

Which Results? Better Regulation and Institutional Politics

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How can one not applaud the renewed better regulation agenda launched by the First Vice President Timmermans? Finally this fuzzy reform field is in the hands of a strong executive politician with the authority to make substantial progress on an agenda that always appeared good on paper, but somehow did not deliver against the expectations it defined for itself. 'Better regulation for better results' not only promises tangible results, but it combines this with the ambition of 'changing how we work at the European level'. This ambition should provide us – as citizens, stakeholders and scholars – with an opportunity to essentially present a scorecard concerning these results in the near future. And, indeed, experts and other stakeholders in the better regulation game do welcome the initiative.¹

My view on this agenda² is that the promise of 'better results' will be hard to deliver, whereas the ambition of 'changing how we work' is more likely to materialize in one way or another. Those actors pushing the agenda might actually subscribe in good faith to the stated objectives of a 'balanced agenda' (p. 6), such as 'consulting more, listening better' (p. 4) as well as 'focusing on the things that really do need to be done by the EU and making sure they are done well' (p. 3). However, achieving such laudable goals will be difficult, both for inherent features of the 'better regulation' toolbox and the design of this partic-

ular agenda. At the same time, it is more likely that, when implemented, the programme will have some impact on the institutional relations within the complex web of EU-policy-making. Following a political economy perspective, we can go as far as assume that such changes are intended, and possibly more important for the actors pushing the agenda than the laudable goals as formulated in the programme. Better regulation presents itself as a politically neutral agenda to improve the inner workings of the bureaucratic engine room of policy making. Politics is (supposedly) factored out of policy making. However, the design of better regulation procedures and institutions has implications for the political game that policy making also is. Let us briefly discuss the two issues – 'results' and 'institutional politics' – in turn.

I. Why Should it Be Difficult to Deliver Results?

First, because better regulation reforms are notoriously difficult to implement and evaluate: Their cross-cutting nature and the very indirect logic of intervention – via procedural rules (such as those regulating consultation or prescribing an impact assessment procedure) that should lead to changes in the way regulations and policies are developed and at some point lead to better outcomes – make an 'objective' assessment difficult.³ If 'results' are measured at the output level, i.e. compliance with procedural standards of better regulation (as it is done in much of the applied research in the field), we fall into the trap of 'naïve institutionalism'⁴ and believe that formal changes equal real changes, including the change of informal practice. Consider an impact assessment regime prescribing that a legislative initiative (or an important non-legislative initiative) should be based on a careful consideration of various regulatory and non-regulatory options; further assume that the final legislative proposal has been made on the basis of an impact assessment that indeed considered various options *and* that the option with the most beneficial

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1 See for example the German 'Normenkontrollrat' in his press release from 16 May 2015, http://www.normenkontrollrat.bund.de/Webs/NKR/Content/DE/Download/2015-05-19_pm_better_regulation.pdf?__blob=publicationFile&v=3 (retrieved 17 June 2015).

2 European Commission 'Better regulation for better results – An EU agenda', Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2015) 215 final, Strasbourg, 19.5.2015.

3 Cf. Martin Lodge and Kai Wegrich 'Managing Regulation: Regulatory Analysis, Politics and Policy' (Palgrave Macmillan, 2012), chapter 10.

4 Alasdair Roberts 'The Logic of Discipline' (Oxford University Press, 2010).

cost-benefit ratio has been selected and put forward as the legislative proposal of the Commission. If these conditions are met, should we assume that the impact assessment has actually driven, not to say caused, the selection of the option that ended up as winner? Or, is it also plausible that there was already a preferred option when the initiative was formally launched, based on a long process of support-building and compromise-seeking? Is it not also plausible that in the technicalities of the impact assessment, the evidence that supports the initially preferred option has received a more prominent treatment than the other options? Or that competing options are formulated as straw men that will definitely not survive scrutiny? If we assume that politicians and bureaucrats are smart, we should also assume that such gaming of better regulation procedures is happening.⁵ So, compliance with formal procedural rules is (maybe) a necessary condition for better regulation to work, but definitely not a sufficient condition. Some authors have argued that the constraints of too-tight procedures will lead to a style of regulatory design that is less problem-adequate⁶ because options have to be measureable and hence simple (rather than a complex combination of different regulatory and non-regulatory options). If, however, evaluation is shifted to the outcome, results will be contested between different actors. What can be considered 'better' is in the eye of the beholder: A reduction of red tape for one stakeholder is the scrapping of critical regulatory standards for another. Different actors will therefore assess the 'results' of the better regulation agenda very differently, depending on where they 'sit'.

Despite all its focus on results, the Commission's new better regulation agenda does not offer much in terms of approaches to achieve these results and to deal with the recurring challenges of any better regulation agenda. Concerning a second evaluation challenge (stakeholders' divergent views on good regulatory outcomes), the agenda promises to be 'balanced', based on 'clear objectives' and taking into account all regulatory and non-regulatory options in the search for the solution offering the most beneficial cost-benefit ratio. And, while the cutting back of red tape is an important goal, so is the protection of workers or sustainability. To be sure, saying something different in such a document would be risky politically, but these are indeed very vague statements concerning 'results'. To tackle the first problem of achieving 're-

al' (rather than formal, box-ticking) compliance with better regulation standards, the Commission attempts to strengthen 'independent' scrutiny of impact assessment. The Impact Assessment Board is remodelled as the independent 'Regulatory Scrutiny Board'. The idea to increase the board's independence for a more objective evaluation of the quality of impact assessments has been floated since the perceived success of independent watchdogs in member states such as Germany. However, the scrutiny board has a much broader remit and will engage much deeper with the substance of regulatory proposals than, for example, the German 'Normenkontrollrat'. While the reform might have an impact on (formal) compliance with better regulation standards across DGs, together with the Refit platform as the other substantial pillar of the new agenda, it might have a stronger effect on the executive politics within the Commission and the inter-institutional politics.

