European Parliament and of the Council of 4 April 2001 providing for minimum criteria for environmental inspections in the Member States.
[131] Report from the Commission to the European Parliament and the Council: *On the application and effectiveness of the EIA Directive – How successful are the Member States in implementing the EIA Directive* 2003 p 17.
[132] http://ec.europa.eu/environment/impel/htm

When IMPEL projects are completed, a report is often produced and submitted to the IMPEL Meeting for adoption and publication. Since 1992, IMPEL has published almost fifty reports and in 1998, it published a report on the interrelationship between several directives including the EIA Directive.[133] This report also emphasized on the implementation of the EIA Directive amongst others. I have chosen to use this report in examining how well the UK had implemented the EIA Directive before the adoption of the amending Directive 97/11/EC since I believe it is good to look at the implementations before, as well as after the amendments of the 1997 Directive.

4.2 Implementation of Directive 85/337/EEC in the United Kingdom

The Commission has applied to the ECJ on numerous occasions for rulings on the national transposition of environmental directives including several cases against the United Kingdom.[134]

4.2.1 The IMPEL Report

In the IMPEL report of 1998, the Member States were asked different questions regarding the EIA procedure and what approaches they used in their national legislation implementing the Directive. The first question concerned what kind of approaches that were used for implementing the projects listed in Annex II of the Directive? Out of the alternatives, namely general criteria, case-by-case examining and thresholds, the United Kingdom responded that they use all three approaches. As *general criteria* they listed:

- more than local importance; or
- particularly sensitive location; or
- particularly complex environmental effects

The indicative *thresholds* are specified for each of the following categories:

- agriculture
- extractive industry
- surface storage
- wind generators
- manufacturing industry
- chemical industry
- industrial estate development projects
- urban development projects

[133] IMPEL Network - "Interrelationship between IPPC, EIA, SEVESO Directives and EMAS Regulation" Final Report, December 1998.
[134] For example, Case C-337/89 *Commission v United Kingdom* [1992] ECR I-6103, Case C-340/96 *Commission v United Kingdom* [1999] ECR I-2023, Case C-508/03 *Commission v United Kingdom* [2006] ECR I-0000 and Case C-98/04 *Commission v United Kingdom* [2006] ECR I-4003.

- local roads
- construction of harbour of marina
- airports
- long distance aqueducts
- motorway service areas
- coast protection works
- other infrastructure projects
- waste disposal

When asked how many EIA's carried out each year the answer was approximately three hundred. When asked whether screening, scoping and/or monitoring were part of the EIA procedures, the UK responded that during the screening phase the competent authority must decide whether EA is necessary: the local authority has three weeks to decide and the Secretary of State the same period or as long as the project requires. Regarding the scoping phase it was held that developers are encouraged to consult the relevant competent authority about the scope of the Environmental Statement for which there is no time limit. Monitoring was answered not to be a part of the authorisation procedure but there may be planning conditions attached to the permission which are legally enforceable requirements. The IMPEL report also inquired which authorities that are consulted during the EIA procedure. The UK responded that this varies according to the project type but the possible authorities are: Environment Agency, English Nature, Countryside Commission, English Heritage, Health and Safety Executive, British Waterways Board, local amenity or conservation societies, Royal Society for the Protection of Birds etc.

A planning permission is always needed in the UK when it comes to new developments and planning permissions for projects which are subject to EIA has a sixteen week target but EIA projects often take longer time. When asked what possible difficulties may arise during the implementation of EIA procedures in accordance with the amending Directive 97/11/EC, the UK responded that the fact that the competent authority must make and publicise a decision on whether EA is required in every case could prove difficult. The UK also held that competent authorities may never know about some small developments or changes to them.

4.2.2 The Commission Report

The European Commission's five-year report of 2003 is similar to the IMPEL report since it is based on information provided by the Member States. It is however more recent and should give a better view of the implementation regarding Directive 97/11/EC. The EIA Directive has generated a large number of complaints to the Commission and the report provide details of these complaints and other procedures, mainly through the use of tables and figures. The tables set out statistical information for the five-year period 1997-2001 on infringement procedures relating to the application of Community law on EIA. In order to fully comprehend the report, I will briefly explain the key terms used throughout the report.

4.2.2.1 Letter of formal notice

The letter of formal notice is the first stage of an infringement procedure. When the Commission envisages that a Member State has failed to fulfil an obligation under the EC Treaty, it delivers a letter of formal notice giving the MS concerned the opportunity to comment.

4.2.2.2 Reasoned Opinion

The reasoned opinion is issued when the Commission is confident it has identified an infringement. If the Commission considers that a MS has failed to fulfil an obligation under the EC Treaty, it shall deliver a reasoned opinion on the matter after giving the MS concerned the opportunity to comment.[135]

4.2.2.3 Saisine

Saisine is the stage of application to the ECJ, when the infringement procedure becomes a judicial procedure. If the MS concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the ECJ.[136]

4.2.2.4 Own initiative case

'Own initiative' cases are cases opened directly by the Commission. They are mainly commenced on the basis of Written Questions and Petitions of the European Parliament.

4.2.3 Non-conformity and bad application - Directive 85/337/EEC and 97/11/EC

Regarding the non-conformity with the EIA Directive, the report focuses on the time period 1997-2001 and shows that the United Kingdom have received a total of two reasoned opinions from the Commission in 1998 and 2001.[137] The report also contains a Table on the 'Bad Application' of the EIA Directive and during the same period of time, the UK received one reasoned opinion on this matter in 2001.

Regarding 'Own initiative' cases, the UK also had two, one in 1999 and one in 2000. This can be compared with Spain which had forty-three own initiative cases. The United Kingdom had a total of forty complaints during these five years which compared to other Member States is somewhat average with the Netherlands' five and Spain's two hundred fifteen. It need

[135] Article 226 (1) EC Treaty.
[136] Article 226 (2) EC Treaty.
[137] Report from the Commission to the European Parliament and the Council: *On the application and effectiveness of the EIA Directive – How successful are the Member States in implementing the EIA Directive* 2006 p 18 Table 1.

to be pointed out however, that only a very small proportion of complaints and 'own initiative' cases develop into infringement procedures. Between 1997 and 2001, the Commission opened nine hundred seventy seven complaints (including 'own initiative' cases´) on conformity and the wrong application of the EIA Directive. During this period, only thirty six reasoned opinions were sent to the Member States. Article 4(2) EIA Directive is the provision which is the most frequently concerned in infringement procedures and in particular as regards the screening, the application of the thresholds and the listing of projects in Annex II. Under both the old and the new version of the Directive, the assessment of the characteristics of Annex II projects is often not correctly carried out (wrong application).[138]

4.2.4 Transposition of Directive 97/11/EC

According to the Commissions five-year report, the United Kingdom has transposed the amending Directive in a correct way. It should however be stressed that the transposition of the Directive into the legal system of a Member State does not necessarily mean that the transposition is in complete compliance with the Directive.[139] The questionnaire which served as the basis for the report were only distributed at national level and this makes it impossible to state whether the amending Directive has been fully transposed at sub-national level. It should also be noted that the UK's regulation for the EIA of 'uncultivated land or semi-natural areas for intensive agricultural purposes' missed the 1999 deadline for transposition by three years.

