

FITNESS CHECK MANDATE FOR NATURE LEGISLATION

Fitness Check title and owner

“Fitness Check on EU Nature Legislation (Birds and Habitats Directives)¹”: DG Environment

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Introduction

In 2010 the Commission announced the evolution of its approach to better regulation into a new agenda for smart regulation². Smart regulation is a continuous process, affecting the whole policy cycle - from the design of a piece of legislation, to implementation, enforcement, evaluation and, where justified, to revision. Within this process, evaluation is a key, retrospective exercise – it assesses what has happened and looks at what caused any change and how much might reasonably be credited to EU action. Evaluation provides an evidence-based critical analysis of whether EU actions are fit for purpose and delivering as expected. Robust evaluations help to identify key learning points which can then be fed back into the decision-making process, leading to actions being dropped or developed and improved.

The Commission initiated its Regulatory Fitness and Performance Programme (REFIT) in December 2012³. REFIT demonstrates the Commission's ongoing commitment to a simple, clear, stable and predictable regulatory framework for businesses, workers and citizens. It emphasises the importance of EU regulation efficiently pursuing only those public policy objectives which are clearly best achieved at the EU level. EU regulation needs to be proportionate to its objectives and respect the principle that action should be taken as close to the citizen as possible – 'subsidiarity'. It seeks to ensure the best possible cost/benefit ratio for EU regulation. Under the first stages of the REFIT programme, the Commission reviewed the entire stock of EU legislation and proposed four categories of follow-up actions. One of the resultant actions was this Fitness Check.

Fitness checks are comprehensive policy evaluations assessing whether the regulatory framework for a policy sector is “fit for purpose”. Their goal is to assess the effectiveness, efficiency, coherence, relevance and EU added value of specific parts of the EU acquis, thus promoting better/smart legislation, making it more responsive to current and future challenges and helping improve implementation. This includes identifying excessive administrative burdens, overlaps, gaps, inconsistencies and/or obsolete measures which may

¹ In the REFIT Communication – there is only reference to Natura 2000. However, the accompanying footnote states “*Directives 92/43/EC and 2009/147/EC: This Fitness check will be organised to accompany the evaluation required under the legislation, respecting the deadlines set-out in the Directive*”. Therefore it is taken that REFIT applies more generally to the Birds and Habitats Directives and related actions and is not limited to Natura 2000

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Smart Regulation in the European Union. COM(2010)543, 08.10.10.

³ COM (2012) 746

have appeared over time, and considering the cumulative impact of EU legislation and activities. Their findings will serve as a basis for drawing policy conclusions on how well EU policies have been performing and feed into possible consideration on the future of the relevant regulatory framework.

Context

There are two main pieces of EU nature legislation – the 1979 Directive on the conservation of wild birds (Birds Directive) and the 1992 Directive on the conservation of natural habitats and of wild fauna and flora (Habitats Directive). These directives provide a common EU framework that sets the standards for nature protection across the Member States.

The aim of these directives is to contribute to ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the EU. The overall objective of the Habitats Directive is to maintain or restore habitats and species of EU conservation concern to favourable conservation status. The Birds Directive aims to achieve good conservation status for all wild bird species naturally occurring in the EU territory of the Member States. One of the key ways in which this to be achieved is through conservation and sustainable use of an EU network of areas of high biodiversity value, called Natura 2000.

The directives are key tools to give effect to EU commitments under international conventions and agreements such as the Convention on Biological Diversity, Bern Convention on European Wildlife, the Convention on Migratory Species and the African Eurasian Waterbird Agreement.

The Birds and Habitats Directives are central to achieving the EU 2020 target of halting and reversing the loss of biodiversity endorsed by Heads of State and Government. The Commission has adopted an ambitious strategy to achieve this objective, comprised of six targets⁴. Target 1 of this Strategy is focused on “Full implementation of EU nature legislation to protect” biodiversity and requires a significant improvement in conservation status.

