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Better regulation, so badly named…

EDITORIAL

A floating institutional system

In 1984 - 40 years ago - the European Economic Community (EEC) was in trouble. The Single European Act from 1986, followed by the Maastricht Treaty (1993), established the 'Community method' with its three pillars: the Commission's monopoly of legislative initiative, qualified majority voting in the Council of Ministers, and Parliament-Council co-decision. This edifice was to be destroyed by three unfortunate initiatives: the Lisbon Treaty, the generalisation of trilogues at first reading and the misnamed 'Better Regulation' package.

The first nail in the coffin of good European governance was driven by the Treaty of Lisbon, with the detrimental decision to keep one Commissioner per Member State and the institutionalisation of the European Council composed of Heads of State and of Government. The latter captured power for its own benefit (contrary to the letter and spirit of the Maastricht Treaty), brought the Union into an inter-governmental dynamic and used the Commission as a 'secretariat' in charge of technical standards and regulations, via a senseless reform of Comitology and delegated acts.

The second nail in the coffin is a general laxity consisting in officially retaining the co-decision procedure (ordinary legislative procedure), but pushing first reading agreements with the generalisation of trilogues. Since 2021, there has been no second reading. Everything takes place behind closed doors, where a panel of civil servants, Members of Parliament and representatives of the six-monthly rotating Presidency of the Council will agree on a compromise text, which will be ratified without debate by the Council and Parliament. In addition to its lack of democracy, this system is the source of an extraordinary profusion of delegated and implementing acts.

The third nail in the coffin is Better Regulation. With the best intentions in the world, the package and the Interinstitutional Agreement following it, add a layer of approximations, exceptions, derogations and interpretations to a system that has become horribly complex in procedural terms.

Whereas before these three 'reforms' the European institutional system was clear and uniform, today it is a floating system. Each case now has its own institutional environment. Everything is case-by-case. Personal considerations often prevail over strict adherence to method. **The law is no longer the law, but an ersatz law.**

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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

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The 4 vices of impact assessments (IA)

Impact assessments have always been part of the Community's toolbox. I remember the analyses of biofuel production in 1985-95, the results of which were perfectly aligned with the Commission's wishes. The Better Regulation package, and the 2016 Interinstitutional Agreement on Better Law-making, aimed to make impact assessments more transparent and, above all, more objective. This goal, in terms of principles, was welcomed by the institutions, Member States and stakeholders. With several years of experience, however, the neutral observer notes the shortcomings of the system and the necessity of correcting them.

The first of the 4 vices relates to the contradiction between the theoretical role of the impact assessments and their practical roll-out. The role of the impact assessment is to study several policy options and to identify the preferred option, which will serve as a basis for the Commission to draw up its legislative proposal. We could therefore imagine a three-stage process: impact assessment for the preliminary orientation of the text, incubation process between the Commission and its interfaces - Member States, Parliament, stakeholders – and then drafting of the proposed directive or regulation. But the impact assessment and the draft legislation are published on the same day. Simultaneously. This denies the necessary maturation of proposed legislation. The Commission defends itself by arguing that dissociating the impact assessment from the publication of the draft would undermine its monopoly of legislative initiative. I do not see it that way.

The second of the 4 vices is the 'false' independence of the panel responsible for examining, rejecting or validating impact assessments. This task is entrusted to the Regulatory Scrutiny Board (RSB), which has 9 members: a Chairman with the rank of Director-General, four senior Commission officials and four external experts. Over 40% of draft impact assessments submitted to the RSB are rejected after the first evaluation by the Board, but validated after the second submission, usually with minor adjustments. It is a bit like at university, where those who fail the first session, pass the second.

Unfortunately, the opinion of the RSB is not final and can be overruled by political considerations. This is detrimental to the role of the Board and more broadly the credibility of impact assessments.

The third of the 4 vices relates to the scope of impact assessments. A whole series of Commission acts are exempt: action plans and strategies, policy initiatives, communications, recommendations etc. on the basis that they are not binding legislative texts. Likewise, bi- or multilateral trade agreements with third countries are exempt on the grounds of a lack of policy alternatives.

