Public Trust and the Preparation of Regulation

Winter, Heinrich; Klein Haarhuis, Carolien M.

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Public Trust and the Preparation of Regulation: The Case of ex ante Studies in the Netherlands

Heinrich B. Winter[*] and *Carolien M. Klein Haarhuis*[**]

1. Introduction

In the legislative process, empirical and analytical instruments of information provision play an increasingly important role. Legislation was originally a vertically structured process of policy development, primarily involving interaction within and between government ministries and, later on in the process, a dance between the Cabinet and Parliament. Society's role in that context was relatively limited. That changed rapidly in recent decades. Forms of feedback and dialogue have been embedded at both ends of the procedure. At the beginning, social consultation takes place with a clearly defined target group, supplemented by internet consultation with an open target group. After the fact, we see a surge in ex post evaluation since the 1980s. By now, it has become customary for the effects of regulations to be evaluated after legislation has been established. In general, the relevant regulation includes an evaluation clause that prescribes evaluation within three or five years after the law's entry into force, and then mandates repeated evaluation from then on, generally every five years. The content and/or implementation of the regulations are relatively frequently amended on the basis of ex post evaluations.[1] On the other hand: according to Michiels utilization of evaluations of the General administrative law act in the Netherlands seems to be limited.[2] A surge in ex ante research has been observed in the legislative process in the past decade. Before the definitive draft instrument of a regulation enters the procedure, the proposed arrangement or possible alternatives have often already been subjected to extensive testing and analysis. This article focuses on that trend towards information-driven legislation. It will address various forms of ex ante analysis, the use thereof and their consequences

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* Professor of Public Administration at the department of Constitutional law, Administrative law and Public Administration of the Law Faculty of the University of Groningen.

** Researcher at the Research Centre of the department of Security and Justice (WODC).

1 *See*: H.B. Winter, *Evaluatie in het wetgevingsforum. Een onderzoek naar de relatie tussen evaluatie en de kwaliteit van wetgeving*, Kluwer, Deventer: 1996.

2 F.C.M.A. Michiels, Het evalueren van de Awb: een voortdurend proces, in: T. Barkhuysen e.a. (red.), *Bestuursrecht harmoniseren: 15 jaar Awb*, Boom Juridische uitgevers, The Hague: 2010, p. 41-55. Daalder is even more critical, when he judges utilization to be disappointing: E.J. Daalder, Voldoende kwaliteit van het bestuursproces: enkele opmerkingen naar aanleiding van het verslag van de Commissie Evaluatie Awb II, *NTB* 2002/6, p. 153-159 and E.J. Daalder, De derde evaluatie van de Awb: komt het einde in zicht?, *NTB* 2007/5, p. 141-146.

for the legislative process, as well as the confidence that society can have in these forms.

2. Legislation in the past

The various functions of legislation are referred to as guarantee and instrument.[3] The law as a guarantee addresses the values of the rule of law. Such principles as legal certainty, equality of rights and democracy become relevant.[4] The underlying concept behind legislation is that these principles are served by embedding legal rules in legislation. We are referring to the legality requirement that means that not only the citizenry, but also the governing administration are bound by the law. During the course of the previous century, the emphasis in legislation shifted from the guarantee to the instrument in terms of function. As the government took on clearer ambitions to achieve and regulate changes in society, the need for instruments that made it possible for the public administration to do so grew proportionately. Legislation was no longer primarily about codification, but also took on significance as an agent of modification.[5] That changed function of legislation is closely related to what we call the development of government from watchman state to welfare state.[6]

If legislation primarily serves a codifying function and aims to offer guarantees, legislating can remain a relatively internal matter. The concept of the legislative lawyer as a "plodder in the forecastle" references this as well.[7] This image is an exaggerated example, of course, but codifying legislation was generally established without intensive interaction with society, and without extensive consultation with implementing authorities and enforcement agencies. The decades following the Second World War showed many rapid changes in precisely that area.

3. Legislating in the welfare state

Legislation that has different, more modifying ambitions cannot automatically rely on societal support and are more likely to elicit questions regarding implementation and enforcement. Critical questions about realising those

3 P. de Haan, Th.G. Drupsteen and R. Fernhout, *Bestuursrecht in de sociale rechtsstaat*, Kluwer, Deventer: 1978.

4 *See* regarding these principles: M. Scheltema, J.W.M. Engels e.a. (eds), *De rechtsstaat herdacht*, Kluwer, Alphen aan den Rijn: 1989, p. 11-25.

5 It was Koopmans who first described this pair of concepts in this way: T. Koopmans, "De rol van de wetgever", in: *Honderd jaar rechtsleven*, Kluwer, Zwolle: 1970.

6 It may be too early to determine whether the recent shift to an "activation state" will once again have consequences for the function that legislation serves.

7 Former legislative lawyer W.J. van Eijkern used the term *zwoegers* or plodders, *see*: "De macht van de zwoegers in het vooronder. Rechtsvorming door juristen via het werk van de afdelingen wetgeving", in: *De jurist-ambtenaar (Kan-bundel),* W.E.J. Tjeenk Willink, Zwolle: 1977, p. 42-43.

ambitions – which are, after all, neither undisputed nor automatically successful – can be expected. Against that backdrop, it is easy to understand the intensification of analysis and empirical substantiation in the legislative process. At the beginning of the process, this has led to the emergence of countless forms of societal dialogue and stakeholder consultation. Implementation and enforcement organisations contribute in the form of implementation and enforcement checks. In recent years, internet consultation on proposed legislation has become a permanent fixture in the legislative preparation process. Anyone has the opportunity to respond to draft versions of bills via www.internetconsultatie.nl. Since 2009, several hundred proposed laws and orders in council (*algemeen maatregel van bestuur*, AMvB) have been subjected to public consultation using this method. Ex post evaluation studies have taken off. Since the early 1980s, when the first forays into legislative evaluation were made with the University Administration Reform Act, the Freedom of Information Act and the Noise Pollution Act, ex post legislative evaluation has more or less become a standard part of the legislative process. Although no policies have been developed for research on evaluating laws, it is standard practice for the introduction of new legislation to be accompanied by ex post evaluation studies. Many laws and regulations include an evaluation clause drafted according to the model of designation 164 of the "designations for regulations". Ex post legislative evaluation attracts scientific attention, including studies on the organisational context, the methodological structure, the results, and the use of these findings in the evaluations.[8]

Ex post evaluation yields very useful results in terms of the added value of the findings in making minor course corrections in the legal system. At the same time, ex post evaluation clearly has some disadvantages as well. It is no exception to see ex post evaluation studies used to reach a compromise or – conversely – to reopen a discussion of fundamental principles. Moreover, ex post evaluation research is an expensive undertaking. Conducting empirical research and collecting and analysing fact-based information on the implementation and effects of a regulation take time and require considerable budgetary commitments. This is an important consideration, especially in systematic design of evaluation research. Finally, ex post legislative evaluation is frequently also dysfunctional. Evaluation research rarely leads to dramatic change.[9] The consequences are generally confined to introducing limited amendments to the laws and regulations, the chosen organisational arrangements, and/or the method of implementation, and these changes are often technical in nature. Directional dependence may offer a possible explanation for this pattern. It is far from easy to abandon a regulatory

8 *See* e.g.: H.B. Winter, M. Scheltema & M. Herweijer, *Evaluatie van wetgeving: terugblik en perspectief*, Kluwer, Deventer: 1990; Winter, 1996; C.M. Klein Haarhuis & E. Niemeijer, *Wet en werkelijkheid. Bevindingen uit evaluaties van wetten*, BJu, The Hague: 2008.

9 Winter, 1996.

direction and embark on a new course. It would seem that evaluation cannot provide sufficient substantiation for the system-wide changes needed to make that happen. In some sense, that is understandable: evaluations generally only address the existing solutions; they do not usually extend to exploring possible alternatives. Intensification of research during the preparatory process for legislation (and policy) is therefore unsurprising in this context. The various forms of research and analysis in the legislative process will be addressed below.

4. Research and analysis of proposed laws and regulations

The process of preparing legislation naturally includes coordination between and within government ministries. Goals, methods and resources are coordinated throughout that process, often involving a process of exchange. Ministries frequently hold divergent views on policy problems and the solutions at hand. Those divergent views are also held by stakeholders and other parties who play a growing role in the legislative process. We also refer to legal, economic, sociological, scientific and political rationality when it involves the diverse interests and considerations of the various parties involved in legislation. Veerman states that political rationality often trumps the other rationalities in legislation.[10] Klein Haarhuis holds that scientific insights could help make choices in such a way as to achieve the goals of the law.[11]

Engaging many different parties in the preparation process suits the context of the "polder model" used in the Netherlands, but it goes beyond that when implementation and enforcement authorities are involved in the preparation process. Stakeholder engagement takes place not only from the top down, but at the grassroots level as well – only we call it "lobbying". Internet consultation is a relatively new phenomenon that was mentioned above. All these forms of engagement during the legislative procedure are relatively non-systematic and quality-oriented. Along the way, there has been a growing need for a more systematic focus on the process of preparing legislation. For that reason, various tests have been introduced over the past ten to fifteen years.[12] Sometimes it involves obligations dictated by law, and on some occasions also the requirement to engage external expertise or support. Statistics Netherlands is required to be called in to assess business impact; the National Institute for Public Health and

10 Gert-Jan Veerman & Robin Mulder, *Wetgeving met beleid. Bouwstenen voor een bruikbare wetgevingstheorie*, BJu: The Hague, 2010, p. 15 and following.

11 C.M. Klein Haarhuis, "Over nut en noodzaak van ex-anteanalyses bij de totstandbrenging van wetgeving", in: *RegelMaat* 2010/2, p. 65-79.

12 In a 2015 report OECD mentions the Netherlands as one of the early starters in Europe in the 1990s in developing better regulation and with a strong focus on reducing administrative burdens. The report also hints at the Integraal Afwegingskader (IAK) as a way to bring together guidance and instructions for impact assessments tools. Nevertheless, according to the report, the Netherlands is acting below OECD-average on the field of ex ante as well as ex post evaluation. OECD, *Regulatory Policy Outlook*, 2015.

the Environment (RIVM) has to assess environmental impact; the Council for the Judiciary or the Expertise Centre for the Administration of Justice and Law Enforcement must be brought in on matters involving the impact on the judiciary, or to test whether a proposed measure can feasibly be enforced or implemented.

As of 1 March 2003, pursuant to a decision by the Council of Ministers, a new structure for assessing the impact of proposed regulations became mandatory.[13] It consists of two phases. The initial phase involves substantiation of the selected instrument(s). Then the initiating ministry assesses whether the proposed law or order in council (or amendment to the legislation) is desirable and necessary to achieve the policy intention. The consequences it will have for the business sector and the environment will be addressed at that point, as well as whether it can feasibly be implemented and enforced. This takes place in the form of a quick scan. This step may be skipped if there is no room for an alternative choice of instruments, if no substantial consequences are expected for the business sector, the environment, or feasibility of implementation and enforcement, if it is clear in advance that no substantial societal costs or benefits are associated with the regulation, or if it involves regulations entailing EU implementation. Substantiation of the choice of instrument also remains necessary in those cases. Once the instrument has been selected and the choice has been substantiated, phase 2 starts. Various checks are conducted at that point. These may include a cost-benefit analysis, or a check of compliance with the draft regulation on business impact, an environmental impact check, or a check on feasibility of implementation and enforcement.

As of 2011, the Integral Consideration Framework for policy and regulation [*Integraal Afwegingskader voor beleid en regelgeving* (IAK)] in preparing for and providing accountability on laws and regulations.[14] 120 checks, among which the aforementioned cost-benefit analysis, the environmental impact check and the check of the feasibility of implementation and enforcement, have been combined and reduced to 16 mandatory elements that have to answer the following 7 questions about the policy to be prepared or the regulation to be drafted: 1) What is the cause or reason? 2) Who is involved? 3) What is the problem? 4) What is the purpose? 5) What justifies government intervention? 6) What is the best instrument for the purpose? and 7) What are the consequences? Relevant aspects include the effectiveness of the proposed intervention and the consequences it will have for citizens, businesses, the government and the environment.[15]

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13 Information described here comes from "Effectbeoordeling Voorgenomen Regelgeving" [Impact Assessment for Proposed Regulations], a 2003 publication by the *Meldpunt Voorgenomen Regelgeving*, an alliance of various ministries, which guides and supervises the process of mapping the impact of draft regulations.

14 Parliamentary Papers 2010-11, 29 515, no. 330.

15 At first, there was the Regulation on Performance Data and Evaluation Research for the National Government in 2001 and 2006. This RPE required ministries to include the

The question with all these activities, of course, is whether they can help answer questions about achieving the set goals, at what cost point that will be the case, and the unintended effects. No systematic research had been done on that issue at that point, let alone an inventory of the nature and scope of the ex ante studies in the Dutch government ministries. In order to answer those questions, the Research and Documentation Centre of the Ministry of Security and Justice (WODC) conducted studies in 2013 and 2014 on the various checks and analyses that could be identified in the legislative preparation process, summarised as "ex ante studies", based on a review of these studies from 2005-2011.[16] The key findings from that study are outlined here. These studies were conducted during the preparation process for policies and for regulations. The findings reported below therefore extend beyond the strict scope of this chapter, i.e. the preparation of regulation.

5. Ex ante studies: nature and number[17]

The study focused on published studies, so only a small percentage of the ex ante studies and analyses were included; many of these studies are for internal use only. The study conducted by the Research and Documentation Centre focuses on two questions: how can ex ante studies be categorised based on reason, approach and commissioning party, and what do ex post evaluations teach us about the predictive value of ex ante studies? The latter question addresses the connection between ex ante and ex post research, closing the circle and making it possible to create actual added value. The ex ante studies involve published reports from studies on the consequences of one or more policy or regulatory options in national policy, legislation and regulations, commissioned by a government ministry or a ministerial research institute. To reiterate: the study does not exclusively look at laws and regulations, although that is the primary focus of this chapter; ex ante policy evaluation was also included in the study by the Research and Documentation Centre. 306 studies matching this description were founded in the period between 2005 – 2011. The studies can be grouped based on a number of characteristics. The following sections look at the cause or reason, the commissioning and implementing parties, the phase of policy preparation in which the studies took place, the number of alternatives that were studied, the nature of the subject of study, and the types of ex ante studies.

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consideration of ex ante evaluation in policy preparations. The 2008 Regulation on National Budget Requirements later abandoned that requirement.

16 C.M. Klein Haarhuis assisted by S.A.C. Keulemans, *Ex ante onderzoek in meta-perspectief. Aard, aantallen en gebruik van ex ante studies door de rijksoverheid*, The Hague: Research and Documentation Centre of the Ministry of Security and Justice (WODC), *Onderzoek en Beleid* no. 311, 2014.

17 The original report and a publication about the report were used to write this chapter: C.M. Klein Haarhuis & M. Smit, "Ex-antestudies op de kaart. Onderzoek naar beleidsvoornemens (2005-2011): aard, aantallen en wat ex-postevaluaties erover zeggen", in: *RegelMaat* 2014/4, p. 229-245.

The cause

Over half of the studies (51%) are intended primarily to support policy formation or decision-making processes. In 12% of the cases, a question, pledge or motion in the House of Representatives was the primary cause. Nearly one in seven studies (15%) is intended to calculate the possible consequences of a proposed plan. In 9%, the study is designed to support implementation. 7% involved a different cause or reason, such as a statutory obligation; the remaining 6% were based on a combination of different reasons.

Commissioning and implementing parties

Most analyses were commissioned by the former Ministry of Transport, Public Works and Water Management (now the Ministry of Infrastructure and the Environment: 44), followed by the Ministry of Health, Welfare and Sport (38). The Ministry of Finance commissioned the lowest number of studies (4), but that ministry frequently co-commissioned studies in cases involving interministerial research. Nearly half of the analyses were conducted by private research or consultancy firms (45%); slightly more than a quarter (26%) were conducted by academic institutes, planning bureaus or other government-run scientific research institutes. Implementing organisations are responsible for 7%, while 14% of the studies are conducted by various types of research parties, generally an ad hoc partnership between private agencies and researchers. Only a very few (4%) were conducted by a ministerial body. Another 4% were assigned to a council or advisory committee.

Phase

Ex ante research is frequently criticised for being involved late in the policy process, and thus having limited impact on the policy formation process.[18] The Research and Documentation Centre study shows that nearly 85% of the studies were conducted at an early point in the process, when there were still one or more intentions that still needed to be decided on. Still, that does mean that 15% were conducted after the decision had already been taken. In those cases, the study was intended to run the calculations for the selected alternative or to continue developing it. Obviously, the earlier in the preparation process that the analysis is conducted, the more influence the results will have on considering the alternatives.

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18 J. Hertin, K. Jacob, U. Pesch & C. Pacchi, *The production and use of knowledge in regulatory impact assessment: an empirical analysis,* Berlin: Freie Universität Berlin, Forschungsstelle für Umweltpolitik. FFU report, 01-2009, for the EU regulatory framework E. Beukers, L. Bertolini & M. te Brömmelstroet, "Percepties op het MKBA proces", in: *Tijdschrift Vervoerswetenschap*, 2012/2, 68-79.

Numbers of alternatives studied

The number of alternatives studied – following from the above – grows larger when the analysis is conducted in an earlier phase of the preparations: 3.7 compared to 1.8 in the second phase. On average, 3.4 alternatives were examined in the 306 covered here. Studying multiple options is customary in the cost-benefit analyses. In a few cases, a study looked at several alternatives after the policy or regulation was adopted; in these cases, the study involved modes of implementation or a baseline option to compare with the selected variant. It is striking to note that the studies conducted by private agencies looked at relatively many options, on average. The same held true for the studies commissioned by the former Ministry of Transport, Public Works and Water Management.

Manifestations

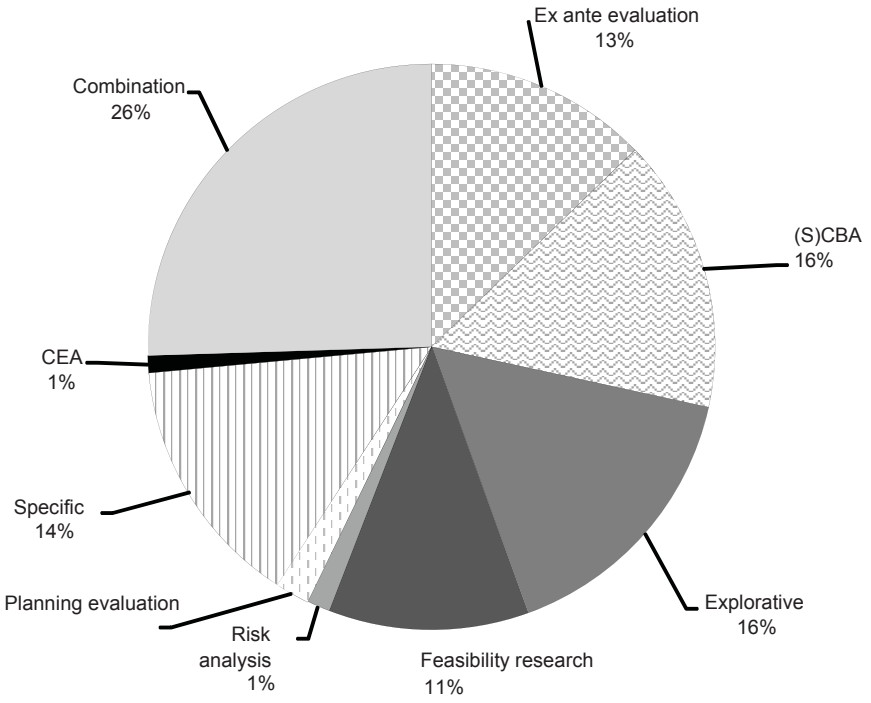
As stated, the study covers both regulations and policies. In many cases, it involves coherent, interconnected regulations or policies: a programme. Examples include the fifteen studies conducted in the framework of the kilometre pricing; various studies were also conducted on agreements involving environmental policy, as well as system-wide reforms (e.g. in health care). The examples show that they generally involve studies on policy. In 75 cases, it concerns ex ante research on regulations.

Types of studies

Eight different types of ex ante studies can be identified. These categories are subjective and do not follow clearly delineated boundaries or adhere to mutually exclusive criteria. There is also a significant degree of overlap between the categories: over a quarter of the 306 ex ante studies cannot be classified as a single type, but as a combination of types. The types of studies that occur most frequently are the cost-benefit analysis and the exploratory ex ante study. A cost-benefit analysis compares one or more alternatives to a baseline option, looking at a range of costs and benefits, which are expressed in financial terms wherever possible. Generally, the result is a positive or negative balance within a certain bandwidth. A societal cost-benefit analysis looks at costs and benefits in terms of the economy and society. The number of studies looking at societal costs and benefits increased between 2005 and 2011. This type of studies primarily occurred in the former Ministries of Transport, Public Works and Water Management and of Housing, Spatial Planning and the Environment; the scope of application has expanded to the social domain (the Ministry of Health, Welfare and Sport), but the Ministry of Economic Affairs and the Ministry of the Interior and Kingdom Affairs also use societal cost-benefit analysis more frequently. Exploratory studies refers to studies that explore policy options and are preliminary in nature or serve as a quick scan. These studies are often conducted in the earliest stages of planning. The question here would be whether the proposed instrument will

achieve the intended purpose, or whether an alternative would be preferable. 21% of the studies were cost-benefit analyses or societal cost-benefit analyses, if the combination studies are included; 19% were exploratory ex ante studies.

Figure 1: Types of published ex ante analyses in the Netherlands (2005-2011)



Of the total, 14% involves specific types of consequence-driven studies, e.g. looking at environmental impact, legal consequences, or consequences of the administrative burden on organisations in the public or private sector. In combination with other types of studies, this type occurs in 21% of cases. The potential effectiveness is the primary focus in 13% of the studies: the ex ante evaluations. An example is the analysis looking at whether the shift in nature policy by the former Ministry of Agriculture, Nature and Fisheries could achieve the intended ecological impact. In combination with other types of studies, the percentage rises to 14%. The consequences for implementation or feasibility of implementation were addressed in 11% of the analyses, e.g. in an organisational and financial context. The implementing organisations are generally involved in implementation themselves. Implementation analyses are frequently combined with other types of studies, which would bring their share to 17%. The least

frequent types are the planning evaluation, the risk analysis and the cost effectiveness analysis.

