

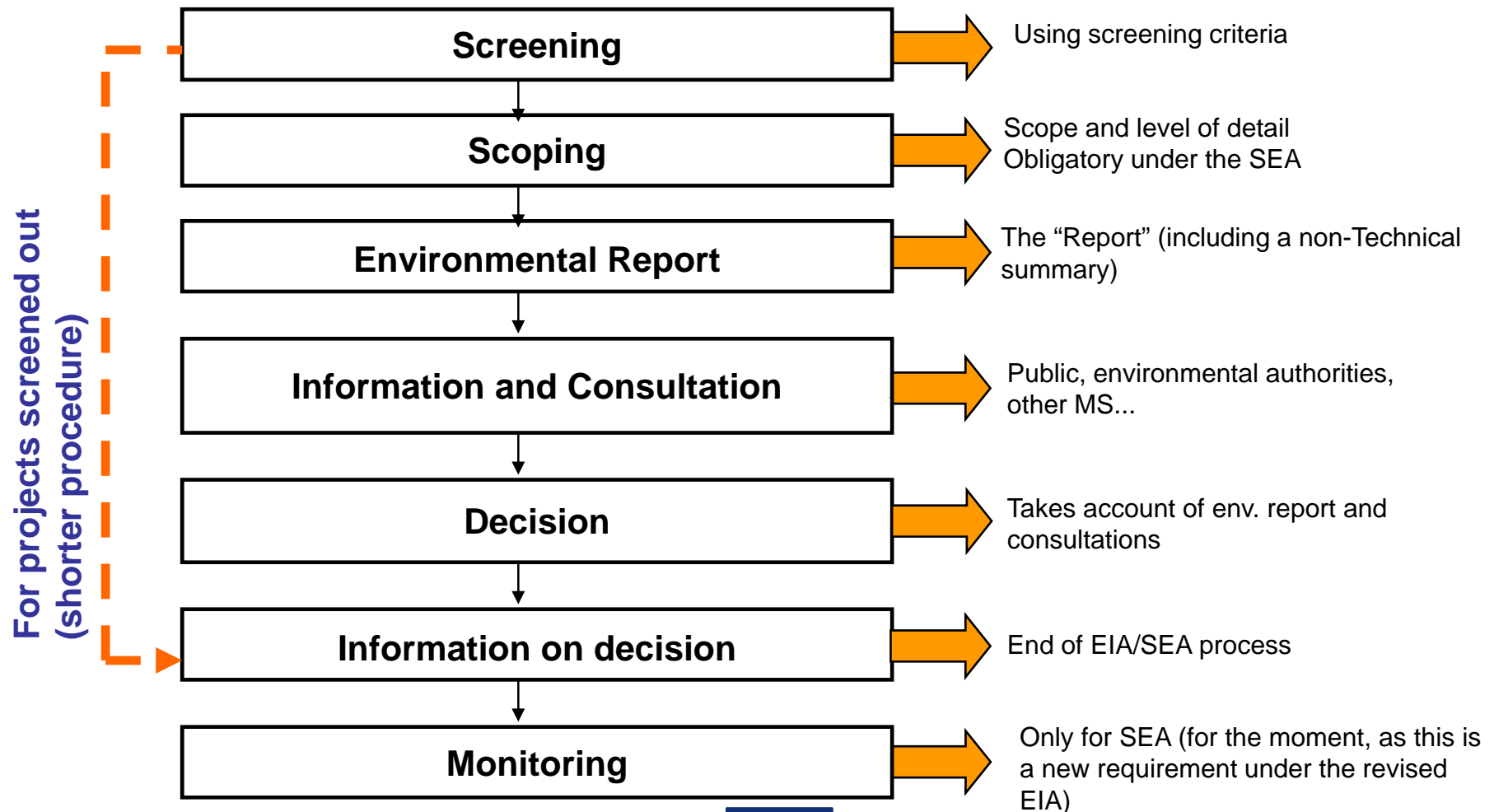


The implementation of the SEA, and EIA Directives in the light of key rulings of the Court of Justice of the EU

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Stephanos Ampatzis
Deputy Head of Unit
European Commission - DG Environment D1
Enforcement, Cohesion Policy & European Semester

The Environmental Assessment Procedures





SEA and EIA: 3 basic principles

1. Clear transposition
2. Uniform interpretation and application of EU law
3. Wide scope and broad purpose





SEA and EIA: 3 basic principles

1. **Transposition:** MSs should ensure full application of the directive in a **sufficiently clear and precise manner**.

C-427/07, Commission v. Ireland

2. **Uniform interpretation** and application of EU law – involves comparison of the language versions and autonomous and uniform interpretation.

C-72/95, Kraaijeveld and Others & C-332/04, Commission v. Spain

C-287/98, Linster; C-420/11, Leth





SEA and EIA: 3 basic principles of interpretation

3. The Directives have a **wide scope** and a **broad purpose**

C-435/97, WWF and Others; C-2/07, Abraham and Others – *Liège airport*, C-275/09; C-105/09 and C-110/09 *Terre wallonne*

- Consistent emphasis on the fundamental purpose of the Directive: **projects likely to have significant environmental** effects must undergo an EIA (idem for SEA).
- Exemptions to be interpreted narrowly.

