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Two decades of Better Regulation in the EU Commission – Towards evidence-based policymaking?*

Executive summary and discussion: Towards a solidification of Better Regulation

Context: towards a new Commission in 2019

The European Commission is a recognised leading organisation when it comes to shaping EU laws and policies, and to setting the standard of good governance (to be understood here especially as ‘better regulation’ – BR). As concluded earlier, the mechanisms developed in the Commission to ensure regulatory quality have, already for some time, been among the highest in the world.¹ By any standards, its ability to

deliver integrated policy assessments is a remarkable achievement. Considering that in the 1990s the Commission apparatus was highly fragmented and political, this world-leading standard when it comes to impact assessments is particularly impressive and the Commission is constantly looking for ways to improve its BR policy. The past decades have seen continuous efforts by the Commission to complement political decision-making with independent, accessible and scientifically sound assessments of policies throughout the policy cycle.

In 2019, after the European Parliament elections, a new Commission will succeed the Juncker team. This makes it relevant to assess the current state of play as regards BR under the (‘very political’) Commission Juncker and to discuss possible adaptations. This paper is accompanied by a paper on the extent to which EU agencies have delivered on the expectations that they would offer independent fact-based policy analyses,² and a paper on European Added Value of EU policies.³ Together, these documents indicate that the Commission’s Better Regulation policy has come far indeed but also that issues have remained as regards fact-based policymaking in day-to-day policy

* This paper is part of three papers on EU Agencies, EU Added Value and the EU’s Better Regulation policy that, together, give insight into the state of the EU’s efforts to strengthen evidence based policy making in the EU. These papers are: Schout, A. (2018), *EU agencies after 25 years: a missed opportunity to enhance EU governance*, The Hague: Clingendael Policy Brief, and: Schout, A., D. Bevacqua (2018), *EU Added Value – Fact-based policy or politicised facts?* The Hague: Clingendael Policy Brief. They can be found on [the Clingendael website](https://www.clingendael.nl/en).

1 Schout, A. & Sleifer, J. (2014) ‘Expertise at the crossroads of national and international policy making: a public management perspective’ in Ambrus, M., K. Arts, E. Hey & H. Raulus (eds.) *The Role of ‘Experts’ in International and European Decision-making Processes* Cambridge: Cambridge University Press. OECD (2018), *OECD Regulatory Policy Outlook 2018*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264303072-en>.

2 Schout, A. (forthcoming) *EU agencies after 25 years: a missed opportunity*, The Hague: Clingendael Policy Brief.

3 Schout, A., D. Bevacqua (2018), *EU Added Value – Fact-based policy or politicised facts?* The Hague: Clingendael Policy Brief.

making. Given the enormous breadth of the themes EU agencies, EU added value, and the regulatory quality of EU legislation, the findings can only be tentative and more in-depth and sectoral research is required. Moreover, the Commission Juncker is still finalising its current strategic agenda.⁴

In essence, this paper on BR, and the papers on EU agencies and EU Added Value, point to a paradox that on the one hand the Commission is, and is regarded as, a politicised body (also e.g. when it comes to its independent macroeconomic supervision of member states⁵) while on the other hand, the Commission aims at evidence-based policy making (based on ex ante assessments and ex post evaluations). Trying to combine a political as well as an independent role creates, as also appeared in interviews with policy experts outside the Commission and with politicians, a credibility problem for the EU Commission. This, ultimately, leads to questions regarding the available systems of checks and balances: if the Commission is partly political how can we ensure the credibility of fact-based policymaking (e.g. in its claims of Added Value or in its supervisory tasks)?

The point put forward here is that, if only for reasons of credibility, a decision has to be made about separating political and analytical tasks. This point is far from new. However, with the growing role of the Commission and following its further politicisation (see below), the legitimacy of its checks and balances have grown in importance.

General findings and discussion

This scrutiny of the Commission communications and initiatives and of the literature over the past two decades shows the following:

4 https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-short_en.pdf.

5 'EU Fiscal Board blames Commission of ineffective recommendations', <https://www.euractiv.com/section/economic-governance/news/eu-fiscal-board-blames-commission-of-ineffective-recommendations/>.

- 1) Better regulation is a complex objective. BR methodology assists, first of all, the College of Commissioners in their decision-making by offering fact-based evidence that supports their political decisions on what the most effective and efficient ways are to address problems. The political objectives of the Union's action are multiple and vary across policy areas and over time. Hence, the BR framework needs to collect evidence on a large array of impacts. At the same time, BR processes, such as data analysis and consultations, serve a variety of overlapping purposes including creating transparency, facilitating communication, and laying the basis for ex-post evaluations. The multifarious methodologies contribute to better assessments of whether new policies and the existing stock of legislation are fit for purpose. Yet, as underlined in the literature, the BR agenda has become a collection of varied goals, including policy simplification, prioritisation, consultation, rationalisation, communication and cost reduction, which has led to criticism of inconsistent objectives and of growing politicisation of BR. The multifarious nature of assessments and evaluations underline the need to safeguard the *reputation* of the BR framework.
- 2) Implementation of BR procedures and principles remains a challenge:
 - a. The Commission has incorporated BR guidelines in its rules of procedures, including a new (semi-) internal quality control mechanism (the regulatory scrutiny board). However, the European Parliament and in particular the Council are slow in applying BR methodologies. As a result, the quality control focuses on Commission proposals, not on the final policies that result from the negotiations.
 - b. Major Commission initiatives are not accompanied by impact assessments and the literature points to major questions regarding the quality of impact assessments (including about methodological issues).
 - c. Costs of assessments are an obstacle in a diversified EU of close to 30 member states.

- d. Within the Commission, adherence to IAs has been variable. As a result, the Commission has created a world-class BR system⁶ but questions remain as regards the application.
- 3) Juncker's priority to be 'big on big and small on small' seems to have been successful in focusing attention on specific policy areas but it competes with demands for more legislative detail from member states, European Parliament, industry sectors, international regulatory standardisation organisations and from within the Commission. Further assessment is required to see whether the level of detail in Juncker's legislative packages has indeed gone down. There is also a trade-off between full-cycle evidence-based policymaking and reducing the volume of legislation: the former may require updating old legislation, which may conflict with the Commission's objective to reduce overall regulatory burden and its predefined political strategic agenda. Moreover, what is 'small' is ultimately a political assessment. Views on the importance of, for example, EU legislation on parental leave differ between member states.
- 4) As concluded by Russel and Radaelli (2015), the EU's Better Regulation Agenda is in danger of becoming another case of '[scaling] up in ambitions and [engaging] with grandiose narratives of "governance"'⁷ rather than an exercise in realistically determining what objectives are achievable and how. 'European Added Value' is an example of a notion that suggests a factual foundation and it is often used in Commission documents but that is hard to substantiate. Such a notion, as well as major assessments without assessments, risk creating the impression of unsystematic application of evidence-based principles.

6 OECD (2018), OECD Regulatory Policy Outlook 2018, OECD Publishing, Paris, <https://doi.org/10.1787/9789264303072-en>.

7 Dunlop, C. & C. Radaelli (2015), 'Impact Assessment in the European Union: Lessons from a Research Project', Symposium on Policy Evaluation in the EU, *European Journal of Risk Regulation*, 5(1), p. 33.

Discussion and points of attention for the next EU Commission: Solidifying trust

- 1) One way to increase trust could be to create a truly independent quality control system by carrying out quality control on IAs and on ex-post evaluations of policies independently of, and outside, the Commission. Moreover, tasks that require independent assessments and monitoring should be separated from more political components of BR such as stakeholder engagement.

