

Maastricht Centre for European Law

Master Working Paper

2015/3

Nina-Christin Stoffel

Quo Vadis Impact Assessment?

An Evaluation of the European Commission's New Better
Regulation Agenda

Master Working Paper Series

The MCEL Master Working Paper series seeks to give excellent Master students the opportunity to publish their work accessible to a wide audience.

In order to give visibility to highly promising students interested in EU law and their research, outstanding European Law may be selected for publication on this page of the website of the Maastricht Centre following conditions:

Eligibility

- The Master thesis must be written in the field of European law
- The Master thesis must have received the grade of 9 out of 10 or higher
- A master thesis graded with an 8.5 out of 10 may be eligible, subject to specific justification

Submission procedure

- Submissions should be filed by a member of MCEL who has been involved in the thesis
- The sponsor must provide a short explanation on why the thesis is suitable for publication
- The sponsor must provide a short explanation on why the thesis is particularly significant
- Submissions should be sent to the associate director of the Centre for European Law
- The sponsor should provide a covering letter

All rights reserved

No part of this paper may be reproduced in any form
without the permission of the author(s)

The MCEL Master Working Paper series seeks to give excellent Master students the opportunity to publish their final thesis and to make their work accessible to a wide audience. Those wishing to submit papers for consideration are invited to send work to the associate Director of the Centre: elise.muir@maastrichtuniversity.nl

Our submission guidelines and further information are available at:
<http://www.maastrichtuniversity.nl/web/Institutes/MCEL/Publications1/MasterWorkingPapers.htm>

© NINA-CHRISTIN STOFFEL

Published in Maastricht, November 2015

Faculty of Law
Maastricht University
Postbox 616
6200 MD
Maastricht
The Netherlands

This paper is to be cited as MCEL Master Working Paper 2015/3

Table of Content

- 1. Introduction 1**
- 2. The Relation of Impact Assessment and (Better) Regulation 5**
 - 2.1 Introduction 5
 - 2.2 Definitions 5
 - 2.3 The Theoretical Context & Rationales of Impact Assessment 8
 - 2.4 Conclusion 10
- 3. The “Old” EU System of Better Regulation & Impact Assessment 11**
 - 3.1 Introduction 11
 - 3.2 The Making Off: The Creation of the Impact Assessment System in the EU 11
 - 3.3 The Three Defects of the “Old” System 12
 - 3.2.1 *The Limited Scope of Application* 12
 - 3.2.2 *The Impact Assessment Board’s Lack of Independence* 16
 - 3.2.3 *Transparency* 18
 - 3.4 Conclusion 21
- 4. The 2015 Better Regulation Agenda of the Juncker Commission 22**
 - 4.1 Introduction 22
 - 4.2 Tackling the Three Deficiencies of the EU Impact Assessment System 23
 - 4.2.1 *Clarification for the Scope of Application?* 23
 - 4.2.2 *The New Regulatory Scrutiny Board: More Independence in Quality Control?* 26
 - 4.2.3 *The Transparency Boost* 29
 - 4.3 Conclusion 32
- 5. Conclusion 33**
- Bibliography 37**
- Table of Figures 44**

List of Abbreviations

CCM	Classic Community Method
CWP / CLWP	Commission (Legislative and) Work Programme
DG	Directorate-General of the European Commission
EIA	Extended Impact Assessment
EU	European Union
IA	Impact Assessment
IAB	Impact Assessment Board
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-Operation and Development
PIA	Preliminary Impact Assessment
ROB	Regulatory Oversight Body
RSB	Regulatory Scrutiny Board
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the European Union

1. Introduction

Directly from the beginning of the term of office in November 2014, the “new” Commission of President Juncker presented a “new start” with an ambitious 2015 Work Programme that radically differs from previous Commission Work Programmes (CWPs) as it concentrates on a limited set of concrete policy initiatives – namely 23 initiatives. Compared to an average of over 130 new initiatives proposed by the previous Commission, the 2015 Work Programme seems to hold its promise of more focused new policy initiatives, cutting red tape and clearing desks.¹ The “magic words” of the Commission for holding its promise and achieving its goals are *better regulation* through comprehensive and effective *impact assessment*. Therefore, on 19 May 2015, the Commission adopted a new *Better Regulation Agenda*² by means of a comprehensive reform package consisting of new detailed *Better Regulation Guidelines*³ as well as an extensive *Toolbox* that aim to improve, in particular, the quality of new laws through better impact assessments of draft legislation and amendments. This revises the previously existing framework of *inter alia* the 2002 Impact Assessment Communication, the 2002 Better Regulation Action Plan, the 2005 Better Regulation Communication, and the 2010 Smart Regulation Communication.⁴ The shift towards a new framework serves as a solid foundation for achieving the new Commission’s ambitious EU’s policy objectives in the most efficient and effective way with the new set of initiatives and hence, enhancing scrutiny and transparency for well-informed and evidence-based law-making – or in other words, *better regulation*.⁵ The key better regulation instrument that serves as “aid to the legislator” is the *impact assessment* (hereinafter, IA). Previously, this instrument has been subject to strong criticism⁶ with regard to three deficiencies: Firstly, the scope of IA was limited mainly to legislative acts and was only rarely applied to non-

¹ For the 10 priorities see the European Commission website, http://ec.europa.eu/priorities/work-programme/index_en.htm .

² Commission Communication, ‘Better Regulation for Better Results – an EU Agenda’, COM(2015) 215 final (2015 Better Regulation Agenda).

³ Commission Staff Working Dokument, ‘Better Regulation Guidelines’, SWD(2015) 111 final.

⁴ Commission Communication, ‘Impact Assessment’, COM(2002) 276 final; Commission Communication, ‘Action plan “Simplifying and improving the regulatory environment”’, COM(2002) 278 (Better Regulation Action Plan); Commission Communication, ‘Better Regulation for Growth and Jobs in the European Union’, COM(2005) 97 final ; Commission Communication, ‘Smart Regulation in the European Union’, COM(2010) 543 final.

⁵ European Commission, Press release ‘Better Regulation Agenda: Enhancing transparency and scrutiny for better EU law-making’ of 19 May 2015. Retrieved on 1 July 2015 from http://europa.eu/rapid/press-release_IP-15-4988_en.htm .

⁶ For more elaborate discussion about the criticism within the academic literature and several studies, please see Chapter 3.

legislative acts such as delegated and implementing acts.⁷ Secondly, the lack of independence of its regulatory oversight body (ROB), the Impact Assessment Board (IAB), which consisted of high-ranking Commission officials, has been criticised in several studies as well as in literature;⁸ and thirdly, there was a lack of transparency in the regulatory decision-making process.⁹

In fact, it was not until 2002, that the EU in the course of its first *Better Regulation Action Plan*¹⁰ launched the integrated impact assessment as a essential tool to be used within the pre-legislative phase to improve the quality and coherence of the policy making process by a establishing a regulatory review system within the European Commission.¹¹ Initially, IA was a single-sector type assessments and the scope of EU impact assessment encompassed only “major initiatives” presented by the Commission in its Annual Policy Strategy or its Work Programme (now called Commission Work Programme, or CWP) for legislative proposals or other proposals having an economic, social and environmental impact. It followed the aim of addressing the lack of “evidence-based decision-making” in the legislative processes by functioning as ‘an aid to decision-making, not a substitute for political judgement.’¹² In fact, in the EU, non-legislative acts were explicitly excluded from the

⁷ See *inter alia* Alberto Alemanno & Anne Meuwese; ‘Impact Assessment of EU Non-Legislative Rulemaking: The Missing Link in “New Comitology”’, *European Law Journal* 19 (1), 2013, pp. 76-92; The Evaluation Partnership, *Evaluation of the Commission’s Impact Assessment System. Final Report – Executive Summary*. April 2007; Anne Meuwese; *Impact Assessment in EU Lawmaking*. Kluwer International, 2008;; Tanja Ehnert; ‘The Legitimacy of New Risk Governance – A Critical View in Light of the EU’s Approach to Nanotechnologies in Food’. *European Law Journal* 21 (1), 2015, pp. 44-67; Jonathan B. Wiener & Alberto Alemanno; ‘Comparing regulatory oversight bodies across the Atlantic: The Office of Information and the Regulatory Affairs in the US and the Impact Assessment Board in the EU’, in: Susan Rose-Ackerman & Peter Lindseth (eds.); *Comparative Administrative Law*. Edward Elgar, 2010; Andrea Renda; *Impact Assessment in the EU: The state of the art and the art of the state*. Brussels: Centre for European Policy Studies, 2005, pp. 61 – 66.

⁸ See *inter alia* Wiener & Alemanno 2010; Renda 2005; Meuwese 2008; Ellen Vos; ‘Chapter 2: European Agencies and te Compositie EU Executive’, in: Michelle Everson, Cosiomo Monda & Ellen Vos (eds.); *European Agencies in between Institutions and Member States*. Kluwer Law International, 2014, p. 37.

Opinion by Stijn Hoorens; “Better Regulation”: Why Timmermans should go beyond the Regulatory Scrutiny Board’, euractiv. Retrieved on 11 August 2015 from <http://www.euractiv.com/sections/science-policy/better-regulation-why-timmermans-should-go-beyond-regulatory-scrutiny> ; Andrea Renda; ‘The cost of Europe: can better EU regulation lift the burden?’. Contribution to the Policy’s Network, 2 March 2015. Retrieved on 20 July 2015 from http://www.policy-network.net/pno_detail.aspx?ID=4854&title=The+cost+of+Europe%3a+can+better+EU+regulation+lift+the+burden%3f.

⁹ See *inter alia* Meuwese 2008; Wiener & Alemanno 2010; Renda 2005; Renda 2015; Robert Baldwin; ‘Is Better Regulation Smarter Regulation’, *Public Law*, 2005; Rick Haythornthwaite; ‘Better Regulation in Europe’, in: Stephen Weatherill (ed.); *Better Regulation*. Hardpublishing, 2007

¹⁰ Communication from the Commission, ‘Action plan “Simplifying and improving the regulatory environment”’, COM(2002) 278 (Better Regulation Action Plan).

¹¹ COM(2002) 276 final.

¹² *ibid.*, p. 3-6.

scope of IA until 2005.¹³ The Commission extended in its IA Guidelines the scope of application of IA firstly in 2005, on a case-to-case basis to ‘cross-cutting policy-defining non-legislative proposals’¹⁴, however, acts falling under the Commission’s executive powers were usually not subject to IA. Later in 2009, it was more generally stated that non-legislative initiatives must undergo an IA provided that they are likely to have significant impacts.¹⁵ Nevertheless, the scope of application for IAs to non-legislative acts continued to be rather obscure and thus, existed only on paper since there were no clearly stated conditions or criteria within the IA system triggering a proposal to be “likely to have significant impacts”. This is supposed to be changed by the “new start” of the Juncker Commission.

The question as to whether the new Agenda overcomes the above-mentioned three main deficiencies is therefore key in this thesis. Hence, the thesis aims to examine:

To what extent does the 2015 Better Regulation Agenda address the three deficiencies of the “old” impact assessment system with regard to the limited scope of application of impact assessment especially for non-legislative acts as well as to the lack of independence and transparency?

With analysing the new Better Regulation Agenda according to the research question, this thesis is an important contribution to the academic debate. Conducting the evaluation almost directly after the Agenda’s publication by relying solely on data provided by the Commission’s documents, the thesis pioneers with its results for further assessments of the new better regulation and impact assessment system in practice. Thus, it fills in the gap to compare the defective “old” system with the “new start” of the new Better Regulation Agenda by shedding light on the deficiencies of the “old” system, the suggestions for improvements made by studies or academia as well as assessing the novelties and changes introduced by the new Agenda with regard to their effectiveness to resolve the three main deficiencies.

In order to answer the research question, the thesis is structured as follows: Firstly, a general definition of impact assessment and its connection to regulation – and better regulation – is given (Chapter 2). Secondly, this thesis examines the EU System of Better Regulation and impact assessment by outlining the current state of the art by examining the old framework and its three main deficiencies (Chapter 3). Thirdly, the “new” start by the Juncker Commission establishing new Better Regulation Agenda is investigated (Chapter 4).

¹³ The Commission Communication stated ‘Commission measures deriving from its powers of controlling the correct implementation of Community Law are equally exempted.’ See COM(2002) 276 final, p. 5.

¹⁴ COM(2005) 97 final, p. 5.

¹⁵ European Commission, Impact Assessment Guidelines 2005, SEC(2005) 791 and Impact Assessment Guidelines 2009, SEC(2009) 92.

Thereby, the new IA system is assessed with regard to its effectiveness of solving the deficiencies of the limited und unclear scope of application of the IA system, the lack of independence of the IAB and the lack of transparency (Chapter 4). Fourthly, the paper draws conclusions from its analysis by answering the research question as well as giving a further outlook on the way forward (Chapter 5).

2. The Relation of Impact Assessment and (Better) Regulation

2.1 Introduction

Before zooming in into the EU system of impact, it is necessary to briefly draft a general definition of impact assessment and setting it into context of the concept of *regulation*. Hence, it is reasonable to clarify the concept of *regulation* – and *better regulation* – as it is a precondition for understanding the purpose of the existence of *impact assessment* within the regulatory decision-making process of the EU.

2.2 Definitions

In general, impact assessments are considered to be flexible decision-making tools that can be adapted to the individual needs of each state using it. The OECD defines it as

‘decision tool, a method of i) systematically and consistently examining selected potential impacts arising from government action and of ii) communicating the information to decision-makers. Both the analysis and communication aspects are crucial.’¹⁶

This decision tool falls under the five simplified regulatory decision methods, identified by the OECD, which are individually adjusted by the regulators according to the issue at hand, political traditions, national culture and administrative style. Firstly, the “expert method” uses the professional judgement of a trusted expert as central decision-making tool, which can be either a regulator or an external expert. Secondly, the “consensus method” reaches a common position of a group of stakeholders that balances their interests. Thirdly, political representatives decide within the “political method” according to the particular importance of the relevant matter to the political process. Fourthly, decisions can also be based on the “benchmarking method” by relying on international regulation as an outside model. Finally, by use of the “empirical method”, the parameters of actions are determined by decisions that are based on analysis and fact-finding according to established criteria.¹⁷

It is obvious from the political practice that these methods are complementary when designing individually the appropriate IA system for a particular state. Besides, it is noteworthy that impact assessment is not meant to be a decision-making tool *per se* for reaching regulatory decisions, rather it aims to expand and clarify the relevant factors for balanced regulatory decisions – hence, it is an *aid to the legislator*.¹⁸ It intends to result in a balanced decision by implicitly broadening the highly-focused problem-solving mission of the

¹⁶ OECD; *Regulatory Impact Analysis: Best Practices in OECD Countries*. 1997, p. 13.

