

Regulatory Impact Assessment and Sub-national Governments

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INTRODUCTION

Regulatory impact assessment (RIA) is, in some ways, the reformulation of an old and rather trivial question that any government body or ruler has in mind before issuing a new regulation: What is its purpose? What are the expected results? How to achieve compliance with this regulation?

These simple questions turned into a critical review of public policies in the United States (US) in the late 1960s, when the development of federal programmes began to raise concerns over the economic burden they represented. This gave an impulse to public policy analysis, regulation being part of the set of instruments used by the government (Mény and Thoenig 1989, 13), followed by the economic analysis of law in which regulation is viewed as part of the costs that a business has to bear. The very beginning of RIA as a distinct public policy started under the Thatcher government in the United Kingdom (UK) and the Reagan

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administration in the USA with the purpose of identifying the costs of regulation for the business sector and devising measures to alleviate this burden on enterprises and increase their competitiveness (Kirkpatrick and Parker 2007).

Over time, both academic research and policy papers have been devoted to what has been labelled “regulatory policy”. The initial unilateral approach of regulation as a “burden” has been offset by the consideration of the benefits that regulation can bring to society as a whole. The policy focus was shifted from “less regulation” to “better regulation” and RIA could even be integrated in to the “sustainable development approach” of public policies. All the impacts of regulation on economic, social, and environmental development should be assessed and weighed against each other (Kirkpatrick and Parker 2007). Nevertheless, to talk seriously about impact assessment an institutional basis is necessary, in particular in the form of a mandatory procedure (Dunlop and Radaelli 2016).

The Organisation for Economic Cooperation and Development (OECD) has played a key role in supporting RIA. In 1995, the OECD’s *Recommendation on improving the quality of government regulation* recommended integrating RIA in the development review and reform of regulations (OECD 1995). Subsequently, with the 2001 Mandelkern Report, the European Union (EU) decided to adopt its own policy framework to promote RIA, leading to numerous policy documents and programmes. The *Regulatory policy outlook 2015* found that, in 2014, 33 out of 34 OECD member states and the EU had an explicit “whole-of-government policy of regulatory quality”, including in particular *ex ante* impact assessment of regulation (OECD 2015, 26–27).

RIA is an instrument which helps to inform decision-making by assessing the costs, benefits, and risks for important public goods and targeted groups. It is

a systematic, mandatory, and consistent assessment of aspects of social, economic, or environmental impacts such as benefits and/or costs; (2) affecting interests external to the government; (3) of proposed regulations and other kinds of legal and policy instruments; (4) to (i) inform policy decisions before a regulation, legal instrument, or policy is adopted; or (ii) assess external impacts of regulatory and administrative practices; or (iii) assess the accuracy of an earlier assessment. (Radaelli 2009, 25)

With the generalisation of RIA, however, there has been a dilution of the concept, in relation to the diversity of institutional and political contexts, making the assessment of its implication almost impossible.

After decades of widespread practice, RIA still raises questions on conceptual ambiguities affecting its results. Therefore, it is worth first evaluating RIA by reviewing the conceptual challenges and confronting its purposes and results. The second task is to shed light on an obscure area in the academic literature—the relationship between RIA and local government. We can pick up some hints in a few policy papers but there is no in-depth analysis of this relationship. Given the regulatory role of sub-national levels of government, it is necessary to evaluate the role of RIA at sub-national levels, including its limits or, more precisely, what can reasonably be expected from it.

LIMITS OF RIA IN REGULATORY GOVERNANCE

Conceptual Ambiguities

RIA, Policy Impact Assessment and Regulatory Quality

Regulation is usually part of a policy programme implemented by government in order to attain specific targets. Thus, it is an action whose impacts, perceived or actual, can be assessed. Classical writings on public policy analysis distinguish so-called regulatory policies, whereas policy assessment has to refer to policy goals. The literature and policy papers are inclined to fuse regulatory and policy assessment, however (see Dunlop and Radaelli 2016, 4). As a consequence, regulations are treated in policy impact assessments as tools, not as norms. This is in particular the case for EU policies, which are generally implemented through directives or regulations.