The implementation of EU nature legislation also contributes significantly to other targets of the biodiversity strategy, including in relation to green infrastructure and restoration under Target 2 as well as to integration with agriculture and forestry under Target 3 and sustainable management of fisheries under Target 4.

There are other actions for which new developments are foreseen under the EU Biodiversity Strategy, which have been underpinned by an overall impact assessment⁵, and were largely endorsed by the Council and the European Parliament. This includes the Commission proposal for a new regulation on invasive alien species⁶ under Target 5 and an initiative to

⁴ COM(2011) 244 final

[http://ec.europa.eu/environment/nature/biodiversity/comm2006/pdf/2020/1_EN_ACT_part1_v7\[1\].pdf](http://ec.europa.eu/environment/nature/biodiversity/comm2006/pdf/2020/1_EN_ACT_part1_v7[1].pdf)

⁵ SEC(2011) 540 final: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2011:0540:FIN:EN:PDF>

⁶ COM(2013) 620 final: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0620:FIN:EN:PDF>

ensure no-net loss of ecosystems and their services⁷ under Target 2 of the strategy for which a separate impact assessment is planned. The complementarity with these other initiatives will need to be taken into account as part of the fitness check.

The Commission will carry out a mid-term review of the Biodiversity Strategy in 2015, which will focus on assessing progress in the implementation of the different actions under each of the Targets⁸. The Fitness check will therefore benefit from information gathered in this exercise.

Scope of Fitness Check

The Fitness check will focus on two pieces of legislation, commonly referred to as the Birds and Habitats Directives:

The Birds Directive (2009/147/EC) is the codified version of Directive 79/409/EEC as amended. This directive provides a legal framework for the conservation of all wild bird species naturally occurring in the EU. The protection scheme involves:

- Member States designate Special Protection Areas (SPAs) for particularly threatened species and all migratory bird species. They are part of the Natura 2000 ecological network set up under the Habitats Directive 92/43/EEC.
- They ban activities that directly threaten birds, such as the deliberate killing or capture of birds, the destruction of their nests and taking of their eggs.
- They establish rules governing the hunting and trading of wild birds.
- Exceptions to the species protection rules can be granted under very specific conditions.

The Habitats Directive (92/43/EEC) aims to ensure the conservation of species and habitat types of EU conservation concern. The protection scheme involves:

- The Directive establishes the EU wide Natura 2000 ecological network of protected areas (also embracing SPAs under Birds Directive).
- For these areas of high biodiversity value the Directive provides a set of safeguards to avoid habitat deterioration against procedures to deal with potentially damaging developments.
- The Directive also provides for species protection measures beyond the Natura 2000 network.
- Exceptions to the strict protection rules can be granted under very specific conditions.

The fitness check will also consider the EU value added having regard to commitments under the EU Biodiversity Strategy and international Biodiversity Conventions. In addition, the