¹⁷ *ibid.*, p. 14.

¹⁸ As established in *inter alia* Commission Communication, ‘Impact Assessment’, COM(2002) 276 final, p. 3; Alberto Alemanno & Anne Meuwese; ‘Impact Assessment of EU Non-Legislative Rulemaking: The Missing Link in “New Comitology”’, *European Law Journal* (19) 1, 2013, p.76-92; Anne Meuwese; *Impact Assessment in EU Lawmaking*. Kluwer International, 2008; Anne Meuwese; ‘Inter-institutionalising EU Impact Assessment’, in: Stephen Weatherhill (eds.); *Better Regulation*. Hard Publishing, 2007.

regulators and trading off problems against wider distributional and economic goals. Thus, instead of being a neutral “add on” technocratic tool within the decision-making process, impact assessment is a *mode of governance* that transforms the view of what is the appropriate action to what is the proper role of the state.¹⁹

In fact, Ehnert defines *regulation* as a *mode of governance*, which depicts – together with law - ‘the way political power is exercised.’²⁰ Public and/or private actors can exercise this political power by using legally binding or non-binding instruments. Hence, regulation is ‘the intentional attempt to alter the behaviour of others according to defined standards and purposes.’²¹ Within the context of the EU, Scott & Trubek ‘define new governance as any major departure from the “Classic Community Method” (CCM) that is embodied in the co-decision procedure according to Art. 251 TFEU.’²² They refer to the notion of the Community Method that is emphasised by the Commission’s White Paper on Governance highlighting the Commission’s exclusive right of legislative initiative. Not surprisingly, the CCM is therefore characterised by the adherence to legally binding, legislative and executive acts at the EU level.²³ Additionally, they identify the same wide gap as Meuwese and Wallace that exists ‘between the Commission’s self-perception of its role, as guardian of the treaties and agenda-setter, and outside perceptions of its weaknesses as policy manager.’²⁴

This is where impact assessment comes into play: the idea of objective impact assessment within the Better Regulation programme is to fill in this gap.²⁵ Thus, by striving for better regulation and ‘to ensure that EU action is effective, the Commission assesses the impact of policies, legislation, trade agreements and other measures at every stage - from planning to implementation and review.’²⁶ In other words, to improve the empirical basis for attempted regulatory decisions and produce well-informed and evidence-based policy

¹⁹ *ibid.*, p. 15.

²⁰ Tanja Ehnert. *Regulating the Invisible: A Critical Analysis of the EU’s Approach to Nanotechnologies*. Maastricht: Maastricht University Press, 2015, p. 58.

²¹ *ibid.*, p. 59, employing Julia Black’s definition in: Julia Black; ‘Constitutionalising Self-Regulation’. *The Modern Law Review* 59 (1), 1998, pp. 24-55.

²² Joanne Scott & David M. Trubek; ‘Mind the Gap: Law and New Approaches to Governance in the European Union’. *European Law Journal* 8 (1), 2008, p. 1.

²³ Marco Zinzani; *Market Integration through ‘Network Governance’*. *The Role of European Agencies and Networks of Regulators*. Intersentia, 2012, p. 4.

²⁴ W. Wallace; ‘Post-Sovereign Governance’, in: H. Wallace, W. Wallace & M.A. Pollack (eds.); *Policy-Making in the European Union*. [5th edn.], Oxford: Oxford University Press, 2005, p. 496, quoted in: Meuwese 2008, p. 53; Scott & Trubek 2008.

²⁵ For extensive discussions on impact assessment please see Meuwese 2008; Anne Meuwese; ‘Inter-Institutionalising EU Impact Assessment’, in: Stephen Weatherill (ed.); *Better Regulation*. Hardpublishing, 2007; Claudio M. Radaelli; ‘Diffusion Without Convergence: How Political Context Shapes; The Adoption Of Regulatory Impact Assessment’. *Journal of European Public Policy* 12 (5), 2005, pp. 924-943.

²⁶ European Commission on Better Regulation, see http://ec.europa.eu/smart-regulation/index_en.htm

proposals²⁷, *impact assessments* are put into place as ‘most important aid to policy-making within the EU “better regulation” agenda’.²⁸ Additionally, IA is a policy analysis instrument as it is ‘*the* rational provider of evidence about the future costs, benefits and risks of each policy option for new legislative proposals.’²⁹

Nevertheless, the question arises what defines *better regulation*³⁰. What has been a rather open-ended term for over a decade and was re-labelled as “Smart Regulation”³¹ in 2010, has now been clearly defined in the *Better Regulation Guidelines*³², which were issued in the course of the new *Better Regulation Agenda*³³ by the Juncker Commission. According to this document,

“Better Regulation” means designing EU policies and laws so that they achieve their objectives at a minimum cost. Better Regulation is not about regulating or deregulating. It is a way of working to ensure that political decisions are prepared in an open, transparent manner, informed by the best available evidence and backed by the comprehensive involvement of stakeholders.³⁴

In fact, Better Regulation is pursued with different tools, procedures and principles during the whole policy cycle meaning from the policy design and preparation, the adoption, the implementation to the evaluation and revision (see next page, Figure 1).

²⁷ It was identified by Meuwese that ‘the main issue impact assessment is meant to address is a lack of “evidence-based policy making” in the EU legislative process’ in Anne Meuwese 2008, p. 3; Anne Meuwese; ‘Inter-institutionalising EU Impact Assessment’, in: Stephen Weatherill (ed.); *Better Regulation*. Hard Publishing, 2007, pp. 290ff.

²⁸ Jacopo Torriti & Ragnar Löfstedt; ‘The first five years of the EU Impact Assessment system: a risk economics perspective on gaps between rationale and practice’. *Journal of Risk Research* 15 (1), 2012, p. 169.

²⁹ Jacopo Torriti; ‘The unsustainable rationality of Impact Assessment’. *European Journal of Law and Economics* 31, 2011, p.308.

³⁰ For extensive discussions see Stephen Weatherill (eds.); *Better Regulation*. Hard Publishing, 2007; Anne Meuwese & Patricia Popelier; ‘Legal Implications of Better Regulation: A Special Issue’. *European Public Law* 17 (3), 2011, pp. 455-466; Robert Baldwin; ‘Is Better Regulation Smarter Regulation’, *Public Law*, 2005, pp. 485-511; Ciara Brown & Colin Scott; ‘Regulation, Public Law, and Better Regulation’. *European Public Law* 17 (3), 2011, pp. 467–484; Claudio M. Radaelli; ‘Whither better regulation for the Lisbon agenda?’. *Journal of European Public Policy*, 14 (2), 2007, pp. 190-207.

³¹ COM(2010) 543 final.

³² Better Regulation Guidelines 2015, SWD(2015) 111 final.

³³ Better Regulation Agenda 2015, COM(2015) 215 final.

³⁴ Better Regulation Guidelines 2015, p. 5.

Figure 1. The EU Policy Cycle



Source: Commission Staff Working Document, 'Better Regulation Guidelines', SWD(2015) 111 final, p.5

This refers to forward planning and political validation, stakeholder consultation, evaluation and fitness checks, impact assessment, quality control as well as implementation support and monitoring.³⁵ Additionally, during the whole process the overarching principles of proportionality and subsidiarity have to be respected as laid down in Art. 5 TEU. Which role impact assessment plays in particular within the EU Better Regulation framework is analysed in Chapter 3 of this thesis. The application of the better regulation principles are targeted at ensuring 'that measures are evidence-based, well designed and deliver tangible and sustainable benefits for citizens, business and society as a whole.'³⁶ Nevertheless, it is important to emphasise that impact assessment *cannot* replace political decisions, but serves only as a tool for providing a basis for sound and timely policy decisions.³⁷

2.3 The Theoretical Context & Rationales of Impact Assessment

Additionally, impact assessment is subject to a wide-spread disciplinary and interdisciplinary debate in the European academic literature, therefore, this section from puts IA into a theoretical context and briefly illuminates its underlying rationales. Meuwese identifies two predominantly research "camps": the political research and the normative research on IA.³⁸

³⁵ *ibid.*, pp. 6-9

³⁶ Better Regulation Agenda 2015, p. 3

³⁷ *ibid.*; For further discussion about Better Regulation please see Stephen Weatherill (ed.); *Better Regulation*. Hard Publishing, 2007; Anne Meuwese & Patricia Popelier; 'Legal Implications of Better Regulation: A Special Issue'. *European Public Law* 17 (3), 2011, pp. 455-466; Robert Baldwin; 'Is Better Regulation Smarter Regulation', *Public Law*, 2005, pp. 485-511; Brown, Ciara & Colin Scott. 'Regulation, Public Law, and Better Regulation'. *European Public Law* 17 (3), 2011, pp. 467-484; Claudio M. Radaelli; 'Whither better regulation for the Lisbon agenda?'. *Journal of European Public Policy*, 14 (2), 2007, pp. 190-207.

³⁸ Meuwese 2008, pp. 4ff

Within the political camp, Majone is one of the first scholars that identified IA as a discipline of policy analysis and put IA in the juridical and political context, namely risk regulation.³⁹ In fact, he argued to facilitate the shift of the “European regulatory pendulum” from the precautionary principle to risk-based regulation in the EU.⁴⁰ Nevertheless, the political camp is dominated by the focus on regulatory *quality* and *performance* of IA. According to Radaelli, there are three types of tests indicating the regulatory quality: a compliance test, a performance test and a function test.⁴¹ The success was aimed to be measured by an ambitious scorecard approach, from which the most extensive was conducted together with the Commission by Renda in 2005.⁴² He identifies ‘a stark contrast between the Commission’s increased emphasis on impact assessment and the quality of assessments performed so far by Commission DGs’⁴³, which seemingly results from many defects in the IA system. Therefore, he suggests ten “roadmaps” (not to be confused with Commission’s roadmaps) offering different routes to improving the IA.⁴⁴ The normative research camp, on the other hand, focuses on the desirability of the *ex ante* assessment of legislation and policies⁴⁵, which is not of importance for this thesis and is, therefore, not examined in further detail.

From the literature debate, Torriti & Löfstedt identify nine underlying rationales of impact assessment from which five are of particular importance for the analysis of this thesis and thus, it is necessary to briefly outline them.⁴⁶ Firstly, as above-mentioned, IA serves as means for improving regulatory quality by generating positive values for better regulation. Secondly, IA aims to facilitate the shift to risk-based regulation by including economic analysis with simultaneous and social and environmental estimates. Thirdly, IA serves as policy instrument for increasing the openness of regulation for closing the democratic gap in policy-making. That is done widening the range of policy options in the IA system and weighting all alternative policy options before making the final policy decision.⁴⁷ Fourthly, IA constitutes an internal policy learning process that contributes to well-informed and evidence-based policy making process by improving the knowledge base of both policy-makers and policy

³⁹ G. Majone; *Regulating Europe*. London: Routledge, 1996.

⁴⁰ Ragnar E. Löfstedt; ‘The swing of the regulatory pendulum in Europe: From precautionary principle to (regulatory) impact analysis’. *Journal for Risk and Uncertainty* 28, 2004, pp. 237 – 260.

⁴¹ For more detail see Claudio M. Radaelli; ‘Getting to grips with quality in the diffusion of regulatory impact analysis in Europe’. *Public Money and Management* 24 (5), 2004 pp. 924-943; Claudio M. Radaelli & F. de Francesco; *Indicators of Regulatory Quality*. Working Paper, University of Bradford, 2004.

⁴² Renda 2005, pp. 61 – 66.

⁴³ *ibid.*, p. 66.

⁴⁴ All “roadmaps” can be found in Renda 2005, Chapter 3, pp. 80-132.

⁴⁵ Meuwese 2008, p. 6.

⁴⁶ For all nine rationales of IA please see Torriti & Löfstedt 2011, p. 170 – 176.

⁴⁷ J. Pelkmans, S. Labory & G. Majone; ‘Better Regulation quality: Assessing current initiatives and new proposals.’, in: G. Gallo & J. Pelkmans (eds.); *Regulatory reform and competitiveness in Europe. Volume 1: Horizontal issues*. Cheltenham: Edward Elgar, 2000.

decisions. Lastly, IA also includes stakeholder participation by its minimum-standard of consultation, which makes the regulatory process both more accountable and more transparent – and results in *better regulation*.⁴⁸

2.4 Conclusion

It becomes clear how regulation – and better regulation – and impact assessment are related and interdependent to each other. Impact assessment is the essential information “aid to the legislator” for producing well-informed, evidence-based decisions. IA is a mode of governance that transforms the view of what is appropriate action to what is the proper role of the state for better regulation filling the gap between the Commission’s self-perception of its role, as guardian of the treaties and agenda-setter, and outside perceptions of its weaknesses as policy manager. Moreover, the underlying rationale of IA is improving the quality of the regulatory decision-making process by opening regulation for input by stakeholders and citizens as well as taking into account a wide range of policy options in the IA system and weighting all alternative policy options before making the final policy decision – and produce better regulation.

⁴⁸ Radaelli 2003, p. 723; Torriti & Löftstedt 2011, p. 176.

3. The “Old” EU System of Better Regulation & Impact Assessment

3.1 Introduction

This Chapter examines the “old” EU System of Better Regulation and impact assessment that governed the regulatory decision-making as well as law-making process up to the “new start” launched in May 2015 by the Juncker Commission. Up to this point, this Chapter sheds light on how a system of well-informed and evidence-based decision-making in the whole policy cycle emerged, in which the impact assessment is the policy tool that is the most important aid to the legislator to produce “better regulation”. Nevertheless, this system still suffered from several deficiencies⁴⁹, from which the three most important – or the most defective – are examined: the limited scope of application of IAs, the lack of independence of especially the Impact Assessment Board (IAB) and the lack of transparency within the regulatory process.

