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Better Regulation in the European Union

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Better regulation in the European Union (EU): Past, present and future

Calls for a strategy to improve the quality of the rules produced by the European Union (EU) date back to the early 1990s. During the last thirty years, this strategy has emerged in waves of 'high quality regulation' and 'better regulation'. Since the early 2000s, this agenda has gradually taken its role in the EU policy process, especially at the stage of policy formulation (with the tools of consultation and impact assessment) and, in the last decade, with attempts to include other stages of policy process with tools for the retrospective review of legislaton and regulatory offsetting. Better regulation is an overall commitment binding the EU institution (with the inter-institutional agreement on better law-making agreed in 2016)[1] and the member states. The reality on the ground is that the Commission has deployed the tools of better regulation more intensively than the European Parliament and (even more so) the Council. Member states and the Commission are not always on the same page when it comes to the choice and specification of how to use the tools, and whether the political aim is to improve on regulatory quality or to reduce the quantity of rules.

For all these nuances and political differences, today, better regulation is a formally endorsed working method of the European Commission (2019a). In the near future, the

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016Q0512(01)&from=PT accessed 29 January 2021

challenges concern the integration of foresight, the connection between different phases of the EU policy process (what in Commission's parlance is known as 'closing the policy cycle', Mastenbroek et al. 2016), and policy coherence for sustainability.

In this chapter, we outline the foundations of better regulation by reviewing the historical record tracing the main episodes. Specifically, we cover: the 1992 Edinburgh summit to the Mandelkern Report of 2001, the Prodi Commission's package on regulatory reform, impact assessment and consultation, the dialogue between the Council and the Commission on setting targets for administrative burdens, the rise of regulatory oversight first with the Impact Assessment Board (2007) and then with the Regulatory Scrutiny Board (RSB), the Juncker-Timmermans vision for better regulation and the commitment to regulatory off-setting of the von der Leyden Commission. With the foundations laid, we finally explore what lies ahead.

Foundations

The EU is a political system with a comparative advantage in the production of regulatory policy (Majone 1996), with implications for both regulation in the Member States and the EU as global regulatory power (Bradford 2020). This raises the challenge of governing the EU regulatory system. The challenge has two sides: trust and effectiveness. Bad regulation implies that citizens and firms do not consider the EU institutions trustworthy. It can also negatively affect growth and corruption, provide the wrong regulatory responses to health and financial crises, and impose unnecessary burden on firms and citizens.

However, the exact specification of what 'bad' and 'good' regulation is far from straightforward. In the abstract, we can think that good EU regulation should pass the dual tests of effectiveness and trustworthiness (see Baldwin and Cave [1999] for other academic benchmarks). In more concrete terms, the concept of regulatory quality and the so-called better regulation strategy of the EU have been the territory of ideational confrontation between the European Commission and the Member States, and between the EU institutions and different stakeholders (including business groups and civil society organizations). There has been consensus too, since it is objectively hard to 'fight' something called 'better regulation' – after all, who wants 'worse regulation'?

And so, the devil is often in the detail. Indeed, the presence of calls for, and the emergence of, strategies dedicated to better regulation since the 1990s has been the empirical manifestation of how an equilibrium between various political/economic preferences and ideas have been found, challenged and re-defined. This is because underneath the surface of ideational confrontations on this topic lies the definition of who is in control of the process of formulation, implementation, and evaluation of the EU regulatory system.

To define these variables means to define power and control in the law-making and implementation process of the EU. Thus, better regulation is the terrain where fundamental power relations are constantly tested in concrete ways. We are thinking of power relations such as institutional balance, the right of the Commission to initiate legislation, and the regulatory discretion of Member States and independent regulators. As for the concrete ways, think of the deployment of tools in everyday policy-making: the quality of proposed regulations can be appraised in terms of different and not totally overlapping standards, such as foresight and risk assessment, cost-benefit analysis, and reduction of administrative burdens; the degree of transparency in the use of science in the *ex ante* assessments of proposed legislation can vary depending on whether one is following a hazard or risk-oriented goal; the independence of the EU-level regulatory oversight body has been the object of intense discussions and gradual change of membership; customization when Member States transpose and implement legislation demands tight connections between the EU-level and the domestic usage of appraisal tools; the criteria deployed in the ex post evaluation of legislation cover a broad range; the interventions of the EU system of courts in topics like the publication of impact assessments for proposals that had been withdrawn by the Commission define and constrain some important choices; and; the control relationship between the Secretariat General of the Commission (SECGEN) and the Directorates General (DG) which is marked by the specific *modus operandi* of the impact assessment teams inside the bureaucratic engine of the EU.

