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Better Regulation through more Transparency in Regulatory Impact Assessments

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1 Introduction

A future-oriented environmental policy requires a comprehensive, balanced and scientifically sound presentation of regulatory impacts on both the national and European level. This is because a comprehensive and objective presentation of regulatory impacts is foundational in ensuring that interests such as environmental protection or social justice are given appropriate weight in the democratic opinion-making process.

Only when all relevant information is available on the potential impacts of a law can a legislator make an informed and appropriate decision based on his or her priorities. The public, too, can only recognize and evaluate their elected legislator's priorities if there is transparency in the explanatory memorandum as to how the regulatory impacts were taken into account in drafting the bill.

2 Status Quo

Germany

In Germany, it is above all the responsibility of the federal government to ensure that the regulatory impacts of a bill and how they were taken into account when drafting the bill are made transparent in the explanatory memorandum.

The federal government sets its own rules for drafting bills. These include, for example, the Joint Rules of Procedure of the Ministries (Gemeinsame Geschäftsordnung der Ministerien - GGO) or the cabinet decision to implement the "one in, one out" rule (see below). Few of these rules are codified law, such as the act establishing a National Regulatory Scrutiny Board (Normenkontrollrat Act).

Genesis of laws

Laws are created through a complex political process in which the federal government, the Bundestag, the Bundesrat and civil society work together. The Bundestag, together with the Bundesrat as the legislature, is responsible for the final decision on laws, and the various parliamentary parties can introduce bills. However, the Bundestag and Bundesrat are hardly equipped with sufficient capacities to develop bills independently. For this reason, the majority of successful bills are introduced into the legislative process by the federal government. Even the few bills introduced by the Bundestag originate predominantly from the parliamentary parties and are prepared for them by the federal government.

Compliance costs

The compliance costs are defined in § 2 of the "Act on the Establishment of a National Regulatory Scrutiny Board" (Normenkontrollrat Act). It defines the time and costs incurred by citizens, industry and public administration in implementing a law, e.g. through filling in forms or transmitting statistical information, but also through any necessary technical conformance.

The cabinet may deviate from their self-imposed rules at any time. In the GGO, the federal government has committed itself to presenting as a matter of principle all essential, intended and unintended regulatory impacts. However, the GGO only contains concrete requirements for fiscal and economic impacts, the general price level and the compliance costs. There are no explicit requirements for the presentation of environmental impacts.

Accordingly, in practice often only the explicitly mentioned impacts are comprehensively presented in the federal government's explanatory memoranda. Other negative or positive impacts of a law, such as the costs resulting from damage to the environment or the benefits of reduced environmental impacts, are either less comprehensive or not mentioned at all.

As a consequence, in the explanatory memorandum statements are missing, for example, as to whether the law will cause higher greenhouse gas emissions, whether health problems will arise due to increased emission of air pollutants or whether ecosystems will be destroyed because areas are sealed off or converted. Statements on aspects of social justice, such as the question of whether a law will place a higher burden on lower-income brackets than on higher-income or on women more than men, are also frequently absent.

The effect of these one-sided requirements is reinforced by the fact that scientific methods and the collection of data are less developed for environmental impacts than for economic impacts. This is due not only to their complexity, but also to the fact that they have not and do not receive as much intensive support.

Accordingly, research into economic interrelationships has been much more intensive to date than, for example, into complex ecosystems or into the impacts of climate change.

The Federal Statistical Office also expends significantly more effort collecting economic data and data on compliance costs than it does for data on the environment. As a result, the assessment of environmental impacts is still often difficult and comparatively complex. The same applies to the evaluation of regulatory impacts in the social sector.

UBA guidelines and tools

To facilitate a comprehensive and balanced ascertainment and presentation of regulatory impacts, UBA has developed a regulatory impact assessment tool. This tool makes it possible to gauge economic and environmental impacts that can be monetized, i. e. those for which cost rates are available. A further tool for strategic impact assessment, also developed by UBA (publication spring 2019), guides users through the impact assessment of a regulation or strategy and supports them in ascertaining all impacts on the environment, the economy and society– irrespective of whether the impacts are to be assessed qualitatively or quantitatively.

