

# Better Regulation Impact on EU Law-Making

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This paper aims to analyse these new rules introduced by the EC. The purpose is to evaluate whether or not these changes have altered the original institutional design significantly and to assess its impact on the “Community method”, in other words on the EC prerogative to initiate the law-making machinery.

**Keywords:** EU Institution, EU law-making process, the draft of legislative proposals, better regulation, the Regulatory Scrutiny Board, public consultations, the European citizens’ initiative, the erosion of the right of initiating legislation.

## Geresnio reglamentavimo poveikis ES teisėkūrai

Straipsnyje siekiama išanalizuoti naujas EB nustatytas taisykles. Tikslas yra įvertinti, ar šie pokyčiai reikšmingai pakeitė pradinę institucinę struktūrą, ir įvertinti jų poveikį „Bendrijos metodui“, kitaip tariant, EB prerogatyvai inicijuoti įstatymų leidybos sistemą.

**Pagrindiniai žodžiai:** ES institucija, ES įstatymų leidybos procesas, teisėkūros pasiūlymų projektai, geresnis reglamentavimas, Reguliavimo kontrolės taryba, viešosios konsultacijos, Europos piliečių iniciatyva, įstatymų iniciatyvos teisės panaikinimas.

## 1. The law-making rules under the EU Treaties

The rules describing the procedure leading to the adoption of the EU legal texts (directives, regulations, decisions) are laid down in the Treaties of the European Union. These rules are fundamentally unchanged since the signature of the Rome Treaty, with the exception of the modifications enabling the European Parliament to become co-legislator together with the Council. In a nutshell, the legislative mechanism built into the Treaty foresees the (exclusive) right conferred upon the European Commission (EC) to initiate the legislative process, *i.e.* to assess, elaborate and propose those pieces of legislation deemed to be needed in order to achieve the political objectives incorporated in the Treaties establishing the European Union. The so-called “Community method” is perhaps the most *sui generis* aspect of this supranational legislative machinery. At the outset of the setting up of the European project it was justified as the European Parliament (EP), or the Assembly as it was called at that time, was not elected directly by the citizens. This rule remains still justified

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nowadays considering that the smaller Member States are not sufficiently represented in the EP<sup>1</sup> to be able to effectively defend their interests.

This unique mechanism whereby is conferred upon an executive organ (*i.e.* the EC) the monopoly to start a procedure which should generally lead to the adoption of a legislative act decided on by another organ (the Council jointly – after the modification introduced to the original text – with the EP) seems, in recent years, to have been somehow altered mainly by a series of administrative decisions taken by the EC itself.

Whilst the unchanged Art.17.2 of the Treaty on the European Union (TEU) provides indeed that: “Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise”<sup>2</sup>, the procedure leading to a formal proposal is now subject to an increasing number of constraints and scrutiny, some of which are imposed by the Commission to itself.

Actually, the EP enjoys a ‘right of initiative’, which consists of being able to ‘ask the Commission’ to submit a proposal. This possibility has existed since the Maastricht treaty and was confirmed in the Lisbon treaty, with an addendum requiring the Commission to give reasons for its decision if it does not adhere to such a request<sup>3</sup>. However, this power has been rarely used since the EP prefers to demand legislative proposals by other means, in particular by adopting resolutions addressed to the EC.

This paper aims to analyse these new rules introduced by the EC. The purpose is to evaluate whether or not these changes have altered the original institutional design significantly and to assess its impact on the “Community method”, in other words on the EC prerogative to initiate the law-making machinery. We will then try to draw some conclusions as regards the possible consequences of this adaptation to the scheme which was devised when the European Community (nowadays the European Union) was set up in 1957.

## 2. The need for a “better regulation”

It is worth recalling that the *Directory of the European legislation in force* contains some 24 000 acts<sup>4</sup>, if one includes all types of texts with legal effect. This impressive figure is justified by the large areas of competence allocated to the EU, competences which have continuously increased over the years.

The vastness of this *corpus* entails a series of difficulties. To mention only a few, think of the trouble in retrieving the relevant provision in such a large amount of texts and hence in applying it correctly

<sup>1</sup> The number of seats for Member State ranges from 6 to 96.

<sup>2</sup> “The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission” (Art.289.1 of the Treaty on the functioning of the European Union, TFEU). Therefore “The Commission shall submit a proposal to the European Parliament and the Council” (Art.294.2 TFEU).

<sup>3</sup> “The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons”, Art. 225 TFEU. As is the case for the Commission legislative drafts, also legislative drafts originating from the European Parliament shall be forwarded to national Parliaments (Art. 4, Protocol n. 2 on the application of the principles of subsidiarity and proportionality). Also the Council can require the Commission to table a proposal (and it does it in the practice by the mean of the “conclusions” drawn up at the end of a meeting), as foreseen in Art.241 TFEU: “The Council, acting by a simple majority, may request the Commission to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals. If the Commission does not submit a proposal, it shall inform the Council of the reasons”.

<sup>4</sup> In 2001 it was estimated at some 80 000 pages. Unofficial estimates of the current size of the *acquis* in connection with the translation of all binding Union law into Croatian put it at some 130.000 pages.

in this wide context where other provisions, in the same or a different area, may seem not rarely as conflicting<sup>5</sup>. This situation has consequences as to transparency and legal clarity, which may in turn also generate unnecessary costs. One can simply think of the mere practical difficulty posed by the obligation to translate the entirety of such legislation into the official languages of the new applicant States when launching the accession procedure of such States to become members of the EU<sup>6</sup>.

Recently, upon closer scrutiny of the legislation in force, the European legislator realized that a number of texts still included in the Directory had in reality been superseded by more recent ones and that a significant number of texts had become obsolete, *i.e.* formally in force but not applicable any longer. Since then, a number of texts have been repealed and EU lawbook has been reduced as a consequence.

“The lack of simplicity, clarity and accessibility of European provisions – such as unclear, confusing terminology, incomplete or inconsistent regulations or use of vague terms – constitute significant problems” was the conclusion of a report published in 2001 on this issue<sup>7</sup>.

