Can you teach an old public law system new tricks ?
The Greek experience on good regulation: from parody to tragedy without (yet) a *deus ex machina*

By George Dellis, *Assistant Professor of Public Law at the University of Athens Law Faculty*

I. Regulatory Impact Assessment model: Greece had to get one too

A. *A national order without any good regulation tradition*

Greece has a continental law system. It is a non-federal State, with a written Constitution based on the principles of parliamentarism and a rigid separation of powers[1]. The Administration is a part of the executive power and is supervised by the Government. Greek public law has been strongly influenced by the French paradigm. Administrative law constitutes a set of rules clearly distinguished from private law, and has mainly been elaborated by the Greek Council of State, a copy of the French Conseil d'Etat[2].

Due to its continental law origins, the Greek approach on the administrative model and action has been excessively "legalistic"[3]. The role of the public authorities is described through legal concepts and "axiological" positions, sometimes utopist and almost always underestimating facts and reality[4]. The Administration is supposed to be "non-discriminatory" or "good" but not "effective" nor "efficient"; the latter qualities do not constitute general principles of the internal administrative law[5]. Moreover, it is important to stress that, despite the liberal foundations of the Greek constitutional order, the dominant view on the role of the State over the society and the markets is in favor of strong interventionism. Both right-wing and left-wing governments promoted a "paternalistic" conception of the State, regarding principally the organization of the economy, a conception that has not been challenged by the Courts[6] nor the society itself[7], at least not until very recently despite Greece's integration in the internal market.

---

[1] Spyropoulos/Fortsakis, *Constitutional Law in Greece,* Kluwer international/Ant. Sakkoulas publishing, Athens, 2009.

[2] Spiliotopoulos, *Greek Administrative Law,* Ant. Sakkoulas publishing, Athens 2004, Spiliotopoulos/Makridimitris (eds), *L'administration publique en Grèce,* Hellenic Institute for Administrative Science, Ant. Sakkoulas publishing, Athens, 2001.

[3] It is not without importance that the Greek Parliament is composed mostly by lawyers.

[4] For instance, according a settled case law, the citizens may evoke an "acquis social" arising from the social rights provisions included in the Constitution that prohibits the Parliament to pass Laws that decrease the existing level of social protection. Nevertheless, such approach seems irrelevant, if not obsolete in a period of serious financial crisis.

[5] Regarding the need for a more realistic approach on administrative law, see Shapiro, *Pragmatic Administrative Law*, Issues in Legal Scholarship 1, 1 (2005).

[6] The Courts recognize a vast discretion to the legislator and the government for defining the "economic public interest". Since it is generally allowed to restrict private economic initiatives for public interest purposes, it goes without saying that such restrictive measures are subject to a very limited judicial review.

Unsurprisingly, Greece ignored good regulation instruments such as Regulatory Impact Assessment (RIA) until the latter were "consensually imposed" from abroad, in the context of an attempt to present Greece as –but not to transform into- a "modern European State". Since the nation adopted the model of a large and very interventionist administration that did not have to be effective, evaluating the effects of its action was irrelevant and not judicially controlled. The internal legal system traditionally knew only sector-oriented[8] and poorly elaborated forms of regulatory assessment, such as a budgetary impact report imposed by the Constitution before the adoption of cost increasing legislative measures[9]. On the contrary, the "explanatory report" that must accompany all draft legislation according to art. 74.1 of the Hellenic Constitution, is rather an empirical essay and definitely not an impact assessment study. Moreover, public consultation procedures were unknown except in specific areas, as in the case of urban planning[10], and even then, their importance was under-evaluated.

B. The introduction of a "good regulation" model in Greece

The discussion on the necessity to implement good regulation principles and a more efficient strategic planning[11] was launched only after 1995[12] and mostly after OECD's[13] report on "Regulatory Reform in Greece" in 2001[14] that recorded the main deficiencies of the internal public structures[15] and moved on to make specific suggestions. The conditions were favourable since at this period, Europeanization of public law was cutting edge[16], European

---

[7] Genuine liberal politicians occupy a marginal role in Greek politics.

[8] Such as, a review on the saturation of tourist areas on the basis of which the national Tourism Organization planned the issuance of licenses for new hotel premises.

[9] According to art. 75.1 HC all legislative proposals that lead to additional budgetary expenses shall be accompanied by a Report from the General Accounting Office of the State that defines the exact cost of the regulatory action.

[10] Draft Urban Plans are published and open to public discussion and objections since 1923.

[11] On the importance of strategic planning, see, Berry, *Innovation in Public Management: The Adoption of Strategic Planning*, Public Administration Review 54(4):322 (1994).

[12] For the first steps towards the introduction of a RIA system in Greece, see Hatzis/Nalpantidou, *From Nothing to Too Much: Regulatory Reform in Greece,* Brussels: European Network for Better Regulation*;* ENBR Working Paper No. 13/2007,http://ssrn.com/abstract=1075963. The authors make a special reference to a report submitted by Prof. I. Spraos to the Prime Minister in 1998 (known as "Spraos Report").

[13] In 1997, the ministers at OECD endorsed the OECD Report on regulatory reform which clearly recommends governments to "introduce RIA into the development, review and reform of regulations". See, Mahon/MacBride, Standardizing and Disseminating Knowledge: The Role of the OECD in Global Governance, European Political Science Review 1(1), 83 (2009) and OECD, *The OECD Report on Regulatory Reform: Thematic Studies* (1997), *Regulatory Impact Analysis: Best Practices in OECD Countries*, (1997), *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance* (2002), *OECD Regulatory Policy Committee. 2009. Indicators of Regulatory Management Systems*, (2009), OECD publishing, Paris.

[14] OECD, *Regulatory Reform in Greece* [OECD Reviews of Regulatory Reform] (Paris:OECD, 2001).

[15] Mainly, overregulation, ineffectiveness, oversized public sector, lack of transparency and impartiality, corruption. See also the "Regulatory Impact Analysis (RIA) Inventory" published by the Public Governance Committee of the Public Governance and Territorial Development Directorate of OECD (Paris, April 15, 2004).

[16] Among many others, see Cassese, *The Globalization of Law*, International Law and Politics

Commission was focusing on RIA[17] and Greece was trying to meet the requirements for euro zone entry. In addition, forms of impact evaluation were already introduced in the internal legal order by EU directives in two fields: First, in the sector of liberalized services of general economic interest – primarily, telecoms and energy- together with the model of independent regulatory authorities, unseen before in Greece[18]. Second, regarding environmental protection; the evaluation of the Environmental Impact Study (EIS) which is required prior to the licensing of any project supposed to cause negative effects to the environment and is submitted to public consultation, constitutes the first real form of scientific-based and open-to-the-public administrative action systematically and successfully applied in Greece[19].

After a series of ambitious but unsuccessful attempts to produce legal texts imposing good regulation tools, RIA was finally established in Greece in 2006 by a circular published by the Prime Minister's office, entitled "Legislative policy and the assessment of quality and effectiveness of legislation and regulation"[20]. The choice of the textual form and of the authority imposing RIA can be seen as having a "symbolic" value: since it is not a Law or a Decree but a circular (circulars are not legally binding according to Greek administrative Law) and given that such a text does not come from the Ministry of the Interior (which is competent for supervising the Administration in general), one could see in this choice an indication that the traditional, "over-legalistic" approach of the administrative action based on concepts and assumptions coming from public law and the administrative courts, is left behind and replaced by a new vision [an "administrative science" vision(?)] emphasising on modern governance and public effectiveness.

The circular expressly refers to the EU's Inter-institutional Agreement on better law-making[21] and OECD, it was addressed to the heads of the main branches of the administration (General Secretary of the Government, Ministries, Regions) and aimed to implement a "state of the art" vision of good

---

37(2):973 (2005), Della Cananea, *Beyond the State: the Europeanization and Globalization of Procedural Administrative Law*, European Public Law 9(4):563 (2003), Harlow, *Global Administrative Law: The Quest for Principles and Values*, European Journal of International Law 17(1), 187 (2006).

[17] For a more thorough analysis, see Radaelli/De Francesco, *Regulatory Quality in Europe. Concepts, Measures and Policy Processes*, Manchester: Manchester University Press 2007, Allio, *Better Regulation and Impact Assessment in the European Commission,* in Kirkpatrick/Parker (eds), *Regulatory Impact Assessment, Towards Better Regulation*? The CRC Series on Competition, Regulation and Development, Edward Elgar Publishing, Cheltenham, UK, 2007, p.72 and the new European Commission Guidelines of 2009: http://ec.europa.eu/governance/impact/commission_guidelines/docs/iag_2009_en.pdf.

[18] Laws 3431/2006 and 2773/1999, respectively in the contexts of telecoms and energy, imposed a consultation procedure before the adoption of all major regulatory measures on those sectors.

[19] Already introduced since Directive 85/337/EEC and Law 1650/1986 but systematically and correctly applied, under the tight control of the Hellenic Council of State, from the mid 90s. See below, under III.A.

[20] Prime Minister's Office, Circular Y190 (July 18, 2006). For a detailed presentation of the circular and the main features of the RIA model provided for by the circular, see Hatzis/Nalpantidou (2007) and Karkatsoulis, *Regulatory Impact Assessment in Greece,* (2007) www.oecd.org/ dataoecd/19/47/39795225.pdf

[21] OJ 2003/C321/01, December 23, 2003.

administration. Despite the political alternation of 2009, the new socialist government maintained the circular in force with some minor amendments regarding the content of the RIA study. It also declared its commitment to promote openness in governmental action by resorting systematically to consultation procedures[22] and implementing more attentively the RIA model[23].

C. *The main characteristics of the Greek RIA system*

The Greek RIA system according to the circular is threefold. *Firstly*, it relies on the unanimously recognized *principles* for the improvement of law-making that go beyond the legality of the text and its conformity with norms of higher value. The system focuses also on *de facto* proportionality (necessity, suitability and stricto sensu proportionality) of the proposed measure and on qualities that were not very highly appreciated until then, such as simplicity, efficiency and transparency. *Secondly*, the respect of the above principles is safeguarded through a specific *procedure* that includes, on the one hand, the drafting of a RIA Report (RIAR) and on the other hand, an active involvement of the society through open consultation. Such procedure is mainly followed for the preparation of Laws voted by the Parliament and should be extended to other forms of regulation as well. *Thirdly*, the circular provides for *structural* improvements in order to adapt the existing public authorities to the good governance era. A central watchdog is established within the General Secretariat of the Government to supervise and coordinate the whole project (Bureau for the Support of Good Regulation). In addition, each administrative authority involved shall establish a special Regulatory Quality Assessment Unit (RQAU) that will undertake the drafting of the RIAS and the preparation of periodical RIA reports on the progress of the better regulation policy. Another innovation of structural nature was the promotion of a codification process through a Central Codification Committee[24], entrusted with the burden to rationalize the chaotic and extremely oversized internal legislation.

It is worth taking a closer view of the guidelines in force (2009)[25] regarding the parameters examined in the framework of the RIA Report. The Greek system opted, at least in principle, for a sophisticated, Integrated Impact Assessment (IIA) methodology that aims to cover all potential effects of the regulation under review. The Report examines at first, the *lato sensu proportionality* of the measure in the sense of its necessity and suitability. At this stage, the Report identifies and describes the problem or issue to be regulated together with the targets of the proposed solution on the basis of quantified elements. The "do-nothing" option shall be expressly examined in comparison with the reviewed measure. The *evaluation of the regulatory*

---

[22] According to the 2009 circular of the new Prime Minister, Mr. Papandreou, all draft legislation shall be open to prior public consultation.

[23] New guidelines were published in 2009 (see below) with reference the Impact Assessment Guidelines of the European Commission, the Framework for Regulatory Impact Analysis (RIA) of the OECD and the International Standard Cost Model Manual of the SCM Network.

[24] Already established with Law 3133/2003.

[25] (*in Greek*): www.ggk.gov.gr/wp-content/uploads/2010/02/ypodeigma_2009.doc, the 2009 Guidelines were followed by a Manual on the preparation of the RIA Report: *www.ggk.gov.gr/wp.../Egheiridio_odigion_symblirosis_ypodeigmatos.pdf*

consequences includes the following sectors: A) Economy: the Report shall not only identify the concerned industries, the structural effects on the market, the effects on competitiveness, the state Budget and the national economy as a whole but also answer to specific questions such as the consequences on the establishment of new economic players or on SMEs. According to the 2009 guidelines, economic assessment includes the evaluation of the administrative burden (red tape) induced to the business by the new regulation on the basis of a "standardized cost model" quantifying such cost. B) Effects to society and the citizens: the Report identifies the concerned social groups and quantifies those effects by referral to the existing data of the National Statistics Service (average income, living standards etc). Emphasis is also given to the consequences for the citizens by evaluating whether the proposed measures improve the services provided by the State and simplify administrative procedures. C) Natural and cultural environment: Any expected effects on the environment shall be described and if an EIS has been undertaken for projects related to the regulation under review, its findings must also be briefly presented in the Report. D) Administration and Justice: Pursuant to the 2009 guidelines, a part of the Report is dedicated to the consequences that the project implies to the public action (in terms of workload and efficiency) and to the administration of justice (in terms of delays). As for the *legality* of the regulation under consideration –which is examined after the proportionality and the evaluation of the consequences- the guidelines emphasize on the conformity with constitutional and European provisions, including the case-law of the Court of Strasbourg. Moreover, proof has to be given that the draft regulation followed the approved standards for law-making (regarding textual formulation) and is in harmony with pending codification procedures. The effects of the project regarding the distribution of powers within the Greek administrative model are taken into consideration as well. It's worth mentioning that, in case the proposition provides for the establishment of a new public structure in the form of a new committee, service, unit or public body, such proposition must be accompanied by an additional, technical report on feasibility and a positive opinion from a special intergovernmental committee[26]. The last part of the Report deals with *transparency, social cohesion and public consultation*. It refers to the specific characteristics of the consultation procedure (time frame, means of publicity and communication, number and categories of persons involved), the main findings of that procedure and includes a brief presentation of the expressed views.

II. From illusion to reality: a distorted and marginalized regulatory assessment

Examined *in vitro,* the Greek model seems to be, if not flawless, at least of high quality. However, such image is idyllic and totally misleading. Almost 5 years after its introduction in the regulatory process, very few have been done towards a realistic and correct implementation of the RIA system. Despite the number of important Laws passed by the Parliament after 2006, only a little portion of them was accompanied by a RIAR and even in some of those cases, the assessment turned into parody. The example of the new insolvency

[26] According to another soft law text: Decision of the Prime Minister Y189/18.7.2006.

legislation in 2007 is revealing[27]: the author of the relevant RIAR shamelessly considers that the legislation in question is not supposed to provoke any effects to the economy and to the society…

There are some good exceptions of course, as in the case of the new Law (called "Kallikrates") that reformed radically the organization of both the local authorities and the decentralized administrative services (2009), which was preceded by a true RIAR[28]. The same applies for other legislative texts produced during 2010, such as "lifelong learning"[29], or the introduction of an "electronic system for the prescription of drugs" to face corruption and unjust public spending[30]. Nevertheless, even in the last two cases, the absence of technical expertise in drafting RIA studies and in quantifying effects is obvious; the persons that prepared the Report, probably public servants without any specific skills, are in position to present the preexisting regulation and to explain the reasons why the new project has been prepared but cannot justify them through scientific arguments and data. For other important legislative projects, RIARs have been hastily prepared without respect to the methodological and scientific principles set by the abovementioned circular and guidelines. For instance, the project aiming to introduce a "fast-track" procedure for licensing major investments in Greece –an effort to attract foreign capital and to face red tape obstacles- has been the object of a five-page RIA Report[31]; that document does not contain any specific elements and data on the negative consequences of administrative overregulation and on the expected benefits from the proposed amendments, but resembles more to the traditional "explanatory report" that goes along with the draft legislation proposed by the Government to the Parliament during the last 150 years of Greek constitutional parliamentarism. In other terms, it's like "downgrading" RIA to a simple empirical essay drafted by persons without the required skills[32]. In brief, the Greek RIA model presents a series of serious weaknesses that may be grouped as follows.

A. *Failure to customize the RIA tools according to the Greek administrative reality*

It is generally agreed that RIA should not be undermined in a "one-size-fits-all" practice[33]. It is necessary to adapt it to the specific characteristics of the regulatory environment in which it is used. Until today, the Greek public authorities have not undertaken such a "shaping" process. The Government seems satisfied in solely reproducing a general RIA framework as provided for

---

[27] The case is presented by Hatzis/Lalpantidou, op.cit., (2007).
[28] http://www.eetaa.gr/kallikratis/Ekthesi_Sinepeion_Rithmisis.pdf (*in Greek*)
[29] http://www.gsae.edu.gr/attachments/396_ekthesi_aksiologisis_30_08.pdf (*in Greek*)
[30] http://www.hellenicparliament.gr/UserFiles/c8827c35-4399-4fbb-8ea6-aebdc768f4f7/5_EKTHESH%20AXIO.pdf (*in Greek*)
[31] http://www.investingreece.gov.gr/files/Stratigikes_ependyseis/EKTHESI.pdf (*in Greek*)
[32] The same critic may be addressed to the RIA Report on the legislation for the shrinkage of the Administration through merger or abolishment of unnecessary public units: http://www.hellenicparliament.gr/UserFiles/c8827c35-4399-4fbb-8ea6aebdc768f4f7/5EKTHESIAXIOLOGISIS.pdf (*in Greek*)
[33] Kirkpatrick/Parker (eds), *Regulatory Impact Assessment, Towards Better Regulation*? The CRC Series on Competition, Regulation and Development, Edward Elgar Publishing, Cheltenham, UK, 2007

by EU or OECD texts without adjusting it to national, sectoral or local specificities. The "failure to customize" reveals indifference or even reluctance towards the proper use of RIA tools.

For instance, one of the major problems of Greek economy is its lack of competitiveness due to excessive red tape burdens. Greek Administration is a champion in imposing unnecessary, overlapping and time consuming requirements and in keeping licensing procedures open for months or years. For that reason, the Government should give priority to the use of RIA tools that are appropriate for dealing with this specific problem, such as the Standard cost model (SCM) to measure time needed to comply with administrative requirements. Although that model is used in the 2009 guidelines, it has never been applied systematically. Since the scope of the RIA is too broad and too "ambitious", tending to cover all potential effects of the examined regulation, some of the most important issues of the assessment are lost in the process. As it has been correctly remarked, a more "humble" RIA model, in two phases, "with a preliminary, simple impact assessment devoted to the analysis of alternative regulatory options and an extended impact assessment of the benefits and costs of the chosen regulatory option"[34] would be more effective.

Another major weakness of the Greek RIA model is the almost total absence of technical data that could be used for the quantification of the regulatory effects and targets. For that reason, the establishment with Law 3832/2010, of a National Statistics System supervised by a Council and an Independent Authority (Hellenic Statistics Authority), both operating under the control of the National Parliament, constitutes a major step forward. A close cooperation of those authorities with the relevant RIA units could radically improve the quality of the performed assessment.

At last, it would be more realistic not to impose RIA tools before the adoption of any normative measure as it is actually provided for in the 2006 circular[35]. It would be preferable to reserve the RIA procedure only to Laws[36] and normative acts of higher importance -such as Presidential Decrees, Ministerial Decisions or Regulations adopted by Independent Authorities- and only if those texts are presumed to have significant regulatory effects, on the basis of a preliminary assessment on whether a text is worth a RIA[37].

B. Failure to familiarize administrators and policy makers with RIA tools

Apart from imposing, *in abstracto*, the use of RIA tools, it is equally crucial to develop RIA skills within the governmental machinery and, more broadly, to adapt the human factor to the use of those tools. Very few have been done

[34] Hatzis/Nalpantidou, op.cit. (2007).

[35] Although the circular refers to all means of regulatory action, RIAR have been prepared only in case of Laws passed by the Parliament and of regulations prepared by independent regulators.

[36] Included legislative amendments, as provided for in the 2009 guidelines.

[37] Such solution has been adopted also by the EC Directive on Strategic Environmental Assessment (SEA), see directive n. 2001/42/EC.

towards that direction. The establishment of a central RIA watchdog at governmental level within the General Secretariat of the Government (GSG) was a good choice but that body has gradually lost its, in any case minor, role. Greece needs the equivalent of UK's former Better Regulation Task Force, current Better Regulation Commission (2006)[38] with powers to exercise an even more aggressive review than that of the US Office of Information and Regulatory Affairs (OIRA) and managed by personalities capable of imposing their role to non cooperative ministerial officials. The Unit within the GSG must remain but has to be significantly upgraded.

Moreover, the creation of a specific RIA unit within all concerned levels of the administration (ministries, independent agencies, Prefectures, some other public bodies) with the dual task, first to organize RIA processes within the framework of their unit and second, to broaden the understanding of RIA tools among the personnel and the directors of their unit, did not succeed in practice. Such units do not practically exist; the existing personnel are reluctant in occupying those posts and in any case are totally unqualified for the task. To be more pragmatic, drafting of proper RIA Studies cannot be achieved –at least for a transitional period of time- without the technical assistance of external experts that will infuse to the relevant administrative units the required scientific added value for fulfilling that task. Greece spends lots of money in buying unnecessary services; using some of that money in RIA experts would be spending for a good cause[39]. Those experts may also help the Administration in performing early RIA planning[40], which is still science fiction in Greece[41].

Another important weakness of the Greek RIA paradigm is the failure to combine the use of RIA tools with codification processes. The Central Codification Commission reestablished in 2003 published a manual in 2007 that totally ignored the better regulation effort[42]. A new draft law was submitted to the Parliament in September 2010 on "fighting overregulation, codification and reformation of the legislation" which is supposed to create two committees, one for the codification and another one for the reformation of the legislation[43]; this text refers to good regulation principles but does not expressly impose the preparation of a RIAR as a prerequisite to codification and to reformation.

---

[38] Jacobs, *The evolution and development of regulatory impact assessment in the UK,* in Kirkpatrick/Parker, op.cit., (2007), p.106.

[39] Recently, the Ministry of Interior initiated a Tender procedure to find an expert who will provide assistance for modernizing the existing RIA model in Greece.

[40] See Jacobs, *Current trends in RIA Process and methods*, in Kirkpatrick/Parker, op. cit., (2007), p.23.

[41] Except in some specific contexts, closely linked to the implementation of sectoral EU policies through administrative agencies as in the case of energy and telecoms. Those agencies have the resources to undertake those initiatives in close cooperation with the European Commission services.

[42] By not stipulating the preparation of a RIAR for the codifying texts.

[43] It's far from being obvious why it is necessary to create two distinct collegial bodies with so neighboring, if not overlapping, tasks.

In sum, Greece has to find a way in fighting bureaucratic inertia and needs a broader cultural change within both the government and the administration to overcome reaction coming from above and from below.

C. *Lack of transparency and failure to link consultation procedures with the use of specific RIA tools*

Consultation procedures were in practice introduced in Greece during the last 10-15 years[44] and their use is in constant increase. The Government itself has made consultation a procedural keystone of its action. Nevertheless, it is extremely doubtful whether such a procedure has improved the content of the measures taken. The problem lies in the fact that, in most cases, consultation is not linked to an organized RIA process; its scope is to stress openness and transparency of the public action from a political point of view rather than improve the outcome of the regulatory action. To achieve the latter, two conditions seem required:

First, it is essential for the persons participating in consultation, to have access not only to the draft measures but also to a "technical" study, prepared by persons with adequate scientific skills in RIA and including a non-final analysis of the pros and cons of the adoption of the measures under review. Without such scientific assistance –as in the framework of environmental decision making, where consultation follows the submission of a scientific study on environmental impacts- opening the discussion does not contribute in improving regulation itself but in improving the image of the Government.

Second, it is important to ensure that contributions collected during consultation, are taken into consideration during the adoption of the final decision. The existing system fulfills that requirement by imposing to the author of the RIA Report to briefly present the views expressed during consultation. The best solution should be to provide for an update of the RIA study, already open to consultation, after the completion of the latter and to integrate consultations into the final report.

The main problem relies in the fact that publication of the RIA Reports is not compulsory according to the 2006 circular and the 2009 guidelines. Nevertheless, it would be more consistent with good regulation principles to establish as a general rule a two-step RIA process and open to public consultation the initial draft of the Report, while publishing its final version. It's worth mentioning two important improvements that were recorded in 2010. First, many Ministries started to post RIA reports on the internet and more recently, the Parliament has followed the same practice. In a more general context, the Prime Minister imposed from October 1st, 2010, the publication on the internet of all regulatory and administrative measures in order to promote transparency and accountability[45].

---

[44] Dellis, *Soft law and Consultation. Two Instruments for the Improvement of Administrative Regulatory Action,* European Public Law Series, vol. XCVIII, Esperia Publications Ltd, London, 2010, p.39.
[45] http://diavgeia.gov.gr (*in Greek*).

D. The day after the adoption of a regulation: Absence of monitoring "culture", of ex post RIA evaluation and of procedures to enforce RIA

It is not without reason that the term "monitoring" cannot be exactly translated in Greek. Unsurprisingly, public authorities lack the necessary mentality and culture for periodically evaluating the results and the efficiency of the adopted regulatory measures. To my knowledge, none of the regulatory measures adopted after the 2006 circular have been subject to a monitoring procedure. In any case, limited attention given to monitoring and *ex post* evaluation is one of the most common weaknesses of all RIA systems around the word, even the ones much more advanced and mature than the Hellenic one.

In addition, it is premature for the Greek model to ensure a system of proper evaluation of the RIA performance. From all known performance indicators[46], Greek RIARs may be submitted to input based, content evaluation and, to some extend, to output evaluation. On the contrary, it is impossible, at this stage, to perform any outcome evaluation, by measuring the effect of RIA in terms of the quality of regulatory outcomes, or an impact evaluation of the change in regulation provoked by the RIA. Poor RIA evaluation also results from the fact that the central watchdog failed in assuming that task until now.

The gap due to the lack of monitoring and *ex post* evaluation of the RIA itself may be partially filled through enforcement and sanctioning procedures. This is not possible at this point, since the existing RIA model was introduced by *soft law* texts. Nevertheless, it is not inconceivable to convert that process into a series of binding rules, the respect of which will be mandatory for the Administration and, to a certain extend, judicially controlled. This issue is examined in the following, last part of the present analysis.

III. Could Justice be the "*dea ex machina*"?: converting the better regulation model into, judicially reviewed, concepts of public law.

For a country on the verge –if not, beyond the brink- of insolvency, with a weak, badly regulated economy and an oversized, interventionist Administration, the above, significant incompetencies in the implementation of an effective RIA model, do not constitute a common problem, but a real tragedy -in the ancient Greek sense of the world- without an apparent *katharsis* (purging/happy end). Therefore, it is imperative to look for the required means to redress that situation. The solution may be found in two different approaches, an administrative and political science approach on the one hand, and a public law approach on the other.

Following an *administrative science and political science approach,* curing the problems within the Greek administrative model consists in dealing with extra-legal questions such as finding the solutions to face the absence of qualified personnel or the lack of a broader understanding of the importance of RIA, improving the questionnaires, customizing the scope of the

[46] Jacobs, in Kirkpatrick/Parker, op.cit (2007), p.23.

assessment, etc. Such an approach requires a broader change in the forms and the culture of the national administration and looks like trying to teach an old dog new tricks. That change is by all means desirable, but (a) is very difficult to achieve, (b) needs time and (c) is based on a consensus that can be overturned at any time. Without ignoring the value of the approach in question, it risks to fall in the same trap that initially blocked the proper implementation of the RIA model in Greece: to be too ambitious, too good to be true.

This is the reason why -at least for a traditional continental law system as the Hellenic one- it seems even more important to promote also a *public law approach,* which consists in understanding good regulation and RIA through the methods and the means of legal science and in integrating them in the rules, concepts and institutions of administrative law. RIA has been unsuccessful in Greece because of the legalistic origins of the Hellenic administrative model. From that angle, it is not incomprehensive that an institution, such as RIA, that has developed and flourished within the anglosaxon context, faces significant difficulties when transposed to the other side of the Atlantic and the English Channel[47]. Continental systems are more rigid, more formalistic and more attached to the traditional, "Kelsenic" approach of the rule of law[48]. Forms and procedures that arise from "*soft law*" –a notion that is not easily translated outside English language- and, for that reason, not legally binding, are by definition underestimated, if not ignored, in a system used to "understand" only requirements imposed by legal norms. Instead of trying to change the whole legalistic environment, it seems to be more pragmatic to adapt the latter by converting RIA into an additional legal ingredient and prerequisite of the public action which falls under the scope of the judicial control exercised by the administrative courts. For as long as RIA remains outside Greek law, outside *public* law to be more specific, its implementation may not become really mandatory for the public administration, despite its indisputable value and its recognition –by EU, OECD and others- as a policy tool.

A. *The environmental assessment paradigm*

Transforming RIA to a general legal obligation that covers the totality of regulatory action faces a series of theoretical and legal barriers in a continental law system. To the extent that public regulation is carried out through general, regulatory and legislative, acts, introducing a mandatory RIA prior to the adoption of such acts equals to imposing their "technocratic"

---

[47] It is interesting to compare the reception of the better regulation approach in Greece and in Cyprus, two countries with many common, historical and cultural, grounds. Nevertheless, the British occupation of Cyprus made the internal administrative and legal system more familiar with anglosaxon concepts. The Cyprus' National Action Plan For Better Regulation, initiated in 2007 and updated in 2010 is much better and more efficient than the Greek one: www.mof.gov.cy/mof/mof.nsf/.../NationalActionPlanFINAL1112010.pdf,and www.mof.gov.cy /.../DMLplaisio.../DMLplaisio_gr *(in Greek)*

[48] For a recent comparative analysis on the implementation of RIA tools in anglosaxon and continental law systems, see De Francesco, *A comparative Analysis of Administrative Innovations,* EPCR conferences, 2010, stockholm.sgir.eu/.../De%20Francesco_SIGR_ Stockholm_2010.pdf and Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, Law and Contemporary Problems 68(1), 63 (2005).

motivation. Yet, according to a general principle of Greek public law, normative acts do not have to examine the advisability of the measure at stake, since they may not be, in practice, judicially reviewed on the merits. Such exemption is more severely respected in the context of legislative acts. Imposing on the Parliament to adopt normative acts only after and on the basis of technical studies appears to be an attempt to harm the democratic legitimacy of that body and to the traditional concept of its role as it was recognized in continental Europe after the French revolution. Therefore, such an obligation could be found unconstitutional and, in any case, if introduced by a Law, it could be set aside by another, posterior Law coming from the Parliament. Moreover, the Courts do not, in principle, review the compliance with the procedural rules by the Parliament in the context of the adoption of legislative acts (*interna corporis* exemption).

Despite those impediments, it is not inconceivable to attach legal effects to the failure to undertake a proper RIA before the adoption of regulatory decisions, even of normative nature. It is interesting at this point to refer to the example of the Environmental Impact Assessment and how such institution has been successfully implemented in Greece. Following a specific obligation coming from an EEC directive[49], the national legislator established a procedure for the evaluation of the environmental risks resulting from any public or private activity entailing such risks. The procedure in question consists of the drafting of an environmental impact study (EIS) that is open for consultation prior to the deliverance of the administrative license (called "environmental terms") required for the exercise of the action under review. The EIS is a scientific document that describes the existing environmental status of the region potentially affected by the activity to be licensed, the effects of such activity to the environment and the alternative options. That procedure is periodically repeated before the renewal of the environmental license. After a decade of hesitations and ambiguities and under the pressure of the Supreme Administrative Court (the Greek Conseil d'Etat), the administration was forced to conform to the EIA procedure, relatively unknown until that time in Greek administrative law. To arrive to that result, the administrative judge had to raise EIA to the level of a legal requirement, the respect for which is judicially controlled. In case of violation of the relevant procedural rules, the challenged administrative license is annulled on due process grounds[50]. Moreover, the Council of State, despite the fact that is not entitled to enter into technical and scientific issues, uses the content of the EIS as a means to review the motivation of the challenged acts and applies a "marginal" cost-advantage test on the merits[51]. According to the settled case law, the drafting of the EIS and its opening for consultation by the "interested public"

---

[49] See above, note n. 19.

[50] Dellis, Antennes de téléphonie mobile. Conseil d´État hellénique. Arrêt no 1264/2005, séance plénière, in: *Annuaire International des droits de l' homme*, Volume II, Ant Sakkoulas/Bruylant ed., Athens/Brussels, 2007. 601.

[51] Council of State (Plenary Session) 613/2002: the Court applied the cost-benefit analysis, already applied by the French Conseil d'Etat under the name of "bilan coût-avantages", for assessing whether the benefits for the national economy from the operation of a gold mine in the north of Greece were more significant than the environmental costs arising from the project. The Court concluded that the administration failed in implementing correctly the cost-advantage balance.

constitute the main institutional guaranties for the proper protection of the environment, which is a constitutional duty for all public authorities, and the appropriate tool for the judge to review whether the economic and social benefits arising from the authorized activity are balanced compared to the environmental risks provoked by that same activity. The Court extended this case-law in order to include even environmental approvals granted through Statutes voted by the Parliament, imposing indirectly to the latter to scientifically justify its decisions[52]!

B. Making RIA part of the Hellenic Public Law: perspectives and obstacles

The EIA case law could be used as an example for the imposition of similar legal obligations in the context of the RIA, if the latter becomes a procedural condition imposed by legal provisions and not by *soft law* texts. Such a development is not very far away: actually, the Ministry of Interior is preparing a "new regulatory framework for the improvement of regulatory governance"; after assessing the existing RIA framework, a new Law on regulatory government has been introduced (Law 4048/2012) setting principles, tools and procedures for good regulation, including RIA instruments. Moreover, since August 2010, the Regulation on House Rules stipulates that (almost) any draft law submitted to the Parliament shall be accompanied by a RIA Report[53]. Consequently, Greece is not very far away from a RIA binding legislation. Nevertheless, the above provisions remain to be enforced.

Yet, the task to legally impose impact assessment tools in general, is much harder than in the field of environmental law for three reasons: *First*, at the current stage, there is not a general duty to perform RIA coming from an EU secondary legislation describing the basic features of the impact studies as in the case of directive 85/337/EEC. *Second*, RIA concerns also –if not mainly- public *normative* and not individual acts as in the case of environmental licenses; as it has been explained herein, continental law is not used to impose the motivation of normative acts or their judicial review on the basis of such motivation and, *a fortiori*, is reluctant to limit the decisional powers of the Parliaments. *Third*, unlike the EIA, in the context of which the environmental study is performed by experts outside the administrative bureaucracy at the expenses of the (more often private) entity wishing to acquire the permit for the activity under review, the RIA is, almost in all cases, an internal administrative procedure; in principle, the Reports have to be performed by the personnel of the regulator and if assigned to private experts, the costs are born by the public authority and the awarding procedures are very complex and time consuming.

But those difficulties could be bypassed, at least in a significant scale. Regarding regulatory normative acts that are not passed in the form of a Parliamentary Statute, but attributed to the Executive (Government, central administration, independent authority), there is not any constitutional

[52] Council of State (Plenary Session) 1847/2008.
[53] Art. 85.3 of the Regulation on House Rules of the Greek Parliament (OJ 139A/10.8.2010).

constraint prohibiting the introduction by law of a specific, compulsory RIA procedure, prior to their adoption. Such a procedure, in the form of the EIA, should at first engage in the drafting of a regulatory impact study[54] that will include and examine the main potential effects of the measure under review to the society, the economy and the operation of the public authorities together with possible alternative solutions. That study/report should be prepared prior to all regulatory measures of any kind that are supposed to produce "significant" regulatory effects and has to become public and open for consultation before the adoption of the regulatory decision. The latter should rely on the findings of the report and take into consideration the outcome of the consultation. The respect of the abovementioned RIA requirements should be judicially controlled by the administrative courts. The latter will be invited to review whether a RIA procedure should be undertaken or not together with the compliance with the requirements regarding the form and the "external" content of the RIA (has the study performed the assessments provided for by law, has it been conducted by persons dully qualified, were the alternative options properly evaluated, publicity of the study, consultation stage, etc). Apart from controlling the "RIA due process", the judge may also review, on the basis of a marginal test (including reasonableness and cost-benefit) whether the adopted regulation is consistent with the major results of the RIA procedure.

Such a form of judicial control –it should be noted that regulatory normative acts (except Laws) are, directly reviewed by administrative courts in Greece as in almost all continental law systems- is expected to have several positive effects: Firstly, it will achieve the imposition of a realistic RIA in Greece, the non respect of which will lead to the annulment of the measures that were non properly assessed. In addition, it will improve the transparency of the regulatory action and the participation of the persons subject to regulation; the latter will have interest in participating at the consultation procedure and will be more active in judicially challenging poorly prepared regulations. Finally, converting RIA in a series of legal obligations will improve and clarify the role of the judge: on the one hand, the judge will be able to broaden the scope of its review towards regulatory acts; one the other hand, such review will not risk to become abusive, to violate the separation of powers and to cause legal uncertainty since the judge will not challenge the content of the regulatory measure based on his own experience and ideas but on the "objective" findings of the impact study, if the said measure obviously contradicts those findings.

