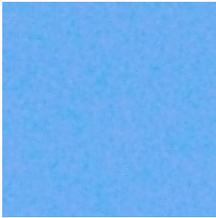
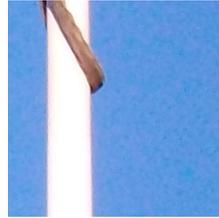
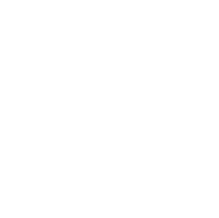
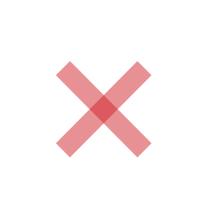
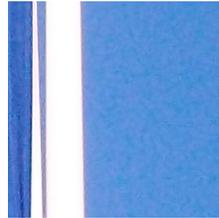
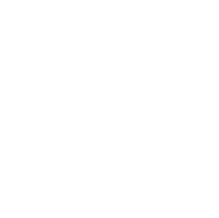
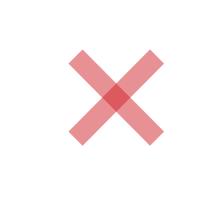
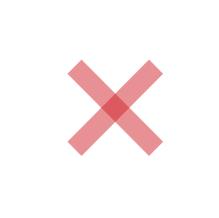
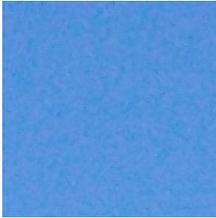




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# SCRUTINY OF EU POLICIES

Edited by Alfredo De Feo and Brigid Laffan

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# SCRUTINY OF EU POLICIES

CONTRIBUTIONS TO THE WORKSHOP  
ORGANISED BY THE RSCAS  
FEBRUARY, 27-2017

Editor:

Alfredo De Feo and  
Brigid Laffan

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# FOREWORD

by Brigid Laffan<sup>1</sup>

The need for EU reform is gaining ground and rising on the European political agenda. In 2015 the Robert Schuman Centre for Advanced Studies started a research project on the use of financial resources in Europe. This project, part of the Integration, Governance and Democracy strand, has followed the approach of the RSCAS in combining multidisciplinary academic researchers and practitioners from the EU Institutions and Member States.

As part of this project, a first workshop was organised on *Own Resources*,<sup>2</sup> followed by a workshop on *Efficiency and Effectiveness of the EU Budget*.<sup>3</sup> *Scrutiny of EU policies* was the third of this series.

The workshop brought together multidisciplinary academics, politicians and practitioners, who engaged in a lively discussion touching upon the different facets of scrutiny of EU legislation and their links with the decision-making process.

In a period of deep crisis of the European project, of a scarcity of financial resources and with the EU facing new challenges, a rationalization and a concentration of resources would make its policies more efficient. Scrutiny of the implementation of EU legislation should be part of this process to make EU policies more focused on European priorities. EU scrutiny should not remain a concept managed internally by each institution, but should complete the legislative cycle in order to deliver better regulation. Is this already happening? How can better scrutiny be achieved?

1 Brigid Laffan, Director of the Robert Schuman Centre for Advanced Studies.

2 A. De Feo, B. Laffan (eds) *EU Own resources: Momentum for a Reform?* Contributions to an RSCAS workshop, EUI 2016, doi: 10.2870/176147 ISBN: 978-92-9084-384-9, <http://bookshop.europa.eu/en/eu-own-resources-pbQM0116048/>

3 A. De Feo, B. Laffan, *Effectiveness and European Added Value of the EU Budget*, pending.

How could scrutiny of EU policies contribute to reform of the EU?

These are some of the questions which were addressed during the workshop and which can find some answers in the contributions collected in this publication.

Brigid Laffan



# BETTER REGULATION: SCRUTINY OF EU POLICIES

by Alfredo De Feo

## Abstract

This introductory chapter, based on the oral and written contributions to the workshop, highlights the contribution of soft law through an interinstitutional agreement to reinforce scrutiny of EU policies with enhanced participation by stakeholders.

The chapter reviews the two initiatives that the Juncker Commission put at the top of its political agenda: Better Regulation and a Budget Focused on Results. After an analysis of the impact of these initiatives on the legislative process, the article concludes that a cultural change at the administrative level has started but this is not yet embedded in the policy-decision mechanism.

## Introduction

The Commission and the Council have culturally dominated the European decision-making process, at least until the Lisbon Treaty. The European Parliament's influence has nevertheless increased over time, even before the introduction of co-decision.

The Treaty entrusts the Commission with implementation competences, while the European Parliament, with the support of the Court of Auditors, gives discharge to the Commission on budget implementation. Scrutiny of EU policies is not limited to the discharge procedure, but is a more complex activity which involves all the Institutions. The Institutions have developed a number of tools – ex-ante and ex-post impact

assessments and policy evaluations – to enhance the monitoring of existing legislation and the preparation of new legislation.

Furthermore, the Lisbon Treaty (art. 318) invites the Commission to submit an annual report on the *evaluation of the Union's finances based on the results achieved*. This report, addressed to the legislative authority and to the Court of Auditors, increases the number of tools to evaluate the implementation of the EU policies. Article 318 has favoured a cultural change within the Institutions, which are now becoming aware of the necessity of scrutiny.

The European Parliament has among its primary tasks the scrutiny of EU policies. Experience shows that, so far, the EP is more effective in monitoring linked with political decisions. For instance, the control of the Parliament in the discharge procedure is more oriented toward influencing future implementation mechanisms, rather than toward sanctioning the Commission and the Member States. The EP practice of postponing decisions on discharge, which is not foreseen by the Treaty, has the objective of obliging the Commission to change its implementation methods according to requests formulated by the EP.

To enhance the follow-up of EU policies, since the beginning of EU legislation the European Parliament has tried to expand its legislative influence on the secondary level of legislation, the so-called implementing rules, which are adopted by the Commission with the comitology procedure.

## Scrutiny and comitology

The first control of policies starts in the pre-legislative phase. Since the first regulations in 1960 implementing the Common Agriculture Policy, the Commission was aware of the importance of obtaining a Member State consensus on all the implementing rules. The Member States were



not ready to leave management decisions to the Commission. The comitology mechanisms were therefore introduced as a way of reducing the Commission's autonomy, at first in the domain of agriculture. The mechanism proved successful, both for the Commission, which had the great majority of its proposed measures accepted, and for the Council, which gained full control over and visibility of implementing measures. This procedure rapidly spread into all policy areas.

The literature<sup>4</sup> frames this procedure either as an *intergovernmental bargaining procedure* or as *supranational deliberation* aimed at problem solving. Both descriptions apply to the practice of deliberations on implementing rules. However, the accountability of this procedure was questioned when the EP increased its legislative competences. Nevertheless, the Member States considered these procedures useful not only to control the implementing powers of the Commission but also to limit EP interference in legislation.

The EP was aware that even in the consultation procedure a large part of the definition of legislation was below its radar. In 1988 the first interinstitutional agreement on comitology was signed by Jacques Delors and Sir Henri Plumb<sup>5</sup> with a commitment by the Commission “...to keep Parliament fully informed of all proposals it submits to ‘comitology’ committees.”<sup>6</sup> In spite of this agreement, the EP reacted and did not hesitate to use its budgetary competences, freezing the allocations<sup>7</sup> for the organisation of comitology meetings until progress was made in

the recognition of the EP ‘*droit de regard*.’ In 1994 the three Institutions agreed on a *modus vivendi*,<sup>8</sup> with a commitment by the Council to take into consideration (non-binding) EP opposition to some implementing measures and seek an acceptable solution. The Commission and the EP also concluded specific agreements in sectoral areas.<sup>9</sup>

The Lisbon Treaty modifies comitology by introducing the Delegated Acts (TFEU art. 290). This modification is perceived as a further increase in EP influence. Christiansen and Dobbels<sup>10</sup> convincingly argue that “real progress [had] been minimal and that the EP does not make full use of its new powers.”

EP determination to be more involved in monitoring the implementation rules seems more motivated by form than by substance. The EP scrutinises delegated acts, but after the adoption of the text its interest in the follow-up fades. While the situation varies from committee to committee, two reasons seem to emerge: the technical content of the majority of the decisions, and the absence of political decisions linked to the assessment of EU policies. The EP is a political (and not a technical) body, and, as such, in the absence of political decisions it loses interest.

4 Siderius, K and Brandsmajcns, G. J. The Effect of Removing Voting Rules: Consultation Practices in the Commission's Delegated Act, JCMS, 2016 Volume 54. Number 6. pp. 1265–1279 DOI: 10.1111/jcms.12380.

5 Westlake, M. The Commission and the Parliament: Partners and rivals in the European policymaking process. London: Butherworth (1994).

6 Bradley, K. (1997) ‘The European Parliament and Comitology: On the Road to Nowhere?’ European Law Journal, Vol. 3, pp. 230–54.

7 Credits for the meeting were entered into the B0-40 chapter (reserve).

8 “Modus vivendi” of 20 December 1994 between the European Parliament, the Council and the Commission concerning the implementing measures for acts adopted in accordance with the procedure laid down in Article 189b of the EC Treaty”, p. 1. OJEC. 04.04.1996, n° C 102.

9 Samland-Williamson on transparency (1998), Structural policies: agreement Klepsch-Millan (1993), Gil Robles-Santer (1999); in Financial services Lamfalussy procedures.

10 Christiansen, Thomas & Mathias Dobbels (2012), ‘Comitology and delegated acts after Lisbon: How the European Parliament lost the implementation game’, European Integration online Papers (EIoP), Vol. 16, Article 13, <http://eiop.or.at/eiop/texte/2012-013a.htm>.



## The emergence of a new culture

This introduction aims to underline the strong interest of the EP in participating in the decision-making process concerning delegated acts. During the period 2013-2017, the EP opened 512 procedures.<sup>11</sup> At the same time, this interest in

years	procedure
2013	104
2014	133
2015	107
2016	136
2017	32
	<b>512</b>

defining the implementing rules for legislation has not been translated into a growing influence in monitoring during the implementation periods of programmes.

Signs of culture change are emerging at different levels: changes are being driven by the scarcity of financial resources, the need to improve the efficiency of EU policies and the focus on European Added Value.

This change became more concrete with the arrival of the new Commission in 2014. The concepts of *Better Law-Making* and a *Budget Focused on Results* were promoted to the top of the interinstitutional political agenda. At the first mid-term of the Juncker Commission, Vice Presidents Timmermans and Georgieva not only imposed these two concepts on the Commission services but also tried to involve the budgetary and political authorities in supporting this agenda and in guaranteeing a change of culture in the whole legislative cycle.

This publication aims to contribute to answering the following questions:

- a. Is there coherence between the two approaches?
- b. Are the other Institutions and the Member States equally involved in these approaches?
- c. Can we benefit from other experiences within and outside the EU?
- d. How far are evaluations taken into account in the decision-making process?

<sup>11</sup> Source: EP Legislative Observatory.

## Better Regulation

The Lisbon Treaty (art. 318) invites the Commission to submit a report on the *evaluation of the Union's finances based on the results achieved*. It was only after five years that the annual reports presented by the Commission substantially improved, but they remain somewhat administrative papers and the link with political decisions is still difficult to detect.

The annual report is not the only novelty; the Juncker Commission made a commitment to implement a Better Regulation programme.

A comprehensive programme<sup>12</sup> was launched in 2015 around 4 axes:

- a) Concentration on Priority initiatives (period 2015-2017: 77 initiatives indicated);
- b) Proposals for Withdrawal (period 2015-2017: 109 proposals withdrawn);
- c) Repealed Laws (period 2015-2017: 48 acts repealed);
- d) Regulatory simplification (period 2015-2017: 137 cases simplified).

Attention to outputs and ex-post evaluations has increased in recent years, but full attention has not been achieved yet. However, each Commission proposal now takes into account the principles of Better Regulation.

These positive achievements have been recognised by the Impact Assessment Institute (IAI), which scrutinised the implementation of the European Commission's Better Regulation Package after May 2015.<sup>13</sup> Nevertheless, the study raises a number of criticisms. The main ones are:

<sup>12</sup> EC: Better Regulation and Transparency Commission, Assessment of the achievements during the period 2015-2017 [https://ec.europa.eu/commission/sites/beta-political/files/2-years-on-better-regulation\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/2-years-on-better-regulation_en.pdf)

<sup>13</sup> Impact Assessment Institute, A year and a half of the Better Regulation Agenda: what happened?, IAI-BR1½Yr-170130f, [http://docs.wixstatic.com/ugd/4e262e\\_6b29131f31ad40fd8072fef2b6280bd6.pdf](http://docs.wixstatic.com/ugd/4e262e_6b29131f31ad40fd8072fef2b6280bd6.pdf)

- About half of the proposals have neither Impact Assessment nor justification for the exceptions;
- The procedures outlined in the 2015 Better Regulation Guidelines are not always followed and, again, exceptions are not duly justified;
- Transparency and effectiveness need to be improved;
- The neutrality of the IA cannot always be guaranteed;
- Subsidiarity and proportionality should be justified by factual evidence.

In spite of these observations, the Better Regulation approach is progressing under the leadership of VP Timmermans and with constant monitoring by the Regulatory Scrutiny Board.<sup>14</sup> This body carries out an ‘*objective quality check of its impact assessments*’ and gives the Commission green lights to proceed with proposals. The EP recommends that this body should assume a ‘*supra partes*’ role and has asked for it to be autonomous from the Commission, constituting an Advisory Board for all the EU Institutions. The contribution by Bernard Naudts highlights the role and influence of this body in the evaluation of policies.

Better Regulation is not only at the centre of attention in the EU bubble. National parliaments also follow the process, as is described in detail in the contribution by Katrin Auel.<sup>15</sup> In addition, Elena Griglio assesses how national parliaments tackle impact assessment tools with reference to the EU decision-making process and the type of functions they perform from a legal constitutional point of view.

<sup>14</sup> Regulatory Scrutiny Board advisory body to the Commission.

<sup>15</sup> See also Auel, K. and Neuhold, C. (2016) ‘Multi-arena players in the making? Conceptualising the role of national parliaments since the Lisbon Treaty,’ *Journal of European Public Policy*, published before print, doi: 10.1080/13501763.2016.1228694

The Interinstitutional Agreement (IIA) on Better Law-making of April 2016 was a further step towards defining some common principles shared by the Council, Commission and Parliament. It sets out a common understanding of the timing and processes to make the legislative cycle more transparent. The agreement gives more relevance, among other things, to tools such as ex-ante and ex-post impact assessments, public stakeholder consultations and evaluations.

## The principles of the IIA

The IIA confirms a procedural framework of interinstitutional cooperation which is essential to progress in the direction of more effective EU legislation. The first feature to underline is that the three Institutions have subscribed to the Agreement on Better Law-making, which underlines the common coordinated effort to achieve and monitor better legislation.

The Agreement is based on clear principles of law such as “*democratic legitimacy, subsidiarity and proportionality and legal certainty.*” The Institutions also agree to promote “*simplicity, clarity and consistency in the drafting of Union legislation and to promote the utmost transparency of the legislative process.*”

## A policy dialogue to set the legislative agenda

In the Union’s legislative mechanism, legislation is a responsibility shared between the three main Institutions. This represents a *de facto* limit to the right of initiative of the Commission, but it is necessary that through policy dialogue the three Institutions highlight their priorities and act where it is most likely that an effort will be made to conclude the co-decision procedure. In this respect, the IIA provides not only procedures for consultation on their priorities between the two branches of the legislative authority but also a ‘joint declaration’ on the year’s legislative programming.



The IIA includes a competence of the Commission to withdraw legislative proposals in the policy dialogue, as Nicola Lupo explains in his article on the roles of the EP and the Council following the decision of the Court of Justice in case *C-409-13 Council v. Commission*.

## The preparation of legislation: impact assessment

Impact assessment is the recognised method to evaluate each piece of legislation. It should contain the main justification for whether or not Union action is needed, respect for subsidiarity and proportionality, and should map out the quantitative and qualitative economic, environmental or social impacts. Even if the obligation to carry out impact assessment is on the Commission, the Council and the EP can make assessments of their amendments, but only when they consider it “appropriate and necessary.” The preparation phase should include both public and stakeholder consultations, and the results should be communicated to the co-legislators.

## The Regulatory Scrutiny Board (RSB)

The Regulatory Scrutiny Board (RSB) was created by the Commission in May 2015<sup>16</sup> and is entrusted with the task of controlling the quality of draft impact assessment reports and offering independent opinions to the Commission (and other Institutions) on the methodology used (see the contribution by Bernard Naudts).

## Ex-post evaluation of legislation

The IIA also contains five articles on ex-post evaluation.<sup>17</sup> The Commission and the legislative

<sup>16</sup> Decision of the President of the Commission on the establishment of an independent Regulatory Scrutiny Board, C(2015) 3263 final <https://tinyurl.com/y972hzqg>

<sup>17</sup> IIA on Better Law-making, OJ L 123, 12/5/2016, art 22

authority share the multiannual planning of evaluations of existing legislation, which includes requests for scrutiny from the Council and Parliament. Evaluations should be based on “*efficiency, effectiveness, relevance, coherence and value added*” and “*should provide the basis for impact assessments of options for further action.*”

The scrutiny activity has become more relevant with the appearance, in most of the recent legislation, of performance objectives and indicators, and macro-economic conditionality, together with evaluation and reporting arrangements. Furthermore, the cohesion policy also includes the possibility of drawing supplementary funds from a “*performance reserve*” of structural funds.

The Committee of Regions (CoR) also plays a role. Its Territorial Impact Assessment Strategy is recognised in the Protocol concluded by the CoR with the Commission and Parliament, as is described in the contribution by Beatrice Taulègne.

At the legislative level, most of the 2014-2020 Regulations contain indicators and review clauses (there are about 700). The combination of these two tools should facilitate revision of the legal texts where necessary. In theory, the existence of these clauses should raise scrutiny from being a technocratic exercise to a more political dimension. Nevertheless, the use of review clauses in legislative regulation has so far been quasi-non-existent.

The contribution by Mariana Hristecheva assesses the concrete commitment of the Commission in the evaluation of the Cohesion policy.

Scrutiny of EU legislation closes the circle of the

.....  
(ex-post). In the context of the legislative cycle, evaluations of existing legislation and policy, based on efficiency, effectiveness, relevance, coherence and value added, should provide the basis for impact assessments of options for further action. To support these processes, the three Institutions agree to, as appropriate, establish reporting, monitoring and evaluation requirements in legislation, while avoiding overregulation and administrative burdens, in particular on the Member States. Where appropriate, such requirements can include measurable indicators as a basis on which to collect evidence of the effects of legislation on the ground.



legislative cycle. This function has become even more relevant in recent years, mainly for two reasons: a) the great majority of legislation with a financial impact is adopted in one go, every seven years; and b) due to a reduction in the quantity of legislation, all Institutions, and the EP in particular, can devote more time to oversight of the legislation.

To conclude, the mechanisms set within the IIA on Better Law-Making for evaluations and impact assessments are important and cover most of the legislation, but as Bernard Naudts pointed out during the workshop, they are not always reader-friendly. Moreover, clear conclusions cannot always be drawn from the evidence.

## An EU Budget Focused on Results

Better Regulation is oriented towards enhancing the tools to monitor legislation. The funds allocated to the different programmes are submitted to the financial scrutiny of the Court of Auditors and the European Parliament through the discharge procedure.

Since 2010, The Court of Auditors<sup>18</sup> and the EP Budgetary Control Committee<sup>19</sup> have played an important role in putting more emphasis on the outputs of EU legislation than only on compliance with rules and the error rate. The quality of expenditure and the outcomes of EU legislation are becoming more and more relevant evaluation parameters. The indicators introduced in the legislative programmes offer a measurable tool for decision-makers to evaluate outcomes.

As indicated above, most of the current legislation has a mid-term review clause – usually requested by the EP – but often this exercise remains a procedural step. EU Institutions, including the Parliament, do not seem inclined to re-open at

18 See European Court of Auditors Making the best use of EU money, 2014, @ [http://www.eca.europa.eu/Lists/ECADocuments/LR14\\_02/QJ0614039ENN.pdf](http://www.eca.europa.eu/Lists/ECADocuments/LR14_02/QJ0614039ENN.pdf)

19 A. D'Alfonso Discharge procedure for the EU budget Political scrutiny of budget implementation, EPRS, 2016 @ <https://tinyurl.com/yb9vrtyj>

mid-term the Pandora's box of legislative acts.

In his contribution, Paul Stephenson highlights the leading role of the Court of Auditors (ECA) in the 'chain of accountability,' and the evolution from compliance audit to performance audit is described in President Vitor Caldeira's introductory speech. The ECA, in its special reports and the EP resolutions presented by the budgetary control committee, urged the Commission towards a budget more focused on results.

In 2015, the Commission took the lead by launching the #EUBudget4Results initiative to maximise the Union's budget effectiveness in supporting EU policies. The relevance given to this flagship initiative has already had a considerable impact on the Commission's administrative culture. Furthermore, Conferences organised in 2015 and 2016<sup>20</sup> and their follow-ups at the interinstitutional and national levels have involved many actors from all the Member States.<sup>21</sup>

The Discharge Procedure, which falls within the EP competencies, is certainly one of the highest political syntheses of all the scrutiny work performed within the Institutions and is a powerful means to influence and change implementation methods. Nevertheless, these procedures often do not lead to a change of legislation or to a different allocation of resources.

## Performance indicators

Indicators are an essential tool for policy-makers, and they are also essential for public opinion to be able to evaluate the impact of policies. They facilitate the evaluation of the outcome of policies and programmes, and the impact on countries, regions, industries, the environment and social groups. Composite indicators combine different elements.<sup>22</sup>

20 See the Recoding and transcript of the 2016 Conference at [http://ec.europa.eu/budget/budget4results/conference/2016/index\\_en.cfm](http://ec.europa.eu/budget/budget4results/conference/2016/index_en.cfm)

21 At the interinstitutional level a technical working group has been created with Council and EP experts; at the national level a series of meetings has been organized.

22 Eurostat, Towards a harmonised methodology for



Eurostat, OECD and the United Nations are committed to developing more sophisticated categories of indicators at a higher standard. Indicators contribute to describing and/or anticipating the effects of a policy. The above institutions have developed a code of general principles<sup>23</sup> concerning the independence and the professional ethics of public statistical institutes and their assessment methods. At the same time, Eurostat and national institutes recognize that policy-makers cannot only rely on evidence-based indicators as reality is more complex and opinion-based elements should also be taken into consideration.<sup>24</sup> A balance between evidence and opinion-based indicators should give policy-makers a complete picture of the impact of a policy.

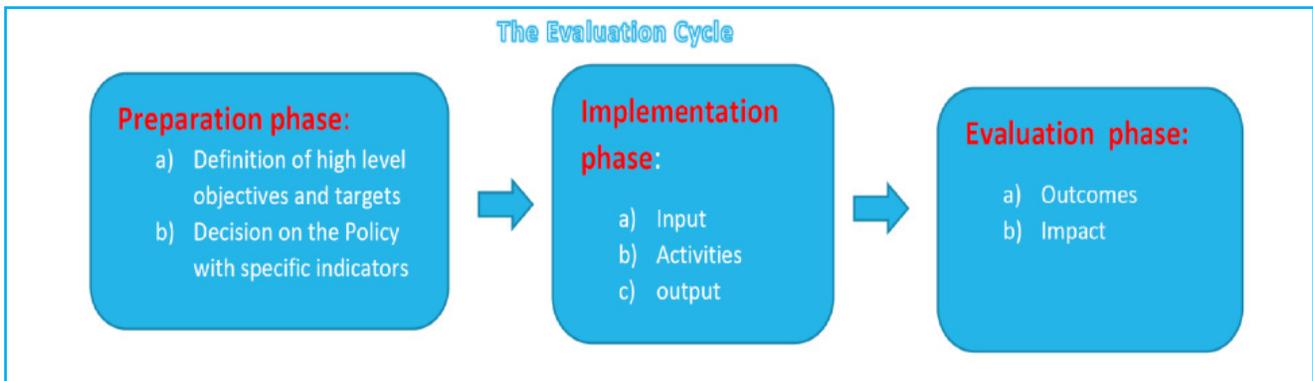
## Indicators in EU legislation

As indicated above, the EU has started to use indicators as a tool for informed decisions in the legislation linked to the multiannual framework 2014-2020.

The indicators included in EU legislation should correspond to the categories defined by Eurostat:

<i>Input indicator</i>	The indicator measures the financial, human and material resources used in a given policy, programme or project.
<i>Output indicator</i>	The indicator measures the products, capital goods or services that result from a given policy, programme or project.
<i>Outcome indicator</i>	The indicator measures the output's effects, in the short or medium term, on the target group, for instance, in the form of behavioural change.
<i>Impact indicator</i>	The indicator measures the positive and negative, primary and secondary long-term effects produced, whether directly or indirectly and whether intended or unintended.

Sources: Eurostat Towards a harmonised methodology, 2014, p. 14



The literature classifies indicators in three broad categories<sup>25</sup> and recognises that they can be misused or abused.

statistical indicators, 2014, ISBN 978-92-79-40322-4, ISSN 2315.0815, doi:10.2785/56118 <https://tinyurl.com/y8rgop6l>

23 United Nations Fundamental Principles of Official Statistics (UN 2014b), the European Statistics Code of Practice (ESSC 2011). See also Eurostat, Getting messages across using indicators, 2014, ISBN 978-92-79-27205-9, ISSN 2315-0815, doi:10.2785/36378 p 14.

24 Eurostat, Relevance of indicators for policy making, 2017, ISBN 978-92-79-68871-3 ISSN 2315-0815 doi:10.2785/53076, p.11.

25 Indicators for Instrumental use, Conceptual use and Political use.



About 55 regulations contain more than 700 indicators of different types measuring their performance against 61 general and 228 specific objectives.

integrated performance indicators in the hearings for the preparation of the 2018 budget.

This change of culture has reached the EP administration, where a service dedicated to

Heading	No. of programs	No. of programmes for which 100% of indicators are informed	Total number of indicators	Total number of informed indicators	Percentage of informed indicators
1A	20 (+2)	12	249	192	74.7 %
1B	4	2	84	49	58.3 %
2	5	0	99	83	84.7 %
3	12	8	176	163	92.6 %
4	14 (+1)	12	108	102	94.4 %
Special Instruments	2	2	2	2	100 %
<b>TOTAL</b>	<b>57 (+3)</b>	<b>36</b>	<b>718</b>	<b>591</b>	<b>82.3%</b>

Source: European Commission, DB 2018, Working Document 1, p. 10

The Commission itself recognises that, apart from Headings 3 and 4, the evidence for indicators is only partially available, especially for programmes in sub-heading 1a. For the Cohesion policy, about 80% of the indicators are provided with data but these refer to the period 2014-2015.

This assessment exercise through measurable objectives/indicators shows weaknesses at the conceptual level. In real life, the situation is more complex: according to the Commission “some good indicators rely on information that is, at times, not available on a regular basis; some dimensions of performance are very difficult to measure; in addition, contextual factors can importantly influence final results, and indicators cannot eliminate or adjust these factors.”<sup>26</sup> Even if there have been virtually no governance decisions taken on the basis of measurable output, the Budget Focused on Results has produced a change of culture, especially after the Commission

impact assessment has been created. It produces analyses on Commission Impact Assessments on its own initiative. However, it is still questionable whether these analyses are fully exploited by the Members of the EP.

A practical example: the target of Europe 2020

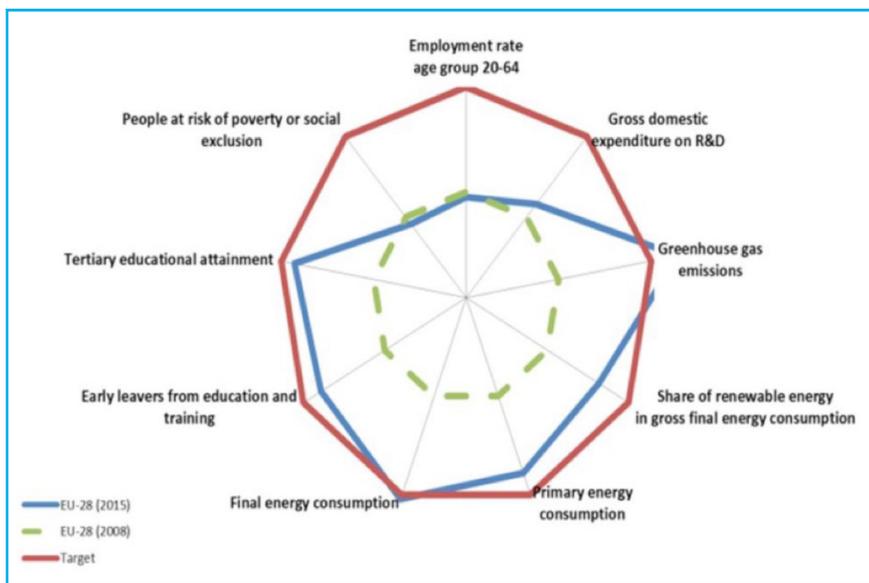
The working document for the preparation of the 2018 budget presents the results of some monitored programmes. Europe 2020 is one of these. Its strategy includes five main targets: employment, research and development, climate and energy, education and the fight against poverty and social exclusion, which, according to the Commission, should produce the following outcomes:

- a) Raise the employment rate of the population aged 20-64 from the current 69% to at least 75%;
- b) Achieve the target of investing 3% of GDP in R&D, in particular by improving the conditions for R&D investment by the private sector, and develop a new indicator to track innovation;

<sup>26</sup> European Commission, DB 2018, Working Document 1, p. 16 at [http://ec.europa.eu/budget/library/biblio/documents/2018/DB2018\\_WD01\\_en.pdf](http://ec.europa.eu/budget/library/biblio/documents/2018/DB2018_WD01_en.pdf)



- c) Reduce greenhouse gas emissions by at least 20% compared to 1990 levels or by 30 % if the conditions are right; increase the share of renewable energy in our final energy consumption to 20%, and achieve a 20% increase in energy efficiency;
- d) Reduce the share of early school leavers to 10% from the current 15%, and increase the share of the population aged 30-34 who have completed tertiary education from 31% to at least 40%;
- e) Reduce the number of Europeans living below national poverty levels by 25%, lifting 20 million people out of poverty.



Source: Eurostat

The table above shows the progress made since 2008 and also the distance still to be covered towards the relevant Europe 2020 targets. The situation in the area of employment, research and development and the fight against poverty or social exclusion has remained at the same level as in 2008. The information produced by the indicators has not produced a change in the legislation.

### The weaknesses of the scrutiny

The paragraphs before show the progress the Commission has made in imposing mechanisms to evaluate policies in its services, but this information is still not embedded in the decision-

making process and most of the time evaluations remain without follow-up. The evaluation of EU public spending has not been raised to the political level, because of a number of factors:

- a) Path dependency. After the approval of a piece of legislation, the legislative authority lacks the motivation to re-open discussion on the legislative text. It considers that the Commission should solve weaknesses in the implementation phase.
- b) The financial envelopes embedded in legislation give a guaranteed allocation to policies. These are a further disincentive.

Institutional stakeholders (the EP and the Member States) are generally reluctant to change the financial envelope, which often contains the 'essence' of the legislative compromise.

c) The indicators – even if they are included in the primary legislation or delegated acts – are often perceived by the legislative authority as a technical element which has not received its political

endorsement.

- d) The Budgetary Authority perceives the links between the indicators and the allocation of resources as results of political decisions, with the risk of creating a more technocratic budget and reducing the political added value of budgetary decisions.
- e) The number of indicators and objectives included in legislation is very often too high and *de facto* creates a disincentive for efficient monitoring. Indicators need the full political endorsement of the legislative authority. A reduction of their number should also facilitate the reading of results.

These factors lead to the conclusion that the Council and the EP lack political ownership of the evaluation mechanisms used by the Commission. The *#Budget4results* initiative has not yet been translated into better-informed budget allocation. Supplementary steps are necessary to address the weaknesses highlighted above. There is no magic wand which would allow the quality of expenditure to be taken into consideration.

### How could the decision-making process better integrate scrutiny?

To raise scrutiny to a political level and influence the decision-making process, all the Institutions should acquire ownership of the procedure. Creation of a structured framework could be a step forward in this direction.

The presentation by Rolf Alter<sup>27</sup> highlighted four challenges:

- i. Insufficient use of evidence;
- ii. Uneven implementation;
- iii. Stakeholder engagement;
- iv. Inadequate evaluation of results.

Responding to these challenges will improve the political added value of the Better Regulation programme. Scrutiny is not, and should not be, an exercise per se, but it should aim to improve the efficiency and effectiveness of public expenditure by linking funding to the results it delivers. Scrutiny should lead to political decisions. This element, for the time being, is missing.

Introducing more flexibility, or even suppressing, the financial envelopes from regulations could be a step in the right direction. Financial envelopes could still indicate the magnitude of the expenditure allocated to an initiative but the annual allocation should be defined on the basis of previous performance. This change will draw the attention of the budgetary authority, which should take more responsibility in the evaluation of performance, based not only on budgetary decisions but also on legislative implementation.

<sup>27</sup> Director of the OECD.

The IIA on *Better Law Making* or the IIA on *budgetary discipline, on cooperation in budgetary matters and on sound financial management* could include a procedure to structure the oversight of legislation.

### The interinstitutional dimension

Enhancement of the oversight of legislation would gain from being framed by an interinstitutional agreement to structure the scrutiny exercise. As legislative and budgetary procedures are ruled by co-decision, the same should apply to scrutiny of legislation. In November, after the presentation of the Court of Auditors' report and possibly before the final decision on the N+1 budget, the legislative and budgetary authorities should agree:

- a. **To submit EU policies to in-depth scrutiny** in the following years. This would be much more efficient if all the Institutions focussed on a limited number of policies every year. The Institutions should plan in-depth evaluation of policies in such a way as to cover all policies in a period of 3-4 years. The European Court of Auditors could autonomously decide to give particular attention to these policies in its annual report or in a special report.
- b. **The calendar** leading to the preparation of political decisions, if necessary. Scrutiny should be finalised within fourteen months at the latest, in time for the Commission to make concrete proposals, if appropriate, in the draft budget (year N+2).
- c. **The dates of special trilogues** dedicated to scrutiny, where the Institutions can exchange information about their work in progress.

This procedure would have the advantage of raising awareness and increasing ownership of scrutiny at the political level.

This will not only give visibility to the scrutiny function, but also improve the democratic



accountability of implementation. It will reinforce the role of the European Parliament, which will accompany the EU legislation through the whole cycle from preparation to scrutiny and, last but not least, it will constitute an incentive for beneficiaries to focus on outputs and outcomes.

Once each Institution agrees on the frame, they should define the internal procedures to best carry out the exercise. In fact, scrutiny of EU policies should not be limited to the budgetary aspect but also to legislative elements, and it should somehow involve stakeholders, who should give their view of the strengths and weaknesses of the implementation of policies in the spirit of the Better Law-Making agreement.

## Scrutiny within each Institution

Mrs Calviño, in her presentation, underlined the progress made by the Commission in assessing EU policies in the frame of the EU Budget Focused on Results, and stressed the efforts of DG BUDG to coordinate the contributions of the different Commission services.

EP Rules of Procedure<sup>28</sup> facilitates joint activity by parliamentary committees to conduct scrutiny in the legislative and budgetary domain. A resolution adopted in plenary should conclude the EP internal procedure. Ideally the resolution should clearly state the outcome of its investigation and either approve the Commission implementation or, where appropriate:

- a. Ask the Commission to modify the implementation of the legislation;
- b. Ask the Commission to modify the legislation;
- c. Ask the Budgetary Authority to increase/reduce the annual allocation of resources.

.....  
<sup>28</sup> EP Rules of Procedure, Rule 55 Procedure with joint committee meetings. “The Conference of Presidents may decide that the procedure with joint meetings of committees and a joint vote is to be applied.”

With a plenary decision, scrutiny would assume a political dimension, which is so far missing. The decision would then have a direct impact on implementation and on budgetary allocation.

The Council has never been pro-active concerning the scrutiny of legislation. After the adoption of a piece of legislation, the Council seems to have little concern with questioning implementation. Member States, in fact, are co-responsible for the implementation of the vast majority of programmes. Therefore, the Council lacks motivation to question implementation, which is a sort of gentlemen’s agreement between the Member States. At the same time, the Member States see an interest in assessing whether the allocation of funds respects the conditions set in the Regulation, especially in the presence of performance reserve mechanisms.

Last but not least, the Court of Auditors should play an important role in delivering the results of their audits to the Institutions. The contribution by Béatrice Taulegne also underlines the efforts of the Committee of Regions to monitor the implementation of EU policies.

Fiorini and Hoekman give a concrete example of how Better Regulation ‘can indirectly generate greater economic benefits,’ improving the governance and the regulatory process of the services trade policy.

To conclude, a structured framework might transform the bureaucratic/technocratic exercise of scrutiny into a more political procedure with the involvement of all the Institutions. Indicators should remain an important component of the assessment, but other elements – opinion-based factors – should also play a role. The aim of scrutiny is to enhance legislation. The fact that scrutiny can also lead to a different allocation of resources or a modification of a regulation should not be excluded, provided that the budgetary and legislative authority can co-decide the modification.



## Conclusions

The articles published in this edited volume give a wide overview of how the initiatives Better Regulation and a Budget Focused on Results have started to frame EU policies in a new dimension, favouring the efficiency and effectiveness of EU policies. However, this process is not yet embedded in political decision-making. A further reflection on how measurement of the results of EU policies could contribute to more informed decisions should constitute a supplementary step that academics and institutions need to make.



# THE OVERSIGHT OF EU LEGISLATION

by Vitor Caldeira

I am very grateful for the invitation to be here today at the European University Institute to participate in this workshop on better regulation and the scrutiny of EU policies. It is a pleasure to be able to contribute to this discussion. Indeed, as the introductory note announcing this workshop states: “In a period of unprecedented crisis for the European project, the EU has the opportunity to enhance its efficiency and effectiveness by focusing on its political priorities and a better use of its financial resources. The evaluation of the impact of EU policies should not be an exercise in itself; it will become more effective if linked to clear political decisions.”

In my last official public engagement as President of the European Court of Auditors (September 2016), I shared my views on some of these issues at the 2016 conference organised by the European Commission on an EU Budget Focused on Results, and in particular on the issues of simplification and better regulation. These were recurrent themes in the work of the Court during much of the sixteen years I was a member.

I recall very well that at that point the Court, under the last multi-annual framework, was calling on the Commission to improve the legal frameworks for EU spending and to make spending schemes more output-oriented and easier to manage. It is clear that simplification and better regulation will be just as important this time around. But I think that was always to be expected and it is not a sign of failure. The EU budget system naturally grows in complexity as policies and funding arrangements develop, and so it needs to be pruned back at regular intervals.

I think we have reached such a point. Since 2008, the EU has had to respond to major challenges:

- the banking and sovereign debt crises;
  - a prolonged period of low economic growth and high unemployment in Member States; and
  - the ongoing refugee crisis and security threats.
- It has done so by setting up new EU-level bodies and mechanisms and by mobilising the EU budget. For example, we have seen the EU:
- establish new agencies and supervisory mechanisms for regulating the financial sector;
  - introduce mechanisms to provide financial assistance to Member States in need;
  - increase its use of financial instruments across the EU budget; and, of course,
  - establish the European Fund for Strategic Investment outside the EU budget but backed by an EU budget guarantee.

As a result, the overall arrangements by which EU policies are funded have become more complex. Financial management has become more challenging. And it has become more difficult to ensure effective accountability and auditing.

I believe the ‘Better regulation’ and ‘Simplification’ initiatives of the Commission should be seen as instruments for pruning the current arrangements. The question is how should they now be applied to the EU budget system? The work performed by the European Court of Auditors would suggest that three things are particularly important in the run-up to the next programming period. First, there is a need to consider what to cut back. The EU budget is limited to around 1% of GNI, so it is important to ensure the funds available are used to best effect. This means targeting funds to where they can add most value. But it also means identifying the spending schemes that are not bearing fruit.

