CEPS SPECIAL REPORT
Thinking ahead for Europe

Too good to be true?
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No. 108 / May 2015

ISBN 978-94-6138-463-8

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Introduction

On 19 May 2015, the European Commission published a very comprehensive, ambitious and innovative Better Regulation package, which contains new guidelines on various phases of the policy cycle and various documents setting out the rules and functioning of entirely new consultation platforms and a new body in charge of regulatory scrutiny. This Special Report presents some initial impressions on the content of this remarkable set of new documents, which will shape the way in which EU policies will be prepared, shaped, monitored and evaluated in the years to come.

Before analysing the content of the new package, it is important to explain the context in which the new package has been introduced. As some commentators have noted, the Juncker Commission has started its mandate with the right foot on Better Regulation. The appointment of a First Vice President with a specific mandate on better regulation and institutional relations seemed to promise a bright future for the quality of EU legislation. Indeed, the agenda on the table of Mr Timmermans looked challenging from the very outset: besides the review of the impact assessment guidelines, the publication of the long-awaited guidelines on ex-post evaluation and an upgrade of the EU's consultation practices, the most challenging tasks included the review of the Inter-institutional Agreement on Better Law-making, the reform of the Impact Assessment Board and the long-standing battle to convince member states to adopt better regulation tools when implementing legislation.[1]

However, after a few weeks of 'honeymoon', the publication of the Commission's Work Programme for 2015 has raised many eyebrows, especially among civil society organisations active in fields such as consumer rights, the environment and healthcare. The Work Programme proposed to launch 23 new initiatives during 2015, and to withdraw or amend 80 existing proposals for political or technical reasons.[2] The determination of the new Commission to slash much more regulation than the one it would create anew was seen by some commentators as a clear pro-business de-regulatory stance, a return to the 'less is more' rhetoric hardly masked behind the publicly stated desire to be "big on big things, and small on small things". These gut feelings were strengthened by other, consistent signals, including the fact that the Commission decided to focus on a very limited

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[1] See Lorna Schrefler, Andrea Renda and Jacques Pelkmans, "What can the Better Regulation Commissioner do for the EU?", CEPS Commentary, 29 September 2014.

[2] See the Commission's Work Programme for 2015 at http://ec.europa.eu/atwork/pdf/cwp_2015_en.pdf

number of priorities (the Energy Union, the Digital Single Market); the postponement of the review of the Europe 2020 strategy for smart, sustainable and inclusive growth, and the priority given to the 'Juncker plan', which to the contrary mostly focuses on investment; and last but not least, the elimination of the position of Chief Scientific Advisor created by former Commission President Barroso during his second mandate.[3]

Since then, to use a euphemism, the relationship between Mr Timmermans and many representatives of civil society has been dominated by an atmosphere of suspicion. Over the past few weeks, however, the situation has gradually worsened. At the end of April, trade unions started complaining that the Commission is sacrificing the health of workers on the altar of red tape reduction, by referring specifically to the decision to suspend legislative initiatives on the protection of workers against chemicals.[4] On May 12th, more than 100 NGOs active in the environmental field voiced their concern that the European Commission's new better regulation agenda will end up downplaying environmental legislation, as testified by the fact that the 2015 Work Programme lists the Circular Economy package as one of the measures to be withdrawn.[5] The newly launched REFIT initiative on nature legislation has been taken as an attempt to slash Europe's sophisticated and far-reaching environmental laws. On May 18th, the clash became even more evident as a new 'Better Regulation watchdog' was officially launched as a "network to protect citizens', workers' and consumers' rights". The network is an explicit response to the "European Commission's attempts to remove what it deems regulatory burdens under the 'Better Regulation' initiative and comprises a wide range of public interest groups including consumer, environmental, development, financial, social and public health organisations and trade unions. It will examine actions taken under the Better Regulation initiative to identify possible risks to existing and future social, labour, environmental, consumer, financial regulation and public health standards. It will then inform civil society, media and decision-makers of these risks by organising public debates, promoting research, and through joint campaigning and advocacy work.[6]

Are all these concerns justified? The perfect opportunity to verify the Commission's commitment is by looking at the new better regulation package adopted on May 19th. **The new package, a draft version of which had already leaked outside the Commission, does not seem to take an exclusively deregulatory stance**: on the contrary, it includes a Communication on "Better Regulation for Better Results", which introduces a number of very interesting new procedural arrangements, reflected also in the proposed new Inter-institutional Agreement on Better Law-making. In addition, on May 13th (the day after the big protest of the environmentalist NGOs), the Commission has also announced the appointment of a new panel of seven highly qualified scientists, who will sit within the Commission's research directorate and be supported by a relatively large secretariat of 25 people, potentially showing that it has no intention of doing away with scientific advice.[7]

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3 See http://ec.europa.eu/archives/commission_2010-2014/president/chief-scientific-adviser/index_en.htm

4 See *i.a.* http://www.euractiv.com/sections/health-consumers/european-commissions-better-regulation-has-killed-150000-says-etuc-314030.