4.2.4.1 Screening

Regarding the screening criteria, the UK have, on the advice of the Commission, transposed Annex III directly into their national legislation.[140] Furthermore, Annex III introduced, as a mandatory screening criterion, 'the environmental sensitivity of geographical areas likely to be affected by projects' and lists matters that need to be considered in the screening process including SPA's. The United Kingdom have expanded on the concept of 'sensitive area' referred to in Annex III and incorporated it into their national legislation. In the UK, the implementing Regulations include a definition of sensitive areas which has nine headings such as Natura 2000 sites, SSSI's, Areas of Outstanding Natural Beauty etc. The purpose is to require all proposed development in or partly in a sensitive area to be screened, even it is below the exclusion threshold.[141]

Regarding the area of consultation, only three Member States were reported to consult the public before arriving at a screening decision on Annex II projects. The UK was not one of these and stated that it was regarded as a purely technical decision.

[138] Report from the Commission to the European Parliament and the Council 2006 p 25.
[139] Report from the Commission to the European Parliament and the Council 2006 p 30.
[140] Report from the Commission to the European Parliament and the Council 2006 p 40.
[141] Report from the Commission to the European Parliament and the Council 2006 p 48.

Regarding the number of projects, the UK is one of the MS where there is a significant increase since the adoption of the amending Directive. Before 1999, the amount of EIA's were estimated around three hundred per year and after 1999 around five hundred EIA's. It is despite of this increase, interesting to compare with Sweden which despite of its size has almost four thousand EIA's per year.

4.2.4.2 Scoping

As mentioned above, the purpose of scoping is to focus the environmental assessment on the main or significant potential impacts of a project. Thus, the scoping process requires a detailed characterisation of the project and its receiving environment in order to identify all potential impacts and from that to ascertain which of those impacts that are likely to be significant. Impact identification is complex and it is often necessary for the developer to consult with the competent authority, the general public and other agencies with environmental responsibilities on the scope of the assessment. Article 5(2) of the EIA Directive was introduced by Directive 97/11/EC and provides for a formalised scoping procedure, mainly to establish an early contact and co-operation between the developer and the competent authority. When it comes to the methodologies for the interaction of impacts, the UK does provide some guidance, depending on the developer/project. Consultation with the public during the scoping procedure is not a legally required part in the UK. It is up to the competent authority to decide whether or not the public should be consulted on the scope.

4.2.4.3 Review

There is no requirement under the original EIA Directive for a formal review of the adequacy of the environmental information provided by the developer to the competent authority. However, the amending Directive introduced new mandatory minimum information requirements that establish an implicit need for review as a project may not be authorised if the set out in Article 5(3) is not complete. Among these new minimum information requirements is the introduction into the EIA Directive by 97/11/EC for a consideration of information on the alternatives that have been studied by the developer. In the UK, it is ultimately for the competent authority to decide the best means of ensuring that the environmental information is adequate and fit for purpose. The determination of the development application is suspended in anticipation of the environmental information or ES.[142]

The Commission's report also inquired whether the Member States carries out research on the quality and sufficiency of the ES. The UK reported that this had been carried out once in 1995 and responded that their research showed that, at that time, the environmental information was

[142] Report from the Commission to the European Parliament and the Council 2006 p 58.

sometimes inadequate for the purposes of the planning authorities. As a result, best practise guides were published.

4.2.4.4 Decision making and delays

The Commission's survey inquired Member States to explain how delays between environmental assessment and the consent for the project are dealt with and how delays between consent and construction or operation are handled. Such delays could have important implications for the outcome of the EIA process since the receiving environment may change and the environmental information may no longer be relevant. The UK responded that the competent authority can request further information at any point until a consent decision is taken. It is therefore up to the competent authority to ensure that prior to consent all likely significant effects are considered subject to current knowledge and methods of assessment. Once development consent is granted the developer is able to go ahead with the construction phase. At that stage the EIA procedure can not be re-opened. However, if the previously unknown effects were so significant that they would have major and irreversible impact on a protected site or species, then arguably would it would be open to the competent authority to consider whether the consent would have to be revoked, subject to the provisions of national legislation.[143]

4.2.4.5 Public participation

Consultation with the public can as mentioned above take place in different stages of the EIA process. Some Member States holds public participation exercises during both the screening and scoping stages, while in other only during the scoping stage. In all cases Member States are required to ensure that the public are consulted on the information pursuant to Article 5 (EIS) of the EIA Directive. The Directive further requires that 'the public', which is not defined in the Directive, shall be notified and the 'public concerned' shall be consulted before development consent is granted. In the UK, the public concerned is not defined and notice is given at a local stage.

4.2.5 Environmental Statement submissions in the UK

Over the period July 1988 to April 1998 a total of 3671 ESs are known to have been published in the UK.[144] The implementation of the EIA Directive have clearly led to a significant increase in ES submissions in the UK since before the Directive, approximately twenty ESs were prepared on an annual basis.

[143] Report from the Commission to the European Parliament and the Council 2006 p 63.
[144] Wood, G, *Ten years on: An Empirical Analysis of UK Environmental Statement Submissions since the Implementation of Directive 85/337/EEC* p 724.

4.3 A practical examination of EIA in England & Wales

I will in this chapter try to outline the basic steps of a potential EIA process in the UK by using the Swedish company, Minesto and their tidal energy device, Deep Green, as a practical example of a development project. By illustrating how the procedure actually works in practise, I hope that this will provide the reader with a better understanding of the very complex procedure that EIA is. Minesto is interesting since the "Deep Green" project has a unique character which have never before undergone an EIA evaluation. Even though there are many other marine energy solutions such as wave energy extraction or marine wind farms, there is no real comparison to the Deep Green project. I did however find a guidance document on consenting arrangements in England and Wales for a wave and tidal stream energy devices[145] that have provided me with relevant information. The industry of "marine renewables" is growing large and the British Government are determined to maintain their position as global leader and pioneer and have allocated several millions of pounds to different wave and tidal stream energy projects. Decisions on site leases and grant funding are entirely separate from decisions on individual consent applications submitted to the regulatory bodies. I will in the following chapters focus exclusively on the consent application procedure.

