

Eberhard Bohne

The politics of the ex ante evaluation
of legislation



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The politics of the ex ante evaluation of legislation*

I. Conflicts between formal and political rationality in EEL

1. Formal rationality

The ex ante evaluation of legislation (EEL), as defined in chapter 1 is an offspring of the rational model of decision-making. This model consists, in simplified form, of the following steps (*Rosenbloom/Kravchuk*, 2005: 319 ff.; *Henry* 2007: 290 ff.):

- Identify the decision problem,
- determine consistent objectives and preferences,
- identify all measures and alternatives for the achievement of objectives,
- analyze and assess the possible impacts of each alternative,
- evaluate alternatives against objectives,
- choose the optimal alternative,
- implement decision,
- evaluate decision outcomes.

The means-ends logic of this decision model is also called rationalist paradigm or economic rationality, since “economic man” (*homo oeconomicus*) is supposed to make decisions according to this model. Here, the term “formal rationality” is preferred to indicate that the model is not confined to economic decisions but can be applied to any type of decision and policy area.

EEL and its subcategories of evaluation like regulatory impact assessment (RIA) reflect the concept of formal rationality. According to the Commission’s impact assessment guidelines (2005: 4), an impact assessment consists of the following analytical steps:

* A revised version of the paper will be published in the forthcoming book by Jonathan Verschuuren (ed.), *The effect of legislation. A critical analysis of various forms of ex ante evaluation*, *Martinus Nijhoff/Brill Publishers*. Comments are very welcome.

- Identify the problem,
- define the objectives,
- develop the main policy options,
- analyze their impacts,
- compare the options,
- outline policy monitoring and evaluation.

It is evident that impact assessment is based on the concept of formal rationality.

Many similar analytical assessment instruments have been around for the last 50 years. Most prominent among them is benefit-cost-analysis which follows the same formal logic (*Wittmer/McGowan, 2007: 333 f.*), and has been used, for instance, for the deregulation of social and environmental policies in the US under the Reagan administration (*Tolchin, 1987: 249 ff.*).

Before the advent of EEL, RIA and – in Germany – Gesetzesfolgenabschätzung (GFA) in the 1990s (*Böhret, 2005: 34 f.*) the analytical activities which are subsumed under these concepts used to be part of programme evaluation. The scope of programme evaluation is much wider than the evaluation of legislation and covers any public or private policy (*Posavac/Carey, 1992: 1-3, 15*). Moreover, programme evaluation tends to focus on programme performance (*Wholey, 1997*). It is, therefore, an ex post evaluation of programme effects. If the programme evaluation includes an analysis of the implementation process and structure, it is also called implementation research.¹ The past experience with programme evaluation and its instruments has to be taken into account in the further development of EEL.

2. Political rationality

Programme evaluation and its cousin EEL are “inherently and unavoidably political” (*Palumbo, 1987: 12*). Even if the EEL is conducted in a non-partisan manner, its results may be used to support or prevent certain legislative actions. Consequently, already the conduct of

1 For the most influential implementation study in Germany concerning air pollution control and water management regulations, see *Mayntz et al., 1978*; for a recent comparative analysis and evaluation of industrial permitting regulations in eight EU member states see *Bohne, 2006*.

the evaluation study can be drawn into the political process by relevant actors who provide no, false, misleading or incomplete information. Furthermore, the public authority which commissions an EEL study has certain ideas and expectations about the need for certain legislative actions and their practicability, and will convey them to the evaluator. If he ignores them, the study is likely to be discarded as irrelevant. If he accepts them, he has become part of the political process. Finally, evaluation studies are often used as a political instrument to justify preconceived legislative actions (*Palumbo, 1992: 13 f.*). This complaint has frequently been made of RIAs on the European level (*The Evaluation Partnership, 2007: 5 f.*). These political characteristics of EEL must not be dismissed as accidental shortcomings of poor evaluation research. They are “inherent and unavoidable” and reflect conflicts between formal and political rationality.

Political rationality also follows a means-ends logic which, however, combines policy objectives with the objectives of gaining and/or maintaining power in government (*Böhret, 1970: 44*). Exercising political power is a necessary condition for any legislative action.

