
“Better Regulation”: a bureaucratic simplification with a political agenda

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Éric Van den Abeele

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europaen trade union institute

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Abstract

In principle, no one is opposed to smart regulation and less red tape. For around 20 years, the European Commission has been trying to simplify legislation. In its opinion, reducing the regulatory and administrative burden could mean savings for business of at least EUR 150 billion. However, when this process is examined more closely, there are many reasons for astonishment, and even concern.

Firstly in the underlying message. Europe has previously been proclaimed as a Community of law. Currently, not only national but also European politicians seem to have joined in criticism of the European bureaucracy, of these pernickety regulations and of this legislation that has apparently suffocated business to the point of harming the continent's competitiveness. This criticism is an attack on European law in general, without any distinction being made between the perceived costs of these regulations and their true benefits in terms of tackling Europe-wide economic, social and environmental challenges.

Secondly, the weakness of the arguments for this simplification process cannot fail to be a surprise. Studies into the costs of regulations are one-sided and mostly tend to exaggerate the results, which also allows the expected benefits of deregulation to be inflated.

Lastly, the complexity of the processes used to achieve this simplification is disconcerting, whether these involve impact assessments, *ex-post* evaluations, cost estimates, etc. However, when case studies are examined, it is clear that the impact assessments are actually chosen to order, in line with discreet influences. This could mean that the Commission ignores an impact assessment, or that it underestimates the impact of legislation, or that it disregards the opinion of stakeholders, and so on.

This is a surprising finding that supports the impression that the simplification process has fallen hostage to certain interests, to the benefit of deregulation strategies. This impression is reinforced by the very significant prominence given to "high-level experts" and other "stakeholders" in this process.

Introduction

Since the REFIT programme was adopted in June 2014 (European Commission 2014b), three events on the political calendar have pushed forward the "Better Regulation Agenda" (hereinafter BRA).

Firstly there were the European Parliament elections on 25 May 2014, which resulted in greater fragmentation and a significant increase in Eurosceptic and Europhobic MEPs. These were followed on 1 November 2014 by the installation of the new College of Commissioners under the presidency of Jean-Claude Juncker and, lastly, the appointment of Donald Tusk as President of the European Council, who took over from Herman Van Rompuy on 1 December 2014.

Although the appointment of Donald Tusk does not yet seem to have had a decisive influence on this agenda, the composition of the new European Parliament and the reorganisation of the Commission, with the appointment of Frans Timmermans as First Vice-President of the Commission with specific responsibility for the BRA, will surely upset the power balance between the three institutions. First Vice-President Timmermans in fact immediately positioned himself, in the BRA debate, as the real strong man of the Juncker Commission who will decide what Europe will and will not do.

The European elections resulted in two shifts in direction. Firstly, the new Parliament's centre of gravity lies even more firmly on the centre-right. A pro-European technical coalition has been formed, led by the Conservatives of the EPP (221 MEPs), who remain the dominant force in the assembly despite losing a significant number of seats¹, the Socialists and Democrats of the S&D (191 MEPs), who remain at their previous level, and the Liberals of the ALDE (67 MEPs), who lost a few seats. Secondly, the European Parliament that emerged from the ballot box has seen a rise in power among the Eurosceptic and Europhobic groups, which account for 170² of the 751 MEPs (i.e. 22.63% of MEPs compared to 16% during the previous legislative period of 2009-

1. The EPP holds 29.43% of Parliament, ahead of the S&D with 25.43% and the ALDE with 8.92%.
2. This significant figure is obtained by adding the members of the ECR Group, which is the third largest by number of MEPs (70) and which is Eurosceptic but democratic, to the UK Conservatives (19 MEPs) and the Polish PiS (19 MEPs), plus the Europhobes of the EFDD, with 48 MEPs, founded by Nigel Farage's UKIP, and, lastly, the non-attached Members (52 MEPs, including 23 from Marine Le Pen's National Front) who, for the time being, have no control over the smooth running of the European Parliament.

2014). Although a *cordon sanitaire*³ has been formed around the Europhobes, the influence of the Eurosceptics is being felt, particularly through certain voices in the ECR, which negotiated for two of its members to become the respective chairs of the highly sensitive parliamentary committees for the internal market and defence.

The balance of power resulting from the European elections installed Jean-Claude Juncker, the *Spitzenkandidat* of the EPP, as Commission President. He immediately chose to clarify the situation: “I will not include anything in the Commission’s work programme or add any initiative to the College’s agenda without the approval of Frans Timmermans”, he wrote in his mission statement sent to his right arm when the new College was formed in November 2014.

First Vice-President Frans Timmermans in turn stated that his goal, and that of President Juncker, was nothing less than to bring about a cultural shift, not only in the Commission’s working methods, but also in the way that the three institutions interact. According to the Vice-President, the idea that “to regulate is to exist” is too prevalent within the institutions. This mistaken belief should be abandoned and the focus shifted to specific areas in which European legislation can add value based on evidence provided by existing national legislation, by using other forms of regulation (particularly codes of good conduct, co-regulation and self-regulation) or other forms of intervention (implementation, control, Community action, etc.).

In the following pages, in Part One we examine the new guidelines of the BRA with regard to the development of its four constituent pillars: (1) reduction of the regulatory and administrative burden; (2) evaluation of the *ex-ante* and (3) *ex-post* impact of legislation, and (4) consultation of stakeholders. We will try to go beyond words and slogans in order to identify the fundamental changes at work in the BRA. In Part Two we will examine the activities of the EU’s five institutions in light of recent developments in the BRA and REFIT, and try to draw some lessons from these. We will then try in Part Three to illustrate our findings by examining seven example cases in order to determine the relevance of the Commission’s criteria and real intentions, particularly with regard to the impact assessment. Lastly, in Part Four, we will study the context of the revision of the 2003 Interinstitutional Agreement – which admittedly has become obsolete, but which forms the real *raison d’être* of the BRA, namely improving the quality of legislation – by trying to identify the new challenges posed and the main strengths of each institution’s proposals.

3. This *cordon sanitaire* could even be reinforced by the ad hoc support that the Greens (50 MEPs) and GUE (52 MEPs), which are two pro-European groups, could give to the main coalition.

Part One

From "Better Regulation" to "REFIT": a one-dimensional view of regulation?

In recent years, the BRA has become increasingly important within the political agenda, to the point where it now dominates the public arena and has become the most widely debated political topic.

However, it is not a monolithic issue, in fact quite the contrary! It is often perceived as a hydra with many heads. In April 2015, the MEP Sylvia Kaufmann (S&D/DE) stated that the multitude of names and programmes adopted by the Commission, such as "better regulation", "smart regulation", "regulatory fitness", "think small first", "fitness checks" and other "ABR*plus*", encouraged the impression of a technocratic Europe and did not form the model of clarity that citizens are entitled to expect from the Union.

Despite the successive "better regulation" programmes not receiving good press, because they take so long to produce the desired effects, the BRA has gradually become the foundation stone for those calling for less state intervention and a return to the national, regional or local level, with increasingly insistent demands for respect for subsidiarity and proportionality.

In this first part, we will firstly examine the two sides of regulation: costs and benefits. We will then review the four pillars that form a continuum and the heart of the REFIT programme.

1. The four main phases of the legislative procedure

To ensure a better understanding of the issue, we would briefly note that the European legislative procedure in a broad sense is split into four main phases:

- a cycle upstream of the legislative initiative, which includes intermediate stages such as Green Papers, White Papers, consultation of stakeholders, impact assessments, etc.;
- the legislative cycle properly speaking, which involves the ordinary legislative procedure between the Commission, Parliament and the Council, sometimes after consulting the European Economic and Social Committee (EESC) and the Committee of the Regions (CoR);
- a downstream cycle, which consists of the transposition into national law, implementation, application and monitoring by the Commission of the legislation in question;
- an *ex-post* cycle: fitness check, *ex-post* evaluation, consultation of stakeholders, possible revision of the legislation in question.

However, before examining the development of the issue, we would firstly discuss the two sides of regulation. This stage is necessary, in our opinion, because debate has not focused on just one aspect of the impact of regulation.

2. The two sides of regulation: costs and benefits

2.1. Pre-2007 situation

Reducing the administrative burden, and subsequently bureaucracy, has been a mantra tirelessly repeated by the Commission for around 20 years. Not one European institution text has failed to call for a reduction in the burden on business or for red tape to be cut.

2.2. 2007 break

In 2007, when this issue was firmly taken in hand by Günter Verheugen, then Vice-President of the Commission for Industry, it was no longer just the administrative burden that threatened the competitiveness of business, but also the “pointless” regulatory burden, which was presented as a series of costs and burdens that the EU should reduce “in order to free up business”.

The Action Programme for Reducing Administrative Burdens in the European Union, launched in 2007 by the Barroso I Commission, caused the first break in the European legislative process as it established a causal link – never before shown – between the regulatory burden and competitiveness (Van den Abeele 2009). The quality objective of regulation gave way to a utilitarian objective: help business to become internationally competitive by reducing compliance costs.

The aim of the 2007 Action Programme was to allow savings of EUR 41 billion⁴ per year by reducing the administrative burden on business. It was meant to reduce the administrative burden created by European legislation by 25% by the end of 2012 at the latest and in 13 priority areas (including tax law, accounting, statistics, transport and public procurement). According to the Commission, the administrative burden was reduced by 33% in 2012, although the Commission did not provide proof that this reduction was a net value – i.e. that it took into account the annual addition of new burdens following the entry into force of new legislation – or a relative value.

In this very partisan context, impact assessments (IAs) were increasingly perceived, not as a decision-making tool – which is the primary reason for an IA – but as a way of updating the costs and burdens faced by business in order to reduce and even eliminate them. The reasoning was as follows: if regulation

4. In previous studies, we pointed out the fact that this figure, which is questionable in itself, particularly as it is a theoretical extrapolation from a potential saving, is relatively low compared to the high expectations of business, on the one hand, and the investment needed in social and environmental areas in particular, on the other hand.

and regulatory costs and burdens as well as pointless administrative burdens are removed, this will be good for business competitiveness, competition, growth and investment as well as for employment.

2.3. High Level Group on Administrative Burdens: the "Stoiber group"

In 2007 the Commission mandated a "High Level Group on Administrative Burdens" (HLG 2014) (hereinafter HLG), which had 15 members selected on the basis of their expertise and which was chaired by Edmund Stoiber⁵. This working group advised the Commission for seven years and during three successive mandates with the aim of reducing the administrative burden created by the EU.

The HLG's first mandate (European Commission 2007) (31 August 2007-31 August 2010) focused on identifying measures to reduce the administrative burden and defining the measurement tool. The Commission gave itself the task of fully mapping the European legislative *acquis* and measuring the additional cost of the administrative burden.

During its second mandate (European Commission 2010) (September 2010-December 2012), the HLG submitted a report, in November 2011, entitled "*Europe can do better*" (HLG 2011), which set out best practices for reducing the administrative burden when implementing and transposing European legislation at national level. This report claims in particular that 32% (European Commission 2009a) of the additional administrative burden primarily stems from the decision of certain Member States to go beyond the European legislative measures⁶ or from implementation difficulties (European Commission 2012).

For its third mandate (January 2013-October 2014), the HLG was asked to present a programme for reducing administrative burdens in the business sector, and particularly those on SMEs and micro companies, and to assess how many measures adopted by the Action Programme had been implemented by the Member States.

On 24 July 2014 (HLG 2014), the HLG published its final report, which made a series of recommendations on smart regulation and cutting red tape. The report highlighted that two proposals had been finalised with the Council and the European Parliament (EP): the proposal on VAT and electronic invoicing (potential saving of EUR 18 billion per year) and the exemption of micro companies from complying with certain accounting rules (potential saving of EUR 6.3 billion) (European Commission 2014h). We will see that the first

5. Eurosceptic Conservative, Edmund Stoiber, was a Minister, the President of the CSU and the Minister-President in Bavaria from 1994 to 2007. He was appointed in 2007 as Chair of the High Level Group on Administrative Burdens. He currently advises Jean-Claude Juncker on "Better Regulation".

6. This phenomenon of over-regulation is also known as "gold plating".

proposal is based on particularly optimistic premises as it underestimates the adaptation costs of small and very small businesses, which form the bulk of SMEs. As for the second measure, we previously indicated (Van den Abeele 2009) how this called into question the level playing field.

2.4. Lack of any nuance in the current approach

In this section, we would like to firmly qualify this received wisdom that too often forms one of the flagships of this one-track approach – all pointless trappings must be removed from the *acquis communautaire* – with its ideological corollary: the EU is a bureaucratic machine that produces poor quality rules.

Firstly, the European impact assessment (IA) system differs significantly from its American equivalent (US RIA system), which is sometimes cited as an example, due, among other reasons, to the absence or unusable nature of comparable data between Member States for calculating the administrative or regulatory burden. The failure to take account of certain beneficial impacts, the lack of relevant information on the implementation of European legislation by Member States, and the absence of a detailed assessment of cumulative costs, distributive effects or the cost of inaction lead to significant methodological biases in the calculation of the “regulatory burden”: questionable weighting of figures and data; approximation of long-term prospects; minimisation or underrepresentation of certain elements in comparison to others, etc.

Secondly, as proven by several recent studies⁷, the debate on regulation is far more nuanced than the caricaturisation would sometimes have us believe. Admittedly, legislation has direct and indirect impacts, which can generate needless costs, but also – and this is often obscured – benefits that are precisely the main objective of the legislation.

2.5. The six categories of regulatory impact

In the aforementioned study, Andrea Renda, Senior Research Fellow at the Centre for European Policy Studies (CEPS), identified six different categories of regulatory impact.

- (a) Direct costs of regulation, which particularly include:
 - Direct compliance costs, i.e.:
 - regulatory burden that includes taxes, remunerations and other levies;
 - compliance costs: investments and expenditure that must be made by businesses and citizens in order to fulfil the requirements and obligations contained in the legislation;

7. See in particular Renda (2013).

- administrative burden and costs borne by businesses, public authorities and citizens in order to fulfil the information obligations contained in the law (evaluation reports, statistics, etc.).
- “Irritating” costs, i.e. costs associated with or arising from compliance costs: deadlines, redundant effects, fines for delay, changes in habits, etc.

(b) Implementation costs

These costs, such as market surveillance, correct application of the law and quality of court decisions, can vary significantly between Member States depending on the level of effectiveness and relevance (administrative case-law, speed of decision-making by courts, etc.).

(c) Indirect regulatory costs

These are costs that are not directly associated with ensuring compliance with regulations. They are generally incurred when there are changes in regulations, prices or availability and quality of goods and services produced in regulated sectors. These changes indirectly affect other economic sectors, businesses and citizens.

(d) Direct regulatory benefits. These can be divided into two categories:

- improvement of the welfare of citizens, which in return allows progress in terms of public health, safety, or social and environmental protection;
- improvement of the effectiveness of public intervention, which not only includes avoided costs and costs of non-regulation, but also the provision of reliable information, greater legal certainty, and a safer market in goods and services for consumers.

(e) Indirect regulatory benefits. These particularly include:

- spillover effects associated with legislation in other sectors being brought into line;
- macroeconomic benefits, including an increase in GDP, productivity gains, higher employment rates, creation of quality jobs, etc.;
- non-monetary benefits, such as protection of fundamental rights, improved social and territorial cohesion, enhanced national or international stability, etc.

(f) Net impacts (ultimate impacts) of regulation

This is the “net” added value of regulation, i.e. the value that lies at the intersection between the goals pursued and the regulation’s impact on the real economy. In other words, the net impact is the ratio between the negative impact (needless, ineffective costs, etc.) and the positive impact (improvement of welfare, increase in legal certainty, etc.) of regulation.

A regulation that reduces health or safety reporting obligations in the workplace may be regarded both as eliminating a cost for business and as adding an additional cost for public authorities, which must procure the information in another way, or as the loss of important information for the community.

2.6. The Commission's method of calculating the burden under fire

For its regulatory and administrative burden reduction programmes, the Commission has used the Standard Cost Model (SCM) method.

This model is mainly based on an “extrapolation of data” by external consultants mandated by the Commission. Conceived in the Netherlands in the early 1990s, the SCM was recognised by the OECD as the reference model for calculating the administrative burden of regulation. The SCM is still the reference model to which the Commission refers.

As a reminder, the methodology involves three phases:

- divide the regulation into measurable units;
- calculate the cost of the regulatory and administrative burden of each segment;
- propose the removal of regulatory or administrative elements regarded as pointless, redundant or too costly.

For each administrative activity, the SCM measures the number of obligations, the time needed to fulfil those obligations and the hourly cost of the resources involved. The result of these measurements is then entrusted to external experts who suggest ways of reducing the administrative burden.

2.6.1. Limits of the SCM

Over a number of years the model has been shown to have serious shortcomings. The SCM suffers from a significant methodological bias, as underlined above⁸, which is aggravated by a partiality at all stages of the procedure. The main criticisms can be summarised in four points (see in particular Allio and Renda 2010; OECD 2010):

- an approach exclusively focused on the costs generated by the regulatory or administrative provisions to the detriment of their benefits, given that the method starts from the principle that legislation

8. The methodological bias is further accentuated by the fact that the SCM method fails to take a multi-faceted approach to identifying the objective in question: renew growth and create jobs, increase competitiveness, etc. This would involve, as a minimum, considering other just as important elements: identification of “holes” in the internal market (technical barriers, unjustified requirements, etc.) due to the divergence of legislation; calculation of the benefit of improved use of the mutual recognition principle; calculation of the benefits of harmonising certain legislation, etc.

is a burden weighing on the results of businesses and threatening their competitiveness;

- an *a priori* approach in applying the definition of information obligation and/or administrative burden, and an overestimation of the burden based on the assumption that all businesses will comply with the legal and administrative provisions in the same way;
- a highly subjective approach on the part of interviewers and interviewees, who tend to maximise the time that they spend on the administrative burden in order to justify their own usefulness;
- distortion of the results due to extrapolations and generalisations based on interviews and seminars, sampling or surveys.

