

A new concept for „better regulation“

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The proposals of the EU Commission for improving the legislative process in the EU range from consultations to new proposals, from impact assessments on actual draft bills to assessments of the existing legislation. Of particular importance are:

- ▶ The Regulatory Scrutiny Board will increase the quality of both ex-ante and ex-post impact assessments.
- ▶ The planned assessment of existing legislation aims to examine whether the purpose for which a law has been passed is being achieved.
- ▶ As the main point of contact, the REFIT Platform facilitates the involvement of civil society in the evaluation of existing EU legislation.
- ▶ National parliaments are to be formally involved – like interest groups – in the exchange of information, in advance of legislative proposals.
- ▶ The proposed formal procurement of opinions from stakeholders following submission of a legislative proposal should be abandoned.

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1 Introduction

Models for better regulation have been discussed at national level for many years. Thus, since 2006, Germany has had a National Regulatory Control Board to help the Federal Government to reduce bureaucracy and achieve "better regulation".¹

At EU level too, measures have been taken in the past to make the legislative process more efficient. Thus, the institutions involved in legislation - European Parliament, Council and EU Commission (hereinafter: the three institutions) - have concluded two inter-institutional agreements on the revision of legislative acts (2001)² and better regulation (2003)³ and produced an inter-institutional concept for impact assessment (2005)⁴. The Inter-Institutional Agreement proposed by the First Vice President of the EU Commission, Frans Timmermans, aims to combine and revise the existing agreements.

In addition, the EU Commission also wants to effect a systematic examination of the effectiveness of the existing law as well as carry out impact assessments of existing legislative acts. For this purpose, it has provided the initial organisational and technical foundations with the creation in 2015 of the internet-based platform to improve the legal framework (REFIT Platform)⁵.

In addition, in May 2015, a Regulatory Scrutiny Board was set up by the EU Commission to ensure the quality of all impact assessments.⁶ It replaced the Impact Assessment Board whose work was restricted to the evaluation of impact assessments for new legislative proposals.

The work of both of these bodies has already been taken into account in the proposed Inter-Institutional Agreement. The package of measures aims to make the legislative process more efficient, to make EU law more comprehensible for citizens and restore their confidence in the EU.⁷ This ceplnput will consider whether these objectives can be achieved with the new provisions.

¹ Section 1 (2) of the Act establishing a National Regulatory Control Board (NKRK).

² Inter-Institutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts (OJ C 77 of 28 March 2002).

³ Inter-Institutional Agreement "Better Regulation" of 31 December 2003 (OJ C 321 of 31 December 2003).

⁴ Council Document 14901/05 of 24 November 2005; available at <http://data.consilium.europa.eu/doc/document/ST-14901-2005-INIT/en/pdf> (last accessed on 20 August 2015).

⁵ Regulatory Fitness and Performance Programme (REFIT) http://ec.europa.eu/smart-regulation/better_regulation/documents/c_2015_3260_en.pdf (last accessed on 20 August 2015).

⁶ The Board was set up by way of the Decision of the President of the European Commission on the establishment of an independent Regulatory Scrutiny Board, C(2015) 3263 of 19 May 2015.

⁷ Communication "Better regulation for better results - An EU agenda", COM(2015) 215 of 19 May 2015.

2 Measures for better regulation

In the Inter-Institutional Agreement proposed by the EU Commission, the three institutions will primarily undertake to improve cooperation (2.1), introduce "ex-ante instruments" to allow for better assessment of the impact of legislative acts (2.2) and introduce "ex-post instruments" to allow for better evaluation of the effectiveness of existing legislative acts (2.3).

2.1 Cooperating on legislation

As a result the increased influence of the European Parliament on regulation, resulting from the introduction of the ordinary legislative procedure, there is now greater need for consultation between the three institutions in order to exchange information on the annual work programme (2.1.1), clarify and justify legislative proposals (2.1.2), coordinate the legislative procedure (2.1.3) and implement EU legislation (2.1.4).

