

ECONOMIC, ENVIRONMENTAL AND SOCIAL FACTORS IN DECISION-MAKING PROCESSES

**(Remarks to the concept of regulatory impact assessment and
public consultation with special regard to environmental matters)**

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ABSTRACT

Impact assessment, especially the evaluation of economic, environmental and social implications of planned measures has become a general requirement in legislative processes. Several databases are available on impact assessment schemes; there is a growing demand from international organizations, civil society and scholars that social and economic interests affected by a possible regulation as well as sectorial experience are channelled into the shaping of public policies. The current paper aims to contribute to this goal by providing a summary on the concept of regulatory impact assessment and its relationship with public consultations. As in environmental matters the framework of public involvement is well-elaborated both at the level of international standards and EU law, environmental legislation shall be a main point of reference. Furthermore, it is intended to examine on the basis of the decisions of the Court of Justice of the European Union, how the court interprets the role of public consultation and impact assessments in decision-making processes. Through the combination of the descriptive-analytical and the case-based approach, the analysis might contribute to a better understanding of the concept of regulatory impact assessment with special regard to its relationship to public consultation. At the same time, it can provide theoretical foundations, which might support the implementation of the goals of public participation in national laws and the comparability of national solutions in international context.

KEYWORDS

impact assessment, public consultation, legislative process, environmental matters

INTRODUCTION

“Indicators of regulatory quality, performance measures of regulatory governance and targets for the reduction of paperwork and administrative burdens have become prominent items on the reform agenda of governments and international organizations.” [i]

A major element of this trend is the concept of impact assessments. Besides contributing to the high quality of regulation, impact assessment appears in the relevant literature as a safeguard of transparency and democratic control in policy-making.[ii] This procedure, namely, presupposes that social interests and economic effects affected by a possible regulation as well as sectorial experience are channeled into the shaping of public policies. [iii]

Briefly: impact assessment (or regulatory impact analysis) *“is both a tool and a decision process for informing political decision makers on whether and how to regulate to achieve public policy goals”*. [iv]

However, the concept of impact assessment shows certain similarities with another term, namely public consultation. Taking the relevant international [v] and European [vi] legal background into account, public consultation can be seen as a method that allows for the

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inclusion of the needs and interests of the public concerned and the special knowledge of specialized groups and organizations in order to ensure the transparency and coherence of the legislative process. [vii]

Due to the conceptual similarities of these two instruments they usually appear parallel in international treaties. Taking the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter: Aarhus Convention) [viii] as an example: It prescribes in its Article 5 that the parties to the Convention “shall: (a) Publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals; (b) Publish, or otherwise make accessible, available explanatory material on its dealings with the public in matters falling within the scope of this Convention.” The Aarhus Convention also stipulates in its Article 8 that the parties shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.

Several international fora scrutinize and promote the implementation of the requirement of public involvement and better regulation in national laws, including OECD, World Bank (see below), Council of Europe (Venice Commission)[ix] and the European Union [x]. The objective assessment of developments and possible shortcomings in this regard could be significantly supported by a unified conceptual framework. The current paper aims to contribute to this goal by providing a summary on the concept of regulatory impact assessment and its relationship to public consultations. Clear theoretical foundations can support the implementation of the goals of public participation in national laws and the comparability of national solutions in international context.

Background and methodology

The topic of public consultations and impact assessments is a rather rarely examined question especially from the point, how their role and relationship can be defined in the decision-making, primarily legislative process. The relevant literature focuses rather on the role of public participation in democratic processes, [xi] on certain elements of regulatory impact assessment (e.g. health impact assessment [xii]), on its methodology, [xiii] and on its relation to “good governance” by determining requirements. [xiv] In the field of environmental cases, the provisions of Aarhus Convention stand in center of attention, [xv] with special regard to administrative cases and access to justice rights [xvi]. The environmental impact assessment of concrete projects, programmes or plans are also often in the focus of scientific research. [xvii] However, these should be distinguished from the regulatory impact assessment in environmental legislation. [xviii]

As in environmental matters the framework of public involvement is well-elaborated both at the level of international standards and EU law, and as the case-law of the Court of Justice of the European Union (hereinafter: CJEU) reflects to this framework intensively, these cases shall be a main point of reference.