2.6.2. The Commission's determination to favour a one-dimensional approach

Despite the doubts expressed about the method's reliability⁹, the Commission has persisted in using this as the basis for its burden reduction programmes. In the October 2014 final report, Edmund Stoiber explained the use of the method as follows: "Data for calculation was collected primarily through workshops and interviews with a sample of businesses in six Member States. This data was supplemented by existing data from the only four Member States (Czech Republic, Denmark, the Netherlands and the United Kingdom) which had previously carried out SCM measurements. The data for the remaining [18] EU Member States was then estimated through extrapolation" (HLG 2014, p. 30).

In this case, we note the limited representativeness of the SCM method: only six Member States out of 27 were surveyed, primarily sponsors of the SCM method, but also the Member States most in favour of the less regulation approach. Only four Member States had hard data and applied the SCM method¹⁰, namely the Czech Republic, Denmark, the Netherlands and the United Kingdom. A detailed analysis was not carried out for the states in southern Europe (such as Italy, Spain and Portugal) and in central and eastern Europe (Poland, Hungary and Slovakia) or for the Baltic States, Belgium or Luxembourg.

3. The four pillars of the Regulatory Fitness and Performance (REFIT) programme

We have already indicated (Van den Abeele 2014) how the REFIT programme fell within the framework of previous programmes: Better Regulation and Smart Regulation. Dating from 2012, and renewed in 2013 and 2014, the REFIT programme "aims to cut red tape, remove regulatory burdens [sic!],

9. See in particular Vogel and Van den Abeele (2010), p. 69.

10. The situation of the other countries measuring administrative costs is illustrated in the study entitled "EU Project on Baseline Measurement and Reduction of Administrative Costs: Final Report" carried out on behalf of the European Commission by Capgemini, Deloitte and Ramboll Management, February 2010.

simplify and improve the design and quality of legislation so that the policy objectives are achieved and the benefits of EU legislation are enjoyed at lowest cost and with a minimum of administrative burden, in full respect of the Treaties, particularly subsidiarity and proportionality. Under REFIT, the Commission is screening the entire stock of EU legislation on an ongoing and systematic basis to identify burdens, inconsistencies and ineffective measures and identified (sic) corrective actions” (European Commission 2014b, p. 2).

3.1. The REFIT approach: curbing regulation

The break between REFIT and earlier programmes became apparent on the publication of the second REFIT communication in October 2013. Edmund Stoiber acknowledged that: “With the new approach of Smart Regulation and the launch of the REFIT Programme (Commission Communication of 2 October 2013), President Barroso and the Commission as a whole have initiated a fundamental change in the EU law-making process. I believe that this re-direction, which has led to a change of working methods within the Commission, is a real ‘quantum leap’” (HLG 2014, p. 7) (our emphasis).

Five times in these two sentences, Edmund Stoiber refers to a significant increase in quality, a form of break and a change of method.

Firstly, pointless regulation – by extension, the *acquis communautaire* – is presented as a form of costly and needless bureaucracy: “Unnecessary bureaucracy tarnishes the image of the European Union and is a burden for businesses and citizens” (HLG 2014, p. 8). This assertion is astonishing and simplistic in more than one respect, in that Edmund Stoiber sees legislation and administrative burdens as tantamount to bureaucracy, on the one hand, and diagnoses that unnecessary bureaucracy is at the root of the EU’s poor image, on the other hand, whereas the causes of Europe’s deteriorating image are clearly multiple.

Secondly, bureaucracy “also hampers economic growth and the creation of new job opportunities” (HLG 2014, p. 8). In this way Edmund Stoiber reintroduces the old idea that “achieving the objective of the Action Programme could lead to economic growth and an increase in the level of EU GDP of approximately 1.4% or EUR 150 billion per annum in the medium term and would bring substantial improvements for consumers, such as lower prices”. This unqualified assertion is not based on any scientific finding and does not refer to any statistical data. In fact, the lack of resources provided in order to monitor regulations on the posting of workers, for example, is often cited as one of the causes of undeclared work and the failure to create new jobs.

Lastly, Edmund Stoiber takes the view that, despite the progress made, we have to keep moving forward. The process seems to be “never-ending”. “While the Commission has made significant progress on cutting red tape and smart regulation, the HLG believes that much more can and must be done. It is

essential that the Commission, the other EU institutions and Member States all come forward jointly with an ambitious programme of proposals, targets and mechanisms for eliminating unnecessary and bureaucratic red tape which will strengthen Europe's capacity to prosper (HLG 2014, p. 8).

Let us consider for a moment what causes an "unnecessary" burden, be it administrative or regulatory. Is it the objectivation of rules that are particularly detrimental to businesses or citizens? Is it an abuse of the European Parliament-Council codecision system that stimulates a form of competition between the co-legislators and inflates rules through the interplay of the double legitimacy (States, citizens)? Is it a subjective perception on the part of businesses and/or citizens?

Once again, a cause-and-effect relationship is established between the volume of EU regulations, on the one hand, and the EU's prosperity, on the other hand, without the HLG providing any evidence to back up these assertions. We may therefore legitimately wonder whether, in some way, it is not intellectually dishonest or ideologically blind to consider that legislation purely represents a cost and a negative burden to be removed.

In fact, despite the repeated requests of certain Member States, particularly within Coreper, the Commission has never been able to confirm the specific effects of the BRA and REFIT in terms of competitiveness, growth and job creation, or provide any concrete estimates.

3.2. Impact assessment

The Commission's impact assessment (hereinafter IA) system¹¹ is being applied at an ever earlier stage of the policy cycle. The IA system, which is applied to order and only for substantive proposals since 2002, has been constantly improved and extended since then to any legislative proposal, and even non-legislative proposals (recommendation, White Paper, etc.). Currently, delegated act proposals are increasingly being subject to IAs, with these now being systematic whenever a delegated act may have a substantial impact. There are calls for all EU acts, including implementing acts and certain unnamed acts (e.g. communications) to undergo an IA.

3.2.1. Impact Assessment Board (IAB)

Like the HLG on the reduction of administrative burdens, the Commission's impact assessment system is also headed up by a committee. This is the Impact Assessment Board (IAB), which is internal to the Commission and made up of high-level officials.

11. See in particular Van den Abeele E. (2014), pp. 7-12.

Members of the Impact Assessment Board (IAB)

IAB Members	Expertise
Ms M. KLINGBEIL (Chair)	Deputy Secretary-General of the Commission
Ms A. BUCHER	Director - DG Economic and Financial Affairs
Mr P. KERMODE	Director - DG Taxation and Customs Union
Mr D. HERBERT	Acting Director - DG Enterprise and Industry
Mr J-E. PAQUET	Director - DG Enlargement
Mr G. FISCHER	Director - DG Employment, Social Affairs and Inclusion
Ms B. PYKE	Director - DG Home Affairs
Ms V. TOVSAK PLETESKI	Director - DG Climate Action

Source: European Commission, 2015

This Board has the task of checking whether the impact assessments conducted by the Commission services or, more often than not, by external experts are of sufficient quality to justify approval by the College.

In its work, the Board must apply an ever-increasing battery of criteria and tests relating in particular to:

- subsidiarity, proportionality, and the added value provided by the European Union through the proposed initiative;
- risk assessment and consideration of the precautionary principle;
- economic, social and environmental impacts;
- impacts on consumers;
- impacts on small and micro-enterprises;
- impacts at national and regional level;
- impacts on trade and international investment, and on third countries;
- impacts on the administrative burden and simplification.

Over the years, the Council and sometimes the EP have made numerous requests for further filters: tests involving the internal market and the four freedoms; test on the external dimension of competitiveness (competitiveness-proofing); test on respect for fundamental rights and, very recently, digital test on the compatibility of proposals with the digital economy.

Suffice to say, the criteria are becoming increasingly strict and there are many opportunities to defer or even refuse a proposal on the grounds that the impact assessment is insufficient or even negative in one of these dimensions. Since 2010 (European Commission 2014b), over 400 IAs have been conducted. However, the number of impact assessments submitted to the Board in 2014 was substantially reduced. During 2014, the Board examined 25 draft IA reports and issued 35 opinions (25 at first reading and 10 at second reading on resubmitted drafts).

This fall can be explained, not only by the end of the term of the Barroso II Commission and the impending European elections, but also by the fact that the Board is becoming more demanding. Accordingly, 40% of the draft reports submitted to the Board in 2014 were deemed to be of insufficient quality and were returned to the Commission services for improvement.

As in previous years, the Board's main recommendations in 2014 focused on three requests:

- revise the provisions on definitions;
- improve the assessment of the impact on the sector(s) concerned;
- improve the presentation of alternative options to the one ultimately chosen by the Commission.

A public consultation was launched in June 2014 with the aim of improving the quality of impact assessments. This consultation concerned proposals made in the "Better Regulation" package to be adopted by the Commission on 19 May 2015.

3.2.2. Regulatory Scrutiny Board (RSB)

Although the decision has not yet been officially adopted by the College¹², the Commission has proposed to replace the "Impact Assessment Board" with a "Regulatory Scrutiny Board".

The mandate of this new Board is to be extended to allow for a fundamental retrospective evaluation and fitness checks of EU policies. Its examinations will also cover a broader segment of the legislative cycle and it may even conduct impact assessments on texts amended by the Council or the EP. The Board will assess the quality of impact assessment reports and may make recommendations to improve this quality.

This new body is to have a chair and six autonomous and independent members¹³, employed on a full-time basis, with:

- 3 high-level Commission officials;
- 3 external members.

Except for the chair, who will be a Deputy Secretary-General of the Commission, responsible for Better Regulation, all the members will be employed under a permanent three-year contract. They will work full time for the RSB and will be attached to the General Secretariat of the Commission.

12. This new body is set to be created on 19 May 2015 when the "Better Regulation For Better Results - An EU Agenda" package is adopted.

13. These members are to be experts in impact assessment, employed on a full-time basis, and may not combine this position with any other professional activity. By way of illustration, the IAB was made up of directors or deputy directors from the Commission's various DGs.

The expertise of these members must cover the entire policy cycle and relate to macroeconomic, microeconomic, social and environmental policies. The RSB will adopt its opinions by consensus. In the event of disagreement, a vote will be held with the decision being taken by a simple majority.

Compared to the IAB, the RSB will in future play a much more important role as it will be invested with greater powers:

- monitor the entire IA system from start to finish, with the RSB therefore becoming judge and party;
- assess the entire *acquis communautaire* and no longer just the Commission's new proposals;
- hold a virtual veto over the Commission's new proposals that are deemed to be non-compliant;
- issue opinions on EP and Council amendments.

However, perhaps the most decisive element in our eyes, and also the most questionable, is clearly the partial privatisation of this supervisory structure. Three “high-level” experts appear in the organisation chart, beside the three “high-level Commission officials”. Beyond the actual expertise of these specialists, the fundamental political element is clearly the legitimisation of their role in the institutional structure and their interference in the policy process, without their appointment having been discussed in the European Parliament. In our opinion, beyond the “informed” bureaucratisation of decision-making, the partial privatisation of the Commission's decision-making process abuses the principle of the Commission's independence, as laid down by Article 17(3) TEU: “In carrying out its responsibilities, the Commission shall be completely independent”.

3.2.3. The issue of impact assessment within the Council

3.2.3.1. Application of the indicative check list

The issue of impact assessment has upset the Council, which has been invited to use an indicative check list¹⁴ to conduct impact assessments within the Council. To this end, the Presidency Trio of Italy (2014), Latvia and Luxembourg (2015) has closely examined three pilot projects¹⁵ to assess the relevance of this check list.

14. This indicative check list was established as part of the “Impact Assessment Guidelines intended for the Council” in 2005, under the Austrian presidency. At the time, Belgium, supported by France, firmly insisted on adding the word “indicative”.

15. Proposal for a Directive of the European Parliament and of the Council on package travel and assisted travel arrangements, amending Regulation (EC) No 2006/2004, Directive 2011/83/EU and repealing Council Directive 90/314/EEC; Proposal for a Regulation of the European Parliament and of the Council establishing a framework on market access to port services and financial transparency of ports (COM (2013) 296); and Proposal for a Regulation of the European Parliament and of the Council on organic production and labelling of organic products, amending Regulation (EU) No XXX/XXX of the European Parliament and of the Council [Official controls Regulation] and repealing Council Regulation (EC) No 834/2007 (COM (2014) 180 final, 24.3.2014).

The most sensitive issue – and also the most debated – concerns the impact assessment that the Member States or the Council should conduct before submitting a substantive amendment to a Commission proposal. Certain Member States, such as Germany and the United Kingdom, and also the Commission take the view that, before submitting a substantive amendment, the Member State or the group of Member States concerned should calculate the impact, particularly financial, of this amendment on the Commission's legislative proposal. This argument is clearly not without foundation, because it makes the Member States accountable and avoids unjustified costs, but it also raises two questions:

1. What happens if the impact assessment invoked in support of this amendment is in turn challenged by the Commission, other delegations or the European Parliament? Should a further impact assessment be carried out to decide between the competing and even contradictory impact assessments?
2. What happens if a majority of Member States can accept this substantive amendment or if a blocking minority cannot be formed against the amendment in question? Will it be considered that, despite the qualified majority supporting the amendment, an impact assessment must nevertheless be conducted, if only to enlighten the Commission or European Parliament?

It is clear that these questions – and other possible questions – call for a common methodology between the three institutions so that there is a comparable working basis.

3.2.3.2. 2014 Annual Report on Impact Assessment

The 2014 Annual Report on Impact Assessment within the Council made several astonishing findings.

Firstly, while the added value of the criterion concerning the impact of regulation on competitiveness was acknowledged and invoked, there were no requests from preparatory bodies of the Competitiveness Council for an additional discussion on this dimension of the IA. Likewise, as regards the impact assessment of economic governance, Coreper never invited the Economic and Financial Committee or the Economic Policy Committee to work on the IAs or to conduct a deeper impact assessment of specific elements of the Commission's IAs.

Secondly, in cases where the Council requested an IA on substantive amendments, there was a relatively long, if not very long, period between the request and the impact assessment properly speaking.

Accordingly, in the case of the “Smart Borders” package¹⁶, the Permanent Representatives Committee (Coreper) invited the Commission, in February 2014, to undertake further assessment work on a number of technical, cost-related and operational questions that had been identified during negotiations. The Commission has begun this work with Member States’ experts and this should be finalised by mid-2016, i.e. two years after the IA request. Likewise, in the case of the “Omnibus 2” Directive on insurance¹⁷, the Commission took a year to assess the impact of amendments proposed by the EP with the support of the Council.

We would highlight the extreme length, whether estimated or actual, of the *ex-post* evaluations conducted by the Commission, which do not fit at all with the renewed governance called for by the new College. In short, the Commission wants to reinforce the IAs at all stages of the procedure, but cannot conduct a relevant analysis of them within a reasonable political timeframe, even with the assistance of experts.

3.2.4. Evaluation of the measure

The proposals that more impact assessments should be conducted at different stages of the process raise a number of questions.

Firstly, in our opinion, the integrated and holistic nature of impact assessments is fundamental. There is every possibility that targeted impact assessments, conducted at precise stages of the procedure into specific elements of the Commission’s proposal, will unbalance the entire proposal.

Secondly, the obligation for “significant amendments” to be systematically justified by a neutral impact assessment risks compromising the fluidity of the process and making it considerably longer. The mandatory nature of such an approach could mean that the co-legislators lose their room for manoeuvre, and could even lead to an escalation between impact assessments in support of a particular amendment or also discriminate against delegations without sufficient funds to order an impact assessment¹⁸.

16. On 28 February 2013 the Commission submitted three proposals for regulations on “smart borders” to speed up, facilitate and reinforce border check procedures for foreigners travelling to the EU. This package of measures consists of a Registered Traveller Programme (RTP) and an Entry/Exit System (EES) that will simplify life for frequent third country travellers at the Schengen external borders and enhance EU border security.

17. This is Directive 2014/51/EU of 16 April 2014 amending Directives 2003/71/EC and 2009/138/EC and Regulations (EC) No 1060/2009, (EU) No 1094/2010 and (EU) No 1095/2010 in respect of the powers of the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority.

18. Germany proposes continuous cross-cutting monitoring of legislation by an independent body (cf. the role of the *Nationaler Normenkontrollrat*), without this seeming to be transposable to the EU. In terms of the institutions, the role of this body is actually played by the Commission itself, which therefore gets away from the classic pairing of national governments/European Parliament.

Lastly, an impact assessment conducted after the trialogue risks delegitimising the ordinary legislative procedure, by calling into question the amendments made by the co-legislators to the Commission's initial proposal (loss of the political dimension of the trialogue).

3.3. *Ex-post* evaluation

The *ex-post* evaluation (EPE) of regulations is the EU's new leitmotif. To prevent "horses coming out as camels at the end of the legislative procedure"¹⁹, as appositely underlined by First Vice-President Timmermans, EPEs verify whether the expected results and impacts of a regulation have been achieved. To this end, the Commission has introduced fitness checks in several areas of action, such as the environment (EU policy on fresh water), employment and social policy (information and consultation of workers), industrial policy (type-approval of motor vehicles) and transport (internal market in aviation).

