

# KLRI Conference 2019

## Ex ante-evaluation in Switzerland from a Legal Perspective

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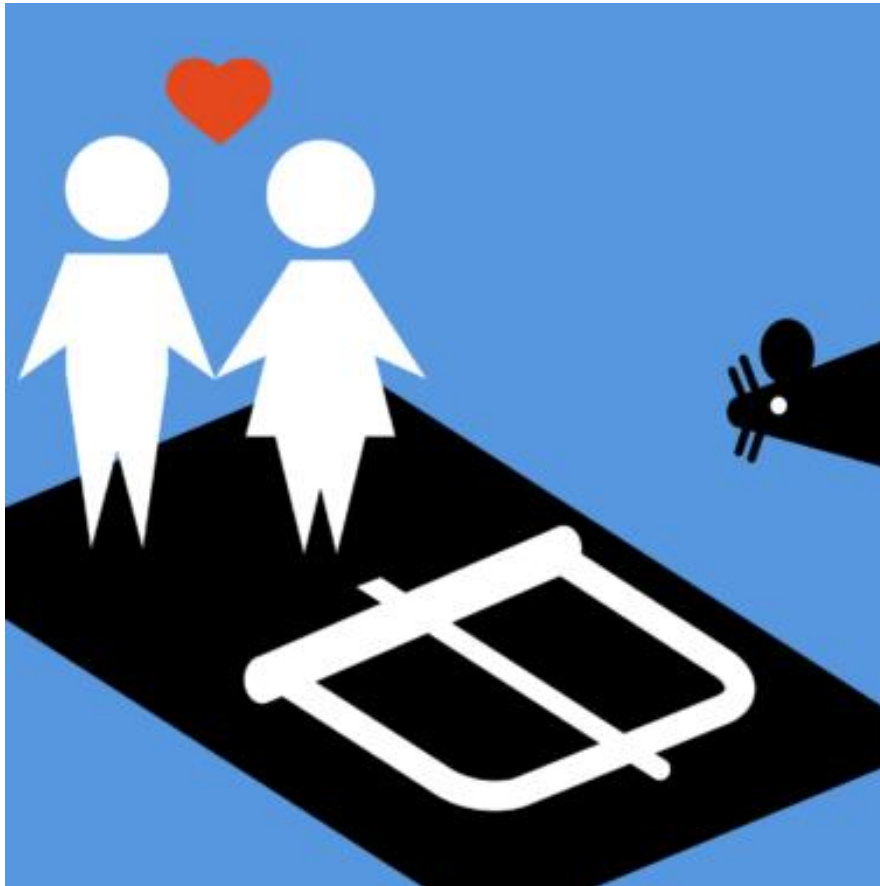
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# I. Importance of Ex ante-evaluation

Example: "Marriage Penalty"



# I. Importance of Ex ante-evaluation

Example: "Marriage Penalty"

## **Swiss Supreme Court Decision of April 10, 2019\***

It is necessary to examine whether the Federal Council has informed the voters in detail about facts which were exclusively available to the Federal Administration and thus falsified the information situation in the referendum on 28 February 2016. The faulty or incomplete information concerns three points. First, the number of two income marriage couples affected by the marriage penalty was wrong. The voters also did not know that the figure of 80,000 was based on an estimate. Finally, they also did not know that the figure referred to data from 2001 that had not been updated.

\* 1C\_315/2018, 1C\_316/2018, 1C\_329/2018, 1C\_331/2018, 1C\_335/2018, 1C\_337/2018, 1C\_339/2018, 1C\_347/2018

# I. Importance of Ex ante-evaluation

Example: "Marriage Penalty"

## **Swiss Supreme Court Decision of April 10, 2019\***

According to the federal authorities, the correction raised the number of two income couples affected by the initiative from 80,000 to 454,000. The original number was thus more than quintupled. [...]

