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A balanced appraisal? Impact Assessment of European Commission proposals

Susan Owens

1 Introduction

'The objective of an effective system of impact assessment is to change the way in which public authorities develop their policies'

Institute for European Environmental Policy¹

Decision makers need to be informed about the likely consequences of projects, plans, policies and regulations. This principle has been embodied for many years in procedures like environmental impact assessment and risk assessment. More recently, theory and practice in the field of impact assessment have been influenced by three important trends, all of which are evident within (though not restricted to) the European Union. First, the need for a more strategic approach has been recognised, as in the instigation of strategic environmental assessment which broadens the focus from specific projects to the plans and programmes from which they derive.² At the same time, 'better regulation' has become an almost ubiquitous goal, and some form of regulatory impact assessment is now supported by governments throughout the European Union and the OECD.³ Third, more integrated forms of assessment, including sustainability appraisal, have been developed, which seek to address environmental, economic and social consequences simultaneously. In 2002, the European Commission introduced an internal system consisting of 'a balanced appraisal of all impacts',⁴ associated with its major policy and legislative proposals. This new system operated for the first time during 2003.⁵

As these developments gain momentum, it is an opportune moment to reflect upon the purpose, practice and effectiveness of impact assessment. We have much to learn from the substantial achievements of well-established procedures such as EIA. But as new approaches, methodologies and guide-

lines proliferate we may be in danger of losing touch with the fundamentals. How, for example, should we conceptualise the role of impact assessment in policy- and decision-making? There is an interesting emergent view that assessment might better be characterised as a *social and institutional learning process* rather than a technical-rational means of informing decisions and leading (it is typically assumed) to better outcomes.⁶ This perspective has interesting implications, because it emphasises the importance of open and deliberative approaches, especially when there is little or no consensus about the issues under investigation. It therefore begs the question of which groups should be involved in impact assessment, when, why and how.

There are also important questions about the newer, integrated approaches to assessment, which are inevitably complex, and potentially opaque. Some commentators have expressed concern that integration *within* an assessment might, in practice, disguise political judgements and inappropriate trade offs.⁷ A particular fear is that environmental considerations will be marginalised, with the risk that hard-won gains of the past few decades will be lost. Indeed, some suspect that integrated forms of assessment have been a means of reasserting the primacy of economic objectives at a time when strategic environmental assessment was otherwise threatening to bite.⁸ Significant, related issues concern the quality and transparency of assessments, which must often be conducted under severe time pressures and with incomplete information.

These questions are relevant for assessment at all levels of governance, but they are explored here primarily with reference to integrated impact assessments of European Commission proposals (henceforth referred to as 'IA'). The next section sets out the policy background to this system, and considers the guidelines developed by the Commission for the conduct of such assessments. The paper then turns to experience with IA to date, particularly in relation to the questions identified above. Finally, it proposes a set of principles, which should form a

¹ Institute for European Environmental Policy (IEEP) (2004). Sustainable Development in the European Commission's Integrated Impact Assessments for 2003: Final Report, London, IEEP.

² European Commission (2001). Directive 2001/42/EC of the European Parliament and of the Council on the Assessment of the Effects of Certain Plans and Programmes on the Environment, Luxembourg, 27 June 2001, (PE-CONS 3619/3/01 REV 3), <http://europa.eu.int/comm/environment/eia/sea-support.htm> (04/07/01).

³ Radaelli, C. M. (2005). Diffusion without convergence: how political context shapes the adoption of regulatory impact assessment, *Journal of European Public Policy* 12 (5) 924-943.

⁴ See http://ec.europa.eu/governance/better_regulation/impact_en.htm

⁵ CEC (2002). Communication from the Commission on Impact Assessment, 276 final, Brussels 5th June.

⁶ Owens, S., Rayner, T. and Bina, O. (2004). New agendas for appraisal: reflections on theory, practice and research. *Environment and Planning A* 36, 11, 1943-1959. See also Radaelli (2005) op. cit.

