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**REPORT FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN  
PARLIAMENT, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND  
THE COMMITTEE OF THE REGIONS**

**On the application and effectiveness of the EIA Directive  
(Directive 85/337/EEC, as amended by Directives 97/11/EC and 2003/35/EC)**

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**1. POLICY AND LEGAL CONTEXT**

The aim of this Communication report is to review the application and effectiveness of Council Directive 85/337/EEC<sup>1</sup> on the assessment of the effects of certain public and private projects on the environment, as amended by Directives 97/11/EC<sup>2</sup> and 2003/35/EC<sup>3</sup> (hereinafter the Environmental Impact Assessment – EIA Directive), in the European Union (EU).

The EIA Directive has been subject to similar regular reports in the past, which were based on Article 11 of the Directive. On the basis of such reports, this EIA Directive was amended in 1997. Directive 97/11/EC widened the scope, strengthened the procedural stages and integrated the changes provided by the UN/ECE Espoo Convention on EIA in a transboundary context. Following the signature by the Community (June 1998) of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, the Community law had to be properly aligned with that Convention. Thus, the EIA Directive was amended by Directive 2003/35/EC, which sought to align the provisions on public participation with the Aarhus Convention.

The Directive aims to protect the environment and the quality of life, while ensuring approximation of national laws with regard to the assessment of the environmental effects of public and private projects. It is a key instrument of environmental integration, covering a wide range of projects and making them environmentally sustainable. The means of achieving this objective are laid down in Article 2(1) of the Directive, which states that, before development consent is given, certain public and private projects likely to have significant environmental effects by virtue, *inter alia*, of their nature, size or location are made subject to a requirement for development consent and an EIA. The Directive harmonises the principles of the EIA by introducing minimum requirements, in particular with regard to the type of projects that should be subject to assessment, the main obligations of the developers, the content of the assessment and the participation of the competent authorities and the public.

At present, all Member States (hereinafter MS) have established comprehensive regulatory frameworks. However, the challenge of ensuring that the Directive is implemented effectively and consistently across all MS is a continuous one. This

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<sup>1</sup> OJ L 175, 5.7. 85, p. 40.

<sup>2</sup> OJ L 73, 14.3. 97, p. 5.

<sup>3</sup> OJ L 156, 25.6.03, p.17.

report assesses the 20 years of implementation in an effort to address this challenge. The main sources of this report are mentioned in Annex 1.

The report is well-timed for several reasons:

- after EU enlargement in 2004 and 2007, the Directive began to apply in 12 new MS;
- there are growing environmental challenges in the areas of climate change and biodiversity;
- the European Court of Justice (ECJ) has delivered important rulings clarifying some of the EIA provisions;
- there is a need to generate synergy between the Directive and the Espoo Convention, including the Protocol on Strategic Environmental Assessment<sup>4</sup>;
- the EIA Directive has been identified as a potential instrument for a future simplification exercise,<sup>5</sup> the aim being to identify overlaps, gaps and potential for reducing regulatory and administrative burdens, in particular regarding transboundary projects (e.g. pipelines or power cables on the sea bed).

The report outlines the strengths of the EIA Directive, highlights the main areas where improvements are needed and provides recommendations, where relevant. It concludes with consideration of approaches to improving the Directive.

## **2. STRENGTHS OF THE EIA DIRECTIVE**

### **2.1. Establishment of comprehensive EIA regimes in all MS**

In general, MS have transposed and implement the EIA Directive largely in line with the Directive's objectives and requirements. In several cases, MS have introduced obligations which go beyond the Directive's minimum requirements. This is the case regarding the key stages of the EIA, such as "*screening*" and "*scoping*":

- "*Screening*" is the part of the EIA process that determines whether an EIA is required. In some MS, an EIA is mandatory for some types of projects listed in Annex II or for other project categories in addition to those listed in Annexes I and II.
- "*Scoping*" is the stage of the EIA process that determines the content and extent of the matters to be covered in the environmental information to be submitted to a competent authority. It is an important feature of an adequate EIA regime, mainly because it improves the quality of the EIA. Many MS have gone further than the minimum requirements of the Directive, making scoping mandatory and providing for public consultation during scoping.

