



Basics of EU Environmental Law

Environmental impact assessment



Spring 2019
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Last seminar summary

1) Public participation in general

- Procedural rights, often constitutional, sources: IL, EU, NL

2) The Aarhus Convention (1998)

- Parties: MSs + EU + more, the three pillars: information, participation, justice; non-compliance mechanism, a 'floor', not a 'ceiling', interest and rights, important definitions (the public, the public concerned), list of projects, GMO amendment

3) EU level

- Regulation for the EU institutions, directives in first two pillars for the MSs (EIA, IPPC), restrictive interpretation (CJEU – individual concern)

4) National level

- The Aarhus Convention is not directly applicable (but as far as possible), EU directives are directly applicable, but do not deal with much with specific conditions (scope of review, costs and fees, size and activity of the NGOs)



Exam questions: Examples

- What are the principles of the EU environmental policy? In which way are these principles applied in practice?
- What is the meaning of principle of subsidiarity/proportionality in EU environmental law-making? Can you provide an example for each principle?
- What is the relationship between EIA and SEA procedures?
- Is the Aarhus Convention directly applicable? What are the implications of definition of public and public concerned in practice?



Today

- 1) EIA and SEA in general
- 2) EU level
- 3) Case law



EIA/SEA

EIA is “the process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals or projects prior to major decisions being taken and commitments made.”

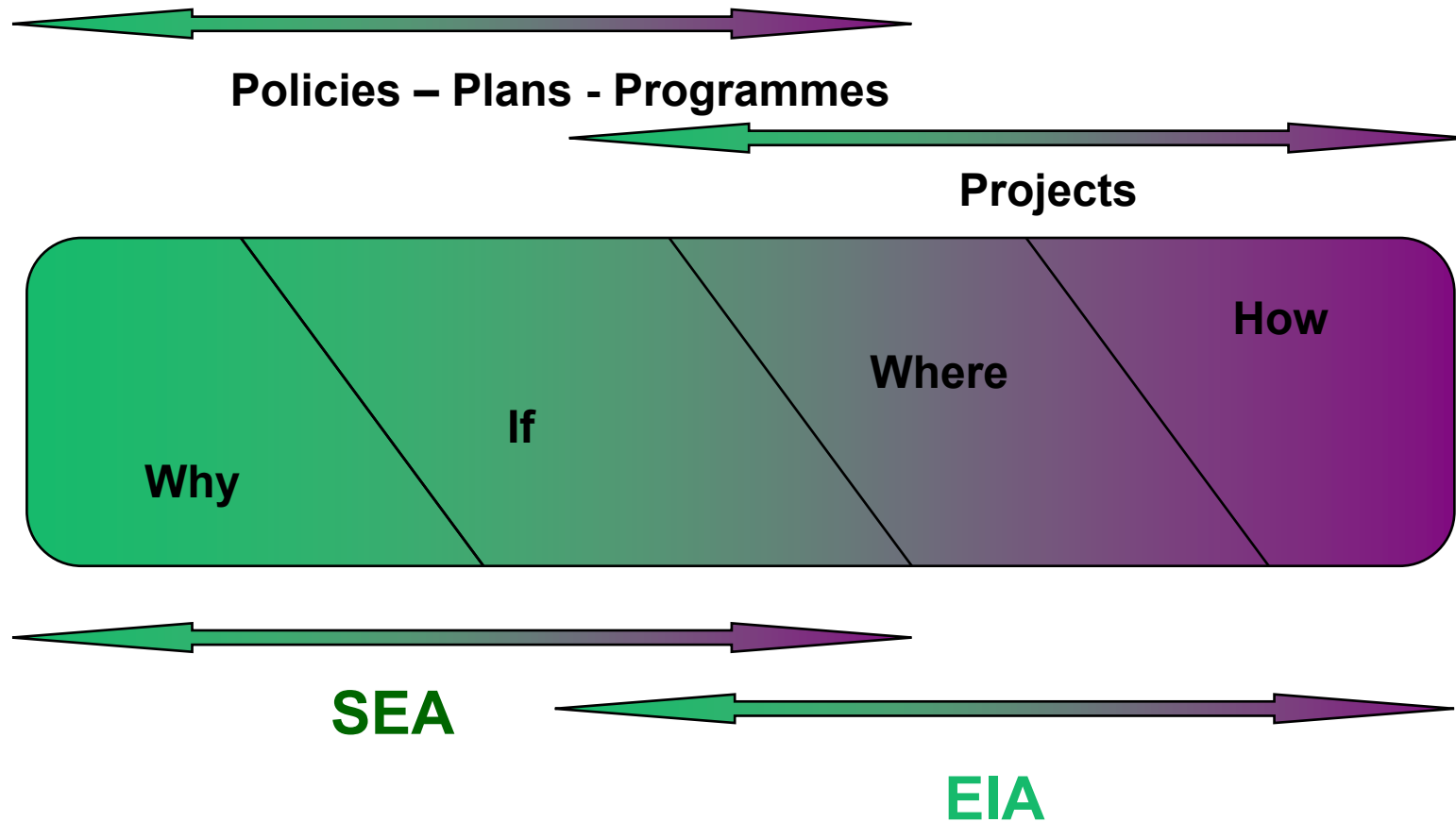
(www.unesco.org)

