



HARVARD Kennedy School

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for Business and Government

‘Better Regulation’: European Union Style

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‘Better Regulation’: European Union Style

The European Union is often criticised for producing too many – sometimes badly written - laws which interfere too much with the lives of citizens and business in areas better regulated at national or local level.¹ Red tape and bureaucracy are seen as major failings of the EU.² The European Commission, as the European Union executive, has responded to this criticism by giving priority to regulatory policy, termed ‘Better Regulation’. Using strategic planning, impact assessment, consultation and evaluation as its main tools, ‘Better Regulation’ aims to prepare and adapt EU policy and legislation in knowledge of its expected economic, environmental and social impacts, avoiding unnecessary burdens and red tape for citizens, businesses and public authorities. The assessment of regulation from the design phase to implementation, with public consultation throughout the process, has become systematic.

Despite these efforts, EU Member States, business and a broad section of the public continue to express dissatisfaction with the volume and quality of legislation. The Member States and business groups call for reduction targets and regulatory budgeting schemes to contain the volume (and hence the costs) of legislation.³ Most recently, for example, the coalition agreement which forms the policy platform of the German government has called for the European Union to launch a ‘one in/one out’ scheme of regulatory budgeting.⁴

This raises questions about the European Commission’s regulatory policy approach. Is ‘Better Regulation’ effective? Is it relevant in the decision-making process? There are no straightforward answers to these questions and many ways to go about answering them. This paper attempts a response based on personal experience and available evidence. It outlines the factors that have shaped and driven regulatory policy over the past fifteen years. It describes the main features of the European Commission’s ‘Better Regulation’ system and looks at whether it is effective and relevant. The results of the analysis, including illustrations from three case studies on roaming surcharges, air quality legislation and climate change legislation, provide insight as to whether ‘Better Regulation’ has worked to improve policy outcomes and decision-making and whether commonly prescribed solutions to ‘over regulation’ (targets and quantitative offsetting schemes) are fit for purpose at EU level.

The analysis shows that the EU regulatory policy system is complete, covering the policy-making cycle from strategic planning and impact assessment through to implementation, review and

¹ Criticisms are wide-ranging, from a variety of sources over many years. See for example, publications and position papers of business groups such as Business Europe and non-governmental organisations such as RegWatch Europe which are listed in the bibliography.

² See Eurobarometer 2017 in which 70% of businesses surveyed see EU legislation as increasing their paperwork and 67% as increasing administrative costs; for public perception see Thomas Raines et al, *The Future of Europe*, Chatham House (2017), a survey in which bureaucracy and red tape are perceived by the public as the biggest failure of the EU.

³ See Competitiveness Council Conclusions, November 2016.

⁴ https://www.cdu.de/system/tdf/media/dokumente/koalitionsvertrag_2018.pdf?file=1; p. 43

evaluation. The most significant legislative proposals are subject to ‘Better Regulation’ requirements. Independent scrutiny bodies judge that impact assessments (and increasingly evaluations) meet the quality standards set in the European Commission ‘Better Regulation’ Guidelines. These ‘Better Regulation’ tools are relevant (i.e. systematically used), in the decision-making process of the European Commission and increasingly by the European Parliament and the Council in the working groups of the legislature. Evidence suggests that the preparatory work done in impact assessments strengthens the Commission in negotiations and contributes to more rapid agreement on proposals in the legislature and to the downward trend of infringements of EU law by the Member States. The Regulatory Fitness Programme has been successful in generating more systematic evaluation of legislation and cross-cutting areas of legislation, with progress in measuring cost savings. The system performs well by international comparison.⁵ That said, there are weaknesses in the system and in the absence of agreed indicators in a monitoring framework and systematic measurement using common methodologies and producing comparable quantitative results, it is difficult to draw definitive conclusions on performance of the ‘Better Regulation’ system.

Looking to the future, neither targets nor regulatory budgeting emerge as better approaches to EU legislative management. While they may stimulate greater attentiveness to costs and cost calculation, they are not suited to the multi-layered system of governance of the EU and they miss the point of regulating, namely to generate net social benefits. The use of standard tools has stood the test of time, but they need to adapt flexibly to changing circumstances and explore new ways to access and use data. The comprehensive coverage of the EU body of legislation and decreasing appetite for more regulation mean that there will likely be fewer ex-ante assessments of new legislation in the years to come. That combined with the need to adapt legislation to change and innovation, suggests an even greater role for ongoing review and ex-post evaluation. A qualitative jump in evaluation practice is needed – moving from one-off complex exercises to ongoing assessment in which evidence is systematically gathered, feedback and inputs from stakeholders are regular and results are fed into policy-making at useful moments. A renewed and streamlined approach to evaluation will enable decision-makers to show results (together with benefits/costs) and in so doing, strengthen their accountability and that of the European institutions.

⁵ OECD (2015) *Regulatory Policy Outlook*, 2015, OECD Publishing Paris. 2015, pp. 30-33.

I. The analytical framework

Has the European Commission's 'Better Regulation' effort produced better policy results? Has it made a difference to decision-making?

Few attempts have been made to respond to these questions. Monitoring by the European Commission has focused on outputs of the system – for example, how many impact assessments, evaluations, consultations have been conducted.⁶ The OECD has assessed the system against a set of composite indicators in its Regulatory Policy Outlook⁷ but its focus is on whether the essential elements of a 'whole of government' regulatory policy system (impact assessment, evaluation, consultation, oversight) are set up and functioning in a transparent way. The OECD points out that the composite indicators that underpin their assessment cannot capture the complex reality of the quality, use or impact of regulatory policy.⁸ The academic literature has mainly described the Commission's regulatory policy system, tools and guidance, examining and critically assessing aims, scope and method. There are only a few assessments examining whether objectives – for example, of improved policy outcomes, reduced costs or better implementation – have been met because 'Better Regulation' tools were used.⁹

That few analyses of the European system go beyond description or prescription is understandable. It is difficult to directly link policy outcomes to the use of 'Better Regulation' instruments by the European Commission given the number of decision-making levels (European, national, regional, local) and actors in European policy-making as well as the multitude of factors that impact on outcomes. In EU policy-making, the Commission makes proposals; the Council and the European Parliament adopt laws, and; the Member States (and their local authorities) implement the laws (often in very different ways). In this set-up, 'Better Regulation' informs Commission decision-making but the decisions on legislation are political, made by the Commission as the executive, the Council and Parliament as the legislature and the Member States who are charged with implementation. Decisions can differ substantially from the preferred options in the 'Better Regulation' analyses, making direct links between 'Better Regulation' analysis and policy outcomes and impacts tenuous.

The same considerations apply to cost/benefit analysis and the use of aggregated net social benefit to illustrate performance of the regulatory system. In economic terms, regulations should produce net social benefits. The regulatory policy system should make sure that the net social benefit of

⁶ See European Commission (2017), *Overview of the Efforts to Simplify and Reduce Regulatory Burdens*, COM(2017) 651 final, 24 October 2017; European Commission (2016) *Delivering Better Results for a Stronger Union* COM(2016) 615 final. Luxembourg, Publications Office of the EU

⁷ OECD (2015) *Regulatory Policy Outlook*, 2015, OECD Publishing Paris. 2015.

⁸ Arndt, C. et al (2015), *Indicators of Regulatory Policy and Governance*, OECD Regulatory Policy Working Paper, No. 1, OECD Publishing, Paris.

⁹ See Fritsch (2017) who indicates that studies on the analytics of impact assessment often stop at simple compliance tests, asking the question of whether regulators comply with the statutory guidelines on regulatory analysis and provides examples of such studies that have been done in the USA and in the EU.

each proposed law is assessed ex-ante. The effectiveness of the system could then be measured as a tally of monetised net benefits. Because Commission impact assessments examine a range of policy options for their economic, environmental and social impacts, rather than one option, multi-criteria analysis is used more often than standard cost/benefit analysis. While the European Commission ‘Better Regulation’ guidelines¹⁰ provide a typology of different types of costs and benefits, there is no prescription as to what must be assessed.¹¹ Some assessments measure administrative burdens only, using the Standard Cost Model. Others look at compliance costs. On the benefit side, EU policy-making places a value - for example on EU integration - that is difficult to quantify, much less monetise. Experience has shown that it is enormously difficult to quantify precise costs and benefits ex-ante with any precision in a system of multi-layered governance, with 28 very diverse Member States making autonomous choices as to implementation and enforcement and with little comparable EU wide data. So, the costs/benefits calculated at impact assessment stage may differ significantly from the costs/benefits of the proposal, the adopted law and the costs/benefits incurred in implementation. While most Commission impact assessments and evaluations attempt to quantify costs and benefits to the extent possible, given the differences in analytical approach, there is insufficient consistency to facilitate meaningful aggregation of either costs or benefits. Given that standard cost/benefit analysis is neither mandatory nor appropriate for many of the proposals undergoing impact assessment, the effectiveness of European legislation and the regulatory policy system cannot therefore be measured in terms of net social benefit.

This means that assessment of the European Commission’s ‘Better Regulation’ remains largely qualitative. This paper is no exception. It examines performance of the European Commission’s ‘Better Regulation’ approach by looking at available evidence on the quality and relevance/use of its outputs. It uses case studies on air quality, climate change and telecommunications roaming surcharges, to illustrate how ‘Better Regulation’ has contributed to better policy outcomes and decision-making. It makes relevant comparisons with other regulatory policy systems. The analysis spans a fifteen-year period 2002–2017, from the launch of the European Commission impact assessment process to the consolidation of ‘Better Regulation’ throughout the policy cycle under the present Juncker Commission.

The analysis looks at the following:

1. The development of ‘Better Regulation’ in the European Commission.

¹⁰ European Commission, *Better Regulation Guidelines and Toolbox*, July 2017, Luxembourg, Publications Office of the EU

¹¹ This contrasts to the US system where cost/benefit analysis is a requirement. As set out in Executive Order 12866 of 30 September 1993 and reaffirmed in Executive Order 13563 of 18 January 2011 “*Each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity).....*”

2. The European Commission's regulatory policy framework and related analytical tools.¹² It examines if there are any gaps in the regulatory policy framework and whether the application of the tools is proportionate in terms of scope and depth.
3. How well the regulatory policy system is functioning in terms of effectiveness and relevance.

On effectiveness, using the terminology outlined in C. Coglianese's work for the OECD,¹³ the analysis looks at behavioural compliance (i.e. whether actions have been conducted in line with applicable guidelines).¹⁴ The 'Better Regulation' Guidelines, supported by a Toolbox,¹⁵ set out the standards against which the European Commission's use of regulatory policy tools (impact assessment, evaluation and consultation) can be measured. The extent to which the standards are met is reflected in the opinions of the independent scrutiny bodies (the Regulatory Scrutiny Board and its predecessor, the Impact Assessment Board),¹⁶ as well as in other scrutiny instances. If the regulatory policy instruments used in preparation of proposals are judged by these entities to meet quality standards, the potential for better policy outcomes is enhanced. The overall quality of the 'Better Regulation' analytical efforts as judged by various scrutiny bodies is hence taken as one indicator of effectiveness.

The paper also looks at trends in the stage at which proposals are adopted by the legislature. The legislature can take up to three readings to adopt legislation. If preparations (impact assessment, consultation) are of good quality, there is increased potential for adoption following the first reading.

Long-term trends in the number of legal cases that the European Commission launches against the Member States are also taken as an indicator of the quality of legislation and its preparatory processes. Better preparation (impact assessment, consultation) of laws should result in a better

¹² The response to this question falls broadly into the category of "regulatory administration", a category suggested by Coglianese (OECD, *Measuring Regulatory Performance*, Expert Paper 1, 2012) to refer to evaluations that look at the extent to which a jurisdiction has adopted elements of regulatory best practice.

¹³ This typology is taken from Coglianese, C. (OECD, *Measuring Regulatory Performance*, Expert Paper 1, 2012)

¹⁴ In a similar fashion, Radaelli (2004) refers to content tests (checking if processes are in place), outcome tests (checking if results have been realised) and function tests (checking if the efforts made a difference). p. 20. This approach is also taken in Hahn and Tetlock (2008) where the quality of the economic analysis in the US regulatory impact assessments is compared against basic standards of economic research (and found wanting in the assessment of the authors).

¹⁵ European Commission (2017), *Better Regulation Guidelines*, SWD(2017) 350, 7 July 2017, Luxembourg, Publications Office of the EU. <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines-better-regulation-commission.pdf>.

¹⁶ See register of impact assessments and related opinions of the Regulatory Scrutiny Board at <http://ec.europa.eu/transparency/regdoc/?fuseaction=ia>.

understanding of implementation challenges in the Member States, lead to better implementation, and result in fewer legal cases against the Member States.¹⁷

Concerning the stock of legislation, this paper examines whether ‘Better Regulation’ initiatives (administrative burden reduction targets; regulatory fitness/simplification initiatives) have achieved their cost reduction objectives.

On relevance, the paper looks at how regulatory policy tools support decision-making in the Commission and in the legislative process. It provides examples of where ‘Better Regulation’ has made a difference in changing policy orientations and looks at whether the effort has made a difference to stakeholder perceptions.

Effectiveness and relevance are also examined in three cases – roaming charges, air quality, and climate change policy¹⁸ where the policy and legislation has gone from the stage of conception (and the use of impact assessment) to implementation and then to review (evaluation).

4. Whether other approaches (such as target-setting and regulatory budgeting) would be more effective at EU level. The paper examines briefly the experience of the United Kingdom, Germany and France in regulatory budgeting and looks at the challenges of deploying such schemes at EU level.

¹⁷ After the legislature adopts directives, Member States normally have two years to integrate the law into national law (a process called transposition). They then need to correctly apply the law. If Member States are late in transposing EU legislation or do not apply it correctly, the European Commission launches legal proceedings, termed infringements, against them.

¹⁸ As Coglianese points out: “Any complete evaluation of regulatory policy will entail the incorporation of evaluations of individual regulations. ...If better outcomes from regulations are the ultimate outcome of concern for regulatory policy the only way to evaluate such policy will be to determine whether the regulations themselves are better.... As long as regulatory policy seeks to improve regulation, nested within a full evaluation of regulatory policy will be an evaluation of regulations themselves.” Coglianese, Cary; *Measuring Regulatory Performance*, Evaluating the Impact of Regulation and Regulatory Policy, Expert Paper No. 1, August 2012, p. 13

II. EU Regulatory Policy – context and drivers

2.1 Setting the scene – ‘Better Regulation’ and EU Governance

‘Better Regulation’ is defined as

"..... designing EU policies and laws so that they achieve their objectives at minimum cost. ‘Better Regulation’ is not about regulating or deregulating. It is a way of working to ensure that political decisions are prepared in an open, transparent manner, informed by the best available evidence and backed by the comprehensive involvement of stakeholders. This is necessary to ensure that the Union's interventions respect the overarching principles of subsidiarity and proportionality i.e. acting only where necessary at EU level and in a way that does not go beyond what is needed to resolve the problem. ‘Better Regulation’ also provides the means to mainstream sustainable development into the Union's policies."'¹⁹

‘Better Regulation’ is both an aim and a process setting out how regulations are prepared, assessed and revised. It does not exist in a vacuum but has been shaped to the EU governance structure (institutional and legal framework) as follows.

The European Union: How does it work?²⁰

The European Union is founded on the Treaties,²¹ which set out the competences at EU level, the roles and responsibilities of the different institutions, and the methods of legislating. The Treaties are referred to as primary law.

What does the EU legislate?

The EU can act only in areas where competences have been conferred by the Treaties. Where legal competence is **‘exclusive’**, only the EU can legislate and act. Areas are trade, competition, customs union, monetary policy for the EURO, and common fisheries policy relative to conservation of marine biological resources. Where competence is **‘shared’**, the EU can act alongside the Member States. Areas are the internal market, social policy, economic, social and territorial cohesion, agriculture, fisheries (other than the conservation of marine biological resources), environment, consumer protection, transport, trans-European networks, energy, freedom, security and justice and common safety in public health. Where competences are **coordinated or joint**, the European Union level generally has a coordinating role and the Member States act independently. Areas include research and development, development cooperation, industry, culture, tourism, education, vocational training, youth and sport, civil protection and administrative cooperation.

¹⁹ European Commission (2017), ‘Better Regulation’ Guidelines, 2017, p. 4, Luxembourg, Publications Office of the EU, <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines-better-regulation-commission.pdf>.

²⁰ For further explanation, see European Commission, *How the EU works* <https://publications.europa.eu/en/publication-detail/-/publication/9a6a89dc-4ed7-4bb9-a9f7-53d7f1fb1dae>.

²¹ Treaty of the European Union; Treaty of the Functioning of the European Union; <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012M/TXT&from=EN>.

Who decides?

The European Commission 'proposes' (the sole initiator of laws) and the Council of the European Union (the Council) and the European Parliament 'dispose', debating and amending through to adoption or rejection of the Commission proposal.

The Council and the Parliament are often referred to as the 'co-legislators' as they are on an equal footing in the legislature. The Council is composed of the Ministers of the 28 Member States. Its work is prepared by working parties (e.g. Competition Council working party, Environment working party). Except for the European Council, which is chaired by the President of the Council, and the Foreign Affairs Council, which is chaired by the High Representative, the Councils are chaired by a Minister of the Member State holding the so-called 'Presidency'. The Presidency rotates between the Member States and lasts for six months at a time. The priorities of the Member State holding the Presidency are usually reflected in the agenda set for the Council in that period. Decisions are normally taken by weighted majority voting in the Council. There are exceptions, such as taxation and foreign policy, that require unanimity.

The European Parliament is composed of 751 directly elected representatives. Its decisions are prepared by parliamentary committees. Decisions are taken on the basis of majority voting in the European Parliament.

How does the EU legislate?

There are four main legal tools – directives, regulations, decisions and recommendations. Directives set out broad aims but leaves the detail on how they are to be achieved (form and method) to the Member State. Regulations are binding in their entirety and directly applicable in all Member States. A decision is binding and has a specific addressee. Recommendations have no binding legal force.

There are two main legislative procedures. The **ordinary procedure** is the general rule for adopting legislation at European Union level. It puts the European Parliament and the Council of the European Union on equal footing and applies in 85 defined policy areas covering the majority of the EU's areas of competence. The procedure starts with a legislative proposal from the Commission and consists of up to three readings.

Under the **special legislative procedure**, the Council is, in practice, the sole legislator. The European Parliament is required either to give its consent to a legislative proposal or to be consulted on it. Under the consent procedure, the European Parliament has the power to accept or reject a legislative proposal by an absolute majority vote but cannot amend it. The consent procedure is used for legal proposals on combating discrimination and when the subsidiarity general legal basis is used. It is also required for non-legislative procedures: when the Council adopts certain international agreements negotiated by the EU; in cases of a serious breach of fundamental rights (Article 7 of the Treaty on European Union); for the accession of new EU Member States, and for arrangements for withdrawal from the EU. Under the consultation procedure, the European Parliament may approve, reject or propose amendments to a legislative proposal. The Council is not legally obliged to take the Parliament's opinion into account, but, according to the case-law of the Court of Justice, it must not take a decision without having received it. The procedure is applicable in several areas, such as internal market exemptions and competition law and when international agreements are adopted under common foreign and security policy.

What happens once EU laws are adopted?

The EU Member States have the responsibility to implement EU law. In the case of directives, the Member States are required to introduce the EU text into their national legal framework. This process is called transposition and normally has an eighteen-to twenty-four-month deadline following adoption of the law by the Council and Parliament. The Commission is the so-called 'guardian of the Treaties' and has the responsibility to make sure that Member States are transposing and correctly applying EU law. If the Member States do not, the Commission can launch a legal proceeding (an infringement). If the breach in the law is not corrected, the Commission can take the Member State to the European Court of Justice.

What are delegated and implementing acts?

In addition to the instruments of secondary law mentioned above, the Treaties allow for autonomous decision-making by the Commission for secondary legislation in specific circumstances, using so-called delegated and implementing acts. Delegated acts are legally binding acts that enable the Commission to supplement or amend non-essential parts of EU legislative acts, for example, to define detailed measures. The Commission is granted this delegation by the European Parliament and the Council. It can adopt delegated acts and if Parliament and Council have no objections, the act enters into force. Implementing acts are legally binding acts that enable the Commission – under the supervision of committees consisting of EU Member State representatives – to set conditions that ensure that EU laws are applied uniformly. The European Parliament and the Council can withdraw their delegations if they believe that the Commission is overstepping the powers delegated.

This can be illustrated with a couple of examples. The type approval requirements for tractors are set out in a regulation. The updates of the functional safety requirements and environmental performance are done through delegated regulations. Making use of biocides and placing them on the market is legislated by a regulation. The fees and charges levied by the European Chemicals Agency to process applications are set out in an implementing regulation.

What do the principles ‘subsidiarity’ and ‘proportionality’ mean?

Subsidiarity is a principle which says that the EU can act only if the aim of the action cannot be achieved sufficiently by the Member State (at national, regional and local levels) and can be achieved better at EU level. In other words, policy measures and laws are to be decided at a level as close as possible to the citizen and at EU level only where necessary. This principle does not apply to the areas listed above where the EU has exclusive competence to act. It is highly relevant in the areas where competences are shared between the EU level and the Member States.

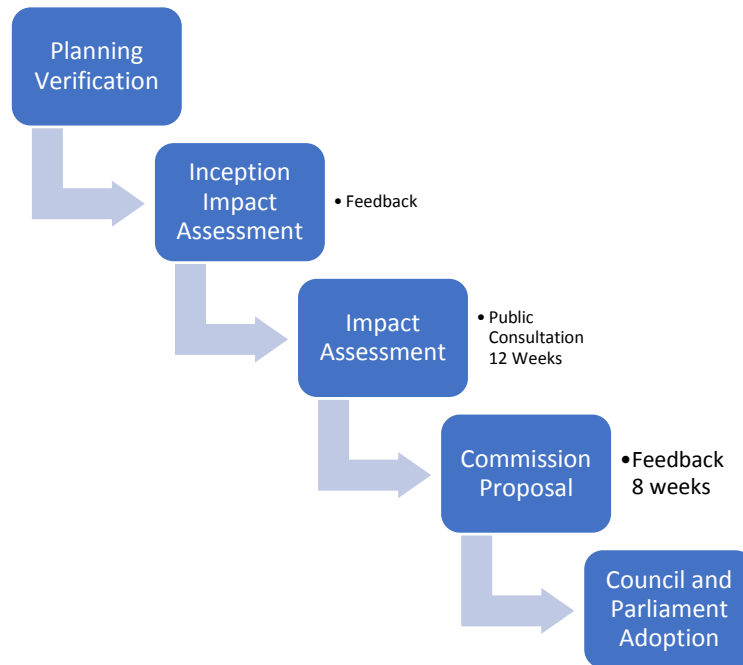
Proportionality means that EU action must not go beyond what is necessary to meet the objectives of the Treaties. The policy approach (scope and depth) should match the scale of the problem identified.

What is the ‘*acquis communautaire*’?

The body of EU legislation is referred to as the ‘*acquis*’. By mid-2017, it consisted of 645 consolidated acts (281 Directives and 364 Regulations) adopted through the ‘ordinary procedure’. Consolidated acts are those for which amendments are integrated into one act. They are consolidated for ease of reference but do not have legal validity. The total number of acts in force is higher (more than 20,000 in 2015, of which close to 14,000 were European Commission decisions and roughly 7000 were legislative acts adopted either through the ordinary procedure or through special legislative procedures).

Figure 1 How European decisions are prepared – from conception to adoption

From preparation of an initiative to adoption by the co-legislator (European Parliament and Council of the European Union) with feedback and consultation opportunities.....



....and on to implementation by the EU Member State and review/evaluation.....

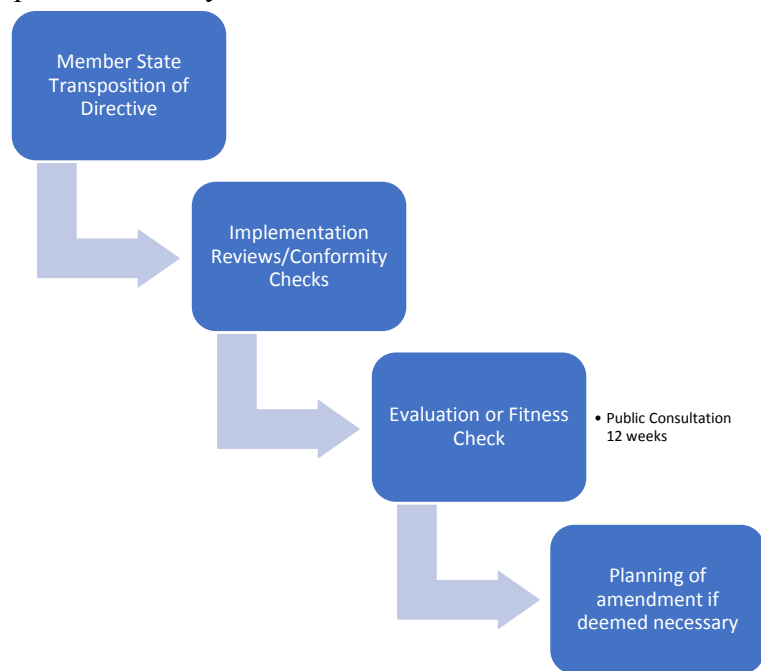


Figure 2 The Policy Cycle²²



What are the phases in the legislative cycle? When can citizens provide inputs?

The Commission prepares and proposes. During the preparation process, individuals and stakeholders can comment on the initial ideas for action which are set out either in an inception impact assessment (i.e. a preliminary impact assessment on proposals which are judged to have significant impacts) or in roadmaps (for initiatives that will not be accompanied by an impact assessment). They can respond to 12-week public consultations conducted during the preparation of impact assessments. They can provide their feedback for 8 weeks on the proposals and impact assessments once the Commission has adopted the texts and before they are debated by the Council and the European Parliament. If the basic act provides for delegated or implementing acts, the latter are put out for feedback for 4 weeks prior to adoption. Anyone can provide comments on EU laws at any time through the 'Lighten the Load' website. All evaluations of legislation or areas of legislation (fitness checks) include a 12-week public consultation. The results of consultations are recorded and summarised in the relevant impact assessment or evaluation.

²² European Commission (2017) *Better Regulation Guidelines*, SWD(2017)350, 7 July 2017, Luxembourg, Publications Office of the EU, p. 5

Figure 3: Decision-making and consultation

<i>Preparation</i>	
Inception Impact Assessment	Feedback (4 weeks) following posting
Impact Assessment	Public consultation (12 weeks) during preparation
Commission Proposal with Final Impact Assessment	Feedback (8 weeks) following Commission adoption
<i>Adoption</i>	
Secondary Legislation (Implementing and Delegated Acts)	Feedback (4 weeks) prior to Commission adoption of final act
Primary Legislation	Input to co-legislator (European Parliament and Council) discussions
<i>Transposition, Application and Implementation by Member States</i>	Member State specific
<i>Evaluation</i>	Public consultation (12 weeks) by Commission

2.2. What prompted the drive for ‘Better Regulation’ at the European Commission?

An ageing, expanding and more complex body of law

The 1990s witnessed a growth spurt in EU legislative activity. The push to complete the single market in goods, the rapid development of EU environment policy and the response to toxin scares and BSE (mad cow disease) resulted in an increasing volume of law which needed to be implemented by the Member States. By the early 2000s, EU Member States, business and the public were feeling the impacts not only of this new wave of regulation, but of the cumulative effect of close to 40 years of largely incremental legislative activity. It was widely recognised that older laws needed to be reviewed to make sure that they were still fit for purpose and that new legislative proposals needed to be better prepared, through wider consultation and with a better understanding of their cumulative impacts.²³

Indeed, as the executive with the sole right to propose legislation, the Commission faced ever more complex (finance, telecommunications) and inter-connected (energy, environment, climate) policy challenges by the early 2000s. It recognised that well-targeted, evidence-based and simply written legislation had greater potential to go smoothly through the legislature for adoption, to be implemented correctly and ultimately, to achieve its goals. Beyond that, debates on ‘Better Regulation’ – more or less regulation; a greater or lesser stress on competitiveness - provided Commissioners with a way to express their political orientations in an executive that does not vote or act along party lines.