“One in, one out” rule

In the context of the so-called “one in, one out” rule, the federal government has agreed to introduce new laws into the Bundestag only if their direct, ongoing costs for the economy are fully offset by the repeal or amendment of an existing law. This rule fails to take into account the indirect impacts on the economy (e.g. effects on demand in other sectors or advantages arising from innovations, so-called “second-round effects”), not to mention the impacts on citizens and the administration, the environmental and social impacts.

This can be illustrated by the example of a law that would require operators of industrial plants to implement more elaborate filtration systems with the goal of improving air quality. According to the “one in, one out” rule, such a law would be evaluated based only on the ongoing costs it would incur for the operators of the industrial plants. The additional profits for the companies that manufacture the filters and for the tradespeople who install and maintain them would not be taken into account, nor would the positive effects of improved air quality on human health and on the state of ecosystems. In addition, the Ministry of the Environment would have to offset the costs for the plant operators by amending or repealing other environmental laws.

In the absence of a comprehensive, balanced and scientifically sound presentation of the regulatory impacts, a proper political discussion about a law and the resulting impacts can hardly take place. If, for example, the environmental damage caused by a law is not disclosed, its overall impact on society is not clear. As a result, a law may be enacted despite a negative overall impact on society, for example if it benefits companies but creates high costs to society through the emission of greenhouse gases or air pollutants. Conversely, laws that have a positive overall impact on society may fail, if, for example, they require additional investment by companies to protect human health or sustain ecosystems. This can occur if the laws’ benefits are not taken into account in the decision due to a presentation of the regulatory impacts that is limited to compliance costs and fiscal consequences only.

In addition to limiting the regulatory impacts to compliance costs, also the “one in, one out” rule adopted by the federal government impedes an objective regulatory impact assessment. The rule’s narrow perspective increases the probability that proposed legislation will not even be discussed in public, even if it has positive impacts on society as a whole. According to the “one in, one out” rule, such legislative proposals can already be rejected within the federal government if they lead to direct economic costs. The federal government then fails to bring such laws before the Bundestag for a vote despite a potentially positive outcome for society. In doing so, it essentially preempts the political decision of the legislature, since the Bundestag hardly has sufficient capacity to draft bills independently. Public debate on these regulations is also not possible.

In this way, the further development of environmental law required for a future-oriented environmental policy can be blocked by the “one in, one out” rule, or this development is bartered through the abolition of other regulation in the environmental sector. This can lead to the dismantling of standards. The “one in, one out” rule thus contradicts the German government’s Sustainability Strategy (“Nachhaltigkeitsstrategie”) of April 2017, because this Sustainability Strategy targets development that is not only economically efficient but also socially balanced and environmentally sound.

European Union

At the European level, the European Commission is the key player in shaping regulatory proposals. As a rule, it has the sole right of initiative. The European Commission prepares impact assessments for the regulations it proposes. In contrast to the German federal government, however, the European Commission’s requirements for presenting the regulatory impacts are not limited to the direct costs of its implementation and thus avoids a fundamental imbalance. Rather, the operational guidelines (the Better Regulation Guidelines and Toolbox1) principally stipulate that the Directorates General must take all relevant impacts into account in their impact assessments, i.e. including impacts on the environment and social objectives.

The research report drawn up on behalf of the UBA, “The presentation of environmental impacts in the EU’s legislative impact assessments” [UBA-

Texte 96/2017, in German], concludes that the Directorates General do not always live up to this claim, particularly with regard to environmental impacts. For example, environmentally friendly alternatives are not always sufficiently examined or environmental impacts are not presented comprehensively enough. Compared to Germany, however, the presentation of environmental impacts is much more balanced due to its broader content and its entrenchment in the institutions. In addition, in the EU there is a requirement to give equal weight in the impact assessments to all relevant impacts, be they social, environmental or economic, instead of, as in Germany, giving economic interests de facto priority by means of the “one in, one out” rule.

This requirement in EU impact assessments does not impede the setting of political priorities at a later date but ensures that Parliament, the Council and the public are informed as objectively as possible.

In addition, the European Commission has taken a clear position against the setting of quantitative bureaucracy reduction targets and the introduction of a “one in, one out” rule [KOM 2017]. One of the reasons given by the Commission is that these would lead to a significant risk of deregulation and limit its ability to introduce new, objectively necessary legal regulations. In some countries in which quantitative reduction targets have been set, the Commission has already observed a negative impact on the political will to create new legal regulations.

