



# Compliance with the EU legislation on environmental assessments of plans/programmes (SEA) and projects (EIA)

Georges Kremlis  
Cohesion Policy and Environmental  
Impact Assessments Unit (A3)  
Directorate-General Environment



# Outline

## **I. General introduction**

- environmental assessments (P/PP/P)
- relationships with other environmental assessments
- introduction to case-law (ECJ)

## **II. Overview of SEA and EIA Directives**

- objectives and applicability
- common overview of EIA/SEA stages (incl. ECJ cases)

## **III. Focus on critical areas – EIA Directive (ECJ & MSs experience)**

- development consent
- salami slicing and project splitting
- obligation to remedy the failure to carry out an EIA

## **IV. Relationship with Art. 6(3) assessment**

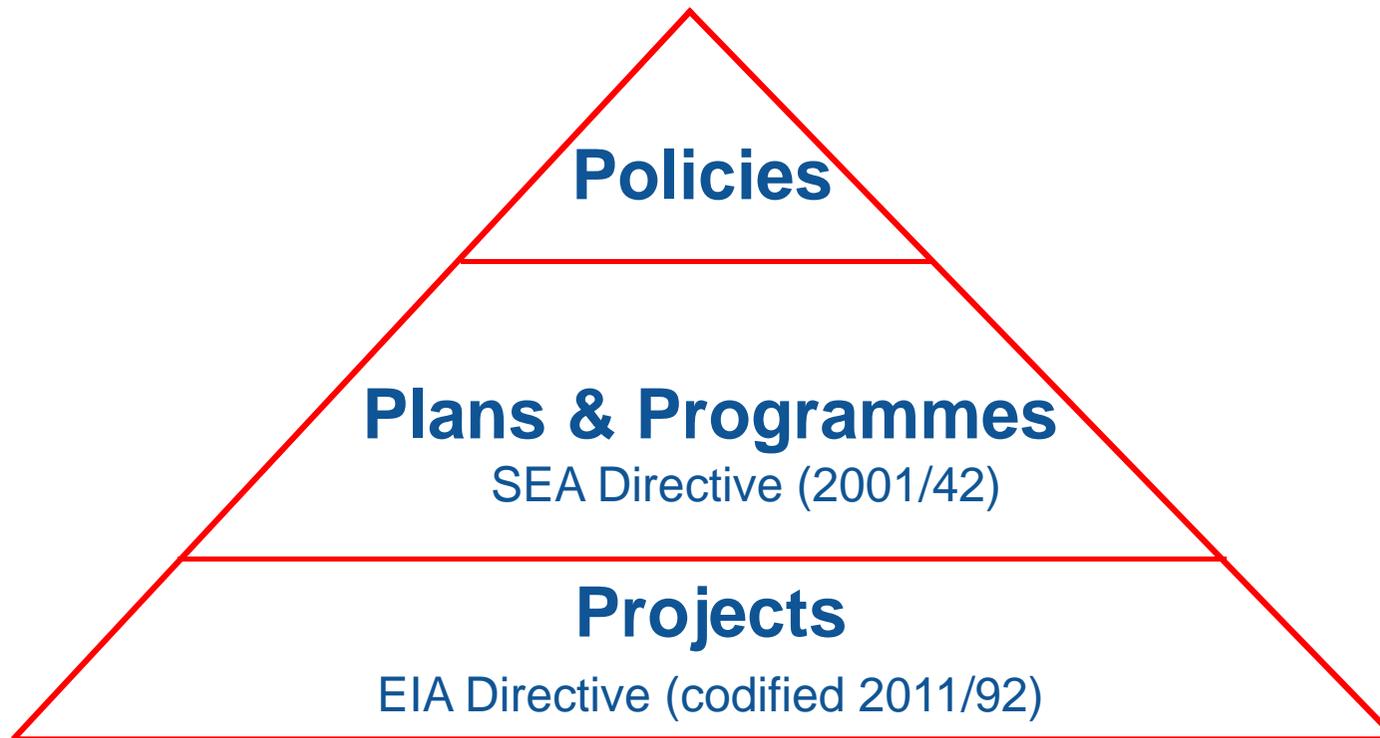
## **V. EIA & SEA ex-ante conditionalities (2014-2020)**