⁷ http://ec.europa.eu/environment/nature/biodiversity/nnl/index_en.htm

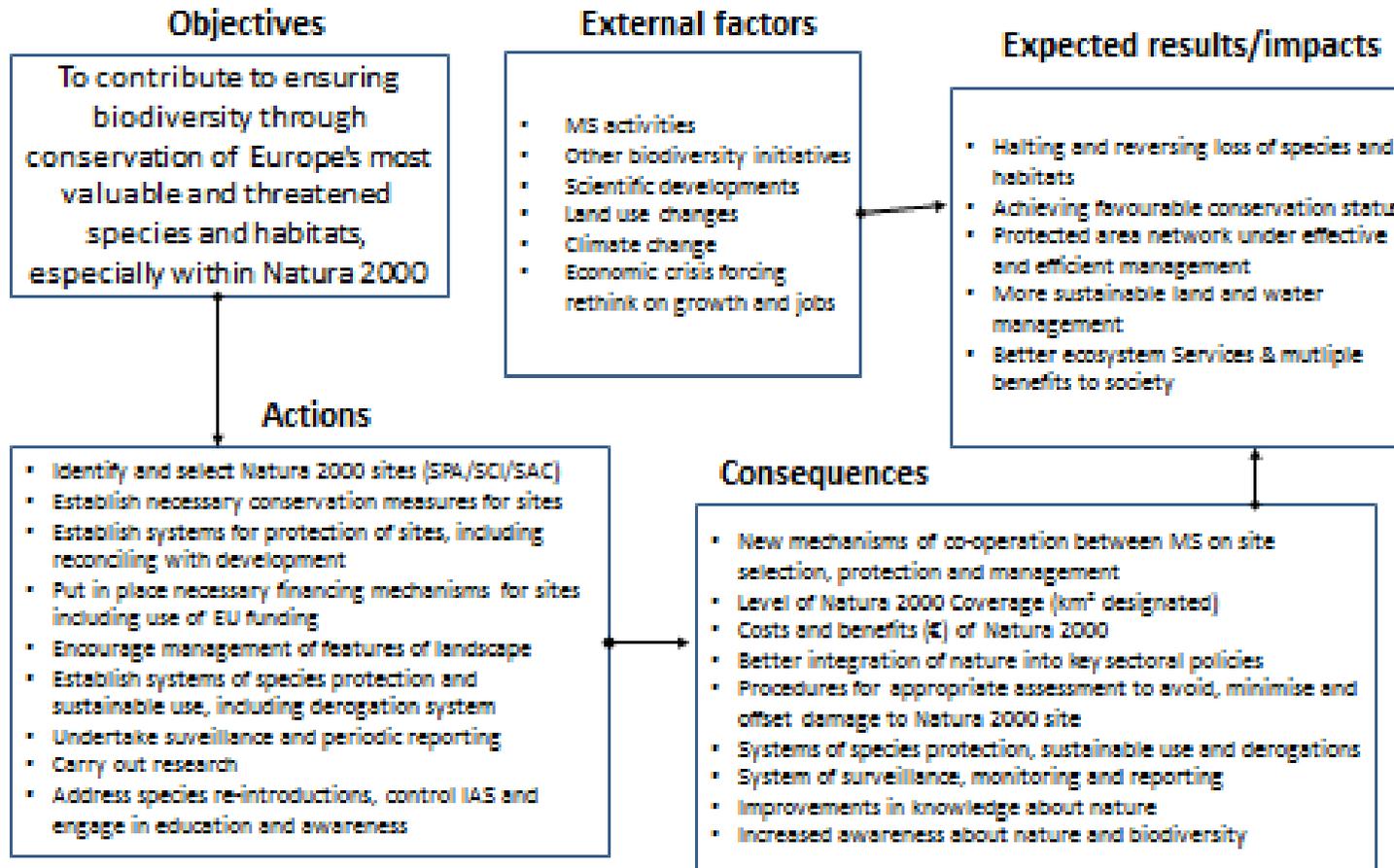
⁸ The 4 actions are: Complete the establishment of the Natura 2000 network and ensure good management; Ensure adequate financing of Natura 2000 sites; Increase stakeholder awareness and involvement and improve enforcement; Improve and streamline monitoring and reporting.

fitness check will take into account relevant Communications, Staff working papers and guidance documents that have already been issued by the Commission in support of implementation of the Nature Directives⁹.

The overall “cause and effect” of EU Nature legislation is summarised in the attached chart.

⁹ These include the 2004 Communication (COM(2004)431 final) and 2011 Staff working paper (SEC(2011) 1573 final) on financing Natura 2000, the 2009 Communication (COM(2009) 845 final) on reporting under Habitats Directive and a series of guidance documents on species protection and hunting issues as well as on the application of Article 6 of the Habitats Directive, including sector specific guidelines (http://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm)

EU Nature legislation



Overall aim of Fitness Check

The overall aim is to undertake a comprehensive policy evaluation to assess whether EU nature legislation is “fit for purpose” on the basis of the following criteria: relevance, effectiveness, efficiency, and coherence, as well as its EU added value.

