

Co-operation with national judges in the field of
environmental law under the European Commission
Framework Contract ENV.E.2/FRA/2016/0043

Training module

**HOW TO HANDLE COURT PROCEEDINGS INVOKING NON-COMPLIANCE
WITH EU ENVIRONMENTAL ASSESSMENT LAW
FOCUS ON ENVIRONMENTAL IMPACT ASSESSMENT (EIA) & STRATEGIC
ENVIRONMENTAL ASSESSMENT (SEA)**

22-24 October 2018

Sofia, Bulgaria

Organised by Academy of European Law



Procedure of assessment

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Topics

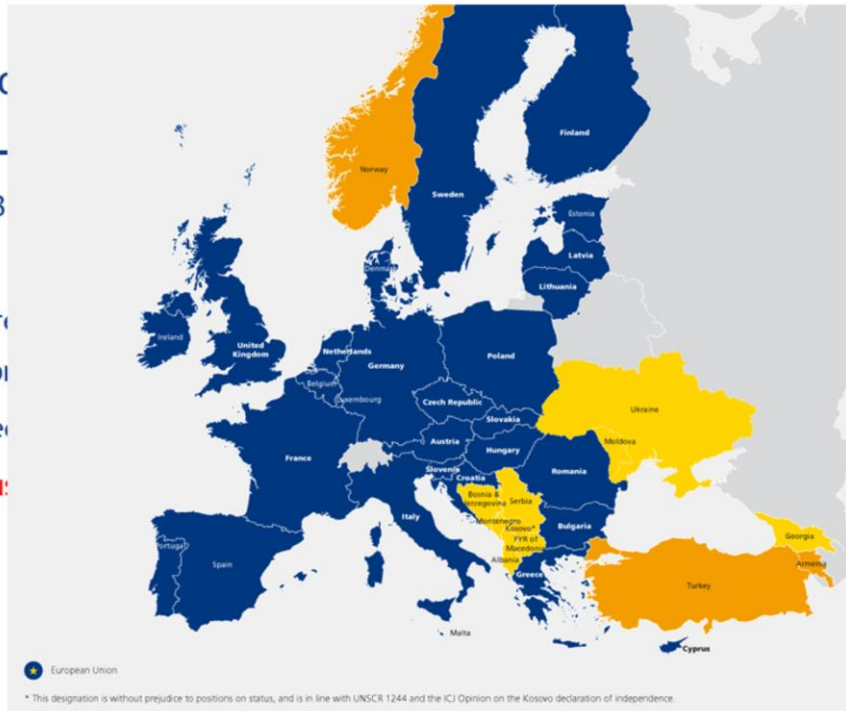
- Introduction
- Scoping
- Assessment of alternatives
- Development consent decision/the reasoned conclusion
- Monitoring
- Environmental Authority/Competent Authority
- CJEU case law



