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REVIEW

A balanced appraisal? Impact Assessment
of European Commission Proposals

Susan Owens

The New European Regulatory Impact
Assessment - In Theory and Practice

Ekkehard Hofman

Transposition and Implementation of EIA
Directive in some Member States

Pavel Černý, Jerzy Jendrośka

Evaluation of the German Act on
Environmental Impact Assessment

Nils Bedke, Jaqui Dopfer, Simone Kellert, Detlef Kober

Environmental Liability Directive and
'Polluter Pays' Principle

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REACH – Assessment of the Political Agreement

Uwe Lahl

Amended Comitology Decision strengthens
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New Books

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Editorial

In 2002 the European Commission published the “Communication on Impact Assessment (276 final)” and supplemented it in 2005 with the “Impact Assessment Guidelines (SEC(2005) 791)”. The latter defines the Regulatory Impact Assessment (RIA) as “a set of logical steps which structure the preparation of policy proposals” (p. 4). The aim of the RIA is paraphrased as “deepening the analysis and formalising the results in an autonomous report.” In bold letters the Guidelines add: “Remember: Impact assessment is an aid to political decision-making, not a substitute for it.” The aid offered by the RIA is nothing other than a more “rational” foundation¹ of policy proposals, newly apostrophised as “good governance”. The underlying assumption therefore is that such an aid is helpful to achieve more rational results in the proposals presented by the Commission to the Council and the European Parliament.

Five years after the Communication, quite a number of Commission proposals² have gone through the “logical steps” required by the RIA. But rather than supporting the search for the best solution to a “regulatory choice problem”, critical observers may receive the impression that the justification of political agreements that have already been made is the central function of the Impact Assessments undertaken by the Commission.

Beyond this background, two articles in this issue evaluate the results of the RIA approach: The question “A balanced appraisal? Impact Assessment of European Commission proposals” is raised by *Susan Owen* and “Theory and Practice” of the RIA are analyzed by *Ekkehard Hofmann*.

Two other articles deal with another form of Impact Assessment – the “classical” Environmental Impact Assessment (EIA). *Pavel Černý* and *Jerzy Jendroska* examine the “Transposition and Implementation of EIA Directive in some EU Member States (with special emphasis on transport infrastructure cases)”. A methodological approach for an ex-post “Evaluation of the German Act on Environmental Impact Assessment” is presented by *Nils Bedke*, *Jaqui Dopfer*, *Simone Kellert* and *Detlef Kober*.

In an article by *Florence Coroner*, an overview is given on the legislative process on a national level. Herein, she observes that in the transposition of the Environmental Liability Directive the “Member States [are] missing the opportunity to implement ‘polluter pays’ principle”.

In the sixth article of this issue, *Uwe Lahl* addresses the REACH Regulation, one of the largest legislative projects on an EC level, which was published in the Official Journal of the EU right at the end of 2006. He presents an “Assessment of the political agreement” reached in the trilogue procedure.

In the final article in this issue, *Gerhard Roller* provides an analysis of the amended Comitology Decision which came into force in the summer of 2006. His message is clear: it “strengthens [the] position of European Parliament”.

Last but not least, the “New Books” column presents two recently published anthologies: “Implementing the Precautionary Principle” (edited by *Nicolas de Sadeleer*) and the liber amicorum for *Eckard Rehbinder* (both founder members of elni).

The next issue of the *elni review* will focus on the implementation of the Aarhus Convention. Please send contributions on this topic as well as other interesting articles to the editors by the end of June 2007.

Martin Führ
March 2007

elni forum on Nanotechnology

**in memoriam of Betty Gebers
took place at Thursday, 7 December 2006, 6 p.m.,
at the Joint Representation of the States of
Hamburg and Schleswig-Holstein,**

The lecture given by Stefanie Merenyi, Martin Führ and Andreas Hermann led to a lively discussion. The programme and a few photos of the event can be found on the elni website.

