

1+2/2013

ENVIRONMENTAL
LAW NETWORK
INTERNATIONAL

RÉSEAU
INTERNATIONAL
DE DROIT DE
L'ENVIRONNEMENT

INTERNATIONALES
NETZWERK
UMWELTRECHT

elni

REVIEW

Environmental ELNI EIA Conference in Wrocław

Sergiusz Urban and Jerzy Jendroška

The Appropriate Impact Assessment and Authorisation Requirements of Plans and Projects likely to have significant impacts on Natura 2000 sites

Nicolas de Sadeleer

Environmental Impact Assessment and Environmental Quality Standards

Eckard Rehbinder

Assessing the assessment:
Quality review of EIAs/SEAs: a Dutch perspective

Gijs Hoevenaars

The EU, access to environmental information and the open society

Ludwig Krämer

The Dutch policy on gold-plating and the transposition of Directive 2008/98/EC on waste

Lorenzo Squintani

The prohibition of mercury discharges from coal-fired power stations under European law

Peter Kremer

Editorial

The aim of the Environmental Impact Assessment (EIA) process is to ensure that projects which are likely to have a significant effect on the environment are assessed in advance so that people are aware of what those effects are likely to be. The review process conducted by the Commission of the 25 year-old “EIA-Directive” identified its potential strengths and weaknesses. Set against this background, the current edition of the *elni review* is dedicated to legal challenges in the implementation of Environmental Impact Assessment.

Firstly, an overview of challenges and perspectives of the EU Environmental Impact Assessment Directive is given by *Sergiusz Urban and Jerzy Jendroška* in their review of the elni conference held on May this year in Wrocław which examined the proposed changes of the EIA Directive in the light of practical experience gathered up to now (Member States experience, jurisprudence of EU courts and international bodies) and views expressed in literature.

Subsequently, the Appropriate Impact Assessment and Authorisation Requirements of Plans and Projects likely to have significant impacts on Natura 2000 sites are examined by *Nicolas de Sadeleer*. The aim of his article is to shed light on the procedural requirements of the Habitats Directive, which are a key provision for implementing the EU’s system of protecting and preserving biological diversity in the Member States.

The third article is written by *Eckard Reh binder* and argues for (suitable) criteria for the assessment of the likely environmental impacts of projects which are subject to the EIA, focusing on the assessments carried out by the competent authority and the assessment elements of the environmental report and the consultation of interested authorities. The final article which concentrates on EIA is by *Gijs Hoevenaars* and analyses the quality review of EIAs and Strategic Environmental Impact Assessments (SEA). With regard to the current discussions in Europe on this subject, this article provides an insight into Dutch experiences with the quality review of EIA and SEA.

Further articles are dealing with current EU legal issues.

The article of *Ludwig Krämer* analyses the practice of access to documents within the EU on the basis of several examples of legislation, and its use and interpretation by the EU Courts of Justice in the area of access to environmental information.

In a further article *Lorenzo Squintani* discusses the practice of national bodies exceeding the terms of European Union directives when implementing them into national law. He analyses certain provisions of

the Directive 2008/98/EC on waste in order to understand the functioning of the Dutch policy on so-called “gold-plating”.

Finally, *Peter Kremer* examines whether mercury depositions which are emitted by Coal-Fired Power Stations are in line with the Industry Emission Directive and the Water Framework directive. Furthermore, he analyses what instruments are available under prevailing law to prohibit the construction of new coal-fired power stations and to make their approval subject to judicial review.

We hope you enjoy reading the journal.

Contributions for the next issue of the *elni Review* are very welcome. Please send contributions to the editors by mid-February 2014.

Claudia Fricke/Martin Führ

December 2013

Pre-announcement elni forum 2014

February 2014 in Brussels, Belgium

The elni forum will take place in February 2014, at EU Liaison Office of the German Research Organisations (KoWi), 8th Floor, Rue du Trône 98, 1050 Brussels.

The elni forum 2014 will offer the opportunity to discuss environmental footprint issues in environmental law from different point of views:

“Environmental Footprints– Key issues and practical experiences”

With an introduction by

Arjen Hoekstra, Professor for Water Management and co-founder and scientific director of the Water Footprint Network, University Twente, Netherlands.

Imola Bedo, Production Coordinator DG Environment, European Commission, Brussels.

Arjen Hoekstra presents key issues on the concept and developments on the water footprint. Imola Bedo will provide the point of view of the EU green products policy (PEF, OEF, PCRs, product passport). Furthermore there will be the possibility to discuss the topic from an NGO and business perspective.