The fitness check will include an assessment of:

- implementation and integration successes and problems.
- the costs of implementation and of non-implementation of the legislation.
- the administrative burden of implementation and opportunities for improving implementation and reducing administrative burden without compromising the integrity of the purpose of the directives.
- the situation of implementation in different Member States
- the views of key stakeholder groups

Main questions to be addressed by the Fitness Check

The following questions will be addressed under the five basic aspects that the fitness check will cover

Effectiveness¹⁰

- What progress have Member States made over time towards achieving the objectives set out in the directives and related policy documents? Is this progress in line with initial expectations? When will the main objectives be fully attained?
- What is the contribution of the directives towards ensuring biodiversity? In particular to what extent are they contributing to achieving the EU Biodiversity Strategy Objectives and Targets?
- Which main factors (e.g. implementation by Member States, action by stakeholders) have contributed to or stood in the way of achieving these objectives
- Beyond these objectives, have the directives led to any other significant changes both positive and negative?

Efficiency¹¹

- What are the costs and benefits (monetary and non-monetary) associated with compliance with the directives in the Member States and in the EU?

¹⁰ The degree to which something is successful in producing a desired result. The degree to which objectives are achieved and the extent to which targeted problems are solved

¹¹ The ability to do something or produce something without wasting materials, time, or energy : the quality or degree of being efficient

- Are availability and access to funding a constraint or support in the implementation of the directives?
- If there are significant cost differences between Member States, what is causing them? Can any costs be identified that are out of proportion with the benefits achieved? In particular, are the costs of compliance proportionate to the benefits brought by the directives? Can good practices, particularly in terms of cost-effective implementation of the directives in Member States, be identified?
- What are likely to be the costs of non-implementation of legislation?
- Taking account of the objectives and benefits of the directives is there evidence that they have caused unnecessary administrative burden?
- Is the knowledge base sufficient and available to allow for efficient implementation of the Directives?

*Relevance*¹²

- Are the key problems and concerns facing species and habitats of EU conservation concern still addressed by the EU nature legislation?
- Have the directives been adapted to technical and scientific progress?
- How relevant are the directives to achieving sustainable development?
- How relevant is EU nature legislation to EU citizens and what is their level of support for it?
- What are citizens' expectations for the role of the EU in nature protection?

*Coherence*¹³

- To what extent are the objectives set up by the directives coherent with each other?
- To what extent are the directives satisfactorily integrated and coherent with other parts of EU environmental law/policy, including environmental impact assessment and strategic environmental assessment? Is the scope for policy integration with other policy objectives (e.g. water management, flood protection, marine, and adaptation to climate change) fully exploited?
- To what extent do the nature directives complement or interact with other EU sectoral policies affecting land and water use at EU and Member State level (e.g. agriculture, regional and cohesion, energy, transport, research, etc.)? How do these policies affect positively or negatively the implementation of the EU nature legislation?
- To what extent do they support the EU internal market and the creation of a level playing field for economic operators?
- To what extent has the legal obligation of EU co-financing for Natura 2000 under Article 8 of the Habitats Directive been successfully integrated into the use of the main sectoral funds?
- Are there overlaps, gaps and/or inconsistencies that significantly hamper the achievements of the objectives?

¹² To know the relevance of something is to know why it matters or how it is important.

¹³ Forming a unified whole. *Coherence* comes from a Latin word meaning "to stick together. When you say policies, arguments and strategies are coherent, you're praising them for making sense

- How do the directives complement the other actions and targets of the biodiversity strategy to reach EU biodiversity objectives?
- How coherent are the directives with international and global commitments on nature and biodiversity?

EU added value¹⁴

- What has been the EU added value and what would be the likely situation in case of there having been no EU nature legislation?
- Do the issues addressed by the directives continue to require action at EU level?

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Contractor

To be determined. Call for tender to be launched in 2014, for a study to support the work needed to complete the Fitness Check. It will build on and complement the Article 12 Birds Directive and Article 17 Habitats Directive reports from Member States.