C-435/97, WWF and Others; C-128/09, *Boxus*





Environmental Impact Assessment

- Scope of the EIA
- Definition of a project
- Screening
- Concept of development consent
- Public participation and access to justice





Scope and purpose of the EIA Directive

- **EIA** must be carried out before project's authorization

[C-215/06 Commission v. Ireland]

In case of breach, the national court shall consider if the consent should be revoked or suspended, or alternatively harm compensated.

C-201/02, Wells, C-215/06, EC v. Ireland

- **Procedural nature** of EIA [C-420/11, Leth]
- **Overall environmental assessment** of the effects of projects

C-205/08, Umweltanwalt, C-147/07, Ecologistas





'Assessment' is a fundamental obligation

- The assessment obligation is the **core** of the EIA procedure (Art. 3).
- It is **distinct from the rest** of the obligations laid down in the EIA Directive (to collect and exchange information, consult, publicise and guarantee judicial appeal).

C-50/09, Commission v. Ireland

- The EIA Directive adopts an **overall** assessment of the effects of the projects on the environment. It must include a description of the direct and indirect environmental impact of a project.

C-2/07, Abraham; C-142/07, Ecologistas en Accion; C-205/08, Umweltanwalt von Karnten; C-560/08, Commission v. Spain





Ex post EIAs

- Should be used **exceptionally** only (C-215/06)! Three possible scenarios:
- ✓ Project authorized but works have not started: a screening/full EIA required (the development consent must be amended/reissued; injunction measures (e.g. suspension of the project's authorization before completion of the EIA/screening procedure) to be considered).
- ✓ Project authorized, the works have started but not completed: injunction measures should be used; consider if a full EIA can be carried out.
- ✓ Project authorised and completed: ex-post EIA should be carried out + mitigation/compensation measures identified.
- In all cases: **public consultation and information** (Articles 6 and 9) should also be taken into consideration.





Definition of project

"Project" refers to **works and physical interventions.**

C-275/09, Brussels Hoofdstedelijk Gewest and Others; C-2/07 Abraham and Others

- Modernization of existing road [C-142/07, Ecologistas en Acción-CODA].
- Modernization of existing runway [C-2/07 Abraham and Others].
- Demolition works [C-50/09 Commission v. Ireland].
- Extension of consent for operation of the airport [C-275/09, Brussels Hoofdstedelijk Gewest and Others].
- Extension of consent for operating of the landfill [C-121/11, Pro-Braine and Others].





Screening (1)

- **Limits of discretion** – MSs should not undermine the objective of the Directive

C-435/97, WWF and Others; C-87/02 Commission v. Italy

- Need for **assessment of cumulative effects**.

- Avoid splitting the projects (**salami-slicing**).

C-142/07, Ecologistas en Acción-CODA ; C-205/08, Umweltanwalt von Kärnten; C-2/07, Abraham; C-275/09, Brussels Hoofdstedelijk Gewest ; C-531/13 Marktgemeinde Straßwalchen

- **Criteria/thresholds**

- * **All** relevant Annex III criteria to be used.

- * Even a **small-scale project** can have significant effects on the environment (ex. a series of small hydroelectric plants).

- * Criteria/thresholds are to facilitate the examination of effects, not to exempt in advance certain **whole classes of projects/all projects of a certain type**.

C-392/96 & C-66/06, Commission v. Ireland; C-72/95, Kraaijeveld, C-435/97, WWF; C-255/08, Commission v. Netherlands; C-435/09, Commission v Belgium.





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Example of screening thresholds (UK)

Development type	Schedule 2 criteria and thresholds (exclusion thresholds: subject to the proposal <u>not being</u> in a sensitive area))	Indicative criteria and threshold	Key issues to consider
3. Energy industry			
(h) Installations for hydroelectric energy production;	The installation is designed to produce more than 0.5 megawatts.	New hydroelectric developments which have more than 5 MW of generating capacity.	Physical scale of the development, the potential wider impacts on hydrology and ecology.
(i) Installations for the harnessing of wind power for energy production (wind farms).	(i) The development involves the installation of more than 2 turbines; or (ii) the hub height of any turbine or height of any other structure exceeds 15 metres.	Commercial developments of five or more turbines, or more than 5 MW of new generating capacity.	Scale of the development, its visual impact, and potential noise impacts.