3.2 The Making Off: The Creation of the Impact Assessment System in the EU

In the aftermath of the 2000 Lisbon Strategy, the European Commission worked hard on achieving its main strategic goal to become the ‘to become the most competitive and dynamic knowledge-based economy in the world’⁵⁰ by *inter alia* aiming at two specific policy considerations – simplifying and improving the regulatory environment in the EU and therefore, *ex ante* assessing the economic, social and environmental effects of policy proposals. These two considerations were introduced by the Göteborg European Council⁵¹ and the Laeken European Council⁵². Additionally, the White Paper of Governance underpinned that the EU will be judged by the impact of its regulation and ‘must pay constant attention to improving the quality, effectiveness and simplicity of regulatory acts’⁵³, hence, striving for *better regulation*. For achieving better regulation, the White Paper suggested five essential political principles – ‘openness, participation, accountability, effectiveness and coherence’⁵⁴ – that should be integrated in future actions. In fact, only one year later, the Commission issued the so-called *Better Regulation Action Plan*⁵⁵, which aimed at simplifying and improving the quality of the regulatory environment in the EU by

⁴⁹ See also Patricia Popelier; ‘Governance and Better Regulation: Dealing with the Legitimacy Paradox’, *European Public Law* 17 (3), 2011, pp. 555-596; Meuwese & Popelier 2011; Claudio M. Radaelli; ‘The diffusion of regulatory impact analysis: Best-practice or lesson-drawing?’, *European Journal of Political Research* 43 (5), 2003, pp. 723-747.

⁵⁰ “Lisbon Strategy” of the Lisbon European Council of 23-24 March 2000, retrieved on 4 July 2015 from http://www.europarl.europa.eu/summits/lis1_en.htm#d.

⁵¹ Göteborg European Council of June 2001, COM(2001) 130 final

⁵² Laeken European Council of December 2001, COM(2001) 726 final

⁵³ European Commission, White Paper on European Governance, COM(2001) 428 final, p. 16

⁵⁴ *ibid.*, p. 27

⁵⁵ Better Regulation Action Plan 2002, pp. 1-7

launching two key measures by means of two separate communications: *minimum standards of consultation* and, even more importantly for this thesis, the *consolidated respectively integrated impact assessment method*. The former aims at enhancing the transparency and quality of the Commission proposals by placing consultation of stakeholders, experts and interested parties as well as the civil society on a systematic and transparent footing.⁵⁶ That translates two of the five essential principles – openness and participation – presented by the White Paper on Governance into practice. Moreover, the latter is targeted at guaranteeing and justifying the validity of the legislative proposals to bring also two more essential principles into effect, namely accountability and effectiveness. In other words, IA is introduced as the central tool to facilitate the decision-making process and the choice of the most appropriate policy instrument or combination of instruments EU level by respecting especially the principles of proportionality and subsidiarity. Additionally, the Better Regulation Action Plan implemented the IA as ‘a consolidated and proportionate instrument for assessing the impact of its legislative and policy initiatives, regulatory impact assessment and sustainable development (in the economic, social and environmental fields)⁵⁷. Previously, the Commission had developed several specific partial and sectoral assessment instruments and methods⁵⁸, but in the Action Plan the Commission firstly integrated and replaced the formerly used single-sector type assessments into one ‘global instrument’⁵⁹. In fact, the global IA instrument was designed according to the procedures developed within the OECD as outlined in the preceding chapter and some Member States.⁶⁰

3.3 The Three Defects of the “Old” System

The creation of an impact assessment system in the EU suffered from many “childhood diseases” and therefore, was subject to many changes and developments in the subsequent years. However, there are three particular deficiencies that emerged over the whole process and could not be resolved within the “old” system. This section zooms into these deficiencies and their developments within the EU IA system from its creation in 2002 up the “new start” by the Juncker Commission in 2015.

3.2.1 The Limited Scope of Application

The first deficiency is the limited application of IA. As a matter of fact, impact assessment – although labelled as “global instrument” – was subject to a limited scope of application with

⁵⁶ *ibid.*, p. 6

⁵⁷ *ibid.*, p. 7

⁵⁸ Such as Business IA, Regulatory IA and Sustainable IA.

⁵⁹ COM(2002) 276 final, p. 2

⁶⁰ Better Regulation Action Plan 2002, p. 6

regard to non-legislative proposals.⁶¹ Until 2005, it applied only to *major initiatives* included in the Commission's Annual Strategy or Work Programme 'provided that they have a potential economic, social and/or environmental impact and/or require some regulatory measure for their implementation'⁶². Thus, the 2002 Commission Communication on Impact Assessment laid down two general principles and an explicit exclusion for the definition of the scope. Firstly, the submission for inclusion of a legislative or other policy proposal into the Commission's Annual Strategy or CWP served as basic criterion. The inclusion resulted from "dual stage approach" comprising a "preliminary IA" (PIA), and an "extended IA" (EIA). The PIA selected a number of proposals with expected large impacts, which are – after a decision by the College of Commissioners – subject to an EIA, hence, a more in-depth analysis.⁶³ Secondly, this basic criterion was restricted to 'regulatory proposals, such as directives and regulations, and in an appropriate form, other proposals, such as white papers, expenditure programmes and negotiating guidelines for international agreements that have an economic, social or environmental impact'⁶⁴. Thirdly, the general exemption from the IA application scope applied to Green Papers, implementing and statutory decisions, technical updates as well as Commission measures for controlling the correct implementation of Community law.⁶⁵ These principles and the exclusion built a vague theoretical construct for the IA scope, which in practice mainly excluded non-legislative proposals as they are normally not included in the CWP.

In 2005, the Commission made an attempt to clarify the IA scope by issuing *Impact Assessment Guidelines*⁶⁶. This attempt mainly failed as the Commission again set out an explicit exemption⁶⁷ and a formal requirement - again the inclusion in the CWP – but simultaneously opened up the scope by giving broad discretion to the Commission, which may, 'on a case-by-case basis, decided to carry out an impact assessment of a proposal which does not appear on the CWP'⁶⁸. There were no conditions or criteria that provide guidance for the discretion of the Commission to apply IAs to non-CWP proposals.

Subsequently, a different approach for defining the IA scope was adopted within the revised Impact Assessment Guidelines in 2009 as a consequence of the Lisbon Treaty entering into force. They claimed that '[t]hese Guidelines do not define which Commission initiatives need to be accompanied by an IA. This is decided each year by the Secretariat

⁶¹ Firstly identified by Alemanno & Meuwese 2013, pp. 76-92.

⁶² COM(2002) 276 final, p. 5.

⁶³ Better Regulation Action Plan 2002, p. 7; Renda 2006, p. 53.

⁶⁴ *ibid.*

⁶⁵ *ibid.*

⁶⁶ Impact Assessment Guidelines 2005.

⁶⁷ 'Green Papers and proposals for consultation with Social Partners are exempted', stated in European Commission, Impact Assessment Guidelines 2005, p. 6.

⁶⁸ *ibid.*

General/Impact Assessment Board and the departments concerned.⁶⁹ This referred to the so-called “roadmaps” that are published at an early stage of the policy cycle and served as an initiative’s political validation as well as information tool for stakeholders stating the planned impact assessments, consultations and evaluations.⁷⁰ Most importantly, this replaced also the distinction between “preliminary” and “in-depth/extended” impact assessments ‘primarily because the required case-by-case decisions were seen to be too open for political “horse-trading”⁷¹. In other words, roadmaps were ‘essential tools for internal and external transparency of policy preparation’⁷², which – again – were only created for initiatives included in the now so-called “Commission Legislative and Work Programme (CLWP)” initiatives and since 2009, even for all non-CLWP initiatives having significant impacts. What looked similarly vague at the first glance, could be translated into a different and more extended scope of IA approach that required an IA for *all legislative initiatives*⁷³ and *all non-legislative initiatives, which define future policies*.⁷⁴ On the one hand, this depicted a slight clarification of the IA scope, but on the other hand, the Commission added that ‘certain implementing measures (so-called ‘comitology’ items) which are likely to have significant impacts’⁷⁵ fall also under the IA scope. This put again limitations on the scope, which did certainly not apply to *all* non-legislative proposals. However, the Commission did not give any indication, guidelines or criteria for determining when something is “likely” or “significant”.

This created again a wide discretion for the Commission – and a great uncertainty for the other institutions, stakeholders and the civil society. Although “better regulation” became “smart regulation” in 2010⁷⁶, there were no significant changes made to the IA system that contributed to clarifying its scope. As the only novelty, the Commission established the requirement for publishing roadmaps ‘for all proposals that are likely to have significant impacts, including delegated and implementing acts, explaining whether an impact assessment is planned or not and why’⁷⁷. As a result, the scope was only partially clarified to the extent that it does not differentiate between legislative and non-legislative acts anymore and even explicitly included delegated and implementing acts. However, the necessary

⁶⁹ Impact Assessment Guidelines 2009, p. 6.

⁷⁰ Glossary “Roadmap” in European Commission, Better Regulation Guidelines, COM(2015) 215 final, p. 91.

⁷¹ The Evaluation Partnership 2007, p.9.

⁷² 2009 Impact Assessment Guidelines, p. 7.

⁷³ Included in the CLWP as well as non-CLWP legislative initiatives with clearly identifiable economic, social and environmental impacts.

⁷⁴ European Commission, Memo ‘The main changes in the 2009 Impact Assessment Guidelines compared to 2005 Guidelines’, retrieved on 12 July 2015 from http://ec.europa.eu/smart-regulation/better_regulation/key_docs_en.htm .

⁷⁵ Impact Assessment Guidelines 2009, p. 7.

⁷⁶ COM(2010) 543 final.

⁷⁷ *ibid.*, p. 6.

condition “likely to have significant impacts” remained undefined, which kept the scope of application being indefinite.

This unclear definition of its scope depicts a serious defect of the IA system as was already highlighted in the report of the Evaluation Partnership in 2007⁷⁸. In interviews, Commission officials criticised that the IA scope suffered from a two-fold defect. On the one hand, the “formalistic” selection were too wide and against the principle of proportionality producing IAs for legislative and non-legislative acts that are not suitable for an IA.⁷⁹ On the other hand, the only clear condition that had to be fulfilled by a proposal to be caught by the IA requirement, the inclusion in the CLWP, was not effective as ‘many many interviewees felt that the CLWP does not necessarily include all those proposals with the most significant likely impacts’⁸⁰. In particular, this concerned the application of IA to non-legislative acts as they are normally not integrated into the CLWP. Consequently, it was stressed that ‘*an inappropriate mechanism for determining the IA system’s scope of application has the potential to undermine the credibility and acceptance of IAs among Commission staff*’⁸¹.

Not only the Commission staff expressed its criticism about this deficiency, but also academic circles criticised the limitation of the IA scope – especially with respect to an general extension to non-legislative acts.⁸² According to Wiener & Alemanno, the ‘blanket application of IAs to *all* items on the [CLWP] [did] not necessarily cover all proposals with the most significant impacts.’⁸³ Although Alemanno & Meuwese admitted *inter alia* that an automatic extension of the IA scope would eventually slow down the process of non-legislative acts, they strongly argued that there is ‘a potential of IA to contribute to a more encompassing, higher quality and better controlled exercise of delegated authority’⁸⁴ if the scope were further clarified.

Moreover, by taking into account the ‘principle of proportionality analysis’⁸⁵, Renda criticised the lack of a precise definition in the Commission’s documents on what is to be understood as “proportionality” and therefore, pleaded to introduce amongst others thresholds. These should facilitate and simplify the decision of when a detailed impact assessment is necessary when the proposed regulation ‘is expected to exert a substantial impact on the EU economy, or alternatively, when it has the potential to significantly affect the EU agenda or key policy priorities in subsequent years’.⁸⁶ Nevertheless, the difficulty is

⁷⁸ ⁷⁸ The Evaluation Partnership 2007.

⁷⁹ *ibid.*, p. 30.

⁸⁰ *ibid.*, pp. 30f.

⁸¹ *ibid.*, p. 31, emphasis added.

⁸² See Meuwese 2008; Alemanno & Anne Meuwese 2013; Ehnert 2015.

⁸³ Wiener & Alemanno 2010, p. 323.

⁸⁴ Alemanno & Meuwese (2012), p. 92.

⁸⁵ See COM(2002) 276 final, p. 13.

⁸⁶ Renda 2006, p. 94.

to set the threshold appropriate to catch all important proposals – but not *all* proposals. Here, the experience from *inter alia* the US, where the threshold for “major impacts” is set at ‘an annual impact on the economy of over \$ 100 million’⁸⁷ could possibly serve as a helpful indication.

Additionally, the so-called “Doorn Report” as well as the Report of the European Court of Auditors, both requested by the European Parliament, underpinned the criticism towards the scope of application of the IA system. The Doorn Report criticised that most of the secondary respective implementing legislation is adopted through the comitology procedure without a prior IA, hence, lacking transparency and parliamentary control. The Doorn Report concluded that since the Commission does not follow the same methodology in IAs resulting varying quality, “the impact assessment often resemble[d] a justification of the proposal rather than an actual objective assessment”⁸⁸. Additionally, the Court of Auditors criticised that there was no comprehensive overview of the non-CLWP legislative initiatives selected to undergo an impact assessment or explanations of the selection criteria for the initiatives.⁸⁹

3.3.2 The Impact Assessment Board’s Lack of Independence

The second deficiency that emerged during the whole process of developing the IA system, stems from the the regulatory oversight body (ROB) – the Impact Assessment Board (IAB) – created by the European Commission in November 2006 as means for internal check and balances.⁹⁰ In general, regulatory oversight has a technocratic and a democratic function. On the one hand, analytic methods are used to reduce the costs and side effects for increasing the benefits by using analytic methods. On the other hand, regulatory oversight is a tool for scrutinising as well as enhancing the accountability of officials working in the regulatory process.⁹¹ One can identify two key attributes of an ROB: first, expertise ‘in the form of trained professional staff capable of undertaking technical evaluation of regulatory impacts and options’⁹²; second, political accountability meaning being accountable to e.g. the President, hence, the centre of government. In fact, when creating the IAB, the Commission expected it to become the ‘centre of excellence’⁹³ being composed of four

⁸⁷ John F. Morall, ‘An Assessment of the US regulatory impact analysis programme’, in: OECD; *Regulatory Impact Analysis: Best Practices in OECD Countries*. 1997, p. 73.