Pressure from Member States....

‘Better Regulation’ emerged in the early 2000s as a domestic policy priority in some of the Member States (U.K., Germany, the Netherlands, Denmark). Recognising that many laws originated with the EU, these Member States wanted to see similar attention being devoted to ‘Better Regulation’ at European level. ‘Better Regulation’ was at the heart of the EU policy agenda in the United Kingdom (UK) under successive Labour and Conservative Governments. A largely business-driven exercise, the UK effort focused domestically on cost reduction and quantitative offsetting (regulatory budgeting) and the UK lobbied for the application of similar approaches at EU level. ‘Better Regulation’ figured prominently in the deal negotiated by the UK Prime Minister Cameron prior to the UK referendum on EU membership which included a strengthened method for subsidiarity checks and a commitment to burden reduction targets in key sectors.²⁴

The German Government has also led a concerted campaign over the past ten years to reduce unnecessary red tape both domestically and at European level.²⁵ It launched a national programme to ease administrative burden in 2006, setting a target of 25% for burden reduction by 2011. The effort was extended to systematic calculation of compliance costs. The German Government

²³ See European Commission (2001) *White Paper on Governance*, COM(2001) 428; Brussels, 25 July 2001

²⁴ See European Council Conclusions, 18/19 February 2016.

²⁵ Nationaler Normenkontrollrat (2016) *10 Years NKR – Good Record in Reducing Bureaucracy and Costs, Annual Report 2016*

introduced regulatory budgeting (a ‘one in/one out’ system) in 2015 and has urged the EU level to follow suit.²⁶

More broadly, when it was difficult to find a consensus on thornier issues, the EU Member States, including at the level of Heads of States and Government at the European Council, could find common ground in asking the Commission to regulate better. ‘Better Regulation’ or regulatory fitness was referred to in the conclusions of each European Council from October 2012 to December 2014 and again in both February and June 2016 as well as in the context of sustainable development in June 2017.²⁷ These discussions were prepared in part by the Competitiveness Council, where Member States rallied together and were unified in their call for the European Commission to make more progress on ‘Better Regulation’. The most recent Member State drive took place during the Dutch Presidency of the Council in the first half of 2016. Taking inspiration from a letter from 19 Member States (26 November 2015)²⁸ calling for burden reduction targets, the Dutch Presidency prepared conclusions on ‘Better Regulation’ for the Competitiveness Council of 26 May 2016.²⁹ The Conclusions called for quantification of cost reduction and savings to be documented in an annual burden survey and the setting of sectoral burden reduction targets.

Member State demands for ‘Better Regulation’ were often linked to calls for greater respect of subsidiarity – that is, for the European Commission to demonstrate more convincingly that actions needed to be taken at EU rather than local level. The Dutch Government published a review in 2013 on subsidiarity and highlighted areas and specific laws where they felt the EU could have best left legislating to the Member States.³⁰ A similar initiative was launched by the Finns.³¹

Dissatisfied Stakeholders....

Business felt that the Commission paid insufficient attention to costs and cumulative burdens. Some argued that the costs of environmental legislation pushed companies to locate manufacturing abroad. Others argued that regulation was throttling innovation. Business was supportive of the ‘Better Regulation’ agenda but lobbied for targets, regulatory offsetting and better assessment of SME impacts and cumulative costs.³² Some asked the Commission to release draft impact

²⁶ https://www.cdu.de/system/tdf/media/dokumente/koalitionsvertrag_2018.pdf?file=1; p. 43

²⁷ See European Council Conclusions, June 2017, June 2016, February 2016, December 2014, March 2014, October 2013, June 2013, March 2013, December 2012

²⁸ Letter of 19 Member States to Commission Vice-President Timmermans on Regulatory Simplification, November 2015

²⁹ See Competitiveness Council Conclusions, 29 May 2013; 4 October 2013; 4 December 2014; 26 May 2016

³⁰ Netherlands Government Subsidiarity Report ‘*Europe Where Necessary, national where possible*’, 21 June 2013

³¹ Finnish Government *Stakeholder Survey on EU Legislation*, Cabinet Office, Prime Minister’s Office, December 2015

³² See Business Europe, ‘*Better Regulation for Better Results – An EU Agenda*’, 16 September 2015; ‘*Building a true single market for Europe*’, 28 September 2015; Business Europe’s recommendations regarding the review of impact assessments, 24 February 2015; *Smart Regulation – Reduction of Regulatory Burdens*, 25 November 2015;

assessments and draft legislation for comment. Others urged that an independent body to scrutinise impact assessments should be set up outside the Commission.

Other stakeholders (the trade unions, social, consumer and environmental NGOs) argued that insufficient attention was being paid to the social and environmental impacts of legislation.³³ They wanted to see more emphasis on the benefits of legislation, particularly those related to consumer and environmental protection, health and safety.³⁴ They considered that the Commission's simplification and cost-cutting exercises were ill-disguised attempts to deregulate.³⁵

The push for international regulatory cooperation....

The emergence of regulatory cooperation as an important aspect of international trade and investment relations also raised the profile of and resulted in increased attention being paid to EU regulation and regulatory policy. The USA has been a strong vocal advocate of its own regulatory policy approaches in both bilateral and multilateral forums. Bilaterally, the US administration urged the development of a regulatory policy process which would allow access and consultation on draft legislation and impact assessments. This was a constant theme throughout the discussions under the trans-Atlantic economic partnership and the now dormant Trans-Atlantic Trade and Investment Partnership (TTIP) negotiations.³⁶

2.3 'Better Regulation' – the Commission's response

This widespread concern about the quality of European laws, their preparation, and their cumulative effects gave rise to calls for a more coherent approach to regulating and the emergence of European level regulatory policy, entitled 'Better Regulation'.

Eurocommerce response to the Communication on Regulatory Fitness, February 2014; Eurochambers (2014) *Counting the Cost of EU Regulation to Business*, January 2014

³³ See for example publications of the G10 (<https://green10.org/>), 'Better Regulation' Watchdog (<http://www.betterregwatch.eu/>)

³⁴ See Corporate Europe Observatory and Friends of the Earth Europe paper (2014) *The crusade against 'red tape'*, criticising the deregulatory nature of the Regulatory fitness programme and arguing that it was geared towards meeting the interests of big business and multinationals.

³⁵ See Dissenting View of the NGOS on the High Level Group for Reducing Administrative Burden; http://ec.europa.eu/smart-regulation/refit/admin_burden/docs/annex_12_en_hlg_ab_dissenting_opinion.pdf

³⁶ http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf; <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/March/US-Objectives-US-Benefits-In-the-TTIP-a-Detailed-View>; <https://www.ceps.eu/system/files/SR110%20Regulatory%20Cooperation%20in%20TTIP.pdf>.

A nascent approach to ‘Better Regulation’ at EU level surfaced with the adoption of a protocol on “subsidiarity and proportionality”³⁷ annexed to the Amsterdam Treaty of 1997³⁸ which set out the basic requirements of preparing good European legislation. All initiatives were to respect the principles of subsidiarity and proportionality, be subject to public consultation, be prepared with a view to minimising costs and be simple. To work out how to put these aims into practice, an expert group, the Mandelkern Group, was set up and reported in 2001 on the principles and methods of good regulation.³⁹

The Prodi Commission (2000-2005) took up these ideas in a White Paper on Governance of 2001⁴⁰ which set out the aim of legislating better through improved consultation, impact assessment, new approaches in legislative method (such as self- and co-regulation⁴¹), simplification, and better monitoring of the application of law. The drive for sustainable development, reflected in the Conclusions of the Gothenberg European Council in 2001, motivated the development of an approach to impact assessment that would cover the social, environmental and economic impacts of proposed policies.⁴² Attention focused thereafter on developing the policy foundation and guidance as to how to implement these ideas.⁴³ An inter-institutional agreement was negotiated

³⁷ Subsidiarity is the principle that the European Union should perform only those tasks which cannot be performed at national or local level. Proportionality is the principle that the European Union should act in a way that does not go beyond what is needed to meet the objectives of the measure under consideration.

³⁸ Amsterdam Treaty amending the Treaty of the European Union, October 1997

³⁹ Mandelkern Report, 13 November 2001;
http://ec.europa.eu/smart-regulation/better_regulation/documents/mandelkern_report.pdf.

⁴⁰ European Commission (2001), *White Paper on Governance*, COM(2001) 428 25 July.2001); Luxembourg, Publications Office of the EU.

⁴¹Point 18 of the 2003 Interinstitutional Agreement defines co-regulation as the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, trade unions, non-governmental organisations, or associations). Point 22 of the same agreement defines self-regulation as the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt among themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements). 2003 Inter-institutional Agreement on Better Law Making, 2003 C321/01

⁴² European Union, European Council June 2001, Gothenberg, Conclusions of the Presidency “*Notes that the Commission will include in its action plan for ‘Better Regulation’ to be presented to the Laeken European Council mechanisms to ensure that all major policy proposals include a sustainability impact assessment covering their potential economic, social and environmental consequences.*”

⁴³ European Commission (2002) *Communication on Impact Assessment* COM(2002) 276, including internal guidelines, 2002; *General principles and minimum standards of consultation* COM(2002) 704; *Simplifying and improving the regulatory environment* COM(2002) 278. Luxembourg, Publications Office of the EU.

with the European Parliament and the Council, followed by a Common Agreement between the institutions on impact assessment.⁴⁴

The two Barroso Commissions (2005-2015) took up the challenge of putting ‘Better Regulation’ into practice, improving regulatory tools, establishing an independent quality control function, introducing quantitative reduction targets for administrative burden and carrying out qualitative assessment of the stock of legislation – of individual initiatives as well as across and between sectors - the so-called ‘Regulatory fitness programme (REFIT)’. In the early years of the Barroso Commission, most attention was devoted to ensuring that the impact assessment system was well established, functioning and effectively scrutinised through the creation of an internal quality control body, the Impact Assessment Board.⁴⁵ In issuing his orientations for his second term (2010-2015), President Barroso, indicated that the Commission aimed "to match its huge investment in ex-ante assessment with an equivalent effort in ex-post evaluation".⁴⁶ The Commission placed high priority on regulatory fitness, making sure, on the basis of evaluation and fitness checks, that the existing stock of legislation was fit for purpose. President Barroso sought and profiled external expert advice, with a high-level group of Member State experts, chaired by Dr. E. Stoiber⁴⁷, being set up to provide advice to the European Commission on administrative burden reduction.⁴⁸

The Juncker Commission (2015-2020) built on the work of the previous Commissions, taking a political, targeted approach, which was presented in a ‘Better Regulation’ package in 2015.⁴⁹ Better planning, improved public consultation/feedback and enhanced independent scrutiny were hallmarks of the approach. First Vice-president Timmermans was given the mandate for ‘Better Regulation’. He prioritised political oversight, introducing a system of early validation of initiatives to ensure that only those initiatives with the backing of the Commission would be prepared through impact assessment.⁵⁰ The opportunities for stakeholders to contribute to policy-making were strengthened significantly with mandatory consultation on all impact assessments and

⁴⁴ 2003 Inter-institutional Agreement on Better Law Making, 2003 C321/01; Common Agreement on Impact Assessment, 2005

⁴⁵ The blueprint of the approach was set out in a 2005 Communication on ‘*Better Regulation for Growth and Jobs*’ (COM(2005) 97 final) which called for a strengthening of the impact assessment system introduced in 2002 (COM(2002) 276 final). In early 2009 *Guidelines for Impact Assessment* were adopted (SEC (2009) 92).

⁴⁶ European Commission (2010), Communication *Smart Regulation in the European Union* (COM(2010) 543 8 October 2010), Luxembourg, Publications Office of the EU

⁴⁷ Dr. Edmund Stoiber was the Minister-President of the German state of Bavaria from 1993 to 2007.

⁴⁸ Commission Decision setting up the High-Level Group of Independent Stakeholders on Administrative Burdens, (2007/623/EC); amended 5 December 2012; Luxembourg, Publications Office of the EU

⁴⁹ European Commission (2015), Communication *Better Regulation for Better Results* COM(2015) 215 final 19 May 2015, Luxembourg, Publications Office of the EU

⁵⁰ See European Commission (2017) *Better Regulation Guidelines* SWD (2017) 350, 7 July 2017; Luxembourg, Publications Office of the EU. Major items are included in the Commission Work Programme; before work starts on any major item, it must be validated by the lead Commissioner and the 1st Vice-President. Other initiatives require validation by the lead Commissioner and/or Director General.

evaluations as well as feedback opportunities along the decision-making chain, including on draft secondary legislation (implementing and delegated acts). Stakeholders and Member States were engaged in the effort to improve the stock of legislation through the so-called ‘REFIT Platform’, expert groups set up to detect regulatory burdens and identify possible solutions.⁵¹ A regulatory scrutiny body with full-time professional staff, including external members, was created as a separate body to carry on the work of the Impact Assessment Board.⁵² Given that the quality of legislation depends on the decisions of the legislator and the Member States in their implementation choices, the negotiation of a revised Inter-institutional Agreement with the European Parliament and the Council was given priority.⁵³

⁵¹European Commission (2015) Commission Decision establishing the REFIT Platform; C(2015) 3261 final, Luxembourg, Publications Office of the EU

⁵² European Commission (2015) Communication to the Commission, Regulatory Scrutiny Board, C(2015) 3262 final; Decision of the President of the European Commission on the establishment of an independent Regulatory Scrutiny Board, C(2015) 3263 final. Luxembourg, Publications Office of the EU

⁵³European Commission (2015), Communication *Better Regulation for Better Results* COM(2015) 215 final, 19 May 2015; Proposal for an Interinstitutional Agreement on ‘Better Regulation’, COM(2015) 216 final. Luxembourg, Publications Office of the EU

III. ‘Better Regulation’: the European Commission’s regulatory policy and tools

The aims and underlying principles...

‘Better Regulation’ is defined in the Commission ‘Better Regulation’ Guidelines as an approach to policy and law-making that reaches objectives at minimum costs, and ensures that political decisions are prepared transparently with the involvement of stakeholders and informed by the best possible evidence.⁵⁴ It is based on respect for the principles of necessity (need for intervention), proportionality (not to go beyond what is strictly needed), subsidiarity (to act at the appropriate level of governance and only at EU level when it cannot be done nationally or locally) and transparency. ‘Better Regulation’ should lead to an improved quality of legislation, simplification and a reduction of regulatory burdens, including cumulative ones – all while maintaining benefits. Inspired by the drive for sustainable development, it takes social and environmental as well as economic impacts of policies and law into consideration.

The need to engage the European Parliament and the Council

While the Commission can make a proposal that meets high regulatory standards, it does not control the end-product of the legislative process. The Council and the European Parliament, through a legislative process called ‘co-decision’, decide on the final legislative act. It is possible that elements of poor regulation creep in during this process. Thus the need to engage all EU institutions has been a constant theme since 2003, culminating at that time in an Inter-Institutional Agreement on Better Law Making, which was revised in 2016.⁵⁵

The 2016 Agreement contrasts with the previous one of 2003⁵⁶ in so far as it covers all phases of the policy cycle. On programming, it provides for annual priority-setting involving all the institutions. Jointly with the Commission, the European Parliament and the Council identify items of major political importance that need to be given priority in the legislative process. On impact assessment, the Council and the European Parliament commit to looking at the Commission impact assessment in their deliberations and to examining the impact of their suggested amendments on a Commission proposal. The institutions agree that a systematic approach to evaluation is needed to check the performance of existing legislation and that all new legislation needs to have clear provisions on how the performance of the legislation should be monitored and evaluated. The European Commission took on a commitment to “assess the feasibility of establishing, in REFIT (the Regulatory Fitness Programme), objectives for the reduction of burdens in specific sectors”. The Institutions confirmed their commitment to using the legislative technique of recasting (a process whereby when a law is amended, all the previous amendments are incorporated in the new text) and codification (a process in which all amendments to a law over the course of many years

⁵⁴ European Commission (2017), *Better Regulation Guidelines* SWD (2017) 350, 7 July 2017, Luxembourg, Publications Office of the EU, p. 4

⁵⁵ 2016 Inter-institutional Agreement on Better Law Making, 13 April 2016, L/123

⁵⁶ 2003 Inter-institutional Agreement on Better Law Making, 2003 C321/01;

are incorporated into a single new act). They also made a commitment to promoting greater transparency in showing how EU law is transposed into the national legal order. This is important because the EU is often blamed for imposing rules and burdens which do not derive from EU legislation but from national legislation.⁵⁷

3.1 The regulatory policy tools

The preparation of high-quality regulation is done by the mandatory application of different tools – strategic planning, impact assessment, ex-post evaluation and stakeholder consultation. In its 2015 initiative ‘Better Regulation’ for Better Results’⁵⁸, the European Commission brought these tools together in a regulatory policy package in which the interlinkages and dependencies between the instruments are highlighted. Their integrated use is promoted through one set of consolidated ‘Better Regulation’ Guidelines and their quality is subject to independent quality control (of the Regulatory Scrutiny Board). Improving the stock of legislation involves evaluation and related cost reduction/savings initiatives. ‘Better Regulation’ includes seeking advice and guidance from external experts (gathered in the so-called REFIT Platform with two strands – stakeholders and Member State representatives). Support for implementation and enhanced enforcement are also components of ‘Better Regulation’.

Strategic Planning

Strategic planning is key to managing the flow of legislative activity. Activity-based management was introduced in the European Commission in the early 2000s.⁵⁹ It included preparation of an Annual Policy Strategy and related Commission Work Programme. Planning has evolved based on experience and is now an integral part of the ‘Better Regulation’ tool box. It involves the setting of strategic priorities at the start of a Commission mandate, followed by an annual political statement by the Commission President (the so-called ‘State of the Union’ address delivered in September to the European Parliament) and an annual work programme, usually adopted in October. This provides the framework for discussions with the Council and the European Parliament under the 2016 Inter-institutional Agreement on Better Law-Making culminating in agreement on an annual ‘Joint Declaration’.

In the Commission administration, before work on any major initiative can start, validation from the executive is needed. Once an initiative is validated, a preliminary overview of objectives, options and impacts is provided in an ‘inception impact assessment’ that is put out for feedback. Then, an impact assessment is prepared. A positive opinion from the Regulatory Scrutiny Board on the impact assessment is required before proceeding to an inter-service consultation (i.e. mandatory consultation of all departments) and tabling the proposal for Commission adoption. If the Commission adopts measures without a supporting impact assessment, it needs to publicly

⁵⁷ 2016 Inter-institutional Agreement on Better Law Making; 13 April 2016; Official Journal of the EU L/123

⁵⁸ European Commission (2015), Communication *Better Regulation for Better Results* COM(2015) 215 final, 19 May 2015, Luxembourg, Publications Office of the EU.

⁵⁹ European Commission, Press Memo 01/278, 25 July 2001 ‘European Commission will fully implement activity-based management by 2004’.

explain why. If the initiative involves changes to the existing law, an evaluation is required ('evaluate first' principle). These requirements necessitate careful planning over a relatively long programming horizon.

Impact Assessment

Recognising that new initiatives should be based on solid evidence, examining non-legislative as well as legislative options and demonstrating EU value added, the Commission gives much emphasis and devotes considerable resources to impact assessment. The Commission's Working Methods specify that initiatives with significant economic, social or environmental impacts must be accompanied by an impact assessment.⁶⁰ Impact assessments should set out policy options and analyse their impacts. They are tailor-made for each initiative and, depending on the subject, may look in more depth at considerations such as territorial impacts, human rights, etc. Often, given the complexity of legislating in the EU, impact assessments use multi-criteria analysis. Cost/benefit analysis is only one element of Commission impact assessments. The economic analysis should take account of impacts on different groups (e.g. small and medium-sized enterprises) and competitiveness.

The methods for impact assessments were set out in guidelines published in 2005 and revised in 2009, 2015 and 2017.⁶¹ The guidelines assist policy officials (who would normally prepare a limited number of proposals in their career) with a step-by-step guide to preparing an assessment. In addition to procedural guidance, the guidelines cover basic building blocks for a good impact assessment: problem definition, setting objectives, identifying options, assessing subsidiarity and proportionality (EU value added), assessing impacts and outlining monitoring and evaluations provisions. They also give guidance on behavioural analysis, modelling and other analytical techniques.

Evaluation

While evaluation of funding programmes has been standard practice in the European Commission under its financial regulations since the 1980s and there have been successive attempts since 2000 to simplify legislation, a structured approach to evaluation of legislation as part of the regulatory policy framework is relatively recent. A Communication on Smart Regulation (2010) stated that the Commission "*will review the evaluation guidelines to ensure that evaluations establish whether legislation is delivering the intended benefits, and assess the costs entailed*".⁶² The Commission committed to an "evaluate first" principle, whereby "all significant proposals for new or revised

⁶⁰ European Commission (2017), Better Regulation Guidelines, SWD(2017)350 final, July 7, 2017, p. 15.

⁶¹ European Commission (2015) Communication on impact assessment (COM(2002) 276), including internal guidelines, 2002.; European Commission (2009), *Impact Assessment Guidelines* (SEC(2009) 45); European Commission, Communication *Better Regulation' for Better Results* COM(2015) 215 final, 19 May 2015. Luxembourg, Publications Office of the EU.

⁶² European Commission (2010), Communication *Smart Regulation in the European Union* (COM(2010) 543 8 October 2010), Luxembourg, Publications Office of the EU.

legislation are in principle based on an evaluation of what is already in place".⁶³ A more systematic approach to evaluation as a necessary contribution to the evidence base for further policy development and for reducing regulatory burdens started to take shape thereafter. It received impetus in the EU Regulatory Fitness (REFIT) Communication of December 2012,⁶⁴ which reiterated the Commission's intent to improve evaluation inter alia as a means to identify regulatory burdens and reduce costs. The 2015 'Better Regulation' package confirmed the requirement to 'evaluate first', obliged the Commission to carry out stakeholder consultation on evaluations, and subjected evaluation for the first time to the scrutiny of the Regulatory Scrutiny Board.

The 'Better Regulation' Guidelines specify that "*As a minimum, evaluations must assess effectiveness, efficiency, relevance, coherence and EU added value or explain why this is not done. Assessment of efficiency should always aim to quantify regulatory costs and benefits and identify burdensome or complex aspects of legislation and its implementation. All evaluations must assess all significant economic, social and environmental impacts of EU interventions (with particular emphasis on those identified in a previous IA) or explain why an exception has been made.*"⁶⁵ Commission departments are encouraged to plan evaluations over a five-year period so as to support the overall strategic planning process.

Burden Reduction

Because of concerns about cumulating regulatory burdens, the Commission raised the profile of measures to reduce regulatory burden by launching the Administrative Burden Reduction Programme in 2007. The programme focused only on administrative costs and was aimed at reducing them by 25% (33 billion EURO) by 2012.⁶⁶ It targeted 72 laws in 13 priority areas. This was estimated to represent 80% of the total administrative burden of EU law on companies. A baseline calculation was done, and the Standard Cost Model was used to measure the administrative costs of each law.⁶⁷ The Commission adopted the proposals embodying the 25% reduction by 2012. With this, the Commission considered that the target had been met.⁶⁸

⁶³ European Commission (2010), *Communication Smart Regulation in the European Union* (COM(2010) 543 8 October 2010), Luxembourg, Publications Office of the EU.

⁶⁴ European Commission (2012), *Communication on Regulatory Fitness* COM(2012) 746, 12 December 2012, Luxembourg, Publications Office of the EU

⁶⁵ European Commission (2017), *'Better Regulation' Guidelines*, Luxembourg, Publications Office of the EU, p. 50 <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines-evaluation-fitness-checks.pdf>,

⁶⁶ European Commission (2006) *Measuring Administrative Costs and Reducing Administrative Burdens in the European Union*; European Commission (2007), *Action Programme for Reducing Administrative Burdens in the European Union*, Luxembourg, Publications Office of the EU.

⁶⁷ The Standard Cost Model is Activity Cost = Price x Quantity = (tariff x time) x (population x frequency)

⁶⁸ European Commission (2012), *Action Programme for Reducing Administrative Burdens in the European Union*, Final Report, (2012 SWD 423 Final), Luxembourg, Publications Office of the EU

Despite repeated calls for a second reduction target, the Commission decided to first assess the results of the 25% reduction effort while taking a more targeted, qualitative approach. The EU Regulatory Fitness (REFIT) Communication of December 2012 outlined this approach. It involved screening the entire body of legislation for unnecessary burdens, gaps and inconsistencies. It committed to making "*the identification of unnecessary costs and areas for performance improvement an integral and permanent part of its policy-making and programming across all EU legislation*".⁶⁹ Laws were screened at the launch of the programme and then annually in the Commission Work Programme (planning) process. Given the need to tailor policy action to each specific situation, REFIT put an emphasis on ex-post evaluation of legislation or areas of legislation to establish the evidence for burden reduction. The aim was to examine whether benefits could be realised in a less costly and simpler manner. The programme did not specify which costs should be reduced. The responsible directorates-general were charged with managing their own body of legislation and deciding how the cost savings could be made. In its 2017 'Better Regulation' Communication, the Commission strengthened its commitment by indicating that all amendments to existing law would be accompanied by cost-saving measures.⁷⁰ The burden reduction achievements are recorded in a scoreboard, a summary of which is published annually.⁷¹ No attempt is made to add up either the monetised costs/benefits or cost savings.

As a separate exercise under REFIT, cumulative cost studies were performed, looking at costs and their legislative origins in the ceramics, glass and aluminium industries.⁷² The aim was to use this information in subsequent policy initiatives impacting on these sectors.

The complexity and volume of legislation is also reduced through a process termed codification in which all amendments to a law over the course of many years are incorporated into a single new act. A technique called recasting is also used. When a law is amended, all the previous amendments are incorporated in the new text. Finally, Commission proposals are sometimes withdrawn from the legislature before adoption and laws may be repealed. Concerning withdrawals, at the beginning of each five-year Commission term legislative proposals carried over from the previous legislature are reviewed and withdrawn as appropriate (i.e. no longer a priority of the new Commission; overtaken by the passage of time etc). The exercise of reviewing proposals facing limited progress in the legislature is conducted annually in the context of the preparation of the

⁶⁹European Commission (2012), *Communication on Regulatory Fitness* (COM(2012) 746), 12 December 2012, Luxembourg, Publications Office of the EU.

⁷⁰ European Commission (2017), *Communication Completing the Better Regulation Agenda: Better Solutions for Better Results* (COM(2017)651 final, 24 October 2017, p. 14.

⁷¹https://ec.europa.eu/info/sites/info/files/regulatory-fitness-and-performance-programme-refit-scoreboard-summary_en_4.pdf.

⁷² 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-costimp_en.pdf ; 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/>.

Commission Work Programme. Repeals of obsolete legislation are routine and also reviewed in the programming process.

Stakeholder Consultation

Stakeholder consultation is a legal obligation and has developed into a key instrument in the European Commission's regulatory policy toolbox. The obligation to consult widely comes directly from the Treaties (Article 11 TEU and Protocol 2 on the application of the principles of subsidiarity and proportionality).⁷³ Minimum standards for consultation were set out in 2002.⁷⁴ Stakeholder consultation was fully integrated in the 'Better Regulation' toolbox in the 2015 'Better Regulation' package.⁷⁵

Systematic consultation (public or targeted) and feedback opportunities are provided along the policy-making process. A twelve-week public consultation is mandatory when preparing impact assessments and evaluations. Inception impact assessments (roadmaps), delegated and implementing acts, and proposals adopted by the Commission are published for feedback. The Commission does not put drafts of impact assessments or draft proposals for legislation out for comment, on the basis that a Commission proposal merits discussion first in the Commission and only then in the broader public sphere. A Commission proposal is by its nature a draft since only the Council and the European Parliament as the co-legislators can adopt legislation (or grant a delegation for the Commission to do so, in which case the draft legislation is put out for feedback). The Commission facilitates comment on its proposals immediately after adoption. Any comments received within an eight-week period following adoption are made available to the co-legislators for their consideration during the legislative process.

