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Case studies of the European Legislative Evaluation

2008. 7. 11.

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Program

Discussant Prof. Dr. Hong, Wan-Sik
(Konkuk University)

Translator Dr. Kang, Wu-Ye
(Korea Institute of Criminology)

12:00 ~ 13:30 Lunch Time

13:30 ~ 15:00

Session 2 **“Evaluation of Legislation in Switzerland”**

Presenter Dr. Werner Bussmann
(Swiss Federal Office of Justice)

Discussant Prof. Dr. Seong, Hong-Jae
(National Police University)

Translator Dr. Kang, Joo-Young
(Korea Legislation Research Institute)

15:00 ~ 15:20 Coffee Break

15:20 ~ 16:50

Session 3 **“Evaluation of Legislation in Germany”**

Presenter Prof. Dr. Choi, Yoon-Cheol
(Konkuk University)

Discussant Dr. Kim, Su-Yong
(Korea Legislation Research Institute)

16:50 ~ 18:00 Part III : Panel Discussion

18:00 ~ Part IV : Closing Remark & Farewell Ceremony

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Impact Assessment in the European Union

Impact Assessment in the European Union

Dr. Craig Robertson

(Senior Lecturer, European Institute of Public Administration Maastricht¹⁾)

'There is nothing a politician likes so little as to be well informed; it makes decision-making so complex and difficult' - John Maynard Keynes

Introduction

As if to disprove the view expressed by Keynes, in June 2002 the politicians who make up the College of Commissioners of the European Union chose to introduce an integrated Impact Assessment (IA) process, which would require the ex-ante examination of potential social, economic and environmental impacts of European Commission proposals. It would also involve a test against the principles of subsidiarity and proportionality, as well as a requirement to consult with stakeholders as part of the overall analysis. Since then, IA has become the cornerstone of the European Commission's efforts to deliver on its commitments to the shared objectives

1) The author worked as a UK Seconded National Expert in the Secretariat General of the European Commission from 2003 to 2007, during which time he worked in the Strategic Planning and Programming Unit and the Better Regulation and Impact Assessment Unit. His area of responsibility included the 2005 revision of the Impact Assessment Guidelines; the negotiation of the 2006 Inter-Institutional 'Common Approach to Impact Assessment'; and the setting-up of the Impact Assessment Board in 2006.

(shared by the Member States and institutions of the EU) to simplify and improve the regulatory environment for Europe's citizens and businesses.

Although sustained and high-level interest in the topic of Better Regulation (BR) within the European Commission essentially began with the re-launch of the Lisbon Strategy under the Barroso Commission²⁾, its roots can be traced much further back in time.³⁾ This is important to bear in mind, since failure to do so could lead to the impression being given that Better Regulation, and its associated actions, is driven solely by the desire to minimise or reduce the costs to business of compliance with EU regulation. Although of fundamental importance to the EU Better Regulation agenda, the so-called 'competitiveness' dimension is only part of the picture.

As far back as the European Council⁴⁾ of 1992, there have been high-level demands for the simplification and improvement of the regulatory environment for Europe's citizens and businesses. However, in spite of some initiatives to simplify the existing body of regulation (such as SLIM - Simpler Legislation for the Internal Market; and BEST - Business Environment Simplification Task Force), it took the 2000 Lisbon Strategy to

2) European Commission, COM(2005)97, *Better Regulation for Growth and Jobs in the European Union*, Brussels: March 2005.

3) See Meuwese (2008), *Op. cit.* and L Allio, 'Better Regulation and Impact Assessment in the European Commission', in *Regulatory Impact Assessment: Towards Better Regulation?*, C Kirkpatrick and D Parker (eds.), Cheltenham: Edward Elgar, 2007, for useful and brief histories of the development of Better Regulation in the European Commission.

4) The meeting of Heads of State and Government of the Member States of the European Union.

really start the process in earnest, with its call for a ‘strategy for further coordinated action to simplify the regulatory environment’.⁵⁾ The reflections on how to operationalise this new demand for coordinated action to improve the regulatory environment quickly came to be part of the Commission’s reflections on how to react to the many Europeans who felt ‘alienated from the Union’s work’.⁶⁾ Consideration of the Governance dimension added to the political context in which the Better Regulation actions were being developed. The context was further enriched by the formalisation of the EU’s Sustainable Development Strategy at the Gothenburg European Council in June 2001. A further significant ingredient was provided by the report on Better Regulation prepared by representatives of the Member States. This ‘Mandelkern Report’⁷⁾, named after the French Chairman of the group of national experts, would play an important part in the development of the Commission’s proposed Better Regulation activities since ‘for the first time all Member States agreed a significant BR agenda’.⁸⁾

All of this work informed the Commission’s approach to the preparation of a set of Communications, which were adopted by the College of Commissioners in June 2002.⁹⁾ So what we can see from the context

5) Presidency Conclusions, Lisbon European Council, 23-24 March 2000.

6) European Commission, COM(2001)428, *European Governance: A White Paper*, Brussels: July 2001.

7) Endorsed by the Laeken European Council in December 2001.

8) L Allio, *Op. cit.*, pp.78.

9) European Commission, COM(2002)275, *European Governance: Better Lawmaking*, Brussels: June 2002; European Commission, COM(2002)278, *Action Plan “Simplifying and Improving the Regulatory Environment*, Brussels: June 2002; European Commission, COM(2002)276,

within which the integrated approach to impact assessment was introduced in 2002, is that Better Regulation can be seen as having two dimensions. It can be viewed in terms of ‘outputs’, i.e. in the production of ‘better regulations’ (or proposals for legislation/regulation from the Commission) or an overall improvement/simplification of the existing body of EU regulation. Then it can also be seen as a process - of ‘regulating better’ or better policy-making. IA addresses both dimensions of Better Regulation.

Clearly the aim is to ensure that the Commission thinks carefully about the possible consequences of the actions it is proposing to take in order to ensure that regulation is meeting its objectives in an effective and efficient manner, while minimising costs and negative impacts on citizens and businesses. However, the process of conducting an IA also involves some important aspects which are more concerned with the process of policy-making.

The Development of Integrated IA in the European Commission

At the time of its introduction in 2002, the IA system consisted of a two-step approach. All Commission Directorates-General (DGs) were required to prepare a Preliminary IA (PIA) for all initiatives or proposals submitted for inclusion in the Annual Policy Strategy (APS) or the Commission

Impact Assessment, Brussels: June 2002; European Commission, COM(2002)704, *Towards a reinforced culture of consultation and dialogue - General Principles and Minimum Standards for Consultation of Interested Parties by the Commission*, Brussels: June 2002; and European Commission, COM(2002)713, *The Collection and Use of Expertise by the Commission: Principles and Guidelines*, Brussels: June 2002.

Legislative and Work Programme (CLWP). On the basis of the information included in the PIA, a political decision would be taken as to which of the proposals were likely to have the greatest potential impacts or consequences. The proposals falling into this category would then be required to carry out an Extended Impact Assessment, which would examine economic, social and environmental impacts; consider questions of subsidiarity and proportionality; and seek to integrate the views or data provided by other DGs and stakeholders. These Extended Impact Assessments would then be made available to political decision-makers to allow them to make a decision after full consideration of the likely consequences.

The early results following the introduction of the new system were, to say the least, mixed. The quality of Extended Impact Assessments tended to be poor, and the two-step process was judged to be too open to the possibility of 'horse-trading'.¹⁰⁾ As scrutiny of the Commission's Better Regulation activities by key stakeholders and Member States intensified, the Secretariat General of the Commission established an ad hoc Impact Assessment Working Group of Commission DGs. This group would be responsible for 'taking stock' of the early lessons and to offer suggestions on how the system could be improved. The ultimate outcome of the group's work was the preparation of a revised set of Impact Assessment Guidelines. In June 2005, the revised Guidelines were given formal endorsement by the College of Commissioners, unlike the earlier set of guidance documents prepared in 2002/2003.

10) The Evaluation Partnership, *Evaluation of the Commission's Impact Assessment System - Final Report*, Brussels, April 2007.

The revised system replaced the two-step approach with a requirement that all items submitted for inclusion in the APS or CLWP prepare a ‘Roadmap’, in which the work already carried out for the IA is summarised together with a work-plan and outline of the remaining IA work, including timing of stakeholder consultations, etc. Unlike the previous approach, the Roadmap would not be used to determine which proposals would be required to undergo ‘Extended’ IA. Instead there would be a blanket requirement that, as a general rule, all items included in the APS and CLWP would be subject to an IA. The main exceptions being Green Papers and proposals for consultation with Social Partners. Since there is a wide variety in the nature of proposals included in the APS/CLWP, there is an understanding that not all Commission IAs will require the same levels of detail or analysis. The principle of ‘proportionate analysis’ means that the proposals likely to be of greatest direct consequence will require greater efforts in terms of analysis and provision of data, than those proposals with less direct or relatively insignificant potential impacts.

The new procedures outlined above, together with much clearer guidance on the steps to follow and the types of impacts that ought to be considered as part of an IA were the main changes resulting from the 2004/2005 stock-taking exercise. However, the overall integrated approach remained unchanged. Although there was growing pressure from stakeholders and some Member States for the Commission to essentially shift the emphasis of the system towards a ‘competitiveness test’, the decision was taken to retain an overall approach that afforded no *a priori* weight to one dimen-

sion over any other. This was consistent with one of the most important and key founding principles of the IA approach in the Commission i.e. that the results of the IA would be considered as part of, but would not determine, the final political decision. As the 2002 Communication on Impact Assessment had made clear:

‘Impact Assessment is an aid to decision-making, not a substitute for political judgement.’

