Implementation of Legislative Evaluation in Europe: Current Models and Trends

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A. Introduction

Regulatory Impact Analysis (RIA) is a method of assessing the costs and consequences of law as enforced and of evaluating how new draft legislation is applied by EU-organs and in institutions of all Member States. This paper intends to present the principles and main outlines of institutionalising RIA. Neither does it aim at giving an exhaustive picture of all models and solutions which have been developed by different countries, nor can it include all Member States.[1] It will, however, shed light on international and European institutions and RIA-models in

- France, the Netherlands, Belgium;
- Germany, Austria, Switzerland;
- Spain, Italy, Greece;
- the Scandinavian countries;
- some countries in transition;
- the Anglo-Saxon countries UK, USA and Canada.

B. Regulatory Impact Assessment – Nature, Importance and Legal Basis

I. What is RIA?

RIA is the systematic evaluation of the effects of norms. Evaluation is a methodological inquiry into the worth or merit of an object. RIA could be: i) prospective evaluation of a draft norm; ii) concurrent in the decision-making

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[1] For more details in comparative perspective A. Kellermann *et al.* (Eds.), Improving the Quality of Legislation in Europe (1998); U. Karpen, *Gesetzesfolgenabschätzung in der Europäischen Union*, 124 Archiv des öffentlichen Rechts 400-422 (1999); U. Karpen (Ed.), Evaluation of Legislation, Proceedings of the Fourth Congress of the European Association of Legislation (EAL) in Warsaw (Poland), June 2000 (2002); Camera dei Deputati, R. Pagano (Ed.), Le Direttive Di Tecnica Legislativa in Europe (1997); U. Karpen, *L'avaluacio de la legislació, in* Parlament de Catalunya (Ed.), Legislator i tècnica legislativa, workshop celebrat al Palau del Parlament el dia 17 de febrer 2003, at 49-72 (2003).

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process for a norm; and iii) retrospective, after the norm has been applied (ex ante – concurrent – ex post-evaluation). The calculation of consequential costs or the prognosis of possible costs have been tried or used already for a longer time, but this concentrated only on the possible effects concerning government and administration. In the course of time, and especially inspired by technology assessment procedures, one has postulated a comprehensive impact assessment which is not only dealing with the effects for state authorities.[2] In fact, it started with the budget procedure, because the budget – after all – is the most important tool to evaluate future costs of governmental activities.

In the meantime, there is consent that the goals and measures of rational evaluation are transparency, accountability, enforceability, technical quality, simplicity, clarity, capacity building, necessity, efficacy, effectiveness, efficiency, consistency, subsidiarity, proportionality, continuous learning and so on.[3] Various methodologies and tools of inquiry are applied: statistics, interviews, workshops, case studies, surveys, document reviews, best practices, focus groups.[4] Everywhere one struggles with the same difficulties: to obtain proper data, looking for adequate methodologies, time and resource demands, lack of political support. Countries consistently report that evaluations were more cost- and resource-intensive than expected. The positive long-term effects of evaluation are, however, not to be overlooked.

II. Institutionalisation of Evaluation

In the last three decades, evaluation has become quite an important element in the legislative practice of many countries. To some extent it has been institutionalised. As for the form of institutionalisation, we may distinguish between procedural measures on the one hand and organisational measures on the other.[5] Procedural measures are, for example, evaluation clauses (obligation to make prospective and/or retrospective evaluations) or obligations to produce periodic reports. Organisational measures concern the creation of institutions, organs, units, independent or as departments and suborgans within institutions, which are specialized in the evaluation of legislation under the separation of powers-principle. The legislature is involved in the RIA-process as well as the executive. The judiciary via court decisions is an important factor of ex post-evaluation. In parliament as well as in the executive branch one may prefer a centralized solution – one ministry or a cabinet-office as agent for RIA, one committee of the house – or a decentralized one – each department writes draft

[2] H. Schäffer, *Towards a More Rational and Responsible Law-Making Process*, *in* Karpen, *supra* note 1, at 113 *et seq.* (143).

[3] L. Mader, *The Evaluation of Draft Laws*, *in* Karpen, *supra* note 1, at 102 *et seq.* (105).

[4] K. Foss, *Paper on Methodologies, Approaches and Experiences with ex-post-Evaluation of Public Consultation Mechanisms in the Regulatory Decision-Making Process*, *in* OECD Public Government and Territorial Development, Public Management Committee (PUMA), Working Party on Regulatory Management and Reform, Expert Meeting, Paris, September 2003 (2003).

[5] Mader, *supra* note 3, at 114; U. Karpen & H. Hof (Eds.), Wirkungsforschung zum Recht IV, Möglichkeiten einer Institutionalisierung der Wirkungskontrolle von Gesetzen (2003).

bills and makes RIA, each committee makes concurrent RIA in its matters. In some countries, RIA is concentrated in the Ministry of Finance and Budget or the Ministry of Justice.[6] In some parliaments RIA is concentrated in the budget-committee or in one legislative committee. Parliamentary auxiliary units may support the substantive as well as – if so implemented – the budget or legislative committee.

It can be useful to bring in outside expertise through experienced consultants. However, the main responsibility needs to lie firmly with the policy officials. These institutions may bring in distance from the actors and problems, expertise, flexibility, credibility and stability.[7] Independent evaluations may be done by universities and other academic or scientific institutions, by audit-offices, ombudsman-institutions and so on. As far as ex post-evaluation is concerned, it is vital that it must not rest with the legislative or executive branch and the judiciary, but that institutions which do apply and obey the law must bring in their observations: business, chambers of commerce, lawyers, even individuals should be heard. There are always obstacles to good RIA: lobbying, need of too much time, resistance from ministerial officials who 'know how we have to do our job', insufficient staff resources, paucity of reliable data. RIA does not work, after all, if there is no strong political will and pressure to improve effectivity and rationality of the law.

III. Legal Anchoring of RIA

The exact detail of the most appropriate form of RIA depends heavily on the constitutional, legal and administrative framework in which it operates. It is therefore not possible to describe here in great detail what system a given state might adopt beyond the main principle. What has to be stressed again, however, is that RIA needs a firm legal anchoring and high level political support and that it must be overseen by a structure dedicated to better regulation and assisted by clear advice, guidelines and training of actors.

Basically, in the hierarchy of norms there are four options to regulate on RIA, each with advantages and disadvantages.[8] First of all, one may legislate on the mandate and details of RIA in the constitution. The advantage is that this option offers great visibility and a strong binding force. The disadvantage is, however, that detailed regulation is impossible, since there is a considerable danger of overloading the constitution. Furthermore, the procedure of amending the constitution is complicated; therefore, this option entails a considerable degree of inflexibility. It is the new Federal Constitution of the Swiss Confederation of 18 April 1999, which in Article 170 provides: "The Federal Parliament shall ensure that the efficacy of measures taken by the Confederation

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[6] S. Farrow & C. Copeland, *Evaluating Central Regulatory Institutions*, OECD (n. 4), Doc. 4 (2003).

[7] F. Gilandi, *Evaluating Independent Regulators, Independent Regulatory Agencies (IRA)*, OECD (n. 4), Doc. 15 (2003).

[8] C. Böhret & G. Konzendorf, Handbuch Gesetzesfolgenabschätzung (GFA) 319 (2001).

is evaluated." Details of organisation, be it the parliament itself which evaluates, be it other agencies, are not regulated upon.[9] The German State of North-Rhine-Westphalia, in December 1997, debated a motion[10] to include into the constitution a more detailed clause on RIA, but did not adopt it in the end.

The second option is to regulate on RIA in a statutory law. This is visible and binding on the legislature, could be amended, however, in the formal procedure of legislation: Bulgaria, since 1973 (as amended in 2003),[11] has a "Law for the Normative Acts". The UK has a "Regulatory Reform Act of 2001", which in chapter 6 (including Explanatory Notes) deals with improving the quality of legislation. The US Congress adopted the "Paper Work Reduction Act of 1995"[12] and the "Unfounded Mandates Reform Act of 1995",[13] which both deal with RIA.

The third option is to regulate on RIA in the rules of procedure and standing orders of parliament and the executive. This allows for a broad and differentiated regulation, in close contact with the working units, and provides for flexibility. The regulation is, however, only binding on the parliament or the executive branch correspondingly. As an example, the Rules of Procedure of the German Parliament in §56a deal with evaluation of technical consequences of legislation. A proposal to add a §56b for RIA in a wider perspective is in a phase of deliberation. §44 of the Common Standing Rules of the German Federal Government's Ministries require a statement on RIA as a mandatory part of the legislative intent.

Finally, there is the option of regulating on RIA in detail in circulars and organisational regulations of a ministry. This allows for a differentiated and broad regulation of details. However, it is binding only for the staff of that particular ministry. In Germany, all ministries have adopted circulars of that kind.

C. Regulatory Impact Analysis (RIA) in International and European Institutions

I. OECD Activities

On the international level, states are recognizing the enormous social and economic significance of the law-making process and are strengthening the joint efforts for deregulation and improvement of the quality of legislation. This includes Regulatory Impact Assessment (RIA).

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[9] Mader, *supra* note 4, at 114, n. 18.
[10] LTDrS 12/2667 of 9 December 1997.
[11] State Gazette 27/3 April 1973; State Gazette 44/17 June 2003.
[12] Public Law 104-13 (at 2441, 22 May 1994), 109 Stat. 153.
[13] 109 Stat. 48.

RIA in OECD activities forms part of a broader concept of 'regulatory governance'. The regulatory policy agenda has been forged from more than 25 different efforts aimed at improving the understanding of the nature of regulation as a tool of government and increasing the effectiveness of that tool. These efforts have broadened and deepened over time, commencing with simple notions of deregulation, before moving up towards concepts of regulatory reform.

The major tools employed to improve the efficiency and effectiveness of regulation include RIA. In the case of consultation and accountability mechanisms, the context is one in which, despite the fact that most OECD countries have long histories in using these tools, substantial changes in their design and implementation are occurring as they are made to serve new purposes and respond to more demanding citizenries. The use of RIA and regulatory alternatives is generally a much more recent phenomenon in OECD countries, but both have spread rapidly in recent years. Approximately half of OECD governments are now using RIA as an integral part of all regulatory development, while a substantial additional number of countries use it in defined circumstances. While the scope and sophistication of RIA is only starting to expand, and though objective standards of analysis are often not high, this tool already has a major influence on policy-making through its promotion of the systematic use of the cost-benefit principle as the underlying framework for analysing regulatory decisions.

In terms of institutional setting, the nature and functioning of regulatory oversight bodies is an essential determinant of the performance of a regulatory policy. As in the case of tools, the current situation is a mixed one. Responsible oversight bodies are present in a majority of OECD countries. However, they still face major challenges in terms of sufficient power, resources and capacities to drive high quality policies.

The starting point of the new approach of OECD activities concerning regulatory governance with a focus on RIA was the "Recommendation of the Council of the OECD on Improving the Quality of Government Regulation" of 1995, including the OECD "Reference Checklist for Regulatory Decision Making".[14] The Checklist has been widely disseminated within member states. In addition, the Public Management Committee (PUMA) in the Public Governance and Territorial Development section of OECD published a report in 1996 on "Regulatory Impact Analysis: Best Practice in OECD Countries", which contains some ten practices.[15] The OECD Report on Regulatory Reform of 1997[16] addresses RIA as well. In the frame of the Stability Pact – Regulatory Governance Initiative in South East Europe, the OECD in 2003 held a seminar on "Regulatory Governance: the Use of RIA to Foster Economic Efficiency and Policy Coherence".[17] This report outlines how Serbia, Estonia, Poland,

[14] OECD/GD (95) 95.
[15] PUMA/Rep/A (96) 1.
[16] Full text in Kellermann, *supra* note 1, at 323 *et seq.*
[17] Sofia, Bulgaria, January 2003.

Macedonia, Romania, the United Kingdom, the Netherlands and Bulgaria organize their RIA activities. The best overview of RIA institutions on the level of the OECD members and the European Union, as well as its Member States was provided by an OECD Expert Meeting on "Regulatory Performance: ex post-Evaluation of Regulatory Policies" held in September 2003 in Paris.[18] The report presents a colourful picture of different models of institutionalising RIA, and forms the basis for the following country studies.

II. The Council of Europe

The Council of Europe, since the late 1990's, started a program of Legal Cooperation in the frame of "Activities for the Development and Consolidation of Democratic Stability" (ADACS). This program intends to give incentives for better legistics in all member countries and aims, in particular, at assisting states in transition to establish their parliamentary institutions. Conferences have been held in Georgia, the Ukraine, Belarus, Albania and so on. They focused predominantly on legislative evaluation.[19] The European Association of Legislation (EAL) contributed significantly to these activities, namely in addressing the constitutional issues of institutionalising RIA functions. The Council of Europe stresses that RIA must give particular attention to the evaluation of the effects of legislation on the exercise of fundamental rights.[20] Definitive judgment on the compatibility of a law with fundamental rights and freedoms often depends on an analysis of its effect in actual practice.

In organizing the evaluation process, the Council held that it is important to take the particular country's political, economic and social peculiarities into account. It would be pointless to try laying down a model evaluation approach. The approach should, however, fulfil a number of essential requirements:

- through the way in which responsibility is shared between the power that approves the evaluation and the power that carries it out, it must be ensured that the evaluation process does not affect the balance between those powers;
- every evaluation body should be composed in a way that guarantees its independence, yet it should be inherently multidisciplinary and with a wide partnership;
- the evaluation body should have extensive access to information;
- wide publicity of the evaluation process should be ensured so that it fully plays its part in the democratic debate.

These are basic requirements of organizing RIA in a democracy based on the separation of powers and the rule of law. Organizing legislative evaluation also

[18] OECD, Paris, 22 September 2003, Documents 1-19.

[19] Council of Europe, Legislative Evaluation, Multilateral Seminar, Sounion/Greece, 14-17 September 1999.

[20] U. Karpen, The Obligation to Evaluate the Effects of Laws on the Exercise of Fundamental Rights, paper delivered at the Council of Europe, Legislative Evaluation, Multilateral Seminar, Sounion/Greece, 14-17 September 1999.

requires the necessary means: effective institutions, trained staff and adequate budgetary allocations, with proper attention to the time frames that such process entails.

III. RIA in European Union Institutions

It is important, at the outset, to understand the different types of community legislation of which Article 249 EC is the foundational provision. Section 1 reads as follows:

> In order to carry out their task in accordance with the provisions of the Treaty, the European Parliament acting jointly with the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.

It is a sole institution – the Commission – which holds the monopoly of legislative initiative. Council and Parliament take the decisions on the basis of the Commission's proposals. All three organs share the legislative duties, but in general take a different approach whereby the Commission acts from the viewpoint of a legislator; Council and Parliament concentrate their efforts on the negotiation of the legislative texts.[21] One may speak of 'diplomatic legislation' and 'intergovernmental negotiation'. In fact, this means that RIA is – to a great extent – carried out by the Commission. It is the Directorates General which apply the checklist, look at budgetary consequences, add to the proposals to Council and Parliament as part of the intent (*exposé des motifs*) a financial statement (*fiche financière*) and an evaluation of the consequences (*fiche d'impact*).[22] The Council and the Parliament have their own legal services, so that all three organs are the guardians of rational effective and efficient legislation.[23] However, the important role of the European Court in ex post-evaluation should not be overlooked.

Taking into account the burden-sharing of the three organs in carrying out RIA, most initiatives for improving legislation and supporting RIA originated in the Commission. In 1996, the Commission Report to the Council "Better Lawmaking" was finalized.[24] The Amsterdam Intergovernmental Conference (1997) issued Declaration No. 39 "On the quality of the drafting of community legislation". In 1998, Parliament, Council and Commission negotiated an "Inter-Institutional Agreement on Common Guidelines for the Quality of Drafting of

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[21] T. Gallas, *Evaluation of Legislation in European Institutions*, *in* Karpen (Ed.), *supra* note 1, at 25 *et seq.*; M. Cutts, E. Wagner, Clarifying EC-Regulations: How European Community Regulations Could Be Written More Clearly, so that Citizens of Member States, Including Lawyers, Would Understand Them Better, Plain Language Commission (2002); Ch. Lange, *Gesetzesfolgenabschätzung auf der Ebene der Europäischen Union*, 16 Zeitschrift für Gesetzgebung (ZG) 268 (2001).

[22] Karpen, *Gesetzesfolgenabschätzung*, *supra* note 1, at 421.

[23] C.W.A. Timmermans, *How To Improve the Quality of Community Legislation: the Viewpoint of the European Commission, in* Kellermann *et al.* (Eds.), *supra* note 1, at 39 *et seq.* (53).

[24] CSE (96) 7 final; full text *in* Kellermann *et al.* (Eds.), *supra* note 1, at 298.

Community Legislation".[25] An important step forward was the Commission's "White Paper" on "European Governance", dealing – *inter alia* – with a more open use of expert advice in the legislative process.[26] In following the decisions of the Lisbon Summit 2000, "Better Regulation Action Plans" were adopted by the Member States (Mandelkern-Report 2001)[27] and then by the Commission (2002).[28] It seems that the Mandelkern-Report, written by a consultation group of high officials of the Member States, currently presents the most important and comprehensive paper on the status of RIA, deregulation, simplification of norms and so on. A special message of the Commission concerning RIA was released in 2002.[29] In 2002, Parliament, Council and Commission negotiated another inter-institutional agreement "On Better Lawmaking".[30] Finally, in 2005, the Commission released a message of the Commission to the Council and Parliament on "Better Regulation for Growth and Workplaces".[31] To implement all these guidelines and standards for European legislation, the Commission since 2002 offers seminars on the quality of legislation for officials from all three organs.

These are general and comprehensive approaches to better EU-regulations. In single sectors, like business, transport and so on, RIAs have been carried out much earlier, namely since the 1980s.[32] In these fields, NGO's – like the Union of Industrial and Employer's Confederations of Europe (UNICE) – contribute considerably to the work of the Commission; they carry out their own RIAs as complementary or alternative.

D. Regulatory Impact Analysis (RIA) in European Countries

I. France, the Netherlands, Belgium

In France[33] the experiment of evaluation was of a centralized and institutionalised nature rather than clearly defined on a methodological basis, appearing to use different types of approaches to determine efficient ways to assess the value

[25] OJ 1999 C 73/1.
[26] Com (2001) 428 final.
[27] Mandelkern Group on Better Regulation, Final Report, November 2001.
[28] M. Björklund, *The European Commission's Work on Judicators of Regulatory Quality, in* PUMA, *supra* note 18, Doc. 14.
[29] Com (2002) 273 final.
[30] OJ 2003 C 321/1.
[31] Com (2005) 97 final.
[32] Björklund, *supra* note 28, at 31; B. Schulte-Brauks, *The European Commission's Business Impact Assessment System, in* Kellermann *et al.* (Eds.), *supra* note 1, at 207 *et seq.*
[33] Ch.-A. Morand, *L'evaluation législative et le droit*, Council of Europe, Legislative Evaluation, Sounion (1999); J. Prada, *The Analysis of the Problem Posed by the Costs of Administrative Requirements, in* Kellermann *et al.* (Eds.), *supra* note 1, at 281.

of public policies (including statutes involved) without distinguishing between evaluation and control.[34]

French evaluation of legislation is influenced by the American standards on Planning, Programming, Budgeting and Execution (PPBS). The French *rationalisation des choix budgétaires* (RCP) was expected to solve the problem of a rationalized public decision, generally with a financial involvement. As far as fields and methods of evaluation and proposals for institutional participation in the evaluation process are concerned, the most influential body is the *Conseil scientifique de l'évaluation* (CSE).[35] The interministerial evaluation of draft laws follows the guidelines of the CSE. The main ex ante-evaluation is prepared in the central planning office of the government (*Commisariat général du plan*). In fact, it modernizes the budget process, and the evaluation gives priority to budgetary costs. The draft with intent and evaluation goes to parliament, to both Houses, National Assembly and Senate. Organisation of units and support bodies within the Assembly changed recently. There has been an 'office parlementaire de l'évaluation de la législation' and an 'office parlementaire de l'évaluation des politiques publiques', which evaluates draft laws in the context of more comprehensive political programs. The final report on evaluation in the Assembly is prepared by the 'mission d'évaluation et de contrôle' inside the *Comité de finance*. The *Comité de législation*, in addition, looks over the drafts. Furthermore, there are additional external bodies involved in the evaluation. This is primarily the auditing institution (*Cour des comptes*) and the 'Conseil Supérieur de l'évaluation'. The opinion of the latter bears the importance of a court decision. To sum up, one may say that in France, basically, all law-making bodies in parliament, government and administration are involved in RIA.

In the Netherlands, like other countries of the western constitutional type, evaluation is the responsibility of the first and second power and the results of legislation are controlled by the courts. The evaluation in this country, however, is shaped by the decisive role of the Dutch Council of State.[36]

Legislative advice is one of the three tasks of the Council of State. Under the present constitution, the Council plays an important advisory and judicial role, the aim of which is to ensure quality, balance and harmony in legislation and to protect the legal status of the citizens. According to section 15 of the Council of State Act, the Council must be consulted on bills, draft orders in council and proposal for the approval of treaties. The recommendations on draft legislation are submitted to the Head of State.

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[34] J.-P. Duprat, *Cost of Legislation for Economy, Bureaucracy and Citizen, in* Karpen, *supra* note 1, at 203 *et seq.*

[35] For details: CSF, Petit guide de l'évaluation des politiques publiques (1996).

[36] B. Dorbeck-Jung, *Evaluation of Draft Legislation by the Dutch Council of the State, in* Karpen, *supra* note 1, at 85 *et seq.*; more by J. H. van Kreveld, *The Main Elements of a General Policy on Legislative Quality: Dutch Experiences, in* Kellermann *et al.* (Eds.), *supra* note 1, at 85 *et seq.*; J. Hottus, *The Use of Regulatory Impact Analysis in the Netherlands, in* Sofia, *supra* note 17, at 72; A. Nijsen, Evaluating One Stop shops, A Case Study, OECD Paris (n. 18) Doc. 18 (2003).

The first evaluation of the draft is prepared by the responsible minister. Then it goes to the Minister of Justice. In his office the department of legislative quality has an overall responsibility for the quality of legislation in general. The activities of this department are strongly supported by the Dutch Academy of Legislation. Finally, the draft is approved by the Cabinet, before it goes to the Council of State. Its report is published, together with the draft bill, before it is discussed in parliament.

Thus, the formal stages of evaluation in the Netherlands are the following:[37]

- proposed legislation
- selection by working group
- regulation is listed
- Council of Ministers adopts list
- draft regulation
- legislative appraisal and quality control
- Council of Ministers decides on regulation
- Council of State gives advice
- Parliament adopts
- Head of State approves
- publication.

In Belgium it is, according to the principles of the constitution, up to parliament and not to government or its advisory commissions to give the final evaluative political judgment on draft bills. There are finally five levels to guarantee the quality of the process:

- concrete legislative projects are proposed;
- intra-ministerial quality management;
- cooperation between ministries;
- parliamentary discussions;
- 'outside' quality control by advisory bodies.

In Belgium, like in other countries, evaluation developed from the budget-process: "from policy budget to policy annual account."

[37] S. Fornisma, *Assesment of Draft Legislation in the Netherlands*, *in* Kellermann *et al.* (Eds.), *supra* note 1, at 213 *et seq.* (212).

II. Germany, Switzerland, Austria

As far as the German Constitution[38], the 'Basic Law', is concerned, evaluation of law is nowhere mentioned explicitly. However, the Constitutional Court interpreted the rule of law principle, which is explicitly mentioned in Article 20 of the Constitution as such, that for the legislator it is mandatory in legislating to obey the principles of effectiveness, efficiency, and proportionality. There are some cases in which the Federal Constitutional Court held that laws, as enacted by parliament, did not meet these standards and principles. Consequently, these laws had to be amended.

As far as the constitutions of the 16 states in the Federation are concerned, the situation is the same. In 1998, there was a motion in the parliament of the state of North-Rhine-Westphalia to include a clause concerning evaluation. This was lengthly discussed and intensively studied, but in the very end failed, since the majority of the house did not want to change the constitution.

As far as statutory law in federal and state legislation is concerned, times are over when the legislative intent of a draft mentioned simply 'cost of the draft: zero'. Today usually the legislative intent goes more into detail. This is sort of prospective evaluation. Very many statutes include mandates to government to report on the implementation and application of the law. These may be general mandates to report within a given time, for example after two years, four years and so on. Very often laws include special obligations for the government, special perspectives which have to be taken into account in reporting to parliament. This is true, for instance, for the federal law on the environment, which mentions explicitly chemical and biological aspects which have to be taken into account. This is also true for the laws on subventions, on renting flats, on the social security law of the federation, the law of protection of animals and so on.

Of course, rules of procedure of all parliaments provide for prospective and retrospective evaluation. The committees for reporting to the plenum of the parliaments make a thorough ex ante-evaluation. A common instrument of ex post-evaluation are ordinary questions which are discussed in plenary sessions and interpellations of the individual deputy. The country has a tradition of having many interpellations so that almost no aspect of any law is not evaluated ex post.

The major work of evaluation in Germany[39] is done in Federal and State Governments. §44 of the Common Standing Rules of Federal Ministries requires an evaluation for each draft from the responsible Ministry, based on

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[38] Karpen, *in* Karpen, *supra* note 1, at 71 *et seq.*

[39] C. Böhret & G. Konzendorf, Leitfaden zur Gesetzesfolgenabschätzung, Moderner Staat – Moderne Verwaltung (2000); C. Böhret & G. Konzendorf, Handbuch Gesetzesfolgenabschätzung (GFA), Gesetze, Verordnungen, Verwaltungsvorschriften (2001); P.-Ch. Müller-Graff, *The Quality of European and National Legislation, The German Experiences and Initiatives*, *in* Kellermann *et al.* (Eds.), *supra* note 1, at 111 *et seq.;* Regulatory Reform in Germany, Draft Report on Government and Capacity to Assure High Quality Regulation, OECD GoV/Puma/Rep. (2002) 2, of 8 September 2003.

general guidelines of the Minister of Finance and on suggestions of the Minister of Interior. The evaluation must focus on consequences of the law in general, in particular on financial consequences, namely for the economy and small and medium sized enterprises. The Minister of Economy and the Minister of Technology must be heard, as well as the relevant associations. §56a of the Procedural Rules of the Federal Parliament requires that the House Committee on Research and Technology must present – if this is the topic of a draft bill – an evaluation of technological consequences. The committee may give a mandate for this evaluation to scientific institutions, which happens frequently. For the past couple of years, an addition to the Procedural Rules of the Parliament has been discussed in the committee for Procedures to include a new §56b on general evaluation. According to this proposal, every responsible committee may require an evaluation of the draft from the staff of the Parliament. The staff then may ask for the support of external scientific institutions. According to discussions on the evaluation process in Parliament, it is suggested that committees and the plenary do not restrict themselves to check the RIAs of the government, but rather are put into a position to make alternative, or at least additional, RIAs.

Switzerland,[40] since a 1999 amendment of her constitution, makes RIA mandatory (Section 170): "The Federal Parliament shall ensure that the efficacy of measures taken by the confederation is evaluated." The country has a long tradition in rationalizing legislation. As a first step, in 1987, a *Nationales Forschungsprogramm 'Wirksamkeit staatlicher Maßnahmen'* (National Research Program "Efficiency of Governmental Measures", NFP) was installed. As a next step, the Minister of Justice in 1987 called upon a working group "Gesetzesevaluation" (AGEVAL), with representatives of the confederation, the cantons and scientific institutions. Finally, in the last decade of the 20th century, instruments of New Public Management (NPM) were introduced on a large scale.

Ex post-evaluation has been in use for a long time. Legal rules for ex ante-evaluation are numerous on the federal and cantonal level. The institutionalisation of ex ante-evaluation is relatively weak. This is due to the fact that prospective evaluation of draft laws was and is regarded as an essential part of the legislative procedure, which is regulated in detail. There is a Centre for Evaluation of Technology Consequences.[41] Otherwise, the practical use of prospective evaluation does not follow the scientific and academic standard of legislation.[42] It is, however, undoubted that operative responsibility for RIA should rest with government, ministries and the administration. This is a guarantee for uniformity of legislation, professional drafting and clear responsibility. Furthermore, this allows for evaluation as a permanent learning process

[40] D. Kettiger, *Gesetzesevaluation in der Schweiz: Stand – Einbettung in das politisch-administrative System – Ausblick*, *in* H. Schäffer (Ed.), Evaluierung der Gesetze, Gesetzesfolgenabschätzung in Österreich und im benachbarten Ausland (2005), at 47 *et seq.*

[41] http://www.ta.swiss.ch.

[42] Kettiger, *supra* note 40, at 62.

and exchange of views and experiences of administration, science and politics. Parliament has – of course – to finally guarantee the efficiency of state action. In contrast to other countries, the opinion prevails in Switzerland that parliament should not carry out its own RIAs, although it is certainly entitled to do so.[43] The establishment of a special independent organ for legislative evaluation is under consideration. This could be a Confederative Evaluation Conference. On the other hand, the Confederative Audit System is so well established that there are arguments to include its organs into the evaluation process.

In Austria[44] – as in other countries – RIA in a broader sense developed from budget planning and calculating financial costs of legislation. Only the amendment of the Standing Order of the National Council, in 1961, created a provision according to which 'independent drafts' (i.e. draft bills presented by a parliamentary committee or by a group of deputies), if it would cause a new financial burden for the budget, must contain a proposal on how to cover the additional expenses (§28). In such cases – according to the original version of this provision, the opinion of the budget committee also had to be obtained.[45] By an amendment of the Standing Order in 1975 the latter provision was deleted. Since then, the committee dealing with the substantive law itself has to test whether the proposal for financial coverage is convincing. This is an ex ante-evaluation: as of 1970 and 1979, respectively, the Austrian legislative guidelines concerning the drafting of government draft bills (ministerial drafts) prescribed a statement of the financial consequences. But it took some more years until the internal guidelines of the administration had been superseded by a legal provision. A general obligation for calculation of financial effects of new laws has been introduced by the Federal Law concerning the Management of the Federal Budget.[46] According to §15, each draft shall contain considerations and data about the necessity and the benefits of the legal measures, about presumable costs, the effects to be expected within the next three years, and about the financial coverage. The developments accelerated when the Federal Minister of Federalism and Administrative Reform in 1992 published a study entitled "What are the costs of a (statute) law?" This of course, was linked to the Maastricht Treaty of 1992, in which the Member States agreed on the convergence criteria, not least to avoid excessive public deficit and excessive indebtedness. This required RIA. Evaluation has to be done with the consultation mechanism between the federation, the states and the municipalities to ensure that all levels of government and administration stay within the financial frame. For the financial evaluation, the Federal Minister of Finance issued guidelines.[47] The OECD Report on Regulatory Reform of 1997[48] had an impact

[43] Kettiger, *supra* note 40, at 68 with further references.

[44] B. Binder, V. Enzenhofer, F. Strehl & B. Leite, Rechnung und Abschätzung der Folgekosten von Gesetzen in Österreich, unter Berücksichtigung ausländischer Maßnahmen und Erfahrungen (1999); Schäffer, *supra* note 40.

[45] H. Schäffer, *Towards a More Rational and Responsible Law-Making Process*, *in* Karpen, *supra* note 1, at 133 *et seq.*

[46] ÖBGB 1986, 213.

[47] ÖBGB II 1999/50.

on evaluation procedures in Austria. In 1998, the Federal Chancellery Service (constitutional law) distributed the report including the checklist to the Federal Ministries. Since then, each time a government bill is drafted, there has to be an examination, which repercussions are to be expected for the employment situation and the economy in Austria. Not only budgetary consequences are to be listed, but also possible burdens and reliefs for enterprises, clients, citizens and administrative authorities from the viewpoints of administration, prices and expenses.

In Austria, evaluation is primarily carried out in the ministerial bureaucracy. Centralized and independent institutions do not exist. The Federal Ministry of Justice and its section of law-making projects predominantly fulfill the role of a consultant. It is advocated[49] to improve the possibility of parliament to control the implementation of its laws. This means an expansion of staff and equipment of the scientific services. Good and sufficient evaluation depends on political culture. Evaluation in the gravitation field of the first and second power, in Austria as well as in other states, cannot bring about the 'perfect law', but can contribute to improving the (relative) goodness of laws. Scientific advice can never substitute political decision.

III. Spain, Italy, Greece

The evaluation of laws in Spain is heavily influenced by the Latin tradition and the legal culture and experiences in the German-speaking countries.[50] The country, however, follows with great interest the British and US ways of drafting bills and acts, although the Spanish pre-legislative techniques, and in particular: ex ante-evaluation, owe much – some[51] would say "too much" – to the decentralized system. There is no central parliamentary Council office as the British Parliament has and the bureaucracies of the Ministries draft the 'anteproyetos de ley', which are eventually approved by the Spanish cabinet and sent to the Spanish parliament (*Congreso de los Diputados*).[52]

The Spanish Directives of Legislative Drafting (*Directrices sobre la forma y estructura de los anteproyetos de ley*) of 1992 only cover the formal and conceptual aspects of legislation.[53] In 1993, the Spanish Government, supported

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[48] *Supra* note 16.

[49] Schäffer, *supra* note 45, at 154.

[50] M.J. Montoro Chiner, La evaluación de las normas, Racionalidad y eficiencia (2001), at 79 *et seq.*; P. Salvador Coderch, *Technica legislativa y su desarollo Actual*, *in* GRETEL (Grupo de Estudios de Técnica Legislativa) (Ed.), Curso de technica legislativa (1989), at 12 *et seq.*

[51] P. Salvador Coderch, *Comments*, *in* Kellermann *et al.* (Eds.), *supra* note 1, at 107 *et seq.*

[52] F. S. Moreno, Generalitat de Catalunya, Tècnica Normativa, El procediment intern d'elaboració de las normas, Barcelona (1992), at 7 *et seq.*; at 175 *et seq.*

[53] GRETEL (Grupo de Estudios de Técnica Legislativa) (Ed.), La Forma de las Leyes (1986), at 10 *et seq*; M.J. Montoro Chiner, Test de la practicabilidad de las leyes, Adecuación al ordamiento y factibilidad de las Normas, Serie de Tècnica Legislativa II (1989), at 76 *et seq.*; M.J. Montoro Chiner, *Seguretat Jurídica i tècnica legislativa*, *in* Legislador, *supra* note 1, at 52 *et seq.*

by Catalan legislators,[54] approved a questionnaire which was, in essence, a checklist inspired by the German "Blaue Prüffragen" (1986). This checklist has been very useful in order to make Spanish politicians and civil servants more conscious about the need to control the flood of new regulations. Those two guidelines were prepared by the Ministry of the Presidency. The Spanish Ministry of Justice is – and has always been – the residual Ministry of Legislation, because it is in charge of drafting and modifying the main codes: the Civil and Criminal Code, the Code of Commerce and so on. So the current situation is that Spain has two administrative centres in charge of controlling the decentralized system of drafting pre-legislative texts and other general regulation. In 1995-96 the Ministry of Economy and Public Finance created a special committee on Economic Law and consulted almost all the relevant cultural, social and economic actors of society.

In recent years, parliament plays a growing role in legislation. As in other countries, in view of law inflation, there is a discussion on the convenience of going back to a policy of codification, of emphasizing the quality of legislation and having a central organ of codification and consolidation. This issue is controversial because that would mean that an administrative governmental entity would have a scrutinizing eye on the always intense and complex relationship between the central government and the autonomous ones.[55]

In Italy, the first chamber of Parliament, the Camera Dei Deputati, has been working for years to introduce and improve consultation and evaluation procedures.[56] The Camera successfully tried to balance the legislation techniques' efforts of the Government, which established a Central Office for the coordination of legislative initiative and regulatory activity of ministries,[57] including legislative guidelines.[58] The Camera uses her own checklist and guidelines.[59]

The problem of evaluation was first raised in Parliament as an accessory aspect of ensuring financial coverage of bills. It was subsequently extended to encompass the development of a consistent general budgetary policy through annual budget measures aimed at reducing the deficit. It is now a consolidated instrument for verifying the consistency of individual measures with the general framework of objectives and constraints. In this framework, the incorporation of evaluation methods within formal parliamentary procedures has changed their very role: no longer limited to confining the scope of legislation within technical constraints, they now form part of the political relationship between the supreme constitutional bodies of the state, including the two houses of

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[54] I.E. Pitarch, *El procediment legislativ del parlament*, *in* J. Sobrequés i Callicó (Ed.), El Parlament de Catalunya (2001), at 259 *et seq.*; Generalitat de Catalunya (Ed.), Manual d'elaboració de les normas de la Generalitat de Catalunya 0009-001/92 (1992).

[55] Salvador, *supra* note 51, at 109.

[56] A. Palanza, Evaluation of Legislation in Italy, *in* Karpen, *supra* note 1, at 31 *et seq.*; F. Capelli, *Comments*, *in* Kellerman *et al.* (Eds.), *supra* note 1, at 129.

[57] Law on the Organisation of the Presidency of the Council, Law 400/88, Art. 23.

[58] Presidenza del Consiglio dei Ministri: Guida alla spermimentazione dell' analisi di impatto della regolamentazione (AIRI), 2000.

[59] Pagano, *supra* note 1, Vol. II, at 2059 *et seq.*

Parliament and the Government, and play a key role in the political dialogue between the majority and the opposition.

Parliamentary evaluation procedures do not merely consider individual measures: they seek to establish a link between the single legislative provision and the global framework. Accordingly, the evaluation process in a body with such general and political responsibility as the Parliament considers the corpus of existing legislation and its overall effects as a key parameter of any decision.

The very development of legislative evaluation in the Italian Parliament explains why the issue is of such broad and complex significance when it is performed within a body with extensive political responsibility. In Italy, the initial use of evaluation techniques in ascertaining the financial impact of measures has recently been extended to other aspects of the relationship between Parliament and Government that determine the consistency and effectiveness of legislation.

Special pre-legislative consultation and evaluation procedures have been introduced in the Chamber's Rules of Procedure, based on the model of those employed in financial impact assessment. The new procedures also ensure that Parliament has access to essential, focused information on the key aspects of each measure and on the ways such measures interact with existing legislation, i.e. within an increasingly vast and confused legislative framework.

Such technical information meets a new political need: understanding what is going on and reconstructing a reliable, synthetic and verifiable picture of the context in which each issue under consideration is located. Unlike past procedures where the main political issues were addressed from a sectoral and national perspective, today the context is so broad and so varied that it breaches the limits of the knowledge of a single political body, which is normally driven by the interests it represents. Pre-legislative evaluation provides political actors, whether the Prime Minister or ordinary members of parliament, with a reference framework within which they can conduct their evaluations of legislation, which are global in scope.

In short, parliaments are in the midst of a far-reaching transformation that is forcing them to adopt specialised tools to understand the correlations and impact of individual legislative measures in a context that is far too complex to control without their aid.

Thus, parliaments find themselves competing from a relatively weak position with highly experienced external powers, some of which have acquired legitimacy based on criteria other than political affirmation. The scope of political action is therefore circumscribed by technical, or apparently technical, constraints. As a result, the political world has had to learn how to study and analyse such constraints as a prerequisite for solving them and generating multiple alternative approaches, which are technically compatible but highly diverse in political terms.

The 'Europeanisation' and internationalisation of economies, together with the technical complexity of so many issues, have sharply curtailed the decision-making scope of parliaments. The development of legislative policy is increasingly delegated to technical and administrative bodies, both in the European

Union and at the national level. Parliaments can reassert control and influence if they require such bodies to provide a verifiable technical demonstration of the consistency and effectiveness of legislation during the pre- and post-legislative stages.

The issue goes beyond parliaments to include the role of politics in general and democracy itself in countering the increasingly pervasive influence of oligarchic and technocratic forces.

Technical evaluation, therefore, has a profound impact on the very functioning of democracy, an influence and constitutional importance that has not been fully appreciated. A significant indicator of the importance of the issue is that Italy is considering the possibility of introducing a constitutional measure on the principles that all regulation-producing bodies must follow in order to ensure the transparency of the pre-legislative process and the verification of the technical evaluations they perform. Conceived in such a way, transparency becomes a new approach to guaranteeing fundamental democratic principles.

In Greece, the issue of evaluating draft laws is closely linked with strong efforts to introduce e-government, namely e-democracy. The "Information Society" program strives for allowing as much participation of citizens in decision-making processes, including access to parliament and deputies.[60] This adds elements of direct democracy to the system of representative parliamentary models of democracy.

IV. Sweden, Denmark, Finland

In Sweden, as in other countries, the legislative process normally includes comprehensive investigatory work. The process often starts with the setting up of a governmental committee.[61] Sometimes, however, a working group within the ministry concerned will be sufficient.

When a committee is set up, it might be authorized to work rather freely, but it might also be governed by strict terms of reference or directives. The composition of the committee will vary depending on what matter is at issue. Sometimes a one-man committee will be enough, but in most cases the committee will be composed of several members. The group of members will often include experts – legal experts as well as experts in the special field at issue – and also members of the parliament and other people representing ordinary citizens.

With respect to experts, it is, of course, desirable that they are as independent as possible. Since, in many fields, the opinion among experts varies, it

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[60] K. Tsimaras, *An Opening to the New Technologies: the E-Government in Greece*, *in* U. Karpen (Ed.), E-Government (2005) , at 209-211; E. Stylianidis, *E-Democracy and the Role of Citizens in the Decision Making*, *in* Karpen (Ed.), E-Government (2005), at 57 *et seq.* (629) (Legislation database); P. Karkatsoulis, The Social Context of the Evaluation of Regulation and Policies, Council of Europe, Sounion (1999), at 7.

[61] S. Magnusson, *Analysis and Prognosis of Draft Legislation as an Instrument to Improve the Acceptance of Norms*, *in* Karpen, *supra* note 1, at 170 *et seq.*; G. Schäder, *Comments*, *in* Kellermann *et al.* (Eds.), *supra* note 1, at 101 *et seq.*

might be appropriate to attach several experts, representing different views, to the committee.

As to how the committee work should be carried out, the committee will often have a certain freedom. Sometimes, however, the directive given to the committee contains some statements on this point. Normally, it is stipulated in the directive when the work of the committee shall be finished. In Sweden, committees will seldom be allowed to work for more than two years.

The committee work will usually include extensive studies and inquiries. The committee may, for instance, send out questionnaires and arrange oral hearings. The committee may also make study tours, in Sweden and abroad.

Before proposing a law (a new act or changes to an existing act) the committee must estimate what would be the cost effects of the proposal. This is, in fact, one of the most important tasks of the committee. In principle, committees are forbidden to propose anything which would entail costs. It must, in any case, be shown how the costs, if any, shall be covered. If a committee proposes a law which implies the setting up of a new authority with the task to supervise the application of the law, it might be appropriate to introduce a system of fees which will cover the costs for the authority.

When the committee has finished its work and published its report, the ministry concerned will normally refer the report to a number of authorities and organisations for consideration. Here, the number and type of addressees will vary depending on the matter dealt with in the report. The actors on the labour-market will often be heard, as well as authorities and organisations representing consumer interests. If the committee report involves questions of a legal nature, it will be referred to a number of courts and university faculties. In cases where, according to the report, an existing authority shall be vested with a certain task, it is, of course, important to give this authority the opportunity to express its opinion.

After all observations on the report have been submitted to the ministry, there will be further studies and considerations within the ministry or ministries concerned. Sometimes, complementary investigations will be needed. A ministry might, for instance, arrange a public hearing where the matters in question are discussed. The government will then, on the basis of all this material, take its position. At the end, it may or may not be decided that a bill including a draft law shall be sent to the parliament.

During recent years, attention has more and more become focused on the importance to formulate law provisions in a clear and simple way. To achieve this, linguistic experts are often consulted when a draft is prepared. In Sweden, a system has been introduced meaning that every draft law must be scrutinized by a special department in the Ministry of Justice, consisting of linguistic experts, before the draft is finalized and sent to the parliament.

As a rule, a bill containing a law can not be sent to the Swedish parliament unless it has first been submitted to the so-called Law Council. This is an independent authority composed of three judges from the highest courts, the Supreme Court and the Supreme Administrative Court. The task of the Law Council is, in the first place, to examine such drafts as have been prepared by

the government. Occasionally law provisions are drafted directly in the parliament, following, for instance a motion by one of the members of the parliament. Such drafts may be sent to the Law Council by the parliament committee in question.

One important feature of the Law Council's work is to consider whether a draft is compatible with fundamental laws and with the legal system in general. In so doing, the Law Council has, by tradition, very much focused on the relation between the draft in question and the Swedish constitution. Ever since Sweden joined the European Union in 1995, it has become increasingly important to examine whether a proposal is in line with Community law.

Besides checking that there is no conflict with other parts of the legal system, the Law Council has to examine how the different provisions of the draft law relate to each other. The Council shall also pay attention to the need for legal security. Finally, the Council has to consider whether the proposal is framed so as to satisfy its purposes and what problems are likely to arise when the law is applied.

The views expressed by the Law Council are of an advisory nature. They are not binding on the government or the parliament. The Council's advice will, however, normally be accepted. That is especially true in cases where the Council has stated that the draft in question is against the constitution or Community law. The draft will then, in most cases, be withdrawn or revised.

After the Law Council has sent its report to the ministry in question, the ministry will, on the basis of the report, finish the bill and submit it to the parliament. The bill will then be handled by one of the standing committees of the parliament. Even there, careful examination will take place before the intended law is adopted. If the proposed law has been much amended by the parliamentary committee, it might be sent to the Law Council for further consideration.

As far as ex post-evaluation of laws is concerned, Sweden has no special constitutional court, vested with the task to examine laws which have been enacted to see whether they are in line with the constitution and other existing laws. To a certain extent, the Law Council fulfills a similar task.

Since there is no special constitutional court, it is for the ordinary courts to execute an ex post-control. In Sweden, all courts, district courts as well as courts on a higher level, have the authority to set aside any provision which, according to the court's finding, is in conflict with constitutional law or another superior statute. This follows from one of the articles of the constitution. If the provision in question has been approved by the parliament or by the government, it may be set aside only if the conflict is manifest. However, the prerequisite that the conflict shall be manifest does not apply to cases where European Community law is at issue. Such law will always take precedence over Swedish domestic law.

After a law has been in force for some time, studies might be initiated in order to find out if the law is efficient or not. Such studies will, in the first place, be performed within the ministry or ministries concerned. Ex post-evaluation might, however, also be entrusted to an existing authority or to a

special committee. Authorities with the task to supervise a law are, of course, under a duty to report whether the law functions well or not and propose appropriate changes.

Other control organs performing evaluation of legislation are the parliamentary ombudsmen, as well as the auditors of the parliament and the Chancellor of Justice.

In Sweden organized business plays a significant role in RIA.[62] It proposed to the Parliament (Rijksdag) some quality enhancing measures:

- setting up a body with overall responsibility for checking RIAs;
- installing a comprehensive uniform system of RIA;
- enlarge the scope of sanctions;
- to have a senior official for RIA at every public agency;
- to improve ecological consultations with business sector;
- to report publicly on RIA.

The part of businesses and their associations is similarly strong in RIA in Denmark.[63] There are Business Test Panels. More than 500 businesses are represented in standing panels.[64] They evaluate namely the administrative consequences of draft bills.

Finland has a decentralised system of drafting, although with strong coordination from the Centre.[65] Drafts are written in the ministries by full-time law drafters (as educated by the Ministry of Justice). The drafter seeks expertise from the Supreme Court, the Supreme Administrative Court and other courts as well as from associations and parties involved in the matter of the draft bill. Then the draft goes to the Minister of Justice, who cooperates with the Council of State's Bureau of Legislative Inspection. In former times the draft then was submitted to an independent review by judges of the two Supreme Courts. This procedure has been abolished. Instead, the Minister of Justice seeks close contact with the Minister of Finance and the Prime Minister's Office. In fact, there is a Central Steering Group on the Preparation and Management of a Law Drafting (Permanent Secretary's Group on Law Drafting).[66] Finally, the draft is approved by the cabinet and then goes to parliament.

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[62] L. Palm, *Board of Industry and Commerce for Better Regulation (NNR)*, *in* OECD (n. 4), Doc. 8 (2003); *How High is the Quality of the Swedish Central Government's Regulatory Impact Analysis in the Business Sector?, The NNR Regulation Juricator for 2003*, *in* OECD (n. 4), Doc. 9 (2003).

[63] For Norway, see OECD (n. 4), Doc. 3a (2003), at 12; for Estonia see OECD (Sofia), *supra* note 17, at 53; P. Järvelaid, *Enlargement of the European Union in the 21st century – Either integration or Moving on Parallel Ways? (Estonian view)*, *in* Karpen, *supra* note 1, at 159 *et seq.*

[64] K. Andreassen, *in* OECD (n. 4), Doc. 10 (2003), at 11.

[65] K. Rissanen, *Comments*, *in* Kellermann *et al.* (Eds.), *supra* note 1, at 139 *et seq.*

[66] OECD (n. 4), Doc. 3a (2003), at 7.

V. Countries in Transition: Poland, Bulgaria, Romania

The OECD as well as the Council of Europe and the European Union assisted Central and East-European countries in the transformation process. One strong point was, and is, to build up parliaments, including administrative and service staff, to educate deputies and to enable parliaments to carry out RIA. There are some common problems:[67]

- underestimation of modern management methods;
- lack of horizontal cooperation, resortism, lack of coordination;
- preference of legal solutions;
- concentration on legal problems;
- lack of public involvement;
- lack of impact assessment.

Advisory meetings, conferences, workshops, working groups, and specialized offices successfully try to cope with these demands.

RIA was introduced in Poland in 2001 and since then is an integral part of the law-making process.[68] Earlier law-making procedures concentrated mostly on the legal quality of the drafts. In order to improve the substantial quality of the drafts, RIA was included into these procedures. The law-making process involves the Government (Council of Ministers), the Parliament and the President. Since the initiative of legislation rests with government, RIA was introduced on that level. Drafts are prepared by the ministers within their responsibilities. In addition, a Government Legislation Centre (GLC) was established, which is independent from the ministers and reports directly to the Prime Minister. It coordinates the drafting of laws and subordinate acts until adoption by the Council of Ministers and monitors the interministerial consultations in order to ensure high legal and legislative quality of the drafts prepared by the government. For that reason, it seemed reasonable to entrust to the GLC the additional task of coordinating the preparation of RIAs. In consequence, the GLC monitors all drafts in regard to the legal and legislative quality and gives opinions in regard to RIAs, in order to ensure the high quality of drafts in both aspects (legal and substantial).

In addition, a Government Centre for Strategic Studies (GCSS) in the RIA system was formed. GCSS is a public body that prepares its own impact assessment of prepared drafts. Deciding to prepare a RIA of the draft, the GCSS

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[67] D. Trnka, *RIA: Why it is Useful for Countries in Transition*, *in* OECD (Sofia), *supra* note 17, at 42 *et seq.*

[68] M. Szwarc, *Regulatory Impact Assessment in the Governmental Law-Making Process in Poland*, *in* OECD (Sofia), *supra* note 17, at 54 *et seq.*; M. Graniecki, *Evaluation of Poland's Legislation in the Process of Legal Adjustment (Basic Problems)*, *in* Karpen, *supra* note 1, at 59 *et seq.*; S. Wronkowska-Jáskiewicz, *Criteria of Evaluation of Law*, *in* Karpen, *supra* note 1, at 89 *et seq.*

considers the important and long-term impact of the act on society and economy. It can also prepare a RIA when the Prime Minister asks for it. The Council of Ministers decided to cover all drafts or normative acts (binding) prepared by the Council, Prime Minister and Ministers. The Council of Ministers decided to adopt the minimum of four areas of interest:

- impact on public finance (including central budget and local governments' budgets);
- on labour market;
- on internal and external competitiveness (here the short term and long term impact on business is also considered);
- on the situation and development of the regions.

When other impacts are identified, they must also be considered, in particular social impacts such as impact on health, environment, quality of life improvement and so on. Public consultation is an integral part of RIAs. The results of the consultation should also be presented in RIA. The RIA system was prepared and presented to the Council of Ministers for acceptance in 2001 by the Team for Legal Regulations Quality (established in 2000). It is the advisory body to the Council of Ministers, presided by the Minister responsible for economy. It is an interministerial body, consisting of 20 high ranking officers, which helps to ensure political support. The Team coordinates the implementation of the OECD recommendations (resulting from the Regulatory Review Report published in July 2001), as well as publication and propagation of the knowledge on the RIA (principles, methodology). The Team for Legal Regulations Quality organised two training sessions for civil servants (directly involved in drafting in ministries) and business organisations (to gain their acceptance for the RIA system and to encourage greater involvement in the consultation process). A guidebook on RIA principles and methods has been prepared. GLC is coordinating the preparation of RIAs by the ministers, in particular by giving opinions on the scope of RIA and the scope of public consultations undertaken by the ministers. The RIA unit was established in the GLC in November 2001, employing five highly qualified people (four economists and one lawyer).

GLC's experience as the coordinating body of the RIA system shows that the following aims should be realised:

- to enhance the conviction of civil servants directly involved in drafting the benefits of the RIA system;
- to persuade civil servants that they should use methods, data, capabilities, consultation procedures available in their ministries and build on them;
- to bring methods of economic analysis to the persons directly involved in the drafting;
- to make clear that effective implementation needs long term and systematic efforts.

In order to realise those aims, the GLC proposed training seminars, approved by the Team for Legal Regulations Quality. The detailed program was prepared and is realised in cooperation with the Government Legislation Centre, the Ministry of Economy, Employment and Social Policy (which assures the technical assistance) and the Government Centre of Strategic Studies.

Implementation of the RIA system brought great progress. Acceptance for the system is increasing among the civil servants of the government administration (great interest in knowledge and training); in ministries (i.e. wide and practical use of the Internet as a tool for public consultation and information about RIAs); and also in the Polish Parliament (RIAs accompanying the government draft laws are widely appreciated as the best tool to accomplish the aims).

Bulgaria is one of the few countries, which adopted a Law for Normative Acts.[69] According to its Article 26, drafting and RIA are carried out by the Ressort-Minister as designated by the Council of Ministers. The drafting Minister, of course, communicates with all other Ministries. According to Article 31, the National Assembly, which legislates on the initiative of the Cabinet, implements a permanent commission which works on legislative RIAs.

In Romania – as in all other countries in transformation – the RIA process is one of the main tools to enable legislators to support progress of the (new) market economy.[70] An important topic for Regulatory Impact Analysis is the cost of the regulatory process in relation with its cycle. An inventory of the main cost categories for each stage of the regulatory process was presented. A case study of RIA was developed by a research centre in cooperation with the Ministry of Development and Prognosis and the Chamber of Commerce and Industry of Romania and Bucharest, assessing the efficiency of the regulation simplifying the registration and authorisation formalities of the companies in Romania. The tool used for the law assessment was the cost-benefit analysis. The presentation stressed the following issues:

- the old and new procedure;
- the general scheme used for cost-benefit analysis;
- the cost structure (borne by entrepreneurs, the Government and the economy);
- indicators and relations between them.

A range of proposals for improving the regulatory reform are based on some main categories to be taken into consideration:

- speeding-up the legislative process;

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[69] State Gaz. 27/1973,; suppl. and amended in State Gaz. 55/2003. More detailed K. Stranchev, *Experience with Regulatory Reform: Bulgaria*, *in* OECD (Sofia), *supra* note 17, at 86 *et seq.*

[70] C. Rotaru, *Romania's Progress in Regulatory Reform*, *in* OECD (Sofia), *supra* note 17, at 59 *et seq.*; C. Simion, *The Key Priorities of the Romanian Macroeconomic Policy's Reform*, *in* OECD (Sofia), *supra* note 17, at 61 *et seq.*

- improvement of Government accountability;
- establishment of clear methodologies;
- development of an institutional framework for RIA;
- information exchange for using best practices.

It is significant to the Romanian RIA process that a couple of institutions are involved in the consultation mechanisms. As the coordinator of the monitoring process for implementation of the Action Plan aiming to improve the business climate, the Ministry of Development and Prognosis conducts the consultation activity with both governmental and non-governmental partners:

- Romanian Academy;
- Centre of Economic Policies;
- General Union of Engineers;
- Alliance of Romanian Economic Development;
- National Association of Exporters and Importers;
- Trade Union representatives;
- the RIA Research Centre.

VI. UK, USA, Canada

RIA in the United Kingdom[71] is imprinted by centralisation. The Regulatory Impact Unit (RIU) in the Cabinet Office is responsible for evaluation of all draft bills, which are initiated by the government. The reason why the UK is very advanced in RIA-techniques and procedures is that Prime Minister Margaret Thatcher in 1979 started an extensive program for modernising the administration and privatising public activities.[72] From 1985-1996 government carried out a comprehensive program of law consolidation. More than 1000 laws were repealed or simplified. This took place under the Deregulation and Contracting Out Act of 1994. It was reflected in Parliament by the establishment of the Commons Deregulation Committee and the Lords Deregulated Powers and Deregulation Committee. Currently, RIA takes place in the framework of the Regulatory Reform Act of 2001,[73] namely chapter 6, with Explanatory Notes.

[71] T.St. John & N. Bates, *The Evaluation of Legislation, in* Karpen, *supra* note 1, at 116 *et seq.*; M. Cutts, Lucid Law, Final Report on an Independent Research Project to Rewrite and Redesign a UK Act of Parliament, The Sequel to "Unspeakable Acts", Plain Language Commission (1998); E. Parker, *Analysing Costs and Benefits in the UK's Regulatory Impact Assessment Process, in* OECD (Sofia), *supra* note 17, at 71; E. Humpherson & M. Courtney, *UK Evaluation of the Quality and Effectiveness of RIAs, in* OECD (n. 4), Doc. 7 (2003).

[72] C. Harlow & R. Rawlings, Law and Administration (1997), at 305 *et seq.*

[73] Deregulation and Contracting Out Act of 1994; Cabinet Office: Good Policy Making, A Guide to Regulatory Impact Assessment (1994).

Ex ante-evaluation of drafts starts in the promoting department after consultation with interested parties and collection of specialist advice. Then the draft is submitted to the Regulatory Impact Unit. The Regulatory Impact Unit is based at the centre of Government in the Cabinet Office. Its role is to work with other government departments, agencies and regulators to help ensure that regulations are fair and effective. Regulations are needed to protect people at work, consumers and the environment, but it is important to strike the right balance so that they do not impose unnecessary burdens on businesses or stifle growth.

The Unit's work involves:

- promoting Principles of Good Regulation;
- identifying risk and assessing options to deal with it;
- supporting the Better Regulation Task Force;
- removing unnecessary, outmoded or overly-burdensome legislation through the powers as enacted in the Regulatory Reform Act;
- improving the assessment, drawing up and enforcement of regulation, taking particular account of the needs of small businesses.

In addition to taking an overview of regulations which impact business, the RIU also examines any impact on the voluntary sector and charities. And a new team investigates ways of reducing bureaucracy and red tape in the public sector.

In both Houses of Parliament, RIA is carried out by subject-related scrutiny committees which – as in most other countries – reflect the executive functions or select committees. If the draft has a wider scope, specialist advisers do participate, but drafts in the legislative tradition in general are drawn up in a narrow spectrum. The Public Accounts Committee of Parliament (PAC) always takes part in the RIA frame by the ministries which undertake research. The quality of retrospective evaluation depends, of course, on the administrative, statistical and consultative arrangements. Judicial review by the courts ('the Judge over your shoulder') is an important tool of RIA. The National Audit Office (NAO) is supported in its RIA work by the Cabinet Office's Regulatory Impact Unit.