I should point out however, that an EIA process indeed is very complex and with a development of this magnitude it would probably take several months or even years for experienced EIA-experts and lawyers to complete the process, hence the lack of detail. I have alongside with the guidance document of 2005 used the EIA Regulations of 1999 and other related legislation as well as the a guidance document from the Department for Communities and Local Government's on EIA of 2000.[146]

4.3.1 Minesto

Minesto is a company situated in Gothenburg, Sweden that initially started as a project at the Chalmers School of Entrepreneurship (CSE). Together with Saab AB, Minesto is developing a dynamic underwater power plant for the renewable energy industry. The power plant, Deep Green, draws energy from tidal streams and currents and consists of a wing, turbine, generator and a cable that is mounted to the bottom of the ocean. The generated power is transferred through a landside connection to the National Grid via electrical cables. According to Minesto, the unique design enables Deep Green to use the water currents ten times more efficient than competing

[145] Department of Trade and Industry, "Planning and Consents for Marine Renewables – Guidance on Consenting Arrangements in England and Wales for a pre-commercial demonstration phase for wave and tidal stream energy devices (marine renewables)", November 2005.

[146] Department for Communities and Local Government, ""Environmental impact assessment: A guide to procedures". January 2000

solutions and makes it possible even to compete with traditional energy sources such as nuclear and coal plants. Deep Green is also cutting edge technology since it can be optimised in slow currents, a major problem for other underwater power stations. Deep Green operates solely underneath the surface and has the United Kingdom as the primal target market due to the strong tides of that area. A worldwide patent has been applied for and due to competition, many details regarding Deep Green is secrecy classified. I will however pre-assume that Deep Green, as a development project is to be located in the South West region of the UK, a region with a high level of wave, hydro, wind and solar energy and supposedly the best climate in the UK for growing energy crops. The Government also views this a beneficial region and prefers to have a number of projects in one location for efficiency reasons. For example, developers will devote less time and fewer resources to grid connections and stakeholders will be asked to consider fewer sites. The South West has 150 businesses working in renewable energy and aims to generate up to 15% of the region's power from renewable sources by 2010.[147]

4.3.1.1 Consenting requirements

Before a developer can deploy marine energy devices in the sea it must get the agreement of the Crown Estate to a site licence or lease and obtain the relevant development consents/licences.[148] The principle consents/licences are a consent from the DTI under the Electricity Act 1989 if the generating station has a capacity above 1MW and in all cases under the Food and Environmental Protection Act 1985 and the Coastal Protection Act 1949 from DEFRA. Consent under the Town and Country Planning Act 1990 either from DTI or the relevant local authority will also be required for the associated onshore works. Separate approvals as regards the laying of electricity export cables may be required from Port Authorities and the Environment Agency.[149]

4.3.1.2 Location of development

Minesto will make the choice of site for the Deep Green project. In doing this, Minesto should ensure that they have sufficient knowledge and understanding of the local environment, its sensitivities and potential risks. Early consultation with, inter alia, Maritime and Coastguard Agency (MCA), Trinity House, Ministry of Defence (MOD), English Nature, Countryside Council for Wales and Joint Nature Conservation Committee as appropriate is encouraged.[150] Particular importance lies with resolving any issues regarding navigational safety. There are no geographical restrictions within the UK on where developers are able to apply for a site lease or licence from The Crown Estate.

[147] http://www.regensw.co.uk
[148] DTI, "Planning and Consents for Marine Renewables" p 5
[149] DTI, "Planning and Consents for Marine Renewables" p 7
[150] DTI, "Planning and Consents for Marine Renewables" p 7

4.3.1.3 Obtaining a ruling on the need for EIA

The first step of the EIA-procedure for Minesto is to investigate whether an EIA is necessary to begin with. Does this type of project fall under Schedule 1 (mandatory EIA) or Schedule 2 (EIA only if the particular project is judged likely to give rise to significant environmental effects by virtue of factors such as its nature, size or location) of the EIA Regulations? In other words, is Minesto's proposed development to be regarded as an EIA development? According to Regulations 4(2-3) of the EIA Regulations, there are two different ways to establish this. The relevant local planning authority can adopt a screening opinion to the effect that the development is EIA development or the Secretary of State can through a screening direction determine whether Deep Green is an EIA development. Minesto can in accordance with Paragraph 5 request the LPA to adopt a screening opinion and this request shall be accompanied by;

(a) a plan sufficient to identify the land;
(b) a brief description of the nature and purpose of the development and of its possible effects on the environment; and
(c) such other information or representations as the person making the request may wish to provide or make.

Should the LPA upon receiving this request consider that they have not been provided with sufficient information to adopt an opinion, they shall in writing notify the developer of the points on which they require additional information.[151] Should the LPA fail to adopt a screening opinion within the relevant period[152] Minesto can request the Secretary of State to make a screening direction.[153] When over-looking the different project types in Schedule 1, it is my own humble opinion that Deep Green does not meet the criteria and Schedule 2 is therefore where the relevant provision can be found. As mentioned before, the EIA Regulations applies a system of thresholds and criteria and should the development not meet or exceed these, an EIA is normally not required. Should the location of the development be deemed to be in, or partly in a sensitive area, (see chapter 2.3) an EIA may still be required. It should also be pointed out that the Secretary of State may exercise his power under the EIA Regulations to direct that a particular type of Schedule 2 project require EIA even if it is not to be located in a sensitive area and does not meet or exceed the applicable threshold or criterion. I will however presuppose that Deep Green will not be located in a sensitive area and neither will the Secretary of State intervene. The next step is then to look at Schedule 2 which is made up by two columns; Column 1 is the description of development and Column 2 states the thresholds and criteria. Developments that meet or exceed the applicable threshold are considered on a case-by-case basis and for the purpose of determining whether EIA is necessary, the selection criteria in Schedule 3 must be taken into account. These criteria fall into three broad headings:

[151] Regulation 5(3) EIA Regulations 1999.
[152] Three weeks. Regulation 5(4) EIA Regulations 1999.
[153] Regulation 5(6) EIA Regulations 1999.

