

ERA Workshop for Judges:

HOW TO HANDLE COURT PROCEEDINGS INVOKING NON-COMPLIANCE WITH EU ENVIRONMENTAL ASSESSMENT LAW

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Activities subject to EIA - screening



This presentation is about the first step of the EIA-process, which is often referred to as "screening".

What is “screening”?

What is the purpose of “screening”?

Some questions...

How to carry out screening?

- What constitutes a “project” within the meaning of the EIA directive?
- Can an agreement be seen as a project?
- Can projects be excluded by national law?



First, some questions will be presented. The thought is to present the questions to which the presentation will bring the answers.

In the end of the presentation, the questions will be presented again, and hopefully the audience will be able to answer the questions.

The frame indicates that the purpose of screening is central. If you understand the purpose of screening, then you will be able to reason your way through most of the questions that may arise in the context of screening.

Some questions...

What is “screening”?

What is the purpose of “screening”?

How to carry out screening?

- What constitutes a “project” within the meaning of the EIA directive?
- Can an agreement be seen as a project?
- Can projects be excluded by national law?
- When must an EIA be carried out where national law provides that the consent procedure is to be carried out in several stages?**

Consent procedure:

NATIONAL LAW

EIA?

Stage 1

Stage 2

Stage 3

Before the first stage?

Some questions...

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Consent procedure:

NATIONAL LAW



EIA?

Stage 1

Stage 2

Stage 3




During the first stage but before the second stage?

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What is the purpose of “screening”?

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Consent procedure:

NATIONAL LAW



Stage 1

Stage 2

Stage 3

EIA?




During the second stage but before the third stage?

Some questions...

What is “screening”?

What is the purpose of “screening”?

How to carry out screening?

- What constitutes a “project” within the meaning of the EIA directive?
- Can an agreement be seen as a project?
- Can projects be excluded by national law?
- When must an EIA be carried out where national law provides that the consent procedure is to be carried out in several stages?**

Consent procedure:

NATIONAL LAW

Stage 1

Stage 2

Stage 3

EIA?

During the third stage and before it's completed?

Some questions...

What is “screening”?

What is the purpose of “screening”?

How to carry out screening?

- What constitutes a “project” within the meaning of the EIA directive?
- Can an agreement be seen as a project?
- Can projects be excluded by national law?
- **When** must an EIA be carried out where national law provides that the consent procedure is to be carried out in several stages?
- Is it possible for a developer to split projects to avoid an EIA?



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**PROJECT
EIA required**



You have a large project for which an EIA is required.

Some questions...

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- **When** must an EIA be carried out where national law provides that the consent procedure is to be carried out in several stages?
- Is it possible for a developer to split projects to avoid an EIA?



Though... thinking about it, it is actually possible to split this big project in several smaller projects, each of which has not any significant effect on the environment.

Is this possible to do, under the directive?

Some questions...

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- Is it possible for developer to split projects to avoid an EIA?
- Should cumulative effects be considered?



Some questions...

What is “screening”?

What is the purpose of “screening”?

How to carry out screening?

- What constitutes a “project” within the meaning of the EIA directive?
- Can an agreement be seen as a project?
- Can projects be excluded by national law?
- When must an EIA be carried out? Does the directive provide that the consent procedure has several stages?
- Is it possible for development to be exempted from an EIA?
- Should **cumulative effects** be taken into account?

Additive effects:

The magnitude of the combined effects equal the sum of the individual effects.

$1+1+1=3$

Cumulative:

Increasing by one addition after another

Synergistic effects

Combined effects lead to an increased effect greater than the individual effects.

$1+1+1=5$



Cumulative effects means that you increase the effects by one addition after another. The effects can be of at least two types.

1. Additive effects: Here, the magnitude of the combined effects equal the sum of the individual effects. $1+1+1=3$
2. Synergistic effects: Here, the combined effects lead to an increased effect greater than the sum of the individual effects. $1+1+1=5$

Some questions...

What is “screening”?

What is the purpose of “screening”?

How to carry out screening?

- What constitutes a “project” within the meaning of the EIA directive?
- Can an agreement be seen as a project?
- Can projects be excluded by national law?
- When must an EIA be carried out where national law provides that the consent procedure is to be carried out in several stages?
- Is it possible for developer to split projects to avoid an EIA?
- Should cumulative effects be considered?
- Is there a kind of relation between the splitting of projects and cumulative effects?



What is screening?

Screening is the first step in the EIA process.

Helps us to find out if a certain project is likely to have significant effects on the environment.

If so → An EIA is necessary!



We start with the most basic question. What is screening?

Screening helps us to find out if a certain project is likely to have significant effects on the environment. We need to know that; because if it is, an EIA is necessary.

Article 2 tells us for which projects an EIA is required:

Article 2:

Member States shall adopt all measures necessary to ensure that, before development consent is given, **projects likely to have significant effects on the environment** by virtue, inter alia, of their nature, size or location **are made subject to a requirement for development consent and an assessment with regard to their effects on the environment.**



This follows from article two in the directive, which tells us for which projects an EIA is required.

Article two requires that...

Article 2 tells us for which projects an EIA is required:

- **before** development consent is given,
- projects likely to have significant effects on the environment
- made subject to a requirement for
 - development consent
 - and an EIA.



- before** a development consent is given,
- projects likely to have significant effects** on the environment
- made subject to a **requirement for**
 - **development consent**
 - and an **EIA**.

Notice the timing. Member states shall adopt all measures necessary to ensure that these requirements are met **before** a development consent is given.

Article 2 tells us for which projects an EIA is required:

- before development consent is given,
- projects likely to have significant effects on the environment
- made subject to
 - a requirement for development consent
 - and an EIA.



The requirement is only applicable on projects likely to have significant effects on the environment.

When is a particular project 'likely to have significant effects on the environment' ?

The question is fundamental since it is only those projects that are required to undergo an EIA!



The crucial question will then be, **when** is a particular project 'likely to have significant effects on the environment' ?

The question is fundamental since it is only those projects that are required to undergo an EIA!

When is a particular project 'likely to have significant effects on the environment'?
Which projects shall be made subject to an EIA?

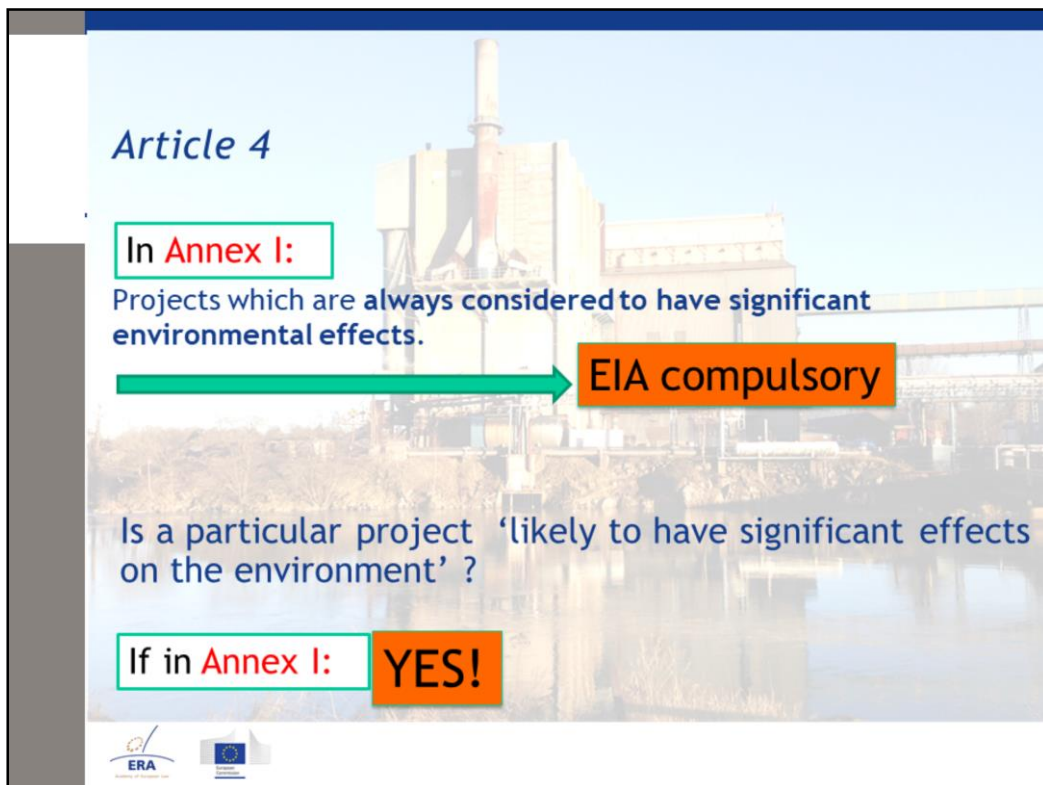
Answers in article 4:

(1) Projects listed in **Annex I**
shall be made subject to an EIA!



The answer to this question is to be found in article four.

First of all; projects listed in Annex I shall be made subject to an EIA.



Article 4

In Annex I:
Projects which are **always considered to have significant environmental effects.**

→ **EIA compulsory**

Is a particular project 'likely to have significant effects on the environment' ?

If in Annex I: YES!

In Annex I, we find projects which are always considered likely to have significant environmental effects.

We don't need to think about it!

If a project is found in Annex I, then the EIA is compulsory. We know it is likely to have significant effects on the environment, it is already foreseen.

ANNEX I

PROJECTS REFERRED TO IN ARTICLE 4(1)

1. Crude-oil refineries (excluding undertakings manufacturing only lubricants from crude oil) and installations for the gasification and liquefaction of 500 tonnes or more of coal or bituminous shale per day.
2. (a) Thermal power stations and other combustion installations with a heat output of 300 megawatts or more;
(b) Nuclear power stations and other nuclear reactors including the dismantling or decommissioning of such power stations or reactors ⁽¹⁾ (except research installations for the production and conversion of fissionable and fertile materials, whose maximum power does not exceed 1 kilowatt continuous thermal load).
3. (a) Installations for the reprocessing of irradiated nuclear fuel;
(b) Installations designed:
 - (i) for the production or enrichment of nuclear fuel;
 - (ii) for the processing of irradiated nuclear fuel or high-level radioactive waste;
 - (iii) for the final disposal of irradiated nuclear fuel;
 - (iv) solely for the final disposal of radioactive waste;

This is what Annex I looks like; it describes the activity for which an EIA is compulsory.