The charts and the complete study (on behalf of the German Environmental Protection Agency - Umweltbundesamt) can be downloaded from the elni-website (www.elni.org).

The study is based on the final version of REACH.

¹ The topic “Rational Environmental Policy – Rational Environmental Law” was analyzed by a research group at the Bielefeld “Center for Interdisciplinary Research” in 1998/99, directed by *Gertrude Lübbecke-Wolff*; see <http://www.uni-bielefeld.de/ZIF/FG/1998Umweltrecht/>.

² See, for example, the study on behalf of the European Parliament: The Proposed Directive on Waste - An assessment of the Impact Assessment and the Implications of the Integration of the Hazardous Waste Directive into the existing Waste Framework Directive www.europarl.europa.eu/comparl/envi/pdf/externalexpertise/proposed_waste_directive_assessment_en.pdf.

Member States missing the opportunity to implement 'polluter pays' principle

Florence Coroner

1 Introduction

The shipwreck of the Napoli off southwest England in January this year, and who should foot the bill for its clean-up is just one more example demonstrating the need for a strong environmental liability régime aimed at preventing and clearing up environmental damage in Europe. This is precisely the aim of the Environmental Liability Directive¹ (ELD), which was adopted in April 2004 and should be transposed by Member States before 30 April 2007. This Directive seeks to apply the 'polluter pays' principle by forcing operators who are responsible for environmental damage to pay for its remediation. ELD's provisions apply to water, land and biodiversity and combine two different liability régimes: damage to water, biodiversity and land are only covered by the ELD if they have been caused by a specific dangerous activity set out in Annex III² of the ELD. Liability in these cases is 'strict', meaning that it provides automatic responsibility without the need to prove negligence for damage. Biodiversity damage which is caused by any other occupational activity not listed in Annex III is also covered by the ELD, but only if the operator was at fault or negligent. So, if the operator of an un-listed activity causes biodiversity damage and is not at fault, or if he causes soil or water damage, whether he is at fault or not, he will escape the Directive's reach.

A feature of this Directive is how its text is phrased, simply, making recommendations on crucial points, and allowing governments considerable leeway. Indeed, the text includes options such as implementing compulsory financial security measures for operators, expanding the extent of biodiversity over the Birds and Habitats Directives, and adopting exemptions for operators who act in accordance with a permit or according to the state of scientific and technical knowledge when the activity took place, from the obligation to remedy. The fact that Member States enjoy great latitude in transposing the Directive has two direct consequences. First, it delays the transposition process owing to the debate between

stakeholders over controversial clauses in this Directive. A few EU countries, including the UK, Ireland, and Austria risk missing the deadline. Second, this situation could lead to a very multifarious liability régime in Europe and even among different regions in a single country in federal states, which would clearly complicate monitoring and enforcement of the new law. The indirect consequence is that differing liability régimes risk failing to meet the Directive's objective of applying the 'polluter pays' principle. As it stands most Member States seem to take advantage of the leeway the Directive offers by implementing weak legislation which only complies with the bare minimum requirements of the EU's legislative text. Those countries are missing the opportunity to implement the 'polluter pays' principle.

2 The Directive's main controversial clauses

Given Member States' considerable discretion in transposing this Directive, its effectiveness and implementation of the 'polluter pays' principle will depend heavily on the political will (or its absence) to implement the 'polluter pays' principle.

2.1 Financial security for operators

One of the most controversial issues is the clause referring to financial security. Article 14 of the Directive offers national governments the opportunity to require operators of risky activities to be covered by some form of financial security, whether through insurance, bank guarantees, reserves, bonds, dedicated funds or other mechanisms. At this point, only a few countries have chosen to implement compulsory measures on financial security.

