

Quality of legislation and the role of impact assessment

QUALITY OF LEGISLATION: ESTONIAN PERSPECTIVES
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Content & Context: Better Regulation

I. Regulatory reforms and the use of impact assessment tools in OECD & EU countries since 1970ies.
 ‘3rd wave’ (OECD 1997+): rationalisation, integration, democratisation, accountability and legitimatisation.

- +EU Council Lisbon agenda³ (2000); *Mandelkern Report on Better Regulation* (2001); EU Commission: *Impact Assessment* (2002), *Impact Assessment Guidelines* (2005) etc.
- + Diversity of theories behind the institutional analysis of knowledge-based policy, legislation & public services.
- + How the use of *impact assessment* (IA) can improve the implementation of legal principles like freedom, justice, necessity, proportionality, subsidiarity or accountability?
- + Better Regulation agenda & some **Estonian challenges**.

II. 12 institutional preconditions for knowledge-based public policy, legislation and... systematic use of IA & civic engagement methods in Estonia.
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III. Some conclusions and perspectives.

Context1: starting points, definitions

The OECD & EU states started the regulatory policy reforms in mid 1970ies (after oil **crisis!**) and those global reforms are not yet finished.

Estonia has joined to the EU and ‘third wave’ of those reforms and has an opportunity to learn from the best & bad practices of other countries.

Impact Assessment (IA) is the systematic process of identification and quantification of economic, social and environmental impacts likely to flow from adoption of a proposed regulation or a non-regulatory policy option under consideration. May be based on *cost-benefit*, *cost effectiveness*, *SCM*, *risk*, *multicriterial* etc analyses (OECD Sigma, EC 2005)

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Context2: Mandelkern Group Report On Better Regulation* (2001+, EC 2002+)

* **7 principles**: necessity, proportionality, subsidiarity, transparency, accountability, accessibility & simplicity

* **7 key areas**:

- **policy implementation options** (political will >)
- **impact assessment** (IA > evidence-based policy >)
- **consultation** (open governance < IA knowledge)
- **simplification** (e.g. improve regulations < IA)
- **access to regulation** (e.g. understanding < IA)
- **supporting structures** (IA units & coordination)
- **implementation of EU regulation** (e.g. *ex post* IA)

http://europa.eu.int/comm/secretariat_general/impact/docs/mandelkern.pdf

Context3: some theories to study the institutional framework of knowledge-based policy & legislation:

- + **If we believe in democracy, morality and justice, ..the quality + availability of public information is a common good: ...R>** Hayek, Rawls, Habermas **<L...**
- + **Diversity within institutional theory:** mix of cultural, economic, normative & regulative elements + levels: Fig.1
- + **Policymakers vs academics?** Organisational and/or communicative 'gap'. Why the evidence-informed policy?
- + **Society as a 'marketplace':** research, production & marketing of public policies, laws & services
- + **ICT and media:** changes in society, policy & law
- + **Political motivation as the key for institutional design, regulatory reform & quality of legislation**

Figure1: Levels of institutional analysis

Level	Examples
World system	OECD & EU institutions , (<values, ideas, rules, resources, networks...>)
Societal	Estonia (..dominant values, ideas, aims, rules, resources, networks... >)
Organisational field	The public sector (e.g. Parliament, Government, National Court, State Audit Office, Ministry A, B, Cetc>)
Organisational population	Politicians, civil servants, invited experts etc participants in the policy- & law-making processes >
Organisation	Ministry A, B or C > study, Figure2
Organisational subsystems, inter-personal relations	Departments and services in the Ministry A, B or C (org. culture, values, symbols, knowledge, skills, rules, routines, relations...)

Adopted from W.R.Scott 2001



Context4: A + B = C (?!)

- A. **The quality of social, economic, environmental & fiscal information offered in the explanatory memoranda of draft acts is an important precondition for knowledge-based policy debate, civic engagement & regulatory management capacity* (*=implementation of law).**
- B. **An integrated IA enables to assess the existence of constitutional/legal principles like *necessity, freedom, proportionality, subsidiarity or justice***
- C. **The structure & quality of IA information in the explanatory memoranda of draft acts should be considered as a public service with fixed quality standards > see 6th study, Figure2**

Context5: Small society & public sector. How...?!