Point out the thresholds! Many of the projects in annex I has thresholds!

For example: Not all thermal power stations and combustions installations are included in Annex I; only if they have a heat output of 300 megawatts or more.

For installations for the reprocessing of irradiated nuclear fuel, on the other hand, there is no threshold.

So, when deciding whether a certain installation is to be found in annex I or not; note very carefully if there is a threshold or not and if the relevant project has reached the threshold or not.

Crude-oil refineries



Quarries and open-cast mining



Annex I

Nuclear power stations



Thermal power stations/combustion installations;
heat output > 300 MW



Here we have some examples from Annex I.



Annex I

Installations for the intensive rearing of poultry or pigs with more than:

85 000 places for broilers, 60 000 places for hens

3 000 places for production pigs (over 30 kg)

or 900 places for sows



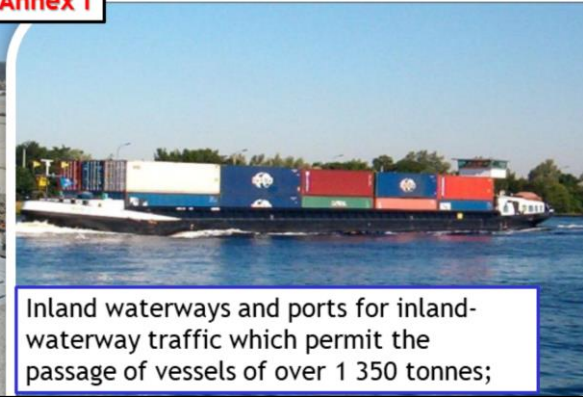


Construction of motorways and express roads



Construction of lines for long-distance railway traffic and of airports with a basic runway length of 2 100 m or more;

Annex I



Inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1 350 tonnes;

Waste disposal installations for the incineration, chemical treatment

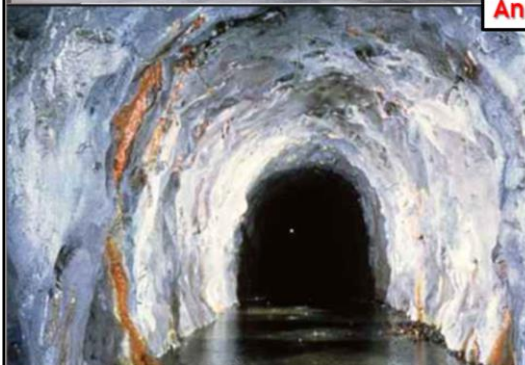


Groundwater abstraction or artificial groundwater recharge schemes
annual volume of water ≥ 10 million m^3

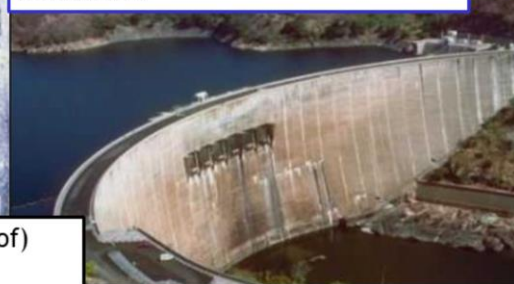


Annex I

Dams and other installations designed for the holding back or permanent storage of water > 10 million m^3 .



Works for the transfer of (certain amounts of) water resources between river basins



Is a particular project 'likely to have significant effects on the environment' ?

Annex I:

Note p. 24

Changes to or extensions of listed projects are also subject to compulsory EIA, provided that they **in themselves meet any applicable thresholds** set out in the Annex.



Note paragraph 24, that also covers changes to or extensions of listed projects are subject to compulsory EIA, provided that they in themselves meet any applicable thresholds set out in the Annex.

Is a particular project 'likely to have significant effects on the environment' ?

If in Annex I :	YES!
If in Annex II :	MS determines

Article 4

2. Subject to Article 2(4), for projects listed in **Annex II**, Member States shall determine whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

 If listed in **Annex II**: **Member States shall determine** whether the project needs an EIA or not!

So, if in Annex I, a project **is** likely to have significant effects on the environment.

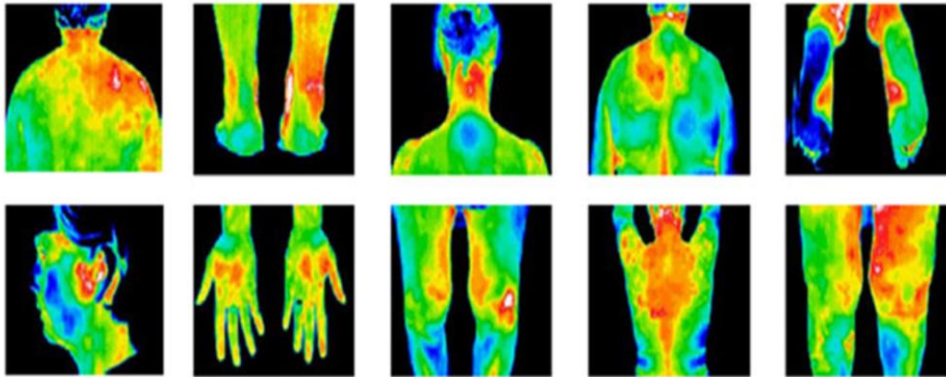
But what if not? What if a threshold is not met or if it is another type of project?

Continue to read in article 4:

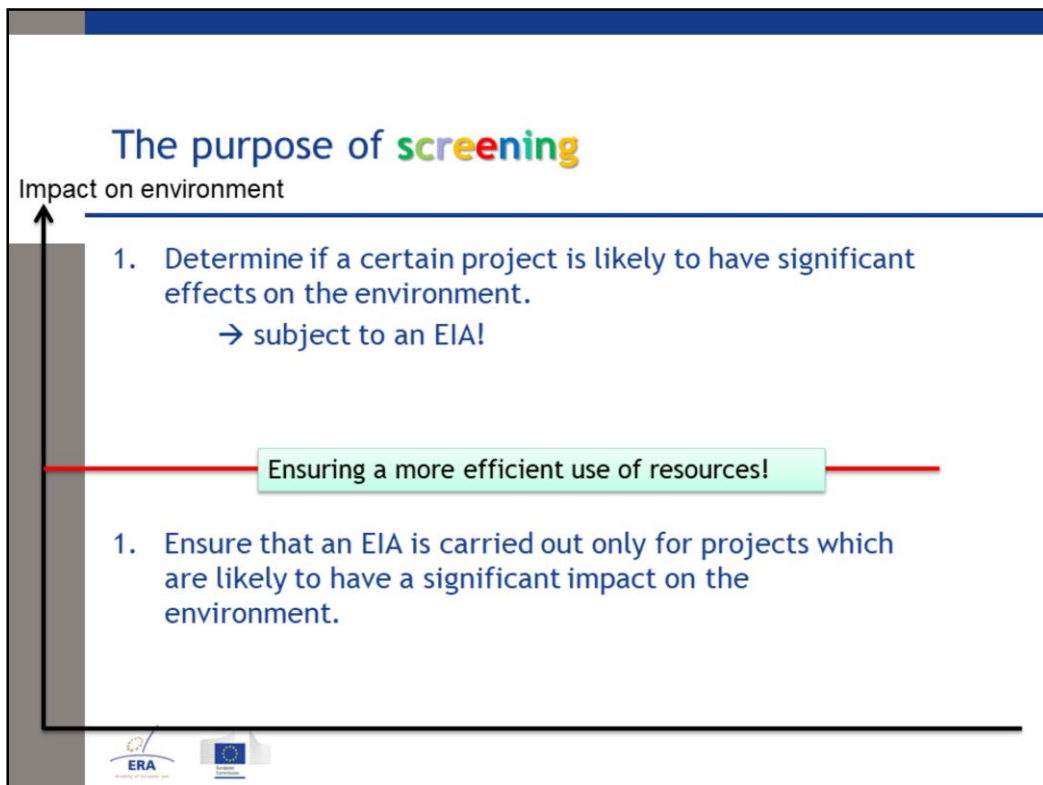
Paragraph 2 says, in short, that if a project is found in **Annex II**, then the **Member States** shall determine whether the project shall be made subject to an EIA or not.

Is a particular project 'likely to have significant effects on the environment' ?

This determination, for projects in Annex II, is often referred to as '**screening**' or "**the screening procedure**"



This determination is what most often is referred to as "screening" or "the screening procedure". It is the procedure where a member state determines whether a certain project, listed in annex II, shall be made subject to an EIA. In other words; it is the procedure when a member state determines whether a certain project is likely to have significant effects on the environment.



Before looking at how the member states shall determine this, and how big their discretion is in determining this, we need to put a few seconds to think of **the purpose of screening**:

The purpose of screening is first of all **to determine if a certain project is likely to have significant effects on the environment** and therefore, should be made subject to an environmental impact assessment.

On the other hand, the purpose of screening is **also** to ensure that an EIA is carried out **only** for those projects that might possibly have a significant impact on the environment.

It is costly to make an environmental impact assessment – the purpose of the screening procedure is thus, also, to ensure that **an EIA is carried out only for projects which are likely to have a significant impact on the environment**.



PROJECTS REFERRED TO IN ARTICLE 4(2)

1. AGRICULTURE, SILVICULTURE AND AQUACULTURE

- (a) Projects for the restructuring of rural land holdings;
- (b) Projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes;
- (c) Water management projects for agriculture, including irrigation and land drainage projects;
- (d) Initial afforestation and deforestation for the purposes of conversion to another type of land use;
- (e) Intensive livestock installations (projects not included in Annex I);
- (f) Intensive fish farming;
- (g) Reclamation of land from the sea.

Some of the projects listed in Annex II are the same as those included in Annex I, but under the thresholds.

There are also other types.

Here, we have some examples of different types. Like agriculture, silviculture and aquaculture



2. EXTRACTIVE INDUSTRY

- (a) Quarries, open-cast mining and peat extraction (projects not included in Annex I);
- (b) Underground mining;
- (c) Extraction of minerals by marine or fluvial dredging;
- (d) Deep drillings, in particular:
 - (i) geothermal drilling;
 - (ii) drilling for the storage of nuclear waste material;
 - (iii) drilling for water supplies;
 with the exception of drillings for investigating the stability of the soil;
- (e) Surface industrial installations for the extraction of coal, petroleum, natural gas and ores, as well as bituminous shale.

Extraktive industri.

For example quarries and open cast mining that is under the thresholds in Annex I, underground mining and deep drilling.