Fitness Check approach and planning

The fitness check will be based on an evidence-based approach and cover environmental, economic and social aspects in relation to the two nature directives. There are a series of recent and on-going studies directly relevant to the fitness check (see appendix)

Critical information on whether the objectives of the directives are being achieved and on major pressures and challenges to be overcome will come from reporting by Member States under Article 17 of the Habitats Directive as well as under Article 12 of the Birds Directive. The EU will provide a summary of these reports in 2015. These reports will provide a major input into an evaluation of the main achievements, problems and obstacles, including interactions with other policy areas that promote or prevent the achievement of the objectives of EU Nature legislation.

However, these will need to be complemented by additional data collection, especially in relation to the efficiency of the Directives, as well as a public consultation including Member

¹⁴ EU added value is the value resulting from EU support for conservation of natural habitats and of wild fauna and flora in the EU which is additional to the value that would have resulted from activities at regional and national levels.

States and stakeholders. This should include an assessment of evidence of implementation and integration achievements and problems from different sources, (including legal cases, European Parliament petitions and written questions). There will also be a need to consider the situation of implementation in different Member States as well as to secure the views of key stakeholder groups. There will be a need to develop objective criteria to underpin this assessment and to evaluate the public good¹⁵ provided by the Nature Directives.

Therefore, a call for tender for an external study will be launched in 2014 to contribute to the fitness check of the two directives. This study will provide: an overview of relevant information and evidence sources at EU and Member State levels; a compilation of relevant evaluations, studies, reports and audits; information on the number and importance of the issues covered by infringements and complaints and their impact on the extent to which the objectives of the EU nature directives are being attained; and a compilation and assessment of relevant data. This will also include support for a public consultation including selected Member States and stakeholders through a structured process.

The consultants' terms of reference will include requirements to conduct desk research, face to face consultations, including interviews with selected stakeholders and Members States. The consultant will be expected to deliver and present their intermediate findings in a draft report and organise a stakeholder workshop in which the preliminary findings will be discussed and then refined before delivery of the final report. The preliminary outcome of their analysis will be presented at Green Week in June 2015, or another appropriate forum, which will form one element of stakeholder consultation.

A public internet consultation will also be run in 2014/2015 within the framework of the study contract to provide an opportunity to civil society to provide their opinions on the subject.

Together with the results of the EU assessment of the reports submitted by Member States pursuant to Article 17 of the Habitats Directive and Article 12 of the Birds Directive, the consultants' report will form an input into final documentation to be issued by the Commission on the results of the Fitness Check, likely to be towards the end of 2015 or start of 2016.

Given the sensitivity of the issue it will be important to ensure good communication with Member States and stakeholders throughout the process. DG ENV will provide a dedicated page on the Europa website to outline the fitness check and provide links to key documents.

Steering Group

A Biodiversity Interservice Group already exists. It is proposed to use this structure but limiting it to the relevant services (DGs AGRI, CLIMA, ENER, ENTR, JRC, MARE, MOVE, REGIO, RTD, SG, SJ) as well as colleagues from the evaluation and impact assessment unit in DG ENV. The group will meet at regular intervals.

¹⁵ Public good in this context is understood as the benefit or well-being of the public.

Data Sources

See attached Appendix, which provides an overview of some relevant existing data sources as well as on-going evaluations.

Important gaps in knowledge and collation of information, especially in relation to implementation in Member States, will be the subject of the study contract.

Next steps

- Set up dedicated page on DG ENV website to explain and provide information on the fitness check (February 2014 onwards)
- Establish Commission Services Steering Group (February/March 2014)
- Launch of External Study Contract (March/April 2014 to autumn 2015)
- Public internet consultation (end 2014/start 2015)
- EU assessment of Article 17 Habitats Directive and Article 12 Birds Directive national reports (first half of 2015)
- Consultation at Green Week (June 2015) or other appropriate forum for preliminary discussion of fitness check assessment
- Communication / Staff working document end 2015/early 2016.

