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# elni

## REVIEW

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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 Wroclaw 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](http://www.elni.org)

## Environmental ELNI EIA Conference in Wrocław

Sergiusz Urban/Jerzy Jendroška

*Opening Speech by Professor Konrad Nowacki:*

*Dear Colleagues, Ladies and Gentlemen!*

*We have gathered here today after arriving from various countries of Europe, or even from outside Europe, because of European law. If your countries and Poland were not subject to integration, there would be no reason for us to meet. Likewise, one of the most important instruments for environmental protection – environmental protection assessments, which have been used to evaluate undertakings for over 20 years, and strategic and cross-border environmental impact assessments, which have been in use for 15 years – would not be in existence. They constitute the so-called horizontal instruments of the European environmental protection law provided for in international conventions since the 1990s. These instruments were introduced into Polish law as early as the 1980s. These issues will be examined by you, experts in the field, during two entire days of our conference. The evolution, form, stages of use, including the Aarhus Convention, will be discussed by Prof. Jerzy Jendroška of the Environmental Law Center and Opole University.*

*This conference has been organised by my colleague Prof. Jendroška, me – let me introduce myself: Konrad Nowacki of Wrocław University and the Polish-German Research Centre for Public and Environmental Protection Law, together with our colleagues from the Environmental Law Network International (ELNI) – Prof. Gerhard Roller, Ms M. Bar, and Mr Piotr Otawski of the General Directorate for Environmental Protection in Warsaw.*

*It is not a coincidence that we are now in one of the biggest and most modern halls of Wrocław University – the European Union Hall of the Faculty of Law, Administration and Economics, which has been the venue for meetings of the Presidents of France, Germany and Poland, prime ministers and outstanding politicians. However, not the whole university is as modern as this hall, because it goes back over 300 years, to the time of the Habsburgs. Recently, we celebrated two important anniversaries connected with the establishment and expansion of our University. Some of you will have an opportunity to see its facilities. The University has been a Polish institution for nearly 70 years now. It has over 40,000 students, one third of whom are students of a single field of study – law and administration.*

*Our conference is taking place just after the 20th anniversary of the launch – in the late 1990s – of the ELNI movement, whose founders included Gerd Roller, Martin Führ, the late Betty Gebers, and Thomas Ormond on the German side and us from Poland. The first conferences were organised in Frankfurt am Main, Wrocław (this is where I met Prof. Luc Lavrysen of Ghent), Utrecht (organised by Marga Robesin), Brussels and in other cities; the last one, which was hosted by the Flemish Environmental Law Association, in Ghent. Professors Eckard Rehbinder and Gerd Winter of Frankfurt and Bremen Universities, Nicolas de Sadeleer of the Universities of Louven and Ghent, Mr Ludwig Krämer and Luc Lawrysen of the European Commission, and Prof. Marek Górski of Łódź University in Poland have been connected with the movement; on the one hand, presenting the instruments and achievements of the EU law related to environmental protection (see the ELNI Newsletter), and on the other, challenging and critically analysing some of the applied solutions. I have not mentioned all of them, but we would like, together with Prof. Jerzy Jendroška and the governing bodies of Wrocław University, to thank all of you for your kind cooperation. We would also like to welcome to Wrocław all the conference participants from Europe and elsewhere, from the European Commission and the European Parliament, the General Directorate for Environmental Protection and regional directorates.*

*Have a very nice and fruitful stay in Wrocław!*



On 23 and 24 May 2013 the conference of Environmental Law Network International (ELNI) dedicated to “*EU Environmental Impact Assessment Directive - challenges and perspectives in the light of the past experiences and the recent proposal for amendment*” took place at the University of Wrocław in Poland. The conference was addressed to both practitioners and academics dealing with different aspects of Environmental Impact Assessment (EIA) and brought together almost 250 participants from 24 countries worldwide.

The aim of the conference was to review and discuss the recent proposal of the European Commission to amend the EIA Directive proposed by the European Commission and bring it face to face with practical experiences with EIA at international and national level, in particular in the light of the jurisprudence of the Court of Justice of EU and national courts. To this end the conference gathered representatives of various stakeholders, including EU institutions, national authorities, judges and attorneys, EIA consultants and academics dealing practically or theoretically with EIA. It was expected that the discussion and illumination of different views could lead to the introduction of further improvements during the legislative process regarding the proposed amendment of the EIA Directive.