Quality Support and Control

Quality support for the Commission departments in conducting their regulatory policy activities is provided by the Secretariat-General, a central coordinating service. It has a Directorate of some 70 officials dedicated to the strategic development of 'Better Regulation' policy and coordination of strategic planning, consultation, impact assessment, implementation and enforcement (the legal/infringement process), and evaluation.⁷⁶ It prepares and issues guidance on the use of regulatory policy tools: the Commission's 'Better Regulation' Guidelines help practitioners to

⁷³ *Treaty on European Union; Treaty on the Functioning of the European Union*, Protocol 2.

⁷⁴ European Commission (2002) *Minimum Standards of Consultation* COM (2002)0704, Luxembourg, Publications Office of the EU. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0704:FIN:EN:PDF>.

⁷⁵ European Commission (2015), *Communication Better Regulation for Better Results* COM(2015) 215 final, 19 May 2015, Luxembourg, Publications Office of the EU.

⁷⁶ To note that this pertains to the situation at the point of drafting this working paper, prior to the change in the organigramme of the Secretariat General in October 2018 which integrated Better Regulation experts into other Directorates of the Secretariat General.

apply the ‘Better Regulation’ tools at each step of the policy cycle – from the planning stage through to evaluation.⁷⁷

Quality control was introduced in 2006 by the decision to set up an independent body in the Commission, the Impact Assessment Board (IAB), to assess quality of impact assessments.⁷⁸ If quality standards were met, the assessment received a positive opinion. The latter was needed before the related proposal can be submitted for inter-departmental consultation and tabled for Commission adoption. The IAB was chaired by the Deputy Secretary-General and its members came from different Commission departments (initially the enterprise, environment and employment/social affairs departments) on a part-time basis. In the 2015 ‘Better Regulation’ package, the Juncker Commission decided to strengthen quality control by setting up the Regulatory Scrutiny Board (RSB) as an independent body composed of both Commission and external members, with a broader mandate. It was tasked with assessing the quality of impact assessments, evaluations and Fitness Checks, making sure that they complied with revised Guidelines. Like the IAB, the RSB works autonomously and reports to the Commission President. It helps to ensure that initiatives take all available evidence and stakeholder groups’ views into account before decisions are taken. The RSB is chaired by a full time Commission official appointed at Director-General level and is composed of three full-time internal Commission officials and three full-time external experts. It is supported by a unit (of about 12 officials) in the ‘Better Regulation’ Directorate of the Secretariat-General.

Impact assessments are also scrutinised by the European Parliament and the Council. The European Parliament has set up a Directorate covering impact assessment, evaluation and EU value added studies. The Council outsources any necessary analytical work to supplement the Commission’s efforts.

The Commission’s internal audit service and the European Court of Auditors examine how the regulatory policy system as such is functioning, having examined the impact assessment system in 2010 and the evaluation system more recently.⁷⁹ In investigating complaints, the European Ombudsman has also been active in assessing whether the European Commission is complying with the procedures and meeting the standards that it has set for itself.⁸⁰

Support for Implementation and Enforcement

Since the best prepared law will not deliver results if it is not implemented or enforced, the implementation performance of the Member States and the enforcement actions of the Commission

⁷⁷ European Commission (2017) *Better Regulation Guidelines and Toolbox*, Luxembourg, Publications Office of the EU

⁷⁸ European Commission (2006) Commission Decision on the Impact Assessment Board; SEC (2006)1457

⁷⁹ European Court of Auditors in 2010, Impact Assessments in the EU: do they support decision-making? Special Report 3/2010; *Ex-post review of EU legislation: a well-established system, but incomplete*. Special Report No. 16/2018 12 June 2018.

⁸⁰ European Ombudsman, Case 3617/2006 JF, 03 July 2008; European Ombudsman, Case 2131/2009 RT, 30 July 2010; European Ombudsman, Case 904/2014 OV, 22 September 2015

are integral ingredients of ‘Better Regulation’. The Member States are responsible for the implementation of EU legislation. The Commission, as guardian of the Treaties, is responsible for ensuring compliance with EU law. After a directive is adopted, Member States normally have two years to introduce the provisions into national law (this is referred to as transposition). If the Member State does not notify this transposition, if it is late in transposing, if the provisions are incorrectly transposed into the national law or if they are poorly applied, the Commission investigates and can launch a legal procedure (referred to as an infringement) which could ultimately end up with a European Court of Justice ruling. The Commission has prioritised its enforcement work and is working with Member States through a variety of means to help them ensure the correct transposition and application of EU legislation. This includes drawing up ‘implementation plans’ outlining actions that could be taken to facilitate better implementation and discussing implementation issues before launching formal legal proceedings.⁸¹ The Commission has encouraged the preparation by the Member States of explanatory documents, which show how EU legislation is taken over in the national legal order.⁸²

⁸¹ In 2007, the Commission launched a pilot project ‘EU Pilot’ to communicate with Member States informally before the launch of the formal legal process to see if there was an infringement of EU law and whether it could be solved without launching a legal procedure. This became a standard working method until January 2017 when the Commission decided to reverse its position and privilege the formal infringement route. See Commission Communication on the Application of EU Law COM(2017) 370 final, 6 July 2017.

⁸² See Inter-institutional Agreement on Better Law Making, April 13, 2016, L/123

IV. Is the system complete? Does it cover the most significant proposals?

4.1 The system

The European Commission system outlined above complies broadly with the OECD recommendation on Regulatory Policy and Governance, which sets out 12 recommendations for building and strengthening regulatory quality and reform, involving the establishment of: a whole of government policy for regulatory quality; open government, transparency and participation; oversight; regulatory impact assessment for new policy proposals; systematic programme and policy review; regular reporting on the functioning of the regulatory policy systems; consistent policy on the role and functions of regulatory agencies; systems for the review of the legality and procedural fairness of regulations and decisions; use of risk assessment, risk management and risk communication strategies, as appropriate; coordination mechanisms to promote regulatory coherence; sub-national regulatory management capacity and performance, as appropriate; and due consideration for international standards and frameworks for cooperation.⁸³

The European Commission system is complete. It is ranked highly by the OECD in its Regulatory Policy Outlook in the three dimensions analysed - stakeholder engagement, impact assessment and ex-post evaluation.⁸⁴ The European Court of Auditors has concluded that both the Commission's impact assessment and its ex-post review/evaluations systems are well established.⁸⁵

4.2 Outputs

Strategic planning means delivering a more focused work programme. There has been a reduction in numbers of initiatives in the Commission Work Programme from roughly 100 per year to 23 'packages'. Strategic planning by way of packages has facilitated more joined-up preparations which should result in enhanced synergies and fewer unforeseen negative cross-cutting impacts in future years. Since 2015, the number of legislative proposals going to the co-legislator (European Parliament and Council) under 'ordinary procedure' was 49 (2015), 108 (2016) and 74 (2017). This compares to the flow of legislative proposals over a similar period in the previous Commission term of 97(2010), 157(2011) and 87 (2012).⁸⁶

The numbers of impact assessments vary annually in relation to the point in the Commission term (i.e. fewer at the beginning and at the end of the five-year period of the Commission). From 2003-

⁸³ OECD (2012) *Regulatory Policy Recommendation of the Council on Regulatory Policy and Governance*, 2012, OECD Publishing Paris pp.4-5.

⁸⁴ OECD (2015), *Regulatory Policy Outlook*, A comprehensive review of regulatory policy systems of 35 OECD member countries including the 'EU'

⁸⁵ European Court of Auditors (2010), *Impact Assessments in the EU: do they support decision-making?* Special Report 3/2010; European Court of Auditors (2018) *Ex-post review of EU legislation: a well-established system, but incomplete*, Special Report No. 16/2018, 12 June 2018.

⁸⁶ EURLEX (<https://eur-lex.europa.eu/collection/eu-law/pre-acts.html>)

2017, 1028 impact assessments were conducted. In the early part of the period, there were 100 impact assessments per year. The numbers fell to 25, 29, 60 and 53 in each year from 2014 to 2017, reflecting the reduction in the numbers of initiatives with significant impacts proposed by the Commission.⁸⁷

The number of evaluations registered on the official websites reached 1385 in the period 2003-2017.⁸⁸ This figure includes studies supporting evaluations as well as evaluations of funding programmes. Roughly half of all evaluations are on funding programmes, with around 30% covering regulatory policy and the remainder examining communication activities and events. Since 2013, many so-called Fitness Checks have been launched assessing interlinkages between laws in specific areas.⁸⁹

The number of public consultations is roughly the same as the numbers of impact assessments and evaluations. The Commission reports that there were 814 consultations or roughly 100 open consultations annually from 2010-2017. Significantly more feedback opportunities are now available and are being tracked.⁹⁰

Figure 4 ‘Better Regulation’ Activity of the European Commission⁹¹

Impact assessments (2003-2017)	1028
Public consultations (2010-2017)	814
Evaluations (2003-2017)	1385

Source: European Commission Communications on Better Regulation and IAB/RSB Annual Reports

4.3 Is the system proportionate, covering the most significant proposals?

Is the system sufficiently focused or too broadly spread? Are the most significant proposals subject to the disciplines of ‘Better Regulation’?

Initiatives with ‘significant’ economic, environmental and social impacts are subject to impact assessment. The decision on what is significant is a qualitative judgement made by the responsible

⁸⁷ See IAB/RSB Annual Reports: https://ec.europa.eu/commission/priorities/democratic-change/better-regulation_en.

⁸⁸ Statistics for 2003-2016 are on the European Commission evaluation site (<http://ec.europa.eu/smart-regulation/evaluation/search/search.do>.) and from 2016 on the EU Bookshop site (<https://publications.europa.eu/en/web/general-publications/publications>.)

⁸⁹ European Commission, *Communication on Regulatory Fitness*, COM(2012)746, 12 December 2012, p. 4 Luxembourg, Publications Office of the EU

⁹⁰ European Commission (2017), *Communication Completing the ‘Better Regulation’ Agenda: Better Solutions for Better Results* (COM(2017)651 final) 24 October 2017; European Commission, *Overview of the Union’s Effort to Simplify and to Reduce Regulatory Burdens* (SWD(2017)675 final, 24 October 2017), Luxembourg, Publications Office of the EU.

⁹¹ Total numbers of impact assessments have been registered since the signing of the first Inter-Institutional Agreement on Better Law Making in 2003.

Commission department. This contrasts to other systems such as the American system which use quantitative thresholds (e.g. in the US case, regulations having impacts of greater than \$100,000).

The Commission does not publish statistics on numbers of proposals accompanied by impact assessment. However, it is possible to compare the number of impact assessments produced every year against the number of Commission proposals.

Figure 5 Impact Assessments/Commission Proposals⁹²											Total
	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	
Impact assessments	102	135	79	66	104	97	97	25	29	60	794
Proposals - Ordinary Procedure	101	116	56	97	157	87	120	68	49	108	959
Total COM Proposals - Ordinary and Special Procedures	242	267	158	181	288	180	237	122	75	149	1899
% of total proposals covered by IA	42%	50%	50%	36%	36%	54%	41%	21%	39%	42%	42%
% of ordinary procedures covered by IA	100%	86%	141%	68%	66%	111%	81%	37%	59%	58%	83%

Source: Impact Assessment Board and Regulatory Scrutiny Board Annual Reports, Eurlex (<https://eur-lex.europa.eu/collection/eu-law/pre-acts.html>)

Most proposals with significant impacts go through ordinary legislative procedure⁹³. 81% of proposals under this procedure are accompanied by impact assessments. This indicates that proposals with the most significant impacts are covered. However, there are exceptions - proposals developed in emergencies (e.g. those related to the migration crisis) or for which political orientations are already set (so there is hence little sense in developing options). Also, some areas of Commission action are not subject to regulatory policy disciplines. Examples include soft law/cooperation initiatives (primarily in the economic area – the European semester process) and competition case work (which follows a separate set of analytical rules). Many implementing and delegated acts (secondary legislation) are not considered to have significant impacts when taken individually and therefore do not undergo impact assessment (or evaluation).

The legislature has become increasingly attentive to the absence of impact assessments. In its mid-term report on legislative activity (2014-2016), the European Parliament noted the lack of impact assessment for proposals received from the Commission, prepared by the Directorate-General for Home Affairs. Out of 33 proposals from that Department, only 3 were accompanied by an impact assessment.⁹⁴ The Council noted that it had examined 75 proposals without impact assessment in

⁹² In some years the numbers of impact assessments exceeded 100% of ordinary proposals. This is because impact assessments prepared in a given year may relate to proposals made in the following year. Or, the figure could capture delegated or implementing acts. They are adopted by the Commission and hence do not fall under either ordinary or special legislative procedures.

⁹³ The decision-making procedure that involves the European Parliament and the Council and applies to most proposals. See above p. 10.

⁹⁴ European Parliament, Activity Report of the Ordinary Legislative Procedure, July 2014-December 2016, p. 15

the 2014-2017 period and noted that in at least two or three cases (e.g. European Deposit Insurance Scheme, trade in seal products), the Council did not proceed to examine the related proposals until an impact assessment had been conducted.⁹⁵

⁹⁵ See Council of the European Union, Annual Council Reports on Impact Assessment (8749/15; 9786/16; 9865/17)

V. How does the European Commission system compare to its American counterpart?

While both the European Commission and the American administration are committed to good regulatory policy and practice, as set out in OECD recommendations, there are differences.

Definitions and scope of coverage of the ‘regulatory policy’ system....

The American system covers regulation developed by executive agencies to implement primary legislation, defined as “.... a general statement issued by an agency, board, or commission that has the force and effect of law.Federal regulations specify the details and requirements necessary to implement and to enforce legislation enacted by Congress.”⁹⁶ The American regulatory impact assessment requirement applies only to the rules of the executive agencies. Regulatory impact assessment is not done for Congressional bills. While independent agencies may choose to conduct impact assessment, they are not obliged to do so under the American Administrative Procedures Act.⁹⁷

The European Commission regulatory policy system covers all types of legislative initiatives (primary and secondary legislation).⁹⁸ The Commission conducts impact assessment on its proposals for directives, regulations, implementing acts and delegated acts having significant impact. In the case of directives and regulations, impact assessment is used to develop a proposal before it is submitted to the decision-making process (i.e. the executive and the legislature). The impact assessment is done at an early stage to inform Commission decision-making and provide evidence for the debate in the legislature. The impact assessments done on implementing and delegated acts do not look at broad policy options but rather choices entailed in implementation of a given law. These acts and the impact assessment process related to them most closely resemble the American regulatory impact assessment process.

Accountability logic

The accountability logic between the two systems differs. As the US executive agencies can adopt regulations autonomously (i.e. without going back to Congress before adoption of regulations), the regulatory policy system was developed in part to hold them accountable. That logic did not motivate the development of the European regulatory policy system. Rather, the original driver was for the Commission to use regulatory policy tools in the pre-legislative stage to improve policy development. The Commission is then held accountable by the legislature - Council and the European Parliament - rather than through an administrative procedures law.

⁹⁶ Office of Information and Regulatory Affairs <https://www.reginfo.gov/public/jsp/Utilities/faq.jsp>.

⁹⁷ Administrative Procedure Act (APA), Pub.L. 79-404, 60 Stat. 237, enacted June 11, 1946

⁹⁸ Strictly defined, a European regulation is an EU legal instrument having direct application in the EU Member States. However, ‘Better Regulation’ or regulatory policy covers all legislative initiatives – directives and regulations as well as delegated and implementing acts.

The American Administrative Procedures Act which governs the process by which Federal agencies propose and establish new regulations serves to hold the executive accountable. The APA requires agencies to provide public notice and seek comment prior to enacting new regulations. The APA also lays out the process for the judicial review of rules in federal court.

In contrast to the Administrators of US executive agencies, Commissioners cannot take decisions on their own. All decisions are taken by the Commission (as a College of 27 Commissioners and the Commission President). Outside of delegated and implementing acts, all Commission proposals are submitted to the legislature for decision. The legislature holds the Commission, as a College, responsible. If Commission proposals are not sound, or, are judged to have been prepared without the requisite analysis, the co-legislators can either compensate by applying their own regulatory policy tools (i.e. conduct their own assessments) or simply not adopt Commission proposals.

The two systems are broadly comparable in accountability terms relative to the role of the legislature in calling back regulations. In the EU, the co-legislators can decide to delegate power to the Commission to adopt delegated and implementing acts. It holds the Commission responsible by way of exercising its right to withdraw its delegation to the Commission if it feels that the latter has gone beyond its mandate. In the US, the Congressional Review Act (CRA) (5 U.S.C. Chapter 8)⁹⁹, formally requires Federal agencies to submit all new final rules to both the House and the Senate. After submission, Congress may begin a process to reconsider and vote to overturn the rule.¹⁰⁰ If the House and Senate pass a resolution of disapproval and the President signs it (or if both houses override a presidential veto), the rule becomes void and cannot be republished by an agency in the same form without Congressional approval. Since 1996, when this process started, until the Trump administration, Congress had disapproved only one rule.¹⁰¹ However, it has been used recently by the Trump administration to repeal the rules adopted and those pending in the rule-making process under the Obama administration. Once withdrawn, they cannot be presented again with the same form and content.

Methods.....

Cost/benefit analysis is generally required in the regulatory analysis conducted by American executive agencies. Executive Order 12866 states that agencies in developing a regulation "*shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.*"¹⁰² The emphasis is on

⁹⁹ Subtitle E ("Congressional Review") of the Small Business Regulatory Enforcement Fairness Act of 1996, Title II of the Contract with America Advancement Act of 1996, P.L. 104-121, 101 Stat. 847 at 868-874, codified at Title 5 U.S.C. Sections 801-808. The congressional disapproval procedure is contained in Section 802.

¹⁰⁰ Office of Information and Regulatory Affairs <https://www.reginfo.gov/public/jsp/Utilities/faq.jsp>.

¹⁰¹ https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.

¹⁰² Executive Order 12866, Federal Register, Vol. 58, No. 190 (4 October 1993)

making sure that the benefits justify the costs and on cost effectiveness. The cost/benefit analysis are submitted for review of the Office of Information and Regulatory Affairs (OIRA).

The European Commission ‘Better Regulation’ Guidelines do not require cost/benefit analysis. All relevant impacts are to be assessed qualitatively and quantitatively. Various methods may be used.

¹⁰³

The timing of stakeholder consultation differs between the US and European Commission systems. While executive agencies may give ‘advance notice’ of their intent to issue a rule, the mandatory requirement under the APA is that a proposed rule be posted for comment at the final stages prior to adoption by the executive agency promulgating the rule. The Commission also allows comment along the decision-making chain. Stakeholders can provide comment on the inception impact assessment. Then, a 12-week public consultation is mandatory when preparing Commission impact assessments and evaluations. The Commission posts its proposals for legislation, together with the impact assessment, for comment for eight weeks following Commission adoption. Any comments received during that period are made available to the ‘co-legislator’ for their consideration during the legislative process. The Commission puts delegated and implementing draft acts out for comment.

Outputs ...

Statistics gathered by the Office of Management and Budget allow a comparison with the USA executive agencies 2006-2016.¹⁰⁴ In the period from 1 October 2006-30 September 2016, 36,255 rules were promulgated by US executive agencies; 2670 (7%) were reviewed by the Office of Information and Regulatory Affairs (OIRA); and 609 (1.7% of all rules and 22.8% of the number of rules reviewed) were considered major, requiring a regulatory impact assessment.¹⁰⁵ In roughly the same period (2006-2016), the Commission made 1899 proposals, 959 of which were sent to the co legislator under ordinary procedure (generally seen as the most significant in terms of impacts) and 794 impact assessments were conducted (42% of total proposals; 83% of all ordinary procedure files). The proportion of regulatory activity covered by impact assessment in the EU thus compares well to the American system.

These figures provide a basis for comparison, but, differences between the American and EU regulatory policy systems mean that the proportion of regulatory activity covered by impact assessment in both systems is likely overestimated. On the American side, neither congressional acts nor rules of the independent agencies are counted in the above figures. Their inclusion would increase total numbers of regulations and result in a lower proportion of regulations covered by impact assessment. On the Commission side, the totals do not include roughly 1500 implementing

¹⁰³ European Commission (2017) *Better Regulation Guidelines*, SWD(2017) 350 final, July 7, 2017, Luxembourg, Publications Office of the EU, p. 26

¹⁰⁴ US Office of Management and Budget, 2017 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act, 23 February 2018, .

¹⁰⁵ US Office of Management and Budget, 2017 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act, 23 February 2018, p.8.

and delegated acts which are adopted each year. They are normally not subject to impact assessment because they do not have significant impacts - many are of limited duration and scope and their impacts have been analysed in the basic law. The proportion of regulatory activity covered by impact assessment would be lower if delegated and implementing acts were included in the calculation.¹⁰⁶

Figure 6 Comparison of the proportion of impact assessments conducted (EU/USA)

Outputs (2006-2016)	US	EU
Proposals	36255	1899
Significant	2670	959
RIA/IA	609	796

Source: <https://eur-lex.europa.eu/collection/eu-law/pre-acts.html>; US Office of Management and Budget, 2017 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act, 23 February 2018.

Performance in quantification of costs and benefits shows that the American system, possibly because of the mandatory requirement to do cost/benefit analysis, has a somewhat better record in producing fully monetised assessments.¹⁰⁷ The Office of Budget and Management reported that in Fiscal Year 2016, 85 major rules were promulgated, of which 31 were transfer rules related to income or wealth transfers (as contrasted with regulatory rules). Of the 54 non-transfer rules, the agencies had quantified and monetised 16 (30%); partially quantified and monetised 32 (59%); quantified benefits for 1 (2%) and had done no quantification for 4(7%).¹⁰⁸ Figures provided by the Regulatory Scrutiny Board show that 70% of all Commission impact assessments identified costs and benefits. Full quantification of costs was done in around 25% of all impact assessments; full quantification of benefits was done in 20% of all impact assessments.¹⁰⁹

In the 2006-2016 period, the European Commission conducted 1108 evaluations, roughly 100 annually.¹¹⁰ Half of them are evaluations of funding programmes and about 30% are policy

¹⁰⁶ A further comparison can be made with Germany but not over the same time period. From November 1, 2013 to 30 June 2017, the German Government proposed 1489 legislative initiatives. 872 (59%) were considered to have negligible impacts on competition. 597 (41%) were considered to have impacts on competitiveness and were examined by the German National Regulatory Council (the national review body). .See *Normenkontrollrat*, Bureaucracy Reduction. ‘Better Regulation’. Digital Transformation. Leverage Successes – Address Shortcomings, 2017 Annual Report, p. 18

¹⁰⁷ See Cecot et al (2008) for a comparative look at EU and US performance on quantification in the early 2000s.

¹⁰⁸ USA Office of Management and Budget, 2017 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act, 23 February 2018, pp. 2-3.

¹⁰⁹ Regulatory Scrutiny Board, RSB Annual Report 2017. p. 24

¹¹⁰ See <http://ec.europa.eu/smart-regulation/evaluation/search/search.do>.

evaluations.¹¹¹ The US administration's regulatory policy dashboard shows that in the 1983-2016 period, the American executive agencies conducted 22 retrospective reviews.¹¹² This contrasts with a blog post from the former Director of the Office of Information and Regulatory Affairs, that puts the number of retrospective analyses from 2011-2016 at over 800.¹¹³

VI. Does the system work well? Is it effective?

6.1 How to assess effectiveness?

Regulatory policy should contribute to improved decision-making and policy/regulatory outcomes.¹¹⁴ From an economic perspective, regulation should produce net social benefit, and effective regulatory policy should ensure that calculations and assessments are being done to this end. Ideally net social benefit would be estimated ex-ante and measured ex-post.

But, as mentioned above, the European Commission system cost/benefit analysis is not mandatory. Given the different types of approaches (cost- benefit analysis, multicriteria analysis, etc.) that are applied, there is insufficient consistency to facilitate meaningful aggregation of either costs or benefits. Counterfactual analysis - looking at what the situation would have been without regulation (or without the application of regulatory policy instruments) - is not systematically done. Furthermore, there is no monitoring system or agreed set of indicators in place against which the European Commission's regulatory system has been measured.

So, in the absence of such metrics, the effectiveness of the system is measured in the following in terms of so-called 'behavioural compliance' (i.e. whether the outputs - impact assessments, evaluations, stakeholder consultation- meet the quality standards set for them).¹¹⁵ If they meet the quality standards, there is a greater likelihood that the resulting policies will be of good quality. In the European Commission case, the 'Better Regulation' Guidelines and Toolbox set the definition of 'Better Regulation' and the standards against which the European Commission's use of regulatory policy tools (impact assessment, evaluation and consultation) can be measured.¹¹⁶ The

¹¹¹ European Commission, Management Plans, https://ec.europa.eu/info/publications/management-plans-2017_en.

¹¹² <https://www.reginfo.gov/public/Forward?SearchTarget=RegReview&textfield=retrospective+review>.

¹¹³ <https://obamawhitehouse.archives.gov/blog/2016/08/31/retrospective-review-numbers-0>.

¹¹⁴ Coglianese, C. (*Measuring Regulatory Performance*, OECD Expert Paper 1, August 2012, p. 7) points out that "To measure regulatory progress in a meaningful and credible way, governments will need both indicators to measure relevant outcomes of concern and research designs to support inferences about the extent to which a regulation or regulatory policy under evaluation has actually caused any change in the measured outcomes.."

¹¹⁵ This approach is taken in Hahn and Tetlock (2008), where the quality of the economic analysis in the US regulatory impact assessments is compared against basic standards of economic research (and found wanting in the assessment of the authors).

¹¹⁶ European Commission (2017), 'Better Regulation' Guidelines, p. 4 " 'Better Regulation' means designing EU policies and laws so that they achieve their objectives at minimum cost....It is a way of working to ensure that political decisions are prepared in an open, transparent manner, informed by the best available evidence and backed by the comprehensive involvement of stakeholders "

extent to which the standards are met is reflected in the opinions of the independent scrutiny bodies (the Regulatory Scrutiny Board and its predecessor, the Impact Assessment Board)¹¹⁷ as well as in other scrutiny instances. The overall quality of the ‘Better Regulation’ analytical efforts as judged by various scrutiny bodies is hence taken as one indicator of effectiveness.

The ease and speed of decision-making in the legislative process reflects, in part, the quality of the proposal and its analytical underpinnings. The legal case load reflects in part how well implementation has been taken into consideration in the preparatory processes. These indicators provide some insight into how ‘Better Regulation’ has shaped proposals and has affected policy decision-making. In the case of regulatory burden reduction programmes, legislative volume and cost reduction figures are taken as indicators of effectiveness.

6.2 The ‘quality’ of the ‘Better Regulation’ products - the views of ‘scrutiny bodies’

The opinions of various quality control bodies provide some indication of the quality of the impact assessment and increasingly of the evaluation and consultation work of the Commission. Commission analytical work is scrutinised by the Regulatory Scrutiny Board prior to adoption of the Commission proposal. It is thereafter examined by the preparatory bodies of the co-legislator: by the European Parliament administration in support of the work of parliamentary committees, and by the Council Secretariat in support of the work of the Council working parties. The European Court of Auditors and the Commission’s internal audit also engage in scrutiny of the regulatory policy system. Recently ‘RegWatch Europe’ (a group of regulatory scrutiny bodies in some of the Member States - Germany, UK, Netherlands, Czech Republic, Sweden) joined the quality control discussion by publishing their views on the quality of Commission impact assessment.¹¹⁸ In investigating complaints, the European Ombudsman has also examined whether the Commission is respecting its own procedural requirements. Academic work also provides insights into the quality of impact assessment and evaluation.