Experience shows that analytical evaluation instruments do not survive the political process if they ignore the demands of political rationality. The most prominent example is the former “Planning, Programming, Budgeting System” (PPBS) which dominated government reforms and academic policy research in the 1960s and 1970s like the concepts of new public management today. PPBS passed away, inter alia, because analytically powerful instruments like benefit-cost-analysis ignored the political rationality of the budgetary process (*Wildavsky/Caiden, 2004: 190; Rosenbloom/Kravchuk, 2005: 297*). EEL will suffer the same fate if it fails to account for the political rationality of the legislative process.

3. The quest for better regulation

Since the Commission’s White Paper of 2001 “better regulation” has become a new mantra in Europe, and EEL is seen as the philosopher’s stone that will improve the quality of EU and national regulations (*Renda, 2006: 43, 48*).

Ex ante impact assessments are required for new proposals of EC directives and regulations, and have to meet the requirements of the Commission’s impact assessment guidelines of 2005/2006.

In 2000, the German Federal Government included a provision in the internal “Joint Rules of Procedure of the Federal Ministries” (*Gemeinsame Geschäftsordnung der Bundesministerien – GGO*) which requires all federal ministries to prepare a prospective GFA (i. e. an ex ante impact assessment) for all proposals of legislative acts and statutory orders. There are no binding guidelines for GFAs. However, the Federal Ministry of Interior authorized the publication of a GFA-handbook (*Böhret/Konzendorf, 2001*) which contains GFA examples and provides guidance on the conduct of GFAs. Meanwhile, most OECD countries have adopted formalized RIA arrangements (*Kirkpatrick/Parker, 2007: 10*).

However, neither the RIA documents of the Commission nor the GFA documents of the German Federal Government mention the conflict between formal and political rationality and its implications for the conduct and use of evaluation studies. The same thing can be said about the RIA literature. It is largely ahistorical, apolitical and technical.²

This essay will, therefore, explore the functions and requirements of EELs as part of the political process. On the basis of the analytical distinction between information deficits and information asymmetries using concepts of principal agent theory, the potential benefits and limitations of EELs in the political process will be examined. The essay concludes with some reflections on ex post evaluation.

II. Types of information deficiencies

The ultimate aim of an EEL is to provide the lawmaker³ with sufficient and clear information on the expected economic, social and environmental effects and side-effects of potential new legislation including legislative alternatives that can be used as a basis of comparison of those legislative options against each other and against the “no change option”.⁴ Thus, EEL is an instrument to remedy the information deficiencies of lawmakers.

2 See, as an example, the contributions in *Kirkpatrick/Parker, 2007*.

3 The term lawmaker is used here to denote any actor within the executive and legislative branches of government who is responsible for the drafting and/or adoption of regulations.

4 See the EEL definition in chapter 1 and the Commission’s impact assessment guidelines 2005/2206, p. 26.

Legislative effects can consist of changes in human behaviour which is triggered by the legislation concerned. Effects on the economic and social system (e. g. effects on the unemployment rate) are aggregate effects of individual behaviour. Information on behavioural effects will be termed “behavioural information”.

Legislative effects can also represent changes of physical, chemical or biological properties of man, environment and man-made objects (e. g. industrial installations) which result from the human behaviour affected by the legislation concerned. Information on these effects will be termed “technical information”. For the analysis of the political functions of EEL in the legislative process it is useful to divide information deficiencies into regulatory information asymmetries and information deficits. The criterion of distinction is whether or not the needed information is in the possession of the regulatees, implementing public authorities or third parties who have a special interest in the regulations.

1. Regulatory information asymmetries

The term “regulatory information asymmetry” is used here to denote the situation where the lawmaker lacks the necessary behavioural and technical information on the potential effects of new regulations while this information is in the possession of the regulatees, implementing public authorities and/or third parties who have a special interest in the regulations (e. g. interest groups representing regulatees). This situation poses problems for the lawmaker. Problems of information asymmetries are the subject of the principal-agent theory. Its concepts are useful for the analysis and development of EELs.