2.1.1 Exchanging information on the annual work programme

According to the EU Commission's Communication, the three institutions will cooperate better on programme planning. **New is**, in particular, the exchange of information about the EU Commission's annual work programme before it is decided. The EU Commission will undertake to "give serious consideration"⁸ to requests made by the other institutions for the submission of legislative proposals. As before, the three institutions want to determine priority proposals with the focus being placed on updating and simplifying existing legislation and on the reduction of the regulatory burden, especially for small and medium-sized enterprises. **New is** the fact that the EU Commission will undertake to report to the other institutions about the progress of implementation of the work programme. Until now it has done this voluntarily.

2.1.2 Explaining and justifying legislative instruments

The EU Commission wants to continue to explain its reasons for making a specific legislative proposal and justify its compatibility with the principles of proportionality and subsidiarity. **New is** that the EU Commission also wants to show compatibility with the Charter of Fundamental Rights.

2.1.3 Coordination of the legislative process

The three institutions will continue to aim for better coordination. This includes both the preparatory work and the ordinary legislative procedure. The preparatory work will continue to be published. The three institutions will commit to establishing, for each legislative proposal, a timetable for the legislative procedure which will include a second reading agreement. The informal trilogue process will continue to be used in order to speed up the legislative process.⁹

The three organs will continue to keep each other regularly informed about their work throughout the legislative process and about their negotiations with each other and will ensure transparency. **New is** the invitation to the committees of the European Parliament¹⁰ and of the Council¹¹ to contribute to the improvement in efficiency and synchronisation of the legislative process.

⁸ Communication "Proposal for an Inter-Institutional Agreement on Better Regulation", COM(2015) 216 of 19 May 2015, No. 4.

⁹ COM(2015) 216 No. 26.

¹⁰ The parliamentary committees can be found on the internet (last accessed on 20 August 2015) at <http://www.europarl.europa.eu/committees/en/parliamentary-committees.html>.

¹¹ The 154 Council preparatory bodies can be found on the internet (last accessed on 20 August 2015) at <http://www.consilium.europa.eu/en/council-eu/preparatory-bodies/?p=1>.

2.1.4 Implementation of EU legislation

As before, the three institutions will call upon the Member States to implement and apply union law swiftly. **New is** the proposal to establish, in some cases, a common date for the commencement of national implementation legislation binding on all Member States. Current implementation deadlines establish the last possible date for entry into force of national implementation legislation. Earlier implementation is at the discretion of the Member State.

New is also the call upon the Member States to refrain in future from so-called gold-plating¹². Where they do adopt such measures, they will have to give reasons to the EU.¹³ In this case, they will also be called upon to identify the laws affected by gold-plating. In addition, it is planned that Member States will be called upon to undertake their own impact assessments for their implementation legislation.

The EU Commission also wants to continue to report annually to the European Parliament on the progress of implementation and application of Union legislation. **New is** the explicit call upon the Member States to provide the EU Commission with the necessary data in this regard. It is already standard practice, however, for Directives and Regulations to stipulate that Member States must report on their transposition into national law.

2.2 "Ex-ante instruments" for better regulation

The public will be allowed greater involvement in the legislative process by way of stakeholder consultation (2.2.1). In addition, the impact assessments will be improved (2.2.2) and their quality checked by the Regulatory Scrutiny Board (2.2.3). The rules on downstream regulation - delegated acts and implementing acts - will also be revised (2.2.4).

2.2.1 Stakeholder consultation

The stakeholders affected by planned regulation will be consulted in the draft phase of the legislative proposal. The EU Commission has laid down minimum standards for these consultations. The results of the consultations will be published. Following completion of the consultation process and the subsequent impact assessment, the EU Commission decides on its legislative proposal and sends it to the European Parliament, the Council and the national parliaments.

