

# Regulatory impact assessment: current situation and prospects in the German Parliament

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## I. RIA AS A STANDARD METHOD IN EUROPE: “STATE OF THE ART” LEVELS AND FUNCTIONS, POLICY AREAS AND TRENDS

Regulatory impact assessment (RIA) is a standard method of measuring costs of legislation, in the EU as well as in all Member States. It is applied on all levels of governance: on EU level, Member States’ level, in Federated States on states’ level, and in all states on the municipal level as well. All state functions participate in RIA – the legislative and the executive powers – and the courts very often have to calculate the compliance costs of laws. In Germany the legislative power is applied by the Federal Diet (*Bundestag*) and the representation of *Länder*-Governments, the Federal Council (“Second Chamber”). The policy-areas subject to RIA have expanded more and more; in social, labour and environmental legislation RIA is indispensable. The trend to a rational, calculable, economically measurable governance has intensified since the position of state finances has become worse.

This paper describes the current methods of RIA on European and Member State levels, the latter namely in Germany. This includes organisations established in particular for RIA work, namely the European High Level Group of Reducing Administrative Burdens (“Stoiber Group”) and the German National Regulatory Control Council (Part II). Part III deals with RIA in the German Parliament, including the Office of Technology Assessment and the Parliamentary Advisory Council of Sustainable Development, both in the Federal Diet. Part IV refers to some elements and requirements of “good legislation”.

## II. REGULATORY IMPACT ASSESSMENT IN THE EUROPEAN UNION AND MEMBER STATES

### (i) *European Union*

At EU level Germany has long advocated putting greater emphasis on qualitative factors in the EU-Agenda for better

regulation. The Federal Government has enhanced its dialogue with European actors to this end. It urged the European Commission to identify the regulatory areas which offer the greatest potential for simplifying and reducing the costs of legislation, particularly where they are relevant for small and medium-sized enterprises.

It did so by

- raising the reporting thresholds for statistics;
- streamlining the licensing procedure for novel food;
- electronic toll service.

The licensing procedure is one of the key issues of negotiations of the EU with the USA to establish a Free Market Agreement (Transatlantic Trade and Investment Pact, TTIP). Furthermore, the EU Commission worked on factors influencing the linguistic quality of EU-legislation studies and education. The Federal Government itself improved the Annual Report of the National Regulatory Control Council.

The Federal Government called for an effective, independent regulatory control mechanism at EU-level. It pushed for the decision in relevant items of future EU legislation to start a review of whether ordinances and other regulations take adequate account of concerns of small and medium-sized enterprises. The mandatory involvement of independent expertise both when drafting new laws and revising existing laws is a central element in this context. To these ends, a High Level Group of Independent Stakeholders on Administrative Burdens (HLG) was established. This group, as one of the pillars of the European Action Programme, has supported the Commission to the best of its abilities with several hundred concrete suggestions for the reduction of “red tape” amounting to an estimated savings potential of around €41 billion per annum.

The HLG released its final report in 2014 by giving recommendations to the Commission, other EU institutions

and Member States (see “Cutting Red Tape in Europe, Legacy and outlook”, Final Report, Brussels, July 24, 2014). It recommended, among other items, that the Commission:

- adopt a new EU Action Programme and strengthen existing EU programmes for reducing overall regulatory costs;
- introduce a system of offsetting new burdens on business stemming from EU-legislation by removing existing burdens from elsewhere within the acquis;
- improve engagement with stakeholders through comprehensive public consultation on draft legislative proposals;
- rigorously apply the “think small first” principle and competitiveness test to all proposals for legislation;
- develop a common EU methodology to measure regulatory costs and benefits and make the evaluation of all EU legislation compulsory;
- substantially improve its media communication of its activities, in collaboration with Member States, in order to foster public understanding and support for the work of the EU.