⁸⁸ European Parliament, Report on assessment of the impact of Community legislation and the consultation procedures - Committee on Legal Affairs and the Internal Market, 2004 (The Doorn Report), p. 4.

⁸⁹ The European Court of Auditors; *Impact Assessment in the EU Institutions: Do they support Decision-Making?*. Special Report No.3, 2010.

⁹⁰ Commission Communication, ‘A Strategic Review of Better Regulation in Europe’, COM(2006) 689 final.

⁹¹ Wiener & Alemanno 2010, p. 310.

⁹² *ibid.*, pp. 311-312.

⁹³ COM(2006) 689 final.

permanent and four rationing high-level officials⁹⁴ at Director level appointed due to their personal capacity and economic, social and environmental expert knowledge. Their term of office was set at two years in which they shared work on a rotating basis due to the aim to avoid conflicts of interest and to ensure a sustainable work burden.⁹⁵ They had the duty to act independently from any policy making departments and report directly to the President of the Commission as they worked under his direct authority, but were chaired by the Deputy Secretary General for Smart Regulation. Moreover, the staff could be extended temporarily by internal and external experts. However, it is to note that there were no enforcement mechanisms or sanctions known in case of a breach of duty.

The purpose of IAB was *quality control*⁹⁶ in order to 'to provide widespread quality advice and control whilst ensuring that the responsibility for preparing assessments and the relevant proposals remains with the relevant departments and Commissioner'⁹⁷. With issuing non-binding opinions, it aimed to 'ensure that impact assessments are of high quality, that they examine different policy options and that they can be used throughout the legislative process.'⁹⁸ All IAB opinions were published after the publication of the IA report in contrast to the draft IAs it had been working with. In fact, the non-binding amendments and recommendations given by the IAB have practically developed into "best practices". Although the IAB had no veto power, it had competence to "return letters" and to send so-called "prompt letters" that incorporated a request to the DGs to carry out an IA for an initiative that falls outside the current obligatory scope of application.⁹⁹ Moreover, in the 2009 Impact Assessment Guidelines, the role of the IAB was further clarified. It added the IAB's ability to ask for a revision respective resubmission as well as the requirement to include the recommendations of the IAB in the explanatory memorandum.¹⁰⁰

It becomes obvious that there was only thin line between solely quality control and control over substance, which can be directly linked to the question of the actual

⁹⁴ Until November 2011, the IAB consisted of five permanent members. It has been extended to five permanent for rotating members from different Commission DGs, whereby the rotation aimed to ensure that all DGs are represented at one point in time.

⁹⁵ Presentation by Riccardo Maggi, Deputy Head IAB Secretariat of the European Commission; *European Commission Impact Assessment Board*, OECD-Czech Workshop on Regulatory Impact Assessment Prague, Czech Republic 1 June 2012. Retrieved on 19 July 2015 from <http://www.oecd.org/gov/regulatory-policy/50526845.pdf>.

⁹⁶ Further information on quality control please see G. Mather & F. Vibert; *Evaluating Better Regulation Building the System*. 2006, London: European Policy Forum; Radaelli & De Francesco 2007.

⁹⁷ COM(2006) 689 final.

⁹⁸ *ibid.*

⁹⁹ Meuwese 2008, pp. 73 – 74.

¹⁰⁰ '[T]he Explanatory Memorandum accompanying the draft proposal should set out briefly the options that have been considered, their potential economic, social and environmental impacts, the website address where the final IA report can be found and how the recommendations of the IAB have been incorporated.', Guidelines on Impact Assessment 2009, pp. 10 -11.

independence of the IAB.¹⁰¹ In general, the concept of independence generally ‘refers to independence from executive and legislative powers, that is independence from politics and independence from market participants.’¹⁰² Although the members of the IAB were meant to work independently from their own DGs and all other policy-making departments, they were *de facto* officials employed by the Commission, thus, in a dependency relationship with it. Consequently, it was questionable how impartial and independent an official could be in overseeing the work of the institution it is directly affiliated to as well as the work of its own Directorate-Generale’s (DG) superiors.¹⁰³ As possible explanation, an incentive effect caused by reputational factors was suggested. It was assumed that IAB are incentivised to follow a consistent and impartial analysis approach that resulted in higher quality assessments, as they were well aware of the direct link between successful IAs and their professional future.¹⁰⁴ Besides, the Commission Communication on “Smart Regulation in the European Union” pointed out that ‘the IAB is effective’¹⁰⁵ and that its independence ‘is demonstrated by the frank views of its opinions’¹⁰⁶ and their willingness to request additional analytic help if other Commission services. However, it cannot be denied that the IAB was an ‘internal, multi-member, *institutionally dependent* representative board’¹⁰⁷.

Besides, since the creation of the IAB, it could be observed that the discipline in Commission services has been enhanced, which in turn lead to a greater quality of IA documents.¹⁰⁸ However, the IAB did not manage to achieve the status of a real “watch dog” that catalyses badly drafted and methodically unsounds policy proposals out of the process due to the fact that it was ‘still at once too small, and too “internal”’¹⁰⁹. Therefore, an omnipresent request – resulting from EU studies and literature – arises for addressing the lack of independence and accountability: the creation of an independent watchdog.¹¹⁰

3.3.3 Transparency

Already in 2001, the White Paper on Governance established five basic principles of good governance, which comprised *inter alia* openness and participation. Openness emphasised

¹⁰¹ *ibid.*

¹⁰² Ellen Vos 2014, p. 37.

¹⁰³ The Evaluation Partnership 2007, p. 60; Wiener & Alemanno 2011, p. 324; Hoorens 2015.

¹⁰⁴ *ibid.*

¹⁰⁵ COM(2010) 543 final, p. 6.

¹⁰⁶ *ibid.*

¹⁰⁷ Wiener & Alemanno 2011, p. 331.

¹⁰⁸ Renda 2015 ; see also COM(2006) 689 final; The Evaluation Partnership 2007, p. 60.

¹⁰⁹ Renda 2015.

¹¹⁰ For suggestions for an independent watchdog please see *inter alia* Renda 2015; Renda 2006, pp. 124-132; The Evaluation Partnership 2007, p. 127; Robert W. Hahn & Robert E. Litan; ‘Counting Regulatory Benefits and Costs: Lessons for the U.S. and Europe’. *Journal of International Economic Law* (8) 2, 2005, pp. 473-508; Lee & C. Kirkpatrick; *A pilot Study on the Quality of European Commission Extended Impact Assessment. Draft for consultation*. Impact Assessment Research Centre, Institute for Development Policy and Management, University of Manchester, 21 June 2004 .

that ‘the European institutions should attach more importance to *transparency* and communication in their decision-making’¹¹¹ and place ‘[m]ore effective and transparent consultation at the heart of EU policy-shaping’¹¹². Therefore, participation may serve as one channel for improving the communication as well as systematically involving stakeholders, citizens and other interested parties during the whole policy making process, from drafting to implementing the policies. Another channel for enhancing transparency is *consultation*, which is also embedded in the EU treaty provisions. According to Article 11 TFEU, ‘the European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent’. Additionally, Protocol No. 2 annexed to the TFEU on the application of the principles of subsidiarity and proportionality postulates that ‘before proposing legislative acts, the Commission shall consult widely’. Furthermore, as a result of the commitments made in the White Paper on Governance, the Commission launched the Better Regulation Action Plan accompanied by a Communication laying down “minimum standards of consultation”.¹¹³ These minimum standards of consultation are targeted at helping to improve the participation of civil society and interested parties in the consultation process as well as making consultations more transparent.¹¹⁴

The relation of transparency respectively consultation to impact assessment was clarified in the Impact Assessment Guidelines as they emphasise that the importance of IA is demonstrated by ‘the Commission’s openness to input from a wide range of external stakeholders, and show[ed] its commitment to transparency.’¹¹⁵ Within the IA system, there are several components connected with consultation that influence the degree of transparency. Firstly, ‘roadmaps are essential tools for internal and external transparency of policy preparation and allow all actors involved in IA work to prepare their contributions in a timely manner’¹¹⁶. Hence, they serve as “agenda” in particular for external stakeholders and other interested parties by sketching the time line of the IA process, outlining a consultation plan and briefly stating the likely impacts of each policy options and whom they might affect. This allowed the stakeholders to provide input.¹¹⁷

Moreover, since the consultation is a dynamic process and not a one-off event, interested parties that are obliged by the treaty to implement the policy or are differently affected by the policy are consulted and informed by Commission services at different

¹¹¹ Summary of White Paper on Governance COM(2001) 428 final, retrieved on 22 July 2015 from <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:10109>.

¹¹² Commission Communication, ‘European governance - A white paper’, COM(2001) 428 final (White Paper on Governance), p. 12.

¹¹³ Commission Communication, ‘Minimum Standards of Consultation’, Com(2002) 277 final; Better Regulation Action Plan 2002, pp. 6-7.

¹¹⁴ *ibid.*

¹¹⁵ Impact Assessment Guidelines 2005, p. 5.

¹¹⁶ Impact Assessment Guidelines 2009, p. 7.

¹¹⁷ *ibid.*

stages of the IA procedure. Referring back to the minimum standards of consultation, policy makers are required to, firstly, ensure the most appropriate timing, format and tools to consult all interested parties; secondly, base the consultation on a clear problem definition, subsidiarity analysis, description of the possible options and their impacts; thirdly, keep in contact with the parties; and fourthly, include a comprehensive analysis of the consultation results in the IA report.¹¹⁸

Nevertheless, the study of the Evaluation Partnership shows that in practice, 35% of the external stakeholders consulted disagreed or strongly disagreed with the question whether the IA system is sufficiently open and transparent relative to interested parties outside the Commission. These external stakeholders were not directly involved in the IA process. In contrast, '[i]n all cases, those stakeholders who were involved in direct interactions with the Commission (such as working groups, bilateral or multilateral meetings) generally felt that the process was transparent.'¹¹⁹ However, even within these "transparent" processes, the external stakeholders criticised that the timing and/or political pressure prevented them from commenting on the *draft* final IA report; that clear information and feedback was lacking; and no information about the usage for the IA report of the input provided by them was given.¹²⁰ In fact, no consultation on *draft* IAs were conducted by the Commission as it did not consider consultation at this stage as necessary.¹²¹ By explicitly excluding draft IAs from the consultation scope, the Commission acted contrary to the recommendation given by the Court of Auditors. According to the findings in their report, 'consulting on draft IA reports is useful in ensuring that the analysis is complete, consistent and accurate. In particular, it provides a basis for identifying and quantifying potential costs and benefits, administrative burdens and problems with implementation and enforcement.'¹²² Additionally, the Court of Auditors points out that in other OECD countries such as in the USA, draft IAs are systematically made public for both information and opportunity to comment.

In literature, the necessary link between transparency and consultation is also recognised – and supported. Baldwin highlights that '[p]ublic consultations, moreover, contribute to regulatory transparency [...]. When regulation is open this improves accountability, helps to reduce arbitrariness and conduces to the fair consideration of affected interests.'¹²³ Haythornthwaite suggests that '[t]ime spent on consultation is a sound

¹¹⁸ *ibid.*, p. 19.

¹¹⁹ The Evaluation Partnership 2007, p. 47.

¹²⁰ *ibid.*

¹²¹ COM(2010) 543 final, pp. 6f; The European Court of Auditors 2010, p. 30.

¹²² The European Court of Auditors 2010, p. 30.

¹²³ Robert Baldwin 2005, p. 5.

investment in a proposal's future quality and legitimacy.¹²⁴ Therefore, Meuwese advocates a participatory law making approach by arguing that the IA system has to provide a forum for stakeholder input for enhancing transparency.¹²⁵ Additionally, Renda highlights that the IA process can be made more transparent by further developing the consultation procedures and by obliging the Commission to enable consultation on draft IAs before the IAB publishes its opinion.¹²⁶ He recently has claimed that 'the Commission should surrender' and allow stakeholder input on draft IAs as even the regulatory oversight body 'cannot replace such key step in the policy process.'¹²⁷ Hence, the lack of transparency could only be solved by enhancing and extending the consultation process with external stakeholders, citizens and other interested parties.

3.4 Conclusion

The "old" better regulation system established an integrated impact assessment system that is designed for the whole policy making process and aimed at producing well-informed, evidence-based and effective policies. Although the IA system underwent several developments and adaptations over the years, three main deficiencies could not be resolved. First, the inappropriate mechanism for determining the IA system's scope of application, which was additionally limited with regard to non-legislative acts. Second, the lack of independence in the regulatory oversight body, the Impact Assessment Board. Third, the lack of transparency due to insufficient consultation of stakeholders and citizens.

¹²⁴ Haythornthwaite 2007, p. 23.

¹²⁵ Meuwese 2008, pp. 41-49.

¹²⁶ Renda 2006, pp. 81f; Renda 2015.

¹²⁷ Renda 2015.

