
'One-in, one-out' in the European Union legal system: a deceptive reform?

Éric Van den Abeele

Working Paper 2020.04

'One-in, one-out' in the European Union legal system: a deceptive reform?

—
Éric Van den Abeele

Working Paper 2020.04

europaen trade union institute

Eric Van den Abeele is a guest researcher at the European Trade Union Institute, an expert for the European Economic and Social Committee (EESC) and lecturer at the Institut des Hautes Études des Communications Sociales (IHECS). He is Counsellor at Belgium's permanent representation at the European Union. The present publication does not necessarily reflect the views of the state of Belgium.

ETUI publications are published to elicit comment and to encourage debate. The views expressed are those of the author(s) alone and do not necessarily represent the views of the ETUI nor those of the members of its general assembly.

Brussels, 2020
©Publisher: ETUI aisbl, Brussels
All rights reserved
Print: ETUI Printshop, Brussels

D/2020/10.574/18
ISSN: 1994-4446 (print version)
ISSN: 1994-4454 (electronic version)



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

Contents

Abstract	5
Introduction	7
1. The institutional framework of the European Union	10
1.1 Europe is not a cost, but an investment	10
1.2 The legitimacy of legislative initiative is framed by the EU treaties	11
1.2.1 The primacy of the EU's three fundamental principles	11
1.2.2 Adhering to the three key objectives	13
1.3 The institutional paradox	13
2. 'One-in, one-out' as a simple technical adjustment or a paradigm shift?	15
2.1 Ursula von der Leyen's surprising announcement	15
2.2 The Centre for European Policy Studies (CEPS) Report	17
2.3 A radical change in governance	19
2.3.1 Main characteristics of 'one-in, one-out'» (OIOO)	19
2.3.2 Towards the creation of a 'heat map'	19
2.3.3 Adaptation of the current policy cycle in a manner favourable to stakeholders... ..	21
2.3.4 Strengthening the role and independence of the Regulatory Scrutiny Board (RSB).....	21
2.3.5 Members of the platform Fit for the Future in charge?.....	22
3. Critical assessment of the OIOO report	23
3.1 The positions of the member states	23
3.2 The report's numerous imperfections	26
3.2.1 A lack of methodological rigour	26
3.2.2 Practical difficulties	30
3.2.3 The difficulty of applying an approach to cost reduction in relation to the EU's institutional and decision-making process	32
3.2.4 Burdensome bureaucratisation of instruments and procedures	34
3.2.5 The implicit biases of the study	36
3.2.6 A politically motivated agenda	37
3.2.7 The latest developments with regard to 'one-in, one-out' at the level of the EU Council	39

4. Recommendations and proposals	42
4.1 Breaking away from the fatal logic of cost-cutting at any price	42
4.2 Addressing the real obstacles	42
4.3 Thinking in terms of net benefits	43
4.4 Evaluation of what comes out of the legislative pipeline and sunset clause	43
4.5 Creating a register of the costs and burdens that should be avoided	44
4.6 Working towards a common commitment	44
Conclusions	46
Bibliography	48
List of acronyms and abbreviations	51

Abstract

Since 2002 and the publication of the Mandelkern report,¹ the question of reducing burdens and costs, both regulatory and administrative, has emerged as a recurrent topic that regularly comes up at the European Council. It is, moreover, revealing that one of the points of rupture that led the United Kingdom to opt for Brexit² was the issue of 'better lawmaking'.³

In this context, the system of regulatory compensation 'one-in, one-out' – which involves setting off against every new cost arising from a legislative initiative the elimination of an existing cost – has become a potent political symbol, if the warm welcome afforded it by a dozen member states and, in particular, the European employers' lobby Business Europe is anything to go by. Some have gone so far as to attribute veritable healing powers to 'one-in, one-out', such as reducing the unduly onerous costs of the European bureaucratic machinery for businesses.

By showcasing this accounting-based approach, which lacks precise economic substance, the sponsors of 'one-in, one-out' believe that they have found a kind of automatic brake that will help them to strip the *acquis communautaire* of some of its obligations and 'unnecessary' costs. Claims of significant savings have been made, sometimes recklessly, as if a new Eldorado was on the horizon for businesses.

Germany, which will take over the presidency of the European Council for six months from 1 July 2020, tasked a team of researchers at the Centre for European Policy Studies (CEPS) with drafting a report⁴ on the feasibility of introducing this approach at the level of the European Commission. The presentation of this report and its critical analysis are the topic of the present publication.

-
1. Report of the interdepartmental working group on the quality of legislation (2002).
 2. As a matter of fact, the conclusions of the European Council of 18 and 19 February 2016, Section B (Competitiveness) point out that the European Union must strengthen the single market and implement certain measures to simplify its regulations: 'better regulation ... means lowering administrative burdens and compliance costs on economic operators, especially small and medium enterprises, and repealing unnecessary legislation as foreseen in the Declaration of the Commission on a subsidiarity implementation mechanism and a burden reduction implementation mechanism, while continuing to ensure high standards of consumer, employee, health and environmental protection'.
 3. For more on this subject, see Van den Abeele (2019).
 4. 'Feasibility Study: Introducing a One-in, X-out Rule in the European Commission.'

It is important to note that this debate is coming in the wake of the Von der Leyen Commission's approval, in December 2019, of an ambitious roadmap of more than 50 measures on a Green Deal for Europe, both legislative and non-legislative.

While the European Union (EU) needs rules to provide it with legal certainty and predictability, as well as a level playing field with its trade partners, the notion that law impedes smooth business operations is making a comeback.

The issue of regulatory compensation, in the form of 'one-in, one-out', will be high on the agenda of Angela Merkel's government during Germany's EU presidency. The first Council Conclusions on the topic have already been adopted, at the ministerial session of 27 February 2020.

This debate is important because it will determine the EU's role in the coming years.

Introduction

The costs incurred as a result of regulation represent normal expenditure that is part and parcel of all political systems. To be sure, bureaucracy that is unnecessarily costly, fussy, irksome, ineffectual and redundant should be eliminated. That is self-evident and a positive duty. But to suggest that the EU's political system and legal order could function without imposing substantial burdens or costs on the member states, business or its citizens would strain the credulity of anyone familiar with how Europe works.

The debate on the 'pointlessness' of regulatory or administrative costs or burdens has been going on for twenty years since the establishment of the Mandelkern group.⁵ It took on a political dimension in 1997 when the German economic-liberal Martin Bangemann, then European Commissioner for the internal market and industrial affairs, suggested that potential growth could be unleashed by reducing the administrative burden. Scarcely ten years later this purview was expanded to encompass also the regulatory burden, and that means regulation as such. The political dimension of cutting unnecessary costs became even more pronounced when Ursula von der Leyen took over the helm of the European Commission in 2019 with the flagship proposal that every new burden, whether it be regulatory or administrative, has to be compensated by the removal of an equivalent burden in the same policy area. This 'bookkeeping' approach, 'one-in, one-out', will be the topic of the present publication.

The discussion on regulation is a major issue because it touches on the very foundations of the European Union. Unfortunately, as we shall see, this discussion is vitiated by those who, at every opportunity, wilfully confuse democratic accountability and red tape; regulation and bureaucracy; necessary and unnecessary costs and impositions; costs and investments.

In this way, those who disdain regulation also denigrate current ways of doing things and the *acquis communautaire* without offering anything in their place other than trimming the EU's regulatory sails. As if less regulation alone was enough to boost growth, conjure up business opportunities or even create more jobs.

5. See note 1.

Scrutiny of ‘one-in, one-out’⁶ revives an old debate launched in the 1980s by US President Ronald Reagan⁷ and British Prime Minister Margaret Thatcher on the role of the state and the status of legislation. Over the past decade, governments have increasingly shown an interest in limiting growth in regulation by insisting that one or more items of legislation should be withdrawn before a new one may be included in the *acquis communautaire*.

Fairly recently, in 2017, US President Donald Trump enshrined a ‘one-in, two-out’ system in US legislation.⁸ It is hardly surprising that the governments that opt for ‘one-in, *n*-out’ tend to be on the right of the political spectrum.⁹ Edelman and Radaelli estimated, some time ago, that ‘one-in-*N*-out can serve as a potent political symbol, even if it may be devoid of precise economic content’ (Edelman 1964; Radaelli 2009).

More broadly, this reassessment of the primacy of law or of the rule of law is always directly related to a threefold undermining of the EU’s institutional framework by the combined action of market forces, competition between the EU and emerging economies and the reversal of the hierarchy between the public interest and individual interests.

By repeating incessantly that the EU *acquis* needs to be revised by eliminating unnecessary or undesirable costs, the same actors denigrate the EU and foment ‘Europe bashing’, thus echoing extreme right-wing French MEP Marine Le Pen, who declared in 2017 that ‘we need to slay this bureaucratic monster’.¹⁰

And perhaps this is what is most worrying of all in ‘one-in, one-out’’s accompanying narrative. The advocates of the relentless reduction of legislation come to the same conclusion as the most virulent Eurosceptics and Europhobes.

In this first part of the present article, we examine the framework within which the European Union operates: a full-blown legal order, fundamentally different from national legal systems, which underpins all EU policies.

-
6. The literature calls this regulatory policy innovation ‘one in, *n* out’, in which *n* tends to be equivalent to one. See, in particular, Hahn and Renda (2017).
 7. On 20 January 1981, Ronald Reagan, in his inaugural speech as president of the United States, declared that ‘in this present crisis, government is not the solution to our problem; government is the problem’.
 8. In its current form, ‘one-in, *n*-out’ owes its political revival to Trump’s signing of an executive order on 30 January 2017 (EO 13777, 2017) which establishes ‘one-in, two-out’ as an objective.
 9. Andrea Renda, whose report we analyse in detail in the present article, as well as Jan-Christoph Hauswald, senior advisor at Germany’s Federal Ministry of Economic Affairs and Energy, explained at a meeting of the EU Council’s Better Lawmaking working group on 17 January 2020 that regulatory compensation ‘one-in, *n*-out’, although yielding impressive results at the outset, attaining a ratio of one to eight or even higher, tends towards ‘one-in, one-out’ after a number of years.
 10. See interview with Marine Le Pen in *Le Point*, 23 February 2017, <https://www.lepoint.fr > Politique > Présidentielle 2017>.

In the second part we present the main aspects of the CEPS study, published in December 2019. This study is important because it serves the intentions of Germany and several other member states – in particular Czechia, Hungary, Ireland, Italy, Malta, Spain and Poland – that are openly arguing for the introduction of this principle.

Part three is devoted to a critical reading of the arguments put forward in the eponymous report. We shall see that the intention of the abovementioned member states, aimed at influencing the Commission Communication on Better Lawmaking, includes 'one-in, one-out', which will probably be adopted by the College of Commissioners in autumn 2020.

Finally, in a fourth part we shall formulate a number of recommendations.