5 See, *e.g.* http://www.euractiv.com/sections/health-consumers/ngos-launch-watchdog-keep-eye-commissions-better-regulation-314644

6 The founding statement and the indication of members is available online at http://www.beuc.eu/publications/beuc-x-2015-047_upa_better_regulation_watchdog_founding_statement_and_members.pdf

7 See the press release at http://europa.eu/rapid/press-release_IP-15-4970_en.htm

But on the other hand, the fact that so much attention has been focused on the work of the new Commission is ultimately good news. The existence of active and well-informed civil society organisations, able to react to the proposals tabled by the Commission, as well as to the amendments proposed and voted on by other EU institutions, is a precondition for a healthy debate. And some of the actions proposed by the European Commission in its new better regulation agenda might also have been positively affected by the prospect of such a proactive, albeit hostile, stimulus.

Does the new better regulation agenda create the preconditions for such a constructive debate? This commentary contains a first reaction to the new Commission documents, and offers some recommendations on how to move forward in this complex debate. Since the documents leaked are still incomplete drafts, the reader should not take all reflections as final. The next sections distinguish between changes introduced in the European Commission's impact assessment system, changes in inter-institutional relations, provisions addressed at member-state level and changes in the appraisal of delegated acts, in ex-post evaluation and in the REFIT programme.

Proposed changes in the European Commission's ex-ante impact assessment system

Since 2003, the European Commission has established a rather sophisticated ex-ante appraisal system, which implies that all major initiatives adopted are subject to an assessment of the prospective economic, social and environmental impacts, and that the impacts of a meaningful set of alternative policy options is assessed before a decision is taken on the best possible approach.[8] Since 2005, the publication of initiatives in the yearly Commission Work Programme has entailed also the publication of a synthetic 'roadmap' for every initiative, which summarised and anticipated some of the basic content of consultations and impact assessment work carried out on each initiative. Two years later, this system has greatly profited from the creation of the Impact Assessment Board, a relatively small internal body coordinated by the Secretariat General, in charge of scrutinising the draft impact assessments produced by the Commission services in support of specific proposals. Empirical analysis has revealed that the overall quality of Commission proposals has improved as a result of this quality assurance mechanism.[9]

More than a decade down the road, it is fair to state that the system has produced mixed results. On the one hand, many Commission officials have digested over time the new procedure, and seem to accept its regular use as more than a simple additional administrative requirement, but rather as a way to make the case for legislative action. Increased use of Commission impact assessments in other institutions, including the European Parliament, the Council and even the Court of Justice, seems to further encourage this sentiment inside the Commission. But a number of problems remain.

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[8] See, *i.a.* Renda, A. (2005), *Impact Assessment in the EU: the State of the Art and the Art of the State*, CEPS monograph.

[9] Renda, A. (2011), Law and Economics in the RIA World, Intersentia: Amsterdam; and Fritsch, O., C. Radaelli, A. Renda and L. Schrefler (2012), *Regulatory Quality in the European Commission and the UK: Old questions and new findings,* CEPS Policy Paper, n. 362, January 2012. Finally, see Renda, A. (2014), " *Les études d'impact des réglementations de l'Union européenne : état des lieux et pistes de réforme*", Revue Française d'Administration Publique, 2014/1 N° 149, p. 79-103. DOI : 10.3917/rfap.149.0079.

First, from a methodological perspective, a split seems to have emerged over time inside the Commission, with the Secretariat General pushing for more regular use of quantitative cost-benefit analysis, and individual DGs inevitably preferring the reliance on multi-criteria analysis, in which specific impacts would be looked at more closely: competitiveness, administrative burdens and impacts on SMEs for DG Enterprise (now DG GROW); environmental impacts for DG Environment; social impacts for DG Employment; impacts on Fundamental Rights for DG Justice; etc. This split can be observed in the publication of a number of specific guidance documents on individual impacts, which the Secretariat General has never fully endorsed as being fully integrated into the Commission Impact Assessment Guidelines.[10]

