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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
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Environmental Liability Directive and
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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 Lübbe-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.

Evaluation of the German Act on Environmental Impact Assessment

Nils Bedke, Jaqui Dopfer, Simone Kellert, Detlef Kober

1 Introduction

The German Federal Act on Environmental Impact Assessment (EIA Act) of 1990 was comprehensively amended and broadened in 2001. Since the summer of 2005, a revised form of the Act has been in force. The precautionary and integrative approach of the German EIA Act initially awoke high expectations in the academic community. However, after first practical experiences had been gained, increasingly critical views were voiced, suggesting that steering contributions of the EIA Act were rather low (see Hien 1997 amongst others), that EIA led to delays in the approval procedure and caused disproportional costs.¹ In contrast, it is also claimed that precisely the early and systematic assessment of possible environmental effects prevents taking wrong decisions and is thereby not only beneficial to the environment (see Commission 2003 *inter alia*).

Against this background as well as induced by research activities in Germany² and in neighbouring countries,³ a research project was commissioned by the German Federal Environment Agency (funded by means of the federal environmental research plan). The intention of the analysis is to determine and evaluate the effects of the EIA on the implementation and realisation of approval procedures, to identify weak points as well as to develop improved instruments for an effective and efficient implementation. Generally speaking, the following research questions are investigated: What benefits and costs are associated with EIA? What deficiencies and positive effects are identifiable with regard to specific phases of the EIA? What incentives are available for the project participants to actually fulfil the legal requirements of the EIA? What modifications can be recommended with respect to the legal provisions and/or actual implementation?

The project is divided into two stages: stage 1 provided a feasibility study which was tendered in September 2006 along with the data collection concept for the EIA evaluation. Key points of this stage are presented in this article. In stage 2, the evaluation of the German EIA Act is carried out, which encompasses not only an analysis of numerous EIA documents, but also the associated actors such as employees of authorities, environmental associations and applicants.

2 Methodology of the analysis

The crux of the evaluation is posed by the empirical analysis. The analysis to be conducted applies to a time period of six years from 1999 to 2005. Since an extensive EIA documentation does not exist in Germany out of which a representative random sample could be drawn, a four-tier cascade model forms the basis of the research concept. The first level provides a rough overview of the database with regard to EIA in the individual federal states. On the second level, regions are selected for the analysis, within which a comprehensive survey of all EIA procedures takes place. On the third level, 100 case studies are examined in a standardised fashion. Finally, approximately 25 case studies are subjected to in-depth analysis on the fourth level (Figure 1). Central element of the evaluation is a cost-benefit review. In order to allow for the fact that the success of EIAs is substantially dependent on the behaviour of the actors involved, the research team deploys the approach of interdisciplinary institutional analysis developed by sofia.⁴ In the process, the differences between the behavioural contributions required by law of the standard target groups for the EIA on the one hand and their actual behavioural contributions on the other hand are determined. This allows for actor-specific recommendations that could remedy steering deficiencies.

This approach represents a retrospective regulatory impact assessment. The central test criterion is the degree of goal achievement, which is reflected in the benefits and deficiencies of the projected effects of the Act (Figure 2). Costs are considered in the form of expenditures for the intended realisation of EIA and are contrasted with benefits. Side effects can exercise considerable influence in this context, such as a growing concern of the public to environmental concerns (positive) or the avoidance of EIA obligations by project splitting (negative). The emergence of such side effects needs to be investigated in order to assess frequency and general effects on EIA quality; this supplements the case studies on the third level. In addition, the impact of EIA is also influenced by the position of the project participants with regard to incentives as well as the acceptance and feasibility of the German EIA Act. Other factors that either stem from the regulatory environment or are independent of it can also be significant. These additional aspects are investigated in detail within the framework of in-depth case studies on the fourth level.

¹ On the reasons for these deficiencies, see Bechmann 2003; on deregulation efforts, see DIHK 2006 for example.

² Schröck 1999, Wende 2001, *inter alia*.

³ See for example Sager et al. 2004 with regard to Switzerland and Klaffl et al. 2006 with regard to Austria.

⁴ For detailed accounts, see Bizer, Führ & Hüttig 2002 and Führ, Bizer & Feindt 2007.

