The EU's REFIT strategy: a new bureaucracy in the service of competitiveness?

Éric Van den Abeele

Working Paper 2014.05

The EU's REFIT strategy: a new bureaucracy in the service of competitiveness?

Éric Van den Abeele

Working Paper 2014.05

european trade union institute

Éric Van den Abeele is a guest researcher at the *Observatoire social européen* and lecturer at the University of Mons-Hainaut.

Translation from the French by Kathleen Llanwarne, ETUI

Brussels, 2014
© Publisher: ETUI aisbl, Brussels
All rights reserved
Print: ETUI Printshop, Brussels

D/2014/10.574/26
ISSN 1994-4446 (print version)
ISSN 1994-4454 (electronic version)

The ETUI is financially supported by the European Union. The European Union is not responsible for any use made of the information contained in this publication.

Contents

Introduction	5
Part one	
The actors and their current practice	7
1. The impact analysis (IA) system.....	7
2. The reduction of red tape and regulatory burdens.....	13
Part two	
The refit programme: continuity or new departure?	19
1. Presentation of the programme	19
2. Implementation of REFIT: regulation under fire.....	20
3. Horizontal actions.....	22
4. Overall assessment of the REFIT programme	24
Conclusion	27
References	29

Introduction

The whole question of regulation is currently one of the most sensitive and hotly debated areas of concern: there are those who support deregulation; there are those who would like to adjust regulation to suit the needs of business competitiveness; and there are those who believe that regulation represents a vital aspect of legal security and protection of the general interest in the broadest sense. More than ten years after the Inter-institutional agreement on Better Law-making of 31 December 2003, the question of simplifying and improving the quality of EU legislation has given way to continuous across-the-board evaluation of the Community *acquis* and to the demand for a reduction of 'burdens' and 'costs'; these are the concerns that have gradually but insistently moved to the top of the agenda. In the first part of this paper we will examine the practice of the actors in relation to two currently centre-stage agenda items, namely, the impact analysis of the EU legislation system and the question of reducing administrative and regulatory burdens. In a second part we will look at the new REFIT exercise (Regulatory Fitness and Performance Programme) in an effort to ascertain how far this new agenda item represents a continuation of earlier ones and to what extent it signals a new departure.

Part one

The actors and their current practice

It is well to begin with a reminder: the 'better law-making' agenda, which evolved into 'smart regulation' in 2009¹ before becoming a Regulatory Fitness and Performance (REFIT) programme in 2012, consists of the following three main components:

- simplification and improvement of the quality of EU regulation, which was the initial goal of the 'better law-making' agenda;
- the impact analysis of all substantial new Commission legislation, which has taken on major importance over the years and today extends also to the impact analysis of amendments submitted by co-legislators and to the ex post evaluation of existing legislation;
- the reduction of 'red tape' – administrative burdens and subsequently regulatory burdens – which has now become a fully-fledged goal in its own right.

1. The impact analysis (IA) system

The impact analysis system entails, in principle, an economic, social and environmental analysis of policy proposals issued by the Commission insofar as these entail a substantial impact on the Community *acquis*, on the European Union and on its member states. IA is required also for non-legislative initiatives – green papers, white papers, action plans, negotiation mandates for international agreements – that serve to define future policies. Certain types of implementing measure – such as comitology acts and delegated acts – likely to have a significant impact must also, in principle, be accompanied by an IA. The purpose of impact assessment is to contribute to properly documented decision-making throughout the legislative process and to seek to ensure that negotiations will be conducted with a view to achieving a satisfactory balance among the different priorities².

1. For a full analysis of the subject, see Van den Abeele (2009) and Vogel and Van den Abeele (2010).

2. The percentage of important proposals included in the Commission's work programme and subject to impact assessment rose from 32% to 44% between 2011 and 2012 (COM(2012) 746, 12 December 2012).

1.1. The Commission's practice

The impact analysis of a proposal is the responsibility of the European Commission which, to this end, has recourse to three levels of expertise: an Impact Evaluation Board (IAB), internal to the Commission, whose task is to examine the IA carried out either by the relevant Commission policy departments or produced independently; a working group from the member states (the Group of high-level national regulatory experts); and recourse to external consultants contracted by the Commission.

1.1.1. The increasing power of the Impact Assessment Board (IAB)

The Board has become a kind of central control tower for EU legislation, its role being to provide advice and assistance under the authority of the Commission President. The Board, set up at the end of 2006, is chaired by the Deputy Secretary General of the Commission's General Secretariat, Ms Marianne Klingbeil, who has responsibility for smart regulation. The Board is claimed to be independent of the policy-making departments; its members are high-level Commission officials from the DGs most directly concerned by the three pillars of impact analysis, i.e. economic, social and environmental analysis. Members are appointed in a personal capacity and on the basis of their expert knowledge.

Once a year the Commission General Secretariat puts questions to the Board³ which reviews all initiatives underway and decides which of them will need to be accompanied by an impact assessment. In addition, the Board examines and issues opinions on the quality of the draft impact assessments prepared by the Commission departments. The examination is generally completed within six weeks.

The Board's opinions are not, in principle, binding. However, a proposal cannot be submitted to the College of Commissioners for decision until it has received a positive opinion from the Board⁴. The Board is responsible for monitoring the Commission's legislative proposal with the impact analysis throughout the decision-making process. In actual fact, the College never acts against a negative opinion issued by the Board. Proposals that receive a negative opinion from the board are submitted a second time and if the examination again proves negative the procedure is halted.

