Report on Thresholds and Criteria in Respect of Projects Listed in Annex II of Directive 2011/92/EU, as Amended by Directive 2014/52/EU (the Environmental Impact Assessment Directive)

Fieldfisher Ireland LLP in conjunction with Fothergill Training and Consulting Ltd | 26 February 2025

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List of Acronyms

AA: Appropriate Assessment
CEPP: Climate and Environmental Planning Policy Unit
CJEU: Court of Justice of the European Union
DHLGH: Department of Housing, Local Government and Heritage
EcIAR: Ecological Impact Assessment Report
EIA: Environmental Impact Assessment
EIA Directive: Directive 2011/92/EU as amended by Directive 2014/52/EU
EIAR: Environmental Impact Assessment Report
eNGO: Environmental Non-governmental Organisation
EPA: Environmental Protection Agency
Ha: Hectare
ICPE: Installations Classées pour la Protection de l'Environnement (France)
IED: Industrial Emissions Directive
MW: Megawatt
NGO: Non-governmental Organisation
NIS: Natura Impact Statement
OPR: Office of the Planning Regulator
PDR: The Planning and Development Regulations 2001 (as amended)
SHD: Strategic Housing Development
The 2000 Act: The Planning and Development Act 2000 (as amended)
The 2011 Regulations: European Communities (Environmental Impact Assessment) (Agriculture) Regulations 2011
The 2017 Regulations: Schedule 2 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017
The 2024 Act: The Planning and Development Act 2024
UNECE: United Nations Economic Commission
UNESCO: United Nations Educational, Scientific and Cultural Organisation
UVPG: Gesetz über die Umweltverträglichkeitsprüfung (Germany)
§: Section (Belgium)

Environmental Impact Assessment (EIA) and the Legislative Background

EIA accords with the precautionary principle to require assessment of the likely significant effects of certain projects on the environment before those projects are approved. Pursuant to Article 4.1 of the EIA Directive,[1] mandatory EIA is required for projects listed in Annex I (Annex I projects). Pursuant to Article 4.2 of the EIA Directive, the projects listed in Annex II (Annex II projects) shall be subject to either a case-by-case examination or thresholds or criteria set by the Member State; it is these projects that are the focus of this report. Member States may also employ a combination of thresholds and/or criteria and case-by-case examinations.

Pursuant to Article 4.3 of the EIA Directive, when Member States are setting thresholds and/or criteria or examining projects on a case-by-case basis, account should be taken of the relevant selection criteria set out in Annex III of the EIA Directive (including the characteristics, the location and the potential impact of the project on the environment).

In respect of Annex II projects, the EIA Directive recognises that Member States are in the best position to apply the Annex III selection criteria, subject to the overriding requirement that, before development consent is given, relevant projects that are 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. The EIA Directive therefore empowers Member States to set thresholds and/or criteria for Annex II projects for which an EIA is required, and which may require a determination as to whether the project requires an EIA (a screening determination).

[1] References to the EIA Directive throughout this report are to Directive 2011/92/EU as amended by Directive 2014/52/EU, unless expressly stated otherwise.

Relevant Amendments Under the 2014 EIA Directive

Directive 2014/52/EU made certain amendments to the EIA process, in particular amendments to the screening determination by reference to information submitted by developers in Annex IIA. It also introduced an amendment to Article 4.3 which expressly empowers Member States to set both exclusionary thresholds, to exclude the need for EIA or a case-by-case examination, and inclusionary thresholds at or above which EIA is required.

Ireland's Transposition of the EIA Directive in the Planning System in Ireland

The EIA Directive has been transposed in the planning system in Ireland through the Planning and Development Act 2000 (as amended) (the 2000 Act) and the Planning and Development Regulations 2001 (as amended) (the PDR). Section 176 of the 2000 Act transposes Article 4.1 and Article 4.2 of the EIA Directive, by reference to the PDR which prescribes the classes of development in Schedule 5.

EIA is mandatory for Annex I projects:

- Under Section 172(1)(a)(i) of the 2000 Act for the classes of development listed in Schedule 5 Part 1 of the PDR (if exceeding any quantity, area or other limit specified or if no quantity, area or other limit is specified).

EIA is required for Annex II projects:

- Under Section 172(1)(a)(ii) of the 2000 Act when the development is listed in Schedule 5, Part 2 of the PDR and the development equals or exceeds any relevant quantity, area or other limit specified, **or**
- Under Section 172(1)(b) of the 2000 Act when the development is listed in Schedule 5, Part 2 of the PDR and does not equal or exceed the relevant quantity, area or other limit specified but the relevant authority concludes that it is likely to have a significant effect on the environment.

The latter provision, in effect, constitutes a safety net for the EIA system in Ireland but applies at least preliminary examination to everything that is below the relevant thresholds, rather than being something that is engaged only in specific cases.

The Implementation of Thresholds and/or Criteria and Case-by-case Examination in Ireland

Ireland relies on both the use of inclusionary thresholds, which are set out in Schedule 5 of Part 2 of the PDR, and a case-by-case examination which is either by way of preliminary examination or EIA screening in certain cases. The relevant selection criteria – which the State was required to have taken account of in setting the thresholds and/or criteria in Schedule 5 Part 2 – are transposed into Irish law via Schedule 7 of the PDR.

In respect of development proposals which fall below the relevant threshold in Schedule 5 Part 2, the planning authority must carry out a preliminary examination of, at the least, the nature, size or location of the development. A preliminary examination under Article 103(1) of the PDR and an EIA screening determination under Articles 103(1B) and 103(3) of the PDR do not differ in the subject matter of their inquiry – the test is to establish whether there is no real likelihood of significant effects on the environment – the difference lies in the depth of inquiry. The planning authority can conclude that there is no real likelihood of significant effects and no EIA is required, or that there is significant and realistic doubt in respect of the likelihood of significant effects and require the developer to submit the information specified in Schedule 7A and Article 103(1A) of the PDR for a screening determination, or it can conclude that there is a real likelihood of significant effects on the environment and require the developer to submit an EIA Report (EIAR). The preliminary examination process is Ireland's means of giving effect to the amendments to Article 4.3 of the EIA Directive discussed above.

Current Implementation of EIA Thresholds and/or Criteria in Ireland

Ireland has transposed Annex II of the EIA Directive in the planning code through Part 2 of Schedule 5 of the PDR. The thresholds and/or criteria implemented are reproduced in full in Schedule A of this report. However, the projects of focus for this report are – Category 3(i) "*installations for harnessing wind power for energy production*" and Category 10(b) "*urban development projects, including the construction of shopping centres and car parks*".

Relevant Case Law and Guidance

This report considers some of the relevant Irish and Court of Justice of the European Union (CJEU) case law concerning EIA, as well as relevant EU Commission guidance on definitions of EIA project categories and EIA screening.

Comparative Jurisdiction Analysis

This report compares and contrasts the relevant Irish statutory provisions and associated practices and procedures on the implementation of Article 4.2 and 4.3 of the EIA Directive with a number of other jurisdictions. This includes a high-level summary of the implementation of Article 4.2 and 4.3 in England, Belgium (Wallonia Region), France, Germany, the Netherlands and Austria. We have set out a detailed summary of the approach in each jurisdiction in section 3 below.

Jurisdiction:	Summary of Approach to Annex II:
Ireland	Combination of inclusionary thresholds and/or criteria and case-by-case examination.
England	Combines exclusionary thresholds and/or criteria and case-by-case examination, with lower thresholds for development in proximity to sensitive locations, and a '*safety net*' provision for any sub-threshold projects that may still require EIA.
Belgium (Wallonia Region)	Combination of inclusionary and exclusionary thresholds and/or criteria and case-by-case examination.
France	Combines inclusionary and exclusionary thresholds and/or criteria and case-by-case examination, with a '*safety net*' provision.
Germany	Combines inclusionary and exclusionary thresholds and/or criteria and case-by-case examination, with lower thresholds for development in proximity to sensitive locations. There is no safety net provision in Germany.
The Netherlands	Predominantly a case-by-case examination.
Austria	Combines inclusionary and exclusionary thresholds and/or criteria and case-by-case examination, with lower thresholds for development in proximity to sensitive locations.

This report also provides a full analysis of the implementation in other comparative jurisdictions of Annex II Category 3(i) "*installations for harnessing wind power for energy production*" and Category 10(b) "*urban development projects, including the construction of shopping centres and car parks*". These are outlined in section 4 below. Furthermore, Schedule A to the report provides a full examination of Annex II projects in the comparative jurisdictions.

Following from the legal analysis and learnings from case law, both at Irish and EU level, the legal analysis conclusions are incorporated into a wider environmental expert review of the potential options available to Member States in considering the implementation of the Directive. The report, in section 5, identifies that there are potentially seven options for implementing Article 4.2, 4.3 and Annex II following our review of the other jurisdictions and the relevant case law. These are through either or both exclusionary and/or inclusionary thresholds and/or criteria, plus a case-by-case examination, or a combination of all three.

A number of practical implications for the implementation of options one to seven are identified and analysed further. For example, if every Annex II project is subject to at least a case-by-case examination there will likely be a significant number of projects that are subject to examination unnecessarily. On the other hand, implementing hard exclusionary or inclusionary thresholds and/or criteria, as in three of the potential options, clearly creates a risk that a project falling below a threshold and/or criteria, which is likely to have a significant effect on the environment – in particular on a sensitive area and/or protected species – will be granted development consent without being subject to any consideration under the EIA Directive. This research therefore highlights that there are merits in having a combination of inclusionary and exclusionary thresholds and/or criteria and case-by-case examination, this is notionally referred to as a full "*traffic-light approach*" (discussed in section 6, expert review and analysis of option four).

Another feature of the operation of the Directive in comparative jurisdictions identified in this research is described as a '*safety net*', such as in England and France. The research suggests that it is prudent to include a '*safety net*' provision in conjunction with any option which excludes projects below a certain threshold, including a full traffic light system. Such a provision can ensure that a project falling below the exclusionary threshold and/or criteria that may still have significant effects on a sensitive site or protected species is subject to at least screening for EIA and this accords with the overarching principle under Article 2.1 of the EIA Directive.

Section 6 of the report presents expert analysis exploring the forms of screening approaches that exist within the scope of the EIA Directive's Articles and the practical implications of implementing these in practice.

There is increasing pressure on national consenting systems as they seek to effectively and efficiently contribute to resolving complex challenges, including the need to deploy significant new infrastructure to address the climate crisis, whilst ensuring existing environmental challenges are not exacerbated. In this context, the effectiveness of EIA, both as defined in legislation and delivered in practice must be reviewed to ensure it is efficiently contributing to the solution and avoiding undue delay to timely decision-making.

Section 6 of the report therefore explores the options, opportunities and challenges related to determining whether a project requires EIA, or whether a proposal does/does not require a case-by-case determination to make that decision.

When considered against the requirements of Article 2.1 of the EIA Directive, only some of the approaches presented above appear to provide a strong basis for establishing effective national EIA legislation. This is particularly the case as over time the findings of the CJEU (discussed in section 2.7) have strengthened the basis upon which thresholds and/or criteria draw from the relevant criteria in Annex III; these case law developments have occurred since Ireland first implemented Schedule 5 Part 2 of the PDR in 2001.

The expert analysis focuses on four key approaches to defining a screening system which are identified as viable options for further analysis – being applied, at least in part, by at least one of the national systems discussed in section 3.

The analysis presented demonstrates that each option has practical strengths and challenges associated with its potential general application. Analysis is provided in each case on potential implications if the option were to be explored in Ireland, i.e. potential practical risks and opportunities compared to the PDR's current approach.

All options are found to include positive elements as well as practical challenges, including the '*do nothing*' scenario (i.e. continue the current approach in the PDR).

It is not the role of this report to determine whether Ireland should seek to amend its approach, or favour any one of the four approaches considered; as such, the analysis does not make an overall conclusion across options one to four. Instead, the information, advice and conclusions across the whole of the report should be considered by those looking at the future of EIA screening thresholds as part of the evidence base for any future decisions, which includes the choice and implications of opting to '*do nothing*'.

The final part of the expert analysis considers practical drivers and challenges related to the screening of wind energy developments – under Annex II (3)(i) – and for both the residential dwelling and other *urban developments* – under Annex II (10)(b). The analysis highlights a spectrum of issues to be aware of from drivers that appear to push toward a need to review such thresholds, to outlining risks that have arisen, in practice, when national legislation has gone beyond the sub-category wording set out in Annex II of the EIA Directive.

1.1 Context and Scope of Report

Fieldfisher was engaged by the Office of the Planning Regulator (the OPR), pursuant to the OPR's powers under Section 31Q(3) of the Planning and Development Act 2000 (as amended) (the 2000 Act), to conduct research into the implementation of Article 4.2 and 4.3 of the EIA Directive. This arises on foot of a request from the Department of Housing, Local Government and Heritage (the DHLGH) to undertake research to develop a synthesis of evidence on key considerations and options in respect of the implementation of either or both inclusionary and exclusionary thresholds and/or criteria in the context of implementing Article 4.2 and 4.3 of the EIA Directive. The OPR set the research objectives to collate information and undertake legal research, including an overview of the current implementation in Ireland and a comparative analysis with the UK and a selection of EU Member States.

By way of context to the request, Section 225 of the Planning and Development Act 2024 (the 2024 Act) proposes that the Minister may prescribe a class of relevant development and prescribe a threshold[2] in respect of relevant development of that class, for the purpose of carrying out EIA where that threshold is reached or exceeded. If that threshold is not reached an EIA screening may be required and the Minister may prescribe the manner in which and the criteria by reference to which an EIA screening determination shall be made. The Minister may also prescribe a class of relevant development and prescribe a threshold in respect of relevant development of that class, and where relevant development of that class does not reach the threshold prescribed, the competent authority shall carry out an examination of the nature and location of that relevant development in order to satisfy itself as to whether the possibility of significant effects on the environment resulting from the relevant development can be excluded, and if not determine whether an EIA screening or EIA is required.

[2] Note that the 2024 Act does not reflect the precise terms of Article 4.2(b) and 4.3 which states "*thresholds or criteria*". This might be flagged with the draftsperson in case the regulations require criteria and not just thresholds.

The 2024 Act has not yet been commenced and no draft regulations prescribing the classes of development or thresholds described in Section 225 of the 2024 Act have been published, and it is understood that this research is necessary to provide an evidence-base for whatever approach to Annex II projects is taken in those regulations.

With this in mind, the OPR and the Climate and Environmental Planning Policy Unit (CEPP) in the DHLGH have scoped the research request as follows:

1. Provide an overview of current statutory provisions in the planning code and associated practices and procedures on the implementation of Article 4.2(b) and 4.3 of Directive the EIA Directive.
2. Compare and contrast the overview above with relevant statutory provisions and associated practices and procedures on the implementation of Article 4.2 and 4.3 of the EIA Directive across relevant jurisdictions, with particular focus on the use of either or both inclusionary and exclusionary thresholds in the context of implementing the above articles. To include a high-level summary of the implementation of Article 4.2 and 4.3 in the jurisdictions of England, Belgium, France, Germany, the Netherlands and Austria.
3. Undertake a review of relevant European case law, including CJEU cases taken against Ireland, legal precedents, or other research reports and data in relation to the implementation of the above articles, including EU Commission Guidance on EIA screening. Report learnings on the application of inclusionary and exclusionary thresholds and commentary on the action taken in relevant jurisdictions in response to case judgments (if any). Planning expert to assist in relation to academic commentary on inclusionary and exclusionary thresholds used in other jurisdictions.
4. Evaluate and report the issues arising from the various approaches to implementation of the above articles in both Ireland and case study relevant jurisdictions highlighting key trends in the evolution of practices and legal decisions.
5. Based on the evidence gathered, the research report should set out key considerations and options in respect of the implementation of either or both inclusionary and exclusionary thresholds in the context of implementing Article 4.2 and 4.3 of the Directive above, with specific reference to the existing thresholds set out in the Planning and Development Regulations 2001 (as amended), Schedule 5 Part 2. This element of the review should consider all projects listed in Part 2 of Schedule 5 but with a particular focus on the following:

- Category 3(i) Installations for harnessing wind power for energy production;
- Paragraph 10(b)(i) Construction of more than 500 dwelling units;
- Paragraph 10(b)(iv) Urban development; and
- Definition of '*urban development*'.

1.2 Research Methodology and Data Sources

Fieldfisher has undertaken a detailed quantitative and qualitative assessment of data and information relating to the implementation of Article 4.2 and 4.3 of the EIA Directive and options in respect of the implementation of thresholds and/or criteria in the context of implementing Article 4.2 and 4.3 of the EIA Directive. This data and information was obtained from a range of sources, including:

- Reports that were prepared by the Fieldfisher Offices in Belgium, France, Germany and the Netherlands in respect of their jurisdictions;
- Relevant judgments of the Superior Courts of Ireland;
- Relevant judgments of the CJEU;
- A range of academic texts, judgments and guidance documents from Ireland, the relevant countries, and the EU Commission; and
- EIA expert input (Josh Fothergill).

The choice of jurisdiction for the comparative jurisdiction analysis was partly due to the practicalities of obtaining information on the legislative regime in each of the Member States chosen. Fieldfisher has offices in England, Belgium, France, Germany, the Netherlands, and Austria, so this made it easier to obtain reliable information. In the case of England, clearly it was of value to have a detailed review of the legislative approach in a neighbouring, English-speaking and common law jurisdiction. Austria was also subject to a recent judgment of the CJEU in C-575/21 in respect of its approach to thresholds for Annex II EIA projects.

In addition, the expert input set out in section 6, was conducted by Josh Fothergill FIEMA CEnv, an EIA professional with over 20 years' experience in the field and experience of conducting previous research in the field, including into proportionate EIA, applying digital technologies in EIA and competency requirements of EIA professionals. Josh Fothergill is based in England and is very familiar with the legislative regime in that jurisdiction, which assisted the comparative jurisdiction analysis.

2.1 What Comprises EIA

EIA is a crucial component of the EU environmental legislative regime. In accordance with the precautionary principle,[3] it requires assessment of certain public and private projects on the environment to ensure that likely significant effects are assessed before those projects are approved. Whilst the principles of assessment – such as the obligations on developers and the content of the assessment – of the environmental effects of such projects are harmonised by the Directive, there is latitude for individual Member States to lay down stricter rules to protect the environment.[4] In the context of this report – focused on Annex II projects – it is worth noting that the purpose of the EIA Directive, as stated in Recital 6, is to lay down general principles for the assessment of environmental effects with a view to supplementing and coordinating development consent procedures for "*projects likely to have a major effect on the environment*".[5]

The EIA Directive was introduced in 1985 (Directive 85/337/EEC). Subsequent amendments were made in 1997, 2003, and 2009, leading to the adoption of a codified Directive in 2011 (Directive 2011/92/EU). Directive 2014/52/EU made important amendments to the 2011 Directive, in particular in relation to ensuring the completeness and quality of the EIAR submitted by developers, the thorough examination by the competent authority, and by facilitating early and effective public participation before the development consent decision is made. The 2014 Directive also included amendments to the screening process which are required for Annex II projects, with Annex IIA inserted. Annex IIA sets out what information developers should provide when requesting a screening opinion.

The EIA Directive defines EIA as follows:

> "*Environmental impact assessment means a process consisting of:*
>
> *(i) the preparation of an environmental impact assessment report by the developer, as referred to in Article 5(1) and (2);*
>
> *(ii) the carrying out of consultations as referred to in Article 6 and, where relevant, Article 7;*

[3] Recital (2) of the EIA Directive states: "*Pursuant to Article 191 of the Treaty on the Functioning of the European Union, Union policy on the environment is based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should, as a priority, be rectified at source and that the polluter should pay. Effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision- making processes".*
[4] Recital (3) of the EIA Directive.
[5] Recital (6) of the EIA Directive.

(iii) the examination by the competent authority of the information presented in the environmental impact assessment report and any supplementary information provided, where necessary, by the developer in accordance with Article 5(3), and any relevant information received through consultations under Articles 6 and 7;

(iv) the reasoned conclusion by the competent authority on the significant effects of the project on the environment, taking into account the results of the examination referred to in point (iii) and, where appropriate, its own supplementary examination; and

(v) the integration of the competent authority's reasoned conclusion into any of the decisions referred to in Article 8a".[6]

The EIA process applies to specific categories of project listed in the Directive. Pursuant to Article 4.1 of the EIA Directive, projects listed in Annex I of the EIA Directive are mandatorily subject to assessment. These projects are deemed to have significant effects on the environment and should be subject to assessment as a rule.[7] Pursuant to Article 4.2 of the EIA Directive, projects listed in Annex II of the EIA Directive should be subject to either a case-by-case examination or thresholds or criteria set by the Member State, which allow the Member State to determine whether these projects should be made subject to an assessment.

Article 4.2 states:

"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.

Member States may decide to apply both procedures referred to in points (a) and (b)".

[6] Article 1.2(g) of the EIA Directive.
[7] Recital (8) of the EIA Directive.

Annex II projects may not have significant effects on the environment in every case, therefore those projects should be assessed where the Member States consider that they are likely to have significant effects on the environment.[8] Where Member States set thresholds or criteria for the purpose of determining which of the Annex II projects should be subject to assessment on the basis of the significance of their environmental effects, there is no requirement to examine projects below those thresholds or outside those criteria on a case-by-case basis.[9] Pursuant to Article 4.3 of the EIA Directive, when Member States are setting such thresholds or criteria or examining projects on a case-by-case basis, account should be taken of the relevant selection criteria set out in Annex III of the EIA Directive.

The selection criteria detailed in Annex III of the EIA Directive include the characteristics of projects, the location of projects, and the type and characteristics of the potential impact of the project on the environment, with regard to the factors set out in Article 3.1 of the EIA Directive. Article 3.1 dictates that an EIA shall assess the direct and indirect significant effects of a project on population and human health; biodiversity; land, soil water, air and climate; material assets, cultural heritage and the landscape; and the interaction between the aforementioned factors. The EIA Directive recognises that where a case-by-case examination is carried out or thresholds or criteria are set, Member States are in the best position to apply the Annex III selection criteria.[10]

Article 4.3 of the EIA Directive states as follows:

> *"Where a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relative selection criteria set out in Annex III shall be taken into account. Member States may set thresholds or criteria to determine when projects need not undergo either the determination under paragraphs 4 or 5 or an environmental impact assessment, and/or thresholds or criteria to determine when projects shall in any case be made subject to an environmental assessment without undergoing a determination set out under paragraph 4 or 5*".
>
> (emphasis added)

[8] Recital (9) of the EIA Directive.
[9] Recital (10) of the EIA Directive.
[10] Recital (11) of the EIA Directive.

Member States may set thresholds or criteria for projects listed in Annex II above which an EIA is required, and below which may require a determination as to whether the project requires an EIA (a screening determination), and pursuant to Article 4.4 the developer shall provide information on the characteristics of the project and its likely significant effects on the environment to inform that screening determination.

Member States are required to ensure that, before development consent is given, projects, as defined in Article 1.2(a)[11] and subject to the parameters set by Article 4.1 to Article 4.3 as described above, 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.[12] The EIA process includes the preparation of an EIAR by the developer, which requires a certain minimum amount of information concerning the project and its effects, as well as any reasonable alternatives considered by the developer.[13] Ultimately the EIAR will inform the EIA carried out by the competent authority, which must include a description of the likely significant effects of the project (both construction, operation and demolition stages)[14] on population, human health, biodiversity, land, soil, water, air, climate, material assets, cultural heritage and landscape, and the interaction between these factors.[15] The description in the EIAR should therefore cover the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the project.[16]

The EIA process must also include effective public participation – including participation by associations, organisations and groups (e.g. eNGOs) – in decision-making whereby the public can express, and the decision-maker can take account of, comments and opinions which may be relevant. This increases accountability and transparency, contributes to public awareness of environmental issues and support for the decisions taken and is in line with the EU (and Ireland's) obligations under the Aarhus Convention.[17] The Aarhus Convention also notes that improved access to information and public

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[11] Article 1.2(a) of the EIA Directive defines '*project*' as:
- *"The execution of construction works or of other installations or schemes,*
- *Other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources".*

[12] Article 2.1 of the EIA Directive.
[13] Article 5.1 and Annex IV of the EIA Directive.
[14] Recitals (22) and (35) of the 2014 EIA Directive.
[15] Article 3.1 of the EIA Directive.
[16] Annex IV of the EIA Directive.
[17] Recitals (16) to (21) of the EIA Directive.

participation in decision-making enhances the quality and the implementation of decisions.[18]

Member States shall also ensure that other authorities likely to be concerned with the project by reason of their specific environmental responsibilities or local/regional competencies are given an opportunity to comment on the EIAR, and Member States are required to designate such authorities to be consulted.[19] If a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, there should be transboundary consultation with that Member State.[20] This is implemented in Ireland via Section 174 of the 2000 Act, which provides that the Minister may make regulations which require an EIAR where a development is likely to have significant effects on the environment in another Member State, or a state which is a party to the Espoo Convention,[21] or where the other State considers that the development would be likely to have such effects.

The PDR provide for the notification of and provision of information in respect of any such development to the Minister. Article 126 of the PDR sets out the transboundary consultation process, and this includes provision for the other State concerned to take part in the decision-making process and to be sent the EIAR and any other relevant information.

The competent authority then examines the EIAR and other supplementary information provided by the developer or through consultations, to reach a reasoned conclusion on the significant environmental effects of the project. While the EIA itself does not determine the outcome of the development consent decision, it must be integrated into the decision(s) to grant or refuse development consent.[22] At a minimum, this must include the reasoned conclusion by the competent authority on the significant effects of the project on the environment as referred to in Article 1(2)(g)(iv) as well as any environmental conditions attached to the decision and any mitigation measures incorporated into the project with a view to avoid, prevent, reduce or offset significant adverse effects on the environment as well as monitoring measures where appropriate.[23]

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[18] Recitals to the United Nations Economic Commission (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention).
[19] Article 6.1 of the EIA Directive.
[20] Article 7(1) of the EIA Directive.
[21] The UNECE for Europe Convention on EIA in a Transboundary Context, held at Espoo (Finland), 25th February 1991.
[22] Article 1(2)(g) (iv) and (v) of the EIA Directive.
[23] Article 8(1) of the EIA Directive.

2.2 Relevant Amendments Under the 2014 EIA Directive

As noted above, Directive 2014/52/EU made important amendments to the 2011 Directive. In particular, these amendments related to ensuring the completeness and quality of the EIAR submitted by developers, the thorough examination by the competent authority, and facilitating early and effective public participation before the development consent decision is made. The 2014 Directive also included amendments to the screening process by inserting Annex II.A. Where Member States decide to require a screening determination for projects listed in Annex II, Annex II.A sets out what information developers must provide.

A significant amendment made by the 2014 Directive clarified that Member States are entitled to establish both exclusionary thresholds so as to exclude the need for EIA or a case-by-case examination and inclusionary thresholds at or above which EIA is required. This is established within Article 4.3 of the EIA Directive, as amended by Article 1.4(a) of the 2014 Directive, which provides that Member States *"…may set threshold or criteria to determine when projects need not undergo either the determination under paragraphs 4 and 5 or an environmental impact assessment, and/or thresholds or criteria to determine when projects shall in any case be made subject to an environmental impact assessment without undergoing a determination set out under paragraphs 4 and 5*…" The 2014 Directive also updated Annex III of the EIA Directive, which outlines the criteria to be used to determine whether projects require EIA. A further amendment of note is the insertion of Article 8a into the EIA Directive, which requires a decision to grant development consent to incorporate a reasoned conclusion pursuant to Article 1.2(g)(iv) of the EIA Directive as well as any environmental conditions attached to the decision. It also places an obligation on Member States to ensure that any features of the project and/or mitigation measures envisaged to avoid, prevent, reduce or offset significant adverse effects on the environment are implemented by the developer and the Member State is also required to determine the procedures to be used in monitoring significant adverse effects on the environment.

The 2014 Directive also inserted Article 10a into the EIA Directive which obliges Member States to set rules on penalties for infringements of the national measures taken in adopting the EIA Directive.

2.3 Ireland's Transposition of the EIA Directive in the Planning System

The EIA Directive is largely transposed in the planning system in Ireland through Part X of the 2000 Act. While many amendments have been made to the 2000 Act, one piece of amending legislation of particular relevance here is the European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018, which came into effect on 1 September 2018 in order to transpose Directive 2014/52/EU into Irish law and to give further effect to the EIA Directive. Annexes I-IV of the EIA Directive have, largely, been replicated in Schedules 5, 6, 7 and 7A of the Planning and Development Regulations 2001 (as amended) (the PDR).

Section 176 of the 2000 Act transposes Article 4.2 of the EIA Directive into Irish law. Section 176(1) provides that the Minister shall make regulations which identify development which may have significant effects on the environment and specify the manner in which the likelihood that such development would have significant effects on the environment is to be determined. Section 176(2) provides that these regulations may provide for the establishment of thresholds or criteria and/or the determination on a case-by-case basis for the purposes of determining which classes of development are likely to have significant effects on the environment. These provisions were implemented via the PDR.

Article 93 of the PDR prescribes that the classes of development for the purpose of Section 176 of the 2000 Act are set out in Schedule 5 of the PDR. Pursuant to Section 172(1)(a)(i) of the 2000 Act, EIA is mandatory for the classes of development listed in Schedule 5 Part 1 of the PDR (which correspond to the projects listed in Annex I of the EIA Directive) if it equals or exceeds the quantity, area or other limit specified or where there is no quantity, area or other limit specified. There are two scenarios in which an EIA is required for the classes of development listed in Schedule 5 Part 2 of the PDR (which correspond to the projects listed in Annex II of the EIA Directive). First, pursuant to Section 172(1)(a)(ii) of the 2000 Act, EIA is required if the proposed development is of a prescribed class in Schedule 5, Part 2 of the PDR and the development equals or exceeds any relevant quantity, area or other limit specified in respect of the development concerned.[24] Secondly, pursuant to Section 172(1)(b) of the 2000 Act, an EIA is required where the proposed development does not equal or exceed the relevant quantity, area or other limit specified in Schedule 5, Part 2 of the PDR but it is concluded, determined or

[24] Note that Ireland has decided to make EIA mandatory for certain Annex II projects at certain thresholds which is entirely by choice. There is no EU law requirement to make EIA mandatory for any Annex II projects.

decided by a planning authority, An Bord Pleanála, a State authority or Minister, that the proposed development is likely to have a significant effect on the environment.

2.3.1 The Implementation of Thresholds and/or Criteria in Ireland

The implementation method adopted by Ireland relies on both the use of inclusionary thresholds and/or criteria, which are set within Schedule 5 of Part 2 of the PDR (dealt with in greater detail below), and a case-by-case examination. The thresholds typically relate to matters such as the number of units involved, or area of land affected. In setting such thresholds, the scope of the State's discretion is bound by the obligation set out in Article 2.1 of the EIA Directive which dictates that projects likely, by virtue *inter alia* of their nature, size or location, to have significant effects on the environment are to be subject to an assessment before consent is given.[25] Pursuant to Article 4.3 of the EIA Directive, Member States are required, when setting those thresholds or criteria, to take account of the relevant selection criteria set out in Annex III to the Directive. Annex III is transposed into Irish law via Schedule 7 of the PDR.

2.4 The Implementation of Case-by-case Examination in Ireland

In addition to the use of thresholds and/or criteria, a case-by-case decision as to whether EIA for sub-threshold development is required is carried out by way of formal EIA screening determination, which is provided for in Articles 4.4 and 4.5 of the EIA Directive and transposed in Ireland either by:

1. Article 103(1B)(b)[26] of the PDR, where accompanied by the information required under Schedule 7A of the PDR (which corresponds to Article IIA of the EIA Directive), or
2. Article 103(1)[27]of the PDR by way of preliminary examination, a process which is intended to deal with sub-threshold developments of a smaller scale. In respect of many of these developments, it was considered that a formal EIA screening determination was unnecessary and wasteful, as it was obvious that they were not likely to have significant effects on the environment and did not require EIA.[28] The basis for the preliminary examination is found in the 2014 amendments to Article 4.3 of the EIA Directive.

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[25] If thresholds or criteria are established by Member States without taking into account all three of these criteria (nature, size or location), the Member State's discretion under Article 2.1 and 4.2 of the EIA Directive would be exceeded.
[26] Or Article 109(2B)(b) of the PDR on appeal.
[27] Or Article 109(2) of the PDR on appeal.
[28] *Shadowmill Limited v An Bord Pleanála* [2023] IEHC 157 at Section 52.

Annex III of the EIA Directive is transposed in Ireland by Schedule 7 of the PDR.

Preliminary examination is provided for in Ireland via Article 103(1)[29] of the PDR, which provides as follows:

> "*(1) (a) Where a planning application for sub-threshold development is not accompanied by an EIAR, the planning authority shall carry out a preliminary examination of, at the least, the nature, size or location of the development.*
>
> *(b) Where the planning authority concludes, based on such preliminary examination, that—*
>
> *(i) there is no real likelihood of significant effects on the environment arising from the proposed development, it shall conclude that an EIA is not required,*
>
> *(ii) there is significant and realistic doubt in regard to the likelihood of significant effects on the environment arising from the proposed development, it shall … require the applicant to submit … the information specified in Schedule 7A for the purposes of a screening determination unless the applicant has already provided such information, or*
>
> *(iii) there is a real likelihood of significant effects on the environment arising from the proposed development, it shall— (I) conclude that the development would be likely to have such effects, and (II) … require the applicant to submit to the authority an EIAR and to comply with the requirements of article 105*".
>
> (emphasis added)

Accordingly, where a planning application for sub-threshold development is not accompanied by an EIAR, or the information specified in Schedule 7A, the planning authority conducts a preliminary examination of the criteria outlined in Schedule 7 of the PDR. Where the planning authority concludes that there is no real likelihood of significant effects on the environment then no EIA is required. However, where the planning authority concludes that there is significant and realistic doubt in respect of the likelihood of significant effects on the environment then it shall require the applicant to submit the information specified in Schedule 7A and Article 103(1A)[30] of the PDR, which will be relied upon to carry out an examination of, at least the nature, size or location of the development for the purposes of an EIA screening determination. Where the planning

[29] The equivalent provision is contained for an appeal to the Board under Article 109(2) of the PDR.
[30] Or Article 109(2A) of the PDR on appeal.

authority concludes that there is a real likelihood of significant effects on the environment it shall require the applicant to submit an EIAR.