Further information to follow soon on www.elni.org

Environmental Impact Assessment and Environmental Quality Standards

Eckard Rehbinder

1 The issue

Article 3 of the EIA Directive (Directive 2011/92) sets out the basic concept of the EIA as a process which shall identify, describe and assess the effects that a particular project is likely to have on the environment. However, if one looks at the following articles of the Directive, the concept of “assessment” seems to have somehow been lost. In particular, Article 8 of the EIA Directive only requires that the results of consultations and the information gathered pursuant to Articles 5, 6, and 7 shall be taken into consideration in deciding on granting consent for the project. This duty to consider relates to the environmental impact report submitted by the developer (Article 5) and the information and views gathered in the consultation of interested authorities, the public at large and, where applicable, foreign authorities (Articles 6 and 7). However, Article 8 of the EIA Directive does not formally require the assessment of the project also to be taken into consideration. Although in the case “Commission v. Ireland” of 2011 the European Court of Justice¹ has clarified that the assessment is independent of the duty to consider and must precede the decision on the admissibility of the project, its role in decision-making on the admissibility of the project remains unclear.

According to the Court, the assessment of the likely significant effects associated with the project is a task of the competent authorities. This is too narrow a view. The information to be generated by the developer in the environmental report (Articles 3(3) (c), 5 and Annex IV points 4 and 5) contains some elements of environmental assessment. Moreover, the consultation of interested authorities and the public involves the assessment of the likely effects of the project on the environment. Therefore, one has to distinguish between the assessment in the strict sense to be carried out by the competent authorities and the assessment in the broad sense in which all other relevant actors are involved. In any case, the Directive does not address the question of criteria to be used for the assessment of the likely effects the project may have on the environment. The same is true for the criteria to be used in the following stage, that is, taking the information gathered in the EIA process into consideration when making a decision on the admissibility of the project. These questions are almost entirely left to the member states. It should be clear that criteria are needed in order to assess the likely significant environmental effects of a

project and take this assessment into consideration when making a decision on the project.

This raises the following questions:

- Against what criteria does the competent authority (and likewise already the developer in determining the significance of effects) need to assess the effects predicted and described in the environmental report, in the framework of the consultations and eventually also by the competent authority itself?
- How does this assessment enter into the decision-making process regarding the project? Is there a difference between the assessment criteria and the criteria applied when taking the decision on the admissibility of the project?

These questions will be discussed under the perspective of the role of environmental quality objectives and environmental quality standards.

2 Existing practice

2.1 Member state implementation of Articles 3 and 8 EIA Directive

2.1.1 General evaluation

The dearth of clear directions on the part of the EIA Directive as to the concept of the project assessment has led many member states to follow the wording of the Directive closely and say almost nothing about the assessment phase of the EIA process as far as the assessment to be made by the competent authority is concerned. Only some member states such as Sweden (Chapter 6, Section 3 of the Environmental Code) and Belgium (Flanders; Article 4.1.1, § 1 no. 8, § 2 no. 1 of the Regional Law on General Provisions on Environmental Protection) at least mention the assessment in the goals provision or definitions of their EIA laws. The European Commission seems to have no objections against this practice; it has as yet only challenged Ireland’s transposition of the Directive.² By contrast, the duty to take the EIA results into consideration has been fully implemented in all member states. As far as I can see, there has not been either extensive discussion about the criteria for assessing the project or for considering the EIA results

¹ Judgement of 3 March 2011, Case C-50/09, Commission /Ireland, 2011 ECR I-873, paras. 36-41.

² See European Commission, Report on the application and effectiveness of the EIA Directive, COM (2009) 378, pp. 3-4.

in the decision-making process in the majority of EU member states.³ However, it may be assumed that existing EU and member state environmental quality standards must be applied or at least considered in decision-making on the admissibility of the project.

2.1.2 Germany

The perhaps most comprehensive regulation seems to exist in Germany.⁴ Section 11 of the EIA Act requires the competent authority, on the basis of information and comments generated in the EIA process as well as investigations of its own, to elaborate a summary description of the environmental impacts of the project and the measures to avoid, reduce or compensate significant adverse effects. Section 12 mandates the competent authority to assess the relevant environmental impacts contained in the summary description and take this assessment into consideration in deciding on the admissibility of the project with a view to effective environmental precaution pursuant to applicable laws.

It seems clear that under German law the assessment criteria must in principle be based on the statutes to be applied in the procedure for granting development consent. There are two reasons for this. On the one hand, Germany belongs to the few EU member states that follow the integration model. The EIA is integrated in the permit procedure for industrial and infrastructure facilities. On the other hand, the EIA is understood as a procedural tool which only aims at improving the quality of the decision on the development consent. Therefore, it is deemed that the EIA assessment cannot be more demanding than the prerequisites for granting development consent. In this sense, the German EIA Administrative Rules (part 0.6) provide that the assessment of the environmental effects is equivalent to the interpretation and application of the statutory environmental requirements. In the decision-making process, countervailing concerns may have to be taken into consideration where the normative programme of the relevant law requires so or permits it.