On this point, the EP considers that "ex-post assessments of EU acts should be carried out in the interests of legal certainty several years after the deadline for transposition into national law. The involvement of national parliaments at an early stage in such evaluations would furthermore have the added value of strengthening the common European responsibility of the parliaments of the Member States (European Parliament 2015).

The evaluation time becomes longer than the time taken for the initiative and ordinary legislative procedure. As a result, the methodology guiding these *ex-post* evaluations will be at least as important as the evaluation itself. Beyond the announcement effect, the Commission will have to present a methodological guide on sustainable development criteria, defined jointly by the three institutions. However, the fact that national parliaments – and regional parliaments for matters within their competence – are involved in this comprehensive evaluation, several years after the legislation has been implemented, risks complicating the process and making the political decision, as well as the clarity of the political action, extremely difficult.

3.4. Consultation of the social partners and stakeholders

3.4.1. Consultation of the social partners in certain cases ...

Under Article 154 TFEU, the Commission consults the social partners only on matters falling within the social policy field.

For example, in a document dated 10 April 2015 (European Commission 2015b), the Commission announced that it intended to consolidate three

19. "If the Commission designs a horse, and then it goes through Parliament and the Council and out comes at the end a camel, one wonders if that is exactly what society wanted", remarks by First Vice-President Frans Timmermans on Better Regulation at BusinessEurope Day on 26 March 2015.

directives on information and consultation (I&C) of workers²⁰, subject to the results of a consultation of social partners, as part of the REFIT initiative. A recent “fitness check” conducted by the Commission had found that the three directives were broadly “fit for purpose” (relevant, effective, coherent and efficient) and mutually reinforcing. However, the assessment also brought to light a number of gaps and shortcomings in their practical operation. The Commission therefore considered it necessary to promote consistency among all directives in the area of I&C, and examined the option of a recast. It announced that it would monitor the application of the Quality Framework and report by 2016 on whether further action was necessary in this area, including a possible legislative proposal.

3.4.2. ... and full-scale consultation of stakeholders

A number of years ago, under pressure from several Member States and at the insistence of powerful stakeholders, the Commission decided to increase the number and length²¹ of its consultations, extend their scope to an increasing number of experts and conduct them from an ever earlier stage up to the draft impact assessment (draft IA).

The consultation of stakeholders and experts has taken on such importance and occurs at such an early stage that we may wonder whether it has not, in actual fact, replaced the consultation of the social partners, the European Economic and Social Committee, and the Committee of the Regions, which participate only at precise moments in the legislative cycle and within the limits set by the TFEU.

3.4.3. Creation of a REFIT stakeholder platform chaired by Frans Timmermans

The Juncker Commission has established a “REFIT stakeholder platform” to ensure greater substance and visibility when consulting and listening to stakeholders.

This platform will, once again, involve “high-level experts” from the business world and civil society, as well as representatives from the 28 Member States. All members of this platform will be able to put forward their remarks or suggestions and present their views on the impact of EU law. The platform will react to these contributions and forward them to the Commission. Vice-President Timmermans will chair this platform in person.

20. As a reminder, this involves the exercise of workers’ right to Information & Consultation (I&C) at national or company level, which is currently regulated by the following three directives: Directive 98/59/EC on collective redundancies, Directive 2001/23/EC on transfers of undertakings (Article 7), and Directive 2002/14/EC establishing a general framework for informing and consulting employees.

21. The consultation period was increased from 8 to 12 weeks.

Stakeholders will be consulted at every stage of the process, “from the first idea, to when the Commission makes a proposal, through to the adoption of legislation and its evaluation” (European Commission 2015a). The Commission will also establish a web portal where each initiative can be tracked.

3.4.4. Evaluation of the proposed measures

The consultation of stakeholders seems to be the touchstone for the new Commission, which has made it into one of the main pillars of the BRA. The fact that Frans Timmermans will personally chair the stakeholder platform indicates how much faith is being placed in views from outside the European institutions, led by stakeholders and experts. We have already highlighted the particularly ambiguous role of “high-level experts”. Questions must also be asked about stakeholders, who seem to form a particularly loose category of actors²².

The interference of stakeholders at every stage of the procedure is questionable, particularly given their typology, with the term “stakeholders” covering a myriad of different situations and actors.

The broad view proposed by Freeman (1984) defines a stakeholder as “any group or individual who can affect or is affected by the achievement of the organization’s objectives”. This definition includes just about all actors in society. A more restricted view regards stakeholders as “those groups without whose support the organization would cease to exist” (Stanford Research Institute). However, some regard it as very simplistic to try and identify the “stakeholders”, who are at times very abstract, within a group of social actors with complex and diverse situations.

In the distinctions made between stakeholders in the literature, three categories, among others, should make us reflect on how the political objectives and strategies driving them differ, sometimes considerably:

- internal stakeholders (employers, shareholders, directors, etc.) and external stakeholders (consumers, employees, recipients of social benefits);
- strategic stakeholders (who may affect the organisation) and moral stakeholders (who may be affected by the organisation);
- voluntary stakeholders (who voluntarily interact with the organisation) and non-voluntary stakeholders (who are subject to the interaction).

Some authors (Greenwood 2007) dispute the assertion that paying more attention to stakeholders is necessarily evidence of corporate responsibility, bearing in mind that this is nothing more than a strategic concern on the part of the organisation, in this case the Commission or the European Union.

22. On this issue, see in particular Benjamin Huybrechts, Centre for Social Economy, University of Liège, consulted on the internet on 8 May 2015.

It would therefore be useful to determine which categories of stakeholders are uppermost in the mind of Frans Timmermans in his quest for interaction. It straightaway appears that not all stakeholders are equal in the expertise that they hold and the information that they can access, and therefore in the influence that they can exert over the European process. It is a shame that the institutional consultation of the social partners through the European Economic and Social Committee and the Committee of the Regions does not receive such attention.

In this debate, the European Parliament has stated, through its rapporteur Sylvia Kauffman (S&D/DE), that “the views of all stakeholders, in particular the social partners, must therefore be taken into account in all better regulation activities by all involved parties at all levels. The general approach on better regulation should therefore include a strengthening of the role of the European Economic and Social Committee and the Committee on the Regions in policy making at the EU level” (European Parliament 2015).

As with the EPE, the system put in place by the First Vice-President aims to “bypass” the entire democratic consultation chain: experts from the Member States and social partners in particular, to the benefit of a new category of actors whose legitimacy must be questioned, particularly as their influence will be difficult to monitor.

4. Consequences of REFIT

4.1. “ABR Plus” programme to reduce administrative burdens

In its REFIT communication of 12 December 2012, the Commission announced that the Action Programme for Reducing Administrative Burdens in the EU (ABR), applied from 2008 to 2012, would be followed by a programme called “ABR Plus”, which would focus on the implementation by Member States of the measures adopted under the ABR programme. This would determine to what extent burdens had been reduced and how these results had been perceived by stakeholders.

In its final report on the ABR Plus results²³, the ICF International consortium concluded that savings of EUR 5.4 billion had been made in the five countries surveyed. However, ICF itself considered that it was difficult to draw any operational conclusions for the other 23 Member States that had not been surveyed. As a result, how can the soundness of these conclusions not be questioned when there is insufficient evidence regarding the impact of these measures on the ground?

²³. ABR + study. Final report. ICF Consulting Services Limited, 18 December 2014, document not published.

Lastly, ICF concludes – but did it need to resort to external expertise to find this out? – that the best way of streamlining and reducing administrative burdens is to target one of the following actions: increase the role of online collection tools and systems for the requirements associated with information obligations; revise thresholds and criteria in order to reduce administrative burdens, particularly for micro-enterprises; standardise information obligations, particularly for cross-border activities; and improve the use of existing information and data to reduce information obligations and eliminate redundant reporting requirements, etc.

4.2. The issue of Cumulative Cost Assessments (CCA)

The range of new REFIT programme instruments now includes fitness checks and CCAs. Studies were already being carried out in specific areas of regulation (such as water treatment regulations) or specific sectors such as the food or chemical sectors. The idea is that, when the Commission evaluates the *ex-ante* or *ex-post* impact of a piece of European legislation, it will take into account the fact that these new costs are added to existing compliance and implementation costs. CCAs will be used to calculate the financial costs generated by the legislation.

From now on, the Commission will take the view that an excessive accumulation of regulatory costs in a sector may not be sustainable for operators in that market, even though its proposal may generate a “net benefit” for society as a whole. The Commission’s intention in this respect is to focus on the cost-benefit analysis for a given sector, not in order to assess any benefit of this regulation to end recipients (customers or beneficiaries), but to avoid overregulation of the sector to the detriment of operators in that sector.

5. Overall evaluation

At the end of this first part, we must ask ourselves what interim lessons can be drawn from the analysis of the BRA’s successive incarnations.

Firstly, despite its adaptations, the BRA seems to remain intrinsically bound by its utilitarian nature. European legislation is depicted as a source of burdens and costs that weigh on the economy, without the Commission having properly conducted a double assessment of the costs and benefits. At no point has the Commission given the impression that benefits in terms of economic relevance, meeting the needs of social partners, legal certainty or protection of the general interest can emanate from EU regulation, which clearly stands accused. The first finding must therefore be as follows: the message to the outside world is that the EU does not function correctly and that it produces legislation that is poor quality, full of red tape and not fit for purpose. The objective of the BRA was to tackle a technocratic Europe but, ultimately, the image conveyed to the outside world confirms the dysfunction of the legislative cycle and even reinforces mistrust of the EU by nurturing Euroscepticism.

Secondly, if we keep saying that the EU generates red tape and that we must find this and cut it, surely the subliminal message conveyed to the public is that, in essence, the EU is not the right institutional vehicle for dealing with the issues of our time. Does this mean that the Union is not sufficiently equipped to fulfil its purpose? That the 28 Member States should take over from a “white elephant” that does not work? That legislation is outdated as a way of managing the economy and society? Should we take the view that soft law, or even no law or exemption from certain regulations for SMEs and micro-enterprises, for example, will make life easier for businesses, States and citizens? In this respect, we would like answers from First Vice-President Timmermans and for the European Parliament to step up, because the very future of the EU depends on it.

Lastly, we must note that a paradigm shift seems to be occurring in the European Union. The delegitimisation or sidelining of actors instituted by the Treaty on the Functioning of the European Union (social partners, EESC, CoR) to the benefit of a new category of actors – “high-level” experts, consultants, stakeholders – is worrying because, paradoxically, a new form of opaqueness is developing, which is perhaps more dangerous than the dysfunctions in the current system. If we involve these new actors in the process from start to finish, even before the democratic procedure has been initiated, this will open the door to hidden influences.

Part Two

Development of the agenda with regard to the five EU institutions

In this second part, we want to review the position of each institution with regard to the BRA in general. We will try to identify the main points of the current or expressed positions and we will see if it is possible to draw some conclusions in the form, for example, of common ground between the institutions.

1. European Council: competitiveness as an impassable horizon

1.1. European Council of 2021 March 2014

Under the heading "Industrial competitiveness and policy", the European Council of March 2014 considered the issue in a manner that could not have been more explicit with regard to the link between REFIT and competitiveness:

"5. ... Competitiveness requires a stable, simple and predictable environment, including better regulation and in particular an ambitious REFIT programme. The overall framework at European and national levels must be made more conducive to investment and innovation and the reshoring of manufacturing jobs. The Commission communication 'For a European Industrial Renaissance' provides important input in this respect; the Commission is invited to present a roadmap for taking work forward on this basis.

6. Industrial competitiveness concerns should be systematically mainstreamed across all EU policy areas and be part of impact assessments in view of getting a stronger industrial base for our economy. This should go together with competitiveness proofing ..."

In addition to its support for the REFIT programme, we note the European Council's request, in paragraph 6, for industrial competitiveness concerns to be systematically mainstreamed across all EU policy areas. We find this request interesting in two respects. Firstly, industrial competitiveness is already included in the list of impacts that the Commission must take into account when assessing any proposal. This request therefore constitutes either latent criticism of the Commission, for not having taken this aspect sufficiently into account, or a request to the Commission to pay more attention to some impacts than others.

Secondly, the European Council seems to be suggesting that EU competitiveness is driven by a programme of regulatory and administrative governance and not, for example, by a successful industrial policy or an integrated internal market, which indirectly points to a weakness in the strategic discussions and vision of the Heads of State and Government.

1.2. European Council of 26 and 27 June 2014: continued nuance

Under the heading “Regulatory fitness”, the European Council of 26 and 27 June 2014 gave a very positive assessment of the REFIT programme, while being prescriptive with regard to the four pillars of REFIT:

“18. The European Council reviewed progress made in the area of regulatory fitness and performance on the basis of the Commission Communication. A lot of progress has been achieved in the implementation of the REFIT programme by the Commission, the other EU institutions and Member States; this has led to an effective reduction of the regulatory burden. The European Council considers that regulatory fitness should remain a priority in the work of the institutions. This requires a strong commitment to regulatory simplification and burden reduction in legislative work and better use of impact assessment and ex-post evaluation throughout the legislative cycle, at the EU and national level.

19. Regulatory fitness measures at the European level should be complemented by initiatives for regulatory fitness by the Member States. In this respect Member States should make full use of regulatory flexibility provisions for the benefit of small and medium-sized enterprises in the implementation of EU legislation.

20. The European Council calls on the Council to proceed to a detailed examination of the Commission Communication. The Commission, the other EU institutions and the Member States are invited to continue the implementation of the REFIT programme in an ambitious way, taking into account consumer and employees protection as well as health and environment concerns” (our emphasis).

This, once again, relates to the balance of the impact assessment. However, this time, it was a French request (supported by Belgium) that consumer and employees protection should be taken into account, together with “health and environment concerns”. Obviously it is noticeable that this time the pendulum is swinging against competitiveness. However, it is entertaining to see that, for example, social protection is not mentioned, even though this is one of the three pillars of the integrated impact assessment and the social clause forming Article 9 TFEU provides that: “In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of

adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health". With regard to health and environment, the European Council has chosen a word that is ambiguous and vague. The word "concern" is particularly weak compared to "protection", which entails commitments and rights and which is the word used in the TFEU. The message conveyed by the European Council on this issue indirectly confirms that some impacts are more important than others and that a kind of implicit hierarchy does exist.

1.3. European Council of 18 December 2014

Under the heading "Fostering investment in Europe", the European Council confirms the previous messages by establishing a link between investment and regulatory environment.

"d) invites the Commission and the Union legislators to step up work on key measures to increase the Union's attractiveness for production, investment and innovation, and to improve the regulatory environment for investments, including moves towards better integrated capital markets, while at the same time robustly pursuing the better regulation agenda aimed at transparent and simple regulation achieved at a minimum cost, consistent with the Council conclusions of 4 December 2014;

e) calls for speeding up adoption, transposition and implementation of Union legislation in the Single Market area and enhancing efforts to remove barriers and complete the internal market in products and services".

This time, a call is made for the regulatory environment to be improved in order to support investment, which seems to deviate in a way from the primary objective of regulation and which is undoubtedly not the most emphatic way of increasing investment.

It should be noted that the European Council of March 2015 did not mention the BRA, which may seem surprising given that the new "Better regulation for better results - An EU agenda" package followed close on its heels on 19 May 2015.

2. The Commission: from "coitus" interruptus to legislative abstinence

In this section, we are interested in how Jean-Claude Juncker and his First Vice-President have constructed the internal governance of the Commission and the new working methods developed to achieve the ambitious objectives set.

2.1. A renewed governance

Ten days after assuming the Commission presidency, Jean-Claude Juncker stated in the first communication (European Commission 2014e): “I want us all to show that we are open to change and ready to adapt to it. I want the Commission as a whole to be more than the sum of its parts. I therefore want us to work together as a strong team, cooperating across portfolios to produce integrated, well-grounded and well-explained initiatives that lead to clear results ... I want the Commission to be bigger and more ambitious on big things, and smaller and more modest on small things”.

The general tone was set. The Commission would limit its action to ambitious and well-prepared issues that would generate concrete results on the ground.

2.1.1. Installation of the new College: a radical change in method

When the new College was installed, President Juncker laid down the new rules: “The new Commission has taken a clear commitment to prioritise and streamline its work. This will be achieved through a new way of working with the Vice-Presidents, who were appointed to this function by the President and are coordinating and steering work in the priority areas set out in the Political Guidelines of the President. The principles of subsidiarity, proportionality and better regulation will be at the core of this work, focusing the Commission’s efforts on areas where EU action has clear added value and benefit” (European Commission 2014f).

The document also specified that: “This new way of working needs to be fully reflected at services level. These instructions ... explain that services should seek early political validation of new initiatives and how cooperation between services will be strengthened throughout the policy cycle”, and added that: “The Secretariat-General will play an enhanced coordinating role for major initiatives, supporting the Project Teams led by the Vice-Presidents on behalf of the President”.

In the future, it will no longer be possible to launch an inter-service consultation (ISC) if this proposal has not been entered on the College’s agenda at least 12 months before the planned adoption date. This proposal must also be accompanied by a roadmap.

This rule particularly applies to all major initiatives, i.e. an initiative included in the Commission Work Programme, REFIT items, new legislative proposals, proposals for the negotiation or the conclusion of international agreements, policy communications (as well as White Papers and Green Papers), delegated and implementing acts, financing decisions having significant impacts, and other Commission initiatives that are important.