Preliminary examination under Article 103(1)[31] of the PDR and the EIA screening determination under Articles 103(1B) and 103(3)[32] of the PDR do not differ in the subject matter of their inquiry – the standard ultimately is to establish whether there is no real likelihood of significant effects on the environment arising from the proposed development, such as to not require EIA. The question of significance is not a rigid test and requires the exercise of informed judgement in the circumstances of an individual case. The key difference between the preliminary examination and EIA screening determination, lies in the depth of inquiry.[33] For a preliminary examination, a lesser depth of inquiry may be sufficient to answer what is ultimately the same question.

2.5 Current Implementation of EIA Thresholds in Ireland

Ireland has implemented the following thresholds for the three Annex II projects that are of particular focus of this research, as follows:

Paragraph in Annex II:	Part 2, Schedule 5 of the PDR:
3. ENERGY INDUSTRY 3. (i) Installations for the harnessing of wind power for energy production (wind farms);	(3)(i) Installations for the harnessing of wind power for energy production (wind farms) with more than five turbines or having a total output greater than five Megawatts (MW).
10. INFRASTRUCTURE PROJECTS 10. (b) Urban development projects, including the construction of shopping centres and car parks;	(10)(b)(i) Construction of more than 500 dwelling units. 10(b)(iv) Urban development which would involve an area greater than two hectares (ha) in the case of a business district, 10ha in the case of other parts of a built-up area and 20ha elsewhere. (In this paragraph, "*business district*" means a district within a city or town in which the predominant land use is retail or commercial use.)

[31] Or Article 109(2) of the PDR on appeal.
[32] Or Articles 109(2B) and 109(4) of the PDR on appeal.
[33] *Shadowmill Limited v An Bord Pleanála* [2023] IEHC 157 at Section 55, and *Monkstown Road Residents' Association v An Bord Pleanála* [2022] IEHC 318.

The Irish transposition of all the projects set out in Annex II of the EIA Directive is detailed in Schedule A to this report, along with details of each of the comparative jurisdictions discussed below.

2.6 Irish Guidance

Transposition of EIA requirements are also covered in a number of government guidance documents, which include approaches to preliminary examination and screening of Annex II projects. While these documents are focused on a practical understanding of the processes, rather than focusing on establishing Annex II EIA thresholds or criteria, they play a key role in ensuring the legislation is understood and applied correctly in practice.

Screening is covered within the following formal Government EIA guides:

- '*Guidelines for Planning Authorities and An Bord Pleanála on carrying out Environmental Impact Assessment*' launched in August 2018 by the (former) Department of Housing, Planning and Local Government; with Section 3 providing advice on EIA screening.[34]
- '*Guidelines on the information to be contained in Environmental Impact Assessment Reports*' launched in May 2022 by the Environmental Protection Agency (EPA), with screening covered in Section 3.2 and on thresholds specifically in 3.2.3.[35]

In addition, the OPR produced a practice note focused on EIA case-by-case examination processes. The note published in June 2021, provides detailed advice on the regulatory requirements and practical considerations, as well as presenting templates and case examples within its appendices.[36]

[34] DHPLG: Guidelines for Planning Authorities and An Bord Pleanála on carrying out Environmental Impact Assessment (August 2018).
[35] EPA: Guidelines on the Information to be Contained in Environmental Impact Assessment Reports (May 2022).
[36] OPR: OPR Practice Note PN02: Environmental Impact Assessment Screening (June 2021).

2.7 CJEU Case Law

2.7.1 Case C-72/95 Kraaijeveld and Others

This preliminary reference was made in proceedings brought by the Applicant for annulment of a decision by which the South Holland Provincial Executive approved a zoning plan entitled "*Partial modification of zoning plans in connection with dyke reinforcement*". This related to the requirements of the original EIA Directive 85/337 which did not contain express provisions in relation to modifications to projects listed in Annex II. The first question referred related to the interpretation of '*canalization and flood-relief works*' in Annex II and the Court held that this must be interpreted as including certain types of work on a dyke running alongside waterways.

Secondly the Court found that Annex II to the EIA Directive is to be interpreted as including not only construction of a new dyke but also modification of an existing dyke, despite no express reference being made to same in Annex II. Further questions related to whether Articles 2.1 and 4.2 of the Directive should be interpreted as meaning that where a Member State in its national implementing legislation has laid down specifications, criteria or thresholds for a particular Annex II project but those specifications, criteria or thresholds are incorrect, Article 2.1 requires that an EIA be made if the project is likely to have significant effects on the environment by virtue *inter alia* of its nature, size or location.

The Court also considered whether the provision had direct effect and could be relied upon by an individual before a national court, and whether it must be applied by the national court even if it was not in fact involved in the matter pending before the Court. The Applicant and the Commission argued that the Netherlands had not properly implemented the Directive since the minimum size criteria set in national legislation on dykes was fixed at a level such that no river dyke projects met the criteria, hence all dyke reinforcement projects remained outside the ambit of impact assessments. The Netherlands argued that the choice of thresholds for dyke length and cross-section measurements was made with due account taken of the impact of such work on the environment and the fact that, in practice, the transposing legislation left numerous projects free of the requirement of an assessment was wholly immaterial, since those projects had no harmful effects.

The Court rejected a submission from the Commission that the existence of specifications, criteria and thresholds does not remove the need for an examination of each project in order to verify that it fulfils the criteria of Article 2.1, as to accept otherwise would deprive Article 4.2 of any purpose. A Member State would have no interest in fixing specifications, thresholds and/or criteria, if, in any case, every project had to undergo an individual examination with respect to the criteria in Article 2.1.

The Court concluded that Article 4.2 and Annex II of the Directive must be interpreted as meaning that a Member State which establishes criteria or thresholds necessary to classify projects relating to dykes at a level such that, in practice, all such projects are exempted in advance from the requirement of an impact assessment exceeds the limits of its discretion under Articles 2.1 and 4.2 of the Directive, unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment.

Therefore, the limits of a Member State's discretion under Article 4.2 are to be found in the obligation set out in Article 2.1 that projects likely, by virtue *inter alia*, of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment.

2.7.2 Case C-392/96 Commission v Ireland

These enforcement proceedings related to an alleged failure by Ireland to properly transpose aspects of the original EIA Directive. In particular, the Commission alleged that Ireland had transposed Article 4.2 of the Directive incorrectly by setting absolute thresholds for the classes of Annex II projects covered by points 1(b) (use of uncultivated land or semi-natural areas for intensive agricultural purposes), 1(d) (initial afforestation/land reclamation) and 2(a) (extraction of peat). The proceedings related predominantly to concerns regarding the extent to which peat extraction and land reclamation projects were subject to the legislation in Ireland which sought to transpose the Directive.

The CJEU held that a Member State which established criteria or thresholds taking account only of the size of projects, without also taking their nature and location into consideration, would exceed the limits of its discretion under Articles 2.1 and 4.2 of the Directive. The CJEU further noted that even a small-scale project can have significant effects on the environment if it is in a location where the environmental factors set out in Article 3 of the Directive, such as fauna and flora, soil, water, climate or cultural heritage, are sensitive to the slightest alteration. Similarly, a project is likely to have significant effects where, by reason of its nature, there is a risk that it will cause a substantial or

irreversible change in those environmental factors, irrespective of its size. In the CJEU's view, the Commission had put forward several convincing examples of projects which, whilst considered solely in relation to their size, may none the less have significant effects on the environment by reason of their nature or location.

The CJEU noted that it was necessary and possible to take account of factors such as the nature or location of projects, for example by setting a number of thresholds corresponding to varying project sizes and applicable by reference to the nature or location of the project.

The CJEU ultimately held that Ireland had exceeded the limits of its discretion under Article 2.1 and 4.2 of the Directive by setting thresholds which took account only of the size of projects to the exclusion of their nature and location.

The Commission also alleged that Ireland's transposition of the Directive failed to take account of the cumulative effect of projects. In this regard, the Commission submitted that no project for the extraction of peat covered by Annex II had been the subject of an impact assessment, despite small-scale peat extraction becoming mechanised, industrialised and considerably intensified, resulting in the unremitting loss of areas of bog of nature conservation importance. The Commission further submitted that much land clearance had taken place in the Burren without a single impact assessment being carried out, despite it being an area of unquestionable interest. The CJEU held that by setting thresholds for the classes of projects covered by points 1(d) and 2(a) of Annex II without also ensuring that the objective of the legislation would not be circumvented by the splitting of projects, Ireland had exceeded the limits of its discretion under Articles 2.1 and 4.2 of the Directive.

2.7.3 Case C-435/97 World Wildlife Fund and Others v Autonome Provinz Bozen and Others

This case related to the restructuring and redevelopment of an existing military airport for predominantly civil aviation purposes in the region of Bolzano in Italy. The proposed development was to transform an airfield which had been historically used for military purposes and private flying, into an airport which could be used commercially, with the aim of having regular scheduled flights, as well as charter and cargo flights.

The works involved the renewal of the existing runway, construction of access roads and car parks and the construction of a control tower, a hangar and the extension of the runway from 1,040m to 1,400m.

The Italian law which implemented the Directive (Law No. 27/92) made all projects for the construction of new airports subject to EIA. On the other hand, the extension or alteration of existing airports, like all other projects comprising extensions or alterations, falls within Article 2(2) of Law No. 27/92, which requires an EIA for projects exceeding the thresholds referred to in Annex II of that law by more than 20%. Annex II of Law No. 27/92 did not set a threshold for airport projects, however. Therefore, in effect, as a matter of national law, the extension and alteration of the airport was not made subject to EIA. The referring Court was of the view that the project at issue, by reason of its nature and size, and probably also by reason of its location in a hollow in the immediate vicinity of an industrial and a residential area, could have a significant effect on the environment.

The first issue considered by the CJEU was whether Articles 2.1 and 4.2 of the Directive are to be interpreted as conferring on a Member State the power to exclude from the outset and in their entirety, from the EIA procedure, certain classes of projects falling with Annex II to the Directive, including modifications to those projects, even if they have significant effects on the environment.

The CJEU noted that the limits of the discretion in Article 4.2 are to be found in the obligation set out in Article 2.1, that projects likely, by virtue of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment.

The CJEU also noted that the criteria and/or thresholds mentioned in Article 4.2 are designed to facilitate examination of the actual characteristics of any given project in order to determine whether EIA is required, and not to exempt in advance from that obligation certain whole classes of projects listed in Annex II which may be envisaged on the territory of a Member State.

The CJEU acknowledged that Member States had a discretion under Article 4.2 but found that that was not itself sufficient to exclude a given project from the assessment procedure under the Directive. Whatever the method adopted by a Member State to determine whether or not a specific project needs to be assessed, be it by legislative designation or following an individual examination of the project, the method adopted must 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 assessment, be regarded as not being likely to have significant effects.

The CJEU therefore found that Italian law was incompatible with the Directive as it did not confer on a Member State the power either to exclude, from the outset and in their entirety, from the EIA procedure, certain classes of projects falling within Annex II to the Directive, or to exempt from such a procedure a specific project, such as the project of restructuring an airport either under national legislation or on the basis of an individual examination of that project, unless those classes of projects in their entirety or the specific project could be regarded, on the basis of a comprehensive assessment, as not being likely to have significant effects on the environment.

2.7.4 Case C-332/04 Commission v Spain

This case related to the development of a proposed leisure centre in an urban area. The project was presented as the second largest cinema complex in Europe, located in an urban area, next to existing urbanisations and close to urban development areas, and for which the expected weekly attendance was 60,000 people.

Point 10(b) of Annex II refers to urban development works, including the construction of shopping centres and car parks.

Spanish law provided a list of projects which must be subject to an EIA, including projects which are located in particularly sensitive areas (designated pursuant to EU law), or in wetlands included in the list of the Ramsar Convention and particular urban development projects and hotel complexes located outside the urban areas and related constructions, including the construction of shopping malls and car parks.

The Commission sought to ascertain whether by failing to conclude that it was necessary to make the project for the construction of a leisure centre in Paterna subject to EIA, Spain had correctly applied the provisions of the Directive.

Under Spanish law, the leisure centre was not subjected to EIA on the basis that it was going to be built in an urban area which did not fall within one of the sensitive areas referred to.

The Spanish Government argued that the only urban development projects which were not subject to an EIA were those which are situated in urban areas, therefore the effects on the environment are practically nil.

The CJEU noted that whilst Member States have the possibility of laying down the criteria and/or thresholds for determining which projects covered by Annex II are to be the subject of an assessment, in setting those thresholds and/or criteria, the Member States must take account not only of the size of the projects but also of their nature and location (the

CJEU referred in that respect to Case C-392/96 *Commission v Ireland*, paragraphs 65 to 67, and Case C-474/99 *Commission v Spain*, paragraph 31).

The CJEU also noted that densely populated areas and landscapes of historical, cultural and archaeological significance are among the selection criteria which the Member States must take into account for the case-by-case examination or the setting of thresholds or criteria, in order to determine whether a project should be subject to assessment. Therefore, the Spanish Government's argument that, in urban areas, the environmental impact of urbanisation projects is practically nil could not be accepted in light of the list of factors which may be directly or indirectly affected by the projects covered by the Directive.

The CJEU held that in light of the size, nature and location of the project, it cannot be ruled out from the outset, that it is likely to have significant repercussions on the environment. The Spanish law applicable to the project for the construction of the leisure centre was not compatible with the Directive, in so far as the competent authorities were not obliged to determine whether the implementation of urban projects may cause significant effects on the environment, and if so, subject those projects to an EIA.

2.7.5 Case C-2/07 Abraham and Others v Region Wallonne and Others

This preliminary reference was made in proceedings between numerous individuals who lived near Liege Bierset Airport in Belgium regarding the noise pollution brought about by the establishment of an air freight centre at the airport. The CJEU was considering the provisions of the original EIA Directive 85/337, as follows:

- Annex I included a project for the "*construction…of airports with a basic runway length of 2,100m or more*";
- Point 10(d) of Annex II referred to the *"construction of…airfields"* (projects not listed in Annex I); and
- Point 12 of Annex II referred to "*modifications to development projects included in Annex I*".

An agreement signed by the Region of Wallonia, the airport development agency and a freight carrier provided for certain modifications to the infrastructure of the airport in order to enable it to be used 24 hours per day and 365 days per year. As part of this, the runways were to be restructured and widened and a control tower, new runway exits and aprons were also to be constructed.

The relevant national law provided for the construction of airports with a runway length of at least 2,100m to be subject to an EIA. Further, the construction of airports with a runway length of 1,200m or more, including the extension of existing runways beyond that threshold and leisure airports, also had to be subject to an EIA.

The national court by its second question asked, in essence, whether works relating to the infrastructure of an existing airport whose runway is already more than 2,100m in length falls within the scope of point 12 of Annex II, read in conjunction with point 7 of Annex I to Directive 87/337.

The CJEU highlighted that the scope of the Directive is wide and its purpose very broad and that it would be contrary to the very objective of the Directive to exclude works to improve or extend the infrastructure of an existing airport from the scope of Annex II on the ground that Annex I covers "*the construction of airports*" and not "*airports*" as such. Such an interpretation would allow all works to modify a pre-existing airport, regardless of their extent, to fall outside the obligations of the Directive and would deprive Annex II of all effect. Therefore, all works relating to the buildings, installations or equipment of an airport must be considered to be works relating to the airport. That means that works to modify an airport with a runway length of 2,100m or more thus comprise not only works to extend the runway, but all works relating to the buildings, installations or equipment of that airport where they may be regarded, in particular because of their nature, extent and characteristics, as a modification of the airport itself. This was particularly the case for works aimed at significantly increasing the activity of the airport and air traffic.

The CJEU held that a Member State which establishes criteria and/or thresholds taking account only of the size of projects, without also taking their nature and location into consideration, would exceed the limits of its discretion under Article 4.2 and 2.1 of the Directive.

The national court also asked whether there was an obligation to take account of the projected increase in the activity of an airport in determining whether a project covered by Annex II must be subject to an assessment of its impacts. The CJEU held that it would be simplistic and contrary to the Directive, when assessing the environmental impact of a project or its modification, to consider only the direct effects of the works envisaged themselves, and not of the environmental impact liable to result from the use and exploitation of the end product of those works.

It is apparent from the case law of the CJEU that if a Member State uses thresholds to assess the need for an EIA, it is necessary to take account of factors such as the location of projects, for example, by setting a number of thresholds corresponding to varying project sizes, by reference to the nature or location of the project (see, to that effect, judgment of 21 September 1999, *Commission v Ireland*, C 392/96, paragraph 70).[37]

2.7.6 Case C-244/12 Salzburger Flughafen GmbH

This case concerned the proposed expansion of Salzburg Airport including an area of approximately 90,000m^2 for the construction of warehouses and other such buildings and the extension of parking areas and aircraft standing areas. A further aspect related to an area of almost 120,000m^2 primarily for general aviation, the construction of hangars, vehicle parking and aircraft standing areas. It also involved the alteration of taxiways.

The airport was sited in an urban area near Salzburg City with a high level of air pollution. Austrian law required an examination of changes to certain projects on a case-by-case basis above a certain threshold. In this regard Column 1 of Annex I to the Austrian legislation included "*Modification of airports, if this is expected to increase the number of aircraft movements (motor aircrafts, power gliders in powered flight or helicopters) by 20,000 or more per year...*".

The referring court asked whether the provisions of Directive 85/337 preclude national legislation which makes projects which change the infrastructure of an airport and fall within the scope of Annex II to the Directive subject to an EIA, only if those projects are likely to increase the number of aircraft movements by at least 20,000 per year.

Salzburger Flughafen (SF) operates Salzberg Airport and applied for a permit to construct an additional terminal to deal with increased passenger numbers. This was granted in 2003. Further applications were made in 2004 for associated expansion works. Whilst the proposed development included the construction of aircraft hangars and alterations to taxiways, it did not involve any changes to the runway itself.

The EIA Directive requires that for any changes or extensions of projects listed in Annex I or II which may have significant adverse effects on the environment, the Member States must determine on the basis of a case-by-case examination or of thresholds or criteria which they establish, whether such a project should be made subject to EIA.

[37] This was in the context of an exclusionary threshold and it may be appropriate under the EIA Directive to use a sole threshold such as size for the purposes of an inclusionary threshold when combined with other measures, such as a case-by-case assessment for projects falling below the thresholds.

The referring court was of the view that the Austrian legislation in respect of EIA for airport development set the threshold at such a level that in practice it was highly unlikely that small or medium sized airports would be subject to an EIA. The referring court was also of the view that the legislation failed to take account of the location of projects, contrary to the Directive.

The CJEU noted that the criteria and/or thresholds mentioned in Article 4.2 are designed to facilitate the actual characteristics of any given project in order to determine whether it is subject to the requirement to carry out an EIA, and not to exempt in advance from that obligation certain whole classes of projects listed in Annex II to the Directive, which may be envisaged on the territory of a Member State.

The CJEU further noted that a Member State which established criteria or thresholds at such a level such that, in practice, an entire class of projects would be exempted in advance from the requirement of an EIA would exceed the limits of its discretion under Article 2.1 and 4.2 unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment.

The CJEU also noted that in establishing thresholds or criteria under Article 4.2, regard must be had to the relevant selection criteria established in Annex III to the Directive. These criteria include the absorption capacity of the natural environment and, in that regard, particular attention must be paid to densely populated areas.

The CJEU found that the establishment of such a high threshold (i.e. 20,000 aircraft movements per annum) meant that changes to the infrastructure of small or medium-sized airports would never, in practice give rise to an EIA despite the fact that it could not be excluded that such works may have significant effects on the environment.

The legislation was also found to be incompatible with the Directive as the criteria were only quantitative and failed to take account of the other selection criteria in Annex III, particularly the population density of the area in or near which the project was to be located.

2.7.7 Case C-575/21 Wertinvest Hotelbetriebs GmbH v Magistrat der Stadt Wien

This case concerned a proposed development in Vienna City centre involving the demolition of an existing hotel and replacement with several structures including a 19-storey tower for hotel, commercial, conference and office use with an underground ice rink, sports hall, swimming pool and a car park with 275 spaces. The proposed project occupied an area of 1.55ha with a gross floor area of 89,000m^2. The entire project was

located in the central area of the UNESCO World Heritage Site known as the '*Historic Centre of Vienna*'.

The procedure before the national competent authorities and the national courts was complex but ultimately the national court referred a series of questions to the CJEU as to whether Austrian law adequately transposed the relevant provisions of the EIA Directive in the context of this development.

Austrian law implemented Annex II of the EIA Directive with certain thresholds of project set out in Annex 1 to the UVP-G 2000. Column 1 of Annex 1 identified projects which were in any event subject to an EIA. Column 2 identified projects in respect of which a simplified procedure was required. By way of example, in respect of infrastructure projects, Column 2 included "*theme parks or amusement parks, sports stadia or golf courses with a land take of at least 10 hectares or at least 1,500 parking spaces for motor vehicles*", *"Urban development projects with a land take of at least 15 hectares and a gross floor area exceeding 150,000m²*", "*industrial or trading estates with a land take of at least 50 hectares*", "*shopping centres with a land take of at least 10 hectares or at least 1,000 parking spaces for motor vehicles*" and "*accommodation establishments such as hotels or holiday villages, and ancillary facilities, with at least 500 beds or a land take of at least 5 hectares, outside enclosed settlements*".

Column 3 of Annex 1 to the UVP-G 2000 then sets out projects which are subject to EIA only when specific conditions are met with respect to protected areas. The types of projects include "*theme parks or amusement parks, sports stadia or golf courses in protected areas of Category A or D with a land take of at least 750 parking spaces for motor vehicles*", "*industrial or trading estates situated in protected areas in Category A or D with a land take of at least 25 hectares*", "*shopping centres in protected areas in Category A or D with a land take of at least 5 hectares or at least 500 spaces for motor vehicles*" and "*accommodation establishments such as hotels or holiday villages, including ancillary facilities, in protected areas in Category A or B with at least 250 beds or an occupied surface area of at least 2.5 hectares, outside enclosed settlements*". Unlike the other project types, there was no corresponding threshold for urban development projects in Column 3 aside from a reference to how the cumulative effects of such projects were to be measured.

For the purposes of projects listed in Column 3, Category A sites relate to UNESCO World Heritage Sites whereas Category D protected sites are described as '*Polluted site (air)*', the scope of which is to be determined in accordance with a separate statutory provision.

In respect of Column 3 projects, once the minimum threshold is reached, a case-by-case examination should be carried out taking into account whether significant adverse effects are to be expected to the protected habitat or the objective of protection for which the protected site has been defined. If significant adverse effects are to be expected, an EIA is required.

For the purposes of Annex 1 to the UVP-G 2000, urban development projects are defined as "*projects for entirely multifunctional development with at least residential and commercial buildings, including the access roads and utilities provided for those buildings, and with a catchment area that extends beyond the area covered by the project. Once completed, urban development projects or parts of such projects shall no longer be regarded as urban development projects*".

Austrian law also provides for a provision to capture the cumulative effects of projects in Annex 1 which do not on their own reach the thresholds or meet the criteria in the Annex but when combined with other projects reach the threshold or meet the criterion in question. In those circumstances the authority is required to declare on a case-by-case basis whether the cumulative effects are likely to be significant and, if so, whether an EIA must be carried out for the project. A case-by-case examination is not required however where the proposed project has a capacity of less than 25% of the relevant threshold.

The Government of the Province of Vienna found that the project need not be made subject to EIA on the ground that it did not fall within any of the categories of project listed in Column 2 or 3. Further, as regards the category of '*urban development projects*' it stated that the thresholds laid down in that provision would not be reached and that in relation to cumulation with other projects, that also did not apply, since the 25% threshold laid down in that provision had not been reached.

The CJEU first noted that pursuant to Article 4.3, Member States are required, when setting thresholds or criteria in respect of Annex II projects, to take account of the relevant selection criteria in Annex III to the Directive. It further identified that Annex III sets out first the characteristics of projects, which must be considered in particular in relation to the size of the project and the cumulation with other existing or approved projects. Secondly, the location of projects, so that account is taken of the environmental sensitivity of geographical areas likely to be affected by them, paying particular attention to densely populated areas and landscapes and sites of historical, cultural or archaeological significance. And thirdly, the characteristics of the potential impact of projects, particularly with regard to the geographical area and the size of the population likely to be affected by projects and their cumulative effect with other existing or approved projects.

A Member State that establishes thresholds or criteria which take account only of the dimensions of projects, without taking into consideration the other criteria, exceeds its margin of discretion under Article 2.1 and 4.2 of the Directive.

The CJEU found that whilst Austria had set a number of thresholds, applicable according to the location of the project, including UNESCO World Heritage sites, for the projects concerning '*shopping centres*' and '*car parks and garages accessible to the public*', being projects which also fall within the concept of '*urban development projects*' within the meaning of Annex II of the Directive, it set only a single threshold with respect to the '*urban development projects*' in Annex 1 of the domestic law.

The CJEU further found that in an urban environment in which space is limited, thresholds of land take of at least 15ha and a gross floor area of more than 150,000m^2 are so high that, in practice, the majority of urban development projects are exempt in advance from the requirement for an EIA. This approach is not permissible unless all the projects excluded could, when viewed as a whole, be regarded as not likely to have significant effects on the environment.

The CJEU held therefore that these provisions of Austrian law were contrary to the EIA Directive in that they required urban development projects to meet both the thresholds of land take (15ha) and gross floor area (150,000m^2) and also satisfy the definition of an urban development project (as set out above). It was also apparent that the CJEU considered the applicability of thresholds without taking account of, *inter alia*, location, was contrary to the EIA Directive.

A further question referred by the national court asked whether Article 4.3 of the Directive must be interpreted as meaning that in the context of a case-by-case examination of whether a project is likely to have significant effects on the environment, the competent authority may confine itself to taking into account certain aspects of environmental protection, such as the objective of the protection of a given area, or whether it must examine the project concerned having regard to all of the selection criteria in Annex III. In this regard, the CJEU held that a competent authority must examine the project concerned having regard to all of the Annex III criteria in order to determine the relevant criteria in the particular case, and must then take due account of all the criteria which thus prove to be relevant.

A further question which the CJEU did not answer, as it was not considered necessary in light of answers provided to other questions, but which was addressed in the Advocate General's Opinion, related to the assessment of the cumulative effects of urban projects under Austrian law. In that regard, Austrian law required that only similar urban

development projects are to be taken into consideration, provided that they had been approved in the last five years but had not yet been carried out and that the urban development project envisaged accounted for at least 25% of the relevant threshold.

The Advocate General found that the scope of the cumulative assessment required under the EIA Directive was not limited to projects of the same kind, since such cumulative effects may arise from projects belonging to the same category, as well as from projects of a different nature, such as urban development and the construction of transport infrastructure. The Advocate General found that as even a small-scale project can have significant effects on the environment, the EIA Directive does not permit national legislation that excludes the examination of significant effects until the project envisaged reaches a certain size such as that it reaches 25% of the applicable thresholds.

The Advocate General further found that whilst a Member State may disregard projects that have not been carried out or at least have not commenced despite being approved years prior since that suggests such projects are unlikely to be executed,[38] the EIA Directive clearly requires Member States to take into consideration the cumulative effects of other existing projects, irrespective of when they were completed.

[38] Unless legal or administrative proceedings are ongoing which would explain the delay in execution.

2.7.8 Summary of Relevant Principles from CJEU Case Law

Some of the key principles that have emerged from CJEU case law concerning Articles 4.2 and 4.3 of the EIA Directive, are summarised as follows:

- Member States can set thresholds and/or criteria which mean that an examination of each individual project is not required, otherwise Article 4.2 would be deprived of any purpose.
- The limits of a Member State's discretion under Article 4.2 are found in Article 2.1 that projects likely, by virtue *inter alia*, of their nature, size or location, to have significant effects on the environment are to be subject to an EIA.
- A Member State which establishes thresholds and/or criteria taking account only of the size of projects, without also taking their nature and location into consideration, would exceed the limits of its discretion under Article 4.2 and 2.1.
- A small-scale project can have significant effects on the environment, if, for example, it is in a location where environmental factors set out in Article 3 are sensitive to the slightest alteration.
- A project is likely to have significant effects where, by reason of its nature, there is a risk that it will cause substantial and irreversible change in those environmental factors, irrespective of its size.
- It is necessary and possible to take account of factors such as the nature and location of projects, for example, by setting a number of thresholds and/or criteria corresponding to varying project sizes and applicable by reference to the nature or location of the project.
- In implementing the EIA Directive, Member States must ensure that the object of the legislation cannot be circumvented by the splitting of projects.
- Articles 4.2 and 2.1 do not permit Member States to exclude projects from EIA if they are likely to have significant effects on the environment.
- No project that is likely to have significant effects on the environment, within the meaning of the EIA Directive, should be exempt from assessment. The only way in which Member States can exclude projects from assessment is on the basis that particular classes or projects in their entirety or a specific project, could be regarded as not being likely to have significant effects on the environment.

- Densely populated areas and landscapes of historical, cultural and archaeological significance are among the selection criteria which the Member States must take into account for the case-by-case examination or the setting of thresholds and/or criteria.
- The thresholds and/or criteria mentioned in Article 4.2 are designed to facilitate the actual characteristics of any given project in order to determine whether it is subject to the requirement for EIA, and not to exempt in advance from that obligation whole classes of project listed in Annex II.
- A Member State which establishes criteria or thresholds at such a level that, in practice, an entire class of projects would be exempted in advance from the requirement for an EIA, would exceed the limits of its discretion under Article 4.2 and 2.1 unless all projects excluded, could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment.
- In establishing thresholds or criteria under Article 4.2, regard must be had to the relevant selection criteria established in Annex III to the EIA Directive.
- The scope of the cumulative assessment required under the EIA Directive is not limited to projects of the same kind, since such cumulative effects may arise from projects belonging to the same category as well as from projects of a different nature.

2.8 Irish Case Law

2.8.1 Jennings and O'Connor v An Bord Pleanála [2023] IEHC 14

This judgment of Mr. Justice Holland in the High Court concerned a challenge by local residents to a 679-bed space student accommodation close to University College Dublin, Belfield, Dublin 4. The Applicants asserted that An Bord Pleanála's decision granting permission was invalid as An Bord Pleanála had failed to comply with Article 299B(1)(b)(i) of the PDR[39] and/or Article 4(5) of the EIA Directive, as it was not open to An Bord Pleanála to exclude at preliminary examination the possibility of significant effects on the environment because of *inter alia* the presence of bats on site and to a lesser degree breeding birds. The Applicant submitted at hearing that An Bord Pleanála could not have regard to mitigation when doing a preliminary examination, but the Court found this point was not pleaded.

[39] The provision for submission of an EIAR for sub-threshold development inserted into the PDR by the Housing and Residential Tenancies Act 2016 for Strategic Housing Developments (SHDs).

The Applicants also raised the point at hearing that case-by-case preliminary examination is not permitted by the EIA Directive and Article 299B(1)(b)(i) of the PDR inadequately transposed Article 4.3 of the EIA Directive, but the Court was clear that it was not concerned with whether Ireland had adequately transposed Article 4 of the EIA Directive, as that was not pleaded.

The developer had prepared and submitted an Appropriate Assessment (AA) screening report that concluded that an AA was not required and an Ecological Impact Assessment Report (EcIAR) that noted that bats were a strictly protected species under Article 12 of the Habitats Directive, that there were three potential effects on bats and that bats had been recorded on site. In particular it was identified that four trees to be removed had bat roost potential and if present that would result in significant impacts on bats at a local scale. Similarly, the EcIAR noted breeding bird species recorded as having used the site, including three that were amber listed,[40] and the site was deemed "*of local importance (higher value) for breeding birds*." The report concluded that bird habitat loss and displacement and potential mortality to nesting birds during construction would likely result in a negative effect on the local bird population, but mitigation would minimise the impact. The report described the law on EIA Screening, conducted an "*EIA Screening exercise*" which considered the criteria set out in Schedule 7 of the PDR, and decided that EIA was not required.

An Bord Pleanála's Inspector identified the development as sub-threshold[41] and carried out a preliminary examination having regard to the criteria set out in Schedule 7 of the PDR. While her preliminary examination did not explicitly address bats or birds, it was read with her consideration of bats and birds elsewhere in her report, so the Judge was satisfied that she had considered same. The Inspector concluded that having regard to the limited nature and scale of the proposed development and the absence of any connectivity to any sensitive location, there was no real likelihood of significant effects on the environment arising from the proposed development, the need for EIA was excluded and an EIA screening determination was not required. An Bord Pleanála agreed with the Inspector as to exclusion of EIA on a preliminary examination.

The Court found that An Bord Pleanála's reasoning as to the limited nature and scale of the proposed development was in the context of a 500-unit threshold, and the reason that it was considered sub-threshold was clear and allowed for an appreciable margin within

[40] Of medium conservation concern on the Birds of Conservation Concern Ireland List 2020-2026.
[41] The threshold is >500 dwelling units, but it was considered that 698 bedspaces fell below it because the average household was 2.7 persons, which equated to 698/2.7 = 258.5 dwelling units.

that threshold. The Applicants' complaint that the pre-screening form did not refer to the site being in a sensitive location (when there was a development plan objective for tree protection on the site) was not pleaded and the Inspector had in fact considered the tree protection objective in her report.

