

# Better for Whom?

*Francesco Sarpi\**

At first sight, the new “better regulation package” probably appears as one of the most ambitious and comprehensive set of measures on the quality of EU regulation developed in recent years. It introduces relevant innovations as far as both better regulation tools (impact assessment-IA, ex post evaluation, consultation) and governance (the Regulatory Scrutiny Board-RSB, the REFIT Platform and the proposal on the new Inter-institutional agreement on Better Law-making-IIA) are concerned. Moreover, the package is a clear demonstration of the Commission’s political commitment towards the relaunch of the smart regulation agenda, already proved by its inclusion within the scope of the mandate of the First Vice President, Mr. Timmermans.

Nonetheless, ambition and wideness are not the only relevant criteria to judge the package. It could indeed be assessed also from a different perspective, i.e. by analysing the possible effects it could produce and the incentives it could provide for some key players: EU institutions, Member States (MS) and stakeholders.

Before going into these aspects, a clarification is needed. To fully catch the scope of the new package, it is essential to take into account also the overall political and institutional framework in which it has been laid down. The growth of EU regulatory powers associated with the adoption of measures to address the economic crisis, the desire to bridge the gap between Bruxelles and European citizens and business, the overarching political objective to increase the legitimacy of the Commission’s decisions, the Commission’s clear attempt to regain a more active role as a political player with respect to MS are therefore elements that, even if not tackled in this paper, should be all duly considered.

## I. Searching for New Equilibria in the European Regulatory Processes

At EU level the most relevant provisions are included in the IIA proposal.

First of all, the Commission accepted to reinforce the legislative programming, one the Council’s key

priorities in view of the IIA negotiations. Both the commitment “to give serious consideration to the requests made by the European Parliament or the Council” and the provision of an annual agreement among the three institutions on a list of proposals which will be given high priority are good changes that can help the effectiveness of the legislative process.

Secondly, the Commission reiterates the well-known (but little implemented) idea that smart regulation is a common responsibility of all the three institutions (and MS). In this sense, two main aspects merit to be considered: the appointment of an independent panel carrying out IA of substantial amendments to Commission’s proposals; the Commission’s greater willingness to assist the Parliament and the Council not only by explaining its IAs, but also by sharing the data used and “in duly justified cases” by complementing its original IA. While the latter can actually boost the use of IA among the three institutions, also in the light of the relatively greater weight that IAs are gaining during Council’s negotiations, the former seems less convincing as it would introduce a weak and unclear quasi-judicial assessment of IAs in case of disagreement on how to evaluate the impact of new proposals, and would probably lengthen the duration of the legislative process.

The role of external expertise within the regulatory process is indeed confirmed also as to the review of the Commission’s IA quality: three members of the RSB will be recruited from outside the EU Institutions “via rigorous and objective selection procedures on the basis of their expertise”. This is clearly a compromise among the opposite positions that several MS (and possibly the Commissions’ staff itself) have expressed on this issue. Even if the need to strengthen the competences and the human resources of the RSB in line with its greater mandate (now covering also fitness checks) is understandable, if one considers this change along with the above mentioned setting up of the independent panel, it

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\* Osservatorio AIR.

seems that the underlying idea of the Commission is that the ultimate responsibility on the quality of IA and ex post evaluations should be outsourced in order to be credible. While it is not clear if this solution could ultimately hinder or enhance confidence in the neutrality of these assessments, it is sure that the independence and impartiality of external experts will not be easy to ensure and demonstrate.

## II. Possible Impacts on Member States

Some of the most relevant potential consequences of the package relate to Member States.

As to new regulatory proposals, the Commission will introduce “inception impact assessments”, that is IA prepared from the very beginning of work on a new initiative. Although it is not yet clear what will differentiate these preliminary IA from the current roadmaps, it is likely that they will provide additional information. Thus, they will not only represent an opportunity for stakeholders to know in advance the main elements of the most significant regulatory proposals, but also a chance for MS to receive more information on the goals and the possible alternatives well before the formalisation of a proposal. This could help MS to select the most significant proposals to be assessed through national IA that could be used during consultation with the Commission, enabling them to demonstrate the possible expected effects of Commission’s proposal at national level.