1. *Characteristics of the development;*
2. *Location of the development;*
3. *Characteristics of the potential environmental impact.*

There is no general definition of "significant" impacts or effects and one has to regard general guidance documents or previous rulings or decisions from LPAs or the Secretary of State. However, one of these guidance documents, DETR Circular 2/99 (Welsh Office Circular 11/99) suggests that there are three main criteria for determining what constitutes "significant";

1. *Major developments which are of more than local importance;*
2. *Developments which are proposed for particularly environmentally sensitive or vulnerable locations;*
3. *Developments with unusually complex and potentially hazardous environmental effects.*

Minesto's development should fall under paragraph 3(h) of the EIA Regulations; *Energy industry – installations for hydroelectric energy production*. The applicable threshold is that the installation is designed to produce more than 0,5 megawatts and Minesto is calculating to generate at least 1,5 megawatts per year so the threshold is exceeded and an EIA is most likely to be undertaken. Where there is a possibility that a proposed development will require EIA, developers are in the UK advised to consult the relevant planning authority well in advance of a planning application. It is for the developers themselves to decide that their project falls within the scope of the EIA Regulations. As mentioned in Chapter 3.3, the developer can also apply to the planning authority for a screening opinion on whether EIA is needed or not provided that a basic minimum of information about the proposal are given to the LPA. The developer may also, when requesting a screening opinion, simultaneously request an opinion on what should be included in the environmental statement. The LPA then have three weeks to give its opinion unless the developer should agree to a longer period of time. The opinion should further be a written statement giving clear and precise reasons for it and should also be made available for public inspection. Should Minesto be dissatisfied with the opinion, there is a possibility to refer the matter to the Secretary of State.

4.3.1.4 Scoping

Minesto is responsible for preparing an environmental statement which must be submitted along with the application for planning permission. It is custom for a developer at this stage to engage consultants for some or all of the work since it is rather complex task. The preparation of the ES should be a collaborative process involving discussions with the LPA, statutory consultees and possibly other bodies as well. There is no prescribed form of the ES except the fact that the requirements of the EIA Regulations have to be met. Should the developer be uncertain of what to include in the ES he may, in accordance with the EIA Regulations[154], ask the LPA for a scoping opinion (see Chapter 3.3) which also must be kept available for public

[154] Regulation 10 EIA Regulations 1999.

inspection for two years. Before adopting a scoping opinion, the LPA shall take into account;[155]

(a) the specific characteristics of the particular development;
(b) the specific characteristics of development of the type concerned; and
(c) the environmental features likely to be affected by the development.

Should the LPA fail to give its scoping opinion within five weeks, (or any agreed extension) Minesto may apply to the Secretary of State for a scoping direction.[156] Projects will normally only be required to provide levels of data for EIA and Habitats Regulations, as applicable, that are proportionate to the perceived risk and scale of adverse impacts. Where potentially greater impacts are identified, assessment requirements will be more rigorous, and any mitigation measures and monitoring requirements will be more onerous.[157]

4.3.1.5 Preliminary consultations

In order for the EIA process to be successful, there is a need for a full and early consultation by the developer with bodies which have an interest in the likely environmental effects of the development proposal. To not have addressed vital issues at an early stage could lead to disastrous economic delays and redesigns for the developer. It is therefore ideal to start the EIA at the stage of site selection and process selection so that the environmental merits of practicable alternatives can be properly considered. Even though Minesto is not under any formal obligation to consult about the proposal before submitting the planning application, there are good practical reasons for doing so. The relevant authorities often possess local and specialised information about the development site and may be able to give preliminary advice on areas of concern for the developer. Should the ES be submitted after the planning application the developer should publish his name and adress and that he is the applicant for planning permission and the name and address of the relevant LPA in a local newspaper circulating in the locality in which the land is situated. The location and the nature of the proposed development as well as the date of the planning application also needs to be stated.[158] There is also a possibility for Minesto to require that the information provided on the preliminary stage should be treated in confidence by the LPA and any other consultees.

4.3.1.6 Environmental Statement

As mentioned above, Minesto and the relevant authorities should discuss the scope of the ES before its preparation has even begun. The formal requirements as to the content are set out in Schedule 4 of the EIA Regulations but the comprehensive nature of these provisions should not be taken to imply that all ES's should cover every conceivable aspect of a

[155] Regulation 10(6) EIA Regulations 1999.
[156] Regulation 10(7) EIA Regulations 1999.
[157] DTI, "Planning and Consents for Marine Renewables" p 8
[158] Regulations 14(1-2) EIA Regulations 1999.

project's potential environmental effects at the same level of detail. They should instead be tailored to the nature of the project and its likely effects. Examples of the content that need to be included in the ES are:[159]

- *Description of the development, including in particular a description of the physical characteristics of the whole development and the land use requirements during the construction and operational phases;*
- *a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used;*
- *an estimate, by type and quantity, of expected residues and emissions resulting from the operation of the proposed development;*
- *an outline of the main alternatives studied by the applicant*
- *a description of the aspects of the environment likely to be significantly affected by the development including fauna, flora, soil, water, air, climatic factors, material assets etc;*
- *a description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment;*
- *a non-technical summary of the information provided;*
- *an indication of any difficulties encountered by the applicant in compiling the required information.*

Even though the ES should entail a full factual description of the Deep Green-project, the emphasis of Schedule 4 is on the main or significant effects to which a project is likely to give rise. Subsequently, in some cases only a few of the aspects set out in the checklist will be deemed significant. Other issues of little or no significance should only briefly be touched, to at least indicate that their possible relevance have been considered. Minesto are also required to include an outline of the main alternative approaches to the proposed development in the ES.[160] It is today regarded as good practise to include alternatives and it might even be economically beneficial to have researched this should the planning application be denied. Should Minesto have required a scoping opinion adopted by the LPA, they are nevertheless responsible for the content of the submitted ES. Minesto should at an early stage consider whether an assessment of environmental effects may be required under another EC Directive, such as the above mentioned Habitats and Wild Birds Directives. Unnecessary time and effort could be saved if they identify and co-ordinate the different possible assessments required.

4.3.1.7 Statutory and other consultees

The Regulations give a particular role in EIA to those public bodies with statutory environmental responsibilities that must be consulted by the LPA before a Schedule 2 planning application is determined. Should the LPA or the Secretary of State rule that an EIA is required, it is for them to notify those bodies that act as statutory consultees for the particular project. The effects of this notification is to put those bodies under an obligation to provide the developer (on request) with any information in their possession

[159] Schedule 4, Part I, Regulations 1-7 EIA Regulations 1999.
[160] Schedule 4, Part I, Regulation 2 EIA Regulations 1999.

which is likely to be relevant to the preparation of the ES. It should be pointed out however, that this obligation only relates to the information that these bodies already possess, they are not required to undertake research on behalf of the developer and they may make a reasonable charge for the information requested. It could be wise of Minesto to also consider whether to consult the general public as well as other non-statutory bodies concerned with environmental issues during the ES preparation since they might have particular knowledge and expertise to offer. This will also give Minesto an early indication of the issues that are likely to be important at the formal application stage where the proposal goes to public inquiry.