Under the Spanish plan, if an economic operator has the potential to cause environmental damage exceeding €2m, it will have to provide financial guarantees such as an insurance policy, bank guarantee or contingency fund. Between €300,000 and €2m, operators must either provide financial guarantees or join the European Eco-Management and Audit Scheme (EMAS). Operators will have until 2010 to comply with the requirement. The Czech Republic established a different solution in its draft law through a clause which introduces financial security for operators either by insurance contract or bank guarantee. However, these measures should be compulsory only five years after the Czech act enters force. The Slovak, and Bulgarian drafts also use the Directive's option to include compulsory financial security in national laws.

¹ The text of the Directive 2004/35/CE of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage can be found at <http://europa.eu.int/eur-lex/en/>

² Annex III: This lists the range of dangerous activities subject to Community instruments (e.g. IPPC, waste management, water discharge and abstraction, activities connected with dangerous goods and substances subject to Community rules, activities subject to Directives on GMs and more). In this case, liability is strict, i.e. subject to the 'permit' and 'state of the art' exemptions below operators are liable regardless of whether they are at fault (Article 3(1)(a))

2.2 Extent of biodiversity protected

Another clause in the Directive which offers national governments great leeway is that concerning the extent to which biodiversity is protected by the environmental liability régime (Article 2). This clause allows Member States to designate species and habitats other than those which are protected by both the Birds and Habitat Directives. This is a crucial point for the new law's effectiveness. For example, the Spanish draft aiming at transposing the Environmental Liability Directive extends the law's area of application from 14% percent of Spanish territory to the entire country, simply by including national protected species in the list. In contrast, as it stands, in UK the Environmental Liability Directive (ELD) will exclude 80 percent of wildlife subject to government action plan and more than 20 percent of SSSIs³. Estonia, France, Lithuania, Poland, and Sweden have chosen, like Spain, to include their national protected species in the list of habitats and species protected by the environmental liability régime.

2.3 Exemptions from clean-up obligations

Member States' interpretation of Article 8(4) will also be crucial to new environmental liability régime's success. The option of implementing the 'permit' and 'state of the art' exemptions in national law is also left up to Member states. As a result, some Member states variously include one or other exemption, both or none. As it stands, Belgium, the Czech Republic, Estonia, the Netherlands and the UK will probably implement both these exemptions. The situation is different for Germany, where the inclusion of exemptions is the responsibility of the individual 'Länder'. Lithuania and Poland do not use the option of Article 8(4), at least in the former versions of their draft laws. Since operators would have greater incentives to operate safely and prevent environmental damage without these exemptions, whose implementation would deviate from the 'polluter pays' principle and the principle of strict liability. Including exemptions would also add legal uncertainty and make it harder for operators and insurance companies to assess the risks. EEB believes that no notifications or permits under GMO régimes should be included under either the 'permit' or 'state-of-the-art' exemptions as they apply too widely and would effectively remove GMO damage from the ELD's ambit.

3 Conclusions

In addition to the clauses mentioned above, the Directive does not clearly define 'environmental damage'. It will be the duty of the 'competent authority'⁴ to enforce the new régime and decide if environmental damage is 'significant' enough to be covered by the new law. As the designation of the competent authority is left to Member States' discretion, its capacity, in terms of expertise in risk assessment, could fundamentally differ between countries. The competent authority could also in many cases be the same as that issuing permits. This may cause a conflict of interest and thus may over-burden the authorities concerned. Implementing the Environmental Liability Directive gives Member States an opportunity to implement the 'polluter pays' principle. But only a strong liability régime would encourage industries to adopt a precautionary approach and take measures to avoid environmental harm. It would also save the substantial amounts of public money being spent on cleaning up damage such as that resulting from the Napoli. Finally, it would help prevent environmental dumping, for example by companies exploiting differences between countries on liability rules, and would help establish a level playing-field.

³ A site of Special Scientific Interest or SSSI is a conservation designation denoting a protected area in the United Kingdom. SSSIs are the basic 'building block' of nature conservation legislation and most other nature/geological conservation designations are based upon them.