The assessment requirements are specified with respect to the categories of projects subject to EIA. Where legally binding or non-binding environmental

quality standards exist, these standards must in principle be applied. Otherwise, the Administrative Rules (Annex 1) contain a list of orientation criteria with respect to interventions into nature and landscape, impacts on surface waters and soil contamination (much of which appear to be obsolete in view of more recent standard setting). Moreover, the holistic assessment with respect to the interaction between environmental media and a potential shifting of problems is addressed although it is underlined that this can only be done within the limits of the applicable environmental laws (part 0.6.2.1).

Although the German concept appears quite narrow, it should be applauded as an attempt to specify the assessment criteria. However, one should keep in mind that a good legal framework alone does not ensure a proper functioning of the EIA process. An empirical study published in 2008 came to the conclusion that in Germany there are considerable deficiencies in the application of the assessment requirement and – as a result of a classification of effects as insignificant or compensated – also in the practical implementation of the duty to consider.⁵

2.2 European jurisprudence

In the relatively long history of European jurisprudence on the EIA the legal meaning of the assessment process and the contents of the duty to consider have not played a major role. To my knowledge, there is not a single case where the European Court of Justice has had the opportunity to address the role of environmental quality objectives and standards in the EIA process. Both the Commission when instituting infringement proceedings and the member state courts when referring EIA cases to the European Court of Justice for interpretation of the EIA Directive simply have never addressed these questions, probably because they had a predominantly procedural understanding of the EIA. However, there are some recent Court decisions which have dealt with the scope of the assessment.⁶ *According to the Court, interactions between different environmental media as well as cumulative effects caused by several projects must be included in the EIA whilst the mere loss of value of material assets is not part of the assessment. The most important relevant holding is the case “Commission v.*

³ See, e.g., C. Wood, *Environmental Impact Assessment: A Comparative Review* 6, 8 and 11 (2nd ed. 2003); J. Holder, *Environmental Assessment: The Regulation of Decision-Making* 101 et seq. (2005); L. Cashman, *Environmental Impact Assessment: A Major Instrument for Achieving Integration*, in: *Europe and the Environment* (M. Onida, ed., 2005), at 65-90; D. Hughes et al., *Environmental Law* 214 et seq., 217 (4th ed., 2002); M. Prieur, *Droit de l'environnement*, paras. 96, 108 (6th ed. 2011); M. Badré, *Évaluation environnementale, autorité environnementale, des objets juridiques nouveaux ?*, 2009 *Droit de l'environnement*, no. 173.

⁴ Consequently, there is quite extensive legal discussion on assessment and consideration of the EIA in deciding on the project; see for example T. Bunge, § 12, in: *Handbuch der Umweltverträglichkeitsprüfung*, Looseleaf ed. (P.-C. Storm and T. Bunge, eds., 2013); M. Beckmann, § 12, in: *Gesetz über die Umweltverträglichkeitsprüfung* (W. Hoppe and M. Beckmann, 4th ed. 2012); R. Wulforth, § 12 *UVPG*, in: *Umweltrecht*, Looseleaf ed. (R. von Landmann and G. Rohmer, eds., 2013).

⁵ M. Führ et al., *Evaluation des UVP-Gesetzes des Bundes* 104-122, 122-139 (Sofia Berichte SB 01, 2008); short version: K. Bizer, J. Dopfer and M. Führ, *Evaluation of the German Act on EIA*, 2008 *Elni Review*, issue 2, pp. 70-77 (73-74).

⁶ Judgement of 16 March 2006, Case C-332/04, *Commission/Spain*, 2006 ECR I-40*, para. 33; Judgement of 24 November 2011, Case C-404/09, *Commission/Spain*, 2011 ECR I-11853, paras. 78-80; Judgement of 14 March 2013, Case C-420/11, *Leth/Republic of Austria*, paras 26-30 (not yet in official collection).

Ireland” of 2011⁷ which has addressed the meaning of and the responsibility for the assessment. This holding is based on the view that the assessment constitutes a substantive obligation which is distinct from the procedural obligations (collection and exchange of information and consultation) established by Articles 4 to 7 of the Directive. Finally in this context, it should be noted that the recent judgment of the European Court of Justice in the case “Altrip”⁸ is of indirect relevance to our topic. Since the Court has held that a mere insufficiency of an EIA will normally lead to the illegality of the relevant administrative decision the chances that the understanding of “assessment” will be scrutinised by all national courts and ultimately also by the European Court of Justice are increased.