In the report issued in 2013⁵ the Board stated that it had examined 97 analysis impact reports and had published 142 opinions, 45 of which were second-chance reports. This high figure is attributable, in part, to the complexity of the files submitted and to the not always optimal conditions under which the opinions

3. Since its creation in 2006, the IAB has issued more than 700 opinions.

4. Impact Assessment Board Report for 2012. Document 6505/13 of 21 March 2013, p. 10 (Commission 2013c).

5. Impact Assessment Board Report for 2012, Doc. cit.

of the Commission departments are prepared⁶. The Board, however, prefers to see this feature as a sign of its independence rather than of any weakness in terms of the reports prepared in the policy departments. However this may be, the Impact Analysis Board, placed under the responsibility of the Commission's General Secretariat, has become, *de facto*, the body responsible for judging the pertinence of the impact analyses and hence also of the proposals issued by the Commission departments.

1.1.2. The shortcomings of impact analysis in social and environmental matters

In its 2012 activity report, the Board enumerated several shortcomings. It observed, first of all, that more efforts have to be made to give greater consideration to alternative options and to provide a better description of these options. This remark recurs regularly, which may be considered somewhat astonishing insofar as back in 2005 the British Consultancy TEP⁷ had already drawn attention to the shortcomings of the Commission's impact analyses, particularly in relation to social protection and environmental policy.

In relation to social impact analysis, the Board acknowledges 'that there has been no progress in the initial assessments of these impacts. (...) The need to strengthen the quality of the analysis for social impacts remains a concern. The Board therefore recommends that services carry out serious social impact assessments for their proposals, in line with the IA guidelines and relevant guidance'⁸.

In relation to environmental impact analyses, the Board 'has noted weaknesses in some cases in the scope and depth of analysis of environmental impacts, including lack of quantifications. (...) it remains therefore an aspect that has the potential for further improvement'⁹.

In terms of assessment proper, the Board acknowledges finally that the findings of the ex post assessment of existing legislation have been insufficiently heeded. It concludes that the impact analysis must continue to be an integrated assessment process encompassing the economic, social and environmental dimensions and that there remains room for improvement in the quality of the initial impact analyses submitted by the Commission departments.

1.1.3. Inflation of the impact analysis system

Recent years have since a constantly rising number of requests for specific impact analyses, emanating essentially from individual EU member governments. On top of the classic impact analyses covering the social, economic and environmental dimensions, a series of additional requests have been received

6. IAB report for 2013, p.5 (Commission 2014b).

7. 'The Evaluation Partnership Limited' (2007) http://ec.europa.eu/smart-regulation/impact/key_docs/key_docs_en.htm

8. IAB for 2012, Doc. cit, p.27 (Commission 2013c).

9. Ibidem.

for assessments in the following areas: impact on the internal market and the four fundamental freedoms; impact on subsidiarity and proportionality; impact on EU fundamental rights; impact on SMEs and small businesses (the so-called ‘SME test’); impact on the external dimension of EU competitiveness and the need for a ‘competitiveness proofing’, etc. This proliferation of requests for IAs, reflecting an overriding concern to strengthen the economic dimension, constitutes a brake on policy decision-making which is increasingly constrained by ‘independent’ studies and the opinions of invariably ‘high-level’ but also increasingly numerous experts.

1.2. The practice of the Council

1.2.1. Examination of the Commission's impact analyses

Ever since the Council adopted conclusions calling for its own more effective involvement in the negotiation process, some – but not all – of its departments have taken to systematically examining the IA accompanying the Commission's legislative proposal before taking up the legislative proposal¹⁰. Similarly, it sometimes happens that a national delegation informs the other member states of the impact of a substantial amendment. Thus, in the framework of revision of the legislation on public procurement, Austria presented the foreseeable impact on its own national budget of article 84 of the revised proposal for a Directive on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts 2004/18/EC¹¹. In some Council departments, and particularly in the ECOFIN services, there is little or no impact analysis from the Commission or from ‘independent’ experts – even though proposals from this department indisputably have considerable economic and social impacts on the European Union and its member states. In relation to the proposals for Regulations and Directives relating to the Six-Pack¹² and the Two-Pack¹³, the Commission submitted no IA before issuing its proposals. Nor does it generally submit an IA in

10. The examination of an IM takes place at working party level. It is quite rare – indeed exceptional – for an IA to be presented to the Coreper or the Council.

11. Austria had calculated that the impact of article 84 of the directive in question dealing with the creation of a public procurement control body would be 7 million euros. Several delegations followed up and stressed the high cost of such a provision. In the course of the negotiations, the proposed measure was dropped.

12. Regulation (EU) no 1173/2011 of the European Parliament and of the Council of 16 November 2011 (European Parliament and Council of European Union 2011a); Regulation (EU) no 1174/2011 of the European Parliament and of the Council of 16 November 2011 (European Parliament and Council of European Union 2011b); Regulation (EU) no 1175/2011 of the European Parliament and of the Council of 16 November 2011 (European Parliament and Council of European Union 2011c); Regulation (EU) no 1176/2011 of the European Parliament and of the Council of 16 November 2011 (European Parliament and Council of European Union 2011d); Regulation (EU) no 1177/2011 of 8 November 2011 amending Regulation (EC) no 1467/97 (European Parliament and Council of European Union 2011e); Council Directive 2011/85/EU of 8 November 2011 (Council of European Union 2011).

13. Regulation (EU) no 472/2013 of 21 May 2013 (European Parliament and Council of European Union 2013a) and Regulation (EU) no 473/2013 of 21 May 2013 (European Parliament and Council of European Union 2013b).

advance of its proposals on competition matters. Were such impact analyses to be conducted, they could not fail to recognise the tremendous social impact entailed by these proposals for citizens, employees, workers and those in receipt of welfare allowances.

