The evaluation of German federal laws in theory and praxis

Dipl.-Vw. Hanna Willwacher, M.A.
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1. InGFA

» Unit of the German Research Institute for Public Administration (FÖV), Speyer

» InGFA was founded in 2009 by Prof. Ziekow and Prof. Böhret

» Research-based consultancy solutions for all levels of government and public administration

» Jointly funded by the German states and the federal government, additional funds through external sources
2. Background – What is RIA?

» Governments build the foundations on which people build their lives: security, education, infrastructure, health services etc.

» Governance occurs mainly through legislation, designed based on educated guesses of how people will respond

» But often governments have to return to problems they thought had already been solved or to correct perverse outcomes that were not anticipated (see BIT 2016)

How can the design of legislation be improved?
2. Background – What is RIA?

» Regulatory Impact Analysis (RIA) is a systematic approach to critically assessing the positive and negative effects of proposed and existing regulations and non-regulatory alternatives (OECD)
2. Types of RIA (OECD)

**Legislative Process**

- **regulatory intent**
- **draft regulation**
- **regulation**

**Ex ante**

**Regulatory Impact Assessment**

- Examination **whether** and **how** to regulate to achieve public policy goals
- Improve the design of regulations by identifying and considering the most efficient and effective regulatory approaches, including the non-regulatory alternatives, before a decision is made
- **Objective:** Identification of the best regulatory approach

**Ex post**

**Evaluation**

- Scrutiny of regulations that already entered into force
- Examination of target achievement, positive and negative outcomes
- **Objective:** Ensure that regulations are effective and efficient

Source: own representation based on OECD 2012/2015.
2. Types of RIA (German Approach)

**Legislative Process**

- **regulatory intent**
- **draft regulation**
- **regulation**

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**Regulatory Impact Assessment (prospective)**

- Development of regulatory options
- Assessment whether and how to regulate
- **Objective: Identification of the best (regulatory) approach**

**Regulatory Impact Assessment (concomitant)**

- Assessment of a draft regulation or parts of it
- **Objective: Optimization of a given draft**

**Evaluation (retrospective)**

- Scrutiny of regulations that already entered into force
- **Objective: Ensure that regulations are effective and efficient**

Source: own representation based on Böhret/Konzendorf 2001.
3. Ex-ante RIA

Requirements according to the joint rules of procedure of the Federal ministries (GGO)

» According to § 42 (1) GGO bills consists of:
  › the draft text of the law (bill)
  › the explanatory memorandum for the bill (explanatory memorandum)
  › an introductory summary (cover sheet)

» According to § 43 (1) V GGO the memorandum must explain the regulatory impacts in accordance with § 44 GGO
3. Ex-ante RIA
§ 44 (1) GGO

» “Regulatory impacts mean the main impacts of a law: This covers its intended effects and unintended side-effects.”

» “The account of the foreseeable regulatory impacts must be drawn up in consultation with the respective competent Federal Ministries (…) Whether the impacts of the proposal correspond to a long-term development, and in particular which long-term impacts the proposal has shall be indicated.”
3. Ex-ante RIA

§ 44 (2-6) GGO

» The impacts on the public budgetary income and expenditure as well as on the budgets of the Länder and local authorities

» The compliance costs to the public, industry, and public administration as defined in § 2 of the Act on Establishing the National Regulatory Control Council (NKRG)

» The costs to industry, and to small and medium-sized enterprises in particular

» The impacts of the law on unit prices and price levels in general

» The impacts of the law on the consumer

» Further impacts upon request
3. Ex-ante RIA
Further Requirements GGO

» **Equality between men and women** should be promoted by all political, legislative and administrative actions of the Federal Ministries in their respective areas (gender mainstreaming) (§ 2 GGO)

» The language used in bills must be **correct and understandable** to everyone as far as possible (§ 42 (5) S.1 GGO)

» Before a bill is submitted to the Federal Government for adoption, it must be sent to the Federal Ministry of Justice to be examined in accordance with **systematic and legal scrutiny** (§ 46 (1) GGO)

» RIA for legislative projects of the European Union (§ 74 (3) GGO)
3. Ex-ante RIA
Additional Requirements