The Court made an *obiter* finding in respect of whether mitigation could be taken into account in preliminary examination, as follows: there is no objection in principle to taking mitigation into account in preliminary examination, however that must be done in accordance with the precautionary principle and bearing in mind that exclusion of EIA screening and EIA at preliminary examination stage is reserved for obvious cases.[42]

In relation to the challenge to the preliminary examination on the basis of a failure to take account of relevant matters – effects on bats and birds – the Court noted that AG Kokott in Case C-463/20 *Namur-Est* stated to the effect that the need for derogation licences "*as a rule*" implies a significant environmental effect and requires that the environmental effects of carrying a derogation licence into effect be considered in EIA (however that case was considering the Belgian process, whereby a derogation licence precedes development consent, whereas generally it is the reverse in Ireland). However, in this case the prospect of a derogation licence was not considered by the Inspector and An Bord Pleanála. Ultimately the Court refused the Applicants' relief on this ground, as the trees had in fact already been felled at that stage and there was no suggestion that a derogation licence had been required, or that bat mortality had occurred. However, the Court expressed a doubt as to whether the law as to EIA and Habitats Directive derogation licences had been correctly applied in light of *Namur-Est*.[43]

2.8.2 Shadowmill Limited v An Bord Pleanála [2023] IEHC 157

This judgment of Mr. Justice Holland in the High Court concerned a challenge by Shadowmill, an NGO dedicated to the protection of the built and natural environment in Phibsborough, to the decision of An Bord Pleanála to grant planning permission for 18 apartments at the 0.27ha site of "*Stone Villa*", 297 North Circular Road, Phibsborough, Dublin. Stone Villa is a 19th century three-storey, three-bay, stone-faced, detached house

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[42] In reliance on the E&W Court of Appeal in *Gillespie v First Secretary of State* [2003] 3 PLR 20 to the effect that such a conclusion will, at least generally, require that the nature, availability and effectiveness of mitigation are already plainly established and plainly uncontroversial. However, that was prior to the 2014 amendments to the EIA Directive.

[43] It should be noted that this judgment preceded the CJEU judgment in Case C-166/22 *Hellfire Massy v An Bord Pleanála* which found at Section 39 that "*the outcome of an environmental impact assessment – which must be a full assessment (see, to that effect, judgment of 24 February 2022, Namur-Est Environnement, C-463/20, EU:C:2022:121, paragraph 58 and the case law cited) – must make it possible to determine whether, at the time of that assessment, the project concerned was likely to have effects prohibited by Article 12 of Directive 92/43"*.

with a two-storey rear return. It is a protected structure and its curtilage constitutes the site on which the development of the apartments was to occur. The house is derelict and in very poor condition, and the proposal included works to repair it with minimal impact on the interior. The Council refused permission, and on appeal An Bord Pleanála granted permission with the omission of one of the two proposed blocks of apartments (Block B).

An EIAR pre-screening form completed by an official in An Bord Pleanála recorded, in error, that a preliminary examination for EIA was not required. An Bord Pleanála's Inspector referred to the EIAR pre-screening form without comment but realised that the EIAR pre-screening form contained an error. Despite the form's recorded conclusion that preliminary examination was not required, the Inspector in fact herself did, and reported to An Bord Pleanála, a preliminary examination. She concluded that EIA was not required. This was done pursuant to Article 109(2)(a) PDR 2001 the effect that, owing to the "*nature, size and location of the development*", EIA was unnecessary.

There were three bases of challenge to the preliminary examination for EIA, as follows:

1. An Bord Pleanála failed to either adopt the Inspector's report or itself record that it had done a preliminary examination.
2. There was a difference between the proposed development considered by the Inspector and the permitted development (which omitted Block B).
3. An Bord Pleanála failed to properly assess the potential impacts on bats.

The Applicant also alleged in submissions that Ireland had failed to properly transpose Article 4.3 of the EIA Directive as that allowed preliminary examination only by Member States setting thresholds or criteria to determine when projects need not undergo EIA screening and does not permit preliminary screening by way of case-by-case examination (as transposed in Article 109 of the PDR). The State were not a party to the proceedings and the point had not been pleaded properly, therefore the Court refused to consider this issue, but it is noteworthy in terms of any future amendments to/replacement of the PDR.

The Court set out Article 4.3 as amended, underlining the sentence "*Member States may set thresholds or criteria to determine when projects need not undergo either the determination under paragraphs 4 and 5*" and stated that the 2014 amendment to the EIA Directive introduced the possibility of pre-screening screening for EIA, called "*preliminary examination*" in Ireland. The Court added that in C-435/97 *WWF v Bozen* the CJEU stated 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 assessment, be regarded as not being*

likely to have such effects", but that this might need some reinterpretation in as much as full EIA screening may no longer be required after the 2014 amendment to the EIA Directive.

The Court noted that Annex III of the EIA Directive set non-quantified criteria under three headings, noting that whilst the first two headings referred to the characteristics and location of the project, the third heading referred to the "*type and characteristics of potential impact*", specifically by reference to the criteria under the first two headings.

The Court went on to consider the corresponding provisions transposed in Article 109(2) and Schedule 7 of the PDR, and stated that whilst Article 109(4) of the PDR requires the Board, in making a screening determination, to have regard to the criteria set out in Schedule 7 of the PDR, whereas in contrast Article 109(2) requires the Board, in preliminary examination to examine "*at the least, the nature, size or location of the development*". The Court noted that both Annex III and Schedule 7 referred to likely effects on biodiversity, and with particular attention to species and habitats under the Habitats Directive.

It is also noteworthy that Holland J. interpreted the words "*nature, size or location*" in Article 109(2) of the PDR in a conjunctive sense such that preliminary examination must encompass at least the nature, size and location of the proposed development.

The Court also found that the presence of "*no real likelihood of significant effects*" is equated with the absence of "*significant and realistic doubt*", they are the opposite sides of the same coin, therefore the choice on preliminary examination is not to screen or to screen (or to proceed straight to EIA). And that the bar to concluding that neither EIA screening nor EIA is required is a high one, and whilst the obligation of the information to be provided by the developer and of the examination by the decision-maker are lesser for preliminary examination, the conclusion must be "*fairly obvious*". The likelihood of significant effect to the environment must be considered to exist when that likelihood cannot be objectively excluded.[44]

Therefore, the Court concluded that Annex III of the Directive (as transposed in Schedule 7 of the PDR) must apply in preliminary examination as in EIA screening, at least to identify the subject matters of enquiry, even though the depth of inquiry may be less in preliminary examination. However, the precautionary principle must be applied with rigour in preliminary examination and requires that the likelihood of significant effect to the

[44] Case C-721/21 *Eco-Advocacy, Opinion of the Advocate General,* 19th January 2023 and *Waltham Abbey Residents Association v An Bord Pleanála and Others (No. 3)* [2023] IEHC 146.

environment must be considered to exist when that likelihood cannot be objectively excluded.

This part of the case was concerned with the impact on bats. The Court found that as preliminary examination must consider "*biodiversity, with particular attention to species and habitats protected under the Habitats Directive*" – including particular attention to bats, and that might be found in an expert report dedicated to the topic of bats, the Inspector and An Bord Pleanála might satisfy the criterion by accepting the content of such a report. The Court considered Recital 22 and Recital 35 of the EIA Directive, and the definition of "*project*" in Article 1 of the EIA Directive, concluding that an EIAR must include a description of the likely significant effects of the construction of the project on the environment (including on biodiversity, and in this case bats).

The Court found that it was inherently unlikely that An Bord Pleanála disagreed with the Inspector's preliminary examination (and agreed with the incorrectly completed preliminary examination form) and there was a presumption of validity in An Bord Pleanála's decision that the Court should assume, therefore An Bord Pleanála was found to have adopted the Inspector's preliminary examination. The Court went on to consider whether the preliminary examination was adequate.

First, the Court noted the point in Case C-392/96 *Commission v Ireland* to the effect that small projects can have significant effects, but assuming the thresholds are set with a view to generally ensuring that developments requiring EIA are subjected to it, and noting that Annex III of the EIA Directive and Schedule 7 PDR 2001 identify the size of the project as one of its characteristics requiring "*particular regard*". The Court found it unsurprising that a proposed development of 32 dwelling units (reduced to 18 units in An Bord Pleanála's grant of permission) was considered not to require EIA where the relevant threshold is 500 units.

Nothing was advanced to suggest that the likelihood of significant effects (whether negative or positive) on the environment was greater or different by reason of the permitted 18-unit development than by reason of the proposed 32-unit development. Small projects are less likely than large projects to have a significant effect on the environment and this was a case of a permission to build 18 apartments as compared to the threshold of 500. The Court accepted that An Bord Pleanála's preliminary examination of the greater development sufficed as a preliminary examination of the lesser development.

Secondly, in relation to the Applicant's claim that bats being present on site and a protected species, to which the prohibitions listed in Article 12 of the Habitats Directive apply, the Court looked at the CJEU case law to the effect that:

1. The scope of EIA is general;
2. It must be a full assessment;
3. It must occur before development consent is given to the project;
4. It must take full account of the effects that projects are likely to have on the environment;
5. It must address the significant effects that a project is likely to have on fauna; and
6. Where a project requiring EIA also involves a derogation from Article 12 protections of protected species, an EIA must address that impact.

The Court, in reliance again on AG Kokott's opinion in Case C-463/20 *Namur Est* noted that it is the substance of derogations from Article 12 protections and the environmental impacts they produce, rather than their licensing under Article 16, which matters for EIA purposes and that such derogations are significant. The Court also noted Case C- 404/09 *Alto Sil/Spanish Brown Bear* that the protected status of the species concerned was seen by the CJEU as requiring EIA of effects on those species. Therefore, concluding that a decision-maker[45] must in conducting an EIA (by which he included preliminary examination, as the scope of the enquiry should be the same, albeit in less depth) have regard to the nature, extent and requirements of strict protection of species under the Habitats Directive in considering the question of significant effect on the environment. The Court was at pains to point out that that did not mean that any proposed development likely to affect bats automatically requires EIA, rather the consequence of a proper preliminary examination might only be that EIA screening was required. Even if full EIA is required, it can be scoped to address only likely significant effects.

The Court, again, found that there was no reason for excluding consideration of mitigation from preliminary examination, as long as, the level and reliability of knowledge of the effectiveness of such mitigation was clearly understood. In this case the Applicant had pleaded that the effectiveness of bat boxes and reduced lighting had not been generally assessed, but the Court found there was no evidence to support this.

[45] The Court observed that this was not to suppose that Article 12 of the Habitats Directive directly imposed duties on the Board in terms of the derogation licence procedure.

The Court dismissed the Applicant's pleading that the Inspector's conclusion that mitigation will "*minimise*" disturbance of bats was inconsistent with a conclusion of no significant effect, because "*disturbance*" within the meaning of Article 12 of the Habitats Directive consists of some element of risk of harm rather than mere disturbance generally.

However, the Court found that there was no conclusion in the developer's bat report in this case in respect of how mitigation might minimise the effects as to destruction of bat roosts which was in breach of Article 12.1(d) of the Habitats Directive. In light of the precautionary principle, the Court concluded that there was no objective basis on the papers before the Inspector and An Bord Pleanála on which to conclude by way of preliminary examination there was no real likelihood of significant effect by reason of destruction of bat roosts in Stone Villa. In particular, because bats were a protected species under the Habitats Directive.[46]

2.8.3 Concerned Residents of Treascon and Clondoolusk v An Bord Pleanála, Ireland, the Attorney General and Elgin Energy Services Limited [2024] IESC 28

In these proceedings, Concerned Residents of Treascon and Clondoolusk sought to challenge the legality of a decision of An Bord Pleanála of 4th October 2021 granting Elgin Energy Services Limited planning permission (subject to conditions) to construct and operate a photovoltaic solar farm on a site of approximately 90ha in County Offaly. The proceedings concern whether solar farms are a "*project*" for the purpose of the EIA Directive, and not the thresholds for screening in or out an EIA project on the basis of thresholds. However, it is of general importance to considering what is an EIA project and how the Irish Courts will approach a situation where there is overlap between two types of project and between two regulatory regimes. Solar farms are not a "*project*" listed in Annex I or Annex II of the EIA Directive or in Part 1 or Part 2 of Schedule 5 of the PDR. The High Court had previously found that solar farms are not a category of project that requires EIA in *Sweetman v An Bord Pleanála* [2020] IEHC 39 (*Sweetman*) and *Kavanagh v An Bord Pleanála* [2020] IEHC 259 (*Kavanagh*).

However, Annex II of the EIA Directive includes, at paragraph 1(a), "*[p]rojects for the restructuring of rural land holdings*". Such projects would require assessment as to whether they are likely to have a significant effect on the environment and, if so, they must

[46] The Court had regard to *Commission v Poland* C-441/17, the tree felling was "*inevitably such as to result in the killing, and in the deterioration or destruction of breeding sites and resting places, of the species of saproxylic beetle*" a species for which Article 12(1)(a) (killing) and Article 12(1)(d) (destruction of resting places) of the Habitats Directive prescribed strict protection. The CJEU declined Poland's argument that the species were present on the site in question "*in significant numbers*" (and any losses would be insignificant) and held that Article 12(1)(d) of the Habitats Directive prescribes a regime of strict protection of the resting places of protected species "*regardless of their numbers*".

be subject to EIA. In 2011, the European Communities (Environmental Impact Assessment) (Agriculture) Regulations 2011 (the 2011 Regulations) were made. Under the 2011 Regulations, the Minister for Agriculture, Food and the Marine (the Minister) was given the function of screening and, where appropriate, carrying out an EIA on certain '*activities*' including the restructuring of rural land holdings. The 2011 Regulations were amended in 2017 to provide that anyone wishing to undertake an '*activity*' must apply to the Minister for a screening decision and it appeared to the Court that the screening thresholds were removed and the obligation to submit an application to the Minister for a screening decision in respect of a proposed activity is no longer subject to any such threshold, where the activity may have a significant effect on the environment.[47]

The proposed development comprised *inter alia* the removal of 770m of hedgerow and relocation of a further three sections of hedgerow (with a total length of 140m) by 3m. Even though the developer maintained that an EIA screening and EIA was not required for the proposed development, an EIA screening report, a planning and environmental considerations report and a natura impact statement (NIS) was still submitted with the application.

The planning authority and An Bord Pleanála on appeal both took the view that the proposed development did not come within Schedule 5 and was not a "*sub-threshold development*" and therefore an EIAR was not required.

The proceedings were dismissed by the High Court, and both an application for a reference to the CJEU and leave to appeal the judgment of the High Court to the Court of Appeal were refused. The High Court noted that the developer had confirmed that it would make an application to the Minister under the 2011 Regulations for an EIA screening decision in relation to the removal of hedgerow within the proposed development.

[47] Subsequent to the Decision, the Planning and Development (Amendment) (No. 2) Regulations 2023 were made, which inserted a new project into Schedule 5, Part 2 of the 2001 Regulations "*for the restructuring of rural land holdings, undertaken as part of a wider proposed development, and not as an agricultural activity*". This created a requirement for proposed restructuring of rural land holdings to be considered within the planning process where the proposed restructuring forms "*part of a wider proposed development*", such as a solar farm, as opposed to an agricultural activity. The 2011 Regulations continue to govern proposed restructuring of rural land holdings when undertaken as an agricultural activity. This new legislation post-dated the Decision, so had no bearing on the appeal.

There were five issues before the Supreme Court, determined as follows:

1. The first issue concerned a pleading issue which was ultimately dismissed by the Court;

2. The second issue was whether, because the proposed development involved a project for the restructuring of rural land holdings within Annex II, paragraph 1(a) of the EIA Directive, the entirety of the proposed development (including the solar farm) must be subject to EIA. The Court found that simply because hedgerows were to be removed did not trigger the obligation for an EIA of the entire solar farm development. What is to be assessed is the whole project identified in the Annexes to the EIA Directive, and that meant the removal of the hedgerows. Solar farms are not referred to in either Annex I or II of the EIA Directive. While the EIA Directive does not allow the exclusion of components of Annex I and II projects, that does not mean that a wider development must be subject to a full EIA because a particular element of it falls within a project listed in Annex I or II. This does not mean that the EIA Directive allows the impacts of the solar farm project to be disregarded. Annex III of the EIA Directive provides for authorities to consider "*the cumulation of the impact with the impact of other existing and/or approved projects*";

3. The third issue was whether an EIA of the proposed development could be properly conducted under the 2011 Regulations in circumstances where planning permission for the development (including that part of the development said to constitute a project under the EIA Directive) had already been granted in the absence of any EIA, and it was impossible to untangle the solar farm from the rural land restructuring. However, the Court found that there was no reason in law why the Minister could not carry out an effective assessment under the EIA Directive, nor was there anything unlawful about a process whereby multiple development consents may be required. EU law requires that an EIA of the project is carried out before the relevant development consent is granted. While the Minister could not in law reverse An Bord Pleanála's decision, their decision could result in the developer being unable to carry out the proposed development as permitted by An Bord Pleanála. Conversely, if there were a decision of An Bord Pleanála granting planning permission for something which required the Minister's consent for a "*project for the restructuring of a rural land holding*", An Bord Pleanála's decision does not permit that to go ahead without that Ministerial consent;

4. The fourth issue concerned the fact that the Minister was responsible under the 2011 Regulations for screening for EIA and/or conducting an EIA but had no role in

deciding whether a development involving such an activity should be permitted or the conditions to be attached thereto. However, the Court found that the effect of a planning permission was only to assure the applicant that, according to the planning legislation, their development will be lawful. Further permission, under another distinct statutory code – such as building bye-law approval – may be required before that development can actually proceed. Dual consent regimes were envisaged in the EIA Directive; and

5. The fifth issue was whether any of these grounds were a basis for invalidating An Bord Pleanála's Decision and the Court found that even if there was an issue with transposition of the EIA Directive through the 2011 Regulations, this did not affect the validity of the Decision, merely how the regime operates.

2.8.4 Thomas Reid v An Bord Pleanála [2024] IEHC 27

The Applicant, a full-time farmer in County Kildare, challenged a modification to roof design/height to two earlier planning permissions granted to Intel for works to a manufacturing building at the Intel campus in County Kildare. The earlier planning permissions dated back to 2017, when Intel received permission for a revised design of its manufacturing building, and 2019, when Intel received further permission for an extended and revised manufacturing facility. Then in 2020, Intel applied for modifications to the previously permitted developments, including changes to the roof-mounted service ducting and storage arrangements for the chemical '*silane*'.

The Applicant lodged an appeal against the 2020 modification raising various concerns including environmental impacts and procedural issues. An Bord Pleanála, in adopting the Inspector's recommendation, granted permission for the 2020 modifications and these proceedings concerned a challenge to that 2020 permission.

The Applicant's argument at Core Ground 6 relating to EIA, included that the decision was invalid in that it contravened Articles 4.2 to 4.6 of the EIA Directive as An Bord Pleanála failed to make it subject to an EIA in accordance with Articles 5 to 10, in circumstances where Ireland has set certain thresholds to determine when projects shall be made subject to mandatory EIA, without first undergoing a screening but has not set any thresholds or criteria to determine when projects need not undergo a screening or an EIA.

The Court found that the question of whether an EIA was required in this case, was not difficult to answer as Intel manufactured circuits and circuit boards and therefore the project was neither:

- A "*storage facilit[y] for petroleum, petrochemical and chemical products*" under Annex II paragraph 6(c) which the Court interpreted as meaning facilities constructed for the primary purpose of such storage, not facilities in which such substances are incidentally stored for other purposes, nor
- An "*industrial estate development*" under Annex II paragraph 10(a) which the Court interpreted as meaning the development *of* industrial estates, that is developments that relate to the functioning of the industrial estate as an industrial estate, not developments internal to particular undertakings within such estates that do not in themselves contribute to the operation and use of the industrial estate in its wider context as such an estate.

The Court concluded that the modifications to Intel's facility did not fall under the categories requiring an EIA as per Annex II of the EIA Directive. The Court determined that the Intel facility, which stores chemicals incidentally for its manufacturing process did not qualify under Annex II as the Applicant's interpretation of paragraph 6(c) meant that the construction of any building on which chemicals are held for the purposes of the building's primary purpose would be covered by paragraph 6(c), which was totally implausible given how many substances could conceivably fall within the category of chemicals (which includes cleaning products – products that could be stored anywhere such as in a domestic residence) and was inconsistent with the way in which the issue was discussed in the Commission guidance. Further, the Court found that if the EIA Directive had the extensive meaning contended for by the Applicant it would have been phrased in a very different manner. Further, the Applicant's interpretation of the Commission guidance that "*infrastructure for joint industrial or business use*" fell under Annex II paragraph 10(a) did not logically apply to very minor and incidental works within an industrial estate.

The Court emphasised that the EIA Directive should not be interpreted in an overly expansive manner and the language of any provision, and the text of the document overall, "*gain colour, context and meaning*" from the purpose of that document and the "*decontextualised dictionary meaning of the literal words*" shouldn't be used. In other words, the context of the legislation and guidance must be considered rather than an individual words used to describe the projects listed in Annex II.

The Court found that the net effect was clear that this was not an EIA project for the simple reason that it did not come within Annexes I and II of the EIA Directive, nor, the Court found, was there any plausible basis put forward for a reference on the point to the CJEU.

2.8.5 Graymount House Action Group and Others v An Bord Pleanála [2024] IEHC 327

These proceedings concerned a challenge to a grant of planning permission by An Bord Pleanála for the demolition of Graymount House on Dungriffin Road, Howth followed by the construction of a four-storey single block apartment consisting of 32 units on a 0.48ha site.

The Applicants challenged An Bord Pleanála's interpretation of certain elements of the EIA Directive and the transposed Irish law on EIA requirements. The Applicants submitted that An Bord Pleanála had not complied with their obligations under Article 109 of the PDR, in particular, because the Inspector's report was brief on the EIA issue, there had been no reference to cumulative effects on traffic or on bats, and ultimately that An Bord Pleanála had failed to have regard to the matters set out in Annex III to the Directive, as required by Article 4(3) of the EIA Directive.

The Applicants argued that Article 109 of the PDR provides that where a sub-threshold development is being considered, and it is not accompanied by an EIAR, An Bord Pleanála shall carry out a preliminary examination of at least, the nature, size or location of the development. It was submitted that the PDR provides that if An Bord Pleanála was in doubt on the issue, it should require the applicant for planning permission to furnish the information provided for in Schedule 7 of the PDR for the purpose of a screening determination. The Applicants relied on *Shadowmill Limited v An Bord Pleanála* [2023] IEHC 157 which asserted that there is a precautionary principle that requires that the likelihood of significant effects on the environment must be considered to exist when that likelihood cannot be objectively excluded.

The Applicants argued that the Inspector's report could not be seen to have had regard to all matters required under Article 109 as the relevant part of the report had dealt with the issues in only three lines and did not consider cumulative effects on the environment.

However, the Court dismissed the Applicants' arguments on the basis that the obligation to take into account the matters set out in Annex III of the EIA Directive and Schedule 7 of the PDR, does not require An Bord Pleanála to go through each and every matter therein and cross it off in somewhat of a "*tick box*" type exercise, rather there was a duty to "*have regard to*" the matters in the legislation which did not mean a slavish duty to comment on each aspect set out therein. The Court relied on Case C-721/21 *Eco Advocacy v An Bord Pleanála* in relation to the level of reasoning that was required when carrying out the screening process, in particular the Advocate General's opinion that said that the level of reasoning could be quite brief, if it was obvious what the reasons were. It was not necessary to follow the exact structure of Annex III. As long as it was clear that the project

would not have adverse effects on the environment. The Court relied on the principle that when interpreting planning decisions, one must have regard to all the documents that were before the decision maker (*Coyne v An Bord Pleanála* [2023] IEHC 412).

Therefore, the Court dismissed the Applicants' claim on this ground for the following two reasons:

1. There was uncontroverted expert evidence before the Inspector that the amount of traffic during peak hours by the development was negligible. The proximity of the problematic area of traffic, being Sutton Cross, had also been considered which was some 4km away from the proposed development; and
2. The Court distinguished *Shadowmill* with the present case based on the facts. An extensive bat survey was completed by the applicant for planning permission in this case, which found no bats or bat roosts in the trees on site (compared to *Shadowmill* where the site had "*numerous potential bat roosting features*" and it was clear that a derogation licence would be required).

The Court ultimately held that whilst the Inspector's report conclusion was '*somewhat terse*', the level of reasoning was sufficient when having regard to the nature of the evidence that was before An Bord Pleanála.

2.8.6 James Kavanagh v An Bord Pleanála and Others [2020] IEHC 259

This case concerned a challenge by Mr Kavanagh to the decision of An Bord Pleanála to grant planning permission in respect of a proposed development consisting of a 59ha photovoltaic solar farm and associated works. The Applicant submitted that the development of such size and scale should be subject to an EIA as there were residential dwellings close to the site and this would be a large industrial development in a rural area.

The Applicant contended at the hearing that the only issue before the Court was that the provisions of the PDR and/or the EIA Directive required an EIA to be carried out in respect of the development. Additionally, the Applicant argued that if a solar energy development of this scale was excluded from the provisions of the Regulations, then Ireland, who is the Second Respondent, had failed to transpose the EIA Directive into Irish law correctly.

The Court noted that it was clear that the proposed development did not fall within Annex I of the EIA Directive. The Court then considered if the project would fall within the scope of Annex II. Annex II of the 2014 Directive provides under 3(a) "*Industrial Installations for the production of electricity, steam and hot water (projects not included in Annex I)*". The Applicant argued that 3(a) catches all installations which produce either electricity or both

steam and water. The Court was not convinced by this argument and believed this would be an extraordinary use of language. The Court found that it would be understandable if the person drafting 3(a) used the three words entirely disjunctively (so that the installation produced electricity or steam or hot water) or entirely cumulatively (so that the institution produced electricity and steam and hot water), but it was extremely unlikely that the draftsperson would use the three terms initially disjunctively, and then cumulatively. The Court found that the more likely formation was that the installation was one which produced electricity and steam and hot water. In support of this decision, the Court noted there was no evidence before the Court that there were industrial installations which produced steam alone, or hot water alone. Conversely there was support for an installation that burned fossil fuel to release heat, in turn allowing water to be boiled to produce steam which created electricity through the Opinion of Advocate General Tanchev in Case C-31/17 *Cristal Union v Ministre de l'Économie et des Frances*.

The Court also stated that if 3(a) catches all installations producing electricity, there would be no reason for 3(j) which states "*installations for hydroelectric energy production"*. Similarly, the Court noted that an amendment was made to the Directive adding "*installations for the harnessing of wind power for energy production (wind farms)*". If 3(a) covered all installations producing electricity, it would be difficult to see why the additional provision would be necessary. The Court rejected the Applicant's argument that the use of a comma in 3(a) meant that the provision was to be read disjunctively. The Court found that this interpretation would distort the proper meaning of the provision.

The Court then considered whether the proposed development fell within the category at Schedule 5 Part 2 paragraph 3 (a) of the PDR "*3(a) Industrial installations for the production of electricity, steam and hot water not included in Part 1 of this Schedule with a heat output of 300 megawatts or more*". The Court concluded that solar farms such as the proposed development were not included among the installations defined in the PDR. The Court noted that McDonald J. came to the same conclusion in *Peter Sweetman v An Bord Pleanala, Ireland, the Attorney General and IGP Solar 8 Limited* [2020] IEHC 39 (*the Sweetman (IGP Solar 8)* case) and that the present case did not differentiate from the issues raised in the *Sweetman (IGP Solar 8)* case.

Finally, the Court addressed the claim that the State did not adequately transpose the obligations of the 2014 Directive into Irish law. The Court found this claim to be fundamentally flawed, as the Regulations reflected (in all material respects) the relevant provisions of the Directive. The Court found that because of finding that the 2014 Directive did not require an EIA to be carried out in respect of planning applications for the construction and operation of solar farms, it followed that there was no failure on the part

of the State to transpose the EIA. The Court noted that the emphasis placed by the Applicant on the scale of the development was misplaced. The obligations placed on Member States by the Directive were limited by reference to the classes of projects or developments set out in the Annexes, and did not extend beyond them, so if a development did not fall within the classes listed in the Annexes then an EIA was not required.

Ultimately, the Court refused the Applicant's application for judicial review and refused to make a reference on the point to the CJEU (noting that McDonald J. had reached a similar conclusion in the *Sweetman (IGP 8 Solar)* case.

2.8.7 Summary of Findings from Irish Case Law

Recent Irish case law in the area of EIA preliminary examination or screening determination for sub-threshold development includes the following significant points of analysis:

- The description of preliminary examination in Article 103(1)/109(2) of the PDR must be interpreted conjunctively, whereby it would encompass at least the nature, size and location of the proposed development (*Shadowmill Limited v An Bord Pleanála* [2023] IEHC 157).
- The presence of "*no real likelihood of significant effects*" is equated with the absence of "*significant and realistic doubt*". The precautionary principle must be applied with rigour in preliminary examination and requires that the likelihood of significant effect to the environment must be considered to exist when the likelihood cannot be objectively excluded (*Shadowmill*).
- On preliminary examination, the bar to concluding that neither EIA screening nor EIA is required is a high one, and whilst the obligation of the information to be provided by the developer and of the examination by the decision-maker are lesser for preliminary examination, the conclusion must be "*fairly obvious*".
- Where the planning authority imposes a condition requiring derogation licences to address any bats discovered during tree removal/building demolition, that "*as a rule*" implied a significant environmental effect and required that the environmental effects of carrying a derogation licence into effect be considered in EIA (*Jennings and O'Connor v An Bord Pleanála* [2023] IEHC 14 and *Shadowmill*).
- A decision-maker must in conducting an EIA (including preliminary examination, as the scope of the enquiry should be the same, albeit in less depth) have regard to the nature, extent and requirements of strict protection of species under the Habitats Directive in considering the question of significant effect on the environment. Therefore, any proposed development likely to affect bats does not automatically require EIA, rather the consequence of a proper preliminary examination might be that EIA screening is required, or a full EIA that is scoped to address only the likely significant effects (*Shadowmill*).
- There is no reason for excluding consideration of mitigation that would avoid or prevent what would otherwise be significant environmental effects from preliminary examination, as long as the level and reliability of knowledge of the effectiveness of such mitigation is clearly understood (*Shadowmill*).

- The EIA Directive should not be interpreted in an overly expansive manner. The context of the legislation and guidance must be considered rather than individual words used to describe the projects listed in Annex II (*Reid v An Bord Pleanála* [2024] IEHC 27).
- The obligation to take into account the matters set out in Annex III of the EIA Directive and Schedule 7 of the PDR, does not require the decision-maker to go through each and every matter therein and cross it off in somewhat of a "*tick box*" type exercise, rather there was a duty to "*have regard to*" the matters in the legislation which did not mean a slavish duty to comment on each aspect set out therein (*Graymount House Action Group v An Bord Pleanála* [2024] IEHC 327).

2.9 EU Commission Guidance

The EU Commission has published a number of guidance documents in relation to the EIA Directive. While there is no one guidance document specifically targeted at the matter of EIA thresholds and case-by-case analysis, the EU Guidance Document on Screening[48] (the Screening Guidance) covers this area, as does the EU Guidance on Interpretation of definitions of project categories of Annex I and II of the EIA Directive[49] (the Project Category Interpretation Guidance) which aims to reduce the uncertainty regarding the interpretation and scope of certain project categories listed in the EIA Directive. Relevant guidance from both the Screening Guidance and the Project Category Interpretation Guidance is summarised below, along with a number of other EU Commission guidance documents that contain other relevant information.

2.9.1 Interpretation of Definitions of Project Categories of Annex I and II of the EIA Directive 2024

The Project Category Interpretation Guidance states that in determining thresholds, the relevant selection criteria set out in Annex III to the EIA Directive should be taken into account and the screening process should be based on all relevant selection criteria. Thresholds and criteria should establish a "*clear legal requirement*" on the need for EIA, be that by exclusionary thresholds or by indicative thresholds used in tandem with case-by-case decisions. Regardless of the method adopted by a Member State, the objectives of the EIA Directive cannot be undermined.

[48]European Commission: Environmental Impact Assessment of Projects: Guidance on Screening (Directive 2011/92/EU as amended by 2014/52/EU) (2017).
[49]European Commission: Interpretation of Definitions of Project Categories of Annex I and II of the EIA Directive (2015).

The majority of Member States use the following metrics in setting thresholds:

- For power stations: capacity in MW;
- For landfills for non-hazardous waste: total volume (m^3) or volume/day, tonnes/day or total capacity in tonnes;
- For shopping centres: area in ha or m^2 (area of development, gross floor space); and
- For roads: length of road (in km).

The 2014 Directive introduced changes in relation to screening but this did not result in a change in approach to how thresholds are determined.[50]

2.9.1.1 Criteria to be Taken into Account in Setting the Level of Thresholds

The Project Category Interpretation Guidance notes that discretion conferred on Member States in establishing thresholds/criteria is limited by Article 2.1 of the EIA Directive. Thresholds/criteria are designed to facilitate examination of a project's actual characteristics to determine whether it should be subject to EIA. The use of thresholds/criteria that would, in practice, exempt all projects of a particular category goes beyond the limits of the discretion afforded to Member States under the EIA Directive. However, this is not the case if all projects falling within that category could be regarded as not likely to have significant effects on the environment.[51] Similarly, a failure to take account of all criteria listed in Article 2.1 of the EIA Directive or all relevant criteria listed in Annex III goes beyond the limits of the discretion afforded to Member States.

2.9.1.2 Interpretation of Annex II Projects

The Project Category Interpretation Guidance states that thresholds/criteria may be set at different limits for the same project type depending on the location of the project. Some Member States have implemented conditional thresholds/criteria for screening of Annex II category (1)(a) projects (i.e. Projects for the restructuring of rural land holdings). For example, a threshold of "*changes to 4km or more of field boundaries; movements of 10,000m^3 of earth or other material; or otherwise restructure an area of 100ha or more*" becomes subject to stricter thresholds of "*changes to 2km or more of field boundaries;*

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[50] The 'Project Category Interpretation Guidance' is available at: European Commission: Interpretation of Definitions of Project Categories of Annex I and II of the EIA Directive (2015).
[51] Case C-392/96*, Commission v Ireland*, paragraph 53; C-72/95, *Kraaijeveld and Others*, paragraph 53; Case C-435/97*, WWF and Others*, paragraph 38; Case C-392/96*, Commission v Ireland*, paragraph 75; Case C-66/06*, Commission v Ireland,* paragraph 65; Case C-427/07*, Commission v Ireland*, paragraph 42.

5,000m³ or more of earth or other material; or otherwise restructuring an area of 50ha or more" where such a project is within a sensitive area.