So far, the Commission has – in the mid-term review of the MFF – identified a small number of well-performing schemes to be reinforced. The



more challenging task of reviewing the results of the first years of spending under the current MFF still remains. The mid-term evaluations were expected to provide an opportunity to do this in 2017. However, there is a timing problem. The 2014-2020 spending programmes got off to a slow start and the 2007-2013 spending programmes are only now being closed. This means there will be only limited evidence available about the performance and value added of EU spending programmes before the next MFF is proposed by the Commission at the end of this year.

Second, there is a need to re-shape the EU budget around the EU's strategic priorities. The ECA's annual report (in 2015) observed that the allocation of funds in the budget could be better aligned with the Europe 2020 strategy priorities. It was also found that the objectives of individual spending programmes could be better linked to the targets to be achieved by the end of the period.

Third, there needs to be space left in the EU budget for new growth. New challenges or crises are bound to arise. So there needs to be sufficient room in the budget to respond. As the Commission makes clear in its mid-term review, the extra flexibility that was introduced for the current MFF – such as the contingency margin – proved useful. But these possibilities were quickly exhausted as the EU was called upon to respond to the refugee crisis and increased security threats. However, I note that the Commission did make some interesting proposals to make it easier to move funds around within the budget as well as to hold more funds in reserve.

There is much encouraging language in the proposals presented so far. For instance, the proposal for revision of the financial regulation aims to encourage the next generation of EU spending programmes to pay for results achieved rather than just reimburse costs incurred. But if one looks carefully at the opinion on it issued by the ECA last January, there remain a number of issues to be addressed and a need to base proposals

on clear evidence about how spending schemes are performing.

I believe this is a time to look forward and to be constructive and I would like to finish with a general remark. A greater focus on results will undoubtedly help. But we must also simplify the system as a whole, while addressing new challenges or crises, as I mentioned earlier. In this regard, I would like to mention three major specific challenges facing the EU:

- global instability (which risks further increasing migratory pressures and security threats);
- climate change (which entails a risk of occurrences of extreme natural events requiring increased demands from the EU budget to intervene within the EU, and globally may also result in displaced people seeking to migrate to the EU); and
- Brexit (which will occupy much of the decision-making machinery of the EU over the next two years but may offer an opportunity for reforming the EU budget).

There is also the broader challenge of regaining citizens' trust in the EU and its institutions, and here the EU budget system is important; it is difficult to get someone to trust something they don't understand. The Union needs a more user-friendly EU budget system. It needs to be easier for institutions, enterprises and citizens to see that system working. All EU institutions and Member States should stand ready to work closely together to achieve this goal.



# BETTER REGULATION, SCRUTINY AND EU BUDGET FOCUS ON RESULTS

by **Nadia Calviño**<sup>29</sup>

The EU budget represents about 1% of EU-28 GNI or 2% of overall public spending. It fulfils very specific functions, complementary to national budgets. Unlike national budgets, the major part of the EU budget has historically been devoted to redistributive measures to build and sustain support for European integration. With today's challenges facing the European Union, more weight is given to allocative efficiency and investments in European common goods. In its current state, the EU budget is mainly meant as an investment budget focusing on better economic, social and territorial cohesion across the European territory, specific European policies improving competitiveness for growth and jobs (e.g. research) and use of natural resources (e.g. agriculture), European public goods (single market, single trade policy), security and citizenship policies as well as the EU external policy.

For years, especially during periods of prosperity, the main concern of budget stakeholders was to absorb European funds according to the rules. Higher absorption rates and lower error rates meant positive conclusions from the scrutiny of the EU budget. With the economic crises having put unprecedented fiscal pressures on national budgets, the EU budget's focus has further shifted towards being a crucial investment instrument whose value lies in delivering tangible results on the ground. Therefore along with the quantitative

implementation of the EU budget, one of the main challenges has been to address the existing scepticism on the actual impact of the EU budget on the ground. This led the Commission to launch the "EU Budget Focused on Results" strategy in order to move from the primary focus on compliance with the rules and to look also at performance. This strategy has required a very significant investment at political and technical level, in order to change the mind-set of stakeholders, within the European Commission but also in the other European institutions, such as the Parliament and the Court of Auditors, as well as the Member States.

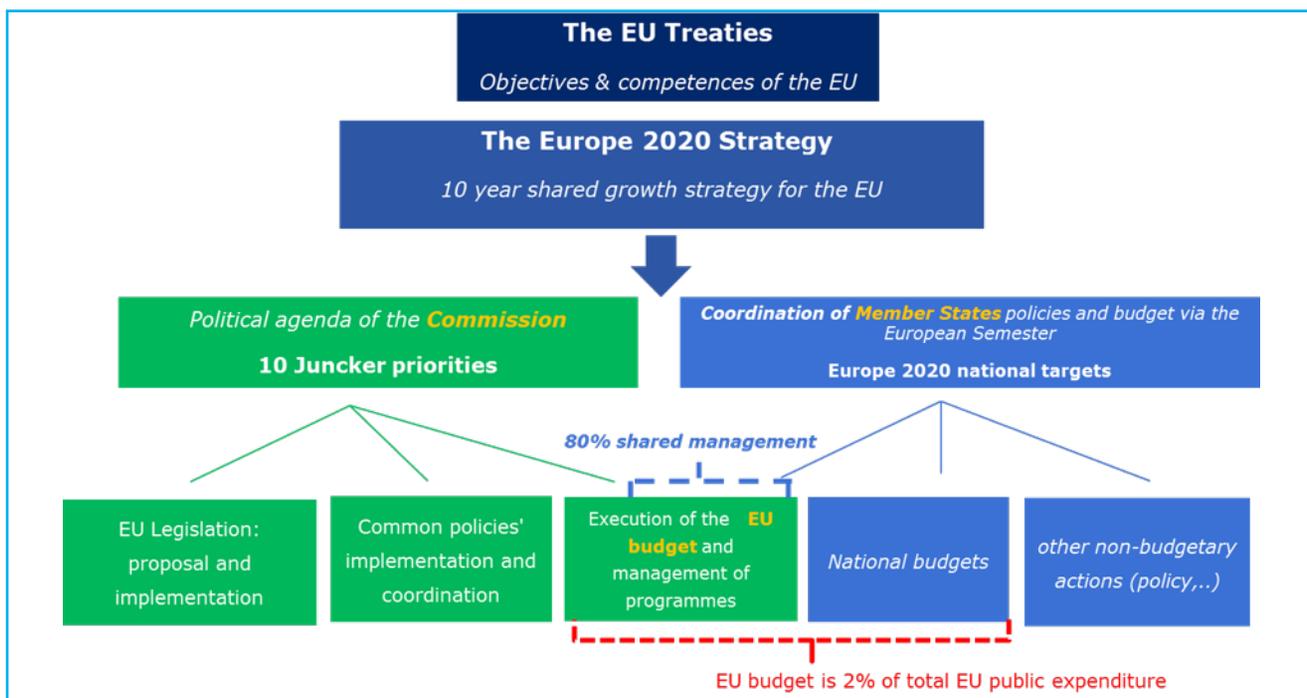
## EU budget regulatory and political framework

The EU budget environment is relatively complex. Over 30 policy areas are funded with multiple sources of funding, using different types of instruments, under different management modes and involving different actors. This requires strong accountability and optimal control mechanisms to ensure the budget is properly and effectively spent.

The figure below presents the performance framework of the EU budget within its political context (i.e. the Europe 2020 Strategy and the political priorities of the Juncker Commission) while also reflecting the regulatory environment in which it operates.

.....  
<sup>29</sup> Nadia Calviño, European Commission, Director-General for Budget





The overarching objectives that guide the Union and its Institutions are defined in the Treaties. Within this framework and taking into account the economic, political and social situation, the Heads of State or Government of the EU Member States define a long-term strategy for the Union, its European institutions and Member States, and the social partners. Currently, this is the Europe 2020 Strategy agreed in 2010. It is a 10-year growth strategy for the Union as a whole. The strategy put forward three mutually reinforcing priorities of smart, sustainable and inclusive growth with five headline targets:

1. Raise the employment rate of the population aged 20-64 to at least 75%;
2. Invest 3% of GDP in Research and Development;
3. Reduce greenhouse gas emissions by at least 20% compared to 1990 levels or by 30% if the conditions are right, increase the share of renewable energy in our final energy consumption to 20%, and achieve a 20% increase in energy efficiency;
4. Reduce the share of early school leavers to 10% and increase the share of population

aged 30-34 having completed tertiary education to at least 40 %;

5. Reduce the number of European living below nation poverty lines by 25 %, lifting 20 million people out of poverty.

The success of this strategy depends on all the actors of the Union, acting collectively. The EU budget is one of the levers towards the Europe 2020 objectives, while a wide range of actions at national, EU and international level also contribute to delivering concrete results:

- *At national level* the EU targets have been translated into national targets and trajectories in order to reflect the specificities of each Member State. The success of Europe 2020 strongly and primarily relies on the ability of the Member States to play their part in implementing the necessary reforms at national level.
- *At supranational level* the Commission works closely with the Member States to support and monitor progress towards the achievement of Europe 2020 targets



and to ensure strengthened coordination of economic policies between Member States. This is done through the European Semester, the EU's annual cycle of economic and budgetary coordination. Alongside this coordinated effort, EU policies, instruments and legal acts, as well as financial instruments are mobilized to pursue the Europe 2020 Strategy's objectives.

The political priorities of the Juncker Commission defined by President Juncker in the political guidelines provide a roadmap for the Commission's action that is fully consistent and compatible with Europe 2020. The differences in scope between the Commission's priorities and Europe 2020 reflect the fact that the Commission's priorities are tailored to the Commission's particular role and competencies, whereas Europe 2020 is a strategy for all EU institutions and Member States. Changes over time also reflect the Commission's duty to respond to new challenges that have emerged or grown in prominence since the development of the Europe 2020 strategy, such as the refugee crisis.

The Multi-Financial Framework (MFF) translates the Union's political priorities into financial terms for at least 5 years setting maximum annual amounts (ceilings) for EU expenditure as a whole and for the main categories of expenditure (headings). The MFF hence supports EU policy actions over a period long enough to be effective and to provide a coherent long-term vision to the various stakeholders.

The 2014-2020 MFF and its constituent spending programs were designed with a focus on European added value to help deliver on the commonly agreed goals of the Europe 2020 growth strategy. The programs have their own, tailored performance frameworks embedded in their legal bases. The performance is assessed against the objectives and measured using the indicators decided by the legislator.

Therefore, although closely related, a distinction is made between:

- the performance of the Union (the EU institutions and its Member States) in achieving the high level commonly agreed EU objectives of the Europe 2020 strategy;
- the performance of the Commission and its Directorates-General as an institution in implementing the 10 priorities of the Juncker Commission; and
- the performance of the spending programs in achieving their objectives as set out in their legal bases.

## Multiannual Financial Framework 2014-2020

The MFF 2014-2020 is the first to introduce performance frameworks across the EU budget. This constitutes an ambitious step towards greater transparency and accountability, alignment of scarce public resources to strategic priorities and objectives, and more efficient and effective use of EU funds. The MFF provides a stable funding framework for programs which contribute to the achievement of the Europe 2020 strategic long term objectives in the areas of competitiveness for jobs and growth, economic, social and territorial cohesion, sustainable growth and natural resources, security and citizenship and external action (Global Europe). The focus on political priorities is further reflected in the Commission's Agenda for Jobs, Growth, Fairness and Democratic Change, which highlights the ten policy areas on which action is being focused during the current mandate of the Juncker Commission.

The 2014-2020 MFF has brought about some significant improvements in terms of how EU money is invested, notably:

- **Competitiveness, EU value-added and strengthened conditionality:** the share of the budget spent in programs considered to bring



the highest EU added value in terms of jobs and growth and enhancing competitiveness has been significantly increased. This has been notably the case for Horizon 2020 program for research and innovation and the new Connecting Europe Facility that supports the development of trans-European networks in the fields of transport, energy and digital services. It is also the case of Erasmus+, with a strong EU value-added in its transnational mobility activities, contributing to skills development, employability of students and fighting unemployment. Moreover, new provisions have been introduced for the implementation of the European Structural and Investment Funds to improve their effectiveness and European added value, notably by concentrating resources on key Europe 2020 objectives, establishing a performance framework based on measurable indicators and targets linked to the release of a performance reserve, introducing ex-ante conditionalities as well as creating closer linkages with the EU economic governance and the European Semester process.

- **Performance budgeting:** a performance budgeting system, aligned on the Europe 2020 strategy, has been established. Performance benchmarks have been embedded in the legal bases of multiannual programmes, including a set of clearly defined objectives, indicators, milestones and long-term targets, which are reported on, both ex-ante and ex-post, at the time of the draft budget.
- **Simplification:** progress has been made in reducing the number of programmes and instruments and grouping some of them under a common framework with uniform rules, simplifying procedures for application and declaration of costs by final beneficiaries, facilitating the deployment of innovative financial instruments, and improving the cost-efficiency of controls.

- **Flexibility:** the introduction of new instruments allows for shifting available monies between headings and years, which represents a major step forward in terms of flexibility within the total MFF ceilings to accommodate evolving needs.
- **Leveraging:** the MFF 2014-2020 and the related spending programmes have also laid down the foundations for a more systematic use of financial instruments as a means to leverage the EU funds, and authorised the setting-up of EU Trust Funds in the external policy area.
- **Mid-term review/ revision:** to make sure that the EU budget planning framework continues to correspond to the economic situation and the latest economic projections. Therefore, the MFF mid-term review/ revisions allows for a reassessment of Union priorities and the adjustment of the EU budget implementation over the remaining period of the MFF based on progress made and changes in the political and economic context.

Therefore, the EU budget's performance framework was not built from scratch, but is rather subject to incremental improvements in its monitoring, implementation and reporting.

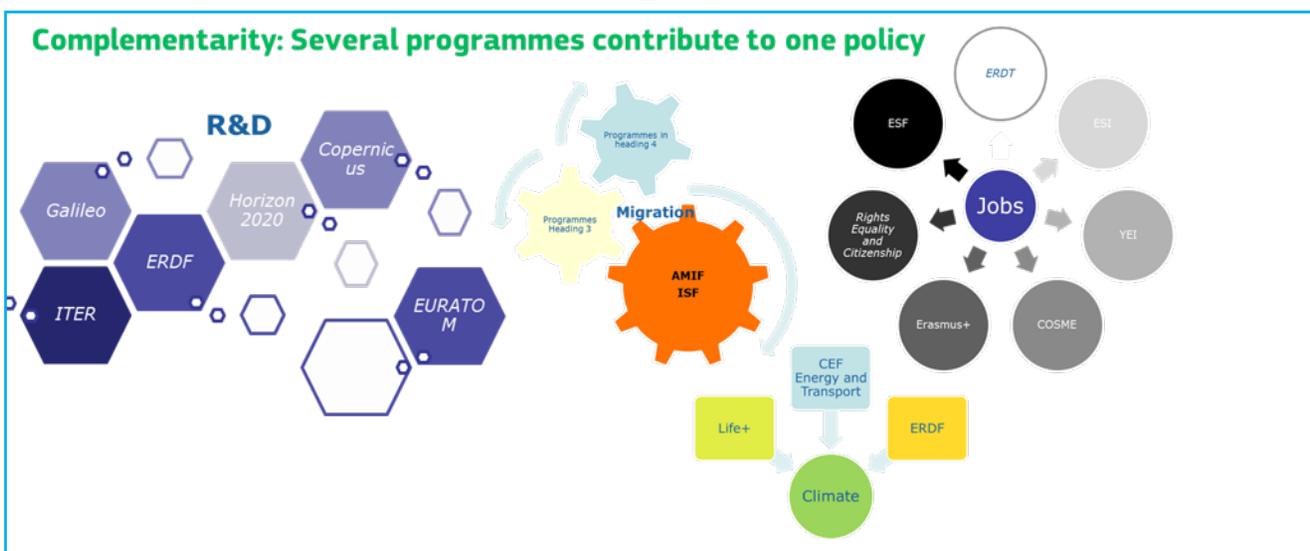


## Complementarity and mainstreaming

The performance framework of the EU budget is based on the principle of complementarity. EU programmes support the EU policy priorities in the relevant areas and are complementary to the other non-financial activities of the European Commission such as legislative proposals, regulatory and coordination activities and those of the Member States that are carried out in the pursuit of common policy objectives. This is particularly evident in relation to the European Structural and Investment Funds, which are deployed in the Member States and support structural reforms and job creation. It is not unusual for several programmes to contribute to one policy (and indeed for a single programme to contribute to multiple policies). For example, research and development policy is supported not only by Horizon 2020 but also by the European Regional and Development Fund, and large industrial programmes such as Galileo, ITER or Copernicus.

**Climate change:** To respond to challenges and investment needs related to climate change, the EU has decided that at least 20 % of its budget for 2014-2020 – roughly EUR 180 billion over this period – should be spent on climate change-related action. To achieve this result, mitigation and adaptation actions are being integrated into all major EU spending programmes, in particular Cohesion Policy, regional development, energy, transport, research and innovation, common agricultural policy as well as the EU’s development policy. Starting from the 2014 budget the estimates for the climate related expenditures are monitored on an annual basis in accordance with the methodology founded on Rio markers.

**Biodiversity:** The EU has committed to halting the loss of biodiversity and the degradation of ecosystem services in the EU by 2020. Similarly to climate action mainstreaming, biodiversity-related expenditure is tracked in a consistent way across the EU budget with detailed instrument-specific guidelines. In addition, EU budget spending in other areas should not have a negative impact on biodiversity.



In the same way, different policies are mainstreamed into several programmes. The 2014-2020 MFF includes provisions that mainstream the EU’s climate, biodiversity and gender objectives in all major EU policies. The EU budget is thus an important tool to support the achievement of these cross-cutting policy objectives..

**Gender equality:** Gender mainstreaming is an important element in EU policy agenda. Gender equality is a cross-cutting objective for all policy areas: fundamental rights and citizenship, employment and social inclusion, cohesion policy, education, research and innovation, external



actions and development cooperation. Except for actions specifically targeting gender inequality issues, for the majority of programmes it is not always possible to estimate the amounts that are allocated to gender issues. Thus the approach of gender mainstreaming is preferred over gender budgeting.

## EU Budget Focused on Results

In 2015, the European Commission launched the “EU Budget Focused on Results” (BFOR) strategy. One of its main objectives was to present the performance features of the Multiannual Financial Framework 2014-2020, making a first assessment of their effects, identifying actions for strengthening further the performance orientation of the budget implementation and supporting effective communication on EU Budget achievements..

### Rebalancing compliance with performance

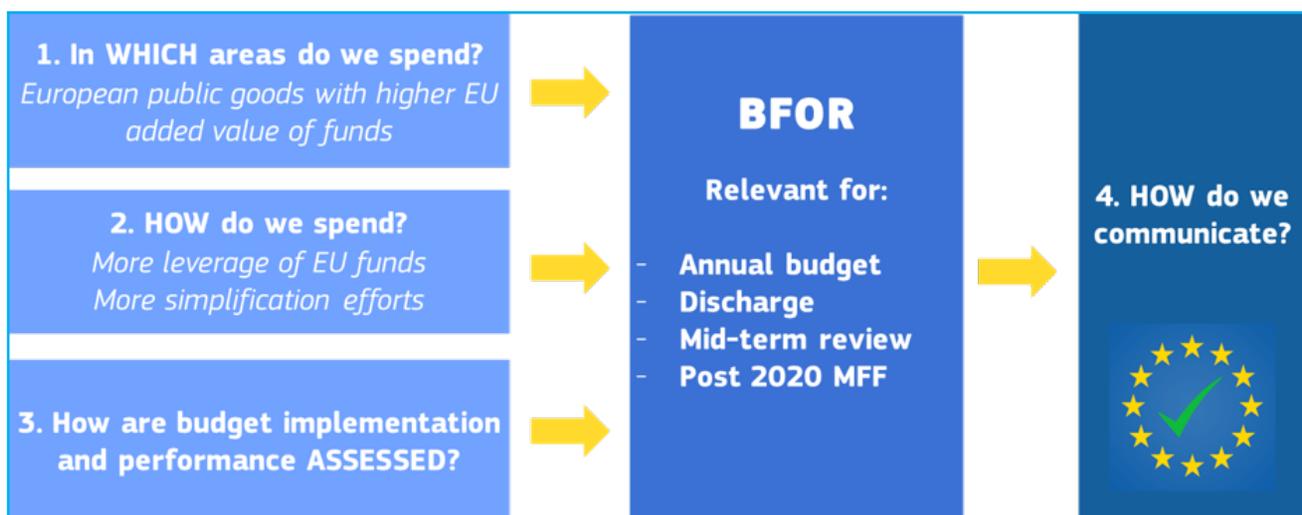
A major element of the strategy was changing the European Union spending culture, by rebalancing compliance and performance objectives for the EU budget. The unrepresented fiscal pressures on national budgets over the last decade highlighted the importance of the EU Budget as an investment instrument that can deliver tangible results on the ground. European innovation projects, cross-border infrastructure and employment programmes for graduates are just a few examples. More recently, the EU budget was instrumental

in coping with migratory pressures at the EU’s borders and refugee integration in Member States, providing support in humanitarian crisis and ensuring fast response in emergency situations. While the EU budget continues to be the subject of unparalleled scrutiny, a democratic and desired system of public spending control, it is also called on to provide the highest possible EU added value.

### EU added value

A well-performing budget effectively supports the European Union’s response to arising challenges and long-standing priorities. Economic growth and financial stability compete for funds with new needs related notably to security and migration. Many of these issues can be addressed more effectively at European than at national level. Capitalising on the advantages of the single market and supplementing national budgets where they are unable to cope individually, the EU Budget’s contribution to the solutions brings clear added value. A major objective of the EU Budget Focused on Results strategy is thus to ensure that EU programmes and projects not only deliver the desired results on the ground, but do so better than any Member State could if it were to implement them on its own.

The EU Budget’s focus on results strategy is built in four key pillars that cover both the substance and conceptual framework of the EU budget’s performance:



### *In which areas do we spend?*

The EU Budget must be aligned with European priorities: investing in programmes dedicated to jobs, growth and competitiveness, serving multiple objectives, for example climate mainstreaming, and making sure it is flexible and agile to address new challenges.

### *How do we spend?*

Simple, accessible funding continues to be a core objective. Financial instruments and investment funds such as the European Fund for Strategic Investments attract additional funding from other public and private sources, ensuring higher financial leverage from EU money and thus more accessible funding.

### *How are budget implementation and performance assessed?*

A well-performing EU Budget complies with the rules and contributes to the desired results. The Commission and Member States should cut unnecessary audit and control costs, while reducing errors in spending and better protecting the EU Budget. Moreover, the results of spending should be evident – both on paper, and on the ground.

### *How do we communicate?*

European citizens have the right to know what the EU Budget's results are. The [EU Results](#) is a centralised online source of examples of EU-financed projects across policy areas. Next to easily accessible information for citizens, communication about the EU Budget performance with all stakeholders should be more open, timelier and more productive.

## **Improved transparency and accountability as regards EU Budget performance**

The EU Budget Focused on Results strategy has brought about significant improvements in the EU Budget's performance framework in recent

years. The Commission provides up-to-date performance information on the EU budget in a comprehensive set of documents when presenting the budget proposal for the upcoming year and when reporting on the previous year's budget implementation and performance:

## **Programme statements attached to the Draft Budget**

The performance information per programme is compiled in the working document "Programme Statements of operational expenditure" accompanying the draft budget. Thus, the performance information is regularly updated every year. The purpose of Programme Statements is to substantiate the Commission's draft budget proposal with available performance information. They provide the best available performance information, encompassing both the ex-post information on programmes' performance and ex-ante estimations in terms of future outputs and results. Since the draft budget 2017, programme statements include a programme update section, which provides a quick overview of the most recent progress in the implementation of the programme based on quantitative and qualitative information. The programme statements thus present the status of programme implementation, relevant findings of evaluations or programme related studies, and on this basis, the budgetary planning for the year.

## **Annual Management and Performance Report for the EU Budget and the Integrated Financial Reporting Package**

In 2016, the Commission released for the first time an Integrated Financial Reporting Package. The package aims to improve transparency and to streamline the information concerning the performance of the EU Budget. The package contains the annual accounts, the Annual Management and Performance Report, the Financial Report, and the Communication of the protection of the EU budget. Among these reports, the Annual Management and Performance Report provides information on the progress of the 2014-



2020 MFF programmes and the latest available evidence on the results of the 2007-2013 MFF programmes. In addition, it shows how the EU budget contributed to the Commission's political priorities and the Europe 2020 objectives. The report merges the previous "Synthesis" and "Article 318 TFEU" reports in one document in order to deliver annually a single performance report on the EU budget.

## Conclusion: Better Regulation, Better EU Budget Scrutiny and Focus on Results

Increased focus on performance is indispensable in a context of growing needs and budgetary discipline. Therefore, a number of improvements have been introduced to further streamline and enhance the information and reporting on EU programme results with a view to improve the implementation of the programmes. Built to encompass objectives, performance indicators to monitor progress and regular reporting on achievements, the EU performance framework is aligned with international standards. It is framed by the legal and political setup and a multi-layered architecture of budgetary and policy tools involving many different actors at national and supranational level. In this context, realistic expectations are important for success: the process of improving the evaluation and performance frameworks is a gradual one where every step forward counts. The "EU Budget Focused on Results" initiative has strengthened the discipline in the Commission's approach to performance: focusing on the four key questions, allowing progressive improvements where they are most needed, and thus enabling better accountability. For better EU budget scrutiny, the following lessons learned since the start of the "EU Budget Focused on Results" initiative must be taken into consideration:

- The performance of the EU budget must consider the multiplicity of objectives as well as the complementarity and mainstreaming of policies and programmes; at the same time, consistency should be ensured throughout the very dense legal framework;
- Establishing the budget is a political process with multi-institutional layers; indicators can inform on performance, but cannot replace political decision-making;
- It is challenging to pick the right indicators, but this should not lead to a propensity to add unnecessary new ones, or delete existing useful indicators; the cost of collecting performance data to inform indicators should not be neglected;
- Stakeholder understanding and expectations of performance can be dramatically different, and cannot be addressed by a simple traffic-light type approach, or by an overly complex system of indicators, measures and rules;
- Avoiding unrealistic expectations: there is often a time-lag between evaluation and decision, between real program timing and budgeting and reporting cycles that cannot be overcome;
- Sometimes the link to the EU budget is not clear-cut: results and outcomes are not easily attributable or directly linked to the money allocated, which does not mean lack of performance or results thanks to the associated investment.



# EVIDENCE-BASED EU POLICIES: THE DG REGIONAL AND URBAN POLICY'S PERSPECTIVE

by Mariana Hristecheva

## Introduction

The European Commission is committed to ensuring that EU policies deliver better results for citizens, businesses and public authorities and that they achieve their objectives in the most efficient and effective way. Accordingly, its policy action is centred on evidence: any adoption of a new initiative, or revision of an existing one, or a decision to repeal outdated acts is subject to an analysis of the impacts both *ex ante* and *ex post*.

**Ex-ante** impact assessments are carried out in order to compare policy options and discern their expected economic, social and environmental impacts, and their potential impact on competitiveness and administrative burden, in particular for SMEs, digital aspects, territorial impact, etc. For new initiatives, whenever possible an assessment is also made as to whether action should be taken by the Union, or it is best left to the Member States. Impact assessments may rely on evidence collected from previous evaluations of the initiative under review, or evidence on international experience with similar initiatives, or simply brand-new evidence collected for the purpose. **Ex post**, the Commission is committed to evaluating all EU activities intended to have an impact on society in a proportionate way. Evaluations gather evidence to assess how well an intervention has performed (or is working) and draw conclusions on whether the EU intervention continues to be justified or should be modified.

In its evaluations, the Commission takes a critical look at whether EU activities are fit for purpose and deliver, at minimum cost, the desired changes to European citizens and businesses and contribute to the EU's global role. In both cases, the evidence-gathering starts from the monitoring data and it continues with the collection of additional data, statistical information, case studies, interviews with stakeholders and modelling exercises.

As the initiator of legislative and non-legislative initiatives, **the Commission applies the 'Evaluate First' principle** to make sure any policy decision takes into due account lessons learnt from past EU action. This is imbedded in the regulatory framework. For example, regarding Cohesion policy, evaluations are required under the Financial Regulation<sup>30</sup> and the Common Provisions Regulation<sup>31</sup> and should follow the principles outlined in the Better Regulation Guidelines.<sup>32</sup>

Within the Commission, in practice this entails a **participatory process** involving the relevant services. Interservice Groups, for instance, are created in order to steer all evaluation studies and impact assessments. They include experts from relevant services throughout the Commission. The Regulatory Scrutiny Board provides opinions and recommendations on the resulting studies. The Interservice Consultations which lead to the adoption of the assessments ensure validation at the Commission level. The participatory process also entails the active participation of a variety of actors. **Stakeholders and the general public** are consulted early in the process. All the roadmaps for evaluations and inception impact assessments serve to inform interested parties about the direction and details of the planned work. Open public consultation also ensures feedback from the general public on the initiative under review.

30 <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1504540860925&uri=CELEX:32012R0966>

31 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R1303>

32 <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines.pdf>

Further consultations with stakeholders (through surveys, interviews, workshops and case studies) are carried out as the study progresses and relevant experts are usually invited to contribute to the conceptual and methodological frameworks of the work. The **European Parliament** and the **Council** in their role as legislators benefit from the evidence collected for a given policy initiative, as it allows them to take an informed decision when deliberating on a legislative proposal. The Commission presents the results of its studies in various fora (committees, working groups etc.) in the European Parliament and the Council preparatory and decision-making bodies. The institutions also contribute to the collection of evidence: the two legislative branches are entitled to perform impact assessments of their own on their substantial amendments to the initiatives proposed by the Commission. The European Parliament, for example, carries out its own studies on the effects or impacts of policies. The **Member States** are also closely involved in the production of evidence (through the provision of data, feedback on experience with EU policies and examples of national or regional good practices etc.). The **European Court of Auditors** contributes to the body of evidence on EU policies, in particular through its performance audits. The Court regularly reviews the implementation and the performance of policies, providing recommendations for future refinements.

## DG Regional and Urban Policy and the delivery of Cohesion Policy

The Directorate General Regional and Urban Policy follows the approach described above to pursue its objectives, as framed by the Treaties on the European Union and on the Functioning of the European Union.

Article 174 of the Treaty on the Functioning of the European Union (TFEU) provides that, in order to strengthen its economic, social and territorial

cohesion, the Union is to aim at reducing disparities between the levels of development of the various regions and the backwardness of the least-favoured regions, and that particular attention is to be paid to rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicaps.

DG Regional and Urban Policy activities contribute to most of the Commission's overarching priorities in various ways. Its funds directly support the delivery of such priorities and the implementation of country-specific recommendations issued in the context of the European Semester and it ensures the necessary investment-enabling conditions through following up ex-ante conditionalities for the 2014-2020 programmes.

DG REGIO's contribution is particularly significant for the delivery of the following five of the Juncker Commission's priorities:

- (1) A New Boost for Jobs, Growth and Investment;
- (2) A Connected Digital Single Market;
- (3) A Resilient Energy Union with a Forward-Looking Climate Change Policy;
- (4) A Deeper and Fairer Internal Market with a Strengthened Industrial Base;
- (8) Towards a New Policy on Migration.

The EU is committed to creating more and better jobs and a socially inclusive society. These goals are also at the core of the Europe 2020 strategy, which sets the overarching strategic framework for the 2014-2020 period.

DG Regional and Urban Policy provides support to deliver these objectives, notably through interventions financed under the European Regional Development Fund (ERDF) and the Cohesion Fund (CF), which, together with the



other European Structural and Investment (ESI) Funds,<sup>33</sup> are among the European Union's main instruments for investment.<sup>34</sup> Through the ERDF and CF, a critical mass of investment is delivered in key EU priority areas to deliver structural change and respond to the needs of the real economy by supporting job creation, business competitiveness, economic growth, sustainable development, and by improving citizens' quality of life, thus contributing to the goals of the Europe 2020 Strategy for smart, sustainable and inclusive growth and the objectives of Cohesion Policy enshrined in the Treaty.

The ERDF and CF are implemented through **shared management**. In this management mode, the co-legislators fix the legal framework and the overall funding and determine the allocations by MS and categories of regions. The Commission adopts programmes following negotiation with the Member States. As regards implementation, Member States' administrations (at the national, regional and local levels), are in charge of operational implementation and report at least annually on the rhythm of implementation in terms of selection of investment projects and their expected achievements, as well as completed projects and results achieved. The Commission cooperates with them and closely follows the progress of programmes through analysis of monitoring data. In particular, the monitoring data feeds into *performance frameworks*, which are the European Commission instrument for identifying – and giving early warning on – the existence of implementation weaknesses and for rewarding programmes for swift delivery. Moreover, at the

33 European social fund (ESF), European agricultural fund for rural development (EAFRD) and European maritime and fisheries fund (EMFF).

34 This contribution provides a snapshot of the activities carried out under the ERDF and the CF, which make up about 24% of the EU budget. DG Regional and Urban Policy is also involved in the management of the following instruments: (1) the Instrument for Pre-accession Assistance (IPA), which is the means by which the EU supports reforms in 'enlargement countries' with financial and technical help; (2) The European Union Solidarity Fund (EUSF), which was set up in 2002 to grant financial assistance to Member States and to countries negotiating their accession to the EU, mainly in the event of major national or regional natural disasters.

end of the period, the EC evaluates the results achieved at the EU level.

DG Regional and Urban Policy has established a tradition of focussing on the analysis and evaluation of Cohesion Policy. The policy evidence is gathered and analysed through three main functions in the DG: 1) evaluation (ex-post assessment of implementation and policy impacts), 2) impact assessment (ex-ante analysis of options for future policy), and 3) economic analysis (statistical analysis of socio-economic development of EU regions). The Evaluation unit regularly analyses the monitoring data reported by Member States, and carries out evaluation studies as needed. The main evaluation exercise (in terms of scope, resources and impact) is the ex-post evaluation, which is carried out at the end of a programming period. The studies are based on a variety of methods, from econometric to counterfactual analyses and case studies. The function of impact assessment and economic analysis focuses on the strategic design of cohesion policy. Impact assessments are prepared primarily for the policy orientation of a new programming period, but also for any other Commission initiatives likely to have significant impacts on the EU economy, society, and environment. DG REGIO also prepares the Cohesion Report, usually biannually, and in any event on time to feed into the debate on future cohesion policy. Other units in the DG (horizontal units such as the Unit for Urban and Territorial development or Smart Specialization, and geographical units) also carry out studies dedicated to specific aspects of policy.

## Cohesion Policy: the evidence so far

### 2007-2013 Programming Period

The most recent ex-post evaluation, completed in September 2016, covered the programmes supported by the two main REGIO funds (ERDF and Cohesion Fund) during the previous programming period 2007-2013 for a total of EUR 269.9 billion.



The ex-post evaluation involved 14 work packages, most of them organized by themes (SME support, Transport, Environment, Energy Efficiency, Financial instruments etc.). In most instances, these evaluation studies were carried out by independent contractors<sup>35</sup> who, in turn, used experts from Member States. In addition, each study also relied on input from independent academic experts. The evaluation also sought to elicit feedback from a variety of stakeholders (through surveys, workshops and interviews) and from the general public (through open public consultation).<sup>36</sup>

In terms of methods, the choice was driven by data availability and the suitability of the method. Most of the studies include case studies (at the project, programme or country level) and theory-based analysis. Counterfactual studies were used to estimate the impact of policies at the regional level. Assessments of the overall potential impacts of policies across regions and countries, on the other hand, were provided through general-equilibrium analyses.

For example, the modelling exercises inform us that, given the volume of investments, their thematic distribution and the rhythm of implementation, Cohesion Policy is likely to have benefited all Member States to a significant extent. The policy multiplier over the period to 2023 is estimated at 2.74, implying that **each euro invested in cohesion policy is likely to generate an additional 2.74 euro of additional GDP over the long term.** This amounts to a total of almost one trillion euros of additional GDP generated in the EU economy by 2023. Each MS and region, even the net contributors to the policy, will experience a positive impact owing to its implementation.

The essential achievements of the policy are

35 With the exception of the macroeconomic modelling exercise, performed by the Commission.

36 All the material produced in the Ex Post Evaluation is available at: [http://ec.europa.eu/regional\\_policy/en/policy/evaluations/ec/2007-2013/](http://ec.europa.eu/regional_policy/en/policy/evaluations/ec/2007-2013/)

also visible on the ground. More than **1,100,000 jobs** were created through Cohesion Policy interventions up to the end of 2015, thus sustaining the employment rate in many Member States. In parallel, more than **380,000 projects to support investment in SMEs** were undertaken across the EU in the period, thus improving the business environment and sustaining investment. Cohesion Policy has also supported close to **120,000 research and innovation projects**, thus ensuring a significant level of investment in this area and positively influencing gross EU domestic expenditure on R&D. Achievement data reported by 2007-2013 programmes notably point to an estimate of **15 million additional people covered by broadband access**, which helps create the right conditions for digital networks and services to flourish, giving consumers and businesses better access to digital goods and services across Europe, in particular in rural areas. The investments in water facilities ensured that **almost 6 million additional people have access to a new or improved supply of drinking water**, which is expected to bring health benefits in the long term. Similarly, due to investments in cohesion policy, **almost 7 million people are now connected to improved/new facilities for the treatment of wastewater.** Significant achievements in the area of energy efficiency and renewables also resulted directly from supported interventions: **close to 5,000 MW of reported additional capacity for renewable energy production; a reported reduction of greenhouse emissions by more than 420,000kt of CO<sub>2</sub> equivalent.**<sup>37</sup>

Notwithstanding these achievements, there is constant striving to further improve. In particular, the ex post evaluation highlighted how the monitoring of Cohesion Policy had improved from the previous 2000-2006 period, and there had been a strong focus on investing money, delivering projects and generating outputs.

37 DG REGIO, 2016 Annual Activity Report, [https://ec.europa.eu/info/sites/info/files/file\\_import/aar-regio-2016\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/file_import/aar-regio-2016_en_0.pdf)



However, very few 2007-13 programmes had a ‘focus on results,’ setting clear goals for changes at the regional level, selecting projects accordingly and tracking progress towards those goals. The acknowledgment of such limits has led to the development of the result-orientation approach used in the current 2014-2020 programming period.

### *2014-2020 Programming Period*

One of the major changes in cohesion policy in the current period is its result-orientation. This is the first programming period when the Commission and Member States have agreed on the inclusion of an explicit and detailed logic of intervention for each type of investment. When designing programmes, the Managing Authorities have defined the objectives to be pursued by the investments and the result indicators which are to be used to monitor progress in achieving these objectives. In addition, output indicators are regularly reported in order to track implementation over time. The targets to be attained by the year 2023 are defined for both result and output indicators.

As a result, given the current result-orientation of cohesion policy, the monitoring data collected from Member States on the implementation of their programmes is much richer and more structured than ever before. All the data is regularly uploaded to the European Commission Open Data Platform<sup>38</sup> and made available to the public in a timely manner.

A second provision related to gathering evidence on the impacts of a policy includes a requirement for Member States to carry out impact evaluations for each type of investment (corresponding to the objectives of the programme). It is expected that this requirement will significantly improve the

38 The Open Data Platform (ODP) was launched in December 2015 by DG Regional and Urban Policy together with the other 3 DGs for European Structural and Investment Funds: Agriculture, Maritime and Fisheries, and Employment. For over 530 programmes, the platform visualises the latest data available at the EU, country and programme levels. The ODP is available at: <https://cohesiondata.ec.europa.eu/>

knowledge from which, together with our ex-post evaluation, we will draw lessons and conclusions at the policy level by the end of the period. For example, based on the evaluation plans received from Member States to date, it is estimated that a minimum of 2000 evaluation studies will be produced by the end of the period in relation to ERDF and CF programmes. Many of these studies will be impact evaluations, providing assessments of the impacts of policies at the regional level and by themes (including R&D, SME support, environment, transport etc.). The Commission will analyse these evaluations and possibly conduct additional studies if deemed necessary.