There is a wide range of acts (new legal acts, revision/recast of existing legal acts, delegated acts, implementing measures, etc.) which are 'initiatives for which the need for an impact assessment should be assessed'. And we will spare you the phrase 'unless', which allows for exceptions, derogations or interpretations of the principle that has just been laid down. In short, "we do as it suits" us and this is how - as we shall see - some very important EU texts have undergone no impact assessment at all.

The fourth of the 4 vices is the bureaucratic method used to carry out the impact assessment. The process is not untransparent, but so complicated that it becomes opaque. In a very preliminary phase, the Commission issues a call for evidence, presenting options as part of an inception impact assessment. The impact assessment will follow at a later stage. When designing the impact assessment, the final 'desired' policy outcome is often already embedded in the outline of the IA, much like the construction of a motorway: length, width, bridges, tunnels, etc. All is foreseen, only its execution remains. This starting point for the procedure is in reality the point of arrival.

Everything about the process of drawing up an impact assessment is open to criticism: pre-selection of options, choice of the Commission's subcontractor from shortlists drawn up by the Commission, determination of the subjects to be analysed, the questions to be asked, the people to be contacted, etc. Opacity reigns and doubts creep in. Industrial sectors are also to blame: they are convinced that 'impact assessments are a taboo' and are generally absent in this upstream stage. By contrast, NGOs are omnipresent.

These observations highlighted above argue strongly in favour of internalising impact assessments, as recommended by the Letta Report.

The Letta Report and impact assessments: 'Elucidating rather than obscuring'

Two high-profile reports have been published in recent months on the state of the European Union. The first, known as the Letta Report, on the failure to complete the internal market; the second, known as the Draghi Report, on the EU's non-competitiveness and on how to remedy it. Both reports clearly question the Union's governance and its excess regulation, stressing the need for simplification.

The Letta Report devotes several pages to the shortcomings of Better Regulation, with a particular focus on impact assessments, which need to be more operational and more 'agile'. Impact assessments should not dictate which policy option should be adopted, as this is a political choice. They must also be 'dynamic' in order to assess the amendments proposed by the co-legislators during the adoption phase of EU laws.

The Letta Report considers that impact assessments, the preparatory work often entrusted to external consultants, should be brought in-house, in particular with the increased involvement of the Joint Research Centre, a department of the Commission whose human resources (2,000 people!) and technical skills are, in our view, insufficiently used.

End of internal combustion vehicles in 2035 The emblematic case of an industrial disaster

The end of combustion engine vehicles has been front-page news in Europe for some months now. The car industry is crying foul. Jean-Dominique Senard, a serious man if ever there was one, former head of Michelin and current chairman of Renault, told the Economic Affairs Committee of the French Senate on 19 March 2024: 'There has been no impact assessment'. No impact assessment, really?

An impact assessment ...

In fact, there was. There was an impact assessment dated 14 July 2021. It is part of the revision of Regulation 2019/631 on 'Strengthening the CO2 emission performance for new passenger cars', which has led on 19 April 2023 to a ban on combustion engines in 2035, with 3 intermediate stages: no more than 7g of CO2/km in 2024, 6g/km in 2029 and 4g/km in 2035.

The 86-page impact assessment focuses its analysis on the gradual reduction of CO2 emissions. The preferred option - to use the standard jargon - proposes to base the reduction curve on the commitments of the Fit for 55 package, i.e. a 55% reduction in CO2 emissions in 2030 compared with 1990.

The impact assessment sets (as does the future amended regulation) intermediate targets and clearly confirms the objective of carbon neutrality. The study does not identify any major problems either in terms of employment or investment. Efforts to train staff are highlighted. International competitiveness is not addressed, at least not sufficiently.

It is the legislative work of the European Parliament and the Council of Ministers that will place the ban on combustion engines in 2035 at the heart of the debate. The discussion dragged on for several months, with, as you will recall, Germany initially opposed, then in favour following a relaxation on sustainable fuels.

... but not on the end of combustion engine vehicles!

