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# The European Union versus the Better Regulation Agenda

## Why the outcome depends on a paradigm shift

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Eric Van den Abeele

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**Background analysis 2019.02**

**etui.**



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**europaen trade union institute**

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## Introduction

At its roots, the rise in nationalism and populism among citizens of the European Union (EU) can be attributed to the fact that ordinary people no longer believe that any value is being added to their lives by this 'bureaucratic technostucture', often perceived as cold and remote because nowadays it offers no protection against their most pressing concerns – insecurity, exclusion and poverty.

According to the latest opinion polls to gauge voting intentions, a growing proportion of the EU population believes that budgets and competitiveness are being prioritised to the detriment of employment, social protection, the environment and even people's health, and that the EU is not overly concerned by this state of affairs.

Against this backdrop, it is unsurprising that many questions (some critical in nature)<sup>1</sup> have been asked about the real motivations behind the Commission's Better Regulation Agenda, particularly as regards its impact on the EU's *acquis* and some of its policies.

Although the Better Regulation Agenda was intended to simplify the EU's legislation and improve its quality, it has gradually morphed into a tool for making companies more competitive, marking the start of a slippery slope which leads from targeted deregulation and an increase in 'soft' legislation right down to an absence of legislation altogether.

In the report which follows, we attempt to unpick the history of the 'Better Regulation' concept by investigating how certain stakeholders – in particular major business groups and their powerful lobbies – exploit the agenda for their own ends, and what happens when regulatory provisions are identified as the main stumbling block to competitiveness.

The report has been split into two parts for ease of reading. In the first, we turn a critical eye on progress to date under the Better Regulation Agenda. In the second, we evaluate the situation from a number of different perspectives and offer some recommendations.

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1. See, in particular, Van den Abeele E. (2015) 'Better regulation': a bureaucratic simplification with a political agenda, Working Paper 2015.04, Brussels, ETUI.

The impact assessment – a topic which raises many questions relating not only to methodology and organisation of work, but also to policy – will occupy us for most of the first part of the report, as we attempt to track its development using a number of illustrative examples.

The next section of the report contains a discussion of the innovation principle, which is seemingly well on the way to becoming a new acid test for competitiveness.

The brief examination of stakeholder consultations which follows leads us to the regrettable conclusion that, in spite of all the European Commission's efforts, the consultation procedure has been derailed by powerful and well-organised lobbies, with the citizens – less well-organised, and therefore more vulnerable – losing out.

It will also become clear that a number of Member States view quantification and reduction of the regulatory burden as the most pressing political issue currently faced by the EU, calling into question the European Commission's power of initiative.

By way of a conclusion, the second part of the report contains an evaluation of the Better Regulation Agenda from a number of different perspectives and a selection of recommendations, in an attempt to set a more positive and mobilizing course and steer the European integration project out of its current stormy waters.



## **Part one**

# **The ambiguity, contradictions and lack of realism inherent to the Better Regulation Agenda**

Ever since 2007, when the Barroso I Commission and its Commissioner, Günter Verheugen, initiated a shift to a more utilitarian discourse, an ambiguous, contradictory and unrealistic goal has been pursued under the aegis of the Better Regulation Agenda and the REFIT<sup>2</sup> programme which implements it; reducing the regulatory and administrative burden and eliminating unnecessary costs.

The ambiguity of this goal stems from the fact that we live in a highly complex world whose contours are formed by countervailing power structures and intractable constraints, meaning that the regulatory simplification process can go only so far. There is an underlying assumption that simpler rules are readily achievable, and yet the task of balancing competing interests (business, employment, social protection and the climate) is becoming more like a Gordian Knot by the day, and calls for detailed rules of engagement. Certain quarters are openly demanding less regulation, but this may result in contentious issues being settled at national level rather than within the Community's legislative system, ultimately leading to the renationalisation of these regulations or even a move to private adjudication arrangements (which raises real ethical questions).

The goal is also contradictory, since transparent rules which provide a high level of protection, security and legal certainty and which safeguard the EU's general interests are the hallmark of any high-quality piece of legislation. It would have been more honest – and indeed 'simpler' – to work towards a goal of clear, reliable and consistent regulation.

Finally, the goal is unrealistic. The claim that legislative streamlining will result in a fresh injection of cash into the economy is misleading. The headline figures are based on (often unreliable) extrapolations of the costs that will be avoided or the savings that will be made, and there are no plans to divert this 'fresh injection of cash' towards policies aimed at boosting the economy, making investments or creating jobs. A 25% reduction in the regulatory and

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2. REFIT is an acronym which stands for REgulatory FITness and Performance, a programme created on 12 December 2012 and relaunched in 2013 and 2014. The REFIT Programme 'aims to cut red tape, remove regulatory burdens, simplify and improve the design and quality of legislation so that the policy objectives are achieved and the benefits of EU legislation are enjoyed at lowest cost and with a minimum of administrative burden, in full respect of the Treaties, particularly subsidiarity and proportionality' (Communication from the Commission, Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook, COM(2014) 368 final, 18 June 2014, p. 2).

administrative burden was set as a political objective in 2012,<sup>3</sup> but no mention was made of the baseline against which progress would be measured. The same is true for the savings goal announced in 2014 of EUR 150 billion, which accounts for less than 1% of the European Union's GDP (around EUR 15 300 billion).

This figure<sup>4</sup> looks impressive at first glance, but fades into insignificance when compared to the total annual volume of business – and there is nothing to say that overall costs will not increase as a result of the rules that will need to be introduced by the Member States to compensate for deregulation at EU level.

We will now examine each of the four main pillars of the Better Regulation Agenda in turn:

- regulatory impact assessments;
- the innovation principle as a new acid test for competitiveness;
- stakeholder consultations;
- simplification and reduction of the regulatory and administrative burden.

## 1. Impact assessments

The Commission holds the monopoly on legislative initiative according to Article 17(2) of the Treaty on European Union (TEU), and is therefore responsible for submitting to the Council and to the European Parliament proposals for regulations, directives or decisions according to the ordinary legislative procedure described in Article 294 of the Treaty on the Functioning of the European Union (TFEU).

A proposal determines the substantive scope of an initiative and whether it should take the form of a legislative or non-legislative instrument, and so assessing its potential impact is a vital stage in this procedure.

### 1.1 Background

#### 1.1.1 The importance of the 2016 Interinstitutional Agreement

Paragraph 12 of the Interinstitutional Agreement on Better Law-Making<sup>5</sup> states that: '*Impact assessments are a tool to help the three Institutions reach well-informed decisions and not a substitute for political decisions within the democratic decision-making process. [...] Impact assessments should cover the*

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3. See Van den Abeele E. (2014) The EU's REFIT strategy: a new bureaucracy in the service of competitiveness?, Working Paper 2014.05, Brussels, ETUI.

4. The Commission also believes that 'full implementation of EU environment legislation could save the EU economy EUR 50 billion every year in health costs and direct costs to the environment' (see Communication from the Commission, Completing the Better Regulation Agenda: Better solutions for better results, COM(2017) 651, p. 14.

5. Interinstitutional Agreement on Better Law-Making of 13 April 2016, OJ L 123/1-14, 12.2.2016.

existence, scale and consequences of a problem and the question whether or not Union action is needed. They should map out alternative solutions and, where possible, potential short and long-term costs and benefits, assessing the economic, environmental and social impacts in an integrated and *balanced way and using both qualitative and quantitative analyses.*'

This importance of these provisions cannot be overestimated, since they set out a clear framework for the impact assessment procedure; of particular interest is the reference to 'alternative solutions', or in other words scenarios which differ from the solution that is ultimately selected, as well as the reference to a proposal's 'potential [...] long-term [...] benefits'.

## 1.2 The three dimensions of an impact assessment

An impact assessment is not a single, static analysis; it comprises ex-ante, ongoing and ex-post evaluations.

- In line with the 'evaluate first' principle, the ex-ante stage involves analysing whether or not it would be politically expedient to propose a legislative initiative or a substantial non-legislative initiative.
- Ongoing evaluation involves analysing the impact of proposed legislative initiatives on the law of the European Union and its Member States, and investigating any economic, social and environment implications.
- At the ex-post stage, the implementation and outcomes of the regulatory provisions are examined with a view to rectifying any unintended side effects and amending the legislative framework.

### 1.2.1 The variable geometry of impact assessments

As a basic principle, an impact assessment must be carried out for any substantial initiative launched by the Commission; most are carried out on an in-house basis, within the relevant unit of the Secretariat-General.

The task is sometimes contracted out to external consultants, however, and the Secretariat-General's claim that the vast majority of impact assessments are carried out by its own staff is regularly disputed, not only by trade unions or associations, but also by Members of the Council or of the European Parliament. There is a lack of clarity as to the real state of affairs, and more detailed information is urgently needed on subjects such as the identity of the contractors, the methodologies they use, and the cost of studies procured from external suppliers as a basis for impact assessments.

Incidentally, the Commission failed to carry out an impact assessment for almost 17% of its initiatives between 2015 and 2018, according to data supplied by its own services; this represents a breach of the 2016 Interinstitutional Agreement, since the latter requires an impact assessment to be carried out for any substantial initiative.

### 1.2.2 Proliferation of economic criteria

An impact assessment involves working through around 17 criteria and tests<sup>6</sup> that provide a general overview of economic, social and environmental impacts, and a more detailed analysis of the below:

- impacts on external trade and investment;
- impact on the internal market;
- subsidiarity, proportionality and value added by Community action in the form of the proposal;
- impacts on SMEs and micro-enterprises, etc.

Over the years, the co-legislators have added new tests such as:

- the external dimension of competitiveness ('competitiveness proofing');
- impacts on small and medium-sized enterprises (Think Small First Principle);
- compatibility with the digital economy ('digital proofing').

This proliferation of criteria and tools raises questions as to their relative importance; who decides – and on what basis – which criterion should take precedence over the others as the decisive benchmark? How do these tests relate to fundamental social rights and the precautionary principle which governs environmental policy for example?

The following two examples prove that the increase in the number of criteria and tests by which the impact of an initiative is gauged has been sometimes detrimental.

The SME test:<sup>7</sup> although the Commission claims that this criterion is examined in detail for each substantial initiative, a reliable source has informed us that this is not often the case in reality.<sup>8</sup>

Evaluations of regional and local impact: the Commission does not have the tools needed to carry out proper evaluations of the local and regional impact of its proposals throughout the European Union.

Finally, scant attention is paid to 'unpopular' criteria, which include those relating to risk assessments and the precautionary principle.

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6. See in this respect Tools #19 to 35 of the 'Better Regulation Toolbox', European Commission, SWD(2017) 350 final, 7 July 2007.

7. This also poses a major problem in terms of methodology: how exactly should the term 'SME' be defined?

8. There are 24 million SMEs in the EU; during a working group meeting, the Commission admitted that the maximum possible 'return' was somewhere in the magnitude of 10 000 SMEs, i.e. 0.004% of the total. The problems associated with the automated consultation procedures that are often used have been studied extensively.

### 1.2.3 New criteria which ride roughshod over social considerations

The ‘Better Regulation Toolbox’, which was published in July 2017 and which is intended for use by the Commission services, is especially interesting because it guides thinking and practice at decision-making level (i.e. whether to propose a legislative or non-legislative initiative).

Instead of a decision support framework, it is structured as a list of questions that should be asked in relation to an initiative in order to identify its impacts (e.g. social impacts, impacts on health or impacts on employment). The questions themselves are non-specific and neutral in nature, and unlikely to galvanise anyone into action.