Another major change introduced in the 2014-2020 programming period has been the devising of a performance framework as one of the tools to achieve result-orientation of the ESI Funds.<sup>39</sup> The idea behind the performance framework is to create a mechanism for rewarding swift progress of programmes in carrying out investments according to plans.

In practice, the programmes are organised in priority axes, and each priority is described by a limited number of result and output indicators. The performance framework<sup>40</sup> includes a subset of these indicators representing the majority<sup>41</sup> of the funding and with fixed milestones (for the end of 2018) and targets (for the end of 2023). All the performance frameworks include a financial indicator, which represents the total expenditure in the priority axis. For each priority, achieving the programmed milestones and targets rewards the programmes with the corresponding performance reserve.<sup>42</sup>

39 DG REGIO, Guidance Fiche Performance Framework Review and Reserve in 2014-2020, [http://ec.europa.eu/regional\\_policy/sources/docgener/evaluation/pdf/guidance\\_performance\\_framework.pdf](http://ec.europa.eu/regional_policy/sources/docgener/evaluation/pdf/guidance_performance_framework.pdf)

40 For ERDF and CF, the performance frameworks only use output indicators and key implementation steps (e.g. for infrastructure projects that would not be completed by the end of 2018). For ESF, they can also use result indicators.

41 The Commission Implementing Regulation (EU) No 215/2014 requires programme authorities to document coverage of the indicators (more than 50% of allocation) and the evidence and calculation method for the targets and milestones set.

42 The performance reserve represents between 5% and 7%



The Managing Authorities submit annual reports to the European Commission on progress towards milestones and targets. Assessment of these reports provides an opportunity to discuss performance of the programmes, to identify priorities showing signs of underperformance, and to send – in justified cases – appropriate observations and to engage Member States in discussion on implementation weaknesses.

The objectives set for the 2014-2020 programming period are ambitious. They involve providing support to 1,100,000 firms, creating 450,000 new jobs in supported enterprises, giving broadband access of at least 30 Mbps to 14,500,000 additional households, building additional waste recycling capacity for 2,500,000 tonnes/year, serving 4,500,000 additional persons with an improved water supply and 8,500,000 persons with improved wastewater treatment. Many people will benefit from flood protection measures (over 7,600,000 persons) or fire protection measures (almost 6,500,000 persons). In terms of energy efficiency, the estimated decrease in annual primary energy consumption by public buildings is over 4,600,000,000 kWh/year.

The information from the 2017 Annual Implementation Reports – which refer to the end of 2016 – indicates that the programmes are already starting to work towards the majority of these objectives. In particular, in the area of support to enterprises, 140,000 firms and 25,000 start-ups have already started receiving support.<sup>43</sup>

## The future ahead

The conception of the future of the Cohesion policy post-2020 will be embedded in a wider political process in tune with the preparation of the next MFF. The MFF should reflect the ambitions for the future of the European Union in budgetary terms. It will be in accordance with the principles of evidence-based policy-making, taking account of

.....  
of the allocation to the priority axis and 6% of ESI Fund resources at the level of the EU and Member States.

43 Most recent data available, as published in: <https://cohesiondata.ec.europa.eu/funds/erdf> (page accessed on 01/09/2017)

current and past performance, broad consultation processes and assessment of the impact of the options under consideration.

A broad reflection on the future of Europe has already been initiated by the Commission with the presentation of the **White paper on the future of Europe and the way forward** on 1 March 2017 and the subsequently issued reflection papers.<sup>44</sup>

So far, the White Paper and the reflection papers have stimulated a debate remarkable in its depth and coverage across Europe, which is still ongoing. The Commission will examine all the reactions and responses to the White Paper and the reflection papers with a view to presenting its proposals for the next multiannual financial framework around mid-2018.

In addition to the general debate on the MFF, dedicated fora provide input concerning the future of the Cohesion policy. The latest one was the 7<sup>th</sup> **Cohesion Forum**, which took place on 26th-27th June 2017 in Brussels. This high-level political event marked a milestone in the preparations for the post-2020 framework for the European Structural and Investment Funds, collecting contributions from various stakeholders including the Commission, the Parliament, the European Economic and Social Committee, the Committee of the Regions, representatives from Member States responsible for the Funds and key policy experts, through panel discussions, keynote speeches and themed workshops. Another broad discussion platform will be provided during the **European week of Regions and Cities**, which starts on 9 October 2017.

44 [https://ec.europa.eu/commission/white-paper-future-europe-reflections-and-scenarios-eu27\\_en](https://ec.europa.eu/commission/white-paper-future-europe-reflections-and-scenarios-eu27_en)



# BETTER REGULATION: THE ROLE OF THE COMMISSION'S REGULATORY SCRUTINY BOARD

by Bernard Naudts

*Better regulation is a key consideration for the Juncker Commission. Its May 2015 Better Regulation Package contained a set of measures to improve the quality and effectiveness of legislation, reduce its regulatory burden, and increase the involvement of stakeholders. The creation of the Regulatory Scrutiny Board (RSB) was one of the main measures to improve the quality of the analysis underlying policy and spending initiatives. This paper<sup>45</sup> explains how the Board functions, how it fits in the broader Better Regulation cycle, and what initial lessons can be drawn after its first year of operation.*

## Better regulation

The Juncker Commission has committed to putting better regulation principles at the heart of its policy-making processes. Policies are to deliver better results with lower costs for citizens, businesses and public authorities. Its May 2015 Better Regulation Package<sup>46</sup> included initiatives and measures with three objectives:

To improve openness and transparency. The

45 This paper reflects the content of a presentation given to a Workshop on “Better Regulation: scrutiny of EU policies” organised by the European University Institute on 23-24 February 2017. It relies heavily on information and documents that can be found on the Better Regulation pages of the Commission’s website: [https://ec.europa.eu/info/law/law-making-process/better-regulation-why-and-how\\_en](https://ec.europa.eu/info/law/law-making-process/better-regulation-why-and-how_en). In particular, the Annual Report 2016 of the RSB was a main source: [https://ec.europa.eu/info/files/regulatory-scrutiny-board-annual-report-2016\\_en](https://ec.europa.eu/info/files/regulatory-scrutiny-board-annual-report-2016_en). The author wishes to thank the other Board members for their contributions to this Annual Report.

46 Communication from the Commission on “Better regulation for better results - An EU agenda”, COM(2015)215.

package introduced more frequent and inclusive consultation possibilities during the development of new legislation. It also created the possibility for citizens and interest groups to comment and make suggestions on existing legislation through a new website. These suggestions are to be reviewed by the new Regulatory Fitness and Performance (REFIT) platform, with representatives from business, social partners, civil society and Member States.

To improve the quality of new proposals. The Commission further refined its tools for evidence-based law-making through inclusive impact assessments, looking at the economic, social and environmental impacts of its initiatives. It established independent internal scrutiny of its evidence and analysis with the creation of the RSB. It also wanted to work with the European Parliament and Council on the quality of legislation, which resulted in a new Interinstitutional Agreement on Better Law-making (IIABL)<sup>47</sup> in April 2016.

To ensure that existing legislation delivers on expectations. The Commission committed to a more systematic use of evaluations<sup>48</sup> and to evaluate existing legislation before making new proposals (‘evaluate first’). Its REFIT programme focusses on the reduction of regulatory burdens and the simplification of existing legislation, without jeopardising the realisation of its objectives.<sup>49</sup> The new REFIT platform will also make suggestions for improving and simplifying existing legislation.

As such, the Commission introduced improvements in all phases of the preparatory process for new legislation. This process involves the preparation of evaluations and impact assessments, consultation of stakeholders, and the application of REFIT principles. The full better regulation cycle is shown in figure 1.

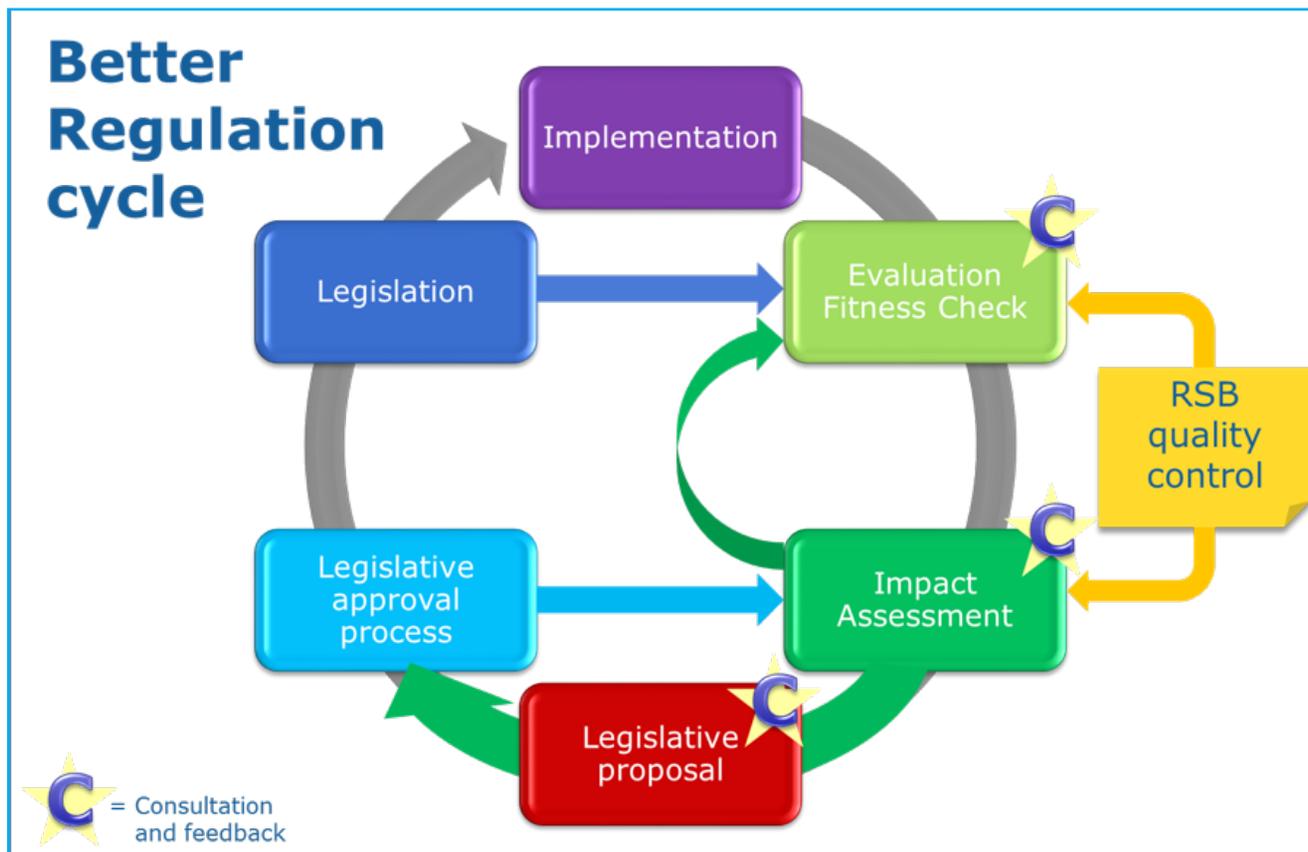
47 OJ L 123, 12 May 2016, p.1.: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2016:123:TÖC>

48 In the Commission’s terminology, evaluations are retrospective assessments of existing policies or spending programmes. Ex-ante evaluations of proposed initiatives are called impact assessments.

49 In the Commission’s Work Programme 2017 (COM(2016)710), it was clarified that all initiatives that revise existing legislation should be REFIT initiatives.



Figure 1: The better regulation cycle



## Evaluation and fitness check

The preparation of a new initiative normally starts with an examination of the functioning of existing policy or spending initiatives. The Commission has a long tradition of evaluating expenditure programmes and has gradually extended this practice to policy initiatives.<sup>50</sup> In 2013, it committed to make an evaluation of existing legislation before making a proposal for a significant revision.<sup>51</sup> This ‘Evaluate First’ principle was extended to all policy proposals in the Better Regulation Guidelines<sup>52</sup> and Toolbox<sup>53</sup> in 2015.

An evaluation assesses a specific EU law, policy or funding programme for effectiveness (whether the

EU action reached its objectives), efficiency (what the costs and benefits are), relevance (whether it responds to stakeholders’ needs), coherence (how well it works with other actions) and EU added value (what the benefits of acting at the EU level are).

A fitness check is a type of evaluation that assesses a consistent set of several related actions. It focuses on identifying the collective impact (costs and benefits) of laws, policies and programmes, how they interact, and if any inconsistencies or synergies exist.

## Impact assessment

Impact assessments examine whether there is a need for EU action and analyse the possible impacts of available solutions. These are carried out during the preparation phase, before the Commission finalises a proposal for a new law. They provide evidence to inform and support the decision-making process.

50 Communication from the Commission on “Smart Regulation in the European Union”, COM(2010)543.

51 Communication from the Commission on “Strengthening the foundations of Smart Regulation – improving evaluation”, COM(2013)686.

52 Commission Staff Working Document on “Better Regulation Guidelines,” SWD(2015)110.

53 [https://ec.europa.eu/info/files/better-regulation-toolbox\\_en](https://ec.europa.eu/info/files/better-regulation-toolbox_en)

The Commission conducts an impact assessment on policy or spending initiatives that are expected to have significant economic, social or environmental impacts. When the Commission does not carry out an impact assessment, it normally explains the reasons why in the Explanatory Memorandum that accompanies the proposal. The most common reason is political urgency and a lack of time to conduct an impact assessment.

The impact assessment report builds on the findings of available evaluations to analyse the problem the initiative tries to tackle. It further justifies why the EU should act and describes what the initiative should achieve. It analyses what options are available, what their impact is, and how they compare. The analysis of impacts should cover both costs and benefits, and should assess the economic, environmental and social implications in an integrated and balanced way. Finally, the impact assessment describes how implementation and impacts will be monitored and how and when the initiative will be evaluated. Indeed, the necessary implementation data should be collected to allow a future evaluation to review the extent to which the outcomes that were foreseen in the impact assessment have become reality.

The impact assessment not only informs the Commission's decision-making, but also accompanies the Commission's legislative proposal when it is sent to the European Parliament and Council for adoption. The extent to which the Parliament and Council explicitly review the content of the impact assessments during their decision-making process still varies. The IIABL foresees that when the European Parliament and Council consider substantial amendments to the Commission's proposal, they will carry out additional impact assessments when they consider this to be appropriate and necessary. They can also ask the Commission to conduct additional analysis. The European Parliament has started making additional impact assessments

and has already covered 32 amendments up to the end of 2016.<sup>54</sup> The Council has recently agreed on organisational arrangements to start conducting impact assessments on amendments.

## Consultation of stakeholders

The Commission consults interested citizens and stakeholders from the start to the end of its decision-making process.

During the planning phase, the Commission publishes roadmaps for its initiatives, evaluations and impact assessments (these are called inception impact assessments) for feedback. These documents explain why the Commission is taking an initiative or launching an evaluation or impact assessment, and how it intends to proceed. The feedback period normally lasts for four weeks.

For all evaluations and impact assessments, a twelve-week open public consultation is conducted. This should cover all the elements of the evaluation or impact assessment. In addition, the Commission also organises more targeted consultations to complement the open consultation. The consultation results are a main source for the reports and should be used in the analysis.

Drafts of delegated and important implementing acts are published for feedback (four weeks).

After the Commission has adopted a proposal, it invites feedback on it within eight weeks. To feed these views into the legislative debate, the Commission collects and presents them to the European Parliament and the Council.

## Regulatory Scrutiny Board

One of the main novelties in the Commission's renewed commitment to Better Regulation is the transformation of the former Impact Assessment

54 European Parliamentary Research Service, "European Parliament work in the fields of Impact Assessment and European Added Value, Activity Report for 2016"; PE 598.598



Board into a full-time Regulatory Scrutiny Board RSB with stronger safeguards on independence. Like its predecessor, the RSB continues to provide quality control of impact assessments. Furthermore, the Commission has extended the mission of the RSB to cover fitness checks and significant ex post evaluations.

The RSB provides quality assurance to the political level of the Commission. It checks that initiatives take into account all the available evidence and stakeholders' views before political decision-makers consider what action to take, if any. More broadly, it helps to develop the Commission's policy on better regulation by providing feedback on the problems and issues it observes in its scrutiny work. The Board also provides advice to Commission services on individual impact assessments and evaluations.

The Board is an independent body within the Commission. It comprises a Chair and six regular members. All seven are appointed by the Commission on the basis of their expertise, to serve on the Board full-time on three-year non-renewable terms. The Chair and three regular members come from within the Commission. The three remaining members are recruited from outside the Commission.

The RSB acts independently and prepares its opinions autonomously. It does not seek or take instructions from within the Commission, nor from any other national or EU institution, body, office or agency. All Board members act in their personal capacity. They share collective responsibility for the decisions of the Board. The Board's rules of procedure cover the RSB mandate and proceedings.<sup>55</sup> They define such issues as rules of independence and related ethics provisions, the scope of the mandate, and protocols for communication, transparency and outreach activities.

The Board publishes its opinions on the

55 The rules of procedure are available at [http://ec.europa.eu/info/files/regulatory-scrutiny-board-rules-procedure\\_en](http://ec.europa.eu/info/files/regulatory-scrutiny-board-rules-procedure_en)

Commission's website<sup>56</sup> at the same time as the corresponding evaluation or impact assessment is published. It also publishes a list of all draft reports that it has considered.<sup>57</sup>

The RSB intervenes at a point before legislative proposals have been finalised. It helps to improve draft impact assessments (and evaluations) before Commission services finalise their proposals. The Board's opinions are, therefore, not quality assessments of specific legislative proposals, which are typically prepared later.

For impact assessments, the opinion can be positive or negative. In the case of a negative opinion, the report needs to be substantially revised and resubmitted to the Board for a second review and opinion. Indeed, the Commission's Working Methods specify that for impact assessments a positive Board opinion is needed before proceeding to an interservice consultation and eventual consideration by the College of Commissioners.<sup>58</sup> The second opinion is in principle final. If this is negative, it signals that serious shortcomings remain. Whether and under what conditions the initiative can proceed further requires a political decision in these cases.

When the Board delivers a positive opinion, it includes reservations or only recommendations. Reservations allow the report to proceed on the understanding that relevant adjustments will be introduced beforehand. The final version of the impact assessment report should also take into account any recommendations from the Board.<sup>59</sup>

For evaluations, the Board started to make a distinction between positive and negative opinions in 2017. Unlike for impact assessments, a positive

56 Board opinions on impact assessments are available on <http://ec.europa.eu/transparency/regdoc/?fuseaction=ia> and on evaluations on [http://ec.europa.eu/info/regulatory-scrutiny-board-opinions-evaluations-and-fitness-checks\\_en](http://ec.europa.eu/info/regulatory-scrutiny-board-opinions-evaluations-and-fitness-checks_en)

57 [https://ec.europa.eu/info/publications/meetings-regulatory-scrutiny-board\\_en](https://ec.europa.eu/info/publications/meetings-regulatory-scrutiny-board_en)

58 Working Methods of the European Commission 2014-2019, C(2014) 9004.

59 The Explanatory Memorandum of the final proposal and Annex 1 of the final impact assessment explain how the Board's opinion is taken into account.



opinion is not required to continue the finalisation of the report. However, the final version of the evaluation should take into account the remarks of the Board, or explain why this has not been done.

Overall, the Board interacts with services constructively in a spirit of helping the system work more effectively and improving the quality of evaluations and impact assessments. It proactively makes its expertise and advice available in the initial stage of the preparation of evaluations or impact assessments. This can involve reviewing the main evaluation roadmaps and inception impact assessments, and providing comments and guidance to the author Directorate-General.

## Practical experience of the Regulatory Scrutiny Board

### Impact Assessments

In 2016 and 2017, the Juncker Commission has been launching much of the legislative work necessary to deliver on its 10 priorities. The workload of the Board reflects this. Table 1 shows that the Board examined far more impact assessments compared to its predecessor in 2015 and 2014.

**Table 1: Impact assessments reviewed, 2014-2017**

Year	Cases	Negative opinions	Resubmission rate*
2014	25	10	40%
2015	29	14	48%
2016	60	25	42%
2017 <sup>+</sup>	22	12	55%

\* The resubmission rate is defined as the ratio of the number of negative opinions to the number of cases  
<sup>+</sup> Up to 15 June 2017

About half of the impact assessments scrutinised received an initial negative opinion, resulting in revision and resubmission to the Board. In 2016, the Board subsequently gave positive overall assessments to all but one<sup>60</sup> of the revised impact assessments that it received.

A positive or negative opinion is not the result of a mechanistic process or of a box-ticking exercise. The Board evaluates the quality of an impact assessment report based on the Commission's Better Regulation Guidelines and verifies whether the minimum standards are met. However, in doing so, the Board also takes into account the context of each initiative and the proportionality of the analysis, meaning that the depth of the analysis should match the importance of the initiative. It considers how an individual initiative fits within the wider sectoral regulatory environment, to what extent it responds to political orientations that have already been agreed by the relevant EU institutions, and whether there is a legal obligation to act. Timing constraints on the initiative are sometimes a factor when judging the availability of evidence, of prior evaluations and of comprehensive stakeholder consultations.

A positive opinion means that, based on the draft examined and on clarifying discussions with the responsible Directorate-General during the Board meeting, the Board is confident that the next

<sup>60</sup> Revision of Directive 2009/28/EC on the promotion of the use of energy from renewable sources.

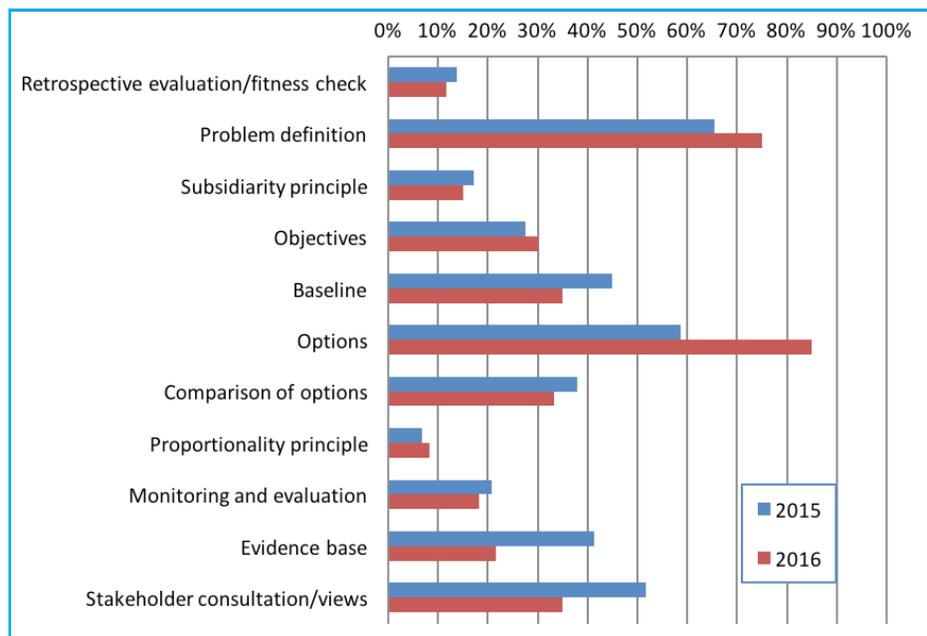


version of the document will be acceptable as a tool to support sound decision-making by the political level of the Commission. It does not mean that an impact assessment has fully addressed every aspect of the better regulation requirements. Rather, the Board signals that the report adequately communicates what the best available evidence suggests, and where the political judgment begins.

An initial negative opinion implies that the Board wants to review the report again before the initiative proceeds further. Reasons for negative opinions vary, but most often they involve multiple shortcomings in the initial draft report.

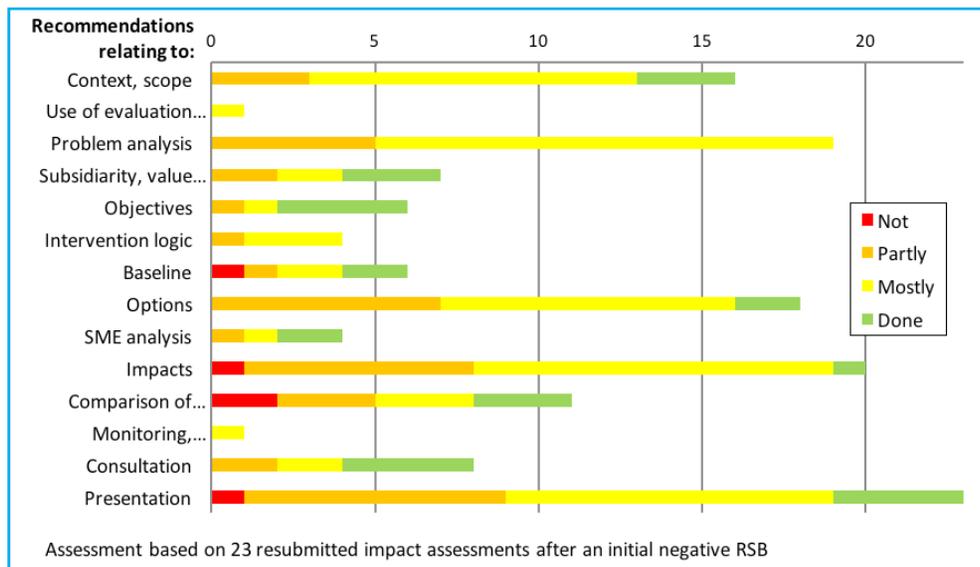
Common weaknesses in impact assessments during 2016 have been the problem definition and development of options (see Figure 2). As these are two key elements in the design of an impact assessment, they sometimes overshadow other elements. For example, when the problem is poorly defined, it is hard to define appropriate corresponding objectives and options. Likewise, analysis of options is of limited value if valid approaches are left out without explanation or when the options considered do not solve the problem. Other weaknesses have included the design of baseline scenarios, unclear linkages of objectives and options to the problems (the intervention logic), and a lack of quantification. The handling of stakeholder consultations is also a work in progress, and sometimes stakeholder consultation exercises have not been used to their full potential as a source of evidence. Reader-friendliness can also be an issue: an impact assessment report that is too long and technical for non-experts becomes less useful.

**Figure 2: Structural issues raised in Board opinions in 2015 and 2016**



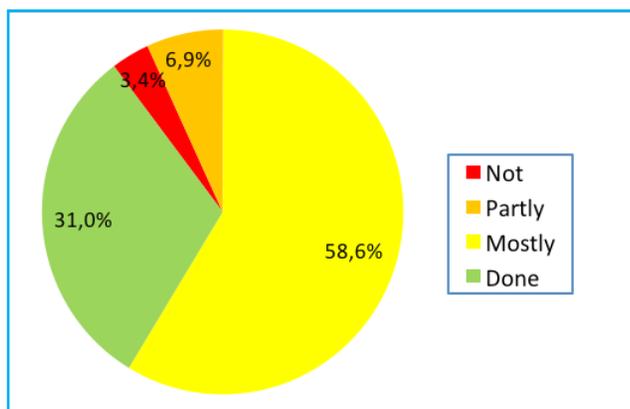
When finalising their impact assessments, Commission services have largely taken into account the recommendations that the Board made in its opinions. Figure 3 shows how draft impact assessments improved substantially after an initial negative opinion in 2016. The context, problem analysis, options, impacts and presentation were all ameliorated in the vast majority of cases where the Board made remarks. Revisions contained descriptions of problems that were sharper and more evidence-based, there was more detailed analysis of stakeholder views, the case for EU measures was more compelling and the policy trade-offs of various options were clearer. However, the comparison of options did not always improve satisfactorily. In these cases, it was not evident that the conclusions and preferred option followed logically from the evidence presented. In all cases but one, however, the Board considered that the improvements the services introduced in the resubmitted impact assessments were sufficient to merit a positive opinion. Positive opinions still flagged remaining concerns for Services to address and for policy-makers to consider.

**Figure 3: Integration of RSB recommendations after an initial negative opinion in 2016**



A second moment when the integration of the Board’s recommendations can be assessed is when services submit their impact assessment for interservice consultation, after having obtained the final Board opinion. Figure 4 shows that only in a limited number of cases does the final impact assessment not integrate the remaining RSB recommendations, or it only does so to a limited extent.

**Figure 4: Integration of RSB recommendations after the final opinion in 2016**



## Evaluations

The 2015 better regulation package reaffirmed the Commission’s commitment to ‘evaluate first.’ to evaluate what exists before proposing

changes. Already several decades ago, EU budget procedures imposed an obligation to evaluate spending programmes. Systematic evaluation of policy and legislation is more recent, but it is delivering pertinent lessons. Nevertheless, until recently, quality assessment of evaluations was left to the individual services and did not rely on a centralised quality control mechanism.

The Board started issuing opinions on evaluations in 2016,

but did not give overall ratings as has been the practice with impact assessments. The work started gradually and 7 opinions were issued on evaluations and fitness checks. From 2017 onwards, the Board is issuing positive and negative opinions on evaluations as well. This is for transparency reasons and should support the Commission’s ongoing efforts to systematise and improve evaluation activity. Up till mid-June 2017, the Board has issued 11 opinions on evaluations and fitness checks, almost half of them being negative. The Board expects to receive 18 evaluations and fitness checks for scrutiny in 2017. Other than transparency, Commission working methods do not currently envisage formal procedural implications of a negative Board rating on an evaluation.

The mandate of the Board is for the RSB to only look at fitness checks and the most important evaluations. When selecting the evaluations it wants to examine, the Board gives priority to major initiatives that are scheduled for review later in the mandate of the Commission. This typically includes initiatives included in the Commission’s Work Programme and the preparation of the next Multiannual Financial Framework (MFF) post-2020. In particular, it includes programmes



with large budgets and ones with a high degree of innovation or political sensitivity. It also includes policy initiatives of a cross-cutting nature.

To increase ownership of evaluation results, services are now obliged to write a Staff Working Document (SWD) that summarises the evaluation and its conclusions. The Board's opinion on evaluations focuses on the quality of the SWD. The few (seven) SWDs that the Board reviewed in 2016 had limited critical analysis of such issues as coherence, relevance and EU value added. They also did not systematically draw clear conclusions for follow-up action and did not always exploit all the information that external evaluators had collected. By contrast, the analysis of efficiency and effectiveness was more complete.

It appears that at least half of the impact assessments applied the 'evaluation first' principle in 2016. This is a positive result given that the increased emphasis on the implementation of this principle started with the May 2015 adoption of the better regulation package. The preparations for many of the impact assessments that the Board reviewed in 2016 had already started before that date. In the first months of 2017, the proportion of impact assessments that respect 'evaluation first' has already increased to around two thirds.

The 'evaluation first' principle increases transparency. Board review of the SWDs also provides an institutional safeguard against 'cherry-picking,' i.e. selectively reporting evidence that supports a particular approach. The presence of such a safeguard serves to increase the credibility of evaluation practices. Of course, it has to be noted that the Board only reviews a small proportion of all evaluations.<sup>61</sup>

## Other lessons learned

Most of the Board's work concerns implementation of the Commission's 10 priorities. While the overall strategy document for these priorities is not subject to an impact assessment, the downstream

<sup>61</sup> In 2016, more than 130 evaluations and fitness checks were finalised by the Commission.

legislative or non-legislative actions are much more systematically evaluated and impact-assessed. Within each priority, the Commission simultaneously submits several initiatives from different departments in **packages**. This enables the underlying impact assessments to take into account the broader context and consider cumulative impacts of related measures. A good case in point is the Energy Union proposals, where an overall reference scenario provided a common starting point for energy-related impact assessments on specific measures regarding climate change, renewables, the electricity market and energy efficiency.

Building on existing minimum standards for consultation stemming from EU Treaty obligations, the Commission's new Better Regulation Guidelines strengthened the commitment to carry out **consultations** that are of high quality and reach all stakeholder groups. Stakeholder consultations improve transparency and can have a positive effect on the efficiency and effectiveness of regulation.

Consultations have multiple functions in evaluation and impact assessment. Among other things, they collect evidence on past performance, opinions on areas for improvement, options for solutions, evidence on impacts, and views on preferred options. The Better Regulation Guidelines require all of the above. Fulfilling all these roles in a single open consultation is often difficult. For this reason, the guidelines invite Commission services to complement open consultations with smaller targeted consultations when needed.

The Board has observed several instances where impact assessments treat open online consultations as a representative survey. The collection of respondents is seldom representative of the stakeholder population. It almost always oversamples some groups and undersamples others. Moreover, knowing the details of opposing viewpoints is often important to policy-makers. As a consequence, the Board considers that it is usually inappropriate to present consultation



results as a sort of opinion poll, showing overall percentages in support of a certain option without clarifying diverging points of view of different groups of stakeholders.

The Commission has a commitment to better quantify regulatory burden reductions or savings potentials wherever possible, and the Interinstitutional Agreement of April 2016 reflects this. Both regulatory burdens and impacts are often hard to quantify. The Board has observed that, in practice, quantification is often one of the most challenging parts of impact assessment work. Availability of relevant data is often a major constraint. This problem can only be addressed over time, by improving monitoring and evaluation provisions. For this reason, it is helpful when impact assessments clearly define future data requirements.

## Conclusions

Like its predecessor, the RSB delivers quality control for impact assessments. Now, however, it also examines major evaluations and fitness checks. This extension of its mandate has increased the Board's capacity to add value and to promote rigorous and transparent application of better regulation principles.

The RSB has taken shape and become operational at the peak of the political cycle, when the Commission is proposing specific measures to make progress on its 10 priorities. In its first year, the Board already has been able to make a difference to the quality of impact assessments, as its remarks and recommendations were largely taken into account in the final versions of the reports.

The Board is further developing and improving its tools and working methods in 2017. Priority work includes developing a set of quality performance indicators for impact assessments and evaluations. This will enable the Board to track and report on improvements in better regulation practices over

time. The RSB intends to more systematically monitor how its recommendations on draft reports are implemented.

The Board is also prioritising closer upstream interaction with the Commission services to review major initiatives in the Commission Work Programme and identify the major challenges of the related evaluations and impact assessments early on. This early interaction should contribute to efficiency and improve the quality of reports.

The main novelty in 2017 is the more systematic review and rating of evaluations and fitness checks. Their quality is still lower and more diverse than for impact assessment. Establishing a consistent quality requirement across different types of evaluations poses a particular challenge to the Board. The identification of common weaknesses should help to improve the overall quality of retrospective work in the Commission.



# THE COMMISSION'S POWER TO WITHDRAW LEGISLATIVE PROPOSALS, AFTER ITS RECOGNITION BY THE COURT OF JUSTICE

by Nicola Lupo<sup>62</sup>

## 1. Introduction

EU institutions are subject to many rules embedded in the Treaties, both in the TEU and the TFEU. However, these rules just sketch a part of the discipline of the many and complex relationships among EU institutions that exist in the different decision-making processes in the EU legal order. Institutional practice is strongly influenced by non-Treaty rules and considering only them is often not sufficient to understand the real constraints that the lawmakers have to respect in their daily activity. Among non-Treaty rules, interinstitutional agreements and EP rules of procedure play a crucial role in particular. The former, foreseen by Article 295 TFEU, actualize and enforce the principles of loyal cooperation and institutional balance;<sup>63</sup> the latter, recognized

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<sup>63</sup> Art. 295 TFEU expressly acknowledges that interinstitutional agreements concluded by the European Parliament, the Council, and the Commission in compliance with the Treaties 'may be of a binding nature'. Unlike the interinstitutional agreement on cooperation in budgetary matters and on sound financial management between the European Parliament, the Council, and the Commission on budgetary discipline (approved by the Parliament on 19 November 2013 and by the Council on 2 December 2013), the interinstitutional agreement on better law-making does not specify that the "Agreement is binding on all the institutions for as long as it is in force." Nevertheless, it quotes Article 295 TFEU and it seems to assume that it constrains the signing institutions. On interinstitutional agreements, see F.

by Article 232 TFEU, concretely designs and develops the institutional autonomy of the EP.<sup>64</sup>

This contribution will try to corroborate the above statement by dealing with an instrument that did not receive any explicit discipline in the Treaties: the Commission's power to withdraw legislative proposals. This instrument was first experienced in institutional practice, although not too frequently, and then more recently was recognized by the Court of Justice. More specifically, the judgment of the Court of Justice (Grand Chamber) in case C-409-13 Council v. Commission of 14 April 2015 clearly recognized the power of withdrawal of the Commission, deriving it from the power of legislative initiative attributed, as is well-known, to the Commission. At the same time, on the basis of the principles of conferral of powers, institutional balance and loyal cooperation, the Court set some limits to the exercise of the power of withdrawal, among which is the fact that the Commission must state "the grounds for withdrawal" to the Parliament and the Council. Therefore, an action of annulment may be brought before the same Court of Justice against a decision to withdraw in order to check its compliance with the three principles and to verify whether the decision is supported by cogent evidence or arguments.

In the year following the above-mentioned judgment by the Court of Justice, both the 'atypical' sources of law, i.e. the new interinstitutional agreement on better law-making and the reformed EP rules of procedure, concretely reacted to it. Through new procedural rules, both contributed to enforcing the principles affirmed by the Court

Snyder, 'Interinstitutional Agreements: Form and Constitutional Limitations' in G. Winter (ed.), *Sources and Categories of European Union Law: A Comparative and Reform Perspective*, Baden Baden, Nomos, 1996, p. 453 ff. and L. Ronchetti, 'Gli accordi interistituzionali nell'ordinamento comunitario', in *Diritto pubblico*, 9 (2003), 1, p. 1 ff.

<sup>64</sup> On the effective use of the EP's rules of procedure as a way to empower the EP often beyond the provisions of the Treaty, see N. Brack, O. Costa, and C. Dri, 'Le Parlement européen à la recherche de l'efficacité législative: Une analyse des évolutions de son organisation', in *Bruges Political Research Paper*, 39/2015, p. 4 ff. (available at <http://aei.pitt.edu/63513/>).



of Justice and to “parliamentarising” the exercise of the Commission’s power to withdraw legislative proposals, inserting it, at least normally, within the annual interinstitutional programming.

## 2. The new interinstitutional agreement on better law-making

In the interinstitutional agreement on better law-making between the European Parliament, the Council of the European Union and the European Commission of 13 April 2016,<sup>65</sup> the power of withdrawal is quoted in two provisions.

A first provision (no. 8) of the interinstitutional agreement, regarding the Commission Work Programme, makes reference, *inter alia*, to the withdrawal of legislative proposals. The Commission Work Programme, in fact, “will include major legislative and non-legislative proposals for the following year, including repeals, recasts, simplifications and withdrawals. For each item, the Commission Work Programme will indicate the following, as far as available: the intended legal basis; the type of legal act; an indicative timetable for adoption by the Commission; and any other relevant procedural information, including information concerning impact assessment and evaluation work” (italics added).