As a matter of fact, a critical analysis of the legislation was started already in 1992, following the Presidency’s Edinburgh Council conclusions. It was noted at that summit that “The Commission has indicated that it will consult more widely before proposing legislation, which could include consultation with all the Member States and a more systematic use of consultation documents (green papers). Consultation could include the subsidiarity aspects of a proposal. The Commission has also made it clear that, from that moment onwards and according to the procedure it already established in accordance with the commitment given at the European Council in Lisbon, it will justify in a recital the relevance of its initiative with regard to the principle of subsidiarity”.

In fact, the principle of subsidiarity – but it should be stressed here that it was not introduced for the sake of clearer legislation – could not be the right tool to tackle the issue of unclear provisions. And not only because this principle is still too vague and, as a scholar put it, rather a “fancy yet meaningless, normatively void, term”<sup>8</sup>.

In reality, the problem the EU was facing concerned rather the legitimacy of its action as criticism was raised as to what was labelled a “democratic deficit” of the EU’s legislative power. An alleged guilt that is still somehow haunting the EC nowadays.

“Despite its achievements, many Europeans feel alienated from the Union’s work”, was one of the conclusions drawn by the Prodi’s Commission in its 2001 Communication on European governance.

Thereafter, the European Institutions having taking stock of the danger, considered it was central to innovate as regarding the law-making process and solemnly committed themselves to “simplifying” the legislation bearing in mind the interests of European citizens and of the economic operators.

Following this shift, the 1997 Intergovernmental Conference attached Declaration n.39 on the quality of the drafting of Community legislation to the Amsterdam Treaty. In that document it was stated that “the quality of the drafting of Community legislation is crucial if it is to be properly implemented by the competent national authorities and better understood by the public and in business”.

<sup>5</sup> We refer here to the interpretation of the legislation by the users, as the competence to interpret officially lies with the Court of justice, as it is known (Art.267 TFEU).

<sup>6</sup> Council Regulation n.1/1958 *Official Journal (OJ) L 17, 6.10.1958, p. 335*, as amended, which provides that regulations and other documents of general application must be drafted in the 23 official languages and that the Official Journal must be published in all those languages. See GALLIZIOLI, G. *Language pitfalls in EU legislation and how to deal with this challenge*, in *Law and interculturalism*, Porto, 2018, p. 72.

<sup>7</sup> See *Mandelkern Group Report on Better Regulation*, 2001.

<sup>8</sup> Almost thirty years after its first appearance, there is still no clear, detailed or widely accepted definition in the EU of the legal substance of subsidiarity, or what the enforceability criteria are for assessing compliance with and potential violations of the principle.

Immediately after, and already in the following year, the EU Institutions signed the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation<sup>9</sup>, later replaced by the Interinstitutional Agreement of 16 December 2003 on Better Law-making<sup>10</sup> and afterwards by a new Interinstitutional Agreement (IIA) on Better Law-making<sup>11</sup> in 2016, which is still currently in force.

### 3. The different steps of the law-making process

In this paper, we will not pay much attention to the measures adopted by the other EU Institutions, though their procedures have also been updated. We will instead focus on the changes made to the Commission's internal procedures because they are much more far-reaching. The analysis will essentially deal with the different steps leading to the adoption of a Commission's proposal until its transmission to the co-legislators. We will look closer in particular: i) at the consultation of interested parties and ii) at the scrutiny on the quality of the impact assessment reports, since these two steps show up the most significant changes.

The scheme for this procedure leading to the adoption of a EC's proposal is basically composed of the following phases:

(a) preparation: following the Commission's annual work programme, which lists the priorities, Commission services draw up within each Directorate-General a work programme containing the texts that are under preparation and the foreseeable date for their presentation for adoption by the College of Commissioners. The leading department shall submit the first draft to the opinion of the other departments concerned through a procedure known as "interservice consultation". As soon as a draft proposal is elaborated, the service concerned shall produce a "roadmap" identifying the goals that the initiative intends to achieve and describing the way in which objectives can be reached. When the initiative is deemed to be of some importance, the roadmap is replaced by an inception impact assessment, which is a more detailed document.

b) the impact assessment (IA): this analysis is required for any initiative (legislative or non-legislative proposals or recommendations for negotiations of international agreements, implementing and delegated acts) expected to have significant economic, social or environmental impact.

Introduced since 2002, the IAs are of paramount importance in the better regulation context. They are in fact a deep analysis of the situation that the legislative act intends to tackle and of the different possible measures that should be devised in order to attain the goals in a more efficient and effective possible manner. All foreseeable consequences, be they positive or negative, shall be taken into account. Any financial or administrative burdens which fall on the Union, national governments, local and regional authorities, or economic operators, must be minimised and be commensurate with the

<sup>9</sup> *OJ C* 73, 17.3.1999, p. 1

<sup>10</sup> *OJ C* 321, 31.12.2003, P.III, p.12.

<sup>11</sup> *OJ L* 123, 12.5.2016, p.1. The importance of impact assessment is stressed: "Impact assessments should cover the existence, scale and consequences of a problem and the question whether or not Union action is needed. They should map out alternative solutions and, where possible, potential short and long-term costs and benefits, assessing the economic, environmental and social impacts in an integrated and balanced way and using both qualitative and quantitative analyses. The principles of subsidiarity and proportionality should be fully respected, as should fundamental rights. Impact assessments should also address, whenever possible, the „cost of non-Europe“ and the impact on competitiveness and the administrative burdens of the different options, having particular regard to SMEs („Think Small First“), digital aspects and territorial impact. Impact assessments should be based on accurate, objective and complete information and should be proportionate as regards their scope and focus”.

objectives to be achieved. For the Commission the rule is: to deliver ambitious policies in the simplest and least costly way and without unnecessary red tape.

Given the complexity of the exercise, IAs are often assigned to external experts. The impact assessment report contains an analysis of the environmental, social and economic expected consequences, and particularly on small and medium-size enterprises and on competitiveness. They shall also identify who will be affected by the initiative and how, and include the conclusion drawn from the consultation carried out. The findings of the impact assessment process shall be made public.

