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Workshop on the Best Practices in Legislative and Regulatory Processes in a Constitutional Perspective

Study for the AFCO Committee

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EUROPEAN PARLIAMENT

DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

CONSTITUTIONAL AFFAIRS

The best practices in legislative and regulatory processes in a constitutional perspective (workshop)

STUDY FOR THE AFCO COMMITEE

Abstract

This is a working document aimed solely at providing to the Committee for information draft contributions to the workshop on best practices in legislative and regulatory process. Final version will be published after the workshop and include elements introduced in the discussions during the workshop.

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POLICY DEPARTMENT ON CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

Workshop for Committee on Constitutional Affairs

ON THE BEST PRACTICES IN LEGISLATIVE AND REGULATORY PROCESSES IN A CONSTITUTIONAL PERSPECTIVE

European Parliament, Altiero Spinelli 1G3,
17th June 2015, 10-12.30

PROGRAMME

10.00-10.10	**Introduction by Danuta Hübner, chair of the Committee on Constitutional Affairs**
10.10-11.30	**European Union and Better Law-Making: Best practices and Gaps** Andrea Renda, Center for European Policy Studies **Better Regulation in the EU and The Netherlands: A Comparison** Arnout Mijs, Clingendael **Perspectives from the United States: Public Consultation Practices and Accountability in Rulemaking** Rachel Shub, Office of the United States Trade Representative **Perspectives from Poland: Regulatory Planning, Impact Assessment and Early Warning System** Malgorzata Kaluzynska, Ministry of Foreign Affairs of Poland, EU Economic Department
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European Union and Better Law-Making: Best Practices and Gaps

Andrea Renda, Center for European Policy Studies

The EU Better Lawmaking agenda is deeply rooted in Treaty provisions, which stress the need for EU institutions to adopt their policy initiatives in a way that is open, transparent, accountable, and in full respect of fundamental rights and key principles such as subsidiarity and proportionality. The way in which the agenda has been implemented goes very far in ensuring respect of these principles, and indeed many aspects of the EU policy process can be considered as best practices worldwide. This certainly applies to the pervasiveness of consultation process and standards, as well as to the ever-growing use of ex ante impact assessments, monitoring and ex post evaluations throughout the policy cycle. The new better regulation package adopted by the European Commission on May 19, 2015 further strengthens these prerogatives of the EU policy process, and must be welcome in general terms for this reason. The same applies to the Commission's proposed new Inter-Institutional Agreement on Better Lawmaking, with the *caveats* that will be illustrated below.

Against this backdrop, there are still some gaps in the existing policy cycle at the EU level, and also some reasons to be concerned about the feasibility of some of the proposed reforms. This briefing note aims at clarifying these gaps and concerns and at contributing to the work of the Committee on Constitutional Affairs of the European Parliament on the issue of "Best practices in legislative and regulatory processes in a constitutional perspective". In particular, this briefing addresses the case of the European Union by referring specifically to the use of better regulation tools throughout the legislative and regulatory process of the EU. Below, the key concepts of "policy cycle" and better lawmaking/better regulation are introduced.

Aim

- Illustrating the key features of the better lawmaking and better regulation agendas of the European Union.
- Explaining the main features of the new EU better regulation package adopted on May 19, 2015.
- Highlighting areas in which the European Union can be considered as a best practices and those areas in which margins for improvement remain.

This briefing note was written by Andrea Renda as a contribution to the work of the Committee on Constitutional Affairs of the European Parliament on the issue of "Best practices in legislative and regulatory processes in a constitutional perspective". In particular, it addresses the case of the European Union by referring specifically to the use of better regulation tools throughout the

legislative and regulatory process of the EU. Below, the key concepts of "policy cycle" and better lawmaking/better regulation are introduced. At the end of this introductory section the structure of this briefing note is further outlined.

1. INTRODUCTION

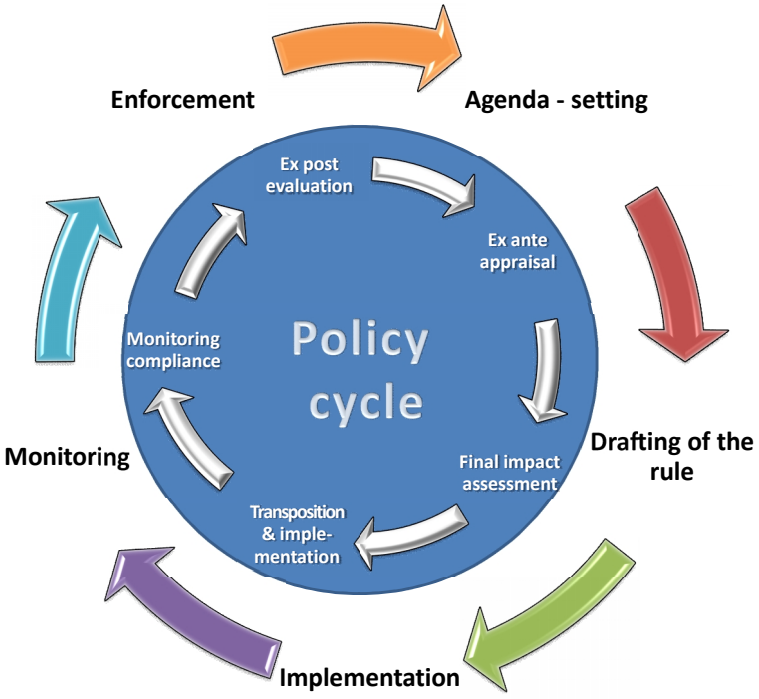
1.1. The "policy cycle"

Many legal systems around the world have specific provisions in place, which enable a better coordination and governance of the policymaking process (OECD, forthcoming). The "policy cycle" (or, as defined at the OECD level, the "regulatory governance cycle") includes in reality two separate cycles, one related to the life of individual rules, and another to the better regulation tools used by institutions to promote the quality and good delivery of the legal provisions throughout their whole life cycle.

Figure 1 below shows both the policy cycle (outer circle) and the cycle of better regulation tools that accompany each phase (inner circle). The outer circle distinguishes between the following phases of the life of a legal rule:

- The *agenda-setting* phase of regulation: during this phase, the main preparatory documents are prepared and adopted. This can include preliminary documents, strategy papers, communications, and "umbrella" regulations (e.g. framework regulations) that are binding, but which still require the adoption of further implementation measures.
- The *drafting* of the rule is a crucial phase since the ability to express a legal provision in clear language is often considered as a fundamental step towards legal certainty, which in turn can have positive impacts on the economy both in terms of general awareness of existing rights and obligations, and also in terms of reduced litigation and enforcement costs.
- The *implementation* phase can entail the formulation and adoption of secondary legislation measures, in the form of specific regulations, or delegated acts. This phase can typically imply the setting of standards, which might be kept fixed or changed throughout the lifespan of the legal rules. In some cases, depending on the type of regulatory alternative chosen, implementation measures might have to be adopted by private organizations in the execution of a co-regulatory arrangement.
- The *monitoring* phase is normally not strictly speaking a regulatory phase, but rather a set of actions and behaviour that have to be put in place by targeted stakeholders when having to comply with a specific set of rules. As will be illustrated below, different types of regulatory interventions can have a very significant impact on innovation when it comes to compliance.
- The *enforcement* phase refers to securing compliance with the rules. It often entails the involvement of local administrations, which perform inspections and might impose sanctions for non-compliance. Also this phase can be delegated to specific agencies, or even private parties depending on the type of regulatory approach chosen.

Figure 1 – The "policy cycle"



Source: Author

For what concerns the "inner circle", the instruments that are most regularly used at the global level include ex ante impact assessments (IAs), interim and ex post evaluations, and stakeholder consultations carried out at various stages of the policy process. Governments increasingly make use also of instruments aimed at analysing the "stock" of legal rules, not only the "flow": these include programmes for the measurement and reduction of administrative burdens and compliance costs generated by legislation, analyses of cumulative and interactive costs of legislation in specific domains, etc.

1.2. Better lawmaking: the EU legal basis

"Better Law-Making" covers the whole policy cycle – from the genesis of law through to its implementation and enforcement – and involves a series of tools which are aimed at linking both decision-making and legislative drafting more closely to empirical evidence (so-called "evidence-based policymaking"). Better regulation and better lawmaking are rooted in key constitutional principles at the European Union level.
The relevant provisions in the Treaties include:

- Article 3 TEU, which states the aims of the EU, and in particular points 5 and 6, which state that the EU shall promote its values, contribute to eradicating poverty, observe human rights and respect the charter of the United Nations by "appropriate means", according with its competences given in the treaties.
- Article 5 TEU, which sets out the principles of conferral, subsidiarity and proportionality with respect to the limits of its powers.

- Article 7 TFEU, which states that "The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers".
- Articles 11-12 TEU and Protocol 1 include provisions related to the dialogue with civil society and national parliaments. Article 11 establishes government transparency, declares that broad consultations must be made and introduces provision for a petition where at least 1 million citizens may petition the Commission to legislate on a matter. Article 12 gives national parliaments limited involvement in the legislative process.
- Article 15 TFEU and 42 of the Charter of Fundamental Rights address the issue of transparency and access to documents.
- Art 16 TFEU, Art. 298 TFEU and 41 of the Charter are related to the right to good administration.
- Inter-institutional relations are also addressed by the Treaty: Article 4 TEU refers to the principle of sincere cooperation, whereas Article 5 TUE (now Article 295 TFEU) explicitly foresee the possibility of inter-institutional agreements.

1.3. Structure of this work

This briefing note reflects on the experience of the European Union on Better Lawmaking and discusses some of the features of the recently adopted new EU Better Regulation Package, as well as the content of the proposed new Inter-Institutional Agreement on Better Lawmaking, both presented by the European Commission on May 19, 2015.

Section 2 of the briefing analyses the current role played by the major EU institutions in better lawmaking, and aspects of the current inter-institutional agreement that would be worth re-considering. Key issues include:

- The use of ex ante impact assessments in major EU institutions;
- The frequency, timing and relevance of stakeholder consultation throughout the policy process;
- Problems related to the ex post evaluation, fitness checks and other forms of analyses of the stock of legislation (e.g. cumulative cost assessments); and
- A brief account of the role of Member States in the transposition and implementation phases of the policy cycle.

Section 3 deals with the review of the Inter-Institutional Agreement on Better Lawmaking. In particular, the briefing focuses on the existing proposals that would ensure that better regulation tools are used throughout the ordinary legislative procedure, and accompany EU rules throughout their life, as described in Figure 1 above.

2. BETTER LAWMAKING AND BETTER REGULATION IN THE EUROPEAN UNION

2.1. The use of ex ante impact assessments in major European Institutions

2.1.1. The European Commission

The European Commission is by far the EU institution in which ex ante impact assessment has been more successfully mainstreamed into the policy process. Renda (2014) distinguishes between three main "eras" in the EU better regulation agenda, and more specifically in the use of impact assessment: (i) the early years (2003—2005); the relaunch of the system and the "plateauing era" (2006-2009); and (iii) the consolidation era (2009-2014), which leads to the transition towards smart regulation and then the regulatory fitness (REFIT) agenda. A fourth era has just begun with the Juncker Commission and the recently adopted Better Regulation Package.

The early years (2003-2005)

At the European Council meetings of Göteborg and Laeken, the Commission announced its Action Plan for Better Regulation, which was eventually launched in June 2002. The new impact assessment model was introduced as part of this wider Action Plan, together with a communication aimed at simplifying and improving the regulatory environment and measures aimed at promoting "a culture of dialogue and participation" within the EU legislative process.[1] The Communication on impact assessment was inspired partially from the activity of the Mandelkern Group, but also from the commitment undertaken by the Commission at the Göteborg Council, to develop a tool for sustainable impact assessment.[2] As a result, the Commission decided to integrate all forms of *ex ante* evaluation by building an integrated impact assessment model, to enter into force on 1 January 2003.[3] Such model bears the heavy responsibility of ensuring that adequate account is taken at an early stage of the regulatory process of both the competitiveness and sustainable development goals, which rank amongst the top priorities in the EU agenda.

The new integrated impact assessment (IIA) model introduced in 2002 – which incorporated not only the economic impact, but also the social and environmental impact of the proposals concerned – adopted a 'dual stage' approach: while all Commission initiatives proposed for inclusion in the Annual Policy Strategy or the Commission Legislative and Work Programme and requiring some regulatory measure for their implementation were subject to a 'preliminary impact assessment', a selected number of proposals with large expected impact were subjected to a more in-depth analysis called

1 During 2002 and early in 2003, the Commission developed its Action Plan through eight targeted Communications, at the same time defining with the European Parliament and the Council an overall strategy on better law-making. The Communications addressed the following issues: 1) General principles and minimum standards for consultation (COM(2002)704); 2) the collection and use of expertise (COM(2002) 713); 3) impact assessment (COM(2002) 276), including internal *Guidelines*; 4) Simplifying and improving the regulatory environment (COM(2002) 278); 5) proposal for a new comitology decision (COM(2002) 719); 6) operating framework for the European Regulatory Agencies (COM(2002) 718); 7) framework for target-based tripartite contracts (COM(2002) 709); and 8) Better monitoring of the application of community law (COM(2002) 725).

2 See Communication COM(2002)276, p. 2. See also the Communication from the Commission to the European parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Towards a Global Partnership for Sustainable Development*, COM(2002)82, 12 February 2002.

3 "Impact assessment is intended to integrate, reinforce, streamline and replace all the existing separate impact assessment mechanisms for Commission proposals." See the Commission's Communication on impact assessment, COM(2002) 276, 5 June 2002, Section 1.3.

'extended impact assessment'.[1] The extended impact assessment (ExIA) contained an in-depth evaluation of expected social, economic and environmental impact of the various policy options associated with the proposal and a summary of the consultation activity, which should also focus on political and ethical issues related to the proposal. The Commission also specified that the expected impact should be estimated in qualitative, quantitative and possibly monetary terms. The alternative policy options were to be evaluated according to criteria such as the relevance to the problem, the effectiveness in achieving the objectives, the coherence with wider economic, social and environmental objectives, the interaction with other existing and planned EU interventions, the cost or resources required and the user-friendliness of the regulatory option at hand.

The IIA permeated the whole Commission's Strategic Planning and Programming Cycle, from the definition of the Annual Policy Strategy to the publication of the Commission's Work Programme that leads to inter-service consultation before selected initiatives are undertaken and pursued. Preliminary IAs could be included in the APS, but had to be completed at the latest before the publication of the CWP. The availability of an extended IA (for proposals selected for such a more in-depth analysis) was a necessary precondition for launching inter-service consultation at the beginning of the year in which the regulation will be issued. The ExIA report was then attached to the proposal when it was submitted to the Commission for final adoption and adopted as a working document of the services. After adoption, the ExIA was sent to other institutions along with the proposals and made available online.

The re-launch of the EU IA system and the "plateauing" era (2005-2009)

The Commission assessed the first results of its new Integrated Impact Assessment model in December 2004, by drawing a mixed picture on the progress made in improving the quality of EU legislation. At the time, the worrying signals shown by the mid-term review of the Lisbon strategy in February 2005 called for greater emphasis on fostering employment and growth and reducing the administrative burdens of regulation, shifting the focus from sustainable development to competitiveness, and from integrated impact assessment to economic assessment, when not mere compliance cost assessment[2].

This was a key passage for the Commission's Impact Assessment system, which led to more evident convergence towards the US model – in 2005, the UK was also revising its RIA system, which resulted however in a dilution of the previous system and the adoption of more pragmatic tools to cut red tape on the stock of existing legislation, rather than on the flow of new proposals. Importantly, this passage also led to abandoning the dual stage system of preliminary and extended IAs, to create a single system dominated by the principle of proportionate analysis. Against this background, a first measure was to request services to establish 'Roadmaps' for the initiatives they have put forward for inclusion in the Annual Policy Strategy (APS) and in the Commission's Work Programme.[3] Roadmaps,

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1 Proposals that are exempted from impact assessment include: a) Green Papers where the policy formulation is still in process; b) periodic Commission decisions and reports; c) proposals following international obligations; d) executive decisions, such as "implementing decisions, statutory decisions and technical updates, including adaptations to technical progress"; and e) Commission measures deriving from its powers of controlling the correct implementation of Community Law (although the Commission may in some instances decide to carry out an impact assessment). See Communication on impact assessment, COM(2002) 276, 5 June 2002, Section 2 ("Coverage").

2 In its Communication to the Spring European Council on "Working together for Growth and Jobs – A New Start for the Lisbon Strategy", COM(2005)24 of 2 February 2005, the Commission suggested that "[a] new approach to regulation should seek to remove burdens and cut red tape unnecessary for reaching the underlying policy objectives. Better Regulation should be a cornerstone for decision making at all levels of the Union."

3 See European Commission Staff Working Paper, *Impact Assessment: Next Steps*, SEC(2004)1377, Brussels, 21.10.2004.

now available online at the end of every year, contain indications of the IA activity already carried out, consultation undertaken, options considered and future work to be undertaken[1].

