Assessing the assessment

Quality review of EIAs/SEAs: a Dutch perspective

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1 Introduction

For some time now, the Netherlands has been an authority in reviewing the quality of Environmental Impact Assessments (EIAs) and Strategic Environmental Assessments (SEAs). The European Commission proposal amending the EIA Directive[1] imposes an obligation on Member States to introduce a system of quality review. With regard to the current discussions in Europe on this subject, this article focuses on the Dutch experience with the quality review of EIA and SEA.

2 European legal context

Since 3 July 1988, the EU has a system of environmental assessment of projects.[2] Due to the fact that 'the environment' cannot stand up for itself, other parties (the general public, the administrative bodies and NGOs concerned) will have to stand up to protect the environment. In order to do so, it is necessary they have sufficient information at their disposal concerning the projects' impacts on the environment.

The directive states that certain public and private projects[3], likely to have significant effects on the environment, need a development consent and an assessment to be conducted before consent to develop the project is given.[4] Article 5(3) and Annex IV of the directive stipulate what information should be included in an EIA. Member States need to adopt measures to ensure this information is included. According to the European Court of Justice, Article 3 signifies that it is up to the competent (environmental) authority (and not the proponent) to assess the impacts on the environment of a project.[5] To this end, the competent authority should conduct investigation and analysis activities. In other words, the European legislator was aware that, notwithstanding the fact that a proponent can actually draw up the EIA, the EIA should be thoroughly checked by the competent authority.

In 2001 the European Commission published the guidance document 'Guidance on EIA - EIS Review' to 'help developers and their consultants to prepare better quality Environmental Impact Statements and competent authorities and other interested parties to review them more effectively, so that the best possible information is made available for decision making.'[6]

With the implementation of the SEA Directive[7], the legal framework on environmental assessments was extended to include plans and programmes. Article 12(2) of this Directive (more) explicitly requires Member States to 'ensure that environmental reports are of a sufficient quality to meet the requirements of this Directive'. The older EIA Directive does not contain a similar provision on quality review. Apparently, the European Commission considers this to be a flaw in the current EIA Directive, for her proposal entails a new provision on this issue. This provision will further be discussed in section 5.

3 The Dutch system

The Dutch environmental assessment system was fleshed out in 1980. At the same time, discussions on the subject of the desirability and content of regulations for environmental assessment at European level were ongoing in the European Community. In the Netherlands a deliberate decision was made to incorporate a number of additional elements:

1. Scoping, including widespread public participation, consultation of administrative bodies, and advice from an independent advisory commission at the beginning of the environmental assessment procedure.
2. The obligation to describe alternatives – including the most environmentally-friendly alternative – plus their environmental impacts.
3. The mandatory review of the quality of the environmental assessment report by an independent advisory commission.

1 Proposal for a Directive of the European Parliament and of the Council amending directive 2011/92/EU of the assessment of the effects of certain public and private projects on the environment, COM(2012) 628 final.

2 Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ L 175, 5.7.1985, replaced and codified by Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ C 248, 25.8.2011.

3 Listed in Annex I and II of the EIA directive.

4 Art. 2(1) EIA.

5 Case C-50/09, Commission v. Ireland, CoJEU 3 March 2011, paragraphs 35, 37-41, http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0050:EN:HTML.

6 European Commission, *Guidance on EIA – EIS Review*, Luxembourg, Office for Official Publications of the European Communities, 2001, http://ec.europa.eu/environment/eia/eia-guidelines/g-review-full-text.pdf

7 Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plan and programmes on the environment, OJ L 197/30, 21.7.2001.

4. Environmental assessment would not only be for projects, but also for a number of government plans.

Several years before transposing the EIA Directive into Dutch law, Dutch environmental law[8] installed a separate authority – the Netherlands Commission for Environmental Assessment (NCEA)[9] – whose purpose is to ensure that the envisaged quality of the EIA instrument is achieved and maintained. In order to reach this goal, members of the NCEA have to be independent experts. The NCEA runs a database that contains approximately 300 experts who work at governmental agencies, universities and consultancy agencies. They are specialised in the field of the description, protection, pollution of and damage to the environment.[10] 'Independent' means that the members should not be engaged in any way in the project that is to be reviewed.[11] A working group is set up especially for each advisory report, and the members represent those disciplines relevant to the assessment the working group is advising on. Over the years, the composition and the procedure of the NCEA itself have hardly changed. The moment at which the NCEA advises and the type of report it advises on, however, have changed quite substantially. Notably, the Dutch Act on the Modernisation of the EIA Regulation that came into force in July 2010[12] introduced important modifications:

- advice of the NCEA on the scope of EIA (and SEA) is no longer mandatory,
- distinction between simple and complex EIAs[13]; only for the latter advice of the NCEA on the quality of the EIA is mandatory,
- advice of the NCEA on the quality of the SEA is always mandatory (not only when nature conservation is involved),
- the timeframe for NCEA advice was reduced to (approximately) six weeks from the date that the EIA/SEA report is available for public inspection.[14]

In current legislation, the NCEA prepares mandatory and voluntary advisory reports for national, provincial and local governments on the scope and quality of environmental impact reports (EIA and SEA).The NCEA advises the authority that must make a planning decision based on that report. Who the competent authority is, depends on the kind of decision to be taken (e.g. the municipal council or the provincial authority). Only the competent authorities can request that the NCEA prepares an official advisory report. However, anyone may approach the NCEA with questions about the environmental assessment procedure in practice or questions in relation to case experience.[15]

The NCEA has always been financed by several Dutch ministries: Infrastructure and Environment, Economic Affairs (also covering nature conservation), and Education, Culture and Science. Since the Dutch Modernisation of the EIA Regulation, the Ministry of Infrastructure and Environment requests a contribution towards its costs for a voluntary advisory report, and will collect the payment. This applies to all types of voluntary advisory reports. The fee varies from €3,500,- for advice on a supplement up to €24,000,- for advice on a large-scale national plan or project. The money must be transferred by the competent authority – not by the proponent.

Brief description of the stepwise procedure

1. Once the date on which the EA report will be available for public inspection is known, the NCEA should be informed that the project is imminent.[16]

2. Sufficient copies of the documentation must be lodged with the NCEA no later than one day before the EIA or SEA report is publicly available, and preferably even earlier.

3. The NCEA secretariat sets up a working group comprising a chairperson, a secretary and several experts in the disciplines relevant to the project. Their names are reported to the competent authority. If a competent authority can prove an expert is not independent in relation to this project, he or she will be replaced by an expert who is.

4. The secretary to the working group establishes agreements with the competent authority on the timing of the project's site visit by the working group, whether submissions by the general public are to be taken into account by the working group[17] and when the advice will be finalised.

8 Paragraph 2.2 of the Dutch Environmental Management Act (EMA), as of 1 September 1980.

9 See explication of the proposal of law, TK 1980-1981, 16 814, no. 3, p. 29, and TK 1983/1984, 16 814, no. 7, p. 51.

10 Art. 2.19(1) EMA.

11 Art. 2.21(2) EMA.

12 Wet van 17 december 2009 tot wijziging van de Wet milieubeheer enkele daarmee verband houdende wetten (modernisering van de regelgeving over de milieueffectrapportage), Stb. 2010, 20.

13 All projects which require an appropriate assessment on the basis of the Dutch Nature Conservation Act and all projects in which a government body is proponent (e.g. expansion airport, projects concerning the infrastructure, housing programmes) are so-called complex projects that require advice of the NCEA on the quality of the EIA.

14 For voluntary advices there is no fixed time-frame, but the NCEA strives to meet a six-week deadline for these too.

15 Because of its status of independent authority, the NCEA cannot give official interpretations of Dutch law on EIA/SEA.

16 In the case of voluntary advice, before the EIA/SEA report or scoping note are publicly available the NCEA must have received notification from the Ministry of Infrastructure and Environment of receipt of payment.

17 The consideration of such submissions is not an optional extra and so no extra fee is involved. However, the NCEA will need more time to examine submitted comments, as they may result in new information being given to the working group after the deadline for submissions has passed. The extra time required depends on the anticipated number of submissions, but about three weeks is usually sufficient.

5. After visiting the site, the working group will meet once or several times to discuss the most important issues. The site visit is organised by the proponent and the competent authority, in consultation with the NCEA. During the site visit the government employee handling the application, the proponent and the entire NCEA working group are present. It is also desirable for a government official to be present, as then the deliberations can be organisational as well as procedural. It is an excellent opportunity for the working group to obtain a good picture of the proposal, the plan area and the relevant environmental aspects. The site visit is also used for consultation with the proponent and the competent authority about the EIA/SEA approach.

