

ANALYSIS: HOW TO EFFECTIVELY USE EU-FUNDED INFORMATION FOR NATURA 2000 SITE MANAGEMENT



Justice and Environment 2022
Summer Kern, Lawyer

TABLE OF CONTENTS

ABSTRACT	3
INTRODUCTION	4
BRIEF BACKGROUND TO THE LIFE PROGRAMME	4
LEGAL FRAMEWORK	5
RELEVANT PROVISIONS OF THE HABITATS DIRECTIVE	10
CASE STUDIES	12
CONCLUSIONS AND RECOMMENDATIONS	23

Abstract

The LIFE Programme establishes a comprehensive and innovative funding regime to achieve the ambitious environmental goals of the European Union. Among its aims is to support the protection of critical habitats and species encompassing the collection and proper use of information gathering, which in turn leads to appropriate plans and, where needed, implementation measures. This programme has supported significant achievements and continues to do so. At the same time, there are cases in which the results of LIFE Programme projects have failed to be incorporated in site management and especially the course of procedures which have the potential to impact the environment in ways contrary to not only EU laws relating to the environment, but also those specific rules concerning the finances of the EU, among them those rules established for the LIFE Programme itself.

The current study provides a brief overview of the applicable legal provisions and case-law and then examines this in light of cases stemming from Austria. It concludes that there are both good and bad practices and provides recommendations to ensure that the LIFE Programme truly accomplishes its aims and provides “best value”.

Das LIFE-Programm etabliert ein umfassendes und innovatives Fördersystem, um die ehrgeizigen Umweltziele der Europäischen Union zu erreichen. Zu seinen Zielen gehört es, den Schutz kritischer Lebensräume und Arten unter anderem durch die Sammlung und ordnungsgemäße Nutzung der gesammelten Informationen zu unterstützen, die wiederum zu geeigneten Plänen und erforderlichenfalls Umsetzungsmaßnahmen führen. Dieses Programm hat bedeutende Errungenschaften unterstützt und tut dies auch weiterhin. Gleichzeitig gibt es Fälle, in denen die Ergebnisse von Projekten des LIFE-Programms nicht angemessen in das Management von Gebieten und insbesondere in Verfahren eingeflossen sind, die möglicherweise Auswirkungen auf die Umwelt haben und nicht nur gegen EU-Umweltgesetze, sondern auch gegen besondere Regeln für die Finanzen der EU verstoßen, darunter die Regeln, die für das LIFE-Programm selbst festgelegt wurden.

Die vorliegende Studie gibt einen kurzen Überblick über die anwendbaren Rechtsvorschriften und entsprechende Rechtsprechung und untersucht diese anschließend anhand von Fällen aus Österreich. Er kommt zu dem Schluss, dass es sowohl gute als auch schlechte Praktiken gibt, und gibt Empfehlungen, um sicherzustellen, dass das LIFE-Programm seine Ziele wirklich erreicht und „den besten Nutzen“ bietet.



Introduction

1. Justice and Environment is an association governed by Czech law. It consists of 14 member associations, almost all of which are established in European Union (EU) Member States. Its aim is the adoption and application of stronger environmental legislation to protect the environment, people and nature.
2. In the present study Justice and Environment aims to identify good and bad practices in terms of compliance with EU financial rules concerning projects funded by the EU's LIFE Programme, under which the EU provides financial support for certain undertakings which have the goal of supporting *inter alia* environmental projects. The Member State chosen for the present study is Austria and moreover concerns specifically hydropower projects subject to the Water Framework,¹ and Birds² and Habitats Directives.³

Brief Background to the LIFE Programme

3. The European Union's LIFE Programme⁴ is the EU's funding instrument for environmental and climate action.⁵ LIFE'S subprogramme for the environment is specifically aimed at funding nature conservation projects in particular in the areas of biodiversity, habitats and species. It provides action grants that contribute to the implementation of the EU's directives on birds and habitats, the EU's biodiversity strategy to 2020, and the development, implementation and management of the Natura 2000 network.⁶

¹ Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy.

² Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds.

³ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

⁴ https://www.bmlrt.gv.at/wasser/wasser-oesterreich/plan_gewaesser_ngp/massnahmenprogramme/life_iris.html

⁵ <https://ec.europa.eu/easme/en/life>

⁶ <https://ec.europa.eu/easme/en/section/life/life-environment-sub-programme>

Legal Framework

a. Selected Provisions Relevant to Projects funded by the LIFE Programme

4. Directive (EU) 2017/1371 of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law (the "PIF Directive") was adopted on 5 July 2017 as part of the Commission's overall anti-fraud strategy. For the Member States bound by it, the PIF Directive replaces the 1995 Convention on the protection of the European Communities' financial interests and its Protocols (the "PIF Convention"). The PIF Directive enables the newly created European Public Prosecutor's Office (the "EPPO")⁷ to conduct effective investigations and prosecutions.
5. These instruments and the EPPO relate, however, to criminal fraud. As the projects discussed in the present study do not appear to amount to instances involving criminal fraud, these are not discussed further.

i. Treaty provisions

6. At the outset, it should be noted that, pursuant to Article 310(5) of the Treaty on the Functioning of the European Union (TFEU), the EU's budget shall be implemented in accordance with the principle of sound financial management, and Member States are obliged to cooperate with the Union to ensure that the appropriations entered in the budget are used in accordance with this principle. Article 310(6) provides that the Union and its Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union.
7. Article 325 TFEU provides the legal basis for protecting the EU's financial interests against fraud, corruption and other illegal activities.

ii. The Financial Regulation and its Implementing Rules

8. The Financial Regulation,⁸ together with its implementing rules,⁹ is the main point of reference for the principles and procedures governing the establishment, implementation and control of the EU budget. As such, it applies to funding the EU provides to its Member States, including funding pursuant to the LIFE Programme.