But several sources of pressure were calling for some major effort from the Commission in order to significantly improve the momentum of better regulation efforts, with specific emphasis on strengthening and improving impact assessment methods. First, the Parliament and the Council were urging the Commission to accept a greater involvement of all EU institutions in the procedure, by extending impact assessment to major amendments and defining common methodologies for carrying out assessments in all three institutions. Moreover, the failure to achieve the 25% reduction in the volume of the *acquis communautaire* by 2005, stated by the Prodi Commission, suggested the need for new efforts in the field of simplification. Finally, the decision to extend the impact assessment procedure to all the initiatives included in the Commission's 2005 Legislative and Work Programme (roughly 100 per year) starkly contrasted with evidence that the scheduled IAs had not been completed and had exhibited significant methodological problems, calling for a refinement of the guidelines.

The Commission took action in March 2005 with a new Communication on Better Regulation for Growth and Jobs in the European Union, defining the achievements of the first years of implementation of the IIA as "first steps in what must be a permanent effort"[2]. The communication laid down important changes in the IIA procedure and re-launched the role of IA and better regulation as part of the Lisbon strategy. The Communication's vibrant statement on the need to boost better regulation initiatives at all levels results in the launch of three key actions, to be reviewed in 2007, devoted to: a) the design and application of better regulation tools at EU level; b) a closer collaboration with member states to ensure a consistent application of better regulation principles; and c) a stronger, constructive dialogue with all EU regulators, member states and other stakeholders.

The main features of the Commission's new strategy on impact assessment can be summarized as follows:

- Although the IIA was rooted in the sustainable development principle and its integrated nature was not under discussion, there was an *urge to strengthen the assessment of the economic impact* of proposed regulations – compared to the social and environmental impact assessments – in view of the increased importance (and urgency) of the competitiveness goals set by the Lisbon strategy.
- The Commission started developing a methodology to better integrate the *measurement of administrative costs* in its IA model, and has launched a pilot project for the quantification of such burdens that produced the first results in late 2005, together with a trial new methodology named 'EU Net administrative cost model', which later became the EU Standard Cost Model.[3]

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1 See the Roadmaps for every year, available online on the Commission's website, at http://ec.europa.eu/governance/impact/planned_ia/planned_ia_en.htm.

2 See Better regulation for Growth and Jobs in the European Union, European Commission Communication - COM(2005)97 (March 2005).

3 See Commission Staff Working Paper, Annex to the 2005 Communication on Better Regulation for Growth and Jobs in the European Union, *Minimizing Administrative Costs Imposed by Legislation*, *Detailed Outline of a Possible EU Net Administrative Cost Model*, SEC(2005)175, 16 March 2005. Recall, in addition, that the UK Presidency stated its intention to develop a common methodology on measuring administrative burdens, based on the Standard Cost Model successfully applied in the Netherlands.

- The Commission launched an independent evaluation of the Impact Assessment system, which was then completed by The Evaluation Partnership in 2007.[1]
- Two networks of experts were created. A first network grouped high-level national regulatory experts for the development of a "coherent set of common indicators to monitor progress as regards the quality of the regulatory environment" both at EU and member state level. In addition. another network was created, composed of experts in better regulation issues, including academics and practitioners from the economic, social and environmental fields, who are called to advise the Commission on a case-by-case basis as regards the methodology adopted for carrying out the IA.

To those who had been following the debate on the implementation of the Commission's IA model since 2003, these changes came to no surprise. The IA was coming back to the somewhat tighter walls of cost-benefit analysis, compliance cost assessment and simplification, in line with the established experience of other countries, and with the mounting pressure of industry stakeholders. The 'back to basics' hypothesis was supported by the new Guidelines issued by the Commission in June 2005.[2] The Technical Annex to the Guidelines devoted special attention to methods for assessing the economic impact of proposed regulations, in particular the impact on growth, competitiveness and employment. A specific section was also dedicated to the assessment of administrative costs imposed by legislation (Annex 10 to the Guidelines, from March 2006).

Evolution of the EU impact assessment system after 2005

An external evaluation of the Commission's IA system in 2007 concluded that the Commission was making progress, by improving the quality of proposals, providing effective aid to decision-making, and enhancing transparency[3]. The evaluation, however, pointed out the need to clarify the concept of proportionate analysis, to better identify the initiatives to be assessed, to improve the timing of IA, and to reduce the number of impact assessments per policy measure. Subsequent development led to a further evolution of the system, although in rather sparse directions:

- The European Parliament and the Council had been increasingly involved in the better regulation agenda, a tendency which started with in the 2003 Inter-Institutional Agreement on Better Lawmaking and culminated with the 2005 agreement on a "common approach" to impact assessment[4].
- In late 2006, the Commission appointed an Impact Assessment Board (IAB), responding to repeated calls for better quality assurance mechanisms and stronger coordination in the *ex ante* assessment activities carried out by the various DGs[5].
- In January 2007, the Commission launched its Action Programme for the measurement and reduction of administrative burdens generated by EU legislation[6]. As recalled by Dunlop et al. (2009) and by Wegrich (2009), while RIA was the most important instrument in better regulation policies between 1995 and 2005, over the past few years other instruments, such as the standard cost model used for the reduction of administrative burdens, have become more pivotal.

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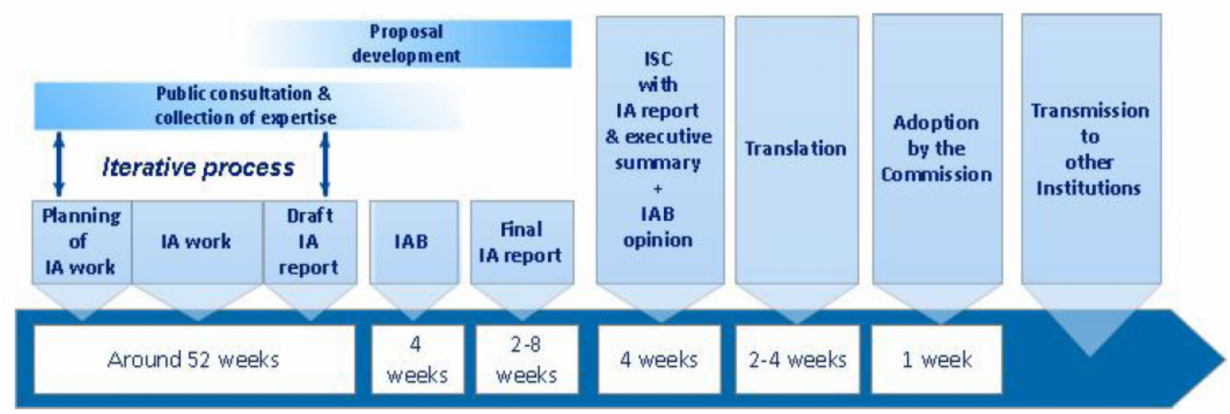
1 Communication on Better Regulation for Growth and Jobs in the European Union, op. cit., p. 6 (emphasis in original).
2 See European Commission, Impact Assessment Guidelines, SEC(2005)971, 15 June 2005.
3 See http://ec.europa.eu/governance/impact/docs/key_docs/tep_eias_final_report.pdf.
4 Both documents can be found at http://ec.europa.eu/governance/better_regulation/ ii_coord_en.htm.
5 For a short description of the IAB, see http://ec.europa.eu/governance/impact/ iab_en.htm.
6 COM(2007)23 final, 24 January 2007.

- The European Commission published an updated and improved version of the IA Guidelines in January 2009, followed a few months later by an *ad hoc* guidance document on the assessment of social impacts, an aspect that was perceived to be particularly weak in the IA documents produced by the European Commission.
- A consultation on the future of the smart regulation agenda in the EU was launched in 2010, with a view to collecting stakeholder views on how to improve the system in the years to come.

As a result, the Commission IA system became more firmly nested into the Commission's policy cycle. The IA procedure, coupled with stakeholder consultation, takes approximately 52 weeks to be completed, before the Commission proposal can indeed be finalized and sent – where appropriate – to other EU institutions. Figure 2 below shows the Commission policy process and the corresponding timing of IA.

Figure 2 – Countdown for preparing IA in the European Commission



Source: European Commission, Impact Assessment Guidelines, 15 January 2009

Of the abovementioned changes, perhaps the most important ones – the ones that left a mark on the overall design of the system – are the adoption of the 2009 IA guidelines, the creation of the IAB, and the launch of the Action Programme for the measurement and reduction of administrative burdens[1].

The 2010 "Smart regulation" communication and the "balkanization" of the EU IA system

After the public consultation on the future of the smart regulation agenda, in December 2010 the European Commission adopted a new Communication that spelled out the Commission's new priorities for the now-called "smart regulation" agenda. The term "smart" was used to denote a preference towards simpler regulation, and possibly to a competitiveness-enhancing use of regulation with the minimum possible use of red tape. The Communication announces a number of new features in the Impact Assessment system, and in particular:

- *The need to "close the policy cycle"* by ensuring that proposals that have been assessed *ex ante* are also monitored over time and evaluated *ex post* after a number of years, to check whether the rules in place have achieved the intended results. This evolution was to be integrated with new guidelines issued by the Secretariat General of the European Commission on *ex post* evaluation, which to date have not been published and should be made available during 2014.

[1] For an account of the relevance and methodological features of the Standard Cost Model, see Böheim, Renda et al. (2006), Renda (2008) and Allio and Renda (2010).

- *The re-cast of the administrative burdens reduction programme and its combination with simplification initiatives*, with the acknowledgment of the work performed by the High Level Group on administrative burdens chaired by Edmund Stoiber, which acted as a stimulus for reforms that would cut red tape for the business sector in particular. The Commission announced that it was "on track to exceed its target of cutting red tape by 25% by 2012", as it had tabled proposals which, if adopted, would generate annual savings of EUR 38 billion for European companies out of a total estimated burden of EUR 124 billion – a reduction of 31%. The Commission also decided to combine the administrative burdens reduction programme with the previously separated rolling programme for simplification.
- *The idea that smart regulation is a shared responsibility*, and that accordingly the European Commission can try to improve the quality of its documents as much as possible, but if the European Parliament, the Council of the EU and Member States do not take action to accompany this ongoing development the impact on the final quality and smartness of EU legislation would be limited.
- *The need to strengthen the consideration of SMEs in the policy process*, by refining tools such as the "SME test" that was introduced in the IA system after the adoption in 2008 of the Small Business Act for Europe, but which had not been fully operationalized in methodological terms by the European Commission to date. The smart regulation Communication was then followed by a review of the Small Business Act in 2011 and, in 2013 by two important initiatives: (i) a consultation and subsequent report on the top ten most burdensome pieces of EU legislation for European SMEs[1]; and (ii) the introduction of a new annual scoreboard which will allow to track the progress in the legislative cycle of proposals where a significant impact on SMEs can be expected, and will also show how different approaches to implementation by Member States affect the overall impact on SMEs.

All in all, however, the smart regulation era of the European Commission was heavily affected by a slowdown in the impact assessment activity of Commission DGs (as will be shown below, only 51 IAs were concluded in 2010, against the 135 initially planned) and also by a growing tension between the approach advocated by the Secretariat General, centred around the use of cost-benefit analysis, and the need – strongly felt by some DGs of the European Commission – to depart from this method to develop more specific techniques, which would lead in some cases to a narrower approach (e.g. the focus on administrative burdens or compliance costs in DG ENTR) or to a broader approach, very close to a multi-criteria analysis (e.g. DG EMPL, DG Justice, DG REGIO, etc.). This radical divergence has led, over time, to a worrying fragmentation of the IA system in the European Commission: while the SecGen believes and argues that the one and only official reference for conducting an IA is the 2009 Guidelines, to be revised in 2014 with even more emphasis on cost-benefit analysis, it seems to disregard and downplay the importance of the sectoral, specific documents that have been introduced under the initiative of individual DGs, such as:

- *For DG Enterprise and Industry*, the EU Standard Cost Model, the "Operational Guidelines to Assess Impacts on Micro-Enterprises", and the "Operational Guidance for Assessing Impacts on Sectoral Competitiveness within the Commission Impact Assessment System - A "Competitiveness Proofing" Toolkit for use in Impact Assessments".
- *For DG Justice and Citizens' rights*, the "Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments".

[1] COM(2013)446, 18 June 2013.

- *For DG Employment*, the already mentioned "Guidance on assessing Social Impacts", coupled with two large studies on existing practices in Member States.
- *For DG Regional policy*, "Assessing Territorial Impacts: Operational guidance on how to assess regional and local impacts within the Commission Impact Assessment System".

Along with these developments other DGs such as MARKT (Internal Market) and ENV (Environment) have developed own tools and handbooks on how to perform IA, which depart to some extent from the general template provided by the SecGen.

Another, important development that followed the Smart regulation Communication was the creation, in 2012, of the Impact Assessment (IMPA) Directorate within the European Parliament, which since then started to review the Commission's roadmaps and IA documents, as well as performing or commissioning ad hoc IAs on Parliamentary amendments or on own initiatives of the European parliament. The first year of operations of the IMPA Directorate has shown encouraging progress in the small groups' ability to exert pressure on the European Commission to produce better IA documents. If this trend is confirmed in the future, the Parliament might become an important gatekeeper of the soundness of the IA documents produced by the European Commission, thus filling some of the gaps left by the absence of a quality assurance mechanisms besides the "internal" quality check provided by the Impact Assessment Board of the European Commission. Recent examples include the Commission's legislative proposal containing rules on third countries' reciprocal access to EU public procurement, which was challenged by the IMPA Directorate through the collection of four different expert reports by experts in trade law and various economic disciplines, including game theory[1].

2.1.2. The European Parliament

The early years of implementation of the Inter-Institutional Agreement on Better Lawmaking were not easy for the European Parliament. As explained in Renda (2006, 2011), part of the problems faced by the Parliament can be explained by the fact that no existing impact assessment system had been sufficiently tested in any national assembly. As a matter of fact, many expressed scepticism as regards the possibility to implement an IA system and advanced forms of evidence-based policy-making in a context in which decisions are adopted typically by striking political compromises.

That said, the early attempts in Parliament took the form of commissioned IA studies on "major amendments" on Commission proposals, which were mostly organised by the launch of framework contracts with multiple contractors, who could then be called to perform specific studies over a specific time frame (e.g. two years). However, the first experiments were not fully welcome by MEPs, and IA studies were soon "degraded" to briefing notes and background studies, which lacked the overall structure and the specific indication of preferred policy options that are normally included in an IA document.

In June 2011, the European Parliament adopted an own-initiative report (the so-called "Niebler report") on 'guaranteeing independent impact assessment', which welcomed the on-going development of the impact assessment process within the EU institutions as an important aid to better law-making during the whole policy cycle. The following year, with a view to strengthening the capacity of the parliamentary committees to engage in ex-ante work of various kinds, the

[1] See the expert reports at http://www.europarl.europa.eu/meetdocs/2009_2014/documents/inta/dv/pp_summaries_/pp_summaries_en.pdf

Parliament's Bureau established a dedicated Directorate for Impact Assessment and European Added Value. The latter's Ex-Ante Impact Assessment Unit routinely summarises and appraises the strengths and weaknesses of Commission IAs accompanying legislative proposals and is available to provide, upon request from the relevant EP committee, more in-depth IA-related services, such as complementary or substitute impact assessments, in cases where certain aspects have been dealt with inadequately or not at all in the original Commission IA, and impact assessments of substantive amendments.

Between June 2012 and December 2014, the unit has prepared more than 90 initial appraisals of Commission IAs for parliamentary committees, six detailed appraisals, four complementary or substitute IAs, and four impact assessments on substantive EP amendments, encompassing a total of 21 amendments. IAs on amendments may help support the institution's position in trialogue negotiations, as well as improve advance knowledge of likely effects. Guidance for committees in using these EP impact assessment services are set out in the Parliament's internal 'Impact Assessment Handbook', adopted by the Parliament's Conference of Committee Chairs, and most recently updated in November 2013.

2.1.3. The Council of the European Union

The Council has initially run a limited number of pilot impact assessment on some of its own major amendments shortly after signing the Inter-Institutional Agreement on Better Lawmaking, but soon abandoned the project. Since then, for more than a decade very little has been done, with the exception of a growing use of Commission IAs in Council working parties at an early stage of the debate on specific legislative proposals. In the past years, at least a third of the EU Member States have exerted pressure on the Council to set up at least a small IA unit, but so far o concrete step has been made in that direction.

2.1.4. Other EU institutions

Use of Commission IAs has reportedly increased over the past decade also in EU advisory bodies such as the Committee of the Regions (which has been calling for more attention to territorial impacts) and the European Economic and Social Committee (traditionally more attentive to social impacts, but also to issues such as self- and co-regulation). Alemanno (2012) interestingly reports that the Court of Justice of the European Union (CJEU) is making increasing use of Commission IAs, even if only as a sort of *obiter dicta*, i.e. documents that help the Court in developing a better understanding of the rationale that led the Commission to adopt its original proposal[1].

2.2. Ex post evaluation, fitness checks and other forms of analyses of the stock of legislation

Since the early days of the better regulation agenda in the European Union, programmes launched by the European Commission have also involved the analysis of the stock of existing legislation. Significant steps were made in the 2002 better regulation package with the adoption of the Action plan "Simplifying and improving the regulatory environment"[2] ; and later with the 2005

[1] Alemanno, Alberto, *A Meeting of Minds on Impact Assessment: When Ex Ante Evaluation Meets Ex Post Judicial Control* (July 31, 2011). European Public Law, Vol. 17, No. 3, 2011. Available at SSRN: http://ssrn.com/abstract=1899276

[2] Communication from the Commission of 5 June 2002 -- Action plan " Simplifying and improving the regulatory environment" [COM(2002) 278 final - Not published in the Official Journal].