Thresholds implemented in specific Member States may vary depending on the local practices in the Member States in question, for example the types of land use and agricultural practices and some countries have included lists of relevant agricultural practices and habitats in national guidance documents in order to clarify how this category should be interpreted.

Certain types of Annex II project may also be open to a range of interpretations and can result in Member States taking different approaches in implementing thresholds. For example, for Annex II category (10)(a) projects (i.e. Industrial estate development projects), some Member States have specified a project size for industrial estate projects but there was no real consensus among Member States on the use of the terms "*industrial*" or "*estate*". Providing a comprehensive list of the project types that may be relevant under this heading is near impossible due to the wide scope of interpretation of the project title, but there are common characteristics for all of these projects – e.g. an industrial estate development project is a specific area of land; zoned for industrial or for joint industrial and business purposes; where the necessary infrastructure is provided; and commonly used by several companies that are in close proximity.

Some Member States may require EIA for all projects within a certain category whereas others may require EIA above a specific threshold. For example, EIA may always be required for golf course projects in some Member States whereas in other Member States EIA may only be required for golf course projects of 10ha and above or 18-hole golf courses. However, any differing approaches taken are required to be in line with the objectives of the EIA Directive.

Certain Member States have relied on other legislative regimes as an aid for setting thresholds for the purposes of EIA. For example, thresholds introduced by the Industrial Emissions Directive (the IED) are relied upon by some Member States in relation to Annex II (5)(e) "*Installations for smelting mineral substances including the production of mineral fibres*". The IED refers to the same activity in Annex I, point 3.4 "*melting mineral substances including the production of mineral fibres with a melting capacity exceeding 20 tonnes per day*".

2.9.2 EIA Guidance: Screening 2017

The Screening Guidance states that a "*common Screening approach*" is to be adopted by Member States as defined by Article 4.2 of the EIA Directive (i.e. by carrying out a case-by-case examination, setting thresholds or criteria or both). The requirements of a case-

by-case examination include that the developer must submit the information about the project in accordance with Annex IIA and, based on this information, the competent authority must make a decision on whether the proposed project is to be subject to the EIA procedure or not. There is considerable discretion afforded to Member States within this common approach in determining the grounds upon which an Annex II project may be subject to EIA but ultimately regardless of what approach is applied a Member State must ensure that every project that is likely to have significant effects on the environment is subject to an EIA.

The Screening Guidance summarises the amendments to the EIA Directive introduced in 2014 including:

- The amendment to Article 4.3 "*to clarify the possibility for the Member States to set thresholds/criteria to determine when Projects do not need to undergo Screening or an EIA, and/or thresholds/criteria to determine when Projects shall in any case be made subject to an EIA*";
- The introduction of Article 4.4 and Annex IIA which relate to the information to be provided by the developer and requiring the developer to take into account available results of other relevant assessments of environmental effects carried out under EU legislation other than the EIA Directive in Screening Annex II Projects;
- The introduction of Article 4.5 which requires the Competent Authority to make its determination taking into account the results of relevant assessments of environmental effects carried out under EU legislation other than the EIA Directive;
- The introduction of Article 4.6 which requires the Competent Authority to make its determination within 90 days from the date when the developer has submitted the information required in Annex IIA; and
- The Amendment of Annex III which details the relevant criteria to be considered when deciding whether EIA is required.

The Screening Guidance refers to the important role played by the CJEU in the implementation and interpretation of the EIA Directive, and a number of the amendments made to the EIA Directive in 2014 "*are a direct reflection of the clarifications provided in the CJEU's jurisprudence*".

The Screening Guidance suggests that there is variation among Member States in how they have approached screening Annex II projects. The EU-15 Member States[52] have taken a combination of approaches as follows:

- Simplified procedures for small scale development which are primarily used with a specific category of Annex II Projects that have a limited number of impacts which are well known on a Project to Project basis;
- Elaboration of Screening criteria by adopting thresholds which take into account the size, nature and location of the proposed development;
- Regulatory initiatives to combat project splitting; and
- Improved guidance on the application of screening procedures and publication of practical examples which explain the decisions reached.

By contrast, 10 of the EU-13 Member States[53] have taken a simpler approach and adopted thresholds/criteria for the screening of specific Annex II developments.[54]

The Screening Guidance states that the advantage of using thresholds/criteria only is that it is relatively straightforward, but where a project is below threshold it may still have significant effects on the environment. While Member States are given a level of discretion in establishing thresholds/criteria, this discretion is subject to the overriding limitation set out in Article 2.1 of the EIA Directive that Projects that are likely to have significant effects on the environment by virtue of their nature, size or location are to be subject to assessment. By contrast, the case-by-case method allows for a more complete and relevant assessment but takes up more resources as a method of screening.

2.9.2.1 Thresholds

The Screening Guidance considers thresholds and criteria in the context of EIA screening as quantitative or qualitative triggers which are used to include or exclude a project from requiring EIA. Thresholds are typically related to quantitative characteristics of the project such as the size (e.g. 20,000m^2) whereas criteria typically relate to qualitative characteristics of the project or its impacts (e.g. visual impact on the surrounding environment due to architectural characteristics).

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[52] The "*EU-15*" is made up of those member states that comprised the European Union from 1st January 1995, as follows: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and United Kingdom. The UK was a Member State at the time the guidance was published.
[53] The "*EU-13*" is made up of those member states that joined since 2004, as follows: Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia. Of those 13 member states, the following ten have taken a thresholds/criteria screening approach: Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Romania, Slovakia and Slovenia.
[54] Note that this guidance is from 2017 and approaches may have evolved in the interim.

The Screening Guidance states that there are two types of thresholds/criteria, exclusionary thresholds which identify projects as being exempt from EIA or EIA screening and inclusionary thresholds which identify projects for certain threshold values where, if the value is exceeded, EIA or EIA screening is required. Both types are designed to simplify the EIA process and facilitate the examination of the actual characteristics of the Project. Certain Member States have also set indicative thresholds which do not automatically trigger EIA or EIA screening but are in place to assist with case-by-case examinations. These approaches may be used in tandem in what is known as the traffic light approach, illustrated in the Screening Guidance[55] by the following Figure (2.1) below.

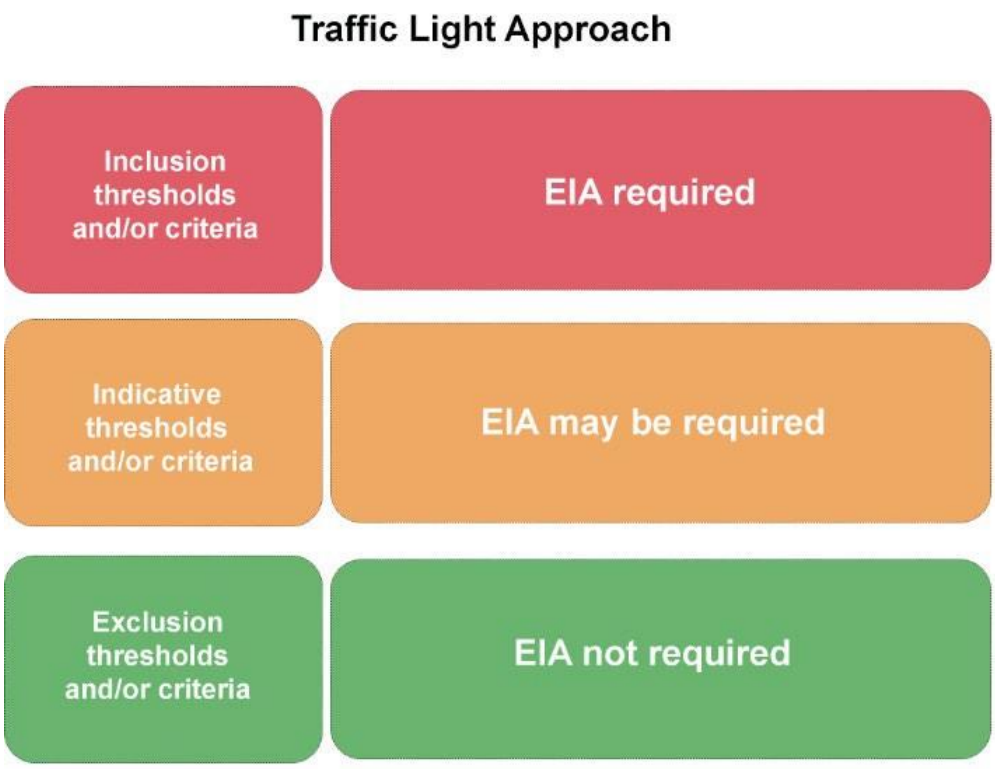

Figure 2.1 | Extract from EIA Guidance – Screening (2017)

Where exclusionary thresholds are used by Member States, the Member State may provide for exceptions to exclusionary lists if, for example, the project is located in specified environmentally sensitive locations or if the Project is likely to have significant impacts on a Natura 2000 site.

[55] At page 31 of the 'Screening Guidance' European Commission: Environmental Impact Assessment of Projects: Guidance on Screening (2017).

Some Member States, in transposing the EIA Directive into national legislation, have extended the requirements for EIA to project types that have not been included in Annex I or Annex II and some Member States require mandatory EIA for certain Annex II projects.

The Screening Guidance is clear that in establishing thresholds and/or criteria, Member States must ensure that no project that, by virtue of its nature, size or location, is likely to have significant effects on the environment avoids an assessment of these effects. Every project likely to have significant effects on the environment must be subject to an EIA and one mechanism of ensuring this is the use of a "*catch-all provision*" which allows the competent authority to decide that an EIA-procedure is required for an Annex II project whether the thresholds/criteria have been met or not.

The Screening Guidance states that the relevant selection criteria outlined in Annex III of the EIA Directive must be taken into account in establishing thresholds/criteria. This includes assessing a project's cumulative effects with other projects. Failure to do so may lead to projects which are likely to have significant effects avoiding assessment for the purposes of EIA altogether. The CJEU has interpreted the requirements of Article 4.2 and Article 4.3 of the EIA Directive in respect of the establishment of national thresholds/criteria, finding that thresholds/criteria which only take the size of projects into account and not all relevant selection criteria exceeds the limits of the discretion afforded under Article 2.1 and Article 4.2 of the EIA Directive.[56] Similarly, thresholds/criteria which, in practice, exempt projects of a certain type from requiring EIA assessment would exceed the limits of this discretion.[57]

Three different types of thresholds that are generally adopted by Members States are identified in the Screening Guidance, as follows:

- Project characteristics (e.g. size – 20ha and over);
- Project capacity (e.g. an output of more than 5MW); and
- Project location (e.g. a designated planning zone).

Where thresholds/criteria are set by taking account of only some of the relevant selection criteria (e.g. size-based thresholds) then the national legislation should provide for case-by-case examination of any selection criteria which are relevant for a category of project but are not taken into account in the thresholds/criteria that have been set. Certain Member States have amended their approach to thresholds/criteria in order to comply with the case law of the CJEU. For example, the Czech EIA thresholds were initially

[56] Case C-66/06 *Commission v Ireland*.
[57] Case C-392/96 *Commission v Ireland*.

based on project size exclusively but following an amendment in 2002 a screening notification is required for projects both above and below threshold, with different levels of information being required depending on whether the project is above or below the threshold. Certain other Member States operate without predefined thresholds. For example, in Germany projects are ranked in terms of magnitude or capacity and different types of screening apply depending on this rank. The different types of screening include mandatory EIA, a general case-by-case examination or a specific case-by-case examination. Specific case-by-case examinations are limited to investigations of projects that are planned to be located either in or close to environmentally sensitive areas.

2.9.2.2 Case-by-case Examination

The Screening Guidance sets out that a case-by-case examination is required to determine whether an EIA is necessary for a project where the project does not feature on an inclusionary threshold or an exclusionary threshold or where such thresholds/criteria have not been set. It is permissible for the information provided by a developer for the purposes of a case-by-case examination to be of a preliminary nature, a full account of any potential significant effects is not mandatory at this stage. However, certain basic information must be provided as per Annex IIA of the EIA Directive which includes details of the nature and function of the project as well as information on any construction works envisaged. Certain Member States have implemented national level requirements that are more detailed compared to Annex IIA, for example the German Environmental Assessment Act. Member States have also implemented differing approaches to the level of information required depending on the type of project involved.

A developer may also provide information on features of the project and/or measures which are anticipated will prevent what may otherwise have been significant adverse effects on the environment. This may influence the outcome of Screening for EIA.

Some approaches to case-by-case examination may require significant information about the environment. Such information may not always be available at what is a relatively early stage in a project. However, the approach taken to case-by-case examinations in Member States should be "*sufficiently robust*" to generate high quality decisions on the need for EIA to be carried out. Generic approaches may result in EIA not being applied for projects that do have significant effects on the environment.

Regardless of the approach taken, be it threshold-based, a case-by-case examination or a hybrid approach, it is imperative that national legislation ensures that projects likely to have significant environmental impacts are subject to an EIA prior to a decision being made on that project.

2.9.3 Other EU Commission Guidance

The Guidance on Integrating Climate Change and Biodiversity into Environmental Impact Assessment 2013[58] (the Climate Change and Biodiversity Guidance) seeks to help Member States in improving the way in which climate change and biodiversity are integrated into EIA. While this guidance does not specifically address thresholds/criteria in detail, the content of this guidance has likely influenced and will continue to influence thresholds/criteria and EIA more generally.

The EIA Guidance - Scoping 2017[59] (the Scoping Guidance) defines a threshold as *"a quantitative or qualitative standard against which the significance of a given environmental effect may be determined",* noting that thresholds are generally derived from scientific knowledge and are frequently included in regulatory standards. However, while thresholds can help to determine the significance of environmental effects, they are not necessarily certain. While it is easy to quantify performance against a legislative or scientific standard, certain effects can be more difficult to quantify and qualitative descriptions need to be used. Regardless, thresholds should be based on legal requirements or scientific standards that indicate a point at which a given environmental effect becomes significant.

The updated recommendation and guidance on speeding up permit-granting for renewable energy and related infrastructure projects 2024[60] (the Permit-Granting Guidance) identifies that most renewable energy projects are not automatically subject to mandatory EIA and states that Member States should establish clear thresholds or criteria in this regard while remaining within the parameters allowed by the EIA Directive.

[58] European Commission: Guidance on Integrating Climate Change and Biodiversity into Environmental Impact Assessment (2013).
[59] European Commission: Environmental Impact Assessments of Project: Guidance on Scoping (2017).
[60] Directorate: General Energy: Recommendation and Guidance on Speeding up Permit-granting for Renewable Energy and Related Infrastructure Projects (2024).

The following section of this report sets out an overview of the implementation of Articles 4.2 and 4.3 and Annex II of the EIA Directive across comparative jurisdictions – England, Belgium, France, Germany, the Netherlands and Austria – with a particular focus on the use of either or both inclusionary and exclusionary thresholds.

3.1 England

3.1.1 Overview

Annex II of the EIA Directive[61] is transposed in England by Schedule 2 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (the 2017 Regulations).[62] The 2017 Regulations apply to England only, except for provisions relating to projects serving national defence purposes in Scotland, Wales and Northern Ireland. The regulations apply to development which is subject to planning permission under Part III of the Town and Country Planning Act 1990.

If the project is listed in Schedule 1 of the 2017 Regulations, an EIA is required in every case. If the project is listed in Schedule 2 of the 2017 Regulations, the local planning authority should consider on a case-by-case basis whether it is likely to have significant effects on the environment. The 2017 Regulations list what are referred to as exclusion thresholds and criteria.

The 2017 Regulations prohibit the granting of planning permission or subsequent consent for EIA Development unless an EIA has been carried out.

EIA Development is defined in Regulation 2 as:

> *"development which is either –*
>
> *(a) Schedule 1 development; or*
>
> *(b) Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location.*
>
> *Schedule 2 development is defined as "development…of a description mentioned in Column 1 of the table in Schedule 2 where –*
>
> *(a) any part of that development is to be carried out in a sensitive area; or*
>
> *(b) any applicable threshold or criterion in the corresponding part of column 2 of that table is respectively exceeded or met in relation to that development*".

[61] EU legislation as it applied to the UK on 31st December 2020 when it became part of the UK domestic legislation under the control of the UK's parliaments and assemblies.
[62] The Town and Country Planning (Environmental Impact Assessment) Regulations 2017.

Screening is the procedure used to determine whether the proposed development is likely to have significant effects on the environment, usually at the beginning of the project. This is carried out by the consenting authority. Screening can also occur after a planning application has been made or after an appeal has been made. The Town and Country Planning (General Permitted Development) (England) Order 2015 grants a general planning permission ('*permitted development rights*') for several specified types of developments. Schedule 1 development is precluded from being granted permission for development unless the Secretary of State has directed that the development is exempt from the 2017 Regulations. In all other circumstances, Schedule 1 developments require the submission of a planning application and an Environmental Statement (in effect, an EIAR).

Schedule 2 development cannot be granted permission unless the local planning authority has adopted a screening opinion to the effect that an EIA is not required, or the Secretary of State has made a screening direction or directed that the development is exempt from 2017 Regulations. Under Schedule 2 of the 2017 Regulations, a developer is not obliged to seek a screening for the developments listed in this schedule and can proceed to prepare and submit an Environmental Statement in the alternative.[63]

Approach in the Devolved Nations

Whilst not the focus of this section, it is worth acknowledging that the approach in Wales, Scotland and Northern Ireland is similar to that in England. There is some difference in the approach in Scotland and Northern Ireland in relation to urban development. In England and Wales, the threshold for urban development includes more than 1ha of urban development which is not houses, or includes 150 houses or the overall area exceeds 5ha. In contrast, in Scotland and Northern Ireland the relevant threshold for urban development is where the area of the development exceeds 0.5ha. There is some slight divergence in what constitutes a sensitive area across the four nations but there is no substantive difference between what is captured in practice. In all four nations, there is an overarching '*safety net*' provision which is exercised by the central Government/devolved Government Ministers/Department, as applicable and provides the power to require any project to undergo EIA, notwithstanding those which fall below an exclusionary threshold.

[63] The requirements of this are set out in Regulation 18 of the 2017 Regulations and are broadly equivalent to that required in an EIAR under Irish law.

3.1.2 Integration of Annex II Thresholds

Schedule 1 of the 2017 Regulations provides for projects which automatically require an EIA, this replicates the projects in Annex I of the EIA Directive. If a proposed project is listed in Schedule 2 of the 2017 Regulations and exceeds the relevant exclusionary thresholds, the proposal must be screened by the local planning authority to determine whether significant impacts on the environment are likely and therefore determine whether or not an EIA is required. The thresholds are exclusionary thresholds below which no case-by-case examination is required, subject to certain exceptions. If a project is in a sensitive area, wholly or partly, it also needs to be screened, even if it is below the threshold. Sensitive areas are defined in Regulation 2.1. Sensitive areas include, for example, European Sites, a National Park within the meaning of the National Parks and Access to the Countryside Act 1949, a property appearing on the World Heritage List per the UNESCO Convention, the Broads, an area of outstanding national beauty as designated by Natural England, a scheduled monument within the meaning of the relevant legislation and land notified as sites of special scientific interest under the Wildlife and Countryside Act 1981.

Schedule 2 sets out a number of exclusionary thresholds for Annex II projects, including the following:

Column 1 Description of Development:	Column 2 Applicable Thresholds and Criteria:
3 Energy industry (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 15m.
10 Infrastructure Projects (b) Urban development projects, including the construction of shopping centres and car parks, sports stadiums, leisure centres and multiplex cinemas.	(i) The development includes more than 1ha of urban development which is not dwellinghouse development; or (ii) the development includes more than 150 dwellings; or (iii) the overall area of the development exceeds 5ha.

Schedule 2 of the 2017 Regulations contains an additional provision in relation to '*changes and extensions*' (see below). This threshold applies to all developments.

> *"13. Changes and Extensions –*
>
> *(a) Any change to or extension of development of a description listed in Schedule 1 (other than a change or extension falling within paragraph 24 of that Schedule) where that development is already authorised, executed or in the process of being executed.*
>
> *Either— (i) The development as changed or extended may have significant adverse effects on the environment; or*
>
> *(ii) in relation to development of a description mentioned in a paragraph in Schedule 1 indicated below, the thresholds and criteria in column 2 of the paragraph of this table indicated below applied to the change or extension are met or exceeded.*
>
> *(b) Any change to or extension of development of a description listed in paragraphs 1 to 12 of column 1 of this table, where that development is already authorised, executed or in the process of being executed.*
>
> *Either— (i) The development as changed or extended may have significant adverse effects on the environment; or*
>
> *(ii) in relation to development of a description mentioned in column 1 of this table, the thresholds and criteria in the corresponding part of column 2 of this table applied to the change or extension are met or exceeded.*
>
> *(c) Development of a description mentioned in Schedule 1 undertaken exclusively or mainly for the development and testing of new methods or products and not used for more than two years*".

3.1.3 Summary

In summary, England applies exclusionary thresholds to Annex II projects and does not have any inclusionary thresholds. Where a project meets or exceeds a threshold, EIA screening is required. Below the relevant thresholds, a project is not subject to EIA requirements unless all or part of the project is in a sensitive area in which case it is subject to EIA screening.

The 2017 Regulations also contain an over-arching '*safety net*' whereby the Secretary of State can require any project to undergo EIA, notwithstanding that it might fall below an

exclusionary threshold. This is contained in Regulation 5(6) and (7). However, it is understood that this is rarely used in practice.

Notably England's 2017 Regulations do not list the following types of projects:

- Projects for the restructuring of rural land holdings; or
- Initial afforestation and deforestation for the purposes of conversion to another type of land use.

These types of development are not consented through the English planning system; as such, EIA requirements are set out in separate EIA Regulations that are managed by the Department for Environment, Food and Rural Affairs.

3.2 Belgium (Wallonia Region)

3.2.1 Overview

Belgium is split into three different regions: the Brussels Capital Region, the Flemish Region and the Walloon Region.[64] Decision-making powers in Belgium are divided between three levels of government: the federal government, three language-based communities (French, Flemish and German-speaking) and three regions (Brussels Capital, Flanders and Wallonia).[65] Regions have powers in fields that are connected with their region or territory.[66] Accordingly, the EIA Directive has been implemented at the regional level in Belgium, resulting in different legal regimes in each Belgian region (i.e. Brussels, Flanders and Wallonia,). The following analysis is on the Walloon legal framework only.

The EIA Directive is currently given effect in Wallonia by a Decree of 24th May, 2018 (the Decree of 2018).[67]

This Decree modifies the Environmental Code applicable in Wallonia. Notably, it provides that:

> *"Art. D.64. § 1. The projects referred to in Annex II are automatically subject to an environmental impact assessment.*

[64] Belgium, a Federal State.
[65] European Union: Belgium: EU County Profile.
[66] The Powers of the Regions (Belgium).
[67] The Decree of 2018.

§ 2 The Government shall draw up a list of projects which, due to their nature, size or location, are subject to an environmental impact assessment, taking into account the relevant selection criteria referred to in Annex III".[68]

Paragraph 1 of Article D.64 refers to Annex II of the Decree of 2018 for projects that require a mandatory assessment and this replicates the projects in Annex I of the EIA Directive.

In parallel, paragraph 2 of the same Article states that the government must identify projects that require an EIA, based on certain criteria, outlined in Annex III of the Decree of 2018 (the same criteria as in Annex III of the EIA Directive).

The Walloon government has compiled a table listing all projects that require an EIA which are, in effect, inclusionary thresholds.[69] This table includes both the projects specified in Annex II and those deemed necessary to be subject to EIA by the government within its discretion deriving from Article 4.2 of the EIA Directive (and transposed in Article D.64§2 of the Decree of 2018). The table contains a very comprehensive list of projects.

Additionally, the Walloon government retains the authority to require an EIA for other projects on a case-by-case basis above certain exclusionary thresholds. This has been confirmed by the Belgian Council of State. In this regard, the Council of State, case n°244.694, 4th June 2019 *La Ville de Châtelet v. Région Wallonne*[70] is noteworthy, the Council of State referenced CJEU case law, which clarifies that:

"While Article 4(2) of Directive 85/337 grants competent authorities some discretion in determining whether a particular project requires an assessment, case law establishes that this discretion is limited by Article 2(1) of the directive, which mandates assessments for all projects likely to have significant environmental effects."

It is important to note that the scope of Articles 2 and 4 of Directive 85/337 is comparable to that of the current EIA Directive.

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[68] Informal translation from *"Art. D.64. § 1er. Les projets visés à l'annexe II sont soumis d'office à l'évaluation des incidences sur l'environnement.*
§ 2. Le Gouvernement arrête, la liste des projets qui, en raison de leur nature, de leurs dimensions ou de leur localisation, sont soumis à l'évaluation des incidences sur l'environnement, compte tenu des critères de sélection pertinents visés à l'annexe III."
[69] Walloon Project Table.
[70] Conseil d'État (13e chambre): Arrêt n° 244.694, 4th June 2019.

The Council of State concluded that, under the case law of Directive 85/337, "*all Annex II projects likely to have a significant environmental impact must undergo an assessment".*

The Council further concluded that the criteria and thresholds included in Article 4.2(b) of Directive 85/337 are designed to facilitate the evaluation of a project's specific characteristics in determining whether an environmental impact assessment is required or not.

As a result, when authorities review a project falling under Annex II of the EIA Directive they must assess whether, based on the criteria provided in Annex III, an EIA is necessary.

3.2.2 Integration of Annex II Thresholds

It is worth acknowledging that the Walloon government has identified over 90 categories of projects for which an environmental impact assessment is required.[71] The Walloon government has broadened the scope of projects that necessitate a mandatory assessment pursuant to the EIA Directive.

The table listing all projects that require EIA[72] details all project categories that should be considered. If the "*EIE*" box (or "*EIA*" in an English-language translation of same) is checked, the assessment is mandatory. Projects requiring a permit are identified as either Class 1 or 2 installations or activities depending on the threshold or criteria for the particular project. For most project types in the table, there are both Class 1 and Class 2 thresholds. All Class 1 projects are subject to mandatory EIA whereas most Class 2 projects are subject to a case-by-case examination. For those projects subject to a case-by-case examination, the developers are required to submit an EIA notice with their permit application. This is required to identify, describe and assess the direct and indirect effects of the project on the factors set out in Article 3 of the EIA Directive. The competent authority then determines, in light of the notice and taking into account the selection criteria in Annex III to the EIA Directive, whether the project is likely to have significant effects on the environment. If the competent authority determines that the project is likely to have significant effects on the environment an EIA will be required.

Projects falling below the permit thresholds identified in the table are not subject to EIA obligations. These are, in effect, exclusionary thresholds.

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[71] See Schedule A for more detailed information.
[72] Walloon Project Table.

Additionally, an administration may consider that a decision at an early stage of a project not listed in the table could still have significant effects on the environment and could require examination on a case-by-case basis.[73]

Wind Farms

In Wallonia, Annex II class 3 (i) *Installations for the harnessing of wind power for energy production (wind farms)* is addressed within Project Category 40.10.01.04. This project category defines wind turbines and wind farms as well as their site areas, with a windfarm consisting of one or more wind turbines. A wind farm with a total capacity of 3MW or more requires an EIA.

Urban Development Projects

As outlined above, the EIA thresholds are particularly detailed in Wallonia and a number of the thresholds that the Walloon government has elected to set fall under the category of urban development (Annex II Class 10(b)). By way of example, the following projects thresholds are set out in the Walloon legislation:

- A project for parking with a capacity of more than 750 motor vehicles requires mandatory EIA while a project for the parking of 51 to 750 vehicles requires case-by-case examination.
- A mandatory EIA is also required for a "*Subdivision project comprising an area of 2 hectares or more of lots intended for the construction of dwellings or the placement of fixed or mobile installations that can be used for habitation, including spaces reserved for the construction of various equipment and developments related to the implementation of the subdivision*".
- A mandatory EIA is required for a "*Retail store in which the sales premises and the premises adjoining them and used as a goods depot have a total surface area exceeding 2,500m^2, including the area occupied by counters and other furniture*".

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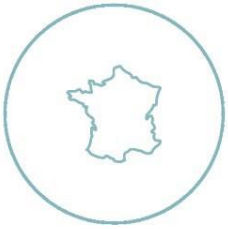
[73] See for example case Conseil d'État (13e chambre): Arrêt n° 244.694, 4th June 2019, which concerned a challenge on a Ministerial appeal to allocate a part of the municipal territory to a road (connecting two new commercial developments). Such decisions on the creation, modification or removal of a road are not listed under the Environmental Code as projects subject to EIA screening. Walloon law subjects the project for the construction of a road to EIA screening at the later stage of application for planning permission. The Court found that as the essential effects on the environment could be determined at the time of the municipal/Ministerial decision that EIA screening should have been carried out at that stage. However, on the facts of the case the court went on to find that an environmental impact study had been carried out and subjected to public enquiry that the municipality/Minister was aware of at the time, so the decision was not annulled.

Because of the considerable detail on the different categories of project in Wallonia, these have only been partially set out in Schedule A, but a full list can be found directly on the Wallonia Government website.[74]

3.2.3 Summary

In summary, the Walloon government has identified a very detailed schedule of projects for which EIA is mandatory and also includes a broad scope of projects that require screening for EIA on foot of a case-by-case examination by the competent authority. Projects falling below the permit thresholds are not subject to EIA obligations. The approach in the Wallonia region of Belgium can be described as a combination of inclusionary and exclusionary thresholds and/or criteria and a case-by-case examination.

3.3 France



3.3.1 Overview

France has implemented the EIA Directive in its Environmental Code[75] and in 2022 added a '*safety net*' provision to include projects falling below relevant thresholds.[76]

As permitted by Article 4.2 of the EIA Directive, France has decided to adopt both the case-by-case examination and the thresholds/criteria procedures to determine whether a project shall be made subject to an EIA.[77]

Under French regulations, the procedure for an EIA follows three steps:[78]

1) Preparation of an EIA report (known as an '*impact study*') by the project owner;
2) Consultation with the environmental authority, local authorities, and the public; and
3) Examination by the authority in charge of authorising the project.

In France, the obligations under Article 4.2 and Annex III have been transposed under Articles L. 122-1 et seq and R. 122-2 et seq of the French Environmental Code. The Nomenclature[79] is set in the Annex to Article R. 122-2 of the French Environmental Code.[80] Projects which, by their nature, dimension or location, are likely to have a

[74] Wallonia Government List.
[75] Articles L. 122-1 et seq and R. 122-1 et seq.
[76] The French Environmental Code.
[77] Annex to Article R. 122-2 of the French Environmental Code.
[78] Article L. 122-1 of the French Environmental Code.
[79] In this context, nomenclature means a system of classification of different categories of projects.
[80] The French Environmental Code: Appendices (Articles Annex to Article R122-2 to Annex to Section 1 of Chapter III of Title IX of Book V).

significant impact on the environment or human health must be subject to an EIA depending on criteria and thresholds defined by regulation and, for some of them, after a case-by-case examination.[81]

In particular, in its Annex, Article R. 122-2 categorises, essentially based on size, projects (i) automatically subject to an EIA (Column 2) or (ii) subject to a preliminary case-by-case examination (Column 3). This nomenclature currently lists 48 categories of projects (Column 1).

There is an automatic exemption for projects below the thresholds of the case-by-case examination. However, this inconsistency with the EIA Directive was rectified via the creation of a *'safety net' provision*,[82] under which even a small project can be subject to a case-by-case examination if it can potentially have significant effects on the environment (see below).[83]

Thus, a project will be subject to an EIA in the following cases:

1. The project falls within the scope of the systematic (i.e. mandatory) EIA;
2. The project falls within the scope of the case-by-case examination and the authority responsible for it concludes that the EIA is necessary; and
3. The project is below the thresholds of the nomenclature and is subject to a case-by-case examination the end of which examination the authority responsible for it concludes that the EIA is necessary. The case-by-case examination is undertaken either at (i) the request of the authority responsible for examining the first authorisation; or (ii) at the initiative of the project owner.

One important category set out in the nomenclature is the one regarding "*Installations Classées pour la Protection de l'Environnement*" (also known as ICPEs),[84] i.e. activities or equipment that are regulated for purposes of environmental protection.

ICPE regulations provide for different levels of permitting (mainly authorization, registration, or declaration, from the most stringent to the less stringent regime) for each activity or equipment, depending on volume, capacity, or power thresholds.

Under Article 1 of the nomenclature, all ICPEs subject to authorisation are either automatically subject to an EIA or to a case-by-case examination. All ICPEs subject to

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[81] Article L. 122-1, II, of the French Environmental Code.
[82] By Decree no. 2022-422 of 25th March 2022.
[83] A note on the application of the "*safety net clause*" has been published by the government and is available in French.
[84] Article 1 of the nomenclature.

registration are subject to a case-by-case examination. And, with the '*safety net*' provision, even ICPEs subject only to declaration can be subject to a case-by-case examination if they can potentially have significant effects on the environment.

In France, although there are thresholds and/or criteria for non-ICPE type developments as set out in Schedule A, there are six categories of ICPEs subject to authorisation that are automatically subject to an EIA:

1) Installations covered by the Seveso III Directive (Directive 2012/18/EU of 4 July 2012),
2) Quarries,
3) Windfarms,
4) Cattle farms,
5) Oil storage sites,
6) Geological storage sites.

Criteria for the Case-by-case Examination

Criteria, thresholds and the determination of projects falling within the case-by-case examination must be set according to Annex III of the EIA Directive.[85]

This Annex has been implemented via the Annex of Article R. 122-3-1 of the French Environmental Code, which includes the same three main criteria for the case-by-case examination:

1) Project characteristics,
2) Project location,
3) Type and characteristics of potential impacts.

In terms of the practical application of the procedures in France, in 2018 4747 Annex II projects were screened with 550 found to require EIA while in 2021 4855 were screened with 569 found to require EIA. This data is obtained from the European Commission '*Collection of information and data on the implementation of the revised Environmental Impact Assessment (EIA) Directive (2011/92/EU) as amended by 2014/52/EU*" Final Report, March 2024. The report notes certain limitations in the data that Member States were able to provide and therefore the dataset should not be considered a comprehensive record of projects screened for, or subject to, EIA in the relevant jurisdictions.

