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Belgian environmental impact assessment systems: Legal frameworks and beyond

Jan De Mulder

As a result of a number of constitutional reforms in recent decades Belgium is now a federal state. The societal evolution and the historical devolution of competencies have resulted in a multi-actor policy approach at different policy levels: municipal, provincial, regional and national (federal). Competencies regarding particular policy fields like the environment are often not attributed to one policy level. The application of policy instruments in such a framework leads to complex processes and regulatory frameworks for decision-making within Belgium.

The transposition of the consecutive EU Directives¹ has resulted in a growing environmental impact assessment practice. (E)IA approaches and requirements are found in horizontal as well as in specific legislation.

The application of the impact assessment frameworks has raised questions about the coherence of both proponents and authorities have to deal with these institutional features. Institutions provide not only for frameworks; they are also stakeholders in decision-making and have an interest in impact assessment.²

Most EIA legislation is, however, to be found at the regional level, except for the projects in the Belgian marine environment and nuclear installations which have remained a federal issue. Yet, for certain projects and even plans – e.g. on the North Sea coastline in Flanders, the only coastal region in Belgium – the decision-making process requires the application of both the federal and regional legislations.

Later on the transposition of the Strategic Environmental Assessment Directive of 2001 revealed a more profound “impact” on decision-making processes. The final adoption of federal and regional SEA legislation happened in the course of 2006-2008.

This article will briefly outline EIA and SEA (and emerging IA) regulations at the Belgian federal and regional policy levels. Furthermore, some particular issues regarding the involvement of stakeholders and consultants as an element of impact assessment quality requirements are explored.

1 Legislation at the federal level

As a limited number of environmental policy items like the protection against ion radiation, transit of waste, protection of the marine environment, and the policy concerning product norms remained within the federal competence, instruments to fulfil the implementation of legal requirements are adopted and applied at this policy level.

So at the federal level, EIA and SEA regulations and provisions have been adopted concerning 1) the protection against ionising radiation from nuclear installations; 2) the protection of the marine environment; 3) a limited number of plans and programmes.

1.1 Nuclear installations

The Act of 15 April 1994 on the protection of the population and the environment against ionising radiation from nuclear installations and the Federal Agency for Nuclear Control (FANC) is the basic act and replaced a similar act of 1958 which became outdated.

This act classifies the nuclear installations in different categories. The permit application for installations of category I must include an EIA which contains:

- Information in accordance with information as stipulated by the recommendations of the European Commission of 6 December 1999 (1999/829/Euratom) concerning the application of Art. 37 of the Euratom Treaty;
- The necessary information to provide and assess the effects on the environment related to ionising radiation;
- A draft of the most important alternatives, including a justification of the final choice with respect to the effects on the environment.

The permitting regulation concerning nuclear issues stipulates that the EIA is the responsibility of the developer who has to appoint natural persons or a legal person for drafting the EIS. These persons can carry out this work only after the developer receives approval from the Federal Agency for Nuclear Control that has based its opinion on a document submitted by the developer, containing information on the consultant(s), such as their technical competencies and other relevant references.³

¹ EIA Directive (85/337/EC as amended) and Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (SEA Directive).

² S. Nooteboom, Impact assessment procedures for sustainable development: a complexity theory perspective, *Environmental Impact Assessment Review*, Vol. 27 (2007), 645-665.

³ Royal Order of 20 July 2001 (The act was amended on 15 May 2007), see: http://www.fanc.fgov.be/download/reglementation_20_07_2001_fr.pdf.

1.2 Marine developments

The act of 20 January 1999 on the protection of the marine environment in sea areas under Belgian jurisdiction, the “MMM” act (changed by the acts of 17 September 2005 and 21 April 2007 and implemented through a number of royal orders) establishes the legal basis for the protection of the Belgian part of the North Sea against sea-related pollution and for the conservation, restoration and development of nature. This act summarises some general principles of environmental law and transposes international legal obligations⁴:

- The prevention principle: prevention is better than cure
- The precautionary principle: preventive measures must be taken if there are grounds for concern regarding pollution
- The principle of sustainable management: human activities must be managed in such a way that the marine ecosystem remains in a condition which ensures the continued use of the sea
- The polluter pays principle: the costs of measures to prevent and fight pollution are to be borne by the polluter
- The principle of restoration: if the environment is damaged or disrupted, the marine environment must be restored to its original condition as far as is possible.

The principle of objective liability is also established: in the event of any damage to or disruption of the environment in sea areas owing to an accident or an infringement of the law, the party having caused the damage to or disruption of the environment is obliged to remedy this, even if they are not at fault.