Communication on "Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment"[1]. In order to implement its strategy the Commission established a rolling programme of simplification based on a sectoral assessment[2]. Assessment would reportedly consist of an analysis of the administrative and other benefits and costs of the legislation in question, with an initial focus on automotive, construction and waste and later an expansion into other industry sectors such as pharmaceuticals, mechanical engineering, information and communication technologies (ICT), and energy-intensive sectors to eventually focus on services.

Simplification instruments in the Commission's toolkit included repeal, codification, recasting, modification of the regulatory approach and reinforcing of the use of ICT-enabled tools such as e-government. The simplification rolling programme faced significant problems from the outset, and already in the first progress reports the Commission reported delays (in 2005-2006 it adopted only 27 out of 71 scheduled initiatives).

In the following years the European Commission has gradually shifted towards a more concrete strategy aimed at measuring and reducing administrative burdens generated by the EU *acquis*. Since February 2007 a pan-European strategy to reduce by 25% the administrative burdens generated by EU legislation was launched, and led to a number of important reduction measures that, as reported by the European Commission, have achieved the set target of reducing administrative burdens by at least one fourth, and even went beyond to an estimated 33% reduction in the priorities areas selected (a total of 42 Directives from thirteen priority areas)[3]. In order to keep the momentum in this specific area of intervention, a High Level Group of experts on Administrative Burdens was set up as an advisory body to the Commission: with the support of this Group, the initiatives proposed by the Commission and adopted by the co-legislator reportedly led to more than €33.4 billion of savings per year for business, which include €18.8 billion in savings on invoicing and €6.6 billion on annual accounting requirements[4]. Thanks to the work of the High Level Group, the Commission now fully applies the "think small first" principle, considering the impact of legislation on small and medium-sized enterprises (SMEs) whenever possible and considering SME exemptions and lighter regimes for legislative requirements whenever appropriate.

Since the beginning of the second Barroso mandate, and definitely after the October 2010 Smart regulation Communication, the European Commission has also made it clear that the time had come for ex post evaluations to become a regular commitment of the EU institutions, and in particular of the European Commission. Since then, long announced guidelines on ex post evaluation have finally seen the light after a long gestation on May 19, 2015.

The various developments observed in the past decade of better (or "smart") regulation in the European Commission culminated, at the end of 2012, in a new Communication on "regulatory

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1 Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 25 October 2005 "Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment" [COM(2005) 535 final -- Not published in the Official Journal]. See also Communication from the Commission of 14 November 2006 "Commission working document -- First progress report on the strategy for the simplification of the regulatory environment" [COM(2006) 690 final - Not published in the Official Journal].

2 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 11 February 2003 "Updating and simplifying the Community acquis" [COM(2003) 71 final - Not published in the Official Journal].

3 See information on the administrative burdens reduction programme at http://ec.europa.eu/smart-regulation/refit/admin_burden/high_level_group_en.htm.

4 http://europa.eu/rapid/press-release_IP-14-1116_en.htm

fitness", which sets the stage for radical developments in the set of European Commission policies for the quality of legislative proposals. The communication announces the launch of a new Regulatory Fitness and Performance Programme (REFIT) to systematically identify and transparently carry out initiatives that will result in significant regulatory cost reduction and simplification; a follow-up to the Action Programme for Reducing Administrative Burden (so-called "ABRplus") to ensure that the claimed success in the Administrative Burden Action Programme to cut red tape by 25% will eventually bring benefits to businesses and SMEs. The Communication also anticipates new and sharpened tools for regulatory management, including new impact assessment guidelines and guidance for ex post evaluation. The Communication is accompanied by two Staff Working Documents: "Review of the Commission Consultation Policy" and a report on the Action Programme for Reducing Administrative Burden".

Apart from the follow-on initiatives on previously launched streams of actions (such as the administrative burdens reduction programme) and the refined methods to close the policy cycle through stronger and more sophisticated assessments, the real novelty of REFIT is the launch of a set of comprehensive "fitness checks" in key domains of EU policy, which are expected to begin in 2014, and which will lead to a more general re-assessment of the potential for reform, simplification and improvement of the regulatory framework in each of those policy domains.

However, the REFIT seems to have exacerbated, rather than reduced, the ongoing "continental drift" between the approaches to better regulation adopted by different DGs of the European Commission. For example, in welcoming the idea of fitness checks, the DG ENTR decided to launch in early 2013 a series of fitness check in economic sectors, rather than policy domains, and ended up selecting the steel and aluminium sectors as the first candidates for a fitness check. Pity that the initiative by DG ENTR was only aimed at measuring the cost that EU legislation imposes on market players in these fields, which arguably make them less competitive than their rivals in non-EU countries: only after a long discussion with the SecGen the term "fitness check" was removed, and the studies were more correctly termed "cumulative cost assessments"[1].

In October 2013 the Commission already explained that it had taken action on 6 of the top ten most burdensome legislations for SMEs to achieve simplification in the fields of data protection, posting of workers, consumer product safety, public procurement, professional qualifications and recording equipment (tachograph) in road transport. The Commission then announced that by the end of 2014, it would carry out or launch as many as 47 evaluations, Fitness Checks or similar reports with a view to reducing regulatory burden in areas such as environment, enterprise and industry and employment. But the "obsession" of the Commission seems to have been increasingly placed on the need to cut red tape, rather than to increase the net benefits or – better – improve the effectiveness of EU policies in achieving the EU long term goals; and all this despite frequent announcements on the need to preserve the quality of EU regulation.

2.3. Frequency, timing and relevance of stakeholder consultation throughout the policy process

One area in which EU institutions, and in particular the European Commission, represent a best practice is certainly stakeholder consultation. The Commission is obliged by Article 11 TEU to carry out broad consultations with parties concerned in order to ensure that the Union's actions are

[1] See e.g. http://www.ceps.eu/publications/assessment-cumulative-cost-impact-steel-industry

coherent and transparent'. Also Protocol No. 2 on the application of the principles of subsidiarity and proportionality annexed to the Treaty stipulates that "before proposing legislative acts, the Commission shall consult widely". As a matter of fact, today the Commission consults stakeholders at various stages of the policy cycle, and it does so with minimum standards that go beyond those of all other legal systems around the world.

Relations with stakeholders are governed by four general principles:

- *Participation*: Adopt an inclusive approach by consulting as widely as possible;
- *Openness and Accountability*: Make the consultation process and how it has affected policy making transparent to those involved and to the general public;
- *Effectiveness*: Consult at a time where stakeholder views can still make a difference, respect proportionality and specific restraints;
- *Coherence*: Ensure consistency of consultation processes across all services as well as evaluation, review and quality control.

These principles are complemented by five Minimum Standards that all consultations have to respect, namely clarity, targeting, publicity, availability of a sufficient time and acknowledgement of feedback. The results of (open public) consultations should be published and displayed on websites.

Mandatory open, internet-based public consultation must be carried out for a minimum of 12 weeks and must be carried out for all initiatives with impact assessments, evaluations, fitness checks and Green Papers. As will be explained below, with the adoption of the new Better Regulation Package Stakeholders will also be able to give feedback on Roadmaps for Evaluations and Fitness Checks roadmaps (for four weeks), and Roadmap and Inception Impact Assessments (duration will depend on a case by case decision). In addition, a four-week consultation process will be available to stakeholders on major Delegated Acts and Implementing Acts; a new eight-week consultation process will be run on legislative or policy proposals adopted by the College and, where applicable, accompanying IAs.

2.4. The role of Member States in the transposition and implementation phases of the policy cycle

For what concerns better regulation tools, it is no mystery that most of the EU Member States are much less advanced than the European Commission. This is of course problematic for many reasons. First, it is impossible in most circumstances to accurately predict the enforcement and compliance costs of a specific EU rule, since patterns of monitoring and enforcement at national level vary significantly across Member States (Renda *et al*. 2014). Second, most Member States are not in the position to accurately assess the impacts of transposition measures at the national and local level, and they are also unable to report to the EU institutions on the impacts of EU rules during the evaluation phase. This crucially affects the multi-level governance of the European Union.

There are, of course, important exceptions. In particular, the United Kingdom has started experimenting with better regulation tools since the mid-1980s and moved to a full-fledged cost-benefit analysis system in 1998. On 15 December 2010, the UK Government announced the forthcoming adoption of Guiding Principles for EU Legislation, and in April 2013 a Guidance

document was published, which helps policy makers and lawyers across Government in the implementation of EU Directives[1]. Dedicated guidance for far-reaching pieces of EU legislation is also available (e.g. on the services Directive, and on procurement Directives)[2].

Besides the United Kingdom, other national governments have made significant steps forward in the development of extensive better regulation tools. Countries like the Netherlands, Denmark, Germany, Sweden, and more recently also France, the Czech republic and Estonia have managed to promote the adoption of better regulation within government, with some differences: some countries chiefly focus on costs for businesses, and rely on semi-independent or fully independent oversight bodies for appraisal and advocacy with respect to pieces of legislation that have a significant impact on compliance costs and administrative burdens (mostly, for businesses)[3]. The cases of Germany is probably the most advanced in this respect, with the *Normenkontrollrat* actively working on the transposition and implementation of EU legislation at the federal and also regional level, and even contemplating the possibility of systematically providing government representatives in Council formations with an analysis of the likely impact (on Germany) of proposed rules being put on the Council formation's agenda.

2.5. Subsidiarity and proportionality

Subsidiarity and proportionality are Treaty-based principles that must be considered at various stages of the decision-making cycle of the European Union. Better regulation tools are the most important vehicle through which these principes enter the daily policy process of the Europran Commission, and are explicitly considered at the preliminary stage of "Roadmaps" attached to th Commission's Work Programme for the following year[4]; and also at the ex ante impact assessment stage, as the Commission guidelines include specific questions on the need to act at the EU level and the assessment of the degree of proportionality of altermative policy options[5]. When the impact assessments are sent to the Impact Assessment Board (from now on Regulatory Scrutiny Board), a further check on the respect of the subsidiarity and proportionality principles is performed (in 2013 the IAB commented on these aspects of draft IAs in more than one third of the cases. Typically subsidiarity and proportionality are also considered during Inter-Service Consultation, and in the explanatory memoranda (or Staff Working Documents) attached to Commission proposals, normally echoing an analysis that is also fond in the IA document.

Throughout the policy process, subsidiarity and proportionality remain at the core of the EU decision-making. The Euroepan Parliament considers these principles in carrying out impact assessments of major amendments, in commissioning "EU added value" studies, and in providing for ex post evaluations of existing pieces of legislation belonging to the EU *acquis*[6]. Regrettably, the principles of

1 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229763/bis-13-775-transposition-guidance-how-to-implement-european-directives-effectively-revised.pdf

2 See https://www.gov.uk/transposing-eu-procurement-directives; and more generally https://www.gov.uk/browse/citizenship/government/compliance-with-european-union-laws-and-regulation.

3 Renda *et al.* (2014) as well as Renda (forthcoming) and Castro and Renda (forthcoming) provide an overview of all these developments in the mentioned legal systems.

4 Roadmaps provide a preliminary description of these potential initiatives and outline the Commission's plans for policy and consultation work. They also include an initial justification for action with regard to subsidiarity and proportionality.

5 More generally, the IA exercise can be considered overall as an application of "constitutional principles" in the EU, such as proportionality and effectiveness.

6 The relationship between EU Added Value and subsidiarity is still in need of a clearer definition at the EU level. While the is certainly a degree of overlap between the two concepts, EU Added Value is a term originally developed within the

subsidiarity and proportionality are much less explicitly considered and subject to clear explanations when the proposed legislation reaches the desk of the Council: this echoes the more general problem of accountability, transparency and overall compliance with better regulation principles, which has already been raised in the past sections.

Subsidiarity is also subject to constant consultation with national parliaments. The position of national parliaments in the EU was strengthened in various ways by the Lisbon Treaty in order to enhance democratic legitimacy. Protocol 2 of the Lisbon Treaty introduced a mechanism of subsidiarity scrutiny by national parliaments on draft EU legislation. The so called "early warning system" including the yellow and orange card procedures give them a direct role in assessing compliance of draft legislation with the principle of subsidiarity (TEU art. 5). The chambers of national parliaments may each give a reasoned opinion and collectively they can influence the legislative procedure if a certain threshold is attained in the set time limit. In its latest report on subsidiarity and proportionality, the European Commission explains that in 2013, the Commission received 88 reasoned opinions from national Parliaments on respect of the principle of subsidiarity, which represents 14% of the overall number of opinions the Commission received in the context of the broader political dialogue with national Parliaments. In addition, national parliaments have made very limited use of the 'yellow card' mechanism foreseen by the subsidiarity control mechanism under the Lisbon Treaty[1].

Subsidiarity checks are, finally, performed also by the Committee of the Regions. However, what seemed likely to become a regular, influential control point for the EU policy process in terms of respect for constitutional principles ended up being often a rather light-touch, unoccordinated form of interaction.

2.6. The new EU better regulation package

More than a decade after the launch of the EU's first comprehensive better regulation package, it is fair to state that the system has produced mixed results. On the one hand, many Commission officials have digested over time the new procedure, and seem to accept its regular use as more than a simple additional administrative requirement, but rather as a way to make the case for legislative action. Increased use of Commission impact assessments in other institutions, including the European Parliament, the Council and even the Court of Justice, seems to further encourage this sentiment inside the Commission. But a number of problems remain.

First, from a methodological perspective, a split seems to have emerged over time inside the Commission, with the Secretariat General pushing for more regular use of quantitative cost-benefit analysis, and individual DGs inevitably preferring the reliance on multi-criteria analysis, in which specific impacts would be looked at more closely: competitiveness, administrative burdens and impacts on SMEs for DG Enterprise (now DG GROW); environmental impacts for DG Environment; social impacts for DG Employment; impacts on Fundamental Rights for DG Justice; etc. This split can be observed in the publication of a number of specific guidance documents on individual impacts, which the Secretariat General has never fully endorsed as being fully integrated into the Commission

context of budget policy, as a criterion for the allocation of funds to different areas of intervention. It was then "promoted" to the overall policy level by the European Parliament in setting up its IMPA Directorate in 2012.

[1] Commission Annual Report on Subsidiarity and Proportionality, Brussels, 5.8.2014 COM(2014) 506 final.

Impact Assessment Guidelines, although some recognition has now been given to these documents in the new impact assessment guidelines published in May 2015.

Second, the European Commission has always shown remarkable reluctance to appoint an independent body in charge of scrutinising draft impact assessments, or even to publish its draft impact assessments for stakeholder consultation. While the former idea was difficult to translate in practice without hindering the Commission's right of initiative, the latter has always stood on more fragile explanations, such as the need to avoid capture or to uselessly prolong the duration of an already quite clumsy legislative process (the Commission claims to take on average 52 weeks to move from early consultation on potential proposals to the formalisation of the proposal and its accompanying documents).[1] The fact that the Commission normally becomes a 'black box' exactly at the moment in which it needs more input – when using data and specific methods in support of the comparison of alternative policy options – has traditionally been subject to a rather generalised criticism. Only industry associations have so far managed to obtain some additional degree of scrutiny on Commission practices, when the Barroso Commission decided to create the High Level Group on Administrative Burdens, whose mandate expired last year.

Third, the Impact Assessment Board has been criticised for being too small, and insufficiently equipped to be able to provide a meaningful scrutiny of the flaws and imperfections of draft analyses submitted by the Commission services. Part of the problem was due to the fact that its members (originally five, then increased to nine, with a small secretariat) were acting in their personal capacity, on top of their daily duties of director-level officials in their respective DGs; and part was simply due to the fact that, being an internal body, the Board would have limited incentives to block initiatives that had been given highest political priority.

These criticisms, together with more recurring mantras of the government-stakeholder dialogue on better regulation (e.g. the impact assessments are a way to justify decisions that were already pre-determined; consultation takes place either too early or too late, and opinions are not fully taken on board; business impacts are given more weight than environmental and social impacts; etc.), called for action by the Juncker Commission, exactly in the direction of ensuring more constructive dialogue with stakeholders, even more on methods, data and decision-making criteria than on the merit of proposed initiatives, on which the Commission already extensively consults by following high standards.

What does the new better regulation agenda do in reaction to those criticisms? At a first glance, quite a lot.

For what concerns consultation:

- The Commission launched a new platform termed "Lighten the load – have your say", which constitutes an open channel for anyone willing to provide views on aspects of EU legislation that they find irritating, burdensome or worthy of improvement. Such platform seems indeed more addressed at companies wishing to signal burdensome pieces of legislation, in line with a consolidated practice at the EU level.[2] But there is no restriction on the possibility that

[1] See the 2009 impact assessment guidelines for an illustration.
[2] Top ten most burdensome pieces.

citizens voice their concerns on the need to improve, for example, the design or the enforcement of environmental legislation.