It is worth noting that the Commission's services are not tied by the recommendations included in the studies. It is also relevant noting that it is the EC that defines the tendering specifications of the study.

To limit somehow the relevance of the IA, some caveats have been conveniently introduced in the 2016 Inter-Institutional Agreement signed by the EU Institutions. In order to safeguard the political prerogatives, it was stated therein that "Impact assessments are a tool to help the three Institutions to reach well-informed decisions and not a substitute for political decisions within the democratic decision-making process".

The EC is aware that not infrequently the rules relating to a correct exercise of the IA are applied in a formal manner, rather than in a substantial one, and that the choice between the alternative ways ahead ("don't change current legislation", "make a simple adaptation" or "make a fundamentally new text") may be not substantiated enough<sup>12</sup>, the leading service showing a clear preference for the last alternative which in fact – as one can expect<sup>13</sup> – is the one normally proposed. Some observers claim that evidence is sometimes twisted to legitimise political decisions instead of having the decisions based on sober consideration of all the facts involved. Vice-president Timmermans sought to counter these flaws with new mechanisms, since evidence should inform political decisions and not the other way around<sup>14</sup>.

An important element of the IA is the subsidiarity and proportionality test<sup>15</sup>. Even though it is in principle clear that the subsidiarity rule applies only when the EU does not have an exclusive competence, it is not a rare occurrence for the Commission's services to undergo this test for texts that fall within the EU's exclusive competence though this is clearly explained in the guidelines elaborated for this purpose<sup>16</sup>.

<sup>12</sup> Or there is even no attempt to justify. An example is given by the IA relating to the renewal of the European Maritime and Fisheries Fund (EMFF): "As shown in previous sections of this IA report, in terms of economic and environmental sustainability the situation facing the fisheries sector today is very different from when the EMFF was designed and although concerns remain for some stocks, segments (overcapacity) and sea-basins, mainly the Mediterranean, the general outlook for the future is positive. Nevertheless, the CFP needs a dedicated tool for delivering on its prime objectives. This is unlikely to be achieved by any other EU funding source" (EC, SWD(2018)295, p. 23). This comment has been sharply criticised by the EP's services, as well as the absence of any analysis of the environmental, economic, social or employment impacts. Another example of circular reasoning (on the choice of the instrument) is the following: "Choice of instrument: The proposed instrument is a Commission Delegated Regulation. Other means would not be adequate because the Commission has been granted powers to adopt a discard plan by means of delegated acts".

<sup>13</sup> As Prof. Anne Glover, chief scientific advisor to EC's President Barroso, put it, it is difficult to disentangle the Commission's evidence-gathering processes from what she calls the "political imperative" that's behind them.

<sup>14</sup> When presenting the assessment in an IA/evaluation, general statements and circular reasoning should be avoided in favour of concrete arguments specific to the issues being analysed. Points should be substantiated with qualitative, and where possible, quantitative evidence.

<sup>15</sup> The principles of subsidiarity and proportionality are laid down in Art.5 TEU. The subsidiarity principle aims to ensure that decisions are taken as closely as possible to the citizen and that the EU does not take action unless it is more effective than action taken at national, regional or local level. The proportionality principle limits the exercise of the EU's powers to what is necessary to achieve the objectives of the Treaties.

<sup>16</sup> It has been felt necessary to remind for instance that trade policy and the negotiation of international trade agreements are areas of exclusive EU competence pursuant to Art.207 TFEU and therefore the subsidiarity principle does not apply. However, when they do apply, a statement as the following will suffice: "The subsidiarity (Union added value/necessity for Union action) and proportionality dimensions of funding priorities were assessed" (see EC, COM(2018)390 on the renewal of the Fisheries Fund, p. 2).

Each year the Commission submits, in line with Article 9 of Protocol No 2 annexed to the TEU, an annual report on the application of the principles of subsidiarity and proportionality in European Union law-making.

The importance of the IA has become more and more crucial since it was submitted by the Commission service author of the proposal to a specific scrutiny body. It was in 2006 that the Commission's President instructed the Secretary-General to set up an "Impact Assessment Board" (IAB) to provide both independent scrutiny and support and advice on impact assessments with the overall objective of ensuring high-quality impact assessments. The IAB would have functioned independently, under the President's authority with members acting in a personal, expert capacity<sup>17</sup>. But in 2015 it was deemed necessary to widen the IAB's competences and a Regulatory Scrutiny Board (RSB) was set up<sup>18</sup>, tasked with the scrutiny of the quality of all impact assessments, major evaluations and fitness-checks of existing legislation and with issuing opinions on the draft of the related reports in line with the relevant guidelines. Under the new mandate, the Board acquired full independence from the EC's departments. It comprises a chairperson and six members, half of whom recruited outside the Commission's services. The RSB's members shall prove to possess expertise in macroeconomics, microeconomics, social policy and environment policy. The RSB, as was the case for the IAB, remains however administratively attached to the Secretariat-General. The Board gives advice and opinions to the political level of the Commission. When the RSB issues a negative opinion on an IA, the procedure is put on hold until the Board is satisfied with the quality of a revised document.

(c) consultation: this is the aspect that has been more developed recently and can lead sometimes to unpredictable consequences, as described below<sup>19</sup>. This aspect became of particular relevance after the presentation of the communication on European governance, already mentioned, where the EC underlined the importance of acting with openness, wide participation and effectiveness and laid down standards for consultation of interested parties.

It is undoubtedly an obligation upon the EC to carry out broad consultations with parties concerned in order to ensure that the Union's activities are coherent and transparent (Art. 11.3 TEU). However, the concept of parties concerned has nowadays become extremely broad and there is no requirement at all to justify participation in a consultation. The invitation to make comments to a new proposal is actually addressed not only to the customary stakeholders<sup>20</sup> or authorities, but also to the general public. Everybody can send his comments to the EC that shall record and analyse each contribution. Roadmaps, incept impact assessment and impact assessment are made accessible to every citizen or

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<sup>17</sup> The members of the IAB were the Deputy Secretary-General responsible for better regulation and one permanent official at Director level from the Commission departments with the most direct expertise in the three pillars – economic, social, environment - of integrated impact assessment, namely DG ENV, DG ECFIN, DG EMPL, DG ENTR. The IAB provided advice and issued opinions on the quality of the impact assessment work before the Impact Assessment report is finalised by the responsible department and, where appropriate, issued recommendations for further work, EC, SEC(2006)1457.