Examples of screening thresholds (PL)

5) hydroelectric plants;

6) installations using wind power to produce energy, other than listed in Article 2 section 1 item 5:

a) located in nature protected areas, referred in Article 6 section 1 items 1–5, 8 and 9 of the Nature Conservation Act of 16 April 2004 (Journal of Laws of 2013, items 627 and 628), excluding the facilities intended solely for energy supply for road and railway signs, road or railway traffic control or monitoring devices, navigation signs, lighting, billboards and advertisement boards,

b) with a total height of 30 metres and more;





Screening (2)

- **Content** of the screening decisions
 - * Justification of negative screening decisions – such a decision **must contain or be accompanied by all the information** enabling to check it is based on **adequate screening**. [C-87/02 Commission v. Italy]
 - * ...but only **upon request** – Art. 4 does not require that a negative screening decision should itself contain the reasons; however, these shall be communicated if requested. [C-75/08 Mellor]
- **Non-binding effect** of a screening-out decision with regard to **'public concerned'** [C-570/13 Gruber]
 - * a negative screening decision cannot prevent an individual, part of the 'public concerned', from contesting it in an action brought against either that decision, or against a subsequent development consent decision.





Concept of development consent

- Must be defined pursuant to national law in a manner consistent with EU law, i.e. *decision of the competent authority, which entitles the developer to proceed with the project*

C-290/03, Barker - Crystal Palace

- Might be multi-stage consent procedure – main and implementing decision.

C-201/02, Wells; C-416/10, Križan

- Consent comprising more than one stage requires EIA to be carried when it shows that the project is likely to have significant effects on the environment.

C-290/03, Barker - Crystal Palace





Development consent in PL

Article 71

A decision on the environmental conditions

1. A decision on the environmental conditions shall define the environmental conditions for the implementation of a project. ...

Article 72

1. **A decision on the environmental conditions shall be issued prior to obtaining:**

- 1) **a decision on a construction permit, a decision on the approval of a construction design, a decision to permit the resumption of construction works and a decision to permit a change in use of a building or a part thereof ...**
- 2) **a decision to permit the demolition** of nuclear sites ...
- 3) **a decision on the conditions for land development and use ...**

...

3. A decision on the environmental conditions **shall be attached** to a request for the decisions referred to in paragraph 1. Submission of a request shall be made within 4 years of the date on which a decision on the environmental conditions has become final ...





Development consent in PL – repeated EIA

Article 88

The repeated conduct of the environmental impact assessment for a project

1. The environmental impact assessment for a project within the framework of the procedure to issue the decisions referred to in Article 72 (1) (1), ...

- 1) on the request of the entity which plans to undertake the project, submitted to the authority competent to issue the decision;
- 2) where the authority competent to issue the decision finds that **changes have been made to the request for the issue of the decision in relation to the requirements set out in the decision on the environmental conditions;**

...



Public participation and Access to Justice

- ✓ Right of individuals to rely on the EIA Directive and invoke it before national courts.

C-72/95, Kraaijeveld; C-287/98, Linster; C-201/02, Wells

- ✓ Aarhus Convention is an integral part of the EU legal order.

C-240/09, Slovak bear case

- ✓ Need to ensure broad access to justice:

- Participation in administrative procedure?
- Rights of NGOs and protection of public interest.
- Rights of individuals capable of being impaired.

C-263/08, Djurgården and C-115/09, Trianel





Strategic Environmental Assessment

- Definition of plan and programme
- Screening
- Relationship between SEA and EIA/AA
- Conflict of interests





Strategic Environmental Assessment (1)

- The concept of plan and programme
 - * A project for the partial diversion of the waters of a river not to be regarded as a P/P [C-43/10, WWF Greece and Others].
 - * Specific land development plans (incl. total or partial repeal of a land use plan) [C-567/10, Inter-Environnement Bruxelles].
 - * Nitrates action programmes [C-105/09 and C-110/09, Terre Wallonne] => content and purpose of the P/P.
 - ? Other type of P/P: RBMP, Waste MP/PP, Flood Programmes...
- Screening (P/P determining the use of small areas at local level)
 - * Art. 3(5) precludes national legislation, which provides that SEA is not to be carried out in the land planning documents applied to small areas of land at local level, of only one subject of economic activity [C-295/10, Lithuanian Green Movement and Others]





Strategic Environmental Assessment (2)

- Relationship between EIA and SEA (Art. 11)
 - * EIA **does not dispense** with the obligation to carry out an SEA [C-295/10, Lithuanian Green Movement]
- Relationship between AA and SEA (Art. 3.2(b))
 - * The obligation to make a particular plan subject to SEA depends on the preconditions requiring an AA under Directive 92/43/EEC, including the condition that the plan may have a significant effect on the site concerned, being met in respect of that plan [C-177/11, Greek Association of Urban and Regional Planners]
- Conflict of interests
 - * MS have to ensure a **functional separation** with an authority that is both a developer of a P/P and a competent authority within the meaning of the Directive [C-474/10, Irish Department of the Environment]





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ENVIRONMENTAL IMPACT ASSESSMENT OF PROJECTS
RULINGS OF THE COURT OF JUSTICE