The current paper aims to give a summary on the framework of regulatory impact assessment in three selected countries, Germany, France and Spain, with special regard to environmental legislation. [The selection is based on the wish to cover countries with different forms of government as well as legal traditions.]

Furthermore, it is intended to examine on the basis of the decisions of the CJEU, how the court interprets the role of public consultation and impact assessments in decision-making processes.

Through the combination of the descriptive-analytical and the case-based approach, the analysis might contribute to a better understanding of the concept of regulatory impact

assessment with special regard to its relationship to public consultation and to a more efficient shaping of future practices as well.

Legal framework

Concerning the national legislative processes, firstly, the question arises, what do we mean by regulatory impact assessment, what forms of participation are covered by this requirement.

These factors (obligation to carry out impact assessments; which authority shall carry them out; under what criteria and how transparency can be ensured) are analyzed in the World Bank's Global Indicators of Regulatory Governance study, [^{xix}] which "*explores how governments interact with the public when shaping regulations that affect their business community.*" [^{xx}] From the information accessible in the database, the following chart can be compiled regarding the question of regulatory impact assessments. These data can give useful insights into the interconnection of impact assessment and public consultation and can support the better understanding of the approach of national laws to this institution (i.e. how strict criteria apply to the implementation of regulatory impact assessment).

Table 1: Basic characteristics of regulatory impact assessment

Source: World Bank's Global Indicators of Regulatory Governance study

Question	France	Spain	Germany
<i>Do ministries or regulatory agencies conduct an impact assessment of proposed (not yet adopted) regulations?</i>	Yes	Yes	Yes
<i>Are there criteria used for determining which proposed regulations are subjected to an impact assessment?</i>	Yes	No.	Yes [There needs to be an Impact Assessment for any single initiative. However, the intensity of the Impact Assessment follows the rule of proportionality. There are thresholds for quantitative evaluation of the data given in the Impact Assessment.]
<i>Are there any specific regulatory impact assessment guidelines?</i>	Yes	Yes	Yes
<i>Are impact assessments required by law?</i>	Yes	Yes	Yes
<i>Are impact assessment made publicly available?</i>	Yes	Yes	Yes
<i>How is this assessment distributed?</i>	Through a unified website for all proposed regulations;	Through a unified website for all proposed regulations.	Through public meetings, through targeted outreach to stakeholders, such as

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	through the website of the relevant ministry or regulator.		business associations or other groups.
<i>When is this assessment distributed?</i>	After the consultation period for the proposed legislation.	Together with the draft proposed regulation.	Together with the draft proposed legislation and after the consultation period for the proposed legislation.
<i>Is there an obligation for regulators to consider alternatives to proposed regulation?</i>	Yes	Yes [Considering the Law, the Regulatory Impact Assessment should include a justification of the necessity of the new rule contrasted with the alternative of not approving any regulation for the case.]	Yes [The obligation is part of the Joint Rules of procedures of the Federal Ministries; a section in the cover sheet is reserved for a summary on the consideration of alternatives.]
<i>Is there a specialized government body tasked with reviewing and monitoring regulatory impact assessments conducted by other individual agencies or government bodies?</i>	Yes	Yes ^[xxi]	Yes
<i>Please provide the name of this government body, and explain its functions.</i>	The Council of State - France's highest administrative jurisdiction.	All Ministries led by the Presidency and AEVAL agency	National Regulatory Control Council (NKR)

From this comparison it is apparent that ministries or regulatory agencies carry out impact assessments concerning proposed (not yet adopted) regulations, and they are obliged to do so by law.

Certain monitoring or review of this activity is ensured, but the models are highly diverging (ministries or bodies attached to ministries play a significant role – except for France). It is not general that the impact assessment is distributed together with the draft proposed regulation, so it is not evident that the publicity of impact assessments could be regarded as part of the public consultation in legislative procedures. The way of distributing these reports to the public,

however, is very similar to the rules of public participation in legislative processes (internet consultations or direct contact with stakeholder groups). It is also an interesting phenomenon, that instead of strict evaluation criteria, all selected countries apply impact assessment guidelines, which might reflect the striving for balance between the need for the government to adopt public policies with a sufficient margin of appreciation and the requirement of transparent and circumspect preliminary assessment of public policies.