Although the period since the introduction of the revised Guidelines in 2005 has seen the agreement by Council, Commission and Parliament (July 2006) on a set of ‘traffic rules’ for using impact assessment throughout the policy-making and legislative processes; the addition of a new requirement (from March 2006) to apply the EU Standard Cost Model to examine potential administrative costs as part of the IA process; results published from an external evaluation of the system requested by the Commission (April 2007); and the setting-up of the Impact Assessment Board (in November 2006) as a means of improving the overall quality of Commission IAs, essentially the approach set-out in the June 2005 Guidelines remains in place.¹¹⁾

The Commission IA Approach

Each Commission IA should follow certain analytical steps. In the first instance, consideration needs to be given to the policy problem or chal-

11) Although, at the time of writing, a further revision of the Guidelines is in progress.

lenge which may require action to be taken. This step in the IA process ought to examine why the situation is considered problematic; whether there is general agreement that there is indeed a problem that may require a policy reaction; the extent and drivers of the problem; those mainly affected by the situation; consideration if the problem is likely to improve or get worse, also taking into account other actions - by the EU/Member State/concerned parties - that have been taken, or are in the planning/implementation stage, which may also make the problem better or worse. It is also at the Problem Definition stage that explicit consideration needs to be given to whether the EU has the right to act i.e. that there is a link to a Treaty article, and that applying the 'necessity test' would demonstrate that the EU level is the most appropriate level to be considering policy intervention.

Full consideration of the policy challenge should then allow for clear policy objectives to be set which will be directly related to the specific problem. Essentially the policy objectives are the 'desired impacts'. As such, it ought to be possible for a direct and logical link to be made between more specific objectives, such as promoting economic growth in rural areas, with more general policy objectives, such as preventing depopulation of rural areas. There is also a requirement that the objectives are as SMART (Specific, Measurable, Accepted, Realistic, Timed) as possible, in order to facilitate later monitoring of progress or evaluation. This stage in the IA process is also the point at which explicit consideration needs to be given to the consistency between the policy objectives in this

particular initiative and other policy areas, and with wider EU policies or strategies, such as Lisbon and/or Sustainable Development.

Setting clear policy objectives should then allow for a range of alternative policy approaches or options to be developed, each with the potential to meet the policy objectives. There are few absolute requirements in the Commission's Guidelines, but the need to include the option of 'No EU Action' is one of them (unless there is an explicit Treaty obligation for EU action to be taken). There is also strong encouragement to include policy options or approaches which fall into the category of alternatives to traditional forms of regulation. This could include systems of co- or self-regulation, or Open Method of Co-ordination, or market-based instruments, etc.

Each of the policy options identified as being feasible in meeting the set objectives (normally anything between 3-6 options) should then be analysed in terms of their potential economic, social and environmental impacts. Direct and indirect, positive and negative impacts ought to be considered for each option, with the analysis also examining if these impacts will have consequences beyond the borders of the EU. In line with the principle of proportionate analysis, in some instances it will be considered acceptable for the impact analysis to be entirely descriptive and qualitative in nature. However, where there are likely to be more significant or controversial impacts, greater efforts ought to be made to assign quantitative or monetary values to the impacts.

Each of the analysed options or approaches can then be compared in terms of their potential impacts and against the evaluation criteria of ‘effectiveness’ in meeting the objectives, ‘efficiency’ in terms of meeting the objectives while minimising direct costs, and ‘consistency’ with other policies or strategies. It ought also to be possible to assess each option’s compatibility with the principles of subsidiarity and proportionality. At this point it is important to underline that there is no requirement in the Impact Assessment Guidelines for a full Cost-Benefit Analysis to be carried out. This reflects a recognition in the Commission of the problem of limited data availability and resources - both human and temporal - in preparing IAs. However, it also reflects an unease felt by some in the Commission about placing monetary values on certain public goods.

It is possible for the IA to not reach a conclusion as to which option is the ‘best’ or preferred option. This is consistent with the idea that the IA is there to be used by the political decision-maker as a source of value-free information. However, in practice, there is normally a conclusion which includes the identification of the preferred option, which, in those cases where the option of “No EU Action” is not the preferred option, will be taken forward as the Commission proposal.

Underpinning each of the analytical steps outlined above, there is a set of procedures that need to be followed by the Commission DG responsible for preparing the IA. As mentioned earlier, since 2005 there is now a general rule that all items included in the APS and CLWP are subject to IA. However, in addition to this requirement, IAs are also being carried

out on important items that do not feature in these key annual policy documents, including some implementing measures under Comitology procedures.¹²⁾ The new Impact Assessment Board or IAB (see below) is likely to become much more active in identifying non-APS or CLWP items which it believes ought to be subject to IA, and put pressure on the appropriate DG to carry out an IA.

Preparation of the IA is the responsibility of the Commission DG which has submitted the item for inclusion in the APS or CLWP. However, in many cases it has been judged necessary to use external assistance in preparing the IA. Although it is possible for the external consultant to do the vast majority of the IA-related work, it is not possible for the DG to present the external study as the final IA Report. This Report, which should be the summary of the full IA process and findings, is a Commission document. The work of the lead Commission DG and/or the external consultant will normally be guided by an Inter-Service Steering Group (ISSG), consisting of representatives of other interested DGs. Although it is for the lead Commission DG to determine the make-up of the ISSG, it needs to take into account that failure to involve some interested DGs in the preparation of the IA could lead to difficulties later in the formal process of Inter-Service Consultation (ISC). The Secretariat General (SG) should always be invited to be part of the ISSG. The SG role is to provide guidance to the lead DG on how to follow the IA Guidelines. The ISSG is meant to ensure that the IA takes as wide a

12) Essentially a form of secondary legislation.

perspective as necessary, and that issues of consistency with other policies or strategies are also fully considered.

Failure to start preparation of the IA early enough in the policy development process has been identified by the external evaluation of the Commission's system as one key factor in the patchy quality and usefulness of Commission IAs.¹³⁾ The evaluation found that in many cases the IA was prepared too late to have any real effect on the final shape of the policy. This is in spite of the integration of IA with the Commission's Strategic Planning and Programming cycle, which requires submission of the Roadmaps for items included in the APS and CLWP. The Roadmaps are available to other DGs in the preparation of the APS and CLWP, which allows them to verify that the IA is likely to cover all impacts that they see as relevant or important, and to plan their contribution as part of the ISSG. Once the Commission has adopted the CLWP, the Roadmaps for all those items that eventually were included are made publicly available alongside the CLWP. This allows stakeholders, Member States, European Parliamentarians, etc to examine the Commission's early IA work and its plans for completion of the IA. It will also allow them to prepare for any contribution that they may wish to make as part of a stakeholder consultation exercise.

At the same time as it adopted the integrated IA approach, the Commission also adopted minimum standards for consultation with stakeholders. These also apply for consultations carried out as part of a Commission

13) *Ibid.*

IA. The minimum standards state that the Commission DG needs to be clear in the aims of the consultation exercise e.g. is it for brainstorming or is it to test opinion. It also needs to consult all relevant parties. This is where the ISSG and input from other DGs can be important, since the IA will often need to examine impact areas which fall outside the normal scope of the lead DG. This also means that an effective and comprehensive consultation may involve stakeholders who are not part of the group normally solicited for their views by the lead DG. The consultations also need to be made available on a single access point, avoiding the need for stakeholders to go looking for consultations in various places. There is also a minimum time limit of eight weeks for public consultations, and a requirement that the Commission provides feedback on the input it has received from stakeholders, either in the IA, the Communication or the Explanatory Memorandum.

As noted earlier, the end product of the IA process is an Impact Assessment Report. This should be a fair summary of the work carried out as part of the IA process, and should be clear in setting-out any uncertainties or assumptions in the analysis. External or separate studies, or results of stakeholder consultation exercises should be annexed to the IA Report (or web links provided to where the documents can be found). The IA Report is required to be completed in all cases, even when a decision has been taken not to proceed with the proposal. This is particularly important if the decision not to proceed is based upon consideration of the evidence gathered as part of the IA. Until recently there

had been no instances of an IA Report being prepared for an aborted policy initiative. However, the IAB has once again made its presence felt in this respect, and there are now IA Reports which set out clear reasons as to why a decision has been taken not to proceed with the proposal.

The IA Report is a Commission Staff Working Document and is given a 'SEC' document reference. This is significant for two main reasons. The first, more practical, reason is that SEC documents do not need to be translated into all Community languages. The IA Report can be drafted in any of the working languages of the Commission, but they tend to be written mainly in English. The decision not to translate into all Community languages was driven by the fact that DG Translation was not in a position to be able to translate all IAs within a timeframe which would not lead to the policy-making process grinding to a halt. This position, however, raised a number of issues in terms of transparency and the effective use of IAs to better inform debate and negotiation in the legislative process. Responding to demands from some Member States (notably Spain and Italy) and some stakeholder groups, the Commission agreed in July 2006 to prepare an Executive Summary of the IA Report. This summary would be of a maximum length of ten pages and would be translated into all Community languages.

The second, more fundamental, reason for the SEC document reference is to underline that the IA Report is not a political document and, as such, never receives political endorsement by the College of Commissioners. This is meant to reinforce the point that IA is prepared as a means of

better informing political discussion and debate, and not as a way of dictating a political outcome. In theory it is possible for the IA Report to indicate that one option is by far and away the ‘best’ option, in terms of effectiveness, efficiency, consistency and minimising negative impacts, but for the political decision to be taken to go in an altogether different direction. In practice, however, it is more likely that the processes of preparing the IA and related policy initiative will have been conducted in parallel, with both elements being revised and reformulated as and when thought necessary.