3 The European Commission’s proposal for amendment of the EIA Directive

As regards the assessment process and the duty to consider the EIA results, the Commission’s proposal for an amendment of the existing EIA Directive⁹ makes an attempt to cure some of the existing deficiencies. The definition of the EIA in the new Article 2(2) (g) now explicitly mentions the assessment by the competent authority as part of the EIA process. Besides, the developer has to take major steps of environmental assessment for identifying and describing the potential impacts of the project in the environmental report (Article 5 in conjunction with Annex IV point 5). Article 8 relating to the duty of consideration will undergo major changes. As under the existing directive, the result of consultations and the information gathered pursuant to Articles 5 to 7 shall be taken into consideration in the development consent procedure. To this end the decision to grant development consent shall contain as piece of “information”, *inter alia*, the environmental assessment of the competent authority as required under Article 3 (new Article 8(1)(2)(a)). Moreover, the consent must contain a statement summarising how environmental considerations have been integrated into the consent and how the results of the consultations and the information gathered pursuant to Articles 5 to 7 have been integrated or otherwise addressed (new Article 8(1)(2)(d)). Taken together, these requirements seem to ensure that the competent authority must take the assessment into consideration in the decision-making process. Nevertheless, one wonders why the Commission has not deemed it appropriate to just follow the language of the European Court of Justice: The competent authority

must assess the likely impact of the project and this assessment must precede the decision on granting development consent. It is quite simple. Moreover, the Commission’s proposal does not say anything about the relevant criteria applicable to the assessment to be carried out and the decision on the admissibility of the project to be taken by the competent authority. It does contain such criteria with respect to the assessment elements of the environmental report, that is, the description of the likely significant effects of the project. In this respect, it provides that the developer shall take into account “the environmental protection objectives established at EU or Member State level which are relevant to the project” (Annex IV point 5).

4 Discussion and recommendations

4.1 General remarks

As regards the assessment of the project and the consideration of the EIA results in making a decision on the admissibility of the project, the Commission’s proposal only constitutes a small step in the right direction. There is a need for more specific and ambitious rules.

Article 3 makes it clear that the assessment focuses on the direct and indirect environmental effects of the project. To this end the authority should not only be empowered to require, if necessary, an amendment of the environmental report, as Article 8(2) of the proposal suggests, which of course is an import feature of the EIA process, but also use supplemental information gathered by itself for assessing the environmental effects of the project. What is even more important is that the assessment of the environmental effects of the project in Article 8 should be formally elevated from an information tool to an indispensable element of the substantive decision on the project. In this respect, the Report of the Environment Committee of the European Parliament on the proposal¹⁰ and the Legislative Resolution of the European Parliament in the First Reading¹¹ which fully follows the Committee report are preferable. However, in obliging the permit authority to assess the results of the environmental report and the results of consultations in the permit procedure the European Parliament gives the impression that the assessment is not the final step of the EIA but only part of the permit procedure. That this position is not tenable becomes evident if one considers the prevailing member state practice according to which the EIA procedure is not integrated into the development consent procedure but entirely separate from it. It is hardly conceivable that a

⁷ *Supra* note 1; see also European Court of Justice, Judgement of 4 May 2006, Case C-508/03, Commission /United Kingdom, 2006 ECR I-3969, para. 103.

⁸ Judgement of 7 November 2013, Case C-72/12, Gemeinde Altrip et al./Land Rheinland-Pfalz (not yet in official collection)

⁹ COM (2012) 628 final.

¹⁰ 22 July 2013, A7-0277/2013, Amendment 68, Article 1 – point 8.

¹¹ 9 October 2013, P7_TA (2013) 0413, Amendments 109, 93 and 130, Article 1 – point 8.

separate EIA proceeding could be concluded without an assessment being carried out by the authority competent for the EIA, the more so since the assessment will often be binding for the permit authorities.

It is also disappointing that the Commission has not deemed it appropriate to establish basic rules for the assessment of the likely significant effects of the project by the competent authority and their consideration in the decision on the project which are the core elements of the whole EIA process. It is submitted that recourse to environmental quality objectives and standards is crucial for increasing the relevance of the EIA for the outcome of the decision on the project.¹² The Commission's proposal explicitly only refers to quality objectives, which might lead to the impression that environmental quality standards shall not be relevant. Environmental quality standards are a tool to convert environmental quality objectives into numerical scales and thus make them fit for application on the ground. There is no reason to discard environmental quality standards, as a matter of principle, for the purpose of assessing the environmental effects of a project in the framework of the EIA. However, it must be conceded that environmental quality standards may have quite different functions under EU environmental law,¹³ which may influence their relevance for the purposes of the EIA. Environmental quality standards may be facility-oriented or plan-oriented. In the former case it appears cogent that they must be relevant for environmental assessment. This is true for Article 10(3) of the Water Framework Directive (Directive 2000/60) which mandates the imposition of more stringent discharge limits on a source than achievable by application of best available technology or emission standards where necessary to meet EU water quality standards. Existing permits may have to be adjusted (Article 11(5) of the Directive). As regards the air quality standards set by the Air Quality Framework Directive (Directive 2008/50), these are in principle plan-oriented, that is, are objectives to be met through air quality planning, and accord the authorities a certain margin of discretion (Articles 23(2) and 24 of the Directive)¹⁴. However, Article 18 of the Industrial Emissions Directive (Directive 2010/75) requires "translation" of the air quality standards into individual permits unless other