2.1.2. The long road to Commission initiatives

2.1.2.1. Roadmap

A roadmap must be produced for all new major initiatives. It should outline the context and objectives of the initiative, as well as a preliminary assessment of the problem, the added value of action at EU level, possible policy options and their likely impacts. It is the Secretariat-General that validates the initiative and publishes the roadmap on the Europa website. The Secretariat-General also confirms whether an impact assessment is required.

2.1.2.2. Impact assessment²⁴

An IA is required for all initiatives with significant economic, social or environmental impacts (legislative proposals, non-legislative initiatives, delegated and implementing acts). Once an initiative has been validated, the inter-service group (ISG) will be set up in agreement with the Secretariat-General to steer both the IA and the policy preparation work. Draft IA reports need to be submitted for scrutiny by the Regulatory Scrutiny Board. A positive RSB opinion is necessary before an inter-service consultation can be launched.

2.1.2.3. Stakeholder consultation

This process must respect the minimum standards for consultation and allow for at least a 12week consultation period for open public consultations (European Commission 2002 and 2012). The consultation should invite stakeholders' views on all IA elements: definition and scope, subsidiarity, policy options and likely impacts, etc. Public consultations should also be conducted in the context of *ex-post* evaluation of existing policies. As we have already indicated above, the role of experts is considerably reinforced.

2.1.2.4. The "evaluate first" principle

The Commission will apply the "evaluate first" principle. Evaluations, including wider ranging fitness checks, should precede impact assessments of options for new or amended regulation. Inter-service groups (ISG) should be kept informed of evaluations and fitness checks. These ISGs should assess the relevance of evidence and interim opinions proposed before any new stage.

2.2. The First Vice-President: in sole command of new regulation?

Looking at the new working method, it seems that First Vice-President Timmermans is almost solely responsible for "filtering" all new Commission initiatives. Already Chair of the stakeholder consultation platform, he appears

²⁴. On this point, see also the "Impact Assessment Guidelines" of 15 January 2009, available at http://ec.europa.eu/smart-regulation/impact/index_en.htm.

to be the *deus ex machina* who will decide what the European Union “will and will not do”. In his work, Frans Timmermans will be assisted by Edmund Stoiber, appointed, at the age of 73, to the post of “Special Adviser for Better Regulation”. Sometimes perceived as the 29th Commissioner of the Juncker team, he will be the eyes and ears of Chancellor Angela Merkel within the College. Jean-Claude Juncker stated²⁵ that “he is the right man to advise us on fighting overregulation and red tape and give growth and jobs a real chance in Europe”.

2.3. Supervision of the Directorates-General by the Secretariat-General of the Commission

Under the supervision of the President and his Cabinet, Vice-Presidents will be supported by the Secretariat-General in their tasks. All requests from Vice-Presidents to Commissioners and to Commission services – in particular briefing requests and requests for meetings with several Commissioners and/or the services that report to them – should always be made via the Secretariat-General and in close consultation with the President’s Cabinet. The Secretariat-General will facilitate the cooperation between services necessary to deliver on the Vice-Presidents’ instructions. The Secretariat-General and the President’s Cabinet will help ensure that Vice-Presidents always act with the support and in line with the mandate given to them by the President: The Secretariat-General and the President’s Cabinet “will be the guardians of fairness, objectivity and efficiency in the relationship between Vice-Presidents, between Vice-Presidents and Commissioners and between Commissioners”.

Major initiatives must be validated by the responsible Commissioner, the Vice-President and the First Vice-President, unless the initiative is directly initiated by the President. In addition, initiatives must be validated by the First Vice-President through the Secretariat-General, in close consultation with the President’s Cabinet, before the item is confirmed on the agenda.

We are therefore witnessing a kind of “presidentialisation” of the College, which will depend upon the Secretariat-General of the Commission, confirmed as being simultaneously the war machine²⁶ of the Juncker-Timmermans “presidential” duo, the control tower for Commission initiatives and the guard dog for procedures implemented.

²⁵. Jean-Claude Juncker, Press release, 18 December 2014, consulted online on 13 April 2015 at http://europa.eu/rapid/press-release_IP-14-2761_fr.htm.

²⁶. In order to perform its new tasks, the Secretariat-General has expanded its services with 80 new employees taken from the Directorates-General.

2.4. The Commission's 2015 Work Programme vetted by REFIT

2.4.1. The Commission's limited legislative ambition

On 16 December 2014 the Commission adopted its Work Programme for 2015. This programme was formally presented to the General Affairs Council on 16 December 2014 and to the European Parliament during its plenary session held in Strasbourg on 15-18 December 2014.

This Work Programme repeats the 10 priorities identified by President Juncker in his July 2014 "Political Guidelines for the next European Commission" and is notable for its annexes.

Annex 1 sets out these 10 priorities in a list of 23 proposals that the Commission intends to put on the table in 2015. The Commission's focus is on responding to the economic crisis, particularly by prioritising investment, in order to restore sustainable growth and jobs.

To ensure rapid and effective action, the Commission intends to apply the "political discontinuity" principle. Annex 2 therefore lists 80 pending proposals that the Commission suggests withdrawing or amending, subject to the views of the EP and the Council.

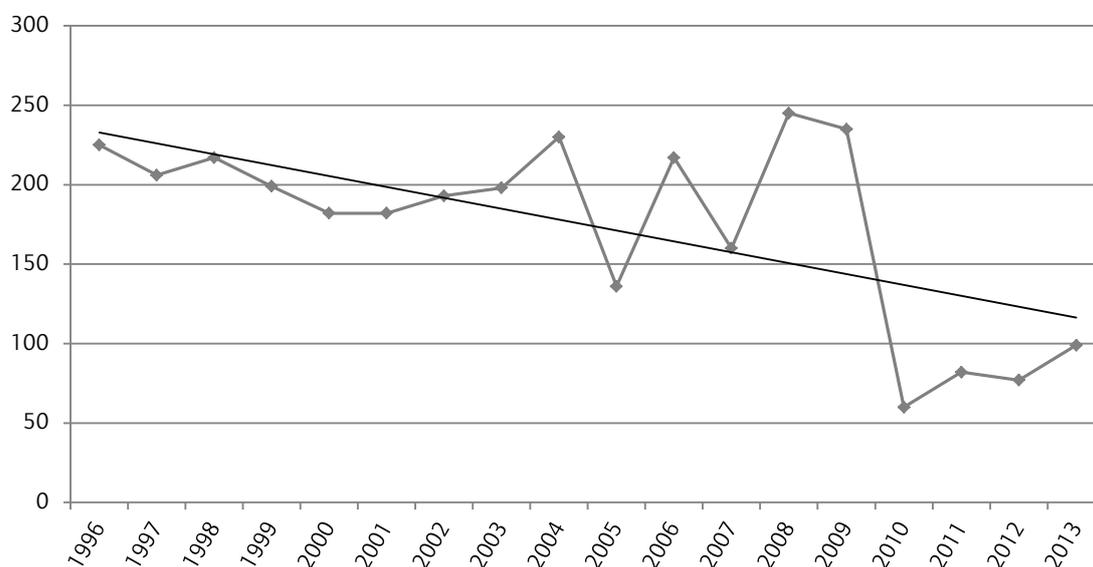
By therefore sifting through the numerous proposals awaiting decision by the Council and the European Parliament, the Commission has taken an undeniably political responsibility, which was in fact indicated by the EP. Accordingly, Sylvia Kaufmann, rapporteur for the REFIT programme, highlighted that Article 39 of the 2010 Framework Agreement between the EP and Commission stipulated that the Commission "shall proceed with a review of all pending proposals at the beginning of the new Commission's term of office, in order to politically confirm or withdraw them, taking due account of the views expressed by Parliament", so that the latter is not presented with a *fait accompli*.

Annex 3 sets out all the REFIT legislative initiatives to be adopted by the Commission in 2015, together with all the evaluations and fitness checks that are currently being conducted under the REFIT programme or for which results are expected during 2015.

Clearly, the most striking point when reading the Commission's 2015 Work Programme is the considerable reduction in initiatives compared to the reference year 2009, i.e. at the start of the last Parliament (2009-2014).

The Commission's 2009 Work Programme (European Commission 2008a) in fact contained 12 strategic initiatives, 37 priority initiatives and 33 simplification initiatives, i.e. 82 initiatives in total, compared with the 23 initiatives in the 2015 programme, of which 9 are non-legislative initiatives.

Figure 1 Number of adopted EU acts by year (1996-2013)



Source: EU Legislative Output 1999-2013 [database], Centre for Socio-Political Data (CDSP, CNRS – Sciences Po) and Centre d’Études Européennes (CEE, Sciences Po) [producers], Centre for Socio-Political Data [distributor]

2.4.2. Withdrawal by the Commission of pending legislative proposals

Invoking the political discontinuity principle, the new Commission has withdrawn from its 2015 Work Programme a considerable number of legislative proposals, arguing in some cases that agreement within Council is unlikely.

Although the Commission is entitled to withdraw a legislative proposal, rapporteur Sylvia Kauffman takes the view that such radical action cannot be justified solely by the change in composition of the College and its priorities: “Any decisions at European level on matters for which there is a legal basis in the Treaty on the Functioning of the European Union providing for a procedure which includes Parliament, but which only take the positions of the Council and the Commission into account, merely violates the balance of power between both legislative Chambers and has the effect of underscoring the democratic deficit of the European Union”.

Sylvia Kauffman therefore believes that “Parliament ought to send a strong message to the Commission to not take any action in connection with the working programme which could jeopardize the political trust between the institutions, in particular if taken under the umbrella of simplification and better regulation”.

We will see that the Court of Justice of the European Union has ruled on this precise point to limit the Commission’s room for manoeuvre.

3. Council of the European Union

3.1. Competitiveness Council

The Competitiveness Council gave its opinion on the REFIT programme during its meeting of 4 December 2014, under the Italian Presidency. These conclusions (Council 2014) are interesting as they detail the position of the 28 Member States with regard to the REFIT programme and its various aspects.

We firstly note that a debate took place, instigated by Belgium and Luxembourg, on the very role of legislation. Following bitter discussions, the Council ended up stating that it “re-emphasises that regulation at Union level is necessary in order to ensure that EU policy goals, including the proper functioning of the Single Market, are attained”, which echoes the first sentence of the Commission communication on the REFIT programme.

What seemed obvious to certain Member States and external observers was not to other Member States that did not want to convey a paradoxical message – regulation is necessary ... but the regulatory burden must be reduced – at a time when the European Union and its institutions were on the back foot.

Otherwise, the Council’s conclusions confirm the most common view of the Member States.

- The Council “emphasises that smart regulation is among the key drivers for addressing the challenges of delivering economic growth and fostering competitiveness and job creation” (paragraph 4). We note the constantly reiterated premise of an organic link between smart regulation, on the one hand, and growth, competitiveness and job creation, on the other hand.
- It “calls on the Commission to reaffirm its commitment to an ambitious REFIT programme, accelerating its implementation and including further evaluations, simplifications, withdrawals and proposals for repeals of the most burdensome EU proposals and legislation” (paragraph 6). Once again, a few delegations unsuccessfully called for these withdrawals, deletions and other simplifications to be subject to a genuine impact assessment in order to avoid the costs of non-Europe and blanket deregulation.
- It “calls on the EU institutions to enhance efforts to reduce the overall regulatory burden, without undermining the policy goals of regulation” (paragraph 15). Belgium, Luxembourg and a few other Member States insisted on clarifying that lightening the regulatory burden should not reduce the objectives pursued by the Treaty.
- It “stresses the importance of applying competitiveness proofing within the Commission’s integrated IAs in all policy areas, with the aim to contribute to systematic mainstreaming of industrial competitiveness” (paragraph 17) and of introducing “a digital dimension in the IA process to ensure that all new legislation is made fit for the digital age” (paragraph 19). It was logical that the Competitiveness Council would insist on reinforcing the competitiveness pillar in the impact

assessment. The call for a new “digital” test, to be added to the already long list of tests to be conducted in the integrated impact assessment, simply reinforces the need – and the difficulty – for the Commission to prioritise all the various dimensions of a proposal, while leaving the co-legislators to move the political cursor.

- It invites the Commission “to ensure that stakeholders and Member States can contribute at an early stage in the process of impact assessments. This might enable stakeholders and Member States to have a better informed opinion and to contribute evidence to inform the IA the Commission subsequently prepares” (paragraph 19). Once again, a fierce fight took place between the advocates of a consultation at the draft impact assessment stage and those who felt that stakeholders – understood as certain particularly well-organised lobby groups – could not take precedence over the institutional consultations provided for by the Treaty, particularly with the EESC, CoR and social partners.
- It “supports stronger ex-post evaluation of the performance of EU regulation as part of the EU policy cycle, particularly as regards the growth and jobs expected benefits put forward in the IA” (paragraph 20). This request is one of the most sensitive items on the political agenda and also one of the pet subjects of First Vice-President Timmermans.

3.2. General Affairs Council

The General Affairs Council has looked at this issue in recent years as part of its preparations for the European Council and in its conclusions, which have examined the REFIT programme at irregular intervals.

4. European Parliament

4.1. The situation among the political groups

The situation is mixed among the political groups. Paradoxically, the Eurosceptic and Europhobic groups, which could have quite easily joined Edmund Stoiber in denouncing the Brussels bureaucracy, fairly regularly vilify Europe and denounce its anti-democratic nature. However, we have not (yet) found any trace of a structured reflection, based on the HLG’s findings on administrative burdens, in support of the BRA. It is rather as if their radical criticism of Europe does not need any findings or justification. It is not that the regulations are too burdensome, but rather that the very idea of Europe is questioned.

The EPP has assumed a mainstream position, similar to that of Edmund Stoiber, according to which the regulatory burden must be reduced and bureaucracy combatted. It makes a link between burden reduction and job and growth creation, although some EPP members take a more radical stance. Accordingly, a working group that closely examines each legislative proposal with regard to its regulatory burden and its impact on SMEs has been set up by the EPP. “In this new legislative period, we finally have to take the gloves off and make sure

that new EU law focuses on what is really essential. Too detailed regulation is a barrier to economic growth”²⁷, explained Markus Pieper (EPP/DE), the newly-elected CDU Chairman of this 40MEP working group. Expressing the position of his group, Markus Pieper called for a “Red Tape Watch” – an observatory against bureaucratic excess – and for a “European Regulatory Control Board”, which would prevent infringements of the principle of subsidiarity and measure the cost of bureaucracy, two tasks that are not part of the RSB’s mandate.

For its part, the S&D Group defends a balanced position as it is sensitive to criticisms of the BRA and calls for respect for the social partners and transparency, particularly as we will see below with the Kaufmann report and in the context of the revision of the 2003 Interinstitutional Agreement in Part Four of this study.

4.2. Kaufmann report on the REFIT programme: an interesting stage

The European Parliament’s draft report, dated 5 March 2015 (European Parliament 2015), for which the deadline for tabling amendments was 30 April 2015, emanates from the Committee on Legal Affairs. It was entrusted to Sylvia-Yvonne Kaufmann (S&D/DE). This report is interesting in more than one respect.

Firstly, it “underlines that the Commission should focus more on the quality of legislation rather than on the number of legislative acts” (paragraph 3), and “stresses that a European standard generally replaces 28 national standards, thereby underpinning the single market and cutting down on bureaucracy” (paragraph 4). This point of view is simple common sense, but it is heard much more in certain arenas, particularly in the Council where this finding remains relevant.

The report also points out that, according to Article 11 of the EU Treaty, all EU institutions are required to maintain an open, transparent and regular dialogue with representative associations and civil society; it calls on the institutions to pay special attention to this obligatory and regular dialogue in the negotiations on a new interinstitutional agreement (paragraph 8). This is a pertinent point given that, more often than not, it is business federations and consortia of experts that conduct the dialogue with the Commission ...

The report also “insists that impact assessments should be based on estimating what the additional costs would be for the Member States if there were no solution at European level” (paragraph 14). This important reminder refers to the costs of non-Europe. In other words, deregulation and the “disintegration” of the EU also have a cost that could result, for example, in the construction of new barriers or new forms of legal uncertainty.

27. EPP Group, Press release, 16 September 2014, consulted online on 13 April 2015 at <http://www.eppgroup.eu/press-release/SMEs%3A-EPP-Group-sets-up-Red-Tape-Watch>

The rapporteur “believes that, while the focus of such assessments is primarily on monetary factors, and on easily quantifiable criteria such as economic operators costs, the long-term value of legislation, such as the reduction of adverse health effects or the preservation of ecosystems, is often difficult to quantify, and that, as a consequence, social and environmental costs and benefits are not taken into adequate account” (paragraph 17). In addition, she “believes that all EU institutions should develop a common methodological approach to impact assessments, and calls on them to include this as a priority in the upcoming negotiations on a new interinstitutional agreement” (paragraph 18).

In our opinion, these two points are highly relevant. The first point echoes the finding made by Andrea Renda in his report to the General Secretariat of the Council. There should be an assessment of the direct and indirect impacts, covering not only the costs but also the benefits of a piece of legislation, and not just from an economic standpoint, but also in broader social and environmental terms. The second point highlights the importance of a common methodological approach to impact assessment.

The rapporteur also “stresses that, in the interests of legal certainty for citizens and businesses, such [*ex-post*] analyses should be carried out within a sufficient time-frame, preferably several years after the deadline for transposition into national law” (paragraph 22).