» In addition, there are further criteria that can be derived from other documents such as the “Demography-check” (letter of the Federal Ministry of the Interior); One-in, one-out rule (cabinet resolution); etc.
3. Ex-ante RIA
The National Regulatory Control Council

» As “none” was normally entered in the cost column of draft laws, the National Regulatory Control Council (NKR) was established as an independent supervisory body in 2006 (see NKR 2015b)

» The NKR examines in particular the description of the compliance costs of new regulations for citizens, the business sector and public administration in terms of comprehensibility and correct methodology, as well as the description of the other costs to businesses, especially for small and medium-sized enterprises (§ 1 (3) NKRG)

» Initially, only the bureaucracy costs of laws were examined (information and documentation responsibilities); since 2011 expanded to include “compliance costs” (determined via SCM)
3. Ex-ante RIA

Compliance Costs

» Term compliance costs embraces the total measurable time and costs incurred by the citizens, the business sector and administration through a provision under Federal law

» A differentiation is made between the one-off adjustment costs and the annual costs
3. Ex-ante RIA

Exkursus: Compliance Costs – Standard Cost Model (SCM)

Identification pattern

- legislative provision/proposal
  (statutory law, ordinance, administrative regulation)

- obligation 1 (individual regulation)
  - if necessary: cluster obligations to form processes/ form case groups
  - wage rate
  - time
  - material costs (if necessary pro rata)

- obligation 2

- obligation 3 to n
  - number of addressees
  - frequency per year

- costs (per case)

- number of cases (per year)

- costs x number of cases = annual compliance costs of an obligation/ a process

\[ \sum \text{Compliance costs of obligations/a process 1 to n = compliance costs of the provision/proposal (per year)} \]


1 does not apply to citizens
2 if required to identify the number of cases
3. Ex-ante RIA
The National Regulatory Control Council

» The examination by the NKR can extend beyond the examination pursuant to § 1 (3) NKRG to include the methodologically appropriate implementation and comprehensible presentation of the following aspects (§ 4 (1) NKRG):

1. comprehensible presentation of the intention of and need for the regulation,
2. consideration of other possible solutions,
3. consideration regarding the time of entry into force, time limits, and evaluation,
4. considerations of simplifications of law and administration,
5. the extent to which, in the case of the implementation of a directive or other statutory instrument of the European Union, further-reaching regulations are put in place.
Inter-ministerial consultation

Cabinet decision

German Bundestag

Bundesrat

Entry into force

Draft regulation

Legislative draft is submitted to NKR → NKR verifies presentation of compliance costs, considerations of alternatives etc.

NKR comment is attached to the regulatory draft

If necessary, hearing of the NKR in Committees of the German Bundestag

Source: based on NKR 2015b.
3. Ex-ante RIA

The National Regulatory Control Council

» The National Regulatory Control Council examines the draft regulations of the Federal Ministries before their submission to the Federal Cabinet (§ 4 (3) NKRG)

» The National Regulatory Control Council examines draft regulations of the Bundesrat if they are transmitted to it by the Bundesrat. It examines draft acts from the floor of the Bundestag when requested so to do by the parliamentary group or member of the Bundestag proposing the legislation (§ 4 (3) NKRG)

» If the National Regulatory Control Council comments on the bill (§ 45 (2) GGO), its comments shall be attached to the bill; the same applies to comments by the Federal Government (§ 42 (1) S. 2 GGO)
3. Ex-ante RIA

Manuals

» At the federal level exist different types of guidelines, manuals, and tools for the various criteria to help legislators scrutinize the impacts of their drafts and to sensitize them to possible outcomes

» Additionally there are aspirations to integrate further criteria/manuals into the law-making process