1.2.2. The impact analysis of Council amendments

Another politically important matter is the potential impact, over and above the Commission's initial proposal, of an amendment adopted by the Council. Some stakeholders, particularly the employer federations (Business Europe, etc.) consider that the action brought to bear on a Commission proposal by the co-legislators frequently serves to generate additional red tape and/or regulatory costs. The following subsidiary question thus arises: is it necessary, before an amendment is submitted, that an impact analysis of the amendment should have been carried out by the member state or the group of member states submitting it? Urged on by Germany, several member states seem to have recognized that such should be the case, a stance that entails a twofold incongruity: why should it be necessary to carry out an impact assessment to approve an amendment that might well receive all-round support in the event of a general compromise? What would happen if a group of different member states were to carry out an impact analysis that reached a different and perhaps even an opposing conclusion? Would it then be necessary to conduct a third impact analysis to scrutinize the two competing IAs and come down on one side or the other? Over and above the questions of the cost of conducting such studies, of their potential bias in relation to the general European interest, and of the time that would be required to carry them out, the issue at stake here is evidently that of the method and existence of inter-institutional cooperation.

1.2.3. The Council's refusal to set up an impact analysis unit

The Council declined to set up its own IA unit in spite of the insistence of twelve delegations (United Kingdom, Czech Republic, Estonia, Ireland, Finland, Germany, Latvia, Lithuania, The Netherlands, Slovenia, Slovakia, Sweden). The reasons for this refusal, as stated, were essentially budgetary. In a letter dated 11 October 2011, the Secretary-General of the Council of the EU, the German Uwe Corsepius, turned down the request, advancing three arguments in support of his stance: first the establishment of such a body would duplicate the resources allocated to the Commission and those used for this purpose by each member state; secondly, to set up a body of this kind would demand an additional budget, while recourse to external consultants would increase the financial burden at a time when the European Council was asking each institution to reduce its costs; thirdly, the Council General Secretariat considered that it would be more opportune, rather than setting up a new body, if the Commission itself were – in cooperation with the member states – to provide additional assistance to assess the impact of substantial amendments submitted by member states. It is to be noted, in this connection, that from several quarters of the Council there came requests that the monopoly on impact analysis should remain with the Commission and that the procedure

should be integrated, i.e. should effectively encompass the three dimensions of sustainable development (economic, social and environmental), while offering, if necessary, political alternatives to the co-legislators.

1.3. The practice of the European Parliament

In January 2012 the European Parliament (EP) set up – in the form of a horizontal directorate within the Internal Policy DG (DG IPOL) of its General Secretariat – a unit to conduct impact analyses of the Commission’s legislative proposals. This initiative reflects the European Parliament’s concern to ensure that it has at its disposal the requisite means to conduct effective parliamentary activity and to enable MEPs to be properly prepared for their task of amending legislative proposals.

The EP’s IA unit seeks to ensure, in particular, that the Commission correctly applies its own impact analysis guidelines. It is also responsible for conducting a detailed examination of the road maps that accompany the Commission’s work programme; for carrying out an analysis of any Commission proposal likely to entail a substantial impact¹⁴; and to assess the possible impact of substantial amendments proposed by the EP.

1.4. The role of the European Council

In 2014 the European Council called on the Commission and the member states to make ‘industrial competitiveness concerns (...) part of impact assessments in view of getting a stronger industrial base for our economy’ (point 6 of the European Council Conclusions of 20 and 21 March 2014) and to make ‘better use of impact assessment and ex post evaluation throughout the legislative cycle, at the EU and national level’ (European Council Conclusions of 26 and 27 June 2014).

It will be observed that the question of regulation is nearly always coupled with the topic of ‘growth, competitiveness and employment’ and that the European Council stipulates that better regulation is one of the conditions for promoting better competitiveness.

¹⁴. It is important to point out that the impact analysis of a substantial amendment from the EP is conducted by external experts. The agreement of the four large political groups is required to set in motion such an analysis, a requirement that serves to limit recourse to the practice.

2. The reduction of red tape and regulatory burdens

It should be remembered that Community legislation generates essentially two types of costs:

- regulatory costs: the costs of ensuring compliance of products, processes and companies with standards laid down by legislation, for example, adjustments required to meet new economic, social or environmental standards;
- administrative costs: costs stemming from the requirement to provide information (statistics, reports, labelling, etc.) in accordance with legislative provisions.

2.1. The practice of the Commission

In January 2007, the European Commission proposed the launch of an action programme aimed at reducing the amount of red tape hampering businesses in the EU. The European Council agreed to the proposal in March 2007 and adopted the goal of reducing administrative costs by 25% in 2012 – a goal applicable both to administrative burdens deriving from Community legislation and to the associated national implementing or transposition measures. At the beginning of 2013, the Commission considered that it had done its own share of the work when it announced that it had reduced the administrative burden of the Community *acquis* by 33% instead of the promised 25%, thereby enabling savings of close upon 41 billion euros. The Commission regretted, however, that not all member states had kept their promises in spite of their solemn undertakings. On 3 September 2009 José Manuel Barroso, with his slogan ‘smart regulation to make markets work for people’¹⁵, initiated a fundamental change of direction on the part of the Commission: the programme for the reduction of administrative burdens was from this point on to be turned into a programme for the reduction of regulatory burdens¹⁶, a change of goal post that prompted no objection from the co-legislators.

2.2. The special case of the High Level Group on Administrative Burdens

By its decision 2007/623/EC of 31 August 2007¹⁷, and to help it achieve its goal of reducing the administrative burden by 25%, the Commission set up a high-level group of independent experts on administrative burdens. The new

¹⁵. Vogel and Van den Abeele (2010), p. 69.