- A. **The smallness of Estonian society (population ca 1.4 mil) and public sector (ca 19 300 civil servants) has been a distinctive matter, which direct us to ask:**
 - ***How to build up a sustainable regulatory policy & IA systems with limited human, fiscal etc resources?***
 - ***How to guarantee the quality of IA knowledge?***
 - ***How to be a responsible policy- & law-maker?>***
- B. **There are some simple answers related to advantages of small systems with smaller hierarchy & inertia, better communication and adaptation with *glocal* changes/reforms, network type of management etc. The core question is how to develop/use the new ICT, global networks, eServices, team+network type of management routines, knowledge + interest of NGOs, universities, businesses etc?! (A.K. 1998, 2000)**

12 institutional preconditions for knowledge-based policy, legislation and... systematic use of IA

- 0. Legitimacy of political/legal institutions, rules and laws**
- 1. Political commitment in regulatory policy aims (e.g. IA)**
- 2. Legal basis for good lawmaking (e.g. IA & consultations)**
- 3. Coordination and regulatory management capacity (EU+ Cabinet + Ministry A, B, C..., + Department a, b, c... + expert...)**
- 4. Methodological guidelines for IA, consultations & control**
- 5. Data collecting strategies and integration of databases**
- 6. Systematic involvement of experts and interest groups**
- 7. Simplification of regulations & services (e.g. marketing)**
- 8. Transparency and accessibility of law-making & IA data**
- 9. Systematic training of officials and policy analysts**
- 10. Basic quality control and surveillance mechanisms**
- 11. Links between action, law, power & negative sanctions**

Institutional preconditions for systematic use of IA methods in Estonia (1): Political commitment..

1.1. Done (some examples 2002-05):

2002 Parliament: The Civil Society Development Concept (**consensus**)
2002-03 Prime Minister (Siim Kallas): Expert Commission to analyse the use of social science expertise in the Cabinet.
2003 Coalition Agreement (17 different promises were related to the IA, scientific expertise and civil society <Lisbon agenda >).
2004 Government: The Developmental Strategy 'Estonian Success'
2005 Parliament: Strategy "Sustainable Estonia 2006-2030"> (e.g. integration of cultural-educational policy with knowledge-based economic policy, innovation, social cohesion and sustainable development = Lisbon agenda + culture)

1.2. 'Waiting list' of political options (recommendations):

- 1) Need for Governmental program on Better Regulation (BR) & IA**
- 2) Co-ordinating body near Cabinet dealing with BR & integrated IA**
- 3) The annual lawdrafting plans of the Government should include a list of prioritized research & IA areas (e.g budget).**
- 4) The ordering of social research should be more integrated with IA**
- 5) Strengthening of existing quality control & feedback mechanisms.**

Institutional preconditions for IA (2): Legal basis

2.1. Done (examples from Estonia, 1992-2005):

1. 1992 - The Constitution: §1; § 3; §11; §44; §53; §56, §105 etc
2. 1996, updated 1999, 2001, 2004 - Government Regulation No 279 'On Technical Rules for Drafts of Legislative Acts'
3. 1993, u 2001- The Board of the Estonian Parliament: 'The Rules for Draft Legislation in the Legislative Proceedings of *Riigikogu*'
4. 2001 - Public Information Act etc..

Both the *Riigikogu* and the Government lawdrafting rules [2, 3] include the same list of impacts that have to be presented in the explanatory memoranda of draft act, e.g: **Social IA; Business IA; Environment IA; Budgetary IA; Administrative IA; Consultations; References to studies.**

2.2. Some options and discussions 2004+:

- 1) Implementation & quality control of lawmaking rules (How to avoid the 'selective' fulfillment of law-making & IA rules?)
- 2) Need for integrated & standardised IA guidelines >

Institutional preconditions for IA (3): Coordination..

3.1. 'What's working' (some examples in 2005):

- 1) The preparation of Government annual action plan..
- 2) During the draft legislation: a) responsible ministry; b) after the publishing the draft act in the Internet; c) before the Government meeting; d) in the Parliament.
- 3) Round tables in the State Chancellery & Min.of Justice.

3.2. Options under discussion (Estonia 2005+):

- Better coordination of the Better Regulation agenda (e.g. Min. of Justice, Min. of Finance, State Chancellery etc).
- Need for integrated social, economic, environmental & fiscal IA of both national & EU draft strategies & acts
- Management of inter-ministerial strategies, expertise...
- Responsibilities in the quality control of IA information
- Use of IA methods in the ministries: qualification, skills, structures (units), quality control etc.> study: Fig.2

