

TO THE COMMISSIONER RESPONSIBLE FOR BETTER REGULATION

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* In the face of substantial Euroscepticism, diverging approaches to policy among EU countries and concerns over burdensome legislation, protecting the credibility of EU policy formulation is of vital importance. Better regulation tools and processes are a vital part of this. Transparency, objectivity and independence are key.

Though the better regulation process overall is an area of strength for the EU, you should make impact assessments more consistent and work to improve the quality and consistency of economic analysis. You should also give greater weight to the ex-post evaluation process and connect it better to the ex-ante impact assessment process.

In addition, you should push for more resources for regulatory scrutiny and prioritise communication to demonstrate that EU policy has a sound basis and delivers real benefits.

- * TRANSPARENCY AND CONSISTENCY
- * REGULATORY SCRUTINY
- * CREDIBILITY AND LEGITIMACY

1 STATE OF AFFAIRS

Better regulation (BR) tools and processes contribute to the European Union's perceived legitimacy and to the maintenance of public confidence by ensuring that policies are fact-based, that policy processes are transparent and that EU actions are fit for purpose. In the face of substantial Euroscepticism, diverging approaches to policy among the member states and concerns over burdensome EU legislation, protecting the credibility of EU policy formulation is of vital importance.

Better regulation is a vital part of EU governance. It seeks to ensure that measures are no more burdensome than necessary, and that EU actions are appropriately undertaken at EU rather than at member-state level, in line with subsidiarity.

The BR process¹ serves not only to rigorously evaluate new proposals *ex ante*, but also to assess the added value of EU policies *ex post* in order to determine whether the intended benefits have materialised, and to improve or eliminate programmes that fail to perform.

The better regulation process

BR comprises a detailed methodology that provides policymakers with an objective basis for designing and evaluating policies. Importantly, BR helps to identify policy options but does not determine policy choices – the crafting of legislation is inherently a political process.

Transparency, objectivity and independence are key to the credibility of BR.

Under the logic of BR, the strengths and weaknesses of a current policy should be identified by means of an *ex-post* evaluation before new interventions are formulated by means of an *ex-ante* impact assessment. This is the *evaluate first* principle.

A BR *ex-ante* impact assessment begins by clearly identifying a problem. Objectives in addressing the problem are formulated, together with a small number of promising options starting with the 'business as usual' option. Options are compared on the basis of their expected effectiveness in dealing with the problem, the efficiency with which they achieve their effects, their coherence with other EU policies and the degree to which they are relevant in addressing citizens' concerns.

*TRANSPARENCY

*INDEPENDENT
OVERSIGHT

Over time, the Commission's BR system has been progressively improved to provide for a measure of independent oversight, primarily by means of a Regulatory Scrutiny Board (RSB) that operates under the auspices of the Commission, and by an Impact Assessment Unit (IAU) within the European Parliament. To date, the Council has undertaken only limited oversight of the BR process whereas the European Parliament has set up a BR support unit.

In reviewing the current state of affairs, we consider: 1) regulatory simplification and the role that BR plays in it; 2) the consistency with which BR *ex-ante* impact assessment reports are delivered with legislative proposals; 3) the quality of the BR process; 4) the consistency of economic analysis as part of the BR process; and 5) the relationship with *ex-post* evaluation.

Regulatory simplification

The Juncker Commission sought simplification of the EU *acquis*, in particular by introducing less new regulation, in line with being "*bigger on the big things, and smaller on the small things*". The avoidance or elimination of needless or ineffective regulation is in line with BR principles. It is therefore useful to consider whether the EU has followed through on the commitment to simplification.