Even if every last one of the questions in the Toolbox is answered, all that emerges is a description of the initiative’s potential consequences (both positive and negative), with no thought to ways in which the impact could be reduced, the initiative reworked or an alternative scenario devised. The binary ‘yes/no’ nature of the questions encourages those responsible for the initiative to treat it as a *fait accompli* rather than risk soliciting any diverging opinions.

Despite the abundance of methodologies for examining economic impacts, the Toolbox also lacks proposals or suggestions for methodologies to be applied when tackling more complex issues.

Particular attention should be paid to the following passage, which amply expresses the ambiguity inherent to the Toolbox:

‘Initiatives aimed at increasing competition or technology driven activities leading to new forms of work (e.g. a sharing economy) can reduce job security. Initiatives fostering entrepreneurship and self-employment can have a positive impact on job creation, but they can also undermine employees’ rights and protection if the initiative[s] lead to “false self-employment”.<sup>9</sup> [...] On the other hand, very protective employment protection legislation can adversely affect segmentation of the labour market with large differences in costs and rights between permanent and non-standard forms of work.’

The Toolbox contains 65 tools in total, with Tool #29 relating to employment, working conditions, income distribution, inclusion and social protection. Under the title ‘Impact on working conditions’, it includes the following question:

‘Does the question affect directly or indirectly employment protection, especially the quality of work contract or false self-employment?’

Tool #20, which relates to sectoral competitiveness, goes into greater detail and is more ‘cost-oriented’ in comparison.

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9. See the Better Regulation Toolbox, p. 217.

Tool #29 (social/employment)	Tool #20 (sectoral competitiveness)
Does the question affect directly or indirectly employment protection, especially the quality of work contract or false self-employment?	Does the proposal affect the cost of labour e.g. through changes in retirement age, minimum wages, social insurance contributions, promoting/restricting labour mobility?

What is more worrying is the lack of any tool devoted specifically to environment-related or climate-related impacts, with the possible exception of Tool #35 ‘Resource efficiency’,<sup>10</sup> which is seldom used.

By way of contrast, the ‘SME test’ (Tool #22) and questions relating to the digital economy (Tool #27) are set out in great detail (in response to intense pressure from stakeholders).

Finally, it would appear that not all of the qualitative criteria listed in the Toolbox (in particular those relating to social/employment, health and regional impacts) are covered systematically and in detail in the Commission’s impact assessments; according to Andréa Renda<sup>11</sup> and our contacts within the Commission’s Secretariat-General, this has been the case for several years.

In conclusion, the impact assessment procedure appears to prioritise competitiveness over the EU’s other objectives (in particular employment, the environment, social protection and health) and give less weight to quality-related indicators than to ‘cost’ factors as a basis for shaping the European Commission’s initiatives.

#### 1.2.4 The problem of bias

There is a clear tendency for scenarios which promote competitiveness, growth or competition to win out over those which do not; and, even if sustainable and inclusive initiatives which promote social rights are adopted, they tend to lack ambition and often get bogged down or even brought to a standstill by endless political debate.<sup>12</sup>

In reality, it is relatively unusual for the Commission to adopt an ‘eco-social’ approach or one which combines competitiveness with social protection, all the more so because the College of Commissioners tends to skew centre-right, as do the Council and the European Parliament, and the same is true for the

<sup>10</sup>. This criterion (which comes last on the list of tools) concentrates more on resource efficiency rather than on the protection and sustainability of these resources.

<sup>11</sup>. Renda A., Schrefler L., Luchetta G. and Zavatta R. (2013) Assessing the costs and benefits of regulation. A CEPS – Economisti Associati Study for the European Commission. [http://ec.europa.eu/smartregulation/impact/commission\\_guidelines/docs/131210\\_cba\\_study\\_sg\\_final.pdf](http://ec.europa.eu/smartregulation/impact/commission_guidelines/docs/131210_cba_study_sg_final.pdf), cited by Isabelle Schömann (2015) in EU REFIT machinery ‘cutting red tape’ at the cost of the *acquis communautaire*, Policy brief 5/2015, ETUI.

<sup>12</sup>. Cf., in particular, the withdrawal of a proposal for a directive on maternity leave and the Commission’s failure to adopt any initiatives proposing health and safety legislation for hairdressers.

President of the Commission (who is selected from among the members of the most powerful political party). A more socially conscious approach to legislative initiatives is likely in the near future only if the balance of power swings to the left during the forthcoming European elections (to be held between 23 and 26 May 2019) and future parliamentary elections in the 27 Member States.

### **1.2.5 A deficient methodology**

Little information is available on the methodology used to draft impact assessments. Which bodies or institutions are assigned the task, and on the basis of which specifications? What measures are taken to ensure the reliability of the documentary evidence, and the independence of any third-party contractors (after all, the market for consultancy services is a competitive one)? What is the real cost of these studies?

Although impact assessments are intended to illuminate the political decision-making process, in reality they tend to instigate and pre-empt policy choices.

The main methodological conundrum is that two different approaches must be combined and cross-referenced – one based on short-term or medium-term costs (both monetary and quantitative), and one based on long-term non-market benefits and overall well-being.

This dual threshold (immediate costs/long-term overall benefits) raises the question of how a ‘level playing field’ can be achieved between the European Union and other international powers (such as China, the United States or Japan), and what kind of collaboration should be established between the EU and other intergovernmental bodies (in particular the OECD) tackling this same issue. Sad to say, there is no indication that the European Union has made any inroads into this topic in its debates with the United States and China.

Can such a thing as a ‘neutral’ methodology exist? We are not currently aware of one, but any attempt to reconcile these two approaches would require access to independent data and a research approach capable of calculating the social and environmental benefits and balancing them against short-term effects on the EU’s competitiveness in order to gauge the overall impact of a regulatory or non-regulatory initiative.

### **1.2.6 A harmful asymmetry of information**

The current asymmetry of information, which makes it impossible for the Commission (and also the European Parliament and the Council) to agree on a common framework, stems from three different phenomena: the magnifying glass effect, the blind spot effect and the halo effect.

An example of the magnifying glass effect would be when the Commission has access to documentation, feedback and (inevitably) lobbyists’ materials which

are extensive, but which concentrate on certain types of data – often with an industry origin – and ignore others which are less readily available.

The blind spot effect occurs when reliable information is lacking for certain regions, sub-sectors of the economy or population groups (unemployed persons, etc.), resulting in more extensively studied regions, sub-sectors or groups being prioritised by the initiative.

The halo effect is a cognitive bias which influences perceptions of a particular sector, policy or area; information is interpreted selectively in line with the individual's first impressions, and there is a tendency for preconceived ideas to be corroborated.

The resulting asymmetry of information has a cumulative effect that may work to the disadvantage of certain population groups or policies.

### 1.3 Impact assessment of substantial amendments by the co-legislators

#### 1.3.1 **Parallel impact assessments (in contravention of the Interinstitutional Agreement)**

With the aim of avoiding legislation that is bloated with additional requirements and that entails additional compliance costs, the 2016 Interinstitutional Agreement states that Member States must carry out impact assessments in relation to substantial amendments to a proposal by the Commission (see paragraph 15 of the Interinstitutional Agreement).

There is no getting away from the fact that the Commission's impact assessments tend to be an exercise in justifying the relevant proposal rather than a truly independent and early-stage analysis.

In reality, time constraints and a push for efficiency mean that impact assessments are often carried out in parallel to the drafting of legislative initiatives, and these assessments are often static rather than dynamic (i.e. they rarely anticipate the substantial amendments which are likely to be tabled by the European Parliament or the Council).

#### 1.3.2 **A revealing example: revision of the unemployment chapter in connection with Regulation (EC) No. 883/2004/EC of 29 April 2004 on the coordination of social security systems**

##### **Background**

As a basic principle, an impact assessment carried out by the European Commission is limited in terms of scope to the impacts of the Commission's own initiative, and only rarely includes the impacts of any amendments that might be made by the co-legislators.



Article 65 of the current Regulation on the coordination of social security systems states that the legislation of the Member State of residence shall apply to unemployed frontier workers. In its proposal for revision of the Regulation, the Commission suggested amending Article 65(2) to state that the legislation of the Member State of employment shall apply after 12 months of work in this Member State.

Table 1 Aggregation of insurance periods (Regulation (EC) No. 883/2004 – Article 65(2) [Unemployed persons who resided in a Member State other than the competent State]

Commission proposal	EP Amendments (AM 98)	Council Position
2. [...] A wholly unemployed person who, during the last activity as an employed or self-employed person, resided in a Member State other than the competent MS, and who had not completed at least 12 months of unemployment insurance exclusively under the legislation of the competent MS, shall make himself or herself available to the employment service of the MS of residence. [...]	2. Where a person [...] makes himself or herself available to the employment service of the MS of residence [...], he or she shall receive benefits in accordance with the legislation of the MS of residence as if he or she had completed all periods of insurance under the legislation of that MS. Those benefits shall be provided by the institution of the MS of residence.	2. [...] A wholly unemployed person who, during his or her last activity as an employed or self-employed person, resided in a Member State other than the competent MS, continues to reside in that MS or returns to that MS, and who had not completed an uninterrupted period of at least three months of insurance, employment or self-employment exclusively under the legislation of the competent MS, shall make himself or herself available to the employment services in the MS of residence. [...]

Source: Secretariat-General of the EU Council, version of 19.12.2018

Parliament's rapporteur (Mr Guillaume Balas, a French MEP belonging to the GUE Group) proposed that frontier workers should be allowed to choose between the Member State of employment and the Member State of residence; Parliament did not carry out an impact assessment before arguing in favour of its amendment, however.

The Council believed that the legislation of the Member State of employment should apply after three months of work in the relevant country. Based on the assumption that Parliament's proposal would involve an excessive amount of work (although no data were supplied to back up this claim), it rejected the amendment as a whole.

The Commission's impact assessment anticipated neither of these diametrically opposed positions.

By revealing that a negotiating deadlock can frequently be resolved only by brokering a political deal, which is often the origin of the regulatory and administrative burdens criticised down the line, this illustrative case demonstrates how important it is for each of the Commission's impact assessments to be of a high quality and to anticipate future developments.

In the end, the provisional agreement that had been concluded on 19 March 2019 was rejected by the Member States in the COREPER on 27 March 2019. As for the European Parliament, it decided not to adopt the text at the plenary session of 17 April 2019.

### 1.3.3 Air quality and a successful example of a dynamic impact assessment

A dynamic impact assessment was successfully carried out back in 2013 for a legislative package on air quality;<sup>13</sup> the contractor assigned the task was kept on stand-by throughout the period of negotiations between Parliament and the Council, meaning that the assessment could be expanded to reflect the amendments made by the co-legislators.

### 1.3.4 Recommendations

A good impact assessment should be based on a dynamic modelling approach which makes it possible to identify the policy concerns that may be raised by the co-legislators and the consequences of any amendments by these latter (either expanding or restricting the scope of the initiative or changing it in some other way).

Looking ahead, it would be a good idea to use digital and artificial intelligence techniques as a basis for dynamic models with a view to calculating the potential costs and benefits of amendments by the co-legislators and incorporating the associated impacts.

Finally, it remains the case that the introduction of a single methodology for all three institutions would be a welcome development, since it would mean that they were all working from the same page.