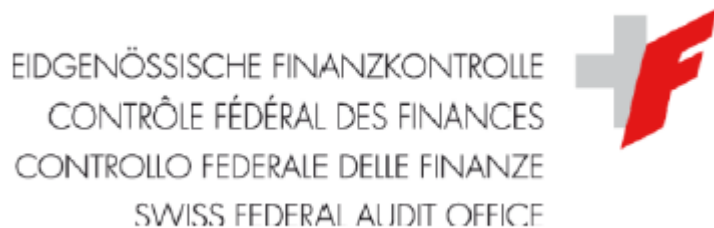
[T]he figure of 80,000 was used to underline the insignificant nature of the cases affected by the initiative in relation to the expected costs [...]

The federal referendum of February 28, 2016 on the popular initiative "For marriage and family - against the marriage penalty" is repealed.

\* 1C\_315/2018, 1C\_316/2018, 1C\_329/2018, 1C\_331/2018, 1C\_335/2018, 1C\_337/2018, 1C\_339/2018, 1C\_347/2018

# I. Importance of Ex ante-evaluation

## Criticism of the Swiss Federal Audit Office



### **Prognosen in den Botschaften des Bundesrates**

Evaluation der prospektiven  
Folgenabschätzungen von  
Gesetzesentwürfen

### **Projections in Federal Council dispatches**

Evaluation of the prospective  
impact assessments conducted for  
legislative projects

# I. Importance of Ex ante-evaluation

## Criticism of the Swiss Federal Audit Office

### **Key facts**

The Swiss Federal Audit Office (SFAO) has examined a sample of 50 Federal Council dispatches. The objective was to assess how the federal offices predict the consequences of legislative projects (laws and financial appropriations). The federal offices have various impact assessment tools at their disposal for this purpose. These tools should enable them to select the best variant and the most appropriate measure and also to provide the public and parliamentarians with dependable, transparent information.

This is not always so, however. One high-profile example of this is the Corporate Tax Reform II of 2008, where the Federal Council dispatch grossly underestimated the loss in tax receipts. That particular error was a key driver for commissioning this SFAO evaluation. The evaluation has found that the impact assessment tools available are under-used and, where they are used, the reliability of their results is questionable.

# II. Legal Sources of Ex ante-evaluation

## Constitution

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Only applies in cases of referenda and popular initiatives

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## Federal Constitution of the Swiss Confederation

of 18 April 1999 (Status as of 23 September 2018)

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### Art. 34 Political rights

<sup>1</sup> Political rights are guaranteed.

<sup>2</sup> The guarantee of political rights protects the freedom of the citizen to form an opinion and to give genuine expression to his or her will.



# II. Legal Sources of Ex ante-evaluation

## Constitution

### **Art. 170** Evaluation of effectiveness

The Federal Assembly shall ensure that federal measures are evaluated with regard to their effectiveness.

- No specification whether ex ante or ex post
- Vagueness
- Lack of consequences

# II. Legal Sources of Ex ante-evaluation

## Parliament Act

171.10

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### **Federal Act on the Federal Assembly (Parliament Act, ParIA)**

of 13 December 2002 (Status as of 26 November 2018)

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#### **Title 7 Procedural Relations between the Federal Assembly and the Federal Council**

#### **Chapter 1 Federal Council Bills**

#### **Art. 141** Dispatches on bills

<sup>1</sup> The Federal Council shall submit its bills to the Federal Assembly together with a dispatch.

## II. Legal Sources of Ex ante-evaluation

### Parliament Act

<sup>2</sup> In the dispatch, the Federal Council shall provide justification for the bill and if necessary comment on the individual provisions. In addition, it shall explain the following points in particular, on condition that it is possible to provide a substantial amount of information thereon:

a. the legal background, the consequences for constitutional rights, compatibility with superior law and the relationship with European law;

a<sup>bis</sup>.<sup>116</sup> the use of Switzerland's room for manoeuvre in adopting international law;

a<sup>ter</sup>.<sup>117</sup> the observance of the principle of subsidiarity in the allocation and performance of state tasks and the impact of the bill on communes, towns and cities, urban agglomerations and mountain areas;

a<sup>quater</sup>.<sup>118</sup> any examination of time limit on the bill;

b. the delegation of powers provided for in a draft act;

c. the points of view debated in the preliminary stages of the legislative process and their alternatives and the related position of the Federal Council;