As regards control on impact assessments, this implies placing the Regulatory Scrutiny Board outside the Commission. In relation to ex post evaluations of policies, the role of the European Court of Auditors could be elaborated.

This discussion about a truly independent quality control is not new. The OECD underlines the importance of keeping quality control closely connected to policymaking. Also the Commission has insisted on keeping quality control within its own organisation – and for understandable reasons.⁸ However, to ensure trust, we would emphasise the importance of independent and external checks and balances.

A separate RSB, however, creates the danger that it can be easily ignored. Hence, its relevance needs to be assured by the quality and independence of its staff, and its connection to the policy process should be legally safeguarded. One option would be to anchor it in the EU Treaty or to strengthen it in the rules of the procedures of the Commission, EP and Council. The RSB could monitor proposals as well as the outcomes of the negotiations.

To ensure member states' ownership of new proposals and the related impact assessments, it is advisable to sharpen the first discussion of a Commission proposal in the Council by stating in the rules of procedure of the Council of

8 Smulders, B. & J.-E. Paquet (2018), 'The European Commission and its Better Regulation Agenda' in S. Garben & I. Govaere (eds.) *The EU Better Regulation Agenda*, Hart Publishing.

Ministers that the Council adopts the proposal and recognises the quality of proposal and IA.

- 2) Evidently, impact assessments and fact-based policy cost money. A higher budget for BR to ensure evidence-based policy is required (also for the EU Court of Auditors).
- 3) This paper is about BR in its current format. BR is essentially about making ongoing EU policy evidence-based. A more fundamental question is whether EU policy is needed in the first place. What should be explored as a next step would be the inclusion of 'policy competition' as a specific BR objective of the next EU Commission. Policy competition goes further than aiming for 'small on small', subsidiarity, or proportionality. Instead of making the case for EU measures and for harmonisation, it is time to explore options for competition between member states. Relatedly, there is a tendency to work more with Regulations than with Directives. The EU is more harmonised than other federal blocks such as the US. The question that needs to be addressed is how policy competition can be sharpened also in terms of formal policy objective. As regards BR, this would imply more attention for the 'do nothing' alternative by explicitly considering the value of policy competition.
- 4) This paper is about BR at EU level. A successful BR policy, in the EU's multilevel administrative system, should be complemented with comparable BR policies at the national level.⁹ BR at EU level will only be owned by the member states if they have comparably objectives and systems. Moreover, it will be easier to deliver input in assessments and evaluations if countries can deliver comparable data. Finally, given the continued relevance of national policies, the functioning of the internal market

depends on the abilities of member states to ensure evidence-based assessment themselves. Effective BR is more than an EU policy; it should be part of a multilevel administrative culture.

I. Introduction: From 'doing less but doing better' to 'big on big and small on small'

Better Regulation (BR) principles have steadily grown in importance in the working procedures of the EU over the past two decades. Attention for quality and quantity of EU legislation and particularly of Commission proposals was triggered by Delors activism in 'completing' the internal market. Industry complained about too many complex, poorly developed, and inconsistent policies¹⁰ and criticism of EU legislation mounted, up to the point that a veritable "legitimacy crisis" came to a head in 1999 with the fall of the Commission Santer.¹¹ Moreover, already in 1996, Albert Breton argued that the EU was more harmonised than federal states such as US and Canada at the expense of policy competition between states.¹² Among the early responses to these criticisms were Delors' introduction of the principle of subsidiarity,¹³ discussions in the Netherlands about policy competition versus harmonisation,¹⁴ and Santer's ambition for

9 Schout, A., A. Mijs (2015) Expert contribution 'Better Regulation', European Parliamentary hearing on better regulation initiatives at EU and at national level: http://www.europarl.europa.eu/cmsdata/83495/STUDY_Pol%20Depart_PE%20519.222_en.pdf.

10 Everson, M., G. Majone, L. Metcalfe and A. Schout (1999): 'The Role of Specialised Agencies in Decentralising EU Governance: Report Presented to the Commission', Florence.

11 Majone, G. (2000), 'The Credibility Crisis of Community Regulation', *Journal of Common Market Studies*, 38: 273-302.

12 Breton, A. (1996), *Competitive Governments: An Economic Theory of Politics and Public Finance*, Cambridge: Cambridge University Press, p. 276.

13 Wilke, M. & H. Wallace (1990) *Subsidiarity: Approaches to Power-sharing in the European Community*, London: Royal Institute of International Affairs.

14 Geelhoed, A. (1997), '1997: een delta in Europa', *ESB*, 1-1-1997.

his Commission to “do less but do it better” in 1998.¹⁵

BR steadily developed under successive Commission Presidents: after the adoption of the Lisbon Strategy in 2000 and the subsequent 2001 “Mandelkern Group Report on Better Regulation”,¹⁶ the Prodi Commission issued a variety of communications on better law-making,¹⁷ impact assessments,¹⁸ and general principles for stakeholder consultation.¹⁹ In 2005 and 2010, the Commission renewed its commitment to better regulation under Barroso with its communications on ‘Better regulation for growth and jobs in the European Union’²⁰ and ‘Smart Regulation in the European Union’.²¹ Up to this point, commentators had been highly positive about the implementation of the BR agenda,²² despite earlier expectations that a politicised and fragmented organisation such as the Commission could not implement the needed reforms.²³

Following the final report of the “High Level Group on Administrative Burdens” operating from 2007 until 2014²⁴, the Juncker Commission revamped BR in 2015 “to deliver better rules for better results”.²⁵ The new post of the First-Vice President responsible for “Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights”, as well as the creation of a Task Force “on Subsidiarity, Proportionality and ‘Doing Less More Efficiently’” gave further impetus to the adoption of BR principles across the EU institutions.

This paper discusses the trajectory of the BR agenda by firstly reviewing the different BR priorities of the Commission Presidents since Prodi, followed by an assessment of the implementation of the individual components of BR under Juncker. It is based on a collection of evidence from academic literature and official reports, also with a view to mapping the field. In addition, background interviews have been conducted with practitioners, politicians and experts to complement the desk research.

II. Better Regulation: A multifaceted and flexible concept

The Prodi Commission (1999-2004): good governance as an ethical requirement

Following the Lisbon European Council meeting in 2000, the Mandelkern report defined ‘better regulation’ as

“[t]he policy of seeking to improve and simplify the regulatory environment. Regulation should be used only when necessary and be appropriate and proportionate to the task. It should be transparent and accessible to all and as

15 E.g. Santer, J. (1998) *Speech European Parliament*, 21 October. Peterson, J. (2015) ‘The Commission and the New Intergovernmentalism’ in Bickerton, C., D. Hodson & U. Puetter (eds.) *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era*, Oxford: Oxford University Press, p. 188.

16 Mandelkern Group on Better Regulation, *Final Report*. 13 November 2001. Available at http://ec.europa.eu/smart-regulation/better-regulation/documents/mandelkern_report.pdf.

17 COM(2001) 428.

18 COM(2002) 276.

19 COM(2002) 704.

20 COM(2005) 0097.

21 COM(2010) 543.

22 Bauer, M.W., A. Jordan, C. Green-Pedersen and A. Héritier (eds.) (2012) *Dismantling Public Policy*, Oxford: Oxford University Press. Schout, A. & Sleifer, J. (2014) ‘Expertise at the crossroads of national and international policy making: a public management perspective’ in Ambrus, M., K. Arts, E. Hey & H. Raulus (eds.) *The Role of ‘Experts’ in International and European Decision-making Processes*. Cambridge: Cambridge University Press.

