

Contribution to the *Better Regulation* Debate

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Two inter-related themes provide the architecture of this better regulation package: the political tone of the initiative and the responsibility/blame game. The tone is in part the consequence of the political context surrounding regulatory policy in the EU. Whilst in the past regulatory quality standards interested only a few top civil servants and elected politicians, today there is much more political interest – and contestation, as shown by the new better regulation watchdog created by non-governmental organizations and their response to the package.¹ The very fact that in May 2015 there was media interest in the leaked version of the *chapeau* communication is a novelty. Why so much attention? Among others, the rhetoric of the past few years on making the EU acquis fit for purpose and less burdensome, coupled with a growing recognition by stakeholders that impact assessment and policy evaluation are "here to stay" have turned better regulation into an additional window of opportunity for those wishing to influence EU policy-making.

But partly this has to do with the Commission's awareness of the gravity of the political context. Gone is the triumphalism of previous communications on regulation and governance. Juncker and Timmermans believe that the EU has to change to regain the confidence of citizens and markets, and that the ability to deliver is more important than the rhetoric of leading Europe and Europeans towards a bright fu-

ture. Actually, there is still a bit of *grandeur* in the fact that instead of making a limited number of concrete proposals, the Commission showers its readers with a colossal number of pages – to illustrate, the toolbox runs for an epic amount of 414 pages. Arguably, this over-reaction is a feature of organizational memories: when attacked, the Commission re-launches by setting the bar of expectations very high rather than sticking to a few precise points – the mechanism behind these memories is described in Lang et al.²

But the political tone is also connected to very concrete problems of attribution of responsibility and blame – the second theme. Remember that this package is the Commission's vision. It is useful to contrast it with the vision proposed by the member states in 2001, with the Mandelkern Group on better regulation.³ Mandelkern was concerned with the poor management of the regulatory system by the Commission. Accordingly, it advocated for alternatives to regulation, robust ex-ante and ex-post regulatory evaluation, simplification, consultation, access to regulation and oversight institutions. A demanding 'instructions sheet' for the Commission, as well as for the other institutions.

Today, the Commission kind of answers to Mandelkern arguing that its officers are entirely committed to regulatory quality – as shown by the single set of guidelines on better regulation, covering the whole policy cycle. But from now on the Commission will not accept taking the blame for something that it has not done. It is in this vein that we should read the Commission's proposal for a new inter-institutional agreement on better regulation, after the poor results of the 2003 agreement. All too often – the Commission seems to reason – proposals for new regulation come out of the Berlaymont with their impact assessments – but then major amendments are introduced by the EP and the Council, without subjecting them to IA. The Commission should not be blamed for the regulatory costs arising from these amendments. Thus the proposal states that any of the three institutions can activate an expert panel when significant amendments are not impact assessed. It is reason-

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1 Better Regulation Watchdog Network. 2015. Open letter in response to the Commission proposal for an inter-institutional agreement and the Commission communication on better regulation results.

2 Lang, A. Radaelli CM and J Tosun. 2015. Organizational bureaucratic memories and policy over-reactions. Policy integration in the European Commission. Paper delivered to the joint sessions of workshops of the European Consortium for Political Research, Warsaw, 29 March – 2 April 2015.

3 Mandelkern Group on Better Regulation. 2001. Final report. http://ec.europa.eu/smart-regulation/better_regulation/documents/mandelkern_report.pdf

able to assume that the Commission is more interested in activating the panel than the two other institutions. The Commission for example could threaten to call the panel to examine the effects of major changes – absent the EP's IA of these changes. The panel mechanism is a proposal, and the final agreement may differ on this point. But it is indicative of the attitude of the Commission about responsibility and blame.

With the same logic, the Commission demands detailed information on additional regulatory costs introduced by the member states. In exchange, it offers to open up the system to different layers of consultation. It also opens its Regulatory Scrutiny Board to three external experts – but it does not go as far as to make the body independent and to give it a right of veto on proposals supported by poor IAs. Although it is too early to say, the (in)famous trilogues might also be covered by the IIA negotiations. How will a strong request for comprehensive policy appraisal be reconciled with the practice of reaching first reading agreements behind closed doors?

Will the package work? Is it inspired by a de-regulatory vision? Actually the possible de-regulatory vision that worries the social and environmental pressure groups has less to do with better regulation than with subsidiarity. The Commission has already withdrawn 73 pending legislative proposals, alerting the European Court of Justice (Case C-409/13) as well as NGOs. But this decision comes from Timmermans and Juncker's reasoning about subsidiarity: this is more a question of +/- subsidiarity than an issue of +/- regulation. In terms of delivering on 'closing the policy cycle' with an integrated regulatory management approach, the questions to ask are about strategic and operational management, and whether the institutions have the analytical capacity to manage the increased flow of consultation and impact assessments – now extended to implementing and delegated acts, under certain conditions.⁴ The availability of such additional capacity to cope with an increased

workload is less than certain. Moreover, some institutional resources will have to be re-directed from ex ante IA efforts (given the much shorter CWP) to a deeper evaluation of the existing acquis. The required skills and mindset are not necessarily the same. Another problem is that although the package is very big, it does not say much on crucial issues. We are thinking in particular of alternatives to traditional regulation (there is something on pages 87-93 of the toolbox, contrast this with the prominence the theme had in Mandelkern). The big agenda of nudging Europe, that is to draw on cognitive and behavioral economics to design regulation, apparently, is also not very interesting for the Commission. Neither is there a lot of enthusiasm for quantitative targets, indicators of regulatory quality and strong commitment to a method or another. Contrast this with the OECD's Framework for Regulatory Evaluation,⁵ where regulatory indicators are endorsed as the main way to manage and communicate regulatory reform, and to build strategic management. To 'close the policy cycle' surely requires a single set of guidelines. But fundamentally we also need to know about who does what and how the different actors will be accountable for their results, how these results will be measured and in what type of institutional forum. It would be unfair to ask the Commission to tell us all that. Indeed, these are questions for all the EU institutions and the member states.

In short, there are dogs that did not bark in the package. And as Sir Arthur Conan Doyle taught us, the absence of expected facts is always illuminating. Perhaps the EP and Council's dogs will bark instead...otherwise expect the business community and citizens to bark in anger.

4 Andrea Renda, *Too good to be true? A quick assessment of the European Commission's better regulation package* (Brussels: Centre for European Policy Studies, 2015).

5 OECD, *A framework for regulatory evaluation* (Paris, OECD publications, 2014).