As before, national parliaments will have the opportunity, within eight weeks of submission of the proposal, to express their views on the compatibility of the proposal with the principle of subsidiarity, except in cases of urgency. **New is** the fact that, in future, stakeholders will also have the opportunity to provide feedback on the proposal within this eight-week period. All feedback will be submitted to the European Parliament and the Council at the beginning of the legislative process.¹⁴

2.2.2 Better impact assessment

As before, the EU Commission wants to subject those legislative proposals which are likely to have significant economic, environmental and social impacts to an impact assessment. **New is** the fact

¹² In the context of the EU legislative process, "gold-plating" refers to the situation where, when transposing union law into national law, Member States adopt rules which go beyond the requirements of the EU. "Gold-plating" does not amount to a breach of EU law but often leads to additional costs being incurred by those affected. http://ec.europa.eu/enterprise/policies/smart-regulation/glossary/index_en.htm (last retrieved on 20 August 2015).

¹³ COM(2015) 215, No. 3.3.

¹⁴ COM(2015) 216, No. 15.

that it is now the Commission's express objective to be "comprehensible and clear"¹⁵ in the formulation of legislation.

New is the fact that the EU Commission wants to announce in advance which legislative proposals will be subject to an impact assessment. The affected stakeholders will then be able to provide feedback on the respective proposals and their opinions, together with qualitative and quantitative analyses, will be fed into the impact assessment. In the context of this ex-ante evaluation, alternative approaches will be considered. **New is** also the fact that the Regulatory Scrutiny Board¹⁶ will examine impact assessments. Finally, the European Parliament and the Council will start their consideration of the legislative proposals by examining the EU Commission's impact assessment.

Until now, the European Parliament and the Council have been free to undertake their own impact assessments if they make a change to a proposal from the EU Commission. Between 2007 and 2014, the EU Commission undertook 700 impact assessments, the European Parliament 20 and the Council none.¹⁷ **New is** the fact that the European Parliament and the Council will also have to carry out - their own - impact assessments, at least in the case of material changes. As before, the EU Commission will provide the European Parliament and the Council with the results of its impact assessments and the relevant data. **New is** also the fact that the EU Commission's impact assessments will also be used as the starting point for any subsequent impact assessments. Thus the methodical approach will be similar. The aim is to ensure that all subsequent impact assessments are comparable to that of the EU Commission. On this basis, each institution will be able to organise its own impact assessments and make its own decisions on the deployment of resources. Impact assessments carried out by the European Parliament and the Council will, as is already the case for those of the EU Commission, be published and the findings used as a basis for a later ex-post evaluation of the legislative act.

New is finally that the impact assessments will also include questions on the comprehensibility, subsequent monitoring and practicability of implementing material changes by the European Parliament and the Council. This includes the fact that rights and duties of citizens arising from the legislation should be easy to understand, the EU Commission's reporting, monitoring and evaluation requirements should also be set out in the impact assessment and the act should be easy to implement without unreasonable costs. In the case of any such essential changes to the Commission's proposal, any institution may appoint a "panel" to assess whether these requirements have been fulfilled. Each of the three institutions will appoint a member of the "panel" who must have the specific expertise to carry out the requested analysis, have no conflict of interests, and act independently from the appointing authority. The panel will take account of any pre-existing impact assessments when carrying out its work.

2.2.3 The Regulatory Scrutiny Board

The Regulatory Scrutiny Board, set up in May 2015, is made up of a chairperson and six members with specialist expertise in the areas of macroeconomics, microeconomics and social and environmental policy. The chairperson will be appointed by the Commission. Three members are officers of Directorates General and three are external members who will be recruited from outside the EU Commission, must have the necessary qualifications and will be recruited as officers for a fixed term. The non-renewable period of office is three years. The members are independent and not

¹⁵ COM(2015) 216, No. 12.

¹⁶ More on this in 2.2.3.

¹⁷ Between 2007 and 2014, the EU Commission carried out 700 impact assessments, the European Parliament 20 and the Council none; COM(2015) 215, No. 3.3.

bound by instructions. Any conflicts of interest must be reported to the chairperson. This Board replaces the Impact Assessment Board^{18, 19}

New is the fact that the proposed agreement now specifies the tasks of the Regulatory Scrutiny Board: The Board will ensure the quality of ex-ante impact assessments, undertake the quality control of ex-post impact assessments and carry out effectiveness assessments of existing legislation. It will also make recommendations to the Commission departments on how to improve their impact assessments. The legislative proposals themselves will not be subject to assessment. Advice applicable to all Commission departments about a legislative proposal will only be instituted after the Board has approved the impact assessment. The Board's opinions will be published.