At least one month before the planned date for the launch of the formal process of Inter-Service Consultation, the draft IA Report is submitted by the lead DG to the Impact Assessment Board for its scrutiny and opinion on its overall quality. The IAB was established to work under the direct authority of the Commission President, and independently of DG influence. It was the Commission’s response to an intensifying call from some stakeholders, MEPs, and Member States (most notably the German Presidency of the EU) for the setting-up of an external body to examine the quality of Commission Impact Assessments. Some observers went even further and demanded that an external body be given responsibility for preparing the IAs. Both suggestions were felt to raise uncomfortable issues for the Commission in terms of its exclusive right to propose legislation. Nevertheless, the high-level political support that they enjoyed in some quarters was enough to convince the Commission that its previous mechanisms of quality control and support were not enough

to ensure a uniformly high standard in its IA work.

The IAB consists of five senior officials drawn from the areas of the Commission with the most direct link to the three dimensions required to be addressed in any Commission IA i.e. Economic, Social and Environmental. It is chaired by the Deputy Secretary General, and the members come from DGs Economic and Financial Affairs (ECFIN), Enterprise and Industry (ENTR), Environment (ENV), and Employment and Social Affairs (EMPL). All members are nominated by their DGs, but are appointed *ad personam* by the President. As such they are expected to be independent of influence from their DG and to excuse themselves from consideration of any draft IA Report where there could be a conflict of interest.

The Secretariat of the Board is based in the Secretariat General's Better Regulation and Impact Assessment Unit. It has responsibility for assisting IAB members in the preparation of draft opinions, although the members also draw upon support from staff within their own DGs. The IAB will examine the draft IA Report and offer recommendations on areas where it believes further work may be necessary. In most cases the Board will invite the lead DG to attend a meeting at which it will be expected to respond to written comments sent to it by the IAB beforehand. The IAB will then issue a final opinion on the IA Report. At present there is no authority for the IAB to veto an IA Report, although it can ask for it to be resubmitted for further scrutiny. However, there is an implicit understanding that failure by the lead DG to fully take on board the IAB's opinion will be used as a justification by the SG (and

possibly other DGs) for a suspended or negative opinion in Inter-Service Consultation. Since the IAB opinions on the draft IA Reports are subsequently made publicly available, it is important for the lead DG to include a section in the final IA Report in which it explains how it has responded to the Board opinion.

Once the Board has scrutinised the draft IA Report and the lead DG has completed its remedial work, the IA Report accompanies the draft proposal into the formal process of Inter-Service Consultation.¹⁴⁾ As already made clear, it is perfectly possible for weaknesses in the IA Report to be used as justification for a suspended or unfavourable opinion in this process. This can also be the opportunity for DGs who have not been as involved in the preparation of the IA as they would have liked to have been, to give a suspended opinion until such time as their concerns about the IA have been taken into account.

A further possible step prior to the IA and related proposal appearing on the Commission agenda is for the IA to be discussed by one or more of the Groups of Commissioners, established under the Barroso Commission. This is most likely to be the Group of Commissioners on Competitiveness and Growth, but it is also possible that the Group of Commissioners on Fundamental Rights will examine the IA to see if it has adequately considered the issue of fundamental rights as part of its analysis. Although there is certainly scope for greater use of IAs at the political

14) This is the process by which other services or Directorates-General of the European Commission give their approval or otherwise on the proposal from the lead DG.

level in the Commission¹⁵⁾, some Impact Assessments accompanying high-profile proposals have been subject to intense debate at Cabinet level and/or in the Group of Commissioners on Competitiveness and Growth e.g. the Clean Air for Europe Directive. As the IAB continues to drive-up the overall quality and comprehensiveness of the analysis in individual IAs, it is to be expected that their usefulness in political discussions will become more widely appreciated.

Once the proposal is adopted by the College; it is published together with the IA Report and the IAB opinion on the draft IA Report on the Commission's Impact Assessment web pages on the Europa website.¹⁶⁾ The proposal, Explanatory Memorandum and IA Report are then transmitted to the joint legislature - the Council of Ministers of the European Union¹⁷⁾ and the European Parliament.

The Inter-Institutional Dimension

The shared responsibility for considering the consequences of new legislation was first formally recognised in the December 2003 *Inter-Institutional Agreement [IIA] on Better Lawmaking*¹⁸⁾, in which the Council, Commission and European Parliament all recognised the value of IA in terms of improving the quality of EU legislation. The IIA went on to state that:

15) The evaluation carried out by The Evaluation Partnership examined this issue and, although the evidence it presented was largely anecdotal, it concluded that political decision-makers were not using IA as much as it is intended to be used.

16) http://ec.europa.eu/governance/impact/practice_en.htm.

17) Consisting of representatives of all Member States of the EU.

18) 2003/C 321/01.

'...Parliament and Council may [emphasis added], on the basis of jointly defined criteria and procedures, have impact assessments carried out prior to the adoption of any substantive amendment, either at first reading or at the conciliation stage'.

It also called upon the three institutions to consider the possibility of developing a 'common methodology' for carrying out IA throughout the policy-making and legislative processes. The task of taking forward the commitments in the IIA was given to a High-Level Technical Group, consisting of the Deputy Secretary General of the Commission, the EP Secretary General, and the Council Presidency, aided by the Legal Service. The work relating to Impact Assessment was further delegated to a Correspondents' Group, meeting at the level of Directors/Directors-General. Early discussions in the Correspondents' Group made it clear to all that developing a truly 'common methodology' was overly ambitious. In the end it was possible to agree what is in effect a set of 'traffic rules' for how IA is to be used throughout the policy-making and legislative processes. This so-called 'Common Approach to Impact Assessment' was given political endorsement by the Council and Commission in November 2005, and by the European Parliament in July 2006. It includes a commitment to review experiences and examine how to proceed further after a period of two years. This process of review is presently beginning to get underway.

The 'Common Approach' begins by setting out a number of general principles relating to IA. These include an agreement that decisions need

to be made ‘after giving careful consideration to the available evidence’, and that IA should not prejudice the respective roles and responsibilities of the institutions. It further states that each institution will be responsible for its own IA work, and that all such work needs to be integrated and cross-dimensional i.e. giving equal consideration to the economic, social and environmental dimensions. All three institutions agree that IA should not be used to delay the legislative process or to oppose legislation or amendments. It reaffirms that IA - at all stages of the policy-making and legislative processes - is not a substitute for democratic political decision-making.

The Commission’s commitments in the ‘Common Approach’ are much in line with what it had already set out in its June 2005 IA Guidelines. For example, it states that the minimum standards for consultation will apply to IA; and it agrees that ‘as a general rule’ IA will be carried out on all items in the CLWP. Furthermore, it states that the Commission may decide to complement its original IA in the light of previously unavailable data, etc. However, the Commission has made it clear that the main purpose of its IA is as an aid to internal Commission decision-making. For this reason it cannot be forced by the Council or Parliament to re-visit or re-do the IA. Similarly, it cannot be forced by the Council and Parliament to do an IA on a proposal where it has judged it to be unnecessary or inappropriate. Essentially the Commission has sought to avoid a situation where the IA becomes the focus of the negotiation, rather than the proposal itself. The Commission IA is sent to

the other institutions to provide some background data and information, and to allow Member States and MEPs to see the evidence which the Commission considered prior to deciding on how or whether to proceed.

Both Council and the European Parliament agree in the ‘Common Approach’ that they will ‘examine’ the Commission IA alongside the initiative itself. They also agree to go further than the IIA and make a firm commitment to carry out IA on ‘substantive amendments’ to Commission proposals. However, this ‘commitment’ is heavily qualified. The definition of ‘substantive’ is left for the individual institution to determine. Furthermore, such IA on substantive amendments will be carried out only ‘when appropriate and necessary for the legislative process’. At the time of writing there would appear to be little immediate prospect of an IA on a substantive amendment being carried out by the Council. However, there have been some examples of IAs being carried out by EP committees, and the budget set aside by the EP for such studies is growing on an annual basis (from €500 000 in 2006 to €700 000 in 2007).

The effects on Commission Decision-Making

Since the main stated aim of IA in the Commission is to act as an ‘aid to decision-making’, it is only fair to ask how it is affecting the decision-making processes within the institution. However, as the second part of this key founding statement makes clear, it will not (and ought not) remove politics from the picture. Politics within and beyond the Commission will continue to play a predominant role in the decisions that the

Commission makes. Nevertheless, it is possible to speculate as to how the introduction and wider, more systematic application of IA within the Commission is likely to impact on decision-making.

Perhaps the most striking point of note about the introduction of the new system of IA, is that it is leading the Commission further towards developing a standardised approach to policy-making, since all significant policy initiatives will need to be prepared following a standardised set of IA procedures. The general rule that all items submitted for inclusion in the APS and CLWP now require the preparation of an IA, together with a growing tendency for IA to be applied beyond these two key strategic documents, is likely to restrict the autonomy of DGs to propose new initiatives where doubts remain as to their absolute necessity.