Screening : Is a particular project 'likely to have significant effects on the environment' ?

- | | |
|---|---|
| 3. ENERGY INDUSTRY | 8. TEXTILE, LEATHER, WOOD AND PAPER INDUSTRIES |
| (a) Industrial installations | 9. RUBBER INDUSTRY |
| 4. PRODUCTION AND PROCESSING OF METALS | Manufacture and treatment of elastomer-based products. |
| (a) Installations for the production of metal | 10. INFRASTRUCTURE PROJECTS |
| 5. MINERAL INDUSTRY | (a) Industrial estate development projects; |
| (a) Coke ovens (blast furnaces) | 11. OTHER PROJECTS |
| 6. CHEMICAL INDUSTRY (PROJECTS) | 12. TOURISM AND LEISURE |
| (a) Manufacture of organic chemical products | (a) Ski runs, ski lifts and cable cars and associated developments; |
| 13. (a) Any change or extension of projects listed in Annex I or this Annex, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment (change or extension not included in Annex I); | |
| (b) Projects in Annex I, undertaken exclusively or mainly for the development and testing of new methods or products and not used for more than two years. | |
| (f) Manufacture of ceramic products by pressing or porcelain. | (e) Theme parks. |
| | (g) Installations for the manufacture of artificial mineral fibres; |

And then there is the energy industry, the production and processing of metals, the mineral industry, the chemical industry, food industry, textile, leather, wood and paper industries, rubber industry, infrastructure projects, other projects, tourism and leisure etc etc.

Screening : How to screen???

Annex II

For this project; Member States must determine whether it shall be made subject to an EIA (= screening)

Either through

CA

stands for

Competent Authority

a case-by-case examination

or a combination

or

by setting thresholds or criteria

Article 4



If the relevant project is in Annex II; it's time for screening!

How are the member states supposed to do? Are they free to determine on their own discretion whether a certain project (which is found in annex II) has significant effects on the environment or not?

No. They don't have that freedom.

According to article 4, the screening should be done either through **a case by case examination** or by setting thresholds or criteria or by a combination.

Screening : How to screen???

Annex II

For this project; Member States must determine whether it shall be made subject to an EIA

Either through

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a case-by-case examination

or a combination

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by setting thresholds or criteria

Article 4

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

And when doing this case-by-case-examination or when setting thresholds or criteria; **the member states must take into account the relevant selection criteria set out in Annex III!**

Criteria in case-by-case examination or thresholds or criteria are set:

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

- Characteristics of project
- Location of project
- Characteristics of potential impact



The criteria in Annex III relate to the characteristics of the project, the location of the project, and to the characteristics of the potential impact.

SELECTION CRITERIA REFERRED TO IN ARTICLE 4(3)

1. CHARACTERISTICS OF PROJECTS

The characteristics of projects must be considered having regard, in particular, to:

- (a) the size of the project;
- (b) the cumulation with other projects;
- (c) the use of natural resources;
- (d) the production of waste;
- (e) pollution and nuisances;
- (f) the risk of accidents, having regard in particular to substances or technologies used.



When annex III describes how the member states shall consider the characteristics of projects, it follows that the member states need to consider, the **size, cumulation with other projects, the use of natural resources, the production of waste, pollution and nuisances** and the **risk of accidents**.

SELECTION CRITERIA REFERRED TO IN ARTICLE 4(3)

1. CHARACTERISTICS OF PROJECTS

2. LOCATION OF PROJECTS

The environmental sensitivity of geographical areas likely to be affected by projects must be considered in particular, to:

- (a) the existing land use;
- (b) the relative abundance, quality and regenerative capacity of natural resources in the area;
- (c) the absorption capacity of the natural environment, paying particular attention to the following:
 - (i) wetlands;
 - (ii) coastal zones;
 - (iii) mountain and forest areas;
 - (iv) nature reserves and parks;



When it comes to **the location of the project**, member states need to consider **the environmental sensitivity of the areas likely to be affected**; the existing land use, the relative abundance, the absorption capacity etc.

It is important to note that the word "location" does not focus on planning, but on **environmental sensitivity of the areas likely to be affected by the project**.

SELECTION CRITERIA REFERRED TO IN ARTICLE 4(3)

1. CHARACTERISTICS OF PROJECTS
2. LOCATION OF PROJECTS
3. CHARACTERISTICS OF THE POTENTIAL IMPACT

The potential significant effects of projects must be considered in relation to criteria set out having regard in particular to:

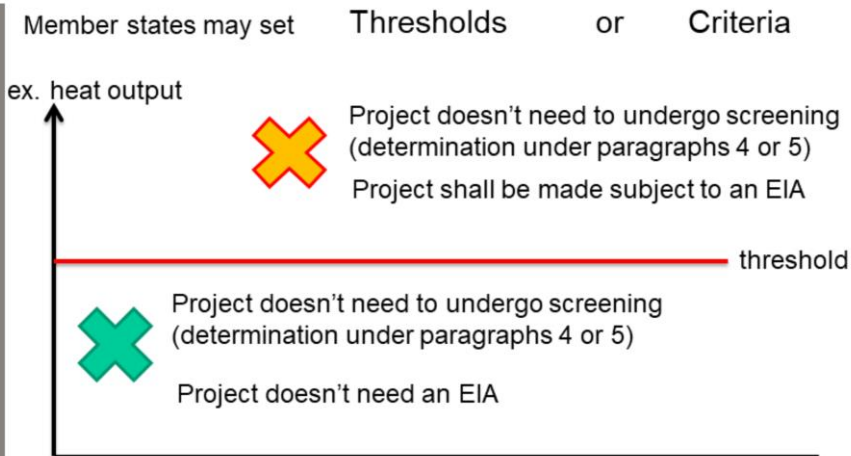
- (a) the extent of the impact (geographical area and size of the affected population);
 - (b) the transfrontier nature of the impact;
 - (c) the magnitude and complexity of the impact;
 - (d) the probability of the impact;
 - (e) the duration, frequency and reversibility of the impact.
- (iv) nature reserves and parks;



And finally, the **characteristics of the potential impact** must be considered.

The extent of the impact, the transfrontier nature of the impact, the magnitude and complexity of the impact and the duration, frequency and reversibility of the impact.

Projects not in need of screening... A 4 (3)



Article 4 (3) allows the member states to set thresholds or criteria to determine whether the screening is needed or not.

These thresholds or criteria can be used to determine **when a project doesn't need to undergo screening**.

The situations can be as follow:

If a project falls **under the threshold** there is no need of screening – and the project doesn't need an EIA either. Thus; **no need of screening and no need of an EIA**.

If a project is **over the threshold**; then it might not need to undergo screening because then you can presuppose that it is likely to have significant effects on the environment at it shall be made subject to an EIA nevertheless. Thus; **no need of screening, always in need of an EIA**.

Here it is important again to remember the purpose of screening; to determine whether a certain project is likely to have significant effects on the environment or not and thus whether it needs an EIA or not.

The screening process

Who is doing what? And when?

Article 4 (4)-(6)



Article 4, paragraph 4-6 describes the screening process.

Who is doing what? And when?

Article 4 (4)

Article 4 (4)

The developer

provides information

Detailed list of information to be provided is specified in Annex IIA

- the characteristics of the project
- the projects likely significant effects on the environment

Where relevant take into account:

Available results of other environmental assessments (other EU law)

May provide:

Planned measures to avoid or prevent significant adverse effects on the environment

CA
stands for
Competent Authority



In paragraph 4, it starts with **the developer**.

The developer shall provide information to the competent authority.

The detailed list of information to be provided is specified in Annex IIA.

In brief, it the information shall be on the characteristics of the project and its likely significant effects on the environment.

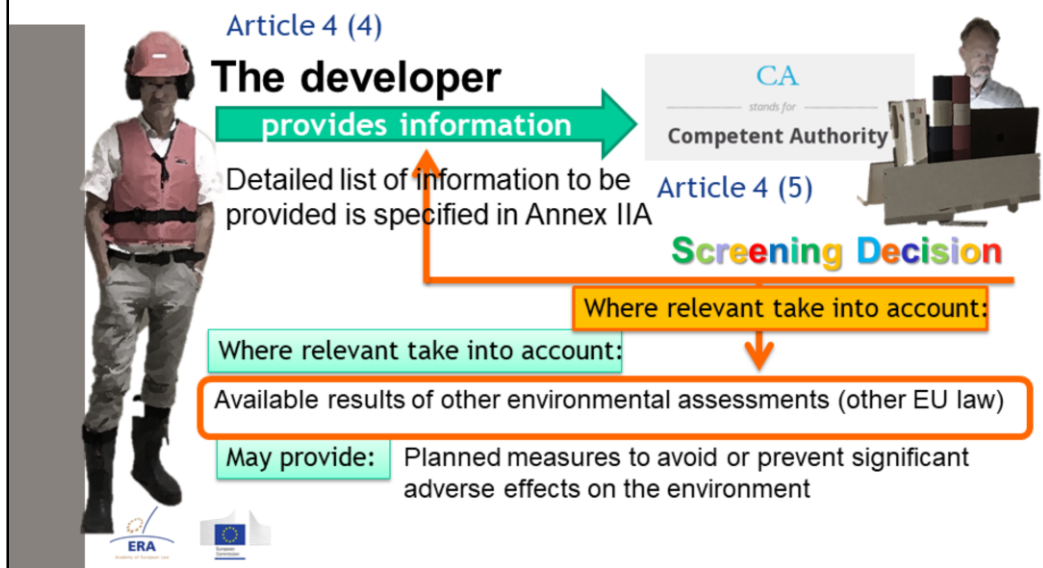
Where relevant the developer shall take into account the available results of other relevant assessments of environmental effects carried out pursuant to Union legislation other than this Directive (for example the birds directive, the habitats directive, the water framework directive and the IED).

The developer may also provide a description of any features of the project or planned measures to avoid or prevent what might otherwise have been significant adverse effects on the environment.

The screening process

Who is doing what? And when?

Article 4 (5)



Then the competent authority shall make its determination. This is **the screening decision**.

The decision shall be on the basis of the information provided by the developer.

Where relevant, it shall also take into account the results of preliminary verifications or assessments of the environmental effects carried out according to other EU-legislation.

The screening process

Who is doing what? And when?

