

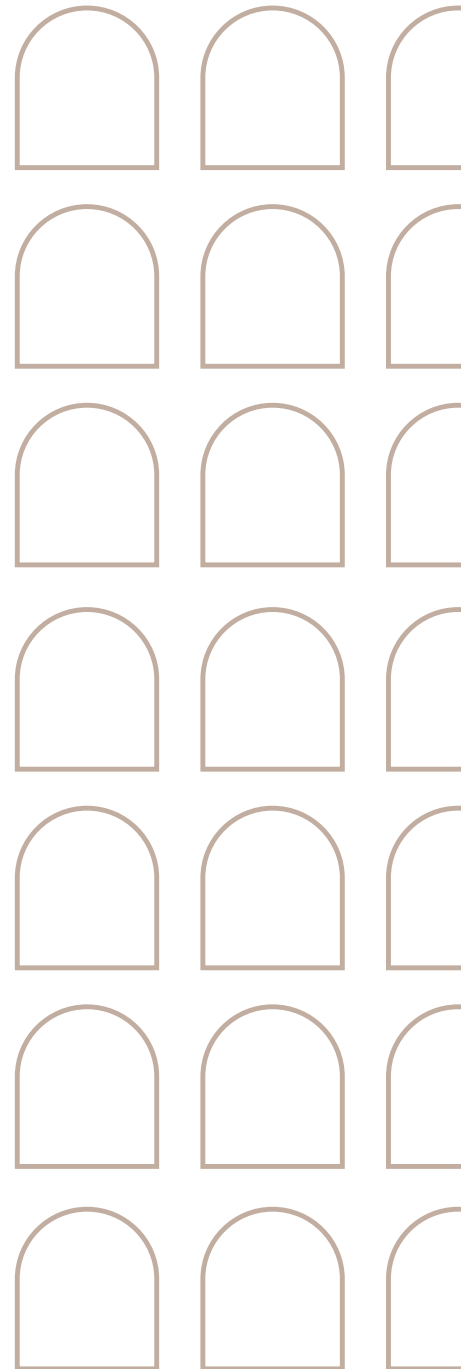
STG Policy Papers

POLICY BRIEF

THE STATE OF PLAY WITH THE BETTER REGULATION STRATEGY OF THE EUROPEAN COMMISSION

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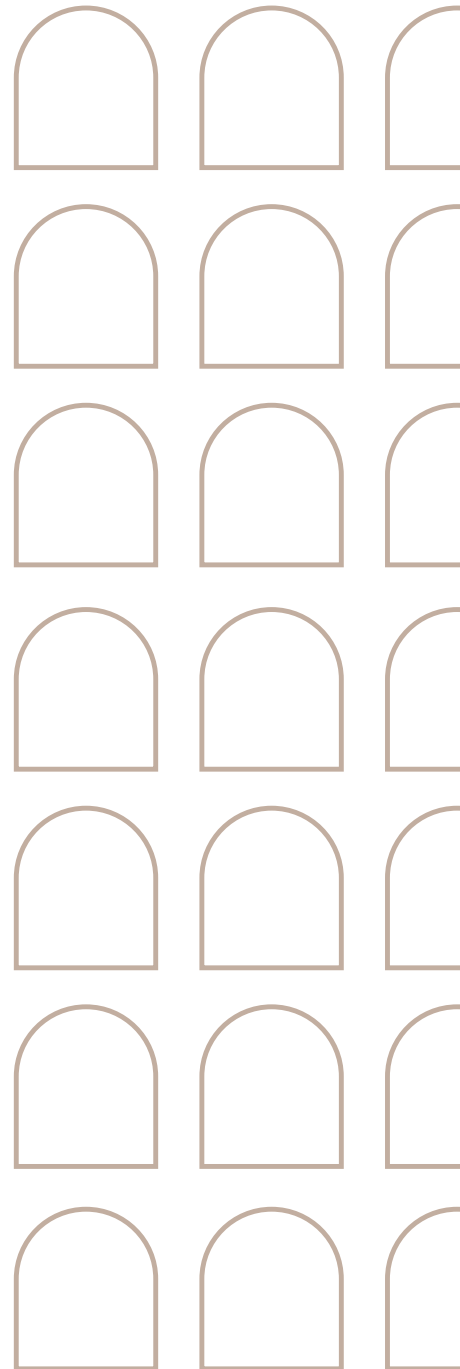
EXECUTIVE SUMMARY

At the moment of writing, we are waiting for the publication of the new Communication of the European Commission on [better regulation](#), originally announced for Spring 2020 and then delayed to Autumn 2020, re-scheduled for February 2021 and now announced for the end of April 2021. To understand the Communication, however, we need a map to navigate the better regulation strategy of the European Commission, and situate events like the publication of a Communication in the broader political context of the European Union (EU). To provide such a map is the aim in this paper.