### **2.2. Increasing public participation in the decision-making process**

Directive 2003/35/EC was to be implemented in national law by 25 June 2005. At the time of writing, only Ireland has not completely transposed the Directive; the case is pending before the ECJ (C-427/07). The general impression is that experience in the application of the new provisions introduced by Directive 2003/35/EC is still

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<sup>4</sup> It was approved by Decision 2008/871/EC, OJ L 308, 19.11.08, p.33.

<sup>5</sup> COM(09)15.

limited. Working on the basis of the information available, preliminary observations on the implementation of these provisions are made in Annex 2. Significant conclusions will be drawn by the ongoing assessment of the conformity of the national transposition measures.

Most of the MS reported that the amendments introduced by Directive 2003/35/EC increase public participation in the decision-making process. In addition, the MS that joined the EU in 2004 and 2007 reported that the EIA Directive had contributed directly to consolidating democratic development, by improving public participation and transparency in decision-making.

### **2.3. Clarification of the provisions of the EIA Directive by the ECJ**

The ECJ has emphasised that the Directive is broad in scope and purpose and confines the MS' degree of discretion. Most of the ECJ rulings focus on "*screening*" and the decision as to whether or not to carry out an EIA. The ECJ has also provided interpretations of some of the project categories and the concept of "*development consent*", and has dealt with the issue of retention permissions. The main findings of recent rulings are summarised in Annex 3.

### **2.4. Overall benefits of the EIA Directive**

Two major benefits have been identified. Firstly, the EIA ensures that environmental considerations are taken into account as early as possible in the decision-making process. Secondly, by involving the public, the EIA procedure ensures more transparency in environmental decision-making and, consequently, social acceptance. Even if most benefits of the EIA cannot be expressed in monetary terms, there is widespread agreement, confirmed by the studies available, that the benefits of carrying out an EIA outweigh the costs of preparing an EIA<sup>6</sup>.

In addition, the Commission's experience from the assessment of projects co-funded under the EU Regional Policy, in particular major projects, shows that EIAs have improved the project design and the decision-making process (including the participation of environmental authorities and the public) and have helped to improve the incorporation of environmental considerations.

Finally, implementation of the Directive has created specific national dynamics. MS have often built on the minimum requirements of the Directive and have gone beyond them, by introducing more stringent provisions (on the basis of Article 176 of the EC Treaty), which aim to ensure better environmental protection and more transparency. Many MS have also developed their own guidance on good practice and on specific project categories and issues. These national experiences can be shared across the EU.

It can therefore be concluded that the principal objective of the EIA Directive has been achieved and that the momentum is there to step up the Directive's minimum requirements and improve the Directive.

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<sup>6</sup> The costs of preparing an EIA as a share of project costs typically range from 0.1% for large projects to 1.0% for small projects. These costs provide an initial perspective but obviously do not take into consideration other costs (e.g. subsequent amendments, reporting, delays).

### **3. INDICATIVE AREAS OF THE EIA DIRECTIVE WHERE IMPROVEMENTS ARE NEEDED**

The EIA Directive has evolved after 20 years of implementation. At the same time, EU legislation has grown and new policies have developed. While ensuring that the EIA Directive is effectively implemented across the EU, it is also necessary to identify areas where improvements are needed, such as implementation gaps, overlaps with other pieces of legislation and inconsistencies with other EU policies, and to provide recommendations, where relevant.