⁷ <https://www.eppo.europa.eu/en>

⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32018R1046>

⁹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012R1268>



9. Chapter 7 of Title II of Part One of the Financial Regulation requires that the principle of sound financial management and performance be observed.¹⁰ Its Article 33(1) provides that, in order to comply with this principle, appropriations must be implemented respecting the following principles:

- (a) the principle of economy which requires that the resources used by the Union institution concerned in the pursuit of its activities shall be made available in due time, in appropriate quantity and quality, and at the best price;
- (b) the principle of efficiency which concerns the best relationship between the resources employed, the activities undertaken and the achievement of objectives;
- (c) the principle of effectiveness which concerns the extent to which the objectives pursued are achieved through the activities undertaken.

10. Title VIII of the Financial Regulation establishes the rules governing grants issued by the EU. Its Article 186¹¹ provides the criteria used to determine “eligible costs” under such grant agreements. Notably, pursuant to Article 186(3)(f) eligible costs must be “reasonable, justified, and comply with the principle of sound financial management, in particular regarding economy and efficiency (see para. 9 above). Its Article 202(2) provides *inter alia* that where controls or audits demonstrate systemic or recurrent irregularities, fraud or a breach of obligations, the authorising officer may suspend or terminate the grant agreement and may, in addition, reduce the grants, reject ineligible costs, and recover amounts unduly paid.

iii. The LIFE Regulation

11. Of particular relevance in the present context is the LIFE Regulation,¹² which is the legal basis for the LIFE Programme.¹³ Article 2 of the LIFE Regulation provides the definition of different types of projects.

12. Article 3(1) of the LIFE Regulation sets out the general objectives for the LIFE Programme.

13. Article 20(2) of the LIFE Regulation recalls that the conditions for the eligibility of costs are laid down in Article 186 of the Financial Regulation (see para. 10 above).

¹⁰ Chapter 6 of the implementing rules addresses this principle in greater detail.

¹¹ This was Article 126 in the previous version of the Financial Regulation from 2012

¹² Regulation (EU) No 1293/2013 of the European Parliament and of the Council of 11 December 2013 on the establishment of a Programme for the Environment and Climate Action (LIFE) and repealing Regulation (EC) No 614/2007.

¹³ <https://ec.europa.eu/easme/en/section/life/life-legal-basis>

iv. Key Clauses in LIFE Agreements

14. In evaluating the compliance of a given project receiving funding under the LIFE Programme, one must also consider the terms of the agreement itself. In this regard, it is instructive to consider key clauses in the Model Agreement for the LIFE Programme applicable at the time in which a LIFE agreement was entered into, as the Model Agreement(s) contain(s) definitions and other information one should expect in all agreements.¹⁴
15. Article II(19) of Annex I¹⁵ to the Model Agreement(s) lays out the conditions for eligible costs. In particular subparagraph (1)(f) is of relevance in the present context, and is aligned with the definitions in the Financial and LIFE Regulations set out above. Thus, such costs must be “reasonable, justified and comply with the principle of sound financial management, in particular regarding economy and efficiency.” Note that Annexes I-XI are, in accordance with the express wording of Model LIFE Agreements, an integral part of the agreements.¹⁶ Accordingly, these annexes are binding, just as the main, operative parts of any agreement entered into pursuant to the LIFE Regulation.
16. Annex II of the Model Agreement(s) contain(s) the project description.¹⁷
17. In order to ensure that agreements entered into do not result in the misuse of EU funds, irregularities and fraud, Article II.27 of Annex I of the Model Agreement(s) provide for checks, audits and evaluations. This includes checks and inspections by the European Anti-Fraud Office (“OLAF”) and checks and audits by the European Court of Auditors.
18. Of particular interest are the provisions in Annex I concerning, suspension, termination, reduction and recovery, which are all potential legal consequences in the case of the misuse of funds, irregularities or fraud. These are outlined below.

Suspension of the project implementation

19. In accordance with Article II.16.2.1 of Annex I to the Model Agreements, the Commission may suspend the implementation of the project or any part thereof: (a) if the Commission has evidence that a beneficiary committed substantial errors, irregularities or fraud ... while implementing the agreement or if a beneficiary fails to comply with its obligations

¹⁴ The respective Model Life Agreements can be found here:

https://ec.europa.eu/environment/archives/life/toolkit/pmtools/life2014_2020/grantagreement.htm

¹⁵ Annex I contains the general conditions of LIFE agreements.

¹⁶ See pp. 2-3 of the Model LIFE Agreements.

¹⁷ See Model Agreements, p. 2.

under the agreement; (b) if the Commission has evidence that a beneficiary has committed systemic or recurrent errors, irregularities, fraud or serious breach of obligations in other grants funding by the Union awarded to the beneficiary under similar conditions and the errors, irregularities, fraud or breach have a material impact on the grant; or (c) if the Commission suspects substantial errors, irregularities, fraud or breach of obligations committed by a beneficiary in the award procedure or while implementing the agreement and needs to verify whether these have actually occurred.