## 1.4 Different Member States, different impacts

Should impact assessments be carried out at EU level, or at the level of individual Member States? Is it necessary to pay attention to the different impacts at Member State, regional and local level? If a balance needs to be struck, should it be a midpoint between the extremes or favour the weaker party? If the Commission is obliged to carry out a differentiated assessment of impacts, what does this mean in terms of subsidiarity, the functioning of the internal market, social policy and the level of harmonisation?

These are not merely theoretical questions; consultations reveal that the Commission often bases its initiatives on a limited pool of data.

We believe that the Commission's impact assessments should be based on multifactorial data sets which are as comprehensive as possible, and which

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**13.** Impact assessment accompanying the documents: Communication from the Commission. A Clean Air Programme for Europe; Proposal for a Directive on the limitation of emissions of certain pollutants into the air from medium combustion plants; Proposal for a Directive on the reduction of national emissions of certain atmospheric pollutants and amending Directive 2003/35/EC; Proposal for a Council Decision on the acceptance of the Amendment to the 1999 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone, SWD(2013) 531.

incorporate statistical information about the impacts on different regions, industrial sectors, population groups, etc.

## 1.5 When does an amendment become substantial?

### 1.5.1 A controversial case

During a Council meeting held in October 2018 on the proposal for a Goods Package Regulation,<sup>14</sup> seven delegations (the Netherlands, Estonia, the United Kingdom, Ireland, Bulgaria, Denmark and Malta), led by Slovakia and Luxembourg, expressed serious concerns regarding the potentially negative impact of an amendment tabled by another group of Member States (France, Germany, Italy and Portugal).

The latter amendment (intended to strengthen the Commission's proposal) stated that an individual should be appointed at the level of each Member State with responsibility for checking that all products entering the national territory are compliant and have the necessary technical documentation, and for immediately taking any actions necessary to rectify non-compliance with the requirements of EU legislation.

Luxembourg was unhappy at the idea of having to appoint a 'scapegoat' forced to hire dozens of extra staff to carry out these checks, since tens of thousands of parcels arrive each day in the country's sorting office.

### 1.5.2 An unsuccessful request for an additional impact assessment

After having carefully examined the amendment, the Austrian Presidency of the Council concluded that 'it does not appear that the conditions for requesting an impact assessment are fulfilled in the present case [...], guided by the fact that in the Working Party there was no majority in favour of requesting an impact assessment.'

The Presidency believed that the following three cumulative conditions needed to be fulfilled in order for an impact assessment to be deemed necessary:

- the proposed amendment calls for substantial changes;
- the proposed amendment is supported by a significant number of delegations;
- the process of carrying out the impact assessment will not unduly delay the legislative process.

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<sup>14</sup> Proposal for a regulation laying down rules and procedures for compliance with and enforcement of Union harmonisation legislation on products, COM(2017) 795, 19 December 2017.

The Presidency believed that the first two conditions were not fulfilled, and concluded that ‘It is impossible to avoid the conclusion therefore that an impact assessment on Articles 4 and 4a at the present time would “unduly delay” (minimum of 11 months) the legislative process, and consequently would be contrary to the guidance given by COREPER.’

### 1.5.3 Evaluation

This example illustrates how difficult it is to trigger an impact assessment of a substantial amendment by the Council, since it is extremely rare for the relevant conditions to be fulfilled, especially given the deadline (11 months in the above example, or in other words a delay covering two EU Council presidencies) and the associated costs (the Council has no budget line for impact assessments).

This makes it even more important to introduce a dynamic impact assessment procedure which anticipates substantial amendments by the co-legislators.

## 1.6 Impact assessments of delegated acts and implementing acts

Delegated acts and implementing acts currently play a vital role in the European Union’s legislative system.

Article 290 of the Treaty on the Functioning of the European Union (TFEU) allows the EU legislator (generally the European Parliament and the Council) to delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. The scope of delegated acts can be considerable and may include amendments to the annexes of a legislative act, but the challenges involved in their implementation can also be considerable, and often become clear to Member States only when it is too late.

The delegated or implementing act has become the regulatory tool of choice, and most directives are associated with one or more.<sup>15</sup> The figures speak for themselves, as can be seen from the table below:

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**15.** Implementing acts, which are regulated by Article 291 TFEU, are purely technical and administrative measures; unlike a delegated act, an implementing act makes no substantial change to the legislative act. An implementing act must be approved by the Member States via comitology committees, whose organisational arrangements are complex thanks to a plethora of review committees, appeal committees and many different exceptions and derogations.

Table 2 Statistics for legislative acts

	Legislative acts	Delegated acts	Implementing acts
2018	72	96	861
2017	73	133	903
2016	72	127	832
2015	60	99	873
<b>TOTAL</b>	<b>277</b>	<b>455</b>	<b>3 469</b>

Source: Legislative acts – statistics (EUR-Lex: <https://eur-lex.europa.eu/statistics/legislative-acts-statistics.html?>)

The European Parliament and the Council typically struggle to gauge the relevance and impact of these acts, however; the Commission itself admits that time and money constraints mean that the number of impact assessments carried out in relation to delegated acts is low to zero.

We believe that the main economic, environmental and social impacts of these delegated acts should be identified and examined in depth at the ex-ante stage.

## 1.7 Effect of trilogues on impact assessments

According to paragraph 15 of the Interinstitutional Agreement, the Council and Parliament should, ‘*when they consider this to be appropriate* [...], carry out impact assessments in relation to their substantial amendments to the Commission’s proposal’.

Observers agree that such assessments are seldom carried out, for several reasons:

### 1.7.1 Acceleration of the political cycle

The main reason why neither the Council nor the European Parliament carry out impact assessments in relation to their substantial amendments is the rapid pace of the political cycle, which is driven forward by three different parties:

- the Commission, which is keen to ensure adherence to the roadmap for its work programme;
- the rotating presidency of the Council, whose efficiency will be gauged by the number of political agreements or trilogues concluded during its six-month term, and which therefore pursues the goal of pushing through as many Council acts as possible;
- the European Parliament: each chair of a parliamentary committee and each rapporteur wants to preserve his or her political reputation and not look like a slouch compared to his or her counterparts within the Commission and the Council.

### **1.7.2 Financial constraints**

Another problem faced when it comes to carrying out impact assessments relates to the availability of financial resources, since the Council has refused to assign responsibility or set up a new budgetary line for this purpose.

By way of contrast, the European Parliament has set up the 'European Parliamentary Research Service' (EPRS), the role of which is to carry out an initial quality appraisal of the European Commission's impact assessments. The MEPs who sit on the Scientific and Technology Options Assessment (STOA) Panel undertake scientific and technological assessment and analysis on emerging policy issues and trends.

### **1.7.3 Mechanism for triggering an impact assessment**

Before a decision can be taken to carry out an impact assessment in relation to a substantial amendment, the choice must be made to trigger the relevant decision-making mechanism. If a majority in the Council or the European Parliament supports an amendment, and even if this amendment is substantial, neither Parliament nor the Council are likely to see the point in carrying out an impact assessment when the amendment has majority support. Conversely, if a substantial amendment is supported by only a minority of Member States or MEPs, there is little point in carrying out an impact assessment since the amendment will fall in the face of the majority vote.

### **1.7.4 Political considerations**

When does an impact assessment become a political debate? The two activities should be mutually reinforcing, rather than mutually silencing. Is it a good idea for the Council and Parliament to spend time and money on yet another impact assessment of a substantial amendment, particularly if the latter is deemed a political necessity? Are quantifying and monetarising really our top priorities?

## **1.8 Ex-post impact assessments by the Commission**

The impact of a regulation or directive is assessed several years after its transposition and implementation, at the point when national or regional law is deemed to have taken full effect.

Directives and regulations often contain a standard article at the end requiring the Member States to carry out the relevant impact assessment.

### **1.8.1 Directive on the protection of workers from the risks related to exposure to carcinogens or mutagens at work<sup>16</sup>**

The following Article 18a was added to this Directive, which was adopted in 2017 and which amends a basic Directive from 2004: ‘No later than in the first quarter of 2019, the Commission shall, taking into account the latest developments in scientific knowledge, assess the option of amending the scope of this Directive to include reprotoxic substances. On that basis, the Commission shall present, if appropriate, and after consulting management and labour, a legislative proposal.’

This example is interesting for several reasons: firstly, it raises questions regarding the quality of the impact assessments carried out by the Commission, the way in which the Commission interprets scientific knowledge, and the feedback to be forwarded to the Commission by scientific experts and social partners.

It is vitally important to evaluate developments in scientific knowledge, but the evaluations must be completed within a reasonable timeframe in order to allow amendments to be implemented and assessed, and the deadline is often too short for the necessary information to be gathered. It is also vitally important to decide which scientific knowledge should be given precedence, when and by whom, since it is important to maintain independence in relation to the parties directly involved in manufacturing the relevant products or chemicals (and responsible for carrying out studies as a basis for their marketing authorisations). The case of glyphosate<sup>17</sup> is an enlightening one in this respect.

### **1.8.2 The ‘Platform-to-Business’ Regulation**

The proposal for a *Regulation on promoting fairness and transparency for business users of online intermediation services*, better known as the ‘Platform-to-Business’ Regulation,<sup>18</sup> is another interesting case in point.

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**16.** Directive (EU) 2017/2398 of 12 December 2017 amending Directive 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens or mutagens at work, OJ L 347/87-93, 27.12.2017.

**17.** See, in particular, ‘Lost at SEA: The information policymakers actually need from applicants and SEAC opinions’, Chemsec, February 2019.

**18.** COM(2018) 238 of 26.4.2018.

Table 3 Proposal for a 'Platform-to-Business' Regulation

Article 14 – Review
<p>'1. By three years after the date of entry into force, and subsequently every three years, the Commission shall <u>evaluate this Regulation</u> and report to the European Parliament, the Council and the European Economic and Social Committee.</p> <p>2. The first evaluation of this Regulation shall be carried out, in particular, with a view to assessing the compliance with, and <u>impact on the online platform economy</u> of, the obligations laid down in Articles 5, 6, 7 and 8, and whether additional rules, including regarding enforcement, may be required to ensure a fair, predictable, sustainable and <u>trusted online business environment</u> within the internal market.</p> <p>3. <u>Member States shall provide any relevant information that the Commission may require for the purposes of drawing up the report referred to in paragraph 1.</u></p>

This 'Review' clause states not only that the Commission should evaluate the impact of the future Regulation on the platform economy, but also that the Member States must provide any relevant information.

Incidentally, the evaluation to be carried out by the Commission is based on a single criterion (business/the economy, referred to twice in the text), which runs counter to the Commission's obligation to assess impacts on other areas, in particular employment. It seems obvious that activities by the 'GAFA group'<sup>19</sup> would very probably give rise to environmental, social or employment impacts.

Our aim is not to forestall the outcome of the evaluation at this early stage, but the Commission's own statements regarding feedback from the Member States suggest that the regulatory provisions have produced little in the way of real results.

### 1.8.3 Evaluation

Greater attention should be paid to review clauses: firstly, because they allow implementation of the relevant legislative act to be evaluated, and, secondly, because they serve as 'rendez-vous clauses' which can prove particularly useful in cases where the legislation needs to be expanded, modified or amended on the basis of new scientific findings or feedback from the field.

## 1.9 The key role played by the Regulatory Scrutiny Board (RSB)

### 1.9.1 Background

In 2015, the Commission set up the Regulatory Scrutiny Board (RSB) to replace the former Impact Assessment Board. Compared to this latter, the RSB has a broader mandate and more independence, as well as greater capacity to promote stricter adherence to regulatory improvement principles.