⁷ See, for example, EEAC (2003) European Governance for the Environment, First EEAC Statement on Governance, EEAC October; Owens, S. and Cowell, R. (2002). *Land and Limits: Interpreting Sustainability in the Planning Process*, Routledge: London.

⁸ Owens and Cowell, *ibid.* esp. chs 4 and 8.

basis for impact assessment if it is to fulfil its role as an element of good governance.

2 Impact assessment in the European Commission: development and application of an integrated system

The European Commission is no stranger to impact assessment, having in the past 'used a wide range of tools to assess its proposals'.⁹ However, the new IA system was stimulated by two important developments. The first was the call, at the Gothenburg Summit in 2001, for the Commission to 'include in its action plan for better regulation ... mechanisms to ensure that all major policy proposals include a *sustainability impact assessment* covering their potential economic, social and environmental consequences'.¹⁰ A Task Force was set up by the Secretariat General to develop this approach.

The second, and arguably the stronger, driving force was the 'better regulation' agenda, being developed at the same time by the so-called Mandelkern Group. An action plan published in June 2002 proposed to implement, by the end of that year, a 'consolidated and proportionate instrument for assessing the impact of [the Commission's] legislative and policy initiatives, covering regulatory impact assessment and sustainable development (in economic, social and environmental fields)'.¹¹ In an accompanying Communication,¹² the Commission explained how it would 'integrate, reinforce, streamline and replace' existing, separate impact assessments and create a single tool 'to improve the quality and coherence of the policy development process'.¹³ It envisaged that the new system would 'contribute to an effective and efficient regulatory environment and further, to a more coherent implementation of the European strategy for Sustainable Development'.¹⁴ A two-stage process, with preliminary and, when appropriate, extended IAs, was envisaged. The new system was to be introduced gradually, with a trial phase for 42 selected proposals in 2003.

The Commission has produced two sets of guidelines laying down principles and procedures for IA. The first appeared in October 2002.¹⁵ Following an internal review of the initial operation of the system,¹⁶ and external critical comment (discussed in more detail in the following section), a revised set of guidelines was issued in June 2005, and partly updated in 2006.¹⁷ Both versions of the guidelines emphasise that the key task of IA is to reflect on policy objectives, develop alternatives, assess the likely impacts and, if possible, recommend a preferred option. They differ in some significant respects, however. As might be expected in an evolutionary process, the 2005/6 guidelines are more extensive, systematic and detailed. IA is now expected for all major proposals in the Commission's annual legislative and work programme, though some may require only a light touch. The preliminary assessment is replaced by a 'roadmap' for each proposal, outlining the issue at hand, policy options, likely impacts, and the form and timing of assessments and consultations. There is greater elaboration of procedural components, a tightening of the requirements for inter-service coordination,¹⁸ and more emphasis on external consultation. All of these might be regarded as helpful developments.

Both the earlier and later versions of the guidelines include 'protecting the environment' among the list of fundamental goals to be considered in preparing an IA, but Article 6 of the EC Treaty, which stipulates that environmental concerns must be integrated into Community sectoral policies, is not explicitly invoked. In 2002, the technical annexes opened with a link to the EU *Strategy for Sustainable Development*,¹⁹ emphasising the need to consider whether the subject of the IA related to 'unsustainable trends'. Interestingly, this does not appear in the 2005 annexes, which open instead with information about the roadmap. The 'harmonious and sustainable development of economic activities' (Article 2, EC Treaty) now appears among the fundamental goals of the Union (though not promotion of sustainable growth 'respecting the environment', as in Article 2, TEU). Some might detect a subtle shift of emphasis away from sustainable development, especially its environmental dimension; it is also worth noting an

⁹ CEC (2002) Impact Assessment in the Commission: Internal Guidelines on the New Impact Assessment Procedure developed for the Commission Services: (http://www.ec.europa.eu/governance/docs/comm_impact_en.pdf) with Technical Annexes: A Handbook for Impact Assessment in the Commission – How to do an Impact Assessment, Brussels, CEC.