Lastly, the rapporteur “acknowledges that, in most cases, it is the prerogative of the Member States to decide whether to adopt higher social and environmental standards at national level than those agreed upon at EU level ...; calls, however, on the competent national authorities to be aware of the possible consequence of the so-called practice of ‘gold plating’, by which unnecessary bureaucratic burdens are added to EU legislation, since this may lead to a misconception of the legislative activity of the EU, which in turn might foster EU scepticism; recommends, for the sake of transparency and user-friendliness, that any additional innovations introduced at national level be clearly identified as such (paragraph 25). Here she alludes to the “gold plating” mentioned previously, without, however, offering any solutions to the problem of minimum harmonisation that allows over-regulation. We have seen, in this regard, that the incoming Luxembourg Presidency considers that one way of counteracting this phenomenon could be to generalise the mutual recognition principle, by including an internal market clause in harmonisation directives.

4.3. The European Parliament’s impact assessment unit

From the Doorn report in 2004 through to the Niebler report in 2011, the European Parliament has maintained pressure on the Commission to conduct an *ex-ante* impact assessment of its proposals.

In 2012 a Directorate for Impact Assessment and European Added Value was established in order to strengthen the European Parliament's ability to monitor and better understand the policy cycle stages and improve the general quality of "better regulation".

Two units focus on *ex-ante* issues in the legislative process.

4.3.1. Ex-Ante Impact Assessment Unit

The *Ex-Ante* Impact Assessment Unit conducts fitness checks of the IAs produced by the Commission. It studies their solidity, consistency and completeness. This unit examines the Commission's roadmaps on legislative proposals and undertakes an initial appraisal of all the Commission's significant IAs to check that all relevant criteria have been met and to identify the strengths and weaknesses of the text.

The unit's work includes:

- detailed appraisals of the quality and independence of the Commission's IAs;
- substitute or complementary IAs on certain aspects of the text;
- IAs on one or more substantive amendments proposed by the EP.

Between June 2012 and June 2014²⁸, the unit prepared 74 initial appraisals of Commission IAs for parliamentary committees, five detailed appraisals of IAs, two substitute or complementary IAs, and four IAs on 21 amendments proposed by the EP.

The most common areas were public procurement, product safety, the Transatlantic Trade and Investment Partnership (TTIP), registration of motor cars, and so on, i.e. all the areas in which a legislative initiative was proposed by the Commission.

4.3.2. European Added Value Unit

The European Added Value Unit analyses the potential impacts and benefits of EP proposals under Article 225 TFEU²⁹, as well as current EU activities through "Cost of Non-Europe Reports". It produces these Cost of Non-Europe Reports in policy areas where greater efficiency or a collective good could be realised through common action at European level.

²⁸. These figures are taken from the activity report published by the European Parliamentary Research Service, which covers the activities from June 2012 to June 2014 (European Parliament 2014). The next report will cover the period from July 2014 to June 2015.

²⁹. Article 225 TFEU provides that "The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties".

This unit produced eight European Added Value Assessments (all accompanying legislative initiative reports) and six Cost of Non-Europe Reports.

From June 2012 to June 2014, the impact assessment and European added value units produced around a hundred reports with a total of 4 000 pages.

5. Court of Justice

5.1. The Afton judgment on impact assessment

The debate on impact assessments has resulted in a judgment of the Court of Justice. The Court's judgment of 8 July 2010 in Case C343/09 *Afton Chemical Limited*³⁰ v *Secretary of State for Transport* found that the European Union legislature must be allowed a broad discretion, in an area which entails political, economic and social choices on its part, in particular as to the assessment of highly complex scientific and technical facts in order to determine the nature and scope of the measures which it adopts. "The legality of a measure adopted ... can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue"³¹, adds the Court.

Accordingly, the Court takes the view that the impact assessment carried out by the Commission, which was annexed to its proposal for a directive, was not binding on either the Council or the Parliament, who, under the ordinary legislative procedure, were entitled to make amendments to that proposal (paragraphs 30 and 57).

The Court also takes the view that the European Union legislature's broad discretion applies not only to the nature and scope of the measures to be taken but also, to some extent, to the finding of the basic facts (paragraph 33). In that regard, "it is necessary to ascertain whether, in exercising its discretion, the European Union legislature attempted to achieve a degree of balance [our emphasis, ed.] between, on the one hand, the protection of health, environmental protection and consumer protection and, on the other hand, the economic interests of traders, while pursuing the objective assigned to it by the Treaty to ensure a high level of protection of health and environmental protection" (paragraph 56). The Court adds: "it must be acknowledged that the European Union legislature may, under the precautionary principle, take protective measures without having to wait for the reality and the seriousness of those risks to be fully demonstrated" (paragraph 62).

³⁰. Afton, which is based in the United Kingdom and forms part of the Afton Chemical group, manufactures methylcyclopentadienyl manganese tricarbonyl (MMT) for use as a metallic additive in fuel. It brought an action for annulment against Article 1(8) of Directive 2009/30/EC amending Directive 98/70/EC on the grounds that this would limit the use of MMT in fuel whereas, prior to the adoption of that Directive, there was no restriction on the use of MMT.

³¹. Case C343/09, Summary of the Judgment, paragraph 3.

The Court further specifies that “The objectives of protection of health, environmental protection and consumer protection are referred to both in Article 95(3) EC [now Article 114(3) TFEU], under which the legislature is to take as a base a high level of protection, taking account, in particular, of any new development based on scientific facts, and in Article 174(1) and (2) EC [now Article 191(1) and (2) TFEU], which provides that the Community policy on the environment is to be based on, inter alia, the precautionary principle” (paragraph 49). The Court adds that it remains, however, to be verified that the European Union legislature has not gone beyond what is necessary to attain those objectives (principle of proportionality) (paragraph 50), that it has not adopted a measure that is discriminatory (paragraphs 63 and 68) and that the principle of equal treatment has not been infringed (paragraph 77).

This opinion is important in our view as it clearly indicates that impact assessments cannot be automatic or prevail over the political assessment. The co-legislators must have the last word.

5.2. The Court’s opinion on the conditions for the withdrawal of a Commission initiative

Can the Commission keep control of its legislative proposal throughout the negotiations and use its right of withdrawal with regard to a proposal not yet adopted? Can it object to changes that it regards as contrary to the proper functioning of the internal market (in which case, the Council’s unanimous approval is needed in order to submit the necessary amendment)? These are some of the questions that arise when the European Parliament or the Council significantly amend a Commission proposal.

5.2.1. The Council’s action against the Commission concerning its right of withdrawal

In July 2013 the Council brought an action regarding the power that may be conferred on the Commission to withdraw a legislative proposal. The Council argued that the Commission did not have a “right” of withdrawal symmetrical to its right of initiative enshrined in Article 17(2) TEU, which is almost absolute insofar as it is discretionary.

According to the Council, the Commission’s right of withdrawal must be limited to:

- objective circumstances, such as where the legislative proposal has been rendered obsolete or pointless by the passage of time or by the emergence of new circumstances or technical or scientific data;
- cases where a lack of notable progress in the legislative procedure for a considerable time presages failure;

- cases where there is a common strategy shared with the EU legislature in a spirit of sincere cooperation and of observance of the institutional balance³².

Again according to the Council, the Commission could no longer withdraw its legislative proposal once a compromise was reached between the co-legislators regarding the adoption of the legislative act, without infringing the principle of sincere cooperation.

In its defence, the Commission asserted that withdrawal of a legislative proposal, like the submission or alteration of such a proposal, is one of the expressions of its right of initiative in the general interest of the European Union.

It is for the Commission alone to decide:

- whether or not to submit a legislative proposal;
- whether or not to alter its initial proposal or a proposal that has already been altered, where its proposal has not yet been adopted;
- whether to maintain the proposal or to withdraw it³³.

5.2.2. Opinion of the Advocate-General

In his opinion, the Advocate-General noted that the Treaties do not refer to the existence of a power of withdrawal nor to the manner in which this may be exercised. However, in accordance with a well-established tradition, the Commission withdraws legislative proposals on an individual or group basis by way of an “administrative clean-up”.

For these reasons, the Advocate-General was of the opinion that conferring a power of withdrawal on the Commission is the ultimate manifestation of the Commission’s monopoly on initiating legislation, in accordance with Article 17(1) TEU, but that this affects the legislative position of the other institutions participating in the legislative procedure.

Consequently, its exercise precludes the co-legislators from pursuing the legislative procedure. As the power of withdrawal definitively affects their legal position, it cannot be unlimited.

He determined that the withdrawal must be preceded by extensive communication between the Commission and the co-legislators. The Commission is in fact required to provide a detailed explanation in due time before withdrawing

³². The Council refers, in this respect, to Article 7(2) and (3) of Protocol (No 2) on the application of the principles of subsidiarity and proportionality, annexed to the TEU and TFEU (hereinafter the “subsidiarity protocol”).

³³. See, in this respect, judgment in Case 188/85 *EEC Seed Crushers’ and Oil Processors’ Federation (Fediol) v Commission of the European Communities*, EU:C:1988:400, paragraph 37).

any proposals on which Parliament has already expressed a position at first reading³⁴.

5.2.3. Judgment of 14 April 2015 in Case C-409/13

In accordance with the opinion of the Advocate-General, the Court defined the conditions that the Commission must fulfil before withdrawing a proposal:

- it must state to Parliament and the Council the grounds for the withdrawal, which, in the event of challenge, have to be supported by cogent evidence or arguments (paragraph 76);
- it may withdraw a proposal only after having due regard to the concerns of the European Parliament and the Council underlying their intention to amend that proposal (paragraph 83).

However, the Court takes the view that it must be accepted that, where an amendment planned by the EP and the Council distorts the proposal for a legislative act in a manner which prevents achievement of the objectives pursued by the proposal and which, therefore, deprives it of its *raison d'être*, the Commission is entitled to withdraw it (paragraph 83).

This recent judgment is important as it invites the Commission to rethink very carefully its approach to the withdrawal of its proposals. This judgment means, by extension, that proceedings may now be brought against the Commission by the Council or the EP if it has not made every effort to take into account the concerns of the co-legislators.

The fact that the Court has limited the Commission's right to withdraw legislative proposals is a key point in the debate, with consequences that are not yet fully measurable. In our opinion, this is a setback for First Vice-President Timmermans, who must reconsider the withdrawal of certain legislative proposals, as we will see in Part Three.

34. Framework Agreement on relations between the European Parliament and European Commission (OJ L 304, 20.11.2010, p. 47). This agreement forms part of Parliament's rules of procedure (as Annex XIII).

Part Three

Seven example cases with regard to impact assessments

In order to assess the new Commission's practice and intentions in using, not using and even exploiting impact assessments, we can refer to seven cases that are exemplary in several respects.

In the following section, we will set out seven cases, in different areas and at different stages of the procedure, that the Commission has considered not to be appropriate for a genuine IA, or where it has decided to postpone the initiative despite a genuine IA, or where it has ignored signals from the social partners.

1. The Commission proposal on the circular economy: an unjustified withdrawal of the work programme

1.1. Background

The Commission's 2010 impact assessment revealed that, in 2010 alone, an estimated 400 000 people would die prematurely from air pollution in the EU (European Commission 2013e) and that almost two-thirds of the EU land area would be exposed to excess nutrients from air pollution. The damage to health would have a huge economic cost, added the IA, estimated at EUR 330940 billion (39% of EU GDP) (European Commission 2013f).

However, several months before the new College was installed, some of Europe's employers lobbied the Commission intensely, calling for the withdrawal of the "Clean Air Programme for Europe" (European Commission 2013c) and the redrafting of the proposed directive on the circular economy "as an economic piece of legislation rather than from a purely environmental perspective". The employers based their demands on the argument that the global macroeconomic cost of climate change policies was around 1% of GDP per year. They stressed that certain economic sectors could be hard hit and that the adoption of ineffective measures would increase this figure (Business Europe 2011).

In his mission letter of 1 November 2014 to the Environment Commissioner, Karmenu Vella³⁵, Jean-Claude Juncker asked Mr Vella to take stock of the

35. Jean-Claude Juncker, Mission Letter to Karmenu Vella, Commissioner for Environment, Maritime Affairs and Fisheries, 1 November 2014. http://ec.europa.eu/commission/sites/cwt/files/commissioner_mission_letters/vella_en.pdf.

negotiations on the “air strategy” (European Commission 2013d) and the “circular economy” to see whether and how these packages were consistent with the jobs and growth agenda, on the one hand, and the broader environmental objectives, on the other hand.

Following this announcement, in a joint letter of 1 December 2014 addressed to the Commission President and the relevant Commissioners, no less than 11 Environment Ministers³⁶ expressed their “firm support for the ‘Circular Economy’ package published in July 2014 and for the ‘Clean Air’ package adopted in December 2013 by the Commission, on which the Council and Parliament had already started work”.

The ministers highlighted that “air pollution remains a major economic and social burden for Europe’s citizens, resulting in significant and extensive damage to health and the environment” (European Commission 2013b) and that this was an area in which “a sizeable majority of people – 79% according to a recent Eurobarometer survey – wanted the EU to act”³⁷. They also recalled that, during its meeting on 28 October 2014, the EU’s Environment Council³⁸ had “unanimously” adopted conclusions indicating that “the transition towards a circular and low-carbon and climate resilient economy and sustainable consumption and production patterns, will create global business opportunities that will benefit competitiveness and employment in the Union”. In this context, they therefore invited the Commission to “closely examine the opportunities offered by the Circular Economy package, not just as the only route to sustainable growth, but also as an appropriate way of fulfilling the EU agenda in terms of jobs and growth and in its social dimensions”. This position was endorsed by the European Environmental Bureau (EEB) (European Environmental Bureau 2014). In an open letter sent on 17 November 2014 to the Commission President, the EEB reiterated that 400 000 European citizens die prematurely each year as a result of air pollution and stated that Europe would miss out on a “huge health benefit for the European economy” in the event of inaction.

On 16 December 2014 the European Commission announced, in the context of REFIT, its intention to withdraw from its work programme for 2015 (European Commission 2014a) the “clean air” and “waste” packages (i.e. the legislative instrument of the “circular economy “package”), which would be reintroduced at a later date.

In order to justify his position on the “circular economy” package, Frans Timmermans explained that the Commission would come back with a proposal that would go beyond the existing proposal by including the “recycling” dimension in the design of new products and by creating a market in secondary raw materials. The First Vice-President denied that the Commission was

36. Belgium, Germany, Greece, Spain, France, Italy, Cyprus, Luxembourg, Portugal, Slovenia, Sweden and Norway.

37. Eurobarometer 2014, http://ec.europa.eu/public_opinion/archives/ebs/ebs_416_en.pdf.

38. Council – Press release 534 PR CO 54 – 28 October 2014, p. 7.

abandoning its environmental ambition and justified the reduction in its work programme by the desire to focus on the priorities of jobs, growth and investment and "to stop meddling in national issues and imposing pointless paperwork or regulatory burdens". He also considered that "no agreement was foreseeable" in the near future between the Council and Parliament on air and the circular economy.

However, as a token of its good faith, the Commission announced that it would redraft this legislative package (van Eekhout 2014) "based on the impact assessment that had concluded that the EU needed to act urgently".

1.2. Reaction of the co-legislators

On 17 December 2014 the Environment Council had an exchange of views on the 2015 work programme. The delegations were overwhelmingly opposed to the withdrawal of the circular economy package and to the amendment of the air package.

As for the European Parliament, exchanges within the ENVI Committee showed that all the political groups were highly critical³⁹ of the withdrawal. The European Parliament failed to achieve the majority needed in plenary to adopt a resolution on all the intentions announced by the Commission for its work programme. However, the Chair of the ENVI Committee, Giovanni La Via (EPP/IT), sent a very clear letter to Vice-President Timmermans on 18 December 2014.

He stated, firstly, that "the negative impacts of air pollution on human health and the environment and the European dimension of the problem are evident from the Commission's impact assessment and from all relevant stakeholders in the field of air quality: 400 000 premature deaths (ten times more than caused by road traffic accidents), total external annual costs of health impacts alone in the range of 330 to 940 billion euros, including indirect economic damages of 15 billion euros from lost workdays, 4 billion euros healthcare costs, 3 billion euros crop yield loss and 1 billion euro damage to buildings. The expected benefits of the proposed legislation are compelling: it would help prevent an additional 58 000 premature death annually and reduce the costs of air pollution by 2030 by at least 45 billion euros, ten times the compliance cost, which will further reduced by synergies with the 2030 climate and energy policy".

He also reiterated the expected benefits of the "circular economy" package in the next 15 years for the EU economy and population: "180 000 jobs to be created, reinjection of raw material into economy, reduction in greenhouse emissions gases, reduction in costs of cleaning litter, reducing red tape,

39. According to Agence Europe on 15 January 2015, five out of the seven political groups, accounting for over 60% of MEPs, opposed the withdrawal of key environmental legislation.

increasing competitiveness of EU manufacturing, boosting innovation in green technology and remaining the world leader in green technology. In addition, non-quantifiable benefits of ambitious waste recycling and landfilling targets include improved environment and health of population guaranteeing higher productivity of labour force in Europe and lower costs for national budgets”.

The letter ended with an urgent invitation to the Commission “to maintain both proposals unchanged to avoid pointless loss of time and resources as well as uncertainty ... and strike the right balance between the Commission’s better regulation agenda and the higher objective of sustainable development which is enshrined in article 3 of the EU treaty”.