<sup>18</sup> EC, C(2015)3263.

<sup>19</sup> The EC is perfectly aware of the risk inherent to this tool: "Web-based public consultations also have a self-selection bias of the respondents towards the views of those who choose to respond to the consultation against those who do not. These elements need to be kept in mind when interpreting the results".

<sup>20</sup> Trade unions have blamed the EC for non-respect of Treaty provisions requesting the specific consultation of labour and management in relation to legislation on social issues (Art. 154.2 TFEU), since the EC is giving the same weight to the opinion of any individual with no particular expertise or knowledge of the issue at stake as to the social partners themselves.

organisations and they are invited to send comments. The setting up of the ‘Have your say’ portal<sup>21</sup> has made access to the consultation procedure very friendly for each and every European citizen. Given the number of consultations launched every week, the EC’s services may be faced with an uphill struggle to process a significant quantity of data<sup>22</sup>.

We shall return to this aspect later on.

Similarly, national parliaments are involved in the consultation process. According to Protocol n.1 added to the Treaties, the Commission’s consultation documents (green and white papers<sup>23</sup> and communications) shall be forwarded directly by the Commission to national Parliaments upon publication. An eight-week period shall elapse between a draft legislative act being made available to national Parliaments in the official languages of the Union and the date when it is placed on a provisional agenda for the Council for its adoption or for adoption of a position under the legislative procedure<sup>24</sup>.

National parliaments are entitled to assess compliance with the principles of subsidiarity and proportionality as regards the texts proposed by the Commission<sup>25</sup>. In areas where the EU shares competence with the Member states, if national parliaments consider that draft legislative acts do not comply with the subsidiarity principle, they can send a reasoned opinion to the Commission within eight weeks. The Commission will analyse each negative opinion sent to the Commission within the deadline of eight weeks. National parliaments can waive a “yellow card” or an “orange card” (depending on the number of opposing member states) against a Commission’s proposal<sup>26</sup>. Both in the case of the yellow and orange card procedure, the College will decide whether to maintain, amend or withdraw the legislative proposal in question, and give reasons for its decision in the form of an EC Communication<sup>27</sup>. In 2018, the EC received 37 reasoned opinions from national Parliaments, a number which in fact shows a lukewarm interest.

<sup>21</sup> If one registers with the “Have a say” website (<[http://ec.europa.eu/info/law/better-regulation/have-your-say\\_en](http://ec.europa.eu/info/law/better-regulation/have-your-say_en)>), they will be notified by each and every new proposal falling within the domains the recipient has ticked. Be aware that you may receive a significant number of emails asking for your opinion, which – according to the author’s own experience – may prove to be very time-consuming to read.

<sup>22</sup> To reassure participants, the website displays this text: “You won’t receive more than 1 email per day and you can manage your subscription preferences whenever you like”, but you may easily gather tens of consultations per month!

<sup>23</sup> Green Papers are documents published by the EC to stimulate discussion on given topics at European level. They invite the relevant parties (bodies or individuals) to participate in a consultation process and debate on the basis of the proposals they put forward. Green Papers may give rise to legislative developments that are then outlined in White Papers. EC White Papers are documents containing proposals for European Union action in a specific area. In some cases, they follow on from a Green Paper published to launch a consultation process at EU level.

The purpose of a White Paper is to launch a debate with the public, stakeholders, the European Parliament and the Council in order to arrive at a political consensus. The most recent example of a White paper is the 2017 EC’s communication “The future of Europe – Reflections and scenarios for the EU 27 by 2025”.

<sup>24</sup> “Commission consultation documents (green and white papers and communications) shall be forwarded directly by the Commission to national Parliaments upon publication. The Commission shall also forward the annual legislative programme as well as any other instrument of legislative planning or policy to national Parliaments, at the same time as to the European Parliament and the Council”, Art.1, Protocol n.1 attached to TFEU on the role of national parliaments in the European Union. Furthermore “Draft legislative acts originating from the Commission shall be forwarded to national Parliaments directly by the Commission, at the same time as to the European Parliament and the Council. *ivi*, Art.2.

<sup>25</sup> See Protocol n.2 attached to the Treaties.

<sup>26</sup> Until today three yellow cards were raised, one relating to the highly controversial ‘posting of workers’ proposal.

<sup>27</sup> The Protocol on subsidiarity and proportionality also reinforced judicial control, whereas national parliaments (via their respective governments) may decide to bring a case to the EU Court of Justice in order to assess a possible breach of subsidiarity *ex post*. This procedure is referred to as the “red card”.

Consultation is required also when the EC envisages adopting an implementing or a delegated act through a so-called “comitology” procedure, which has been in practice for a long time though frequently altered<sup>28</sup>.

Before adopting an implementing act<sup>29</sup>, the Commission should usually consult a committee in which every EU country is represented. Since the text is subject to a vote, each Member State can seek to amend its content<sup>30</sup>.

The EC prepares and adopts also delegated acts<sup>31</sup> after consulting expert groups composed of representatives from each EU Member State<sup>32</sup>. Moreover, a delegated act adopted by the EC can only enter into force if no objection is raised by the Council or the Parliament by a deadline set in the basic act.

As part of the Commission’s better regulation agenda, citizens and other stakeholders can provide feedback on the draft text of a delegated act during a four-week period. Equally, citizens and other stakeholders can provide feedback on the draft text of an implementing act for four weeks before the relevant committee votes to accept or reject it.

d) computation of costs: at its onset, the Better regulation initiative, launched in 2007, was essentially a tool to lessen the administrative burden through a severe trim in the law book. A target of 25% cost reduction by 2012 was even set, which the EC affirmed later on to have achieved and exceeded, though the methodology applied in calculating those cost cuts was never proved to have a solid basis<sup>33</sup>. For some critics the “red tape cutting” was in reality closer to a hidden deregulatory agenda than a way to relaunch the economic viability, especially as regards the Small and Medium-size Enterprises. Scholars argued that social advantages were sacrificed to boost growth and competitiveness.