Termination of the Agreement

20. Article II.17.3.1 provides the requirements for a termination of the agreement. This includes *inter alia* the circumstance in which (a) beneficiaries do not implement the project as described in Annex II; or (b) where a beneficiary fails to comply with another substantial obligation on it under the agreement (c) or the Commission has evidence that a beneficiary or any related person has committed substantial errors, irregularities or fraud in the award procedure or while implementing the agreement, or (d) where there is evidence that a beneficiary has committed systemic or recurrent errors, irregularities, fraud or serious breach of obligations in other grants awarded to it under similar conditions and these have had a material impact on the grant.

Reduction of the Amount of the Grant

21. Pursuant to Article II.25.4 of Annex I to the Model Agreements, the Agency/Commission may reduce the maximum amount of the grant if the project has not been implemented properly as described in Annex II (i.e. if it has not been implemented or has been implemented poorly, partially or late), or if another obligation under the agreement has been breached. The amount of the reduction will be proportionate to the degree to which the project has been implemented improperly or to the seriousness of the breach.

Recovery

22. Article II.26.1 of Annex I to the Model Agreements provides that, where the payment of the balance takes the form of a recovery, the coordinating beneficiary must repay the Agency/Commission the amount in question, even if it was not the final recipient of the amount due. However, the Agency/Commission reserves the right, where appropriate, to recover the amount due directly from the final recipient. In accordance with Article II.26.2, where an amount is to be recovered after payment of the balance, the beneficiary concerned by the audit or OLAF findings must repay the Agency/Commission the amount in question. Where the audit findings do not concern a specific beneficiary (or its affiliated entities), the coordinating beneficiary must repay the Agency/Commission the amount in question, even if it was not the final recipient of the amount due. Each

beneficiary is responsible for the repayment of any amount unduly paid by the Agency/Commission as a contribution towards the costs incurred by its affiliated entities.

Suspension of payments

23. Article II.24.1.1. provides that the Agency/Commission may at any moment suspend, in whole or in part, the pre-financing payment and interim payments for one or more beneficiaries or the payment of the balance for all beneficiaries: (a) if the Agency/Commission has evidence that a beneficiary has committed substantial errors, irregularities or fraud in the award procedure or while implementing the Agreement or if a beneficiary fails to comply with its obligations under the Agreement; (b) if the Agency/Commission has evidence that a beneficiary has committed systemic or recurrent errors, irregularities, fraud or serious breach of obligations in other grants funded by the Union or the European Atomic Energy Community ('Euratom') awarded to the beneficiary under similar conditions and such errors, irregularities, fraud or breach have a material impact on this grant; or (c) if the Agency/Commission suspects substantial errors, irregularities, fraud or breach of obligations committed by a beneficiary in the award procedure or while implementing the Agreement and needs to verify whether they have actually occurred.

b. Relevant Case-Law

24. Case ClientEarth v. EIB¹⁸ concerned the construction of a biomass power generation plan in Galicia, known as the "Curtis Project". The project promoter of the Curtis Project applied for and was granted financing from the European Investment Bank (EIB) for a maximum amount of €60 million. Environmental NGO ClientEarth requested internal review of this decision pursuant to the Aarhus Regulation, as it considered the loan breached the EIB's financing criteria for responsible investment in renewable energy and that numerous errors had been made in assessing the project's suitability for funding. This request for internal review was denied.

25. Subsequently, ClientEarth brought an action to the General Court, which decided that the EIB must accept the request for internal review. In doing so, the court confirmed the right of the NGO to hold the EIB to judicial scrutiny for a failure to ensure that its financing decision complies with international and EU laws relating to the environment and uses its public money to achieve the best possible environmental outcome. This is a ground-breaking decision, affirming not only that EU financial decisions must be subject to scrutiny

¹⁸ T-9/19, available here:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=237047&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6829878>

for their compliance in key environmental aspects, but also that NGOs have the right to demand such scrutiny.

26. More generally, in *Úrad špeciálnej prokuratúry*,¹⁹ the Court of Justice of the EU (CJEU) clarified that Article 325 TFEU (see para. 7 above) obliges Member States to take effective measures to recover sums wrongly paid to the beneficiary of an EU subsidy, but does not impose any constraint as regards the recovery procedure. Thus, if compensation for damage is not available under criminal law, should an adequate and effective civil remedy be in place, this suffices.

Relevant Provisions of the Habitats Directive

27. What follows is not a comprehensive discussion of the Habitats Directive. However, as our evaluation of case studies refers to certain provisions of that Directive, we recall a few salient points.

28. Firstly, pursuant to Article 3(1) of the Habitats Directive:

“A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species’ habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.”


29. Article 4(1) of that Directive therefore provides that:

“On the basis of the criteria set out in Annex III (Stage1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host.” As indicated by the Commission this means concretely that all such sites and species that are present in the site in question must be listed in a Standard Data Form, the format for which the Commission provides.

30. Article 6 of that Directive provides:

¹⁹ C-603/19, available here:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=231843&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6827085>



1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.”

31. Briefly, Annex I of the Habitats Directive lists natural habitat types of community interest whose conservation requires the designation of special areas of conservation. Annex II of that Directive specifies animal and plant species that require the designation of such areas. Annex III of the Directive in turn defines the criteria for selecting sites eligible for identification as sites of community importance and designation as special areas of conservation.