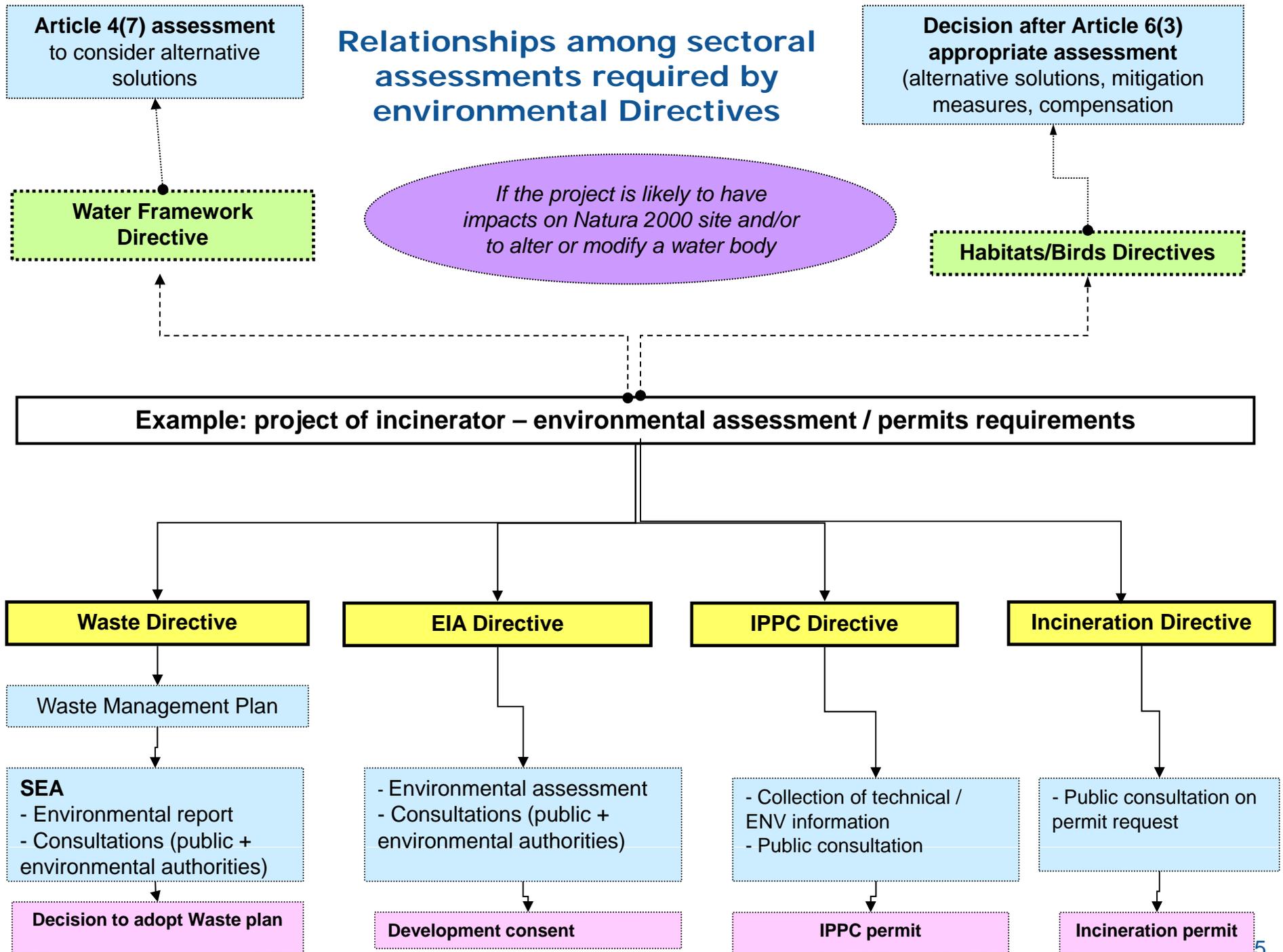


# I. General introduction



# Environmental assessments







## European Court of Justice – Case law



- Interpretation of Directives: NOT STATIC
- MSs' discretion is limited.
- Infringements or references by national courts
- Considerable body of ECJ case law
- ECJ rulings: mostly EIA but also relevant to SEA
- The EIA Directive has *'a wide scope and a broad purpose'*
- Consistent emphasis on the fundamental purpose of the Directive: projects likely to have significant environmental effects must undergo an EIA.
- Exemptions to be interpreted narrowly
- Examples of rulings (presentation)