6. The secretary of the working group will draw up a draft advice.

7. Approximately one week before the deadline for the advice, the NCEA sends the draft report, and invites the competent authority to meet with the working group. This meeting is not intended to negotiate the report's wording but solely to address any ambiguities or misunderstandings.

8. The advisory report (revised if necessary) is issued subsequent to the meeting and can be downloaded from the NCEA website thereafter, along with the relevant documentation that was reviewed by the working group (e.g. EIA, annexes, and draft decision). The competent authority will receive digital and paper versions of the report.

9. If the NCEA's review of an EIA reveals that information essential for making the planning decision is missing, it sends provisional advice to the competent authority in which this is mentioned.

There are then two options:

a. The NCEA issues the advice stating that crucial information for making planning decisions is missing, within the usual time limit.

b. The competent authority requests the NCEA to postpone the procedure in order to give the proponent time to supplement the EIA/SEA. The NCEA may postpone its procedure for a maximum of six weeks. To guarantee transparency the provisional advice is posted on the NCEA website in the meantime. If the supplementary material is not supplied within the agreed period, the NCEA formally issues its advice. If the material is provided in time, the NCEA assesses whether this information, together with the original EIA/SEA, now contains all the information essential for the decision-making. The NCEA's conclusions are subsequently published in its advice. Advice on an EIA/SEA supplement is always voluntary.

4 Dutch experience

Why should one ask for an independent review of the quality of an EIA/SEA? What is the added value? Of course, it is understandable that there is some reluctance about introducing an extra procedural step in a planning procedure: it will cost more time and (thus) money. Moreover, an independent body can focus on politically delicate issues. Why ask for these issues to be raised?

Nevertheless, Dutch experience with the involvement of the NCEA proves there are a number of advantages to independent quality reviews:

1. The expansion of the general support for initiatives is seen as the most important added value. In a country as densely populated as the Netherlands, with so many conflicting interests (such as house-building, water, industry, infrastructure and nature conservation) competing for the scarce space, it is essential for projects to have broad support if they are actually to be realised. An independent assessment of the quality of the environmental information by the NCEA is seen as a hallmark that contributes to that support. In such a case, it is even more desirable that submissions by the public are taken into account by the NCEA. This is particularly useful if the proposed project is controversial, as then local information from those involved and also proposed alternatives are evaluated objectively and impartially.
2. Furthermore, it appears that judges attach great importance to the NCEA's opinion in cases where the quality of the information supplied is challenged. A number of these cases are summarised below.
3. NCEA advice can provide information on relevant scientific and legislative developments and pass on best practices acquired in earlier assessment procedures. Due to a legal deadline many spatial plans on rural areas were reviewed by the NCEA last year and similar nature conservation bottlenecks were encountered. For that reason, the NCEA was able to distribute knowledge on best practices to prevent especially smaller municipalities from reinventing the wheel.
4. With regard to scoping, NCEA advice can prevent important issues being overlooked and at the same time ensure no unnecessary research is carried out in the assessment. It will indicate in advance which aspects of the final EIA/SEA will be focused on in the NCEA's review.

These advantages have recently been confirmed by the survey 'Influence on decision-making of NCEA advice and environmental assessments',

commissioned by the Dutch Ministry of Infrastructure and Environment.[18]

The researchers found that environmental assessment (both EIA and SEA) as well as the NCEA advice of the NCEA appear to influence the decision-making process heavily. Therefore, they concluded that the interests of the environment were given a fully fledged position in the decision-making process and that environmental assessment is effective. According to interviewed competent authorities, environmental assessment increases the insight into environmental impacts and alternatives, contributes to a transparent process and provides public support for a decision in the surrounding area of a project. Moreover, the researchers remarked that in two thirds of the viewed cases NCEA was asked to deliver scoping advice, even though this was no longer mandatory. On the one hand, this scoping advice was appreciated because of its substance. On the other hand, competent authorities expressed that they expect scoping advice to contribute to an EIA/SEA of superior quality and to increase the chance of obtaining 'positive'[19] quality review advice from the NCEA. In this sense, scoping advice is perceived by some as a form of risk management. The survey furthermore revealed that for environmental assessments that received 'negative' quality review advice from the NCEA, supplementary research is often conducted or additional information is supplied.

The interviews prove that the parties concerned willingly accepted the comments of the NCEA, fearing that in not doing so; they will run into the same obstacles later on in the decision making-process. The researchers found that 63% of the interviewees claim that the environmental assessment influenced the final decision on the project.