- At the same time, the Communication "better regulaton for better results" also announces the creation of a REFIT stakeholder platform chaired by the First Vice President of the Commission, which will involve high level experts from business and civil society stakeholders as well as all 28 Member States appointed through an "open and transparent process". Even if not many details are disclosed in the draft Communication, it seems that the platform will meet regularly and hear presentations and proposals by all members. This, if properly implemented, would potentially become a powerful instrument of advocacy for all stakeholders, who would obtain a direct channel of communication with the First Vice President. At the same time, it is not clear whether experts from business and civil society will add to the experts selected for each of 28 Member States, and whether the latter will be government experts or, themselves, representatives of the civil society, as would seem from the fact that they have to be appointed through a public competition. Importantly, the wording of the Communication suggests that the platform will serve also as a forum for reflection on the functioning of EU's multi-level governance, in particular when problems highlighted by the platform members will relate to the transposition and implementation of specific pieces of legislation by some or all Member States.

For what concerns the scrutiny of draft impact assessments, the new features introduced by the better regulation package are potentially far-reaching.

- First, the Commission confirms that the Impact Assessment Board will be replaced by a Regulatory Scrutiny Board, in which members will now operate full time, and will now include one Chair (with the rank of Director General), three 'internal' members, as well as three members (up from the two previously announced) recruited with fixed-term contracts on the basis of their specific academic competence and expertise "via rigorous and objective selection procedures"[1]. For the first time, the Commission thus accepted to open the doors of its watchdog to external members: as a general rule, all members of the Board should act independently and autonomously, and should "disclose any potential conflict of interest to the Chairperson and can be requested not to participate in the scrutiny of any impact assessments or evaluations or fitness checks where such potential conflict of interest arises".[2]
- Moreover, the Commission's Communication announces that the Commission will start consulting before and even "during the impact assessment process". This would happen after the publication of a new "inception impact assessment" document, which appears to be a somewhat more elaborate version of the Roadmap that so far has been produced by the Commission for each initiative on the occasion of the publication of the yearly Work Programme.[3] What is still unclear is whether this procedure will be mandatory for all proposals subject to impact assessment; and at what state of advancement of the proposal

[1] Communication, page 7, Section 3.2. Three members will be officials selected from within the Commission services. Three posts will be created, therefore, for officials who will work full time exclusively for the Board and be transparently selected on the basis of their expertise in accordance with prevailing Commission rules. They will be ranked as Director, Principal Adviser or Adviser. Three temporary posts will be created to permit the recruitment of the members from outside the Commission on the basis of their proven academic expertise in impact assessment, ex-post evaluation and regulatory policy generally.

[2] Regulatory Scrutiny Board, Missions, Tasks and Staff, page 3. Strasbourg, 19.5.2015, C(2015) 3262 final

[3] It is defined as a "Roadmap for initiatives subject to an IA that sets 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".

would consultation be run. The Impact Assessment Guidelines clarify that only "major" new initiatives have to be accompanied by an Inception IA and require political validation from the lead Commissioner, Vice-President and First Vice President. Such "major" initiatives are defined very broadly, such that they include "initiatives included in the Commission's Work Programme, REFIT items, new legislative proposals, recommendations for the negotiation of international agreements and proposals for their conclusion, policy communications, delegated and implementing acts having significant impacts, financing decisions having significant impacts, and other Commission initiatives that are sensitive or important".[1] The result is that all initiatives that are not routine administration or very minor regulatory interventions would need to be subject to a political validation before any policy appraisal work can start: and while 'major' initiatives included in the Work Programme have to be validated by the College of Commissioners, 'major' initiatives not included in the Work Programme only have to be validated by the First Vice President.[2] The 'political nature' of the new Commission here becomes visible, and places a significant constraint on the discretion attributed to the Commission services in adopting new initiatives. What is a bit more obscure is the scope of the consultation during the impact assessment process: ideally, this should be a rather 'technical' consultation, focused on the quality of the data, on the overall methodology, on the soundness of underlying assumptions, and on the list of considered alternatives, rather than on the content of the preferred policy option. But the guidelines do not fully clarify what type of consultation questions should the Commission services prepare after the inception report. Page 72 pf the new Guidelines do not differentiate between the consultation that would be run before, during or immediately after the impact assessment has been completed, and simply clarify that consultation should cover all elements in the impact assessment process, including most notably the problem to be tackled, the issue of subsidiarity and the EU dimension to the problem, the available policy options; and the impacts of the policy options.

Finally, the new Better Regulation Communication marks a decisivelong-awaited step forward on the application of better regulation tools to delegated acts, the thousands "ex comitology" decisions that are taken every year to ensure the implementation of primary legislation. As a matter of fact, these rules are more similar to the types of rules on which Regulatory Impact Analysis (RIA) is mandatory in the United States since 1981: most often we forget that the type of impact assessment carried out by the Commission on its primary rules does not correspond to the type of regulation that in other jurisdiction is subject to systematic cost-benefit analysis or risk analysis. The Commission now (and as already announced since 2009) aims at extending its impact assessment system also to these measures, whenever impacts are likely to be significant: this is very similar to the U.S. rule introduced in 1981 as amended a decade later by the Clinton administration, which set out a number of basic criteria that had to be met for federal regulation to be subject to mandatory RIA. What the Commission does not explain is whether the methodology that will be used for delegated acts is the same contained in the (new) guidelines: one would expect that cost-benefit analysis be applied more systematically for these rules. Importantly, the Commission will also consult the public, although for a shorter period (4 weeks) on these acts, and will publish ahead of time an "indicative online list of any such acts in the pipeline" to allow stakeholders to plan in advance their contributions. Given the number of such acts that are adopted every year, this will certainly constitute a very heavy workload

[1] IA guidelines, at 14.

[2] Less important initiatives have to be validated only by the Commissioner or, for evaluation and fitness checks, by the Director General of the competent DG.

for the Commission, and it is hard to imagine how all opinions expressed in these consultations, likely to be of a much more technical nature, will be fully taken into account.

All 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 as such, with the usual *caveats*, must be welcome.

3. THE PROPOSED NEW INTER-INSTITUTIONAL AGREEMENT ON BETTER REGULATION: AN ANALYSIS

Over the past few years, the harshest critiques moved to the EU better regulation agenda have neither been confined, nor mostly focused, on the Commission's impact assessment system. While the Commission's impact assessments are certainly imperfect and worthy of some improvements, other institutions such as the European Parliament and the Council have shown problems in (if not reluctance to) implement what the 2003 Inter-Institutional Agreement on Better Law-making and the later 2005 Inter-Institutional Common Approach to Impact Assessment would in principle have forced them to do: carry out systematic impact assessment of their proposed major amendments on Commission proposal, as well as – for the European Parliament – regular impact assessments on own legislative initiatives. And as already recalled, while the European Parliament actually started carrying out impact assessments since 2012 and has, since then, tried to step up its analytical efforts by gradually upgrading its workforce and sharpening its toolkit, the Council has remained virtually silent on this issue.

The logic behind the 2003 and 2005 Inter-Institutional Agreements was clear. Compared to the early statements of the European Commission, which referred to impact assessment as merely an instrument of 'in house learning', the two Agreements looked at the impact assessment accompanying a specific initiative as a 'living document', to be updated to reflect the changes that EU institutions would introduce to the proposal during the ordinary legislative procedure. This feature was strengthened by the fact that that all three institutions were required to use the same methodology (the 'common approach'), which would avoid duplications and redundancies and create, at least in principle, a shared commitment towards better regulation. One of the worst consequences of the relative failure of the two inter-institutional agreements to trigger a real common approach is that the final document that emerges at the end of the legislative procedure is not backed by an updated impact assessment. This entails two deplorable consequences: on the one hand, some (if not all) of the amendments adopted by the European Parliament and (most importantly) the Council are not backed by evidence, nor motivation, nor by any assessment of their impact for European citizens and businesses; on the other hand, member states are constantly faced with the impossibility to rely on any up-to-date impact assessment when deciding on their transposition and implementation measures. This, although coupled with a degree of inertia of most member states in adopting better regulation tools, has doomed the whole EU better regulation agenda to a state of incompleteness.

Does the Commission proposed nw Better regulation package remedy this stalemate? To some extent, yes. Three major new features are introduced, which signal a degree of discontinuity with the past.

- First, the Commission commits to run an eight-week consultation after the adoption of every proposal, in order to collect comments and opinions that would then be sent to the other EU

institutions to facilitate their appraisal work. This consultation should, in principle, add to the one that will be carried out 'during' the impact assessment process, as the Commission has now proposed to carry out consultation on "inception IAs". The scope of this consultation is not clarified, but given its timing in the policy process it is likely that it will focus on the content of the proposed policy initiative, rather than on the impact assessment itself.

- Second, the Commission declares in the proposed text of the new Inter-Institutional Agreement its availability to assist the European Parliament and the Council in their assessment of the impacts, in particular by explaining in detail its impact assessment, sharing the data used, and even – in duly defined cases – integrating its impact assessment. This commitment will have to be observed in practice. One possible interpretation is that, as the European Parliament has since 2012 started to provide its own analyses of the Commission's impact assessment, this might in some specific cases motivate the Commission in updating and complementing its original document. Another possible interpretation is that the Commission is leaving the door open to possible updates in its impact assessment to reflect the amendments adopted by other institutions, should the inertia (in particular, of the Council) continue.
- A third, related feature that complements the previous one is the brand new right, contemplated by the Commission, for any of the three institutions to call for an independent panel of three experts (each one appointed by a different EU institution) that would carry out an assessment of the impacts of a substantially revised proposal, to be finalised and made public within a reasonable amount of time, and which should be based on any existing impact assessment work. Clearly, this procedure will have to be detailed with due care, in order to avoid delaying tactics by any of the institutions. Other than this, the optional procedure is going to prove particularly useful, if confirmed in the final text of the Inter-Institutional Agreement, in case the Council will confirm its reluctance to back its decisions with a transparent, thorough, evidence-based document.

The proposed text of the Inter-Institutional Agreement, while contemplating these alternative ways to involve other institutions, is clear on the desired outcome: whatever the way in which this result will be achieved, the three institutions agree that information should be given on the impact of the final piece of legislation, and that this information will be used for future evaluation work, thus helping to complete the so-called 'policy cycle'. While this statement does not attribute any specific responsibility to any of the three institutions, the stated outcome (if taken seriously) would represent a clear step towards the completion of a fully evidence-backed policy cycle in the EU.

4. CONCLUDING REMARKS AND MAIN FINDINGS

The EU Better Lawmaking agenda is deeply rooted in Treaty provisions, which stress the need for EU institutions to adopt their policy initiatives in a way that is open, transparent, accountable, and in full respect of fundamental rights and key principles such as subsidiarity and proportionality. The way in which the agenda has been implemented goes very far in ensuring respect of these principles, and indeed many aspects of the EU policy process can be considered as best practices worldwide. This certainly applies to the pervasiveness of consultation process and standards, as well as to the ever-growing use of ex ante impact assessments, monitoring and ex post evaluations throughout the policy cycle. The new better regulation package adopted by the European Commission on May 19, 2015 further strengthens these prerogatives of the EU policy process, and must be welcome in

general terms for this reason. The same applies to the Commission's proposed new Inter-Institutional Agreement on Better Regulation, with the *caveats* that will be illstrated below.

Against this backdrop, there are still some gaps in the existing policy cycle at the EU level, and also some reasons to be concerned about the feasibility of some of the proposed reforms.

The gaps that are most evident in the current EU better lawmaking agenda can be summarised as follows:

- There is no full certainty nor full accountability, on the side of the Commission, for what concerns the selection of "major" proposals that should undergo inception IAs, full Impact Assessments, and now also consultation and impact assessment on delegated and implementing acts. The Commission has always stated that, as a general rule, all legislative and non legislative initiatives included in the Commission's Annual Work Programme will be subject to ex ante IA, but has also been equally accurate in stating that this general rule can very well find exceptions, as some initiatives not included in the Work Programme could be subject to IA, and some that are included might eventually be exempted.
- As a reflection of this lack of full accountability, there is no judicial scrutiny on the respect of the obligation to respect fundamental better regulation principles throughout the process. While in other jurisdictions (e.g. the United States) a piece of regulation can be declared null and void by a federal court for msterial or procedural errors in carrying out the underlying cost-benefit analysis, in Europe no such gatekeeping role of courts is provided for.
- There are also uncertainties related to methodology: to the extent that the pendulum keeps swinging between cost-benefit analysis and multi-criteria analysis inside the European Commission, the importance attached to issues such as respect for fundamental rights, or distributional impacts, will keep being surrounded by a degree of uncertainty.
- There is also a problem of overall scope and coherence between the EU better lawmaking agenda and the medium- to long-term goals of the European Union. The mehodological uncertainty highlighted above is also relevant for what concerns the link between the tools used by the Commission in appraising its own proposals and the ultimate targets and goals politically set in initiative such as Europe 2020. It is, indeed, a different thing to speak of an IA system that looks at the "efficiency" of proposals (through cost-benefit analysis), and an IA system aimed at checking the consistency of proposed actions with the Union's politically set targets in terms of smart, sustainable and inclusive growth. A move towards the latter approach would probably make it a lot easier to implement better regulation principles in the European Parliament and the Council, since these institutions would feel more ownership of impact assessment if they could depart form a mere technical document that looks at the efficiency of proposals, possibly ignoring other important aspects such as distributional impacts, fairness, innovation, poverty, employment, etc.
- As already mentioned, important gaps are found in the way the Council of the EU handles legislative proposals: the compatibility of Council amendments with the interests of the EU citizens and the EU project as a whole is not subject to any assessment, nor is there any specific motivation for proposals that in some cases can easily be seen as worsening the original balance struck by Commission and Parliament decisions.
- Finally, the role of Member States in the process should be strengthened. Better Regulation cannot be made meaningful if the transposition, implementation and enforcement phases of EU rules are not subject to clear ex ante appraisal, monitoring and evaluation. Initiatives such

as extended guidance on implementation (e.g. in the UK), a constant interaction between the national parliament and the EU authorities (e.g. in the Swedish parliament) and ex ante assessments of impacts of pending dossiers on national interests (as will probably be done by Germany's *Normenkontrollrat* in the near future) are so far too sparse to be considered as the rule, and are rather exceptions that would deserve more diffusion in Member States.

As regards the concerns tha current proposals raise, these include the following:

- A first element of concern, and a missing explanation, is how the European Commission plans to multiply its activities, providing for many more rounds of consultation, inception IAs, implementation plans and much more without significantly increasing the staff dedicated to these tasks. And even if more staff is allocated to these tasks, it is unclear how the right competences can be put in the right place: but maybe this can be seen as a medium term commitment. The sneaky sensation here is that such enhanced workload (and expected lenghtier duration of the policy process) would only be sustainable if the Commission maintained its initial approach, which seems oriented to a drastic reduction in the number of proposals tables on a yearly basis.
- Even if the Commission very cautiously repeats in several occasions that it plans to look at social and environmental impacts. Here and there the almost exclusive reference to administrative burdens and regulatory costs surfaces again the Commission's documents. To what extent this will remain the dominant refrain in Commission's better regulation actions is thus to be seen.
- The restatement of the joint responsibility of all three institutions to ensure that adequate information is provided on the prospective impacts of final piece of legislation hides the lack of a real attribution of responsibility to the Parliament and most importantly to the Council, the most reluctant of all EU institutions when it comes to evidence-based decision-making. It would be easy for a malicious commentator to observe that such a shared commitment was already emphatically stated in the 2003 Inter-Institutional Agreement on Better Law-Making, and yet very little has happened since then for at least a decade.
- What about self- and co-regulation? Perhaps the most surprising "elephant in the room" in looking at the new proposed inter-institutional agreement is the total absence of any reference to the issue of self- and co-regulation, which were prominent in the 2003 agreement. This comes after the European Economic and Social Committee filed a rather detailed and sophisticated opinion on the issue, seeking to clarify the features that a self- or a co-regulatory scheme should display in order to be considered as potentially in line with the public interest. So far, the impact assessment guidelines simply refer to the "principles for better self- and co-regulation" developed in the past years with respect to the advertising sector by DG SANCO, and recently made the subject of a community of practice coordinated by DG CONNECT. What will happen to self- and co-regulation in the European Union? This is a delicate issue, since in many sectors of the economy the growing pace of innovation and technological development call for the adoption of flexible regulatory regimes: but absent more clarity on this issue, stakeholders might me discouraging from engaging with the Commission in otherwise welfare-enhancing forms of public-private cooperation in the design and enforcement of regulation.

Biography

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Better Regulation in the EU and The Netherlands: A Comparison

Arnout Mijs, Clingendael

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A comparison between Dutch and the Commission's Impact Assessment system is relevant with a view to understanding the importance of the **interdependence** between national and European IA systems. As it stand, IA systems in the EU (at national and at EU level) are generally designed and discussed as systems that are independent from each other whereas both are mutually interdependent. This comparison is therefore a case study with a wider relevance in view of moving toward interconnected national and European IA systems. In addition, the comparison leads to lesson regarding the strengths and weaknesses of both systems. This analysis presents an **organisational analysis** of the IA systems in the Commission, The Netherlands and addresses the management of the interdependence between the two systems.