How did the EU get to play on this political terrain of power relations and tools? It is useful to start with the major player in the formulation of proposals for EU regulation: the European Commission. Equally useful is to take the long view and go back to the 1990s. Since its origins, the Commission has been a hierarchical organization, vertically segmented into sections (the Directorates General, DGs) with slight capacities for horizontal intra-

organizational regulatory management, the control of implementation structures (which limit the role of the Commission by design) across sectors and levels of governance. Further, while several Member States embarked on administrative reforms to increase their analytical and organizational capacity in the 1990s, the Commission was definitively a late-comer (on those years see Stevens and Stevens 1996; Stevens 2001). Unsurprisingly then, the early concerns for the quality of EU regulation were expressed by the Member States. This happened at the Edinburgh European Council (1992), with Germany, the Netherlands (Koopmans Report 1995) and the United Kingdom (which hosted Edinburgh) in the driving seat. Business federations were also supportive of new policies to increase the transparency of policy formulation in Brussels and for simplification of the regulatory environment (Radaelli 1999).

Edinburgh was the first agenda-setting moment for better regulation in the EU. But, it took a decade for the agenda-setting moment to become a strategy. After Edinburgh, an idea floated by the French Conseil d'Etat, taken up by the Koopmans Report and pushed (unsuccessfully) by the Dutch EU Presidency at the inter-governmental conference in 1997 was to create a body of 'guardians of the rules' (an independent review body) that would one day take the shape of a 'European Conseil d'Etat'. The spectacular resignation of the Santer Commission in 1999 strengthened the argument for a properly portfolio-structured Commission.

These events and debates were not sufficient to turn the agenda-setting moment into a single strategy in the 1990s. Instead, a patchwork approach to simplification and improvement of legislation emerged. The Commission set up a task force to do the simplification job: the Business Environment Simplification Task Force (BEST). BEST focused on the administrative and fiscal constraints on recruitment of new staff, training, access to research and technology and relations with credit and finance institutions. Instruments for the *ex ante* analysis of legislative proposals were timidly introduced in the 1990s, including checklists, rules of procedure, a legislative drafting manual, and a compendium on 'information, communication and openness'. The DGs retained high autonomy when handling the checklists, and co-ordination among across services remained low. Policy evaluation remained limited to financial controls only.

A series of studies and initiatives matched simplification as goal with small and medium enterprises (SMEs) as target population. During these years the 'think small first' regulatory philosophy appeared, with the idea of thresholds below which proposed regulations would not apply, or specific derogations for SMEs (Schulte-Braucks 1997; Kellermans et al. 1998). A 'business test panel' was launched in 1998 to have participating firms assist the Commission in the assessment of the regulatory burdens. The overall impact of these initiatives on SMEs remained weak (Dannreuther 1999; Radaelli 1999). Simplification was also the conceptual foundation of the 1996 SLIM initiative (European Commission 1996). This was a pilot with limited effects (Radaelli 1999).

Taken together, the proposals, pilots, checklists failed to produce a coherent response to the challenge of governing the EU regulatory system and to increase the capacity for horizontal coordination of proposals and vertical coordination of implementation structures. The Commission reacted to the pressure of the Edinburgh summit, and the follow-up declarations and requests by the Member States, by engaging with many different instruments (the patchwork) without embracing a single template for the assessment of proposals (in particular, a regulatory impact assessment system). Neither did the Commission clarify the role of stakeholders in policy formulation. Consultation was tried in SLIM but never extended to proper, transparent, duly enforced standards of notice and comment. Finally, the SECGEN did not build capacity for overall coordination of the proposals emerging from the DGs.