2.2.4 Delegated acts and implementing acts

Delegated acts and implementing acts consolidate legislation. They are adopted by the EU Commission. The legislative, i.e. the European Parliament and the Council, must expressly authorise the EU Commission to do this in the respective act.

The EU Commission cannot lay down essential aspects of the respective act by way of delegated acts. The procedure for adopting delegated acts is currently regulated in a Common Understanding.²⁰ **New is** the fact that this procedure will be structured as follows²¹: In future, the EU Commission will generally consult experts from the Member States prior to adopting delegated acts. In addition, it is expressly stated that it will consult the stakeholders and can hold public consultations. Where the EU Commission makes use of the possibility of consulting experts or holding public consultations, national experts will only be consulted thereafter.

In implementing acts, the EU Commission can lay down standard conditions for the implementation of EU Directives and - Regulations in the Member States. The procedure for adopting implementing acts is currently regulated in the Regulation on the adoption of implementing acts.²² The proposed Inter-Institutional Agreement does not provide for any changes to this. It requires that the essential elements of legislative provisions be laid down by the legislator.²³ Consequently, no tasks should be assigned to the committees of national experts which go beyond those set out in the Regulation on the adoption of implementing acts.

2.3 "Ex-post instruments" for better regulation

In 2012, the EU Commission began an examination of existing law in the context of the REFIT Programme²⁴ in order to ensure that existing acts are efficient, effective and relevant and to determine what, if any, added value they provide. In future, it will carry out this assessment more systematically and more often (2.3.1), have its quality monitored by the Regulatory Scrutiny Board (2.3.2) and, by way of the REFIT Platform²⁵, create a central point where suggestions for improvement can be made.

¹⁸ Information Note from the President of the Commission concerning the improvement of the quality and control of impact assessment analyses in the Commission – the Impact Assessment Board, SEC(2006) 1457/3, 14 November 2006.

¹⁹ C(2015) 3263, Recital 3.

²⁰ Common Understanding between the European Parliament, the Council and the Commission on Delegated Acts.

²¹ COM(2015) 216, Annex 1 III.

²² Regulation (EU) No. 182/2011 of the European Parliament and of the Council concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55 of 28 February 2012).

²³ COM(2015) 216, Annex 1, No. 8.

²⁴ Regulatory Fitness and Performance Programme (REFIT); Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "EU Regulatory Fitness", COM(2012) 746 of 12 December 2012.

²⁵ Communications to the Commission: "The REFIT Platform - Structure and Functioning", C(2015) 3260 of 19 May 2015.

2.3.1 Ex-post evaluation of existing laws by way of the REFIT Programme

The EU Commission already carries out ex-post evaluations of existing EU Directives and -Regulations in which it pays particular attention to practicability. **New is** in particular the fact that the three institutions will coordinate on ex-post evaluation, that the EU Commission will inform the European Parliament and the Council of its long-term plans on ex-post evaluation and that future acts will systematically contain reporting and monitoring clauses.

2.3.2 Quality control by the Regulatory Scrutiny Board

The Regulatory Scrutiny Board²⁶ will monitor the quality of ex-post impact assessments, carry out assessments of the effectiveness of existing legislation and provide the EU Commission with recommendations on how it can improve its ex-post impact assessments. The legislative proposals themselves will not be subject to assessment. The Board's opinions will be published.

2.3.3 The REFIT Platform

With regard to the question of possibilities for improvement in secondary law, the EU Commission was supported until October 2014 by two High Level Groups - the Group on Better Regulation and the Group on Administrative Burdens²⁷.²⁸ The Group on Better Regulation included experts from the Member States, the Group on Administrative Burdens included economic players and other stakeholders.