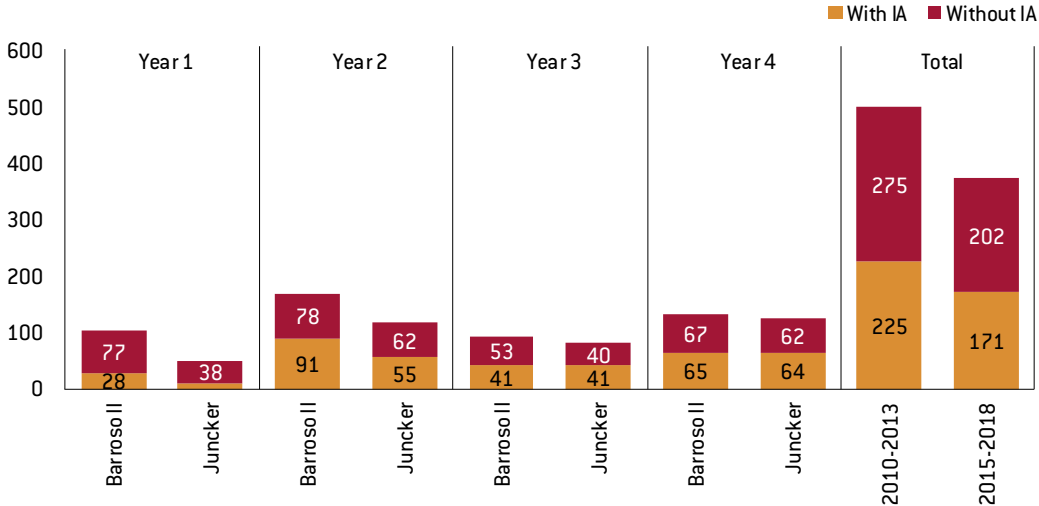
There is a tendency to introduce more legislation in the middle of a legislative cycle than at the beginning or the end. Comparing the first four years of the Barroso II Commission to the corresponding years of the Juncker Commission, it is clear that the Juncker Commission introduced substantially fewer legislative measures (Figure 1) – a drop of 25 percent compared to Barroso II (373 versus 500 measures). This is not in and of itself definitive, since the complexity of measures also needs to be considered, but it suggests that the Commission delivered on its promise to focus more its activities.

Measures introduced without an impact assessment (IA)

The *ex-ante* impact assessment document that is submitted with a legislative proposal is a key part of the legislative process. In assessing the quality of IA documents that have been submitted in recent years, a key question is whether an IA was submitted at all. The percentage of legislative proposals submitted without an IA was similar for the Barroso II and Juncker Commissions (55

*IA QUALITY

Figure 1: Commission legislative proposals introduced with and without an impact assessment



Source: Bruegel based on data from EUR-Lex. Note: only legislative proposals made under the ordinary legislative procedure (previously, the COD), as listed in EUR-Lex, are covered. Year 1 corresponds to the first full year after elections, thus 2010 and 2015 (for Barroso II and Juncker respectively). Year 5 for the Juncker Commission (ie 2019) is not shown because the results are not known at time of writing.

percent from 2010-2013 for Barroso II, 54 percent for Juncker from 2015-2018; Figure 1). Neither Commission submitted many IAs during Year 1 of its legislative cycle (just 27 percent and 22 percent under Barroso II and Juncker, respectively).

There are a number of reasons for not submitting an IA as identified in the BR Toolbox: when there is no policy decision to be made, when the policy decision is effectively pre-determined by some other policy decision that has already been taken (eg a treaty), or when the decision has no significant impacts, such as in a codification of a law and its amendments into a single new act.

In most cases where IAs appear to have been required, they were in fact conducted. However, under the Juncker Commission, for quite a few (important) legislative proposals, neither an IA nor a valid justification for its absence is apparent (Table 1). In nearly half of these cases, no reason for the omission was given².

Urgency is sometimes claimed as a basis for the lack of an IA. The BR Guidelines explicitly recognise that the BR process must have sufficient flexibility to enable it to respond to political urgency (European Commission, 2017b). There will sometimes

*MISSING ASSESSMENTS

Table 1: Impact assessments missing without sufficient substantiation

	Of the proposals without IA	Of the total number of proposals
2015	42.1%	32.7%
2016	27.4%	14.5%
2017	33.3%	16.0%

Source: Bruegel.

be a need to skip or abbreviate the IA (which, as the Toolbox notes, often takes a year to prepare) for reasons of urgency.