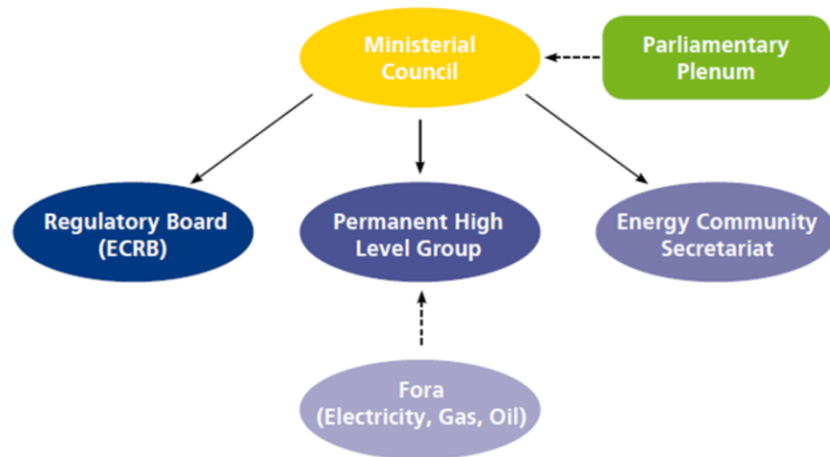
Intro

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Introduction



Introduction

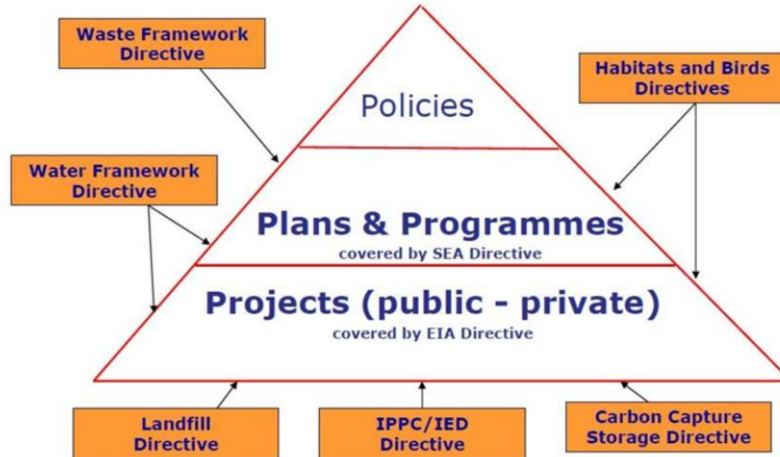
Environment

- **Directive 2011/92/EU (EIA)** - after entry into force (updated in 2016, with amendments of 2014/52/EU included as of 1 January 2019)
- Directive 1999/32/EC (SiF) - as of 1 January 2012 (updated)
- Directive 2001/80/EC (LCP) - as of 1 January 2018
- Art. 4(2) Directive 79/409/EEC (Wild Birds) - after entry into force
- Construction and operation of new generating plants - Chapter III and Annex V of Directive 2010/75/EU (IED), 1 Jan 2018
- No binding acquis on climate yet, MMR Recommendation



Introduction

Environmental Assessments



Source: Presentation of the European Commission at the 11th meeting of the Energy Community Environmental Task Force, June 2016



Art. 5(2) - Where requested by the developer, the competent authority, taking into account the information provided by the developer in particular on the specific characteristics of the project, including its location and technical capacity, and its likely impact on the environment, shall issue an opinion on the scope and level of detail of the information to be included by the developer in the environmental impact assessment report in accordance with paragraph 1 of this Article. The competent authority shall consult the authorities referred to in Article 6(1) before it gives its opinion.

Member States may also require the competent authorities to give an opinion as referred to in the first subparagraph, irrespective of whether the developer so requests.

Scoping is an important stage that takes place early in the EIA process. It provides an opportunity for both Developers and the Competent Authority to determine those key environmental impacts and issues of concern that are likely to be of the utmost importance to the Project proposal's decision making and eliminates those that are less of a concern. In other words, Scoping defines the EIA Report's content and ensures that the environmental assessment is focused on the Project's most significant effects on the factors listed in Article 3 of the Directive, and that time and money are not spent on unnecessary examinations. It also reduces the likelihood that competent authorities will need to request additional information from Developers after the Environmental Report has been prepared and submitted.

Mandatory scoping in: Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Bulgaria, and Romania.

Purpose

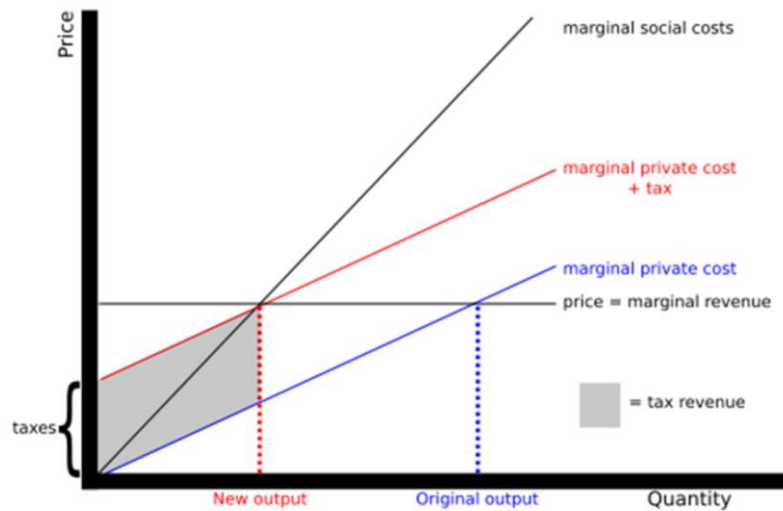
- “Externalities are changes in the condition or circumstances of institutional units caused by the economic actions of other units without the consent of the former.” (UN Statistics Division, System of National Accounts 1993)
- “Externalities refers to situations when the effect of production or consumption of goods and services imposes costs or benefits on others which are not reflected in the prices charged for the goods and services being provided.” (OECD)
- Concept central to the neoclassical critique of market organisation (Buchanan-Stubblebine, 1962)
- Market failure
- Can be negative or positive