Fig.2: Normative content analysis of explanatory memoranda of draft laws

MINISTRY and number of acts	EU reg.	Required IA info in the explanatory memoranda						Refer-ences	Consult. Public/NGO		SUM %
		1.0.	Soc. 2.1.	Fin. 2.2.	Eco. 2.3.	Env. 2.4.	Adm 2.5.		Transp. 2.6.	State 2.7.	
Period (6th st.): 1.05.04 - 1.02.05											
Finance (n=13)	4	2	13	6	4	3	1	11	8	46%	
Economy (n=13)	3	5	13	6	2	9	4	13	10	60%	
Social (n= 11)	2	10	11	2	1	5	3	10	8	56%	
Education (n=5)	-	2	5	1		2	3	4	3	50%	
Agricult. (n=2)	-		1			2		2	1	38%	
Environm. (n=5)	2	2	5	4	3	3		5	5	68%	
Justice (n=8)	3	5	8	3		6	2	7	5	56%	
Interior (n=9)	-	9	8			5	1	8	3	47%	
Culture (n=2)	-	2	2				2	2	1	56%	
Foreign (n=18)	16	7	18	2	2	13	1	18	4	45%	
Sum (n= 86 acts)	30	44	84	24	12	48	17	80	48	52%	
% (86=100%)	35%	51%	98%	28%	14%	56%	20%	93%	56%		
Comparison: 1998-2003, n=561		47%	71%			52%	26%		24%	<i>A.K. et al 2005</i>	

Institutional preconditions for IA (4): Guidelines

4.1. Done (some books & guidelines in Estonian):

- 1) Since 1993 different ministries have taken into use quite different guidelines & check-lists translated from British, Dutch, Swedish, Finnish, German etc ministerial papers;
- 2) 2 handbooks on law-drafting with general description of IA (Estonian Law Centre in 1999 & Ministry of Justice in 2003).
- 3) OECD Sigma paper No 31 (1998) on Impact Assessment;
- 4) K.Staronova (2003) Policy analysis methods - NISPACE
- 5) 2001, 2004: 2 handbooks on Environmental IA
- 6) 2005: Dutch manual on the Standard Cost Model
- 7) 2005: Draft guidelines for integrated social, economic, environmental, administrative & budgetary IA (Co-op!)*

4.2. Some problems and options under discussion 2005+:

- 1) It's time for the standardisation of IA guidelines!
- 2) The draft guidelines* should be improved in co-op with responsible ministries (e.g methods for SIA, BIA, EIA, FinIA etc)

Institutional preconditions for IA (5): Data collect..

5.1 Done (some examples and results):

- 2000 National Office of Statistics and the Estonian Social Science Data Archive started the cooperation..
- 2002 A parliamentary study on government ordered applied studies in Estonia gives an overview (1999-2001): in connection with the drafting of laws (*ex ante*) and appraising effects of laws in force (*ex post*), 3 ministries + State Chancellery ordered a total of 106 studies. It was ca **38%** of the total cost of all surveys (!only 38 % of ordered studies were related to policies/laws).
- * 2002-03 Prime Minister established an Expert Group of social scientist to analyse the system of government-commissioned studies and use of social science expertise.

5.2. Options under discussion in 2005+

- 1) There is a need for a systematic co-op with universities
- 2) Co-op between Eurostat & National Office of Statistics
- 3) Need for better coordination to integrate the ministries ordered applied studies to the IA of policies and/or laws
- 4) Technical integration of state owned registers (ca 200)

Institutional preconditions for IA (6): Consultations

6. Systematic involvement of experts and interest groups: a) Scientists; b) Non-Profits; c) Businesses; d) Municipalities

6.1. Done (some examples):

- 1999 Agreement between 10 political parties & NGOs
- 2002 Estonian Concept for Civil Society Development*
- 2003 Joint Committee of Ministries and NGO-umbrellas
- 2004 Government Action Plan to implement the Concept*
- 2005 Guidelines for civic engagement in the decision-making process (1 general + 4 ministerial guidelines)

6.2. Some options under discussion 2005+:

- Improvement of national statistics and NGO register
- Transparent & stable financing mechanisms for NGOs (how to support the autonomy of NGOs?)
- Civic education agenda, building of NGO' networks
- Implementation of civic engagement guidelines etc

Institutional preconditions for IA (7): Simplification

7.1. Done or started:

1998+ Debate “all most important laws are passed – it’s time to start with minor reregulations & simplification”

2005 – a lot of laws/decrees have additional client-oriented public service standards (champions are Min. of Finance, Min. of Social Affairs & Min. of the Environment*> ca 50% of laws/decrees have special simplified service standards)

7.2. Some problems and options under discussion 2005+:

1) During the policy planning an IA (e.g Standard Cost Model) is needed to analyse the implementation of law, decree & service standards in client-oriented manner;

2) Sometimes, the complex ‘legal arhitecture’ is missing e.g. aims, intended impacts, budget and conformity between draft law, decree & !service standards! are not in order..

3) Need for systematic *ex post* IA and consultations with target groups (=users are the experts of simplification).