measures are or can be taken to comply with the standards (for example adjustment orders against existing facilities). National law may go beyond and sometimes does, such as in the Netherlands, Sweden and – with respect to industrial facilities – also Germany. A third example of a facility-oriented environmental quality standard is Article 6(3) of the Habitats Directive (Directive 92/43) which in principle prohibits any project which adversely affects the integrity of a protected habitat. Even when environmental quality standards are understood as mere planning targets it would seem that the competent authority cannot grant development consent if the additional emissions from a new or significantly changed existing facility will render compliance with the standards practically impossible, for example when the standards are already exceeded. The same is true when environmental quality standards are formulated as target values which just require best efforts. If the additional emissions from a new facility would amount to a considerable and unreasonable set-back or delay of the efforts to reach the target values, this may justify additional requirements for the relevant facility. In these instances the EIA assessment at least serves to evaluate the degree to which the permit authority can reasonably rely on other measures for meeting the standards. Therefore, environmental quality standards should be relevant for the assessment at least in the sense that they must be considered. There are a number of environmental quality objectives and standards at EU level that might be used for assessment. *Examples include the various environmental quality objectives of the Water Framework Directive, the non-deterioration requirement contained in the Air Quality Framework Directive, the critical loads concept underlying the Directive on National Emission Ceilings (Directive 2001/18),¹⁵ the waste management hierarchy of the Waste Directive (Directive 2008/98) and the conservation obligations for protected habitats set out in the Habitats Directive. Moreover, there are a number of environmental quality standards in EU environmental regulation. Examples are the water quality standards for dangerous substances under the Directive on environmental quality standards in the field of water policy (Directive 2008/105), the various air quality standards established by the Air Quality Framework Directive as well as the air quality target values for heavy metals and PAH set forth by the Directive relating to arsenic, cadmium, nickel and*

¹² See generally on the issue of relevance: C. Jones, S. Jay, P. Slinn and C. Wood, *Environmental assessment: dominant or dormant?*, in *Taking Stock of Environmental Assessment: Law, Policy and Practice* (J. Holder and D. McGillivray, eds., 2007) 17-44, at 30 *et seq.*

¹³ See C. Backes and M. van Rijswijk, *Effective environmental protection: Towards a better understanding of environmental quality standards in environmental legislation*, in *Miljörettsliga Perspektiv och Tankevägar* (L. Gipperth and C. Zetterberg, eds., 2013) 19-50, at 22 *et seq.*

¹⁴ To the same extent regarding the predecessor directive European Court of Justice, Judgement of 25 July 2008, Case 237/07, *Janecek/Freistaat Bayern*, 2008 ECR I-6621, para. 47.

¹⁵ But see European Court of Justice, Judgement of 25 May 2011, Cases C-165/09, 166/09 and 167/09, *Stichting Natuur en Milieu/College van Gedeputeerde Staten van Groningen*, 2011 ECR I-4599, paras. 69-70. The Court has held that the NEC standards are not facility-oriented. However, this does not rule out that the critical loads concept underlying the Directive might be considered in the assessment.

polycyclic aromatic hydrocarbons in ambient air (Directive 2004/107).

Member state law supplements the EU environmental quality objectives in particular by quality objectives for nature conservation outside protected areas and structural changes of soil and adds to the EU quality standards national quality standards for water and soil.

However, it should be noted that compared to the substances that are being emitted from industrial facilities, the number of EU and member state environmental quality standards is quite limited. There remains a certain gap.

Even if the suggestions made above about necessary clarifications of the proposal were followed, there remain some problems:

- How close should the link be to the normative programme of the decision-making process, that is, the consideration of the assessment in taking a decision on the admissibility of the project?
- What if the existing environmental quality objectives and quality standards are deemed to be inadequate, for example do not sufficiently consider precautionary requirements? Can the assessment serve as a means to “correct” the relevant prerequisites for granting consent?
- What if there are no legal environmental quality objectives and quality standards? Can one take recourse to planning objectives and targets, emission standards and scientific criteria?

4.2 Relevance of the prerequisites for granting consent

At the outset it should be underlined that the requirement to “consider” environmental quality objectives and quality standards in the assessment process is not necessarily equivalent to their “application” but can be understood as meaning a more limited relevance of such objectives and standards.