## II. Overview of SEA and EIA Directives



## Similar Objectives of the Directives

Guiding principle for both **SEA** & **EIA**



Plans/Programmes (SEA), OR  
projects (EIA),

which are likely to have significant effects on the environment are subject to  
an assessment of their environmental effects

so they can be taken into account,

while Ps/Ps are actually being developed, and in due course adopted (SEA)  
before **development consent** is given to a project (EIA)



high level of protection of the environment  
& integration of environmental considerations into Ps/Ps (SEA),  
protection of the environment and the quality of life  
& ensuring approximation of national EIA laws (EIA)



## Scope of applicability: SEA (1)

### Which Ps/Ps?

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

### Exemptions:

- ✗ Ps/Ps the **sole** purpose of which is to serve national defence or civil emergency;
- ✗ financial or budget plans/programmes.



## Scope of applicability: SEA (2)

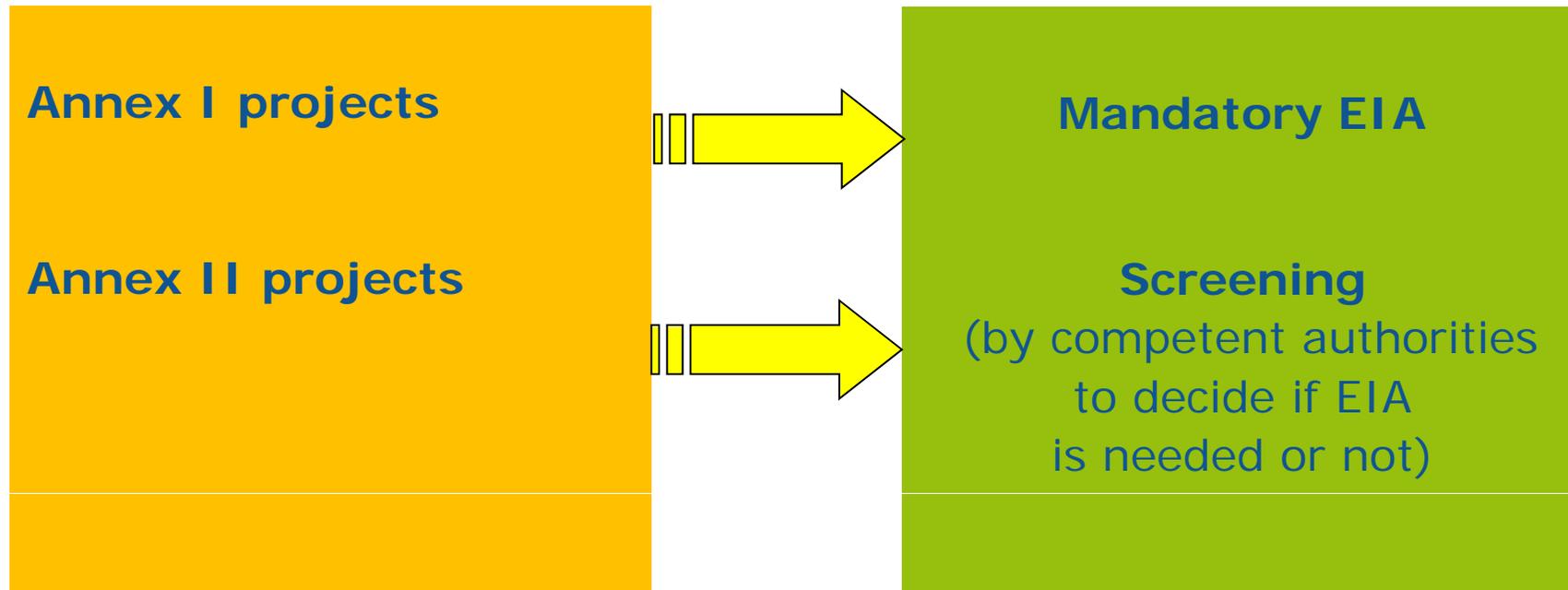
### Mandatory SEA

- ✓ prepared for agriculture, forestry ... land use **AND** which **set the framework** for future development consent of projects listed in the EIA Directive; **OR**
- ✓ which have been determined to require an assessment under Articles 6 or 7 of the Habitats Directive.
- ❖ P/Ps co-financed by the EU (e.g. OPs).
- ❖ modifications of P/Ps.