Institutional preconditions for IA (8): Transparency

8.1. Done (some examples):

- **Estonian public sector has made many innovations in last five year in this field implementing accessible ICT tools like e-law (*E-Õigus*), Today I Decide – TOM, etc**
- **Everyone has the opportunity to be familiar with the draft laws and IA data under co-ordination. Access to the system is free (e.g libraries, municipalities etc). One can also follow how the opinions and proposals to the co-ordination letters are taken into account or not.**

8.2. Options under discussion:

- **Technical integration of state owned registers (ca 200)**
- **Improvement of public accessibility to the main registers, development of eServices (X-road etc)**
- **The low quality of public information in the explanatory memoranda of draft laws (e.g. description of aims, intended impacts, results of partial IA, references to used studies and reports etc) – ‘no understanding, no interest’.**

Institutional preconditions for IA (9): Trainings

9.1. Done (some examples):

* Since 1995 a number of expert seminars, conferences and training visits to other EU countries have been organised every year. Main partners: UK, NL, FI + OECD Sigma.

* The training needs in the field of IA have been analysed many times since 1998. Some legally-focused courses.

* 2005+ The IA of policies and draft acts is one of the priorities in civil service training program for 2005-2006. The trainings will be financed from the European Structural Funds aiming to support the human resources development in Estonia. (measure 1.4. "Enhancing Administrative Capacity").

9.2. Activities and options under discussion:

- 1) The preparation of civil servants IA trainings 2005+>
- 2) Ministerial IA experts should exchange their knowledge & skills in training workshops (integration of practices).
- 3) Need for general IA guidelines/manuals (e.g. methods).
- 4) Need for good trainers and better overview how the IA trainings are organised in other EU countries.

Institutional preconditions for IA(10): Quality control

10.1. The possibilities for quality control & supervision mechanisms of draft acts (e.g. explanatory memoranda & IA) conducted by ministries are best described in the next stages (10+1):

A1. The Government (resolution based on Coalition agreement, parliamentary or EU initiative, ministerial proposal etc)

B. Responsible Ministry1: (concept, initial IA, 3-4 stages)

C. Ministry of Justice: (evaluates from the systematic point of view whether such regulation fits the rest of the legislation).

D. Responsible Ministry2: (preparation of draft act: 8-9 stages)

E. Official co-ordination (1st round) & public debate: (based on Public Information Act, Administrative Proceedings Act)

F. Responsible Ministry3: (reviews the comments and opinions, makes necessary amendments, justifies if disagrees)

G. Official co-ordination (2nd) with the Min. of Justice.

H. Responsible Ministry4: (similar with F);

Institutional preconditions..(10): Quality control 2

I. State Chancellery: (reviews draft legislation of the Government of the Republic for conformity with the Constitution and the laws).

J. The Government meeting (Prime Minister & Ministers);

K. Parliament, Riigikogu: (Board of the *Riigikogu* > *Riigikogu* Committee and its supporting system, e.g research departments)

A2. The Government (enforcement and system of *ex post* IA, e.g. data collecting strategy, co-op with State Audit Office etc).

10.2. Problems and options under discussion 2001+

1) In comparison to legal analysis and also to budgetary IA of draft acts, the **economic, social, environmental & administrative IA** are quite frequently not made or formal. It means also that the Min. of Economy, Min. of Social Affairs, Min. of Environment & State Chancellery have to check more the quality of draft acts prepared in other ministries (**development of network type control**);

2) Need for a coordinating body near the centre/Cabinet

..conclusions & perspectives... A

The concepts of knowledge-based policy and good responsible governance are a part of institutional (regulatory) reforms, initiated by OECD and EU Member States in 70ies (it was after oil crisis & economic decline!).

Estonia has joined to the EU and 'third wave' of those reforms looking for the best practices of regulatory policy.

Considering the results of Estonian socio-legal studies and best practices of OECD & EU countries in last decade, there is no reason to think that good governance and law-making practices will start to function without:

- **political commitment in regulatory policy aims/measures,**
- **good inter-ministerial coordination (networking),**
- **integrated IA guidelines;**
- **systematic training and**
- **basic quality control, supervision and feedback mechanisms.**

..conclusions & perspectives... B_{eeee}

Michal Ben-Gera (OECD, Sigma): *All democratic countries are concerned to improve the quality of policy-development and decision-making by public authorities.*

This is a long, perhaps a never-ending process.

It is also multi-dimensional and often politically sensitive.

Since policy development occurs at the interface between experts and politicians, good work by experts can, and often does, point to weaknesses in specific policy preferences.

In the end, however, all good policy is the result of interaction between values, preferences, and empirical reality.

The task of impact assessment is to clarify the empirical reality, and to ensure that the knowledge it generates is of good quality, and that it is brought to the attention of decision-makers.

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