23 Dinan, D. (2005), ‘Governance and Institutions: A New Constitution and a New Commission’, *Journal of Common Market Studies*, 43:37-54.

24 High Level Group on Administrative Burdens, *Cutting Red Tape in Europe: Final Report*. 24 July 2014. Available at: http://ec.europa.eu/smart-regulation/refit/admin_burden/docs/08-10web-ce-brocuttingredtape_en.pdf.

25 COM(2015) 215.

simple as possible. It should be enforceable and at European level should obey the principle of subsidiarity.”²⁶

The report emphasised the importance of impact assessments, consultations and regulatory simplification and transparency to improve the European regulatory environment. After the subsequent 2001 White Paper on European Governance, the Prodi Commission tabled the first ‘Better Regulation’ package in June 2002 to “[simplify] and [improve] the regulatory environment”, standardise impact assessments across Commission services and create a Commission internal network on ‘better law-making’. Some commentators considered the package a marked, and controversial, departure from the precautionary principle which had guided the Commission’s regulatory philosophy previously and which was still the *modus operandi* for many DGs.²⁷ Nevertheless, a greater emphasis on cost-benefit analyses was welcomed by many international commentators, particularly in the US, many of whom were worried about the supposed ‘over-regulatory’ tendencies resulting from the precautionary principle.²⁸ It is noteworthy here that, following the better regulation toolbox of 2015 (updated in 2017), the precautionary principle may still guide risk management measures if supported by evidence on the costs and benefits of applying the principle in the specific case.²⁹

26 Mandelkern Group on Better Regulation, *Final Report*, p. 81.

27 Lofstedt, R. (2007) ‘The ‘Plateau-ing’ of the European Better Regulation Agenda: An Analysis of Activities Carried out by the Barroso Commission’, *Journal of Risk Research*, 10(4): 423-447.

28 For a thorough review of the precautionary principle in US regulatory policy, see R. Percival (2006) ‘Who’s Afraid of the Precautionary Principle?’, *Pace Environmental Law Review*, 23(1).

29 “A proportionate IA should also be carried out for every decision invoking the precautionary principle which should set out the elements necessary for the exercise of the principle.” European Commission (2017) Better regulation “Toolbox”, Tool #12: Risk assessment and management, p. 73. We thank an anonymous reviewer for drawing our attention to this.

Beyond the technocratic rationale for BR as described by the Communication on impact assessments,³⁰ the Prodi Commission considered BR (at the time referred to as Better Law-making) a “veritable ethical requirement” and a necessary response to a growing “democratic conscience” by ensuring that European institutions show “the willingness to stand up to scrutiny”.³¹ Referring directly to worries expressed in the EP Resolution of November 2001, the Commission acknowledged “the primacy of political accountability behind legislative action” and “the need for more transparent, equitable and disputational consultation”. The Prodi Commission appears to have defined its BR agenda primarily in terms of accountability and accessibility. BR was seen as a way to improve the reputation of the Commission in the eyes of both the public and co-legislators.³²

The Barroso Commission I-II (2004-2014): Evaluate first and reduce red tape to promote competitiveness

The first Barroso Commission further developed BR into a more comprehensive regulatory strategy, defining BR as a means to

“better design regulation so as to increase the benefits for citizens, and to reinforce the respect and the effectiveness of the rules, and to minimise economic costs. [...] Better regulation is crucial for promoting competitiveness both at EU level and in the Member States.”³³

Barroso reinforced Prodi’s BR infrastructure by introducing impact assessment guidelines,³⁴ including a ‘common methodology for assessing

30 COM(2002) 276.

31 COM(2002) 275.

32 Topan, A. (2002), ‘The resignation of the Santer-Commission: the impact of ‘trust’ and ‘reputation’’, *European Integration online Papers (EIoP)*, 6(14); Meuwese, A. (2008), ‘Informing the EU Legislator through IA’, in *Impact Assessment in EU Lawmaking*, Leiden: Leiden University, p. 30.

33 COM(2005) 97, pp 2-3.

34 SEC(2005) 791/3.

administrative costs³⁵ and setting up the ‘Impact Assessment Board’ as a quality control mechanism for Commission IAs. In addition, the Barroso Commission put a stronger emphasis on ex-post policy evaluation, responding to a suggestion by the Court of Auditors to include “legislation and non-spending policies” in the systematic evaluation of Commission activity.³⁶ Another key element of Barroso’s BR agenda was the ‘action programme for reducing administrative burdens’³⁷, which introduced means to reach a 25% reduction in administrative burdens for European businesses by 2012. Despite these initiatives, scholars at the time saw a ‘plateau-ing’ of the BR agenda during the first years of the Barroso Commission, given disagreements between Commissioners on the relationship between regulation and competitiveness.³⁸ While Commissioner Verheugen of DG Enterprise was vocal in his belief that ‘less red tape equals more growth and jobs’,³⁹ Commissioner Dimas of DG Environment argued that ‘environmental standards drive innovation and contribute to competitiveness’.⁴⁰

At the start of the second Commission Barroso and in the immediate aftermath of the economic crisis, better regulation was rebranded, in 2010, as ‘smart regulation’, and greater emphasis was put on stakeholder consultations, further reducing regulatory burden for businesses, and on proper policy implementation (as opposed to only focusing on policymaking). A key introduction was the Regulatory Fitness and Performance Programme (REFIT), which would conduct fitness checks to evaluate the effectiveness of a range of policy actions in one policy area, supplementing DGs’

evaluations of individual policy instruments. More generally, the Barroso Commission highlighted the need to ensure that the principles of smart regulation are embedded in the professionalisation of the working culture⁴¹ of the entire Commission, and the President took “direct responsibility” for its implementation.⁴² As the October 2010 communication put it:

“Since it is the existing body of legislation, however, that creates most benefits and costs, we must make an equivalent effort to manage it more systematically. Smart regulation policy will therefore attach greater importance than before to evaluating the functioning and effectiveness of existing legislation.”⁴³

This ‘evaluate first’ culture was meant to be embedded throughout the Commission’s services by aligning evaluation planning timelines and creating an evaluation template so as to streamline the quality of ex-post evaluation activity across different DGs. In summary, while the Barroso Commission explicitly built on the BR initiative of the Prodi Commission,⁴⁴ Barroso’s definition of BR shows a clear shift towards a more comprehensive, ‘full-policy cycle’ approach, with a renewed aim to ‘be big on big things and smaller on smaller things’.⁴⁵ BR was no longer presented as a political response to ‘democratic conscience’ but as technocratic, evidence-based policymaking to promote the legitimacy (credibility) of EU policy, the efficiency of EU laws and ultimately the competitiveness of European businesses in the global economy.⁴⁶

35 COM(2005) 518.

36 SEC(2007) 213.

37 COM(2007) 23.

38 Lofstedt, R. (2007) ‘The ‘Plateau-ing’ of the European Better Regulation Agenda’.

39 Verheugen, G. (2005a) Press conference on Better Regulation: ‘Less red tape = more growth’, Brussels, 16 March.

40 Dimas, S. (2005c) Growth jobs and the environment. Speech given at the European Environment Agency, Copenhagen, 7 October.