4. The 2015 Better Regulation Agenda of the Juncker Commission

4.1 Introduction

*'Is this radical or not? Methinks it is!'*¹²⁸

As the First-Vice President Frans Timmermans expressed in Shakespearian language in the quote above, the European Commission launched a new *Better Regulation Agenda* on 19 May 2015 introducing a comprehensive reform package covering the whole policy cycle. It constitutes the long-awaited fulfilment of European Commission's President Jean-Claude Juncker's promise for a "new start for Europe" with high priority on 'less, better and simpler'¹²⁹ regulation, which is produced by a 'more effective Commission'¹³⁰. Therefore, it contains the ambitious aim to

'boost openness and transparency in the EU decision-making process, improve the quality of new laws through better impact assessments of draft legislation and amendments, and promote constant and consistent review of existing EU laws, so that EU policies achieve their objectives in the most effective and efficient way.'¹³¹

In other words, this Agenda has the purpose to produce and encourage the implementation of regulatory interventions of the highest possible quality as well as to make the European Union more democratic according to one of the Juncker's Commission's ten priorities.¹³² Moreover, it incorporates also new integrated *Guidelines on Better Regulation*¹³³, which have been immediately in effect and replace the previous Impact Assessment Guidelines. These new Guidelines are accompanied by the *Better Regulation "Toolbox"*¹³⁴, which provides additional special and operational guidance for the application of the regulatory instruments by practitioners of the EU institutions. Another highly interesting novelty is, in fact, the specific mandate on better regulation that is given to a First Vice-President, namely Frans Timmermans. As "right-hand" of President Juncker, he has the complex mandate 'dedicated to the Better Regulation agenda, guaranteeing that every Commission proposal is

¹²⁸ Response by European Commission First Vice-President Frans Timmermans to the question whether his Better Regulation Agenda 2015 would be enough to satisfy the United Kingdom's demand for reform at a EU press conference on 19 May 2015, retrieved at 20 July 2015 from <http://www.euractiv.com/video/timmermans-methinks-better-regulation-radical-314707>.

¹²⁹ Extract from 'New Growth without Debt: My Priorities as Commission President', in the European Parliament elections 2014 Suomalainen klub, Helsinki, 16 April 2014; retrieved on 20 July 2015 from <http://juncker.epp.eu/press-releases/new-growth-without-debt-my-priorities-commission-president>.

¹³⁰ 'Time for Action – Statement in the European Parliament plenary session ahead of the vote on the College', Speech by Commission President-elect Jean-Claude Juncker at the European Parliament Plenary Session in Strasbourg on 22 October 2014, retrieved on 20 July 2015 from http://europa.eu/rapid/press-release_SPEECH-14-1525_en.htm.

¹³¹ European Commission, Press release 'Better Regulation Agenda: Enhancing transparency and scrutiny for better EU law-making' of 19 May 2015. Retrieved on 1 July 2015 from http://europa.eu/rapid/press-release_IP-15-4988_en.htm.

¹³² See http://ec.europa.eu/priorities/democratic-change/index_en.htm.

¹³³ Better Regulation Guidelines 2015

¹³⁴ European Commission, Better Regulation "Toolbox", 2015

truly required and that the aims cannot best be achieved by Member States.¹³⁵ When the Better Regulation Agenda was launched on 19 May 2015, the First Vice-President Timmermans gave a “preview” of the changes coming with the new Agenda when he stated:

‘We must rigorously assess the impact of legislation in the making, including substantial amendments introduced during the legislative process, so that political decisions are well-informed and evidence-based. [...] The decisions taken by EU Institutions interest us all, so we are putting forward measures which will open up the EU’s decision-making process, allowing for more transparency and scrutiny, and providing more opportunities for people to give their views.’¹³⁶

At first glance, it can be observed that Timmermans addresses all three deficiencies that are outlined in the previous Chapter of this thesis. Although his ambitions are perceived by the academia as ‘welcome and overdue’¹³⁷ as well as a ‘welcome step in the right direction’¹³⁸, there is also scepticism towards the new Better Regulation Agenda wondering whether it is ‘too good to be true’¹³⁹. More than sceptical was the group of European organisations that joined forces to create a “Better Regulation Watchdog”¹⁴⁰ because they are concerned that the new Agenda would weaken or obstruct important EU legislative proposals and focus solely on corporate interests. Hence, they do neither trust in President Juncker’s nor First-Vice President Timmermans’ promises and ambitions. Due to this lively public and academic debate, it is particularly interesting to examine in the following whether the Commission addresses – and possibly solves – the three above-mentioned key deficiencies.

4.2 Tackling the Three Deficiencies of the EU Impact Assessment System

4.2.1 Clarification for the Scope of Application?

When reading the new Better Regulation Agenda about the Commission committing to delivering better results by changing the way the Commission works at EU level¹⁴¹, one

¹³⁵ European Commission, Press release on ‘The Juncker Commission: A strong and experienced team standing for change’, retrieved on 23 July 2015 from http://europa.eu/rapid/press-release_IP-14-984_en.htm.

¹³⁶ European Commission, Press release on ‘The Juncker Commission: A strong and experienced team standing for change’, retrieved on 23 July 2015 from http://europa.eu/rapid/press-release_IP-14-984_en.htm.

¹³⁷ Lorna Schrefler, Andrea Renda & Jacques Pelkmans; ‘What can the Better Regulation Commissioner do for the EU?’, *CEPS Commentary*, 29 September 2014. Available at URL: http://aei.pitt.edu/54982/1/LS_et_al_Commission_Priorities_Regulation.pdf

¹³⁸ Sajjad Karim (ECR’s Legal Affairs committee coordinator) & Anthea McIntyre is (ECR’s employment committee coordinator & chair of the ECR’s re-shoring and better regulation policy group); ‘All EU institutions must embrace “better” regulation’ [Opinion], retrieved on 23 July 2015 from <http://www.euractiv.com/sections/trade-society/all-eu-institutions-must-embrace-better-regulation-314837>

¹³⁹ Andrea Renda; ‘Too good to be true? A quick assessment of the European Commission’s new Better Regulation Package’. *CEPS Special Report (108)*, May 2015. Available at URL: http://www.ceps.eu/system/files/SR108AR_BetterRegulation.pdf

¹⁴⁰ For further information, please see <http://www.betterregwatch.eu>.

¹⁴¹ Better Regulation Agenda 2015, p. 3.

fruitlessly looks for a statement about a development or clarification of the scope of application of impact assessments. However, a first hint is given on the Commission's website on impact assessment where it is clarified that 'impact assessments are prepared for Commission initiatives expected to have *significant economic, social or environmental impacts*'¹⁴² comprising legislative proposals, non-legislative initiatives defining future policies as well as implementing and delegated acts. Hence, one can observe that the general scope is clearly extended to non-legislative acts as well as delegated and implementing acts. However, it does not relate anymore to the inclusion to then CW(L)P as depending factor for the scope of application. Rather, the "significant impact" determines the relevance of initiatives for the IA scope. Nevertheless, for further guidance for conducting impact assessments, the Commission website refers to the new Better Regulation Guidelines 2015, which 'set out mandatory requirements and obligations for each step in the policy cycle.'¹⁴³ Following this reference, already in the first stage of the policy cycle, "Planning", an attempt is made to define "major initiatives", which need to be politically validated and then be accompanied by either a Roadmap or a newly introduced Inception IA.¹⁴⁴ In fact, as "major initiatives" qualify *inter alia* initiatives included in the CLWP, new legislative proposals as well as *delegated and implementing acts having significant impacts*.¹⁴⁵ Nevertheless, it adds a responsibility of each DG for determining initiatives to be "major" by considering aspects 'such as the political importance and sensitivity, the magnitude of the expected impacts; importance for other policy areas and prior knowledge about divergent or sensitive stakeholder views.'¹⁴⁶ For the next stage of the policy cycle, the Impact Assessment itself, the "Guidelines on Impact Assessment"¹⁴⁷ repeat that '[a]n IA is required for Commission initiatives that are *likely to have significant economic, environmental or social impacts*.'¹⁴⁸ This condition is required to be fulfilled with taking into account the principle of proportionate analysis. However, the key qualification "likely to have significant impacts" remains an undefined criterion.

Instead, the documents refer to the complementary "Tool box" that provides guidance on specific issues such as when an IA necessary and when it is not.¹⁴⁹ Finally, a specific tool –

¹⁴² European Commission, *Impact Assessment*, retrieved on 28 July 2015 from http://ec.europa.eu/smart-regulation/impact/index_en.htm, emphasis added.

¹⁴³ Better Regulation Guidelines 2015, p. 4.

¹⁴⁴ Inception IAs are the replacement for a roadmap if it is decided that an IA is carried out and set out in greater detail the description of the problem, issues related to subsidiarity, the policy objectives and options as well as the likely impacts of each option.

¹⁴⁵ Better Regulation Guidelines 2015, pp. 16-17.

¹⁴⁶ *ibid.*

¹⁴⁷ Better Regulation Guidelines 2015, 'Chapter 3 – Guidelines on Impact Assessment', pp. 16-32.

¹⁴⁸ *ibid.*, p. 17, emphasis added.

¹⁴⁹ *ibid.*, p. 16 and reference made in footnote 18, p. 17.

“Tool #5”¹⁵⁰ – can be traced down being targeted at helping to assess when an IA is necessary. In fact, it identifies “significant impacts” as the *benchmark criterion* applying at both the macro- and the micro-level, hence, to both impacts on the society or economy as a whole and impacts on particular region, societal group or sector. It adds that the criterion should be applied on a case-by-case-basis to ensure that an IA is only carried out when it is useful. Besides, there are two tables indicating initiatives included in the “Toolbox” document that require an IA and that do not require an IA. What looks promising at first sight as a clear categorisation for defining a scope of application, turns out to be given for illustrative purposes only and is neither based on a formally agreed classification nor an exhaustive list. The only reasonable clear conclusion that can be drawn from the tool results from a kind of “blacklist”, namely that it is likely that no IA is needed when impacts are small or cannot be clearly identified *ex ante* or there is not enough choice among policy options available for the Commission.¹⁵¹

Although the investigation of a potential clarification of the scope of application of IA rather resembled “hide and seek” in which one intended to trace down specific qualification criteria, it becomes obvious that the Commission has improved the scope of application to some extent with its new Better Regulation Agenda. On the one hand, it clearly included also non-legislative acts as well as delegated and implementing acts, which abolishes the previously criticised limitation of the scope.¹⁵² On the other hand, provides tools for guidance with especially the detailed and elaborate Better Regulation “Tool box” for determining on a case-to-case-basis whether an initiative falls under the scope of application for an IA or not. Interesting is also the introduction of a “comply or explain”-principle since ‘[w]henver it is concluded that no IA is needed, this must be flagged and explained to the public through the roadmap.’¹⁵³ Hence, roadmaps are now used to explain why no IA has been conducted.¹⁵⁴

Additionally, by including acts deriving from the executive power of the Commission, namely delegated and implementing acts, into the scope of application, the EU IA system becomes more similar to the US system, which serves as the ‘polar star’ for EU policy makers.¹⁵⁵ In the US, impact assessment depicts the essential regulatory tool for overseeing the executive branch’s exercise of legislatively delegated powers.¹⁵⁶ This resemblance is also detected by Renda in his “quick assessment” of the new Better Regulation Agenda. He argues that the application of better regulation tools to delegated and implementing acts is

¹⁵⁰ Better Regulation “Toolbox“ 2015, ‘Tool #5: When is an IA necessary?’, pp. 33-36

¹⁵¹ *ibid.*

¹⁵² Please see Chapter 3.3.1 on the criticism about the limited scope of application.

¹⁵³ Better Regulation „Tool box“, p. 34.

¹⁵⁴ Their initial function is now transferred to and executed by the „Inception Impact Assessments“. For further information please see http://ec.europa.eu/smart-regulation/roadmaps/index_en.htm.

¹⁵⁵ Renda 2006, p. 8.

¹⁵⁶ Wiener & Alemanno 2010, pp. 313ff

more similar to the type of regulations being subject to the US RIA, which comprises a systematic cost-benefit analysis. Since the scope of the RIA is also limited to “major” initiatives, which, however, are clearly and ‘generally defined as having an annual impact on the economy of over \$ 100 million¹⁵⁷, he also points out the lack of clear criteria that can be systematically applied to the EU IA system.¹⁵⁸ Nevertheless, one has to keep in mind that the scope EU IA system is much wider and complex *per se* in comparison to the IA system in the US or other OECD countries as it takes into account not only economic, but also social and environmental impacts, which are often non-quantifiable.¹⁵⁹ Still, the new Better Regulation Agenda 2015 leaves room for improvement as it the Commission still needs to clarify the benchmark criterion of “significant impacts” for fully clarifying the scope of application.

4.2.2 The New Regulatory Scrutiny Board: More Independence in Quality Control?

With the new Better Regulation Agenda, the Impact Assessment Board (IAB) has been replaced respectively transformed into the *Regulatory Scrutiny Board (RSB)*. The board has a strengthened role in the IA system as its task is to scrutinise all impact assessments as well as “major”¹⁶⁰ retrospective evaluations and fitness checks. Hence, after the completion of the preparatory work, the draft IA reports in form the Staff Working Documents (SWDs) have to be submitted to the RSB for a quality check. In the RSB meeting, which occurs principally twice a month, the SWD is reviewed on the basis of a so-called “Quality Checklist”, which ‘outlines the RSB’s preliminary view in the quality of the report relative to the requirements of the relevant guidelines and identifies priority issues.’¹⁶¹ An important novelty is established with regard to the *opinions* issued by the RSB. These opinions can be positive or negative, however, a positive opinion is required before the initiative can be processed to the inter-service consultation (ISC) within the regulatory decision-making process. Additionally, a positive opinion still obliges the author service of the relevant IA to revise the submitted report according to recommendations given by the RSB. Finally, the opinions are published after the respective policy initiative has been decided by the College.

¹⁶²

¹⁵⁷ Morall III 2997, p. 73.

¹⁵⁸ Renda 2015.

¹⁵⁹ For an elaborate comparison between the EU and US IA system please see *inter alia* Wiener & Alemanno 2010; Cavan O’Connor & Dominic J. Mancini; ‘Comparison of US and European Commission guidelines on Regulatory Impact Assessment/Analysis’, *Industrial Policy and Economic Reforms Papers No. 3*, Enterprise and Industry Directorate-General, European Commission, 2007.

¹⁶⁰ Major evaluations comprise REFIT evaluations, Fitness Checks and major MFF programme evaluations based on the DG’s rolling evaluation programme. See Better Regulation Guidelines 2015, p. 9, footnote 10.

¹⁶¹ Better Regulation “Tool box” 2015, p. 11.

¹⁶² *ibid.*, p. 12.