II. Why 'How We Work in Europe' Is Likely to Change

The better regulation agenda is of course not the only and also not the most important venue for changing institutional power balances. Nonetheless, observers and stakeholders should be aware of the implications the new better regulation agenda might carry for the relation between the institutional players in the EU, and also for the style of policy making. What kind of changes can be anticipated?

Within the Commission the agenda suggests further strengthening of the core executive around the presidency. In 2010 Radaelli and Meuwese argued that better regulation should be seen as a tool to recalibrate institutional power relations, and with respect to the executive politics within the Commission they claimed that: 'The Secretariat General's preference is to evolve from a sort of *primus inter pares* with loose coordination power to a UK-style

5 A systematic empirical investigation of the extent of such gaming of better regulation strategies is still not available. But anecdotal evidence suggests that such strategies are used, and the 'straw man' strategy might actually be induced by signals from the higher echelons of the hierarchy.

6 Robert Baldwin, 'Better Regulation: the search and the struggle', Robert Baldwin, Martin Cave and Martin Lodge (eds.), *The Oxford Handbook of Regulation* (Oxford University Press, 2010), pp. 259 *et seqq.*

cabinet office that effectively steers policy formulation.⁷ The Juncker presidency has started out with a clear agenda to strengthen the core executive, not least by introducing the position of a First Vice President; the better regulation agenda should arguably do its bit to contribute to this strengthening. Such a development should, in general, be welcomed, given the challenge of coordination across 28 Commissioners and the problem of fragmented policy making in the EU.

However, using the better regulation agenda to do so could be problematic. As mentioned above, better regulation hides fundamental differences about political and regulatory choices behind a language of 'common sense' (the balanced agenda, what works etc.). If the agenda is used to hide genuine political choices, such as reducing regulatory standards, it does not contribute to more transparency or political accountability. Future assessments of the Commission's better regulation activities should evaluate how the Commission's core executive has made use of 'common sense' language of 'what works' for making political choices. My concern is that political preferences will be wrapped in the language of 'evidence-based policy making', which makes a more inclusive deliberation on contested issues more difficult. As we know from the agenda-setting literature in political science, a technical language that only the insiders speak is a popular strategy of agenda control.⁸

With respect to the Parliament (and the Council) institutional politics concerning the appointment of members of the Regulatory Scrutiny Board will further extend the power game into another round (given that three of the six members (plus the Chair) will be Commission officials, while the other three should

be independent experts). Note that the better regulation agenda comes with a proposal of the Commission for a new 'Interinstitutional Agreement on Better Regulation' between the EP, the Council and the Commission. While impact assessments had some appeal for the EP as a tool to hold the Commission accountable, they also carry the risk of making Commission proposals 'bullet-proof' and making later changes to legislative proposals more difficult – or at least to establish parameters for deliberations in the Parliament, which is exactly what the Interinstitutional Agreement seeks to do: In the section on impact assessment, the draft agreement states that '*Prior to the adoption of any substantial amendment to the Commission proposal, at any stage of the legislative process, the European Parliament and the Council will carry out impact assessment of the amendment. As a general rule, the Commission's impact assessment will be the starting point for that additional impact assessment work.*'⁹

This development has to be considered in the light of recent changes in the architecture of EU governance. The traditional 'Community method' of policy making with the Commission in the driver's seat as the sole initiator of legislation is increasingly sidelined by a range of intergovernmental forms of decision making around Euro crisis management and economic policy making more widely.¹⁰ While some scholars suggest that the Commission could surprisingly strengthen its position among the EU institutions,¹¹ it is also clear that we are witnessing a continuing re-calibration of the EU's institutional architecture. Of course, if better regulation would contribute to such a re-calibration by introducing more transparency, increasing participation and deliberation and more effective delivery of results - in short: better policy-making – this should be a highly welcomed development. Yet, I am concerned that these benefits will not materialize because of the inherent nature of better regulation policy and the lack of any breakthrough innovations in the way the new agenda of the Commission is designed and pursued. My expectation is that we will have more of the same in terms of better regulation – with the tools and procedures being used and gamed according to political logics. I am also concerned that the justification of political choices with better regulation tools will contribute to the further 'technocratization' of EU policy making.

7 Claudio M. Radaelli and Anne CM Meuwese, 'Hard questions, hard solutions: proceduralisation through impact assessment in the EU', 33 *West European Politics* (2010), pp. 136 *et seq.*, at p. 142.

8 Frank R. Baumgartner and Bryan D. Jones 'Agendas and instability in American politics' (University of Chicago Press, 2010).

9 European Commission 'Proposal for an Interinstitutional Agreement on Better Regulation', Communication from the Commission to the European Parliament and the Council, COM(2015) 216 (final), Strasbourg, 19.05.2015.

10 Cf. for example Sergio Fabbrini, *Which European Union?*, (Cambridge University Press, 2015).

11 Michael W. Bauer, Michael W. and Stefan Becker, 'The Unexpected Winner of the Crisis: The European Commission's Strengthened Role in Economic Governance', 36 *Journal of European Integration* (2014), pp. 213 *et seq.*