

# EU Governance *Inquirer*

## LexNow legal documentation platform

### EDITORIAL

#### Law and rectitude: a triptych on the evaluation, proposal and implementation phases of EU legislation

Democracy, the public good and the general interest are words that apply to the legislative power. The administration, for its part, is subject to rectitude. In fact, it is its primary duty. This means that for the administration, there can be no approximations, interpretations or imprecisions, and even less favouritism, subjectivity or nepotism.

That is exactly why States - and in particular the Member States of the Union - have adopted codes: penal codes, labour codes, town planning codes, environmental codes, administrative codes, etc. These codes mark out the path to avoid any deviation.

There is no European administrative code. Some will argue that the Commission is not an administration. And they would be wrong to say so. It is true that the Commission has powers of a political nature - first and foremost its monopoly of initiative - but in its evaluation, proposal and implementation functions, it acts, or should act, with the same concern for rectitude that should guide any public administration.

But this is not the case. Or not always. In several publications (Comitology: Hijacking European Power?, European Lobbyists, etc.) and in numerous Comitology Newsletters, I have noted breaches of rectitude, i.e. inaccuracies, omissions, lack of objectivity, and preferences.

The cases reported concerned the proposal and implementation phases. Added to this triptych is the evaluation phase, which is poorly understood and little analysed. **In my view, it is a common duty to encourage the Commission to adopt a more rigorous approach to public policy, because just as 'Caesar's wife should be free from suspicion', the Commission must guarantee its independence and neutrality; in a word, its rectitude!**

### *The concentration of European Commission powers calls for unfailing rigour*

#### Content

The evaluation of public policies, so necessary, so imperfect,...	P2
What works and what doesn't work for evaluations	P2
Recommendations moving forward	P4

#### In 2024

A triptych of three Newsletters on the assessment, proposal and implementation phases of EU legislation

##### SEPTEMBER :

Evaluation of legislation

##### OCTOBER :

The proposal phase

##### NOVEMBER :

The implementation phase

OPERATED BY



## The evaluation of public policies: so necessary, so imperfect...

Better Regulation, initiated by Frans Timmermans in his first term of office and implemented as of 2015, was intended to eliminate the imperfections of the Lisbon Treaty.

The main developments of Better Regulation are well known:

- Submission of draft delegated acts to Expert Groups,
- Systematic organisation of public consultations,
- Reinforced rules for impact assessments,
- In-depth procedures for preparing impact assessments,
- Creation of an independent Regulatory Scrutiny Board.

The whole package is encapsulated in two texts: the Better Regulation guidelines and the Better Regulation toolbox. While the first is only 43 pages long, the second is 614! That's about the size of an Administrative Code, but without the binding aspect, as we shall see.

Within the large chapters on impact assessments, there is also a place for evaluations. These relate to either the evaluation of policies or legislation, in order to assess their relevance and performance. Like ex-ante impact assessments, evaluations (ex-post assessments) are in principle subject to 'quality control' by the Regulatory Scrutiny Board, an independent body- albeit under the authority of the President of the Commission- made up of 9 members, assisted by around 20 policy officers.

Unfortunately, this good governance is undermined by three major flaws:

- Impact assessments are systematically applied for legislation, but not for general policy documents such as Communications

(e.g. Farm to Fork) or if no policy choice is made (such as a ban on internal combustion vehicles in 2035). The same applies to evaluations, which are sometimes compulsory, but whose quality control by the RSB is limited to the texts it selects.

- The second flaw is that the evaluation report is prepared by the Directorate General (DG) in charge of the dossier. It may call on external consultants, but in practice it is the DG in charge that carries out the self-assessment. This is even truer when the evaluation report is not submitted to the RSB.
- The third flaw relates to possible malfunctions in the performance of evaluations. These may concern factual errors, but above all involve possible conflicts of interest concerning external consultants chosen by the Commission and lack of adequate data.