Second, the European Commission has always shown remarkable reluctance to appoint an independent body in charge of scrutinising draft impact assessments, or even to publish its draft impact assessments for stakeholder consultation. While the former idea was difficult to translate in practice without hindering the Commission's right of initiative, the latter has always stood on more fragile explanations, such as the need to avoid capture or to uselessly prolong the duration of an already quite clumsy legislative process (the Commission claims to take on average 52 weeks to move from early consultation on potential proposals to the formalisation of the proposal and its accompanying documents). The fact that the Commission normally becomes a 'black box' exactly at the moment in which it needs more input – when using data and specific methods in support of the comparison of alternative policy options – has traditionally been subject to a rather generalised criticism.[11] Only industry associations have so far managed to obtain some additional degree of scrutiny on Commission practices, when the Barroso Commission decided to create the High Level Group on Administrative Burdens, whose mandate expired last year.

Third, the Impact Assessment Board has been criticised for being too small, and insufficiently equipped to be able to provide a meaningful scrutiny of the flaws and imperfections of draft analyses submitted by the Commission services. Part of the problem was due to the fact that its members (originally five, then increased to nine, with a small secretariat) were acting in their personal capacity, on top of their daily duties of director-level officials in their respective DGs; and part was simply due to the fact that, being an internal body, the Board would have limited incentives to block initiatives that had been given highest political priority.

These criticisms, together with more recurring mantras of the government-stakeholder dialogue on better regulation (e.g. the impact assessments are a way to justify decisions that were already pre-determined; consultation takes place either too early or too late, and opinions are not fully taken on board; business impacts are given more weight than environmental and social impacts; etc.), called for action by the Juncker Commission, exactly in the direction of ensuring more constructive dialogue with stakeholders, even more on methods, data and decision-making criteria than on the merit of proposed initiatives, on which the Commission already extensively consults by following high standards.

Does the new better regulation agenda provide a response to those criticisms? At a first glance, quite a lot. For what concerns consultation, the Commission is launching a **new platform termed "Lighten the load – have your say"**, which constitutes an open channel for anyone willing to provide views on aspects of EU legislation that they find irritating, burdensome or worthy of improvement. Such platform seems indeed more addressed at

[10] See again Renda (2014), *Les études d'impact*, op. cit.

[11] See Renda, A. *et al.* (2009), *Policy-making in the EU: Achievements, challenges and proposals for reform,* CEPS Paperbooks, May 2009. (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1417390).

companies wishing to signal burdensome pieces of legislation, in line with a consolidated practice at the EU level. But there is no restriction on the possibility that citizens voice their concerns on the need to improve, for example, the design or the enforcement of environmental legislation.

But it is on the scrutiny of draft impact assessments that some of the most important new features are introduced. First, **the Commission confirms that the Impact Assessment Board will be replaced by a Regulatory Scrutiny Board**, in which members will now operate full time, and will now include one Chair (with the rank of Director General), three 'internal' members, as well as three members (up from the two previously announced) recruited with fixed-term contracts on the basis of their specific academic competence and expertise "via rigorous and objective selection procedures"[12]. **For the first time, the Commission thus accepted to open the doors of its watchdog to external members**: as a general rule, all members of the Board should act independently and autonomously, and should "disclose any potential conflict of interest to the Chairperson and can be requested not to participate in the scrutiny of any impact assessments or evaluations or fitness checks where such potential conflict of interest arises".[13]

Moreover, **the Commission's Communication announces that the Commission will start consulting before and even "during the impact assessment process". This would happen after the publication of a new "inception impact assessment" document**, which appears to be a somewhat more elaborate version of the Roadmap that so far has been produced by the Commission for each initiative on the occasion of the publication of the yearly Work Programme.[14] What is still unclear is whether this procedure will be mandatory for all proposals subject to impact assessment; and at what state of advancement of the proposal would consultation be run. **The Impact Assessment Guidelines clarify that only "major" new initiatives have to be accompanied by an Inception IA and require political validation from the lead Commissioner, Vice-President and First Vice President.** Such "major" initiatives are defined very broadly, such that they include "initiatives included in the Commission's Work Programme, REFIT items, new legislative proposals, recommendations for the negotiation of international agreements and proposals for their conclusion, policy communications, delegated and implementing acts having significant impacts, financing decisions having significant impacts, and other Commission initiatives that are sensitive or important".[15] The result is that all **initiatives that are not routine administration or very minor regulatory interventions would need to be subject to a political validation before any policy appraisal work can start**: and while 'major'

[12] See the Communication, Better Regulation for Better Results, COM(2015) 215 final, 19 May 2015,.p. 7, Section 3.2. More in detail, three members will be officials selected from within the Commission services. Three posts will be created, therefore, for officials who will work full time exclusively for the Board and be transparently selected on the basis of their expertise in accordance with prevailing Commission rules. They will be ranked as Director, Principal Adviser or Adviser. Three temporary posts will be created to permit the recruitment of the members from outside the Commission on the basis of their proven academic expertise in impact assessment, ex-post evaluation and regulatory policy generally.