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Indeed, this is a good time to look at what has been achieved in the domain of better regulation, and what has changed along the way both in the political context, and in the social climate. Policy paradigms in economic, innovation and sustainability policy have also moved fast. It is always useful to rewind the clock and listen to what the recent political history has to tell us. Hence let us start with the question what was the state of play with better regulation when the new Commission chaired by Ursula von der Leyen started its operations? Was EU-style better regulation in need of major repair, or was it *grosso modo* doing well?

The last time the better regulation strategy was significantly re-shaped by the Commission was in 2015. That year Frans Timmermans provided his Communication, [guidelines](#) and [toolbox](#). In 2016 the Parliament, the Commission and the Council reached an [inter-institutional agreement](#) on better law making to bind the three main institutions of the EU in a shared commitment – trying to improve on the limited implementation of the [2003 agreement](#) on the same topic.

The major conceptual and organisational feature of the 2015 strategy was identified in the mission of closing the policy cycle with the principle of ‘evaluate first’ - that is, not planning new legislation without prior appraisal of the existing rules. Overall, Timmermans pushed for systematic (as opposed to episodic) retrospective review of regulations and enhanced consultation across the different stages of EU law-making. The appraisal of new proposals, based on impact assessment, was carried out with the support of enhanced extensive guidance of many different techniques to estimate the likely effects on a wide range of stakeholders and categories – most importantly, the economic, environmental, and social effects.

The institutional custodian of the quality of the strategy was and still is the [Regulatory Scrutiny Board \(RSB\)](#), staffed partly by independent experts and partly by high-level Commission officers – all of them working full-time for the board. This body replaced the Impact

Assessment Board – which was staffed only by the officers of the Commission on a part-time basis. It’s no mystery that the most active member states in this field asked for a fully independent membership of the RSB. But, as Brussels political decisions go, the solution was found in the middle, with the RSB chair provided by the Commission (Anne Bucher first, and now Veronica Gaffey), three Brussels officers, and three independent experts.

Incidentally, during the Timmermans years the European Parliament also invested in highly qualified staff to oversee the impact assessments and evaluations of the Commission. For the first time the European Parliamentary Research Service (EPRS) published robust analysis of the impact assessments of the Commission to inform the MEPs. As for retrospective review of regulation, in my research for the ERC Project [Protego](#) I documented the presence of [parliamentary questions](#) about evaluations asked by MEPs – an indicator of the intention to make the Commission accountable to the European Parliament for the scope, frequency and quality of regulatory evaluations.

Interestingly in 2019 the OECD published a [report](#) on better regulation policies in its Member States and the EU. This report draws on forensic [indicators](#) on (among other dimensions) impact assessment, stakeholder’s engagement and regulatory review. The report shows clearly that the Commission outperformed the EU member states on a number of dimensions, or was in any case in the top positions. In short, the OECD ranked EU-level better regulation well above the member states. In its internal 2019 [stocktaking exercise](#), supported by interviews carried out inside different DGs, the Commission reached positive conclusions about the achievements – something to be expected, but corroborated by empirical evidence. An academic [study](#) of 673 Opinions of the RSB concluded that the Directorates General listen carefully to what this oversight body says.

Thus, recent history and data suggest that the Commission had reasons to be relatively confident with the results achieved by its

strategy. Better regulation was re-defined just six year ago and its achievements appreciated internally and externally (that is, by the OECD). This is not to justify complacency or to ignore [controversies](#) on the political goals of better regulation and the quality of [impact assessments](#). But the perception of the state of play inside the Berlaymont was positive when the new Commission chaired by Ursula von der Leyen was appointed.

Let's see what happened at the end of 2019. One of the first acts of von der Leyden's Commissioners was to confirm their faith in better regulation – not surprisingly, given that the architect of the 2015 reform, Frans Timmermans, is executive vice-president in the current Commission. The proof of this confidence in the strategy is the inclusion of better regulation in the [working methods](#) of the Commission. This is something noteworthy, because it means that better regulation is not just a sector-level policy or a self-contained strategy. Rather, it is a set of principles to make policy – any policy. This is what a working method is – a *modus operandi* that underpins the full range of policy priorities.