On this last point, I exchanged with Mr Philippe Mengal, one of the nine members of the RSB, during a presentation to the CDPF (Cercle des Délégués Permanents Français) on 24 May 2024. In response to a question about these potential conflicts of interest, Mr Mengal replied quite openly that he had never heard of them; that the RSB should not be subject to any external pressure or intervention; and that if there was any suspicion of a conflict of interest, it was up to the complainant(s) to contact the relevant DG directly.

In other words, the surest way of burying the issue, as we shall see in the pages to come...

## What works and what doesn't work for evaluations (ex-post impact assessments)

### The limited involvement of the Regulatory Scrutiny Board (RSB)

As opposed to ex-ante impact assessment (in advance of legislative proposals), the RSB does not provide systematic opinions on ex-post impact assessments (evaluations). In 2023, the RSB scrutinised a relatively small number (eight) of self-standing evaluation reports. Of those eight, four evaluations received a (initial) negative opinion. They do not require re-submission to the RSB afterwards.

Moreover, the 2023 scrutinised sample is atypical since it comprised only one evaluation of existing legislation, while

others concerned either spending programmes, evaluation regarding agencies or international agreements. The RSB had a heavy workload given the high number of legislative initiatives under the von der Leyen I Commission. However, this shouldn't be a reason to limit the number of opinions on evaluations, as they are key to getting a decent understanding of what works in policy and what doesn't.

### The pros and cons of back-to-back evaluations

The Board also scrutinised 10 so-called 'back-to-back' evaluations, i.e. the performance of ex-post and ex-ante impact assessment 'in one'.

The RSB and experts indicate that these back-to-back analyses generally have a lower analytical quality. Linking the evaluation of an existing legislative corpus directly to the preparation of a legislative revision can be problematic in view of the spirit of the 'evaluate first' principle.

### What does 'evaluate first' mean?

Embedded at EU level since the Better Regulation package, the objective is to first perform an analysis of the existing legislative framework and its implementation before taking legislative action. This would ensure that account is taken of lessons learned from past EU actions.

### Quality of evaluations: low according to the RSB

In terms of quality of evaluations, **the RSB indicated that, in 2023, the share of positive opinions was among the lowest so far and the average quality score was below the 2017-2022 average.**

When assessing the quality of evaluations, the RSB looks at several components. There are three components that, overall, were performed to a standard of good quality: 'purpose and scope', 'evaluation questions' and 'readability and clarity'.

There are, however, **four components that overall are weak: 'points of comparison', 'validity of conclusions', 'data collection' and 'effectiveness'**. These components are crucial for a solid and pertinent evaluation. More stringency would be required on these aspects, and it therefore makes sense that the RSB would be more systematically involved in evaluations.

### Massive involvement of external consultants vs. internalisation of analysis

The European Parliamentary Research Service has recently published a **study** on the use of external consultants. Via analysis of the Commission's Financial Transparency System (2014-2021 period), the study concludes that the Commission spends € 6.4 billion on consultants. When zooming in on the use of consultants for evaluations, the amount comes to € 378 million in that period (+/- 50 million € in average per year !). Although the use of consultants is not per se and systematically an issue, there are a couple of points that require specific attention.

### Concentration issue

According to the EPRS report, no more than 40 firms obtained at least € 1 million in contracts; this amount is lower for evaluations. Beyond that, there is a relatively vast array of smaller firms with much more limited contracts.

Given the specialisation of many consultancies, there tends to be some degree of concentration, i.e. the same consultancy always being involved in the same type of policy work. The increased use of framework contracts has also increased this tendency.

A European Court of Auditors **report** indicates a risk of supplier concentration and overdependence on a relatively small number of service providers in some fields. They tend to become entrenched in certain DGs as they acquire knowledge giving them a competitive advantage in bidding for future contacts. The Court of Auditors provided recommendations for improvement to the European Commission.