1.3. Outcome

In the end, despite everything, the First Vice-President decided to withdraw the circular economy package. Frans Timmermans had also planned to withdraw the proposal for a directive on plastic bags (which formed part of the same package), but had to backtrack at the last minute due to pressure.

As regards the “clean air” package, although he had to drop the plan to withdraw the directive on national emission ceilings (NECs), the Commission announced that this would likely be amended at a later stage. He also had to backtrack on withdrawing the proposal for a directive on emissions from medium combustion plants.

1.4. Assessment

Despite a very clear IA and consistent signals that these two packages should be maintained, the Commission confirmed its withdrawal and amendment intentions. It announced that it would take into account only “formal” signals sent by the Council and the European Parliament. For those who understand how the European institutions work, there is no real prospect of the co-legislators sending formal signals on such a politically sensitive issue: in fact, in the past, Parliament has never adopted any resolution on the Commission’s work programme ... and the entire Council⁴⁰ would have to (unanimously) adopt conclusions, which is unrealistic. In retrospect, with its invitation, the Commission therefore seemed to be thumbing its nose at the “environmental” pillars of the Council and Parliament. It therefore exploited a shortcoming in the operation of the institutions before taking a partial step backwards.

40. We should remember that the Council has 10 different configurations: General Affairs; Foreign Affairs; Economic and Financial Affairs (Ecofin); Agriculture and Fisheries; Justice and Home Affairs; Employment, Social Policy, Health and Consumer Affairs; Competitiveness; Transport, Telecommunications and Energy; Environment; Education, Youth, Culture and Sport.

The intransigence of the Juncker Commission raises several questions that have not been answered to date.

- With regard to the withdrawal of the circular economy package:

Why did the Commission really withdraw the “waste” package, when it plans to reintroduce it at a later date?

Why not leave the co-legislators to improve the proposal, in the knowledge that the Commission is an active participant in the negotiations and can withdraw its proposal if the EP and the Council distort it?

How can the Commission hope to present a “more ambitious” proposal by the end of 2015 when it took four years to adopt the current proposal following tough internal debates? When an in-depth IA has already been conducted, what added value would a new IA or a new analysis of the existing IA bring, and how long would this take?

- With regard to the “clean air package”:

Why does the 2030 Climate and Energy Package require this package to be reviewed? How does the Commission intend to comply with the EU’s international commitments?

At the end of this first case study, we have to conclude that the Commission has failed to comply with its own IA guidelines. Given that the IA clearly indicated that a legislative proposal was fully justified and that failure by the EU to act would have very damaging consequences for human health and very costly effects on the budget of the Member States, the Commission should have assumed its responsibilities in the general interest of the EU. The fact that it has delayed certain initiatives, even though urgent action is needed, sends the wrong signal about the real intentions of the Commission, which seems to be more concerned with reducing the regulatory burden than protecting its citizens.

That said, the strong reaction of the 11 Environment Ministers and the European Parliament’s ENVI Committee caused Frans Timmermans to backtrack on two parts of the package.

2. Report on the industrial policy roadmap: “refitting an initiative that was generally expected”

2.1. Issues

On four occasions the European Council and the Competitiveness Council called on the Commission to prepare a “roadmap” containing ambitious proposals. The idea of a “roadmap” was the result of lengthy and intense debate within the Council, dating back to 2012, which enabled a European consensus to emerge

on the need for voluntary action in this area, coordinated by the Commission under Article 173 TFEU⁴¹.

This undertaking seemed to be even more essential as the European Union was facing two major challenges:

1. the erosion of its competitiveness by increasingly efficient competitors in the industrial segments with high added value;
2. the urgent need for the EU to complete its industrial transition, particularly in order to deal with the increasingly critical issues of sustainable development (pollution, global warming, etc.) and digitisation of the economy.

The roadmap was precisely intended to identify and coordinate a series of initiatives, mainly non-legislative in nature, in order to commit the EU and its Member States to an ambitious programme of modernisation in its industrial sector.

During her hearings, Commissioner Elżbieta Bieńkowska proved to be sensitive to these issues and also indicated her intention to prioritise industrial policy.

However, despite the impact assessments, numerous Commission reports, international studies and calls from Member States, First Vice-President Timmermans – and we must also recognise the role of Vice-President Jyrki Katainen in this, who has always been sceptical about this issue – announced the withdrawal and deferral of all initiatives within the 2015 work programme. A draft roadmap has therefore failed to materialise despite the positive signals sent by the Council and the EP.

At the “Friends of Industry” conference held in Madrid on 17 February 2015, Commissioner Bieńkowska stuck to the official line of the Juncker Commission by emphasising systematic use of the REFIT tools and arguing for targeted actions to reduce the burdens on business, including reinforcing the application of the mutual recognition principle: “In the US there is one rule for one market, in the EU we have 28 rules for 28 markets. We cannot go on like this”.

However, Commissioner Elżbieta Bieńkowska announced her intention to send a message on industrial policy, in the form of a letter, to the Competitiveness Council in June 2015, in the wake of the Competitiveness Council meeting on 28 May 2015. Among the proposals to be included in this letter, as a kind of hangover from the roadmap, would be enhancement of the internal market

41. Article 173(2) TFEU provides that “The Member States shall consult each other in liaison with the Commission and, where necessary, shall coordinate their action. The Commission may take any useful initiative to promote such coordination [our emphasis], in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation.

and removal of remaining barriers in order to simulate the development of European "value chains", support for the transition of European industry towards "smart & clean" products, particularly through initiatives in the area of "key enabling technologies" (KETS), and a coordinated approach to smart specialisation and industrial clusters.

2.2. Assessment

Although industrial transition and reinforcing EU industrial policy in a globalised world seem to be high priorities, the new Commission has once again prevaricated. It is striking that the First Vice-President of the Commission has assumed responsibility for withdrawing this key measure from the Commission's 2015 work programme without a prior impact assessment and even though everyone involved agrees that an ambitious roadmap would be useful to maintain industrial development. Reducing a roadmap – which has been under negotiation with the Member States since 2012 in consultation with the social partners – to a simple letter focusing on the "refitting" of industrial policy is very telling on the part of the College.

3. Absence of an impact assessment on the economic governance review

3.1. Background

Although all Commission communications and all European Council and Council of the European Union conclusions underline the importance of an in-depth assessment of any substantive initiative, there was no impact assessment prior to the adoption of the six-pack and two-pack⁴².

⁴². The six-pack and two-pack consists of the following instruments: Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area; Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances; Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure; Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability; Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area. Although it forms part of the six-pack, Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States is not included within this review process. It is subject to a different timetable, with the deadline for its review being 14 December 2018.

More worryingly, the *ex-post* evaluation – which, in its recent documents, the Commission stresses is of the utmost importance and which has been discreetly renamed “economic governance review” – has been rushed, with only the title having been assessed.

Accordingly, the Commission Communication of 28 November 2014 on the economic governance review (European Commission 2014c) and the report on the application of Regulations (EU) No 1173/2011, 1174/2011, 1175/2011, 1176/2011, 1177/2011, 472/2013 and 473/2013 are short and very general texts that are not based on any scientifically established finding or on any statistical data.

This document mentions that progress has been made in economic governance:

- the average fiscal deficit has fallen from 4.5% of GDP in 2011 to a forecast of around 3% of GDP in 2014;
- the number of countries subject to an excessive deficit procedure has fallen from 23 out of 27 Member States in December 2011 to 11 out of 28 in August 2014;
- the social dimension of the EU has been strengthened, according to the Commission, by adding indicators in the social and employment area.

3.2. Assessment

The assessment, which is deficient, does not consider any of the impacts on growth, employment (net destruction and creation of jobs, quality of newly created jobs, etc.), social and environmental protection, or competitiveness. It is purely mentioned at the end of the document that the “review has revealed some strengths as well as possible areas for improvement, concerning transparency and complexity of policy making, and their impact on growth, imbalances and convergence” (European Commission 2014d). This failure to analyse the consequences of the most important proposal that the Commission has had to adopt in the last 15 years is evidence of an impact assessment programme that is chosen to order. Once again, we must conclude that the Commission has failed to comply with several mandatory provisions of the TFEU, including the horizontal social clause in Article 9.

Admittedly, the Commission has plans to discuss this with the European Parliament and the Council “in coming months”, but that is about all ... which is very little ... even though independent econometric studies point to the negative effects of the austerity policies applied to public investment (Uhr 2014).

In fact, in order to reduce their public deficits and debt burdens, public authorities are being forced to delay, and even cancel, investments as the main way of making savings. However, it is common knowledge that sustained growth within the EU cannot be restored without encouraging the investment that can increase the growth potential and employment.

According to the Commission’s assessments, investment in the EU28 in 2014 fell to an historic low in terms of the expenditure of public authorities.

Worsening lending conditions, particularly for the most vulnerable economies, also add, to a large extent, to the reduction in public policies of support for the economy and employment. In short, public investment and the role of the State in the economy have come under extreme pressure, without the economic governance review having made any mention of this ...

4. Withdrawal of the draft directive on maternity leave: a cowardly act by the Juncker Commission

The proposal for a directive on maternity leave (European Parliament 2010a) is one of the 80 directives that the European Commission planned to withdraw from its 2015 work programme. This concerns the revision of Directive 92/85/EEC of 19 October 1992, which set the minimum period of maternity leave at 14 weeks (European Commission 1992).

Adopted at first reading by the European Parliament in October 2010 (European Parliament 2010c), the Commission proposal was blocked for almost four years by the Council. The co-legislators could not agree on increasing maternity leave.

4.1. Background

As a reminder, in October 2006 (ETUC 2009) the Commission launched a consultation of the European social partners on the issue of reconciling professional, private and family life. It proposed to revise the directive on pregnant workers. At the time, ETUC wanted maternity leave to be increased to 18 weeks, which is the standard set by the International Labour Organisation (ILO). In 2008 the European Commission agreed to this increase to 18 weeks.

However, in the midst of the economic crisis, the issue of the length of maternity leave and the associated allowance became the subject of debate. In some quarters it was maintained that too long a period of leave could prevent women from successfully returning to the labour market and could therefore result in discrimination in recruitment. The measure would therefore be a deterrent to the employment of women. Defenders of the measure considered that this would improve the health of parents and children, save on childcare costs, and so on.

The impact assessment concluded that the real benefits of the measure were difficult to quantify.

Edite Estrela (European Parliament 2010a) (S&D/PT), rapporteur for the EP's FEMM Committee in 2009, proposed increasing maternity leave to 20 weeks, with an allowance of 100% of the mother's salary, and creating adoption leave. The Commission proposed that leave should be limited to 18 weeks and that the minimum salary paid during maternity leave should be based on the level of statutory sick pay in each Member State.

The report raised important concerns about the financing of such a measure, not only in the European Parliament, but also in certain Member States,

particularly Germany and the United Kingdom. For their part, business federations and employers' organisations strongly opposed the idea that women could continue to receive a full salary during their maternity leave.

After an initial referral back to the FEMM Committee, just before the 2009 European elections, the Estrela report (European Parliament 2010b) was adopted at first reading by the EP in October 2010 (European Parliament 2010c). However, the proposal was rejected by the Council⁴³. Faced with this blockage, the Commission surrendered and announced its plan to withdraw the proposal.

In a press release dated 18 June 2014 (European Commission 2015c), the new Juncker Commission stated that it “considers it good legislative management to withdraw proposals that do not advance in the legislative process”.

The withdrawal of this draft directive by the Commission was widely challenged both by civil society and trade unions and the European Parliament. Joanna Maycock, Secretary General of the European Women's Lobby (EWL), sent an open letter to the Commission President: “The threat to remove the Maternity Leave Directive from the legislative process ... undermines the democratic process of the European Parliament's adopted position” (European Women's Lobby 2014).

This position was not shared by BusinessEurope, which, in a letter to the Commission dated 25 November 2014, stated that “pregnant workers are already adequately protected ... Given the economic situation, it is not reasonable to come up at European level with rules which would significantly increase costs for companies and public finances” (Business Europe 2014).

On 16 December 2014 First Vice-President Timmermans publicly announced (European Commission 2014i) that the proposal for a directive would be withdrawn within six months if no consensus was reached. The deadline was set as May 2015.

4.2. Assessment

Following this announcement, Bernadette Ségol, General Secretary of the European Trade Union Confederation (ETUC), declared that “it is an absolute scandal that EU Governments have been blocking an improvement in maternity leave since 2008! They need to act now to save this shameful situation” (ETUC 2015).

⁴³. Opponents stated that granting women maternity leave of 20 weeks on full pay would be unaffordable for both employers facing difficult economic conditions and governments trying to reduce public expenditure. They cited the impact assessment on this measure, which showed that Member States would have to cover exorbitant additional costs amounting to several billions of euros.

For the MEPs on the FEMM Committee, this withdrawal was a blow to women's rights: "We must progress towards equality, but also allow women to balance family and professional life. Adopting an ambitious directive on maternity leave would increase the employment rate of women and the birth rate in Europe", stated Marie Arena (S&D/BE) (Euractiv 2015) on 16 March 2015.

We also have the feeling that the executive's reputation would improve if this proposal were maintained and if it called on the co-legislators to agree on a symbolic proposal.

5. Consequences of the Commission's decision not to propose an initiative on legislation in the field of health and safety at work for hairdressers

5.1. Background

Under Article 155 TFEU⁴⁴, the social partners asked the Commission in 2012 to propose a directive implementing their agreement on health and safety rules applicable to hairdressing salons.

However, on 2 October 2013, under the REFIT programme, the Commission decided that it would not propose such an agreement during its 2009-2014 term of office. According to the Barroso II Commission, the relevance and European added value of this agreement needed first of all to be fully assessed.

In response to a parliamentary question from three Belgian MEPs in December 2014, the Commission stated that "an external cost-benefit study was finalised in July 2014. The Commission is currently drafting its own assessment, with due regard for the characteristics of the sector, where small and micro-enterprises prevail with attendant limitations on data. It will take a reasoned decision on the social partners' request for legislation implementing the Agreement on that basis. The assessment will be published once work is completed⁴⁵.

5.2. Assessment

The reasons cited by the Barroso II Commission for not submitting a proposal for a directive implementing the social partners' agreement on health and safety rules applicable to hairdressing salons give rise to three findings:

44. Article 155 TFEU provides, in paragraph 1, that "should management and labour so desire [our emphasis], the dialogue between them at Union level may lead to contractual relations, including agreements.

45. Answer to the parliamentary question for written answer, put by Marie Arena (S&D), Hugues Bayet (S&D) and Marc Tarabella (S&D), given by Marianne Thyssen, European Commissioner for Employment, Social Affairs, Skills and Labour Mobility, on 1 December 2014 (E-007876/2014).

1. refusing to submit a social partners' agreement to the Council gives the impression that the Commission is distancing itself from its role as guardian of the Treaties, which requires it to take the utmost account of the wishes of the social partners;
2. likening a reasoned request from the social partners to an unnecessary bureaucratic burden for SMEs denies the real challenges for a category of professionals facing real health and safety problems at work;
3. taking the view that the issue of the health and safety of hairdressers is better managed nationally than by the EU once again risks generating a multi-speed approach.

Lastly, if the Commission, in liaison with employers, had to submit all agreements negotiated between social partners to impact assessments, prior to their entry into force, this would result in their autonomy being negated. If the fruit of tough negotiations had to be screened by the Commission and its "high-level" expert groups, this would considerably harm social dialogue. The coming weeks and months will shed more light on the Commission's intentions.

6. The minimisation of certain constraints by impact assessments: example of the electronic invoicing obligation for micro-enterprises

The Second Directive on VAT Invoicing (Council Directive 2010/45/EU) (European Commission 2011) was adopted on 13 July 2010 and has applied since 1 January 2013. It aims to simplify invoicing rules by removing existing administrative burdens and barriers.

6.1. Background

In 2008 a study on the VAT invoicing rules contained in the VAT Directive (2006/112/EC) (European Commission 2006) was carried out for the Commission by PricewaterhouseCoopers. It aimed to look at the four principal areas of invoicing – the requirement to issue an invoice, the content of an invoice, electronic invoicing and the storage of invoices – with a view to mapping the existing legislation in all Member States and analysing burdens on business and Member States' control needs.

The various findings prompted the Commission to pursue an active policy promoting electronic invoicing. On 28 January 2009 it therefore adopted a proposal to amend the VAT Directive as regards invoicing rules. The Commission's aim was to increase use of electronic invoicing, reduce burdens on business, support small and medium-sized enterprises (SMEs) and help Member States to tackle fraud. This proposal was a key element of the Commission's Action Programme to reduce burdens on business by 25% by 2012 (European Commission 2009b).

There was broad consensus on the elimination of paper invoices in the long term. This movement away from paper seemed unavoidable, if only in financial terms:

- the average cost of processing an outgoing invoice was in the order of EUR 810 and an incoming invoice EUR 1015, whereas processing electronic invoices cost half these amounts;
- the cost of a disputed invoice was at least five times higher than an undisputed invoice;
- the sending-receipt-payment chain could be made much quicker and more secure if the invoice was sent electronically.

Despite a positive prior impact assessment by the Commission, Ernst & Young identified obstacles to electronic invoicing for SMEs in its January 2014 White Paper (Ernst & Young 2014): "Implementation [of the Directive] is more complex as using an electronic invoicing solution requires the customer to also have appropriate tools. However, many, if not most, businesses still use paper invoices and the digital flow may therefore represent an additional format and a constraint for businesses without an electronic invoicing solution".