From 2015 to 2017, there were many instances where urgency was claimed for reasons we view as valid (for instance, in relation to measures that involved the migration crisis or security). In a few cases, however, we are not convinced that the claim of urgency was sufficiently substantiated³. Where the Commission claimed urgency as the reason for not submitting an IA, and where we considered the claim to have a reasonable objective justification, we did not treat the IA as missing without sufficient substantiation.

We have some concern that a number of IAs that were missing without apparently sufficient substantiation seemed to be associated with substantial impacts, and dealt with legislative proposals that were politically sensitive. Examples include the legislative proposals for a European Deposit Insurance Scheme (COM(2015)586), for the European Fund for Sustainable Development (COM(2016)586), and for the European Fund for Strategic Investments (COM(2015)10 and COM(2016)597).

The quality of the Better Regulation process

The BR process overall is an area of relative strength for the EU; indeed, the EU receives high marks in external assessments. Nonetheless, further improvements and refinements are possible, as we explain under Recommendations.

The OECD has rated the EU third best (after the UK and Mexico) in terms of its *ex-ante* IA process, and fourth best (after Australia, the UK and Korea) in terms of *ex-post* assessments (OECD, 2018). The OECD assessed the EU to be the best performing policymaking institution worldwide in 2018 in stakeholder engagement,



In a few cases, impact assessments justify a preferred option without adequately exploring alternatives and can be less fastidious when done under time or political pressure

having improved substantially since the previous assessment in 2015, when it ranked fifth. The EU public consultation process is highly consistent, with most proposals benefitting from substantial stakeholder input.

The majority of IAs appear to be of good quality. The assessment in OECD (2018) and our discussions with the Parliament's Impact Assessment Unit (IAU) point to visible improvements in the process over time. Reports from the Parliament's IAU suggest guidelines are being followed more closely than in the past, and that difficulties with unclear goals and weak problem definition are better addressed than in the past.

We have nonetheless identified a few possible concerns in a few IAs, including:

- A possible rush to justify a preferred option without adequately exploring alternatives⁴;
- An occasional tendency to be less fastidious when there is time pressure or political pressure⁵.

The Parliament's IAU has also identified a number of IAs in which alternatives do not appear to have been considered to a sufficient degree, such as the proposal for a pan-European Personal Pension Product (PEPP) (COM(2017) 343) and the proposed Regulation of small pelagic stocks in the Adriatic Sea (COM(2017)97). The Impact Assessment Institute (a private firm) claims that the majority of EU IAs have major shortcomings in terms of analysis, methodological rigour, transparency and their subsidiarity and proportionality justifications (Impact Assessment Institute, 2017). The Parliament's IAU has also expressed concerns over the quality of analysis of subsidiarity and proportionality in IAs.

*CONSIDERATION
OF ALTERNATIVES

Analysis of economic costs and benefits needs to be improved

Despite the high quality of the BR process overall, there is room for improvement, especially as regards the consistency of economic analysis. Marcus *et al* (2019) reviewed for the European Parliament the economic assessments embodied in the impact assessments submitted with most of the legislative measures associated with the Digital Single Market (DSM), totalling nearly 40 IAs. In no case was a coherent comparison of costs and benefits provided. Some provided assessment of benefits, but not of costs. A few analysed only costs. Some analysed implementation costs for the EU, but neglected to assess transaction costs and other burdens imposed on market players. Even when an analysis was done, cost and benefit assumptions were not consistent across the IAs.

These observations are fully in line with Schout and Schwieter (2018), who found:

- No quantification of administrative costs in 42 percent of IAs;
- No quantification of compliance costs in 29 percent of IAs and evaluations; and
- No quantification of enforcement costs in 55 percent of all IAs and evaluations.

Nevertheless, the trends over time are positive. From 2016 to 2017, the share of IAs and *ex-post* evaluations that quantified benefits increased from 69 percent to 80 percent, while the share of IAs that quantified regulatory costs rose from 69 percent to 89 percent (Schout and Schwieter, 2018).

In fairness, there is often very little basis in practice on which to base a sound assessment of costs and benefits; even so, it is difficult to see how coherent policy can be crafted on the basis of economic analysis that is so patchy and inconsistent.