» Examples: “Youth Check“; additional compliance costs
## 3. Ex-ante RIA

### Manuals (extract)

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<td>Gender mainstreaming-Check</td>
<td>§ 2 GGO</td>
<td>Manual: Gender Mainstreaming in the Conduct of Legislation</td>
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<td>Compliance costs</td>
<td>§ 44 (4) GGO; § 2 NKRG</td>
<td>(1) Erbex-Tool (2) Guidelines on the Identification and Presentation of Compliance Costs in Legislative Proposals by the Federal Government (3) Manual for Participation of Municipalities</td>
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<td>Other costs to businesses, especially for small and medium-sized enterprises</td>
<td>§ 44 (5) No. 1 GGO</td>
<td>(1) SME Test (2) Guideline Economic Costs and Impacts on Price Levels</td>
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<td>Legal scrutiny</td>
<td>§ 42 (4) GGO; § 46 GGO</td>
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<td>One In, One-Out criterion</td>
<td>Cabinet Decision (2014)</td>
<td>Concept of an One-in, One-out Rule</td>
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<td>Language Scrutiny</td>
<td>§ 42 (5) GGO</td>
<td>Manual for Drafting Legislation</td>
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Source: own representation.
3. Ex-ante RIA

Current Challenges

» Digitalisation of the legislative procedure (“eGesetzgebung“)

» Transformation of the current RIA criteria into a standardized assessment procedure

» On behalf of the Federal Ministry of the Interior InGFA carries out:
  › Elicitation of all inspection requirements in legislative procedure
  › Documentation of all manuals, guidelines, tools at the federal level
  › Design of a concept for a test cascade
  › Development of a proposal for a unitary testing procedure for RIA
3. Ex-ante RIA

Our projects

» Consolidation and digitalisation of manuals, guidelines and handbooks concerning the legislative procedure

» Development of a “Youth Check” to systematically identify the consequences of federal measures on young people

» Development of a tool for the assessment of further compliance costs for businesses

» Dialogue with experts on legal act for environmental inspection – exchange on possible transformations in the enforcement of EU environmental law

» Development of a tool for RIA in the Evangelical Church in the Rhineland (EKiR)
4. Ex-post RIA

Source: based on NKR 2015b.
4. Ex-post RIA

Reassessment

» Reassessment by the Federal Statistical Office two years after the legislative act has entered into force – compliance costs only
4. Ex-post RIA

In what cases is an evaluation carried out?

» Provision in the explanatory memorandum of the draft regulation according to § 44 (7) GGO

» Systematic evaluation of laws with high compliance costs (since 2013)

» Inclusion of evaluation clauses in a regulation
  › by the lead federal ministry
  › by the German Bundestag

» (Constitutional evaluation duties)
4. Ex-post RIA

§ 44 (7) GGO

“In the explanatory memorandum for the bill, the lead Federal Ministry must state whether and, if so, after what period of time, a review is to be held to verify whether the intended effects have been achieved, whether the costs incurred are reasonably proportionate to the results, and what side-effects have arisen.”
4. Ex-post RIA
Systematic evaluation (Decision of State Secretaries 2013)

» **Significance of legislative proposal/regulation:**

- Annual compliance costs of at least (threshold)
  - €1 million or 100,000 hours for citizens, or
  - €1 million for businesses, or
  - €1 million for public authorities

» Based on reassessment (evaluation may be prompted by the reassessment of compliance costs concluding that the actual costs exceed one of the thresholds/ if reassessment finds the actual costs also fall short of the threshold, the ministry may review the evaluation considerations in its draft)
4. Ex-post RIA
Systematic evaluation (Decision of State Secretaries 2013)

» Evaluation should take place between three and five years after a legislative proposal has come into force.

» The final time of the evaluation is at the discretion of the lead ministry.
4. Ex-post RIA
Systematic evaluation (Decision of State Secretaries 2013)

Evaluation criteria:

» Progress made in achieving the objectives (main criterion)
» Side-effects of a regulation (positive or negative)
» Take-up of a regulation
» Practicality of a regulation
» Considerations of whether the costs are proportionate to the results (not necessarily monetary; advantages/disadvantages)
4. Ex-post RIA
Systematic evaluation (Decision of State Secretaries 2013)

» BUT: “An evaluation is not predetermined in terms of its depth (e.g. legislative proposals as a whole, parts of a framework law, some areas of an original act, enforcement), methodology (ranging from an internal to a scientific evaluation) or size (from a two-page report to a detailed report, also depending on the available resources). These decisions are up to the lead department.”