Interesting example on Pigovian tax in The Economics of Welfare: alcohol. Pigou argues that the sale of alcohol necessitates higher costs in policemen and prisons because of the crime associated with alcohol. In other words, the net private product of alcohol businesses is peculiarly large relative to the net social product of the same business. He suggests that this is why most countries tax alcohol businesses.

Members of the Pigou Club: (politics) Al Gore, Bernie Sanders, Michael Bloomberg; (business) Bill Gates, Elon Musk, (celebrity) Leonardo di Caprio (economists) Joseph Stiglitz, Nouriel Roubini, Daron Acemoglu, Kenneth Rogoff, Paul Krugman, Alan Greenspan

The Pigovian model



Source: Wikimedia Commons

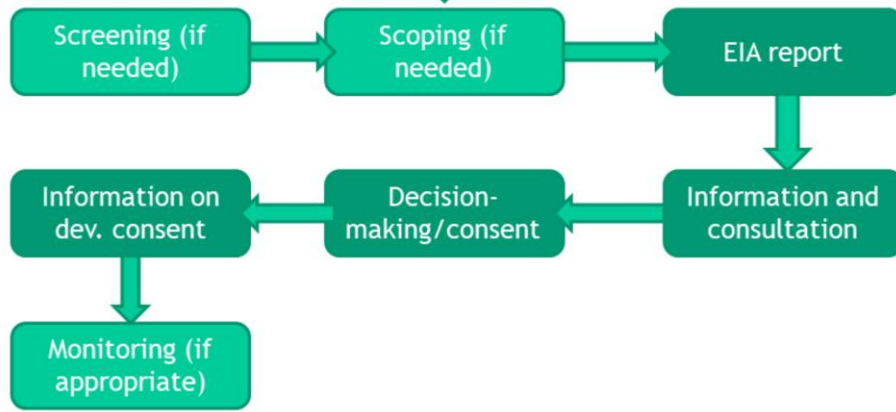
Blue line: price does not reflect the social costs → wrong price signal → increased output = market failure

Red line: cost-reflective price including Pigovian tax

Example: cigarette price → natural production costs very low (largest % of end price is tax) so in a purely market-based environment, the output will be high (blue line) and the social costs are not reflected (i.e. born by State via health costs or individuals via health costs or shorter and less healthy life)

Other examples: products with an excise duty (petrol, alcohol: In defense of excises on strong drink, Adam Smith (150 years before Pigou!) wrote in *The Wealth of Nations*: "It has for some time past been the policy of Great Britain to discourage the consumption of spirituous liquors, on account of their supposed tendency to ruin the health and to corrupt the morals of the common people.")

Scoping



Scoping

- Art. 5(2) EIAD
- “Risk reduction” tool
- Early in the process
- Can be voluntary (as a minimum) or mandatory depending on transposing legislation
- Competent authority / independent body - EIA Commission (e.g. NL, FR) / expert panel (e.g. CY, IT)
- Output: scoping report / opinion
- COM scoping guidelines (2017):
http://ec.europa.eu/environment/eia/pdf/EIA_guidance_Scoping_final.pdf