The Regulatory Scrutiny Board (and its predecessor, the Impact Assessment Board)

The Regulatory Scrutiny Board (and its predecessor, the Impact Assessment Board) systematically examine all impact assessments and, since 2015, a selection of evaluations to assess whether they comply with the ‘Better Regulation’ Guidelines and are of sufficient quality to underpin Commission policy proposals. Commission departments need a positive opinion from the RSB before they can launch the inter-service consultation required prior to tabling proposals for consideration by the Commission.

The activities of the Regulatory Scrutiny Board and its predecessor are shown below.¹¹⁹

Figure 7 Impact Assessment Board/Regulatory Scrutiny Board activities		
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¹¹⁷ See register of impact assessments and related opinions of the Regulatory Scrutiny Board at <http://ec.europa.eu/transparency/regdoc/?fuseaction=ia>

¹¹⁸ Report of RegWatchEurope, *Findings on the Commission’s Impact Assessments from the Perspective of Independent Scrutiny Bodies*, November 2016

¹¹⁹ See RSB Annual Report 2016 and 2017; Impact Assessment Board Annual Reports 2007-2015

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Total impact assessments examined	102	135	79	66	104	97	97	25	29	60	53
Resubmission rate	9%	33%	37 %	42 %	36 %	47%	41%	40%	48%	42%	41%
Total Evaluations Examined										7	17
Resubmission rate											41%

Source: RSB Annual Report 2016 and 2017

The RSB (and its predecessor) have registered a resubmission rate averaging around 40% for the past ten years. These are cases where the RSB has found the analysis lacking in certain aspects. The department concerned has to remedy the deficiency and resubmit the assessment before going to the Commission with the related proposal. In most instances the assessments are improved in line with the RSB comments. The RSB estimates that only around 4% of impact assessments failed to take comments of the Board into account when submitting final impact assessments with the related proposal to the Commission. For comparison purposes, the Regulatory Scrutiny Board requests resubmission in relatively more cases than the UK's scrutiny body, the Regulatory Policy Committee. The latter found that 69% and 68% of the impact analyses submitted to them were 'fit for purpose' in 2016-17 and 2015-16 respectively.¹²⁰

Review of the opinions of the Regulatory Scrutiny Board/Impact Assessment Board over a decade point to some recurring 'quality' issues in impact assessments. Despite years of application, there is still a tendency to prepare a justification for a predetermined preferred option. The impact assessments have not always been convincing in their explanation of the problem and the necessity for an EU-level solution. They tend to aggregate and do not demonstrate sufficient understanding of local circumstances. Monitoring and evaluation frameworks are missing or poor in many cases.

The RSB started scrutiny of evaluations in 2016. They have looked at a limited number of evaluations and identified significant room for improvement: in setting out the intervention logic and questions; in quantifying and using counterfactual evidence; in gathering needed data; and in drawing conclusions based on the evidence.¹²¹

A criticism of both impact assessment and evaluation relates to quantification. The RSB reports that data (particularly on SMEs) is often missing and this affects quantification. The Board reported in 2016 that 50% of impact assessments quantified costs with 40% quantifying benefits (2016). Of all REFIT evaluations, 80% quantified costs while 70% quantified benefits. The positive trend continued in 2017, with increases in assessments with at least partial quantification. Comparing this performance on quantification of both costs and benefits as reported by the

¹²⁰ UK Regulatory Policy Committee, Corporate Report, 2016-2017, July 2017, p. 14

¹²¹ Regulatory Scrutiny Board (2017), 2017 Annual Report, March 2018, p. 27-29..

Regulatory Scrutiny Board with early performance as noted by Renda in his 2006 analysis (13% for both costs and benefits), there has been an improvement over the years.¹²²

Progress is also being made in applying the ‘evaluate first’ principle. The Regulatory Scrutiny Board reported that 75% of impact assessments for amendments of legislation were backed up by evaluation in 2017, up from 50% in 2016.

The RSB has also been looking at stakeholder consultation practices, reporting in 2016 that it did not consider that stakeholder consultation inputs were always being effectively used as input to impact assessments and evaluations. The RSB stressed the need to better report on the differences between stakeholder positions and to avoid treating stakeholder consultations as representative surveys. In its 2017 Report, the Regulatory Scrutiny Board noted improvements. In 2017, 92% of the impact assessments were supported by an open public consultation, up from 80% in 2016 and 38% in 2015; 89% mentioned additional targeted consultation; 92% reported on consultation findings, compared with less than 50% in earlier years. The RSB identified quality issues in these reports – that they sometimes described stakeholder inputs selectively or too positively. Some stakeholder groups were aggregated in ways that hid significant differences in perspectives between the various groups of respondents.

The Legislature - European Parliament

The European Parliament has set up a directorate for regulatory assessment, including systematic quality control of Commission work. It looks at the quality of each impact assessment accompanying a Commission legislative proposal against a set of quality criteria.¹²³ In a recent report, the Parliament’s Ex-Ante Impact Assessment Unit judged that the Commission impact assessments examined (181) between July 2012 and December 2017 improved qualitatively over the period although not across the board (i.e. given *inter alia* continuing differences between Commission directorates-general (DGs)). Largely echoing the comments in the opinions of the RSB (IAB), the European Parliament’s reports identified weakness such as “....*poor problem definition; limited choice of viable options and bias towards the preferred option; insufficient information about the situation/experiences at Member State level and inadequate assessment of the likely impacts of the initiative on individual Member States; lack of cost/benefit analysis; lack of quantification; insufficient data; tendency for economic analysis to dominate the consideration of social and environmental impacts; and weak presentation of stakeholders' views on the various*

¹²² Renda, A. (2006), *Impact Assessment in the EU: the State of the Art and the Art of the State*, CEPS Monograph. 2006

¹²³ European Parliament (2016) *European Parliament work in the fields of Impact Assessment and European Added Value Activity Report* for July 2014-December 2015, p. 13

options”.¹²⁴ The most recent report¹²⁵ points to the same issues but indicates that some progress has been made on defining the problem and linking problems-drivers-objectives.

The Legislature – the Council

In 2013, the Council Secretariat developed a checklist for reviewing Commission impact assessments and monitors their use by the Council working parties.¹²⁶ Starting in 2014, the Council Secretariat has prepared an Annual Report on Impact Assessment within the Council. The Report of 2 June 2017 indicates that the Council examined 32 impact assessments in the period June 2016 to May 2017 and points to concerns such as “...*lack of specific data or evidence that would better support the proposed policy options and/or the legal basis of a proposal; outdated data; performance indicators, methodologies, modelling, scenarios and criteria used in the IA; a narrow scope of analysis of the data set out in the IA; inconsistent links between calculations and policy choices, insufficient coverage of certain impacts, such as on competitiveness, insufficient differentiation of impacts at Member State level and insufficient consideration of different options for EU action*”.¹²⁷ The 2016 Report (June 2015-May 2016) raised similar concerns.¹²⁸

The Auditors – the European Court of Auditors and the Commission’s Internal Audit

The Commission ‘Better Regulation’ system has been examined both by the internal Commission auditors and the European Court of Auditors. The latter conducted a thorough review of the Commission’s impact assessment system 2008-2010.¹²⁹ It concluded that the impact assessment system was comprehensive and effective in supporting decision-making in the EU institutions; impact assessments were helpful in discussions in the European Parliament and Council; 85% of the regulatory policy experts surveyed agreed that the impact assessment system was leading to ‘Better Regulation’; impact assessment had been successfully integrated in the Commission’s policy development cycle and has helped to improve the design of Commission proposals; and the

¹²⁴ European Parliament (2016), *European Parliament work in the fields of Impact Assessment and European Added Value Activity Report* for July 2014-December 2015, p. 14-15

¹²⁵ European Parliament (2018), *European Parliament work in the fields of Impact Assessment and European Added Value Activity Report for 2017*, May 2018 PE615.642 pp. 19-20.

¹²⁶ See Council of the European Union - *Impact Assessment, Indicative Guidance for Working Party Chairs* 16024/2016; Report 2013; *Impact Assessment with the Council* – 2012 16569/12, 2013 8406/13, 2014 10882/14, 2015 Annual Report 8749/15, 2016 Annual Report 9786/16, 2017 Annual Report 9865/1/17

¹²⁷ See Council of the European Union (2017), Annual Report on Impact Assessment in the Council ST 9865/1/17, p. 6

¹²⁸ See Council of the European Union (2016) - Annual Report on Impact Assessment in the Council ST 9786/16, p. 6.

¹²⁹ European Court of Auditors (2010), *Impact Assessments in the EU: do they support decision-making?* Special Report 3/2010

system could be considered best practice in terms of transparency and comprehensiveness, with integrated analysis of economic, environmental and social impacts.

The European Court of Auditors recently released a special report on the ex-post review of EU legislation.¹³⁰ They assessed whether the European Commission system of ex-post review had been properly planned, implemented, managed and quality controlled. They concluded positively that the system compares well to equivalent systems in the Member States. They identified some weaknesses such as differing definition of terms between the European institutions and the lack of clarity about certain types of reviews (for example, the distinction between initiatives under the Regulatory Fitness Programme and other evaluation/review initiatives).

The Commission's internal audit department conducted a review of the 'Better Regulation' system in 2016. It assessed the state of play of the 2015 'Better Regulation' Communication approximately one year after its adoption to see what progress had been made and to indicate areas for possible improvement/corrective action. It concluded that the Commission had taken significant steps to implement the 2015 initiatives but that efforts were needed at corporate level to bring the full agenda to a mature state.¹³¹ The audit indicated that at corporate level there was continuous improvement of the process and comprehensive guidelines, providing clear advice to the Directorates General. The audit recognised that the 'Better Regulation' tools are embedded in policy preparation processes and generally accepted. The auditors were critical however about the lack of a monitoring framework and identified low participation in stakeholder consultation as another key issue. They also pointed to the need to continue to foster a 'Better Regulation' culture' and to communicate more clearly on the internal workflows for policy development.

Member State Regulatory Watchdogs

In 2016, the Regulatory Scrutiny bodies in some of the Member States, grouped together under the title 'RegWatch Europe', started to assess the quality of Commission impact assessments. Although each examined a different set of assessments and used different methods to select them, the group agreed on a common set of concerns and recommendations.¹³² Many of the concerns related to methodology. They called on the Commission to more clearly differentiate between direct and indirect costs; to separate recurring costs from one-off costs; to be more transparent about the assumptions underlying the cost calculations; and to grant more attention to competitiveness impacts. They all agreed that quantification and analysis of effects at Member State level needed to be improved.

¹³⁰ European Court of Auditors (2018) *Ex-post review of EU legislation: a well-established system, but incomplete*, Special Report No. 16/2018, 12 June 2018.

¹³¹ See European Commission (2017) Annual Report to the Discharge Authority on Internal Audits carried out in 2016, COM(2017) 497, 15 September 2017, p.11.

¹³² RegWatchEurope (2016), Findings on the Commission's Impact Assessments from the Perspective of Independent Scrutiny Bodies, November 2016

The European Ombudsman

As described in the roaming charges case study in annex, the European Ombudsman received complaints alleging maladministration in the preparation and adoption of the EU Roaming Regulation which relate to the Commission's compliance with its own 'Better Regulation' rules, practices and procedures. The Ombudsman found maladministration in relation to shortening or not conducting public consultation (i.e. failing to respect its own consultation standards).¹³³

Academic Assessment

The academic community has followed and critically analysed the development of the regulatory policy system in the European Commission. There was a spurt of activity following the launch of impact assessment in the Commission in 2002 which was critical of the quality of Commission impact assessments.¹³⁴ This was followed in 2010 with a more positive assessment of the system's functioning from 2005 to 2010, which concluded that quality had improved steadily, in part due to learning and quality control/scrutiny.¹³⁵ Prominent regulatory policy academics responded to the 2015 'Better Regulation' Package, pointing to a perceived lack of ambition, possible methodological inconsistencies, the institutional implications of suggested changes and the difficulty in showing whether 'Better Regulation' can generate better results.¹³⁶ This collection of articles did not attempt to assess the system as such.

Until recently, academic attention has focused on the effectiveness of the impact assessment system, with less attention being given to evaluation. That said, a recent article looks at the quality of European Commission ex-post evaluations from 2002-2012.¹³⁷ The authors found that only about 33% of significant legislation had been evaluated ex-post and that evaluation was often conducted simply to meet legal or procedural requirements. The study concluded that quality was patchy and that there was a lack of consistency in methodology, poor involvement of stakeholders, and issues of accessibility.

6.3 'Better Regulation' – facilitating legislative discussions? Improving implementation?

While there are many factors that influence the adoption of laws by the European Parliament and the Council (the co-legislators), if legislative proposals are well prepared through the application

¹³³ European Ombudsman, Case 3617/2006 JF, 03.07.2008; European Ombudsman, Case 2131/2009 RT, 30.07.2010; European Ombudsman, Case 904/2014 OV, 22.09.2015

¹³⁴ For an overview of the early academic work, see Cecot, C. et al (2008), An evaluation of the quality of impact assessment in the EU with lessons for the EU and the USA.

¹³⁵ Fritsch, O., C. Radaelli, L. Schrefler and A. Renda, Regulatory Quality in the European Commission and the UK: Old questions and new Findings, *CEPS Working Document 362*, January 2012

¹³⁶ Alemanno, A.(ed.), Special Issue on the 'Better Regulation' Package, *European Journal of Risk Regulation*, Vol. 6, No. 3, 2015.

¹³⁷ Masterbroek, E., van Voorst, S., Meuwese A.(2016), Closing the Regulatory Policy Cycle? A meta-evaluation of ex-post legislative evaluations by the European Commission, *Journal of European Public Policy* 2016 Vol. 23 No. 9

of ‘Better Regulation’ disciplines, it is more likely that they will be agreed in first reading.¹³⁸ The following table shows that in this legislative session (2014-2019) all Commission proposals to end October 2017, have been agreed at first reading. The figures for the previous legislative periods indicate that there has been a significant increase since the turn of the century.

Figure 8 Ordinary Legislative Procedure (2014 –2017)

	3 rd Reading	2 nd Reading	1 st Reading
2014	0	0	4
2015	0	17	58
2016	0	21	55
2017	0	6	82
Total	0	44	199

Figure 9 Ordinary Legislative Procedure (percentage in each reading category)

	3 rd Reading	2 nd Reading	1 st Reading
1999-2004	22%	49%	29%
2004-2009	5%	23%	72%
2009-2014	1%	11%	88%
2014-2017	0%	18%	81%

Source: European Parliament, Legislative Observatory

Likewise, if the preparatory analysis for legislation is of good quality, it should include a good assessment of potential implementation challenges in the Member States. With this information in hand, the related legislative proposal should be drafted so as to reduce the risk of implementation problems which would give rise to Commission enforcement measures. If there are fewer implementation problems, there should be fewer instances in which the Commission needs to launch a legal case against a Member State for late or incorrect transposition or bad application of EU law (i.e. infringements). While there are obviously many factors which influence this case load, it is insightful to look at the evolution over time.

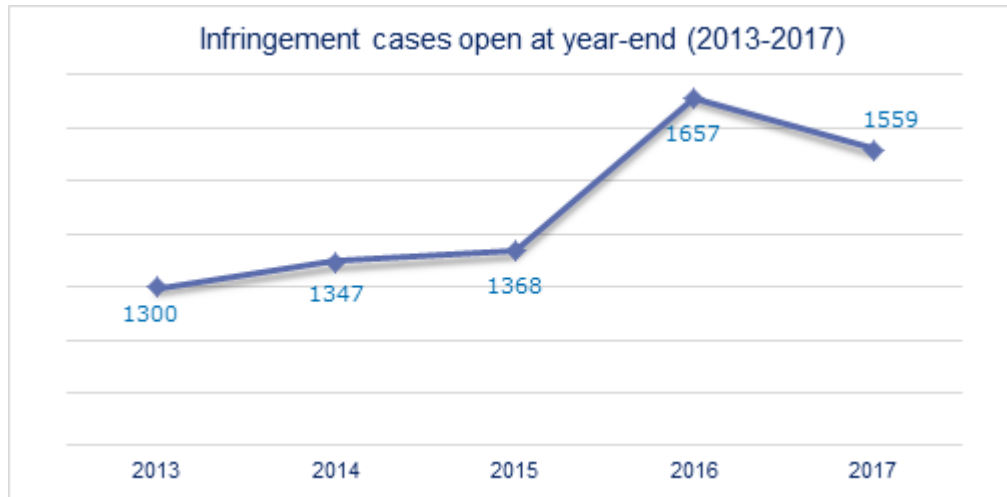
There were 2100 infringement cases open in 2010. This declined steadily to 1775 in 2011 and remained relatively stable thereafter (1343 in 2012, 1300 in 2013, 1347 in 2014 and 1368 in 2015).¹³⁹ In the last two years it has increased to 1657 (2016) and 1559 (2017). The overall decrease in legal cases could reflect the increased focus on implementation and enforcement in the ‘Better Regulation’ effort, namely the increased attention paid to implementation at the stage of impact assessment, the recommendation to work on implementation plans at an early stage of policy development, and the request to Member States for many years (eventually brought into the

¹³⁸ The European Parliament and the Council adopt legislation jointly. They have the possibility to agree on a legal text and conclude the procedure at the stage of first, second or third readings.

¹³⁹ European Commission, Annual Reports on the Application of EU Law, 2010 to 2016 at https://ec.europa.eu/info/publications/annual-reports-monitoring-application-eu-law_en.

2016 inter-institutional agreement) to be transparent as to how EU laws are transposed into the national legal order. It could also be related to the reduced volume of legislation under the Juncker Commission. These trends pointing to a possible link between ‘Better Regulation’ and a reduction in the case load would need further examination before any firm conclusions can be drawn about a causal relationship.

Figure 10



Source: European Commission, http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en

6.4 Has 'Better Regulation' reduced costs and unnecessary regulatory burdens?

Reducing burden by reducing the regulatory flow.....

The Juncker Commission took a commitment to reduce costs and burdens by better strategic planning, reducing the flow of new laws, withdrawing proposals and repealing existing laws. The Commission Work Programme was limited to 23 major initiatives or packages in 2016 and 2017, and to 26 in the Commission Work Programme for 2018. The total legislative output since 2006 is shown in the table and charts below.

The results show that there is a downward trend in the volume of Commission legislative proposals for directives and regulations (in both ordinary and special legislative procedures¹⁴⁰). Given that legislative activity increases towards the middle of a Commission mandate, it is necessary to compare similar years (2010 to 2015; 2011 to 2015; 2012 to 2016; etc). This shows that there has been a reduction in legislative output under the Juncker Commission. However, in the same period (2010 – 2017) the volume of delegated and implementing acts increased significantly, averaging 68 delegated acts and 520 implementing acts annually.¹⁴¹

There has been some success in reducing the volume of legislation through withdrawal (i.e. the Commission taking back a proposal before it is adopted by the legislature) and repeal (i.e. the Commission proposing to repeal a law) as shown in the table below. Withdrawals tend to be proposals that stand no chance of being adopted or have been overtaken by events or other legislative proposals. Withdrawals are used mainly at the start of a Commission term when the new executive decides on whether it wants to continue to defend proposals made by the previous Commission which are still with the legislature. The high numbers of withdrawals in 2014 and 2015 (see table below) reflect this tendency. However, many withdrawals are eventually replaced by proposals for similar legislation. Examples are the proposal for maternity leave directive, a school fruits scheme and legislation on waste (plastic bags), which formed part of the first withdrawal package in 2015 but were replaced by new initiatives covering the same issues.

It has proven difficult to repeal laws. Most of the repealed laws are obsolete and usually cover implementation periods, deadlines or topical issues. Repeal has thus been more of a housekeeping exercise rather than full scale simplification. As shown below, the number of repeals in any given year is usually quite high, with most falling under the special legislative procedure, suggesting that they were competition or agricultural decisions that had a fixed period of validity. There are fewer substantial repeals due to the nature of the repeal process and the potential for stakeholder resistance. Concerning the process, if the Commission wants to repeal an act, it needs to make a proposal to the co-legislator. It is not guaranteed that a repeal will be adopted and if it is a directive, the Member States would need to revise their national legal act to reflect the repeal. This is not a quick process. Repeals also risk stakeholder resistance. To date, the political complications of repeals have generally outweighed the gains in terms of simplified, up to date rules.

¹⁴⁰ See Section 2 for a description of the ordinary and special legislative procedures

¹⁴¹ <https://eur-lex.europa.eu/statistics/2014/legislative-acts-statistics.html>

An attempt to repeal an outdated rule on mirror requirements for lorries illustrates these difficulties. Safety concerns about blind spots of lorries led to the adoption of ‘type approval’ legislation in 2003 which required lorries to be equipped with side-mirrors that allowed the driver to see an enlarged area around the lorry cabin and hence objects close to the driver's position.¹⁴² The regulation, adopted in 2003, meant that by January 2007 all new lorries would have to be so equipped. To cover lorries registered between 2000 and 2007, legislation was adopted to require that lorries be retrofitted to meet the same safety concerns.¹⁴³ The Commission’s attempt to repeal the retrofitting legislation in 2013 under the REFIT programme given that it was no longer needed drew strong opposition from the cyclist and road safety associations.¹⁴⁴ They were concerned about vehicles registered prior to 2000 and the accuracy of reports showing the full implementation of the retrofitting directive. They argued that there were significant risks in repealing the directive. In the end, in light of these concerns, the Commission did not propose a repeal, although there was little evidence that the law was still needed.

Certain Member States (e.g. the Netherlands, Finland)¹⁴⁵ have launched domestic exercises to identify laws or areas of EU law that could be repatriated to the national level. Their suggestions for repeal have been rather modest. This is not surprising since all Member States had participated in the legislative process through the Council and few want to reopen what were often contentious legislative discussions with difficult compromises reached.

To sum up, there has been a reduction in the flow of new Commission proposals in ordinary legislative procedure and in the numbers of adopted acts. Fewer laws imply a reduced regulatory ‘load’ but further refinement in the analysis would be needed to measure if and how the slowing of the pace and volume of legislation has had the impact of cost reduction or saving. It is interesting to note that in the 2017 Eurobarometer survey of EU business, more than half of the companies interviewed indicated that regulatory costs stemming from compliance with EU legislation, and from obligations to provide information, stayed the same in the last financial year.¹⁴⁶ Few businesses thought that costs were decreasing.

¹⁴² European Union, Directive 2003/97/EC

¹⁴³ European Union, Directive 2007/38/EC

¹⁴⁴ See letters to Commissioner Kallas and Commissioner Bulc from a group of traffic safety and cyclist NGOs (European Cyclists Federation, the European Transport and Safety Council, European Federation of Road Accident Victims, Road Peace, Transport & Environment, Institute of Civil Engineers Cycling Working Group)

¹⁴⁵ Netherlands Government Subsidiarity Report *Europe Where Necessary, national where possible*, 21 June 2013; Finnish Government *Stakeholder Survey on EU Legislation*, Cabinet Office, Prime Minister’s Office, December 2015

¹⁴⁶ Eurobarometer Special Report, Flash Eurobarometer 451, Business Perceptions of Regulation, March 2017.

Figure 11 EU Legislative Activity – Proposals, Withdrawals, Adopted Acts and Repeals

	Legislative proposals by the Commission for			Withdrawn legislative proposals by the Commission for	Proposals minus withdrawals	Adopted legislative acts			Repeals and expiry of legislative acts			Adoptions minus repeals
	Ordinary legislative procedure	Special legislative procedure	TOTAL	Regulations and Directives		OLP (COD)	Special legislative procedure	TOTAL	OLP (COD)	Special legislative procedure	TOTAL	
	EP and Council Regulations and Directives	Council Regulations and Directives				EP and Council Regulations and Directives	Council Regulations and Directives		EP and Council Regulations and Directives	Council Regulations and Directives		
1999	78	195	273	1	272	26	195	221	2	335	337	-116
2000	117	223	340	23	317	50	186	236	7	150	157	79
2001	118	166	284	67	217	55	156	211	2	204	206	5
2002	109	184	293	10	283	63	154	217	8	191	199	18
2003	128	187	315	1	314	78	177	255	9	118	127	128
2004	78	192	270	3	267	75	196	271	7	134	141	130
2005	79	148	227	62	165	45	128	173	3	241	244	-71
2006	117	192	309	34	275	83	189	272	27	227	254	18
2007	101	141	242	6	236	40	133	173	7	168	175	-2
2008	116	151	267	18	249	101	154	255	11	280	291	-36
2009	56	102	158	13	145	138	117	255	50	311	361	-106
2010	97	84	181	30	151	48	54	102	35	150	185	-83
2011	157	131	288	16	272	71	59	130	17	159	176	-46
2012	87	93	180	11	169	63	56	119	18	64	87	32
2013	120	117	237	6	231	102	83	185	82	148	230	-45
2014	68	54	122	46	76	135	70	205	32	79	111	94
2015	49	26	75	53	22	57	52	109	59	141	200	-91
2016	108	41	149	4	145	69	49	118	46	112	158	-40

Source: EURLEX (<https://eur-lex.europa.eu/statistics/legal-acts/> and <https://eur-lex.europa.eu/collection/eu-law/pre-acts.html>.)

Reducing burdens by setting targets.....

As described above, the EU set a 25% target for administrative burden reduction in the 2005-2010 period. By 2013 the Commission had met and surpassed the target by making legislative proposals measured to generate a 25% reduction. The savings were derived from modification of 42 directives in 13 priority areas. The total reduction was calculated at EUR 123.8 billion (or 27%).¹⁴⁷

Before proceeding with a further target, the Commission decided to assess the results of the Administrative Burden Reduction (ABR) programme in an exercise entitled ABR+. Twelve out of the forty-two measures were examined to see how they were being implemented/applied at national level and the extent to which burden reduction had been realised. The other measures in the ABR programme were not examined because they were either still being discussed by the legislature or at such early stages of implementation in the Member States that it was not possible to draw any conclusions about actual reduction in costs, or were no longer relevant as they had been overtaken by other legislative amendments.

Very few Member States could provide data on the administrative burden reduction/cost savings resulting from ABR measures. Given the lack of data, the exercise was reduced to an analysis of the results in five Member States per measure. The assessment did not produce firm conclusions on the results and impacts of the overall programme.

*“The ABR Plus exercise was heavily reliant on evidence and data from Member States as to experience on the ground. There was an expectation that these Member States would be able to evidence the approach they had taken to implementing these measures and the impacts they were having on the businesses to which they apply. In reality, the completeness and robustness of the evidence provided by individual Member States varied significantly across the ABR measures and the Member States themselves....Overall, the evidence gathered and analysed throughout the course of this study suggests that the outcome of the ABR Action Programme in relation to the 12 specific ABR measures has generally been positive, although the robustness of the conclusions is compromised by the lack of available evidence and data on the impacts of these measures on the ground....”.*¹⁴⁸

The effort was weakened by the lack of a monitoring and assessment framework in the original programme. Hence the ABR+ assessment could not conclude definitively on whether the ABR measures had reduced burden on business.¹⁴⁹

¹⁴⁷ European Commission (2012), Action Programme for Reducing Administrative Burdens in the European Union, Final Report, (2012 SWD 423 Final), Luxembourg, Publications Office of the EU.

¹⁴⁸ ABR Plus Study, Final Report, ICF, 18 March 2015, P. 13-15.

¹⁴⁹ The only other assessment related to the ABR programme was a regression analysis conducted by a team of academics in 2014, which estimated the impact of the 25% reduction on economic growth. They estimated that the reduction could have a positive effect on growth of 1.62 % in the European Union. See Poel, K., Marneffe, W., Bielen, S., Van Arle, B., Vereeck, L. Administrative Simplification and Economic Growth, *Journal of Business Administration*, Vol. 3, No 1, 2014, p. 45.