¹⁰ This was to be part of the EU Sustainable Development Strategy. See Presidency Conclusions, Gothenburg European Council, 15-16 June 2001, no. 24: emphasis added.

¹¹ CEC (2002) Action plan: 'Simplifying and improving the regulatory environment' COM(2002) 278 final, p. 7.

¹² CEC (2002) Communication on Impact Assessment, op. cit..

¹³ Ibid, p.2.

¹⁴ Ibid

¹⁵ CEC (2002) Communication on Impact Assessment, op. cit..

¹⁶ CEC (2004) Impact Assessment: Next Steps, Commission Staff Working Paper SEC (2004) 1377, 21st October

¹⁷ European Commission (2005). Impact Assessment Guidelines. SEC(2005) 791, from 15.6.2005. with Annexes.

¹⁸ Though responsible DGs still have discretion over the design and organisation of impact assessments

¹⁹ CEC (2001) A Sustainable Europe for a Better World: a European Union Strategy for Sustainable Development, Commission's Proposal to the Gothenburg Council, COM (2001) 264 final, 15th May

increased emphasis on quantification and monetisation, which tends to marginalise complex, intangible and long-term environmental impacts in relation to more immediate and readily quantifiable effects. When concepts are quite vague, however, much must depend upon the interpretation and implementation of the guidelines, and it is to experience of IA in practice that this paper now turns.

3 Impact assessments: where is the deficit?

This section considers what might be learned from the operation of IA to date, drawing on reviews by the Institute for European Environmental Policy (IEEP)²⁰ and the European Commission itself,²¹ and on recent experience of IA in relation to four Commission proposals. Some comment is also made, where relevant, on the practice of integrated forms of assessment in other (non-Commission) contexts.

The IEEP, in a review of 21 extended IAs completed by April 2004, found that the assessments were of uneven quality. The reasons for this included the absence of formal mechanisms for quality control, inadequate resources and advice, and the lack of an institutional framework within which the Commission's objective of 'learning by doing' could be realised. An important finding was that insufficient attention had been given to the framing of problems, which were analysed predominantly from the perspective of the responsible directorate-general. IEEP also reported significant asymmetries in assessment design and process. Of the 15 IAs deemed to have relevance to all three dimensions of sustainable development, only about a third addressed them all, and then at very different levels of detail. In general, more attention was paid to short-term economic costs than to environmental or (particularly) social impacts. The asymmetry extended to stakeholder engagement, with industrial groups tending to be more involved in the IA process than environmental or social coalitions, reflecting the 'considerably greater resources'²² of the former. IEEP also found that some assessments had been hampered by severe data limitations, that there was a general lack of transparency in the system, and that the treatment of sustainable development issues in the Commission's guidelines had been 'brief and not easy to understand'.²³

Overall, the IEEP study showed that, with some exceptions, sustainable development issues were

receiving inadequate attention in IA; environmental and social dimensions were under-emphasised, and trade-offs between the different elements insufficiently considered. This has also been the experience within a number of Member States. In the UK, for example, the incorporation of environmental policy appraisal (EPA) into RIA has led to fears that 'integrated forms of appraisal, whose primary focus is still on reducing regulatory burden on business, will squeeze out environmental concerns altogether'.²⁴ The National Audit Office (NAO), in an analysis of 10 RIAs, confirmed that 'most did not handle sustainable development concerns well', and that social and environmental impacts 'were often not analysed in sufficient depth'.²⁵ Furthermore, RIAs were often used 'to justify decisions already made'²⁶ – a clear challenge to the technical-rational model of impact assessment as neutral, *ex ante* appraisal of policy impacts. The NAO's findings informed a subsequent study by the House of Commons Environmental Audit Committee, which made a number of recommendations for improvement. The narrow framing of assessments especially concerned the Committee, which noted that 'sustainable development is particularly neglected whenever scope is limited in this way, especially the wider social and environmental impacts of the policy'.²⁷

While the above studies point to a deficit in the environmental and social coverage of integrated assessments, the strongest pressures on the Commission in the context of IA have come from a different direction. The internal review conducted by an inter-service IA Working Group in 2004 was provoked by the Spring European Council, the High Level Group on Competitiveness and Growth and the Financial Affairs and Competitiveness Councils, all of whom were urging the Commission 'to reflect in greater detail on how competitiveness and issues related to administrative burden may be considered in the Impact Assessment method'.²⁸ The review concluded that there was room for further improvement in implementation and in fostering a culture of assessment within the Commission,²⁹ and proposed a

²⁰ Institute for European Environmental Policy (IEEP) (2004). op. cit.