The Commission seems to attach great importance to the implementation phase, probably the crucial Achilles’ heel of the current regulatory system. In order to ensure that simplification and burden reduction really reach end-users and to gather information on the impacts of EU regulation on the ground, MS are obviously crucial and need to be involved more and better in the process.

To this end, the Commission seems to follow a mix of greater control and new incentives, like in the case of implementation plans. In fact, while on one hand these plans will identify support mechanisms that the Commission services will provide to MS to assist them in their implementation of EU legislation, on the other the plans will include monitoring arrangements between the Commission and MS to ensure

the availability of data to track progress and report on the performance of the regulation under control.

A great emphasis is devoted also to the identification and prevention of gold-plating. On this issue the draft IIA asks MS to identify in their transposition notifications any additional element in relation to EU legislation to transpose or implement. Moreover, MS are expected to carry out an IA of these additional provisions, especially as regards extra administrative burden, by providing a “statement of reasons” to justify their introduction.

The new version of the Refit scoreboard follows a similar logic. It is now complemented with monitoring of MS’ implementing measures, and underlines delays, new burdens added, and measures that reduce the positive impacts of simplifications provided for in the Commission’s original proposal. It is clear that the Commission’s intention is to track the changes to initial proposals in order to highlight the respective responsibilities. At the same time, even in this case the Commission will need information and data from MS as to the impact of implementation measures.

Finally, another relevant innovation for MS is the Refit Platform. It will replace the expired high level group of national better regulation experts and will be the place for discussing with Mr. Timmermans and stakeholders. The Commission’s decision to put together both national experts and stakeholders in a unique place (though through two subgroups) and to give a concrete role to the Platform (identification of suggestions and proposals to be considered by Commission’s services and MS) is certainly a relevant step forward.

To sum up, the new package offers new opportunities for MS to participate in the European regulatory process. At the same time, it is foreseeable that the Commission will focus deeply on implementation, demanding more detailed and frequent data to MS on the impact of EU regulation and its transposition into national legislation (indeed, this can also be read as a clue of blame shifting). Both the ABR-plus programme and the pilot project on joint evaluation between the Commission and MS of the General food law<sup>1</sup> are a clear example of this. It is up to MS to decide whether to become simple suppliers of pieces of information and data or more active players of the EU regulatory policy cycle through a more effective use of tools like IA and ex post evaluations that can integrate the usual negotiations.

1 Regulation (EU) n. 178/2002.

### III. Only Good News for Stakeholders?

The package undoubtedly strengthens stakeholders' consultation and transparency throughout the regulatory cycle.

Stakeholders will not be consulted on draft IA (a change that at least businesses and some MS have repeatedly claimed), but they will have the opportunity to be consulted on inception IA and fitness checks. Also, and more importantly, for the first time consultation will be extended to implementing and delegated acts, and a list of such acts in the pipeline will be published online. These innovations are quite significant considering that these acts set out technical or specific elements that are needed to implement the legislation and can then produce relevant impacts on end-users.

The creation of a specific stakeholders subgroup within the Refit Platform will ensure a continuous exchange of views with the Commission and MS not only on administrative burdens (like was in the case of the previous High level group chaired by Mr. Stoiber), but also on the impact of EU laws, with the

opportunity to make concrete proposals to the Commission that will be published.

Nevertheless there are also some critical points.

Firstly, the package does not include measures to promote the consultation of the most vulnerable and less resourceful stakeholders, those who hardly have a chance to understand the Commission's proposals and still less its IA. It is unlikely that the new portal "Lighten the Load" can be an adequate solution for this historic weakness of the Commission's consultation strategy, partly because of the well-known self-selection biases typical of online consultations.

Secondly, at least stakeholders represented by the new Better regulation Watchdog have strongly criticized the new package<sup>2</sup>, especially with respect to the IIA draft. Aside from the merit of these criticisms, it is a clear signal that making civil society representatives a partner of the Commission's better regulation agenda will not be a breeze.

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2 See the open letter available at [http://www.betterregwatch.eu/Open\\_Letter\\_to\\_EP\\_on\\_IIA.pdf](http://www.betterregwatch.eu/Open_Letter_to_EP_on_IIA.pdf)