Regulatory quality standards have travelled far over the past 20 years in The Netherlands (with the emphasis on **output** steering via quantitative targets) as well as in the EU (with the emphasis op **input** steering via integrated impact assessments). Dutch regulatory innovations have contributed to the enhancement of European regulatory initiatives, i.e. concerning administrative burden reduction and to sectoral policy fields (such as the promotion of an integrated environmental policy in the Treaty of Amsterdam) (Jordan & Schout, 2006). Other countries too have had great influence on the development of the European regulatory model. As a result, the Commission's impact assessment system has developed in several complementary directions and has resulted in the integrated impact assessment system. The EU's integrated framework is highly regarded internationally (Radaelli, 2010; European Court of Auditors, 2010; Schout and Sleifer, 2014).

Effective, efficient and transparent policy processes with adequate consultations contribute to the understanding of, and the trust in, the rules. The Netherlands (output) and the Commission (input) BR mechanisms have seen great accomplishments, although there is still considerable room for improvement (Schout & Sleifer, 2014). The European better regulation agenda has resulted in detailed attention for proportionality, choice of instrument, horizontal objectives, obligatory alternatives, quantitative and qualitative substantiations, and with an internal quality control mechanism. From 2007 onwards, The Netherlands has attributed considerable time and effort to develop its own impact integrated assessment system (*integraaal afwegingskader* IAK – integrated assessment framework). With the Dutch IAK and the EU (Commission) Smart Regulation/REFIT programme the two assessment **systems and methodologies have become somewhat comparable.**

Both systems are still in flux and have their relative strengths. They both combine a quantitative (output or 'macro') approach related to the stock of rules and regulatory burdens, as well as a

qualitative (input or 'micro') approach assessing the policy needs and alternative options. After the investments of both the Commission and The Netherlands, the time seems ripe to compare the two regulatory systems and draw lessons for both parties.

This briefing note briefly compares the EU and Dutch impact assessment mechanisms (micro level). The first section continues with a summary of the main findings. The second section presents the framework for the administrative analysis of the Dutch and EU IA-systems. We assess the organisational designs according to **four organisational design variables (Leadership, procedures, staff and democratic control)**. These four variables are mutually reinforcing. The subsequent sections (3-6) address these design criteria. The last section offers suggestions for an assessment system in which national and European IAs operate in parallel to enhance exchange of information and to increase ownership for the overall methodology instead of working with separate and incompatible systems. Although the EP is working on its IA system, this comparison focuses on the Commission system in relation to the Dutch system.

Conclusions

- The **Dutch and the EU systems operate independently** from each other and they have been **designed without adequate attention for their mutual interdependence**. The interdependence between both the national and the EU system – and the importance of the management of this interdependence – is insufficiently on the radar screen of lawmakers. Any EU IA system, irrespective how good it is, will be hard to operationalise without input (data and information) from the member states (that is where the ownership for policies has to reside and that is the level where costs and benefits materialise). Ownership from national civil servants for EU IAs will be facilitated if methodologies are similar and if the information can be exchanged between both levels of government. Hence, it is important to work towards comparable national and EU methodologies so that information can be exchanged within comparable systems. Moreover, ownership for the quality of EU legislation requires that member states be involved in the EU IAs (to provide input but also to get the integrated thinking incorporated in national policies and in the preparations of EU negotiations, Schout, 2009; Schout & Jordan, 2008). Building on the comparison between the Dutch and the EU case, we can conclude that better interconnection of IA methodologies and of carrying out IAs is a precondition for successful European IAs. **Considerable work still needs to be done in managing the interdependence in terms of methodologies and carrying out IAs between the national and EU level.** If there is no proper integrated assessment nationally, than 'integrated thinking' at EU level is hard to expect.
- **In terms of senior level ownership and leadership, both the EU and the Netherlands have deficiencies.** The Dutch system suffers from dispersed ownership (if everyone is responsible, than no one is responsible). Moreover, **the independence of senior quality control is underdeveloped in The Netherlands**. As a result the systematic application of the Dutch IA leaves much room for improvement, as does the integration of horizontal objectives in the IA. The weaknesses at the Dutch level also affect the way in which Dutch policy makers are involved in, and work with, the integrated impact assessments of the Commission. At EU level (at least within the Commission), senior level leadership was reasonably well established under Barroso (although the independence could have been better as also concluded in the various evaluations) and contributed to its success. **The new Commission Juncker may run the risk of politicisation.** Firstly, because of its self-

proclaimed increased political profile and corresponding political decision-making. Secondly, senior quality control via the IAB may lose its influence by replacing the IAB at a distance from the Commission. Besides that, senior quality control via the Commissioners and vice-presidents appears to develop at the expense of the speed of the policy process. Hence, **senior level leadership in the Commission has always been a strong point but with the more political profile of the Juncker Commission, the nature of the IA system may change.**

- In terms of procedures, the **Dutch procedures are less developed compared to the** Commission system in terms of hierarchical control, transparency and of timing of the different IA steps. Besides, the IA is only applied to the *ex ante* phase in The Netherlands and **ex post evaluation and monitoring is poorly developed**. To have an integrated system requires connecting all actors and stakeholders (including the parliament) in **one (digital) location and within a single senior (political) quality control mechanism**.
  - Although the Commission system is more centralized and better organised via the Secretariat General and under the President, some questions concerning transparency and timing of public communication remain. **The Commission needs to better connect the information of the different institutions (particularly of the member states- that is where the effects are in practice).** The procedures could emphasise to involve national IA organisations or build more on national information. Especially concerning monitoring and evaluation this involvement of national organisations seems a promising avenue. As it stands, the Commission system is 'Brussels based and Brussels owned'.
- The capacity (i.e. staffing) and means for an IA also influence the results. **It is difficult in The Netherlands to coordinate and steer the IA processes because, in general, the coordination of the IAs starts late – only during the quality control phase because there is no adequate capacity at central (and no senior) level to guide, coordinate and monitor the IAs.**
  - In the Commission, the SG fulfils the supervisory task early on in the process. The staffing in the Commission also combines both sectoral (through two policy coordination Directorates) and methodological (through 13 officials in the Impact Assessment unit) knowledge early on in the process.
- **Democratic (political) control of Dutch IAs lacks the political push from a responsible minister.** In addition, Dutch parliamentarians show little interest in IAs so that there is also **little political stimulus coming from Parliament** for integrated impact assessments. The ability to update IAs during the political negotiating phase may prove a step in the right direction towards more awareness and/or ownership at both the Dutch and the European level.
  - Political control in the Commission is guaranteed by the location of the SecGen under the Commission president and the strong involvement of the new first vice-president.
- The application of the analysis leads to the conclusion that **the Commission system is better designed.** The four criteria show that the Dutch system (generally regarded as one of the best systems in the member states) suffers from weaknesses in particularly senior leadership and commitment, from integrated methodologies, and from central political

and administrative support. **Moreover, the Dutch system is not well suited for an easy interaction with the Commission IA system**. To better serve Commission IAs with information, and to allow earlier and integrated assessments of new Commission proposals, the Dutch case indicates that further steps to improve the EU (and national) impact assessments should be taken at the national level.

– Therefore, **the real policy challenge concerns the questions: how to upgrade national IA systems and how to better connect the national and the Commission (or EU) IA systems?** Generalising from the Dutch case, in terms of IAs, **Commission and member states are still far away from a European IA system**.

1. ORGANISATIONAL DESIGN OF BETTER REGULATION

1.1. The Legitimacy of Better Regulation

BR agendas increase of the legitimacy of governance via reliable systems of evidence provision and by offering a system of hierarchical as well as democratic control (Schout & Sleifer, 2014). Legitimacy is used here as the belief people, industry and other relevant actors have in the actions and rules of government (based on Weber, 1968). People must have confidence in the systems that government have in place to take technical decisions. The concept of legitimacy has been used in various ways, but we focus on Scharpf's (1999) distinction between input legitimacy (government *by* the people) and output legitimacy (government *for* the people). The distinction helps to operationalise legitimacy in terms of underlying legitimising mechanisms defined by Curtin (2005) as "those arrangements made for securing conformity between the values of a delegating body and those to whom powers are delegated". These mechanisms offer politicians instruments to monitor how the government machinery translates different types of objectives into effective and trustworthy policies (Schout & Mijs, 2015). Input legitimacy provides a framework of tasks and decision-making rules and is comprised of i.a. work planning, the use of expertise, hierarchical control of technocratic processes, and public access to decision-making. Input legitimacy defines when and how to proceed in the policy process, who is involved, and how transparent the policy process is so that the responsible ministers can actual be held accountable for the processes (and hence the outcomes).

Output legitimacy includes the setting of targets by the political level and that independent expert bodies have to implement or safeguard. An example of setting a (macro-)target was a reduction of administrative burdens on business from EU legislation by 25% via the Action Programme for Reducing Administrative Burdens (Commission, 2007) subsequently followed by the REFIT programme (Commission, 2013). The Dutch focus on output (macro-control), from 1994 onwards, has contributed to a culture of awareness of the costs of regulation (Bockel, J. van & J. Sleifer, 2013), has created ownership for the objectives (the net reduction target), and produced tools for steering policy processes (World Bank, 2007). The elaborate procedures of the Commission's IA system typically follow the logic of input legitimacy and control. Both input (micro) and output (macro) tools define the success of the BR agenda.

1.2. Analysing Policy Processes

New strategies require new organisational structures (Chandler, 1962) in order to change administrative behaviour. Structural changes following major policy changes are not new in EU policy as can be seen from food safety (Buonanno et al., 2001) and environmental policy (Jordan & Schout, 2006). It needs to be acknowledged that organisations have their (in)formal institutional practices and patterns (North, 1990) but organisational design also plays a role in safeguarding organisational objectives such as 'better regulation' or 'deregulation'.

To structure this study we use a conceptual framework to compare the European and Dutch IA-systems. Considering the huge number of variables that influence administrative behaviour (Mintzberg, 1989), we limit ourselves to five key criteria[40] to compare the Dutch and the

[40] See Annex I for the conceptual framework based on Jordan & Schout, (2006).

Commission policy preparation processes.[41] The focus of our analysis is on deregulation as part of the broader integrated impact assessment (IA) systems. The criteria are:

1. **Leadership** relates to 'authority' as presented by Weber (1968). He divides authority into procedural power ('rational-legal authority') and into individual or organisation power ('charismatic authority'). Procedural power consists of i.a.:

    a. *Power to intervene.* Possibilities to intervene as a supervisor (rules and procedures). The leader needs to have the job to intervene.

    b. *Politico-administrative support*. Means, mission/mandate and political embedding of the mandate in i.e. political priorities/work programmes. The leader needs the staff to intervene.

    c. *Job description*. The job description might be light i.e. primarily based on years of experience in the policy field, or make high demands such as proven scientific independence (professor, years of experience in policy advice, scientific publications in peer-reviewed journals, experience in formal advisory bodies), visibility in the public debate etc. The leader needs to have the training and public visibility to intervene.

    Together these procedures help to strengthen the charisma of the leader. The core of the organisational embedding of the position is to select a weighty candidate (if desired) and to provide the final candidate with the status that fits the demanding appointment procedure. The appointment criteria help to accentuate characteristics such as an 'independent status and independent mind for analysis', but also to underline the status of the position. Leadership is important because policy, policy control, and policy interaction between administrators and with politicians is, in the end, people's work. Leadership is necessary at all the above-mentioned levels of government (national & European, central & in the network between national and EU).

2. **Procedures**. Procedures control the scale and scope of experts' influence in decision-making and thereby impacts the quality of the process (Olsen, 1996). Procedures in the policy process encompass i.a. the instructions for choosing the policy instruments (and according to which criteria), the content of the IA-system (which factors are being considered), the transparency (who, when, what, availability of the website, public complaint procedures), timing of subsequent policy steps, and the application of IA's to different policy phases. Procedures also determine the timing (early coordination or at the end of the process), the ease of information exchange (active – obligation to inform others; passive – others must engage in order to be kept in the loop), the width of quality control, and evaluation (sunset clauses, 3 year evaluations etc.).

3. **Staff**. Procedures must be supported by means of sufficient staff at inter- and intra-DG level. The capacity (people and budget lines available) determines the degree of success. Collectively, staff must be able to combine methodological knowledge and sectoral knowledge in order to implement horizontal objectives. In addition, the communication between the centre and decentral level within DG's/Ministries are of importance to anchor these objectives. Also the seniority of the staff involved has to be defined to ensure that IAs are embedded at strategic level in the Ministry/DG. Staff (eg consultants) can also be external depending on how the budget for IAs is organised.

[41] See Annex II for an overview the EU and Dutch policy prepration processes.

4. **Democratic control.** IA-systems remain an "aid to policymaking/decision-making and not a substitute for it" (Commission, 2009). Democratic control over the policy preparation process lies with politicians/Commissioners. Therefore, it is important to map the political push. Is better regulation part of the priorities of the Council, the Commission, and the European Parliament? Is it part of work planning and is it specified in strategic policy documents? Without political momentum, any organisational structure is doomed to fail. The success of horizontal objectives is partially dependent on the extent to which political decision-making weighs in these objectives.

All these factors in the design of an organisation influence the quality to execute its tasks and responsibilities. This conceptual framework is applied to the European and Dutch IA-systems. In this analysis, we assess central (under the president of the Commission or under the Prime minister, in an independent agency, etc.) and decentral central (within Ministries/DGs) components of the design of IA systems (see table 1).

Table 1. Multilevel control of IA-systems

	European Commission	The Netherlands
Central level	Secretariat-General under the President of the Commission	Interministerial level and independent external supervision by 'Actal'
Decentral level	Organisational design IA in Directorates-General	Organisational design IAK in Ministries

Both systems are comprised of multiple components and layers (inter- and intra DG/ministry). The relative power of both systems is determined by the degree of complementary between the different factors.

For this research we made use of the literature and of interviews in both The Hague and Brussels. Within the limitations of this briefing note we were only able to make some initial estimates of the capacities and qualities of both systems – and of the interaction between the national and EU IA systems. Therefore, the findings here must be considered as input for debate on ways to strengthens the EU multilevel ambitions for better regulation. At the moment the Commission is reforming the system. The plans of Juncker and Timmermans are still to fresh to really assess. They appear to invest heavily on better regulation, however statements on a more 'political' Commission might contradict the analytical objectives of any IA system.

2. LEADERSHIP

2.1. Commission

Within the Commission, leadership of the impact assessment (IA) at the central level is organised under the Commission president. The deputy secretary-general of the Commission chairs the 'impact assessment board' (IAB) (Commission, 200*). This makes the IAB a very senior position and this underlines the central position and seriousness of the IA system. The authority of the deputy secretary-general (SecGen) ensures procedural leadership in the form of clear hierarchical control. Moreover, the role of the new Commission's first vice-president, as guardian of better regulation, also ensures procedural authority. The first VP has access to decision-making at early stage (planning and draft-roadmaps) and is equipped with veto power. In the preliminary stages both new initiatives (approx. 10% of EU policy) as well as the existing 'catalogue' (approx. 90% of EU policy) are hierarchically reviewed by the Commissioner, relevant vice-president and the first vice-president for final approval. In addition, the IAB guarantees continuous and cross-sectoral scrutiny. This elaborate hierarchic control secures the attention for horizontal objectives, although some regard it as a cumbersome process (Kafsack, 2015; Lefebvre, 2015).

In addition, seniority of the IAB is supported by eight members at director level. Membership of the IAB is a part time position coinciding with their primary responsibilities as policy directors. This exerts a lot of pressure on the members and, according to critics, may lead to conflict of interest (RegWatchEurope, 2014).

The procedural authority is ensured by the rule system behind the IA and which defines a central coordinating and monitoring role for the IAB. Despite the considerable procedural power elaborated in the IA procedures, there is rule for improvement. 'Independence' is one of the key characteristics as described in the Rules of Procedure (Commission, 200*). However since the creation of the IAB, independence has remained a point of discussion (RegWatchEurope, 2014). In addition, the internal candidates are neither assessed on the basis of a proven academic track record nor on their independent mind for analysis. Hence, job requirements can be refined.

In terms of external credibility, there is also room to strengthen the position of IAB members. In part, the new better regulation agenda (Commission, 2015A) foresees a reforming of the IAB into the 'Regulatory Scrutiny Board' (RSB) (Commission, 2015B) that will consist of seven full-time positions; a chairperson, three Commission administrators (Director level), and three external members. This would improve the procedural power of the IAB, but the procedural leadership ('job description') of the chair remains underdeveloped. It is prone to risk because it is possible to intentionally attribute less weight to the next chair of the IAB and, as a consequence, of the IAB's influence.

As regards individual leadership capacities ('charisma') the previous IAB president, deputy secretary-general Alexander Italianer, provided the IAB with authority and status. He proved to be a knowledgeable chair that was on top of his files, with convincing judgment ability. Of all the impact assessments proposals in the first four years, approximately 1/3 was rejected ('resubmission'), 1/3 was adopted, and 1/3 was to be revised ('proceed, making recommended improvements') (Commission, 2011). This underlines the authority of the procedure and of its well-accepted leadership. Former Commission president Barroso has expanded the role and capacity of the SecGen and his commitment provided the IAB with a good starting point. The combination of

the individual values of Italianer (aimed at upholding integrated objectives, his focus on substantiation of arguments, and commitment to considering policy alternatives) and his thorough approach contributed to the success of the early years of the IAB. The current president (deputy SG Marianne Klingbeil) is also regarded as an authority in the area of integrated impact assessments and as a guardian of horizontal objectives in the *ex ante* process.