1. The institutional framework of the European Union

1.1 Europe is not a cost, but an investment

It is perfectly reasonable to argue that the European Union comes at a cost. Community legislation indeed gives rise to various kinds of direct cost, which can be categorised in accordance with the so-called standard cost model (SCM)¹¹:

- compliance or adoption costs (enforcement and implementation costs arising from European legislation pertaining to enterprises and public administration);
- costs of familiarisation (the costs incurred in the process of getting to grips with Community requirements);
- administrative costs (costs related to the performance of administrative obligations required under legislation: certification, labelling, fees, monitoring reports, statistics, record management and so on);
- costs arising from revenue losses resulting from the revision or amendment of regulations; and finally
- other types of cost (employee training and purchase of equipment to ensure regulatory compliance, among other things).

In addition to the direct costs to which the European Union gives rise, one can add the indirect costs, such as:

- the cost of Community inaction and the cost of ‘non-Europe’,¹² whether it be a set of legal, administrative or technical barriers that impede the smooth functioning of the single market;
- costs arising from a loss of competitiveness stemming from ‘regulatory bias’¹³ with the EU’s trading partners, whether it be the costs generated by the lack of a level playing field, which hit European companies hard in comparison with their – mainly Asian – competitors.¹⁴

11. The Standard Cost Model (SCM) is a method for measuring the administrative costs imposed on enterprises by the obligations to provide information under the regulations currently in force. Launched in the Netherlands its use has grown rapidly, despite numerous criticisms. See Van Abeele (2009 and 2014).

12. European Economic and Social Committee (2012).

13. Such regulatory bias is the cause of a considerable loss of competitiveness and thus gives rise to substantial financial losses, in particular as a consequence of the phenomenon known as ‘carbon leakage’. The sums to which a loss of competitiveness gives rise as a result of regulatory bias far exceed the accumulated sum of unnecessary burdens generated by EU regulation.

Compared with non-European members of the OECD (such as the United States and Japan), the direct regulatory costs generated by the European Union are reasonable and bearable.¹⁵

But it is perfectly true that there is a significant difference in costs in relation to countries such as China, Russia, South Korea and other emerging economies that do not have the same regulations on wages, investment protection and the social, environmental or climate dimensions, among other things.

It is important to note that, as things stand, those who consider themselves most hard done by because of the supposed costliness of the EU are thinking primarily of the administrative burden and bureaucratic costs ahead of the costs of complying with or adopting European regulation.

1.2 The legitimacy of legislative initiative is framed by the EU treaties

1.2.1 The primacy of the EU's three fundamental principles

In order to assess the relevance of regulatory compensation and of the 'one-in, one-out' rule it is important to recall that the principles underlying regulatory initiative are established by treaty and the development of Community action.

The principles established by treaty

Note that the European Commission has a monopoly on initiating legislation. This exclusive right, which forms the very basis of the legal order of the European Union, is not an arbitrary power. This independence guarantees that the Commission functions in the general interest of the EU (citizens, business and communities).

In order to put forward a proposal for a regulation, a directive, a resolution or a non-legislative act (recommendation, opinion and so on),¹⁶ the Commission is required to adhere to three key principles:

- the principle of conferral (every competence not attributed to the European Union in the treaties pertains to the member states – 'the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein', Art. 5, TEU);
- the principle of proportionality ('the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties', Art. 5, TEU);

14. European Commission (2019b).

15. See in particular the OECD report (2019).

16. Cf. Art. 288 TFEU.

- the principle of subsidiarity ('the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States ... but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level', Art. 5, TEU).

To these three fundamental principles other principles recognised by the Treaty have to be added that are relevant to the implementation of certain EU policies,¹⁷ in particular as regards the environment (Art. 191, §2 TFEU):

- the precautionary principle (if there is a risk that a particular measure may cause public or environmental damage and there is no scientific consensus to support it, it must not be implemented);
- the principle that the polluter should pay (arising from the ethics of responsibility, this principle holds that every economic actor must take responsibility for the negative externalities of their activities).

The principle of the sustainability of Community action, in accordance with which the EU and its member states are invited to take enhanced protective measures pursuant to Article 193 TFEU,¹⁸ comes within this context. Similarly, some trade union organisations have called for the insertion of a non-regression¹⁹ clause as a principle of Community action in its own right.

Moving in the opposite direction, in November 2014, at the initiative of the European Risk Forum,²⁰ 22 multinational firms²¹ and powerful employers' associations, such as Business Europe, declared that they wanted to make the Commission's right of initiative conditional on a new 'principle' of innovation.²²

17. According to Article 3, para 3 TEU, 'The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.'

18. Article 193 TFEU: 'The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.'

19. The principle of non-regression is defined as a principle 'in accordance with which protection of the environment, safeguarded by legislative and regulatory provisions related to the environment, may only be subject to constant improvement, given the current state of scientific and technical knowledge'. For more on this topic see, among others, Vigneau (2006) and Savin (2016).

20. ERF is a think tank set up for the tobacco, pesticide and chemical industries in the 1990s by British American Tobacco to try to influence the risk management of the public authorities.

21. AiCuris, BASF, Bayer AG, The Dow Chemical Company, Dow Agrosciences LLS, Dow Corning Cooperation, Henkel AG & Company, Novartis AG, Royal Philips, Solvay S.A. and Syngenta AG, among others.

22. Reference to the principle of innovation was introduced into EU debate in 2016 by Professor Graf-Peter Calliess, professor of law at the University of Bremen and author of numerous publications on new forms of regulation.

Never properly defined, this concept of innovation surfaced in the Council Conclusions under the Dutch presidency in May 2016.²³ Its aim is to ensure that whenever political decisions or regulatory initiatives are being considered, the impact on innovation should be assessed and taken into consideration.

1.2.2 Adhering to the three key objectives

While business competitiveness is a key aim in the current context of increasing competition with third countries it is worth recalling that the EU's social and territorial cohesion, not to mention environmental and climate protection, are equally important objectives.

The debate on (administrative) burdens must therefore never lose sight of what the regulatory cost and burdens bring European actors in return: the guarantee of legal certainty in the European Union, assurance of the opportunity to invest and to work in another EU member state in safety and security and assurance of the enjoyment of a variety of protections.

Table 1 Adhering to the three key objectives

Security and protection	Efficiency	Quality
Legal certainty and predictability	Business competitiveness	Coherence between legal acts
Social protection	Proportionality of measures	Clarity of issues and provisions
Territorial protection	Necessity of the measure	Transparency of rights and obligations
Consumer protection	Compliance with the principle of subsidiarity	Optimisation of costs in relation to benefits and burdens

1.3 The institutional paradox

In recent years the threefold legitimacy that underpins the European Union (the general interest guaranteed by the Commission, state sovereignty safeguarded by the Council and citizens' representation guaranteed by the European Parliament) has turned into a fourfold frustration:

- frustration on the part of the Commission that finds itself regularly challenged in its initiating role by its co-legislators, which sometimes substantially amend proposals forwarded by the European executive, which in turn makes the passage of burdens and costs much more cumbersome for the public administration, businesses and citizens;

²³. See Van den Abeele (2019: 27).

- frustration on the part of the European Parliament, whose right of amendment is often taken away by the Council in the wake of the attentions of COREPER and its 200 working groups;²⁴
- frustration on the part of the Council, which has to accept amendments termed ‘political’ from the European Parliament, which often come from advocacy groups or business lobbyists;
- frustration on the part of stakeholders and constituencies, such as the European social partners (recognised by Article 153 TFEU). According to them, the handling of specific and/or public consultations is very opaque and their views are not sufficiently taken into consideration by the Commission and the co-legislators.

This fourfold frustration engenders a sense that the EU is not doing a good job. These frustrations give succour to euroscepticism and europhobia, which in turn nurture a form of euro-bashing.

24. In fact, the Parliament and the Council are merely formally on an equal footing. With its 200 working groups, composed of national experts and d’attachés, the Council is very well endowed with legal, technical and administrative expertise. It can afford to go through every proposal with a fine-toothed comb and highlight the shortcomings and contradictions, while the European Parliament must content itself with a few, generally quite short work sessions. The only expertise it has at its disposal lies in the hands of the administrators of political groups and those of the parliamentary assistants, without even mentioning lobbyists of all kinds and other advocacy groups, which enjoy substantial influence.

2. 'One-in, one-out' as a simple technical adjustment or a paradigm shift?

2.1 Ursula von der Leyen's surprising announcement

In her first oral intervention and in the mission letter that she sent to Maroš Šefčovič, the Commissioner in charge of Better Lawmaking, Ursula von der Leyen surprised observers by declaring that the Commission would apply 'one-in, one-out' regulatory compensation in order to cut red tape.²⁵

This announcement was all the more astonishing because the previous head of the Commission, Jean-Claude Juncker, had put a lot of effort – voiced in particular by his first vice-president in charge of the Better Lawmaking dossier, Dutchman Frans Timmermans – into explaining why it was preferable to proceed by a 'case by case evaluation' of the *acquis communautaire* than by sweeping cuts.²⁶

In her Communication on the Commission's working methods President Von der Leyen clarified her position:

'The Commission will apply the "one in, one out" principle. Every legislative proposal creating new burdens should relieve people and business of an existing equivalent burden at EU level in the same policy area. The Vice-President for Inter-institutional Relations and Foresight will oversee the application of the principle and ensure that it is applied coherently across the Commission services. He will draw on the Secretariat-General to develop a new tool to deliver this principle in the different policy areas.'

The executive also announced that it would adopt a so-called 'whole-of-government' approach when introducing the 'one-in, one-out' principle, without limitation to certain sectors or policy domains. The Communication also mentioned that this system would be introduced to send 'a clear and credible signal to citizens that its policies and proposals deliver and make life easier'.²⁷

²⁵. See mission letter to Maroš Šefčovič: https://ec.europa.eu/commission/sites/beta-political/files/mission-letter-maros-sefcovic-2019_en.pdf

²⁶. The relevant reference is Communication of the Commission 'Completing the Better Regulation Agenda: better solutions for better results (own-initiative opinion) – related information reports' (European Commission 2017).

²⁷. European Commission (2019c: 11).

Nevertheless, the Commission raised four important caveats:

- minimum standards must not be dismantled: legislation must be retained when it is necessary;
- ‘one-in, one-out’ must be applied in the same regulatory domain, but it will not be implemented in an automatic fashion. The number of legislative items to be eliminated will not be decided in advance. The policy area in question will be examined thoroughly;
- the proposal must be based on reliable data (‘evidence-based’);
- ‘one-in, one-out’ must be integrated in the Better Lawmaking system and supervised by members of the REFIT platform.²⁸

Evaluation

Given that the decision to apply ‘one-in, one-out’ did not emanate from the Commission and its powerful secretariat-general, Ursula von der Leyen’s choice seems to have been inspired by political motives, and especially by the coalition agreement that underpins Angela Merkel’s government. It is highly likely that the decision can be attributed to Bavaria’s very conservative Christian Social Union (CSU), within which Edmund Stoiber, in his capacities as honorary CSU president and former president of the European Commission’s Impact Assessment Board,²⁹ still enjoys considerable influence.

Some have seen this announcement as a form of political compensation for conservatives following the personal failure of Manfred Weber, MEP and member of the CSU, designated Spitzenkandidat of the European People’s Party (EPP) and, for this reason, expected to become head of the Commission following the EPP’s victory in the European elections in May 2019.