SEA is a systematic process for evaluating the environmental consequences of proposed policy, plan or programme initiative in order to ensure they are fully included and appropriately addressed at the earliest appropriate stage of decision making on par with economic and social consideration”

(Sadler, Verheem 1996)

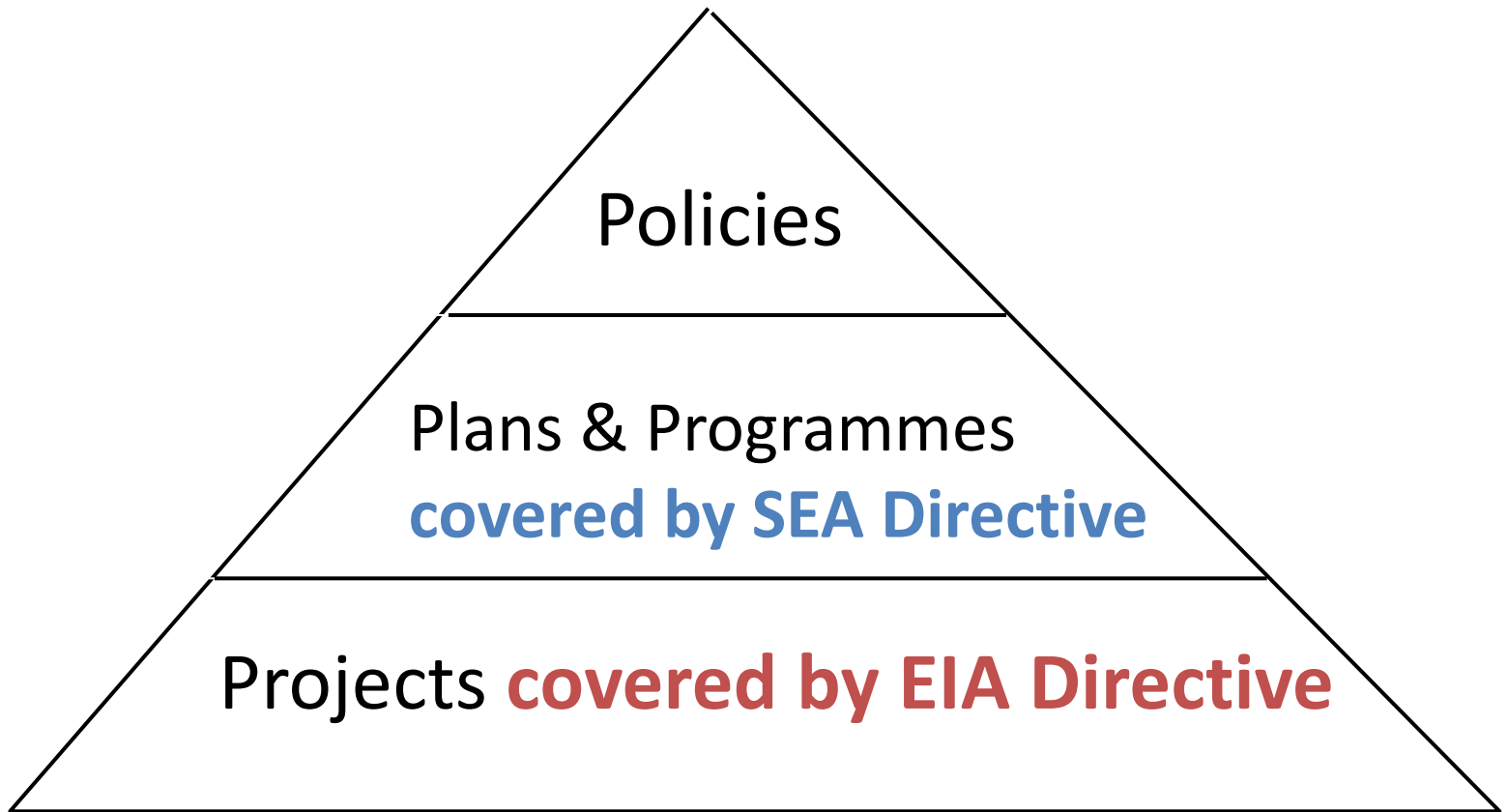


EIA/SEA



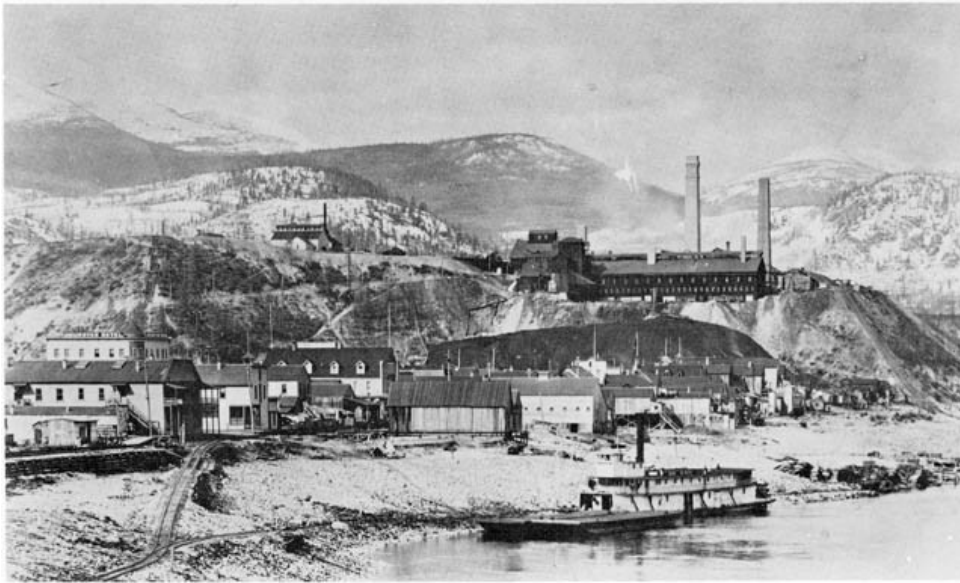


Environmental Assessment





Impact assessment?



- International law – Customary law, Espoo convention (transboundary assessment)...
- EU law – EIA Directive (2011/92/EU), SEA Directive (2001/42/EC).
- National law



Customary international law?



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January 4, 2010

Ing. Karel B l a h a, CSc.
Deputy Minister -
Director General of the Directorate of Technical Protection of Environment
Ministry of the Environment of the Czech Republic
Vrřkovicř 65
110 00 Praha 10
Czech Republic

SUBJECT: Viewpoint of the Federated States of Micronesia on the complex renovation of Prunerov II power plant 3x250 MWe plan

Dear Karel:

We want to thank you for responding to our request for a Transboundary Environmental



Impact assessment?



<https://www.youtube.com/watch?v=RCg800TYf4k>



EIA - General objective

What does the EIA Directive apply to?

- **projects likely to have significant effects on the environment** (by virtue, *inter alia*, of their characteristics, size and location)

What are these projects subject to?

- a **requirement for development consent**
- an **assessment of their effects**

When?

- **before consent** is given



EIA - What assessment?