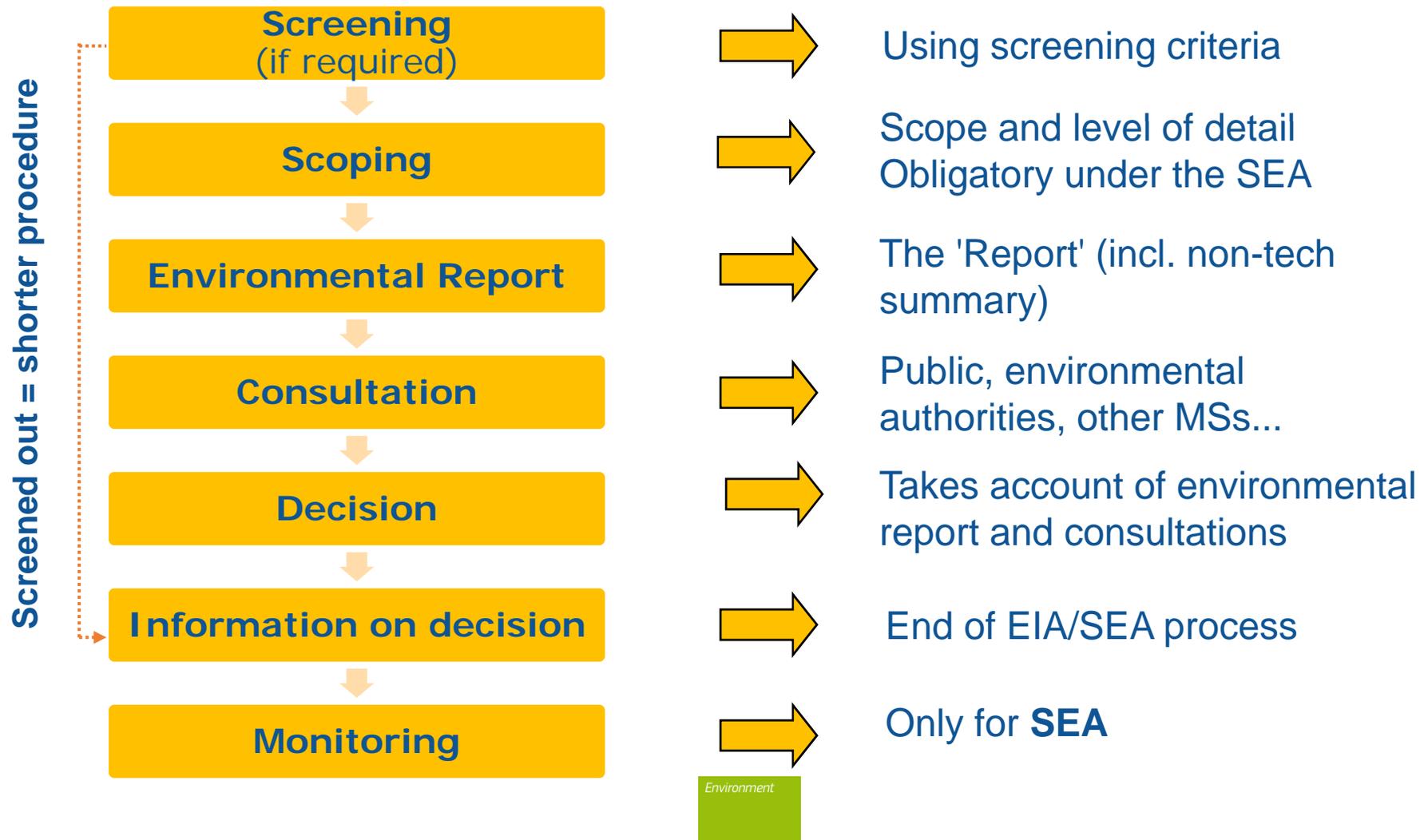
### Screening

- Ps/Ps using small areas at local level
- minor modifications
- Ps/Ps setting the framework for future 'non-EIA projects' and outside sectors covered by mandatory SEA.

## Scope of applicability: EIA



## Environmental Assessment (EIA & SEA)



## Screening - Principles



- Only for Annex II projects (EIA) or small/minor Ps/Ps and Ps/Ps not listed (SEA)
- Answers the question: **Is an EIA/SEA required?**
- Guiding principle: **Is the PP/project likely to have significant environmental effects?**
  - If YES ⇒ SEA/EIA needed
  - If NO ⇒ no SEA/EIA needed
- How do we determine effects (margin of discretion for MS):
  - ✓ case by case examination and/or
  - ✓ specify Ps/Ps (SEA) based on criteria - thresholds or criteria (EIA)
- Screening criteria must always be taken into account.
- Screening decisions (including the reasons for not requiring an EIA/SEA) made available to the public, access to justice

## Screening - Annex criteria



### SEA

- Characteristics of Ps/Ps
- Characteristics of the effects and of the area likely to be affected

### EIA

- Characteristics of projects  
size, **cumulation** with other projects, resources use ...
- Project location - environmental sensitivity of area likely to be affected  
land use, natural resources, **Natura 2000** sites, **exceeded environmental standards...**
- Potential impact  
extent, transboundary nature, probability, magnitude ...



## Ireland C-392/96 (cumulative effects)

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

## Spain C-474/99 and Ireland C-66/06

- MSs are not empowered to **exclude generally** and definitively classes and sub-classes of Annex II projects.
- MSs are obliged to take account of **ALL** the relevant selection criteria listed in Annex III when establishing criteria or thresholds for Annex II projects.
- MS that has established thresholds and/or criteria that take account **only of the size of projects**, without taking all the criteria listed in Annex III into consideration, would exceed the limits of its discretion under the Directive.