The requirement for almost all IAs to be guided by an Inter-Service Steering Group is moving the Commission further away from the ‘policy-making in silos’ caricature which was sometimes deployed by observers of the European Commission to remark on the perceived inconsistencies between Commission policies. Instead the Commission is perhaps moving closer towards what the Blair Government in the UK referred to as ‘Joined-Up Government’ i.e. that policies may be prepared by a lead department, but the final policy should be one that has sought to incorporate the views of all areas of government and essentially represents a government or Commission position. Ideally the requirement for the ISSG will mean fewer instances of delays at the ISC or political levels, due to ‘unexpected’ issues being discovered at these late stages, or indeed

that a significant proposal will be presented to other DGs and political decision-makers without their prior knowledge of its preparation.

As the pressures continue to grow for more rigorous and comprehensive IAs to be carried out, it is likely that the policy-making process within the Commission will become lengthier and more complicated and involved. Although the requirement to consult widely as part of the IA process may make it less likely that regulatory capture will take place, it will mean that more time and resources will need to be allowed for the consultation to take place and for the input to be properly assessed and incorporated into the IA itself.

The establishment of the IAB is of particular interest in terms of how IA is affecting the decision-making structures within the Commission. Although there had already been a trend towards a greater role for the Secretariat General as a referee between DGs and as the guardian of policy-making good practices, the IAB takes this much further. Despite the fact that the IAB has no explicit right of veto over IAs and the related proposals, it is still possible for its opinion to act as a justification for a veto to be exercised by the SG or other DGs. In trying to fend-off the demands for the complete externalisation of quality control (or of IA in general), it will be important for the IAB to take a tough line. If it fails to do so, then external observers will quickly question its usefulness as a means of improving the quality of IAs. However, if it does show some teeth - and there is evidence that it is indeed making a real difference

in terms of the quality of Commission IAs¹⁹⁾ - there may be further pressure for participation from those DGs who are not currently 'represented' on the Board. Furthermore, the current sporadic use of IAs by the political decision-makers in the Commission could become much more widespread if a consensus develops that the IAs are indeed rigorous, comprehensive and impartial. The very active role being played by the current Deputy Secretary General, together with the increasing resources in the SG devoted to supporting the IAB work, once again illustrates that the SG role in the Commission is growing.

A further set of questions relate to the inter-institutional dimension. If the Council and the European Parliament continue to increase their use of Commission IA in the legislative process, will there come a time when an IA is judged to be so 'poor' or incomplete that it is used as a reason for not considering a Commission proposal? Similarly, would the absence of a Commission IA be justification for not considering a proposal? If these questions are answered in the affirmative, then it raises the further question as to whether the threat of such a response will lead the Commission to be far more cautious in the proposals it adopts, with the knowledge that it already enjoys majority support in Council and Parliament being the deciding factor. Determining in advance where the support or opposition is likely to come, may lead the Commission towards a more formal or systematic approach to consultation with Member States, MEPs,

19) See European Commission, *Impact Assessment Board - Report for the Year 2007*, SEC (2008)120.

and advisory bodies, including the Committee of the Regions and the Economic and Social Committee, as part of the IA process. The long-term effects on the Commission's exclusive right of initiative are potentially significant. Finally, the possible role of the European Court of Justice in all of this is also a question worth considering.

Concluding Remarks

Impact Assessment is intended to have direct (and positive) effects on internal Commission decision-making. The extent to which it is leading to improved outputs in terms of 'better' proposals for legislation or regulation is still an open question, and perhaps it is unfair to focus all the attention on the role of the Commission in improving the regulatory environment for Europe's businesses and citizens, when there is so much potential for poor regulatory outcomes to result from ill-conceived and/or ill-considered amendments to Commission proposals, or from badly-transposed legislation. Nevertheless, there is already clear indications that the introduction and more systematic application of the IA approach is resulting in some important and potentially far-reaching changes in the policy-making and legislative processes of the European Union.

유럽연합에서의 영향 평가

Dr. Craig Robertson

(Senior Lecturer, European Institute of Public Administration Maastricht¹⁾)

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1) The author worked as a UK Seconded National Expert in the Secretariat General of the European Commission from 2003 to 2007, during which time he worked in the Strategic Planning and Programming Unit and the Better Regulation and Impact Assessment Unit. His area of responsibility included the 2005 revision of the Impact Assessment Guidelines; the negotiation of the 2006 Inter-Institutional ‘Common Approach to Impact Assessment’; and the setting-up of the Impact Assessment Board in 2006.

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2) European Commission, COM(2005)97, *Better Regulation for Growth and Jobs in the European Union*, Brussels: March 2005.

3) See Meuwese (2008), *Op. cit.* and L Allio, 'Better Regulation and Impact Assessment in the European Commission', in *Regulatory Impact Assessment: Towards Better Regulation?*, C Kirkpatrick and D Parker (eds.), Cheltenham: Edward Elgar, 2007, for useful and brief histories of the development of Better Regulation in the European Commission.

4) The meeting of Heads of State and Government of the Member States of the European Union.

5) Presidency Conclusions, Lisbon European Council, 23-24 March 2000.

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6) European Commission, COM(2001)428, *European Governance: A White Paper*, Brussels: July 2001.

7) Endorsed by the Laeken European Council in December 2001.

8) L Allio, *Op. cit.*, pp.78

9) European Commission, COM(2002)275, *European Governance: Better Lawmaking*, Brussels: June 2002; European Commission, COM(2002)278, *Action Plan "Simplifying and Improving the Regulatory Environment"*, Brussels: June 2002; European Commission, COM(2002)276, *Impact Assessment*, Brussels: June 2002; European Commission, COM(2002)704, *Towards a reinforced culture of consultation and dialogue - General Principles and Minimum Standards for Consultation of Interested Parties by the Commission*, Brussels: June 2002; and European Commission, COM(2002)713, *The Collection and Use of Expertise by the Commission: Principles and Guidelines*, Brussels: June 2002.

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10) The Evaluation Partnership, *Evaluation of the Commission's Impact Assessment System*

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11) Although, at the time of writing, a further revision of the Guidelines is in progress.

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14) This is the process by which other services or Directorates-General of the European Commission give their approval or otherwise on the proposal from the lead DG.

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19) See European Commission, *Impact Assessment Board - Report for the Year 2007*, SEC (2008)120.

『유럽연합에서의 영향 평가』에 대한 토론문

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2) The European Commission has a near-monopoly in initiating legislation: the Commission is responsible for drawing up proposals for new legislative instruments which it forwards to the Parliament and the Council. It also plays an active part in the successive stages of the legislative procedures. () http://eur-lex.europa.eu/en/droit_communaire/droit_communaire.htm#3.1 가

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Evaluation of Legislation in Switzerland

Evaluation of legislation in Switzerland

Dr. Werner Bussmann

(Swiss Federal Office of Justice)

1. The challenges of evaluation of legislation

This paper presents evaluation of legislation in Switzerland. More specifically, it focuses on the Swiss federal level which, although it accounts only for around one third of public expenditures and public employees, accounts for at least half of all public sector evaluations in Switzerland.

By *legislation* I understand legal norms that in an abstract and generalized form apply to citizens and/or to government agencies.

In Switzerland, as in other countries, there is a hierarchy of norms:

- The *constitution* sets the legal framework. It is the legal level most difficult to amend: a majority of the two chambers of Parliament, a majority of people and a majority of people in a majority of cantons is required.
- The *laws* are the primary legislation. They are easier to create or to amend than the constitution: a majority of the two chambers of Parliament is required, 50'000 citizens may collect signatures to bring a law to a national vote in which a majority of people is required for the law to be adopted.

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- *Ordinances* are the secondary legislation. They must be in conformity with the constitution and the law. They are issued by approval of the government of Switzerland (the Federal Council) or, if there is a delegation norm, by the head of department.

The rise of evaluation has to do with the increasing goal-orientation in modern societies. Legal norms more and more are designed to alleviate or solve certain problems and thus to achieve specific goals. Evaluation serves as an instrument to verify if these goals have been attained. It is not by chance that the most goal-oriented form of government activity, the program (which combines objectives and interventions for a specific period of time) has been and is most often the object of evaluation. There is much less zeal to evaluate encompassing legislation, e.g. penal law, civil law or business law.

The focus of this presentation lies on methodological evaluation by which the effects or consequences of legislation are assessed or recorded.¹⁾ Evaluations can be described as methodical if they:

- are carried out in a way which can be generally understood and followed, i.e. the foundations of statements or judgements are known, accessible and verifiable;
- are based on a systematic process intended to record all relevant effects as comprehensively as possible;

1) The rest of section 1 uses various text elements from an article by Luzius Mader: Luzius Mader 2003. Improving legislation by evaluating its effects: the Swiss experience. In: Parlament de Catalunya. *Legislador i tècnica legislativa: workshop celebrat at Palau del Parlament el dia 17 febrer de 2003*. Publicacions del Parlament de Catalunya: Barcelona: p. 76 f.

- endeavour to be as objective as possible in the causal connections that are drawn, i.e. in particular, the views expressed are not one-sided or influenced by any particular interests.²⁾

Defined in this way, the assessment and recording of the effects of legislation are more than simply impressionistic and intuitive in nature. But nor, on the other hand, do they necessarily comply in all respects with the most stringent criteria of a scientific evaluation of the effects of primary and secondary legislation. In reality, they tend to represent a continuum between these two extremes, attempting to absorb, systematise and apply common knowledge and administrative experience on the one hand, while taking a scientific approach as far as is practicable on the other hand.