[85] Article L. 122-1, III, of the French Environmental Code.

Guidelines on the Nomenclature

The French Department of the Commissioner General for Sustainable Development (Commissariat Général au Développement Durable) published a Guide to the nomenclature set out in the Annex to Article R. 122-2 of the French Environmental Code.[86] According to this Guide:

- If, under the nomenclature, a project is subject to both the systematic EIA and the case-by-case examination, the systematic EIA will be applicable to the entire project (even if some parts are only subject to a case-by-case examination) and the case-by-case examination procedure will not be necessary,
- When a project falls under more than one of the articles of the nomenclature, an EIA is required if the project meets the thresholds and conditions of one of the applicable articles. In this case, a single EIA is carried out for the project,
- The authority responsible for the case-by-case examination has 35 days from the date of receipt of the complete form to examine the application. If the authority does not respond within this timeframe, the project owner must carry out the EIA.

Exemptions

Article R. 122-2, II, al. 3 of the French Environmental Code excludes from the scope of the EIA servicing, maintenance and major repair works, regardless of the projects to which they relate.

Two other ministerial exemptions are provided by French regulations:

(i) Projects serving national defence purposes (allowed by Article 1 of the EIA Directive),

(ii) Urgent civil projects.

3.3.2 Integration of Annex II Thresholds

Annex to Article R. 122-2 of the French Environmental Code, sets out thresholds under its Articles 1 (d) and 31 for windfarms, and Articles 39 and 41 (a) for urban development projects, as discussed below.

Wind Farms

Under French regulations, windfarms are included in ICPE regulations, and as such, fall within Article 1 of the nomenclature set out in the Annex to Article R. 122-2 of the French

[86] Guide de lecture de la nomenclature of March 2023.

Environmental Code. Offshore wind turbines also fall within the nomenclature (Article 31) and are automatically subject to an EIA.

Under Article 1(d) of the nomenclature, windfarms that are subject to a systematic EIA are those subject to authorisation under ICPE regulations,[87] i.e. windfarms:

- Including at least one wind turbine generator with the height of the mast and nacelle above ground level being ≥ 50m,
- Including only wind turbine generators with the height of the mast and nacelle above ground level being < 50m and at least one wind turbine generator whose mast and nacelle are ≥ 12m above the ground, where the total power installed is ≥ 20MW.

In other words, if the project is below these thresholds, it does not fall within Article R.122-2 nomenclature. However, as described above, under the '*safety net*' provision, it can still be subject to a case-by-case examination if the authority or the project owner requires it and will undergo an EIA if it is deemed to have significant effects on the environment.

For example, Courts upheld an EIA for a windfarm project because:[88]

- It gave a detailed description of the conditions under which the access tracks would be built, specifying that only 150m of forest tracks would be created,
- It added that the site facilities for the installation of the wind turbines would be uncompacted once the work would be completed in the sectors located outside the wooded area,
- Finally, it also showed that there would be no impact of run-off from the foundations on peat bogs, which are located 4km from the site.

Urban Development Projects

Under French regulations, this category falls within both Article 39 (for "*urban development projects, including the construction of shopping centres*") and Article 41 (a) (for "*construction of car parks*") of the nomenclature set out in the Annex to Article R. 122-2 of the French Environmental Code.

Article 39 applies to the category of "*Works, constructions and development operations*" which, depending on the dimension of the project, will fall either under the automatic EIA scope or the case-by-case examination.

[87] Windfarms are classified under Article 2980 of the ICPE nomenclature.
[88] Administrative Court of Appeal of Marseilles, 25th November 2010, no. 09MA00756.

Article 41 applies to the general category of "*Car parks open to the public, vehicle depots and collective caravan or mobile leisure home garages*". More specifically "*car parks open to the public*" fall within the scope of case-by-case examination, but only if they have 50 units or more. As such, if the car park has less than 50 units, it will not be subject to the nomenclature set out in the Annex to Article R. 122-2 of the French Environmental Code (unless the '*safety net*' provision applies).

For development projects under Article 39 of the nomenclature, it is the project in its entirety that needs to be considered to assess whether it falls within the EIA thresholds.

> *E.g., if the project is the development of a car park (which falls under 41 (a)) for clients of a future shopping centre, it is the whole shopping centre project with all its components (including the car park) that will fall under Article 39 thresholds.*

Development operations where the base area is greater than/equal to 10ha (Article 39(b)) falls within the scope of systematic EIA. When the project is an extension of an existing structure, even if the footprint of the extension is below 10ha, if the base area of the entire structure reaches this threshold, it will fall under the scope of the systematic EIA.[89]

Indeed, modifications and extensions to operations that have already been authorised, which result in the entire operation falling within the thresholds, or which *per se* reach these thresholds, are subject to a systematic EIA or to a case-by-case examination (Article R. 122-2, II of the French Environmental Code).

> *E.g., the modification of a sports complex project - previously authorised and exempted from environmental assessment - to extend its total surface area from 4.4 hectares to 10.2 hectares, results in the whole project falling within the scope of Article 39 of the nomenclature, which requires a systematic environmental assessment (Administrative Supreme Court, 20 October 2020, no. 433404).*

Car Parks Open to the Public of 50 Units or More (Article 41(a))

Under Article 41(a), a car park is defined as a space reserved to park vehicles that may be accessible during the day or at night. The car park is '*open to the public*' if it is associated with an '*establishment open to the public*"(within the meaning of Article R. 143-2 of the French Building and Housing Code), with or without charge and, more generally, if anyone can access it.

[89] Administrative Court of Amiens, 12th May 2021, no. 1900657.

As such, public or commercial car parks are included, while private car parks attached to housing, car parks exclusive to employees,[90] and car parks for vehicle fleets (taxis, buses, car garages) are excluded.

Project with Multiple Components

When a project has several components, each of these components may be covered by different articles of the nomenclature. However, if at least one part of the project falls within the scope of the systematic EIA, then the whole project is subject to EIA. If a project (e.g. a supermarket and a car park) is below the threshold of Article 39, but the car park is subject to a case-by-case examination under Article 41(a), then the entire project is subject to a case-by-case examination.

3.3.3 Summary

In summary, France applies inclusionary thresholds (where EIA is required), exclusionary thresholds (below which no EIA is required) and a case-by-case examination for projects falling between the inclusionary and exclusionary thresholds. However, France also has a safety-net mechanism through which a project falling below an exclusionary threshold can still be subject to a case-by-case examination.

3.4 Germany

3.4.1 Overview

Germany primarily implements the provisions of the EIA Directive through the Environmental Impact Assessment Act (Gesetz über die Umweltverträglichkeitsprüfung - UVPG).[91] Due to the separate legislative powers between the federal government and the federal states in Germany, there are some special regulations under federal state law (example: Art. 13 (2) BayESG (Bavarian Railway and Cable Car Act); Lower Saxony Environmental Impact Assessment Act (NUVPG)) which also implement provisions of the EIA Directive.

Germany has defined the projects subject to EIA to be determined by the Member States in accordance with Art. 4.2 of the EIA Directive in Annex 1 of the UVPG with corresponding threshold values (see Annex). EIA is a necessary part of the administrative procedures in Germany.

Projects requiring an EIA are listed in Annex 1 to the UVPG. German law differentiates between:

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[90] Ministerial Answer n° 36703, p 13289, 17th December 2013.
[91] UVPG: Environmental Impact Assessment Act.

- Projects which are subject to EIA (marked with 'X' in Schedule A to this report) i.e. an inclusionary threshold;
- General preliminary examination of the individual case: see Section 7(1) UVPG (marked with 'A'); and
- Location-specific preliminary examination of the individual case: see Section 7(2) UVPG (marked with 'S').

For most projects in Annex II of the EIA Directive, an EIA is only required in Germany if a preliminary examination reveals in the individual case that the project can have a significant adverse environmental impact. A distinction is made between a general and a location-specific preliminary examination. A location-specific preliminary examination relates to projects which have a small size or capacity value. They can only be subject to an obligation to perform an EIA if ecologically-sensitive areas can be impaired by the impact of the project.

The German policy on this is that the larger the planned project, the sooner an EIA must be carried out. At the lowest level is a location-specific preliminary examination of the individual case pursuant to Section 7(2) UVPG, at the medium level is a general preliminary examination of the individual case pursuant to Section 7(1) sentence 1 UVPG and at the highest level an EIA is required directly. The procedure to be followed in a location-specific preliminary examination and a general preliminary examination is outlined below:

- **Location-specific preliminary examination of the individual case:** The location-specific preliminary examination is carried out in two stages. In the first stage, the competent authority checks whether the new project has special local conditions in accordance with the defined protection criteria. If the examination in the first stage shows that there are no special local conditions such as ecological sensitivities, there is no obligation to carry out an EIA. If it shows that there are special local conditions, the authority shall carry out a second stage assessment, taking into account the criteria listed in Annex 3 of the UVPG, which considers whether the new project may have significant adverse environmental effects that affect the special sensitivity or the protection objectives of the area. The EIA obligation exists if the competent authority considers that the new project may have such environmental impacts.
- **General preliminary examination of the individual case:** The EIA obligation exists if the competent authority considers that the new project may have significant adverse environmental impacts.

Either an EIA is always required to be carried out (mandatory EIA) or only from a certain threshold value. Alternatively, a general preliminary examination of the individual case or a location-specific preliminary examination of the individual case may be required. Certain threshold values may also be relevant for the preliminary examinations.

In terms of the practical application of the procedures in Germany, in 2018 4195 Annex II projects were screened with 85 found to require EIA while in 2021, 4,147 were screened with 146 found to require EIA. This data is obtained from the European Commission '*Collection of information and data on the implementation of the revised Environmental Impact Assessment (EIA) Directive (2011/92/EU) as amended by 2014/52/EU)*' Final Report, March 2024. The report notes certain limitations in the data that Member States were able to provide and therefore the dataset should not be considered a comprehensive record of projects screened for, or subject to, EIA in the relevant jurisdictions.

The following guidelines have been published which are of assistance in considering the application of the EIA Directive in Germany:

- Guidelines of the Federal Ministry for the Environment, Nature Conservation, Nuclear Safety and Consumer Protection on the application and interpretation of the new EIA regulations.[92]
- General information on the environmental impact assessment.[93]

Guidance has also been published in relation to specific categories under Annex II of the EIA Directive, for example category 3(i) and 10(b).

- The term '*wind farm*' in the UVPG 2017 - legally secure and appropriate?[94]
- Brief summary of the EIA in relation to wind farms.[95]
- Overview of EIA projects in the federal states of Germany.[96]

Finally, it is considered noteworthy that, through this research it was found that there has been no specific German case law about the implementation of Article 4.2 of the EIA Directive.

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[92] Anwendung und Auslegung der neuen UVP-Vorschriften.
[93] Bavarian State Ministry for Environment and Consumer Protection: The Environmental Impact Assessment (EIA).
[94]: Der Windfarmbegriff im UVPG 2017: Rechtssicher und Sachgerecht?
[95] Umweltverträglichkeitsprüfung: Fachagentur Windenergie.
[96] UVP: Portale der deutschen Bundesländer.

3.4.2 Integration of Annex II Thresholds

As outlined above Germany primarily implements the provisions of the EIA Directive through its EIA Act or UVPG. In Annex 1 of the UVPG Germany defines the projects and corresponding threshold values, in accordance with Article 4.2 of the EIA Directive. The areas of focus of this report are discussed as follows:

Wind Farms

In accordance with No. 1.6 Annex 1 UVPG, the construction and operation of a wind farm with turbines with a total height of more than 50m is differentiated according to the number of wind turbines.

- For a wind farm consisting of 20 or more wind turbines, there is an obligation to carry out an EIA.
- For a wind farm ranging from six to less than 20 wind turbines, a general preliminary examination of the individual case must be conducted in accordance with Section 7(1) sentence 1 UVPG.
- For a wind farm ranging from three to less than six wind turbines, a location-specific preliminary examination of the individual case must be conducted in accordance with Section 7(2) UVPG.

As illustrated, there are both inclusionary and exclusionary thresholds identified for wind farms with a case-by-case examination between those thresholds. The exclusionary thresholds depend on whether the examination is general or location-specific.

Urban Development Projects

In accordance with No. 18.6 Annex 1 UVPG, the construction of a shopping centre, a large-scale retail operation or another large-scale retail operation is differentiated according to the floor area:

- For 5,000m^2 or more there is an obligation to carry out an EIA.
- For 1,200m^2 to less than 5,000m^2, a general preliminary examination of the individual case must be conducted in accordance with Section 7(1) sentence 1 UVPG.

In accordance with No. 18.7 Annex 1 UVPG, in the case of the construction of an urban development project for other structures, a differentiation is made according to the size of the floor area:

- For 100,000m^2 or more there is an obligation to carry out an EIA.

- For 20,000m^2 to less than 100,000m^2, a general preliminary examination of the individual case must be conducted in accordance with Section 7(1) sentence 1 UVPG.

As illustrated, there are both inclusionary and exclusionary thresholds for urban development projects with a case-by-case examination between those thresholds.

3.4.3 Summary

In summary, Germany applies exclusionary thresholds above which a preliminary examination is required to determine if an EIA is required. The exclusionary thresholds consist of both general and location-specific thresholds with the latter being lower. The general and location-specific preliminary examinations vary in their scope and focus.

Germany also has a small number of inclusionary thresholds for Annex II projects where EIA is mandatory.

3.5 The Netherlands

3.5.1 Overview

Article 4 of the EIA was initially implemented in the Netherlands by the Environmental Management Act (*Wet Milieubeheer*).[97] This has now been partially replaced by the Environment and Planning Act (*Omgevingswet*), which came into force on 1st January 2024.[98]

Paragraph 16.4.2 of the Environment and Planning Act addresses EIA (*Milieueffectrapportage* or *MER*), as follows:

> "*Article 16.43:*
>
> *(1) The projects and the necessary decisions shall be designated by governmental decree:*[99]
>
> *a.) which are likely to have significant effects on the environment and for which an environmental impact assessment must be carried out …*
>
> *b.) for which it is necessary to assess whether they are likely to have significant effects for the environment and, if so, for which an environmental impact assessment should be carried out when preparing the decision.*

[97] Regulation: Environmental Management Act: BWBR0003245.
[98] Regulation: Environment and Planning Act: BWBR0037885.
[99] In Dutch: *Algemene Maatregel van Bestuur*, a legislative measure to be adopted at the national level, by the competent minister.

(2) The competent authority will assess whether there are significant environmental effects as referred to in paragraph one, item b, unless the developer provides an environmental impact assessment when preparing the decision.

(3) In the assessment, the competent authority shall consider:

a.) the relevant criteria in Annex III to the EIA Directive,

b.) where relevant: the results of previous audits or other reviews of environmental effects on the basis of regulations, directives and decisions that have been obtained under Article 288 of the Treaty on the Functioning of the European Union.

(4) The governmental decree[100] may stipulate that:

a.) the designation of a project or decision only applies in designated cases,

b.) an environmental strategy, programme or part of a physical environment plan is regarded as a decision to be taken for a project.

(5) The developer shall prepare the environmental impact assessment".

Appendix V of the Environmental Decree 2024 sets out the routes through which a project may be subject to an EIA:

1. The project types are set out in Column 1.
2. Where there is a corresponding threshold in Column 2 those projects are subject to a mandatory EIA (this largely reflects the projects and thresholds set out in Annex I of the EIA Directive). However, there are certain other projects such as wind turbines that are subject to mandatory EIA (e.g. for a wind farm with 20 or more wind turbines).
3. Projects in Column 3 are subject to an EIA assessment obligation, in effect a case-by-case examination. Whilst the vast majority of projects contained in Column 3 do not have any inclusionary threshold and/or criteria, there are a small number of exclusionary thresholds including in relation to windfarms and airports. Projects of a certain type which either have no threshold and/or criteria in Column 2 or fall below any applicable mandatory threshold and/or criteria in Column 2 are subject to a case-by-case examination.

The authority responsible for carrying out EIA assessment is often the municipality (*gemeente*) in which the project is located. In 2021, the municipalities and the 28 regional

[100] Subsection (4) refers to the governmental decree mentioned in subsection (1).

Environmental Protections Agencies (*Omgevingsdiensten*) were responsible for a combined 779 out of 896 EIA-evaluations. Larger projects are usually the responsibility of provincial authorities or a Ministry. For example, regarding wind farms, the Environment and Planning Act provides that the responsible authorities are:

1) Municipalities if the installations have a power of up to five MW;

2) Provincial authorities if the installations have a power of up to 100MW; and

3) The Ministry of Infrastructure and Water Management (*Ministerie van Infrastructuur & Waterstaat*) in conjunction with the Ministry of Economic Affairs (*Ministerie van Economische Zaken*) if installations have a power over 100 MW.

Appendix V of the Environmental Decree 2024 (*Omgevingsbesluit*) contains a categorised list of projects where an EIA or an EIA-evaluation is required in the Netherlands. In essence, Appendix V is an implementation of Annex II of the EIA Directive. It differs from the Irish implementation of Annex II in that Dutch legislation contains barely any thresholds for EIA-evaluation. For example, Dutch law always requires an EIA-evaluation when a theme park is constructed, modified or expanded, irrespective of its size. Construction, modification or expansion of Annex II projects is generally subject to evaluation in the Netherlands. However, this does not result in many EIAs. Out of 906 EIA-evaluations in 2018 for Annex II projects, only three applicants were ordered to carry out an EIA. In 2021 the ratio was 15 EIAs out of 896 EIA-evaluations. This data is obtained from the European Commission '*Collection of information and data on the implementation of the revised Environmental Impact Assessment (EIA) Directive (2011/92/EU) as amended by 2014/52/EU)*' Final Report, March 2024. The report notes certain limitations in the data that Member States were able to provide and therefore the dataset should not be considered a comprehensive record of projects screened for, or subject to, EIA in the relevant jurisdictions.

3.5.2 Integration of Annex II Thresholds

The Dutch Environment and Planning Act, 2024 together with Appendix V of the Environmental Decree 2024 sets out the routes through which a project may be subject to an EIA, however as outlined above, there is limited use of thresholds for EIA-evaluation.

In terms of the focus areas of this report the research found that for urban development (Annex II Class 10(b) of the EIA Directive) the emphasis was firmly upon case-by-case assessment for urban projects involving '*construction, modification or expansion*' with no metric thresholds identified.

In relation to wind development, the Dutch system does however identify certain metric thresholds:

- EIA is mandatory for a wind farm with 20 or more wind turbines, and
- An EIA-evaluation is required in cases for construction, modification and/or expansion if there are three or more wind turbines.

Notwithstanding the analysis in section 2 in terms of CJEU case law, it is considered noteworthy to highlight some further Dutch jurisprudence to demonstrate the intricacies of the system which operates largely in the absence of thresholds. In this regard, the Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak Raad van State* or '*ABRvS*') is the highest general administrative court in the Netherlands, deciding on appeal in disputes concerning, *inter alia*, the Environment and Planning Act.[101] The following is a summary of some of the important ABRvS-decisions regarding this act.

Zandzuigbedrijf Gasselte B.V. v the Provincial Executive of Drenthe[102]

A Netherlands municipality received a permit application from Zandzuigbedrijf Gasselte B.V. for an expansion of an excavation for mineral resources in the municipality of Aa en Hunze covering an area of c. 18ha. The Appellant did not agree with the conclusion of the municipality that it is necessary to conduct an EIA since the Appellant claimed to have already examined all relevant environmental aspects in its EIA screening evaluation and that this study concluded that the project would not cause significant environmental effects. The Court, however, agreed with the municipality because, based on the '"*potential significant negative consequences*"' of the Appellant's project, an EIA-evaluation can be insufficient due to its lack of procedural safeguards as compared to an EIA. The proposed excavation was in the vicinity of a Natura 2000 site and there was going to be some loss of afforestation as part of the excavation, so the court found that the municipality's concerns regarding likely significant effects was not unreasonable.

Appeal of the [Appellant] in: the [Appellant] v the College of Mayor and Aldermen of De Ronde Venen[103]

A Netherlands municipality refused to grant the Appellant an environmental permit for an existing dairy goat farm with 1,000 dairy goats to allow for the expansion to 2,100 dairy goats within the existing buildings. The municipality decided on a precautionary basis to

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[101] Dutch judicial decisions are published on Rechtspraak.nl - Zoeken in uitspraken; they can be found by their ECLI code.
[102] ABRvS, ECLI: NL:RVS:2014:3546, 01-10-2014.
[103] ABRvS, ECLI: NL:RVS:2022:556, 23-02-2022.

refuse the permit on the basis that there may be an increased risk of pneumonia in people who live in the vicinity of a goat farm. The court found that the responsible authority has discretion in deciding if a project could have significant environmental consequences. However, authorities need proper justification to mandate an EIA and it must be established on the basis of generally accepted scientific insights that the activity for which the permit is requested poses the identified risks. An authority has quite some margin to decide on its policy, which may result in an authority deciding differently on whether an EIA is required in comparable cases.

Appeal of Kannes B.V. and [Appellant under 2] in: [Appellant under 2], and [Party] v the Municipal Executive of Het Hogeland[104]

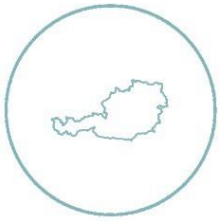
A Netherlands municipality granted an environmental permit for the conversion of a dairy cattle farm into a livestock farm for the keeping of 185 female young cattle, 400 dairy goats and 157 rearing goats. The municipality decided that no EIA was required for the proposed activity, because it could be ruled out that the activity may have significant effects on the environment. The Appellant did not agree with the permitted partial conversion to a goat farm, in particular because of feared odour nuisance and possible health risks. It was held that the court only marginally reviews an authority's decision. If the decision is based on wrong or incomplete information, in those circumstances the court does correct the authority. In this case, however the court found that the municipality was entitled to take the position that any health risks for those living in the vicinity of the livestock farm did not give rise to the need for an EIA, since generally accepted scientific insights into those health risks were lacking.

3.5.3 Summary

In summary, the approach in the Netherlands is largely based on case-by-case examination of Annex II projects with only a small number of inclusionary thresholds (above which EIA is required) and exclusionary thresholds (below which no EIA is required).

[104] ABRvS, ECLI: NL:RVS:2023:3555, 20-09-2023.

3.6 Austria



3.6.1 Overview

The EIA Directive is implemented in Austria via the Bundesgesetz über die Prüfung der Umweltverträglichkeit (Umweltverträglichkeitsprüfungsgesetz 2000, as amended – (UVP-G 2000).[105]

UVP-G 2000 was amended following the CJEU judgment in *Case C-575/21 - Wetinvest Hotelbetriebs GmbH v Magistrat der Stadt Wien (see CJEU case law section above)*.

Annex 1 to the UVP-G 2000 sets out a list of broad project types with criteria and thresholds separated into three columns.

For projects satisfying the thresholds and/or criteria in Column 1, an EIA is mandatory. This includes mostly projects in Annex I of the EIA Directive but also encompasses a small number of Annex II projects included where certain thresholds are met. The majority of Annex II projects are contained in Columns 2 and 3, this is explained further below.

For projects satisfying the thresholds and/or criteria in Columns 2, EIA in the simplified procedure, as defined in section 3 of the UVP-G 2000, is required.

Column 3 identifies projects in areas worthy of protection or areas subject to special requirements. Projects satisfying the criteria and/or thresholds in Column 3 are subject to a case-by-case examination and, if the case-by-case examination results in an obligation to carry out an EIA, the project is required to be subject to EIA in the simplified procedure. Areas worthy of protection are identified in Annex 2 and include conservation areas, Natura 2000 areas, UNESCO World Heritage Sites, water protection areas, alpine regions, areas where the air is already heavily polluted or near settlement areas. Where these location-specific criteria are satisfied, lower threshold values apply in Column 3 to bring the project into the scope of EIA as compared to the thresholds which otherwise apply in Columns 1 and 2.

In the case of projects listed in Annex I of UVP-G 2000 which do not meet threshold values or criteria but which together with other projects reach the respective threshold value or criteria, the consenting authority must determine on a case-by-case basis whether significant effects on the environment are to be expected due to an accumulation of the effects. For the purposes of cumulation, account is taken of other similar and spatially related projects which exist or have been approved, or projects which have been submitted for approval. A case-by-case examination is not required if the planned project

[105] RIS: Environmental Impact Assessment Act 2000: Federal Law Consolidated, Version: 8th January 2025.

has a capacity of less than 25% of the threshold value. If the case-by-case examination determines that an EIA is required, this is required to be done in the simplified procedure.

Where a case-by-case examination is being carried out, the consenting authority is required to take account of a number of criteria in relation to the projects impacts. The criteria in UVP-G 2000 essentially replicate the Annex III criteria from the Directive.

Note: We understand[106] that references to *EIA in the simplified procedure* relates to changes in the detailed procedures and requirements that an EIA project must undergo within the Austrian consenting system. To be clear, the full requirements of the EIA Directive remain applicable to all Austrian projects that require EIA, simplification thus relates to Austria's procedures around application and consent processes – for example the length and scale of public hearings required – which are reduced for those projects that undertake *EIA in the simplified procedure*.

In terms of the practical application of the procedures in Austria, in 2018, 79 Annex II projects were screened with six found to require EIA while in 2021, 78 were screened with two found to require EIA. This data is obtained from the European Commission '*Collection of information and data on the implementation of the revised Environmental Impact Assessment (EIA) Directive (2011/92/EU) as amended by 2014/52/EU)*' Final Report, March 2024. The report notes certain limitations in the data that Member States were able to provide and therefore the dataset should not be considered a comprehensive record of projects screened for, or subject to, EIA in the relevant jurisdictions.

3.6.2 Integration of Annex II Thresholds

As outlined above Annex 1 to the UVP-G 2000 sets out a broad list of project types with criteria and thresholds separated into three columns. Columns 2 and 3, relate to the majority of Annex II projects, including the areas of specific focus of this report, wind farms and urban development:

3(i) Installations for the harnessing of wind power for energy production (wind farms)

Wind Farms

In relation to installations for the harnessing of wind power for energy production (wind farms), Column 2 of Annex 1 to the UVP-G 2000 contains the following thresholds and/or criteria:

[106] Interpretation based on review of Austrian Regulations and follow-up discussions between this project's EIA expert (Josh Fothergill) and Austrian EIA academics at the University of Boku.

a) Installations for the use of wind energy with a total electrical capacity of at least 30MW or with at least 20 converters with a nominal output of at least 0.5MW each;

b) Installations for the use of wind energy above an altitude of 1,000m above sea level with a total electrical output of at least 15MW or with at least 10 converters with a nominal output of at least 0.5MW each.

Column 3 of Annex 1 also contains the following thresholds and/or criteria:

c) Installations for the use of wind energy in Category A areas worthy of protection with a total electrical output of at least 15MW or with at least 10 converters with a nominal output of at least 0.5MW each.

Category A areas include Natura 2000 sites, UNESCO World Heritage Sites and a list of other special protection areas as set out in Annex II to UVP-G 2000.

Urban Development Projects

Column 2 of Annex 1 addresses urban development projects, including the construction of shopping centres and car parks and contains the following thresholds and/or criteria:

a) Industrial or commercial parks with a land use of at least 25ha;

b) New development for urban development projects with a land use of at least 15ha and a gross floor area of more than 150,000m^2.

In addition, Column 3 of Annex 1 contains the following thresholds and/or criteria:

c) Industrial or commercial parks in areas worthy of protection in categories A or D with a land use of at least 10ha;

d) New development for urban development projects with a land use of at least 3.75 ha and a gross floor area of more than 37,500m^2 after carrying out a case-by-case examination;

e) Construction projects in UNESCO World Heritage Sites (core Zone) with a total height of at least 35m and a gross floor area of at least 10,000m^2, including conversions, provided that they are carried out at a height of at least 35m and with a gross floor area of at least 5,000m^2;

f) New construction of industrial or commercial parks with a use of unsealed areas of at least 10ha after a case-by-case examination has been carried out.

Certain of the project categories identified above are more likely to fall under the category 10(a) of Annex II of the EIA Directive but the Austrian legislature has presented these

projects together and there is a degree of overlap between them. This means some project types have been incorporated here which may fall outside the strict confines of category 10(b) of Annex II of the EIA Directive.

There are a number of other project categories identified in Annex 1 relating to urban development projects including for shopping centres, logistic centres, hotel accommodation and car parking which are set out in detail in Schedule A to this report.

3.6.3 Summary

In summary, Austria applies inclusionary thresholds for a small number of Annex II projects (at or above which EIA is mandatory) and exclusionary thresholds (below which no EIA is required). For projects which meet or exceed the exclusionary thresholds, a case-by-case examination is required. Austria also sets exclusionary thresholds at lower levels where certain location-specific criteria are met which are intended to protect specific sensitive areas. Austria does not have a safety net mechanism.

An analysis of the legislative text and thresholds in other comparative jurisdictions across their respective approach to implementation of Annex II was undertaken. The findings of this analysis across all Annex II categories set within the EIA legislation in Ireland, England, Belgium (Wallonia Region), France, Germany, the Netherlands and Austria is a significant document on its own and is therefore presented as Schedule A, to this report. Based on the scope of the research (see section 1.1) this section focuses on providing an overview analysis of two specific sub-categories of Annex II:

(1) Category 3(i) "*installations for harnessing wind power for energy production*" [section 5.1]
(2) Category 10(b) "*urban development projects, including the construction of shopping centres and car parks*" [section 4.2]

The analysis of the implementation in other comparative jurisdictions of Annex II Category 3(i) "*installations for harnessing wind power for energy production*" is presented in section 4.1 as Table 4.1. The analysis of '*urban development*' - as set out in Annex II Category 10(b) – identified a greater degree of interpretation of this sub-category than Category 3(i) across the comparative jurisdictions. Section 4.2 therefore provides a summary of the different types of '*urban development*' referenced across the comparative jurisdictions EIA legislation in Table 4.2. Further analysis of the types of thresholds applied in relation to Category 10(b) in both Ireland and the comparative jurisdictions is presented in Table 4.3. The full text from each jurisdiction under Category 10(b) (as translated for this study) is considerable and is therefore not presented in this summary analysis; for completeness it can be accessed by reference to the relevant section of Schedule A.

It is important to acknowledge that the analysis and summaries of the different thresholds adopted by other comparative jurisdictions, as in this section and across this report, have been subject to translation, with exception of England. Therefore, the local legislation, in its original language, in each jurisdiction should be directly consulted for compliance purposes or for further insight/research into any of the specific EIA regimes included in this study.

4.1 Focus on Category 3(i) within the Comparative Jurisdictions

Annex II Project:	
Jurisdiction	**3. ENERGY INDUSTRY** *3. (i) Installations for the harnessing of wind power for energy production (wind farms);*
Ireland	**Inclusionary threshold:** **Mandatory EIA**: Installations for the harnessing of wind power for energy production (wind farms) with more than five turbines or having a total output greater than 5MW. **Case-by-case examination** of projects less than thresholds [via preliminary examination and/or screening].
England	**EXCLUSIONARY threshold for projects below case-by-case thresholds:** **Case-by-case examination** of projects where: (i) The development involves the installation of more than two turbines; or (ii) the hub height of any turbine or height of any other structure exceeds 15m.
Belgium (Wallonia Region)	**Inclusionary threshold:** **Mandatory EIA**: Wind farm with a total capacity equal to or greater than 3MW electrical power. **Case-by-case examination** of projects less than thresholds.
France	**Inclusionary threshold:** **Mandatory EIA:** (1) **Wind farms subject to authorisation under** *Installation Classified for the Protection of the Environment* **(ICPE)**: -Including at least one wind turbine generator with the height of the mast and turbine above ground level greater than/equal to 50m **OR** -Including only wind turbine generators with the height of the mast and turbine above ground level less than 50m and at least one wind turbine generator whose mast and turbine are greater than/equal to 12m above the ground, where the total power installed is greater than or equal to 20MW. Opportunity for case by case below this via '*safety net*' provision, see section 3.3.1. (2) **Offshore energy production facility:** Offshore wind turbine.
Germany	**Inclusionary threshold:** **Mandatory EIA**: Wind farm with turbines with a total height of more than 50m each with 20 or more wind turbines. **Case-by-case examination** - From six up to less than 20 wind turbines: **General preliminary examination.** - From three up to less than six wind turbines: **Location-specific preliminary examination.**
The Netherlands	**Inclusionary threshold:** **Mandatory EIA:** For construction, modification or extension of a wind farm with 20 or more wind turbines (as set out in Column 2 of Appendix 5 of the Environmental Decree 2024). **Case-by-case examination** for construction, modification or extension if there are three or more wind turbines.
Austria	**Inclusionary threshold:** **Mandatory EIA:** a) Installations for the use of wind energy with a total electrical capacity of at least 30MW or with at least 20 converters with a nominal output of at least 0.5MW each; b) Installations for the use of wind energy above an altitude of 1,000m above sea level with a total electrical output of at least 15MW or with at least 10 converters with a nominal output of at least 0.5MW each; **Case-by-case examination:** c) Installations for the use of wind energy in Category A areas (as set out in Annex II to UVP-G 2000, e.g. Natura 2000 sites) worthy of protection with a total electrical output of at least 15MW or with at least 10 converters with a nominal output of at least 0.5MW each.

Table 4.1 | **Summary of Category 3(i) Thresholds in Ireland and the Comparative Jurisdictions**

4.2 Focus on Category 10(b) Within the Comparative Jurisdictions

An area of focus in this research was an examination of the definition of '*urban development*' projects across the comparative jurisdictions (section 3). Each Member State has a measure of discretion in translating the projects listed in the Annexes to the EIA Directive into their national legislation. The research found that the comparative jurisdictions, like Ireland, did not set out a precise definition of what is to be understood as '*urban development*'. The tables below (4.2 and 4.3) focus on different elements of this interpretation.

Table 4.2 summarises the different forms of '*urban development*' that are specifically listed in each jurisdiction within their respective legislative coverage of Annex II Category 10(b). Table 4.3 provides a summary of the approach applied to the establishment of thresholds related to Category 10(b) '*urban development*' across the comparative jurisdictions included in the analysis. Direct comparison of these thresholds across all the jurisdictions is not possible due to the different interpretation applied across the different jurisdiction (as presented in Table 4.2). A full comparison of the full text for Annex II under Category 10(b) (as translated for this project) across each jurisdiction can be found in the relevant section of Schedule A.