A general obligation is established, as regards activities for which a permit is required in advance, to prepare a report on the environment effects (EIA at the initiative of the proponent) and to undertake environmental assessment before and during these activities (carried out by the government). The legal requirements of the MMM Act are elaborated in a number of Royal Orders: The Royal Order of 7 September 2003 on the procedure for permits required for certain activities in sea areas and the Royal Order of 9 September 2003 on the assessment of environmental effects.⁵ Art. 6 of this last Royal Order requires that a co-ordinator is in charge of the supervision of the EIA drafting. This coordinator may be employed by the proponent and if that is the case, the coordinator is

provided with certain safeguards in order to assure the independency.

Alongside the legal requirements regarding the contents of an EIA, the proponent may address the competent authority (The Management Unit of the North Sea Mathematical Models and the Scheldt estuary, MUMM) for scoping advice. The review or quality control is done by the MUMM. The MUMM investigates if the proponent’s EA statement is complete and of a sufficient quality. It may require additional information or research to be done by the proponent or the MUMM may commission the additional research or do it on its own. The MUMM presents a report (assessment of the proponent’s EA statement) about its investigation and advises the Minister responsible for granting or refusing the permit.

The MMM Act does not deal with plans and programmes, which means that SEA is not an issue under this Act. However, given the size of at least the wind farm projects and their role in an overall energy strategy, one may question the appropriateness of this project level approach.

1.3 Federal plans and programmes

The field of application of the federal SEA Act (act of 13 February 2006 on the environmental assessment of certain plans and programmes and the participation of the public in the development of certain environmental plans and programmes and its implementing Royal Orders of 22 October 2006 and 5 June 2007) is rather limited. A SEA is mandatory for only six types of plans. For some of these types earlier sector legislation (e.g. on the organisation of the electricity market and on the transport of gas products) already provides for a SEA requirement. One category concerns plans and programmes for the exploration and exploitation of non-living resources in the Belgian territorial sea and the continental shelf. In order to introduce a SEA requirement for other types of plans or programmes, a Royal Order has to be approved. The SEA Act also stipulates that for certain particular plans or programmes the proponent has to provide for a SEA after the Council of Ministers has decided so after consulting an Administrative Advisory Committee.

This Committee is also involved in the SEA scoping. The proponent has to present a draft scoping document to the Committee. The Committee gives advice and the proponent decides but the latter has to inform the Committee of the decision. Members of this Committee belong to several federal departments, such as Energy, Mobility, Economy and also Sustainable Development. When the proponent relies on consultants for drafting the SEA, he needs to ensure that there is no conflict of interest. Contrary to the regional approaches there is no obligation to contract certified consultants. The proponent (and consultants)

⁴ The key instruments in this context are the OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic (Paris, 1992), the Bonn Agreement for cooperation in dealing with pollution of the North Sea by oil and other harmful substances (1983) and the system of International Conferences on the Protection of the North Sea.

⁵ Royal Order of 7 September 2003, see: <http://www.mumm.ac.be/Downloads/MBBS170903pp46101-46111.pdf>.

needs to follow and apply the advice of the Committee.

The proponent has to submit the draft plan or programme and SEA to the Advisory Committee as well to the Federal Council on Sustainable Development and the regional governments for advice.

Regarding the consultation of foreign authorities when the implementation of the plan or programme might have a transboundary environmental impact, Art. 13 of the SEA Act refers to the UNECE Espoo Convention.⁶ This is quite intriguing given the existence of the Kiev Protocol on SEA to this Convention (not yet in force; signed but not yet ratified by Belgium), but is not totally inexplicable given the provision in this convention which provides the opportunity to apply the convention also to policies, plans and programmes.⁷

1.4 Federal policy proposals

As a result of the federal planning on sustainable development, a requirement introduced by the Act of 5 May 1997 concerning the coordination of federal policy on sustainable development, a system of Sustainability Impact Assessments (SIA) for important new federal policies has been introduced at the beginning of 2007. Particular SIAs have to be prepared by the Sustainable Development Cells that were established in each federal department and must be presented with the concerned policy proposal in advance of the discussion and decision about the proposal in the federal Council of Ministers.⁸ Although methodological support has been available (e.g. scoping and screening guidance) up to now, experience with SIA is very limited and as the application of SIA is not a legal requirement at this moment its future development depends on political willingness.

2 Legislation at the regional levels

All three Belgian regions have EIA and SEA systems. The Walloon Region has a quite elaborated system that has been amended in the course of recent years.⁹ The general provisions on EIA and SEA are found in the 5th part of book I of the Walloon Environmental Code. The Brussels EIA procedure is also elaborated.¹⁰ As both regional EIA and SEA regimes have

to implement the EU Directives they contain provisions on transboundary impact assessment which provide for information exchange and consultation, even with the other Belgian regions.