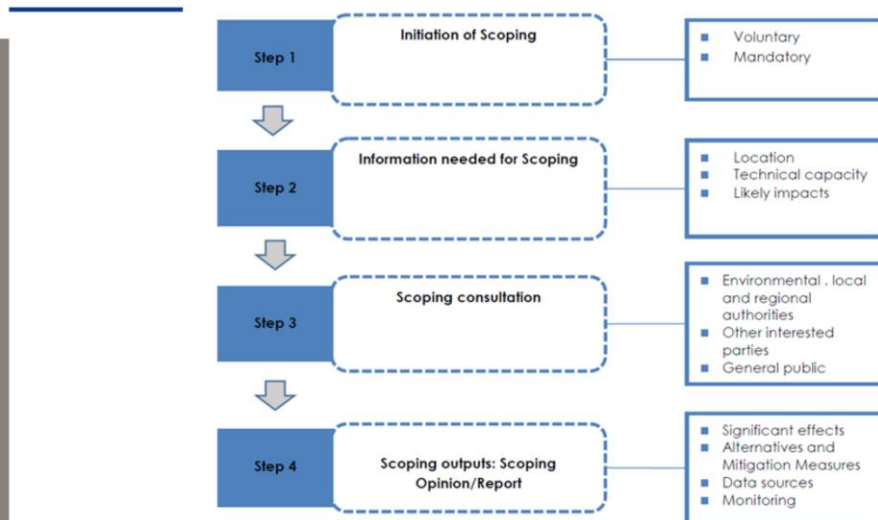
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The process of scoping



The result of scoping

- Scoping report (“ToR” for the EIA report)
- Scoping should continue throughout the process
- Amendments in light of new issues and new information
- Scope of an EIA Report must be flexible enough to allow the incorporation of new issues
- EIAD allows competent authorities to request additional information at a later stage in the EIA process, even where they did not request this information when they issued a formal Scoping Opinion.

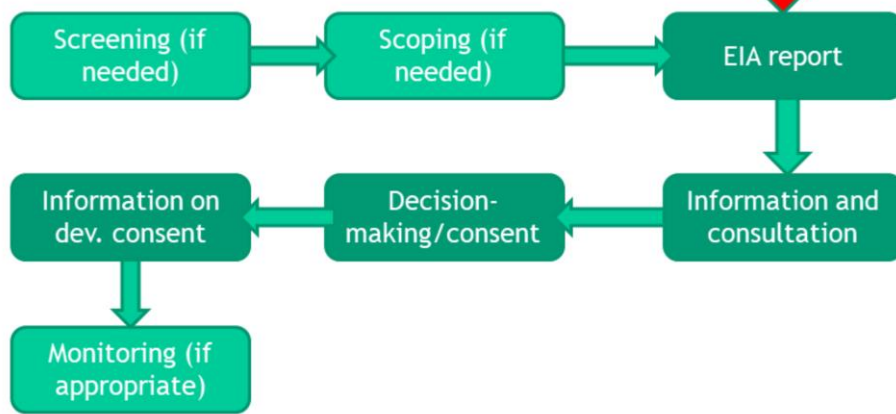


The benefits of scoping

- Identifies key issues to be addressed
- Saves time and money (both for the developer and for the competent authority)
- Stimulates early consultation
- Sets appropriate time and space boundaries
- Helps to identify preliminary alternatives and mitigation measures



Assessment of alternatives



Assessment of alternatives

- Mandatory part of an EIA report (Art. 5(1) d) EIAD + Annex IV, point 2) → broadened in 2014
- description of the reasonable alternatives studied by the developer, which are relevant to the project and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the project on the environment;
- Can take diverse forms (exemplary list of Annex IV: project design, technology, location, size and scale)



Before 2014 → an OUTLINE of the MAIN alternatives + “which are relevant to the project and its specific characteristics” was not yet included

Alternatives can take diverse forms and may range from minor adjustments to the Project, to a complete reimagining of the Project.

Put simply, the Developer needs to provide:

- A description of the reasonable Alternatives studied; and
- An indication of the main reasons for selecting the chosen option with regards to their environmental impacts.

The number of Alternatives to a proposed Project is, in theory, infinite, considering that the Directive does not specify how many Alternatives should be considered. National legislation or general practice may, however, dictate how many Alternatives are to be considered. The number of alternatives to be

assessed has to be considered together with the type of alternatives, i.e. the ‘Reasonable Alternatives’ referred to by the Directive.

The feasibility of the Alternatives proposed can be determined on a case-by-case basis.