One conclusion drawn by the European Commission and other Member States conducting the 25% administrative burden reduction exercise is that, while important, administrative costs are a small sub-set of total costs (including compliance, one-off investment costs, payroll, taxes, etc.). This raises the question as to the usefulness of focusing regulatory policy efforts on the measurement and reduction of a small sub-set of costs (or whether it is useful at all to look at costs in isolation without measuring benefits).

Reducing burdens through tailor-made reduction initiatives – the Regulatory Fitness and Performance Programme....

Rather than launch another target setting and reduction programme, the Commission opted for an approach, termed the Regulatory Fitness and Performance Programme, in December 2012. The programme uses evaluation or fitness checks (evaluation of sectors of legislation) to identify where unnecessary costs can be reduced, and legislation simplified without impairing the achievement of policy goals.

In 2013 and 2014, a screening of all legislation by the Commission Directorates General was conducted. By September 2017, over 150 REFIT initiatives had been launched. In the first years of the programme, the screening and evaluation results identified REFIT initiatives which were listed separately and profiled in the Commission Work Programme. In 2016, the Commission decided that any Commission proposal involving amendment of legislation should show that the potential for simplification and for cost reduction/savings has been examined.¹⁵⁰ The REFIT programme was essentially merged into the Commission standard strategic planning exercise.

The Commission does not add up cost reductions or savings. The calculations for each initiative are shown in a report, entitled the REFIT scoreboard.¹⁵¹ Examples include waste where targets for waste prevention and recycling could bring savings of 1.3 billion per year; VAT, where a proposal to extend a One-Stop-Shop to online sales and allow a business to declare VAT in the Member State where it is established is expected to reduce compliance costs for businesses by €2.3 billion a year; derivative rules in the financial sector which are expected to save business €9.56 billion; the Single Digital Gateway that could help companies save more than €11 billion per year, and; revised legislation on veterinary medicines cutting costs by an estimated € 145 million. While totals are not tallied, the Regulatory Scrutiny Board reports that in 2017, 71% of REFIT initiatives had quantified cost savings.¹⁵²

¹⁵⁰ European Commission (2017) Communication *Completing the Better Regulation Agenda: Better Solutions for Better Results*, COM(2017)651 final, Luxembourg, Publications Office of the EU, p. 14

¹⁵¹ European Commission (2017) Overview of the Union's Effort to Simplify and to Reduce Regulatory Burdens (SWD(2017) 675 final), 24 October 2017; Luxembourg, Publications Office of the EU. see REFIT scoreboard at <http://publications.europa.eu/webpub/com/refit-scoreboard/en/index.html>.

¹⁵² Regulatory Scrutiny Board Annual Report (2017), March 2018, p. 25

VII. Are the ‘Better Regulation’ outputs relevant?

7.1 Were ‘Better Regulation’ tools a useful and relevant support in decision-making?

The Commission has integrated the preparation of impact assessments, evaluations and related consultations into its working procedures. Because they are mandatory, they are done. But, are they relevant? Are decision-makers using them? If so, has their use led to changes in policy proposals? Have the critics of EU regulation been persuaded by the work being done?

... the impact assessment process brings together different departments and sources of expertise, enhancing the coherence and quality of proposals prepared for executive decision

Commission proposals are prepared through a cross-departmental process (through so-called ‘inter-service’ meetings, groups and consultation).¹⁵³ ‘Better Regulation’ exercises (impact assessments, evaluations, stakeholder consultations) are part of this process, prepared by the lead department and discussed in these inter-service groups. This brings together different sources of expertise and experience to debate and discuss options which go up to the political level for decision. While formal inter-service consultation is a Commission procedural requirement that has always applied before a decision at Commission level is taken, even in the absence of the impact assessment and evaluation requirements, it is doubtful whether in the past the inter-service discussions leading up to the formal consultation would have been as extensive and well informed by evidence and analysis as is currently the case.

.....it has fostered a cultural change in the Commission services

The adoption of systematic impact assessment necessitated a cultural change within the departments of the Commission. There was a tendency prior to 2000 to rely on legislation as the sole means to achieve policy goals.¹⁵⁴ Too often the policy-making process started with the assertion that ‘we need a directive’ and the process focused on the instrument as an end-product, not the expected results. The requirement to assess all options, including ‘no action’ was a change of approach. Also, the decision to require Commission departments to prepare the assessments rather than outsource them to consultants strengthened in-house analytical capacities.¹⁵⁵ A different skills set was required of individuals and of the various services involved in policy development.

¹⁵³ See the inter-service processes outlined in the European Commission, ‘Better Regulation’ Guidelines, SWD(2017) 350 final, July 7, 2017, Luxembourg, Publications Office of the EU at <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines-planning.pdf>, p. 16.

¹⁵⁴ See European Commission, White Paper on Governance 2001 and Report on Implementing the White Paper on Governance, 2003, p. 23 Luxembourg, Publications Office of the EU at http://ec.europa.eu/governance/docs/comm_rapport_en.pdf. for a discussion on the desirability of using other approaches to achieving policy goals.

¹⁵⁵ The need to match skills to the demands of ‘Better Regulation’ were discussed internally by the Directors General of the Commission departments on a number of occasions between 2005-2010 when the system was first implemented.

The Joint Research Centre, for example, has developed into a centre of excellence for modelling and for behavioural assessment.

The shift in attitude and quality of analysis has not been even across Commission departments. Some (e.g. trade, customs and taxation, environment, climate change, information technology) have traditionally performed better than others.¹⁵⁶

....and at political level...

The ‘Better Regulation’ outputs are also used at political level when decisions are taken on the proposals. A Commission decision is prepared at political level by the Cabinet (the political staff) of the Commissioner concerned, through dedicated meetings of the members of the other Cabinets responsible for the subject area and at meetings of the Heads of Cabinet. The impact assessments or evaluations, together with the opinion of the Regulatory Scrutiny Board are reviewed together with the related proposal in those meetings in preparation for discussions in the Commission. They are linked as a formal part of each Commission decision.¹⁵⁷

Commission impact assessments are being more systematically reviewed by the co-legislator in its examination of legislative proposals, signalling a trend of increasing relevance in the decision-making of the legislature. The European Parliament has done this systematically, looking at roughly 50% of the Commission impact assessments (i.e. 181 impact assessments from July 2012 to December 2017).¹⁵⁸ The Council has not examined Commission impact assessments as consistently (85 impact assessments examined between 2012 and 2017 (22%)) but there has been an increase in the numbers examined in recent years.¹⁵⁹

A growing number of Member States are examining Commission impact assessments, also as a basis for their own analysis of how EU laws should be implemented in the national legal order.¹⁶⁰ In addition, the Member States have taken a more active role in the group of Member State and stakeholder representatives (the so-called REFIT Platform) that was set up to discuss ‘Better

¹⁵⁶ See Annual Reports of the Impact Assessment Board and the Regulatory Scrutiny Board to see a breakdown of departments and opinions. https://ec.europa.eu/info/law/law-making-process/regulatory-scrutiny-board_en#annual-reports.

¹⁵⁷ See European Commission, Rules of Procedure, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:o10004&from=EN>.

¹⁵⁸ European Parliament (2018), *European Parliament work in the fields of Impact Assessment and European Added Value Activity Report for 2017*, May 2018 PE615.642 pp. 19-20.

¹⁵⁹ See Council of the European Union- *Impact Assessment, Indicative Guidance for Working Party Chairs* 16024/2016; Report 2013; *Impact Assessment with the Council* – 2012 16569/12, 2013 8406/13, 2014 10882/14, 2015 Annual Report 8749/15, 2016 *Annual Report* 9786/16, 2017 *Annual Report* 9865/1/17

¹⁶⁰ See for example, the German National Regulatory Council, *Normenkontrollrat, Bureaucracy Reduction. ‘Better Regulation’. Digital Transformation. Leverage Successes – Address Shortcomings*, 2017 Annual Report.

Regulation’ issues and make suggestions for improvements.¹⁶¹ Since early 2016, the REFIT Platform has adopted 58 opinions on how to reduce burdens and simplify legislation and has provided input notably for the simplification of the Common Agricultural Policy, the European Structural and Investment Funds, VAT rules and the single market.

Interestingly, Commission impact assessments have been used by the European Court of Justice (ECJ) as supporting evidence for certain judgements.¹⁶² The ECJ has also clarified that impact assessments are not binding on either the European Parliament or the Council in their legislative deliberations.¹⁶³

...but, is there any evidence that the ‘Better Regulation’ effort has been instrumental in changing policy orientation, in affecting pre-set notions of policy design and outcomes?

A full reply to this question would include an indication of files that did not go ahead (i.e. that never reached the stage of a Commission proposal but were stopped at impact assessment stage) as well as those that were substantially altered in the preparatory phases due to impact assessment results. Concerning the former, decisions not to proceed with legislation are difficult to identify. There is no public record of such events. Two well-known examples from the second Barroso Commission (2009-2014) were the decision of the Commission not to table a Commission proposal for a social partner agreement on the occupational health and safety of hairdressers and for a soil directive.¹⁶⁴ There are many examples of how evaluations and impact assessments influenced decision-making. The air quality case study in annex shows how an evaluation feeding into the 2013 impact assessment led to the decision not to increase air quality standards. There are other examples where questions of EU value added and level of governance – so-called subsidiarity issues – have modulated the extent of EU intervention. These include debates on issues such as tourism, energy-saving devices, and legislation on accessibility for the handicapped where the departments behind the proposals were asked in the internal inter-service discussions and through opinions of the Regulatory Scrutiny Board and the Impact Assessment Board to demonstrate more convincingly that actions would be better taken at EU rather than national level.

¹⁶¹ European Commission (2015), Communication ‘‘Better Regulation’ for Better Results’ COM(2015) 215 final, 19 May 2015, Luxembourg, Publications Office of the EU.

¹⁶² See, for example, a case concerning acrylamide (T-368/11) of 1 February 2013 in which the Court analysed the findings in the impact assessment; Findel (C-179/09) 12 May 2011 in which the ECJ refers to the impact assessment in dismissing an allegation of lack of proportionality relative to airport charges; a roaming case (C-58/08) of 8 June 2010 in which the ECJ dismissed the allegation of a lack of proportionality, using evidence from the impact assessment.

¹⁶³ See for example, European Court of Justice, Afton (Case-343/09), 8 July 2010 in which the ECJ concluded that the Commission impact assessment is not binding on either the Council or the Parliament

¹⁶⁴ European Commission (2013), Communication on Regulatory Fitness and Performance: Next Steps COM(2013) 685 final, 2013, http://europa.eu/rapid/press-release_MEMO-13-833_en.htm.

In its most recent report on ‘Better Regulation’,¹⁶⁵ the Commission provides various examples where ‘Better Regulation’ led to more proportionate approaches. They include the proposal on the free flow of data in the digital single market on which the Regulatory Scrutiny Board raised concerns about the necessity and proportionality of the option of intervening in business-to-business contracts to make the transfer ("portability") of data between providers of cloud services more efficient. The Commission therefore chose rather to encourage self-regulation by codes of conduct on information to be provided to users of data storage or other processing services. It also decided that switching and porting should be addressed through self-regulation to define best practices. A second example was the proposal for a Directive on the promotion of renewable energy. Less intrusive measures were proposed to promote renewable energy in the heating and cooling sectors.

.....and what about evaluation?

Evaluation presents a different set of relevance issues. Given the length of the policy cycle (typically around 2 to 3 years for each stage of the policy chain for directives: Commission adoption of a proposal, adoption by the legislature, transposition by the Member State and then implementation), evaluation cannot meaningfully start before a minimum of ten years from initial work on a proposal. This period thus exceeds the duration of two Commission terms. Unless an evaluation is linked to a new policy initiative, there is a natural tendency for politicians (and Commissioners are no exception) to consider evaluations of past performance as having a lower political profile. Even when linked to new proposals, the evaluation is often rushed so that the requirement to ‘evaluate first’ can be met when preparing the impact assessment for the new proposal. Commission agendas normally cover new proposals and discussions on the performance of policies are usually seen through this prism.

7.2 Were the ‘Better Regulation’ efforts relevant to stakeholders?

Has the ‘Better Regulation’ effort been of any relevance to stakeholders? Has it made a difference in terms of changing their perceptions of bureaucracy and red tape?

...business views

Business attitudes to EU regulation show some improvement over time but few businesses are aware of the regulatory policy efforts being made at EU level. A targeted special report/Eurobarometer in 2017 surveying 10,000 businesses showed that few companies across the EU (39%) were aware of campaigns or actions that aim to simplify or reduce administrative tasks linked to legislation. Only 37% of businesses were aware of the efforts being made in their own country; few (4%) were aware of EU efforts. 34% feel that EU legislation hampers or is an obstacle

¹⁶⁵ European Commission (2017) Communication *Completing the Better Regulation Agenda: Better Solutions for Better Results*, COM(2017)651 final, Luxembourg, Publications Office of the EU, p. 5.

to growth but 70% feel that EU legislation adds to the amount of paper-work.¹⁶⁶ This compares to the standard Eurobarometer results of 2013,¹⁶⁷ which showed that 79.3% of Europeans felt that the EU generates too much red tape.

Business organisations, particularly those based in Brussels, are aware of Commission efforts and have broadly welcomed the Commission's 'Better Regulation' initiatives over the years.¹⁶⁸ Business and industry associations in the Member States have been supportive of the Regulatory Fitness initiative and many (for example, the German Industry Federation - DIHK, the Italian Confederation of Industry, the German Insurance Association, the Austrian Federal Economic Chamber, the Danish Business Forum for 'Better Regulation', Board of Swedish Industry and Commerce for 'Better Regulation') sent in constructive suggestions for legislative improvement. These suggestions were taken up in the work of the REFIT Platform.¹⁶⁹

The UK business sector has been very critical of EU regulation specifically in the past. British business seems to have reconsidered its position on many aspects of EU regulation and the EU regulatory system in the BREXIT context. The Confederation of British Industry in its recent survey writes *"Businesses do not have the capacity to manage significant legislative changes at this moment in time and generally perceive EU regulation to be good regulation....."*¹⁷⁰ A recent analysis done by Peter Sands and Ed Balls et al indicates that British business has a generally positive view of European regulation. *"Contrary to much of the media and political commentary, the majority of businesses we interviewed were broadly satisfied with current regulatory approaches in their sectors. While there are always examples of specific aspects of regulation that seem overly burdensome or inappropriate, many spoke to the overall quality of EU regulations and rulemaking processes, claiming that the process of securing input and agreement from 28 Member States usually helped weed out poor quality regulation."*¹⁷¹ Another example: manufacturers had been warning that REACH rules would raise costs and snarl up supply chains in red tape, but they now want to remain under the REACH legislative framework. As reported in the Financial Times, *"in a letter to Michael Gove, the Chemical Industries Association urged the*

¹⁶⁶ European Commission, Flash Eurobarometer, "Business Perceptions of Regulation", March/October 2017; referred to in European Commission (2017) *Overview of the Union's Effort to Simplify and to Reduce Regulatory Burdens* (SWD (2017)675 final, 24 October 2017, p.36-45.

¹⁶⁷ Standard Eurobarometer Spring 2013

¹⁶⁸ See Business Europe website where 'Better Regulation' is posted as a policy priority, <https://www.busesseurope.eu/>.

¹⁶⁹ https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly/refit-platform/refit-platform-incoming-suggestions_en

¹⁷⁰ Confederation of British Industry, Smooth Operations, April 2018, p. 7.

¹⁷¹ Sands, P, E. Balls; S. Leape, N. Weinberg; "Making Brexit Work for British Business", Mossavar-Rahmani Centre for Business and Government, June 2017, p. 5

government 'to do all it can to remain within or as close as possible' to the EU's rule book for the sector, which exports about £50bn a year.'¹⁷²

...other non-governmental organisations

The NGO community (public health, environment, consumer protection) have different views on the impact of the 'Better Regulation' efforts. They recognise that evidence-based policy-making and measurement of benefits in particular is highly relevant to them. But they see the current approach as too focused on costs, and not enough on benefits. This is best illustrated by the dissenting opinion accompanying the conclusions of the High-Level Group of Independent Experts on Administrative Burden (the 'Stoiber Group') in 2014.¹⁷³ Four NGO representatives (advocates for workers, public health, the environment and consumers) could not agree with the final conclusions of the group which called, inter alia for targets, budgetary offsetting, publication of draft impact assessments and proposal and a fully independent regulatory scrutiny body.¹⁷⁴ The NGO community formed their own regulatory watchdog in 2015.¹⁷⁵ Composed of over 50 NGOs, the group 'The 'Better Regulation' Watchdog', follows the regulatory policy initiatives of the European institutions, trying to ensure that 'Better Regulation' does not weaken the legislation protecting workers, consumers, citizens and the environment. Corporate Europe Observatory and Friends of the Earth Europe issued a paper in 2014, 'The crusade against 'red tape'', criticising the deregulatory nature of the REFIT programme and arguing that it was geared to meet the interests of big business and multinationals.¹⁷⁶

¹⁷² Chemical and Pharma Groups Urge Gove to Stick to EU Regime, *Financial Times*, 11 December 2017

¹⁷³ Final Report High Level Group on Administrative Burdens Brussels, 24 July 2014

¹⁷⁴ See European Trade Union website - <https://www.etui.org/News/REFIT-Commission-red-tape-cutting-expert-group-at-odds>.

¹⁷⁵ See <http://www.betterregwatch.eu>.

¹⁷⁶ Corporate Europe Observatory and Friends of the Earth Europe, *The crusade against red tape*, 2014

VIII. Weighing up the evidence

8.1 Observations

The evidence shows that the European Commission system is complete, covering all phases of the policy cycle. The ‘Better Regulation’ Guidelines provide exhaustive guidance on all steps in the cycle - from planning to evaluation, including on cost/benefit methodologies and the use of behavioural approaches. While there are a few exceptions, the system captures most significant proposals.

The evidence gathered on the quality of the outputs and their deployment in the policy cycle, point to a system which produces useful and relevant input to policy-making that has made a difference in the decision-making process. On quality, judging by the opinions and views of the scrutiny bodies, impact assessments meet the standards set. Roughly 60% of the assessments pass the quality control of the Regulatory Scrutiny Board in the first instance and most of the remaining 40% are improved before decisions are taken on the corresponding proposals. The European Parliament and the Council review mechanisms have usually supported the opinions of the Regulatory Scrutiny Board in their documents. The Court of Auditors and the internal audit, while raising concerns about certain aspects of the system, have judged it as generally sound. The European Commission regulatory policy system and its outputs are under systematic review and have emerged favourably. The European Commission regulatory policy system does well by international comparison.¹⁷⁷

While the evidence points to a well-functioning system, in the absence of a monitoring framework with an agreed method of measuring performance, a tally of net benefits or any sort of counterfactual analysis, it is difficult to conclude definitively on the effectiveness of the system. In addition, while the quality of outputs has improved over time, there are persistent weaknesses. For impact assessments, these include a tendency to justify a pre-determined option, poor problem definition and a focus on actions (what the Commission wants to do) rather than on the results to be achieved. Evaluations likewise often present the state of play, but do not always include a full analysis of why something has happened, whether changes can be attributed to EU action, the difficulties encountered, and/or the reasons why the intervention may have fallen short of expected results or impacts. Evaluations are not generating sufficiently convincing evidence that results are being delivered in the most effective and efficient manner. That is particularly relevant for REFIT where despite the effectiveness focus (i.e. cost reduction), evaluations have tended to examine whether policy objectives have been met but not whether they have been met in the most cost-effective way possible.

The weakness in cost quantification and of clarity in cost calculation methodologies is a recurring criticism.¹⁷⁸ The picture is not as bleak however as critics allege. As mentioned above, a ‘one size fits all’ approach to quantification is not appropriate. A variety of methodologies are used, and

¹⁷⁷ See *OECD Regulatory Policy Outlook*, 2015, OECD Publishing Paris, pp. 29-30.

¹⁷⁸ See *RegWatchEurope Findings on the Commission’s Impact Assessments from the Perspective of Independent Scrutiny Bodies*, November 2016

practitioners apply common sense in determining the extent of their quantification and monetization efforts. As pointed out above, the type of analysis normally being conducted by the Commission (i.e. on policy orientations rather than on one preferred option) does not lend itself to standard cost/benefit analysis. The importance of values that are difficult to monetise – such as EU integration – is an additional factor. Furthermore, there are limits to producing a ‘perfect’ assessment with precise quantification of costs and benefits in a system of multi-layered governance, with 28 very different Member States, particularly in the absence of reliable data. The Commission performance on quantification is not that much different from the American system which has a mandatory requirement to do cost/benefit analysis or the UK system which has only recently started to monetise so-called societal impacts.¹⁷⁹

The quality of the analytical efforts is often affected by insufficient monitoring and/or a lack of data. The preparation of a good monitoring framework is often seen as the least important part of an impact assessment/preparatory process. Departments resist investing in monitoring frameworks at this early stage given that the adopted law can vary from the Commission proposal and that the implementation choices by Member States need to be considered. Monitoring is often hindered by a lack of data. The requirement to collect data is often perceived as costly and an administrative burden by the Member States and hence is dropped by Council in its consideration of the legislative proposal. This has serious implications as it limits the quality of the evaluation effort to follow.

Full compliance with ‘Better Regulation’ timelines can take a backseat to political timetables, with a knock-on effect on the quality of the analytical or consultation exercise. The Commission is a political body. At the beginning of the five-year Commission term, when the executive is new and anxious to show quick results, analytical exercises and consultations risk being rushed. The same holds true towards the end of the term when there is pressure to get proposals on the table in time to be adopted by the end of the legislature.¹⁸⁰

That said, the analysis shows that the outputs of the regulatory policy system are relevant and used in the decision-making process. The process has generated a greater awareness of the costs of action/inaction and of benefits in Commission decision-making from preparatory phases in cross directorate discussions to the political decision-making by the executive itself. Parliament and Council are more systematically examining Commission impact assessments prior to their examination of the related proposals. Beyond the quality of the individual assessments, this process has a value in itself.

¹⁷⁹ As mentioned above, of the regulations reviewed as significant, American executive agencies quantified and monetised 30%; partially quantified and monetised 59%; quantified benefits for 2% and had done no quantification for 7%. Figures provided by the Regulatory Scrutiny Board show that 70% of all Commission impact assessments identified costs and benefits. Full quantification of costs was done in around 25% of all impact assessments; full quantification of benefits was done in 20% of all impact assessments. See USA Office of Management and Budget, 2017 *Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*, February 23, 2018, p. 2-3.; Regulatory Policy Committee, *Regulatory Overview: RPC Scrutiny during the 2015-2017 Parliament*, May 2018.

¹⁸⁰ As the legislative process takes two years on average, the likelihood of having proposals adopted by the legislature decreases towards the end of the Commission’s term.

Illustrating the use of ‘Better Regulation’

The case studies in annex on the EU roaming regulation, the air quality framework directive and the first climate change legislation show that ‘Better Regulation’ tools were consistently applied. Exceptions related to stakeholder consultation in the roaming regulation case which were subsequently remedied. The impact assessments met quality standards and were used in decision-making in the Commission and the legislature. Available analysis establishes a link between policy drivers and outcomes in the roaming and climate change cases.

The contribution of the ‘Better Regulation’ work to the decision-making process varies between the different cases. Political decisions in the roaming case were initially inspired by the preparatory impact assessments and periodic reviews.¹⁸¹ However, the Commission and the legislature took decisions in 2013/2015 that nullified previous decisions and did not align with the preferred options and analysis emerging from impact assessment and review work. The climate change example shows that ‘Better Regulation’ tools made a difference in the decision-making process with the legislature making few changes to the Commission proposal, which itself was based on the analysis in the impact assessment. The legislative process from proposal to adoption of the first climate change package was relatively swift (9 months compared to an average of roughly 24 months). Both the air quality and climate change impact assessments introduced an awareness of costs and benefits that had not been present in previous discussions. This facilitated a more informed discussion in the European Parliament and the Council in their consideration of the Commission proposals. The development and refinement of economic modelling in these two areas has come about as a result of the requirement to do impact assessment and evaluation. The review of implementation of air quality legislation in 2011/2012 showed that progress was insufficient to justify further tightening of emissions standards.

All the cases show the importance given to non-monetary considerations – the high value placed on EU integration and the single market. These factors were decisive in the roaming case. The levying of higher roaming charges for calls made in other Member States was a visible demonstration that the internal market was not working in the telecommunications area. The elimination of the roaming surcharge had a symbolic value that was determinant in decision-making. The EU dimension also drove climate change and air quality policy, with each having the aim of promoting the wider project of European integration (also in view of developing a stronger position in international negotiations) and avoiding that national differences in policy would distort the EU’s internal market. These considerations were not monetised but were key factors in weighing up policy options.

As to the link between the application of ‘Better Regulation’ tools and the achievement of legislative/policy results, in the climate change case, available analysis suggests that the achievement of policy objectives (20% reduction in greenhouse gas emissions by 2020) is partly

¹⁸¹ Cini, M. and Marián Šuplata (2017) Policy leadership in the European Commission: the regulation of EU mobile roaming charges, *Journal of European Integration*, 39:2, 143-156.

related to policy drivers which in turn were shaped by the analytical effort.¹⁸² In the roaming case, existing analysis suggests that the reduction in roaming charges would not have happened without the regulatory regime.¹⁸³ In the air quality case, while many objectives have been met, the limit values for particulates and nitrogen oxide which were the focus of early impact assessment work have not been respected. The impact assessment underestimated implementation difficulties (as reflected in a high number of legal cases) related to particulate matter and urban hot spots. So, the link between the preparatory work and the results is more tenuous.

8.2 So why are there continued calls for a change in approach?

Given the evidence, why are there lingering doubts among Member States and stakeholders about the system and a continued appetite for change? Part of the response to this question relates to the politics of regulation, part to the continuing flow of new legislation, and part to the Commission's difficulty to show results of its 'Better Regulation' efforts.

The politics of regulation....

The complaints about EU regulation are often more about politics than substance. 'Better Regulation' is a battleground for discussions about what kind of a European Union citizens want. Some want less regulation, and some want more. Those wanting more would argue that the 'Better Regulation' drive was an ill-disguised effort by some Member States and business to stem the flow of new legislation coming from Brussels and to diminish environmental, health and social protection through deregulation. Those wanting less regulation engaged in 'Brussels-bashing', creating myths of regulatory excesses which were often reported in the popular press. This often took pressure off and attention away from domestic issues.

Many complainants have conflicting, contradicting demands. This includes the Member States in the various Council formations. While the Heads of State and Government in the European Council often argue for less and 'Better Regulation', their sector Ministers (e.g. environment, health, climate change, transport) often supported more legislation in their specific Council formations (e.g. the Environment Council, the Transport Council, etc).

Some stakeholders' requests are inherently contradictory. On consultation, for example, business associations argue that draft proposals and their impact assessments should be put out for comment before they go to the Commission for decision. They want to be consulted only on a draft text. At the same time, these same stakeholders want to have an early input into the preparation of proposals before options are narrowed. They do not seem to see the contradiction between wanting to comment on a draft in which an option will have already been chosen and wanting to influence the policy choices at an early stage.

¹⁸² European Commission, *Report on Evaluation of Decision No. 406/2009/EC* (Effort Sharing Decision), COM (2016) 483, July 20, 2016), p. 7, Luxembourg, Publications Office of the EU

¹⁸³ European Commission, *Economic Occasional Papers*, No. 129, February 2013, p. 72, Luxembourg, Publications Office of the EU.

The continuing flow of new legislation....

The continued flow of new legislation linked in part to the increasing use of implementing and delegated acts, means that stakeholders continue to be faced with new requirements and fail to perceive any reduction in regulatory demands.

The difficulty in showing results of the ‘Better Regulation’ effort.....