²¹ CEC (2004) op. cit.

²² IEEP (2004). op. cit.

²³ IEEP (2004). op. cit., page 3.

²⁴ Russel, D. and Jordan, A. (2007) 'Gearing up governance for sustainable development: patterns of policy appraisal in UK Central Government', *Journal of Environmental Planning and Management* 50 (1) 1-21, quote from page 18. The EPA system was in operation from the late 1980s to 2004, but its impacts in government departments were rather limited.

²⁵ UK National Audit Office (2006) *Regulatory Impact Assessments and Sustainable Development*, Briefing for the Environmental Audit Committee, 22 May, quotes from page 3.

²⁶ *Ibid.*, page 2.

²⁷ House of Commons Environmental Audit Committee (2007) *Regulatory Impact Assessments and Policy Appraisal*, Third Report of Session 2006-07, HC 353: London, The Stationery Office; quote is from paragraph 25.

²⁸ CEC (2004) op. cit.: quote is from page 3.

²⁹ *Ibid.*, page 4.

number of reforms to take account of these considerations, including a simplification of process.

The opportunities and potential problems associated with IA can be further illustrated by the diverse experience of conducting assessments in the context of particular policy and legislative proposals. It is worth looking briefly at four of these, relating to policies or regulations in the fields of air pollution, chemicals, services and biomass energy.

3.1 Air pollution and the 'CAFÉ' Directive

An example of an effective and well-conducted IA is that relating to the Thematic Strategy on Air Pollution and the so-called 'CAFÉ' Directive (the Directive on Ambient Air Quality and Cleaner Air for Europe [COM (2005) 447]).³⁰ This assessment combined an open participatory consultation process with science-based discussions and a sophisticated modelling approach. Scoping, selection of options and scenarios, choice of models, underlying assumptions and results were all subject to scrutiny by expert and multi-stakeholder committees. Industry, environmental NGOs, research institutes and representatives of the Commission and Member States were involved in the working process, which presented numerous opportunities for dialogue, deliberation and learning. It helped that impact assessment in this sector was well-developed,³¹ and the different groups had been involved for a period of a decade or more. No doubt it was also helpful that the benefits of air pollution reduction outweighed the costs in all scenarios, and macroeconomic effects were negligible.³² Even so, the Commission opted for a relatively undemanding approach, settling for the benefits that could be achieved before the cost curve began to rise sharply.

3.2 REACH

Impact assessment for REACH, a regulatory framework for the registration, evaluation and authorisation of chemicals, involved a very different, less

consensual experience.³³ The intensity and scope of consultation on this controversial framework were extraordinary, and included multi-stakeholder conferences, an internet consultation,³⁴ intensive discussion in expert committees,³⁵ and preparation of guidance for implementation.³⁶ What is most interesting about REACH in the present context, however, is what Hey et al have called 'the battle of impact assessments',³⁷ in which cost estimates became the main bone of contention. After the Commission's initial impact assessment of its chemicals White Paper³⁸ in 2001, the 'battle' commenced, with close to 40 assessments and pilot studies subsequently being conducted at national and EU level.³⁹

Many of these assessments were far from neutral: rather, they were used as ammunition in a protracted political conflict over the merits of the proposed regulation. While the Commission's assessments (including its own extended IA of REACH⁴⁰) emphasised the benefits of reform and produced moderate estimates of costs, industry-sponsored studies typically produced much higher cost figures and stressed the negative impacts of the regulation on

³⁰ CEC (2005) Commission Staff Working Paper, Impact Assessment of Thematic Strategy on Air Pollution and The Directive on "Ambient Air Quality and Cleaner Air for Europe" (SEC 2005) 1133, Brussels 21 September 2005).