Not only the role of the RSB as regulatory oversight body has been strengthened, but also the lack of independence respectively impartiality has been addressed as '[t]he composition of the Board will allow it to deliver an impartial opinion on the basis of comprehensive know-how of the relevant analytical methods.'¹⁶³ Accordingly, the RSB is composed of seven members from which are three Commission officials, three temporary agents and one chairperson. The seven Board members are selected on the basis of their specific expertise via objective and rigorous selection procedures. In fact, the members are employed full time and, particularly those recruited from among the Commission staff, not subject to any policy responsibilities.¹⁶⁴ Additionally, and most importantly, the Decision establishing the RSB contains in Article 4 a clear commitment to independence:

'In the performance of their task, the members of the Board and the supporting staff shall act independently and shall not seek or take instructions. They shall disclose any potential conflict of interest with respect to a particular report to the Chair, or, in the case of the Chair, to the President.'¹⁶⁵

Thus, it can be said that there is a *de facto* improvement of independence made by the Commission by replacing the IAB with the RSB, which has 'more teeth than its predecessor'¹⁶⁶. Also Renda points out rightly that '[f]or the first time, the Commission thus accepted to open the doors of its watchdog to external members'¹⁶⁷. With the creation of the RSB the Commission complies to the recommendation in above-mentioned studies¹⁶⁸ and literature for creating a 'strong centralised oversight unit to help evaluate significant regulatory proposals.'¹⁶⁹ In fact, the RSB seems to fulfil all five key characteristics for a strong centralised regulatory oversight body as recommended by Hahn & Litan. First, the RSB has a similar status to the units it has to discipline, namely a Directorate-General. Secondly, the RSB is the leading body for ensuring information quality and adhering to regulatory guidelines both for all EU policy-makers. Thirdly, the RSB has the authority to challenge initiatives at draft stage by giving a negative opinion in case they do not produce sufficient or satisfactory net benefits. Fourthly, the RSB makes its findings public on the Internet after the College has decided on the initiative. Finally, the RSB plans to publish a comprehensive annual report on the costs and benefits of EU regulation.¹⁷⁰ Consequently, it

¹⁶³ Better Regulation Agenda 2015, p. 7.

¹⁶⁴ *ibid.*

¹⁶⁵ European Commission; Decision of the European Commission President on the establishment of an independent Regulatory Scrutiny Board, C(2015) 3263 final, p. 3; similar statement also included in the Communication to the Commission, Regulatory Scrutiny Board – Mission, task and staff, C(2015) 3262 final, p. 3.

¹⁶⁶ Hoorens 2015.

¹⁶⁷ Renda 2015, p. 5.

¹⁶⁸ The Evaluation Partnership 2007; The European Court of Auditors 2010; Lee & Kirkpatrick 2004.

¹⁶⁹ Recommendation given by Hahn & Litan 2004, p. 503 and advocated by Renda 2006, p. 124-132.

¹⁷⁰ Hahn & Litan 2004, pp. 503-505.

can be even claimed that the Commission managed to establish a *more independent watchdog* – but whether it can withstand the practice remains to be seen.

Nevertheless, it can be argued that complete independence and impartiality in terms of ‘independence from executive and legislative powers, that is independence from politics and independence from market participants’¹⁷¹ has not been achieved yet by creating the RSB because it is still tied to the ‘political imperative’¹⁷² of the Commission. Thus, one could go one step further and suggest to establish ‘an independent evidence centre with in-house analytical capabilities [that] would demonstrably disconnect the EU’s evidence gathering processes from the political imperative that drives policy proposals’¹⁷³ that could take the form of an *European agency*. In fact, this would be a step towards the US RIA system, where Congress mandated executive branch regulatory agencies with the task to assess the most efficient regulatory option for society by means of an IA. Thus, the IA serves as justification¹⁷⁴ and as mechanism for exercising control over the delegated regulatory power.¹⁷⁵ According to Everson, a ‘US-inspired model of autonomous and accountable agencies, is attractive to the Commission’¹⁷⁶ provided that the *Meroni doctrine*¹⁷⁷, which reserves the ultimate decision-making power for the Commission, is respected. She identifies three favourable factors: firstly, institutionalised agencies stipulate consistent and sustainable expertise; secondly, autonomous agencies serve the internal market model of economic operations; and thirdly, the pluralistic approach of accountability helps to avoid a

¹⁷¹ Vos 2014, p. 37.

¹⁷² Stated by the former Chief Scientific Advisor, Prof. Anne Glover, of the European Commission while speaking before the EU elections in 2014. Retrieved on 11 August 2015 from <http://www.euractiv.com/sections/eu-priorities-2020/eu-twisting-facts-fit-political-agenda-chief-scientist-says-302399>

¹⁷³ Hoorns 2015

¹⁷⁴ IAs conducted by agencies are supposed to “justify” the choice of a certain policy proposal as laid down by Clinton’s Executive Order (EO) 12866 in September 1993.

¹⁷⁵ For a detailed discussion about the US RIA system please see O’Conner Close & Mancini 2007; Wiener & Alemanno 2010; John F. Morrall III; ‘An Assessment of the US Regulatory Impact Analysis Programme’, in: OECD; *Regulatory Impact Analysis: Best Practices in OECD Countries*, 1997, retrieved on 12 August 2015 from <http://www.oecd.org/gov/regulatory-policy/35258828.pdf>; Maria Sole Porpora; ‘The introduction of Regulatory Impact Assessment in American Independent Regulatory Commissions’, *I Paper dell’ Osservatorio, Osservatoria sull’ Analisi d’Impatto della Regolazione*, 2014.

¹⁷⁶ Michelle Everson; ‘Chapter 3: European Agencies: Barely Legal?’, in: Michelle Everson, Cosiomo Monda & Ellen Vos (eds.); *European Agencies in between Institutions and Member States (European Monographs, 85)*. Kluwer Law International, 2014, p. 58.

¹⁷⁷ For more information about the *Meroni doctrine* please see *inter alia* Michelle Everson & Ellen Vos; *European Agencies. What about the institutional balance?*, *Maastricht Law Working Papers Series*, 2014; Michelle Everson, Cosiomo Monda & Ellen Vos (eds.); *European Agencies in between Institutions and Member States (European Monographs, 85)*. Kluwer Law International, 2014; S. Griller and A. Orator; ‘Everything under control? The “way forward” for European agencies in the footsteps of the Meroni doctrine’, *European Law Review*, 2010; Xénophon A. Yataganas; ‘Delegation of Regulatory Authority in the European Union - The Relevance of the American Model of Independent Agencies’, Jean Monnet Working Paper 3 (1), 2001, retrieved on 12 August 2015 from <http://www.jeanmonnetprogram.org/archive/papers/01/010301.html>.

“competence creep” of other institutions or Member States.¹⁷⁸ Moreover, Meuwese argues that ‘a possible function of IA in the legislative process is to deliver a more objective analysis, which can “speak truth to power”¹⁷⁹ resembling the US approach where IA serves as control of the regulatory powers delegated to agencies. This can be linked to the Commission’s view on the *raison d’être* of agencies – independence of technical and/or scientific assessments due to their ‘purely technical evaluations of very high quality and [not being] influenced by political or contingent considerations.’¹⁸⁰ Consequently, it can be concluded that “outsourcing” the regulatory oversight of the RSB into an European agency would be *de facto* a step into greater independence – however, would also be a radical step that the Commission is not yet willing to do.

4.2.3 The Transparency Boost

The above-mentioned quote of the Commission’s commitment to ‘boost openness and transparency in the EU decision-making process’¹⁸¹ creates high expectations for the Better Regulation Agenda to address the “old” IA system’s lack of transparency. In fact, the Agenda contains a whole chapter on “Openness and Transparency” in which it undertakes to listen better to citizens and stakeholders by being open for consultation and feedback at every stage of the policy making process. The Commission underlying rationale for this is that more openness in the policy-making process can make the EU regulatory process, on the one hand, more transparent and accountable and on the other, the policies produced more evidence-based and effective. In the Better Regulation “Tool box”, it is highlighted that Better Regulation instruments should be transparent for which the following conditions are formulated:

‘Be clearly visible to the outside world if they are to be understood and credible. Results of evaluations, impact assessments and consultations should be widely disseminated. Stakeholder responses should be acknowledged and consultation results widely disseminated through a single access point. The reasons for disagreeing with dissenting views must be explained.’¹⁸²

Accordingly, the general public gets a more transparent insight into the policy-making process through a new webportal where the Commission plans to enable the tracking of each initiative as well as through the so-called “Lighten the Load – Have Your Say” feature

¹⁷⁸ *ibid.*

¹⁷⁹ Meuwese 2007, p. 298.

¹⁸⁰ Commission Communication, ‘The operating framework for the European Regulatory Agencies’, COM(2002) 718 final, p. 5; for more evaluation of the agencies’ rationale please see Vos 2014, pp. 33-39; Herwig C.H. Hofmann, Gerard C. Rowe & Alexander H. Türk; *Administrative Law and Policy of the European Union*. Oxford: Oxford University Press, 2011, pp. 285ff.

¹⁸¹ European Commission, Press release ‘Better Regulation Agenda: Enhancing transparency and scrutiny for better EU law-making’ of 19 May 2015. Retrieved on 1 July 2015 from http://europa.eu/rapid/press-release_IP-15-4988_en.htm .

¹⁸² Better Regulation “Tool box” 2015, p. 8.

on the Commission's better regulation website, where everyone is able to comment informally on initiatives and existing laws.¹⁸³ Besides, the Commission commits in two key ways to transparent high quality consultations. Firstly, building on the minimum standards of consultation, stakeholder are *always* consulted *throughout the whole policy cycle* of a Commission legislative or policy initiative or when performing an evaluation or Fitness Check. Therefore, there is an automated alert system that circulates the roadmaps for initiatives not subject to an IA and inception impact assessments for initiatives subject to an IA to ensure that stakeholders are timely informed and are able to provide input. In fact, stakeholder may even provide feedback on these roadmaps, inception IAs as well as *draft* delegated and implementing acts.¹⁸⁴

This links directly to the second key improvement, namely the ability for stakeholder to provide feedback for the first time on *draft* delegated acts, which amend or supplement existing legislation, or draft implementing acts, which set out specific technical provisions, within a period of four weeks prior to their adoption.¹⁸⁵ Additionally, even after the Commission has adopted a regulatory proposal, there is an eight weeks period for stakeholders and citizens to provide feedback or suggestions that will feed into the legislative debate before Parliament and Council.¹⁸⁶ Moreover, for an overview of mandatory consultations feedback requirements, please see Figure 2 below.

¹⁸³ See http://ec.europa.eu/priorities/democratic-change/better-regulation/feedback/index_en.htm

¹⁸⁴ *ibid.*, p. 5; Better Regulation Guidelines 2015, p. 66; European Commission, Fact Sheet 'Better Regulation Agenda: Questions & Answers', 19 May 2015, retrieved on 29 July 2015 from http://europa.eu/rapid/press-release_MEMO-15-4989_en.htm

¹⁸⁵ There are certain explicit exceptions to this rule laid down in Better Regulation Guidelines 2015, Chapter 7, Section 4.1, p. 67

¹⁸⁶ Better Regulation Agenda 2015, '2. Openness and Transparency', pp. 4-6.

Figure 2: Overview of mandatory consultation and feedback requirements

Box 3: Mandatory consultation and feedback requirements
<p>Mandatory open, internet-based public consultation (minimum 12 weeks)⁸⁷:</p> <ul style="list-style-type: none"> • Initiatives with impact assessments. Consultation is on the basis of consultation documents including questionnaires, background information, the Inception IA etc.; • Evaluations. Consultation is on the basis of consultation documents including questionnaires and background information, the Roadmap, etc.; • Fitness Checks. Consultation is on the basis of consultation documents, including questionnaires, background information, Roadmaps, etc.; • Green Papers.
<p>Stakeholders must be able to give feedback on:</p> <ul style="list-style-type: none"> • Roadmaps for Evaluations and Fitness Checks roadmaps (4 weeks), and Roadmap and Inception Impact Assessments (suggested timeline for feedback to be provided on a case by case basis taking in to account the expected timing of any subsequent consultation); • Draft Delegated Acts and Implementing Acts (4 weeks)⁸⁸; • Legislative or policy proposals adopted by the College and, where applicable, the accompanying impact assessments (8 weeks).

Source: : Commission Staff Working Document, 'Better Regulation Guidelines', SWD(2015) 111 final, p. 66

Consequently, it can be observed that the Commission indeed addressed the lack of transparency of its “old” system and aimed at boosting both openness and transparency with the above-outlined developments and novelties. In particular, it is interesting to observe that stakeholder consultation for draft delegated and implementing acts complies with the request by many non-governmental organisations (NGOs) to be involved into the comitology process.¹⁸⁷ As the comitology procedure has been most frequently used in the environmental policy area, the Directorate-General on Health and Food Safety (hereinafter, DG SANCO) responded to this request already in 2007, by establishing a “stakeholder dialogue group”.¹⁸⁸ With opening consultation for acts under Articles 290 and 291 TFEU, this becomes practically redundant as from now on NGOs and all other interest groups have regularly four weeks for participating in the process. In fact, also Renda concludes that “[a]ll in all, these are important changes, which – if properly implemented – would likely stimulate a more constructive dialogue during the early stage of policy formulation and ex-ante policy appraisal within the European Commission, and [...] must be welcome.”¹⁸⁹ Nevertheless, it

¹⁸⁷ For discussions please see Herwig C.H. Hofman & Alexander Türk (eds.); *EU Administrative Governance*. Cheltenham: Edward Elgar Publishing, 2006, pp. 127ff; Joana Mendes; ‘Delegated and Implementing Rule-Making: Proceduralisation and Rule-Making Design’, *European Law Journal* 19 (1), 2013; G. J. Brandsma & J. Blom-Hansen; ‘The Post-Lisbon Battle over Comitology: Another Round of the Politics of Structural Choice’. *EUI Working Paper SPS 2011/03*, 2011; Wim J. M. Voermans, Josephine Marna-Rose Hartmann & Michael Kaeding; ‘The Quest for Legitimacy in EU Secondary Legislation’. *The Theory and Practice of Legislation* 2 (1), 2014, p. 5-33.