41 Connolly, S., H. Kassim & M.W. Bauer, ‘Managing without?’, EUSA Fifteenth Biennial Conference, Miami, May 4-6, 2017.

42 COM(2010) 543.

43 COM(2010) 543, p. 3.

44 COM(2005) 97, p. 2.

45 Barroso, J.M.D. (2013) State of the Union Address, available at: http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm.

46 Wiener, J.B. (2006) ‘Better Regulation in Europe’ *Duke Law School Working Paper Series*, 65, available at: <http://www.osservatorioair.it/wp-content/uploads/2009/08/wiener2006.pdf>.

That BR was more than an objective but rather an attempt to change the working culture was also emphasised by the organisational changes: obligatory integrated assessment and team work (integrated assessment teams), expansion of the Secretariat General under the Commission, with the Deputy Secretary General (Alexander Italianer at the time) chairing the quality review board (IA Board), and in addition the departments in the Directorates in the Secretariat General all referred to BR.

The Juncker Commission (2014-2019): 'big on big', 'doing less more efficiently', EAV

The Juncker Commission rephrased the original 'small but better' mantra as 'big on big things and smaller on smaller things' and defined better regulation as:

"designing EU policies and laws so that they achieve their objectives at minimum cost [and] a way of working to ensure that political decisions are prepared in an open, transparent manner, informed by the best available evidence and backed by the comprehensive involvement of stakeholders."⁴⁷

This entails three main objectives for the new BR agenda: more frequent stakeholder consultations throughout the policy cycle, more thorough impact assessments, and improved ex-post evaluation.⁴⁸ To deliver on these goals, three changes to the institutional system have been made:

- The REFIT platform, chaired by the First Vice President, now gives stakeholders a means of engaging directly in the policymaking process. Next to the online consultation platform for citizens, there are two consultation groups: the government group, consisting of national experts, and the stakeholder group, comprised of experts from the European Economic and Social Committee, the

- Committee of the Regions, as well as business and civil society representatives.
- The redesigned Regulatory Scrutiny Board (formerly the Impact Assessment Board), which has been tasked to assess the quality of impact assessments submitted as part of new policy proposals. For improved functional independence, all members are recruited on a fixed three-year, full-time contract and are divorced from any policy responsibility through their administrative attachment to the Secretariat-General. Half of the board is now also composed of members recruited from outside the Commission. Since 2017, the board also conducts assessments of ex-post evaluations.
- The 2016 interinstitutional agreement on Better Law-Making and the common approach to impact assessments, allow the Commission to provide additional evidence at any stage of the legislative process if requested by the co-legislators. The Impact Assessment Institute also reaffirms the 2003 commitment by both the European Parliament and the European Council to carry out their own IA if the original proposal has been substantially amended. The Commission can assist in this process, if requested. However, even though since 2003 the co-legislators have been committed to impact-assessing their substantial amendments, progress has been limited. The Council has only recently established the capacity to outsource such assessments (and it is unclear at this stage how it uses this capacity). The European Parliament has started to perform assessments.⁴⁹

Following the 2017 White Paper on the Future of Europe, the Juncker Commission began supplementing the 'big on big' mantra with the maxim of 'doing less more efficiently', which culminated in the creation of a Task Force on Subsidiarity, Proportionality and 'Doing Less More Efficiently' headed by First-Vice President Timmermans in order to "take a very critical look at all policy areas

47 SWD(2017) 350, p. 4.

48 Alemanno, A. (2015) 'How Much Better Is Better Regulation? Assessing the Impact of the Better Regulation Package on the European Union - A Research Agenda', *European Journal of Risk Regulation*, 6(3):344-356.

49 For details see: <http://www.europarl.europa.eu/thinktank/en/search.html?policyAreas=EXIMAS>.

to make sure we are only acting where the EU adds value”.⁵⁰ In May 2015, the Juncker Commission published Guidelines and a Toolbox (updated in 2017) on how civil servants in the DGs ought to implement BR principles as regards planning, impact assessments, implementation, monitoring, evaluations and stakeholder consultations. Notably, the principle of ‘EU added value’ is referred to as a key determinant for what constitutes better regulation.⁵¹

Judging from these changing BR maxims, there appears to be a significant effort by the Juncker Commission to broaden the BR agenda by marrying Prodi’s *demos*-orientated political rationale of BR with the business-orientated efficiency argument of Barroso.⁵² Nevertheless, there are indications that the ‘political’ Juncker Commission⁵³ is shifting towards emphasising the democratic legitimacy argument over the technocratic argument. In response to the criticism of UNI Europa that the BR agenda is a way to ‘de-democratise the legislative process in favour of technocratic decisions (influenced by business lobbies)’, Smulders⁵⁴ and Jean-Eric Paquet⁵⁵ underline that ‘[the] aim is precisely the opposite’.⁵⁶

These different rationales and justifications have led to the adoption of multiple communications on, and changes to, the BR framework, the coherence of which has however been criticised.⁵⁷

III. How successful is Better Regulation?

Historically, the – conflicting⁵⁸ – goals of the Better Regulation agenda of the Commission have been: a) to improve the quality and ex-ante impact assessments and ex-post evaluations (evidence-based policymaking), b) to ensure greater stakeholder input in the policymaking process,⁵⁹ c) to reduce unnecessary regulatory burden, and d) to ‘focus’ on political priorities (big on big and small on small). How has the Juncker Commission delivered on these promises so far? Each of these aspects deserves elaborate treatment. Here, we particularly focus on evidence-based policymaking, given the traditional objective of better regulation to rationalise the policymaking process.

a) Evidence-based policymaking

Frequency of reports

As regards impact assessments, the BR guidelines require an IA “for Commission initiatives that are likely to have significant economic, environmental or social impacts” and state that “impact assessments should be carried out for both legislative and non-legislative initiatives as well as delegated acts and implementing measures”.⁶⁰ Considering the aim to be ‘big on big things’, one may expect that most legislative proposals seek to have a significant economic, environmental or social impact, therefore warranting an IA for most proposals. According to the Impact Assessment Institute:

- in 2015 less than every third proposal was accompanied by an IA,⁶¹
- in 2016, half of all 2016 proposals were accompanied by an IA.⁶²

50 Juncker, J.-C. (2017) State of the Union Address. Available at: http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm.

51 For an elaborate critique of EAV and its relationship to BR see Schout, A., D. Bevacqua (2018), ‘EU Added Value – Fact-based policy or politicised facts?’ The Hague: *Clingendael Policy Brief*.

52 “[A]n ethical necessity for evidence-based policymaking [was] at the root of Better Regulation in 2002 which is still relevant in today’s world – arguably even more so.” – Smulders and Paquet (2018), p. 81.

53 Peterson, J. (2017) ‘Juncker’s political European Commission and an EU in crisis’, *Journal of Common Market Studies*, 55(2): 349–367.

54 Head of the Cabinet of the Commission’s First Vice President.

55 Deputy Secretary-General of the Commission.

56 Smulders, B. & J.-E. Paquet (2018), p. 81.

57 E.g. Alemanno, A. (2015), pp 355–6.

58 Eliantonio, M. & A. Spendzharova (2017) ‘The European Union’s New “Better Regulation” Agenda: Between Procedures and Politics’, *European Journal of Law Reform*, 19(1–2): 14.

59 SWD(2017) 350, p. 5.

60 SWD(2017) 350, p. 15.

61 Impact Assessment Institute, *A year and a half of the Better Regulation Agenda: what happened?*, 30 January 2017, p 34, available at <http://www.impactassessmentinstitute.org/br-18-months>.