- the nature of Project;
- timeframes for construction or the lifespan of the Project;
- process by which the Project is constructed;
- equipment used either in the construction or running of the Project;
- site layout (e.g. location of buildings, waste disposal, access roads);
- operating conditions (e.g. working schedule, timing of emissions);
- physical appearance and design of buildings, including the materials to be used;
- means of access, including principal mode of transport to be used to gain access to the Project.

The ‘do-nothing’ scenario or ‘no Project’ Alternative describes what would happen should the Project not be implemented at all. In some Member States, national legislation requires the ‘do-nothing’ scenario to be considered and included in the EIA Report. In some cases, however, the ‘do-nothing’ scenario cannot be considered a feasible policy option, as a Project is very clearly needed: for example, if another policy dictates an action, such as a waste management plan, which requires improved waste management, then a new plant must be built. The ‘do-nothing’ scenario is heavily based on the Baseline.

Assessment of alternatives

- Often a difficult element in the process (no specification of number or nature of alternatives by EIAD)
- Not to be confused with SEA
- Method: depends on the type of alternative (has to provide a comparative assessment of environmental impacts)
- “Do nothing” scenario vs “reasonable alternatives”
- Obstacles to certain alternatives:
 - technological
 - budgetary
 - stakeholder
 - regulatory



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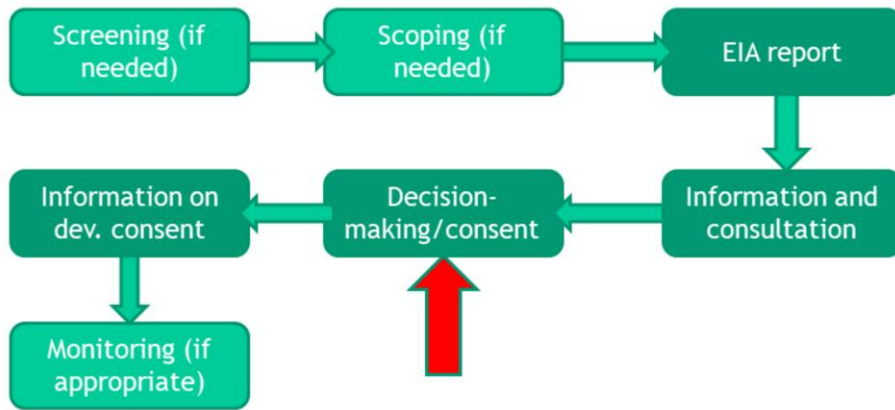
There are technological obstacles: high costs of a required technology may prevent it from being considered to be a viable option, or the lack of technological development may preclude certain options from consideration;

There are budget obstacles: adequate resources are required to implement Project Alternatives;

There are stakeholder obstacles: stakeholders opposed to a Project Alternative may make a particular option unattractive;

There are legal or regulatory obstacles: regulatory instruments may be in place that limit/prohibit the development of a specific Alternative.

Development consent



Development consent decision/the reasoned conclusion

- Art. 1(2) (c) EIAD: *'development consent' means the decision of the competent authority or authorities which entitles the developer to proceed with the project;*
- Art. 1(2) (g) (definition of EIA) → amended by 2014/52/EU based on case-law (C-50/09)
- Art. 1(2) (g) EIAD, (iii) and (iv) (elements of an EIA): the reasoned conclusion by the competent authority on the significant effects of the project on the environment, taking into account the results of the examination referred to in point (iii) and, where appropriate, its own supplementary examination; and the integration of the competent authority's reasoned conclusion into any of the decisions referred to in Article 8a.



Art. 8a

1. The decision to grant development consent shall incorporate at least the following information:

(a) the reasoned conclusion referred to in Article 1(2)(g)(iv);

(b) any environmental conditions attached to the decision, a description of any features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment as well as, where appropriate, monitoring measures.

2. The decision to refuse development consent shall state the main reasons for the refusal.

3. In the event Member States make use of the procedures referred to in Article 2(2) other than the procedures for development consent, the requirements of paragraphs 1 and 2 of this Article, as appropriate, shall be deemed to be fulfilled when any decision issued in the context of those procedures contains the information referred to in those paragraphs and there are mechanisms in place which enable the fulfilment of the requirements of paragraph 6 of this Article.