¹⁸⁸ See http://ec.europa.eu/dgs/health_consumer/stakeholders/draft_mandate_dialogue_group_en.pdf

¹⁸⁹ Renda 2015, p. 6.

must be noted that the scope of the consultations conducted during the impact assessment process is not explicitly clarified. Due the given stage of consultation within the regulatory process, it is likely that is targeted at the content of the proposed initiative rather than on the IA itself.¹⁹⁰ Moreover, it is unclear how the Commission plans to conduct and process such a great amount of consultations or whether again some form of selection is necessary. Hence, the Commission's two novelties for boosting transparency are ambitious so that it remains to be seen in practice how they can be executed effectively.

4.3 Conclusion

The analysis of the new Better Regulation Agenda 2015 presented by the Juncker Commission illuminates an overall positive result as it shows that the Commission indeed managed to –radically – address all three deficiencies of the “old” system. Firstly, the scope of application of the impact assessment system is not limited anymore with regard to non-legislative acts such as delegated and implementing acts. The only limitation depicts the benchmark criterion of “likely to have significant impacts” as there are no clear (quantifiable) criteria or classifications provided by the Commission. Secondly, with replacing the IAB with the Regulatory Scrutiny Board, the Commission opened up its IA system – to some extent – to external control and created a more independent watchdog overseeing its IA process and safeguarding high quality for better regulation. Thirdly, the Commission included an consultation approach that is capable of opening up the policy making process and thereby, boosting transparency. Nevertheless, the analysis is based on the theoretical framework build by the new documents accompanying the Better Regulation Strategy 2015 so that the assessments still have to pass the practice test.

¹⁹⁰ *ibid.*, p. 7.

5. Conclusion

The 2015 Better Regulation Agenda of the European Commission can indeed be labelled as a “new start” for the EU better regulation and impact assessment system, as it clearly addressed all three main deficiencies – the limited scope of application of IA to non-legislative acts, the lack of independence of particularly the former regulatory oversight body, the Impact Assessment Board and the lack of transparency of the whole regulatory process. It needs to be highlighted that the three deficiencies are tackled *to some extent* – but not fully resolved. On the one hand, there is still room for further improvement or clarification by the European Commission and on the other, it remains to be seen how effective the new Better Regulation Agenda is when applied in practice. Nevertheless, by being able to answer the research question, this thesis showed with its evaluation that the First Vice-President Frans Timmermans’ Shakesperiean statement can be revived – ‘Is it radical or not? Methinks it is!’¹⁹¹

When zooming into the content of the thesis, firstly, it was clarified that the impact assessment is as “aid to the legislator” the most important policy-making tool for better regulation, which aims to produce political decisions at a minimum cost due to an open, transparent regulatory process, which is informed by the best available evidence and backed by the comprehensive involvement of stakeholders. By laying the foundation for evidence-based, well-designed measures that cause sustainable and tangible benefits for citizens, business and society as a whole, IA has as its underlying rationale to improve the quality of the regulatory decision-making process by opening regulation for input by stakeholders and citizens – and produce better regulation. Secondly, the “old” IA system, which was mainly coined by the Better Regulation Action Plan, transformed IA into ‘a consolidated and proportionate instrument for assessing the impact of its legislative and policy initiatives, regulatory impact assessment and sustainable development (in the economic, social and environmental fields).’¹⁹² Within this system the above-mentioned three central deficiencies could be detected. Despite all attempts of clarification, the scope of application of IA kept being obscure, although it was required that an IA be conducted for all legislative initiatives and all non-legislative initiatives, which define future policies including delegated and implementing acts. However, the necessary condition “likely to have significant impacts” remained undefined. Moreover, since the members of the IAB were high-ranking

¹⁹¹ Response by European Commission First Vice-President Frans Timmermans to the question whether his Better Regulation Agenda 2015 would be enough to satisfy the United Kingdom’s demand for reform at a EU press conference on 19 May 2015, retrieved at 20 July 2015 from <http://www.euractiv.com/video/timmermans-methinks-better-regulation-radical-314707>

¹⁹² *ibid.*, p. 7

Commission officials, their the independence and the impartiality of their work did not correspond to the general concept of independence from executive and legislative powers, hence, independence from politics and independence from market participants. Although the Commission had committed itself to the minimum standards of consultation, a lack of transparency emerged from external stakeholders' criticism that time and/or political pressure prevented them from commenting on the *draft* IA report; that clear information and feedback was lacking; and no information about the usage for the IA report of the input provided by them was given. Thirdly, the new Better Regulation Agenda launched by the European Commission under President Juncker was examined by paying special attention to the extent of which these three deficiency were addressed. Although the investigation of a clarification of the scope of application of IA rather resembled "hide and seek", in which one intended to trace down specific qualification criteria, it becomes obvious that the Commission has improved the scope of application to some extent with its new Better Regulation Agenda. On the one hand, it abolishes the previously criticised limitation of the scope by extending the scope to Commission initiatives that have '*significant economic, social or environmental impacts*'¹⁹³ comprising legislative proposals, non-legislative initiatives defining future policies as well as implementing and delegated acts.¹⁹⁴ Hence, as benchmark criterion serves the likeliness of "significant impacts" at micro- and macro-level, which, however, depicts a weakness of the new Agenda as no clear categorisation of this criterion is given. Only a "blacklist" negatively defines the scope by excluding initiatives with small or *ex ante* not clearly identifiable impacts and initiatives for which there is not enough choice among policy options available for the Commission.¹⁹⁵ On the other hand, the new Agenda provides tools for guidance with especially the detailed and elaborate Better Regulation "Tool box" for determining on a case-to-case-basis whether an initiative falls under the scope of application for an IA or not. Additionally, the determining process for the scope becomes more transparent due to the "comply or explain"-principle that ensures '[w]henver it is concluded that no IA is needed, this must be flagged and explained to the public through the roadmap.'¹⁹⁶

The second deficiency is radically addressed by transforming the IAB into the Regulatory Scrutiny Board (RSB), which has "more teeth" than its predecessor due to its strengthened role in the IA system of scrutinising all impact assessments as well as "major" retrospective evaluations and fitness checks. More importantly, lack of independence respectively impartiality has been addressed as '[t]he composition of the Board will allow it to

¹⁹³ Europea Commission, *Impact Assessment*, retrieved on 28 July 2015 from http://ec.europa.eu/smart-regulation/impact/index_en.htm, emphasis added.

¹⁹⁴ Please see Chapter 3.3.1 on the criticism about the limited scope of application.

¹⁹⁵ *ibid.*

¹⁹⁶ Better Regulation „Tool box“, p. 34.

deliver an impartial opinion on the basis of comprehensive know-how of the relevant analytical methods.¹⁹⁷ For the first time, the Commission opens up its regulatory oversight body to external experts and releases the board members recruited from the Commissions workforce from all policy responsibilities. Nevertheless, it still can be argued that complete independence and impartiality in terms of ‘independence from executive and legislative powers, that is independence from politics and independence from market participants’¹⁹⁸ has not been achieved yet by creating the RSB because it is still tied to the ‘political imperative’¹⁹⁹ of the Commission. Therefore, ‘an independent evidence centre with in-house analytical capabilities [that] would demonstrably disconnect the EU’s evidence gathering processes from the political imperative that drives policy proposals’²⁰⁰ in form of an *European agency* would be a possible remedy.

Thirdly, the new Better Regulation Agenda is capable of generating a transparency boost due to two major improvements. First, building on the minimum standards of consultation, stakeholder are now *always* consulted *throughout the whole policy cycle* of a Commission legislative or policy initiative or when performing an evaluation or Fitness Check. Second, it enables stakeholders to provide feedback on roadmaps, inception IAs and, most importantly, *draft* delegated and implementing acts within a period of four weeks.²⁰¹ Hence, this also responds to the long pending request by many non-governmental organisations (NGOs) and interest groups to be involved into the comitology process.

Nevertheless, it must be emphasised that all evaluations of the new Better Regulation Agenda made by this thesis are solely based on the Commission documents²⁰² and therefore, it still remains to be seen how the new provisions, tools and actors function in future practice. Due to the timely evaluation and publication of this thesis in relation to the launch of the new Better Regulation Agenda, it is not capable of assessing the actual effectiveness and efficiency of the identified improvements. As pioneer, this thesis provides a basis with its results for further assessments of the new better regulation and impact

¹⁹⁷ Better Regulation Agenda 2015, p. 7.

¹⁹⁸ Ellen Vos; ‘Chapter 2: European Agencies and te Compositie EU Executive’, in: Michelle Everson, Cosiomo Monda & Ellen Vos (eds.); *European Agencies in between Institutions and Member States (European Monographs, 85)*. Kluwer Law International, 2014, p. 37.

¹⁹⁹ Stated by the former Chief Scientific Advisor, Prof. Anne Glover, of the European Commission while speaking before the EU elections in 2014. Retrieved on 11 August 2015 from <http://www.euractiv.com/sections/eu-priorities-2020/eu-twisting-facts-fit-political-agenda-chief-scientist-says-302399>

²⁰⁰ Hoorns 2015

²⁰¹ *ibid.*, p. 5; Better Regulation Guidelines 2015, p. 66; European Commission, Fact Sheet ‘Better Regulation Agenda: Questions & Answers’, 19 May 2015, retrieved on 29 July 2015 from [http://europa.eu/rapid/press-release MEMO-15-4989_en.htm](http://europa.eu/rapid/press-release_MEMO-15-4989_en.htm)

²⁰² See Commission Communication, ‘Better Regulation for Better Results – an EU Agenda’, COM(2015) 215 final (2015 Better Regulation Agenda); Commission Staff Working Dokument, ‘Better Regulation Guidelines’, SWD(2015) 111 final; European Commission, Better Regulation Toolbox, 2015

assessment system in practice. Thus, it fills in the gap to compare the defective “old” system with the “new start” of the new Better Regulation Agenda.

When zooming out and setting the findings of the thesis in a broader context, it can be concluded that the improvements of the deficiencies of the “old system” made by the new Better Regulation Agenda, in fact, serve as cornerstone for the “new start” of a “more democratic” and “more effective” European Commission under President Juncker. It is *capable* of boosting openness and transparency in the EU regulatory decision-making process, improving the quality of new laws through better impact assessments of draft legislation and amendments that are subject to enhanced public consultation and scrutiny by the RSB as a more independent watchdog. Whether the Better Regulation Agenda is also in practice *radical or not* – or not radical enough – only the future can tell.

Bibliography

Literature

Alemanno & Meuwese 2013

Alberto Alemanno & Anne Meuwese; 'Impact Assessment of EU Non-Legislative Rulemaking: The Missing Link in "New Comitology"', *European Law Journal* 19 (1), 2013, pp. 76-92;

Baldwin 2007

Robert Baldwin; 'Is Better Regulation Smarter Regulation', *Public Law*, 2005

Black 1998

Julia Black; 'Constitutionalising Self-Regulation'. *The Modern Law Review* 59 (1), 1998, pp. 24-55

Brandsma & Blom-Hansen 2011

G. J. Brandsma & J. Blom-Hansen; 'The Post-Lisbon Battle over Comitology: Another Round of the Politics of Structural Choice'. *EUI Working Paper SPS 2011/03*, 2011

Brown & Scott 2011

Ciara Brown & Colin Scott; 'Regulation, Public Law, and Better Regulation'. *European Public Law* 17 (3), 2011, pp. 467-484

Ehnert 2015

Tanja Ehnert; 'The Legitimacy of New Risk Governance – A Critical View in Light of the EU's Approach to Nanotechnologies in Food'. *European Law Journal* 21 (1), 2015, pp. 44-67

Everson 2014

Michelle Everson; 'Chapter 3: European Agencies: Barely Legal?', in: Michelle Everson, Cosiomo Monda & Ellen Vos (eds.); *European Agencies in between Institutions and Member States (European Monographs, 85)*. Kluwer Law International, 2014

Everson, Monda & Vos 2014

Michelle Everson, Cosiomo Monda & Ellen Vos (eds.); *European Agencies in between Institutions and Member States (European Monographs, 85)*. Kluwer Law International, 2014

Everson & Vos 2014

Michelle Everson & Ellen Vos; 'European Agencies. What about the institutional balance?', *Maastricht Law Working Papers Series*, 2014

Griller & Orator 2010

S. Griller & A. Orator; 'Everything under control? The "way forward" for European agencies in the footsteps of the Meroni doctrine', *European Law Review*, 2010

Hahn & Litan 2005

Robert W. Hahn & Robert E. Litan; 'Counting Regulatory Benefits and Costs: Lessons for the U.S. and Europe'. *Journal of International Economic Law* (8) 2, 2005, pp. 473-508

Haythirnthwaite 2007

Rick Haythornthwaite; 'Better Regulation in Europe', in: Stephen Weatherill (ed.); *Better Regulation*. Hardpublishing, 2007

Hofman, Rowe & Türk 2011

Herwig C.H. Hofmann, Gerard C. Rowe & Alexander H. Türk; *Administrative Law and Policy of the European Union*. Oxford: Oxford University Press, 2011

Hofman & Türk 2006

Herwig C.H. Hofman & Alexander Türk (eds.); *EU Administrative Governance*. Cheltenham: Edward Elgar Publishing, 2006

Löfstedt 2004

Ragnar E. Löfstedt; 'The swing of the regulatory pendulum in Europe: From precautionary principle to (regulatory) impact analysis'. *Journal for Risk and Uncertainty* 28, 2004, pp. 237 - 260

Majone 1996

G. Majone; *Regulating Europe*. London: Routledge, 1996

Mendes 2013

Joana Mendes; 'Delegated and Implementing Rule-Making: Proceduralisation and Rule-Making Design', *European Law Journal* 19 (1), 2013

Meuwese 2007

Anne Meuwese; 'Inter-institutionalising EU Impact Assessment', in: Stephen Weatherill (eds.); *Better Regulation*. Hard Publishing, 2007

Meuwese 2008

Anne Meuwese; *Impact Assessment in EU Lawmaking*. Kluwer International, 2008

Meuwese & Popelier 2011

Anne Meuwese & Patricia Popelier; 'Legal Implications of Better Regulation: A Special Issue'. *European Public Law* 17 (3), 2011, pp. 455-466

Morall III 1997

John F. Morall III; 'An Assessment of the US regulatory impact analysis programme', in: OECD; *Regulatory Impact Analysis: Best Practices in OECD Countries*. 1997