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<sup>19</sup> The acronym GAFA refers to the companies Google, Amazon, Facebook and Apple, which between them generated USD 555 billion in total earnings in 2017 (Source *Statista*, 2018).



The Board examines the quality of impact assessments and carries out health checks and major evaluations of legislation on behalf of the Commission.

A positive RSB opinion on an impact assessment means that the procedure can continue, whereas a negative RSB opinion means that the Commission services must submit fresh documentation. The RSB may also give a positive opinion with reservations, in which case the lead Directorate-General is required to integrate the RSB's recommendations in the final impact assessment with respect to the key aspects reflected in the opinion, prior to proceeding further.

The RSB considers many factors while scrutinising the impacts of the initiative on the basis of the Better Regulation Toolbox. A lack of quantification of one of the impacts can but may not automatically lead to a negative opinion by the RSB.

### 1.9.2 Evaluation

The RSB members should be praised for their professionalism, since they have succeeded in turning the Board into an independent body which works efficiently and which is not afraid to refuse to scrutinise impact assessments, even on important topics, if it believes that the documentation is inadequate.

In 2018, the RSB issued negative opinions for 28% of impact assessments<sup>20</sup> owing to quality concerns. The same figure was 43% in 2017, 42% in 2016 and 48% in 2015.<sup>21</sup>

The RSB plays a vital role by supporting the Commission services at the preparatory stage; it holds upstream consultations and helps to bring about improvements to methodological practices.

The RSB has been sometimes criticised by BusinessEurope (an employers' association) and certain Member States (in particular Germany and the Netherlands) for its lack of independence with regard to the EU's executive arm; it is true that three of its members and its director hail from the Commission services, but the Board does not follow instructions or yield to pressure from above when it issues its opinions.

Most members of the public are unaware of what the RSB does; 320 (74%) out of 433 respondents to a public consultation stated that they knew little or nothing about the Board.<sup>22</sup>

Even more regrettable is the fact that the RSB's opinions are not always acted upon by the Commission services. It is also a shame that the RSB appraises only the quality of an impact assessment, and not the interplay between the impact assessment and the legislative proposal itself.

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**20.** See Table 1 of the 2018 RSB report, 10 April 2019.

**21.** See p. 11 of the 2017 RSB report: [https://ec.europa.eu/info/sites/info/files/rsb-report-2017\\_en.pdf](https://ec.europa.eu/info/sites/info/files/rsb-report-2017_en.pdf).

**22.** Source: SWD(2019) by the Commission, *op. cit.*, p. 29.

## 1.10 Recommendations

We believe that the following three tools would be useful:

– **A decision support framework**

As things stand at present, impact assessments are scrutinised by the Council or Parliament only when either or both of these parties want to oppose the Commission's proposal for political reasons.<sup>23</sup> Based on our experience, this scrutiny is often merely a box-ticking exercise which has little or nothing to do with the examination of the legislative proposal proper.

The impact assessment must become a decision support framework, clarifying the choices to be made within the framework of the legislative process and allowing responses to be given to legitimate concerns raised by the social partners.

– **An 'integrated' impact assessment**

The social and environmental dimensions of a legislative initiative are not generally examined in detail; instead, they are treated as ancillary or even secondary concerns, and most frequently relegated to the status of 'unintended consequences'. Substantive investigations are lacking, particularly if the impact assessment is carried out by a directorate-general whose focus lies outside the realm of social issues.

The consideration of social issues by DG Move in connection with the 'Transport' package<sup>24</sup> (e.g. those faced by lorry drivers or air crew members working on leased aircraft) is a good example of this problem.

Rather than a mishmash of impact assessments of varying quality, the following are needed:

- integrated impact assessments which take into consideration all priority criteria, including social protection and employment, but also health, the environment and the climate;
- a transparent methodology for carrying out impact assessments which is common to all the institutions and advisory bodies so that amendments can be drafted and opinions issued, and both can be examined in advance;
- impact assessments which include alternative scenarios and a clear indication of their advantages, in particular as regards employment and social protection, but also as regards health, the environment and the climate;

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<sup>23</sup>. A good example of this phenomenon is the position adopted by the Visegrad Group (Poland, Hungary, the Czech Republic and Slovakia) when examining the impact assessment for the revised Posting of Workers Directive.

<sup>24</sup>. The 'Europe on the move' package includes eight legislative initiatives presented by the Commission between May 2017 and May 2018.

- impact assessments which incorporate end-of-cycle health checks for the different policy areas (social, employment, etc.).
- **A pilot project**

Progress of the kind described above would be promoted by development of a pilot project in the field of intelligent modelling, using AI or other technologies with the end goal of a dynamic framework which is as neutral and unbiased as possible and which can be used by any of the institutions, by stakeholders or by the social partners to ‘switch on’ or modify certain parameters, for example emission rates, percentages, quantitative thresholds or ceilings or qualitative data.

Eurostat could provide basic data on health, the climate, the environment and biological resources (agricultural and fisheries policy), for example.

The challenge would be to ensure that the modelling technique and the framework were transparent, accessible and reproducible; if this could be done, the debate might throw off its current political and legal shackles and move towards a more enlightened, mindful and responsible discussion (a ‘sustainable and resilient model’).

It is, of course, true that not everything can be modelled, and it is important to leave room for on-the-ground evaluations, in particular those carried out by the social partners.

## **2. The innovation principle: a new acid test for competitiveness?**

In November 2014, the European Risk Forum (ERF) led 22 multinational companies<sup>25</sup> in calling for an additional criterion (the ‘innovation principle’) which would assess the potential compatibility of any new legislative proposal from the perspective of its impact on innovation, with the stated aim of creating ‘future-proof legislation’.

The business community (in particular BusinessEurope) and also the EU Member States have embraced this principle enthusiastically in the intervening period, and it is hard to find a recent debate not dominated by it.

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<sup>25</sup> Including AiCuris, BASF SE, Bayer AG, The Dow Chemical Company, Dow AgroSciences LLS, Dow Corning Corporation, Henkel AG & Company, Novartis AG, Royal Philips, Solvay SA and Syngenta AG.

## 2.1 Support from the chemical industry

The concept was formalised by Commission President José-Manuel Barroso in October 2013 ('Innovation is key to our competitiveness'<sup>26</sup>), and brought to a wider audience by the European Risk Forum<sup>27</sup> as part of a large-scale lobbying offensive by the pesticide and chemical industries against the regulation of endocrine disrupters.

This aim of this much-vaunted concept (which involves the use of sandboxes, testbeds and so on) is to promote the emergence of innovative processes or products by temporarily lifting regulatory obstacles so that their effects can be tested more rapidly.

Although the principle was originally confined to the field of R&D, it now has a much broader application; the barely concealed goal of its supporters is to ensure that nothing whatsoever stands in the way of innovation, which is best able to thrive when it is not thwarted by strict legislation (which penalises not only innovation itself, but also the development of 'smart' solutions, entrepreneurial agility, competitiveness, etc.).

In October 2016, during the Slovakian Presidency, a group of Better Regulation experts and managers gave a presentation of best practices with the aim of demonstrating that the innovation principle had produced compelling results in the field of R&D; particular attention was paid to promising examples such as smart displays in the refrigeration industry or intelligent storage in the field of fisheries.

## 2.2 Approval under the Dutch Presidency of 2016

Following a vigorous lobbying campaign, the innovation principle was finally enshrined during the Dutch Presidency. Paragraph 2 of the Conclusions of the Competitiveness Council of 26 May 2016 reads as follows:

'[The Council] [...]

2. STRESSES that, when considering, developing or updating EU policy or regulatory measures, the "Innovation Principle" should be applied, which entails taking into account the impact on research and innovation in the process of developing and reviewing regulation in all policy domains. CALLS on the Commission, together with Member States, to further determine its use and to evaluate its potential impact.'

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<sup>26</sup>. World Economic Forum, European Commission.

<sup>27</sup>. The European Risk Forum (ERF) is a lobbying group created and funded by major industrial players, which (successfully) promotes the innovation principle within the European institutions.

## 2.3 An integral part of the *acquis communautaire*?

In 2019, the innovation principle was (surreptitiously) incorporated into the Horizon EUROPE programme, under which EUR 100 billion in funding will be allocated between 2021 and 2027. According to [Recital 3](#) of the proposal for a regulation, which is still being debated:<sup>28</sup>

‘(3) Activities supported under this Programme and the promotion of research and innovation activities deemed necessary to help realize Union policy objectives should take into account the innovation principle as put forward in the Commission Communication of 15 May 2018 “A renewed European Agenda for Research and Innovation – Europe’s chance to shape its future” (COM(2018) 306) as a key driver in turning faster and more intensively the Unions substantial knowledge assets into innovation.’

## 2.4 An ill-defined principle

Although this principle is vigorously defended by certain quarters, it is unusually ill-defined and leaves a great deal of room for interpretation.

### 2.4.1 Absence of any precise definition and use of tautologies

There is no legislative basis for the innovation principle, and references to it are often tautological in nature: ‘The “Innovation Principle” should be applied, which entails taking into account the impact on research and innovation’ (Council Conclusions of May 2016).

The kind of innovation – scientific, technical, organisational or social – to which this passage refers is left open, and the fact that this ‘principle’ has not been clearly defined means that it is interpreted in a multitude of ways and shoehorned in regardless of context.

The underlying goal is apparently to ensure that a light-touch approach wins out over ‘hard legislation’ in as many cases as possible. As illustrated by examples such as the Platforms-to-Business Regulation, this debate is far from just theoretical.

### 2.4.2 The innovation principle and the precautionary principle – poor bedfellows?

Although the scope of the innovation principle is not defined in any legislation, its backers believe that it should be regarded as on a level with, or even superior to, the precautionary principle which is enshrined in the Treaty on the

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<sup>28</sup>. It should, however, be noted that several Member States wanted to remove any reference to the principle, and that, on 11 March 2019, a citizen’s platform (made up of 75 associations including the ETUC, BEUC, Greenpeace, EPSU, the EEB, SOLIDAR, etc.) called for the innovation principle to be axed from the Horizon Europe programme.

Functioning of the European Union.<sup>29</sup> Industry is keen for a balance to be achieved between these two principles (or even for them to be pitted in competition against each other), since the precautionary principle is a criterion of obligation, whereas the innovation principle is a criterion of opportunity. What is more, the adherents of the innovation principle are keen to replace ex-ante risk assessments (a consequence of the mandatory precautionary principle) with ex-post evaluations.

#### **2.4.3 The REACH Regulation: an impregnable defence of the precautionary principle**

The REACH Regulation<sup>30</sup> contains several hundred pages of rules, many of which are extremely technical in nature. It demonstrates that hard-hitting legislation which foregrounds the precautionary principle can serve as a source of inspiration for innovative uses of existing substances and more environmentally friendly practices, even if there is as yet no confirmed evidence that the target of increased innovation has been achieved.

Although the European Chemical Industry Council (Cefic) often cites this Regulation as an example of a regulatory burden, and calls for it to be revised with a view to loosening up the mandatory requirements or exempting SMEs from their scope, the majority of observers agree that REACH has vastly increased the safety, predictability and accessibility of chemicals registration, evaluation and authorisation, since a single European procedure now applies instead of 28 national procedures.