Because the introduction of ‘one-in, one-out’ is the result of political horse-trading, one has every right to question the validity of a principle whose scope and implications have not yet been evaluated.

It is, however, strange – and indeed rather dubious – that the president of the European Commission, guarantor of the independence of the European executive, has ordained the implementation of a ‘bookkeeping’ procedure that has not been subject to either an impact assessment or any preliminary consultation.

In short, the ‘one-in, one-out’ instrument has been proposed without any holistic vision of what EU governance in general and the Better Lawmaking programme in particular should be like.

28. The REFIT platform has been replaced by the ‘FIT for the Future Platform’ (see Commission Decision of 11.5.2020 establishing the Fit for the Future platform, C(2020) 2977 final, 11.5.2020).

29. The Impact Assessment board is the predecessor of the current Regulatory Scrutiny Board (RSB), which we shall discuss later.

2.2 The Centre for European Policy Studies (CEPS) Report

The CEPS report³⁰ was commissioned and funded by Germany's Federal Ministry of the Economy and Energy to be carried out by Andrea Renda, senior research fellow at the CEPS. The research team comprised Moritz Laurer, Ada Modzelewska and Antonella Zarra.

The report has 143 pages³¹ and is divided into three parts:

- experiences with 'one-in, x-out' rules in EU and OECD countries;
- EU and OECD experiences with targets for reducing (administrative) burdens; and
- towards a possible 'one-in, one-out' regulation at European level?

The document is accompanied by a questionnaire on a possible feasibility study on the introduction of the 'one-in, one-out' rule within the European Commission.

The study is part of a broad campaign led by Germany to reduce regulatory costs in the EU that has been going on for several years, especially within the Council's Better Lawmaking working group, as well as in other forums (including the REFIT platform³²).

The aim of this study is to introduce a regulatory brake in the form of a compensation system, 'one-in, one-out'. Whenever regulatory costs are increased in a certain domain, there must be an equivalent cutting of costs in the same domain.

The study is along similar lines to the Conclusions of the Competitiveness Council of 2014 and 2016, repeated in 2017 and 2019 when the Council demanded a lowering of 'direct compliance costs' while maintaining a high level of protection for consumers, public health, the environment and workers, as well as the optimal functioning of the single market.

Para. 9 of the Council Conclusions: Better regulation to enhance competitiveness³³

'9) RECALLS the Council Conclusions of December 2014 that 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

30. Established in Brussels in 1983, the Centre for European Policy Studies (CEPS) is a think tank and a discussion forum for European affairs. It has a well developed internal research capacity and a vast network of partner institutes across the world.

31. CEPS (2019).

32. The REFIT platform brings together the Commission, national authorities and other interested parties at regular intervals for the purpose of improving existing EU legislation.

33. Council Conclusions of 26 May 2016.

benefits of regulation; WELCOMES the Commission's recent commitment in this regard, and URGES 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.'

Despite repeated and urgent calls from the Council, the Commission's secretariat-general, in its Communication of October 2017³⁴ stated that it was inclined towards a 'case-by-case approach', thus precluding any fixed target for reducing the regulatory burden, including the 'one-in, one-out' rule, for methodological reasons. The Commission stuck to this position up until the announcement by President von der Leyen in December 2019.

Evaluation

The fact that the research team was paid by the German government to produce a study aimed at the European Commission throws serious doubt from the very outset on the study's premises, development and conclusions. Three reasons come to mind:

- it is highly unusual for a member state to interfere to such an extent in the management of the European Union. It should be recalled that all the delegations, including the Commission, were invited to Berlin for the presentation of the study and that this received official support from the Croatian presidency of the EU;
- one's perplexity is only increased by the fact that commission given to the authors of the study was not so much to explore the potential of 'one-in, one-out' as to champion its merits, among other things in the perspective of the publication of the Commission Conclusion on the 'one-in, one-out' method, which will probably be adopted in autumn 2020;
- the fact that the 'one-in, one-out' method and the related Commission Conclusion will be handled under the German Council presidency, from 1 July to 31 December 2020, gives this report a particular aura and importance.

Most astonishing of all perhaps is the fact that Andrea Renda, the report's principal author, has been well known, until recently, for his bold positions ... in favour of the benefits of regulation. This is confirmed by a whole series of publications, above all *Assessing the costs and benefits of regulation* (2013).

34. European Commission (2017).

2.3 A radical change in governance

2.3.1 Main characteristics of 'one-in, one-out'» (OIOO)

The authors of the report define 'one-in, one-out' in ten points:

1. The principle would take the form 'one-in, one-out' (OIOO) rather than 'one-in, n -out' (OINO), where n is two or more.
2. 'One-in, one-out' would cover all direct compliance costs,³⁵ including administrative burdens (see table on p. 4).
3. All costs newly introduced into EU regulation ('ins') would count ('ideally') as necessary and would replace unnecessary costs of existing regulation ('outs').
4. The system would apply to both businesses and citizens. Over time, public administrations would also be covered.
5. The system would authorise the 'banking' of part of the cost reductions achieved. In case of failure to achieve the planned reductions during a given year, the reductions to be achieved would then be passed onto the following year.
6. Recurrent costs would be covered, but not one-off costs.
7. The system would not, in principle, allow for the trading of burden reductions between different policy domains because that may lead to a confusion between regulatory costs and benefits.
8. The 'one-in, one-out' system would not permit exemptions except in exceptional circumstances. In other words, all EU policies would be affected, including, for example, climate policy.
9. The 'one-in, one-out' system would require oversight on the part of the Regulatory Scrutiny Board (RSB).
10. The system would be supervised and coordinated by the Commission's Secretariat General, in particular regarding the development and updating of a 'heat map', designed by Andrea Renda to make it easier to identify 'low hanging fruit'.

2.3.2 Towards the creation of a 'heat map'

A twofold option

For those who instigated the study, compensation between necessary and unnecessary costs would take a twofold form, depending on the circumstances:

- to reduce the number of regulations (mathematical method);
- to reduce the volume of regulatory costs (cost-based approach).³⁶

³⁵. To recall, basic compliance costs include the costs of implementation, the costs of direct labour and general expenses.

³⁶. The research team has a clear preference for this second route.

The researchers clearly favour a cost-based approach: reducing the volume of regulatory costs rather than the number of regulations.

The authors also advocate that ‘one-in, one-out’ be extended to compliance costs and not confined to administrative burdens, and without exceptions, whether in emergency situations or for certain policies (social policy, employment policy or climate policy, for example).

Phased introduction

The report proposes the phased implementation of the system at the European level, in combination with programmes for reducing burdens that would make it easier to identify unnecessary burdens (‘outs’).

Two stages are distinguished:

- a set-up phase; and
- the functioning of the method in yearly cycles.

In the starting phase, the Commission would launch a preliminary study tasked with identifying burdens destined for elimination (‘EU law bashing’) and would conduct a survey (‘life events’) of stakeholders to flush out possible other targets.

The results would be handled and presented in the form of a ‘heat map’, such as the most sensitive policy domains among which unnecessary costs have been identified for reduction or elimination.

This ‘heat map’ would be subject to consultation with members of the Fit for the Future platform, then converted into ‘burden reduction plans’ for each EU policy area and for each Directorate General (DG).

A system for ‘banking’ and ‘trading’ unnecessary costs

Compensation would not be immediate, but take place over the course of a year. Reductions in unnecessary compliance costs (‘outs’) that exceed the requisite level of compensation would be ‘put in reserve’ (‘banked’) and could be deferred to later years.

In exceptional cases, the ‘ins’ arising from a policy area could be compensated by reducing unnecessary costs in a different policy area.

The authors estimate, however, that full exemptions of policy areas (climate policy, for example) would not be justified.

An integrated approach to the Commission’s work programme

This system is intended to be relatively adaptable, according to the research team. Each euro of regulatory costs that is introduced would not necessarily be

matched by the reduction of a euro of regulatory costs. The revision of a particular legislative act may be proposed rather than its elimination.

The heat map would be updated every year. The annual survey of burdens would also review the results obtained in each policy area by focusing on certain measures (simplification, digitalisation and so on). This would indicate what could be 'banked' (or added to the identified target) over the course of the subsequent year.

2.3.3 Adaptation of the current policy cycle in a manner favourable to stakeholders

The 'one-in, one-out' system would give rise to plenty of adjustments of the current policy cycle, such as:

- a specific module on costs would be added to the twelve-week consultation of the 'stakeholders' on the initial impact assessments, as well as to the eight-week consultation on the Commission's finalised proposal;
- a new section devoted to the 'one-in, one-out' rule in the ex ante impact assessment, prior to any regulatory initiative, would be provided for, in which new 'necessary' costs ('ins') would be calculated, and unnecessary costs to be eliminated ('outs') would be identified by means of the heat map;
- the Commission would issue a warning to co-legislators (the Council and the Parliament) if their respective amendments would lead to new costs, not recognised in the initial impact assessment or making it impossible to achieve the anticipated reduction of unnecessary costs;
- during the implementation phase of 'one-in, one-out' stakeholders' feedback on the effective reduction of unnecessary costs would be carried out by means of the applications 'Lighten the Load' and 'Have Your Say', as well as the 'Fit for the Future' platform;
- possible new 'ins' would be identified in the ex post assessment. The heat map and the Commission's annual work programme for the following year would adjusted correspondingly.

2.3.4 Strengthening the role and independence of the Regulatory Scrutiny Board (RSB)

As we have seen, the RSB is an independent body of the Commission which advises the College. It provides quality assurance and examines all impact assessment projects, as well as important evaluations and fitness checks on legislation currently in force; it also provides advice and recommendations on them.

The Committee is chaired by a high-ranking official of the Commission and has six members:

- three high-ranking officials from the Commission (Veronica Gaffey, Mona Björklund and Bernard Naudts);
- three experts recruited from outside the Commission (Nils Björkstén, Andreas Kopp and one other, whose appointment is still in process).

Without referring to any impact assessment the authors propose far-reaching reform of the SRC:

- it would be freed from the supervision of the Commission and become totally independent;
- its tasks should not be confined to reviewing Commission impact assessments, but should be extended to other aspects of the legislative cycle, such as substantive amendments by the co-legislators (the Council and the Parliament);
- its secretariat should henceforth be strengthened in financial and human resource terms to enable it to carry out its new missions. The fact is that Germany would like to transform the SRC into a German-style ‘*Normenkontrolrat*’,³⁷ which would oversee the EU executive.

2.3.5 Members of the platform Fit for the Future in charge?

The REFIT platform, which became ‘Fit for the Future’ on 11 May 2020, is a body that brings together, at regular intervals, the Commission, national authorities and stakeholders for the purpose of reviewing, at the proposal of the Commission, all suggestions relevant to improving European legislation.

Chaired between 2014 and 2019 by Frans Timmermans, then first vice president of the Juncker Commission, and charged with improving regulation, interinstitutional relations, the rule of law and the Charter of Fundamental Rights, the platform Fit for the Future is now chaired by Maroš Šefčovič, vice president in charge of interinstitutional relations and foresight.

The Intergovernmental Reflection Group comprises 27 high-level experts nominated by each member state.