Moving to electronic invoicing in fact involves significant additional costs and investment in order to set up the technical tools allowing electronic invoices to be quickly and efficiently accessed (enterprise resource planning (ERP) applications and electronic data interchange (EDI)). According to the Ernst & Young report, "greater savings are made where a large number of invoices is processed. It is generally accepted that an electronic invoicing solution comes into its own above 20 000 invoices per year" (Ernst & Young 2014).

Lastly, in many emerging countries (China, India, etc.), electronic invoicing is often prohibited by tax law (Ernst & Young 2014).

6.2. Assessment

This example, which is reminiscent of others⁴⁶, offers at least two insights into the use of IAs.

Firstly, these tend to overestimate the benefits of certain "smart" regulations, in terms of costs, and to minimise the obstacles posed by the qualitative leap to digital technologies for certain operators (micro-enterprises, SMEs, etc.), in terms of adapting to the change (hardware, training, etc.).

Secondly, they seem to ignore certain international contingencies and the level playing field for smaller enterprises.

46. The former Internal Market Commissioner, Michel Barnier, tended to justify the reform of public procurement by saying that the use of electronic invitations to tender – i.e. fully digitising all paper procedures – would generate up to EUR 100 billion per year in the EU.

7. And the Transatlantic Trade and Investment Partnership (TTIP)?

7.1. Background

With regard to the TTIP, an impact assessment was carried out by the European Commission (European Commission 2013a) prior to the opening of negotiations. This IA concluded that there was a clear-cut case for the EU to reach an ambitious free trade agreement with the United States of America.

The Commission identified three scenarios:

1. status quo (baseline scenario);
2. conclusion of a free trade agreement limited to customs duties, services and public procurement;
3. conclusion of an ambitious USA-EU free trade agreement covering a much wider list of areas, such as agriculture.

Having brushed aside the first scenario in under half a page, the Commission examined the second scenario, i.e. a limited agreement, with barely any more detail.

As regards customs duties, the impact assessment acknowledged that: “A tariff-only agreement would tackle the existing tariffs and therefore constitute a potential improvement in terms of trade and economic activities. However, concentrating on a tariffs-only agreement would inevitably neglect some major areas relevant for trade such as, regulatory obstacles and government procurement or trade in services, in which stakeholders report the main trade barriers between the EU and the US” (p. 26). It added that: “The tariff-only scenario will therefore assume a more conservative 98% elimination of all tariff lines, falling short of the goal of full duty elimination announced in the interim report. It should be noted, however, that even 98% duty elimination may be difficult to achieve in the absence of comprehensive negotiations and we take the upper bound of a reasonable range of assumptions ... The economic simulation will nevertheless assume a scenario of removing 10% of all existing barriers to trade in services in the case of a bilateral services-only agreement and in line with requests from certain stakeholders. This may be an optimistic assumption and again has to be taken as the upper bound of a reasonable set of assumptions” (pp. 26-27).

With regard to services, the impact assessment noted in passing that “given the ongoing preparations for a plurilateral services initiative, in which both the EU and the US are currently involved, it is politically unlikely that both sides would agree to a separate bilateral services-only track in parallel to these negotiations” (p 27).

As regards public procurement, the study concluded that “given the shared goal stated in the interim report of increasing market access at all levels of government on the basis of national treatment, an estimated 25% reduction of barriers is used under this scenario” (p. 27).

Finally, the Commission justified its conclusion for an ambitious free trade agreement as follows: "both in the EU and the US, such an agreement would have to be of a deep and comprehensive nature, involving, *inter alia*, a major effort to eliminate all tariffs and a considerable number of non-tariff barriers for goods, as well as liberalization of trade in services and the liberalization and facilitation of investment flows in both services and non-services sectors" (p. 27).

According to the authors of this study, in the ambitious scenario, "the impact on the value of the EU bilateral exports would be an increase by €187bn, while the US bilateral exports would show an increase of €159bn" (p. 37). Admittedly, there would be "dynamic" adjustments to be agreed for the EU in the area of agriculture, but these would be offset by a significant increase in the area of motor vehicle and chemical exports and in the area of insurance (p. 39).

With regard to the impact on SMEs, the study took the view that: "Enhancing market access in the US for EU business will particularly help SMEs, if the main goal is to tackle regulatory barriers" (p. 46).

As regards the environmental impact, the report stated firstly that "the income gains associated with increased trade are in principle sufficiently large to pay for the necessary costs for pollution abatement (i.e. the costs of additional measures and activities to negate any repercussions on the environment) and still leave an economic surplus", before concluding that "increased economic cooperation between the EU and the US should, in principle, facilitate greater cooperation on climate protection as well as on other environmental issues including biodiversity, natural resources and waste, given that trading does encourage technology transfers" (p. 47).

On wages, the study stated that "wages of unskilled workers are expected to rise in the EU, between 0.30% (conservative FTA) and 0.51% (ambitious FTA)" (p. 50).

7.2. Assessment of the Commission's impact assessment

On reading the Commission's IA, the most striking element is that the various scenarios are examined based on partial figures and without looking at the agreement's potential impacts on EU and Member States policies or on regulatory, economic, social and environmental aspects.

In a counter-impact assessment carried out for the European Parliament, the CEPS shared its feelings on the quality of the Commission's IA by noting in particular that:

"The empirical economic analysis underlying the European Commission's Impact Assessment of the TTIP is particularly difficult because of two principal reasons. First, the TTIP is a most unusual bilateral trade agreement ...The regulatory core of TTIP makes it extremely difficult for economists to come to

grips with the expected economic meaning of the negotiation outcomes. NTBs and mere regulatory heterogeneity create ‘trade costs’ for market access, both ways, but it is exceedingly hard to assess authoritatively what the trade costs are, and what consequences they have, whether for goods or services. Yet, without good proxies of those costs and the scope for their reduction, an empirical economic analysis with proper modelling is basically impossible or mere sophisticated ‘guess’ work. Second, TTIP is so wide-ranging that a so-called partial (equilibrium) approach – already second-best anyway – would be totally inappropriate. Therefore, this type of economic analysis is made with the help of modern CGE models. Such highly complicated and demanding empirical general equilibrium models are capable of addressing most interactions between horizontal and sectoral negotiated aspects of TTIP, presenting sectoral effects (after incorporating such interactions), extending the immediate effects in the specific goods and services markets to their impact in labour markets, and arriving at changes of trade flows as well as overall increments to GDP. Each one of these two reasons is already a tall order; together they amount to an enormous challenge” (Pelckmans 2014).

In other words, and this was underlined several times, the Commission’s IA was based on starting assumptions that clearly favoured the supposed benefits of full trade liberalisation by systematically minimising or concealing all the numerous difficulties that would result from this agreement for the EU – we are clearly thinking of the use of GMOs in agriculture and the stranglehold of US agro-industrial groups over the food chain – and by maximising the supposed benefits of this agreement for the EU in terms of the export of certain goods (chemicals, motor vehicles) or services (insurance), and with regard to the development in wages in industry and services.

8. Overall assessment of the seven example cases

From the seven cases that we have reviewed, we would conclude that the IA, despite all the existing guidelines, is a system that operates to order, depending on the wishes of the Commission and other discreet influences. Sometimes the Commission ignores the IAs and withdraws proposals that are, however, essential (Clean Air and Circular Economy packages), and sometimes it does not carry out IAs even though it is felt that they are needed (industrial policy) or the consequences on the real economy and on the life of European citizens demand it (economic governance). It also sometimes overestimates the expected impact of legislation (electronic invoicing for micro-enterprises) or negotiations (TTIP). Lastly, sometimes it disregards the opinion of the social partners, although favourable, and dismisses an initiative (hairdressers). In short, the practice of impact assessments would gain from being systematised and strengthened, particularly the environmental and social aspects, without their results being prejudged. This once again raises the question of a common, clear and transparent methodology.

Part Four

Revision of the 2003 Interinstitutional Agreement

1. Multiplication of interinstitutional fora

Since 1998 numerous types of agreements, approaches and arrangements have been concluded between the three institutions.

We would mention in particular:

- the 1998 IIA on common guidelines for the quality of the drafting of Community legislation;
- the 2003 IIA on better law-making;
- the 2005 common interinstitutional approach to IAs;
- the 2007 joint declaration on the practical arrangements for the codecision procedure;
- the 2010 EP-Commission framework agreement;
- the 2011 common interinstitutional understanding on delegated acts.

There was therefore a certain logic to rationalising all these agreements, with differing scopes, within a single document in order to prevent overlaps and even differences – which were sometimes contradictory – between agreements.

2. The 2003 Interinstitutional Agreement (IIA)

The “better law-making” IIA of 31 December 2003 (European Commission 2003) formed the common reference document that bound the three institutions between 2003 and 2015. This agreement actually became out of date in 2007 and no longer represented the interinstitutional balance. As acknowledged by the European Parliament, “the better law-making agenda has evolved substantially in response not just to Treaty changes but also to institutional, interinstitutional and legislative developments”⁴⁷. At the EP’s Conference of Presidents meeting on 5 March 2015, “there was consensus that the current IIA Better Law Making ... no longer reflected the new interinstitutional balance and ... was clearly an out-of-date text”⁴⁸. What is now striking, on reading this agreement, is the significant amount of flexibility and room for manoeuvre allowed on several important points.

⁴⁷. Technical Document on the 2003 Interinstitutional Agreement on Better Law-Making, p. 1 (Document not published, March 2015).

⁴⁸. *Ibidem*.

We must focus on three more specific points that have remained interesting points for comparison as this issue has developed.

2.1. Quality of regulation: the main theme of the 2003 IIA

Firstly, the 2003 IIA put quality at the heart of the BRA process. Accordingly, and in particular, paragraph 1 of the IIA stipulated that: “The European Parliament, the Council of the European Union and the Commission of the European Communities hereby agree to improve the quality of law-making by means of a series of initiatives and procedures set out in this interinstitutional agreement”. Moreover, an entire section was dedicated to the quality of legislation (paragraphs 25 to 31). This point is interesting as, in more recent texts, reducing the regulatory burden has eclipsed the debate on the quality of legislation.

As regards the pre-legislative consultation, the agreement called on the Commission to conduct the widest possible consultations, the results of which would be made public. “In certain cases, where the Commission deems it appropriate, the Commission may submit a pre-legislative consultation document on which the European Parliament and the Council may choose to deliver an opinion” (paragraph 26). We note the very cautious tone of the wording and the option given to the Commission and the co-legislators to respectively take the initiative or react to the Commission’s initiative. We also note that the consultation involves the co-legislators and not stakeholders, which will be discussed in detail further on.

With regard to impact assessments, the IIA identified three elements:

1. Positive contribution of impact assessments in improving the quality of legislation: IAs are intended to serve quality and their main objective is not to reduce the cost or burden of regulation, improve competitiveness or exempt small and very small enterprises.
2. Integrated advance impact-assessment process for major items of draft legislation: The process must combine in one single evaluation the impact assessments relating inter alia to social, economic and environmental aspects.
3. Jointly defined criteria and procedures: The agreement provides that, where the ordinary legislative procedure applies, the European Parliament and Council may have impact assessments carried out prior to the adoption of any substantive amendment, either at first reading or at the conciliation stage. We note here that preventive IAs and the common methodology to be applied when they are carried out are optional.

Lastly, with regard to the consistency of texts, it is agreed that the European Parliament and the Council will make all appropriate arrangements for improving the scrutiny carried out by their respective departments of the wording of texts adopted under the codecision procedure, “with a view to avoiding any inaccuracies or inconsistencies” (paragraph 31).

2.2. The Community method as an unpassable horizon

Secondly, paragraph 2 of the IIA recalled the importance attached by the three institutions to the Community method. Furthermore, the three institutions agreed to observe general principles such as democratic legitimacy, subsidiarity and proportionality, and legal certainty. They further agreed to promote simplicity, clarity and consistency in the drafting of laws and the utmost transparency of the legislative process. We should examine two sections in particular. Paragraph 12 et seq. details the choice of legislative instrument. "The Commission will explain and justify to the European Parliament and to the Council its choice of legislative instrument, where possible as part of its annual work programme ... and it will take account of the results of any consultations which it has undertaken before tabling its proposals" (paragraph 12).

Two interesting observations must be made in this respect. The Commission has limited room for manoeuvre with regard to its work programme as it must provide reasons for and take account of the EP's opinion in its legislative choices. We also note the optional nature of the consultations. On these two points, and particularly the second one, the situation has considerably changed.

2.3. Compliance with the *acquis communautaire* as the ultimate benchmark

Thirdly, the IIA refers to simplifying and reducing the volume of legislation. In this respect, the agreement stipulates that the three institutions agree, firstly, to update and condense existing legislation and, secondly, significantly to simplify it. Legislation will be updated and condensed inter alia through the repeal of acts that are no longer applied and through the codification or recasting of other acts "or by means of new legislative proposals, whilst maintaining the substance of Community policies" (paragraph 35). We note here that the agreement is very cautious, but also unambiguous. The *acquis communautaire* must be preserved. Only "deadwood" must be removed, with efforts being made to recast and consolidate legislation. On this point, we will see that First Vice-President Timmermans has radically different ideas.

3. Requests of the co-legislators with regard to the revision of the IIA

3.1. The Council

The General Affairs Council meeting on 21 April 2015 put three points right at the top of its priorities:

- annual programming of the EU's legislative activities;
- better regulation;
- consultation of experts on delegated acts.

Annual programming is the Council's main priority, which intends to remain a participant, and not become a spectator, in the legislative process with the EP. This request is actually fairly close to paragraph 12 of the 2003 IIA.

Improving the multiannual legislative programme between the three institutions is another of the Council's priorities. Numerous voices are calling for quick and efficient processing of legislative dossiers.

Two more specific requests have been made by the Council:

- Inclusion in the IIA of the principles and main tools of “better regulation” and in particular: setting of targets for reducing the regulatory burden; strengthening of *ex-ante* IAs accompanying Commission proposals, particularly with regard to the SME dimension and the involvement of stakeholders; and better use of *ex-post* evaluations in the legislative cycle. The Council also wants the better regulation tools to be reinforced, such as annual monitoring processes, competitiveness and digital dimensions, and greater transparency.
- Reinforcement of the obligations for IAs on amendments made during the legislative process, without causing undue delays in the legislative process.

3.2. The European Parliament

There are few documents setting out the European Parliament's opinion, and those that do exist are generally not publicly accessible. The ones that we consulted came from the S&D Group in Parliament. We believe that these more or less reflect the general opinion of the EPP/S&D/ALDE coalition.

Unsurprisingly it is the term “upstream” that saw the most amendment proposals by the S&D Group.

- Commission's work programme

Under the terms of the 2010 Framework Agreement between Parliament and the Commission, the S&D Group calls for the European Parliament to be involved in assessing the annual work programme and in preparing the next legislative programme. On this precise point, we note that the legislators are in broad agreement.

- Agreement with the social partners

The revised IIA should take account of the social dialogue with the social partners under the aforementioned Article 155 TFEU. In this respect, there is a kind of orthodoxy on the part of the European Parliament, which refers to compliance with the Treaty, as opposed to the Commission and Council, which favour the systematic use of independent experts.

– Impact assessment

Parliament and Council should establish the principles of a common methodology for carrying out IAs prior to the adoption of any substantive amendment. In order to improve the consistency of texts, a legal check should be performed before the act is finally adapted. In this respect also, we note that this is a fairly balanced request from the European Parliament, without the latter being any more specific as to how it has arrived at this point.

Parliament takes the view that the Commission should develop a holistic approach and not focus solely on the competitiveness dimension. On this point, its positions and those of the Council diverge quite significantly. The European Parliament seems to be much more receptive to the idea of an integrated IA that helps with the policy decision and is not a way of limiting initiatives or prematurely halting them.

The IA should be detailed and based on information that is as complete as possible, so that a well-informed policy decision can be taken.

In the list of existing criteria, the European Parliament would like due account to be taken of the added value of the EU's intervention and the cost of non-action. We have already recognised the merits of this proposal.

As regards the RSB, the European Parliament takes the view that its role should be better defined and that its members should not come under any political pressure. It therefore suggests that the RSB's independence should be increased and that it should operate along the lines of OLAF, with similar recruitment methods for the appointment of its director, which would involve the Council and EP.

The S&D Group's view differs from the Commission's on two points:

1. For the Socialists, it would not be necessary to carry out an IA after the trialogue if the respective amendments had already been assessed in advance.
2. A negative impact assessment cannot in itself constitute a veto of the proposal, but should trigger a specific decision to maintain, withdraw or amend the proposal in question.

Once again, we underline the qualified approach of the European Parliament, which leaves the last word to the co-legislators on the fate of a legislative proposal.

– Stakeholder consultation

In this respect also, Parliament favours an integrated approach, which constantly and transparently involves the stakeholders, together with appropriate involvement of consultative bodies such as the EESC and the Committee of the Regions.

– Subsidiarity

The EP rightly notes that subsidiarity is rarely an issue in itself. Involving the national parliaments more could result in them becoming more involved in the substance whereas, firstly, respect for the subsidiarity principle does not mean looking at the substance of initiatives, but rather checking that the principle of the division of powers has been observed, and, secondly, the influence of national parliaments must be brought to bear on the Council through the Member State's representatives designated for this purpose through the various Council configurations.

We welcome this sound proposal, which avoids demanding full respect for subsidiarity in the substance of initiatives at the risk of involving the national and regional parliaments in the conduct of Community policies and of lengthening and jeopardising the process.

– REFIT

The European Parliament insists that better regulation cannot be synonymous with deregulation and that all aspects, including the costs of non-action, should be the subject of a cost-benefit analysis.