Article 4 (5)

CA
stands for
Competent Authority

Article 4 (5)



Screening Decision

Made available to the public

If decided that an **EIA is required**:
The main reasons for with reference to the relevant criteria in Annex III

If decided that an environmental impact assessment **is not required**:
The main reasons for with reference to the relevant criteria in Annex III
and, where proposed by the developer
state any features/measures envisaged to avoid or prevent what might
otherwise have been significant adverse effects on the environment.




Then the competent authority must make the decision available to the public.

(a) If the decision means that an EIA is required, then the decision must state the main reasons with reference to the relevant criteria listed in Annex III.

(b) If the decision means that an EIA is **not** required; the decision must also state the main reasons.

If the developer had proposed measures to prevent adverse effects on the environment, the CA shall state them in the decision.

The screening process

Who is doing what? And when?

Article 4 (6)

CA
stands for
Competent Authority

Article 4 (5)
Article 4 (6)



Screening Decision

The CA must reach a decision as soon as possible and

within 90 days

from the date when the developer submitted all information required. (May be extended in exceptional cases)



The decision must be made as soon as possible and within a period of time not exceeding 90 days from the date on which the developer has submitted all the information required pursuant to paragraph 4.

This time limit can be extended in exceptional cases. Exceptional cases might for instance relate to the nature, complexity, location or size of the project.

If the time limit is extended; the CA shall inform the developer, in writing, on the reasons for the extension and the date when its determination is expected.

What to screen?



Article 4

2. Subject to Article 2(4), for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.



So far, we have talked about the member states' screening.

Now we will take a closer look on **what** they are screening; the subject of screening. The project.

What is a 'Project'?

Article 1(2a)

"project" means:

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



What is a project??

The simple answer is found in article 1 (2a) defining a "project".

A "project" means...

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

What is a 'Project'?

The term "project" refers to
construction works and physical interventions
in natural surroundings

C-2/07 *Abraham and others*,
C-275/09 *Brussels Hoofdstedelijk Gewest and others*



Emphasize that The term "project" refers to **construction works** and **physical interventions in natural surroundings**.

C-2/07 Abraham and others:

22 By its first question the national court asks whether an agreement such as the one at issue in the main proceedings is a 'project' within the meaning of Directive 85/337.

23 That question calls for a negative answer. It is apparent from the very wording of Article 1(2) of Directive 85/337 that the term 'project' refers to works or physical interventions. An agreement cannot, therefore, be regarded as a project within the meaning of Directive 85/337, irrespective of whether that agreement contains a more or less exact description of the works to be carried out.

While an agreement such as the one at issue in the main proceedings is not a project within the meaning of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, it is for the national court to determine, on the basis of the applicable national legislation, whether such an agreement constitutes a development consent within the meaning of Article 1(2) of Directive 85/337. It is necessary, in that context, to consider whether that consent forms part of a procedure carried out in several stages involving a principal decision and implementing decisions and whether account is to be taken of the cumulative effect of several projects whose impact on the environment must be assessed globally.

C-275/09 Brussels Hoofdstedelijk Gewest and others

20 As the Court observed at paragraph 23 of its judgment in Case C-2/07 *Abraham and Others* [2008] ECR I-1197, it is apparent from the very wording of Article 1(2) of Directive 85/337 that the term 'project' refers to works or physical interventions.

24 It follows that the renewal of an existing permit to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a 'project' within the meaning of the second indent of Article 1(2) of Directive 85/337.

The second indent of Article 1(2) of, and point 7 of Annex 1 to, Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997, are to be interpreted as meaning that:

- the renewal of an existing permit to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a 'project' or 'construction', respectively, within the meaning of those provisions;
- however, it is for the national court to determine, on the basis of the national legislation applicable and taking account, where appropriate, of the cumulative effect of a number of works or interventions carried out since the entry into force of the directive, whether that permit forms part of a consent procedure carried out in several stages, the ultimate purpose of which is to enable activities which constitute a project within the meaning of the first indent of point 13 of Annex II, read in conjunction with point 7 of Annex I, to the directive to be carried out. If no assessment of the environmental effects of such works or interventions was carried out at the earlier stage in the consent procedure, it would be for the national court to ensure that the directive was effective by satisfying itself that such an assessment was carried out at the very least at the stage at which the operating permit was to be granted.

What is a 'Project'?

Renewal of an existing consent to operate an airport.

No works or interventions involving alterations to the physical aspect of the site

Cannot be classified as
a project!

C-275/09 Brussels Hoofdstedelijk Gewest and others

The **physical intervention** is important!

In case *C-275/09, Brussels Hoofdstedelijk Gewest and others*, which was about the renewal of an existing consent to operate an airport, the CJEU expressed that if there are no works or interventions involving alterations to the physical aspect of the site, it cannot be classified as a project.

C-275/09, Brussels Hoofdstedelijk Gewest and others.

24 It follows that the renewal of an existing permit to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a 'project' within the meaning of the second indent of Article 1(2) of Directive 85/337.

30 It follows that, in any event, the renewal of an existing consent to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a 'construction' within the meaning of point 7(a) of Annex I to Directive 85/377.

Just to keep in mind; from the same case follows:

However, it is for the national court to determine, on the basis of the national legislation applicable and taking account, where appropriate, of the cumulative effect of a number of works or interventions carried out since the entry into force of the directive, whether that permit forms part of a consent procedure carried out in several stages, the ultimate purpose of which is to enable activities which constitute a project within the meaning of the first indent of point 13 of Annex II, read in conjunction with point 7 of Annex I, to the directive to be carried out. If no assessment of the environmental effects of such works or interventions was carried out at the earlier stage in the consent procedure, it would be for the national court to ensure that the directive was effective by satisfying itself that such an assessment was carried out at the very least at the stage at which the operating permit was to be granted.

What is a 'Project'?

Case C-2/07 Abraham and Others

Agreement between the Region of Wallonia, Société de développement et de promotion de l'aéroport de Liège-Bierset and TNT Express Worldwide.

Provided for certain modifications to the infrastructure of the airport.

- The runways were restructured and widened.
- A control tower, new runway exits and aprons were constructed.
- The length of the runway of 3 297 meters was not altered.

Planning consents and operational authorisations were also granted.



In case C-2/07 an agreement had been signed which provided for certain modifications to the infrastructure of the airport, in order to enable it to be used 24/7, the entire year.

Planning consents and operational authorisations were also granted so that the works could be carried out.

C-2/07 Abraham and Others:

III – Facts, procedure and questions referred for a preliminary ruling

13. The main proceedings concern an action brought by individuals who live near Liège-Bierset Airport in Belgium. For some time that airport has had a runway well over 2 100 metres in length. Following an economic study carried out by a third party, the Region of Wallonia decided to develop air freight activity at the airport which would take place 24 hours a day.

14. The Region of Wallonia and the Société de développement et de promotion de l'aéroport de Liège-Bierset (Liège-Bierset Airport Development and Promotion Company; 'SAB') entered into agreements with air freight undertakings. No further information has been conveyed to the Court regarding the contract concluded with Cargo Airlines Ltd ('CAL') on an unspecified date. However, the agreement entered into with the express courier company TNT on 26 February 1996 ('the agreement') is set out in detail.

15. The parties who live near the airport submit that the agreement provided, inter alia, that:

- the entire length of the main runway (23L/05R) of the airport was to be fully operational and equipped with a landing system;
- parallel runway (23R) was to be equipped by 1 March 1996 at the latest;
- parallel runway 23L/05 was to be widened to 45 metres and comply with standards sufficient to enable an Airbus 300 to manoeuvre;
- runway 23ML was to be equipped with two additional high-speed exits and the Air Traffic Control (ATC) tower was to be moved;
- a new apron of 18 hectares was to be sited directly opposite TNT's main sorting centre;
- the apron was to be extended towards the aircraft maintenance hangar and linked to the new high-speed exit;
- a control tower was to be erected, and a refuelling centre with a minimum capacity of one million litres was to be retained, with TNT having the option of requiring it to be enlarged;
- the airport was to be open 24 hours a day, 365 days a year, and an appropriate power source was to be available for TNT's operations (approximately 2 000 amperes) with a back-up system enabling an uninterrupted supply of energy to be maintained, which required permission to be granted for the construction of two 15 kV high-tension electricity substations.

16. The first night flights were carried out in 1996 by CAL. TNT began its own night flights in March 1998.

17. The individuals who live nearby complain of very serious noise pollution, mostly at night, and of its effects on sleep and health. They have instituted civil proceedings, seeking compensation for the damage suffered by reason of the use of the infrastructure referred to in the agreement and a ban on the use of those infrastructure.

18. They argue that no environmental impact assessment was carried out prior to the grant of the planning consent and operational authorisation necessary for carrying out the works referred to in the agreement; as a result of the lack of impact assessment, the consents necessary for the implementation of the agreement and, therefore, also the infrastructure covered by those consents and the use thereof are unlawful.

19. The Tribunal de première instance de Liège (Court of First Instance, Liège) granted the application partially; on appeal, the Cour d'appel de Liège (Court of Appeal, Liège) dismissed it. The Cour d'appel stated inter alia that the EIA directive contemplates and defines the notion of an airport by reference to the length of its runway and not by reference to the installations connected with the runway, such as hangars or a control tower. However, the runway was not substantially modified. The Cour d'appel added that Annex I to the directive refers to the 'construction' of an airport and Annex II applies to modifications to a project included in Annex I, that is to say modifications to the construction.

20. In the appeal to the Cour de cassation (Court of Cassation), the individuals who live nearby challenge the interpretation by the Cour d'appel of the notion of a 'project'.

What is a 'Project'?

Case C-2/07 Abraham and Others

1. Does an agreement between public authorities and a private undertaking (...) constitute a project within the meaning of [the Directive]?
2. Do works to modify the infrastructure of an existing airport (...) without extension of the runway, correspond to the notion of a "project", for which an EIA is required within the terms of [the Directive]?

Two of the referred questions, from the national court to the CJEU, concerned the concept of "project".

1. Does an agreement between public authorities and a private undertaking (...) constitute a project within the meaning of [the Directive]?
2. Do works to modify the infrastructure of an existing airport (...) without extension of the runway, correspond to the notion of a "project", for which an EIA is required within the terms of [the Directive]?

