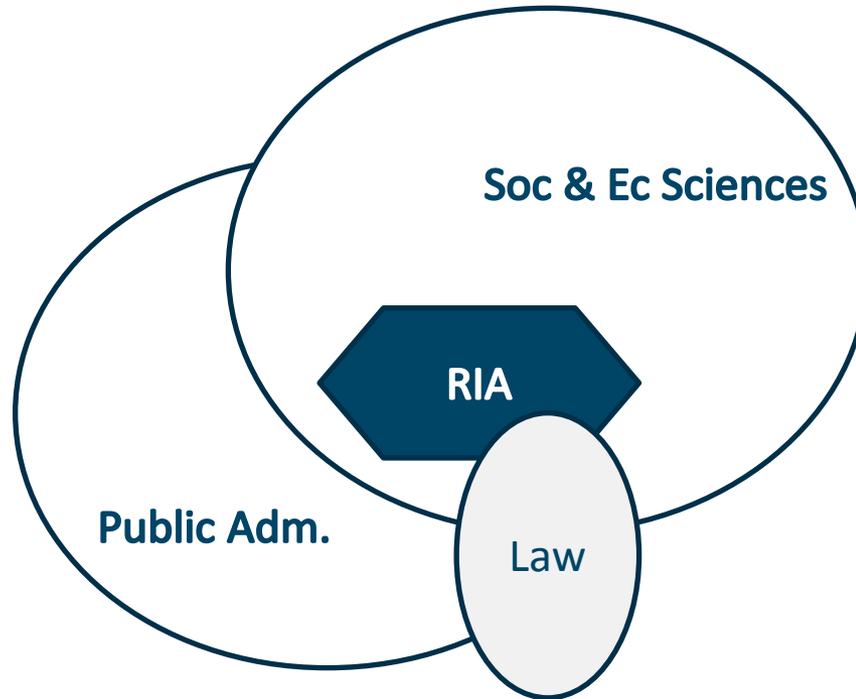




A Legal Perspective on Regulatory Impact Assessments

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Perspectives on RIAs



A Legal Perspective: the Legal Validity Test

- Purnhagen & Feindt: RIA should reflect the goals and values prioritized in the EU Treaties
- National RIAs: goals and values in the constitution
 - E.g. fundamental rights, health protection, environmental protection, children's rights and protection, gender equality, ...
- Determine:
 - Which data should be collected
 - Weight attached to them in the overall balance of options

A Legal Perspective:

Is there an enforceable legal duty to carry out RIAs?

- I. Preliminary remarks
- II. Arguments pro and contra judicial enforcement
- III. Data: RIAs in the case law of courts in Europe
- IV. Evaluation: do the arguments pro or contra judicial enforcement stand ground?

I. Preliminary remark 1: Legal analysis vs social and economic IA

Broad definition: International
Ass. Of Impact Assessments

“the process of identifying the future consequences of a current or proposed action”

→ Legal analysis/compatibility check included

Ex 1: draft directives: affected provisions

Ex 2: Fundamental Rights Check

Narrow definition: Dunlop and Radaelli

“a systematic and mandatory appraisal of how proposed primary and/or secondary legislation will affect certain categories of stakeholders and other dimensions”

→ Legal analysis/compatibility excluded

I. Preliminary Remark 2. Regulatory IA

- Not: individual measures
- Executive measures: theory of delegation
- Parliamentary acts: Parliamentary sovereignty
- EU laws: Involvement EP and national parliaments

I. Preliminary Remark 3

Alternatives for Judicial Review

Regulatory oversight bodies and courts:
alternatives or complementary bodies?