4. In accordance with the requirements referred to in paragraph 1(b), Member States shall ensure that the features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment are implemented by the ▼B 2011L0092 — EN — 15.05.2014 — 001.001 — 13

developer, and shall determine the procedures regarding the monitoring of significant adverse effects on the environment.

The type of parameters to be monitored and the duration of the monitoring shall be proportionate to the nature, location and size of the project and the significance of its effects on the environment.

Existing monitoring arrangements resulting from Union legislation other than this Directive and from national legislation may be used if appropriate, with a view to avoiding duplication of monitoring.

5. Member States shall ensure that the competent authority takes any of the decisions referred to in paragraphs 1 to 3 within a reasonable period of time.

6. The competent authority shall be satisfied that the reasoned conclusion referred to in Article 1(2)(g)(iv), or any of the decisions referred to in paragraph 3 of this Article, is still up to date when taking a decision to grant development consent. To that effect, Member States may set time-frames for the validity of the reasoned conclusion referred to in Article 1(2)(g)(iv) or any of the decisions referred to in paragraph 3 of this Article.

Development consent decision/the reasoned conclusion

- Article 8a → specifies the content of the development consent decision
- Results of consultations and the information gathered shall be duly taken into account in the development consent procedure
- Content of the decision to grant development consent:
 - the reasoned conclusion of the CA on the significant effects of the project;
 - any environmental conditions attached to the decision, etc.
- Decision to refuse development consent should include main reasons for it
- Decision-making reflects the different EIA systems in the EU (Art. 8a(3) and recital 21): need for a binding EIA decision or an EIA integrated/part of the development consent



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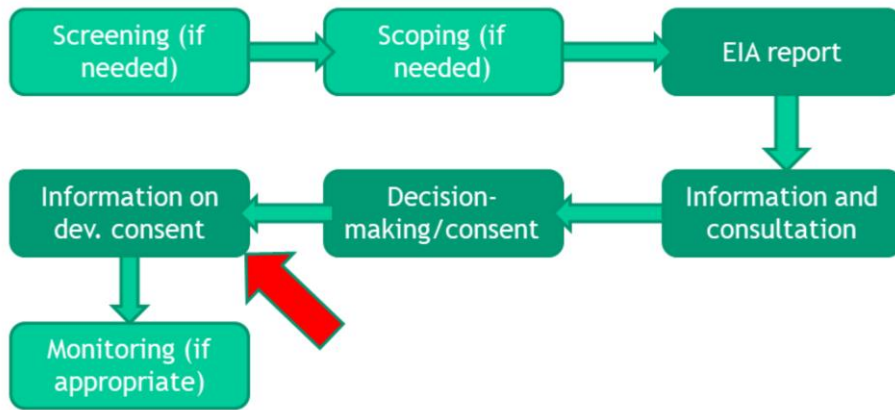
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Information on development consent



Information on development consent

- No significant changes
- Obligation to inform the public and relevant (environmental and local/regional) authorities promptly
- Obligation to make available to the public relevant (environmental and local/regional) authorities specific information:

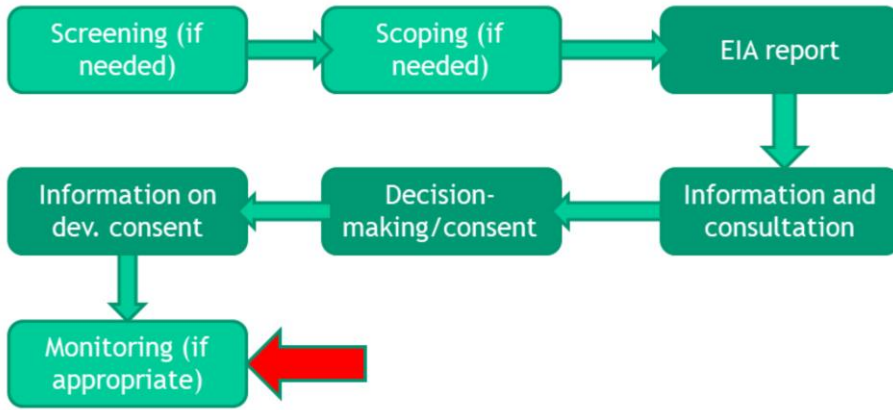
Content of the final decision (no change)

Main reasons (no change).