#### **3.1. Concerns regarding the "screening" procedure**

The EIA Directive gives MS broad scope to determine, through a case-by-case examination and/or through national thresholds or criteria, whether an EIA is required for projects listed in Annex II. When establishing those thresholds or criteria, MS must take into account the relevant selection criteria set out in Annex III. This provision, which is based on the principle of subsidiarity, resulted in a wide variation in the types and levels of thresholds or criteria set by MS.

Implementation and case-law show that, when establishing thresholds, MS often exceed their margin of discretion, either by taking account only of some selection criteria in Annex III or by exempting some projects in advance. In addition, although the trend is on the increase, EIAs carried out in the various MS vary considerably (from fewer than 100 to 5 000), even when comparing MS of a similar size. The levels at which thresholds have been set has clear implications for the amount of EIA activity. Furthermore, there are still several cases in which cumulative effects are not taken into account, while problems remain when it comes to eliminating "salami-slicing"<sup>7</sup> practices, especially for big investment plans. These features could jeopardise the legitimacy of the Directive and undermine efforts to establish common screening standards. Thus, the screening mechanism should be simplified and clarified, for example, by detailing the selection criteria listed in Annex III and by establishing Community thresholds, criteria or triggers (e.g. by comitology). The possibility of granting consent on the basis of a simplified prior assessment procedure should be considered.

#### **3.2. Concerns regarding the quality of the EIA**

The EIA Directive lays down essentially procedural requirements; it does not establish obligatory environmental standards. The competent authorities are obliged to take into consideration the results of consultations and the information gathered and to provide specific information at the end of the development consent procedure (Articles 8 and 9), but they are not obliged to draw specific conclusions from the findings of the EIA. Ensuring quality control in an EIA is largely left to the national competent authorities. However, the ability to make valid decisions depends on the quality of the information used in the EIA documentation and the quality of the EIA process. Quality is therefore a crucial element for the effectiveness of the Directive.

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<sup>7</sup> The practice of dividing projects up into 2 or more separate entities so that each individual element does not require an EIA and thus the project as a whole is not assessed; or the practice of obtaining permission for a project that is below a threshold (and thus not subject to EIA) and at a later date extending that project or its capacity above the threshold limits.

### 3.2.1. *Quality of the information used in the EIA documentation*

Many MS have pointed out that the lack of sufficient quality in the information used in the EIA documentation is a problem. There are major differences in the quality of EIA documentation, not only between different MS but also within MS themselves.

There are several ways of ensuring proper quality control of EIA documentation, (often presented as a report): proper accreditation of consultants that undertake EIA work; preparation of reports by independent consultants; use of independent external review or expert assistance; use of guidelines on specific issues to be taken into account for certain types of projects; keep the data used up to date; mandatory "*scoping*"; introduction of comitology to update Annex IV (information to be supplied by the developer).

### 3.2.2. *Quality of the EIA process*

Experience with implementation shows that some issues are often raised in EIA procedures.

With regard to **alternatives**, the Directive includes among the information to be provided in the EIA documentation "*an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice*". Some MS have introduced a legal obligation to consider specific alternatives, while others have not. The competent authorities and the public may also contribute to the selection of alternatives for assessment. The assessment of alternatives in EIA procedures is usually a difficult issue. It may be necessary to specify what should be required under the provisions of the Directive, e.g. by introducing the obligatory assessment of alternatives or by specifying a range of alternatives (such as the "do-nothing" alternative) to be studied.

The lack of provisions in the Directive relating to reasonable timeframe and preferably fixed timeframe for granting development consent, to the duration of the **validity** of the EIA and to **monitoring** the significant environmental effects of the implementation of projects is also a cause for concern. Those gaps could be addressed by introducing specific provisions in the Directive.

## 3.3. **Lack of harmonised practices for public participation**

Despite increasing public participation in the decision-making process there is still no standard practice across the EU. This is confirmed by the following:

- The public must be given early and effective opportunities to participate in the environmental decision-making process. There is no common reference point for the beginning of the consultation. In several MS, the public is already consulted at an early stage (at the screening stage or at the scoping stage). However, in most cases, the public is consulted for the first time on the information gathered pursuant to Article 5, which corresponds to the minimum requirement laid down by the Directive.