The OECD Dataset on the Indicators of Regulatory Policy and Governance [xxii] also carries out a comparison [xxiii] of national regulatory models, which extends to similar factors summarized along the concepts of methodology, [xxiv] systematic adoption, [xxv] oversight and quality control [xxvi] and transparency, [xxvii] while establishing composite indicators on stakeholder engagement, regulatory impact assessment and ex post evaluation. The main findings of this report call the attention to certain deficiencies or details to be improved:

“While the system to consult with social partners and experts is well-established, Germany could open consultations more systematically to the general public, release impact assessments for public consultation and systematically publish responses to consultation comments online.” [xxviii]

In France *“RIAs have to be prepared for all primary laws and major subordinate regulations and are available online. The range of impacts and costs assessed in RIA has been broadened in the past three years. The Secrétariat Général du Gouvernement (SGG) at the Prime Minister’s Office is responsible for reviewing the quality of RIAs and provides advice and expertise on drafting regulation to authorities. For primary laws, it can return RIAs if their quality is considered insufficient. Since mid-2017 the SGG no longer provides a formal opinion on RIAs for subordinate regulations.”* [xxix]

In Spain, *“[a]n update from the 2009 RIA guidelines would provide useful support to regulators, all the more in the conduct of the new RIA procedures. The guidance could be further developed by providing advice on methods of data collection as well as providing clear assessment methodologies.”* [xxx]

These statements confirm the main conclusions derived from the World Bank database, namely, that the legal framework of regulatory impact assessment is usually of rather soft-law nature; the background for systematic reviews is partially incomplete and the relationship to public consultations (i.e. whether regulatory impact assessments are also subject to public consultation) is not entirely clear. [xxxi]

Examining the question from the specific point of view of environmental legislation, the following conclusions can be derived.

Although environmental aspects and sustainability are crucial points of impact assessment in the German law according to the general recommendations and guidelines, [xxxii] stricter or more specific criteria do not apply to environmental matters. Certain methodological guidance [xxxiii] including qualitative and quantitative elements is offered at expert level also supported by the legislative or executive power, which might be taken into account as parts of expert consultation or literature reviews.

In case of Spain, the starting point is that the obligations stemming from the second pillar of the Aarhus Convention have been implemented in one act in Spain [xxxiv] containing certain specific rules of impact assessment but rather in relation to environmental impact assessment of certain plans or programmes. Concerning regulatory impact assessment an Environmental Advisory Council (*Consejo Asesor de Medio Ambiente*) establishes a more direct connection between NGOs, trade unions etc. and administrative authorities and may issue a report on the draft laws and draft regulations with environmental impact and, in particular, on the issues that should have the status of basic regulations. In lack of further provisions, concerning the exact framework of regulatory impact assessment in environmental matters, the general rules of consultation shall be assumed to apply.

As regards the French scheme of regulatory impact assessment in environmental matters, it shall be stressed that the factors of general impact assessment [xxxv] are in line with Article 6 of the Charter for the environment, [xxxvi] according to which public policies must promote sustainable development. To this end, they reconcile the protection and enhancement of the environment, economic development and social progress. However, no specific guidance in environmental legislation (specific normative provisions in e.g. the Code on the environment, [xxxvii] circulars etc. [xxxviii]) can be retrieved concerning the way, how this balance shall be established on the level of impact assessment in general. The guidance is rather connected to the assessment of certain impacts or to the specificities of certain types of legislation. [xxxix]

The conclusions of the general assessment and the analysis of the environmental legislation show that regulatory impact assessment is closely connected to public consultations; it is treated as a preparatory document for the decision-making procedure of the government. Therefore – despite the evolving legal background and methodological guidance – a rather broad margin of appreciation is provided for the body preparing the draft law, leading to uncertainties concerning the practical applicability and efficiency of this instrument. [xl]

Case-law analysis

A possible way of finding general standards as regards the relationship of public consultations and regulatory impact assessment, is to analyze the case-law of CJEU. Although there are not many judgments available in this regard (the majority of decisions touching upon the problem of impact assessment are related to environmental impact assessment of certain programmes, plans or projects), some cautious conclusions can be derived on the approach of CJEU.