EIA must identify, describe, **assess likely direct** and **indirect** environmental effects of activities on

- human beings,
- fauna, flora, soil, water, air, climate, landscape,
- material assets, cultural heritage
- the **interaction** between those factors



EIA - What projects?

- Annex I projects
- Annex II projects



**Mandatory
EIA**



Screening

by Competent authorities to
decide if
EIA needed or not



EIA - What assessment?

EIA directive:

Article 2/1:

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.

Article 4/1.

Subject to Article 2(4), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10. 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. **Member States shall make that determination through: (a) a case-by-case examination; or (b) thresholds or criteria set by the Member State.**

Italy C-87/02 (Lotto zero-Variante, tra Teramo e Giulianova, alla strada statale SS 80')



Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

Italy C-87/02

- **MSs have discretion about the methods they use to specify whether a project is subject to EIA.**
- **But this method must not undermine the Directive's objective.**
- **A decision that a project does not require EIA must contain or be accompanied by all the information that makes it possible to check that it is based on adequate screening, compliant with the Directive.**

Ireland C-392/96

- Thresholds cannot exclude all projects of a certain type UNLESS, when viewed as a whole, they would not be likely to have significant environmental effects.
- Small-scale projects can have significant effects on the environment.
- Thresholds are to help in screening, not exempt classes.
- Cumulative effects of projects must be taken into account.



Impact assessment?



The EIA - process

- In a research project in cooperation with the University Innsbruck, the European Academy in Bozen and other experts, we analyzed the EIA-process in all alpine countries. It demonstrates several deficiencies:
 - important alpine-specific projects were not listed
 - sensitive eco-systems were not considered
 - threshold values were too high
 - deficiencies in the environmental impact study
 - insufficient follow-up checks
 - in some countries public involvement was criticized

SEA

6

<https://www.youtube.com/watch?v=0uReVJYe0qw>



EIA - examples

ANNEX I

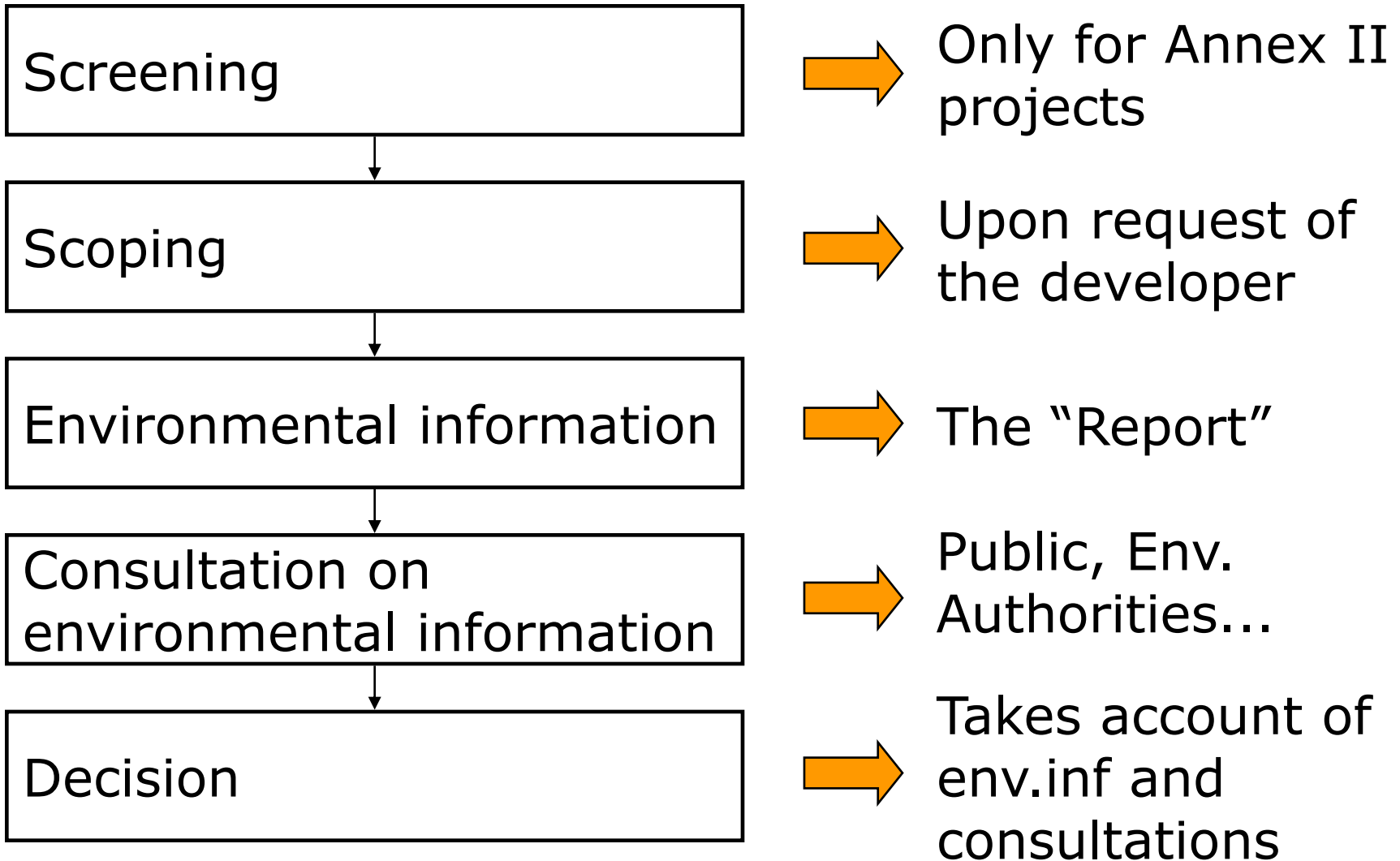
- Long-distance **railway** lines
- **Motorways**, express roads, **roads** of four lanes or more (of at least 10Km)
- **Waste** disposal installations
 - for hazardous waste
 - for non hazardous waste (above 100 tonnes/day)
- **Waste water** treatment plants (above 150000 p.e.)
- [+ changes or extensions of Annex I projects meeting Annex I thresholds]
-