NCEA in court cases

In some cases the highest general administrative court in the Netherlands, the Dutch Administrative Jurisdiction Division of the Council of State, quite explicitly attaches a certain meaning to the quality review advice of the NCEA when assessing the quality of the challenged decision and research. In the jurisprudence of this court the NCEA advice plays an important role with regard to the following aspects:

1. Quality of the environmental assessment in general

First of all, the court mentions (the content of) (positive) quality review advice of the NCEA to assess whether an EIA is of sufficient quality to serve as a basis for the decision on a project.[20]

2. Scope and quality of the examination of alternatives in EIA

Secondly, the court considers the quality review advice of the NCEA to be important in assessing whether appropriate and sufficient alternatives have been examined and whether the examination of alternatives itself was of sound quality.[21] For this reason, the proponent and the competent authority involve the NCEA in order to ensure that sufficient alternatives are examined in advance. In other words, when the NCEA considers the examination sufficient, it would be rather difficult for a concerned party to prove that more alternatives had to be looked at.

Moreover, the quality review advice of the NCEA is of importance in assessing whether a specific alternative has been examined sufficiently. One example is the court case of 13 March 2013 regarding the spatial plan of 'Randweg Zundert".[22] In discussing the NCEA advice, the court found that the most environmentally-friendly alternative has been sufficiently examined; the NCEA stated in its advice that the choice for this alternative was adequately reasoned out.

3. Research of environmental impacts

While referring to the quality review advice of the NCEA, the court often rules that certain environmental impacts have been adequately portrayed.[23] In the court case of 5 October 2011[24] on the spatial plan of 'LOG Graspeel', the court concluded, with reference to the NCEA advice, that the environmental assessment was correctly based on the maximum range of the plan.

4. Scientific knowledge or used research methods

The jurisprudence shows that quality review advice of the NCEA can be useful in assessing whether the best available scientific knowledge was used or whether a

18 'Doorwerking m.e.r., Onderzoek naar de doorwerking van adviezen Commissie voor de m.e.r. en het MER in besluitvorming', Wolbers, Oostdijk, Wesselink en Helder, Berenschot, 20 December 2012.

19 Although the NCEA does not use the terms 'positive' and 'negative' for the advice it provides, advice stating that 'information essential for making the planning decision is missing', is perceived as 'negative' NCEA advice in practice and vice versa.

20 See for example ABRvS 18 July 2012, no. 201103110/1/R3, ABRvS 18 July 2012, no. 201109200/1/R2, ABRvS 8 February 2012, no. 201100875/1/R2, ABRvS 24 August 2011, no. 201000106/1/M2, ABRvS 6 Juli 2011, no. 200905633/1/M3, ABRvS 23 February 2011, no. 201001393/1/R1, ABRvS 15 December 2010, no. 200906644/1/R1, ABRvS 6 October 2010, no. 200904399/1/R2 en ABRvS 28 July 2010, no. 200902071/1/M2.

21 See for example ABRvS 13 February 2013, no. 201205534/1/R2, ABRvS 10 October 2012, no. 201103439/1/R2, ABRvS 18 July 2012, no. 201109200/1/R2, ABRvS 2 May 2012, no. 201105967/1/R1, ABRvS 8 February 2012, no. 201100875/1/R2, ABRvS 17 August 2011, no. 201012202/1/H1 en 2010122203/1/H1, President ABRvS 25 July 2011, no. 201103533/2/R4, ABRvS 29 June 2011, no. 200905914/1/R2, ABRvS 15 December 2010, no. 200906644/1/R1 en ABRvS 24 March 2010, no. 200806140/1/R1.

22 No. 201208110/1/R3.

23 See, for example, ABRvS 29 August 2012, no. 201001848/1/T1/A4, ABRvS 27 June 2012, no. 201006363/1/R4, ABRvS 2 May 2012, no. 201105967/1/R1, ABRvS 8 February 2012, no. 201100875/1/R2, ABRvS 17 August 2011, no. 201012202/1/H1 en 2010122203/1/H1, ABRvS 27 April 2011, no. 201002954/1/T1/M3" en ABRvS 16 June 2010, no. 200904325/1/R3.