³¹ Wurzel, R. K. W. (2002). Environmental policy-making in Britain, Germany and the European Union. Manchester. Manchester University Press; and Jordan, A., Wurzel, R. K. W., Zito, A. R. (Hrsg.) (2003a): "New" Instruments of Environmental Governance? National Experiences and Prospects', London: Frank Cass. Environmental Politics, Special Issue 12 (1) 1-24.

³² Three different levels of ambition were compared with a 'do-nothing' and a 'maximum technical feasible reduction' scenario; these were assessed for environmental and health effects, costs, and macroeconomic impacts, including employment. Different strategies for achieving the targets were also assessed for their efficiency. In total, 360 model runs were undertaken. Results suggested a sharply rising cost curve for emissions reduction, whereas benefits followed a flatter curve.

³³ REACH was proposed by the Commission in 2003 (COM [03] 644[01]) and is due to enter into force in June 2007 (Regulation No. 1907/2006, see OJ L 396, Vol 49, 30th December 2006) [see the article by Uwe Lahl in this issue].

³⁴ This elicited 6400 comments, as a result of which the Commission considerably modified its requirements. Most were from employees mobilised by companies and trades unions to protest about potential job losses, see Hey, C., Jacob, K., Volkery, A. (in press) 'Better regulation by new governance hybrids? Governance models and the reform of European chemicals policy', *Journal of Cleaner Production* (2006), doi: 10.1016/j.jclepro.2006.11.001.

³⁵ Hey, C. (2000): *Zukunftsfähigkeit und Komplexität: institutionelle Innovationen in der Europäischen Union*. In: von Prittwitz, V.: *Institutionelle Arrangement in der Umweltpolitik, Zukunftsfähigkeit durch innovative Verfahrenskombinationen?* Opladen: Leske+Budrich, p. 85 - 102 also available in English: *Towards balancing participation*, EEB, 2001.

³⁶ See <http://www.ecb.jrc.it/REACH/>

³⁷ See Hey et al. (in press) op. cit., quote is from page 12. This is a good example of assessment becoming bound up in an 'analytical arms race' – see Owens, S. and Cowell, R. (2002) *Land and Limits: Interpreting Sustainability in the Planning Process*, London: Routledge, chapter 4. See also Jacob, K., Volkery, A. (2005). *Europäische Rechtssetzung: Die Auseinandersetzungen zur Europäischen Chemikalienpolitik REACH und die Rolle nationaler Regierungen und Akteure im Policy-Prozess*. *Technikfolgenabschätzung - Theorie und Praxis* 14 (1), S. 69-77.

³⁸ CEC (2001) *Strategy for a Future Chemicals Policy*, COM (2001) 88 final, Brussels, 27th February.

³⁹ Witmond, Bart et al. (2004). *The impact of REACH. Overview of 36 studies on the impact of the new EU chemicals policy (REACH) on society and business*. Studie für den Workshop "REACH Impact Assessment", 25.-27. Oktober 2004, Den Haag, Niederlande. Available from <http://www.eu2004-reach.nl/downloads/Comprehensive_Overview-v2.pdf>

⁴⁰ *Risk & Policy Analysis, Statistics Sweden* (2002) *Assessment of the Business Impact of the New Regulations in the Chemicals Sector*. Final Report prepared for European Commission Enterprise Directorate. London: RPA.

employment and growth.⁴¹ These gloomy predictions led in turn to further studies, producing lower cost estimates.⁴² Finally, the Commission bowed to pressure from industry (and from governments and industry associations outside the EU) to embark upon another series of assessments, although in this round environmental and consumer organisations were included on an overall steering committee. The most prominent of these studies was an industry-financed one by KPMG,⁴³ which suggested that the negative economic effects of planned chemicals reform were likely to be moderate. This enabled the Luxembourg Presidency to conclude that ‘there is no evidence to suggest that the Commission’s extended impact assessment of REACH contained fundamental flaws’.⁴⁴