After a decade, the Member States applied renewed pressure on the Brussels executive, which was recovering from the political scandal of the resignation of the Santer Commission. This new wave of calls for regulatory reform beyond the then existing efforts for simplification appeared in the so-called Mandelkern report (Mandelkern Group on Better Regulation 2001) published in November 2001. This report specifically addressed the Commission asking for a comprehensive policy on regulatory reform, including consultation, regulatory impact assessment, and the consideration of alternatives to traditional command and control regulation. Mandelkern went as far as to propose a deadline asking the Commission to "propose by June 2002 a set of indicators of better regulation" (Mandelkern Group 2001: iii and 59).

The Commission did not want to produce just a response to Mandelkern. Given the status and the newly found ambition of the institution under Prodi, the Brussels bureaucracy put forward its integrated approach, drawing on its own foundational principles of governance as enshrined in the White Paper on Governance (European Commission 2001) as well as on OECD good practice. The 2002 Commission Communication was the first strategic document tackling better regulation comprehensively (European Commission, 2002). It included standards on consultation (then codified in the same year, 2002) to allow stakeholders to make an input in policy formulation, and to open up the policy process to evidence and expertise via regulatory impact assessment (RIA). The latter was based on a single impact assessment template to appraise policy proposals. This single template is still in use today at the Commission.

The RIA system of the Commission is original because it revolves around the three dimensions of economic, environmental and social effects of the proposals being appraised – this way the three major internal stakeholders left their imprint on the template (Allio 2008). Indeed, inside the Commission, impact assessment emerged as a compromise among the major players in EU regulation: the Secretariat General (SecGen) and the Directorates General (DGs) in charge of enterprise, environmental policy and social/labour market regulation (Allio 2008).

Thus, Member State pressure aside, the identification of a Commission's strategy was fundamental in refracting and re-balancing the roles and capacity of different organizational universes (DGs and Sec Gen). As Radaelli and Meuwese show (2010: 142), the process of creating and finalising RIAs established "a focus for strategic and operational management within the Secretariat General" and a limitation of the silos mentality that prevailed until then. In the first decade of the 2000s, the SECGEN mutated from a *primus inter pares* with loose coordination capacity to something like a cabinet office (Radaelli and Meuwese 2010). Among other things, this explains why in the first decade of the 2000s the profile of better regulation within the SECGEN rose year-after-year, as did its capacity to steer the impact assessment steering groups inside the Commission (Radaelli and Meuwese 2010). The intention of the Commission was to lock-in these foundations of regulatory reform with a system of regulatory performance indicators. However, around 2003-2004 the Commission

lost the support of the UK and the Netherlands, two countries that were more interested in experimenting with tools for the reduction of administrative burdens (Radaelli 2020a).

In the Netherlands, the then Finance Minister Gerrit Zalm was championing a basic approach to measure the cost of administrative obligations – something that was miles away from the conceptual rigor (and complexity) of impact assessment. This tool is the standard cost model (SCM) (Coletti 2013, 2016). The Dutch had started using it by setting departmental *targets* for the reduction of administrative burdens. In the UK, the then Chancellor Gordon Brown became persuaded that the war on red tape was more attractive and business-friendly than a sophisticated system of regulatory indicators for the EU and its Member States. The *Less is More* Report, a report to the British Prime Minister by the Better Regulation Task Force (2005) was indicative of the new direction pursued by the Labour government.

A divide emerged: on one hand there was, the broad, governance-inspired vision of the Commission. On the other there was the Dutch and British-led de-regulatory, war on red tape vision, inspired by the desire to show that the government was doing something relevant for business (for these positions and added remarks on the role of Germany see Gravey 2016). A second divide emerged between the Commission and the other EU institutions. The 'better regulation' vision was supposed to bind the Council, the European Parliament and the Commission with the 2003 inter-institutional agreement on better regulation (OJ C321 31Dec 2013). This agreement was never operational on the ground however, showing that the commitment to impact assessment and evidence-based policy was not entirely shared by the EP and the Council.