Regarding the regulatory choices made by the Parliament through the adoption of Law, the conditions are less favorable for two reasons: a) lack of a Constitutional Court, Laws may not be directly challenged and annulled, b) the respect of RIA "due process" could be considered as an "*interna corporis*" issue, exempted from judicial review. Even so, it must be noted that, recently, the Greek Council of State, probably influenced by its own case-law on environmental assessment, reconsidered its traditional negative position regarding the review of the advisability of legislative measures. Since the administrative courts in Greece are entitled to incidentally review the

[54] In principle, by a specialized administrative unit or an off-counsel expert.

constitutionality of the Laws on which relies a challenged administrative act, and such constitutionality test includes a proportionality assessment of the legislative choices that restrict rights and freedoms, if the judges demand from the legislator to prove the reasons that justified his action, such an obligation will inevitably lead to a more consistent implementation of the good regulation principles and techniques and to an indirect judicial review of the RIA Report. For instance, the Plenary Session of the Council of State was recently called to review the constitutionality of a Law prohibiting gas stations to operate at night at their own free will[55]. Although the majority finally upheld the constitutionality of the restriction, invoking the traditional approach that "the legislator knows better how to define public interest", a strong opposition (15 out of 33 judges) considered the Law unconstitutional due to the failure of the legislator to justify his action on specific and judicially reviewed grounds. If that approach becomes dominant, RIA instruments will allow the judge to exert a more profound review of the rationality and the proportionality of legislative choices and the absence of a proper RIA will increase the chances of the Law to be found unconstitutional. In a broader context, RIA will become the meeting point of economics with administrative law[56], a "rendez-vous" that has not still taken place in Greece.

RIA requirements may also be imposed to the legislator through relevant supra-legislative rules. In that context, the adoption of an EU secondary legislation providing for RIA rules before the adoption of any national measure, including parliamentary Statutes, with significant effects in contexts falling in the scope of the EU legal order, could fill that gap. Unfortunately, the institutions of the EU, faithful to the "Lisbon spirit", seem not to be willing to discuss a mandatory and not consensual RIA approach, probably so as to avoid tensions with the national Parliaments. Another solution for Greece would be an amendment to the Constitution, expressly referring to the principles of good regulation and integrating the RIA Study in the context of the law-making process of the Parliament. Until then, an updated reading of the existing constitutional provisions, "under the light" of good regulation standards would be a positive development[57].

* * *

Although, Greece is a country with many excesses, over-regulation included, its main problem that caused an unseen evolving crisis seems to be the fruit of two severe forms of administrative pathology: a) the adoption of *bad,* -in the sense of *ineffective, uninspired, "amateur", "empirical" and corrupted-* regulation and b) the total incapacity to support, overview and monitor the implementation of, even bad, policies. Those two invalidities of the Greek

---

[55] CoS (Plenary Session) 1585/2010.

[56] Rose-Ackerman (ed), *Economics of Administrative Law*, Cheltenham: Edward Elgar, 2007.

[57] Public law doctrine may combine in that context, art. 74 par. 1 HC which refers to the "reasoned report" on draft legislation, art. 75 par. 1 and 3 HC on budgetary assessment and ministerial financial assessment for cost increasing legislative provisions and art. 82 par. 3 HC on the Economic and Social Commission which submits to the Parliament a report on economic and social effects, so as to give to RIA a constitutional status, and consider that the "reasoned report" on draft legislation is not dully "reasoned" if not based on a RIA Study.

public system must, to an important extent, be attributed to the absence of good regulation instruments such as the RIA. Therefore, one of the lessons that may be taken by the Greek regulatory tragedy is that RIA tools are indispensable not only for curing excessive regulation but even more fundamental, functional and structural incapacities of the public action. Accepting that RIA is a method to improve the quality of the existing regulatory system is, in such a context, an understatement: instead of seeking for "less" or "better" regulation, in Greece we should promote rationality in regulation and deal with anarchy and hypocrisy (two Greek words) in public management[58]. In other terms, *the Greek system needs RIA to achieve reregulation and not necessarily, deregulation*. To succeed in that goal, it seems important to convert good regulation principles into compulsory legal provisions and to create a, judicially controlled, "regulatory due process". That public law approach on RIA is crucial but not a panacea for the "mal Grec"; it cannot substitute other necessary conditions such as the need for experts, impose the requested quality of the RIA Reports, nor face risks of regulatory capture[59]. In other terms, Justice as a *dea ex machina* is not enough; more than one different Gods are needed.

58 See the reasoning of Torriti, *Impact Assessment in the EU: a tool for Better Regulation, Less Regulation or Less Bad Regulation* ?, Journal of Risk Research, 10, (2), p. 239 (2007).

59 The application of RIA tools inevitably increases the importance of the "expert" vis-à-vis the politician/decision maker. This could lead to a new form of regulatory capture. Specific interest groups may have access to specialists and resources which may "divert" RIA tools towards their interests and then evoke such RIA to shift the final decision according to their needs.