APPENDIX

OVERVIEW OF SOME RELEVANT EXISTING AND ONGOING EVALUATIONS

1. Evaluation of effectiveness

A key source of information for this evaluation will be the Member State reporting under Article 17 of the Habitats Directive¹⁶ as well as under Article 12 of the Birds Directive¹⁷, both focusing in particular on conservation status assessment. Member States will have submitted national reports by end the 2013 and the EU level assessment will be complete in early 2015. This will provide critical information on the extent to which the objectives of the Directives are being achieved and on major pressures and challenges to be overcome. Earlier Articles 12 and 17 reports will also be examined as will other implementation reports provided by Member States (e.g. derogation reports pursuant to Article 9 BD and Article 16 HD).

Reviews of implementation of the EU biodiversity action plan in 2008 and 2010 contain relevant information on implementation of the Nature legislation at EU and Member State levels¹⁸. The mid-term review of implementation of the EU Biodiversity Strategy foreseen for 2015 and for which the Commission has a service contract, will contain relevant information on EU nature legislation, which is the key delivery mechanism for target, 1 but also relevant to other targets of the Strategy. Other relevant information is available on the Biodiversity Information System for Europe¹⁹.

Other scientific assessments, most notably European Red Data lists of species, prepared at the request of the Commission, will be used in the evaluations²⁰. A contract for a red data list of habitat types has been launched in 2013 and should yield results in 2015²¹. Assessments have been prepared for many of the 50 EU action plans for threatened bird species. There are also an increasing number of scientific publications that independently evaluate implementation. The European Topic Centre for Biodiversity of the European Environment Agency is undertaking a literature review on the 'effectiveness of Natura 2000' including a gap analysis.

¹⁶ http://ec.europa.eu/environment/nature/knowledge/rep_habitats/index_en.htm

¹⁷ http://ec.europa.eu/environment/nature/knowledge/rep_birds/index_en.htm

¹⁸ http://ec.europa.eu/environment/nature/biodiversity/comm2006/index_en.htm

¹⁹ <http://www.biodiversity.europa.eu/>

²⁰ http://ec.europa.eu/environment/nature/conservation/species/redlist_en.htm

²¹ http://ec.europa.eu/environment/nature/knowledge/redlist_en.htm

There is an on-going EU initiative on large carnivores which provides a basis for assessing the role of the Directives in their conservation²².

A key element of implementation of the Nature legislation relates to the effective establishment, protection, management and restoration of sites in the Natura 2000. Information on Natura 2000 includes a recent overview by the European Environment Agency on evolution of the network. The Commission has also launched a biogeographical process to promote sharing of experience and best practice on the management of Natura 2000 and a new Natura 2000 Communication Platform has been established. A study has also been launched to assess the restoration efforts needed to achieve the objectives of EU Nature legislation, which will deliver results in 2015. A study is also to be launched in 2014 to evaluate the contribution of Natura 2000 to wider biodiversity objectives.

2. Evaluation of efficiency

A key source of information in relation to problems of implementation are complaints, infringements, court rulings, petitions, written questions and other parliamentary and citizen correspondence. These relate to a range of implementation issues such as transposition, site selection and designation, site protection, management and permitting for developments, species protection, use of derogations). A report has been prepared for the petitions committee of the European Parliament on implementation problems²³.

Information on implementation is also available on web sites of Member States. A study contract is underway on a Structured Information for Implementation Framework (SIIF) for EU Nature Legislation which will assess information systems in a representative sample of 10 Member States.

In the United Kingdom there has been a recent review of implementation focussing in particular on those obligations that affect the authorisation process for proposed development, with a view to reducing the burdens on businesses while maintaining the integrity of the purpose of the Directives²⁴. There is also relevant information from the review of balance of competence review in the United Kingdom²⁵. The Commission is not aware of such evaluations in other Member States although relevant information exists for many of them. The Commission is currently undertaking a study on permitting under Article 6 of the Habitats Directive.

