

# REGULATORY IMPACT ANALYSIS IN FLANDERS AND BELGIUM: AN UPDATE ON THE EXPERIENCE AND CHALLENGES

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## Abstract

*This paper discusses the introduction, experience and unsolved issues after about five years Regulatory Impact Analysis (RIA) in Flanders. In addition, it examines RIA at the Belgian federal level and in the Walloon and Brussels Regions. It aims at contributing both to the exchange of RIA-experience between countries and to the debate in Belgium on how to proceed.*

*International benchmark surveys show that the design of the Flemish RIA-system scores well compared to many other jurisdictions. A good design however does not guarantee good quality RIAs or a well performing RIA-system. We argue that further modifications of the Flemish RIA-system are required to cope with five persisting challenges: How to maximise political commitment to RIA? How to integrate RIA at the heart of the policy making process and avoid formalism? How to allocate responsibilities for RIA? How to raise RIA-quality? How to cope with new and competing demands? We draw upon domestic as well as international experience on what has worked and what not to propose a set of policy recommendations.*

*At the Belgian federal level and in the Walloon and Brussels Regions the systems are very different and much less advanced or even absent. RIA at the federal level is composed of two separate tools: the 'Kafkatest' for administrative burdens and Sustainability Impact assessment (SIA). Evidence however shows that SIA is not working properly with only one full SIA performed in 3 years time. Hence, a reconsideration of the SIA-system is imperative. Wallonia and Brussels only run a 'Kafkatest' although there are signs that their governments are considering to introduce RIA in the near future.*

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## 1. EXECUTIVE SUMMARY

RIA policies in Belgium are at crossroads. In the Flanders region, about 500 RIAs have been produced in four years time, covering all departments. The track record is mixed, as might be expected in the difficult area of regulatory governance. On the one hand, the design of the Flemish RIA-system scores well compared to many other jurisdictions; average RIA quality is still low but rising; and support for RIA from a broad range of stakeholders and parliament is growing. For example, on January 20 2009, the Flemish government, the Flemish administration, the social partners organized in SERV and other stakeholders signed a treaty ("Pact 2020") with a vision and objectives for Flanders in 2020, which i.a. calls for "an ambitious program for better regulation" and "measures raise substantially the quality of new regulations and policy decisions". On February 4 2009, the Flemish Government, Parliament, the Social-Economic Council and the Strategic Advisory Councils confirmed in an "Interinstitutional Agreement (IIA) about the joint approach to the Regulation Impact Analysis (RIA)" the positive contribution RIA can make to the improvement of regulatory quality, the empirical underpinning in the decision-making process, the cooperation between policy areas and the transparency of the policy process. On the other hand, there still are important weaknesses in the Flemish RIA-system, both in design and implementation. Most policy processes still seem to be done the old fashion way, with RIA as a mandatory add on. As a result, RIA often has become a formal requirement with little or no added value for regulatory decisions. Hence, there is not much enthusiasm to award adequate time and resources to RIA, leading to a vicious circle and a self fulfilling prophecy that RIA is not worthwhile. Politicians seem to prefer visible 'quick wins' through administrative burden reduction in stead structural reforms and more sophisticated tools such as RIA. This has lead the in June 2009 elected new Flemish government to question RIA as it announced a "reform of regulatory impact analysis into a more effective instrument aiming at effective burden reduction and simplification of admission- and licensing procedures".

This is probably not the right way to go. Other countries that had made the analysis and minimization of administrative burdens the flagship of their regulatory policy, are now addressing the limitations of such a policy and move towards a broader view of regulatory quality beyond deregulation and administrative simplification. The reason is that administrative cost reduction can be highly desirable, but does not consider all categories of costs (only burdens generated by information obligations included in pieces of legislation) and does not consider the benefits associated with those costs. In other words, administrative cost reduction pursued narrowly can be counterproductive to good policy and better regulation. Better-quality regulation - in its broader definition - is fundamental to the functioning of society and the economy, and RIA is a necessary - although not sufficient - tool in the 'regulatory factory' to produce high quality outputs. Most observers therefore agree that whatever amount of resources is allocated to the measurement of administrative burdens, this should not subtract resources from RIA and other better regulation tools.

*Our analysis confirms the view that Flanders is on the right road. No fundamental correction is needed to its compass. What is needed is political confirmation of the regulatory policy and a period of consolidation, sustained application and refinement of the tools already applied.* The Flemish government has established a policy and a program of regulatory management comparable to those existing in leading countries and has made noticeable efforts strengthen the RIA-system after its introduction on 1 January 2005. It should invest further (and *smarter*) in RIA – not withdraw from it – to reap the returns for this investment. Implementing RIA however is a long term process since it requires changes to existing decision making habits and procedures. A RIA system can only be successful if there is continuity in the basic tools in the regulatory policy regardless the political changes and if the institutional framework can grow and be adapted over time on the basis of reviews and experiences. We believe that further modifications of the Flemish RIA-system are required to cope with five persisting challenges:

To *maximize political commitment to RIA*, Flanders could:

- Persuade the new elected Flemish government to confirm its commitment to a broad better regulation policy.
- Install a high level group to prepare a medium-term implementation plan, to be adopted by the Council of Ministers, to strengthen the better regulation policy in view of the experiences and upcoming challenges.

- Use the decision to downsize the ministerial cabinets to convince the personal collaborators of a minister that RIA helps to promote a transparent analysis and presentation of options and impacts of the policies proposed by the administration: RIA sets out this information in a clear and concise way to inform the political decision.
- Assure that performing a RIA remains in each particular case an effective use of resources; RIA procedures should allow flexibility to adapt the approach to the political and technical requirements of the specific case, which means that RIA sometimes is not useful or can realistically do little more than fine-tune a proposal on which there is political consensus;
- Make strategic use of the upcoming review of the regulatory capacities and tools in the EU-15 countries by the OECD to provoke renewed engagement by the political sphere.
- Use the decision to introduce impact analysis for draft European legislation as a leverage for political support for a reinforced RIA-system.
- Establish a legal mandate for RIA through parliament.
- Communicate successful RIA-examples better and look for 'sexier' indicators to show progress and results.
- Make sure that the current uncertainty on the coverage and future direction of RIA is as short as possible.

To *integrate RIA at the heart of the policy making process*, Flanders could:

- Introduce a mandatory phasing of each RIA, with a preliminary RIA (limited to problem definition, objectives, options) for internal and external discussion in an early stage and a full RIA in a final stage;
- Link RIA more explicitly to (upgraded) regulatory agendas and to departments' strategic and operational plans;
- Modify its RIAs in subsequent phases of the regulatory procedure to make sure that RIAs reflect as much as possible the current thinking in relation to relevant policy options;
- Evaluate the scope of the RIA-system;
- Adopt an explicit consultation policy with mechanisms to ensure early and effective consultation, and link consultation with RIA.

To adequately *allocate responsibilities for RIA*, Flanders could:

- Assure high level support and adequate resources for the central regulatory management unit, more in accordance with its broad mandate;
- Find an appropriate watchdog, but refrain from allocating responsibility for scrutiny to the departmental regulatory management units: a body independent of the department carrying out the RIA should be charged with quality control, preferably the central regulatory management unit or an interdepartmental Impact Assessment Board.
- Push departments to strengthen their own processes, build up capability and show primary responsibility for the quality of RIAs, and encourage them by spreading good practice examples and monitoring results through benchmark indicators;
- Find renewed dynamism in parliament for regulatory quality by considering the many proposals that are already on the table.

To *raise RIA-quality*, Flanders could:

- Update its RIA-guidance to make it more practical, and complement it with a e-learning tool and with more technical guidance for sophisticated RIAs;
- Continue to assure there is a RIA central help-desk and provide hands on RIA-advice by the departmental units;
- Invest in training, to achieve that all regulatory bodies have a core group trained in RIA and all managers at the level of director and all policy advisors in the ministerial cabinets have had a basic training in the principles and tools of good regulation;
- Set up a network of RIA-practitioners to promote best practice and co-ordinate across departments;
- Encourage the use of early draft RIAs as the basis for consultation;
- Ensure that finalized RIAs are published together with a link to the legislation to which they relate;
- Make published RIAs easier to find by requiring that there are dedicated RIA webpages and actively disseminate RIAs;
- Continue its monitoring and public reporting on the quality of RIAs.

To *cope with new and competing demands* such as administrative burden measurement and sustainable impact assessment (SIA), Flanders could:

- Confirm its commitment to the broader view of regulatory policy and regulatory quality beyond deregulation and administrative simplification.
- Safeguard that resources for RIA are not crowded out by resources allocated to the measurement of administrative burdens.
- Protect RIA from losing its integrating role by confirming that RIA should incorporate any existing or future sector-specific test (including administrative burdens measurements), and that those sectoral test should not unbalance RIA.
- Stress that the basic ambitions of RIA and SIA are similar and implement common sense measures that can help RIA to contribute better to sustainable development.

At the Belgian federal level and in the Walloon and Brussels Regions, the RIA-systems are very different and much less advanced or implemented than in Flanders, or even absent. RIA at the federal level is composed of two separate tools: the Kafka test for administrative burdens on the one hand and SIA (Sustainability Impact Assessment) on the other. In Wallonia and Brussels, there is only the Kafka test, although there are signs that their governments are considering introducing RIA in the next few months.

Evidence shows that SIA at the federal level is a dead end. It is not working properly, with only one full SIA performed in about 2,5 years time and more than 500 screenings (exemption forms) completed. It is obvious that the Belgian SIA-system suffers from the same weakness as many two-track RIA-systems: "screening SIAs" are shaped by a desire to prove that the threshold for a full SIA is not met, rather than to do a proper evaluation of impacts. Hence, a reconsideration of the SIA-system is imperative. A well-functioning RIA or SIA-system at the Belgian federal level and in the other regions is necessary considering the quality of many regulations and the fact that high quality regulation at a certain level of government today in Belgium may easily being compromised by poor regulatory policies and practices at other levels, impacting negatively on public service delivery, citizen's perception, business activities and the country's performance on economic, social and environmental goals.

## 2. INTRODUCTION

1. Institutions and think tanks such as the OECD have been promoting the use of regulatory impact analysis or RIA for a long time<sup>1</sup>. In the context of the OECD Recommendation on Regulatory Quality and Performance of 28 April 2005, OECD member states have committed themselves to:

- ‘assess impacts and review regulations systematically to ensure that they meet their intended objectives efficiently and effectively in a changing and complex economic and social environment;’
- ‘integrate RIA into the development, review, and revision of significant regulations;’
- ‘support RIA with training programmes and with ex-post evaluation to monitor quality and compliance;’ and
- ‘ensure that RIA plays a key role in improving the quality of regulation, and is conducted in a timely, clear and transparent manner’<sup>2</sup>.

2. Today, RIA is widely spread among OECD member states and is increasingly introduced in many other countries<sup>3</sup>. The OECD reports that RIA has become a norm of democratic governance in modern industrialised countries. OECD member countries are continuing to invest heavily in RIA and are reaping greater returns for this investment<sup>4</sup>. The financial crisis and economic downturn have raised awareness of the important role that regulatory quality and regulatory control systems like RIA play in ensuring that regulations introduced are appropriate and effective and that they are being enforced and complied with<sup>5</sup>. At the same time, the OECD recognizes that while the benefits of integrating RIA in the policy decision making process are evident, challenges and problems remain in all countries. The design and later implementation of an RIA system can only be successful when an institutional framework has been carefully defined and built over time and when continuous efforts are made to improve RIA.

3. On 1 January 2005 the Flanders Region in Belgium joined many other jurisdictions and implemented Regulatory Impact Analysis (RIA) as a key instrument for improving regulatory quality. This paper offers an update on the experience and challenges<sup>6</sup>. It presents - after an introductory section for readers not familiar with RIA or the institutional setting in Belgium - an overview of the introduction, experience and unsolved issues after about five years RIA in Flanders. We argue that further modifications of the RIA-systems are required. Drawing upon domestic and international experience, we make recommendations to cope with five persisting challenges. We then turn to RIA at the Belgian federal level and the Walloon and Brussels Regions, where the systems are very different and much less advanced or even absent.

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<sup>1</sup> OECD (1995).

<sup>2</sup> OECD (2005).

<sup>3</sup> See, for example, Jacobs (2006), Kirkpatrick and Parker (2005).

<sup>4</sup> OECD (2006a).

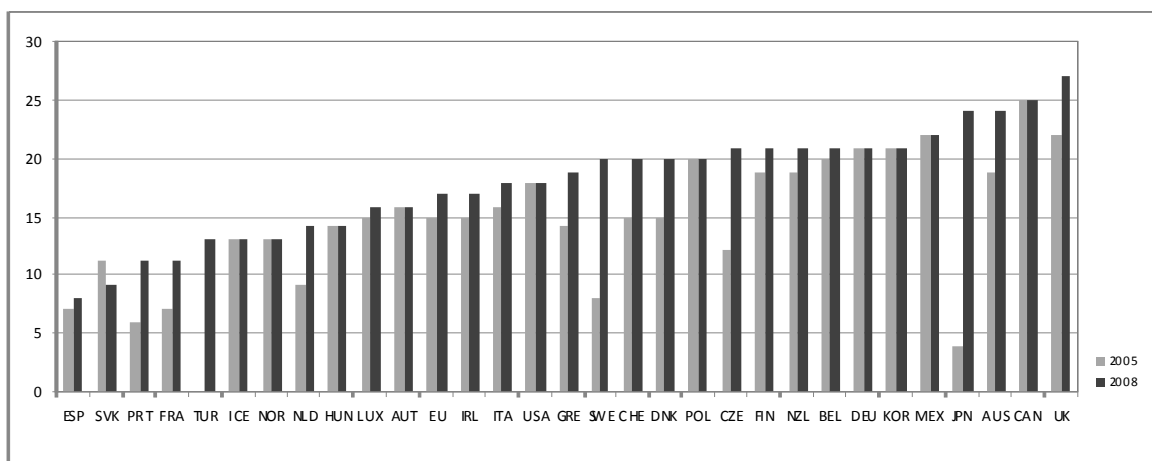
<sup>5</sup> According to the British House of Commons Regulatory Reform Committee for example, the financial crisis has highlighted a number of lessons for the way in which regulation is conducted. One is that there are dangers in relying too much on regulatory ideologies and procedures. “Ultimately it is a truism that good regulation is not about any particular philosophical approach, but about what produces the right outcome. The Better Regulation agenda sets out to achieve desirable regulatory outcomes with minimum adverse impact. It remains a valid project, but there is scope for using the lessons of the crisis to re-energize it with a greater diversity of input, including more accountability to citizens and end users”. Among things the Committee recommended that regulators should do, some are closely linked to RIA: (e) seek to anticipate unintended consequences of regulation, (f) develop mechanisms for challenging prevailing wisdom and political pressure, (g) involve representatives of consumers in such challenge...

<sup>6</sup> We refer to a previous paper for a more general discussion of the main steps in the development of a regulatory management system in Flanders and for an assessment of the Flemish RIA-system between 2005 and 2007 (Van Humbeeck, 2007a, available at the ENBR website: <http://www.enbr.org/public/RIA%20in%20Flanders%20working%20paper%20febr%202007.pdf>).

4. In their effort to build robust regulatory management systems, countries implementing or running RIA can learn from each other's experience, both in terms of success and failure. Belgium and in particular Flanders are probably interesting cases to look into since the RIA system scores quite well on OECD-criteria for RIA-processes. In fact, based on the information of the 2008 OECD-survey, Belgium together with Germany might have the better RIA-processes in continental Europe (see figure 1). To be clear: the *design* of the Belgian and Flemish RIA-system scores well compared to many other jurisdictions. A good design of the system however does not guarantee good quality RIA's or a well performing RIA-system. As we will discuss in this paper, many challenges remain and further modifications in the RIA-system and in decision-making habits and policy culture are required.

5. Our purpose with this paper therefore is twofold. We hope our analysis will stimulate the debate in Flanders and Belgium on how to proceed and will contribute to the policy learning process between countries and regions implementing or running RIA.

Figure X.1.3 Explicit RIA processes (2005 and 2008) <sup>7</sup>



Disclaimer: Please note that this graph summarises information about the existence of key elements of RIA processes in OECD countries, but does not offer information on the quality of specific RIAs.

### 3. BACKGROUND INFORMATION ON RIA AND BELGIUM

#### 3.1. Introduction to Regulatory impact analysis

6. Better regulation is fundamental to the functioning of society and the economy. It is crucial to economic performance and to improve the quality of life of citizens. By improving the quality of regulations, countries improve citizens' rights and the quality of public services, increase efficiency and innovation, create new job opportunities and improve consumer and environmental protection. This is the reason why the Better Regulation Initiative in Europe is explicitly tied to the Lisbon Strategy (which aims to make Europe the most productive economy in the world by 2010 while maintaining the European social model and fostering environmentally sustainable growth) and to the National Lisbon Action Programmes of EU-Member States. 'Better' regulation puts the focus on better results, outcomes,

<sup>7</sup> Source: OECD, Government at a Glance, to be published. The data refers to questions such as: Is regulatory impact analysis (RIA) carried out before new regulation is adopted? Is RIA required by law or by a similarly binding legal instrument? Is a government body outside the ministry sponsoring the regulation responsible for reviewing the quality of the RIA? Is guidance on the preparation of RIA provided? Does the RIA require regulators to demonstrate that the benefits of new regulation justify the costs? Are RIA documents required to be publicly released for consultation? ...

performance—not just on less regulation per se (nor more). Better results should mean improving societal well-being, that is, increasing societal net benefits, via less cost or more protection or, ideally, both<sup>8</sup>.

7. Better regulation requires a sophisticated “good governance” agenda, not a narrow “deregulation” agenda aimed at cutting costs. Successful regulatory reform has become a multifaceted strategy that includes better regulation, reregulation, simplification and institution-building. In the modern practice, regulatory reform is not about limiting the role of the state, but about re-defining the capacities and the role of the state to meet evolving needs. This means that regulatory quality management must become as much a part of public management as have fiscal management and human resource management<sup>9</sup>. In most OECD countries as well at the level of supra national government institutions, regulatory policy is recognized today on its own as a relevant part of the governance agenda.

8. Regulatory reforms aimed at single processes and rules will never catch up with the productive capacities and incentives of governments to create regulations and controls. The issue is clearly a systemic one. The essential concept of the OECD “system” approach is that a national regulatory system can be divided into the stock of regulations (that is, the accumulated legacy of regulations that have built up over years and decades) and the flow of regulations (that is, the continuing production of new regulations that are needed to meet the changing needs of society). Management of the stock and flow of regulations requires different institutional capacities and different strategies, which make up the core of the OECD regulatory reform agenda (box 1)<sup>10</sup>. European countries have embraced these ideas and the European Commission wrote that “establishing a fully fledged and integrated Better Regulation system should be the medium to long-term objective of all Member States.”<sup>11</sup>

#### Box 1: Components of a National Regulatory System<sup>12</sup>

- I. *Build a regulatory management system that can lead the reforms, monitor the quality of the national regulatory system, and promote good regulation tools throughout the entire public sector.*
  - Strategic medium-term regulatory reform policy (5 years)
  - Engines of reform such as a regulatory reform unit at the center of government
  - A responsible minister
- II. *Build the institutions to carry out good regulation*
  - Trained and skilled regulators who understand how to implement “better regulation” tools
  - One-stop shops
  - Regulatory registries, preferably electronic and online
  - Inspections reforms
  - Due process reforms to speed up appeals
- III. *Improve the quality of new regulations (the continuing flow of new laws and other regulations)*
  - Adopting principles of regulatory quality
  - Forwards planning of regulatory activities
  - Systematic use of RIA
  - Transparency and Stakeholder consultation
  - Central quality checks by an independent unit (a regulatory reform unit)
- IV. *Upgrade quality of existing regulations (the huge stock of existing laws and other regulations)*
  - Targeted deregulation, simplification, codification
  - Broad-based reforms (Standard Cost Model approach, Regulatory Guillotine)
  - Rolling programs of review of targeted sectors

<sup>8</sup> Wiener (2006).

<sup>9</sup> Jacobs (2007b).

<sup>10</sup> Jacobs (2007b).

<sup>11</sup> European Commission (2006).

<sup>12</sup> Jacobs (2007b), OECD (2006b), OECD (2002).



9 Many countries are now implementing or running a regulatory system, including actions to improve the strategies and policies for Better Regulation, build institutional capacities for Better Regulation, enhance transparency through consultation and communication, reorganize the development of new regulations (through forward planning, ex ante impact assessment, consideration of alternatives to regulation, administrative procedures, legal quality...); manage and rationalize existing regulations (simplification, administrative burdens...), deal with compliance, enforcement and administrative and judicial review procedures, strengthen the interface between subnational and national levels of government and the interface between the national level and the EU, etc.

10. One of the core instruments in modern regulatory systems is *regulatory impact assessment* (RIA)<sup>13</sup>. RIA is an assessment of the likely effects of a proposed new regulation or regulatory change. It allows decision-makers to examine the implications of regulatory policy options and determine whether they will achieve their objectives more efficiently and effectively than alternative approaches. There is no single generic model of RIA used internationally, but RIAs tend to include at least a clear identification of the problem and the policy objectives, an elaboration of relevant alternative policy options, an examination of impacts (costs and benefits) of each option, an appraisal the capacity of government agencies to implement and enforce regulation and the capacity of affected parties to comply, and a structured consultation with stakeholders. As such, RIA is both a process to help the policy-maker fully think through and understand the consequences of possible and actual government interventions, and a tool to enable the government to balance and present the relevant evidence on the positive and negative effects of such interventions. RIA is designed mostly for evaluating regulations one by one (rather than for regimes) and is mostly used as a tool in looking at new regulatory proposals (rather than for the analysis of existing regulations).

11. It is important to note that RIA is an aid to, not a substitute for, decision-making. RIA is best understood as a tool for policy learning and a guide to improve the quality of decision-making, while also serving the important values of openness, public involvement and accountability. As recalled already in the Mandelkern report, RIA is often a question of "asking the right thing, at the right time, in the right sequence"<sup>14</sup>.

12. Governments that use RIA report that RIA increases the efficiency and effectiveness of the public service<sup>15</sup>. When done well, it improve the quality of policy advice given to Ministers through promoting increased use of evidence in policy-making and providing more information on the likely implications of regulatory proposals. RIA also contributes to achieving value for money and efficiency by generating more detailed information about the effectiveness of a policy and the cost-effectiveness of its instruments. RIA is moreover a key tool for integrating multiple policy objectives and strengthening interministerial cohesion, reducing duplicative and contradictory policies. As RIA involves a thorough consultation process, it provides an opportunity for those potentially affected by regulations to highlight any unforeseen consequences that may not previously have been considered, and it helps to increase compliance with the rules when they are implemented. RIA is also a means of improving the quality of governance. By strengthening transparency and consultation and justification of regulatory decisions, RIA bolsters the credibility of regulatory responses and increases government accountability and public trust in regulatory institutions and policy makers. In dynamic terms, RIA is an essential instrument to change the administrative culture in many countries from a legalistic and passive stance to an evidence-based, proactive and client-oriented attitude.

### 3.2. The institutional setting in Belgium

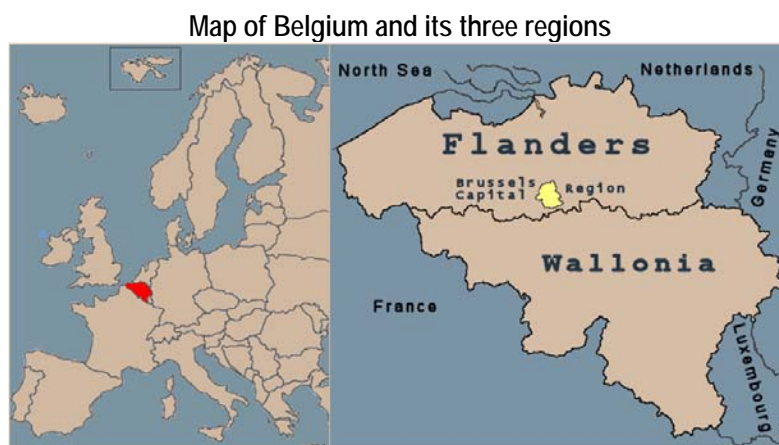
13. Belgium is one country with several parts. As a tourist or occasional visitor one will often only notice the difference between the Northern Dutch speaking part and the Southern French speaking part. But Belgium is far more complicated, with three official languages and six governments. To simplify the picture somewhat, one can say that

<sup>13</sup> See Radaelli, Claudio M. and Anne C.M. Meuwese (2008) for an analysis of the political economy of impact assessment.

<sup>14</sup> The influential Mandelkern Group was a high-level advisory group formed in December 2000, consisting of regulatory experts from the Member States and the Commission, that was charged by the Ministers for Public Administration from EU with taking an active part in the preparation of a better regulation strategy in the European Union. From the time it was formed, it was known by the name of its Chairman, M. Mandelkern, the French representative and Honorary Section Chairman within the Council of State. It issued its report in November 2001. Their report is considered a milestone in the debate on regulatory reform at the EU level.

<sup>15</sup> OECD (2006a), OECD (2008a), Goggin and Launder (2008)...

Belgium is divided into three regions: The Northern part is called Flanders (Vlaanderen). People speak Dutch. The Southern part is called Wallonia (Wallonie). People speak French here. The third region is the Brussels Capital Region. Brussels is the capital of Europe, the capital of Belgium, the capital of Flanders, and the capital of its own region (see map).



14. To avoid confusion, it should be clear that in Belgium the regions have important exclusive regulatory powers and in practice work and act as many national governments. Indeed, from 1830 to 1970, Belgium was a unitary, centralist state with one parliament and one government. Since 1970, in a series of state reforms, the Belgian state is gradually transformed from a unitary into a federal state. In a federal state political decision-making is decentralized. Legislative powers no longer lay with the federal government and federal parliament alone. The regional governments and parliaments each have the power to make primary and secondary legislation<sup>16</sup>. Regional legislation is *not subordinate* to federal laws, as the Belgian state and the regions have different sets of powers and share the same level of authority. The *regional* parliaments and governments have the exclusive competence over important policy areas such as economic, employment and energy policy, science and research policy, environment and water policy, housing and urban planning, public works and transport, agriculture, health care and education. The powers of the *federal* state have become more and more residuary, although they remain important. They now lay in foreign affairs, defence, justice, (most part of) taxation, social security, police, and other matters for which it has (for the moment) been decided that it is necessary or best that they remain organized at the federal level, e.g. price regulation, competition regulation, certain aspects of energy supply, ... Co-operation between the federal state and the federated authorities is institutionalised through Committees for Consultation, Inter-ministerial Conferences, formal treaties and agreements<sup>17</sup>. Local governments (provinces and communes) have a residuary powers derived from either decentralisation or deconcentration.

15. In the '80 and '90s, there was a rapid rise of the regulatory state in Belgium and its federated entities, with a lot of new regulation adopted. As in all countries, law-making was itself considered a confirmation of the existence of a genuinely independent nation or region. Moreover, strong incentives to hasty law-making were linked to the fact that powers remained within the federal government until the region regulated them. A second reason is linked to the EU as the transposition of EU laws was frequently accompanied by "gold plating" adding extra regulatory requirements to the EU Directives. Still today, governments are producing huge amounts of regulation each year. The last five years,

<sup>16</sup> Law is issued by federal parliament, royal and ministerial orders (rules) by the federal executive power and the federated entities rule through decrees (laws) and ordinances (rules).

<sup>17</sup> For example, in December 2003, a co-operation agreement concerning administrative simplification was signed between the federal level, the Flemish, French and German speaking communities, the Flemish region, the Wallonie region, the Capital-Bruxelles region, the Flemish communal Commission, the French communal Commission and the common communal Commission. This collaboration between different levels of government is essential for administrative simplification efforts for two main reasons: citizens and businesses do not distinguish between the federal and the regional level when they are confronted with red tape and the effectiveness and coherence of certain actions are only optimised when they cut across all levels of power.

the federal government produced a flow of 1.074 laws and 17.403 rules and the Flemish government 466 laws and 3.862 rules. In 2008 alone, de Flemish government published 102 new laws (2.883 pages) and 503 rules (7.931 pages). Taken together, all governments in Belgium issued more than 25.000 pages of legislation in the first quarter of 2009 only.

#### 4. THE BASICS OF THE FLEMISH RIA SYSTEM

16. Following international trends and best practice, the Flemish Government decided on 4 June 2004 and 17 December 2004 to introduce regulatory impact analysis in Flanders starting from 1 January 2005. Below, we summarize the objectives and main features of the Flemish RIA system.

##### 4.1. RIA objectives and principles

17. The overall goal of RIA in Flanders is to improve regulatory quality. More specific, RIA in Flanders has three objectives (see box 2):

- Firstly, RIA is a method of systematically and consistently examining potential impacts arising from government action. It aims to influence policy makers to adopt the most efficient and effective regulatory options, using evidence-based techniques to justify the best option.
- Secondly, RIA is a key instrument in the communication between government, businesses and citizens. It aims to increase the transparency of the regulatory process, foster the consultation of stakeholders and improve the justification of regulatory solutions.
- Thirdly, by requiring policy makers to look beyond the traditional policy boundaries of a department and examine positive and negative effects on other policy areas, RIA is also a tool for policy coherence. It aims to promote a 'whole of the government' approach by braking down vertical silos and promoting horizontal thinking.

##### Box 2: RIA objectives (quote from the RIA guidelines<sup>18</sup>)

Why do I have to draw up a RIA?	
▶	On 4 June and 17 December 2004, the Flemish Government decided to introduce a regulatory impact analysis as from 1 January 2005. It thus intends to obtain a regulation that is drawn up after consideration whether it is necessary and efficient, and based on an understanding of the effects and side effects to be expected. The Flemish Government does not want to have the costs for executing, respecting and enforcing the legislation increase to a needlessly high extent, and rather wants them to compensate for the benefits. It wishes for the regulation of one policy domain to take into account the effects on the realisation of the objectives in another policy domain.
▶	RIA will help you to: <ul style="list-style-type: none"> <li>• increase the understanding of the actual situation to which the regulation will apply;</li> <li>• detect possible options for the realisation of the desired policy objective;</li> <li>• reflect on the anticipated costs, benefits and effects of your proposals;</li> <li>• reinforce the commitment of other stakeholding authorities and target groups;</li> <li>• already allow for the execution, enforcement and evaluation in advance;</li> <li>• better inform the political decision-makers.</li> </ul>

18. A number of principles were put forward at the outset and today still guide the RIA-system in Flanders. These principles are summarized in box 3. They were derived from OECD experience<sup>19</sup> and highlight in a number of conditions to be fulfilled, such as support from the highest political level, early start in de policy-making process, decentralised execution with centralised oversight, support and quality control etc.

<sup>18</sup> Dienst Wetsmatiging (2004a).

<sup>19</sup> OECD (1997), OECD (2002).

**Box 3: RIA principles (quote from the RIA guide<sup>20</sup>)**

Principles	Conditions
RIA supports, not replaces political judgement and decision making	Find support at the highest political level
RIA has impact, it is not a justification ex post of decisions already made	Start with RIA as early as possible in the policy-making process
RIA is fully integrated; it is not an extra administrative step	Decentralised execution of RIA by the unit that also drafts the regulation
RIA is flexible; it is not a rigid blueprint	<b>Proportionality.</b> Imposition of stricter conditions for RIA with higher anticipated impacts of a regulation
RIA uses an integrated approach, not a narrow perspective	Offer a method for assessing all relevant effects ('cost-benefit principle')
RIA is a aid to communication; it is not an internal instrument	Link RIA to <b>consultation</b> processes
RIA is part of a system, it does not stand alone	Centralised oversight, <b>support and quality control</b>
RIA is a dynamic issue, it is not a static instrument	RIA can start moderate, to scale up rapidly

**4.2. RIA Scope**

19. RIA is mandatory in Flanders for any regulation that has an effect on citizens, businesses, and non-profit organisations. This includes all draft laws (legislative branch) and subordinate regulations (executive branch), except internal government regulation, budgetary regulation, regulation approving international and interregional conventions and agreements, regulation without substantive impact or of a purely formal nature, decisions of the Flemish Government which do not contain any regulation, and ministerial resolutions (of which there are very few in Flanders).

**Box 4: RIA scope (quote from the RIA guidelines)<sup>21</sup>**

**What do I have to draw up a RIA for?**

- ▶ It is always useful to draw up a RIA in order to inform the decision-makers in a structured and consistent manner. However, as from 1 January 2005, a RIA is obligatory for all regulation that has a regulatory effect on citizens, industry or non-profit organisations. This includes all preliminary draft Flemish Parliament Act and draft Flemish Government Decrees, *except for*:
- ▶ If the Flemish Parliament Act or Flemish Government Decree for which you draw up a RIA consists of several parts that can be distinguished in terms of content (e.g. collective Flemish Parliament Acts), you draw up a RIA for each separate measure.
- ▶ In case you doubt whether you have to draw up a RIA for a specific Flemish Parliament Act or Flemish Government Decree, please contact the Regulatory Management Unit by [ria@vlaanderen.be](mailto:ria@vlaanderen.be).

20. There is no quantitative threshold or two-stage system of screening/full RIAs as in some other countries or at the federal Belgian level (see no. 98)<sup>22</sup>. Instead, both the RIA guide and the RIA manual emphasise that a RIA

<sup>20</sup> Dienst Wetsmatiging (2004b).

<sup>21</sup> Dienst Wetsmatiging (2004a).

<sup>22</sup> It seems this was the right choice. In Ireland for example, the initial two-stage system of screening/full RIAs was recently replaced by a system relying on proportionality like the Flemish system. The problem was that only one full RIA had been completed, since screening RIAs was frequently shaped by a desire to prove that the threshold for a full RIA is not met, rather than a proper evaluation of impacts (Goggin and Lauder, 2008). Rather than an arbitrary distinction between different types of RIAs, it was decided to identify possible levels of analysis on a case-by-case basis. Departments in Ireland now have discretion over the depth of analysis considered appropriate for each RIA, having regard to the significance of the measure. Other procedural measures, such as the increased transparency by the early publication of the draft RIA and increased quality control measures, address the need to

should be proportional. This means that the scope as well as the depth of a RIA must be proportionate with the importance of the regulation and the expected extent of the effects<sup>23</sup>. Proportionality applies not only to the analysis of costs, benefits and impacts but to the entire RIA process, including the number of options considered, the nature of the consultation process and the treatment of enforcement, compliance and review. Ideally, defining the proportionate level of analysis is not a once-off decision taken at the beginning of the RIA process, but an iterative process which must take account of preliminary results and stakeholder input.

### 4.3. RIA process

21. RIA is seen first and foremost as a process of analysis and consultation. Therefore, the RIA guidance and manual stress that RIA is most effective in an early stage of the regulatory preparation. *'RIA is not intended to justify political choices already made, but to improve the decision making. Therefore, the RIA process has to start at the beginning of the regulation process, not after the regulation has been written out. Only then does it make sense to carry out an analysis and assessment of different alternatives and can RIA prevent the development of unnecessary new regulation.'*

22. The RIA guide and the RIA manual further stress that RIA is a team effort. *'The execution of a RIA will seldom be the work of just one person. Regulatory impact analysis is best carried out by the project team which is preparing the regulation. The contact person for regulatory management or the RIA co-ordinator in your department can help you here.'* Both documents also point to the importance of consultation with stakeholders and other departments.

23. In addition, the RIA-system includes support and quality control by the central Regulatory Management Unit. The Unit also has the task of supporting the RIA system by publishing manuals, organising training courses, developing datacollection and data exchange, and encouraging each department to appoint at least one RIA coordinator. The responsibility for the content of a RIA in Flanders however lies with the person or agency that prepares the new regulation. The final responsibility lies with the minister who submits the draft regulation to the Council of Ministers.

### 4.4. RIA product

24. The RIA process, analysis and consultation must be documented in a RIA product or document. Box 5 summarizes the core elements of a RIA document in Flanders.

**Box 5: Core elements in a Flemish RIA**

<i>RIA section</i>	<i>Contents</i>
Title	Brief description of the title of the regulation.
Problem definition and objectives	Outline of the reasons for the government intervention, the objective, and the desired effects: What issue/problem is the policy/proposal attempting to resolve? What main objective is the policy/proposal expected to reach?
Options	List of the most relevant options for achieving the desired objective that are being examined further.
Effects	Analysis of the expected advantages and disadvantages (costs and benefits) and other relevant effects of each option.
Implementation,	Clarification of how the chosen option will be developed, executed, enforced, followed up, and revised,

ensure that the impact analysis is appropriate and proportionate (Department of the Taoiseach, 2009). In Belgium, the SIA-system (see no X) suffers from the same difficulty. Even for the US, influential scholars like Jonathan Wiener (2008) recommend to replace the current dollar thresholds (\$100m) for levels of analytic scrutiny with the better principle of "proportionate level of analysis" as in the EU.

<sup>23</sup> When RIA was introduced in 2005, a difference was made between a 'light version RIA' and a 'heavy RIA' with more extensive requirements for analysis, quantification, consultation etc. Government decided to introduce only the light version. The introduction of the heavy version RIA was postponed until there was more experience. The heavy RIA however was never introduced, for two reasons. First, 'heavy' sound a lot like 'difficult', 'timeconsuming' and 'a lot of work', so nobody asked for it. Secondly, due to the proportionality principle, some light version RIA's in practice were rather 'heavy'.

enforcement and monitoring	together with an estimate of the administrative burdens.
Consultation	List of consultations and their results: Which interested parties were consulted, at what stage of the process, and for what purpose? What were the results of the consultation?
Summary	Summary of the motivation for the chosen regulation: Which option has been selected and why?
Contact information	The name and contact details of the person who is available for more information and questions about the impact analysis or the proposed regulation.

#### 4.5. RIA procedure

25. RIA has been integrated into the lawmaking process by a government circular. The formal requirements are: (1) a RIA advice from the central Unit, (2) a mandatory RIA paragraph in the memorandum to the Council of Ministers; (3) a check by the Chancery to make sure that this paragraph is included; (4) a check by the central Unit on the content of the RIA; and (5) the addition of the RIA to the regulatory file (see Box 5).

#### Box 5: Formal procedural requirements for RIA

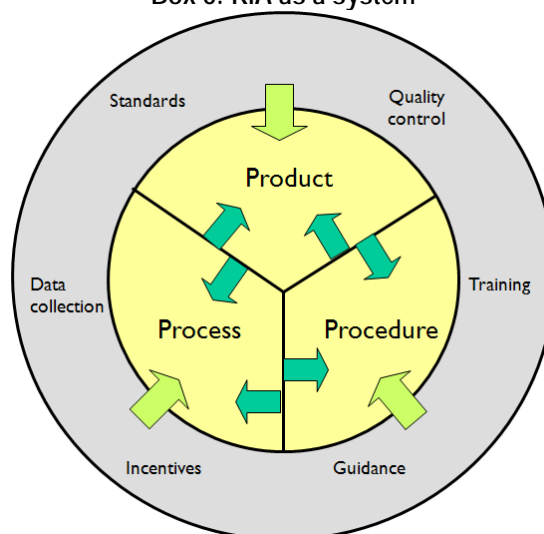
<i>Formal procedural step</i>	<i>Content</i>
RIA advice from the Regulatory Management Unit	The Unit must give an advise on the draft version of the RIA before the regulation is put on the agenda of the Flemish government. The advice is part of the legislative advice which also includes the technical law drafting advice and the plain language advice.
RIA paragraph in the memorandum to the Council of Ministers	Each memorandum to the Council of Ministers which accompanies a draft regulation for approval must include a RIA paragraph. This paragraph contains either a short summary of the RIA which is enclosed in annex, or a statement explaining why a RIA has not been prepared with respect to the scope of the RIA-requirements.
Control by the Chancery	The Chancery checks whether a RIA paragraph is included in the memorandum to the Council of Ministers. If the memorandum does not contain the required RIA paragraph, the regulation cannot be put on the agenda of the government.
Control by the Unit	The Unit checks the quality of the final RIA prior to the discussion of the draft regulation by the Flemish government <sup>24</sup> . The minister responsible for regulatory policy is informed of the results of the quality control so that they can be taken into account at the meeting of the Council of Ministers.
Addition to the regulatory file	Once the RIA has been approved by the Council of Ministers, it is part of the regulatory file. This means that the RIA, together with the regulation and the explanatory memorandum, must be handed over to the advisory councils, the state council, parliament etc.

#### 4.6. RIA system

26. RIA is part of and supported by a broader regulatory policy, regulatory institutions and complementary regulatory tools. The system includes among others: principles of good regulation that are endorsed by government, a central Regulatory management Unit and Regulatory Management Units in each department that draw up RIA quality standards, provide RIA-training, issue RIA-guidance, act as a RIA-helpdesk, perform RIA-quality control...

<sup>24</sup> This ex ante quality assessment was not planned for in the RIA guidance. According to the guidance, the Unit should only control final RIAs ex post and randomly and report annually to the Flemish government and the Flemish Parliament. A more extensive quality control was only provided for 'heavy' RIAs.

Box 6: RIA as a system



## 5. LOOKING BACK: HOW DID FLANDERS ADOPT RIA?

### 5.1. Making the case for RIA

27. Public debate on RIA in Flanders started in 1997 with a number of reports and recommendations from the Social and Economic Council of Flanders (SERV) in which government was asked to start a process of regulatory management and build regulatory management instruments and capacities consistent with OECD best practices<sup>25</sup>. But it still took many years before RIA was introduced in 2005.

28. It proved necessary to repeatedly send out the message to policy makers that RIA is important. That was done along the following line of reasoning:

- Better-quality regulation is fundamental to the functioning of society and the economy (governance matters): regulatory quality contributes to good governance in the public sector, which is increasingly recognised in assessments of a country's competitiveness and attractiveness for investment. It is crucial to economic performance and to improve the quality of life of citizens and for boosting efficiency and innovation, creating new job opportunities and improving consumer and environmental protection;
- Regulatory management or an explicit regulatory policy is necessary for regulatory quality : ad hoc, ex post measures such as working groups and research commissions have been tried but will not do the job. They only result in incremental improvement. For structural and durable improvements in the quality of regulations it is necessary to focus on the process by which regulations are drafted, updated, implemented and enforced through an explicit, continuous and consistent 'whole-of-government' policy;
- RIA is a necessary (although not sufficient) tool in the 'regulatory factory' of government to produce high quality outputs (see no. 29 hereafter).

29. The 'regulatory factory' of Flanders indeed did not work well. By the mid 1990s, there was a growing concern and discomfort with the quantity and quality of the enormous amount of regulations that had been created in a relative short period. There was a perception in Flanders that legal quality deteriorated and the regulatory burden increased, eroding competitiveness and reducing the effectiveness of public intervention<sup>26</sup>. In a series of articles, we showed that the quality controls in the regulatory factory were too little, too late : existing 'checks and balances' in the policy and

<sup>25</sup> SERV (1998), Van Humbeeck (1997, 1999, 200a, 2000b, 2001).

<sup>26</sup> Cordova-Novion and Jacobs (2004).

law making process were limited to legal and budgetary controls<sup>27</sup>. Important characteristics of good regulation such as the effectiveness and efficiency of the proposal in comparison with alternatives, ease of implementation, enforceability, coherence etc. were seldom assessed or tested - in any way not systematically. Also, transparency of the decision making process was weak or even inexistent and formal consultation (inside government as well as consultation of stakeholders) was done only at the very end of the process<sup>28</sup>, notably through advisory councils<sup>29</sup>.

30. Regulatory Impact Analysis was an obvious solution to these flaws in the policy and law making process in Flanders (see section 2.1 supra). In the international community, there was nearly universal agreement that RIA, when it is done well, improves the cost effectiveness of regulatory decisions, reduces the number of low-quality and unnecessary regulations, improves the transparency of decisions, and enhances consultation and participation of affected groups. RIA moreover was in the late '90s and early '00s the tool whose importance in better regulation policies had grown the most in EU-countries<sup>30</sup> and was widely spread among OECD member states and many other countries<sup>31</sup>. Hence, in Flanders as well RIA was promoted as a pivotal tool that can help government make its policies more effective and efficient and reduce the risk of policy mistakes.

## 5.2. Introducing RIA

31. Making the case for RIA is just the beginning in the process of adopting RIA. What comes next is the design and implementation of a RIA-system. There are some common issues to consider and best practices are available, but the OECD and others have stressed that there is no single "correct" model for the implementation of RIA. The appropriate path to follow depends on the political, cultural and social characteristics of the individual country concerned<sup>32</sup>. Before embarking on designing and implementing a RIA process, it is necessary to consider what are the pre-conditions for a successful introduction, to what extent existing institutions can provide a good framework for implementation, how to integrate RIA into the decision making procedures etc. The time invested in such an evaluation has in the case of Flanders proven necessary to look for the best way to proceed, and to buy time to reach consensus.

32. Indeed, stressing the importance of regulatory quality and RIA to develop better regulation was necessary but not sufficient to persuade politicians and policy makers to adopt RIA. Using an analogy, to make a one year old child eat an apple, just repeatedly telling an apple is healthy will not suffice. The way parents succeed, is to (1) feed the apple in small parts, (2) wait for the right moment for the baby to open its mouth, and (3) use their relatives (one spoon for daddy, one for grandma, one for auntie...). In a way, that's how the Flemish government swallowed RIA. Box 7 gives an overview of the steps and initiatives that were taken prior to the introduction of RIA in Flanders. Several government decisions preceded the introduction of RIA (2000, 2001, 2003, 2004 and again 2004, "feeding in small parts"). The timing of several initiatives was important ("wait for the right moment"): the report by SERV came just before the 1999 elections, the Better Regulation Conference just after the 1999 elections, the review by Jacobs&Associates, the memorandum just before the elections of 2004 etc. And more and more 'relatives' were gradually involved in the process of building constituencies in favor of a comprehensive regulatory management system: experts from the OECD and other institutions and countries (Better Regulation Conference 1999, review by Jacobs&Associates 2004), academics (scientific study 2003, memorandum 2004), stakeholders and civil servants (consultation paper 2003, RIA guide 2004, articles and chapters in books 2003-2004)...

<sup>27</sup> Tools and mandatory quality controls in the law making process before a draft regulation was sent to the government for approval were limited to the following: internal guidance for technical law drafting, legislative and plain language advice, advice by the inspectorate of finance, examination of budgetary impact, impact on government personnel, impact on local governments.

<sup>28</sup> It seems there lies a lot of wisdom in Ambrose Bierces 'Devil's Dictionary', a volume of satirical definitions published in 1906: He explains consultation as follows: "*To CONSULT, v.i. To seek another's approval of a course already decided on.*"

<sup>29</sup> After the first approval of a draft regulation by government and before final approval, there was a mandatory advice from one or more advisory councils representing stakeholders (only for laws, not for subordinate legislation) and from the council of state.

<sup>30</sup> Radaelli (2004).

<sup>31</sup> See, for example, Jacobs (2006), Kirkpatrick and Parker (2005).

<sup>32</sup> OECD (2008).



**Box 7: Steps prior to the introduction of RIA in Flanders**

Report by SERV 1998	International benchmark study on best practices in regulatory management with recommendation to create a system of regulatory management and introduce RIA consistent with the highest international (OECD-) standards.
Government coalition agreement 1999-2004	Government coalition agreement with a chapter on regulatory policies.
Better Regulation Conference 1999	High level conference with presentations from SERV, OECD, the Netherlands, Denmark, and the Flemish minister-president
Government decision 25 June 2000	Government approval of a "general framework for the simplification of regulations, procedures and rules". It contains 13 important decisions, among which: "to realize as soon as possible a mature 'regulatory management', to use the principle that benefits should outweigh costs as an important basis for regulatory review, even when a full and formal cost-benefit analysis is not possible or desirable, To introduce a standardized set of core evaluation principles and methods in order to assure that assessments and evaluations have a common, coherent content, to substantially improve the regulatory process, to create a regulatory management unit as a permanent, independent division in a horizontal ministry".
Articles and chapters in books 2001-2004	Several papers by personnel of SERV, the Regulatory Management Unit and universities on regulatory management issues and RIA.
Government decision 14 September 2001	Government decision to develop a regulatory policy along three tracks: administrative burdens reduction, legal simplification/codification and regulatory impact analysis.
Scientific study 2002-2003	Academic study to investigate the conditions to successfully introduce RIA in Flanders and to determine the components of a suitable RIA-system.
Government decision 7 November 2003	Enactment by the government of its eight Principles of Good Regulation.
Guidance on principles of good regulation 2003	Publication by the Regulatory Management Unit mentioning RIA as a central tool to comply with the principles of good regulation.
Consultation paper 2003	Consultation paper issued by the Regulatory Management Unit with a concrete proposal of RIA-scope, procedure, process, product and system.
Review by J&A 29 May 2004	Expert review by Jacobs&Associates of the Flemish regulatory policy
Government decision 4 June 2004	Government decision to introduce RIA from 1 January 2005 on, assigning the Regulatory Management Unit with the preparation of this introduction (guidance, manual, training).
Memorandum 20 professors	Publication of a memorandum by leading experts and academics, calling for a more rigorous regulatory policy and i.a. the adoption of RIA and the establishment of a Parliamentary subcommittee on the quality of legislation.
Government coalition agreement 2004-2009 (September 2004)	Governmental Agreement for the legislative period 2004-2009, with an chapter on a more rigorous regulatory policy.
Parliamentary committee for regulatory quality (2004)	Parliamentary committee responsible for reviewing the quality of legislation was set up.
RIA-guide / RIA-manual / RIA-training	Publication by the Regulatory Management Unit of a RIA guide (explaining the need for and purpose of RIA), a RIA manual (explaining how to perform a RIA) and RIA-training (basic training course in regulatory policy (2days) and supplementary RIA-training course (1/2 day), and and training in administrative burden measurement (1/2 day).
Government decision 17 December 2004	Confirmation of the government decision of 4 June 2004 by the new elected government.
Introduction of RIA 1 January 2005	

**5.3. Scaling up RIA**

33. Bearing the 'principle' in mind that RIA can start moderate, to scale up rapidly (cf. supra, no. 18), the Flemish RIA system evolved since its introduction in 2005. Driving force behind the modifications were a series of evaluations of the compliance with and performance of the RIA-system (box 8). We will briefly run through the main conclusions of these assessments and discuss recent decisions to strengthen the RIA-system in Flanders.

**Box 8: Evaluations of the RIA-system**

Jacobs&Associates	Regulatory management unit	SERV - ICW	Parliament
<ul style="list-style-type: none"> <li>• May 2004</li> </ul>	<ul style="list-style-type: none"> <li>• September 2005</li> <li>• December 2006</li> <li>• December 2007</li> <li>• September 2008</li> <li>• June 2009</li> </ul>	<ul style="list-style-type: none"> <li>• November 2006</li> <li>• June 2009</li> </ul>	<ul style="list-style-type: none"> <li>• January 2007</li> </ul>

**Conclusions and recommendations from RIA-evaluations**

34. The general conclusions of the evaluations of the RIA-system and RIAs and are summarized in box 9. One important conclusion is that the overall design of the RIA-system is good. Already in 2004, just before the RIA-system was launched, Cesar Cordova-Novion and Scott Jacobs wrote in their review that "*Flanders is on the right road. The government has established a policy and a program of regulatory management comparable to those existing in leading countries. (...) No fundamental correction is needed to its compass. What is needed is a multi-year period of consolidation, sustained application, and refinement of the legal and policy reforms already on the table*"<sup>33</sup>. At the end of 2006, the Social-Economic Council of Flanders confirmed in a substantive benchmarking report that Flanders' regulatory policy offers several strengths, such as the RIA-system<sup>34</sup>. And last but not least: the OECD found recently that the Flemish RIA-system scores well compared to many other jurisdictions<sup>35</sup>. This can be attributed to its broad scope, the formal authority of the RIA requirements (laid down in a government circular), the 'soft' benefit-cost approach that is used, the large range of effects that in principle has to be investigated, the requirement to quantify effects whenever possible, the availability of RIA guidance and training, and the RIA quality control by the central Unit etc.

**Box 9: General conclusions of the evaluations**

- Overall design of the RIA-system is good, with some weaknesses;
- Formal compliance with RIA procedures is very high;
- Number of RIA's performed is high: 469 in 4 years: 157 in 2005, 134 in 2006, 77 in 2007 and 101 in 2008, covering all departments;
- Average quality is still low, but rising (slowly) : 62% in 2007, 67% in 2008;
- Lack of real political support for RIA is troublesome; there is opposition because RIA requires quite radical changes to existing decision making procedures and the prevailing policy culture, and because RIA increases transparency;
- Support of parliament and of a broad range of stakeholders for RIA however is growing.

35. Formal compliance with RIA procedures is very high. The rules of the Flemish government require that each draft regulation must be accompanied by a RIA at the time of the first approval by the Flemish government (with a few exceptions). The first two years however, this was not always the case. SERV reported that a RIA was missing without appropriate justification in about one third of the 98 draft regulations that were put forward to the SERV for advice<sup>36</sup>. Thanks to stricter enforcement and more interaction between the administrations and the central regulatory management unit, compliance is now close to 100%<sup>37</sup>.

<sup>33</sup> Cordova-Novion and Jacobs (2004).

<sup>34</sup> SERV (2007), Van Humbeeck (2006b)

<sup>35</sup> OECD (2009a).

<sup>36</sup> SERV (2006a).

<sup>37</sup> Dienst Wetsmatiging (2009a, 2009b).

36. The number of RIA's performed is high as well: 494 RIAs in 4 years: 157 in 2005, 134 in 2006, 77 in 2007 and 126 in 2008, covering all departments (box 10). The length of RIAs varies from a few to nearly 100 pages. This represents a quick adoption within a relatively short timeframe.

**Box 10: Number and quality of the completed RIAs for each department  
(2008, scores attributed by the Regulatory Management Unit)<sup>38</sup>**

Minister/department	Legislation (#)		RIAs (#) (*)		Average RIA-quality (% score)
	Primary	Secondary	Primary legislation	Secondary legislation	
Public Administration, Agriculture, Ports, Foreign Policy, Media, Tourism	11	38	3	6	70%
Finance and Budget, Spatial planning	3	17	12	0	60%
Work, Education and Training	14	88	10	12	68%
Culture, Sport, Youth, Brussels	8	16	5	6	61%
Internal affairs, Housing	13	18	0	5	67%
Transport, Social economy	2	6	2	1	64%
Wellbeing, Health	3	37	5	19	69%
Public works, Energy, Environment	6	38	3	17	67%
Economy, Innovation, Research, Trade	1	8	1	19	70%
Total	61	266	41	85	66%
	327		126		

(\*) the number of RIAs can be higher than the number of regulations because sometimes there are several RIAs performed for one regulation composed of several policy measures.

37. Average quality is still low, but rising slowly. Starting from the second quarter of 2005 the central Regulatory Management Unit has reviewed and scored every final RIA, but until mid 2006 the assessment was very limited<sup>39</sup>. In any case, the quality of many RIAs was very low in the early years. A review by the Social-Economic Council of 46 RIAs that were performed between 1 January 2005 and 15 September 2006 did not find any "very good" RIAs. 20% came out as being good, 24% was moderate and 57% poor to very poor, with no noticeable improvement in the quality of the RIAs over time. Important weaknesses were a lack of consideration of *relevant* alternative options, inadequate analysis of costs and benefits of options, and few quantitative data in all sections of the RIA. A major cause according to SERV was the fact that most RIAs were not prepared until the proposed regulation has been written out. This means that the RIAs had little or no influence on the decision making. The Regulatory Management Unit is now using a new and more elaborate set of criteria (see box 11)<sup>40</sup>. Average quality was around 62% in 2007 and 66% in 2008 (see box 10). Box 12 summarizes the major problems that the regulatory Management Unit identified in the RIAs. They correspond closely to the problems SERV reported.

<sup>38</sup> Dienst Wetsmatiging (2009a).

<sup>39</sup> Four questions were answered: Are the reasons and objectives of the government intervention well defined? Does the RIA contain at least three options for comparison (zero option, chosen option, and an alternative)? Is there a minimal description of anticipated effects? Have the administrative burdens been measured?

<sup>40</sup> The system is clearly an improvement in some respects. It allows for a more complete and tailored quality control that takes account of the importance of the proposed regulation. On the other hand, we have some reservations. The most important one is probably that the transparency of the RIA controls has reduced drastically. The results of the RIA controls are no longer published, neither in the aggregate nor for the various departments. The publicly available information is nowadays limited to the 'regulatory quality' indicator. But that indicator only shows whether or not the plain language and technical law drafting advice was requested or not, and whether the quality score of the RIA was above or below 50%. This means that information about the exact scores is no longer publicly available. Another remark is that the calculation of the scores seems overly detailed. As a result, major and minor quality features of a RIA are probably not distinguished sufficiently. A last comment is that today, only the quality features that are labelled 'obligatory' in the scoring system are accounted for. This means that important aspects of a RIA such as consultation, monitoring and evaluation are not considered.

**Box 11: Criteria and scoring methodology for the RIA quality controls by the Regulatory Management Unit (from 1 April 2006).**

**1. Problem definition and objectives: 11 points**

- It is clear what the exact problem is. (3)
- The legal boundaries and freedom to regulate have been accurately described. (2)
- It is clear what the desired results or expected effects are to tackle the problem. (2)
- The political boundaries and freedom to regulate have been accurately described. (2)
- The objectives or desired policy effects have been described without advanced claim on resources. (2)

**2. Options: 10 points**

- All relevant options have been listed. (4)
- The options are clear. (3)
- The description of options is not contaminated with a description of effects. (3)

**3. Effects & choice of an option: 18 points**

- All relevant target groups and actors are listed. (4)
- All the relevant effects for each target group are enlisted. (3)
- The effects of the zero option is used as a baseline of comparison for the other options. (2)
- The description of effects is well structured and comprehensive. (2)
- The other 'sectoral' effects (child effects, effects on municipalities, etc.) have been enlisted. (3)
- The final choice for an option is well argued. (3)

**4. Implementation, enforcement, monitoring and evaluation: 10 points**

- It is indicated how and when the regulation will be implemented and/or which additional initiatives are necessary for the actual application of the new regulation (executive orders, IT support, guidance, training...). (2)
- The administrative burdens (simplifications) are listed. (2)
- The administrative burdens (simplifications) are measured. (2)
- It is indicated clearly how the proposal will be enforced. (2)
- It is indicated clearly how the target groups will be controlled. (2)

**6. Summary: 2 points**

- The summary reflects the content of the RIA. (2/2)

**Total: /125**

**Box 12: Major quality problems in the Flemish RIAs according to the Regulatory Management Unit<sup>41</sup>**

- RIAs are often prepared too late, after the regulation is written and therefore does not have much influence on the content of the proposed regulation.
- Overall, there is too little consideration of alternative policy instruments.
- Empirical underpinning and quantitative assessment of effects is usually limited and weak (but rising);
- Often, not all relevant effects are examined;
- The trade-offs between effects of one option and between options are often not sufficiently explicit and balanced; The comparison of options is sometimes obscure or methodologically weak;
- The part on consultations is often too concise;
- There is too little examination as to how the proposed regulation will be applied, enforced and monitored in practice.

38. There are few examples of RIAs that had a significant influence on the decision making process by government<sup>42</sup>. Most processes seem to be done the old fashion way, with RIA as a mandatory add on. Policymakers often see RIA as an administrative burden with little or no added value. RIA furthermore increases transparency in

<sup>41</sup> Dienst Wetsmatiging (2009a) and earlier evaluations.

<sup>42</sup> The central regulatory management unit reports in its last evaluation of the RIA system that it "still has received little signals that RIA was actually used in discussions at the political level, be it government or parliament."

what goes wrong/can go better: if a RIA is bad, it now is clearer than before that the legislation was not well prepared, giving opponents in parliament and press ammunition to attack the government's decision. Policy makers dislike this kind of transparency. Hence, there is not much enthusiasm to invest in RIA, leading to a vicious circle and a self fulfilling prophecy that RIA is not worthwhile.

39. Building on these general conclusions of evaluations of the RIA-system and on an own international benchmarking of the design, institutions, processes and instruments of the Flemish regulatory policy, the Social-Economic Council of Flanders recommended government as a priority to (1) strengthen the constituency and political support for reform, (2) raise capacities through more advanced training and guidance and (3) improve the transparency of the regulatory process<sup>43</sup>. Compared to international best practices, the largest gap in the design of the RIA-system turned out to be related to the last point, the openness of the regulatory process<sup>44</sup>: there was no regulatory agenda or forward planning process of regulatory activities in Flanders; intra-governmental consultation and co-ordination was done in an ad hoc and informal way, often at the very end of the rule-making process; consultation came too late in the process and often depended almost entirely on formal consultative boards, etc. More closely linked to the design of the RIA-system, SERV pointed to the fact that leading countries show more openness in the RIA process through publication of draft RIAs and earlier consultation of stakeholders, active publication of final RIAs on a central access point on the Internet and public reporting of assessments of RIA quality by a Regulatory Management Unit, Audit Offices... The full recommendations for Flanders in the SERV-report are summarized in box 13.

**Box 13:SERV-Recommendations for improving the RIA system in Flanders (2006)<sup>45</sup>**

Recommendation	Clarification
Promote political leadership for RIA	Political leadership is urgent to overcome opposition and inertia and implement the recommendations below
Remove the negative connotation around RIA	There is a need for initiatives and good examples to increase public support and dispose of the negative connotation around RIA in Flanders, notably that RIA is an analytical method that is strongly inspired by ideology and geared to cut back the role of the government and regulation and reduce costs for business. Government should stress the value of RIA as a process rather than an analytical method. It is primarily a method for promoting a broad and transparent policy debate about the objectives and content of important new regulations, via an analytical framework in which quantitative and qualitative 'measurements' for economic, social, and environmental effects are analysed simultaneously in an integrated manner.
Introduce a regulatory agenda	A regulatory agenda can be a powerful stimulus to start RIA sooner in the policy making process. Regulatory planning through a regulatory agenda provides for early public notification on planned regulatory initiatives at a time when the proposed regulation has not yet been fully developed, leaving more opportunities for RIA to improve decision making.
Reinforce the transparency of the RIA system	Government should raise transparency to promote the quality of RIAs, notably by more openness in the RIA process through publication of draft RIAs and earlier and broader consultation of stakeholders (notice and comment), active publication of all final RIAs on a central access point on the Internet and public reporting of periodic evaluations of overall RIA quality by the Regulatory Management Unit.
Better target RIA efforts	More selectivity is necessary, in both directions: is not worthwhile to perform RIAs for minor regulatory proposals, but more extensive RIAs are necessary for important regulations. In the short term, in order to learn by doing, a number of planned future regulations should be selected for a more extensive RIA.
Strengthen the responsibility of departments and build RIA capacity	It is necessary to raise the responsiveness and capabilities of the departments for good RIAs, for example by the establishment of regulatory management units in each department. The Regulatory Management Unit should offer more differentiated training courses and manuals in addition to the existing basic RIA-manual and RIA-training, help to organise data collection, promote accessibility of data and develop data quality standards, and further optimise the monitoring of RIA quality.

<sup>43</sup> SERV (2006a).

<sup>44</sup> SERV (2007).

<sup>45</sup> SERV (2006a)

Conduct Flemish RIAs for draft EU-directives	Government should perform RIAs for draft EU-directives with a potentially important impact on Flanders
Give a more prominent role to the Flemish Parliament	The interest of Parliament in RIA should increase, both for the treatment of individual regulations and the discussion of European draft regulations (in the different parliamentary commissions), as well as by periodic evaluations and exchanges of views on RIA (in the parliamentary commission for regulatory policy).

40. Parliament responded to these recommendations with a motion<sup>46</sup>. In that motion<sup>47</sup>, parliament:

- Stressed the significance of better regulation for citizens, businesses and society as a whole;
- Supported RIA as a very important tool for better regulation;
- Called for an improvement of the RIA-system and the quality of the RIAs;
- Asked government i.a. to:
  1. make sure that all RIAs comply with the standard RIA-format published by the regulatory management unit
  2. increase the transparency of the RIA-quality by informing Parliament twice per year of the results of the RIA-quality controls by the Regulatory Management Unit;
  3. introduce a regulatory agenda promptly, to promote the use of RIAs early on in the policy process;
  4. strengthen the regulatory capacity within the Flemish administration.
  5. introduce RIA for European legislation, in order to get sooner and better informed about the effects for Flanders of planned European legislation;

50. Support for RIA from a broad range of stakeholders seems to be rising now. We can refer to the many memoranda stakeholders like employers organisations, unions, local governments and advisory councils prepared in view of the 2009 elections, in which the demand for better regulation, modifications of the regulatory process, and RIA is much more prominent than five years ago - notwithstanding (or due to?) the fact that most external stakeholders judge that progress has been disappointing. Another witness of the growing awareness and support is the 2020 Pact with a vision and objectives for Flanders in 2020 that government, the administration, social partners and other stakeholders signed on January 20, 2009, under which better regulation has been appointed as one of the issues Flanders should realize a major breakthrough. In Parliament, the picture is mixed. Until today, RIA's have been debated in 45 commission meetings. The parliamentary commission responsible for regulatory policy embraced RIA and supported its implementation with a motion on RIA that was approved by the plenary parliament on 31 January 2007 (see no. 40 above). Elsewhere, RIAs were only occasionally used by Parliamentary Committees and to inform Parliamentary debate. Some members of parliament even questioned RIA, arguing that RIAs add administrative burdens to the regulatory process, making it slow and excessively complex<sup>48</sup>. Recently however, on 4 February 2009, an "Interinstitutional Agreement" was signed between the Flemish Parliament, the Flemish Government, the SERV (Social and Economic Council) and the Strategic Advisory Councils "about the joint approach to the Regulation Impact Analysis" (see nr. 56), confirming support by parliament for RIA.

### *Recent decisions to reinforce the RIA-system*

51. Government and its administration have taken action since the introduction of RIA to modify and strengthen the RIA-system. We run briefly through some important measures and decisions (Box 14).

<sup>46</sup> A 'motion' is a recommendation from parliament to the government with policy measures or options the government should take. A motion does not have a legal binding status, but has a high political status and power. The Government moreover is compelled to report annually on the implementation of a motion.

<sup>47</sup> Motie Nr 1071 (2006-2007). Met redenen omklede motie tot besluit van de op 16 januari 2007 door mevrouw Joke Schauvliege in commissie gehouden interpellatie tot de heer Geert Bourgeois, Vlaams minister van Bestuurszaken, Buitenlands Beleid, Media en Toerisme, over de evaluatie en bijsturingen van de reguleringssimpactanalyse (RIA). [www.vlaamsparlement.be](http://www.vlaamsparlement.be)

<sup>48</sup> Vlaams Parlement, Stuk 15 (2008-2009) – Nr. 5-A Zitting 2008-2009, 27 november 2008.

#### Box 14: Recent decisions to reinforce the RIA-system

- Forward planning by introducing a regulatory agenda (May 2007)
- Raise RIA-capacity inside departments by establishing departmental units or cells (May 2007)
- Raise awareness through yardstick competition: quarterly reports on RIA-quality by department
- Raise transparency: full publication of all RIA's on the internet (March 2008); biannual report on RIA-quality for Parliament
- Advanced RIA-training (starting September 2009)
- Interinstitutional Agreement on RIA between Parliament, Government, SERV, and advisory councils (February 2009)

52. The Government introduced a regulatory agenda on 16 May 2007 to enhance co-ordination, planning and transparency in the development of new regulations and facilitate RIA to start sooner in the policy making process. The objective is to have an early public notification on planned regulatory initiatives, comparable with the examples of the Unified Regulatory Agenda and the Annual Regulatory Plan in the United States<sup>49</sup>. For each policy field, government each year has to provide a regulatory agenda to parliament. Evaluations by SERV and by the Regulatory Management Unit showed that this obligation was not always fulfilled and that the quality of the information varied a lot. But compliance is rising<sup>50</sup> and standards are being raised: the Regulatory Management Unit prepared a blueprint; the agenda's will from now on be updated twice a year; they will be published on the internet and send over to the advisory councils; and departments are invited to use 'road maps' or project planning when preparing new regulations.

53. To raise capacity and anchor regulatory tools within each department, government decided on 20 January 2006 and 16 May 2007 to establish departmental regulatory management units. The units have a double assignment: implementation of regulatory policy tools in their administration and practical support during the regulatory processes. The idea was to have interdisciplinary teams with legal, economic, public governance and sectoral expertise. It is up to Departments themselves to decide whether these resources should be placed in line units or in a dedicated central unit, for example depending on the volume and frequency with which RIAs are required. In March 2009 there has been a first evaluation of the departmental regulatory management units by the central unit<sup>51</sup>. It showed that in total 22 'units' were established, always with existing personnel and inside an already existing unit (a legal unit or a policy unit) since government did not provide additional resources for the establishment of the units. In some cases, the 'units' are more loosely structures that tie people from different parts of a department. The central regulatory management unit warned in its review that members of the departmental units should be able to spend enough (more) time and resources on promoting and implementing regulatory quality tools and capacity building, and that the focus should be broader than only a legal perspective. The unit also advised government that the units should play a more pivotal role in the policy making process. In 2011 a new evaluation is being planned.

54. To raise awareness and reinforce the responsibility of the departments themselves, the central regulatory management unit introduced yardstick competition: it publishes quarterly reports in which the quality of the RIAs performed (together with other regulatory indicators) is compared among departments. Twice a year, government has to send a report to parliament on the quality of the RIAs and the performance of the RIA-system. And since March 2008, all final RIA's are being published full text on the internet in a RIA-database together with the draft regulation and the government decision (albeit not in a user friendly format).

55. To build RIA-capacity, a one-day introductory RIA-training for civil servants had been provided by the Regulatory Management Unit in 2004 and 2005. In 2006, these RIA-training sessions were stopped and no training was provided anymore due to a large personnel turnover at the level of the Unit resulting in a loss of training skills, but the unit did organise sessions where civil servants could exchanged experiences. Starting in September 2009 however, a cycle of 3-days advanced RIA-training will be provided by the Interuniversity Centre for Legislation (ICW) on behalf of the administration and the Regulatory Management Unit, with sessions on the basics of RIA (7h),

<sup>49</sup> SERV (2006b), Van Humbeeck (2007b).

<sup>50</sup> Late 2008, 10 policy fields out of 34 did not present their regulatory agenda to parliament, out of which 8 did not plan any new regulation in 2009, meaning that 2 policy fields out of 34 did not comply.

<sup>51</sup> Dienst Wetsmatiging (2009a).

regulatory alternatives (3,5h), cost-benefit analysis (3,5h), European IA (3,5h) and consultation and datacollection (3,5h).

56. Last but not least, on 4 February 2009, an "Interinstitutional Agreement (IIA) between the Flemish Parliament, the Government, SERV and the Strategic Advisory Councils about the joint approach to the Regulation Impact Analysis (RIA)" was signed by all parties of the agreement. It does not have any legally binding character but must be regarded as a declaration of intent. In the agreement, the institutions confirm the positive contribution RIA can make to improving regulatory quality and the aim of RIA to strengthen the empirical underpinning in the decision-making process, promote cooperation between policy areas and make the policy process more transparent. They also emphasise the key role the RIA plays as an instrument for achieving the "Lisbon Objectives", "Good Governance" and a balanced and sustainable form of sustainable development. The agreement aims to "enhance the quality and added value of RIAs" by repeating and stressing some basic principles of RIA (see box 15). The agreement also arranges the co-operation between the institutions on RIA: the active publication of all RIAs and of the biannual report to the Flemish Parliament on RIA quality are confirmed; government agrees to make available to the institutions scientific data underpinning RIA's and any other information that can explain and clarify a RIA; and government opens its RIA-training for staff from Parliament, SERV and the Strategic Advisory Councils. A Technical Group comprising representatives of the institutions is set up to ensure implementation and exchange RIA-best practices and discuss related issues such as the regulatory agendas, consultations with stakeholders, and monitoring of regulations. Within two years, the institutions shall exchange their experiences and take stock of the progress made to improve the RIA-system.

#### Box 15: Some quotes from the IIA-RIA

"For the institutions the RIA is a tool for reaching a well-informed decision. It does not replace a political decision in the context of the democratic decision-making process."

"The institutions believe that the RIA should offer an integrated and balanced picture of the potential social impact of the draft decisions and draft regulations, in comparison with relevant substantive alternatives. One of the relevant alternatives to examine is taking no legislative initiatives. In the case of the RIA the short-term positive and negative effects have to be analysed, including the implications in terms of the consistency of the regulations and the budget. The RIA should specify how data is gathered."

"During the RIA process the purpose of the intended regulatory measure has to be spelled out in an early phase. The comparison and choice of policy instrument has to be based on the impact assessment carried out. The RIA also has to consider how the policy is implemented, maintained, followed up and assessed."

"The institutions believe it is of key importance for an RIA of legislative initiatives to be objective and comprehensive. It is based on the information available which has to be accurate, quantitative and as complete as possible, while showing the shortcomings in the empirical underpinning or factual information. An objective and comprehensive analysis seeks to ensure that the RIA is more than just a justification of the initiative and should be an appraisal and underpinning of reasonable and equivalent policy instruments. The analysis should also show a sense of proportionality, focusing on the aims and objectives of the proposal."

"When stakeholders and other parties are consulted, Government ensures the consultation is consistent with the EU minimum standards for consulting (featured in the RIA guide) or equivalent consulting standards, with the RIAs reporting on the impact of the consultation. The consultations related to the SERV and Strategic Advisory Councils are organised in accordance to the procedures established by decree."

#### 5.4. Strategic use of drivers of change

57. As observed by Scott Jacobs in other countries, rather than a cause and effect scenario in which a single 'driver of change' creates and defines the success of a body of reforms, what actually happened in Flanders is a sequence of events in which various drivers rise and fall, that is, become more and less important in driving phases of the reform process. Jacobs (2007a) identified seven main drivers of change – "forces that expand the opportunity for reform within the political economy of the country": 1. The globalization or competitiveness driver, 2. The crisis driver, 3. Political leadership driver, 4. The unfolding reform driver, 5. Technocratic drivers, 6. Changes in civil society driver



and 7. External pressure driver. With hindsight, Flanders used a changing mix of drivers, with technocratic and political leadership drivers being important in the beginning (technocrats within SERV driven by rational policies to lead the country forward, heavily influenced by international practices and pressures; champions of reform at the centre of government - the minister-president at that time; ...). To prevent the risks of loss of momentum and passive resistance, Flanders later took measures to develop a clear medium-term reform strategy, raise incentives and capacities of regulatory reform units and to aim at systemic change while using one-off administrative burden reforms to buy time and gain support (the unfolding reform driver), enhance transparency and stakeholder involvement, build networks of supportive institutions to assure outside pressure and look for "champions" who will outlast the departure of any particular individual (changes in civil society driver); and strengthen the agenda setting and diagnostics through the use of internal and cross-country indicators and indicators of economic performance (the globalization or competitiveness driver). In the near future, the crisis driver and the external pressure driver will probably (have to) become more important, as we will show in the next section.

## 6. LOOKING FORWARD: HOW TO COPE WITH FIVE PERSISTING CHALLENGES?

58. RIA in Flanders is unfinished business. Right from the beginning, it was clear that the implementation of RIA would be a long term process since it required quite radical changes to existing decision making procedures and the prevailing policy culture in Flanders. From OECD-experience, it was also clear that designing and applying a comprehensive RIA program is not easy and should be seen as an ongoing mission: a RIA system can only be successful if an institutional framework has been carefully built and can grow over time on the basis of reviews and experiences, if there is continuity regardless the political changes, and if there is a strategy to be followed strictly in general terms but with considerable degree of flexibility<sup>52</sup>.

59. Countries have had very mixed experiences with RIA. In 1997 the OECD proposed a set of best practice guidelines or conditions to be fulfilled<sup>53</sup>. Lessons learnt since 1997 conform that they still are the building blocks that can be used as pillars to develop a RIA system: "Maximise political commitment to RIA; Allocate responsibilities for RIA program elements carefully; Use a consistent, but flexible analytical method; Develop and implement data collection strategies; Target RIA efforts; Integrate RIA with the policy-making process; Involve the public extensively; Communicate the results; Train the regulators; Apply RIA to existing as well as new regulations".

60. From these best practice guidelines, it has been more or less clear from the early start of RIA in Flanders onwards *what* is needed or should be done, but the question and debate is *how* to do it. In our opinion, Flanders is still struggling with at least five persisting challenges:

- How to maximise political commitment to RIA?
- How to integrate RIA at the heart of the policy making process and avoid formalism?
- How to allocate responsibilities for RIA?
- How to raise RIA-quality?
- How to cope with new and competing demands?

We will now look into these challenges and draw upon domestic and international experience on what has worked and what not to propose a set of policy recommendations.

<sup>52</sup> According to Jacobs (2007a), "transforming how the public sector carries out its regulatory and administrative functions is extremely difficult for three reasons. First, it is a far-reaching agenda. Transformation of the public sector goes beyond policies and formal legal instruments, since the role and style of regulation in society is deeply embedded in traditions, capacities, interests, and the organization of power. Second, existing incentives strongly favor the status quo. Reform meets massive passive and organized resistance that results in delayed, blocked, or reversed results at the implementation stage. Third, capacities and strategies for change are often insufficient to tackle the magnitude of the problem. Lack of political leadership, poor coordination capacities, fragmented policy jurisdictions, low levels of human skill, and weak accountability mechanisms, conspire together to make successful reform extremely difficult even when the government decides to move forward. For these reasons, the story of regulatory reforms is mostly one of disappointment. Reformers often underestimate or are intimidated by the sheer scale of the problem. And the problem is vast".

<sup>53</sup> OECD (1997).

## 6.1. How to maximize political commitment to RIA?

61. International experience stresses that sustained political support from the highest level and determination to move forward are key, in any case until RIA becomes a systematic part of a country's political and administrative cultures. The question however is how to get and maintain that support, certainly in a country or region where regulatory power is very concentrated and hierarchically organized due to the typical Belgian system of (large) ministerial cabinets (personal staff of a minister, often duplicating or replacing the work in the public administration), where politicians and members of cabinet are concerned of losing their impact on decision-making when finding themselves constrained by the requirement for a RIA, and where there is pressure to reduce unnecessary delays to the decision making process. As a result, from the start on there has been scepticism and passive (or even active) opposition to RIA by ministerial cabinets accustomed to few constraints on their rule-making powers<sup>54</sup>.

62. In Flanders, political commitment to RIA has therefore always been the major challenge and risk to RIA. Several 'tools' have been used to find and maintain political support:

- Incorporating RIA in an explicit, published policy promoting government-wide regulatory reform or regulatory quality improvement, including the use of regulatory impact assessment (2001, 2003, 2009 IIA-RIA);
- Embedding RIA in a government circular and in the household rules of cabinet (2004 with afterward modifications);
- Linking RIA with economic competitiveness and better policy making, by showing that better regulation and RIA contribute to good governance, quality of life and a country's competitiveness and attractiveness for investment (SERV 1997, 2004, 2007...);
- Pointing out that RIA has become "a norm of democratic governance in modern industrialised countries and that OECD member countries are continuing to invest heavily in RIA and are reaping greater returns for this investment"<sup>55</sup>;
- Coupling RIA with the drive for Better Regulation and Impact Assessment at the European level<sup>56</sup>, and lobbying for a system to apply RIA to draft EU regulation and use the RIA model as the basis for periodic reporting to parliament on European negotiations;
- Working in small steps, with annual evaluations of the RIA-policy and explicit room for modification;
- Waiting for the right momentum, putting RIA on the agenda close to elections and in the current debates on the effectiveness and efficiency of the government, and by trying to introduce RIA in important policy documents, such as government coalition agreements (e.g. ICW memoranda 2004 and 2009), the policy declaration of the president of parliament (2004, 2009), the 2020 Pact with a vision and objectives for Flanders in 2020 that government, the administration, social partners and other stakeholders signed in 2009 etc;
- Engaging parliament, by creating a commission in parliament that deals with regulatory management (2004), making it mandatory that RIAs are sent to parliament so legislators can better judge the quality of new laws and regulations that government proposes (2008), the biannual report to the Flemish Parliament on RIA quality (2008), opening up RIA-training for staff from the Parliament (2009) and closing an Interinstitutional Agreement between the Flemish Parliament, the Government, SERV and the Strategic Advisory Councils on RIA (IIA-RIA, 2009), issuing a separate memorandum for parliament on better regulation (ICW 2009)...;
- Involving key stakeholders like SERV, advisory councils, social partners, lawyers, think tanks, research agencies and personnel in the executive that acknowledge the importance of RIA in order to create an informal network of

<sup>54</sup> In other countries as well, it is being reported that "politicians seem unwilling to rely on evidence for decision-making purposes" (Renda, 2008). Wiener (2006) mentions that "in my experience, both in government and in academia, there is a huge swath of interests who favor less regulation regardless of its benefits, and a huge swath who favor more regulation regardless of its costs. In both cases, the alternative to analysis is sanctimony—supposing one knows the right answer without analyzing the consequences. In between these two potent and vocal campaigns is a narrow slice of those who genuinely want to compare the consequences (benefits and costs) of regulatory choices. It is very difficult for governments to maintain a steady commitment to comparing benefits and costs when great political pressure is brought to bear from one swath or the other."

<sup>55</sup> OECD (2006a)

<sup>56</sup> The European Commission required Member States "to demonstrate their clear commitment to better regulation principles through their National Lisbon [Action] Programmes" and planned to monitor progress in the months and years ahead.

- 'RIA-ambassadors' (cf. ICW-memoranda 2004 and 2009, protocols between advisory councils and government, workshops of the Flemish Evaluation Society VEP, IIA-RIA Technical Group...);
- Raising transparency of RIA's and ministerial accountability through full publication of the RIA's and public reports on the quality of RIAs (2008, 2009);
  - Trying to show politicians tangible, real world results of RIA - which proved to be a hard nut to crack in view of the vicious circle caused by the distrust of cabinets in RIA and the lack of cooperation<sup>57</sup>.
  - Finding incentives for politicians, for example by exposing good practice in the media.
  - Recording good RIAs and looking for cases in which the RIA system succeeded in weeding out inefficient regulatory proposals before enactment.
  - Advocating the view that when RIA is an integrated part of the policy process, any delays in the earlier stages are minimized and often outweighed by time and cost savings later in the process where the greater defensibility of the policy solutions and the increased buy-in by stakeholders are important<sup>58</sup>.

63. Looking at these initiatives and their relative success, it might come as a surprise that in Flanders real political commitment to RIA is worrisome still. The 100 page coalition agreement of the new Flemish government<sup>59</sup> for the period 2009-2014 (July 2009) testifies: there is only one sentence on regulatory quality, announcing a "*reform of regulatory impact analysis (RIA) into a more effective instrument aiming at effective burden reduction and simplification of admission- and licensing procedures*"<sup>60</sup>. This shows that political commitment in Flanders indeed is RIA's Achilles' heel and that there is a risk that RIA is seriously jeopardized: is Flanders really going to delete its RIA system and replace it with a administrative burden test like the Kafkatest<sup>61</sup> on the Belgian federal level? This would be a tremendous mistake at a time that other countries and regions are addressing the limitations of an administrative simplification policy and have moved or are moving towards a broader program of regulatory management in accordance with international best practices recommendations by the OECD and others. Fortunately, there is an alternative interpretation of the quoted sentence, saying that it should be read as an affirmation of the commitment of government to make RIA work. In the next months, it will become clearer what exactly the new government has in mind and whether commitments made earlier this year in the Interinstitutional Agreement on RIA was no more than lip service.

64. Political commitment to RIA in Flanders can be strengthened the coming months by implementing some measures that worked in other countries and by strategically using some opportunities or 'drivers of change' (see no. 57 supra). But first, it is extremely important that the uncertainty on the future of RIA in Flanders created by the coalition agreement of the new Flemish government is resolved very soon. Lack of clarity on the coverage and future direction of RIA can seriously impede trust in RIA and delay the supporting measures that would be implemented the next few weeks, such as the planned advanced RIA-training (cf. no. 55)<sup>62</sup>. We believe that Flanders needs a renewed adoption of a policy for better regulation. Adoption by the Council of Ministers would be a key signal of the credibility of the reform policy, and a predictor of its success. To prepare this policy plan and build ownership, the new minister

<sup>57</sup> The regulatory management unit in 2007 tried to launch five RIA case studies that would receive specific support from the unit and from outside experts. The case studies were meant to show practitioners and politicians the added value of high quality RIA. In the end, practically no one was interested or prepared to participate and only one RIA case studies was conducted, for a minor regulation (an archive decree).

<sup>58</sup> Mandelkern group (2001). Wiener (2006) writes that the concern about delay is quite important, but delay is amenable to a weighing of its own pros and cons. The benefit of delay is that additional analysis can improve decisions (and defer policy burdens); the cost is that delay can forfeit the value of earlier policy adoption (eg earlier protection of victims, or earlier authorization of a useful invention). He agrees that "a careful IA can resolve and avoid problems that would yield delay later on, so it can achieve less delay overall" and concludes: "In short, delay turns out to be a problem that calls for better BCA, not avoiding BCA".

<sup>59</sup> The three political parties involved in the new government (2009) are the same as in the previous one (2004), except one (the liberal party).

<sup>60</sup> p. 82.

<sup>61</sup> See no. 93.

<sup>62</sup> We can mention that already the first session of the advanced RIA training which was planned for october 2009 has been cancelled because of the uncertainty on the future direction of RIA.

responsible for regulatory management could install a high level group to strengthen the better regulation agenda to pave the way for a better use of better regulation tools (burdens measurement, ex ante RIA, consultation, ex post evaluation...). The appointed group of experts could be charged with the tasks of evaluating the progress made since 2001 and proposing a new vision for better regulation including suggestions for institutional design.

65. Secondly, the review of the regulatory capacities and tools the OECD and the European Commission are preparing for the EU-15 countries and that will be finalized later this year, can probably be a useful input to that medium-term implementation plan, but hopefully it can in itself provoke renewed engagement for RIA by the political sphere in Flanders. Europe can also be a driving force from another perspective, since the new coalition agreement of the Flemish government announced the introduction of impact analysis for draft European legislation. RIAs prepared in this context are considered important because while EU Commission Impact Assessments take account of certain national and regional impacts, they may not take account of all impacts which are of particular interest to Flanders, having regard e.g. to its location and small size. The Commission is moreover increasingly seeking an input into their impact assessments and through RIA Flemish officials are better placed to provide useful information to the Commission in a structured way. These RIAs should contain a sufficient level of analysis of key issues to properly inform Flanders' negotiating position. In Ireland for example, Departments are required to prepare an information note on draft EU measures within four weeks of formal circulation by the General Secretariat of the Council. This information note must outline the nature and purpose of the proposal and should contain an initial indication of possible implications for Ireland. The Irish government recently decided that Departments should take account of the RIA model in preparing these information notes, and therefore the RIA process should be commenced as early as possible and certainly no later than four weeks from when the Commission publishes the proposed legislation and its own impact assessment<sup>63</sup>. Such RIAs for draft European legislation can be a leverage for political support for RIA in Flanders.

66. Thirdly, the new government decided that the size of the ministerial cabinets will be drastically reduced. This means that ministers will have to rely more than in the past on their administration to develop policies and write new regulations. This could raise the interest of ministers in RIA, since policy makers need plain language, transparent presentation of results, and order-of-magnitude conclusions just as surely as the public does<sup>64</sup>. To attract this renewed support, it is important that RIA is also better tailored to the reality of policy making which is often different to the systematic and rational process that is implicit in most mainstream thinking about policy assessments. Policy formulation is often constrained well before the start of the formal decision-making process, for example by pre-existing political initiatives and policies, by administrative procedures, international and EU legal frameworks and policy commitments. Such a predetermined policy agenda can have a great influence in driving Government action in particular areas. This means that the extent to which the need for regulation can be evaluated in RIAs is restricted and performing a RIA may not be an effective use of resources. This 'problem' cannot be corrected by RIA alone. But rather than forcing desk officers to follow strict templates, RIA procedures should give ministries the flexibility to adapt the approach to the political and technical requirements of the specific case. In some cases, RIA can and should reflect on a broad set of potential measures, in others it can realistically do little more than fine-tune a proposal on which there is political consensus<sup>65</sup>. Therefore, In Ireland for example, the guideline is that RIAs in those circumstances should focused primarily on the consideration of the most appropriate method of implementation, rather than an assessment of the costs and benefits of the policy itself. In the UK, the Audit Office recommended a similar tailoring of RIAs to the policy context to ensure an appropriate level of analysis. Earlier, the Mandelkern Group (2001) took a similar position: "A further situation can be where the main political decision has already been taken (perhaps in a government program or party manifesto). In these cases there can be a reluctance to undertake assessment of the implementation options available. However, almost always details remain to be resolved where an assessment can

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<sup>63</sup> Department of the Taoiseach (2009a)

<sup>64</sup> Wagner ((2009).

<sup>65</sup> As observed for example by Jacob et al (2008).

play an important role in informing, in a very explicit manner, those taking the decisions on the details about the trade-offs that they are making"<sup>66</sup>.

67. Finally, perhaps the time is right for Flemish parliament to take the lead as well and establish a legal mandate for RIA. Apparently, in the last few years, the trend in OECD countries has led to a wider implementation of RIA as a legal requirement. According to the OECD, there is now a clear majority of countries supporting the implementation of RIA by a law that specifies the coverage and method of RIA to be used<sup>67</sup>. The legal requirements have also become more demanding in terms of results and justification of costs and net benefits from the application of regulation. Even then, RIA remains a matter of cultural change. This cannot be imposed by law, but requires, among other things, successes that are able to show politicians tangible results of RIA.

### Recommendations to maximize political commitment to RIA

Flanders could:

- Persuade the new elected Flemish government to confirm its commitment to a broad better regulation policy.
- Install a high level group to prepare a medium-term implementation plan, to be adopted by the Council of Ministers, to strengthen the better regulation policy in view of the experiences and upcoming challenges.
- Use the decision to downsize the ministerial cabinets to convince the personal collaborators of a minister that RIA helps to promote a transparent analysis and presentation of options and impacts of the policies proposed by the administration.
- Assure that performing a RIA remains in each particular case an effective use of resources; RIA procedures should allow flexibility to adapt the approach to the political and technical requirements of the specific case, which means that RIA sometimes is not useful or can realistically do little more than fine-tune a proposal on which there is political consensus;
- Make strategic use of the upcoming review of the regulatory capacities and tools in the EU-15 countries by the OECD to provoke renewed engagement by the political sphere.
- Use the decision to introduce impact analysis for draft European legislation as a leverage for political support for a reinforced RIA-system.
- Establish a legal mandate for RIA through parliament.
- Communicate successful RIA-examples better and look for 'sexier' indicators to show progress and results.
- Make sure that the current uncertainty on the coverage and future direction of RIA is as short as possible.

## 6.2. How to integrate RIA at the heart of the policy making process?

68. A challenge closely linked to political commitment, is how to integrate RIA at the heart of the policy making process and avoid formalism. RIA indeed should be an integrated part of the policy process (and often also will have to *change* the policy process), and not a separate procedure simply added to what already exists. However, a fundamental problem repeatedly reported by countries engaged in RIA is that the RIA process starts too late, which undermines the quality of the RIAs and restricts its influence on the policy making<sup>68</sup>. RIAs may serve primarily as a mechanism for promoting decisions already made rather than scrutinizing them<sup>69</sup>. On the other hand, there sometimes

<sup>66</sup> The same applies for RIA and the transposition of European Directives. RIA conducted at this stage should ensure that the 'best' transposition option is selected. As is the case with all RIAs, a proportionate approach should be taken, recognizing the fact that some Directives are more prescriptive than others in relation to methods of transposition. In the UK, such RIA are compelled to distinguish between those elements of each of the proposed options which are prescriptive or mandatory and those which are optional or have been added as a result of specific national concerns (gold-plating).

<sup>67</sup> OECD (2008), Andres, Richter-Devroe and Rodrigo (2007).

<sup>68</sup> Jacob et.al. (2008), OECD (2008), Andres, Richter-Devroe and Rodriguez (2007).

<sup>69</sup> Williams (2009) reports that even in countries with a long standing tradition in RIA such as the United States, RIA is often a "checking the box" activity as a means to get rules through the decision making procedures. 'Honest answers to the question "How did you use the economic analysis to make your decision?" would be: "What are you talking about, what analysis?" "I made the economists, who work in my program office, make the analysis conform to my chosen option." "I am using it now, it's just supposed to help me get my rule through OMB." Alternative answers are: "I used it a lot, it was really great, thanks for asking me about it." "I

are very good pieces of analysis that only play a limited role in decision-making<sup>70</sup>. Flanders is no exception. It has been common practice - and it is largely still the case - that RIAs are not initiated until after the regulatory process is well underway, often after the preferred alternative has been selected. In this situation a RIA obviously has difficulty being influential. Worse, it puts pressure on the analyst not to deliver bad news about benefits and costs, especially about the preferred alternative, leading to cynicism about the role of RIAs in the regulatory process.

69. To avoid this problem, different strategies are being used in Flanders:

- Promoting forward planning by introducing tool like a regulatory agenda and white papers that ensure early public notification of planned regulatory initiatives, at a time when the proposed regulation is not yet developed and it is still possible for RIA to make a meaningful contribution to the policy development;
- Keeping analytical requirements, tests and criteria for RIA simple and flexible, and raise standards gradually with experience and skills.
- Keeping procedural requirements for RIA as simple as possible, and allowing some flexibility. For this reason, Flanders did not choose a two step approach with formal or difficult criteria to set the scope of RIA; the focus is on proportionality, meaning that the depth of the analysis should correspond with the importance of the regulation;
- Linking RIA with consultation, in view of the fact that many stakeholders push for consultation to occur sooner, more systematically, and more transparently and that RIA can be a cornerstone for consultation processes because it aims to clarify in plain language the reasons, aims, and effects of a proposed regulation (in comparison with alternatives). In many cases, RIA could be a much more suitable basis for discussion with stakeholders and the public than the text of the draft law itself.

70. Here results remain poor as well, as has been illustrated in various evaluations (cf. no. 37). To deal with the problem that RIA and consultation often start too late in the policy making process, new ideas have been launched. The regulatory management unit and the interuniversity centre for legislation (ICW) recently both proposed a mandatory phasing of each RIA, with a preliminary RIA (limited to problem definition, objectives, options) for internal and external discussion in an early stage and a full RIA in a final stage. Preliminary RIAs would be put forward to parliament together with the regulatory agendas (see nr. 52) or would be linked to the use of roadmaps and/or green or white papers for important regulatory or policy decisions. Full RIAs would be required at the moment a draft regulation is being presented to government for first approval and would have to be modified in the subsequent phases of the regulatory procedure (after advice of the advisory councils, advice of the council of state...). The unit furthermore proposed to evaluate the scope of the RIA-system, notably to incorporate some non-regulatory measures on the one hand and to allow for some sector specific derogations on the other.

71. All these proposals seem very valuable from the experience and trends in other countries. Renda (2009) similarly suggests for the European IA that work done at an early stage of the policy process (e.g. on a White Paper) should form the basis for an incremental IA done at subsequent stages, with a discussion of the need to act (at EU level) and possible policy scenarios and proportionality of available regulatory options, and detailed analysis at later stages. Likewise, the UK amended its RIA system last year to introduce a draft RIA to be conducted before a Memorandum seeking permission to regulate goes to Government. Subsequently, an updated version of the RIA must be attached to the Memorandum accompanying the Bill as drafted, when it is brought back to Government for approval. In Ireland, the RIA system was recently modified to embed RIA thinking earlier in the policy development process and in divisional planning via an early draft of the RIA. Before, RIA was much like in Flanders regarded as a document, to be attached to the Memorandum for Government but by that time options often have been narrowed down and choices already made. The Irish government therefore decided that "*RIA thinking needs to start at the time*

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thought I knew what was necessary but after I got briefed by the economists, I selected the option that, you know, maximized net benefits (did I say that right?)." "Hey economist, whatever your name is at the end of the table, you take this one". Some good answers would be: "I made some marginal adjustments to the rule based on the benefits and costs of options." "We examined a wide range of options and I selected an option for which benefits exceeded costs but not one that maximized net benefits -this is why..." "I chose the option dictated by Congress, of course, but an analysis was done to show how another option would maximize net benefits."

*when the issue which might lead to regulation first emerges. Even if the necessary information is not available to assess impacts at that stage, policy makers should be considering the sort of information required and what strategies might be used to access it. For this reason, it is suggested that a brief analysis, in the form of a first draft of the RIA, should be initiated as early as possible in the process. The purpose of this approach is to broaden out the options considered, and to start the thinking about their impacts, from the beginning, so that the rest of the process is informed by this mindset. The early-draft RIA would both address the problem identified, and begin to consider planning the solution. It would be essential for such a draft to be seen and approved by senior management at an early stage. However, it must be recognized that any such draft will be subject to change. New information and ideas may arise during the process of developing regulation, which mean that some options will be dropped while new ones emerge. The purpose of the early draft RIA is not to set in stone options which may turn out to be irrelevant or inappropriate, but to start internal debate about options"<sup>71</sup>. RIA in Ireland is now also linked with Departments' Annual Plans and Strategic Plans, for those initiatives which may result in a requirement for regulation. The workplan for each Bill includes a first draft of the RIA from the start. "Urgent issues will inevitably arise during the course of the year, but as far as possible draft RIAs should be available for all foreseeable major initiatives". Carrying out good quality RIAs in Ireland has also become part of every manager's goals and objectives, performance evaluation includes RIAs and reporting on RIAs is an item on the agenda for senior management meetings within Departments. In Germany as well, there is a two step RIA process with prospective RIAs (future-oriented processes of impact assessments based on regulatory alternatives) and accompanying RIAs (future-oriented processes of impact assessments based on a draft in legal form)<sup>72</sup>.*

72. Renda (2009) proposes furthermore that the European Commission revises the original IA document according to the amendments approved, so that the IA should become a 'live' document, which follows the iter of the proposal and is always updated, in order to enable evidence based decision-making from the beginning until the approval of the final text<sup>73</sup>. Similar recommendations for other countries have been made by for example Klaus Jacob et. A. (2008)<sup>74</sup>. In the UK as well, once the text of a Bill has been agreed by Government, the RIA must be published on the legislation or RIA page on the Departmental website along with a link to the published Bill. Where an earlier version or versions of the RIA have already been published, for example as part of a consultation procedure, it should be updated and re-published at this stage. As a matter of good practice, RIAs should also be actively disseminated to key stakeholders as they are updated. In Ireland too, the RIA document is a living document subject to continuous change which could result in numerous drafts before the final version of the RIA is complete. The RIA guidelines specify that a RIA should, insofar as possible, reflect the current thinking in relation to relevant policy options. "However, it is accepted that, where information is emerging quickly it may not always be possible to update the RIA on each and every occasion that something changes. Where your RIA relates to proposed primary legislation, you must ensure that, at a minimum, it is fully up-to-date when you revert to Government with the Bill as published and prior to its publication. You may need to update your RIA internally to ensure its accuracy more often than you will need to publish. Again, however, this is an issue which needs to be looked at on a case-by-case basis"<sup>75</sup>.

73. Finally, we strongly back the proposal to evaluate the scope of the Flemish RIA-system and the way RIAs in practice are being in relationship with the political process. Resources should be allocated to where they do most good. This means that more analysis should be required for more restrictive types of regulations such as technology based standards or design standards, cap and trade systems etc. as opposed to guidance, information or performance

<sup>71</sup> Department of the Taoiseach (2009a).

<sup>72</sup> More precisely, in Germany, there are three different modules or processes of RIA: prospective RIAs, accompanying RIAs and retrospective RIAs (backward-looking processes based on a statutory regulation already in force). See Lenschow et.al. (2008).

<sup>73</sup> In fact, even the approval of the final text should not be the end of the RIA process since ex post evaluations of RIAs performed can be very valuable to close the loop, that is: learn and continuously make policies better.

<sup>74</sup> They write: "IA should provide the 'answer' and identify the best policy option, then disappear from the scene to let politicians do the bargaining. In our view, this idea is misleading. IAs do not give a single answer, but frame problems, scope solutions and uncover possible side-effects of policy measures. They do not disappear from the scene, but remain a reference point in political bargaining and supports ex post evaluation of policy. In short, IAs should support the decision making throughout the whole policy cycle."

<sup>75</sup> Department of the Taoiseach (2009a).

standards<sup>76</sup>. RIA furthermore must be viewed within the wider context of the realities of policy making which can mean that sometime performing a RIA may not be an effective use of resources (see no. 66).

74. In addition, Flanders could focus on linking RIA with the widespread demand of stakeholders to rearrange and intensify consultation procedures. Compared to international best practices, the largest gap in the regulatory management system of Flanders turned out to be linked to transparency and consultation (see no. 39). Flanders should create a formal consultation policy and mechanisms to ensure a systematic means of early and effective stakeholder consultation during policy and regulatory development, either through the existing advisory councils and/or new consultation methods<sup>77</sup>. Early and meaningful consultation before a regulatory decision is taken has been widely recognized as key to the quality of new laws and other regulations. The government should develop a mandatory consultation policy, based on international practice and e-government tools, that lays out goals, standard methods and procedures, standardized formats for consultation documents and the relationship with RIA (with again Ireland as a useful example<sup>78</sup>). It should build a unique website or 'single access point' for publication and consultation on draft regulations and decisions. Such a policy will require investment in new procedures and staff training in how to consult and how to use information from consultations. The Flemish government already committed itself in the IIA-RIA to ensure that consultations are consistent with the EU minimum standards for consulting or equivalent consulting standards, with the RIAs reporting on the impact of the consultation (see no. 56). The European Commission's general principles and minimum consultation standards indeed are a good benchmark.

#### Recommendations to integrate RIA at the heart of the policy making process

Flanders could:

- Introduce a mandatory phasing of each RIA, with a preliminary RIA (limited to problem definition, objectives, options) for internal and external discussion in an early stage and a full RIA in a final stage;
- Link RIA more explicitly to (upgraded) regulatory agendas and to departments' strategic and operational plans;
- Modify its RIAs in subsequent phases of the regulatory procedure to make sure that RIAs reflect as much as possible the current thinking in relation to relevant policy options;
- Evaluate the scope of the RIA-system;
- Adopt an explicit consultation policy with mechanisms to ensure early and effective consultation, and link consultation with RIA.

### 6.3. How to allocate responsibilities for RIA?

75. The OECD guidance and lessons from international best practice are rather straightforward on how to allocate responsibilities<sup>79</sup>. Line Ministries should conduct RIA. They should build teams to work on RIA and provide the resources and interdisciplinary capacities to undertake the RIA. Technical support units could be established within the departments, whose role would be to provide help and advice concerning methodologies, consultation mechanism etc. Since RIA is a horizontal policy, it needs to be co-ordinated and carefully managed across the ministries of government. Therefore, while locating responsibility for performing RIA with the regulators improves "ownership" and integration into decision-making, the authority for the RIA policy should lie with a central body whose role is to oversee the RIA process and ensure consistency, credibility and monitor compliance. Quality control should also lie with an oversight body or central watchdog. The location and authority of such a unit are important, together with the level of the RIA expertise inside such a unit and the 'informal' authority as a result of its expertise or the political weight given to the controls, with appropriate rules for the appointment and removal of body officials. Best practice is to entrust a

<sup>76</sup> Keohane (2009).

<sup>77</sup> Such as focus groups, test panels, questionnaire-based surveys, face-to-face interviews, public meetings, user panels, advisory committees, workshops, e-community fora...

<sup>78</sup> Department of the Taoiseach (2009b).

<sup>79</sup> OECD (1997, 2002, 2008, 2009b...), Wiener (2008b)..



central unit in a horizontal department (usually either the Prime Minister's Office or the budgetary decision-making institution) with the quality control of the RIAs and the authority to contest regulators' assessments and demand improvements<sup>80</sup>. Jacobs (2006) furthermore has found that the best-performing countries create a rich network of supporting institutions on regulatory reform. The better systems seem to combine both a central unit with a network of institutions among the ministries, including not only departmental units but also ministers responsible for regulatory reform, activist committees and bodies of parliament, inter-ministerial working groups, private sector groups, advisory bodies, think tanks, or other research bodies who support the regulatory agenda.

76 Flanders has implemented these guidelines as much as possible:

- The responsibility for the execution of RIAs in Flanders lies with the agency that prepares the new regulation ultimately with the minister who submits the draft regulation to Government. The RIA guide and the RIA manual further stress that RIA is a team effort.
- In addition, the RIA-system includes support and quality control by the central Regulatory Management Unit established in 2003. The unit has a broad oversight role and responsibility for regulatory management, including RIA policy and quality control, capacity building, communication strategies, forward planning, coordination, administrative simplification etc. It has a budget for hiring consultants, doing research, publishing reports and communicating results<sup>81</sup>. The unit gives a advice on each draft RIA and scores every final RIA.
- From the start, the unit has had contact persons for regulatory management issues in each line ministry. Since 2007, 22 departmental regulatory management units co-operate with the central unit. They i.a. were set up to give practical support and guidance in the RIA processes in the departments.
- One minister is explicitly responsible for regulatory policy.
- A parliamentary committee for regulatory quality has been set up.
- A range of private sector groups, advisory bodies (such as SERV and the Council of State), think tanks (e.g. ICW, Itinera, the CEEO-Commission for a more Efficient and Effective Government...), and research bodies (e.g. the Policy Research Centre "Governmental organization in Flanders") support the regulatory agenda or important parts of it.

77. In practice however there are difficulties. Scrutiny by the regulatory management unit is not working properly. RIA-capacity inside the Unit is limited and there is some technical discussion about the relevance and weights of the scoring system that the unit employs. Also, the time the unit receives for its advice or for the RIA quality control is very limited (3 days), and does not allow for any real dialogue with line departments. There is criticism from line departments and ministerial cabinets, blaming the unit that it has no sector specific expertise and hence cannot judge e.g. the problem or the appropriateness of the options that are assessed in a RIA, and should therefore refrain from judging the quality of the RIAs. As a result, the minister responsible for regulatory policy nowadays seldom uses the results of the quality control to intervene at the meeting of the Council of Ministers and the unit is putting less effort in its watchdog or challenge function. The main reason for these difficulties relate to a lack of high level support and resources. The regulatory management unit started off in 2003 with a staff of 7 people and was located within the services of the Minister-President of Flanders. Since 2005 however, the unit is placed under the minister and the department of public administration with a reduced staff of 5 people, of which only one employee originally started at the unit. The unit must moreover allocate its scarce resources between short term pressures to present visible results and the needs of a medium term strategy requiring structural reforms and more sophisticated tools. In the face of short-term electoral cycles, the focus for politicians and thus for the unit is on administrative burden reduction and ex post simplification. As a result, there is only one member of staff dealing with RIA, not even fulltime.

<sup>80</sup> In a recent paper, the OECD says it is "mindful that for some countries, ensuring effective oversight at the centre of government can present challenges. Different legislative traditions and cultures will play a role in the arrangements that have been developed: as with regulatory tools, there can be different ways to establish regulatory oversight and ensure regulatory quality". The OECD currently runs a project to gather information on the variation and similarity of approaches taken by member countries, the effective design, and the related success factors. The study will look at a number of factors including: the different role and functions of institutions such as regulatory oversight bodies; their budgetary allocations; staffing; communication strategies; and the interplay with the political administration (OECD, 2009b).

<sup>81</sup> The units' budget rose from about 300.000 euro in 2003, 2004 and 2005 towards around 500.000 euro in 2006, 2007 and 2008. For 2009, a budget of 523.000 euro has been allocated.

78. These difficulties are of course well known to the unit. It managed to get approval for additional personnel, but they will probably be allocated to the larger extent to the measurement and reduction of administrative burdens. It has also planned to revise its RIA quality criteria, but added that this requires political validation and the existence of sufficient capacity, knowledge and time for carrying out its challenge function. Consequently, the unit proposed that there should be a fundamental discussion on how to maintain and strengthen RIA quality control given the constraints it faces<sup>82</sup>. For example, like with financial controls, the necessity and scope of ex ante controls should be examined carefully<sup>83</sup>.

79. One idea is to allocate responsibility for scrutiny to the departmental regulatory management units. This seems now more or less the case in the UK, where the Better Regulation Executive (BRE) – which has moved from the Cabinet Office to the Department for Business, Enterprise and Regulatory Reform – devoted a large proportion of its resource to scrutinizing RIAs produced by departments but now believes that departments should have primary responsibility for the quality assurance of RIAs to encourage them to strengthen their own processes. The nature of the BRE's interaction has changed from scrutiny and challenge on individual RIAs to the provision of more strategic support and advice to help strengthen departmental capability.

This development does not seem to be a good idea. Surely, it is officials working in policy sections who have responsibility for conducting RIAs because, as experts in the particular policy section, such officials are best placed to identify policy options and the range of costs, benefits and impacts associated with those options. So, ensuring that individual RIAs meet appropriate quality standards is primarily the responsibility of the Department concerned, but it also involves a body independent of the Department or Office carrying out the RIA charged with scrutinizing it from a quality perspective (with the aim not to "catch out" poor RIAs, but to discourage their production in the first place). If the monitoring institutions are not independent of the agencies preparing RIA, the quality of RIA could easily be compromised. Agencies that are responsible for monitoring the quality of RIAs should in principle not be directly involved in regulatory development and preparation of RIAs<sup>84</sup>. This seems to be confirmed by a first review of the UK Audit Office<sup>85</sup>. It found that the most significant factor cited by departments as a motivation for high quality RIAs was the prospect of external scrutiny, and recommended government that the BRE and departments should bring external challenge to the development of regulations.

The first best solution remains to locate the institution needed to oversee compliance in the center of government where authorities for inter-ministerial oversight are already well established. Individual ministries are not well-placed to carry out such government-wide program management. According to Jacobs (2007b), a central better regulation unit works best if designated as a stand-alone unit, with its own mandate, staff, and head accountable for delivering a specific program. Of course, in carrying out its tasks, it would be accountable to the Council of Ministers, and the Council would be able to charge it with new tasks beyond its core mandate to support Government policy. In addition, the unit should be integrated into the policy processes of the Council so that its advice and outputs are considered by the Council, as appropriate. This however means in the case of Flanders that the profile and resources of the existing central regulatory management unit must be seriously strengthened to align it with the key attributes of effective regulatory oversight bodies such as a recognised authority and expertise in managing regulatory quality tools, political backing to be able to ensure adherence to the process that contributes towards improving regulatory quality and adequate time and resources for scrutiny.

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<sup>82</sup> Wetsmatiging (2009a).

<sup>83</sup> See, for example, C.Jacobs about the situation in the United Kingdom (2005). Reference in this matter can also be made to the international macro-trend in public governance towards more responsiveness and accountability. There is a clear shift from an ex ante controls to ex post. (i.e. the control of the control is done afterwards and not in advance). There is also a shift of control on individual transactions (think of the financial stamp, advice from the IF) to control of management systems. See OECD (2005d).

<sup>84</sup> Jacobs (2007b), Mandelkern Group (2001), OECD (2008)...

<sup>85</sup> NAO (2008, 2009).

Second best is probably to allocate RIA quality control to an Impact Assessment Board (IAB), established along the lines of the example at the level of the European Commission<sup>86</sup>. It should be noted however that the European IAB is criticized for working not transparent enough, having too little resources and coming too late in the process. Anyhow, in such a system, the role for the central unit remains important and could be to periodically review departmental approaches to producing RIAs, with an assessment of a sample of RIAs to develop an understanding of their strengths and weaknesses, tailor guidance and training and disseminate best practice.

80. With regard to the departmental regulatory management units, a first evaluation already showed that here resources are limited as well (see no. 53). The units today often have a narrow legal perspective and are experiencing difficulties to be able to spend enough (more) time and resources on promoting and implementing regulatory quality tools. With an expanding regulatory management agenda and increasing workload and the same level or even fewer resources in the future, due to severe budgetary constraints as a result of the recent financial crisis, prospects are gloomy. This means that leadership, careful planning and intelligent priority setting will be required. Departmental responsibility for the regulatory quality can be stressed through further monitoring and benchmarking and by reintroducing the guideline that performing good quality RIAs is part of every manager's goals and objectives. IN addition, it is extremely important that quality of policies and regulations not only is part of the rules, procedures and formal incentives (regulative pillar), but also becomes part of attitudes and behavior (normative pillar) and common beliefs (cognitive pillar)<sup>87</sup>.

81. At the level of parliament, renewed dynamism for regulatory quality is wanted. Parliament itself undertook recently a international benchmarking exercise to improve its functioning<sup>88</sup>. With ICW, we made several proposals, notably to (1) upgrade debate in parliament, (2) strengthen its controlling function, (3) guide the regulatory policy, (4) invest in ex post evaluation, (5) reorganize the internal support of the parliamentary administration, (6) invest in training and research, (7) cooperate more with other institutions and (8) better respond to the European policy agenda<sup>89</sup>. Among the practical suggestions are to require from government and members of parliament the use white papers or issue notes for important regulatory proposals; strengthen regulatory planning by upgrading the regulatory agenda's and using regulatory 'roadmaps'; draw up substantive requirements for notes to parliament and for explanatory memoranda accompanying draft laws; expand the role of the parliamentary committee for monitoring regulatory quality and involving other committees in this effort; perform a few pilot crosscutting ex post evaluations and meta-evaluations; expand the internal support of the parliamentary administration from a narrow legal perspective towards a broad interdisciplinary view and build internal capabilities for policy evaluation and consultation, e.g. through tailored training and advanced research; cooperate more with institutions such as the Audit Office, the ombudsservice, SERV and ICW; and introducing a system of impact analysis for European legislation.

### Recommendations to allocate responsibilities for RIA

Flanders could:

- Assure high level support and adequate resources for the central regulatory management unit, more in accordance with its broad mandate;
- Find an appropriate watchdog, but refrain from allocating responsibility for scrutiny to the departmental regulatory management units: a body independent of the department carrying out the RIA should be charged with quality control, preferably the central regulatory management unit or an interdepartmental Impact Assessment Board.

<sup>86</sup> This European Board works under the direct authority of the Commission President. Its members are high-level officials from Commission Departments most directly linked with the three aspects of the impact assessment (economic, social and environmental impacts: the Deputy Secretary-General responsible for regulatory matters, with four additional members who are senior officials of DG EcFin, DG Employment, DG Enterprise, and DG Environment). The IAB's rules say that its members must act independently of their home DGs, but it could be worth examining actual IAB decisions to see if conscious or unconscious bias afflicts voting in IAB decisions.

<sup>87</sup> Jann (2008).

<sup>88</sup> Vlaams parlement (2008).

<sup>89</sup> Popelier, Van Humbeek, Van Nieuwenhoven en Van Aeken (2009b)

- Push departments to strengthen their own processes, build up capability and show primary responsibility for the quality of RIAs, and encourage them by spreading good practice examples and monitoring results through benchmark indicators;
- Find renewed dynamism in parliament for regulatory quality by considering the many proposals that are already on the table.

#### 6.4. How to raise RIA-quality?

82 Various in depth studies of RIA's all over the world report that there often is a large gap between actual Impact Assessment practice and requirements set out in official 'best practice' guidance documents<sup>90</sup>. Ensuring quality is a key element to guarantee that policy objectives are better reached through RIA implementation. The provision to regulators by regulatory oversight bodies of published methodological guidance, supplemented by formal training and less formal advisory/helpdesk functions, can be expected to have a major influence on the quality of RIA achieved in practice<sup>91</sup>. Raising and maintaining RIA-quality however is not only a matter of oversight and control. On the contrary, as the OECD notices, having such watchdog agencies can make a difference, but they do not obviate the need for departments and agencies to take ownership themselves for the best practice processes embodied in a RIA<sup>92</sup>. An important duty is therefore raising the responsibility of departments themselves for delivering good RIAs and reinforcing the capacity and learning effects to prepare good RIAs. Hence, countries use a variety of strategies, including RIA-guidance and training courses, technical assistance in drafting RIA, review of individual RIAs, stocktaking of general compliance with RIA by law makers etc.

83. In Flanders as well, different tools have been put into practice.

- Publication of guidelines by the Regulatory Management Unit, notably a RIA-guide (explaining the need for and purpose of RIA) and a RIA manual (explaining how to perform a RIA);
- Provision of a RIA help-desk and RIA-advice;
- RIA-training, consisting of a basic training course in regulatory policy (2days) and a supplementary RIA-training course (1/2 day) and training in administrative burden measurement (1/2 day).
- Development of RIA expertise within each department by creating 'regulatory reform units' at the level of ministries or departments. These units are responsible for the regulatory policy in the department, the provision of more focused and tailored support, and the enhancement of the quality of the RIAs in the department (cf. no. );
- Mandatory publication of RIAs on the internet;
- Provision of incentives for managers in the administration, e.g. by adding their contribution to better regulation to their personal objectives (2003-2004) and benchmarking the performance of their ministry;
- Monitoring and reporting publicly on the quality of the RIAs.

84. These tools until now proved to be insufficient to reach high quality RIAs (see no. 34). Again, one important explanation is the lack of high level support and resources. We can refer to the resources of the departmental units or the lack of political support for adjustments in public consultation procedures (whereas the systematic and early integration of stakeholders views would enhance RIA quality by inviting comments from people that will be affected by the regulation on a daily basis).

85. Another explanation is however linked to flaws in the implementation of the tools. The critical importance of training and guidance was understood from the outset, but it did not evolve enough with changing demands and was even neglected for some time: The training and guidance offered in 2004-2005 indeed focused on the comprehension of the regulatory system and on the technical basics of RIA. But once RIA is introduced in the regulatory processes,

<sup>90</sup> Hertin et al (2007), Jacob et al (2008)...

<sup>91</sup> OECD (2008a).

<sup>92</sup> OECD (2006a).

practical problems happen more often than technical ones. Thus, training and guidance should become more and more practical oriented to assist officials when they use the tool. In practice, these RIA-training sessions were stopped in 2006 and no training was provided anymore due to a loss of training skills at the level of the Unit. The Unit however did organise a few sessions where civil servants could exchange experiences. The unit is now taking up this issue. Starting in September 2009, in addition to the already existing broad training program for regulatory issues, a 3-days advanced RIA-training will be provided by the Interuniversity Centre for Legislation (ICW) with sessions on the basics of RIA (7h), regulatory alternatives (3,5h), cost-benefit analysis (3,5h), European IA and Flanders (3,5h) and consultation and data collection (3,5h), with a possibility of tailored training packages depending on the advance skills and needs of the RIA authors. ICW is preparing these courses in close collaboration with the Regulatory Management Unit and the department responsible for civil service training. The training will also be open to the advisory councils and members of parliament and their employees. These plans seem to correspond with international best practice<sup>93</sup>, but further step seem worthwhile. The UK for example has recently intensified its RIA-training and introduced a short introductory e-learning RIA course on the website of the better regulation executive<sup>94</sup>. Ireland is also considering e-learning for introduction to RIA. An objective could also be that all managers at the level of director and all policy advisors in the ministerial cabinets have had a basic training in the principles and tools of good regulation, including RIA.

86. International experience suggests that setting up networks of RIA-practitioners is helpful to exchange experience, promote best practice and ensure consistent application of the RIA framework, but also to co-ordinate across Departments. In Ireland for example, RIA Network members are empowered to present to the Network their Departments' plans and activities in relation to RIAs and to provide feedback to their Departments as necessary<sup>95</sup>.

87. The Central Unit in Flanders has planned to update the RIA guidance and to develop additional guidance material, notably for problem analysis, detection of relevant options, analysis and comparison of impacts and consultation. One should caution for the risk of overload, but the intentions are valid. Indeed, systematic attention needs to be paid to the quality of published RIA guidance documents and steps should be taken to update these documents on a regular basis in the light of policy learning, changes in RIA policy and improvements in RIA expertise and resource availability among regulators over time. In Flanders, there now seems to be a demand for more practical examples drawn from published Flemish RIAs and a need to share these, both within and across Departments. Of course the examples would have to be chosen carefully, to ensure that bad practice is not perpetuated. An example is the Canadian Writer's Guide or the recent update of the Irish manual. A further issue is that the current RIA-guidance is less than comprehensive in its coverage of methodological issues since it was a deliberate attempt to avoid undue detail and technical complexity and ensure that it would be readily intelligible to generalist policy officers who are often responsible for completing the RIA. But now that RIA is implemented, there is a need for more technical guidance material that is likely to be required by practitioners involved in more sophisticated RIAs. Other countries and regions such as in Australia appear to combine a relatively brief and non-technical RIA guide with one or more supporting documents that provide additional detail and sophistication in their coverage of methodological issues.

88. To raise RIA-quality, early and meaningful consultation is of course very important. Publication of draft RIAs while the regulation is evolving has benefits. The more information on options and their implications is provided to external stakeholders at consultation stage, the better they can provide detailed information on costs and benefits of various options, thus improving the quality of decision-making. Publishing a draft RIA at an early stage will assist stakeholders to make constructive inputs, and publishing a RIA with draft legislation will improve the quality of parliamentary debate and governance generally. Until now however, RIAs in Flanders are not made actively public until after the final approval of the regulation.

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<sup>93</sup> Jacobs (2006) observed that governments that do training seem to use a combination of external training to develop a high level of skills for a core group, combined with in-house or on-site training for a far broader group of civil servants who need to know the principles and tools of better regulation, without the detailed knowledge of a RIA analyst. The better organized governments have begun to integrate training on better regulation into the civil service institutions responsible for continuous training.

<sup>94</sup> <http://www.iatraining.berr.gov.uk/>

<sup>95</sup> Goggin and Launder (2008).

89. Full publication of final RIAs is very valuable as well. It is indeed difficult to over-estimate the benefits which stem from publication<sup>96</sup>. The knowledge that a document is to be published in itself acts as an incentive to quality. Availability of RIAs provides practitioners with examples of how to deal with specific problems relevant to their own policy areas as well as more general issues. Ex-post analysis of published RIAs provides feedback as to their quality and can also suggest ways of finding data for the next revision. Publication should always be the default option, and if RIAs are not published, or not published in a timely fashion, reasons should be given. In accordance with international recommendations, final RIAs in Flanders today are published on the website of the central regulatory management unit. But in practice they are not easy to find and they are supplied in a non user friendly format. International best practice suggests that Departments should create a dedicated RIA page on their websites following a standardized format whereby all RIAs published are easy to find. This page might show all RIAs published, by year of publication and by topic. If a Department's website already has a legislation page, the RIA should be published next to the relevant piece of legislation on this page. If no such page exists, RIAs should be published on a dedicated RIA page along with a link to the legislation to which they relate. These pages should be easily accessible from the home page. RIAs should also be easy to find through the search function on the website<sup>97</sup>.

In Ireland for example, the RIAs must, at a minimum, be published on the legislation or RIA page of Departmental websites along with the regulation once it is signed. However, where consultation processes are underway, it is recommended that Departments publish a version of a RIA at an early stage whilst ensuring that the RIA is fully up-to-date prior to its publication along with the regulation as signed. Departments are also encouraged to actively seek out and notify those who contributed to the consultation process, or those directly impacted by the proposed regulation, and inform them of the publication of the RIA.

90. A last concern is to strengthen RIA quality by organizing data collection. Data collection essential for the quality of RIAs but has been recognized as one of the most difficult parts of RIA because it can be time and resource consuming and requires a systematic and functional approach that is not used by many governments.

### Recommendations to raise RIA-quality

Flanders could:

- Update its RIA-guidance to make it more practical, and complement it with a e-learning tool and with more technical guidance for sophisticated RIAs;
- Continue to assure there is a RIA central help-desk and provide hands on RIA-advice by the departmental units;
- Invest in training, to achieve that all regulatory bodies have a core group trained in RIA and all managers at the level of director and all policy advisors in the ministerial cabinets have had a basic training in the principles and tools of good regulation;
- Set up a network of RIA-practitioners to promote best practice and co-ordinate across departments;
- Encourage the use of early draft RIAs as the basis for consultation;
- Ensure that finalized RIAs are published together with a link to the legislation to which they relate;
- Make published RIAs easier to find by requiring that there are dedicated RIA webpages and actively disseminate RIAs;
- Continue its monitoring and public reporting on the quality of RIAs.

## 6.5. How to cope with new and competing demands

91. There is an international trend to increasingly expect from RIA-writers that they examine all sorts of specific impacts (on SMEs, gender, poverty, administrative burdens, etc.). This trend is not necessarily a bad thing because it could mean that support for RIA is increasing and a proliferation of all sorts of separate specific tests with separate

<sup>96</sup> OECD (2008a), Goggin and Launder (2008)...

<sup>97</sup> OECD (2008a), Jacobs (2007b)...

procedures, data and assumptions can be avoided. However, there is a risk of fragmentation and unbalanced analysis. Use of partial analyses can easily result in fragmentation because the larger integrated framework is not clearly defined or emphasised. "Without the integrating framework, such methods do not rebalance RIA but unbalance RIA"<sup>98</sup>. RIA not only has to compete for resources with new and competing demands from sectoral interests, but is also challenged by other policy communities such as the sustainable impact analysis (SIA) community. Coming from environmental impact assessment, the SIA community indeed developed rather separately from the regulatory policy community, and usually proposes schemes and procedures for SIA that are often very different to existing RIA-schemes. And since RIA developed historically from economic analysis and business impact assessment<sup>99</sup>, the picture of RIA in the SIA-community is that RIA is biased towards industry and against environmental protection, which is in fact an outdated understanding of what RIA today is or is meant to be). As a result, opportunities to link both agendas are sometimes missed.

92. Flemish regulatory policy decisions in 2001, 2003 and 2004 (see no. 32) anticipated on these kind of discussions. The Flemish government in 2001 and 2003 endorsed a regulatory policy along three tracks in which administrative burden reduction and regulatory impact analysis stood equally side by side. Government has furthermore stressed that RIA features or will incorporate any existing or future sector-specific test. The rule has always been that the focus of a RIA should be on comparing the main effects of relevant options via an integral analytical framework, in which quantitative and qualitative 'measurements' for relevant economic, social, and environmental effects are analysed simultaneously in an integrated manner<sup>100</sup>. As a result, the ex ante administrative-burdens assessments via the standard cost model<sup>101</sup> in Flanders has been integrated into the RIA. The RIA guide and RIA manual moreover clearly indicate that RIA is also intended to contribute to sustainable development, by investigating - whenever relevant and proportionate - the likely social, economic and environmental effects for present as well as future generations<sup>102</sup>.

93. Despite the intentions to anticipate on the debate, discussion is very much alive on these issues in Flanders. Although the regulatory management unit together with for example SERV and ICW are sponsoring the broader view of regulatory quality, the political discourse is still much about deregulation and administrative simplification<sup>103</sup>. Consequently, regulatory policy seems to alternate between complex and longer term structural

<sup>98</sup> Jacobs (2006).

<sup>99</sup> The UK e.g. first introduced Business Compliance Cost assessments in 1985; by 1998 this had developed into a requirement for cost-benefit type RIA, and in the last few years RIA has been broadened further to integrate issues like Competition Assessment, Small Firms Impact Test, Sustainable Development, Carbon Assessment, Health Impact Assessment, Race Equality, Disability Equality, Gender Equality, Human Rights and Rural Proofing. The European Union's system has also evolved over time, from a requirement for a Business Impact Assessment on new legislation from 1986, through the development of various sectoral Impact Assessments (health, environment, consumer protection, etc) during the 1990s, to the current system of a general Impact Assessment procedure that covers economic, social and environmental impacts as well as an examination of the principle of subsidiarity, proportionality and the choice of instrument.

<sup>100</sup> The RIA guide and RIA manual therefore explain that "one of the objectives of regulatory impact analysis consists of streamlining the multitude of 'tests' for Flemish regulation and integrating them into the RIA. The other tests can be carried out as well, but the result of these tests should be integrated into the RIA. This is, among other things, the case for the impacts on the local governments, the budgetary and personnel impacts for the public service, the child impact assessment and the Poverty Reduction assessment. To sum up, the RIA document therefore contains in an integrated manner the result of the application of all tests".

<sup>101</sup> In Europe, the standard cost model (SCM) is being applied to measure and reduce paperwork burdens and time consumption due to information demands imposed on businesses and individuals by regulation. The Netherlands pioneered the SCM in 2002, and there is now an SCM Network involving almost all EU member states. Further, European governments are setting political targets, such as a 20 or 25 percent reduction in administrative costs from a base level estimated by the SCM inventory.

<sup>102</sup> "The analysis of the effects also aims at ensuring that the intended regulation has no negative impact on the ability to realize or contributes to a sustainable development. This means that - wherever relevant - you map out the possible social, economic and environmental effects, both for current and future generations".

<sup>103</sup> Radaelli and Meuwese (2008) explain that elected politicians are more interested in sending clear signals to the business community and the median voter, and that there is an political increasing interest in the growth and jobs agenda. As a result, rather than putting their faith in the slow and mostly invisible learning effects of impact assessment in its most integrated form, elected politicians opted for the possibility to make 'concrete' claims about the positive impacts on the GDP by drawing on the arsenal of tools that targets red tape, bureaucratic Europe, and hindrances to entrepreneurship.

reforms like RIA and 'quick wins' to satisfy political constituencies. So the tension and competition for resources between RIA and administrative burden reduction - and to a lesser extent with sector-specific test like poverty impact assessment - is still there. We find similar problems in other countries. Jacob et. al. (2008) observed in investigation of RIA in 27 European countries that reducing administrative burdens is in many countries a popular political objective, making SCM an activity with a high visibility that diverts administrative resources and political attention from a broad IA. In the UK, the Audit Office reports that over the last two years, there are increasingly competing demands on the time of the departmental better regulation units as other initiatives, including the reduction of administrative burdens and the consideration of regulatory budgets, now place additional demands on resources. Several units reported that their workload was only manageable with careful planning; and others indicated that it was not manageable and that some areas were ignored. There is a risk that time and resources for RIA are crowded out further in the coming period as result of popular speech on 'cutting red tape' and European targets for administrative burden reduction. In Flanders, this has become very obvious since the new Flemish government plans to "reform regulatory impact analysis into a more effective instrument aiming at effective burden reduction and simplification of admission- and licensing procedures"<sup>104</sup>.

This is a sad development since most observers agree that whatever amount of resources is allocated to the measurement of administrative burdens, this should not subtract resources from RIA and other better regulation tools. As Renda (2009) writes, "ex ante impact assessment, ex post evaluation and simplification initiatives<sup>105</sup> are too important for Europe to be 'sacrificed on the altar' of administrative burdens". In this respect, it must be recalled that the measurement of administrative burdens has a much narrower scope than the impact assessment tool, does not consider all categories of costs (only burdens generated by information obligations included in pieces of legislation) and does not consider the benefits associated with those costs<sup>106</sup>. In other words, administrative cost reduction can be highly desirable, but administrative cost reduction pursued narrowly could be counterproductive since it needs to be evaluated in terms of its full social costs and benefits<sup>107</sup>. Given the narrower focus of the administrative burdens measurement compared to RIA, it is often recommended that the former should be incorporated into the RIA practice, as today is already the case in Flanders, in countries like the UK and in the EU. In the Netherlands, Sweden, Denmark and Belgium at the federal level, there is a two-track system, with the full RIA process scarcely implemented and, at the opposite, the analysis and minimization of administrative burdens having become the flagship regulatory policy. It should be noted however, that these countries are now experimenting the limitations of a administrative burdens oriented regulatory policy and some are evolving towards broadening the scope of the measurement to include compliance costs, at least qualitatively<sup>108</sup>.