#### **2.4.4 Confirmation by the ECJ that scientific criteria take priority**

##### **Context**

Biocidal products are necessary for the control of organisms that are harmful to human or animal health and for the control of organisms that cause damage to natural or manufactured products.

However, biocidal products can pose risks to humans, animals and the environment due to their intrinsic properties and associated use patterns. In order to improve the free movement of biocidal products within the Union while ensuring a high level of protection of both human and animal health and the environment, the EU legislator adopted Regulation (EU) No. 528/2012 concerning the making available on the market and use of biocidal products.

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**29.** The precautionary principle is detailed in Article 191 of the Treaty on the Functioning of the European Union. It aims at ensuring a higher level of environmental protection through preventative decision-taking in the case of risk. However, in practice, the scope of this principle is far wider and also covers consumer policy, EU legislation concerning food and human, animal and plant health.

**30.** Regulation (EU) No. 1907/2006 of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) [and] establishing a European Chemicals Agency (ECHA) has been in force since 1 July 2007.

This Regulation lists active substances which shall not, as a basic principle, be approved. They include, in particular, active substances which, on the basis of criteria to be established, are considered as having endocrine-disrupting properties that may cause adverse effects in humans.

With this in mind, the Regulation states that, no later than 13 December 2013, the Commission shall adopt delegated acts specifying scientific criteria for the determination of endocrine-disrupting properties.

On 4 July 2014, Sweden lodged an action for failure to act<sup>31</sup> with the European Court of Justice which states that, by ‘failing to adopt measures concerning the specification of scientific criteria for the determination of endocrine-disrupting properties, the Commission has breached EU law’.

#### **A noteworthy ruling**

In its ruling, the Court firstly finds that ‘it is explicit in the Regulation that the Commission had a clear, precise and unconditional obligation to adopt delegated acts as regards the specification of the scientific criteria for the determination of the endocrine-disrupting properties and that that was to be done by 13 December 2013.’

The Court goes on to note that ‘the Commission cannot rely on the fact that the scientific criteria which it had proposed were the subject of criticism, in summer 2013, on the ground that they had no basis in science and that their implementation would affect the internal market. [...]

The Regulation reflects the balance desired by the legislature between an improvement in the functioning of the internal market by the harmonisation of the rules concerning the placing on the market and use of biocidal products, on the one hand, and the preservation of a high level of protection of human and animal health and the environment, on the other. In the exercise of the powers delegated to it by the legislature, the Commission cannot call that balance into question.’

The Court therefore concludes that, ‘by failing to adopt delegated acts as regards the specification of the scientific criteria for the determination of endocrine-disrupting properties, the Commission has failed to fulfil its obligations under Regulation No. 528/2012.’

This is a noteworthy ruling because it thwarts any attempts to evaluate obligations imposed by the legislator on a subjective basis on the grounds that certain scientific criteria might be criticised.

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**31.** The ‘action for failure to act’ mechanism provided for in Article 265 TFEU is aimed at securing a ruling by an EU judge stating that an institution has unlawfully failed to act.

### 3. The consultation procedure, and the waning influence of worker representatives

#### 3.1 A skyrocketing number of consultations

Stakeholder consultation is one of the Juncker Commission's top priorities, and – following campaigns by certain Member States and powerful lobbying groups – the pace, duration (12 weeks instead of 8 weeks) and scope of the Commission's public consultations have increased in recent years. They have also been brought forward in time, to the point that draft impact assessments and proposals for legislative initiatives are being put out for consultation while work on them is still ongoing. Consultations relating to priority initiatives are translated into all the EU languages, whereas other consultations are translated into the EU's three main working languages (English, French and German).

These valiant efforts notwithstanding, the consultation procedure is still bedevilled by critical flaws.

Table 4 Developments in the area of public consultations (2015-2018)

	2015	2016	2017	2018
Number of public consultations	105	120	112	80
Percentage of public consultations in the languages of the European Union	26	21	55	71

Source: Commission, SWD(2019) 156 final, 15.4.2019

Of all the contributions, business groups accounted for approximately 42.9%, NGOs for 10.5%, EU citizens for 31.1% and public authorities for 2.7%. The most responses came from Belgium (16.8%), followed by Italy (16.3%), France (12.1%) and Germany (11.6%).<sup>32</sup>

Nearly 40% of respondents to the public consultation were (very) dissatisfied with the way the Commission reports on the result of its public consultations and feedback and what it does with this information. NGOs responding to the public consultation argued that it is often difficult to discern how the consultation process has affected policymaking. This is also supported by the literature review.<sup>33</sup>

<sup>32</sup>. Source: SWD(2019) 156 final accompanying the Commission Communication Taking Stock of the Commission's Better Regulation Agenda, 15.4.2019, p. 10.

<sup>33</sup>. See, for example, Bartlett, O. (2018). Reforming the Regulation on Spirit Drinks – an Example of Better Regulation? *European Journal of Risk Regulation*, 9(2), 310-315; Maśnicki, J. (2016). Good Governance thorough Better Regulation. Looking for the impact assessment approach to the proportionality principle; Ranchordas, S. (2017). Consultations, Citizen Narratives and Evidence-Based Regulation: the Strange Case of the Consultation on the Collaborative Economy, 1, 1-33; Willermain, F. and Cioriciu, A. (2015). The Better Regulation Package: Creating better regulations, but for what kind of EU politics?



### 3.2 Social partners at a clear disadvantage compared to lobbies

The intervention of stakeholders at all stages of the procedure is all the more questionable because the ‘stakeholder’ category covers a wide range of different approaches and players,<sup>34</sup> often with contradictory or diametrically opposed viewpoints.

In terms of the expertise they hold, the information to which they have access and the influence they can consequently exercise over the European decision-making process, some stakeholders are more equal than others.

Despite the fact that worker representatives have been granted a recognised and legitimate role in the decision-making process, and should be consulted automatically and independently on all social policy issues, they stand at a clear disadvantage compared to powerful multinational corporations with the means to pull strings,<sup>35</sup> and the ‘Better Regulation’-influenced interpretation increasingly being forced on Article 155 TFEU<sup>36</sup> (particularly in respect of its guidelines) is reducing their role and marginalising them yet further.

Tool #11 of the Toolbox states that a two-stage consultation must be carried out: before the second stage of negotiations, the social partners must submit an analytical document which ‘should focus on analysing the problem which EU action should address, present the objectives, analyse the impacts of the measures under consideration and explore the value added of EU action’.<sup>37</sup>

The drafting of this ‘analytical document’, which is similar to an impact assessment in its prescribed form, is remarkable in that, previously, only the representativeness of the social partners and the lawfulness of the agreement were checked by the Commission. This development calls into question the Commission’s right to block agreements on hairdressers<sup>38</sup> and on information and consultation in local authorities<sup>39</sup> (in the latter case, the impact assessment which the European Commissioner for Employment and Social Affairs promised to carry out is still not available).

**34.** See Van den Abeele E. (2015) *op. cit.*

**35.** Further evidence for this can be found in participation rates for the REFIT Platform; almost 80% of respondents represent 11 major companies or business groups.

**36.** Article 155 TFEU states that ‘1. Should management and labour so desire [underlining by the authors], the dialogue between them at Union level may lead to contractual relations, including agreements. 2. Agreements concluded at Union level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The European Parliament shall be informed.’

**37.** Tool #11 of the Toolbox (Social partner initiatives), p. 61.

**38.** This was an agreement between social partners which could have led to a legislative initiative by the Commission in the area of workplace health and safety for hairdressers.

**39.** The social partners were responding as part of the first-phase consultation of social partners under Article 154 TFEU on a consolidation of the EU Directives on information and consultation of workers [C(2015) 2303 final of 10.4.2015].

### 3.3 Excessive use of leading questions

Public consultations frequently take the form of questionnaires containing yes/no questions which leave little room for detailed responses, and the questions are often leading in nature and designed to keep responses within a narrow bandwidth. Most questionnaires are of mediocre quality and are not tested in advance, preventing interested parties from submitting a meaningful opinion.

### 3.4 A lack of cultural familiarity

One of the major challenges faced at present is the fact that the citizens of certain large Member States (in particular Germany and France) are very familiar with the concept of responding to a public consultation, while the same is not always true for the smallest Member States. It is not unusual for most of the Commission's findings from a public consultation to be based on responses from only three or four Member States.

### 3.5 Automated and standardised analysis of responses

Responses are counted by private sub-contractors using automated key word analysis techniques. This statistics-heavy approach makes it impossible to examine the responses in an intelligent or nuanced manner.

Clearer and more transparent information should be available regarding the way in which responses are grouped by stakeholder categories. Why does a response submitted by the average man on the street count for the same as that submitted by a company, a business association or a trade union? Why are similar responses submitted on the basis of a campaign led by an NGO or a trade union counted as a single response? How are responses accounted for and weighted? Are responses accepted in all of the EU's languages? What kind of balance is struck between the targeted consultation of stakeholders and a consultation which is open to everyone?

The outcomes of stakeholder consultations are generally summarised in the annexes to impact assessments or staff working documents, and position papers are rarely published. Impact assessments seldom contain any qualitative analysis of these outcomes by the Commission services, and few responses are given to the many suggestions submitted and questions raised.

This method of working leads to misrepresentation of the opinions expressed and manipulation of the public consultation procedure; rather than providing the co-legislators with impartial information, it frequently serves as a means of justifying political decisions which have already been taken.

### 3.6. Communication on climate policy:<sup>40</sup> a textbook example

In a presentation of its Communication entitled ‘A clean planet for all’, the European Commission admitted that it had received only 700 responses to its stakeholder consultation, most of which had come from professional organisations and major companies, with only 140 NGOs, 55 SMEs and 30 universities or local authorities submitting responses. The majority of responses emphasised the importance of technological neutrality, and few expressed the urgent need to realign the European Union’s policies towards climate and environmental concerns.

### 3.7. Evaluation

Three main risks can be identified:

1. Bureaucratisation of the consultation process: It is highly questionable whether allowing a haphazard selection of ‘stakeholders’ to participate at all stages of the process allows relevant opinions to be collected, and the situation as a whole is murky given the use of leading questions, the statistical analysis of responses and the little attention paid to these responses.
2. Partial or false representativeness: A stakeholder should be obliged to hold a minimum of expertise before submitting an expert opinion on a scientific, legal or economic issue. By foregrounding the consultation procedure, the Commission is placing all the good cards in the hands of the best-organised players, or in other words those with the most human and financial resources.
3. Inclusion of stakeholders and lobbying groups in the decision-making process to the disadvantage of traditional institutional players: By increasing the number of automated consultations, the Commission has made it harder for the advisory bodies set up under the TFEU (in particular the European Economic and Social Committee and the Committee of the Regions) to get their voices heard.

The Commission should overhaul its consultation procedure, with particular attention to the following points:

- Greater involvement of the population groups likely to be affected, since citizen participation in online consultations tends to be low. Qualitative consultations should be publicised more at EU level according to policy area, in particular at the start of a legislative term.

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<sup>40</sup> Commission Communication. A Clean Planet for all. A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy, COM(2018) 773, 28.11.2018.

- More accurate identification of future challenges, problems and proposals, through the inclusion of ‘rendez-vous clauses’ and ex-post evaluations.
- Increased participation by the social partners on the basis of a collaborative partnership predicated on advance consultation.