– Alternative method of regulation

Parliament takes the view that the use of alternative methods has not generally been successful. If this type of instrument is chosen, its use should be limited and duly justified in each sector and it should be included in the long-term programming so that Parliament can exercise appropriate scrutiny.

– Greater involvement of the European Parliament in negotiations

In this respect, Parliament notes that the Treaty of Lisbon gives it a greater role and more powers, including the right to be kept fully informed at all stages of the negotiation procedure (mandate, parliamentary assent, possible suspension and application). Unsurprisingly, it calls for the IIA to also cover international agreements. This request is very timely, particularly in view of the negotiations on the TTIP⁴⁹.

Unsurprisingly, it also calls for the IIA to cover the European semester, which, in its opinion, should have an appropriate legal basis and involve interinstitutional programming, stakeholder consultation, an in-depth *ex-ante* IA and an *ex-post* evaluation.

⁴⁹. It is currently proposed that a joint regulatory committee, composed of European and US officials, checks the compatibility of draft EU directives with the TTIP.

The contributions of the political groups were submitted to the Conference of Presidents on 23 April 2015. Initial negotiations between the EP and the Commission started on that date.

4. The Commission's revised IIA proposal of May 2015

At the very start of his mandate, First Vice-President Timmermans clearly indicated his intention to renegotiate the 2003 Interinstitutional Agreement, particularly in order to improve the functioning of the legislative procedure, take better account of the stakeholder consultation and lay down more detailed provisions on impact assessments.

The new Better Regulation package was adopted by the College on 19 May 2015. The IIA is one of its important documents.

– Impact assessment

In paragraph 7 of the new IIA, the three institutions agree on the positive contribution of IA in improving the quality of Union legislation. "They consider that impact assessments should address the existence, scale and consequences of a problem and whether Union action is needed. They should also map out alternative solutions assessing the economic, environmental and social impacts, using both qualitative and quantitative analyses."

The text is quite innovative as the IA has a much broader role than previously. IAs will no longer be carried out solely on legislative proposals, but will consider in advance whether EU intervention is needed according to the existence, scale and consequences of a "problem". The IA system should include qualitative and quantitative analyses, but not analyses of the benefits and usefulness of legislation or the cost of non-action.

In its IA, the Commission must take account, in advance, of the opinion of stakeholders. As a new element, the RSB must carry out a quality check of the Commission's IAs. The results of this analysis will be made available to the EP and the Council. We note that the RSB is to receive new tasks, in addition to the already important tasks that it has in terms of scrutiny.

The most innovative element will certainly be the fact that the EP and the Council must carry out an IA prior to the adoption of "any substantial amendment to the Commission proposal, at any stage of the legislative process". This proposal is clearly intended to significantly limit any substantial amendment by the EP and the Council for the reasons already mentioned above (cost, choice of experts, duration of IAs, etc.).

Interestingly, the IIA stipulates that "The Commission may, on its own initiative or at the invitation of the European Parliament or the Council, assist the European Parliament and the Council in their impact assessment work

by explaining its assessment and sharing the data used, or in duly justified cases by complementing its original impact assessment” (paragraph 10), and that “Each of the three institutions is responsible for determining how to organise its impact assessment work, including internal organisational resources and quality control. The aim of impact assessments is to inform the decision-making of each institution, in full respect of each institution’s roles and responsibilities” (paragraph 11). The IIA further stipulates that “Each institution may call for an independent panel to carry out an assessment of these factors following any substantial amendment to the Commission proposal” (paragraph 12).

We can draw three interim conclusions in relation to the 2003 IIA:

Firstly, IAs of any substantial amendment by the Council or EP to a Commission proposal are now mandatory (“will carry out”), whereas they were optional in the 2003 IIA.

Secondly, a small step is made towards voluntary cooperation between the three institutions, but each institution remains responsible for its own area, including quality control. The fact that each institution can call on a panel of independent experts to carry out impact assessments is worrying because this open door could lead to expert assessments being outsourced from the institutions and to different, and even divergent, quality standards being defined.

Lastly, the call for a common methodology to be shared by the three institutions has been abandoned and no longer appears in the IIA, which leaves the door open to increased bureaucracy and the involvement of external experts and consultants.

– Stakeholder consultation

Stakeholder consultation becomes an integral component of the better regulation approach and will involve public internet-based consultations. Stakeholders may therefore give their opinions during an eight week period, in parallel with the consultation process established for national parliaments. The opinions collected will be presented to the co-legislators at the start of the legislative process.

Little needs to be said in this regard, except to note the Commission’s caution with regard to the role of stakeholders in draft impact assessments. Where the Council requested the proactive involvement of stakeholders at the “draft impact assessment” stage, the Commission does not propose anything. Particularly close attention should be paid to this point.

– *Ex-post* evaluation

It is proposed that the Commission will inform the EP and the Council of its multiannual planning of evaluations of existing legislation (paragraph 16).

It is also proposed that “The three institutions agree that proposals for significant amendments or development of Union legislation should be rooted in robust prior evaluation of the efficiency, effectiveness, relevance, coherence and value added of existing law and policy. Such evaluations should provide the basis for impact assessment of options for further action. To support these processes, the European Parliament, the Council and the Commission agree to establish monitoring, evaluation and reporting requirements in legislation. Where appropriate, these can include measurable indicators as a basis to collect evidence of the effects of legislation on the ground”.

It is quite comical – and, to tell the truth, exhilarating – to note that, while the Commission claims to be fighting against an increased administrative burden, its IIA proposal plans to add monitoring and surveillance parameters as well as reports including measurable performance indicators in future legislative proposals.

5. Assessment

The revision of the 2003 IIA is worrying because the objective of quality has been superseded by evaluation and consultation in a broad sense, which are assuming increasing importance in the political arena.

The fact that experts and stakeholders can make their voices heard at a very early stage, but that the EP and the Council must carry out IAs on any substantial amendment that they propose, completely reverses the democratic system, which puts the co-legislators on the defensive, if not kicking them into touch. In our opinion, this will upset the delicate balance of power in favour of the Commission, which is now positioning itself at the centre of the political game.

Lastly, it seems that the most interesting proposals have been made by the EP, whether in the Kauffman report, which insists on the quality of legislation and on the danger posed by the cost of non-Europe, or in the S&D Group’s proposals on the IIA.

Conclusion

1. At the end of this study, how can we not be struck by the Commission's obstinacy and, to a lesser extent, by the blindness of the European Council and the Council of the EU in focusing on the systematic reduction of regulatory costs and burdens, and not on the potential benefits of regulation or on the cost of non-Europe?

The Commission's determination to favour a one-dimensional approach is astonishing given that the supposed cause-and-effect relationship between regulation, on the one hand, and competitiveness, on the other hand, is not based on any convincing evidence. The fact that no relevant and evidence-based figures on growth, investment or jobs are provided further reinforces our legitimate distrust of the "remastered" version of the BRA.

2. We are witnessing a "refitting" of legislative activity. Burden reduction and IAs remain the main engines of the "Better Regulation" galaxy. However, the process is being refined. The *ex-ante* IA will occur earlier and earlier in the pre-legislative cycle. Before the impact assessments properly speaking are carried out, there will be a "First Evaluation" of the policy in order to screen initiatives, even at this stage. Stakeholders will then be involved, at a very early stage, i.e. when the IAs are prepared. This therefore means that the discussion of options will be moved further and further upstream in the process – and what is most worrying – before the co-legislators and social partners have become involved, who therefore risk being unable to determine the terms of the debate, which will already have been set without them.
3. Are these changes good or bad? Quite clearly, the First Vice-President takes the view that all Commission initiatives must be "sieved" and then carefully filtered so that only the real substance and absolutely essential remain. It is the refrain that "Europe cannot do everything and should not concern itself with matters that the Member States can handle". On that basis, the EU risks falling into two traps:
 - invoking subsidiarity to justify the EU's legislative abstinence and renationalising, or even re-regionalising, a series of policies on the grounds that they would be more effectively managed by the Member States;

- replacing the co-legislators and social partners with experts, private consultants and other stakeholders.

The first trap could lead to the disintegration of the EU by weakening the *acquis communautaire*; the second attacks the “Community method” by delegitimising the European Parliament and the Council. In both cases, there is a huge risk that the EU will end up permanently weakened.

4. Bureaucratisation of the process and politicisation of the agenda remain a reality. In terms of the Better Regulation bureaucratic machinery, one body is taking over from another. The Regulatory Scrutiny Board (RSB) has replaced the Impact Assessment Board (IAB) and the High Level Group on Administrative Burdens, but will have greater, if not exorbitant, powers. A new interface has been created: the stakeholder platform that will be chaired by Frans Timmermans in person. There is therefore a risk that the RSB will become the censor of legislative activity, whilst the stakeholder consultation platform will give even more weight to stakeholders. What we find revealing is the fact that the Commission, which is an independent body guaranteeing the general interest, is in a way delegating its work to stakeholders who have many, varied and conflicting interests.
5. Europe is not a cost. It is the absence of Europe that costs dear, by preventing entrepreneurs, citizens, workers and consumers from seizing all the opportunities of the internal market. Regulatory work remains to be done in areas such as social protection, sustainable development, energy, the digital economy, financial services and international trade. The Juncker Commission should have the courage to recognise that legislation has a cost and generates an administrative burden that is not the main problem. The real issue is whether the legislation in question and its associated burden are useful, if they ultimately bring benefits that outweigh the costs that they generate. It is to be regretted that nothing – or very little – has been said in this respect.
6. Reducing for the sake of reducing is not a policy. There must be a positive regulatory horizon that does not just consist of invocations and admonitions.

In the negotiations on the conclusion of the Transatlantic Trade and Investment Partnership (TTIP), the Union therefore appears to be in a position of weakness: it does not have sufficient internal rules in such strategic areas as agriculture, energy or telecommunications.

We therefore need, at international level, robust social, health, environmental and financial rules that apply, in particular, to all transnational firms.

Reinforcing the rules would prevent the mass tax evasion resulting from ever more opaque and complex legal arrangements that aim to optimise the profits of offshore companies, just at a time when governments, subject to increasingly tough budgetary adjustment and austerity programmes, must explain to their businesses and citizens that they cannot help them.

Lastly, the TTIP negotiations have reminded us why it is so important to have ambitious rules, not only in economic terms, but also in social and environmental terms. The fact that the EU cannot agree on sufficiently strong and protective legislation has created a breach that the prospect of an ambitious free trade agreement cannot fill. The EU seems to have forgotten that regulatory competition and competitive deregulation are definitely more worrying dangers than supposed excessive regulation.

7. Lastly, and without doubt most importantly in our opinion, if the European Union wants to influence the choices of tomorrow's society, reduce the ecological footprint of human activity, meet its commitments on reducing CO₂ emissions and climate change, integrate technological and non-technological innovation, etc., it must change the behaviour of its businesses and citizens through high quality legislation and rules. The main challenge seems to be less about reducing the *acquis communautaire* than equipping the EU with smart rules forcing the paradigm of "all for competitiveness" to be replaced with a "smart revolution for sustainable development". The Juncker Commission would do well to consider the adage: whoever possesses the rules of tomorrow possesses the markets of the day after tomorrow.

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Annex

Guideline list of key dates and events

5.3.2015	European Parliament (2015) Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook, 2014/2150(INI), COM(2014) 368, JURI/8/01740, 5 March 2015.
18.12.2014	European Commission (2014) President Juncker appoints Dr Edmund Stoiber as Special Adviser for Better Regulation; First Vice-President Timmermans announces reform of the Impact Assessment Board, Press release, 18 December 2014.
25.11.2014	Council of the European Union (2014) Draft Council conclusions on Smart Regulation, Document No 16000/14, 25 November 2014.
14.10.2014	The HLG publishes its final report, which makes a series of recommendations on smart regulation and cutting red tape. The report highlights that two proposals have been finalised with the Council and the EP: the proposal on VAT and electronic invoicing (potential saving of EUR 18 billion per year) and the exemption of micro companies from complying with certain accounting rules (potential saving of EUR 6.3 billion).
October 2014	^{Third} mandate of the HLG (January 2013-October 2014) The HLG is asked to present a programme for reducing administrative burdens in the business sector, and particularly those on SMEs and micro-enterprises, and to assess how many measures adopted by the Action Programme have been implemented by the Member States.
18.6.2014	European Commission (2014) Communication from the Commission to the European Parliament, the Council, the 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.
10.12.2013	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.
2.10.2013	Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Regulatory Fitness and Performance (REFIT): Results and Next Steps, COM(2013) 685 final, 2 October 2013.
12.12.2012	European Commission (2012) Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: EU Regulatory Fitness, COM(2012) 746 final, 12 December 2012.
December 2012	End of the second mandate of the HLG (September 2010-December 2012).
15.11.2011	HLG (2011) Europe can do better. Report on best practice in Member States to implement EU legislation in the least burdensome way, Warsaw, 15 November 2011, High Level Group on Administrative Burdens.
31.8.2010	The HLG's first mandate (31 August 2007-31 August 2010) focuses on identifying measures to reduce the administrative burden and defining the measurement tool. The Commission gives itself the task of fully mapping the European legislative acquis and measuring the additional cost of the administrative burden.

22.11.2009	European Commission (2009) Communication from the Commission to the Council and the European Parliament. Action Programme for reducing administrative burdens in the EU. Sectoral reduction plans and 2009 actions, COM(2009) 544 final, 22 November 2009.
28.1.2009	European Commission (2009) VAT: Commission proposes a review of the VAT rules on invoicing with a view to reduce burdens on business and to help Member States tackle fraud, Press release IP/09/132, 28 January 2009.
January 2009	Commission's Third strategic review of Better Regulation for the Spring Council in March 2009.
5.11.2008	European Commission (2008) Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Commission Legislative and Work Programme 2009. Acting now for a better Europe. Volume 2: Annexes, COM(2008) 712 final, 5 November 2008.
January 2008	Commission's Second strategic review of Better Regulation for the Spring Council in March 2008.
22.11.2007	Competitiveness Council: progress report.
9.10.2007	Conclusions of the Ecofin Council: Better Regulation - Improving Competitiveness.
17.9.2007	First decision adopted by the EP using the accelerated procedure (Merger Directive).
15.9.2007	Appointment of Edmund Stoiber as Chair of the High Level Group on Administrative Burdens.
5.9.2007	Communication from the Commission on applying Community law.
31.8.2007	In 2007 the Commission mandated a "High Level Group on Administrative Burdens" (hereinafter HLG), which had 15 members selected on the basis of their expertise and which was chaired by Edmund Stoiber.
19.6.2007	Evaluation of the Commission's Impact Assessment System, TEP (UK).
March 2007	Sixth Commission package.
30.1.2007	Conclusions of the Ecofin Council on reducing the administrative burden on businesses.
January 2007	European Commission (2007) Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Action Programme for Reducing Administrative Burdens in the European Union, COM(2007) 23 final, 24 January 2007.
4.12.2006	Conclusions of the Competitiveness Council on the fourth package.
15.11.2006	Fifth Commission package.
14.11.2006	Establishment of the Commission's Impact Assessment Board.
10.10.2006	Conclusions of the Ecofin Council on reducing the administrative burden on businesses.
5.4.2006	Appointment of national experts on Better Regulation as members of the HLG.
28.2.2006	Creation of the High Level National Expert Group on Better Regulation (2006).

29.11.2005	Inter-Institutional Common Approach to Impact Assessment.
November 2005	Conclusions of the Competitiveness Council.
8.11.2005	Conclusions of the Ecofin Council on reducing the administrative burden on business.
25.10.2005	Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment, COM (2005) 535 final, 25 October 2005.
Sept.-Oct. 2005	Fourth Commission package.
12.12.2003	Report from the Commission “Better lawmaking 2003” pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (1 st Report).
December 2003	European Commission (2003). Interinstitutional Agreement on Better lawmaking, OJ C 321, 31 December 2013.
12.2.2003	Third Commission package.
5.6.2002	Communication from the Commission: Action plan “Simplifying and improving the regulatory environment”, COM(2002) 278 final, 5 June 2002, not published in the Official Journal of the European Union.
June 2002	Second Commission package.
Nov.-Dec. 2001	First Commission package.
5.12.2001	Communication from the Commission: Simplifying and improving the regulatory environment, COM(2001) 726 final, 5 December 2001.
28.11.2001	Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts, OJ C 77, 28 March 2002.
28.2.2000	Communication from the Commission to the Council and the European Parliament: Review of SLIM : Simpler Legislation for the Internal Market, COM(2000) 104 final, 28 February 2000.
22.12.1998	Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, OJ C 73, 17 March 1999.
6.11.1996	Communication from the Commission to the Council and the European Parliament: The SLIM Initiative. Report of the Commission on the SLIM Pilot Project. Simpler Legislation for the Internal Market, COM(96) 559 final, 6 November 1996.
8.5.1996	Communication from the Commission to the Council and the European Parliament: Simpler Legislation for the Internal Market (SLIM): A Pilot Project, COM(96) 204 final, 8 May 1996.
1995	Treaty of Amsterdam: Protocol on the application of the principles of subsidiarity and proportionality.
20.12.1994	Interinstitutional Agreement of 20 December 1994 on an accelerated working method for official codification of legislative texts, OJ C 102, 4 April 1996.
25.10.1993	Interinstitutional Agreement on the procedures for implementing the principle of subsidiarity.
1993	Declaration No 18 on the estimated costs under Commission proposals and Declaration No 19 on the implementation of Community law.