II. Judicial enforcement of the duty to carry out IAs: arguments and counterarguments

Arguments contra

1. The political primacy argument
2. Market-liberal bias instead of neutrality
3. Efficiency: the over-judicialization difficulty
4. The competency problem

Arguments pro

1. Enforcing a public, inclusive and informed debate, leading to more legitimate and rational lawmaking
2. HR perspective: proportionality test
3. Improve regulatory reform and change the administrative culture
4. Training, criteria, and deference: guarantee against arbitrary interference

III. The Data: an Overview of Case Law in Europe

A. Process Review

- Conseil Constitutionnel (FR)
- The ECJ

B. Procedural Rationality Review

- The ECtHR
- The ECJ

A. Process Review: the French Model

Art. 8, 2009 Institutional Act: the duty to carry out an IA

Art. 39, § 4 Const.:

- government bills may not be included on the agenda if the Conference of Presidents of the First House declares that the provisions of the Institutional Act have been ignored
- Disagreement: matter may be referred to the CC (1)

Art. 61 Constitution: Abstract control ex ante by the CC (7)

Art 61-1 Constitution: Preliminary request ex post to the CC (0)

A. Process Review: the French Model

- (1) Formal requirements fulfilled; no need to give data if not defined as goal; no need to give more information on consultations
- (2) The Conference gathered within ten days – if IA was not disputed at that time, Conseil will not assess its quality
- (3) No IA required if the provision was introduced by way of an amendment (5x)
- (4) No examination of the possible improper use of amendments to avoid consultation and IA requirements
- (5) IA completed at a very late stage: formal requirement when submitted to Parliament

A. Process Review: Art. 5 Prot. N° 2 (Subsidiarity and Proportionality) and the ECJ

- (1) ECJ must verify compliance with the substantive, but also with the procedural safeguards in Prot. N° 2.
- (2) IA includes sufficient information to show the advantages of taking action at the EU level. Should not be so detailed as to examine the impact of any individual provision on any particular MS
- (3) IA is not binding on the EP or the Council.
- (4) The EP and the Council do not have to carry out their own IA: satisfied if the available scientific evidence was taken into account

B. Procedural Rationality Review

- = part of a substantive check
- where the Court takes into consideration the quality of the decision making procedure
- As a decisive factor for assessing whether government interference was justified

→ Looking for procedural guarantees for an informed and inclusive balancing exercise – IA is one of the options



B. Procedural Rationality Review: the ECtHR

- (1) References to scientific and statistical evidence, but no significant judgments on RIA
- (2) PRR usually leads to the verdict that the law is proportional
- (3) Not required to have comprehensive and measurable data for each and every aspect of the matter
- (4) Problem if the measure is based on an assumption for which there is no evidence at all, or that goes counter the unanimous view of experts
- (5) Problem if the evidence produced was manifestly biased



B. PRR and RIAs: the ECJ

- (1) EU legislature has broad discretion, but choices must rely on objective criteria
- (2) Discretion as to the finding of facts: examination of various options suffices
- (3) ... but also options that are less harmful to fundamental rights should be examined
- (4) Assessment of future effects is open to criticism only if manifestly incorrect in the light of information available at the time of adoption
- (5) ... but EU legislature has to take into consideration all the relevant factors and circumstances and must produce the basic facts on which the measure relies



IV. Evaluation

Political Primacy

- Process review: no impact
- PRR: deference: judicial interference remains restricted
- ECJ more demanding of scientific evidence than ECtHR: technical rules + availability of Ias
- Gives legitimacy to most EU laws

Market-liberal bias

- Process review: neutral
- PRR ECJ: Market-liberal bias within the legal and political context
- Broadening the scope: fundamental rights

Over-judicialization

- Deferential approach as to choice of instruments and methodology
- Requirements are not specific or detailed
- No proof of ossification of the lawmaking process
- No proof of improvement of the administrative culture

Competency

- Deference: onterference only in exceptional cases
- Evidence is examined where proportionality is under dispute, not to invalidate the outcome if it seems proportional at first sight
- Exceptions: Hartz IV (German Const. Court)

V. Conclusion

Should we fear or embrace the judicialization of regulatory tools in general and Ias in particular?

