REGULATORY IMPACT ASSESSMENT IN FINLAND AND THE ROLE OF COMPETITION AUTHORITY

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Abstract

RIA promotes the understanding of regulatory impacts. It ensures that the most efficient and effective policy options are chosen. The OECD considers the Finnish regulation successful but there are still some aspects that need further attention. In Finland, RIA has been developed from the 1970's but the assessment still contains problems and deficiencies. The Finnish Competition Authority (FCA) has been an active advocate in the regulatory reform in Finland. At the moment, the FCA's contribution to the regulatory reform takes place through advocacy. RIA is used to enhance the arguments that are used for this purpose. Finland requires stronger RIA techniques and needs new institutions to coordinate and promote the regulatory reform.

Introduction

The role of RIA is important since regulatory quality is crucial for economic performance and government effectiveness in improving the quality of life. Regulatory reform that enhances competition and reduces regulatory costs can boost efficiency, bring down prices, stimulate innovation, and help improve the ability of economies to adapt to change and remain competitive. In the context of regulation, it is important to consider its impacts. Empirical evidence is needed to clarify the impacts of regulation and to predict the potential impacts of new regulatory measures.

Improving the empirical basis for regulatory decisions through RIA is an expanding reform strategy in the OECD countries. RIA is a decision-making tool; a method of systematically and consistently examining selected potential impacts arising from government action and of communicating the information to the decision-makers. Because regulatory decisions are made in political environments, RIA is not of itself a sufficient basis for decision, but is an adjunct to good decision-making. According to the OECD, RIA can be a powerful tool for:

- Improving understanding of real-world impacts of government action, including both benefits and costs, and using this understanding to pursue efficient policies as cost-effectively as possible;
- Integrating multiple policy objectives in a complex world. RIA can be used as a common integrating framework to expose impacts and linkages among policies and to give decision-takers a capacity to weigh trade-offs;
- Improving transparency and consultation. RIA exposes the merits of decisions and the impacts of actions. For this reason, RIA is, in many countries, closely linked to processes of public consultation, and is part of the larger movement in the OECD area to improve the openness, transparency, and responsiveness of government;
- In the long-term, changing the culture of policy-making so that it adopts longer-term views and is more able to serve important but diffuse interests rather than narrow and concentrated interests.[1]

Impact assessment is an information-based analytical approach to assess probable costs, consequences and side effects of planned policy instruments (laws, regulations, etc.). It can also be used to evaluate the real costs and consequences of these instruments after they have been implemented. In both cases, the results are used to improve the quality of policy decisions. The objectives of impact assessment are to improve the policy decisions and to

[1] Meeting on Regulatory Impact Analysis: Best Practices in OECD Countries. Paris, 29-31 May 1996.

reduce the number of legal instruments by avoiding unnecessary legislation. The results of impact assessment should be seriously considered when political decisions are taken.[2]

In the OECD country review on Finland, "*Regulatory Reform in Finland – A New Consensus for Change*", attention is paid to the systematic economic assessment of regulation both in implementing new regulation and in assessing and reforming the existing regulation. The OECD finds a transparent, consistent and systematically followed regulatory impact assessment system a key to the further development of the regulatory reform. In Finland, assessing the effects of regulation is neither open, consistent or systematically followed, says the OECD.

Finland has experienced remarkable changes over the last twenty years: regulatory reforms have had a major impact on the economy and society. A generally open and more innovation-driven economy has replaced the old traditions of economic nationalism and heavy, pervasive state control.

The ministries responsible for preparing legislation do not always acknowledge that a proposal may limit, prevent or distort competition. Sometimes it is necessary to issue provisions that limit competition but the competitive effects of such proposals should always be recognized. First, such practices should be found which do not unnecessarily limit competition.

In this paper, I will present RIA in Finland in the light of the recent OECD report on Finland's Regulatory Reform. The current state of RIA in Finland will be explored as well as the plans for the future. The role of the FCA has been central in the Finnish regulatory reform. I will also describe how the FCA takes RIA into consideration.