¹⁶. It is highly significant to observe that the administrative part of a legislative act is tackled exclusively from the standpoint of its burden and its cost (necessarily excessive) and not from that of its positive contribution to the implementation and enforcement of the legislation in question. The assimilation of every administrative burden to a matter of red tape is a specious procedure insofar as administrative procedures are essential for ensuring legal security, democratic control, and governance.

¹⁷. See Commission Decision of 31 August 2007 (European Commission 2007).

body's task was to advise the Commission on implementation of the action programme for the reduction of administrative burdens.

The Group is chaired by Edmund Stoiber, former Prime Minister of Bavaria. Composed of 15 members selected by Mr Stoiber on the basis of their expertise and/or in the areas covered by the action programme, its mission is to advise the Commission on the administrative burdens affecting businesses.

The composition of the group, from the outset, was clearly right-wing and highly business-oriented. With two exceptions¹⁸, all the members were from the business world¹⁹.

Four large member states were dealt a particularly good hand in the appointment of members, namely, Germany, France, the United Kingdom and Poland, as well as northern Europe (Finland, Denmark and Sweden). There was no representative from the Benelux countries, the Baltic states or the Mediterranean island member states (Greece, Malta, Cyprus).

2.2.1. A long-running mandate

The Stoiber group's mandate was extended in August 2010. On 5 December 2012, it was once again prolonged²⁰ until the end of the Commission's term of office, i.e. 31 October 2014, with a particular request for attention to SMEs and small businesses so as to 'make public administrations in the member states more efficient and responsive to the needs of stakeholders'²¹.

2.2.2. A substantially broadened mandate

Initially, the Stoiber Group advised the Commission in the framework of its programme to reduce the administrative burdens imposed by the existing legislation. Under the new mandate, 'the group's task shall be to advise the Commission on the administrative burden placed on business, in particular on SMEs and micro companies, arising from EU legislation, and on simplifying existing EU legislative acts appropriate for review and on how to make public administrations in the Member States more efficient and responsive to the needs of stakeholders, in particular SMEs, when implementing EU legislation.'²² In other words, the Commission had delegated to the Stoiber group a portion of its own powers; the Stoiber group exercises de facto external and 'independent' control over the smart regulation agenda. Henceforth, the High

18. Monika Kosinska and Heidi Ronne-Moller.

19. This must appear contradictory insofar as the new paragraph 6 of article 4 of the decision to set up the High Level Group states that members are appointed on a personal basis, act independently and in the general interest.

20. The Stoiber group's mandate was extended by the European Commission President without any assessment of its work having taken place and without any involvement of the co-legislators in the decision.

21. See Commission Decision of 5 December 2012 (European Commission 2012c).

22. New Article 2 of the Commission Decision of 5.12.2012.

Level Group has responsibility for conducting an examination of all legislation in preparation.

2.3. The Group of High Level National Regulatory Experts

To conduct the dialogue with the member states, the Commission set up, in 2006, a group of high-level national regulatory experts whose task was to advise it on questions of relevance to the programme. The group examines European and national legislation, paying particular attention to simplification and impact analysis and taking into account questions of legislative implementation and enforcement²³. While originally this high-level technical group did not issue opinions on the Commission's proposals or draft legislative proposals, things have changed in this respect too because, since 2011, the group has entered very deeply into the institutional aspects. Discussions are held on the internal organisation of the Council, on the role of Coreper, on how to proceed in the Council working groups, on the role of European Union presidencies, etc.

2.4. The role of high-level groups in the framework of IA and reduction of burdens

The proliferation of forums for monitoring European legislation, inspired by the experience of four member states (DE, NL, SE, UK), raises four cautionary questions concerning the goal being pursued:

1. *Institutional questions*: does not the intrusion and systematic interference of external 'experts' during the phase when the Commission is exercising its right of initiative (even if the said experts are 'independent' and 'high-level') run counter to the principles – guaranteed by article 213 of the TFEU – of the Commission's monopoly on legislative initiative and of its independence?
2. *Interference with the 'classic' and institutionalised consultation of stakeholders*: the Commission requests the opinion of advisory committees, organises online consultations, puts questions to national and European federations, publishes green papers, etc. What could be the value of such official stakeholder consultation if external experts have already pre-empted the terms of the debate at a preliminary stage? Does not the structured and institutionalised dialogue practised by the Commission in the framework of the treaties constitute a useful form of protection to ensure that balances are respected and that the general interest is guaranteed?
3. *Political impact*: the Commission's impact analyses supply systematic quantitative data concerning the impact of its proposals in terms of administrative burdens, while also examining their implications from the

²³. It is to be noted that the Commission Decision of 14 December 2012 amending Commission decision 2006/210/EC setting up a group of high-level national regulatory experts extended the mandate of the group of national experts until 31 October 2014 while strengthening the rules on professional secret (new paragraph 4 of Article 4 of Decision 2006/210/EC) (European Commission 2012b).

standpoint of proportionality and subsidiarity. Does not the focussing of the examination of proposals on *costs* – neglecting the possible *benefits* of the legislation – entail the risk of discrimination against businesses in the more highly regulated member states? This would then require a ‘deregulation bonus’ to safeguard the competitiveness of firms belonging to these member states.

4. *Primacy of competitiveness over other dimensions*: is not the creation of an external body responsible for targeting the impact on competitiveness, particularly of SMEs and small businesses, likely to prompt demands for similar structures for the monitoring of social and environmental policy?

2.5. The role of the European Council

At each European Council, the heads of state and government have supplied details concerning the road map followed by the Commission, the Council and the European Parliament. The European Council of 19 and 20 December 2013 actually stated that it would raise this question every year in the framework of the European semester’ (point 26).