Several institutions supported Environmental Law Network International (ELNI) in organising the conference, namely: Environmental Law Center of Wrocław, the law firm Jendrośka Jerzmański Bar & Partners, Environmental Lawyers, General Directorate for Environmental Protection (Poland), Universities of Wrocław and Opole and German-Polish Centre for Public Law and Environmental Network (GPPLN).

The scientific committee of the conference was chaired by Jerzy Jendrośka of Environmental Law Center and of Opole University, and composed of Konrad Nowacki of Wrocław University and GPPLN, Gerhard Roller of Bingen University and ELNI, Piotr Otawski of the General Directorate for Environmental Protection and Magdalena Bar of Jendrośka Jerzmański Bar & Partners - Environmental Lawyers.

The conference was opened by the Vice-Chancellor of Wrocław University Professor Adam Jezierski and the Dean of Law Faculty Professor Włodzimierz Gromski. Also the representatives of other institutions involved addressed the conference with short welcoming speeches. An opening speech was given by Professor Konrad Nowacki, a founding member of ELNI.

**The first introductory session** was chaired by Jerzy Jendrośka. The session was initiated by Stephanos

Ampatzis of Cohesion Policy and EIA Unit of the DG Environment (European Commission) with a presentation of the Commission’s proposal. He discussed in detail the amendments proposed to be introduced to the EIA Directive and their rationale. The next speaker was Vytautas Kalpokas of Lithuania Ministry for the Environment, who on behalf of the forthcoming Lithuanian Presidency presented the approach and tentative timeline of the work of the Council regarding the proposal. The presentation of the views of the EU Presidency was followed by an overview of the amendments proposed by the European Parliament in response to the original proposition of the European Commission, which was presented by Sergiusz Urban from Wierciński, Kwieciński, Baehr law firm (Poland). He also formulated some remarks on the influence of these amendments on the domestic law. This session was complemented by the presentation of the opinion of the European Economic and Social Committee regarding the proposed EIA Directive amendment, which was delivered by the EESC Rapporteur Josef Zboril. The introductory session showed quite a divergence of views between European institutions not only in terms of the details of the amendments to the EIA Directive but also the scope of amendments and even the very need for them. In particular the EESC seemed to be far from enthusiastic about the EC proposal as it considered the proposed provisions too burdensome for the economy, thus making European industry less competitive. The audience found this view very controversial and it provoked vivid discussion.

**Session II**, chaired by Gerhard Roller of Bingen University, was devoted to the role of the EIA in the environmental policy. The first speech, by Jerzy Jendrośka, presented the origins of environmental assessment in Europe, its development until present as well as expected future trends. The main thesis was that while originally the drafters of environmental assessment legislation in Europe were reluctant to follow fully the original model designed in the US under the National Environmental Policy Act of 1969 and thus adopted the 1985 EIA Directive limited to individual project only and lacking many procedural details, all the missing elements have been gradually introduced to European law over the years. The EIA Directive was amended in 1997 to add screening criteria and scoping, in 2003 to add access to justice and missing details of public participation, and it was also supplemented with SEA Directive extending the assessment to plans and programmes. The recent proposed amendment should be seen in this context and aim to fulfil the remaining gaps, particularly in relation to post-project analysis and approach to

alternatives. The second speaker in this session, Francesco la Camera from the Environment Ministry of Italy, was discussing whether the EIA could serve as the tool for assuring the sustainable development. He urged the scope of this tool to be widened so that it encompasses all ecosystem interactions and would not only focus on the effectiveness of the project. Finally, Piotr Otawski of the Polish General Directorate for Environmental Protection described the place of EIA in the development control, especially in the context of the proposal to integrate it with different procedures such as IPPC assessment. He outlined possible consequences of the proposed “one-stop shop” approach”.