Sonderforschungsgruppe Institutionenanalyse

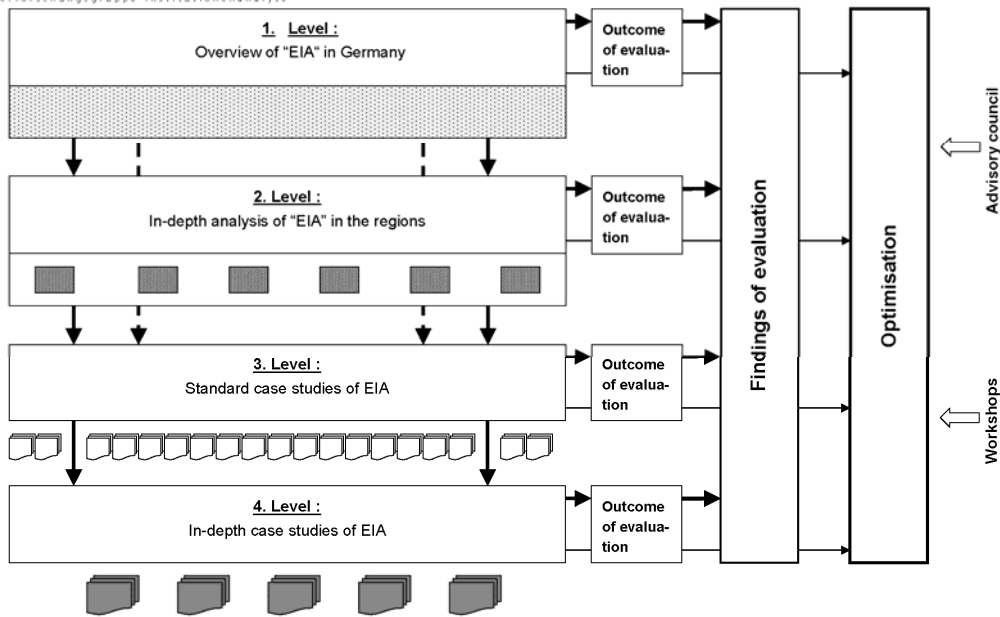


Figure 1: Cascade model with four levels of impact assessment for EIA

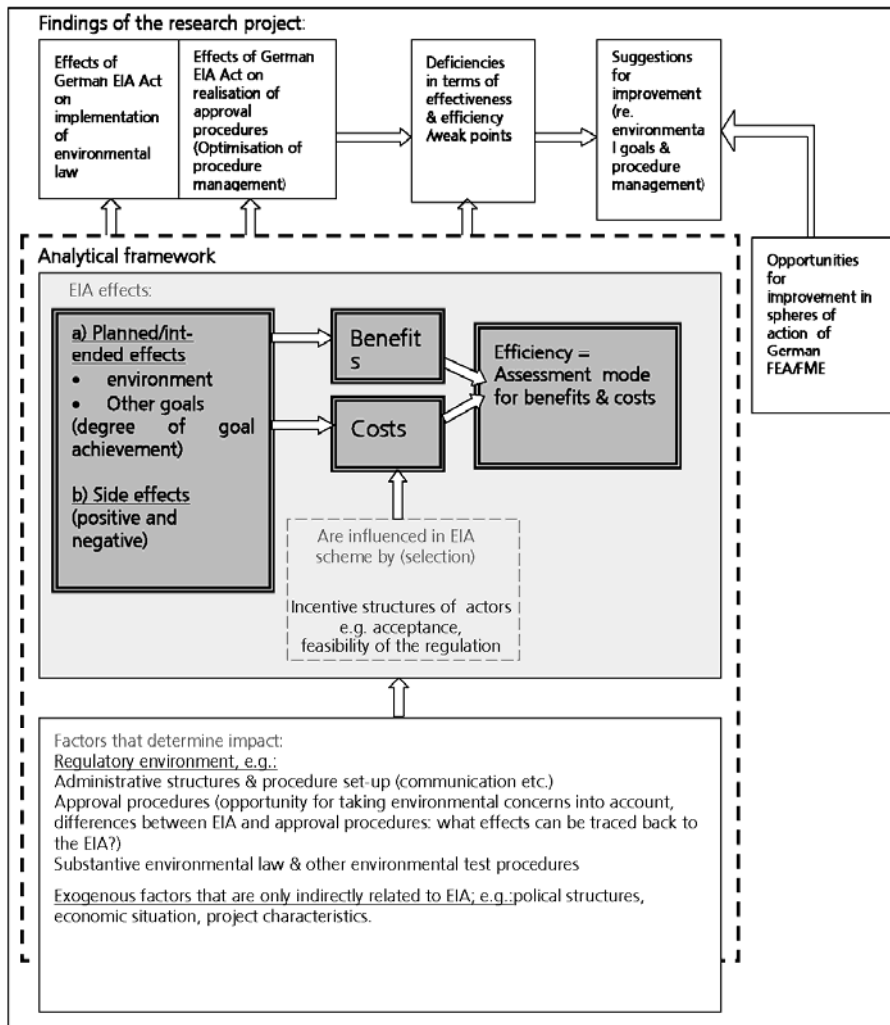


Figure 2: Impact model of test criteria that have to be taken into account

3 Data Collection Concept

3.1 Level 1: EIA procedures in Germany

The crucial question on this level is to clarify how data of EIA cases could be made available in the federal states. As the German Länder administrations act independently in terms of the implementation, many of them disregard systematic data collection. It also had to be clarified which agencies would be responsible for EIA implementation and what characteristics should be highlighted in the collection of data on EIA-compulsory procedures. The only nation-wide study available up to now (Wende 2001) could merely serve as a rough starting point, since the data of the individual federal states are rated as “barely reliable” by Wende himself. These estimates are based on rough overall estimates (Wende 2001, 99) and cover only the time period up to 1997. In view of the various problems related to data availability, it was not simply a matter of collecting data on the total population, but also of ascertaining the following questions in detail: Where can data on EIA procedures be acquired or generated (at what costs)? What significance does such data carry? What additional approaches of indirect collection and preparation of databases are available? As part of the empirical analysis, Länder data on EIA procedures were retrieved (when available) across the nation. The scarce data were then analysed and assessed across certain characteristics. In addition, a specific enquiry at the ministries and approval bodies took place, which was then extended to environmental associations due to the low level of data response. This was documented in a “data collection matrix” in order to document developments in detail. The conclusion was reached that reliable data are unavailable on the total population of EIA procedures carried out in Germany. Consequently, there are no data on individual projects. For Germany the total population of EIA cases can at best be indirectly inferred by using official publication organs (e.g. *Staatsanzeiger Hessen*) to generate data for selected federal states or regions that is “comprehensive by approximation”.