At the decentral, the authority falls under the responsibility of the designated director(-general). He or she must defend the policy proposal in front of the IAB (in case of an oral procedure). Because of the IAB, there is a firm hierarchical review process in place. As a consequence, directors, with their authority based on in-depth knowledge and experience in their respective policy area, generally loyally implement the impact assessment procedure. It remains to be seen whether the new RSB, which is placed more at a distance of the Commission, will maintain this status.

2.2. The Netherlands

The Dutch integrated assessment framework - *integraal afwegingskader* (IAK) - contains 18 different obligatory quality requirements as opposed to the former quagmire of 110 different requirements (Kamerstukken II, 2010/11). The leadership of the IAK is placed with the Ministry of Security and Justice (V&J), however this predominantly concerns the design of the IAK. The control on the application of the quality requirements is divided across a multitude of quality control institutions. This makes the leadership of the IAK unclear. There is a lack of specific involvement of a coordinating organ, such as the Prime Minister's Ministry of General Affairs (AZ) to secure sector-independence, quality and the integration of horizontal objectives. The hierarchical embedment is weak.

The IAK also lacks procedural leadership because of the absence of a broad control framework – there is no integrated IAB-type of organ, which controls on the basis of independence, reputation, education, and experience. For example, the Ministry of the Interior (BZK), the Ministry of Economic Affairs (EZ) and the independent external Dutch Advisory Board on Regulatory Burden 'Actal' monitor regulatory burdens. EZ (the effects on business) & Interior (effects on citizens) have procedural power to apply horizontal, deregulation objectives to policy, but they have limited politico-administrative support to intervene (Actal, 2015). EZ suffers from a shortage of means (and probably political willingness) to be on top of the policy processes at different stages in other ministries and, as a consequence, control on burden reduction shows mixed results. The leadership of Actal on regulatory burden requires further study yet the picture that arises from interviews and evaluations (KplusV, 2010) is that there is a tension between the procedural positioning of Actal as and advisory body and its limited individual legitimacy (Weber's charisma). The substantive knowledge and external placing contributes to the independence of Actal, however, Actal has limited authority because it does not have a well-recognised 'face' and because it is not directly linked to an influential minister (or the influential minister refrains from using his political clout). Therefore, it has limited visibility throughout the policy development process. Moreover, Actal is mostly concerned with deregulation and can hardly be regarded as a monitor of horizontal integrated objectives.

Apart from the hierarchical, administrative chain, the Council of State also scrutinises the quality requirements. The Council of State focuses on the legal quality and has hardly attention for other horizontal issues (Raad van State, 2013). The Council of State's leadership is highly regarded, because of its knowledge and experience, independent stature, eminent leadership and enforced political weight over the last years. However, it has a lack of procedural power to intervene, for it is

but an advisory council. Therefore, they have less political weight than the IAB in case of horizontal objectives.

At decentral/ministerial level the quality of leadership and ownership of the IAK, and more specifically regulatory burden, is fluctuating (Actal, 2015). As interviewees indicated, a director-general has more interest in executing government policy for which he is directly responsible. He/She lacks the incentives to implement the IAK in the ministry, partially because it is not a political priority (see below). Several interviewees state that directors of non-coordinating ministries scantily focus on horizontal objectives.

In essence, the Dutch system lacks procedural and personal leadership.

3. PROCEDURES

3.1. Commission

The Commission IA-system provides a clear overview and integrates multiple objectives, methodologies and procedures (Commission, 2009). It operates on the basis of publicly accessible guidelines that define the timing, width of policy goals, choice of instruments, the assessment of alternatives, size, consultations etc. This leads up to a powerful instrument, which is standardised on the basis of rules and defined tasks with clear hierarchical control via the IAB and Commission president.

The IA contains different sectoral – integrated – objectives such as proportionality, gender and regional consequences. The Commission has taken considerable steps to process potential impacts of policy in the impact assessments. The agenda-setting and problem definition in the Commission work programme is open, without predetermined solutions. The open approach has a positive effect on the quantity and quality of evidence gathering and analysis and in turn on the quality of regulation as a whole (Houppermans, 2011).

The transparency of Commission decision-making has improved considerably with the publicly available and timely announcements of impact assessments, opinions from the IAB, and a central website. The specific time line for policy proposals makes the process predictable and accessible. The system of guidelines, work programmes, roadmaps, impact assessments, consultation, and IAB opinions is publicly available. These procedures contribute to the high degree of transparency. The Commission still tinkers with the degree and timing of public communication. For instance, the draft-roadmaps are neither open to the public nor to the other institutions. Besides that, there is an ongoing debate in Brussels on the visibility of the Commissions' considerations on a particular proposal. Frequently, critique consists of the Commission who overrides input from external experts with the mere phrase '*noted*'. This contributes to the persistent – but almost unavoidable feeling given the amount of feedback the Commission receives - that the IAs are characterized as a 'box-ticking' exercise.

In recent years the Commission has put extra effort in the application of the IA-system on the policy cycle from policy preparation to policy revision. Despite critique, the IA is regarded as a system that forces administrators to systematically pay a considerable amount of attention to the monitoring and evaluation of policy goals and the final policy.

At the decentral level the IA mechanisms foresees in inter-DG coordination via the Impact Assessment Steering Group (IASG). The lead-administrator is required to convene an IASG for every policy initiative. The IASG is composed of the sectoral lead-administrator, a representative from the DG's own IA support unit, a coordinator from the SecGen, and somebody from related DGs (Commission, 2009). The route towards the College passes via the IAB and the Inter-Service Consultation (ISC). On the whole it is a transparent procedure where the lead DG is expected to actively engage other related DGs. The Commission IA mechanism is regularly evaluated and adapted – and is generally well regarded (see Schout and Sleifer, 2014 for a review).

3.2. The Netherlands

With the entry into force of the IAK, The Netherlands has booked considerable progress regarding the streamlining of the multitude of procedures and requirements. The IAK is publicly available online, encompasses different objectives, and extensive guidelines i.a. on how to calculate different types of impacts. The quality control mechanisms for the different parts of the IAK are clearly defined. Compared to the Commission system, improvements are possible on how to gather evidence and facilitate consultation, and also on the timing of the IAK process.

The procedures for regulatory burdens give some interesting leads for better regulation. The Dutch system, partially under leadership of Actal, is in an advanced stage of calculating impacts. The monitoring and control of regulatory burden is helped with the use of 'factsheets'. Ministries send a factsheet of a policy proposal to the coordinating ministries (EZ and BZK) containing the calculated impact on the Cabinet-wide net burden reduction target of 2,5 billion euro (Regeerakkoord, 2012). These factsheets stimulate ownership in the ministries. However, there still are concerns over the implementation of factsheets in all ministries, and critics point at the timing of these factsheets as being too late to influence the proposal (Actal, 2015).

Interviews state that the content of the IAK questions is adequate. However, the order/timing of questions leads to doubts about the integration of horizontal objectives. According to the IAK the impact of a proposal (question 7) is calculated only after the choice of the best instrument (question 6). It appears as if the horizontal consequences of policy are unable to influence the choice for a particular instrument and subsequently that alternatives are not seriously considered. In this way, attention for different, integrated goals is put under pressure.

The timing of the process is partially the result of the Dutch administrative culture. The Dutch workprogramme ('*regeeraakkoord*') approaches policy problems in a closed fashion by already formalising solutions. The *regeerakkoord* already decides on *what type* of policy should follow instead of *whether* there should follow policy. This reduces the room for considerations. Control on horizontal objectives takes place at a late stage in the preparations between officials (comparable to EU's Inter-Service Conslutation – but the Commission consultations are pro-active in terms of coordination). The reactive nature makes it difficult to steer horizontal objectives (compare the approval of draft-roadmaps by the first vice-president of the Commission).

The Netherlands is working towards centralisation of information via websites with an online legislative calendar ('*wetgevingskalender*'), internet consultation, an internal tool for interdepartmental information sharing, and a digital quality control tool ('*toetsloket*'). These measures contribute to the transparency of the IAK and to the public's access to decision-making. It demands a considerable amount of work to form an overview of all the measures, which is detrimental to the accessibility of a communication tool. The online legislative calendar offers a bird's eye view on, and the coordination of, the policy process. However, the calendar displays the actual proposal only in a late stage, which limits the possibilities for external input. The *toetsloket* is a step in the right direction of more overview and central coordination, but at the moment not all ministries are connected to it.

As regards evidence collection and analysis, interviews create the impression that Dutch administrators actively search for evidence to improve their proposal. However, internet consultation takes place on the basis of a proposal that is already quite elaborated and in which many (implicit) choices have already been made. The impact of internet consultations on the final policy appears to be limited. Besides that, as in the case of the EU, the processing of external input

is opaque. Furthermore, there is no publication scheduled between the draft proposal and the submission to the Dutch parliament. In case of rejection by the parliament, the final proposal will not see daylight. Hence, it is unclear on what basis a proposal is rejected.

Interviewees claim that the structural application of the IAK must be improved. The IAK functions principally as an instrument that generates information for the administrator instead of an instrument that steers decision-making and transparency. The lack of hierarchical control and the semi-obligatory nature give the system a voluntary nature. The voluntary nature and the diversity in (quality) control per ministry makes the system sensitive to opaque decision-making. It remains unclear whether or how administrators weigh different objectives. Besides that, the separate quality requirements are mandatory, but the application of the IAK as a whole is not. Therefore the IAK is unable to impose structures and procedures in the same fashion as the Commission's integrated IA-system (Meuwese, 2012). Moreover, the IAK mechanism mainly adheres to the *ex ante* phase of the policy cycle. The IAK has provisions for monitoring and evaluation, but it is hardly applied to the full policy cycle, which includes evaluation and revision of policy.

At the decentral level the lead ministry is in charge. In the current structure of the process, the Dutch tradition of ministerial autonomy competes with the hierarchical control of the mechanism. The Dutch Prime Minister is the so-called 'primus inter pares' and as a rule refrains from actively steering ministers. Despite the legislative calendar, ministries are still dependent on the lead ministry for their involvement in the early phases of policy preparation. The approach towards inter-ministerial coordination differs per ministry. For example the Ministry of Infrastructure and the Environment, partly due to a lack of capacity, choses to only monitor policies in other ministries only in a passive way.

In first instance the supervision on the IAK as well as the quality control takes place in each ministry. Within the ministry, a legal policy advisor reviews the application of the IAK. Since the review is done by an individual lawyer, quality will vary. Besides that, the legal advisor lacks the procedural power to steer the proposal beyond legal matters. Within many ministries there is an additional internal quality control system. This system however focuses on the review process of the Council of State. Therefore, the internal quality control on potential impacts of horizontal objectives is all but secured.

4. STAFF

4.1. Commission

At the central level, the IA structure is (firmly) vested within the secretariat-general of the Commission. There is a special directorate for horizontal steering with i.a. three units for; 1. Impact assessments 2. Evaluation and REFIT 3. Work Programme & Stakeholder Consultation. Within the impact assessment unit there is a total of 13 administrators who support the IAB and at the same time work together on the methodology of the system. The personnel policy of the Commission, where administrators rotate between the centre and the DGs and back, creates methodological as well as sectoral knowledge. In almost every DGs there is an IA support unit. These administrators are permanently involved in IA's and fulfull an active role at medior or senior level. Besides that, administrators are trained on how to process an IA and how to set up an effective consultation process.

Communication within the Commisison takes place permanently at different levels. Besides horizontal steering within the SG, the SG also has an integrating role at dossier level. They participate in the IASG and on big inititiatives they have the lead (and the authority). The SG supports this integrating role via two policy coordination directorates.

4.2. The Netherlands

The Netherlands maintains a decentral model. The central level foresees in a relatively small number of FTEs to steer the mechanism. The responsibility for the methodology of the IAK-system adheres to the Ministry of Security & Justice (V&J). In addition there are temporary task forces, such as the ones in charge of the *toetsloket* and the online legislative calendar. Once again the incorporation of horizontal objectives is well reflected through the case of regulatory burdens. The methodology on deregulation is attributed to DG Enterprise & Innovation of the Ministry of Economic Affairs and more specifically to the 'Unit for the Reduction of Regulatory Costs' as part of the Directorate 'Regulatory Reform & ICT Policy', where 9 administrators work on regulatory burden reduction. Their tasks range from actual checking of regulatory burden calculations to ICT and methodology. Officially, Actal, the independent watchdog, is also aligned to the DG Enterprise & Innovation, although they operate independently. In the past Actal reviewed individual dossiers on how administrative burden checks were performed. In recent years, the 13 administrators[42], do system checks on the assessment of regulatory burden in policy-making. The size of the reviewing staff for regulatory burdens differs per ministry. At least every ministry has one regulatory burdens coordinator at medior level (Actal, 2015).[43] Interview show that regulatory burdencoordinators are passively used within the ministry and they often have to search for dossiers. De unit for the Reduction of Regulatory Costs coordinates the work of the administrators.

[42] http://www.actal.nl/over-actal/secretariaat-2/
[43] The norm is 1 FTE per ministry with outliers such as the Ministry of Education, Culture and Science with 6 FTE.

5. DEMOCRATIC CONTROL

5.1. EU

Within the Commission the IA is an essential part of the adoption process by the 'political' College of Commissioners (Juncker, 2014; Commission, 2015). As mentioned above, the president together with the (first) vice-president is directly responsible for the better regulation methodology and its application. The College regards the IA as an accountability instrument towards the Council and EP. All three institutions are responsible for their own impact assessment (Interinstituional Agreement on Better Law-making, 2003). Recently, the EP is building its own IA capacity with the Ex-ante Impact Assessment Unit where X administrators make appraisals of Commissions IAs, provide substitute or complementary IAs, or carry out IAs on one or more specific substantive amendments (European Parliament, 2014). It develops its own evidence gathering and analysis capacity i.a. via external consultancy reports. On the side of the Council, it has introduced a kick-off meeting of the negotiations with a broad discussion on the basis of the Commission IA.

Interviews provide an image that both the Council, as well as the EP, hardly takes the IA into consideration when tabling amendments. These post-IA amendments allegedly are root causes of many unforeseen impacts and IAs on amendments are rarely carried out. There is an ongoing discussion on the actualisation of IAs during the negotiations in case of far-reaching amendments. The better regulation communication highlights these issues and will take it on board for the interinstitutional agreement (Commission, 2015A).

5.2. The Netherlands

Regulatory burden appears high on the Dutch political agenda via output targets, but burden reduction via the IA system generates less attention (Regeerakkoord, 2012). In the past the Minister of Justice Ernst Hirsch Ballin made the IA-system one of his priorities and as result the IAK was introduced. Nowadays there is a lack of a directly responsible minister for the entire system, or at least someone who takes up the responsibility. The absence of a directly responsible minister makes steering and controls an arduous task. Decision-making takes place in the administrative *voorportalen* en subsequently in the pre-Council and Council of Ministers. In practice, in these later stages few adjustments take place for reasons of i.a. ministerial autonomy, lack of central coordination of horzitontal objectives etc.

As is the case in Brussels, the Dutch Parliament (*Tweede Kamer*) adopts amendments that often lead to additional regulatory burdens. Within the Dutch Parliament only the Committee for Economic Affairs occasionally pays attention to regulatory burdens. Besides that, sometimes there are discussions about regulatory burdens in the Dutch Senate (*Eerst Kamer*). However the *Eerste Kamer* only has the power to adopt or reject, not to amend.

6. TOWARDS AN INTEGRATED EUROPEAN POLICY CYCLE?

The Commission is introducing new initiatives to integrate the entire policy cycle from *ex ante* preparation to revision. The aim is to support IA thinking in, a rather abstract, Inter-Institutional Agreement. In this way it would like to establish qualitative and quantitative integrated better regulation principles. The Commission will only be able to provide accurate impact assessments if the member states forward the relevant information in time. Moreover, at EU level, Commission, national and EP IA systems should be able to communicate with each other so that policy preprations and assessments are based on comparable objectives and methodologies (SChout & Sleifer 2014). Ideally, the same logic of the impact systems should be applied to the negotiations in the Commission, Council and the EP to ensure that the systems can deal with this interdependence. It is hard to imagine a European IA system aimed at horizontal (sectoral) and vertical (multilevel) integration that is based on different objectives and different methodologies. The ime seems to have come to move away from isolated national and European better regulation discussions and to start managing interdependence in the policy processes.