4.2.1 Anticipated effect of consent prerequisites in EIA process?

Since the EIA is designed to prepare a decision to grant development consent for a project, it does not in principle appear unreasonable to orient the assessment at the prerequisites for granting such consent. This does not mean that the assessment must already balance environmental against development concerns where the normative programme of the consent procedure requires so. The assessment only concerns the environment; it is not tantamount to decision-making on the project. However, the question is why one should extensively assess something that will be

entirely irrelevant in the decision-making process regarding development consent?

4.2.2 Broad prerequisites for granting consent

Accepting an anticipated effect of the environment-related consent prerequisites in the assessment phase of the EIA process does not pose any serious problems where the applicable law provides for a broad scope of concerns to be addressed and a broad margin of planning discretion. In such instances which are typical for the authorisation of infrastructure facilities and to a certain extent also the siting of industrial facilities, the competent authority has to balance all affected interests against one another and ideally try and achieve an optimal solution.¹⁶ The scope of the decision is not limited to pollution but also includes impacts on nature and landscape. In particular, it should also consider whether the adverse effects caused by the project can be kept well below the applicable standards. Consequently, the assessment of the likely significant adverse effects on the environment associated with the project in question should take a broad view and consider, where suggested by a perceived inadequacy of existing quality objectives and standards, also the precautionary principle.¹⁷ Environmental quality standards then only mark the minimum level of protection. It also would seem to be a matter of course that complex issues such as the interaction between environmental media, cumulative effects, accumulation over time, combined effects of different pollutants and the total pollution load should enter into the assessment. The additional element of the following phase of decision-making on the project is that the assessment may be specified, supplemented or, where national law permits that, revised and non-environmental concerns be introduced.

4.2.3 More limited prerequisites for granting consent

Difficulties may arise when the prerequisites for granting consent for the project are more limited. This is especially a problem for the integration model of the EIA, less for the separation model. An important example is presented by the Industrial Emissions Directive (IED). Two aspects have to be distinguished: The scope of application of the IED is limited to pollution; it does not include the physical impairment of nature and landscape (habitat protection, national regimes regarding other interventions into nature and landscape and the like). Where such impacts on nature and landscape are identified, described and assessed, the information so generated is only useful for decision-making processes

¹⁶ This also is the German view although the assessment is considered to be equivalent to interpretation and application of existing environmental law; see Federal Administrative Court, Judgement of 25 January 1996, BVerwGE 100, 238, at 245.

¹⁷ To the same extent: Jones, Jay, Slinn and Wood, *supra* note 12, at 42.

governed by other laws. However, these processes may constitute elements of a multi-stage development consent procedure¹⁸ or may even be, as in Germany, integrated in the IPPC consent procedure.

On the other hand, within the limited scope of the IED, that is, pollution, there seems to be some room for an assessment beyond existing environmental quality standards. The IED aims at avoiding a transfer of pollution from one environmental medium to another and reflects this concept in its permit requirements (Articles 11(b) and 14(1)(a) in conjunction with Article 3(10) IED).¹⁹ However, it is an open question whether and to what extent an overall assessment or a quantitative or at least qualitative balancing between different impacts on environmental media is warranted or at least permissible. While this is accepted in some member states, others insist on a separate assessment of all likely effects. Moreover, the Directive's provision on the goal of achieving a high level of protection of the environment as a whole (Article 1 IED) is not reflected in its operative provisions. *It is doubtful to what extent cumulative effects from several projects, the accumulation of pollutants over time, combined effects of different pollutants and the total pollution load are relevant in the decision-making process for granting consent for the operation of the planned industrial facility.*

Cumulative and combined effects certainly can and need to be considered when they constitute significant pollution. However this is not necessarily true for the accumulation of pollutants over time. It is difficult to conclude that this may constitute a present significant risk. The total pollution load, that is, a situation where several environmental quality standards are almost exceeded but still just met, causes particular difficulties. There is no significant pollution since the standards mark the borderline between significant risk and precaution. At most, preventive measures in accordance with Article 11(a) IED could be deemed to encompass these two aspects of pollution. The proposal (Article 3(d)) explicitly requires the inclusion of the interaction between public health, biodiversity and environmental media in the assessment. It also refers to cumulative effects with respect to the assessment to be made in the environmental report. Dealing with combined effects of different pollutants, accumulation over time and total pollution loads remains an open question and should be specifically addressed in the Directive.