24 No. 201003856/1/R3.

certain research method can be applied.[25] In the court case of 20 February 2013 regarding the spatial plan of 'Strand Wijk aan Zee', the court referred to the NCEA advice concluding that the appropriate assessment (Habitats directive) integrated into the SEA, makes use of the best available scientific knowledge in this field.[26]

5. Substantive steps in the environmental assessment process

In some cases, the court used NCEA advice to assess whether certain substantive steps in the assessment process have been followed correctly.[27] In the court case of 27 December 2012 regarding the spatial plan of 'Harselaar-Driehoek', the court ruled that seven year old documents could still be used in the environmental assessment of the plan.[28] As motivation for his judgment, the court mentioned that the NCEA did not argue differently.

6. Closer assessment

Sometimes the NCEA advises for further argumentation of a certain aspect of the environmental assessment to be supplied. This advice can induce the proponent or the competent authority to supply supplementary information. In the court case of 17 November 2010 regarding a decision for the National trunk road 31 Leeuwarden, the supplementary information contributed to the rejection of a ground for appeal.[29] Another example is the court case of 10 July 2013 regarding the provincial spatial plan of 'Westfrisiaweg'.[30] Appellants put forward that the provincial authority concentrated on the construction of a road north of the town of Heerhugowaard, without taking the alternatives south of the town into consideration. The NCEA advised for an assessment to be provided of the environmental impacts of an alternative south of the town or a well-founded supplement on why 'south alternatives' cannot be seen as a reasonable alternative. The competent authority supplied a supplement to the SEA that assessed the impacts of two alternatives south of the town. It concluded that the first did not meet the goal of the project and that the second alternative scored worse on environmental impacts than the alternative north of the town. The court judged that appellants failed to show that these conclusions were false.

7. Recommended measure

In some cases, the NCEA not only decides whether information essential for decision-making is missing, but also makes recommendations to further improve the decision (-making process). In several cases, the court obviously judged these recommendations not to be the same as a deficit of essential information.[31] According to the court, it is not mandatory to follow recommendations, although the competent authority needs to substantiate why it did not do so. On the other hand, the court case of 15 June 2011 regarding the spatial plan of 'Nieuwe Driemanspolder' showed that taking a measure recommended by the NCEA to reduce nuisance, can contribute to the rejection of a ground for appeal regarding this hinder.[32]

8. 'Positive' advice in general considerations

One noteworthy court case in this context is the one of 30 June 2010[33] which regarded the refusal of a municipal competent authority to a requested planning exemption for a livestock farm for pigs. With reference to the 'positive' NCEA quality review advice for the project, the court ruled that the competent authority insufficiently substantiated the refusal.

5 Current European discussion

Although there is not a legal obligation for Member States to introduce a system of quality review of EIA, several of these systems already exist. Most of them make use of accreditation or certification of the experts that draw up the EIA. In some cases, this is supported by a review committee that is part of the ministry concerned. The Dutch system is the only example that has set up an independent body, apart from the ministry concerned. The Dutch experience has become more relevant due to the fact that the European Commission published a proposal to modify the EIA directive. The Commission considered it time to review the directive that in its 25 years of application had not significantly changed, while the policy, legal and technical context has evolved considerably. The general objective of the proposal is threefold: 'to correct shortcomings, reflect ongoing environmental and socio-economic changes and challenges, and align with the principles of smart regulation.'[34] With regard to quality review, the Commission proposes to modify Article 5 comprehensively, 'with a view to reinforcing the quality of information and streamlining the EIA process.' The core requirement for the developer to submit environmental information is maintained, but its form and content is streamlined and specified in Annex IV. The scoping process becomes obligatory and the content of the opinion delivered by the competent authority is specified. Mechanisms are introduced to guarantee the completeness and sufficient quality of the environmental reports.'[35]

25 See for example ABRvS 6 October 2010, no. 200904399/1/R2.
26 No. 201204018/1/R1.
27 See for example ABRvS 24 March 2010, no. 200806140/1/R1.
28 No. 201105472/1/R2.
29 No. 201004771/1/M2.
30 No. 201209433/1/R1.
31 See for example ABRvS 24 July 2013, nos. 201209836/1/R3 and 201303381/1/R6, ABRvS 13 March 2013, no. 201208110/1/R3, ABRvS 18 July 2012, no. 201109200/1/R2.
32 No. 200905295/1/R1.
33 No. 200908572/1/H1.
34 Proposal, p. 2.
35 Proposal, p. 5.