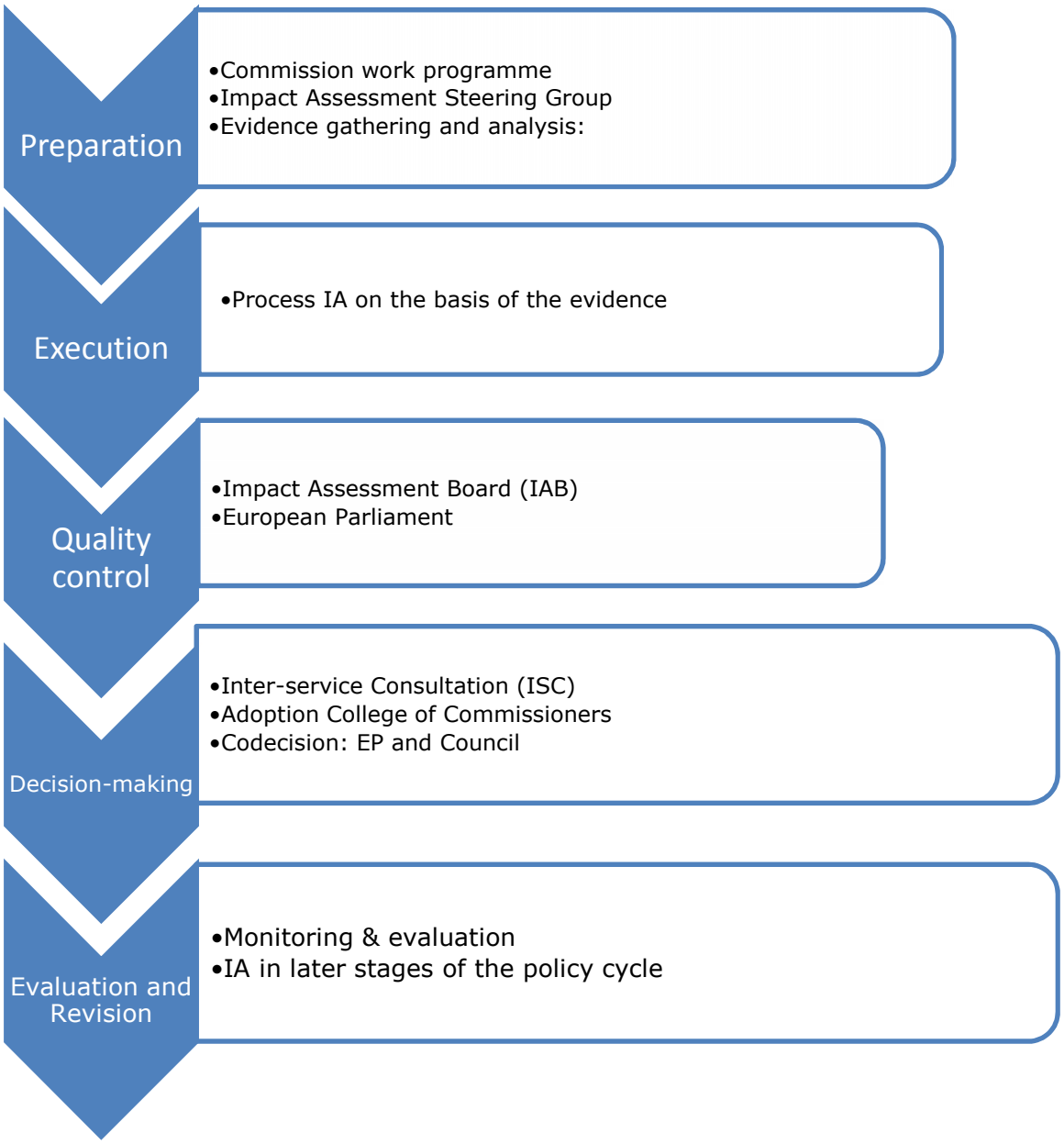


Figure 3. Commission policy preparation process.

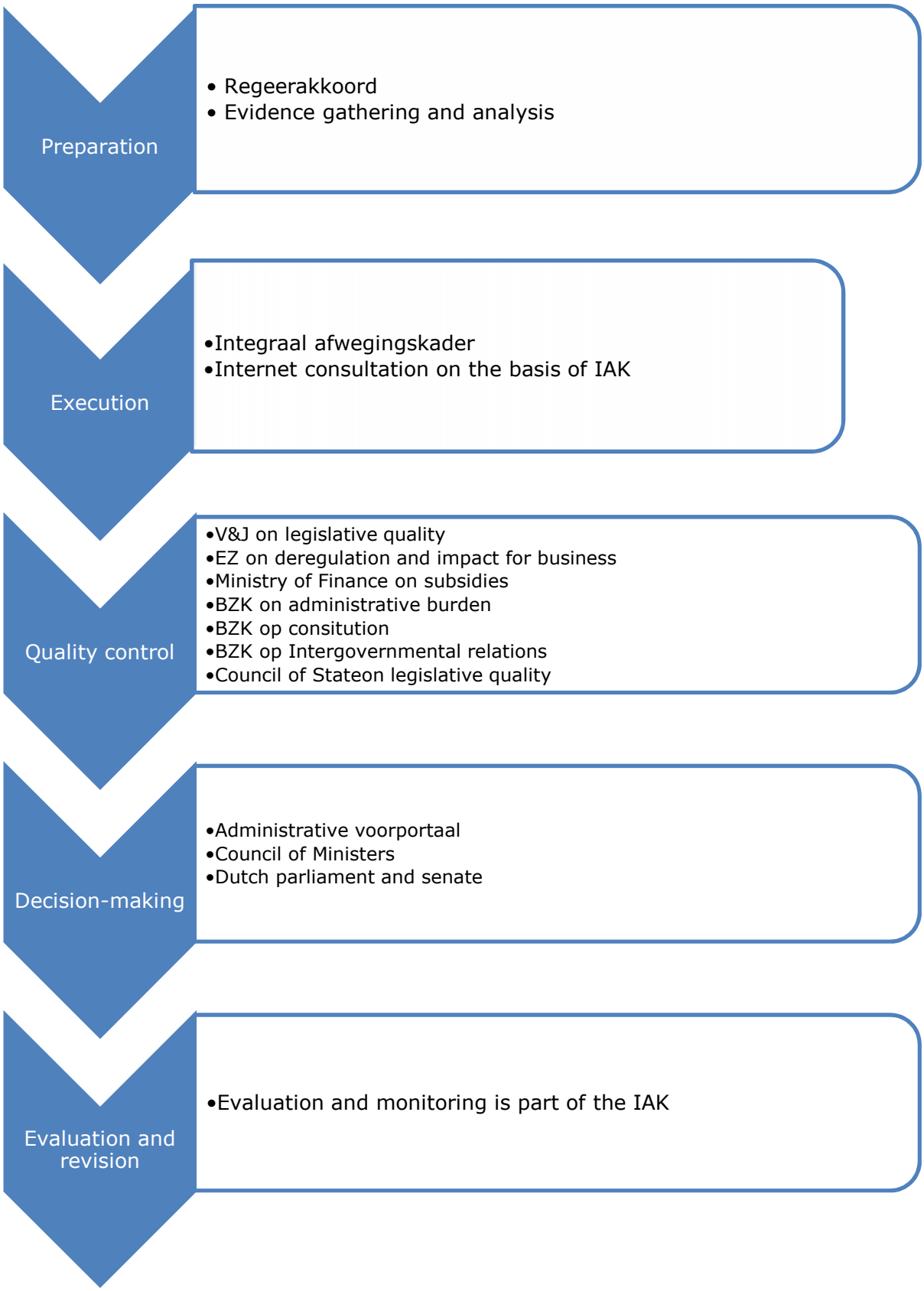


Figure 4. Dutch policy preparation process.

Biographies

Arnout Mijs is a Research Fellow at the Netherlands Institute of International Relations 'Clingendael', after having worked as a consultant for BMC. His research at the Europe cluster predominantly focuses on EU economic and financial affairs such as the economic policy coordination, the EU budget, better regulation and the Banking Union. In this he provides an institutional perspective, specifically on multilevel EU governance issues and the functioning of the European Commission.

He has conducted several consultancy projects for the Dutch Ministries of Foreign Affairs, Finance and Economic Affairs. Other activities entail the organisation of policy seminars on the European Union, training of the Dutch EU Presidency and media appearances.

Adriaan Schout is coordinator EU studies at the Netherlands Institute of International Relations 'Clingendael' in The Hague. Dr. Schout has written extensively about multilevel EU governance and specifically about the interdependence between EU and national administrations. His book co-authored with Andrew Jordan "The Coordination of the European Union" won the UACES price for "Best Book in Contemporary European Studies". Dr Schout has recently published a book on Dutch EU politics "The Netherlands as an EU Member: Awkward or Loyal Partner?" and is currently working on the links between national and European better regulation programmes. He is also a member of the European Integration Committee of the Dutch Advisory Council on International Affairs to the Dutch government.

Perspectives from the United States: Public Consultation Practices and Accountability in Rulemaking

Rachel Shub, Office of the United States Trade Representative, Washington, DC USA

Allocation of roles in the U.S. Constitutional framework

a. Legislative Branch: Congress (U.S. Senate and House of Representatives)

U.S. Constitution vests "[a]ll legislative Powers" in Congress.

Any Member of Congress may introduce a bill, but most bills do not become law.

In complex areas requiring implementation, legislation generally delegates broad authority to executive branch to develop regulations or otherwise further elaborate on the statutory requirements.

- Direct accountability to electorate (geographical)

b. Executive Branch: President, and Executive Branch Agencies

U.S. Constitution vests the "executive Power" in the President and requires him to "take Care that the Laws be faithfully executed."

President's principal role in legislation is in signing legislation into law or vetoing bills of which he disapproves.

The U.S. system differs from traditional parliamentary governments because, although the President may sometimes recommend bills, only a Member of Congress can introduce legislation, and Congress has complete discretion concerning its legislative agenda.

Executive branch agencies execute and implement laws, including by developing regulations when authorized/directed by statute.

Agency regulations typically promulgated pursuant to the procedures required by the Administrative Procedure Act of 1946 (*infra*).

President is directly elected. Agency heads appointed by the President, subject to approval of the Senate. Agencies largely staffed by a permanent civil service hired without consideration of political affiliation.

c. Judicial Branch: Federal courts

U.S. Constitution vests the "judicial Power" in the Supreme Court and in the inferior courts created by Congress.

Courts have authority to consider claims by concerned/affected members of the public that statutes are not consistent with the Constitution, and claims that agency regulations are not consistent with statutes or the procedures required by the Administrative Procedure Act.

Historical Context of Administrative Procedure Act of 1946 (APA)

a. 1930s—Great Depression; enhanced federal government role, new executive agencies created to address pressing economic problems.

b. Criticism in 1930s: unlawful delegation of legislative "functions"/concerns about lack of public accountability—potential "despotism" of unelected officials as well as weakened public confidence in fair adjudication of private rights.

c. 1938-41: Public-private Committee on Administrative Procedure, led by Attorney General, surveyed and reported on existing transparency/accountability practices and procedures of individual agencies.

d. 1946: Committee's suggestions led to the APA, which establishes uniform obligations—"minimum basic essentials"—on agencies.

Basic structure of APA

a. Adjudication/Orders: determine rights and liabilities of individuals in respect of existing requirements.

b. Rulemaking—usually sets a standard for *future* conduct of persons, designed to implement, interpret, or prescribe law or policy for the future.

c. Applies to all federal agencies ("executive" or "independent").

Fundamental minimum public rights in rulemaking (see Graph)

a. Notice of Proposed Rulemaking (NPRM); agency must:

publish essential information, usually the text of the rule (or a full description/"substance") in the Federal Register, as well as its underlying legal authority and

provide the public—any interested person, nationals and non-nationals—an adequate opportunity to submit "written data, views or arguments" on the proposed rule.

Key principle: must provide the public with sufficient information about the proposal to fairly apprise interested parties of the subjects and issues involved, so that they may present responsive data or arguments.

b. Final Rule: must usually be published at least 30 days before its effective date; the notice must also include a statement of the basis and purpose of the rule, and agency must provide elaborations of why the agency accepts or rejects each of the substantive comments received.

c. Exceptions to NPRM requirements

d. Underlying purposes: include public's opportunity to (1) provide the agency with *information* that will increase the agency's knowledge of the subject matter of the proposal and (2) *challenge the factual assumptions, analyses and tentative conclusions* underlying the agency's proposal and show in what respect they are in error.

- Not a referendum; practical or technical issues

e. Evolution of APA practices:

Agencies often go beyond strict APA requirements

Not only text, but the information on which the agency relies to support its proposal, which can include underlying scientific or **economic studies or** analyses, such as the Impact Assessment, are submitted for public comment, along with the NPRM.

Final Rule must be a logical outgrowth of the full record, (which includes information from timely submitted comments) contained in the publically available "docket" on line (regulations.gov).

Docket contains records of any meetings with stakeholders during the comment period. Separate additional ethical rule: civil service employees may not accept lunch from outsiders more than twice a year; $25 limit per meal.

f. Judicial review: stakeholders and public interest groups can challenge the rule under the APA on the basis that it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law."

- Court deference to agency technical expertise, and as entity charged with implementation.

g. Public right to petition

Transparency ("Sunshine") in solicitation of opinions from expert groups: Federal Advisory Committee Act of 1972

Prompted by two concerns (1) proliferation of advisory committees and (2) concern that agency use of advisory committees made them more susceptible to undue influence by special interests/favoured groups.

Agencies ordinarily use expert groups to gather expert advice on discrete issues (such as technical questions on the frontier of scientific knowledge), well before rulemaking begins.

Selection requirements ensure balanced composition and avoid "regulatory capture".

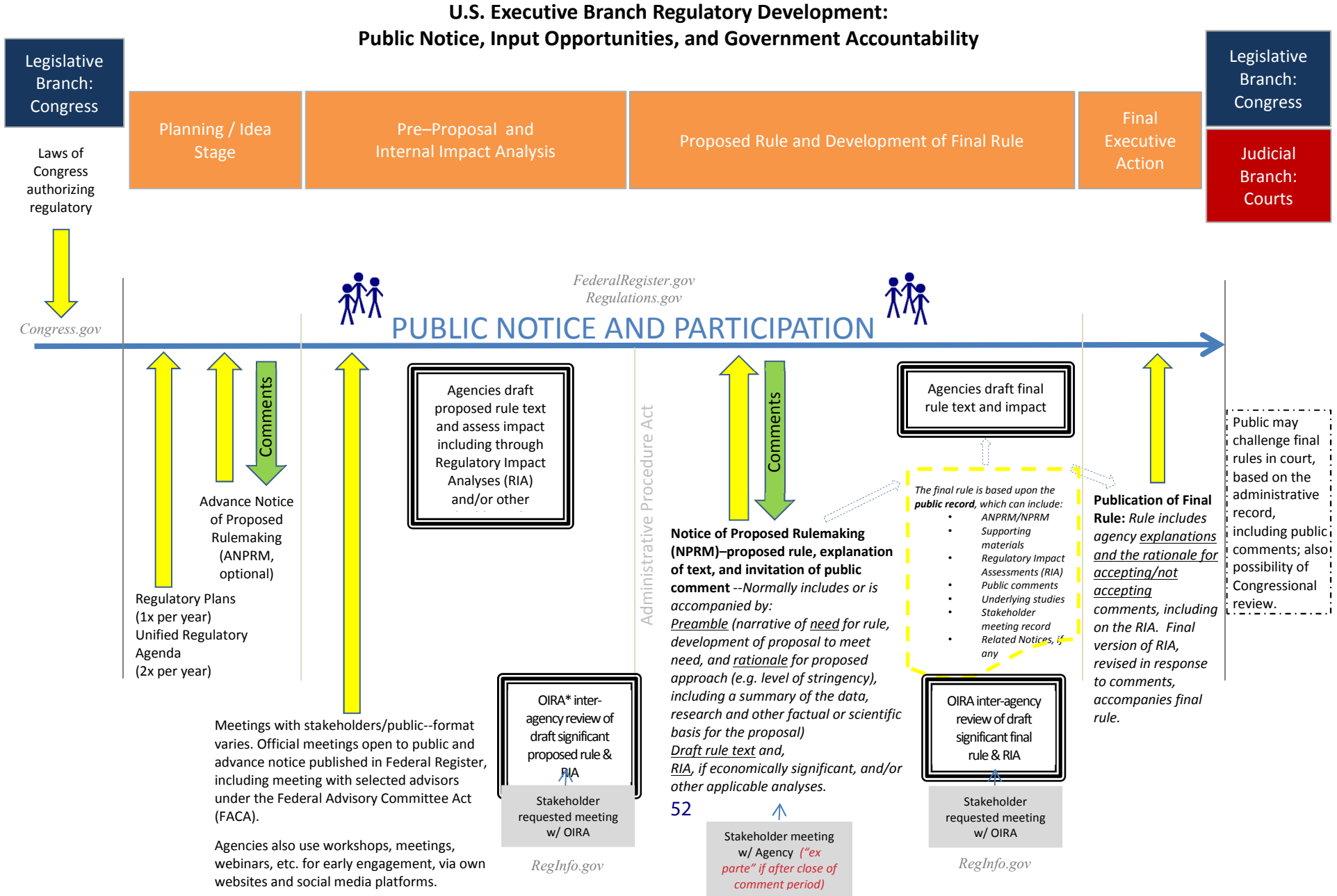
- Transparency requirements:
  - **a. Meetings announced in Federal Register 15 days or more in advance**
  - **b. Members of public allowed to attend committee meetings and submit written and/or oral comments for the committee's consideration**
  - **c. Documents made available to, or prepared for, or by ,committee members are available to the public on request (subject to Freedom of Information Act exceptions)**

Transparency/opportunities for input pre-NPRM

Regulatory plans and twice-yearly Unified Regulatory Agenda

Advanced Notice of Proposed Rulemaking (ANPRM)

Other outreach techniques


U.S. Executive Branch Regulatory Development:
Public Notice, Input Opportunities, and Government Accountability
Legislative Branch: Congress
Planning / Idea Stage
Pre–Proposal and Internal Impact Analysis
Proposed Rule and Development of Final Rule
Final Executive Action
Legislative Branch: Congress
Judicial Branch: Courts
Laws of Congress authorizing regulatory
Congress.gov
FederalRegister.gov
Regulations.gov
PUBLIC NOTICE AND PARTICIPATION
Comments
Advance Notice of Proposed Rulemaking (ANPRM, optional)
Regulatory Plans (1x per year)
Unified Regulatory Agenda (2x per year)
Meetings with stakeholders/public--format varies. Official meetings open to public and advance notice published in Federal Register, including meeting with selected advisors under the Federal Advisory Committee Act (FACA).
Agencies also use workshops, meetings, webinars, etc. for early engagement, via own websites and social media platforms.
Agencies draft proposed rule text and assess impact including through Regulatory Impact Analyses (RIA) and/or other
Administrative Procedure Act
OIRA* inter-agency review of draft significant proposed rule & RIA
Stakeholder requested meeting w/ OIRA
RegInfo.gov
Comments
Notice of Proposed Rulemaking (NPRM)–proposed rule, explanation of text, and invitation of public comment --Normally includes or is accompanied by:
Preamble (narrative of need for rule, development of proposal to meet need, and rationale for proposed approach (e.g. level of stringency), including a summary of the data, research and other factual or scientific basis for the proposal)
Draft rule text and,
RIA, if economically significant, and/or other applicable analyses.
52
Stakeholder meeting w/ Agency ("ex parte" if after close of comment period)
Agencies draft final rule text and impact
The final rule is based upon the public record, which can include:
ANPRM/NPRM
Supporting materials
Regulatory Impact Assessments (RIA)
Public comments
Underlying studies
Stakeholder meeting record
Related Notices, if any
OIRA inter-agency review of draft significant final rule & RIA
Stakeholder requested meeting w/ OIRA
RegInfo.gov
Publication of Final Rule: Rule includes agency explanations and the rationale for accepting/not accepting comments, including on the RIA. Final version of RIA, revised in response to comments, accompanies final rule.
Public may challenge final rules in court, based on the administrative record, including public comments; also possibility of Congressional review.