### Conflicts of interest

At regular intervals, concerns over conflicts of interest are raised regarding external consultants/organisations which the European Commission involves in policy-making. **There are rules on how to assess and judge conflicts of interest**, but they are not always clear, nor are they stringent enough to avoid at least a strong perception of conflict of interest. This is partially due to non-transparency in what is specifically asked of external experts and what they base their findings on. The assessment of conflicts of interest itself is also vague.

This leads to question marks and can be harmful to the outcome of an evaluation and potential legislative process afterwards.

### The case of the Tobacco Control Policy evaluation

A € 3 million tender was opened by the European Health and Digital Executive Agency (HaDEA) for research and consultancy services concerning the implementation of EU tobacco control policy and the Beating Cancer Plan. The tender was awarded to the only candidate, i.e. a consortium composed of the European Network for Smoking Prevention (ENSP), the University of Crete and Open Evidence. Industry and at least one MEP have pointed at a potential conflict of interest, notably the participation of ENSP in the consortium, an NGO advocating for strict rules on tobacco control and regulation of tobacco products. ENSP is also a sponsor of the European Citizen's Initiative 'Call to achieve a tobacco-free environment and the first European tobacco-free generation by 2030'. A complaint has been submitted to the European Ombudsman, who is currently investigating.

1. <https://www.euractiv.com/section/politics/news/stakeholders-bicker-over-eu-tender-on-tobacco-control-policy/>

### *The case of the merger enforcement policies evaluation*

In 2021, the European Commission issued a tender for the evaluation of merger enforcement policies. The tender was awarded to RBB Economics, a consultancy specialising in competition law and representing clients in merger and acquisition proceedings. They have been involved in many

high-profile merger cases, including in the tech sector. Doubts were expressed - notably by Corporate Europe Observatory - about the objectivity that could be expected of RBB Economics. After requesting clarification from the Commission services, a complaint was filed with the European Ombudsman. In August 2023, the European Commission, in the person of Commissioner Vestager, indicated an intention to cancel the contract.<sup>2</sup>

2. <https://www.corporateeurope.org/en/2023/04/how-commission-outsourced-its-merger-policy-googles-best-friend>

## Re-thinking evaluations in order to guarantee more rigour and quality

### 1. A more systematic involvement of the Regulatory Scrutiny Board

This would benefit the overall quality of evaluations and, by extension, EU policy-making. Currently, the main criterion for an RSB opinion on evaluations is 'major evaluations, based on relevance and political priorities of the Commission'. This should become a more substantiated set of objective criteria that could be evaluated by the RSB independently of the European Commission's own priority-setting.

Criteria that come to mind are, e.g. the (high) impact on EU citizens, (high) impact on SMEs, (high) budgetary impact, (high) impact on competitiveness. Along the same lines, the non-obligatory re-submission after an initial negative opinion of the RSB should also be reconsidered.

### 2. Limiting back-to-back evaluations

Their use should be limited to exceptional cases, with proper justifications as to why, in a given situation,

they are deemed the best option. A stricter attitude is needed to guarantee an adequate evaluation, regardless of whether a legislative revision is ultimately needed. The RSB offers early on in the process of impact assessment the possibility of a discussion with DGs/units in charge. This practice should be better 'promoted' within the European Commission, including with regard to evaluations. Obliging the units to hold at least one upstream meeting with the RSB could be beneficial.

### 3. More internalisation of work

Internalising work in the Commission is a useful path to explore. Opinions are divided between a firm 'yes, they should' and a 'not realistic, due to lack of human resources'.

It is interesting to take a closer look at the Letta Report which states that it is 'crucial to further develop and broaden the European Commission's in-house expertise, ensuring that policies are not only well-informed but also effectively implemented'.

**Letta calls for better leveraging of the Joint Research Centre, further support for Eurostat's capabilities to deliver rapid and detailed data as well as re-allocating funds from external sources. Also, the (increased) role of agencies in the context of ex-post and ex-ante impact assessments is worth exploring. In other words, to move from case-by-case evaluations, as it suits, to a uniform, exhaustive, holistic method. And provide resource to do it.**