This is an area that would benefit from serious further work. Costs and benefits for stakeholders and for EU and member-state institutions should be estimated wherever feasible. Where a cluster of interrelated measures is put forward (as was the case, for instance, with the Digital Single Market strategy; see Marcus *et al*, 2019), a combined economic assessment is likely to be both more practical and more valuable than a series of fragmented and mutually inconsistent assessments.



More work is needed to ensure that economic analysis is conducted, and that where it is conducted, it is comprehensive and consistent

*EVALUATION

The *ex-post* evaluation process seems to be under-developed in comparison with *ex-ante* impact assessment

The *ex-post* evaluation system has changed and improved over time, but the changes have tended to prioritise efficiency over effectiveness. The Commission made this clear in its communication on ‘Completing the Better Regulation Agenda: Better Solutions for Better Results’, that the ‘evaluate first’ approach aims to identify potential for simplification and cost reduction (European Commission, 2017c). The Commission has sought to improve these aspects of *ex-post* evaluation with initiatives such as ‘fitness checks’, which cover all legislative proposals in a given policy sector, and the REFIT platform. Such elements have, according to the OECD (2018), resulted in improvements to the *ex-post* evaluation system.

But such initiatives still leave gaps. As the *ex-post* evaluation section of the interinstitutional Agreement on Better Law-Making of the three EU institutions notes, evaluations of existing law and policy should consider not only efficiency, but also effectiveness, relevance, coherence and value added (European Union, 2016).

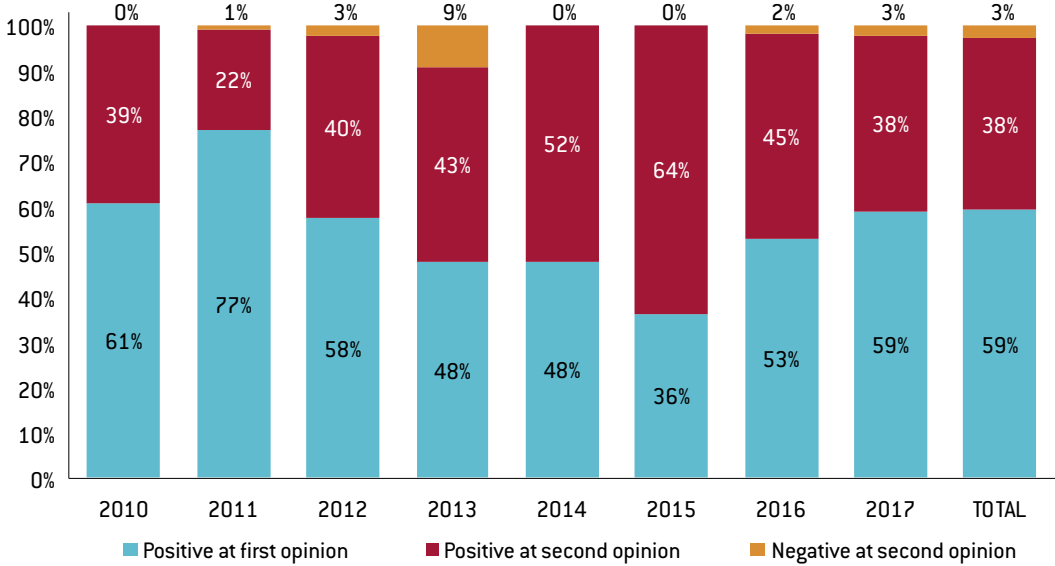
As we have noted, further work is also needed to ensure that economic analysis is conducted, and that where it is conducted, it is sufficiently comprehensive and consistent.

2 CHALLENGES

Credibility of the BR process depends on independence and objectivity. A fully effective and independent Commission review of *ex-ante* and *ex-post* BR submissions is therefore essential. In the absence of fully independent review, stakeholders and the public will always wonder whether legislative proposals

*CREDIBILITY

Figure 2: RSB (IAB) opinions on IAs



Source: Bruegel.

truly reflect an impartial assessment of the best available evidence.