The findings of this first level produce important “mosaic pieces” for the estimation of the total population by providing an overview of several areas. In this way, they represent a basis by which - along with the data from the second level - important starting points for the selection of regions can be achieved.

3.2 Level 2: Examination of individual regions

The purpose of level 2 is to decide on the regions to be examined, in which a complete collection of total EIA procedures will be undertaken, and from which the test cases are drawn as a sample. In addition,

these cases are scanned for a content-oriented analysis of structural characteristics.

On the basis of previous findings, the feasibility study found a specific, feature-backed selection of regions preferable to the abstraction of a random sample from Germany as a whole. The features of the sample of regions should reflect all regions in the Federal Republic of Germany as broadly as possible. The regional characterisation is based on the concepts of regional planning. We assume that these regions capture the total case population of EIAs and thereby offer a representative sample of EIA cases. In this way, representative statements can be attained on the implementation and impact of EIA with regard to these regions. A cautious generalisation is possible on a national level. However, a straightforward projection of the findings made on the regional level onto the national level is not possible.

The selection of federal states was based on state specific characteristics that could be expected to have an influence on the number as well as the manner of implementation of EIA procedures. Amongst these are, for example, federal state legislation on EIA, the size and population of the federal states, due consideration of city states and territorial states, the categories of spatial structures and also the administrative structure (whether it has two or three stages). The six states selected on the basis of these characteristics are Bavaria (alternatively Baden-Wuerttemberg or Lower Saxony), Bremen, Hesse, Mecklenburg-Western Pomerania, North Rhine-Westphalia and Saxony (alternatively Saxony-Anhalt or Thuringia). The number of regions - six - is regarded as a balanced compromise between necessary differentiation and the degree of representativeness of the findings as well as feasibility of the study. In the remaining main stage of the project, definite regions are selected from the nominated federal states.