Evaluation may intervene at different points of legislation. We distinguish between *prospective evaluation* that takes place *before* a law is adopted and tries to assess or forecast its most likely effects³⁾ and *retrospective evaluation* that takes place *after* a legal act is put into force and tries to establish empirically its actual effects.⁴⁾ Their purpose is to know

2) Luzius Mader 2003. Improving legislation by evaluating its effects: the Swiss experience. In: Parlament de Catalunya. *Legislador i tècnica legislativa: workshop celebrat at Palau del Parlament el dia 17 febrer de 2003*. Publicacions del Parlament de Catalunya: Barcelona: p. 76 f., based on a definition proposed by a working group of the Federal Department of Justice and Police: Eidgenössisches Justiz- und Polizeidepartement (ed.), *Die Wirkungen staatlichen Handelns besser ermitteln - Probleme, Möglichkeiten, Vorschläge*, Bern 1991, p. 13.

3) This form of evaluation is also called front-end analysis, policy analysis, logframe analysis etc.

4) For the different types of evaluations, the methodology and the initiatives towards institutionalisation in Germany, see Carl Böhret / Götz Konzendorf 2001, *Handbuch der Gesetzesfolgenabschätzung (GFA)*, Baden-Baden.

better what happens after the entry into force of legislation and to apprehend the real effects of legislative action.

2. The Swiss legal framework for evaluation

The Swiss legal framework for evaluation concerns the constitutional, but also the levels of primary and secondary legislation.⁵⁾

Constitutional level

According to article 170 of the *Federal Constitution*, “the Federal Parliament shall ensure that the efficacy of measures taken by the Confederation is evaluated”.⁶⁾ This anchors evaluation at the very highest normative level.

Thus, evaluation is explicitly mentioned as one of the main tasks or responsibilities of the parliament. In spite of its rather narrow wording, this task or responsibility must be understood in a broad sense if we take into account the parliamentary discussions. Indeed, Article 170 concerns prospective as well as retrospective evaluation. Although the provision emphasizes the evaluation of efficacy and in this way gives particular

5) This section, except for the last paragraph, takes over the following text: Luzius Mader 2006. Prospective evaluation and regulatory impact analysis: do they make laws better? *Legislação, Cadernos de Ciência de legislação*, N.º 42/43 January • June: p 180-182.

6) See Charles-Albert Morand, *L'évaluation des effets des mesures étatiques*, in Daniel Thürer / Jean-François Aubert / Jörg Paul Müller (eds), *Verfassungsrecht der Schweiz*, Zurich 2001, p. 1119 ff. and Mastronardi, Philippe 2002. Art. 170: Überprüfung der Wirksamkeit, in: Ehrenzeller Bernhard u.a. (Hrsg.) *Die schweizerische Bundesverfassung: Kommentar*: Schulthess/Dike: 1677-1682.

importance to one criterion, it has to be interpreted more widely, covering the evaluation of the effects of all measures taken by the state. This means also that the provision is not limited to legislation. It has to be added that parliament is not supposed to do the evaluations itself; it has just to make sure that evaluations are done; they can be done by the administration or by the government or by external experts mandated by them (which is the most frequent case). And finally, it should be mentioned, that article 170 does not specify the standards which evaluation should follow nor the periodicity of such an endeavour. The latter is left to primary and secondary legislation.

Level of primary legislation (level of federal laws)

At this level, several provisions will be mentioned:

- a) First, the assignments of article 170 of the Federal Constitution have been specified in the *Parliament Act*. According to article 44, evaluation is a task not only of the audit committees but of all committees of Parliament including those preparing new legislation. Article 27 authorizes parliamentary commissions a) to demand from the Federal Council to carry out evaluations, b) to examine evaluations commissioned by the Federal Council and c) to commission evaluations themselves. The federal Parliament has set up a small, but knowledgeable evaluation service, the Parliamentary Control of the Administration.
- b) Second, many or even most of the newly or recently adopted federal laws contain evaluation clauses providing that the effects of

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the law have to be evaluated periodically.⁷⁾ They impose upon the government the obligation to report periodically to the parliament about the results.

- c) Third, Article 5 of the Federal Subsidies Act provides for the review of financial aid and other subsidies on a periodic basis, but at least every six years. In other words: the legal foundations of all subsidies have to be re-examined periodically in order to control, in particular, the appropriateness and cost-effectiveness of the subsidies.
- d) The fourth and last legal provision to be mentioned here concerns specifically prospective evaluation; it is Article 141 of the Federal Parliament Act. This article provides that wherever the government submits a legislative proposal to the parliament, the proposal has to be accompanied by a report, called “message”, giving information on the expected or possible consequences or effects in a rather detailed and comprehensive manner including not only effects in terms of personnel or finances but also social, economic, environmental effects, etc. By the way, the parliamentary committees have to meet the same requirements when they prepare legislation proposals themselves.

At the level of secondary legislation and administrative rules

Finally, at the infra-legal two elements shall be mentioned:

- a) First, there are several guidelines and checklists specifying the requirements of the previously mentioned Article 141 regarding prospective

7) For a list of such evaluation clauses see http://www.bj.admin.ch/bj/de/home/themen/staat_und_buerger/evaluation/materialien/_uebersicht.html.

evaluation. For example, according to these guidelines, the government must indicate the foundations on which the information or statements about the possible effects of proposed measures are based. This requirement is very important because it makes sensible discussions possible. In Switzerland as in many other OECD - countries, there are guidelines concerning in particular regulatory impact analysis (RIA) and the prospective evaluation of the economic consequences of legislation, in particular the consequences for small and medium size enterprises.⁸⁾

- b) Second, the Federal Council, head of the executive branch, which is concerned by article 170 of the Federal Constitution only indirectly, has not waited for the Parliament to act. Upon proposals of an interdepartmental working group, he has adopted a set of administrative rules: Evaluations have been integrated into the planning (Goals of the Federal Council for the next year) and reporting (Report of the Federal Council on the past year) instruments of the Confederation. Evaluation has been strengthened by defining tasks of departments, offices and supporting agencies in this field. Offices are required to develop explicit evaluation strategies spelling out the organisation, content and instruments of evaluation. This policy does not imply a central steering of evaluations. It relies on self-regulation combined with coordination among departments and offices and on transparency about evaluation activities and results.

8) See the Guidelines of the Swiss government, a handbook and a checklist under <http://www.seco.admin.ch/themen/00374/00459/00465/index.html>.

3. Actors involved in evaluation

Apart from the courts, all main federal actors are involved in evaluation. The figure below shows their roles in prospective and retrospective evaluation:

Figure 1: Federal actors involved and their function in prospective and retrospective evaluation

Unit of government involved	Prospective evaluation	Retrospective evaluation
Parliament (parliamentary committees)	Addressee of prospective evaluation (by message of Federal Council on the proposed legal act), may require additional information during the parliamentary debates.	Often triggers off retrospective evaluations (by inserting evaluation clauses into legal acts, by requesting specific evaluations from the executive, by giving a mandate for an evaluation to the Parliamentary Control of Administration).
Parliamentary Control of the Administration	-	Carries out retrospective evaluations on demand of parliamentary commissions.
Executive	Responsible to carry out prospective evaluation and to inform about the results (in the message of the Federal Council to the proposed legal act).	Carries out most retrospective evaluations (by its proper decisions, prompted by an evaluation clause, prompted by a specific request from Parliament).
Swiss Federal Audit Office	-	Carries out retrospective evaluations in relation to its audit functions.

In the following two sections of this paper, the practice first of prospective and second of retrospective evaluation in Switzerland will be presented, by highlighting concrete examples.

4. The legislative process and prospective evaluation

4.1 Legislative process: The Swiss Transparency Act

The Swiss Transparency Act serves as an example for the legislative process and for prospective evaluation. It introduced, on the federal level, the principle of transparency of official documents, established the procedures to be followed in public access to such documents and spelled out in which cases public access is restricted.

The figure below describes the main steps in preparing the Swiss Federal Transparency act.

Figure 2: Elaboration of the Swiss Federal Transparency Act

When	Step	What
1982 - 1995	Preparatory work	Different working groups and authorities on the federal level presented proposals to introduce the principle of transparency into Swiss law.
1997	Impulse	Three parliamentary requests concerned the introduction of the principle of transparency into Swiss federal law.
July 1998	Mandate	The Federal Department of Justice and Police charged an interdepartmental working group to elaborate a pre-draft of a Federal Transparency Act and an explanatory report.

When	Step	What
July 1998 - April 2000	Pre-draft	Establishment of the pre-draft and of the explanatory report.
April 2000 - March 2001	Consultation process	Draft and report were submitted to a consultation among all cantons, all political parties and among various interested groups. The results were evaluated and published in a report.
March 2001 - February 2003	Elaboration of the draft and of the accompanying message of the Federal Council to the Parliament	Taking into account the results of the consultation, the Federal Office of Justice reworked the pre-draft of the Federal Transparency Act and of the accompanying explanatory message. It then submitted the draft and the message into a double consultation within the federal administration: First, the lower administrative units, the offices, were consulted and then a finalized version was submitted to a consultation among the other six federal departments and the Federal Chancellery. ⁹⁾ The Federal Council finally adopted the draft of the act and the message and submitted both documents to the Parliament.
February 2003 - December 2004	Parliamentary debates and de- cision	The Parliament (two chambers) modified several legal norms with not unsubstantial consequences and adopted the Federal Transparency Act.
December 2004 - July 2006	Post-parliamentary phase	During a delay of 100 days after publication of the law, a referendum could be started. This possibility was not used. The Federal Office of Justice worked out an ordinance by which the concrete terms of public access to official documents and its limits are spelled out. The Federal Council put both the Transparency Act and the ordinance into force on July 1, 2006. Since then, citizens have access to official documents.

