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The impact of transposing the EU's EA directives in Flanders

Features of the evolution of subnational regulatory policy making

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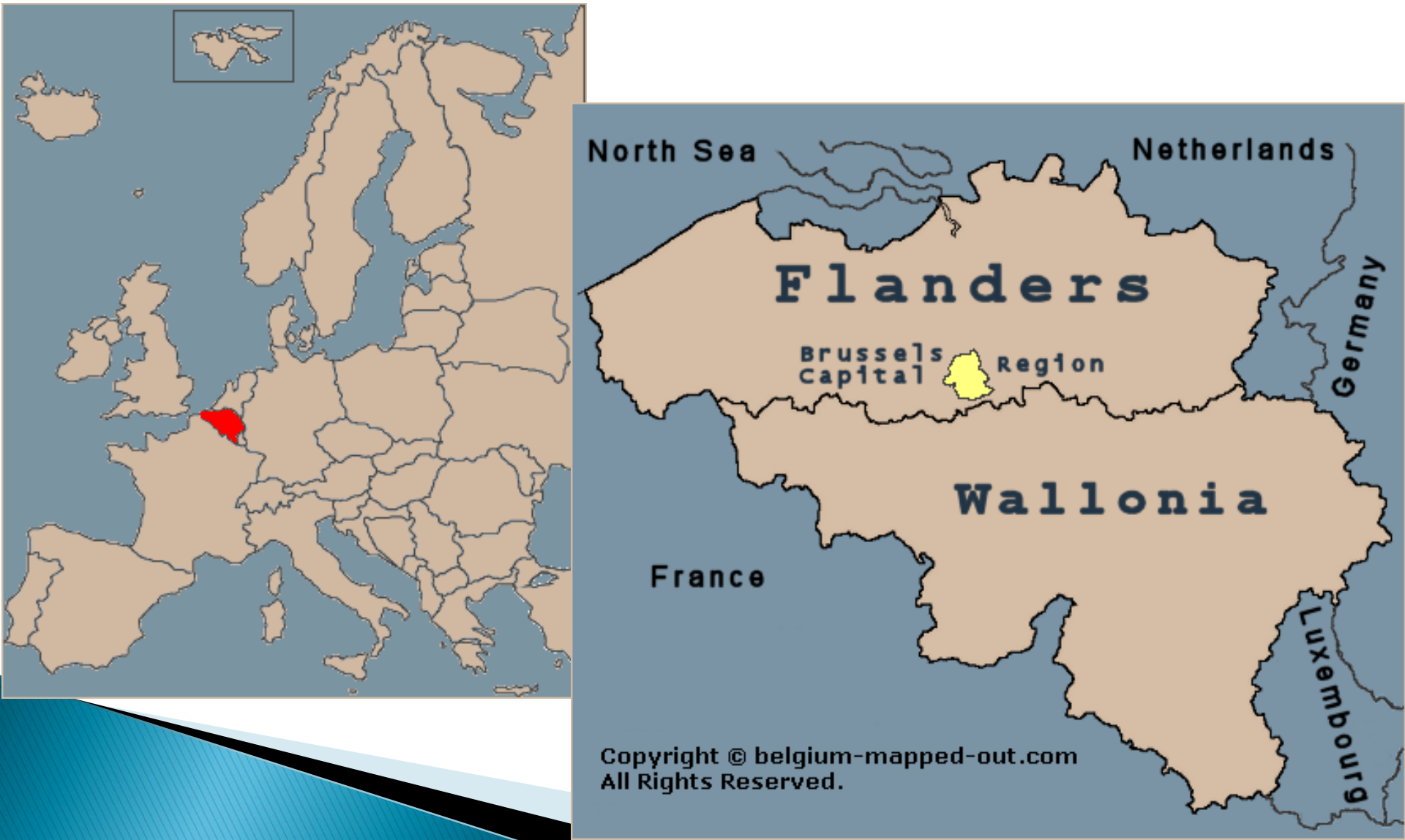
Outline

- Not about the current transposition of the new EIA directive
- Mainly a quick review of relevant IA-developments during the past 2 decades
- Dimensions/angles: supranational, legal, institutional, administration and public management, political-administrative "culture"
- Some observations, reflections, conclusions and prospects
- Perspective: "reflective practitioner" / "fellow traveler"

Flanders/Belgium/European Union



Transposing EIA/SEA directives

- Political-institutional setting
- Flanders = 1 of 3 regions in Belgium
- Belgium = federal state / EU member state
- 6 state reforms -> increasing complexity
- Environmental policy = predominantly regional competency
- Result:
  - Some federal EIA/SEA-legislation
  - Regional legislations
  - Intra-Belgian co-operation frameworks (political, administrative, legal: agreements)