Thus, the European Council of 26 and 27 June 2014 called on the member states to ‘make full use of regulatory flexibility provisions for the benefit of small and medium-sized enterprises in the implementation of EU legislation’ (point 19) and to ‘continue the implementation of the REFIT programme in an ambitious way, taking into account consumer and employees protection as well as health and environment concerns’ (point 20).

The European Council of 20 and 21 March 2014 stated: ‘Competitiveness requires a stable, simple and predictable environment, including better regulation and in particular an ambitious REFIT programme.’ (point 5)

The positions adopted by the heads of state and government emphasize three main points:

1. The European Council confirms its determination to reduce the regulatory burden at both EU and national level²⁴. This stance gives the go-ahead to the deregulatory effort currently being unleashed in a totally uninhibited and direct manner. What is more, very surprisingly, the administrative burden – or red tape – no longer receives more than a passing mention. The evident priority, from now on, is reduction of the regulatory burden.
2. A correlation – one that, in our view, is questionable – is established between deregulation of the EU and the strengthening of competitiveness. In some cases no evidence of such connection is supplied. A harmonisation of EU rules is frequently less costly than the sum of 28 different sets of rules. Even at the level of international competitiveness, it is far from certain that

²⁴. Hence the calls to ‘reduce the overall burden of regulation at EU and national levels’ and to ‘pay particular attention to avoiding additional burdens in the implementation of EU legislation’ (European Council 2013).

a hotchpotch of divergent rules, or an absence of rules, helps to improve the competitiveness of EU businesses, a fortiori SMEs. We do well to remember that chief executives, in a study conducted in 2006, were asked to place different factors in order of their importance for competitiveness: 'level of regulation' was placed after 'quality of management', 'sector', and 'country'²⁵.

3. The heads of state and government have taken SMEs as their choice target. Henceforth, simplification and deregulation must have the effect of providing relief to SMEs which, it is true, constitute 99% of the EU's industrial fabric. Apart from the presumably well-meant character of the measure, no information is supplied concerning what can be expected in return for this commitment to relieving the burden under which SMEs have been forced to labour. Thus, for example, the reduction of certain regulatory obligations for SMEs will signify, in a certain number of cases, an increase in the burden borne by public authorities, less transparency and more opaque markets, more expensive returns on investment, and so forth.

25. Dorgan et al. (2006).

Part two

The refit programme: continuity or new departure?

1. Presentation of the programme

On 12 December 2012²⁶ the Commission launched a new initiative, the Regulatory Fitness and Performance Programme, known for short as REFIT. The initial communication was complemented, on 7 March 2013, by the Communication entitled 'Smart regulation - Responding to the needs of small and medium-sized enterprises' and then, on 18 June 2014, by another entitled 'Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook'²⁷. By means of these three texts, the Commission was attempting to speed up the simplification programme and show its determination to make regulation into a hallmark of EU policy.

First of all, the Commission was confirming its aim of giving a 'simple, clear, stable and predictable regulatory framework for businesses, workers and citizens'²⁸ but also its determination to 'adapt EU regulation to needs and to put Europe back on the rails of growth and employment'²⁹. To this end it wished to map the whole legislative stock of the EU and in so doing to scrutinize, in an ongoing and systematic fashion, the 100 000 pages of the Community *acquis* and the approximately 6000 most important pieces of legislation in order to identify the excessive burdens, the inconsistencies and ineffective measures and to propose corrective action. The programme included plans to devise computer-based (Excel sheet) procedures to manage the Community *acquis* as a whole. Not that this was the first time that such proposals had been mooted; it was a natural continuation of earlier communications aimed at promoting better governance; yet at this stage we are enabled to glimpse the master plan of mapping the whole of the Community *acquis*, a sort of constantly developing and shifting *terra incognita*.

The Commission wished also, in the framework of REFIT, to put in place a detailed annual scoreboard showing the state of progress of transposition and implementation of each initiative and the schedule for new actions to be undertaken, thereby indicating whether the costs generated by regulation have

26. COM(2012) 746 final, 12 December 2012 (European Commission 2012a).

27. COM (2014) 368 final, 18 June 2014 (European Commission 2014a).

28. SWD(2013) 401 final, 1 August 2013 (European Commission 2013a).

29. COM(2012) 746 final, p. 2 (European Commission 2012a).

been increased or reduced, with results being submitted to stakeholders for their opinion.

The whole exercise, finally, was subject to two essential guiding concerns, namely, respect of subsidiarity and proportionality, and stakeholder consultation.

2. Implementation of REFIT: regulation under fire

On 18 June 2014 the Commission published the final component of the REFIT triptych setting out its intentions in the field of regulatory fitness and performance. It proposed collaborative action at several levels: unilateral recommendation to withdraw certain legislative proposals; self-censorship; revision of the *acquis* and scoreboard of existing regulation; partial exemption from or lightening of legislation for SMEs; better involvement of stakeholders; strengthened control of subsidiarity and proportionality, etc.

In the following sections we will review the Commission's intentions and, if possible, draw some lessons from them.

2.1. Withdrawal of proposals awaiting approval from co-legislators

The Commission has conducted a meticulous examination of all the proposals currently awaiting adoption by the legislator, enabling it to identify proposals that it considered to be out-of-date or lacking in legislator support and which could therefore be proposed for withdrawal³⁰. In this framework the Commission approved in 2014 the withdrawal³¹ of 53 proposals; in some cases its decisions were criticised, for example in relation to proposals for directives on protection of the soil³² or access to environmental justice.

2.2. Self-censorship by the Commission

The Commission announced that it would withdraw, or would not present to the co-legislators, proposals for directives that had failed to pass all the prior assessment tests or in connection with which no proof of added value

30. The list included proposals on investor-compensation schemes, aviation security charges, pregnant workers, a fund for the compensation of oil pollution damage, exemption of micro-undertakings from certain provisions on food hygiene – even though small businesses could have derived great benefit from this last proposal.