Let us consider the Council first and then the EP. For the Council, better regulation was a strategy to make the Commission more accountable to the Member States and the business community through enhanced transparency, consultation and oversight of the treaty-defined right of the Commission to initiate legislation. The Member States were concerned about leaving the better regulation strategy in self-piloting mode, by this we mean entirely self-checked by the Commission. They pushed for the establishment of a regulatory oversight body, similar to the oversight bodies featuring in the Netherlands and the UK in

the same period. The Commission reasoned that the introduction of an oversight body would be a good way to enhance the credibility of the better regulation strategy. But, yet again the devil in the detail, the Commission wanted this body staffed by its officers: a Commission-staffed Impact Assessment Board (IAB) appeared in 2007.

Only in 2015, was the IAB turned into a Regulatory Scrutiny Board (RSB) with three members from the Commission and three temporary agents recruited externally, and a chair from the Commission ranked at the level of Director General. Although in terms of staffing, the RSB is half-independent and half-not, *de facto* its behaviour has been independent (Radaelli 2018). The 2020 decision of the Commission (European Commission 2020) emphasised that the RSB does not take political instructions from the Commission, its working method is to check whether RIAs and evaluations are based on a sufficiently robust evidence base.

With the same decision, the RSB was instructed to include foresight in its mandate and to widen its operations to the scrutiny of the 'one-in, one-out' initiative (OIOO). Already an established feature of regulatory offsetting (Trnka and Thuerer 2019) in the UK (introduced in 2010) and Germany (in 2015) (see Renda 2019 table A for a summary of OIOO[2] approaches across the then EU-28), the OIOO principle aims to bear down on the cost and volume of regulation in the economy and society. And so, where legislative proposals create new burdens – on businesses or citizens – an equivalent existing burden in the same policy area should be removed. In 2019, OIOO was adopted as part of the working methods of the von der Leyen Commission's drive to reduce red tape.

Turning to the EP, impact assessments were a new way to make the Commission accountable to parliamentary committees, and indeed in the 2010s the EP increased its capacity in critically appraising the RIAs and ex-post legislative evaluations of the Commission – with a substantial strengthening of its research service (European Parliament Research Service [EPRS]) (Radaelli 2018). Never on the radar, at least in the 2000s, the proposition that the Council and the EP would become more accountable by taking better regulation commitments seriously. In the 2010s the EP showed more political attention for

[2] More accurately, Renda uses the terminology one-in X-out (OIXO) to reflect the fact that in recent years OIOO has expanded in some places to two- and three-out.

its own RIA of amendments introduced during the legislative procedure by the MEPs and for ex-post legislative evaluations (Radaelli 2018). However, even today the EP deploys more officers and brainpower in scrutinizing the RIAs of the Commission rather than checking on the quality of its own appraisals of substantive amendments.

Recent trends

In May 2015 (European Commission 2015), the Juncker Commission re-calibrated better regulation by: setting the goal of closing the policy cycle, that is, making ex post evaluation as activity to precede any work on new proposals (the so-called 'evaluate first' principle); enhancing the flow of consultations involving stakeholders at different stages of the policy cycle; re-defining the IAB into a stronger and more independent scrutiny body (the RSB we mentioned above); finalising a new inter-institutional agreement on better law-making (OJ L 123 vol.59, 12 May 2016); publishing a single set of methodological templates for better regulation activities (a toolbox running above 400 pages, re-adjusted in summer 2017); and finally, withdrawing proposals (Radaelli 2018 on the controversies raised by this last point). By taking the decision to embark on both systematic ex post evaluation and making evaluation the first step in the planning of new legislation, the Commission set a very high bar (Zwaan et al. 2016). The choice for consultation reveals the attempt to seek more legitimacy for policy formulation directly from stakeholders (Bozzini and Smismans 2016; Bunea 2016; Bunea and Ibenskas 2017).

As for regulatory oversight, today all RSB members work full-time, are bound to the principle of collective responsibility and enjoy a mandate that, with the 2020 additions mentioned above, is wider than that of the IAB, covering RIA, major *ex post* regulatory evaluations and fitness checks of existing legislation, and implementing and delegated acts (plus one-in-one out and foresight as per the 2020 decision).