## The Netherlands C-255/08 (thresholds)

- ❑ In this ruling, the Court has upheld the Commission's action, which related to the non-conformity of the Dutch EIA screening system (regulated under Articles 4(2), 4(3) and Annex III of Directive 85/337 as amended, the "EIA Directive").
- ❑ The Court has essentially found that the Dutch thresholds-based system is incompatible with the Directive since the **screening thresholds are merely size-based**.



## Italy C-87/02 (screening decision)



- MS have discretion about the methods they use to specify whether a project is subject to an EIA.
- But this method must not undermine the Directive's objective.
- A decision that an Annex II 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.

## Mellor C-75/08 (publication of screening decision)



- A decision that an EIA is not required for an Annex II project (negative screening decision) should not itself contain the reasons for the competent authority's decision that the EIA was unnecessary.
- However: **if an interested party so requests, the competent authority is obliged to communicate to him the reasons for the determination or the relevant information.**
- A negative screening decision is sufficiently reasoned where the reasons which it contains (added to factors brought to the attention of interested parties and to any necessary additional information which the competent national administration is required to provide to those interested parties at their request) can enable the interested parties to decide whether to appeal against that decision.

## Belgium C-435/09

- ❑ Established case-law (thresholds and Annex III): a MS which has established thresholds and/or criteria taking into account **only the size of projects, without taking into consideration all the criteria listed in Annex III** [i.e. nature and location of projects], exceeds the limits of its discretion.
- ❑ **NEW:** This conclusion cannot be challenged even when the level of thresholds is particularly low. The Court refers to the criteria of cumulative effects and location.