## II. Legal Sources of Ex ante-evaluation

### Parliament Act

- d. the planned implementation of the enactment, the planned evaluation of its implementation and the assessment of the planned implementation that took place in the preliminary stages of the legislative process;
- e. the coordination of tasks and funding;
- f.<sup>119</sup> the consequences for staffing and finances of the bill and its implementation for the federal government, cantons and communes, the methods for meeting the costs and the cost-benefit ratio;
- g.<sup>120</sup> the consequences for the economy, society, the environment and future generations;
- g<sup>bis</sup>.<sup>121</sup> the safeguarding of the responsibility and room for manoeuvre of the private individuals affected by a regulation;
- g<sup>ter</sup>.<sup>122</sup> the impact on the need for information and communication technologies and the related expenditure;
- h.<sup>123</sup> the position of the bill in relation to the planning of legislation and the financial plan;
- i. the consequences for gender equality;
- j.<sup>124</sup> the consequences of the bill for the Swiss living abroad.

# III. Standards of Ex ante-evaluation

SEVAL

**SEVAL**

Schweizerische Evaluationsgesellschaft  
Société suisse d'évaluation  
Società svizzera di valutazione

## **Evaluation Standards of the Swiss Evaluation Society**

Adopted (in German and French) by the General Assembly on 9 September 2016.

# III. Standards of Ex ante-evaluation

## SEVAL

### Evaluation

The SEVAL Standards are based on the following conception of evaluation: **An evaluation is a systematic and transparent analysis and assessment of the design, implementation and/or effects of an evaluation object.** Evaluations are scientific procedures and use scientific methodology. Common evaluation objects are policies, regulations, strategies, plans, programmes, projects, interventions, services, organizations, procedures, events, technologies or materials.

Evaluations adopt an ex-ante, accompanying or retrospective perspective. Evaluations may be carried out with the purpose of knowledge acquisition, accountability, decision making, improving and managing the evaluation object or stimulating learning processes among the stakeholders. The term 'evaluation' is used for both the process and the result.

# III. Standards of Ex ante-evaluation

## SEVAL

### Quality of evaluations

The quality of an evaluation is determined by the following four criteria. These can be seen as points of reference that are significant and ideally applicable to the same extent in all stages and processes of an evaluation:

- **Utility:** An evaluation targets the defined purposes and information needs of the intended users. Evaluations should be informative, effective and be conducted at an appropriate time. Evaluators should become familiar with the audiences of the evaluation and their information needs, then plan and carry out the evaluation according to these needs, and finally present their results clearly and in good time.
- **Feasibility:** An evaluation should be planned and carried out so that it is adapted to the existing circumstances, well thought-through and cost-effective. The goal should be to reach the greatest possible acceptance by the various stakeholders. Usually, evaluations involve a large number of people and can be time-consuming for everyone involved. Consequently, they should only use as many resources, material, staff, time and money as required for achieving the purpose and answering the evaluation questions.

# III. Standards of Ex ante-evaluation

## SEVAL

- **Propriety:** An evaluation should be conducted in a legally and ethically correct way and carried out in a respectful and unbiased manner. Evaluations affect many people and organizations in different ways and may even constitute an imposition. Propriety requires that the rights of those involved be protected, that stakeholders be treated with respect, and that evaluations be carried out with due sensitivity with regard to ethical and legal issues. Propriety also requires an unbiased and impartial attitude on the part of the evaluators and consideration for the legitimate interests of the stakeholders.
- **Accuracy:** An evaluation should provide appropriate, valid and applicable information that is developed using methodologically robust tools. The assessment provided must have a logical connection to the information collected.



# IV. Related Instruments

## Consultation Procedure

### **Federal Constitution of the Swiss Confederation**

#### **Art. 147** Consultation procedure

The Cantons, the political parties and interested groups shall be invited to express their views when preparing important legislation or other projects of substantial impact as well as in relation to significant international treaties.