The HLG also recommended that all European Institutions:

- declare political commitment to focus only on those interventions which are indispensable at EU-level, and which add the greatest value in comparison to national and regional action (subsidiarity principle);
- empower an independent body to scrutinise the Commission’s impact assessment before the legislative proposal is adopted by the Commission;
- empower a European Ombudsman to act as an EU-wide point of contact for complaints and suggestions for the reduction of red tape;
- accelerate the legislative process as much as possible.

Finally, the HLG recommended that all Member States:

- adopt ambitious national targets to reduce overall regulatory costs, accelerate national implementation, and make “gold plating” transparent by outlining where and why elements of implementing measures go beyond the requirements set out by EU legislation;
- exchange best practice on the transposition of EU legislation into national law;

The work of the High Level Group is part of the “smart regulation programme” of the EU (COM(2010) 543 (October 8, 2010), as well as a new approach, the EU-Regulatory

Fitness and Performance Programme (REFIT – State of Play and Outlook (COM[2014] June 18, 2014)), which, inter alia, gives recommendations for simplifying EU law, withdrawing proposals that are no longer necessary, and revoking obsolete legislation.

(ii) *Member States and abroad: Netherlands, UK, Switzerland, USA*

As has been mentioned, RIA is applied in one or other form in all European Union Member States and abroad. In the Netherlands initiatives started early. In the focus of undertakings was the Advies College Toedising Administrative Lasten (ACTAL). Its studies and results of practical work spread all over Europe and abroad: for details, see Ulrich Karpen, “Comparative Law: Perspectives of Legislation in Legisprudence”, *International Journal for the Study of Legislation*, vol 6, no 2, 2012, Oxford 2012, pp 149-89. The “Better Regulation Commission” of the UK (see the Legislative and Regulatory Reform Act 2006 (c51)), which was established as an independent body in 2006, developed the UK Principles of Better Regulation as proportionality, accountability, consistency, transparency and targeting. In Switzerland, a legislation guide (“Gesetzgebungsleitfaden, Leitfaden für die Ausarbeitung von Erlassen des Bundes”, 3 Aufl, Bern, 2007) contains a chapter on RIA of legislation at all levels in Federal Government and the cantons. The US Paperwork Reduction Act of 1980, as amended in 1995, (Publ L No 104-13, 109 Stat 163) is designed to reduce the total amount of paperwork burden which the Federal Government imposes on private businesses and citizens. The Act establishes the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget. OIRA’s authority is extended not only over agency orders to provide information to the government, but also agency orders to provide information to the public.

(iii) *Germany: National Regulatory Control Council*

The country started RIA in 1996 with a checklist for drafters. Ten years later, in 2006, the National Regulatory Reform Council (NRRC) was established by Federal Law (August 14, 2006 (BGBl I, S 1866), as amended March 16, 2011 (BGBl I, s 420). As a next step in 2010 the Rules of Procedure of Federal Government state that the explanatory memorandum of every Bill must answer up to 37 questions, covering everything from impact assessment to participation/consultation, and from sustainability to duration. In 2013 the Coalition Treaty of the two governing parties established that:

- regulations must be simple, comprehensible and effective;
- there must be a RIA prior to legislation and an evaluation post decision;
- participation of stakeholders and citizens was mandatory;

- compliance costs should be cut by joint projects of Federal Government NRRC, regional governments (States/*Länder*) and municipalities.

Germany's current situation can be summarised by the following observations: the euro-crisis is not over; the European Central Bank is a very powerful player in the European fiscal and financial game; Germany introduced by constitutional amendment a "budget-brake", and for the first time after decades of budget deficits the budget for 2016 adds up to a "black zero".

RIA is applied on all levels of governments: federal, state, municipalities. Subject to control *ex ante* are all Bills, amendments, non-statutory regulations, Bills implemented by EU law and *ex post* all laws as already enacted and implemented. Furthermore, all policy areas are subject to RIA, such as laws on asylum seekers, job seekers, medical and dental surgeries. In the economy, for example, there is legislation on small and medium sized enterprises, regulations of procurement, electronic invoicing, employment for foreign specialists, and one stop service points. Citizen-friendly administration is sought in fields including passports and identity cards, environmental protection, and continuing work flow management.