According to principal-agent theory, any relationship between two or more actors where one actor depends on the action of another actor constitutes a principal-agent relationship (*Pratt/Zeckhauser*, 1985: 2; *Saam*, 2002: 6 ff.; *Furubotn/Richter*, 2005: 4.4.1). The dependent actor is called principal, the other actor is the agent.

In the context of regulations, the lawmaker is the principal while the regulatees and implementing authorities are the agents. The compliance of regulatees with the regulations and the effectiveness of implementation by the authorities determine whether and to what extent the regulatory objectives set by the lawmaker (principal) are achieved. The relationship between the lawmaker and actors who are not regu-

latees but have a positive or negative interest in the adoption and/or implementation of the regulations can also be viewed as a principal-agent relationship. Actors who represent the regulatees (e. g. business associations, professional associations) or public interests protected by the regulations (e. g. environmental groups) are agents of the lawmaker, because their activities support or impede the adoption and/or implementation of regulations prepared by the lawmaker (principal).

The relationships between the lawmaker and regulatees, implementing authorities or non-regulatees with a special interest in the regulations constitute regulatory principal-agent relationships. They are to be distinguished from other principal-agent relationships of the lawmaker, e. g. his relationship with evaluators or with other non-regulatees who have no special interests in the regulations. Since these relationships do not involve regulatory information asymmetries, they pose no specific problems for EEL.

Principal-agent relationships are characterized by information asymmetries to the disadvantage of the principal. This means that the agents have more and better information than the principal. It is assumed that the agents use their information advantages to pursue their own objectives and interests. Consequently, the principal is faced with the problem to moderate or overcome this situation by influencing the agent or by other means. Principal-agent theory distinguishes four types of information asymmetries where relevant information is "hidden" from the principal (*Arrow*, 1985: 38 ff.; *Göbel*, 2002: 100 ff.; *Saam*, 2002: 29 ff.):

- "Hidden characteristics" denote properties of the agent (e. g. technical expertise, financial means) which are relevant for the activities of the agent but not known by the principal.
- "Hidden action" delineates behaviour of the agent which cannot be discovered under normal circumstances by the principal (e. g. certain actions to deviate from technical or professional standards).
- "Hidden knowledge" (or information) refers to special information of the agent which is necessary to understand and evaluate his actions (e. g. insider knowledge of technical or economic developments).
- "Hidden intentions" are plans of the agent which are not disclosed to the principal so that he is misled or deceived about the agent's behaviour. Some authors subsume this information asymmetry under hidden characteristics (*Göbel*, 2002: 103).

A main concern of principal-agent theory is to design and analyze the instruments which help the principal to cope with information asymmetries. The debate focuses on incentives, controls and sanctions which are intended to make the agent provide the necessary information and/or to prevent him from using his information advantage to the detriment of the principal (Göbel, 2002: 110 ff.; Saam, 2002: 31 ff.).

2. *Information deficits*

There is another type of information deficiency which is not asymmetric and not related to a principal-agent relationship but relevant for lawmakers. This information deficiency is called here “information deficit” and denotes a situation where the lawmaker lacks the necessary information on the potential effects of new legislation because this information does not (yet) exist (e. g. information on the still unknown causes of ubiquitous forest damages).

The term “information deficit” is also used to depict information deficiencies of the lawmaker which are not characterized by regulatory information asymmetries. Two cases can be distinguished.

In the first case the relevant information on potential legislative effects lies with non-regulatees who have no special interest in the regulations (e. g. scientific data on dose-effect relationships of pollutants in the hands of an independent research institute). If the same information is also in the possession of regulatees and/or interested third parties, problems of regulatory information asymmetries do not arise. This is because the regulatees and interested third parties (agents) cannot exclude the lawmaker from the information which is also available elsewhere. Thus, there is simply an information deficit on the part of the lawmaker as long as he has not obtained relevant information from independent non-regulatees.