[13] Regulatory Scrutiny Board, Missions, Tasks and Staff, page 3. Strasbourg, 19.5.2015, C(2015) 3262 final

[14] It is defined as a "Roadmap for initiatives subject to an IA that sets out in greater detail the description of the problem, issues related to subsidiarity, the policy objectives and options as well as the likely impacts of each option". See new European Commission Better Regulation Guidelines, SWD(2015) 111 final, Chapter III.

[15] Impact Assessment Guidelines, op. cit., at 14.

initiatives included in the Work Programme have to be validated by the College of Commissioners, 'major' initiatives not included in the Work Programme only have to be validated by the First Vice President.[16] The 'political nature' of the new Commission here becomes visible, and places a significant constraint on the discretion attributed to the Commission services in adopting new initiatives.

What is a bit more obscure is the scope of the consultation during the impact assessment process: ideally, this should be a rather 'technical' consultation, focused on the quality of the data, on the overall methodology, on the soundness of underlying assumptions, and on the list of considered alternatives, rather than on the content of the preferred policy option. But the guidelines do not fully clarify what type of consultation questions should the Commission services prepare after the inception report. Page 72 pf the new Guidelines do not differentiate between the consultation that would be run before, during or immediately after the impact assessment has been completed, and simply clarify that consultation should cover all elements in the impact assessment process, including most notably the problem to be tackled, the issue of subsidiarity and the EU dimension to the problem, the available policy options; and the impacts of the policy options.

All in all, these are important changes, which – if properly implemented – would likely stimulate a more constructive dialogue during the early stage of policy formulation and ex-ante policy appraisal within the European Commission, and as such, with the usual *caveats*, must be welcome.

Impact Assessment: The inter-institutional puzzle

Over the past few years, the harshest critiques moved to the EU better regulation agenda have neither been confined, nor mostly focused, on the Commission's impact assessment system. While the Commission's impact assessments are certainly imperfect and worthy of some improvements, other institutions such as the European Parliament and the Council have shown a remarkable reluctance to implement what the 2003 Inter-Institutional Agreement on Better Law-making and the later 2005 Inter-Institutional Common Approach to Impact Assessment would in principle have forced them to do: carry out systematic impact assessment of their proposed major amendments on Commission proposal, as well as – for the European Parliament – regular impact assessments on own legislative initiatives. And while the European Parliament actually started carrying out impact assessments since 2012 and has, since then, tried to step up its analytical efforts by gradually upgrading its workforce and sharpening its toolkit, the Council has remained virtually silent on this issue.

The logic behind the 2003 and 2005 Inter-Institutional Agreements was clear. Compared to the early statements of the European Commission, which referred to impact assessment as merely an instrument of 'in house learning', the two Agreements looked at the impact assessment accompanying a specific initiative as a 'living document', to be updated to reflect the changes that EU institutions would introduce to the proposal during the ordinary legislative procedure. This feature was strengthened by the fact that that all three institutions were required to use the same methodology (the 'common approach'), which would avoid duplications and redundancies and create, at least in principle, a shared commitment towards better regulation.

[16] Less important initiatives have to be validated only by the Commissioner or, for evaluation and fitness checks, by the Director General of the competent DG.

One of the worst consequences of the failure of the two inter-institutional agreements to trigger a real common approach is that the final document that emerges at the end of the legislative procedure is not backed by an updated impact assessment. This entails two deplorable consequences: on the one hand, some (if not all) of the amendments adopted by the European Parliament and (most importantly) the Council are not backed by evidence, no motivation, nor by any assessment of their impact for European citizens and businesses; on the other hand, member states are constantly faced with the impossibility to rely on any up-to-date impact assessment when deciding on their transposition and implementation measures. This, although coupled with a degree of inertia of most member states in adopting better regulation tools, has doomed the whole EU better regulation agenda to a state of incompleteness.

