Chapter 8
National Experiences with General Forms of Ex Ante Evaluation of Legislation: The Cases of Germany and Sweden

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I. Introduction

‘Better regulation’ reforms have gained political attention in the whole EU since the mid 1990ies. The growing importance of this area is made particularly apparent by the rapid diffusion of instruments like Regulatory Impact Assessment (RIA) and Standard Cost Model (SCM) in the whole European region. However, ex ante evaluation of legislation is not a new topic. Attempts to improve the information base of political decision makers within the legislative process have a long history. Traditionally, political decision makers have relied on formal and informal consultation to fill their knowledge gaps. However, with the blossoming of policy analysis and planning in the 1960ies and 1970ies, people also increasingly thought about the possibility of integrating impact analysis systematically in the legislative process.

This chapter discusses the significance of ex ante evaluation of legislation in two European countries: Germany and Sweden. At first, it provides an outline

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2 In the following, only reforms on the Federal level will be examined. In Germany the Federal government is primarily responsible for legislation, while the implementation of laws is mostly done by the Federal states (“Länder”). Moreover, the “Länder” have their own legislative competences in certain areas of law, which are determined by the basic law.
of the history of the reform area. Current instruments of reform are presented and legal as well as organizational questions of their implementation are described. Which role _ex ante_ evaluation of regulatory impacts plays in present day legislative practice in both countries is afterwards demonstrated by means of the empirical evaluation of numerous draft laws. The insights into present day evaluation practice that were gained in the course of a content analysis of preambles and explanatory memoranda of all German and Swedish government bills of 2006 are furthermore compared to government bills of 1977. By doing this, it can be demonstrated, that _ex ante_ evaluation of legislation even then was an important topic and that changes were only achieved in certain areas, despite the reform boom of recent years. When comparing the two countries, it becomes apparent that the integration of _ex ante_ assessments in the legislative process is to a great extent dependent on two variables: the cultural and structural characteristics of the national legislative process, as well as matters of organizational institutionalization.

II. *Development and Key Aspects of Ex Ante Evaluation of Legislation in Germany*

The question of an amelioration of _ex ante_ evaluation of legislation in the FRG first appeared on the political agenda at the end of the 1960ies. This does not mean, however, that preparative analyses of draft laws did not play a role before then. Prospective evaluation as well as ex post evaluation of effectiveness already belonged to the steady repertoire of the legislative process (including: independent commissions, advisory committees, expert advisory boards, hearings of experts and stakeholders, reporting commitments regarding specific laws/political areas, evaluations). However, there was much criticism that these procedures were used mainly ad hoc and not systematically and that scientific-systematic processes of _ex ante_ evaluation of legislation in particular were hitherto rarely used. Hence, the overall concept of reform efforts was to design structures and processes of the political-administrative system in a more intelligent way, so that knowledge about the effects of laws is already generated and used systematically in the drafting phase. The ‘active state’ was to plan political programs rationally and anticipatory with help of science, use synergy effects and learn from experience. Better planning and the use of socio-scientific analyses were to counteract problems like efficiency deficits of political programs, the lack of attention to the long term effects of laws and the absence of an ‘overall concept’ of political governance.