On the one hand, this provision aims to re-affirm that the Commission is annually called on to revise the state of the art of its proposals, verifying whether it is desirable to withdraw ones that did not receive any attention either by the Parliament or by the Council, ones that can be deemed obsolete (so-called ‘technical’ or ‘administrative’ withdrawals, largely used particularly by the Barroso and Juncker Commissions in order to

<sup>65</sup> Official Journal of the European Union, L 123/1, 12 May 2016. This new agreement replaces the Interinstitutional Agreement on Better Law-Making of 16 December 2003 and the Interinstitutional Common Approach to impact Assessment of November 2005. Moreover, the Annex to this Agreement replaces the 2011 Common Understanding on Delegated Acts.

achieve better regulation objectives)<sup>66</sup> or ones that, in the meantime, have been the object of reasoned opinions issued by national parliaments (especially when these reasoned opinions reached the threshold for a yellow or an orange card).<sup>67</sup>

On the other hand and to a certain extent, it would even be possible to read the provision as intended to state that there is a duty for the Commission to notify in advance its decision to withdraw a proposal through an insertion of this intention in the Commission Work Programme. This interpretation seems consistent with the second provision specifically referring to the Commission’s power of withdrawal included in the same interinstitutional agreement. Provision no. 9 affirms the need for the Commission to give a proper reason and to pre-alert the other institutions about its intentions. The provision runs as follows:

<sup>66</sup> On the better regulation agenda of the Juncker Commission, see, for instance, D. Jančić, ‘The Juncker Commission’s Better Regulation Agenda and Its Impact on National Parliaments’, in C. Fasone, D. Fromage, Z. Lefkofridi (eds.), *Parliaments, Public Opinion and Parliamentary Elections in Europe*, EUI Working Paper MWP 2015/18, p. 45 ff. More specifically, on the appointment by the Juncker Commission of a vice-president in charge of Better Regulation, Inter-Institutional Relations, the Rule of Law and the Charter of Fundamental Rights, see L. Schrefler, A. Renda, J. Pelkmans, ‘What can the Better Regulation Commissioner do for the EU?’, CEPS Commentary, 29 September 2014 (available at [http://aei.pitt.edu/54982/1/LS\\_et\\_al\\_Commission\\_Priorities\\_Regulation.pdf](http://aei.pitt.edu/54982/1/LS_et_al_Commission_Priorities_Regulation.pdf)).

<sup>67</sup> This hypothesis of withdrawal, as is explicitly provided for by the Treaties (Protocol no. 2: Article 7), has to be deemed to be autonomous. In practice, however, only in one case out of three ‘yellow cards’ did the Commission decide to withdraw its proposal, and it took this decision despite re-affirming that in its view the original proposal respected the principle of subsidiarity (see F. Fabbrini-K. Granat, ‘Yellow Card, but no Foul’: The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike’, in *Common Market Law Review*, 2013, n. 1, p. 115 ff.; M. Goldoni, ‘The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation’, in *European Constitutional Law Review*, 2014, n. 1, p. 90 ff.; D. Jančić, ‘EU Law’s Grand Scheme on National Parliaments: The Third Yellow Card on Posted Workers and the Way Forward’, in D. Jančić (ed.), *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?*, Oxford, OUP, 2017, p. 299 ff.; and N. Lupo, ‘Le molteplici funzioni dell’ Early Warning System, alla luce del terzo “cartellino giallo” sui lavoratori distaccati’, in *Dialoghi con Ugo Villani*, Cacucci, Bari, 2017, p. 583 ff.).



“In accordance with the principles of sincere cooperation and of institutional balance, when the Commission intends to withdraw a legislative proposal, whether or not such withdrawal is to be followed by a revised proposal, it will provide the reasons for such withdrawal, and, if applicable, an indication of the intended subsequent steps along with a precise timetable, and will conduct proper interinstitutional consultations on that basis. The Commission will take due account of, and respond to, the co-legislators’ positions” (italics added).

In other words, the Commission is obliged to inform the other institutions about its intention to withdraw a legislative proposal. It should do this during the submission and the discussion of its Work Programme if its intention is already defined; it could do it later only if the decision is taken afterwards. This seems a wise choice, also in the light of the importance that the interinstitutional agreement attributes to the programming procedures, designing them as fully interinstitutional in order to reduce conflicts among (EU and even national) institutions in the following steps of decision-making.<sup>68</sup>

### 3. The European Parliament’s reformed rules of procedure

A new provision regarding the Commission’s intention to withdraw a legislative proposal was inserted in the context of a general revision of the EP rules of procedure, which was approved on 13 December 2016 and the main parts of which entered into force on 16 January 2017.<sup>69</sup>

68 This choice is seen as derived from the politicization of the Commission by M. Dawson, ‘Better Regulation and the Future of EU Regulatory Law and Politics’, in *Common Market Law Review* 53 (2016), 5, p. 1209 ff. On the role (actual and potential) played by national parliaments even in these procedures, see C. Fasone and D. Fromage, ‘From Veto Players to Agenda-Setters? National Parliaments and Their ‘Green Card’ to the European Commission’, in *Maastricht Journal of European and Comparative Law*, 23 (2016), 2, p. 294 ff.

69 For an overview, see C. Fasone, ‘La (silente) revisione generale del regolamento del Parlamento europeo’, in *Quaderni costituzionali*, 2017, n. 1, p. 159 ff.

The setting of this new rule within Rule 37 is extremely interesting because it is connected with the provisions commented on above in the inter-institutional agreement relating to ‘annual programming.’ Nevertheless, the new rule seems to design a procedure which is also applicable outside the examination of programming documents. More specifically, Rule 37, para 4, specifies that the intention to withdraw a legislative proposal needs to be discussed in the competent parliamentary committee, and also in the plenary: “If the Commission intends to withdraw a proposal, the competent Commissioner shall be invited by the committee responsible to a meeting to discuss that intention. The Presidency of the Council may also be invited to such meeting. If the committee responsible disagrees with the intended withdrawal, it may request that the Commission make a statement to Parliament” (italics added). Rule 37 concludes by stating “Rule 123 shall apply.” This is the procedure provided for statements by the Commission, Council and European Council which allows a resolution to be voted on by the European Parliament through which the Parliament can exercise its influence on how, when and even whether the Commission will make use of its power of withdrawal.

### 4. The judgement of the Court of Justice

In order to fully grasp the meaning of these two provisions inserted in the interinstitutional agreement on better law-making and of the new article in the EP rules of procedure, more specific attention should be given to the previously mentioned judgment of the Court of Justice of 14 April 2015, which clearly recognized the power of withdrawal of the Commission on the basis of Article 17, para. 2, TEU, in conjunction with Articles 289 and 293 TFEU.

It is true that the power of withdrawal had already been considered in a couple of previous judgments of the Court of Justice (14 July 1988,



Fediol v. Commission, case 188/85; 5 October 1994, Germany v. Council, case C-280-93), but in neither of these cases was a statement of the existence of this power formulated in such general terms, and in both of them the legitimacy of the withdrawal could be related to the particularities of the act concerned.<sup>70</sup>

Therefore, before this last judgement there were still some scholars who argued against the ability of the Commission to withdraw its proposals, at least when the proposal had started to be discussed by the other institutions.<sup>71</sup> There were also some perplexities among the Council and the European Parliament in recognizing to the Commission such a power, especially if it was motivated by political reasons.<sup>72</sup>

Together with the general recognition of the power of withdrawal, in this judgment the Court of Justice pointed out some constraints that the Commission must respect. As the judgment affirmed, a general veto power in the conduct of the legislative process attributed once and for ever to the Commission “would be contrary to the principles of conferral of powers and institutional balance.”<sup>73</sup> This means

70 As has been remarked by R. Adam, *Il potere di iniziativa della Commissione e il processo decisionale: il difficile equilibrio tra ritiro della proposta e potere decisionale*, in A. Tizzano (ed.), *Verso i 60 anni dai tratti di Roma. Stato e prospettive dell'Unione europea*, Giappichelli, Torino, 2016, p. 21 ff., spec. 24.

71 R. Adam, A. Tizzano, *Manuale di diritto dell'Unione europea*, Giappichelli, Torino, 2014, p. 200 ff., arguing that in this case the Commission would be responsible for a “sviamento di potere” (*détournement de pouvoir*, more or less corresponding to a ‘misuse of power’).

72 See P. Ponzano, C. Hermanin, D. Corona, *The Power of Initiative of the European Commission: A Progressive Erosion?*, *Notre Europe*, no. 89, 2012, p. 39, which also cites the few cases in which the Commission exercised this power for political reasons (only 6 cases between 1977 and 1994).

73 For some casenotes, see S. Peers, ‘The Commission’s power of initiative: the CJEU sets important constraints’, at <http://eulawanalysis.blogspot.it/2015/04/the-commissions-power-of-initiative.html>, 14 April 2015; P.J. Kuiper, ‘Commission’s right of withdrawal of proposals: Curtailment of the Commission’s Right or Acceptance by the Court of the Commission’s long-standing position?’, at <http://acelg.blogactiv.eu/2015/06/01/commissions-right-of-withdrawal-of-proposals-curtailment-of-the-commissions-right-or-acceptance-by-the-court-of-the-commissions-long-standing-position/>, 1 June 2015; N. Lupo, ‘Un conflitto tra Consiglio e Commissione: il diritto di iniziativa

that the Commission must state to the Parliament and the Council “the grounds for withdrawal” and that an action of annulment against this decision may be brought before the same Court of Justice, or in order to verify whether the decision has been supported by cogent evidence or arguments.

This judicial review of the act of withdrawal was exercised and positively concluded in the case at hand, relating to a proposal for a regulation laying down general provisions for macro-financial assistance to third countries. The Court held that the grounds for withdrawal were sufficiently brought to the attention of the Parliament and the Council and that they were capable of justifying the withdrawal. Indeed, the Court agreed with the Commission that the amendments the Parliament and the Council were planning to make, requiring the use of ordinary legislative procedure instead of an implementing act for granting macro-financial assistance, would have prevented the achievement of the objectives pursued by the legislative proposal – which aimed precisely to set a framework regulation to accelerate the decision-making on the matter at hand – and therefore deprived it of its *raison d'être*.

Furthermore, the Court analysed somewhat in depth the legislative process as it had developed, and more specifically the outcomes of the ‘tripartite meetings’ (better known as ‘trilogues’).<sup>74</sup> It concluded that in that case the Commission did not infringe the principle of sincere cooperation, as it had even pre-announced its intention to withdraw the proposal if the Council and the Parliament did not find an agreement on a different option.

legislativa della Commissione include il potere di ritiro, ma non è privo di limiti’, in *Quaderni costituzionali*, 2015, n. 3, p. 792 ff.; and S. Ninatti, ‘Un conflitto tra Consiglio e Commissione: la conferma del ruolo della Corte come arbitro dell’equilibrio istituzionale nella forma di governo dell’Unione’, *ivi*, p. 795 ff.

74 On ‘trilogues’ see, among others, O. Costa, R. Dehousse, A. Trakalová, *Codecision and “early agreements”: An improvement or a subversion of the legislative procedure?*, in *Notre Europe*, no. 84, 2011; G. Rugge, ‘Il ruolo dei triloghi nel processo legislativo dell’UE’, in *Il diritto dell’Unione europea*, 2015, n. 4, p. 810 ff.; R. Corbett, F. Jacobs, D. Neville, *The European Parliament*, 9<sup>th</sup> ed., London, Harper, 2016, p. 284 ff.



## 5. Conclusion: towards a parliamentarisation of the power of withdrawal

In synthesis, on the one hand, the Court of Justice recognized the power to withdraw, founding its “constitutional basis”<sup>75</sup> in Article 17, para. 2, TEU, “read in conjunction with” Articles 289 and 293 TFEU. This means that this power, unlike the basis invoked by the Commission in the act at stake (which only referred to Article 293, para 2, TFEU), but in conformity with the interpretation adopted by the Advocate General, is seen as a natural corollary to the Commission’s power of legislative initiative, rather than as an aspect of the power to amend its proposals. This approach seems correct, as the legal and political effects on the two institutions co-exercising the legislative function of the power to withdraw a legislative proposal are much more relevant than those deriving from one or more amendments proposed by the Commission.

At the same time, on the other hand, the Court significantly limited the power to withdraw, arguing that it needs to be exercised in conformity with the principles of conferral of powers, institutional balance and sincere cooperation. Of course, it is up to the same Court, through the judicial review it thus introduced, to check whether these principles have been respected in each case, but without exercising an *ex ante* review of the merits of the legislative proposal that has been withdrawn.

In the follow-ups to the judgment in the new interinstitutional agreement on better law-making and in the new EP rules of procedure, an intent to ‘proceduralise’ and above all to ‘parliamentarise’ the power of withdrawal is somewhat evident, formalising some elements which had partly already emerged in the institutional practice and repeating all the limits to this power as set by the Court of Justice.

<sup>75</sup> The expression “constitutional basis” is not used by the judgment, but appears in the opinion of Advocate General Jääskinen, delivered on 18 December 2014: points 36 and 52.

It is clear that the recognition of this power now offers the Commission a mighty weapon as it can be used throughout the legislative process (at least until the completion of the first reading, in respect of Art. 293, para 2, TFEU: “as long as the Council has not acted”) to impede any amendment the Commission does not like. However, it is a weapon that should be used loyally and avoiding surprises, if possible with its use announced in the annual programming procedures, whose interinstitutional character has been strongly underlined recently, in particular by the new interinstitutional agreement on better law-making.<sup>76</sup>

The aim of this parliamentarisation is twofold. On the one hand, it allows both the Parliament and the Council to assess the political significance of a withdrawal, also in order to concentrate the debate on cases of major political importance. On the other hand, it makes sure that both the Parliament and the Council may exercise their legislative function without the unexpected risk that all the work already done – which normally tends to anticipate the formal steps of the first reading – can be nullified by a surprise and unmotivated withdrawal of a proposal by the Commission.

<sup>76</sup> On the trend toward the diminishing role of the Commission as agenda-setter, see (also for further references on political science research) A. Kreppel-B. Oztas, ‘Leading the Band or Just Playing the Tune? Reassessing the Agenda-Setting Powers of the European Commission’, in *Comparative Political Studies*, 50 (2017) 8, p. 1118 ff.



# THE EUROPEAN PARLIAMENT'S USE OF THE EUROPEAN COURT OF AUDITORS' SPECIAL REPORTS IN THE SCRUTINY OF EU BUDGETARY PERFORMANCE

by Paul Stephenson<sup>77</sup>

## Abstract

This article focuses on the role that performance audits by the European Court of Auditors (ECA) play in the scrutiny work of the European Parliament (EP). It looks at the use of special reports as a 'scrutiny tool', examining the role of the newly established European Parliamentary Research Service (EPRS) in dealing with the ECA reports in the legislative context. It considers the extent to which the audit of policy performance can provide insights into the effectiveness of programmes financed by the EU budget, and in so doing, help the co-legislator deliver improved regulation and better policy instruments. The article argues that ECA performance audits are a crucial input for EP oversight as part of a larger 'toolbox' of informational resources.

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## 1. Introduction: the EP's capacity for oversight and scrutiny

Legislative scrutiny of public spending is a vital mechanism for holding the executive to account. A recent report by the Association of Chartered Certified Accounts (ACCA) has stressed that legislatures must improve their performance if scrutiny is to keep up with budget and accounting reforms, and with other financial developments.<sup>78</sup> In the wake of the financial crisis, parliamentary scrutiny processes have been slow to evolve. Systematic evaluation and monitoring is essential but they depend on input and own resources. Parliamentary oversight has been conceptualized as "legislative supervision and monitoring of the decisions and actions of executive agents."<sup>79 80</sup>

The ability of European parliamentarians (MEPs) to probe the executives of the Commission and Member States on issues pertaining to budgetary implementation rests on the parliament's capacity to provide sufficient insight into how money is spent. Budget processes and policy programmes are complex, presenting a barrier to engagement by MEPs. The task of budgetary control is complicated by the fact that committee members are required to have oversight of a range of policy areas – not just one, as most select committee members are – and as such they must cultivate and maintain expertise inside while drawing on external experts. Technical support is a crucial factor, as are the allocation of sufficient time for debate and access to appropriate support, resources and information, including high-quality analysis of policy performance by auditors, evaluators

<sup>78</sup> ACCA (Association of Chartered Certified Accountants), 'Parliamentary financial scrutiny in hard times,' 2011. Available at: <<http://www.accaglobal.com/content/dam/accaglobal/PDF-technical/public-sector/tech-tp-pfs.pdf>>.

<sup>79</sup> N. Font and I. P. Durán, 'The European Parliament oversight of EU agencies through written questions,' *Journal of European Public Policy*, Vol. 23, No. 9, 2016, pp. 1349-1366, at p. 1350.

<sup>80</sup> M. D. McCubbins, R. Noll and B. Weingast, 'Administrative Procedures as instruments of political control,' *Journal of Law, Economics and Organization*, No. 3, 1987, pp. 242-279.



and third parties. EP committees are supported by permanent secretariats, whose officials have “long held a prominent role in supporting MEPs in drafting parliamentary reports,”<sup>81</sup> particularly committee chairmen, although their role over time has diminished. Some scholars have questioned whether technical staff are fundamentally engaged in technical work to assist “the smooth functioning of the policy process” or if their role might have a political dimension.<sup>82</sup>

Since it is the EP’s role to scrutinize how the executive has implemented the EU budget, it must also scrutinize the evaluations conducted and commissioned by the executive. Part of this process may be to seek alternative evaluations in order to test or triangulate findings. This means turning to the work of third parties, initiating its own evaluations, and making use of the audits by the European Court of Auditors (ECA). As part of the ex-post scrutiny role, the EP’s Budgetary Control Committee (CONT) has traditionally looked at the audit findings of the EU’s external financial control body, though other EP committees now increasingly consider the ECA’s audit findings. Audit findings help “provide public confidence and certainty in the systems of governance and public spending,” but the findings themselves depend on reliable and trusted audit systems.<sup>83</sup> SAIs are traditionally “the most effective legislative vehicle for scrutiny,”<sup>84</sup> providing assurance of financial and regulatory compliance, but in recent years also paying greater attention to value-for-money examinations of expenditure, otherwise known as performance auditing. Performance audits of policies, programmes and other initiatives draw conclusions on effectiveness, efficiency and economy, and make recommendations to executive bodies. Their conduct is normally

81 T. Winzen, p. 28; C. Neuhold, ‘The “Legislative Backbone” keeping the institution upright? The role of European Parliament committees in the EU Policy-Making Process,’ *European Integration Papers Online*, Vol. 5, No. 10, 2001.

82 T. Winzen, p. 28.

83 *Ibid*, p. 20.

84 *Ibid*, p. 20.

guided by the use of international standards (e.g. INTOSAI) within the auditing profession.

Broadly speaking, zooming out from the work of the ECA and EP, arriving at any notion of what the EU delivers (*output legitimacy*) itself depends on *throughput legitimacy*, i.e. on ensuring the EU institutions and their administrative machinery have effective governance processes and practices. Throughput is “based on the interactions – institutional and constructive – of all actors engaged in EU governance.”<sup>85</sup> The quality of interaction and deliberation both matter. In this regard, throughput legitimacy relies on effective scrutiny and oversight of the audits and evaluations of budgetary spending by legislatures. In the same way, the *throughput legitimacy* of ex-post parliamentary scrutiny depends on the *throughput legitimacy* of auditing practice itself. Ultimately, there is a limit to the potential impact of audit reports if they are not taken up effectively by the legislature; audit only aids democratic accountability, it does not deliver it.<sup>86</sup> Thus, the potential for audit findings to be used in a way that can influence future law-making and programming depends on their quality, timeliness and relevance for MEPs.

## 2. The rise of performance auditing and ECA special reports

As established in the previous section, performance auditing, in particular, can help scrutinizers in parliament by drawing attention to, and making value judgements on, policy outcomes in terms of the three ‘E’s: economy, efficiency and effectiveness. Performance auditing is less concerned with whether the sums add up but rather whether money has been spent effectively.<sup>87</sup>

85 Schmidt 2013, p. 5.

86 A. Kanis, ‘Ex-Post Budgetary Oversight in Europe,’ *European Court of Auditors Journal*, No. 6, 2011, pp. 15-17.

87 P. Stephenson, ‘Reconciling Audit and Evaluation? The Shift to Performance and Effectiveness at the European Court of Auditors,’ *European Journal of Risk Regulation*, Vol. 6, No. 1, 2015,



It focuses on the *additionality* of EU policy and what has ultimately been delivered to the taxpayer. In this sense, it comes closer to the general notion of policy evaluation, given the focus on results, impact and effectiveness. As Mendez and Bachtler state,<sup>88</sup> performance auditing has developed since the mid-1980s. It resembles evaluation in probing the efficiency and effectiveness of public programmes but is undertaken in a manner resembling auditing.<sup>89</sup> Performance audits usually include evaluative elements of selected subjects and consider evaluation systems and information with a view to assessing their quality and, when they are considered to be satisfactory and relevant, use evaluation information as audit evidence. Being less dense than annual reports, special reports can make for “arresting reading.”<sup>90</sup>

Special reports are not new. Since 1977 the ECA has produced “a myriad of special reports on policy programmes or financial procedures.”<sup>91</sup> In its first 20 years, the ECA published 102 special reports and studies (1977-1996), followed by 112 special reports in the following seven years alone (1997-2004) and 71 in the following five years (2005-2010). The ECA claims that special reports “provide a means to focus on specific topics reflecting a high-level of risk and public interest, in particular performance issues.”<sup>92</sup> A House of Lords report (2001) found special reports to be of a “generally greater value than the Annual Reports,” pp. 79-89.

88 C. Mendez and J. Bachtler, ‘Administrative Reform and unintended consequences: an assessment of the EU cohesion policy “audit explosion”’, *Journal of European Public Policy*, Vol. 18, No. 5, 2011, pp. 746-765.

89 M. Barzelay, ‘Central audit institutions and performance auditing: a comparative analysis of organizational strategies in the OECD’, *Governance*, Vol. 10, No. 3, 1997, pp. 235-60.

90 D. O’Keefe, ‘The Court of Auditors’ in *Institutional dynamics of European integration: essays in honour of Henry G. Schermers*, vol. II, pp. 177-1994.

91 G. Karakatsanis and B. Laffan, ‘Financial Control: the Court of Auditors and OLAF’ in J. Peterson and M. Shackleton (Eds), *The Institutions of the European Union*, Oxford University Press, 2012, pp. 242-261.

92 European Court of Auditors, *Gaps, overlaps and challenges: a landscape review of EU accountability and public audit arrangements*, 2014, p. 7. Available at: <[http://www.eca.europa.eu/Lists/ECADocuments/LR14\\_01/QJ0214776ENC.pdf](http://www.eca.europa.eu/Lists/ECADocuments/LR14_01/QJ0214776ENC.pdf)>.

while recognising variations in quality.<sup>93</sup> Reports examined the effectiveness of internal programme expenditure (e.g. ERDF assistance, energy programmes, and fisheries), external expenditure (e.g. development aid, PHARE and TACIS, nuclear safety in the CEECs), customs union/revenue (e.g. risk analysis in customs control, protection of EC financial interests, assessment of VAT and GNP) and EU institutions (MEPs’ allowances, the added value of EU agencies).<sup>94</sup>

A 2012 report on the future role of the ECA conducted by international peer reviewers, refers to the EP’s Budgetary Control Committee (CONT) belief - which arguably still stands - that the ECA is in a pre-eminent position to provide the legislator with valuable opinions on the results achieved by the Union’s policies in order to improve the performance and cost-efficiency of the delivery mechanisms for of Union-financed activities, identify economies of scale and scope, spillover effects among national policies of Member States, and provide Parliament with external assessments of the Commission’s evaluation of public finances in the Member States.<sup>95</sup>

The case for a greater focus on special reports persists among many in the ECA’s management. As Klaus-Heiner Lehne, the recently appointed president of the ECA, then German member of the ECA, and former MEP in the Committee on Legal Affairs, asserted in 2014,<sup>96</sup>

“Politicians need to know specifically what has gone wrong and where; the Court of Auditors does not provide enough information on this. On the political side, be it at the Commission, the Parliament

93 G. Karakatsanis and B. Laffan, p. 249.

94 B. Laffan, ‘Auditing and accountability in the European Union’, *Journal of European Public Policy*, Vol. 10, No. 5, p. 772.

95 European Parliament, Report of 9 January 2014 on the future role of the Court of Auditors (2012/2064 (INI)). Available at: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0014+0+DOC+XML+V0//EN>>.

96 Interview with Klaus-Heiner Lehne in the *European Court of Auditors Journal*, May 2014. Available at: <<http://www.eca.europa.eu/en/Pages/Journal.aspx>>.



or the Council, it is extremely difficult to do anything sensible just with error rates. On the other hand, it is very helpful that special reports deal with substantive issues, draw substantive conclusions and put forward solutions.”

The fact that the ECA increasingly makes value judgements in its special reports, and therefore in its policy recommendations (largely aimed at the Commission), creates a tension in so far as the ECA is expressing how policy fared. The ECA has traditionally been the (supposedly) apolitical agent of the EP, itself a political and directly elected body. Moreover, the fact that the EP has sought external assessments of the Commission’s own evaluations implies not only that performance auditing is being carried out to ‘evaluate evaluations,’ but that the EP is endorsing the ‘meta-auditing’ of the work of the executives responsible for implementation at both the supranational and national levels.

### 3. The EP’s CONT committee and its use of ECA special reports

EU legislators and policy-makers are subject to fast-paced change in the external environment and the demands of social media. The legislature is under pressure to react more quickly, to deliver value judgements and opinions and to provide sound evidence-based insights into policy performance. The EP has never had much capacity for ex-post programme evaluation and scrutiny, relying largely on CONT for oversight. Today CONT retains its prerogative to be consulted first in EP-ECA consultation since it is the main committee responsible for the discharge procedure. In practice, this has meant dependence over time on the commitment of individual MEPs and rapporteurs, input from the library, and the ad hoc work of research staff within the parliamentary DGs and committee secretariats. CONT takes a retrospective perspective, while standing (also known as sectoral, specialised or

spending) committees look forwards, tending to largely overlook questions regarding ex-post evaluation.

Arguably, there is a tension within the institutional machinery of the EP when it comes to budgetary scrutiny ex post. First, as co-legislator the EP decides upon new laws, which provide the legal basis for policies/programmes to be financed; then, a few years down the line, it engages in scrutinising the effectiveness of these very policies/programmes, drawing on the findings of audits on budgetary spending and ex-post evaluations. The EP holds the Commission to account for implementing legislation and policies, but does it – and can it – hold itself to account? Is it able to conclude objectively whether its laws have been effective policy instruments? There is arguably a role conflict given that the EP acts both as a (political, biased) decision-maker and as a (supposedly objective, unbiased) overseer of policy performance. MEPs both legislate (before spending) and scrutinise (after spending), and make judgements on the *value* of the results and impacts of the policies that have emerged from legislation. However, MEPs are not objective evaluators; they are biased politically-driven actors who may use ex-post evaluation to advance their political agendas and interests, often for short-term goals, including re-election.

Second, most of the EP’s committee machinery, with its forward-looking perspective, is engaged in tasks relevant to the agenda-setting, policy formulation and decision-making stages of the policy process, whereas CONT has traditionally been the sole committee explicitly working to examine implemented policy and engage in some sort of ex-post evaluation. In short, CONT’s motives and rationale are markedly different to those of standing committees. Like other committees, it works on the basis of a committee chair and rapporteur and comprises MEPs with relevant policy expertise or who have expressed an interest in committee membership.



The strength of the committee has arguably been dependent on the personality and drive of the chair and on the commitment of its rapporteur to gather information on behalf of its members and invite external experts and speakers to its meetings, including public hearings.

But what of the motives of the standing committees? Why have they become more interested in the ECA's work? The Juncker Commission's priority was to have fewer legislative proposals, which has arguably encouraged much of the EP to develop a greater interest in policy implementation and evaluation.

A recent report by CONT on the future role of the ECA – the Sender report of 2014 – noted that the ECA's mandate provides for significant flexibility to allow the Court to carry out its mission beyond the scope of the SOA (the *statement of assurance* produced in financial and compliance auditing, long referred to as the DAS, a French acronym, is the ECA's opinion on EU finances, as established at Maastricht as part of a package of reforms of the EU institutions, and first used for the financial year 1994, now in Article 287 TFEU). It stated that the results of its performance audits in special reports “provide a significant opportunity to add value by focusing on and investigating high-risk areas.” In addition, it asserted that special reports “provide information to European citizens on the functioning of the Union and the use of European funds in many sectors, helping to bring Europe closer to its citizens and to make it more transparent and easier to understand.”<sup>97 98</sup>

97 European Parliament 2014. Report of 9 January 2014 on the future role of the Court of Auditors. The procedure on the appointment of Court of Auditors' Members: European Parliament consultation (2012/2064(INI)): See the section “The Court's new dimensions and challenges”, note 10). Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0014+0+DOC+XML+V0//EN>

98 The 2014 report followed the 2012 public hearing of the Committee on Budgetary Control. The proceedings were entitled ‘Future role of the European Court of Auditors: Challenges ahead and possible reform.’ Rapporteur: Inés Ayala Sender. 30 May 2012.

#### 4. The emerging role of the EPRS: helping auditing feed audits into scrutiny

Being wary of relying too heavily on Commission evaluations, the EP has sought to streamline its own processes and develop its own evaluation capacity. The creation of the European Parliamentary Research Service (EPRS) appears to be a major milestone in this process even if it has resulted in a power play with other DGs inside the EP. The 2011 Niebler report called for the establishment of an integrated impact assessment process within the EP in support of parliamentary committees.<sup>99</sup> The report invited the EU institutions to adopt a holistic approach to impact assessment “throughout the whole policy cycle, from design to implementation, enforcement, evaluation and to the revision of legislation” (point 2), stressing a need to “evaluate more accurately whether the objectives of a law have actually been achieved and whether a legal act should be amended or retained” (point 25). A service was set up in January 2012 within the EP's own administration with the focus initially on ex-ante impact assessment. In November 2013 the service became part of the newly created Directorate General for Parliamentary Research Services and broadened its remit to ex-post evaluation. The importance of both ex-ante and ex-post impact assessment for evidence-based policy-making in the context of better law-making was subsequently reiterated in the EP's 2016 resolution on the state of play of REFIT and the outlook for it.<sup>100</sup>

To assist in digesting and processing the audit reports, MEPs can now turn not only to the research

99 European Parliament Report of 18 April 2011 on guaranteeing independent impact assessments (2010/2016(INI)), Committee on Legal Affairs, Rapporteur: Angelika Niebler. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0159&language=EN>

100 European Parliament, Report of 24 June 2015 on Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook (2014/2150 (INI)). Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2015-0208+0+DOC+XML+V0//EN/>.



services within the parliament's directorate-generals but also to the EPRS. The service provides added value by studying ECA special reports in depth to extract the essential information and then providing a legal context to the audit through an overview of the committee's working documents, draft reports and EP resolutions that emerged both before and after the publication of the ECA special report. This provides a huge amount of policy-relevant information for MEPs and committees, who can better understand where the ECA's findings come from, and check whether the criticisms and shortcomings have been sufficiently taken up by the legislature, and also monitor how the Commission has responded to ECA recommendations. This closer and more effective monitoring of the ECA provides valuable insight for parliamentary scrutiny.

How does this work? The EPRS regularly compiles and issues comprehensive 'rolling checklists' of what it refers to as "important, but otherwise largely inaccessible, material relating to various aspects of the EU law-making and policy cycles."<sup>101</sup> Cumulatively, these seven checklists already amount to about a thousand pages of, often interactive, text. As far as policy evaluation is specifically concerned, it monitors *ex-post* evaluation exercises in the European Commission and the ECA special reports, which have steadily grown in number from 15 to 25-35 a year. Although the special reports are easily retrievable from the ECA website, committee MEPs now receive relevant special reports directly by email via the ECA's stakeholder management system.

The rolling checklist of ECA special reports published in March 2016<sup>102</sup> provides essential insight into 24 special reports from December 2014 to March 2016 with "recent findings." The reports are sorted into 12 policy categories. As an example,

101 European Parliament, 'EPRS Scrutiny Toolbox', European Parliamentary Research Service Blog, 2017. Available at: <https://eprthinktank.eu/scrutiny-toolbox/>.

102 *Ibid.*

let us take a recent special report on 'EuropeAid's evaluation and results-oriented monitoring systems.'<sup>103</sup> First, the checklist provides a report number, title and date, including a hyperlink to the full report and to the summary. It then explicitly states the questions asked by the auditors and the observations and recommendations made by the ECA. Thereafter, in the following row of the table, the EPRS provides a direct link to the CONT working document of the meeting (30 March 2015) held soon after publication of the special report, and lists the specific recommendations of the committee rapporteur. Next, it provides a link to related EP reports and resolutions by other committees, in this case a DEVE draft report (March 2016) awaiting committee decision. It also provides direct hyperlinks to, and summaries of, ten EP resolutions relevant to the subject of the special report, dating from April 2012 to October 2015 (two months before publication of the report). For each resolution, the legal base (individual legislation and relevant decisions) is clearly stated. Finally, it provides direct links to 19 oral and written questions from MEPs, indicating the rule number, name, political group affiliation and question subject matter. The questions cover a seven-year period from 2009 to 2016.

Looking more closely at the CONT committee hearing following the ECA report, the rolling checklist details the rapporteur's recommendations word for word.<sup>104</sup> In its scrutiny, the committee can then draw attention to the inadequacies of evaluation at the programme level. The committee shares the ECA's concerns over the 'insufficient reliability' of EuropeAid's evaluation systems, supervision and monitoring activities (1-2). It points out that "it is indispensable to provide Parliament and the budgetary authority with a clear view of the real extent to which the Union's

103 European Court of Auditors, Special Report No 18/2014: Europe Aid's evaluation and results-oriented monitoring system, 11 December 2014. Available at: <http://www.eca.europa.eu/en/Pages/DocItem.aspx?did=30363>.

104 European Parliament, 'EPRS Scrutiny Toolbox'.



main objectives have been achieved” and asserts that “feedback on the performance of Commission aid projects and programmes should be provided as part of the Commission’s commitment to quality assurance” (3-4). Furthermore, it considers that “outcomes of the evaluations are key elements to feed into policy and political review” (5). It considers that “the sharing of knowledge by all means and tools is crucial for developing a culture of evaluation and an effective culture of performance” (6). Finally, it supports the ECA’s recommendations with regard to Europe Aid’s evaluation and results-oriented monitoring systems. In a word, by extracting from the CONT committee minutes, the rolling checklist documents describe step-by-step how the EP has formally considered the findings of the ECA and subsequently endorsed its position.

The wealth of data provided in the interactive rolling checklists constitutes a valuable resource and should improve the work of MEPs in their scrutiny function. As a consequence, this suggests the need to reconsider and recalibrate how the EP manages and uses effectively the findings from external financial control work that departs from - i.e. doesn’t look like - traditional audit activity. Arguably, the more oversight provided by the EPRS, the more empowered the committees, the better the quality of deliberation, and potentially, the more effective the follow-up, including communication with standing (legislative) and drafting committees. Encouraging more reflexive governance means more thorough and close-up scrutiny of past policies *with a view to* better future policy programming.

## 5. Towards EP scrutiny beyond the CONT committee?

If we consider the institutional machinery for scrutiny in the EP, then there has been a clear case of path dependency – and *lock-in* – since the establishment of CONT in the late 1970s. It has remained the single formalised venue for scrutiny, and held the *de facto* monopoly on

oversight within the committee system. This is not to suggest that the standing committees do not read and discuss audits and reports on spending in their policy domain; nonetheless, their formal role has not been to monitor and gauge the results of spending. The ECA president has traditionally presented the annual report to CONT, while a member of the ECA, from one of the five audit chambers, presents each special report. As a result, the ECA has arguably had a rather narrow and predictable audience for its work, which might to some extent explain the perception by some stakeholders, including MEPs, of the limited relevance and impact of its work. That said, the Commission generally perceives the ECA’s work to have a high impact, as evidenced by the fact that it takes on board 80% of recommendations.

ACCA recognises standing committees as the ‘engine rooms’ of parliaments and important fora for holding governments to account.<sup>105</sup> Nonetheless, it recognises a greater need for the training and professional development of parliamentarians to “promote a culture of financial awareness and to empower politicians to ask more searching questions on financial matters,” which requires high-quality accounting information and “effective independent audit.”<sup>106</sup> The ECA has been seeking to establish direct relations with standing committees in recent months. It has now had direct audiences with 12-13 standing committees. For example, by presenting an ECA special report on the effectiveness of the EU budget in paying for rail freight infrastructure directly to the transport committee, it has sought to encourage greater interest in its work among parliamentarians. Such a strategy should ultimately empower the standing committees and provide greater information of relevance to policy-making. If the EP as a whole has more insight into the success and failure of past policies (and the legislation from which they emanated), then arguably it should make more informed decisions about future policy, and perhaps even design more effective legislation,

105 *Ibid*, p. 1.

106 *Ibid*.



recognising that legislation is the policy instrument that provides the fundamental legal basis for policies and programmes financed by the EU budget.

In the past, the CONT committee has expressed frustration about the quantity of reports and its ability to process the findings, and hence a need for more concise and better-written audit reports. The issue is today one of quality rather than quantity; where once it wanted fewer reports, today it wants more, but delivered in a timely manner and with greater foresight as to the special reports to come. This perhaps also provides further justification for scrutiny to be mainstreamed across committees. CONT has in the past suggested topics for ECA audits, quite logically in areas of most (political) interest to the EP. The ECA continues to make clear its independence as an official EU institution but in so doing it must strike a balance between appearing receptive and responsive to EP interests while maintaining control over its priorities and internal decision-making over the selection of audit topics. As such, the ECA actively approaches the Committee of Committee Chairs (CCC) for a list of suggestions.

## 6. Conclusion

Closer attention paid to the conclusions and recommendations of ECA special reports, which address the performance of programmes, projects and initiatives paid for by the EU budget, should lead to more effective scrutiny. Likewise, a better understanding of policy, particularly the dynamics of implementation, gained through specific insights into the successes and shortcomings of spending programmes at street level, should better enable MEPs to reconsider the design of legislation as a policy instrument. Auditing and evaluation that place greater specific emphasis on the (lack of) achievement of policy objectives and questions of effectiveness might encourage decision-makers – through scrutiny and oversight of past spending

– to look forwards in order to legislate and design policy more effectively.

At the institutional level, the EPRS is increasingly playing a key role within in the EP in terms of stimulating learning: processing information, seeing what is relevant, distilling the main findings and ‘feeding’ them to committees or MEPs where appropriate. It is arguably contributing to more informed and transparent law-making, in line with the goals of the Better Regulation agenda. More precisely, the EPRS offers increased support to committees in their scrutiny work by monitoring and assessing a wealth of studies, reviews, reports and audits conducted by other EU institutions and policy stakeholders. These institutional developments imply that we should also not think of scrutiny as an *event* that takes place purely in the confines of the committee venue at a specific point in time, but rather as a continual *process* of monitoring and judging, made possible through the provision of high-quality information, i.e. the interpretation of policy-relevant data by a permanent corps of EP researchers.

These institutional developments also raise the key question of whether or not ex-post evaluation risks becoming politicised. Why might this be so? First, because it is taking place *inside* a political institution; and second, because it is taking place *for* political actors. There is of course a risk of the politicization of evaluation since the EPRS was set up to serve the needs of the institution. We should remember that all scrutiny by MEPs is inherently political. As elected representatives of their constituents, they belong to domestic political parties and transnational political groupings within the EP, whose aim is to secure more seats. As such, oversight and scrutiny by MEPs can never be a technocratic exercise. Even if objective impartial evaluations, reviews, reports and audits are made available to CONT, the findings, including conclusions and recommendations, will ultimately be used to secure political objectives in the pursuit of obtaining and maintaining political



power. All ex-post evaluations conducted by objective external stakeholders have the potential to feed into the process of political deliberation, although MEPs will be likely to pick and choose the findings that support their political cause. However, the mixed political composition of committees should ensure a balance in the way that audits and evaluations are taken up in scrutiny work.

In short, there is arguably an ongoing tension between ECA special reports (largely ex post), Commission evaluations, and the EP's own impact assessments (largely ex ante), when it comes to the evaluation/appraisal findings that influence the debate and determine the shape of legislation for future EU policies. The committees and MEPs might consult and use both. Ultimately, there are a series of institutional, political and technical/professional agendas at play. Scrutiny can only be effective if the scrutinisers are well informed and can understand the policy and legal context.