32. The Standard Data Form (“SDF”) is the format for the transmission of information on the Natura 2000 network to the Commission, as provided in Article 1 of Implementing Decision 2011/484 on Site information format for Natura 2000 sites and its Annex. Accordingly, the data concerning Annex I habitat types and Annex II species, as listed in the SDF, is the basis for the determination of the necessary conservation objectives and corresponding management plans within the meaning of Article 6(1) of the Directive (see para. 30 above).
33. Furthermore, the data in the SDF must be considered when assessing any plan or project’s implications for a site’s conservation objectives in light of the provisions for appropriate assessments within the meaning of Article 6(3) and (4) of the Directive (see para. 30 above).

Case Studies

a. Case Study 1: Natura 2000 site Obere Drau and LIFE Project Auenverbund Obere Drau

34. The Obere Drau was targeted for a comprehensive river revitalization under the Carinthian Federal Water Management Administration, which was supported by the EU under the auspices of its LIFE Programme with a contribution of 1.5 million Euros. The project ran from 2006-2011.²⁰
35. The goals of the project included:
- Further stabilisation of the bed of the river Drau through expansions and strengthened entry of new bed load;
 - More naturalistic and dynamic river habitat areas;
 - Improved information and control of (human) visitors at the site
 - International cooperation with the expert agencies of those countries which neighbour the river Drau
36. In the course of the project 5 kilometres of the 68 kilometre-long part of the river were renatured and approximately 25 hectares of lands in the area of the river were purchased, a number of water bodies alongside the river were created and pilot measures were carried out to improve the bed load balance. The details and impacts of the project are discussed in greater detail below.

²⁰ See: https://webgate.ec.europa.eu/life/publicWebsite/index.cfm?fuseaction=search.dspPage&n_proj_id=3149

i. Background information on the Obere Drau

37. The Obere Drau (site AT2114000) is a rich source of natural biodiversity. The river and its coastal areas were proposed as a Natura 2000 Site of Community Importance (SIC) in 1998, which was confirmed in 2003. Since 2011 it has been designated as a European protection area, specifically a Special Area of Conservation (SAC).²¹
38. The Obere Drau includes one of the last free flowing parts of the river and includes Austria's largest inter-alpine Grauerlen-Auwald.²² It has 19 native fish species, including species endangered throughout Europe, and over 140 species of birds, approximately 50 of which are on the red list.²³ It serves as a typical bird community and brooding area.²⁴
39. Following the construction of a rail line through the Obere Drau Valley in the late nineteenth century, changes to the course of the river aimed at reducing the risk of flooding so as to enable intense agricultural uses and an extension of residential areas resulted in the shrinking of the original wetland area in the Obere Tau Valley.²⁵ Between 1965-66 a further problem arose, namely a deepening of the river bed. Due a diminished influx of bedload from built-up wild streams soil erosion in the Drau increased. A number of water bodies alongside the river dried up as a result, and also agriculture and the stability of bank protection constructions suffered.²⁶
40. Following first reconstruction efforts in 1993, a project under the LIFE Programme "Auenverbund Obere Drau" took place from 1999-2003, under which, among other achievements, 10 river kilometres were revitalized, along which 100 water bodies were created and approximately 100 hectares of alluvial forest were secured.²⁷ Despite these accomplishments, a number of new goals were made clear for the site, the achievement of which became the focus of the Obere Drau Project (see paras. 34-35 above).

²¹ See the current Standard Data Form for site AT 2114000, available at: <https://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=AT2114000>; see also the end report for LIFE Projekt Lebensader Obere Drau, p. 5, which can be downloaded at: https://www.bmlrt.gv.at/wasser/wasser-eu-international/life-natur/life-projekte_abgeschl/life-obere-drau.html

²² End report for LIFE Projekt Lebensader Obere Drau, p. 5.

²³ End report for LIFE Projekt Lebensader Obere Drau, p. 5.

²⁴ End report for LIFE Projekt Lebensader Obere Drau, p. 5.

²⁵ End report for LIFE Projekt Lebensader Obere Drau, p. 7.

²⁶ End report for LIFE Projekt Lebensader Obere Drau, p. 7.

²⁷ End report for LIFE Projekt Lebensader Obere Drau, p. 7.

ii. Positive changes in the Obere Drau as a result of the LIFE Project

41. The goal to stabilize the Drau riverbed was attained through expansion of the river's bed, which not only served to protect against floods by holding the water back, but also created new wetland habitat areas and local recreation areas.²⁸
42. Moreover, a too-narrow and outdated bank protection was removed along 3 kilometres. This resulted in increased freedom of movement with positive effects on the river and new habitats for fish. In the course of these measures, as discussed above, 25 hectares were obtained and transferred into public hands.²⁹
43. On the Drau near Rosenheim the river bed was widened along a length of 1 kilometre and a new arm of the river, many water bodies along the river, and an old arm system resulted, thereby creating habitats for rare species and those believed to have disappeared. The most striking example of this is the Eisvogel, which broods since 2007 regularly in the walls along the shore of the Obere Drau.³⁰
44. On the Oberen Drau by Amlach over 60,000 kilometres of soil and gravel were moved, resulting in a river bed broadened by 20 meters, and the development of areas suitable for young fish and amphibians. This resulted in a significant jump of amphibian species, from one to six species.³¹
45. Monitoring has confirmed the benefits to amphibians and fish, as well as to spiders and beetles.³² Furthermore, the results of this monitoring show that not only the flora and fauna have since developed positively, but also flood protection, and that fishing and local recreation have benefitted from the river widening.³³
46. Changes in the SDF (see para. 32 above) for the Obere Drau were made as a result of the LIFE project for this area, and played a critical role in leading to the improvements discussed above.