C-2/07 Abraham and Others:

III – Facts, procedure and questions referred for a preliminary ruling

21. The Cour de cassation has therefore referred the following questions to the Court of Justice for a preliminary ruling:

1. Does an agreement between public authorities and a private undertaking, signed with a view to having that undertaking become operational at an airport with a runway more than 2 100 metres in length, featuring an exact description of work on the infrastructure to be carried out in relation to the adaptation of the runway, without its being extended, and the construction of a control tower with a view to permitting large aircraft to fly 24 hours per day and 365 days per year, and which provides for both nighttime and daytime flights with effect from the date on which the undertaking becomes operational at that airport constitute a project within the meaning of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as applicable before its amendment by Council Directive 97/11/EC of 3 March 1997?
2. Do works to modify the infrastructure of an existing airport with a view to adapting it to a projected increase in the number of nighttime and daytime flights, without extension of the runway, correspond to the notion of a 'project', for which an impact assessment is required within the terms of Articles 1, 2 and 4 of Directive 85/337, as applicable before its amendment by Directive 97/11?
3. Since a projected increase in the activity of an airport is not directly referred to in the annexes to Directive 85/337, must the Member State in question nevertheless take account of that increase when examining the potential environmental effect of modifications made to the infrastructure of that airport with a view to accommodating that increase in activity?

1. Does an agreement between public authorities and a private undertaking (...) constitute a project within the meaning of [the Directive]?

Case C-2/07 *Abraham and Others*

CJEU:

It is apparent from the very wording of Article 1(2) of Directive 85/337 that the term 'project' refers to **works or physical interventions**.

Therefore;

An agreement cannot be regarded as a project

irrespective of whether that agreement contains a more or less exact description of the works to be carried out.

The first question:

1. Does an agreement between public authorities and a private undertaking (...) constitute a project within the meaning of [the Directive]?

Before showing the rest of the picture, ask the audience what they think. From what they know about the definition of a "project": Is it possible to regard an agreement as a project?

The court of justice found that **it is apparent from the very wording** of Article 1(2) of Directive 85/337 that the term 'project' refers to **works or physical interventions**.

And therefore **an agreement cannot be regarded as a project** irrespective of whether that agreement contains a more or less exact description of the works to be carried out.

C-2/07 Abraham and Others:

23 That question calls for a negative answer. It is apparent from the very wording of Article 1(2) of Directive 85/337 that the term 'project' refers to works or physical interventions. An agreement cannot, therefore, be regarded as a project within the meaning of Directive 85/337, irrespective of whether that agreement contains a more or less exact description of the works to be carried out.

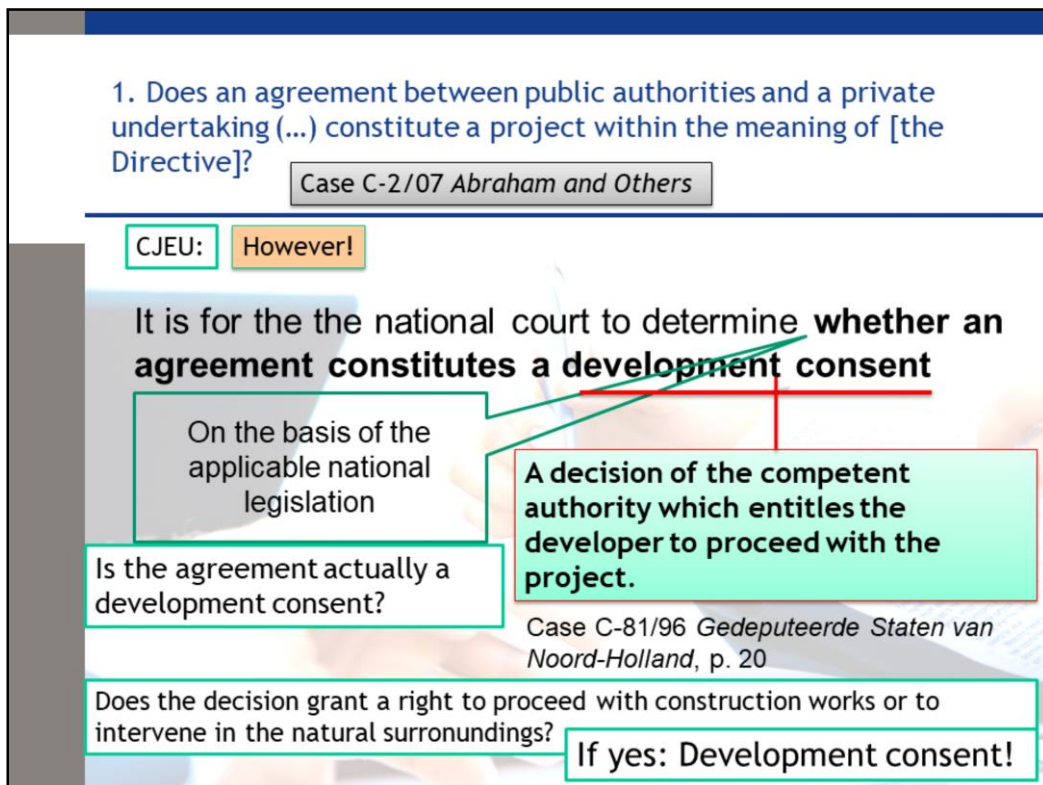
1. Does an agreement between public authorities and a private undertaking (...) constitute a project within the meaning of [the Directive]?

Case C-2/07 *Abraham and Others*

CJEU:

However!

But, then the court continued...



It is for the national court it to determine whether an agreement constitutes a development consent. And a development consent is to say, a decision of the competent authority which entitles the developer to proceed with the project. This should be determined by the national court on the basis of the applicable national legislation.

In short; the national court should ask itself: is the agreement actually a development consent?

Such would be the case if the decision grant the developer the right to proceed with construction works or other installations or schemes or to intervene in the natural surroundings and landscape.

C-2/07 Abraham and Others:

24 However, in order to provide a satisfactory answer to a national court which has referred a question to it, the Court of Justice may also deem it necessary to consider provisions of Community law to which the national court has not referred in the text of its question (see, inter alia, Case 35/85 *Tissier* [1986] ECR 1207, paragraph 9).

25 In the present case, it should be pointed out to the national court that it is for it to determine, on the basis of the applicable national legislation, whether an agreement such as the one at issue in the main proceedings constitutes a development consent within the meaning of Article 1(2) of Directive 85/337, that is to say a decision of the competent authority which entitles the developer to proceed with the project (see, to that effect, Case C-81/96 *Gedeputeerde Staten van Noord-Holland* [1998] ECR I-3923, paragraph 20). Such would be the case if that decision could, under national law, be regarded as a decision of the competent authority or authorities granting the developer the right to proceed with construction works or other installations or schemes or to intervene in the natural surroundings and landscape.

Case 35/85 Tissier

9 As far as that point is concerned, it is for the Court, when faced with questions which are not framed in an appropriate manner or which go beyond its functions under Article 177, to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of Community law which require interpretation or whose validity is at issue, having regard to the subject-matter of the dispute. In order to provide a satisfactory answer to a national court which has referred a question to it, the Court of Justice may deem it necessary to consider provisions of Community law to which the national court has not referred in the text of its question. However, it is for the national court to decide whether or not the rule of Community law, as interpreted by the Court of Justice pursuant to Article 177, is applicable in the case brought before it.

Case C-81/96 Gedeputeerde Staten van Noord-Holland:

20. It should be noted, as a preliminary, that it is for the national court to determine in each case and on the basis of the applicable national law whether approval of the development plan constitutes consent within the meaning of Article 1(2), that is to say a decision of the competent authority which entitles the developer to proceed with the project.

1. Does an agreement between public authorities and a private undertaking (...) constitute a project within the meaning of [the Directive]?

Case C-2/07 *Abraham and Others*

CJEU:



In addition:



And here the CJEU takes a small legal detour and tells us that in addition..

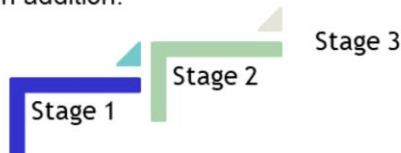
1. Does an agreement between public authorities and a private undertaking (...) constitute a project within the meaning of [the Directive]?

Case C-2/07 *Abraham and Others*

CJEU:

Where national law provides that the **consent procedure** is to be **carried out in several stages....**

In addition:



**...the EIA must be carried out
as soon as it is possible to identify and
assess all the effects on the environment.**



Where national law provides that the consent procedure is to be carried out in several stages, the EIA must be carried out as soon as it is possible to identify and assess **all** the effects which the project may have on the environment.

Case C-2/07 Abraham and Others

26 In addition, where national law provides that the consent procedure is to be carried out in several stages, the environmental impact assessment in respect of a project must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment (see Case C-201/02 *Wells* [2004] ECR I-723, paragraph 53). Thus, where one of those stages involves a principal decision and the other involves an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of the latter procedure (*Wells*, paragraph 52).

Case C-201/02 Delena Wells

52. Accordingly, where national law provides that the consent procedure is to be carried out in several stages, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure.

53. The answer to the first two questions must therefore be that Article 2(1) of Directive 85/337, read in conjunction with Article 4(2) thereof, is to be interpreted as meaning that, in the context of applying provisions such as section 22 of the Planning and Compensation Act 1991 and Schedule 2 to that Act, the decisions adopted by the competent authorities, whose effect is to permit the resumption of mining operations, comprise, as a whole, a development consent within the meaning of Article 1(2) of that directive, so that the competent authorities are obliged, where appropriate, to carry out an assessment of the environmental effects of such operations.

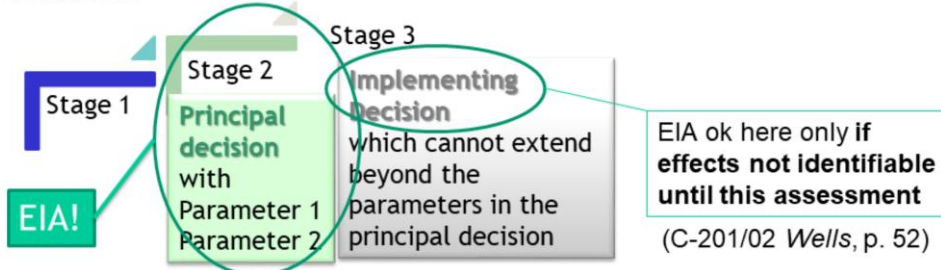
In a consent procedure comprising several stages, that assessment must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment.

1. Does an agreement between public authorities and a private undertaking (...) constitute a project within the meaning of [the Directive]?

Case C-2/07 *Abraham and Others*

CJEU:

In addition:



...the EIA must be carried out as soon as it is possible to identify and assess all the effects on the environment.