» The evaluation reports are to be submitted to the ministries concerned as well as the Federal Government Coordinator for Bureaucracy Reduction and Better Regulation and the National Regulatory Control Council
4. Ex-post RIA
Systematic evaluation (Decision of State Secretaries 2013)

» Federal Government had conducted seven pilot projects by the end of 2014

» Conclusions (see NKR 2015a):
  › Objectives were not specified in sufficiently concrete terms -> NKR will request the specification of criteria
  › A major challenge was empirical acquisition of concrete information -> involvement of The Federal Statistical Office

  › Evaluation results are an added value for the responsible specialist branches (particularly insights into execution and practicability)
4. Ex-post RIA
Evaluation clauses

» Sunset provisions, continuation of the regulation often indexed to evaluation results

» Besides criteria as target achievement, practicality, acceptance of a law, sometimes specific criteria (e.g. interference with basic rights)

» Evaluations that were conducted by InGFA mostly based on evaluation clauses

» Specificity: legal analysis based on empirical data (combination of legal and social science approaches)
4. Ex-post RIA

Example: Evaluation of the Database on Right-Wing Extremism

» In reaction to the NSU murders, the File on Right-Wing Extremism (RED) was launched in September 2012

» Obliges 36 German security agencies to save relevant information on violent right-wing extremists, so that each participating agency has immediate access to the data. This aims at improving the exchange of information between agencies and ensuring a more effective fight against violent right-wing extremism

» Article 3 section 2 of the Act on Improving the Fight against Right-Wing Extremism from 20 August 2012 provided for an evaluation of the RED-G before 31 January 2016, with the involvement of scientific experts
4. Ex-post RIA

Example: Evaluation of the Database on Right-Wing Extremism

» According to the evaluation clause, the intensity of interference with basic rights that comes along with data collection and use shall be weighed against the effectiveness of the database in fighting violence-related right-wing extremism

» Difficulty: operationalisation of the effectiveness in fighting violence-related right-wing extremism
4. Ex-post RIA

Example: Evaluation of the Database on Right-Wing Extremism

» Approximation: analysis of what changes RED has had on the exchange of information (interviews, standardized surveys, log data)

» Measuring the interference with basic rights through an assessment of the amount of data saved in the database, the number of accesses to the data (analysis of log data), avoidance of data collection by security agencies
4. Ex-post RIA

Our projects

» Evaluation of Counter-Terrorism Laws

» Evaluation of the Hamburg Transparency Act (HmbTG)

» Evaluation of the Act on a File on Right-Wing Extremism (RED-G)

» Evaluation of the Police Authority Act (POG) Rhineland-Palatinate

» Evaluation of the Act on Regulating Access to Federal Information (IFG)

» Evaluation of the Mediation Act
4. Ex-post RIA

Current Challenges in Germany

» Coherent implementation of the Decision of State Secretaries – concomitant collection of data, building of evaluation capacities in the ministries

» Evaluation of behaviorally informed approaches (Cabinet Decision of 4 June 2014); RCTs
5. An international comparison of RIA – ex ante

The results apply exclusively to processes for developing primary laws initiated by the executive. The vertical axis represents the total aggregate score across the four separate categories of the composite indicators. The maximum score for each category is one, and the maximum aggregate score for the composite indicator is four. This figure excludes the United States where all primary laws are initiated by Congress.

Source: OECD 2015.
5. An international comparison of RIA – ex post

The vertical axis represents the total aggregate score across the four separate categories of the composite indicators. The maximum score for each category is one, and the maximum aggregate score for the composite indicator is four.

Source: OECD 2015.
6. What happens with the RIA results?

» Ex-ante:
  › RIA results are attached to the regulatory draft; pass through the legislative procedure

» Ex-post:
  › Evaluation reports are submitted to the lead ministry
  › Evaluation reports based on decision of State Secretaries are to be submitted to the ministries concerned, Federal Government Coordinator for Better Regulation and the NKR
  › If the evaluation is based on an evaluation clause, results are also submitted to the German Bundestag
  › Publication of evaluation reports
6. What happens with the RIA results?

» “..RIA’s most important contribution to the quality of decisions is not the precision of the calculations used, but the action of analyzing – questioning, understanding real-world impacts and exploring assumptions.”

(OECD 2008)
Thank you very much!

Contact: willwacher@ingfa-speyer.de
References


References


References