²² http://ec.europa.eu/environment/nature/conservation/species/carnivores/index_en.htm

²³

<http://www.europarl.europa.eu/document/activities/cont/200910/20091013ATT62399/20091013ATT62399E N.pdf>

²⁴ <http://www.defra.gov.uk/habitats-review/background/>

²⁵ <https://www.gov.uk/government/consultations/eu-and-uk-action-on-environment-and-climate-change-review>

A key cost in relation to implementation relates to the management and restoration of sites in the Natura 2000 network. Cost estimates have been provided by the Member States, most of whom have also submitted ‘Prioritised Action Frameworks’ setting out their overall needs and priorities for investment in Natura 2000. The Commission has undertaken economic evaluations of the benefits of the ecosystem services of Natura 2000. This is also now being applied in some Member States at national or regional levels (e.g. Flanders, Belgium)²⁶.

3. Relevance

The evolving policy context is shaped by the EU 7th Environment Action Programme²⁷ and the EU Biodiversity Strategy²⁸, for which extensive consultations have taken place. The international/global biodiversity context is largely framed by EU commitments made within the framework of the Convention on Biological Diversity (most recently the Aichi Targets but also earlier commitments on protected area networks) and other international nature related conventions and agreements under them (Convention on Migratory Species and Bern Convention) all of which have implementation reports. The pertinence of EU Nature legislation to attainment of these international commitments will need to be further assessed.

Other relevant information on the relevance of EU nature legislation to citizens will be available from Eurobarometer surveys on Biodiversity, most recently conducted in 2013²⁹.

Other emerging challenges, most notably in relation to climate change implications for species and habitats protected under EU Nature legislation, will need to be considered. The recently completed EU guidelines on Natura 2000 and climate change, contains relevant information in this context³⁰.

4. Coherence

The Nature Directives are legally integrated into other EU legislation, most notably for environment (e.g. Water Framework Directive, Marine Strategy Framework Directive, and Environmental Liability Directive). There is also a close link with EIA and SEA Directives. Therefore, it is relevant to assess implementation reports for these Directives and the extent to which they refer to EU Nature legislation, in the context of this evaluation.

²⁶ http://ec.europa.eu/environment/nature/natura2000/financing/index_en.htm

²⁷ <http://ec.europa.eu/environment/newprg/index.htm>

²⁸ <http://ec.europa.eu/environment/nature/biodiversity/comm2006/2020.htm>

²⁹ http://ec.europa.eu/public_opinion/flash/fl_379_en.pdf

³⁰ <http://ec.europa.eu/environment/nature/climatechange/pdf/Guidance%20document.pdf>

The Nature legislation is a key tool for integration with main EU policies linked to land and water use management (e.g. CAP, CFP). This includes cross-compliance under Pillar 1 of the CAP as well as rural development policy. The Commission services are in the process of finalising guidelines on Natura 2000 and farming and similar guidelines are being prepared on Natura 2000 and forestry. An evaluation has also been undertaken on the integration of Natura 2000 funding into the main EU sectoral funds³¹.

In light of the interaction with other EU policy sectors, notably in the fields of wind energy, port development, non-energy extractive industries, inland waterways, aquaculture, the Commission services have already developed guidelines on how best to implement the nature legislation in close consultation with industry stakeholders³². Similar guidelines are under development for grid connections and hydro power. However, an overview of sector-related guidelines needs to be made.

5. EU added value

There are numerous articles and experiences in the Member states assessing the level of which EU Nature legislation has provided the framework to meet the Treaty objective of a high level of environmental protection and to ensure a level playing field through common minimal standard of protection across the Member States. There are an increasing number of studies and evaluations which demonstrate the EU dimension as a catalyst for action across the Member States, for example assessing the effects of the creation of the Natura 2000 network, based on a common approach and organised at the Biogeographical level, in providing the framework for raising standards across all Member States. A careful and critical analysis will have to be conducted of these sources of evidence and opinion to ensure that sound conclusions can be drawn.

Recent Eurobarometers on biodiversity, most recently in 2013, provide information on the views of citizens as to the EU added value and pertinence of the Nature Legislation.

³¹ http://ec.europa.eu/environment/nature/natura2000/financing/index_en.htm

³² http://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm