Implementation of Legislative Evaluation in Europe: Current Models and Trends

Introduction

Regulatory Impact Analysis (RIA) as a method of assessing the costs and consequences of law as enforced and evaluating 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.

I. Regulatory Impact Assessment – nature, importance and legal basis

1. 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 prospective, evaluation of a draft norm, concurrent, in the decision-making process for a norm, and retrospective, after the norm has been applied (\textit{ex ante} – \textit{concurrent} – \textit{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 it 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. 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. Various methodologies and tools of inquiry are applied: statistics, interviews, workshops, case studies, surveys, document reviews, best practices, focus groups.

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.

2. Institutionalisation of evaluation

In the last three decades, evaluation has become a quite important element in the legislative practice of many countries. To some extent it has been institutionalized. As for the form of institutionalisation, we may distinguish between procedural measures on the one hand and organisational measures on the other. 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 for 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 by court decisions is an important factor of ex post-evaluation. In parliament as well as in the executive branch

2 Heinz Schäffer, Towards a more rational and responsible law-making process, in: EAL (n. 1) pp. 113 et seq. (143).
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 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. 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 experience through experienced consultants, whereas 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. 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, use 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 effectiveness and rationality of the law.

3. 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. 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 a detailed regulation is impossible, since there is a considerable
danger of overloading the constitution. Furthermore, the procedure of amend-
ing the constitution is complicated; so this option forms a considerable degree
of inflexibility. It is the new Federal Constitution of the Swiss Confederation
of April 18, 1999, which in art. 170 provides: »The Federal Parliament shall
ensure that the efficacy of measures taken by the Confederation is evaluated.«
Details of organisation, be it the parliament itself which evaluates, be it other
agencies, are not regulated upon.\footnote{9} The German State of North-Rhine-West-
phalia in December 1997 debated a motion\footnote{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 proce-
dure of legislation: Bulgaria, since 1973 (as amended in 2003)\footnote{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«\footnote{12} and the »Unfounded Mandates Reform Act of 1995«\footnote{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 differen-
tiated 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 Diet in § 56a deal with evaluation of technical consequences of
legislation. A draft of adding 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 makes a RIA-Part 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, but is, however, binding only for the staff of that
particular ministry. In Germany, e.g., all ministries have adopted circulars of
that kind.

\footnote{9} Mader (n. 4), p. 114, n. 18.
\footnote{13} 109 Stat. 48.
II. Regulatory Impact Analysis (RIA) in International and European Institutions

4. OECD activities

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

RIA in OECD activities forms part of a broader concept of »regulatory govern-
ance«. The regulatory policy agenda has been forged from more than 25 of 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 that period of time, commencing with sim-
ple notions of deregulation, before moving up towards concepts of regulatory reform.

The major tools employed to improve the efficiency and effectiveness of reg-
ulation include RIA. In the case of consultation and accountability mecha-
nisms, 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 alter-
natives is generally a much more recent phenomenon in OECD countries, but both have spread rapidly in recent years. Approximately half of OECD gov-
ernments are now using RIA as an integral part of all regulatory development, while a substantial additional number of countries use it in defined circum-
stances. 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 system-
atic use of the benefit-cost-principle as the underlying framework for analys-
ing regulatory decisions.

In terms of institutional setting, the nature and functioning of regulatory over-
sight bodies is an essential determinant of the performance of a regulatory pol-
icy. 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 capaci-
ties to drive the high quality policies.

The starting point of the new approach of OECD activities concerning regula-
tory governance with a strong point in 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

https://doi.org/10.5771/9783845212074
Generiert durch IP '54.70.40.11', am 02.09.2020, 18:09:37.
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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. The OECD Report on Regulatory Reform of 1997 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«. This report registers how Serbia, Estonia, Poland, Macedonia, Romania, the United Kingdom, the Netherlands and Bulgaria organize their RIA activities. The best overview of RIA institutions on OECD members’ and the European Union’s as well as its member states’ level provides an OECD Expert Meeting on »Regulatory Performance: ex post-Evaluation of Regulatory Policies« held in September 2003 in Paris. The report presents a colourful picture of different models of institutionalising RIA, which forms the basis for the following country studies.

5. 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 logistics 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. 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. 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.

14 OECD/GD (95) 95.
15 PUMA/Rep/A (96) 1.
16 Full text in Asser (n. 1), pp. 323 et seq.
19 Council of Europe, Legislative Evaluation, Multilateral Seminar, Sounion/Greece, 14-17 September 1999.
account. It would be pointless to try laying down a model evaluation approach. The approach should, however, fulfil a number of essential requirements:

- although the way in which responsibility is shared between the power that approves the evaluation and the power that carries it out, it must be made clear that, by no means, should the evaluation process affect the balance between those powers;
- every evaluation body should be composed as to guarantee its independence, yet that it is 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 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 requires the necessary means: effective institutions, trained staff and adequate budgetary allocations, with proper attention to the time frames that such process entails.

6. RIA in European Union Institutions

It is important, at the outset, to understand the different types of community legislation of which art. 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 Commission’s proposals. All three organs share the legislative duties, but in general take a different approach, whereas 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 budget-

21 Tito Gallas, Evaluation of Legislation in European Institutions, in Karpen (n. 1), pp. 25 et seq.; Martin Cutts, Emma 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; Christian Lange, Gesetzesfolgenabschätzung auf der Ebene der Europäischen Union, in: Zeitschrift für Gesetzgebung (ZG), 2001, p. 268 et seq.
arian 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«). The Council and the Parliament have their own legal services, so that all three organs are the guardians of rational effective and efficient legislation. 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. 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 Community Legislation. 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. In following the decisions of the Lisbon Summit 2000, »Better Regulation Action Plans« were adopted by the member states (Mandelkern-Report [2001]) and then by the Commission (2002). 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. Finally, in 2005 the Commission released a message of the Commission to the Council and Parliament on »Better Regulation for Growth and Workplaces«. 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

24 CSE (96) 7 final; full text in Asser (n. 1), p. 298.
much earlier, namely since the 1980’s.\textsuperscript{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.

III. Regulatory Impact Analysis (RIA) in European Countries

7. France, the Netherlands, Belgium

In France\textsuperscript{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 of public policies (including statutes involved) without distinguishing between evaluation and control.\textsuperscript{34}

French evaluation of legislation is influenced by the American 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’evaluation (CSF).\textsuperscript{35}

The interministerial evaluation of draft laws follows the guidelines of 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 as 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 evaluate draft laws more 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

\textsuperscript{32} Mona Björklund (n. 28), p. 31; Schulte-Brauks, The European Commission’s Business Impact Assessment System, in: Asser (n. 1), pp. 207 et seq.
\textsuperscript{33} Charles-Albert Morand, L’evaluation legislative et le droit, Council of Europe, Legislative Evaluation, Sounion, 1999; Jean Prada, The analysis of the problem posed by the costs of administrative requirements, in: Asser (n. 1), p. 281.
\textsuperscript{34} Jean-Pierre Duprat, Cost of legislation for economy, bureaucracy and citizen, in: Karpen (n. 1), pp. 203 et seq.
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 legislation.

In the Netherlands, like in all 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 imprinted by the decisive role of the Dutch Council of State.\textsuperscript{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.

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. This department’s activities 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. His 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:\textsuperscript{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 in detail, evaluation developed from the budget-process: »From policy budget to policy annual account.«

8. 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 state 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 that the Federal Constitutional Court held laws as enacted by parliament not meeting these principles and consequently had to be amended.

As far as the constitutions of the 16 member 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 amend 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. This may be general mandates to report within a given time, lets say 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 of environment which mentions explicitly chemical and biological aspects which have to be taken into account. This is also true for the laws for subventions, for renting flats, for the

\(^{38}\) Karpen, in: Karpen (n. 1), pp. 71 et seq.
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 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\(^3\) 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 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 economy and small and medium size business. 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 Diet 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 to evaluate to scientific institutions, which happens frequently. For the past couple of years, an enlargement of the Procedural Rules of the Diet is 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 Diet. 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 don’t 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,\(^4\) 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 is in use for a long time. Legal rules for ex ante-evaluation are numerous on a 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 upon 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 logistics.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 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 carry out its own RIAs.43 It is considered to establish a special organ for evaluation which should be independent. 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 Austria44 – 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 legally provided number of deputies), if it would cause a new financial burden for the budget, such a draft 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 also had to be asked for.45 By an amendment of the Standing Order in 1975 the latter provision was omitted. Since then the committee dealing with

41 <http://www.ta.swiss.ch>
42 Kettiger (n. 40), p. 62.
43 Kettiger (n. 40), p. 68 with further references.
a substantive law itself has to test whether the proposal for financial coverage is convincing. This is an *ex ante*-evaluation: After the Austrian legislative guidelines (1970 and 1979) concerning the drafting of government draft bills (ministerial drafts) had prescribed a statement of the financial consequences. But it took some more years until the internal guidelines of the administration have 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.\(^\text{46}\) 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. Things developed drastically, 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 at least to avoid excessive public deficit and excessive indebtedness. This required RIA. Evaluation also was necessary to carry on with the consultation mechanism between the federation, the states and the municipalities to stay within the financial frame. For the financial evaluation, the Federal Minister of Finance issued guidelines.\(^\text{47}\) The OECD Report on Regulatory Reform of 1997\(^\text{48}\) had an impact on evaluation procedures in Austria. In 1998 the Federal Chancellery Service (constitutional law) distributed the report including the checklist to the Federal Ministries. On the occasion of each government draft bill since then shall be examined, 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 fulfil the role of a consultant. It is advocated\(^\text{49}\) 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

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\(^{45}\) Heinz Schäffer, Towards a more rational and responsible law-making process, in: Karpen (n. 1), pp. 133 et seq.  
\(^{46}\) ÖBGB 1986, 213.  
\(^{47}\) ÖBGB II 1999/50.  
\(^{48}\) n. 16.  
\(^{49}\) Schäffer (n. 45), p. 154.
law», but can contribute to improving the (relative) goodness of laws. Scientific advice an never substitute political decision.

9. 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. 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 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). 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. In 1993 the Spanish Government, supported by Catalan legislators, approved a questionnaire which was, in essence, a checklist as 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.

51 Pablo Salvador Coderch, Comments, in: Asser (n. 1), pp. 107 et seq.
52 Fernande S. Moreno, Generalitat de Catalunya, Tècnica Normativa, El procediment intern d’elaboració de les normas, Barcelona, 1992, pp. 7 et seq., pp. 175 et seq.
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.  

In Italy, the first chamber of Parliament, the Camera Dei Deputati, has been working for years to introduce and improve consultation and evaluation procedures. The Camera thus 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, including legistic guidelines. The Camera uses her own checklist and guidelines.

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 government, including the two houses of 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 therefore explains why the issue is of such broad and complex significance when it is performed within a body with extensive political responsibility.

55 Salvador (n. 51) p. 109.
57 Law on the Organisation of the Presidency of the Council, law 400/88, art. 23.
59 Pagano (n. 1), vol. II, pp. 2059 et seq.
In Italy, the initial use of evaluation techniques in ascertaining the financial impact of measures has recently been extended to the 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 therefore meets a new political need: understanding what is going on and reconstructing a reliable, synthetic and verifiable picture of the context within 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. Prelegislative 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, we are in the midst of a far-reaching transformation that is forcing us 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. Thus conceived, such 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. This adds elements of direct democracy to the system of representative parliamentary models of democracy.

10. Sweden, Denmark, Finland

In Sweden, as in other countries, the legislation process normally includes a comprehensive investigatory work. The process often starts with the setting up of a governmental committee. 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 might

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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 of 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, within Sweden and abroad.

Before proposing a law (a new act or changes of 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 addresses will vary depending of what matter is 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. It might, thus, 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 within 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 cannot be sent to 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. However, now and then law provisions are drafted within the parliament, following, for instance a motion by one of the members of the parliament. Such draft might be sent to the Law Council from 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. On this point, the Law Council has, by tradition, very much focused on the relation between the draft in question and the Swedish constitution. However, after Sweden in 1995 became a member of the European Union, 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, thus, 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 examinations 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 and see if they are in line with the constitution and other existing laws. To a certain extent, the Law Council just mentioned fulfils 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 of 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. It proposes 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 as well strong in RIA in Denmark. There are Business Test Panels. More than 500 businesses are represented in standing panels. They evaluate namely the administrative consequences of draft bills.

Finland has a decentralised system of drafting, although with a strong coordination from the Centre. 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.