The analysis on the regional and national level covers structural characteristics and particularities of the individual states, with regard to institutional and organisational general conditions (e.g. advisory bodies or documentation centres, EIA-based educational and further education opportunities, economic aspects etc.). The findings are especially important with regard to suggesting improvements of the German EIA Act and its implementation.

3.3 Level 3: Cost-benefit survey and analysis

Level 3 analyses about 100 EIA cases with regard to the actual quality of EIA cases. This will be determined within the scope of a piled random sample, in which the frequency of conducted EIA procedures of a project type or groups of project types acts as the piling feature in the individual region. In addition availability of cases within the administration is a

necessary prerequisite. The cost-benefit review is not conducted as a precise monetary assessment of all benefits and costs; the task is rather to produce qualitative statements in order to relate the contribution of individual stages of the EIA to the overall quality of the EIA and to compare this to the relevant expenditure.

In order to operationalise the degree of goal achievement, the normative steering goals of the German EIA Act are derived from the wording of the law and the respective EU Directive. The focus of the analysis is placed on the environment-related goals. In order to determine the specific impact of the EIA Act, various analytical approaches are chosen. On the one hand, the total benefit of EIA shall be determined in each case, in the course of which the adjective and substantive nature of goal fulfilment is differentiated. The goal is met substantively if environmental aspects of the project relevant to the decision are identified, described and evaluated, and were taken into account in the decision (at least “formally” i.e. in the form of a proper tackling of the respective topic). Adjective goal achievement is diagnosed if all precautions are taken to avoid, reduce and compensate considerable negative environmental effects.

Moreover, the individual procedural stages of EIA are examined with regard to their (substantive) degree of goal achievement. Thus, sub-goals are also developed for each stage of the procedure indicating legal requirements (EIA Act, EIA administrative regulations etc.). They are differentiated according to the required behavioural input of individual actors on level 3 and 4 of the study (standardised or in-depth case studies). A comparison of the expected goal and the actual result at this stage reveals a delta, which shows the deviation from the goals. By means of aggregation of the individual criteria, the degree of goal fulfilment of the individual stages is assessed along with the substantive overall benefits of EIA. In a similar way, a collection and assessment pattern is deduced for the adjective overall benefit, which addresses the project set-up before and during the approval procedure. Data collection is effected in this case by studying files and conducting interviews (standardised and individual-explorative).

A further analytical step is to investigate perceived quality of the specific EIA case, both as a whole as well as in terms of its individual stages. Perceived quality is measured by questionnaires of state agencies, environmental groups as well as investors. This approach provides an overall evaluation of the effectiveness of EIA using the standard targets of the German EIA Act, both as a whole and specifically with regard to individual actor groups. The costs of EIA in terms of the individual stages are also investigated by interviews asking for working hours spent

on EIA cases. The cost investigation thus takes place on the basis of EIA-related process expenditure which results from each approval procedure. The subsequent costs of the realisation of the project, incurred by modifications or support, are not taken into account.

In the cost-benefit review, the actual (analysis of EIA documents) and perceived quality (questioning relevant actors) of an EIA is positioned in relation to the associated costs. Finally, comparative statements on the stages of the EIA and the overall appraisal of the EIA case result from the review. These empirical assessments serve to identify the strengths and weaknesses of EIA. Guided by the hypotheses gathered on this level, the selection of case studies takes place on level 4. The selection of cases is orientated to the classification of EIA procedures with a high or low level of efficiency.

In addition, a case-related analysis of general conditions and individual aspects of EIAs take place on this level in order to trace causalities in the light of the findings of the cost-benefit analysis. These findings also have an effect on the recommendations delivered by the research project.

3.4 Level 4: In-depth case studies

The objective of the fourth level of the cascade model is an in-depth causal analysis. The methodological basis of this research is an institutional analysis. By means of cascade approach, it is possible to combine the advantages of a relatively broad case base from level 3 with a more precise treatment of complex processes of opinion and decision making processes on level 4. In doing so, causalities can be apprehended in relation to individual stages and transferred into actor- and procedure-specific recommendations. Level 4 allows for an intensive enquiry of different actor groups (also building upon the findings of preceding levels), by means of which it can be more precisely explained how certain findings on level 3 of the analysis came about.