The second case is concerned with behavioural information on regulatees which is not “hidden” from the lawmaker because it exists in standardized form. Examples are statistics of the Federal Statistics Office (e.g. on waste disposal) and cost estimates on the basis of the Standard Cost Model which is used to identify the administrative burden of regulatees complying with regulatory information requirements (e. g. filling in an application form). The costs are estimated with the help of standardized information concerning the wage and overhead costs of regulatees, the time to complete the required activity, the

number of regulatees affected and the frequency that the required activity must be completed each year (SCM Network, 2005: 8 ff.).

3. Relevance of the distinction for EEL

As mentioned above, the purpose of an EEL is to provide the lawmaker with sufficient and clear information on the effects of potential new legislation. This task is impaired by the problems of regulatory information asymmetries and information deficits.

If the EEL is conducted by the lawmaker or regulatees, it is part of the regulatory principal-agent relationship with the problems of regulatory information asymmetries and information deficits. The same thing holds true if the EEL is commissioned by the lawmaker or regulatees because in this case the evaluator acts on behalf of the lawmaker or regulatees respectively.

If the EEL is initiated by an independent third party, the evaluator is not part of the regulatory principal-agent relationships. However, these relationships are the subject of the evaluator's analysis. Since the evaluation results will be known and eventually used by the lawmaker, it is unlikely that regulatees and non-regulatees will disclose information to the evaluator which is harmful to their interests. Consequently, the constraints of the regulatory principal-agent relationships are likely to spill-over into the third party evaluation. This spill-over effect does not exclude the possibility that the third party evaluator enjoys more trust with regulatees and non-regulatees than the lawmaker and/or his evaluator, and can, therefore, obtain certain information which the lawmaker and/or his evaluator have no access to. In any event, the distinction between regulatory information asymmetries and information deficits is also crucial for third party evaluations.

On the basis of the distinction between regulatory information asymmetries and information deficits it can be shown that, in the context of regulatory information asymmetries, the EEL is merely a political instrument. The EEL can meet its proclaimed purpose only with respect to reducing information deficits.

The distinction between regulatory information asymmetries and information deficits is an analytical one. This means that in reality EELs will be concerned with both types of information deficiencies. In this case the characterization of an EEL as a political or analytical in-

strument depends on whether the main focus of the EEL lies with regulatory information asymmetries or information deficits.

III. Potential benefits and limitations of EEL in the political process

1. Functions of EEL for better regulation

The key problem of EC and national legislation is not quality, but quantity.⁵ The accelerating production of multitudinous detailed and complex EC directives and regulations is accompanied by an ever widening gap between legislative promises and their actual fulfilment. The over 20 years old promise of holistic assessment of environmental effects, first pronounced by the EIA directive, and 10 years later by the IPPC directive, is a prominent example for the credibility gap of EC legislation (*Bohne, 2008*). This gap results in a gradual erosion of the supranational normative force of EC law. The preservation of effective supranational EC law rather than neo-liberal postulates of deregulation make restrictions on the EC norm production a top priority of better regulation. Similar complaints of overregulation can be heard in most EU member states.

EEL can contribute to a slow-down of the norm production by delivering information that certain regulations are not needed. However, experience⁶ shows that information deficiencies concerning the need for certain regulations contribute to overregulation only to a small extent. The main causes are political and institutional factors.

Overregulation results, to a large extent, from continuous political pressure of interest groups on the European and national level. Industries, labour unions, farmers, handicraftsmen, service providers and self-employed professionals like doctors, pharmacists, attorneys etc. seek to protect their economic and other interests through regulations.

5 In its White Paper on European Governance the European Commission (2001: 18) criticizes the large number of too detailed regulations and the accompanying regulatory complexity as the main problems of EC legislation.

6 The author had been involved in lawmaking for some 20 years in the German Federal Ministries of Interior, and of Environment, Nature Conservation and Nuclear Safety.