Some would prefer a regulatory oversight body with no Commission's officials. For the Commission, instead, opinions on the quality of impact assessments of proposed initiatives should remain a component of the treaty right to initiative legislation. Inside the Berlaymont, the RSB is a fundamental component of the internal process of monitoring and

learning – that is, the policy conversation among the Secretariat General, the Directorates General, and the Commissioners (Senninger and Blom-Hansen 2020).

The Commission published a mid-term review of the better regulation agenda (European Commission, 2017a) and a taking-stock communication in 2019 (European Commission 2019b) supported among other things by in-house interviews (that is, carried out within the Commission) and a literature review (Listorti et al. 2019). The main achievements are the strong emphasis on consultation, the role of RIA in policy formulation, the attempts made to include ex-post legislative evaluation into the policy cycle, and the RSB capacity to handle different types of scrutiny. On stakeholders engagement, the OECD indicators of regulatory policy and governance rank the Commission ahead of all the 27 member states (and with a slight edge on the UK). The OECD composite indicators for RIA confirm the EU in position number 1 (OECD 2019). In both cases (consultation and RIA) the EU outperforms the OECD average by a large margin (OECD 2019).

Simplification has been carried out by the platform called REFIT[3] – whose mandate was to check that the legislation in force is still fit for purpose). The methodological robustness and timing of the ex-post legislative evaluations provide ample room for improvement, but to be fair this is a relatively new component in the better regulation agenda in Europe, and the practice of the Commission does not lag behind the average member state. Certainly, the quality and timing of evaluations are key to the goal of closing the policy cycle.

Challenges

[3] https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-less-costly-and-future-proof_en accessed 29 January 2021

In terms of the better regulation horizon, we focus on the ways in which strategic challenges at the EU level play out not only in the blue skies of policy vision statements but also their coherence on the ground at particular stages of the policy process – most importantly, formulation, implementation and evaluation. This interaction between the big picture and the operational is of course where we find our perennial questions of ideational confrontation and institutional power politics.

Starting with the broad brush, the von der Leyen Commission's will have to grapple with some considerable challenges. Notable among these is how OIOO will work in practice. Despite its commitment to OIOO, the Commission has lacked until the time of finalising this chapter (December 2020) a robust and consistent guiding framework for its application. Critical questions found upstream in the policy-making – how burdens are defined, the limits of offsetting and what constitutes equivalence in administration costs – remain in the eye of the beholder. While the fit-for-future (F4F) expert platform (that replaces REFIT) offers a potential first step in giving these ideas concrete form, the initiative remains in its infancy. And for a platform dedicated to the future (F4F) is odd that the main emphasis remains on burdens rather than a broader focus on dynamic efficiency and innovation.

A second big picture challenge that intersects with the ambiguity surrounding OIOO is the European Green Deal (European Commission 2019c). At its launch, Commissioner Timmermans presented the environmental ambition of the deal as akin to the medical hypocritic oath first 'do no harm'. Environmental campaigners have been keen to highlight its potential incompatibility of reducing regulatory burdens while safeguarding the environment (Green 10 2019). Just how the Commission will negotiate these tensions on the ground – fashioning new guidelines and policy formulation tools that balance

sustainability issues in the least burdensome ways – remains to be seen. Think tanks close to the business community have also asked the Commission to be explicit in adopting better regulation principles in the Green Deal – indicating that so far they have not seen empirical evidence that this is the case (ERF 2020).

The realisation of the 'Green Oath' also links of course to the EU's preferred understanding of precaution and harm and, critically, how these can be measured in a consistent and transparent way. In terms of the two flagships initiatives, the Green Deal and the Digital Single Market, there are still differences between Member States and the Commission on whether precaution or innovation is the best foundation for regulatory choice. Or, if neither innovation nor precaution should be ranked first in every case, how should they be balanced in everyday RIA, evaluations, policy appraisal?

The Competitiveness Council has endorsed the innovation principle as fundamental for the flagship initiatives of the EU but the Commission has so far preferred to consider innovation a perspective, or a means to the end of a sustainable Union – not a foundation of regulatory choice (Taffoni 2020). In these conditions, the subtle yet crucial differences of meanings (between national delegations and the Commission) on the concrete interpretation of slogans like 'regulating for innovation' (Taffoni 2020) reveal a new turn of the power struggle about who controls the EU policy process.