The Walloon EIS has to be carried out by an accredited consultant proposed by the proponent. The accreditation system also, however, includes penalties. An accredited consultant can lose the accreditation temporarily or definitely after being warned about poor quality and after the advising authorities have been consulted. Additionally, the legislation provides that in the case of an “*independency problem*” the consultant can be challenged. The particular procedure for such a case has been trimmed down which makes it rather ineffective due to a lack of “*information opportunities*” regarding timing and awareness.¹¹ It should also be mentioned that the highest administrative court of Belgium (the State Council) decided on one occasion that due to a lack of impartiality and independence of the consultant a particular EIA procedure had to be declared void.¹²

The EIA and SEA legislation of the Brussels region reflects the urban context. After the local community receives a submission for a permit for which an EIA is necessary, the Brussels Environmental Institute is informed, which then convenes a “*guidance committee*”. The guidance committee approves the consultant proposed by the proponent in his or her submission. If there is no approval, the proponent may suggest other names of candidate consultants. The legislation includes an appeal procedure to the Brussels Government. The consultant (natural and legal persons) must be accredited by the Government of Brussels and the accreditation is valid for 15 years. The contract between the consultant and developer has to include a provision that stipulates that the scoping guidelines (issued by the “*guidance committee*”) shall be “*followed*”. The Brussels SEA legislation does not contain a requirement for the use of an accredited consultant. It is the responsibility of the proponent/developer to make the environmental report.¹³

3 Legislation at the Flemish level

3.1 Overview of regulations

The EIA / SEA decree of 18 December 2002 introduced the first comprehensive set of provisions on environmental assessment at the Flemish level. Through this decree EIA, SEA and safety reporting (as required by the Seveso Directive) became part of the framework decree on general provisions regarding environmental policy. The decree of 27 April 2007

⁶ Belgium approved its ratification law on 9 June 1999, published in the Official Journal of 31 December 1999 (the Espoo Convention on EIA in a transboundary context came into force on 10 September 1997).

⁷ On the Belgian transboundary arrangements, see: J. De Mulder, The institutional context for transboundary environmental impact assessment in Belgium: multi level setting - a matter of smooth governance? In: Impact Assessment and Project Appraisal, forthcoming special issue on transboundary impact assessment (December 2008).

⁸ See: <http://www.poddo.be/>.

⁹ Decree of 18 June 2002, see: <http://wallex.wallonie.be/indexMain.html>, look at: “évaluation des incidences sur l’environnement – droit interne”.

¹⁰ Ordinance of 5 June 1997 (art. 70-78), see: <http://www.ibgebim.be/>.

¹¹ J. Sambon, L'évaluation des incidences dans la délivrance des permis en Région wallonne, Aménagement-Environnement, 2 (2004), 77.

¹² Court case Council of State N° 44.022 (15 September 1993).

¹³ Ordinance of 18 March 2004.

replaced the SEA chapter completely.¹⁴ Next to these general EIA and SEA provisions, a number of “checks” have been introduced, especially in environmental regulations, e.g. the “water check” (required by the Decree of 18 July 2003 on integrated water policy), the “landscape check” (required by the Decree of 13 February 2004) and several “nature checks”. The EIA / SEA decree of 18 December 2002 includes a provision providing the possibility of integrating different impact assessments and checks if more than one is required for a particular activity.

The first Flemish SEA provisions (which contained no transposition of the scope of application of the SEA Directive) had to be supplemented with some lists of plans and programmes for which a SEA would be required or which had to be screened. On a political level, an agreement was not feasible for years. The Flemish Government needed a ruling from the European Court of Justice (7 December 2006, case C 54/06) before it was convinced to supplement its SEA provisions.

The current provisions are more or less a copy of the Directive’s provisions on its scope of application. The proponent has the burden of evidence and has to prove that a plan or programme will not lead to significant environmental impacts. This particular screening approach involves quite extensive consultations and requires the collection of substantive information (including previous studies). The assessment of the submitted evidence is a challenge for the competent SEA authority (part of the Environment administration). If a SEA is required, alongside the scoping provisions, consultations should result in quite detailed scoping instructions. At least a certified consultant has to be contracted by the proponent for coordinating the SEA work.

The final review of the SEA is carried out by the competent SEA authority and leads to a (dis)approval, after which the SEA becomes (or continues to be) part of the planning process.

The EIA and SEA provisions were supplemented by the implementing orders of the Flemish Government of 10 December 2004 (lists of projects for which an EIA is mandatory, directly or after screening), 12 October 2007 (on SEA, mainly consultation requirements, further elaborated in a ministerial circular of 1 December 2007)¹⁵ and 18 April 2008 (on the SEA integration in the physical planning procedures)¹⁶. Based on the relevant provisions of the decree of 27 April 2007, the Art. 6 and Art. 11 of the implementing order of 12 October 2007 provide for

(but mainly repeat) the requirement for transboundary consultation in the screening and scoping phases and also in the public inquiry phase of the decision-making on the plan or programme.