The Stakeholders’ Reflection Group comprises 19 members, coming from the private sector, the social partners, civil society, the European Economic and Social Committee and the Committee of the Regions. Its representativeness is more balanced than was previously the case, both at the political level and at the level of gender equality (10 men and 9 women).

The authors of the report make this two-headed body, composed of 47 members from a wide range of backgrounds and chaired by the Commission, into a major player in the implementation of ‘one-in, one-out’.

³⁷ In September 2006, the *Normenkontrolrat* (NKR) was designated an independent body, tasked with helping Germany’s federal government to implement its legislative programme and to act in an advisory role, even proposing certain reforms and encouraging cost savings.

3. Critical assessment of the OIOO report

3.1 The positions of the member states

The final version of the report was published, unexpectedly, on 5 December 2019, at a presentation seminar in Berlin. The member states had not been informed in advance and had received no feedback on the comments they had submitted on the intermediate version of the document. Various countries straightaway detected errors or approximations concerning the description of their functioning or the data that had been collected.

The authors claim to base their recommendations in favour of implementing 'one-in, one-out' at the level of the European Commission on the experiences of member states that supposedly already apply regulatory compensation, on the activities of the OECD and on findings of the Juncker Commission. In Table 2, based on the information contained in the CEPS report, we provide an overview of the positions of the 27 member states, which appear more nuanced than the research team would have us believe.

Table 2 The member states in relation to the OIOO rule and the quantitative reduction approach

Country	Year	Position
Austria	2019	No specific target for its administrative or compliance costs. The objective is to contain the number of new regulations, as well as the corresponding costs.
Belgium	2019	No specific target for its administrative or compliance costs, but Flanders has made commitments to reduce the administrative and regulatory burden for the period 2019–2024.
Bulgaria	2018	No specific target, but a package of 1,528 measures aimed at improving administrative services for services and businesses.
Croatia	2017–2019	An administrative reduction target of 21% has been set for the end of 2021.
Cyprus	2019	No specific reduction target in terms of numerical quantification.
Czech Republic	2019	No reduction target for regulatory costs. Concrete measures are defined instead of aiming for percentage values.
Denmark	2019	No reduction targets or OIOO rule anymore. The focus is on achieving simplification for business and citizens by promoting digital-by-default and future-proof regulation.
Estonia	2019	After the experience of zero-bureaucracy until December 2018, follow-up activities are currently under way through innovative digital solutions, the once-only principle or the real-time conception.

Country	Year	Position
Finland	2018–2019	No specific reduction target but a project launched by the Prime Minister's Office on freezing regulatory costs incurred by businesses (Tuominen-Thuesen <i>et al.</i> 2018). A pilot model aims to monitor all types of regulatory burdens.
France	2017	'One-in, two-out' rule: any new regulatory standard must be compensated for by the deletion or, where this proves impossible, the simplification of at least two existing standards. (Circular on controlling the flow and impact of regulations (Cf. JORF No. 0175 of 28.07.2017).
Germany	2015–2019	'One-in, one-out' rule on regulatory costs, including compliance and enforcement, coupled with life-events method.
Greece	2019	No burden reduction target, but the prime minister's office can set an annual target for reduction or rationalization of legislation (Cf. new Law on the 'Executive State' – 4622/2019).
Hungary	2019	An OIOO principle was introduced by government decree in March 2019, focusing on administrative burdens and substantive compliance costs.
Ireland	2019	No burden reduction target, but consideration for reducing burdens on business, coupled with the need to protect consumers, employees, the environment, health, safety, etc.
Italy	2019	The OIOO rule applies to both primary and secondary legislation, but limited to administrative burdens. Each department chooses regulations to simplify or to repeal.
Latvia	2019	An OIOO rule was introduced in November 2019 under the aegis of 'zero bureaucracy'. The new system is focused on businesses, and covers both administrative burdens and substantive compliance costs.
Lithuania	2019	Operates a 'zero-growth' policy, which equates to a OIOO rule.
Luxembourg	2019	No burden reduction target.
Malta	2018–2019	No burden reduction target but a policy commitment to reduce bureaucracy by a further 30% during the current legislature.
The Netherlands	2019	No burden reduction target but a strong 'disciplining effect' on the administration and greater awareness regarding regulatory policy. The Netherlands uses a compliance cost reduction target for businesses of EUR 0.5 billion per year over a five-year period without an explicit 'one-in, <i>n</i> -out' rule.
Poland	2018–2019	Burden reduction relies mainly on dedicated legislative instruments. The 'Constitution for Businesses' (2018) introduced an obligation for all ministries to evaluate adopted law that has an impact on business every year.
Portugal	2017–2019	The OIOO rule mentioned in 2014 under the <i>Simplificar</i> Programme has never been implemented in practice. The Unit for Regulatory Impact Assessment (UTAIL) assesses the impact of any new legislative act (administrative and compliance costs).
Romania	2019	No burden reduction target. The current strategy foresees the creation of an inventory of administrative burdens, but implementation is still ongoing.
Slovakia	2017–2019	Reduction targets on regulatory costs and administrative burdens experienced as positive.
Slovenia	2016–2019	Reduction targets on regulatory costs and administrative burdens experienced as positive.
Spain	2019	Some reforms have been proposed to simplify the normative framework for business, including the adoption of a OIOO rule. The overall experience of the Spanish government with OIOO is reportedly positive.

Country	Year	Position
Sweden	2019	No nominal, percentage target for reducing regulatory costs or OIOO rule. It has adopted a net target, however, based on the goal that business administrative costs be lower in the year 2020 compared with 2012.

Source: Hahn and Renda (2017); CEPS (2019); OECD (2019)

Evaluation

It is no easy matter to draw lessons that are really relevant with regard to the benefits of 'one-in, one-out' from the somewhat skewed picture presented by the authors of the report.

Certainly, in 2020 six member states are applying 'one-in, one-out' (Germany, Hungary, Italy, Latvia, Lithuania and Spain), albeit in different ways.³⁸ Some, such as Germany, have been applying this approach – with some apparent success – for several years, while others (Hungary and Spain) have only just opted for it. France, which laid down the 'one-in, two-out' principle in a circular in July 2017, applies the method at national level, but rather cautiously.³⁹ Otherwise, France has declared itself somewhat reluctant to transpose 'one-in, one-out' at the EU level.⁴⁰

Seven other countries (the Netherlands, Austria, Sweden, Croatia, Slovakia, Slovenia and Malta) to some extent apply a quantitative reduction of regulatory costs and administrative burdens.

The Nordic states (especially Denmark and Estonia) favour innovative digital solutions (digital-by-default and future proof regulation).⁴¹

On top of this, what is initially striking above all is the heterogeneity of national circumstances and the conditions in which the different approaches are applied.

It also repeatedly arises, in a number of accounts, that – in the final analysis – the expected results are not forthcoming. Thus the Netherlands recognises that 'the main criticism [of the burden reduction target – *author's remark*] was the lack of noticeability of the reduction achieved. Besides, energy in the

³⁸. Thus Italy and Lithuania apply OIOO only in relation to administrative burdens.

³⁹. France has imposed two restrictions on the OIOO principle: on one hand, the rule pertains to the removal, but also, where this has proved to be impossible, the simplification of at least two existing rules and, on the other hand, these deletions or simplifications must be qualitatively at the equivalent level and not merely to meet a quantitative target.

⁴⁰. It is in this sense that Agnès Pannier-Runacher, secretary of state to the Minister of the Economy and Finance Bruno Le Maire, spoke in the debate on the EU Council Conclusions on better regulation at the Competitiveness Council on 27 February 2020.

⁴¹. Thus in November 2019 the Danish Agency for Digitisation and the Danish Business Authority invited the 27 EU delegations to a seminar on the subject.

administration was more focussed on reaching the target rather than making a real, noticeable difference for businesses with measures that matter. It became a “book-keeping exercise”, with measures that looked good on paper but were not necessarily noticed by business and recognized as important’.⁴²

The Flemish government, which has experimented with ‘one-in, one-out’, made an equivalent statement in 2014: ‘The too small number of dossiers in which the impact on administrative burdens was being measured, the low quality of the measurements, the lack of perceived impact by the target groups (...)’.⁴³

These two testimonies explain, in part, why governments have changed or adapted their approach.

3.2 The report's numerous imperfections

3.2.1 A lack of methodological rigour

Non-transposability of national experiences to the Community level

The report starts out from a false premise: the belief that useful lessons can be inferred from national circumstances that can then be transposed to the EU level.

As we have seen in Section 1, under the principle of conferral, the EU can take the initiative only within the area of competences conferred on it by the Treaty, while the member states are able to operate in a much larger field of possibilities, harmonising certain provisions, centralising certain mechanisms and so on, which the EU is not permitted to do.

As a consequence, the study is confined to a summary comparison of national approaches in relation to quantitative targets for cutting legislation. The study juxtaposes figures and plans, although it was supposed to be inspired by national good practice.

Furthermore, ‘one-in, one-out’ is not implemented in the abovementioned countries in the same ways.

There has been no serious reflection on the results generated by this method in the countries in which it has been tried.

Finally, the text says very little about the feasibility of such targets at the EU level with regard to the content of the proposals or the method of realising them. Indeed, there is a substantial difference between applying the ‘one-in,

42. CEPS (2019: 77).

43. Ibid., pp. 62–63.

one-out' system at member state level and applying it at EU level. The latter is much more difficult because the EU can legislate only under certain restrictive conditions.⁴⁴

Moreover, to be credible, at a minimum, the European institutions and the member states would have had to make concurrent commitments. As it is, the authors propose to apply the method to the EU's legal order without the member states committing simultaneously to do the same and without the formalization of a measure of general application, whether political or legal, that forges a common commitment.

The new approach lacks systematic foundations

In order to provide 'one-in, one-out' with at least some prospect of success, it would have been necessary, at a minimum, to establish a point of departure and a baseline measurement.⁴⁵ Only a point of comparison would make it possible to judge the potential impact of reductions of burdens or costs. According to a well established doctrine, human and financial resources (use of pilots and so on) should be devoted to assessing the potential effectiveness of decisions taken (Greenstone 2009).

The authors believe, however, that it is unlikely that burdens could be accurately quantified, but that an overall estimate of unnecessary costs would be sufficient to lay down targets for reducing burdens. They also take the view that it would not be necessary to set a reference point in relation to which reduction targets could be set, on the basis that it would be difficult, protracted and costly.

These two premises – no preliminary quantification and no setting of a reference point – appear contradictory and reveal the study's lack of systematic foundations, especially as regards the aim, repeated over and over again, to stick to evidence-based policy and hard data.

Another substantial criticism that one could well pose the authors concerns the total failure to demonstrate that the Commission's current system, based on a case-by-case analysis of the *acquis communautaire*, is ineffective, dysfunctional or outmoded.

The only argument raised to justify recourse to regulatory compensation is that the 'one-in, one-out' system is supposed to have delivered convincing results ... in Germany, which just happens to be the country that commissioned the report.

44. Thus, 'under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States' (Article 5, paragraph 2 TEU).

45. Sweden has therefore decided on a net reduction of administrative burdens for 2020 based on 2012 figures.

The fact that Denmark, the Netherlands or Portugal have abandoned ‘one-in, one-out’ or have distanced themselves from the compensation approach is ignored.