4.3.1.8 Techniques of assessment

The different options of assessment techniques are plenty and extensive literature is available on how to assess the effects on the environment of particular processes and activities. The chosen forms of techniques used, and the degree of detail in which any particular subject is treated in the ES, will depend on the character of the proposal, the environment which it is likely to affect and the information available. The LPA and statutory consultees may be able to advise Minesto on sources of specialist information and original scientific research will normally not be necessary. Environmental statements will often need to recognise that there is some uncertainty attached to the prediction of environmental effects.

4.3.1.9 Submission of the environmental statement and handling by the planning authority

In order for the planning application to be handled as quickly as possible, Minesto should submit their ES at the same time as the final application is made. The information provided in the ES will have an important bearing on whether matters may be reserved in an outline permission; it will then be important to ensure that the development does not take place in a form which would lead to significantly different effects from those considered at the planning application stage. Besides the LPA, Minesto need to submit two further copies for onward transmission by the LPA to the Secretary of State.[161] Minesto is also required to provide the LPA with sufficient copies of the ES to enable one to be sent to the statutory consultees. When the ES is finally submitted along with the planning application, the LPA will arrange for a notice to be published in a local newspaper and displayed at or near the site of the proposed development. The planning authority must also notify the statutory consultees of the application and invite them to comment on the ES. Consultees must be allowed at least fourteen days from receipt of the statement in which to comment before a decision is taken. Should the LPA consider the environmental information in the ES to be insufficient, they can require further information. Should the ES however be deemed sufficient, the LPA will then have sixteen weeks from the date of receipt of the ES to determine decision for the planning application (unless

[161] Regulation 11 of the amended EIA Regulations 2006.

the developer agrees to a longer period). In determining the application, the LPA is required to have regard to the ES, as well as to other material considerations. The LPA may refuse permission or grant it with or without conditions. However, the LPA cannot take the view that the planning application is invalid because it considers that an inadequate ES has been submitted. Should Minesto fail to provide further information if required to do so, the application can be determined only by refusal.
Furthermore, should a consent be given, Minesto needs to lease the area of land intended for the project from the Crown Estate who own the sea bed out to the 12 nautical mile territorial limit.

4.3.1.10 Related legislation

The Electricity Works Regulations 2000[162] apply to application for consent to construct, extend or operate a generating station in England and Wales and is applied together with the Electricity Act of 1989. The Regulation is very similar to the EIA Regulations 1999 and is made up by two schedules that define those developments for which an EIA is required. Schedule 1 calls for mandatory EIA while the requirement under Schedule 2 of the Electricity Regulations is to be determined on a case-by-case basis. Schedule 2 also defines "sensitive areas" which is a key consideration when dealing with electricity works. Application for consent has to be made to the Secretary of State who is prohibited to grant consent for an EIA development without taking into account an ES together with any associated environmental information.[163] It is however my understanding that since Minesto is not de facto constructing a generating station but merely connecting to one, the Electricity Works Regulations does not apply.[164]

It should also be pointed out that if an EIA is deemed not necessary under the Electricity Works Regulations, it may still be subject to the EIA Regulations 1999 for which EIA may be required by the relevant LPA.

DEFRA has recently published a consultation document entitled The Marine Works (Environmental Impact Assessment) Regulations 2007. This proposed regulation will transpose the EIA Directive, as last amended by the Public Participation Directive (2003/35/EC), to provide a statutory framework for carrying out EIAs where required, and for public participation as part of the assessment of the of the environmental impact on the marine environment. The aim of the Marine Works Regulations will be to apply the EIA and Public Participation Directives so that suitable EIAs are carried out prior to granting permission for the deposit of substances or articles within UK waters or UK controlled waters. By waters is meant either in the sea or under the sea bed, from various structures, vessels, containers or structures on land or anywhere in the sea from a British vessel,

[162] Statutory Instrument 2000 No. 1927 - The Electricity Works (Environmental Impact Assessment) (England and Wales) Regulations 2000
[163] Schedule 3 & 4 Electricity Works Regulations 2000
[164] Regulation 2(a) Electricity Works Regulations 2000 and Section 36 Electricity Act 1989.

hovercraft or marine structure.[165] The Regulations will also apply to activities affecting navigation, where prior consent is sought for construction, alteration or improvement works, and removals or placement of material that may cause an obstruction or danger to navigation.
An EIA will be carried out by either mandatory or discretionary determination and certain thresholds will be used in determining this. For instance, under Schedule 1 Article 4 of the proposed Regulations as regards the construction of an installation for hydroelectric energy production, the applicable threshold is proposed to be set at 0,5 megawatts, likely to be exceeded by Minesto. However in the Marine Works Regulations, there is also, under Schedule 1 Article 5, provided that the construction of offshore generating stations, including wind farms and wave and tidal devices with a threshold of 1 megawatt or that the project involves the installation of more than two turbines or the hub height of any other structure exceeds fifteen meters. Clearly Minesto falls under this category and the new Regulations seems more up to date when it comes to alternative energy sources.

Screening and scoping opinions will be provided for and more emphasis then ever before are being put on the issue of public participation. The public is to be informed of proposed projects subject to EIA and given effective opportunities to participate in decision-making procedures to the extent required by the Public Participation Directive. It is also proposed that LPAs can require an applicant to pay reasonable fees in respect of administrative and other expenses. The Marine Works Regulation is said to bring forward the changes necessary to ensure compliance with the relevant EC Directives. These new Regulations will replace part II of the Harbour Works (EIA) Regulations 1999 in Great Britain, Part II of the Food and Environment Protection Act 1985 and, for Great Britain only, activities under Part II of the Coast Protection Act 1949.[166] It is clear that Minesto's proposed activities will fall under these Regulations should they come into force before the commencement of consent applications etc. Until then however, the EIA Regulations is the primal applicable legislation.