ENVIRONMENTAL IMPACT ASSESSMENT OF PROJECTS – RULINGS OF THE COURT OF JUSTICE

http://ec.europa.eu/environment/eia/pdf/eia_case_law.pdf





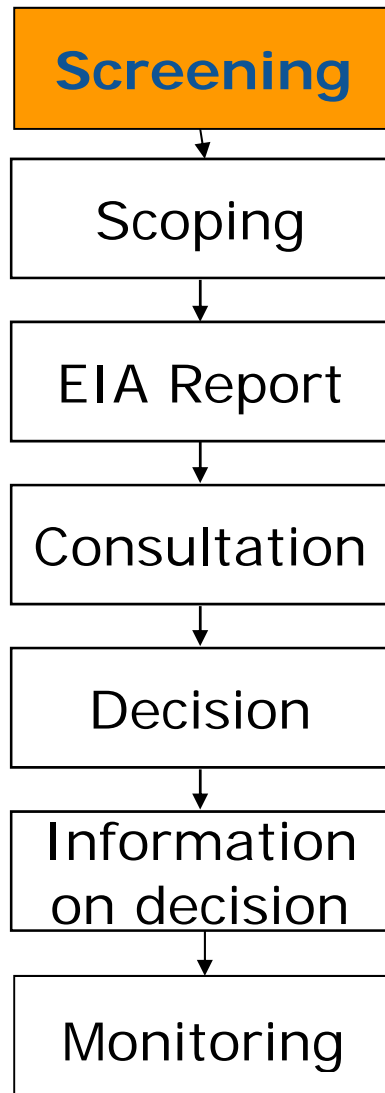
The revised EIA Directive: what's **NEW**

- Transposition due by 16 May 2017.

Transitional provisions

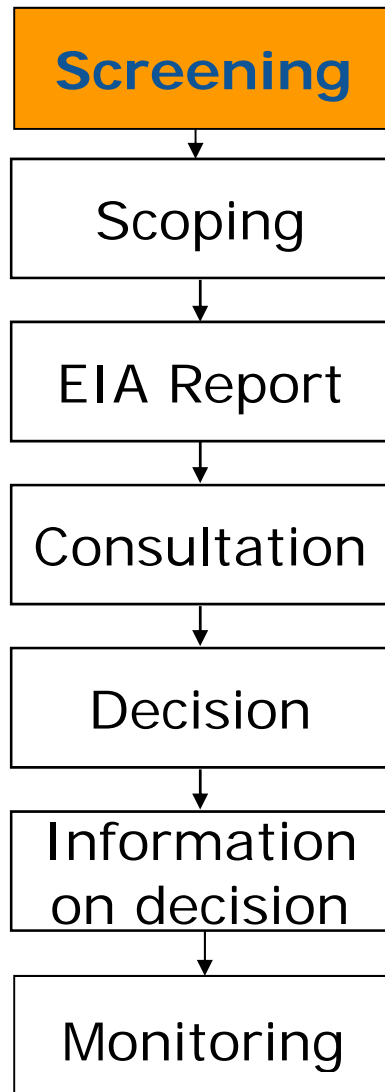
- Projects for which the screening was initiated before 16 May 2017 shall be subject to the provisions of Directive 2011/92/EU (i.e. current regime).
- Projects for which:
 - the scoping was initiated or
 - the EIA report was submitted by the developer before 16 May 2017 shall be subject to the provisions of Directive 2011/92/EU (i.e. current regime).





Screening principles

- **Thresholds** to decide when projects have/have not to undergo screening or EIA, taking into account relevant screening criteria of Annex III (Art.4(3)).
- **NEW: List of information to be provided by the developer (Art.4(4) and Annex II.A).**
- **NEW: Content of the screening decision (Art.4(5)):**
 - ✓ on the basis of the information provided by the developer.
 - ✓ take into account, where relevant, the results of preliminary verifications/assessments [SEA, Hab Dir.].
 - ✓ use of annex III criteria reasons for any screening decision [see C-87/02 and C-75/08].
 - ✓ if no EIA: measures/features to avoid or prevent significant adverse effects.
- **NEW: Time-frame for the decision (Art. 4(6)):**
 - ✓ 90 days (from the date on which the developer has submitted all the requisite information).
 - ✓ Possibility for extension in exceptional cases (in writing informing the developer of the reasons for the extension and the expected new date).