Transposing & implementing EIA/SEA directives

EIA Directive:

ECJ cases regarding Flemish EIA-legislation : inter alia: C-133/94 / C-435/09 / C-257/09 (preliminary ruling)

Concerned different issues, e.g. about criteria/thresholds: not to exempt in advance from screening certain categories of projects listed in Annex II; even a small-scale project can have significant effects on the environment (COM 2013 report on ECJ rulings regarding EIA)

SEA-directive:

Warnings for late transposition in Flanders (2007); implementation cases: Brussels case: C-567/10; Wallonia cases: C-105/09 & C-110/09

Transposing & implementing EIA/SEA directives

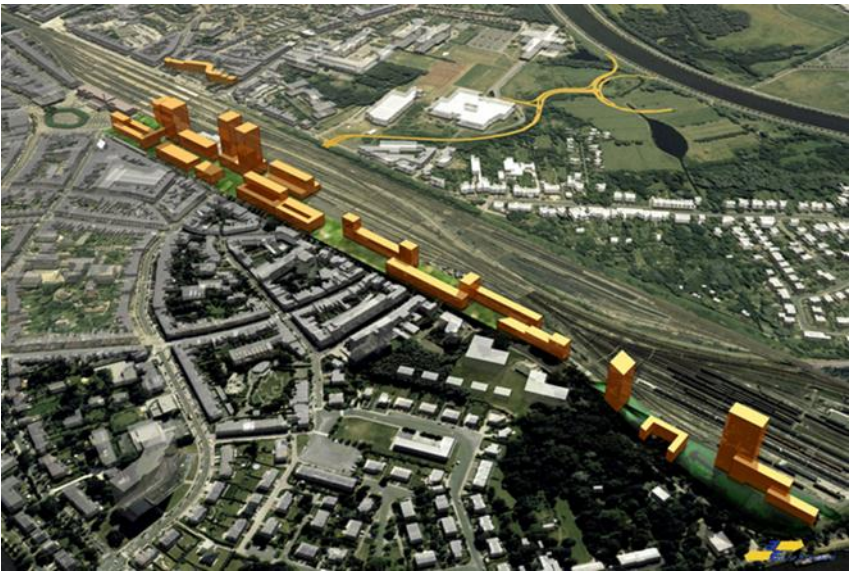
Legal-judicial perspective

Since 90ies periodical legislative initiatives to amend EA-regulations. These are embedded in environmental & spatial planning & zoning regulations. These also reflect evolutions:

- agency-fication: growing (sub)sectoral divisions,
  - proliferation, specialisation, fragmentation -> coherence
- sub-regional dynamics/politics: local authorities
- regional "profiling": additional administrative appeal procedures created
- court cases reveal growing complexity, lack of efficiency and limited "impact" of instruments
- Policy answers after several "evaluations": streamlining but also new legislative initiatives, e.g. decree on complex projects.

EIA & SEA "impact" influenced by context realities

- Difficult transposition/legislative process
- Linked to complex planning & decision making processes
- "Managed" by administrative silos & governmental layers wthin evolving public management reforms, institutional arrangements
- But…generating information, consultation, participation: from policy announcements to co-design (legal active/passive; growing advisory scenery; formal/informal participatory arrangements)



Gent case: Renovation of railway station and development of residential and office area

July 2008 neighborhood NGO complaint to the European Commission. Concerned inter alia the application of the EIA and SEA Directives.
December 2008 Commission classified the complaint. Commission stated:

- Combined SEA & EIA seems in this case acceptable
- Alternatives have been sufficiently assessed (however not always very profound)
- Even in case the assessments reveal negative impacts a positive ("licence to start") decision is possible as the decision needs only to be justified considering the results of the assessments

Anno 2015: 1 building project finished… ongoing judicial issues about separate building permits

Antwerp case: Mobility plan
Instrumental role of EA for…

The Oosterweel link has been a political problem since the original presentation of the construction options in 2000. The BAM-plan should close the circular road (Ring) in order to ease congestion by allowing traffic from the left bank of the Scheldt and new routes to the Netherlands (north) and to Germany (east). It was decided that a long, two-tier viaduct would pass through the docks area in the centre of greater Antwerp.

ALTERNATIVES !!!!

Following opposition from two groups, Ademloos and Straten-Generaal, a referendum was held in 2006. The citizens of Antwerp voted in favour of an alternative to the BAM plan: replace the viaduct by a tunnel. Alternative routes for the link were proposed by the two groups to move the link outside of the city centre, in order to avoid severe pollution problems because of fine particulates. Ringland is calling for the new link to be completely covered (tunnel), cutting down greatly on pollution and noise, and providing a vast amount of new urban space, which could be used for parks, sports and leisure facilities.