OECD Regulatory Reform report

The OECD report, "*Regulatory Reform in Finland - A New Consensus for Change*", published in May 2003, focuses on the government's capacity to manage the regulatory reform, competition policy and enforcement, market openness, and the regulatory framework of specific sectors against the backdrop of the medium-term macro-economic situation.[3]

Finland has used regulatory reform from the late 1980s to support policies aimed at opening up the economy and strengthening competition. Regulatory reform has already had a significant impact on Finnish economy and society. Its major achievement has been to help Finland make a successful transition from a heavily regulated market to an open market economy.[4]

Finland took its first steps regarding the regulatory impact analysis in the 1970s when the early editions of the Instructions on the Drafting of Government Proposals required the assessment of economic and certain other impacts. RIA started with a requirement to assess the economic impact of regulation, and since then, further aspects have been added, for

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[2] Improving Policy Instruments through Impact Assessment. 2001. Sigma paper no. 31, p. 10.
[3] OECD 2003a, p. 3.
[4] OECD 2003a, p.6.

example social and health impacts. A wide range of partial impact assessments is now proposed.[5]

Finnish regulatory policy is broadly consistent with the 1995 OECD recommendations of the Council on Improving the Quality of Government Regulation. The first formal regulatory policy was issued in 1996. Guidance on implementing the policy is also available. The most important basic guidelines are the above-mentioned Instructions on the Drafting of Government Proposals. There is also the 1998 "Finnish Checklist" based on the 1995 OECD Recommendations. The current policy is set out in the 2000 Government Ordinance "The Second Programme of the Government to Improve Law Drafting".[6]

Despite the early start, RIA still does not play a very effective role in the preparation of the Finnish regulation. Administering regulation and the policy of statutes do not play a major role in Finland. Finland has no central body to drive the regulatory governance policy. Informality and decentralization are typical features of Finnish regulatory governance. There still exist gaps and weaknesses in the regulatory policy that need further work. Firstly, there are few concrete criteria to support the test of good legislation. Secondly, the main focus is on primary legislation. Thirdly, only few legislative proposals are covered. Fourthly, the relationship between the tests set by the regulatory policy and those set by the "Finnish Checklist" is unclear. And fifthly, the implementation of the policy is relatively poor. And finally, regulatory policies, institutions and tools (such as RIA) are seldom evaluated ex post facto.[7]

There is a need for stronger and more targeted RIA policy. Finland should promote an evidence-based approach to regulation. Most Finnish officials agree with the OECD that, so far, RIA has had little impact on the shape of the regulation.[8] The use of RIA should be supported at the highest levels of government. Despite the fact that various government ordinances backing RIA have been passed, no political pressure or sanctions exist for the lack of enforcement and compliance of RIA by the ministries. The weakness of the central quality control function on non-budgetary impacts of laws and regulations also reflects a low level of political and institutional commitment to ensuring a high and consistent standard of analysis. Addressing this issue should be a high priority for further improving RIA in Finland. Like most countries, Finland requires regulating ministries to be primarily responsible for the conduct of RIA. However, the extent of this decentralised responsibility is greater than in most countries. Individual ministries are subject to minimal challenge from outside the ministry as regards whether RIA is required, which impacts should be assessed, and how they should be assessed. Thus, there is extensive discretion as to the type of RIA analysis used in individual cases.[9]

There exist three regulatory institutions whose impact in implementing RIA is crucial. Firstly, the Ministry of Justice, and in particular its Bureau of Legislative Inspection is responsible for the development of proposed laws, and government resolutions used to implement regulatory policy. It examines proposals for new legislation and checks compliance with the Instructions on the Drafting of Government Proposals. It has the responsibility to verify that all of the relevant impact assessments have been completed. However, these reviews do not target the

[5] OECD 2003, p. 28.
[6] OECD 2003a, p. 46.
[7] OECD 2003a, p. 47.
[8] OECD 2003a, p. 41.
[9] OECD 2003b, p. 33.

substance of the analysis carried out through the RIAs. The Ministry of Finance is the second institution where RIA is used. The Ministry often assesses the economic impact on the economy through its budgetary oversight powers, but these controls are not formalised. Lastly, as a crucial 'gatekeeper' before the final decision is made, the Cabinet Finance Committee can block proposals in case it deems that the expected impacts of the measure may be too negative on the economy.