There is nevertheless a legal approach to RIA, which is concerned with legal consistency, regulatory instability and uncertainty, and normative inflation. In particular, the increasing number of norms to be complied with has been raising concerns about the efficiency of regulation. Thus, simplification strategies are recommended in order to alleviate the regulation burden, assess the necessity of new regulations, and eliminate obsolete regulations through regulatory performance reviews. On the other hand, in regulatory state (Majone 1996) there is a growing need

for governments to regulate more in order to answer the problems on their agenda (Conseil d'Etat 2016, 49–52).

The common principles for better regulation listed by the Mandelkern Report have specific legal meaning (necessity, proportionality, subsidiarity, transparency, responsibility, simplicity). Furthermore, RIA can be worked out as the procedural moment, framed by the law of policy-making and decision-making process. This involves the integration of RIA in to the decision-making procedure, the determination of the method to be used and evaluation criteria, the consultation process and how the results of consultation have to be used to improve initial drafts (see Mandelkern 2001; OECD 2015, 25). However, the limitation of RIA is that it is a tool for decision-making which cannot limit the decision-making powers of competent authorities. For example, the European Court of Justice ruled that an Impact Assessment (IA) is not binding for the powers of the European Parliament or the Council (ECJ *Afton Chemical*, C-343/09, 8 July 2010).

RIA and Evaluation

The relationship between RIA and evaluation is not unambiguous. They partially overlap and both include *ex ante* and *ex post* dimensions; however, their focuses and rationales differ. In general, evaluation is considered as a part of a policy cycle with a purpose to assess whether the policy goals have been met. “Evaluation may be understood as an analytical tool and procedure which aims, first, at attaining relevant information on the performance (process) and results of public policies, programs and measures and, second, at making available (‘feeding back’) such information to the political and administrative actors concerned (as well as to the general public at large)” (Wollmann 2005, 2). Depending on the possibility to influence a concrete policy programme, evaluation can be performed *ex ante*, *ex post*, or parallel with the policy implementation (Wollmann 2007, 393–394). There is a dominance of the *ex post* evaluation enabling evidence-based policy-making that is focused on the effectiveness and efficiency of policy-making (and thus legislating), built upon the scientific evidence of the success of existing policies and using expert knowledge (Howlett 2009). RIA can be performed both *ex ante* and *ex post*, but in practice, the *ex ante* type prevails as a first step in the legislative or other decision-making action (e.g. developing strategies, urban planning, awarding concessions, etc.).

Both approaches use similar criteria: economic, environmental, and social impacts, outcomes and/or results, among others. Policy evaluation takes into account other effects that can be observed, such as social acceptance or effects on political legitimacy, but these can only be vaguely assumed by RIA. Moreover, *ex post* evaluation may help in the detection of unintended consequences (Kuhlmann and Wollmann 2011), offering a valuable insight into the second cycle of legislating policy. By comparing *ex ante* RIA and *ex post* evaluation (as dominant types), the most important distinction, besides the temporal one, relates to the learning capacity in the latter—the evidence of real-world implications gathered through the evaluation process can help with better regulating in the next cycle. On the other hand, *ex ante* RIA remains largely in the area of probability, and cannot rely on evidence.

The evaluation too has become a part of regulatory policy. According to the Expert Report on the implementation of *ex post* evaluations (Prognos 2013), they are “part of the standard repertoire of regulatory policy activities” in the UK, Canada, Sweden, Switzerland, and the EU, using similar organisation, evaluation criteria and tools, but also displaying differences in the quality control of procedures and the use of evaluation results. In some countries, such as Sweden and Switzerland, the obligation to evaluate existing legislation is determined legally, up to the constitutional level. Sunset clauses are also used as a form of obligatory norm evaluation in some countries, such as the US or the UK, whereby the statute can be amended or renewed only upon an evaluation, otherwise it simply ceases to exist.