The proposed Article 5(3) states:

3. To guarantee the completeness and sufficient quality of the environmental reports referred to in Article 5(1):

(a) the developer shall ensure that the environmental report is prepared by accredited and technically competent experts or

(b) the competent authority shall ensure that the environmental report is verified by accredited and technically competent experts and/or committees of national experts.

Where accredited and technically competent experts assisted the competent authority to prepare the determination referred to in Article 5(2), the same experts shall not be used by the developer for the preparation of the environmental report.

The detailed arrangements for the use and selection of accredited and technically competent experts (for example qualifications required, assignment of evaluation, licensing, and disqualification), shall be determined by the Member States.

This means that Member States need to ensure the quality of every EIA that is mandatory according to the EIA Directive. To do so, there are basically two options:

a. The first option focuses on the writers of an EIA. The EIA should be drawn up by 'accredited and technically competent experts'. This means that the Member State should set up a system of accreditation/certification of these experts. The ministry, an agency or a private body accredit experts meeting specific requirements that will ensure they (only) draw up EIAs of superior quality. This means that the Member State needs to formulate its own quality standards with regard to EIA. The validity of the accreditation should regularly be checked, which means that an expert can lose his accreditation ('disqualification'). It is not clear what this means for EIAs that were drawn up by an expert who lost his or her accreditation. An accredited expert cannot at the same time assist the competent authority and the developer for the same project. This can be regarded as a kind of independence in the quality safeguard.

b. The second option emphasises the verification of the drawn up EIA. The EIA should be checked by accredited experts or committees of national experts. Therefore, this option could entail a form of accreditation as well, but this time accreditation of the verifier of the report. In practice, there might be little difference, since EIAs in most cases are drawn up by several experts in their own field (e.g. ecologists, geologists, urban planners, technical engineers). Much of the work is done by junior researchers. Their work is checked by a senior researcher who has the final responsibility for the content of the report. This could be regarded as 'verification' of the report, but also as 'preparation' of the report. Verification by a committee of national experts requires the installation of a group of experts on a national level that verify all EIAs. The article does not give any specifications with regard to the experts on the committee. After publication of the Commission proposal, the Council reflected on its provisions. Several meetings of the Working Party on the Environment from June to September 2013 resulted in three different versions of a Presidency compromise text.[36] They do not differ substantively with regard to Article 5(3). These texts display a quite different approach to quality review. There is no mention of accreditation, although the text states that the experts that draw up the EIA have to be competent. Apparently, the Council wishes to leave it up to the Member States to choose how to ensure that the experts are competent. This seems to lead to a broad margin of appreciation. Furthermore, competent authorities need to have the possibility to be assisted by sufficient expertise to examine the EIA. It is not clear when they are obliged to make use of this expertise. On 22 July 2013 the report of the European Parliament Committee on the Environment, Public Health and Food Safety was published.[37] This report encompasses 68 amendments to the Commission proposal in total. Amendment 58 specifically deals with quality review. This amendment modifies Article 5(3) (as proposed by the Commission modification in bold type):

"3.To guarantee the completeness and sufficient quality of the environmental reports referred to in Article 5(1):

(a) the developer shall ensure that the environmental report is prepared by ***qualified*** *and technically competent experts* ***and***

(b) the competent authority shall ensure that the environmental report is verified by ***independent qualified*** *and technically competent experts and/or committees of national experts* ***whose names shall be made public****.*

Where ***independent qualified*** *and technically competent experts assisted the competent authority to prepare the determination referred to in Article 5(2), the same experts shall not be used by the developer for the preparation of the environmental report.*

[36] (Revised) Presidency compromise text of 19 July 2013, 12405/13, of 27 May 2013, 9391/13, and of 20 September 2013, 13883/13, not publicly available.

[37] Report on the proposal for a directive of the European Parliament and of the Council amending Directive 2011/92/EU of the assessment of the effects of certain public and private projects on the environment, (COM(2012)0628 – C7-0367/2012 – 2012/0297(COD)), A7-0277/2013, rapporteur: Andrea Zanoni. Not all of these amendments have later been adopted by the European Parliament on 9 October 2013, (COM(2012)0628 – C7-0367/2012 – 2012/0297(COD)): see http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0413&language=EN&ring=A7-2013-0277.