ANNEX II

- Construction of **railways** and **roads** not included in Annex I
- **Waste** disposal installations and **waste water** treatment plants not included in Annex I
- **Urban development projects**
- **Changes or extensions** of Annex I and II projects that may have adverse environmental effects
- [+ modifications not included in Annex I]
-

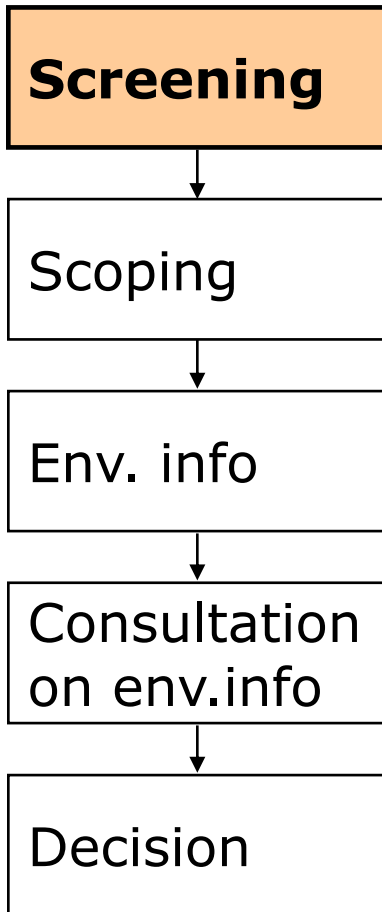


EIA - procedure





EIA - screening

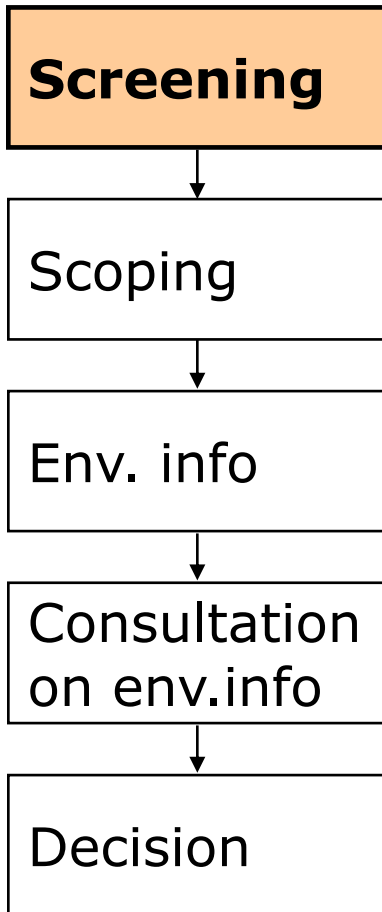


- Answers the question: ***is EIA required?*** (Annex II projects)
- The guiding principle: ***are significant environmental effects likely?***