While unnecessary costs should always be avoided, later on the EC moved from the simple computation of costs to an assessment of the legislation in force from a “fit for purpose” angle. The main operation of this initiative is the continued monitoring of the adequacy of legislation in force: if the assessment shows up deficiencies, the act shall be removed or adapted. The whole EU’s rulebook is therefore under scrutiny. Here again concerns were voiced, namely by the social partners, anytime a legislative act pertaining to the social *acquis* fall under the list of texts being scrutinised. The EC rejected the criticism by stating that when a piece of legislation is necessary the costs it entails would never be an obstacle to its adoption or continuation.

<sup>28</sup> Following a conflict between EU Institutions, the EC tabled a proposal aimed at adjusting the procedure: see, EC’s proposal of amending Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers, EC, COM(2017) 85.

<sup>29</sup> Member States shall adopt all measures of national law necessary to implement legally binding Union acts, However, where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission (Art. 291 TFEU).

<sup>30</sup> If the committee delivers a negative opinion, the EC shall not adopt the draft implementing act, Art.5.3 Reg.n. 182/2011, *OJ L* 55, 28.2.2011, p.13. This is in practice a rare case: out of a total of 1726 opinions delivered by committees in 2015, there have been recorded only two negative opinions and 36 cases of no opinion, which represent around 2% of the total.

<sup>31</sup> A legislative act may delegate to the EC the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act Art.290 TFEU.

<sup>32</sup> There are different kinds of expert groups. In this case they are made up of representatives of each EU Member State, are set up by the legislator (either the Council and the European Parliament, or the Council alone), give **formal opinions** on draft acts which the EC intends to adopt to ensure that EU law is implemented uniformly (see EC Dec. C(2016) 3300 and 3301).

<sup>33</sup> Following a model devised in the Netherlands in the 1990s and used by the OECD, the “Standard Cost Model” calculates, on the basis of interviews, sampling and opinion polls among management and workers, the cost of the regulatory and administrative burden imposed by each segment of the legislation. The value of these costs is extrapolated and a reduction estimated.

The EC moved from the “Better regulation” to the 2009 “Smart regulation” initiative and adopted in 2012 the “Regulatory Fitness and Performance Programme” (REFIT)<sup>34</sup>, already mentioned. REFIT was launched at the end of 2012 by the Barroso II Commission and has been at the heart of the Juncker Commission policy, to the point that the first Vice-President was put in charge of this file. In this task he is assisted by the REFIT platform, set up in 2015<sup>35</sup>. The experts of the REFIT Platform assist the Commission with providing solutions to simplifying existing legislation<sup>36</sup>. The Platform makes recommendations to the EC taking into account suggestions received from interested parties. Also each citizen can submit suggestions aimed at making existing laws and initiatives more effective and efficient through the EC website “lighten the load”<sup>37</sup>, suggestions which will be reviewed by the REFIT platform.

The Juncker Commission has been very active in its Better regulation agenda, thereby also creating a Task Force on Subsidiarity, Proportionality and “Doing Less More Efficiently”<sup>38</sup>.

e) ex post evaluation: the aim of an ex-post evaluation is to assess existing acts regularly and ensuring that relevant evidence is available to support the preparation of new initiatives. The analysis on how every measure is implemented and enforced across the EU once entered into force is of a great relevance in order to achieve the objective of a “better regulation”<sup>39</sup>. For this reason, it is recommended that the “evaluate first principle” is regularly applied whereby the evaluation results are used to better tailor the rules under preparation so as to best satisfy real needs.

As the Court of Auditors recently observed, this phase requires further improvements because often relevant data are (still) not available to the leading service at the time a proposal is under preparation or that the indicators provided for in the basic text have not been wisely chosen. As a result, the *ex-post* evaluation is frequently not conclusive in determining the content of a new initiative.

<sup>34</sup> EC, COM(2012)746.

<sup>35</sup> It consists of a stakeholder group, with 18 members and two representatives from the European Economic and Social Committee and the European Committee of the Regions, and a Government group, with one high-level expert from each of the EU’s 28 Member States. Citizens and stakeholders may send suggestions to the Platform via the online form ‘Lighten the load’. The Refit Platform groups are chaired by the chairperson of the Regulatory Scrutiny Board.

<sup>36</sup> The Commission’s president-elect, Ms von der Leyen, intends to apply a new principle as regards to better regulation: “Principle 3 - In order to make lives easier for people and to allow businesses the time and space they need to grow, the Commission must ensure that regulation is targeted, easy to comply and does not add unnecessary regulatory burden. The Commission must always have the leeway to act where needed. At the same time, it must send a clear and credible signal to citizens that its policies and proposals deliver and make life easier. In this spirit, the Commission will develop a new instrument to deliver on a “One In, One Out” principle. Every legislative proposal creating new burdens should relieve people and businesses of an equivalent existing burden at EU level in the same policy area. The Commission will also work with Member States to ensure that, when transposing EU legislation, they do not add unnecessary administrative burden”.

<sup>37</sup> <[https://ec.europa.eu/info/law/better-regulation/lighten-load\\_en](https://ec.europa.eu/info/law/better-regulation/lighten-load_en)>.

<sup>38</sup> On 14 November 2017. The Task Force comprised members from the Committee of the Regions and national Parliaments. It looked at the role of subsidiarity and proportionality in the work of the Institutions, the role of local and regional authorities in the EU’s policymaking and whether responsibility for policy areas or competences could be left or returned to the Member States. A specific “grid” was established containing a series of questions and issues designed to guide the analysis of subsidiarity and proportionality. It should be used by the EC in a balanced way as part of the EC’s better regulation agenda building on the need to undertake analyses which are proportionate to the specific proposal in question.

<sup>39</sup> Evaluation is an assessment of the effectiveness, efficiency, coherence, relevance and EU added-value of one single EU intervention.