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# QUALITY OF EU LEGISLATION - THE ROLE OF NATIONAL PARLIAMENTS

by **Katrin Auel**

Ensuring the quality of legislation is clearly an important topic for national parliaments (NPs) in the EU, and one that they have focused on for at least two decades. As early as 1997, the Conference of Presidents of European Parliaments discussed the issue at its Helsinki meeting and agreed to set up a working group on the 'Quality of Legislation.' The working group also cooperated closely with the OECD on the first OECD report on 'Parliamentary procedures and Relations' presented at the 2000 Conference of Speakers in Rome (OECD 2000). Although domestic legislation remains their main concern, NPs have also for a long time been involved in the scrutiny of EU legislation (Heffler et al. 2015). Prior to the Lisbon Treaty, NPs only had the opportunity to influence and control EU politics through their governments, mainly by scrutinising EU documents and issuing – more or less binding – positions on them. However, the Lisbon Treaty changed their role somewhat fundamentally (Auel and Neuhold 2016), most importantly with the introduction of the Early Warning System (EWS)<sup>107</sup> designating NPs as the guardians of the subsidiarity principle (Protocol no. 2 to the TEU and the TFEU, Jonsson Cornell and Goldoni 2016). From a purely institutional

107 National parliaments can send a reasoned opinion within eight weeks of receipt of a legislative proposal if they consider the proposal to violate the principle of subsidiarity. These opinions are counted as votes – two per parliament, one per chamber in bicameral systems – and if certain thresholds are reached (one-quarter of votes for freedom, security and justice proposals and one-third for all other proposals) the proposal must be reviewed ('yellow card'). If a threshold of over 50 per cent of votes is reached, the so-called 'orange card' not only forces the Commission to review the proposal, but also allows the European Parliament or the Council, acting by defined majorities, to reject the proposal.

point of view, the provisions of the Lisbon Treaty, together with the already existing Political Dialogue<sup>108</sup> (PD), give NPs a direct role in EU law-making and thus turn them into EU actors – in their own right and independently of their national governments.

The aim of this paper is therefore to look at the specific role of NPs in, and contribution to, ensuring the quality of EU legislation, with a particular focus on pre- and post-legislative scrutiny of EU law. Given the broadness of the topic, and the scarcity of empirical data, the paper can only highlight a few issues. As will be shown, NPs are still in many ways marginalised, yet this marginalisation is a result of both a sidelining of national parliaments by EU and domestic actors and a lack of parliamentary capacity and willingness to become more involved.

## The Commission's Better Regulation Agenda and the Role of NPs

As mentioned above, the EWS turned NPs into genuine European actors: the EU institutions must send them their draft legislative acts and wait for incoming opinions, which are then weighed and counted as votes. As with the Political Dialogue, the Commission has promised not only to reply to all parliamentary opinions but also to take them into due consideration (Preising 2011). This role of NPs is also emphasised in the Commission Better Regulation Agenda (for an excellent overview and discussion, see Jančić 2015). In fact, the Commission tends to view the involvement of NPs as separate from stakeholder consultations, as suggested in the Commission's 'Better Regulation Guidelines' (European Commission 2015a: 64), which explicitly mention that the term 'stakeholder consultation' does not apply to opinions from

108 The Political Dialogue, introduced with the Barroso initiative in 2006, aims at establishing a dialogue between national parliaments and the European Commission early in the policy-making process and is not, like the EWS, limited to aspects of subsidiarity (see Jančić 2012).



national parliaments. NPs can take part in the consultations as ‘public authorities’ (European Commission 2015a: 74, 2015b: 22), and since 2014 they receive automatic notifications of the launch of such consultations, but formally their role is only defined with regard to the control of the subsidiarity principle under the EWS. While stakeholders are invited to take part in public consultations during a 12-week period *prior* to the publication of a new proposal, the guidelines only refer to an opportunity for national parliaments to submit reasoned opinions “*after* the Commission proposal has been published” and explicitly *in parallel* with the stakeholder consultations on proposals (European Commission 2015c: 6, 2015d: 5). Within REFIT (Regulatory Fitness and Performance Programme), the scheme was launched in 2012 with the aim of identifying policy areas with potential for regulatory simplification. The role of NPs is again defined as “playing a key role in checking that the subsidiarity principle is correctly applied” (European Commission 2012: 11), yet NPs are neither mentioned in the “national dedicated networks” (Jančić 2015: 49) and nor are they included in the new REFIT Platform, which consists of stakeholder representatives (businesses, social partners and civil society organisations), representatives of the European Economic and Social Committee and the Committee of the Regions and Member State public officials (European Commission 2015e: 4). In other words, “virtually all interested actors from the public and private sectors – except NPs – are included in this element of the better regulation process” (Jančić 2015: 49).

It thus seems that the Commission sees the role of NPs within the EWS (and possibly the PD, although it is never explicitly mentioned) as the appropriate form of parliamentary input. Indeed, it can be argued that providing NPs with an exclusive consultation procedure reflects their role as elected and central democratic institutions of the Member States, which cannot be reduced

to that of ‘simple’ stakeholders. At the same time, however, this also limits their involvement. The Early Warning System and the Political Dialogue only unfold once the Commission has published a proposal, thus providing an input opportunity only *after* the crucial stage of the development of a proposal. Moreover, while the Commission has pointed out that subsidiarity checks are important not only for new legislative drafts but also for fitness checks of existing legislation or non-legislative documents (European Commission 2015b: 21-22), the EWS *only* applies to legislative drafts. All other documents can only be responded to under the more informal PD, where NPs have an overall weaker role.

Unsurprisingly, NPs have not been too happy about this. The House of Commons European Scrutiny Committee remarked in a recent report that it found it “disappointing” that the Commission’s draft Inter-Institutional Agreement on Better Regulation did “no more than ‘reiterate the role and responsibility of national Parliaments as laid down in the Treaties’” (House of Commons 2015:13). Similarly, the 2014 Rome COSAC Contribution states that “COSAC supports the idea of *ad hoc* public consultations aimed at national Parliaments, including a dedicated section for national Parliaments’ replies in the European Commission’s summary report on the consultation. COSAC invites the European Commission to explore the possibility of creating such a dedicated section” (COSAC 2014). Moreover, as will be shown in the next section, NPs so far also consider neither EWS nor PD to be working in a satisfactory way.

## Pre-Legislative Scrutiny of EU Law in Action

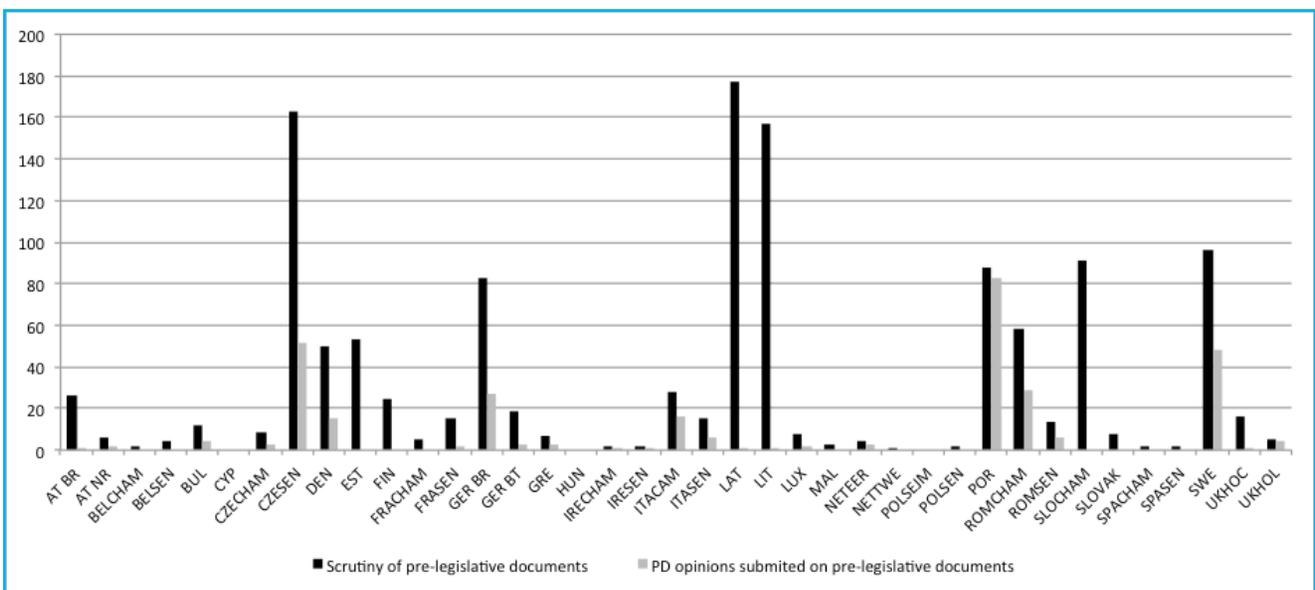
Unfortunately, very little comparative data on the involvement of NPs in pre-legislative scrutiny is available. A recent ECPRD seminar on ‘Pre- and Post Legislative Scrutiny’ (ECPRD 2016) indicated that about 25% of the responding NPs



conducted some type of pre-legislative assessment or evaluation, while in most parliaments the scrutiny process starts with the introduction of a bill. Similarly, an Oireachtas research paper states that “PLS [pre-legislative scrutiny] per se is not widely practised in other European parliaments” (Oireachtas 2014: 6). With regard to EU legislation,<sup>109</sup> there is also no aggregate data on the participation of NPs in the Commission’s public consultations as ‘public authorities,’ and such data is also not readily accessible without a section on parliamentary contributions in the consultation reports. However, given that the Commission has repeatedly “encourage[d] national Parliaments to ... participate more actively in public consultations” (European Commission 2014),

such as Green/White papers or Commission Communications and Work Programmes (CWPs) (Figure 1; see also COSAC report 20<sup>110</sup>). The figure also shows, however, that most of them focused their scrutiny efforts on their own government; only a few NPs regularly sent PD opinions on pre-legislative documents to the European Commission. As the Presidency of the Conference of the Speakers of the EU Parliaments pointed out, “especially as regards the European Commission’s consultation documents, greater use should be made of political dialogue in the pre-legislative phase, when there is more potential to perform guidance functions” (EUSC 2015: 6).

**Figure 1: Scrutiny of and PD Opinions Sent on Pre-Legislative Documents 2010 -2012**



they do not seem to make very active use of the instrument.

Data generated in the context of the OPAL project for the period 2010 to 2012 (Auel et al. 2015) indicate that during the first few years after the coming into force of the Lisbon Treaty many NPs had already been fairly actively involved in the scrutiny of pre-legislative documents

109 Existing databases such as IPEX make it difficult to search for aggregate data on NP scrutiny activities on specific types of EU documents, such as Commission White/Green Papers or Communications; documents have to be analysed individually.

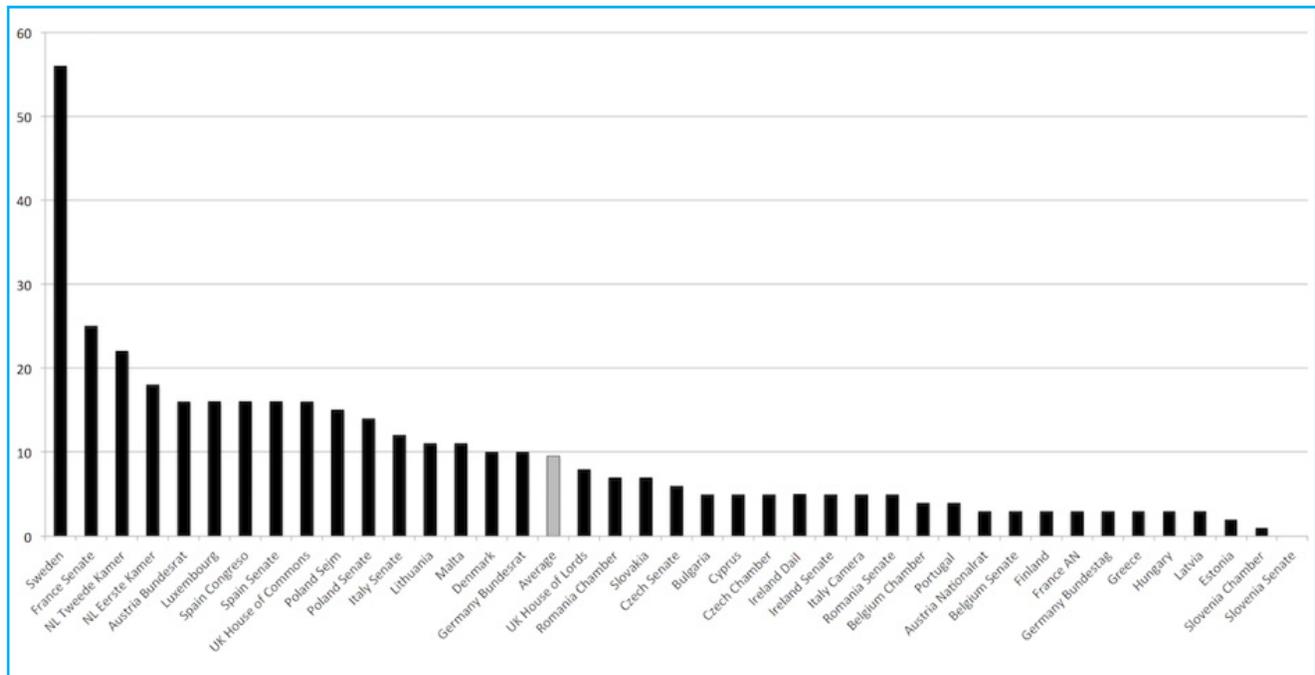
Source: OPAL data (Auel et al. 2015)

Regarding the EWS, we see a similar picture. Some national chambers have made very frequent use of the instrument, but overall participation varies (Cornell and Goldoni 2016; see Figure 2).

110 The bi-annual reports of COSAC are available at: [cosac.eu/documents/bi-annual-reports-of-cosac](http://cosac.eu/documents/bi-annual-reports-of-cosac).

**Figure 2: Reasoned Opinions Submitted 2010 to 06/2016**

and this is true for the PD as well, also does not seem to live up to the expectation of establishing



Source: Auel and Neuhold (2016)

The absolute frontrunner in the EWS is the Swedish Riksdag, followed by the French Senate and the two chambers of the Dutch Parliament, while other parliaments have been more reluctant in their use of the EWS. One reason may be disappointing experiences with the instruments. Indeed, national parliaments have so far issued only three ‘yellow cards,’<sup>111</sup> which have all been ultimately unsuccessful.<sup>112</sup> However, the EWS,

111 These were: ‘Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services’ (‘Monti II’; COM/2012/130; 19 votes); ‘Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office’ (COM/2013/534; 19 votes); and ‘Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services’ (COM/2016/128; 22 votes).

112 In the case of the Monti II regulation, the Commission subsequently withdrew the proposal but stated that a breach of the subsidiarity principle was not evident in the parliamentary opinions. Instead, the Commission explained, the proposal was withdrawn because it was “unlikely to gather the necessary political support within the European Parliament and the Council” (European Commission 2012b: 1). Regarding the European Public Prosecutor’s Office and the Posting of Workers, the Commission decided to maintain the proposals without amendments despite the yellow card (European Commission 2013, 2016).

a constructive and meaningful exchange of arguments between national parliaments and the Commission. A large number of parliaments have repeatedly criticised the fairly late, vague and generally inconsequential replies by the European Commission to both reasoned and Political Dialogue opinions (COSAC reports 18, 19, 20, 22, 24, 26; see also Mastenbroek et al. 2014). As the most active parliament in the EWS, the Swedish Riksdag, pointed out, it was not clear to what extent “the Swedish Parliament’s objections to the application of the principle of subsidiarity are taken into account in legislation that is adopted” (COSAC report 20: 23). Thus, although they have a special role in (pre-)legislative scrutiny, parliaments feel that their input is usually ignored. This may also explain why they have not been more actively engaged in the Commission’s public consultation, where they only have an individual voice among many others.

## Post Legislative Scrutiny: Transposition and Evaluation

NPs are in a somewhat stronger position when it comes to post-legislative scrutiny, as the related processes move from the European to the domestic level. Here, a distinction needs to be made between the implementation and the evaluation of EU legislation. While the former relates to the involvement of NPs in the transposition of EU legislation (directives) into domestic law, the latter concerns the assessment of EU legislation already in force. In the following, both will be discussed in turn.

### *Ensuring the Quality of EU Legislation During Transposition*

Despite the fact that quality of legislation has been a concern for national parliaments for at least two decades, there is again little recent comparative data available, especially regarding EU legislation. A study commissioned by the EP (2001) provided an overview of 'Regulatory Impact Analysis' (RIA) in, *inter alia*, EU member states, and a comparative study by the Estonian Parliament in 2001 dealt with 'Impact Assessment of Legislation for Parliaments and Civil Society' (Riigikogu 2001). Both studies concluded "that the national Parliaments are not the competent institutions for performing [RIA]" (EP 2001: 5), which is primarily the task of the government, but that most parliaments were informed of the results of the RIA. In addition, all parliaments also take steps to verify the accuracy of the information supplied by the government, either by requesting further information or through more detailed evaluations by their own services or external experts (Riigikogu 2001: 94; see also OECD 2000: 7). However, the Riigikogu report remarked that "the use of socio-economic studies and RIA models in the parliamentary decision-making still remains a black box for many countries" (Riigikogu 2001: 50), and this is especially true when it comes to EU legislation. As a result, the following can only present a fairly sketchy picture.

Regarding the transposition of EU legislation, a report on a recent ECPRD Seminar on 'Pre- and

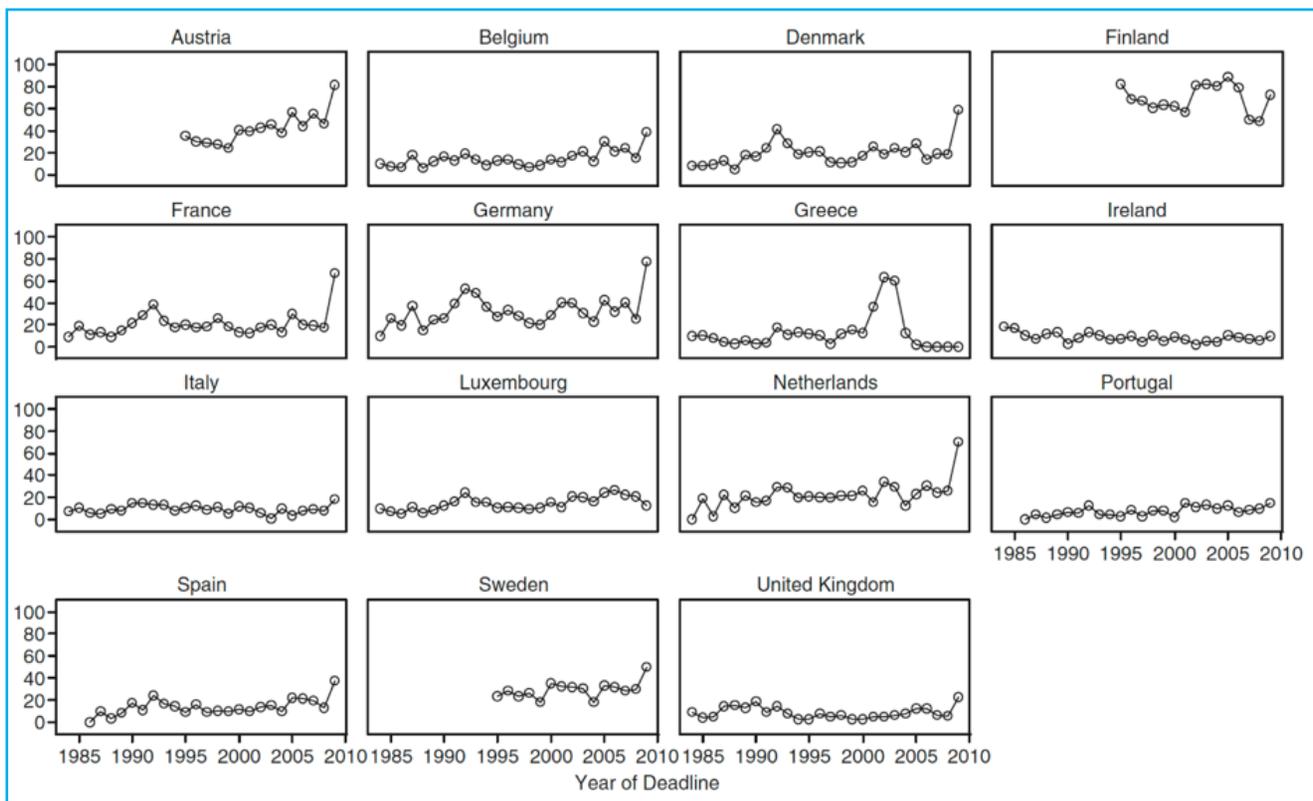
Post- legislative scrutiny in and beyond parliament' concluded that "[a]pparently parliaments do not distinguish specifically between purely 'national' bills and those which have their origin in EU law" (ECPRD 2016: 2). Similarly, the most recent COSAC report (no 27: 15f.) shows that the possibility for MPs to raise issues regarding the implementation of EU law either in committee or in the plenary was most common, followed by regular, often annual, reports on the state of play regarding the transposition of directives by the government. Other instruments, such as the possibility to compile own-initiative reports on implementation issues, hardly exist. This is also mirrored by an ECPRD enquiry in September 2016 into 'Best practices on how to ensure the quality of legislation with specific regard to transposition, implementation and enforcement of EU law' conducted by the Italian Senate (results published in European Parliament 2016a). The study, to which only 21 chambers (out of 41) replied, also revealed that most NPs treat the transposition of European legislation no differently to domestic legislation – and most stated that they relied on information provided by the government. Only a few NPs reported that they had established specific procedures for the transposition of EU directives. Overall, the EP therefore concluded "that transposing and implementing EU Law is not a real issue."

The question remains, however, of whether transposing and implementing EU law is not 'a real issue' because the process runs smoothly in most parliaments or rather because NPs are, in fact, hardly involved in the transposition of EU law at all. König et al. (2012: 32-4) show that, with few exceptions, the share of EU directives transposed with formal parliamentary involvement between 1984 and 2010 hovered at around or even below 20 per cent in the EU-15 (Figure 3), although the results varied considerably across individual EU policy fields.



**Figure 3: Parliamentary Involvement in the Transposition of EU Directives Over Time**

suggests that “[c]ontrary to ex ante impact assessment, most countries do not systematically



Source: König et al. (2012: 32)

A recent COSAC report (no 25) also indicated that things have not changed all that much since. COSAC has therefore put parliamentary scrutiny of the implementation of EU legislation on the agenda for the 2017 conference in Malta (COSAC 2016). The relevant COSAC report (no 27) indeed revealed that slightly more than half of the responding chambers (16 out of 29) considered that NPs should have a greater role in monitoring the implementation and transposition of EU law. “Most parliaments/chambers wishing for a greater role in this matter, however, did not elaborate on what an increased role should look like, as such debates had not taken place yet.” (COSAC report 27: 6)

### Evaluation of Existing EU Legislation

Finally, to what extent are NPs engaged in evaluating the quality of existing EU legislation? A recent OECD report (Arndt et al. 2015: 18)

conduct ex post assessments and are only starting to develop the methodology.” This is even more the case for NPs regarding the evaluation of existing EU legislation. According to the latest COSAC report (no 27: 14f.), 33 out of 37 responding chambers do not carry out any evaluation. The only chambers where evaluations do take place are the French Sénat, the Italian Senato della Repubblica, the Romanian Camera Deputaţilor and the Belgian Chambre des Représentants. In most NPs, involvement in the evaluation of EU legislation is therefore indirect. Around half of the chambers reported that they scrutinised, at least occasionally, *their government’s position* on the reports of the European Commission evaluating existing legislation. It is therefore perhaps not astonishing that many chambers also had no opinion regarding the level of detail provided by the Commission report. A number of NPs that do scrutinise them, however, are satisfied with the level of detail but would find additional information helpful.

We do, however, see an increasing engagement of NPs in the scrutiny of the Commission's mid-term reviews of, e.g. the Multiannual Financial Framework or Europe 2020 (COSAC report 20), and also scrutiny of CWP and REFIT proposals. Particularly the CWPs have recently become much more important means for NPs to plan their scrutiny activities more strategically. According to the latest COSAC report (no. 27), 30 chambers had already discussed the CWPs and five intended to do so. In addition, the CWPs are not only regularly discussed at COSAC meetings, especially the meeting of COSAC's Chairpersons at the beginning of the year, but they also serve to identify one or two subjects as the focus of COSAC's activity for the coming year (for details, see Fasone and Fromage 2016: 300-1).

Finally, further developments may increase parliamentary ex-post scrutiny and evaluation. In June 2014, the European Parliament launched an initiative to increase inter-parliamentary exchange of information on the implementation, application or effectiveness of EU law to support the EP in the preparation of 'implementation appraisals' or 'European Implementation Assessments' (European Parliament 2016b): 12). In Summer 2016, the EP's related Unified Repository Base on Implementation Studies (URBIS)<sup>113</sup> went online. So far, however, the response by NPs has been somewhat lukewarm. COSAC welcomed the idea in a meeting in Riga in June 2015, and NPs broadly expressed their willingness to share information in COSAC report 25. A number of NPs also pointed out that monitoring lies within the competence of the executive and/or the European Commission or that they were not dealing with the transposition or evaluation and/or had no information to share. Similarly, the contribution of NPs to URBIS has so far not been overwhelming, but there are some exceptions. Both French chambers, both UK chambers and the Italian Senate have been among the most active suppliers of documents. However,

113 <http://urbis.europarl.europa.eu>

overall the parliamentary documents found on the website are a rather eclectic mixture of research or briefing papers on various EU-related topics and Committee reports on EU policy issues or legislative proposals – all published in the original language.

Other more recent developments are the proposals for a 'red' and 'green card.' The so-called 'red card', intended to strengthen NPs' position in the EWS, was originally proposed by the UK government in the context of its negotiations over EU reform and subsequently included in the European Council's draft settlement with the UK (European Council 2016). National parliaments would be able to submit (within 12 weeks) reasoned opinions regarding alleged violations of the subsidiarity principle. If these represent more than 55 per cent of national parliaments' votes, these opinions would be "comprehensively discussed" in the Council. If the EU draft legislative proposal were then not changed in a way that reflects the concerns of national parliaments, the Council would have to discontinue the consideration of that draft. While the settlement with the UK has become moot following the British referendum and the triggering of Article 50 TEU, the 'red card' proposal still seems to be on the table (Rozenberg 2017: 35).

In addition, NPs have also recently pushed for the inclusion of a 'green card' in the PD which would allow parliaments to propose new legislative or non-legislative initiatives, or amendments to existing legislation (for the following, see Rozenberg 2017: 35-38). This not only receives strong support from NPs (COSAC reports 23, 24), but the EP has also signalled its backing of the proposal (European Parliament 2017: para 60) and the Commission has declared its general openness to the idea (European Commission 2017). A number of, albeit completely informal, 'green cards' have already been issued. The first, organised by the House of Lords in March 2014 on the topic of food waste, was followed by green cards organised



by the Latvian (revision of the Audiovisual Media Services Directive) and the French Parliaments (EU corporate social responsibility). Although none of them have been very successful so far (Rozenberg 2017: 37), they do indicate that NPs are willing to take a more active role in EU law-making. If properly institutionalised, it would not only provide NPs with an active and more constructive involvement in EU law-making, but could also encourage NPs to engage more actively in the assessment of existing EU legislation.

### Conclusion: NPs' Marginal Role in Better Legislation – Inflicted or Homemade?

Despite the scarcity of empirical comparative data, the above indicates that pre- and post legislative scrutiny of both domestic and EU legislation has become an important topic for NPs over the last two decades, but that their actual involvement seems to trail behind. On the one hand, this seems to be due to a sidelining of NPs both at the domestic and at the EU level. As argued above, the role of NPs with regard to the European Commission's Better Regulation policies remains somewhat ambiguous. On the one hand, they are in a rather privileged position as the EWS and the PD respectively constitute institutionalised opportunities to voice their objection regarding a breach of the subsidiarity principle or general concerns regarding a legislative proposal. On the other hand, the Commission's pre-legislative consultation scheme does not exclude NPs but it does tend to separate public consultation from parliamentary input through the EWS. However, the EWS limits parliamentary involvement to legislative proposals and thus does not apply to the drafting stage. Similarly, research has shown that the role of national parliaments in the transposition of EU directives remains, with few exceptions, fairly marginal.

At the same time, however, NPs could also make more active use of the opportunities for pre- and

ex-post legislative scrutiny available to them. NPs neither seem to participate very actively in the public consultations organised by the Commission and nor do they seem to fully exploit the opportunities provided by the PD for input during the drafting stage of EU legislation. Participation in this varies greatly, but many NPs seem to focus instead on well-established domestic scrutiny procedures when it comes to pre-legislative EU documents. As discussed, one of the reasons may be (mounting) frustration with the lack of (or unclear) impact of their input in the EU legislative process. However, regarding both pre- and ex-post legislative scrutiny, and the evaluation of legislation in particular, parliamentary capacities play a role as well: compared to the executive, NPs often simply have neither the resources nor the infrastructure to conduct impact assessments or evaluations and thus have to rely on government information.

To conclude, despite the stronger institutionalised role in EU legislation, NPs' involvement in pre- and post-legislative scrutiny has not yet lived up to its full potential. For it to do so, NPs certainly have to make greater use of their opportunities for involvement at the EU level. However, in turn, the EU institutions, and the Commission in particular, also need to be willing to take NPs' input into account. Otherwise, parliamentary involvement in EU legislation is little more than symbolic politics.



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# BETTER LAW- MAKING AND THE INTEGRATION OF IMPACT ASSESSMENT IN THE DECISION- MAKING PROCESS: THE ROLE OF NATIONAL PARLIAMENTS

by Elena Griglio

## Abstract

Better law-making, as an institutional target addressed to all subjects involved in the composite EU decision-making process, is open to contributions from national parliaments (NPs). However, contrasting perspectives affect national parliaments' involvement in better law-making processes, particularly in impact assessment (IA) procedures. Contrary to normative approaches, this paper aims to assess how national parliaments approach IA tools from a legal-constitutional point of view with reference to the EU decision-making process and the type of functions they perform. IA procedures are framed in the relationship between national parliaments and the relevant executive(s). The engagement of national parliaments in IA is analysed by focusing on the three stages of the better law-making cycle: the pre-legislative stage that precedes the inception of the EU legislative procedure; the legislative stage, which takes place while EU legislative proposals are being negotiated; and the post-legislative stage that follows the enactment of EU pieces of legislation.

Parliaments are neither councils of state or independent authorities or courts of auditors. The large variation in the willingness and capacity of national parliaments to engage in IA processes can hence be explained as a variable dependent on the more general variation in the standard scrutiny/oversight relationship linking each parliament to the national government in EU affairs. Some common trends may, however, be highlighted. On the one hand, NPs mainly scrutinise governmental IA and are only occasionally able to develop their own IA analysis. IA processes therefore tend to highlight the role of NPs as scrutinisers/gatekeepers rather than as agenda-setters/decision-makers.

On the other hand, NPs' involvement in IA procedures produces differentiated outcomes at the national and at the European levels. At the national level, it is part of the scrutiny/oversight cycle linking the parliament to the national government in the *ex-ante* and *ex-post* stages related to the formation and implementation of EU law. At the European level, national parliaments' involvement in IA functions both as a means of contributing to the Euro-national composite decision-making process and as an indirect tool for holding the EU institutions, including the Commission, accountable for the role they play in initiating, approving and implementing EU legislation. The call for enriched inter-parliamentary and inter-institutional dialogue on IA thus leads to the presence of a strategic dimension in inter-parliamentary cooperation for future steps towards an ever more integrated better law-making process.

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*The views and opinions expressed in the text are those of the author and do not reflect the official policy or position of any institution.*



## Summary

1. Better law-making in the EU: contrasting perspectives on the involvement of national parliaments in impact assessment processes. 2. How national parliaments relate to pre- and post-legislative scrutiny: the conceptual framework. 3. The participation of national parliaments in the different stages of the better law-making cycle. 3.1. The pre-legislative stage. 3.2. The legislative stage. 3.3. The post-legislative stage. 4. Conclusions.

### 1. Better law-making in the EU: contrasting perspectives on the involvement of national parliaments in impact assessment processes

The integration of impact assessment (IA)<sup>114</sup> in the decision-making process as a priority target of the EU better regulation agenda<sup>115</sup> is often perceived as being subject to ‘executive dominance.’ Better regulation and IA have been central to the agenda of the EU Commission in Brussels since 1986, when the first methods for assessing the impact of EU regulations were launched under the UK Presidency.<sup>116</sup> The Commission has played a major role in proceduralising and operationalising impact assessment requirements into the EU legislative cycle.<sup>117</sup> Two factors contribute to explaining the Commission’s prominent place in ensuring better law-making targets: on the

114 For the purposes of this Chapter, IA refers both to *ex-ante* impact assessment and to *ex-post* evaluation processes, thus relating to the whole legislative cycle. On the definition of IA as a tool for better law-making, see the Interinstitutional Agreement on Better Law-Making (OJC 321, 31.12.2003, 12-18).

115 On the initiatives undertaken over the past two decades at the EU level to improve the quality of regulation through *ex-ante* IA, see A Renda, *Impact Assessment in the EU. The State of the Art and the Art of the State* (Brussels, Centre for European Policy Studies, 2006) 43 ff.

116 See European Commission, Enterprise Directorate-General, ‘Business impact assessment pilot project. Final report - Lessons learned and the way forward’ (2002) 9 *Enterprise Papers* ([http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item\\_id=2435&lang=en](http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=2435&lang=en)).

117 See ACM Meuwese, *Impact Assessment in EU Lawmaking* (The Netherlands, Kluwer Law International, 2008) 51 ff.

one hand, the Commission has a monopoly on initiating legislation,<sup>118</sup> and on the other hand the integration of IA in decision-making is time-consuming and technically demanding.

However, further steps in the implementation of better law-making targets in the EU have increasingly featured inter-institutional cooperation. Since 1994, the European Council, the European Commission and the European Parliament have formally committed to better regulation standards through inter-institutional agreements or declarations.<sup>119</sup> The Interinstitutional Agreement on Better Law-Making adopted on 13 April 2016,<sup>120</sup> which replaces a former agreement dating back to 16 December 2003,<sup>121</sup> confirms this trend.<sup>122</sup>

118 On IA as a tool instrumental to the exercise of the right of initiative of the Commission, see European Commission, ‘Impact Assessment: Next Steps. In Support of Competitiveness and Sustainable Development’ (2004) SEC(2004)1377 *Commission Staff Working Paper* 3. In fact, art. 34 TEU, in the original version preceding the entry into force of the Treaty of Lisbon, set no requirement or commitment on Member States to conduct IA on (ex) Third Pillar proposals, for which they shared the right of initiative with the Commission. See Meuwese, *supra*, at 4, 126.

119 See the Interinstitutional Agreement of 20 December 1994 on an Accelerated Working Method for Official Codification of Legislative Text (OJC 102, 4.4.1996, 2-3), the Interinstitutional Agreement of 22 December 1998 on Common Guidelines for the Quality of Drafting Community Legislation (OJC 73, 17.3.1999, 1-4), the Interinstitutional Agreement of 28 November 2001 on a More Structured Use of the Recasting Technique for Legal Acts (OJC 77, 28.3.2002, 1-3), the Joint Declaration of 13 June 2007 on Practical Arrangements for the Co-Decision Procedure (OJC 145, 30.6.2007, 5-9) and the Joint Political Declaration of 27 October 2011 on Explanatory Documents (OJC 369, 17.12.2011, 15-15).

120 OJL 123, 12.5.2016, 1-14.

121 *Supra* at 1.

122 These Agreements partially stand as a reaction to the EP’s plea for stronger interinstitutional dialogue in the better law-making processes. Further to the European Commission’s 2001 White Paper on European Governance (the so-called ‘Kaufmann Report’, COM(2001)727, 25 July 2001, the European Parliament issued a resolution - European Parliament, ‘Report on the Commission White Paper on European Governance’ (29 November 2001) A5-0399/2001 (OJC 153E, 27.06.2002, 314-322) - to deplore the lack of cooperation between the Commission and the Parliament in defining the EU agenda for better regulation.



For all the institutional bodies involved in the legislative cycle to be formally committed to better law-making processes is not an exclusive prerequisite of the EU institutional architecture.<sup>123</sup> Experiences at the national level of improving the quality of legislation have similarly been conducted through inter-institutional agreements between legislative bodies and executives.<sup>124</sup> What is particular to the EU legislative cycle is the composite nature of the decision-making process, which involves both EU and national institutions. On the one hand, EU institutions (the European Commission, the Council, the European Parliament), and on the other, Member State authorities (national governments represented in the Council of Ministers and national parliaments) contribute to legislative decisions.<sup>125</sup> The polycentric nature of this system<sup>126</sup> explains why national parliaments, although they lack direct decision-making authority over EU legislation, are a constitutionally relevant component of the law-making process.<sup>127</sup>

123 The OECD ‘Recommendation of the Council on Regulatory Policy and Governance,’ adopted on 22 March 2012 (<http://www.oecd.org/gov/regulatory-policy/2012-recommendation.htm>) clearly recognises that “Ensuring the quality of the regulatory structure is a dynamic and permanent role of governments and parliaments” (ivi, 22). The Report on Regulatory Policy is drafted through consultation with both governmental and parliamentary institutions.

124 In the UK, one of the political systems which has gained sound experience in *ex-ante* appraisal, IA has been institutionalised in pre-legislative scrutiny by means of UK draft bills presented to Parliament. See Renda, *supra* at 2, 26.

125 The EU decision-making process, growing out of the interaction between EU institutions and Member States, has been intensively studied in the literature, with somewhat divergent approaches. For an overview, see T König, ‘Divergence or convergence? From ever-growing to ever-slowing European legislative decision making’ (2007) 26 *European Journal of Political Research* 417-444. On the evolving nature of competing expectations regarding key aspects of this composite political system, see R Thomson, *Resolving Controversy in the European Union: Legislative Decision-Making Before and After Enlargement* (Cambridge, Cambridge University Press, 2006).

126 On the absence of a single ‘legislator’ and the presence of many co-actors as a particular feature of the EU regulatory authority compared to national constitutional systems, see EMH Hirsch Ballin and LAJ Senden, *Co-Actorship in the Development of European Law-Making* (The Hague: TMC Asser Press, 2005).

127 In contrast to the paradigm of ‘multilevel

In this framework, a question arises regarding the role that national parliaments are expected to play in ensuring better law-making standards, including the working out of IA processes. The Interinstitutional Agreement of 13 April 2016 on Better Law-Making explicitly recognises the role and responsibility of national parliaments in EU decision-making, as laid down in Protocol No. 1 and Protocol No. 2 annexed to the Treaty of Lisbon.<sup>128</sup> In addition, jointly with the EP and with the Council, national parliaments are included among the privileged addressees of IA results delivered by the Commission.<sup>129</sup> However, it is difficult to approach the issue from a factual point of view. If national parliaments are clearly perceived as essential players in the better law-making cycle, problems arise when it comes to proceduralising and implementing their participation in IA processes.

There are two contrasting perspectives regarding the involvement of national parliaments in IA processes. One is grounded on a normative approach; the other on an empirical one. From a normative viewpoint, the participation of national parliaments in IA is often perceived as an added value in that it adds higher input and output legitimacy to EU policy-making.<sup>130</sup> Input

constitutionalism,’ which on the whole suggested a relative separateness between the European and the national levels, under the ‘polycentric’ paradigm the EU and national institutions are viewed as forming part of one constitutional order; see L. Besselink, ‘National Parliaments in the EU’s Composite Constitution: A Plea for a Shift in Paradigm,’ in P. Kiiver (ed), *National and Regional Parliaments in the European Constitutional Order* (Groningen, Europa Law Publishing, 2006) 117-131. A similar approach is implied in the conception of the ‘Euro-national parliamentary system’ by N Lupo and A Manzella, *Il sistema parlamentare euro-nazionale* (Torino, Giappichelli, 2014). For a theorisation of the representative dimension in the EU in terms of a ‘multilevel parliamentary field,’ see B Crum and JE Fossum, ‘The Multilevel Parliamentary Field: a framework for theorizing representative democracy in the EU’ (2009) 1 *European Political Science Review* 249 ff.