- Under the EIA Directive, the timeframe for effective public consultation should be reasonable, since short timeframes are an obstacle in this respect. However, timeframes vary considerably<sup>8</sup>.
- The detailed arrangements for informing and consulting the public are determined by the MS. However, public participation is not effective when national arrangements are constricted (e.g. when the EIA documentation is only available for consultation at the offices of the competent authority).
- As for access of the public concerned to a review procedure, the criteria for standing differ considerably from one MS to another, and the cost of procedures is considered to be an obstacle to access to justice in some MS.

These gaps could be addressed by providing for early public consultation at the scoping or screening stages (including involvement of stakeholders) and by establishing minimum timeframes. Guidelines could also be developed on best practices for making the EIA documentation available to the public concerned.

### **3.4. Difficulties regarding EIA transboundary procedures**

The EIA Directive gives MS broad scope to decide when and how other MS should be involved in EIA procedures for projects with transboundary impacts.

Many MS pointed out that transboundary EIA procedures give rise to difficulties which are mainly due to differences in national EIA procedures, such as the different stages of the project proposal process, different timeframes and language barriers.

The risks of duplications, inconsistencies, burdens (e.g. administrative) and potential conflicts are high for projects which are carried out in areas under the jurisdiction of more than one MS (e.g. in sea basins). In addition, there is a risk that the impacts of a multi-country project are not assessed as a whole.

Improved formal and informal arrangements are needed for consultation on transboundary impacts with neighbouring countries. This could be achieved by developing guidance or by strengthening the Directive's provisions (e.g. definition of minimum timeframes for transboundary consultation, coordinated or possibly joint EIA procedures for multi-country projects; explore the possibility for having a single EIA procedure).

Furthermore, following approval by the Council of the SEA Protocol to the Espoo Convention, the EIA Directive could be reviewed to ensure better implementation of the requirements of the Protocol.

### **3.5. Better coordination between the EIA and other EU directives and policies**

In many cases, projects covered by the EIA Directive are also subject to the provisions of other EU environmental Directives and policies. Despite the risk of overlaps in assessment requirements, no major problems are reported with regard to

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<sup>8</sup> At the screening stage, the range goes up to 45 days; at the stages of scoping and of the consultation on the EIA documentation, the timeframe is between 10 and 60 days.

coordination between the EIA Directive and other Directives and policies; in general, coordination is smooth. However, there is a need to reflect on how to improve synergy between the EIA Directive and legislation and policy in specific environmental sectors such as air quality, noise exposure, waste and water management, protection of the marine environment, soil protection, disaster risk prevention (including control of major-accident hazards), climate change, and biodiversity. There are specific issues, for example, which require a thorough assessment to ensure better coordination.

### 3.5.1. *EIA and SEA*

Directive 2001/42/EC<sup>9</sup> (Strategic Environmental Assessment – SEA) applies "upstream" to certain public **plans and programmes**, while the EIA Directive applies "downstream" to certain public and private **projects**. The 2 Directives address different subjects and are distinct in nature. The following main differences have been identified: the objectives of the SEA are expressed in terms of sustainable development, whereas the aims of the EIA are purely environmental; the SEA requires the competent authorities to be consulted at the screening stage; the SEA requires an assessment of reasonable alternatives and has an explicit provision concerning the use of information from other sources; the SEA includes requirements on monitoring and quality control.

In theory, overlap should not be expected. However, different areas of potential overlaps<sup>10</sup> in the application of the two Directives have been identified. In particular, the boundaries between the definition of a plan, a programme or a project are not always clear, and therefore there may be some doubt as to whether the subject of the assessment meets the criteria for requiring the application of either or both of the EIA and SEA Directives. In this regard, the definitions of some project categories, which often relate to land use, are not clear and this might create confusion with the SEA.