The OECD gives credit to the FCA, which has been among the main driving forces of the regulatory reform, devoting substantial resources on it. Deregulation has been one of the FCA's priorities during its entire existence. It has influence over the proposed economic legislation. But the 1989 PM's recommendation that ministries should consult the FCA before issuing potentially restrictive legislation is no longer carefully followed.[10] The OECD recommends that, in the future, Finland should to see to it that when the effects of new regulation are assessed competition-policy considerations and the effects on companies' business operations should be evaluated more systematically than is being done now.

To summarise, the OECD recommendations in the development of RIA in Finland are:

- Maximise political commitment to RIA. There is no political pressure and no sanctions to enforce RIA requirements.
- Allocate responsibilities for RIA carefully. Responsibility for RIA should be shared between ministries and a central quality control unit.
- Train the regulators. Regulators need the skill to carry out high quality RIAs. There is no general guidance.
- Use of consistent but flexible analytical method. An effective RIA needs a soundly based cost-benefit analysis, which includes quantification.
- Develop and implement data collection strategies. RIA quantitative evaluations are only as good as the data they rest on. Lack of information is known to raise problems.
- Target RIA efforts. RIA resources should be targeted at regulations with the largest potential impacts, and with the best prospects for changing outcomes. RIA is mainly focused on primary legislation and there is no objective test to target efforts.
- Integrate RIA with the policy-making process. RIA can only be effective if it is integrated with policymaking, and not just "add-on" after policy decision has been made. Political commitment is poor and urgently needs strengthening, which would also help policy coherence.
- Communicate the results and involve the public. Consultation provides essential quality control, by providing feedback on a draft regulation's feasibility and likely future impact. Finnish guidance requires that RIAs are made available during the consultation process, but this seldom happens in inter-ministerial consultation, or in public consultations.
- Apply RIA to existing regulations. [11]

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[10] OECD 2003a, p. 47.
[11] OECD 2003a, pp. 53 - 54.

Present state of RIA in Finland

The assessment of the impacts of government proposals has been required by the Instructions on the Drafting of Government Proposals from 1976. At the same time that new assessment demands have been invented, the problem involved in reforming law drafting has been that the old assessment requirements have not been properly adhered to. New demands have been proposed in the government programmes, in the state council's decisions in principle and the publications of the ministries.

Developing the preparation of statutes is an ongoing process. The assessment of impacts has been developed from the late 1990s. The results are not very impressive, however. What is striking is that almost each government proposal nowadays contains some kind of an impact assessment. However, the progress has mainly concerned the traditional types of impact such as economic impacts.

In the late 1990s, the guidelines concerning the prediction of the impacts of legislative proposals have expanded and become increasingly more specific, however, after the State Council began to improve the quality of law drafting and of laws. In the 1996 decision of principle of the State Council, the ministries were obliged to ensure that when legislative proposals are planned, enough time and resources are reserved for impact assessment. However, the proposals have still not contained more information on the impacts of the statutes, even though improving the information on impacts has been among the top priorities.[12] In many instructions and opinions on law drafting and its development, the ex post facto follow-up and impact assessment of law proposals has been discussed. And yet the topic has been emphasised much less than the prediction of impacts.[13]

The Instructions on the Drafting of Government Proposals are the most important legal norm regarding the ex ante impacts of the laws. According to them, the impacts of the proposals should be examined, in particular. The instructions in force date back from 1992.[14] On 26 October 2001, the Ministry of Justice set up a working group to prepare the reform of the Instructions on the Drafting of Government Proposals. The group left its proposal for the new Instructions on 15 October 2003. The group's report has sought to develop solutions, which would encompass the relevant impacts and leave out those that are irrelevant.[15] In the reform of the Instructions, the aim is that all the relevant impacts of the government proposals could be described in an adequate manner.[16]

The Meeting of the Permanent Secretaries of the State Council appointed a working group on 20 January 2003 with the task to investigate measures for developing the law drafting of the Council. The report was completed on 2 April 2003[17]. The group made proposals to boost the planning and administering of law drafting, to improve its quality, to consolidate the expertise of law drafting and to implement the inspection of law proposals. According to the working group's report, impact assessment is one of the main development targets, which has received

[12] Tala 2001, p. 44, 48.
[13] Tala 2001, s. 50.
[14] Tala 2001, p. 43.
[15] Proposal of the working group preparing the Instructions on the Drafting of Government Proposals. Helsinki 2003.
[16] The development proposals of the Meeting of the Permanent Secretaries 2003, p. 14.
[17] Towards improved planning and administering of law drafting. Proposals of the Meeting of the Permanent Secretaries. State Council, Series 8/2003.

attention over the years, and been the object of stronger and stronger development demands. The main proposals include more uniform and explicit instructions on impact assessment and the creation of support for it. This work should be headed by the Ministry of Justice and include the relevant ministries.