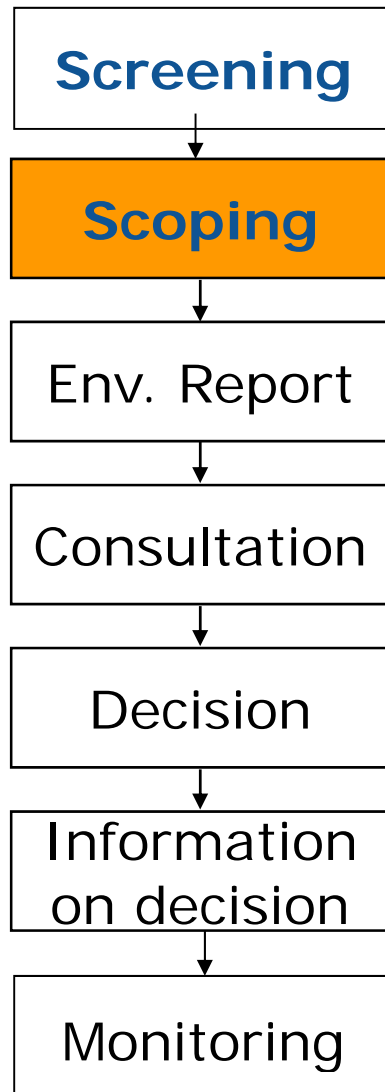
Screening – Annexes II.A & III

■ Annex II.A: NEW

- ✓ Description of the 'whole' project.
- ✓ Description of the env. aspects likely to be significantly affected.
- ✓ Description of the likely significant impacts.
- ✓ Measures/features to avoid or prevent significant adverse effects.

■ ANNEX III: updated/new criteria

- ✓ Use of natural resources.
- ✓ Risks to human health.
- ✓ Risk of major accidents/disasters, including those caused by climate change.
- ✓ 'Whole' project to be considered (incl. subsurface/underground) at ALL stages (construction, operation, demolition).
- ✓ Cumulative impacts with existing/approved projects.
- ✓ Landscapes and site of cultural heritage.
- ✓ Type of the impact (magnitude, intensity/complexity, onset, cumulation, possibility to reduce it)

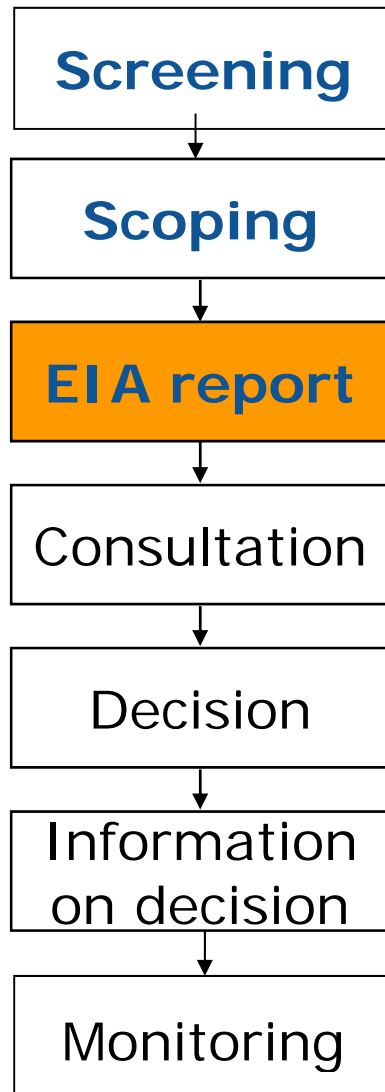


Scoping – Art.5(2)

- Very few changes.
- Voluntary character unchanged.
- Information provided by the developer to be taken into account (incl. location and technical capacity and likely impacts).
- Opinion should refer to the scope and level of detail of the EIA report.
- Consultation of environmental and local/regional needed.