The review process has benefitted from successive improvements over many years. Even so, none of the current review bodies are simultaneously: 1) absolutely independent, 2) properly resourced, and 3) able to cover all necessary elements of policy design and evaluation.

The Regulatory Scrutiny Board, the main entity responsible for IA quality, has seen its role progressively strengthened. Unlike its predecessor (the Impact Assessment Board), the RSB is required to give a positive or a negative opinion of each IA. Moreover, under the new guidelines, its views are more binding, with a second negative opinion in principle preventing the Commission from proceeding with a proposal. In 2016, only one proposal was pushed through despite having received a second negative opinion, while prior to 2015, five out of the six proposals with two negative opinions were nonetheless pushed through to interservice consultation.

Between 2010 and 2017, the RSB issued an initial negative opinion for 41 percent of legislative proposals submitted with an IA. Of these, the IAs for 134 legislative proposals received one negative opinion, while the IAs for 10 legislative proposals received two

*REGULATORY
SCRUTINY BOARD

*RSB
INDEPENDENCE

negative opinions⁶. Although it is clear that the RSB does not shy away from initial criticisms, it is not clear whether the high rate of ultimate approval (97 percent) reflects substantial improvements in resubmitted IAs, leniency on the part of the RSB, or both.

In its annual reports, the RSB regularly stresses that there is usually a significant improvement in the quality of IAs after the first review by the RSB, and that upstream meetings between the board and the relevant Commission official prior to the first draft IA usually lead to an IA of significantly higher quality⁷. Even so, and despite the fact that the Commission describes the RSB as acting “*independently from the policy-making departments and from any European institution, body, office or agency*”⁸, the board is not fully independent. It is made up of three outside experts and three high-level Commission officials, and is chaired by a Commission director-general. It is also not adequately resourced, considering the volume of impact assessments and the importance of its function. These shortcomings threaten its credibility as a review body.

The Parliament’s IA team, which is part of the European Parliamentary Research Service (EPRS), is potentially in a stronger position to exert oversight over the Commission; however, it is severely resource-constrained. Moreover, although the team conducts appraisals of all impact assessments submitted by the Commission, it only undertakes complementary or substitute assessments at the request of the Parliament.

The European Court of Auditors, an independent institution, performs audits of the regulatory management system, yet its evaluations do not appear to be fully integrated into the BR process.

3 RECOMMENDATIONS

The EU has a unique institutional structure. Many citizens and residents are geographically and politically distant from the seat of European power, but their support is essential to the current and future success of the EU.

In order to maintain (or in some cases to regain) the full trust of the public, it is essential that the public comes to view the EU

*ACCOUNTABILITY

as responsive to real public needs, and as fully accountable to the public. The BR process is a key instrument through which this could be achieved, and the EU has good reason to be proud of the BR process, but it is very little understood outside of the Brussels bubble (or even within the Brussels bubble for that matter). A key point of clarification is that BR does not, by design, make the EU more technocratic. *Ex-ante* and *ex-post* assessments are meant to support policy decisions: to complement, not to limit politics.

*LEGITIMACY

In order to enable the BR process to achieve its full potential, not only in terms of ensuring that EU policy instruments are effective and efficient, but also that the EU is perceived as having democratic and policy legitimacy, you need to play an active role first in promoting the continuous improvement of the process, and second in serving, together with your staff and other EU bodies, as a public champion or evangelist for the openness, transparency, objectivity and robustness of the policymaking apparatus of the Commission in particular, and of the EU institutions in general.