Finally, the report is not accompanied by any impact assessment worthy of the name, despite the fact that ‘one-in, one-out’ would substantially affect institutional balance, EU policies and indeed the very foundations of the European Union.

Confusion of terms

The authors fail to distinguish between compliance costs, direct or indirect costs and administrative burdens, leaving aside the question of the benefits⁴⁶ that fees or taxes can bring, such as eliciting desirable behaviour. The same can be said about qualitative methods of impact assessment.

‘One-in, one-out’ is presented as a ‘principle’, a ‘system’ and a ‘rule’. But ‘one-in, one-out’ is not a ‘principle’ because this implies a fundamental premise or a premise that establishes a system. It is not a matter of a system because that would imply that ‘one-in, one-out’ forms part of a much bigger and coherent set of operating rules that encompass other dimensions of governance.

‘One-in, one-out’ appears rather to be a ‘bookkeeping device’ which assumes that regulation should generate the lowest possible costs and burdens for stakeholders, which basically means ‘businesses’.

Seeking out unnecessary costs is no Eldorado

The ‘one-in, one-out’ approach finds it difficult to specify how cutting unnecessary burdens will in fact improve things for businesses and for society in general.

Even though the Commission mentioned, in its 2018 report on the administrative burden,⁴⁷ significant economies achieved and costs avoided,⁴⁸ they appear to be quite limited and do not translate into actual cash. On the contrary, in the consultations that the Commission holds with stakeholders the latter regularly complain of the lack of impact of the Better Lawmaking agenda.

Furthermore, the Commission has been committed to a programme of reducing unnecessary costs since 2012. The dead wood, both regulatory and

46. A burden imposed on a company may create a benefit for the planet (emissions standards), society (job creation) or consumers (labelling). In fact, this criticism is also directed towards the authors by Daniel Trnka, Regulatory Police Division (OECD), 10.01.2020.

47. The European Union’s efforts to simplify legislation, 2018 Annual Burden Survey.

48. Thus the proposal for a directive amending directive (EU) 2017/1132 as regards the use of digital tools and processes in company law, COM(2018) 239 final of 25.4.2018 proclaims savings estimated at between 42 and 84 billion euros because of online registration.

administrative, has already been picked up. There isn't an infinite stock of unnecessary costs or unjustified burdens. There are three reasons for this:

- for nine years now, the Commission has been regularly and comprehensively screening the *acquis communautaire*, identifying unnecessary burdens and costs;
- it carries out systematic impact assessments of all its substantial regulatory initiatives with minute examinations of unjustified costs and burdens;
- finally, the Commission carries out ex post analyses of the implementation and enforcement of legislation in the member states. Such studies reveal the existence of unnecessary burdens and costs, which the Commission draws on when revising the said legislative item.

If one eliminates redundant or obsolete costs from the outset without any discussion about the need to do so, what criteria are to be used to decide whether a cost is 'unnecessary'? At what point and above what level is it to be determined that a cost is too onerous? And who, in the final analysis, gets to decide?

The nature of a burden's public utility or its lack of economic benefit is a tricky political question.⁴⁹ One example are discussions about proposals to regulate online platforms.⁵⁰

In preparatory discussions at the level of the Council, Belgium was keen to ensure the consistency of a regulation laying down new standards of transparency and fairness, as well as its uniform enforcement.

During the discussion Belgium proposed to add an Article 15 that invites 'each member state to ensure the adequate and effective enforcement of the regulation', and specifies that 'the member states shall determine the rules establishing penalties applicable in the event of infringements of the present regulation and ensuring its implementation. The envisaged penalties are effective, proportionate and dissuasive'.

This demand, eventually accepted by the Permanent Representatives Committee (Coreper), adds a burden on public authorities, namely to devote adequate human and financial resources to ensure implementation of the said regulation. It also adds a possible sanction on businesses in case of an infringement. Although certain member states regard this as a disproportionate – and so unnecessary – burden it was nevertheless adopted to ensure the effective implementation of the regulation.

49. On this topic see Supiot (2015).

50. Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

Another example is the introduction of an EU kerosene tax on aviation. It will be regarded as a detrimental – and thus unnecessary – burden and cost on airlines (loss of competitiveness) and certain categories of passenger (increased ticket prices), while public authorities and civil society will welcome it as a means of combatting global heating.

In other words, how the cost of a regulatory or administrative burden is perceived differs depending on whether it is supported by business, the public authorities or society as a whole.

In the case of a business a cost can represent lower earnings, a loss of competitiveness and a possible constraint on development. In the case of society as a whole, certain costs are regarded as a long-term investment to protect the general interest: social, environmental, consumer or employment protection, among other things.

By casting doubt on what constitutes a necessary cost or an unnecessary burden the authors of the report distort the debate.

3.2.2 Practical difficulties

A disturbing lack of concrete examples

In order to convince us of the well-foundedness and merits of the ‘one-in, one-out’ approach, the research team should have put forward pertinent examples allowing us to assess its rationale. Such specific instances are all the more important because the Commission would like to make it one of the pillars of its 2020–2024 work programme.

In this respect the report fails to provide anything concrete to illustrate the types of unnecessary or onerous cost that are to be avoided. Questioned at their oral presentation,⁵¹ Andrea Renda and Business Europe only managed to come up with a few, pretty unconvincing references.

For example, Andrea Renda mentioned the partial overlap of the general data protection regulation (GDPR)⁵² and European standards.⁵³

51. At the EU Council’s Better Lawmaking working group, 31 January 2020.

52. Cf. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

53. European standards are adopted by the following three European standardisation bodies: the European Committee for Standardisation (CEN), the European Committee for Electrotechnical Standardisation (CENELEC) and the European Telecommunications Standards Institute (ETSI).

For its part, Business Europe gave the example of eco-design:⁵⁴ the restriction of certain kinds of chemical products should not be done by means of new legislation – at the risk of creating legal uncertainty – but within the framework of an evaluation of existing processes (the REACH regulations and the Restriction of Hazardous Substances directive in this instance).

These two examples scarcely advertise the merits of 'one-in, one-out'.

Costs without benefits

The report is limited to unnecessary burdens and costs without taking into consideration the 'useful' advantages or benefits that would also gain from being evaluated and compared in relation to the burdens they give rise to.

While the intention of simplifying the rules and rendering them less onerous is easily understood, the authors' intention is not clear. Is it to reduce or eliminate existing items of legislation (published in the Official Journal of the EU and implemented at national level), to eliminate proposals that are still pending or that have been blocked for a number of years?⁵⁵ If that was the case, could a proposal that has been blocked by the co-legislators or is pending their approval constitute a simplification measure, given that it does not exist in law and has no legal effects?

The question of the costs and burdens that should be eliminated remains uncertain. Would the whole law or only the most costly or burdensome part be affected? Should the amendment or elimination of one or several provisions of the same act be considered or recorded as one elimination or as several? Will it be necessary to achieve the same estimated amount of savings between the introduction of the burden 'in' and the elimination of the burden 'out'?

54. In December 2018, under the eco-design directive, the Commission and the Ecodesign and Energy Labelling Regulatory Committee introduced a ban on a group of chemical products (halogenated flame retardants) by means of an implementing act establishing new ecodesign requirements for electronic displays. In doing so, the Commission circumvented the relevant procedures under the Registration, Evaluation, Authorisation and Restriction of Chemical Substances (REACH) regulation and the directive on the restriction of the use of certain hazardous substances in electrical and electronic equipment (RoHS).

55. Cases in point would include the Proposal for a regulation setting out the conditions and procedure by which the Commission may request undertakings and associations of undertakings to provide information in relation to the internal market and related areas, COM(2017) 257 final of 2 May 2017; the Proposal for a directive of the European Parliament and of the Council on the enforcement of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorisation schemes and requirements related to services, and amending Directive 2006/123/EC; the Proposal for a directive of the European Parliament and of the Council on the legal and operational framework of the European services e-card introduced by regulation ... [ESC Regulation] (COM(2016) 823 final), as well as a Proposal for a regulation of the European Parliament and of the Council introducing a European services e-card and related administrative facilities, COM(2016) 824 final.

'Offsetting is not contextual'

The authors start out from the notion that 'one-in, one-out' should be achieved within the policies of the EU itself. Consequently, a whole series of practical questions arise: will what is to be eliminated be at the same level of importance? How will different kinds of burdens be quantified (reporting, fees, taxes and so on)?

The risk is that this will give rise to a somewhat perverse system. On one hand, the cost of burdens and of existing costs will have to be measured objectively in real time, along with new and/or additional burdens, which will require ongoing impact assessments and a weighted calculation between old and new burdens in order to determine the net burden.

On the other hand, the Commission will be tempted to identify a 'reserve' of unnecessary burdens to enable it, subsequently, to compensate for the introduction of 'useful' or 'necessary' burdens. Instead of reducing unnecessary costs in one go, the risk is that the decision will be postponed to make it possible to levy 'one-in, one-out' compensation for political reasons.

A number of other undesirable effects will arise from setting quantitative targets for reducing burdens:

- compromising the Commission's capacity to discharge its political responsibilities by compelling it to come up with a flattering audit;
- causing delays because of the need to achieve savings in the *acquis communautaire*.

In summary, undoubtedly one of the most scathing criticisms that can be levelled at the backers of this approach is that it would entail the extreme bureaucratisation of the compensation system.

3.2.3 The difficulty of applying an approach to cost reduction in relation to the EU's institutional and decision-making process

The research team appears to consider its approach to be somehow detached from the rules of political compromise, despite the fact that the latter is part and parcel of the formation of the *acquis communautaire*.

Undoubtedly this is one of the regrets one would be justified in feeling in relation to the authors, namely the fact that they did not more fully take into account that every political compromise generates additional costs and burdens for the very reason that it is the outcome of a contradictory balance of power (employers versus employees, consumers versus business and so on).

How the three institutions work

1. At the level of the EU institutions

Within the framework of legislative procedure (Art. 294 TFEU) the Council and the Parliament are free to table amendments (follow-up reports, labelling and so on) that add burdens and costs. While the European Parliament uses an impact assessment system,⁵⁶ the Council still lacks one of its own.

Most costs, whether regulatory or administrative, are generated at three particular points in the life of the Union:

- at the time of the relevant negotiations in the Parliament (finding an agreement between political groups) and in the Council (finding an agreement between the 27 member states at the level of Coreper);
- at the time of the 'trilogue' between Parliament and Council (first reading, second reading and conciliation procedure);
- when transposing the regulatory act in the 27 member states of the European Union.

Although the origin of the costs is clearly identified it is often not easy to get to grips with these additional cost structures because each institution, each member state and each political group needs, for reasons of their own (partisan politics, domestic reasons), to leave their mark or to convey their influence on the regulatory act. An economic impact assessment may turn out to be relatively ineffectual when political motives are in play.