Annex II Project:	
Jurisdiction	**10. Infrastructure Projects** *10. (b) Urban development projects, including the construction of shopping centres and car parks;*
Ireland	Legislative thresholds refer to development of: - Dwelling units, Car-parks, Shopping centres, - Additionally the EIA Directive term '*urban development'* is also included with specific locational thresholds applied.
England	Legislative thresholds refer to development of: - Dwellings and dwelling house development, - Additionally the EIA Directive term '*urban development'* is also included with specific area based thresholds applied. Note: The legislation also lists sports stadiums, leisure centres and multiplex cinemas but no specific thresholds are set for them.
Belgium (Wallonia Region)	These projects are **not** considered as a single category by Walloon legislation, which is very detailed, a selection of relevant forms of '*urban development*' within the legislation include: - Parking of vehicles and real estate development (including: dwellings or the placement of fixed or mobile installations that can be used for habitation).
France	The French legislation for Category 10(b) is complex and does not link to specific forms of '*urban development*'. The legislation instead makes frequent cross reference to specific sections within the French Town Planning Code and applies an area-based threshold approach, a number of which are defined based on whether location of the development is within an area that has a local urban plan (PLU) or where a *municipal map* is applicable.
Germany	Legislative thresholds refer to development of: - Shopping centres (including large-scale retail business), car-parks, - Additionally '*other structural facilities*' in relation to '*urban development'* are listed with specific area thresholds applied. Note: For all forms of '*urban development*' the legislation refers to an expectation a development plan to have been drawn up.
The Netherlands	No specific forms of '*urban development*' are listed under entry J11 of Appendix 5 in Environmental Decree 2024 – the equivalent of Annex II's Category 10 (b) - the Decree's text states: Case-by-case examination for construction, modification and/or expansion.
Austria	The Austrian legislation in this area combines multiple areas, notably industrial, commercial and urban development. The relevant categories in the legislation refer to development of: - Shopping centres, logistics centres, sports stadia, golf courses, amusement parks, accommodation establishments (e.g. hotels or holiday villages), car parks, and construction projects in UNESCO World Heritage Sites (core Zone). - Additionally the term '*urban development project'* is also included with its own specific area based thresholds applied. The categories also include: Industrial or commercial parks; development of glacial ski areas, ski areas and new reservoirs for snowmaking purposes; and overhead power lines.

Table 4.2 | Summary Analysis of Forms of '*Urban Development*' Across the Comparative Jurisdictions

As can be seen from Table 4.2 above (and set out in more detail in Schedule A to this report), some Member States have implemented "*urban development*" by reference to discrete elements unique to their planning system and land use zoning, and others have referred to site size or floor areas. As a result, a direct comparison between Ireland's Schedule 5 (10)(b) thresholds for '*urban development*' is not possible across the full breadth of forms and thresholds applied within the comparative jurisdictions equivalent legislative categories.

The focus of our analysis – as presented in Table (4.3) below – therefore illustrates the range of measures and metrics in the screening criteria and thresholds found across the comparative jurisdictions in their respective transposition of the term urban development from Annex II 10(b). For brevity, the table is focused on the parameters to summarise the range of criteria used, with Schedule A of the report providing the full (translated) text of the details of the each of the comparative jurisdiction's systems.

Annex II Infrastructure Projects 10.(b)						
	Forms of criteria used in relation to *Urban Development* Thresholds (Yes/No + Summary)					
Jurisdiction	**Site Location** based		**Site Area** based		**Specific Details** based	
Ireland	**Yes**	- Business district - Built-up areas - '*Elsewhere*'	**Yes**	- Site area - Floor space	**Yes**	- Dwelling units - Car parking spaces
England	**No –** Note: Over-arching rules on location apply to <u>all</u> categories of Annex II proposed in '*sensitive areas*', [Section 3.1.4].		**Yes**	- Site area	**Yes**	- Number of dwellings
Belgium (Wallonia Region)	**No**		**Yes**	- Site area	**Yes**	- Real estate (dwellings) - Car parking spaces
France	**Yes**	Presence / Absence of: - Local urban plan (PLU) - municipal map. Or, in "*urbanised parts*" of municipality.	**Yes**	- Site area - Footprint - Floor space	**No**	
Germany	**Yes**	Related to presence of '*existing development plan*'.	**Yes**	- Floor space - Site area (car parks only)	**No**	
The Netherlands	**No**		**No**		**No**	
	<u>Note</u>: The Netherlands operates on a substantially case-by-case examination basis, see discussion of *Appendix V of the Environmental Decree 2024* [Section 3.5.1].					
Austria	**Yes**	- Specific categories of "*Areas worthy of protection*" - Construction in UNESCO World Heritage Sites (core Zone).	**Yes**	- Site area - Floor space	**Yes**	- Car parking spaces - Number of beds (e.g. hotels). - Height linked to UNESCO World Heritage Sites. - Cumulation with '*other development*' of defined size.

Table 4.3 | Analysis of Threshold Types for '*Urban Development*' Across the Comparative Jurisdictions

Considerably more variation exists in relation to both the form of development (Table 4.2) and types of threshold applied (Table 4.3) in relation to interpretation of the '*urban development*' category [Annex II, 10(b)] than in relation to Category 3(i) (Table 4.1). As a result of this variation in the inclusion of different forms of '*urban development'* across the jurisdictions it is not possible to provide a direct comparison of thresholds between Ireland and all of the jurisdictions in relation to category 10(b).

A summary of the thresholds and approach (mandatory EIA or case-by-case examination) for each other jurisdiction that does have a comparable form of development (e.g. in the case of dwelling units – England and Belgium's Wallonia Region) to a form included in the PDR is presented in Table 4.4 below. It should be noted that explicit comparison between the thresholds for each jurisdiction in Table 4.4 may not always be appropriate as the full detail across each jurisdictions legislation can also include additional detail and cross reference to other requirements within the jurisdiction's EIA legislation, as well as wider laws and planning codes. As such, Table 4.4 should be read as a general comparison alongside the related text in section 3 of this report; the reader is also referred to the table included as Schedule A of this report for the full text related to Annex II category 10(b) developments per jurisdiction.

Form of Development in Schedule 5 Part 2 (10)(b) of PDR:	Ireland's PDR Thresholds:	Jurisdictions including this form:	Related Threshold with Each Other Jurisdiction:
Dwelling Units	Mandatory EIA >500 dwelling units	**England**	Case by case examination if: - Includes >150 dwellings; or - Overall area exceeds 5ha.
		Belgium (Wallonia Region)	**Mandatory EIA** real estate development, subdivision comprising area of 2ha or more of lots intended for the construction of dwellings.
Car Parks	Mandatory EIA >400 spaces* * ["*other than a car-park provided as part of, and incidental to the primary purpose of, a development*"]	**Belgium (Wallonia Region)**	**Mandatory EIA** = Capacity of more than 750 motor vehicles. Case-by-case examination capacity from 51 to 750 motor vehicles.
		Germany	Car park "f*or which a development plan is drawn up*": - **Mandatory EIA** = 1ha or more: - General preliminary assessment = 0.5ha to <1ha
		Austria	**Mandatory EIA** = Car park with at least 1,500 spaces. Case-by-case examination for both: - publicly accessible parking spaces or parking garages in protected areas of category A, B or D with at least 750 spaces - open-space parking spaces, provided at least 1ha of unsealed areas are used for the parking area. ***Note***: Thresholds linked to parking spaces also referenced in relation to: *sports stadium, golf courses, amusement parks* and *shopping centres*.
Shopping Centres	Gross floor space >10,000m^2	**Germany**	**Mandatory EIA** = 5,000m^2 or more of permissible floor area General preliminary assessment = 1,200m^2 to <5,000m^2 permissible floor area.
		Austria	**Mandatory EIA** = Site area of at least 10ha or at least 1,000 parking spaces Case-by-case examination for both: - Area of at least 5ha or at least 500 parking spaces in category A or D areas worthy of protection; - Use of unsealed areas of at least 5ha.
"*Urban Development*"	Area >2ha in a business district* Area >10ha in other parts of a built-up area Area >20ha elsewhere * ["*business district" means a district within a city or town in which the predominant land use is retail or commercial use.*]	**England**	Case-by-case examination = >1ha which is not dwellinghouse development.
		France	**Mandatory EIA =** Creating a surface area of soil or development operations footprint ≥40,000 m^2 in an area other than in areas where: - A local urban plan (PLU) is applicable; - A municipal map is applicable; or - The urbanised parts of the municipality within the French Town Planning Code in absence of PLU or municipal map. **Mandatory EIA** = Development operations where the base area is ≥ 10ha. Case-by-case examination = - Floor area or footprint is ≥ 10,000 m^2. - Base area is between 5 and 10ha.
		Germany	**Mandatory EIA** = Total specified floor area 100,000 m^2 or more. General preliminary assessment = Total specified floor area 20,000m^2 to <100,000 m^2.
		Netherlands	Case-by-case examination = In case of construction, modification and/or expansion.
		Austria	**Mandatory EIA** = Land use of at least 15ha and gross floor area of >150,000 m^2. Case-by-case examination = A land use of at least 3.75ha and gross floor area of >37,500m^2.

Table 4.4 | Comparison of Threshold Criteria Between the Forms of '*Urban Development*' Included in the PDR and Where That Form is Present in Other Jurisdictions

5.1 Ireland's Approach Compared with the Other Jurisdictions

Ireland's implementation of Articles 4.2, 4.3 and Annex II of the EIA Directive in the planning system includes a combination of inclusionary thresholds and/or criteria and case-by-case examination. The inclusionary thresholds and/or criteria do not expressly refer to sensitive areas. However, in circumstances where all sub-threshold projects are subject to at least a preliminary examination, which must have regard to the Annex III criteria, the location of any proposed project will be a consideration in the decision whether or not to subject the project to EIA screening and/or EIA. The difficulties encountered in Irish case law appear to relate to the depth of enquiry of the preliminary examination, questions as to the application of the Annex III criteria and the adequacy of reasons for determining that no EIA screening or EIA is required.

From the other jurisdictions considered, it is clear that a number of different approaches have been taken to the implementation of the requirements of Articles 4.2, 4.3 and Annex II. Germany and Austria have implemented a combination of inclusionary and exclusionary thresholds and/or criteria whereby some Annex II projects are subject to mandatory EIA and some which are subject to a case-by-case examination. In Austria, some Annex II projects are subject to a simplified procedure. This research suggests that Austria's simplified procedure relates to the depth and detail of its own consenting procedures, with both the development and competent authority obligations satisfying the requirements for a full EIA under the EIA Directive. Austria does not appear to have any '*safety net*' provision, so in effect any project in Austria which falls below the lowest thresholds is not subject to any EIA requirements. Whilst Austria does apply case-by-case examination in respect of projects that may affect specifically identified sensitive areas, we do not consider this approach to be a true '*safety net*' as there are still exclusionary thresholds below which no EIA obligations arise.

Some of the jurisdictions considered have identified specific sensitive locations in their legislation which, if a development is proposed in their proximity, warrant assessment at lower thresholds than would otherwise be the case (e.g. England, Austria and Germany). In the transposing legislation in England, Germany and Austria sensitive areas are generally defined by reference to classifications which exist outside the EIA process, for example: Natura 2000, National Parks, UNESCO World Heritage Sites. Where a project has the potential to affect an identified sensitive area, the broad effect of the legislation in the aforementioned jurisdictions is to lower or remove thresholds where the project is in or near that sensitive area. Based on the research this was considered a prudent approach and accords with the overriding principle in Article 2.1 of the EIA Directive.

No matter how small the project, EIA could be required if there are likely significant effects on protected species or sensitive areas. It is not apparent in jurisdictions we have considered that there is any specific reference in legislation to protected species as a distinct consideration, however it would again accord with the overriding principle in Article 2.1 of the EIA Directive (and this has been made clear in cases such as *Shadowmill*).

It is of note that England and France have a specific '*safety net*' provision whereby the relevant authorised person or body has the power to subject any project to EIA regardless of the exclusionary thresholds in place. It would be very difficult to expressly legislate for every possible scenario therefore a '*safety net*' provision provides the flexibility to respond to unanticipated scenarios.

The absence of location-specific criteria in Austrian law for particular urban development projects was the subject of a finding of unlawfulness by the CJEU and led to amendments to Austrian law. Whilst the amended Austrian law addresses the shortcomings that led to a development in the vicinity of a UNESCO World Heritage Site not being subject to EIA, the amended legislation still ties the project location to a quantitative threshold. There is still no obvious '*safety net*' provision in the legislation for a small project that is likely to have a significant effect on the environment, which we think perpetuates the legal risk.

The Netherlands has taken a slightly different approach to the other jurisdictions considered. Apart from projects which are subject to mandatory EIA at certain thresholds, largely reflecting Annex I projects, all other projects falling within a particular project type are subject to a case-by-case examination without reference to any thresholds. There are very few inclusionary thresholds outside of the Annex I projects and no exclusionary thresholds.

5.2 Potential Implementation Options

We have set out below some potential options for approaches to implementing the requirements of Article 4.2, 4.3 and Annex II following our review of the other jurisdictions and the relevant case law:

1. Option 1 – **Case-by-case examination only (similar to the Netherlands)**

   Annex II projects are all required to undergo a case-by-case examination to determine whether EIA screening or EIA is required and there are no inclusionary or exclusionary thresholds and/or criteria.

2. Option 2 – **A modified '*traffic light*' approach that combines exclusionary thresholds and/or criteria + case-by-case examination (similar to England)**

Annex II projects are excluded from EIA below certain exclusionary thresholds and/or criteria. Projects at or above the exclusionary threshold and/or criteria are subject to a case-by-case examination to determine whether EIA is required.

3. Option 3 – **A modified '*traffic light*' approach that combines inclusionary thresholds and/or criteria + case-by-case examination (similar to Ireland)**

   Annex II projects are all required to undergo EIA at a certain inclusionary threshold and/or criteria. All sub-threshold projects are subject to a case-by-case examination to determine whether EIA screening or EIA is required.

4. Option 4 – **Full '*traffic light*' approach that combines inclusionary and exclusionary thresholds and/or criteria + case by case examination (similar to Germany, France, Austria and Wallonia to different degrees)**

   This approach applies both inclusionary and exclusionary thresholds and/or criteria to define the points at which EIA is required or excluded and in between these points a case-by-case examination is required. This option could also include a '*safety net*' as a catch-all to ensure projects falling below the exclusionary thresholds which are likely to have significant environmental impacts are capable of being subjected to EIA. This could give a designated person, for example the competent Authority or the Minister, the power to subject any project to EIA in a given case regardless of any exclusionary thresholds and/or criteria.

5. Option 5 – **Exclusionary thresholds and/or criteria only**

   This approach applies exclusionary thresholds and/or criteria only, so Annex II projects falling below the thresholds and/or criteria are not subject to any EIA requirements.

6. Option 6 – **Inclusionary thresholds and/or criteria only**

   This approach applies inclusionary thresholds and/or criteria only, so Annex II projects above the thresholds and/or criteria shall in every case be made subject to an EIA.

7. Option 7 – **A modified '*traffic light*' approach that combines exclusionary and inclusionary thresholds and/or criteria but no case-by-case examination**

   This approach applies a combination of both exclusionary and inclusionary thresholds and/or criteria only, but does not have any form of case-by-case examination.

5.3 Practical Implications of Implementing Options 1 to 7

There are some obvious practical implications for Option 1 above. If every Annex II project is subject to at least a case-by-case examination there will likely be a significant number of projects that are subject to examination unnecessarily. On the other hand, implementing hard exclusionary or inclusionary thresholds and/or criteria as in Options 5, 6 or 7 clearly creates a risk that a project falling below a threshold and/or criteria, which is likely to have a significant effect on the environment - in particular on a sensitive area and/or protected species – will be granted development consent without being subject to any consideration under the EIA Directive.

Therefore, clearly there is merit in having a combination of inclusionary and exclusionary thresholds and/or criteria and case-by-case examination as in Option 4, whereby some Annex II projects are subject to mandatory EIA, some Annex II projects are subject to screening and some which are subject to a case-by-case examination in certain limited circumstances (i.e. the "*traffic-light approach*" outlined in the Screening Guidance).

However, in light of the CJEU's decision in Case C-575/21 *Wertinvest Hotelbetriebs GmbH v Magistrat der Stadt Wien*, there appears to be significant risk in attempting to expressly legislate for all possible situations particularly where exclusionary thresholds and/or criteria are utilised in the absence of a '*safety net'* provision. The Austrian implementing legislation had included location-specific criteria for a significant number of projects but had not done so for the particular category of urban development project which simply had a threshold based on area and size. The Austrian legislation which has been implemented to address the CJEU's findings still couples the inclusionary thresholds and/or criteria with the location-specific criteria when, in reality, it may be possible that a project falling below the threshold and/or criteria could have significant effects on a sensitive site (e.g. as in that case, a UNESCO World Heritage Site). Similarly, as demonstrated by the Irish jurisprudence on preliminary examination (e.g. *Shadowmill* and *Jennings*), there will always be a possibility of a project having a significant effect on a protected species that is not associated with a sensitive area (e.g. bats). Therefore, even small projects that would ordinarily fall below exclusionary thresholds and/or criteria may require a '*safety net*' provision such that the project is subject to at least screening for EIA.

The approach in England is less prescriptive when it comes to sensitive areas. If a development is located in or partly in a sensitive area it must be screened for EIA, even if the project is otherwise below the thresholds and/or criteria. This appears to be a more precautionary approach than in Austria and accords with the overarching principle under Article 2.1 of the EIA Directive.

The preceding sections of this report have provided a comprehensive review of Ireland's existing statutory provisions, context from EU and recent Irish case law and information on how EIA screening thresholds are applied in a number of other European nations. This section builds upon that evidence to explore the forms of approaches to screening that exist within the scope of the EIA Directive's articles and the practical implications of implementing these approaches in practice.

EIA is recognised as an effective and practical tool for ensuring environment issues are effectively taken into account when determining applications for development consenting that are likely to have significant effects on the environment. However, there is increasing pressure on the national consenting systems as they seek to effectively and efficiently contribute to resolving complex challenges, including the need to speed up permit granting for renewable energy projects while ensuring environmental protection Directives are implemented appropriately. Reviewing EIA's effectiveness is a part of this process, to ensure the assessment is efficiently considering significant environmental effects and enabling timely decision-making.

This section of the report therefore explores the options, opportunities and challenges related to determining whether a project requires EIA, or whether a proposal does/does not require a case-by-case determination to make that decision.

The practice review below considers the following areas:

- **Section 6.1:** Provides an over-arching analysis of approaches to inclusionary and exclusionary thresholds, including understanding the general approaches to screening available to Member States (section 6.1.1) and from these available approaches identifies which provide a strong basis for a legislative system that effectively aligns with the requirements of Article 2.1 (section 6.1.2).
- **Section 6.2:** Presents practice analysis of each of the four options identified through section 6.1, presenting perspective of their strengths, challenges and opportunities in both a general context and in relation to Ireland's current approach to EIA screening.
- **Section 6.3:** Provides additional analysis of the three project sub-categories discussed in sections 4 and 5 – wind energy developments (section 6.3.1), residential dwelling units (section 6.3.2) and the broad concept of '*urban development*' (section 6.3.3).
- **Section 6.4:** Provides the conclusions across the expert analysis.

6.1 Analysis of Approaches to Inclusionary and Exclusionary Thresholds

6.1.1 Understanding the Approaches Available to Member States Under Articles 2.1, 4.2 and 4.3 of the EIA Directive

While appearing simple in concept, the requirement of Article 2.1 to apply EIA to "*projects likely to have significant effects on the environment*" has proven to be complicated to effectively implement across Europe. Sections 2.7 and 2.8 of this report demonstrate that there is considerable case law related to what are often termed screening thresholds in practice; however, these cases are simply the tip of the iceberg in relation to in country legal challenges to EIA screening decisions taken by competent authorities in the EU Member States and the United Kingdom. The issue often at question is the application of the relevant Member State's EIA legislation and the judgements made by the competent authority whose screening decision or consent award is being challenged.

As such, while Member States must ensure the legislative system they develop to meet the requirements of Article 2.1 is robust and compliant, the implementation of that system in practice will always retain a degree of risk of errors arising in its application to individual cases. In developing, or reviewing, a Member State's approach to the delivery of the screening approaches allowed under Article 4.2 and 4.3 there is therefore a need to consider both the direct compatibility of that system with the requirements of Article 2.1 and also the practicability of the delivery of the system within the Member State's consenting system.

This section of the report seeks to outline the approaches available to a Member State in the implementation of the requirements across Articles 2.1, 4.2 and 4.3.

6.1.1.1 Summarising the Requirements of Article 4.2 and 4.3 into Seven Clear Approaches

Article 4.2 allows Member States to determine which projects are likely to result in significant effects on the environment by developing systems that either:

a) Only use case-by-case examination to determine the status of each Annex II project that seeks development consent, or

b) Only use thresholds or criteria, defined by the Member State, to determine the relevant Annex II projects, or

c) Use a combination of threshold or criteria and case-by-case examination to enable the determination to be made.

In relation to b) and c), the 2014 amendments made to Article 4.3 clarified that where Member States develop thresholds or criteria these can take a number of forms, which can be summarised as:

a) **Inclusionary thresholds and/or criteria**– those that "*determine when projects shall in any case be made subject to an environmental impact assessment without undergoing a"* case-by-case examination,

b) **Exclusionary thresholds and/or criteria** – those that "*determine when projects need not undergo … an environmental impact assessment*", or

c) **Indicative Thresholds and/or criteria** - those that "*determine when projects need not undergo … the determination under paragraphs 4 and 5"*; in other words the trigger point that determines the distinction between when a case-by-case examination is and is not required.

It should be noted that unless a Member State includes some form of a '*safety net*' approach – to enable sub-threshold projects to undergo case-by-case examination – then an *indicative threshold* will also act as an *exclusionary threshold* by removing those projects that fall below it from any further need to consider whether EIA is applied.

Based on the above, the approaches Article 4.2 and 4.3 provide to a Member State can be presented in a Venn diagram (Figure 6.1 below).

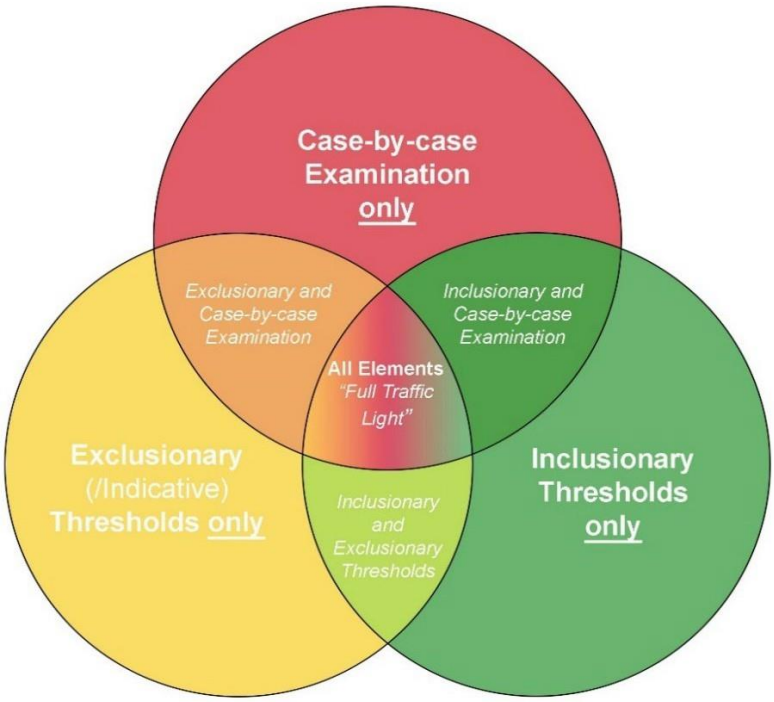


Figure 6.1 | Venn Diagram Summarising the Approaches Articles 4.2 and 4.3 set out to Member States in Implementing Their own System/s to Identify When an Annex II Project is Likely to Cause Significant Effects on the Environment

While the EIA Directive allows for systems either solely based on *case-by-case examination* (Article 4.2.a) or *thresholds or criteria* (Article 4.2.b) the opportunity described at the end of that article to combine these approaches generates seven broad approaches for a Member State. At the centre of Figure 6.1 is a system that combines all elements described across Articles 4.2 and 4.3. This is the so called '*traffic light*' system, as discussed in the EU's 2017 EIA Screening Guidance - section 2.9 provides further description and a copy of the EU *traffic light* diagram. Around the central area of Figure 6.1 are three approaches that combine two of the three potential methods available to Member States. These approaches are sometimes referred to as a '*modified traffic light*' system. Ireland's existing EIA legislative approach therefore applies one of the examples of a modified traffic light system – using *Inclusionary thresholds and case-by-case examination,* whereas England (section 3.1) applies a different form of the modified traffic light, exclusionary thresholds and case-by-case examination.

It should be noted that not all of the sections of the Figure 6.1 Venn diagram are equally likely to provide a Member State with an EIA system that can effectively meet the requirements of Article 2.1 that all projects with likely significant effects on the

environment undergo an EIA. The approaches within Figure 6.1 that could pose more significant risk around effective compliance are discussed in section 6.1.1.2 below, with the remaining four options reviewed in terms of their practical benefits and challenges within section 6.2.

6.1.1.2 Thresholds versus Criteria and the Need to Consider the Environment

There is no definitive answer in EIA practice as to what distinguishes a threshold from a criteria. It is often the case that EIA screening thresholds have tended to focus on details linked to the project type, whereas criteria often also include issues related to the environment. It is also the case that thresholds are generally considered to be quantitative in nature, as noted in the EU's EIA screening Guidance (2017), and as are found in Schedule 5 Part 2 of the PDR.

Criteria should clearly be considered to have a broader scope in relation to EIA, as Article 4.3 refers to the '*selection criteria*' in Annex III of the EIA Directive, which not only cover project related details, but also the receiving environment and the type of impact a development might generate. EIA guidance from the EU scale downward recognises that *criteria* often include qualitative factors that may require evaluative judgement to be applied, when compared to the more binary outcome driven by a quantified threshold.

The application of criteria – or at least non-project oriented quantified thresholds – within European screening approaches has tended to focus on whether the location of a proposed development overlaps/is within a designated environmental feature. In England, the 2017 Regulations provide an example, where any part of a proposed Annex II development is within a *sensitive area* (e.g. a National Park) a case-by-case examination is required to determine whether an EIA is or is not required. Many EU Member States apply similar approaches, including Austria and Germany, see sections 3.4 and 3.6 above. In contrast, Portugal[107] appears to have applied this approach in reverse, via its recent *Simplex* review of EIA legislation, with a recent conference presentation indicating that the need for EIA is now excluded for certain Annex II projects where proposed outside of a sensitive area.[108]

As set out in section 2.7, the European Court has ruled that solely using quantified thresholds related to details of a project (e.g. its output or land take) as a means of excluding development from the EIA process goes beyond the discretion the EIA Directive affords Member States. The PDR mandates that where an Annex II project is

[107] Portugal was not one of the other jurisdictions considered as part of this report, however.
[108] Lameiras, M and Jesus, J: New EIA Regulation in Portugal: A Step Backwards (2024).

above a certain (often) quantified *threshold* it must undergo EIA. However, proposals that fall below the thresholds in the PDR's Schedule 5 Part 2 are subject to case-by-case examination, requiring the consenting authority to apply their judgement across '*at least the nature, size and location of the development*'.[109]

From a practical basis the approach to the application of criteria within the existing Irish EIA system has a degree of ambiguity, as noted in the recent *Shadowmill* case (see section 2.8). The existing preliminary examination process defined in Article 103(1)(a) of the PDR lacks clarity as to whether the competent authority undertaking this activity must give any consideration to the relevant criteria set out in Schedule 7 of the PDR. Given that the outcome options available from a preliminary examination include concluding whether a project does or does not require EIA, this examination would appear to be delivering the function of a "*case-by-case examination*" as defined in Article 4.3 of the EIA Directive.

Article 4.3 requires that *case-by-case examination*s consider the relevant criteria in Annex III (transposed in Schedule 7 of the PDR). To ensure the effectiveness of Irish EIA practice it would be beneficial to clarify whether those undertaking the *preliminary examination* process must give consideration to the relevant criteria in Schedule 7 of the PDR. In practice such clarification could be achieved in multiple ways – from regulatory amendment, through a departmental circular, or via updated guidance. Any activity to improve clarity in this area is likely to prove most effective if it is also framed alongside advice on the intended depth of approach expected between the preliminary examination process and that applied through a full screening determination. Provision of improved and updated advice in this area could reduce/eliminate the risk of practitioners unnecessarily duplicating a deeper analysis, associated with screening determination.

6.1.2 Identifying the Article 4.2 and 4.3 Approaches that Provide for Clear Legislative Alignment with Article 2.1

Before undertaking an analysis of the practical benefits and challenges of screening options, we must consider if all seven of the conceptual approaches presented in Figure 6.1, above, provide an equally strong basis for compliance with the requirements of Article 2.1. There would be little value in exploring an approach in detail if it appeared to carry significant risks in terms of achieving the EIA Directive's requirements.

Figure 6.2, below, identifies three approaches that are identified as having such risk. The black shaded section of Figure 6.2 indicates that seeking to apply a system only based on exclusionary (or indicative) thresholds and/or criteria has severe limitations, explored in

[109] Article 103(1)(a) of the PDR.

section 6.1.2.1. The grey shaded areas on the same diagram note that there are also likely to be significant challenges that limit the viability of two further approaches. The grey shaded areas represent approaches that operate without any form of case-by-case examination and either *only apply inclusive thresholds and/or criteria*, or use a combination of both exclusionary and inclusionary thresholds and/or criteria. The functionality challenges of establishing these approaches are presented in sections 6.1.2.2 and 6.1.2.3 respectively.

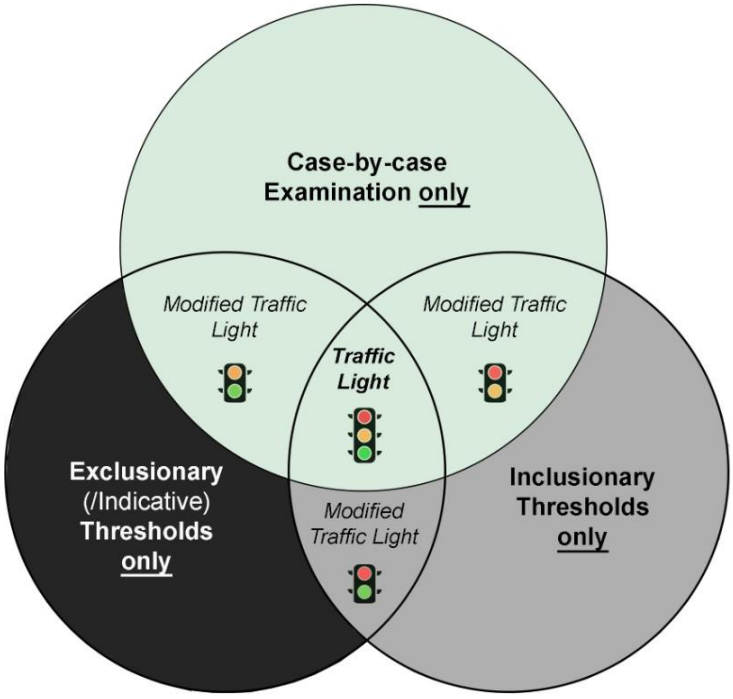


Figure 6.2 | Summary of Practicability of the "*Seven Approaches*" Available via Article 4.2 and 4.3

The four areas shaded green on Figure 6.2 above are considered to provide a more effective basis for demonstrating that the Member State has adopted an approach that strongly aligns with requirements of Article 2.1. They make up the four options that are subject to more detailed review of their practical benefits and challenges within section 6.2, below.

6.1.2.1 The Limitations of a System That Only Applies Exclusionary (/ Indicative) Thresholds and/or Criteria

A system that seeks to only use exclusionary thresholds and/or criteria – to remove certain projects from the need to undergo EIA – without the potential for case-by-case examination is likely to have severe limitations. To demonstrate this method complied with the requirement on Member States in Article 2.1 to "*adopt all measures necessary to ensure that… projects likely to have significant effects on the environment …. are made*

subject to a requirement for..." EIA, this method would appear to need to adopt one of the following systems.

a) **Set its exclusionary thresholds at such a low level that they effectively applied EIA to all projects that have any potential to lead to significant (positive or negative) effects on the environment**. Such an approach would be highly likely to result in EIA being applied to very large numbers of projects, many of which would have no real likelihood of actually generating significant environmental effects. As such, this approach to an exclusionary only system is not considered a practically viable approach for further review in this report.

Or

b) **The creation of highly detailed and specific exclusionary thresholds and criteria for each project type listed in Annex II**, the establishment of each having needed to consider the relevance of the 26 criteria set out in Annex III of the EIA Directive. As the only mechanism for determining whether EIA is or is not required is the legislative thresholds and criteria, the scope of these triggers would need to consider a very broad range of potential significant effects across different environmental factors (e.g. biodiversity, climate, heritage) and at different stages of project delivery (e.g. construction and operation). Such thresholds and criteria are likely to be elaborate in their detail and may prove complex and time consuming to create. The level of detail within such a system may make it more prone to opportunities for challenge, especially in relation to whether risks of significant effects on specific environmental issues have been adequately integrated. As such, this approach to an exclusionary only system is not considered a practically viable approach for further review in this report.

6.1.2.2 Proportionality Risks of a System that Only has Inclusionary Thresholds and/or Criteria

A legislative approach that only applies inclusionary thresholds and/or criteria – without the potential for case-by-case examination - is likely to require a disproportionate number of projects to undergo EIA in order to demonstrate the Member State had sought to "*adopt all measures necessary to ensure*" it was in compliance with Article 2.1 of the EIA Directive. In other words, if the only approach used to determine whether projects listed under Annex II require an EIA are inclusionary thresholds, they will need to be set at a very low trigger point to ensure they provide clear evidence of compliance with the EIA Directive.