²⁸ End report for LIFE Projekt Lebensader Obere Drau, p. 9.

²⁹ End report for LIFE Projekt Lebensader Obere Drau, p. 13.

³⁰ End report for LIFE Projekt Lebensader Obere Drau, p. 16.

³¹ End report for LIFE Projekt Lebensader Obere Drau, p. 16.

³² End report for LIFE Projekt Lebensader Obere Drau, p. 25.

³³ End report for LIFE Projekt Lebensader Obere Drau, p. 5.

iii. Changes in the Standard Data Form for the Obere Drau

47. The 2002 SDF for the Obere Drau, prepared at a time when it had yet to be confirmed as an SCI, lists the presence at the site of only 17 species that fall under Annex II of the Habitats Directive. Just over 30 further species were listed as other important species of flora and fauna.
48. By contrast, the updated and current SDF from 2015 for the site lists more than 85 species as present at the site that fall under Annex II of the Habitats Directive.³⁴ Almost 50 species are listed as other important species on the form. These updated inclusions in the SDF reflect the information obtained through the Obere Drau LIFE Project, and were used directly so as to achieve the goals of the project itself, and the goals set out in the LIFE Programme more broadly, as reflected in Article 3 of the LIFE Regulation (see paras. 3 and 12 above).
49. Accordingly, the Obere Drau LIFE Project serves as a good practice example. The information gathered and as reflected in the updated SDF for this area flowed directly into the project and informed the development of measures undertaken thereto. This resulted in concrete improvements measurable under the Habitats Directive. Thus, this project appears to be in conformity with the principles of sound financial management expressed in the Financial Regulation and its implementing rules, in particular the principles of efficiency and effectiveness (see paras. 9 and 10 above).

Conclusion:

The **Obere Drau Project** (2006-2011) is a **good practice example**. The results of comprehensive and up-to-date information was integrated into the Standard Data Form for the site and led to considerable improvements to achieve the goals set out in the LIFE Regulation and the Habitats Directive. This provides meaningful added value to the stated goals of the EU and thus serves the principle of sound financial management well.

b. [Case Study 2: Natura 2000 Site Osttiroler Gletscherflüsse Isel, Schwarzach und Kalserbach \(AT3314000\) and LIFE IP Integrated River Solutions Austria Project](#)

50. In 2017 Austria applied for an Integrated Project under the LIFE Programme. Accordingly this project should be subject to the rules governing such integrated projects for the period

³⁴ <https://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=AT2114000>

of 2014-2020, having been submitted in 2017, despite being only officially launched in 2019.³⁵ The Model Agreement for 2014-2020 can be found online.³⁶

51. Austria's proposed project was to test River Development and Risk Management Concepts (GE-RMS) in selected pilot regions as an integrative planning instrument to implement national plans in accordance with EU environmental policies, specifically River Basin Management Plans and Flood Risk Management Plans (RBMPs and FRMPs, respectively).³⁷

52. The application was approved by the Commission and received the designation "LIFE IP Integrated River Solutions in Austria LIFE 17 IPE/AT/000006" (henceforth, LIFE IP IRIS Austria).³⁸ In total, 16.5 million Euros were set aside for the realization of LIFE IP IRIS Austria, 10 million of which are funded by the EU through the LIFE Programme.³⁹

53. According to the competent ministry's website in Austria, namely the Federal Ministry for Agriculture, Regions and Tourism (BMLRT), the LIFE IP IRIS Austria project will test GE-REMS as a planning instrument to be applied to seven pilot regions. The project will develop interdisciplinary, cross-border concepts for measures, including a priority ranking of the individual measures in accordance with the various objectives of the pilot regions. Another objective is to establish integrated monitoring following implementation of these river development measures. LIFE IP IRIS AUSTRIA aims to develop and test new common indicators which can evaluate the effects of combined measures in a holistic way. Among other purposes, these would help improve the ecological situation in connection with flood protection and the impact on ecosystem services. Among the expected results of the LIFE IP IRIS AUSTRIA project are detailed plans and permits to implement pilot measures in the pilot regions.⁴⁰

54. The LIFE IP IRIS Austria project began in 2019 and is to take place over 9 years.⁴¹ It is split into four phases:

³⁵ <https://ec.europa.eu/environment/archives/life/funding/life2017/index.htm>

³⁶ https://ec.europa.eu/environment/archives/life/toolkit/pmtools/life2014_2020/documents/LIFE2017_Model_Grant_Agreement_for_integrated_projects.pdf

³⁷ https://www.bmlrt.gv.at/wasser/wasser-oesterreich/plan_gewaesser_ngp/massnahmenprogramme/life_iris.html

³⁸ https://ec.europa.eu/easme/sites/easme-site/files/austria_update_en_final_may20.pdf

³⁹ https://ec.europa.eu/easme/sites/easme-site/files/austria_update_en_final_may20.pdf

⁴⁰ https://www.bmlrt.gv.at/wasser/wasser-oesterreich/plan_gewaesser_ngp/massnahmenprogramme/life_iris.html

⁴¹ https://www.bmlrt.gv.at/wasser/wasser-oesterreich/plan_gewaesser_ngp/massnahmenprogramme/life_iris.html

1. The preparation of the GE-RMs and the detailed planning of measures (3 years);
2. The implementation of the integrative pilot measures (2 years);
3. The finalization and monitoring of the integrative pilot measures (2 years); and
4. The evaluation of the project and development of recommendations (2 years).⁴²

