The state of affairs with the legislative impact assessment

Does a legislator know what the consequences of its decision are?

Report by the National Audit Office to the *Riigikogu*
Tallinn, 31 October 2011

Summary of audit results

The National Audit Office audited whether the explanatory memoranda of the draft legislation initiated or adopted by the Government of the Republic contains impact analyses and whether the coordination mechanism of assessment of the impact of legislation constantly ensures that the analyses made provide the members of the *Riigikogu* and the public with reliable information on the possible consequences of implementing the legislation.

To that end we assessed whether ministries have performed their obligation to analyse the impact of legislation upon drafting legislation. We also audited the activities of the Ministry of Justice in developing and improving the analysis of the impact of legislation.

The results of legislative drafting affect the life of all Estonian residents and therefore everyone has the right to know, above all, how an Act can influence them and, thereafter, whether the impact of the legislation has been as planned.

Act and regulations serve as the basis for the rights and obligations of persons and for redistribution of money and benefits. Expenses fixed by legislation amount to approx. 73.5% of the state budget in 2011 (4.4 billion euros). Most of these arise from Acts. Therefore, legislative drafting and its financial impact are directly related to state budgeting and the use of the state budget.

Each piece of legislation usually has more than one impact and often the impacts can have an opposing effect. For instance, an Act that seems cost-effective in the narrow view of the state budget may not be effective in the social or environmental view. If the impact is not assessed, it may result in unexpectedly high expenses for the whole of society. The assessment and balancing of all legislative effects is a groudwork for the Government and the *Riigikogu* for making informed and high-quality decisions for the benefit of the people of Estonia.

According to the opinion of the NAO, the impact of legislation is assessed insufficiently and therefore the institutions adopting legislation or the public may not have sufficient and reliable information about the possible consequences of the legislation.

Over the years, the Ministry of Justice, the coordinator of the entire field, has failed to establish effective coordination mechanism of analysing the impact of legislation. Likewise, other ministries have failed to fully implement the requirements for impact assessment.

- The extent of impact analyses of legislation is moderate and it is done formally. More than a half of the required impact areas lacked impact assessments in the explanatory memoranda of all the audited legislation. The main reason for the absence of impact assessment lies in the insufficient supervision over the implementation of the rules of impact assessment and in general perception that impact assessment is of secondary importance. The assessment of the impact of legislation remains modest also because the drafters of legislation lack the skills of assessing all effects and often there is too little time for it. Also, there is not enough money for outsourcing impact assessment.

■ Explanatory memoranda of legislation often cover only positive impact and/or impact that supports the chosen manner of regulation, leaving out the negative consequences. The opinions of the stakeholders or feedback from the Ministries about taking or not taking them into account are not always submitted to the *Riigikogu*. This results in a weak public accountability of the impact analysis.
■ Where the impact has been analysed, the numerical expression of the impact has been used only in a half of the cases. Financial impact has, to a certain extent, also been assessed in a half of the explanatory memoranda, whereby the assessment of both the revenue and expenditure has been given in only about 10% of the letters of explanation.
■ In more than a half of the explanatory memoranda of legislation the financial impact on the state budget has not been indicated or it has been stated that the legislation does not bring about any additional expenditure to be covered from the state budget or that the adoption of the legislation does not call for any additional expenditure by the state. The Ministry of Finance has not considered it necessary to create the required guidelines for the ministries for calculating state budget expenditure in explanatory memoranda of legislation and therefore the analysis of the impact of legislation does not support state budgeting or the optimisation of budgetary allocations.
■ The time required for the entry into force of the legislation is inadequately assessed in explanatory memoranda of legislation and the activities required for the entry into force are insufficiently planned. Often, the period between the publication and entry into force of legislation is very short. In over 2/3 of the legislation included in the audit sample the period from the publication of the legislation until the entry into force of the legislation was less than two months and in over a half of the cases the period was less than a month. Many pieces of legislation did not have any secondary legislation as of the date of entry into force. This results in problems in the implementation of Acts and in the need to quickly amend the Acts following their adoption.
■ The situation of impact assessment of legislation relating to the adoption of EU law is the same as that of legislation regulating solely national issues. The access of stakeholders to information in the early stage of EU legislative drafting has still not been resolved.
■ Since 2007 the Ministry of Justice has aimed at improving the coordination of analysing the impact of legislation and the quality of impact analysis, but this aim has not been achieved. When the NAO compared its audit results and a similar survey of the Ministry of Justice carried out in 2007 regarding the current status of impact analysis, it became evident that over four years the quality of impact analysis has not improved. The activities of the Ministry of Justice in this field have been limited to planning a new way to institutionalize the impact analysis, but no time or money has been found for the practical and continuous advising of the ministries or for analysing impact.
■ The volume of work required for implementing the Better Regulation Policy (until 2018) adopted in the Riigikogu in 2011 has been underestimated and there is no realistic implementation plan or funding.
■ One of the users and quality assessors of analyses of the impact of legislation is the *Riigikogu* whose critical attitude towards impact assessment will improve the quality at the level of the Executive. In spite of the substandard impact analyses, the Board of the *Riigikogu* has not refused and the Chancellery of the *Riigikogu* has not advised to refuse to discuss the draft legislation whose impact has not been analysed in accordance with the rules of legislative drafting of the *Riigikogu*.

All in all, the recommendations of the NAO are aimed at resolving the most urgent problems of the organisation of the analysis of the impact of legislation. Among other things, the following must be done:

- for officials, to clarify the scope and methods of analysing the impact of legislation;
- to establish sustainable and meaningful quality control both at the level of the Executive (Government) as well as the Legislature (*Riigikogu*);
- to improve the involvement of stakeholders in legislative drafting;
- to present impact analyses more clearly in explanatory memoranda;
- to increase the liability of the ministers for the thoroughness of impact analyses in their respective fields of responsibility;
- to draft an implementation plan of the Better Regulation Policy in the Ministry of Justice.

Responses by the auditees

The NAO sent the audit report to eleven ministries (all but the Ministry of Foreign Affairs), the Government Office and the Chancellery of the *Riigikogu* so they could express their opinion.

The auditees agree that the NAO has drawn attention to the right and essential problems and make adequate recommendations for resolving them. In principle, the auditees take most of the recommendations into account and find that their implementation would ensure better decisions and problem-free implementation of legislation and reduce the number of amendments arising from implementation issues.

Various auditees have pointed out that more financial resources are required for the implementation of the Better Regulation Policy and for improved analysis of the impact of legislation.

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