Their quest for legal certainty is often the main cause for detailed regulations.⁷

Furthermore, the legislative process on the European and national level, from an institutional perspective, tends to be in the hands of semi-autonomous systems of government experts whose interests and joint efforts result in the production of voluminous and complex regulations. A case in point is the Water Framework Directive which has been called a “regulatory monster” in the German debate (*Berendes, 2005: 18*). Commission and national government experts form relatively homogenous groups in their respective fields. In environmental protection they tend to have an engineering or national science background. Their professional socialisation often displays similar characteristics. Many of them have known each other for years. They gain social recognition and career rewards for producing regulations rather than for preventing them. They often develop a sort of common “tunnel vision” on what constitutes the technically best solutions. The results tend to be detailed and technically complex regulations like the Water Framework Directive or the REACH regulation. These expert

7 A bizarre example of unnecessary legislation is the German Horse Shoeing Act (Gesetz über die Reform hufbeschlagsrechtlicher Regelungen und zur Änderung tierschutzrechtlicher Vorschriften vom 19.04.2006, BGBl. I, S. 900). Today iron horse shoes are not the preferred method for the protection of horse hooves, since horses are no longer used for pulling heavy loads but for sports and hobby purposes. Under a 1940 regulation shoeing horses with iron shoes was the monopoly of blacksmiths who had to pass an exam and were certified by the government. Over the years, so-called horse therapists had emerged who treated horse hooves with other means than iron horse shoes. Their activities did not require a certification by the government. The lobbyists for the blacksmiths pressured the Federal Government to subject horse therapists to the blacksmith certification requirement in the 2006 regulations. Since no cases of maltreatment of horses by horse therapists or any other reasons of animal protection were known, the only effect of the regulation was to relieve blacksmiths from the competition of horse therapists. The certification requirement for horse therapists was quashed by the Federal Constitutional Court on constitutional grounds in 2007 (BVerfG, 1 BvR 2186/06 vom 03.07.2007 <http://www.bverfg.de/entscheidungen/rs20070703_1bvr218606.html>). The activities of blacksmiths and horse therapists should be left to the market and to the self-coordination of the profession. The Horse Shoeing Act illustrates how even relatively small interest groups can trigger regulations to protect their particular interests. Professional regulations of this sort are abundant in Germany.

systems are, in practice, semi-autonomous and have partly got out of political control.

The political and institutional factors causing overregulation are not affected by EEL activities. Therefore, the potential benefits of EEL for better regulation are rather limited.

2. *Consequences of regulatory information asymmetries for EEL*

a) Influence of regulatory information asymmetries on data collection

A main part of EEL is the collection of data on the economic, social and environmental effects of potential new legislation.⁸ This requires causal models in order to identify potential regulatory effects (Commission, 2005: 27). Where models are not available, everyday experience with causal relationships must suffice.⁹ The data encompass behavioural and technical information and partly reflect regulatory information asymmetries to the disadvantage of the lawmaker.

The first step of data collection is to identify the likely effects of new regulations on the behaviour of regulatees, implementing authorities and third parties who are interested in the regulations. Information on these effects is behavioural data, and largely concerned with the regulatory compliance of regulatees. Compliance information is at the centre of potential conflicts between lawmaker (principal), regulatees, and implementing authorities (agents). The evaluation must, therefore, cope with the aforementioned (II.1) categories of regulatory information asymmetries.

The second step of data collection is to identify the potential economic, social and environmental effects which are likely to result from the regulatory behaviour of regulatees. These are technical and behavioural information.

The main problem of an EEL with obtaining compliance information is the fact that it can only be obtained from potential regulatees and implementing authorities. These actors will provide information which serves their interests, or, at least, does not impair them. If the

8 The Commission's impact assessment guidelines (2005: 26 ff.) contain detailed advice on data collection.

9 See *van Aeken* contribution in this book.

regulatees and implementing authorities support the new legislation, they are likely to play down compliance problems. If they reject the proposed legislation, there will be a tendency to exaggerate or invent compliance problems. A German example for the invention of compliance problems is the information provided in the 1990s by implementing authorities for the draft regulations on free access to environmental information. Then, a flood of information requests entailing enormous amounts of administrative work and costs were predicted which would lead to the break-down of German environmental administrations. Nothing of this sort ever happened. In retrospect, one can say, that the true motivation behind this false information was the administrators' distrust of the public which was, at that time, deeply engrained in German public authorities.

