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Better Regulation Package:

Regulating More or Regulating Less?

What's Juncker got to do with it?

Better regulation is not a novelty, but a continuation of previous efforts through different means. This time around, there were great expectations from the package and its influence on policy formulation, implementation, monitoring and evaluation. From the onset, Commission President Juncker showed unequivocal political support for the better regulation agenda. A clear indication was the fact that within the 'two-tier' College of Commissioners, the senior strand was to be led by Frans Timmermans, the First Vice-President responsible for *inter alia* the better regulation portfolio. Such an action spurred a lot of hope of the magnitude of reforms aiming at the simplification and streamlining of superfluous EU legislation. According to Juncker's mission letter to Timmermans, every new initiative will have to go through and receive the green light from the VP in order to assure the respect of subsidiarity and proportionality, and to reduce the activity of the Commission to merely those which genuinely represent added value if acting on the EU level.

Juncker showed unequivocal political support for the better regulation agenda from the beginning of his term.

Timmermans introduced on 19 May five proposals under the Better Regulation Package.

The goal was to assure that EU initiatives and activities are delivering in terms of effective solutions, but are also respecting the principles of transparency and inclusiveness across policymaking stages so as to limit the administrative burdens on the stakeholders. Indeed, Timmermans on 19 May introduced five proposals under the Better Regulation Package – a proposal for an Inter-Institutional Agreement; communications on Better Regulation, Regulatory Scrutiny Board, and REFIT; as well as extensive guidelines on better regulation and impact assessments (IAs). It undeniably raises the importance of IAs in all stages of the EU decision-making process and aims thus to strengthen the consultation and feedback as well as the quality assurance mechanisms across institutions. This article will go through the main changes that the packages bring to conclude on their feasibility in the near future, and relevance to Serbia.

Impact assessments as the Commission's Trojan horse?

The European Commission introduced IAs from 2003 so as to ensure *ex ante* appraisal of the economic, social, and environmental impacts of all major initiatives to be adopted. The goal is that IAs will help illustrate the costs and benefits of policy options thus facilitating selection of optimal, evidence-informed decisions. The guidelines have been revised a couple of times since, while member states have also picked up the methodology but have given it a particular national 'twist': similar to CEP's conclusion on the implementation of regulatory impact assessments in Serbia, research shows that IAs evolved from being mere administrative requirements to justifications of legal solutions.¹

¹ Andrea Renda, Too good to be true? A quick assessment of the European Commission's new Better Regulation Package, CEPS Special Report No. 108, April 2015, p. 3.

The Parliament joined the IAs bandwagon in 2012, and today the Directorate for Impact Assessment and European Added Value under the Parliament's Directorate-General for Parliamentary Research Services is composed of separate units in charge of *ex ante* IA, *ex post* IA, and policy performance appraisal. Following its reluctance to implement the 2003 Inter-Institutional Agreement on Better Law-Making and the 2005 Inter-Institutional Common Approach to Impact Assessments, the Council is not yet on board with these developments, which means that tensions can arise. So why would the 2015 package be any different? The Commission introduced the possibility to assist the other two institutions in carrying out IAs. Experts claim that in this way it opens the possibility to step in if any of the other two institutions lags behind with its IAs.² On the downside, the layers of IAs across every institution may create an "[onion effect](#)" that will hold up rather than accelerate the decision making.

However, as the majority of legislation is adopted through the ordinary legislative procedure, all the institutions participate and amend the Commission's proposal, while the IA accompanying the initial proposal does not change. Claims were that IAs are redundant in the Parliament due to the institution's logic of decision making (democratic representativeness rather than technocratic legitimacy as it is the case with the Commission). Whereas, in the case of the Council, it was argued that since representatives are member states' executives, they articulate common positions developed within their respective administrations.³ However, these arguments seem to miss the point of why IAs are actually necessary: they do not serve to legitimise already articulated decisions/positions but to predict how they will affect the citizens, economy and environment. If IA is done only by the Commission at the onset and is not reviewed later in the process, following amendments, the impact of the final policy instrument will be uncertain. Finally, an IA done early will be of limited value for the member states when transposing and implementing them in the national systems.⁴

The European Parliament showed clear commitment to conduct IAs in 2011, which was followed through a year later. The European Council still remains reticent in joining these efforts.

Impact Assessments are a powerful consultative tool which can be used in the early stages of policy formulation, thus promising a substantial level of engagement and influence.

What's in it for the civil society?

As [CEP previously emphasised](#), and the IA guidelines stand in support, the policy formulation is the stage with the greatest impact on the final policy product in the policy cycle and is therefore the most conducive to consultations and dialogue, while [IAs are a helpful tool](#) towards this goal. While supposedly the Commission consults external stakeholders the most intensively during the formulation of a policy when it needs the most technical expertise and support, critics point out that draft IAs are not made publicly available, which in turn prevents public interest groups from contributing to the process. Conversely, as explained in the previous [CEP Insight](#), business interests use different lobbying techniques for direct contacts and meetings with policy and decision makers, so they are claimed to have substantial impact. Additionally, consultations are said not to have been timely, but either premature or overdue.

This criticism was to an extent mitigated with the platform [Lighten the load – have your say](#), which serves as an online interactive tool to collect views on existing EU legislation so as to scrap or improve it, as well as opinions on new initiatives. Individuals and groups give a description of the problem, and even suggest improvements, and estimate the savings if these were implemented. These entries are then examined by the Commission and may be taken up to choose actions for simplification and burden reduction under REFIT. Since 19 May there have been only 20 [registered contributions](#), with the majority coming from citizens (9) and 6 from business associations. All of them have received publicly available feedback from the Commission.