⁴ Article 11-1 : « Member states shall designate the competent authority responsible for fulfilling the duties provided for in this Directive »

Transposition 2004/35/CE Dec.2006	State of the process	Competent authorities (art 11)	Extent of Biodiversity protected (art 2)	Financial security (art 14)	State of the Art Permit exemptions (art 8(4))	NGO Action (request for action art 12)	Comments on Legislative process
AUSTRIA	Federal Draft law (9 February 2007) Consultation are opened until March 23			<u>Financial security compulsory</u>			Federal and Regional Acts are expected
BELGIUM	Flemish Draft decree http://www.mina.be/front.cgi?s_id=803 . + draft decree for the Walloon region		Limited cover: identical to the Directive	No measure on Financial security	State of the Art/Permit (not for Walloon draft) exemptions included in the drafts		
CYPRUS *	*	*	*	*	*	*	*
CZECH REPUBLIC	Ministry of Environment produced a draft Act on preventing and remedying of environmental harm (July 2006)	Czech Environmental Inspectorate	Limited cover: identical to the Directive	2 options : insurance contract or bank guarantee / <u>compulsory 5 years after the Act enter into force</u>	State of the Art/Permit exemptions included in the draft – use on decision of competent authority	Strict interpretation of art 12	2 comments processes are over – draft to be submitted to government
DENEMARK	Implementation Group Including stakeholders (ongoing process)						
ESTONIA	Public Consultation process on the draft of Environmental Liability Act	Regional departments of MoE	Include habitats and species protected under national law	No measure on Financial security	State of the Art/Permit exemptions included		Draft should be presented to the Parliament by the end of 2006 –
FINLAND*	*	*	*	*	*	*	*
FRANCE	Public draft Nov 2006 submitted to consultation http://www.ecologie.gouv.fr/article.php?id_article=6559		Extended cover - All areas protected under national law	No measure on Financial security	State of the Art included in the draft		Draft to be submitted to Parliament beginning of 2007
GERMANY	Public draft (federal level) – 8 September 2006 http://www.bmu.de/files/pdfs/allgemein/application/pdf/gesetzentwurf_umweltschaeden.pdf			No compulsory insurance / possibility given by legal basis	No use of Art 8 in the draft- Competence of the Lander	Access to justice for NGO	
GREECE *	*	*	*	*	*	*	*
HUNGARY	Draft Law and Law Harmonisation Dpt of the Ministry of Environment and Water in charge of the transposition (ongoing process)						Current Hungarian legislation more stringent than ELD
IRELAND	No public draft						
ITALY	6th Part of the Environmental Code-Legislative Decree No 152 of 3 April 2006						former governments text to be improved by new government
LATVIA *	*	*	*	*	*	*	*
LITHUANIA	Act on 24 March 2005		Extended cover -4th category for damage-element + species habitat, water, soil	No measure on Financial security	No use of Art 8		

LUXEMBURG*	*	*	*	*	*	*	*
MALTA*	*	*	*	*	*	*	*
POLAND	First public draft on 5 May 2006 Amended Public Draft on 25 August 2006	The "Voivode" (regional authority)	Extended cover- All areas protected under national Polish law	No compulsory insurance	<u>Not use of article 8 in the revised draft</u>	In case when authority refuses any action- access to administrative court	Draft subject to consultations with stakeholders and general public court
PORTUGAL*	*	*	*	*	*	*	*
SLOVAKIA	Proposal of an act submitted to governmental legislation process	Ministry of environment, district offices, environmental inspection	Limited cover : identical to the Directive	<u>Financial security compulsory</u>	State of the Art/Permit exemptions included in the draft	possibility to initiate a process	Changes must be expected during government and parliament reviews
SLOVENIA*	*	*	*	*	*	*	*
SPAIN	Public draft to be approved by Parliament and Council of Ministers		Include all species and habitats – extended cover	<u>Financial security compulsory</u>	State of the art / Permit exemptions included in the draft	In case of imminent damage	
SWEDEN	Report produced by an ad hoc commission composed of civil servants and experts	Swedish environmental agency /county administrative board	Extended cover- All areas protected under national Swedish law	No suggestions yet	<u>No clear exemptions</u>	Access to justice for NGO	Report subject to comment from stakeholders
NETHERLAND	Draft discussed in council of state	Administrative authority of various level authorities according to the case	Limited cover : identical to the Directive	No measure on Financial security	State of the art / Permit exemptions included in the draft		Proposals submitted to Council of State
UK	No official draft - ongoing consultation process http://www.defra.gov.uk/environment/liability/index.htm#1		Limited cover : identical to the Directive		State of the art / Permit exemptions foreseen	weakening of NGO rights	2 consultation process foreseen deadline for comment 1st consultation: 16 February 2007
BULGARIA	Draft bill			<u>Financial security compulsory</u>			