Does the draft Commission Communication remedy this stalemate? To some extent, yes. Three major new features are introduced, which signal a degree of discontinuity with the past. First, **the Commission commits to run an eight-week consultation after the adoption of every proposal**, in order to collect comments and opinions that would then be sent to the other EU institutions to facilitate their appraisal work. This consultation should, in principle, add to the one that will be carried out 'during' the impact assessment process (see above). The scope of this consultation is not clarified, but given its timing in the policy process it is likely that it will focus on the content of the proposed policy initiative, rather than on the impact assessment itself.

Second, **the Commission declares in the proposed text of the new Inter-Institutional Agreement its availability to assist the European Parliament and the Council in their assessment of the impacts, in particular by explaining in detail its impact assessment, sharing the data used, and even – in duly defined cases – integrating its impact assessment.**[17] This commitment will have to be observed in practice. One possible interpretation is that, as the European Parliament has since 2012 started to provide its own analyses of the Commission's impact assessment, this might in some specific cases motivate the Commission in updating and complementing its original document. Another possible interpretation is that the Commission is leaving the door open to possible updates in its impact assessment to reflect the amendments adopted by other institutions, should the inertia (in particular, of the Council) continue.

A third, related feature that complements the previous one is the **brand new right, contemplated by the Commission, for any of the three institutions to call for an independent panel of three experts (each one appointed by a different EU institution) that would carry out an assessment of the impacts of a substantially revised proposal**, to be finalised and made public within a reasonable amount of time, and which should be based on any existing impact assessment work.[18] Clearly, this procedure will have to be detailed with due care, in order to avoid delaying tactics by any of the institutions. Other than this, the optional procedure is going to prove particularly useful, if confirmed in the final text of the Inter-Institutional Agreement, in case the Council will confirm its reluctance to back its decisions with a transparent, thorough, evidence-based document.

The proposed text of the Inter-Institutional Agreement, while contemplating these alternative ways to involve other institutions, is clear on the desired outcome: **whatever the way in which this result will be achieved, the three institutions agree that information should be given on the impact of the final piece of legislation, and that this information will be used for future evaluation work, thus helping to complete the so-called 'policy cycle'**. While this statement does not attribute any specific responsibility

[17] See proposed Inter-Institutional Agreement, COM(2015) 216 final, at §10.

[18] *Id.,* §12.

to any of the three institutions, the stated outcome (if taken seriously) would represent a clear step towards the completion of a fully evidence-backed policy cycle in the EU.

The role of member states: A stronger commitment?

Another weakness of the EU better regulation system in place until today is the **lack of a real involvement of member states**. While some national governments have started to adopt sophisticated better regulation tools many years before the European Commission (in particular, the United Kingdom), and other have made significant steps in the development of methods for the assessment of regulatory costs (the Netherlands, Germany, and increasingly Sweden and the Czech Republic), in most member states, despite the official adoption of better regulation tools, implementation remains poor or non-existent.

This is not merely a problem for national governments, but also for the EU level. First, the absence of a thorough, evidence-based reflection on implementation measures, and in particular on the efficiency and effectiveness of enforcement, makes it in turn impossible to estimate enforcement and compliance costs with any degree of precisions when the rules are still being drafted in Brussels. The same rule could be implemented, for example, through e-government solutions and risk-based inspections in one country, and in a much less efficient way in another. Which of these costs can really be considered EU-originated costs? Absent a transparent and accountable use of impact assessment tools by national and regional governments, the distinction between costs generated by the text of EU legislation and burdens generated by the inefficiency of national, regional and local administrations will remain impossible to draw.

Moreover, the absence of a culture of evaluation inside many national governments reverberates on the possibility for EU institutions to follow the life of EU rules throughout the transposition, implementation and enforcement phases, which most often fall under the remit of national or local authorities. This is particularly the case of 'gold-plating', i.e. case in which member states "over-transpose" a specific piece of legislation by adding new requirements or provisions: a practice that is not negative per se, especially if motivated by a genuine need to adapt EU rules to the national context. The significant under-development of impact assessment in member states leads to the impossibility of distinguishing between cases of inefficient and needlessly burdensome gold-plating from those in which additional provisions are indeed grounded in evidence and economic analysis.