Much older tradition than evaluation

# IV. Related Instruments

## Consultation Procedure

172.061

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### **Federal Act on the Consultation Procedure (Consultation Procedure Act, CPA)**

of 18 March 2005 (Status as of 26 November 2018)

#### **Art. 2** Purpose of the consultation procedure

<sup>1</sup> The consultation procedure has the aim of allowing the cantons, political parties and interested groups to participate in the shaping of opinion and the decision-making process of the Confederation.

<sup>2</sup> It is intended to provide information on material accuracy, feasibility of implementation and public acceptance of a federal project.

# IV. Related Instruments

## Consultation Procedure

### **Consultation and ex ante-evaluation**

- Which information from consultations is valid, i.e. valid and not biased?
- In what areas do we expect valuable information?
- Is consultation a test of acceptance?

# IV. Related Instruments

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Ex post-evaluation

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## **Federal Act on Cartels and other Restraints of Competition (Cartel Act, CartA)**

of 6 October 1995 (Status as of 1 December 2014)

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# IV. Related Instruments

## Ex post-evaluation

### Chapter 6a:<sup>48</sup> Evaluation

#### Art. 59a

<sup>1</sup> The Federal Council shall arrange for the evaluation of the effectiveness of the measures and the application of this Act.

<sup>2</sup> After conclusion of the evaluation and at the latest five years after this provision has come into force, the Federal Council shall report to Parliament and submit proposals for further action.

#### **Ex post- and ex ante-evaluation**

- When is ex ante/ex post evaluation more appropriate?
- Combination?

# IV. Related Instruments

## Experimental Clauses

142.31

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### **Asylum Act** **(AsylA)**

of 26 June 1998 (Status as of 1 March 2019)

#### **Chapter 8a Asylum Proceedings in Test Phases<sup>340</sup>**

**Art. 112b<sup>341</sup> ...<sup>342</sup>**

<sup>1</sup> The Confederation may provide for test phases to assess new procedures if a test phase is required for such procedures prior to amending the law due to the complex organisational and technical measures involved.

# IV. Related Instruments

## Experimental Clauses

<sup>2</sup> The Confederation regulates the details of the test phases in an ordinance. In doing so it may deviate from the terms of this Act and the FNIA<sup>343</sup> in relation to the organisation of first instance asylum proceedings and the removal proceedings and related financial issues.

<sup>3</sup> It may reduce the deadline for filing an appeal under Article 108 paragraph 1 in test phases from 30 days to ten days, provided effective legal protection for the asylum seekers concerned is guaranteed by suitable measures.

<sup>4</sup> The ordinance lists all the statutory provisions from which it deviates.

<sup>5</sup> The test phases last no longer than two years.

# IV. Related Instruments

## Experimental Clauses

### **Experimental clauses and ex ante-evaluation**

- Experiments if ex ante-evaluation is not sufficient?
- Experiments to ease political resistance?
- When is legislation itself an experiment (and should be evaluated ex post)?
- How are ex post-evaluation and experimental clauses linked to each other and to ex ante-evaluations?



# V. Synthesis

## Independence

EIDGENÖSSISCHE FINANZKONTROLLE  
CONTRÔLE FÉDÉRAL DES FINANCES  
CONTROLLO FEDERALE DELLE FINANZE  
SWISS FEDERAL AUDIT OFFICE



### **Need for better quality control of the estimated consequences**

In light of the above, the SFAO believes that certain measures should be taken to improve the quality of the estimated consequences of legislative projects. Regarding its dispatches to Parliament, the Federal Council should improve identification of those projects requiring an extensive impact assessment. It should also establish a system of quality control for assessments conducted by the federal offices. The Federal Chancellery, **by virtue of its independence from the federal offices** handling legislative projects and its legal mandate in the legislative process, should take responsibility for this control process and should provide the federal offices with a coordinated manual for assessing the impact of legislative projects.

# V. Synthesis

## Holistic Approach

### **Ex ante-evaluation as part of larger legislative process**

- What is the crucial information legislator should know (targeted approach)?
- What will be known by public consultation (which has to be conducted anyway)?
- When should an ex ante-evaluation take place (once/multiple times; before/after public consultation)?
- Which information is better provided by ex post-evaluations and/or experimental clauses?
- Which assumptions of ex ante-evaluations should be reassessed by ex post-evaluations?