If **yes** ⇒ **EIA needed**

If **no** ⇒ **no EIA needed**

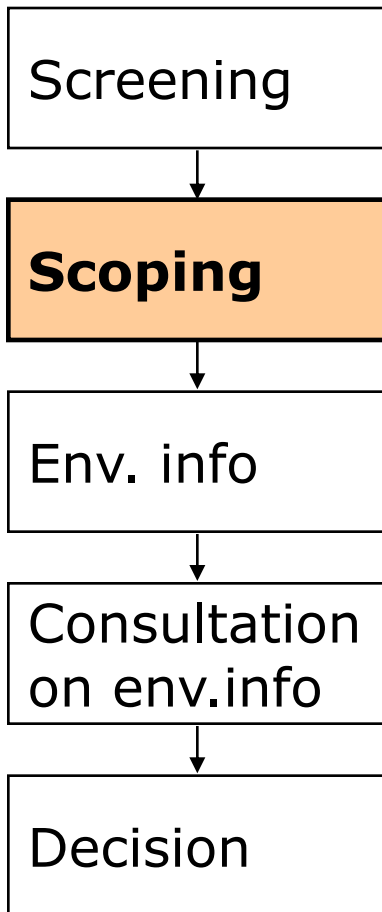
EIA - screening



- Determination through:
 - Case by case examination and / or
 - Thresholds or criteria
- **Annex III criteria** must always be taken into account – characteristics, location, potential impact
⇒ **avoid “salami slicing”!**
- Screening determination made **available to the public**



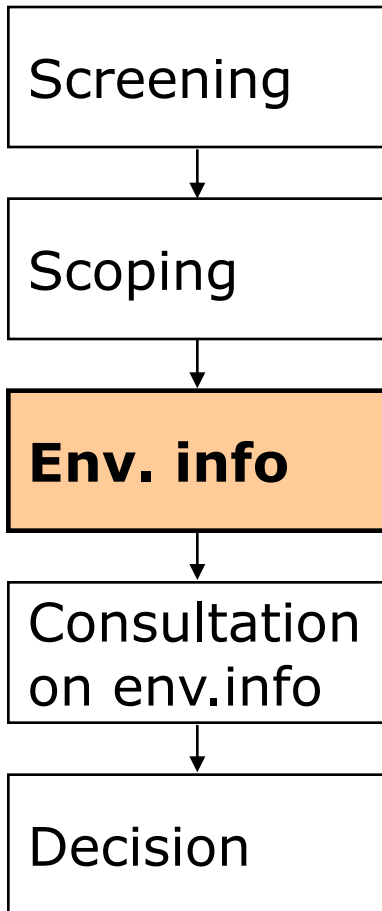
EIA - scoping



- Interaction between competent authority, developer, environmental authorities
- Before development consent application is submitted
- Answers the question ***“what should be covered by the environmental information?”***
- Opinion by the competent authority
- By request of developer



EIA - Environmental information “the report”



- Project **description**
- Likely significant environmental **effects** (and forecasting methods)
- Main **alternatives** and reasons for the choice taking account of the environmental effects
- **Cumulative** effects
- **Short term** and temporary effects
- **Mitigation** measures
- **Non-technical** summary



EIA/SEA

PLANNING

SEA report for the plan or programme

plan or programme



EIA report for the development consent

PERMITTING

EIA

Project (building, activity)

LAND USE

BUILDING

ACTIVITY

EIA

Project (building, activity)

BUILDING

EIA

Project (building, activity)



Informing and consulting

- 1. Environmental authorities** (Art. 5,6)
(scoping, env.information)
- 2. Public concerned** (Art. 4,6,10)
- 3. Other Member States** affected by the project (incl. env. authorities and public concerned in those MSs) (Art. 7,9)