Similarly to example a) under the *exclusionary threshold only*, section 6.1.2.1, this approach risks bringing many projects that are not likely to have any significant effects on environment within the Member State's formal EIA requirements. The result could lead to significant '*gold-plating*' beyond the requirements of the EIA Directive, which would add the need to conduct a formal EIA to far more developments and as a result require additional resources from developers and input from competent authorities, statutory consultees and the public.

Based on this analysis a legislative approach to screening Annex II developments that only uses inclusionary threshold and/or criteria is not considered further in this report.

6.1.2.3 Practicality of a System that Only Utilises Thresholds and/or Criteria (Without the Option for Case-by-case Examination)

This approach would use different thresholds and/or criteria within the Member State's EIA legislation to establish whether projects do or do not require EIA. The approach does not include the opportunity for case-by-case examination; as such, the combination of thresholds and/or criteria must be capable of delineating the risk of significant effects across all projects.

Article 4.3 of the EIA Directive would require any thresholds and/or criteria in this system to be developed with consideration given to the relevant criteria from Annex III. The jurisprudence of the domestic and European courts – discussed in sections 2.7 and 2.8 above – is clear that such thresholds and/or criteria would need to consider the inclusion of qualitative environmental aspects (e.g. absorption capacity, cultural significance, cumulation of impact with other projects) alongside more familiar and often quantified project characteristics (e.g. land take, floorspace, production capacity). As this approach is solely based on legislatively defined thresholds and/or criteria, these triggers are likely to require far more elaboration – in depth and detail – than currently applied across Ireland and the other country examples discussed in section 3. As discussed in bullet b) in section 6.1.2.1 (exclusionary thresholds only), seeking the implementation of highly detailed thresholds and criteria could prove more prone to challenge.

A further risk with this type of approach is that the boundary between whether a project is or is not likely to have a significant effect on the environment is often context specific. It is rarely the case that a distinct and widely accepted boundary exists across all environmental factors for a type or scale of project that is considered to be the point where significant effects begin. As such, an approach that applies inclusionary and exclusionary thresholds and/or criteria that seek to establish a distinct/binary boundary – as illustrated on the lefthand side of Figure 6.3 below – is likely to prove difficult to both

define and agree. The righthand side of Figure 6.3 recognises that there is often a gap where there will be context specific uncertainty as to whether a project is or is not likely to have significant environmental effects and such information should play a role in determining whether a project is required to undertake EIA, or not.

Defining a combination of different thresholds and/or criteria in EIA legislation that seeks to resolve such a gap may be possible but would be needed for each of the project sub-types listed in Annex II. Establishing such elaborate and in-depth combinations of thresholds and criteria is likely to prove complex to both establish in legislation and implement in practice. In Ireland and the other country examples in section 3, project proposals that fall into the uncertainty gap of significance (Figure 6.2) are generally resolved using case-by-case examination; however, such examination is not a component of this approach. Based on this analysis a legislative approach to screening Annex II developments that only uses inclusionary and exclusionary thresholds and/or criteria is not considered further in this report.

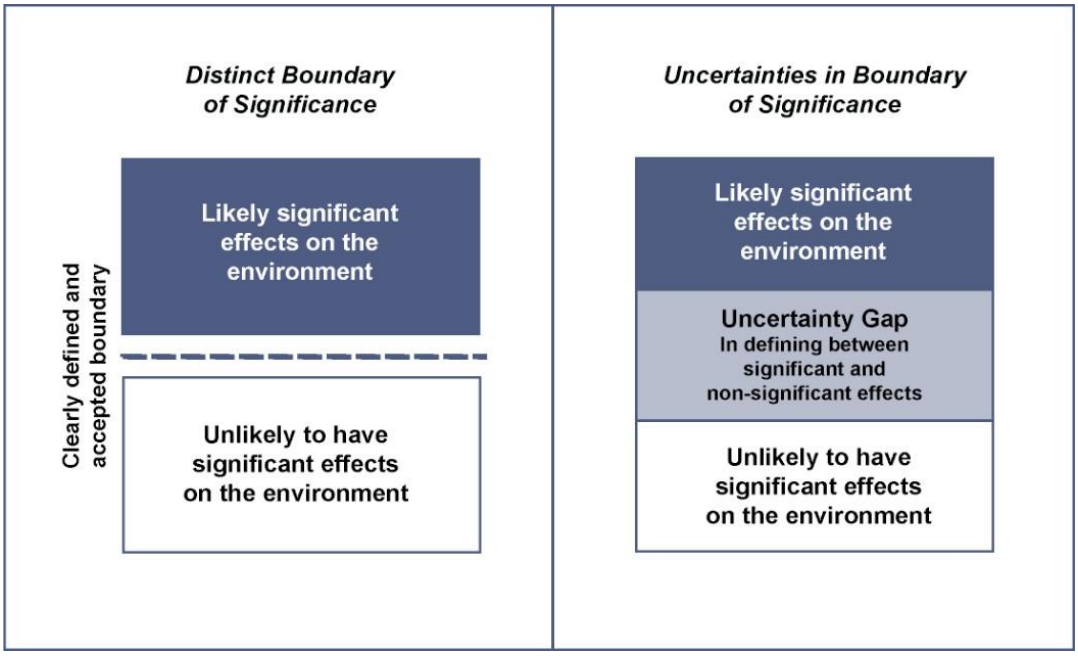


Figure 6.3 | Understanding of the Boundary Between Projects that are Considered Likely to Have Significant Effects on the Environment and Those That are not

6.2 Analysis of Options

In light of the above, the expert review has identified four broad options for analysis of their potential benefits and challenges. They are:

> **Option 1**: Case-by-case examination only;
>
> **Option 2**: A modified traffic light approach that combines exclusionary (/ indicative) thresholds and/or criteria and case-by-case examination;
>
> **Option 3**: A modified traffic light approach that combines inclusionary thresholds and/or criteria and case-by-case examination; and
>
> **Option 4**: A complete traffic light approach containing all elements – inclusionary thresholds and/or criteria, exclusionary (/indicative) thresholds and/or criteria and case-by-case examination.

The options are presented in Figure 6.4 (below), which presents where Options 1 to 4 sit within the previously discussed Venn diagram and below this provides a visual representation of what each option could look like in practice as conceptually applied to wind power installations. The practical implications of each option are then considered in sections 6.2.1 to 6.2.4 respectively. In each case general analysis is presented followed by contextualising the option in light of Ireland's existing EIA legislation and the review draws on examples and guidance as relevant.

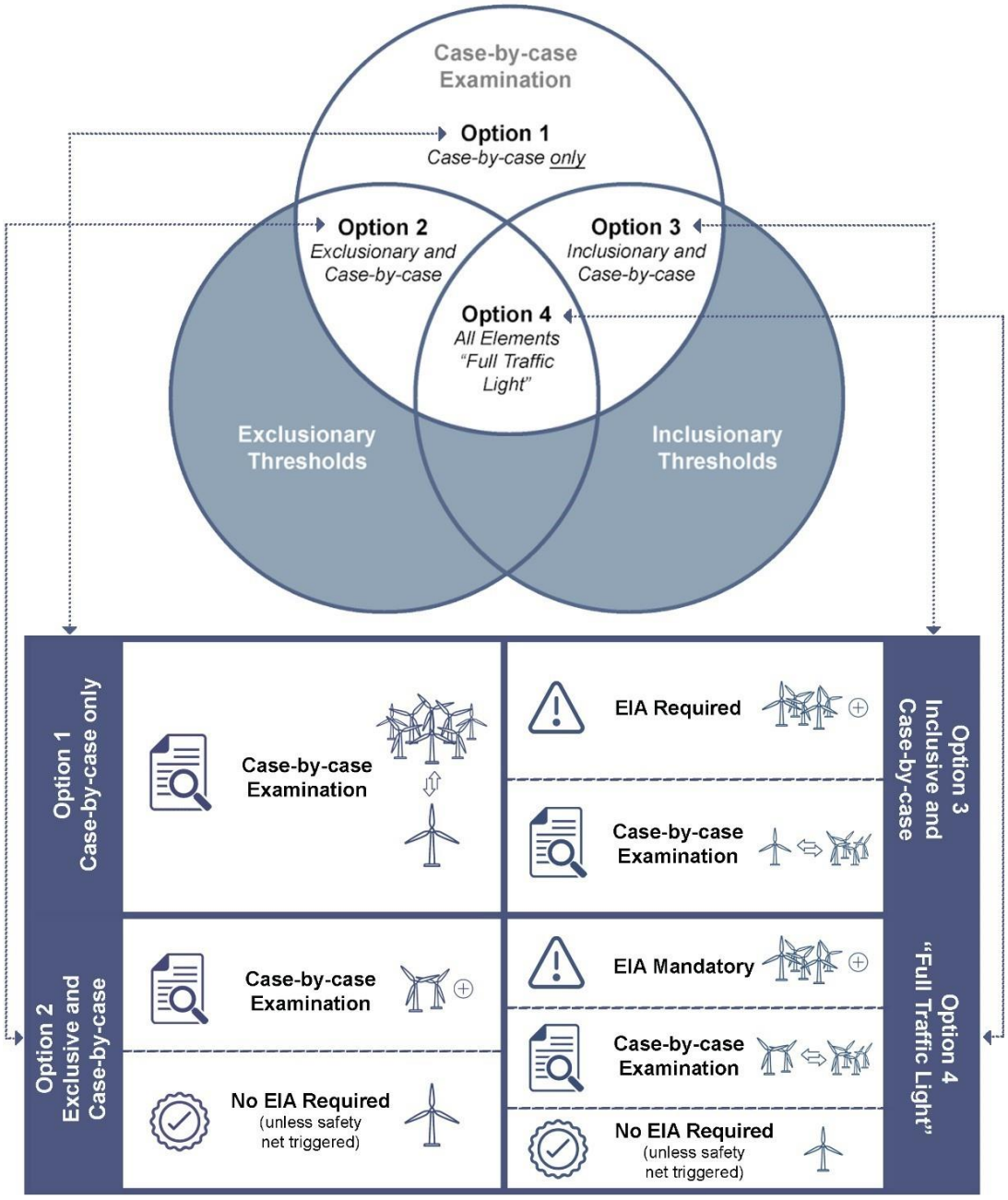


Figure 6.4 | The Four Options That are Explored in Relation to Their Practicability (Venn Diagram) and a Visualisation Representation of Each Option's Approach (Table with Wind Power Installations as a Conceptual Example)

6.2.1 Option 1: Case-by-case Examination Only

This approach involves a case-by-case examination for each Annex II project that seeks consent, Figure 6.4 *Option 1*. Decisions on whether an EIA is needed are made individually, generally by staff working for the competent authority responsible for determining the consent. While there do not appear to be any Member States that apply a true case-by-case only approach, the new EIA legislation in the Netherlands (see section 3.5, above) only includes thresholds for a small number of Annex II projects. As such, the

revised EIA system in the Netherlands appears to have implemented a case-by-case only approach across the majority of Annex II project types.

The clear benefit of this approach is that it should ensure that direct evidence of compliance with Articles 2.1 and 4.3 of the EIA Directive is available for every Annex II project brought forward. As such, if applied effectively the *case-by-case only* approach offers the potential to deliver a publicly available screening determination that justifies why each and every proposed Annex II development either is or is not likely to generate significant effects to the environment (Article 2.1 compliance). In addition, such a system would need to comply with Article 4.3 and thus every screening determination issued will have been expected to give due consideration to the Annex III (Schedule 7 of the PDR) criteria. It must therefore be recognised that an Option 1 system is likely to require the most resources across the four options (Figure 6.4) in terms of documentation and staff time to deliver it.

Without the inclusion of any thresholds, this approach to reviewing Annex II projects against the requirements of Article 2.1 would require all projects of a type listed to comply with Article 4.4 and 4.5 of the EIA Directive. That is to say that an Option 1 system would require a full screening determination. Developers would therefore be required to submit the Annex IIA (Schedule 7a of the PDR) information alongside their application and the consenting authority would be required to deliver a complete screening determination including a publicly available justification of their reasoning for either requiring EIA, or not. The only exception to the above in such a system would be where a developer voluntarily chose to apply EIA to their project and thus submitted an EIAR alongside their application, removing the need for a case-by-case examination.

An Option 1 system offers less certainty for developers of projects commonly considered to be likely to generate significant environmental effects when compared to Options 3 or 4 systems (Figure 6.4); those systems containing inclusionary thresholds that provide a clear direction to developments considered to have greater environmental risks. Under Option 1 a developer will need to include time in their programme to allow time for a screening determination to be made, or they will need to make their own decision and elect to undertake an EIA. Where the screening determination identifies the need for EIA, developers would then need to add this into their pre-application process, risking delays. It should also be recognised, however, that a *case-by-case only* approach offers a more refined approach meaning that projects that would have required EIA under a legislative inclusionary threshold can be judged on their own specific context and may not be found to pose risk of significant environmental effects.

The EU's 2024 review of the EIA Directive's implementation by Member States[110] includes a review of a series of screening examples from different countries in an attempt to summarise the implications of case-by-case screening to both developer, in compiling Annex IIA information, and consenting authority, in making a determination. Across the examples the report finds that the average time taken for a competent authority to make a screening determination is 86 days, with seven of the 11 examples delivering the decision beyond the target set in the respective Member State's EIA legislation. The resource implications to a competent authority of case-by-case screening are found to be far lower to those required to handle a full EIA application, as would be expected. However, the review (Table 15 in the EU report) found a considerable range of resource implications for making a screening decision with the shortest being 20-30hrs and the longest – an example from Denmark – taking nearly 250 hours of inputs. These times do not include the time a developer would take to compile the Annex IIA information and submit it; however, it must be recognised that in many instances developers will be expected to gather some information on environmental risks as part of general consenting requirements, outside of these EIA requirements.

The EU's 2024 review of the EIA Directive's implementation by Member States also finds that those involved in the case examples reported that the screening process had a positive influence on a project. This is noted across Table 23 (of the EU's report) with 60% of those who responded indicating the result improved consideration of the proposal's effects on environment, the remainder being unclear as to how screening had influenced the environment. In terms of positive consequences, the most common identified in the EU's 2024 review were greater prioritisation of the environment in a developer's project planning and the identification of environmental mitigation measures at an early stage.

Finally, any system with heavy reliance on case-by-case examination will require those undertaking the process to be well trained with access to suitable guidance to help support the process. This would need to be supported through increased resourcing, capacity building and the development of effective guidance. It is arguable that the frequency of such examinations in a *case-by-case only* system could result in the individuals responsible for this work becoming highly proficient and therefore less likely to make mistakes, when compared to the lower frequency of such examinations in the other options set out in Figure 6.4. However, it must be recognised that any system that relies

[110] European Commission: Collection of Information and Data on the Implementation of the Revised Environmental Impact Assessment (EIA) Directive (2011/92/EU) as amended by 2014/52/EU), Final Report (March 2024).

on frequent case-by-case determinations will, on occasion, result in procedural errors and ineffective judgements both of which have the potential to be challenged through the courts. Option 1 therefore places significant responsibility on each of the competent authorities that undertake case-by-case screening to ensure that those staff responsible for the task have adequate training, support and supervision.

6.2.1.1 Contextualisation to Ireland

Option 1 would involve a moderate change in Ireland's existing approach to defining which projects listed in Schedule 5 Part 2 of the PDR (Annex II EIA Directive) require an EIA. The current inclusionary thresholds within Part 2 of the Schedule would need to be removed, which under the 2024 Act would require secondary legislation and related consultation. The consultation would need to justify the change in approach and may raise concerns, for example, as it would remove the certainty that is currently achieved through the well-established and understood inclusionary thresholds.

Based on the current PDR, the resulting system would be one that would expect all applications for development of a type listed in Schedule 5 Part 2 to undergo preliminary examination at the point of submission (Figure 6.5). This would generate an increase in resource needs for consenting authorities (e.g. An Bord Pleanála and planning authorities) as those projects at, or above, the current PDR's thresholds would instead need to undergo at least preliminary assessment and in some cases subsequent screening determination. **This could also have a knock-on consequence of increasing the burden on developers from a potential for a more frequent need to gather and submit the content specified under Schedule 7A.** The potential outcome of such preliminary examinations would be the same – No EIA Required/Screening Determination Required/EIA Required. As such, Option A would provide the potential that some projects that currently require EIA, via the existing inclusionary thresholds, could be found not to need an EIA based on the competent authority's case-by-case examination.

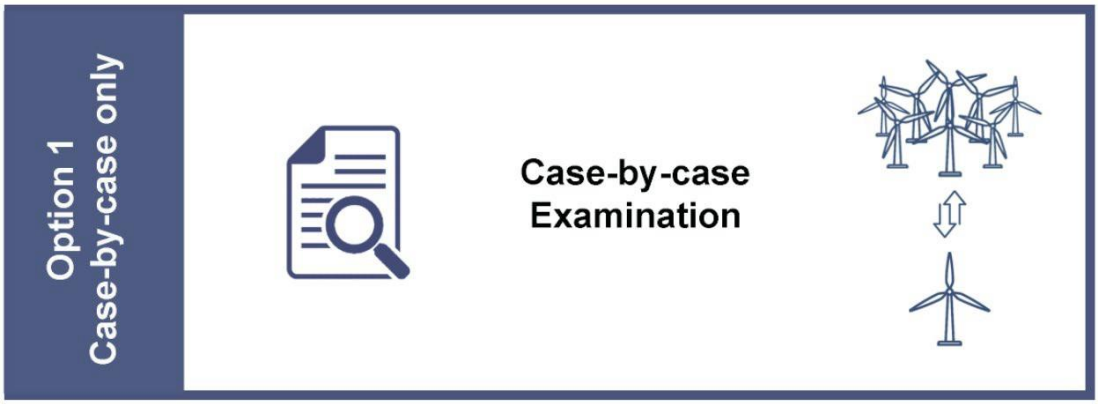


Figure 6.5 | Visualisation of an Option 1 Approach as it Could Apply to Wind Power Installations

It must be noted, however, that it is unclear whether an Option 1 approach would allow for the application of a preliminary examination approach, as currently employed via Article 103 (1)(a) of the PDR. This is due to the wording of Article 4.3 of the EIA Directive, which allows a Member State to establish thresholds and/or criteria to rule out an Article 4.4 (screening) determination. Given that an Option 1 system does not apply any thresholds, the operation of this approach may require a full screening determination in all cases. The scale of analysis required would still be able to be amended between each case-by-case determination based on its specific circumstance but there would be a need for a developer to provide the information required by Annex IIA (Article 4.5 EIA Directive) and the need for the competent authority to consider which of the criteria across all those set out in Annex III would appear to be a requirement in all cases under this approach.

Beyond the above, developers of projects that currently require EIA – as they sit well above an inclusionary threshold – may be concerned by the lack of certainty within an Option 1 approach, especially as to whether they still need to plan the time and budget for conducting an EIA within their business plans and pre-application program. As such, seeking to implement Option A in Ireland may result in:

- An increase in requests for pre-application screening determinations from those seeking consent for developments at or above the (previous) regulatory thresholds, and related to this more developers being required to prepare Schedule 7A documentation, with related increase in cost/resources to both the applicant and consent authority.

and

- More developers voluntarily opting to undertake an EIA where their proposed development is considerably above (what would be) the former inclusionary thresholds.

Anecdotally, Portuguese EIA practitioners have reported[111] the latter response from multiple renewable developers as a result of recent legislative changes (2023) in the country's EIA thresholds. These changes have significantly increased Portugal's inclusionary thresholds, outside of sensitive areas for many forms of Annex II projects, including renewable energy projects.

6.2.2 Option 2: Exclusionary Thresholds and/or Criteria and Case-by-case Examination

This approach involves Annex II projects being excluded from EIA below certain exclusionary thresholds and/or criteria defined in the Member State's legislation. Projects at or above the exclusionary threshold relevant to them are required to undergo a case-by-case examination to determine whether EIA is required, or not, *Option 2* on Figure 6.4. Option 2 results in projects that are considered to always be unlikely to have significant environmental effects being excluded from the EIA process by the Member State's legislative thresholds and/or criteria. This is the approach applied to the screening of Annex II projects across the United Kingdom, as discussed in relation to England in section 3.1.

It should be noted that to be confident of compliance with Article 2.1 of the EIA Directive – ensuring all measures are taken to ensure a project with likely significant effects undergoes EIA – it is advisable for an Option 2 system to consider the inclusion of some form of '*catch-all*' or '*safety net*' clause in relation to sub-exclusionary-threshold development. Without a legislative '*safety net*' process – which enables discretionary application of either EIA or a case-by-case examination to sub-threshold projects – an Option 2 system may be vulnerable to challenge on the basis that it does not offer the level of environmental protection required by the EIA Directive.

The case-by-case examination aspect within Option 2 has the same benefits and challenges as discussed in relation to Option 1, above. However, the frequency at which the case-by-case process needs to be applied has the potential to be considerably reduced. Compared to the total sum of development that has been consented across the EU since the EIA Directive was introduced in 1985, only a very small proportion of projects have required an EIA. As such, if exclusionary thresholds are well designed and their development considers the relevant criteria within Annex III (ensuring Article 4.3 alignment) then an Option 2 system has the potential to deliver a proportionate scale of case-by-case examination alongside a Member State's consent regimes.

[111] Lameiras, M and Jesus, J: New EIA Regulation in Portugal: A Step Backwards (2024).

The major challenge with an Option 2 system is therefore developing suitable evidence to justify the level at which the exclusionary threshold and/or criteria are set. If set too low, then the system risks unduly pulling hundreds, or even thousands, of applications into the need for case-by-case examination. However, if set too high there is the potential the thresholds will be challenged, where they could be found to not conform with the EIA Directive's requirements. The latter is not a conceptual threat as demonstrated in section 2.7, above, including the findings of C-575/21 where Austria's legislation applied a 15ha threshold before considering the need for EIA of *urban developments*. As such, establishing and implementing exclusionary thresholds is likely to require more thought and evidence than might be needed in developing a system focused on inclusionary thresholds (Option 3 of Figure 6.4), because the latter has the back-up of case-by-case examination for sub-threshold proposals. In establishing an Option 2 system there needs to be a careful balance in how precautionary an approach is taken to manage these challenges.

An Option 2 system also leaves a lot of discretion in relation to which projects require EIA to individual competent authorities. This is not necessarily a benefit or challenge but does mean that the system must accept that the approach is based on the judgements of these organisations and their staff. As such, two very similar projects – in terms of scale, proximity to environmental receptors and potential construction and operational activities – could be justifiably found to require EIA by one competent authority and not by another. This is the reality of case-by-case examination but it can generate frustration amongst both developers and stakeholders as clarity on whether EIA is required, or not, is only achieved at the end of each case-by-case determination.

In the English system – described in section 3.1 – the Government has sought to provide a degree of guidance to consenting authorities and other parties by publishing a set of indicative thresholds within its online EIA Guidance.[112]These indicative thresholds provide the Government's general perspective as to the circumstances when each of the project types listed in Annex II might be considered likely to have significant effects on the environment. The development of such a list clearly requires time and resources to gather evidence and establish information related to each of the development types included in Annex II. However, the potential benefit from developing such guidance-based indicative thresholds may be limited in practice due to the need for case-by-case examination to consider the specific project on its own merits. As such, the UK Government online EIA

[112] The UK Government's indicative screening thresholds produced as part of its EIA guidance for use in the English town and country planning system can be accessed here.

Screening Guidance includes a significant caveat in relation to the role its indicative thresholds should play in the screening decision, stating:

> *"… it should not be presumed that developments above the indicative thresholds should always be subject to assessment, or those falling below these thresholds could never give rise to significant effects, especially where the development is in an environmentally sensitive location. Each development will need to be considered on its merits*".

6.2.2.1 Contextualisation to Ireland

Implementing an Option 2 style system to screening Annex II projects in Ireland would involve substantive change when compared to the existing approach. The PDR's existing inclusionary thresholds (Schedule 5 Part 2) would be removed and would need to be replaced with a set of exclusionary thresholds below which EIA would not be required, bar the application of any '*safety net*' clause. In effect, Ireland's established screening system would be flipped on its head.

A likely positive effect of such an approach is that developers of projects that present no real risk of significant effects to the environment would have greater certainty of this, as the legislation would exclude their proposals from the need for a preliminary examination. However, there would be far less certainty for both developers and stakeholders – as to whether an EIA would be undertaken for those projects that sit at or above the <u>current</u> inclusionary thresholds in Schedule 5 Part 2. In these cases an Option 2 system would require additional resources from developers, due to the need to submit the information set out in Schedule 7A, and for competent authorities in undertaking a screening determination as part of their case-by-case examination.

Seeking to apply an Option 2 system in Ireland – where a project is either excluded from the need for EIA or undergoes a case-by-case examination to determine if an EIA is required – might mean that a full screening determination was required for all case-by-case decisions. This approach may be needed as it is unclear whether the EIA Directive's wording in Article 4.3 would allow for a system whose only route to requiring an EIA was via the use of a preliminary examination approach, rather than a full formal screening determination. Article 4.3 of the EIA Directive, as below, which applies *either/or* wording in relation to an exclusionary threshold rather than allowing a single threshold to exclude both aspects of the Directive's quoted text below:

"*Member States may set thresholds or criteria to determine when projects need <u>not</u> undergo **either** the determination under paragraphs 4 and 5 or an environmental impact assessment…"* [Emphasis added]

Given a key benefit of an Option 2 style system is to establish exclusionary thresholds – removing the need to undertake EIA for certain projects (see Figure 6.6) – it would seem infeasible to allow the remaining projects – above the exclusionary threshold – to initially be exempt from undergoing a determination under Articles 4.4 and 4.5 (i.e. a screening determination as currently set out under Article 103 (1b) of the PDR).

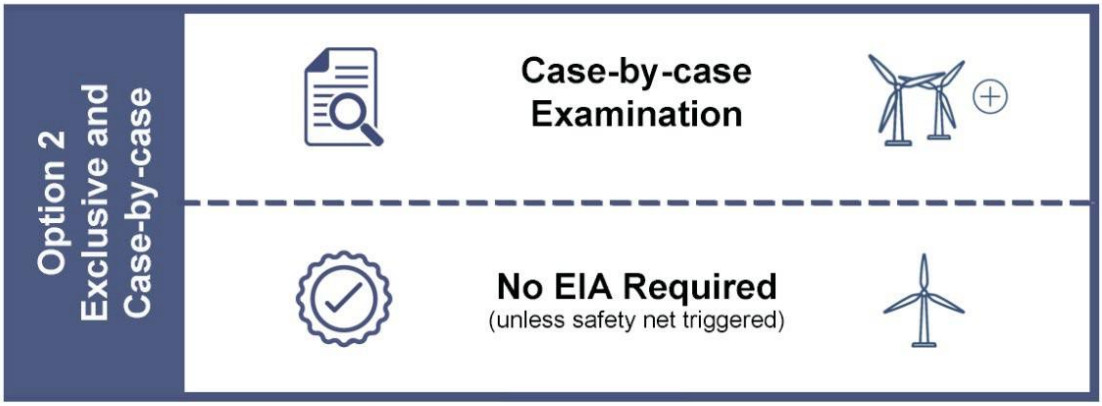


Figure 6.6 | Visualisation of an Option 2 Approach as it Could Apply to Wind Power Installations

The effective reversal of Ireland's current approach to screening Schedule 5 Part 2 of the PDR projects to implement an Option 2 style system would require considerable re-training of competent authority staff and a programme of awareness-raising across the country's developers, consultants and stakeholders. Such capacity-building work could require considerable time and resources from government. Beyond this there would be a need to amend key government EIA guidance and advice, including the government's 2018 EIA guidelines,[113] the EPA's 2022 EIAR guidelines[114] and the OPR's 2021 practice note on EIA screening.[115]

An Option 2 approach would require legislative changes – to both the 2000 Act and the PDR – and therefore trigger the need for public consultation. As such, sufficient evidence would need to be gathered to justify such a change in screening approach and would be subject to the same risks of criticism as noted under Option 1, for example the reduction in certainty that is currently provided by the PDR's inclusionary thresholds.

It is noted that Northern Ireland applies a system of exclusionary thresholds above which case-by-case examination is required; as such, application of an Option 2 style approach

[113] DHLGH: Guidelines for Planning Authorities and An Bord Pleanála on carrying out Environmental Impact Assessment (August 2018).
[114] EPA: Guidelines on the Information to be Contained in Environmental Impact Assessment Reports (May 2022).
[115] OPR: OPR Practice Note PN02: Environmental Impact Assessment Screening (June 2021)

in Ireland would have the potential to bring greater consistency with the approach in Northern Ireland. However, it is unclear whether any environmental benefit would arise from having consistent approaches as it is unlikely that the exclusionary thresholds and criteria adopted would be directly comparable with those applied in Northern Ireland's EIA Regulations. It is clear from section 3, above, that different screening regimes operate side-by-side across Europe, but there does not appear to be any evidence that this causes significant problems.

6.2.3 Option 3: Inclusionary Thresholds and/or Criteria and Case-by-case Examination

This approach applies legislative thresholds and/or criteria that define which Annex II projects automatically require an EIA, and below these triggers a case-by-case examination process is applied, Figure 6.4 *Option 3*. This approach is a modified traffic light system, in effect containing the red light – to stop project consenting until an EIA has been undertaken for those at or above a threshold, and an amber light – requiring a case-by-case decision for all other cases. Ireland's current EIA legislation falls within the definition of an Option 3 system, with inclusionary thresholds in Schedule 5 Part 2 of the PDR and two levels of case-by-case examination – preliminary examination and screening determination – for sub-threshold developments, as detailed in section 2.3.1.

An Option 3 approach has a number of benefits, notably developers and the public are provided with greater certainty as to when EIA is required across those projects listed in Annex II of the EIA Directive. For example: in Ireland developers of wind power projects over 5MW are clear they need to undertake an EIA and can therefore plan the time and funds required to undertake this within their project timelines. Additionally, the public and other stakeholders are aware of when EIA is required, providing them with the enhanced opportunities to review and comment on an application's EIAR.

This approach is also considered to be sound in relation to delivering a system that is likely to be compliant with both Article 2.1 and 4.3 of the EIA Directive. This is because no project of a type listed in Annex II is ruled out of the potential need to undertake EIA by the legislation itself. There is a need for a case-by-case examination for all sub-threshold developments. In effect an Option 3 based system deploys what the EU's 2017 EIA screening guidance describes as a '*catch-all*' (or '*safety net*' as referred to in sections 3.1 – England and 3.3 – France) case-by-case examination process. While such a system may have strong legislation there can be challenges in terms of ensuring effective implementation in practice and there is likely to be greater numbers of case-by-case examination compared to Options 2 and 4, which include exclusionary thresholds.

By applying case-by-case examination to all Annex II developments below the inclusive thresholds a very large number of consent applications may need to be individually reviewed by the country's competent authorities each year. Where the outcome is in the format of a determination, as set out in Article 4.3, then there will be a need for the examination to comply with Article 4.4 and 4.5 requiring additional time and resources. Developers will need to provide the Annex IIA information and decision-makers will need to give direct consideration to the Annex III criteria. Ireland's existing approach has innovated in this area through the application of the PDR's *preliminary examination* process, which is discussed further below.

6.2.3.1 Contextualisation to Ireland

An Option 3 approach is already applied in Ireland (see Figure 6.7), so the existing system would not need to change in character but opportunities remain to update the detail within the PDR.

As discussed in Section 6.1.1.2, Article 4.3 of the EIA Directive requires relevant criteria in Annex III (Schedule 7 of the PDR) to be taken into account "*where a case-by-case examination is carried out*". It would appear that the PDR's *preliminary examination* process is a case-by-case examination but the wording in the PDR do not make the requirements of Article 4.3 explicit – as discussed in the *Shadowmill* case (section 2.8.2). The OPR's Practice Note 2 – EIA Screening (2021) may be considered to go part of the way to addressing this potential issue. Its advice, presented in *Step 2 – Preliminary Examination*, provides some expansion on how competent authorities can interpret the PDR's reference to "*nature, size and location*" and uses some words that appear in Schedule 7 of the PDR. However, the OPR document is only advisory– so a competent authority is not required to follow it – in addition its *preliminary examination* advice does not refer to all criteria included in Schedule 7. Given this issue has been discussed in recent legal challenges, due consideration should be given as to whether the existing legislation and guidance in this area would benefit from refinements and updates, based on recent learnings from case law.

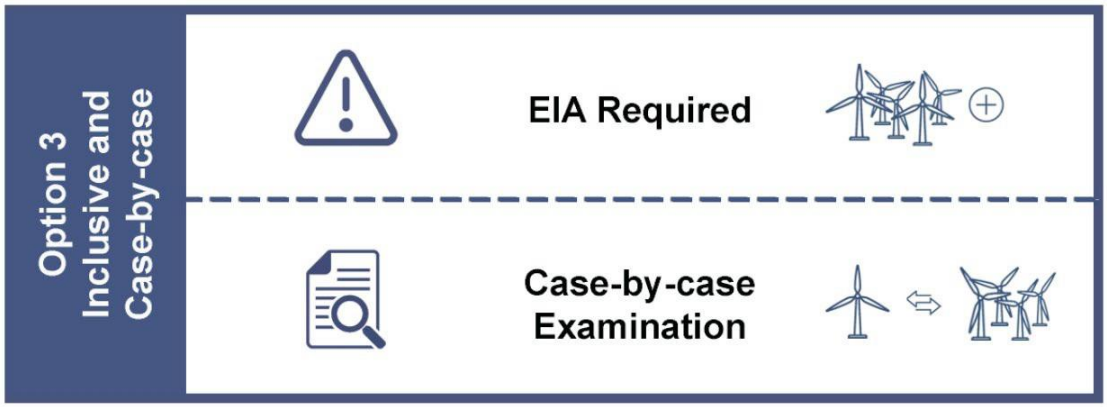


Figure 6.7 | Visualisation of an Option 3 Approach as it Could Apply to Wind Power Installations

A further challenge with an Option 3 approach is that there is a risk that the level at which inclusionary thresholds were originally set become outdated over time. This can occur due to changes in both the context of approaches to development and increased understanding of environmental risks and challenges. The PDR's inclusive thresholds were established in 2001 and there have been considerable changes in Ireland's environmental and development priorities in the past two decades. As such, within Ireland's existing Option 3 style system there appear to be two sub-options that could be explored:

- **Do Nothing** – Retain the existing inclusionary thresholds contained in Schedule 5 Part 2 of the PDR.
- **Review and Renewal** of both the level and format of the inclusionary thresholds contained in Schedule 5 Part 2 of the PDR.