The latest implementing order of 18 April 2008 elaborates the provision in the EIA / SEA decree that provides for an “integration track” for physical or spatial plans (at local, provincial or regional level). In practical terms, the SEA work starts at the same moment as when the spatial plan is being prepared after it has been decided by the competent planning authority that a SEA is required. The competent SEA authority is involved in the scoping phase as well as the final (quality control) phase. The approved SEA is part of the consultation stage about the draft spatial plan.

Contrary to the many EIA-related cases and decisions by the State Council (Superior Administrative Court), the jurisprudence regarding SEA is still very limited.¹⁷ A recent case concerned the rejection by the State Council of the appeal by citizens and NGO’s against the (planning/building permit) decision to allow major infrastructure works (railway and bus station, road building, urban development) in Ghent. One of the arguments against this decision concerned the quality and contents of the SEA.¹⁸

The cases reveal the problematic relationship of the SEA component with the other elements in the decision-making process(es). In the literature, it has been stated that:

*“SEA practitioners are advised to make an ex ante assessment of the contribution that can realistically be made and how they should act to realise this potential. This may avoid too much time and effort being put into activities that are of little interest to decision-makers; at the same time it allows for realistic expectations.”*¹⁹

¹⁴ Official Journal of 20 June 2007. This decree amended the Decree on General Provisions regarding Environmental Policy, as amended by the Decree of 18 December 2002; see: <http://www.mervlaanderen.be>.

¹⁵ Official Journal of 7 November 2007.

¹⁶ Official Journal of 30 May 2008.

¹⁷ L. Lavrysen, The integration principle – Belgian report, Avosetta Meeting, Budapest, 18-19 April 2008, see: <http://www.avosetta.org>.

¹⁸ Court cases Council of State N° 183.356/183.357 (26 May 2008).

¹⁹ H. Runhaar and P.J.P. Driesen, What makes strategic environmental assessment successful environmental assessment? The role of context in the contribution of SEA to decision making, Impact Assessment and Project Appraisal, Vol. 25, (2007), 12.

Step	Action	Actors	Delay - targetdate
0	Informal pre-consultation	Proponent, competent SEA authority, consultants	
	PM screening opportunity:	Proponent, competent SEA authority, consultants	30 d. (+ 60 d. in case of transboundary procedure)
1	Notification (including documentation)	Competent SEA authority	N
2	Declaration of completeness of Notification is sent to Proponent	Competent SEA authority	to be done within 20 days after receiving the Notification (= Y) time = Y
SCOPING phase = > requirements about SEA contents			
3	Start of consultation, Gathering of advices, organisation of publicity of Notification & documentation, discussions, Meeting (optional)	Competent SEA authority, governmental services, local authorities, foreign authorities, the public, proponent, consultants	Y + 30 d
	Comments are analyzed & processed, Scoping decision	Competent SEA authority	Y + 50 d (+ 60 d. in case of transboundary procedure)
	Decision is sent to Proponent ²⁰		
MIDDLE phase			
4	SEA is being drafted, Intermediate consultation (including meetings) is possible	Proponent, consultants	No fixed period, duration depends on the scope of the plan and the SEA
FINAL phase – QUALITY CONTROL			
5	Submission of the final SEA	Proponent	
6	Review of the SEA (Dis)approval of SEA	Competent SEA authority	50 d
	Decision is sent to Proponent ²⁰	Competent SEA authority	

Table 1: The Flemish SEA procedure: steps and the involvement of actors

3.2 Flemish policy proposals

Only last summer, more than ten years after the federal act, the Flemish Government adopted a Decree to enhance Sustainable Development.²¹ The decree has 8 articles and introduces an approach which obliges each new Flemish government to adopt a sustainable development strategy. This strategy has to be realised through the application of a number of policy princi-

ples like participation, coordination and inclusive policy-making. A major criticism on the contents of the draft decree concerned the lack of instruments to implement the strategy. The joint advice of both the Socio-economic Council and the Environment and Nature Council was quite critical and stated that the draft lacked ambitions and clear objectives.²² The advice of the Strategic Advisory Council on International Issues found the draft was too descriptive and lacked normative provisions. During the discussions in the Flemish Parliament, the green opposition introduced a few – rather modest – amendments, inter alia to introduce a sustainable impact assessment approach, but these proposals were rejected. During the

²⁰ After receiving this decision the proponent may decide to introduce an "appeal" to an administrative Advisory Commission.

²¹ Decree of 18 July 2008, Official Journal of 27 August 2008. This decree came into force on 6 September 2008.