- Thus, if one of those stages involves a **principal decision**.
- and another stage involves an **implementing decision** which cannot extend beyond the parameters set by the principal decision.

The **EIA** must be carried out at the time of the procedure relating to **the principal decision**.

Only if those **effects are not identifiable until the time** of the procedure relating to the implementing decision is it **ok to carry out the EIA in this latter procedure**.

And why is it so?

Because: the EIA must be carried out **as soon as it is possible to identify and assess all the effects on the environment!**

1. Does an agreement between public authorities and a private undertaking (...) constitute a project within the meaning of [the Directive]?

Case C-2/07 *Abraham and Others*

CJEU:

The national court should be reminded:

In addition:

The objective of the legislation cannot be circumvented by the splitting of projects!



Likely to have significant effects on the environment



The court further reminds the national court that the objective of the legislation cannot be circumvented by the splitting of projects.

If you have a project which is likely to have significant effects on the environment....

1. Does an agreement between public authorities and a private undertaking (...) constitute a project within the meaning of [the Directive]?

Case C-2/07 *Abraham and Others*

CJEU:

The national court should be reminded:

In addition:

The objective of the legislation cannot be circumvented by the splitting of projects!



Likely to have significant effects on the environment

Failure to take account of their cumulative effect must not mean that they all escape the obligation to carry out an EIA

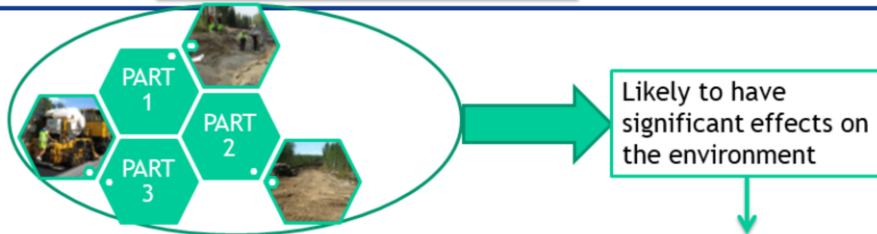
Obligation to carry out an EIA



Failure to take account of their cumulative effect must not mean in practice that they all escape the obligation to carry out an EIA.

1. Does an agreement between public authorities and a private undertaking (...) constitute a project within the meaning of [the Directive]?

Case C-2/07 *Abraham and Others*



C-392/96, *Commission v. Ireland*, pp. 76 and 82
C-142/07, *Ecologistas en Acción-CODA*, p. 44
C-205/08, *Umweltanwalt von Kärnten*, p. 53

The purpose of the EIA Directive cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the EIA Directive.

This statement:

“The purpose of the EIA Directive cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the EIA Directive...”

This statement has been repeated in many cases from the court of justice!

C-392/96, *Commission v. Ireland*

76. That would be the case where a Member State merely set a criterion of project size and did not also ensure that the objective of the legislation would not be circumvented by the splitting of projects. Not taking account of the cumulative effect of projects means in practice that all projects of a certain type may escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the Directive.

82. It follows from all of the foregoing that, by setting thresholds for the classes of projects covered by points 1(d) and 2(a) of Annex II to the Directive without also ensuring that the objective of the legislation will not be circumvented by the splitting of projects, Ireland has exceeded the limits of its discretion under Articles 2(1) and 4(2) of the Directive.

C-142/07, *Ecologistas en Acción-CODA*

44. Lastly, as the Court has already noted with regard to Directive 85/337, the purpose of the amended directive cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the amended directive (see, as regards Directive 85/337, Case C-392/96 *Commission v Ireland* [1999] ECR I-5901, paragraph 76, and *Abraham and Others*, paragraph 27).

C-205/08, *Umweltanwalt von Kärnten*

53. Moreover, the Court has held that the purpose of Directive 85/337 cannot be circumvented by the splitting of projects and that the failure to take account of the cumulative effect of several projects must not mean in practice that they all cease to be covered by the obligation to carry out an assessment, when, taken together, they are likely to have ‘significant effects on the environment’ within the meaning of Article 2(1) of Directive 85/337 (see, to that effect, *Ecologistas en Acción-CODA*, paragraph 44).

Are works to modify the infrastructure of an existing airport a “project”?

Case C-2/07 *Abraham and Others* (p 32)

The CJEU:

Referring to C-72/95 *Kraaijeveld and Others* p 31 and C-435/97 *WWF and Others*, p 40

The scope of the Directive is wide and its purpose very broad.

It would be contrary to the very objective of the Directive to exclude works to improve or extend the infrastructure of an existing airport from the scope of Annex II on the ground that Annex I covers the ‘construction of airports’ and not ‘airports’ as such.

Consequently, Annex II, read in conjunction with Annex I, must be regarded as also encompassing works to modify an existing airport. In addition, the fact that the works at issue in the main proceedings do not concern the length of the runway is not relevant to the question whether they fall within the scope of Annex II.

The second question in the case related to the concept of “project” was about whether the works to modify the infrastructure of the already existing airport was to consider as a “project”.

First of all (referring to C-72/95 *Kraaijeveld and Others* p 31 and C-435/97 *WWF and Others*, p 40) the court stated that:

“The scope of the Directive is wide and its purpose very broad.”

This is a really important statement to remember!

Then, the court concluded that it would be contrary to the very objective of the directive to exclude those works.

C-72/95 *Kraaijeveld and Others*

31 The wording of the directive indicates that it has a wide scope and a broad purpose. That observation alone should suffice to interpret point 10(e) of Annex II to the directive as encompassing all works for retaining water and preventing floods — and therefore dyke works — even if not all the linguistic versions are so precise.

39 It has already been pointed out in paragraph 31 above that the scope of the directive is wide and its purpose very broad. Its purpose would be undermined if ‘modifications to development projects’ were so construed as to enable certain works to escape the requirement of an impact assessment although, by reason of their nature, size or location, such works were likely to have significant effects on the environment.

C-435/97 *WWF and Others*

40 Thus, observing that the scope of the Directive was wide and its purpose very broad, the Court held that the Directive covered ‘modifications to development projects’ even in relation to projects falling within Annex II, on the ground that its purpose would be undermined if ‘modifications to development projects’ were so construed as to enable certain works to escape the requirement of an impact assessment when, by reason of their nature, size or location, they were likely to have significant effects on the environment (*Kraaijeveld*, paragraph 39).

C-2/07 *Abraham and others*

The second question

29 By its second question the national court asks, in essence, whether works relating to the infrastructure of an existing airport whose runway is already more than 2 100 metres in length fall with the scope of point 12 of Annex II, read in conjunction with point 7 of Annex I, to Directive 85/337, in its original version.

30 Pursuant to point 12 of Annex II in the version prior to Directive 97/11, ‘modifications to development projects included in Annex I’ constitute projects subject to Article 4(2). Point 7 of Annex I refers to the ‘construction ... of airports ... with a basic runway length of 2 100 m or more’.

31 Société de développement et de promotion de l’aéroport de Liège-Bierset, TNT Express Worldwide and the Kingdom of Belgium submit that it necessarily follows from that wording that only modifications to the ‘construction’ of an airport with a runway length of 2 100 metres or more are covered and not modifications to an existing airport.

32 The Court has frequently pointed out, however, that the scope of Directive 85/337 is wide and its purpose very broad (see, to that effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 31, and Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 40). It would be contrary to the very objective of Directive 85/337 to exclude works to improve or extend the infrastructure of an existing airport from the scope of Annex II on the ground that Annex I covers the ‘construction of airports’ and not ‘airports’ as such. Such an interpretation would indeed allow all works to modify a pre-existing airport, regardless of their extent, to fall outside the obligations resulting from Directive 85/337 and would, in that regard, thus deprive Annex II to Directive 85/337 of all effect.

33 Consequently, point 12 of Annex II, read in conjunction with point 7 of Annex I, must be regarded as also encompassing works to modify an existing airport.

34 That interpretation is in no way called into question by the fact that Directive 97/11 has replaced point 12 of Annex II to Directive 85/337 with a new point 13, which expressly designates ‘any change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed ... as a project subject to Article 4(2) of Directive 85/337, as amended by Directive 97/11, whereas point 12 of Annex II merely referred to ‘modifications to development projects included in Annex I’. The new wording adopted by Directive 97/11, the fourth recital in the preamble to which makes reference to experience acquired in environmental impact assessment and stresses the need to introduce provisions designed to clarify, supplement and improve the rules on the assessment procedure, merely sets out with greater clarity the meaning to be given here to the original wording of Directive 85/337. The Community legislature’s amendment cannot, therefore, warrant an *a contrario* interpretation of the directive in its original version.

35 In addition, the fact that the works at issue in the main proceedings do not concern the length of the runway is not relevant to the question whether they fall within the scope of point 12 of Annex II to Directive 85/337. Point 7 of Annex I to Directive 85/337 makes a point of defining the term ‘airport’ by reference to the definition given in Annex 14 to the Chicago Convention of 7 December 1944 on International Civil Aviation. Under that annex, an aerodrome is ‘a defined area on land or water (including any buildings, installations and equipment) intended to be used either wholly or in part for the arrival, departure and surface movement of aircraft’.

36 It follows that all works relating to the buildings, installations or equipment of an airport must be considered to be works relating to the airport as such. For the application of point 12 of Annex II, read in conjunction with point 7 of Annex I, to Directive 85/337, that means that works to modify an airport with a runway length of 2 100 metres or more thus comprise not only works to extend the runway, but all works relating to the buildings, installations or equipment of that airport where they may be regarded, in particular because of their nature, extent and characteristics, as a modification of the airport itself. That is the case in particular for works aimed at significantly increasing the activity of the airport and air traffic.

37 Finally, it is appropriate to remind the national court that, although the second subparagraph of Article 4(2) of Directive 85/337 confers on Member States a measure of discretion to specify certain types of projects which will be subject to an assessment or to establish the criteria and/or thresholds applicable, the limits of that discretion are to be found in the obligation set out in Article 2(1) of the directive that projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment (*Kraaijeveld and Others*, paragraph 50).

38 Thus, a Member State which establishes criteria and/or thresholds taking account only of the size of projects, without also taking their nature and location into consideration, would exceed the limits of its discretion under Articles 2(1) and 4(2) of Directive 85/337.

39 It is for the national court to establish that the competent authorities correctly assessed whether the works at issue in the main proceedings were to be subject to an environmental impact assessment.