55. As follows from the above description of the phases this project aims to provide significant added value particularly through the support of proper implementation of EU laws relating to the environment within Austria through the mapping of the occurrence of several habitats and species of community interest. Indeed, according to the project website this is very important and the basis for the definition of management objectives and conservation-measures.⁴³

56. One of the seven pilot regions selected to be part of the LIFE IP IRIS Austria project is the Isel and Drau region, located within the Austrian province of Tyrol.⁴⁴

i. Background information on the Isel glacier river system

57. In May 2013 an independent expert, Univ. Prof. iR. Mag. Dr. Grabherr (Grabherr), together with 31 scientific colleagues wrote to the Governor (*Landeshauptmann*) of Tyrol and his Provincial Nature Protection Councillor to request the consideration and timely admission of the “Isel glacier river system in Eastern Tyrol” in the Natura 2000 network. This was done in light of the fact that for more than a decade the need for the designation of the river Isel and its most important tributaries as a Natura 2000 site was scientifically and legally required.⁴⁵ However, the government had failed to designate this site and its respective habitat types and species pursuant to Article 4(1) of that Directive in conjunction with its Annexes I and II (see para. 29 above).⁴⁶

58. In the context of infringement procedure Nr. 2013/4077, the Commission issued a reasoned opinion to Austria on 31.05.2013 regarding Austria’s alleged failures with regard to the designation of Natura 2000 sites, and this area in particular. In September of that year Austria provided its comments to the reasoned opinion regarding those areas which should be designated. However, this was done without presenting a corresponding listing in the SDF and without a plan for the delimitation of the area.⁴⁷

⁴² https://www.bmlrt.gv.at/wasser/wasser-oesterreich/plan_gewaesser_ngp/massnahmenprogramme/life_iris.html

⁴³ <https://life-iris.at/>

⁴⁴ <https://life-iris.at/isel-drau/>

⁴⁵ Grabherr, 2013, p. 1.

⁴⁶ Grabherr, 2013, p. 2.

⁴⁷ Grabherr, 2013, p. 2.

59. According to the independent research of Grabherr and his colleagues, both the condition of the Isel and its tributaries, as well as the data acquired had significantly improved, such as to justify the designation of this area as a Natura 2000 area.⁴⁸ Accordingly, Grabherr wrote on 16 December 2013 to the Commission to also provide that body with a SDF, including a delimitation for the area, so as to provide a clear and accurate picture which habitat types and animal and plant species were present in the Isel Glacier river system that are worthy of protection under the Natura-2000 Network.⁴⁹ His letter was copied to the Environmental Ministry, and the Governor and acting Governor of Tyrol, and was supported by 25 noted scientific experts.⁵⁰
60. Grabherr's SDF identified for the Isel Glacial river system not only habitat type 3230, Alpine rivers and their riparian vegetation with *Myricaria germanica*, but nine further habitat types in total falling under Annex I of the Habitats Directive, among them types 3220, 3240 and 91EO, as well as at least 8 species under that Directive's Annex II.⁵¹
61. In 2015, Austria designated the river Isel and several of its tributaries as a Natura 2000 site AT3314000. However, the SDF for site this provided to the Commission by the Office of the Tyrol Provincial Government lists only the single habitat type 3230, Alpine rivers and their riparian vegetation with *Myricaria germanica* and fails to define conservation measures or ecological requirements.⁵² It omits the further habitat types and species of community interest listed in Annexes I and II of the Habitats Directive Grabherr had identified as present at the site (see paras. 59-60 above). Thus for example types 3220, 3240, and 91EO, as well as Annex II species, which similarly are present at the site,⁵³ were neither in the SDF nor the corresponding regulation by which the area was designated under the Natura 2000 framework.
62. Moreover, the SDF for site AT3314000 also makes clear that no management plan for the area has been prepared to date; nor have specific conservation measures been developed, apart from a statement that habitat type 3230 falls generally under protections pursuant to the Tyrolean Nature Protection Law,⁵⁴ as well as "individual species" such as

⁴⁸ Grabherr, 2013, p. 2.

⁴⁹ Grabherr, 2013, p. 2.

⁵⁰ Grabherr, 2013, pp. 2-4.

⁵¹ Grabherr 2013 Reference-Standard Data Form for the Natura 2000 Glacial river system Isel, pp. 4-5

⁵² Natura 2000 -Standard Data Form for site AT3314000 prepared June 2015 by the Office of the Tyrolean Provincial Government, p. 2.

⁵³ Grabherr, 2013, pp. 2-4.

⁵⁴ This law implements the Habitats Directive. Pursuant to Austrian Constitutional Law, nature protection falls within the competence of the Provinces.

native to that habitat type, such as *Myricaria germanica*. As of February 2022, the SDF remains unchanged.⁵⁵

ii. The “Pre-study GE-RM Isel Drau”