Informing and consulting the public concerned

- **Screening determination** to be made available
- Public can express an opinion :
 - on **environmental information**
 - on the development consent request
- When **final decision** is taken, public must be informed of:
 - its contents and reasons,
 - attached conditions and mitigation measures
 - [after June 2005: information about public participation process]



Main provisions of „the Aarhus“ Directive 2003/35/EC

- Definition of **public** and **public concerned**: “*public affected, or likely to be affected by, or having an interest in, the decision making procedure*” , including NGOs. Art. 1(2)
- **National defence projects** not automatically excluded from EIA Art. 1(4)
- Strengthened **public consultation** provisions: early in the decision-making procedure, detailed list of information to be provided, reasonable time-frames Art. 6(2,3)



Main provisions of „the Aarhus“ Directive 2003/35/EC

- New provisions on public access to a **review procedure** Art. 10(a)
- Information provided to the public on the final decision needs to include **information on the public participation process** Art. 9(1)
- **Changes or extensions** :
 - of Annex I projects meeting Annex I thresholds (if any) ⇒ in **Annex I (22)**
 - of other Annex I projects, and of Annex II projects ⇒ in **Annex II (13)**



SELECTED CASE-LAW



CJEU – Basic principles

- The meaning of the EIA Directive is not static
- Affected by technical development
- The EIA Directive has “a wide scope and a broad purpose” (Kraaijeveld).
- Member States’ discretion is limited.
- Consistent emphasis on the likely environmental effects of proposed projects.
- Exemptions to be interpreted narrowly.

The Kraaijeveld case C-72/95 (South Holland Provincial Executive approved a zoning plan „Partial modification of zoning plans in connection with dyke reinforcement“)

- “The wording of the directive indicates that it has a wide scope and a broad purpose.”
 - Consistently quoted in subsequent cases by the Court (eg Bozen, Ireland).
- Uniform interpretation cannot be determined by one language.
- Some good news: criteria and thresholds have a role.

Linster C-287/98

- Individuals can rely on a Directive that has not been transposed on time.
- National courts are not restricted to the national law but can use the directive itself.
- Need for uniform application and principle of equality require autonomous uniform meanings for expressions in EC law.

Spain C-227/01 - Valencia-Tarragona railway line, Las Palmas-Oropesa section



Spain C-227/01 - Valencia-Tarragona railway line, Las Palmas-Oropesa section

- **Annex I point 7 must be understood to include the doubling of an existing track, and not a mere modification.**
- **That the case concerned a short section of a long distance route is not relevant:** *If the argument of the Spanish Government were upheld, the effectiveness of Directive 85/337 could be seriously compromised, since the national authorities concerned would need only to split up a long-distance project into successive shorter sections in order to exclude from the requirements of the Directive both the project as a whole and the sections resulting from that division.*
- **The new track would obviously create significant new nuisances, so no need to prove the existence of concrete negative effects – likelihood is sufficient.**
- **Note: this case pre-dates amendments by Directive 97/11.**