40 The answer to the second question must therefore be that point 12 of Annex II, read in conjunction with point 7 of Annex I, to Directive 85/337, in their original version, also encompasses works to modify the infrastructure of an existing airport, without extension of the runway, where they may be regarded, in particular because of their nature, extent and characteristics, as a modification of the airport itself. That is the case in particular for works aimed at significantly increasing the activity of the airport and air traffic. It is for the national court to establish that the competent authorities correctly assessed whether the works at issue in the main proceedings were to be subject to an environmental impact assessment.

What is a 'Project'? What is a 'consent'?

Does the definitive decision relating to the carrying on of operations at an existing landfill site constitute a 'development consent'?

C- 121/11 Pro-Braine and others

Project?

The mere renewal of an existing permit to operate a landfill site

No works or interventions involving alterations to the physical aspect of the site

Cannot be classified as a project!

Consent?

The definitive decision relating to the carrying on of operations at an existing landfill site

Only if:

- the decision authorises a change to installations, or extension of installations or site through
- **works or interventions involving alterations to its physical aspect.**

Another example is found in case C-121/11, concerning the mere renewal of a permit to operate an existing landfill:

Ask the audience what they think? Is this a 'project' within the meaning of the directive?

No! The mere renewal of an existing permit to operate a landfill site cannot in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a 'project'.

So, it was not a project. But can the definitive decision relating to the carrying on of operations at an existing landfill site, constitute a 'consent'?

Yes! But only if that decision authorises a change to or extension of that installation or site through **work or interventions involving alterations to its physical aspect.**

C- 121/11 Pro-Braine and others

The definitive decision relating to the carrying on of operations at an existing landfill site, taken on the basis of a conditioning plan, pursuant to Article 14(b) of Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste, does not constitute a 'consent' within the meaning of Article 1(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, unless that decision authorises a change to or extension of that installation or site, through works or interventions involving alterations to its physical aspect, which may have significant adverse effects on the environment within the meaning of point 13 of Annex II to Directive 85/337, and thus constitute a 'project' within the meaning of Article 1(2) of that Directive.

May demolition works constitute a project?

The definition of “project” cannot lead to the conclusion that demolition works could not satisfy the criteria of that definition.

Such work can indeed, be described as “other interventions in the natural surroundings and landscape”.

C-50/09 Commission v. Ireland

→ Demolition work may constitute a “project”.

May demolition works constitute a project?

Point out the difference: **Demolition** works are not really **construction works**

The court:

The definition of “project” cannot lead to the conclusion that demolition works could not satisfy the criteria of that definition.

AND; although not construction works, such work can indeed, be described as “other interventions in the natural surroundings and landscape”.

Thus: Demolition work may constitute a „project“ .

C-50/09 Commission v. Ireland

97 As regards the question whether demolition works come within the scope of Directive 85/337, as the Commission maintains in its pleadings, or whether, as Ireland contends, they are excluded, it is appropriate to note, at the outset, that the definition of the word ‘project’ in Article 1(2) of that directive cannot lead to the conclusion that demolition works could not satisfy the criteria of that definition. Such works can, indeed, be described as ‘other interventions in the natural surroundings and landscape’.

98 That interpretation is supported by the fact that, if demolition works were excluded from the scope of that directive, the references to ‘the cultural heritage’ in Article 3 thereof, to ‘landscapes of historical, cultural or archaeological significance’ in point 2(h) of Annex III to that directive and to ‘the architectural and archaeological heritage’ in point 3 of Annex IV thereto would have no purpose.

99 It is true that, under Article 4 of Directive 85/337, for a project to require an environmental impact assessment, it must come within one of the categories in Annexes I and II to that directive. However, as Ireland contends, they make no express reference to demolition works except, irrelevantly for the purposes of the present action, the dismantling of nuclear power stations and other nuclear reactors, referred to in point 2 of Annex I.

100 However, it must be borne in mind that those annexes refer rather to sectoral categories of projects, without describing the precise nature of the works provided for. As an illustration it may be noted, as did the Commission, that ‘urban development projects’ referred to in point 10(b) of Annex II often involve the demolition of existing structures.

101 It follows that demolition works come within the scope of Directive 85/337 and, in that respect, may constitute a ‘project’ within the meaning of Article 1(2) thereof.

How much can the Member States determine?

Screening Discretion...

Article 4

2. Subject to Article 2(4), for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.



Conclude: When it comes to decide whether or not it is a 'project', it's very important to look for "works or interventions involving alterations to the physical aspect of the site".

Now we turn back to article 4 and notes, once again, that **it is for the member states to do the screening and to determine whether the project shall be made subject to an EIA or not.**

How much freedom to the member states have in doing this? Where are the limits of their discretion in the screening discretion?

Limits of screening discretion:

Case C-72/95 *Kraaijeveld and Others* p. 50

Article 4(2) confers on MS a measure of discretion to specify certain types of projects which will be subject to an assessment or to establish the criteria or thresholds applicable.

Article 2(1) the limits of that discretion:

The obligation to ensure that projects likely to have significant effects on the environment are to be subject to an EIA.



The second paragraph of Article 4(2) of the directive confers a measure of discretion on MS, to specify certain types of projects which will be subject to an assessment or to establish the criteria or thresholds applicable.

The limits of the discretion is found in the obligation set out in Article 2(1):

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

Case C-72/95 *Kraaijeveld and Others*

50 However, although the second paragraph of Article 4(2) of the directive confers on Member States a measure of discretion to specify certain types of projects which will be subject to an assessment or to establish the criteria or thresholds applicable, the limits of that discretion are to be found in the obligation set out in Article 2(1) that projects likely, by virtue *inter alia*, of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment.

Criteria in case-by-case examination or thresholds or criteria are set:

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

- Characteristics of project
- Location of project
- Characteristics of potential impact



When 'screening', the member states shall take the criteria in Annex III into account.

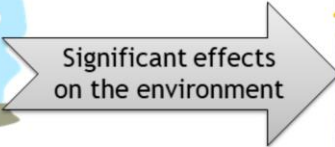
Limits of screening discretion:

All Annex III criteria to be used - not only size

C-392/96, *Commission v. Ireland*, p. 66



Significant effects
on the environment





Even a small-scale project can have significant effects on the environment if it is

in a location where the environmental factors are sensitive to the slightest alteration.



fauna and flora,
soil, water, climate
or cultural heritage, (Article 3)

In case 392/86 (commission versus ireland), the court held that even a small **small-scale project** can have significant effects on the environment if it is in a location where the environmental factors such as fauna and flora, soil, water, climate or cultural heritage, are sensitive to the slightest alteration. And therefore, **all** relevant Annex III crireteria shall be used in the screening process.

Link between Articles 2(1) and Article 3

Even a **small-scale project** can have significant effects on the environment if it is in a location where the environmental factors set out in Article 3 of the EIA Directive, such as fauna and flora, soil, water, climate or cultural heritage, are sensitive to the slightest alteration.

(C-392/96, *Commission v. Ireland*, paragraph 66)

Certain Annex II projects excluded from an EIA in advance

Case C-133/94 Commission v. Belgium

The Flemish Region:

Listed the projects having to be subject to EIA

The CJEU:

Member States may :

- specify certain 'types' of projects as being subject to assessment
- establish criteria or thresholds for determining which projects are to be subject to assessment

This power of the Member States is conferred **within** each of the classes listed in Annex II. (p. 41)

Case C-133/94 Commission v. Belgium

40 It should first be made clear that, as stated in paragraphs 33 and 34 of this judgment, the Flemish legislation excludes totally and definitively from environmental impact assessment certain classes of projects mentioned in Annex II. The question is therefore whether such exclusion is permitted by Article 4(2) of the directive.

41 Whilst it appears from that provision that Member States may always specify certain 'types' of projects as being subject to assessment or may establish criteria and/or thresholds for determining which projects are to be subject to assessment, it must be emphasized that that power of the Member States is conferred **within** each of the classes listed in Annex II. This means that the Community legislature itself considered that all the classes of projects listed in Annex II may possibly have significant effects on the environment depending on the characteristics exhibited by those projects at the time when they were drawn up.

42 It follows that the criteria and/or the thresholds mentioned in Article 4(2) are designed to facilitate the examination of the actual characteristics exhibited by a given project in order to determine whether it is subject to the requirement to carry out an assessment and not to exempt in advance from that obligation certain whole classes of projects listed in Annex II which may be envisaged on the territory of a Member State.

43 Consequently, Article 4(2) does not empower the Member States to exclude generally and definitively from possible assessment one or more classes mentioned in Annex II.

44 In view of that finding, the aforementioned arguments put forward by the Belgian and German Governments to the effect that Article 4(2) does not preclude the possibility for a Member State to determine the projects to be subjected to assessment in the abstract using criteria and/or thresholds and therefore does not require a decision to be taken on each specific project are irrelevant to this case, irrespective as to whether they are based on a correct interpretation of Article 4(2).

45 In view of the foregoing it must be held that the Flemish legislation at issue does not correctly transpose Article 2(1) and Article 4(2) of the directive, since it impliedly excludes in advance all the classes of projects mentioned in Annex II which are not covered by that legislation from the possibility of assessment, even if it should prove that the characteristics of projects belonging to those classes are such as to require such assessment.

46 It follows that that complaint must be upheld.

Certain Annex II projects excluded from an EIA in advance

Case C-133/94 Commission v. Belgium

The Flemish Region:

Listed the projects having to be subject to EIA

The ECJ:

Member States may :

- specify certain 'types' of projects as being subject to assessment
- establish criteria or thresholds for determining which projects are to be subject to assessment

This power of the Member States is conferred **within** each of the classes listed in Annex II. (p. 41)



Facilitate the examination of the actual characteristics exhibited by a given project!

Determine whether it is subject to the requirement to carry out an assessment

A 4(2)

Case C-133/94 Commission v. Belgium

40 It should first be made clear that, as stated in paragraphs 33 and 34 of this judgment, the Flemish legislation excludes totally and definitively from environmental impact assessment certain classes of projects mentioned in Annex II. The question is therefore whether such exclusion is permitted by Article 4(2) of the directive.

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Certain Annex II projects excluded from an EIA in advance

Case C-133/94 Commission v. Belgium

The Flemish Region:

Listed the projects having to be subject to EIA

The ECJ:

Member States may :

- specify certain 'types' of projects as being subject to assessment
- establish criteria or thresholds for determining which projects are to be subject to assessment

Member States may not :

Exempt whole classes of projects listed in Annex II

This power of the Member States is conferred **within** each of the classes listed in Annex II. (p. 41)

Case C-133/94 Commission v. Belgium

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44 In view of that finding, the aforementioned arguments put forward by the Belgian and German Governments to the effect that Article 4(2) does not preclude the possibility for a Member State to determine the projects to be subjected to assessment in the abstract using criteria and/or thresholds and therefore does not require a decision to be taken on each specific project are irrelevant to this case, irrespective as to whether they are based on a correct interpretation of Article 4(2).