²² Advice of 12-13 December 2007, see: <http://www.minaraad.be/adviezen/2007>.

political debate possible linkages (even integration) of a future SIA approach to the existing SEA and Regulatory Impact Assessment (RIA) systems were mentioned.²³

RIA is also not based on a legal requirement but was introduced by a governmental decision on 1 January 2005. Some years earlier in 2001 the Flemish Government had already established a Regulatory Management Unit. This Unit has developed guidance documents in order to assist the departmental Cells for Regulatory Quality, responsible in practice for the RIA. The quality control of the Regulatory Impact Statements remains in the hands of the Regulatory Management Unit.²⁴ An evaluation of the RIA practice carried out by the Flanders Socio and Economic Council (SERV) two years ago revealed no spectacular results and even now it seems that RIA is not yet firmly established in the political minds and the administrative culture.²⁵

4 Quality requirements

4.1 Legal Framework

Discussions on the quality of environmental assessment have primarily focused on the quality of the reports (EIS). A good report is usually an effective report: one that influences the final decision-making on the proposed activity.²⁶ In order to obtain a good quality output, procedures have been developed that include the major EIA-stages (such as screening, scoping, consultation, review).²⁷ EIA (and SEA) procedures are prescribed in laws and regulations. As a product of such a procedure, the quality of a report or statement is likely to be reflecting the quality of the applied procedure in a formal way but also more informal features such as common administrative practices. So when addressing the quality issue of EIA and SEA one has to look beyond the legal context.²⁸ But it is undeniable that the legal framework remains the fundamental one.

The EU and international law provisions are not that elaborated regarding the quality requirements. Contrary to the EIA Directive which is silent in this respect, Art. 12 of the SEA Directive²⁹ requires that: “(...) Member States shall ensure that environmental

reports are of a sufficient quality to meet the requirements of this Directive and shall communicate to the Commission any measures they take concerning the quality of these reports”.

The Commission’s Guidance on the implementation of SEA-Directive, clarifies this provision as follows:

“(…). The Directive does not elaborate what is sufficient quality. But since the SEA process and environmental report are both defined by the Directive, a correct transposition and proper application of its provisions, both in content and procedure would appear to meet the requirement for sufficient quality. The procedural and substantive requirements of the Directive, if properly implemented and applied, may be envisaged as a ‘minimum standard’ for ensuring the quality of environmental reports. Member States may decide for themselves whether to establish additional measures and, if so, what these should be. (...)”

Art. 10 of the SEA Directive offers in the long run better perspectives on the improvement of the quality of environmental reports as it obliges Member States to monitor the significant environmental effects of the implementation of plans and programmes in order, inter alia, to identify at an early stage unforeseen adverse effects, and to be able to undertake appropriate remedial action.

This article is reflected in Art. 12 of the UNECE SEA Protocol to the UNECE Convention on Environmental Impact Assessment in a Transboundary Context. This convention which remains also rather vague on quality assurance given its procedural character, contains however a basic provision similar to the later above-mentioned monitoring provisions. However, Art. 7 of the Espoo Convention on post-project analysis has a non-mandatory character, but clearly provides opportunities. The Guidance on the practical application of the Espoo Convention clarifies this provision and indicates that a post-project analysis has to analyse as a minimum both the activity as well as its potential adverse transboundary impacts. A post-project analysis is typically based on the monitoring of the activity and its impacts.³⁰

The SEA Directive does not define the term ‘monitoring’. Monitoring can, however, be generally described as an activity which concerns the follow-up of the development of concerned parameters (magnitude, time and space). In the context of Art. 10 SEA Directive and with regard to the aspect of ‘remedial action’ monitoring may also include an evaluation of the environmental information. Art. 10 does not contain any technical requirements about the methods which are to be used for monitoring the significant environmental effects. The objective of Art. 10, namely to find out whether the assumptions made in the envi-

²³ Vlaams Parlement, Stuk 1629 (2007-2008), No. 3.

²⁴ See: <http://www.wetsmatiging.be>.

²⁵ See: <http://www.serv.be>.

²⁶ K. Fuller, Quality and quality control in environmental impact assessment, in: Handbook of Environmental Impact Assessment, Vol. 2, (J. PETTS, ed., Blackwell Science, Oxford, 1999), 55-82.

²⁷ C. Wood, Environmental impact assessment, a comparative review, (Longman, Harlow, 1995), 5.

²⁸ B. Dalal-Clayton and B. Sadler, Strategic Environmental Assessment, A sourcebook and reference guide to international experience, (Earthscan, London, 2005).

²⁹ See: <http://europa.eu.int/comm/environment/eia/sea-legalcontext.htm#legal>.

³⁰ ECE/MP. EIA/8, Guidance on the practical application of the Espoo Convention, UN, Geneva, 2006, 20.

ronmental assessment correspond with the environmental effects which occur when the plan or programme is implemented and to identify at an early stage unforeseen adverse effects resulting from the implementation of the plan or programme, may give some orientation in this respect. Furthermore, it follows from Art. 10(2) and the potential revision of the plan or programme which is implicitly addressed by the words 'remedial action', that Art. 10 creates an obligation which, although coming into effect after the environmental assessment and the adoption of the plan or programme, may be integrated in the regular planning cycle where appropriate.