Regulatory Impact Assessment (RIA)

By the mid 1990s, there was a growing concern and discomfort with the quantity and quality of the growing **amount of regulations** that had been created in a relative short period. Regional "coming of age". Several government decisions preceded the introduction of RIA in Flanders (2000, 2001, 2003, 2004 and again 2004).

Following **international trends** (OECD, EU Better Regulation) and best practice, the Flemish Government decided on 4 June 2004 and 17 December 2004 to introduce RIA starting from 1 January 2005.

Federal level

Next to the particular EIA (nuclear & marine projects)/SEA (some plans: e.g. marine spatial plan) requirements , two separate tools were introduced:

- the 'Kafkatest' for administrative burdens
  - (< Lisbon Strategy / EU Better Regulation)
- Sustainability Impact Assessment (SIA)
  - (< Göteborg Strategy / SDS)

  Evidence however showed that SIA was not working properly with only one full SIA performed in 3 years time.

  OECD review: too sophisticated (a form of super impact assessment) and "It does not make sense to continue, at least over the longer term, with two separate processes" (SIA and Kafka/RIA)

  As of 2014 merged into one federal RIA approach, that includes sustainable development, gender, development co-operation, administrative burdens and small and medium enterprises.

  First results are rather positive according to a recent survey but there is still a long way to go...

FL: Children & Youth impact assessment (JoKER)

Since 1997 legally required for draft-regulations that may directly impact youngsters < 18 y. Amended in 2008 to widen its scope to < 25 y.

Evaluation in 2012

Based on multiple data collection techniques (including an electronic survey and focus groups), JoKER was critically evaluated as to its scope, quality, process, support and control, effectiveness and impact. The evaluation required maintaining a balance between various perspectives and tensions. A major challenge concerns the tension between mainstreaming JoKER in the more general regulatory impact assessment (RIA), on the one hand, and preserving the specificity of a youth and children's rights perspective, on the other.

Growing integration with RIA and formally agreed in 2013

FL: Poverty impact assessment

Flemish Poverty Reduction Action Plan for 2010-2014 included the proposal for a “poverty test”.

The test was introduced in 2013 and its mandatory use was formally approved in 2014.

It includes a participatory approach that is applied to all new measures introduced to consider possible detrimental effects of legislation on those living on lower incomes, as far as this measure is subject to RIA.
3-steps-approach:

1° The so-called “SIA-quick scan” will consider the impact of any new measure.

2° In case of possible impact -> in-depth Poverty test

3° Outcome becomes part of RIA

SIA -> RIA

In September 2008 a decree on Sustainable Development was adopted. It requires a horizontal policy for SD and the development of a strategy for SD every legislature. No requirement for SIA!!

OECD (2010) mentions that some countries or regions, such as the UK or Flanders in Belgium, have integrated sustainability criteria into an existing impact assessment system, e.g. the RIA.

From SIA -> RIA, but…

SIA quick scan – in particular its impact-matrix – has been introduced in the RIA-scoping.

This impact-matrix contains 4 categories: ecological, social, economic, institutional.

RIA Guidance stipulates in principal a comprehensive societal impact-focus but stresses the need for a **proportionate approach.**

RIA Guidance mentions impacts on: administrative burden and management costs, child & youth (JoKER), poverty, equal opportunities, inclusion, sustainable development, local authorities, Brussels…

Current status of RIA

Evaluation

- Design is rather good (EA inspired)
- Not legally required but formal compliance is rather high
- Number of RIA's was initially high (587 in 7 years, declining, became less mandatory)
- Average quality is low, no improvements due to declining monitoring and quality control
- Impact on policy decisions is poor
- No or slow change in the policy culture, no indication for improvements

RIA disappears from policy briefs, uncertainty about RIA team/contactpersons…

Final observations & prospect?

PM: Evidence-based versus efficiency? Design versus outcome?

EU's EIA/SEA directives: rather problematic implementation and complex settings. Inspired indirectly the introduction of other IA's. Lack of clarity (data) on environmental impacts… but in a number of cases clearly a means to stir debate, participation and legal actions.

- > beyond instrumentalism due to "outhouse-linkages"

Separate - supranational inspired but not required - IA approaches introduced but unclear implementation tracks.

- Integrated approach (efficiency) < RIA
- Impact on effectiveness & quality ?

- -> more "inhouse"

Final observations & prospect?

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Without firm legal framework and dedicated compliance (including robust evaluations and performance management), leeway towards more opinion based (à la carte) policy making?

Any Flemish IA policy particularities compared to federal developments and EU developments …?

How close to a “whole of government” approach…?

Supranational roles, e.g. ECJ? Positive…

-> towards procedural rationality test