The politics of REACH were extremely complex, and extended beyond the battle of impact assessments. Ultimately the regulation survived, but in significantly amended form with reduced data requirements and lower costs: it was formally adopted on 18th December 2006 by the Council of Environment Ministers following the vote in second reading of the European Parliament on 13 December. Three points are of particular interest here. First, the extended consultation, including the assessments, helped the Commission to mobilise knowledge, identify key concerns and conflicts, and fine-tune the design and the implementation of REACH: this is an interesting case of policy learning driven at least in part by conflict between advocacy coalitions.⁴⁵ Second, the process of impact assessment was highly politicised from the outset – assessments were often prepared to support particular positions, rather than simply to ‘inform’ – and third, the involvement of different coalitions, though extensive, was less balanced and less structured than in the air pollution case.⁴⁶

3.3 The Services Directive

In comparison with REACH, the IA process for the Services Directive, finally adopted in 2006,⁴⁷ was rather sedate, though the Directive itself was not uncontroversial. Its object is to remove barriers to the cross-border establishment and provision of services. An IA was published together with the proposal for the Directive early in 2004.⁴⁸ After an initial screening, two options were assessed in detail: a directive requiring the removal of all barriers at a certain point in time, and a two-phase directive focusing initially on the most important barriers, with those remaining to be evaluated at a later stage by stakeholders, the Commission and Member States. The IA suggested that the two-phase option was on balance to be preferred.

What is interesting about this IA is the scoping. DG Environment, when contacted by the lead DG (which controlled the IA), had suggested that environmental impacts did not need to be assessed in detail. The IA focused on socio-economic considerations, and in a brief section on environmental impacts stated that these were likely to be ‘negligible’.⁴⁹ However, environment ministries in some Member States did not share this view: the German Ministry, for example, raised a number of concerns.⁵⁰ There were anxieties that the liberalisation of services may in fact have significant impacts on the environment, and that the country-of-origin principle might undermine environmental standards. Although there had been extensive consultation during drafting of the directive, it was not systematically linked to the assessment process (and the IA itself did not involve a dedicated stakeholder consultation). Arguably then, the assessment in this case provides an example of a missed opportunity for a wider framing of the issues, policy learning and environmental policy integration. In practice, the IA acted mainly to legitimise the main thrust of the Services Directive, relating to the internal market and competitiveness.

3.4 The Biomass Action Plan

Finally, it is worth mentioning the IA for the Commission’s *Biomass Action Plan*,⁵¹ published by the Commission in December 2005 (and followed in

⁴¹ SRU (2003). Zur Wirtschaftsverträglichkeit der Reform der Europäischen Chemikalienpolitik. Berlin.

⁴² More detail about the various assessments is given in Hey et al, op cit.

⁴³ KPMG Business Advisory Services (2005): REACH – further work on impact assessment. A case study approach. Executive Summary http://europa.eu.int/comm/enterprise/reach/docs/reach/kpmg_summary.pdf. See also European Environmental Bureau (EEB) and World Wide Fund DetoX Campaign (2005). Assessing EU Environmental Policy Impacts. A Critical Evaluation of Impact Assessments carried out for Europe’s chemical policy reform. Brussels: EEB.

⁴⁴ Presidency Report on the Luxembourg Presidency Workshop on REACH, 10/11 May 2005, page 2.

⁴⁵ The role of advocacy coalitions in policy learning is discussed by Sabatier, P. A. (1987) ‘Knowledge, policy-oriented learning and policy change: an advocacy coalition framework’, *Knowledge: Creation, Diffusion, Utilisation*, 8 (4) 649-692.

⁴⁶ These points are made by Hey, C. et al, op. cit.; see also Jacob and Volkery, op. cit.

⁴⁷ Directive 2006/123/EC of the European Parliament and the Council on Services in the Single Market, OJ L376/36, 27.12.06.