Particularly in recent years, both the State Council and the ministry have implemented several measures including the impact assessment of decisions in principle, the reform programmes of law drafting by the State Council, guidelines and guidebooks. The concrete results of these acts have remained quite moderate, however. Above all, this is due to the fact that the practical implementation of the measures has not been ascertained and that the administering of law drafting has not been sufficiently included in the planning and governance of the ministries' work.[18]

The Permanent Secretaries' Group suggested that a special Permanent Secretaries' Group on Law Drafting would be set up as the main organ of coordination. In accordance with the proposals of the Permanent Secretaries' Group, on 25 June 2003, the PM established a reform group for the planning and administering of the State Council's law drafting. The Permanent Secretaries' Group on Law Drafting has particularly devoted itself to impact assessment. One of the group's tasks is to follow the progress and implementation of the law proposals and other important initiatives following from the government programme. Additionally, the Permanent Secretaries' Group on Law Drafting makes proposals on the launching of the joint development initiatives of the State Council, e.g. relating to the use of regulatory alternatives and the impact assessment of legislation. The Permanent Secretaries' Group also reviews the instructions on law drafting, which the State Council should follow, and prepares the proposals on the supporting structures of law drafting.

To support the coordination of inter-ministerial law drafting, the Minister of Justice has, on 4 September 2003, set up a Regulatory Reform working group with a representation from all ministries, the Research institute of Legal Policy and the parliament. It continues the work of the previous regulatory reform network for the State Council's law drafting. It is the task of the Regulatory Reform working group to act as a co-operation organ for the ministerial law drafting, and support the Permanent Secretaries' Group. In this task, the group

- act as an information exchange, brain storming and development forum promoting good ministerial law drafting,
- follows the international law drafting reform work and supports the related national projects when necessary,
- seeks to solve potential problems arising in law drafting and in ministerial co-operation,
- makes proposals on developing law drafting to the Permanent Secretaries' Group and reports its own activities to the Group at regular intervals.

Particularly the commitment of the management, the attitudes of the officials preparing the legislation, guidelines and training and the chance to get expert help affect the further development of impact assessment. The majority of the government proposals nowadays contain impact assessments, but their level is not very good. Legislative proposals are seldom planned sufficiently well; instead, a great rush is often typical of law drafting, which contributes to the qualitative problems, such as the complexity of the text and insufficient

[18] The development proposals of the Permanent Secretaries' Group 2003, p. 7.

impact assessment. The administering of law drafting is not sufficiently linked to the total administration of the ministries. Combined with the other factors, the deficiencies in administration, systematicity and resourcing result in excessive regulation and contribute to the excessive length of the commentaries to the government proposals.[19]

The attitudes of the officials preparing the legislative texts appear to exhibit seasonal variations. For example in 2001 several impact assessment courses were arranged, but after that, the interest to towards the training has decreased. Without guidance and a centralised support organisation, which has firm links to the impact assessment experts of the different ministries and research institutes, improving the quality of the impact assessments is uncertain. On the basis of the proposals of the Permanent Secretaries' Group, a law drafting support function is planned to be established in the Ministry of Justice.

Several instructions and guidebooks have been published on impact assessment regarding the assessment of environmental, company, criminal, regional development and gender impacts. Additionally, working group memorandums can be used as guidelines. These instructions on impact assessment are largely uniform in principle and the different instructions are quite clear as such. In the reform programme of law drafting, it is required that the Ministry of Finance develops and harmonises the instructions on impact assessment in co-operation with the relevant ministries, based on the experiences obtained. The Permanent Secretaries' Group recommends that impact assessment be improved by harmonising and clarifying the existing instructions under the supervision of the Ministry of Justice and in consultation with the relevant ministries.