But what is perhaps more relevant for the civil society are the consultations introduced in three separate stages: 1) on Roadmaps and inception IAs, 2) upon the adoption of legislative proposals by the Commission, and 3) on implementing and delegated acts. The novelty of the package is the promise to consult before and during the proc-

² Ibid.

³ Anne C. M. Meuwese, *Impact Assessment in EU Lawmaking*, Kluwer Law International, 2008, p. 123.

⁴ Renda, p.7.

The European Commission's Regulatory Fitness and Performance programme (REFIT) is seen as signalling the institution's deregulatory preference.

ess of drafting IAs, of course only in cases of major initiatives so as to avoid bottlenecks with minute regulatory changes. The consultation period is to last for eight weeks following the Commission's adoption of its proposal and impact assessment, in parallel with the consultation process for national parliaments.⁵ In respect to delegated and implementing acts of "significant impact", the obligation to conduct IAs and accordingly month-long stakeholder consultations is a renewed commitment from 2008. Such an obligation for these technical, non-legislative acts, however, risks reducing IAs to a "tick-the-box" exercise, not least because it is a time consuming endeavour. The consultations are all done online through the portal [Your Voice in Europe](#).

REFIT more than meets the eye?

In terms of existing legislation, REFIT will signify repeals of unnecessary legislation, simplifications of complex legislation, codification and recasts of amended legislation, fitness checks (i.e. examining the EU added value of legislation), cumulative cost assessments of the legislative effect on competitiveness, and evaluations of the enforced legislation. In order to make the REFIT process transparent and all-encompassing, a REFIT Platform was established and will be chaired by Timmermans. It gathers on the one side a government group comprised of 28 appointed experts from national authorities, and on the other, a stakeholder group comprised of a maximum of 20 experts representing the private and non-profit sector as well as an expert from the European Economic and Social Committee and one from the Committee of the Regions. However, there is [a lot of scepticism](#) regarding the selection of experts and the accountability of these mechanisms given their increased role in policy making.

REFIT will also ensure that legislative proposals that reach a stalemate are scrapped so as to avoid clogging the system and facilitate identification of alternative instruments to

hard law. In this context, civil society fears REFIT will be used as an excuse for taking a deregulatory stance favouring corporate and business interests at the expense of public ones. For instance, the withdrawal of the Circular Economy package led to the outcry of [environmental NGOs](#) as well as certain MEPs such as the Greens. In response, 58 consumer, environmental, development, citizen and public health organizations, trade unions and social justice-oriented organizations created the Better Regulation Watchdog, a network aimed not only at following the developments on the better regulation agenda and participating in the policy making process, but also at raising the awareness that reducing regulatory burdens can be at the expense of public interests. The most recent withdrawal of the Commission's proposal concerning the Maternity Leave Directive, which was stuck in the legislative process for four years due to the Council's inability to agree on a common position, led to extensive campaigns and media hype. This case shows that Timmermans will not hesitate to use REFIT even when a wide-reaching backlash can be expected.

What are the odds?

It is in the cards whether the Commission's intended objective will indeed materialize itself or will fall short of fulfilling the Juncker prophecy of "a European Union that is bigger and more ambitious on big things, and smaller and more modest on small things." The package itself is estimated as perhaps even overly ambitious as the overview above points out. The example of the Maternity Leave Directive shows that this approach could also be a pretext for scrapping useful regulation that would further citizens' rights and benefits, thus indicating a diminished ambition to pressure the Council, since big topics are open to discussion and politically sensitive for member states' governments. However, evaluations of the Commission working programme claim that there are no particular preferences for deregulation on the agenda. If looking at the

⁵ Communication from the Commission to the Parliament and the Council, Proposal for an Interinstitutional Agreement on Better Regulation, COM(2015) 216 final, Strasbourg, 19 May 2015.

Juncker's mantra of "a European Union that is bigger and more ambitious on big things, and smaller and more modest on small things" promises to revamp the institutional logic of the Commission.

efforts a prioritising regulation, perhaps Juncker's political Commission will indeed overhaul the notorious reputation of a technocrat Commission that regulates on every minute issue. One should keep in mind, though, that regulating better need not mean regulating less, yet finding the best possible solution to the targeted policy problem.

Does this matter to Serbia?

The Serbian Public Policy Secretariat of the Republic (PPS), established with the incumbent Government a year ago, took up, among other responsibilities, the mandate to give opinions on IAs submitted by ministries. More importantly, it is the institution driving the reform of the policy making and coordination system and providing support in strengthening the evidence basis of public policies, their alignment and budgetary considerations. Given that it is currently in the process of developing a legislative package on policy planning, which will include a methodology for managing public policies and impact assessment, the timing is right to follow closely the Commission's efforts in this domain, as a source of both inspiration and lessons learnt. As EU regulatory policy is strongly driven by the necessity to justify itself, the EU level IAs are probably the purest examples to be found across the EU – both methodologically and in terms of the actual application. Though the national level political constraints will certainly prevent this pure form to be fully emulated in any member or candidate state, including Serbia, the opportunities for learning from EU practice are ample. This point becomes ever more important in Serbia's EU accession negotiations, where proper and unbiased assessment of the impacts of full implementation of the *acquis*, well informed by relevant stakeholders' views, can determine the outcomes of the negotiations in several chapters, [as has already been argued by CEP](#). The transition from the present practice of conducting IAs *pro forma* to a practice of utilising IAs as a negotiating and communication tool will require a significant change of mind-set and intensive awareness-raising, which can be strongly supported by insights into the importance given to IAs and better regulation at the EU level as well as positive EU practices.

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The Serbian Public Policy Secretariat of the Republic could take up valuable lessons from the Commission's recent efforts at reform, particularly in terms of stakeholder participation in the process.

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