Different approaches have been chosen by MS to solve potential ineffectiveness resulting from overlapping procedures. However, many MS often consider that they do not have sufficient experience to identify and assess any overlapping issues properly. This is why very few MS recommended consolidating the two Directives. Many MS underlined that each process should be preserved and distinguished, as these are complementary procedures addressing different stages and processes; MS have also asked for guidance documents to be produced.

Given the specificities of the two processes and the limited experience in applying the SEA, there is currently no case for merging these Directives. At this stage, better coordination can be achieved by addressing the differences between the provisions of the two Directives and by clarifying the definitions of project categories for which overlaps can occur. This can be done in the context of the EIA review.

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<sup>9</sup> OJ L 197, 21.7.01, p.30.

<sup>10</sup> For instance, where large projects are made up of sub-projects; projects that require changes to land use plans; plans and programmes which set binding criteria for the subsequent development consent of projects; and hierarchical linking between SEA and EIA ('tiering').

### 3.5.2. *EIA and IPPC*

Very few MS have used the option of establishing a single procedure for projects falling under the EIA Directive and Directive 2008/1/EC<sup>11</sup> (concerning integrated pollution prevention and control - IPPC); in some MS, a single procedure may be used at the request of the developer. MS have provided for solid forms of coordination (e.g. the EIA documentation part of the documentation for IPPC applications; IPPC permit conditioned by a positive EIA decision; use of same data; common public participation procedure).

In general, no specific coordination problems have been reported. However, for the same type of activities, the IPPC Directive sometimes sets thresholds which differ from those used in the EIA; this may cause some confusion. Harmonising the thresholds and criteria used to define projects subject to the requirements of these Directives (e.g. by comitology) and streamlining the provisions on information requirements (also taking the ongoing revision of the IPPC Directive into account) should therefore be considered.

### 3.5.3. *EIA and biodiversity*

MS have established both informal and formal links between the EIA Directive and the **Habitats**<sup>12</sup> and **Birds**<sup>13</sup> Directives (in particular Article 6(3)-(4)<sup>14</sup> of the former). Although no major problems have been reported, the Commission's implementation experience shows that the requirements of Article 6(3)-(4) are not taken properly into account in the context of EIA procedures. Furthermore, EIA procedures focus on the impact on Natura 2000 sites, while the species protection provisions tend to be neglected.

The EIA Directive does not make explicit reference to the concept of biodiversity (it only refers to fauna and flora). Many MS replied that the provisions of the EIA Directive already take sufficient account of the substance of the **Biodiversity Action Plan**<sup>15</sup> (BAP) and that their national EIA systems are effective in preventing biodiversity loss. However, it appears highly unlikely that the EU will meet its 2010 target of halting biodiversity decline<sup>16</sup>; intensive efforts will be required. In this regard, the biodiversity considerations could be expressly reflected within the text of the EIA Directive. In addition, a single assessment procedure for projects falling under the EIA Directive and Article 6(3)-(4) of the Habitats Directive could be established.

### 3.5.4. *EIA and climate change*

The EIA Directive does not expressly address climate change issues. Most of the MS recognise that climate change issues are not adequately identified and assessed

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<sup>11</sup> OJ L 24, 29.1.08, p.7.

<sup>12</sup> Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.92, p.7.

<sup>13</sup> Directive 79/409/EEC on the conservation of wild birds, OJ L 103, 25.4.79, p.1.

<sup>14</sup> This Article contains procedural and substantive safeguards for any plan or project likely to have a significant effect on a Natura 2000 site.

<sup>15</sup> COM(06)216.

<sup>16</sup> COM(08)864.

within the EIA process. Any review of the impacts of climate change is often limited to CO<sub>2</sub> and other greenhouse gas emissions from industry and from increases in transport as part of air quality studies or as indirect impacts. The EIA assessment will often not go beyond evaluating existing emissions and ensuring that ambient air quality standards are met. In addition, the effects on global climate, the cumulative effects of an additional project and adaptation to climate change are not sufficiently considered within the EIA.

