

Better Regulation – An Ongoing Journey

*Peter Chase and Adam Schlosser**

The Commission's new Better Regulation package represents a step forward in the European Union's decade-long journey to bringing coherence and rationality to its legislative and regulatory process. But as the Communication on the package itself suggests, the journey is far from over.

The Communication consistently emphasizes the key aspects of good regulation: quality over quantity; taking time to get proposals right; evidence-based decision making; open and continuous consultation to gather evidence from all stakeholders; rigorous impact assessments and cost-benefit analysis; applying these tools to regulatory measures as well as legislation; and implementing a robust ex-post evaluation program. It is important as well that the Secretariat General published unified and detailed guidance for Commission officials on how each step of the regulatory process should work, with a "tool-box" to elaborate further on these steps.

All of this is good. Yet in some areas, the Commission misses opportunities to go farther down the good governance road, and in others the guidance needs to be made much more explicit.

For example, the Commission's decision to post legislative proposals adopted by the College of Commissioners on-line, invite public comments for eight weeks, and report on these comments to the Council and the European Parliament is a welcome step. This is, however, still the first time stakeholders will see the actual legal text. Since the devil is often in the detail, this scrutiny may well uncover significant adverse effects, a (potentially embarrassing) outcome that could easily be avoided by seeking comments on draft language earlier in the process. But in any event, comments should be published and incorporated, and the Commission should indicate it will retract and amend, or even withdraw, a proposal if comments highlight important flaws.

Similarly, requiring stakeholder consultations and impact assessments on actual drafts of implementing measures and delegated acts is a major improvement to a part of EU law-making that has been, at best, opaque and ad hoc. However, the consultation period of four weeks is too short, and the footnote

indicating that agencies such as EFSA, ECHA and the European Banking Agency may be exempt from the requirement is disturbing. Even if there was extensive consultation by the agencies, the drafts may have been amended in important ways and the Commission has the right to change their recommendations.

While the Communication addresses stakeholder consultation at length, it is less clear on how this information is to be used. It would be helpful to provide additional guidance about methodologies for evaluating the comments received. The tool box does, however, rightly underscore that all impact assessment reports must include a report on the substance of those comments.

Further, the regulatory guidance on how the Commission and its agencies should conduct highly technical risk assessments could be usefully improved by providing greater details on the methodologies that should be used. In the past, Commission analyses have often lacked consistency in the assumptions and the quality of data used in making these calculations. This is particularly important as these determinations serve as a baseline for many regulatory decisions.

The new Guidance for assessing the impact of a proposed measure on trade is far more detailed and useful than previous guidance, and it is more explicit about considering the impact on imports as well as exports. This is a step forward. But this is another instance in which both the guidance and the toolbox should be more explicit about where officials should go to get information, what they should report, and the methodology to be used.

Finally, the role of the Regulatory Scrutiny Board should be carefully watched. Beyond a name change and an appearance of greater independence, it has been granted little new power or authority and remains insulated from stakeholder input. That said, it

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did importantly gain the gift of time as Board members will now be dedicated to regulatory review rather than doing it in addition to their full-time job.

The Better Regulation Package is indeed a step in the right direction, and we are heartened that the Commission is willing to entertain critiques such as this and to continuously amend and improve the Guidance. Achieving better regulation is a lengthy

journey, and course corrections will be needed along the way. We applaud the Commission for its leadership in bringing forward this package, as we support the goals of better regulation and evidence-based decision making. But while aspirations are important, discipline in execution will ultimately determine whether and when the EU will arrive at its desired better regulation destination.