



EUROPEAN RISK FORUM - POLICY NOTE 16

EX POST EVALUATION – ASSESSING REGULATORY OUTCOMES

November 2009

EUROPEAN RISK FORUM

The European Risk Forum (ERF) is an expert-led and not-for-profit think tank with the aim of promoting high quality risk assessment and risk management decisions by the EU institutions, and raising the awareness of the risk management issues at EU-level.

In order to achieve this, the Forum applies the expertise of a well-established network of experts to 'horizontal', cross-sectoral issues. In particular, it addresses regulatory decision-making structures, tools and processes, as well as the risks and benefits of new and emerging technologies, of climate change, and of lifestyle choices.

The Forum believes that:

- High quality risk management decisions should take place within a structured framework that emphasises a rigorous and comprehensive understanding of the need for public policy action (risk assessment), and a transparent assessment of the workability, effectiveness, cost, benefits, and legitimacy of different policy options (risk management).
- Risk management decision-making processes should ensure that outcomes are capable of meeting agreed social objectives in a proportionate manner;
- Risk management decisions should minimise negative, unintended consequences (such as new, unintended risks, economic losses, reduced personal freedoms, or restrictions on consumer choice);
- The way in which risk management decisions are made should be structured, consistent, non-discriminatory, predictable, open, transparent, evidence-based, legitimate, accountable, and, over time, subject to review.

Achieving these goals is, the Forum believes, likely to require extensive use of evidence (especially science); rigorous definition of policy objectives; clear and comprehensive description and assessment of problems and their underlying causes; realistic understanding of the costs and benefits of policy options; and, extensive consultation.

The Forum works with all of the EU's institutions to promote ideas and debate. Original research is produced and is made widely available to opinion-formers and policy-makers at EU-level. As an expert group, the Forum brings together multiple sources of evidence (such as the experience of practitioners and policy-makers; non-EU good practices; and academic research) to assess issues and to identify new ideas. Indeed, direct engagement with opinion-formers and policy-makers, using an extensive programme of conferences, lunches, and roundtables, is a feature of the Forum's work.

The ERF is supported principally by the private sector. The ERF does not seek to promote any specific set of values, ideologies, or interests. Instead it considers high quality risk assessment and risk management decisions as being in the public interest. An advisory group of leading academics supports the ERF's work.

EXECUTIVE SUMMARY

Policy-makers in number of countries have begun to use ex post evaluation tools to assess systematically the outcomes of regulatory decisions. Such analyses take place after implementation of new rules and examine the relevance, effectiveness, and impacts of regulatory decisions, as well as identifying unintended outcomes, reasons for failure, and factors contributing to success. Results, derived from this new regulatory management tool, form a key knowledge input for decision-makers, creating a feedback loop that completes the “policy-regulatory cycle”.

If well-designed and carried out systematically, high quality ex post evaluations of regulatory decisions improve the quality of future regulatory decisions; facilitate the reform and improvement of existing regulations; enhance accountability and transparency; and, reduce the risk of regulatory failure

Since the 1990s, the European Commission has made substantial use of ex post evaluation techniques to assess the outcomes of expenditure programmes. Over the last two years, however, these efforts have been complemented by important initiatives that, taken together, begin to set up a process for evaluating the impact of regulatory decisions. This strategy is, however, in its early stages and more needs to be done, if it is to achieve its goals fully. This could include a number of possible improvements:

- Expand the Commission’s Evaluation policy statement to ensure that ex post evaluations of regulatory decisions focus on outcomes, unintended consequences, and failures;
- Revise the scope of the application of the evaluation policy to encompass major technical implementation decisions (such as agency guidelines and comitology);
- Revise the Commission’s Impact Assessment (IA) guidelines to ensure that expected outcomes of new legislative proposals are quantified, stated clearly, and supported by clear metrics designed to measure progress;
- Require the IAB to ensure that all ex ante impact assessments set out clear and measurable regulatory outcomes and progress metrics;
- Require the Impact Assessment Board (IAB) to assess the extent to which ex post evaluation processes are likely to be able to examine fully the stated impacts of new legislative proposals;
- Develop standards for undertaking ex post evaluations of regulatory decisions;
- Establish new monitoring procedures facilitating early identification of major negative, unintended costs and consequences;
- Require relevant European Parliament legislative committees to revisit original ex ante impact assessments, prior to developing ideas for the revision of legislation;
- Expand the responsibilities of relevant European Parliament legislative committees to include review of ex post evaluations of legislative decisions;

1. DEFINITION AND BENEFITS

In recent years, policy-makers in a small number of OECD countries have begun to use ex post evaluation tools to assess systematically the outcomes and results of regulatory decisions¹. Such analyses take place after implementation of new rules and, in their most sophisticated form, examine the relevance, effectiveness, and impacts of regulatory decisions, as well as identifying unintended outcomes, reasons for failure, and factors contributing to success. Results, derived from this new regulatory management tool, form a key knowledge input for decision-makers, creating a feedback loop that completes the “policy-regulatory cycle”.