## Scoping



- Answers the question: **What should be covered by the environmental information?**
- Obligatory under the SEA; optional under the EIA.
- Opinion by the competent authority on the scope and detail of the information to be included in the environmental report – SEA).
- Opinion by the competent authority on the information to be supplied if the developer so requests (EIA).
- Improves the quality of the EIA process.

## Environmental report



Must identify, describe and evaluate, e.g.:

- The environmental characteristics of aspects/areas likely to be significantly affected.
- The likely significant environmental effects of the plan/programme/project (including indirect and cumulative effects).
- Alternatives (reasonable + zero/SEA or main alternatives studied by the developer/EIA) and reasons for the choice.
- Mitigation measures
- Monitoring measures and arrangements - SEA
- Non-technical summary

## Consultation



- ❑ **Environmental authorities**
  - in several stages (screening, scoping, report)
  - on the draft plan/programme or request for development consent
  - the environmental “report”
- ❑ **The public (including NGOs)**
  - on the draft P/P
  - the environmental “report”
- ❑ **Transboundary consultations (Art. 7 EIA and SEA, Art. Espoo)**
  - on the draft P/P
  - the environmental “report”
- ❑ **Modalities:**
  - early and effective opportunities to participate
  - when all options are open
  - reasonable time-frames

## Decision and information



- ❑ **Competent authorities must take account of:**
  - ✓ Environmental report
  - ✓ Opinions expressed
  - ✓ Results of transboundary consultations
  
- ❑ **Information about final decision has to be provided to the public, environmental authorities, other countries (if consulted):**
  - ✓ Content of the plan/programme/decision on project
  - ✓ Main reasons on which the decision is based (statement in SEA)
  - ✓ Mitigation measures (EIA/SEA)
  - ✓ Monitoring measures (SEA)

## Djurgården- C-263/08 (access to review procedure for public concerned)

- ❑ Members of the '**public concerned**' **must be able to have access to a review procedure** to challenge the decision by which a body attached to a court of law of a MS has given a ruling on a request for development consent, regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views.
- ❑ Article 10a of the EIA Directive precludes a provision of national law which reserves the right to bring an appeal against a decision on projects which fall within the scope of that directive, as amended, solely to environmental NGOs which have at least 2.000 members.



# Aarhus Convention (AC): C-115/09 (AG Opinion)



- ❑ **Reference for a preliminary ruling** (from the Higher Administrative Court for the Nordrhein-Westfalen Land) on access to justice for NGOs (under German law, a party wishing to bring a judicial action must rely on the infringement of a substantive individual right).
- ❑ The referring court asks, whether the EIA Directive and the Aarhus Convention give, or require MSs to give, environmental NGOs the right to bring an action before the national courts, **without** demonstrating or relying on the infringement of a **substantive individual right**.
- ❑ **Article 10a** of the EIAD requires that environmental NGOs wishing to bring an action before the national courts should be **permitted to argue** that there has been an infringement of any environmental provision relevant to the approval of a project, including provisions which are intended to serve the interests of the general public alone rather than those which, at least in part, protect the legal interests of individuals.
- ❑ In the absence of full implementation into national law, an environmental NGO is entitled to **rely directly on the provisions of Article 10a**.

## Monitoring



- Mandatory in SEA
- MSs have to monitor the significant environmental effects of the implementation of the plan/programme in order to:
  - ✓ identify at an early stage unforeseen adverse effects
  - ✓ be able to undertake remedial action
- Existing monitoring arrangements may be used.
- Monitoring measures must be covered in the SEA Report.



## III. Focus on critical EIA areas

## Development consent: definition and case-law

□ *"Development consent means the decision of the competent authority or authorities which entitles the developer to **proceed** with the project"* (EIA Directive)

□ **ECJ case-law on development consent**

- 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. (C-201/02, Wells)
- The EIA Directive is to be interpreted as requiring an environmental impact assessment to be carried out if, in the case of grant of consent comprising more than one stage, **it becomes apparent**, in the course of the **second stage**, that the project is likely to have significant effects on the environment by virtue *inter alia* of its nature, size or location. (C-290/03, Barker)