With this in mind, we recommend you should:

- **Further strengthen consistency in providing an IA when required:** You should ensure impact assessments are always provided unless there are valid grounds for exemption, in which case the grounds for exemption should be submitted to the RSB, presumably as part of the required explanatory memorandum.
- **Economic analysis:** You should work to improve the quality and consistency of economic analysis. Both the costs and benefits should be analysed to the greatest extent possible, and costs should consistently consider not only costs to the EU, but also costs to stakeholders and the public at large. Where several measures are closely related, it might be appropriate to provide a joint analysis; failing this, the inter-related IAs should at least use a common basis for estimating effects, with common metrics.
- **Strengthen *ex-post* evaluation:** In terms both of management focus and any future revisions to the guidelines, you should



Reaching out to stakeholders, including the general public, is vitally important so the public understands that EU policy has a sound basis and delivers real benefits

ensure that greater weight is accorded to the *ex-post* evaluation process, and that it is better integrated in practice with the *ex-ante* IA process (*evaluate first* is a nominal goal, but is not consistently implemented). You should strengthen the focus on effectiveness – efficiency alone is not enough. You might also want to consider a more integrated role for the Court of Auditors.

- **Strengthen the regulatory scrutiny function:** The regulatory scrutiny function needs adequate resources and full independence. You should bolster the autonomy of the RSB and provide it with more staff support. You should also encourage the Council to play its full role in the BR process – proper scrutiny by the Council is conspicuous by its absence today.
- **Better communication with the public:** You should make the most of the Commission’s capabilities to do a better job of reaching out to stakeholders, including the general public. It is vitally important that the public understands that EU policy has a sound basis, and that it delivers real benefits⁹.

NOTES

- 1 The BR process has been set out by the Commission in its role of executive institution of the EU, and has been adapted over the years. The BR framework and collection of methodologies are presented found in the Commission's 'Better Regulation Guidelines' and the 'Better Regulation "Toolbox"' (European Commission, 2017a, 2017b). With the Inter-Institutional Agreement on Better Law-Making, the Commission, Parliament and Council have jointly agreed to follow this approach (European Union, 2016).
- 2 Our assessment of the grounds for omission are based on the information provided in the Explanatory Memoranda submitted with the legislative proposals.
- 3 There is necessarily some subjectivity in this classification. However, any proposal which is automatically excluded from the IA requirement as per the 2017 BR Toolbox - including codifications, repeal of redundant legislation, signature/application of international treaties (because no policy alternative exists), implementation by EU agencies - has not been counted as 'problematic'. Many cases of 'problematic missing IAs' involve proposals for which the Commission says sufficient evidence has been collected already, where the scope of the proposal is argued to be too small to merit an IA or where the proposal is deemed urgent without clear justification. Proposals pertaining to the migration crisis and terrorism have been considered justified in missing IAs due to urgency.
- 4 The BR process lends itself to temptation for the Commission first to choose the politically desired outcome and then to make the IA fit, or to structure the options to "*set up a straw man in order to knock it down*" (Dunlop and Radaelli, 2015).
- 5 From the 2016 activity report of the Parliament's IAU: "*There were a number of cases - often where the impact assessment was prepared under clear time and/or political pressure - where the impact assessment was found not entirely to meet the quality standards defined in the guidelines*". The 2017 activity report noted: "*Some Commission impact assessments appear to have been prepared under substantial time and/or political pressure. [...] This does not contribute to the quality of either the evaluation or the impact assessment.*"
- 6 These numbers differ slightly from those in Figure 1 because an IA sometimes covers more than one legislative proposals, and because we were unable to locate an RSB opinion on the IAs of three legislative proposals.
- 7 See for example Regulatory Scrutiny Board (2017), Annual Report 2017, available at https://ec.europa.eu/info/sites/info/files/rsb-report-2017_en.pdf.
- 8 See the European Commission webpage on the RSB at https://ec.europa.eu/info/law/law-making-process/regulatory-scrutiny-board_en.
- 9 The Inter-Institutional Agreement (2016) explicitly recognises this need, but more needs to be done: "*The three Institutions will improve communication to the public during the whole legislative cycle and in particular will announce jointly the successful outcome of the legislative process in the ordinary legislative procedure once they have reached agreement, namely through joint press conferences or any other means considered appropriate.*"

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Suggested citation:

Marcus, J.S., C. Midoes and A. Schout (2019) 'Memo to the commissioner responsible for better regulation', in M. Demertzis and G.B. Wolff (eds) *Braver, greener, fairer: Memos to the EU leadership 2019-2024*, Bruegel, available at <https://bruegel.org/2019/07/memos-2019/>