Salami slicing





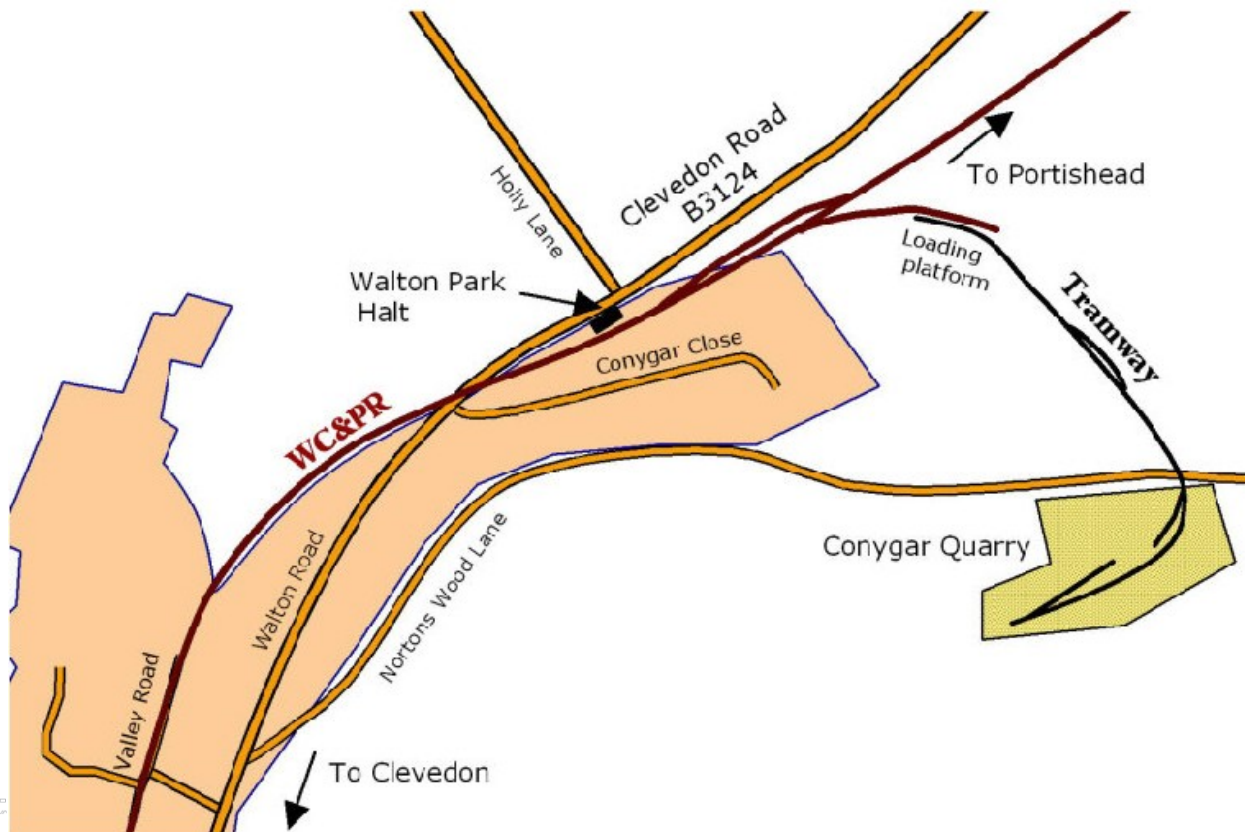
Transboundary EIA/SEA





Delena Wells C-201/02

Grant of a new consent for mining operations at Conygar Quarry without an environmental impact assessment having first been carried out





Delena Wells C-201/02

- In two (or more) stage consent procedures, assessment of environmental effects must be as soon as they can all be identified and assessed.
- If MSs fail to carry out EIA, they must take measures to remedy that failure. These might include the revocation or suspension of a consent, or compensation if an individual has suffered harm.



Practical application

- CJEU and Commission rely on EU law – ie the Directive, not the national transpositions.
- In considering difficult cases, such as many infrastructure projects, reflect on the approach the Court would take.
- Consider the context and purpose of the legislation.



Strategic Environmental Assessment

Directive 2001/42/EC

Applicable from 21st July 2004



What is a plan or programme?

(Article 2)

- prepared and/or adopted by an authority at national, regional or local level **AND**;
- required by legislative, regulatory or administrative provisions.

Definition includes:

- *co-financed* by the EC, *modifications*.

Typically urban plans, waste management plans,...



Which plans and programmes require SEA?

Article 3(2) - plans and programmes that always require environmental assessment:

(a) prepared for agriculture, forestry, fisheries, energy, industry, transport, waste/ water management, telecommunications, tourism, town & country planning or land use

AND

which set the framework for future development consent of projects listed in the EIA Directive.



Which plans and programmes require SEA?

Article 3(2) - plans and programmes that always require environmental assessment:

(b) which, in view of the likely effect on sites, have been determined to require an assessment under Article 6 or 7 of the Habitats Directive.



Which plans and programmes require SEA?

Article 3(9) - Exemptions:

- National defence, civil emergency, financial or budget plans/programmes
- Structural Funds Regulations (inc EAGGF) for current programming period 2000-2006/7



To be continued...

Thank you for your attention 😊