9) Differences among offices and departments concerned exceptions to public access to documents, e.g. in foreign policy or with regard to autonomous units such as the National Bank or the health insurance organizations.

The example of the Federal Transparency Act allows highlighting some typical features of the Swiss federal legislative process:

Length of procedure

From the mandate to the entry into force 88 months passed. This is considerably longer than the average (new laws and modification of laws: 55 months), but not unusual for a completely new legal act. Compared to many other Western European countries, the legislative process in Switzerland is considerable longer.

Satisfactory legislative outcomes

Although there is no accepted standard for the quality of legislation, we can plausibly presume that the rather lengthy legislative process produces satisfactory results. It never happens that federal acts are not put into force because there is not enough confidence into their merit. It is very exceptional that a federal act has to be quickly corrected after it is put into practice, because it has serious flaws. Only a minority of federal acts are not implemented properly. In general, the implementing agencies (usually the cantons) and the groups affected by legislation - through the consultation process, through the parliamentary debates and through various networks and information channels - are well prepared for the new or changed legislation and are accepting the challenges that it brings.

Decentralized preparation, coordinated decision making

In the Swiss federal administration, the offices (one hierarchical level below the departments/ministries) are responsible for the drafting of le-

gislation. Several administrative units, such as the Federal Office of Justice, the Federal Finance Administration and the Federal Chancellery assume cross-sectional functions and help to integrate (pre-) drafts into a common framework. Put differently: There is neither a central drafting service (as in the UK) nor a predominant government unit in law-drafting (as the Chancellery in Germany or Austria). The 82 federal offices are on the same footing, and, one hierarchical level higher, the same holds true for the 7 departments/ministries. Often, as in the case of the Federal Transparency Act, the responsible offices integrate substantive knowledge from other offices into the drafting process by creating interdepartmental working groups. Whenever a decision of the Federal Council (which works as a collegiate organ) has to be taken (e.g. mandate to prepare a law, start of consultation on the pre-draft, report on results of consultation, adoption of act and message), a two-step consultation procedure within the administration takes place. This helps not only to give decisions a sounder political base but also to integrate the perspective and the knowledge of different administrative units into the drafting process.

Consultation procedures

Swiss federal legislation always involves consultation among cantons, political parties and interested groups in a systematic and transparent way. This allows integrating the viewpoint of civil society into lawmaking. The example of the Federal Transparency Act does not show the whole array of devices used. Involvement of civil society into the legislative process is comparatively stronger, if a legal act regulates private sector branches,

if it has substantial impact on the rights and obligations of the citizens and/or if will it be implemented by the cantons (the typical case for most federal laws). Representatives of the cantons, of economic associations or academics, as members of expert groups, may participate in working out a (pre-) draft of the act. Informal contacts between the responsible office and the cantons or economic and other associations help to mobilize relevant knowledge in particular questions.

Role of Parliament

Unlike other Western European countries, Parliament in Switzerland plays a rather important role in legislation. It can refuse to adopt an act, modify it substantially or even initiate its own drafts of a legal act. The substantial role of the Swiss Parliament owes partly to the fact, that there is no vote of (no-) confidence which can be used by the prime minister to discipline the Parliament.

42 Prospective evaluation in the Swiss legislative context

Drawing on the Federal Transparency Act we can now focus on prospective evaluation in the Swiss context and present its main features.

Prospective evaluation and legislative procedures

Prospective evaluation at the Swiss federal level is deeply *embedded in the already existing politico-administrative procedures* (e.g., mandate, pre-draft, consultation, draft and message, parliamentary debates etc.). Prospective evaluation with its focus on implementation and on the effects of

the legal act in preparation can add value to those procedures. Thus, a consultation among cantons may help to obtain information on the implementation of the law, on its costs and on the appropriate date of putting it into force. The consultation within the administration allows the administrative unit in charge to gain information from other administrative units. The other offices and departments/ministries may help to draw the attention of the responsible office to possible coordination problems or to side effects of a (pre-) draft in their fields, thus contributing to improve the quality of legislation.

Causal model of the legal act

The essence of prospective evaluation lies in a *presentation of the working mechanism of the law*, once it will be implemented and *of the possible effects* on the society, the economy and the environment. This working mechanism should be presented in a coherent, explicit and transparent way.¹⁰⁾ Its assumption should be backed by empirical evidence. As mentioned in section 2 of this paper, there are detailed rules at the legal and infra-legal level on the spelling out of estimated effects in messages accompanying the draft of a legal act. In the message for the draft of the Transparency Act, the estimated effects on public finance, on the number of public employees, on administrative procedure and on information technology within the administration were spelled out. The esti-

10) Werner Bussmann 1997, *Die Methodik der prospektiven Gesetzesevaluation*, in *LeGes/3*, p. 109 ff.; Werner Bussmann 1998, *Rechtliche Anforderungen an die Qualität der Gesetzesfolgenabschätzung*, in *Zeitschrift für Gesetzgebung*, p. 127 ff.

mates were based on empirical evidence from other national (Sweden) and sub-national (Québec, Canton of Bern) units. Furthermore, a survey among all the federal departments yielded further information on the official documents that would most likely cause demands for public access and on the possible impact on workload. Some possible effects on the public economy were also mentioned, but they remained largely speculative, as there was no substantive evidence available.

Coordination among different verifications and exams

In the process of preparing and adopting the draft and the accompanying message *various verifications and exams* (constitutionality, legality, coherence with the existing law, conformity with prescriptions regarding legislative techniques, linguistic quality etc.) have do be made. All these verifications and exams should work in an integrated - preferably parallel and not subsequent - way. On the Swiss federal level the consultation within the administration (consultation of offices, consultation of departments) is used in this multiple way.

Streamlining prospective evaluation

Prospective evaluation, especially the assessment of the likely effects of a planned legal act, concerns different units of the administration. A bill on agricultural policy, for instance, might have possible effects on the economy as a whole, on consumers, on land use and public zoning, on energy consumption and on the environment. One of the main challenges in prospective evaluation is to combine the specific knowledge, available

at different administrative units, without multiplying procedures and lengthening preparation time.

On the Swiss federal level, an obligation to estimate the effects of drafts of legal acts and to present those findings in the accompanying message exists since the 1960's. The quality of the estimates has improved during the past years. Yet, it was not judged satisfactory with regard to economic effects. In 1999, regulatory impact analysis (RIA) has been introduced. For several years, it was considered a separate procedure. Since then, RIA gets fully integrated into the prospective evaluation procedures, resulting in less work and more impact. In 1999, complementary to RIA, the "Small and medium enterprises-test" has been introduced as well: During the consultation procedure, pre-drafts of legal acts with an impact on small and medium enterprises are examined more rigorously, mostly by means of surveys among such firms. Furthermore, there exists a "Small and medium enterprises-forum" which examines issues relevant for these enterprises and expresses its opinion on them.

More recently, in various fields of public activity, new specific prospective evaluation techniques have been developed (examination of sustainability, evaluation of economic impact of environmental programs, energy impact analysis).

The challenge is now to streamline and recombine these various techniques, mentioned in the previous two paragraphs, in order to have an integrated, "slim" prospective evaluation procedure.

Turning back to the example of the Federal Transparency Act: As it didn't have any substantial economic impact, no RIA had to be made.

When a RIA is necessary, it usually is done at the time when the explanatory report to the pre-draft is worked out (before the consultation procedure), at the latest, when the draft and the accompanying message is to be written. In RIA, the economic costs of a planned legal act, for instance in the case of an obligation of firms to furnish information, will be substantiated. The relevant information will be presented in the message that accompanies the draft of a legal act. RIA is thus an instrument to get a more balanced view on the economic costs of a regulation and to improve the balance of costs and benefits. Both the Federal Council and the Parliament can use information of RIA and of other prospective assessments as a support for their decision-making.

5. Retrospective evaluation

51 Function and triggering off mechanisms

Retrospective evaluation takes place once a law is put into force. It can give information on the implementation and on the social, economic and environmental effects of legislation. The latter may take some time. Thus, it may be useful to allow some months or years to pass before a retrospective evaluation which focuses on effects (and not just on implementation processes) is carried out.

Retrospective evaluations can improve government accountability and increase knowledge about public policies. More specifically, they should help to improve implementation and, in case the legal act needs to be adapted, can be a support for legislation. Although retrospective evalua-

tions look back, they are to be used for future decisions.

Whereas legislation is mostly done by lawyers, the planning and the realization of an evaluation imply social or natural science knowledge. This knowledge can be provided by specialized services within the administration or by external sources (university institutes, specialized consultants).

In Switzerland, there are various devices by which evaluations are triggered off:

- Yearly, at the federal level, approximately 40 important evaluations are carried out. About half of them are triggered off by the Parliament (a) through an evaluation clause that the Parliament has inserted into a law, (b) through a specific parliamentary request or (c) through a parliamentary mandate to the Parliamentary Control of the Administration respectively to the Swiss National Audit office.
- Two thirds of important evaluations are managed by the executive (federal offices) who very often hand them out to university institutes or private consultants. The rest of the evaluations is carried out by the National Audit office and by the Parliamentary Control of the Administration.
- The less important evaluations (approx. another 40 evaluations) are mostly triggered off and managed by the executive.
- To these evaluations, carried out or mandated by public sector actors, have to be added at least a dozen evaluations per year, sponsored by research actors (Swiss National Science Foundation, universities etc.).