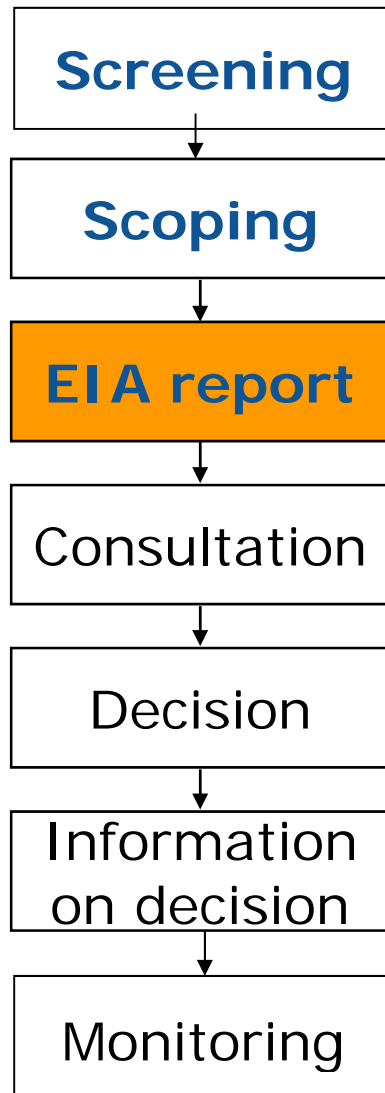


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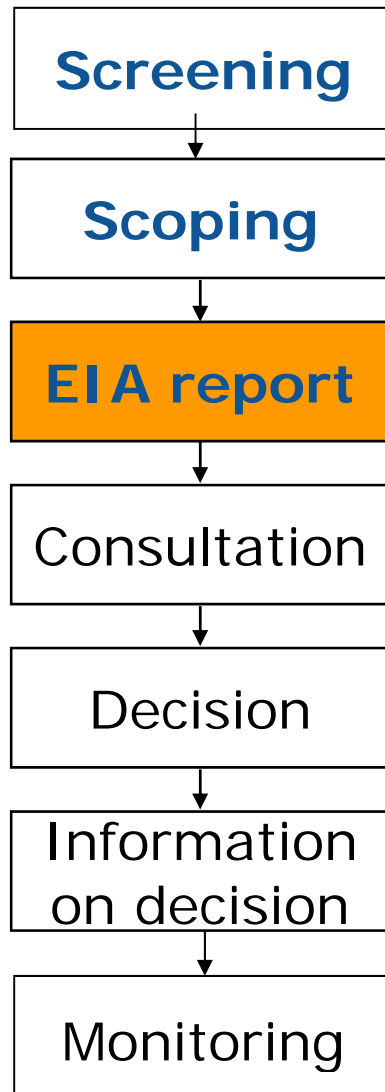
Information of the EIA Report – Art.5(1)

- Mirroring changes in Article 3.
- description of the project (site, design, size and other relevant features);
- description of the likely significant effects;
- description of the features and/or measures of the project envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects;
- description of the reasonable alternatives studied by the developer relevant to the project and its specific characteristics, and an indication of the main reasons for the option chosen;
- non-technical summary;
- additional information specified in Annex IV



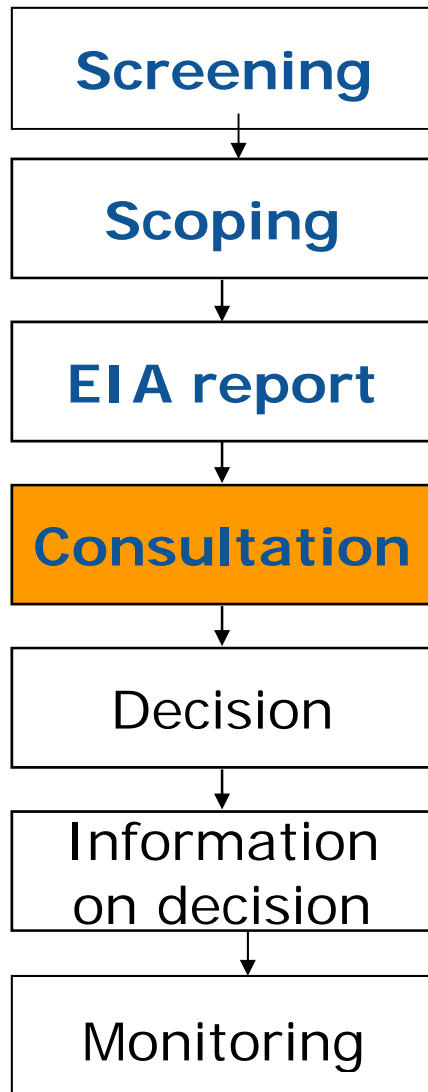
Several **new** elements in the information of the EIA Report – Annex IV

- Resource and energy efficiency elements (IV.1 and IV.5).
- Reasonable alternatives, including baseline scenario (IV.2 and IV.3).
- Adaptation to new environmental issues, such as climate change and biodiversity (IV.4 and IV.5).
- Cumulative impacts (IV.5.e).
- Risk assessment related to accidents/disasters (IV.8).
- Thorougher description of mitigation and compensation measures, as well as introduction of monitoring (IV.7).
- Methods/evidence and list of sources used (IV.6 and IV.10).



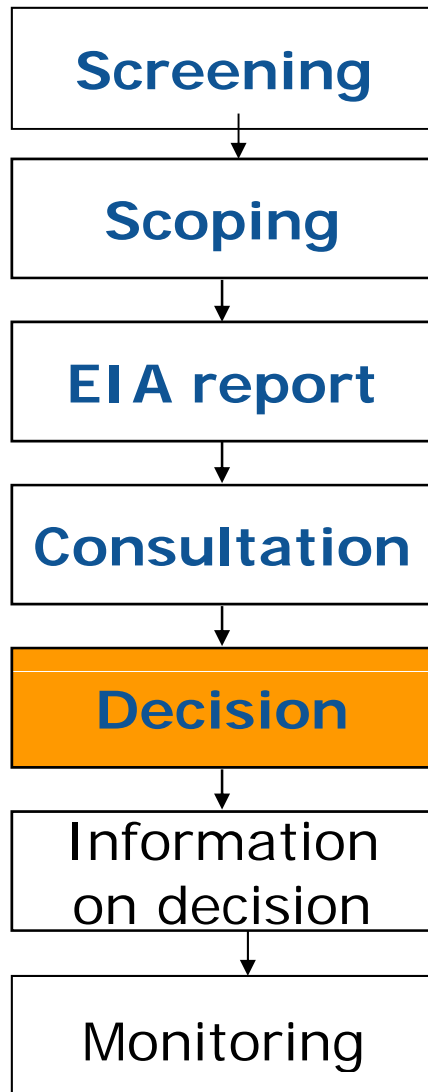
NEW: Quality of the EIA Report – Article 5(3)

- Guarantee the completeness and quality of the EIA report.
- Shared responsibility of the developer and of the competent authority (CA)
- Two cumulative conditions:
 - Developer shall ensure that the EIA report is prepared by competent experts and
 - CA shall ensure that it has, or has access as necessary to, sufficient expertise to examine the EIA report.
- Where necessary, CA shall seek from the developer supplementary information, directly relevant to reaching the reasoned conclusion on the significant effects of the project.