The extensive use of RIA has created great expectations in terms of assessing the real implications of legislation and policy. For example, in 2010 the EU upgraded its 2002 Better Regulation to Smart Regulation policy (EC 2010), extending the regulatory efforts to the enforcement, evaluation, and revision of legislation (EC 2015). The principle “evaluate first” was introduced making the evaluation of existing legislation and lessons learned from past experience necessary for the formulation of new legislation. It was expected that the evaluation of effectiveness and efficiency of the EU legislation would improve the quality of decisions and regulation and lead to the reduction in administrative burdens. The inclusion of sunset clauses requiring an evaluation of the functioning of European executive agencies also points to the wave of the evaluation. Still, the more systematic evaluation of legislation has only recently become more prominent—more than half of 83 evaluation documents

in the European Commission database were published in 2016. Some of the reasons for the reluctance to engage in evaluation may be found in the amount and the complexity of legislation, and there is less interest in evaluation than in transposition, especially if policy has no budgetary effects (Delahais 2014).

Purposes and Results

At first glance, RIA is deemed to *improve the quality of regulation* involved in policy implementation. Its initial purpose in the early 1980s, however, was bound up with deregulation policies and the objective to give businesses more market freedom and increase competitiveness. The emphasis has shifted onto different priorities over time, depending on the country, raising doubts as to the supposed factual evidence given by RIA for decision-making. The determination of this emphasis is in itself a political choice—policy goals have to be determined first. For example, at the EU level, sustainable development and competitiveness were main priorities in the integrated RIA of the first stage (2002–2005), but after 2005 the emphasis shifted to employment and growth.

A less obvious purpose of RIA is *to control* public administration. In the USA, it was aimed at giving the US president stronger control over federal agencies, meaning that “regulatory review was and remains a mechanism that allows for centralised executive oversight of the bureaucracy across the entire spectrum of domestic policy in the USA” (West 2016, 322). This explains why in the USA RIA has developed for regulations of federal executive agencies and not for primary legislation voted by Congress or for executive orders of the president. A similar function of RIA can be observed at the EU level. Whereas the Commission has developed its own practice and methodology for RIA and has been eager to keep control of this procedure, the European Parliament (EP) has been involved in RIA from 2011, urged by the reports and decisions of other EU institutions. The EP’s new Directorate of Impact Assessments and European Added Value, established in 2011, checks RIAs transmitted with Commission’s proposals, assesses their quality and relevance, and takes a position on the consistency between the draft proposal and the content of RIA and, above all, it checks the compliance of the Commission’s proposals with parliamentary guidelines. But the Council is still reluctant to engage in transparent RIA on its amendments (Renda 2014, 99).

Since the goal of RIA is to improve regulation, diminish its economic weight and increase its efficiency, it is legitimate to ask about *the results* of RIA. Unfortunately, the answer to this question is rather disappointing. It is possible to have a financial or economic estimate of the impact of regulation, even only partial and approximate, but this does not say anything about the consequences for the final decision. And if RIA has an impact on the final decision, then the main difficulty is to assess the real results of RIA. As pointed out by Dunlop and Radaelli (2016), “causal relationships between IA and final outcomes are complex”; there might be several principles referred to, and it is difficult to demonstrate economic benefits. It is even more difficult when nonquantifiable variables are to be taken into account. As a matter of fact, there is a little evidence of any economic benefits of RIA. Data presented to establish productivity or performance gains resulting from RIA are largely associative and provide little evidence of causality (Kirkpatrick and Parker 2007, 10).

Another example points to the disputable results of RIA—the questionable performance of the instrument in certain contexts. In Central and Eastern European countries, the development of RIA was different than in other EU and OECD countries, as shown by Staroňová (2010). First, RIA was adopted prior to the development of the regulatory policy programmes, so the better regulation rhetoric of the political elites was largely absent. Second, these countries have mostly not set up strong centres of government that could coordinate the efforts of line ministries, leading to problems of coordination and capacity. Consequently, the effects of the RIA have been modest. Given the absence of a broader policy framework and the lack of central steering, the introduction of RIA was mainly seen as a formal administrative measure introduced in the process of the EU accession under conditionality (Musa 2015). These findings correspond with the conclusions of research into RIA in 26 European countries (De Francesco et al. 2012): the high appeal of RIA as regulatory innovation is not followed by equal (and successful) implementation, with political factors and economic resources being critical in the phases of setting up the RIA system, while the administrative capacity and demand from pressure groups affects later implementation of RIA.