If the required compliance information lies with third parties who have an interest in the regulations, the information also tends to reflect the interests of third parties, e. g. observations on regulatee behaviour by environmental groups.

In sum, all agents involved in the collection of compliance data will act in a strategic manner preserving their interests. This result of the theoretical EEL analysis from the principal-agent perspective can be illustrated with a practical example of an EEL.

b) Examples

In the early 1990s, the German Federal Ministry of Environment, Nature Conservation and Nuclear Safety planned to introduce binding administrative guidelines, inter alia, for the implementation of the general scoping provision in the Federal EIA Act (section 5). In order to assess the likely effects of the planned guidelines, a working draft of the guidelines prepared by the competent unit in the Environment Ministry, was tested by simulating permitting procedures under the Federal Immission Control Act and the Federal Water Management Act.¹⁰ Representatives of permitting authorities, operators and environmental groups participated three days in the simulated permitting procedures for a power plant, a chemical installation and a land fill. EIA and the scoping procedure were then new in German environ-

10 The regulatory test is described by *Böhret/Hofmann*, 1992. The test was conducted under the direction of Carl Böhret (Speyer University) and the author who was then responsible for the EIA regulations.

mental law and politically very controversial. Generally speaking, EIA and scoping were considered obstacles to speedy permitting procedures by industries, a potentially powerful instrument of environmental protection by environmental groups, and a regulatory nuisance by permitting authorities. The test was, therefore, requested by the German Federal Parliament.

In the simulated permitting procedure for a chemical installation (*Böhret/Hofmann*, 1992: 74 ff.) the operator submitted an incomplete permit application arguing that the draft guidelines were confusing, and that scoping made the submission of a permit application within a reasonable time and cost range impossible. Thus, the actual ability of the operator to prepare a permit application under the EIA guidelines was “hidden” from the lawmaker (hidden characteristics).

The environmental group refused to participate in the scoping hearing arguing that preparation time was too short and needed to be regulated in the guidelines. Thus, the actual ability and environmental expertise of the environmental group was “hidden” from the lawmaker (hidden characteristics, hidden knowledge).

The permitting authority demonstrated regulatory toughness and formally dismissed the incomplete permit application on procedural grounds. With this decision the informal bargaining practices of permitting authorities which usually precede permit applications for a multi-million investment were “hidden” from the lawmaker (hidden actions).

In sum, all test participants acted strategically, and tried to use the test for the promotion of their own interests.

An evaluation study based on a survey and interviews would have yielded similar results. The regulatory test only made the strategic behaviour of the regulatory agents more apparent than a study would have done.

Given this situation, the Environment Ministry gained no better information from the regulatory test but used the test results to legitimize its EIA guidelines.

Current examples of regulations which would invite an EEL in Germany are the planned introduction of a single environmental permit for industrial installations, and the future revenue-cap regulation for the operation and maintenance of electrical power lines and gas pipelines which is to be implemented in 2009, and already hailed as an effective instrument for generating competition in the German electricity and gas markets.

With respect to the single environmental permit the constellation of political interests is similar as in the test case of EIA regulations.

In the case of the revenue-cap regulations, many complex technical information which are in the sole possession of utilities and pertain to the operation of the electricity grid and the gas distribution system would enter the EEL in addition to the compliance aspects. Regulatory information asymmetries seem to be even more pronounced with these regulations than with EIA and permitting regulations. Any EEL on the aforementioned regulations would have to cope with the strategic behaviour of the regulatory agents.

However, the instruments proposed in the literature for the principal to prevent the agents from exploiting the information asymmetries are not available to the lawmaker and evaluator in EELs. Lawmaker and evaluator cannot offer tangible rewards (e. g. money) to make the regulatory agents disclose true information. They are also unable to control or sanction strategic behaviour of the agents. Only with respect to implementing authorities situations are conceivable where the lawmaker (e. g. a ministry) exercises control over certain authorities. However, with respect to EELs on federal regulations these situations hardly occur, since the Federal Government has no controls over the authorities of the Länder which implement the largest part of federal regulations.

c) EEL as a political instrument

All things considered, the EEL cannot overcome regulatory information asymmetries, and fulfil the purpose of regulatory analysis for which it is designed. In the context of regulatory principal-agent relationships the EEL is merely the continuation of politics with analytical means. It may be used by the lawmaker to legitimize planned regulations, or, in certain cases, to identify patterns of political conflicts likely to be caused by planned regulations. In short, EEL is a political instrument in these cases.