NEW: Summary of the results of the consultations and the information gathered and how those results have been incorporated or otherwise addressed, in particular the comments received from the affected Member State(s), shall be made available as well.

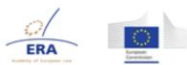


Monitoring



Monitoring

- When significant adverse effects were identified in the EIA
- To be included in development consent / EIA report
- Avoiding duplications → use of existing monitoring systems
- 2012 Impact Assessment for the review of the EIA Directive estimated that 50% of Projects developed each year would fall under other EU legislation requiring monitoring, and thus monitoring would be carried out regardless of EIA requirements



Art. 8a: the decision granting development consent shall include (...) any environmental conditions attached to the decision, a description of any features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment as well as, where appropriate, monitoring measures.

Monitoring Measures can help to ensure that Projects meet all existing environmental legal requirements, and that impacts are in line with EIA Report Projections.

Monitoring Measures can also provide insight into the quality of the EIA procedure carried out, and can generate lessons learned and good practices for future EIAs.

Practitioners should first check which Monitoring Measures are required by other legislation. If these are not sufficient or appropriate for monitoring the expected environmental impacts or proposed Mitigation Measures, then additional measures may be proposed within the EIA Report. (COM guidance provides a number of databases)

The 2012 Impact Assessment for the review of the EIA Directive estimated that 50% of Projects developed each year would fall under other

EU legislation requiring monitoring, and thus monitoring would be carried out regardless of EIA requirements. (e.g. IED, WFD, Habitats)

Environmental Authority/Competent Authority

- Art. 1(2) (f) EIAD: 'competent authority or authorities' means that authority or those authorities which the Member States designate as responsible for performing the duties arising from this Directive
- The distribution of tasks throughout the EIA procedure may vary in the Member States → hence "authorities"
- Main role → issuing development consent / reaching reasoned conclusion, but also screening, scoping, carrying out public consultation, etc.
- Environmental authority: authorities likely to be concerned by the project by reason of their specific environmental responsibilities (Art. 6)



3. In order to ensure the completeness and quality of the environmental impact assessment report:

- (a) the developer shall ensure that the environmental impact assessment report is prepared by competent experts;
- (b) the competent authority shall ensure that it has, or has access as necessary to, sufficient expertise to examine the environmental impact assessment report; and
- (c) where necessary, the competent authority shall seek from the developer supplementary information, in accordance with Annex IV, which is directly relevant to reaching the reasoned conclusion on the significant effects of the project on the environment.

Environmental Authority/Competent Authority - Expertise

- Recurring criticism → (access to) expertise of the competent authority
- 2014 amendments → revised wording of Art. 5(3) establishes joint responsibility of the developer and the competent authority + quality control



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Environmental Authority/Competent Authority - Conflict of interest

- New obligations → avoidance of conflict of interest (Art. 9a)
- Member States have to ensure that competent authorities perform their duties in an objective manner and do not find themselves in a situation giving rise to a conflict of interest
- Where the competent authority is also the developer:
 - Separation of the duties of the authorities
 - Minimum obligation: functional separation (within national organisation of administrative competences, ensure an appropriate separation between conflicting functions)



CJEU case law

- EIAD is one of the oldest pieces of EU environmental law with 30+ years of existence → rich case-law from all categories - preliminary rulings Art. 267 TFEU, failure to fulfil obligations (non-transposition, non-implementation) Art. 258 TFEU
- Highly useful collection of cases, updated in 2017:
http://ec.europa.eu/environment/eia/pdf/EIA_rulings_web.pdf
- Illustrative cases related to general principles
- Cases related to the above points of the presentation