The above issues need to be tackled. Various specific project categories where climate change considerations should be expressly reflected within the EIA have been identified. These relate mainly to projects with potential significant CO<sub>2</sub> emissions, such as energy and transport infrastructure projects, but they also include projects for which energy efficiency is a key issue. The introduction of comitology could be an option for updating Annexes I and II.

In addition, the MS called for assessment tools to be developed (e.g. on the integration of climate change issues into the EIA process). The Commission will develop guidelines by 2011 to ensure that climate impacts are taken into account in the EIA Directive.<sup>17</sup>

#### **4. CONCLUSION**

This report confirms that the objectives of the EIA Directive have generally been achieved. The principles of environmental assessment have been integrated into the national EIA systems. All MS have established comprehensive regulatory frameworks and implement the EIA in a manner which is largely in line with the Directive's requirements; in many cases, MS have built on the minimum requirements of the Directive and have gone beyond them. As a result, environmental considerations are taken into account in the decision-making process, which has become more transparent.

However, the development of EIA is an evolving process. While ensuring that the EIA Directive is effectively implemented across an enlarged EU, it is also necessary to ensure that the EIA Directive is adapted to the Community and international policy and legal contexts. This report indicates areas where improvements are needed (e.g. screening, public participation, quality of the EIA, EIA transboundary procedures, coordination between the EIA and other environmental directives and policies, such as climate change and biodiversity) and presents possible recommendations for action.

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<sup>17</sup> COM(09)147.

These findings are relevant in the framework of a simplification exercise. The Commission will consider all simplification methods (codification, codification combined with the introduction of comitology, recasting, merging, use of regulation). Any simplification initiative will aim to improve environmental protection, increase the degree of harmonisation and simplify existing procedures. Regardless of the approach chosen, the Commission will ensure that any major modification will be subjected to a consultation with all stakeholders and will undergo a legislative impact assessment.

## **ANNEX 1: Main sources of the report**

- MS' responses to the Commission questionnaire on the application and effectiveness of the EIA Directive (these were sent in 2007 and 2008).
- The study commissioned by the Commission on the application and effectiveness of the EIA Directive (2009)
- The findings of previous reports on the application and effectiveness of the EIA Directive.
- Relevant studies commissioned by the Commission: *"The Relationship between the EIA and the SEA Directives"* (2005); *"Costs and benefits of the EIA Directive"* (2006); *"Inventory of EU Member States' measures on access to justice in environmental matters"* (2007); *"Evaluation of EU legislation - Directive 85/337/EEC (Environmental Impact Assessment, EIA) and associated amendments"* (2007).
- The Commission's experience with the implementation of the EIA Directive (including information from complaints and petitions and the case-law).

## **ANNEX 2: Preliminary observations on the implementation of the new provisions introduced by Directive 2003/35/EC**

*Definitions of the "public" and "public concerned" (Article 1(2)):* all MS appear to apply a broad definition of the "public", allowing all natural and legal persons to take part in the decision-making process. The picture regarding the definition of "public concerned" is more varied. The majority of the MS have included a definition in their national legislation. Some MS do not distinguish between the "public" and the "public concerned"; it is not yet clear whether the lack of a specific definition may be a problem.

*Option of exempting national defence projects from EIA on a case-by-case basis (Article 1(4)):* the majority of the MS have included relevant provisions in their laws. However, it appears from the information available to the Commission that this option is used very rarely.

*Strengthened provisions on public consultation (Article 6(2) and (3)):* in general the public has acceptable access to the decision-making process. Although a more detailed investigation is required to assess the effective implementation of these provisions, some positive features emerge: several MS already provide for public consultation at the scoping stage, while some MS also provide for public consultation at the screening stage.