New is the fact that the EU Commission wants to replace their work with an internet-based platform, known as the REFIT Platform, on which organisations, companies and citizens can make suggestions, and where a continuous exchange of views will take place, about which legislation can be improved under the REFIT Programme²⁹.

Suggestions made on the Platform will be examined by two new groups: a "Group of Member States", made up of one expert per Member State, and a "Group of Stakeholders", made up of up to 20 representatives from business, social partners and civil society as well as high-level experts from the European Economic and Social Committee and the Committee of the Regions. Both groups annually hold a joint meeting chaired by the First Vice President of the EU Commission. Additional - separate - meetings of the two groups take place under the chairmanship of the President of the Regulatory Scrutiny Board. The groups can appoint expert panels, leading members and rapporteurs for specific subject areas. The period of office of members of the Platform shall correspond to that of the incumbent EU Commission.

The Platform has the following functions:

- to call on stakeholders and Member States to make suggestions for reducing the administrative burden;
- to evaluate the suggestions collected;

²⁶ The Board is described in detail in Section 2.2.3.

²⁷ High Level Group on Administrative Burdens chaired by Edmund Stoiber; Information available at http://ec.europa.eu/smart-regulation/refit/admin_burden/high_level_group_en.htm (last accessed on 20 August 2015).

²⁸ C(2015) 3260 of 19 May 2015, No. 1.

²⁹ Regulatory Fitness and Performance Programme (REFIT).

- to determine which proposals, from the EU Commission or - in the case of suggestions relating to the implementation of EU law by the Member States - a Member State, will be submitted and why;
- to notify stakeholders and citizens individually about the results by responding to the submissions.

The EU Commission undertakes to respond to the recommendations from the Platform and, where appropriate, make public which follow-up measures it intends to take. Likewise, all relevant documents from the Platform will also be published.

Evaluations from the Platform will, where possible, contain a quantified assessment of the regulatory burden and the potential for reduction of the same. The aim of the legislation concerned and the question of whether provisions are being complied with by Member States will not be subject to evaluation.³⁰

2.3.4 Simplification

The three institutions will continue in their efforts to update and simplify legislation. **New is** the fact that in future this will take place under the express proviso of "reducing unnecessary regulatory burdens for business, administrations and citizens".³¹ As before, the EU Commission will determine which legal provisions should be simplified, streamlined or even repealed. **New is** the fact that in future it will refer to the recommendations from the REFIT Programme and include the proposals thereby obtained in its Work Programme.

³⁰ The question of whether Member States are complying with provisions is dealt with exclusively by the EU Commission, if necessary by way of infringement proceedings.

³¹ COM(2015) 216, No. 34.

3 Assessment

Rules are essential for the functioning of states and sovereign institutions. Member States, citizens and companies in the EU therefore have an interest in good legal rules. In this regard, it is not primarily a question of more or less regulation but that the existing and newly adopted rules are practicable. The aim of a legislative act should be achieved in the most efficient and comprehensible way possible thereby giving rise to the greatest possible benefit. This is what the EU Commission is seeking to achieve with the aforementioned measures. The basis for achieving the aim is reliable information. That means both reliable forecasts of the consequences of future legislation and accurate assessments of the effect of existing legislation. This requires the knowledge of numerous players from civil society, business, administration and politics. The EU Commission therefore wants a systematic improvement in its access to such knowledge and in the evaluation of the findings.

3.1 Cooperating on legislation

The proposals of the EU Commission cover the entire course of the legislative process. They include the exchange of views on the Annual Work Programme (3.1.1), the explanation and justification for legislative proposals (3.1.2), the coordination of the legislative process (3.1.3) and the implementation of EU legislation (3.1.4).

3.1.1 Exchange of views on the Annual Work Programme

The proposed closer involvement of the European Parliament and the Council in the planning of the EU Commission's Work Programme and in particular in this regard the EU Commission's undertaking to give "serious consideration" to requests made by both institutions for considered legislative proposals, contribute significantly to extending the EU Commission's monopoly of the right of initiative laid down in the European treaties because both institutions are dependent on the good will of the Commission when it comes to consideration being given to their own legislative wishes. The commitment represents a concession by the EU Commission.