Growth in the use of regulations to achieve public policy goals, fear of regulatory failure, and pressure from citizens for greater political accountability are some of the factors that have contributed to the progressive increase in ex post evaluation of regulatory decisions. Other factors include greater interest in evidence-based policy-making, and a general increase, throughout the OECD area, in the use of policies, tools, and institutions to manage regulatory quality.

Within this context, the use of ex post evaluation tools to assess the outcomes of regulatory decisions forms part of a wider “regulatory performance agenda” now being pursued by a number of countries. This strategy also encompasses the assessment and management of administrative burdens imposed by regulations on companies; regulatory simplification; and, evaluation of the effectiveness of regulatory tools and institutions.

Regulators undertake ex post evaluation of regulatory decisions because, if well-designed and carried out systematically, they deliver a wide range of benefits for citizens, decision-makers, and business. Specifically, high quality ex post evaluations of regulatory decisions:

- Improve the quality of future regulatory decisions, providing evidence of the “real world effects” of rules, identifying unintended consequences, and highlighting design and compliance weaknesses;
- Facilitate the reform and improvement of existing regulations;
- Help decision-makers assess and improve the effectiveness of existing, ‘ex ante, regulatory process management tools and institutions;
- Enhance the accountability and transparency of regulatory decision-making processes;
- Reduce the risk of regulatory failure

¹ Throughout this policy brief, the use of the term ‘regulations’ refers to primary law-making decisions as well as implementing or regulatory decisions. At EU-level this corresponds to secondary legislation, such as EU Directives or Regulations, and technical implementing decisions such as ‘comitology’, and agency guidelines.

2. SUCCESS FACTORS

In most OECD countries, there is relatively little tradition or expertise in the systematic ex post evaluation of regulatory decisions. Programmes designed to improve regulatory quality have, in general, focused on setting up or strengthening 'ex ante' policies, tools, and institutions, such as impact assessment programmes. High quality ex post evaluation assessments are, moreover, difficult to undertake: obtaining credible evidence is expensive; and identifying the distinctive impact of regulatory factors on real-world situations is challenging because of the gap between implementation and evaluation, combined with the impact of other, non-regulatory events.

Despite these difficulties, substantial progress has been made in a small number of countries. In New Zealand, the '*Code of Good Regulatory Practice*' (CGRP) requires regulators to review regulations systematically to ensure that they continue to meet their intended objectives efficiently and effectively. Similar responsibilities have been imposed on regulators in Canada through the recent '*Cabinet Directive on Streamlining Regulation*'. Australia has also implemented a structured process of ex post evaluation of regulatory decisions. This includes the use of "sunset clauses" (placing time limits on some types of rules) and of large-scale reviews of major areas of regulation.

Taking account of this limited experience, and recognising that more ideas may emerge as ex post evaluation processes mature, it is possible to identify a small number of "success factors" for the effective use of ex post evaluation tools to assess the outcomes of regulatory decisions. Specifically:

- There should be high-level political support for ex post evaluation of regulatory decisions, recognising its importance as a key input for future rule-making and creating strong 'demand' amongst regulators and legislators;
- The expected final outcomes of regulatory decisions, along with metrics to identify intermediate results (such as expected changes in behaviour because of government intervention), should be identified clearly during the ex ante assessment of proposals;
- New rules should include review or sunset clauses that mandate formal ex post assessment of outcomes;
- A systematic programme of review of existing rules ("regulatory stock") should be established using extensive consultation with affected parties and based on transparent criteria;
- Policies, tools, and institutions should be put in place that define objectives, requirements, and expected behaviours, support implementation, ensure rigorous and systematic analysis, and facilitate oversight;
- Policy-makers should draw up clear guidelines that set out general standards, recognise differences between different types of policy goal; and allow flexibility of analytical methods;

- Monitoring procedures, based on widespread consultation with affected parties, should be set up that facilitate the early identification of problems and progress, including the emergence of unintended negative consequences.

3. EU INSTITUTIONS

Since the 1990s, the European Commission has made substantial use of ex post evaluation techniques to assess the outcomes of expenditure programmes. Policies have been established, based on a series of Commission Communications; tools have been devised; and institutions, most notably a network of decentralised evaluators located within directorates (DGs), and co-ordinated by DG Budget, have been set up.