31. The Commission estimates that it has removed 293 pending proposals since 2005.

32. Some of the other proposals withdrawn in the context of REFIT relate to information to the public on pharmaceutical products, a regulation on European statistics concerning security in the face of criminality, legal protection of models and drawings, the European patent (a proposal that has been converted into reinforced cooperation) and driving licences incorporating the function of driver cards.

had been clearly identified. Thus the proposal for a directive on occupational health and safety in hairdressing premises was suddenly designated useless by the Commission on the grounds that, under the subsidiarity principle, this was a matter for regulation at member state level. This unilateral withdrawal caused anger in the trade unions and among other stakeholders who denounced the Commission's highhanded behaviour – without achieving any resulting change in the European executive's intentions insofar as it had quite made up its mind to reduce, at any cost, the volume of its proposals.

2.3. The careful 'combing' of the Community *acquis*

The Commission decided to embark on several new assessments and new scoreboards concerning the performance of existing legislation in the EU³³. In 2013, 42% of the regulatory *acquis* had been assessed in the context of REFIT and an additional 19%³⁴ was scheduled for assessment in 2014.

Every time this combing process is renewed, specific selection guidelines are set but only the 'ripest fruits' are proposed for revision or discontinuation, which means that other proposals have also been identified in advance as future candidates for the same fate. The college of commissioners is, to some extent, the victim of the tremendous expectations it has raised. Member states, employer federations, SME representatives, and others, await the new 'winners' to be selected for inclusion in the Commission's 'slimness exercise programme'.

2.4. The setting up of a simplified regime and partial exemption for SMEs

SMEs and small businesses constitute, for the Commission, a choice target. Since 2008 the Commission has been applying the 'Think Small First' principle³⁵. In 2012 the Commission thus carried out a Top 10 consultation among SMEs to find out which pieces of EU legislation they regard as the most hampering. On 18 June 2013 the Commission adopted a communication entitled 'Follow-up to the Top 10 SME consultation'³⁶. The measures adopted included the exemption for small businesses from the requirements of the accounting directives and the use of tachographs in road transport, two measures that have been severely criticised for the perverse effects induced. In its Communication

33. Particularly in relation to timeshare protection for consumers, late payment, the legal framework for prepackaging, the EU system for drawings and models, directives on prospectuses, application of the principle of mutual recognition with a view to improving operation in the internal market, carbon capture and stockage and CO₂ emissions of light industrial vehicles and passenger cars, telecommunications and legislation on non-authorized entry, transit and residence of migrants in the EU.

34. European Commission (2014a) op.cit., p. 13.

35. European Commission (2008).

36. European Commission (2013b) and European Commission (2013a).

of October 2013, the Commission said that all possible steps should be taken to lighten immediately the burdens inherent in the existing regulatory framework, particularly with a view to supporting small businesses.

2.5. The Commission work programme: a voluntary 'refitisation' of the right of initiative

The Commission's next step was to comb through its own work programme for 2014 and the coming years in order to retain only what was essential. All new initiatives are mentioned, for information, in the working document issued by the Commission services, subject to confirmation in the Commission work programme for 2015. The Commission will review in its annual programme all the legislative initiatives covered by the REFIT programme, including withdrawals, repeals and consolidations. Ultimately, the Commission work programme itself will be subject to assessment according to the REFIT programme criteria. It is hardly an exaggeration to assert that the Commission work programme and the REFIT programme henceforth constitute a single entity.

3. Horizontal actions

REFIT embarked on the revision of five constituent elements of smart regulation:

- impact analysis;
- ex post assessment;
- stakeholder consultation;
- cost/benefit analysis of regulation;
- report requirements.

3.1. Impact analysis

Apart from the systematisation of impact analysis, the Commission has decided to ensure that its proposals comply with the principles of subsidiarity and proportionality³⁷. On the basis of the experience acquired (thanks to more than 350 impact analyses since 2010), it has undertaken to update its impact analysis guidelines and will consult the stakeholders by means of a public hearing launched in June 2014. This first call for an external opinion on its assessment methods opens the way to an interesting debate on methodology.

³⁷. See on this subject the excellent contribution by Michael Emerson (Emerson 2014).

3.2. Ex post assessment

With regard to ex post assessment, the Commission will hold consultations 'at each stage of the policy cycle'. To this end, it will 'continue to improve its planning of consultations through the preparation of consultation strategies at the policy preparation stage and continued publication of its evaluation planning (p. 14). But the Commission has warned that 'collaborative efforts in assessing implementation of EU legislation at national, regional and local levels should be launched' (p. 21-22). We may thus observe that the Commission is issuing a second call for cooperation, this time directed at the member states in order to measure the effects of European legislation on the ground.

3.3. Consultation of member states and stakeholders

The Commission considers that 'cooperation with member states is essential to gather data and assess whether EU legislation has had expected effects. National Parliaments also have their role to play in providing input to the Commission at an early stage of the policy-making cycle and in scrutinising Commission proposals under the subsidiarity control mechanism' (p. 17).

As regards the consultation of stakeholders, 'the Commission will strengthen the use of consultations in evaluations and Fitness Checks by applying minimum standards of consultation as it is currently done for impact assessments' (p. 14). 'The Commission invites input, data and evidence from social partners and stakeholders on the state of play and outlook on REFIT' (p. 20)³⁸. The Commission's intention is to continue along these lines and extend its field of action to the social partners and stakeholders, particularly SMEs, by means of direct contacts on the occasion of conferences in the member states or consultations conducted via European and national SME associations and the Enterprise Europe Network. This third call for cooperation relates to the decision-making process proper.

