New European Commission communication on Better Regulation: Joining forces to make better laws

Better Regulation: A dynamic agenda

Better Regulation ensures that EU policies and laws are prepared in an open, transparent manner, informed by the best available evidence and backed by comprehensive stakeholder involvement so that they achieve their objectives at minimum cost. It is a dynamic agenda that has gradually evolved in the European Commission since the early 2000s. Today's Better Regulation agenda covers the whole policy cycle. It was shaped under the Juncker Commission presidency, which formally declared it a priority, with the aim of strengthening the effectiveness, transparency and accountability of its actions across all policy areas. The comprehensive Better Regulation package of 2015 presented a strategy, guidelines and a toolbox, and established the Regulatory Scrutiny Board as the Commission's regulatory oversight body. It also paved the way for the Interinstitutional Agreement on Better Law-Making (IIA-BLM) concluded by the Commission, Parliament and Council in April 2016, and which, inter alia, defines their respective roles and responsibilities in the regulatory process.

Following a revision in 2017, the Commission took stock of the Better Regulation agenda in 2019, concluding that in a post-fact world, evidence-based policy-making remains an imperative. The long-awaited new Commission communication, adopted on 29 April 2021, draws lessons from the Better Regulation stocktaking review. At the same time, it sets out a policy-making framework that aims at supporting post-crisis recovery and the twin digital and green transformation, in line with the Commission’s intention to advance the Better Regulation agenda further, with ‘future-proof legislation that can stand the test of time’.

Overview of the 2021 Better Regulation communication

The communication outlines five headline developments that will receive particular attention in the forthcoming revision of the Better Regulation Guidelines and Toolbox, expected to be published by summer 2021. These are:

- a shared effort on Better Regulation;
- better communication and interaction with stakeholders and the general public;
- improving the toolkit (ex-ante impact assessment, ex-post evaluation, and foresight);
- increasing transparency; and
- adding new instruments such as the ‘one in, one out’ mechanism for further simplification and burden reduction, and the Fit for Future Platform.

In terms of the overall tone, the title of the communication places a strong emphasis on the need to step up involvement by actors at all levels – the co-legislators, national and regional authorities, as well as stakeholders and the general public – to improve the quality of EU legislation.
Five headline developments

As regards the shared effort for Better Regulation, the communication calls repeatedly on the European Parliament and the Council to assess and document the effect of their amendments, thereby making reference to provisions in the IIA-BLM. In this respect, it argues that amendments made to proposals in the course of negotiations may significantly alter the implications of EU legislation for citizens and businesses. At the same time, it emphasises that the way EU legislation is implemented by Member States also has an impact, and therefore asks Member States for feedback regarding the benefits and costs estimated by the Commission once a specific piece of legislation is implemented. Furthermore, it calls on the co-legislators to ensure that monitoring and review clauses embedded in legislation are appropriate, so that they generate the necessary data for evaluating whether the legislation is effective.

To achieve better communication and interaction with stakeholders and the general public, the Commission intends to streamline the consultation process by consolidating open public consultations into a single call for evidence (qualitative and quantitative data, information and knowledge) on the Have Your Say web portal. This means that consultation on evaluation roadmaps and inception impact assessments will in future be merged into one feedback round. Stakeholders' contributions will be facilitated by improving the structure and content of the questionnaires, to be made available, as a general rule, in all official EU languages. Outreach will also be improved through wider promotion of the Have Your Say portal, which will also be made more accessible to people with disabilities. In addition, public consultations on very technical issues will be avoided in favour of targeted consultations. Finally, a summary report on each public consultation will be published within eight weeks of its closure. The envisaged developments appear to address the shortcomings identified by the Commission in its stocktaking communication, and by the Court of Auditors in its 'Have your say!' special report, although the Court also recommended publication of the consultation strategies.

Improvements will be made to the toolkit, to enhance impact assessments and evaluation. To address the acknowledged lack of impact assessments seen with several legislative initiatives in recent years (in particular in the field of justice and home affairs) and which can only partly be attributed to the urgency of the Covid-19 crisis, the Commission will in future publish a staff working document, either together with the proposal or within three months of its publication, in those cases when an impact assessment should have been prepared but was not. This staff working document will include the analysis and its supporting evidence as well as an indication of how and when the legislative act would be evaluated. This is a welcome development, although, in light of the Commission’s impact assessment commitments set out in the IIA-BLM, the communication could have also been expected to confirm that this situation would remain the exception. The communication states that the analysis of impacts would also be improved by including (and reporting on) impacts related to the green and digital transition, as well as paying greater attention to the gender equality dimension. It will implement a 'do no significant harm' and 'digital by default' principle across all policies. Territorial impact assessments and ‘rural proofing’ would also be strengthened and the 'SME test' will be applied more systematically to better assess impacts on small and medium-sized enterprises (SMEs). Finally, each proposal should clarify how it supports the achievement of the United Nations sustainable development goals, and how the effect of the Covid-19 pandemic has been taken into account. According to the communication, the Commission remains committed to the 'evaluate first' principle in the policy revision context. Review clauses will be streamlined, entailing a better distinction between evaluations and implementation reports. Strategic foresight is set to become an integral part of the Better Regulation agenda. It will be embedded in policy-making across all policy areas to add a longer-term perspective, in particular in areas that are subject to rapid change. Foresight aspects, and notably major trends, will be considered in impact assessments, fitness checks and major evaluations.

The communication includes a pledge on increased transparency. The Commission will improve its various evidence registers and portals, as well as their access and interlinkages. In addition, it
intends to reach out to the European Parliament and the Council to set up a common evidence register, the Joint Legislative Portal, which should systematically gather all the evidence underpinning legislative initiatives. Better access to underlying studies, data, sources, and methods for impact assessments and evaluations enhances accountability and trust, and facilitates evidence-based policy-making.