*Changes or extensions of Annex I and II projects:* all MS report that they have adopted national measures to comply with the changes introduced by Directive 2003/35/EC.

*Information on the public participation process contained in the information provided on the final decision (Article 9(1)) and provisions on public access to a review procedure (Article 10(a)):* it is not possible to draw any conclusions at this stage on the implementation of these provisions. However, the Commission has already identified transposition problems in some MS and initiated infringement procedures, in accordance with Article 226 EC Treaty.

### **ANNEX 3: Main findings of recent ECJ rulings**

The ECJ has emphasised that the EIA Directive is broad in both scope and purpose<sup>18</sup> and seeks to ensure that MS' discretion does not undermine the objective of the Directive, which is that no project likely to have significant effects on the environment, within the meaning of the directive, should be exempt from assessment, unless the specific project excluded could, on the basis of a comprehensive screening, be regarded as not likely to have such effects.

#### **Screening mechanism (decision as to whether or not to carry out an EIA)**

MS are obliged to take account of all the relevant selection criteria listed in Annex III when establishing criteria or thresholds for Annex II projects. A 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<sup>19</sup>.

A decision by which the national competent authority takes the view that a project's characteristics do not require it to be subjected to an assessment of its effects on the environment must contain or be accompanied by all the information that makes it possible to check that it is based on adequate screening, carried out in accordance with the requirements of Directive 85/337.<sup>20</sup>

#### **Interpretation of certain Annex I and II categories of projects**

The EIA Directive must be interpreted as meaning that it provides for an EIA of refurbishment and improvement projects for urban roads (projects covered by Annex I.7.b or c, or by Annex II.10.e or by Annex II.13) that are likely, by virtue of their nature, size or location and, if appropriate, their interaction with other projects, to have significant effects on the environment.<sup>21</sup>

Annex II.12 read in conjunction with Annex I.7 of Directive 85/337, in their original versions, 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. This applies in particular to works designed to increase airport operations and air traffic significantly.<sup>22</sup>

A national provision requiring an EIA only for **urban development projects** (Annex II.10.b) outside urban areas narrows the scope of the Directive.<sup>23</sup> The argument that a project intended to be constructed on completely transformed land would not have significant environmental effects was rejected. When determining whether this type of project has significant effects, MS should take into account their nature, size or location, and all the screening criteria listed in Annex III.

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<sup>18</sup> E.g.C-121/03.

<sup>19</sup> C-66/06, §§62-63.

<sup>20</sup> C-87/02, §49.

<sup>21</sup> C-142/07.

<sup>22</sup> C-2/07.

<sup>23</sup> C-332/04.

## Development consent

An agreement between public authorities and a private undertaking is not a project within the meaning of the EIA Directive; *"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). 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"*.<sup>24</sup>

Where national law provides for a consent procedure comprising more than one stage, 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 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 that procedure.<sup>25</sup> An EIA should be carried out at a later stage where, 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.

## Retention permissions and "after-the-event regularisations" of unlawful operations

While EC law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of EC law, *"such a possibility should be subject to the conditions that it does not offer the persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception"*.<sup>26</sup>

## Administrative fees

The levying of an administrative fee for public participation in the consultation process is not in itself incompatible with the purpose of the EIA Directive<sup>27</sup>. *"A fee cannot, however, be fixed at a level which would be such as to prevent the directive from being fully effective, in accordance with the objective pursued by it"*. This would be the case if, because of the amount, a fee were liable to obstruct the exercise of the rights of participation conferred by Article 6 of the Directive.

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<sup>24</sup> C-2/07.

<sup>25</sup> C-201/02, §52; C-508/03; C-290/03.

<sup>26</sup> C-215/06, §§57-61.

<sup>27</sup> C-216/05, §§37-38 and 42-44. This ruling relates to the Directive prior to the amendments introduced by Directive 2003/35/EC.