⁴⁸ CEC (2004) Extended Impact Assessment of proposal for a Directive on Services in the Internal Market (COM [2004] 2 final), Commission Staff Working Paper, SEC (2004) 21, Brussels, 13th January.

⁴⁹ *ibid.*, page 37

⁵⁰ *Ends Daily* 1838, 10 March 2005.

⁵¹ CEC (2005) Biomass Action Plan, Communication from the Commission COM (2005) 628 final Brussels, 7th December, SEC (2005) 1573. The IA is published as an Annex.

February 2006 by a strategy for biofuels).⁵² Based on calculations by the European Environment Agency⁵³ the Commission estimated that the energy potential of biomass could grow from 69 mtoe to 150 – 185 mtoe between 2002 and 2010, with a possible further doubling by 2030. While the biggest absolute growth was expected to be in biomass use for electricity (+35 mtoe between 2002 and 2010), the greatest expansion in relative terms would be in biofuels (expected to grow from 1 to 19 mtoe). The Plan (and the Biofuels Strategy) confirmed the indicative target of a 5.75 % share of biofuel in transport fuel consumption by 2010, and reflected upon the possibility of a more binding target.

There are several paradoxes in this IA. First, even though the biomass and biofuels strategies appear to be driven by an environmental objective (reduction of greenhouse gas emissions), wider and cross-media environmental concerns do not feature strongly in the assessment. It pays little attention, for example, to potential land use conflicts, compatibility with biodiversity or Natura 2000 targets, or implications for air and water quality. These affects may not be negligible and merit serious consideration before targets and instruments are formulated. Further, it seems that the priorities of the *Biomass Action Plan* are not those that one might expect from a climate change or even an economic perspective. For example, one mtoe of biomass can save 2466 t CO₂ equivalents if used for heating, 2167 – 2560 t if used for electricity generation, and 1688 t as biofuel.⁵⁴ A CO₂-optimised biomass strategy might therefore prioritise heating and electricity generation over biofuel use.⁵⁵ The use of biofuels also seems to be less cost-effective than other uses of biomass.⁵⁶

These findings present something of a challenge to the notion that wider engagement encourages breadth of perspective, since the conduct of the biomass IA, which involved an inter-service steering group and extensive consultation, did seem to conform with good practice in this respect. In spite of this, important environmental aspects were overlooked, implying that even broadly-based participa-

tion will not automatically lead to well-balanced assessments – particularly, perhaps, when there are strong drivers in non-environmental sectors. In this case, the Commission's initiative seems to have been driven not only by climate change but by other considerations including rural development, agricultural diversification and security of energy supply.

4 A way forward?

The argument so far suggests that IA offers important opportunities to enrich the policy process – the best experience demonstrates that assessment can certainly have positive effects – but that a number of shortcomings will have to be overcome if this potential is to be realised. These include uneven treatment of economic, environmental and social impacts; a tendency for short-term priorities to take precedence; restricted framing of assessments; and missed opportunities for learning and innovation. In addition, there are problems such as insufficient capacity, which have already been acknowledged by the Commission.⁵⁷

At the time of writing, the Commission is undertaking another review of its system of impact assessment, and a report is expected in Spring 2007. It is timely, perhaps, to reiterate certain key principles, many of which are already recognised by the Commission but need more consistent application in practice, and sometimes more generous interpretation.

The first is *proportionality*. The approach to assessment (for example, which impacts are to be considered, what resources are required and how inclusive the process should be) must depend on the nature of the proposal. 'Big issues', and those on which there is little consensus, demand intensive treatment and the inclusion of a wide range of perspectives. Deciding on a proportionate approach must form a crucial part of the initial framing for any assessment. The second is that there should be a *combination of systematic enquiry and an open, deliberative process* (exemplified by the CAFÉ IA). A wide range of perspectives, values and policy objectives is important at all stages, including the framing stage, when the assessment can still be redirected (wider framing might have helped in the case of the Services directive, for example). A third principle is *transparency* – not always apparent in practice, though it is a positive development that all IAs are now available on a dedicated Commission website. The approach, assumptions and judgements in an assessment should be justified and open to challenge: it would have helped, for example, if underlying priorities had

⁵² European Commission. An EU Strategy for Biofuels. Communication from the Commission (COM/2006/34/final) Brussels.