## **4. Reducing the burden**

### **4.1 REFIT**

The aim of the REFIT Programme is to cut administrative and regulatory red tape and to reduce regulatory costs. The original intention was to eliminate unnecessary administrative burdens, but this has gradually morphed into a ceaseless interrogation of regulatory need. Almost 180 legislative simplification initiatives have been launched under the REFIT Programme.

#### **4.1.1 The REFIT Scoreboard**

The Commission’s REFIT Scoreboard, which monitors simplification initiatives throughout their life cycle, is published online on an annual basis. The Scoreboard provides a comprehensive overview of the REFIT results under each of the Juncker Commission political priorities. The Scoreboard also shows how the recommendations of the REFIT Platform have been taken into account by the Commission. It lists all REFIT initiatives which are being implemented in the various EU policy areas.

#### **4.1.2 The REFIT Platform**

The REFIT Platform was set up on the basis of the May 2015 Better Regulation Communication in order to allow public authorities, citizens and stakeholders to participate in the process of improving European legislation. It comprises two groups:

- A government group made up of a high-level expert from each of the 28 Member States. Until recently, this group was chaired by Anne Bucher, Director within the Commission’s Secretariat-General and Chair of the RSB.
- A stakeholder group made up of 18 representatives of companies (including SMEs), civil society organisations and social partners with direct experience of the application of Community legislation.<sup>41</sup> This group also includes a representative of the European Economic and Social Committee and a representative of the Committee of the Regions.

In addition to these two groups, which meet during plenary sessions and are chaired by Frans Timmermans (First Vice-President of the Commission), a portal has also been established for citizens.

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**41.** It is worth noting that 10 out of 19 members have a corporate background, which means that over 50% of the group’s power rests in the hands of the business community.

### **The 'Lighten the Load – Have your Say' Platform**

This portal was created in order to allow companies and citizens to submit questions and share suggestions for reducing the regulatory and administrative burden associated with EU legislation. The suggestions (417 to date) are examined by the REFIT Platform and by the Commission, and then published on a Commission-created website (provided that they comply with the internal rules).

### **Two examples of submissions via the Platform**

(a) A question relating to public consultations<sup>42</sup>

A Romanian citizen asked the following question in relation to public consultations:

'Is there a way to enforce public consultations at a Member State level? How does the European Commission make sure that people all around Europe participate in a rather equal manner to the decision-making process? How do you stimulate this participation in Member States where citizens are not used to stating their views as much as in other Member States?'

This is an intriguing question, because it raises the issue of how citizen participation can be boosted in Member States where citizens are less accustomed to expressing their opinions via such routes. Unfortunately, the Commission's response (published on 7 November 2016) completely misses the point and refers the anonymous citizen to existing procedures and to the Member States.

'The Treaty on European Union specifies that the European Commission shall carry out broad consultations in areas of Union action in order to ensure that [the] Union's actions are coherent and transparent. In order to do so, the Commission organises for its major initiatives and evaluations public web-based consultations which can be accessed by all EU citizens via the web portal "Contribute to EU law-making". These public consultations may be accompanied by targeted consultation activities, addressed to specific stakeholders, depending on the scope of the initiative. In order to make sure that all potentially interested stakeholders and citizens are informed about a consultation activity, consultations are announced by means of different communication channels, which may differ depending on the topic and targeted stakeholder groups. These communication activities may be set up in consultation with the Commission representations in Member States in case specific stakeholder groups in particular Member States need to be encouraged to participate in a specific consultation. The Commission has no competence related to the organisation of public consultations on Member State level.'

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42. Reference S137646 submitted on 26 October 2016 by an EU citizen from Romania.

This stonewalling is all the more regrettable since the ball was in the Commission's court, and it could have made good on some of the aforementioned failings of the consultation procedure by establishing a stronger dialogue with citizens.

(b) A suggestion by Cefic

The Titanium Dioxide Manufacturers Association submitted an opinion via the REFIT Platform stating that the disproportionate requirements and scope of application of the EU's Classification, Labelling and Packaging (CLP) Regulation<sup>43</sup> offered no additional protection in terms of human health (opinion submitted on 19 February 2019).

This suggestion is a good illustration of how business groups can utilise tools such as the REFIT Platform to suggest amendments to existing legislation or the repealing of this legislation.

The REFIT Platform passed on the suggestion, which – in a blatant demonstration of double standards – prompted the drafting of a proposal for revision.

### **Evaluation**

These two examples provide evidence of stark differences between the two user groups. The REFIT Platform offers high added value for representatives of industry, many of whose questions are examined and whose suggestions are followed up on, but the opposite appears to be true for citizens and NGOs.

#### **4.1.3 Overall evaluation of the REFIT Platform**

In order to gauge how useful the REFIT Platform really is, we interviewed a number of its members. Although the Platform's work is praised and proclaimed as an essential tool for the future by several Member States as well as business groups and employers, the message from the other side of the table is a different one.

#### **A platform without any real legitimacy**

- Only the Commission examines the nominations for the stakeholders that sit on the REFIT Platform, and its composition skews clearly away from representatives of employees, NGOs and civil society.

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<sup>43</sup> Regulation (EC) No. 1272/2008 (CLP Regulation) aligns the previous EU legislation with the Globally Harmonized System of Classification and Labelling of Chemicals (GHS) established by the United Nations to identify hazardous chemical products and inform users of their hazards. It is also linked to the REACH Regulation. The CLP Regulation entered into force on 20 January 2009 and gradually replaced the classification and labelling recommendations set out in Directive 67/548/EEC on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances and Directive 1999/45/EC concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations, both of which were repealed on 1 June 2015.

- The Platform's mandate is excessive and lacks any real legitimacy compared to the rules of procedure that apply to the other institutions and their decision-making processes. It is telling that the Commission and the Member States are represented, but not the European Parliament.
- By issuing opinions on proposals for the revision or withdrawal of legislative acts, the REFIT Platform's government group (made up of representatives of the Member States) duplicates the work carried out by the 200 working groups of the Council's Committee of Permanent Representatives (COREPER).

#### **An asymmetric and biased process**

- Most of the questions and suggestions examined originate from the employer sector, i.e. business groups or chambers of commerce (as evidenced by the statistics published by the Commission itself), and few stem from civil society or the social partners.
- Proposals are often tabled by the members of the Platform itself, even though they are involved in the relevant issues through various other channels.

#### **A body without any real expertise**

Many questions remain unanswered: are all of the suggestions analysed? On what basis, and drawing on which expertise? What checks are carried out to ensure that the suggestions submitted to the Platform reflect the situation on the ground? Is the Platform competent to analyse the suggestions submitted to it? Which criteria are applied when deciding whether a directive, regulation or decision constitutes a disproportionate or overly expensive regulatory burden?

The Commission holds the only real expertise, and sometimes takes advantage of this fact to push through its own proposals.

#### **A slow and redundant process**

- It often takes several months to adopt an opinion.
- Certain specific or technical issues are more suited to examination by a comitology committee than by a bipartite platform. Is this not an example of being 'tiny on small things' rather than 'big on big things'?
- Finally, the government group and the stakeholder group rarely reach an agreement, since they meet only once and do not engage in any real dialogue.

#### **An unusual method of working**

The REFIT Platform's method of working is ripe for criticism: how can the Commission avoid a conflict of interest, given that representatives of its Secretariat-General are present at and chair all of the meetings, set the agenda, and also make suggestions?

#### **A marked imbalance between outcomes and costs**

- Based on its own recommendations, there appears to be a marked imbalance between the costs incurred in connection with the Platform and the outcomes it has delivered to date.
- There is also a lack of clear or transparent information on the amount spent on the REFIT Platform's operation, or on the outcomes it delivers.

Based on the above, we remain unconvinced that the REFIT Platform should continue its work beyond the term of the current College of Commissioners.

## 4.2 The Commission's 2018 annual burden survey

In November 2018, the Commission published its annual burden survey under the title 'The European Union's efforts to simplify legislation'.

This 107-page document provides an overview of the European Union's simplification efforts, together with around 30 opinions and recommendations issued by the REFIT Platform.

### 4.2.1 Targeted reductions

According to the report:

- The impact assessment for the Commission's proposal for a regulation on explosives precursors<sup>44</sup> estimates a 10% decrease (around EUR 75 million per year) in the compliance costs faced by companies.
- The proposal for a Fisheries Control Regulation<sup>45</sup> is expected to result in cost savings of EUR 157 million over five years thanks to the use of harmonised and/or interoperable IT tools and the harmonisation of the catalogue of serious infringements.
- Application of the proposed specific scheme to supplies made by non-established businesses in each Member State is expected to reduce compliance costs related to VAT<sup>46</sup> for small businesses (by 18% compared to the baseline scenario, i.e. EUR 56.1 billion per year).
- The Commission has adopted a proposal for a Directive (recast) on the re-use of public sector information. The direct economic value of government data is expected to reach EUR 194 billion by 2030. Open data has the potential to increase the efficiency of government through better policy-making, including EUR 1.7 billion cost savings for public administrations in the EU28. The Commission notes that the indirect benefits expected from this review are difficult to quantify, however.

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44. COM(2018) 209.

45. COM(2018) 368.

46. COM(2018) 21.



- The EU company law package adopted by the Commission in April 2018 and since approved by the co-legislators aims to simplify company law procedures and reduce the administrative burden for companies and public authorities by use of digital procedures. The impact assessment estimates savings from the introduction of online registration for new companies at between EUR 42 and 84 billion.
- The Commission has developed an action plan for reporting in the area of the environment; the reduction of regulatory costs from the different actions envisaged is estimated at between EUR 1.4 and 2 million annually.

#### 4.2.2 A result which falls far short of what was promised

Given that this report was expected to list many different examples of ways in which the regulatory burden had been reduced, it is understandable that some were disappointed by the lack of tangible progress.

Part of the progress reported in the report is merely hype and promises which may never come to pass, while part of it can be attributed more to growth of the digital economy than to advances in the fight against red tape (e.g. the Fisheries Control Regulation and the company law package).

Finally, the heterogeneous nature of the data<sup>47</sup> is glaringly obvious, as is the impossibility of distinguishing between achievements of the REFIT Programme and progress which can be chalked up to run-of-the-mill streamlining of the *acquis communautaire*.

### 4.3 Quantifying the potential for reducing the regulatory and administrative burden: a risk to the EU *acquis* as a whole

#### 4.3.1 Background

##### Quantification before reduction

In response to a request by several Member States (in particular the United Kingdom, the Netherlands and the Czech Republic), the Commission was tasked by the European Council with calculating the regulatory and administrative burden of EU legislation for the purpose of identifying unnecessary costs which could potentially be eliminated.

On this basis, the Commission was asked by the Council [...] ‘to present an annual burden survey and, where possible, to quantify the regulatory burden reduction or savings potential of individual proposals or legal acts’. The

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47. The figures given for savings include both gross savings, savings calculated for some point in the distant future (2030), and savings calculated for a period of five years or even one calendar year, which makes it hard to gauge what progress has really been made in terms of reducing the burden.

Commission was also invited 'to include in the annual burden survey figures on the increase or reduction in burden of new legislation over the previous year' (paragraph 7 of the Conclusions of the Competitiveness Council, May 2016).

The Council also called on the Commission; 'to continue its work on quantification of the burden reduction efforts by quantifying where feasible ex ante the expected results of the proposed initiatives in the REFIT scoreboard [...]' (paragraph 8).