Does the new proposed agenda address these issues? When it comes to member states, the reaction of the Commission seems mostly oriented towards minimizing the impact of legislation on businesses. For example, **the new Inter-Institutional Agreement provides that member states should provide a detailed motivation for decisions to add new rules and engage in gold-plating, possibly through an impact assessment, and specify that this would be even more strongly needed if this decision creates new administrative burdens on businesses, citizens and administrations.** Moreover, the Commission explicitly contemplates the possibility that transposition of EU legislation occurs in a limited number of specified dates for any given year: also this proposal echoes so-called "common commencement dates" that have been evoked for SMEs in the context of the administrative burdens reduction programmes, especially in the Netherlands but then also at the OECD level.[19] Finally, the newly proposed REFIT stakeholder

[19] *Ibid.* at §30. See also www.gov.uk/government/uploads/system/uploads/attachment_data/file/32233/10-1137-common-commencement-dates-august2010.pdf; and

platform (see below) is a potential reaction to the absence of real channels to discuss transposition and implementation measures with member states.

The Commissions' stance on member states is probably motivated by the strong pressure that a limited number of relatively more advanced countries (the UK, the Netherlands, Germany, Sweden and the Czech Republic), all of which have independent watchdogs in charge of monitoring regulatory costs, have exerted on the Commission to adopt a similar model to avoid generating unnecessary burdens, mostly on businesses.[20] Here, it is probably true that the rhetoric of the Commission becomes focused much more on burdens and regulatory costs, rather than on the benefits of regulation: this is probably true of all sections of the new Communication that are dedicated to REFIT and member states.

But there is more, in the new package, that seems to have the potential to improve the multi-level governance of the EU. First, the European Commission commits to draft **implementation plans** (in the form of Staff Working Documents) that will accompany proposals for major Directives and will describe implementation challenges and relevant support actions to be taken by the Commission itself. This plan would in particular be needed whenever the implementation of the legal act concerned, because of its nature or complexity, could benefit or be facilitated by supportive measures. Implementation plans will be subject to inter-service consultation and will start with an assessment of the challenges that member states are likely to face in applying the legislation, and then set out the various types of support which the Commission services will provide to the member states to assist them in their implementation of the legislation, together with relevant monitoring arrangements.

On the side of member states, since the Commission wants to strengthen its ability to oversee transposition measures, they **may be asked in cases of particular complexity to submit additional explanatory documents on their transposition strategy, in addition to the simple notification of transposition. The Commission also plans to conduct a two-stage compliance assessment**, based on a formal transposition check and a more substantive conformity checks.

Delegated and implementing acts, REFIT and ex-post evaluation: Closing the policy cycle?

The Commission does not forget a number of other reforms, which have been experimented with for a few years with mixed results, and which would be essential for the EU to close the policy cycle by ensuring regulatory scrutiny and evidence-based decision-making throughout the life of legal rules. A first important clarification is provided by the Commission on the **application of better regulation tools to delegated and implementing acts,** the thousands of 'ex-comitology' decisions that are taken every year to ensure the implementation of primary legislation.[21] On these acts, the Inter-Institutional Agreement includes an Annex that contains a "Common Understanding on Delegated Acts".[22] As a matter of fact, these rules are more similar to the types of rules on which Regulatory Impact Analysis (RIA) is mandatory

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http://ec.europa.eu/enterprise/policies/sme/documents/common-commencement-dates/index_en.htm.

[20] References goes to the so-called "RegWatch". See http://www.normenkontrollrat.bund.de/Webs/NKR/Content/DE/Anlagen/2014-09-11-regwatch-europe.pdf?__blob=publicationFile&v=1.

[21] See Alemanno, A. and A. Meuwese (2014), *Impact Assessment of EU Non-Legislative Rulemaking: The Missing Link in 'New Comitology'*, European Law Journal, Vol. 19, No. 1, January 2013, pp. 76–92.

[22] COM(2015) 216 final.

in the United States since 1981: most often we forget that the type of impact assessment carried out by the Commission on its primary rules does not correspond to the type of regulation that in other jurisdiction is subject to systematic cost-benefit analysis or risk analysis.[23] **The Commission now (and as already announced since 2009) wants to extend its impact assessment system also to these measures, whenever impacts are likely to be significant**: this is very similar to the U.S. rule introduced in 1981 as amended a decade later by the Clinton administration, which set out a number of basic criteria that had to be met for federal regulation to be subject to mandatory RIA. What the Commission does not explain is whether the methodology that will be used for delegated acts is the same contained in the (new) guidelines: one would expect that cost-benefit analysis be applied more systematically for these rules.

Importantly, **the Commission will also consult the public, although for a shorter period (4 weeks) on these acts, and will publish ahead of time an "indicative online list of any such acts in the pipeline"** to allow stakeholders to plan in advance their contributions.[24] Given the number of such acts that are adopted every year, this will certainly constitute a very heavy workload for the Commission, and it is hard to imagine how all opinions expressed in these consultations, likely to be of a much more technical nature, will be fully taken into account.