In the meantime, the scope of RIA (scope and methodology-wise) has been widened. RIA no longer restricts itself to bureaucratic burdens and the application of the Standard Cost Model. RIA measures and reports compliance costs and continuity and applies the Net Administrative Cost model. § 2 of the amended NRRC Law reads as follows:

*Now the explanatory memorandum of every law should contain a comprehensive reflection of regulation impact: economical, social, environmental, sustainability costs altogether compliance costs. Of course the internationally recognised rules for the application of the Standard Cost Model must be taken as a basis. The method of counting and calculating is, however, wider and requires a Net Administrative Cost Model.*

As an interim statement – at the end of 2012, before the new government took over in 2013 – one might have said the following:

- Germany has reached its targets in reducing bureaucratic burdens almost completely.
- The plan in 2006, when the NRRC started its work, was to reduce the then bureaucratic burden of €50 billion by 25 per cent. At the end of 2011, 22 per cent of this figure had been reached, amounting to €11 billion.
- the EU – following the German example – set the target to reduce administrative burdens at 25 per cent, and it reached the goal;
- in the end, Germany was falling somewhat behind.

This overall positive tendency changed drastically in 2013/14, as the 2014 Report of the NRCC indicates ("Give serious attention to follow-up-costs – seize opportunities", Berlin, 2004). The Council observed a significant rise in compliance costs. Over the past 12 months, annual compliance costs have on balance gone up by some €9.2 billion (from €2,5 bn in 2012/13). The introduction of a statutory minimum wage alone has caused the major part of this cost increase. This was – as the NRRC says – "a cold start into the 18th legislature"(N 9, p 5). In retrospect, the first half of 2014 has presented the greatest challenge so far to the work of the NRCC. The rules of establishing transparency in terms of follow-up costs were not consistently adhered to in important legal initiatives.

The NRRC claims:

- consistent implementation of the new work programme of government, concerning better regulation;
- greater involvement of the Federal States and municipalities in cost estimates;
- greater efficiency in electronic administration;
- to have established more transparency in Brussels in terms of the follow-up costs accruing for Germany;
- to have made further progress with the evaluation and quantification of benefits;
- to have kept up the pressure on setting targets to reduce red tape – a new clear-cut regulation, following the 25 per cent target, does not exist;
- to be thinking about following a reduction target as in the UK – "one in, one out" regulation.

In detail, the topics of the NRRC's 2014 report concern:

- life insurance politics;
- energy transition from nuclear energy to wind and solar energy;
- financial base of the statutory health insurance Act;
- financial market regulation.

Over the next few years the NRRC will concern itself with:

- medical surgery projects;
- living conditions of asylum seekers;
- i-cars;
- e-government and e-justice.

Furthermore, the NRRC underlines the following goals as important for its future work:

- joint requirements of the Independent Regulatory Control Councils in Europe for a smart regulation;
- contacts with the European Parliament;
- cooperation in RIA activities with the OECD-countries and exchange of ideas in the field of methodology;
- OECD cooperation, including comparisons with other countries.

### III. REGULATORY IMPACT ASSESSMENT IN THE GERMAN PARLIAMENT

#### (i) Government first

In Germany, RIA is primarily a responsibility and duty of government. The Federal Chancery has a section for general issues of RIA as well as another for European legislation and its implementation into domestic law. All ministries use RIA in the course of drafting Bills. There is a network of RIA specialists of government.

More than 90 per cent of Bills are initiated in government, after having been decided on in Cabinet. The Cabinet on June 4, 2014 adopted a work programme on better regulation, namely on improving legislative procedures, which demands:

- testing of rules prior to their initiation in Parliament;
- the systematic evaluation of all major regulatory proposals;
- systematic procedures to take account of the concerns of small and medium-sized enterprises;
- consolidating and restructuring the Federal Government's tools for better regulation;
- the incorporation of legal language into basic and further training, strengthening linguistics;
- an electronic legislative process;
- control management for administrative rules;
- improving quantification and presentation of benefits, in particular in the fields of environmental and construction law;
- the evaluation of the procedure for participation in the drafting of EU-Law;
- to strengthen the rule that EU Directives are transposed into national law on a "one-to-one" basis to ensure equal opportunities throughout the European internal market and to avoid unnecessary expense in implementing EU legislation.