3.4. Cost/benefit analysis of regulation

Determination of the cost/benefits entailed by the legislation will lead the Commission to conduct assessments of cumulative costs on the scale of an industry, for example³⁹. According to the Commission, one of the priorities of REFIT should be to quantify the costs and benefits throughout the regulatory

³⁸. To date some 53 answers have been received from government departments or local authorities, stakeholders and citizens in the framework of this public consultation, constituting a very weak response and a highly unrepresentative result.

³⁹. Two assessments of this type dealing with the steel industry and the aluminium industry have already been conducted; a third, on the chemicals industry, is underway, and others are in preparation for the timber and woodworking industry, the ceramics industry, the glass sector and the construction sector (see http://ec.europa.eu/enterprise/sectors/metals-minerals/files/steel-cum-cost-imp_en.pdf).

cycle, employing appropriate assessment and follow-up frameworks, re-examined and adapted after each important revision of the legislation. Here the Commission observes that ‘the accuracy of cost and benefit measurement in impact assessments and ex post evaluations depends on the quality of data provided by member states, social partners and stakeholders’ (p. 15).

3.5. Reporting requirements

In terms of reporting, finally, the Commission considers that the regulatory burden can be reduced by lowering reporting demands. Since 2007 member states have submitted to the Commission a single report instead of separate reports on the practical implementation of 24 directives in the area of health and safety at work (directive 2007/30/EC amending framework directive 89/391/EEC). The Commission has announced that this approach may be extended into other areas in 2015 (p. 16-17).

4. Overall assessment of the REFIT programme

After the foregoing presentation of the REFIT programme, how can we not be struck by the difference between the inflated intentions announced by the Commission and the modest results available to date?

4.1. An essentially declamatory exercise

The revision of the *acquis* is part of the European Commission’s ongoing work programme. The legislative acts mentioned in the ‘Top Ten’ most cumbersome pieces of legislation have already been identified, some of them long ago (REACH for example). Accordingly, some topics currently up for simplification are ‘business as usual’ and are more revealing of a dimension of the Commission that is under fire from different quarters (member states, stakeholders, eurosceptics). Similarly, we take as more virtual than real the announcement in REFIT that 150 billion euros of additional savings have been made and have contributed to increasing the Community GDP by 1.4%. Far from being effective and operational measures for renewing growth and employment, the cleaning up of the Community *acquis* and the scoreboards of EU regulation appear at best as measures of good governance. But the exercise should not be allowed to conceal some measures of questionable value and others that are distinctly doubtful like the health and safety legislation for hairdressers.

4.2. An imprecise and partial exercise

The qualification of regulation as ‘burdensome’ is imprecise and at no point has it been defined. Is this qualification linked to costs? To administrative formalities? To the complexity of the wording? To the fact that legislation can be perceived as an irritant? To factors such as competitiveness? Is it to be

understood in comparison to the level of legislation of some trade partners (China, India, United States, Japan, for example)? Is it judged 'cumbersome' at national level or in the context of cross-border activities? There is a definite sense that this whole exercise is being conducted against the background of a partially hidden agenda: to reduce the federative role of the EU; to reduce the level of control by states that are regarded as fussy and intrusive; to cut down on basic social welfare and environmental guarantees.

4.3. An insufficiently well-founded procedure

The Commission has included in its explanations no qualitative analysis of the reasons for which the pieces of legislation subject to review were considered 'burdensome'. In fact, three types of possible reason could be put forward. In some cases, a piece of legislation is judged too cumbersome or too constraining on account of provisions that are lacking, or that are insufficiently encompassing or not identically applicable to all actors or areas concerned (this might apply for example to the exclusion of notaries and the period of transition for midwives in the directive on vocational qualifications). In other cases, the incomplete state or unfinished character of the internal market is the cause of the 'burdensome' nature of the legislation. In the case with which we are dealing here, it is the loopholes or gaps in the legislation that are the cause of the problem that is regarded as disturbing. Finally, the sheer complexity of the texts may sometimes explain the 'heavy' character of some pieces of legislation. This would apply to REACH or to occupational safety directives that contain numerous highly technical provisions and specifications.

4.4. An exercise confined to SMEs and small businesses

A bias has been identified in favour of the competitiveness of SMEs and small businesses. Over and above the usefulness of the measure for the economic units concerned, this could be viewed as a kind of lapse in the balance among the three dimensions (economic, social and environmental) to the detriment of the second and third and, as a result, as a failure to uphold the principle enshrined in article 17 according to which 'the Commission shall promote the general interest of the Union'. One might equally put forward a claim, after all, that regulation should be 'Think Social First' or 'Think Environment First'.

4.5. Everything up for public consultation

The assessment guidelines, including those applicable to the analyses conducted in the REFIT framework, will be revised after a public consultation. The Commission is considering extending the period of this consultation from 8 to 12 weeks.

The Commission stipulates that interested parties should be consulted on all essential aspects of an impact analysis and at all times. The IA reports

accompanying the Commission proposals will be made public and interested parties will be able to state their opinion throughout the legislative process.

This trend towards generalisation of consultation of the public at all stages of the procedure raises the question of the functioning of the decision-making mechanism which is located, in principle, in the framework of the institutional triangle and of the consultation of the Committee of the Regions and the Economic and Social Committee. In calling on the national parliaments, the social partners, and civil society, to become more involved in the decision-making process, the Commission is going to have to arbitrate among different types of legitimacy in a situation where the different parties do not have access to the same information or to the same resources.

Conclusion

The initial goals of simplification and qualitative improvement have been replaced by the fight against bureaucracy and the contribution to competitiveness.