Regular information about the progress of the implementation of the Work Programme improves transparency and gives an indication, in particular, of which legislative proposals are going to be forthcoming from the EU Commission in the near future. Thus the two other institutions are given the opportunity to familiarise themselves with the subject areas.

3.1.2 Explaining and justifying legislative instruments

Consideration for the compatibility of legislative proposals with the Charter of Fundamental Rights is to be included in the Inter-Institutional Agreement but this will have no practical impact because the EU Commission already considers this aspect.

3.1.3 Coordination of the legislative process

It is doubtful whether the invitation to the Committees of the European Parliament and of the Council to contribute to the improvement in efficiency and synchronisation of the legislative process will have any effect. This will require the European Parliament and the Council to revise the provisions contained in their Rules of Procedure for Committees with the aim of improving efficiency.

3.1.4 Implementation of EU legislation

A standard deadline for all Member States for the entry into force of national implementation statutes will prevent (temporary) differences between the national legal systems which can lead inter alia to distortions of competition or have the effect of partitioning markets. It will be difficult, however, to identify those Commission proposals which are subsequently likely to be subject to different speeds of implementation and therefore require a corresponding prophylactic clause on entry into force. One indicator for this may be the level of opposition during the legislative process both in the European Parliament and in the Member States, identified inter alia via the Council and national stakeholders. This will enable an assessment to be made as to whether or not a Member State will intentionally delay implementation.

In principle, it is appropriate to call upon Member States to avoid, or at least give reasons for, gold-plating in the future since gold-plating impedes standard EU provisions and thereby constrains the internal market. However, this call for avoidance, or at least the submission of reasons, will have little impact because it is non-binding and the Member States are not required to comply.

3.2 "Ex-ante instruments" for better regulation

Consultation with stakeholders (3.2.1) and the changes to impact assessments (3.2.2) as well as the guarantee of their quality by the Regulatory Scrutiny Board (3.2.3) are capable of improving future regulation. Downstream regulation - delegated acts and implementing acts - will also be revised (3.2.4).

3.2.1 Stakeholder consultation

The fact that the stakeholders are permitted to express their views at every phase of the legislative process may increase their influence. The EU Commission suppresses the fact, however, that it is at least equally as important to strengthen the currently low level of influence of the national parliaments because their ability to express their views will remain limited to the eight-week period following formal acceptance of a proposal by the EU Commission.³² The national parliaments should, at least as far as the exercise of shared competences is concerned, be included as early as possible in the exchange of views and also, like stakeholders, be permitted to respond officially in the preparatory stages. Thus they would have the opportunity to express their views at an early stage on initiatives of the EU Commission where they do not consider the legislative proposal to be necessary or see no need for the harmonisation of national provisions. In addition, the national parliaments could also, at this early stage, express possible doubts regarding the compatibility of a proposal with the principle of subsidiarity.³³ What is more, the early involvement of national parliaments would also improve the acceptance of EU action because citizens and parliamentarians in the Member States would no longer have the impression that rules from Brussels are being forced upon them unbidden.

3.2.2 Better impact assessment

The EU Commission is rightly planning to allow the views *of all* social groups regarding a planned legislative proposal to be incorporated into the ex-ante impact assessment. It thereby counteracts the risk that, on the one hand, small homogeneous interest groups, which are therefore faster but

³² COM(2015) 215, No. 2.