4.3 Assessment and inadequate quality objectives and standards

This leads to the question as to whether the assessment can be used to "correct" inadequate environmental standards. This might be relevant for gaps of regulation or inadequate specification of environmental quality objectives by quality standards, especially due to a neglect of precaution and an accommodation for development interests, in other words when the environmental concerns have been "balanced away" by development concerns. Some German authors believe that such a corrective concept is inherent in Section 12 of the German EIA Act whereby the assessment has to be carried out "with a view to effective environmental precaution pursuant to existing laws."²⁰ The majority opinion and the German EIA rules consider the reference to the precautionary principle as merely declaratory, meaning that the precautionary principle has to be considered in the assessment to the extent it is reflected in the existing environmental and planning laws. What is meant in this latter view is precaution pursuant and within the limits of the relevant laws, not "free" precaution.

The fundamental question in this context is whether the EIA should have a substantive function. The holding of the European Court of Justice in the case "Commission v. Ireland"²¹ can be understood to the extent that the Court attributes to the assessment a substantive meaning. However, strictly speaking the Court has only held that the competent authority may use the assessment to evaluate the validity of the environmental report. The EIA could be considered a merely procedural tool to improve the quality of the relevant administrative decision on the project, in particular ensure its conformity with the applicable legal requirements or, in other words, ensure that it is an acceptable proposal. In this view, which is certainly prevailing, the relevant criteria should always be derived from environmental quality objectives and standards set forth in EU and member state law. By contrast, the EIA could also have a substantive function in the sense that it aims at reaching an optimal solution for the environment.²² In this case a broader view in respect of the applicable assessment criteria would seem to be appropriate. Such a door-opener might be the new Article 8(2) of the proposal which would empower the competent authority, in case of significant adverse environmental effects being identified, to consider whether the environmental report should be revised and the project modified to avoid or reduce these adverse effects and

¹⁸ See, e.g., European Court of Justice, *Commission v. United Kingdom*, *supra* note 7, paras. 102-106.

¹⁹ See Federal Administrative Court, *supra* note 16, at 245/246.

²⁰ In this sense, e.g., Bunge, *supra* note 4, § 12 paras. 3, 51 *et seq.*; A. Vorwerk, *Die Bewertung von Umweltauswirkungen im Rahmen der Umweltverträglichkeitsprüfung nach § 12 UVPG*, 29 *Die Verwaltung* 241-264(1996), 243 *et seq.*, 250 *et seq.*

²¹ *Supra* note 1.

²² See Wood, *supra* note 3, at 11.

whether additional mitigation, compensation or monitoring measures or are needed.²³ In any case, it might be useful to explicitly clarify in the relevant Annex to the Directive that environmental quality objectives and standards are orientation values for assessment but do not necessarily mark the upper level of environmental quality to be aimed at.

4.4 Assessment in absence of quality objectives and standards

Finally, the question is what the competent authority shall do in the absence of environmental quality objectives and quality standards. In the first place, one should consider that there may be environmental quality objectives that are a product of spatial and special environmental planning (e.g. land-use plans, nature conservation plans, protection ordinances for habitats, water management plans) including strategic environmental assessment (SEA). Such objectives may constitute legal norms or, as in the case of the SEA, be otherwise binding. Then they are a normal point of reference for the assessment. Even if they are not, they possess a high degree of legitimacy through the procedural requirements of the relevant planning procedure. Moreover, they are normally geared to the specific environmental conditions in the surroundings of the facility. Therefore, there should be no doubt that they can be used for assessing the adverse effects associated with a project. Another option is the use of emission standards including emission levels associated with best available techniques pursuant to Articles 13(5) and 15(3) IED. This is very important regarding industrial facilities because the number of pollutants that may be emitted from such facilities is about ten times higher than the number of existing environmental quality standards. Emission standards represent best available techniques, but they may also embody risk-related considerations. Their adoption mostly occurs in a process that ensures that the most recent state of technology is taken into account and entails a fair degree of public participation. By and large such standards may be considered as having the necessary degree of legitimacy. Meeting such standards does not necessarily ensure an adequate ambient quality. However, in the absence of a high level of background pollution or cumulative effects from other facilities to be anticipated, compliance with such standards indicates that there are no ambient quality-based concerns. This leads to the conclusion that emission standards can be used for assessment provided that their constraints are taken into account in the assessment process.

Finally in this context, the role of scientific standards must be addressed. The court practice in many EU member states shows that the competent authorities

are deemed to be empowered to use such standards for specifying broad statutory terms such as the significance of an impairment of the environment (value of the relevant environmental asset, severity of the impairment or adequacy of mitigation measures) or the existence of hazard or risk to the environment. To this extent such standards can also be used for assessing the likely environmental effects of a project, at least if the competent authority duly reflects their nature, content and limitations.²⁴ These considerations suggest that the Directive should explicitly recognise the relevance of the three types of criteria discussed here.