Analysis of Do Nothing

The existing system has been in place for an extended period of time and should therefore be well understood by all parties: consenting authorities, developers, statutory consultees, the public and other interested parties. However, the existing inclusionary thresholds were adopted in the original PDR in 2001 and thus may not be well aligned with Ireland's context in 2024 across environmental priorities, technological developments, and capability of environmental mitigation measures.

A '*do nothing*' approach offers limited opportunities to address such changes, as it would maintain the existing EIA legislation, but that does not rule out taking some steps to enhance the system short of legislative change. Further support to the implementation of Ireland's sub-threshold case-by-case examination systems could be considered. For example, OPR Practice Note 2 could be updated in response to learning from recent practice and case law over the past four-five years and could be combined with training

on effective screening practices for competent authorities. It is noted that both the Northern Irish[116] and Welsh[117] Governments have sought to enhance the effectiveness of the implementation of their EIA systems through developing and delivering coordinated EIA training in recent years.

In terms of risks to the existing system, section 2.8 highlights a recent spate of Irish case law related to screening, although it is noted these have focused on the case-by-case examination, rather than the inclusive thresholds in Schedule 5 Part 2. There is a risk, especially if the frequency of such cases continue, that the combined effect of such challenges begins to erode confidence in the existing system.

Analysis of Review and Renewal

A process of reviewing Ireland's existing Schedule 5 Part 2 inclusionary thresholds provides the opportunity to update the thresholds to ensure they are relevant to the environmental challenges and technological developments that exist in 2024 and that they align with future national goals and targets. Such a review could provide an opportunity to consider if greater alignment with policy developments at EU level is required, for example, with the Renewable Energy Directive III.[118]

The key challenge with any such renewal of Ireland's inclusionary thresholds is likely to be ensuring that there is sufficient evidence to justify any substantive changes (up or down) in the trigger applied to a particular project type/sub-type, particularly as the amended regulations would be likely to require public consultation. In the mid-2010's the government in England sought to amend both its thresholds for wind energy projects and urban development projects and consulted upon the proposed regulatory changes. While the case was successfully made for the latter – the *urban development* threshold was raised from 0.5ha to England's current approach (see the table in section 4) – consultation responses challenged the government's proposal for increasing the wind energy exclusionary threshold. As a result, England's EIA Regulations still retain the same threshold for wind farms as originally adopted in 1999, despite the transformation in relation to that sector – in terms of knowledge, experience and technology – over the last quarter of a century. As such, there is a risk that an approach that seeks to review and

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[116] Fothergill, J: Setting the Tone on EIA Capability: How Northern Ireland Improved EIA's Application in Planning Through a Capacity Building Focus, within Volume 22 of IEMA's 'Impact Assessment Outlook Journal' (2024).
[117] See the case study: Fothergill, J and McGibbon, S: 'Enhancing People Investing In Key EIA Stakeholder' on page 12 of Delivering Proportionate EIA: A Collaborative Strategy for Enhancing UK Environmental Impact Assessment (2017).
[118] Directive (EU) 2023/2413 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC, and repealing Directive (EU) 2015/652.

renew Ireland's existing Option 3 style screening system might ultimately lead to limited changes in the detail of its EIA legislation while potentially requiring considerable evidence and resource in seeking to make the case for renewal.

Finally, a process of review and renewal would provide clear opportunities for government-led capacity building – through updates to EIA guidance and advice and/or centrally coordinated training – to support the implementation of the renewed EIA screening legislation.

6.2.4 Option 4: Inclusionary and Exclusionary Thresholds and/or Criteria and Case-by-case Examination

Option 4 applies both inclusionary and exclusionary legislative thresholds and/or criteria to define the trigger points for Annex II projects that require EIA or are excluded from the need to consider undertaking an EIA, and between these case-by-case examination is used (Figure 6.3). This approach is synonymous with the traffic light approach discussed within the European Commission's 2017 EIA Screening Guidance (see section 2.9.2, above). The approach reflects the reality of practice, where there is rarely a single distinct boundary for a project type (e.g. urban development) that distinguishes between the presence and absence of significant environmental effects. An Option 4 system aligns to the righthand side of Figure 6.3, with case-by-case examination applied in the uncertainty gap.

As noted in section 6.1.1.1, the combination of both inclusionary and *indicative* legislative thresholds for Annex II projects also fall into the scope of Option 4, as projects that are below the indicative threshold are excluded from the need for EIA. Examples of Option 4 type approaches include France, Germany and Austria as discussed across sections 3.3, 3.4 and 3.6. Amendments made to the French EIA legislation in 2022 introduced a '*safety net*' (see section 3.3.1.1) to enable the country's competent authorities to undertake case-by-case examination, at their discretion, for projects falling below the exclusionary thresholds established in legislation. As such, of the national examples reviewed across this report, France may have the most comprehensive approach to the requirement on Member States in Article 2.1 of the EIA Directive to '*adopt all measures necessary*'. The French system could be considered as a *safety netted traffic light* approach. Our research did not identify similar clauses in the German and Austrian systems. The European Court's judgement in case *C-435/97* (section 2.7.3) also discusses the concept of a safety net provision, although it did not rule on this directly.

A key strength of an Option 4 system is that the system has the potential to deliver the most efficient application of developer and competent authority resources in relation to

determining whether Annex II projects require EIA. If well designed and evidenced, the inclusionary and exclusionary thresholds and/or criteria will provide confidence to developers and stakeholders as to when EIA is required and when it is very unlikely to be required (although not definitively given the potential application of a safety net provision). This leaves a smaller workload – those developments that fall between the two legislative thresholds – to be considered on a case-by-case basis. Proposals that require case-by-case examination should therefore be those that have the potential to pose a significant risk to the environment and thus – based on the polluter pays principle – it is more justifiable that developers provide the environmental analysis required under Annex IIA to help enable the competent authority to make a determination.

Competent authorities are arguably more empowered in an Option 4 system as the staff undertaking the process – if well trained and provided with effective guidance/advice – should be aware that the role they are playing is focused on the uncertainty gap (Figure 6.3) and is determinative in balancing the needs for environmental protection and the delivery of an efficient consenting system. When compared to Options 1, 2 and 3, an Option 4 system has the potential to require less time and resources – as there is no need for case-by-case examinations where the need for EIA is obvious or where it is clear no significant effects will occur to the environment.

The key challenge with Option 4 systems is designing it to be effective in the first place. There clearly needs to be a reasonable "*gap*" between the thresholds and/or criteria for each inclusionary threshold and/or criteria and those used to exclude projects from EIA. As noted above, case law is clear that simplistic quantified thresholds based on a development's size alone are not acceptable and go beyond the discretion afforded to Member States, which will need to be reflected in the development of any thresholds going forward. There are clearly risks in this process, with multiple Member States' thresholds having been found wanting across the last two decades. The recent example from Austria (Case C-575/21, discussed in section 2.7.7) noting that there is a need to be careful with each threshold and that there are clear risks if exclusionary thresholds are set so high as to rule out the chance of applying EIA to all/the majority of developments under a specific type (i.e. urban development).

As with any system that applies case-by-case examination there is a need for competent authorities to ensure their staff are suitably trained and experienced to make judgements on the likelihood of significant effects on the environment. The opportunity for the provision of national or sectoral guidance and capacity building on effective screening also exists to help support understanding across the system.

6.2.4.1 Contextualisation to Ireland

Applying an Option 4 system in Ireland would certainly require moderate change to the existing legislation, through the addition of a series of exclusionary thresholds and/or criteria to each development types listed in Schedule 5 part 2 of the PDR (see Figure 6.8). However, a number of factors could mean the process could be more complicated and involved than it may first appear and particular consideration would need to be given to:

i. The current level at which some inclusionary thresholds are set in Schedule 5 Part 2, and

ii. The future role of preliminary examination.

In relation to i) a number of sub-category development types in Schedule 5 Part 2 require *all applications* of that type to undertake EIA (e.g. sugar factories, paper production, glass manufacturing). In other areas the inclusionary thresholds may be considered relatively modest if an exclusionary threshold is also to be applied (e.g. inclusionary for construction of aircraft with seating exceeding 10 passengers). In these cases the creation of a complete traffic light system that covered all development types listed in Schedule 5 Part 2 would involve the need to change the existing inclusionary threshold to provide the opportunity for an exclusionary threshold and case-by-case examination to be applied. It must be noted that there is no requirement within the EIA Directive to apply the same over-arching screening approach to all types of development; as such, where Schedule 5 Part 2 already requires EIA in *all cases* for certain development types, the existing approach can be maintained. Beyond this, the tables in section 4, above, provides an example where Germany has applied inclusionary and exclusionary thresholds that appear to be set close together. The German legislation indicates that a car park >1ha requires mandatory EIA, whereas one that is below 0.5ha would appear to be excluded from a need to consider EIA as it is below Germany's indicative threshold for a *preliminary examination* (screening determination).

In relation to ii), the predominant approach to case-by-case examination applied in Irish practice is preliminary examination – through Article 103 (1)(a) of the PDR. Under an Option 4 approach the project types listed in Schedule 5 Part 2 would have an additional exclusionary threshold providing Ireland with a three-tier traffic light system with an inclusionary threshold (the "*red light*"), an exclusionary threshold (the "*green light*") and between these the need for case-by-case examination (the "*amber light*"). However, the wording of Article 4.3 may mean that a full *screening determination* is needed for projects that fall between the two thresholds (the "*amber light"*), rather than the preliminary examination approach currently applied. Article 4.3 of the EIA Directive – and coverage in

the EU Guidance on Screening (2017) - appear to anticipate that a screening determination in compliance with Article 4.4 and 4.5 will be applied in relation to the "*amber*" element of a traffic light style system. As such, a move to an Option 4 approach – via the development of exclusionary thresholds within Schedule 5 Part 2 – could result in the need to shift Ireland's predominant EIA screening practice from preliminary examination led to screening determination led.

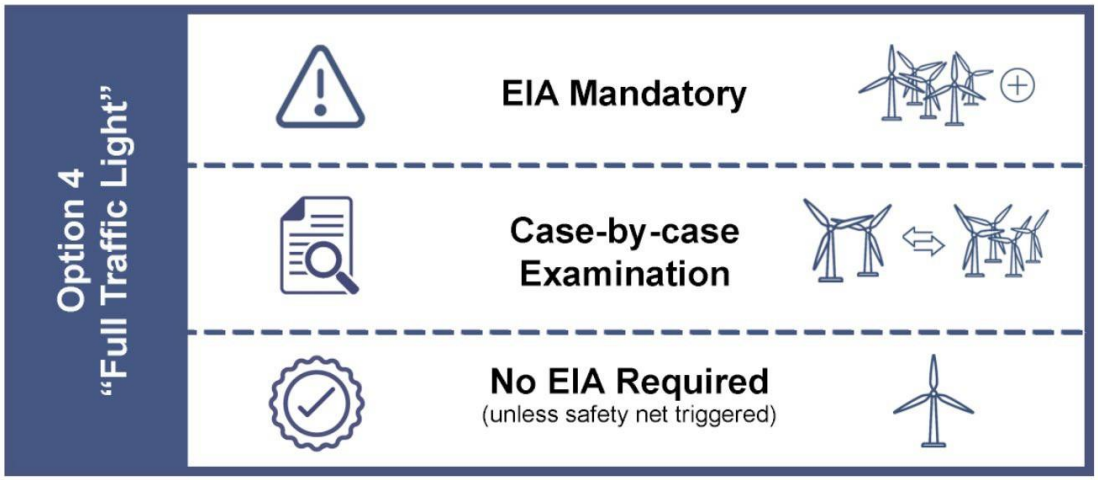


Figure 6.8 | Visualisation of an Option 4 Approach as it Could Apply to Wind Power Installations

It is not infeasible that Ireland explores developing a more detailed four tier-system beyond the standard three tier traffic light discussed above, conceptualised below. However, such an approach is likely to prove more complex to both establish and implement, plus it should be recognised that increasing the complexity of a screening system poses its own challenges across compliance and effectiveness of application.

Conceptual four tier traffic light approach:

1) Inclusionary Threshold, at or above which EIA is mandatory;
2) Screening determination led, between the inclusionary and an indicative threshold;
3) Preliminary examination led, between the exclusionary and an indicative threshold; and
4) Exclusionary Threshold, below which EIA is not required; subject to preliminary examination of sub-threshold development (safety net system).

The case-by-case examination within any Option 4 traffic light system is likely to see greater application of screening determinations, as described above, but such a change need not be overly complicated, nor the evidence behind a competent authority's decision exhaustive. However, it would require developers to provide Schedule 7A information in

all cases and the decision-maker to give due consideration across the Schedule 7 criteria. This is likely to require a moderate increase in the resources needed by both developers and competent authorities per screening determination – compared to the preliminary examination process. It is unclear whether this increase would be offset by the fact that an Option 4 system would no longer require automatic application of preliminary examination to proposals below its exclusionary thresholds.

The current preliminary examination process could also have a role as a discretionary tool in an Option 4 system. A competent authority could retain the ability to apply it to any sub-exclusionary threshold project when they were concerned it had the potential to lead to significant effects on the environment. In this role, the preliminary examination would act in a similar way to the '*safety net*' clauses applied in France and England, which already operate exclusionary thresholds in their legislation. How effective such '*safety net*' approaches are in terms of application in practice is unclear with experience from the UK indicating its use in that country is infrequent and also in Portugal:

"*…the legislation provides the possibility to request the completion of an EIA procedure even in cases not covered by the Annex II thresholds, where a Project may nonetheless have significant impacts in the environment. This occurs in practice only very rarely*."

Box 11 within EIA of Projects - Guidance on Screening[119] (EU, 2017)

Beyond the above, to efficiently operate an Option 4 style approach the country's competent authorities need to be able to rapidly delineate those projects that are either excluded or included from those that require a case-by-case examination. In the Austrian system, which applies an Option 4 style system, this appears to be achieved by the use of digital systems that apply the legislative thresholds and criteria for local authority staff to then view on their computers. As such, it appears that much of the, potentially time consuming, work to initially identify where a proposal sits in relation to the legislative thresholds has been automated into digitised systems, with proposed sites considered in relation to the boundary of environmentally sensitive locations via GIS mapping and any relevant quantified thresholds being flagged to the user. Without the deployment of such digital systems the time spent by competent authority staff members comparing every planning application to the relevant exclusionary and inclusionary thresholds and/or criteria could become considerable.

[119] European Commission: Environmental Impact Assessment of Projects: Guidance on Screening (Directive 2011/92/EU as amended by 2014/52/EU) (2017).

6.3 Analysis of Key Project Types

6.3.1 Wind Power Installations

The PDR's inclusionary threshold for wind installations is that EIA is required for proposals with '*more than 5 turbines or having a total output greater that 5W*'. A number of sub-categories of project in Schedule 5, Part 2 require EIA on all occasions, for example proposals for extraction of petroleum (2(g)) and production of steel (4(a)); however, as noted by the inclusionary threshold above, wind energy developments are not in this category.

Ireland's wind energy threshold was established in 2001, at a time when that sector and wind energy technology was in a relatively early state of commercial deployment. In 2001, the PDR's threshold therefore acted as a true threshold with commercial wind energy developments being brought forward across the EU at, or below, five turbines and regularly having a total capacity of under 5MW. However, in a 2024 context this threshold effectively means EIA is mandatory for all commercial scale wind energy developments in Ireland. This is as a result of developments in wind turbine technology and the scale of MW capacity required for an investable commercial scheme.

It may be the case that mandatory EIA for all commercial wind power installations is appropriate for Ireland in 2025 but this is different to the original intent and application of the threshold as established in 2001. As such, it would be beneficial to reconfirm that the existing threshold remains relevant in terms of the likelihood of a wind energy project to lead to significant effects on the environment, rather than what is effectively mandatory application being based on a historic snapshot of an industry which has changed significantly over the past 20 years. A further factor, as noted in section 6.2.3.1 above, is the opportunity to consider greater alignment with the EU's policy developments in this area, including Renewable Energy Directive III and related good practice guidance,[120] which states that:

"*Most renewable energy projects are not automatically subject to an obligatory EIA and Member States should establish clear thresholds or criteria in this regard, within the flexibilities allowed by the EIA Directive.*"

The EU guidance does not provide any quantified evidence to support the above statement, nor does it indicate which forms of renewable energy tend to avoid obligatory EIA; however, the statement could be seen as being at odds with the practical outcome of

[120] Directorate, General for Energy: Guidance to Member States on Good Practices to Speed Up Permit-granting Procedures for Renewable Energy and Related Infrastructure Projects (May 2024).

the PDR's current wind energy threshold. The guidance proves more useful in terms of providing examples of the approaches other countries – including Italy, Germany, France and Denmark – have taken to permitting and EIA implementation as they have sought to address the Regulation's requirements on repowering.

Aside from EU policy factors above, the reality from Irish practice is that applications for wind energy projects continue to prove challenging in terms of concerns from stakeholders about their risks to the environment. Alongside this, there is now a considerable potential library of completed EIARs and active onshore wind farms that could provide useful evidence on the predicted and real-world significant effects of wind power installations in Ireland. Reviewing the evidence contained across this record of EIAR would help to provide evidence for any future review of the Schedule 5 Part 2 threshold for wind energy projects. This could include generating evidence on:

- Which environmental factors are commonly found to have significant effects, both before and after mitigation is considered? And whether these findings are generally accepted or challenged by consultees responding to the consultation on the application and its EIAR?
- Whether the above are common across all wind developments, or relate to particular locations or scales of development (turbine numbers/MW capacity/other)?

Such information could be gathered and analysed to help generate an evidence base to determine whether changes to the current threshold for this sub-category are both justified and likely to lead to improved outcomes.

One issue that is regularly considered in undertaking EIAs of wind farms in Ireland are cumulative effects on the environment between the proposal seeking consent, other existing wind farms and other proposed wind energy developments that are also being brought forward. Cumulative effects are an issue that is required to be considered, where relevant, within a case-by-case examination, as set out under Article 4.3 of the EIA Directive. As discussed above, the current PDR threshold provides for commercial scale wind energy developments to fall above the threshold and thus undergo an EIA; as such, there is limited application of case-by-case examination for wind power projects.

However, <u>if</u> this threshold were to be changed and some, or all, future wind applications were directed through the *preliminary examination* process, it is unclear whether the existing approach to this process would be adequate to ensure that cumulative effects risks were duly considered. This issue could be exacerbated where wind energy

developments in Northern Ireland (either onshore or offshore) or UK waters (offshore) had the potential need to be taken into account in any future case-by-case examination.

As such, any potential change to the thresholds related to wind energy development should gather evidence from existing EIAs completed for Irish wind farm proposals and consider the practical implications that would be anticipated from any revised thresholds and/or criteria. There would appear to be a risk that time and resources could be spent reviewing and developing new wind energy thresholds and/or criteria only to lead to the same outcome (i.e. all commercial scale wind projects require an EIA). However, a revised approach could lead to additional delays if the resulting system required developers and competent authorities to regularly undertake case-by-case examination of a wind farm proposal, only for these to ultimately conclude there was a need for EIA. Such an outcome would not appear to **align with** EU policy, such as the Renewables Energy Directive III; as such, there would appear to be a need to give due consideration to both the risks and opportunities of *any* change to the existing threshold applied to this sub-category via the PDR.

6.3.2 Residential Dwelling Units

The consideration of residential dwellings units in the EIA process is not a specific sub-category included within wording of Annex II 10 (b) of the EIA Directive – "*urban development projects, including construction of shopping centres and car parks*". However, the 2015 EU guidance on project types indicates that "*Housing developments, in particular, are frequently included in the 'urban development projects' category*". The tables within section 4, above, indicates Ireland and England (and the devolved nations of the UK) make explicit reference to dwellings within their national legislation. In the other jurisdictions considered, the case-by-case examination of a proposed residential development would only appear to be triggered if it falls within one of the broader categories. In Germany this would appear to be linked to a much greater land use/development plans to allocate sites for '*urban developments*', with various degrees of case-by-case examination required dependent on the floor space of the proposed development.

For Ireland, however, the potential to step back and only include a direct transposition of the EIA Directive's Annex II wording of 2 (10)(b) in the future may prove difficult. The PDR has included a specific sub-category (Schedule 5 Part 2 (10)(b)(i)) related to dwelling units since 2001. While the EU Directive's wording could in theory be applied in this legislation in future, the current legislation has provided clarity for 20+ years that the development of dwelling houses should be subject to EIA above 500 units, and apply

case-by-case examination below that. As such, having already established dwelling house proposals are within Ireland's EIA legislation any future review is likely to need to focus on considering:

- Does the existing inclusionary threshold remain relevant and effective?
- Could the establishment of any additional (exclusionary/indicative) thresholds and/or criteria prove helpful to enabling more effective application of case-by-case examination?
- Is the existing guidance on screening for this sub-category adequate and up-to-date?

The latter would be most likely to focus on the OPR's 2021 Practice Note on EIA Screening as that document provides a specific focus on the EIA screening system, whereas the other key EIA guides - Government's 2018 Guidelines and the EPA's 2022 EIAR Guidelines – have a far broader remit, as they present guidance on all aspects of the EIA process.

The UK approach, which also includes direct reference to dwellings in its EIA legislation related to Annex II (10)(b), is also worth further consideration here. The UK's EIA legislation is consistent across its four nations in recognising that when an *urban development* proposal occurs within or overlaps a legislatively defined *sensitive area* (a form of environmental criteria), the competent authority must undertake a screening determination in all cases. This does lead to some challenges in practice as it means that planning authorities responsible for National Parks (a legislatively defined *sensitive* area) have to judge whether the legislation requires a full EIA screening determination for very small planning application of one or more residential dwellings.

Outside of *sensitive areas*, the UK approach across the UK's four nations diverges into two approaches, as explained in section 3.1. Scotland and Northern Ireland maintain the original quantified exclusionary threshold related to all *urban* development with a land take threshold which sees any project below 0.5ha excluded from the need to be subject to EIA, unless the devolved Government applies the EIA legislation's safety net clause. However, the thresholds in this category were reviewed and updated in England (and subsequently Wales) approximately a decade ago with a specific focus on providing greater clarity on when a proposal for residential dwellings would and would not require a case-by-case EIA screening. The resulting legislation increased the land area based exclusionary threshold – where the proposal is solely for residential development – by an order of magnitude from 0.5ha to 5ha. Consultation responses at the time of this proposed change highlighted that high rise residential development – notably large-scale

residential towers – could have the potential to generate likely significant effects but were often developed on sites far smaller than 5ha. As a result of these concerns, the final exclusionary thresholds adopted in England – and later adopted by the Welsh Government – included an additional clause that requires a case-by-case screening decision where "*the development includes more than 150 dwellings*".

While the UK's approach to amending the thresholds applied to dwelling units is a useful example it must be remembered that it relates to the level at which *exclusionary* thresholds are set, rather than the inclusionary thresholds applied in Ireland via the PDR. As such, while there may be learnings for Ireland from the approach of England and Wales to updating its Annex II (10)(b) thresholds, any future review in Irish thresholds and/or criteria applied to dwelling units would need to gather its own evidence to justify proposing any changes. Such evidence is likely to need to take a broad view and not solely rely on data gathered from the existing system; however, generating some data from past experiences of EIA screening could help provide part of any future evidence base, including:

- How many proposals for dwelling units have undergone preliminary examination and/or screening determination in recent years? (three-five years.)
- How many proposals for dwelling units from the above – i.e. those below the current mandatory threshold – have been found to require an EIA?
- For those sub-threshold projects found to require EIA, what environmental effects drove the competent authority's justification and conclusions? Are there any common issues across these cases?
- Additional aspects that could include qualitative information and could extend to seeking information across all recently constructed housing developments in terms of environmentally related incidents, complaints or enforcement actions.

In addition, understanding the '*likely significant effects*' conclusions of the EIARs that have been completed across Ireland for residential applications, may also prove useful to assist in determining whether the current level of inclusionary threshold remains appropriate in 2025 and into the future.

6.3.3 Other Urban Development Projects

Annex II 10 (b) of the EIA Directive is an example of a number of areas within this European legislation that have proven to be unhelpfully vague when it comes to implementation. Other examples within the EIA Directive include a lack of definition of what constitutes a *competent expert*, or the crucial element of when an environmental

effect is considered to be *significant*. As a result, Member States have applied their own interpretations with Spain (C332/04) and Austria (C575/21) having been found to have gone beyond the discretion allowed by limiting such development to those outside urban areas, in the case of Spain, and applying thresholds so large as to never realistically see EIA applied, in Austria.

Additional issues have also arisen due to the way the EIA Directive's wording of this sub-category of projects has been officially translated into the different EU language versions of the Directive. For example, in the Portuguese EIA legislation this sub-category was translated as "*Urban allotments operations + shopping malls*".[121] In practice this has meant that where urban developments, other than shopping malls, do not involve formal allotment operations then they are not subject to EIA; as such, large urban developments that sit outside the specific legislative wording would not have been considered within the jurisdiction of Portuguese EIA legislation.

Due to the broad nature of this sub-category there is the potential to take an expansive approach and develop considerable additional complexity/detail through the creation of multiple sub-components related to different potential forms of urban development. Section 3.6.3 provides an example of this from Austria, which included commercial parks, logistic centres and hotel accommodation, alongside the specific types listed in Annex II of the EIA Directive, i.e. '*urban development projects, including construction of shopping centres and car parks*'. While this approach can clearly be helpful in seeking to assist competent authorities and enables more specific thresholds to be applied to particular forms of urban development it can also pose risk as it may unduly focus the approach of decision-makers onto the particular defined forms, over the consideration of other forms of urban development.

The EU's 2015 Guidance[122] in relation to the Annex II 10(b) category indicates that interpretation could take account of:

> *"(i) Projects with similar characteristics to car parks and shopping centres could be considered to fall under Annex II (10)(b). This could be the case, for example, of bus garages or train depots, which are not explicitly mentioned in the EIA Directive, but have similar characteristics to car parks.*
>
> *(ii) Construction projects such as housing developments, hospitals, universities, sports stadiums, cinemas, theatres, concert halls and other cultural centres could*

[121] Lameiras, M and Jesus, J: New EIA Regulation in Portugal: A Step Backwards (2024).
[122] European Commission: Interpretation of Definitions of Project Categories of Annex I and II of the EIA Directive (2015).

also be assumed to fall within this category. The underlying principle is that all these project categories are of an urban nature and that they may cause ***similar types of environmental impact****.*

[Emphasis added to denote that a footnote in the EU guide indicates the types of impacts include: *noise and traffic-related disruption during the construction phase, traffic generation during the operational phase, land-take, impairment of soil function due to sealing and visual impact*.]

(iii) Projects to which the terms 'urban' and 'infrastructure' can relate, such as the construction of sewerage and water supply networks, could also be included in this category."

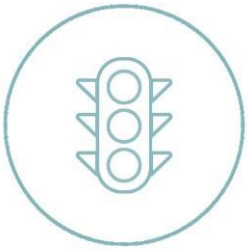
The EU guide recognises that some of the above examples may be considered to fall within other Annex II categories but notes that this is not problematic. Box 2 of the same guide, refers to case C-66/06 (*Commission v Ireland*) to demonstrate the linkage between Annex II categories, providing the example that while *reclamation of land from the sea* is found within the Annex II category *Agriculture, silviculture and aquaculture*, it "*must not be interpreted as excluding projects for reclamation of land from the sea in other sectors, e.g. urban development projects"*.

As indicated above, there is a need to be aware of the risks of including additional sub-categories and threshold and/or criteria within the '*urban development*' category. The 2021 case C-575/21 provides a good example of this risk, as it focused on a very specific sub-category of *urban development* that Austria has added to its EIA legislation – construction within World Heritage Sites (also discussed in section 3.6.3). The court found nothing wrong with Austria creating a sub-category of "*urban development*" that sought to recognise the increased likelihood of significant effects when undertaking a project in a World Heritage Site. Problems arose in the Austrian legislation's ambition to define a relatively simplistic exclusionary threshold below which the likelihood of significant effects on a World Heritage Site could be discounted. As such, Austria's desire to recognise and offer more specific EIA protections to World Heritage Sites was not at fault, rather it was ultimately the inability of an established legislative threshold being capable of addressing the complexity of real-world significance judgements in the context of such heritage sites. England's EIA legislation takes a notably different approach to the same issue placing the responsibility on the competent authority to make a case-by-case examination for <u>any</u> Annex II project proposed in or that overlaps a World Heritage Site, as such sites are one of the environmental criteria the legislative uses to define *sensitive areas*.

As such, beyond Ireland's inclusion of residential dwellings within this category – discussed in 6.3.2 – it would appear advisable to retain alignment between the domestic legislative wording and the approved language translation of the exact words within Annex II (10)(b) of the EIA Directive (e.g. urban development projects, construction of shopping centres, construction of car parks). Additions or alternations beyond the EIA Directive's wording carry the risk of generating unintended consequences/restrictions on the sub-category, even where such additions are intended to provide enhanced environmental protections.

If greater clarity in interpreting '*urban development*' is needed in Irish EIA practice, then consideration could instead be given to non-legislative activities. For example, reviewing the scope and quality of guidance available to those conducting case-by-case examinations. It is noted that page 19 of the OPR's Practice Note 2, on EIA Screening, already provides advice on how to interpret *urban development*. It would be advisable to consider further exploration of the approach to interpreting '*urban development*' in Irish EIA practice in any future review of EIA related guidance and advice to ensure the term is better defined and understood.

As noted at the start of this section, the key principle for legislators and competent authorities is to keep Article 2.1 of the EIA Directive central to their thinking in reviewing and defining legislation and guidance/advice provided for any category of Annex II project. The central question for any future evaluation of Schedule 5 Part 2 10(b)(iv) is to consider whether the existing thresholds and advice provide a clear basis to ensure that all *urban development* projects that are likely to have significant effects on the environment undergo EIA. The PDR threshold – a quantified project size (twoha, 10ha, 20ha) based on project location – would appear to have the potential to influence case-by-case examinations to focus on size and urban location, rather than likelihood of significant environmental effects. However, if the case-by-case process (preliminary examination or screening determination) is properly applied in practice then the competent authorities should themselves be ensuring they take account of size, nature, location and the relevant criteria across Schedule 7.



6.4 Expert Conclusions

The expert review has analysed the EIA Directive's requirements identifying seven potential approaches to Member State screening systems. Further review identified four options within these for in-depth analysis considering potential strengths and weaknesses of each. The key findings are summarised below:

- Article 4.2 and 4.3 of the EIA Directive can be conceptualised as a Venn diagram of seven broad approaches that draw across case-by-case examination, exclusionary and inclusionary thresholds (Figure 6.1).
- When considered against the requirements of Article 2.1 of the EIA Directive, only some of the approaches presented in Figure 6.1 appear to provide a strong basis for establishing effective national EIA legislation. This is particularly the case as over time the findings of the CJEU (discussed in section 2.7) have strengthened the basis upon which thresholds and/or criteria draw from the relevant criteria in Annex III; these case law developments have occurred since Ireland first implemented Schedule 5 Part 2 of the PDR in 2001.
- Section 6.1.2 provides the expert's justification for not conducting detailed analysis of three potential approaches. These approaches are presented in black and grey shading on Figure 6.2, and all are characterised by legislative systems that only apply pre-set thresholds and criteria – i.e. there is no opportunity in the system for case-by-case examination:
- The remaining four approaches are identified as viable options for further analysis – being applied, at least in part, by at least one of the national systems discussed in section 3. The additional analysis focuses on the potential practical benefits and challenges related to their application.
- The four options are those that either only apply case-by-case examination, or apply such examination after the application of one or more trigger level thresholds and/or criteria defined within the legislation, as presented in Figure 6.4. They are:
    - **Option 1:** Case-by-case examination only;
    - **Option 2:** Exclusionary thresholds and/or criteria with subsequent use of case-by-case examination;
    - **Option 3:** Inclusionary thresholds and/or criteria with subsequent use of case-by-case examination; or

- **Option 4:** The so-called traffic light approach, which includes inclusionary and exclusionary thresholds and/or criteria with the use of case-by-case examination between these thresholds (and the potential for a '*safety net*' clause allowing selective examination for sub-threshold development).

- The analysis presented demonstrates that each option has practical strengths and challenges associated with its potential general application. Additional review is provided in each case on potential implications if the option were to be explored in Ireland, i.e. potential practical risks and opportunities compared to the PDR's current approach.

    - All options – section 6.2.1 to 6.2.4 - are found to include positive elements as well as practical challenges, including the '*do nothing*' (i.e. continuation of the approach currently established set within the PDR and Government guidance). Option 2 (section 6.2.2) is identified as having the most practical challenges for application in the Irish context. This is because the option is based on the use of exclusionary thresholds followed by case-by-case examination to determine whether any Annex II project requires an EIA, which is effectively the reverse of Ireland's established approach.

- The final part of the expert analysis considers practical drivers and challenges related to the screening of wind energy developments – under Annex II (3)(i) – and for both the residential dwelling and other *urban developments* – under Annex II (10)(b).

The analysis highlights a spectrum of issues to be aware of, including drivers that push toward a need to review such thresholds, to risks that have arisen in practice when national legislation has gone beyond the sub-category wording set out in Annex II of the EIA Directive. While seeking to improve clarity and understanding in relation to interpretation of the meaning of *urban development* is clearly valuable, it may prove to be more efficient and effective to achieve this through guidance than within the EIA legislation.

Please find a link to an Excel file of '*Schedule A: Comparative Analysis of Annex II Implementation'* which can downloaded **here**.

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