³³ Under the principle of subsidiarity, the EU should only adopt legislative acts where the problem to be regulated cannot be sufficiently regulated by the Member States and the desired aim therefore has to be pursued at European level (Art. 5 (3) TEU).

less influential, and on the other hand, large, mainly heterogeneous groups, which are therefore slower but more powerful, receive unequal treatment.³⁴

The proposed ability for interest groups to express their views again on legislative proposals which have already been published by the Commission has little positive effect however. Firstly, the EU Commission is hardly likely to withdraw or revise its legislative proposal because of the concerns of stakeholders - if only for reasons of credibility and reputation. Secondly, allowing interest groups to set out their position in such statements of opinion will only increase transparency to a limited extent. It will not eliminate informal discussions.³⁵ In fact, stakeholders will continue to use the opportunity to influence the proposed piece of legislation in such discussions. They are unlikely to include the content of these background discussions in the statements of opinion sent to the EU Commission because it would then become public. Thirdly, the European Parliament's scope for decision-making could be constrained as a result of this procedure because in order to avoid the accusation of following the arguments of stakeholders, it may take positions in the discussions and request changes which it would not otherwise have done without the prior formal statements of opinion from the interest groups.

The EU Commission's call for the European Parliament and the Council to carry out ex-ante impact assessments, at least in the case of significant changes to the Commission's proposal, is appropriate because ex-ante impact assessments are crucial, at least in the case of relevant changes, for achieving a sustained level of quality in the legislative process.

Ultimately, with its call for ex-ante impact assessments to be carried out by the European Parliament and the Council, the EU Commission is also solving a conflict of objectives. On the one hand, the EU Commission is regularly urged to speed up the legislative process; on the other, careful ex-ante impact Assessments by the European Parliament and the Council are time-consuming. This conflict will - rightly - be resolved in favour of thoroughness because the citizens and businesses of Europe are better served by carefully drafted legislation than by instruments which have been adopted quickly but which are ineffective.

Nevertheless, despite all the improvements, the effect of impact assessments will remain limited because, in the legislative process, political, sometimes even ideological considerations and objectives, as well as the need for compromise often push logical arguments to the background.

In the case of essential changes, an examination by the European Parliament or the Council of the comprehensibility of a legislative proposal and the subsequent ability to review and implement it, is appropriate. The proposed "panel" for this is unlikely to bring about any significant improvement however, because the necessary independence of this panel, which is also required by the Commission, would have to be guaranteed. The fact that the panel is made up of one member each from the European Parliament, the Council and the EU Commission basically calls its independence into question however. In addition, the examination will take account of existing impact assessments by the institutions. This also gives rise to a conflict of interests because it seems unlikely that a panel member will speak out against an amendment which has previously been decided by his employer on the basis of an impact assessment. Furthermore, the appointment of the panel constitutes an optional provision. Thus the institutions are not bound to appoint one.

³⁴ *Olson, Mancur*: „The Logic of Collective Action: Public Goods and the Theory of Groups“, 1965, p. 9 et seq.

³⁵ Better Regulation Agenda: Questions and Answers, MEMO/15/4989 of 19 May 2015.

3.2.3 The Regulatory Scrutiny Board

The Regulatory Scrutiny Board does not fully meet the standards required to ensure that only evidence-based and not political motivations are used as benchmarks for impact assessments. Although Board members must have expertise in the areas of macro-economics, micro-economics and social and environmental policy, and at least three members cannot be Commission staff, and although the period of office is not renewable and the Board is not bound by instructions from the Commission, true independence cannot be inferred because the Chairperson, who has a casting vote where votes are tied, is always a representative of the EU Commission.³⁶ It is probable that in cases of doubt the Board will decide in favour of the EU Commission. Whether this tendency will be successfully counteracted, by the planned publication of the Board's work, remains to be seen. The problem could be solved by appointing an external specialist as Chairperson or at least rotating the Chair between EU Commission staff and external specialists.

3.2.4 Delegated acts and implementing acts

Involving national experts in the adoption of delegated acts will improve the quality of these instruments. Equally, consulting the affected stakeholders and holding public consultations on planned delegated acts may help delegated acts to become better targeted. Thus, the public is likely to be informed more quickly about which delegated acts are in preparation. This will finally make it possible to have a public debate. Until now, the public has generally only found out about a delegated act - if at all - when it is submitted for approval to the European Parliament and the Council by which time, however, it is too late for any wide-ranging public debate. The expected improvement in publicly available information will therefore significantly improve acceptance, or at least allow the public to come to terms with, the delegated act.