62 Ibid.

Based on our own calculations, in 2017 84 proposals were made and 53 IAs were published, indicating that over 60% of proposals were accompanied by an IA.⁶³ Although there is a positive development towards a greater share of proposals with an IA, the European Parliament in 2018 deplored the fact that “a significant number of Commission proposals were not accompanied by impact assessments”.⁶⁴ This lack of IAs is of particular concern in key policy areas such as the EMU: the recent policy package adopted by the Commission in December 2017, including proposals for a European Monetary Fund,⁶⁵ a revamped Structural Reform Support Programme⁶⁶ and the adoption of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) into the EU acquis,⁶⁷ are notably not accompanied by IAs, despite their potential for significant socio-economic impacts.⁶⁸

It is difficult to draw decisive conclusions about the frequency of ex-post evaluation reports, not least because the Juncker Commission has not published a list of evaluations finalised since 2016. Nevertheless, there has not been a comprehensive ex-post evaluation

concerning the costliest single policy area of the EU, the Common Agricultural Policy,⁶⁹ which in itself is evidence of a major gap in the ex-post evaluation of EU activity.

Quality of IAs and ex-post evaluation reports

Starting with ex-post evaluations, the majority of evaluation reports conducted until 2012 demonstrated a lack of clear methodology, making it difficult to assess the robustness of the evaluation results.⁷⁰ Similar methodological problems, albeit to a lesser extent, were found regarding IAs prior to 2012.⁷¹ However, in recent years, the Commission has appeared to be making progress in this regard. The BR guidelines now state that “[g]ood evaluations should make strong efforts to go beyond a qualitative description of the different costs and benefits of the EU intervention and seek to quantify them.”⁷² Similarly, for Impact Assessments, “[a]ll relevant impacts should be assessed qualitatively and quantitatively whenever possible.”⁷³

From 2016 to 2017:

- The share of IAs and evaluations that quantified benefits increased from 69% to 80%;
- The share of IAs that quantified regulatory costs rose from 69% to 89%;
- IAs and evaluations that quantified aggregate costs (including administrative, compliance and enforcement costs) increased by almost one third.

63 See Figure 1 & 5. in the Annex. Note that the number of legislative proposals and IAs as reported by the Impact Assessment Institute slightly differs from the numbers as reported by Haeger (2011), Rozenberg et al. (2018) and the Regulatory Scrutiny Board, which were used for the figures in the Annex. The trend was nevertheless also observed in both datasets.

64 European Parliament, Resolution on the interpretation and implementation of the Interinstitutional Agreement on Better Law-Making (2016/2018(INI)), 30 May 2018, paragraph 22.

65 COM(2017) 0827.

66 COM(2017) 0825.

67 COM(2017) 0824.

68 It is important to note that not all proposals have significant expected impacts, as some may be proposals to codify legislation or amend pre-existing legislation through very specific adjustments. Additionally, in the area of financial programmes, the legislator has given the Commission the choice (possibility?), under the Financial Regulation, to present ex-ante financial statements rather than impact assessments.

69 Darvas, Z. & G.B. Wolff (2018) ‘Rethinking the European Union’s post-Brexit budget priorities’, *Bruegel*, March 2018, p 3; Schout, A., D. Bevaqua (2018).

70 Mastebroek, E., S. van Voorst & A. Meuwese (2015), ‘Closing the regulatory cycle? A meta evaluation of ex-post legislative evaluations by the European Commission’, *Journal of European Public Policy*, p. 14.

71 For an elaborate discussion, see Luchetta, G. (2012) ‘Impact Assessment and the Policy Cycle in the EU’, *European Journal of Regulatory Reform*, 3(4): 561-575.

72 SWD(2017) 350, p. 61.

73 SWD(2017) 350, p. 26.

Still, in 2017, a significant share of reports contained no quantification of costs.

- No quantification of administrative costs in 42% of IAs;
- No quantification of compliance costs in 29% of IAs and evaluations;
- No quantification of enforcement costs in 55% of all IAs and evaluations.

The significant share of reports that lack quantification indicates that actual compliance with the Commission's BR standards remains patchy. This is further substantiated by the Report of the Impact Assessment Institute on the Commission BR agenda. Four out of seven IAs studied in depth⁷⁴ showed major issues in terms of the rhetoric used, which appeared to "prejudge the results and generate starting assumptions not based on evidence".⁷⁵ More worryingly, the majority of IAs demonstrated major shortcomings in terms of analysis, methodological rigour and transparency, as well as subsidiarity and proportionality arguments.⁷⁶ This lacklustre compliance with subsidiarity and proportionality checks and lack of robust methodologies in IAs and ex-post evaluations is visible in **one** of the EU's key policies, the Common Agricultural Policy.⁷⁷ This criticism, again, is in line with a recent EP resolution, which notes that "committees have expressed concern that the quality and level of detail of impact assessments varies from the comprehensive to the rather superficial".⁷⁸ However, it is important to note that the Regulatory Scrutiny Board, in its annual reports, regularly stresses that there is usually a significant improvement in the quality of IAs after the first review by the RSB, and that upstream meetings between the board and the relevant Commission

official prior to the first draft IA usually lead to an IA of significantly higher quality.⁷⁹

While problematic, the Commission's internal report on quantification in IAs and evaluations shows that the Commission is aware of the issue and is seeking ways to raise standards. However, the 'boundaries of the possible'⁸⁰ in this endeavour must be acknowledged.⁸¹ Quantification of benefits and costs is often difficult and resource-intensive, particularly when the data has to be gathered from all over the EU from member states that differ in terms of many significant variables, such as climatic conditions, socio-economic contexts and soil composition, as well as their capacity to collect information on these variables.⁸² The frequent references to 'European Added Value' in this regard may be potent rhetorically, but given the lack of a clear working definition across Commission DGs, only further exacerbates the issue of impact quantification.⁸³

Role of reports in the policymaking process

While both the quality and frequency of ex-ante and ex-post evaluations leave room for improvement, there are indications that, even in cases where IAs or evaluation reports have been conducted, their role in the wider policymaking process remains limited.

- Out of seven IAs conducted between 2014 and 2016 and analysed by the IAI, two were accompanied by a legislative proposal. These two legislative

74 IAs published between 2014 and 2016.

75 Impact Assessment Institute, *A year and a half of the Better Regulation Agenda: what happened?*, p. 14.

76 *Ibid.*, p. 21.

77 Schout, A., D. Bevacqua (2018).

78 European Parliament, Resolution on the interpretation and implementation of the Interinstitutional Agreement on Better Law-Making (2016/2018(INI)), 30 May 2018, Paragraph 22.

79 See e.g. Regulatory Scrutiny Board (2017), *Annual Report 2017*. Available at https://ec.europa.eu/info/sites/info/files/rsb-report-2017_en.pdf.

80 Majone, G. (1989) *Evidence, Argument and Persuasion in the Policy Process* (London: Yale University Press).

81 'To a great extent domestic factors continue to frame the 'boundaries of the possible', and to mediate the impact of any new interventions from the EU level' – Cram, L. (2001), Governance 'to Go': Domestic Actors, Institutions and the Boundaries of the Possible. *Journal of Common Market Studies*, 39: 613.