The lack of an agreed framework for monitoring regulatory policy initiatives means that the Commission has difficulties showing the results of its regulatory policy efforts over time. It relies on case-specific or anecdotal evidence. While quantification under REFIT is improving, there is still some way to go in showing cost reduction/savings and/or burden reduction in a simple and convincing manner. The Commission’s early efforts to develop indicators were sidelined by the 25% administrative burden reduction target which became a prime indicator of ‘Better Regulation’ success.¹⁸⁴ Other efforts to develop indicators have not gained any traction for a variety of reasons. A successful monitoring exercise requires close cooperation with the Member States as they are responsible for implementation and need to be fully involved in monitoring and generating needed data. Such an initiative has not yet been put in place.

¹⁸⁴ Radaelli, C. Measuring the Quality of Regulation: Organizational Processes and Performance Assessments, *Conference on International Organizations and the Globalisation of Public Instruments and Ideas*, Strasbourg, 22 July 2016.

IX. Would other approaches work better?

While there is growing acceptance of the Commission's impact assessment and consultation methods and practices, there are continuing calls for targets and regulatory budgeting schemes to reduce perceived regulatory burdens. These approaches are the mechanism of choice for many of the Member States. They have been championed by the business community.

9.1 Member State experience in target setting and regulatory budgeting

Almost all Member States have or have had administrative burden reduction programmes, mainly in the period 2005-2010, aiming at up to 25% reductions in administrative costs.¹⁸⁵ Those Member States who set targets report that they have been met. There has been little independent verification of results. Given that the scope of the initial programmes covered administrative costs only, the programmes had limited impact by design. Some Member States ventured beyond administrative costs to examine compliance costs more broadly and set targets and regulatory budgeting as a function of some variation of cost calculation.

The 'one in/one out' approach, pioneered by the United Kingdom, seeks to reduce the costs of regulation by requiring that the costs of prospective legislation be offset by removing and/or reducing the costs of existing regulation. The concept has been adopted by Germany (2015), France (2015), Austria (2017) and Denmark (2017). Other Member States (e.g. Finland) are experimenting with the idea by launching pilot projects.¹⁸⁶

The United Kingdom...the pioneer

The UK has the longest track record of target-setting among EU Member States. It was active participant in the 25% administrative burden reduction programme. The UK introduced a 'Business Impact Target' (BIT) of £10 billion reduction for the period 2015-2020 and departments are required to submit 'cost to business' estimates for any changes to regulation, with the aim of producing cost savings to contribute to meeting the target. The UK Department of Business, Energy and Industrial Strategy reported in May 2018 that the Business Impact Target delivered £6,615.7million net business savings in 2015-17 (thus exceeding the interim target of £5 billion).¹⁸⁷ The current government subsequently announced the continuation of the scheme and revised the target to £9billion over the parliamentary period, with a £4.5 billion interim target for the first three years of the term (i.e. to 2020).¹⁸⁸

¹⁸⁵ These are documented in Renda, A. Introducing EU Reduction Targets on Regulatory Costs: A Feasibility Study; CEPS; Brussels, 12 July 2017, p. 15-27.

¹⁸⁶ Renda, A. Introducing EU Reduction Targets on Regulatory Costs: A Feasibility Study, CEPS; Brussels 12 July 2017, p. 15, 17-19, 27.

¹⁸⁷ UK Department for Business, Energy and Industrial Strategy, *Business Impact Target Final Report for the 2015-2017 Parliament*, May 2018, p. 8.

¹⁸⁸ UK House of Commons, Business Impact Target: Written statement - HCWS776, 20 June 2018

In addition to and alongside targets, the UK has experimented with regulatory budgeting since 2011. The UK ‘one in/one out’ programme, started in 2011, required that the costs of new regulation be offset by the repeal of legislation resulting in no net increase in costs to business.¹⁸⁹ The Department of Business and Industry claimed a £1.2 billion reduction in the period 2011-2012. The repeal requirement was then increased to ‘one in/two out’ in January 2013. By end 2014 this was estimated to have contributed an additional £662 million of savings.¹⁹⁰

The BIT initiative was judged critically by the UK National Audit Office in making a submission to the House of Commons Public Accounts Committee.¹⁹¹ The report of the Committee indicated that by the end of 2016, less than £1 billion had been achieved, and most of that was accounted for (counter intuitively) by the introduction of a fee on plastic bags. Since 2015, 95 regulations had been examined, of which 64 had impacts of less than £5 million. Of the claimed savings of £10 billion under the programme, 90% were achieved by 10 regulatory changes. The National Audit Office concluded that there had been limited progress in reducing costs under the programme; that departments generally had no idea about the costs of legislation, and that wider social and economic costs and impacts were generally disregarded.

*“The credibility of the Government’s target is undermined by the exclusion of significant costs to business arising from new regulations; the National Living Wage is one of a number of individual regulations that are excluded and which, in total, are expected to add costs to business of £8.3 billion by the end of this Parliament, far outweighing the reported ‘savings’. Departments do not know the cost to businesses of their existing regulations, making it difficult for the Government to know where to prioritise its efforts to reduce business costs. The focus on reducing business costs also means that departments are not consistently giving adequate consideration to the wider societal costs and benefits of particular regulations, for example where they impact on the environment, consumers or employees. Departments also need to do more to monitor and evaluate the impacts of their regulatory decisions, both to see whether regulations are working as intended and to learn lessons to inform future regulatory decisions.”*¹⁹²

The testimony of the business organisations during the preparation of the Public Accounts Committee Report indicated that while British business was very concerned about regulation, it was not feeling the impact of the target.¹⁹³

¹⁸⁹ UK Government, One-in One-out: Statement of New Regulation, April 2011, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31617/11-p96a-one-in-one-out-new-regulation.pdf

¹⁹⁰ The results are published in a series of Statements of New Regulation (Vol. 1-9, April 2011-December 2014), <https://www.gov.uk/government/collections/one-in-two-out-statement-of-new-regulation>

¹⁹¹ National Audit Office, *The Business Impact Target: Cutting the Cost of Regulation*, Report by the Comptroller and the Auditor General, 29 June 2016.

¹⁹² House of Commons, *Public Accounts Committee Report on ‘Better Regulation’*, 19 September 2016, p. 3

¹⁹³ House of Commons, *Public Accounts Committee Report on ‘Better Regulation’*, 19 September 2016, p. 10

These concerns are echoed in the most recent report of the Regulatory Policy Committee (RPC).¹⁹⁴ The RPC reports that the calculations contributing to the net benefit have not incorporated full costs of the measures and that “exclusions compromise the completeness of the BIT account and distance the BIT from real business experience of regulatory change”.¹⁹⁵ Only 36% and 53% of the impact assessments monetised wider effects on society in 2015-16 and 2016-17 periods respectively. The report also points out that 36% of the BIT impact assessments received an RPC opinion after the measure had entered into force, making the process an accounting exercise rather than a means to introduce improvement to the measure being considered.¹⁹⁶

Supplementing these formal scrutiny reports, a study by Lodge and Wegrich examines the results of the Red Tape Challenge, a crowd sourcing initiative in the UK which generated suggestions for the ‘outs’, concluding that it is difficult to come to an assessment as to whether it led to a noticeable change in the regulatory burden to business (or others).¹⁹⁷

Germany... the focus on costs

The German Government approach to targets and regulatory budgeting started with a programme for the reduction of administrative burden in 2006.¹⁹⁸ It entailed setting a target of 25% for burden reduction by 2011. A baseline measurement was conducted, indicating that German business faced a burden of €49 billion annually in administrative costs. A target of 25% reduction (roughly €12 billion) was set. The German ministries were asked to calculate the expected administrative costs of new measures by using the standard cost model.¹⁹⁹ In 2012, taking the situation following the 25% reduction situation as a baseline, a ‘Bureaucracy Cost Index’ was set up to measure movement in administrative costs over time.²⁰⁰

¹⁹⁴ Regulatory Policy Committee, *Regulatory Overview: RPC Scrutiny during the 2015-2017 Parliament*, May 2018. The quality of the calculations of the regulatory budgeting effort are examined by the Regulatory Policy Committee, an independent scrutiny body set up by the government to check the regulatory policy outputs of the departments and agencies. It has the mandate to confirm the government’s assessment costs under the Business Impact Target. It has long championed regulatory budgeting, verifying the data on cost calculations.

¹⁹⁵ Regulatory Policy Committee, *Regulatory Overview: RPC Scrutiny during the 2015-2017 Parliament*, May 2018, p. 29

¹⁹⁶ Regulatory Policy Committee, *Regulatory Overview: RPC Scrutiny during the 2015-2017 Parliament*, May 2018, p. 70

¹⁹⁷ Lodge, Martin, Wegrich K. Crowdsourcing and regulatory reviews: A new way of challenging red tape in British government? Lodge, Martin and Wegrich, Kai, *Regulation & Governance*, March 2015, Vol.9(1), pp.30-46

¹⁹⁸ For overview, see Nationaler Normenkontrollrat, *10 Years NKR – Good Record in Reducing Bureaucracy and Costs*, Annual Report 2016, Berlin, p. 10,

¹⁹⁹ Standard Cost model equation: Administrative cost = $\Sigma P \times Q$ where P (for Price) = Tariff x Time; and where Q (for Quantity) = Number of businesses x Frequency

²⁰⁰ Nationaler Normenkontrollrat (2016), *10 Years NKR – Good Record in Reducing Bureaucracy and Costs*, Annual Report 2016, Berlin. p. 29.

At the same time, the German government recognised that administrative costs are a small portion of total costs faced by business, the administration and individuals.²⁰¹ So in 2012 it asked its ministries to start to calculate total compliance costs. Compliance costs are broken down into annual running costs (money and time) as well as the one-off costs of a new initiative.²⁰²

More recently, the German government introduced the ‘one in/one out’ rule which has been applied since January 2015.²⁰³ Each new regulatory proposal should be offset by a reduction in costs elsewhere. Cost calculations are based on recurring compliance costs, including administrative costs. One-off costs and investment costs are not included in the calculation. Neither are indirect costs. The costs are broken down into three categories: those impacting business, public administration and citizens. The responsibility for ‘no net increase’ and its calculation rests with each ministry. Exceptions to the ‘one in/one out’ rule include implementation of projects under the coalition agreement, emergencies, regulations with a duration of less than one year, and EU law. The reduction effort is pooled across the government. If a ministry cannot make a reduction when proposing new rules, it can go into a deficit position. But it will need to make a reduction effort, ideally within a year, but by the end of the government term at the latest. The ministry must justify why it cannot reduce costs. The Chair of the Committee on Reduction of Bureaucracy, a State Secretary, can decide to cap the reduction if s/he considers that the cost reduction cannot be achieved or can only be achieved by compromising the expected benefits of the law.

The calculations of the ministries and the results of the regulatory offsetting are reviewed by the German Regulatory Control Board (NKR).²⁰⁴ They are presented in the annual report of the NKR as well as in periodic reports of the ‘Better Regulation’ Department of the Federal Chancellery.

According to NKR reports, the ‘one in/one out’ results have been positive.²⁰⁵ During the 2016/2017 reporting period, ‘ins’ were more than offset by the ‘outs’ leaving a balance of €536.3 million. From 2015 to 2017, ‘ins’ of €258.3 million was offset by ‘outs’ of €794.6 million, with a balance of €1.4 billion.

The approach looks comprehensive on paper. But a closer look at the approach raises some questions. It does not count many costs which are relevant for business. For example, it does not

²⁰¹ Nationaler Normenkontrollrat (2016), *10 Years NKR – Good Record in Reducing Bureaucracy and Costs*, Annual Report 2016, Berlin, p. 11.

²⁰² Nationaler Normenkontrollrat (2016), *10 Years NKR – Good Record in Reducing Bureaucracy and Costs*, Annual Report 2016, Berlin, p.21

²⁰³ Nationaler Normenkontrollrat, *10 Years NKR – Good Record in Reducing Bureaucracy and Costs*, Annual Report 2016, Berlin, p. 57.

²⁰⁴ The NKR was set up by law as an ‘independent body’ to review and verify the costs as calculated by the German ministries of new legislation. See https://www.normenkontrollrat.bund.de/Webs/NKR/EN/About_Us/Overall_Concept/_node.html;jsessionid=795399B760FA4AEFBA7E6A29F6184C3C.s1t2

²⁰⁵ Normenkontrollrat, *Bureaucracy Reduction. ‘Better Regulation’. Digital Transformation. Leverage Successes – Address Shortcomings*, 2017 Annual Report, Berlin, p. 16.

include one-off compliance costs (e.g. investment, installation of new IT systems) or the costs of transposing EU law (which in some sectors such as the environment can be significant). Furthermore, it only counts the costs of a new initiative in the year of adoption. So, the increase in the minimum wage is not included in the ‘one in/one out’ calculation because the Minimum Wage Act was formally adopted in 2014. Its two-yearly revision is not captured by the “one-in/one-out” methodology. Yet this is a cost increase that most business would attribute to regulation.

The 2016/2017 results illustrate the costs that are not captured in the regulatory budgeting scheme. The ‘one in/one out’ calculation shows relief to business of €536.3 million.²⁰⁶ However, annual compliance costs are reported to have increased by approximately €2.1 billion. Almost half of the increase (about €1 billion) was due to an increase in the statutory minimum wage from € 8.50 to €8.84 per hour. The other contribution to the increase in compliance costs was the transposition of two European directives – on insurance distribution and on the protection of waters against the excessive use of fertilisers – which resulted in additional costs to the business sector of €481 million and €195 million respectively. One-off compliance costs reached €4.8 billion for 2016/2017, a quarter of which related to the implementation of a floods prevention act. Administrative costs, a component of compliance costs, were only slightly reduced (about 1%) relative to the 2012 baseline. So, while the ‘one in/one out’ scheme is presented as a cost control mechanism which is working successfully, a closer examination of the numbers paints a different picture.

Furthermore, the focus on costs is not sound methodologically. From an economic perspective, the purpose of regulation is to correct for market failure and to maximise net social benefit. If the government focuses only on cost reduction, substantial benefits for society may be foregone.

The National Regulatory Council mentions these shortcomings in its annual reports.²⁰⁷ It is encouraging ministries to make progress on benefit calculation by suggesting a methodology. It is also aware that there has been no verification of actual results of the cost-cutting efforts. Ex-post evaluations are scheduled and will be completed in coming years.

The French.... joining the “regulatory budgeting club”

The French Government adopted a ‘one in/one out’ approach in 2015 which was extended under the new French government in 2017.²⁰⁸ There is no information publicly available on whether the programme has been successfully implemented. However, the French Senate published a report in

²⁰⁶ Normenkontrollrat, Bureaucracy Reduction. ‘Better Regulation’. Digital Transformation. Leverage Successes – Address Shortcomings, 2017 Annual Report, Berlin, p. 16,.

²⁰⁷ *Nationaler Normenkontrollrat*, 10 Years NKR – Good Record in Reducing Bureaucracy and Costs, Annual Report 2016, Berlin, p. 31.

²⁰⁸ *Journal Officiel de la République Française*, 3/61, 28 July 2017. Paris.

2017 on the previous government's simplification programmes since 2012.²⁰⁹ This report is very critical, pointing to major shortcomings in achieving intended results. It reviews the history of the French 'regulatory policy' efforts, starting with simplification being identified as a key stimulant to growth in the French Government's 2012 Pact for Growth, Competitiveness and Employment. In March 2013, the Government announced a 'Simplification Shock', an initiative to be led by a Simplification Council which has political level, civil servant and business representation. A Minister of State was appointed. In 2014, 290 simplification measures were announced bringing the total number of ongoing simplification initiatives launched since 2012 to 463. Despite good momentum at the beginning, the programme ran into problems. Three ministers changed in three years. Only 43% of the simplification actions were implemented. The calculation of €5 billion in savings per annum was not independently verified. The report observes that the Government's simplification programme did not take account of additions to the body of legislation and impact assessments on legislation were often done simply to comply with a legal obligation rather than to support policy-making. Evaluation was apparently rare and not rigorous. An independent scrutiny body was announced in 2014 but abandoned in 2015.

The present government has revived the regulatory budgeting approach, requiring each Ministry to prepare a simplification plan and to suggest regulatory relief when proposing new legislation. There is no requirement to quantify the 'ins' or 'outs' but should the Prime Minister's Office feel that the measures are not of equivalent importance, the ministry is asked to revise its efforts. The system apparently applies to all legislation.²¹⁰

9.2 Are targets and regulatory budgeting feasible at EU level?

The position of the European Commission

In its most recent Communication on 'Better Regulation', the European Commission explains why a global target setting programme would not be feasible at EU level.²¹¹ The Commission argues that to be credible and effective, a target-setting initiative needs to be based on a methodology for establishing the overall level of costs and a baseline measurement. This is expensive, takes time to complete, and potentially faces constraints due to a lack of data. On 'political' targets (i.e. arbitrarily setting a cost saving target) and regulatory budgeting such as 'one in/one out', the Commission considers that both approaches could lead to deregulatory pressures and would not be acceptable to all stakeholders. The Commission concludes that an approach involving ex-ante reduction targets would not produce better results in terms of reducing unnecessary costs than the

²⁰⁹ Lamure, E et Cadic, O., Sénateurs, Senat Français, *Senat Rapport d'information fait au nom de la délégation aux entreprises (1) relatif aux moyens d'alléger le fardeau administratif des entreprises pour améliorer leur compétitivité*, No. 433, 20 February 2017.

²¹⁰ Prime Minister letter to the ministries No. 5991/SG, 12 January 2018.

²¹¹ European Commission (2017) *Completing the Better Regulation Agenda: Better Solutions for Better Results* COM(2017) 651final, 24 October 2017, Luxembourg, Publications Office of the EU, p. 10.

current approach, which involves a case-by-case examination of where costs can be reduced, and legislation can be simplified, streamlined or eliminated. The Commission commits to further improvement in this approach by including calculation of cost savings in impact assessments related to amendments of existing legislation, enhanced training on quantification, systematic consultation of stakeholders on potential cost savings, and an increased focus on monitoring and assessment.

Other views

This contrasts to the position of the Member State regulatory watchdogs and an assessment done for them on options for target-setting.²¹² The study reviews Member State experience and suggests that: targets can be set politically with no need for data collection or baseline measurement; general targets are more effective than targets for industry sectors or policy areas; and target-setting can have a significant impact on behaviour of civil servants.

²¹² Renda, A. Introducing EU Reduction Targets on Regulatory Costs: A Feasibility Study; CEPS; 12 July 2017, Brussels

X. Reflections on future orientations

Commitment at all levels ...

‘Better Regulation’ is now anchored in the Commission policy-making process. But the application of ‘Better Regulation’ disciplines throughout the policy cycle is relatively recent and not set in administrative law. Strong political commitment, including by the European legislator and the Member States, and administrative discipline are essential to sustain the ‘Better Regulation’ effort. In the Commission administration, it will be important to make sure that the process does not become an end in itself and that the focus remains on the goal of supporting policy-making, not that of meeting procedural requirements. Impact assessments and evaluations are becoming increasingly complex documents and efforts need to be made to keep them accessible, understandable and useful for decision-makers.

A renewed narrative...

Renewed commitment could benefit from a renewed narrative. The focus on costs and cost reduction over the past ten to fifteen years was necessary to respond to the concerns of the public and business about regulatory overreach from Brussels. But, together with the argument that regulation is a brake on growth, it is a defensive narrative. The EU does not regulate to impose costs. It regulates to bring benefits. The calculation of costs and cost savings is important. But it should not overshadow efforts to measure benefits ex-ante or to assess ex-post whether benefits have been realised in the most effective and efficient way. The argument that regulation impedes growth has lost traction, particularly in the light of evidence that regulation has had the opposite effect in many sectors, stimulating for example, the development of certain sectors such as the ‘green economy’.²¹³

Real-time review and evaluation with a focus on results ...

There will be a natural shift toward evaluation. Because of the maturity and completeness of the body of EU legislation, there will presumably be less demand for new legislation and more for improving the existing stock. Given the rapid pace of technological development and innovation, existing laws will need to be adjusted. This means that evaluation and related consultation should take on even more prominence in regulatory policy activity. This requires a stronger political commitment to evaluation. Currently unless evaluation is linked to a new policy initiative, there is little political drive to evaluate. In future Commissions, Commissioners could be held to account regularly on the results and achievements of their policy responsibilities rather than on the new initiatives they intend to propose. This would require a political commitment by and joined-up action with the Member States given their responsibility for implementation.

Better cost/benefit analysis – better data collection...

Quantification of costs/benefits is a weak point in the system. Commission performance in quantifying is improving. But, the fact remains that the Commission system does not lend itself

²¹³ Dechezleprêtre, A. & Sato, M. (2017). The Impacts of Environmental Regulations on Competitiveness. Review of Environmental Economics and Policy, 11(2), pp.183–206.

to standard cost/benefit analysis and new ways should be explored to see how legislative impacts can be better measured in the EU governance set-up. One way would be to supplement current ex-ante assessment with a more detailed cost/benefit analysis of the adopted legislation (during the transposition phase). The Member States, ideally driving the effort, could use this evidence in making implementation choices and to set a sounder baseline against which effectiveness and efficiency could be measured in subsequent reviews. Given the differences in regulatory policy capacity between the Member States, peer support in such an exercise could be beneficial. Cost/benefit should be key elements of monitoring and evaluation frameworks of legislation such that actual costs and benefits can be monitored alongside policy outcomes. It would be essential to provide for the collection of necessary data, including on costs and benefits, in legislation. If Member States are as concerned as Council conclusions suggest about the cost of EU legislation, they should have a keen interest in working in this way with the Commission to make sure that cost/benefit aspects are central to policy monitoring and evaluation frameworks, that provision is systematically made to collect the data necessary, and that the monitoring and evaluation work is actually done.

Adjusting the depth and scope of impact assessments...

The value of sound ex-ante preparation has been proven and the good practice in impact assessment should be maintained. That said, now that impact assessments are performed systematically, it may be possible to exercise more flexibility and adjust the scope and depth of impact assessments to different types of initiatives. Politically and economically significant initiatives demand a full impact assessment. However, given that the broad assessment of social, environmental, economic impacts should already have been done for ‘basic act’ or primary legislation, it should be possible to use simpler, more streamlined methods for delegated and implementing acts.

And what about regulatory budgeting – should the Commission not follow the example of others?

There are many conceptual and practical aspects of targets and regulatory budgeting which reduce their potential usefulness at EU level. On a conceptual level, the focus on costs in both cases overlooks the fundamental justification of regulation, which is to maximise net social benefits. If the aim is only cost reduction, significant benefit to society may be foregone.²¹⁴ If the ‘one in/one out’ scheme takes the status quo as the baseline with no consideration of whether that is a good starting point across sectors, there is a risk that some sectors could remain over regulated, with excessive burdens and others under-regulated at the point of departure.

Neither target-setting, nor regulatory budgeting is particularly suited to EU-level governance. Cost reductions may or may not be sustained in the legislative process and in implementation. The Commission would calculate the potential cost savings and make a proposal to amend legislation to achieve them. The calculated savings could change or be lost as the proposal makes its way through the legislative process and when the adopted act is transposed by the Member State. The exercise would not provide ‘quick relief’ as it requires legislative amendment which takes time.

²¹⁴ This point is made in relation to the new regulatory budgeting scheme of the US administration by R. Pierce in his article “How to Achieve Regulatory Reform”, *Administrative and Regulatory Law News*, Spring 2017, p. 12.

If the regulatory budgeting methodology is based on volume (i.e. numbers of laws) and not costs, insignificant regulations would have the same weight as significant ones. Each ‘out’ at EU level would need to be repealed. The Commission can only propose a repeal. It cannot force the legislature to adopt a repeal. Furthermore, a repeal would need to be carried through to the Member State legal order with no guarantee of outcomes.

It could be argued that these difficulties could be overcome by way of an agreement between the European Commission, the European Parliament and Council to protect repeal or cost-saving potential in the legislative process. A variation on this theme was attempted in the discussions on the revision of the Inter-Institutional Agreement on Better Law Making in 2015. Recognising that elements of poor regulation could inadvertently creep in during the legislative process or, in the case of directives, when Member States transpose EU law into national law, the Commission suggested a moment of reflection/review whereby an external view could be sought if a legislative draft seemed to be developing into a piece of poor regulation during the legislative process.²¹⁵ This suggestion was dismissed by the Council and the European Parliament, as they considered it to impinge their democratic role and legislative competence. Any similar request to safeguard cost reductions would undoubtedly be seen as restricting the co-legislator’s prerogatives.

Regulatory budgeting also risks being a paper exercise. Both the UK and German examples show that methods can be deployed in such a way as to show desired results. The Report of the UK National Audit Office indicates that “limitations in the approach means the scope of the target is open to manipulation and may not reflect a realistic business-centred view of regulatory costs”.²¹⁶ The German National Regulatory Council openly reports that it does not take one-off investment costs or increases in the minimum wage into account in its regulatory budgeting and recognises that these costs may be the most important to business.²¹⁷

In sum, there are few grounds to believe that targets and regulatory budgeting would be more effective ways to manage the stock of legislation. Such schemes could stimulate greater attentiveness to costs and cost calculation, but they risk overlooking benefits and turning into a paper exercise at EU level that does not bring real relief from regulatory burden. If the political aim is to freeze regulatory activity and deregulate, there are less costly ways to achieve the same result, such as legislative moratoria. If there are unnecessary costs, irritation or other burden, it would seem to make sense to zero in on that legislation or areas of legislation so that tailored cost reduction measures can be developed, making sure to maintain benefits.

²¹⁵ European Commission (2015), Communication ‘‘Better Regulation’ for Better Results’ COM(2015) 215 final.; Proposal for an Interinstitutional Agreement on ‘Better Regulation’, COM(2015) 216 final. 19 May 2015, Luxembourg, Publications Office of the EU

²¹⁶ National Audit Office, *The Business Impact Target: Cutting the Cost of Regulation*, Report by the Comptroller and the Auditor General, 29 June 2016, p. 9.

²¹⁷ Normenkontrollrat, Bureaucracy Reduction. ‘Better Regulation’. *Digital Transformation. Leverage Successes – Address Shortcomings*, 2017 Annual Report, Berlin, p. 11-21.

Strengthening outreach....

That only 4% of businesses surveyed in the special Eurobarometer were aware of European Commission actions to simplify EU legislation is a concern. It reflects a fundamental weakness in communication. As the former UK Prime Minister, Tony Blair, pointed this out in a recent speech, *“There is much good work done by this and the previous Commission to reduce regulation and bureaucracy, unfortunately usually ignored or over-shadowed. But we should recognise this is still an issue for people all over Europe.”*²¹⁸ Commission actions on ‘Better Regulation’ need to be more widely communicated by the institution itself, but also by the European institutions, the Member States and the many organisations that are active in the process.

A monitoring framework to track progress...

The ‘Better Regulation’ system itself is vulnerable to criticism in the absence of an agreed monitoring system and systematic measurement of performance. Ideally there should be an improved, more systematic measurement of cost/benefit in the evaluation of individual policy initiatives/legislation feeding into the ‘Better Regulation’ monitoring system. Without a monitoring system, the Commission will continue to rely on anecdotal evidence. This weakens accountability. Being able to show ‘results’ both of legislation and of ‘Better Regulation’ policy is essential to regain public trust.

And to recall in concluding....

‘Better Regulation’ informs political decision-making. It does not replace it. Today, when there is widespread public scepticism about experts and ‘facts’, support for rigorous analytical work is even more important. That is why it is important to keep ‘Better Regulation’ as a high public policy priority and to continue to critically assess and improve on efforts to regulate better.

²¹⁸ Tony Blair, Speech to the European Policy Centre, 1 March 2018

Annex I Case studies – the analytical framework

It is insightful to look at specific cases to examine how ‘Better Regulation’ tools were applied and if they were used and relevant in the decision-making process.

The cases selected and described in detail in annex are initiatives that have gone through the ‘Better Regulation’ cycle, from impact assessment through to implementation, review and evaluation. As ‘Better Regulation’ tools started to be applied systematically in the European Commission through the strategic planning process and to be scrutinised consistently with the establishment of the Impact Assessment Board in 2006, the cases date from the first Barroso Commission (2005-2010). A selection is made of initiatives (the climate change and air examples) governed by means of directives (with the need for the laws to be transposed into the national law of the Member State) and regulation (the roaming example, directly applicable in the Member State). The choice is by no means exhaustive and no attempt is made to suggest that they are fully representative.