Art. 12(2) of the SEA Protocol stipulates that monitoring results shall be made available to the consulted authorities and the public which reveals that stakeholders play an important role as quality guardians.

Art. 4.6.3 of the Flemish EIA/SEA decree provides for the possibility that the competent EIA/SEA authority (within the Environment Administration) may organise a monitoring or evaluation exercise. This could be based on a particular project or plan but also a certain category of activities (project, plan). If this is undertaken, the proponent is obliged to cooperate and provide all required information.

In general the Belgian federal and regional assessment systems reveal a certain degree of diversity with respect to the specific procedural elaboration of the main EIA and SEA phases as provided for in the EU EIA and SEA Directives.

Quality requirements in these EIA/SEA systems are mainly focused on the content-based requirements for the reports and scoping guidance by the competent environmental authorities. The public and advising institutions may also play a (rather limited) role at this stage. The final review of the EIS or environmental report remains in Flanders an "in house" operation for the environment administration that approves or disapproves the EIS or environmental report. By contrast, in the Walloon Region, some advising institutions can comment on the quality of the report.

4.2 The role of stakeholders, public expertise and consultants

An EIA process involves at least a number of categories of participants and given the objective of this process, describing the relationships between these stakeholders in the impact assessment process as an "administrative negotiation process" is quite acceptable.³¹ This process includes also different dimensions

related to rationality, decision-making and sustainability. So the EIA/SEA serves multiple purposes.³²

As the participants or stakeholders have different expectations regarding the process and its outcome given their interests, perceptions and societal values, their opinion about a "good quality EIA" might differ as well. From this participatory perspective, one may agree with observations in the literature that EIA professionals should come to grips with the facts that EIAs (and SEAs even more, given their "strategic nature") are not science and will always contain unexamined and unexplained value assumptions.³³

Some are clear about the ultimate values that have to be pursued:

"(...) EIA practitioners, whether regulators, proponents or consultants, are environmental professionals and have an implicit responsibility to work towards a sustainable future. In a busy practice and with the demands of procedural and financial imperatives, it can become easy to slip into a 'box ticking' approach to EIA. Vigilance is needed".³⁴

The EIA/SEA legislation in Flanders contains only a few provisions on the use and accreditation of consultants. In general an EIA or SEA report has to be undertaken by an accredited consultant put forward by the developer. For a SEA, only the use of an accredited coordinator is mandatory as the other SEA team members might be employees of the developer. In the case of an EIA however, the EIA coordinator and all team members have to be accredited. The legislation also stipulates that a consultant needs to be independent, and he may not be in a position that can contain a conflict of interest. The accreditation is given by the regional Minister for the Environment and is in principle valid for a period of 5 years (shorter periods are possible; renewal is also possible). The accreditation file contains a draft proposal by the environment administration that is based on a number of advices (from relevant governmental agencies or services) and an evaluation of the information that has been submitted by the concerned consultant. In his application, the consultant has to indicate for what kind of "environmental (sub-) disciplines" (e.g. noise, fauna & flora, or marine waters) he or she wants to obtain an EIA accreditation. The accreditation procedure is rather time-consuming. The consultant can lose the accreditation if the accreditation conditions are no longer fulfilled or the independency is lost. However the public has an

³¹ See: J. de Hemptinne, La négociation : outil d'aide à la prise de décision et de règlement des conflits environnementaux, Revue Interdisciplinaire d'Etudes juridiques (1994) 129-161; also: R. Buckley, Improving the quality of Environmental Impact Statements (EISs), in: Environmental Methods Review: retooling impact assessment for the new century, (A.L. Porter & J.J. Fittipaldi, eds. AEPI-IAIA, Fargo, 1998), 42.

³² M. Cashmore, R. Gwilliam, R. Morgan, D. Cobb & A. Bond, The interminable issue of effectiveness: substantive purposes, outcomes and research challenges in the advancement of environmental impact assessment theory, Impact Assessment and Project Appraisal, Vol. 22, (2004), 297.

³³ R. Beattie, Everything you already know about EIA (but don't often admit), Environmental Impact Assessment Review, Vol. 15 (1995), 109.

³⁴ A. Weaver, A., Pope, J., A. Morrison-Saunders, and P. Lochner, Contributing to sustainability as an environmental impact assessment practitioner, Impact Assessment and Project Appraisal, Vol. 26, (2008), 97.

opportunity to participate in the scoping phase and the environmental administration approves the proposed EIA/SEA team together with the scoping guidelines, there is no procedure to challenge the consultant(s) in the case of an alleged “*independency problem*”. At present, due to a lack of more detailed implementation regulations, the environmental administration has only one real sanction opportunity, namely the refusal to renew the accreditation of the consultant.

tional public service.³⁶ By receiving the accreditation a consultant obtains the right to execute this service, but this accreditation also brings the consultant within the legal framework of the public service or governmental policy. This means that this particular work by the consultant has to be evaluated by applying certain basic principles or criteria of public sector functions (objectivity, impartiality, independency, etc.). The consultant also has to accept legally required govern-