The study does not tell us a great deal about how the Parliament and the Council function, which demonstrates, incidentally, a lack of understanding of the EU's decision-making process. The Parliament and the Council introduce numerous changes in the form of cumulative amendments in a system of give and take, which is sometimes invaluable for reaching agreement between the co-legislators to the great satisfaction of the EU's rotating presidency, whose aim is to wrap up as many cases as possible during its mandate. Whether at the level of Coreper or within the framework of the Commission/Parliament/Council trilogue, experienced observers know that compromises are made in order to reach agreement within a reasonable time. What will the situation be with regard to accounting for further burdens added during this phase and what to do about them? The authors are happy to pass on responsibility to the Commission, whose task it is to make the co-legislators aware of the risk to which certain of their amendments might give rise. Political compromises have their logic of which reason knows nothing ... (as Pascal almost said).

More often than not, if not always, the EU's legislative *acquis* is based on fragile political compromises, sometimes painful, negotiated, at the end of the day,

⁵⁶ The European Parliamentary Research Service (EPRS) evaluates the quality of the European Commission's impact assessments.

between institutions. What happens when a legislative branch, perhaps a significant minority of one of the two branches, considers it inappropriate to delete an act or part of an act (sometimes the most symbolic part) on the ground that reducing the related regulatory burden does not constitute sufficient reason to justify its removal?

There is already a possibility for the Commission to intervene when additional costly amendments are introduced, which were not anticipated in the impact assessment, above all at the level of the relevant Council working group. Do the authors favour henceforth formalising this procedure by authorising a system of yellow and red cards on the part of the Commission? In that case, what would the co-legislators' leeway be? If for every amendment a financial statement and independent impact assessment was attached would there not be a risk not only of complicating the process and of delaying it considerably, but also of making it difficult to achieve any political agreement on legislative measures? The danger would then be to put the decision to submit an amendment on the shoulders of consultants tasked with carrying out impact assessments. In that case, politics would give way to a form of privatised decision-making ...

2. At national level

Within the framework of transposition into national law of a directive that would bring about minimal harmonisation a member state is permitted to adopt complementary measures in line with the principles of proportionality and subsidiarity. This therefore covers social policy (Title X TFEU), public health (Art. 168 TFEU), consumer protection (Art. 169 TFEU) and environmental protection (Title XX TFEU). By contrast, this option is not available in the case of maximum harmonisation.

By stigmatising member states for an alleged propensity to 'overregulate', the authors of the report ignore the options provided to the member states by the Treaty on European Union to strengthen a legislative act in cases in which the lowest common denominator would otherwise be imposed.

3.2.4 Burdensome bureaucratisation of instruments and procedures

If they were applied the two reforms put forward by the research team would undermine the institutional system by weakening the role of the Commission, which would thus find itself under the control of the Regulatory Scrutiny Board (RSB) and swept up in a maelstrom of stakeholders, as would the traditional decision-making process.

The Regulatory Scrutiny Board in the hands of independent experts

With no impact assessment to support their view the authors believe that the secretariat of the RSB, composed of six members, should assert an enhanced independence in relation to the Commission and have its staffing increased.

The RSB, which would be made up solely of independent experts,⁵⁷ if the authors had their way, would thus become a kind of counter-force that would de facto arrogate to itself the power to stymie the Commission's right of initiative by systematically rejecting every proposal that it judged too costly or too 'burdensome'.⁵⁸

But the engagement letters that RSB members receive already release them from any responsibility and any order from the Commission. They acknowledge that they shall have all the scope they need to carry out their tasks.

By wanting to cut any ties between the members of the RSB and the Commission, whether they be financial or statutory, the authors of the report, paradoxically, take it upon themselves to incur substantial costs for hiring new staff, which the authors do not quantify and whose origin they do not specify.

This call to beef up the RSB comes on top of the multiplication of new life events surveys, without the existing procedures ('lighten the load', for example) being eliminated. Thus new procedures and new costs are added in pursuit of their reduction.

Members of the platform Fit for the Future in charge?

According to the authors of the report, the platform would play an enhanced role and assume primary responsibility in steering 'one-in, one-out'.

Given that this double-headed forum, 47 members strong, meets four times a year and stems from member states, the business world and civil society, one has every right to ask whether this is a good idea.

First of all, many observers, including some members of the platform, acknowledge how poorly the forum functions, torn asunder between the respective rationales of the member states, the Commission and stakeholders.

Furthermore,⁵⁹ the lack of conclusive results from the platform under the chairmanship of Frans Timmermans between 2014 and 2019, and the lack of technical expertise on the part of the members of this forum for assessing such

57. It should be noted that the myth of the high level independent expert – statistically a 48 year-old man – is persistent and still deeply rooted in people's minds.

58. This notion of burdensomeness is regularly invoked in the cause of eliminating particular legislative proposals or calling for the reform of certain existing items of legislation, such as the REACH regulation.

59. See Van den Abeele (2019).

diverse dossiers, ranging from a regulation on fishing to agricultural legislation, cast doubt on the body's capacity to steer the system of regulatory compensation.

Is this why the Commission's decision to set up the Fit for the Future platform does not concede any responsibility to the latter regarding 'one-in, one-out' and confers only a subsidiary role on this new body in relation to the secretariat general?

3.2.5 The implicit biases of the study

The overvaluation of the stakeholders

The authors believe that the stakeholders should be more closely involved in the decision-making process and that they should give their opinions on the costs of regulation: 'without involving the stakeholders the European Union loses legitimacy', stated Andrea Renda when he appeared before the Council working group Better Lawmaking in November 2019. This remark is noteworthy.

The Commission boasts of the OECD studies that praise the consultation system it launched, without really analysing it. However,

- consultations are often limited to the biggest member states by population;
- surveys are oriented and often drafted in binary form, offering little scope for a more nuanced evaluation by the respondents.

Scrutiny of the responses is done in a standardised way. The upshot generally is a statistical treatment of the results, which does not permit intelligent and nuanced use of the responses or weighting of the results of the consultation.⁶⁰

The stakeholders' expertise is called upon, but the study does not specify what that includes. The interference of the stakeholders at every stage of the process raises questions all the more because the classification of 'stakeholders' covers many different rationales and actors.

In the proposed categorisation of stakeholders three groups can be identified in terms of the extent to which their policy objectives and the strategies that drive them diverge (sometimes considerably):

- internal stakeholders (employers, shareholders, senior staff and so on) and external stakeholders (consumers, employees, social security recipients);

60. On this point, see the opinion of the European Economic and Social Committee (2019).

- strategic stakeholders (who are in a position to influence the organisation) and moral stakeholders (who are affected by the organisation);
- voluntary stakeholders (who interact with the organisation voluntarily) and involuntary stakeholders (who do not).

Consequently, it would be useful to know what category of stakeholders the authors are referring to in pursuit of interactions. But it is already apparent that not all stakeholders are equal in terms of their expertise and the information to which they have access and therefore in terms of the influence they are able to exert on the European process. It is therefore a pity that the social partners' institutional consultation via the European Economic and Social Committee and the Committee of the Regions in particular does not receive as much attention.

Making consultation more burdensome

Under the pretext of rationalisation the report adds specific modules on costs to the current consultation process.

Adding the question of costs to a consultation document will inevitably lead the stakeholders to focus their attention on the financial impact of the measure under examination. There is reason to fear that this addition could be used as a pretext for rejecting any kind of further harmonisation.

Including a specific module solely on the costs and not the possible expected benefits of a regulatory provision skews the consultation. Furthermore, how will this 'specific module' be organised, given the extreme diversity of the stakeholders? What will be the proposed approach to examining costs? What it involve popularising the 'standard cost model', whose subjective and somewhat unscientific nature we have already emphasised?

In brief, the role that the authors want to bestow on the stakeholders appears disproportionate in relation to that of the co-legislators because it opens up the way to every kind of partisan and sectoral demand on the part of those who would prefer to evade the common effort to protect their particular interests.

3.2.6 A politically motivated agenda

In the guise of modernisation the CEPS study puts European legislation in the dock, accusing it of generating intolerable costs from which business must be freed.

The authors thus put the economic performance of regulation as principal priority. To be sure, this aspiration has regularly been identified as an important goal by the European Council. It is, moreover, one of the main priorities signed off on by business.

But as we have already seen, the functioning of 'one-in, one-out' should also be seen in terms of other dimensions (social, environmental, territorial,

climatic and so on). This is the meaning of Art. 3 TFEU and of the Interinstitutional Agreement on Better Lawmaking of 2016.⁶¹

Finally, the question of ‘one-in, one-out’ does not enjoy unanimous support within the Council. Hence the topic has never formally been put on the Council’s agenda and has never been discussed at the level of Coreper.

A choice of legislative priorities with political undertones

Separating the good from the bad in a legislative initiative at the level of an impact assessment, distinguishing between necessary costs that should be retained (‘ins’) and unnecessary costs that should be eliminated (‘outs’), is an important political challenge in itself.

To assume that this choice may affect multiple items of legislation in the same policy domain risks excessively ‘politicising’ the analysis at a very preliminary stage by giving certain units of the Commission the power to set themselves up against legal acts of other units in the same directorate general on the grounds that they would be too costly or burdensome.

Furthermore, this way of proceeding risks pre-empting the debate that should be held at the level of the co-legislators.

Finally, to demand that every burden ‘in’ be compensated by a burden ‘out’ risks creating congestion among legislative initiatives, which the College would then be unable to adopt because of the shortage of ‘out’ candidates.

A systematic attack on the EU acquis?

In the report, recourse to ‘one-in, one-out’ seems to be an element in a larger campaign, which assumes that regulation, because it generates costs, constitutes a hindrance to competition.

Implicitly, it has thus been suggested that one could perfectly well:

- settle for modes of governance that are more flexible (soft laws), non-binding and at low cost (voluntary agreements, codes of conduct, guidelines and so on);
- produce more legislation to deliver the same results or better, including making more use of the principle of subsidiarity or to digitalisation by default;
- substitute for the precautionary principle, deemed to be inherently cautious and slow, a principle of regulatory innovation, presented as proactive, dynamic and efficient.

61. Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission (2016).

The proposal is extremely disingenuous to the extent that it dangles efficiency gains, while the most significant costs are associated with 'non-Europe', because the European integration process has not been completed. In fact, large swathes of legislation remain to be created in financial services, company law, environmental and climate policy, and at the level of cybersecurity, to mention only some examples.

3.2.7 The latest developments with regard to 'one-in, one-out' at the level of the EU Council

Although the EU Council is a single legal entity it meets in ten different configurations, depending on the subject under discussion.⁶² The EU (Competitiveness) Council – and not the General Affairs Council – has a responsibility to deal with the issue of 'Better Lawmaking', even though it is a horizontal objective. This relative incongruity is owing to the fact that 'Better Regulation' has been seen, right from the start, as one of the subsidiary drivers of competitiveness.

Therefore the Competitiveness configuration of the Council regularly adopts Conclusions⁶³ when the European Commission publishes a Communication or an important report.⁶⁴

Strongly influenced by Germany, which assumes the rotating presidency of the Council from 1 July 2020 for six months, the Croatian presidency has proposed a number of Conclusions for adoption.⁶⁵

In this document, which is of a political nature and presents the member states' positions, the Council:

'RECALLS the commitment by the three institutions to promote the most efficient regulatory instruments, such as harmonisation and mutual recognition, in order to avoid overregulation and administrative burdens and fulfil the objectives of the Treaties (point 8);

62. General Affairs (CAG), Foreign Affairs (CAE), Economic and Financial Affairs (ECOFIN), Justice and Home Affairs (JAI), Agriculture and Fisheries (AGRIPECHE), Environment (ENVI), Internal Market, Industry and Research (COMPET), Transport, Telecommunications and Energy (TTE), Employment, Social Policy, Health and Consumer Affairs (EPSCO), Education, Youth, Culture and Sport (EJCS).