63. In August 2018 a “Pre-study GE-RM Isel Drau” was commissioned and completed.⁵⁶ A summary of the study can be found on the BMLRT webpage devoted to the LIFE IP IRIS Austria, though it must be noted that this project was launched only in December 2018, meaning that the “Pre-Study” as such falls outside the scope of the project itself.⁵⁷ The “Pre-Study” acknowledges that up to the time the study was prepared, no management plan had been prepared, and states that the applicable SDF for the Isel from 2015 discussed in para. 61 above only lists 3230 Alpine rivers with vegetation of *Myricaria germanica*.⁵⁸
64. At the same time, the study points to the existence of a comprehensive data set with regards to nature protection, and that in this regard the biological mapping provides meaningful information. The study notes that the biological mapping for the Isel took place in 2014 and for the Drau in 2013.⁵⁹ It states further that in addition there is comprehensive information about the protected areas available.⁶⁰ Strikingly, the study describes in its description of the services for the creation of a management plan for the site, as part of a comprehensive Natura habitats/bio mapping, the inclusion of all relevant habitat types for purposes of the Habitats Directive, including for example, types 91EO, 3220, 3230, and 3240.⁶¹
65. The Pre-Study notes that for both the Isel and the Drau many measures have been implemented over the past decades and that there is a clear trend to broaden the Isel. At the same time, some measures are partly 30 years old, others have only been implemented in recent years, despite the fact that there comprehensive information exists in the form of studies and plans which would enable the evaluation of a comprehensive evaluation of appropriate measures.⁶²

⁵⁵ <https://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=AT3314000>

⁵⁶ Pre-study GE-RM Isel Drau, August 2018, p. 10.

⁵⁷ <https://life-iris.at/resumee-vorstudie-isel-drau/>

⁵⁸ Pre-study GE-RM Isel Drau, August 2018, pp. 83-84.

⁵⁹ Pre-study GE-RM Isel Drau, August 2018, pp. 84 and .

⁶⁰ Pre-study GE-RM Isel Drau, August 2018, p. 84.

⁶¹ Pre-study GE-RM Isel Drau, August 2018, p. 123.

⁶² Pre-study GE-RM Isel Drau, August 2018, p. 93.

iii. Implementation of the LIFE Iris Project

66. As noted on the website devoted to the LIFE Iris project, the creation of an inventory (“Bestandsaufnahmen”) of protected items belongs to the first phase of the implementation of the project and was started in 2019 and completed in 2020.⁶³ The Pre-Study discussed above served as the basis for the inventory. Accordingly, the inventory reflects those protected items identified in the Pre-Study, namely habitats 91EO, 3220, 3230, and 3240.
67. On 4 September 2019 all relevant items for protection were inventoried within this LIFE Project. At the same time, within and near to Natura 2000 site AT331400, several projects were being planned or already under construction, which could lead to further negative effects on the site and protected species. In this regard, the European Environmental Agency makes clear that hydropower projects are the main danger for the Natura 2000 site AT331400.⁶⁴ This is also the conclusion of an independent expert report by Professor Dr. Müller, commissioned by the Tyrolean Provincial Government.⁶⁵
68. Two hydropower projects, which in the author’s view might endanger site AT331400 are examined below.

iv. Specific activities during the timeframe of the LIFE Iris Project

Hydropower Plant Schwarzach Extension 2 Maschinensatz

69. TIWAG Wasserkraft AG has operated a hydropower plant on the Schwarzach in Eastern Tyrol since 2007. In June 2012 it submitted its applications to the Tyrolean Provincial Government to receive the necessary water and nature protection permits for a planned extension with a second set of machinery.⁶⁶ The water permit was granted in August 2013.⁶⁷ The planned extension falls [partly] within Natura site 331400.

⁶³ <https://life-iris.at/en/resumee-preliminary-study-isel-drau/>

⁶⁴ See Habitat Report for site AT3314000 at point 7.1

⁶⁵ Wasserkraftanlagen und FFH-Lebensräume „Alpine Flüsse“ unter besonderer Berücksichtigung der Deutschen Tamariske in Tirol“, 4. April 2014, p. 29-37; available here: https://www.tirol.gv.at/fileadmin/themen/umwelt/naturschutz/downloads/Tamariske/Wasserkraft_und_Tamariske-Endbericht-Prof._Dr._Norbert_Mueller_04.04.2014.pdf

⁶⁶ <https://www.tiwag.at/ueber-die-tiwag/kraftwerke/wasserkraftausbau/unsere-kraftwerksprojekte/kleinwasserkraftwerke/erweiterung-kraftwerk-schwarzach/>

⁶⁷ <https://www.tiwag.at/ueber-die-tiwag/kraftwerke/wasserkraftausbau/unsere-kraftwerksprojekte/kleinwasserkraftwerke/erweiterung-kraftwerk-schwarzach/>


70. Parties to the procedure provided comments, pointing specifically to the other protected items.
71. The Tyrolean Provincial Government granted the nature protection permit on 15 May 2019, following an appropriate assessment.⁶⁸ In light of the fact that the SDF for the site only includes habitats type 3230 and fails to include other habitat types and species present on the site which fall under Annexes I and II of the Habitats Directive the appropriate assessment could not and did not assess potential significant effects on these other habitats and species. This despite the fact that the Tyrolean Provincial Government had been made aware of the presence of these other habitat types and species on multiple occasions (see paras. 59-60 and 63-65 above), including through the Pre-Study for the LIFE IP IRIS AUSTRIA project and, more importantly, the inventory based thereon, which specifically identifies habitat types and species beyond merely habitat type 3230.
72. Notwithstanding these deficits, the Provincial Administrative Court of Tyrol upheld the nature protection permit on 21 February 2020.⁶⁹ An appeal against this decision was rejected by the Supreme Administrative Court,⁷⁰ which also elected not to refer questions regarding the case and interpretation of the Habitats Directive to the Court of Justice of the EU in accordance with Article 267 TFEU.
73. When viewed in the light of the evidence available to the permitting authorities and courts of Austria, and considering the purpose of the Habitats Directive and the LIFE Programme, the granting of the nature protection permit for the “Hydropower Plant Schwarzach Extension 2 Maschinensatz” would appear at odds with the above-described provisions governing those projects funded by the LIFE Programme. Studies were undertaken and items worthy of protection identified since the 2015 study, which only identifies the protected item 3230, namely Alpine rivers with vegetation of *Myricaria germanica*.
74. Yet the purpose of these studies, and the entire LIFE Iris project itself is to (1) provide strategic planning for a coordinated implementation of water and flood management plans; (2) develop coordinated concepts for measures for IRIS-Pilot areas; and (3) Plan and construct selected morphological measures in the IRIS-Pilot areas. Yet this purpose is nullified if the very basis for assessing any planning, including management plans, or other measures lacks key data including an inventory of all protected items at the site.