**Session III**, chaired by Zbigniew Bukowski of Bydgoszcz University, tackled the subject of *screening*. It was opened with a very informative speech by Magdalena Bar from Jendroška Jerzmański Bar & Partners – Environmental Lawyers on concept of the “project” in the EIA and its understanding by the Court of Justice of the European Union. She discussed the constitutive elements of this notion as well as doubts related to the existence of the project when a renewal of the permit is sought and when the planned activity would not require construction works but merely a change of organization of current activity or its higher intensity. The next speaker Hendrik Schoukens of Ghent University, described the criteria used at screening stage. In his opinion a balance should be struck to avoid having too many screening procedures on the one hand and too few, formalistic procedures on the other hand. However, he claimed that exclusion of projects from screening on the basis of thresholds and criteria defined by the Member States would not conform with the jurisprudence of the European Court of Justice and that they should not be obligatory but serve as suggestions only. This session ended with a presentation of Eckard Reh binder, Professor Emeritus of Frankfurt University on the compliance of the EIA with environmental quality standards. The need for better incorporation of these standards as well as environmental goals (of EU and as well as national/local level) into the EIA and development consent was expressed in this respect. They could serve as an additional source of information to be taken into account and reference for the competent authorities in this process.

**Session IV** was the last session of the first day. It was chaired by Thomas Ormond of the Regional Environmental Administration in Hessen and focused on the links between EIAs and other forms of assessment. In this respect, Stephanos Ampatzis presented the concept of streamlining EIAs and reducing overlaps and inconsistencies with other assessments, creating at the same time synergies. Pavel Cerny from Ekologicky Pravni Servis (Brno)

compared EIA with Strategic Environmental Assessment (SEA), highlighting procedural similarities, coherence of aims and comparable scope of examination. These similarities are the source of overlaps that have not been overcome until now; therefore the need for tiring and better coordination is essential. Nicolas de Sadeleer (FUSL-Brussels, Academy of Louvain) compared EIA with *habitat assessment*. Just as in case of SEA, several similarities of scope and procedure of both instruments were shown, proving that there is a room for enhanced coordination. The next speaker, Marcin Pchałek (Ochrona środowiska i działalność inwestycyjna – Konsulting), compared EIA and SEA with assessment required by the Water Framework Directive. Finally, Magdalena Michalak (Łódź University) explained the links between EIA and waste management. This speech was supplemented by *ad hoc* intervention of Jan Jerzmański (Jendroška Jerzmański Bar & Partners – Environmental Lawyers) on certain problematic issues related to different terminology of certain activities related to waste management used in the EIA legal scheme and in waste legislation.

**Session V** was the first regular session of the second day. It was chaired by Nina Stojanova of Environmental Consultancy Sofia and was devoted to citizen’s rights and transboundary procedure. In this part, Ludwig Kraemer of College of Europe in Brugge was discussing the transboundary EIA and its weaknesses stemming from lack of regulatory precision, inadequacy to modern world expectations and poor practice. His main point was that this procedure, developed to meet specific political needs in the late 1970s and early 1980s is rather outdated in the united Europe, and should be supplemented, if not substituted, by wider use of transboundary public participation under the Aarhus Convention. Teresa Weber of Justice and Environment talked about public participation in EIA as well as international treaties such as Aarhus Convention. She also pointed out several flaws of this tool, especially the lack of public participation at the stage of screening, the insufficient time frame for this participation and insufficiency of current related regulation in transboundary procedures. Another practical challenge is to ensure public participation at an early stage when all options are still open, making it more effective than usually it is nowadays. This subject was subsequently widened by Jan Darpo of Uppsala University who spoke about access to justice in the EIA Directive and referred to the important judgements of the European Court of Justice. He was discussing the scope of subjects entitled to question the decisions of development consent and the grounds for such appeal contrasting it with the provisions of Aarhus Convention (the study of European Commission on this subject-matter was announced). Jerzy Jendroška, this time speaking as a

UNECE consultant, finished this session, announcing the forthcoming UNECE recommendations on public participation. This publication results from the fact that there is no political will to introduce any relevant legal changes to the Convention; therefore at least a guidebook was found to be necessary in order to highlight the best practices of the Parties to the Convention as well as the Compliance Committee rulings. It is hoped that this would influence the way in which public participation is assured by the authorities worldwide.