Research report takes a critical view of “one in, one out” rule

The research report “Analysis of compliance costs and the ‘one in, one out’ rule as guiding principles for policy-making” [UBA-Texte 50/2016], commissioned by UBA, arrives at an assessment of compliance costs and the “one in, one out” rule similar to the European Commission’s own assessment. It makes the criticism that the macroeconomic effects are largely ignored when determining the effort of compliance and that the benefits of a law are not taken into account. It also observes that the “one in, one out” rule focuses exclusively on the direct impacts on the economy and ignores environmental as well as social impacts.

3 Recommendations

In order to arrive at a practice of regulatory impact assessments in Germany that ensures a balanced and comprehensive consideration of environmental impacts and at least meets the requirements of the EU impact assessments, UBA recommends the following reforms:

PRESENT REGULATORY IMPACTS IN A TRANSPARENT, BALANCED AND COMPREHENSIVE MANNER

In the explanatory memorandum, the federal government should inform the legislature and civil society in a balanced manner about the essential intended and unintended impacts of the bill it has introduced. The environmental impacts include, for example, the amount of greenhouse gases and air pollutants emitted, the conversion of land and the destruction of ecosystems.

The environmental and social impacts may not be given less weight in the presentation than the economic impacts and the impact on public budgets. In addition, the overall impact on the economy must be presented, rather than taking into account only the microeconomic costs to the industries directly affected by a law. These impacts include so-called second-round effects, by which, for example, sales in supplier industries rise when an industry directly affected by a law is compelled to make capital investments.

The explanatory memorandum should contain a clear distinction between the presentation of the impacts according to scientific principles (e.g. the rate of increase in greenhouse gas emissions caused by a law) and the presentation of the political priorities that influenced the decision (e.g. compliance with climate targets, high economic growth). Impact assessments should not be influenced by policy prioritization; impact assessments should be based on scientific principles, and their presentation should be comprehensive and comprehensible.

IMPROVE THE FRAMEWORK CONDITIONS FOR A TRANSPARENT, BALANCED AND COMPREHENSIVE PRESENTATION OF REGULATORY IMPACTS

The federal government should ensure that in all ministries the regulatory impacts are analyzed and presented in such a way that they actually meet the aforementioned requirements. To this end, it should improve the institutional framework conditions for regulatory impact assessments. It should, for example, revise its existing rules and in particular the GGO and the guidelines for regulatory impact assessments so that it becomes clear that, in addition to compliance costs and the fiscal consequences, other negative or positive regulatory impacts, such as its environmental impacts, are also presented. The tools developed by UBA for regulatory impact assessments and strategic impact assessments can provide reference points for this work.

BROADEN THE SCIENTIFIC BASIS

As part of its research funding, the federal government should strengthen scientific research on environmental and social interrelationships and on the further development of impact assessment methods. It should also expand its capacity to collect the necessary data. This is necessary to close gaps in assessments of environmental impacts that still exist in many areas, such as the assessment of impacts on ecosystems.

ABOLISH THE “ONE IN, ONE OUT” RULE

The federal government should abolish the “one in, one out” rule, because it one-sidedly prioritizes the interests of industry over environmental and social goals and over the interests of the citizens. This puts the goals of the sustainability strategy in danger.

4 Advantages of transparent legislative impact assessments

A comprehensive and balanced presentation of the regulatory impacts in line with the recommendations in Chapter 3 would help in giving appropriate weight to environmental protection concerns in the legislative process. It would also strengthen legislators and civil society as a whole.

The explanatory memorandum and the regulatory impacts described therein can provide an important basis for the decisions of the legislators and the democratic opinion-making process in civil society. The prerequisite for this, however, is that all essential intended and unintended environmental, social and economic impacts are presented in the explanatory memorandum in a scientifically sound and comprehensible manner, and that the economic impacts or costs of a law are not prioritized over its benefits, or its environmental or social impacts.

In addition, it makes it easier for legislators and civil society to assess a law if the explanatory memorandum shows how the regulatory impacts have influenced the drafting of the law and which alternatives have been considered.

A comprehensive presentation of the regulatory impacts also helps stakeholders in civil society to work towards amendments or corrections to a bill, e.g. as part of their public relations work or the involvement of associations in the legislative process.



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