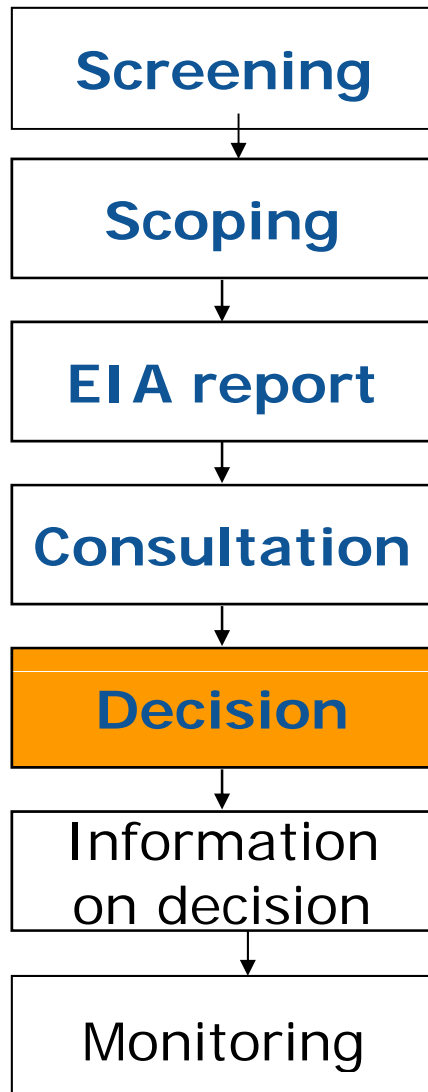
Consultation – Articles 6 and 7

- Broadened scoped: local and regional authorities clearly spelled out as bodies to be consulted.
- **Reinforced modalities:**
 - ✓ Public to be informed electronically and by public notices (Art.6 (5))
 - ✓ Relevant information electronically accessible to the public, through at least a central portal or easily accessible points of access, at the appropriate administrative level (Art. 6 (5))
 - ✓ Reasonable time-frames for the different phases to be provided of the decision-making (Art. 6(6)).
 - ✓ Time-frame for consulting the public concerned on the EIA report - at least 30 days (Art. 6(7)).
- Transboundary consultations:
 - ✓ Consultations may be conducted through an appropriate joint body (Art.7(4)).
 - ✓ Time-frames for public consultation to be set (Art. 7(5)).



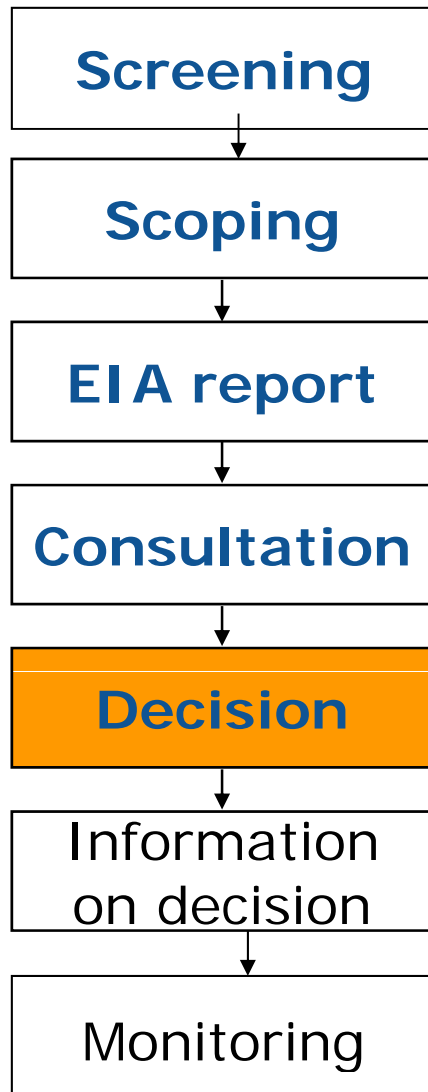
Final decision – Articles 8 and 8a

- 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, 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.
- Decision to refuse development consent should include main reasons for it.
- Timing of the decision reflects different EIA systems in the EU (Art. 8a(3) and recital 21): need for a binding EIA decision or an EIA integrated in the development consent.