In certain cases, public consultations are treated – as a consequence of the practice followed by the European Commission – as part of the impact assessment of legal acts. E.g. “*On 19 December 2012, the European Commission adopted a proposal for a directive to revise Directive 2001/37 (‘the Commission proposal’), accompanied by an impact assessment summarising the results of a detailed study carried out by the Commission services following a public consultation of interested parties (‘the impact assessment’).*” [xli]

From the case-law of the CJEU, however, a specific requirement of formal impact assessment cannot be derived. In a given judgment, the CJEU confirmed that the preparation of impact assessments is a step in the legislative process that, as a rule, must take place if a legislative initiative is liable to have significant economic, environmental or social implications. “*Not carrying out an impact assessment cannot be regarded as a breach of the principle of proportionality where the EU legislature is in a particular situation requiring it to be dispensed with and has sufficient information enabling it to assess the proportionality of an adopted measure.*” [xlii]

In an opinion, the Advocate General mentioned that the public consultation brought to light practical problems in the given context. [xliii] This example shows that public consultation can contribute to finding the best regulatory alternative; it helps to discover whether there is a problem that shall be addressed by means of legislation and to determine the extent and features of the given problem; thus its conclusions can be seen as parts of the impact assessment.

Treating public consultations as part of regulatory impact assessment can be supported by the fact that it is more compatible with the definition of (ex-ante) regulatory impact assessment. It can contribute to informing political decision makers on whether and how to regulate to achieve public policy goals. Therefore, the public opinion can be seen as an element of this assessment, of the process of political decision-making.

However, if, public consultation is treated as part of impact assessment, the findings of the evaluations of social, economic, environmental consequences cannot be commented on by the public concerned [xliv], or this is at least significantly aggravated (as for the public the factors

to be assessed are much more difficult to discover on its own than to react to preliminary findings). This, however, could be also a significant task of public involvement. [xlv]

Nevertheless, the CJEU case-law shows that it is not the formalized procedure of impact assessment or public consultation that is decisive when evaluating legislative measures, but the complex assessment of relevant factors. Public consultation and impact assessment schemes are possible methods to support this goal. “[T]he Court has held that the EU legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments.” [xlvi]

Closing remarks

From the analysis of the legal framework for regulatory impact assessment and the respective case-law, the following conclusions can be derived. There is a gradually evolving demand for the precise and throughout evaluation of planned legislative measures. The clear identification of policy goals, the evaluation of the question whether a regulation is necessary and the analysis of how it can be most effective and efficient in achieving those goals, can contribute to finding the best regulatory approach. [xlvii] Nevertheless, the incommensurability of interests affected by impact assessment – effects on flora, fauna, human health, administrative burdens, budgetary questions, public employment etc. – [xlviii] makes it difficult to elaborate strict and binding standards of impact assessment.

This is demonstrated by the fact that the general obligation to carry out regulatory impact assessment is in practice rather of soft-law nature; either the scope of legislation covered (e.g. Germany) or the distribution after the consultation period (e.g. France) or the lack of external control (e.g. Spain) result in the assessment that the implementation of this goal is not entirely coherent in practice.

As far as environmental matters are concerned, it can be concluded that effects on the environment are generally defined as an important reference point of impact assessment; nevertheless, separate rules for evaluation in case of environmental norms cannot be perceived in the examined legal systems. At the same time, this fact might be understood in a way that the appropriate impact assessment scheme should offer a throughout evaluation for the environmental interests, irrespective the subject of the norm.

The relationship of regulatory impact assessment and public consultation is not entirely clear.

The theoretical background of public consultation would rather suggest ensuring that the public consultation can also reflect on the results of the impact assessment. Practical considerations, however, show that public consultation should be treated as a way of obtaining information on the economic, environmental and social implications of a planned legislative measure and thus contributing to the proper assessment of possible consequences.