In terms of specific content, the Commission's working methods include the presence of a mechanism of [regulatory offsetting](#) called one-in-one-out. This offsetting principle affirms that any regulation introducing new burdens should relieve business and citizens of an equivalent burden existing in EU-level legislation in the same policy area. The [Council](#) specified that this commitment to one-in-one-out should not be detrimental to the ecological and social objectives of the EU. The challenge for the Commission was to show how this could happen and for the RSB in particular to check the correct implementation of one-in-one-out. At the end of 2019, one-in-one-out was only a political commitment in search of operational implications and robust practice.

I say 'political' not only because the details were supposed to come later. Indeed, the time needed to work out the exact formula for the implementation of one-in-one-out was one reason behind the delays in the publication of the Communication. But also

'political' in the sense that the Commission had rejected explicit regulatory targets twice, in [2017](#) and [2019](#). To accept one-in-one-out was a way to accommodate the preferences of governments that had been instrumental in delivering support for von der Leyen - without accepting an explicit de-regulation target such as the [business impact target](#).

Be that as it may, when this Commission started to work, we were expecting a period of smooth incremental changes, with emphasis on controlling regulatory costs via one-in-one-out. In January 2020, the mandate of the RSB was extended to include 'foresight' – to align its mission with the tasks of the Commissioner in charge of better regulation, Maroš Šefčovič.

In a way, the arrival of foresight on the RSB scene was a premonition of (really big) things to happen. With the Covid-19 pandemic, the EU institutions were parachuted into a brave new world. And these days the EU is dealing with political priorities for a green, digital, sustainable recovery. Today, with the recovery and resiliency plan, we witness a new context with a paradigmatic change in political priorities: €672.5 billion in [loans and grants](#) for the recovery, followed by policy objectives aiming at resilience, social inclusion, green deal, digital transition, a [farm-to-fork](#) vision, and socially-responsible innovation - all meant to deliver on sustainable growth.

Although context and policy paradigms have changed, better regulation *principles* have not disappeared. And to be frank I do not think they should be disposed of. If anything, I would have seen more explicit usages of these principles in the eventful last twelve months. Specifically, I am thinking of principles of proportionality, evaluate first, risk-risk analysis, evidence-informed policy, and explicit balanced judgements between costs and benefits. We have not seen much open discussion of trade-offs between types of risk in handling the different waves of Covid-19 – but this is by all means a *shared* responsibility of the member states and the Commission.

The [digital single market](#) and the [green deal](#) have been presented as political priorities

rather than results of the [application of better regulation principles](#). I am not saying that these are wrong priorities – not at all. But better regulation reasoning could have assisted. As set of principles, better regulation could have been used to test the assumptions of the high-level strategies for change. Here are some examples. Are we persuaded that small and medium enterprises will be at the forefront of the recovery because they produce innovation? In terms of better regulation thinking, this is an assumption to be tested. If instead this is a goal, better regulation would clarify the intervention logic and appraise options that can put small and medium enterprises in a leading position. The Commission argues that the EU must reach the goal of 25% of agricultural land dedicated to organic farming. Good, but how will the costs and benefits of this commitment fall on different categories of firms and sectors? Yet again, better regulation can provide some structured pathways to answer this question.

Another problem is that after Covid-19, the suspension of the stability and growth pact, the green deal and the arrival of the recovery and resiliency facility, I find it difficult to accept that one-in-one-out can be the compass of better regulation. This can't be the major innovation that the European economy and citizens want from 'better law-making'. It is a narrow priority when compared with the political priorities of the moment. All the political priorities of the EU institutions are geared towards delivering welfare. They are net benefits-oriented. Offsetting burdens with one-in-one out is acceptable if you think that the main problem is one of administrative obligations and costs. If you instead direct better regulation towards net benefits, the role of one-in-one-out has to be majorly discounted.

And yet, the Commission cannot and will not make discounts on this - because one-in-one-out is the only regulation-related point of substance in the working methods. Therefore, expect the Communication to come to be rich in detail on one-in-one-out. We will be told that this is not against the higher social and environmental political priorities of the

moment. But better regulation should do more than being not detrimental to these sustainability goals. It should assist the EU in achieving them. In the context of the paradigmatic change towards sustainability, regulatory review should be more future-oriented, with emphasis on benefits that may not appear in the short term. Equally fundamental are benefits that occur across sectors, given the inter-dependence implicit in the priorities described above.