128 *Supra* at 1, premise No. 4.

129 *Supra* at 1, par. 13.

130 On the connection with the additional dimension of ‘throughput’ legitimacy, theorised in terms of “efficiency, accountability, transparency and openness to consultation with the people of the EU’s internal governance processes,” see V Schmidt,



legitimacy arguments can see the involvement of national parliaments as a way to secure increased democratic participation.<sup>131</sup> The output legitimacy discourse can instead highlight the positive outcomes of engagement by national parliaments in IA, resulting in Member States complying with policy outputs and effectively implementing legal measures.<sup>132</sup> In principle, parliamentary access to information on the consequences of legislation on social, economic and environmental issues is seen as a prerequisite for effective democratic accountability.<sup>133</sup>

On the other hand, from an empirical viewpoint, three sets of reasons stand against the proceduralisation of the engagement of national parliaments in IA. On purely legal grounds, national parliaments are not formally eligible for involvement in better law-making mechanisms. Moreover, circumstantial evidence indicates that as a core instrument for better law-making IAs are structured to be implemented by governments, not by parliaments. A number of arguments relating to political, resource, organisation and time constraints faced by parliaments seem to demonstrate that representative assemblies may lack the political motivation, technical capacity, organisational arrangements and time availability to engage in exhaustive IA (especially in the *ex-ante*

.....  
'Dealing with Europe's other deficit' (2012) 19 *Public Policy Research* 108.

131 See P Lindseth, *Power and Legitimacy. Reconciling Europe and the Nation-State* (Oxford, OUP, 2010) and S Micossi, 'Democracy in the European Union' (2008) 286 *CEPS Working Document 7* ([www.ceps.eu](http://www.ceps.eu)).

132 On the 'legitimacy through subsidiarity' argument, claiming that national Parliaments can contribute to making EU policy-making fully compliant with input and output legitimacy standards, see K Boronska-Hryniewiecka, 'Legitimacy through Subsidiarity? The Parliamentary Control of EU Policy-making' (2013) 1 *Polish Political Science Review* 84-99.

133 This point was raised in the so-called 'Doorn Report' on IAs (European Parliament, 'Report on Assessment of the Impact of Community Legislation and the Consultation Procedures' (2004) 2003/2079(INI) 5 and it specifically refers to the position of the European Parliament. However, due to the composite nature of EU constitutional architecture, a similar instance can be referred to the position of national parliaments.

stage).<sup>134</sup> Lastly, regarding dimensional concerns, it could be argued that in EU decision-making the role of NPs is marginal (as these institutions are not able to exercise a binding force) and limited (as each parliament is only able to cover the domestic sphere of action).<sup>135</sup> The involvement of national parliaments in IA should therefore turn out to be a somewhat limited and partial means of supporting the enhancement of higher law-making standards.

Each of these three empirical sets of objections to national parliaments engaging in IA finds a corresponding counter-argument. Against the legal objection, it has been claimed that the legal basis for including national parliaments in better law-making mechanisms already exists in the Treaties and is to be found in the Protocols annexed to the Treaty of Lisbon pertaining to the role of national parliaments in the EU.<sup>136</sup> Contrary to the factual argument that representative assemblies are inadequate to serve better law-making enforcing

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134 Before the European Parliament started developing its own IA expertise, no existing impact assessment system had been sufficiently tested in any national assembly. For a long time, parliaments therefore lacked concrete reference models for engaging in IA processes. See Renda, *supra* at 2.

135 C Neuhold and J Smith, 'Conclusion', in C Heffler, C Neuhold, O Rozenberg and J Smith (eds), *The Palgrave Handbook of National Parliaments and the European Union* (London, Palgrave Macmillan, 2015) 668 ff. Moreover, not all national parliaments have been able to fully exploit their participative opportunities in EU affairs. See O Höing, 'Differentiation of Parliamentary Powers. The German Constitutional Court and the German Bundestag within the Financial Crisis', in M Cartabia, N Lupo and A Simoncini (eds), *Democracy and Subsidiarity in the EU. National Parliaments, Regions and Civil Society in the Decision-Making Process* (Bologna, Il Mulino, 2013) 255 ff.; J Neyer, 'Justified Multi-level Parliamentarism: Situating National Parliaments in the European Polity' (2014) 20 *The Journal of Legislative Studies* 126.

136 D Jančić, 'The Juncker Commission's Better Regulation Agenda and Its Impact on National Parliaments', in C Fasone et al (eds), *Parliaments, Public Opinion and Parliamentary Elections in Europe* (2015) 18 *EUI MW Working Paper* 45 ff. (<http://cadmus.eui.eu/handle/1814/37462>). Article 12 TEU and Protocol No. 1, giving national Parliaments limited involvement in the legislative process, are explicitly mentioned in A Renda, 'European Union and Better Law-Making: Best Practices and Gaps', in A Renda et al, *Workshop on the best practices in legislative and regulatory processes in a constitutional perspective* (European Parliament, Study for the AFCO Committee, 2015) 5-29, spec. 8 among the constitutional key principles serving as an EU legal basis for better regulation and better law-making.



mechanisms, it can be observed that the European parliament has specific experience in using IA.<sup>137</sup> Finally, dimensional limits can be easily overcome by national parliaments either individually, engaging in a strict oversight of government performance in better law-making, or collectively, acting as collective actors in the supranational dimension by means of their European 'direct' powers.<sup>138</sup>

By pointing out these contrasting perspectives, this article aims to reframe the main question on the contribution of national parliaments to better law-making processes in the EU. The focus is not on whether, normatively speaking, national parliaments should be involved or more involved in IA processes. Rather, the article acknowledges that, in spite of increasing progress in the institutionalisation of IA and in the call for greater inter-institutional participation, the contribution of national parliaments to the implementation of the procedure is still uncertain, partly due to persisting disagreements on the role and status of IA in the European legislative process.<sup>139</sup>

A number of related questions are therefore addressed in this article. On the one hand, what are national parliaments to do when faced with the Commission's IA? How are they allowed to scrutinise these documents? What is the procedural outcome of scrutiny by national parliaments of Commission IA? On the other hand, can national parliaments draw up their own IA? What procedural use can they make of these texts? In both cases, what type of function

137 For an overview of initiatives undertaken in the last decade by the EP to develop its own IA capacity, see Renda, *supra* at -23, 17 f.

138 I. Cooper, 'A 'Virtual Third Chamber' for the European Union? National Parliaments after the Treaty of Lisbon' (2012) 35 *West European Politics* 441 f. A. Cygan, 'Collective subsidiarity monitoring by national parliaments after Lisbon: the operation of the early warning mechanism,' in M. Trybus and L. Rubini (eds), *The Treaty of Lisbon and the Future of European Law and Policy* (Cheltenham e Massachusetts, Edward Elgar Publishing, 2012) 55 ff.

139 Meuwese, *supra* at 4, 21 ff.

(relating to codified parliamentary procedures) do they perform when engaging in IA processes?

After an overview of the theoretical framework describing the place of national parliaments in pre- and post-legislative scrutiny (§ 2), an assessment of the above-mentioned constitutional and empirical issues is provided in § 3. This analysis will be conducted by distinguishing the involvement of national parliaments between the supranational level and in the domestic arena. Some final remarks and normative suggestions on the constitutional significance of the contribution of national parliaments to better law-making in the EU are included in the Conclusions (§ 4).

## 2. How do national parliaments relate to pre- and post-legislative scrutiny: the conceptual framework

The contribution of national parliaments to the integration of IA in EU policy-making should be conceived of as part of the relationship linking these assemblies to the "fragmented EU government(s)."<sup>140</sup> This formula comprises the national governments acting at the national and supranational levels and the executive bodies of the EU institutional architecture, including the EU Commission. Different theoretical conceptions can therefore be used to describe the role played by national parliaments in this decision-making cycle. From a constitutional viewpoint, parliamentary engagement in IA processes can be framed within theories of IA as a constitutionally relevant topic. They contribute to enforcing the potential of regulatory policy in the constitutional sphere as a mechanism for securing accommodation between political and legal systems, assessing how constitutional norms are made effective within political practice<sup>141</sup>.

140 D. Curtin, 'Challenging Executive Dominance in European Democracy' (2014) 77 *The Modern Law Review* 29 ff.

141 C. Scott, 'Regulating Constitutions,' in Christine Parker et



Against this background, parliamentary engagement in IA takes on somewhat different institutional meanings depending on whether it affects national or EU law-making. In the national legislative cycle, parliaments can integrate IA in preliminary legislative work carried out during consideration of bills as a tool aiming to support their legislative function.<sup>142</sup> IA therefore become a relevant constitutional topic “as it is part of the legislative process and has consequences for the position of the legislator, either as a fetter on its discretion or as a means of holding (a part of) the legislature accountable.”<sup>143</sup>

At the EU level, by contrast, national parliaments are not formal law-making authorities in the EU legislative cycle. Their participation in IA processes is thus instrumental not to the legislative but to the oversight function. Whether they oversee government IA or they themselves assess the impact of EU legislation, they do not act as decision-makers, but instead they exercise an indirect action which is mediated by the oversight of government conduct.<sup>144</sup> This relational dimension binds national parliaments regardless of whether they engage in IA to hold the government accountable for its conduct of EU affairs<sup>145</sup> or to advance proposals for amending draft legislative proposals/legislation in force. In

al. (eds), *Regulating Law* (Oxford: Oxford University Press, 2004) 226-45.

142 For specific reference to the pre-legislative scrutiny debate and experience in the UK Parliament, see Hansard Society Commission on the Legislative Process, *Making the Law* (London, Hansard Society, 1992); G Power, *Parliamentary scrutiny of draft legislation 1997-1999* (London, UCL Constitution Unit, 2000); J. Smooker, ‘Making a difference: the effectiveness of pre-legislative scrutiny’ (2006) 59 *Parliamentary Affairs* 523 ff.; M Korris, ‘Standing up for Scrutiny: How and Why Parliament Should Make Better Laws’ (2011) 63 *Parliamentary Affairs* 564 ff.

143 Meuwese, *supra* at 4, 23.

144 Framed in this way, the function can be interpreted as a form of ‘political safeguard of federalism.’ See G Martinico, ‘Dating Cinderella: On Subsidiarity as a Political Safeguard of Federalism in the European Union’ (2011) 4 *European Public Law* 649 ff.

145 T Raunio, ‘The gatekeepers of European integration? The functions of national parliaments in the EU political system’ (2011) 33 *Journal of European Integration* 315.

the EU dimension, the constitutional relevance of IA therefore goes beyond national standards.

The approach of national parliaments to IA in EU policy-making should instead be explained with reference to the more general oversight/accountability cycle linking national parliaments to the EU fragmented executive(s).<sup>146</sup> According to Article 10 TEU, parliamentary representation in the EU flows through two channels: one embodied by the EP and the other centred on national parliaments.<sup>147</sup> These two channels, jointly considered, are meant to satisfy the principle of accountability as a fundamental component of democratic government.<sup>148</sup> To scrutinise government proposals, decisions and actions, parliaments use their oversight powers to cover all stages of EU decision-making,<sup>149</sup> holding the government to account both *ex ante*, in view of the position to be adopted in European

146 On the original chain of accountability in the EU as “overstretched on a range of accounts,” see B Crum, ‘Legislative-Executive Relations in the EU’ (2003) 41 *Journal of Common Market Studies* 379. On the oversight/accountability circuit in the EU institutional architecture, see O Costa, N Jabko, C Lequesne and P Magnette, ‘La diffusion des mécanismes de contrôle dans l’Union européenne: vers une nouvelle forme de démocratie?’ (2001) 51 *Revue française de science politique* 859-867; C Harlow, *Accountability in the European Union* (Oxford, Oxford University Press, 2002); C Harlow and R Rawlings, ‘Promoting Accountability in Multi-Level Governance: A Network Approach’ (2007) 13 *European Law Journal* 542-562; D Curtin and A Wille (eds), *Meaning and Practice of Accountability in the EU Multi-Level Context* (Mannheim, Connex Report Series No. 07, 2008); M Bovens, D Curtin and P ‘t Hart, P (eds), *The Real World of EU Accountability. What Deficit?* (Oxford, Oxford University Press, 2010); L Vehrey, P Kiiver and S Loeffen (eds), *Political accountability and European Integration* (Groningen, Europa Law Publishing, 2009); S Gustavsson, C Karlsson and T Persson (eds), *The Illusion of Accountability in the European Union* (New York, Routledge, 2009).

147 L Besselink, *A Composite European Constitution* (Groningen, Europa Law Publishing, 2007); Micossi, *supra* at 18; P Lindseth, *supra* at 18.

148 V Bogdanor, ‘Legitimacy, accountability and democracy in the European Union’ (2007) *A Federal Trust Report*. [fedtrust.co.uk/wp-content/uploads/2014/12/FedT\\_LAD.pdf](http://fedtrust.co.uk/wp-content/uploads/2014/12/FedT_LAD.pdf).

149 T Raunio, ‘Holding Governments Accountable in European Affairs: Explaining Cross-National Variation’ (2005) 11 *The Journal of Legislative Studies* 319; C Neuhold and R de Ruiter, ‘Out of reach? Parliamentary control of EU affairs in the Netherlands and the UK’ (2010) 16 *The Journal of Legislative Studies* 57 ff.



negotiations, and *ex post*, in the implementation of EU decisions and policies.<sup>150</sup>

The proposed perspective contributes to explaining why, in the following sections, the involvement of national parliaments in the IA process is framed within the ‘scrutiny’ of EU legislation. Other theoretical conceptions might nonetheless be used, taking a political viewpoint. IA processes in the EU could be examined in a principal-agent perspective ‘adapted’ to the specificities of the EU context.

Positive political theory is usually sceptical about the willingness of parliaments to engage in *ex-ante* and *ex-post* analysis of legislation. ‘Classical’ principal-agent theory, in fact, claims that representative assemblies are keen on relying on constituency feedback rather than on investing resources in the systematic appraisal of legislation.<sup>151</sup> However, in the EU context, the interaction between regulatory principals and agents is influenced by the particularity – missing in most national legal orders – that law-drafting is delegated to a third party, the EU Commission (regulatory agent). In view of this delegation option, IA acts as a means of reducing information asymmetry and minimising the costs of transactions and monitoring between the principal (the elected legislator) and the drafting agent (the Commission).<sup>152</sup> Due to the composite nature of EU law-making, the importance of IA is not limited to the position of the European Parliament as the main regulatory principal. The same benefits may come from engagement by

Member States, including national parliaments, in IA processes. These serve as mechanisms that aim to shape the behaviours of political actors and enhance the governance of their relations by imposing constraints on them. This contributes to explaining why national parliaments’ consideration of IA may further contribute to enhancing the overall political coherence of the system by reducing information and transaction costs.

### 3. The participation of national parliaments in the different stages of the better law-making cycle

Better law-making is pursued throughout the legislative process, just as better regulation covers the whole policy cycle.<sup>153</sup> Each stage of the legislative cycle acknowledges a number of better law-making principles, objectives and tools to make sure that EU laws achieve their targets at minimum cost. These relate to planning, impact assessment, stakeholder consultation, implementation and evaluation.

To examine the involvement of national parliaments in better law-making processes and highlight their engagement in IA, the following three stages of the legislative cycle can be focused on.<sup>154</sup> The pre-legislative stage precedes the inception of the EU legislative procedure and involves the preparation of legislative initiatives. The legislative stage, which starts with submission of an EU legislative bill by the Commission, steers the design of the definitive text subject to final adoption. Lastly, the post-legislative stage follows the enactment of EU pieces of legislation; it encompasses monitoring

150 K Auel, ‘Democratic Accountability and National Parliaments: Redefining the Impact of Parliamentary Scrutiny in EU affairs’ (2007) 13 *European Law Journal* 487 ff.

151 MD McCubbins and T Schwartz, ‘Congressional Oversight Overlooked: Police Patrols versus Fire Alarms’ (1984) 28 *American Journal of Political Science*, 165-179. According to G. Regonini, ‘Parlamenti analitici’ (2012) 1 *Rivista italiana di Politiche Pubbliche* 33-87, spec. 78, the institutionalisation of regulatory policies in the last few decades has completely changed the political framework on which these classical theories were based.

152 G. Luchetta, ‘Impact assessment and the policy cycle in the EU’ (2012) 4 *European Journal of Risk Regulation*, 561-575.

153 According to European Commission, ‘Better Regulation Guidelines’ (2015) COM(2015) 215 final - SWD(2015) 110 final 5, better regulation covers policy design and preparation, adoption, implementation (transposition, complementary non-regulatory actions), application (including enforcement), evaluation and revision.

154 On Better Regulation as composed of these three stages, see Jančić, *supra* at 23, 45 ff.



of the transposition and implementation phases. Instances related to each of the above-mentioned stages are discussed in the following sub-sections.

### 3.1. The pre-legislative stage

The pre-legislative stage serves as a preliminary phase in the law-making cycle; it spans from legislative or policy planning to the submission of a draft legislative act to the European Parliament and to the Council. At this stage, national parliaments have different scrutiny and IA options and different ways to channel their contribution to EU decision-making (see Figure 1). Better law-making begins with good legislative planning based on inter-institutional cooperation. Multiannual and annual programming is in fact subject to a dialogue between the Commission, the European Parliament and the Council.<sup>155</sup> National parliaments are not formally supposed to participate in this stage. However, the Annual Work Programme of the Commission, and other instruments of legislative or policy planning and Commission consultation documents (green and white papers and communications) are made directly available to national parliaments by the Commission.<sup>156</sup> These documents are therefore open to contributions by national parliaments through Political Dialogue, the practice started in 2006 with the ‘Barroso initiative.’ Lacking a Treaty basis, the functioning of the mechanism relies entirely on voluntary engagement and participation.

Partly because of these intrinsic limits, the capacity of national parliaments to scrutinise the Commission Work Programme still proves rather weak. Most of the parliaments have not so far been able to use this scrutiny window to engage in an early assessment of the substance of EU policy options. In its turn, the

<sup>155</sup> See the Interinstitutional Agreement on Better Law-Making (supra at 1), Section II ‘Programming.’

<sup>156</sup> See art. 1, Protocol No. 1 on the role of national Parliaments in the European Union, annexed to the Treaty of Lisbon.

Commission does not usually provide insightful replies that may contribute to strengthening the background information and awareness of national parliaments.<sup>157</sup> In order to bypass these weaknesses, national parliaments may engage in ‘collective’ scrutiny of the Commission’s Work Programme by resorting to Cosac’s contributions to the Commission, as provided for by art. 10 of Protocol No. 1 annexed to the Treaty of Lisbon. Although the Commission is not bound by these contributions, “this avenue allows NPs to discuss the Work Programme *in concreto*.”<sup>158</sup> Moreover, because of the way that it is structured, the Annual Work Programme provides a means of assessing the composition of legislative and non-legislative initiatives planned to fulfil specific political goals and of reviewing information on IA and evaluation work that is expected to accompany them.<sup>159</sup>

Further to the planning and validation stage, according to the Better Regulation Guidelines<sup>160</sup> it is in the following stage of evaluation and policy preparation that two major better law-making tools are used by the Commission with the aim of defining the scope and impact of planned initiatives. On the one hand, when introducing a new law or policy the Commission may resort to either roadmaps or to an inception impact assessment.<sup>161</sup> The former are documents aiming to explain what the Commission is considering, which problems must be tackled, which objectives pursued, why EU action is needed and what the added value is. The latter is a roadmap for initiatives

<sup>157</sup> On this point, see C Fasone and D Fromage, ‘National Parliaments and the EU Commission’s Agenda: Limits and Recent Developments of a Difficult Partnership’, in Fasone et al, supra at 23, 33 f.

<sup>158</sup> *Ibidem*, 34.

<sup>159</sup> The Annual Work Programme includes major legislative draft acts and non-legislative proposals for the following year. For each initiative, the programme provides legal and procedural information, including information concerning IAs and evaluation.

<sup>160</sup> See supra at 40, Section ‘Guidelines on planning.’

<sup>161</sup> According to the Better Regulation Guidelines, the Commission also uses roadmaps to initiate the evaluation or fitness checking of existing laws and/or policies. Roadmaps are required to justify the absence of an impact assessment.



subject to an IA that describes the problem in detail, addressing issues related to subsidiarity and clarifying the likely impacts of each option.

On the other hand, stakeholder consultation is another essential tool serving better law-making purposes in the process of policy preparation, evaluation and review. A 12-week internet-based public consultation is provided for by Section VII of the Commission Better Regulation Guidelines as part of the consultation strategy for initiatives subject to impact assessments, evaluation and fitness checks and for green papers. The key elements of the consultation strategy are outlined in the roadmap or the inception impact assessment. The consultation is addressed to ‘stakeholders,’ including those who will be directly impacted by the policy and also those who are involved in ensuring its correct application. However, this does not apply to inter-institutional consultations, thus explicitly excluding national parliaments from the process of preventative assessment of a policy’s initial design. This exclusion has two potential implications. It may indicate that national parliaments are sidelined, as the Guidelines do not even mention the political dialogue as a parallel channel for participation. Alternatively, it may imply that national parliaments are not treated like the public consulted at large and that a special treatment is reserved for them (consisting in participation through the political dialogue) as institutions exercising public power. Another possible interpretation may be that the Guidelines leave national parliaments the choice of whether to engage in IA at this stage or later. This is the interpretation followed in implementing practice.

Notwithstanding their formal exclusion from stakeholder consultations, in fact, national parliaments have been informally included in the EU online system of automatic notifications about new roadmaps and consultations. The Commission has not yet clarified what the procedural outcomes available to national parliaments gaining access

to these documents are.<sup>162</sup> However, this practice allows them to be timely informed of ongoing initiatives, thus enabling them to actively participate in the pre-legislative phase should they elect to do so.

At this stage, national parliaments willing to engage in a dialogue on EU decision-making have two alternative ways to integrate IA in their decisions: they may draw on Commission roadmaps and inception IAs and carry out an appraisal of the estimated impact/expected outcomes of a proposal; or they may invest in autonomous (and possibly streamlined) IA. In the former case, two distinct channels are open to national parliaments. The ‘direct’ channel offers national parliaments the opportunity to address an opinion directly to the Commission through non-binding informal political dialogue. Consultation documents (such as communications, green and white papers, work programmes and any other legislative or policy planning instrument) are directly sent to national parliaments by the Commission. These documents cannot be scrutinised under the EWS<sup>163</sup> but they can be considered by national assemblies under the heading of political dialogue. Without posing any legal constraint on the Commission, this procedure enables national legislators to participate in the consultation on incoming draft EU legislation through the adoption of a ‘contribution.’

Additionally, or alternatively, by means of the ‘indirect’ channel national parliaments may try to engage in a ‘mediated’ dialogue with EU institutions, resorting to standard oversight procedures addressed to the national government

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162 However, as highlighted by D Jančić, *supra* at 23, 49, the Better Regulation Toolbox, complementing the Better Regulation Guideline (available at [https://ec.europa.eu/info/files/better-regulation-toolbox\\_en](https://ec.europa.eu/info/files/better-regulation-toolbox_en)), mentions *en passant* (and contrary to what is provided for in the Better Regulation Guidelines) national Parliaments among public authorities (potentially) contributing to open public online consultations.

163 The EWS, in fact, only encompasses draft EU legislation (see art. 6 of Protocol no. 2 and art. 1 of Protocol no. 1 annexed to the Lisbon Treaty).



and adopting any other parliamentary document (e.g. resolution, report, decision).<sup>164</sup> These procedures aim to shape the official position of Member States on initiatives planned by the Commission and indirectly contribute to the improvement of EU initiatives. In both hypotheses, we lack robust data with which to test if and how national parliaments engage in either of the two channels as means of *ex-ante* appraisal of initiatives planned by the Commission.<sup>165</sup>

Case studies can, however, be drawn from a detailed analysis of questionnaires annexed to the latest Cosac bi-annual report dealing with national parliaments' examination of pre-legislative initiatives advanced by the Commission on selected topics (e.g. trans-European transport infrastructure, EU energy policy, migration). These reports often question national parliaments on whether and how they have discussed actions/proposals from the Commission. The answers provided by national parliaments only occasionally clarify whether these documents have been scrutinised under the lens of the political dialogue or through any other parliamentary scrutiny procedure.<sup>166</sup> Even fewer details are offered on the methodology followed by the parliament to assess

164 National Parliaments may eventually decide to 'debate' the proposal, in committee or in plenary, without adopting any conclusive document. This hypothesis is not specifically taken into consideration in this article as it only marginally relates to the integration of IA in decision-making.

165 Some comparative data on procedures and practices followed by national parliaments are available through the Cosac bi-annual reports and through the European Centre for Parliamentary Research & Documentation (ECPRD) Network (see *infra*).

166 This is the case of the answers to the survey annexed to the Cosac 'Eighteenth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny', 27 September 2012 (<http://www.cosac.eu/documents/bi-annual-reports-of-cosac/>) 20, dealing with the proposal for a Regulation of the European Parliament and of the Council on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC (COM(2011) 658). The survey found that 27 out of 41 Parliaments/Chambers scrutinised the proposal, but only 4 through the 'political dialogue' (submitting a contribution to the proposal). The remainder either merely 'debated' the proposal (12) or used the 'indirect' channel, adopting another type of document (11).

the proposal and whether it includes an (even simplified) appraisal of the impact assessment estimated by the Commission itself.

On the whole, national parliaments have more chances to engage in IA reasoning when they scrutinise the Commission's proposals or actions by means of the political dialogue. This is due to the fact that subsidiarity and proportionality concerns may be better explained through basic IA arguments.<sup>167</sup> Outside the remit of political dialogue, parliaments may try to challenge specific estimations of Commission IAs as a means of arguing against the political desirability/sustainability of a proposal. An example is offered by the survey included in the twenty-fourth Cosac report on parliamentary discussion of action proposed by the European Commission concerning the relocation and resettlement of migrants.<sup>168</sup> Many parliaments from eastern Europe<sup>169</sup> opposed country quotas defined by the European Commission and supported the distribution of refugees on a voluntary basis. Some of them made use of basic IA reasoning to

167 See, for instance, the survey on national parliaments/chambers' discussion of a number of proposals and communications on energy security and energy efficiency, as well as renewables and other related dimensions, published in Cosac, 'Twenty-Sixth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny', 18 October 2016 (<http://www.cosac.eu/documents/bi-annual-reports-of-cosac/>) 15 ff. A minority of parliaments/chambers planned to engage in the political dialogue on two communications from the Commission, one on 'An EU strategy for liquefied gas and gas storage' (COM (2016) 49) and the other on 'An EU Strategy on Heating and Cooling' (COM (2016) 51), raising concerns about the expected impact on both consumers and on Member States.

168 Cosac, 'Twenty-Fourth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny', 4 November 2015 (<http://www.cosac.eu/documents/bi-annual-reports-of-cosac/>) 26 f. The relocation and resettlement actions were included in the first implementation package on the European Agenda on Migration (European Commission, 'Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions' (13 May 2015) COM/2015/0240 final).

169 The Polish *Senat* and *Sejm*, the Hungarian *Országgyűlés*, the Estonian *Riigikogu*, the Czech *Poslanecká sněmovna* and *Senát*, the Lithuanian *Seimas*, the Latvian *Saeima* and the Slovak *Národná rada*.



support their political position.<sup>170</sup> However, this reasoning did not always result in the adoption of a document to be addressed either to the European Commission or to the national Government.<sup>171</sup>

The incomplete picture resulting from these partial data seems to show that national parliaments are keener to use the indirect channel than to participate in direct dialogue with the Commission. The use of IA reasoning is far from made explicit; it is randomly used mostly to support political arguments against a specific proposal and it is only occasionally applied to draft formal parliamentary documents (opinions, resolutions, reports) for submission either to the Commission or to the national Government.

Alternatively to referring to Commission roadmaps and inception IAs, national parliaments may themselves engage in forms of *ex-ante* assessment to scrutinise Commission documents under the heading of political dialogue. Among the most relevant tools are public consultations. The use of public consultations by national parliaments to improve their cooperation with the Commission in the early stages of the legislative

170 For instance, the position agreed by the EU Affairs Committee of the Polish *Sejm* stressed that the European Commission had exceeded the mandate established by the European Council on the relocation and resettlement programme, which expressly refers to voluntariness and not compulsoriness. The principle of voluntariness implies allowing every Member State that would like to support frontier countries to assess its capacity, asylum system, integration capabilities, etc (Annex to Cosac, supra at 55, 286 f.). In its Resolution No. 161 of 18 June 2015 the Czech *Senát* rejected the mandatory relocation of migrants, noting that it does not address the reasons for the current massive wave of migration, has no relation to the protection of migrants in the Mediterranean Sea and does not contribute to a reduction in migration pressure on Europe as a whole; on the contrary, it may encourage more people to illegally migrate to the European Union in life-threatening ways (ivi, 84). The Romanian Senate expressed disagreement with using a standard mechanism without taking into consideration the particularities of each Member State in respect of relocation in the EU and resettlement and contributions to the activities of European agencies such as Frontex (ivi, 332).

171 Many answers are ambiguous in this regard, as respondents from national parliaments/chambers often refer to a 'common position' rising out of debates in committee or in the plenary that, however, did not result in a vote over a formal document.

process is mentioned in the 22<sup>nd</sup> Cosac bi-annual report on "new trends in the EU policy- and decision-making process." The Report primarily highlights the necessity of consultations by national parliaments resulting in direct inputs addressed to the Commission, and of the Commission including in its summary report on the consultation a dedicated section for national parliaments' replies.<sup>172</sup>

A complete picture of how intensively national parliaments use these tools as a means of *ex-ante* appraisal of Commission proposals is not yet available. Some relevant practices can, however, be examined. For instance, during the Interparliamentary Conference on Energy, Innovation and Circular Economy held in The Hague on 3-4 April 2016, the EU Commissioner for environment, Karmenu Vella, appreciated as a best practice the consultation by the Italian Senate on the second circular economy package published in December 2015 by the EU Commission. The public internet-based consultation held for 8 weeks between February and March 2016 was deliberately promoted by the Environmental Standing Committee of the Italian Senate within the new better law-making framework as a means of participating in the EU decision-making process with contributions on the merits of the EU Commission's proposals. The consultation gathered oral and written evidence from a large number of private and public bodies.<sup>173</sup> Based

172 The Report states that a large majority of responding parliaments/chambers (25 out of 30) favour the idea of *ad hoc* national parliament public consultations and of having a dedicated section for their replies in the European Commission's summary report on the consultation. The UK House of Lords expressed the hope that the Commission's annual report on relations with national parliaments would be used to identify the impact of engagement by national parliaments. See Cosac, "Twenty-second Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny", 4 November 2014 (<http://www.cosac.eu/documents/bi-annual-reports-of-cosac/>) 31.

173 Details on the methodology followed, on the contributions submitted by respondents and on the outcomes of the consultation are published in the report drafted by the Italian Senate's Research Service. See Servizio studi del Senato, 'La consultazione pubblica



on these results, the Environmental Commission drafted a resolution, which was submitted to the European Commission through the political dialogue, including proposals for amendment.

### 3.2. The legislative stage

According to the Interinstitutional Agreement on Better Law-Making,<sup>174</sup> the Commission carries out IA of legislative initiatives which are expected to have significant economic, environmental or social impact. The initiatives included in the Commission Work Programme are, as a general rule, accompanied by an IA. The Agreement explicitly provides for the final results of IAs to be made available (as ‘privileged’ addressees) not just to the EP and to the Council but also to national parliaments<sup>175</sup> along with the opinion(s) of the Regulatory Scrutiny Board.<sup>176</sup> This accreditation does not seem to have major practical implications, as the final results of IAs are in any case made public at the time of adoption of a Commission initiative. However, its institutional meaning should not be underestimated. The explicit reference to national parliaments is, in fact, directly connected to the role that they play in the scrutiny of legislative initiatives under the lens of the subsidiarity principle.<sup>177</sup>

Since the Mandelkern Report, published in 2001,<sup>178</sup> the subsidiarity principle has been known as a ‘regulatory principle’ in the EU.<sup>179</sup>

della 13<sup>a</sup> Commissione (Territorio, Ambiente, Beni ambientali) sull’economia circolare’ (2016) 328 *Dossier*.

174 See supra at 1, par. 13.

175 Ibidem.

176 This is the body established within the General Secretariat of the Commission to replace the Impact Assessment Board charged with checking impact assessments conducted by the Commission itself.

177 This is true for initiatives falling within an area where the EU does not have exclusive competence.

178 The Mandelkern Report was adopted in 2001 by the High Level Advisory Group established in response to the ‘Lisbon strategy’ and the call for a simplification of the regulatory environment both at the national and European levels.

179 O Pimenova, ‘Subsidiarity as a ‘regulation principle’ in the EU’ (2016) 4 *The theory and practice of legislation* 381-398, 382.

The participation of national parliaments in the Early Warning System (EWS) is therefore treated as a fundamental component in the better law-making cycle.<sup>180</sup> Not by chance, the Resolution of the European Parliament on EU Regulatory Fitness and Subsidiarity and Proportionality – Better Lawmaking,<sup>181</sup> while noting the crucial importance of IAs as tools for aiding decision-making in the legislative process, “stresses the need, in this context, for proper consideration to be given to issues relating to subsidiarity and proportionality.” It thus strongly underlines the importance of parliamentary scrutiny by national parliaments, beside the European Parliament, and welcomes the closer participation of national parliaments in the framework of the European legislative process.

However, the regulatory relevance of the subsidiarity scrutiny carried out by national parliaments is not universally acknowledged. There is widespread scepticism about the practical potential of the EWS to serve IA purposes. The EWS is often approached as a mechanism for *ex-ante* political scrutiny which can contribute to the multi-level dialogue but in no way can act as an administrative tool for evaluating legislation. In fact, the involvement of national parliaments in the EWS may prove to be a more or less relevant regulatory tool depending on how subsidiarity scrutiny is interpreted and performed and on

As highlighted in S Blockmans et al, ‘From Subsidiarity to Better EU Governance: a Practical Reform Agenda for the UE’ (2014) 10 CEPS Essay 3 ([www.ceps.eu](http://www.ceps.eu)), “subsidiarity is inherently connected to debates on smarter regulation, deregulation, improving the democratic accountability of EU policies and institutional equilibrium.”

180 The 8 weeks available to national Parliaments for subsidiarity scrutiny within the EWS run in parallel with the 8 weeks open to feedback from stakeholders. According to the Better Regulation Guidelines (Section 4), citizens and stakeholders are given 12 weeks to react to consultation documents. Therefore, once a proposal is formally adopted, 8 more weeks are provided for feedback on the initiative and, when applicable, on the impact assessment.

181 European Parliament, ‘Resolution of 4<sup>th</sup> February 2014 on EU Regulatory Fitness and Subsidiarity and Proportionality - Better Law-making’ (2014) 2013/2077/INI, par. 15.



whether it encompasses embryonic forms of IA (see Figure 2).

The implementing practices of the last ten years have shown quite different conceptions of subsidiarity scrutiny and views of its connection to other related principles. On the one hand, the European Commission has come to adopt a 'narrow' vision of the EWS in which it is confined to a legal assessment of the principle of subsidiarity. Any further consideration and contribution should instead be channelled through the political dialogue.<sup>182</sup> On the other hand, national parliaments have drawn up quite different approaches to subsidiarity review. Some parliaments/chambers have shared the narrow EWS vision fostered by the EU Commission. Conversely, others have supported (whether explicitly or through consequential arguing in their reasoned opinions) that the review of the subsidiarity compliance of a measure may comprise assessment of other related principles that are an intrinsic part of subsidiarity scrutiny, including the 'adjacent' principle of proportionality.<sup>183</sup> Whereas subsidiarity scrutiny implies assessing whether legislation is needed (necessity test) and EU action is appropriate (added value test), the principle of proportionality questions whether the means that are provided for are the least intrusive or burdensome to achieve the goals fixed. These two tests are closely related

182 In its Communication to the European Parliament, the Council and the national Parliaments on the review of the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No. 2 (COM (2013) 851 fin), the European Commission, in assessing the 'yellow card' raised by national Parliaments declared that there was no breach of subsidiarity because many of the reasoned opinions were motivated on the basis of proportionality or through other policy issues unrelated to subsidiarity.

183 The principle of proportionality, jointly with the principle of conferral, is considered 'adjacent' to subsidiarity "in the sense that the three of them appear together in Article 5 TEU as consecutive tests of the appropriateness of EU legislation;" I Cooper, 'Is the Early Warning Mechanism a Legal or a Political Procedure? Three Questions and a Typology', in AJ Cornell and M Goldoni, *National and Regional Parliaments in the EU-Legislative procedure Post-Lisbon. The Impact of the Early Warning Mechanism* (Oxford, Hart Publishing, 2017) 17 ff.

to each other. The subsidiarity test may not be satisfied by an abstract and formal appraisal of whether EU legislation is needed and appropriate in a certain regulatory area. Subject to the goal that is assumed,<sup>184</sup> the subsidiarity concern may require that the content of the proposal is taken into consideration and the relationship between goals and means is assessed. Not by chance, art. 5 of Protocol No. 2 annexed to the Treaty of Lisbon provides that all draft legislative acts forwarded to national parliaments must be justified with regard both to subsidiarity and to proportionality.<sup>185</sup> By contrast, arts. 6 and 7 of the same Protocol limit the EWS to subsidiarity scrutiny,<sup>186</sup> thus leaving the proportionality test to the "constructive criticism" of the political dialogue.<sup>187</sup> Regardless of this formal constraint, some national chambers or parliaments have taken a 'broad' approach to the EWS, either including aspects of proportionality in the subsidiarity control or factually combining (on procedural grounds too) the EWS and the political dialogue.<sup>188</sup> This is the case, among others, of the Swedish Riksdag,<sup>189</sup> the Italian

184 As highlighted in GA Moens and J Trone, 'The Principle of Subsidiarity in EU Judicial and Legislative Practice: Panacea or Placebo' (2015) 41 *Journal of Legislative Studies* 78, the subsidiarity test is not about questioning the goal, but rather assessing who is to achieve it.

185 According to the Interinstitutional Agreement on Better Law-making (par. 25), the Commission accomplishes this duty by providing, in the explanatory memorandum accompanying a proposal, an explanation and justification to the European Parliament and to the Council regarding its choice of the legal basis and type of legal act. In the memorandum, the Commission must explain how the measures proposed are justified in the light of the principles of subsidiarity and proportionality.

186 Art. 8 of the same Protocol also limits appeals to the ECJ to the sole principle of subsidiarity, thus excluding proportionality from this sphere of action.

187 Cooper, *supra* at 70.

188 D Jancic, 'The Game of Cards: National Parliaments in the EU and the Future of the Early Warning Mechanism and the Political Dialogue' (2015) 52 *Common Market Law Review* 939.

189 The Riksdag's Committee of Constitution has declared that there is no obligation to jointly scrutinise subsidiarity and proportionality, but that there is support for including a limited proportionality test. This interpretation is the one prevailing in implementing practice. See AJ Cornell, 'The Swedish Riksdag as Scrutiniser of the Principle of Subsidiarity' (2016) 12 *European Constitutional Law Review* 308 ff.



Senate<sup>190</sup> and the Portuguese Parliament.<sup>191</sup> The option for a narrow or a broad approach to the subsidiarity test deeply influences the connection with IA. The proportionality test, even more than ‘simple’ subsidiarity scrutiny, may in fact offer national parliaments the opportunity to engage in an embryonic form of IA of an EU proposal.

Further opportunities for engaging in IA arguments are offered to those national parliaments willing to include in their scrutiny a sort of ‘political judgment’ on the policy effectiveness of proposals. This may include assessing whether legislation is designed to achieve its stated purposes, thus contributing to IA purposes.<sup>192</sup> These evaluations, which are formally confined to the political dialogue, have at various times been included in the reasoned opinions forwarded by national parliaments under the EWS.<sup>193</sup>

Depending on how the subsidiarity assessment is conducted with reference to both the scope of the review and the connection with the political dialogue, national parliaments are offered mechanisms of variable intensity for engaging in IA processes and contributing to better law-making. This does not, however, automatically imply that the broader the approach to subsidiarity

190 On the combination of the EWM and the political dialogue in the practice of the Italian Senate, see N Lupo, ‘The Scrutiny of the Principle of Subsidiarity in the Procedures and Reasoned Opinions of the Italian Chamber and Senate’, in Cornell and Goldoni, *supra* at 70.