Imprint

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Focus of the forthcoming issue :

Transposition of the Aarhus Convention

Manuscripts should be submitted as files by email to the Editors using an IBM-compatible word processing system.

The elni Review is the review of the Environmental Law Network International. It is distributed twice a year at the following prices: commercial users (consultants, law firms, government administrations): € 52; private users, students, libraries: € 30. Non-members can order single issues at a fee of € 20 incl. packaging. The Environmental Law Network International also welcomes an exchange of articles as a way of payment.

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The views expressed in the articles are those of the authors and do not necessarily reflect those of elni.

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elni Membership

If you want to join the Environmental Law Network International, please use the membership form on our website: <http://www.elni.org> or send this form to the **elni Coordinating Bureau**, c/o IESAR, FH Bingen, Berlinstr. 109, 55411 Bingen, Germany, fax: +49-6721-409 110, mail: Roller@fh-bingen.de.

The membership fee is €52 per year for commercial users (consultants, law firms, government administration) and €21 per year for private users and libraries. The fee includes the bi-annual elni Review. Reduced membership fees will be considered on request.

Please transmit the amount to our account with the **Nassauische Sparkasse** – Account **no.: 146 060 611, BLZ 510 500 15**, IBAN: DE50 5105 0015 0146 0606 11; SWIFT NASSDE55XXX.

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The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.

The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

The Environmental Law Division of the Öko-Institut:

The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

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The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R. carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

The Institute fulfils its assignments particularly by:

- Undertaking projects in developing countries
- Realization of seminars in the areas of environment and development
- Research for European Institutions
- Advisory service for companies and know-how-transfer

Main areas of research:

- **European environmental policy**
 - Research on implementation of European law
 - Effectiveness of legal and economic instruments
 - European governance
- **Environmental advice in developing countries**
 - Advice for legislation and institution development
 - Know-how-transfer
- **Companies and environment**
 - Environmental management
 - Risk management

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The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.

The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of *homo oeconomicus institutionalis*, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

The areas of research cover

- Product policy/REACH
- Land use strategies
- Role of standardization bodies
- Biodiversity and nature conservation
- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
- Self responsibility

sofia is working on behalf of the

- VolkswagenStiftung
- German Federal Ministry of Education and Research
- Hessian Ministry of Economics
- German Institute for Standardization (DIN)
- German Federal Environmental Agency (UBA)
- German Federal Agency for Nature Conservation (BfN)
- Federal Ministry of Consumer Protection, Food and Agriculture

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elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. Since then, elni has grown to a network of about 350 individuals and organisations from all over the world.

Since 2005 elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

The Coordinating Bureau was originally set up at and financed by Öko-Institut in Darmstadt, Germany, a non-governmental, non-profit research institute.

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. It is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt). The Coordinating Bureau is currently hosted by the University of Bingen. elni encourages its members to submit articles to the Review in order to support and further the exchange and sharing of experiences with other members.

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brus-

sels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

- Access to justice in Environmental Matters and the Role of NGOs, de Sadeleer/Roller/Dross, Europa Law Publishing, 2005.
- Environmental Law Principles in Practice, Sheridan/Lavrysen (eds.), Bruylant, 2002.
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