**New instruments** will be added beyond the improvements to the toolkit to further simplify and reduce regulatory burden. The most notable of these is implementing the *one in, one out* approach announced in the political guidelines of President von der Leyen, which aims at offsetting new burdens resulting from legislative proposals by reducing an equivalent existing burden in the same policy area. According to the communication, the implementation of this approach will be reported in the annual burden survey. In the communication, the Commission confirms that the calculation of burdens will not constitute a mechanical exercise. Instead, there will be a certain degree of flexibility within the reporting period, the possibility of 'trading' across policy areas or even exemptions in certain exceptional circumstances. The main aim of 'one in, one out' is to create greater cost-awareness in policy-making. The methodological details as to how the new mechanism will be implemented in practice will only become clearer once the Better Regulation Guidelines are revised. However, among the concerns raised is a certain risk that the strong focus on regulatory costs and burdens might neglect the consideration of benefits, which are as much a part of the Better Regulation agenda as costs (see paragraph 12, IIA-BLM), and that quantification might be prioritised over necessary regulation. To recap, the Commission itself, in its 2017 communication on completing the Better Regulation agenda, reiterated the concerns expressed in the accompanying report and questioned the feasibility of regulatory offsetting at the EU level with regard to data availability and potential implications withdrawn legislation may have in the Member States. Therefore, the new 'one in, one out' approach marks a real paradigm shift in EU policy-making.

Still in the context of regulatory offsetting, the communication highlights **fitness checks** (i.e. ex-post assessments of entire policy areas, as opposed to evaluations of individual acts), as a tool to determine cumulative impacts, overlaps and potential inconsistencies. However, it remains to be seen how the burdens of older legislative acts (notably those that precede the 2015 Better Regulation Guidelines) would be calculated to determine what should be 'knocked out' in implementing the new 'one in, one out' mechanism. The Fit for Future Platform, a high-level expert group established to help the Commission identify burden reduction and digitalisation potential, as well as opportunities to make EU legislation SME-friendly and easier to comply with, replaces the former REFIT Platform. Finally, the Regulatory Scrutiny Board will continue its oversight functions and include the 'one in, one out' approach, foresight, and the post-pandemic recovery in its scrutiny of impact assessments, evaluations and fitness checks.

### Conclusion and outlook

The new communication reiterates that Better Regulation is a shared responsibility. It follows up on the findings of the Commission's stocktaking exercise carried out in 2019, underlining that Better Regulation is not a static, but a dynamic agenda that is steadily evolving. In fact, most of the items addressed in the communication represent a coherent answer to the general lessons learned and the specific issues previously identified in terms of stakeholder outreach, transparency, improved impact analysis and evaluations.

Notable new elements, anticipated in President von der Leyen's political guidelines, are the 'one in, one out' approach and the mainstreaming of strategic foresight in policy-making. The use of 'one in, one out' represents a true paradigm shift, since the Commission had previously been reluctant to apply regulatory offsetting for EU policy-making. The pronounced focus on burdens and costs will inevitably lead to more quantification, increasing even further the need for data and transparency of methods. Care will need to be taken that the focus on costs does not outpace the consideration of regulatory benefits, and that a balance is struck between qualitative and quantitative analysis. The Commission indicated it would pilot the 'one in, one out' approach as early
as the second half of 2021, and will formally start implementing it with the 2022 Commission work programme. A review of the mechanism is set to follow in 2023.

The Commission’s intention to make more use of fitness checks is a means to maintain the coherence and relevance of the body of EU legislation. Given their broad coverage and their implications in the context of ‘one in, one out’, increased consideration could be given to the possibility for Parliament to ask the Commission to present the outcomes of fitness checks to committees. The communication also reiterates the joint responsibility of the co-legislators in ensuring that high quality monitoring and review clauses are included in legislation, and line up with the policy cycle, against the backdrop that data-gathering is essential for measuring regulatory performance, but has costs and burdens. In the same vein, while the Parliament has recognised its joint responsibility with the other institutions in delivering high-quality Union legislation, the communication’s repeated call on the co-legislators to do more impact analysis of their amendments takes little account of the fact that this could put their capacities under strain and potentially lead to delays in the legislative procedure, possibly even restricting the co-legislators’ margin of manoeuvre. Increased consideration could be given to the possibility for the co-legislators to ask the Commission to update its initial impact assessment, as envisaged in the IIA-BLM.

As shown by the sheer number of impact assessments planned in the 2021 Commission work programme, the Commission appears to be upholding the Better Regulation principles. It remains to be seen how the ambitious plans, unveiled in the new communication, to integrate the analysis of a number of additional impacts into Commission impact assessments will be put into practice, so that the assessments remain proportional and fit for purpose. Overall, the current communication is a strategic document, and certain operational aspects will only become clearer once the revised Better Regulation Guidelines and Toolbox are issued.

ENDNOTES


3 Up to now, a synopsis report of the whole consultation process is annexed to the impact assessment or evaluation.

4 To note, in the Commission’s terminology, implementation reports describe the transposition, implementation and application of legislation, whereas evaluations place the focus on effects in light of the five established evaluation criteria of effectiveness, efficiency, relevance, coherence and EU added value.

5 See C.M. Radaelli, The state of play with the better regulation strategy of the European Commission, European University Institute-School of Transnational Governance, STG Policy Papers, Issue 2021/06, April 2021. See also E. Golberg, The jury is still out on one-in-one-out, The Regulatory Review, 3 February 2020.

6 Some of these issues were also addressed in Appraising the quality of the European Commission’s impact assessments, Ex-ante impact assessment unit, EPRS, European Parliament, 2019.

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