

Agenda Moderne Regulierung

Effectiveness of sunset legislation and review clauses

Contact:

Frank Frick
Tel. 05241-81 81 253
frank.frick@bertelsmann.de

Dr. Tobias Ernst
Tel. 05241-81 81 247
tobias.ernst@bertelsmann.de

Dr. Henrik Brinkmann
Tel. 05241-81 81 342
henrik.brinkmann@bertelsmann.de

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Wirksamkeit von Sunset Legislation und Evaluationsklauseln

A study prepared for the Bertelsmann Stiftung

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Kai Wegrich

Miriam Shergold

Christian van Stolk



Werner Jann



Summary

The following study, prepared for and funded by the Bertelsmann Foundation, was jointly conducted by RAND Europe and Prof Dr Werner Jann (Potsdam University). The project deals with one specific instrument in the field of "better regulation" policy: sunset provisions and related review (or evaluation) clauses. "Sunset" provisions require regulations (or programmes or agencies) to expire after a specified number of years (unless renewed by law); review clauses call for an evaluation rather than the termination of the law or programme. The project assesses the effectiveness of these instruments for achieving goals of better regulation policy. The research is based on a literature review and an analysis of domestic and international diffusion and dispersion of sunset and review clauses.

Background

One of the key goals of better regulation policy is the reduction or at least containment of regulatory burdens placed on business and citizens. While a number of different tools and procedures have been discussed and adopted on the international level, termination (or sunset) clauses for regulations are regarded as a key tool in Germany. Termination and review clauses should allow for a systematic evaluation of existing regulations and facilitate the adjustment or termination of outdated or ineffective regulations.

Despite its popularity as a policy tool, there is a substantial lack of empirical evidence concerning the functioning of different types of termination and review clauses as a tool for better regulation.

Results

The literature on policy termination and evaluation as well as our survey of international experience with termination and review clauses suggest that, as yet, these tools have had only limited effects for reducing regulatory burdens:

Advocacy for sunseting is based on the assumption that time limits shift burdens of proof towards actors in favour of a particular regulation. However, regulations, which have earlier been adopted as government policy, are based on the support by influential actors within a particular policy

domain (including specialist agencies, ministries, politicians and interest groups). Studies of failed attempts of policy termination show that these 'anti-termination coalitions' can rely on a high capacity for mobilizing resistance due to complementary interests and specialized expertise. While a sunset clause of a regulation formally reverses the burdens of proof, it will primarily activate the capacities of 'anti-termination coalitions' to mobilize resistance. Actors responsible for deregulation, in contrast, cannot rely on 'natural' coalition partners within and outside government with similar power that can be activated when the opportunity provided by a time limit arises.

The criteria for evaluations attached to sunset and review provisions present a key factor shaping the power balance between supporters of regulation (domain-based actors) and actors responsible for deregulation (horizontal actors). According to which criteria will regulations be evaluated in sunset procedures? In answering this question, we follow a basic differentiation between benefit and cost related criteria. Benefit related criteria focus on the effect of the regulation in terms of the domain-specific goals (e.g. nature conservation, occupational health and safety, protection against gender discrimination etc.). Cost oriented criteria direct attention towards regulatory costs, e.g. compliance costs placed on addressees of regulations. While benefit related criteria are connected to the issue-specific policy debate and therefore strengthen domain-based actors, criteria related to regulatory costs could work as 'ammunition' of horizontal actors responsible for regulatory policy.

The empirical analysis regarding the dissemination of sunset and review clauses in 9 countries¹ and in the EU first shows, that a general time limit for regulations is only adopted as a standard procedure in a few cases. Only federal states in the US have adopted comprehensive sunset regimes (with most of the US states limiting the authorization of agencies and not regulations). The sunset regimes in the US federal states are primarily a tool of parliamentary supervision and control of programmes and agencies rather than a generic better regulation policy instrument. Some German states follow the track of establishing a general time limit for primary and

¹ Australia, Austria, Canada, Denmark, Ireland, Netherlands, Switzerland, United Kingdom, USA.

secondary legislation, thereby establishing a five-year time limit (which is below the 12 year period adopted in Texas and other US states).

However, sunset and review clauses for individual laws or regulations in laws are becoming more widely spread in most of the countries included in our analysis. The rationale for the decision to attach a time limit or an automatic review to a regulation is connected to the ambiguity of expected effects of policies/regulations. Sunset and review clauses are also used to secure approval of controversial bills (e.g. counterterrorism bills). Goals of better regulation or deregulation do not play a major role. Countries with pro-active better regulation policies adopt a different set of tools and procedures to achieve targets in that field (e.g. from generalized reviews to quotas for reduction of regulatory information costs).

Correspondingly, evaluation linked to sunset and review clauses are mainly concerned with the benefit of regulations. The effectiveness of regulations or programmes is evaluated against the domain-specific goals. Since regulatory burdens placed on addressees of regulations do not feature as central criteria of domain-oriented evaluations, the common practice of sunset and automatic review does not empower the horizontal actors responsible for better regulation policy.

Conclusions

Our analysis suggests that termination and review clauses will not make a substantial contribution for better regulation as long as the connected evaluations follow established criteria and worldviews of domain specific actors. Without 'ammunition' of cross-cutting actors and agencies responsible for regulatory policy, they will more frequently remain in an inferior position in the (de)regulation game. The systematic integration of cost criteria in evaluation procedures can therefore be regarded as a necessary precondition to transform sunset and review clauses into an effective tool for regulatory policy. Giving these preconditions, sunset could alter the power-balance in the (de)regulation game and strengthening cross-cutting actors. That requires the development of robust organisation structures for better regulation policy that could serve as a basis for the design, testing and enforcement of respective tools and procedures.