O'Connor & Mancini 2007

Cavan O'Connor & Dominic J. Mancini; 'Comparison of US and European Commission guidelines on Regulatory Impact Assessment/Analysis', *Industrial Policy and Economic Reforms Papers No. 3*, Enterprise and Industry Directorate-General, European Commission, 2007

Pelkmans, Labory & Majone 2000

J. Pelkmans, S. Labory & G. Majone; 'Better Regulation quality: Assessing current initiatives and new proposals.', in: G. Gallo & J. Pelkmans (eds.); *Regulatory reform and competitiveness in Europe. Volume 1: Horizontal issues*. Cheltenham: Edward Elgar, 2000

Popelier 2011

Patricia Popelier; 'Governance and Better Regulation: Dealing with the Legitimacy Paradox', *European Public Law* 17 (3), 2011, pp. 555-596

Porpora 2014

Maria Sole Porpora; 'The introduction of Regulatory Impact Assessment in American Independent Regulatory Commissions', *I Paper dell' Osservatorio, Osservatoria sull' Analisi d'Impatto della Regolazione*, 2014

Radaelli 2003

Claudio M. Radaelli; 'The diffusion of regulatory impact analysis: Best-practice or lesson-drawing?', *European Journal of Political Research* 43 (5), 2003, pp. 723-747

Radaelli 2004

Claudio M. Radaelli; 'Getting to grips with quality in the diffusion of regulatory impact analysis in Europe'. *Public Money and Management* 24 (5), 2004, pp. 924-943

Radaelli 2005

Claudio M. Radaelli; 'Diffusion Without Convergence: How Political Context Shapes; The Adoption Of Regulatory Impact Assessment'. *Journal of European Public Policy* 12 (5), 2005, pp. 924-943

Radaelli 2007

Claudio M. Radaelli; 'Whither better regulation for the Lisbon agenda?'. *Journal of European Public Policy*, 14 (2), 2007, pp. 190-207

Radaelli & de Francesco 2004

Claudio M. Radaelli & F. de Francesco; *Indicators of Regulatory Quality*. Working Paper, University of Bradford, 2004

Renda 2005

Andrea Renda; *Impact Assessment in the EU: The state of the art and the art of the state*. Brussels: Centre for European Policy Studies, 2005, pp. 61 – 66

Renda 2015a

Andrea Renda; 'Too good to be true? A quick assessment of the European Commission's new Better Regulation Package'. *CEPS Special Report (108)*, May 2015. Available at URL: http://www.ceps.eu/system/files/SR108AR_BetterRegulation.pdf

Scott & Trubek 2008

Joanne Scott & David M. Trubek; 'Mind the Gap: Law and New Approaches to Governance in the European Union'. *European Law Journal* 8 (1), 2008

Schrefler, Renda & Pelkmans 2014

Lorna Schrefler, Andrea Renda & Jacques Pelkmans; 'What can the Better Regulation Commissioner do for the EU?', *CEPS Commentary*, 29 September 2014. Available at URL: http://aei.pitt.edu/54982/1/LS_et_al_Commission_Priorities_Regulation.pdf

Torriti 2011

Jacobo Torriti; 'The unsustainable rationality of Impact Assessment'. *European Journal of Law and Economics* 31, 2011, p.308

Torriti & Löfstedt 2012

Jacopo Torriti & Ragnar Löfstedt; 'The first five years of the EU Impact Assessment system: a risk economics perspective on gaps between rationale and practice'. *Journal of Risk Reseach* 15 (1), 2012, p. 169

Voermans, Hartmann & Keading 2014

Wim J. M. Voermans, Josephine Marna-Rose Hartmann & Michael Kaeding; 'The Quest for Legitimacy in EU Secondary Legislation'. *The Theory and Practice of Legislation* 2 (1), 2014, p. 5-33

Vos 2014

Ellen Vos; 'Chapter 2: European Agencies and te Compositie EU Executive', in: Michelle Everson, Cosiomo Monda & Ellen Vos (eds.); *European Agencies in between Institutions and Member States*. Kluwer Law International, 2014, p. 37

Wallace 2005

W. Wallace; 'Post-Sovereign Governance', in: H. Wallace, W. Wallace & M.A. Pollack (eds.); *Policy-Making in the European Union*. [5th edn.], Oxford: Oxford University Press, 2005

Weatherill 2007

Stephen Weatherill (eds.); *Better Regulation*. Hard Publishing, 2007

Wiener & Alemanno 2010

Jonathan B. Wiener & Alberto Alemanno; 'Comparing regulatory oversight bodies across the Atalntic: The Office of Information and the Regulatory Affairs in the US and the Impact Assessment Board in the EU', in: Susan Rose-Ackerman & Peter Lindseth (eds.); *Comparative Administrative Law*. Edward Elgar, 2010

Yataganas 2001

Xénophon A. Yataganas; 'Delegation of Regulatory Authority in the European Union - The Relevance of the American Model of Independent Agencies', Jean Monnet Working Paper 3 (1), 2001, retrieved on 12 August 2015 from <http://www.jeanmonnetprogram.org/archive/papers/01/010301.html>

Zinzani 2012

Marco Zinzani; *Market Integration through 'Network Governance'. The Role of European Agencies and Networks of Regulators*. Intersentia, 2012

Studies & Reports

Lee & Kirkpatrick 2004

N. Lee & C. Kirkpatrick; *A pilot Study on the Quality of European Commission Extendend Impact Assessment. Draft for consultation*. Impact Assessment Research Centre, Institute for Development Policy and Management, University of Manchester, 21 June 2004

Mather & Vibert 2006

G. Mather & F. Vibert; *Evaluating Better Regulation Building the System*. 2006, London: European Policy Forum

OECD 1997

Organisation for Economic Co-Operation and Development (OECD); *Regulatory Impact Analysis: Best Practices in OECD Countries*. 1997. Available at URL: <http://www.oecd.org/gov/regulatory-policy/35258828.pdf>

The Doorn Report 2004

European Parliament, *Report on assessment of the impact of Community legislation and the consultation procedures*, Committee on Legal Affairs and the Internal Market, 2004 (The Doorn Report)

The Evaluation Partnership 2007

The Evaluation Partnership, *Evaluation of the Commission's Impact Assessment System. Final Report – Executive Summary*. April 2007. Retrieved from http://ec.europa.eu/smart-regulation/impact/key_docs/docs/tep_eias_final_report.pdf

The European Court of Auditors 2010

The European Court of Auditors; *Impact Assessment in the EU Institutions: Do they support Decision-Making?*. Special Report No.3, 2010

Legislative Instruments

European Commission; Decision of the European Commission President on the establishment of an independent Regulatory Scrutiny Board, C(2015) 3263 final

European Commission Communications

White Paper on Governance

Commission Communication, 'European governance - A white paper', COM(2001) 428 final (White Paper on Governance)

COM(2002) 276 final

Commission Communication, 'Impact Assessment', COM(2002) 276 final

COM(2002) 277 final

Commission Communication, 'Minimum Standards of Consultation', COM(2002) 277 final

Better Regulation Action Plan

Commission Communication, 'Action plan "Simplifying and improving the regulatory environment"', COM(2002) 278 (Better Regulation Action Plan)

COM(2002) 718 final

Commission Communication, 'The operating framework for the European Regulatory Agencies', COM(2002) 718 final

COM(2005) 97 final

Commission Communication, 'Better Regulation for Growth and Jobs in the European Union', COM(2005) 97 final

COM(2006) 689 final

Commission Communication, 'A Strategic Review of Better Regulation in Europe', COM(2006) 689 final

COM(2010) 543 final

Commission Communication, 'Smart Regulation in the European Union', COM(2010) 543 final

2015 Better Regulation Agenda

Commission Communication on 'Better Regulation for Better Results – an EU Agenda', COM(2015) 215 final (2015 Better Regulation Agenda)

European Commission Official Documents

Communication to the Commission, Regulatory Scrutiny Board – Mission, task and staff, C(2015) 3262 final

European Commission, Impact Assessment Guidelines 2005, SEC(2005) 791

European Commission, Impact Assessment Guidelines 2009, SEC(2009) 92

European Commission, Press release 'Better Regulation Agenda: Enhancing transparency and scrutiny for better EU law-making' of 19 May 2015. Retrieved on 1 July 2015 from http://europa.eu/rapid/press-release_IP-15-4988_en.htm

Commission Staff Working Dokument, 'Better Regulation Guidelines', SWD(2015) 111 final

European Commission, Memo 'The main changes in the 2009 Impact Assessment Guidelines compared to 2005 Guidelines', retrieved on 12 July 2015 from http://ec.europa.eu/smart-regulation/better_regulation/key_docs_en.htm

Summary of White Paper on Governance COM(2001) 428 final, retrieved on 22 July 2015 from <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l10109> .

European Commission, Better Regulation Toolbox, 2015

European Commission, Press release on 'The Juncker Commission: A strong and experienced team standing for change', retrieved on 23 July 2015 from http://europa.eu/rapid/press-release_IP-14-984_en.htm .

European Commission, Fact Sheet 'Better Regulation Agenda: Questions & Answers', 19 May 2015, retrieved on 29 July 2015 from http://europa.eu/rapid/press-release_MEMO-15-4989_en.htm

European Commission Website Sources

On Better Regulation, http://ec.europa.eu/smart-regulation/index_en.htm

On Democratic Change, http://ec.europa.eu/priorities/democratic-change/index_en.htm

On "Light the Load – Have Your Say", http://ec.europa.eu/priorities/democratic-change/better-regulation/feedback/index_en.htm

On Impact Assessment, http://ec.europa.eu/smart-regulation/impact/index_en.htm

[On Inception IAs / Roadmaps, http://ec.europa.eu/smart-regulation/roadmaps/index_en.htm](http://ec.europa.eu/smart-regulation/roadmaps/index_en.htm)

On the 10 Priorities, http://ec.europa.eu/priorities/work-programme/index_en.htm

European Council Sources

“Lisbon Strategy“ of the Lisbon European Council of 23-24 March 2000, retrieved on 4 July 2015 from http://www.europarl.europa.eu/summits/lis1_en.htm#d

Göteborg European Council of June 2001, COM(2001) 130 final

Laeken European Council of December 2001, COM(2001) 726 final

Digital Sources

Hoorens 2015

Opinion by Stijn Hoorens; “Better Regulation”: Why Timmermans should go beyond the Regulatory Scrutiny Board’, euractive. Retrieved on 11 August 2015 from <http://www.euractiv.com/sections/science-policymaking/better-regulation-why-timmermans-should-go-beyond-regulatory-scrutiny>

Maggi 2015

Presentation by Riccardo Maggi, Deputy Head IAB Secretariat of the European Commission; *European Commission Impact Assessment Board*, OECD-Czech Workshop on Regulatory Impact Assessment Prague, Czech Republic 1 June 2012. Retrieved on 19 July 2015 from <http://www.oecd.org/gov/regulatory-policy/50526845.pdf>

Renda 2015b

Andrea Renda; ‘The cost of Europe: can better EU regulation lift the burden?’. Contribution to the Policy’s Network, 2 March 2015. Retrieved on 20 July 2015 from http://www.policy-network.net/pno_detail.aspx?ID=4854&title=The+cost+of+Europe%3a+can+better+EU+regulation+lift+the+burden%3f

Karim & McIntyre 2015

Sajjad Karim & Anthea McIntyre; ‘All EU institutions must embrace “better” regulation’ [Opinion], retrieved on 23 July 2015 from <http://www.euractiv.com/sections/trade-society/all-eu-institutions-must-embrace-better-regulation-314837>

Statements of European Commission Officials

Response by European Commission First Vice-President Frans Timmermans to the question whether his Better Regulation Agenda 2015 would be enough to satisfy the United Kingdom’s demand for reform at a EU press conference on 19 May 2015, retrieved at 20 July 2015 from <http://www.euractiv.com/video/timmermans-methinks-better-regulation-radical-314707>

Extract from 'New Growth without Debt: My Priorities as Commission President', in the European Parliament elections 2014 Suomalainen klub, Helsinki, 16 April 2014; retrieved on 20 July 2015 from <http://juncker.epp.eu/press-releases/new-growth-without-debt-my-priorities-commission-president>

Time for Action – Statement in the European Parliament plenary session ahead of the vote on the College', Speech by Commission President-elect Jean-Claude Juncker at the European Parliament Plenary Session in Strasbourg on 22 October 2014, retrieved on 20 July 2015 from http://europa.eu/rapid/press-release_SPEECH-14-1525_en.htm

Stated by the former Chief Scientific Advisor, Prof. Anne Glover, of the European Commission while speaking before the EU elections in 2014. Retrieved on 11 August 2015 from <http://www.euractiv.com/sections/eu-priorities-2020/eu-twisting-facts-fit-political-agenda-chief-scientist-says-302399>

Table of Figures

Figure 1. The EU Policy Cycle



Source: Commission Staff Working Document, 'Better Regulation Guidelines', SWD(2015) 111 final, p.5

Figure 2: Overview of mandatory consultation and feedback requirements

Box 3: Mandatory consultation and feedback requirements

Mandatory open, internet-based public consultation (minimum 12 weeks)⁸⁷:

- Initiatives with impact assessments. Consultation is on the basis of consultation documents including questionnaires, background information, the Inception IA etc.;
- Evaluations. Consultation is on the basis of consultation documents including questionnaires and background information, the Roadmap, etc.;
- Fitness Checks. Consultation is on the basis of consultation documents, including questionnaires, background information, Roadmaps, etc.;
- Green Papers.

Stakeholders must be able to give feedback on:

- Roadmaps for Evaluations and Fitness Checks roadmaps (4 weeks), and Roadmap and Inception Impact Assessments (suggested timeline for feedback to be provided on a case by case basis taking in to account the expected timing of any subsequent consultation);
- Draft Delegated Acts and Implementing Acts (4 weeks)⁸⁸;
- Legislative or policy proposals adopted by the College and, where applicable, the accompanying impact assessments (8 weeks).

Source: : Commission Staff Working Document, 'Better Regulation Guidelines', SWD(2015) 111 final, p. 66