#### 4. The European citizens' initiative

As we have underlined, citizens can influence EU legislation by answering the consultations launched by the EC as regards roadmaps, inception impact assessment, impact assessment, draft implementing and delegated acts. But they also have another special instrument at their disposal: the European citizens' initiative (ECI). The ECI is a democratic tool whereby citizens are empowered to suggest new legislation in those fields where the EC is competent. It shall therefore be regarded as another attempt from the EC to fill the "democratic gap" which we referred to before<sup>40</sup>.

Any initiative which has received the support of at least one million eligible signatories coming from at least one quarter of all Member States can be submitted to the EC<sup>41</sup>. However, according to the recent advocate-general's opinion in case C-418/18 P brought before the Court of justice, the EC is not obliged to present a proposal following the presentation of a 'successful' European Citizens' Initiative since the legislative institutional balance would be disrupted if one million citizens had a greater power of initiative than the European Parliament or the Council of the European Union.

Is the ECI an embryo of direct democracy? The Treaty on European Union refers only to representative democracy, although it recognises the right of any citizen to participate in the democratic life of the EU<sup>42</sup>. Here again one might argue that this initiative is not in line with the Treaties' original design.

#### 5. Empowering the citizens: summer-time arrangements

An amazing example of what the general consultation procedure can bring about is represented by the recent issue of time change twice a year. The EC carried out a public consultation between 4 July and 16 August 2018 to gather the views of European citizens, stakeholders and Member States on the EU summer-time arrangements as set out in Directive n.2000/84/EC<sup>43</sup>. The legislation introducing a harmonised summer-time rule was adopted as a mean to ensuring the proper functioning of the internal market because uncoordinated time schemes can obviously hinder the normal running of economic

<sup>40</sup> It shall not be confused with the European citizens' consultations, inspired by the French President Macron.

<sup>41</sup> "Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties", Art. 11.4 TEU. "The Treaty on European Union (TEU) reinforces citizenship of the Union and enhances further the democratic functioning of the Union by providing, inter alia, that every citizen is to have the right to participate in the democratic life of the Union by way of a European citizens' initiative. That procedure affords citizens the possibility of directly approaching the Commission with a request inviting it to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties similar to the right conferred on the European Parliament under Article 225 of the Treaty on the Functioning of the European Union (TFEU) and on the Council under Article 241 TFEU" (whereas n.1, R.n° 211/2011, *OJ L* 65, 11.3.2011, p. 1). Please note that a new regulation will enter into force on 1<sup>st</sup> January 2020 (R.n.2019/788, in *OJ L* 130, 17.5.2019, p.55). 63 ECIs have been registered in the last 7 years, but only 4 have been successful. One ECI concerned the glyphosate ban. The EC decided on 4.9.2019 to register three new ECIs: on the fight against corruption, on the climate emergency and on the protection of bees. Conversely, the EC rejected twice initiatives aimed at stopping imports of products originating in illegal settlements in occupied territories and exports to such territories on the grounds that it does not have the power to submit proposals for such a decision (see Dec.2019/1567, *JO L* 241, 19.9.2019, p.12).

<sup>42</sup> The functioning of the Union shall be founded on representative democracy, Art.10.1 TEU.

<sup>43</sup> The clock change twice per year was introduced in order to make the best of the available daylight during summer period in a uniform mode across EU.

activities, first of all transport activities between countries. As some requests to review the system after two decades of application were voiced, the EC decided to submit the issue to consultation open to any interested party<sup>44</sup>. The outcome was largely beyond any expectation: around 4.6 million replies were received with over 99% of replies coming from citizens. An overwhelming majority (84% of all respondents) wanted to abolish the bi-annual time switch, while only 16% wanted to keep it. However, if one looks closer at the data, it appears that 70% of the replies (3.1 million) came from one single country: Germany. Although many German citizens expressed a negative opinion on the summer time-shift, the respondents represent only 4% of the German population. In the list of countries favourable to discontinue the system, Germany is followed by Austria (close to 3% of its population) and Luxembourg (close to 2% of its population). In the rest of the EU, less than 1% of the population bothered to reply.

It is also interesting to note that the reason invoked by respondents for a change of the current legislation is mainly linked to health concerns (alleged disorder of the biologic rhythm).

The EC's services analysed – not without any difficulties – the massive amount of answers and though they concluded that “this public consultation is not a representative survey, nor does it constitute a citizens' vote” and that “its outcome has to be considered in the context of the wider policy debate about the future of EU summertime arrangements”, reacted quickly by tabling a proposal aimed at discontinuing seasonal change of time with a view to contributing to the proper functioning of the internal market.

The conclusion one can read in the EC's paper is at least surprising: “it is necessary to put an end to the harmonisation of the period covered by summer-time arrangements as laid down in Directive 2000/84/EC and to introduce instead common rules preventing Member States from applying different seasonal time arrangements by changing their standard time more than once during the year and establishing the obligation to notify envisaged changes of the standard time”. EU legal experts too raised some doubts about the opportunity of presenting this proposal because it was not accompanied by an IA and its conformity with subsidiarity and proportionality principles was not clearly established.

## Conclusions

We shall now come to some conclusions on whether or not the EC is relinquishing part of its prerogatives as legislator.

The EU is a continental-scale law-maker which legislates for over 500 million European citizens belonging to different nations with a different history, culture, language(s), and political orientation. Though they are all European Union citizens by law<sup>45</sup>, significant differences persist that cannot be easily ironed out even if subsidiarity and proportionality principles have been incorporated with the aim of accommodating supranational interests with national ones.

It is perfectly acceptable that the original law-making machinery has evolved over the decades with a view to mitigating the difficulties resulting from such a complex organisation. In an attempt to mitigate any possible conflict within national and EU policies to the greatest possible extent, President Juncker made this famed statement: “I want our Union to have a stronger focus on things that matter,

<sup>44</sup> The EC submitted a questionnaire with five closed questions and respondents were asked to indicate their opinion: 1. Overall experience with the bi-annual time switch; 2. Preference for keeping or abolishing the time switch; 3. Reason for the preferred choice; 4. Importance for their choice to be retained and implemented; 5. Preference in case of abolishment: permanent summertime or permanent standard time.