63. The EU Council negotiates and adopts, not only legal acts provided for in the Treaties, but also Conclusions, Resolutions and Declarations, which are not intended to produce legal effects. The Council makes use of these non-binding acts, generally adopted by unanimity, to express a political position or commitment on a subject related to the EU's areas of activity.

64. Cf. the Conclusions of the Council (Competitiveness) of December 2014, May 2016, November 2018 and November 2019.

65. Conclusions of the Council (Competitiveness) on Better Regulation 'Ensuring competitiveness and sustainable, inclusive growth', Document No. 6232/20 of 27.02.2020.

EMPHASISES that the “one in, one out” instrument should go hand in hand with a qualitative approach, which entails a close dialogue with stakeholders in order to make sure that the efforts to reduce burdens deliver solutions resulting in a noticeable difference for them, while not weakening the objectives pursued by the concerned legislation (point 9);

UNDERLINES the importance of developing further simplification and burden reduction measures in particularly burdensome areas, in cooperation with co-legislators and Member States (point 10);

ENCOURAGES the Commission to ensure, while developing the new “one in, one out” instrument at EU-level, that compliance costs and administrative burdens can be considered; ENCOURAGES the Commission to rely as much as possible on existing data and on its established Better Regulation tools to establish and operate such instrument avoiding any unnecessary burdens on Member States and stakeholders (point 11).’

Evaluation

Thanks to the efforts of three member states – Belgium, France and Luxembourg⁶⁶ – and the discrete support of the European Commission the Conclusions remained relatively moderate as regards ‘one-in, one-out’, to the chagrin of certain delegations – Germany, for a start – which would have preferred the Council to commit itself to this course more resolutely.

First of all – and this is undoubtedly the most important point – the abovementioned three member states emphasise the importance of prioritising the most effective regulatory instruments, such as harmonisation and mutual recognition, to avoid excessive regulation and administrative burdens. This is a sharp retort to those who want ‘soft law’⁶⁷ to take precedence over the legislative route.

Then they underline that the application of ‘one-in, one-out’ should go hand in hand with a qualitative approach. It’s an elegant way of recalling the benefits of regulation and the need to pay attention to the positive aspects of the method. It is also a limitation imposed on a purely mechanical, ‘cost-based’ approach.

It is also recalled that the application of ‘one-in, one-out’ must be subjected to a close dialogue with the stakeholders, specifically the social partners, ‘so that the objectives pursued by the relevant legislation are not weakened’. This is a third welcome moderation.

66. There three member states have entered a written declaration in the Council Minutes, in which they call on the Commission to consider the possible introduction of ‘one-in, one-out’ that would be cautious, progressive and phased, believing that this new instrument should respect the integrity of the *acquis communautaire*, would not be based on a mechanical principle of quantitative reduction and would be subject to constant evaluation (see Document 5964/20 of the Council of 21.02.2020).

67. The Anglo-Saxon term ‘soft law’ refers to a non-binding approach to legal rules.

Finally, the Council suggests that the Commission should take account, not only of administrative burdens, but equally of compliance costs in the application of its approach. Clearly this concerns the most sensitive aspect of its Conclusions, which, nonetheless, provide the executive with the necessary leeway to manage the rule 'one-in, one-out' by basing it on data and existing tools, so as not to revolutionise the Community method, and by avoiding all unnecessary burdens on the member states and stakeholders in order to avoid the two pitfalls that we have indicated in this article, namely, the bureaucratisation and technocratisation of Better Lawmaking.

4. Recommendations and proposals

Some proposals for improving the functioning of the European Union.

4.1 Breaking away from the fatal logic of cost-cutting at any price

Neoliberalism calls for the reduction of intervention by the state and the law in favour of corporate social responsibility.⁶⁸ Every regulation should be screened, weighed and justified in terms of its contribution to competitiveness.⁶⁹

We take the view, by contrast, that the point of departure should be the general interest, in order to protect our societies, safeguard democracy and ensure a solidarity-based system that works.

Climate disruption and the Covid-19 pandemic remind us that health, the quality of the environment and the protection system maintained by the state must be put at the top of the agenda and safeguarded vigorously.

4.2 Addressing the real obstacles

The issue of regulatory and administrative burdens is not, as far as we're concerned, the main source of the problems confronting the European Union, even though it's true that this view is widely shared.

Two factors in particular seem to us to be the most urgent concerns:

- the lack of integration in a whole series of policies, starting with fiscal, social, environmental, mobility and company law;
- regulatory competition and competitiveness between member states in the areas of taxation, employment and social protection, on one hand, and between third countries and the EU, on the other.

⁶⁸. See, in this regard, the work of Alain Supiot (2015) and Éric Van den Abeele (2019).

⁶⁹. See, in this regard, judgment of the Court of Justice of the European Union of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union vs Viking Line ABP and OÜ Viking Line Eesti*.

European regulation produces significant benefits by:

- harmonising 27 different sets of rules in a single EU set of rules, thus eliminating a number of legal, technical and administrative barriers between the member states;
- creating sustainable competitive conditions that provide companies with a level playing field and promote the general interest;
- protecting the interests of citizens, consumers, freelancers, employees and social benefit recipients;
- engaging in environmental and climate protection, as well as social and territorial cohesion.

4.3 Thinking in terms of net benefits

Administrative and regulatory burdens should be regarded in terms of a cost/benefit analysis, in which ultimately the benefit must be greater than the cost, whether it be a material or monetary benefit or an unquantifiable qualitative benefit.

Hence we have to think in terms of net benefits for citizens and businesses. We thus need to go beyond the debate on whether a cost is 'necessary' or 'unnecessary' and look instead at whether the overall costs to which an item of legislation gives rise serve the EU's objectives and the general interest.

4.4 Evaluation of what comes out of the legislative pipeline and sunset clause

It would be a good idea for the Commission to scrutinise legislation as it emerges from the trilogue, in the form of a brief report setting out the substantive differences between what it originally proposed and the agreement that the three institutions managed to reach. Thus the additional burdens and costs added by one or the other legislation branches would be clearly documented for the member states and the stakeholders, in an ad hoc register, with corresponding comments from the Commission, thereby making it possible to identify from the outset the risk of unnecessary costs and to revisit them when the legislation is reviewed.

A sunset clause should be included in all legislative acts to make it possible to evaluate, not only their relevance, but also their economic, social, environmental and territorial impact. Particular care should be given to the issue of the benefits and burdens in trying to distinguish between virtuous obligations, burdens or costs.

4.5 Creating a register of the costs and burdens that should be avoided

As advocated by the European Economic and Social Committee (EESC) a debate is urgently needed on whether a burden is necessary or unnecessary, in terms of the principle of proportionality. Assuming that a burden or a cost is added for a particular reason (evaluation of policies being implemented, encouraging desirable behaviour and so on), it would be a good idea to establish what types of costs or burdens are identified as unnecessary, inappropriate, irksome or harmful in the long term. Are these obligations related to fees and taxes, follow-up reports, statistics, inspections? Would their elimination have unexpected effects or undesirable consequences?

Thus a distinction should be drawn between unnecessary costs. Some costs are unnecessary because they do not provide any pay-off in terms of information, protection, oversight and so on. Such costs should be eliminated.

Other costs are considered to be excessive because they are cumulative costs, which weigh more heavily on particular sectors (one sector often cited is aluminium). In this case it is not so much the unnecessary nature of the cost or the burden as the onerous nature of cumulative burdens that hit those sectors particularly hard that suffer from stiff competition from regions that are less punctilious about, say, social or environmental protection. In this case, ad hoc solutions could be put forward, but not necessarily involving the straightforward elimination of the relevant burden or cost.

Certain costs are considered to be unnecessary by certain kinds of actors (industrial) in contrast to other actors (consumers) who find them necessary (labelling, for example). The fact that one category of actors considers certain costs to be ‘unnecessary’ does not necessarily mean that they need to be eliminated. Perhaps they should be adapted or their benefits better explained by means of a targeted information campaign.

Certain burdens may appear to be necessary but too costly. In that case, it is not so much the existence of the burden as such, as calling into question whether its cost is disproportionate. In this instance it would be not so much a matter of eliminating the burden as reducing or compensating for its costs.

4.6 Working towards a common commitment

First of all, the current Better Lawmaking agenda needs to be fundamentally reformed for the sake of the public interest. The EU should turn its attention from a utilitarian approach, oriented towards costs, towards an approach focusing on efficiency and quality. Along these lines the EU should impose, in its bilateral agreements with third countries, standards that tend to align the regulations of its trading partners with those of the EU and not vice versa.⁷⁰

⁷⁰. It is disheartening to hear from certain commentators that this would not be realistic or that it would be harmful to the EU.

Secondly, there is now an urgent need for the Commission to develop 360-degree impact assessments in the form of an ex ante smart evaluation matrix which enables dynamic modelling of the impact of substantive amendments by the co-legislators, by

- objectifying the economic, social and environmental impact of certain parameters, such as emission rates, percentages, quantitative thresholds or ceilings;
- exploiting qualitative data and demonstrating the expected benefits of Community action; and
- anticipating, as far as possible, possible amendments by the co-legislators.

To this end it is now extremely important that the secretariat-general of the Council create a unit tasked with assessing the impact of substantive amendments by the co-legislators that might give rise to undesirable costs at the behest of the Commission or of one-third of the member states.

On the part of the member states it would be useful to set up a 'network of networks'. The role of national and/or regional agencies, responsible for Better Lawmaking, could be enhanced by means of the Regulatory Scrutiny Board (RSB). They could make available their observations, good practices and so on. When impact assessments are being examined some observations made by these agencies could usefully be integrated by the RSB.

Better use could be made of the existing single market networks – IMI, Your Europe, SOLVIT, Single Digital Gateway,⁷¹ SME envoys – as well as all the high level groups and other European forums. A lot of information and data, especially qualitative, are available on these networks and applications.

Thirdly, it has become urgent to review the partners' consultation mechanisms set up by the Treaty by making them more representative. Similarly, consultations should have more qualitative⁷² and representative scope than at present, when only a very small number of actors – and often the same ones – are surveyed.

Finally, it is time to rediscover the virtues of intelligent and fair legislation. Regulation can guide innovation and inspire legal certainty and predictability. In this regard, it would be in the best interest of the EU to develop very high quality standards.

71. The new portal will help to reduce the administrative burden. Generally speaking, the single digital portal will apply the principle 'once and for all', which means that people or businesses will only have to provide the public administration with particular items of information once.