## Development consent: 'EIA/environmental decision' *vis-à-vis* development consent

- ❑ **EIA/environmental decision/s or statement or opinion**  
(separate part of the development consent = env. permit + construction permit), e.g. many new MSs (PL example)
  - environmental permit + construction permit = development consent
  - 'second'/supplementary EIA
  - environmental permit annexed/referred to in the construction permit.
- ❑ **EIA integrated in the development consent procedure**
  - NL example: single 'National Coordination Procedure' covers all necessary authorisations
  - FR: single coordinated procedure – DUP/la déclaration d'utilité publique or l'arrêté préfectoral

## 'Salami slicing' and 'project splitting'

- 'Salami slicing'** - dividing projects into sub-sections so that they fall below screening thresholds
- 'Project splitting'** – carrying out separate EIA procedures, normally as different developers involved
- Projects may not be divided, in order to avoid assessment, reduce the apparent seriousness of the effects, or limit the available alternatives (C-205/08, points 72-78 )
- The environmental effects of proposals must be assessed as a whole, and must consider cumulative effects
- Even if the construction of a project is to be split into sections for technical or logistical reasons, development consent must be considered in the light of all the effects of the whole project
- SEA may be particularly useful here to assess projects upstream; alternatives and cumulative effects





## The obligation to remedy the failure to carry out an EIA, Ireland C-215/06

- ❑ Competent authorities **are obliged to take necessary measures to remedy failure to carry out EIA** (e.g. revocation or suspension of a consent already granted)
- ❑ Remedial EIA, undertaken to remedy the failure to carry out an EIA is not an equivalent to an EIA
- ❑ MS fails to fulfil its obligations if **after the event** gives **retention permissions** (in place of planning permissions to be issued after an EIA for projects covered by the EIA Directive) without exceptional circumstances
- ❑ Ireland amended their legislation (some issues still followed-up and the case not closed yet) - The Planning and Development (Amendment) Act 2010:
  - Retention permission (ex-post) cannot be applied to any project that should have been, but was not, subject to EIA, screening for EIA or Art. 6(3) assessment
  - Inspection exercise of quarries and their register, enforcement notices to cease operations for some quarries, etc.
  - Substitute Consent introduced under strict conditions (e.g. exceptional circumstances)



## **IV. Relationship with Article 6(3) assessment**



## EIA and Habitats Directive Art. 6(3) assessment

- ❑ Clear link between Article 6(3) assessment and EIA
- ❑ EIA has a wider environmental remit as it should not be limited to Natura 2000:
  - Fauna and flora' and interactions with other factors to be assessed (Article 3 and Annex IV)
  - Reference to the Habitats Directive and the Birds Directive (Annex III).
  - Recital acknowledges the value of ecosystems and highlights the need to take it into account in EIA
  - Annex III (screening criteria) refers to regenerative capacity of natural resources and absorption capacity of the natural environment.
- ❑ EIA and Article 6(3) assessments may be integrated, combined as one, or data and information from the Article 6(3) assessment for the Natura 2000 site used by the EIA and vice-versa.