#### (ii) Legislative procedures

In Parliament, RIA arguments are carefully checked mainly in committees, both in the Federal Diet (*Bundestag*) and in the Federal Council (*Bundesrat*). The responsible minister in the Federal Diet – on a regular basis – is heard in (confidential) meetings of committees. The NRRC is available in an advisory capacity in both houses of Parliament. In the Federal Diet, the Parliamentary parties and the individual deputies are entitled to check RIA statements of government by major and minor interpellations. For example, in 2012 the members of the "Green Party" of the Diet scrutinised the German Federal Training Assistance Act (Dr S 17/11099 of the FedDiet) with 38 well-prepared questions concerning the bureaucratic costs of offices for granting assistance to university students. The deputies, by their interpellation, found out that out of 2.7 million students there were more than 600,000 first and continuing applications for assistance. The working period for a decision was six months. The bureaucracy for these procedures was very costly, amounting to €27.21 million.

#### (iii) Federal Diet (*Bundestag*)

In the Federal Diet, the RIA is located in three institutions: the Scientific Service, the Office of Technology Assessment, and the Parliamentary Advisory Council on Sustainable Development. The Scientific Service is a section of the staff of the Parliament (some 150 persons) responsible for all questions of the deputies. About the same number of civil servants gather information and do research for the committees and the Parliamentary parties.

Much – and, according to the subject-matter, at times very difficult – RIA is done by the Office of Technology Assessment (OTA) at the Federal Diet. It is an independent scientific institution created with the objective of advising Parliament and its committees on issues relating to research and technology. It consists of nine members of scientific staff and is directed by the Committee for Education, Research and Technology Assessment of Parliament. Since 1990 it has been outsourced under contract to the Institute of Technology Assessment and Systems Analysis in Karlsruhe, which is linked with the Association of Engineers and Association of Electronics. The OTA is a member of the European Network of Assessment Offices.

The tasks and goals of the OTA are to:

- evaluate legislative projects and drafts;
- monitor and to analyse important trends in science and technology and related social aspects;
- analyse innovation activities (innovation reports) at an early stage of development (horizon scanning);

- further an exchange of experience and views with players from society by means of systematic discourse analysis and dialogue procedures.

All this includes counselling on new drafts at an early stage, for example:

- exit strategy in nuclear power programmes;
- sustainable energy sources;
- traffic;
- genetic technology;
- medicine.

Clients and target groups are

- the Diet and its committees;
- the staff of political parties in Parliament;
- Members of Parliament;
- study groups, companies, research and educational institutions;
- the public.

Proposals for OTA studies are made by Parliamentary groups in the Committee for Research and other committees. It is vital that the results of studies are widely taken into consideration. The focus is on ensuring the flow of information; to promote communication among scientists as well as between scientists, society and Parliament; and the transfer of knowledge and opinions even before completion of projects, eg draft laws.

The OTA applies a mix of methods. It uses a broad analytical approach to tackle complex issues of a scientific and interdisciplinary nature which have long term societal significance. The encouragement of public discourse and the formation of opinions in society is a fundamental constituent of Technology Assessment.