We will now look at a specific important evaluation: the one on gender equality.

52 Evaluation of gender equality

The evaluation of gender equality was triggered off in 2002 by a parliamentary request. The Federal Council was asked to improve protection against the licensing of women that complain about discrimination. The Federal Council refused to accept the request as such, but was ready to examine the matter more closely by an evaluation of the Gender Equality Act. This act sets out to improve equality in the employment field. Any discrimination, be it in salary, in employment, in continuing education or in licensing is forbidden. Sexual harassment is equally forbidden.

In order to prepare the evaluation, a project group composed of the different administrative units involved (Federal Office of Justice, Federal Office for Gender Equality, State Secretariat for Economic Affairs, Federal Office of Statistics) was set up. The terms of reference of the evaluation were spelled out and 47 addressees were asked to submit their tenders. Then, a consulting firm was chosen to carry out the evaluation.

The firm made the following inquiries:

- 200 lower courts were asked to submit their decisions on gender discrimination; the decisions were broadly evaluated.
- In 4 (out of 26) cantons, all court cases concerning gender discrimination were evaluated in detail.

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- A survey covered 60 arbitration courts.
- Another survey covered 1500 persons from trade unions, employee's associations etc.
- Still another survey covered 5700 persons in the field of human resources in private and public enterprises.
- Interviews were made with 20 persons who had concrete knowledge of discrimination cases and with specialized lawyers.

Furthermore, the Federal Office of Statistics, with the help of another consulting firm, analyzed in depth salary statistics.

These were some of the main results:

- The surveys showed that there is a widespread approval of the Gender Equality Act. No negative side effects were observed.
- In concrete cases, however, it is hard for those that encounter discrimination to furnish proofs for an actual discrimination.
- Analysis of salaries of men and women show that there is still a salary difference of 25 percent, of which around 40 percent can be explained by objective factors such as age, education and career pattern. Part of the difference is most probably due to discrimination.

Based on the results of the evaluation, the Federal Council, in a report to the Parliament, stated that thanks to the Gender Equality Act the situation had improved. He, however, acknowledged subsiding weaknesses. He refused substantial modifications of the law, such as an improved protection against licensing, collective action (by trade unions, employee's

associations etc.) and further alleviations with regard to the burden of proof in discrimination cases. He argued for improved information and education on gender equality, for an improved position of arbitration instances, for better incentives for firms to assure gender equality (e.g. by creating labels for this) and for examining the possibility of public authorities to enquire about gender equality and enforce corresponding policies. The latter mandate has not yet been completed.

The Parliament has accepted the report with great interest. Different parliamentary requests asking for further studies have been accepted.

Since then, the employer's and employee's association, in a joint meeting, have confirmed their intention to improve gender equality. Big efforts need to be made in small and medium enterprises. Those firms, up to now, show the biggest weaknesses in adopting programs for gender equality.

The studies asked for by the Parliament will be completed in the coming years.

The evaluation of gender equality took considerable time (see figure below). It was not so much the empirical enquiries but the preparation and valorisation of the evaluation that were and are time-consuming.

Figure 3: Timetable of the evaluation on gender equality

Date	Action
March 2002	Parliamentary request on gender equality
Mai 2002	Federal Council ready to undertake an evaluation
July 2003	Start of tendering process
December 2003	Mandate given to an evaluation team

Date	Action
January 2004	Start of the evaluation
April 2005	Final report of the evaluation team
February 2006	Report of the Federal Council to the Parliament on the evaluation
March 2007	Debate in the Parliament on the report, various requests for measures to be taken
June 2007	Additional report of the Federal Council to the Parliament on the immediate steps already taken to improve gender equality
2012	Additional report of the Federal Council to be expected

Due to the high salaries in Switzerland, the costs of the evaluation were considerable. Costs for all the external mandates amounted to around 300'000 Swiss Francs.¹¹⁾ Salary costs within the administration for preparing and supporting the evaluation amounted to another 300'000 Swiss Francs.

Evaluations of federal acts, as the Gender Equality Act, are time-consuming and costly. Annex 1 portrays six larger evaluations of legislation with regard their object, the impulse, the evaluation methodology and the costs. It must be kept in mind that evaluation of entire legal acts is rather the exception within Swiss evaluation practice. More widespread is the evaluation of programs of limited scope, such as of information campaigns (e.g. against smoking), of financial programs (such as raising the number of apprenticeship posts) or of legal devices of limited scope (such as the lowering tolerance for alcoholic beverages when driving). Such evaluations, often, can be done much quicker and with fewer resources. As can be seen in Annex 1, first example (divorce law), even

11) The US Dollar is almost on parity with the Swiss Franc. The figures have to be lowered by 1-5 % to have the equivalent in US Dollars.

an evaluation of legislation can be done at comparably low cost, but given the complexity of the field, such an evaluation can only give answers to limited questions.

6. Implications for the practice of evaluation

We shall conclude this presentation by giving indications on the keys for the success of evaluation on a nation-wide scale, both in its prospective and retrospective dimension:

1. The prospective and the retrospective side of evaluation should be and retrospective evaluations are bound together by the same causal model. It serves as a foundation to anticipate and to record effects. Both approaches can at times be supplementary (e.g., if an intricate prospective evaluation is carried out, as when large investments are made). Very often they are, however, complementary, because a thorough assessment of likely effects during prospective evaluation facilitates monitoring and retrospective evaluation.

2. In public sector evaluation, neither a common-sensical “managerial” approach nor a rigid “scientific” approach will yield best results. We advocate a pragmatic solution in which objectivity and balance of judgment is blended with concern for usability. Evaluations can be integrated into the management tools of modern public administrations. Yet, they also should take into account the standards that have been developed for evaluation purposes.¹²⁾

12) Joint Committee on Standards for Educational Evaluation. (1994). The Program Eva-

3. In evaluation, intramural and extramural devices should both be pursued. Given the number of public employees trained in social, natural and legal science, many evaluation tasks can be accomplished within the administration, e.g. elaborating a causal model of a planned legal act, making estimates of its most likely effects or giving a description of implementation activities. In many cases, the program management will also be best suited to hand out evaluations to external evaluators. A recent study of 278 evaluations from Switzerland¹³⁾ shows that an instrumental utilization of evaluation results is best assured by formative evaluations financed by the administrative service responsible for the program examined. However, not all evaluation functions can best be performed by the government unit responsible for the program management. Especially in summative evaluation, i.e. if a critical look is to be thrown at existing programs, the task for evaluating or for commissioning evaluation should not be given to the program management, but to an evaluation service within the administration higher up the hierarchical ladder or to an external body (audit institution, parliamentary evaluation service).

4. The success of a national evaluation system depends on many factors. In Switzerland, a broad strategy has been pursued and it has been fruitful. Key elements of this system were and are:

uation Standards, 2nd Edition. Newbury Park, CA: Sage Publications. See also the Standards of the Swiss Evaluation Society (SEVAL-Standards, available in German, French, Italian and English).

13) Balthasar, Andreas (2007). Institutionelle Verankerung und Verwendung von Evaluationen. Zurich/Chur: Rügger, p. 353-353.

- Universities and consultants that are knowledgeable about evaluation (a National Research Program of the National Swiss Science Foundation in 1990-1996 focused on evaluation);
- A science and consulting community dedicated to evaluation (the Swiss Evaluation Society, SEVAL, was founded in 1996; in the same year an evaluation network within the federal administration was created).
- Government administrative units that are eager to improve their performance and policies and that are ready to use evaluation for this purpose (Swiss federal offices have started using evaluation since the late 1980's/early 1990's).
- A Parliament (resp. parliamentary commissions) that has an interest to learn about the relevance, the effectiveness and the efficiency of the legal acts it has adopted and is willing to use evaluation results for that purpose (the Parliamentary Control of the Administration was created in 1990).
- A sound legal framework for evaluation (the first evaluation clause was adopted in 1974 in the Swiss Federal Environment Act; a broad evaluation clause was inserted into the Swiss Federal Constitution in 1999)
- A government evaluation strategy (the Swiss Federal Council adopted such a policy in 2004)
- Oversight institutions that include evaluation into their toolbox (the National Audit Office received a legal basis for evaluations in 1995).

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In Switzerland, evaluation, and especially the evaluation of legislation, is still a challenge and a learning process. There still is room for improvement: In an evaluation system that is somewhat consolidated, particular attention should be given to the utilization aspects.

We hope that some of our experiences will be of value for others.