Finally, the added value brought by RIA is not economic in nature but political: through the process ascribed to RIA stakeholders are involved in consultations, government officials have to justify their options, and the bureaucratic *fait accompli* may be avoided. This is not

a minor benefit, but nobody can demonstrate that it improves economic performance in general. However, the principle of proportionality should not be forgotten. There is a growing criticism in the USA of excessive use of RIA, given the burden, costs, and delays it imposes on administration. Commentators believe that excessive use of RIA brings a risk of “ossification” of rule-making, driving agencies to develop escape strategies (Strauss 2016).

IMPACT ASSESSMENT AT SUB-NATIONAL LEVELS

Sub-national Government Levels in RIA Literature

The general approach of both the academic literature and policy documents on regulatory policy is that they ignore sub-national governments. They do not totally rule them out, however, viewing them mainly as targets of regulatory activity, circumventing the elaboration of regulatory problems specific to sub-national government levels.

The 2005 OECD *Guiding principles*, which first put forward the idea of the “whole-of-government approach”, refer briefly to sub-national levels: “Regulatory quality is a defining measure of government effectiveness on the national and sub-national levels” (OECD 2005: 3). The 2015 OECD *Regulatory Policy Outlook* supports the orientation towards a “whole-of-government” approach to regulatory policy, and this should include sub-national governments. However, they are mentioned only once, in the context of “stakeholder engagement”: “countries report a variety of consulted groups, including social partners, local authorities, business associations, environment groups”. The Mandelkern Report (2001) considers local governments as regulatory targets, just like businesses or citizens. Similarly, the World Bank database of Global Indicators of Regulatory Governance out of 255 documents on RIA worldwide returns only one item for “local” (the French screening template for measures concerning local authorities) and only one item for “regional” (Russian Guide on RIA at the regional level).

Two international documents offer an exception in this general picture. The World Bank report from 2006, *Simplification of business regulations at the sub-national levels*, considers the impact on businesses of regulations issued by local authorities, but reflects a very narrow point of view—exclusively in terms of the economic burden for businesses (The World Bank 2006). The other exception is the 2009 OECD report (Rodrigo et al. 2009)

focusing on costs as generated by multilevel governance and the development of regulatory policy across governmental levels, putting emphasis on coordination. The OECD report underestimates the regulatory powers of local governments, however, ignoring the fact that local governments are not just executive administrations of central government but also have autonomy in those areas which they are entitled to regulate, such as urban planning and traffic regulation.

It is obvious that if the RIA were to be extended to sub-national levels, federal governments or governments with regional autonomy would likely be the first concerned. Thus we can observe a transfer of RIA on that regional government level in federal governments and governments with regional autonomies. Some sub-national governments (mainly regions) in European countries, such as Piemonte in Italy or Catalonia in Spain, have introduced better regulation strategies, aiming at the implementation of RIA among others (García Villarreal 2010). The regional laws refer explicitly to *ex ante* and *ex post* assessments and to regulatory quality, linking assessments with consultation procedures, and hence with democratic rule-making. In Germany, each *Land* is empowered to implement its own regulatory policy; very often such policies can hardly be distinguished from more general policies of the *Land* government on administrative reforms. However, *Länder* have usually organised the follow-up of the implementation of regional legislation and this has sometimes been extended to *ex ante* assessment. Numerous *Länder* have established special offices to assess the quality of draft laws and regulations (OECD 2010, 148–154). However, it is recognised that RIA is not practised in all regions and not in a systematic way (OECD 2012, 113) and that it is still “in its infancy” at sub-national government level (OECD 2010, 143–144).

In the EU, the Commission adopted the guidance on Assessment of Territorial Impacts in 2013, as a first step in making a greater effort to assess the impact of the EU legislation on local governments. The document is related exclusively to cohesion policy, however, since it is applied to legislation having asymmetrical effects (impacting some local/regional units, or creating disparities). The disregard for the role of local governments in the EU multilevel regulatory governance, and the Commission’s treatment of local governments as stakeholders vis-à-vis EU regulation, has resulted in the response of the Council of European Municipalities and Regions (CEMR). The CEMR thus urges the Commission to apply the multilevel governance ethos in its better

regulation policy, to introduce RIA for all legislative and non-legislative measures, since they affect local units by introducing costs, administrative and regulatory burdens, and to ensure that the procedures defined by Protocol 2 on subsidiarity are fully applied (CEMR 2014). The CEMR's request is that local and regulatory authorities should be considered the same way as national governments—as partners in policy-making and implementation, and not as pure stakeholders.