191 D Jancić, ‘The Portuguese Parliament and EU Affairs: From Inert to Agile Democratic Control’, in Heffler, Neuhold, Rozenberg and Smith, *supra* at 22, 366 ff.

192 On the ‘insufficiency’ test relating to policy efficiency objections, see Cooper *supra* at 70.

193 The ‘policy effectiveness’ criterion has been used, for instance, in some of the reasoned opinions that contributed to raising the ‘yellow card’ on the Monti II proposal for regulation on the right to strike (COM (2012) 130 fin). Many objections deemed the proposal unsuited to the purpose stated in the explanatory memorandum. See I Cooper, ‘A yellow card for the striker: national parliaments and the defeat of EU legislation on the right to strike’ (2015) 22 *Journal of European public policy* 1406 ff.; F Fabbrini and K Granat, “Yellow card, but no foul”: The role of the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike’ (2013) 50 *Common Market Law Review* 115 ff.

scrutiny, the greater the chances offered to national parliaments to engage in forms of IA. Excesses in broadening the subsidiarity test may lead to including in this scrutiny forms of political judgment over a proposal’s compliance with given political priorities or values that have little to do with IA.<sup>194</sup> These purely political objections go beyond the IA remit. They do not aim at providing arguments to challenge the Commission’s appreciation of the necessity and appropriateness of proposals; rather, their sole scope is to debate initiatives relying on given political preferences.

Regardless of the ‘title’ used by NPs to scrutinise EU proposals – whether they resort to the EWS or they take advantage of the political dialogue – they mostly rely upon Commission IAs to assess the effects of proposals. However, there seems to be at least one instance suited to engaging national parliaments in endogenous embryonic forms of IA. This lies in the connection between regional parliaments and involvement in the EWS. According to art. 6 of Protocol No. 2, in fact, within the EWS “it will be for each national parliament or each chamber of a national parliament to consult, where appropriate, regional parliaments with legislative powers.”<sup>195</sup> The wording does not clarify whether national parliaments are obliged to consult regional parliaments or whether this is left open to their choice. The practice of the last decade in the eight EU Member States featuring decentralisation of legislative powers to regional entities has shown that the latter interpretation prevails. Further to an intensive differentiation in the procedural interaction between national

194 Cooper (*supra* at 70) labels these behaviours as “*political expediency*: objections based on the values and/or interests of the parliaments or parliamentarians concerned”.

195 On the subsidiarity scrutiny as a dimension permeated by the interaction between national and regional Parliaments, see Cornell and Goldoni, *supra* at 70; G Abels and A Eppler, *Subnational parliaments in the EU multi-level parliamentary system: taking stock of the post-Lisbon era* (Innsbruck, Studienverlag, 2016); GV Arribas et al, ‘Legislative Regions after Lisbon: A New Role for Regional Assemblies?’, in Heffler, Neuhold, Rozenberg and Smith, *supra* at 22, 133 ff.



and regional parliaments,<sup>196</sup> a major variation has come to identify the capacity of national assemblies to include regional complaints in their contributions and opinions. As a consequence, it could be assumed that national parliaments that are willing to take into account regional arguments in relation to their participation in the EWS and political dialogue<sup>197</sup> are factually subjecting EU proposals to forms of IA tailored to their regional organisation.

In a number of national experiences, it is possible to find elements in support of the incorporation of regional concerns in the scrutiny carried out by the national parliament. This is not so much the case of Belgium, where regional parliaments are recognised with very strong and formalised guarantees of participation in the EWS,<sup>198</sup> and, however, their involvement in the national parliamentary system seems to rely on an atomistic rather than cooperative view of inter-parliamentary domestic relations. Rather, the reference is primarily to the Austrian case, where regional parliaments represented in the *Bundesrat* find an easy way to voice their subsidiarity concerns. The Italian experience offers another significant case of close cooperation between national and regional assemblies: according to art. 9.2. of Law no. 243/2012 regulating participation in the EU, the two houses are formally bound to ‘take into account’ regional contributions. This provision has found implementation particularly in the Italian Senate’s practice of cooperating with the Conference of the Presidents of the Regional

196 For an exhaustive and critical overview, see D Fromage, ‘Regional Parliaments and the Early Warning System: an Assessment Six Years after the Entry into Force of the Lisbon Treaty’ (2016) 33 *SOG Working Paper Series* (www.sog.luiss.it).

197 On regional parliaments’ participation in the political dialogue through their national chambers/parliaments, see Fromage, *ibidem*, 32.

198 Unlike other regional parliaments in EU Member States, Belgian regional Parliaments are not dependent on the federal parliament to have their contributions/opinions forwarded to the EU Commission. See W Vandenbruwaene and P Popelier, ‘The Subsidiarity Mechanism as a Tool for Inter-Level Dialogue in Belgium: On “Regional Blindness” and “Cooperative Flaws”’ (2011) 7 *European Constitutional Law Review* 221.

Councils, aiming at fostering political dialogue with regional parliaments.<sup>199</sup> In Britain, although the Parliament’s relationship with devolved assemblies is flexible, reasoned opinions of British regional parliaments are in any case forwarded to the government in view of its participation in negotiations at the Council level.

The British House of Lords’ Reasoned opinion<sup>200</sup> on the Draft Directive on public procurement<sup>201</sup> offers an interesting precedent showing how the expected impact of the EU proposal on the regional architecture can substantiate the raising of subsidiarity concerns. One of the main claims included in the opinion<sup>202</sup> is that neither the explanatory memorandum nor the Commission IA carry out the requirement under Art. 5 of Protocol No. 2 to prepare a “detailed statement” containing “some assessment in the case of a directive of its implications for the rules to be put in place by Member States, including where necessary the regional legislation.” The opinion thus supports the concerns raised by the National Assembly for Wales that the proposal would breach the devolution principle as an inherent part of the UK’s constitution. It specifically “fails to reflect the way in which separate implementing regulations have hitherto been made in Scotland and the way in which extensive administrative and advisory functions in relation to procurement in Wales are exercised by or on behalf of Welsh Ministers.”

These ‘best practices’ of cooperation between

199 As correctly observed in C Fasone, ‘Towards new Procedures between State and Regional Legislatures in Italy, Exploiting the Tool of the Early Warning Mechanism’ (2013) 5 *Perspectives on Federalism* 122, this outcome has been implicitly supported by the adoption of a wide interpretation of EWS scrutiny, which has allowed regions to voice their concerns not only on matters completely devolved to them, but also on issues which would in any case have a repercussion on them.

200 See House of Commons, ‘Reasoned opinion concerning a Draft Directive on procurement by entities operating in the water, energy, transport and postal services sectors and a Draft Directive on public procurement’, 6 March 2012 (<http://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/scrutiny-reserve-overrides/>).

201 COM (2011) 896 final.

202 *Supra* at 87, par. 17.



national and regional parliaments are, however, exceptions in the daily practice of the EWS and of the political dialogue. Problems of political incentives, technical expertise and capacity, time and procedural restraints often limit the positive interaction that national and regional parliaments can offer to better regulation.<sup>203</sup> To overcome the restrictions that subsidiarity scrutiny faces as a potential IA tool and to promote greater homogeneity in implementation by representative assemblies, one possibility is to adopt common scrutiny guidelines to assist national parliaments in their assessment of compliance with the principle of subsidiarity. The option has been formally advocated by the European Parliament<sup>204</sup> and some proposals in this sense have been shared in the Cosac context.<sup>205</sup> From a normative perspective, to let subsidiarity scrutiny serve as a potential IA tool the guidelines should support a broad approach to the EWS, thus enabling national parliaments to evaluate *in concreto* the expected impact of proposals.<sup>206</sup> A procedural definition of the different stages of the subsidiarity test would provide another valuable support.<sup>207</sup>

203 From a normative perspective, it has been assumed that “regional parliaments with legislative competences should (...) only participate in the EWM in limited cases of particular political importance whereas all regional assemblies should be given the possibility to express their opinion, through their national Parliament, in the framework of the political dialogue.” D Fromage, ‘Regional Parliaments and the Early Warning System: An Assessment and Some Suggestions for Reform,’ in Cornell and Goldoni, *supra* at 70, 136.

204 European Parliament, *supra* at 68, par. 17.

205 See for instance Cosac, *supra* at 55. Building on the Contribution of the LIII Cosac, which noted that a majority of parliaments/chambers were in favour of issuing a voluntary non-binding set of best practices and guidelines, the Twenty-Fourth Bi-annual Cosac Report collects the views of parliaments/chambers on the areas that these informal guidelines should cover and presents best practices.

206 J Hettne, ‘Reconstructing the EWM?’, in Cornell and Goldoni, *supra* at 70, advances a proposal aiming at making the subsidiarity review wider so as to include the principles of conferral, proportionality and respect for national identity. It advocates conceiving of the EWS as a “constitutional dialogue” (or “a political dialogue regarding constitutional issues”).

207 According to Blockmans et al, *supra* at 66, Cosac could be the right platform for exchanging best practices on approaches to subsidiarity and the use of subsidiarity checks by national parliaments.

### 3.3. The post-legislative stage

In the better law-making cycle, the post-legislative stage involves the evaluation of existing legislation and policy based on the criteria of efficiency, effectiveness, relevance, coherence and value added. This evaluatory stage should provide the basis for IA of options for further action. In this stage, national parliaments find two distinct levels of engagement in IA (see Figure 3). At the EU level, specific *ex-post* evaluation tools are ‘fitness checks,’ which are carried out to assess the regulatory framework of a policy area. The Regulatory Fitness and Performance Programme (REFIT), launched by the EU Commission in December 2012,<sup>208</sup> aims to review the entire stock of EU legislation, to identify burdens, inconsistencies, gaps or ineffective measures. According to the Interinstitutional Agreement on Better Law-Making of 13 April 2016, the evaluation of existing legislation is subject to the Commission’s multiannual planning, which is communicated to the EP and to the Council.<sup>209</sup> The Communication from the Commission on the REFIT explicitly mentions the key role played by national parliaments in ‘smart regulation’ in checking that the subsidiarity principle is correctly applied<sup>210</sup>. However, this statement has not led to concrete involvement of national parliaments in *ex-post* IA so far. The Better Regulation Agenda itself has not promoted any form of engagement for national parliaments in the evaluation of the added value of EU legislation that is already in force.

208 COM (2012) 746 fin.

209 *Supra* at 1, par. 21.

210 European Commission, ‘Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions ‘EU Regulatory Fitness’ (2012) COM (2012) 746 fin 10-11 (Ch. 5.2.), introducing the Regulatory Fitness and Performance Programme (REFIT), a programme aiming at promoting the accomplishment of EU policy goals through the so-called ‘fitness checks’: through regulatory mapping, the REFIT programme identifies policy areas with the greatest potential for regulatory costs (i.e. burden) reduction and simplification.



The EWS does not formally apply to these procedures. Because of its nature, the political dialogue is not considered applicable to fitness checks.<sup>211</sup> In fact, some of the reports by the Commission to the EP and the Council on the REFIT evaluation of the implementation of selected pieces of legislation are scrutinised by a few parliaments/chambers mainly formally, just ‘taking note’ of the document without any significant political follow-up.<sup>212</sup>

If national parliaments are marginalised in the REFIT evaluations, they might still find another indirect channel for contributing to post-legislative IA in cooperation with the European Parliament. The EP has its own *ex-post* IA tool at its disposal, termed ‘Implementation Reports’. This tool is rooted in the power, formally entrusted to parliamentary committees by the EP Rules of Procedure,<sup>213</sup> to scrutinise how EU legislation, soft law instruments and international agreements have been transposed into national law, implemented and enforced. Compared to the Commission’s *ex-post* evaluations, this kind of evaluation report is considered to be specifically tailored to the needs of parliamentarians, combining ease of use<sup>214</sup> and political oversight purposes.<sup>215</sup> The activity of parliamentary committees in the area of *ex-post* IA is supported by the EP Research Service’s “Implementation appraisals,” which aim to assess the state of implementation of all the legislative acts listed for revision in the Commission Annual Work Programme.

211 Jančić, *supra* at 23, 49.

212 Data are available on the IPEX Platform. The REFIT Reports are usually accompanied by Staff Working Documents providing an executive summary of the evaluation.

213 Annex XVII, Article 1, indent 1(e).

214 I Anglmayer, ‘Evaluation and ex-post impact assessment at EU level’, *European Parliament Research Service Briefing Better Law Making in Action*, September 2016 (<http://www.europarl.europa.eu>) 7.

215 These reports not only serve as a means of publicity; they also act as an oversight tool aiming at holding the Commission accountable for surveillance over the implementation and transposition of EU legislation. After an implementation report is adopted in plenary, the EU Commission is required to inform the EP on how specific requests included in the report have been followed up.

Undoubtedly, the *ex-post* IA activity of the EP could benefit from the involvement of national parliaments in the collection of information on transposition and implementation procedures and in the monitoring of related deficiencies. Some advances have been made in this direction through the implementation of the online platform Unified Repository Base on Implementation Strategies (URBIS), which aims to gather and make available a collection of contributions from national parliaments, regional entities, national interest groups and citizens on the implementation of EU legislation at the national and regional levels.<sup>216</sup> Irrespective of its informal nature based on administrative inter-parliamentary cooperation, the URBIS framework could prove an extremely valuable tool for information sharing on evaluation and scrutiny across Member States. However, the results achieved so far have not proven sufficiently effective.<sup>217</sup> This is not due to a lack of administrative commitment or distrust in inter-parliamentary cooperation in this field.<sup>218</sup>

216 The initiative was presented in December 2015 through a letter from the Secretary-General of the EP addressed to the Secretaries-General of the national parliaments. This was followed by a request entitled “Contributions of National Parliaments to the pre-legislative phase of EU law,” submitted on 11 March 2016 within the ECPRD Network to collect the opinions of national parliaments on how to contribute to the new platform. National parliaments were asked to confirm whether the evaluation/scrutiny of EU legislation is recorded in any kind of parliamentary working/research/reflection document or political resolution that can be made available for public consultation, and were asked whether they were willing to share these evaluation/scrutiny documents publicly via URBIS. These administrative initiatives were preceded by a letter from the EP President dated 5 June 2014 which offered national parliaments a new form of cooperation with the EP enabling them to share their positions or background knowledge on the implementation of legislation that the Commission intends to amend.

217 For a critical appraisal of the main limits of the URBIS platform, see Auel, in this Volume.

218 A survey carried out in the Cosac network and published in Cosac, “Twenty-Third Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny”, 6 May 2015, 40 (<http://www.cosac.eu/documents/bi-annual-reports-of-cosac/>) has shown that the vast majority (26 out of 32) of the responding parliaments/chambers are willing to share with the EP their best practices and/or ideas on parliamentary monitoring of transposition, implementation and enforcement of EU law. Only a few parliaments (the Finnish *Eduskunta* and the Polish *Sejm*) formally opposed the idea. However, in their answers to the survey published in the Annex



Rather, as the Cosac twenty-third bi-annual report clearly pointed out, the involvement of national parliaments in the sharing of information is limited by the fact that many representative assemblies do not deal at Member State level with the monitoring of transposition and implementation of EU legislation, and therefore have no information to share.<sup>219</sup>

This leads to the second level of the engagement of national parliaments in ex-post IA, which consists of participation in national procedures for monitoring the transposition and implementation of EU legislation. In the domestic arena, national parliaments have a somewhat differentiated experience of post-legislative scrutiny of EU and EU-derived legislation. The comparative data on this issue are extremely limited. However, some general remarks can be drawn on the factors influencing the approach of national parliaments to this activity. The formal role reserved for national parliaments in the procedures leading to the implementation and transposition of EU law does not seem to represent a key influencing factor on the whole. Parliaments may be engaged in the transposition of EU directives, but they may lack information on the *ex-post* impact of domestic transposing legislation or in any case they may consider the task outside their remit.

Two major factors contribute to determining whether and how national parliaments are engaged in the monitoring of EU law implementation: access to information/capacity to develop a parliamentary background knowledge on whether EU legislation/policies are implemented and

to the Report, some parliaments objected that this information is already made available on IPEX, in some cases misunderstanding the type of contributions that they should share on Urbis: not opinions and contributions adopted in participation in the subsidiarity scrutiny and political dialogue, but the information and background knowledge developed in the monitoring of EU law implementation and transposition.

219 This argument has been explicitly advanced by a number of parliaments/chambers, namely the Portuguese *Assembleia da República*, the Spanish *Cortes Generales*, the Polish *Sejm*, the Austrian *Nationalrat*, the Maltese *Kamra tad-Deputati*. Ibidem.

applied and whether they have produced the intended effects,<sup>220</sup> and setting formal *ex-post* scrutiny prerogatives/competences in favour of the national parliament.<sup>221</sup> Due to the combination of these factors, most national parliaments in EU Member States have no specific experience of this sort.

Things are different for parliaments with an established capacity/experience in the post-legislative scrutiny of domestic law.<sup>222</sup> It is highly probable that representative assemblies engaging in the *ex-post* monitoring of the implementation of domestic legislation/policies devote part of their activity to EU-derived legislation. Even within this more limited level of experiences, a difference should be drawn between a 'bureaucratic' and an 'evaluatory' approach to monitoring duties. In the former case, the parliament is merely concerned

220 In the Annex to the Cosac Twenty-Third Bi-annual Report (supra at 105), some parliaments/chambers declare that they do not systematically collect/have access to this type of information (Czech Senate, Luxembourg Parliament), which might be available through more appropriate channels, such as the EU Commission or the Court of Auditors (Belgium Chamber), and that they have no experience of the issue (Maltese Parliament).

221 More parliaments/chambers (Cosac, supra at 105) have objected that they have no formal competence on the monitoring of EU legislation implementation, claiming that: the parliament is not accountable for the implementation of EU law (Portuguese Parliament); this is instead a task for the European Commission (Belgium Chamber, Polish *Sejm*) or the ECJ (Austria *Nationalrat*); or that no specific parliamentary procedure has been established in this area of activity, which could however be included in the general function of parliamentary control (Cyprus Parliament, Spanish *Cortes Generales*).

222 Some national parliaments have developed their own expertise and experience in the field of policy and legislative *ex-post* evaluations. This is a most likely outcome: a) where the parliament enjoys a formal competence in this sphere of action, set in constitutional or legislative clauses, as in the case of France. See P Avril, 'Le contrôle. Exemple du Comité d'évaluation et de contrôle des politiques publiques' (2008) 6 *Jus Politicum*; L Baghestani, 'A propos de la loi tendant à renforcer les moyens du Parlement en matière de contrôle de l'action du Gouvernement et d'évaluation des politiques publiques' (2011) 78 *Les Petites affiches*; P Türk, *Le contrôle parlementaire en France* (Paris, LGDJ, 2011); b) where the Parliament can count on research and evaluation administrative units and/or external bodies (for an overview of the evaluation bodies supporting national parliaments in post-legislative scrutiny, see E.M. Poptcheva, 'Policy and legislative evaluation in the EU', *Library of the European Parliament Briefing*, 3 April 2013 (<http://www.europarl.europa.eu>)).



with checking the formal compliance of national legislation with EU obligations, in a perspective of preventing future infringements.<sup>223</sup> In the latter, by contrast, the parliament engages in an in-depth evaluation of the effects of EU law transposition and implementation, assessed against the specificities of the domestic context.

Some experiences from the Westminster Parliament are good examples of *ex-post* scrutiny carried out through IA analysis.<sup>224</sup> The reference is to the inquiries produced by the House of Commons Environment, Food and Rural Affairs Committee on the national impact of a range of European Directives relating to waste management. The findings of the House of Lords Select Committee on the Merits of Statutory Instruments concerning the Horse Passports (England) Regulations 2004 instead offer an example of evaluation able to prove that the method of implementation at the national level is more burdensome than required by EU standards.<sup>225</sup>

.....  
223 For instance, since 1971 the French Senate has promoted a post-legislative scrutiny mechanism aiming at assessing how laws have been implemented. The scrutiny is carried out by the standing legislative committees and every year each committee releases a report on the outcomes of the scrutiny activity. These reports have a specific section devoted to EU-derived legislation, but the focus is more on the fulfilment of formal implementing legal duties than on the evaluation of the economic, environmental or social impact of each piece of legislation.

On the limits of this experience, see P Preuvot, 'Réflexion sur les remèdes aux difficultés d'application des lois,' 18 June 2011 ([www.droitconstitutionnel.org/congresNancy/.../preuvotTD6.pdf](http://www.droitconstitutionnel.org/congresNancy/.../preuvotTD6.pdf)) 16 ff. On the activity carried out in this field by the French National Assembly, see Assemblée Nationale, 'Fiche de synthèse n. 52: Le contrôle de l'application des lois et l'évaluation de la législation et des politiques publiques,' 6 June 2017 (<http://www.assemblee-nationale.fr>).

224 These cases are mentioned in UK Law Commission, 'Post-Legislative Scrutiny' (31 January 2006) *Consultation Paper No. 178* par. 9.9. and 9.13. They confirm not only that part of the post-legislative scrutiny work carried out by the UK Parliament covers the implementation of legislation derived from the EU; more significantly, they witness that the scrutiny is concerned with the impact and effects produced by this type of legislation.

225 House of Commons Select Committee on the Modernisation of the House of Commons, '2nd Report,' (2004-05) HC 465-I *Scrutiny of European Business* par. 105. The concern with whether the national regulatory instrument inappropriately implements EU legislation is explicitly mentioned among the working methods of the Committee. See House of Lords Select

These kinds of evaluation reveal a clear connection with one of the requirements set by Section VII of the Interinstitutional Agreement of 13 April 2016 concerning the "Implementation and Application of Union Legislation." As a fundamental criterion for better law-making, Member States are in fact required, when transposing directives into national law, to make the added elements that are in no way related to Union legislation (so called 'gold-plating') identifiable. To comply with this standard method of legislation, national legislative institutions will clearly need to engage in IA analysis. However, such 'best practices' still represent exceptions in the framework of participation by national parliaments in post-legislative scrutiny of EU-derived legislation. On the whole, their pro-active engagement in this sphere of activity continues to be constrained by a variety of factors, relating not only to a lack of political motivation, a scarcity of technical capacity and subjection to informative asymmetries.

A connection with a formal parliamentary function related to the scrutiny of legislation or oversight of governmental conduct is of crucial importance to raise the concern of national parliaments with the monitoring of EU legislation. In other words, why should they invest in a time-consuming and technically demanding activity if the outcome in terms of parliamentary procedure and the potential for political oversight is unclear? This brings us back to the original insight on involvement in IA as an extension of standard scrutiny formal prerogatives enjoyed by national parliaments in their interaction with the EU composite constitutional system.

## 4. Conclusions

Engaging in IA activity is a serious challenge for national parliaments. The difficulties are not only due to a lack of the expertise, capacity, time and political motivation to participate in IA processes. Rather, these factors may become very limiting  
.....  
Committee on the Merits of Statutory Instruments, '1st Special Report,' (2003-04) HL18 *Inquiry into Methods of Working*.



constraints depending on the setting of IA activity within the standard scrutiny/oversight relationship linking national parliaments to the fragmented EU executive. Only where the European or national law provides national parliaments with adequate 'opportunity structures' can they play a proactive role in IA processes. Conversely, it cannot be taken for granted that national parliaments may effectively engage in IA activity when it is framed within codified parliamentary functions with a potential for political oversight.<sup>226</sup> Parliaments are not councils of state in relation to the implementation of the EWS;<sup>227</sup> nor are they independent authorities or courts of auditors with respect to the implementation of IA analysis. They do not think and act 'in a court-like manner' and they are not bound to take their decisions on the basis of technical evidence. Rather, when they approach IA methods, they think and act like legislators whose decisions are mainly adopted by striking political compromises.<sup>228</sup> Therefore, if IA is framed in the standard scrutiny/oversight circuit aiming at making the executive power accountable before parliament, there is no scepticism as regards the possibility of implementing embryonic forms of IA and evidence-based policy-making. Framed in these terms, analysis of the involvement of

226 On this notion, see C Neuhold and A Strelkov, 'New opportunity structures for the "unusual suspects"? Implications of the Early Warning System for the role of national parliaments within the EU system of governance' (2012) 4 *OPAL Online Paper Series*, speaking of the new opportunity structures provided for by the Lisbon Treaty for national parliaments that have thus far not played a 'pro-active' role in EU affairs.

227 This vision, advocated in P Kiiver, *The Early-Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality* (Abingdon, Routledge, 2012) 126 ff. and in Fabbrini and Granat, *supra* at 80, is contrasted by many other authors, among whom M Goldoni, 'The Early Warning System and the Monti II Regulation: the Case for a Political Interpretation' (2014) 10 *European Constitutional Law Review* 90 ff.; Cooper, *supra* at 70; and Hettne, *supra* at 93.

228 On the institutional purposes supporting the parliamentary evaluatory function as an activity where the democratic dimension is predominant and prevails over economic arguments typical of management or budgetary controls, see JP Duprat, 'Le parlement évaluateur' (1998) 2 *Revue Internationale de Droit Comparé* 552.

national parliaments in IA processes, referred to the three main stages of EU law-making (the pre-legislative, legislative and post-legislative stages), offers some provisional insights. On the one hand, national parliaments mainly scrutinise governmental IAs and only occasionally are able to develop their own IA analysis. IA processes tend to highlight the role of national parliaments as scrutinisers or gatekeepers<sup>229</sup> rather than as agenda setters and decision makers.<sup>230</sup> On the other hand, the involvement of national parliaments in IA procedures produces differentiated outcomes at the national and at the European levels. At the domestic level, it is part of the scrutiny/oversight relationship linking the parliament to the national government. Its main purpose is to hold the government to account for its conduct of EU legislative policies in the *ex-ante* and *ex-post* stages related to the formation and implementation of EU law. At the European level, the involvement of national parliaments in IA processes acts as a means of contributing to the Euro-national composite decision-making process and strengthening the information and data available to the EU Commission in the monitoring of EU law implementation. Indirectly, it also serves as a tool for holding EU institutions, including the Commission, accountable for the role they play in initiating, approving and implementing EU legislation.

The involvement of national parliaments in the IA cycle is thus a potentially strategic factor not only for the input and output democratic legitimacy of decision-making. In the EU composite constitutional system of representation and decision-making, national parliaments are repositories of key competences and pieces of information that are crucial to the better law-making purposes and cannot be otherwise gained.

229 Raunio, *supra* at 32.

230 C Fasone and D Fromage, 'From Veto Players to Agenda-Setters? National Parliaments and Their 'Green Card' to the European Commission' (2016) 23 *Maastricht Journal of European and Comparative Law* 294 ff.



Compared to these expectations, the Better Regulation Agenda has been considered to be a sort of “missed opportunity” for introducing new forms of involvement by national parliaments that could go beyond the traditional formats of the political dialogue and of the EWS.<sup>231</sup> Pressures from national legislators towards the introduction on an ‘enhanced political dialogue’ or ‘green card’<sup>232</sup> could have pushed ahead the three EU institutions to figure out different forms of structural participation in the better law-making cycle.

From a normative perspective, some improvements would therefore prove desirable at both the European and national levels. At the European level, one priority is to reinforce the involvement of national parliaments in the early stages of EU decision-making, aiming to get feedback on subsidiarity, proportionality and administrative burdens after the publication of Commission roadmaps and during the consultation process. This would reduce the perceived disconnect between the setting of the legislative layout in the early phases when stakeholders are involved and the official negotiations on the text submitted to national and European institutions.<sup>233</sup> Further reasons for an early involvement of national parliaments in IA may be found in studies dealing with the functions of pre-legislative parliamentary scrutiny at the national level: these deal with informing the legislative process, highlighting the significant issues for the subsequent part of the decision-making process, providing a political judgement on proposals, and assessing the impact of proposals on outside groups.<sup>234</sup> At the national level, pursuant to the two-level game played by national parliaments in the EU arena<sup>235</sup> it has been

231 See Jançic, supra at 23, 49.

232 Fasone and Fromage, supra at 117.

233 See Blockmans et al, supra at 66, 6.

234 On these functions, identified with regard to pre-legislative scrutiny by the UK Parliament, see Power, supra at 29, 47 f.

235 A Benz, ‘An Asymmetric Two-Level Game: Parliaments

argued that strengthening national parliaments’ oversight of the national government represents an indirect means of strengthening their involvement in EU policy-making. From this perspective, “binding mandates for national governments would engage parliaments more closely in EU policy-shaping and make them co-responsible for the decisions taken in the Council.”<sup>236</sup>

A third potentially strategic dimension for future steps towards an ever more integrated better law-making process is inter-parliamentary cooperation. Due to the composite nature of the EU decision-making process, an enriched inter-parliamentary dialogue on IA would prove a valuable stage in which to share national positions and views on the impact of EU legislation both *ex ante*, in the pre-legislative and legislative stages, and *ex post*, in the monitoring of EU law implementation and transposition.<sup>237</sup> The Cosac, through its bi-annual surveys, is already contributing to this purpose by means of sharing views and best practices. However, this form of cooperation could be made more systematic in coordination with the topics and proposals listed in the Commission Annual Work Programme or included in the agendas of the EP and the Council<sup>238</sup>.

in the Euro Crisis,’ in B Crum and JE Fossum (eds), *Practices of Inter-Parliamentary Coordination in International Politics: The European Union and Beyond* (Colchester, ECPR Press, 2013) 125 ff.; B Crum, ‘Parliamentary accountability in multilevel governance: what role for parliaments in post-crisis EU economic governance?’ (2017) *Journal of European Public Policy* 1 ff.

236 Blockmans et al, supra at 66, 7.

237 The value of inter-parliamentary cooperation in *ex-post* IA is clearly demonstrated in sectors with low technical intensity, where transposition of EU law can be fulfilled through a variety of pieces of legislation. One example is offered by the Employment Equality Directive (Directive 2000/78/EC), which only contains general requirements and is open to a variety of transposing and implementing measures. Exchanging best practices through inter-parliamentary cooperation would therefore contribute to gaining sound experience of the Directive’s interpretation and application at the Member State level.

238 Some proposals for strengthening the instrumental role of inter-parliamentary cooperation in the EU are advanced in C Heffler and K Gattermann, ‘Interparliamentary Cooperation in the European Union: Patterns, Problems and Potential,’ in Heffler, Neuhold, Rozenberg and Smith, supra at 22, 94 ff. and D Fromage, ‘Increasing Interparliamentary cooperation in the EU: Current



Fostering an IA-sensitive approach in the different formats and sectoral applications of inter-parliamentary cooperation would in fact contribute to meeting two main goals. On the one hand, it would act as an instrumental dimension, preparatory to the exercise of reinforced individual scrutiny by national parliaments, directed either at the national government or to EU institutions.<sup>239</sup> On the other hand, it would support the exercise of 'collective' action by national parliaments, directly addressed to EU institutions but incidentally also pushing on national executives.<sup>240</sup>

To conclude, a fundamental component of the involvement of national parliaments in IA is the set of follow-up requirements to which executives are bound both at the European and national levels. A key part of the process lies in governmental accountability to parliament on IA work conducted by parliamentary scrutiny bodies. The accountability target may be pursued through a variety of tools and procedures, either binding on the government or relying on informal interinstitutional practices. Regardless of the procedural solution adopted, pushing executives (the EU Commission, but also national governments) to respond to parliament in reaction to the outcome of its engagement in IA processes may offer a strategic incentive for representative assemblies to fully engage with IA processes.<sup>241</sup>

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Trends and Challenges' (2016) 22 *European Public Law* 749 ff.

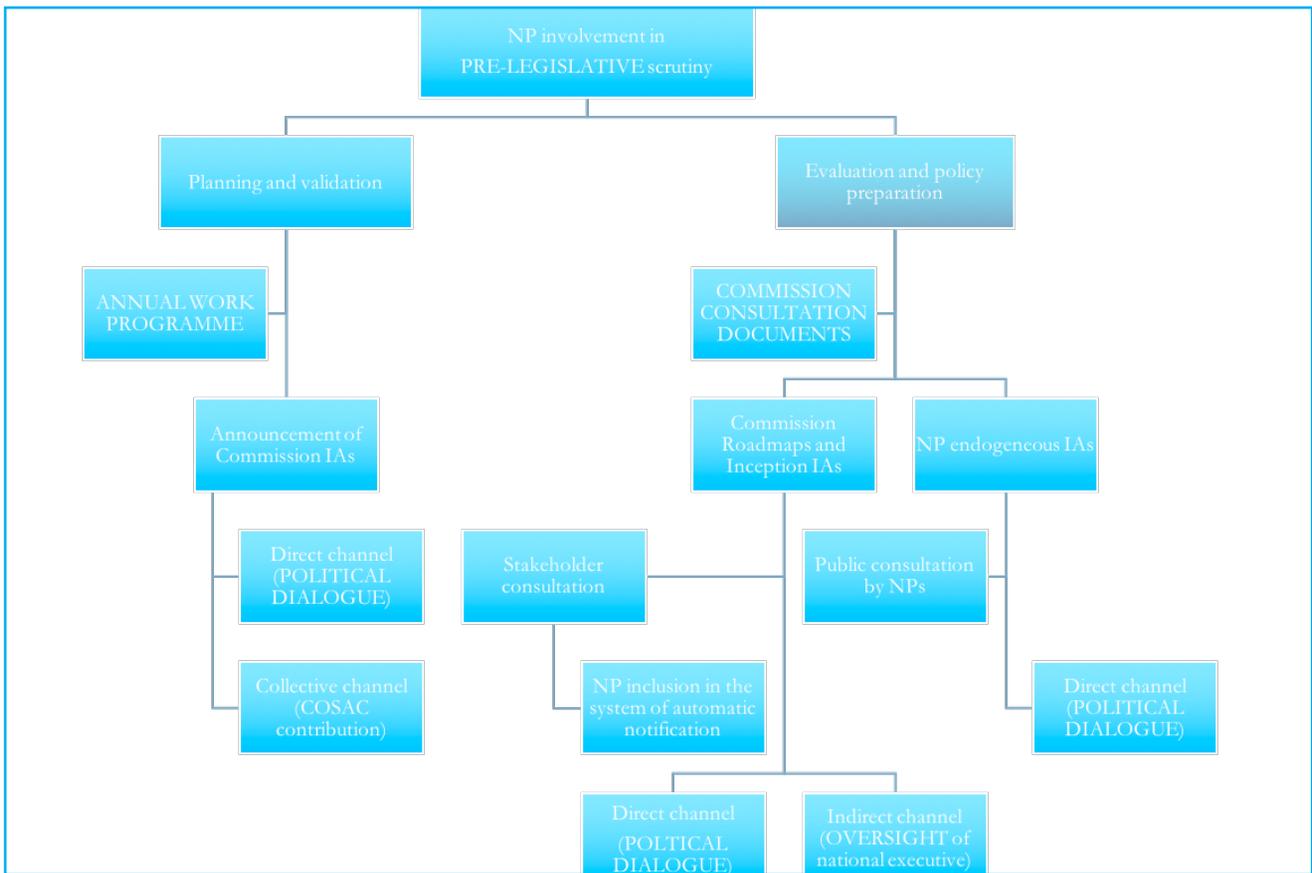
239 On the role of inter-parliamentary cooperation in the EU as an instrumental dimension that could help the European Parliament and national parliaments to strengthen their oversight capacity in their respective domains, see E Griglio and N Lupo, 'Parliamentary oversight in the European economic governance: the Conference on Stability, Economic Coordination and Governance' (forthcoming) *Journal of European Integration*.

240 See supra at 25.

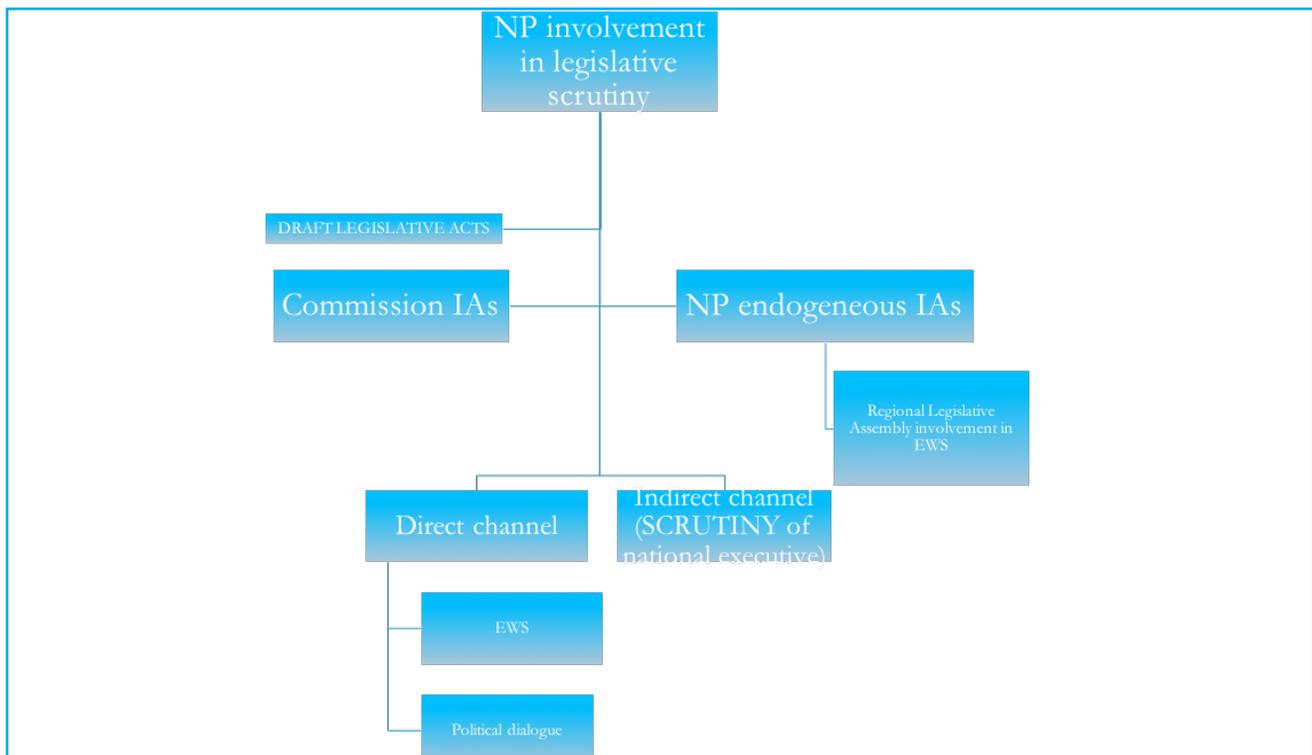
241 This conclusion is highlighted in M Russell and M Benton, *Selective Influence: the Policy Impact of House of Commons Select Committees* (London, UCL, The Constitution Unit, 2011) 86, focusing on the experience of the UK Parliament, and in Preuvot, supra at 110, 19, referring to the experience of the French Parliament.