Ex ante evaluations are relatively more likely to be prompted by a political cause, such as a Parliamentary question or motion. Studies on the legal or environmental consequences and analyses of implementation and enforcement are more likely to be the result of a mandatory requirement. Implementation and risk analysis, ex ante evaluations and planning evaluations are seen more frequently in the context of proposed legislation and policy programmes than for other forms of policy.

6. Ex ante and ex post

An important question in this overview of the "state of the art" in ex ante studies is whether the predictions made by the studies actually come true. Very little is known about the relationship between ex ante and ex post research. The 2015 OESO-report discussed earlier refers to this as "closing the regulatory governance cycle". Does the cycle really gets closed in the Netherlands? Klein Haarhuis states that 47 of the 306 ex ante analyses (which represents 15%) were followed by an ex post study. This not only includes ex post effectiveness studies, but also process evaluations, mid-term reviews and implementation studies. It is striking to note that twice as many ex post evaluations were found when a plan or proposal had already been outlined to some extent during the ex ante analysis and could be calculated or assessed, or when it had already been adopted. Apparently, clearly defined plans have a greater chance of being embedded in policies or regulations. There is no correlation between the type of ex ante study and any later ex post evaluation. So why are so few ex post evaluations found? In 22 cases, the proposed policy or regulation did not move forward, so there was obviously very little reason for ex post evaluation. A comparable situation occurs in the 14 cases where the policy or regulation has not yet been established. In 13 cases, the ex post evaluation has been commissioned or launched, but the results have not yet been published. In a study from 2009 Berveling outlines four reasons why ex post studies were not committed: 1) a typical regulator is more interested in the present and the future and not in past performance, 2) the regulator does not want to annoy his positive evaluation of the regulation with negative information about its performance, 3) organizational impediments can hinder ex post evaluations for instance by means of lack of money, time, capacity etc and 4) methodological problems can block isolation of the effects of a regulation. Overviewing the very limited amount of ex post studies following ex ante analyses, it seems the regulatory cycle does not get closed as a result of several of these reasons.

7. Conclusion and discussion

The study leads to a number of conclusions. First, the number of studies that were found about the "future" of a policy or regulation was higher than expected.

Moreover, the number of ex ante studies is rising sharply. These studies are not distributed evenly across the ministries; ex ante studies are primarily conducted on a regular basis by the Ministries of Infrastructure and the Environment, Health, Welfare and Sport, Security and Justice, and Economic Affairs. The societal cost-benefit analysis is the most frequently occurring type of study, followed by the exploratory studies. It is striking to note the weak connection with ex post evaluation studies.

The study shows that it is quite possible to conduct ex ante analyses of the consequences of policies or regulations that are still in development. The diverse range of studies makes it clear that there are sufficient points of references in many different fields. The trend fits into a European context, in which regulatory impact assessments are increasingly mandatory.

The relationship between how legislation is prepared and the theme of "public trust, public law" would seem self-evident. From a positive outlook, an open and informed debate about the proposed alternatives increases quality and thus boosts public trust in the option ultimately selected. Cynics may protest that studies are often commissioned at a point when the debate can hardly be influenced. Similarly, ex ante studies are alleged to be nothing more than "ticking boxes", or mere window dressing. In that context, it may not be advisable to mandate ex ante analyses, as Meuwese advocates.[19] On the other hand, the research data shows that the vast majority of the ex ante studies are conducted in a relatively early phase – and in any case early enough for multiple alternatives to be considered. That would seem to indicate a serious approach, rather than tactical moves or political motives. This chapter does not address how the studies were used. The study did look at that aspect in five cases. In all those cases, indications of utilization were found: access to information by interest groups in the sector at large; positions taken by civic organisations (in four of five cases); and a response by Cabinet members in all five cases (in the Explanatory Notes or in response to Parliamentary questions). Further development took place in three of the five cases. All in all, these are not results that would support a cynical response.

19 A. Meuwese, "De kracht van 'juridische impact assessments' ", in: *RegelMaat*, 2012/4, p. 213-217.