This major reorientation of the initial draft is done without any impact assessment. Parliament and Council – although they possibly could – don't perform impact assessments on amendments, sometimes very regrettably so. It is worth noting in this respect the Letta Report's proposal for 'dynamic' impact assessments, i.e. assessments that are rebalanced to analyse the impact of a particular amendment that is likely to change the very structure or orientation of the initial draft. This point is pivotal in a Better Regulation reform.

It is unbelievable that such an industrial revolution should be decided on without any simulation of the industrial, economic and social impact within the EU, or of the trade flows between the EU and China and their respective competitiveness. The fact that the European Automobile Manufacturers Association (AECA) did not itself carry out a counter-impact assessment remains, in our view, an inexplicable mystery.

A double penalty for the automobile sector

The car industry is fighting for an extension of the ban on combustion engines beyond 2035. For the industry, the danger is dual. The delay in the electrification of engines is thwarting the average CO2 emissions reduction threshold (7g/km in 2024) laid down in Regulation 2023/851 amending the initial Regulation 2019/631. As a result, the sector is under threat of penalties organised by the CAFE (Corporate Average Fuel Economy) system, which could reach €14 billion by 2025.

Yes, we really are helplessly watching the programmed dismantling of a major economic sector with no positive effect on the economy, employment or the environment.

Farm to Fork : A clash between the Joint Research Centre and the Commission

According to the Commission, the very important Farm to Fork file (one of the main pillars of the Green Deal) should not be the subject of an impact assessment because it is not a legislative project, but a 'package' consisting of orientations for future legislation or revisions of legislation.

Nevertheless, the Joint Research Centre (JRC) - one of the Commission's Directorates-General - has taken the initiative of calculating the economic impact of Farm to Fork. This could be described as an 'unofficial' impact assessment. The analysis showed catastrophic consequences for the agricultural world: a 15% drop in agricultural production in certain sectors, higher prices, loss of competitiveness, increased imports, etc....

This proves that impact assessments on non-legislative documents of key importance are useful and necessary. Furthermore, it shows that the JRC has the capacity to perform or at least substantially contribute to impact assessments. And finally, this assessment does not please the Commission services in charge, nor the political hierarchy most likely, as it contradicts its optimistic orientation.

No impact assessment - No consultation

The previous newsletter, which was widely distributed and devoted to evaluations, led Tobacco Europe to contact us about a case concerning the revision of the Recommendation on Smoke-free Environments.

No evaluation or impact assessment was carried out for this dossier, as it was not a binding text in the strict sense of the term. However, a consultation was planned as the only method to involve citizens, professionals and stakeholders in the drafting of a text that is significant for them.

The Commission had undertaken to publish a 'synopsis report' summarising the contributions received by the Commission as part of its consultation. But the Recommendation was published on 17 September 2024 without either the synopsis or the responses to the consultation having been made public.

In our view, the fact that tobacco is the focus of the text should be of no relevance. As already emphasised in our first newsletter on evaluations, 'For public administration there can be no approximations, interpretations, imprecisions and even less favouritism, subjectivity or nepotism'.

Revising Better regulation? Improving impact assessments?

Although the first recital of the Interinstitutional Agreement from 13 April 2016 sets out the principle of 'equality between co-legislators', the three institutions are not equal because only the Commission has a monopoly of legislative initiative.

As impact assessments are part of the proposal phase, in which the Commission is dominant, any request to involve the co-legislators in impact assessments or any dissociation of the publication of the impact assessment from the publication of the corresponding draft legislation seems to us to be unthinkable unless there is an unlikely reform of the treaties.

There is nevertheless room for significant improvements:

- Mandatory impact assessments for the EU's major strategic choices (action plans, strategies, communications, etc.);
- Giving the Regulatory Scrutiny Board real independence;
- Make the Joint Research Centre the focal point for impact assessments;
- Provide real transparency on the parameters of the impact assessment: options selected, themes analysed, stakeholders consulted, etc.
- Impact assessments are provided with an executive summary, but they should be clearer, easier to understand and translated into all EU languages.

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