**Session VI** was chaired by Jerzy Stelmasiak of Lublin University and the Polish Supreme Administrative Court and was devoted to the judicial review, quality control and monitoring. It was initiated by Mark Clement of the Administrative Court of Appeal of Lyon who presented the scope of judicial control of the EIA in France. In his presentation the immanent contradiction between the effectiveness of courts and the openness to appeal was raised. However, it is this openness that gives the opportunity of executing the real control of decisions influencing the environment. French courts share this approach and in Clement's opinion they do not back up the administration when non-conformity with EIA regulation is identified. It gets more complicated, though, when contradictory information is provided by experts. The next speaker – Luc Lavrysen of Gent University and Belgium Constitutional Court – focused on tools to ensure the quality of EIA especially the system of accreditation of experts. He presented in detail different approaches in this respect applied in Flemish and Valoon Regions in Belgium and compared them with the EIA review system in the Netherlands with its EIA Commission. The last speaker of this session, Nenad Nikulic of Eko Invest Zagreb, gave a speech prepared jointly with Jiri Dusik from Integra Consulting (Praha/Hong Kong) in which they discussed the quality control of EIA documentation. The speech identified several weaknesses of the current approach to this matter and presented some proposals for new approaches to improve the situation in practice, including a proposal for creating a special award for best EIA documentation.

**Session VII** concentrated on the effectiveness of EIA and was chaired by Joanna Cornelius of Swedish Society for Nature Conservation. The session was initiated by practical observations of Martin Führ (University of Applied Sciences Darmstadt and ELNI) who conducted a case study of over 100 EIA procedures with his team. He found that the proper scoping was absolutely crucial for the quality of the EIA documentation and the EIA process as a whole. Guidance for the authorities and mandatory written form of the scoping document were recommended in

this respect. Nonetheless, according to him, there is still room for improving EIA documentation especially by involvement of accredited experts and proper guidance. In general, a need for improved quality assurance and information management was identified. Another lecture that caught attention of the audience was the speech provocatively entitled “Mythology, Deception, and Secrecy - How to Reform Some Unacceptable EIA Practices in Europe and Beyond” given by John Bonine of Oregon University. He discussed the wrongful worldwide practice of producing false EIA documentation in order to present the projects in a better light and the lack of tools to control and sanction such practices. The existing measures, such as codes of ethics, financial or criminal liability are insufficient because the control is virtually non-existent and that the potential consequences are not a deterrent. Furthermore, the possibility to appeal decisions based on false information has very limited effectiveness throughout the world. The need for greater harmonization of EIA with other procedures was questioned by Ismo Polonen of East Finland University who called for reconsidering the EC proposal both on legal and technical levels. In his opinion the proposal is burdensome for the administration and also does not contribute to simplification nor precision of EIA. What's more, it is over detailed, leaving insufficient room for Member States to choose the individual implementation approach. Such freedom could also allow for more participation of the developers in the procedure, which in turn could eliminate unnecessary duplication of assessments to be conducted by the project proponent and by the competent authority. Kazimierz Równy, professor emeritus of the Polish Academy of Science, called for long-term-perspective thinking when adapting changes to EIA Directive, especially those relating to the public participation.

During the **last session** of the conference, national experience on EIA was discussed. Andriy Andrusevych (Resource & Analysis Center “Society and Environment”, Lviv) described the situation in Eastern Europe, Nankyong Moon of the Korea Environment Institute (Seoul) spoke about Korean and north-east Asia approach and Eike Albrecht of the Technical University of Cottbus provided insights into the EIA practice in the Middle East and Africa. This session proved that despite the differences in the actual form that the EIA takes in various parts of the world, there is a general expectation that the developments better reflect the general model and standards of this tool developed by the USA and EU. One can observe the efforts to transfer the knowledge and expertise which ultimately could help to

overcome the difficulties pointed out in the presentations such as insufficient awareness, lack of public participation, insufficient importance paid to the outcome of the EIA and the poor administrative practices.

Overall, the conference proved extremely interesting, not only owing to the “hot” topic but also because of the selection of speakers representing different backgrounds and different views, which appealed to the audience. It was also extremely useful to have an exchange of views among high-profile EIA specialists. The best proof of this was the discussions after each session which engaged numerous participants and went beyond the official conference activities.

Worth noting is that the conference was organized as a so-called “green event”, which means that steps were taken to minimize and where possible offset the carbon footprint it had created. The participants were informed about the “green event” project and the activities undertaken in this regard (see [http://www.jjb.com.pl/green\\_w.html](http://www.jjb.com.pl/green_w.html)).

## 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)

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

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*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@jyb.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](http://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](http://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](mailto:roller@fh-bingen.de)

[www.fh-bingen.de](http://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](mailto:fuehr@sofia-darmstadt.de)

[www.h-da.de](http://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](mailto:bizer@sofia-darmstadt.de)

[www.sofia-research.com](http://www.sofia-research.com)