<sup>45</sup> “Every person holding the nationality of a Member State shall be a citizen of the Union”, Art.21.1 TFEU.

building on the work this Commission has already undertaken. We should not meddle in the everyday lives of European citizens by regulating every aspect. We should be big on the big things. We should not march in with a stream of new initiatives or seek ever-growing competences. We should give back competences to Member States where it makes sense". In short, the Juncker Commission's credo is "Doing Less More Efficiently", which implies that when proposing new policies and laws, the EC should focus on the things that genuinely need to be done by the EU, while making sure they are done well. Besides, the EC intends to meet its objectives at minimum cost and with minimal administrative burden.

In this paper we have sought to underline how the changes made to the original model, in particular in recent years, have lowered the power assigned to the EC to freely start the legislative process, to freely mould its content before bringing its proposal to the legislative authority. Nobody can cast any doubt about the fact that every modification has been introduced in a spirit of making the entire legislative process more transparent and that this approach should be praised by each and every citizen.

However, this move comes at a price in terms of independence and efficiency. The room from manoeuvre initially apportioned to the EC has been reduced. This aspect surely deserves attention. In particular in the areas where the subsidiarity principle applies, the EC seems to largely embrace an attitude of self-restraint. It would be impossible to imagine today an initiative such as the document "Completing the internal market" comprising around 300 measures that were needed more than 30 years ago in order to eliminate physical, technical and fiscal barriers to intra-European exchanges of all kinds. By comparison and according to an EP study, the Juncker Commission adopted some 550 proposals during the entire duration of its mandate. It is clear that the general background is fundamentally different. Mr Juncker stated from the inception of his presidency that the Commission would be "big on big things, small on small things" meaning that the legislative work programme would include only important initiatives. However, even before this "political Commission", the EC's monopoly was already eroded in the 80's by the practice of each Council's Presidency of establishing conclusions which may contain quite precise mandates and instructions for policy actions to be taken by the EC in given areas<sup>46</sup>. More recently, it has become a practice that also the European Council gives "general political directions" and sets up "priorities", though it is legally excluded from performing any legislative functions<sup>47</sup>. In this way the EC's discretionary power has been curbed and this Institution risks being turned into a merely executive power.

Besides the institutional changes, some scholars consider that the practice of handling the preliminary studies needed to satisfy the IA's requirements to independent experts selected from among the best universities, think-tanks and professional consultancies in Europe helps to prevent the Commission from being criticised for its choices.

<sup>46</sup> Conversely, the EC can take advantage of this practice "suggesting" certain conclusions that would enable to launch a policy not foreseen by the Treaty, somehow circumventing the procedure laid down in Art.352 TFEU. This has been the case for the setting up of the Maritime policy: "The European Council welcomes the Commission communication on an integrated maritime policy for the European Union and the proposed Action Plan which sets out the first concrete steps in developing an integrated approach to maritime affairs. <...> The European Council invites the Commission to come forward with the initiatives and proposals contained in the Action Plan and calls on future Presidencies to work on the establishment of an integrated maritime policy for the Union. The Commission is invited to report on progress achieved to the European Council at the end of 2009" (Presidency conclusions, Brussels European Council, 14 December 2007, doc.16616/1/07 REV 1, p. 58). The Maritime policy is now defined in the EC texts as "the Union policy that aims to foster integrated and coherent decision-making to maximise the sustainable development, economic growth and social cohesion of the Union, notably of the coastal and insular areas and of the outermost regions, and of the sustainable blue economy sectors, through coherent maritime-related policies and relevant international cooperation".

<sup>47</sup> "The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions", Art.15.1 TEU.

In order to obtain a comprehensive picture of the law-making machinery, one should remember that the ordinary legislative cycle often involves the requirement to consult the European Economic and Social Committee (EESC) and the Committee of the Regions (CoR). Besides, the EC regularly consults stakeholder committees with a view to acquiring expert advice.

It is therefore not unreasonable to conclude that the consultation of the general public is more a formal gesture aimed at appearing more transparent and open to adaptation following suggestions arising from consultation through a website, rather than a way of securing useful information.

This conclusion is validated by a series of surveys. From the EC's perspective, the results of a recent consultation (but only 596 answers were recorded) proves to be highly disappointing because it shows that approximately half of respondents (53%) are dissatisfied or very dissatisfied with the way that the EC involves members of the public, businesses, non-governmental organisations and other interest groups. It must be particularly frustrating if one bears in mind the efforts deployed by this Institution to ensure that each and every citizen "has a say"<sup>48</sup>.

The Better regulation strategy is a fairly recent initiative since it was started only in 2007 as an Action Programme designed to allow savings of EUR 41 billion by reducing the administrative burden on business. Its original goal was essentially economic and was meant to reduce the administrative burden created by European legislation and to boost the economy<sup>49</sup>.

Subsequently, the main objective was that of reviewing the whole EU law-book in order to assess whether certain acts in force were still "fit for purpose" and to propose deletion of those that were obsolete or unnecessary. As regards the new initiatives, specific tools were introduced with the aim of guiding EC's services in producing proposals only when needed and after having collected all relevant data and analysed the results of wide consultations.

It is our view, however, that what represents a fundamental change to the "Community method" is the introduction of an internal scrutiny mechanism affecting most of the proposals put forward, although those are already listed in the annual working plan and therefore deemed *a priori* as needed. The college of Commissioners submitted itself to the scrutiny of the Impact Assessment Board, and now to the Regulatory Scrutiny Board which may curtail its discretionary power. It is true that the EC may disregard a negative opinion, but it must justify its decision in detail before a body that it has itself created, and also to the general public through a communication process.

Though this procedure is largely inspired by the OECD recommendations on governance, one may interpret it somehow as a sign of mistrust of its own services and finally of College wisdom since it has, in any case, the final decision on its services products. From another perspective, one can also consider that these rules have increased the power of the EC's Secretariat-General which has now more tools to supervise the departments' rulemaking process.