Annex 1: Evaluation of legislation in Switzerland: some examples

Subject	Impulse	Objective	Methodology	Costs (in CHF ≈ USD)
divorce law (status)	parliamentary request	observation of results of new divorce law; if necessary propose modifications	survey among 500 lawyers and judges, experienced with divorce cases	25'000/ 40'000
gender equality / equal salary (completed)	parliamentary request	analysis of extent of existing discrimination, proposals for possible improvements	interviews with employee's organizations, with HR officers of big and medium firms and with mediation offices; analysis of court decision and of mediation results	300'000/ 300'000
energy law (completed)	evaluation clause	accountability, assessment of need for modification	58 studies on specific energy programs with a synthesis	6'300'000 / no figures available
investment aid for mountainous areas (completed)	evaluation clause	accountability, drawing lessons for subsequent legislation	analysis of data on regional development and on aid decisions, interviews with secretariats of the mountain regions, case studies	no figures available

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Subject	Impulse	Objective	Methodology	Costs (in CHF ≈ USD)
aid to victims of crimes (completed)	evaluation clause / departmental initiative	information on implementation and effectiveness	4 studies at 2-3 years intervals: <ul style="list-style-type: none"> • interviews with victims (on counseling) • delphi inquiry with lawyers and judges (on improvement of penal procedure) • study on initial information of victims (e.g. by the police) • study on financial aids for courses (for personnel in victim's aid) 	270'000/ 300'000
justice reform (evaluation planned)	departmental decision / parliamentary request	information on the implementation and effectiveness; proposals for modifications	<ul style="list-style-type: none"> • analysis of data of activities of federal courts and survey at federal courts • telephone interviews with lawyers and representatives of interested organizations • focus groups (judges at federal and cantonal courts, lawyers) • analysis of court cases 	380'000/ 380'000

스위스의 입법평가

Dr. Werner Bussmann

(Swiss Federal Office of Justice)

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1) The rest of section 1 uses various text elements from an article by Luzius Mader: Luzius Mader 2003. Improving legislation by evaluating its effects: the Swiss experience. In: Parlament de Catalunya. *Legislador i tècnica legislativa: workshop celebrat at Palau del Parlament el dia 17 febrer de 2003*. Publicacions del Parlament de Catalunya: Barcelona: p. 76 f.

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2) Luzius Mader 2003. Improving legislation by evaluating its effects: the Swiss experience. In: Parlament de Catalunya. *Legislator i tècnica legislativa: workshop celebrat at Palau del Parlament el dia 17 febrer de 2003*. Publicacions del Parlament de Catalunya: Barcelona: p. 76 f., based on a definition proposed by a working group of the Federal Department of Justice and Police: Eidgenössisches Justiz- und Polizeidepartement (ed.), *Die Wirkungen staatlichen Handelns besser ermitteln - Probleme, Möglichkeiten, Vorschläge*, Bern 1991, p. 13.

3) This form of evaluation is also called front-end analysis, policy analysis, logframe analysis etc.

4) For the different types of evaluations, the methodology and the initiatives towards institutionalisation in Germany, see Carl Böhret / Götz Konzendorf 2001, *Handbuch der Gesetzesfolgenabschätzung (GFA)*, Baden-Baden.

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5) This section, except for the last paragraph, takes over the following text: Luzius Mader 2006. Prospective evaluation and regulatory impact analysis: do they make laws better? *Legislação, Cadernos de Ciência de legislação*, N.º 42/43 January • June: p 180-182.

6) See Charles-Albert Morand, *L'évaluation des effets des mesures étatiques*, in Daniel Thürer / Jean-François Aubert / Jörg Paul Müller (eds), *Verfassungsrecht der Schweiz*, Zurich 2001, p. 1119 ff. and Mastronardi, Philippe 2002. Art. 170: Überprüfung der Wirksamkeit, in: Ehrenzeller Bernhard u.a. (Hrsg.) *Die schweizerische Bundesverfassung: Kommentar: Schulthess/Dike: 1677-1682*.

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7) For a list of such evaluation clauses see http://www.bj.admin.ch/bj/de/home/themen/staat_und_buerger/evaluation/materialien_/uebersicht.html.

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8) See the Guidelines of the Swiss government, a handbook and a checklist under <http://www.seco.admin.ch/themen/00374/00459/00465/index.html>.

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9) Differences among offices and departments concerned exceptions to public access to documents, e.g. in foreign policy or with regard to autonomous units such as the National Bank or the health insurance organizations.

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10) Werner Bussmann 1997, *Die Methodik der prospektiven Gesetzesevaluation*, in *LeGes/3*, p. 109 ff.; Werner Bussmann 1998, *Rechtliche Anforderungen an die Qualität der Gesetz-esfolgenabschätzung*, in *Zeitschrift für Gesetzgebung*, p. 127 ff.

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12) Joint Committee on Standards for Educational Evaluation. (1994). The Program Evaluation Standards, 2nd Edition. Newbury Park, CA: Sage Publications. See also the Standards of the Swiss Evaluation Society (SEVAL-Standards, available in German, French, Italian and English).

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13) Balthasar, Andreas (2007). Institutionelle Verankerung und Verwendung von Evaluationen. Zurich/Chur: Rügger, p. 353-353.

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1) ‘ 가 ’ (Staat-modern), ‘ ’(Verwaltung-innovative)

2) 가, - (Rheinland-Pfalz), - (Baden-Württemberg), (Brandenburg) 가 .

3) Vgl. § 44 Abs. 1, Gemeinsame Geschäftsordnung der Bundesministerien(GGO) 2006.

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(Mandelkern-Berichte)

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II.

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1. 가

(1)

(Gesetzesflut)

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(Bürokratiekosten)

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2. 가

(1) 가

가(Evaluation von Gesetzen)가

30

가 ‘

6)’

가가

가

6) C. Böhret, Gesetzesfolgenabschätzung: Soll sie institutionalisiert werden?, in: Festschrift für Blümel, Berlin 1999, S. 53.

가

(Deutsche Hochschule für Verwaltungswissenschaft Speyer)

· 가 (C. Böhrer), 2000

7) 2001
· 가 (Handbuch Gesetzesfolgenabschätzung)가

가
· 1998 ‘

’(Die blaue Checkliste)

(Gemeinsame Geschäftsordnung der Bundesministerien, GGO) I, II
, 2000

· 2006 가
(Der Nationaler Normenkontrollrat)가

· 가
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· 가

(Technikfolgenabschätzung)

, (IT)

7) · 가
() ’(Abbau rechtliche Hemmnisse), ‘
· ’(Rechtsmittelreform), ‘
vorschriften des Bundes)
www.staat-modern.de

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(Verwaltungskoste)

(Bürokratirkoste)

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(NKR)

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(Informations-

pflicht)

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.8)

8) http://www.verwaltung-innovativ.de/cln_115/nn_684684/DE/Buerokratieabbau/Gesetzesfolgenabschaetzung/gesetzesfolgenabschaetzung__node.html.

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(Gesetzesfolgen)

(wesentliche Auswirkungen)

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.10)

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(finanzielle Auswirkung)

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9)

10) § 44 Abs. 1.

가 ()

(Standardkosten-Modell, SKM)

가 2006

2) 가

2001 가 (‘ ’)¹¹⁾ 2000

2006 가

(GGO)

가 ‘ ’
‘ ’ 가

(Module)

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. 2006 4 25

(Rechtsetzung)

.¹²⁾

(2) 가 -

1)

(Gesetzgebungskosten)

가

가

11) C. Böhret/Götz Kozendorf, Handbuch Gesetzesfolgenabschätzung, Baden-Baden 2001.

12) Kabinettschluss vom 25. April 2006.

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① - - (KNA, Kosten-Nutzen-Analyse)

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② - - (KWA, Kosten-Wirkungs-Analyse)

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③ (KA, Kosten-Analyse)

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④ (SKM, Standardkosten-Modell)

가

.13)14)

13) Thomans Grether, Bertelsmann Stiftung: Weniger Bürokratie in Deutschland, 2005. http://www.bertelsmann-stiftung.de/cps/rde/xbcr/SID-0A000F0A-98F5DA35/bst/Weniger_Buerokratie_In_Deutschland.pdf.

14)

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2) (Normenkontrollrat)

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2005 (CDU), (CSU) (SPD)

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15) GGO § 51 Vorlage an das Kabinett

Werden Gesetzesvorlagen nach Abschnitt 3 der Bundesregierung zum Beschluss vorgelegt, ist im Anschreiben zur Kabinetttvorlage unbeschadet des § 22 anzugeben,

1. ob ...

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3. dass die Anforderungen nach § 44 erfüllt sind,

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• (ex-ante-Schätzung)

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17) Kabinettschluss vom 25. April 2006, S. 4 ff.

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III.

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18) Leitfaden für die ex ante Abschätzung der Bürokratiekosten nach dem Standardkosten-Modell(SKM), Berlin 2008, S. 3 f.

19) Nationaler Normenkontrollrat, Jahresbericht 2007 des Nationalen Normenkontrollrates, Sep. 2007, S. 25.

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(2) (Informationspflicht)

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20) § 2. Abs. 1. NKR-Gesetz; Vgl. C. Böhret, Handbuch der Gesetzesfolgenabschätzung, Baden-Baden 2001, S. 343, Glossar.

21) http://www.normenkontrollrat.bund.de/nn_255418/Webs/NKR/DE/Buerokratiekosten/WassindBuerokratiekosten/was-sind-buerokratiekosten.html.

22)

23) <http://www.normenkontrollrat.bund.de/Webs/NKR/DE/Buerokratiekosten/WassindInformationspflichten/was-sind-informationspflichten.html>.

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28)

26) Kabinettsbeschluss 25. April 2006, S. 3.
27) § 1 Abs. 1, § 2. Abs. 2 Satz 1 NKR-Gesetz.
28) § 2. Abs. 2 Satz 3 NKR-Gesetz.

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가(ex-ante Abschätzung)

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IV. 가

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29)) 14 .

30) 가 = () × () + .

31) = () × / .

32) Leitfaden für die ex ante Abschätzung der Bürokratiekosten nach dem Standardkosten-Modell(SKM), Berlin 2008, S. 5 ff.

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가(ex-ante Folgenabschätzung)

, ‘ (Risikogesellschaft)

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『독일에서의 입법평가 제도화의 사례』에 대한 토론문

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『 가 가 가』, :

, 2008, 160).

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『 (GGO)』 44

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2006 8

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(直觀)

(科學化),

(合理化)

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(獨自性)