This brings us closer to the tools. Here we see the necessity to re-tool the tools. If there is paradigmatic change at the level of sustainability, then issues of climate, gender, human dignity, social inclusion should be fully integrated and mainstreamed in regulatory evaluations and impact assessment of new policy proposals. Actually, the Commission should go as far as to embrace a principle of '[do no significant harm](#)' as key test in the practice of impact assessment. The impact assessment of a new regulation should address seriously the question whether the options being considered 'do significant harm' (or, actually, show the positive impact) to the sustainable development goals. In a recent note, I show how, across the world, the [practice of impact assessment](#) is not yet aligned with the sustainable development goals.

Finally, recovery and resiliency require innovation. The Commission should be explicit on regulation as lever for innovation – a kind of 'regulating for innovation' commitment. The RSB of the Commission is now bound to review the foresight dimension, but more attention should be dedicated explicitly to innovation. There is already an academic discussion on [socially-responsible innovation](#) and its role in impact assessment, but how exactly this can be captured in the practice of EU-level regulatory review can only be told by the Commission and concerted with the European Parliament and Council. Will the Commission go as far as to set the standards for what it considers to be future-proof, socially-responsible innovation? Will it embrace the belief that radical innovation is better than incremental innovation – and if so, on the basis of what evidence?

And not everything can be controlled by strategic guidance in the form of a Communication. For example, much as the EU institutions may be persuaded by the benefits of regulatory flexibility, any form of regulatory flexibility will be carried out in a legal context that differs between civil law and common law countries. If 'something goes wrong' with sandboxes (and regulatory flexibility in general), with what legal lenses will the courts judge accountability? Dublin is not Luxembourg. Civil law standards seem less suitable than common law reasoning in handling the accountability issues raised by regulatory flexibility.

There are many reasons to cast watchful eyes on better regulation. After the Communication is published, we should keep the attention high on how it is received by the other EU institutions, and more fundamentally on its implementation and delivery – not only in Brussels, but also in the member states. Indeed, if the Communication is all about guidance, what will matter in the end will be the multi-level [practice](#) of better regulation.

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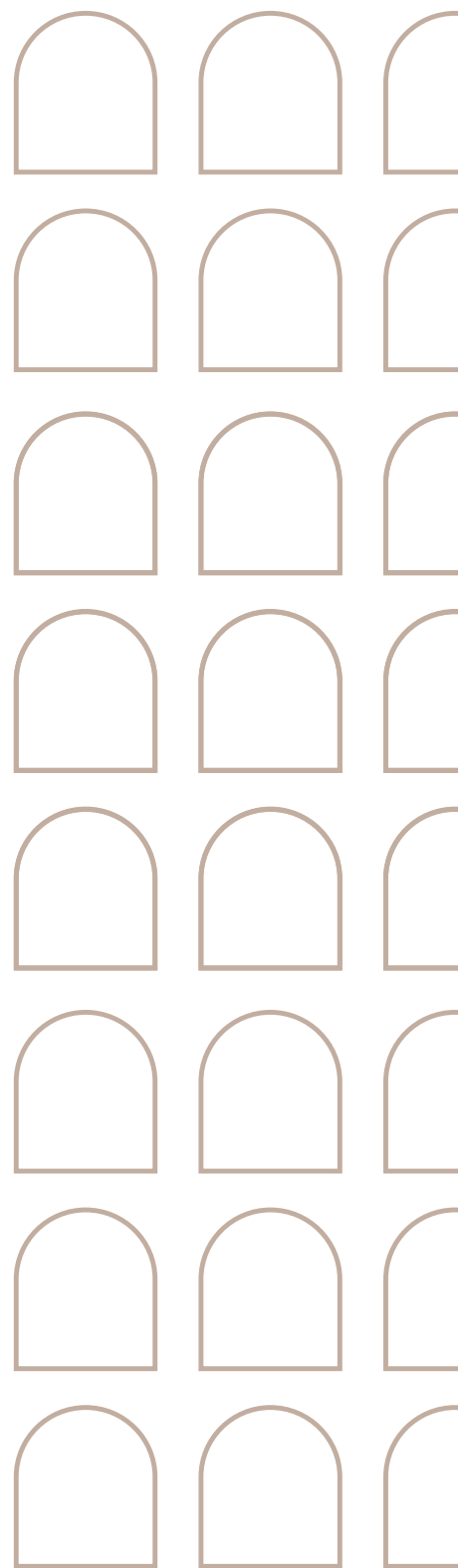
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