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63 For Norway, see OECD (n. 4), Doc. 3a, p. 12; for Estonia see OECD (Sofia) (n. 17), p. 53; Peteer Järvelaid, Enlargement of the European Union in the 21st century- Either integration or moving on parallel ways? (Estonian view), in: Karpen (n. 1), pp. 159 et seq.

64 Katrine Andreassen, in: OECD (n. 4), Doc. 10, p. 11.

65 Kirsti Rissanen, Comments, in: Asser (n. 1), pp. 139 et seq.
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). Finally, the draft is approved by the cabinet and then goes to parliament.

11. Countries in transition: Poland, Bulgaria, Romania

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

- 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, 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. 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. RIA was introduced in Poland in 2001 and since then is an integral part of the law-making process. 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.

66 OECD (n. 4), Doc. 3a, p. 7.
67 Daniel Trnka, RIA: Why it is useful for countries in transition, OECD (Sofia) (n. 17), pp. 42 et seq.
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 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). The 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

https://doi.org/10.5771/9783845212074
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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 the 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. 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. 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

70 Cornelia Rotaru, Romania’s Progress in Regulatory Reform, in OECD (Sofia) (n. 17), pp. 59 et seq.; Cornelia Simion, The Key Priorities of the Romanian Macroeconomic Policy’s Reform, in OECD (Sofia) (n. 17), pp. 61 et seq.
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;
- 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 coordinator of monitoring process for implementation of the Action Plan aiming to improve business climate, Ministry of Development and Prognosis exercising 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.
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 administration and privatising public activities.\(^{72}\) From 1985-96 government carried out a comprehensive program of law consolidation. As a result one could wipe out or simplify more than 1000 laws. 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 within the framework of the Regulatory Reform Act of 2001\(^{73}\), namely chapter 6, with Explanatory Notes.

*Ex ante*-evaluation of drafts starts in the promoting department after consultation with parties as affected and 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 the Principles of Good Regulation;
- identifying risk and assessing options to deal with it;
- supporting the Better Regulation Task Force;
- removing unnecessary, outmoded or over-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.

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In addition to taking an overview of regulations which impact on business, the RIU also examines the 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 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) in its RIA work is supported by the Cabinet Office’s Regulatory Impact Unit.

The United States of America join the UK in applying an extensive and deep-drilling RIA of a centralised nature. Since its inception\(^\text{74}\) in the 1970s 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, railroads, banking, and, currently in progress, electricity. Greater scrutiny of regulations 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 fur-

ther under the watchful eye of advocacy groups supporting or opposing the new legislation and hoping to influence its implementation. Because presidents didn’t have complete control over the agendas of executive agencies, since the 1970s they have sought to put the brakes on this regulatory process 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 February 17, 1981 shortly after President Reagan took office, announcing new rules governing the issuance of regulations by federal agencies. E.O. 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 the inflation, employment, and the profits of affected industries. In addition, E.O. 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 E.O. 12866, issued by Bill Clinton on September 30, 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 E.O. 12291. Presumably, this last change in particular would make 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 imprinted 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. But in addition there are various nonpartisan bodies jointly responsible 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 192, 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 physical 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 work 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 (discussed below under subsection E, the Executive Branch). GAO periodically produces reports on programs that pose substantial »risk«.

The second evaluative body in the legislative branch is the Congressional Budget Office (»CBO«), also created by the 1974 legislation. 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 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, as possible, 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 within the Library of Congress. Its direct 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, of course, 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 budgetarian consequences of a law – like in all other countries – play an important role in RIA, the President’s principle agents in preparing bills is the Office of Management and Budget. 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. 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 Regular Policy included Regulatory Process Management Standards (RPMS) and led to efforts in »smart legislation«. In preparing draft laws the Department of Justice since the 1980s used »legislation deskbooks« which describe in detail contents and procedures of legislation, including RIA. 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, although discussions showed that a too

77 Hélène Quesnel, in: OECD (n. 1), Doc. 4.
simplistic tool of self-destructive legislation cannot solve complex problems. This is a finding that applies – more or less – to all instruments of RIA.

79 Robert C. Bergeron, Cost-reduction through management of law, One trap to avoid: Sunset Legislation, in: Karpen (n. 1), pp. 221 et seq.