[165] The Marine Works (Environmental Impact Assessment) Regulations 2007 – A consultation document, DEFRA, December 2006
http://www.doeni.gov.uk/marine_works_regulations_consultation.pdf
[166] http://www.doeni.gov.uk/marine_works_regulations_consultation.pdf

5 Conclusion

On July 4 1988, the date required for implementation of the original EIA Directive, five Member States had notified the Commission of their transposing measures. Luxembourg for one did not transpose the Directive until 1994[167] and in 1998, the Commission mentioned that the transposing legislation in Spain, Ireland, Greece, Italy, Portugal, Belgium and Germany still did not conform with Community law.[168] The Commission mentioned in its 13th report on monitoring application of Community law that most of the complaints, petitions and infringement procedures which it dealt with concerned the EIA Directive. The most significant problem seems to be the application of the Directive's requirements in practise. According to the former Commissioner and environmental professor Ludwig Krämer, the main problems of the EIA Directive are:[169]

- its loose drafting and the large discretion given to administration often lead to the non-application of some of its principles, such as for instance Article 5(1) or Annex III;
- the Directive does not oblige a developer to study or have studied alternatives to a project;
- the administration is not in any way obliged to avoid and/or minimise the negative effects of a project on the environment, but may give development consent also where very serious negative effects are to be expected.

Considering the UK's initial negative attitude toward environmental assessment, they still have managed, by comparison, to transpose the EIA Directive without any major problems. The new planning regulations of 1999 have led to significant improvements but the EIA system in the UK is still fairly weak and there is plenty of room for improvement. Provisions relating to alternatives, screening, partial scoping, and ES publication are relatively well integrated into existing town and country planning decision-making processes. However, provisions enabling early participation, third party appeal and monitoring are not.[170]

There are approximately 480 planning authorities in the UK and each year, about 300 environmental statements are submitted, inevitably focused on areas where development is encouraged or profitable.[171] This shows the discretion mentioned by Krämer and means that a lot of the authorities are rarely involved in EIA. This is nevertheless no excuse or reason for inaction or indecision. Planning authorities are required, if asked, to give both screening and scoping opinions and should they not feel competent to give such opinions, they can enlist the support of other consultancies.

---

[167] Case C-313/93 *Commission v Luxembourg* [1994] ECR I-1279.
[168] Krämer, L *EC Environmental Law* fourth edition. Sweet & Maxwell, 2000. p 114.
[169] Krämer, L *EC Environmental Law* fourth edition. Sweet & Maxwell, 2000. p 114.
[170] Wood, C, *Planning and Environmental Protection,* Hart Publishing 2001, p 169
[171] Carroll, B & Turpin, T, '*Environmental Impact Assessment Handbook: A Practical Guide for Planners, Developers and Communities*' Thomas Telford 2002, p 8.

According to acknowledged EIA expert William Sheate of Imperial College, University of London, the UK Government has failed to establish an effective form of quality control.[172] He goes on by claiming that of the ES's examined in a report by the UK Department of the Environment, two thirds were held to be unsatisfactory, failing to comply with the minimum requirements of Schedule 3 of the EIA Regulations. Christopher Wood, Director of the EIA Centre and Professor of Environmental Planning at the University of Manchester also claims that the experience of EIA at many of the local authorities is limited and that further EIA-training for officials is needed.

Litigation on EIA in the UK is uncommon, largely because of the costs involved and third parties may also have problems in getting locus standi and there have only been a handful of key cases in the UK since the implementation in 1988.[173] This relatively small amount of EIA case-law gives little encouragement for anyone to seek legal remedies and consequently very few citizens and NGO's are willing to risk significant legal bills. There is however a cheaper, but not necessarily more effective, alternative to EIA litigation in the UK and that is to make a formal complaint to the European Commission. This procedure is however intended to resolve primarily issues of principle regarding implementation of EC law, not to provide relief to complainants over individual projects. Because the EIA Directive is procedural, the Commission can only take action so long as there is a failure to comply with the procedures laid down in the Directive. This procedure is also very slow and laborious.

Regarding public participation, there is a fundamental flaw in the procedure drawn up by the EIA Directive, especially regarding the issue of formal requests on whether and EIA is needed or not. In practise, most developers in fact does not make formal requests, instead they look at the schedules of the EIA Regulations and decide for themselves if an EIA is likely to be required.[174] The consequence is that no opinion is placed on the public register which ultimately leads to the public being unaware of the development until a much later stage. This situation is especially likely to arise for major projects since developers of that kind often do not rely on the assistance of LPAs. The UK does however have a highly effective and long-established NGO networks that regularly scrutinise planning applications and ES's.[175] The general public, together with NGO's indeed have a crucial role to play in the scrutiny of the EIA process and it is of utmost importance that they are given the opportunity to participate at an early stage of each development. The UK Government have however declared that increased public participation is important in the on-going modernization of the UK planning system. It remains to be seen whether the implementation of Directive 2003/35/EC on public participation through the Marine Works

---

[172] Sheate, W '*Environmental Impact Assessment: Law & Policy Making an impact II*' Cameron May Ltd 1996, p 100.
[173] Sheate, W *Environmental Impact Assessment: Law & Policy Making an impact II* Cameron May Ltd 1996, p 101.
[174] Sheate, W *Environmental Impact Assessment: Law & Policy Making an impact II* Cameron May Ltd 1996, p 84.
[175] http://www.art.man.ac.uk/EIA/publications/newsletters/newsletter12/publicparticipation/ngo.htm

Regulations of 2007 will change matters in the future. The new Marine Works Regulations is further said to provide industry with a transparent process when making an application to carry out a regulated activity. The procedure for considering the environmental effects of an activity will be clear to industry and regulator alike, ensuring that all cases are assessed following the same procedure and with the same clear objectives regarding EIA.[176]

The consideration of alternatives is with the EIA Regulations still not a mandatory requirement but they however state that an ES must include 'an outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for his choice, taking into account the environmental effects'.[177] The lack of regulatory weight given to the treatment of the environmental impacts of alternatives is reflected in practise and a review of 100 ESs found that in 20 cases, no alternative sites, routes or processes were presented.[178]

The purpose of the Commission report of 2003 was to examine the effectiveness of the changes made by Directive 97/11/EC and the efficiency of the EIA Directive as a whole. It was found that the main problem lies in the way the Directive is applied, not in the transposition of its legal requirements. To improve the application of the Directive, the Commission calls on the Member States to take certain measures, in particular to improve the keeping of records, to make better use of existing guidelines and to introduce training programs for regional and local authorities. The Commission also invites Member States to make sure that systems with fixed mandatory thresholds (in relation to screening) are so designed as to ensure that all projects that might have significant effects are subject to an appropriate screening process. The Commission plans to adopt five initiatives:[179]

1. *consider the need for further research to improve screening and the use of thresholds, and to achieve a greater consistency of approach;*
2. *it will prepare interpretative and practically oriented guidance on the EIA Directive, with the involvement of experts from the Member States as well as other stakeholders, such as NGO's, local and regional authorities and industry;*
3. *it will consider what might be done to improve the training of officials responsible for EIA;*
4. *it will take enforcement action in the event of incomplete transposition and/or poor application of the EIA Directive;*
5. *it will consider what possible further amendments to the EIA Directive should be introduced.*