The case studies set out the policy framework and examine the following questions:

In terms of compliance, were ‘Better Regulation’ tools applied?

In terms of quality, how were the ‘Better Regulation’ efforts judged by scrutiny bodies?

Did the ‘Better Regulation’ effort help get the Commission proposals through the legislature?

Did the ‘Better Regulation’ process facilitate implementation as reflected in fewer infringement procedures?

Did the ‘Better Regulation’ efforts contribute to the achievement of policy outcomes/results?

Were the ‘Better Regulation’ efforts relevant and useful in the decision-making process?

Annex II Case Study – the “Roaming” Regulation

The regulation of roaming charges in the European Union shows that while the regulation on roaming was prepared and reviewed in compliance with good regulatory practice and the ‘Better Regulation’ guidelines, major decisions were taken on political grounds which departed significantly from the analytical work and recommendations.

That is not to say that ‘Better Regulation’ tools served no purpose. They provided the Commission with reasoned options, rigorous scrutiny and timely review. The requirement to conduct a public consultation opened the debate to a wide range of stakeholders. Policy results have thus far met objectives, and the outputs of the regulatory policy system (impact assessment, stakeholder consultation, review) were used in the decision-making process. The analytical recommendations did not always find their way through to the adopted legislation.

1. The policy and legal context 2006 – 2017

Roaming charges are levied by mobile operators for voice, messaging and data services.²¹⁹ The market has a retail and a wholesale component. “International roaming” outside of the home market justified a surcharge and refers to a service that allows a customer of a Mobile (Virtual) Network Operator (M(V)NO) in one country, to obtain services (voice, SMS or data) from an MNO in another country. The service provider ensures that consumers remain connected to a mobile network abroad while using the same mobile handset, tablet or laptop (for data roaming) and the same telephone number. Wholesale roaming services are those between service providers located in different countries. Service providers that want to offer roaming services to their customers have to buy them from MNOs located in the visited countries. This involves drawing up commercial agreements between service providers.

The European Commission has attached high priority to reduction of roaming charges in the European Union and has tried different ways to achieve this aim over the past twenty years. Roaming charges were examined in a competition inquiry launched in 1999 under which telecom operators were investigated for abuse of dominant position.²²⁰ The competition discussions were overtaken by the decision to propose regulation in 2006 and subsequently dropped. Also, while looking at possible policy options in 2005, the Commission set up a website to encourage price transparency.²²¹ But neither this nudging process, nor the competition route, led to reduced prices or increased competition.

²¹⁹ Definitions and context are set out in each impact assessment. See, for example, the Impact Assessment of Policy Options in relation to the Commission Review of the Functioning of EC Regulation 544 (2009) of 18 June 2009 on roaming on public telephone networks in the European Community, SEC(2011) 870 final, 6 July 2011, p. 8

²²⁰ See European Commission working document on the initial findings of the sector enquiry into mobile roaming charges of 13.12.2000 at http://ec.europa.eu/comm/competition/antitrust/others/sector_inquiries/roaming/. In July 2004 statements of objections were sent to O2 UK and Vodafone UK and in February 2005 to T-Mobile and Vodafone Germany alleging that these operators had infringed the EC Treaty, enjoying a dominant position on each of their monopolistic national wholesale markets for international roaming services. Hearings were held in 2005.

²²¹ see European Commission, http://ec.europa.eu/information_society/activities/roaming/index_en.htm.

So, faced with a fragmented internal market in telecommunications and excessive roaming charges at retail level which did not reflect costs, the European Union decided to regulate the market by way of price caps.²²² Starting in 2007, price caps (Eurotariffs) were applied at retail and wholesale level to voice calls made at home and abroad. They were progressively extended to messaging and data transfer (2009).²²³ Opt-outs from the set rates were allowed to stimulate competition. Yearly reductions in price were implemented. Consumer protection measures were introduced at the same time: consumers were informed of costs when crossing borders and operators were required to issue warnings to consumers to avoid so called bill-shocks.

The approach was reviewed in 2010-2011.²²⁴ The review showed that while the price caps were lowering prices, significant structural problems remained. The 2012 revision of the roaming regime therefore contained structural measures such as decoupling home services from roaming (i.e. using an alternate roaming provider while keeping the home mobile number) and so called “local break out” (e.g. allowing subscribers to access data-roaming directly from an alternate provider without having to have a separate SIM card).²²⁵

These structural measures, due to enter into force in 2014, were overtaken in 2013 when the Commission proposed that operators could be exempted from these structural measures if they moved to a ‘roam like at home’ (RLAH) regime, which would eliminate roaming charges outside the home market for subscribers (i.e. there would be no difference between domestic charges and charges made for voice, messaging or data when travelling or receiving calls from other EU/EEA Member States) and if they created bilateral or multilateral wholesale agreements in the EU.²²⁶ The co-legislator did not take all of the Commission’s suggestions on board and decided in 2015 to move to a mandatory RLAH regime by June 2017.²²⁷ As there would be impacts on operators and the wholesale market, the legislator mandated the Commission to adopt an implementing regulation on wholesale pricing, fair use, and sustainability in that market by the end of 2016.²²⁸

²²² European Union, Reg. EC 717 (2007) Roaming Regulation, 27 June 2007

²²³ European Union, Reg. EC 544 (2009) Roaming Regulation, 18 June 2009

²²⁴ European Commission, 2011 Report on Roaming SEC (2011) 870 and 871, Luxembourg, Publications Office of the EU

²²⁵ European Union, Reg. EC 531 (2012) Regulation on Roaming on public mobile networks

²²⁶ European Commission, COM(2013) 627 final; Proposal for a regulation laying down measures concerning the European single market for electronic communications and to achieve a connected continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012, 11 September 2013, Luxembourg, Publications Office of the EU.

²²⁷ European Union, Reg EC 2120 (2015) Roaming Regulation (Connected Continent Package), 25 November 2015

²²⁸ European Commission, Reg. C 8784 (2016) Implementing Regulation on Fair Use and Sustainability, 15 December 2016, Luxembourg, Publications Office of the EU

2. 'Better Regulation' actions

The development of the roaming legislation went through a whole policy cycle from impact assessment and consultation to implementation and review. There were however exceptions to good regulatory practice. The public consultation in 2006 was shorter than eight weeks. The 2013 impact assessment was conducted without a public consultation. A full ex-post evaluation has not been done.

The roaming regulation was subject to an impact assessment in 2006.²²⁹ The main problems identified were a fragmented internal market in telecommunications, lack of effective competition, and excessive prices to consumers for roaming. The objective of intervention was to foster competition, contribute to the creation of a single market for telecommunications services, and eliminate excessive roaming charges for consumers while ensuring consumer protection through greater transparency. Different options – self regulation, co regulation, soft law, regulation of wholesale and retail markets separately and regulation of both markets via price caps - were examined against a baseline scenario. The latter option was chosen given because the benefits measured in terms of consumer surplus greatly exceeded those of any of the other options.

The impact assessment accompanying the 2011 proposal to amend the Roaming Regulation²³⁰ presented an in-depth qualitative and quantitative analysis. It examined the options of (i) no regulation; (ii) maintaining the approach of applying both wholesale and retail price cap regulation, including the extension of the retail price caps to data-roaming services (and within this option, sub-options of continuing the same price caps, extending the price caps on a steeper price path, or a Roam-Like-Home/Roam-like-a-Local option with a fixed mark-up to be added to domestic prices (to cover roaming wholesale and retail costs either in the customer's home market or in the visited market); (iii) structural solutions such as decoupling (under which customers would be able to purchase roaming services from an operator other than the provider of the domestic services) and granting access to mobile virtual network operators (MVNOs) to specific levels of wholesale charges. The preferred option was for the structural measures combined with price caps for a transitional period.

The 2013 Impact Assessment²³¹ identified three main options: the status quo; changes consistent with the 2012 Regulation, providing additional regulatory incentives to industry to offer RLAH on a voluntary basis to customers; new binding measures that would impose the end of roaming charges by an early date. The status quo and the binding measures were rejected. The option of

²²⁹ European Commission, Staff Working Paper SEC(2006) 925; Impact Assessment Of Policy Options In Relation To A Commission Proposal For A Regulation Of The European Parliament And Of The Council On Roaming On Public Mobile Networks Within The Community; Brussels, 12 July 2006 , Luxembourg, Publications Office of the EU

²³⁰ European Commission, Staff Working Paper SEC(2011) 870 and 871; Impact Assessment of Policy Options in relation to a Commission Proposal For A Regulation of the European Parliament and of the Council on Roaming on Public Mobile Networks within the Community; Brussels, 06 July 2011, Luxembourg, Publications Office of the EU.

²³¹ European Commission, Staff Working Paper SEC(2013) 331 final; Impact Assessment in relation to a Commission Proposal concerning the European single market for electronic communications and to achieve a Connected Continent, Brussels, 11 September 2013, Luxembourg, Publications Office of the EU.

voluntary provision of RLAH was selected as the preferred option. It proposed elimination of charges for incoming calls within the EU and incentives to conclude pan-European roaming agreements between service providers so that operators would provide RLAH by no later than 2016. It set a number of conditions on service providers concerning eligibility for exemption from the requirements set out in the 2012 regulation. The preferred option in the impact assessment inspired the Commission proposal. The legislature, by contrast, chose the binding option in the adopted regulation.

The roaming regulation and its amendments have been subject to review and sunset clauses. The Commission was required to report on a regular basis before extending or adjusting the proposed price caps. The reporting included an assessment of the quality and availability of services, the degree of competition, the impact of structural measures, etc. The Body of European Regulators for Electronic Communications (BEREC), created under the 2009 Regulation, was given the mandate to collect the relevant data on competition and report on the evolution of pricing and consumption patterns and of wholesale rates.

Consultations were held, but, the 2006 public consultation was short and no consultation was done in preparing the 2013 ‘Connected Continent’ package. Given the negative reaction, consultation was held after the Commission initiative was published.²³² There was a public consultation on fair use and sustainability in the wholesale market in 2016. Following that consultation, the Commission prepared a draft implementing regulation and put it out for the required eight-week feedback period. It was pulled from the website before the eight-week public feedback period was completed at the request of the Commission President.

Eurobarometer surveys were conducted to gauge consumer reaction to the measures.

²³² Public Consultation on the Review of National Wholesale Roaming Markets, Fair Use Policy and the Sustainability Mechanisms Referred to in Roaming Regulation 531/2012 as Amended by Regulation 2015/2120”, published on 26 November 2015.

‘Better Regulation’ Outputs

Ex-ante Impact Assessments:

2006 Impact Assessment SEC(2006) 925

2008 Impact Assessment SEC(2008) 2489 and 2490

2013 Impact Assessment Connected Continent SWD(2013) 331 and 332

2016 Impact Assessment on Wholesale Roaming SWD(2016) 202 and 201

2016 Impact Assessment on Fair Use and Sustainability SWD(2016) 465 and 464

Consultation

2006 European Parliament Hearing, Targeted Consultation

2010 Public Consultation

2013-14 Public Consultation

2015-16 Public Consultation on Wholesale Markets

Ex-post Studies and Reviews

2008 Detailed assessment of costs in a study on Data Roaming

2011 Report on Roaming SEC (2011) 870 and 871

2016 Detailed assessment of costs in a study on Wholesale Roaming

Other

2014 Eurobarometer

2017 Eurobarometer

3. The effectiveness of ‘Better Regulation’ instruments

3.1 Meeting quality standards

The Impact Assessment Board/the Regulatory Scrutiny Board

The impact assessments were subject to systematic quality control. As the Impact Assessment Board was only being set up in 2006, there was no quality control of the first impact assessment. Both the 2008 and 2011 impact assessments received positive opinions from the Impact Assessment Board, but, both opinions asked for substantial improvement in the analysis. For the 2008 impact assessment, the Impact Assessment Board requested improved analysis of competition aspects, a better description of the market, particularly revenue and costs to the industry, and better costing of transparency measures.²³³ The 2011 Impact Assessment Board opinion called for improvements in the quantitative analysis and in the presentation of options, and a better analysis of industry structure and costs to the industry of the structural measures (which were identified in

²³³ European Commission, Impact Assessment Board, D(2008) 6957, Opinion on the Impact Assessment on the Review of the Roaming Regulation, 01 September 2008

the IAB opinion as costly, technically challenging and time-consuming).²³⁴ The 2013 impact assessment on a ‘Connected Continent’ received two negative opinions from the Impact Assessment Board. The IAB specifically asked for a better analysis of the impact of the introduction of a RLAH regime on mobile operators and investment and a better assessment of how the proposed solutions would respond to the problems identified.²³⁵ It was particularly critical about the lack of a public consultation. The Regulatory Scrutiny Board gave positive opinions on the 2016 impact assessments on wholesale charges and on fair use/sustainability but requested clarification of the market failure, better justification of the need for intervention, improvement of the baseline, and a clearer presentation of the options.²³⁶

The European Parliament and Council

The European Parliament Initial Assessment of the 2013 Impact Assessment on the Connected Continent echoed the concerns of the Commission’s Impact Assessment Board, that the analysis need to be strengthened to better explain the impacts on operators and the interface with the existing roaming regulation.²³⁷ The European Parliament also scrutinised the 2016 impact assessment signalling that “the body of research presented appears to be solid and comprehensive although it is not always clear which findings were used in the elaboration of which options. Furthermore, the technical language of the IA makes it difficult to understand the reasoning and evidence behind the analysis”.²³⁸ The Council did not record that it examined the impact assessment.²³⁹

The European Ombudsman

Interestingly, the European Ombudsman exercised a quality control function in examining whether the Commission had complied with its own ‘Better Regulation’ rules and procedures. The Ombudsman received complaints alleging maladministration. The first one was made by the GSM Association in 2007, alleging that the Commission had failed to comply with its own procedures on impact assessment and consultation. The Ombudsman ruled that there had been

²³⁴ European Commission, Impact Assessment Board, SEC(2011)872 , Opinion on the Impact Assessment on the Review of the Roaming Regulation, 08.04.2011, Luxembourg, Publications Office of the EU

²³⁵ European Commission, Impact Assessment Board, SEC (2013)468, Opinion on the Impact Assessment on the Measures to Complete the EU Single Market for Electronic Communications, 06.09.2013, Luxembourg, Publications Office of the EU

²³⁶ European Commission, Regulatory Scrutiny Board, SEC(2016)551, Opinion on the Impact Assessment on the Fair Use and Sustainability Mechanism for Wholesale Roaming Markets, 15.12.2016

²³⁷ European Parliament (2013), *Initial appraisal of a European Commission Impact Assessment, European single market for electronic communications -Achieving a Connected Continent*, PE 514.071, October 2013

²³⁸ European Parliament (2016), *Initial appraisal of a European Commission Impact Assessment, Wholesale Roaming Markets*, September 2016

²³⁹ There is no reference in the 2015 Report of the Council on Impact Assessment to the roaming proposal (Council of the European Union, Annual Council Reports on Impact Assessment 8749/15). So, it does not appear to have been formally discussed in the Council working group.

maladministration in regard to the length of the 2006 public consultation, which lasted less than eight weeks.²⁴⁰

The French and the Dutch telecommunications operators lodged a complaint with the Ombudsman in 2009 concerning the methodology used by the Commission in compiling its reviews on the roaming market. In his decision in 2010, the Ombudsman did not find grounds to object to the methodology used. However, he found that the Commission had committed maladministration in the way it presented the reviews, which could be seen as misleading.²⁴¹

The European Competitive Telecommunications Association (ECTA) submitted a complaint to the European Ombudsman, alleging that the European Commission had failed to carry out an adequate public consultation in advance of drawing up its 2013 Connected Continent proposal. The Commission made its proposal on 11 September 2013, three months after it had publicly announced its intentions. The complainant alleged that the Commission had wrongly invoked urgency as a reason for rushing through the consultation process and had deliberately tried to conceal the lack of a public consultation. The complainant also alleged that the Commission had failed (i) to identify the different types of stakeholders to be consulted, (ii) to address the points raised by the Impact Assessment Board, and (iii) to carry out a proper inter-service consultation.

Given the Commission's right to prioritise and plan at its own discretion, the Ombudsman did not find maladministration in relation to the public consultation or the other issues raised.²⁴² But he concluded that the public consultation did not comply with the Commission's own rules on general principles and minimum standards. The Ombudsman queried whether the urgency claimed by the Commission derived from the Council's statement or reflected the Commission's own assessment of the situation. The Ombudsman suggested that the Commission should clarify in its own rules the precise and limited circumstances in which it can curtail a public consultation because of a policy priority.

The European Court of Justice

A group of telecommunications companies (Vodafone, Telefonica, Orange, T-Mobile) challenged the first roaming regulation on the legal basis, proportionality and subsidiarity. In its judgement C-58/08 of 08/06/2010, the European Court of Justice dismissed the charges and used the analysis in the impact assessment to support its conclusions.²⁴³

²⁴⁰ European Ombudsman, Case 3617/2006 JF, 03 July 2008

²⁴¹ European Ombudsman, Case 2131/2009 RT, 30 July 2010

²⁴² European Ombudsman, Case 904/2014 OV, 22 September 2015

²⁴³ European Court of Justice, Case C-58/08, 10 June 2010, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2010-06/cp100053en.pdf>.

3.2 Facilitating adoption and reducing potential implementation difficulties

The roaming regulations were all adopted in first reading. The analytical work is reported by an academic study to have enhanced the Commission role in the interinstitutional discussions “...*the Commission did have a substantial structurally defined role in agenda-setting and consensus-building within the co-decision procedure. Its role is said to have been strengthened as a result of its expertise in this case which was honed through the process of having to work on impact assessments prior to proposing legislation.*”²⁴⁴

The roaming regulations were directly applicable and there have been no infringement cases launched.

4. Did ‘Better Regulation’ make a difference?

4.1 To policy outcomes?

The roaming regulation achieved its policy goal, namely to eliminate the difference between EU international roaming charges and national tariffs.²⁴⁵ Consumers benefited.²⁴⁶ An assessment by the Commission’s economic department indicated that regulation was critical to achieving these objectives.²⁴⁷ So, insofar as regulation, inspired by the impact assessment and review exercises was critical to the achievement of policy objectives, it can be inferred that ‘Better Regulation’ contributed to the results.

4.2 To policy-making?

In terms of decision-making in the Commission, impact assessments were revised in response to the Opinions of the Impact Assessment Board before proposals were finalised for Commission decision. However, there was no reconsideration of the choice of regulation (as opposed to

²⁴⁴ Michelle Cini and Marián Šuplata (2017) Policy leadership in the European Commission: the regulation of EU mobile roaming charges, *Journal of European Integration*, 39:2, p.143-156.

²⁴⁵ European Commission, A Digital Agenda for Europe, COM(2010) 245 final; Annex 2. See http://ec.europa.eu/information_society/digital-agenda/index_en.htm.

²⁴⁶ The Commission estimates that travelling consumers saved €9.6 billion between 2008 and 2013. Between 2007 and 2016 prices fell by over 80%, for calls, SMS (texts) and data together; and during the same period roaming increased by 91%, with the volume of the data roaming market up by 630%.

²⁴⁷ The analysis of the Commission’s economics department in 2014 pointed to the role of the regulators and regulation in shaping those outcomes “...*the evidence seems to indicate that this EU-wide regulatory intervention has engendered not only improved competitive conditions in the form of steady price reduction but also price convergence in the internal market.....the analysis of specific segments like roaming, mobile termination rates and mobile broadband reveals that an often crucial role in the liberalisation has been played by the regulator both at EU and national levelsignificant fragmentation still exists and is not significantly decreasing over time. Integration seems poor also in highly regulated segments like roaming.*” European Commission, Economic Occasional Papers, No. 129, February 2013, p. 72.

competition policy, for example) once the decision had been taken to introduce price caps combined with structural measures in 2006.²⁴⁸

The impact assessments and regular reviews in the 2006-2012 period contributed to the drafting of the Commission proposals, which inspired discussions in the legislature and the adopted regulations. But the link between the 2013 impact assessment and the final 2015 regulation was weak. That impact assessment attempted to justify the introduction of new legislation before the 2012 regulation was implemented.²⁴⁹ It tried to preserve the structural measures called for by the 2011 review and included in the 2012 regulation. The preferred option of the impact assessment was taken over in the 2013 proposal, but the legislature found the proposal too complicated and changes were made in the legislative process.

Political preference also prevailed over the technical analysis presented in the 2016 Commission implementing regulation on fair use. The original draft provided for a maximum 90-day period abroad for roaming like at home. It was withdrawn from the Commission's feedback website as the Commission President did not agree with the 90-day period. Both the draft regulation and the impact assessment were revised to justify the removal of the 90-day option.

So, while the Commission departments have consistently conducted impact assessments which informed the Commission proposals, political decisions were reached in both 2015 and 2016 by the Commission and the legislature which differed from the preferred options set out in the analyses.

5. Observations

The roaming example shows the value placed on European integration and the single market and how it played a crucial role in decision-making alongside standard (cost and benefit) elements of analysis. Differing and excessive charges for roaming in the EU were a visible reminder of a single market failure. Reduction in roaming charges came to represent the 'success of the EU' even though it affected only the travelling population and is a small part of the telecommunications market. The removal of the difference between domestic and internal EU charges served the complementary policy goal of EU integration, which has a value that is difficult to monetise. While it has brought economic benefit, its symbolic value was even greater.²⁵⁰

²⁴⁸ Some question whether the same objectives could have been better achieved through competition policy rather than regulatory policy. See Knieps, G., and P. Zenhäusern. 2014, Regulatory Fallacies in Global Telecommunications: The Case of International Mobile Roaming. *International Economics and Economic Policy* 11 (1–2):pp. 63–79.

²⁴⁹ The impact assessment points out that “it is important to note that the approach foreseen in the legal instrument, i.e. the gradual introduction of 'roam like at home' (RLAH) type of tariffs through bilateral or multilateral roaming agreements, is optional and fully consistent with the current regulatory framework (Roaming III Regulation). It follows that the proposed approach will produce impacts only to the extent that operators decide to opt in. In that case, the impact can be expected to be positive compared to the baseline (no change) scenario.”; European Commission, Impact Assessment Connected Continent SWD (2013) 331, 11 September 2013, pp. 16-17

²⁵⁰ This type of 'valuation' is referred to by Coglianese in the OECD Measuring Regulatory Performance as follows “...This is not to say that the only outcomes of concern for regulatory policy will be the substantive improvement in regulations. Sometimes regulatory policy will aim to advance other goals, such as procedural legitimacy....

The Commission has complied with its ‘Better Regulation’ rules and procedures, except for ex-post evaluation which has not yet been done and consultation where the Commission cut corners in public consultation and related consultation periods. It also caused uncertainty throwing into question the sustainability of many of the measures in the 2012 regulation in its 2013 ‘Connected Continent’ initiative. It is unclear how far the industry had gone in preparing to implement the 2012 regulation (by the 2014 deadline) to introduce changes such as choice of roaming provider at home and abroad. But the change of approach in 2013 did little to improve the industry’s perception of the Commission’s commitment to ‘Better Regulation’ (as reflected in their submission to the Ombudsman).

The roaming example clearly shows that political decisions were informed by impact assessments and reviews but that the analysis was not a determining factor in the political decisions taken.

something which might be valued for its own sake irrespective of how it affects the substantive quality of regulation....”Coglianese, C., Measuring Regulatory Performance, OECD Expert Paper, No.1, 2012

Annex III Case Study – Air Quality Legislation

1. The policy and legal context

In line with the EU's Sixth Environmental Action Plan and complying with the 'Better Regulation' aspirations of the first Barroso Commission, the European Commission adopted a series of thematic strategies. The air quality thematic strategy (TSAP) analysed a broad range of issues, looking at the specific pressures and impacts of air pollution (for example, the negative health impacts of particulate matter), impacts which cut across environment themes (climate change, biodiversity loss), and links between the environment impacts and sector policies (such as transport, energy, agriculture). The strategy examined how efforts to improve air quality could contribute to the broader objectives of growth and jobs. It set out a broad range of options and a varied policy mix, including the use of market-based instruments, technology deployment and innovation.

The Commission adopted the air quality thematic strategy in September 2005²⁵¹ together with a proposal for a directive on ambient air quality and cleaner air for Europe.²⁵² An impact assessment was part of the package.²⁵³

The ambient air quality legislation was adopted by the legislature in 2008.²⁵⁴ It merged the existing legislation on air quality into a single directive with no change to the air quality objectives of those directives.²⁵⁵ It set out basic principles for the assessment and management of air quality as well as limit values/thresholds and targets for ambient air pollution that should not be exceeded. The streamlined legislation covered sulphur dioxides (SO₂), non-methane volatile organic compounds (NMVOC), nitrogen oxides (NO_x), nitrogen dioxide (NO₂), lead (Pb), benzene (C₆H₆), carbon monoxide (CO), ozone (O₃) and particulates (PM₁₀). The Commission proposed to include fine particulate matter (PM_{2.5}) under the directive. If thresholds were exceeded, the national authorities

²⁵¹ European Commission, Thematic Strategy on Air Pollution, [COM\(2005\) 446 final, 21.09.2005](#), Luxembourg, Publications Office of the EU

²⁵² European Commission, Proposal for a Directive on Ambient Air Quality and Cleaner Air for Europe, [COM\(2005\) 447 final](#), Luxembourg, Publications Office of the EU

²⁵³ European Commission, Impact Assessment Accompanying the Thematic Strategy on Air, SEC(2005) 1133, Brussels, 21 9.2005, Luxembourg, Publications Office of the EU

²⁵⁴ European Union, Directive 2008/50/EC on ambient air quality and cleaner air for Europe

²⁵⁵ All existing directives were merged except for the so-called Fourth Daughter Directive (2004/107/EC) relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air; together with this directive air quality legislation covers twelve key air pollutants: sulphur dioxide, nitrogen dioxide and nitrogen oxides, particulate matter (PM_{2.5} and PM₁₀), ozone, benzene, lead, carbon monoxide, arsenic, cadmium, nickel, and benzo(a)pyrene)

were required to develop and implement air quality management plans. The legislation simplified reporting and monitoring requirements with a move towards electronic reporting.

The strategy set targets against a level of maximum feasibility. The aim was to reduce the concentration of PM_{2.5} by 75% and ground level ozone by 60% from what was estimated as technically feasible by 2020. Acidification and eutrophication was to be reduced by 55%. To achieve this, SO₂ emissions needed to decrease by 82%, NO_x emissions by 60%, VOCs by 51%, ammonia by 27% and primary PM_{2.5} by 59% relative to emissions in 2000. These reductions were estimated to save about 1.71 million life years from exposure to particulate matter. They were also expected to reduce the environmental damage done to forests, lakes and streams and biodiversity by acid rain and better protect European ecosystems from atmospheric inputs of nutrient nitrogen.

A review of the results of air quality legislation were presented in the 2013 impact assessment 'Clean Air Programme for Europe'.²⁵⁶ For the ambient air quality directives, the review pointed to continuing compliance gaps and implementation problems and so the Commission did not propose a change to the thresholds and targets. The programme kept the existing air quality standards levels and aimed at achieving full compliance by 2020 at the latest.

The ambient air quality legislation is one pillar of a three-pronged approach to combating air pollution. The other two main areas of regulation are (i) national emission ceilings for the most important transboundary air pollutants, and; (ii) regulation of emission standards for key pollution sources through legislation on, for example, fuel quality, vehicle emissions, industrial emissions, etc. The National Emission Ceilings Directive (NECD 2001/81/EC), revised in 2016 (2016/2284/EU), sets national pollution reduction requirements for 2020 and 2030 for five key pollutants: sulphur dioxide, nitrogen oxides, non-methane volatile organic compounds, ammonia and fine particulate matter. The reductions are expected to reduce the health impacts of air pollution by 54% by 2030, and to reduce the proportion of monitoring stations exceeding the WHO guideline value for PM_{2.5} of 10µg/m³ from 88% in 2005 to 13% in 2030 (with most of the exceeding stations being within 5µg/m³ of the guideline). If the NECD is successful in achieving the reductions, consideration may be given to revising the thresholds in the air quality directives.