Sub-national Government and Regulation

There are two reasons for the lack of interest in sub-national governments in the RIA literature. First, the bulk of regulation is issued by central government, in the form of primary or secondary legislation, and this regulation has the most impact on citizens, businesses, and sub-national governments themselves, in particular local governments. Remarkably, in European countries, RIA development was applied first to primary legislation, in sharp contrast to the USA. Even in European federal countries or countries with strong regional autonomy, national legislation is of paramount importance, in number as in scope. The second reason is the lack of capacity. Not only the quality of both the primary and secondary legislation of sub-national authorities can be questioned, but the lack of administrative and financial capacity is even more salient to carry out or monitor impact assessments.

The issue of sub-national regulation is coming to the fore because of new institutional developments. Decentralisation policies have increased the powers of sub-national governments, and brought new sources of regulation. To some extent, governance has to face contradictory claims: to alleviate the burden of regulation, and hence to diminish the volume of regulation and to pay more attention to differentiated expectations of local units, leading to the devolution of regulatory powers, and raising questions of coordination. The recent report of the French Council of State (2016) addresses the issue of the impact of decentralisation policies on regulatory policy. The report points to the illusion that problems can be solved by issuing new legislation, as a prompt and visible answer. However, local governments are claiming more regulatory powers, bringing about more fragmentation, and raising the question of the impact of regulatory activity. The French report refers to the countries with federal or regional organisation, stressing the tendency to increased regulatory costs in these countries, as a consequence of the dispersion

of regulatory powers (2016, 49). Examples of these problems can be seen in diverging building codes of German *Länder*, despite periodical updating of a national regulation model (Jäde and Hornfeck 2013) and in diversity of regional planning regulation of Italian regions (Cabiddu 2014). However, there is no evidence for the claims that these costs are offset by greater diversity of responses and flexibility (OECD 2010).

In France, local governments have long criticised the burden of regulation imposed on them by the national government. Finally, the National Council of Norm Assessment was established in 2013, with representatives of central and local governments, in order to review all drafts that could involve additional costs on local government. Local councillors may refer to the Council to draw attention to a specific regulation or make a proposal. A recent circular of the prime minister (May 2016) provides for a unique assessment sheet for all impacts on citizens, businesses, and local authorities. These bodies enable a greater awareness of regulatory impacts and have a preventive influence on administrations. But the recent report gives no hint of regulations having been abandoned following a negative assessment (Conseil national d'Evaluation des Normes 2016).

Impact Assessment Obligations of Sub-national Governments

Sub-national governments already have the obligation to submit specific impact assessments required by the EU or national legislation. The major area of such obligations for sub-national governments in the EU countries relates to the environmental impact and dates back to 1985 when the first Environmental Impact Assessment Directive was adopted (now EIA Directive 2011/92/EU, 2014/52/EU) requiring the environmental IA of public and private projects (such as infrastructure, industrial, agriculture, energy projects) which are likely to have significant effects on the environment. A newer and broader obligation is regulated by Strategic Impact Assessment Directive (SEA, EC/2001/42) requiring all public plans and programmes adopted by any governmental level and required by regulatory provisions in various fields (e.g. transport, energy, agriculture, urban planning or land use, agriculture, waste or water management) to be subjected to an assessment as far as they may have a significant impact on the environment. To that extent, regional and local governments are subject to the duty to realise such IAs for practically all planning documents and most public projects they adopt. In France, for

example, regional schemes for sustainable development planning and territorial equality (SRADDET) include a regulatory part with binding provisions for lower level planning documents, making all urban planning documents subject to EIA. Also, from 2015 regional councils received full competence for regulation of local economic development support, and they adopt a specific scheme for this purpose (Marcou 2015: 887). These regulations are supposed to implement a regional economic development scheme, and hence to assess their expected results.