The gradual politicisation of the agenda has been gradually transmitted to and soaked up through all the pores of the Smart Regulation agenda:

- regulation is perceived as a burden, one that hinders firms in their development, weighs down on their competitiveness, or simply constitutes an irritant;
- revision and amendment of existing directives henceforth takes up more space than the launching of new projects which are forced to pass through the humiliating rigours of a battery of prior tests and assessments;
- legislation is regarded with an underlying attitude of suspicion, the assumption being that it generates burdens and hindrances even though the truth is much more nuanced.

Far from effecting any substantial reduction in costs, the smart regulation agenda has generated a creeping bureaucratisation of the process, affecting first and foremost the Commission. The procedures and bodies created to check out the 'ripe fruits' for the REFIT, ABR plus, TOP ten, etc. have shown a tendency to replace, to some extent, the driving role of the Commission – even if this institution insists on denying it. Thus the proliferation of high-level groups, the recourse to committees of experts or to outside consultants, questions the extent to which the Commission really is in control of the process. The fact that it wishes to place itself in the hands of consultation of the member states, social partners and civil society when it comes to impact analysis, cost and benefit analysis, ex post assessment, and so on, gives rise to a feeling that the Commission is seeking to divest itself of a task that is too burdensome for it – unless it believes that it lacks the requisite tools or necessary funding to conduct its own policies properly.

The risk is that political decisions will gradually forfeit their legitimacy in favour of the expert – who is always of a high level, supposed to understand everything, and in a position to evaluate everything, invariably pointing out ways to reduce costs. Over and above the question of legislation, it is the project of a federal Europe that seems to be under real threat. A potential collapse of this European project is perhaps the most worrying aspect of all.

Are we in a position to believe that the next Commission will display a genuine concern to begin anew, to open a new chapter, and to place at the centre of its endeavours the general European interest, for the furtherance of which it will take on the role of impartial arbitrator and intelligent overseer?

References

- Council of European Union (2011) Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States, Journal of the European Union, L 306, 23 November 2011.
- Dorgan S.J., Dowdy J.J. and Rippin T.M. (2006) The link between management and productivity, The McKinsey Quarterly, Web exclusive, February 2006. http://www.forac.ulaval.ca/fileadmin/docs/Manchettes/The_link_between_management_and_productivity.pdf.
- Emerson M. (2014) Proportionality needed in the subsidiarity debate in the EU – Appraisal of the British and Dutch initiatives, Essay, Brussels, Centre for European Policy Studies.
- European Commission (2007) Commission Decision of 31 August 2007 setting up the High Level Group of Independent Stakeholders on Administrative Burdens, Journal of the European Union, L 253, 28 September 2007
- European Commission (2008) Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions 'Think Small First' A 'Small Business Act' for Europe COM(2008) 394 final, 25 June 2008.
- European Commission (2012a) Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions EU Regulatory Fitness, COM(2012) 746 final, 12 December 2012.
- European Commission (2012b) Commission Decision of 14 December 2012 amending Commission Decision 2006/210/EC setting up a group of high-level national regulatory experts and extending the terms of office of the High Level Group and the period of application of Decision 2006/210/EC until 31 October 2014, Official Journal of the European Union, C 390, 18 December 2012.
- European Commission (2012c) Commission Decision of 5 December 2012 amending Commission Decision 2007/623/EC setting up the High Level Group of Independent Stakeholders on Administrative Burdens, C 382, 12 December 2012.
- European Commission (2013a) Commission staff working document: Regulatory Fitness and Performance Programme (REFIT): Initial results of the mapping of the *acquis*, SWD(2013) 401 final, 1 August 2013.
- European Commission (2013b) Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Commission follow-up to the 'TOP TEN' Consultation of SMEs on EU Regulation, COM(2013) 446 final, 18 June 2013.
- European Commission (2013c) Impact Assessment Board Report for 2012.
- European Commission (2014a) Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the

- Committee of the Regions Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook, COM(2014) 368 final, 18 June 2014.
- European Commission (2014b) Impact Assessment Board Report for 2013.
- European Council (2013) Conclusions, Brussels 14 and 15 March 2013.
- European Parliament and of the Council of European Union (1997) Regulation (EC) no 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, Official Journal of the European Union, L 209, 2 August 1997.
- European Parliament and of the Council of European Union (2011a) Regulation (EU) no 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, Official Journal of the European Union, L 306, 23 November 2011.
- European Parliament and of the Council of European Union (2011b) Regulation (EU) no 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, Official Journal of the European Union, L 306, 23 November 2011.
- European Parliament and of the Council of European Union (2011c) Regulation (EU) no 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) no 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, Official Journal of the European Union, L 306, 23 November 2011.
- European Parliament and of the Council of European Union (2011d) Regulation (EU) no 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, Official Journal of the European Union, L 306, 23 November 2011.
- European Parliament and of the Council of European Union (2011e) Regulation (EU) no 1177/2011 of 8 November 2011 amending Regulation (EC) no 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, Official Journal of the European Union, L 306, 23 November 2011.
- European Parliament and of the Council of European Union (2013a) Regulation (EU) no 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, Official Journal of the European Union, L 140, 27 May 2013.
- European Parliament and of the Council of European Union (2013b) Regulation (EU) no 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, Official Journal of the European Union, L 140, 27 May 2013.
- The Evaluation Partnership Limited (2007) Evaluation of the Commission's Impact Assessment System – Final report, Brussels. http://ec.europa.eu/smart-regulation/impact/key_docs/key_docs_en.htm.
- Van den Abeele E. (2009) L'agenda mieux légiférer de l'Union européenne, *Courrier hebdomadaire du CRISP* no 2028/2029, Bruxelles, Centre de recherche et d'information socio-politiques.
- Vogel L. and Van den Abeele E. (2010) Better regulation: a critical assessment, Report 113, Brussels, ETUI.