94. The debate on SIA vs. RIA in Flanders has been spurred by the 2006 Flemish Strategy for Sustainable Development, the introduction in 2007 of a sustainability assessment system at the federal Belgian level (see no. 98) and the research program for sustainable development, under which the Policy Research Centre for Sustainable Development is developing a proposal for a sustainable impact analysis framework. In the research project, sustainability assessment is defined as "an ex ante evaluation of a proposal, checking policy proposals on unwanted sustainability impacts and fostering a strong participatory approach to guarantee a balanced 'weighing' of interests and opinions". (...) "Assessing the sustainability of a policy proposal before its implementation provides decision-makers

<sup>104</sup> See No 63 for a more detailed discussion.

<sup>105</sup> Administrative costs are the costs of furnishing information and of processing government functions. 'Simplification' entails combining, codifying, or repealing old laws, in order to make them easier to understand, to reduce the complexity of bureaucratic steps the public must navigate, and to remove obsolete provisions.

<sup>106</sup> On 15 March 2006 the Commission inserted a warning to this effect, as a new 'Box 11' in the updated version of the IA Guidelines. Box 11 now reads: "The fact that one option would impose lower administrative costs is *not* in itself a sufficient reason to prefer it. For example, a measure . . . likely to impose relatively fewer administrative costs [by mandating specific technical standards, instead of requiring labels that disclose product data]... could give manufacturers less flexibility and could reduce consumer choice, [so that] its overall costs may be higher than the 'administrative' requirement to display data".

<sup>107</sup> Wiener (2006).

<sup>108</sup> Riedel (2009). In the Netherlands for example, there have been several initiatives to broaden the scope of administrative burdens measurements to include compliance costs. The role of ACTAL has now been expanded to include not only administrative burdens but also compliance costs. For Germany, see Schatz, Schiebold, Kiefer and Riedel (2009).



with an overview of the impacts of that particular proposal on the economy, on society and on the environment. (...) The involvement of stakeholders fosters consensus and facilitates the solution of potential conflicts. Ultimately sustainability assessment allows decision-makers to make fully informed decisions, without jeopardizing the freedom of political decision-making<sup>109</sup>.

From this definition it should be clear that SIA is much like RIA. In other countries as well, research showed that there is significant overlap between the manner in which assessment is prescribed in RIA guidance documents (e.g. in the UK, Germany and Sweden and the European Commission) and the principles of SIA<sup>110</sup>. The basic ambitions of RIA and SIA indeed are similar: (1) systematically and consistently examining potential impacts arising from government action, using evidence-based techniques to justify the best option; (2) increasing the transparency of the policy process, by fostering the consultation and participation of stakeholders; and (3) requiring policy makers to look beyond the traditional boundaries and examine positive and negative effects on other policies. Of course this does not imply that today, in everyday practice, RIA succeeds in its objectives. In some countries the dominant rationale for RIA remains to reduce costs imposed by regulations and several case studies have supported the concern that there can be a bias towards the 'hard' economic facts when RIAs considers direct economic effects while social and environmental impacts are less analyzed<sup>111</sup>. Others report that retrospective analyses of a variety of policies do not bear out the concern that RIA is biased toward overstating costs and understating benefits<sup>112</sup>. Anyhow, the difficult areas of distributional issues, long-term, external and unintended side effects often seem of little importance both in RIA guidelines as well as in practice<sup>113</sup>.

However, the picture that RIA is exclusively on competitiveness, that is, on reducing costs to industry, without considering social and environmental benefits, and on less regulation instead of better results should firmly be rejected. The Mandelkern Group Report of 2001 wrote about claims of bias: "Some see RIAs as an excuse to impose a business-focused, deregulatory agenda on policy makers. For a RIA done well, this is absolutely not the case. Rather, RIA simply sets out the information in a clear and concise way to inform—not control—the political decision. This point needs to be stressed, as appropriate and real efforts need to be made to ensure that both benefits and costs are included in the assessment".

95. From this discussion, it should be clear that it would be impractical, inefficient or even impossible to have a SIA-system with the same objectives and scope as RIA next to a RIA-system. That doesn't make sense and is a waste of time and resources. And it has to be acknowledged that the different aspects of sustainable development are not relevant for all proposals. One option is therefore to look for measures to integrate sustainable development better in RIA. Previous studies have made useful suggestions on how to promote the use of RIA as a tool to integrate sustainability concerns. These include making sustainable development strategies an explicit reference point of RIA procedures; integrating sustainability checklists into RIA guidelines; increasing involvement of stakeholders, particularly of civil society organizations; promoting a broad range of methodologies that capture environmental and social (particularly distributional) effects; and giving environment and social affairs ministries an active role in RIA procedures<sup>114</sup>. Another option is to reserve SIA for very specific types of policies, as suggested by e.g. Hertin et. al. (2007): "Certain types of problems lend themselves to ISA more than others. ISA is more likely to be taken up in relation to issues which are perceived to be "open", i.e. where the problem is 'illstructured' or 'wicked', where there is genuinely open public debate and no obvious policy solutions. These are often associated with the appearance of sudden unforeseen crises that open up windows and pressures for significant policy change, as well as a demand for new sources of knowledge. These lead to reconfigurations in the main alliances and coalitions to create a momentum for change; ISA processes are very well placed to respond to the associated demand for new forms of knowledge, capable of operating at some distance from everyday political decisions to allow stakeholders to 'let go' of their short-

<sup>109</sup> Hugé (2008).

<sup>110</sup> Hertin et.al. (2007).

<sup>111</sup> Jacob et.al. (2008).

<sup>112</sup> E.g. Wiener (2006). *Ex post* evaluations of a growing set of cases (though not yet a representative sample) have found that *both* benefits and costs appear to have been overstated in *ex ante* RIAs.

<sup>113</sup> Hertin et.al. (2007).

<sup>114</sup> Jacob et.al. (2008).

term interests; subject to democratic scrutiny and be publicly accountable; given a leadership which is trusted and well-known by the key actors; semi-closed to allow stakeholders to “drop their guard” and engage in longer term learning”.

### Recommendations to cope with new and competing demands

Flanders could:

- Confirm its commitment to the broader view of regulatory policy and regulatory quality beyond deregulation and administrative simplification.
- Safeguard that resources for RIA are not crowded out by resources allocated to the measurement of administrative burdens.
- Protect RIA from losing its integrating role by confirming that RIA should incorporate any existing or future sector-specific test (including administrative burdens measurements), and that those sectoral test should not unbalance RIA.
- Stress that the basic ambitions of RIA and SIA are similar and implement common sense measures that can help RIA to contribute better to sustainable development.

## 7. RIA AT THE BELGIAN FEDERAL LEVEL AND IN THE OTHER REGIONS

96. At the Belgian federal level and in the Walloon and Brussels Regions, the RIA-systems are very different and much less advanced or implemented than in Flanders, or even absent. Hence, we will discuss them more briefly. RIA at the federal level is composed of two separate tools: the Kafka test for administrative burdens on the one hand and SIA (Sustainability Impact assessment) on the other. In Wallonia and Brussels, there is only the Kafka test, although there are signs that their governments are considering introducing RIA in the next few months<sup>115</sup>.

### 7.1. Kafkatest for administrative burdens

#### *The Kafka system*

97. The Kafka-test for prevention and reduction of administrative burdens of regulations was introduced at the federal level in October 2004 and in Wallonia in January 2007. Each note to the Council of Ministers that goes with a regulatory proposal has to be accompanied by a “Kafka-test”. Excluded are internal government regulation, budgetary regulation, regulation approving international and interregional conventions and agreements, regulation without substantive impact or of a purely formal nature. The test consists of a four page form with a series of questions linked to the administrative procedures and formalities in the draft regulation. The Administrative Simplification Service (DAV) acts as an helpdesk and issues guidance material.

#### *DAV-evaluation of the Kafka-system*

98. The Administrative Simplification Service recently made an evaluation of the Kafka-system. The main conclusions were summarized in a response of the Belgian Prime-Minister to a question from a member of the federal parliament<sup>116</sup>. DAV counted 505 Kafka-tests performed in 2006, 401 in 2007, 210 in 2008 and 91 in 2009 (period (1/1/2009-30/4/2009)). Based on a sample of regulations issued in 2008, DAV concluded that “compliance is very high”

<sup>115</sup> We refer to the ongoing OECD review (OECD 2009c) and to the discussions we had at SWEP (Van Humbeeck, 2008). For previous assessments of the situation at the Belgian federal level we refer to i.a. Cordova-Novion and Jacobs (2004) and Popelier (2007) in which several other evaluations are discussed as well.

<sup>116</sup> Parlementaire vraag nr. 031 van 30 april 2009 van de heer Roel Deseyn betreffende testen bij beleidsbeslissingen.

and that “the Kafka-tests have resulted in significant administrative burden reductions”. Data supporting this conclusion was announced to become available on the DAV-website soon<sup>117</sup>. The Belgian prime minister declared in his answer of 25 May 2009 that the “introduction of the Kafka test has certainly resulted in raising consciousness of regulators that administrative simplification should be a permanent issue”. In a report that was published in July 2009<sup>118</sup>, DAV estimated a reduction in a reduction in administrative burdens in regulations of nearly 71 million euros.

## 7.2. Sustainability Impact Assessment

### *The SIA system*

99. Sustainability Impact Assessment was introduced by law in the federal government in Belgium in January 2007. It intends to “analyse the impact of proposed policy measures on the economy, social welfare and the environment, for present and future generations, in Belgium and the rest of the world”. It was to a large extent inspired by the Flemish RIA-system, however with some notable differences. Box 16 explains the basics of the federal SIA-system.

#### Box 16: Basics of the federal SIA-system

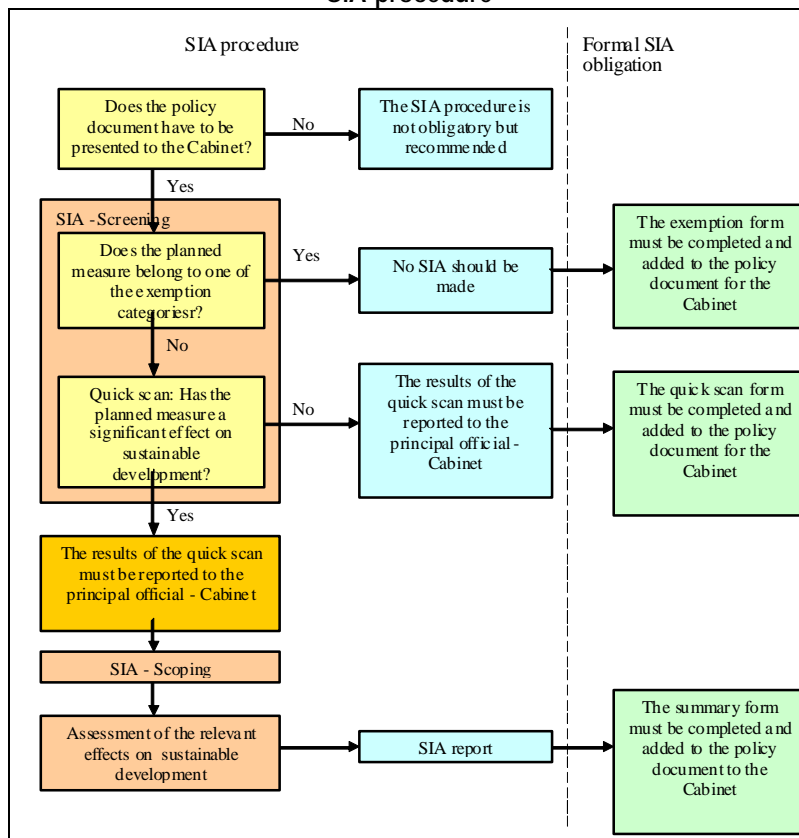
SIA objectives	Article 4 of the Royal Decree of 22 September 2004 defines SIA as “the full range of methods that are utilized to study the possible social, economic and environmental effects of a proposed policy of one of the governmental services concerned, before taking a final decision in the relevant case.”
SIA scope	Each note to the federal government that goes with a policy proposal has to be accompanied by a SIA form. Excluded are internal government regulation, budgetary regulation, regulation approving international and interregional conventions and agreements, regulation without substantive impact or of a purely formal nature measures that have already been subject to an assessment, that are urgent, that relate to national security and safety.
SIA process and procedure	There are 3 different SIA forms, one of which has to be presented to government, depending on the outcome of the SIA procedure: there is an ‘exemption form’ (to be filled out when the policy falls outside the scope of SIA), a quick scan form (in case there are no major impacts) and a summary form (that gives a summary of SIA-report, in case there are major impacts). The SIA procedure itself differs between a screening phase, a scoping phase and the SIA itself (see figure X and X below).
SIA product	The SIA “product” can be either a quick scan (scoping phase) or a SIA-report (after the screening phase). The SIA-quick scan looks like an impactmatrix in which 33 indicators have to be checked and qualitatively answered (10 economic indicators, 10 social, 10 environmental, 3 government, with differentiation between effects in the short / long term and local / global effects). The requirements for the content of a full SIA-report look very much like a standard RIA, although the focus can differ (e.g. longer timeframes, inclusion of global effects...): <ul style="list-style-type: none"> <li>• Problem definition</li> <li>• Policy objective</li> <li>• Policy options</li> <li>• Analysis of effects of policy options</li> <li>• Consultation</li> <li>• Conclusions and recommendations</li> </ul>
SIA-system	SIA is the responsibility of the policy makers and legislators within the departments and agencies. At the end of the process the minister or secretary of state who presents the policy measure for approval to the Cabinet is responsible for the correct application and content of the SIA. To assist SIA-practitioners, a SIA-manual has been drafted <sup>119</sup> and SIA-training has been provided (in 2007). In addition, a system for support ‘on the job’ has been established: there is assistance by the sustainable development cells of each administration, the sustainable development cells of other administrations, the SIA helpdesk (inside PODDO, the federal service for sustainable development), the Federal Planning Bureau (for data) and external offices (for the assessment of specific impacts).

<sup>117</sup> <http://www.vereevoudiging.be>

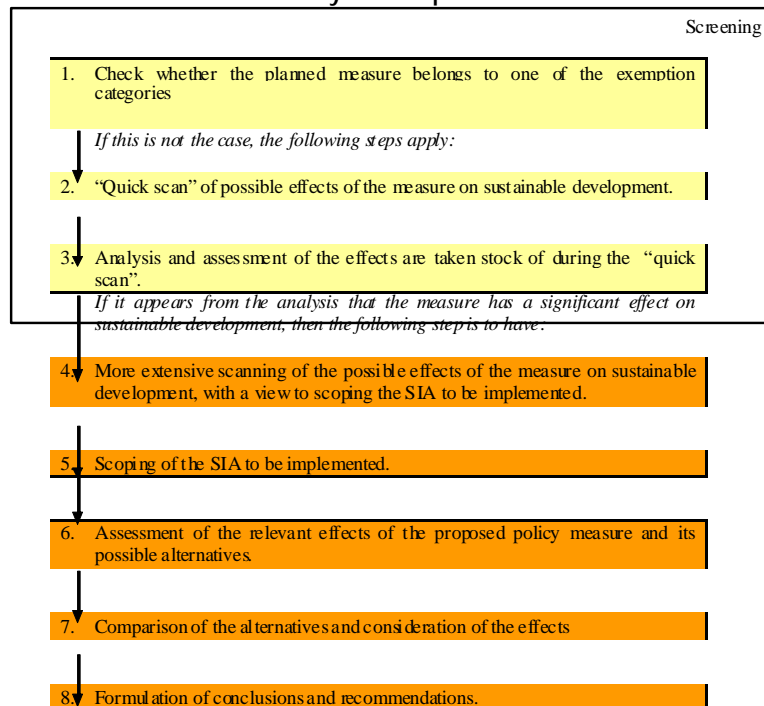
<sup>118</sup> DAV, 2009.

<sup>119</sup> <http://www.poddo.be/NL/instrumenten/doesb/goto.php?id=c8ffe9a587b126f152ed3d89a146b445&type=docs>

### SIA-procedure



### SIA- analytical steps



*PODDO-evaluation of the SIA-system*

100. The SIA helpdesk (PODDO) recently made an evaluation of the SIA-system in a response to a question from a member of the federal parliament<sup>120</sup>. PODDO counted 246 SIA-forms completed in 2007, 221 in 2008 and 97 in 2009 (period between 1/1/2009 and 30/4/2009). They however turned out to be mostly exemption forms and – tragically – only *one* full SIA (on nuclear power) (see box 17)<sup>121</sup>. It looks like the Belgian system suffers from the same weakness as the RIA-system in Ireland experienced: screening SIAs that are shaped by a desire to prove that the threshold for a full SIA is not met, rather than to do a proper evaluation of impacts. The Belgian prime minister declared in his answer of 25 May 2009 to a member of parliament who asked about the added value of SIA that the *"introduction of the SIA test has certainly resulted in raising consciousness of regulators that sustainable development should be a permanent issue"*.

**Box 17: shares of exemption forms, quick scans and full SIA's (2007-2009)**

	Government			
	Verhofstadt II	Verhofstadt III	Leterme	Van Rompuy
	mar 2007- dec 2007	dec 2007-mar 2008	mar 2008-dec2008	dec2008-apr 2009
exemptions	97,7%	96,6%	92,0%	86,8%
quick scans	2,1%	3,4%	8,0%	13,2%
full SIA	0,2% (1)	0,0%	0,0%	0,0%

101. PODDO until now proposed only minor modifications to the SIA-system, in particular the abolishment of the exemption form. As a result, a motivation for the exemption in note to the government itself nowadays is sufficient. We however believe a more thorough reconsideration of the SIA-system is imperative. The federal government could use the international and Flemish RIA-experience and learn from it to build a system that suits the Belgian federal context better than the current SIA (innovate, not imitate, see no. 94). A well-functioning RIA-system at the Belgian federal level and in the other regions is urgent considering the quality of many regulations and the fact that high quality regulation at a certain level of government today in Belgium may easily being compromised by poor regulatory policies and practices at other levels, impacting negatively on public service delivery, citizen's perception, business activities and performance on economic, social and environmental goals<sup>122</sup>.

<sup>120</sup> Parlementaire vraag nr. 031 van 30 april 2009 van de heer Roel Deseyn betreffende testen bij beleidsbeslissingen.

<sup>121</sup> Goggin and Lauder (2008).

<sup>122</sup> On the issue of Multi-level governance issues in regulatory policy, see e.g. OECD (2008d).

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