72. See, on this topic, Van den Abeele (2019).

Conclusions

The Commission should probably publish its Communication on Better Lawmaking, which will have particular bearing on the application of ‘one-in, one-out’, in autumn 2020. This Communication will provide substantial political momentum, particularly in the context of the Covid-19 pandemic, which has shown, simultaneously, the full importance of the role of the public authorities – from the health sector to the law enforcement agencies – but equally the pertinence of the regulatory framework and of the law as guarantors of social cohesion.

In this context we should recall the essential role played by harmonisation in avoiding excessive regulation and administrative burdens. European integration can be summarised as ‘one EU regulation in, 27 national regulations out’!

In this article we have tried to show that the ‘one-in, one-out’ method – as envisaged today by an important think tank, whose report serves the purposes of Europe’s biggest state, which will shortly hold the presidency of the EU – would suffer from insurmountable defects and incoherences, particularly in relation to its transposition at EU level.

Although they deny it, the authors of the report add new procedures and reinforce existing technostuctures. In doing so they provide the basis for a form of ‘bureaucratisation of debureaucratisation’ by proposing to add layers – rules, tools, consultations and so on – that would tend to increase the burden of the decision-making process. If they were implemented these proposals would weaken the Commission’s power of initiative and capacity to make proposals.

Once and for all, we need to dispose of the idea that regulatory compensation can generate savings, constituting, in turn, money for businesses and financial reserves for the public authorities. The most promising savings in the economy are to be found in deepening European integration, in the reduction of regulatory bias with third countries and in the setting up of a level playing field within and outside the EU.

If, as she has committed herself to doing, President von der Leyen, despite everything, is able to get the College to adopt ‘one-in, one-out’, we can only hope that it is toned down substantially in a number of respects.

The first would be to restrict such compensation to administrative burdens rather than EU regulation. It is utterly inconceivable to sacrifice certain social or environmental directives on the altar of the fight against bureaucracy every time the EU adopts new legislation in that area. Also inconceivable would be to narrow the scope or revisit the issue of wages and social protection, which are part of compliance costs, by implementing 'one-in, one-out'.

The second would be to provide for exceptions as regards certain sectors (health and climate policy come to mind) and enforcement. This would be negotiated with the co-legislators, but also with the European social partners.

The forced introduction of 'one-in, one-out' – which would not be desirable – could in any case be done only cautiously, progressively and in stages. This new instrument must respect the integrity of the *acquis communautaire* and not be based on a mechanically applied quantitative reduction. It must also be evaluated continuously.

For our part, we continue to believe that cutting unnecessary costs and burdens must be based on a case by case evaluation of the existing legislation. It is for the Commission objectively to determine what can be simplified, rationalised, consolidated or eliminated and not to set quantified reduction targets arbitrarily 'at the political level'.

In today's crisis and climate of euroscepticism it is vital to restore confidence in the European Union and to recall that it is the leaven of this union of peoples. It is high time that our leaders remembered that.

Bibliography

- Interinstitutional agreement between the European Parliament, the Council of the European Union and the European Commission on Better Lawmaking of 13 April 2016, Official Journal of the European Union, L 123, 12 May 2016.
- Alemanno A. (2015) Dans quelle mesure le 'Mieux légiférer' est-il meilleur? Une première analyse de l'impact de la nouvelle initiative 'Mieux légiférer' sur l'Union européenne, *Revue du droit de l'Union européenne*, 4/2015, 509–527.
- Calliess G.-P and Zumbansen P. (2010) *Rough consensus and running code: a theory of transnational private law*, Oxford, Hart.
- Calliess G.-P and Zumbansen P. (eds.) (2011) *Law, economics and evolutionary theory*, Cheltenham, Edward Elgar.
- CEPS (2019) *Feasibility study: introducing 'one-in-one-out' in the European Commission*, Final report for the German Ministry for Economic Affairs and Energy, Brussels, Centre for European Policy Studies.
- European Economic and Social Committee (2012) *Opinion of the European Economic and Social Committee on 'Towards an updated study of the cost of non-Europe' (own-initiative opinion)*, rapporteur Georgios Dassis, and co-rapporteur Luca Jahier. <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/cost-non-europe>
- European Economic and Social Committee (2016) *Opinion of the European Economic and Social Committee on 'REFIT'*, rapporteur Denis Meynent, SC/044, 26 May 2016.
- European Economic and Social Committee (2019) *Opinion of the European Economic and Social Committee on the Communication from the Commission 'Better regulation: taking stock and sustaining our commitment'*, rapporteur Denis Meynent, INT/886, 25 September 2019.
- European Commission (2012) *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Regulatory Fitness*, COM(2012) 746 final, 12 December 2012, p. 5.
- European Commission (2014) *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook*, COM(2014) 368 final, 18 June 2014, p. 2.
- European Commission (2015) *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Better regulation for better results - An EU agenda*, COM(2015) 215 final, 19 May 2015.
- European Commission (2017) *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Completing the Better Regulation Agenda: Better solutions for better results*, COM(2017) 651 final, 24 October 2017.
- European Commission (2017b) *Proposal for a Regulation of the European Parliament and of the Council setting out the conditions and procedure by which the Commission may request undertakings and associations of undertakings to provide information in relation to the internal market and related areas*, COM(2017) 257 final, 2 May 2017.

- European Commission (2017c) Proposal for a Directive of the European Parliament and of the Council on the enforcement of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorisation schemes and requirements related to services, and amending Directive 2006/123/EC and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, COM(2016) 821 final, 10 January 2017.
- European Commission (2017d) Proposal for a Directive of the European Parliament and of the Council on the legal and operational framework of the European services e-card introduced by Regulation[ESC Regulation], COM(2016) 823 final, 10 January 2017.
- European Commission (2017e) Proposal for a Regulation of the European Parliament and of the Council introducing a European services e-card and related administrative facilities, COM(2016) 824 final, 10 January 2017.
- European Commission (2018) Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law, COM(2018)239 final, 25 April 2018.
- European Commission (2019) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Better regulation: taking stock and sustaining our commitment, COM(2019) 178 final, 15 April 2019.
- European Commission (2019b) Joint communication to the European Parliament, the European Council and the Council – EU–China: A strategic outlook, Join (2019) 5 final, 12 March 2019
- European Commission (2019c) Communication from the President to the Commission – The working methods of the European Commission, P(2019) 2, 1 December 2019. <https://ec.europa.eu/info/sites/info/files/working-methods.pdf>
- European Commission (2020) Commission Decision establishing the Fit for the Future Platform, C(2020) 2977 final, 11 May 2020.
- Council of the European Union (2016) Conclusions of the European Council of 18–19 February 2016.
- Feix M. (2011) Subsidiarité, proportionnalité et construction européenne: essai de généalogie des principes, *Revue d'éthique et de théologie morale*, 2011/4 (267), 59–70.
- Ford C. (2017) *Innovation and the state: finance, regulation and justice*, New York, Cambridge University Press.
- Freeman E.R. (1984) *Strategic management: a stakeholder approach*, Boston, Pitman.
- Greenwood J. (2007) Organized civil society and democratic legitimacy in the European Union, *British Journal of Political Science*, 37 (2), 333–357.
- Hahn R. and Renda A. (2017) Understanding regulatory innovation: the political economy of removing old regulations before adding new ones. <http://dx.doi.org/10.2139/ssrn.3022552>
- OECD (2014) *OECD Regulatory Compliance Cost Assessment Guidance*, Paris, OECD Publishing.
- OECD (2019) *Better regulation practices across the European Union*, Paris, OECD Publishing. <https://doi.org/10.1787/9789264311732-en>

- European Parliament and Council of the European Union (2016) Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), Journal officiel de l' Union européenne, L 119, 4 May 2016.
- Rapport du Groupe de travail interministériel sur la qualité de la réglementation [Report by the Interministerial Working Group on the Quality of Regulation] (2002) chaired by Dieudonné Mandelkern, 1 March 2002. <https://www.vie-publique.fr/sites/default/files/rapport/pdf/024000213.pdf>
- Radaelli C. (2018) Halfway through the better regulation strategy of the Juncker Commission: what does the evidence say?, *Journal of Common Market Studies*, 56 (S1), 85–95.
- Renda A., Schrefler L., Luchetta G. and Zavatta R. (2013) Assessing the costs and benefits of regulation: final report, Brussels, Centre for European Policy Studies.
- Savin P. (2016) Principes de non-régression: un nouveau pilier du droit de l'environnement, Cabinet DS Avocats, CUA-29-2 2016.
- Supiot A. (2015) La gouvernance par les nombres: cours au Collège de France, 2012–2014, Paris, Fayard.
- Van den Abeele E. (2009) The better regulation agenda: a 'new deal' in the building of Europe, Policy Brief. European social policy 1/2009, Brussels, ETUI.
- Van den Abeele E. (2014) La réglementation « intelligente, affûtée et performante » de l'UE: une nouvelle bureaucratie au service de la compétitivité?, Working Paper 2014.05, Brussels, ETUI.
- Van den Abeele E. (2015) 'Mieux légiférer': une simplification bureaucratique à visée politique, Working Paper 2015.04, Brussels, ETUI.
- Van den Abeele E. (2019) L'Union européenne à l'épreuve du 'Mieux légiférer'. De l'urgence de changer de logique pour sauver le projet européen!, Background Analysis 2019.02, Brussels, ETUI.
- Vigneau C. (2006) Les clauses de non-régression en droit communautaire du travail, *Le Droit ouvrier*, 700, 521–524.

All links last accessed on 18.05.2020.

List of acronyms and abbreviations

COREPER	Committee of Permanent Representatives (Comité des Représentants permanents)
EP	European Parliament
EPRS	European Parliamentary Research Centre
EU	European Union
OECD	Organisation for Economic Cooperation and Development
OIOO	One-in, one-out
REFIT	Regulatory Fitness and Performance Programme
RSB	Regulatory Scrutiny Board
SME	Small and medium-sized enterprises
TFEU	Treaty on the Functioning of the European Union

ETUI Working Papers

Using GDPR to improve legal clarity and working conditions on digital labour platforms

Working Paper 2020.05

Michael 'Six' Silberman and Hannah Johnston

« One in, one out » dans le système juridique de l'Union européenne : une réforme en trompe l'oeil ?

Working Paper 2020.04 (EN, FR)

Éric Van den Abeele

European multinational companies and trade unions in eastern and east-central Europe

Working Paper 2020.03

Martin Myant

EWC Confidential

Confidentiality in European Works Councils and how representatives deal with it: case study and survey insights

Working Paper 2020.02

Lise Meylemans and Stan De Spiegelaere

Pushing the limits: the European Central Bank's role in restoring sustainable growth

Working Paper 2020.01

Jörg Bibow

Towards a progressive EMU fiscal governance

Working Paper 2019.13

Nacho Álvarez, *et al.*

Digital labour in central and eastern Europe: evidence from the ETUI Internet and Platform Work Survey

Working Paper 2019.12

Agnieszka Piasna and Jan Drahekoupil

She works hard for the money: tackling low pay in sectors dominated by women – evidence from health and social care

Working Paper 2019.11

Torsten Müller

The platform economy and social law: key issues in comparative perspective

Working Paper 2019.10 (EN, FR)

Isabelle Daugareilh, Christophe Degryse and Philippe Pochet

These publications can be downloaded free of charge from our website.
Please visit: www.etui.org/publications