Another example is outsourcing policy. The EU Directive EU/2014/23 on the award of concession contracts recognises the self-government principle exercised by national, regional, and local authorities that may decide freely on the choice of provision for public works or service delivery, including deciding to do it by their own means or through an in-house contract. Thus, local authorities are supposed to assess the impact of each type of provision with regard to the service to be delivered, the costs for users and for their budget, depending on the contemplated arrangements. This is more explicit in the French ordinance of 29 January 2016 for the transposition of the EU directive into French law: the provision mode chosen by the authority is deemed to achieve a high degree of quality, safety, accessibility, equality of treatment of the service or of the work delivered, and to promote universal access to users and users' rights to the public service. Furthermore, the nature and the scope of the needs to be covered have to be determined before the consultation for the tender. This assessment has to take into account sustainable development objectives in their economic, social, and environmental dimensions.

CONCLUSIONS

The evaluation of RIA as an instrument of regulatory policy can be performed at the institutional, performance and outcome level, as in the case of any institutional policy (Kuhlmann and Wollmann 2011). As shown above, RIA has become a well-*institutionalised* practice in many countries and in the EU, advocated by international organisations as a means to improve the regulatory environment and quality of legislation in terms of process and outcomes. In many cases, it is a formal obligation too, backed up with a more or less complex institutional setting. In recent years, RIA has been supplemented by ex post evaluation of regulation. In terms of *performance*, the literature and policy reports indicate

that the success of RIA varies in relation to political and economic factors, especially political support and administrative capacity (see Radaelli 2009). Its formal adoption is not always followed by substantial implementation. In other words, there are different kinds of RIA. In terms of *outcomes*, it is hard to assess whether the implementation of RIA under the above circumstances has led to better regulation which eventually achieved the desired policy goals. The scope of application of RIA, the institutionalisation of practice and the inclusion of businesses and citizens in consultative procedures could confirm that legislation at least in process terms could be of higher quality. Whether it brings quality is another issue, which requires more comprehensive analysis, such as is offered by the OECD tools for evaluation of regulatory policy. Notwithstanding, RIA represents a costly and demanding activity, with high transaction costs in terms of the immediate material and personnel costs of introducing RIA, as well as the costs of continuously initiating, coordinating, and controlling it (Kuhlmann and Wollmann 2011, 483).

Despite their strengthened role in issuing regulations, sub-national governments are practically absent from the academic and policy literature on RIA. The distinctiveness of sub-national governments is that they are both targets and sources of regulations, and decentralisation policies tend to increase the importance of the latter. *As targets* of regulation, it is without any doubt necessary to involve sub-national governments in the impact assessments of national and EU regulation, especially those that effect the provision of local public services. The assessment of the burden of new regulations can hardly give grounds for the overturn of a decision, however, since some cost has to be assumed in any event.

Should the obligation to implement RIA be extended to sub-national governments *as sources* of regulation? The lack of capacity to carry out RIA, especially at the municipal level, calls for caution. Considering the lessons that can be drawn from the RIA implementation at the national level, it is unlikely that sub-national governments would perform better if RIAs were made obligatory, nor should they be. Sub-national governments are already obliged to provide impact assessments for some of their functions, such as environmental issues or awarding contracts. Thus, instead of insisting on the introduction of RIA for any piece of regulation, they should rather improve the level of openness of their decision-making procedures on issues having a direct impact on the local community, in order to obtain diverse feedback from citizens and

business. At the city level, it is easy to imagine the kind of decisions for which such procedures can be useful: the tariff policy for local public services, changing the traffic plan in the city, public order regulations et cetera. The tradition of impact assessment including public inquiries and hearings on environmental issues and planning at the local level is promising. This does not mean that local governments having greater scope of regulatory powers and the capacity to do so should not engage in the implementation of RIA, however, especially at the regional level or in urban conglomerations. Thus, RIA could be integrated into decision-making procedures for most important decisions having clear impacts on citizens and businesses. Improvement of decision-making could also be expected by using *ex post* evaluation of local policies and regulation.

In sum, at the local level, RIA should not be treated as an additional duty or procedure, but simply as a matter of good practice in the relationships between local self-government bodies and the citizens and businesses. In any case, it should not be used to hide political choices or insulate them with arguments of so-called factual evidence.

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