## SEA and Habitats Directive Art. 6(3) assessment

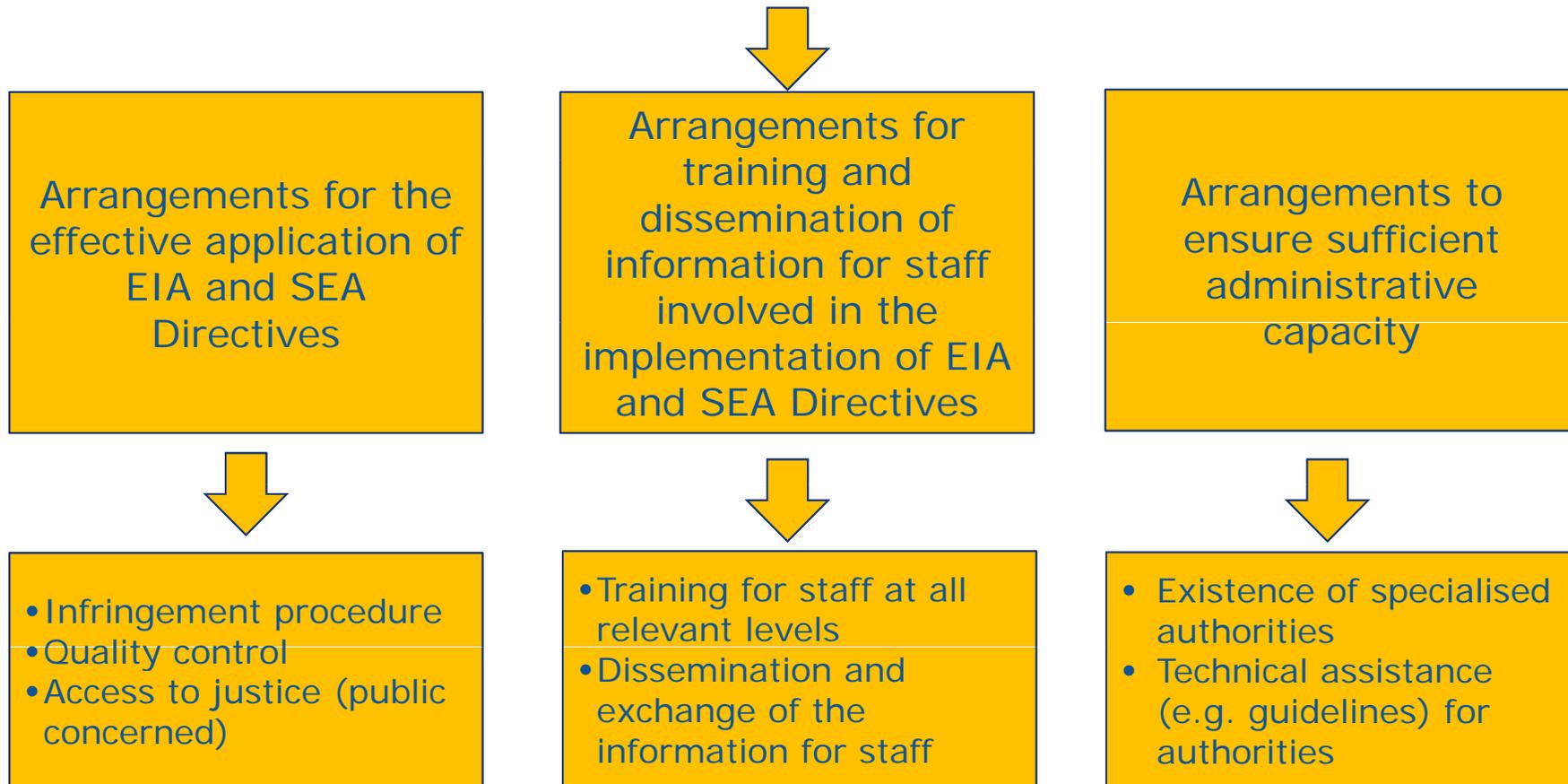
- Wider environmental remit: report to consider effects on 'biodiversity', 'fauna' and 'flora' (Annex I);
- SEA cannot replace Art. 6(3) assessment but the latter can be part of the SEA (clearly distinguishable in the SEA report)
- Impacts to be assessed:
  - Art. 6(3): sites conservation objectives, sites integrity
  - SEA: environment (biodiversity, population, human health ...)
- Who is responsible for assessments:
  - Art. 6(3): competent Natura 2000 authority
  - SEA: competent planning authority
- Consultations with public and environmental authorities:
  - Art. 6(3): not obligatory but encouraged
  - SEA: compulsory before plan's adoption



## **IV. EIA & SEA ex-ante conditionalities (2014-2020)**

## EIA & SEA ex-ante conditionalities

Environmental legislation relating to Environmental Impact Assessment (EIA), and Strategic Environmental Assessment (SEA)





<http://ec.europa.eu/environment/eia/home.htm>  
[http://ec.europa.eu/environment/integration/cohesion\\_policy\\_en.htm](http://ec.europa.eu/environment/integration/cohesion_policy_en.htm)  
[http://ec.europa.eu/regional\\_policy/index\\_en.cfm](http://ec.europa.eu/regional_policy/index_en.cfm)