⁵³ European Environment Agency (EEA) (2005): How much biomass can Europe use without harming the environment? Copenhagen. EEA-Briefing 02/2005.

⁵⁴ CEC (2005) Biomass Action Plan, op. cit., S32.

⁵⁵ See also SRU (Rat von Sachverständigen für Umweltfragen) (2005): Umwelt und Straßenverkehr. Hohe Mobilität - Umweltverträglicher Verkehr. Sondergutachten. Baden-Baden: Nomos. Tz. 355 m.w.N.

⁵⁶ Taking the plausible high price scenario of the IA as starting point, biomass for heating creates a net positive yield of 3.87 Euro/year for a reduction of 82t CO₂-eq, using biomass for electricity costs 22 Euro/t CO₂-eq, while biofuels cost around 100 Euro/t CO₂-eq. This assessment is in line with other cost estimates – see, for example, SRU (2005) *ibid*.

⁵⁷ CEC (2004) op. cit.

been more explicit in the Biomass IA. Fourthly, it will be important to establish *independent quality control*. Some steps have been taken in this direction, with the establishment of an Impact Assessment Board (IAB) in November 2006. It is internal in the sense that board members are high-level officials from Commission departments, but independent in that it will work under the direct authority of the Commission President. An alternative model (building on positive experience in The Netherlands) would be an external, independent body, involving a range of experience and expertise. In either case, monitoring should be in place from the earliest stages of any assessment. Finally, there is clearly a need for *adequate capacity*, in the absence of which Impact Assessment cannot deliver its objectives. It must therefore be high priority to provide full and adequate resources, not only for the execution of IAs but for training, inter-service co-operation, engagement of civil society quality control.

It is worth elaborating a little further on transparency and integration. It is particularly important that the bringing of different assessments together, and comparing and weighing diverse impacts, takes place explicitly and visibly in the political domain. This must raise the question of whether integration should be internal to the process of impact assessment – where there remains a risk that political judgements will be disguised as technical rationality – or always external and clearly separate from it. But the concept of separation itself presumes that the ‘technical’ and ‘political’ realms are clearly distinct, when this is often far from the case in practice (as the REACH IA demonstrates). What really matters is that a sound integrated IA should clarify, and not conceal, political choices. This makes transparency all the more vital.

Finally, we should remember that Impact Assessment is not an end in itself, but it can contribute to good governance if it is embedded in a process that provides crucial information and at the same time maximises the potential for institutional and policy learning. IA cannot of itself redistribute power – at least not in the short term – and even the best of procedures will not resolve value conflicts or reduce inherent uncertainties and indeterminacies. But transparent, well balanced and adequately resourced assessment can become an important part of a deliberative, political process, and over time can modify the landscape upon which policies and decisions are made.

Abstract

Decision makers need to be informed about the likely consequences of projects, plans, policies and regulations. Recent years have seen the development of integrated systems of assessment, considering environmental, economic and social impacts simultaneously: this has been driven by both the sustainable development and ‘better regulation’ agendas. The European Commission introduced one such system for its own policy and legislative proposals in 2002. This paper considers how the new system has been working, in the context of several important questions about the nature of impact assessment and its role in the policy process. It concludes by outlining some key principles to which impact assessment should adhere if it is to fulfil its role as an element of good governance.

Key words

Impact Assessment; sustainable development; better regulation; environmental policy

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⁵⁸ EEAC Working Group on Governance (2006) Impact Assessment of European Commission Policies: Achievements and Prospects, Statement (May 06) and Background paper (April 06), both available at <http://www.eeac-net.org/> see under ‘Statements’.

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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.

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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.

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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

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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.