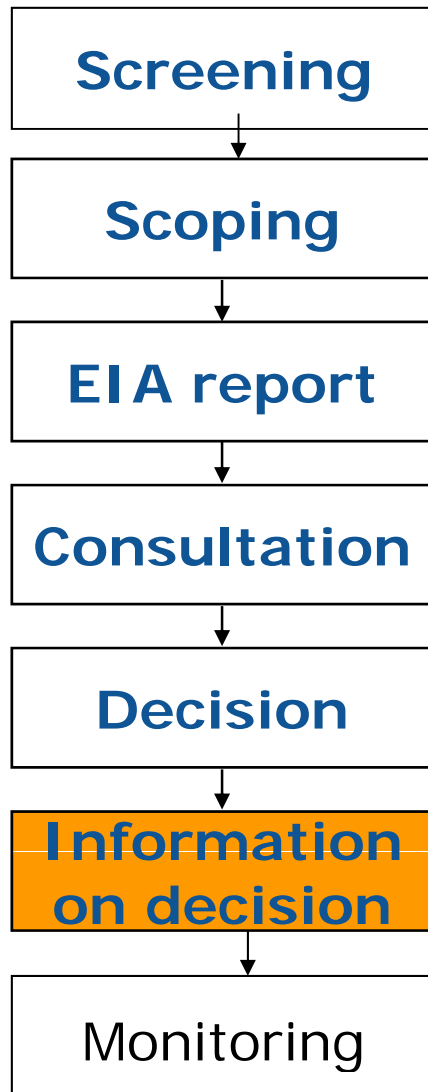
NEW: Conflict of interest (Article 9a)

- Obligation for MS.
- Ensure that CA perform the 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 authorities.
 - Minimum obligation: functional separation (within national organisation of administrative competences, ensure an appropriate separation between conflicting functions).



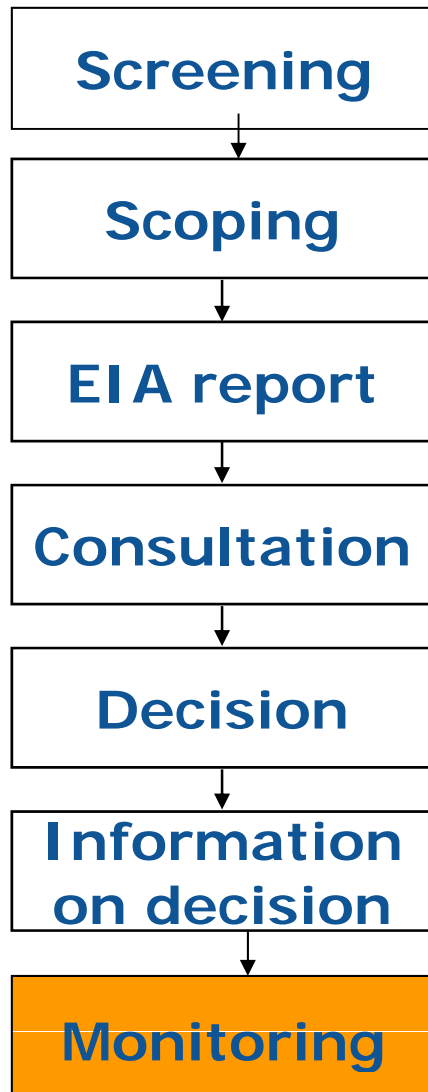
NEW: EIA one-stop shop (Art.2(3))

- Main obligation: coordinated/integrated procedure, *where appropriate*, for assessments under EIA and/or Habitats/Birds Directives.
- For assessments under EIA and other Union legislation (e.g. SEA, Water Framework, IED, Waste Framework, Seveso, listed in recital 37) possibility to apply one-stop shop.
- Short explanations of coordinated/integrated procedures.
- COM to issue guidance on coordinated/integrated procedures.



Information on the final decision – Article 9

- 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.
 - ✓ Main reasons.
 - ✓ 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, shall be made available as well.



NEW: Monitoring – Art.8a(4) and recital 35

- Requirement for projects with significant + adverse environmental effects.
- Scope of the obligation:
 - Measures/features to avoid, prevent, reduce offset effects have to be implemented by the developer.
 - MS to determine appropriate procedures to monitor such effects.
 - type of parameters to be monitored / duration of the monitoring: proportionate to the nature, location and size of the project and the significance of its effects on the environment;
 - use of existing monitoring from EU/national legislation (to avoid duplication).



Other changes

- **Definition** of EIA (Art. 1(2)g), based on the case-law (C-50/09).
- **Limitation of exemptions** (Articles 1(3), 1(4), 2(4), 2(3)):
 - ✓ projects or part of projects, having defence as their **sole** purpose (see also recital 19);
 - ✓ projects having the response to to civil emergencies as their **sole** purpose (see also recital 20).
 - ✓ projects approved in detail by law exempted only as regards public consultation requirements, (see also recital 24).
- Standard provision on **penalties** (new Article 10a): MSs shall lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to the Directive. The penalties thus provided for shall be effective, proportionate and dissuasive.
- Updated **reporting** obligation to the Commission (Article 12(2))
 - ✓ As from May 2023.
 - ✓ Information to assess the effectiveness of the EIA (n° of EIAs/screenings, average duration of the EIA process; general estimates on the average direct costs of EIAs, including the impact to SMEs).



THANK YOU!