68

https://www.ris.bka.gv.at/Dokumente/Lvwg/LVWGT_TI_20200221_LVwG_2019_35_1533_12_00/LVWGT_TI_20200221_LVwG_2019_35_1533_12_00.html

⁶⁹ Erkenntnis LVwG-2019/35/1533-12

⁷⁰ https://rdb.manz.at/document/ris.vwght.JWT_2020100059_20200703L00

- 
75. Accordingly, as an interim conclusion, the hydropower plant on the Schwarzach raises serious concerns as to whether or not EU funds, which are specifically earmarked to improve the natural habitats in this region under the LIFE Iris Project, are being misused, in possible breach of the conditions according to which they were issued.
76. At the very least, EU funds were used to establish the inventory of protected items in the area. This can only be assumed to have been done with the expectation that, as with the LIFE Project Obere Drau, the data collected and assembled into a study would then feed into subsequent management plans and permitting decisions. Yet this does not seem to have been the case as regards the Hydropower Plant Schwarzach Extension 2 Maschinensatz.

Hydropower Plant Haslach-Kalserbach

77. The case of the hydropower plant Haslach-Kalserbach presents similar deficits as to those regarding the extension of the hydropower plant Schwarzach discussed above.
78. Specifically, the developer submitted an expert's statement (Naturverträglichkeitserklärung or NVE) for an appropriate assessment concerning the project in June 2020. On 22 December 2020, the permitting authority (the Office of the Regional Government of Tyrol) requested further information as regards to four distinct points relevant for the consideration of the Haslach-Kalserbach hydropower plant and its potential impacts within and around the Natura 2000 site AT331400. A further report was thus provided on 2 August 2021. However, the information requested, provided, and considered concerned only the general conservation goals for the habitat 3230. Crucially missing was any analysis or discussion of the evidence of the presence of other habitats and species that should be protected within and around Natura 2000 site AT331400.
79. Again, as with the case of the hydropower plant Schwarzach, these further habitats and species should have been fully known to the Tyrolean Provincial Government, as well as other parties to this nature protection procedure. The omission and consideration of this critical information collected within the framework of a LIFE programme project appears quite problematic, as it not only contradicts those provisions one would expect to see in any LIFE agreement, but furthermore fails to ensure that the principle of sound financial management and performance are respected, as required under EU law.

Conclusion:

The site management developed thus far by the regional government of Tyrol is a bad practice example. Key information concerning items that should be protected under the Habitats Directive, including information that was directly a part of the inventory established as part of the project failed to flow into downstream decision-making.


Specifically, the results of the updated information establishing habitats and species requiring protection have not been integrated into downstream processes, notably the permitting procedures for the hydropower plants Schwarzach and Haslach. This means that key goals of the LIFE Agreements were surely not met, as well as the provisions of the LIFE Regulation itself. Moreover, this suggests that provisions of the Financial Regulation may also be infringed, and in particular, the principles of efficiency and effectiveness.

Conclusions and Recommendations

80. In the light of the foregoing, it must be concluded that the LIFE mechanism offers meaningful opportunities to support the implementation of key environmental and climate-related objectives and therefore provide significant added value in terms of the use of EU financial resources.

81. However, whilst there are clear good practices, there are unfortunately also instances in which the use of EU funds fail to provide best value in accordance with the intent and purpose of the instruments and funds provided to protect Natura 2000 areas. The present study highlights in particular the problem where information is gathered and channelled into a project aimed at fulfilling goals of the LIFE mechanism, yet fail to be acknowledged and considered at key steps, most notably the permitting stage for specific projects.

82. Accordingly, Justice and Environment presents the following recommendations:

- 
- That, as a matter of urgency, the regional government of Tyrol takes necessary measures to ensure that information collected (including as to habitats, species, conservation objectives and measures) within the course of projects financed under the LIFE Programme are incorporated into site management and especially permitting procedures. This includes procedures which are pending or have been concluded, provided such information was available and provided and/or clear notice thereof given at the time of the procedures in question;
 - That the federal government undertake the necessary measures to ensure compliance with EU laws to protect nature and the environment, as well as the financial rules to safeguard and support these interests;
 - That the Commission and/or other agencies of the EU check to ensure that projects benefitting from EU funds deliver on their promised aims and that, in the context of grants purportedly for the protection of resources protected under the Habitats Directive, they specifically use the newest, best available evidence as regards the items established by a reliable inventory as deserving of protection under that Directive and are used and applied in permitting procedures;
 - That the Commission and other bodies acknowledge the right of NGOs to challenge in court determinations approving the grant of EU funds that may run afoul of provisions relating to the environment, including those under the Habitats Directive.