3.3 "Ex-post instruments" for better regulation

The proposed measures - systematic and more frequent evaluation (3.3.1), quality control, by the Regulatory Scrutiny Board (3.3.2) and the REFIT Platform (3.3.3) - expand and complete ex-post quality control. Although this should be a matter of course for any legislator, by international standards it is relatively new.³⁷

3.3.1 Ex-post evaluation of existing laws by way of the REFIT Programme

The planned inclusion of examination provisions in new legislative acts facilitates subsequent evaluation because they oblige the EU Commission to take action even without a specific trigger. On the other hand, the planned obligation of the EU Commission to comply with reporting and monitoring obligations included in new legislation, is only of a declaratory nature because it constitutes EU law which the EU Commission is already obliged to comply with.

3.3.2 Quality control by the Regulatory Scrutiny Board

The assessment of the quality of ex-post impact assessments by the Regulatory Scrutiny Board³⁸, and in particular its obligation to formulate recommendations for structural improvements to impact assessments, are capable of improving future impact assessments, not least because the Board will address its recommendations directly to the EU Commission rather than the authors of

³⁶ C(2015) 3263, Art.5 (2).

³⁷ OECD, "Evaluating Laws and Regulations: The Case of the Chilean Chamber of Deputies", OECD Publishing, 2012.

³⁸ More on this in 2.2.3.

the impact assessments. The fact that the legislative proposals themselves will not be the object of examination is consistent because they form part of the legislator's scope for discretion.

3.3.3 The REFIT Platform

The REFIT Platform, as a central point of contact for complaints about complicated and unnecessary legislation, represents significant added value both for citizens and companies in the EU as well as for the European legislator and the Member States because it allows for swift identification of over-regulation. It may also increase public acceptance of the EU by giving citizens the feeling that they are at least being consulted by the "faraway" EU because citizens and stakeholders who submit entries at least receive a response to their suggestions by way of the Platform. Ideally, an entry will result in an improvement to the legislation.

The separate evaluation of suggestions by two different groups of experts may give rise to high quality and balanced experts' reports. Although it is likely that most of the suggestions for the examination of legislation will come from stakeholders, this does not mean that the "Group of Stakeholders" will be biased towards their suggestions because this Group also contains representatives from the Committee of the Regions and from the European Economic and Social Committee. In addition, both Groups are always involved in evaluations so the "Group of Member States" can also have a corrective effect.

The proposal to actively appeal for suggestions from affected stakeholders via the Platform facilitates and expedites the work of the EU Commission, in particular, to improve existing EU law. The work of the Member States in implementing EU law may also be made easier if, as planned, the Platform passes on suggestions in this regard. The fact that the EU Commission will undertake to respond to reform proposals from the REFIT Programme improves its effectiveness.

3.3.4 Simplification

The planned obligation "to reduce regulatory burdens for business, administrations and citizens"³⁹ when examining existing laws, is appropriate because it will reduce the cost of regulation and bureaucracy in the EU.

³⁹ COM(2015) 216, No. 34.

4 Conclusion

Under the slogan "better regulation", the EU-Commission is launching numerous measures aimed at improving the quality of legislation. In this regard, it is looking at the entire spectrum of the legislative process: from consultation on new legislative proposals to impact assessments for concrete legislative proposals right through to ex-post evaluations of existing legislation.

A number of the measures are appropriate; others do not need to be pursued because they will have little effect; a few must be viewed critically. Of particular importance are:

- ▶ The Regulatory Scrutiny Board will increase the quality of both ex-ante and ex-post impact assessments.
- ▶ The planned assessment of existing legislation allows for the examination of whether the purpose for which a law has been passed is being achieved.
- ▶ As the main point of contact, the REFIT Platform facilitates the involvement of civil society in the evaluation of existing EU legislation.
- ▶ National parliaments are to be formally involved - like interest groups - in the exchange of information, in advance of legislative proposals, in order to allow for subsidiarity checks at an early stage.
- ▶ The proposed formal procurement of opinions from stakeholders following submission of a legislative proposal should be abandoned.

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