The detailed arrangements for the use and selection of ***qualified*** *and technically competent experts (for example qualifications* ***and experience*** *required, assignment of evaluation, licensing, and disqualification), shall be determined by the Member States.* ***The qualified and technically competent experts and committees of national experts must provide appropriate guarantees of competence and impartiality when verifying environmental reports or other environmental information in accordance with this Directive, ensuring that their assessment is scientifically objective and independent, without any interference or influence from the competent authority, the developer or the national authorities. These experts shall be responsible for the environmental impact assessments they conduct or supervise or on which they have issued a positive or negative opinion.****"*

What is most striking is the fact that the Committee has replaced the 'or' after option (a) by an 'and'. In other words, Member States cannot choose between improving the quality of the preparation (a) and the verification (b), but rather they should do both.

Secondly, the term 'accredited' is replaced by 'qualified'. This means that, comparable to the compromise text of the Council Presidency, Member States are not obliged to install an accreditation system. Nevertheless, as in the Commission proposal, Member States are to work out 'detailed arrangements for the use and selection' of these experts.

The proposed modification introduces the term 'independent' and 'impartiality' in this article. The experts that verify EIAs should be independent. Luckily, this term is defined in a new article 1(2 g a), that is inserted by Amendment 40:

"(ga) "independent" means capable of the exercise of objective and comprehensive technical/scientific evaluation, free of any conflict of interest, either real, perceived or apparent, in relation to the competent authority, the developer and/or the national, regional or local authorities."

The experts should be able to prove that they are without any interference or influence from the competent authority, the developer or the national authorities. It might be difficult to prove this ('provide appropriate guarantees of competence and impartiality') when an expert is hired by the competent authority to verify the EIA: Why did the competent authority hire this specific expert? Is there a connection between the expert and the authority? Were they satisfied with the verifications he or she did for them previously? Does this lead to a 'perceived' conflict interest? For committees of national experts this seems to be easier. Although they too need to be transparent about their experts by making public their names, a direct hiring relationship between expert and authority seems less likely. The Committee report introduces another form of independence as well. The explanation of Amendment 19 that adds to the recital reads:

"Experience acquired in a number of Member States has shown that specific rules need to be introduced to put an end to the serious issue of conflicts of interest, in order to ensure that the aim of the environmental impact assessment procedure is effectively achieved. The competent authorities charged with carrying out assessments must not, under any circumstances, overlap with developers nor be dependent on or subordinate to them."

This idea of independence between developer and competent authority could be seen in article 5(3) as proposed by the Commission: an independent expert that assists the *competent authority* in scoping cannot assist the *developer* in preparing the EIA at the same time. The Committee of the European Parliament goes even further with regard to independence between developer and competent authority. Amendment 50 proposes a new Article 1(4a):

"4a. Member States shall designate the competent authority or authorities in such a way as to ensure their full independence in the performance of the duties assigned to them under this Directive. In particular, the competent authority or authorities shall be designated in such a way as to avoid any relationship of dependence, any links or subordination between them or their members and the developer. A competent authority may not perform its duties under this Directive in relation to a project which it has commissioned itself."

This new article will have a significant impact on legislation in Member States: it will change the administrative organisation of municipalities, provincial or regional authorities, and the national government. Furthermore, independent quality review seems to be sufficient to reach the goal of bringing independent environmental information to the table. Therefore, it is not likely that this amendment will be acceptable for the Council.

6 Conclusion

EIA is a flexible instrument that leaves room for tailor-made elaboration. This advantage proves to be a weakness at the same time. The quality of EIAs differs substantially. It is no wonder that the European Commission wishes to improve the quality of EIAs. A system of quality review can be an effective tool to realise this improvement. Proposed amendments by the Council on the one hand and the environmental Committee of the European Parliament on the other hand show that there is still much discussion in Europe ahead regarding the desired quality improvement method. The Dutch experience with quality reviews might serve as an inspiration in the current European discussion on the improvement of

the quality of EIAs. Although Dutch environmental legislation is heavily under discussion at the moment [38], the importance of the NCEA as an independent expert in quality reviews of EIAs and SEAs has not been put into question. This does not mean that Dutch developers and competent authorities are always thrilled with NCEA advice. Independent advice may focus on knowledge gaps in the decision-making process. Nevertheless, many competent authorities are inclined afterwards to admit that the advice resulted in a better decision. At the end of the day, it is better to be safe than sorry.

[38] A proposal for simpler and better environmental and spatial legislation is expected to be sent to parliament beginning of 2014.