CJEU case law - scope and purpose of the EIAD

- The wording of the Directive indicates that it has a wide scope and a broad purpose. (C-72/95, Kraaijeveld and Others, paragraphs 31, 39; C-435/97, WWF and Others, paragraph 40; C-2/07, Abraham and Others, paragraph 32, C-142/07 Ecologistas en Acción-CODA, paragraph 28; C-275/09, Brussels Hoofdstedelijk Gewest and Others, paragraph 29)
- This particular nature of the Directive needs to be reflected also when implementing the transposing national legal measures.
- Limits → purposive interpretation cannot be justified (C-275/09, Brussels Hoofdstedelijk Gewest and Others, paragraphs 29-30) → in the absence of any works or interventions involving alterations to the physical aspect of the site cannot be classified as “project”



CJEU case law - right of individuals to rely on the obligation to carry out an EIA

- Question posed by High Court of Justice of England and Wales in a preliminary ruling: “Whether (i) it is open to individual citizens to challenge the State's failure to require EIA, or whether (ii) that may be prohibited under the limitations imposed by the Court on the doctrine of direct effect e.g. By “horizontal direct effect” or by the imposition of burdens or obligations on individuals by an emanation of the State.”
- Answer: “An individual may, where appropriate, rely on Article 2(1) of Directive 85/337, read in conjunction with Articles 1(2) and 4(2) thereof.” (C-201/02 Wells, paragraphs 54-61)



CJEU case law - assessment of pecuniary damage

- C-420/11 Leth, paragraph 32 → links to pecuniary damage
- Article 3 must be interpreted as meaning that the EIA does not include the assessment of the effects on the value of material assets. However, pecuniary damage, in so far as it is the direct economic consequence of the effects on the environment of a public or private project, is covered by the objective of protection pursued by Directive 85/337.



CJEU case law - right of individuals to rely on the EIAD

- The provisions of the EIA Directive may be taken into account by national courts in order to review whether the national legislature has kept within the limits of the discretion set by it (C-287/98 Linster, paragraph 38)
- Right of individuals has to be looked at from the point of view of effectiveness and the particular course of conduct the directive imposes on the Member States (C-72/95 Kraaijeveld and Others, paragraph 56; C-435/97 WWF and Others, paragraph 69; C-287/98 Linster, paragraph 32, C-201/02 Wells, paragraph 57)



CJEU case law - remedy/compensation

- In case of a lack of an EIA, competent authorities are obliged to take, within their sphere of competence, all general or particular measures for remedying the failure to carry out an EIA
- It is for the national court to decide, whether it is possible under domestic law that a development consent already granted is revoked or suspended or whether there are alternatives to claim compensation measures (C-201/02, Wells, paragraphs 66-70; C-420/11, Leth, paragraphs 37-38; C-348/15, Stadt Wiener Neustadt, paragraphs 40, 45-46)



CJEU case law - concept of overall assessment

- The EIA Directive adopts an overall assessment of the effects of projects or the alteration thereof on the environment. Taking only the direct effects of the works envisaged themselves into consideration and not the environmental impact resulting from the use and exploitation of the end product of those works will not meet the purpose of the EIAD (C-2/07, Abraham and Others, paragraphs 42-43; C-142/07, Ecologistas en Acción-CODA, paragraph 39)
- The overall assessment is irrespective of whether the project might be transboundary in nature (C-205/08, Umweltanwalt von Kärnten, paragraph 51)



CJEU case law - concept of development consent

- Development consent is a concept unique to Community law that requires an autonomous and uniform interpretation, taking into account the context of the provision and the purpose of the legislation in question (C-290/03 Barker, paragraphs 40-41)
- It means only a single type of consent, namely the decision of the competent authority or authorities which entitles the developer to proceed with the project (“decisive permit” - C-332/04, Commission v. Spain, paragraph 53)
- EIA may be integrated in other procedures under national law if those comply with the aims of the EIAD (C-50/09, COM v Ireland, paragraphs 73-75)



CJEU case law - competent authority (-ies)

- Member States have the right to designate the task to issue development consent to more than one competent authority, it is subject to those authorities' respective powers and the rules governing their implementation ensuring that an environmental impact assessment is carried out fully and in good time (i.e. before giving consent)
- The competent authority with regard to pollution aspects (environmental permit) cannot issue its decision prior to development consent
(C-50/09, COM v Ireland, paragraphs 77 and 81)



Thank you for your attention!