Participant/ Stakeholder	Potential interpretation of EIA-SEA	Major expectations	Feasible determinants of effectiveness
Developer/proponent	Unnecessary, bureaucratic, costly hurdle for reasons of political expediency	<ul style="list-style-type: none"> • Certainty of outcome • Cost effectiveness • Timing concerns 	Gaining of permit, consent or planning decision
Public: <ul style="list-style-type: none"> • local resident • NGO 	<ul style="list-style-type: none"> • public relations tool to justify decisions • tool to improve stakeholder involvement and transparency and accountability of decision making 	<ul style="list-style-type: none"> • Right to know • Right to be informed • Right to be heard • Right to object 	<ul style="list-style-type: none"> • substantive changes in design • abandonment of project/plan • level and amount of public involvement • changes to status quo
Decision makers: <ul style="list-style-type: none"> • politicians • administration 	A process that demonstrates to the electorate / citizens that environmental concerns are important to and being addressed by the government	<ul style="list-style-type: none"> • Timing concerns • Appropriate information (accurate, necessary manageable) 	<ul style="list-style-type: none"> • poll ratings for environmental issues • maintenance of the status quo • financial impact • policy impact
Environmental economists	A theoretically deficient response to public and political resistance to place economic values on issues affecting human welfare	Scientific objectivity	<ul style="list-style-type: none"> • quantification of impacts • rationality of process and decisions
Environmental consultants	A practical analysis of major environmental consequences of the planned decisions	<ul style="list-style-type: none"> • Scientific objectivity • timing concerns • information sharing and inter-disciplinarity 	<ul style="list-style-type: none"> • (non financial) quantification of impacts • qualitative assessment of impacts • rationality of process and decisions

Table 2: Expectations of participants (or stakeholders) in the EIA/SEA process may differ

In such a case, a consultant may challenge the decision and appeal to the State Council.³⁵

The legal role and the position of the accredited EIA consultant has been analysed and described in Belgian judicial literature as the private execution of a func-

mental guidance such as the scoping instructions from the environment administration.

On the other hand the consultant has a contractual relationship with the proponent or developer that has a private law character. Thus, it is not so surprising that

³⁵ Court case, Council of State N° 107.445 (6 June 2002).

³⁶ D. Deom, Le statut juridique de l'auteur de l'étude, in: L'évaluation des incidences sur l'environnement: un progrès juridique?, (X, CEDRE, FUSL, Bruxelles, 1991) 183.

conflicting responsibilities and liabilities are created by the dual-sided approach.

In the professional literature one cannot find that much factual information about the actual work of consultants in the field of EIA, but it is obvious that the introduction and expansion of EIA/SEA has been very helpful for the growth of environmental consultancy. Critical observations related to the consultancies' performances tend to focus on poor quality as a result of insufficient funding:

*"(...) There has been some concern that competition and cost-cutting by consultancies, an increase in 'cowboy' consultancies and the tendency for developers to accept the lowest bid for preparing an EIS, may affect the quality of the resulting EIAs by limiting the consultants' time, expertise or equipment. Consultants note that 'on all but the largest developments there is always a limited budget (...)'."*³⁷

But obviously other concerns are influential and can explain the problematic EIA/SEA results:

*"Also highlighted is the fact that the 'independence' which proponents inevitably claim for the consultants they engage can only be partial. It has been shown that conclusions represented as 'scientific' and thereby 'independent' cannot only rest on but perpetuate a proponent's partisan worldview about how its project is expected or hoped to operate in the future. Hence the Russian doll metaphor draws attention to a proponent's influence over a project's regulatory outcomes by virtue of providing its consultants with their foundational and contingent baseline data."*³⁸

How to solve such problematic situations could be difficult from a legal perspective given the opposing dimensions. Of course values concerning public goods should prevail but in the absence of obvious legal violations, trade-offs shall be made mostly by the concerned actors, e.g. in particular by the consultant(s). As it is generally accepted, consultation and participation as well as the review of the report (EIS) are crucial elements of the IA process. Early consultation and participation even before the drafting of the EIS (in the scoping phase) or during the drafting phase are ways of enhancing the quality of the final product and to check and supplement the consultants' and governmental services' work. The public availability of the final report should also be seen as a means for the public to "review" the "review of the EIS" in the case such a formal "quality check" forms part of the EIA/SEA procedure in a jurisdiction. As mentioned before public participation and critique are a means of informing not only decision-makers but also consult-

ants and may be helpful in assuring their independence. The use of external expertise (other consultants?) in the review phase may also be a way to assure (and in the longer term improve) the quality of impact assessments, as far as the availability of capacity allows and potential conflicts of interests can be avoided.³⁹

Yet one should be aware that even the best intentions and approaches remain vulnerable:

*"It is difficult to see how the objectives of process transparency and proponent accountability in impact assessment can be met if proponent's formative value frameworks are not systematically identified and opportunities carved out for them to be challenged, negotiated and, where necessary, changed. Nor can these objectives be met if it is not recognised that uncertainty blind-spots are an inherent characteristic of what appears to have become indispensable integrated impact assessment practice."*⁴⁰

5 Some final observations on present features and needs

It is quite interesting that just the requirement for the use of accredited consultants is a common feature of all regional EIA systems in Belgium, but not for all the federal EIA approaches, and for SEA the requirements are less stringent. There seems to be no real willingness for intra-regional exchange regarding the use of consultants, as the intra-regional EIA Cooperation agreement does not contain any relevant provision. One may even say that there seems to be different "EIA/SEA markets" within Belgium and that consultants have to adapt themselves to these different governmental (bureaucratic?) "markets". As long as these markets relate only to procedural – sometimes conflicting or at least difficult to harmonise – arrangements, one has to consider this as a particular feature of the internal institutional developments. It is however more curious when the outcomes of these procedures – that essentially concern and also include the application of scientific methodologies – raise questions. It is even rather startling that the work of an accredited consultant is accepted and approved by one administration and disapproved by another, as the quality review is being executed by using different assessment criteria. This was revealed by a Council of State court case in 2004.⁴¹ This case seems to illustrate that accreditation is not a guarantee of a good quality report. Furthermore, it could be concluded that an accreditation system might also offer the admini-

³⁷ J. Glasson, R. Therivel & A. Chadwick, Introduction to Environmental Impact Assessment, (2nd edition, UCL Press London, 1999), 58.

³⁸ R. Duncan, Problematic practice in integrated impact assessment: the role of consultants and predictive computer models in burying uncertainty, Impact Assessment and Project Appraisal, Vol. 26, (2008), 63.

³⁹ J. Scholten, Reviewing EISs-EIA reports, in: Report of the EIA process Strengthening Workshop, Canberra 4-7 April, 1995, (IAIA – Environmental Protection Agency, Canberra, 1997), 61.

⁴⁰ R. Duncan, Supra note 38, 64.

⁴¹ Court case, Council of State N° 137.954 (2 December 2004).

strations responsible for reviewing EIS's, opportunities a "reduced quality assurance" approach.

As already mentioned an internal inter-regional cooperation agreement on EIA has been in force since 4 September 1994.⁴² This agreement became necessary since the first decade of regional EIA practices in Belgium revealed a lack of information exchange between the regions, especially for projects located at the regional "borders" or for major (even cross-border) projects. Although the federal level remains responsible for major projects in accordance with its competencies, it is not a party to this agreement. The contents of this agreement reveal many similarities with transboundary "international" EIA arrangements, as based on the Espoo Convention, but its implementation remained very weak. Also the legal nature of this kind of internal agreement (it was not endorsed by the regional parliaments) is not helpful to ensure its application. The common declaration to this agreement included an evaluation before the end of 1995. This intention was repeated in an interregional agreement of 6 April 2000. A couple of years later a revision of this cooperation agreement entered the political agenda due to a serious case of (transboundary) air pollution (caused by a fire in Brussels) that raised questions even from Germany. Given the expanding EIA and SEA regulations within Belgium at the different policy levels, one might suppose that a coherent proposal – involving all covered policy fields and levels – would be an option, but this has not been confirmed to date. Some years ago, the FANC started

a separate initiative for a cooperation agreement on nuclear installations that has yet not been finalised.

Given the particular institutional framework, the international (legal) developments⁴³, new societal challenges – such as the climate change and renewable energy – an (updated) cooperation agreement (including SEA on all plans, programmes and even policies whether at federal or regional level) might be interesting and useful.

In addition, more practical particularities (e.g. cross border cooperation issues from the perspectives of the Espoo Convention and Kiev Protocol but also others like bilateral or Benelux agreements, EGTC, etc.) or quality or efficiency improving approaches should be subject to a future cooperation agreement and create a broader impact assessment "market" from which the private sector as well as institutional actors might benefit and also contribute to the conservation and improvement of our common goods.

Another cooperation trigger might be the further development and application of sustainable development policies and instruments. On the occasion of the approval of the Decree on Sustainable Development, the Flemish government announced its willingness to enter into negotiations on a cooperation agreement on sustainable development. However, such formal-institutional improvements need to be accompanied by more substantial, but still procedural, improvements. Alongside enhancement of the application of EIA and SEA, SIA (including RIA) should also be put on the agenda and have a fair chance on all policy levels.

⁴² Official Journal of 11 August 1994.

⁴³ See, for example, D. French, Supporting the principle of integration in the furtherance of sustainable development: a sideways glance, *Environmental Law & Management*, Vol. 18 (2006), 103-117.

The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit-association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available of the public.

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**
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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.