While in the 2001 paper on governance, the EC stressed that "its independence strengthens its ability to execute policy, act as the guardian of the Treaty and represent the Community in international negotiations", nowadays it is not unreasonable to state that the new rules, be they introduced under the Lisbon Treaty or added by the Commission itself, have transformed its role from that of an autonomous initiator to that of a reactive initiator. In fact, it has been calculated that the share of proposals arising from the spontaneous, autonomous will of the College is around 6%.

The risk of losing the monopoly on initiating legislative proposals through a forthcoming formal change in the legal provisions embedded in the Treaties cannot therefore be ignored<sup>50</sup>. This change

<sup>48</sup> However, generally, documents are not available in all languages, but only in English.

<sup>49</sup> According to the EC's computation, the administrative burden was reduced by 33% in 2012.

<sup>50</sup> It has already voiced the idea of giving the EP the power to autonomously initiate the legislative procedure.

would turn the EC into a simple technocratic organ without political power. This would be the opposite result of the “political Commission” sought by President Juncker.

One can also think that too much consideration has been given to the digital era context or somehow to populist drives.

The EC’s quest for democratic legitimacy – which does in any case appear to be a requirement under the EU system as set up by the Treaties in force<sup>51</sup> – by the addition to extra checks and general consultations, risks to impact negatively on the capacity to legislate efficiently in the general interest of the EU’s citizens.

It may therefore be wise to give thought to these side effects.

## References

1. EEC, *Completing the internal market*, COM(85)310.
2. EC, *European governance – a white paper*, COM(2001)428.
3. EC, *Better regulation – simply explained*, 2006.
4. EC, *EU law: Better results through better application*, JO C 18, 19.1.2017.
5. EC, *Better regulation tool-box*, 2017.
6. EC, *Stocktaking of the Commission’s ‘better regulation’ approach*, 2018.
7. EC, *Annual report 2017 on the application of the principles of subsidiarity and proportionality*, COM(2018)490.
8. EC, *The principles of subsidiarity and proportionality: strengthening their role in the EU’s policymaking*, COM(2018)703.
9. EC, *IA on the European Maritime and Fisheries Fund and repealing Regulation (EU) No 508/2014 of the European Parliament and of the Council*, SWD(2018)295.
10. EC, *Annual report 2018 on the application of the principles of subsidiarity and proportionality and on relations with national parliaments*, COM(2019)333.
11. EC, *Better regulation: taking stock and sustaining our commitment*, SWD(2019)156.
12. EC, *Report of the Task Force on Subsidiarity, Proportionality and “Doing Less More Efficiently”*.
13. EUROPEAN COURT OF AUDITORS, *Ex-post review of EU legislation: a well-established system, but incomplete*, *Special report*, n.16/2018.
14. EUROPEAN COURT OF AUDITORS, *‘Have your say!’: Commission’s public consultations engage citizens, but fall short of outreach activities*, *Special report* n.14/2019; EP, *Drafting European Union legislation*, 2012.
15. EP, *Role of the European Parliament in promoting the use of independent expertise in the legislative process*, 2018.
16. EUROPEAN PARLIAMENTARY RESEARCH SERVICE (ERPS), *European Maritime Fisheries Fund 2021–2027*, *Briefing*, January 2019.
17. EUROPEAN PARLIAMENTARY RESEARCH SERVICE, *The European Council’s role in the EU policy cycle*, *Briefing*, September 2019.
18. PETRIC. The principle of subsidiarity in the European union: ‘gobbledygook’ entrapped between justiciability and political scrutiny? *The way forward*, ZPR 6 (3), 2017.
19. PONZANO; HERMANIN; and CORONA, The Power of Initiative of the European Commission: A progressive Erosion? *Notre Europe, Study and Research*, n. 89, 2012.
20. RUSSACK. *Institutional Rebalancing: the ‘Political’ Commission*, CEPS Paper, 2019.
21. VAN DEN ABEELE. *The EU’s REFIT strategy: a new bureaucracy in the service of competitiveness? ETUI, working paper 2014.05.*

<sup>51</sup> The Commission is compelled to resign in case of a motion of censure adopted by the EP following the procedure laid down in Art.234 TFEU.

## **Better Regulation Impact on EU Law-Making**

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### **S u m m a r y**

According to the Founding treaties and to the treaties currently in force, the European Commission has the exclusive right of initiating a legislative process. This unique feature, known as the “Community method”, was established as it was deemed to be a guarantee of impartiality and expertise in front of the political power represented once by the Council alone and nowadays by the co-legislators, the Council together with the European Parliament.

Although the basic provisions have not been significantly altered on this point, the European Commission has seen its power of initiating the legislative process progressively eroded by the Council’s practice of adopting conclusions containing invitation to the Commission to take specific measures. In addition, the Commission itself introduced a series of hurdles in its internal procedure. The “Community method” is therefore not applied extensively any longer. As a consequence, the law-making process is becoming more cumbersome and the agenda is set predominantly by the political power.

## **Geresnio reglamentavimo poveikis ES teisėkūrai**

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### **S a n t r a u k a**

Pagal steigimo sutartis ir šiuo metu galiojančias sutartis Europos Komisija turi išimtinę teisę inicijuoti teisėkūros procesą. Ši unikali teisė, žinoma kaip „Bendrijos metodas“, buvo laikoma nešališkumo ir kompetencijos garantija prieš politinę galią, kuriai kadaise atstovavo vien Taryba, o šiais laikais įstatymų co-leidėjai, Taryba kartu su Europos Parlamentu.

Nors šiuo klausimu pagrindinės nuostatos nebuvo labai pakeistos, Europos Komisija pastebėjo, kad jos galia inicijuoti teisėkūros procesą pamažu griauna Tarybos praktiką priimti išvadas su Komisijos kvietimu imtis konkrečių priemonių. Be to, pati Komisija savo vidaus procedūroje nustatė keletą kliūčių, todėl „Bendrijos metodas“ nebetaikomas plačiai. Dėl to įstatymų leidybos procesas tampa sudėtingesnis, o darbotvarkę daugiausia nustato politinė valdžia.