The Parliamentary Advisory Council on Sustainable Development (PACSD) was established in 2004 and its competences broadened in 2014. Its members are 17 deputies of the Parliament. The term “future” has played a prominent role in the Federal Diet for more than 10 years now. The establishment of the PACSD brought sustainability to the level of Parliament. “Making sure that life today is not at the expense of tomorrow!” is the guiding principle behind policy-making geared towards sustainability, assuming responsibility for those alive today and future generations alike. In Parliament, the PACSD assumes the role of a “watchdog”. It “barks” as soon as an initiative fails to bear in mind the National Sustainability Strategy. Hearings and position papers allow debates to be initiated, making the PACSD an important as well as a living

part of Parliament

“Sustainability is a cross-cutting issue which connects the responsibility for those alive today with the responsibility for future generations – because every generation has to solve its own problems rather than offloading them onto future generations.” This basic rule was set out as far back as 1987 in *Our Common Future*, the report by the World Commission on Environment and Development (“Brundtland Commission”). “Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” This aim can only be achieved if every single one of us becomes active (see the webpages of the German *Bundestag*: [/htdocs\\_e/bundestag/bodies/sustainability//198560](http://htdocs_e/bundestag/bodies/sustainability//198560)).

The PACSD is entrusted to:

- continue monitoring and assisting the sustainability policy of the Federal Government at the Parliamentary level in a suitable and multi-disciplinary way;
- develop the indicators and objectives, setting and specifications of measures and instruments to implement the sustainability strategy and dovetailing important policy approaches of relevance to sustainability;
- improve government’s sustainability policy at the European level, in particular for the European Strategy for Sustainability;
- strengthen the United Nations activities and measures as part of the Rio follow-up-process;
- monitor and support consultations and discussions in other bodies of the Federal Diet related to sustainable development by being able to present opinions and recommendations to the lead committee in question for consideration in the discussions;
- examine other priority issues which affect sustainable development and are suited to promoting the process of sustainable development and, if necessary, submitting recommendations to the Federal Diet or the Federal Government accordingly;
- evaluate the Federal Government’s sustainability impact assessment – the Advisory Council shall present the lead committee in each case with the result of its evaluation as an opinion, which must be discussed by the lead committee and appraised in writing;
- finally, to stay in contact with, and consult, other institutions to promote sustainable development, in particular with other national Parliaments, the Länder and the institutions of the European Union (N.12).

The first topic for the PACSD to consider after the new definition of its tasks was “sustainability in mobility”. Challenges in this area comprise:

- protection of environment, eg shifting transport from road to rail;
- climate protection;
- combined transport;
- infrastructure;
- financing;
- mobility tomorrow – electronic mobility.

New topics will be:

- writing a German Sustainability Code – standards of transparency;
- efficient use of resources;
- EU cooperation.

(iv) *Federal Council (Bundesrat)*

The Federal Council as the representation of the *Länder*-governments plays an important role in German legislation (by acting as a form of unofficial “Second Chamber”). Bills are introduced by the Federal Government from the floor of the Federal Diet or from the Federal Council. Very few Bills originate from the Federal Council: Government Bills reach the Federal Diet, however, via the Federal Council, which has to comment on them within six weeks. After the expiry of that period the Bills are transmitted to the Federal Diet. They then,

as enacted by the Federal Diet, may be passed by the Federal Council or be objected to. The objection may be overruled by the Federal Diet. If, according to the Constitution, Bills require the consent of the Federal Council, the Council gives consent or the Bill fails.

As far as RIA is concerned, a few years ago the Federal Chancellor wrote a letter to the President of the Federal Council, asking whether the Council with its comments could attach its RIA. The President of the Council refused this request, due to the short period (six weeks) available for comments. If necessary, however, the staff of the Council can ask for better information on the draft from the offices of the 16 State Premiers or their involved ministries.

#### IV. RATIONALITY, LOGIC AND EXPERIENCE

The elements and requirements of good legislation, including RIA, are convincing and clear. But solutions for good and better regulation cannot be found by pure rationality and calculation. Dynamic changes and historical developments have to be taken into account.

As John Dickinson stated on August 13, 1787 in the Constitutional Assembly of the United States of America in Philadelphia: “The life of the law has not been logic: it has been experience” (“Century of Law-Making for a New Nation”, US Congressional Documents and Debates, 1774-1875, Farrand’s Records, vol 2 (1991), 278).

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