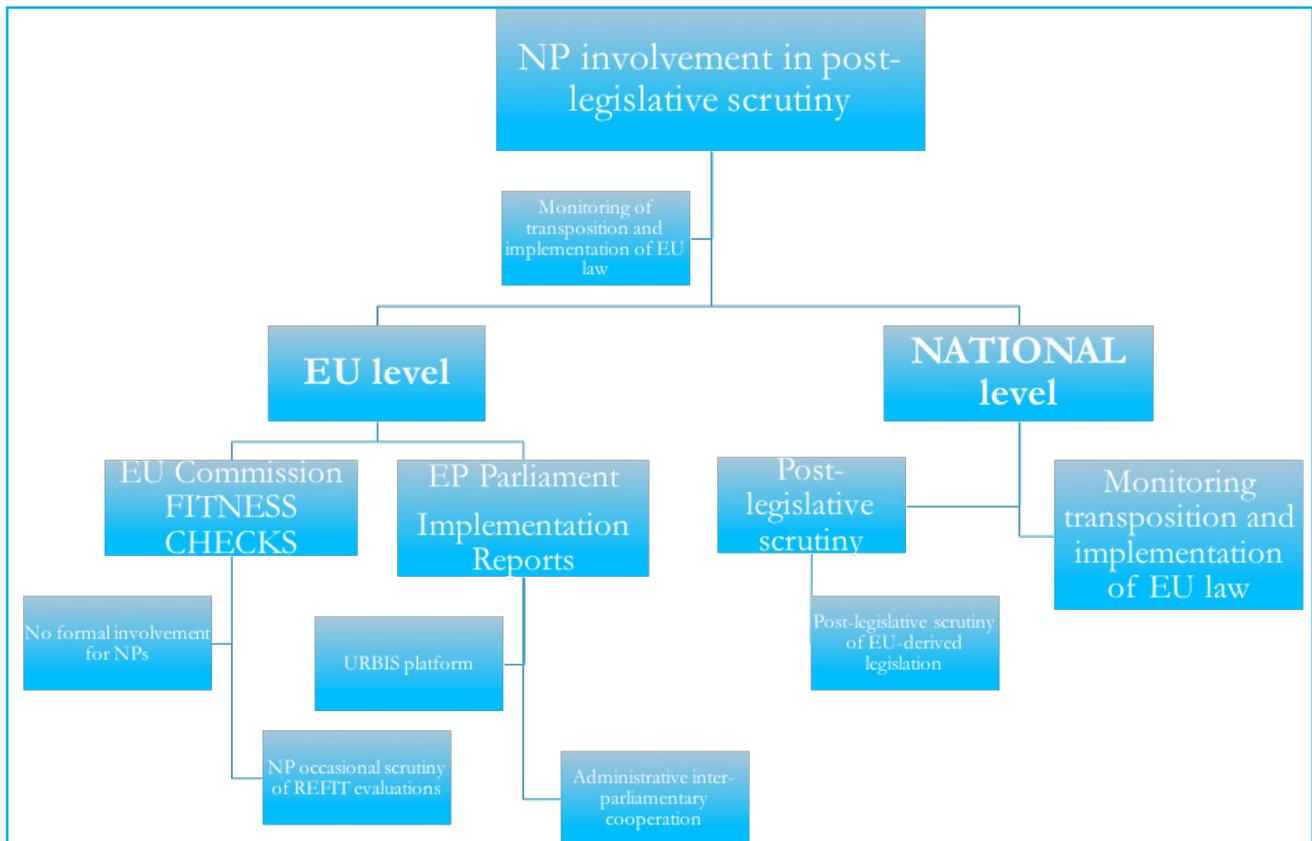
**Figure 1 - National parliaments' integration of IA in the pre-legislative scrutiny of EU legislation**



**Figure 2 - National parliaments' integration of IA in the legislative scrutiny of EU legislation**



**Figure 3 - National parliaments' integration of IA in the post-legislative scrutiny of EU legislation**



# TERRITORIAL IMPACT ASSESSMENT: A KEY PRACTICAL EXPERIENCE OF TERRITORIAL SCRUTINY

by Béatrice Taulègne <sup>242</sup>

First of all, I would like to thank the European University Institute for giving me the opportunity to address the contribution by the European Committee of the Regions (CoR) to this dynamic discussion on better scrutiny of European policies and to highlight the relevance of the **territorial dimension** of EU legislation. This discussion reflects a commitment to a **territorial vision for Europe** and a fully fledged translation of the concept of territorial cohesion enshrined in the Lisbon Treaty into operational guidelines.

The rise in inequality and the deepening of disparities in Europe plea for a **territorially-integrated approach and more evidence-based policy-making**. It is always necessary to remember that the majority of EU policies have a regional and local dimension which can be assessed through a territorial impact assessment (TIA), which should be taken into account when these policies are being designed and revised.

The European Committee of the Regions has always been concerned about the insufficient knowledge about the territorial impact of global strategies and sectoral policies, and by the fact that the current statistical data on the Members States do not necessarily represent the real socio-

<sup>242</sup> Deputy Director of the European Committee of the Regions

economic situation and, as such, should not be the sole basis for the future design and implementation of policies. If **possible asymmetric effects of EU and national policies** are not taken into account, these policies can never be sufficiently efficient or effective and potentially could result in unwanted effects. This challenge has been explicitly addressed in the 2017 European Commission work programme focused on the delivery of European policies and a proper implementation of European laws with collective responsibility at the local, regional, national and European levels. Promoting better regulation is a shared objective also requiring an overall commitment from local and regional authorities.

Local and regional authorities are therefore convinced that the Territorial Impact Assessment is one of the key instruments for **achieving territorial cohesion and the application of the Territorial Agenda 2020**.

## 1. An irretrievably belated recognition

Four milestones have led to the CoR commitment to imposing a territorial dimension on the impact assessment framework:

- the European Commission white paper on EU governance in 2001;<sup>243</sup>
- the CoR white paper on multi-level governance in 2009;<sup>244</sup>
- the better regulation package in 2015;<sup>245</sup>
- the interinstitutional agreement between the European Parliament/European Commission and the Council on Better Law Making signed in 2016, which recommends also addressing the territorial impact of policies.<sup>246</sup>

<sup>243</sup> COM (2001) 428 final.

<sup>244</sup> CdR 89/2009 final.

<sup>245</sup> COM (2015) 215 final.

<sup>246</sup> COM (2015) 2016 final.



TIA is included as one of the tools in the **European Commission's 2015 Impact Assessment Guidelines** and the territorial dimension is mentioned throughout the new Better Regulation package published in May 2015. At the same time, successive steps towards an **urban agenda for the European Union** have played a significant role in the emergence of TIA in EU policy-making. Indeed, the urbanization process in the EU and the lack of statistical data at the urban level argue for developing urban assessment tools. In this respect, the Council and the European Parliament invited the European Commission to take specific and immediate steps to “*enhance ex-ante impact assessment of new EU initiatives and legislation with regard to their territorial impacts and consequences for local authorities*” as part of the EU Urban Agenda.

The **European Parliament**, in particular in its report<sup>247</sup> on ‘The urban dimension of EU policies,’ asked the “*Commission to systematically introduce a territorial impact assessment on the urban dimension of all relevant EU policy initiatives and to make sure that all relevant sectoral EU policies adequately address the challenges that towns, cities and larger functional urban areas are facing*” and called on the Commission “*to concentrate these territorial impact assessments on the following elements: balanced territorial development, territorial integration and territorial governance.*” Its report<sup>248</sup> on ‘Cohesion policy and the review of the Europe 2020 strategy’ calls on the Commission to provide information about the role of territorial issues as factors in economic growth, job creation and sustainable development, and demands that the review of the Europe 2020 strategy addresses **territorial impacts and provides guidance** on how to tackle them.

247 2014/2213(INI), published 6 February 2015.

248 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2015-0277+0+DOC+PDF+V0//EN>

The interinstitutional consensus on the need for better cooperation on impact assessment has been reiterated in the recent report by the European Parliament on ‘improving the functioning of the European Union building on the potential of the Lisbon treaty’<sup>249</sup> adopted in Strasbourg on 16 February 2017, which “*calls on the European Parliament the Council and the Commission to improve cooperation modalities with the CoR, including at the pre-legislative stage during the conduct of impact assessments in order to ensure that their **opinions** and **assessments** can be taken into account throughout the legislative process.*” This recommendation pays tribute to the permanent CoR commitment for TIA to become a standard practice which is also promoted by the other institutions.

## 2. The European Committee of the Regions as an advocate for TIA

The consultative role of the CoR in the EU institutional framework implies implicitly contributing to better legislation. Its mission statement contains the message that the CoR members “*are committed to ensuring that policies are implemented more effectively and at greater proximity.*”

This responsibility has also been formally acknowledged in the protocol on cooperation between the CoR and the European Commission and in the cooperation agreement with the European Parliament.

In 2014, the CoR adopted its first Territorial Impact Assessment strategy and launched a pilot phase during which several methodologies and instruments were tested in order to determine the most suitable ones to meet its objectives. This pilot phase aimed to provide CoR rapporteurs with specific analyses of the territorial dimension of key EU policies. Following the pilot phase, the CoR

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adopted a renewed Territorial Impact Assessment strategy as part of its objective to scrutinise and assess the territorial impact of EU legislation on the single market and initiatives which are designed to have a territorial impact. The strategy is guided by four main objectives: i) to allow CoR rapporteurs to have access to specific analyses and information that can be used to improve the territorial dimension of CoR opinions and to strengthen the consultative role of the CoR as a whole; ii) to improve the quality of EU policy-making by ensuring that territorial impacts of new policy proposals and existing EU legislation are taken into account by the EU institutions; iii) to improve the visibility of territorial impact assessment as an important element in better EU legislation; and iv) to develop the role of the CoR as a TIA knowledge centre.

The files requested for TIA need to fulfil the following criteria: (i) they should have clear political interest for local and regional authorities; (ii) they should touch on competences of local and regional authorities; (iii) they should have a potential territorial impact; (iv) they should concern a legislative dossier. Preference will be given to dossiers on which the CoR plans to issue an opinion.

Pro-active interinstitutional cooperation has been developed since 2016, first of all with a modest but focussed contribution in the context of a pilot phase to two Directives for two ex-post exercises: the Birds and Habitats Directive and the Energy Performance of Buildings Directive. For 2017, encouraged by positive feedback from the European Commission and the European Parliament, the CoR has identified the following key dossiers:

- the Future of Cohesion policy;
- Cross-border obstacles;
- the Implementation of public procurement directives;

- the REFIT revision of the legislation on goods;
- the European Pillar of Social Rights;
- Smart specialization;
- Trade agreements on specific regional concerns.

Over recent years, considerable efforts have been made to promote TIA within the EU institutions, with the following outcomes:

- The CoR has been invited to participate in the outreach activities of the Regulatory Scrutiny Board (RSB) in order to achieve better interaction to provide practical steps towards a more systematic assessment of potential territorial impacts of future EU legislation.
- The CoR is contributing to the DG REGIO pilot project to create an urban impact assessment peer group of cities to be consulted on legislation with a potential impact on urban areas. In this respect, the Committee has planned to consolidate its experience with urban partnerships.
- Based on good cooperation with DG REGIO, the CoR has also been invited to intensify its cooperation with the European Commission on TIA:
  - By including the CoR in its TIA work programme for 2017;
  - By asking the CoR to co-operate closely on TIA activities with regard to the preparation of post-2020 Cohesion policy;
  - By participating in the working group on TIA to further develop TIA tools and methodologies in close co-operation with ESPON and DG JRC.

Nevertheless, the CoR not only sees its role as being to request more and better impact assessments



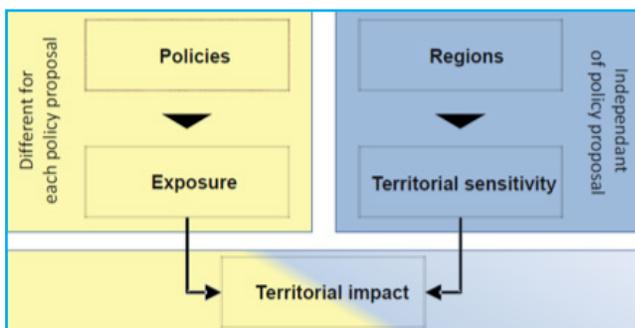
from the European Commission; it is also engaged in better analysing possible **asymmetric territorial impacts of existing and future EU legislation**. In this respect, CoR intends to enhance its analytical capacity for performance appraisal and impact assessment of EU policies.

### 3. A concept, a methodology and various instruments

With a view to them becoming standard practice, the TIA concept and the appropriate TIA methodologies and instruments have been progressively developed. ESPON Quick Scan was identified as one of the most suitable instruments and the CoR will continue to study it in order to make it more effective.

#### 3.1 The vulnerability concept:

The CoR, the European Commission and the European Territorial Observation Network (ESPON) rely on the ‘**Vulnerability concept**.’ The ESPON TIA Quick check is indeed based on the vulnerability concept developed by the Intergovernmental Panel on Climate Change (IPCC).



As the figure above shows, territorial impact is a combination of what is termed regional sensitivity and the exposure caused by the implementation of a policy initiative. The effects deriving from a particular regional measure (exposure) are combined with the characteristics of the region (territorial sensitivity) to produce the potential territorial impact.

#### 3.2 Flexible instruments

In the current situation, the following instruments are considered to be the most appropriate:

##### » Quick Scan territorial impact assessment workshops

Quick Scan TIA workshops are intended to assess the potential asymmetrical territorial impact of a given legislative proposal by applying the ESPON Quick Scan tool. They consist of specialised expert workshops which provide the basis for data calculations leading to a regional mapping of possible impacts. The workshops can assess the effects of EU legislation on EU regions (NUTS 2 and NUTS 3).

The advantages of the tool are that it provides:

- a database with a wide range of indicators at NUTS 3 level for all EU28 Member States;
- the possibility of uploading additional indicators and types of regions;
- an assessment not only based on a statistical model but also considering the input of stakeholders as being equally important;
- results that are more than just a map of territorial impact. It also provides a process and a discussion of data and coherences.

##### » Urban impact assessment

Organised along the same lines as Quick Scan territorial impact assessment workshops, an urban impact assessment is organised if the dossier has a strong urban character and is expected to affect urban areas more than other regions. In contrast to TIA workshops, an urban impact assessment (UIA) workshop will bring together representatives of carefully selected cities to form a representative sample of the EU's cities.

##### » Ex-post territorial impact assessment

As the Quick Scan methodology is an ex-ante methodology and cannot be used at the moment for ex-post assessments, interactive workshops



with relevant stakeholders following a similar logic are organised.

» **Cross-border territorial impact assessment**

In contrast to TIA workshops, a cross-border territorial impact assessment workshop gathers representatives from the European Grouping of Territorial Cooperation and bordering regions (within the EU). These workshops can be organised using the Quick Scan methodology to assess dossiers that have a strong cross-border character and are expected to affect those regions more than others.

» **Targeted consultations**

The CoR also organises targeted consultations to satisfy the requirements of the TIA process. They can be organised in addition to TIA Quick Scan workshops, especially in cases where data is lacking.

» **Analytical notes**

Analytical notes are drafted by the CoR TIA team and are based on available reports, impact assessment reports, evaluations and interviews with stakeholders to support its consultative role.

### *3.3 An adequate and inclusive methodology*

The methodology, which consists in creating a systemic picture linking a policy proposed with territorial effects, is divided into four main parts:

1. How does policy influence the development of regions?
2. Which type of region is affected?
3. How is the 'regional impact' calculated?
4. Mapping the impact: the results are presented on maps.

The methodology implemented requires combining regional scrutiny and expert judgment. It needs clear indicators but must also include an interactive discussion among experts. During

such interactive discussions, the experts identify potential territorial impacts in the fields of the economy, society, environment and governance, and also potential linkages and feedback loops between different effects. The entire process leads to policy proposals and/or suggestions from experts on improving the implementation of a directive.

## 4. The lessons learned from the recent CoR Territorial Impact Assessment strategy

**1. The amplitude of the exercise:** the process affects the continuum of the policy cycle: in the pre-legislative stage, during the legislative phase and when legislative authorities amend the legislative proposals, then in the implementation of a regulation, and finally in its ex-post evaluation.

Evidence-based regulatory analysis has a clear added value in these various stages of law-making and the decision-making process. In this context, regarding the existing stock of EU legislation, the importance of the Regulatory Fitness and Performance Programme (REFIT) must be stressed and will be increasingly highlighted by the CoR as it can identify overlaps and inconsistencies that have arisen over time among a range of objectives and new policy initiatives, together with the negative effect of the practice of so-called 'gold-plating.'

**2. The partnership approach:** achieving a more systematic use of TIAs in EU policy making will also need a more systematic approach by the European Commission and the European Parliament:

- With the European Commission: based on the cooperation agreement, the CoR is keen to contribute to European Commission impact assessments in the pre-legislative phase, and also in the ex-post phase. On the other hand, the CoR could provide an additional type of input by implementing TIA Quick Scan



workshops and delivering related reports. It will also seek, where relevant, exchanges of views with the European Environment Agency and other relevant agencies.

- With the European Parliament: closer cooperation with the European Parliament will be sought by proposing regular joint hearings of their respective committees, and through the European Parliamentary Research Service (EPRS), which is involved during the legislative phase as it analyses the quality, the consistency and the independence of the Commission's impact assessments, and – if asked to do so – assesses the impact of substantive European Parliament amendments. A new step could be achieved as a result of a recent invitation from the Chair of the Conference of Committee chairs (CCC) to the CoR to play a role by contributing to the drafting of European Parliament implementation reports and the organisation of fact-finding missions.
- With the Member States: the CoR will continue to develop relations with Member States and involve them in the TIA process. During the pilot phase, Member State representatives actively participated in the TIA workshops and conferences related to territorial impact assessments and showed strong interest.

With regard to the preparation of the post-2020 Cohesion Policy, the CoR would also welcome the possibility of collaborating with the Organization for Economic Co-operation and Development (OECD) on building scenarios on the basis of different policy options and assessing their respective territorial impacts.

**3. The political process behind the TIA** requires an appropriate follow-up and reporting to feed into the political debate and the legislative process. Specific consideration must be given to three main questions to which the added value of a political assembly of the CoR is pertinent:

- Do the results make sense?

- What are the policy implications?
- How to optimise and communicate TIA results?

**4. Lack of data**: current statistics leave room for improvement at the subnational and regional levels. The CoR regrets the difficulties in obtaining comparative data at the regional, local and sub-local levels across the European Union and calls for a set of comparable and reliable indices and indicators. The European Union needs to develop suitable tools to enable the collection of statistical data and their use to streamline processing.

**5. TIA raises awareness and provides territorial information and methodological support** to local and regional authorities (LRAs). LRAs have a particular interest in knowing how evaluation is carried out and what the concrete results, findings and products are. TIA contributes to filling the 'knowledge gap' by providing an evidence base for decision-makers on the accuracy and feasibility of challenges regarding the administrative capacity of public authorities to implement policies and their own capacity to capture diversity at the regional and local levels.

## 5. Beyond impact analysis: supporting EU decisions on policy-making

TIA contributes to the aim of drawing up a set of indices and indicators relating to European territorial development which could be used to support decision-making in terms of measuring and monitoring **territorial cohesion** and the **territorial agenda** for the coming decade.

In the European Commission reflection paper on 'Harnessing globalisation,' which aims to make a fair and evidence-based assessment of what globalisation means for Europe and the regions, the CoR suggestion regarding developing a concept of **territorial resilience** is recognized. The territorial impact assessment is clearly an instrument created to help assess the possible regional effects of globalisation.



The use of impact assessment as an efficient tool to promote a better regulation strategy at all levels of government has been exploited by local and regional authorities and has also become a clear priority for regional parliaments with legislative powers. Local and regional authorities, from experience, are convinced that a place-based territorial approach is the only policy model through which the EU can address the expectations of European citizens. TIA helps to assess how a policy intervention has actually performed in comparison with expectations. This exercise must therefore not be a static exercise only delivered by experts but should also include a **societal dimension** linked to citizen perceptions of the impact, consequences and added value of European legislation. Therefore, the CoR members are ever more committed to raising the relevance of strengthening the territorial dimension of EU legislation as a **democratic issue** for a better governance, given the fall in perceptions of a positive impact of EU regulation and legislation by citizens. As such, every policy evaluation includes three dimensions: a scientific/technical exercise; a political translation process; and a communication approach towards citizens.

Over the last few years, an increasing awareness of the importance of evaluation of public policies has spread all over Europe. The '**evaluate first**' principle is intended to make sure that every decision takes into due account the lessons learned from past actions.

Indeed, the process of scrutiny serves many purposes. Evidence-based policy must take into account not only the perspective of opportunity and legal feasibility but also the political reality in order to fit into the **European Union Agenda setting**. The Better Regulation agenda should also become an instrument for policy coherence in the European Union, and not only an instrument for greater efficiency.

The continual monitoring of the performance of an EU regulation also means evaluation in the

continuum of the policy cycle and contributes to better regulation as an instrument of coherence with long-term goals, as well as a proper assessment of the global strategies implemented. In this context, the European Commission's intention of mainstreaming the Sustainable Development Goals (SDGs) is a good approach to reach better regulatory governance in the European Union. The European Committee of the Regions is strongly in favour of fully mainstreaming a **comprehensive and territorial EU vision of the SDGs in the multilevel governance of the Union** in order to add political salience and coherence to the overall process and ensure that all the policies concerned are adequately put in support of the 2030 Agenda.



# BETTER REGULATION AND THE BENEFITS OF SERVICE TRADE POLICY REFORMS

by Matteo Fiorini and Bernard Hoekman

## Introduction

Reducing service trade costs is an important dimension of the challenge of increasing economy-wide productivity and per capita incomes. All firms use services as inputs into the production of goods and other services. If input costs are higher than they would be in an environment where service trade costs were lower, this will act as a tax on domestic industries and reduce their competitiveness. The stylized fact is that trade costs for services are much higher than trade costs for goods (Miroudot and Shepherd, 2016). The result is a reduction in the volume of trade in services, and therefore a reduction in the access firms and households have to low cost services.

Trade costs are high in part because of the characteristics of services: trade often requires movement of people and/or establishment of a commercial presence (FDI). This implies that many policies and their administration may impact on trade costs. Two dimensions are important in this regard: (i) regulatory policies that apply to all firms, both national and foreign; and (ii) policies that are designed to discriminate against foreign providers or consumption abroad, that is, to act as barriers to trade. Regulatory policies vary across countries for any given sector and the resulting heterogeneity is an important source of international trade costs. These costs are augmented by barriers to trade in services such as nationality requirements or bans on foreign suppliers providing transport, communications or professional services. Research has shown

that barriers to trade and investment in services are often much higher than for goods. Although information on service trade policy is limited, new datasets have been developed recently that characterize the restrictiveness of service trade and investment policies. These reveal that barriers to trade in services are substantial, with significant variation across countries and sectors (Figure 1).

The extent to which service trade costs are due to explicit barriers, regulatory heterogeneity and the technological challenges of trading in different types of services is an ongoing area of research. What can be said is that, in general, lowering service trade costs can be pursued by reducing or eliminating formal (explicit) barriers to trade; working to attenuate the prevalence of regulatory heterogeneity across countries for given sectors or activities; and by taking actions to lower the costs for firms of complying with whatever regulatory policies apply to providing services across borders. The latter dimension has yet to attract research but the first two dimensions have been the focus of recent research. This has shown that the Better Regulation agenda is directly relevant to the trade agenda: the gains from service trade policy reforms depend importantly on the quality of regulation and regulatory processes that prevail in a country.

An open trade regime may to some extent substitute good economic governance and regulation by giving consumers access to a greater variety of high quality foreign products. However, research suggests that often better regulatory governance is an important complement to service trade policy. What follows summarizes and synthesizes some recent and ongoing research on the role of governance institutions in shaping the economic impacts of service trade policies. This provides a concrete example of how the implementation of better regulation can indirectly generate greater economic benefits. An important finding is that the interaction between regulation and trade policy matters and that it can vary across countries and



sectors. An implication is that efforts to improve the design and effectiveness of regulation – i.e. implementation of the Better Regulation agenda – can and should be directed to enhancing the gains from policies to support greater trade in services. Conversely, trade considerations should be an additional factor informing regulatory reform and the design of specific regulations, whether horizontal in nature (cross-cutting) or sectoral. Analysis informed by transparent consultation of stakeholders is important in helping to identify which aspects of regulation are most important in order to enhance the gains from service trade openness.

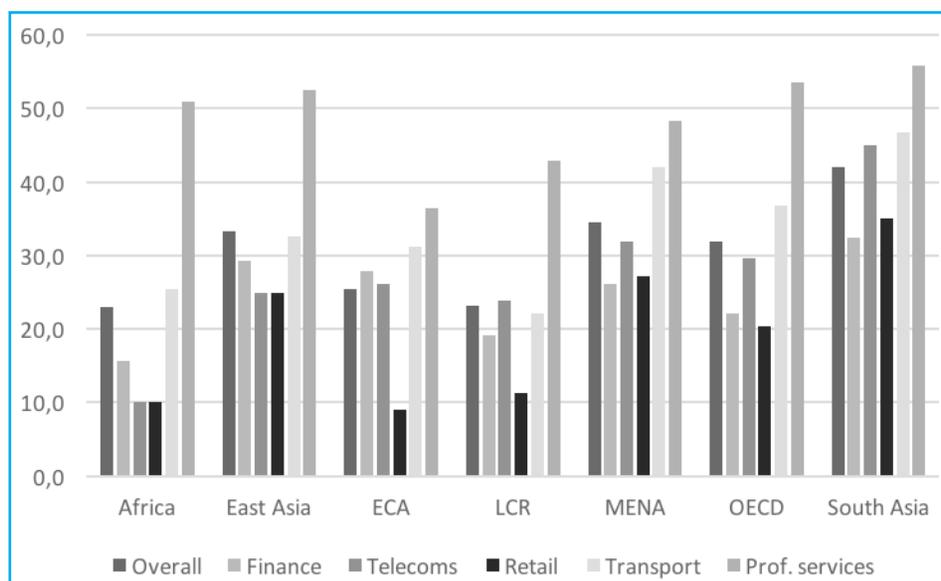
### Economic governance and gains from service trade openness

Recent research has demonstrated that the cost, quality and variety of services available to firms across all sectors is an important determinant of their productivity, and that service trade is a channel through which firms' access to services can be improved. Recent compilations of prevailing policies across countries by the OECD and the World Bank have shown that barriers to trade in services are often significant, translating into estimates of ad valorem tariff equivalents that are substantially higher than trade barriers for goods (Jafari and Tarr, 2017).<sup>250</sup> There is therefore a presumption that liberalization will lower average prices and expand the variety of services on the market. The effects of policies restricting access by foreign producers to service markets on downstream

250 See Services Trade Restrictions Database. <http://iresearch.worldbank.org/servicetrade/aboutData.htm> and OECD. Services Trade Restrictiveness Index. <http://www.oecd.org/tad/services-trade/services-trade-restrictiveness-index.htm>

productivity performance have been estimated in country case studies using firm-level data (e.g. Arnold et al. 2011 for the Czech Republic; Arnold et al. 2016 for India) and across countries using both firm- and industry-level data (e.g. Barone and Cingano, 2011, Bourlès et al., 2013, and Hoekman and Shepherd, 2017).

**Figure 1: Service Trade Restrictiveness Indices by Sector and Region**



Notes: ECA = Europe and Central Asia, LCR = Latin American and the Caribbean, MENA = Middle East and North Africa, OECD = Organization for Economic Co-operation and Development. A value of 0 means no restrictions and a value of 100 indicates maximum restrictiveness. Source: World Bank Services Trade Restrictiveness Indicators database.

A relevant question – which applies to many trade policy instruments (see Rodriguez and Rodrik, 2001 and Freund and Bolaky, 2008) – is whether the effect of reducing service trade restrictions on productivity in downstream manufacturing varies depending on non-trade policy factors. Beverelli et al. (2017) show that the downstream economic effects of service trade policies are moderated by the quality of economic governance institutions in the importing country. Lower service trade restrictiveness is found to only increase downstream manufacturing productivity in countries with good economic governance (as

proxied by indicators of the quality control of corruption, rule of law and regulatory institutions reported in the Worldwide Governance Indicators Database managed by the World Bank). This moderating effect prevails with respect to trade policies that target service provision through foreign establishment (FDI) (mode 3 of the GATS) as opposed to cross-border trade in services (mode 1), a result that may reflect the lower incidence of barriers to mode 1 trade as well as the intangibility and non-storability of services, which imply that at least some share of the value added must be generated locally – that is, foreign providers must invest in local production facilities (establish a commercial presence) in order to be able to operate in the relevant market.

### Unpacking economic governance quality - substitutability vs. complementarity

The measures of governance institutions used by Beverelli et al. (2017) are horizontal in nature, in the sense that they apply to or impact on all economic activities. Because of this, they are likely to capture to a greater or lesser extent the effects of more specific dimensions of regulation that determine the conditions of entry into a market. Examples include the scope of state-owned enterprises (SOEs) in the economy, government involvement in price setting (price controls), licensing and permit systems, and specific service sector regulations. Determining the extent to which the latter types of economic governance impact on the benefits of service trade liberalization is important from a policy perspective as it may be both easier to change sector- or activity-specific regulation than it is to improve the rule of law or to combat corruption and – equally importantly – more feasible to do so in the short run.

To this end, Fiorini and Hoekman (2017b) use OECD Product Market Regulation data to investigate how the effects of service trade policy

on downstream manufacturing is moderated by more narrowly defined measures of economic governance. This reveals significant heterogeneity across individual governance dimensions in terms of their impact on entry and/or operating costs in the economy. Some types of regulation – e.g. a simple registration requirement – only impose a small burden on operators. Other types of regulation may be very difficult for new entrants to overcome and can even prohibit entry, e.g. a ban on investment in complementary infrastructure facilities such as a warehouse/logistics centre; highly restrictive economic needs tests; or regulation reserving certain types of transactions to a state-owned entity (SOE). The benefits of removing service trade barriers (discriminatory measures) will be affected by the measures applicable regulating entry. As long as they are not prohibitive, the most (more) efficient foreign providers can be expected to be able to satisfy the regulatory requirements. These may raise costs above what they would be if, for example, regulatory cooperation allowed mutual recognition or equivalence, but some level of trade can be expected to occur. In this case, market access can be a substitute for regulatory reform. If, however, regulation is such as to essentially preclude entry – e.g. because of state control of prices or the existence of SOEs that dominate (segments of) the market – service trade liberalization may not have much of an effect on incentives to enter the market. In this case there is more likely to be a complementary relationship between service trade policy and regulation: reforms will need to target both policy areas.

In an empirical analysis of these possible relationships, Fiorini and Hoekman (2017b) find that greater market access for service inputs can act as a substitute for reducing regulatory barriers to entrepreneurship, in particular complex regulatory regimes. This suggests that foreign service providers, once granted better market access, can offer better quality, variety



and/or prices than domestic providers by successfully overcoming prevailing barriers to entrepreneurship. Conversely, they also find that if regulatory policy centres on reserving activities to certain SOEs or instances where public ownership affects market conditions, liberalization of market access may be ineffective in increasing downstream productivity.

Similar dynamics may arise with respect to sector-specific economic governance but there is likely to be an additional dimension in comparison to cross-sectoral regulatory regimes. The reason is that sectoral regulation is likely to be motivated by different types of market failures. For some service sectors where there are significant network externalities, there is a rationale for both public investment in infrastructure and regulation of the relevant network to ensure interconnection and access. In other sectors, the primary source of market failure is information asymmetries.

For example, in the case of transport and telecommunications, network infrastructure is central. Weak regulatory regimes that permit exploitation of market power by incumbent operators can prohibit entry by new operators. This feature of regulation cannot be offset by service trade liberalization. In practice, it will often be prohibitively expensive for new entrants to develop their own network infrastructure – they will not be able to overcome a government's failure to put in place and enforce pro-competitive regulation. In the absence of effective pro-competitive regulation, market access liberalization can be expected to have smaller positive downstream productivity effects. In line with this argument, Fiorini and Hoekman (2017b) find strong complementarity between good regulation and the benefits of service trade liberalization in transport and telecommunication.

Such a complementarity relationship is not found to apply between service market access and domestic governance in producer services where

network externalities are less prevalent or do not figure at all. In the case of business services, for example, the main rationale for regulation is to deal with problems of asymmetric information. In cases where domestic regulation is ineffective in addressing this problem it is relatively easier for foreign providers to address such regulatory failure and at least to some extent take action to offset the underlying market imperfection, e.g. by establishing a reputation for quality by leveraging foreign regulatory certification and/or international certification (such as compliance with ISO standards).

### Some implications for policy and international cooperation

A general implication of these findings is that the objective of removing discriminatory barriers to service trade should not be pursued in isolation or unconditionally. Account should be taken of the existing quality of domestic economic governance and the operation of the relevant institutions. Analysis needs to be conducted in order to assess and quantify economic governance performance at a fine-grained sector-specific level and to identify service sectors where the removal of discriminatory barriers needs to be flanked with measures to improve domestic economic governance.

Fiorini and Hoekman (2017a) elaborate on this general implication and advance some proposals on how to jointly target greater market access and better domestic governance in the context of service trade agreements. They argue that different approaches can be envisaged to support greater attention to sectoral regulatory policies and broader economic governance variables in trade agreements, complementing the market access focus that is central in PTAs. Options range from enhanced transparency and policy-dialogue-type mechanisms that provide opportunities for a broad set of actors to engage on both market



access and related economic governance matters, including self-evaluation and peer review (mutual evaluation) on the one hand, to the negotiation of binding policy commitments that can be enforced by businesses and natural persons (citizens) on the other. The complementarities between sectoral regulation/governance and market access barriers will differ across countries and will also change over time. Thus, priorities and solutions cannot be determined *ex ante*, but call for analysis and deliberation involving government officials, regulators and stakeholders focused on reviewing and assessing the performance of economic governance institutions. Such deliberation will also generate information on capacity constraints, including at the local level, which need to be addressed, such as a lack of knowledge or uncertainty on the part of implementing agencies as to what is required of them.

Transparency is an important necessary condition for increasing the profile of regulatory and economic governance matters. Equally important is analysis to identify the measures that are most pertinent at the sector/service provision level. The prospects for improving governance and regulatory performance through a bottom-up process of dialogue with stakeholders, learning and peer review by partner countries may be better than those of one based on hard law and binding dispute settlement procedures – not least because the latter may inhibit commitments from being made in the first place. The experience obtained in the EU shows that many issues arising in the EU single market context can be addressed without going to court. Analogous mechanisms involving the creation of national focal points could be a positive force for gradual improvement in governance and regulation-related areas. Whether or not such approaches can be adopted, what matters is to increase the attention to economic governance and sectoral regulation and to support processes to identify actions that will increase the benefits of service liberalization. This can be

made part of the agenda of monitoring activities and the agenda of the various committees and summits that oversee the implementation of trade agreements, and could build on the experience and lessons obtained from intra-EU integration mechanisms, including the single points of contact and the process of mutual evaluation of sectoral regulatory measures.

A more ambitious approach would be to increase the incentives for governments to implement market access liberalization commitments and to pursue better regulation by leveraging the self-interest of firms. There has been much debate in Europe on the rationale for including investor-State dispute settlement (ISDS) provisions in trade and investment agreements. One reason for concern expressed by many opponents is the view that firms already have access to national (and EU) tribunals and that there is no need for a separate system of arbitration that may undermine the democratic process by contesting what polities deem to be welfare-enhancing changes in applicable regulation. ISDS procedures were incorporated into BITs for a specific, limited purpose – investor protection. ISDS is driven by the self-interest of investors (and those providing the associated legal services), not by public good considerations. However, the example of ISDS illustrates that it is possible for states to agree that enforcement of international agreements can be delegated to firms. In the trade area, so-called bid-protest (domestic review) mechanisms are an element of the WTO Agreement on Government Procurement (GPA). These allow firms to challenge ongoing procurement contests and contract award processes that are perceived to violate GPA provisions (see Georgopoulos, Hoekman, and Mavroidis, 2017).

Creating mechanisms through which firms can challenge compliance with mutually agreed specific economic governance-related commitments would harness private interests to promote the public good. A first step in this direction could be



to permit recourse by foreign persons to existing EU law and regulations pertaining to the Internal Market – as these are measures that have been agreed by EU member states and endorsed by the European Parliament. Indeed, this would not constitute much of a change to the status quo as all such measures are already enforceable. Foreign firms already have access to formal and informal dispute resolution and enforcement mechanisms if they are established in the EU. Extending this possibility to firms that are not established in the market (have not established a commercial presence through FDI) could help expand the set of actors with an incentive to utilize existing channels to contest perceived violations of EU law and regulation. While this is unlikely to be feasible given the strong revealed preference on the part of the EU (and partner countries) for State-to-State dispute settlement processes, establishing platforms through PTAs where such matters can be raised and discussed can make a positive difference. Although existing mechanisms already permit enforcement actions to be taken in cases of non-compliance with EU law, the determinants of compliance are complex and multidimensional. As König and Mäder (2014) note, there may be situations where the balance of incentives confronting the European Commission is insufficient to motivate enforcement action. If the (political) costs to the Commission of sanctioning an EU government are high, enforcement may not occur. Increasing the visibility of non-compliance and creating the prospect of action by trading partners may help to swing the balance of enforcement towards greater action. The upshot would be that infringement proceedings brought by the European Commission through letters of formal notice, reasoned opinions and eventual referrals to the CJEU would be complemented by parallel enforcement pressure from trading partners.

## Conclusion

Services comprise a substantial share of all the inputs used by firms. The cost, quality and variety of services available to firms is one determinant of their competitiveness. Sector-specific restrictive trade policies will impact on the degree of competition on service markets, and thus on markups and sectoral efficiency. Given that recent compilations of barriers to trade in services indicate these are often significant (Jafari and Tarr, 2017), there is a presumption that liberalization will lower average prices and expand the variety of services on the market. An expanding body of empirical research analysing the linkages between service trade policies and downstream productivity performance has identified sizable positive effects of liberalizing service trade on the productivity and export performance of firms.

However, the research summarized in this note highlights the crucial role that regulation plays in the context of service trade policy and the importance of paying more attention to how different dimensions of regulatory governance interact with service trade policies. The finding that in some circumstances trade policy reforms (service liberalization) need to be accompanied by action to improve domestic regulatory governance whereas in other situations market access liberalization can act as a substitute for regulatory improvement suggests that greater effort to ‘unpack’ how and which regulatory institutions influence the effectiveness of service trade reforms may have a high payoff. Key principles of the Better Regulation agenda such as transparency and dialogue with stakeholders are important tools to inform and complement such analytical assessments at the country-sector level.



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# ANNEX: PROGRAMME OF THE WORKSHOP



## WORKSHOP

### *BETTER REGULATION: THE SCRUTINY OF EU POLICIES*

Alfredo De Feo | European University Institute

Sala Europa

Villa Schifanoia, Via Boccaccio 121 - Florence

 @RobSchuCentre

23-24 FEBRUARY 2017

#### ■ DRAFT PROGRAMME

##### 23 FEBRUARY

- 14.00-14.15 Welcome by **Renaud Dehousse** | European University Institute
- 14.15-14.45 Keynote speech by **Mario Monti**
- 14.45-16.15 **Panel I: The oversight of EU legislation**  
Chair: **Miguel Maduro** | EUI  
Introduction: **Bernard Naudts** | EC, Regulatory Scrutiny Board  
Presentations:  
**Stijn Smismans** | Cardiff University  
**Katrin Auel** | Institute for Research on European Integration  
Discussants:  
**Philipp Genschel** | EUI  
**Nicola Lupo** | Luiss University  
**Stephan Huber** | EPRS, EP  
Debate
- 16.15-16.30 Coffee break
- 16.30-18.00 **Panel II: The Scrutiny of EU Budget implementation**  
Chair: **Alfredo De Feo** | EUI  
Presentations:  
**Paul Stephenson** | Maastricht University



**Nadia Calviño** | European Commission, DG Budget

Discussants:

**Adrienne Heritier** | EUI

**Alexander G. Welzl** | EuPro – Bureau for European Projects

Debate

## 24 FEBRUARY

09.30-09.45

Keynote speech by **Vitor Caldeira** | Tribunal de Contas, Lisbon

09.45-11.15

**Panel III: The integration of impact assessment in the decision making process**

Chair: **Adrienne Heritier** | EUI

Introduction: **Rolf Alter** | OECD

Presentations:

**Elena Griglio** | Luiss University

**Mariana Hristecheva** | EC Evaluation Unit, DG Regio

Discussants:

**Beatrice Taulegne** | CoR

**Robert Bray** | DGIPOL, EP

Debate

11.15-11.45

Coffee break

11.45-12.00

Closing keynote speech by **Corina Cretu** | EU Commissioner

12.00-12.15

Conclusions:

**Alfredo De Feo & Miguel Maduro** | EUI