Other, less detailed measures that complete the policy cycle are related to the ex-post evaluation of individual pieces of EU legislation; and to the REFIT programme, which entails a retrospective look at the stock of EU legislation in entire policy areas, rather than individual policy measures. A novelty introduced by the new proposed Communication is that both exercises (ex-post evaluations and "fitness checks") will now fall under the remit of the Regulatory Scrutiny Board. There is also an additional, rather mysterious, provision in the Communication (at the beginning of Section 4, p. 9), which refers to **evaluation exercises aimed at verifying whether a specific policy has had too burdensome impacts on "specific sectors"**: this would be different from a fitness check, which does not look at specific sectors but rather at policy areas; it would be more similar to the "cumulative cost assessment" exercises carried out by DG Enterprise and Industry (now DG GROW) in sectors such as steel, aluminium, furniture, chemicals, construction and others.[25] Alternatively, it could be an intermediate form of exercise, in which EU legal rules are evaluated in terms of their distributional impacts, including impacts on specific industry sectors.

On REFIT, the Communication also clarifies that these exercises should be targeted, quantitative, inclusive and embedded in political decision-making. An important new initiative is the announced creation of a **REFIT stakeholder platform chaired by the First Vice President of the Commission**, with the Chair of the Regulatory Scrutiny Board as his Deputy, which will involve a group of 20 high level experts from business and civil society stakeholders as well as all one representative for each of the 28 member states, all appointed through an "open and transparent process". The platform is bound to replace pre-existing groups such as the High Level Group on Administrative Burdens, the Impact Assessment High-

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[23] See Renda (2011), *cit.*; and *i.a.* Claudio Radaelli (2009), *Desperately Seeking Regulatory Impact Assessment. Diary of a Reflexive Researcher,* Evaluation January 2009, vol. 15, no. 1, 31-48.

[24] Page 5, Section 2.1 of the Communication "Better Regulation for Better Results".

[25] See Renda et al. (2014), *Assessment of the cumulative costs of EU legislation in the steel sector*, Study for the European Commission, at http://ec.europa.eu/enterprise/sectors/metals-minerals/files/steel-cum-cost-imp_en.pdf. And Renda et al. (2014), *Assessment of the cumulative costs of EU legislation in the aluminium sector*, Study for the European Commission, http://ec.europa.eu/enterprise/sectors/metals-minerals/files/final-report-aluminium_en.pdf.

Level Advisory Group and the Directors and Experts on Better regulation. The REFIT stakeholder platform, if properly managed, would become a powerful instrument of advocacy for all stakeholders, who would obtain a direct channel of communication with the First Vice President. **Importantly, the wording of the Communication suggests that the platform will serve also as a forum for reflection on the functioning of EU's multi-level governance**, in particular when problems highlighted by the platform members will relate to the transposition and implementation of specific pieces of legislation by some or all member states.

Finally, contrary to what had happened in past European Commission's non-legislative documents on better regulation, **this time more detailed is given also on the scope and methodology of ex-post evaluation**. The new Communication and the Better Regulation Guidelines firmly embed evaluation in the policy cycle and provide a lot more guidance for Commission officials on the procedural requirements and the ultimate objectives of ex-post evaluation. Other than this, with an almost emotional statement, the Commission states its intention to find new way to discuss with the Parliament and the Council about what has and what hasn't worked in a specific piece of existing legislation: but then, the following sentence frustrates some of the stakeholders that would have wanted to see emphasis on regulatory benefits in addition to costs, as the Commission writes that without such dialogue, "there can be no meaningful attempt to cut red tape or make the necessary changes to laws".

Conclusion: Too good to be true?

The Commission has set the bar very high with its new better regulation package. Among the many virtuous initiatives foreseen, we have mentioned the renewed commitment to consult stakeholders in many, innovative ways, and the important steps into the intricate quagmire of the ordinary legislative procedure, with several channels that can be activated to ensure that the most important outcome, i.e. backing the final piece of legislation with evidence, is achieved. The Communication also shows a renewed commitment towards the completion of the policy cycle, by including in a more convincing way delegated acts, as well as fitness checks and ex-post evaluations in the overall toolkit of better regulation instruments. Finally, initial and interim 12-weeks consultation processes and the new Regulatory Scrutiny Board seem to represent a decisive step towards a more open and accountable Commission during all phases of the policy process, to the extent that the Commission even envisages the creation of a portal, which will allow stakeholders to track the state of advancement of each policy initiative.