In contrast, there has been significantly less use of ex post techniques to assess the impacts of regulatory decisions. Notwithstanding this, some progress has been made in this area. A number of individual directorates have carried out ad hoc reviews of the impact of individual laws. For instance, three reviews, covering impacts on innovation, producer responsibility, and the environment, have been carried out on the Waste Electrical and Electronic Equipment Directive (WEEE) by DG Environment.

The Commission's guidelines for the application of the Precautionary Principle also recognise the importance of ex post evaluation, particularly for decisions based on high levels of uncertainty. Decisions made using the Precautionary Principle should, the Commission explains, be provisional and should be subject to revision as the state of scientific knowledge evolves.

Progress has also been made in establishing and implementing a "regulatory performance agenda" at EU-level. The Commission is currently undertaking a major simplification programme that aims to review all existing laws and to reduce administrative burden. Alongside this, assessments of the cumulative burden of regulations on specific sectors are being implemented.

Over the last two years, these efforts have been complemented by important initiatives that, taken together, begin to set up a process for evaluating the impact of regulatory decisions. Key initiatives include:

- *Commission Impact Assessment guidelines (2005)* – greater emphasis on ex post monitoring and evaluation requirements has now been included in ex ante assessments of legislative proposals;
- *Commission Communication on Simplification (2005)* – the mandatory content of future legislative proposals has been expanded to include appropriate review or 'sunset' clauses;
- *Commission Communication on Evaluation (2007)* – this builds on earlier communications, and aims to ensure that all EU policy actions that affect entities outside the European institutions are subject to systematic, relevant and timely evaluations of impact. It recognises criticisms from the Court of Auditors that there has been a lack of systematic ex post evaluation of the impact of EU legislative policies.

The Communication explicitly includes legislative decisions within its scope. It sets out binding, general evaluation standards covering issues such as resources and organisation, planning, design, conduct, and dissemination. It retains the devolved network of evaluators, and the role of DG Budget as a co-ordinator. And, it sets out plans to exchange experiences amongst DGs about good practices for evaluating regulatory decisions; to draw up guides to help evaluators; and to involve evaluators in ex ante assessments of the monitoring requirements included in new legislative proposals.

4. RECOMMENDATIONS

The Commission has taken a number of steps to establish a programme of ex post evaluation of the impact of regulatory decisions. This strategy is, however, in its early stages and more needs to be done, if it is to achieve its goals fully. This could include a number of possible improvements:

- **Expand the Commission’s policy statement on Evaluation** by requiring ex post evaluations of regulatory decisions to focus on assessing outcomes, identifying unintended consequences, and highlighting causes of success and failure;
- **Revise the scope of the application of the evaluation policy to encompass major technical implementation decisions**, specifically guidelines drawn up by EU agencies; major decisions by EU agencies that embed risk management assumptions; comitology decisions that affect multiple products, substances or processes; and comitology decisions subject to regular and detailed scrutiny by the EP;
- **Revise the Commission’s Impact Assessment (IA) guidelines** to ensure that expected outcomes of new legislative proposals are stated clearly (and quantified for risk management proposals), and are supported by clear metrics designed to measure progress, including expected behavioural changes;
- **Require the IAB to ensure that all ex ante impact assessments set out clear and measurable regulatory outcomes as well as describing the metrics, and processes, that will be used to assess progress;**
- **Require the Impact Assessment Board (IAB) to assess the extent to which ex post evaluation processes, as set out in ex ante impact assessments, are likely to be able to examine fully the stated impacts of new legislative proposals;**
- **Draw up and publish a plan**, based on transparent criteria and informed by consultation describing the programme of ex post evaluation of all existing and future regulatory decisions;
- **Strengthen the role of the Secretary-General in the oversight process** by including within the annual Better Law-Making report a description of the ex post

evaluation plan; an assessment of implementation progress; and a list of major recommendations for future changes in rules and law-making processes identified by ex post assessments;

- **Develop explicit standards for undertaking ex post evaluations of regulatory decisions.** These should be based on good practices, and should recognise different forms of policy action, such as risk management. They should allow scope for tailoring of analyses;
- **Establish new monitoring procedures,** based on early and extensive consultation with affected parties, for all regulatory decisions, facilitating early identification of major negative, unintended costs and consequences;
- **Require relevant European Parliament legislative committees to revisit original ex ante impact assessments, prior to developing ideas for the revision of legislative acts,** ensuring that the regulatory 'cycle is completed;
- **Expand the responsibilities of relevant European Parliament legislative committees** to include the periodic review of ex post evaluations of relevant legislative decisions;

This policy brief was written by Richard Meads, the European Risk Forum's rapporteur, with help from members of the Forum. However, the views and opinions expressed in this paper do not necessarily state or reflect those of the European Risk Forum.

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