The divergence of national systems and the different national solutions aiming the creation of a certain room for maneuver for the legislator show that full comparative analyses are rather inconclusive: the national legislative framework of impact assessments should primarily be assessed in its entirety, including the concreteness of guidelines, the scope of exceptions, the possibility of commenting the results of impact assessment and the legal consequences of failure to comply with these requirements. Irrespective of the level of formalization of impact assessment and public consultation schemes, public involvement shall safeguard that the legislator or the body drafting the norm has the relevant facts and views on its disposal.

Thus, it can be concluded that although there is a growing need for impact assessment schemes elaborated in details, both the national legislative framework and the EU-wide case-law analysis show that regulatory impact assessment and public consultation methods should be flexible enough, in order to ensure an optimal balance between the need for the legislator to frame public policies with a sufficient margin of appreciation and the requirement of efficiency and transparency of the decision-making process. [xlix]

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- [vi] “*The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.*” The Treaty on European Union (hereinafter: TEU) stipulates in its Article 11 Paragraph 1 the most general basis for civil participation in law-making processes in all fields of EU law. Paragraph 3 of the same Article of the TEU gives further guidance: “*The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.*”
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- [xxiii] Due to the significant number of questions examined in the Dataset, the compilation of a similar chart as in case of the World Bank database is omitted.
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- [xl] These questions are in line with the critiques most frequently formulated in connection to the implementation of the public participation in environmental decision-making: “*These gaps include a failure to specify how or when stakeholder comments on projects should be solicited; a lack of clarity as to what standards validating operational entities should apply in deciding whether project participants satisfy the notice and comment provisions under the rules; no guidance as to where, when or how the validating operational entity must make the project design document publicly available (...)*.”
- EDDY, Nathalie, WISER, Glenn. Public Participation in the Clean Development Mechanism of the Kyoto Protocol. In: BRUCH, Carl (Ed.). *The New "public": The Globalization of Public Participation*. Environmental Law Institute: Washington, 2002. p. 210.
- [xli] CJEU, Opinion of Advocate General Saugmandsgaard Øe [ECLI:EU:C:2018:241] delivered on 12 April 2018 in case C-151/17, *Swedish Match AB v Secretary of State for Health*, para 6.
- [xlii] CJEU, C-482/17, *Czech Republic v. European Parliament and Council of the European Union*, judgment of 3 December 2019 [ECLI:EU:C:2019:1035], paras 83-85.
- [xliii] “*It is clear from the responses of most Member State governments to the public consultation on the right to family reunification carried out in 2012 (see http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2012/consulting_0023_en.htm) that there is little in the way of statistical data on the extent of the phenomenon of forced marriage in the European Union.*”
- CJEU, Opinion of Advocate General Mengozzi [ECLI:EU:C:2014:288] delivered on 30 April 2014 in case C-338/13, *Marjan Noorzia v Bundesministerin für Inneres*, footnote 5.

- [xliv] CJEU, C-58/08, *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform*, judgment of 8 June 2010 [ECLI:EU:C:2010:321], para 65.
- [xlv] “*In the course of the public consultation which followed that decision, L and others raised objections to that plan, in particular on environmental protection grounds.*”
- CJEU, C-463/11, *L v M*, judgement of 18 April 2013 [ECLI:EU:C:2013:247] para 15.
- [xlvi] CJEU, T-715/14, *PAO Rosneft Oil Company, formerly NK Rosneft OAO and Others v Council of the European Union*, judgment of the General Court of 13 September 2018 [ECLI:EU:T:2018:544], para 204. (appeal ongoing)
- Similarly: CJEU, C-5/16, *Republic of Poland v. European Parliament and Council of the European Union*, judgement of 21 June 2018 [ECLI:EU:C:2018:483].
- [xlvii] OECD. *Recommendation of the Council on Regulatory Policy and Governance*. 2012. Retrieved 28 July 2020 from <https://www.oecd.org/governance/regulatory-policy/49990817.pdf>
- [xlviii] BOHNE, Eberhard. *The Quest for Environmental Regulatory Integration in the European Union*. Alphen aan den Rijn: Kluwer Law International, 2006. p. 9.
- [xlix] HANISCH, Andrea. *Institutionenökonomische Ansätze in der Folgenabschätzung der Europäischen Kommission*. Berlin: Logos Verlag, 2008. pp 18-19.