However, one might argue that not all regulatees, implementing authorities and interested third parties exploit regulatory information asymmetries. Theoretically, this situation may occur when certain regulations are politically uncontroversial. In this case, an EEL is either superfluous because the potential effects of the regulations are known, or it is concerned with politically unimportant regulations (e. g. procedural rules for archives). In either case, the EEL is not worth the effort.

3. *Consequences of information deficits for EEL*

When an EEL is used to reduce the information deficits of the lawmaker, gaming strategies of regulatory agents cannot affect the collection of data. This is because the EEL is concerned with information which is in the possession of non-regulatees who have no special interest in regulations. When the information does not yet exist (e. g. information on specific dose-effect relationships), new research is necessary to obtain it. The EEL, however, will not include this research under normal circumstances but maybe trigger it.

EEL for the reduction of information deficits are largely concerned with technical information (e.g. environmental effects of speed limits on freeways). With one exception, behavioural information is only involved if it refers to the behaviour of actors who are not regulatory agents (e. g. the impact of labelling requirements on consumer behaviour). However, behaviour of regulatees and other regulatory agents may be the subject of EELs for the reduction of information deficits if it is available in standardized form. For example, the costs of regulatory information requirements are standardized on the basis of the Standard Cost Model and are now routinely part of the explanatory memoranda to new legislation in Germany. The problems of conducting EELs for the reduction of information deficits are the same as for any other natural, technical or social science research.

4. *Conclusions*

Since EELs which are concerned with regulatory information asymmetries are political instruments, their conduct should not be mandatory. This obligation should be confined to EELs for the reduction of information deficits.

Consequently, provisions on mandatory EELs are to be modified. For instance, the German “Joint Procedural Rules of the Federal Ministries” concerning mandatory GFAs should be amended and provide (section 43 (1) No. 5) that the effects of federal regulations are to be presented in the explanatory memoranda to the regulations, “insofar as the effects can be assessed on the basis of official statistics, the Standard Cost Model, or information provided by private and public persons and bodies who are not affected by the regulations”. Such a provision would restrict EELs to the analytical functions which they can fulfil, and enhance their credibility. Otherwise, EELs are running

the risk of becoming discredited as merely political instruments. An evaluation of the Commission's impact assessment system has warned against this existing tendency (The Evaluation Partnership, 2007: 5 f.).

The proposed provision would not preclude studies conducted or commissioned by the lawmaker which are part of regulatory principal-agent relationships. These studies, however, could no longer take credit of the prestige associated with official EELs. In general, this type of studies should be left to the initiative of independent academic institutions.

Finally, given the political constraints of EELs the focus of official impact assessment should be on the ex post evaluation of regulatory effects. While it is true that ex post evaluation also suffers from the political constraints of regulatory principal-agent relationships, these constraints are alleviated by the focus on existing regulatory facts rather than predicted impacts.

The influence of regulatory principal-agent relationships on ex post evaluations could be further reduced by setting up an independent Evaluation Commission made up of government officials, NGOs and experts from academia and relevant professions. In Germany, such a Commission was set up in 2006 for the evaluation of cost estimates on the basis of the Standard Cost Model.

The ex post evaluation of regulations should not be mandatory but subject to the discretion of the Evaluation Commission. The Commission has to determine whether the regulations are still necessary, and meet their prescribed objectives. Furthermore, a modified sunset clause should be introduced which provides for the expiry of legislation one year after the submission of an ex post evaluation, provided that the Commission has concluded that the regulations are no longer necessary, or need to be adapted to new developments. The expiry of the regulations can be avoided if the lawmaker decides otherwise within the one year respite.

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