The basis of examination on this level is the creation of an “analysis grid”, in which assumptions that characterise the relevant groups of actors and their position with regard to incentives and barriers are adopted. The actors of EIA procedures pursue different interests and are shaped by their professional background and experience in very specific ways. Typical perception grids and cognitive boundaries can be the result. Actors also operate in different institutional and organisational contexts in each case, and each group is exposed to different “normative expectations of behaviour”. In this way, a differentiated analysis grid is developed. It allows the motivational deficiencies and active barriers in each case to be traced to both actors and the stages of the EIA.

Finally, an intensive discussion of factors that limit or promote the effect and could also have an influence on the impact of the EIA takes place. In this vein, it is significant whether certain strengths and weaknesses determined on level 3 are actually to be traced back to the mode of operation of the individual EIA, or whether other causalities are at play. These could be, for instance, aspects of the regulatory environment such as special legal requirements in the respective federal state. In addition, aspects connected to EIA that go beyond the previous legal regulations, such as inspection of the implementation of the project and monitoring of the effects on the environment that actually arise, could also play a role in this context.

4 Preliminary Findings and Outlook

The evaluation approach that is developed here underwent six pre-tests in terms of feasibility. In this way, the evaluation questionnaire to appraise the actual quality of conducted EIA procedures, a standardised actor questionnaire on the costs (to assess the quality) as well as factors of influence on EIA procedures were tested and explorative interviews were carried out. The developed evaluation approach essentially proved to be suitable. The first examinations of the standard case studies (level 3) took place in Bremen in November 2006 and shall be carried out till spring 2007. Their assessment gives rise to content-based foci that can be examined more closely in the in-depth case studies on level 4. The case studies are supplemented by workshops with EIA actors (project investors, consultants, environmental associations, officials of public authorities) as well as with the research advisory council of the R+D project. Concurrently, collecting data on the total number of EIA cases conducted in Germany is pursued.

Taking into account the EIA-specific requirements under national and European law as well as the implementation of administrative and environmental law, suggestions for improvement are developed at the end of the project. These suggestions incorporate both the legal requirements and the socio-economic incentive situation of the project investors and the affected administrative institutions. It is intended to provide a contribution to the discussion of effective and efficient implementation of environmental law and approval procedures that use EIA. Special regard is given to an integrated project approval in the future environmental code of law. The research project is highly topical as a result of the plans of the German federal government to pass an (albeit not comprehensive) environmental code of law within this legislative period, which will comprise regula-

tions on integrated project approval that can be aligned with the regulations on environmental impact assessment (see for example von Lewinski 2006, p. 697).

Executive Summary

What effects does the German EIA Act have on the implementation of environmental law and the implementation of approval procedures for industrial plants and infrastructure projects? The goal of the research project "Evaluation of the German EIA Act" on behalf of the German Federal Environment Agency is to answer this question, to identify weak points and possible measures for improvement of the normative requirements and to enable an effective and efficient implementation. In this way, the project also intends to make a contribution to the reduction of bureaucracy. This article presents the methodology and data collection concept as well as preliminary findings of the project.

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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.

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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.
- Voluntary Agreements - The Role of Environmental Agreements, elni (ed.), Cameron May Ltd., London, 1998.
- Environmental Impact Assessment - European and Comparative; Law and Practical Experience, elni (ed.), Cameron May Ltd., London, 1997.
- Environmental Rights: Law, Litigation and Access to Justice, Deimann / Dyssli (eds.), Cameron May Ltd., London, 1995.
- Environmental Control of Products and Substances: Legal Concepts in Europe and the United States, Gebers/Jendroska (eds.), Peter Lang, 1994.
- Dynamic International Regimes: Institutions of International Environmental Governance, Thomas Gehring; Peter Lang, 1994.
- Environmentally Sound Waste Management? Current Legal Situation and Practical Experience in Europe, Sander/ Küppers (eds.), P. Lang, 1993.
- Licensing Procedures for Industrial Plants and the Influence of EC Directives, Gebers/Robensin (eds.), P. Lang, 1993.
- Civil Liability for Waste, v. Wilmowsky/Roller, P. Lang, 1992.
- Participation and Litigation Rights of Environmental Associations in Europe, Führ/ Roller (eds.), P. Lang, 1991.

Elni Website: elni.org

On the elni website www.elni.org one finds news of the network and an index of articles. It also indicates elni activities and informs about new publications. Internship possibilities are also published online.