Finally, the Council recalled that the Commission has been called upon 'to develop and put in place [...] reduction targets in particularly burdensome areas, especially for SMEs, within the REFIT Programme', and urged the Commission 'to rapidly proceed on this to enable the introduction of reduction targets in 2017, whilst always taking into account a high level of protection of consumers, health, the environment and employees and the importance of a fully functioning Single Market' (paragraph 9).

Table 5 **References by the Council to the importance of meeting regulatory cost reduction targets**

- Council Conclusions of December 2014 (Doc 16000/14): '[...] call on the Commission to develop and put in place – on the basis of input from Member States and stakeholders – reduction targets in particularly burdensome areas, especially for SMEs, within the REFIT Programme, which would not require baseline measurement and should consider at the same time the costs and benefits of regulation.'
- Council Conclusions of 26 May 2016 on better regulation to strengthen competitiveness which 'urge the Commission to rapidly proceed on [...] the introduction of reduction targets in 2017, whilst always taking into account a high level of protection of consumers, health, the environment and employees and the importance of a fully functioning Single Market.'
- Council Conclusions of 12 November 2018 (Doc. 14137/18) on the European Court of Auditors' Special Report No. 16/2018 'Ex-post review of EU legislation: a well-established system, but incomplete'. '[...] RECALLS the Council Conclusions of March 2018, which underline the importance of concrete targets for the reduction of unnecessary regulatory burdens, whilst respecting existing protection standards and without undermining the underlying objectives of the legislation.'

In summary, the Council's proposal for quantification/reduction of the regulatory burden by the Commission is based on four stages:

- calculating the monetary value of the EU's entire regulatory *acquis*;
- quantifying the potential for cost savings and the amount of effort involved in achieving them, particularly in the sectors subject to the heaviest burdens;
- setting out a schedule with operational reduction proposals per policy, sector or sub-sector;
- introducing annual follow-ups for the regulatory burden associated with all new proposals by the Commission.

Based in particular on the UK's Business Impact Target (Department for Business, Energy and Industrial Strategy, 2016), the countries referred to above succeeded in persuading the Council that its conclusions of May 2016 (see above) should call on the Commission to 'rapidly proceed on this to enable the introduction of regulatory targets in 2017'.

Germany and the Netherlands, together with a dozen or so other Member States, reiterated their calls for the Commission to reduce the regulatory burden in 2017, 2018 and 2019.

#### **How should the regulatory burden be reduced?**

Three approaches to reduction of the regulatory burden are currently being floated, with none having gained majority approval to date:

- the 'one-in, one-out'<sup>48</sup> or even 'one-in, two-out' principle espoused in particular by Germany and the United Kingdom;
- a gross linear reduction target per policy or sub-policy, expressed as a percentage (15% reduction in agricultural regulations, for example);
- a set target for cost savings in a specific policy area or sector (e.g. EUR 50 million in the area of VAT).

Following an approach espoused by Belgium, France, Spain and Luxembourg in particular, the Commission noted in a Communication published in October 2017<sup>49</sup> that up-front reduction targets were not a good fit at EU level,<sup>50</sup> primarily for methodological reasons, and that regulatory costs should be reduced on the basis of convincing data and reliable information rather than numerical targets. Reduction efforts based on targets run the risk of indiscriminate deregulation in instances where it is difficult to distinguish between necessary and unnecessary costs.

Germany and the Netherlands nevertheless remain attached to the idea of setting a deregulation target, and the topic was raised again in the conclusions adopted in November 2018 by the Austrian Presidency. With the support of 10 or so other countries, these two Member States also succeeded in incorporating it into the conclusions on industrial policy and the internal market adopted under the Romanian Presidency.

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**48.** This principle implies that any new legislative act or any additional costs incurred as a result of legislative provisions must be compensated for by revising or withdrawing two existing legislative acts. Since one of the Commission's ongoing tasks is to review EU legislation, following this principle may well achieve deregulation at EU level; on the other hand, it may also result in 28 different or even divergent national approaches.

**49.** Commission Communication. Completing the Better Regulation Agenda: Better solutions for better results, COM(2017) 651 of 24.1.2017, p. 10.

**50.** The underlying problem is that the Member States that have set linear reduction targets are unable to achieve them because of an inability to quantify them reliably; the United States is facing the same problem.

#### 4.3.2 Evaluation

##### **A temporary reprieve from the risk of indiscriminate deregulation**

Frans Timmermans, First Vice-President of the Commission, claimed that the REFIT Platform was not being established with the goal of deregulation. His claim is contradicted by the urgent calls issued by the European Council and the (Competitiveness) Council of the EU urging the Commission to adopt an initiative aimed at reducing the regulatory burden, which are evidence that the business community and at least some of the Council's members are eager for wholesale deregulation.

These deregulatory ambitions are likely to focus on the pieces of legislation most often referred to as a 'burden', such as the REACH Regulation and Directive 89/391/EC on the introduction of measures to encourage improvements in the safety and health of workers at work.

Fortunately, the Communication published by the Commission in October 2017 and April 2019 rules out the possibility of a 'regulatory burden reduction target', and instead comes down in favour of 'case-by-case assessments'.

Finally, it should be noted that the 'one-in, one-out' principle often boils down to a 'one-out, 27-in' principle, since a step backwards in terms of European integration will necessarily entail the reintroduction of national or regional measures and fragmentation of the internal market.

##### **The need for a solid regulatory basis at international level**

The European Union urgently needs to persuade the major global players (USA, China, Japan, South Korea, etc.) of the need for a common regulatory basis in order to avoid regulatory competition undermining the very foundations of the European project.

#### 4.4 OECD report on 'Better Regulation Practices across the European Union'

##### **4.4.1 An urgent call for better ex-ante consultations and ex-post evaluations**

In 2019, 10 years after having published a similar study for the EU15, the OECD published a report<sup>51</sup> on governance and regulatory practices in the EU and its Member States.

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51. 2019 OECD report 'Better Regulation Practices across the European Union', OECD, 2019.

The OECD calls on the Member States to make a number of improvements, including the following:

- developing effective systems to review existing regulations;
- facilitating the involvement of citizens at an early stage of the Commission's legislative process;
- providing more comprehensive information to stakeholders and granting them a larger role;
- increasing the scope of consultations and carrying out specific impact assessments in the event that regulatory provisions are added which go beyond the reach of EU legislation;
- evaluating the transposition of EU legislation more frequently on an ex-post basis.

The OECD also believes that the regulatory burden and the associated costs should be reduced by establishing 'Better Regulation' structures at national and local level.

#### **4.4.2 The omission of important questions**

The OECD failed to raise at least six key questions in its report:

- Although the OECD claims to have investigated the qualitative benefits of regulation rather than simply concentrating on quantitative cost reductions, there is no evidence of any attempt to categorise regulatory benefits in relation to regulatory costs. The unproven belief that the red tape and inefficiency generated by legislation outweigh its societal benefits therefore still prevails.
- The impact of compensating for the adoption of any new piece of legislation by repealing at least one existing piece ('one-in, one-out' or 'one-in, two-out'<sup>52</sup> system) has not been assessed with a view to identifying the benefit of this empirical method in terms of reducing the regulatory burden and regulatory costs.
- The OECD has not provided any clear definition or categorisation of economic, social and environmental impacts, meaning that it is impossible to know exactly what is meant by these terms, and also impossible to measure their relative importance with any kind of accuracy.
- The OECD appears to believe that new consultation procedures using ICT tools render obsolete more traditional forms and formal arrangements of

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**52.** For a similar approach, see the calls made by Édouard Philippe (French Prime Minister) in the Circular dated 26 July 2017 on the management of new regulatory texts and their impact', JORF No. 0175 of 28 July 2018, text No. 3, ELI: <https://www.legifrance.gouv.fr/eli/circulaire/2017/7/26/PRMX1721468C/jo/texte>.

consulting the social partners,<sup>53</sup> which is clearly bad news for the trade unions;

- The OECD seems to be calling for the *acquis communautaire* and the Member States' bodies of legislation to be partially dismantled in order to reduce the regulatory burden and regulatory costs, without examining the salient question of what magnitude of cost savings we are talking about, and at which point a risk to protection systems of all kinds might emerge (social, environmental, territorial, etc.).
- Last but not least, a fundamental question is raised in relation to the topic of overregulation,<sup>54</sup> sometimes wrongly referred to as gold plating. Should the EU no longer authorise a Member State – as it may do according to the Treaty on the Functioning of the European Union<sup>55</sup> – to do more than the statutory minimum in terms of protecting its workers or its consumers, for example? France appears to have given a positive response to this question in the aforementioned circular dated 26 July 2017,<sup>56</sup> paragraph 3 of which states that, 'as a basic principle, any measure going beyond the minimum requirements of the directive shall be prohibited'.

#### 4.4.3 Evaluation

##### An illuminating report

This big-picture view of regulatory practices, including the main areas of progress and areas for improvement in all the EU Member States, is certainly a step forward, since it provides us with a clearer idea of what has been achieved under the heading of the Better Regulation Agenda.

One of the most interesting sections of the report is the table outlining requirements to use regulatory management tools for EU-made laws, since it

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53. 'Both public consultation, as well as non-public forms of stakeholder engagement including formal and informal consultation, are widely used across EU Member States – although only in a minority of cases on a systematic basis. This reflects a common trend in stakeholder engagement practices across EU Member States throughout the last decade, specifically in countries with a strong corporatist tradition: many Member States have developed forms of consultation with the wider public via ICT tools, without simultaneously abolishing more traditional forms and formal arrangements of consulting social partners and organised interest groups on draft regulations' (underlining by the authors), above-cited OECD report, p. 53.

54. For more details on this topic, see, in particular, the exploratory opinion by the European Economic and Social Committee requested by the Austrian Presidency: 'The impact of subsidiarity and gold plating on the economy and employment', INT/848-EESC-2018-01595-00-00-AC-TRA, adopted on 19/9/2018, OJ C 440, 6.12.2018, p. 28.

55. See, in particular, Article 153(4) TFEU: 'The provisions adopted pursuant to this Article: – shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof, – shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties' (underlining by the authors).

56. See footnote on page 45.

provides an indication of stakeholder involvement at each stage of the decision-making process. Italy achieved a perfect score, putting it in front of the other Member States (including Slovenia, which came second), whereas certain Member States such as the Netherlands<sup>57</sup> did less well, even though they are often fêted as 'Better Regulation' heroes.

**Quantifying the qualitative benefits of legislation**

According to Ms Christiane Arndt-Bascle, one of the main authors of the report,<sup>58</sup> the OECD is working on a method which will make it possible to quantify the sustainable and non-market advantages of a piece of legislation as a basis for calculating its net benefit. We believe that a method of this kind could be particularly useful in so far as it would allow a comparison of market and non-market regulatory benefits.

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57. The Netherlands have a particularly poor track record on stakeholder involvement.

58. In response to a question asked by the authors at a meeting held on 19 March 2019.

## Part two

# Evaluations and recommendations

### 1. The Better Regulation Agenda: overly simplistic, with a political undertone

#### 1.1 The push to dismantle the *acquis communautaire*

The Better Regulation Agenda is looking more and more like an attempt to undermine the ‘Community method’ under the pretext of improving European legislation. Year after year, the underlying implication of the statements adopted by the European Council and the Council of the EU is that rules and regulations are nothing but a burden and an obstacle to competitiveness and liberalisation of the economy.