What is then missing in the Commission's proposal? And will it be sufficient to reassure the mounting concerns over the deregulatory drift of the Juncker cabinet raised by NGOs and civil society organisations from all over Europe? While a full answer will be possible only after the various initiatives foreseen have been implemented, a few elements can already be provided at this, still intermediate, stage of analysis.

- ***Too much to bear?*** A first element of concern, and a missing explanation, is how the European Commission plans to multiply its activities, providing for many more rounds of consultation, inception impact assessment, implementation plans and much more without significantly increasing the staff dedicated to these tasks. And even if more staff is allocated to these tasks, it is unclear how the right competences can be put in the right place: but maybe this can be seen as a medium term commitment.
- ***Is it again about administrative burdens?*** Even if the Commission very cautiously repeats in several occasions that it plans to look at social and environmental impacts. Here and there the almost exclusive reference to administrative burdens and regulatory costs surfaces again the Commission's documents. To what extent this will remain the dominant *refrain* in Commission's better regulation actions is thus to be seen.

- ***Joint responsibility is nothing new.*** The restatement of the joint responsibility of all three institutions to ensure that adequate information is provided on the prospective impacts of final piece of legislation hides the lack of a real attribution of responsibility to the Parliament and most importantly to the Council, the most reluctant of all EU institutions when it comes to evidence-based decision-making. It would be easy for a malicious commentator to observe that such a shared commitment was already emphatically stated in the 2003 Inter-Institutional Agreement on Better Law-Making, and yet very little has happened since then for at least a decade.
- ***What about self-* and co-regulation?** Perhaps the most surprising "elephant in the room" in looking at the new proposed inter-institutional agreement is the total absence of any reference to the issue of self- and co-regulation, which were prominent in the 2003 agreement. This comes after the European Economic and Social Committee filed a rather detailed and sophisticated opinion on the issue, seeking to clarify the features that a self- or a co-regulatory scheme should display in order to be considered as potentially in line with the public interest.[26] So far, the impact assessment guidelines simply refer to the "principles for better self- and co-regulation" developed in the past years with respect to the advertising sector by DG SANCO, and recently made the subject of a community of practice coordinated by DG CONNECT. What will happen to self- and co-regulation in the European Union? This is a delicate issue, since in many sectors of the economy the growing pace of innovation and technological development call for the adoption of flexible regulatory regimes: but absent more clarity on this issue, stakeholders might me discouraging from engaging with the Commission in otherwise welfare-enhancing forms of public-private cooperation in the design and enforcement of regulation.
- ***Which methodology to use?*** Important methodological aspects still await clarification. When will cost-benefit analysis be fully required? And when would multi-criteria analysis be most appropriate? The increasing variety of initiatives on which impact assessment will now be applied (non-legislative documents, primary rules, delegated acts) requires such guidance, which anyway is included, at least partially, in the new impact assessment guidelines. In reality, complete guidance would only be possible and effective if the Secretariat General and the other DGs of the European Commission reached an agreement between their respective approaches to policy appraisal. And it would be even more useful, one would say, if the Commission adopted for all primary rules with significant economic, environmental and social impacts a set of criteria and indicators that match Europe's vision for the medium and long term. This, in particular, would require establishing a stronger link between multi-criteria analysis in the impact assessment and ex-post evaluation, and the Europe 2020 indicators that, at least in theory, represent Europe's vision of smart, sustainable and inclusive growth.[27] But this is yet another challenge for the Commission, as the review of the Europe 2020 strategy has been postponed, and its review is still surrounded by a cloud of uncertainty.

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[26] See European Economic and Social Committee, Opinion INT/754, Self-regulation and co-regulation, Brussels, 22 April 2015. At http://www.eesc.europa.eu/?i=portal.en.int-opinions.32859. And also, on the same issue, Cafaggi, Fabrizio and Renda, Andrea, *Public and Private Regulation: Mapping the Labyrinth* (October 1, 2012). CEPS Working Document No. 370, October 2012. Available at SSRN: http://ssrn.com/abstract=2156875; and Cafaggi, Fabrizio and Renda, Andrea, *Measuring the Effectiveness of Transnational Private Regulation* (October 3, 2014). Available at SSRN: http://ssrn.com/abstract=2508684 or http://dx.doi.org/10.2139/ssrn.2508684

[27] On this issue, see Renda, Andrea, The Review of the Europe 2020 Strategy: From Austerity to Prosperity? (October 27, 2014). CEPS Policy Brief No. 322. Available at SSRN: http://ssrn.com/abstract=2515255.

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