Biography

Rachel Shub has worked in a variety of roles in the U.S. government since 1992, following several years as an associate at a Washington law firm. She is currently the lead U.S. negotiator in T-TIP negotiations on "cross-cutting disciplines on regulatory coherence and transparency." In 2012 she returned from a ten-year posting in the U.S. Mission to the World Trade Organization in Geneva, representing the United States in Trade Facilitation negotiations, trade and environment matters, the Committee on Technical Barriers to Trade, transparency in regional trade agreements, and intellectual property. In 2001-02, she spent a year in Brussels on a Fulbright grant to study transparency in EU institutions. Previously in Washington, Ms. Shub worked on U.S. administrative and trade law, U.S. implementation of trade agreements, and as the U.S. lawyer in five GATT/WTO cases, including two challenges to U.S. environmental regulations.

Perspectives from Poland: Regulatory Planning, Impact Assessment and Early Warning System

Malgorzata Kaluzynska, Ministry of Foreign Affairs of Poland,
EU Economic Department

1. BACKGROUND

As an OECD member state, Poland committed itself to initiate better regulation measures, including in particular introduction of regulatory impact assessment. The obligation to conduct IA was formally introduced into Polish legislation in the second half of 2001.

Impact assessments were performed during accession negotiations and constituted a pilot stage of the methodology in Poland. Those assessment aimed at supporting the development of position papers and identifying the areas where it was necessary to apply for transitional periods (identification of appropriate duration of transitional periods on the basis of IA). IA was closely related to the element of social consultations. Moreover it aimed at supporting entrepreneurs and other groups in the process of preparations for Poland's membership in the EU. The main objective were: implementation of the acquis communautaire in a manner that is optimal for national economy and the society; and minimization of the costs thereof (financial costs for the state budget and adjustment costs for undertakings).

There was awareness of the necessity to perform assessment of economic, financial, legal and social costs of EU policies and of the adopted acts of the acquis communautaire, as well as of the fact that various methods of policy implementation may bring about different effects. Without such knowledge the government would be unable to carry out effective accession negotiations or to present exhaustive information to individual social groups helping them prepare for accession.

As a result, the first impact assessment projects were carried as ad hoc ventures of officials directly reporting to the Chief Negotiator . The need for them was driven by European Commission's invitations for Poland to review its request for transitional periods or to provide more data to better justify them.

Impact assessment projects carried out during accession negotiations focused mainly on social and environmental legislation. A part of legislation in this area can be extremely costly to implement, another part can be extremely complicated. Most legislation in those areas is desirable in medium- and long-term but in the short run in can adversely affect financial stability of enterprises or impose

heavy burdens on public finance. Most costs surfaced fast and were real, while most benefits were expected in long-term perspective and with uncertain effects, determined by many other factors.

Poland's accession to the European Union contributed to the introduction of systematic actions in the scope of regulatory reforms – with the year 2006 being a breakthrough. It was then that for the first time a programme document was developed – the regulatory Reform Programme and Guidelines for Regulatory Impact Assessment. Those actions met with positive recognition at the OECD forum and from the European Commission in the years 2006 and 2007. The Commission deemed the better regulation measures undertaken in the frames of the comprehensive Regulatory Reform Programme to be among the most promising reforms launched in Poland as a part of Lisbon Strategy implementation. Moreover it stressed that this was an ambitious programme, whose implementation would involve great inter-institutional involvement and cooperation. According to OECD opinion of 2007, a good team for implementation of regulatory reform was in place within the Ministry of Economy. Poland was applauded for a good programme and very good preparedness for reform implementation and was named as the country that developed an impressive and comprehensive law-making reform programme.

International pressure and external impulses originating first from OECD, then from the EU (accession negotiations, Lisbon Strategy and Commission agenda in the area of Better Regulation, peer review) were the factors affecting introduction of better regulation principles and instruments in Poland. Beside external impulses there were also national mechanisms, since Polish organisations of entrepreneurs supported changes in law. In 2004 for the first time the Polish Confederation of Private Employers Lewiatan (PKPP Lewiatan) presented a list of regulations hampering pursuance of economic activity, the so-called „black list of barriers".

2. 2012 – 2013 REFORMS: REGULATORY PLANNING AND IMPACT ASSESSMENT SCRUTINY IN POLAND

Since 2006 the improvement of the legislative process has continued. In March 2009 the government introduced the obligation to prepare draft bills assumptions. Also in 2009 the periodic reviews of existing legislation has been introduced (ex-post impact assessment).

The Ministry of Economy was appointed as responsible line ministry for this process. Despite the progress there was still need to find solution to the problem of excessive flow of legislation, limited information included in the Ministry proposals of legislative bills and high number of bills outside the legislative work plan. It was also necessary to identify the means to fully root impact assessment in the decision-making process . In the past attention devoted to better regulation principles was frequently political driven and not fully embedded into bureaucratic structures. Focusing attention on the issues of regulatory reform appeared to be a temporary in the past. It was caused by particularly important political teasers, such as accession negotiations, negotiations of new legal acts in the EU, or improvement of the country's image by maintaining proper position in the World Bank ranking Doing business. Situation changed in 2011 when the issue of regulatory reforms was mentioned in the expose of the Prime Minister. Prime Minister Donald Tusk in his expose of 18th November 2011 gave a political mandate to continue better law-making reforms. He announced an introduction in the Chancellery of the Prime Minister of a mechanism that would limit excessive regulation. Under the new system only an unambiguously positive impact assessment would allow to

release government bills to parliament. Prime Minister also promised to work to achieve a minimum balance between introducing new and removing outdated regulations.

In 2011 the regulatory test was introduced as a separate part of bill assumptions. In 2011 the nature of the Government Work Plan has been changed. In the past Polish governments typically planned legislation on a yearly or half-yearly basis. In 2011 the decision was made to continuously complete the work plan. The impact assessment unit in the Chancellery of the Prime Minister responsible for the assessment of the quality of IA was strengthen. The role of the Government Programming Board that selected the projects to the Government Work Plan and monitored its performance was been strengthened as well. Finally the better regulation programme 2015 (covering the actions to be undertaken between 2013-2015) was adopted by the government on 22nd January 2013. The programme determined the measures that the government planned to take up to 2015 to ensure high quality of regulations through the entire cycle of policy making. Transparent law-making effectively solving the real problems was one of the three objectives of a programme. There were three major reforms introduced after the adoption of the better regulation programme: changes to the rules of work of the Council of Ministers, further improvements of the governmental work programme (new regime of "traffic light system" for the submissions to the work plan) and improvements of Polish participation in the EU law-making process.

New regime of regulatory programming and the role of Government Programing Board:

- Declining inconsequential proposals
- Regulatory test at the earliest possible moment
- After 1 January 2014 regulatory test mandatory for all submission (in February 2012 the programming board decided that before its final decision on the inclusion of the proposal of the legislation it might ask for a regulatory test).
- Regulatory outline approved by Cabinet before bill drafted.

Before the line Ministry starts its work on the bill assumption it must apply for the approval from the Government Programming Board and inclusion in the work plan. The decisions of the Government Programming Board matters. Only when the Board accepts the submission and adds the proposal to the plan the line Ministry can start the public consultations or intergovernmental consultations. The Government Programming Board consist of: Ministry of Economy (coalition partner, representing deregulation and simplification views, verification of one in- one out rule), Ministry of Infrastructure and Regional Development (representing regional development approach and absorption of structural funds), Ministry of Finance (verifying financial and budgetary impacts), Ministry of Foreign Affairs (EU compliance and timely implementation of EU law), Prime Minister's representative (coherence with the government's policies, fulfilment of the expose, scrutiny of regulatory tests and impact assessments). The Board meets twice a month to discusses the submission to the work plan. It applies to the most difficult cases. There is also a possibility to make a decision in the written procedures that usually takes 2 or 3 days. Each proposals is being categorized and in the case of the bills implementing the EU legislation the date of the adoption by the Council of Ministers is being set.

In October 2013 a new set of rules of work of the Council of Ministers was adopted. The new law strengthened the impact assessment in the decision-making system by introducing the obligatory regulatory test for the draft bill assumptions and drafts bills and possibility for the governmental

programming board to ask for in-depth impact assessment for chosen pieces of legislation. The regulatory test presents the outcomes of the impact assessment. In fact the regulatory test is a summary of the social and economic impacts. There is a number of information that needs to be presented in the test like: identification of the problem, setting the objective of the intervention, information on public consultations conducted before the work on the draft bill has started, initial assessment of economic, financial and social impacts (including the assessment of regulatory burdens). There is also a requirement to compare planned regulations with solutions applied in other countries.
In addition ex-post impact assessment has gain a formal and legal basis. The ex-post analysis is conducted when the Council of Ministers or its body askes for such an assessment; it has been foreseen in the regulatory test or impact assessment; the line Ministry initiates such a analysis on its own.

Results so far

Between 2012-2013 fewer legislative acts were passed by the parliament than during comparable years of the IV-VIth legislative parliamentary periods. Also the number of governmental proposals dropped significantly.

In 2014 there were 181 submissions to governmental work plan. The Programming board declined 2% of the submissions (accompanying regulatory test didn't pass and received negative recommendation; 7% of the submissions out of 168 were rejected in 2013 on the ground of excessive regulation, too high cost of the proposed legislation, too high budgetary impacts). In the case of 23% the Board requested additional analysis.

When it comes to the ex-post impact assessments system is in place since 2009. In 2011 18 legislative bills were assessed. In 2014 the Governmental Programming Board identified 20 legislative bills to be subject of ex-post impact assessment.

3. EARLY WARNING SYSTEM IN POLAND - HOW TO INFLUENCE EU LEGISLATION

In 2009 we conducted a study on practices of conducting impact assessment studies in Poland. It covered almost 300 position paper for a draft EU legislation. The results were not satisfactory. 85.8% of RIA correctly identified the aim of legislation, 84.71% of RIA included information about performed social consultations and more and more frequently included information about the impacts on competitiveness of the economy and undertakings and the impact on labour market[44]. However most of the impact assessment accompanying the governmental position papers were judged of having a poor quality and not delivering required information.

In 2012 after the successful Polish Presidency in the Council of the European Union we decided to introduce the impact assessment system for the EU legislation. The basic objective of the system are as follows:

[44] Domański, Zakrzewski, Palinka, *Raport z badań nad funkcjonowaniem polskiego systemu oceny skutków regulacji analizowanego pod względem spełniania kryteriów prawidłowej Impact Assessment wypracowanych Unii Europejskiej*, Warsaw 2009, pp. 99-100.

- to increase the representation of national interests in the legislative process within the European Union
- to influence the shape of European legislation before the proposal is officially tabled by the European Commission;
- to improve the participation of Polish public administration in informal and formal discussion within the European lawmaking process;
- to help to facilitate the process of EU law implementation.
- The system was introduced in November 2012. The main participants of the system are: line Ministries, Ministry of Foreign Affairs, Permanent Representation of the Republic of Poland to the EU and the Committee for European Affairs.

The key elements of the system consists of:

Identification of the most important European initiatives from Polish perspective (vital from political, social or economic point of view). The identification takes place just after the adoption of the Commission work programme. In the autumn each year experts in the Foreign Ministry make initial identification of the list which is next consulted with line Ministries. When a decision on the final list is made each file is being assigned to the line Ministry.

Rolling fiche (information note). This is the basic document used in the process. It is prepared by the lead line ministry. The aim of the fiche is to provide basic information about the initiative, possible impact on Poland and steps to be taken to inform the Commission and other stakeholders of the Polish position. The fiche encourage line Ministries to start to think about the impact on Poland. First it requires to carry out the initial assessment of costs and benefits. It also requires to identify those who will be affected. At the later stage of proposal and process the form of required assessment changes. Line Ministries are required to conduct in-depth assessment.

Active involvement of Polish administration at the earliest possible stages in the discussion. It means that officials are asked to keep regular an close contacts with the Commission and the other EU stakeholders. They are also required to develop partnership with those who will be affected in Poland and their organisations (industry, business organisations ect.). Line ministries should be prepared to contribute data about Poland. They should also remember they need to be a team players. It means that they have to build effective coalitions (with other stakeholders: member states and business community), knowing that in a Union of 28 states not much can be achieved singlehandedly.

Monitoring of the work being done by the line Ministries by the Committee for European Affairs.

Since the beginning of the functioning of the system we identified 20 initiatives (15 came from the 2012 Commission work programme and 8 came from 2014 progarmme) which needed to be covered with the surveillance. Examples of the biggest achievements so far: preventing the publication of the Commission's initiative on cabotage; changing the form of the publication of the Commission's initiative on exploration and production of hydrocarbons from unconventional sources from directive to non-binding recommendations.

4. RECOMMENDATIONS

The large number of adopted or amended legislative acts result in unstable regulatory environment. Limiting excessive legislation is a first step to improve the quality of the regulations.

In the nearest future, UE will face a great challenge to create comprehensible and effective legislation in such strategic policies as e.g. climate change, environment or digital agenda. Only introduction of the convergence dimension in the impact assessment process can ensure, that measures taken in those areas will contribute evenly and fairly to all citizens of the European Union. In 2008 Poland was advocating for the introduction of the convergence criterion into the Commission's impact assessment system. Significant economic development gaps still present in the EU are a serious hindrance for EU capacity to identify goals jointly and undertake joint actions. Compared to other treaty objectives and treaty-defined basic areas of European Union activities the convergence criterion (assessment of the impact of new EU regulatory initiatives on catching up process – bridging of the gaps in socio-economic development) was not given top priority in the European Commission impact assessment guidelines. The European Commission incorporated the convergence criterion into problem analysis, identification of policy targets and the policy implementation capacities when amending its guidelines in 2008. Moreover the European Commission introduced a new criterion – assessment of impacts on regions, a group of the member states and individual states in a situation when the proposed solutions may in those cases have disproportionate effects compared to the entire EU. Such assessment should account for convergence criterion. Although the criterion was introduced it was not commonly used. On 19th May this year Commission published new revised guidelines and accompanying them Toolbox, where territorial impact has been enumerated as one of the impacts, that should be taken into account. According to the Toolbox, territorial impact assessment should focus on identifying potential asymmetrical impacts. It should show in a quantitative or qualitative manner which areas or regions may face the highest costs or benefits. Therefore, following Commissions motion in this area, it will be more then reasonable for both EP and the Council, to also pay special attention to this matter.

Biography

Malgorzata Kaluzynska, Ministry of Foreign Affairs, EU Economic Department

Since January 2010, Małgorzata Kałużyńska serves as the Director of the EU Economic Department at the Ministry of Foreign Affairs of Poland. The Department has a leading role in the European policy as regards the economic issues: reform of the Economic and Monetary Union to cost and benefits of Poland's EU membership in the EU and implementation of the Impact Assessment system of EU legislation. Prior to holding this position, Małgorzata worked as Director of the Department for Analyses and Strategies in Office of the Committee for European Integration. She was also responsible for introducing the Impact Assessment system for implementation of EU legislation and analysing the Member States' approaches towards European policies.

Previously, she hold a position of Director of the Department for Economic Regulations of the Ministry of Economy of the Republic of Poland, where she introduced regulatory reform and was responsible for inter alia administrative burden measurement and regulatory impact assessments. She was also a member of the High Level Group of National Better Regulation Experts.

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