82 Dunlop, C. & C. Radaelli (2015): p. 29.

83 Schout, A. & D. Bevacqua (2018, forthcoming) 'Is European Added Value fact-based policy?' *Clingendael Policy Brief*.

proposals demonstrated a lack of continuity between evidence-gathering and legislation, as the conclusions of the IAs were not considered in their entirety in the final legislative proposal.⁸⁴ Although there is no evidence that this is a systematic issue, and while the Commission is of course free to make a political decision when it comes to the final proposal and ignore the IA findings, it does show that the mere existence of an IA does not guarantee that the proposal is necessarily 'evidence-based'.

However, it is also important to note that IAs have a further function in the policymaking process in the sense that they have a narrative role for the Commission.

- Rather than being a decisional tool, IAs can often serve to strengthen the case of a political choice that was made prior to the conclusion of the IA, finding empirical evidence for the intrinsically political preference for a certain policy.⁸⁵ As Dunlop and Radaelli put it, "[e]x ante evaluation is not necessarily used to 'speak the truth to power'",⁸⁶ as often claimed.

As regards ex-post evaluations, qualitative scholarship has shown that the Commission has considerable political leeway when it comes to implementing recommendations of the evaluation report.

- In the case of cohesion policy, ex-post evaluations were not completed in time to inform the proposal for the new Multi-Annual Financial Framework (MFF) or its respective IA. Instead, only a broad mid-term evaluation of the entire MFF was produced, with little relevance for the cohesion policy.⁸⁷
- In the area of health and food safety, if the evaluated legislation did not explicitly fall within one of the Commission's policy priorities, amendments, even if recommended by the ex-post evaluation,

were unlikely to be proposed.⁸⁸ This highlights an uneasiness within the BR agenda: evidence-based policymaking may sometimes require additional, time-intensive legislative action. Yet the Commission remains committed to reducing the regulatory burden and speeding up the legislative process.⁸⁹

b) Stakeholder input

Increased stakeholder input and public consultation platforms are key BR instruments for the Juncker Commission to improve the transparency of the decision-making process of the Commission. However, some commentators argue that, through its extended collection of stakeholder opinions even *after* legislation has already been proposed, the Commission is harming the institutional balance between the co-legislators and is exceeding its mandate in the co-decision procedure.⁹⁰ Similarly, there is criticism that the Commission overemphasises the opinions of organised interest groups and industry over those of individuals most affected by the proposed legislation.⁹¹ Aside from these political concerns, generally speaking, stakeholder consultations under Juncker are frequent and are deemed of high quality by the OECD.⁹² Moreover, other scholarship has shown that the Commission is the EU institution most responsive to stakeholder input,⁹³ and that the variety of stakeholders consulted has improved in recent years.⁹⁴ Stakeholder consultations under Juncker can therefore be presented as a success.

84 Impact Assessment Institute, *A year and a half of the Better Regulation Agenda: what happened?*, p. 21.

85 Dunlop, C. & C. Radaelli (2015), p. 30.

86 Ibid.

87 Schout, A. & D. Bevacqua (2018 forthcoming) 'Is European Added Value fact-based policy?'

88 Van Voorst, S. & P. Zwaan (2018), 'The (non-)use of ex post legislative evaluations by the European Commission', *Journal of European Public Policy*.

89 Van Voorst, S. & P. Zwaan (2018), p. 18.

90 Pachi, U. (2015), 'Repercussions of the European Commission's Better Regulation Agenda on Consumer Interests and Policy', *European Journal of Risk Regulation*, 6(3): 376.

91 Alemanno, A. (2015), p. 349.

92 E.g. Schout and Sleifer, *ibid.*

93 Judge, A. & R. Thompson (2018), 'The responsiveness of legislative actors to stakeholders' demands in the European Union', *Journal of European Public Policy*, p. 15.

94 Lindgren, K.-O. & T. Persson (2018) 'Participatory governance in the European Union' in H. Heinelt (ed.) *Handbook on Participatory Governance*, Cheltenham: Edward Elgar Publishing, p. 236.

A point of concern is however that stakeholder consultations may conflate evidence-based policymaking: in its BR toolbox, the Commission defines evidence as “quantitative and qualitative information *as well as stakeholder opinions*” [emphasis added].⁹⁵ Evidently, it is highly important the Commission’s puts a lot of effort to discuss the feasibility of policies with stakeholders. Yet, caution is required as stakeholder opinions may conflict with cost-benefit analyses and ex-post evaluations.⁹⁶

c) Reducing red tape

Overall, there has been a steady reduction of legislative proposals by the Commission.⁹⁷ This is likely due to the increasingly centralised decision-making structure within the Commission, which allows the President, the Secretariat-General and the First Vice-President to exert control over the overall policy agenda and reduce the volume of legislation proposed by the different DGs.⁹⁸ However, there are a variety of indicators that suggest that the impetus as regards red tape reduction during the Barroso era may be running out of steam under Juncker.

1. In terms of repealing dated legislation, the Commission proposed to repeal a total of 51 acts in the annual work programmes for 2015 (10 acts), 2016 (23), 2017 (15) and 2018 (3). Of these acts, as of October 2018,
 - 24 acts (47%) are still in force;
 - 18 acts (35%) were actively repealed or made obsolete;
 - 6 acts (12%) are no longer in force due to pre-existing sunset clauses;

- 3 acts (6%) were replaced by follow-up acts prior to being listed in the annual work programme.

These findings are broadly consistent with other scholarship⁹⁹ and show that the Commission is behind schedule in terms of repealing acts and that suggested reductions are already no longer in force.

2. While Juncker set up a Task Force for the explicit purpose of taking “a very critical look at all policy areas to make sure we are only acting where the EU adds value”¹⁰⁰, the Task Force concluded in its final report that “there is EU value added in all existing areas of activity and did not, therefore, identify any competences or policy areas that should be re-delegated definitively, in whole or in part, to the Member States.”¹⁰¹
 - Interestingly, while there is a list of legislation and proposals submitted by a variety of stakeholders for the Task Force to be reviewed, the minutes of the Task Force reveal that the Task Force did not consider this list, due to the politically ‘sensitive’ nature of the stakeholder suggestions.¹⁰² One may question how successful the ‘reduction of red tape’ will be if the Task Force specifically set up for the purpose of ‘taking a very critical look’ at existing EU legislation does not dare to touch the list of suggested changes in EU legislation.

95 European Commission (2017) Better Regulation “Toolbox”, p. 7. Available at https://ec.europa.eu/info/sites/info/files/better-regulation-toolbox_2.pdf.

96 E.g. Radaelli (2018) *ibid.*

97 Rozenberg, O., S. Novak, S. Bendjaballah & R. Dehousse (2018) ‘Avoiding conflict? The EU legislative process in times of tension’, Working Paper 01/2018, *Les Cahiers européens de Sciences Po*, June 2018, p. 16.

98 Kassim, H., S. Connolly, R. Dehousse, O. Rozenberg & S. Bendjaballah (2016) ‘Managing the house: the Presidency, agenda control and policy activism in the European Commission’, *Journal of European Public Policy*, pp 17-8.

99 Zbiral, R. (2018) ‘The Better Regulation Agenda and the Deactivation of EU Competences: Limits and Opportunities’ in S. Garben & I. Govaere (eds.) *The EU Better Regulation Agenda*, Modern Studies in European Law, Hart Publishing, p. 72.

100 Juncker, J.-C. (2017) State of the Union Address. Available at: http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm.

101 Task Force on Subsidiarity, Proportionality and “Doing Less More Efficiently”, *Active Subsidiarity, A New Way of Working*, July 2018. p. 7.