The assessment of alternatives and the related impacts concerns knowledge-based decision-making above all, which, upon implementation, e.g. decreases the legislative amendments resulting from inadequate impact assessment. The basic principle is that the total benefit of regulation shall justify the costs incurred and other negative results. The Ministry of Finance is commencing a project on improving the control of yield and cost impacts. The aim of the project is to improve the assessment and administration of the fiscal impacts and the balancing impacts of the public economy when it comes to legislation in particular. The project promotes the general development of impact assessments.[20]

The role of the FCA in the regulatory reform

The FCA has been one of the driving forces of the regulatory reform, and as mentioned above, has influence over proposed economic legislation. The operations and tasks of the FCA are prescribed in the Act (711/1988) and Decree (66/1993) on the Finnish Competition Authority. In accordance with its task prescribed under Article 1 of the Act on the Finnish Competition Authority, the FCA shall monitor and investigate competitive conditions; follow the preparation of economic legislation and give statements about questions related to its field; take initiatives to promote competition and to dismantle restrictive rules and regulations.

The OECD Regulatory Reform Report points out that the FCA's initiatives have triggered several significant reforms. The OECD adds, however, that, in the recent years, the FCA does not appear to have been so strongly anchored in the policy-making process as before. The

[19] The development proposals of the Permanent Secretaries' Group 2003, p. 8.
[20] The development proposals of the Permanent Secretaries' Group 2003, p. 14.

report considers its good administrative practice that the 1989 PM's recommendations contained an early consultation of the FCA and the attachment of FCA's opinion in the presentation memorandum. The OECD finds that, if systematically implemented, the practice would improve the quality of law drafting, add depth to the discussion and promote competition.[21]

At request, the FCA annually issues several dozens of statements to the ministries responsible for law drafting and makes its own initiatives on matters, which require its attention. The FCA's representatives are regularly heard before the government committees and the parliament. Between the years 1988 and 1996, the FCA issued 385 statements on regulatory issues and 120 initiatives calling for specific regulatory changes. However, the recommendation that the ministries should consult the FCA before issuing potentially restrictive regulations is not always adhered to. To respond, the FCA has opened new channels of communication to interest groups and political decision-makers. It also continues to participate in a wide range of task forces and committees so as to be able to exert influence at the early stages of the discussion.[22] Furthermore, the FCA co-operates with other regulatory authorities, e.g. the Finnish Communications Regulatory Authority and the Energy Market Authority. The complexity of some policy issues where there is a need to balance different objectives and the difficulty of anticipating market effects certainly make advocacy today a great challenge. The FCA has also sought to improve the quality of its opinions and, for this purpose, has prepared a preliminary checklist[23] for use in writing opinions.

A new Advocacy Unit was established at the FCA on 1 October 2002 in the context of an organisation reform. Approximately ten per cent of the FCA's human resources are devoted to the advocacy work. Most of the advocacy work involves long-term interacting with economical operators, political decision-makers and various other interest groups. The FCA's objective is to increase knowledge of the competition rules among the market operators and to promote their commitment to workable competition in their actions and decisions.

The purpose of advocacy is to contribute to regulatory reform in order to increase economic efficiency and welfare. Central to this is the development of the opportunities to engage in business and for market entry. Monitoring the impacts of de-regulation and the related development of the methods of analysis and competence building are important objectives.

For the purpose of the competition authorities' advocacy functions, it is of great importance, at least in the long run, to manage and be able to efficiently apply the RIA tools. These skills would obviously benefit the analysis and follow-up of the effects of competition policy. The FCA finds the examination of the RIA methods important, as well as their more widespread and efficient implementation in the competition authorities work.[24] RIA is a strategic tool for the FCA's own operations but the FCA also intends to network with those responsible for legislation and competition policy, e.g. the Ministry of Justice and the Ministry of Trade and Industry. New institutions are needed for better coordination and the promotion of regulatory reform in Finland.

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[21] OECD 2003a, pp. 6, 77.

[22] The FCA e.g. participates in the working group on the allocation criteria of rights of discharge, the working group on the total reform of the procurement legislation and the working group investigating the issues of responsibility and competition regarding municipal waste management.

[23] See Appendix 1.

[24] The FCA's competition research programme 2004.

Conclusions

RIA is considered one of the most important regulatory tools available to governments. Its aim is to ensure that the most efficient and effective regulatory options are systematically chosen.