5 Conclusion

The Commission's Proposal is, as regards the assessment elements within EIA, but a first step in the right direction and is not entirely satisfactory. Much more remains to be done to give the EIA a realistic chance to influence the outcome of decision-making on the project. Even if one considers that the interface between the EIA and decision-making on the project raises tricky questions due to the different degrees of harmonisation, one should use the chance to introduce meaningful criteria for the assessment of the likely environmental impacts of projects subject to the EIA, both with respect to assessment in the strict sense to be carried out by the competent authority and the assessment elements of the environmental report and the consultation of interested authorities.

²³ See A. Kenyeressy, *Kritische Analyse des Vorschlags zur Änderung der UVP-Richtlinie*, 2013 Umwelt- und Planungsrecht UPR, 139-143, at 143.

²⁴ See Vorwerk, *supra* note 20, 255-257.

Imprint

Editors: Regine Barth, Nicola Below, Claudia Fricke, Martin Führ, Gerhard Roller, Julian Schenten, Silvia Schütte

Editors in charge of the current issue:
Martin Führ and Claudia Fricke

Editor in charge of the forthcoming issue:
Gerhard Roller (gerhroller@aol.com)

The Editors would like to thank **Vanessa Cook** (Öko-Institut) for proofreading the *elni Review*.

We invite authors to submit manuscripts to the Editors as files by email using an IBM-compatible word processing system.

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

The *elni Review* is published with financial and organisational support from Öko-Institut e.V., and the Universities of Applied Sciences in Darmstadt and Bingen.

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

Authors of this issue

Gijs Hoevenaars is Lawyer/Technical Secretary at Netherlands Commission for Environmental Assessment Utrecht, The Netherlands, ghoevenaars@eia.nl

Jerzy Jendroska, Ph.D., Managing Partner at Jendroska Jerzmanski Bar & Partners. Environmental Lawyers and Adjunct Professor at Opole University
jerzy.jendroska@jjb.com.pl

Ludwig Krämer, is director of ClientEarth's European Union Aarhus Centre, 36 Avenue de Tervueren, Brussels 1040, Belgium
fb485695@skynet.be

Peter Kremer, Attorney-at-Law he represents German environmental organisations as counsel in approval proceedings for new coal-fired power stations in Germany and other projects destructive to the environment.
rechtsanwalt@peter-kremer.de

Eckard Rehbinder, Professor emeritus of economic law, environmental law and comparative law, Research Centre for Environmental Law, Goethe University Frankfurt/Germany, rehbinder@jur.uni-frankfurt.de

Nicolas de Sadeleer is Professor of environmental law at Saint-Louis University, and guest professor at UCL. Being based in Brussels, he plays an active part in debates on EU legal and institutional issues. He is holding a Jean Monnet Chair focusing on the trade and environment conflict (see www.tradeenvironment.eu)

Lorenzo Squintani, Lorenzo Squintani, LLD is assistant professor of European Law at the University of Groningen, the Netherlands. He wrote his Phd on Gold-Plating of European Environmental Law. This article falls within the research programme: Protecting European Citizens and Market Participant. Email: l.squintani@rug.nl

Sergiusz Urban Ph.d., Lawyer specialising in environmental law and policy, head of environmental law practice at Wiercinski, Kwiecinski, Baehr Law Firm, sergiusz.urban@wkb.com.pl

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.

Contact

Freiburg Head Office:

P.O. Box 17 71
D-79017 Freiburg
Phone +49 (0)761-4 52 95-0
Fax +49 (0)761-4 52 95 88

Darmstadt Office:

Rheinstrasse 95
D-64295 Darmstadt
Phone +49 (0)6151-81 91-0
Fax +49 (0)6151-81 91 33

Berlin Office:

Schicklerstraße 5-7
D-10179 Berlin
Phone +49(0)30-40 50 85-0
Fax +49(0)30-40 50 85-388

www.oeko.de

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

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

The Institute fulfils its assignments particularly by:

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

Main areas of research

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

Contact

Prof. Dr. jur. Gerhard Roller
University of Applied Sciences
Berlinstrasse 109
D-55411 Bingen/Germany
Phone +49(0)6721-409-363
Fax +49(0)6721-409-110
roller@fh-bingen.de

www.fh-bingen.de

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

Contact

Darmstadt Office:

Prof. Dr. Martin Führ - sofia
University of Applied Sciences
Haardtring 100
D-64295 Darmstadt/Germany
Phone +49(0)6151-16-8734/35/31
Fax +49(0)6151-16-8925
fuehr@sofia-darmstadt.de

www.h-da.de

Göttingen Office:

Prof. Dr. Kilian Bizer - sofia
University of Göttingen
Platz der Göttinger Sieben 3
D-37073 Göttingen/Germany
Phone +49(0)551-39-4602
Fax +49(0)551-39-19558
bizer@sofia-darmstadt.de

www.sofia-research.com