Another weakness of EIA is the vital role of follow-up which has not been systematically required or fully implemented. The term 'follow-up' has been in use since 1982 and is used as an umbrella term for various EIA activities such as monitoring, auditing, ex-post evaluation, post-decision

[176] http://www.doeni.gov.uk/marine_works_regulations_consultation.pdf
[177] Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999, No. 293.) Schedule 4, Part II, para. 4.
[178] Wood, C, *Planning and Environmental Protection,* Hart Publishing 2001, p 159.
[179] http://europa.eu/scadplus/leg/en/lvb/l28137.htm

analysis and post-decision management. Follow-up provides the missing link between EIA decision-making and continued project implementation and serves as a key mechanism for feedback, learning from experience and adaptive management.[180]

After studying the EIA Directive and its implementation in the UK, I can conclude that there is still a lot of room for improvement. It is indeed a difficult task for the Commission to completely monitor how well EC Directives are implemented and applied on sub-national levels. Despite its reports and questionnaires it is hard to get a complete picture over the actual application and for instance, the quality of environmental statements. It is however clear that EIA experts all over Europe agree on one thing and that is that more funding is needed to train and to educate officials responsible for EIA procedures. In the UK however, the understanding and awareness of EIA appear in my experience to be dealt with seriously. The Government openly addresses the issue of lack of practical experience at the local planning authorities and estimates that around 50% of authorities may only have limited experience.[181] In writing this thesis, I have been in contact with both national department officials and sub-national authorities and they have all provided me with relevant information. The EIA Centre at the University of Manchester has contributed to research initiatives in the UK and in Europe for over ten years and continually educates about EIA.[182] But most importantly, the UK is recognised to be a global leader in the technologies to generate renewable energy from waves and tidal streams (marine renewable) and has the potential to create a world class industry.[183] The Department of Trade and Industry have established a Technology Programme has committed in excess of £ 20m to single device projects and under the DTI 'Wave and Tidal Stream Energy Demonstration Scheme' £50m has been allocated by the Government for multiple device projects.[184] The objective is putting the UK at the intellectual heart of the marine renewable industry. Inevitably, alongside this booming industry arises questions regarding the potential significant environmental effects these projects might result in. Environmental impact assessments will be made but is EIA a panacea to environmental problems? Probably not, it should be viewed and used as an anticipatory, participatory, integrative management tool and is further simply one of the elements of the environmental protection policy. The information generated by an EIA process does occur within a political decision-making setting and will undoubtedly be influenced by its norms and procedures. There are clear examples of how the discretion on national level has lead to discrepancies as to what constitutes a project (see chapter 2.2.2). EIA evaluations will often need to be re-assessed and the data contained should be open to scrutiny and

[180] Morrisson-Saunders, A & Arts, J, *Assessing Impact – Handbook of EIA and SEA Follow-up*, Earthscan 2004, preface.
[181] Note on environmental impact assessment directive for local planning authorities. Published 19 April 2004.
http://www.communities.gov.uk/index.asp?id=1143273
[182] http://www.art.man.ac.uk/EIA/eiac.htm
[183] DTI, "Planning and Consents for Marine Renewables " p 3.
[184] DTI, "Planning and Consents for Marine Renewables " p 4

revision as new data becomes available. As of today, the EIA system is not capable of such revision and is dependant on the expertise and experience of the original assessors and on the quality of the environmental statements. In Minesto's case, it is highly unlikely that this will happen since there are no precedent development projects.

Bibliography

Primary legislation
Town and Country Planning Act 1947
Coast Protection Act 1949
European Communities Act 1972
Wildlife and Countryside Act 1981
The Food and Environment Protection Act 1985
Electricity Act 1989
Town and Country Planning Act 1990
Planning and Compensation Act 1991

Secondary legislation
Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI 1988, No. 1199)
Town and Country Planning (Assessment of Environmental Effects) (Amendment) Regulations 1990 (SI 1990, No. 367)
Town and Country Planning (Assessment of Environmental Effects) (Amendment) Regulations 1992 (SI 1992 No. 1494)
Town and Country Planning (Assessment of Environmental Effects) (Amendment) Regulations 1992 (SI 1992 No. 1494)
Town and Country Planning (Simplified Planning Zones) Regulations 1992 (SI 1992 No. 2414)
Town and Country Planning (Assessment of Environmental Effects) (Amendment) Regulations 1994 (SI 1994 No. 677)
Conservation (Natural Habitats & c.) Regulations 1994 (SI 1994, No. 2716)
Town and Country Planning (Environmental Assessment and Permitted Development) Regulations 1995 (SI 1995 No. 417)
Town and Country Planning (Environmental Assessment and Unauthorised Development Regulations 1995 (SI 1995 No. 2258)
Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999, No. 293)
Highways (Assessment of Environmental Effects) Regulations 1999 (SI 1999, No. 369)
Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999 (SI 1999, No. 2228)
Harbour Works (Environmental Impact Assessment) Regulations 1999 (SI 1999, No. 3445)
Electricity Works (Environmental Impact Assessment) Regulations 2000 (SI 2000, No. 1927)
Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004, No. 1633)
Town and Country Planning (Environmental Impact Assessment) (Amendment) Regulations 2006 (SI 2006, No. 3295).
The Marine Works (Environmental Impact Assessment) Regulations 2007 (Proposal)

Directives

Birds Directive,
Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ L 103, 25/04/1979 P. 1)

Environmental Impact Assessment Directive,
Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ L 175, 05/07/1985 P. 40) as amended by Directive 97/11/EC (OJ L 073, 14/03/1997 P. 5)

Habitats Directive,
Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22/07/1992 P. 7)

IPPC Directive,
Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ L 257, 10/10/1996 P. 26)

Strategic Environmental Assessment Directive,
Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ L 197, 21/07/2001 P. 30)

Public Participation Directive
Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of special plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ L 156, 25/06/2003 P. 17)

Treaties and Conventions

Stockholm Declaration 1972, United Nations Conference on Human Environment

Bern Convention, 1979, The Convention on the Conservation of European Wildlife and Natural Habitats.

Single European Act, 1986

Espoo Convention 1991, United Nations Convention on Environmental Impact Assessment in a Transboundary Context.