The United States of America joined the UK in applying an extensive and deep-drilling RIA of a centralised nature. Since its inception in the 1970s,[74] RIA has grown enormously in scope and sophistication, and no institution has contributed more to this trend than the executive branch of the US government. The growth of RIA paralleled the substantial growth of 'social' regulation that began in the United States in the 1970s. Social regulation was concerned with workplace safety and health, environmental quality, exposure to hazardous chemicals, unsafe consumer products, and like concerns. Ironically, as social regulation waxed, economic regulation waned, with deregulation of airlines, trucking,

[74] W. Harrington & R. D. Morgenstern, *Evaluating Regulatory Impact Analysis*, *in* OECD (n. 4), Doc. 6 (2003), namely Appendix.

railroads, banking, and, currently in progress, electricity. Greater scrutiny of regulation would probably have occurred in any case, but its development was greatly enhanced by the long period of 'split government' in the US, in which Congress was in the hands of one party and the presidency belonged to the other. Between 1969 and 2001 power was split except for four years of the Carter Administration (1977-1981) and the first two years of the Clinton Administration (1991-1993). Split government meant a wider-than-normal separation between the executive and legislative branches of the federal government at a time when Congress was beginning to take a more activist approach to environmental, health, and safety regulation. The Democratic Congress would propose sweeping legislation directing executive agencies such as the Environmental Protection Agency (EPA) or Occupational Safety and Health Administration (OSHA) to implement detailed regulations, in some case by industrial sector and in others by product. These agencies, in effect, had to serve two masters: the Congress and the President, and were further under the watchful eye of advocacy groups supporting or opposing the new legislation and hoping to influence its implementation.

Because presidents did not have complete control over the agendas of executive agencies, they have sought to put the brakes on this regulatory process since the 1970s by requiring a review by economists of the costs, benefits and effects of all regulation. The key event was Executive Order (EO) 12291, issued on 17 February 1981, shortly after President Reagan took office, announcing new rules governing the issuance of regulations by federal agencies. EO 12291 introduced two revolutionary innovations into federal rulemaking. First, it required federal agencies to produce, before 'major' proposed regulation could appear in the Federal Register, an assessment of the benefits and costs of the proposal and alternatives to it. Before the Reagan Administration, economic assessment of regulations was concerned not with benefits and costs, but with 'economic impacts', which included the effect of the regulation on inflation, employment, and the profits of affected industries. In addition, EO 12291 required centralized review of regulations and the accompanying RIA by an oversight group, the Office of Information and Regulatory Affairs (OIRA), housed in the Office of Management and Budget.

The regulatory review process in the US is now governed by EO 12866, issued by Bill Clinton on 30 September 1993. The main changes to the Reagan procedure were to increase the public's accessibility to the process, to add requirements to examine distributional consequences of rules, and to require only that the benefits of proposed regulations have to 'justify' the costs, not 'outweigh' the costs as it had been in EO 12291. Presumably, this last change in particular makes it easier to proceed with the regulation even if measured benefits do not exceed measured costs.

For the most part, however, the Democrat Clinton retained and streamlined the procedures put in place by the Republican Reagan. In other words, recent presidents of both parties support the regulatory review requirements, including the RIA. It has ceased to be the partisan political issue it once was.

The current RIA process is characterized by the strict separation of powers principle as vested in the US Constitution.[75] Congress has two Houses with substantive committees which carry out RIA. On the executive side it is the President, who with the support of the Office of Management and Budget (OMB), prepares draft laws and carries out RIA. The President de jure may not initiate legislation, but de facto does.

As far as RIA in Congress is concerned, each legislative committee and subcommittee typically has a staff answerable to the chair. In the United States, of course, there are effectively only two political parties, and the minority party will usually be allocated staff positions accountable to an identified 'ranking' minority member of the committee or subcommittee. In addition there are various nonpartisan bodies reporting jointly to the two houses of Congress that have special responsibilities in the evaluation of legislation. Three of these are particularly important.

First, the General Accounting Office (GAO), created by the Budget and Accounting Act of 1921 and renamed Government Accountability Office (GAO) in 2004, audits and assesses programs and the work of executive branch agencies. Some of the agency's specific projects are required by law, and some are undertaken pursuant to decisions made within the GAO itself, but most of the GAO's work is done at the behest of committees and members of Congress. Requests by committee chairs and ranking minority members of committees have first call on GAO resources.

GAO is headed by the Comptroller General, who is appointed for a single fifteen year term. While the President makes the initial appointment subject to senatorial approval, the Comptroller General and the GAO are thereafter responsible directly to the Congress. The GAO staff includes people with training in a large variety of disciplines, including accounting, law, public administration, economics, and even the natural sciences. In addition it can hire specialised experts. The agency produces more than a thousand reports a year. It has offices in various parts of the country, and does much of its work in the field. In addition to its evaluative activity, the agency works to provide uniform accounting and other reporting standards and good management procedures for federal agencies. Some of this is done in collaboration with the Treasury Department and the Office of Management and Budget. GAO periodically produces reports on programs that pose substantial 'risk'.

The second evaluative body in the legislative branch is the Congressional Budget Office (CBO), created by legislation in 1974. CBO is even more directly under the control of Congress. The CBO Director is appointed by the presiding officer of the House (known as the 'Speaker') and the President pro tempore of the Senate, each of whom is elected by the chamber in question. In making the selection they are to consult with the respective budget committee. The director's term of office is four years, with no limit on the number of terms

[75] R.W. Bennett, *Evaluation of Legislation for the United States Congress*, *in* Karpen, *supra* note 1, at 44 *et seq.*

he may serve. Either house may then remove the Director by resolution. The CBO staff exceeds two hundred, and is dominated by trained economists.

CBO's work is focused specifically on the budgetary process, and as a result it is required by legislation to give priority to requests from the House and Senate Budget Committees. But CBO also does work at the request of the committees in the two houses concerned with revenue production (the House Committee on Ways and Means and the Senate Committee on Finance), and sometimes for other committees. CBO may even prepare cost estimates for bills that individual members are considering. In all events, CBO attempts to steer clear of policy proposals.

The third support agency is the Congressional Research Service (CRS), which undertakes research for committees and members of Congress. CRS work is often focused on drafting or on legislative history, but it can include analysis of legislative issues and proposals. It operates through six divisions (American Law; Domestic Social Policy; Foreign Affairs, Defense and Trade; Government and Finance; Information Research; and Resources, Science, and Industry). In contrast to the GAO, CRS's work is largely based on what can be found in books. CRS thus operates in the Library of Congress. Its director is appointed by the Librarian of Congress, while the Librarian is a presidential appointee subject to senatorial approval.

As far as RIA in the Executive Branch is concerned, the President plays a very important role in the passage of ordinary legislation. The Federal Government is an extraordinary complex array of departments and agencies. Within these agencies, a great deal of evaluative activity no doubt proceeds invisibly, as a simple corollary of effective management. Since the budgetary consequences of a law – like in all other countries – play an important role in RIA, the President's principle agent in preparing bills is the Office of Management and Budget.[76] Executive branch agencies are forbidden by law from submitting budgetary proposals directly to Congress. In any event, Congress is not bound in any way by the presidential budgetary recommendations, and it has developed its own complex process for production of the budget and RIA. The Budget Resolution is a product of the respective budget committees, or of a conference committee (with representation of each house) if the two committees produce different versions of the resolution.

Canada's RIA instruments and procedures are influenced by the USA.[77] In the 1990s, the Canadian government set up a Government Regulation Reform Program, which affected not only the executive, but the legislative as well. The 1995-2000 Regulatory Policy included Regulatory Process Management Standards (RPMS) and led to efforts in 'smart legislation'. In preparing draft laws, the Department of Justice started in the 1980s to use 'legislation desk-books' which describe in detail contents and procedures of legislation, including

[76] For a learned inspection of the US-RIA process see "external evaluation": Union of Industrial and Employer's Confederations of Europe (UNICE), Assessing the Economic Impact of Legislation, Fact-Finding Trip to Washington (1997).

[77] H. Quesnel, *in* OECD (n. 1), Doc. 4 (2003).

RIA.[78] Canada's legislature – following American experiences – started a major project of sunset-legislation which led to a significantly better quality of the body of law of the country,[79] although discussions showed that a too simplistic tool of self-destructive legislation cannot solve complex problems. This is a finding that applies – more or less – to all instruments of RIA.

[78] Department of Justice, Canada, Ottawa, Legislation Deskbook (loose leaf), 1st ed. 1986; Federal Regulation Manual, March 1998.

[79] R.C. Bergeron, *Cost-Reduction through Management of Law, One Trap to Avoid: Sunset Legislation*, *in* Karpen, *supra* note 1, at 221 *et seq.*

The Constitution in Private Relations: Expanding Constitutionalism

edited by András Sajó and Renáta Uitz
Central European University, Budapest

According to a classical tenet of constitutionalism, the constitution and constitutional law address state actors. In the 20th century the concept of 'third party effect' emerged, finding that constitutional rights and principles apply in private relations as well. This raises various questions, such as what are the jurisprudential and political reasons for this change? Is this concept brought about by the welfare state? What are its practical consequences? Is individual liberty enhanced when the state claims to promote a right? How do such understandings influence the role of constitutional and supreme courts? How does the trend influence government spending and redistribution? How does the US 'state action' doctrine compare to the third party/horizontal effect doctrine familiar in other domestic and international jurisdictions? This book addresses these issues and provides an in-depth analysis of jurisprudence, placing problems in a comparative legal and theoretical perspective.

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