The absence of the UK from this struggle because of Brexit takes one pro-innovation principle and pro-deregulation voice off the table, although the UK was never alone inside the Competitiveness Council. The call for more 'regulation for innovation' in terms of sandboxes, sunset clauses, flexible pro-innovation regulatory environments is as present as

before Brexit. The major impact of Brexit on better regulation will be in the domain of regulatory alignment.[4]

Considering the EP, the extent to which the EP's right of initiative is enhanced through the Better Regulation agenda is very much a 'live' issue. Upon her election as Commission President by the EP, von der Leyen confirmed her commitment to extending the EP's right with 'a legislative act in full respect of the proportionality, subsidiarity and better law-making principles' (von der Leyen 2019). That would take the EP power beyond its current role (agreed in the 2016 Interinstitutional Agreement [IIA] on Better Law-Making) where, for example, it can press the Commission to respond to requests for further evidence at any stage of the legislative process.

The nexus between innovation and regulation is also crucial for the recovery and resilience plan. The plan is not just about injecting financial resources in the ailing economy. It is about projects that will have to show how to rekindle growth via sustainable innovation. Here the main responsibility lies with the governments in the 27 member states – it is there that the projects are initially appraised and chosen.

The pandemic has exposed the limitations of EU better regulation in terms of foresight, overall policy coherence and sustainability. There are twin challenges of inevitable economic aftermath of COVID-19 and shifting power balances in the post-Brexit EU. Both of these huge issues interact with more prosaic questions concerning the scope of EU-oriented better regulation activities in the Member States themselves. The extent to which the

[4] The reference is to TITLE X (of the Brexit agreement) on Good Regulatory Pracitces and Regulatory Cooperation". https://ec.europa.eu/transparency/regdoc/rep/1/2020/EN/COM-2020-857-F1-EN-ANNEX-1-PART-1.PDF accessed 29 January 2021

approaches of 27 governments align to EU level aspirations is an ongoing theme of course. But, in a context of post-pandemic fiscal tightening and with Brexit removing one of the key cheerleaders, these questions of compliance become more significant. Previous research demonstrates that while tools such as stakeholder engagement and impact assessment have become popular both in the EU policy cycle and in domestic Better Regulation policies, underneath this process of diffusion lies a difference in the purposes and usages of the tools (Radaelli 2009). The extent to which firstly this variation of practice persists and second these carry consequences for an integrated approach require robust empirical research.

Arguably the most pressing challenges are to integrate foresight and the sustainable development goals in the vision and policy tools. The 2021 Communication of the Commission makes reference to these two dimensions. Questions arise about the overall coherence of the agenda portrayed in the Communication (Radaelli 2021): the flagship policy initiatives for the ecological transition, the digital economy and resilience are geared towards long-term welfare, yet one-in-one-out is a commitment that neglects benefits (Sunstein 2020). The sustainable development goals can be operationalized in RIA by embracing and integrating the impacts on gender, distribution, poverty, environment, and health. Indeed, there are methodologies on how to integrate gender (Gains 2017; Staronova 2017), social effects (Schrefler 2017; Vanclay 2020), energy (Torriti 2017), agriculture (Russel 2017), and health (Green et al. 2020) in a single RIA template – although practice has not as yet caught up with these methods.

The sustainable development goals – we argue – should become the metrics to measure coherence and integration between the tools. The foresight dimension introduced in the RSB mandate in 2020 and reiterated by the 2021 Communication has potential. But, it

should be operationalized taking on board the Agenda 2030 for sustainable development, that is, beyond the life of the present Commission. The sustainable development goals are also promising indicators to measure the overall policy coherence[5] and the real-world progress achieved in terms of outcomes. If the causal theory behind better regulation is that robust evidence-based tools improve on the life-cycle of regulations, the capacity to manage the life-cycle should be traceable in the quality of the rules and their impact on the sustainable development goals with the 2030 target in sight.

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[5] At the UN Environment Programme (2020) there is already work under way on indicators of policy coherence. Interestingly, this methodology refers the presence of sustainable development dimensions and goals in RIA.

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