Maastricht Treaty, (Treaty on the European Union) 1992

Rio Declaration 1992, United Nations Conference on Environment and Development

Treaty of Amsterdam, 1997

Aarhus Convention 1998, United Nations Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters

United Nations Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (Kiev, 2003)

Government publications

Planning Policy Guidance Note 9 (DOE, 1994e)

Department of the Environment Transport and the Regions, DETR (1997d) Air Quality and Land Use Planning, LAQM.G4(97) (London Stationery Office)
DETR (1999a) Environmental Impact Assessment (Circular 2/99) (London: Stationery Office) SI 1999 No. 23
Department for Communities and Local Government. Environmental Impact Assessment: A guide to procedures. January 2000. ISBN: 0 72 772960 8
http://www.communities.gov.uk/pub/410/Environmentalimpactassessmentguidetoprocedures_id1508410.rtf
DETR (2000h) Review and Assessment: Pollutant Specific Guidance, HMSO, LAQM.TG4(00)
Note on environmental impacts assessment directive for local planning authorities. Published 19 April 2004.
http://www.communities.gov.uk/index.asp?id=1143273
Department of Trade and Industry, "Planning and Consents for Marine Renewables – Guidance on Consenting Arrangements in England and Wales for a pre-commercial demonstration phase for wave and tidal stream energy devices (marine renewables)", November 2005.
http://www.dti.gov.uk/files/file15470.pdf
DEFRA, The Marine Works (Environmental Impact Assessment) Regulations 2007 – A consultation document, December 2006
Explanatory memorandum to the Environmental Impact Assessment (Agriculture) (England) 2006 No. 2362
http://www.opsi.gov.uk/SI/em2006/uksiem_20062362_en.pdf

European Community publications

IMPEL Network - "Interrelationship between IPPC, EIA, SEVESO Directives and EMAS Regulation" Final Report, December 1998

European Commission, Guidance on EIA – Screening, 2001
ISBN 92-894-1334-4
http://ec.europa.eu/environment/eia/eia-guidelines/g-screening-full-text.pdf

European Commission, Guidance on EIA – Scoping, 2001
ISBN 92-894-1335-2
http://ec.europa.eu/environment/eia/eia-guidelines/g-scoping-full-text.pdf

European Commission, Guidance on EIA – EIS Review, 2001
ISBN 92-894-1336-0
http://ec.europa.eu/environment/eia/eia-guidelines/g-review-full-text.pdf

Recommendation 2001/331/EC of the European Parliament and of the Council of 4 April 2001 providing for minimum criteria for environmental inspections in the Member States

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/EEC', ISBN 92-828-1818-7.
http://ec.europa.eu/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf/natura_2000_assess_en.pdf

European Commission, 'Implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment', European Communities, 2003, ISBN 92-894-6098-9.
http://www.unece.org/env/eia/documents/EC_SEA_Guidance/ec_030923_sea_guidance_en_cover.pdf

European Commission, Guidance on the implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment.
http://ec.europa.eu/environment/eia/pdf/030923_sea_guidance.pdf

Report of 23 June 2003 from the Commission to the European Parliament and the Council on the application and effectiveness of the EIA Directive (Directive 85/337/EEC as amended by Directive 97/11/EC) – How successful are the Member States in implementing the EIA Directive [COM/2003/0334 final – Not yet published in the Official Journal]
http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52003DC0334:EN:HTML

Internet

Department of the Environment:
http://www.communities.gov.uk/pub/290/APracticalGuidetotheStrategicEnvironmentalAssessmentDirective_id1143290.pdf

The Department for Environment, Food and Rural Affairs:
http://www.doeni.gov.uk/marine_works_regulations_consultation.pdf

Environmental Impact Assessment Center United Kingdom:
http://www.art.man.ac.uk/EIA/eiac.htm
http://www.art.man.ac.uk/EIA/publications/newsletters/newsletter12/publicparticipation/ngo.htm

European Union:
http://europa.eu/scadplus/leg/en/lvb/l28137.html

European Commission:
http://ec.europa.eu/

http://ec.europa.eu/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/index_en.htm

http://ec.europa.eu/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf/natura_2000_assess_en.pdf

European Parliament:
http://www.europarl.europa.eu/

UNECE:
http://www.unece.org/

Literature and articles

Carroll, Barbara & Turpin, Trevor	*Environmental Impact Assessment Handbook: A Practical Guide for Planners, Developers and Communities.* Thomas Telford Publishing, 2002
Jans, Jan	*European Environmental Law*, Second Edition. Europa Law Publishing, 2000
Krämer, Ludwig	*EC Environmental Law*, Fourth Edition. Sweet & Maxwell Ltd. 2000
Miller, Chris	*Planning & Environmental Protection – A Review of Law and Policy*. Hart Publishing, 2001
Modak, Prasad & Biswas, Asit K	*Conducting Environmental Impact Assessment in Developing Countries*. The United Nations University, 1999
Morrison-Saunders, Angus & Arts, Jos	*Assessing Impact – Handbook of EIA and SEA Follow-up*. Earthscan, 2004
Onida, Marco	*Europe and the Environment; Legal Essays in Honour of Ludwig Krämer*. Europa Law Publishing, 2004
Sands, Philippe	*Principles of International Environmental Law.* Cambridge University Press, 2003
Sheate, William	*Environmental Impact Assessment: Law & Policy – Making an Impact II*. Cameron May 1996
Wood, Graham	*Ten years on: An Empirical Analysis of UK Environmental Statement Submissions since the Implementation of Directive 85/337/EEC*. Journal of Environmental Planning and Management, 43(5), 721-747. Carafax Publishing 2000

Table of Cases

European Court of Justice
Case C-337/89 *Commission v United Kingdom* [1992] ECR I-6103
Case C-313/93 *Commission v Luxembourg* [1994] ECR I-1279
Case C-72/95, *Aanemersberdijf PK Kraaijeveld BV and Others v. Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403
Case C-340/96 *Commission v United Kingdom* [1999] ECR I-2023
Case C-392/96, *Commission v Ireland* [1999] ECR I-5901
Case C-201/02, *Wells*, [2004] ECR I-723
Case C-508/03, *Commission v United Kingdom* [2006] ECR I-0000
Case C-290/03, Judgment of the Court (First Chamber) of 4 May 2006 (reference for a preliminary ruling from the House of Lords (United Kingdom) - *Diane Barker v London Borough of Bromley*
Case C-98/04, *Commission v United Kingdom* [2006] ECR I-4003

United Kingdom
Twyford Parish Council and others v. Secretary of State for Transport (1992) 4 JEL 273.
R. v. North Yorkshire County Council ex parte Brown [1998] JPL 764.
R v St Edmundsbury Borough Council, ex parte Walton [1999] Env LR 879
Berkeley v SSETR [2000] WLR21/7/2000
Regina oao Jones v Mansfield DC (January 20, 2003)