2. 'Better Regulation' actions

Impact Assessment

The preparation of the thematic strategy on air and the air quality legislative proposal included the preparation of an impact assessment. Given that the air quality limit values were not changed in the legislation and that the novelty in the package was the introduction of rules on PM_{2.5}, the 2005 impact assessment focused on the latter whilst also setting out detailed analysis of the national emission reductions of the main pollutants which would be needed to make cost-effective progress towards the EU's objectives for reducing the health and ecosystem impacts of air pollution.²⁵⁷ In

²⁵⁶ European Commission, Impact Assessment, Clean Air Programme for Europe, SEC(2013) 531 and 532

²⁵⁷ European Commission, Impact Assessment on the Thematic Strategy for Air Quality, SEC (2005) 1113

the context of the “Clean Air for Europe” package of 2013, the modelling underlying the thematic strategy was revised using updated data.

Stakeholder Consultation

The Commission launched a public consultation on air pollution in December 2004 and January 2005.²⁵⁸ In all, 11,578 responses were received, with over 10,000 from private individuals. In 2005, this was exceptional - by far the largest response ever to a Commission public consultation.

Likewise, the numbers of meetings with stakeholders set a precedent. There were 13 meetings with a range of stakeholders, including industry groups (road vehicles, oil refiners, volatile organic compounds industries and general industry representatives), Member States and NGOs including the European Environment Bureau, the Swedish Secretariat on Acid Rain and the World Health Organisation (WHO), before the adoption of the Communication. Accession and EEA countries were also invited to these meetings. Roughly 100 meetings of various technical working groups were organised by the Commission under the so-called CAFE Programme between 2001 and 2005.

Simplification and Burden Reduction

The air quality package aimed to simplify and reduce administrative burden. The streamlining took the form of merging five separate legal instruments²⁵⁹ into a single directive. The initiative took note of the difficulties that Member States were having in complying with the existing directives and introduced flexibility in meeting deadlines. As well, considerable effort went into working with the Member States on improving monitoring tools and simplifying reporting.

Review/Evaluation: The thematic strategy modelling was redone in 2011 to take account of the recession and to better incorporate data from the new EU Member States in eastern Europe. This work was reflected in the review of the air quality directives in Annex 4 of the 2013 Impact Assessment.²⁶⁰ A fitness check is currently being conducted.²⁶¹

²⁵⁸ European Commission, Impact Assessment on the Thematic Strategy for Air Quality [SEC \(2005\) 1133 p.125](#)

²⁵⁹ Council Directive 96/62/EC on ambient air quality assessment and management, OJ L 296, 21.11.1996, p. 55., Council Directive 1999/30/EC relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air, OJ L 163, 29.6.1999, p. 41, Directive 2000/69/EC of the European Parliament and of the Council relating to limit values for benzene and carbon monoxide in ambient air, OJ L 313, 13.12.2000, p. 12, Directive 2002/3/EC of the European Parliament and of the Council relating to ozone in ambient air, OJ L 67, 9.3.2002, p. 14, Council Decision 97/101/EC establishing a reciprocal exchange of information and data from networks and individual stations measuring ambient air pollution within the Member States, OJ L 35, 5.2.1997, p. 14

²⁶⁰ European Commission, Impact Assessment on the Clean Air for Europe Package, SEC (2013) 531, p. 96.

²⁶¹ See Roadmap for the Fitness Check on Air Quality Legislation, https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-3763998_en.

3. The effectiveness of 'Better Regulation' instruments

3.1 Meeting quality standards

The impact assessment of the thematic strategy on air pollution and the related legislation predated the establishment of the Impact Assessment Board. The 2013 Impact Assessment, which looked at the National Emissions Ceiling Directive and whether the air quality directive needed to be revised, was scrutinised. The Impact Assessment Board asked for improvements in terms of providing evidence of past performance, strengthening the cost/benefit analysis and explaining links with climate change and the air quality directives. In response to the Opinion, the problem analysis and underlying evidence were more clearly brought out by annexing a review of the existing policy framework. The links with existing policy instruments and cost/benefits of options were clarified by including additional quantitative analysis and data in tabular form.

The question of coherence between the air quality legislation and climate/energy policy was raised, not only by the Impact Assessment Board but also by the legislature. The European Parliament commissioned a study which concluded that the air quality and climate change policy initiatives were complementary and that climate initiatives, by stimulating reduced consumption of polluting fuels, would cut mortality rates and make air quality improvement initiatives less costly.²⁶² The question of coherence with the recent policy packages is one of the main avenues of analysis in the ongoing fitness check.²⁶³

3.2 Facilitating adoption and reducing potential implementation difficulties

The quality of the preparations of the air quality package, including the modelling and cost benefit analysis assisted policy makers in deciding on levels of ambition. The impact assessment (and the cost-effectiveness calculations in particular) was used in the legislative process. But as the legislation went to second reading, the conclusion cannot be reached that the analytical preparation contributed to more rapid decision-making.

The impact assessment work did not capture the difficulties that Member States would face in implementation. Almost all Member States were late in transposing the Directive. For particulate matter, as of May 2018, limit values were exceeded in 19 Member States.²⁶⁴ The European Commission has been pursuing infringement procedures for persistent excessive particulate matter (PM10) levels against 16 Member States (Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Hungary, Italy, Latvia, Portugal, Poland, Romania, Sweden, Slovakia and Slovenia). In 2017 and 2018, the European Court of Justice handed down judgments on two of the most severe particulate matter exceedances in Europe, namely in Bulgaria and Poland. For nitrogen dioxide, the annual limit value continues to be widely exceeded across Europe with exceedances

²⁶² European Parliament, DG for Internal Policies, Implementation of the Ambient Air Quality Directive, April 2016, p.63

²⁶³ European Commission, Roadmap for the Fitness Check on Air Quality Legislation, at https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-3763998_en.

²⁶⁴ European Commission, Communication *A Europe that protects: clean air for all*, May 2018, p. 9

reported 22 Member States. By May 2018, infringement procedures for persistent exceedances of nitrogen dioxide levels have been launched against 13 Member States (Austria, Belgium, the Czech Republic, Germany, Denmark, France, Spain, Hungary, Italy, Luxembourg, Poland, Portugal, and the United Kingdom). The flexibility offered to the Member States in terms of transition periods for reaching particulate matter aims has not helped implementation. It seems to have been abused. Furthermore, there are weaknesses in monitoring and enforcement which were not adequately foreseen in the original analytical work.

4. Did 'Better Regulation' make a difference?

4.1. In contributing to the achievement of policy goals and outcomes?

While most of the air quality targets are projected to be met by 2020, those for nitrogen oxide, ground level ozone and particulates – the focus of the 2005 impact assessment – will not be met.²⁶⁵ Limit and target values for these pollutants are exceeded in many urban areas and global emissions of nitrogen oxides (NOx) are not decreasing as much as expected. A range of sectors are responsible for the exceedances in particulate matter, prominent among which are the use of solid fuels (particularly in domestic combustion), the primary particulate emissions from pre-Euro 5/V diesel vehicles, and the combination of agriculture ammonia emissions and emissions from transport and industry to produce so-called 'secondary particles' (combinations of NH₃ with either SO_x or NO_x).

Concerning costs, a 2012 study²⁶⁶ looked again at the air pollution control costs projected in the initial impact assessment against actual costs for 2010. It concluded that these costs were 6% higher than the earlier estimate, mainly due to higher consumption of coal, that required more emission control efforts. This represented an increase from 0.48% of GDP in the initial impact assessment to 0.51%. For 2020, the cost difference was estimated to increase by 0.11 percentage points (0.48% to 0.59%), due in part to the additional legislation that is now included in the TSAP

²⁶⁵ In its 2015 State of the Environment report, the European Environment Agency overview of air pollutant emission trends showed that from 1990 to 2015 the EU28 reduced emissions of all air pollutants. The biggest fall was for sulphur oxides (SO_x) which decreased by almost 90% (2.8 million tonnes compared to 25.3 million tonnes in 1990). The majority of SO_x emission reductions were in the energy production and distribution sector (14.9 million tonnes less). Non-methane volatile organic compounds (NMVOC) declined by nearly 60% from 17.1 to 6.6 million tonnes, with most reductions taking place in the road transport sector (5.1 million tonnes less) and in industrial processes and product use (2.9 million tonnes less). Emissions of nitrous oxides (NO_x) more than halved from 17.6 to 7.8 million tonnes. The largest reduction took place in road transport (4.5 million tonnes less). NO_x emissions in the energy production and distribution sector decreased by 2.8 million tonnes. The smallest decrease was for ammonia and PM_{2.5} emissions. Ammonia (NH₃) emissions fell by roughly a quarter from 5.2 to 4.0 million tonnes. EU-wide emissions of and PM_{2.5} also dropped by roughly a quarter between 2000 and 2015, with the most significant reductions taking place in the energy production and distribution sector as well as in road transport and only marginal reductions in the commercial, institutional and household sector which is responsible for more than half of the total PM_{2.5} emissions in the EU. In 2014, 23 out of 28 Member States reported exceedances of at least one air pollutant, including in more than 130 cities.

²⁶⁶ International Institute for Applied Systems Analysis, Factors Determining Changes of Emissions of Air Pollutants, TSAP Report No. 2, June 2012; <http://www.iiasa.ac.at/web/home/research/researchPrograms/air/policy/TSAP-DISTANCE-20120612.pdf>.

2012 baseline (e.g., the EURO 6/VI standards). The failure to meet nitrogen oxide and particulate matter objectives has had a knock-on effect on benefit projections. In the same study, the authors projected that estimated benefits in terms of protection of human health and reduction of eutrophication and forest acidification would not be met. The TSAP targets for water acidification and ground level ozone were expected to be met.

4.2 In contributing to better policy-making?

The impact assessment set a baseline for measuring progress and for taking both costs and benefits more clearly into account in subsequent years. The projections were redone in 2011-2012 with the result, as mentioned above that the 2013 'Clear Air Package' focused on the challenges of implementing the existing legislation rather than introducing more stringent standards.

5. Observations

The air quality legislation was developed in full compliance with 'Better Regulation' rules and practices. It can be considered an example of good practice, with assessments and reviews guiding policy decisions. Attention has been paid to cost/benefit considerations throughout. However, the air quality policy has not achieved its objectives on certain pollutants. The analytical work did not fully anticipate implementation challenges. The fitness check being conducted now should answer some key questions concerning whether the objectives have been met in the most effective and efficient manner, why certain objectives were not met and whether the initial projections of costs and benefits were sound.

Annex IV Case Study – Climate Change Policy

Climate change is a policy area that has applied ‘Better Regulation’ disciplines systematically over the past fifteen years. Starting in 2005 with the background document to the communication ‘Winning the Battle against Global Climate Change’,²⁶⁷ strategic choices in climate change policy have been subject to impact assessment and review, with structured and extensive stakeholder consultation. The tools of climate change policy, the Emissions Trading System (ETS), the Effort Sharing Decision (ESD) for sectors not covered by ETS, Land Use, Land Use Change and Forestry (LULUCF), energy efficiency, renewables, vehicle emission standards, carbon capture and storage, and fluorinated gases have as well been the subjects of separate impact assessments, consultations and reviews. The amount of preparatory work in the climate change area alone is impressive: 36 impact assessments from the Environment/Climate Change Directorate General of the Commission since 2005. The work of the energy and transport departments add significantly to the body of ‘Better Regulation’ analysis that has been conducted in the climate change field.

An in-depth assessment of each of these ‘Better Regulation’ exercises is beyond the scope of this case study. The following examines the preparation of the first climate change package (2007-2008) which set out the strategic orientations for EU2020 given that this package has gone through the cycle from impact assessment, consultation to adoption, implementation and review, providing some evidence on which to assess the effectiveness of the ‘Better Regulation’ actions in this area.

1. The policy and legal context 2005 – 2017

The overriding objective of EU climate policy is to limit global warming to below 2°C compared to the average global temperature in pre-industrial times. This is an internationally agreed target set in 1992 under the United Nations Framework Convention on Climate Change (UNFCCC). The creation of an energy efficient and low-carbon economy requires innovation and investment which in turn is expected to drive economic growth, create jobs and strengthen Europe's competitiveness.

To meet this goal, the EU has followed a strategy of targets and deadlines (2050, 2030, 2020), using a mix of policy instruments, including funding;²⁶⁸ By 2050, the EU aims to cut its emissions by 80-95% compared to 1990 levels as part of the efforts required by developed countries as a group.²⁶⁹ Key EU targets for 2030 (agreed in 2014 and currently being enacted in legislation) are

²⁶⁷ European Commission, Communication *Winning the Battle Against Climate Change*, COM(2005) 35; Background Paper SEC (2005) 180, Brussels, 9 February 2005. Luxembourg, Publications Office of the EU

²⁶⁸ At least 20% of the EU's 2014-2020 financial perspective - as much as €180 billion - should be spent on protecting the climate. The EU also finances low-carbon energy demonstration projects from the sale of emission certificates. This includes technologies to trap carbon dioxide from power stations and other industrial installations and store it in the ground, so-called. carbon capture and storage (CCS).

²⁶⁹ European Council Conclusions, EUCO2/1/11, 4 February 2011

a cut of greenhouse gas emissions by at least 40%; at least a 27% increase in renewable energy, and; at least 30% improvement of energy efficiency compared with 1990.²⁷⁰

These decisions built on the preparatory work conducted in setting the EU targets for 2020 which were agreed in 2007 and enacted in legislation in 2009²⁷¹, namely:

- 20% cut in **greenhouse gas emissions** compared with 1990
- 20% of total energy consumption from **renewable energy**
- 20% increase in **energy efficiency**

The 2020 regulatory framework is structured on two key pillars – the emissions trading system (ETS) for large emitters (e.g. power plants, large industrial facilities and intra-EU flights) and the effort sharing decision (ESD) for sectors not covered by the ETS (e.g. transport, buildings, agriculture and waste).²⁷²

Around 40% of greenhouse gas emissions are covered by the EU's emission trading system, an EU wide cap and trade system under which the main emitters purchase (or are allocated) allowances which they may then trade. The ETS is complemented by effort-sharing between the EU Member States for greenhouse gas reductions in sectors not covered by the ETS. The efforts are shared on the basis of GDP per capita. The 2020 targets range from a 20% emissions reduction by 2020 (from 2005 levels) for the richest Member States to a 20% increase for the least wealthy ones. The Member States can choose a range of actions best suited to their national circumstances. These include, for example fuel taxation, local building codes, provision of public transport, biofuel mandates, road charges, rural development programmes, and farm advisory services.

As well as these efforts aimed at mitigation, the EU has adopted strategies and related actions on adaptation to climate change. Finally, there is close coordination between climate, transport and energy policies given the clear links between these policy sectors and the mitigation effort. The climate change packages have included renewable energy (e.g. wind, solar and biomass) and energy efficiency targets. The recent energy package included climate change targets. To achieve gains in energy efficiency, legislation has been adopted to reduce the energy use of buildings and of a range of equipment and household appliances. Car manufacturers are required by law to reduce CO₂ emissions from new cars and vans.

2. 'Better Regulation' actions

The climate change package which set out the 2020 target was launched with a 2007 communication and impact assessment²⁷³ that set out the targets, and a 2008 communication and

²⁷⁰ European Council Conclusions, EUCO 169/14, 23-24 October 2014

²⁷¹ European Commission, Communication "20 20 by 2020 – Europe's Climate Change Opportunity", COM (2008)30 23 January 2008, Impact Assessment on the Package of Implementing Measures for the EU's objective on climate change and renewable energies for 2020, SEC (2005) 85/3, Brussels, 23 January 2008.

²⁷² The 2030 regulatory framework adds a third pillar, i.e. separate regulation of land use and forestry.

²⁷³ European Commission, Limiting Global Climate Change to 2 degrees Celsius -The way ahead for 2020 and beyond COM(2007)2, January 10, 2007; Impact Assessment SEC (2007)8 and 8/3, January 10, 2007.

impact assessment which analysed the legislative measures needed to achieve the targets.²⁷⁴ The impact assessments were supported by modelling of target trajectories and cost/benefits. The ‘2007 EU Reference Scenario’,²⁷⁵ a projection of economic activity and energy, transport and emissions trends in the EU and its Member States, laid the foundation for the 2007/2008 work. Trajectories were modelled for greenhouse gas emissions until 2030 based on certain assumptions about macroeconomic trends, fossil fuel import prices and technological development. The Reference Scenario has been used as a benchmark to assess the impacts of policy changes. Economic modelling supplemented the reference scenario, aiming to determine the most cost-effective pathways towards the 2020 climate change policy objective.

The analytical effort was accompanied by extensive public and expert consultation. For the ETS a working group within the framework of the European Climate Change Programme (ECCP) was consulted on four main topics of the review, namely: (1) scope, (2) compliance and enforcement, (3) further harmonisation and increased predictability, and (4) linking with emissions trading systems in third countries, and appropriate means to involve developing countries and countries in economic transition. Each of these topics was examined in depth at dedicated meetings of the above Working Group, which met four times between March and June 2007. In addition, public consultations were held on the Energy Green Paper (March–September 2006), the revision of biofuels policy (April–July 2006), heating and cooling in renewable energy (August–October 2006), and biofuels sustainability (April–June 2007).

The effective implementation of the policy necessitated rules on monitoring and verification of emissions. Regulation of monitoring and verification started in the 1990s. Modelled on UNFCCC guidelines, a monitoring mechanism decision was adopted in 1993 and revised in 2004²⁷⁶ taking account of the significantly expanded monitoring and reporting guidelines under the Kyoto Protocol. Member States were asked to provide: data and trends; quantitative estimates of the effect of policies and measures on emissions by sources, and removals of greenhouse gases using sinks, and impacts of specific policy measures. Reporting on costs and benefits of specific measures was not mandatory. A further revision of the 2013 Monitoring Mechanism Regulation²⁷⁷ was done to strengthen the monitoring effort as agreed under the Doha amendment for the second commitment period 2013–2020 under the Kyoto Protocol. While the Commission proposed the monitoring of individual measures relative to emissions (with a view to encouraging Member States to quantify the performance of the individual instruments deployed), the legislature opted for monitoring of groups of policies. Member States were only obliged to provide cost/benefit data ‘when available’ but not systematically. Cost/benefit analysis was voluntary, not mandatory.

These decisions of the legislature limit the Commission’s ability to do comparative EU-wide evaluations. Nonetheless, the ETS and the ESD were evaluated in 2015/16, respectively, as part of

²⁷⁴ European Commission Impact Assessment on the Package of Implementing Measures for the EU’s objective on climate change and renewable energies for 2020, SEC (2005) 85/3, Brussels, January 23, 2008

²⁷⁵ https://ec.europa.eu/energy/sites/ener/files/documents/trends_to_2030_update_2007.pdf.

²⁷⁶ Council Decision 280/2004/EC

²⁷⁷ Council Decision 525/2013/EC

the preparation of the legislative proposals implementing the 2030 climate and energy policy framework.²⁷⁸ The ESD evaluation acknowledged that although the policy was still in the early stages of implementation, ESD targets seem to have been effective in stimulating new national policies and measures promoting reductions of GHG emissions under the ESD. The evaluation noted that most emission reductions since 2009 had come from technological changes and policies which have resulted in increased uptake of less carbon-intensive technology. Given data limitations, the evaluation made no attempt to quantify either the overall impact of the ESD on GHG emissions or costs/benefits. The ESD was found to have resulted in little additional administrative burden on Member States, although some room for further reduction through simplified or less frequent compliance controls was identified. The evaluation found the ESD to be coherent with other EU climate and energy policies, contributing EU value added. The public consultation showed strong consensus among stakeholders on the need for an instrument such as the ESD after 2020.

3. The effectiveness of ‘Better Regulation’ instruments

3.1 Meeting quality standards

The 2007 effort was not reviewed by the Impact Assessment Board as the latter had only just been set up at the time. The 2008 effort was scrutinised by the IAB and received recommendations for improvement.²⁷⁹ The final impact assessment was revised to respond to these comments: more detailed analysis and tables were added exploring the impact of the package (including cost/benefit) on each Member State; the standard cost model was applied to measure administrative costs and results were presented in the analysis; trade impacts were examined more thoroughly, and a sensitivity analysis was conducted. Clear descriptions of the models and their limitations were included. An extensive analysis was made of distributional impacts and other direct and indirect costs.

3.2 Facilitating adoption and reducing potential implementation difficulties

The quality and depth of the two impact assessments in 2007 and 2008 clearly facilitated the political decision-making process. With the first impact assessment in 2007, the Council set the overarching 2020 targets and invited the Commission to prepare legislation.²⁸⁰ The second impact assessment on the detailed design of the legislative climate and energy package, facilitated the co-decision process in 2008. The speed with which the co-legislators concluded their political agreement on this very comprehensive package - after just nine months of negotiations – was a record.²⁸¹ Changes that were made to the two legislative proposals were quite limited, e.g. under

²⁷⁸ European Commission, Report on Evaluation of Decision No. 406/2009/EC (Effort Sharing Decision), COM (2016) 483, 20 July 2016)

²⁷⁹ European Commission, Impact Assessment Board, Opinion D(2008)84, 18 January 2008

²⁸⁰ European Council Conclusions, March 2007

²⁸¹ The package adopted in April 2009 consisted of the following laws:

the ETS the European Parliament proposed a new financing mechanism for innovative renewable projects and carbon capture projects; and under the ESD the proposed Member State targets were slightly modified.

Looking at legal cases as an indicator of the quality of the preparatory work, while the Commission has launched legal cases against certain Member States regarding energy efficiency and renewable energy legislation, there have been few infringements in the climate change area. Under the ETS legislation, private companies are responsible for compliance and penalties are set such that compliance has been 100%. On the ESD, after three compliance cycles all Member State have been in full compliance. Infringements on some very specific reporting requirements for a limited number of Member States were initiated but were always resolved before the cases went to court.

4. Did 'Better Regulation' make a difference?

4.1. In contributing to better outcomes?

The achievement of climate change goals has been driven in part by policy which in turn has been shaped by the 'Better Regulation' effort. The 2016 Commission report on the ESD observes that the emission reductions achieved can in part be attributed to climate and energy policies and measures implemented by Member States. It refers to a decomposition analysis that was carried out for the 2005-2012 period covering CO₂ emissions from fossil fuel combustion, which concluded that technological changes helped most to drive down emissions, by far outweighing the contribution of the shift within and between economic sectors and GDP-related shifts.²⁸²

Trends are such that the 2020 targets should be met.²⁸³ Emissions from industrial installations under the EU ETS (power plants, large industrial plants, EU aviation) now stand 26 % below 2005 levels thus exceeding the estimated reduction by 2020 of 23%. Likewise, for the non-ETS sectors, the reduction now at 11% exceeds the estimated 10% target for 2020. Reductions in GHG have been effectively decoupled from economic growth. From 1990 to 2016, the economy grew by 53% while GHG emissions were reduced by 23%. The share of renewables in the EU energy mix

European Union, Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community

European Union, Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 ("Effort Sharing Decision")

European Union; Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC ("Renewable energy Directive") - Summary

European Union, Directive on the geological storage of carbon dioxide

²⁸² European Commission, Report on Evaluation of Decision No. 406/2009/EC (Effort Sharing Decision), COM (2016) 483, 20 July 2016), p.7

²⁸³ See European Commission, "Two Years After Paris" COM(2017) 646, 7 November 2017.

reached an estimated 16.9% of the EU's gross final energy consumption in 2016 and is expected to reach the 20% target by 2020.

That said, the assumptions in the impact assessment work deviated significantly from actual developments, particularly on economic growth, technology costs and oil prices. For example, in the original impact assessments, the price of carbon was estimated to reach €39 per tonne of CO₂ with a renewable energy incentive of €45 per MWh. That price has not been realised. Between 2005 and 2014 the price fell from €30 to €5. This was due to the economic slowdown starting in 2008 and compliance was reached by using cheap credits from Clean Development Mechanism projects.

4.2 In contributing to better policy-making?

The 2008 impact assessment informed the design of the legislative proposals. Taking into account the results of three pilot years of ETS implementation from 2005-2007, it analysed many options which represented a significant departure from previous policy orientations (e.g. auctioning for the energy sector, free allocation on the basis of benchmarks for the industrial sectors, carbon leakage lists).²⁸⁴ A new allocation methodology for the non-ETS sectors was developed, basing Member States' targets on GDP per capita. The impact assessment work showed how flexible mechanisms could work at EU level. The proposed legislation, informed by the impact assessment, departed significantly from the then prevailing Kyoto 'burden sharing' approach for the first commitment period 2008-2013. It also replaced Kyoto's five-year commitment cycle with an eight-year commitment period 2013-2020. It is unlikely that this extensive assessment of options would have taken place without the impact assessment exercise. The revisions to the impact assessment following the Impact Assessment Board scrutiny, and the additional economic analysis, contributed to a better underpinning of the legislative proposal. As mentioned above, the analytical work underpinning the proposal supported decision-making in the legislature

5. Observations

'Better Regulation' efforts in 2007-2008 in the climate change field proved their worth in terms of facilitating the legislative process: deeper and faster development of policies and law at EU level than had been the case, for example, in the 1990s. They also served to keep the policy on a stable trajectory. There are many factors that could have derailed the EU's climate change policy since 2008 – the recession, the different policy orientations of some of the Member States, the collapse of the carbon market etc. – but despite these pressures, climate policy has been kept on an even keel, partly due to the analytical underpinnings and broad stakeholder involvement.²⁸⁵

The achievement of climate change goals has been driven in part by policy which in turn has been shaped by the 'Better Regulation' effort. That said, the assumptions in the impact assessment work deviated significantly from actual developments, particularly on economic growth, technology

²⁸⁴ See Rayner, T. and Jordan, A., "Climate Change Policy in the EU", Online Publication August 2016 regarding the shift in policy orientations.

²⁸⁵ See Slominski, Peter, "Energy and Climate Policy: does the Competitive Narrative Prevail in times of Crisis?", *Journal of European Integration*, Vol. 38, No.3, pp. 343-357.

costs and oil prices. Since the 2007-2008 exercises, climate policy has developed its modelling capacity significantly, both in terms of the climate reference scenario and the cost modelling.²⁸⁶

Evaluation is the weak link in ‘Better Regulation’ terms. Evaluation efforts have been modest for various reasons. There is little time series data available on the implementation of the 2020 package (i.e. only 2013-16 GHG emissions data are available currently) and limited information has been provided by Member States on costs (or benefits). Due to the lack of cost/benefit data and the concurrent implementation of other policies impacting on climate change (e.g. energy, transport, agriculture), it is difficult to assess whether the 2020 targets have been met in a cost-efficient manner. The 2008 impact assessment estimated benefits of between € 27.8 bn and €48.1bn by 2020 if a 22% reduction in GHG emissions could be achieved. But, these figures have not been confirmed ex-post and the downturn in the economy since 2008 has likely had a dampening effect on benefits, including employment. A comprehensive evaluation would need to look at the interactions between different policy instruments – for example, the interface between emissions trading, renewables and energy efficiency – which is a more complex exercise that has not been undertaken to date. Moreover, there are political as well as technical issues involved. Member States, particularly the United Kingdom, resisted cooperation in full-scale evaluation as they did not want the Commission monitoring their performance. Likewise, at global level, the UNFCCC had managed to recommend only cursory treatment of monitoring and evaluation systems before the conclusion of the Paris Agreement at the end of 2015. Garnering support for conducting evaluations is difficult if there is no political will.

²⁸⁶ See https://ec.europa.eu/clima/policies/strategies/analysis_en.

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