It would appear that the European Commission intends to take four different types of action in order to respond to calls to reduce the volume of the *acquis communautaire* without heading down the path of deregulation as such:

- adopting regulations instead of directives wherever possible in order to reduce the costs associated with gold plating;
- prioritising a non-regulatory approach based on soft-law instruments such as communications, guidelines, codes of conduct, co-regulation and self-regulation and ‘light-touch’ or ‘step-by-step’ approaches;
- handing power over to national and regional policymakers with an increasing emphasis on the importance of subsidiarity as part of the European project, particularly in the field of employment and social protection;
- prioritising stakeholders, private lobbying groups and experts over social partners during the consultation procedure, despite the fact that this runs counter to the EU Treaties;
- examining further European Citizens’ Initiatives.<sup>59</sup>

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<sup>59</sup> More information about the most recent citizens’ initiative (‘#NewRightsNow’, for ‘uberised’ workers) can be found at [http://europa.eu/rapid/press-release\\_IP-19-1809\\_fr.htm](http://europa.eu/rapid/press-release_IP-19-1809_fr.htm)



## 1.2 The supremacy of the competitiveness agenda over social and employment issues

With its annual and predictable criticisms of the Commission's bureaucratic excesses and the unnecessary and costly burden imposed on the EU's companies and citizens as a result of the legislative endeavours of the European institutions, the Better Regulation Agenda feeds Euroscepticism by sending out four key messages to the public:

- the EU's core business is not to protect workers or European citizens, but to build competitiveness among businesses and economic growth within the EU;
- the EU adopts unwieldy, complex and poor-quality legislation;
- the European institutions are responsible for creating red tape and causing unnecessary costs;
- the decision-making process is slow and inefficient; co-legislators cannot agree amongst themselves, and the EU's social partners and advisory bodies are unreliable collaborators that should be replaced by experts, stakeholders and lobbying groups, and by direct consultation of citizens.

The parties promoting this vision of 'Europe on the cheap' are pursuing five interlinked agendas, each of which represents another nail in the European Union's coffin:

- utilitarian: competitiveness and austerity are more important than solidarity, investment and the public interest;
- bottom-line-focused: a cost-based approach is more appropriate than one which takes into account the benefits of legislation, the value added by the EU *acquis* and the cost of non-Europe;
- authoritarian: top-down action by the powerful European business groups takes priority over a bottom-up approach and what is really happening on the ground;
- centrifugal: the opinions of European institutions and advisory bodies, in particular the social partners and the trade unions, are less important than those of external players such as experts, stakeholders and strong lobbying groups (which are getting stronger as globalisation progresses);
- short-termist: the institutions work to electoral cycles even though the problems and issues they are tackling call for long-term commitments.

## 1.3 An ideological comeback

The Better Regulation Agenda has all the hallmarks of neoconservatism. No substantial progress on social issues can be identified in the working programmes of the Juncker Commission (2015-2018), and no funding was earmarked for ambitious measures in the field of employment (with the exception of EUR 3 billion for the Youth Employment Initiative).

The Commission appears to be unaware of the real problems faced by Europe's workers and citizens, such as the increasing fragility of the social fabric, unemployment and under-employment, insecurity, exclusion, reduced access to healthcare, health and safety at work, and many more.

#### 1.4 Bureaucratisation of decision-making processes and technocratisation of structures

The stated aim of the Better Regulation Agenda is to reduce red tape, cut regulatory costs, make the decision-making process more transparent and enhance stakeholder consultations.

Yet it has achieved quite the opposite: rules and regulations are proliferating and becoming increasingly nit-picky and authoritarian, and the volume of criteria for evaluating, monitoring, tracking and reporting has snowballed, as has the number of support structures and consultation processes, while decision-making processes have become ever less transparent, especially in view of the burgeoning number of delegated acts and implementing acts. The Better Regulation Agenda has increased the amount and cost of red tape and delivered lacklustre outcomes.

According to the European Commission itself, between 150 and 280 full-time equivalent staff are deployed on better regulation-related activities and supported by external contractors providing services amounting to between EUR 10 to 37 million annually.<sup>60</sup>

Paradoxically enough, the use of a 'funnelling strategy' means that the decision-making process is controlled by fewer and fewer individuals; since the Secretary-General of the Commission signs off the Commission's work programme, he or she has de facto control over all of the Commission's initiatives. What ultimately results could be described as 'bureaucratising the debureaucratisation process'.

#### 1.5 An ongoing paradigm shift

Finally, the European Union appears to be in the throes of a paradigm shift. The delegitimisation and marginalisation of the actors whose roles are enshrined in the Treaty in favour of 'high-level experts',<sup>61</sup> consultants or stakeholders is worrying because – ironically enough – it heralds a new attack on transparency which poses perhaps even more of a risk than the problem it was meant to solve. Adding new players at all stages of the game, even before

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**60.** Source: SWD(2019), *op. cit.*, p. 43 and Annex 1 to SWD(2019), p. 50.

**61.** See the very apposite phrase 'paralysis by analysis' used by Isabelle Schoemann in: 'EPSR: a legal analysis and proposals', 2016.

the democratic process has been initiated, and without examining the legitimacy of these players, opens up the floodgates to under-the-table influences.

## **2. Recommendations for the future**

This section of the document contains a number of recommendations aimed at identifying a new direction for the Better Regulation Agenda which responds to the vociferous criticism voiced to date.

### **2.1 A return to Europe's social and environmental roots in order to silence its critics**

The European Union cannot champion the competitiveness of its businesses at the expense of its workers and the environment. Europe unquestionably needs to secure the future prospects of its business owners, from SMEs and micro-enterprises upwards, but it must not forget the fate of its workers, citizens and consumers in the process. When viewed from an historical vantage point, Europe is primarily a project based on cohesion and solidarity between its many different parts.

### **2.2 Successful top-down convergence based on the European Pillar of Social Rights**

The next Commission, whose term will run from 2020 to 2024, must steer a different course by listening to its workers and citizens and proposing a European Pillar of Social Rights (which would impose obligations on companies and enshrine rights for workers, the unemployed and recipients of social security benefits).

Employment and social protection must be mainstreamed into the EU's other policies: Article 9 of the Treaty on European Union must become more than just words on a page.

In a reversal of the current trend, the European Semester must be 'socialised'. Austerity and rigour must be abandoned in favour of investment and the revival of a sustainable development model centred around the goals of full employment and high-quality employment. The European Semester must also evolve to reflect the increasing importance of the European Pillar of Social Rights.

Structured dialogue with social partners which complies with the principles enshrined in the Treaties must take the place of haphazard consultations which merely lend greater weight to the voice of the large corporations.

Social and employment policy must be steered on the basis of high-quality statistical indicators, but these latter must be tools that assist political decision-making rather dominating it to the exclusion of all other considerations. A balance must be struck between the use of these indicators and the relentless calls for facts and figures.

### 2.3 A balanced and citizen-focused decision support framework

The 'Better Regulation' tools must be replaced by a more qualitatively balanced decision support framework, which incorporates in particular:

- qualitative criteria, in particular those relating to social policy, the environment and employment, as the basis for carrying out an impact assessment in relation to any Commission initiative;
- a shared methodological approach applied by the three institutions before any impact assessment;
- the presentation of credible and high-quality alternatives;
- comprehensive consultation of the social partners and advisory bodies.

### 2.4 A paradigm shift: social justice as a prerequisite for sustainable development<sup>62</sup>

A study by the Bertelsmann Foundation<sup>63</sup> confirms that the industrial nations are still a long way from achieving their sustainable development goals (i.e. transition to an inclusive economic model and the promotion of sustainable models of consumption and production), and underlines the fact that in many respects the economic systems of the OECD countries exacerbate the trend towards social inequality rather than counteracting it.

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**62.** For further information on the subject, see, in particular, Degryse C. and Pochet P. (2009) Paradigm shift: social justice as a prerequisite for sustainable development, Working Paper 2009.02, Brussels, ETUI.

**63.** Bertelsmann Foundation 'Sustainable Development Goals: Are the rich countries ready?', 2015 <https://www.etui.org/fr/Actualites/Une-nouvelle-etude-montre-que-les-pays-industrialises-sont-loin-d-atteindre-les-objectifs-de-developpement-durable-des-Nations-Unies>

## 2.5 A call for EU funding and a consistent investment programme in the fields of employment and social protection

EUR 80 billion was earmarked under the European Social Fund for human capital investment in the Member States over the period 2014-2020; a great deal more must be invested during the next financial programming period in order to respond to the needs of citizens and workers.

### 3. By way of a conclusion: change is possible

In the preceding sections, we highlighted the utilitarian nature of the Better Regulation Agenda. In our opinion, the concept that legislation (or the lack of it) can serve as a ‘financial reserve’ that can be tapped into as a way of reinjecting cash into the real-life economy has outlived its usefulness, and it is also misguided to use ‘Better Regulation’ as a pretext for a race to the bottom in terms of cost (as recommended by some quarters). Instead, the Better Regulation Agenda must be taken at face value – as a way of increasing the clarity, certainty and coherency of legislation.

We believe that the single priority of ‘competitiveness’ should be replaced with three priorities that are more constructive and mobilizing in nature:

- **reassurance:** attention should be paid to the real needs of citizens and the economy (value streams, sectors, etc.), the situation of workers, changes in employment, the environment and the climate;
- **democratisation:** bottom-up debates and proposals are necessary, based on a system of social and environmental evidence-based policy;
- **harmonisation:** a single piece of legislation at EU level will always be preferable to 27 individual pieces of legislation at national level; tackling challenges head on as a European collective is preferable to scattergun approaches by individual countries that comply with the principle of subsidiarity.

We must radically alter our approach to the Better Regulation Agenda. Firstly, it must be uncoupled from the concept of competitiveness, which should not be regarded as an objective in itself, but as one of many long-term tools that can be used to execute the tasks assigned to the EU project. Rather than ruling supreme over the policy landscape, it must take second place to the values of the European Union enshrined in Article 2 of the Treaty on European Union: ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’

The logical consequence of the above is that the Better Regulation Agenda should no longer fall under the exclusive purview of the Competitiveness Council, and should either be handed over to the General Affairs Council, or

handled by a variety of Council configurations (Economic and Financial Affairs, Justice and Home Affairs, Environment, Employment, Social Policy, Health and Consumer Affairs, Transport, Telecommunications and Energy, Competitiveness, etc.) on the basis of a cross-sectoral approach.

Finally, the Better Regulation Agenda must be rebranded with a new name that conveys the idea that the regulations adopted by the European Union must be not only efficient, but also sustainable and inclusive. At the same time as ensuring that the EU can compete with the USA and China, they must also prepare it for the forthcoming transition to a low-carbon economy, improve the number and quality of its jobs, protect its citizens and regions and secure long-term funding for public services. Better Regulation should become 'Sustainable and Inclusive Regulation for All' (SIRA).

The debate on sustainable legislation needs a wider audience, since questions relating to the topic of regulation are too important to be decided by business groups alone. Social partners, civil society and citizens must take urgent action to regain ownership of this cross-cutting agenda which has an impact on all of the EU's policies. A protective legal framework is more important today than it ever has been before, and its importance will only increase in the future.

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## **List of acronyms and abbreviations**

<b>Cefic</b>	European Chemical Industry Council
<b>EPRS</b>	European Parliamentary Research Service
<b>EU</b>	European Union
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>REFIT</b>	Regulatory Fitness and Performance Programme
<b>RSB</b>	Regulatory Scrutiny Board
<b>SMEs</b>	Small and medium-sized enterprises
<b>SWD</b>	Staff Working Document