The OECD report cited above pays attention to the systematic economic assessment of regulation both in implementing new regulation and in assessing and reforming the old legislation. A transparent, consistent and systematically followed RIA is the key to the further development of the regulatory reform. The OECD has criticised Finland's position in these respects.

Finland has worked hard to improve its regulatory governance since the 1980s, but a stronger political drive for impact assessment of new laws and regulations would improve the efficiency and coherence of the regulatory policy. Assessment impacts have been presented e.g. in government programmes, and several guidebooks on impact assessment have been published. Predicting the impacts of legislative proposals and their investigation ex post facto has been sought to be improved in the law drafting practice. The measures taken have not led to the desired effects in practice, however. The instructions and recommendations have not been implemented and the ex post facto impacts have not been systematically evaluated. However, Finland continues to develop the quality of RIA. The plan is that the ministries that have provided impact assessment instructions would support the impact assessment more coordinatedly. The most recent phase of the regulatory reform is based on the proposals of the Permanent Secretaries' Group, which suggests to boost expertise of law drafting and to implement the inspection of law proposals. According to the group, RIA is one of the main targets.

One of the most important recommendations of the OECD regulatory report is the development of impact assessment. Finland should think of more evolved ways to evaluate the quality of our regulation ex ante and ex post facto. This requires political commitment to the principles of the regulatory reform. In law drafting, it is necessary to emphasise knowledge-based decision-making, such as the quantitative assessment of impacts and the hearing of all parties in the law drafting process.

Additionally, in its country review on Finland, the OECD recommends a more systematic consideration of the competitive aspects when it comes to law drafting. The competitive impacts should be evaluated as part of the general assessment of the impacts of regulation. Concretely, the OECD recommends the issuing of a binding order to the effect that a statement should always be requested from the Finnish Competition Authority (FCA) if a legislative proposal limits, distorts or prevents competition.

The FCA seeks to promote RIA in its work. A strong RIA is a requirement of effective argumentation, and helps to meet the challenges of advocacy. It is important that the competition authorities focus on analysing the impacts of regulatory reforms and the dismantling of competition restraints, and develop the methods of analysis. Such competences would obviously facilitate the analysis and follow-up of the impacts of competition policy. It is of extreme importance from the point of view of the advocacy function that the assessment of regulation is connected to the legislative process and that the impacts of the changes are not only evaluated ex post facto.

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APPENDIX 1.

COMPETITIVE CONSIDERATIONS FOR WRITING STATEMENTS

Considerations for competition authorities:

Structural regulation

Workability and efficiency of markets

- reaction to changing market conditions
- does the proposal provide possibility for the creation of actual competition and competitive pressure
- safeguarding the freedom of business undertakings to engage in business without unjustified barriers and restrictions (Art. 1 of Competition Act)
- right to work and freedom to engage in business (Art. 18 of the Constitution). Under the law, everybody has the right to earn a living with their chosen work, profession or livelihood.

Complicated market entry

- is the authorities' discretion tied, i.e. are there objective criteria for market entry (assessment of applicability)
- or is it a question of needs testing where the authority granting the permission has the sole right to assess whether more market operators are needed. The authority grants new permissions based on its own assessment
- whether the proposal contains quotas, licences, standards or planning impediments

Operational regulation

Use of competitive methods

- is the use of e.g. advertising prevented, although the manufacture and sales of the product were allowed
- will the opening hours be limited

Price regulation

- are e.g. maximum prices proposed to the sector

Transparency of pricing

- clear means to promote include e.g. separation of official and commercial business
- cost-correspondence
- prevention of cross-subsidisation

Indirect regulation

Competition neutrality

- e.g. taxation neutrality: import bottles excluded from the pawn bottle system

Public subsidy

- is the granting of public subsidy proposed

Antitrust issues

Creation of exclusive right or dominant position
- will e.g. a dominant position be created due to a reform

Discrimination
- will the proposal discriminate against some parties

Creating a cartel-like procedure
- when an opinion is given, several new alternatives have to be weighed

Other considerations

International benchmarking
- has it been proposed in the bill how the matter is arranged in other countries relevant to Finland

Has some party been left out of the preparation of statutes
- insiders and outsiders