102 Task Force on Subsidiarity, Proportionality and “Doing Less More Efficiently”, Minutes of the 6th meeting of the Task Force: Brussels, 21 June 2018, 10.00-12.30. p. 2, available at <https://ec.europa.eu/commission/sites/beta-political/files/meeting-minutes-6th-meeting-task-force-subsidiarity-21june.pdf>.

3. While the number of proposals has steadily declined from Prodi through Barroso to Juncker, the number of words per proposal has steadily increased.¹⁰³ Whether this implies growing complexity of EU legislation, increasing use of legal exemptions, or improved evidence-based policymaking demands further qualitative analysis of the individual proposals. However, the case once more illustrates the inherent tension between the different goals grouped within the BR agenda: it is no easy task to simplify and reduce legislation while at the same time trying to rationalise and streamline the policymaking process.

Reducing red tape is progressing mostly as a result of the Commission's multi-annual strategic agenda. The expected effects on the reduction of red tape should not be too strong. For the internal market at large, red tape depends on the ways in which member states organise their rules and regulations. As a corollary, better regulation – generally – should be as high on the national agendas as on the EU agenda.

Finally, reduction of EU legislation is not only a matter of evidence-based policy; it also demands a new policy objective: policy competition. The EU is now more harmonised than e.g. the US.

d) Big on big and small on small

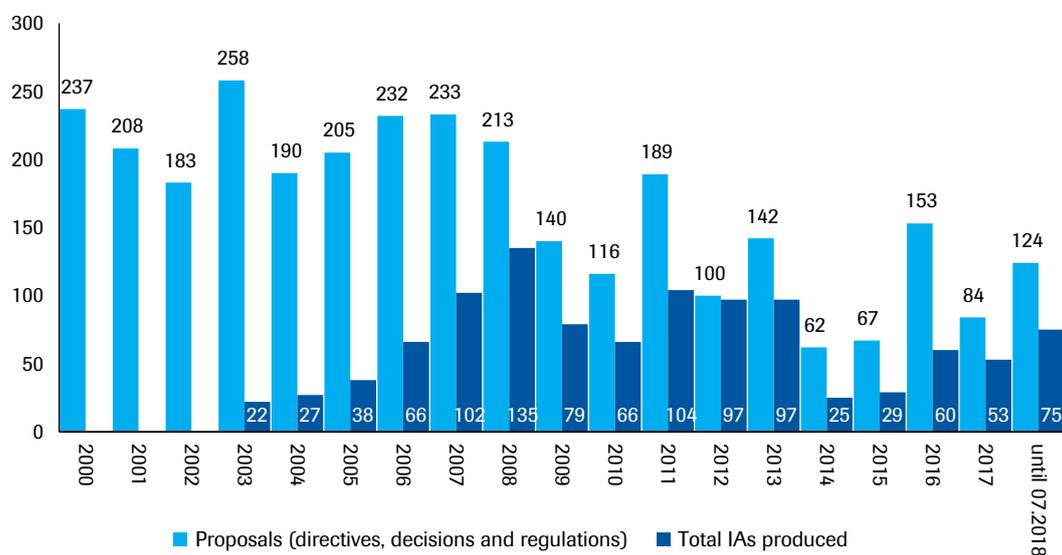
Being 'big on big and small on smaller things' has been the mantra of BR since the very beginning and the Commission Juncker seems to have indeed succeeded in doing less. Juncker has been focusing on clearly identifiable major European challenges, such as, among others, sustainable development, deepening the EMU, and the digital economy. The Juncker Commission also shows why being 'small on smaller things' is persistently more difficult to realise. As background interviews indicate, the volume of legislation has indeed gone down.¹⁰⁴ Yet, the implementation of 'small on small' in practice appears to be limited by a variety of factors, including the difficulty to overrule political impetus coming from the Commission President and his staff (e.g. Secretary General) seeking to offer tangible advantages to citizens through a variety of visible initiatives (such as Interrail Youth Passes, Solidarity Corps, regulating paternity and paternal leave, stopping summertime, etc.). Moreover, pressure to add details originates from, among others, international standardisation bodies, the European Parliament, and member states that resist changing existing legislation and distrust each other regarding the extent to which main policy objectives will be implemented without detailed legislation. Although it seems the case, whether the strategic packages of the Juncker Commission indeed involve less detailed legislation requires a separate study.

103 Rozenberg, O., S. Novak, S. Bendjaballah & R. Dehousse (2018).

104 See also Figure 1. in the Annex.

Annex

Figure 1 Legislative proposals and Impact Assessments published between 2000 – July 2018*

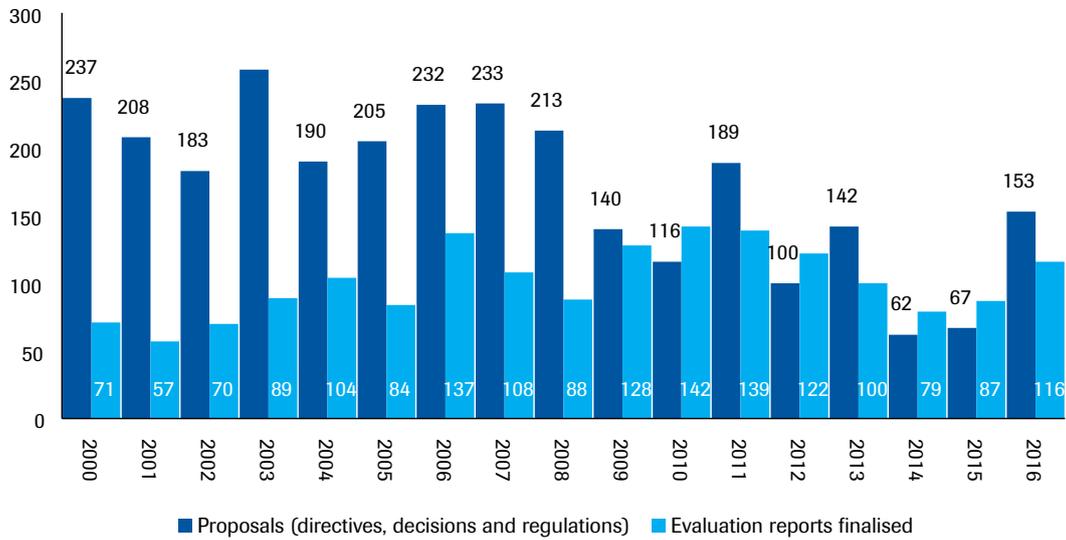


* For the years 2017 and 2018, the following search criteria were used in EUR-Lex (where YEAR was replaced with 2017 or 2018 respectively):

Subdomain: Preparatory acts, Form: Proposal for a framework decision, Proposal for a directive, Recommendation for a directive, Recommendation for a decision, Proposal for a decision, Proposal for a regulation, Draft decision, Recommendation for a regulation, Draft regulation, Draft directive, Proposal for a decision without addressee, CELEX number: 5YEARPC*, Choose multiple collections: EU Preparatory acts, Exclude corrigenda: True, Date: Date of document, From: 01/01/YEAR, To: 31/12/YEAR, Search language: English, Exclude consolidated versions: True