45 In view of the foregoing it must be held that the Flemish legislation at issue does not correctly transpose Article 2(1) and Article 4(2) of the directive, since it impliedly excludes in advance all the classes of projects mentioned in Annex II which are not covered by that legislation from the possibility of assessment, even if it should prove that the characteristics of projects belonging to those classes are such as to require such assessment.

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Certain Annex II projects excluded from an EIA in advance

Case C-133/94 Commission v. Belgium

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Listed the projects having to be subject to EIA

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Member States may :

- specify certain 'types' of projects as being subject to assessment
- establish criteria or thresholds for determining which projects are to be subject to assessment

Member States may not :

Exempt whole classes of projects listed in Annex II

Article 4(2) does not empower the Member States to exclude generally and definitively from possible assessment one or more classes mentioned in Annex II.

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42 It follows that the criteria and/or the thresholds mentioned in Article 4(2) are designed to facilitate the examination of the actual characteristics exhibited by a given project in order to determine whether it is subject to the requirement to carry out an assessment and not to exempt in advance from that obligation certain whole classes of projects listed in Annex II which may be envisaged on the territory of a Member State.

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44 In view of that finding, the aforementioned arguments put forward by the Belgian and German Governments to the effect that Article 4(2) does not preclude the possibility for a Member State to determine the projects to be subjected to assessment in the abstract using criteria and/or thresholds and therefore does not require a decision to be taken on each specific project are irrelevant to this case, irrespective as to whether they are based on a correct interpretation of Article 4(2).

45 In view of the foregoing it must be held that the Flemish legislation at issue does not correctly transpose Article 2(1) and Article 4(2) of the directive, since it impliedly excludes in advance all the classes of projects mentioned in Annex II which are not covered by that legislation from the possibility of assessment, even if it should prove that the characteristics of projects belonging to those classes are such as to require such assessment.

46 It follows that that complaint must be upheld.

Exemptions are possible:

Certain Annex II projects excluded from an EIA in advance

A 2 (5)

Where a project is adopted by a **specific act of national legislation**, Member States may exempt that project from the provisions relating to public consultation laid down in this Directive, **provided the objectives of this Directive are met.**

Member States shall **inform the Commission** of any application of the exemption referred to in the first subparagraph every two years from 16 May 2017.

1. Adopted by a **specific act of national legislation**
2. The objectives of this Directive are met.



However, exemptions are possible, for example by adopting a specific act of national legislation.

There are conditions if doing this:

1. The project must be adopted by a specific act of national legislation
2. The objectives of this Directive must be met.
- (3. The Commission must be informed.)

Certain Annex II projects excluded from an EIA in advance

Both conditions must have been met.

It is for the national court to verify that the two conditions have been satisfied

Taking account: the content of the legislative act adopted
the entire legislative process which led to its adoption.

Not ok to only 'ratify' a pre-existing administrative act without a substantive legislative process enabling those conditions to be fulfilled!

Not sufficient to exclude a project from the ambit of the directive!



Only projects which have been adopted by a specific legislative act, in such a way that the objectives of that directive have been achieved by the legislative process, are excluded from the ambit of that directive. It is for the national court to verify that those two conditions have been satisfied, taking account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates. In that regard, a legislative act which does no more than simply 'ratify' a pre-existing administrative act, by merely referring to overriding reasons relating to the general interest without a substantive legislative process enabling those conditions to be fulfilled having first been opened, cannot be regarded as a specific legislative act for the purposes of that provision and is therefore not sufficient to exclude a project from the ambit of Directive 85/337, as amended by Directive 2003/35.

Joined Cases C-128/09 to C-131/09, C-134/09, and C-135/09, *Boxus and others*.

1. Article 1(5) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, must be interpreted as meaning that only projects the details of which have been adopted by a specific legislative act, in such a way that the objectives of that directive have been achieved by the legislative process, are excluded from the ambit of that directive. It is for the national court to verify that those two conditions have been satisfied, taking account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates. In that regard, a legislative act which does no more than simply 'ratify' a pre-existing administrative act, by merely referring to overriding reasons relating to the general interest without a substantive legislative process enabling those conditions to be fulfilled having first been opened, cannot be regarded as a specific legislative act for the purposes of that provision and is therefore not sufficient to exclude a project from the ambit of Directive 85/337, as amended by Directive 2003/35.

2. Article 9(2) of the Convention on access to information, public participation in decision making and access to justice in environmental matters, concluded on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, and Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as meaning that:

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

The questions again...

The first step in the EIA process.

If the result of the screening is that a certain project is likely to have significant impacts on the environment: EIA is necessary!

What is “screening”?

What is the purpose of
“screening”?

The questions again...

1. To determine if a certain project is likely to have significant effects on the environment. → EIA!
2. Ensuring a more efficient use of resources.

(EIA needs to be carried out **only** for those projects which possibly might have a significant impact on the environment)



The questions again...

What is “screening”?

What is the purpose of “screening”?

How to carry out screening?

The developer provides information to the CA (specified in Annex IIA)

CA
stands for
Competent Authority

by a case-by-case
examination

or by using thresholds
or criteria

Take into account the all relevant selection criteria in Annex III

The CA must reach a decision as soon as possible and **within 90 days** from the date when the developer submitted all information required. (May be extended in exeptional cases)

The decision shall be made **available to the public and motivated.**



The questions again...

What is “screening”?

What is the purpose of “screening”?

- What constitutes a “project” within the meaning of the EIA directive?

The term ‘project’ refers to works or physical interventions

Project:

Works or interventions
which alter the physical
aspect of the site



The questions again...

What is “screening”?

What is the purpose of “screening”?

- What constitutes a “project” within the meaning of the EIA directive?
- Can an agreement be seen as a project?



The questions again...

What is “screening”?

What is the purpose of “screening”?

- What constitutes a “project” within the meaning of the EIA directive?
- Can an agreement be seen as a project?

No!

However!

It is for the national court to determine, on the basis of the applicable national legislation, **whether such an agreement constitutes a development consent!**

If it grants a right to proceed with construction works or to intervene in the natural surroundings



The questions again...

What is “screening”?

What is the purpose of “screening”?

- What constitutes a “project” within the meaning of the EIA directive?
- Can an agreement be seen as a project?
- Can projects be excluded by national law?

Member States may set thresholds or criteria to determine when projects

- don't need screening and don't need an EIA
- don't need screening and always need EIA



The questions again...

What is “screening”?

What is the purpose of “screening”?

- What constitutes a “project” within the meaning of the EIA directive?
- Can an agreement be seen as a project?
- Can projects be excluded by national law?
- When must an EIA be carried out where national law provides that the consent procedure is to be carried out in several stages?

**as soon as it is possible to identify and assess
all the effects on the environment**



The questions again...

What is “screening”?

What is the purpose of “screening”?

- What constitutes a “project” within the meaning of the EIA directive?
- Can an agreement be seen as a project?
- Can projects be excluded by national law?
- When must an EIA be carried out where national law provides that the consent procedure is to be carried out in several stages?
- Is it possible for developer to split projects to avoid an EIA?

NO!



The questions again...

What is “screening”?

What is the purpose of “screening”?

- What constitutes a “project” within the meaning of the EIA directive?
- Can an agreement be seen as a project?
- Can projects be excluded by national law?
- When must an EIA be carried out where national law provides that the consent procedure is to be carried out in several stages?
- Is it possible for developer to split projects to avoid an EIA?
- Should cumulative effects be considered?

YES!



The questions again...

What is “screening”?

What is the purpose of “screening”?

- What constitutes a “project” within the meaning of the EIA directive?
- Can an agreement be seen as a project?
- Can projects be excluded by national law?
- When must an EIA be carried out where national law provides that the consent procedure is to be carried out in several stages?
- Is it possible for developer to split projects to avoid an EIA?
- Should cumulative effects be considered?
- Is there a kind of relation between the splitting of projects and cumulative effects?



The questions again...

What is “screening”?

What is the purpose of “screening”?

The purpose of the EIA Directive cannot be circumvented by **the splitting of projects** and the failure to take account of **the cumulative effect of several projects** must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment

- Is there a kind of relation between the splitting of projects and cumulative effects?

YES!





Some case law in summary

The EIA Directive has a wide scope and a broad purpose

C -72/95, Kraaijeveld and Others

C- 435/97, WWF and Others

C-2/07, Abraham and Others

C-275/09, Brussels Hoofdstedelijk Gewest and Others



Here I have listed some key-conclusions from Case law. All of the situations or the cases mentioned are not discussed in the presentation; view this "list" as kind of a handbook.

Some case law in summary

Concept of "project"

Broad definition of "construction"

C-142/07, *Ecologistas en Acción-CODA* (modernisation of existing road)

C-2/07, *Abraham and Others* (modernisation of existing runway)

C-50/09, *Commission v. Ireland* (demolition works)

A more restrictive interpretation of "project"

C-121/11, *Pro-Braine and Others* (extension of consent for operation of a landfill)

C-275/09, *Brussels Hoofdstedelijk Gewest and Others* (extension of consent for operation of an airport)



Some case law in summary

All Annex III criteria to be used

Not only size of project

C-392/96, *Commission v. Ireland*

C-508/03, *Crystal Palace/White City*

In all screening methods

C- 156/07, *Aiello*

No whole class to be excluded

C-133/94, *Commission v. Belgium*

C-301/95, *Commission v. Germany*



Some case law in summary

Ok to exclude projects if adopted in detail by a legislative act but not if only "ratifying" a pre-existing administrative act.

Joined Cases C-128/09 to C-131/09, C-134/09, and C-135/09,
Boxus and others

Cumulative assessment and no splitting

C-392/96, *Commission v. Ireland*

C-227/01, *Comssions v. Spain*

Consider projects jointly

C-142/07, *Ecologistas en Acción-CODA*, p. 44

C-205/08, *Umweltanwalt von Kärnten*, p. 53

Objective and chronological

C-244/08, *Salzburger Flughafen*

Not confined to municipal boundaries.

C-531/13, *Marktgemeinde Straßwalchen and Others*

Thank you!