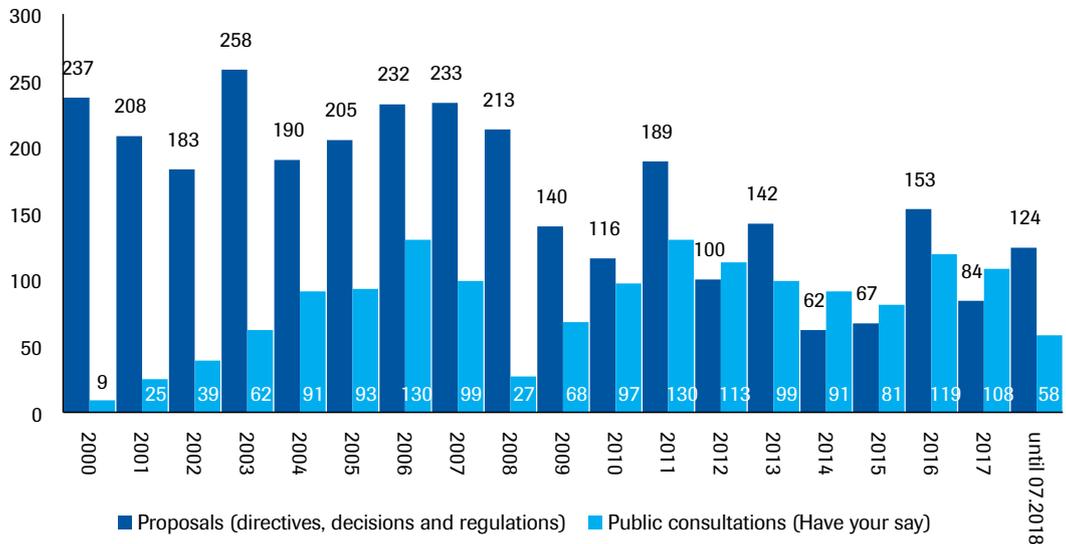
Source: *Proposals*: Haege 2011, Rozenberg et al. 2018, EUR-Lex. *Impact Assessments*: Regulatory Scrutiny Board (Annual Reports), <http://ec.europa.eu/transparency/regdoc/?fuseaction=ia&year=2018&>.

Figure 2 Legislative proposals and evaluation reports finalised between 2007 – 2016 (no information for 2017-2018)



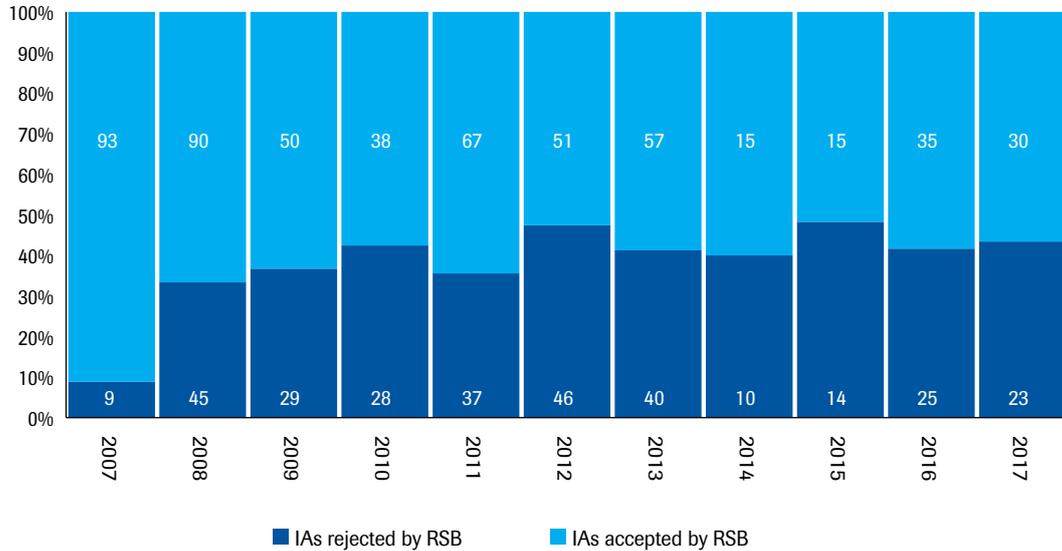
Source: *Proposals: Haege 2011, Rozenberg et al. 2018, EUR-Lex. Evaluation reports: <http://ec.europa.eu/smart-regulation/evaluation/search/search.do>.*

Figure 3 Legislative proposals and public consultations concluded between 2000 – July 2018



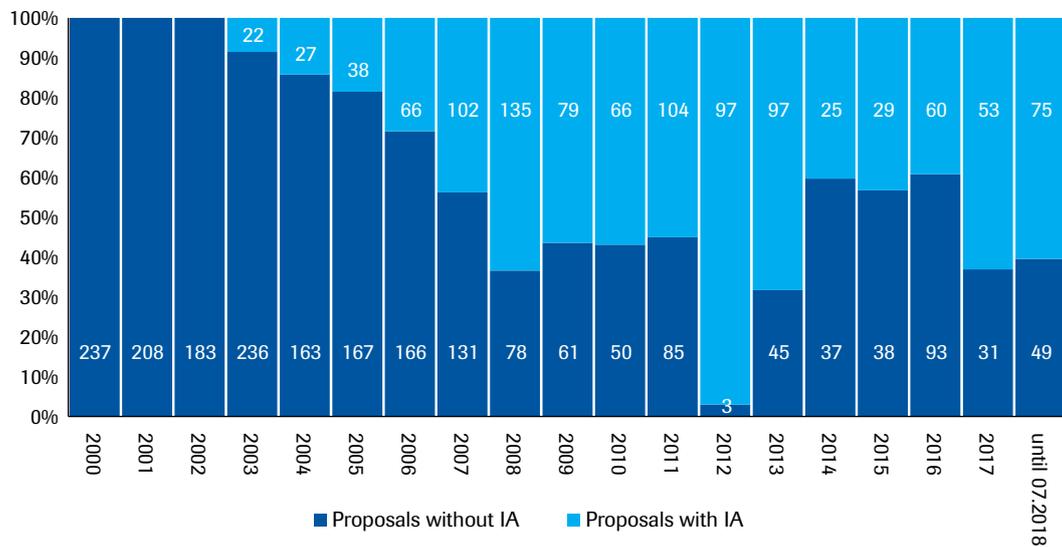
Source: *Proposals: Haege 2011, Rozenberg et al. 2018, EUR-Lex. Public consultations: https://ec.europa.eu/info/consultations_en and https://web.archive.org/web/*/http://ec.europa.eu/smart-regulation/stakeholder-consultation/index_en.htm.*

Figure 4 IAs accepted by RSB vs IAs rejected by RSB (draft IAs, first submission) between 2007 – 2017



Source: Regulatory Scrutiny Board or Impact Assessment Board (Annual Reports)

Figure 5 Legislative proposals with IA vs legislative proposals without IA* between 2000 – July 2018



* Number of proposals with IA estimated by subtracting annual number of IAs published from annual number of legislative proposals, not including inception IAs

Sources: see previous graphs.

About the Clingendael Institute

Clingendael – the Netherlands Institute of International Relations – is a leading think tank and academy on international affairs. Through our analyses, training and public debate we aim to inspire and equip governments, businesses, and civil society in order to contribute to a secure, sustainable and just world.

www.clingendael.org
info@clingendael.org
+31 70 324 53 84

 @clingendaelorg
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 The Clingendael Institute

About the authors

Adriaan Schout is Senior Research Fellow and Coordinator Europe at the Clingendael Institute. He combines research and consultancy on European governance questions for national and European institutions. He has worked on projects addressing issues of the EU presidency, EU integration and Improving EU regulation, amongst others.

Christian Schwieter is a former Research Assistant at Clingendael's Europe and the EU Research Unit.

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